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Volume 22 (*2016*)

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NIJHOFF

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Foundation for the Development of International Law in Asia (DILA)

DILA was established in 1989, at a time when its prime movers believed that economic and political developments in Asia had reached the stage at which they would welcome and benefit substantially from a mechanism to promote and facilitate exchanges among Asian international law scholars that had failed to develop during the colonial era.

The Foundation was established to promote: (a) the study of and analysis of topics and issues in the field of international law, in particular from an Asian perspective; (b) the study of, and the dissemination of knowledge of international law in Asia; and (c) contacts and co-operation between persons and institutions actively dealing with questions of international law relating to Asia.

The Foundation is concerned with reporting and analyzing developments in the field of international law relating to the region, and not primarily with efforts to distinguish particular attitudes, policies or practices as predominately or essentially "Asian". If they are shown to exist, it would be an interesting by-product of the Foundation's essential function, which is to bring about an exchange of views in the expectation that the process would reveal areas of common interest and concern among the states of Asia, and even more importantly, demonstrate that those areas of interest and concern are, in fact, shared by the international community as a whole.

The Asian Yearbook of International Law

Launched in 1991, the *Asian Yearbook of International Law* is a major internationally-refereed yearbook dedicated to international legal issues as seen primarily from an Asian perspective. It is published by Brill under the auspices of the Foundation for the Development of International Law (DILA).

When it was launched, the Yearbook was the first publication of its kind, edited by a team of leading international law scholars from across Asia. It provides a forum for the publication of articles in the field of international law and other Asian international legal topics. The objects of the Yearbook are two-fold. First, to promote research, study and writing in the field of international law in Asia; and second, to provide an intellectual platform for the discussion and dissemination of Asian views and practices on contemporary international legal issues.

Each volume of the Yearbook contains articles and shorter notes, a section on State Practice, an overview of the Asian states' participation in multilateral treaties and succinct analysis of recent international legal developments in Asia, as well as book reviews. We believe this publication to be of importance and use to anyone working on international law and in Asian studies.

In keeping with DILA's commitment to encourage scholarship in international law as well as to disseminate such scholarship, its Governing Board decided to make the Yearbook open access and is available through Brill Open.

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Editorial Note

The 2016 edition (Volume 22) of the *Asian Yearbook of International Law* is a special volume whose main articles focus on the peaceful uses of the East Asian seas and is followed by notes and commentaries; legal materials including a listing of the participation of Asian states in multilateral treaties and a description of the state practice of Asian states in the field of international law; a literature section featuring a book review and a bibliographic survey of materials dealing with international law in Asia; and finally a summary of the activities undertaken by the Foundation for the Development of International Law in Asia in 2016.

I Main Articles

As noted by Keyuan Zou, Harris Professor of International Law at Lancashire Law School and Special Issue Editor for this volume of the Yearbook, the main articles of Volume 22 concern the peaceful uses of East Asian seas and were chosen from the papers that were presented at two international conferences held in Hangzhou, China in 2012 and 2013, sponsored by the Centre for Ocean Law and Governance of Zhejiang University.

Part I of the main articles focuses upon "Maintaining Maritime Peace and the Law of the Sea" and begins with Masahiro Miyoshi's article on "Peaceful Use of the Sea and the Rule of Law". Professor Miyoshi, who is Professor Emeritus of International Law at Aichi University and a former General Editor of the Yearbook, asserts that the governing principle for state conduct in their relations with other states should be the rule of law. He then contextualizes the principle in relation to particular law of the sea matters and sovereignty disputes in East Asia and concludes by noting that despite states' desires to have control over the dispute settlement process and preferring arbitration over the International Court of Justice, a lesson can be learned from the *Anglo-French Continental Shelf Arbitration* of 1977.

Next, Yann-huei Song, Research Fellow, Institute of European and American Studies, Academia Sinica (Taipei, Taiwan) looks at "Peaceful Proposals and Maritime Cooperation between Mainland China, Japan, and Taiwan in the East China Sea: Progress Made and Challenges Ahead". Dr. Song discusses the advances and setbacks that have occurred in relation to proposals and agreements on maritime cooperation between China, Japan, and Taiwan in the East China Sea between 1997 and 2013. Given this experience of the parties,

he believes that maritime cooperation between China, Japan, and Taiwan is possible in the areas of conservation and management of fisheries resources as well as exploration and exploitation of oil and gas resources in the East China Sea along with management of the dispute over the Diaoyutai/Diaoyu/Senkaku Island group. For this to happen, he notes that there must be political willingness among the leaders of these countries so that the area becomes "a sea of peace, friendship and cooperation."

Part I concludes with Yen-Chiang Chang's examination of "The South China Sea Disputes: An Opportunity for the Cross Taiwan Strait Relationship". After reviewing the claims of mainland China, the Philippines, Vietnam, Malaysia, Brunei, and Indonesia, Dr. Chang opines that there is a strong legal basis for mainland China to claim sovereignty over the South China Sea islands and sovereign rights over the surrounding waters. He recognizes that while it would be preferable to set aside the disputes over the South China Sea and emphasize joint development, such a focus would be difficult to achieve. Nevertheless, given the opportunities for joint development, he suggests promoting cooperation between mainland China and Taiwan in resource development of the South China Sea, while at the same time, both sides could put pressure on Southeast Asian states to promote cooperation and negotiations among the relevant state parties.

Part II looks at "Peaceful Uses of Marine Resources" and begins with Kuan-Hsiung Wang's analysis of important aspects of fishery resources in "Management of Fishery Resources: A Starting Point towards Cooperation in the East China Sea". Professor Wang, from the Graduate Institute of Political Science, National Taiwan Normal University, looks at the possibility of creating a mechanism for fisheries management in the East China Sea to manage and conserve the important fisheries resources in the area. He reviews the legal landscape for such a possibility and notes that a successful effort in this regard might spill over into other aspects of the disputes over the South China Sea.

Next, Robert Beckman, Head of the Ocean Law and Policy programme and former Director of the Centre for International Law at the National University of Singapore, and Leonardo Bernard, Ph.D. Candidate, ANCORS, University of Wollongong, Australia, provide their analysis in "Framework for the Joint Development of Hydrocarbon Resources". They note that the EEZ regime created by UNCLOS prompted states to maximize their maritime zones to be able to secure offshore hydrocarbon resources. Their article examines the international obligations in relation to hydrocarbon resources and they assert that states must cooperate with each other in the management of resources

in overlapping claim areas, either through Joint Development Arrangements (JDA) or other forms of provisional arrangements pending resolution of the maritime boundaries. They go on to examine the legal framework for and discuss various models for JDAS noting that creation of JDAS are difficult given the political nature of the underlying issues.

David M. Ong, Professor of International and Environmental Law at Nottingham Law School, follows with "The International Legal Obligations of States in Disputed Maritime Jurisdiction Zones and Prospects for Co-operative Arrangements in the East China Sea Region". Professor Ong analyzes the international rights and obligations of the states in the East China Sea region, namely China, Japan, and South Korea, specifically under the UNCLOS as well as general international law. Within that context, he specifically looks at the procedural obligations of notification, information, consultation and environmental impact assessment and observes the practice of China, Japan, and South Korea with respect to cooperation and joint development in the region.

Jianwei Li and Pingping Chen of the National Institute for South China Sea Studies conclude Part II with "Joint Development in the South China Sea: Is the Time Ripe?" They also examine JDAS and their potential application in the South China Sea area. After explaining the significance of JDAS from the perspective of international law, they look specifically at its application in the South China Sea and how each of the relevant states in the region approach JDAS and JDAS that have been established for resources straddling boundaries, for resources in overlapping sea areas, and attempts to establish JDAS. They note that all claimant states involved in the South China Sea disputes have experienced JDAS and assert that China must play a major role in the search for conflict management measures, including JDA, before there is a final resolution to the disputes in the South China Sea.

Part III focuses on "Promotion of Marine Scientific Research for Peace". Keyuan Zou begins this section with "Peaceful Use of the Sea and Military Intelligence Gathering in the EEZ". Professor Zou notes that the tolerance of military activities under international law does not mean that such activities can be conducted in the Exclusive Economic Zone (EEZ) of a state without any regulation. He acknowledges that while military activities conducted in the high seas are open to all, he observes that the EEZ is different from the high seas in that it is an area under national jurisdiction. With respect to military intelligence gathering and military hydrographic survey in the EEZ of another state, he points out that this continues to be a controversial issue in international law and is hotly contested between China and the United States. Given the significant controversy of these issues, he suggests that a future review conference of

UNCLOS Convention should provide clarification as to the legality of military activities, including military intelligence gathering and military hydrographic surveying in a foreign EEZ.

In the next article, "Marine Data Collection: US Perspectives", Captain J. Ashley Roach, who was attorney adviser in the Office of the Legal Adviser, US Department of State, explains the various data collection activities in the marine environment and reviews the applicable legal regimes that govern such activities. He explains that surveys, operational oceanography, exploration and exploitation, and monitoring and environmental assessment are not marine scientific research (MSR) regulated by UNCLOS, but are subject to separate legal regimes. He observes that the means of data collection are often the same, and may appear indistinguishable from MSR. He points out that the data collected may be the same or different and that the parameters collected, their intended use, and the detailed controls on foreign MSR in the EEZ distinguish MSR from surveys, operational oceanography, exploration and exploitation of resources, and monitoring and environmental assessment. He argues that proposals that would require all forms of marine data collection be under coastal state jurisdiction would deprive the world of the benefits of free and open access to data that enhance safety and environmental protection.

Hong Chang follows with "Voluntary Observing Ship and Marine Scientific Research under the Law of the Sea". Dr. Chang examines the legal status of the Voluntary Observing Ships (VOS) scheme which is an aspect of the Joint Technical Commission for Oceanography and Marine Meteorology. The data that is collected through VOS is used for the preparation of forecasts and warnings to help route ships and avoid severe weather conditions, to monitor the state of the oceans, for climatological data banks serving many purposes, and to build long-term records to monitor changes in the climate of the earth. Dr. Chang examines VOS in light of the principles established by UNCLOS and discusses the complexities that arise in light of considering what is marine scientific research.

Finally, Part IV of the main articles addresses "Peaceful Means for Maritime Dispute Resolution" and starts with Anne Hsiu-An Hsiao of the Institute of International Relations, National Chengchi University, discussing "Unilateral Actions and the Rule of Law in Maritime Boundary Disputes". Dr. Hsiao notes that there is a gap in scholarly treatment on the issue of how international law and the law of the sea regulate a state's unilateral conduct with respect to maritime disputes. Her article attempts to preliminarily fill in this gap in examining unilateral actions in maritime boundary disputes and explores their possible

conceptual natures under international law. She notes that while international law and the law of the sea regime do not prohibit all unilateral actions in maritime boundary disputes, they are subject to existing principles and rules of international law, such as good faith, prohibition of the threat or use of force, and peaceful settlement of disputes.

Lastly, Erik Franckx, Professor of Law at Vrije Universiteit Brussel, follows with "Search and Rescue as an Enabler to Stimulate Cooperation in Areas of Tension". Professor Franckx discusses how cooperation in the area of search and rescue is able to contribute to overall cooperation between the pertinent state parties in the East China Sea, an area that is prone to tension and disputes. He examines the international legal framework governing search and rescue and how this is applied specifically to the East China Sea while also looking at examples from other regions. He observes that while search and rescue cooperation is not generally well suited in regions such as the East China Sea, where maritime areas are disputed between the coastal states, this is not a fatality as illustrated by the recently concluded search and rescue agreement in the Arctic, an area of high tension where much of the maritime boundaries have yet to be fixed in a definitive manner. Professor Franckx sees this as an opportunity for cooperation in the East China Sea.

II Notes and Commentaries

The main articles are followed by notes and commentaries that analyze the state practice of Asian countries in more depth. Matthias Vanhullebusch, Associate Professor at the KoGuan Law School of the Shanghai Jiao Tong University, provides his analysis of "China's Air Defence Identification Zone: Towards Crystallization of a New International Custom". Following, Arie Afriansyah of Universitas Indonesia examines "Indonesia's Practice in Combatting Illegal Fishing: 2015–2016".

III Legal Materials

From its inception, the Yearbook has been committed to providing scholars, practitioners, and students of international law with a report on Asian state practice as its contribution to provide an understanding of how Asian states act within the international system and how international law is applied in their domestic legal systems. The Yearbook does this in two ways. First, it records

the participation of Asian states in multilateral treaties; and second, it reports on the state practice of Asian states. A number of diligent scholars have provided the Yearbook with reports on the 2016 state practice of their respective countries.

1 *Participation in Multilateral Treaties*

Karin Arts of the International Institute of Social Studies, Erasmus University Rotterdam in The Hague, The Netherlands, has compiled and edited the participation of Asian states in multilateral treaties for the 2016 calendar year.

2 *State Practice of Asian States in the Field of International Law*

The State Practice section is intended to offer readers of the Yearbook an outline and summary of the activities undertaken by Asian states that have a direct bearing on international law. The national correspondents, listed in the table of contents, have undertaken the responsibility to report on the state practice of their respective countries during the 2016 calendar year. Their submissions describe how these states are applying international law in their domestic legal systems and in their foreign relations.

IV Literature

1 *Book Review*

For this edition of the Yearbook, Sangmin Shim, Assistant Professor of International Law at the Korea National Diplomatic Academy, gives his review of *Marine Pollution Contingency Planning: State Practice in Asia-Pacific States* edited by Anastasia Telesetsky, Warwick Gullett, and Seokwoo Lee, published by Brill Nijhoff in 2018.

2 *Bibliographic Survey*

Dr. Lowell Bautista of the University of Wollongong School of Law and of the Board of Editors has prepared the bibliography for 2016 which provides information on books, articles, notes, and other materials dealing with international law in Asia.

V DILA Activities

The 2016 edition of the Yearbook concludes with a report on the activities undertaken by DILA in 2016, namely the annual DILA International Conference

and DILA Academy and Workshop that was held on November 4–7, 2016 on the campus of Meiji Gakuin University (Shirokane Campus) in Tokyo, Japan.

Seokwoo Lee
Co-Editor-in-Chief

Hee Eun Lee
Co-Editor-in-Chief

Peaceful Uses of East Asian Seas: An Editorial Note

The East Asian seas, from north to south geographically, include the Sea of Japan (East Sea), the Yellow Sea, the East China Sea and the South China Sea. All of these seas share the same characteristic in that they are defined as semi-enclosed under the 1982 United Nations Convention on the Law of the Sea (LOSC).[1] The bordering countries include Brunei, Cambodia, China (including Taiwan), Indonesia, Japan, the two Koreas, Malaysia, the Philippines, Russia, Singapore, Thailand and Vietnam. Natural resources are abundant in these seas and serve the peoples around them. On the other hand, aside from accompanying natural resources, there are also many pending maritime disputes which are typically illustrated by the South China Sea.

In order to maintain peaceful uses of these seas, there should be a maritime legal order which is supported by rules and institutions based on international law. The current such order in the world has been mainly established by and maintained under the LOSC, which is commonly regarded as the constitution of oceans and has incorporated almost all previously existing conventional and customary rules and norms concerning the oceans. Pursuant to the provisions of the LOSC, a coastal state has the right to establish maritime zones under its jurisdiction: internal waters inside the baselines which are used to measure the extent of the territorial sea and other jurisdictional waters; the territorial sea of 12 nautical miles (nm); the exclusive economic zone (EEZ) of 200 nm; and the continental shelf of 200 nm (or up to 350 nm in some cases), outward from the baselines. Within these maritime zones, a coastal state is entitled to enjoy either sovereignty or sovereign rights and to exercise its jurisdiction and enforce its laws and regulations in accordance with international law. All 16 East Asian countries except Cambodia and North Korea have acceded to the LOSC. In order to implement the LOSC, these countries have adopted relevant domestic laws and regulations for the management of maritime zones and maritime activities within their jurisdiction.[2]

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1 According to Article 122 of the LOSC, "enclosed or semi-enclosed sea" means "a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States." United Nations Convention on the Law of the Sea, 21 ILM (1982) 1261. The Convention was opened for signature on 10 December 1982 and came into effect on 16 November 1994. As of April 2018, there were 168 Contracting Parties to it, including one international organization.

2 For details on these laws, *see* Division for Marine Affairs and the Law of the Sea, *available at*: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/asia.htm.

The LOSC provides that oceans and seas should be used for peaceful purposes, and any threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations shall be prohibited.[3] This special issue is designed to examine how and to what extent the international law of the sea plays a role in promoting and maintaining peace in East Asia seas. It divides the following sections for discussions: maintaining maritime peace and the law of the sea; peaceful uses of marine resources; promotion of marine scientific research for peace; and peaceful means for maritime dispute resolution. It is strongly believed that as long as international law, including customary law and the LOSC, can be well observed by the states in East Asia, peace and regional stability can be maintained and orderly cooperation and development can be promoted in East Asian seas.

Finally, it is specially acknowledged that the articles contained in this special issue are selected from the two international symposia sponsored by the Centre for Ocean Law and Governance of Zhejiang University, China and held in Hangzhou in 2012 and 2013, respectively. This Editor also expresses his own gratitude to all the contributors to this special issue and to the Editors-in-Chief, Seokwoo Lee and Hee Eun Lee, for their kindness to accommodate the selected contributions for the *Asian Yearbook of International Law*.

Keyuan Zou
Special Issue Editor

3 *See* Art. 301 of the LOSC.

Articles

PART 1

Maintaining Maritime Peace and the Law of the Sea

Peaceful Use of the Sea and the Rule of Law

Miyoshi Masahiro

1 Introduction

It is a truism to say that the rule of law should prevail in international relations. The rule of law implies "the subordination of all authorities, legislative, executive, judicial, and other to certain principles which would generally be accepted as characteristic of law, such as the ideas of the fundamental principles of justice, moral principles, fairness and due process."[1] Consequently, political or policy considerations in favour of national interests without heed to their legal implications are outside the realm of law. The rule of law is easy to say, but not necessarily easy to materialise in the actual world where various national interests and cultural-historical backgrounds tend to collide with each other. Despite some uncertainty of its concept, however, the rule of law should be the governing principle for the conduct of States in their mutual relations.

1 *Importance of Peaceful Use of Sea Resources*

Article 88 of the United Nations Convention on the Law of the Sea (hereinafter, "UNCLOS") provides: "The high seas shall be reserved for peaceful purposes." Naturally, this does not automatically apply to all sea areas but, in view of its clear intent, may be applicable *mutatis mutandis* to the exclusive economic zone (hereinafter, "EEZ") where non-coastal States may have a share in the living resources on the basis of specific arrangements with the coastal State.[2] The living resources are absolutely necessary for everyday life of the populations in the coastal State. But "[w]here the coastal State does not have the capacity to harvest the entire allowable catch, it shall … give other States access to the surplus of the allowable catch …."[3] Full benefits from the resources may be ensured by peaceful means of exploitation. Should there be disagreement among the neighbouring coastal States as to an effective use of the resources, it could lead on to an abusive use by some impudent States to the exclusion of others – a state of lawlessness. Protecting fishing vessels by some accompanying warships from possible coast guard interventions of the coastal State, as was

1 David M. Walker, The Oxford Companion to Law 1093 (1980).
2 *See* UNCLOS, Article 62.
3 UNCLOS, Article 62, para. 2.

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occasionally evidenced in the South China Sea, is by no means a peaceful act. That aggressive State is taking advantage of the non-existence of a legal arrangement for fishing in the sea area in question.

To take Japan's fishing arrangements, for example, it has a fishing agreement of 1998 with South Korea[4] in the Sea of Japan and the East China Sea and another of 1997 with China[5] in the East China Sea. Both are naturally results of political compromise and have some defects respectively. Even with some such defective aspects, they are workable arrangements. The most recent fisheries arrangement in the East China Sea is that of 10 April 2013 with Taiwan,[6] which responds to the daily needs of fishermen from Taiwan who used to fish in the waters near the *Senkaku Islands* but have been virtually excluded from those waters over the past few decades.

With respect to non-living resources, however, the basic legal order in which Japan is placed is not complete. It has two continental shelf agreements of 1974 with South Korea[7] but no EEZ agreement yet. The matter is much worse in its relations with China: it has no basic agreement on the continental shelf nor on the EEZ. All it has in this regard is a broad arrangement by means of a brief press release of 2008 for joint development of natural gas in the East China Sea.[8] This has yet to be completed by further implementing arrangements, but no effective results have since been achieved. It is a matter of regret that no clear

4 The Japan-South Korea Fisheries Agreement (entered into force 22 January 1999).

5 The Japan-China Fisheries Agreement (entered into force 1 June 2000). For a brief introductory analysis of this agreement, together with the Japan-South Korea agreement, *see*, for example, Masahiro Miyoshi, *New Japan-China Fisheries Agreement: An Evaluation from the Point of View of Dispute Settlement*, 41 THE JAPANESE ANNUAL OF INTERNATIONAL LAW 30–43 (1998).

6 JAPAN BUSINESS PRESS, *available at* http://jbpress.ismedia.jp/articles/-/37570.

7 For the text of the two agreements of 30 January 1974, *see*, for example, JONATHAN I. CHARNEY AND LEWIS M. ALEXANDER (EDS.), INTERNATIONAL MARITIME BOUNDARIES, VOLUME 1 1063–1068, 1073–1089 (1993).

8 On 18 June 2008, the Governments of Japan and China issued a brief joint press release on "Co-operation between Japan and China in the East China Sea," composed of two instruments of understanding. For a brief description of this joint press release, *see*, for example, Masahiro Miyoshi, *Japan's Arrangements with South Korea and China for the Development of Oil and Gas in the East China Sea: A Memorandum*, an abridged version of a paper filed with the Centre for the Sea and Maritime Law of the Faculty of Law of the National University of Hanoi, Vietnam, and presented as a discussion paper at the Roundtable, *Maritime Boundary Delimitation and Possibilities of Joint Development in East and Southeast Asia*, co-sponsored by The Aichi University Institute of International Affairs and the Centre for the Sea and Maritime Law of the Faculty of Law of the National University of Hanoi, Vietnam, held on Kurumamichi, Nagoya, Campus of Aichi University on 29 November 2008, and reproduced in the 134 JOURNAL OF INTERNATIONAL AFFAIRS 114–120 (2009).

response has been forthcoming from the Chinese side over the past five years to repeated Japanese calls for a re-start of negotiations for implementation.

2 *Military Expansionist Trends*

With its growing economy over the past decade, China is showing a move to increase its advances into the western Pacific sea areas. It has been claiming advances beyond the "First Island Chain" and into the "Second Island Chain" in the Northwest Pacific and a tongue-shaped or U-shaped dash line in the South China Sea.[9] Thus, it has created a concern among the States in this region, particularly because it is viewed as an expansionist move backed by the Navy of the People's Liberation Army. As it is linked to territorial claims to some islands, islets and other smaller insular formations, the move is being viewed as not only resource-oriented but also territorial expansionist. The widely shared concern has been recently reinforced by the Chinese Government's official proclamation that China will resolutely defend its sovereignty over the islands and islets as its "core interest."[10]

Whether the attempt to advance into the western Pacific is an alleged "core interest" is a matter for China. But it has undeniable repercussions on the States in this part of the world, and consequently is unacceptable to them in its alleged form. In other words, a mere proclamation of "core interest" does not entitle the claimant to its claimed territory under international law. It involves a great number of islands, islets and smaller insular formations which have large surrounding areas of the sea where there are good fishery grounds and potential hydrocarbon and other mineral resources. The other States in this region have overlapping claims to those islands, islets or smaller insular formations and long-time interests in the surrounding seas, and seem to be perplexed in the face of the recent Chinese moves. To make the matter worse, such moves for maritime advances are backed by the military.[11] It is even suspected that the military is taking the initiative in those advances. If this is so,

9 For a discussion of the "U-shaped line," *see*, for example, Masahiro Miyoshi, *China's 'U-Shaped Line' Claim in the South China Sea: Any Validity Under International Law?*, 43 OCEAN DEVELOPMENT AND INTERNATIONAL LAW, 1–17 (2012).

10 *See* the public announcement by the Foreign Ministry spokeswoman, Hua Chunying, at the press conference on 26 April 2013, reported in THE JAPAN TIMES, 28 April 2013, at 2, which says the announcement was made for the first time that the *Senkaku Islands* is regarded as a "core interest" just as Taiwan, Tibet, and the restive Xinjiang Uyghur Autonomous Region are.

11 *See*, for example, the recent Scarborough Shoal incident between China and the Philippines, and the earlier conflict between China and Vietnam over the Paracel Islands.

the concern of the neighbouring States is more serious because such advances into the sea could also create a security threat to those States.

If the naval units of the People's Liberation Army are actively involved in the Chinese advances into the western Pacific, those States in the region which think themselves threatened thereby would respond by building up their military forces. This could lead on to a vicious circle of military build-ups in this region. Every State concerned is well advised to refrain from more such military activism and make sincere efforts to come to terms with each other for effective utilisation of the rich sea resources.

II History and International Law

When it comes to the basis of claim to sovereignty over an island or islet, or any other smaller insular formation for that matter, it is well known that China rests its claim on history or long-term assertion of sovereignty. As it has a very long history as a sovereign State, China would have abundant old documents and maps depicting the islands or islets concerned as its possessions overseas. But it is doubted whether history is everything or silences any otherwise grounded argument on territorial sovereignty.

1 *Discovery as an Historical Ground for Title to Territory*

Take, for example, the *Senkaku Islands* (Diaoyu in Chinese) problem. China has repeatedly asserted that its ancient historical documents depict those islands as belonging to China.[12] It can be inferred from such depictions that it may have been the Chinese who sighted the islands first. If territorial sovereignty can be proved by such depictions alone, the Chinese assertions would be clearly correct. Discovery can have a legal effect, as indeed it used to have in the mediaeval years, but in the modern times it can only have a limited effect of *inchoate title* unless perfected within a reasonable time by effective occupation.[13] However, such historical documents presented by China do not provide

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12 *See*, for example, Tianying Wu, An Examination of the Title to the Diaoyu Islands before the Sino-Japanese War: Disproof of Messrs. Okuhara Toshio and Others (Japanese translation by Mizuno Akira) 31–48 (1998).

13 Perhaps the first step to show the will for appropriation, *animus occupandi*, is such symbolic acts as to display the national flag and arms. *See*, for example, the Award of the Permanent Court of Arbitration, dated 4 April 1928, in the *Island of Palmas* case, 2 Reports of International Arbitral Awards 857 (1928). *See* also, C.H.M. Waldock, *Disputed Sovereignty in the Falkland Islands Dependencies*, 25 British Year Book of International Law 323 (1948).

the evidence that China has established *effective control*[14] over the disputed islands over the past hundreds of years. By *effective control* is meant a continuous and peaceful display of State authority or sovereignty without protest from foreign States. It means the *animus occupandi*, the clear intention to possess the territory, and the effectiveness of claims to sovereignty. The rationale of this requirement is that any territorial possession of a State in a remote place may be adversely occupied by another State before it is known to the original possessor State.

2 *The Legal Basis of Title to Territory*

While the main rules of modern international law, including those governing the acquisition of territory, are said to have been established in the late 19th century, the *Island of Palmas* arbitration of 1928 between the Netherlands and the United States wound up the law of acquisition of territory.[15] As to whether a mere sighting or discovery is sufficient to constitute a title, the Award states:

> [D]iscovery alone, without any subsequent act, cannot at the present time suffice to prove sovereignty over the Island of Palmas (or Miangas)....[16]

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14 Here the term "effective *control*" is used, instead of "effective *occupation*" which is the normal term for the establishment of sovereignty, because it is commonly used to mean a continued state of "effective *occupation*."

15 The *Island of Palmas* arbitration, by the sole arbitrator Max Huber of Switzerland, before the Permanent Court of Arbitration has been esteemed among international lawyers as an authoritative exposition of the law of acquisition of title to territory. *See*, for example, Hazel Fox, *Arbitration*, in DAVID DAVIES MEMORIAL INSTITUTE OF INTERNATIONAL STUDIES, INTERNATIONAL DISPUTES: THE LEGAL ASPECTS 109 (1972), where the author says: "... the award in the *Island of Palmas* case, 1928, was the most outstanding contribution to international jurisprudence."

16 The *Island of Palmas* Award, 2 REPORTS OF INTERNATIONAL ARBITRAL AWARDS 846 (1928). As early as 1609 when his MARE LIBERUM was published under a pseudonym, Grotius wrote:

> To discover a thing is not only to capture it with the eyes but to take possession thereof .... The act of discovery is sufficient to give a clear title of sovereignty *only when it is accomplished by actual possession*. (Emphasis added)

HUGO GROTIUS, MARE LIBERUM 11 (1916), as quoted in WALDOCK, *op. cit.*, at 322. Likewise Goebel had this to say about the instruction of Charles V of Spain to his Ambassador in 1523 in the dispute with Portugal over the Molucca Islands:

> Although Mollucco had been discovered by ships of the King of Portugal, it could not on this account ... be said that Mollucco had been found by him; for it was evident that to 'find' required possession, and that which was not taken or possessed could not be said to be found although seen or discovered.

GOEBEL, STRUGGLE FOR THE FALKLAND ISLANDS 96 (1927), as quoted in WALDOCK, *op. cit.*, at 322–323.

> [A]ccording to the view that has prevailed at any rate since the 19th century, an *inchoate title* of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered.[17] (Emphasis added)

The Award further states on the weakness of an inchoate title of discovery:

> But even admitting that the Spanish title still existed as inchoate in 1898 and must be considered as included in the cession under Article III of the Treaty of Paris, *an inchoate title could not prevail over the continuous and peaceful display of authority by another State; for such display may prevail even over a prior, definitive title put forward by another State*.[18] (Emphasis added)

The logic of these findings has been followed in the subsequent judicial decisions on territorial sovereignty, for example, the *Clipperton Island* (1931), *Eastern Greenland* (1933) and *Minquiers et Ecrehos* (1953) cases.[19] The decisive test of a State's title in the modern law, according to Waldock, is not having the

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17 The *Island of Palmas* case, 2 Reports of International Arbitral Awards 846 (1928).

18 *Ibid.*

19 The Sentence du 28 janvier 1931 in the Affaire de l'Île de Clipperton states:

> … même en admettant que la découverte ait été faite par des sujets espagnols, il faudrait, pour que la thèse du Mexique fut fondée, prouver que l'Espagne, non seulement avait le droit, en tant qu'État, d'incorporer l'île à ses possessions, mais encore l'avait effectivement exercé.

2 Reports of International Arbitral Awards 1109 (1933). The judgement of 5 April 1933 of the Permanent Court of International Justice in the *Legal Status of Eastern Greenland* case says:

> [A] claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.

PCIJ, Series A/B 53, at 27–28. The judgment of the International Court of Justice in the *Minquiers et Ecrehos* case of 1953 has this to say:

> What is of decisive importance … is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Miquiers groups.

ICJ Reports 1953, at 53. Waldock extensively discusses the constituent factors of the exercise or display of sovereignty based on the three cases of *Island of Palmas*, *Eastern Greenland*, and *Clipperton Island*, saying that it must be (*a*) peaceful, (*b*) actual, (*c*) sufficient to confer a valid title to sovereignty, and (*d*) continuous. Waldock, *op. cit.*, at 334–337.

territory at its apparent disposition but *the exercise of the functions of a State* in a manner appropriate to the circumstances of the territory and to the extent necessary to fulfil the obligations of a State under international law.[20]

Thus, a mere discovery, even if it is duly recorded, cannot in itself constitute a title to sovereignty unless it is perfected within a reasonable period of time by effective occupation of the target territory. In the case of the *Senkaku Islands*, the Japanese Government had made a series of careful research to make sure that they were not under effective control of any State before it formally incorporated them into the Japanese territory at a Cabinet meeting in 1895.[21] Technically, it did so as a matter of *occupation*, rather than *prescription*, under international law because they were *terra nullius*.[22] It was a lawful acquisition of title requiring no passage of time. Had the acquisition been a case of *prescription*, it should have been the acquisition of title to the islands by a long-continued and undisturbed possession.[23]

3 *Inter-temporal Law*

In this connection, some words would be in order about the concept and role of *inter-temporal law*. The act of incorporating the *Senkaku Islands* into the Japanese territory in 1895 was lawful at the time of the act under *inter-temporal law*. If one criticises its legality today, one does so under international law of

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20 Waldock, *op.cit.*, at 324–325.

21 An episode shows how carefully the Japanese Government treated the sovereignty problem of the *Senkaku Islands* before it formally incorporated them in the Japanese territory. In 1894, when Koga Tatsushiroh applied to the Governor of Okinawa Prefecture for a loan of some *Senkaku Islands* to implement his plan of developing them after some ten years of exploration for feathers, guano and marine products, the Okinawa Governor turned down his application on the ground that the islands were not formally appropriated by any State yet. Subsequently, in August 1896, a year and a half after the Cabinet decision to incorporate the islands into Okinawa in 1895, his request was approved by the Interior Minister for a 30-year loan free of charge. Toshio Okuhara, *Senkaku Islands and Japan's Ownership of Them: A Historical Review of their Incorporation into the Japanese Territory*" (in Japanese), 234 Japan and the World Magazine 21–37 (1979).

22 The reader is referred to a very careful study of the *Senkaku Islands* problem by Shigeyoshi Ozaki, Professor Emeritus of international law, Tsukuba University, Japan. His most recent paper, *Territorial Issues on the East China Sea: A Japanese Position* (this is an erroneous title of the paper adopted by the editor to conform to the title of the Chinese counterpart's paper), 3(1) Journal of East Asia and International Law 151–174 (2010), is a handy abridged English version of his full-scale study based on his thorough-going research over the past thirty years or so. Besides discussing the international law issues involved, it scrupulously refutes the alleged historical basis of China's claimed title by examining the maps and the names of the islands. *Ibid.*, at 155–164.

23 *See* R.Y. Jennings, The Acquisition of Title to Territory in International Law 20, 23 (1963).

today. That is not the correct application of the law. As the *Island of Palmas* Award said,

> Both Parties are also agreed that *a juridical act must be appreciated in the light of the law contemporary with it*, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.[24] (Emphasis added)

Viewed from this statement of the Award, China's criticism of the Japanese incorporation of 1895 has been made in the light of "the law in force at the time when a dispute in regard to it arises or falls to be settled." That is against *inter-temporal law*.

The basis of *inter-temporal law* is that law evolves in the course of time. The law of the Middle Ages, for example, does not necessarily hold true in the modern years. Thus, the law of acquisition of title to territory has changed since the Middle Ages or early modern times. If, therefore, the *Senkaku Islands* had been discovered and so recorded in some historical documents in the early years of the Ming Dynasty, they could have been rightfully claimed to be Chinese territory under the international law of that time.[25] But the law of territorial acquisition underwent changes through the ages of Spanish-Portuguese territorial expansions and other European States' scrambles for territory on the African continent during the 17th to 19th centuries, requiring the *effective* occupation and control of the claimed territory. The *Island of Palmas* Award states:

> It is admitted by both sides that *international law underwent profound modifications between the end of the Middle-Ages and the end of the 19th century*, as regards the rights of discovery and acquisition of uninhabited regions or regions inhabited by savages or semi-civilised peoples.[26] (Emphasis added)

24 2 Reports of International Arbitral Awards 845 (1928).

25 An early arbitral award in the Netherlands-Venezuela *Island of Aves* case, dated 30 June 1865, recognised the validity of discovery as the basis of title to territory. H. La Fontaine, Pasicrisie Internationale 1794–1900: Histoire documentaire des Arbitrages internationaux 152–153 (1997); 28 Reports of International Arbitral Awards 119–123 (French translation of the Award) (1817). But this is an isolated early case recognising discovery as the basis of title, and was soon overturned by the practice of States which placed more emphasis on effective occupation, as did the *Island of Palmas* Award in 1928.

26 2 Reports of International Arbitral Awards 845 (1928).

4 *Effective Occupation* (*or Control*)

The factor of *effective occupation* (or control) has been confirmed as the decisive factor in the acquisition of title in the subsequent international judicial decisions, including the *Clipperton Island*, *Eastern Greenland*, *Minquiers et Ecrehos* cases among others.[27] This logic has further been reconfirmed, in terms of *effectivités*, in more recent territorial cases before the International Court of Justice (hereinafter "ICJ") and arbitral tribunals, including the *Burkina Faso/Mali Frontier Dispute* (1986), *Libya/Chad Territorial Dispute* (1994), *Eritrea/Yemen Territorial Sovereignty and Scope of the Dispute* (*First Stage*, 1998) cases.[28] In the still more recent territorial dispute cases before the ICJ, the parties have abundantly pleaded *effectivités*, and the Court has duly responded by discussing *effectivités*.[29] Thus State practice, as well as the jurisprudence of the ICJ and arbitral tribunals, shows the critical importance of effective control as an indication of *animus occupandi*.[30] Consequently, it is safe now to say that discovery

27 *See* note 19 and accompanying text.

28 *See*, for example, the *Burkina Faso/Mali Frontier Dispute* case of 1986, ICJ REPORTS 1986, at 564, para. 18 and 620, para. 124. *See also,* the *Libya/Chad Territorial Dispute* case of 1994, ICJ REPORTS 1994, at 22, para. 44; at 43 (Separate Opinion of Judge Shahabudeen); at 61, para. 40; 89, para. 128 (Separate Opinion of Ajibola); and 98–100 (Dissenting Opinion of Judge *ad hoc* Sette-Camara). Likewise, the Arbitral Award in the *Eritrea/Yemen Territorial Sovereignty and Scope of the Dispute* case (First Stage) of 1998 discusses *effectivités* in detail. 22 REPORTS OF INTERNATIONAL ARBITRAL AWARDS 268–291, paras. 239–361 (1994).

29 For more subsequent cases discussing *effectivités*, *see* the *Indonesia/Malasia Sovereignty over Pulau Ligitan and Pulau Sipadan* case, ICJ Reports 2002; the *Benin/Niger Frontier Dispute* case, ICJ REPORTS 2005; the *Nicaragua/Honduras Territorial and Maritime Dispute* case, ICJ REPORTS 2007; the *Malaysia/Singapore Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* case, ICJ REPORTS 2008; the *Nicaragua/Colombia Territorial and Maritime Dispute* case, ICJ REPORTS 2012; the *Burkina Faso/Niger Frontier Dispute* case, ICJ REPORTS 2013.

30 However, it is worth noting that *effectivités* is not unrestricted but subject to "the critical date." *See*, for example, the *Indonesia/Malaysia Sovereignty over Pulau Ligitan and Pulau Sipadan* case, ICJ REPORTS 2002, at 682, para. 135, where the ICJ said:

> [The Court] cannot take into consideration acts having taken place after the date on which the dispute between the Parties crystallized unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them.

See also the *Nicaragua/Honduras Territorial and Maritime Dispute in the Caribbean Sea* case, ICJ REPORTS 2007, at 698, para. 117, where the Court states:

> Thus a critical date will be the dividing line after which the Parties' acts become irrelevant for the purpose of assessing the value of *effectivités*.

Furthermore the *Nicaragua/Colombia Territorial and Maritime Dispute in the Caribbean Sea* case states:

> [T]he date upon which the dispute crystallized is of significance. Its significance lies in distinguishing between those acts *à titre de souverain* occurring prior to the date

alone, unless perfected by effective occupation and control within a reasonable period of time, cannot constitute a title to territory in international law of today.

5 *Protest and Acquiescence in the Acquisition of Title to Territory*

Another important point which must not be overlooked in this connection is the complete lack of protest on the part of China at the time of the Japanese incorporation of the islands into its territory in 1895 and thereafter over a period of *three-quarters of a century*, until the late 1960s when all of a sudden it began to claim territorial sovereignty over the islands. It is extremely difficult to understand why China kept silence over such a long period of time if it considered the islands as its "core interest." Or did it not consider them a "core interest" in those days and did it begin to consider them a "core interest" in the late 1960s or more recently? Such a failure to protest during the *three-quarters of a century*, during which there were various chances to lodge protests,[31] is understood under international law to amount to acquiescence in the Japanese act of incorporation, and therefore China would now seem to be *estopped* from claiming a title to sovereignty over those islands.[32]

As Judge Ajibola says in his separate opinion in the *Libya/Chad Territorial Dispute* case of 1994, "There are many awards of international tribunals … supporting the principles of estoppel or acquiescence in the sense of silence or absence of protest." He thus refers to the *Alaska Boundary* arbitration of 1903, the *Delagore Bay* arbitration of 1875, the *Guatemala/Honduras Boundary*

when the dispute crystallized, which should be taken into consideration for the purpose of establishing or ascertaining sovereignty, and those acts occurring after that date,

> 'which are in general meaningless for that purpose, having been carried out by a State which, already having claims to assert in a legal dispute, could have taken those actions strictly with the aim of buttressing those claims' (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua* v *Honduras*), *Judgment,* ICJ REPORTS 2007 (*II*), at 697–698, para. 117).

ICJ REPORTS 2012, at 29, para. 67. Subject to the critical date, however, effective control is of crucial importance in its own right in the acquisition of title to territory.

31 It would have been known to the Chinese authorities that Koga Tatsushiroh was doing his business on a couple of Senkaku Islands since 1896 into the 1930s. Had they not had any knowledge of his business, they were to blame for their lack of diligence if they had thought the islands belonged to them.

32 For more detailed discussions on protest and acquiescence in international law, *see* Masahiro Miyoshi, *Some Thoughts on Protest and Acquiescence in the Acquisition of Title to Territory: Implications for Territorial Claims in the East Asian Seas*, a paper presented at the *International Seminar on Geographical Features in the East Asian Seas and the Law of the Sea,* Taipei, Taiwan, 20–21 September 2012.

arbitration of 1933, the *Grisbadarna* arbitration of 1909 before he comes to the *Island of Palmas* case.[33]

6 *Policy and Law*

There would have been a change of policy on the part of China in its position on the *Senkaku Islands*[34] as a result of the reported discovery of oil and gas fields in the sea areas around them by the scientific group which conducted seismic surveys there under the auspices of the United Nations Economic Commission for Asia and the Far East (hereinafter "ECAFE") in 1968.[35] But if

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33 ICJ REPORTS 1994, at 81, paras. 108–109. For the *Alaska Boundary* arbitration of 1903, the *Guatemala/Honduras Boundary* arbitration of 1933, and the *Grisbadarna* arbitration of 1909, *see* 15 REPORTS OF INTERNATIONAL ARBITRAL AWARDS, 2 and 11, respectively. For the *Delagore Bay* arbitration of 1875, *see* 66 BRITISH AND FOREIGN STATE PAPERS (1874–1875).

34 Before its first-ever expression of opposition to the joint Japan-Korea-Taiwan moves towards the exploitation of the reported offshore oil and gas in the East China Sea in the RENMIN RIBAO (People's Daily) on 4 December 1970, China had failed, at least on two earlier occasions, to raise its claim to territorial sovereignty over the *Senkaku Islands*. In 1953 a news article appeared in the RENMIN RIBAO, suggesting China thought that those islands belong to Japan, because the article states, using the Japanese names for those islands:

> The Ryukyu Islands are scattered to the North-West of our Taiwan and to the South-West of Kyushu, Japan, including the seven island groups of *Senkaku Islands*, Sakishima Islands, Daito Islands, Okinawa Islands, Ohshima Islands, Tokara Island, and Ohsumi Islands.... (Emphasis added.)

This author's translation from the original Chinese text in RENMIN RIBAO, 8 January 1953, at 4. This is a part of the report that has nothing to do with the ownership of the *Senkaku Islands*, and therefore should be an honest admission of Japanese sovereignty over those islands. Again in 1958 when China made a declaration of an administrative nature on the breadth of its territorial sea, it left out the *Diaoyu* islets among the islands that belong to it. The relevant part of this declaration states:

> ... Taiwan and its surrounding islands, the Penghu Islands, the Tungsha Islands, the Hshisha Islands, the Chungsha Islands, the Nansha Islands and all other islands belonging to China ....

The Declaration of 4 September 1958, para. 1, PEKING REVIEW, 9 September 1958, at 1. Should the *Senkaku Islands* be claimed to be included in "all other islands belonging to China," such an interpretation, though grammatically understandable, would rather weaken than strengthen China's position because the failure specifically to mention the name of *Diaoyu* implied no or little such interest of it in *Diaoyu* as it asserts today.

35 The group of scientists conducted the seismic surveys as part of the activities of the Committee for Co-ordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas (hereinafter "CCOP"), then under the management of the ECAFE. The CCOP published a report on the seismic surveys in May 1969, which created a stir among the coastal States in this region by its concluding remarks: "A high probability exists that the continental shelf between Taiwan and Japan may be one of the most prolific oil reservoirs in the world." CCOP 2 TECHNICAL BULLETIN 41 (1969).

China realised the potential of oil and gas and decided to explore for it, it was a matter of policy decision, and not a matter of law. Law and policy must not be mixed up. However strongly China may assert that the islands are a "core interest" to it, it is at most a new policy consideration and cannot necessarily affect the law. In a word, such an assertion of policy has no *opposabilité* under international law. If China alleges that a change of policy entails a change in the law, it would be tantamount to saying: "*Macht ist Recht*."

III Dispute Settlement – Multilateralism *vs.* Bilateralism

So far as the settlement of disputes is concerned, China has been known to have propensity for direct negotiations with its opponent or opponents. In respect of the insular disputes in the South China Sea, there has arisen the question of whether they are to be settled in a multilateral framework or through bilateral negotiations.

As early as 1976 the five original members of the Association of Southeast Asian Nations (hereinafter "ASEAN") – Indonesia, Malaysia, the Philippines, Singapore and Thailand – agreed to settle disputes among themselves *through friendly negotiations*.[36] In 1997 China joined with the ASEAN States in making a joint statement on resolving disputes in the South China Sea "through *friendly consultations and negotiations* in accordance with universally recognised international law, including the 1982 UN Convention on the Law of the Sea."[37] This important joint statement was endorsed in the 2002 Declaration on the Conduct of Parties in the South China Sea, which provides *inter alia*:

> 4. The Parties concerned undertake to *resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations* by sovereign states directly concerned, in accordance with universally recognised principles of international law, including the 1982 UN Convention on the Law of the Sea;
> 5. The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and

36 The Treaty of Amity and Cooperation in Southeast Asia, 24 February 1976, Article 13, 1025 United Nations Treaty Series 316 (1976). (Emphasis added)

37 The 1997 Joint Statement of the Meeting of Heads of State/Government of the Member States of ASEAN and the President of the People's Republic of China of 16 December 1997, para. 8. (Emphasis added)

> stability including, among others, *refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features* and to handle their differences in a constructive manner.[38] (Emphasis added)

This Declaration of 2002 was signed by China and ASEAN's ten members, and the undertaking has since been confirmed time and again.[39] More recently, in July, 2011, China and the ASEAN members signed a document in this context: "Guidelines on the Implementation of the Declaration on the Conduct of Parties in the South China Sea." The Guidelines have yet to be approved by the governments of China and the ASEAN member States, but all sides called it a hopeful sign towards a peaceful resolution of the overlapping claims in the South China Sea.[40]

The question now is whether this can be taken as a firm commitment of China in its relations with the ASEAN States. The latest development at the time of this writing is that the Philippines has submitted its dispute with China over the Scarborough Shoal in the South China Sea to the International Tribunal for the Law of the Sea (hereinafter "ITLOS"), and the ITLOS announced on 25 April 2013 that it has chosen five arbitrators.[41] But China has, as was expected, expressed its opposition to the ITLOS exercising its jurisdiction in this case.[42]

As to China's approach to dispute settlement, a seasoned Indonesian diplomat reflecting on South China Sea issue once said:

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38 The Declaration on the Conduct of Parties in the South China Sea, 4 November 2002, paras. 4, 5.

39 *See*, for example, XINHUA NEWS from Beijing, 23 December 2010: *China, ASEAN Agree to Follow South China Sea Declaration*, *available at* news.xinhuanet.com/english2010/china/2010–12/23/c._13662098.

40 Kathy Quiano, *China, ASEAN agree on plans to solve South China Sea dispute*, CNN, 21 July 2011.

41 ITLOS/Press 191, 25 April 2013, which states that "[B]y a Notification and Statement of Claim dated 22 January 2013, the Republic of the Philippines instituted arbitral proceedings against the People's Republic of China pursuant to Annex VII to the Convention." The Philippines appointed a German national as a member of the arbitral tribunal but China failed to appoint a member of its choice within 30 days of receipt of the notification, as provided in Article 3, subparagraph (c), of Annex VII to the Convention, and the ITLOS President finally appointed four members, composing a total of five members of the arbitral tribunal. But as a result of Mr. M.C.W. Pinto stepping down as a member and President of the arbitral tribunal because of his family member's affiliation with one of the Parties, the ITLOS President appointed Mr. Thomas Mensah as Mr. Pinto's replacement. ITLOS/Press 197, 24 June 2013.

42 THE ASAHI SHIMBUN, 27 April 2013, at 4.

> The issue of whether the prospect for solution would better be achieved bilaterally or through a regional approach still haunts the workshop until now. *China is particularly keen on seeking bilateral solutions with each claimant*, while the Southeast Asian claimants are not so sure whether this is the right approach .... I feel that the Southeast Asian claimants seem to have come to a conclusion that while bilateral dialogues and consultations would be useful, the solution to the Spratly claims would have to be in a regional context involving all claimants.[43] (Emphasis added)

Should China, despite its ostensible accession to joint efforts for dispute settlement with the ASEAN States, continue to stick to its seemingly traditional approach, *i.e.*, reluctance to accede to third-party settlement and preference for bilateralism on the one hand and should the ASEAN States never accept the Chinese bilateralism, there would be no way out of the present impasse in sight in the foreseeable future. What this writer is curious to know is whether China is traditionally averse to third-party settlement or whether such an attitude is a communist-oriented approach.[44]

IV Conclusion

Indeed, States seem to have a propensity for control over the settlement of disputes to which they are parties, and therefore preference for arbitration over judicial settlement, most typically the ICJ.[45] Even so the ICJ Statute has provisions that if no judge of the nationality of one or both of the parties is included in the Court, that party or both parties may choose a person to sit as judge.[46] This implies that even the ICJ allows an arbitration-like characteristic in the

43 Observation made by Hasjim Djalal, then ambassador-at-large of Indonesia, at a speech on the first day of the SEAPOL Tri-Regional Conference on Current Issues in Ocean Law, Policy and Management: Southeast Asia, North Pacific, and Southwest Pacific, Bangkok, 13 December 1994. HASJIM DJALAL, THE SPRATLY ISLANDS DISPUTE: PROSPECTS FOR SETTLEMENT (unpublished text of the speech in mimeo) at 5.

44 There seems to be good reason to suspect that the avoidance of a third-party settlement of disputes in favour of direct negotiations with their opponents has been the traditional policy of Communist regimes, the former Soviet Union among them.

45 For this propensity of States, *see* Masahiro Miyoshi, *The State's Propensity for Control over Proceedings in the Settlement of Disputes*, in KATHLEEN I. MATICS AND TED L. MCDORMAN (EDS.), SUMMARY AND SELECTED PAPERS OF THE SEAPOL TRI-REGIONAL CONFERENCE 106–112 (1995).

46 ICJ Statute, Article 31, paras. 2 and 3.

composition of the bench, especially in view of its allowance of such choice in the composition of a chamber of three or more judges as well.[47] Even if such a procedure does not ensure a strict application of the principle *nemo judex in causa sua*,[48] it is a third-party settlement and amenable to the rule of law.

A lesson may be learned from the *Anglo-French Continental Shelf Arbitration* of 1977. Originally, the United Kingdom wanted to go to the ICJ while France wanted an arbitration[49] in which it could have more control over the choice of arbitrators. The consultations resulted in an arbitration in which the UK also had an equally comfortable control over the composition of the tribunal.[50] It has another aspect of control by the parties over the proceedings. The two Governments first agreed that "[a]ny question of the subsequent publication of the proceedings shall be decided by agreement between the two Governments."[51] Subsequently they agreed *not* to publish them, thus avoiding possible embarrassing domestic effects of the Award. Despite such control over the procedural matters by the parties, this is a third-party settlement and reflects a spirit of the rule of law. One would do well to think well over the maxim: *nemo judex in causa sua*.

47 *Ibid.*, Article 26, paras. 1 and 2. To the same effect the Statute of the International Tribunal for the Law of the Sea, Article 15, paragraph 2, provides that the Tribunal shall form a "chamber for dealing with a particular dispute submitted to it *if the parties so request*." (Emphasis added) Such a chamber is to be composed by the Tribunal *with the approval of the parties*. For its arbitration-like nature, *see* Rüdiger Wolfrum, *Ad hoc Chambers*, in JON M. VAN DYKE ET AL. (EDS.), GOVERNING OCEAN RESOURCES: NEW CHALLENGES AND EMERGING REGIMES-A TRIBUTE TO JUDGE CHOON-HO PARK 275–283 (2013).

48 The Latin expression means: "No one should be a judge in his own cause."

49 France was said to have had a distrust of the ICJ's handling of publicity in the *Nuclear Tests* cases of 1974. Interview with Professor René-Jean Dupuy, counsel for the Government of France in this continental shelf arbitration, at Sophia University in Tokyo on 9 March 1978.

50 But after the two Governments basically agreed on arbitration, it took them another year or so formally to sign the *compromis* with the names of the five members of the arbitral tribunal specifically mentioned, indicating how difficult it was for them to agree on the composition of the tribunal. The parties each chose an eminent international lawyer of their nationality first and then agreed on the three other neutral arbitrators. *See Compromis* of 10 July 1975, Article 1, para. 1., 18 REPORTS OF INTERNATIONAL ARBITRAL AWARDS 5 (1978).

51 *Compromis*, Article 9, para. 4, *ibid.*, at 6.

Peaceful Proposals and Maritime Cooperation between Mainland China, Japan, and Taiwan in the East China Sea: Progress Made and Challenges Ahead

Yann-huei Song

1 Introduction

In the East China Sea, there exist two sets of peaceful proposals and two sets of agreements on maritime cooperation, both of which deal with the complicated maritime disputes and aim to help maintain peace and stability in this important body of water between the three parties, namely, China,[1] Japan, and Taiwan.[2] The first set of proposals refer to the peace initiatives that were announced by the Chinese and Japanese leaders after they met in Beijing and Tokyo, respectively, during the period of time between 2006 and 2008,[3] and the East China Sea Peace Initiative (hereafter referred to as "ECSPI") proposed by Taiwan's President Ma Ying-Jiou on 5 August 2012.[4] The second set of

1 The governments of the People's Republic of China (PRC) and the Republic of China (ROC) adhere to the principle of "One China" under the "92 Consensus," "One China Structure," or "One China Framework." The current Tsai Ing-wen administration refuses to accept the principle and the consensus. Throughout this paper, China is referred to as the PRC and Taiwan is referred to as the ROC. China, Taiwan, the PRC, and the ROC will be used interchangeably.

2 *Ibid.*

3 *Chinese, Japanese Leaders Call for Maintaining Good Momentum of Bilateral Ties*, People's Daily Online (19 November 2006), *available at* http://english.peopledaily.com.cn/200611/19/eng20061119_323010.html; *Chinese Premier Advocates Five Principles for Promoting Sino-Japanese Ties*, People's Daily Online (12 April 2007), *available at* http://english.peopledaily.com.cn/200704/12/eng20070412_36 5829.html; *Chinese, Japanese Leaders Reach Consensus on East China Sea Issue*, Gov.cn (28 December 2007), *available at* http://www.gov.cn/misc/2007-12/28/content_846359.htm; Ministry of Foreign Affairs of Japan, *Joint Statement Between the Government of Japan and the Government of the People's Republic of China on Comprehensive Promotion of a "Mutually Beneficial Relationship Based on Common Strategic Interests"* (7 May 2008), *available at* http://www.mofa.go.jp/region/asia-paci/china/joint0805.html; Ministry of Foreign Affairs of the People's Republic of China, *China and Japan Reach Principled Consensus on the East China Sea Issue* (18 June 2008), *available at* http://www.fmprc.gov.cn/eng/xwfw/s2510/t466632.htm.

4 For the initiative, visit the website of the Republic of China, *available at* http://www.mofa.gov.tw/EnOfficial/Topics/TopicsIndex/?opno=cc7f748f-f55f-4eeb-91b4-cf4a28bbb86f.

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agreements on maritime cooperation refer to the fisheries agreement signed between China and Japan in November 1997, entered into force in June 2000,[5] and the Principled Common Understanding on the East China Sea Issues (hereafter referred to as "the 2008 Understanding") between the two countries in June 2008,[6] and the fisheries agreement signed by Chairman Liao Liou-yi of Taiwan's Association for East Asian Relations and Chairman Mitsuo Ohashi of Japan's Interchange Association on 10 April 2013.[7] These proposals and agreements have the potential not only to help govern the activities that are related to exploration, exploitation, preservation, or protection of the living and non-living resources of the East China Sea, but also to manage the conflicts that arise from the sovereignty and maritime disputes over the Diaoyutai/Diaoyu/Senkaku island group (hereafter referred to as "the DIG") among the three parties in this important East Asian semi-enclosed sea. In the long run, it is hoped that these peaceful proposals and agreements on maritime cooperation, if carried out faithfully and successfully, can help transform the East China Sea from a sea of confrontation into a sea of peace, friendship and cooperation. Before reaching that goal, however, there exist a number of challenges that face China, Japan, and Taiwan. One of the biggest challenges concerns the possibility of combining these bilateral or unilateral peaceful proposals and bilateral agreements on maritime cooperation into a multilateral peaceful proposal and agreement that are acceptable to all of the three parties.

The purpose of this article is to discuss the progress that has been made so far and the challenges that lie ahead with regard to the future development and implementation of the peaceful proposals and agreements on maritime cooperation made or agreed to between China, Japan, and Taiwan in the East

5 For the English text of the Agreement on Fisheries Between the Government of the People's Republic of China and the Government of Japan, *see* GUIFANG XUE, CHINA AND INTERNATIONAL FISHERIES LAW AND POLICY 295–299 (2005), Appendix 6.

6 For the text of the Understanding, visit the website of the Center for International Law, National University of Singapore, *available at* http://cil.nus.edu.sg/rp/il/pdf/2008%20China-Japan%20Principled%20Consensus%20on%20the%20East%20China%20Sea%20Issue-pdf.pdf. *See also,* Gao Jianjun, *A Note on the 2008 Cooperation Consensus Between China and Japan in the East China Sea*, 40 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 302–303 (2009).

7 For more information about the signing of the agreement, visit the website of the Republic of China, *available at* http://www.mofa.gov.tw/EnOfficial/ArticleDetail/DetailDefault/fo17f4b3-5d0d-4408-ad7b-abe4044d7551?arfid=7b3b4d7a-8ee7-43a9-97f8-7f3d313ad781&opno=84ba3639-be42-4966-b873-78a267de8cfi. For the text of the agreement (in Chinese), *available at* http://news.stnn.cc/hk_taiwan/201304/ t20130411_1879091.html. For the text of the agreement in Japanese, *available at* http://www.koryu.or.jp/taipei/ez3_contents.nsf/04/9B1FF4136002E58149257B4A0026702D/$file/20130410torikime.pdf.

China Sea between 1997 and 2013. The paper is organized into six parts. Following this introductory part, Part two provides a background explanation on the development of these peaceful proposals and maritime cooperation-related agreements. Part three examines the content of these proposals and agreements. Part four discusses the current status of the proposals and agreements and their implementation. Part five examines the challenges China, Japan, and Taiwan are facing individually, bilaterally, or collectively. Concluding remarks are made in Part six that ends the article.

II Background Explanation on Peace and Maritime Cooperation-related Developments in the ECS

1 *Agreement on Fisheries between China and Japan*

On 16 November 1994, the United Nations Convention on the Law of the Sea (hereafter referred to as "the LOS Convention") entered into force.[8] Japan signed the Convention on 7 February 1983 and ratified it on 20 June 1996, which entered into force for Japan on 20 July, 1996. China signed the Convention on 10 December 1982 and ratified it on 15 May 1996. The LOS Convention entered into force for China on 7 July 1996.

Immediately after becoming a party to the LOS Convention, Japan amended its Law on the Territorial Sea and the Contiguous Zone[9] and enacted the Law on the EEZ and the Continental Shelf.[10] Japan claims that its EEZ comprises the areas of the sea extending from the baseline of Japan, which are measured 200 nautical miles (nm) from the nearest point on the Japanese baseline and its subjacent seabed and its subsoil. The continental shelf claimed by Japan comprises the seabed and its subsoil to the following areas: (1) the areas of the sea extending from the baseline of Japan "to the line in which every point is 200 nautical miles from the nearest point on the baseline of Japan (excluding from its territorial sea)"; (2) "the areas of the sea adjacent seaward to the areas

8 United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 397, *available at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf. As of 30 January 2013, 164 countries and the European Union were parties to the LOS Convention. For status of the Convention, visit the UN website, *available at* http://www.un.org/Depts/los/reference_files/status2010.pdf.

9 *See* Bureau of Oceans and Int'l Environmental and Scientific Affairs, U.S. Dep't of State, Pub. no. 120, Limits in the Seas: Straight Baseline and Territorial Sea Claims: Japan (1998), *available at* http://www.state.gov/documents/organization/57684.pdf.

10 *See* Law on the Exclusive Economic Zone and Continental Shelf (Law No. 74 of 1996), http://www.un.org/Depts/los/legislationandtreaties/pdffiles/jpn_1996_Law74.pdf.

of the sea referred to" above as prescribed by the Japanese Cabinet Order in accordance with Article 76 of the UNCLOS.[11] In cases of overlapping with the EEZ and the continental shelf claimed by the states with opposite coasts, the problem of maritime boundary delimitation should be resolved by drawing a median line, or the line which "may be agreed upon between Japan and a foreign country as a substitute for the median line."[12]

On 26 June 1998, China enacted its Law on the Exclusive Economic Zone and the Continental Shelf.[13] Article 2 of the law provides that the EEZ of China is an area beyond and adjacent to its territorial sea extending to a distance of 200 nm from the baselines from which the breadth of Chinese territorial sea is measured. Under the same article, the Chinese continental shelf "comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nm from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance." China exercises sovereign rights and jurisdiction in its EEZ and continental shelf.[14] In addition, Article 14 of the law provides that "The provisions of this Act shall not affect the historical rights of the People's Republic of China."

Under Article 61 of the LOS Convention, both Japan and China should ensure through proper conservation and management measures that the maintenance of the living resources in the EEZ is not endangered by overexploitation. Under Article 74, Japan and China should enter into negotiation to delimit their EEZs. However, if no agreement can be reached, Japan and China should "make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation."[15]

In the face of aggressive fishing activities by an increasing number of Chinese fishing vessels in the East China Sea, Japan asked China to enter into negotiation

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11 *Ibid.* art. 1, § 2.

12 *Ibid.* art. 1, § 2, art. 2.

13 Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China, adopted at the 3rd Meeting of the Standing Committee of the Ninth National People's Congress on 26 June 1998 and promulgated by Order No. 6 of the President of the People's Republic of China on 26 June 1998, *available at* http://www.asianlii.org/cn/legis/cen/laws/loteezatcsotproc790/.

14 Arts. 3 and 4, *ibid.*

15 Art. 74(3), LOS Convention.

for a new fisheries arrangement in the overlapping EEZ area.[16] After intense and difficult negotiations, China and Japan signed the Agreement on Fisheries on 11 November 1997.[17] The new fisheries agreement shelved a territorial dispute over the DIG in the East China Sea. On 1 June 2000, the Agreement on Fisheries between the Government of People's Republic of China and the Government of Japan entered into force.

2 *The 2008 Understanding*

Between 2003 and 2008, China and Japan were at odds over the right to explore and exploit oil and gas resources in the East China Sea. In August 2003, China set up a production platform at the *Chunxiao* oilfield, which prompted Japan to lodge a strong protest, asserting that the Chinese drilling in the area about 5 kilometers west of the Japanese claimed median line in the East China Sea would siphon off oil and gas reserves from Japan's side. Japan called on China to suspend production close to the median line pending a diplomatic resolution of the dispute and to share geological data on the Chinese gas fields in the area. In July 2004, Japan conducted its own survey in the area near the disputed median line in the East China Sea by chartering a Norwegian seismic survey ship. For the purpose of managing the conflict arising from China's oil and gas exploration activities in the East China Sea, Tokyo and Beijing agreed to send governmental officials to talk about the issue. The first round of the Sino-Japanese talks took place in October 2004.

In September 2005, in response to an experimental drilling conducted by the Japanese Teikoku Oil Company in the areas near the Chinese natural gas fields in the East China Sea in July 2005, China deployed a fleet of five warships near the *Chunxiao* gas field. In March 2006, China National Offshore Oil Corporation said that it was proceeding with work to develop natural gas reserves in the disputed areas of the East China Sea where Japan rejected a proposal to jointly explore for natural gas with China. In April 2006, China lodged an official protest when Japan's Education Ministry approved the textbooks in which it is stated that the Diaoyutai Islands are part of the Japanese territory. In the same month, Japan lodged complaints with Beijing, saying that China had conducted aerial surveys several times beyond the Japanese claimed median line in the East China Sea.

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16 Park Hee Kwon, The Law of the Sea and Northeast Asia: A Challenge for Cooperation 52 (2000); Guifang Xue, China and International Fisheries Law and Policy 182 (2005); Zou Keyuan, Law of the Sea in East Asia: Issues and Prospects 99–100 (2005).

17 *Japan, China Sign New Bilateral Fisheries Pact*, Japan Economic Newswire, 11 November 1997.

In June 2008, after 11 rounds of serious consultations, China and Japan reached the Principled Common Understanding on the East China Sea Issues. Paragraph 1 of the Understanding provides that

> In order to make the East China Sea, of which the delimitation between China and Japan is yet to be made, a "sea of peace, cooperation and friendship," China and Japan have, in keeping with the common understanding reached by leaders of the two countries in April 2007 and their new common understanding reached in December 2007, agreed through serious consultations that the two sides will conduct cooperation in the transitional period prior to delimitation without prejudicing their respective legal positions. The two sides have taken the first step to this end and will continue to conduct consultations in the future.

In addition, Japanese companies are allowed to participate in the development of *Chunxiao* oil and gas field in accordance with the relevant Chinese laws that govern cooperation with foreign enterprises in the exploration and exploitation of offshore petroleum resources. In addition, the two sides agreed to establish a block for joint development in the East China Sea.[18] To carry out this joint development proposal, China and Japan will work to fulfill their respective domestic procedures and arrive at the necessary bilateral agreement at an early date. The two sides also agreed to continue consultations for the early realization of joint development in other parts of the East China Sea.[19]

3 *The East China Sea Peace Initiative*

In the same month that the 2008 Understanding was released, a Taiwanese vessel *Lienhe* collided with a Japanese Coast Guard patrol boat in the waters near the disputed DIG in the southern part of the East China Sea. The vessel sank following the collision, but all three of its crew members and 13 passengers were rescued by the Japanese patrol boat. Japanese authorities detained the captain of

18 The block for joint development is the area that is bounded by straight lines joining the following points in the order listed:
1. Latitude 29°31' North, longitude 125°53'30" East
2. Latitude 29°49' North, longitude 125°53'30" East
3. Latitude 30°04' North, longitude 126°03'45" East
4. Latitude 30°00' North, longitude 126°10'23" East
5. Latitude 30°00' North, longitude 126°20'00" East
6. Latitude 29°55' North, longitude 126°26'00" East
7. Latitude 29°31' North, longitude 126°26'00" East

19 For the text of the common understanding reached between Japan and China on 18 June 2008, *available at* http://news.xinhuanet.com/english/2008-06/18/content_8394206.htm.

the vessel for three days for questioning, prompting Taipei to file a formal protest with Tokyo to complain about the act.[20] The incident ended with apologies and compensation from the Japanese government to the Taiwanese boat captain.[21]

On 30 June 2008, a group of Japanese lawmakers viewed the areas around the DIG by airplane, which immediately drew strong protests from China and Taiwan.[22] In December 2008, two Chinese marine surveillance vessels, the 1,100-tonne *Haijian 46* and 1,700-tonne *Haijian 51*, entered the Japanese claimed territorial waters around the Diaoyutai Islands. Japan immediately lodged a diplomatic protest against the act.[23] In response, the Chinese Foreign Ministry spokesman stated that "[t]he Diaoyu Islands and its adjacent islets are parts of Chinese territories since ancient times. The Chinese ships are justified in conducting usual patrol in waters within China's jurisdiction."[24]

In April 2010, 10 Chinese People's Liberation Army-Navy (PLAN) vessels, including two submarines and eight warships, sailed through international waters between the islands of Okinawa and Miyako in the East China Sea, heading southeast into the Pacific Ocean. Japanese Maritime Self-Defense Force (MSDF) sent destroyers to follow the Chinese warships and monitor the passing activities. In response, China sent a navy helicopter to fly close to the Japanese MSDF destroyer, which drew protest from the government of Japan. While Japan argued that it was a dangerous act for the navigation of the Japanese vessel, China considered it a "necessary defense measure" in response to the Japanese surveillance activities.[25] In July 2010, Chinese navy conducted live-firing exercises in the East China Sea.[26]

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20 *Tensions rise in Taiwan over boat sinking in disputed waters with Japan*, BBC MONITORING ASIA PACIFIC – POLITICAL, 12 June 2008.

21 *Japan apologies, offers compensation to Taiwan over boat sinking*, JAPANTODAY: Japan News and Discussion, 25 June 2008, *available at* http://www.japantoday.com/category/national/view/japan-apologizes-offers-compensation-to-taiwan-over-boat-sinking.

22 *Japanese MPs view disputed islets from air amidst China, Taiwan protests*, BBC MONITORING ASIA PACIFIC – POLITICAL, 1 July 2008.

23 For the protest dated 19 December 2008, *see* website of the Japanese House of Representatives (in Japanese) *available at* http://www.shugiin.go.jp/itdb_shitsumon.nsf/html/shitsumon/ b170326.htm.

24 *Foreign Ministry Spokesman Liu Jianchao's Remarks on Chinese Marine Surveillance Ships Entering the Waters near the Diaoyu Islands,* 8 December 2008, *see* website of the Chinese Foreign Ministry, *available at* http://www.fmprc.gov.cn/eng/xwfw/s2510/2535/t525428.htm.

25 *Japan lodges protest with China over navy helicopter approach,* BBC MONITORING ASIA PACIFIC – POLITICAL, 21 April 2010; *China says navy chopper approach to Japanese ship necessary measures*, BBC MONITORING ASIA PACIFIC – POLITICAL, 23 April 2010.

26 Goh Sui Noi, *China needs to show its rise is benign*, THE STRAITS TIMES (Singapore), 16 August 2010; *Chinese navy organizes military drill in E Sea*, CHINA DAILY, 7 July 2010, *available at* http://www.chinadaily.com.cn/photo/2010-07/07/content_10074475.htm.

On 7 September 2010, "the most serious China-Japan conflict in decades"[27] erupted in the East China Sea, in which a Chinese fishing boat collided with two Japanese patrol vessels in the waters near the DIG. Japan detained the boat's captain together with 14 crew members on the ground of obstructing the public duties of Japanese law enforcement personnel. On 13 September 2010, nearly a week after the incident occurred, Japan released the Chinese crew members, but kept the captain in custody before deciding whether to press charges against him. China lodged a protest and demanded Japan to release the detained boat captain immediately.[28] Beijing signaled its anger by taking a number of actions, which included postponing the scheduled talks with Japan about the follow-up matters relating to the Principled Common Understanding, canceling a scheduled cultural exchange visit of 1,000 Japanese youth to the Shanghai World Expo, blocking crucial exports to Japan of rare earth, and detaining four Japanese construction company employees in the Chinese province of *Hebei* for videotaping military installation.[29] The fishing boat incident ended on 25 September 2010 when Japan released the Chinese captain.[30]

Tensions in the East China Sea have risen since April 2012 when the former Japanese Tokyo governor Shintaro Ishihara announced his plan to purchase the disputed islands in Washington at the Heritage Foundation.[31] On 7 July 2012, the Japanese Noda administration announced its plan to purchase Diaoyu Dao, the largest of the DIG, and Bei Xiaodao and Nan Xiaodao nearby.[32]

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27 *See* Tanaka Sakai, *Rethinking China-Japan Conflict: The Senkaku/Diaoyutai Islands Clash*, a translation of an article 日中対立の再燃 that appeared in TANAKA NEWS, 1 September 2010 with a follow-up story on 21 September 2010, *available at* http://www.japanfocus.org/articles/print_article/3418.

28 *China Protests Japan's Seizure of Chinese Fishing Boat near Diaoyu Island,* CAIJING MAGAZINE, 9 September 2010, *available at* http://english.caijing.com.cn/templates/inc/webcontentens.jsp?id=110516865&time=2010-09-09&cl=104&page=all.

29 *China postpones E China Sea negotiation with Japan,* CHINA DAILY, 11 September 2010, *available at* http://www.chinadaily.com.cn/china/2010-09/11/content_11288437.htm; Jacob M. Schlesinger and Yuka Hayashi, *Japanese Youth Scrap Shanghai Expo Visit*, THE WALL STREET JOURNAL, 20 September 2010, *available at* http://blogs.wsj.com/japanrealtime/2010/09/20/japanese-youth-scrap-shanghai-expo-visit/; Keith Bradsher, *Amid Tension, China Blocks Crucial Exports to Japan,* THE NEW YORK TIMES, 23 September 2010, *available at* http://www.nytimes.com/2010/09/24/business/global/24rare.html; and Minoru Matsutani and Kanako Takahara, *Four Fujita employees held in Hebei Province*, THE JAPAN TIMES, 25 September, 2010, *available at* http://search.japantimes.co.jp/cgi-bin/nn20100925a3.html.

30 Martin Fackler and Ian Johnson, *Japan Retreats with Release of Chinese Boat Captain*, THE NEW YORK TIMES, 24 September 2010.

31 Yuka Hayashi, *Tokyo Chief Plots to Buy Disputed Islands*, THE WALL STREET JOURNAL, 17 April 2012.

32 *Navy to launch live-fire drill in disputed waters; Exercise to be staged as tensions rise between Beijing and Tokyo over the Diaoyu Islands*, SOUTH CHINA MORNING POST, 10 July 2012.

In August 2012, mainly in response to the rising tension in the East China Sea, and under increasing domestic political pressures that asked the government to take stronger actions to safeguard Taiwan's sovereignty over the DIG and protect the right of fishermen to fish in the waters off the disputed islands, Taiwan's President Ma Ying-jeou proposed the five points East China Sea Peace Initiative. This was followed by the guidelines to implement the ECSPI that were announced on 7 September 2012 at one of Taiwan's offshore islands located in the East China Sea.[33]

4 *Agreement on Fisheries between Japan and Taiwan*

In January 1998, Taiwan enacted the Law on the Territorial Sea and the Contiguous Zone,[34] and the Law on the Exclusive Economic Zone and the Continental Shelf.[35] In February 1999, the base points and baselines were announced by Taiwan in the first part of the baselines of the territorial sea of the ROC.[36] Taiwan's EEZ and continental shelf claim is identical with that of China's.[37] Article 4 of Taiwan's EEZ law also provides that before reaching agreements with adjacent or opposite countries, Taiwan, in a spirit of understanding and co-operation, may reach a *modus vivendi* with the countries concerned, which however should be without prejudice to the final delimitation.[38]

Between 1996 and 2012, sixteen rounds of fisheries talks between Taiwan and Japan were held.[39] Taiwan proposed to Japan that a jointly management zone be established in waters off the disputed DIG so both sides can fish in each country's overlapping EEZ, but Japan rejected the proposal.

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33 *East China Sea Peace Institute Implementation Guidelines*, MINISTRY OF FOREIGN AFFAIRS REPUBLIC OF CHINA (TAIWAN) (7 September 2012), *available at* http://www.mofa.gov.tw/EnOfficial/Topics/TopicsArticleDetail/9d66bed6-16fa-4585-bc7c-c0845f2dfc39 [hereinafter *Initiative*].

34 Law on the Territorial Sea and the Contiguous Zone of 25 February 1992, *available at* http://www.library.uoregon.edu/ec/e-asia/read/sealaw.pdf.

35 *See* BUREAU OF OCEANS AND INT'L ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, U.S. DEP'T OF STATE, PUB. NO. 127, LIMITS IN THE SEAS: TAIWAN'S MARITIME CLAIMS (2005), *available at* http://www.state.gov/documents/organization/57674.pdf [hereinafter *Taiwan's Maritime Claims*].

36 *Decree No. Tai 88 Nei Tze #06161*, EXECUTIVE YUAN GAZETTE (Taiwan), 10 February 1999, at 36.

37 TAIWAN'S MARITIME CLAIMS, *supra* note 35, at 26–33.

38 Law on the Exclusive Economic Zone and the Continental Shelf of the Republic of China (26 June 1998), *available at* http://www.un.org/Depts/los/legislationandtreaties/pdffiles/chn_1998_eez_act.pdf.

39 *Japan, Taiwan to Hold Second Preparatory Fish Talks*, THE JAPAN TIMES, 26 December 2012), *available at* http://www.japantimes.co.jp/news/2012/12/26/national/japan-taiwan-to-hold-second-preparatory-fishery-talks/#.usiq;FfshBk [hereinafter *Japan-Taiwan Fish Talks*].

In November 2012, the first preparatory meeting for the 17th round of Japan-Taiwan Fishery Talk was held in Tokyo[40] and the second preparatory meeting was to be held in January or February 2013.[41] The meeting was further postponed because a boat with Taiwanese activists that headed for the disputed waters near Dioayutai/Senkaku Islands but was turned back on 24 January 2013 after coastguard vessels from Japan and Taiwan converged and dueled with water cannon.[42] On 10 April 2013, at the 17th round of Taiwan-Japan Fishery Talk, a fisheries agreement was signed by Taiwan's Association for East Asian Relations and Japan's Interchange Association. The agreement includes an escape clause which Taipei said allows both sides to set aside disputes over their competing sovereignty claims.[43]

III The Content of the Peaceful Proposals and the Agreements

1 *The Chinese-Japanese Peaceful Proposals*

In November 2006, Chinese President Hu Jintao and Japanese Prime Minister Shinzo Abe met in Hanoi, Vietnam when attending the APEC meeting. The two leaders agreed: (1) to speed up consultation on the East China Sea issue in line with the principle of mutual benefit and reciprocity; (2) to adhere to negotiation and dialogue; (3) to put aside disputes and pursue joint development; and (4) to make East China Sea the "sea of peace, cooperation and friendship."

In April 2007, the Chinese Premier Wen Jiabao paid an official visit to Japan. During the visit, Japan and China reached the following five common understandings on properly addressing the East China Sea issue: (1) both sides are committed to making the East China Sea a sea of peace, cooperation and friendship; (2) they agreed to carry out joint development based on the principle of mutual benefit as a temporary arrangement pending the final demarcation and without prejudice to the positions of either side on matters concerning the law of the sea; (3) they will conduct consultation at higher level when necessary;

40 *Taiwan, Japan Make Little Progress at Fishery Talks*, WANT CHINA TIMES, 1 December 2012, *available at* http://www.wantchinatimes.com/news-subclass-cnt.aspx?id=20121201000074&cid=1101.

41 *Japan-Taiwan Fish Talks, supra* note 39.

42 Amber Wang, *Taiwanese Activists And Japanese Coast Guard Have Water Cannon Duel Near Disputed Islands*, BUSINESS INSIDER, 24 January 2013, *available at* http://www.businessinsider.com/taiwanese-activists-and-japanese-coast-guard-have-water-cannon-duel-near-disputed-islands-2013-1.

43 *Taiwan, Japan ink fisheries agreement,* TAIPEI TIMES, 11 April 2013, *available at* http://www.taipeitimes.com/News/front/archives/2013/04/11/2003559323.

(4) they will carry out joint development in larger waters acceptable to them; and (5) they will speed up consultations and hope to submit a detailed plan on joint development to the leaders of the two countries in autumn of 2007.

In December 2007, the Chinese and Japanese leaders reached a 4-point new consensus on the East China Sea issue: (1) to continue to adhere to the five-point consensus achieved by leaders of the two countries in April 2007 in a bid to turn the East China Sea into a sea of peace, cooperation and friendship; (2) the two sides have elevated the level of consultation, conducted earnest and substantive consultation on the concrete solution to the issue and made positive progress; (3) to conduct vice ministerial-level consultation, if necessary, while maintaining the current consultation framework; (4) the solution to the East China Sea issue conformed with the interests of both China and Japan. The two sides agreed to strive for an early solution in the process of developing bilateral ties. In May 2008, China and Japan issued a joint statement on promoting strategic, mutually beneficial ties. The two sides pledged again to work together and make the East China Sea a sea of peace, cooperation and friendship. The proposal to make the East China Sea a "sea of peace, cooperation and friendship" is reiterated in the 2008 Understanding.

2 *The East China Sea Peace Initiative*

The five points East China Sea Peace Initiative calls all parties concerned to: (1) Refrain from taking any antagonistic actions; (2) Shelve controversies and not abandon dialogue; (3) Observe international law and resolve disputes through peaceful means; (4) Seek consensus on a code of conduct in the East China Sea; and (5) Establish a mechanism for cooperation on exploring and developing resources in the East China Sea.[44]

This peace proposal, based on the principle of "safeguarding sovereignty, shelving disputes, pursuing peace and reciprocity, and promoting joint exploration and development,"[45] was followed by the implementation guidelines that were announced on 7 September 2012 at one of Taiwan's offshore islands located in the East China Sea.[46]

Taiwan's East China Sea Peace Initiative will be implemented in two stages: (1) peaceful dialogue and mutually reciprocal negotiation; and (2) sharing resources and cooperative development. The first stage involves (1) promoting

44 For the proposal, visit the website of Ministry of Foreign Affairs Republic of China (Taiwan), *available at* http://www.mofa.gov.tw/EnOfficial/Topics/TopicsIndex/?opno=cc7f748f-f55f-4eeb-91b4-cf4a28bbb86f.

45 *Ibid.*

46 *Initiative*, *supra* note 33.

the idea of resolving the East China Sea dispute through peaceful means; (2) establishing channels for Track I and Track II dialogue; and (3) encouraging all parties concerned to address key East China Sea issues via bilateral or multilateral negotiation mechanisms to bolster mutual trust and collective benefit.[47] During the second stage, the main task is to institutionalize all forms of dialogue and negotiation, to encourage all parties concerned to implement substantive cooperative projects, and to establish mechanisms for joint exploration and development of resources that form a network of peace and cooperation in the East China Sea area.[48]

Key issues for the implementation of the peace initiative include fishing industry, mining industry, marine science research and maritime environmental protection, maritime security and unconventional security, and East China Sea Code of Conduct.[49] This is to be done by moving from three parallel tracks of bilateral dialogue (between Taiwan and Japan, Taiwan and China, and Japan and China) to one track of trilateral negotiations (among China, Japan and Taiwan) to realize peace and cooperation in the East China Sea.[50]

3 *The 2008 Understanding*

In June 2008, after 11 rounds of serious consultation, China and Japan reached the Principled Common Understanding on the East China Sea Issues. It is stated clearly in the Understanding that in order to make the East China Sea a "sea of peace, cooperation and friendship," China and Japan agreed to conduct cooperation in the transitional period prior to maritime boundary delimitation without prejudicing their respective legal positions.

As the first step in the joint development of the East China Sea between China and Japan, the two sides agreed to establish a block for joint development in the East China Sea, which shall be the area bounded by straight lines joining the following points in the order listed:

1. Latitude 29°31' North, longitude 125°53'30" East
2. Latitude 29°49' North, longitude 125°53'30" East
3. Latitude 30°04' North, longitude 126°03'45" East
4. Latitude 30°00' North, longitude 126°10'23" East
5. Latitude 30°00' North, longitude 126°20'00" East
6. Latitude 29°55' North, longitude 126°26'00" East
7. Latitude 29°31' North, longitude 126°26'00" East

47 *Ibid.*
48 *Ibid.*
49 *Ibid.*
50 *Ibid.*

To carry out the above-mentioned joint development, the two sides will work to fulfill their respective domestic procedures and arrive at the necessary bilateral agreement at an early date. In addition, China and Japan agreed to continue consultations for the early realization of joint development in other parts of the East China Sea.

In addition, the Japanese companies are allowed to participate in the development of *Chunxiao* oil and gas field in accordance with the relevant Chinese laws that govern cooperation with foreign enterprises in the exploration and exploitation of offshore petroleum resources. The governments of China and Japan will work to reach agreement on the exchange of notes as necessary and exchange them at an early date. The two sides will fulfill their respective domestic procedures as required.[51]

4 *The 1997 China-Japan Fisheries Agreement*

Before signing the Fisheries Agreement in November 1997, fisheries relations between China and Japan were governed by the Fisheries Agreement which was signed by the two countries on 15 August 1975 and brought into force on 22 December 1975. The 1975 Fisheries Agreement formalized the three previous ones concluded in 1955, 1963 and 1965 respectively between the Japan-China Fisheries Council of Japan and the China Fisheries Council. The Fisheries Agreement, signed in November 1997 and entered into force on 1 June 2000, establishes a new fishery order in the East China Sea for the two countries in accordance with the LOS Convention. It aims to conserve and utilize rationally marine living resource of common concern, and maintain the orderly conduct of maritime fishing operations in the East China Sea. This agreement has 14 articles and 2 annexes.

The 1997 Fisheries Agreement applies to the EEZs of China and Japan in the East China Sea.[52] Nationals and fishing boats of each party engaged in fishery activities in the other's EEZ should comply with this Agreement and the other's relevant laws and regulations.[53] Both China and Japan are required to adopt necessary measures to ensure compliance by their nationals and fishing boats with the provisions of the Agreement and the conservation measures and other conditions provided for in the relevant laws and regulations of the other Party when they are engaged in fishery activities in the other's EEZ, and should inform each other of such conservation measures and other conditions provided for in its relevant laws and regulations.[54] The two countries also agree

51 For the text of the common understanding reached between Japan and China on 18 June 2008, *available at* http://news.xinhuanet.com/english/2008-06/18/content_8394206.htm.

52 Article 1.

53 Article 2.

54 Article 4.

to cooperate to conduct scientific research in fishery and to conserve marine living resources.[55]

Under the Fisheries Agreement, there are three types of waters: EEZs, Provisional Waters, and waters for maintaining current fishing activity. First, the EEZ waters extend to 52 miles from the baselines that measure the Chinese and Japanese territorial waters respectively. In these waters, both China and Japan have exclusive rights over the exploitation, conservation and utilization of marine living resources. Considering the status of fishery resources, its fishing capacity, traditional fishing activities and the reciprocal fishing situation, and other relevant matters in the EEZ, each party to the agreement decides annually on the fish species, amount of catch allocation, fishing area, and other fishing conditions under which it will allow the other party's fishermen and fishing vessels to operate. In deciding these fishing conditions, each contracting party respects the result of consultations with the Sino-Japanese Fishery Joint Committee.[56] Each contracting party can take necessary measures in accordance with international law to ensure that the other party's fishermen and fishing vessels obey conservation measures for marine living resources and other conditions provided in its relevant laws and ordinances.[57] Each contracting party's fishing vessels need a fishing licence issued by the other coastal country to fish in its EEZ. In the case of seizure or detention, the fishing vessel and crew must be released rapidly after paying a security or submitting a guarantee.[58]

Second, in the waters where it is difficult to distinguish each party's EEZ boundary, a Provisional Measures Zone is established (See Figure 1). The zone is enclosed by straight lines connecting in order the following coordinates:

1. Latitude 30°40' North, longitude 124°10'1" East
2. Latitude 30°00' North, longitude 123°56'4" East
3. Latitude 29°00' North, longitude 123°25'5" East
4. Latitude 28°00' North, longitude 122°47'9" East
5. Latitude 27°00' North, longitude 121°57'4" East
6. Latitude 27°00' North, longitude 125°58'3" East
7. Latitude 28°00' North, longitude 127°15'1" East
8. Latitude 29°00' North, longitude 128°0'9" East
9. Latitude 30°00' North, longitude 128°32'2" East
10. Latitude 30°40' North, longitude 128°26'1" East
11. Latitude 30°40' North, longitude 124°10'1" East[59]

55 Article 10.
56 Article 3.
57 Article 5.
58 *Ibid.*
59 Article 7 (1).

Each contracting party has to take appropriate conservation measures and quantitative management measures to ensure that the maintenance of marine living resources is not threatened by over-exploitation, in accordance with the decision of the China-Japan Fishery Joint Committee and taking into consideration the effect on traditional fishing activities conducted by each contracting party in the Provisional Measures Zone.[60] In this area of waters, neither country can apply its laws or regulations to the other country's fishing vessels and fishermen. When one contracting party detects a violation by the other party's fishing vessels or fishermen, it can notify the other party of the violation and related details. The other party investigates the fact, takes any necessary measures and informs the other party of the results of these measures.[61]

Third, the waters south of latitude 27° North and west of latitude 125° 30′ East in the East China Sea, are not included in the Provisional Measures Zone. However, the relevant laws and regulations of one country are not applied to the other country's fishermen and fishing vessels.[62]

To achieve the objectives of the agreement, the China-Japan Fishery Joint Committee is established. It consists of two representatives appointed by each contracting party. The Committee recommends the following: fish species, amount of catch allocation, fishing area, and other conditions to allow the other party's fishermen and fishing vessels to fish under Article 3; the maintenance of fishing order; the status and conservation of marine living resources; and fishery co-operation. The Committee discusses and determines the conservation and management of marine living resources in the Provisional Waters based on Article 7.[63]

5 *The 2013 Taiwan-Japan Fisheries Agreement*

After 17 years of effort, Taiwan and Japan finally concluded a major fisheries agreement. The purposes for signing the agreement include: (1) maintaining peace and stability in the East China Sea; (2) promoting friendly relations and reciprocity and cooperation between Taiwan and Japan; (3) ensuring conservation and rational utilization of marine living resources of the EEZs and (4) maintaining fishery operation order.[64] The agreement establishes a maritime zone, which is enclosed by connecting the following points (See Figure 2):

60 Article 7(2).
61 Article 7(3).
62 Article 6.
63 Article 11.
64 Article 1.

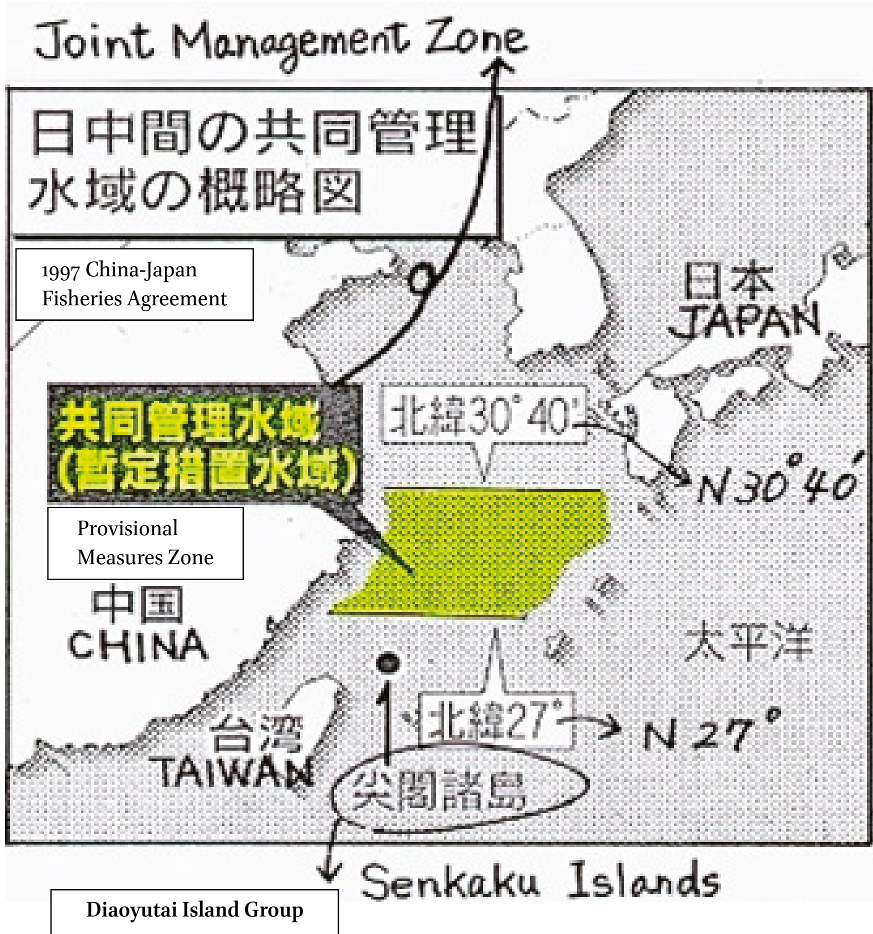

FIGURE 1 The Agreed Provisional Measures Zone under the 1997 Sino-Japanese Fisheries Agreement.
SOURCE: HTTPS://BLOGS.YAHOO.CO.JP/AK08880/52784966.HTML

1. Latitude 27° North, longitude 126°20' East
2. Latitude 27° North, longitude 122°30' East
3. Latitude 24°46' North, longitude 122°30' East
4. Latitude 24°49'37" North, longitude 122°44' East
5. Latitude 24°50' North, longitude 124° East
6. Latitude 25°19' North, longitude 124°40' East
7. Latitude 25°29'45" North, longitude 125°20' East
8. Latitude 25°30' North, longitude 125°30' East
9. Latitude 25°32'17" North, longitude 125°30' East
10. Latitude 25°40' North, longitude 126° East

11. Latitude 26°30' North, longitude 126° East
12. Latitude 27° North, longitude 126°20' East

In addition, a special cooperation area is also established, which is enclosed by the following points:

1. Latitude 26°30' North, longitude 126°East
2. Latitude 26°20' North, longitude 125°30' East
3. Latitude 25°32'17" North, longitude 125°30' East
4. Latitude 25°40' North, longitude 126° East
5. Latitude 26°30' North, longitude 126° East

The agreement guarantees the rights of Taiwan fishing vessels in a long-disputed area of overlap between the two countries' claimed EEZs. It opens up a further 4530 square kilometers of ocean within Japan's claimed EEZ to Taiwanese fishing vessels. Within the "special cooperation zone," the two sides will cooperate to manage fishery resources. A fisheries commission is establishes to consult on the specific management of the cooperation zone, as well as other matters concerning the area designated by the agreement as a whole. More importantly, under Article 4 of the Agreement, the provisions of the agreement and any measures that adopted in the future for the purpose of implementing the agreement should not be deemed as having any bearing on the position on the law of the sea issues taken by the government agencies of each side that have jurisdiction on the issues.

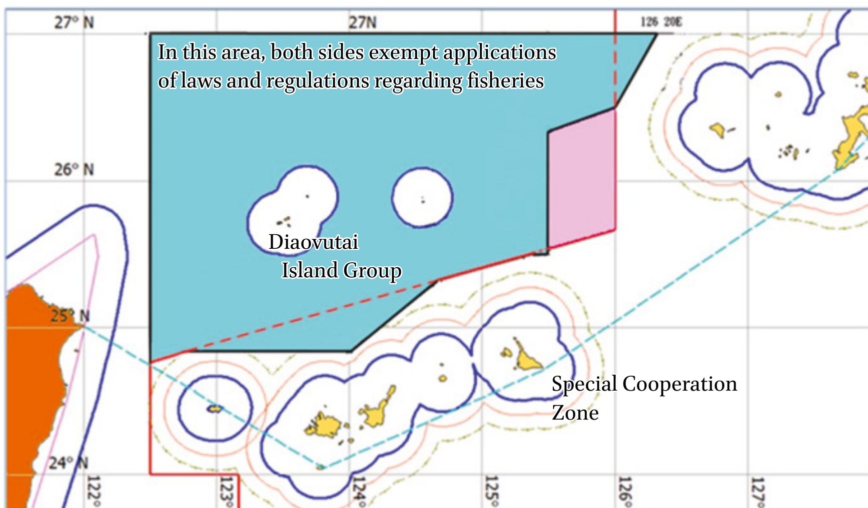

FIGURE 2 The Agreed Zone under the 2003 Taiwan-Japan Fisheries Agreement.
SOURCE: "The Taiwan-Japan Fisheries Agreement -- Embodying the Ideals and Spirit of the East China Sea Peace Initiative," website of the ROC Ministry of Foreign Affairs at https://www.mofa.gov.tw/Upload/WebArchive/979/The%20Taiwan-Japan%20Fisheries%20Agreement%20(illustrated%20pamphlet).PDF

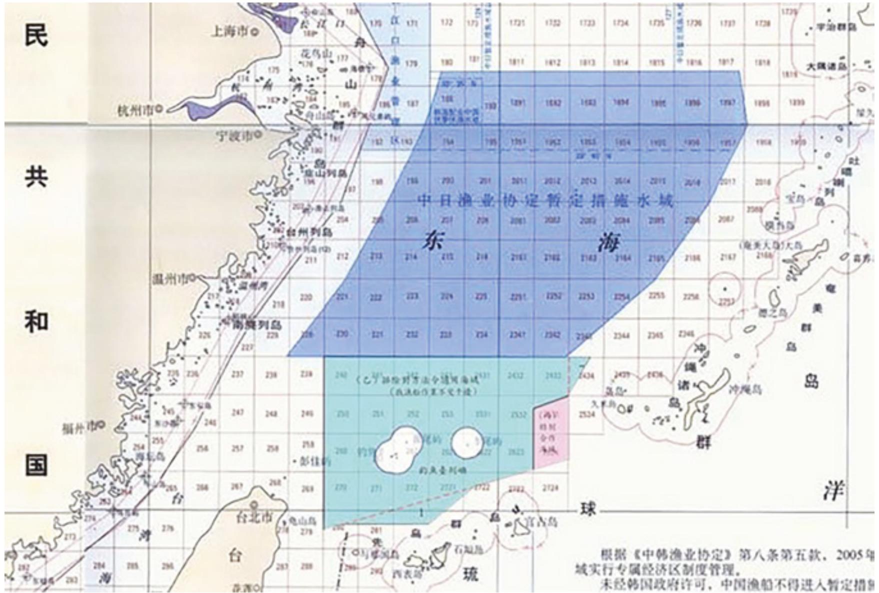

FIGURE 3 The location of the Agreed Zones under the 1997 China-Japan Fisheries Agreement and the 2013 Taiwan-Japan Fisheries Agreement.
SOURCE: "TAIWAN-JAPAN FISHERY AGREEMENT SELLING CHINA'S SOVEREIGNTY OVER DIAOYU DAO," APRIL 13, 2013, AVAILABLE AT HTTP://VIEW.NEWS.QQ.COM/ZT2013/YYXY/INDEX.HTM (IN CHINESE)

IV Current Status of the Proposals and Agreements and their Implementation

1 *The Japanese and Chinese Peace Proposals*

The call for maritime cooperation between Japan and China and turning the East China Sea into a "sea of peace, cooperation and friendship" continued in the development of Sino-Japanese relations since June 2008 when the two sides signed the Understanding. However, it seems that the efforts have been put on hold by the rising tensions caused by the territorial dispute over the DIG in particular since April 2012.

In December 2011, at the China-Japan summit meeting held in Beijing, the Japanese Prime Minister Yoshihiko Noda expressed "six initiatives"[65] to further

65 These initiatives include: (1) Enhancing Mutual Trust in the Political Area; (2) Promoting the Cooperation for making the East China Sea a "Sea of Peace, Cooperation and Friendship"; (3) Japan-China Cooperation in the Wake of the Great East Japan Earthquake; (4) Grading up of Mutually Beneficial Economic Relations; (5) Promoting Mutual

deepen diplomatic relations between Japan and China. Among other things, China and Japan shared on a basic recognition that it is becoming more important for them to tackle regional and global issues together as partners for cooperation in accordance with the four basic documents[66] that govern the China-Japan relations. They also agreed to promote the cooperation for making the East China Sea a "Sea of Peace, Cooperation and Friendship."[67] To achieve this goal, they agreed to establish High-Level Consultation on Maritime Affairs" and made an agreement in principle on the text of "Japan-China Maritime Search and Rescue (SAR) Cooperation." In addition, the Prime Minister urged the early resumption of negotiations on the agreement China and Japan singed in June 2008 on resources development in the East China Sea. In response to this request, the Chinese Prime Minister Wen Jiabao stated that the said agreement should be put into action and that China intends to further communication and to work together with Japan.[68] Japan and China also shared the view that as major countries in the world, they should strengthen dialogues and cooperation concerning regional and global issues.[69]

In May 2012, when attending the Trilateral Summit of Japan, China and the Republic of Korea in Beijing, the Japanese Prime Minister Noda reiterated his "six initiatives" and welcomed the first plenary meeting of "Japan-China High-Level Consultation on Maritime Affairs" that was held in Hangzhou on May 16, 2012.[70] Prime Minister Noda and Prime Minister Wen expressed expectations

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Understanding between People in Both Countries; and (6) Strengthening Dialogue and Cooperation on Regional and Global Issues. *See Japan-People's Republic of China Summit Meeting* (*Summary*), MINISTRY OF FOREIGN AFFAIRS OF JAPAN (25 December 2011), *available at* http://www.mofa.go.jp/region/asia-paci/china/meeting1112.html [hereinafter *Summit Meeting Summary*].

66 These documents include: The 1972 Joint Communiqué of the Government of Japan and the Government of the People's Republic of China; The 1978 Treaty of Peace and Friendship between Japan and the People's Republic of China; The 1998 Japan-China Joint Declaration on Building a Partnership of Friendship and Cooperation for Peace and Development and The 2008 Sino-Japanese Joint Statement on All-round Promotion of Strategic and Mutually Beneficial Relations.

67 *Summit Meeting Summary*, *supra* note 65.

68 *Ibid.*

69 Liu Weimin, Foreign Ministry Spokesperson, PEOPLE'S REPUBLIC OF CHINA, Regular Press Conference (14 October 2011), transcript *available at* http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t868322.htm.

70 At the meeting, Japan and China introduced the organizations and activities of their respective maritime-related department as well as ongoing cooperation and exchange programs between the two countries. It was agreed to hold the next meeting in the second half of 2012 in Japan and continue to communicate through diplomatic channels. Both countries agreed to establish the Working Group on "the Policy and the Laws of the Seas."

that the consultation would lead to enhancing trust between the maritime-related agencies of the two countries. During the meeting, the two prime ministers expressed their respective position on the status of Diaoyu Dao/Senkaku Islands. Prime Minister Noda said, "it would be undesirable if this issue were to impact adversely on the overall bilateral relations."[71] He also indicated that the active maritime activities by the Chinese in the areas surrounding the disputed islands are giving undesirable influence to the sentiment of Japanese people and therefore he urged China to act with restraint. In addition, Prime Minister Noda stressed the importance of maintaining strategic stability among Japan, the United States, and China, and stated in this connection that it was essential for the three countries to promote dialogue among them.

In response, Chinese Prime Minister Wen said that China was seriously considering the trilateral dialogue.[72] In July 2012, the Japanese Foreign Minister Koichiro Gemba and Chinese Foreign Minister Yang Jiechi met in Phnom Penh, Cambodia on the sidelines of the ASEAN-related Ministers' Meeting. Among other things, they talked about the disputed DIG by repeating their respective basic stand on the issue. They also agreed to promote more cooperation and dialogue. The Japanese Foreign Minister Gemba strongly requested for the early resumption of negotiations for the China-Japan agreement regarding the development of natural resources in the East China Sea. He also stated that the Japanese side hoped for the early start of the Japan-US-China dialogue. China's Foreign Minister Yang responded by stating that China's

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The Japanese side explained about the development of making the domestic laws based on the Basic Act on Ocean Policy and the Basic Plan on Ocean Policy as well as Japan's efforts in the fields of laws of sea in terms with the promoting rule of law in the international society. The Chinese side introduced their views and policies on the maritime policies and the laws of sea. Due to the diplomatic standoff between the two countries escalated on September 11 after the Noda administration finalized the purchase of the disputed Diaoyu Dao/Senkaku Islands, the second round of the "Japan-China High-Level Consultation on Maritime Affairs" was not held during the second half of 2012. However, a Track II international conference entitled "Northeast Asian Cooperation and Integration: Constructing a Peaceful Security Environment in Northeast Asia: Towards an Understanding of the Interplay of Cultural and Material Forces" was organized by Zhejiang University and The Korea Foundation for Advanced Studies ("KFAS"), which was held in Hangzhou, China on 14–15 December 2012. For more information about the first meeting, *see* Ministry of Foreign Affairs of Japan, *The First Round Meeting of Japan-China High Level Consultation on Maritime Affairs* (*Outline*) (16 May 2012), *available at* http://www.mofa.go.jp/policy/maritime/jchlc_maritime01.html.

71 Prime Minister of Japan and His Cabinet, *Japan-People's Republic of China Summit Meeting* (*Summary*) (31 May 2012), *available at* http://www.kantei.go.jp/foreign/noda/diplomatic/201205/31jck_e.html.

72 *See ibid.*

position on implementing a principle agreement concerning the East China Sea remained unchanged, and that he would like to continue working-level communications.[73]

In November 2012, the government of Japan expressed its intention to strengthen cooperation with China and continue to make efforts to make East China Sea a "sea of peace, cooperation and friendship" by promoting understanding and trust between the maritime authorities of the two countries through the Japan-China High-Level Consultation on Maritime Affairs" under the "Six Initiatives" that were agreed between the two countries.[74]

As tensions continue to rise in the area near the disputed DIG, it has become more important for China and Japan to make efforts to make East China Sea a "sea of peace, cooperation and friendship" by proposing peaceful measures and establishing dialogue and conflict management mechanisms.

2 *The 1997 China-Japan Fisheries Agreement*

The China-Japan Fisheries Agreement has been implemented successfully since its entry into force on 1 June 2000. In addition to the China-Japan Fisheries Joint Committee, a group of experts on marine living resources and law enforcement dialogue mechanism were also established to help implement the agreement. In August 2007, China Fisheries Association and Japan Fisheries Association signed a Protocol on Safety of Fisheries Operation. During the period of time between 2000 and 2009, 5,000 Chinese fishing vessels applied for operation in the Japanese EEZ in accordance with the Agreement. During the same period of time, 494 patrolling missions, with a total of 4941 patrolling days, were conducted by the Chinese fishery agency in the contracting waters.[75]

In April 2012, the 13th China-Japan Fisheries Joint Committee was held in Tokyo, where the two sides reviewed the implementation status of the Fisheries Agreement, discussed the conditions for fishery operations in each side's EEZ, and decided the number of fishing vessels that were allowed to fish in each side's EEZ and the Provisional Measures Zone, as well as the allowable catch. It was agreed that between 1 January to 31 May 2012, Japan allowed 288 Chinese fishing trawlers to fish in its EEZ, with a total catch no more than 2389 tons. Between 1 June 2012 to 31 May 2013, Japan allowed 288 Chinese trawlers

73 Ministry of Foreign Affairs of Japan, *Japan-China Foreign Ministers' Meeting* (*Overview*) (11 July 2012), *available at* http://www.mofa.go.jp/region/asia-paci/china/meeting1207_fm.html.

74 *Fact Sheet on the Senkaku Islands, Ministry of Foreign Affairs of Japan*, November 2012, *available at* http://www.mofa.go.jp/region/asia-paci/senkaku/fact_sheeet.html.

75 *Ten Years' Implementation of the China-Japan Fisheries Agreement*, CHINA FISHERY NEWS, 8 June 2010, *available at* http://www.farmer.com,cn/wlb/yyb/yy2/201006080190.htm.

to fish in Japan's EEZ, with a total catch no more than 5,733 tones, and 55 squid fishing boats with a total catch no more than 4,141 tons. China allowed 111 Japanese purse seine fishing vessels to enter into China's EEZ to fish, with a total catch no more than 8,558 tons, and 26 trawlers to fish with a total catch no more than 621 tons. Within the Provisional Measures Zone, China agreed to control its total number of fishing vessels at 18214, with fishing effort target set at 1,703,160 tons. Japan agreed to control its total number of fishing vessels at 800, with fishing effort target set at 109,250 tons. The two sides also discussed the joint study of large jelly fish, the use of special fishing purse seine nets, protection of eel larvae, and other fisheries cooperation matters.[76]

In May 2013, Okinawa Vice Governor Kurayoshi Takara and the members of the Okinawa Federations of Fisheries Cooperatives and the Ikema Fisheries Cooperatives asked Senior Vice Minister of Agriculture, Forestry and Fisheries, Taku Eto to review the 1997 Japan-China Fisheries Agreement. The fishermen said the Japanese and Chinese governments concluded this pact in 1997 without any explanation to the local people before it went into effect in 2000. They suggested that the agreement has led to overfishing of coral reefs and has devastated the habitat of bottom fish. Accordingly, they asked for the government to review the pact by working with China at the Joint Fisheries Committee meeting to be held June 2013.[77] In addition, since the 1997 Japan-China Fisheries Agreement did not cover the area of water below 27 degrees north latitude, Okinawa Vice Governor Kurayoshi Takara and the members of the Okinawa Federations of Fisheries Cooperatives and the Ikema Fisheries Cooperatives asked the Japanese government to resolve three issues: (1) Rescinding the content of the Foreign Minister's letter[78] and regulating the Chinese fishing boats working within the area of water (2) Creating a system to prevent net fishing on coral reefs; and (3) Review the area of water included in the Japan-Taiwan fishing pact.[79]

As tensions continue between China and Japan in the waters near the DIG, in particular, the respective claimed 12-nm territorial waters surrounding

76 *The 13th China-Japan Fisheries Joint Committee was held in Tokyo*, 3 May 2012, *available at* http://www.shennong.com/n/1/25/121402.shtml, and http://www/fishzf.com/article.asp?artid=141292 and http://www.jfa.maff.go.jp/j/press/kokusai/120420.htnl.

77 *Okinawan fisheries groups ask government to review Japan-China fisheries pact*, RYUKYU SHIMPO, 30 May 2013, *available at* http://english.ryukyushimpo.jp/2013/06/05/10488/.

78 In the letter sent by the Foreign Minister of Japan to his counterpart of China in November 1997, Japan agreed that it would not apply the relevant fisheries laws to Chinese fishing boats in that area of water below 27 degrees north latitude.

79 *Okinawan fisheries groups ask government to review Japan-China fisheries pact*, RYUKYU SHIMPO, 30 May 2013, *available at* http://english.ryukyushimpo.jp/2013/06/05/10488/.

the disputes islands, and as a result of signing the Taiwan-Japan Fisheries Agreement on 10 April 2013, it can be expected to see the rise of fisheries management conflicts in the area of water below 27 degrees north latitude in the near future (See Figure 3).

3 *The ECSPI and Taiwan-Japan Fisheries Agreement*

The East China Sea Peace Initiative, proposed in August 2012, has gradually gained support from the international community for its contributions to reducing tensions and maintaining regional stability. In September 2012, for example, Eduard Kukan, a Member of the Foreign Affairs Committee, the European Parliament stated that

> The East China Sea Peace Initiative was proposed to promote regional peace and security, and as such is in line with the EU's East Asia Guidelines and EU Common Foreign and Security Policy (CFSP) which encourage peaceful and cooperative solutions to disputes. All parties concerned should take this initiative into consideration with a view to bringing about peaceful and positive developments.[80]

In March 2013, the European Parliament passed a report on EU-China Relations, in which it "takes note of Taiwan's [East China Sea Peace] initiative with a view to reaching a consensus on a code of conduct for the East China Sea and the establishment of a mechanism allowing all sides to cooperate in the joint exploitation of the region's natural resources, including capacity for the generation of electricity from renewable sources."[81]

Although the government of Japan does not consider the DIG issue a "dispute," it accepts the spirit, principles and proposals that are laid out in Taiwan's peace initiative. It seems that what Japan opposes is a three-way dealing with the territorial issue. It also does not like to see the China-Taiwan cooperation on the DIG issue in the East China Sea. On 6 June 2013, Japan's Chief Cabinet Secretary Yoshihide Suga rejected President Ma's call for a three-way dialogue with China and Japan on fishery rights and natural resources in the East China Sea, but he added, "We haven't changed our stance that Japan will promote concrete cooperation with neighboring countries and regions to ensure peace

80 *East China Sea Peace Initiative positive step to reassuring peace and dialogue for consensus in the region*, Press Release, EPP GROUP IN THE EUROPEAN PARLIAMENT, 20 September 2012, *available at* http://www.eppgroup.eu/press-release/East-China-Sea-Peace-Initiative-positive.

81 *European Parliament resolution of 14 March 2013 on EU-China relations*, 2012/2137 (INI), *available at* http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-97, para. 49.

and security in the East China Sea."[82] The signing of the Japan-Taiwan fisheries agreement is considered one of the positive responses of Japan to the ECSPI.[83]

On 7 May 2013, Taiwan and Japan established a bilateral fishing commission, which serves as an institutionalized negotiation mechanism for future talks of fisheries cooperation. Taiwan members of the commission include Chang Jen-joe, senior counselor with the Association of East Asian Relations; James Sha, director-general of the Fisheries Agency; officials from the ROC Coast Guard Administration and Ministry of Foreign Affairs; and representatives from local fishermen's associations. Japanese members include Michihiko Komatsu, director-general of Tokyo-based Interchange Association's General Affairs Department; Kenichi Okada, secretary-general of the IA's Taipei Office; officials from Japan's foreign ministry, coast guard and fisheries agencies; and representatives of an Okinawa fishing committee.[84] During the first session of Taiwan-Japan Fishing Commission, the two sides agreed to complete revising respective laws enabling the Taiwan-Japan fishery agreement to take effect 10 May 2013 and continue negotiations on fishing issues with commission meetings scheduled at least once a year.

Both sides agreed to temporarily shelve the sovereignty dispute over the DIG and designated the area between 27° north latitude and Japan's Sakishima Islands as waters where fishing by both Taiwan and Japan vessels would be allowed to operate. Most fishermen welcomed the conclusion of the agreement. The agreement expands the fishing grounds of Taiwanese fishermen by an additional 4,530 square kilometers beyond the so-called "temporary enforcement line." The second meeting was held in July 2013. It was reported that Taiwan catches of yellow fin tuna in waters off northeastern Taiwan have increased 20% in May 2013 compared with the same period last year following the signing of the Taiwan-Japan Fisheries Agreement.[85]

The signing of Taiwan-Japan Fisheries Agreement has received positive responses from the international community, including the US Department of State. On 23 April 2013, for example, Raymond Burghardt, the chairman of the American Institute in Taiwan (AIT), stated that Taiwan and Japan have

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82 Joseph Yeh, *Tokyo rejects Diaoyutai talks; MOFA reiterates sovereignty*, CHINA POST, 8 June 2013, *available at* http://www.chinapost.com.tw/taiwan/foreign-affairs/2013/06/08/380627/Tokyo-rejects.htm.

83 Kawashima Shin, *The Implications for the Japan-Taiwan Fisheries Agreement*, NIPPON.COM, 5 June 2013, *available at* http://www.nippon.com/en/currents/d00081/.

84 *Taiwan, Japan set up joint fishing commission*, TAIWAN TODAY, 8 May 2013, *available at* http://taiwantoday.tw/ct.asp?xitem=204842&CtNode=414.

85 *Catches rise since Japan fisheries agreement inked*, TAIPEI TIMES, 26 May 2013, *available at* http://www.taipeitimes.com/News/taiwan/archives/2013/05/26/2003563216.

"well-handled" the fishing rights dispute surrounding the DIG in the East China Sea. He said the agreement "really mapped the interest of both sides in a rather neat way."[86] American scholars such as Douglas Paal, Randall Schriver, Richard Bush, and Bonnie Glaser are also in support of the move and consider a good example of dispute resolution.[87] On 10 June 2013, a resolution was proposed in the US Senate, in which the Taiwan-Japan fisheries agreement was considered a model for administering fishing resources in the overlapping EEZs in the East China Sea.[88]

The East China Sea Peace Initiative, proposed in August 2012, has gradually gained support from the international community for its contributions to reducing tensions and maintaining regional stability. Although official reactions from Japan and China, the parties directly involved in the territorial dispute over the DIG and surrounding waters, are not straightforward, there has been seen positive responses from the two parties, in particular, after the signing of the Taiwan-Japan Fisheries Agreement on 10 April 2013.

In addition to the positive responses from Japan and the United States to both the ECSPI and the Taiwan-Japan Fisheries Agreement, it seems that China is also moving toward the direction of supporting the initiative. In May 2013, President Ma stated that Taiwan is willing to talk with China about the possibility of signing a bilateral fisheries agreement to help govern fishing activities in waters around the DIG.[89] On 6 June 2013, President Ma said that since there are also fisheries matters between Taiwan and China that need to be settled, Taiwan does not rule out the possibility of signing a fisheries agreement, similar to the one between Taiwan and Japan, to establish a joint fishery conservation and management zone in the East China Sea. In addition, he stressed, just like the 18 agreements that have been signed so far between Taiwan and China, this fisheries agreement can be signed, not between two countries, but under

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86 *Taiwan, Japan fishing rights issue 'handled well': AIT chairman*, TAIWAN NEWS, 24 April 2013, *available at* http://www.taiwannews.com.tw/etn/news_content.php?id=2204521.

87 *Taiwan-Japan fishery pact good example of dispute resolution: expert*, FOCUS TAIWAN, 16 April 2013, *available at* http://taiwandiaoyutaiislands.tw/EN/Interview_Detail.aspx?ID=1373. *Assessing Taiwanese President Ma's Message to America*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, 16 April 2013, *available at* http://m.ceip.org/2013/04/16/assessing-taiwanese-president-ma-s-message-to-america/fyzm.

88 S. Res. 167, Reaffirming the strong support of the United States for the peaceful resolution of territorial, sovereignty, and jurisdictional disputes in the Asia-Pacific maritime domains, 10 June 2013, *available at* http://thomas.loc.gov/cgi-bin/query/z?c113:S.ees.167.

89 *Ma: Taiwan and Japan sign fisheries agreement, welcome China to Join*, CHINA TIMES, 9 May 2013, *available at* http://news.chinatimes.com/mainland/11050506/112013050900173.html (in Chinese).

special cross-Strait relations.[90] In response, Fan Liqing, the spokeswoman of Taiwan Affairs Office of the State Council stated that the two sides can further study the matter concerning fisheries cooperation.[91]

V The Challenges China, Japan, and Taiwan Are Facing

The development and implementation of the peaceful proposals and agreements on maritime cooperation have encountered a number of challenges. One of the biggest challenges concerns the Japanese position that Tokyo does not have any territorial dispute to be solved over the DIG, and that the leaders of China and Japan did not reach consensus on putting aside the DIG issue in 1972 on the occasion of the normalization of China-Japan diplomatic relations.

On 2 June 2013, Lieutenant General Qi Jianguo, deputy chief of the general staff of the PLA, stated at the Shangri-La Defense Dialogue in Singapore that, "We should put aside disputes, work in the same direction and seek solutions through dialogue and coordination, particularly when it comes to disputes concerning sovereignty as well as maritime rights and interests."[92] In response, Japanese Chief Cabinet Secretary Yoshihide Suga said on 3 June 2013 that there are no disputes involved with the DIG. He also dismissed the existence of bilateral consensus to put the islands dispute aside.[93] Although the Japanese government has maintained that Tokyo is willing to work with Beijing to prevent individual issues from undermining overall relations from the viewpoint of "Mutual Beneficial Relationship Based on Common Strategic Interests" and "Japan always keeps the door to dialogue open,"[94] as long as Tokyo continues to insist on its current position on the DIG, it is unlikely for the two countries to move forward to make the East China Sea a "sea of peace, friendship, and

90 *President: Does not rule out signing a fishery agreement with Mainland China*, CENTRAL NEWS AGENCY, 6 June 2013, *available at* http://www.cna.com.tw/News/aIPL/201306060432-1.aspx.

91 *Taiwan Affairs Office's Response to A Reporter's Question Concerning Ma Ying-jeou's Proposal to sign a Cross-Strait Fishery Pact*, 9 June 2013, *available at* Http://roll.sohu.com/20130609/n378506284.shtml.

92 *China proposes putting aside Asian maritime disputes*, THE MAINICHI, 3 June 2013, *available at* http://mainichi.jp/english/english/newsselect/news/20130603p2g00m0dm0410 00c.html.

93 *Japan politicians seek to mend ties*, China Daily, June 4, 2013, available at http://usa.chinadaily.com.cn/china/2013-06/04/content_16562495.htm.

94 *See,* Speech by H.E. Mr. Fumio Kishida, Minister for Foreign Affairs of Japan, at the 19th International Conference on "The Future of Asia," Imperial Hotel, Tokyo, Japan, 23 May 2013, *available at* http://www.mofa.go.jp/page3e_000057.html.

cooperation" as they agreed before. It is also unlikely for them to resume talks on joint development of oil and gas resources in the East China Sea in accordance with the 2008 Understanding.

Another challenge for the development and implementation of the peaceful proposals and agreements on maritime cooperation in the East China Sea concerns the sensitive "one China" issue. Both China and Japan have been very careful in responding to President Ma's East China Sea Peace Initiative.

On 12 April 2013, two days after signing the fisheries agreement between Taiwan and Japan, the spokesperson of China's Foreign Ministry, Hon Lei, stated at a regular press conference that "China opposes Japan's unilateral actions in relevant waters and urges Japan to properly deal with Taiwan-related issues in strict accordance with the principles and spirit of the China-Japan Joint Statement."[95] It is clear that China is concerned about a possible revival of Taiwan's diplomatic status and its political relations with Japan. At the same time, China considers the Beijing government the authoritative defender of Chinese sovereignty over the DIG and Taiwan should work together with China in safe-guarding the islands and relevant maritime rights and interests. Fan Liqing, a spokeswoman for the Taiwan Affairs of the State Council, also urged that "It is the duty across the Straits to ensure the fishing rights and interest of fishermen from both sides (to operate) in this traditional fishery area on the basis of safeguarding territorial sovereignty."[96]

Japan considered the agreement it signed with Taiwan as a private sector fisheries arrangement, instead of a government-to-government agreement between Tokyo and Taipei. On 18 April 2013, in response to a question concerning the Japan-Taiwan Fisheries Agreement, Japanese Assistant Press Secretary Masaru Sato stated that

> This Japan-Taiwan private sector fisheries arrangement was signed April 10, and negotiations had been held between private bodies of Japan and Taiwan. … the two private authorities have been negotiating over the fisheries issue for many years since 1996, … But it was postponed sometime in 2009, but after the situation concerning the Senkaku Islands intensified since last September, we resumed discussions. And this time the Fishery Arrangement was successfully made. Although we have not changed our policy in any way regarding the treatment of Taiwan vis-à-vis China, the

95 *Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on 12 April 2013*, 13 April 2013, website of the PRC Foreign Ministry, *available at* http://www.fmprc.gov.cn/eng/xwfw/s2510/t1031012.shtml.

96 *Japan-Taiwan fishery agreement raises 'concern,'* CHINA DAILY, 11 April 2013, *available at* http://www.chinadaily.com.cn/china/2013-04/11/content_16391602.htm.

> Japanese Government welcomed the signing as the non-governmental working relations between Taiwan and Japan bearing fruit. So it is hoped this will have a positive impact even on the situation concerning the Senkaku Islands.[97]

On 1 June 2013, at the Shangri-La Dialogue in Singapore, the Japanese Minister Itsunori Onodera reiterated the Japanese position on the legal nature of Taiwan-Japan Fisheries agreement. He said, it is a private sector agreement with Taiwan. But he added, the signing of the agreement "is a benefit for the fisherman and the economies of both countries and that this is progress."[98]

In February 2013, President Ma gave reasons to explain why Taipei decides not to collaborate with Beijing on the DIG issue. First, he said, because China has never recognized the legitimacy of the Peace Treaty signed between Taiwan and Japan in 1952. Second, the Chinese government has not responded to Taiwan's East China Sea Peace Initiative. And finally, Beijing hoped the sovereignty issue would be kept out of the fishery talks between Taipei and Tokyo.[99] Unless a flexible arrangement between China and Taiwan can be made, it is unlikely for Taipei to be included in any of the future bilateral negotiations between China and Japan for law enforcement mechanisms or agreements on maritime cooperation in the East China Sea. It is also unlikely to see a three-way talk between China, Japan, and Taiwan.

A third challenge is the potential conflicts in the territorial waters 12 nm measured from the baselines of the DIG that are claimed respectively by China, Japan, and Taiwan. If no agreements can be reached between the three parties in the near future, this body of waters and the air above it will become the site of accidental conflicts between China and Japan as well as between Japan and Taiwan. The chance for conflicts will be bigger between China and Japan, since activists from Japan and from Hong Kong, Macau, and Mainland China will continue to take actions for the purpose of safeguarding sovereignty over the DIG. Actually it happened twice since the signing of Japan-Taiwan Fisheries Agreement. In April and May 2013, respectively, the Japanese activists and fishermen, guarded by the Japanese coast guard vessels, sailed to the waters near the DIG. In response, China dispatched maritime surveillance vessels to expel

97 *Press Conference by Assistant Press Secretary Masaru Sato,* 18 April 2013, *available at* http://www.mofa.go.jp/press/kaiken/kaiken6e_000005.html.

98 *Defending National Interests; Preventing Conflict: Q&A,* 1 June 2013, *available at* http://www.iiss.org/en/events/shangri%20la%20dialogue/archive/shangri-la-dialogue-2013-c890/second-plenary-session-8bc4/qa-1497.

99 Chris Wang, *Isle dispute a test of Ma's China policy*, TAIPEI TIMES, 20 February 2013, *available at* http://www.taipeitimes.com/News/taiwan/archives/2013/02/20/2003555248.

the Japanese intruders. The possibility for Chinese Taiwanese vessels to enter the 12 nm zone surrounding the DIG cannot be ruled out.

A fourth challenge is the increasing call from Japanese fishermen to review the 1997 Japan-China Fisheries Agreement and the 2013 Taiwan-Japan Fisheries Agreement. Okinawa fishermen asked the Japanese government to review the fisheries agreement with China because the agreement has led to overfishing of coral reefs and has devastated the habitat of bottom fish.[100] In addition, they complained that the Japanese government failed to take their interests into account as Taiwanese trawlers are given more waters to operate in the maritime zones established under the April 2013 Japan-Taiwan Fisheries Agreement. Okinawa fishermen stated that competition with Taiwanese fishing vessels will intensify and good fishing areas for them will shrink as a result.[101] However, Taiwanese fishermen stated that Japanese authorities are implementing the agreement "too strictly" and they would like to see a buffer zone set up immediately outside the maritime zones covered by the Japan-Taiwan Fisheries Agreement.[102]

A fifth challenge is related to the demand from the Chinese fishermen for the right to operate in the maritime zones covered by the Taiwan-Japan Fisheries Agreement and the demand from the Taiwanese fishermen for the right to operate in the provisional measures zone established by the 1997 China-Japan Fisheries Agreement (See Figure 3). This requires cross-Strait negotiations under the ECSPI. In addition, it will be necessary for Japan, Taiwan, and China to enter into trilateral talks that aim to combine the two existing fisheries agreements and come to an agreement for a new agreement between the three parties. In order to avoid the rise of the "one-China" issue, a flexible arrangement similar to the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) or the Western and Central Pacific Fisheries Commission (WCPFC) can be made so to allow "Fishing Entity of Taiwan" become a member of the Extended Commission of the CCSBT or a member of the Western and Central Pacific Fisheries Commission as Chinese Taipei. Alternatively, a fisheries agreement can be signed between China Fisheries Association,[103] Japan Fisheries Association,[104] and Taiwan's National Fishermen's Association.[105]

100 *Okinawa fisheries groups ask government to review Japan-China fisheries pact*, RYUKU SHIMPO, 30 May 2013, *available at* http://english.ryukushimpo.jp/2013/06/05/10488/.

101 *Okinawa fishermen protest to the Government over agreement with Taiwan on fishing rights*, RYUKU SIMPO, 13 April 2013, *available at* http://english.ryukushimpo.jp/2013/04/20/10039/. *See also*, *Japan-Taiwan fisheries pact leaves fishermen on both sides dissatisfied*, Kyoto News, June 10, 2013, *available at* http://english.kyodonews.jp/news/2013/06/229573.html

102 *Japan-Taiwan fisheries pact leaves fishermen on both sides dissatisfied, ibid.*

103 *Available at* http://www.china-cfa.org/.

104 *Available at* http://www.suisankai.or.jp/index_e.html.

105 *Available at* http://www.tpfae.org.tw.

VI Concluding Remarks

Maritime cooperation between China, Japan, and Taiwan is possible in the areas of conservation and management of fisheries resources as well as exploration and exploitation of oil and gas resources in the East China Sea, including the area surrounding the Diaoyutai/Senkau Islands. Possible non-government organizations for fisheries cooperation include China Fisheries Association, Japan Fisheries Association, and Taiwan's National Fishermen's Association. Possible non-government organizations for oil and gas exploration and exploitation include China National Offshore Oil Corporation (CNOOC), Japan Oil, Gas and Metals National Corporation (JOGMEC),[106] and Taiwan's CPC Corporation.[107]

Maritime cooperation between and/or among the three parties have the potential not only to help govern the activities that are related to exploration, exploitation, preservation, or protection of the living and non-living resources of the East China Sea, but also to manage the conflicts that arise from the sovereignty and maritime disputes over the DIG. Unfortunately there has been seen a lack of political willingness, in particular, from the PRC and Japanese governments, to promote maritime cooperation so that the East China Sea can be transformed into "a sea of peace, friendship and cooperation." Apparently, more efforts need to be taken by the leaders of China, Japan, and Taiwan.

106 *Available at* http://www.jogmec.go.jp/english/index.html.

107 *Available at* http://www.cpc.com.tw/english/home/index.asp.

The South China Sea Disputes: An Opportunity for the Cross Taiwan Strait Relationship

Yen-Chiang Chang

1 Introduction

The South Sea, also called the South China Sea, is a semi-enclosed marginal sea in the Pacific Ocean. It is located north of China and the island of Taiwan, east of the Philippines, south of Kalimantan Island and Sumatra Island and west of the Malay Peninsula and the Indo-China peninsula. States and territories with borders on the South China Sea, include mainland China, Taiwan (China), Vietnam, Malaysia, Singapore, Indonesia, Brunei and the Philippines.[1]

The total area of the South China Sea is 350 square kilometres. The South China Sea contains over 230 small islands, atolls, cays, and shoals, collectively known as the South China Sea islands. These islands are geographically divided into four parts: the Paracel Islands, the Macclesfield Bank, the Pratas Islands and the Spratly Islands. Most of these islands are very small, the largest of which is Pratas, with 12 square kilometres and Itu Aba Island, the largest island of Spratly Islands, is also only 0.4 square kilometres in size.[2]

Territorial disputes on the South China Sea islands began in the mid-late 20th Century. Since the 1970s, neighbouring countries in the South China Sea, such as Vietnam, the Philippines and Malaysia, began to conduct activities in the South China Sea islands and claim sovereignty over the Spratly Islands, for the following two reasons. On the one hand, the South China Sea is rich in natural resources including oil, gas and fish. On the other hand, the South China Sea, as a strategic road connecting the Pacific Ocean and Indian Ocean and a major shipping lane connecting Asia and Oceania, Europe and Africa,

1 Chao Ma, On the Island System and the International Maritime Delimitation (Master's thesis, Guizhou University, May 2007) at 28.

2 Lihai Zhao, *On the South China Sea Islands, A Number of Legal Problems*, 4 Law and Social Development 50 (1995); Jianming Shen, *International Law Rules and Historical Evidences Supporting China's Title to the South China Sea Islands*, 21 Hastings International and Comparative Law Review 2 (1997–1998).

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plays a significant role in national defense and economics.[3] The 1982 United Nations Convention on the Law of the Sea (hereinafter UNCLOS) sets up the legal systems for a continental shelf and exclusive economic zones.[4] Article 121 of UNCLOS states that as long as territory can sustain human habitation or economic life of their own, they shall have a corresponding continental shelf and an exclusive economic zone. This provision will undoubtedly broaden the scope of jurisdiction of a State, expand its economic interests gained by using the sea[5] and potentially aggravate the rivalry for activities on and sovereign rights over, the South China Sea, among States surrounding it.

In recent years, rivalry for the South China Sea has become increasingly intense among surrounding States. In addition, Southeast Asian States have tried to involve the United States, Japan and other States, apparently in order to make the South China Sea disputes more international and a potentially more complex issue.[6] On 17 February 2009, the Congress of the Philippines enacted the Philippine Baselines Law, which classifies the Spratly Islands and Scarborough Shoal, 'as a regime of islands under the Republic of Philippines'. On 5 March 2009, the Malaysian Prime Minister, Abdullah Ahmad Badawi landed on Swallow Reef and claimed sovereignty over the reef and its adjacent waters. On 8 March 2009, the USNS *Impeccable* conducted monitoring activities, without the authorization from the Chinese government, within the Chinese exclusive economic zone.[7] On 23 July 2010, the US Secretary of State, Hillary Clinton, stated at the ASEAN Regional Forum, that the settlement of disputes over the South China Sea is, 'related to US national interests'. Meanwhile, the United States has strengthened cooperation with Indonesia, Malaysia and Vietnam and has conducted several military exercises in the area.[8] A recent event,

3 Xiaowei Lv, *The Status of the South China Sea Dispute, Causes and Countermeasures*, 7 CONTEMPORARY SOCIAL HORIZONS 76 (2009).

4 Regulations of continental shelf are Articles 76 and 77 of the Convention; regulations of the exclusive economic zone in the Convention are Articles 55, 56, and 57. The widths of the continental shelf and exclusive economic zones, according to the Convention, are 200 nautical miles.

5 Guoqiang Luo, *The Multilateral Path to Solve the South China Sea Dispute and its Construction - Comment on "Declaration on the Conduct of Parties in the South China Sea"*, 25 LEGAL FORUM 94 (2010).

6 Hao Chu, *The New Situation and New Developments of South China Sea Issue*, 12 INTERNATIONAL DATA INFORMATION (CHINA) 40 (2010).

7 Yen-Chiang Chang, *Thinking about the Impeccable in the International Law of Sea*, SHANDONG UNIVERSITY LAW REVIEW 161 (2010); Feng Dan, Liming Hu, and Shandan Zhou, *New Trends in the South China Sea Dispute and China's Road to Protect Rights activists*, 19 WORLD GEOGRAPHY 14 (2010).

8 Siqi Peng, *New Trends in the South China Sea Issue*, 18 MANAGERS' JOURNAL 45 (2010).

which occurred on 20 July 2011, involved five Philippine congressmen landing on Thitu Island of the Spratly Islands, raising the Philippines flag and declaring sovereignty over the Thitu Island. In April 2012, the *Gregorio del Pilar*, the largest warship of the Philippines fleet, confronted two Chinese ocean surveillance ships at the Scarborough Shoal. The Philippine Navy was trying to arrest Chinese fishermen near the Scarborough Shoal but the arrest was prevented by the presence of Chinese surveillance boats. In June 2012, Vietnam launched the 'Oceans Act' in order to extend its maritime jurisdiction over Paracel and Spratly Islands. China had subsequently raised strong diplomatic protests against Vietnam's enactment. The release of the South China Sea Arbitration Award on 12 July 2016, has caused the South China Sea dispute to reach new heights. The events mentioned above amply demonstrate that States surrounding the South China Sea islands regard the rivalry for the South China Sea as a significant element in their strategy in resolving this issue has become of great concern for mainland China in the process of mainland China's growth process.

The South China Sea disputes are mainly focused on two issues. One is territorial sovereignty and the other is the maritime delimitation in the South China Sea. These two issues will be discussed separately, in the following parts of this article.

II Legal Basis for Each Claiming State

Territorial sovereignty claims over the South China Sea islands have been made by six countries, namely, China, Vietnam, the Philippines, Malaysia, Brunei and Indonesia. In addition, Taiwan (China) also has made claims based upon special political factors, thus creating a six-nation-and-seven-party situation in the area. The Pratas Islands are garrisoned by Taiwan's (China) armed forces. The Macclesfield Bank is dominated by the practical control of the Philippines. The Paracel Islands are controlled by mainland China. The Spratly Islands are controlled by the following countries respectively, mainland China controls 7 reefs, Taiwan (China) 2, Vietnam 29, Philippines 8, Malaysia 5, with Brunei 2, and Indonesia 1.[9]

1 *Mainland China*

Mainland China claims sovereignty over the South China Sea islands, based upon the principle of occupation. Occupation is defined as when a State intentionally takes the territorial sovereignty of *terra nullius*.[10] The object of

9 Luo, *supra* note 5 at 93.

10 Tieya Wang, International Law 171 (1995).

occupation is *terra nullius,* which indicates that the territory has never before been discovered by human beings or over which, any prior sovereignty has been relinquished.[11] According to traditional international law before the 18th Century, a State enjoyed the full sovereignty of the *terra nullius,* only by meeting the requirement of 'discovery'.[12] Since the 18th Century, however, the dominant doctrine accepted by scholars and State practice has been that 'discovery' can only give the discovering country partial sovereignty and a country will only enjoy full sovereignty when it exercises effective occupation over the *terra nullius* and undertakes proper legislative, judicial or administrative action or performs its sovereignty, which is called, 'effectiveness principle'.[13]

As early as the 2nd Century BC, during the ruling period of Emperor Wudi of the Han Dynasty, the Chinese began sailing in the South China Sea and they found the South China Sea islands through long-term sailing and production practices. Prior to this, the South China Sea islands have not been set foot upon, which meets the criterion of occupation, whereby land discovered should be deemed *terra nullius*.[14] According to the principle of international law prior to the 18th Century and 'inter-temporal law',[15] mainland China enjoys full sovereignty over the South China Sea islands, based on discovery.[16]

In addition, according to the view of modern international law, China's sovereignty over the South China Sea islands continues to exist. A series of activities

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11 Shen, *supra* note 2 at 7.

12 GERHARD VON GLAHN, LAW AMONG NATIONS 311 (1986).

13 ROBERT JENNINGS AND ARTHUR WATTS (EDS.), OPPENHEIM'S INTERNATIONAL LAW 686–689 (1992); WANG, *supra* note 10 at 171; Shen, *supra* note 2 at 10–11; Gaoqiang Cai and Yang Gao, *International Law Approach to Resolve the South China Sea Dispute*, 35 JOURNAL OF XIANGTAN UNIVERSITY 40 (2011); Dexin Gu, *The Application of Law of the sea in the South China Sea Dispute*, 6 STRATEGY AND MANAGEMENT 97(1995); Xiaoxuan Zhang, *The South China Sea Dispute between China and the Philippines and Legal Protection of Maritime Sovereignty*, 5 THEORETICAL CIRCLES 54 (2010).

14 Gu, *supra* note 13 at 97; Zhang, *supra* note 13 at 54; Cai and Gao, *supra* note 13 at 39.

15 'Inter-temporal law' was first proposed by Huber, the arbitrator in the *Island of Palmas Arbitration* case in 1928. It indicates that 'a juridical fact must be appreciated in the light of the law contemporary with it and not of the law in force at the time when a dispute with regard to it rises or falls to be settled'. Huber further explained when there is a sovereignty dispute it should be determined whether there is a continued existence of right at the time dispute rises according to the progressed international law. After the *Island of Palmas Arbitration* case, 'Inter-temporal law' becomes a universally recognised principle of international law. Therefore, sovereignty of the South China Sea Islands should be determined according to the principles of international law at the time, that is, 'Acquisition of Property by Discovery' principle. *See* Lingling Sun, *Analysis of the Sovereignty of the Diaoyu Islands from the Perspective of International Law*, 2 JOURNAL OF JAPANESE STUDIES 140–141 (2004); *see also* Yuanlong Huang, *Concept of Inter-temporal Law in International Law*, 2 FOREIGN LAW (2000).

16 Zhang, *supra* note 14 at 55.

conducted by mainland China, during various dynasties, such as naming the islands, exploitation, management, measurement, observation, inspection and stationing troops, shows the jurisdiction of mainland China, which is in compliance with the, 'principle of effective occupation'.[17] 'It is worth noting that the effective occupation or control is a comparative concept, which means its criterion varies depending upon the nature of the *terra nullius*, involving its size, geographical location, climatic conditions and whether there is human inhabitation'.[18] For example, it is much easier to effectively occupy an uninhabited land, than a primitive tribal land because a State's troops may be stationed in the latter, while not in the former.[19] The *Clipperton Island Arbitration*[20] in 1931, between France and Clipperton Island, the *Eastern Greenland Case*[21] in 1933 between Norway and East Greenland Denmark and advisory opinion of the International Court of Justice[22] on the *Status of Western Sahara*, all reflect a common characteristic, that is, the criterion of effective occupation in international law for sparsely populated or uninhabited *terra nullius* is not significant. A tiny or symbolic activity of sovereignty declaration will enable a country to enjoy full sovereignty over the *terra nullius*, while continuous exercise of sovereign acts is not required.[23] There are a large number of sparsely populated or uninhabited islands and reefs in the South China Sea islands. Even although mainland China has not exercised continuous sovereign acts, a series of acts, including naming and inspection, are deemed sufficient to constitute effective occupation.

From the 1830s until the end of the Second World War, the South China Sea islands were invaded and occupied by France and Japan. In 1946, the Chinese government took over the Spratly Islands and Paracel Islands, based upon the statement of the *Cairo Declaration* and the *Potsdam Declaration*, and re-erected a sovereignty monument on the islands.[24] The invasion and occupation by France and Japan of the South China Sea islands, cannot nullify the effect of territorial changes under international law, since the acquisition or occupation

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17 There will not be an elaboration on the specific activities of China's exercise of jurisdiction in the South China Sea islands. *See* Shen, *supra* note 2; Gu, *supra* note 14; Zhao, *supra* note 2; Lihai Zhao, *China's Indisputable Sovereignty over the South Sea Islands from International Law*, 3 Journal of Peking University (Philosophy and Social Sciences) (1992).

18 George Schwarzenberger and E.D. Brown, A Manual of International Law 97 (1976).

19 Michael Akehurst, A Modern Introduction to International Law 143 (1984).

20 *Clipperton Island Arbitration* (Fr. v. Mex.), 2 r.i.a.a. 1105, 26 Am. J. Int'l L. 390 (1931).

21 *Legal Status of Eastern Greenland Case* (Den. v. Nor.), 1933 P.C.I.J (Ser. A/B) No.53 (5 April).

22 *Advisory Opinion on the Status of Western Sahara*, 1975 I.C.J. Rep. 12, 43 (Oct. 16).

23 All cases cited above were taken from Shen, *supra* note 2 at 13.

24 Zhao, *supra* note 2 at 53; Gu, *supra* note 14 at 98.

of land by the threat or the use of force is illegal and will not be recognised in international law.[25]

From the analysis above, mainland China's claim to the South China Sea islands is based upon, 'the principle of occupation', which specifies *terra nullius* discovery and the principle of effective occupation. Meanwhile, before neighbouring States in the South China Sea claimed territorial sovereignty, mainland China had not been subject to intervention by any State, except the illegal invasion and occupation by France and Japan. These facts constitute powerful proof in international law of mainland China's to claim sovereignty over the South China Sea islands.

2 *The Philippines*

The Philippines claims sovereignty over the Scarborough Shoal and part of the Spratly Islands, for the following three reasons. Firstly, these islands are essential to the national security and economic development of the Philippines. Secondly, the Philippines is the State geographically closest to these islands. Thirdly, these islands are, 'ownerless islands'.[26]

There is no legal basis under international law as regards the first and second reasons. It is generally believed that there are five traditional ways of achieving territorial acquisition and changes in international law, these being occupation, accretion, prescription, cession and conquest.[27] Security or economic development needs and the 'adjacency principle', are not recognised methods of territorial acquisition and change. As for the adjacency principle, the judgment of the International Court of Justice in the 1969 *North Sea Continental Shelf* case negated it and pointed out that the 'submarine areas did not appertain to the coastal State merely because they were near it'.[28]

The third reason is also unacceptable in international law. In 1948, Thomas Cloma and his team claimed to discover part of the Spratly Islands in the South China Sea and regarded these islands as, 'ownerless islands'. As mentioned above, however, as early as the Western Han Dynasty, mainland China had discovered and exercised jurisdiction continuously over the South China Sea islands. Meanwhile, mainland China has never had the intention of or acted to relinquish the South China Sea islands. The reasons offered by the Philippines are thus untenable. For a number of uninhabited islands in the Spratly Islands, especially those islands and reefs which appear and disappear with the ebb and

25 Wang, *supra* note 10 at 173.
26 Shen, *supra* note 2 at 59.
27 Wang, *supra* note 10 at 171.
28 The Judgment of the ICJ Advisory Opinion and Command Summary (1948–1991), at 85, *available at* http://www.icj-cij.org/homepage/ch/files/sum_1948-1991.pdf; Zhao, *supra* note 2 at 55.

flow of the seas, make them impossible to permanently occupy but this does not mean that the sovereign States relinquished their claims on sovereignty. Whether a State relinquishes a claim to sovereignty depends on whether the State has the intention to relinquish it and has no intention to continue 'ownership'. It is evident that mainland China has always claimed its sovereignty over the South China Sea islands and no indication to relinquish has been given.[29] The legal basis for the claim of the Philippines to have sovereignty over some of the South China Sea islands is thus untenable under international law.

3 *Vietnam*

Vietnam's claim on the Paracel Islands and Spratly Islands is mainly based on the following two points. Firstly, Vietnam claims its control over the Paracel Islands and Spratly Islands on the basis of history. Secondly, Vietnam inherited France's rights over the Spratly Islands.

The first reason proposed by Vietnam is that 'Hoang Sa' and 'Truong Sa', in its historic documents, are referred to as the 'Paracel Islands' and the 'Spratly Islands'. According to Chinese historical research, however, the aforementioned documents are referring merely to the islets and shoal along the coast of central and west Vietnam, rather than the Paracel Islands and the Spratly Islands.[30] (*See* Figure 3.1) If the authenticity of this research is not questioned, it may be assumed that 'Hoang Sa' and 'Truong Sa' refer to the 'Paracel Islands' and the 'Spratly Island', then Vietnam was indeed the first to have discovered the South Sea islands. Mainland China has, however, claimed effective control over the South China Sea islands for up to 2000 years, while Vietnam only apparently began to claim sovereignty over islands in the 20th century. Vietnam, however, should not be able to obtain sovereignty over the South China Sea islands because its action does not satisfy 'the principle of occupation' in international law. The result would thus appear to be that Vietnam cannot acquire sovereignty over the South China Sea islands.

In addition, before Vietnam's reunification in 1975, Vietnam had confirmed that the South China Sea islands have been a territory of mainland China. The 'Vietnam Atlas' and 'World Atlas', published by the Vietnam Bureau of Surveying and Mapping, even include the South China Sea islands within the territory of mainland China.[31] Based on the abovementioned facts, Vietnam's

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29 Shen, *supra* note 2 at 62.

30 Jinming Li, *Vietnam's Hoang Sa and Truong Sa are not China's Paracel Islands and Spratly Islands*, 2 Chinese Borderland History and Geography (1997).

31 Gu, *supra* note 13 at 98.

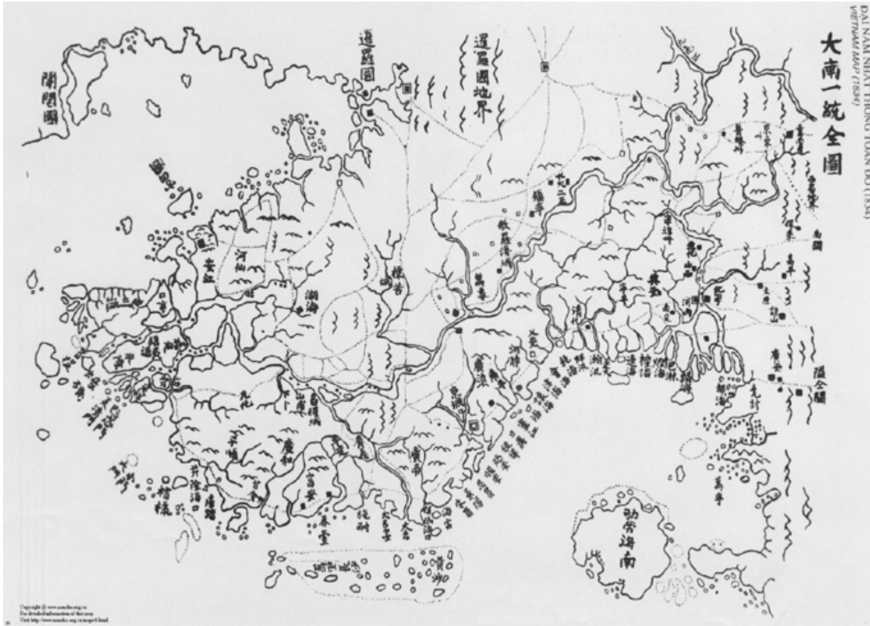

FIGURE 3.1 Vietnam Map, 1834.
SOURCE: WWW.NANSHA.ORG.CN, LAST VISITED: 2018/6/28

sovereignty claims over the South China Sea islands after 1975 are, in fact, in violation of *estoppel* in international law.[32]

As to the second reason proposed by Vietnam, as mentioned earlier, the French occupation of the Spratly Islands is considered a breach of international law. As a result, the apparently illegal activity cannot grant France legitimate rights over the South China Sea islands and inheritance of rights from France seems spurious.

4 *Malaysia, Brunei, Indonesia*

The sovereignty claims from these three States over the islands of the South China Sea are based upon the fact that these islands are within the 200-nautical-mile exclusive economic zone or continental shelf. In fact, this proposition involves some apparent erroneous juxtaposition. UNCLOS specifies that delimitation of an exclusive economic zone and continental shelf is based upon the area being a part of a country's territory, which is embodied in the principle, 'the land dominates the sea'. It is manifested in the judgment of the International Court of Justice in the *North Sea Continental Shelf Case* as early

32 Zhao, *supra* note 17 at 30–40; Shen, *supra* note 2 at 57.

as in 1969, that is, 'the rights of the coastal State to its continental shelf areas were based on its sovereignty over the land domain, of which the shelf area was the natural prolongation under the sea'.[33] The result is that, a State cannot claim sovereignty over a land based upon claiming its exclusive ownership of an economic zone or continental shelf of the land, since this claim does not conform to the basic principle of international law.

5 *Taiwan (China)*

Taiwan (China) claims sovereignty over the South China Sea islands based upon reasons similar to those of mainland China, that is, 'the principle of occupation'.[34] Before 1950, mainland China, as a unified entity, occupied and exercised jurisdiction over the South China Sea islands; while after 1950, the split of mainland China and Taiwan (China) created the situation where the two parties exercised State functions in the South China Sea, respectively. Taiwan (China), as the 'The Republic of China', exercised jurisdiction over the South China Sea. For instance, the 'Pratas garrison area' and the 'Spratly garrison district', were set up in 1956. Ships were dispatched to inspect the Spratly Islands respectively in 1963 and 1966. The Islands of Spratly were hosted by the Kaohsiung City Government in 1980 and a 'district office' was also set up.[35] All these facts satisfy the elements of, 'the principle of occupation' as discussed above.

6 *Summary*

In summary, putting aside the political issues, both mainland China, as represented by the Government of the People's Republic of China and Taiwan (China) represented by the Republic of China, can exercise a strong claim to sovereignty over the South China Sea islands, based on the principle of occupation. Claims from other Southeast Asian States cannot, however, be supported by international law, according to the above analysis.

III Delimitation of the South China Sea

UNCLOS states in Articles 3, 57 and 76 that, measured from baselines, every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, an exclusive economic zone not beyond 200

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33 Yuan Guo, *Analysis of the South China Sea Disputes in the Law of the Sea*, 2 NORTHERN LEGAL SCIENCE 136 (2009).

34 Hasjim Djalal, *South China Sea Island Disputes*, *available at* http://rmbr.nus.edu.sg/rbz/biblio/s8/s08rbz009-021.pdf

35 *Available at* http://lg2005.blog.hexun.com/2757179_d.html.

nautical miles and a continental shelf, not exceeding 350 nautical miles. Undoubtedly, the formulation of UNCLOS provides an authoritative reference for the world, in terms of maritime delimitation. Scholars have, nonetheless, commented that, "The provisions of the law of the sea have caused a new dispute similar to friend-or-foe dispute in Asia. No Asian State claims the limit of the continental shelf or the 200-nautical-mile exclusive economic zone without causing conflict with claims of other States".[36] Furthermore, as mentioned above, some States misuse the relevant provisions of the continental shelf and exclusive economic zone stated in UNCLOS, to claim territorial sovereignty over the South China Sea islands, which aggravates the sovereignty dispute in the region and complicates the issue of maritime delimitation. In addition, the 'historic waters' issue and historical rights, have not been mentioned in detail in UNCLOS. Thus, accepting that there are provisions for the delimitation of straight baselines in Article 7, Paragraph 2, the exception of the historic gulf in Article 10, Paragraph 6 and the delimitation of the boundaries of territorial waters in Article 15,[37] there is little explanation or definition of the concept of 'historic waters'. These defects, to some extent, hinder the solution of the problem of the South China Sea. UNCLOS does, however, expressly provide in Articles 74 and 83, that the delimitation of the exclusive economic zone and continental shelf between States with opposite or adjacent coasts, shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution. This means that although the Convention does not provide specific methods to solve the problem of the maritime delimitation, it guides States to settle the dispute on the basis of basic principles and rules of international law. The rule of 'historic waters', as an international customary law referred to in Article 38 of the Statute of the International Court of Justice, should be considered by States in negotiation, as recognised and supported by UNCLOS.[38]

The concept of 'historic waters' has been proposed since the last century. In 1957, the Secretariat of the United Nations published a document entitled, 'Historic Bays', which specifies a State's 'historic rights', should include not only the 'historic bays' but also 'historic waters'. The so-called 'historic waters' are maritime areas which can be archipelagic waters, the water areas lying between an archipelago and the neighbouring mainland, as well as straits, estuaries and

36 George Lauriat, *Chaos or Cooperation?*, 199 FAR EASTERN ECONOMIC REVIEW (1983); Guo, *supra* note 33 at 136.

37 Jian He and Ao Wang, *South China Sea Dispute in the View of International Law of the Sea*, 1 ACADEMIA IN CHINA 257(2008).

38 Cai and Gao, *supra* note 13 at 41.

other similar bodies of water.[39] The document entitled, 'Juridical Regime of Historic Waters, including Bays', published by the United Nations Secretariat in 1962, defines historic waters as, 'maritime areas which they considered vital to them without paying much attention to divergent and changing opinions about what general international law might prescribe with respect to the delimitation of the territorial sea'.[40] The document also explicitly puts forward the elements of 'historic waters', as being a State exercising rights over the claimed, 'historic waters' effectively. The rights exercised effectively by a State over the waters should be continuous and the exercise of the rights should obtain acquiescence or tolerance of foreign States.[41]

The nine-dashed line, which mainland China has always maintained in the South China Sea delimitation, meets the requirements of 'historic waters'.[42] Firstly, mainland China had discovered the South China Sea and exercised sovereign rights since the Western Han Dynasty. Secondly, the persistent exercise of sovereign rights over the South China Sea can be supported by several historical facts, as mentioned earlier. Thirdly, before the promulgation of

39 UN Secretariat, Historic Bays, UN doc A/CONF.13/1, 1 Official Records of United Nations Conference on the Law of the Sea (1957) at 2. The original statement is: Historic rights are claimed not only in respect of bays, but also in respect of maritime areas which do not constitute bays, such as the waters of archipelagos and the water area lying between an archipelago and the neighboring mainland; historic rights are also claimed in respect of straits, estuaries and other similar bodies of water. There is a growing tendency to describe these areas as 'historic waters', not as 'historic bays'. *Available at:* http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1958/docs/english/vol_I/4_A-CONF-13-1_PrepDocs_vol_I_e.pdf.

40 UN Secretariat, Juridical Regime of Historic Waters, including Bays, UN doc A/CN.4./143, 2 Yearbook of the International Law Commission (1962) at 7. The original statement is: the concept of 'historic waters' has its roots in the historic fact that States through the ages claimed and maintained sovereignty over maritime areas, which they considered vital to them, paying little attention to divergent and changing opinions about what general international law might prescribe with respect to the delimitation of the territorial sea.

41 UN Secretariat, Juridical Regime of Historic Waters, including Bays, at 13–19. *Ibid.* The original statement is, "These factors are: (1) the exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign States".

42 There is a State's uncertain boundary marked by eleven-dotted discontinuous line *South China Sea Islands Location Map* published in 1947 by Division of Territory Administration, Department of the Interior of Chinese government after new China was formed, there was also such a line in the same location of the map published and audited by the relevant government department with the only difference being that eleven-dotted-line was changed to nine-dotted-line, which is often called the traditional boundary line. Because the line is U-shaped, it is also known as U-shaped line. Cited from Cai and Gao, *supra* note 13 at 42.

UNCLOS, the sovereign right of mainland China over the South China Sea had not been subjected to any State's opposition for many years. The result is that, based on the particularity of 'historic waters', mainland China should have exclusive sovereign rights over the South China Sea, not being restricted by the relevant delimitation provisions of UNCLOS. The 'Map of Location of the South China Sea Islands', published by the Republic of China (refers to Taiwan (China), hereinafter ROC) in 1947, creates the U-shaped line whose legal nature is that the islands or groups of islands enclosed by a U-shaped line are part of territories of the State of China. (*see* Figure 3.2) As to the legal nature of the maritime area enclosed by the U-shaped line, the Policy Guidelines for the South China Sea adopted by the Executive Yuan of Taiwan (China) on 13 April 1993, clarifies that, 'the South China Sea area within the historic waters limit is the maritime area under the jurisdiction of Taiwan (China), where Taiwan (China) possesses all rights and interests'.[43] As to U-shaped line, the position of the mainland China is similar to that of Taiwan (China). Mainland China stated in Notes Verbale in response to the Malaysia/Vietnam Joint Submission and the Vietnam Submission that, 'China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters, as well as the seabed and subsoil thereof'.[44] (*see* Figure 3.3) It is, therefore, not difficult to conclude that mainland China and Taiwan (China) stand on the same legal ground with respect to the South China Sea waters.

IV Possible Breakthrough Regarding Existing Difficulties

From the analysis mentioned above, based on international law, mainland China enjoys territorial sovereignty over the South China Sea Islands based on, 'the principle of occupation' and enjoys the historic sovereign rights over the South China Sea, based on the rule of 'historic waters'. Claims proposed by neighbouring States of the South China Sea concerning the delimitation of South China Sea islands are difficult to find legal ground. The delimitation of the South China Sea can, however, be advocated in international law. From this perspective, once the dispute is submitted by disputing States to international arbitration

43 *See* Michael Sheng-Ti Gau, *The U-Shaped Line and a Categorization of the Ocean Disputes in the South China Sea*, 43 OCEAN DEVELOPMENT & INTERNATIONAL LAW 58 (2012). *Also see*, The Republic of China, *South China Sea Policy Guidelines,* attached as an appendix to Kuan-Ming Sun, *Policy of the Republic of China Towards the South China Sea*, 19 MARINE POLICY 408 (1995).

44 PRC, Letter CML/17/2009, 7 May 2009; and Letter, CML/18/2009, 7 May 2009.

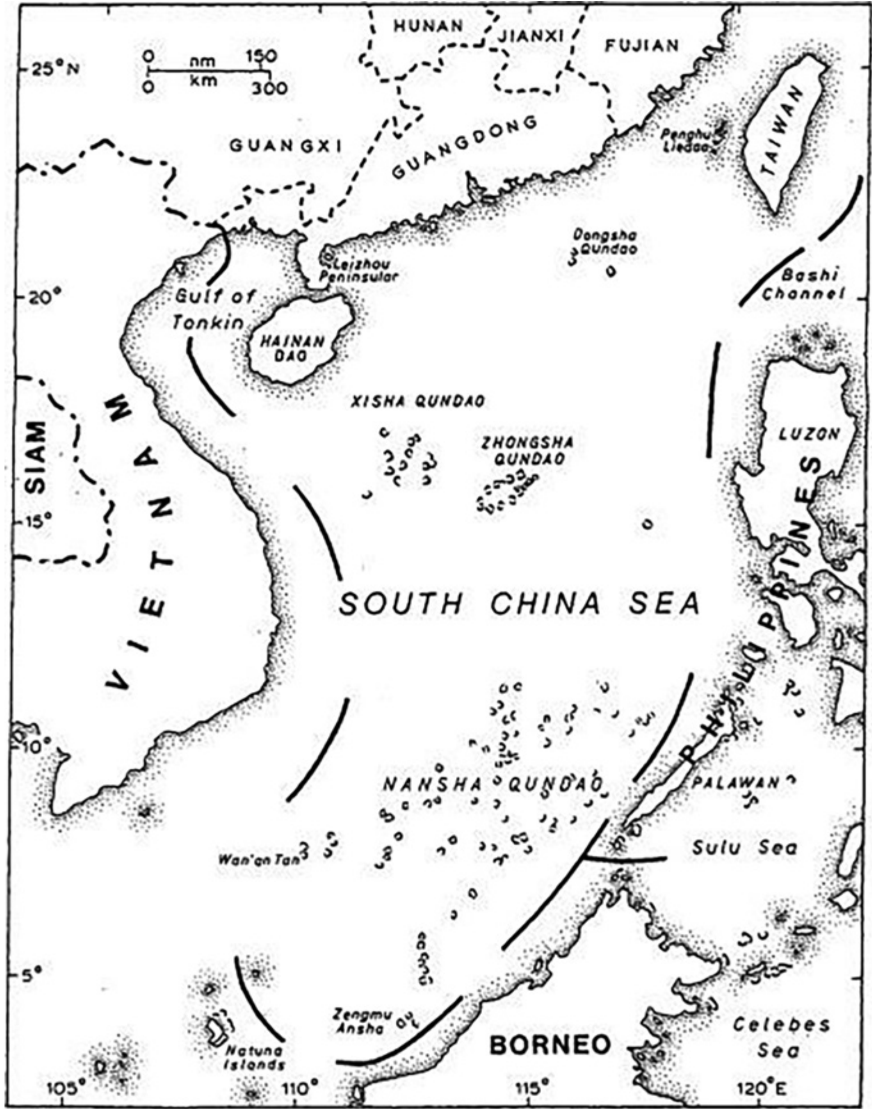

FIGURE 3.2 Map of location of the South China Sea islands, Ministry of the Interior of the Republic of China, 1947.
SOURCE: MINISTRY OF THE INTERIOR, COMPILATION OF HISTORICAL ARCHIVES ON THE SOUTHERN TERRITORIES OF THE REPUBLIC OF CHINA, (2015), P. 51

institutions or the International Court of Justice, mainland China has a great advantage. This solution is also relatively fair and complete. Mainland China has, however, not accepted the compulsory jurisdiction of the International Court of Justice. Furthermore, there is no relevant treaty between mainland

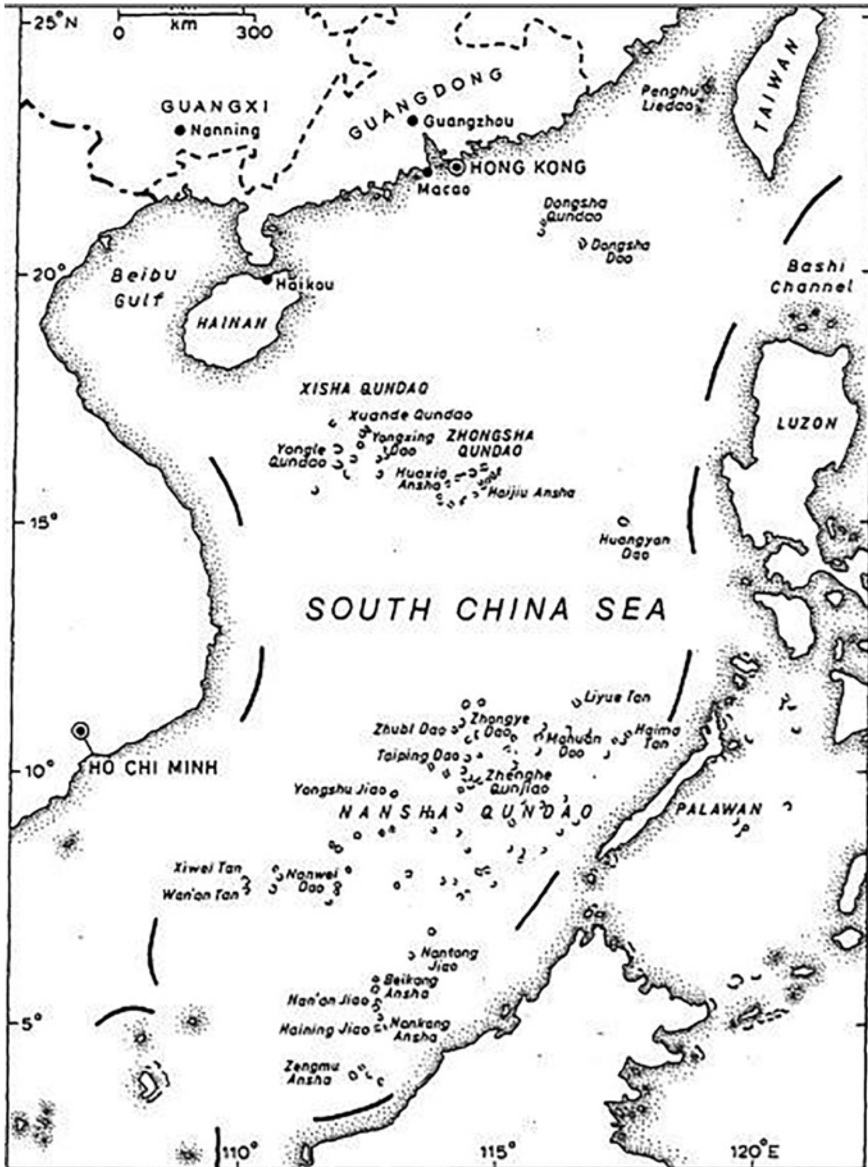

FIGURE 3.3 Nine dotted lines claimed by the People's Republic of China in the South China Sea (*See* Notification of the PRC dated 7 May 2009 to challenge the Joint Submission of Vietnam and Malaysia to the CLCS dated 6 May 2009. The lines are indicated in the map.)
SOURCE: HTTP://WWW.UN.ORG/DEPTS/LOS/CLCS_NEW/SUBMISSIONS_FILES/MYSVNM33_09/CHN_2009RE_MYS_VNM_E

China and other disputing States, to authorize such a jurisdiction or arbitration agreement. Mainland China is not willing to let this issue to be judged by a third party, primarily because it has always maintained the South China Sea islands and the South China Sea, are among its inherent territories, which thus cannot be judged.[45] This position can be seen from the response of mainland China to the fact that the Philippines has submitted the two States' disputes over the Spratly Islands to the International Tribunal for the Law of the Sea.[46]

Mainland China tends to solve South China Sea disputes through bilateral negotiations, which can be seen from the fact that mainland China and ASEAN signed the *Declaration on the Conduct of Parties in the South China Sea* in 2002.[47] According to Article 4 of the Declaration, "The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign States directly concerned, in accordance with universally recognised principles of international law, including the 1982 UN Convention on the Law of the Sea". Article 5 of the Declaration provides that "The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner". However, the situation of the South China Sea dispute becomes increasingly complex and internationalised in recent years, which shows that the Declaration has failed to play its role originally envisaged. This indicates that with increasingly prominent contradictions and differences among parties of the South China Sea, whether negotiations are multilateral or bilateral, it is very difficult for the various disputing parties to reach an agreement on the territorial sovereignty of the South China Sea Islands and delimitation of the South China Sea waters. That is why mainland China has strongly advocated "putting aside disputes and seeking joint development". However, according to the analysis of Professor Guocai Zhao, the prerequisite for joint development is that each State should recognise the existence of the dispute, reach a consensus on the scope of the areas in dispute and confirm that their occupation of the islands and reefs cannot be regarded

45 Guocai Zhao, *Cross-strait Cooperation to Develop Oil and Gas Resources in the South China Sea from the Point of View of International Law*, 56 SPECIAL ISSUE OF MARTIAL LAW 62 (2010).

46 *China's response to the Philippines' advice to submit the South China Sea to the International Tribunal for the Law of the Sea*, *available at* http://gb.chinareviewnews.com/doc/1017/6/5/3/101765366.html?coluid=7&kindid=0&docid=101765366&mdate=0713164945.

47 Luo, *supra* note 5 at 96.

as recognition of its territorial sovereignty. However, it is difficult for each State to make concession to the last point in negotiations. For instance, Vietnam insists on the priority of delimitation over of discussion of joint development. Meanwhile, there are different understandings of States about the way for joint development.[48] Therefore, to achieve the target to develop the resources of the South China Sea jointly with Southeast Asian States can be described as difficult and will be a long process.

However, it is worth noting that there is plenty of space and possibilities for the cross-strait cooperation in resource development of the South China Sea. First, mainland China's and Taiwan's (China) positions on the South China Sea are the same in essence. As mentioned above, both sides have denied sovereignty claims of various States of Southeast Asia. This position lays a foundation for both parties to avoid sensitive political topics, cooperate unanimously to resist externally. Second, Taiwan's (China) "Blue Ocean Strategy" which advocates "shelving disputes, keeping peaceful and reciprocal, and seeking joint development"[49] is consistent with mainland China's principle "putting aside disputes and seeking joint development", which also guarantees cross-strait cooperation. Third, since 1994, the two parties have already launched a series of exploration cooperation programme of oil and gas in the Taiwan Strait. Mainland China's National Offshore Oil Corporation and Taiwan's (China) Chinese Petroleum Corporation have negotiated for many times, worked out agreements and established the principle of "keeping reciprocal and mutually beneficial, and putting aside sovereignty problem".[50] Cross-strait cooperation in the South China Sea can draw lessons from the cooperation in the Taiwan Strait to exploit oil and gas.

Therefore, the two sides can fully draw lesson from the cooperation mechanism of oil and gas exploitation in the Taiwan Strait, to avoid the relevant political factors and to develop the South China Sea resources jointly. To specify, the two sides can divide resources into two parts which are renewable resources such as fishery resources, and non-renewable resources such as oil and natural gas. The two sides can start from the less controversial negotiation of fishery resources to conclude an agreement of joint development, and then gradually expand to the relatively more complex negotiation of the joint development of oil, gas and other non-renewable resources and conclude an agreement different from the development of fisheries resources. Such separate regulation reflects the characteristics of different resources in a better way

48 Zhao, *supra* note 45 at 64–65.

49 Zhao, *supra* note 45 at 66.

50 *Ibid.*

and accelerates the pace of cooperation. To a certain extent, the cooperation of mainland China and Taiwan (China) in the South China Sea can play a role to resist unanimously, to suppress disputing States in Southeast Asia, and to achieve and safeguard maritime rights and interests in the South China Sea in a better way. In addition, with the further deepening of cross-strait cooperation, the two sides can also cooperate and exert pressure on disputing States in Southeast Asia to promote the negotiation of resource cooperation and joint exploitation as soon as possible.

V Conclusion

From the perspective of international law, there is strong legal basis for mainland China to claim sovereignty over the South China Sea Islands and sovereign rights over the surrounding waters. Facing the increasingly intensified situation in the South China Sea, "putting aside disputes and seeking joint development" is the better solution to meet the interests of all States; however, it is still difficult to achieve this goal.

From the analysis mentioned above, based on the common interests of mainland China and Taiwan (China) and the positions of the various claimant States in the South China Sea disputes, there is a great space in the joint development of the South China Sea. Therefore, the first action should be to promote the cooperation of the two sides in resource development of the South China Sea. At the same time, pressures from the two sides on Southeast Asian States can also promote cooperation and negotiations among the disputing States as soon as possible, which will further ease the situation in the South China Sea, and achieve a win-win situation.

PART 2

Peaceful Uses of Marine Resources

Management of Fishery Resources: A Starting Point Towards Cooperation in the East China Sea

Kuan-Hsiung Wang

1 Introduction

The disputes in the East China Sea could be categorized into two parts: one is on the sovereignty of those island features, and the other is the maritime zones claimed by related Parties in the region. It is understandable that the best way to solve the disputes might be delimiting boundaries so that the areas of sovereignty and jurisdiction could be decided. However, such situation is not always possible. It is mainly because negotiation and adoption of a maritime boundary between the related Parties always focused on political considerations and there are no well-established as well as well-recognized regulations for making boundaries. It is recognized that "equitable solution" is one of the most important principles in boundary making. However, there are no definite elements which have been decided in jurisprudence. There have been cases which recognize geographical and geological factors, coastal length, traditional fishing activities, relative impact on the livelihood and economic dependency as considerations in setting maritime boundaries.

Under such circumstances, joint development/joint cooperation then could be treated as a way to solve the disputes. This is not only an expectation made by the related Parties, but could also be found in the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Articles 74(3) and 83(3) of UNCLOS,[1] both provide "provisional arrangements" in situations before the boundary lines are agreed upon. The term "provisional arrangement" could be interpreted to refer to "joint cooperation" which is a popular term quoted and cited by the leaders of the Parties in the region. However, no practical exercises have been realized. Lack of political will is a possible reason.

It is not difficult to locate opportunities for joint cooperation in the East China Sea region. Joint military exercises, joint development of hydrocarbon

1 UNCLOS Article 74(3) provides "Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into *provisional arrangements* of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation".

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resources, marine scientific research, marine environmental protection and fisheries cooperation are options to this end. To date, however, disputes surrounding possible hydrocarbon resources in the area and actions in favor of conservation and management of fishery resources have been delayed. Nevertheless, conservation and management of fishery resources could be the starting point for cooperation in this region and could have a "spillover effect" into other areas of cooperation. Moreover, there might be possibilities that the disputes could be solved through peaceful means.

In this respect, cooperating to manage and conserve fisheries resources is especially significant because fish are migratory, and even some of them are highly migratory. Moreover, overfishing is a serious and pressing problem in the region. In this regard, a maritime boundary cannot entirely protect a State's fishery resources from encroachment, because fishery resources migrate beyond the State's jurisdiction, and overfishing beyond its borders could also have great impact on the fish stocks within its territorial boundaries.

Therefore, a proper management mechanism, subject to natural conditions, is necessary for the coastal States to keep stocks at sustainable levels. This is especially important for the littoral States around the East China Sea. Because this region is a semi-enclosed sea in its geographical features,[2] any change in the fishery policy-making could have far-reaching effects on the continuation of the fishery resources in this area.

II Issues in the East China Sea

The development of globalization has already become an important phenomenon in the modern international society. Such phenomenon was demonstrated in the economy elements of production flowing with an unprecedented speed and scale in the global scope. Although the process of globalization has been witnessed for several decades, it is still under a drastic debate if globalization would cause the collapse of national boundaries. Furthermore, will States be collapsed in the future due to their functions have been restricted?

For discussions or debates on "globalization", most of them are on international financial transaction, technology flows, transnational cooperation, capital flows, cross border movements of people, and so forth. In other words,

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2 UNCLOS Article 122 provides that "[E]nclosed or semi-enclosed sea" means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.

States, as the members of the international community, are getting closer and sharing common interests. Therefore, more functional fields, and even disputes, are emerging.

It is a trend that national sovereignty had been challenged by the developments mentioned above. Not only such phenomenon appears in daily economic life, but also appears in the development of the international legal system, especially in the fields of high seas fisheries and international environmental protection.

For purposes of statistics concerning fish catches, a list of major fishing areas is maintained by the FAO.[3] The East China Sea region is within Area 61, which is under the title of Northwest Pacific. In terms of global production of marine capture fisheries, global capture fisheries production in 2008 was about 90 million tonnes, with an estimated first-sale value of US$93.9 billion, comprising about 80 million tonnes from marine waters. In 2008, the Northwest Pacific had the highest production of 20.1 million tonnes (25 per cent of the global marine catch), followed by the Southeast Pacific, with a total catch of 11.8 million tonnes (15 per cent), the Western Central Pacific with 11.1 million tonnes (14 per cent) and the Northeast Atlantic, with 8.5 million tonnes (11 per cent).[4] More specifically, the fish capture production of 2010 in Area 61 by China, Korea, Japan and Taiwan is 12.7 million tonnes, 1.2 million tonnes, 3.6 million tonnes, and 0.4 million tonnes.[5] This demonstrates the fact that China's fish capture production occupies most of the volume comparing with other States in the Northwest Pacific area.

The East China Sea is a marginal sea in the west Pacific Ocean as well as the west part of the aforementioned FAO fishing Area 61. It is an area of about 700,000 square kilometers to the east of China, north of Taiwan, west of Japan's Ryuku islands, and south of Korea. The eight Daioyu/Senkaku (Chinese name/ Japanese name) Islands are to the northeast of Taiwan, the largest island, with the area of 4.32 square kilometers, is two miles long and less than a mile wide. Though incapable of sustaining life, the islands are important for strategic and political reasons, as claims of ownership are used to bolster claims to the surrounding sea and its resources.[6] That causes the conflicts for the countries surrounding the maritime area, which makes it one of the flashpoints in the east Asia.

3 *Available at* http://www.fao.org/fishery/area/search/en.

4 FAO, WORLD REVIEW OF FISHERIES AND AQUACULTURE 35 (2010).

5 FAO, FAO YEARBOOK 2010 (2012).

6 ENERGY INFORMATION ADMINISTRATION, *Country Analysis Briefs: East China Sea, available at* http://www.eia.gov/EMEU/cabs/East_China_Sea/pdf.

Although it is reported that the oil reserve is abundant in the East China Sea,[7] there is no definite assessment of it. Oil reserve estimates for the East China Sea vary within the same general range. Official Chinese unproven oil reserve estimates tend to vary and tend to be high, at 70 to 160 billion barrels of oil (Bbbl) for the entire East China Sea. Foreign estimates fall closer to the middle of that range at 100 Bbbl. As for gas, Chinese estimates of potential East China Sea gas reserves on the entire shelf range from 175 trillion to 210 trillion cubic feet in volume.[8] Such an abundant oil reserve creates the possibility of fighting for energy among the parties concerned in the East China Sea region. This is especially clear when the oil consumption for those parties is taken into consideration.[9]

As for the fishery resources in the East China Sea, they are rapidly being exploited by the people of the region, who are heavily concentrated along the coastline. Overfishing or a declining average annual fish catch now threatens the extensive fishing industry. Many fishermen are forced to apply more efficient but aggressive fishing techniques, and to venture further out to new fishing grounds. Even worse, fishing in the overlapping areas becomes ordinary practices and creates more disputes among the States related.

It is common that tensions will be mounting in a region where resources are getting fewer and fewer, and demand is on the rise. Owing to its economic development and the change of diet habits, China is consuming more and more fish. In the same time, it is also a fact that China plays an important role of fishing States in the world.[10] Under the situation that global fish stocks are down, especially the catches in the East China Sea region, this would make perfect sense that Chinese fishing vessels are going farther and farther and into disputed waters. In terms of the Diao Yu Tai Islands, the fishing ground there attracts fishermen from along the northeastern coastline of Taiwan and the eastern part of Fujian. Chinese fishermen have been working there for generations, but in recent years, Japan's coastguard has been increasingly active, confronting Taiwanese and Chinese fishing vessels, which makes the situation more complicated.[11]

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7 K.O. Emery, *Geological Structure and Some Water Characteristics of the East China Sea and the Yellow Sea*, CCOP TECHNICAL BULLETIN 41 (1969).

8 Energy Information Administration, *supra* note 3; *also see* Selig S. Harrison, *Seabed Petroleum in Northeast Asia: Conflict or Cooperation?* in SELIG S. HARRISON, (ED.), SEABED PETROLEUM IN NORTHEAST ASIA: CONFLICT OR COOPERATION? 5 (2005).

9 Energy Information Administration (EIA), *Country Analysis Briefs: South China Sea, available at* http://www.eia.gov/EMEU/cabs/East_China_Sea/pdf.

10 For example, China, Peru and Indonesia were the top producing countries in 2008. China remained by far the global leader with production of about 15 million tonnes. FAO, *supra* note 4, at 5.

11 AFP, *Fading Fish Stocks Driving Asian Sea Rivalries*, 15 November 2010.

III Solution: Cooperation as an Obligation

It is not the purpose of this article to define the term "global governance" as there are a variety of definitions on this subject. Instead, the author would like to use the concept of cooperation to describe the on-going processes of managing and conserving fishery resources. Such processes include international instruments, international organizations, and behavior of States.

1 *International Instruments*

Basically, the 1982 United Nations Convention on the Law of the Sea[12] (hereinafter cited as "UNCLOS") and the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks[13] (hereinafter cited as "UNFSA") provide certain possibilities on the regulation of cooperation among States in dealing with the issues of high seas fisheries.

One of the basic issues to be considered is the nature of the duty to cooperate. It is noteworthy that the duty to cooperate among States which applies whether they are amicable or antagonistic against each other, could be traced back to certain documents made more than three decades ago. In a declaration adopted by the General Assembly of the United Nations in 1970,[14] states that "States have the duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations..."

This duty can be characterized into one of two forms: a duty to enter into negotiations; and a duty to negotiate and to reach an agreement. Obviously, both duties of cooperation will require negotiations to be entered into in good faith. Moreover, the parties concerned shall be obliged to work together in good faith to attempt to reach an agreement, and to carry that agreement through to a successful conclusion.[15] Under such considerations, certain provisions regulated in the UNCLOS and the UNFSA embrace the spirit of cooperation.

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12 The UNCLOS entered into force on 16 November 1994 and there are 160 States which have ratified this Convention. *See,* Status of the Convention, *available at* http://www.un.org/Depts/los/reference_files/status2010.pdf.

13 The UNFSA entered into force on 11 December 2001 and there are 67 States which have ratified the Agreement. *Ibid.*

14 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA Res. 2625(XXV), 24 October 1970.

15 L. Guruswamy, *The Promise of the United Natins Convention on the Law of the Sea: Justice and Environmental Disputes*, 25 ECOLOGY LAW QUARTERLY 189 (1998), cited in STUART M. KAYE, INTERNATIONAL FISHERIES MANAGEMENT 111 (2001).

According to Article 118 of UNCLOS, States fishing on the same living marine resources or in the same area of the high seas shall cooperate in the conservation of these resources. With respect to straddling fish stocks and highly migratory species on the high seas, such obligation is supplemented with the special obligations of the relevant coastal States and States fishing for these stocks in adjacent areas of the high seas to cooperate for the conservation of these stocks.[16] Taking into consideration the practices in recent years from States and international organizations, these obligations have become part of international customary law.[17]

Part 3 of the UNFSA includes several provisions for mechanisms for cooperation on the conservation of straddling fish stocks and highly migratory species. Although the introductory paragraph of Article 8 seems to leave States a choice whether to cooperate directly or through regional or subregional fisheries management organizations or arrangements, the ensuing paragraphs place radical limitations on this freedom. Where there exists a fisheries management organization or an arrangement competent to regulate the fishery for a specific straddling fish stock or highly migratory fish stocks, those States fishing for the stocks on the high seas and the relevant coastal States shall become members of the organization or participants of the arrangement.[18]

States fishing for the stock on the high seas may choose not to join or participate but are then obligated to apply the management measures adopted by the organization or arrangement, in order to be entitled to fish on the stock.[19] If the straddling fish stock or highly migratory fish stocks is not subjected to the regulatory competence of any organization or arrangement, States fishing for the stock on the high seas and the relevant coastal States are obligated to establish either an organization or other appropriate arrangements.[20]

2 *International Organizations: Regional Fisheries Management Organizations*

In the absence of an effective centralized authority in dealing with the matters of fishing issues, then probably the regional fisheries organization is an alternative to secure sustainable conservation and management of transboundary

16 UNCLOS, Articles 63(2) and 64(1).

17 *Also see* TORE HENRIKSEN, GEIR HONNELAND, AND ARE SYDNES, LAW AND POLITICS IN OCEAN GOVERNANCE: THE UN FISH STOCKS AGREEMENT AND REGIONAL FISHERIES MANAGEMENT REGIMES 15 (2006).

18 UNFSA, Article 8(3).

19 UNFSA, Article 8(4).

20 UNFSA, Article 8(5).

marine resources. Such regional fisheries cooperation involves efforts by States to overcome collective action problems related to the use of shared and common fisheries. This cooperation arises when two or more States concerned identify a shared problem or goal which requires a common and cooperative solution. Such cooperation is often formalized through bilateral or multilateral agreements establishing principles, rules, procedures and institutional organizations for the implementation of cooperation between the parties. In many cases, these agreements are institutionalized by the formation of Regional Fishery Management Organizations (hereinafter cited as RFMOs).[21]

Most of the RFMOs operative in developing regions during the 1950s and 1960s were established at the initiative of the Food and Agriculture Organization of the United Nations (FAO). They were constituted with broad mandates to promote research, development and management, but without regulatory powers. Moreover, these organizations were established as development mechanisms, their operations dependent on funding from FAO and other donors. Thus, for the functions to be fulfilled, they relied heavily on the political will of members of the RFMOs to enforce regulations.[22]

Some scholars mention that the cooperative governance problem in marine resources management is to provide adequate means for meeting three major tasks: generation of adequate and reasonably consensual scientific knowledge to permit informed judgments about whether and how exploitation of resources shall be conducted; adoption of legitimate and appropriate regulatory measures to govern economic activities while taking heed of existing knowledge; and a system to promote compliance with such measures among those engaged in resource use in the area.[23] Therefore, the latter two problems, i.e., regulatory measures and compliance of the members, rely heavily upon members' positive practices.

Even so, some of the RFMOs had taken steps to improve their performance in managing and conserving marine living resources. The author shall take the Inter-American Tropical Tuna Commission (IATTC) for instance, to examine

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21 Are K. Sydnes, *Regional Fishery Organizations: How and Why Organizational Diversity Matters*, 32 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 350–351 (2001). *Also see*, Are K. Sydnes, *Regional Fisheries Organizations and International Fisheries Governance*, in SYMA EBBIN, ALF HOEL, AND ARE K. SYDNES (EDS.), A SEA CHANGE: THE EXCLUSIVE ECONOMIC ZONE AND GOVERNANCE INSTITUTIONS FOR LIVING MARINE RESOURCES 117–133 (2005).

22 Are K. Sydnes, *Regional Fishery Organizations in Developing Regions: Adapting to Changes in International Fisheries Law*, 26 MARINE POLICY 374 (2002).

23 Olav Schram Stokke, *Governance of High Seas Fisheries: The Role of Regime Linkages*, in DAVOR VIDAS AND WILLY OSTRENG (EDS.), ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY 159, 162–170 (1999).

its progress. IATTC was established in 1950 in accordance with the entry into force of the 1949 Convention for the Establishment of an Inter-American Tropical Tuna Commission.[24] After almost fifty years, it was decided that the IATTC (Commission) and the 1949 IATTC (Convention) should be strengthened and modernized to take into account recently adopted international instruments, such as UNCLOS, the 1992 Agenda 21 and Rio Declaration, the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, the 1995 FAO Code of Conduct for Responsible Fisheries, and the 1995 UNFSA.[25] An ad hoc Working Group was formed to review the 1949 Convention.[26]

The revising work was done in June 2003 with the adoption of an amended convention.[27] According to Article 10 of the Antigua Convention, a Committee for the Review of Implementation of Measures Adopted by the Commission is established to: (a) review and monitor compliance with conservation and management measures adopted by the Commission, as well as other cooperative measures; (b) analyze information and any other information necessary to carry out its functions; (c) provide the Commission with information, technical advice and recommendations relating to the implementation of, and compliance with, conservation and management measures; (d) recommend to the Commission means of promoting compatibility; (e) recommend to the Commission means to promote the effective implementation of the Antigua Convention; (f) in consultation with the Scientific Advisory Committee, recommend to the Commission the priorities and objectives of the program for data collection and monitoring of this Convention and assess and evaluate the results of that program; (g) perform other functions.[28]

Furthermore, Article 18 provides that Parties shall take the measures necessary to ensure the implementation of and compliance with the Antigua Convention and any conservation and management measures adopted pursuant thereto, including the adoption of the necessary laws and regulations. Also, Parties shall provide to the Commission all the information that may be

24 For 1949 Convention, *available at* http://www.iattc.org/PDFFiles/IATTC_convention_1949.pdf.

25 IATTC, *Resolution on the Establishment of a Working Group to Review the IATTC Convention*, June 1998.

26 *Ibid.*

27 Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention between the United States of America and the Republic of Costa Rica (also known as "Antigua Convention"). For full text, *available at* http://www.iattc.org/PDFFiles2/Antigua_Convention_Jun_2003.pdf.

28 Annex 3, Committee for the Review of Implementation of Measures Adopted by the Commission, Antigua Convention.

required for the fulfillment of the objective of the Antigua Convention, including statistical and biological information and information concerning its fishing activities in the Convention Area, and shall provide to the Commission information regarding actions taken to implement the measures adopted in accordance with the Antigua Convention.

Except for the actions made by the IATTC, other RFMOs take similar actions either by adopting resolutions or taking related measures so that the conservation and management measures could be achieved.[29]

From the aforementioned discussion, it might be safe to conclude that the RFMOs and arrangements are given exclusive competence to regulate the high seas fisheries of straddling fish stocks and highly migratory fish stocks.[30]

IV Regional Cooperation in the Semi-Enclosed Sea

In terms of geographical location, the East China Sea could be categorized as a "semi-enclosed sea", which is defined in Article 122 of UNCLOS as follows:

> "[E]nclosed or semi-enclosed sea" means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.

Because the East China Sea is semi-enclosed, any change in the ecosystem of the semi-enclosed sea will have significant impact on the whole area. It is generally recognized that the living resources in the East China Sea area migrate from one EEZ to another, particularly highly migratory species, such as tuna and other shared stocks. Each country may already have its own assessment of its living resources in its EEZ, assuming that the definition and delineation of

29 For example, on 27 December 2000, the International Commission for the Conservation of Atlantic Tunas (ICCAT) adopted a resolution under the title of *Supplemental Resolution by ICCAT to Enhance the Effectiveness of the ICCAT Measures to Eliminate Illegal, Unregulated and Unreported Fishing Activities by Large-Scale Tuna Longline Vessels in the Convention Area and Other Areas*. Under this resolution, the ICCAT Commission urged Japan and Taiwan to take the necessary measures to complete the scrapping of IUU vessels built in Japan and Taiwan.

30 Tore Henriksen, Geir Honneland, and are Sydnes, Law and Politics in Ocean Governance: The UN Fish Stocks Agreement and Regional Fisheries Management Regimes 16 (2006); Robin Churchill and A.V. Lowe, The Law of the Sea 309 (1999); F.O. Vicuna, *The International Law to High Seas Fisheries: From Unrestricted Freedom of Fishing to Sustainable Use*, in O.S. Stokke (ed.), Governing High Seas Fisheries 40–42 (2001).

each EEZ is clear. The problem is that many of those EEZ boundaries are not well defined or mutually agreed upon by the relevant parties. Likewise, there are various conflicting claims to islands that complicate and defer the determination of the EEZ boundaries. For this reason, many experts and scholars are convinced of the need to cooperate on the assessment of the living resources in the East China Sea area without regard to jurisdictional boundaries. The basis for this endeavor would be Article 123 of UNCLOS regarding enclosed and semi-enclosed seas. UNCLOS has foreseen this problem, since Article 123 provides:

> States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organisation:
> (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;
> (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
> (c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
> (d) to invite, as appropriate, other interested States or international organisations to cooperate with them in furtherance of the provisions of this article.

Therefore, all parties concerned should be aware that fish are migratory and fishery resources are exhaustible, so that rational use of the East China Sea and the preservation of its marine environment are important to all parties. Thus, cooperation among littoral States in the region is essential. In order to avoid overfishing or depletion of resources, conservation measures have to be taken. Such measures are not possible without regional cooperation and require close coordination among the parties concerned, especially in a semi-enclosed sea.

Indeed, a semi-enclosed sea concept could conceivably provide the catalyst to promote cooperation and coordination of the management of resources in the disputed region.[31] Under such circumstances, for all the littoral States to make boundary delimitation issue the first priority seems unwise. Rather, concentrating upon their common interests will be an essential motivation to resolve conflicts rationally.

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31 Lee G. Cordner, *The Spratly Islands Dispute and the Law of the Sea,* 25 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 71 (1994).

Fishery cooperation could be the most feasible course of action for the littoral States since through cooperation, fishery resources could be properly conserved and managed such that economic waste and over-exploitation may be avoided. Cooperation in the utilization of fishery resources is a feasible and practical way to start a regional cooperation regime. It sidesteps the issue of sovereignty and focuses upon a common interest, namely the utilization of living resources. It also defers long-term negotiations with respect to delimitation of the continental shelf relating to the hydrocarbon resource issue. Thus, as cooperative relationships are forged with regard to fishery resources, mutual confidence will build among the various parties that may eventually contribute to successful cooperation with respect to hydrocarbon resources. Fishery resources management is crucial in preventing over-exploitation or overfishing and may be a touchstone of the littoral States' sincerity.

Without affecting jurisdictional boundaries as laid down in the UNCLOS, it is certainly possible to have regional joint fishery management in the East China Sea as the starting point for further cooperation. If all States in this region treat cooperation as a key step toward achieving mutual benefit, then the future for such a regional cooperation mechanism is assured.

V Pursuing Sustainable Fisheries

Fishing or fishery is a vital aspect of the world's diet, economy, and biodiversity. However, overwhelming evidence shows that these crucial uses of the marine world are in danger. Under such circumstances, the depletion of fishery resources is not a crisis for food, but also a crisis for environment.

The history of high-seas fisheries management over the last 150 years can be classified into three phases. The first phase, up until the early 1970s, saw a rapid increase in both the number of fishing vessels operating in the individual oceans and advances in technology which allowed greater catches. The phase was characterized by generally narrow coastal State maritime zones and large areas of high seas. Also, a considerable proportion of fisheries in the high seas fell under the jurisdiction of international or regional fishery commissions by the mid-1970s. The second phase, the period from the mid-1970s up until the early 1990s, reflected the developments and negotiations of the Third United Nations Conference on the Law of the Sea. Owing to the practices on claiming exclusive economic zone from countries, coastal States extended their jurisdiction out to 200 nautical miles so that many areas (and fisheries) that were previously classified as high seas came under national jurisdiction. The area defined as high seas was thus considerably reduced and consequently so was the area under the jurisdiction of regional and international

fisheries commissions. Since the mid-1990s, high-seas fisheries management has entered its third phase. This phase reflects the international community's concerns about overfishing in the high seas. Even greater emphasis has been placed on the international duties and responsibilities of all nations in the conservation of ocean resources, as well as the importance of cooperation between States both adjacent to the fisheries and those exploiting them.[32]

For the purposes of conserving and managing marine living resources, traditional thought on *utilization* should be transformed to *sustainability*. In order to reach this object, "sustainable development" is one of the main policy bases, under which sustainable development is the development that "meets the needs of the present generation without compromising the ability of future generations to meet their own needs".[33] Governments should take this position in making the fishery policy, but not concentrate on increasing fishing capacity or the amount of fishing, especially when the FAO reiterates the serious situation in the 1999 International Plan of Action for the Management of Fishing Capacity.[34]

Following on the concept of sustainable development of fisheries, another consideration that should be taken when making policy on fisheries is the "precautionary approach". The concept of the precautionary approach developed in the mid-1980s and in regional legal instruments for the protection of the terrestrial, and subsequently marine, environment, and finally enshrined in Principle 15 of the 1992 Rio Declaration,[35] which states:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Based on the precautionary approach, the UNFSA not only includes this approach as a kind of duty to cooperate,[36] but also demands the application of the precautionary approach. This can be seen from Article 6 of the UNFSA:

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32 Sevaly Sen, *The Evolution of High-Seas Fisheries Management in the North-East Atlantic*, 35 Ocean & Coastal Management 85–86 (1997).

33 World Commission on Environment and Development, Our Common Future 43 (1987).

34 Rosemary Rayfuse, *The Challenge of Sustainable High Seas Fisheries*, in Nico Schrijver and Friedl Weiss (eds.), International Law and Sustainable Development: Principles and Practice 469–477 (2004).

35 Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992, A/CONF.151/26 (Vol. I), 12 August 1996.

36 UNFSA, Article 5(c).

1. States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment.
2. States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.
3. In implementing the precautionary approach, States shall:
   (a) improve decision-making for fishery resource conservation and management by obtaining and sharing the best scientific information available and implementing improved techniques for dealing with risk and uncertainty; …

Such consideration has to be taken into account when a natural phenomenon has a significant adverse impact on the status of straddling fishing stocks or highly migratory fish stocks, States shall adopt conservation and management measures on an emergency basis to ensure that fishing activity does not exacerbate such adverse impact. States shall also adopt such measures on an emergency basis where fishing activity presents a serious threat to the sustainability of such stocks.[37]

Policy assessment is one of the most important parts in a policy-making circle. During the period of focusing on economic development and trading, exploring the marine living resources and increasing the production might be the right choice. However, under a globalized world, it is hard to distinguish the complicated web of influence between trade and environment. So is the fishery. Nonetheless, since we are in the phase of conserving and managing fishery resources, and international instruments and RFMOs have already embedded the concepts of sustainability and precaution into the fishery activities, then it might be the right time and right choice to adjust fisheries policy bases to a more environmental deliberation. Moreover, States bordering the semi-enclosed sea should have responsibilities to embed the consideration of regional cooperation into its national ocean policy.

1 *A Positive Development: Taiwan-Japan Fisheries Agreement*

After Japan announced its nationalization of Diaoyutai/Senkaku Islands on 11 September 2012, the tension in the East China Sea has been on the verge of breaking out into a serious conflict. In responding to Japan's announcement, China and Taiwan issued tough statements against Japan's action.

37 UNFSA, Article 6(7).

China's foreign minister Yang said that the "moves taken by Japan are totally illegal and invalid", he said. "They can in no way change the historical fact that Japan stole Diaoyu and its affiliated islands from China and the fact that China has territorial sovereignty over them". He continually said that the Japanese government had "grossly violated China's sovereignty".[38]

Also, Taiwan's Foreign Ministry lodged a strong protest against Japan, calling the island purchase an "extremely unfriendly move" that "not only harms the longtime cooperation between Taiwan and Japan but will also aggravate regional tensions in East Asia".[39]

Seven months later, the conclusion of the Taiwan-Japan Fisheries Agreement on 10 April 2013 (hereinafter cited as "the Agreement") was a development considered as a way to defuse the tension,[40] because Taiwan and Japan were trying to solve the dispute through a more pragmatic way. Furthermore, a more detailed examination of the provisions in the Agreement show that it conforms to the spirit of 'provisional arrangements' provided for in UNCLOS.

The background for finalizing the Agreement is mixed with international politics as well as international law significance. In terms of international politics, the East China Sea has always been an important strategic sea lane and Diaoyutai/Senkaku Islands play a key role in this context. Japan wants to protect its strategic interests in the East China Sea and tries to prevent Taiwan from cooperating with China while the conflict between Japan and China remained. In addition, the influence from the United States should not be ignored. Both Japan and Taiwan are important to the United States in guarding its rebalancing strategy in East Asia.[41] Under such circumstances, the joint fisheries cooperation between Taiwan and Japan would be a positive way to ease off the tension as well as maintain US strategic interests.

As far as resources management is concerned, it is understandable that any change in the ecosystem of the semi-enclosed East China Sea would have significant impact on the whole area. In addition, it also demonstrated the need

38 *Japan and China Trade Barbs over Islands at UN*, BBC NEWS, 28 September 2012, *available at* http://www.bbc.com/news/world-asia-19754353.

39 *China Sends Patrol Ships to Islands Held by Japan*, THE SEATTLE TIMES, 12 September 2012, *available at* http://www.seattletimes.com/nation-world/china-sends-patrol-ships-to-islands-held-by-japan/.

40 The Library of Congress, *Japan; Taiwan: Landmark Fishing Agreement, available at* http://www.loc.gov/law/foreign-news/article/japan-taiwan-landmark-fishing-agreement; and http://www.mofa.gov.tw/Upload/WebArchive/979/The%20Taiwan-Japan%20Fisheries%20Agreement%20(illustrated%20pamphlet).PDF.

41 For "rebalancing strategy", *see* Robert G. Sutter, Michael E. Brown, and Timothy J. A. Adamson, *Balancing Acts: The U.S. Rebalance and Asia-Pacific Stability*, August 2013, *available at* https://www2.gwu.edu/~sigur/assets/docs/BalancingActs_Compiled1.pdf.

to cooperate on the conservation and management of the living resources in the East China Sea region without regard to sovereignty claims or maritime boundaries. The basis for this endeavor would be the practices of provisional arrangements in Articles 74(3) and 83(3), as well as the rights and duties for States boarding semi-enclosed seas to cooperate on coordinating the management, conservation, exploration and exploitation of the living resources in Article 123 of UNCLOS.

Four parts included in the Taiwan-Japan Fisheries Agreement are in accordance with those provisions mentioned above:[42]

1. **Object of the Agreement:** The purpose is to promote conservation and utilization of marine living resources in the overlapping exclusive economic zone between Taiwan and Japan. In other words, the Agreement touches upon the sovereign rights issues as well as promoting the management of living resources, such as tuna, billfish, bonito, and mackerel. It does not refer to the sovereignty issue over Diaoyutai/Senkaku Islands.
2. **Fisheries Cooperation Area:** The Agreement will be applicable to a Designated Zone which is south of 27 degrees north latitude and north of Japan's Yaeyama Islands and Miyako Islands, covering an area of 74,000 square kilometers. (See Map 1) Two sub-areas are allocated as follows:
   - 2.1 **Waters where the other party's laws are not applicable:** After entry into force of the Agreement, one party's fisheries laws and regulations will not be applicable to the other party's fishing activities. In other words, fishing activities are governed by each party's national laws and regulations. Any intervention from the other party shall not be allowed.
   - 2.2 **A special cooperation zone:** In an area within the Designated Zone where disputes frequently arise between fishing vessels from both parties, a special cooperation zone has been created. Both parties cooperate under the principles of equality and reciprocity with regards to fishing operations in this area. Details concerning this arrangement will be discussed by a Taiwan-Japan Fishery Committee formed from the Agreement.
3. **Management Body:** The Taiwan-Japan Fishery Committee was created and held its first meeting in Taipei on 7 May 2013,[43] in accordance with

42 Dustin Kuan-Hsiung Wang, *Taiwan-Japan Fisheries Agreement: Light at the End of a Dark Tunnel*, 1 (1) ASIA-PACIFIC JOURNAL OF OCEAN LAW AND POLICY 127–130 (2016).

43 Up to this date, five meetings have been carried out. The second meeting was in Tokyo on 26 December 2013; the third meeting was in Taipei on 23 January 2014; the fourth one was back to Tokyo on 7 March 2015; and the fifth one was on 2 March 2016 in Taipei.

the provisions of the Agreement. This committee is an institutionalized joint management mechanism created with aiming to maintain order in fishing operations and preserve the living resources in the Designated Zone.

4. **Without-Prejudice Clause:** Both parties consented to the inclusion of a without-prejudice clause to ensure that the provisions of the Agreement do not undermine their position on and interpretation of international law regarding its sovereignty and maritime claims, affirming their consistent position on the issue of sovereignty claims.

In terms of legal significance, the Taiwan-Japan Fisheries Agreement is a positive contribution in State practice fulfilling the spirit of UNCLOS, especially the concept of provisional arrangements.

According to the Agreement, the maritime area of 12 nautical miles surrounding the Diaoyutai/Senkaku Islands is excluded from the cooperation mechanism in the Designated Zone. This is an arrangement of "shelving sovereignty disputes" and focusing on living resources joint cooperation matters, which conforms to the spirit of joint development. However, the sovereignty issue over those islands will be subject to future negotiations rather than changing or even giving up the position on sovereignty claims. The Agreement itself is a great progress not only in stabilizing the tension in the East China Sea, but also in realizing the term 'provisional arrangements' provided in UNCLOS in Articles 74(3) on EEZ delimitation and 83(3) on continental shelf delimitation.

Moreover, under the UNCLOS framework, a semi-enclosed sea could conceivably provide the catalyst to promote cooperation and coordination of the management of resources in the East China Sea. Concentrating upon common interests will provide the essential motivation to resolve the conflicts rationally. Hence, fishery cooperation would be a feasible course of action for the parties concerned since through cooperation, fishery resources could be properly conserved and managed so that the resources could be utilized in a sustainable way. The Agreement is a good start for sustaining peace in the East China Sea. It focuses on the fisheries issue and puts aside territorial sovereignty or maritime delimitation considerations, which is a praise worthy move made by both Taiwan and Japan. It is also a remarkable practice of 'provisional arrangements' stipulated in the UNCLOS.

The discussion were mainly on the issues of reducing fishery conflicts between fishermen from both sides through setting fishing regulations as well as communication measures.

VI Conclusion

Under the circumstances that EEZ has become customary international law, all States, especially those in the region of the East China Sea, had claimed different maritime zones to extend their jurisdiction over living and non-living resources of these zones. This then is the central element with regard to the disputes in the region. There are three motivating factors behind the conflicts: the first one relates to strategic or political concerns, whilst the other two relate to resource utilization or economic considerations. These factors are interrelated, which further complicates the disputes. However, such situation should not prevail over the consideration of resolving the issue from a pragmatic viewpoint. The idea of cooperation has gradually come to play an important role in a semi-enclosed region like the East China Sea. For this reason, building up an East China Sea RFMO could be the starting step and the newly concluded Taiwan-Japan Fisheries Agreement might be a pilot project. Not only for the fact that fish migrates without regard to State borders and needs careful conservation and management, but also for possibility that the successful experience might spill-over into other controversial issues. Unless a State is ready to go to war over its *terra irredenta*, the best solution is the will to arrive at a non-boundary-based settlement that guarantees peace and progress for all parties concerned.

Framework for the Joint Development of Hydrocarbon Resources

*Robert Beckman and Leonardo Bernard**

1 Introduction

The Exclusive Economic Zone (EEZ) regime under Part V of the 1982 United Nations Convention of the Law of the Sea (UNCLOS)[1] grants coastal States exclusive rights to explore and exploit the natural resources, whether living and non-living (including minerals and hydrocarbon resources), of the seabed and its subsoil, and sovereign rights with regard to other activities for the economic exploitation of the zone. The EEZ may extend up to 200 nautical miles (M) from the territorial sea baseline.[2] When the EEZ regime was established by the Third United Nations Conference on the Law of the Sea,[3] it placed 87 per cent of the world's known offshore hydrocarbon fields under coastal State jurisdiction.[4] This prompted coastal States to maximize their maritime zones claims, either through EEZ claims or through extended continental shelf claims.

In situations where there are a number of claimants with maritime claims to the same geographic area, it may be difficult for the disputes to be resolved through negotiation, especially if sovereignty disputes over land territory are

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* In writing the present article, we have drawn on some works which have been published in BECKMAN, ET AL, (EDS.), BEYOND TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: LEGAL FRAMEWORK FOR THE JOINT DEVELOPMENT OF HYDROCARBON RESOURCES (2013), especially works by Gavin Maclaren and Rebecca James, *Negotiating Joint Development Agreements*, at 139–144 and by David Ong, *Implications of Recent Southeast Asian State Practice for the International Law on Offshore Joint Development*, at 192–193.

1 United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) [UNCLOS]. As of 19 February 2013, UNCLOS has 165 parties (including the European Union), with Timor Leste being the most recent State to accede on 8 January 2013.

2 UNCLOS, *ibid,* Art. 56(1)(a).

3 The conference held its first session in 1973, and worked for several months each year until it finally adopted a convention in 1982.

4 United Nations, *The United Nations Convention on the Law of the Sea* (*A Historical Perspective*), *available at* http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm.

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also involved. The possibility of offshore hydrocarbon deposits being situated in areas of overlapping claims adds to the complexity of the disputes. In order to exploit these hydrocarbon resources, petroleum companies need to be confident that their investment will not be adversely affected by uncertainty as to which State or entity has jurisdiction to grant licenses or leases in the area. A long period of legal stability is therefore essential for petroleum companies.

This article demonstrates that international law imposes certain rights and duties in relation to exploitation of hydrocarbon resources in overlapping claim areas. These rights and duties constrain the conduct of the claimants in their exploration and exploitation of such resources. It argues that under both UNCLOS and general international law, States are obliged to cooperate with each other in the management of resources in overlapping claim areas, either through Joint Development Arrangements (JDAs) or other forms of provisional arrangements pending resolution of the maritime boundaries. The article then sets out the legal framework for JDAs for the exploration and exploitation of hydrocarbon resources under UNCLOS, before examining the preparation process and the circumstances in which joint development may be desirable. It also discusses the various models for JDAs. Finally, the article concludes with an overview of the challenges facing JDAs.

II UNCLOS and JDAS

UNCLOS establishes a legal framework to govern all uses of the oceans. It has no provisions on how to resolve sovereignty disputes over offshore features. However, it does contain provisions on the nature and extent of the maritime claims that can be made from land territory and offshore features. Under UNCLOS, coastal States have sovereignty over their land territory as well as over a 12 M belt of sea adjacent to their coast called the territorial sea,[5] albeit this is subject to the passage regimes in UNCLOS and to other rules of international law.[6] A coastal State is also entitled to a contiguous zone extending out to 24 M from the baselines from which the territorial sea is measured.[7] In the

5 UNCLOS, *supra* note 1, Arts. 2 and 3.

6 UNCLOS, *supra* note 1, Art. 17. Article 17 provides that the ships of all States have a right of innocent passage through the territorial sea.

7 UNCLOS, *supra* note 1, Art. 33.

contiguous zone, a coastal State has the right to enforce violations of its customs, fiscal, immigration and sanitary laws.[8]

One of most important features of UNCLOS is that it gives coastal States sovereign rights to explore and exploit natural resources adjacent to its territorial sea in two resource zones – the EEZ and the continental shelf. First, coastal States have the right to establish an EEZ extending to 200 M from the baselines from which their territorial sea is measured.[9] In the EEZ, a coastal State has sovereign rights for the purpose of exploring and exploiting the living and non-living natural resources of the seabed and its subsoil and of the waters superjacent to the seabed.[10]

Second, coastal States also have sovereign rights to explore and exploit the natural resources of the continental shelf.[11] The extent of a coastal State's continental shelf was one of the most heavily debated topics during the negotiations in the Third UN Conference on the Law of the Sea. The Conference finally agreed to a 200 M limit from the coastline.[12] However, States with a broad continental shelf off their coasts, through a complex assessment mechanism, may extend their sovereign rights claim to the resources of their continental shelf up to 350 M from their coastline or to the outer edge of the continental margin.[13] Claims to an extended continental shelf beyond 200 M (referred to as "outer continental shelf"), however, must be submitted to and accepted by the Commission on the Limits of the Continental Shelf (CLCS).[14]

As mentioned above, UNCLOS also allows States to claim maritime zones from islands under their sovereignty. Article 121(1) defines an "island" as "a naturally formed area of land, surrounded by water, which is above water at high tide".[15] Islands which are capable of sustaining human habitation or an economic life of their own are entitled to a territorial sea, contiguous zone, EEZ and continental shelf.[16] "Rocks" fall within the definition of an island.

8 UNCLOS, *supra* note 1, Art. 33 (1).

9 UNCLOS, *supra* note 1, Art. 57.

10 UNCLOS, *supra* note 1, Art. 56.

11 UNCLOS, *supra* note 1, Art. 77.

12 UNCLOS, *supra* note 1, Art. 76(1).

13 UNCLOS, *supra* note 1, Art. 76(5).

14 UNCLOS, *supra* note 1, Art. 76(8); as of May 2013, 65 countries have put in their submissions to the CLCS, and the CLCS has issued 18 recommendations. *See,* Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to Article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982, *available at* http://www.un.org/depts/los/clcs_new/commission_submissions.htm.

15 UNCLOS, *supra* note 1, Art. 121(1).

16 UNCLOS, *supra* note 1, Art. 121(2). For further discussion on rocks and islands, *see The Republic of the Philippines v. The People's Republic of China*, Award on the Merits of 12 July 2016, at 204–260, *available at* http://www.pcacases.com/web/view/7.

However, Article 121(3) provides that rocks which cannot sustain human habitation or economic life of their own shall have no EEZ or continental shelf.[17]

A *UNCLOS Provisions on Boundary Delimitation and Provisional Arrangements*

The drafters of UNCLOS recognized that there would be instances where claims to maritime space would overlap. UNCLOS therefore has provisions on the delimitation of overlapping territorial sea,[18] EEZ[19] and continental shelf claims.[20] For purposes of this article, the provisions on delimitation of the EEZ and continental shelf are the most salient. Articles 74(1) and 83(1), which are identical, state that:

> The delimitation of the [continental shelf/EEZ] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

Over the subsequent years, international courts and tribunals have attempted to articulate the method by which the delimitation should be determined in order to reach an equitable solution. Some international courts and tribunals have described the method provided for in UNCLOS Articles 73 and 84 as the "equitable principles-relevant circumstances method".[21] In the *Libya/Malta* decision, the ICJ explained that the equidistance method may be applied if it leads to an equitable solution.[22] The ICJ went further in the *Qatar/Bahrain* decision, stating that for the delimitation of maritime zones beyond 12 M, it would first draw a provisional equidistance line before considering whether there are circumstances that require an adjustment of that line.[23]

In the 2009 *Black Sea Case* between Romania and Ukraine, the ICJ introduced a three stage approach to maritime delimitation: (i) establish a provisional equidistance line; (ii) consider whether there any factors which call for

17 UNCLOS, *supra* note 1, Art. 121(3).

18 UNCLOS, *supra* note 1, Art. 15.

19 UNCLOS, *supra* note 1, Art. 74.

20 UNCLOS, *supra* note 1, Art. 83.

21 *See*, for example, *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria; Equatorial Guinea intervening) [2002] ICJ Reports 303 at para. 288.

22 *Continental Shelf* (*Tunisia/Libyan Arab Jamahiriya,* (1982) ICJ Reports, at para. 62 [*Tunisia/Libya*].

23 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain,* Merits, Judgment (2001) ICJ Reports 40, at para. 176.

an adjustment of the equidistance line to reach an equitable result; and (iii) verify that that line does not lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coast lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line.[24] The International Tribunal for the Law of the Sea (ITLOS) also confirmed this approach as the preferred method for delimitation of the EEZ and continental shelf in its recent decision regarding delimitation of the EEZ and outer continental shelf between Bangladesh and Myanmar.[25]

However, while international case law has attempted to clarify the international rules governing the delimitation of maritime boundaries, there is still room for differing interpretations as to how to draw the provisional median line and which factors should be taken into account in order to adjust that provisional median line. The inherent nature of the sovereign rights of the coastal States over their continental shelf adds to the problems of delimiting areas of overlapping claims,[26] since all such claims over continental shelf are presumably valid due to the coastal States' inherent sovereign rights.[27] Thus, States have a choice between settling the boundary, which may require long negotiations during which time the resources of the disputed area are not exploited, and cooperating to jointly develop the resources while setting aside the boundary dispute.[28]

B *Nature of Obligation to Negotiate "Provisional Arrangements of a Practical Nature"*

UNCLOS caters for the fact that it may be extremely difficult for States to reach agreement in areas of overlapping EEZ and continental shelf claims; and it purports to provide a temporary solution to this situation in paragraph 3 of Articles 74 and 83. These interim solutions include a moratorium on resource exploitation pending final delimitation and an obligation on States concerned

24 *Maritime Delimitation in the Black Sea* (*Romania v Ukraine*) (2009) ICJ Reports 61, at paras. 116–122.

25 *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (2012) Judgment, ITLOS Case No 16 [*Bangladesh/Myanmar*] at para. 455, *available at* http://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR.140-E.pdf.

26 Prosper Weil, The Law of Maritime Delimitation – Reflections 9–14 (1989).

27 Peter C. Reid, *Petroleum Development in Areas of International Seabed Boundary Disputes: Means for Resolution* 8 Oil & Gas Law & Taxation Review 214, 215 (1984–85).

28 Fox et al, Joint Development of Offshore Oil and Gas: A Model Agreement for States with Explanatory Commentary 39 (1989).

to take every effort to make "provisional arrangements" in the interim.[29] It provides that if delimitation cannot be effected by agreement:

> [T]he States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during the transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.[30]

Provisional arrangements under UNCLOS share a common goal with the provisional measures powers of the United Nations Security Council, this being to prevent aggravation of a situation in dispute.[31] The provision is designed to "promote interim regimes and practical measures that could pave the way for provisional utilization of disputed areas pending delimitation" and "constitutes an implicit acknowledgement of the importance of avoiding the suspension of economic development in a disputed maritime area".[32]

There are three aspects to the obligation contained in UNCLOS Articles 74(3) and 83(3). First, States should make every effort to enter into provisional arrangements of a practical nature. This imposes on parties a "duty to negotiate in good faith"[33] and to take "a conciliatory approach to negotiations in which they would be prepared to make concessions in the pursuit of a provisional arrangement".[34] Second, during this transitional period before there is final agreement on the boundaries, States are obliged not to jeopardize or hamper the reaching of a final agreement on delimitation. International courts and tribunals have found that any activity which represents an irreparable prejudice to the final delimitation agreement is a breach of this obligation.[35] Third, provisional arrangements of a practical nature are "without prejudice to the final delimitation".[36]

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29 *Ibid.,* at 34.

30 UNCLOS, *supra* note 1, Arts. 74(3) and 83(3); *Guyana/Suriname Arbitration*, UN Law of the Sea Annex VII Arb Trib, award on 17 September 2007, at para. 461, *available at* http://www.pca-cpa.org/upload/files/Guyana-Suriname%20Award.pdf; *see also,* Ranier Lagoni, *Interim Measures Pending Maritime Delimitation Agreements,* 78 AJIL 345 (1984) at 358.

31 United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Art. 40, *available at* http://www.unhcr.org/refworld/docid/3ae6b3930.html.

32 *Guyana/Suriname Arbitration*, *supra* note 30, at para. 460.

33 *Ibid.,* para. 460.

34 *Ibid.*, at paras. 471–478.

35 *Ibid.,* at para. 480.

36 UNCLOS, *supra* note 1, Arts. 74(3) and 83(3); *Guyana/Suriname Arbitration*, *supra* note 30; *see also,* Lagoni, *supra* note 30, at 358.

The obligation of States to make every effort to enter into provisional arrangements of a practical nature has been succinctly summarized by scholars:

> The States concerned are obliged to "enter into negotiations with a view to arriving at an agreement" to establish provisional arrangements of a practical nature and … "not merely to go through a formal process of negotiation." The negotiations are to be "meaningful, which will not be the case when either [state] insists upon its own position without contemplating any modification of it." However, the obligation to negotiate does not imply an obligation to reach agreement …[37]

This view was endorsed in the 2007 arbitration between Guyana and Suriname by an Arbitral Tribunal constituted under Annex VII of UNCLOS.[38] While it was acknowledged that the language "every effort" leaves "some room for interpretation by the States concerned, or by any dispute settlement body", it imposes on the parties to the dispute "a duty to negotiate in good faith". This requires the parties to take "a conciliatory approach to negotiations, pursuant to which they would be prepared to make concessions in the pursuit of a provisional arrangement".[39] Further, the obligation to negotiate in good faith "is not merely a nonbinding recommendation or encouragement but a mandatory rule whose breach would represent a violation of international law".[40]

The second part of the obligation provides that during this transitional period States are obliged not to jeopardize or hamper the reaching of a final agreement on delimitation. It is said that a court or tribunal's interpretation of this obligation must reflect the delicate balance between preventing unilateral activities that affect the other party's rights in a permanent manner but, at the same time, not stifling the parties' ability to pursue economic development in a disputed area during a time-consuming boundary dispute.[41]

International courts and tribunals have found that "any activity which represents an irreparable prejudice to the final delimitation agreement"[42] is a breach of this obligation and that "a distinction is to be made between activities of the kind that lead to a permanent physical change, such as exploitation of oil and gas reserves, and those that do not, such as seismic exploration".[43] For example, in the *Guyana/Suriname Arbitration* it was found that allowing

37 Lagoni, *supra* note 30, at 356.
38 *Guyana/Suriname Arbitration*, *supra* note 30, para. 461.
39 *Ibid.*
40 Lagoni, *supra* note 30, at 354.
41 *Guyana/Suriname Arbitration*, *supra* note 30, at para. 470.
42 Lagoni, *supra* note 30, at 366.
43 *Guyana/Suriname Arbitration*, *supra* note 30, at para. 467.

exploratory drilling in disputed waters was a breach of the obligation to make every effort not to hamper or jeopardize the reaching of a final agreement as this could result in a physical change to the marine environment and engenders a "perceived change to the status quo".[44] This was in contrast to seismic testing, which did not cause a physical change to the marine environment.

However, it is clear that States are under no obligation to enter into any provisional arrangement but must only "make every effort" to negotiate in good faith. Articles 74(3) and 83(3) also do not mandate the type of provisional arrangements States can enter into, but leave it to the discretion of the States concerned.[45] Provisional arrangements can include a wide variety of arrangements such as mutually agreed moratoriums on all activities in overlapping areas,[46] joint development or cooperation on fisheries,[47] joint development of hydrocarbon resources,[48] agreements on environmental cooperation[49] and agreements on allocation of criminal and civil jurisdiction.[50] The term "arrangements" implies that the arrangement can include both informal documents such as Notes Verbale, Exchange of Notes, Agreed Minutes, or Memorandum of Understanding (MOU); as well as more formal agreements, such as treaties.[51] With regard to the meaning of "a practical nature", Articles 74(3)

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44 *Guyana/Suriname Arbitration*, *supra* note 30, at para. 480.

45 Natalie Klein, *Provisional Measures and Provisional Arrangements in Maritime Boundary Disputes* (2006) 21 International Journal of Marine and Coastal 423, 444 (2006); *see also,* Sun Pyo Kim, Maritime Delimitation and Interim Arrangements in North East Asia 94 (2004).

46 *Maritime Delimitation Treaty between Jamaica and the Republic of Colombia*, 12 November 1993, Article 3, *available at* http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/JAM-COL1993MD.PDF.

47 *Agreement on Fisheries between the Republic of Korea and the People's Republic of China,* 3 August 2000 (entered into force 30 June 2001), reprinted in Kim, *supra* note 45, at 347.

48 *Memorandum of Understanding between Malaysia and the Kingdom of Thailand on the Establishment of a Joint Authority for the Exploitation of the Resources in the Sea-Bed in a Defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand*, 21 February 1979 (entered into force 24 October 1979), reprinted in David M Ong, *Thailand/Malaysia: The Joint Development Agreement 1990*, 6 International Journal of Marine and Coastal Law 57, 61 (1990).

49 *Agreement between the Government of Jamaica and the Government of the Republic of Cuba on the Delimitation of the Maritime Boundary between the Two States*, 18 February 1994, Article 5, reprinted in 34 Law of the Sea Bulletin, Division of Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, at 64.

50 *Agreement between the Government of the Kingdom of Thailand and the Government of Malaysia on the Constitution and Other Matters relating to the Establishment of the Malaysia-Thailand Joint Authority*, 30 May 1990.

51 Kim, *supra* note 45, at 47. Kim notes that "some States may prefer MOUs to formal agreements for provisional arrangements because these have some advantages in several aspects: no need to publish them as these are not treaties; no need for elaborate final

and 83(3) do not give much guidance, but have been interpreted to mean that such arrangements "are to provide practical solutions to actual problems regarding the use of an area and are not to touch upon either the delimitation issue itself or the territorial questions underlying this issue".[52]

The use of the word "provisional" implies that the arrangements are interim measures pending the final delimitation of maritime boundaries.[53] Also, the provisional arrangements are "without prejudice" to the final delimitation of the maritime boundary. This means that nothing in the arrangement can be deemed as a renunciation of the claim of any party to sovereignty over the features or sovereign rights in the surrounding waters. Also, the provisional arrangement does not constitute an explicit or implicit acknowledgement of the legitimacy of the claim of any other party.[54]

C *Joint Development Arrangements as a "Provisional Arrangement"*

The concept of joint development of hydrocarbon resources appears to have emerged in the 1950s.[55] However, despite considerable State practice since that time, there is no common or uniform definition of joint development of hydrocarbon resources.[56] It is usually used as a "generic term"[57] and extends from *unitization* of a single resource straddling an international boundary to joint development of a shared resource where boundary delimitation is shelved

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clauses or the formalities surrounding treaty-making; easy amendment; and no need to be submitted for an approval of the parliament"; *see also,* Lagoni, *supra* note 30.

52 Lagoni, *supra* note 30, at 358.

53 Lagoni, *supra* note 30, at 356.

54 *See for example, Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia,* 11 December 1989 [1991] ATS 9, Article 2(3), (entered into force 9 February 1991) [Timor Gap Treaty]; *generally, see also,* Gao Zhiguo, *Legal Aspects of Joint Development in International Law*, in M KUSUMA-ATMADJA, T MENSAH AND B OXMAN (EDS.), SUSTAINABLE DEVELOPMENT AND THE PRESERVATION OF THE OCEANS: THE CHALLENGES OF UNCLOS AND AGENDA 21*, Proceedings of the Law of the Sea Institute's Twenty-Ninth Annual Conference, Denpasar, Bali, Indonesia, 19–22 June 1995,* 639 (1997).

55 Fox et al, *supra* note 28, at 54.

56 Thomas Mensah, *Joint Development Zones as an Alternative Dispute Settlement Approach in Maritime Boundary Delimitation,* in RANIER LAGONI AND DANIEL VIGNES (EDS.), MARITIME DELIMITATION 143–153, 146 (2006). For example, Mensah states that "some scholars seek to distinguish between, on the one hand, 'unitization of shared resources' which they describe as an arrangement under which 'a single resource straddling an international boundary is developed subsequent to agreement without reference to such boundary' and on the other, joint development properly so called which they define as 'a regime under which the entire boundary dispute is set aside, thus creating an ambient development of political cooperation from the outset.'"

57 Fox et al, *supra* note 28, at 43.

because it is not feasible or possible to reach agreement on a boundary at the time.

There is no doubt that JDAs are a type of "provisional arrangement of a practical nature". Their legal basis stems from Articles 74(3) and 83(3) of UNCLOS. Indeed, they appear to be the most commonly used arrangements for overlapping claim areas. International courts and tribunals have also endorsed joint development agreements as an alternative to maritime delimitation.[58] For example, in the *North Sea Continental Shelf Cases*, the ICJ held that joint exploration agreements were "particularly appropriate when it is a question of preserving the unity of a deposit" in areas of overlapping claims.[59] In his dissenting opinion in the 1982 continental shelf delimitation case between *Tunisia and Libya,* Judge *ad hoc* Evensen proposed a system of joint exploration of petroleum resources based on his view that joint development represented an alternative equitable solution to the maritime boundary dispute which was eventually adopted by the parties.[60] In the *Eritrea/Yemen Arbitration*, the Arbitral Tribunal stated that the parties should give every consideration to the shared or joint or unitized exploitation of any such resources.[61]

There has been considerable doctrinal debate on whether there exists an obligation to enter into JDAs.[62] However, while JDAs are a useful mechanism, it appears clear that States do not have a specific duty to enter into JDAs in areas of overlapping claims. First, there is no provision in UNCLOS which specifies this obligation. Articles 74(3) and 83(3) leave it to the discretion of the States as to what type of provisional arrangement they enter into and, again, the States are merely under an obligation to negotiate in good faith. Article 123 provides that States bordering an enclosed or semi-enclosed sea should cooperate with each other, but it imposes no "specific and legally enforceable" obligation on these States, as its language is more "exhortatory than obligatory".[63] Also, the call for cooperation in Article 123 is limited to conservation of marine living

58 *Guyana/Suriname Arbitration*, *supra* note 30, at para. 463.

59 *North Sea Continental Shelf Sea Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), 1969 ICJ 4, at para. 99.

60 Ong, *supra* note 48, at 787.

61 *The Government of the State of Eritrea v The Government of the Republic of Yemen* (1999), 119 ILR at 417, (1999), Award Of the Arbitral Tribunal in The Second Stage of the Proceedings (Maritime Delimitation), *available at* http://www.pca-cpa.org/showpage.asp?pag_id=1160.

62 For a summary of the two opposing schools of thought, *see,* Chidinma Bernadine Okafor, *Joint Development: An Alternative Legal Approach to Oil and Gas Exploitation in the Nigeria-Cameroon Maritime Boundary Dispute?* 21(4) INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 506–509 (2006).

63 Ong, *supra* note 48, at 781.

resources, protection of the marine environment and coordination of marine scientific research. It does not include the joint development of hydrocarbon resources.[64]

Second, there is no obligation in customary international law to enter into joint development agreements. Customary international law consists of State practice, which must be both constant and uniform and common to a significant number of States, particularly those States whose interests are specially affected, and there must be *opinio juris* in that States must recognize that this practice constitutes law binding on them.[65] While there is arguably widespread State practice on joint development in many areas of the world, it does not appear to be constant or uniform. Nor does it appear to be a result of the fact that States believe they are under a legal obligation to enter into such agreements.[66]

The lack of status of joint development as solution to maritime boundary disputes under customary international law, however, does not necessarily indicate a legal void.[67] There is a strong argument to be made that States have a general obligation to cooperate in the exploitation of shared natural resources, even if the normative content of this rule is yet to be determined.[68] Indeed, cooperation to manage and exploit shared marine resources may be a better solution for settling overlapping maritime claims than waiting for an agreement to be reached after a long negotiation process.[69]

III Conditions Necessary for JDAs[70]

Before negotiating a JDA, there are a number of factors that States should consider which go beyond a mere exploration of their legal rights and entitlements. Although many of these factors would not be given weight by an international

64 Ong, *supra* note 48, at 782.

65 *See* Martin Dixon, Textbook on International Law 30–37 (2007).

66 Ian Townsend-Gault and William Stormont, *Offshore Petroleum Joint Development Arrangements: Functional Instrument? Compromise? Obligation*? in Gerald Blake, et al (eds.), The Peaceful Management of Transboundary Resources 53 (1995).

67 David Ong, *Joint Development of Common Offshore Oil and Gas Deposits: 'Mere' State Practice or Customary International Law?*, 93(4) AJIL 771, 792 (1999).

68 *Ibid.*

69 Douglas Johnston, The Theory and History of Ocean Boundary Making 227–229 (1988).

70 This section draws heavily from Gavin Maclaren and Rebecca James, *Negotiating Joint Development Agreements*, in Beckman, et al, (eds.), Beyond Territorial Disputes in the South China Sea: Legal Framework for the Joint Development of Hydrocarbon Resources 139–144 (2013).

court or tribunal, they will usually be significant for a State in determining its approach to negotiations.[71]

A *Recognition of Overlapping Claims*[72]

Understanding and recognising the overlapping claims is the important first step in considering joint development. This is because joint development does not occur in a vacuum, but proceeds in the context of the underlying strengths and weaknesses of the overlapping claims as assessed by reference to the relevant principles of public international law.[73] The legitimacy of the respective States' claims under international law usually has a significant bearing upon the negotiation of the size and location of the joint development area and the revenue sharing arrangements that will apply within it.[74]

B *Political Will*[75]

The presence of political will in support of joint development in all relevant States is critical to the success of any joint development negotiation. Negotiating joint development agreements, which are often complex, requires considerable expertise and commitment of time and resources. Joint development agreements also require, almost by definition, willingness to compromise. A high level of political will within each State is necessary to achieve progress. Negotiations which proceed on the basis of ambit claims and/or aggressive posturing will almost always fail to bring about a joint development agreement. Maintaining a spirit of cooperation beyond the negotiation process is also critical as States must often work together for many years after the original agreement is struck in order to achieve the full benefits of any joint development agreement.[76]

C *Domestic Political Opinion*[77]

If negotiations are taking place within a context of a highly charged domestic political debate, it will be more difficult for a dispute to be set aside and

71 Gavin Maclaren and Rebecca James, *Negotiating Joint Development Agreements*, in BECKMAN, ET AL, *supra* note 70, at 141.

72 *Ibid*, at 140–141.

73 MacLaren and James, *supra* note 71, at 140–141.

74 MacLaren and James, *supra* note 71, at 140–141.

75 MacLaren and James, *supra* note 71, at 141–142.

76 One commentator has observed that "the intermittently coincidental political will of both Malaysia and Thailand" was "one of the mains reasons for the 11-year delay in the full implementation of the provisions of the 1979 Memorandum of Understanding"; *see* Ong, *supra* note 48, at 221.

77 Maclaren and James, *supra* note 71, at 142.

opportunities for joint development to be agreed upon. This is sometimes the case where sovereignty over particular geographic features is in issue. In such circumstances it is not uncommon for domestic political parties to seize upon maritime issues as part of their domestic political agenda, for public opinion to become entrenched against cooperation, and for national governments to use nationalistic sentiment as part of their negotiating strategy. The domestic political landscapes of the States in question and broader issues pertaining to the relationships between neighbouring States will therefore be highly relevant.[78]

D *Other Factors*

1 *Historical factors*[79]

Historical factors are often relevant to the negotiation and conclusion of a joint development agreement. The legacy of past military action, disputes over sovereignty of particular features or a history of failed negotiations, among many other things, can make the process of achieving joint development far more difficult.

2 *Economic factors*[80]

Economic factors can be critical to a State's approach to joint development. While the presence of oil concessions or oil wells within a disputed area would not be taken into consideration in its own right in a maritime delimitation determination,[81] the nature, extent and location of hydrocarbon resources may be critical to a State when considering its approach to joint development negotiations.

A State's domestic need for hydrocarbon resources may prove to be an influential factor which adds impetus to jointly developing a potentially prospective area.[82] Accordingly, States should develop an understanding of the

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78 Okafor, *supra* note 62*,* at 510–512.

79 Maclaren and James, *supra* note 71, at 142.

80 *Ibid.*

81 The ICJ and Permanent Court of Arbitration have found that oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of a provisional delimitation line, though they may be taken into account if based on express or tacit agreement between the parties (which may indicate a consensus on the maritime areas to which they are entitled): *see further*, *Land and Maritime Boundary between Nigeria and Cameroon* (*Cameroon v Nigeria: Equatorial Guinea intervening*) (*Judgment*) [2002] ICJ Rep 303, 447–448 [304]; *Barbados v The Republic of Trinidad and Tobago* (*Award of 11 August 2006*) at 108–109, [364] *available at* http://www.pca-cpa.org/showpage.asp?pag_id=1152.

82 Okafor, *supra* note 62, at 512. *See* for example the now defunct *Timor Sea Treaty between the Government of East Timor and the Government of Australia*, East Timor-Australia, signed 20 May 2002, 2258 UNTS 3.

relevant economic resource potential of the area of overlap and the potential location of those resources. However, it must also be kept in mind that the greater the degree of knowledge about the geological potential of the joint development area, the greater the risk that States will make expansive claims and be less willing to compromise.[83]

If resources are primarily located in an area to which one State considers it has a particularly strong (or defensible) claim, this will tend to result in that State pushing for a smaller joint development area which leaves it with direct control over those resources, or for a joint development agreement that provides it with a disproportionate share of the benefits of joint development. The other State is likely to be equally determined to expand the size of the joint development area to include the relevant resources and to seek the greatest possible share of those resources.

3 *Availability of third party dispute resolution*[84]

Where compulsory third party dispute resolution is available, it is often the case that one State will decide to achieve a final delimitation through these means. This is because in any given set of circumstances, one State will often consider that, having regard to the strengths and weaknesses of the claims and the location of resources, it will obtain a superior outcome through delimitation rather than joint development.

4 *Number of States involved*[85]

It is typically more difficult to resolve multilateral disputes through joint development than bilateral disputes. Most joint development agreements to date have been bilateral, though in principle a joint development agreement need not be limited to two States.

As is evident from the above discussion, various factors should be considered when assessing whether joint development is a viable option in the circumstances surrounding a particular dispute. It is also evident that politically motivated activities and nationalist sentiments described above diminish the

83 One example of this is that "negotiations for the Timor Sea Treaty were made more complex in light of the discovery of two fields, known as Greater Sunrise, that straddle the JPDA across the eastern limits," in *Report Number 6-20(1) and (2) -Australia-East Timor*, in DA Colson and RW Smith (eds.), International Maritime Boundaries, Volume V 3806, 3808 (2005). *See also,* Okafor, *supra* note 62, at 513.

84 Maclaren and James, *supra* note 71, at 143. Compare this, however, with the compulsory conciliation under Annex V of UNCLOS. *See* for example the *Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea*, Conciliation Commission, 9 May 2018.

85 Maclaren and James, *supra* note 71, at 144.

prospects of achieving a successful joint development agreement, and should be avoided.

Once States have decided to explore joint development as a possible solution to delimitation disputes, a further range of issues, such as the possible form of the joint development agreement, should be explored. Each dispute is different and there is no precise formula for States to adhere to when determining their approach.

IV Form and Content of JDAs

Once States that have overlapping claims acknowledge that the best way for them to reach an agreement is by entering into some form of JDA, there are several issues that need to be addressed during the negotiation process. First, the claimant States need to ensure that their national positions would not be jeopardized by agreeing to enter into the JDA. Second, the negotiating States need to identify the areas that are to be jointly developed. Third, the negotiating States need to agree on the form and extent of the JDA.

A *Without Prejudice*

It is important to note that entering into a JDA is the second best option for States; having a defined maritime boundary being the first preferred option. Thus, it is natural that all parties to the JDA wish to preserve their respective legal positions.[86] As noted above, JDAs as provisional arrangements of a practical nature are "without prejudice to the final delimitation".[87] The "without prejudice" provision ensures that whatever arrangement agreed to will not affect the final boundary agreement. This means that if a State makes concessions in order to agree to a JDA, the concessions cannot be used against it in any negotiations or adjudication to reach a final maritime boundary agreement. A JDA gives the States the opportunity to exploit the hydrocarbon resources without giving up their claims to sovereignty or sovereign rights in the joint development area. Furthermore, it is important to remember that although a JDA is a provisional measure, it usually lasts for 20 or 30 years or even longer. Thus, agreeing to a JDA in effect means shelving the dispute for a generation or two, while enabling the States to benefit from the exploitation of the hydrocarbon resources in the agreed area.

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86 David Anderson, Modern Law of the Sea: Selected Essays 495 (2008).

87 UNCLOS, *supra* note 1, Articles 74(3) and 83(3); *Guyana/Suriname Arbitration*, *supra* note 30; *see also,* Lagoni, *supra* note 30, at 358.

B *Identifying the Area to be Jointly Developed*[88]

One of the major obstacles in concluding JDAs is the difficulty of the claimants agreeing on a geographic area/s that can be subject to joint development. JDAs tend to be concluded in areas where there are clearly defined overlapping claims, for example, in an overlapping EEZ or continental shelf claim.[89] It is typically the case that each State must at a minimum clarify the extent of, and the rationale for, its claim by reference to principles of public international law.[90] It is almost impossible to make significant progress without doing so. The agreed area of the joint development zone will either cover the entirety of the overlapping EEZ or continental shelf claim[91] or will be an area within the overlapping claim area.[92] There are examples of States refusing to clearly articulate the limits of their maritime claims. Often this type of conduct is perceived as a negotiating tactic by other States and can become a stumbling block preventing further progress.[93]

From the process of analysing and testing each relevant State's claim, a consensus must emerge regarding the location, size and shape of the area to be jointly developed.[94] The joint development area should be as small as possible, as having a joint development agreement is a second best outcome where claimant States have failed to reach an agreement on fixing the maritime boundaries between them, but agree on a practical accommodation for a certain period of time.[95] The duration may be tied to the duration of the offshore activities. Generally, between the initial seismic work and the completion of

88 Maclaren and James, *supra* note 71, at 144–145.

89 *See* Tara Davenport, et al., *Conference Report,* Conference on Joint Development and the South China Sea Organized by the Centre for International Law, 16 – 17 June 2011, *available at* http://cil.nus.edu.sg/wp/wp-content/uploads/2011/06/Report-of-CIL-Conference-on-Joint-Development-and-the-South-China-Sea-2011-04.08.2011.pdf.

90 Maclaren and James, *supra* note 71, at 144.

91 The Malaysia-Thailand Joint Development Area consists of the entirety of the overlapping claims between Malaysia and Thailand: *See*, the *1979 Memorandum of Understanding between Malaysia and Thailand on the Establishment of a Joint Authority for the Exploitation of the Resources of the Sea-bed in a Defined Area and the 1990 Agreement between the Government of Malaysia and the Government of the Kingdom of Thailand on the Constitution and Other Matters Relating to the Establishment of the Malaysia-Thailand Joint Authority.*

92 *See, for example*, the 2008 *Principled Consensus on the East China Sea Issue,* where the area identified for joint development only consisted of a part of the overlapping claim area.

93 Maclaren and James, *supra* note 71, at 144.

94 *Ibid.*

95 Anderson, *supra* note 86, at 498.

production to decommissioning and disposal of the installation, periods of 40 or 50 years are normal in joint development agreements.[96]

Following agreement on the area to be jointly developed, the next most significant issue is typically the basis on which government revenues are to be shared. In many cases, this has occurred by way of equal division of "government take."[97] However, on some occasions a significant disproportion has been agreed.[98]

C *Forms of a Joint Development Agreements*

A number of authors have identified three broad structural models for joint development agreements.[99] In essence, these are:

1 *The single-state model*[100]

The first joint development model examined here is arguably the simplest option available to States because it requires the least amount of effort by the governments concerned by way of formal bilateral cooperation and legal and institutional harmonization. This model comprises an agreement whereby one State manages the development of the deposits located in a disputed area on behalf of both States. The other State shares in the revenues arising from the resource exploitation, once the costs incurred by the first State have been subtracted. Several of the earliest joint development agreements utilized this model.

Of late, this model has fallen into disuse. This is principally due to the apparently unacceptable loss of autonomy on the part of the State that allows its sovereign rights to be administered by another State. Many States are reluctant to accept such a situation, especially within a disputed seabed area subject to overlapping claims. They are fearful of appearing to accept, however implicitly, a status quo that confers *de facto* jurisdiction to the other State, even if the *de*

96 *Ibid.*

97 Maclaren and James, *supra* note 71, at 144.

98 A good example of this is the *Timor Sea Treaty between the Government of East Timor and the Government of Australia*, 20 May 2002, [2003] ATS 13 (entered into force on 2 April 2003) (Timor Sea Treaty). For further examples, *see* Ana Bastida, et al, *Cross-border Unitization and Joint Development Agreements: An International Law Perspective,* 29(2) HOUSTON JOURNAL OF INTERNATIONAL LAW 356, 416 (2007).

99 *See for example*, Ong, *supra* note 67, at 788–792; Bastida, et al, *ibid*, at 416–418; Yusuf Mohammad Yusuf, *Is Joint Development a Panacea for Maritime Boundary Disputes and for the Exploitation of Offshore Transboundary Petroleum Deposits?,* 4 INTERNATIONAL LAW ENERGY REVIEW 130, 132–133 (2009).

100 The text in this section draws heavily from David Ong, *Implications of recent Southeast Asian State practice for the international law on offshore joint development*, in BECKMAN, ET AL, *supra* note 70, at 192–193.

jure position is explicitly reserved. The main disadvantage is the other State's concern regarding the possible adverse inferences drawn from the managing State's pre-emptive role in the disputed area and its effect on the strength of the other State's claims to this area.[101] However, this thesis is arguably turned on its head by the latest manifestation of a JDA in the Southeast Asian region, namely the Brunei-Malaysia arrangements established by the bilateral Exchange of Letters in 2009. That arrangement represents a return to a single State model.

2 *The joint-venture model*[102]

The second joint development model is the most popular option among the three models. It comprises an agreement requiring the Parties to establish compulsory joint ventures between their national or other nominated oil companies in designated joint development zones. Alternatively, the agreement provides for the compulsory unitization of transboundary deposits and the nomination of a single operator to exploit the unitized deposit on behalf of all the interested operators. A few agreements also combine several of these features.

A number of joint venture model JDAs provide for the unitization of deposits found both within, or lying across, the boundaries of a specifically designated area of marine space. These designated joint development zones usually correspond to disputed continental shelf/EEZ claims between the two States concerned. Other joint venture model JDAs require the compulsory unitization of transboundary deposits in situations where the maritime boundary has been previously agreed. This latter type of joint venture model JDAs has been renounced as not being true "joint development."[103] Despite this objection to the classification of these types of agreements as being "JDAs," we have classified them as JDAs in order to provide as many different working examples of State practice as possible. Moreover, these transboundary unitization agreements represent successful instances of international cooperation that merit examination in their own right.

Thus, it may be noted that there are two distinctive sub-species of joint venture model JDAs. The first type is agreements that designate specific joint

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101 Fox *et al*, *supra* note 28, at 149, 152.

102 Ong, *supra* note 100, at 196–197.

103 Kusuma-Atmadja for example argues that "joint development" properly relates only to overlapping claim areas subject to joint jurisdiction, rather than the unitization of oil and gas structures straddling the boundaries of neighbouring countries, which is merely a well-known principle in the petroleum industry. *See*, Mochtar Kusuma-Atmadja, *Joint Development of Oil and Gas by Neighbouring Countries*, in KUSUMA-ATMADJA, MENSAH AND OXMAN, *supra* note 54, at 592.

development zones in which compulsory joint ventures are established in respect of unitized deposits. The second type is transboundary unitization agreements that provide for a single operator to exploit a "straddling" deposit lying across a previously agreed maritime boundary. The second type is mainly found in the North Sea region.

3 *The joint authority model*[104]

The third joint development model is the most complex and institutionalized option, requiring a much higher level of cooperation than the previous two models. This model consists of an agreement between the interested States establishing an international joint authority or commission with legal personality, licensing and regulatory powers, and a comprehensive mandate to manage the development of the designated zone on behalf of the States. These joint authorities have been described as "strong" institutions, with extensive supervisory and decision-making powers and wide-ranging functions, as opposed to the "weak" liaison or consultative-type bodies under the direction of the parties established by a number of agreements incorporating the second joint development model, described above.[105] Within the Southeast Asian maritime region as defined in this article, the 1979 and 1990 Malaysian-Thailand agreements are good examples of this third joint development model.

D *Factors Influencing the Form of a Joint Development Agreement*[106]

The choice between a simple or more comprehensive joint development model will be governed, to a very significant extent, by the willingness of one State to allow another State's laws to apply within all or part of the joint development area and, consequently, for one State to have disproportionate administrative responsibility for all or part of the joint development area. Where States are prepared to apply one State's laws within the joint development area, the creation of a JDA is a much more straightforward undertaking. Most commonly, this is acceptable where one State perceives that it has a very weak claim to the relevant area, where one State has a longer history and a greater knowledge of petroleum regulation, or where the area in question is a very small portion of the continental shelf and exclusive economic zone of the relevant State.

104 Ong, *supra* note 100, at 200.

105 Masahiro Miyoshi, *The Joint Development of Offshore Oil and Gas in Relation to Maritime Boundary Delimitation*, 2 (5) INTERNATIONAL BOUNDARIES RESEARCH UNIT, MARITIME BRIEFING 43–44 (1999).

106 Maclaren and James, *supra* note 71, at 146–149.

Often neither State is prepared to allow the other to have a disproportionate level of control or influence over the joint development area. In these circumstances, it is typical to pursue a more comprehensive JDA, which involves an application of the *joint authority* model referred to above to the circumstances. Developing a stand-alone regime for petroleum activities becomes essential in this scenario. In essence, the States will need to ensure either that they have direct control over petroleum activities (for example, through national oil companies as proxies for each State) or that there is a framework for the regulation of petroleum activities so that investors are comfortable to invest their money. As a practical matter, this is an involved and complex process. Typically, comprehensive joint development solutions tend to be more appropriate where the area of overlap is large, petroleum exploration is required and/or where the respective claims of relevant States are equally legitimate.

Significant expertise is required to develop a stand-alone oil and gas regulatory framework in light of the complex technical issues and policy questions which need to be dealt with. Even where States have experience in regulating petroleum activities, they often will not have recent experience in establishing an oil and gas regulatory framework. Furthermore, there is potential for the interests of the States to diverge on matters that lead to asymmetries in the economic benefit that each derives from joint development. Taken together, these factors make negotiating joint development agreements time-consuming and difficult, even where there is considerable political will in support of resolution, willingness to compromise and the assistance of appropriate experts.

The presence of gas resources within an area of overlapping claims gives rise to additional complexity, and has often created problems in the implementation of joint development agreements for a number of reasons. The typical joint development model has focussed on oil. Apportionment of the benefits of oil development between States is usually achieved by a division of "government take" (in cash or in kind) at the well head and the sharing of tax revenues by each State in accordance with a pre-agreed formula. Other economic benefits of oil development, such as associated service industries, tend to accrue to the State with the greatest capacity to service the oil industry. Typically, little or no attempt is made to apportion these benefits between the States. However, gas projects require significant development downstream of the well head and there is considerable value in delivering the physical product to market. This is the case even where the gas is ultimately to be processed into LNG and exported, as the economic benefits of LNG processing are significant. The potential economic benefits of gas exploitation include infrastructure development, pipeline tariffs, employment opportunities, additional tax revenue, an increase in the value of the product onshore processing, import-offset

benefits and enhanced energy security. Joint development agreements often do not provide for the allocation of benefits between States downstream of the well head. This creates the potential for States to disagree about the development of gas resources after the joint development agreement has been finalised and, in turn, for delays or breakdowns in implementation. It will, for instance, be difficult to have gas development plans approved and agreed where the consent of both States is required.

Consequently, it is in the interests of States to give consideration to the eventual development of gas resources in the process of negotiating a joint development agreement over gas-prone areas to avoid the potential for stalemate to arise later. One way of addressing this issue is to provide for the sharing of some of the economic benefits of downstream gas development between States through the framework of joint development. Oil companies can also play a role in this regard. In some circumstances, careful commercial structuring has allowed parties to proceed with a development in circumstances where stalemate might otherwise have arisen.[107]

As will be apparent, there is a trade-off to be made between negotiating a joint development agreement which seeks to provide for all eventualities and one which records agreement on key matters only. While it is easier to negotiate and record the latter, this type of agreement is accompanied by the risk of interminable delays down the track which may frustrate the anticipated benefits of joint development.[108]

107 A novel compromise was reached between Australia and East Timor in respect of the Bayu Undan project. In this scenario, the energy company Conoco was successful in facilitating East Timor's approval of the Bayu Undan LNG and liquids project in Australia on the basis that it would construct and operate the gas pipeline to Australia and the LNG facility located in Darwin on a basis which provided a low "infrastructure rate of return," consequently pushing profits upstream to the well head. This benefited East Timor as it was entitled to 90% of the government revenue achieved at the well head, but was also acceptable to Australia since it obtained the employment benefits and tax revenues from the LNG facility and pipeline.

108 For instance, the first Memorandum of Understanding entered into between Thailand and Malaysia in 1979 "did not provide a sufficiently detailed legal framework for the exploration and exploitation of the petroleum resources in the Joint Development Area." The parties subsequently encountered difficulties in light of "the enormity of the task involved in attempting to come up with a new legal regime for joint development which the Joint Authority could operate in the Joint Development Area, but which also represented a viable compromise between both parties" own, incompatible, domestic petroleum development regimes"; *see* Ong, *supra* note 48, at 229–230.

E Common Provisions in Joint Development Agreements

Regardless of the joint development model utilized in State practice, similar types of provisions can be found in most of these agreements. Such common provisions include the following: non-prejudice exceptions to the sovereign rights of each party over the disputed deposit; jurisdictional allocations; institutional arrangements and sometimes, a hydrocarbon licensing regime; dispute settlement; environmental protection; third party rights. In seeking to understand these alternatives, it is important to note that there is no need for States to draw on any specific form of joint development model.[109] States are ultimately free to appropriately tailor their treaty arrangements to the circumstances of the underlying dispute, and they almost invariably do so.

There are certain terms common to many joint development agreements. These include a demarcation of the area that is covered by the joint development agreement, the basis for sharing government revenues and costs within the joint development area, the scope of activities to which the joint development agreement will apply, the applicable law to apply within the joint development area, the duration of the agreement to be entered into, how it is to be terminated and dispute resolution between the parties.

V Conclusions

If a State party to UNCLOS is not able to reach an agreement through negotiations on its EEZ or continental shelf boundaries with an adjacent or opposite State, and it is not willing or able to request for an international court or tribunal to delimit the maritime boundary, certain obligations are triggered under UNCLOS. First, both States have an obligation to make every effort to enter into "provisional arrangements of a practical nature" pending a final agreement on their maritime boundary. Second, they have an obligation not to take any actions that would jeopardize or hamper the reaching of a final agreement on the maritime boundary, including the unilateral exploitation of the hydrocarbon resources in the area of overlapping claims. In such circumstances, it may be in their common interest to set aside the negotiations on the maritime boundary and consider entering into a JDA as a provisional arrangement of a practical nature. A JDA enables the two States to share the hydrocarbon resources without prejudicing their position on the final maritime boundary.

However, JDAs are not an easy solution. They are generally not possible unless several essential factors are present. First, the two States must have a

109 Yusuf, *supra* note 99, at 133–134.

certain level of trust in each other. Second, they must have a common desire to set aside their competing claims and jointly develop the resources. Third, and perhaps most important, they must have the political will necessary to set aside their differences and convince their domestic audience that it is in their national interest to cooperate by sharing the natural resources. Fourth, they must agree on an area for joint development which is politically acceptable to both sides.

If these factors are present, the details of the JDA can be negotiated. Several models are available, and the legal and technical issues which must be addressed are fairly well understood. If the necessary trust and political will are present, the details can be worked out through negotiations. If they are not present, it may be in the best interests of the two States to resolve the maritime boundary by referring it to a court or tribunal.

The International Legal Obligations of States in Disputed Maritime Jurisdiction Zones and Prospects for Co-operative Arrangements in the East China Sea Region

David M. Ong

I Introduction

This article will first set out several observations on the politico-legal nature of the disputes over (island) territorial and overlapping maritime jurisdiction zones claimed from both these islands and mainland territory within the East Asian maritime region. It will then present arguments suggesting that the international legal implications of such disputes, whether territorial or maritime in nature, require the application of several significant international obligations by all States bordering the East China Sea and its associated maritime areas, including the Yellow Sea and the Sea of Japan/East Sea. For the purposes of this article, the East China Sea region will denote all these water bodies and the islands/rocks located within them.

II Territorial and Maritime East China Sea Disputes: Legal Implications

Politically, there is a significant difference of perception both internationally and especially domestically, between the island and associated maritime jurisdiction disputes within the East China Sea. Specifically, international disputes over insular formations are often initially expressed and in time become fixated within the domestic political/social consciousness of littoral States as an overriding issue of national pride. Where these disputes concern sovereignty over island territories, such as the Dioayutai/Senkaku and Dokdo/Takeshima[1]

1 The Japanese perspective on this disputed island (Takeshima/Dokdo) is accessible at the website of the Japan Ministry of Foreign Affairs (MOFA), *available at* http://www.mofa.go.jp/region/asia-paci/takeshima/index.html.

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disputes, they are significantly more intractable to resolve under international law. They also require the application of general public international law principles, in addition to those found in the 1982 United Nations Convention on the Law of the Sea (UNCLOS). The law of the sea and specifically UNCLOS plays a role in the delimitation, rights and responsibilities in the maritime jurisdiction zones generated from these insular formations, notably, the territorial sea, continental shelf and Exclusive Economic Zone (EEZ), but not the sovereignty over these islands. The UNCLOS, specifically Articles 74(3) and 83(3) are applicable when the unresolved sovereignty issue extends to the maritime jurisdiction zones claimed by the respective States from these islands or rocks,[2] as well as the overlapping continental shelves and EEZs claimed from the mainland and (in the case of Japan) the main island coastlines. There is increasing evidence that the political and legal distinctions highlighted above over territorial (island) disputes, as opposed to disputes over the maritime jurisdiction claims arising from either these islands, or the mainland/main island coastlines of the States themselves, are being recognised. For example, Gong has recently noted that the Sino-Japanese maritime disputes in the East China Sea concern two issues: the territorial sovereignty of the Diaoyu/Senkaku islands and maritime delimitation, with the sovereignty dispute over the Diaoyu islands traditionally being the key factor in the East China Sea. Thus, he argues that if this dispute can be disentangled from the maritime delimitation issue through an agreement to exclude the Diaoyu/Senkaku islands from generating continental shelf or EEZs, then the maritime delimitation issue might be handled more easily, since most confrontations and reciprocal distrust to date are rooted in the sovereignty dispute. According to Gong, resolution to the delimitation issue within the East China Sea region will likely take the form of further negotiations towards a maritime delimitation agreement involving possible joint development of resources, or a judicial settlement. While the 2008 China-Japan Principled Consensus on the East China Sea issue is a major step toward cooperation on maritime energy resources, further compromise is required. If China and Japan cannot reach a consensus on the scope of the disputed waters, a judicial settlement may provide another option for settling disputes. The policy implications of Gong's analysis are, *inter alia,* if the sovereignty dispute over the Diaoyu/Senkaku islands continues to remain unresolved then confrontations over the sovereignty of the islands will very likely escalate. China and Japan should therefore agree to exclude the Diaoyu/Senkaku islands from generating EEZ or continental shelf claims to facilitate a resolution of the maritime delimitation

2 Both Article 121(3) of UNCLOS and recent international jurisprudence indicate that rocks which are incapable of sustaining human habitation cannot be allowed to generate maritime jurisdiction space further than the 12 nm territorial sea limits.

issue. If both countries effectively promote the 2008 Principled Consensus, then the establishment of joint development zones near the Diaoyu/Senkaku islands could accelerate the process of cooperation. Finally, the two countries need to be flexible on the method of dispute settlement. A clearly delimited maritime boundary reached through a judicial settlement or further sincere negotiations would encourage Sino-Japanese cooperation in scientific research, environmental protection, and other issues in the East China Sea.[3]

Given the fact that none of the island territorial sovereignty issues are likely to be submitted before any judicial forms of dispute resolution soon,[4] the legal focus shifts to the overlapping maritime jurisdiction zones, whether claimed from the respective mainland territories of the interested States or the disputed island territories between them. Specifically, it should be noted that the international law of the sea makes a distinction between the legal entitlement of coastal/island States to their adjacent seabed or continental shelf jurisdiction, and their delimitation as between their equally entitled neighboring States. Albeit pursuant to the further question of the entitlement of Bangladesh and Myanmar (Burma) respectively, to continental shelves beyond 200-nautical miles, the International Tribunal on the Law of the Sea (ITLOS) has recently confirmed that:

> A coastal State's entitlement to the continental shelf exists by the sole fact that the basis of entitlement, namely, sovereignty over the land territory, is present. It does not require the establishment of outer limits. Article 77, paragraph 3, of the Convention, confirms that the existence of entitlement does not depend on the establishment of the outer limits of the continental shelf by the coastal State.[5]

Applying this generally to seabed areas beyond the 200-nm limit from coastlines, the Tribunal further held that: "Entitlement to a continental shelf beyond 200 nm should thus be determined by reference to the outer edge of the continental margin, to be ascertained in accordance with Article 76,

3 Gong Yingchun, *The Development and Current Status of Maritime Disputes in the East China Sea*, in THE (US) NATIONAL BUREAU OF ASIAN RESEARCH, MARITIME ENERGY RESOURCES IN ASIA: ENERGY AND GEOPOLITICS (December 2011).

4 Following the most recent spate over the sovereignty of the Dokdo/Takeshima islands between the Republic of (South) Korea and Japan in July-August 2012, the Korean government has rebuffed a proposal by the Japanese Ministry of Foreign Affairs (MOFA) to submit the dispute to the ICJ. This follows similar proposals by Japan in the 1950s and 1960s, which have each time been refused by Korea.

5 *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal* (Bangladesh/Myanmar) ITLOS Judgment (2011), at para. 409.

paragraph 4. To interpret otherwise is warranted neither by the text of Article 76 nor by its object and purpose."[6]

Finally, applying these general analytical determinations to the case before it, the ITLOS made the following observations: "The Tribunal therefore cannot accept Bangladesh's contention that, by reason of the significant geological discontinuity dividing the Burma plate from the Indian plate, Myanmar is not entitled to a continental shelf beyond 200 nm."[7] Summing up the case before it, the ITLOS Judgment stated that the "Tribunal is not convinced by the arguments of Bangladesh that Myanmar has no entitlement to a continental shelf beyond 200 nm. The scientific data and analyses presented in this case, which have not been contested, do not establish that Myanmar's continental shelf is limited to 200 nm under Article 76 of the Convention, and instead indicate the opposite.[8] The Tribunal accordingly concludes that both Bangladesh and Myanmar have entitlements to a continental shelf extending beyond 200 nm. The submissions of Bangladesh and Myanmar to the Commission clearly indicate that their entitlements overlap in the area in dispute in this case."[9]

The implications of the above statements for the dispute between China and Japan over the significance of the Okinawa Trough as a natural break in the seabed prolongation of land territory from both Chinese mainland territory and the main Japanese islands are far-reaching. Gao for example has noted that there are two aspects to the controversy over the Okinawa Trough between the States bordering the East China Sea. The scientific aspect concerns whether the Okinawa Trough disrupts the unity of the continental shelf in the East China Sea, and the legal aspect concerns whether geophysical factors should be considered in the delimitation between opposite States where the distance between their coasts is less than 400 nautical miles. He argues that if the Okinawa Trough is proved to constitute a fundamental discontinuity between the natural prolongation of China and Korea on the one hand, and that of Japan on other hand, the median line between the opposite coasts concerned should not be applied in the continental shelf delimitation, for it cannot achieve an equitable solution,[10] as required by Articles 83(1) and 74(1) of UNCLOS. However, China's long-standing view that the Trough represents the furthermost limits of the Japanese legal continental shelf facing the Chinese mainland is arguably diminished by the recent ITLOS finding.

6 *Ibid.*, at para. 437.

7 *Ibid.*, at para. 438.

8 *Ibid.*, at 130, para. 448.

9 *Ibid.*, at 131, para. 449.

10 Jianjun Gao, *The Okinawa Trough Issue in the Continental Shelf Delimitation Disputes within the East China Sea*, 9 (1) CHINESE JOURNAL OF INTERNATIONAL LAW 143–177 (2010).

More generally, the above extracts of the ITLOS jurisprudence strongly suggest that notwithstanding the continuing island/rock territorial disputes, all the interested States in the East China Sea region, namely, North and South Korea, as well as China and Japan have legal entitlements to continental shelf rights up to at least 200-nm (and possibly further) without needing to rely on the ostensible maritime jurisdiction zones generated from the disputed islands/rocks themselves. This leads to the conclusion that all the main protagonists in this scenario have legitimate interests in the seabed between their main (land/island) coastlines and around the disputed island territories, notwithstanding the lack of resolution of the latter disputes. As the law, like nature, abhors a vacuum, the question that then arises is as follows: What are the international rights and obligations of the States involved in the East China Sea region, both specifically under the UNCLOS as well as general international law? Thus, the scene is set for a consideration of these specific procedural and substantive rights and obligations, as well as their normative status in relation to the States in this region.

III Procedural Obligations of Notification, Information, Consultation and EIA

We will begin with the procedural rights and obligations between States in this maritime region. Developments in international law and especially international environmental law, recently confirmed by relevant international jurisprudence, arguably point to an increasingly sophisticated set of procedural standards of behaviour applicable to the States in this region. This section of the article will therefore highlight recent international legal developments on shared natural resource issues and/or transboundary environmental problems, with a view to examining their application to the possible resolution of East China Sea maritime disputes.

Here, it has been noted that the evolving standards of State behaviour have focused upon requirements of prior notification, information and consultation (NIC) with respect to hazardous activities conducted within their territories which may cause damage, either to the territories of other States, or areas beyond national jurisdiction.[11] Moreover, the *procedural* obligation to

11 David M. Ong, *Procedural International Environmental Justice? The Evolution of Procedural Means for Environmental Protection: From Inter-State Obligations to Individual-State Rights*, in DUNCAN FRENCH (ED.) GLOBAL JUSTICE AND SUSTAINABLE DEVELOPMENT 137–166, 141 (2010).

notify, inform and consult (NIC) between States, as an accompaniment to the *substantive* obligation not to cause transboundary environmental damage, both generally and especially in respect of potentially hazardous activities, has arguably been confirmed by the jurisprudence of international tribunals as being part of customary international law long before its inclusion within more recent treaty instruments. As Louka notes, for example, "[t]he *Lac Lanoux* case has been heralded as establishing the principle of prior consultation with another (S)tate before undertaking a project that has transboundary effects. Such a principle has been repeated in a number of international instruments, including the (Transboundary) Environmental Impact Assessment (EIA) Convention."[12] Further international case law has both confirmed and expanded upon these procedural obligations of notification, information and consultations on both transboundary environmental concerns and shared natural resources issues.

A *Malaysia/Singapore Land Reclamation case (2001) before ITLOS*

For example, under the auspices of UNCLOS, the ITLOS and other related (Annex VII) arbitral tribunal decisions have arguably elaborated upon the requirement of notification, information and consultation prior to undertaking potentially hazardous activities in frontier areas between States. Thus, in the *Land Reclamation* case between Malaysia and Singapore, the ITLOS undertook to prescribe what has been described as a "constrained bilateral negotiations procedure" for both Parties.[13]

This constrained bilateral negotiations procedure incorporated specific notification, information and consultation (NIC) requirements with respect to the potential impact of large scale land reclamation activities undertaken by Singapore within her own territorial waters upon neighbouring Malaysian coastal interests and the ecosystem quality of the surrounding marine environment. The ITLOS Order unanimously held, *inter alia*, that Malaysia and Singapore shall first cooperate and enter into consultations to establish promptly a group of independent experts with a mandate to conduct a study to determine the effects of Singapore's land reclamation and to propose, as appropriate, measures to deal with any adverse effects of such land reclamation; exchange,

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12 E. Louka, International Environmental Law 42 (2006) 42, citing para. 24 of the *Lac Lanoux Arbitration* case (France v. Spain) 16 November 1957, 12 RIAA 281. Convention on Environmental Impact Assessment in a Transboundary Context of the United Nations Economic Commission for Europe, 25 February 1991, 1989 UNTS 309 (entered into force 10 September 1997) [hereinafter, "Espoo Convention"].

13 *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v. Singapore), Request for Provisional Measures, Order, 8 October 2003, ITLOS Case No. 12.

on a regular basis, information on, and assess risks or effects of, Singapore's land reclamation works; and implement the commitments noted in this Order, and avoid any action incompatible with their effective implementation. Finally, without prejudice to their positions on any issue before the Annex VII arbitral tribunal, the Parties were to consult with a view to reaching a prompt agreement on such temporary measures.[14] More substantively, the Tribunal also directed Singapore not to conduct its land reclamation in ways that might cause irreparable prejudice to the rights of Malaysia or serious harm to the marine environment, taking especially into account the reports of the group of independent experts.

Subsequently, the Arbitral Tribunal established under Annex VII of UNCLOS convened to decide the merits of the above case and was inveighed by the two Parties to accept a Settlement Agreement incorporating the Recommendations by the Group of Experts (GOE) established pursuant to the (above) ITLOS Order, and adopted by the two States. Within this Settlement Agreement, the Parties agreed to expand the terms of reference of the Malaysia-Singapore Joint Committee on the Environment (MSJCE) to exchange information on and discuss matters affecting their respective environments in the Straits of Johor, as well as undertake monitoring activities in relation to their respective environments in the Straits of Johor and address any adverse impacts, if necessary. These monitoring activities were to include: (i) monitoring water quality to protect the marine and estuarine environment; and (ii) monitoring ecology and morphology.[15]

B *Argentina/Uruguay Pulp Mills case (2007 and 2010) before the ICJ*

The ICJ has also recently rendered a decision in the *Pulp Mills* case between Argentina and Uruguay that is at least in part about the extent of an international duty between neighboring States across a common river boundary, to notify, inform and consult each other about proposed activities that have potentially serious transboundary impacts.[16] In the opinion of the Court, "the obligation to notify is intended to create the conditions for successful co-operation between the parties, enabling them to assess the plan's impact on the river on the basis of the fullest possible information and, if necessary, to negotiate the

14 *Ibid.* at para. 106 of the ITLOS Order.

15 Annex to Settlement Agreement in *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor* (*Malaysia v. Singapore*). Done in duplicate at Singapore, 26 April 2005. *Available at* www.mfa.gov.sg/internet/press/land/Settlement_Agreement.pdf.

16 *Case Concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay) Judgment, 20 April 2010, *available at* http://www.icj-cij.org/docket/files/135/15877.pdf.

adjustments needed to avoid the potential damage that it might cause."[17] The Court therefore concluded that "the obligation to notify is therefore an essential part of the process leading the parties to consult in order to assess the risks of the plan and to negotiate possible changes which may eliminate those risks or minimize their effects."[18]

Having established that Uruguay breached its procedural obligations to inform, notify and negotiate,[19] the Court turned to the relationship between the need for an environmental impact assessment, where the planned activity is liable to cause harm to a shared resource and transboundary harm.[20] Here, the ICJ ruled that "it may now be considered a requirement under general international law to undertake an environmental impact assessment (EIA) where there is a risk that the proposed industrial activity may have a significant risk in a transboundary context, in particular, on a shared resource."[21] The Court noted that "the environmental impact assessments which are necessary to reach a decision on any plan that is liable to cause significant transboundary harm to another State must be notified by the party concerned to the other party, … to enable the notified party to participate in the process of ensuring that the assessment is complete, so that it can then consider the plan and its effects with a full knowledge of the facts".[22] The Court observed that this notification must take place before the State concerned decides on the environmental viability of the plan, taking due account of the environmental impact assessment submitted to it.[23]

The Court concluded that Uruguay had failed to fulfil her procedural obligation to notify and allow Argentina to participate in the transboundary EIA exercise prior to approving the proposed projects.[24] It was the opinion of the Court that the Parties must, for the purposes of protecting and preserving the aquatic environment with respect to activities which may be liable to cause transboundary harm, carry out an environmental impact assessment, stating that: "In this sense, the obligation to protect and preserve has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment

17 *Ibid.*, at para. 113.
18 *Ibid.*, at para. 115.
19 *Ibid.*, at para. 158.
20 *Ibid.*, at para. 203.
21 *Ibid.*, at 60–61, para. 204.
22 *Ibid.*, at para. 119.
23 *Ibid.*, at para. 120.
24 *Ibid.*, at para. 122.

where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource."[25] Moreover, in the opinion of the Court, as long as the procedural mechanism for co-operation between the parties to prevent significant damage to one of them is taking its course, the State initiating the planned activity is obliged not to authorize such work and, *a fortiori*, not to carry it out.[26] Consequently, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a (State) party planning works liable to affect the regime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.[27]

On the other hand, the Court agreed with the Uruguayan assertion that one party did not have a "right of veto" over the projects initiated by the other, such that there was a "no construction obligation" borne by the State initiating the projects until such time as the Court has ruled on the dispute.[28] Uruguay pointed out that the existence of such an obligation would enable one party to block a project that was essential for the sustainable development of the other, something that would be incompatible with the "optimum and rational utilization of the [r]iver" – the shared natural resource in question here. For Uruguay, reference should be made to general international law, as reflected in the 2001 draft Articles of the International Law Commission on Prevention of Transboundary Harm from Hazardous Activities (*Yearbook of the International Law Commission,* 2001, Vol. II, Part Two); in particular, draft Article 9, paragraph 3, concerning "Consultations on preventive measures", states that "[i]f the consultations … fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of the State likely to be affected in case it decides to authorize the activity to be pursued."[29]

However, on the specific requirements and standard of protection of the obligation to conduct a transboundary EIA, the Court also observed that general international law does not specify the scope and content of an environmental impact assessment. Moreover, it pointed out that Argentina and Uruguay are not parties to the Espoo Convention. Consequently, it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental

25 *Ibid.*, at para. 204.
26 *Ibid.*, at para. 144.
27 *Ibid.*, at para. 204.
28 *Ibid.*, at para. 154.
29 *Ibid.*, at para. 152.

impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment.[30]

Finally, the Court noted that the other instrument to which Argentina refers in support of its arguments, namely, the 1987 Goals and Principles of Environmental Impact Assessment of the United Nations Environment Programme (hereinafter, "UNEP Goals and Principles") (*UNEP/WG.152/4 Annex (1987)*, document adopted by UNEP Governing Council at its 14th Session (Dec. 14/25 (1987)), is not binding on the Parties, but, as guidelines issued by an international technical body, has to be taken into account by each Party in accordance with Article 41 (a) in adopting measures within its domestic regulatory framework. Moreover, this instrument provides only that the "environmental effects in an EIA should be assessed with a degree of detail commensurate with their likely environmental significance" (Principle 5) without giving any indication of minimum core components of the assessment. The Court also considered that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.[31]

As the Court had already considered the role of environmental impact assessment in the context of the procedural obligations of the Parties, it then dealt with the specific points in dispute with regard to the role of this type of assessment in the fulfilment of the substantive obligations of the Parties, *inter alia*, whether the populations likely to be affected, in this case both the Uruguayan and Argentine riparian populations, should have, or have in fact, been consulted in the context of environmental impact assessment.[32] While both Parties agree that consultation of the affected populations should form part of an environmental impact assessment, Argentina asserts that international law imposes specific obligations on States in this regard. In support of this argument, Argentina points to Articles 2.6 and 3.8 of the Espoo Convention, Article 13 of the 2001 International Law Commission draft Articles on Prevention of Transboundary Harm from Hazardous Activities, and Principles 7 and 8 of the UNEP Goals and Principles. Uruguay considered that the provisions invoked by Argentina cannot serve as a legal basis for an obligation to consult the affected populations and adds that in any event the affected populations had

30 *Ibid.*, at para. 205.
31 *Ibid.*
32 *Ibid.*, at para. 206.

indeed been consulted.[33] The Court agreed and was of the view that no legal obligation to consult the affected populations arises for the Parties from the instruments invoked by Argentina.[34] In any case, having considered Uruguay's efforts in this regard, the Court held that consultation by Uruguay of the affected populations did indeed take place.[35]

C *State Responsibility for Sponsored Activities in the (Deep Seabed) Area: Advisory Opinion by the ITLOS Seabed Disputes Chamber (2011)*

Apart from the binding decisions (for the States involved) of the judicial decisions above, the ITLOS Seabed Disputes Chamber has also recently rendered an authoritative, albeit non-legally binding advisory opinion on the applicable international law and especially, international environmental law principles applicable to the States that oversee the activities of legal persons or entities within the deep seabed area,[36] beyond the limits of national jurisdiction. Among the most important of these direct obligations incumbent on sponsoring States are as follows: the obligation to assist the Authority in the exercise of control over activities in the Area; the obligation to apply a precautionary approach; the obligation to apply best environmental practices; the obligation to take measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution; and the obligation to conduct environmental impact assessments.[37] The Chamber stressed that the obligation to conduct an environmental impact assessment is a direct obligation under the Convention and a general obligation under customary international law.[38] The Chamber then reiterated Article 206 of UNCLOS, which states the following:

> 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, they shall, as far as practicable, assess the potential effects of such activities

33 *Ibid.*, at para. 215.
34 *Ibid.*, at para. 216.
35 *Ibid.*, at para. 219.
36 *Responsibilities And Obligations Of States Sponsoring Persons And Entities With Respect To Activities In The Area*, Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Advisory Opinion, ITLOS Case List No.17, 1 February 2011.
37 *Ibid.*, at 38, para. 122.
38 *Ibid.*, at 44, para. 145.

> on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205 (which refers to an obligation to publish reports).[39]

Referring directly to paragraph 204 of the ICJ Judgment in the *Pulp Mills* case, the Chamber noted the assertion by the ICJ that "it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource."[40] Significantly for our purposes in the present article arguing for the application of this principle in the East China Sea, the Chamber noted that: "Although aimed at the specific situation under discussion by the Court, the language used seems broad enough to cover activities in the Area even beyond the scope of the Regulations. The Court's reasoning in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction; and the Court's references to "shared resources" may also apply to resources that are the common heritage of mankind. Thus, in light of the customary rule mentioned by the ICJ, it may be considered that environmental impact assessments should be included in the system of consultations and prior notifications set out in Article 142 of the Convention with respect to "resource deposits in the Area which lie across limits of national jurisdiction".[41]

However, the Chamber also observed that, in the view of the ICJ, general international law does not "specify the scope and content of an environmental impact assessment" (paragraph 205 of the Judgment in *Pulp Mills on the River Uruguay*). While Article 206 of the Convention gives only few indications of this scope and content, the indications in the Regulations, and especially in the Recommendations referred to in paragraph 144, add precision and specificity to the obligation as it applies in the context of activities in the Area.[42] In light of the above, the Chamber is of the view that the obligations of the contractors and of the sponsoring States concerning environmental impact assessments extend beyond the scope of application of specific provisions of the Regulations.[43]

39 *Ibid.*, at 45, para. 146.
40 *Ibid.*, at para. 147.
41 *Ibid.*, at para. 148. (Emphasis added.)
42 *Ibid.*, at para. 149.
43 *Ibid.*, at 45–46, para.150.

IV Specific Procedural Obligations over Hydrocarbon Deposits in Disputed Maritime Areas

A *Guyana-Suriname Maritime Boundary Delimitation Award by an Arbitral Tribunal established under Annex VII of the UNCLOS (2007)*

Within the context of shared natural resources, rather than transboundary environmental damage, another UNCLOS Annex VII arbitral tribunal award rendered between Guyana and Suriname in 2007 also prescribed a negotiation process involving detailed notification, information disclosure and consultation requirements for the State initiating offshore hydrocarbon exploration activities within an overlapping continental shelf claims area of the seabed, under Articles 74(3) and 83(3) of UNCLOS.[44] A continuing issue in the evolving international law on offshore joint development of shared hydrocarbon resources relates to the scope of the actions that States can undertake when it becomes clear that a seabed area the State regards as within its continental shelf entitlement is also part of an overlapping claims area. In this context, two developments in judicial opinion and State practice may be highlighted. First, it is suggested here that the 2007 *Guyana/Suriname* Award[45] deals with the procedural elements for co-operation embodied in Articles 74(3) and 83(3) of UNCLOS in such a way as to considerably reduce the scope for any unilateral action by interested States in a disputed maritime area, where hydrocarbon resources have been detected. This Award first declares that these Articles impose two obligations which according to the Tribunal 'simultaneously attempt to promote and limit activities in a disputed maritime area.'[46] The first requirement is that pending the final delimitation agreement, States Parties are to make "every effort to enter into provisional arrangements of a practical nature."[47] The second obligation is that the Parties must during this transitional period also make every effort not to jeopardize or hamper the reaching of the final delimitation agreement.[48]

In relation to the first obligation contained within these Articles, the Tribunal was of the view that it was intended to promote the provisional utilization

44 *See, Guyana v. Suriname*, UNCLOS Annex VII Arbitral Tribunal Award (2007) *available at* www.pac-cpa.org.

45 *Guyana/Suriname*, Award of Arbitral Tribunal established pursuant to Article 287 and Annex VII of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) on 17 September 2007, *available at* http://www.pca-cpa.org/.

46 *Ibid.*, at 152, para. 459.

47 *Ibid.*

48 *Ibid.,* at 153, para. 459.

of natural resources within disputed maritime areas, pending their delimitation. Thus, according to the Tribunal, 'this obligation constitutes an implicit acknowledgement of the importance of avoiding the suspension of economic development in a disputed maritime area, as long as such activities do not affect the reaching of a final agreement.'[49]

Applying these findings to the East China Sea region, while China began exploring for oil and gas in 1974, Japan refrained from licensing such activities (with the exception of the exploration under the 1974 Japan-ROK treaty) until 2004. China moved ever closer to the median line which Japan proposed after both countries had ratified UNCLOS in 1996, and at times even went over to the Japanese side of it. According to Drifte, these two countries missed opportunities to deal with the territorial and boundary disputes while oil and gas interest were not yet very important and while Japan had a technological edge over China in deep-sea oil exploration. By refraining from any exploration itself, Japan sent misleading messages to the Chinese side. The most misleading Japanese action was co-financing of Chinese activities in disputed areas of the EEZ in the 1990s: In November 1998, China had begun full operation of its first oil and natural gas field in the Pinghu field, about 70 km from the median line, on the Chinese side. In 1997/98 Japan co-financed – through its contribution to the Asian Development Bank (ADB), as well as directly through its Export Import Bank (renamed Japan Bank of International Cooperation in 1999) – the two oil and gas pipelines from the Pinghu field to the Chinese mainland. The initial disbursement by the ADB was in February 1997, and the final one was as recent as November 2001 (ADB 2004). This support of Chinese oil and gas extraction activities in the contested area has received heavy criticism in Japan in recent years. Today, the Japanese government publicly insists that the Pinghu field is within the contested ECS area, as long as no agreement on the demarcation has been reached, because it lies within 200 n.m. from the Japanese mainland (YS, 28/4/05, 9/11/06). The Pinghu pipelines have now also come under suspicion because China has connected them with those of the Chunxiao field. Seen from a Chinese perspective, however, the long-term Japanese tolerance and even financial support must have been interpreted as at least implicit acquiescence regarding China's rights in the area, as long as China's activities did not fall within any area on the Japanese side of the median line.[50]

The Tribunal also noted that such provisional arrangements would achieve one of the UNCLOS objectives, namely, "the equitable and efficient utilization

49 *Ibid.,* at 153, para. 460.

50 Reinhard Drifte, *Territorial Conflicts in the East China Sea – From Missed Opportunities to Negotiation Stalemate* (2009), *available at* http://www.japanfocus.org/-Reinhard-Drifte/3156.

of the resources of the seas and oceans."[51] Focusing on the normative density of this first obligation, the Tribunal noted that despite the fact that the phrase "every effort" leaves room for interpretation by the interested States or any dispute settlement body, "it is the opinion of the tribunal that the language in which the obligation is framed imposes on the Parties a duty to negotiate in good faith."[52] The Tribunal buttresses this finding by suggesting that the inclusion of the phrase "in a spirit of understanding and co-operation", indicates the drafters' intent to require of the parties a conciliatory approach to negotiations, pursuant to which they would be prepared to make concessions in the pursuit of a provisional arrangement."[53] This allusion to the intentions of the parties to UNCLOS is returned to by the Tribunal later on in the Award when it notes that: "Provisional arrangements of a practical nature have been recognized as important tools in achieving the objectives of the Convention, and it is for this reason that the Convention imposes an obligation on parties to a dispute to make every effort to reach such agreements."[54]

Thus, the Tribunal placed a specific obligation upon Guyana to inform Suriname *directly* of Guyanese plans to allow its concessionaire company, CGX, to undertake exploratory drilling.[55] In an unprecedented move, the Tribunal then specified the precise steps that Guyana could have taken that would have been consistent with her obligations under the Convention and thus sufficient to discharge her duty to make every effort to reach a provisional agreement. These steps "include (1) giving Suriname official and detailed notice of the planned activities, (2) seeking (the) co-operation of Suriname in undertaking the(se) activities, (3) offering to share the results of the exploration and giving Suriname an opportunity to observe the activities, and (4) offering to share all the financial benefits received from the exploratory activities."[56] By providing this detailed exposition of the required notification, information-sharing, and consultation process that the interested States must enter into, the Tribunal has clearly established the legally authoritative standards of behaviour for any State finding itself in a similar situation where it is seeking to initiate exploration activities, either in respect of a transboundary deposit or overlapping claims area. In doing so, the Tribunal has also clearly drawn from, and analogously applied, the prior notification requirement incumbent upon the

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51 *Ibid.,* citing the Preamble to UNCLOS, where this term can be found in the 4th indent.

52 *Ibid.,* para. 461.

53 *Ibid.* This term does replicate almost word for word: 'in a spirit of mutual understanding and co-operation,' the very first indent of the Preamble to UNCLOS.

54 *Ibid.,* at 154, para. 464.

55 *Ibid.*, at 159–160, para. 477.

56 *Ibid.,* para. 477, at 160 of the Award.

International Seabed Authority (ISA) in similar situations of mineral deposits lying across the limits of national jurisdiction and the deep seabed Area, under Article 142(2) of UNCLOS.[57] Within this context, the Tribunal's advocacy (in step (4), above) of the sharing of any benefits derived from exploration activities is both useful as well as arguably establishing a clear legal presumption for the joint development (and revenue-sharing) of any hydrocarbon deposits found in a disputed maritime area.

Applying these legal standards to the disputes of the East China Sea region, it should be noted that in 2003 the Japanese government began to ask the Chinese to hand over data hydrocarbon exploration and production activities in the Chunxiao field area. Beijing refused since it considers the area part of its EEZ. In order to enhance its leverage, the Japanese government decided in 2004 to collect its own geological information. From July to October 2004, a private company commissioned by the Energy Agency of Ministry of Energy, Trade and Industry (METI) conducted a geological survey on the Japanese side of the median line, in order to investigate whether China was tapping into gas reserves which straddle the median line. The survey area was a 210 km north-south strip, with a width of 30 km, the lower end facing the Chunxiao and Tianwaitian gas fields on the Chinese side (Map in *Kaijō Hōan Repōto* 2006: 38). China reacted immediately after the announcement of the survey and warned the Japanese to act with caution in what it considered to be the Chinese EEZ (FMPRC 2004). It was even reported that a Chinese surveillance vessel, and later two warships, tried to chase away the survey ship (AS, 13/10/04; YS, 13/4/05). The interim report of the survey, in February 2005, concluded that it was highly likely that the Chunxiao and Duanqiao geological structures were linked with those on the Japanese side of the median line; this was confirmed as definite in the final report in April 2005 (YS, 2/4/05). The Chinese disputed any geophysical link between the two sides, maintaining that the geological faults near the two gas fields prevent such a link (YS, 21/2/05).[58]

B *Recent Provisions from Bilateral Boundary Agreements: Norway-Russia Maritime Delimitation (2010)*

These detailed notification and consultation requirements can be also be discerned in recent State practice, namely, the Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and

57 *See*, David M. Ong, *Joint Development of Common Offshore Oil and Gas Deposits: 'Mere' State Practice or Customary International Law?*, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 771–804, 785 (1999) and Cameron (2006) *op. cit.*, at 567.

58 Reinhard Drifte, *Territorial Conflicts in the East China Sea – From Missed Opportunities to Negotiation Stalemate* (2009) *available at* http://www.japanfocus.org/-Reinhard-Drifte/3156.

Cooperation in the Barents Sea and the Arctic Ocean, adopted in Murmansk on 15 September 2010.[59] Para. 2 of Article 5, along with Appendix II of this Treaty, provides for a specific procedure to deal with transboundary hydrocarbon deposits lying across the recently agreed maritime boundary, as follows:

> If the existence of a hydrocarbon deposit on the continental shelf of one of the Parties is established and the other Party is of the opinion that the said deposit extends to its continental shelf, the latter Party may notify the former Party and shall submit the data on which it bases its opinion.
>
> If such an opinion is submitted, the Parties shall initiate discussions on the extent of the hydrocarbon deposit and the possibility for exploitation of the deposit as a unit.
>
> In the course of these discussions, the Party initiating them shall support its opinion with evidence from geophysical data and/or geological data, including any existing drilling data and both Parties shall make their best efforts to ensure that all relevant information is made available for the purposes of these discussions.
>
> If the hydrocarbon deposit extends to the continental shelf of each of the Parties and the deposit on the continental shelf of one Party can be exploited wholly or in part from the continental shelf of the other Party, or the exploitation of the hydrocarbon deposit on the continental shelf of one Party would affect the possibility of exploitation of the hydrocarbon deposit on the continental shelf of the other Party, agreement on the exploitation of the hydrocarbon deposit as a unit, including its apportionment between the Parties, shall be reached at the request of one of the Parties (hereinafter "the Unitisation Agreement") in accordance with Annex II.

A summary of the procedural obligations under international law applicable to all interested States in the East China Sea region is as follows:

1. Duty to inform and consult other interested States addressing the possible impacts on freedom of navigation and other user activities, over *all* planned activities that may have implications for sovereignty over the disputed islands, and/or sovereign rights and jurisdiction in the disputed maritime zones, whether these are military, research and/or exploration activities, or building activities on any insular formations.
2. Duty to conduct an EIA for such activities, assessing the possible social, environmental and ecological concerns;

59 Norwegian Ministry of Foreign Affairs official website, *available at* http://www.regjeringen.no/upload/UD/Vedlegg/Folkerett/avtale_engelsk.pdf.

3. For the specific issue of hydrocarbon fields/deposits found either within areas of overlapping seabed claims, or lying across previously delimited maritime boundaries, the procedural duties of both negotiation towards an interim/provisional (co-operative) agreement and *restraint* from unilateral drilling of such fields/deposits, even for exploratory purposes, has also been confirmed by successive international jurisprudence and recent State practice on this issue.

There is evidence that such procedural standards of notification are being established in the East China Sea region. This derives from littoral State practice responding to incidents involving research vessels in the Sino-Japanese areas of overlapping claims. The two nations agreed on 31 August 2000 to negotiate an agreement for advance notification of such "surveys" by either party. The first working level meeting was held in Beijing on 15 September 2000. Finally, on 13 February 2001 China and Japan agreed on a mutual prior notification system. According to Gao and Wu, the Agreement "cleverly" avoids specifying any line beyond which advance notification is required. It simply says that China is to give Japan at least two months' notice when its research ships plan to enter waters "near Japan and in which Japan takes interest" and that similarly, Japan is to inform China before its vessels enter waters "near" China. The notification must include the name of the organization conducting the research, the name and type of vessels involved, the responsible individual, the details of the research such as its purpose and equipment to be used, the planned length of the survey, and the areas to be surveyed.[60]

V Substantive Obligation for Co-operation: Preferred Models/Types of Co-operative Arrangements in the East China Sea Region

A *South Korea-Japan Joint Development Agreement, 1974*

Between March 1969 and September 1970, altogether 11 seabed petroleum blocks were unilaterally staked out by Japan, South Korea, Taiwan and Okinawa (which was still under United States administration following the end of the Second World War). The four Japanese blocks and Okinawa's one were claimed by private oil interests, unlike South Korea's two and Taiwan's four by the respective governments.[61]

60 Zhiguo Gao and Jilu Wu, *Key Issues in the East China Sea: A Status Report and Recommended Approaches,* at 7–8, *available at* http://wilsoncenter.tv/sites/default/files.

61 Park Choon-Ho, *Seabed Boundary Issues in the East China Sea*, at 1, *available at* http://wilsoncenter.tv/sites/default/files/Choon-Ho_Park_1_.pdf.

The designated (joint development) area of the Agreement is specified in Article 2, paragraph 1 of the Agreement, as the sea area surrounded by, counter-clockwise from the northern tip, 1) the median line between Japan and Korea, 2) the median line between Japan and China, 3) the median line between Korea and China (that would be drawn if Japan is ignored), and 4) the limit claimed by Korea by reason of the natural prolongation of its continental shelf. Therefore, the sea area of joint development is only on the Japanese side of the median line between Japan and Korea. The designated joint development zone is then divided into small zones, each of which is explored and exploited by one or more developers approved by both States (Arts. 3 and 4). The approved developers of both States conclude a joint venture agreement and appoint an operation manager by agreement. The operation is conducted only by the operation manager (Arts. 5 and 6). A Japan-Korea Joint Committee is established, but is only a body for consultation about matters concerning the performance of the Agreement (Arts. 24 and 25). Each approved developer of both States is entitled to an equal share of the natural resources exploited in the joint development zone as profits earned from the joint development (Art. 9, para. 1). Reasonable costs for exploration and exploitation are equally allocated to the approved developers of both States. (Art. 9, para. 2).

Both States deem the part of the natural resources to which the approved developer of each State is entitled as natural resources exploited on the continental shelf over which the State has sovereign rights for the application of its domestic law (Art. 16), and tax only their respective approved developer (Art. 17). Both States apply their respective laws and regulations related to the exploration and exploitation of natural resources to small zones where their respective approved developer acts as a designated operation manager (Art. 19). It has been confirmed that no provision of this Agreement “shall be deemed to settle the issue of sovereign rights over the whole or part of the joint development zone or to harm the position of each contracting State with respect to the delimitation of the continental shelf” (Art. 28).

B *China-Japan Principled Consensus in the East China Sea, 2008*

China and Japan have overlapping jurisdictional claims in the East China Sea, which include seabed areas allegedly rich in hydrocarbon resources. China and Japan both claim sovereignty over the Senkaku/Diaoyu islands. Sovereignty over these islands affects the delimitation of the southern part of the East China Sea. China claims jurisdiction in the East China Sea based on the natural prolongation of its continental shelf and a 200 nautical mile (nm) EEZ. In 2009 China submitted a claim to the UN Commission on the Limits of the Continental Shelf (UN-CLCS) that provided data supporting its claim to an

extended continental shelf beyond 200 nm, as far as the Okinawa Trough. Japan claims an EEZ as far as a median line that bisects the East China Sea, the coordinates of which it has never published. In its EEZ law, Japan says that in the event of an overlap of claims, a median line should serve as the boundary. China has never recognized this median line.

Since 2005, some Japanese officials have suggested that Japan actually claims a full 200 nm EEZ, including space beyond the median line in the East China Sea. Some Japanese legal scholars have argued that the median line in the East China Sea was simply intended to be a provisional boundary until delimitation could be negotiated. However, Japan's stated opposition to China's development of the Chunxiao/Shirakaba field creates some confusion. When Japan protested Chinese activities at the Chunxiao/Shirakaba field in 2004 and 2005, it was on the basis that the gas field extends across the median line and, consequently, Japanese resources were being "stolen." The Japanese Ministry of Economy, Trade, and Industry (METI) commissioned a Norwegian survey vessel, the Ramform Victory, to prove this was the case. However, according to Manicom,[62] if Japan did in fact claim an EEZ as far as 200 nm, then it should have simply protested China's activities at the Chunxiao/Shirakaba field as a violation of Japan's EEZ jurisdiction, since the Chunxiao/Shirakaba field is within 200 nm of Japan's coast. Japan did not do this. By implicitly recognizing that the Chunxiao/Shirakaba field is at least partially in Chinese waters, Japan has undermined somewhat its claim to a full 200 nm EEZ in that area.

In June 2008, Japanese and Chinese media reported that a breakthrough had been reached in the four-and-a-half year Chunxiao gas dispute. Rumors that an agreement was imminent had been circulating since early 2008 and had gained momentum during Hu Jintao's historic visit to Japan in May. The breakthrough followed eleven rounds of director-general level discussions, and several ministerial and executive level meetings. The elite commitment to arrive at a consensus emerged after a period of significant tension in the bilateral relationship. Given this turn around in bilateral relations, the process by which the "new consensus" emerged merits investigation as it may hold lessons for Sino-Japanese relations as a whole.[63]

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62 *See*, Chris Acheson, *Disputed Claims in the East China Sea* (an interview with James Manicom), National Bureau of Asian Research, 25 July 2011, *available at* http://www.nbr.org/downloads/pdfs/PSA/Interview_Maincom.pdf.

63 James Manicom, *Sino-Japanese Cooperation in the East China Sea: Limitations and Prospects*, 30 (3) CONTEMPORARY SOUTHEAST ASIA 455–478 (2008).

Foreign Ministry Spokesperson Jiang Yu announced on 18 June 2008 that China and Japan reached a principled consensus on the East China Sea issue through consultation on equal footing.

1. Cooperation between China and Japan in the East China Sea
In order to make the East China Sea, of which the delimitation between China and Japan is yet to be made, a "sea of peace, cooperation and friendship," China and Japan have, in keeping with the common understanding reached by leaders of the two countries in April 2007 and their new common understanding reached in December 2007, agreed through serious consultations that the two sides will conduct cooperation in the transitional period prior to delimitation without prejudicing their respective legal positions. The two sides have taken the first step to this end and will continue to conduct consultations in the future.

2. Understanding between China and Japan on Joint Development
As the first step in the joint development of the East China Sea between China and Japan, the two sides will work on the following: (a) The block for joint development shall be the area that is bounded by straight lines joining the following points in the order listed. (b) The two sides will, through joint exploration, select by mutual agreement areas for joint development in the above-mentioned block under the principle of mutual benefit. Specific matters will be decided by the two sides through consultations. (c) To carry out the above-mentioned joint development, the two sides will work to fulfil their respective domestic procedures and arrive at the necessary bilateral agreement at an early date. (d) The two sides have agreed to continue consultations for the early realization of joint development in other parts of the East China Sea.

3. Understanding on the Participation of Japanese Legal Person in the Development of Chunxiao Oil and Gas Field in Accordance with Chinese Laws
Chinese enterprises welcome the participation of Japanese legal person in the development of the existing oil and gas field in Chunxiao in accordance with the relevant laws of China governing cooperation with foreign enterprises in the exploration and exploitation of offshore petroleum resources. The governments of China and Japan have confirmed this, and will work to reach agreement on the exchange of notes as necessary and exchange them at an early date. The two sides will fulfil their respective domestic procedures as required.

VI Conclusions

Among the now well-known models or types of offshore co-operative arrangements established by neighbouring States around the world, certain common characteristics can now be discerned in the State practice in the East China Sea region. These common elements are as follows:

1. Unitization of individual fields/deposits appears to be preferred over the establishment of joint development zones corresponding to the overlapping claims areas of the interested States;
2. Involvement of domestic/local energy companies (especially national oil companies) is preferred over that of foreign-owned international oil companies; and
3. Success or failure of such co-operative arrangements is assessed as much (if not more) in the political domain as opposed to the economic benefits accruing from the development of hydrocarbon resources from these offshore wells.

Joint Development in the South China Sea: Is the Time Ripe?

Jianwei Li and Pingping Chen

1 Introduction

The South China Sea disputes are very complicated. They involve six parties – China (Taiwan), Brunei, Malaysia, the Philippines and Vietnam – and concern overlapping claims over both land features and maritime zones. Although it is recognized that peaceful resolution of these disputes is important to the region as well as the world, it is unlikely that this aim could be reached in any near future. Demand for resources, living and non-living, has pushed claimant States to take unilateral activities for resources exploration and exploitation in the disputed sea area. These unilateral activities are against the spirit of Declaration of Conduct for the Parties in the South China Sea (DOC) which was reached between China and the member States of the Association of Southeast Asian Nations (ASEAN) in 2002. They have met and will be meeting strong protests from other claimant States. With situations in the South China Sea being intensified since 2009, various means have been attempted and reconsidered to control the disputes from being escalated or even spilling out of control. This article discusses the concept of joint development arrangements (JDA) and its possible application in the South China Sea proper.[1]

The next section introduces the concept of JDA from an international law perspective and its evolution. Section III takes the South China Sea Region[2] as a site for observation to study the policies of all the claimant countries in relation to JDA, followed by examination of the JDA cases in the region to which

1 For the purpose of this article, the South China Sea proper refers to the sea area which is bordered by China to the north, Vietnam to the west, peninsular Malaysia to the southwest, Brunei Darussalam and the two Malaysian states of Sabah and Sarawak to the south, and the Philippines to the east. *See* Jianwei Li and Ramses Amer, *Recent Practices in Dispute Management in the South China Sea*, in Clive Schofield (ed.), Maritime Energy Resources in Asia: Legal Regimes and Cooperation 81 (2012).

2 For the purpose of this article, the South China Sea Region includes (1) the sea area of the South China Sea proper and adjacent waters such as the Gulf of Thailand and the Gulf of Tonkin; and (2) land features of the Paracel Islands, the Spratly Islands, the Pratas Islands, and the Macclesfield Bank as well as four other island groups in the southwestern part of the South China Sea—the Anambas, Badas, Natuna, and Tambelan islands. *See* Li and Amer, *supra* note 1, at 82.

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one or more claimants are parties. Section IV analyzes the potential application of JDA in the South China Sea, exploring possible areas for JDA and obstacles in view. Concluding remarks are offered in Section V.

II Concept and Evolution[3]

Discussion around joint development (JD) was triggered by the increasing oil and gas exploitation activities in the 1960s which happened in the marine areas where boundaries pass through or where claims overlapped.[4] Onorato is a pioneer scholar who analyzed in detail the topic of JD from an academic perspective.[5] In one of his articles published in 1977, Onorato considers that "potential common petroleum deposit" should be preserved as the "unity of the deposit" and the several "States holding interests therein" are under obligation to exploit through "co-operation, good faith negotiation and agreement".[6] He recognized at that time that international law had not been developed which prescribed clear methods for apportionment of an international common petroleum deposit,[7] but there existed a "legally plausible and practically implementable regime of law" which governs such an issue.[8]

The concept of JD first appeared in international law in the 1970s. By definition of the British Institute of International and Comparative Law, the term refers to "inter-State cooperation" over the offshore oil and gas in a designated sea area that is under dispute among related parties.[9] This is a narrow definition of JD. Judge Gao prefers this definition.[10] Other popular definitions of JD in the 1980s include those by Townsend-Gault, by Lagoni as well as by Fox et al. They all emphasize the rights which all States share to the resources in a given area and they should jointly exploit such-said resources. Lagoni divides JD activities into those across boundary and those lying in an area of

3 Part of this section is drawn from a previous joint research work, Li and Amer, *supra* note 1, at 87–89.

4 Binghui Sun, *Legal Issues Regarding Joint Development of Marine Resources* [*Gongtong Kaifa Haiyang Ziyuan Falu Wenti Yanjiu*], PhD Thesis, China University of Political Science and Law, (2000) at 3.

5 *Ibid.*, at 4.

6 William T. Onorato, *Appointment of an International Common Petroleum Deposit*, 26 The International and Comparative Law Quarterly 326 (1977).

7 *Ibid.*, at 327.

8 *Ibid.*, at 336; Keyuan Zou, *Joint Development in the South China Sea: A New Approach*, 21 International Journal of Marine and Coastal Law 89 (2006).

9 *Ibid.*, Zou, *supra* note 8, at 90.

10 Sun, *supra* note 4, at 6.

overlapping claims.[11] Zou further clarifies another category of JDA which is devised together with maritime boundary delimitation.[12]

JDA may trace its international legal basis as early as the 1958 Geneva Convention on Continental Shelf. The concept of shared resources and co-operation in developing them are also reflected in the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and other international soft laws such as declarations from the United Nations (UN). Article 2 of the 1958 Convention provides that coastal States have exclusive sovereign rights for the purpose of exploring and exploiting the national resources on the sea-bed.[13] Article 77 of UNCLOS re-emphasizes such rights.[14] Regarding resources of shared nature among different States, the 1974 UN Charter of Economic Rights and Duties of States recognised the duties of relevant countries. Its Article 3 provides, "…. in the exploitation of natural resources shared by two or more countries, each state *must co-operate* on the basis of a system of information and prior consultations in order t*o achieve optimum use of such resources without causing damage to the legitimate interests of other*s".[15] (emphasis added)

Here three issues are emphasized. First, States which share natural resources are strongly required to cooperate with each other. Second, cooperation in such a case is for the purpose of optimum use of the resources. Third, the rights of other States must be respected such as navigational rights. On 19 May 1978, Principle One of the Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilisation of Natural Resources Shared by Two or More States was adopted in which States sharing natural resources are required to "co-operate in the equitable utilisation of shared natural resources".[16]

Predicting the difficulty in reaching boundary delimitation agreements in relation to overlapping Exclusive Economic Zones (EEZ) and continental

11 David Ong, *The 1979 and 1990 Malaysia-Thailand Joint Development Agreements: A Model for International Legal Co-operation in Common Offshore Petroleum Deposits?*, 14 INTERNATIONAL JOURNAL OF MARINE & COASTAL LAW 209 (1999).

12 Zou, *supra* note 8, at 92.

13 Article 2 of the 1958 Convention on Continental Shelf, from the website of the UN, *available at*: http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_continental_shelf.pdf.

14 Article 77(2) of UNCLOS provides the same wording as that in Article 2 of 1958 Convention on Continental Shelf, United Nations Convention on the Law of the Sea, from the website of the UN, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_continental_shelf.pdf.

15 Ong, *supra* note 11, at 214; UN General Assembly Resolution 3281(XXIX), 12 December 1974, (1975) 14 ILM 251.

16 *Ibid.*

shelves between countries opposite to each other or with adjacent waters, Articles 74(3) and 83(3) provide that pending final agreement, the neighboring States:

> in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during the transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.[17]

It is analyzed that the obligation reflected in these two articles contains two aspects. First, States should *make every effort to enter into provisional arrangements of a practical nature*. This imposes on parties a "duty to negotiate in good faith" and to take "a conciliatory approach to negotiations in which they would be prepared to make concessions in the pursuit of a provisional arrangement".[18] Such a duty is compulsory and States are under obligation not to take concrete actions but make every effort to reach provisional arrangements.[19] It is further observed that States are *under no obligation* to enter into any provisional arrangement but must only "make every effort" to negotiate in good faith.[20] The second aspect is about the obligation of the States, during this transitional period, *not to jeopardize or hamper* the reaching of a final agreement on delimitation.[21] In this regard, "any activity which represents an irreparable prejudice to the final delimitation agreement" is a breach of this obligation.[22]

In regard to what constitute "provisional arrangements", UNCLOS does not offer any clarification or elaboration. One comment is that these measures could cover a wide range of activities including, *inter alia*, "moratoriums on all activities in overlapping areas, joint development or cooperation on fisheries, joint development of hydrocarbon resources, agreements on environmental

17 Arts. 74(3) and 83(3), UNCLOS.

18 Tara Davenport, et al, *Conference Report on the Conference on Joint Development and the South China Se*a, organized by Center for International Law, National University of Singapore, on 16–17 June 2011, Singapore, at 13; Robert Beckman, *Recent Development of the South China Sea Dispute and Prospects of Joint Development Regime*, Paper presented at the International Workshop on *Legal Framework for Joint Development in the South China Sea*, hosted by National Institute for South China Sea Studies, 6–7 December 2012, Haikou, China, at 5.

19 Sun, *supra* note 4, at 6.

20 Beckman, *supra* note 18, at 6.

21 Davenport et al, *supra* note 18, at 13.

22 Beckman, *supra* note 18, at 6.

cooperation, and agreements on allocation of criminal and civil jurisdiction"[23] as long as they are not jeopardize or hamper the reaching of a final agreement on delimitation. Another comment offers a narrow explanation. Since the purpose is to "further the utilization of the area to be delimited" provisional arrangements should be related to exploration and exploitation of the resources in the area.[24]

The DOC, signed in 2002, is the first document between China and ASEAN countries in relation to the South China Sea issues. The DOC also emphasizes a spirit of "cooperation and understanding". Paragraph 5 provides that "pending the peaceful settlement of territorial and jurisdictional disputes, the Parties concerned undertake to intensify efforts to seek ways, in the spirit of cooperation and understanding, to build trust and confidence".[25] Again Paragraph 6 encourages the Parties concerned to explore or undertake cooperative activities.[26] Since the list of "cooperative activities" is not exhausted, it is believed that JDA of natural resources must be in the mind of negotiators during the process of negotiations leading to the final version of the DOC.

Meanwhile, earlier ASEAN documents encourage member States to cooperate regarding the exploitation of natural resources they share, including those in the maritime domain. For example, Article 19(1) of the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources, provides: "Contracting Parties that share natural resources shall co-operate concerning their conservation and harmonious utilization, taking into account the sovereignty, rights and interests of the Contracting Parties concerned in accordance with generally accepted principles of international law".[27]

Joint development is a temporary arrangement in nature, usually motivated by the possibility of the presence of natural resources and potential economic gains from the exploration and exploitation of concerned resources. In cases where the maritime boundary is delimited, the motivation for cooperation is for the best utilization of the resources. As for agreements in a disputed area, signatories to JDAs seem more motivated by the desire to reach a swift agreement for immediate exploration and exploitation. A second motivation may be the fear that the resources in question may fall on the "wrong" side of the

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23 *Ibid.*, at 9.

24 Rainer Lagoni, *Interim Measures Pending Maritime Delimitation Agreements,* 78 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 354 (1984).

25 Declaration of Conducts of the Parties in the South China Sea, from the website of ASEAN, *available at* http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea.

26 *Ibid.*

27 Ong, *supra* note 11, at 214.

delimitation line in the absence of knowledge of their exact location.[28] The shared desire for economic gain leads to mitigation of the potential for conflicts such that related parties search for a provisional arrangement for cooperation in the disputed area, with the view that resolution of the sovereignty issue could be very time-consuming. The cooperative nature reflected in JDAs helps settle the concerned dispute temporarily by putting potential conflicts under control.[29] Meanwhile, JDAs can been seen as an attempt to fulfill an obligation under UNCLOS. As to the South China Sea region on which this study focuses, JDAs also reflect the efforts from claimant States in implementing the DOC. This approach has been explored in the South China Sea Region where bilateral as well as multilateral maritime disputes exist.

III Claimant States and Joint Development Practice

Cooperative relations are very important for neighboring countries to initiate JDAs in maritime areas either straddling the boundaries or with overlapping claims. On the other hand, JDAs can further promote friendship between neighboring countries, and the benefits can spill over to other areas in inter-State relations.[30] The political will reflected from government policies is vital to such country-to-country cooperation. To judge possibilities of application of JDA in the South China Sea region, it is necessary to first analyze policies of relevant claimant States.

A *Policies of Claimant States*

1 China[31]

To manage maritime disputes with its neighbors, China prefers direct bilateral consultation and negotiation. China has never opted for any form of third party involvement, including judicial settlement, good office, mediation, and conciliation. On 25 August 2006, China submitted to the United Nations a declaration under Article 298 of UNCLOS, which ruled out the compulsory dispute settlement procedures concerning disputes over maritime delimitations,

28 Clive Schofield, *Unlocking the Seabed Resources of the Gulf of Thailand*, 27 CONTEMPORARY SOUTHEAST ASIA 288 (2007).

29 *Ibid.*, at 298–299.

30 Anon, *Feasibility and Restraints regarding Application of Joint Development in the Spratlys Area* [Gongtong Kaifa Shiyong Yu Nansha Zhi Kexingxing Ji Xianzhi], *available at* http://nccuir.lib.nccu.edu.tw/bitstream/140.119/37032/9/301509.pdf.

31 This part is updated and revised from a previous joint research work. Li and Amer, *supra* note 1, at 92–94.

historic bays or titles, military activities, or those in which the Security Council of the United Nations exercises its functions.[32] One earlier Chinese government white paper on maritime affairs declares:

> In view of the strategy of peace and development, the Chinese Government uphold that the disputes should be resolved through friendly consultation, and that pending the final resolution, disputes could be put aside while cooperation shall be strengthened for promoting joint development.[33]

Such a declaration indicates China's basic policy on dispute management. First, disputes shall be resolved by peaceful means through friendly consultation based on the principle of equity and existing international law. Second, the reiterated notion of joint development reflects China's exploration in searching for alternative peaceful means in managing its maritime disputes before they are finally resolved.

Within China, the concept of joint development, together with "putting aside the dispute" (over sovereignty), was initiated by Deng Xiaoping during his 1978 visit to Japan when the dispute over the Diaoyu Islands was raised at a press conference. He was quoted as saying that the issue of the Diaoyu Islands "can be put aside. Maybe our next generation is cleverer than us and could find a real resolution to it".[34] Application of this approach to the South China Sea issue was also first raised by Deng at his meeting with the Philippine vice president in June 1986. Deng was quoted as saying that the issue of the Nansha/Spratly Islands "involves more than one country". He continued by stating that from "a practical view, we opt to put aside this issue. Maybe in several years' time, the Chinese Government could propose a solution acceptable to all parties concerned". In his meeting with his Philippine counterpart Corazon Aquino on 16 April 1988, Deng reiterated, "After many years of

32 China's declaration reads that "the Government of the People's Republic of China does not accept any of the procedures provided for in Section V of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention", United Nations website, *available at* http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China%20Upon%20ratification.

33 *Zhongguo Haiyang Shiye de Fazhan* [The Development of China's Ocean Affairs], *People-Net*, *available at* http://www.people.com.cn/GB/channel2/10/20000910/226233.html; and Zhang Liangfu, *Zhongguo yu Linguo Haiyang Huajie Zhengduan Wenti* [Dispute over Maritime Delimitation between China and its Neighboring Countries] 280 (2006).

34 Sun, *supra* note 4, at 92.

consideration, we think that to solve the issue [the Nansha/Spratly Islands], all parties concerned could explore joint development under the premise of admitting China's sovereignty over them".[35] The meaning of Deng's words at these two occasions can be deduced as, for China putting aside the dispute over the Spratlys does not mean that China gives up its sovereignty claim, and joint development is the practical choice for all parties concerned to manage their sovereignty dispute. This stance is not contradictory with "without prejudice" principle in Articles 74(3) and 83(3).

From then on, top Chinese leaders have reiterated China's proposal on joint development at various occasions. In 1990, Chinese Prime Minister Li Peng, during his visit to Malaysia, expressly put forward the joint development proposal as "shelving the disputes and developing jointly" (*gezhi zhengyi, gongtong kaifa*).[36] At the 25th ASEAN Ministerial Meeting in Manila in July 1992, after Foreign Minister Qian Qichen raised the proposal, he stated that "when conditions are ripe, we can start negotiations". In 2003, when Wu Bangguo, Chairman of the National People's Congress, visited the Philippines, he proposed to his Filipino counterpart joint development of petroleum in the South China Sea.

China's policies of managing maritime disputes with its neighboring countries by peaceful means, including the application of JDA, are consolidated by its commitments under international law or regional documents. China ratified UNCLOS in 1996 and signed the DOC with ASEAN countries in 2002. The latter signifies a further step leading to setting aside the sovereignty and maritime boundary disputes and jointly developing the resources.[37]

In conclusion, China emphasizes peaceful means for dispute settlement regarding the South China Sea issues and pending the final settlement, JDA and cooperation on broader economic issues are proposed as the practical solution for dispute management for building confidence among relevant disputants.

2 Vietnam

Oil and gas resources in the South China Sea are very important for Vietnam to achieve its goal of building Vietnam into a regional maritime power by 2020 which was adopted by the Central Committee of Vietnamese Communist Party in January 2007.[38] It is expected that Vietnam's oil output will peak in 2013 reaching 370,640 b/d and gas production will rise from an estimated 8.6 bcm

35 Zhang, *supra* note 33, at 281–285.

36 Zou, *supra* note 8, at 102.

37 Beckman, *supra* note 18, at 3.

38 National Institute for South China Sea Studies, Special Report on Resources Development in the South China Sea: Policies and Practices (Forthcoming).

in 2012 to 12.2 bcm by 2016.[39] Vietnam moved fast with rapid exploration and development of its offshore oil and gas resources to support its industrialization, but as Valencia and Van Dyke rightly put, "as long as maritime boundaries remain in dispute, foreign oil companies will be reluctant to take concessions or explore these areas".[40] Finding a practical approach to developing oil and gas resources would be one best approach pending the settlement of maritime disputes.

In the 1970s, China-Vietnam boundary negotiations in the Gulf of Tonkin were triggered by the prospect for oil and gas in the Gulf. In the 1980s, Vietnam proposed that the two countries undertake a joint development program in the Gulf. After nearly 28 years of negotiation, China and Vietnam reached a maritime delimitation agreement for the Gulf of Tonkin in December 2000, in which JDA is cited as an approach for exploitation of oil and gas resources straddling the boundary.[41] China and Vietnam also signed a fishery agreement at the same time. During the meeting between Chinese and Vietnamese Premiers in October 2004, both assessed highly the value of the two 2000 agreements with emphasis of the importance of cooperation.[42] During President Hu Jintao's State visit to Vietnam from 15–17 November 2006, a joint communiqué was released in which JDA was raised as a means to keep stability in the South China Sea. It was promoted that both sides "shall actively discuss and negotiate on the issue of joint development in order to find appropriate models and areas".[43] During the meetings between top leaders from both countries in May and October 2008 respectively, two types of cooperation on oil and gas resources are emphasized. The first is to "as soon as possible carry out joint survey in the sea area outside the mouth of the Gulf of Tonkin". The second is to reiterate active discussion on JD to find out appropriate model and area for cooperation.[44] Vietnamese President Truong Tang Sang met Chinese President Xi Jinping on 19 June 2013. When Xi emphasized China's willingness

39 *Vietnam Oil and Gas Report Quarter 1*, *available at* http://www.aetin.eu/news/oil-gas-vietnam-may-turn-LPG-exporter-by-2015/vietnam-oil-and-gas-report-q1–2013/.

40 Mark J. Valencia and Jon M. Van Dyke, *Vietnam's national interests and the law of the sea*, 25 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 219 (1994).

41 Details are offered in the following case study.

42 *China and Vietnam issued a joint communiqué* [Zhong Yue Fabiao Lianhe Gonggao], from the website of Ministry of Foreign Affairs of the People's Republic of China, *available at* http://www.fmprc.gov.cn/mfa_chn/ziliao_611306/1179_611310/t163636.shtml.

43 *China and Vietnam issued China-Vietnam Joint Communiqué* [Zhongguo he Yuenan Fabiao 'Zhong-Yue Lianhe Shengming'", from the website of Ministry of Foreign Affairs of the People's Republic of China, *available at* http://www.fmprc.gov.cn/mfa_chn/ziliao_611306/1179_611310/t280705.shtml.

44 *China-Vietnam Joint Communiqué, from the website of Ministry of Foreign Affairs of the People's Republic of China, available at* http://www.fmprc.gov.cn/mfa_chn/ziliao_

"to strengthen the frequency of meetings and efforts of the working group to concurrently push ahead JD and maritime delimitation in the area outside the mouth of the Gulf of Tonkin", Sang responded by emphasizing Vietnam's wish to actively discuss delimitation as well as JD in the sea area outside the mouth of the Gulf of Tonkin.[45]

Vietnam ratified UNCLOS in 1994 and is bound by the obligations under UNCLOS, including making every effort to negotiate to reach some provisional arrangements, such as JDA, in relation to offshore oil and gas resources. Vietnam is a signatory to the 2002 DOC as well as to the 2011 guiding principles on implementation of the DOC,[46] therefore it is politically bound by the cooperative spirit reflected in these two regional documents.

In conclusion, through the top leaders' speeches, bilateral communiqués and regional and international treaties to which Vietnam is a party, Vietnam advocates JDAs. The government also came into JD agreement with Malaysia in 1992.

3 The Philippines

The Philippines ratified UNCLOS on 8 May 1984 and is also a signatory of the DOC. As such the Philippines is bound by the obligations stated in UNCLOS and should respect the principles of the DOC including the principles of "cooperation" and "self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability".

The Philippines' several administrations have openly expressed the willingness to shelve the disputes for the sake of cooperation. On 11 August 1995, China and the Philippines reached an eight-point "code of conduct" regarding the issues in the South China Sea, in which both countries emphasized the importance of building confidence and trust between the two countries[47] and the readiness of cooperation raised by all claimants in the South China Sea.[48] At the ASEAN Summit meeting of the same year, President Ramos recommended

611306/1179_611310/t460818.shtml; China-Vietnam Joint Communiqué, *available at* http://www.fmprc.gov.cn/mfa_chn/ziliao_611306/1179_611310/t519489.shtml.

45 Xi Jinping met Vietnamese President Truong Tan Sang and emphasized that China and Vietnam shall walk unswervingly along the road of friendship and cooperation, *available at* http://www.fmprc.gov.cn/mfa_chn/zyxw_602251/t1051627.shtml.

46 Hereinafter referred to as the "2011 Guiding Principles".

47 Articles 2 and 3 of the Joint Statement of the RP-PRC Consultations on the South China Sea and on Other Areas of Cooperation, 9–10 August 1995, in Hong Thao Nguyen, *Vietnam and the Code of Conduct for the South China Sea*, 32 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 125–126 (2001).

48 Article 5 of the 1995 China-Philippines "Code of Conduct", *ibid.*

that all parties concerned shelve the dispute over sovereignty to the Spratly Islands and withdraw the soldiers stationed in the features.[49]

Support on JDAs has been reflected in several China-Philippines bilateral communiqués. During the State visit to China by President Arroyo in 2004, a joint communiqué was issued which provides that "pending the final resolution of disputes over territory and maritime rights, both sides continuously explore means of cooperation including joint development".[50] In 2005, when Chinese President Hu paid a State visit to the Philippines after the signing of the China- Philippines-Vietnam Joint Marine Seismic Undertaking Agreement (JMSUA), leaders from both countries expressed their welcome to such cooperation agreement.[51] Even Aquino III whose administration takes a tougher position in their dispute with China expressed their willingness to JDAs. During the Huangyan Dao (Scarborough Shoal) Incident in May 2012, Aquino III responded to a question of JDA in the disputed area by saying that "resources exploration by means beneficial to the whole region will reduce our dependence on oil import from Middle East and NATO".[52]

In January 2013, the Philippines started arbitral proceedings against China requesting the arbitral tribunal to rule on the conformity of China's U-shaped line with UNCLOS and China's activities on some land features in the Spratlys.[53] It was observed that in relation to dispute management in the South China Sea, the Philippines now opted for international arbitration instead of direct means including JDAs.[54]

49 Anon, *supra* note 30, at 74.

50 *Joint Communiqué between the People's Republic of China and the Republic of the Philippines* [Zhonghua Renmin Gongheguo Yu Feilubin Zhengfu Lianhe Gonggao], from the website of Ministry of Foreign Affairs of the People's Republic of China, *available at* http://www.fmprc.gov.cn/mfa_chn/ziliao_611306/1179_611310/t155753.shtml.

51 *China and the Philippines issued a joint communiqué,* from the website of Ministry of Foreign Affairs of the People's Republic of China, *available at* http://www.fmprc.gov.cn/mfa_chn/ziliao_611306/1179_611310/t193789.shtml.

52 Jinlu Zhou, *The Philippine President Raised JD in the South China Sea, Saying Impossible to compete with China, available at* http://news.qq.com/a/20120518/000175.htm.

53 *The Secretary of Foreign Affairs on the UNCLOS Arbitral Proceedings against China, available at* http://www.gov.ph/2013/01/22/statement-the-secretary-of-foreign-affairs-on-the-unclos-arbitral-proceedings-against-china-january-22–2013/; Ministry of Foreign Affairs of the Republic of the Philippines, *Notification and Statement of Claim on the West Philippine Sea, available at* http://www.dfa.gov.ph/index.php/newsroom/dfa-releases.

54 *Malaysian PM echoes Beijing's call for joint development in South China Sea, available at* http://www.scmp.com/news/asia/article/1253564/malaysian-pm-echoes-beijings-call-joint-development-south-china-sea.

4 Malaysia

Malaysia signed UNCLOS on 10 December 1982 and ratified it in 1996. As to the disputes in the SCS, Malaysia favors peaceful resolution through negotiation. In 2005, China's Premier Wen Jiabao and Malaysia's Prime Minister Abdullah Badawi signed a joint communiqué, in which it is stated that both China and Malaysia welcome concrete cooperation in the disputed waters in the SCS under guidelines of shelving the dispute for joint development.[55] In 2011, the Malaysia Deputy Minister of Foreign Affairs A. Kohilan Pillay stated, "Joint development of natural resources may be an interim measure that could be taken by countries with overlapping claims over the area". According to him, Malaysia favors negotiation with the concerned States to settle the maritime dispute. The third party, however, like the ICJ, should be the final option.[56] Malaysia's Prime Minister Najib also called for the claimants in the South China Sea to jointly develop resources to avoid conflict and prevent "extra-regional States".[57]

Malaysia holds an open attitude toward JDAs and on many occasions its leaders expressed their willingness for JDAs in disputed waters. Malaysia has carried out several JDAs with its neighbor countries, such as the 1979/1990 Malaysia-Thailand JDA, the 1992 Vietnam-Malaysia JDA. Recently, when finalizing the delimitation of maritime boundaries between the two countries, Malaysia proposed joint oil exploration with Brunei.[58]

5 Brunei

In 1984, after independence, Brunei signed UNCLOS and ratified it in 1996. As to the dispute in the South China Sea, Brunei insists that the relevant disputes should be resolved through peaceful dialogue and consultations by the concerned sovereign States.

In 2005, during the visit to Brunei, President Hu proposed joint development in the South China Sea with Brunei. On 5 April 2013, President Xi and the Sultan of Brunei Haji Hassanal Bolkiah signed a joint statement which states that both countries and the concerned companies will continue to deepen cooperation in

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55 *The joint communiqué of People's Republic of China and Malaysia*, from the website of Ministry of Foreign Affairs of the People's Republic of China, *available at* http://www.fmprc.gov.cn/chn/pds/ziliao/zt/ywzt/2005year/wjbzlfw/t226666.htm.

56 *Parliament: Malaysia Favours Peaceful Resolution To Maritime Boundary Dispute*, 6 April 2011, *available at* http://maritime.bernama.com/news.php?id=576829&lang=en.

57 *Malaysian PM echoes Beijing's call for joint development in South China Sea*, *available at* http://www.scmp.com/news/asia/article/1253564/malaysian-pm-echoes-beijings-call-joint-development-south-china-sea.

58 *Malaysia proposes joint oil exploration*, The Brunei Times, 7 August 2009, *available at* http://www.bt.com.bn/home_news/2009/08/07/malaysia_proposes_joint_oil_exploration.

energy sector. As to JDAs, "The Leaders agreed to support relevant enterprises of the two countries to carry out joint exploration and exploitation of maritime oil and gas resources following the principle of mutual respect, equality and mutual benefit. Such cooperation shall not be interpreted as to prejudice the position of the respective countries in relation to maritime rights and interests".[59] This is the first time that JD is mentioned in the joint statement or communiqué between the two countries. Brunei also expressed its openness to JDAs.

B *Joint Development Cases in the Region*

1 Joint Development Arrangements for Resources Straddling Boundaries

There are two cases under this category, the 2000 China-Vietnam maritime delimitation and fishery cooperation agreements for the Gulf of Tonkin and the 2009 Brunei-Malaysia maritime delimitation agreement.

a *China-Vietnam Agreements*[60]

The maritime delimitation agreement of 25 December 2000 on the Gulf of Tonkin[61] is the first maritime boundary agreement between China and Vietnam. It is also China's first maritime boundary agreement. The maritime boundary agreement uses a single line for both the continental shelf and Exclusive Economic Zone (EEZ). On the same day, the two countries signed an agreement on fishery cooperation in the Gulf of Tonkin.[62] On 29 April 2004, the Supplementary Protocol to the Agreement on Fishery Cooperation in the Gulf of Tonkin and regulations on preservation and management of the living resources in the Common Fishery Zone in the Gulf of Tonkin were signed.[63] On 30 June 2004, both boundary and fishery agreements entered into force following the completion of the ratification process.[64]

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59 Article 9 and 10 of the joint statement, the full text is *available at* http://www.fmprc.gov.cn/eng/wjdt/2649/t1029400.shtml.

60 This part is revised from a joint research in which one author is involved. Li and Amer, *supra* note 1, at 84 and 95–98.

61 Hereinafter, the 2000 Delimitation Agreement.

62 Hereinafter, the Fishery Agreement, Hong Tao Nguyen, *Maritime Delimitation and Fishery Cooperation in the Tonkin Gulf*, 36 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 35 – 41 (2005); Keyuan Zou, *The Sino-Vietnamese Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin*, 36 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 127–148 (2005).

63 *Protocol on China-Vietnam agreement on fishery cooperation in Beibu Bay signed,* People's Daily Online*, available at* http://english.people.com.cn/200404/30/eng20040430_142001.html, accessed on 5 May 2013.

64 *Two China-Vietnam Beibu Gulf agreements take effect,* PEOPLE'S DAILY ONLINE, *available at* http://english.peopledaily.com.cn/200407/01/eng20040701_148157.html.

The above agreement shows the spirit of support for JDA from both governments. Article 7 of the 2000 China-Vietnam Agreement reads:

> In case that any single geophysical structure of oil and gas or other mineral deposits should straddle the demarcation line as provided in Article 2 of this Agreement, the Parties shall, through friendly consultation, reach an agreement on the development of the structure or deposit in a most effective way as well as on equal sharing of the profits resulting from the development.[65]

An agreement on joint oil exploration in the Gulf of Tonkin was signed on 16 November 2006.[66]

Meanwhile, the Fishery Agreement is an example of a two-step solution for settling fishing disputes and delimiting the EEZ and related arrangements aiming for better conservation and utilization of the living resources shared by both countries. Coordination and cooperation reflected in the fishery arrangements contribute to reasonable utilization and sustainable development of living resources as stated in the Delimitation Agreement.[67] The regime of the EEZ with regard to fisheries is to be applied after four years for the Transitory Arrangements (TA) and after fifteen years for the Common Fishery Zone (CFZ).[68] Several mechanisms were included to supervise the implementation of the two agreements. The Joint Fishery Committee (JFC) is in charge of the implementation of the Fishery Agreement. The expert-level group organized a two-year joint research program in the CFZ from 2006 to 2007 which includes two phases with seventeen aerial surveys.

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65 Appendix: Agreement on the Delimitation of the Territorial Seas, Exclusive Economic Zones and Continental Shelves in the Beibu Gulf between the People's Republic of China and the Socialist Republic of Vietnam, in Zou, *supra* note 62, at 22 – 24, Appendix B: Agreement between the Socialist Republic of Viet Nam and the People's Republic of China on the Delimitation of the Territorial Sea, Exclusive Economic Zone and Continental Shelf between the Two Countries in the Tonkin Gulf, in Nguyen Hong Thao, *Maritime Delimitation and Fishery Cooperation in the Tonkin Gulf*, 36 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 41–44 (2005).

66 *Gov't gives nod to Tokin Gulf oil deal with China*, from the website of Viet Nam Ministry of Foreign Affairs, *available at* http://www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns070105093635/newsitem_print_preview.

67 Article 8 of the Delimitation Agreement provides that "the contracting parties agree to carry on negotiations on related issues regarding the reasonable utilization and sustainable development of living resources in the Beibu Gulf (the Gulf of Tonkin) as well as in the EEZ of both countries in the Gulf", reproduced in Zou, *supra* note 62, at 24.

68 For more detail, *see* Zou, *supra* note 62, at 30–32.

The expert-level talks on the delimitation of the area outside the mouth of the Gulf of Tonkin were initiated in January 2006 and the fifth meeting was held in January 2009.[69] Such expert-level talks were renewed in 2012 and the latest one, dubbed as the 3rd round, was held in May 2013.[70] During the negotiation process, JDA has been emphasized together with delimitation.

All these post-2002 arrangements and on-going negotiations are beneficial to effective implementation of relevant agreements. By the Delimitation Agreement, both countries are obliged to jointly develop oil and gas resources straddling the boundary. Discussions on JDA have been undergoing since the initiation of the negotiation on the area outside the mouth of the Gulf of Tonkin. These, together with the JDA arrangement on fishery in the Gulf of Tonkin, contribute to confidence-building between the two countries, which will help China and Vietnam resolve disputes in other parts of the South China Sea.

b *Brunei-Malaysia Agreement*

In March 2009, through exchange of letters Brunei and Malaysia seem to have resolved their maritime boundaries. Both countries reached an agreement on establishing a "Commercial Arrangement Area" to incorporate both countries' oil blocks for sharing revenue from the exploitation of oil and gas.[71] The JDA in the 2009 Brunei-Malaysia Agreement did not involve sovereignty disputes over features. It was observed that Malaysia agreed to give up its claims (and hence, its sovereign rights) over blocks of hydrocarbon resources (known as Blocks L and M) off Borneo in exchange of participation by Malaysian oil company (Petronas) in the development of these blocks. This is an exceptional case in State practice on joint development in Asia.[72] By this agreement, both countries agreed to establish a joint commercial arrangement area whereby Petronas will participate in the development of Blocks L and M, although the terms of the agreement are reportedly still being negotiated.[73]

69 Ramses Amer, *The Sino-Vietnamese Approach to Managing Border Disputes – Lessons*, at 261.

70 *Vietnam and China initiate the 3rd round of talks for the working group for maritime delimitation for sea area outside the mouth of Beibu Bei, available at* http://www.qdnd.vn/webcn/zh-cn/120/365/380/245152.html.

71 Li and Amer, *supra* note 1, at 89; *Joint Press Statement by Leaders on the Occasion of the Working Visit of YAB Dato' Seri Abdullah Haji Ahmad Badawi, Prime Minister of Malaysia, to Brunei Darussalam on 15–16 March 2009,* Embassy of the People's Republic of China in Negara Brunei Darussalam, *available at* http:// bn.china-embassy.org/eng/wlxw/t542877.htm.

72 Davenport et al, *supra* note 18, at 20–21.

73 *Ibid.*, at 25.

2 Joint Development Arrangements for Resources in Overlapping Sea Areas

Under this category, two cases have been studied in detail, the 1979/1990 Malaysia-Thailand Joint Development Agreement and the 1992 Malaysia-Vietnam Agreement.

a *Malaysia-Thailand Joint Development in the Gulf of Thailand*

The overlapping area claimed by Malaysia and Thailand lies in the southwestern part of the Gulf of Thailand. (See Figure 7.1) It is located about 72 km offshore and covers 7,238km². The area corresponds with the northwestern end of the Malaysia Basin, which is estimated to have 14 trillion cubic feet of natural gas reserves.[74]

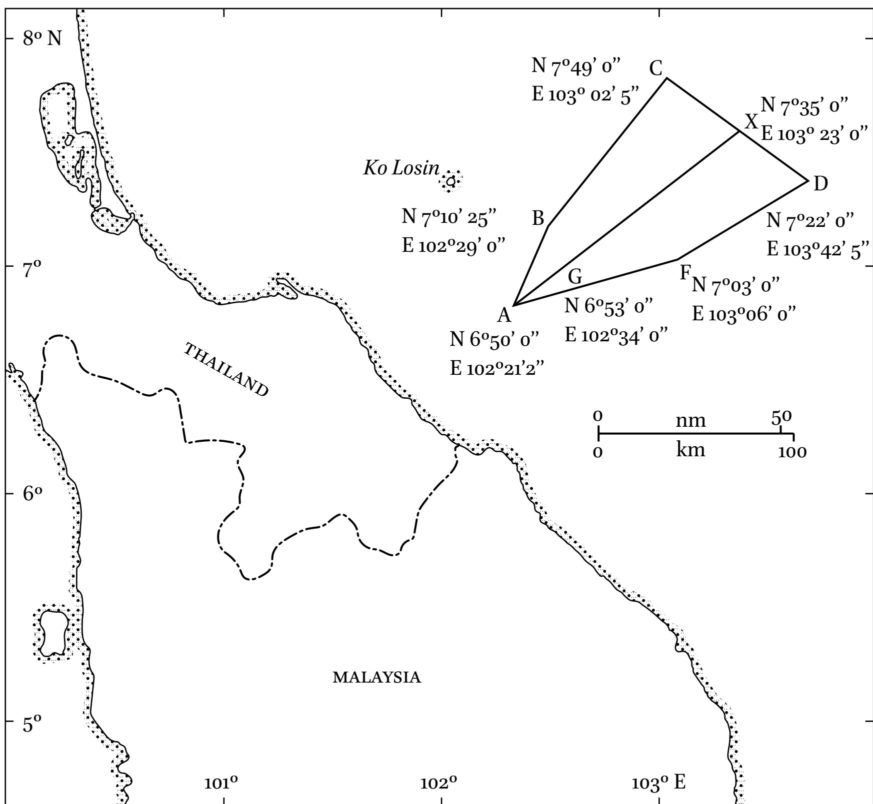

FIGURE 7.1 The area under the 1979 Malaysia-Thailand Joint Development Agreement. Source: David Ong, *The 1979 and 1990 Malaysia-Thailand Joint Development Agreements: A Model for International Legal Co-operation in Common Offshore Petroleum Deposits?* INTERNATIONAL JOURNAL OF MARINE & COASTAL LAW, 14, 207 (1999), at 224.

74 Ong, *supra* note 11, at 222.

In 1972, Malaysia and Thailand successfully delimitated their territorial sea boundary and partial continental shelf boundary in the southwestern part of the Gulf of Thailand up to a point 29 nautical miles offshore. However, the two countries failed to delimit further continental shelf boundary due to disagreement over the effect of Ko Losin in the delimitation.[75] On 21 February 1979, Malaysia and Thailand signed a Memorandum of Understanding (MOU) on a joint development area. The MOU established a Joint Authority which has all rights and responsibilities on behalf of the two countries for exploration and exploitation of the non-living resource of the seabed and subsoil in the overlapping area.[76] However, in the following 11 years, the MOU was not implemented. As Ong mentioned, the MOU is "anything other than an expression of intent between the two State parties".[77] On 30 May 1990, both countries signed the Agreement between the Government of Malaysia and the Government of the Kingdom of Thailand on the constitution and other Matters Relating to the Establishment of the Malaysia-Thailand Joint Authority.[78] The MOU, comprising eight articles, provides the basic principles for joint development. The Agreement follows the basic elements of joint development provided in the MOU and establishes detailed rules and regulations on implementation.[79] On 24 April 1994, both countries and the relevant companies signed a contract for joint development.

Even though the 1990 Agreement builds on the legal framework of the 1979 MOU, two major aspects is worth some attention. First, it established in detail the powers and functions of the Joint Authority, and second, it adopted a production sharing contract system.[80] The Joint Authority consists of two chairmen, one from each country, and an equal number of members from each country. The 1979 MOU incorporated the Joint Authority, while the 1990 Agreement established its constitution. The production sharing contract system was one of the different points from the negotiation process between the two countries in 1979. According to Article 8 of the 1990 Agreement, "50% of gross

75 Ko Losia is a islet, which is 1.5 meters high over the sea level, occupied by Thailand. Ko Losia has no economic life. Malaysia believed that the islet should not have effect on the delimitation, while Thailand insisted it is a valid basepoint. *See* Ong, *supra* note 11, at 223. *Also see* Nguyen Hong Thao, *Joint Development in the Gulf of Thailand*, IBRU BOUNDARY AND SECURITY BULLETIN 79–88, 81 (1990).

76 Ong, *supra* note 11, at 227.

77 *Ibid.*

78 Hereinafter, the "1990 Agreement".

79 Schofield, *supra* note 28, at 293.

80 Masahiro Miyoshi, *The Joint development of offshore oil and gas in relation to maritime boundary delimitation*", 2 MARITIME BRIEFING 14 (1999).

production to be applied by the contractor for the recovery of costs; the remainder of gross production to be profit and divided equally between the Joint Authority and the contractor; all cost of operations to be borne by the contactor, any dispute arising out of the contract to be referred to arbitration unless settled amicably".

Both the 1979 MOU and the 1990 Agreement provide that the JDA has an interim nature. Article 3(1) of the MOU states that the duration of relevant arrangements is 50 years[81] unless the delimitation agreement is reached before its expiry of the said date.[82] Joint development is only a temporary solution before final resolution of delimitation of their maritime boundary.

For the purpose of jurisdiction in the joint development area, the two sides draw a criminal jurisdiction line running from north to south. However, this line does not indicate the continental shelf boundary nor prejudice the sovereign rights of either country in the area.[83]

The fact that it has taken over ten years for the Joint Authority to be constituted shows that JDA in the disputed area is not an easy step. Even so the success of the Thailand-Malaysia JDA provides evidence for the possibility of JDA in the disputed waters between two neighboring countries.

b *Joint Development Agreement between Malaysia and Vietnam*

According to the claims of South Vietnam in 1971 and Malaysia in 1979, there is an overlap of 2,800 km^2 in the Gulf of Thailand. The overlapping area is a long sliver of sea-bed just south to south-east of the designated Malaysia-Thailand Joint Development Area.[84] On 5 June 1992, Malaysia and Vietnam signed a Memorandum of Understanding (MOU) for the exploration and exploitation of petroleum in the "defined area" of the Gulf of Thailand.[85] (See Figure 7.2)

81 Article 3(1) reads, "There shall be established a Joint Authority to be known as "Malaysia-Thailand Joint Authority" (thereafter referred to as "the Joint Authority") for the purpose of the exploration and exploitation of the non-living natural resources of the sea-bed and subsoil in the overlapping area for a period of fifty years commencing from the date this Memorandum comes into force". 1979 Memorandum of Understanding Between Malaysia and the Kingdom of Thailand on the Establishment of the Joint Authority for the Exploitation of the Resources of the Sea Bed in a Defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand, *available at* http://cil.nus.edu.sg/rp/il/pdf/1979%20MOU%20between%20Malaysia%20and%20Thailand-pdf.pdf.

82 *Ibid.,* Article 6.

83 Article 5 of the MOU, *also see* Miyoshi, *supra* note 80, at 14.

84 Ong, *supra* note 11, at 1999, at 242.

85 Ted L McDorman, *Malaysia-Vietnam, Report No.1–19*, in J.I. CHARNEY AND L.M. ALEXANDER (EDS.), VOLUME III 2335–2344 (1998). The full text of the MOU is available at *ibid.*, 2341–2344. For more information on the background of the MOU, *see* Thao, *supra* note 75, at 79–88.

The 1992 MOU provides a framework under which the two countries nominated their national petroleum companies, Petrovietnam and Petronas respectively, to hold talks directly on a commercial agreement for the purpose of joint exploring and exploiting the petroleum resources on basis of equality of rights and obligations.[86] On 29 July 1997, oil was extracted successfully in the JD area, which contributed to enhancing economic development as well as their bilateral relation.[87]

Ong observed that there are main general principles in this JDA:

(1) such co-operation between the two parties for the exploration and exploitation of petroleum resources in the overlapping claim area has been agreed pending final delimitation of the area and is without prejudice to the position and claims of either country;

(2) in keeping with the provisional nature of the agreement, the duration of the Malaysia-Vietnam Memorandum of Understanding is for 40 years subject to any extensions and reviews that both parties may agree at a relevant juncture;

(3) all costs and benefits derived from the exploration and exploitation of the Defined Area shall be borne and shared equally by both Parties;

(4) in respect of the development and management of the petroleum resources in the Defined Area, Petronas for Malaysia and Petrovietnam for Vietnam will undertake exploration and exploitation on behalf of the two Governments; these two national oil companies will enter into a commercial arrangement between themselves for the exploration and exploitation of petroleum in the Defined Area, subject to the approval of the respective governments.[88]

Comparing the 1979/1990 Thailand-Malaysia JDA and the 1992 Malaysia-Vietnam JDA, the defined disputed areas in both agreements are located in the Gulf of Thailand. The former agreement took ten years for the constitution of a joint authority in charge of the operation in the joint zone; in the latter agreement, Malaysia and Vietnam assigned their State-owned oil companies, Petronas and PetroVietnam respectively, to undertake petroleum exploration and exploitation in 1993, and in July 1997 oil was extracted from the Bunga Kekwa field.[89]

86 Ong, *supra* note 11, at 240.

87 Manh Dong, *Maritime Delimitation between Vietnam and Her Neighboring Countries,* presentation on the UN-Nippon Foundation Alumni Meeting, Tokyo, Japan, 13–16 April 2009, *available at* http://www.un.org/depts/los/nippon/unnff_programme_home/alumni/tokyo_alumni_presents_files/alum_tokyo_dong.pdf.

88 Ong, *supra* note 11, at 242.

89 Li and Amer, *supra* note 1, at 85; Schofield, *supra* note 28, at 290; Zou, *supra* note 8, at 94; and Nguyen, *supra* note 75, at 83–84.

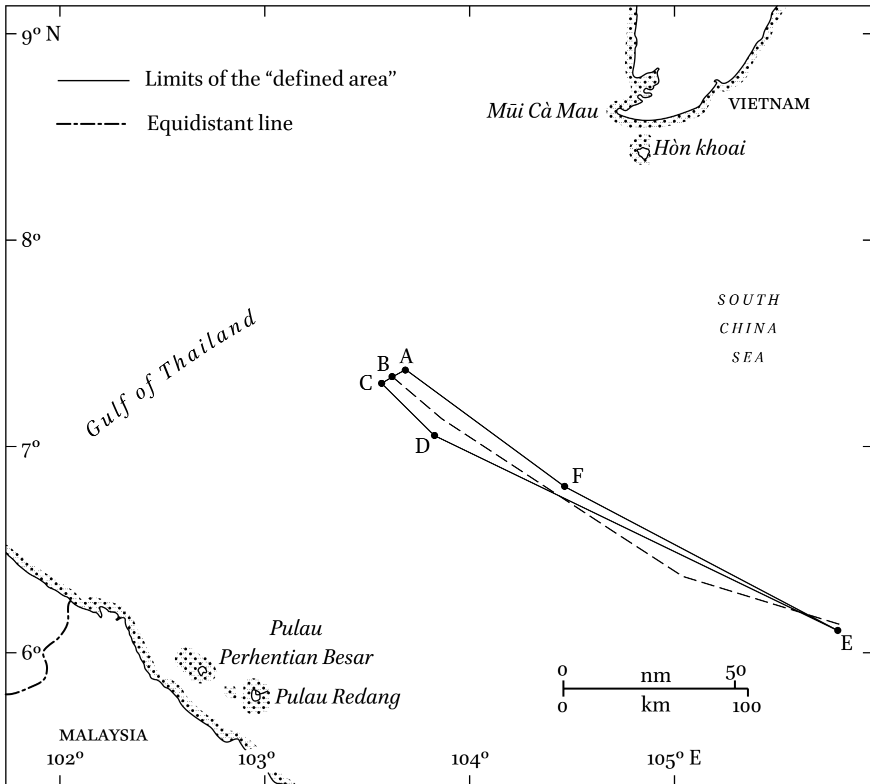

FIGURE 7.2 Illustration of the area under the 1992 Malaysia-Vietnam MOU.
Source: David Ong, *The 1979 and 1990 Malaysia-Thailand Joint Development Agreements: A Model for International Legal Co-operation in Common Offshore Petroleum Deposits?* 14 International Journal of Marine & Coastal Law 207, 241 (1999)

The Malaysia-Vietnam model is viewed as more flexible than the Malaysia-Thailand model because the former is unifunctional and sharply focused on facilitating petroleum exploration and exploitation at the earliest opportunity with minimal governmental participation or interference.[90] More notable progress during the 1990s included the initiation of trilateral talks among Vietnam, Malaysia, and Thailand regarding an area of the Gulf of Thailand where claims of the three countries overlapped. These talks were made possible by the signing of the maritime boundary agreement between Vietnam and Thailand in 1997. Although the parties agreed in principle on JD in the overlapping area, the modalities for such a trilateral scheme have yet to be agreed on.[91]

90 Nguyen, *supra* note 75, at 83; and Schofield, *supra* note 28, at 299.

91 Ramses Amer, *Conflict Management within the Association of Southeast Asian Nations* (ASEAN)*: Assessing the Adoption of the 'Rules of Procedure of the High Council of the Treaty of Amity and Cooperation in Southeast Asia*, in KAMARULZAMAN ASKANDAR (ED.),

3 *Joint Development Attempts*[92]

Under this category there are three cases, namely, the 1982 Cambodia-Vietnam historic water arrangement, the 1999 Malaysia-Thailand-Vietnam agreement and the 2005 China-Philippines-Vietnam joint seismic exploration agreement.

a *1982 Cambodia-Vietnam Historic Water Arrangement*

On 7 July 1982, Vietnam and the then People's Republic of Kampuchea (PRK) signed an agreement on "historic waters" located between the coast of Kien Giang Province, Phu Quoc Island and the Tho Chu islands on the Vietnamese side and the coast of Kampot Province and the Poulo Wai islands on the Cambodian side. The agreement stipulated that the two countries would hold, "at a suitable time", negotiations to determine the maritime frontier in the "historic waters". Pending such a settlement the two sides would continue to regard the Brévié Line drawn in 1939 as the diving line for the islands within the "historic waters" and the exploitation of the zone would be decided by "common agreement".[93] On 20 July 1983, the two countries signed a Treaty on the settlement of border problems and an Agreement on border regulations.[94] On 27 December 1985 the Treaty on the Delimitation of the Vietnam-Kampuchea Frontier was signed by the two countries.[95] On 10 October 2005, the two countries signed a Supplementary Treaty to the 1985 Treaty.[96]

MANAGEMENT AND RESOLUTION OF INTER-STATE CONFLICTS IN SOUTHEAST ASIA 117–118 (2003); and Nguyen, *supra* note 75, at 86.

92 This part is taken from a joint research report with Ramses Amer. Jianwei Li and Ramses Amer, *Recent Practices in Dispute Management in the South China Sea*, in CLIVE SCHOFIELD (ED.), MARITIME ENERGY RESOURCES IN ASIA: LEGAL REGIMES AND COOPERATION 83 (2012).

93 For the full text of the Agreement of 7 July 1982, *see British Broadcasting Corporation, Summary of World Broadcasts, Part Three, Far East*, 7074 A3/7–8, 10 July 1982. The text of the Agreement has also been reproduced in English as "Appendix 2" in Kriangsak Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia* 180–181 (1987); and in Ted L. McDorman, *Cambodia-Vietnam* in JONATHAN I. CHARNEY AND LEWIS M. ALEXANDER (EDS.), INTERNATIONAL MARITIME BOUNDARIES, VOLUME III 2364–2365 (1998). Interestingly enough, the "full text" of the Agreement transmitted by the official Cambodian news agency (SPK) on 8 July omitted the sentence: "Patrolling and surveillance in these historical waters will be jointly conducted by the two sides", which was included in Article 3 of the version published by Vietnam News Agency and reproduced in Kittichaisaree's study (*BBC/FE*/7074 A3/8, 7076/A3/7, 13 July 1982); and Kittichaisaree, *op. cit.*, at 180–181.

94 *BBC/FE*/7393 A3/1 (23 July 1983). *See also* Quang Nghia, *Vietnam-Kampuchea Border Issue Settled*, 4 VIETNAM COURIER 8–9(1986).

95 For reports from Vietnam and the PRK announcing the signing of the Treaty and for details, *see BBC/FE*/8143 A3/1–3, 30 December 1985. *See also,* Quang, *supra* note 94, at 8–9.

96 *PM Khai holds talks with Cambodian counterpart*, from the website of the Ministry of Foreign Affairs of Vietnam, *available at* http://www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns05101140825.

In this case, some political actors within Cambodia have opposed the agreements signed with Vietnam in the 1980s, including the 1982 Agreement on "historical waters".[97] The effect of the 1982 Cambodia-Vietnam Historic Waters Agreement was that Cambodia effectively gave up its claim over Phu Quoc Island although it arguably simply endorsed a situation that had been prevalent for some time.[98]

b *1999 Malaysia-Thailand-Vietnam Agreement*

In 1999, Malaysia, Thailand and Vietnam agreed in principle to undertake joint development in the tripartite overlapping area where Vietnam's 200 EEZ and continental shelf overlap with the Thailand -Malaysian JDA of 1979.[99] The tripartite arrangement is based on two bilateral JDAs concluded between Malaysia and Thailand in 1979, and Malaysia and Vietnam in 1992 respectively.[100] The tripartite talks were made possible only by the signing of the maritime boundary agreement between Vietnam and Thailand in 1997. Although the parties agreed in principle on joint development in the overlapping area, the modalities for such a trilateral scheme have yet to be agreed on.[101] When the tripartite accord becomes effective, it will be the first multilateral agreement on joint development in the region.[102]

c *2005 China-Philippine-Vietnam Joint Seismic Undertaking Agreement*

The tripartite agreement started from a bilateral agreement which was signed between the Chinese oil company (CNOOC) and the Philippine National Oil Company on 11 November 2003. By this agreement, a joint committee will be set up to help select exploring areas in the South China Sea. As a follow-up, the two State oil companies signed an agreement on joint seismic work in the Sino-Philippine disputed area in the South China Sea. Applauded by the two governments as being important for maintaining peace and stability in the South China Sea, this agreement met with some opposition in the Philippines, because, put by the Philippine side, "the joint exploration will be conducted in the North-West Palawan offshore area, 'not even close enough to the Spratlys'".[103]

97 Kittichaisaree, *supra* note 93; and Ted L. McDorman, *Cambodia-Vietnam*, in JONATHAN I. CHARNEY AND LEWIS M. ALEXANDER (EDS.), INTERNATIONAL MARITIME BOUNDARIES, VOLUME III, 2364–2365 (1998).

98 Davenport et al, *supra* note 18, at 20.

99 Ana Placida D. Espina, *Recent Development in the South China Sea and Prospects for Joint Development*, RCAPS WORKING PAPER SERIES "DOJO", RPD-12001, at 13.

100 *Ibid.*, at 13–14.

101 Amer, *supra* note 91, at 117–118. Li and Amer, *supra* note 1, at 88–89.

102 Nguyen Hong Thao, *Vietnam and Joint Development in the Gulf of Thailand*, 8 ASIAN YEARBOOK OF INTERNATIONAL LAW 138–139 (2003).

103 Zou, *supra* note 8, at 103.

On 14 March 2005, further developments occurred when the national oil companies of China, the Philippines, and Vietnam signed the Tripartite Agreement for Joint Marine Seismic Undertaking in the Agreement Area in the South China Sea. It was arranged that all activities in the agreement area must be discussed among the concerned parties and the seismic survey and research be carried out in a 143,000 km^2 area in the South China Sea, including parts of the disputed Spratly Islands, for a period of three years. The signing of the agreement "would not undermine the basic position held by the Government of each party on the South China Sea issue". The agreement showed the determination of the involved parties to abide by the DOC and the parties expressed their "resolve to transform the South China Sea into an area of peace, stability, cooperation and development".[104]

Although JMSUA was within the framework of marine scientific research and did not include any arrangements relating to exploitation of resources in the area, it is obvious that such activities aim for future exploitation therein.

In conclusion, since all disputant countries have ratified UNCLOS and they are signatories to the 2002 DOC and the 2011 Guiding Principles, they were bound legally or politically to make efforts to cooperate in the disputed waters pending the final resolution of the maritime disputes. By government statements and/or bilateral government-to-government documents between the claimant countries, all the countries expressed their willingness to come into cooperative arrangements including JDA for resources exploitation in the South China Sea. There are two successful JDA cases in the region, the 1979/1990 Malaysia-Thailand JDA and the 1992 Malaysia-Vietnam JDA. Tripartite agreements have been attempted, with one being halted and one still under discussion. The friendly inter-State relations are important for the success of any JDA, meanwhile domestic attitudes and political will within individual claimant countries could never be ignored.

IV Implications for the South China Sea

The South China Sea is believed to be rich in marine resources, including oil and gas. According to an estimation from the U.S. Energy Information Administration (EIA), there are approximately 11 billion barrels (bbl) of oil reserves and 190 trillion cubic feet (Tcf) of natural gas reserves in the South China Sea.[105] These numbers include both proved and probable reserves. Besides

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104 Revised from a joint work, Li and Amer, *supra* note 1, at 91.

105 EIA, *South China Sea U.S. Energy Information Administration*, *available at* http://www.eia.gov/countries/analysisbriefs/South_China_Sea/south_china_sea.pdf.

that, the South China Sea may have hydrocarbons in underexplored areas. The U.S. Geological Survey (USGS) estimates that the South China Sea may contain between 5 and 22 billion barrels of oil and between 70 and 290 trillion cubic feet of gas in undiscovered resources.[106] In the South China Sea, the sea area outside the Mouth of Gulf of Tonkin, Reed Bank (Liyue Tan in Chinese) and Vanguard Basin (Wan'an Basin) may be potential ideal areas for JDAs. (See Figure 7.3)

A *Area Outside the Mouth of Gulf of Tonkin* (*Wankou Wai*)

As suggested above, after reaching the agreement of the maritime boundaries delimitation and fishery cooperation in the Gulf of Tonkin in 2000, China and Vietnam began to negotiate the delimitation of the area outside the mouth of Gulf of Tonkin. In February 2012, Vietnam and China's Deputy Foreign Ministers held talks in Beijing. They agreed to establish working groups at the department level to negotiate on the mouth of the Gulf of Tonkin. They also agreed to set up working groups to cooperate in "less sensitive sea domains". Up till mid-2013 three rounds of talks at the department level were held to negotiate possible JDA in areas outside the mouth of the Gulf of Tonkin.[107]

Both countries have shown strong political will in pushing ahead with JDA in this area when negotiations on maritime delimitation are undergoing.[108] However, one comment goes that the existence of different attitudes towards the Paracels will continue to haunt their negotiation and cooperation process. In such a case, common support for defining an area for JDA must be a welcome sign.[109]

B *Reed Bank* (*Liyue Tan*)

Reed Bank, claimed by both China and the Philippines, is reported to be rich in hydrocarbon resources, 3.9 million cubic feet of gas, 35 million barrels of oil and 21 billion barrels of methane hydrate.[110] Recently, the Philippines carried

106 *Ibid.*

107 Ramses Amer and Jianwei Li, *How to Manage China-Vietnam Territorial Disputes*, CHINA & US FOCUS, 18 April 2013, *available at* http://www.chinausfocus.com/print/?id=27029.

108 *See* the above-mentioned bilateral joint communiques in 2008 as well as talks between top leaders.

109 Anon, *Gloomy prospect is observed on China-Vietnam negotiation on the delimitation of the area outside the mouth of the Gulf of Tonkin* [Zhongyue Beibuwan Wankouwai Haiyu Huajie Tanpan Bei zhi Qianjing Andan] *available at* http://mil.huanqiu.com/Observation/2012–07/2884875.html.

110 Chen Bingxian, *An Analysis of the South China Sea Policy of Philippines in Recent Years* [Qiantan Jinnianlai Feilubin de Nanhai Zhengce], 22(5) Journal of Wuzhou University 34 (2012); Wang Lianhe, *On the New Trends and Prospects of the South China Sea Disputes* [Nanhai Wenti Xinqushi Ji Qianjing Chutan], 4 Southeast Asian Studies 38 (2012).

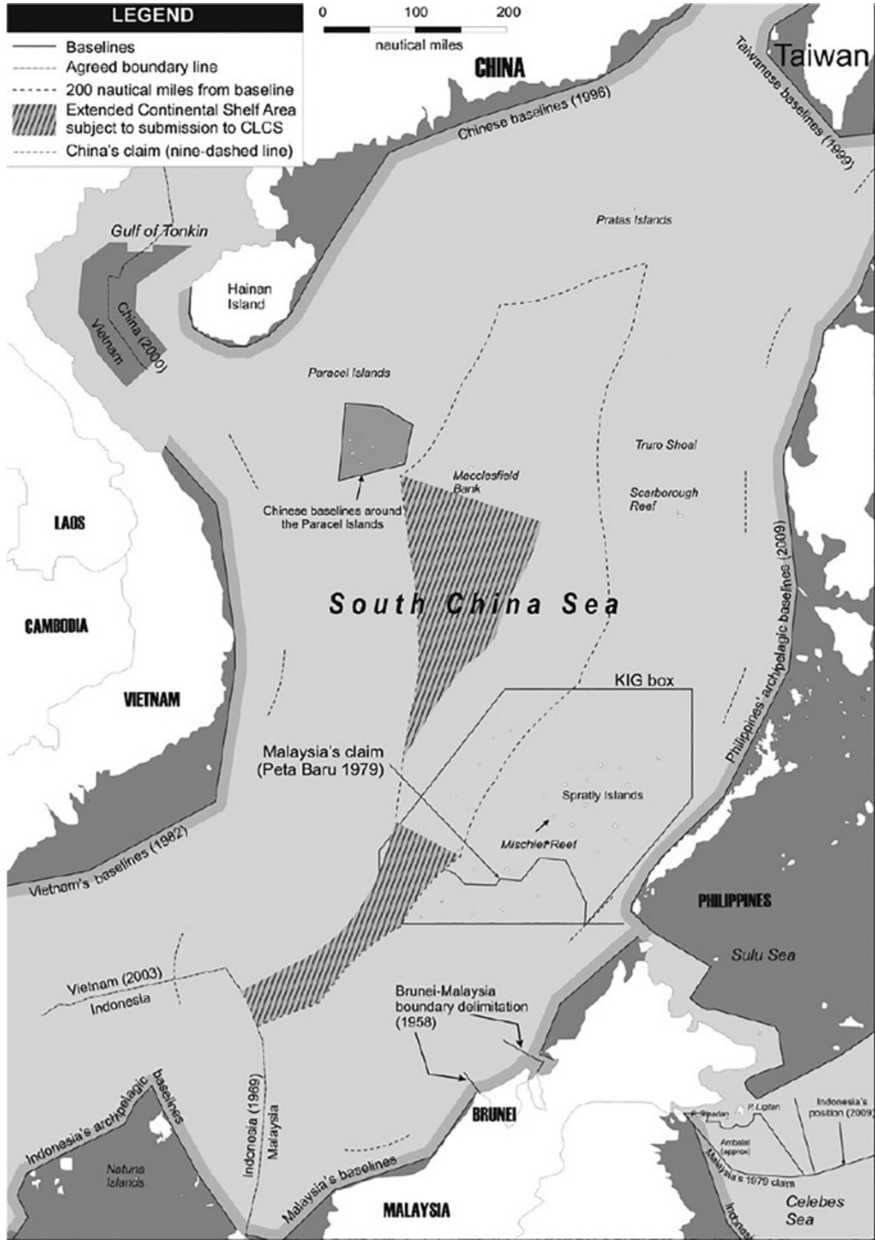

FIGURE 7.3 Illustration of areas of overlapping claims in the South China Sea proper.
SOURCE: *MARITIME ENERGY RESOURCES IN ASIA: ENERGY AND GEOPOLITICS*, NATIONAL BUREAU OF ASIA RESEARCH (NBR) SPECIAL REPORT #35, NOVEMBER 2011, P.VIII

out unilateral exploration activities, which have been met with strong protests from China.

In August 2009, the Philippine government gave approval to a UK company, Forum Energy, and its partner to carry out oil and gas exploration in the area around Reed Bank. Early 2011, Forum Energy was endowed with two years' contract for oil and gas exploration in Block SC72 which is located in the disputed area. On 2 March, two fighters from the Philippine Air Force were dispatched to assist the exploration of the UK company and standoff occurred between the fighters and China's maritime patrol vessels.[111] On 30 June, the Philippine Ministry of Energy issued a commercial bidding of 15 oil blocks, part of which are perceived by China as located in the disputed area.[112]

In 2012, during the period of the "Huangyan Island Incident", it was reported that a Philippine mining company was negotiating with CNOOC to pursue JDA for oil and gas off the Liyue Bank. In response to the report, Chinese spokesman stated, "We support more exchanges and cooperation between Chinese and the Philippine companies. On the oil and gas development in waters off the Liyue Bank, China's attitude is clear. The Liyue Bank is part of China's Nansha Islands. It will harm China's rights and interests if the Philippines engage in unilateral development in this area. China is firmly opposed to that. At the same time, China is ready to discuss joint development with the Philippines. But the key is that they should show sincerity".[113]

Since mid-2011, the Philippines and Vietnam have taken measures in which it is indicated that they are moving ahead to explore and exploit the hydrocarbon resources in areas which they believe to be not in disputed area while China believes to be under their jurisdiction.[114] Tensions increased due to these perceived unilateral exploration activities. It was suggested that the claimant States, at least China, the Philippines and Vietnam, take immediate steps

111 Ian Lewis, *China rattles its sabre over disputed reserves*, PETROLEUM ECONOMIST, May 2011.

112 Ju Hailong, *South China Sea Policy of the Philippines: Interest Driven Policy Choice* [Feilubin Nanhai Zhengce: Liyi Qudong De Zhengce Xuanze], 3 JOURNAL OF CONTEMPORARY ASIA-PACIFIC STUDIES 86 (2012).

113 China Minister of Foreign Affairs, 2102, Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on 9 May 2012, *available at* http://medan.chineseconsulate.org/eng/fyrth/t930925.htm.

114 Ramses Amer, and Jianwei Li, *Recent Developments in the South China Sea – Assessing the China-Vietnam and China-Philippines Relationships,* Paper prepared for the International Conference on *Recent Development of the South China Sea Dispute and Prospects of Joint Development Regime*, Organised by the National Institute for South China Sea Studies, Haikou, China, 6–7 December 2012.

to clarify their claims and define the areas in dispute (and not in dispute),[115] which would be beneficial to initiation of JDA.

Zou in 2006 listed three reasons for the claimant countries to take JDA in the South China Sea. First, political will is strong because all the claimant countries in the South China Sea region need a good environment for their social and economic development, and JDAs can stabilize the South China Sea region. Second, JDAs can lead to rational use of the South China Sea resources when competition of different kind of uses and among surrounding countries are increasing. Third, through JDAs confidence can be enhanced among claimant countries, which is conducive to expanding regional cooperation.[116] Furthermore, the increasing demand for offshore energy resources coupled with the difficulty to do so due to territorial disputes make JDAs an attractive choice for the claimant countries.[117]

The advantages of JDAs which Zou listed above exist in the South China Sea. The two pushing factors, namely, demand for energy and difficulty for unilateral exploration which the CIL conference report pointed out are increasing. Now maybe the time is coming for the claimant countries to pool together their determination and to negotiate through persistence and compromise to put JDAs from paper to reality. Beckman's suggestion of finding the disputed waters which may be generated from what all agree as disputed land features might be a feasible way to start with.

V Conclusion

It may be still true that a customary rule enjoining JDAs is ultimately not proven and the concept of JDA is still evolving. JDAs may expand to cover any cooperative arrangements for activities at sea where a boundary passing through or delimitation negotiations are undergoing and where rational utilization of the marine resources therein requires ignoring those artificial boundaries. JDAs are attempts to fulfill an obligation under UNCLOS. As to the South China Sea region, JDAs also reflect the efforts from claimant States in implementing the DOC.

All claimant States involved in the South China Sea disputes have experienced JDAs one way or another, successful ones or ones in principle. There are two successful JDA cases in the region, the 1979/1990 Malaysia-Thailand

115 Beckman, *supra* note 18, at 12.

116 Zou, *supra* note 8, at 98.

117 Davenport et al, *supra* note 18, at 34.

JDA and the 1992 Malaysia-Vietnam JDA. Tripartite agreements have been attempted, with one joint seismic exploration being halted and the other among Malaysia, Thailand and Vietnam under discussion. The friendly inter-State relations are important for the success of any JDA, meanwhile domestic attitudes and political will within individual claimant countries will also affect such practices. Various JDAs in the broader South China Sea Region have provided useful models for international legal co-operation on the exploitation of common hydrocarbon deposits, as well as options for the most disputed South China Sea proper.

It seems that time has come for some sort of JDA to happen in one way or another. China, as the largest State in size and economic power, needs to play a major role in the search for conflict management measures, including JDA, before the final resolution of the South China Sea disputes. Once a small step forward is made, such as a JDA in the area where there are only two claimants – outside the mouth of the Gulf of Tonkin between China and Vietnam or around Reed Bank between China and the Philippines, the region will be moving towards long-term peace and stability.

PART 3

Promotion of Marine Scientific Research for Peace

Peaceful Use of the Sea and Military Intelligence Gathering in the EEZ

Keyuan Zou

1 Introduction

The 1982 United Nations Convention on the Law of the Sea (LOS Convention)[1] is regarded as a global ocean code governing maritime zones and human activities therein. According to it, maritime space is divided into several zones either under or beyond national jurisdiction of a coastal State: *internal waters* within the baselines are treated the same as the land territory of a State and under the full sovereignty of that State; *territorial seas* are also under the sovereignty of the coastal State only subject to the provisions of the LOS Convention allowing foreign ships to exercise the right of innocent passage; *exclusive economic zone* (EEZ) which extends outward 200 nautical miles from the baselines where the coastal State enjoys sovereign rights to natural resources and national jurisdiction over certain maritime activities including marine scientific research; the legal status of the *continental shelf* is similar to that of the EEZ, but for broad continental shelf countries, they may claim it up to 350 nautical miles; *high seas* which are open to all; and the *international seabed* which is now under the governance of the International Seabed Authority.

The concept of the EEZ is relatively new in the international law of the sea in comparison with the territorial sea regime and has some unique characteristics. Thus, it is defined as a maritime zone *sui generis*. Article 56 of the LOS Convention provides that a coastal State has "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources" and other activities for the economic exploration and exploitation, as well as jurisdiction with regard to "the establishment and use of artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environment". However, some high seas rights, including the freedom of navigation and overflight, are preserved in the EEZ. Furthermore, such rights include "other international lawful uses of the sea

1 United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 21 ILM 1261 (entered into force 16 November 1994).

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related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines",[2] which has invited controversial interpretations in terms of military uses including military intelligence gathering in the EEZ of another coastal State.

Recent maritime incidents having occurred in East Asia, for example, the EP-3E Spy Airplane Incident in 2001,[3] have raised a number of legal issues in the context of the development of the law of the sea, particularly of the EEZ regime. Because the EEZ regime is relatively new, it is quite understandable that many new issues will arise during its implementation after the entry into force of the LOS Convention.

II Peaceful Use of the Seas and Foreign Military Activities in the EEZ

According to the LOS Convention, all the seas in the world shall be used peacefully, and any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations shall be prohibited.[4] From this basic legal principle, military activities including military intelligence gathering with threatening potentials should not be carried out in the EEZs of other countries.

2 *See* Art. 58, LOS Convention.

3 On 1 April 2001, while a U.S. EP-3E Aries II airplane was conducting espionage activities near the Chinese coast in the South China Sea, it was intercepted by two Chinese F-8 fighter jets and then collided with one of the jets. The damaged Chinese jet crashed into the water and the pilot died. The damaged American airplane made an emergency landing in China's Hainan Island at Lingshui and all the crewmembers were safe. The incident immediately became a diplomatic issue between China and the United States. China accused the United States of encroaching on China's territorial sovereignty and of violation of international law as well as of relevant Chinese laws, and demanded an apology and compensation from the American side. The United States responded that the reconnaissance airplane operated outside China's territorial waters and that the airplane landed in distress. For that reason, the United States refused to render an apology; and instead demanded China to immediately return the American crew and the airplane. After several rounds of diplomatic contacts, the United States finally sent a letter to China on 11 April 2001, expressing its sincere regret over the Chinese missing pilot and aircraft and used the word "sorry" for their loss. The letter also used the word "sorry" for the American airplane's entering of China's airspace and landing without verbal clearance. On the next day, China allowed all 24 crewmembers to leave China. However, the American damaged spy airplane did not leave China until 3 July 2001 after it had been dismantled and packed. The Chinese side asked for one million US dollars for the costs relating to the aircraft but the Americans only offered the amount of 34,567 US dollars which was refused by the Chinese. For related information, *see, State Jurisdiction and Jurisdictional Immunities: Aerial Incident off the Coast of China*, 95 AJIL 631–633 (2001).

4 *See* Art. 301, LOS Convention.

According to one scholar, military use of oceans consists of two categories: movement rights and operational rights. The former embraces the notion of mobility and includes such legal rights as transit passage through straits used for international navigation, innocent passage in territorial seas and archipelagic waters, and high seas freedom of navigation and overflight, and the latter includes such activities as task force maneuvering, anchoring, intelligence collection and surveillance, military exercises, ordnance testing and firing, and hydrographic and military surveys.[5] For the purpose of this article, military activities refer to those activities in the second category as defined above, i.e., other than simple navigation or overflight.

As we know, there is a controversy on whether the conduct of military activities in the EEZ of another country is legitimate. Some States may invoke Article 58(1) of the LOS Convention to justify their military activities in other countries' EEZ. The provision reads: "[i]n the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in Article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention". Freedoms on the high seas provided in Article 87 are thus applicable to the EEZ as long as they are not contrary to other provisions of the LOS Convention. According to maritime powers such as the United States, the term freedoms "associated with the operation of ships, aircraft" implies the legality of naval maneuvers in a foreign EEZ.[6] One view even considers military exercises, aerial reconnaissance and all other activities of military aircraft freedom of high seas if due regard is paid to the rights and interests of third States.[7] As advocated, since the LOS Convention mainly provides the rights of navigation and overflight, while keeping silent on the rights of military activities, maritime superpower must defend and enforce such rights for its security interests.

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5 Charles E. Pirtle, *Military Uses of Ocean Space and the Law of the Sea in the New Millennium*, 31 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 8 (2000).

6 *See* Boleslaw Adam Boczek, *Peacetime Military Activities in the Exclusive Economic Zone of Third Countries*, 19 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 450 (1988).

7 Kay Hailbronner, *Freedom of the Air and the Convention on the Law of the Sea*, 77 AJIL 503 (1983). A US operational commander opined that the EEZ regime "does not permit the coastal state to limit traditional non-resources related high seas activities in this EEZ, such as task force maneuvering, flight operations, military exercises, telecommunications and space activities, intelligence and surveillance activities, marine data collection, and weapons' testing and firing". Walter F. Doran, *An Operational Commander's Perspective on the 1982 LOS Convention*, 10 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 341 (1995).

The LOS Convention does not mention military use so that it becomes a gray area which leads to different interpretations. This no-mention is criticized as one of the major defects in the new LOS Convention. On the other hand, it is argued that without an express mention in the Convention, military use is hardly regarded as one of such lawful uses. However, such argument may not be convincing. According to a fundamental legal principle, nothing is illegal if there is no law to make it so. Following this, military use is not prohibited since there is no such prohibition in the LOS Convention. Second, as the LOS Convention affirms that matters which are not regulated under it should be continually governed by general international law including customary law. If it is traced back to look at history, military activities were consistently allowed under customary international law, though in the implied form. Third, it is admitted that there is a difficulty in inferring that the establishment of the EEZ has limited foreign military operations other than pure navigation and communication from the text and legislative history of Article 58 of the LOS Convention.[8]

The allowance of military activities under international law does not mean that they can be conducted in the EEZ without any regulation. It should be borne in mind that the circumstances now are fundamentally different from those in the past. There was and still remains no controversy regarding the military activities conducted in the high seas which was and is open to all. The EEZ is different from the high seas in that it is an area under national jurisdiction. While military activities are allowed there, the factor of national jurisdiction must be taken into account. There should be some kind of check-and-balance mechanism for foreign military activities in the EEZ. It is hard to understand the logic of the argument that while marine scientific research in the EEZ is subject to the consent of the coastal State, military activities can be conducted freely without any check by the coastal State. On the other hand, even if the military use is an internationally lawful use, it can be argued according to the LOS Convention that it is limited to navigation and overflight, and other rights as provided in Article 87 of the Convention. This can be seen from some domestic EEZ legislations, such as Suriname's, as it provides, all nations, with the observance of the international law, enjoy: "… 4. Freedom to exercise internationally recognized rights in connection with navigation and communication".[9]

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8 Francesco Francioni, *Peacetime Use of Force, Military Activities, and the New Law of the Sea*, 18 Cornell International Law Journal 216 (1985).

9 Art. 5 of Law Concerning the Extension of the Territorial Sea and the Establishment of a Contiguous Economic Zone of 11 June 1978, in Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, The Law of the Sea: National Legislation on the Exclusive Economic Zone 351 (1993).

In practice, coastal States, including Bangladesh,[10] Brazil, Cape Verde, India,[11] Pakistan,[12] and Uruguay[13] explicitly restrict unapproved military exercises or activities in or over their EEZs conducted by other countries. According to Brazilian law, military exercises or maneuvers, in particular those that imply the use of weapons or explosives, can only be carried out with the consent of the Brazilian Government.[14] Brazil is perhaps the most adamant country which strictly regulates foreign military activities in its EEZ. As early as December 1982 when Brazil signed the LOS Convention, it made a statement of this kind which was reiterated several times afterwards. The United States reacted to it on each occasion by protesting against Brazil's restrictions and stating its reservation of military exercises in Brazil's EEZ as internationally lawful uses

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Honduras' law contains a similar provision (Art. 2 of Decree No. 921 of 13 June 1980 on the Utilization of Marine Natural Resources), *see* DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, OFFICE OF LEGAL AFFAIRS, UNITED NATIONS, *ibid.*, at 129.

10 The *Bangladesh Declaration* states: "The Government of the People's Republic of Bangladesh understands that the provisions of the Convention do not authorize other States to carry out in the exclusive economic zone and on the continental shelf military exercise or manoeuvres, in particular, those involving the use of weapons or explosives, without the consent of the coastal State". *Available at* http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm.

11 The *Indian Declaration* states: "The Government of the Republic of India understands that the provisions of the Convention do not authorize other States to carry out in the exclusive economic zone and on the continental shelf military exercises or manoeuvres, in particular those involving the use of weapons or explosives without the consent of the coastal State". *Available at* http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm.

12 The *Pakistani Declaration* states: "It is the understanding of the Government of the Islamic Republic of Pakistan that the provisions of the Convention on the Law of the Sea do not in any way authorize the carrying out in the exclusive economic zone and in the continental shelf of any coastal State military exercises or manoeuvres by other States, in particular where the use of weapons or explosives is involved, without the consent of the coastal State concerned". *Available at* http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm.

13 The *Uruguay Declaration* states: "In the exclusive economic zone, enjoyment of the freedom of international communication in accordance with the way it is defined and in accordance with other relevant provisions of the Convention excludes any non-peaceful use without the consent of the coastal State - for instance, military exercises or other activities which may affect the rights or interests of that State; and it also excludes the threat or use of force against the territorial integrity, political independence, peace or security of the coastal State". *Available at* http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm.

14 Article 9 of the Act concerning the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf of Brazil and other provisions: Act No. 8617 of 4 January 1993, in DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, OFFICE OF LEGAL AFFAIRS, UNITED NATIONS, *supra* note 9, at 38.

of the ocean.[15] The other typical country is Iran which also lays down laws restricting foreign military activities in its EEZ by stipulating that "[f]oreign military activities and practices, collection of information and any other activity inconsistent with the rights and interests of the Islamic Republic of Iran in the exclusive economic zone and the continental shelf are prohibited". Because of this legal provision, there was a diplomatic row between Iran and the United States. The United States lodged a protest against it by stating that the prohibition of military activities contravenes international law and the United States reserves its rights in this regard. In reply to the United States protest, the Iranian diplomatic note states that due to the multiplicity of economic activities, it is possible that such activities, for which the coastal State enjoys sovereign rights, could be harmed by military practices and maneuvers; accordingly, those practices which affect the economic activities in the EEZ and the continental shelf are thus prohibited. It is interesting to note that the Iranian explanation does not deny the right of foreign military activities in the EEZ and the only reason for their prohibition results in their possible harm to economic activities there.

Relating to East Asia, it is worthy to mention Malaysia's position. As stated, "the Malaysian Government also understands that the provisions of the Convention do not authorize other States to carry out military exercises or manoeuvres, in particular those involving the use of weapons or explosives in the EEZ without the consent of the coastal State".[16] According to a prominent Malaysian scholar, there are three reasons to explain Malaysia's position. First, in Malaysia's view, there is no law that prohibits coastal State jurisdiction over foreign military activities in the EEZ. Moreover, unauthorized foreign military activities can undermine a coastal State's security, particularly if they are nonpeaceful in nature. Second, the LOS Convention is a treaty where the provision on foreign military activities in the EEZ is a new and controversial concept, rather than customary international law. Third, the provision on military activities in the EEZ is not consistent with the principle of peaceful uses of the sea. Malaysia views foreign military activities in its EEZ as undermining and threatening its security as well.[17]

15 For details, *see* J. Ashley Roach and Robert W. Smith, United States Responses to Excessive Maritime Claims 409–413 (1996).

16 *Malaysian Declaration*, *available at* http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm.

17 *See* BA Hamzah, *Military Activities in the EEZ: Preliminary Views from Malaysia*, in Shicun Wu and Keyuan Zou (eds.), Securing the Safety of Navigation in East Asia: Legal and Political Dimensions (2015).

The regulations above are made under the rationale that military activities are inherently potential threats to peace and good order of the coastal States. While such regulations are understandable, it should be borne in mind that not all military activities are threatening. Contrarily, some military activities, such as the activities undertaken by the UN peacekeeping forces, are indispensable to maintain peace and good order. In the same thinking, some civilian activities may be threatening and this can be illustrated by a severe marine pollution accident caused by a civilian activity or illegal fishing in the EEZ. In such context, what we should look into is not the form of a certain activity, but its nature. If a military activity is threatening in nature and with clear bad intention and/or in a hostile manner, it should be banned in the EEZ. Otherwise, it can be allowed under certain conditions laid down by the coastal State, similar to the marine scientific research regime under the LOS Convention. There is no reason why the coastal State is prevented from regulating foreign military activities in its EEZ while it is allowed to regulate foreign marine scientific research there.

There is a discrepancy regarding the concept of the EEZ between the legal term and the operational term. The United States navy divides the ocean into two categories: national waters and international waters, for operational and mobility purposes.[18] The EEZ is accordingly categorized as "international waters".[19] However, it must be pointed out that it is only an expression for operational purposes, thus in no way affecting the legal nature of the EEZ as a maritime zone within national jurisdiction under the LOS Convention.

It is worth mentioning that the East-West Center once organized several workshops on "military and intelligence gathering activities in the EEZ". The launch of this series of workshops was triggered by the EP-3 Incident between China and the United States. The first one was held in Bali, Indonesia in June

18 National waters include internal waters, territorial seas and archipelagic waters, and international waters include contiguous zones, EEZ, high seas and security zones. *See* DEPARTMENT OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 1–4, 1–6 (1995).

19 The term "international waters" is even questioned by retired naval officials. *See* Paul (Pete) Pedrozo, *Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone,* 9 CHINESE JOURNAL OF INTERNATIONAL LAW 19 (2010), ("continued reliance on the term 'international waters' by the United States muddies the waters and unnecessarily allows China to divert attention from the legitimacy of the US position by arguing that the United States does not know the difference between the EEZ and the high seas. The United States should therefore cease to use the term 'international waters' when referring to its lawful military activities in the EEZ".)

2002, which focused on identifying disagreements and contrasting positions as well as on areas of possible mutual understanding and agreement.[20] The Tokyo Meeting in February 2003 acknowledged that with the technology advances in the EEZs, intelligence gathering activities would increase.[21] The Honolulu Meeting in December 2003 went further and some guidelines for military and intelligence gathering activities in the EEZs were drafted, based on the disagreement between maritime powers and developing coastal countries.[22] According to the Guidelines drafted by the study group, "ships and aircraft of a State undertaking military activities in the EEZ of another State have the obligation to use the ocean for peaceful purposes only, and to refrain from the threat or use of force, or provocative acts, such as stimulating or exciting the defensive systems of the coastal State; collecting information to support the use of force against the coastal State; or establishing a 'sea base' within another State's EEZ without its consent. The user State should have due regard for the rights of others to use the sea including the coastal State and comply with its obligations under international law".[23] Furthermore, "warships or aircraft of a State intending to carry out a major military exercise in the EEZ of another State should inform the coastal State and others through a timely navigational warning of the time, date and areas involved in the exercise, and if possible, invite observers from the coastal State to witness the exercise".[24] As for military surveying, the Guidelines provides that "maritime surveillance may be conducted by states for peaceful purposes in areas claimed by other states as EEZ and should not prejudice the jurisdictional rights and responsibilities of the coastal state within its EEZ".[25] Unfortunately, these constructive guidelines are rejected by the United States despite the involvement of American scholars in the drafting process.

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20 For details, *see* EAST-WEST CENTER, MILITARY AND INTELLIGENCE GATHERING ACTIVITIES IN EXCLUSIVE ECONOMIC ZONES: CONSENSUS AND DISAGREEMENT: A SUMMARY OF THE BALI DIALOGUE (2002).

21 For details, *see* EAST-WEST CENTER, THE REGIME OF THE EXCLUSIVE ECONOMIC ZONES: ISSUES AND RESPONSES: A REPORT OF THE TOKYO MEETING (2003).

22 *See* Hasjim Djalal, Alexander Yankov and Anthony Bergin, *Draft guidelines for military and intelligence gathering activities in the EEZ and their means and manner of implementation and enforcement*, 29 (2) MARINE POLICY 175–183 (2005).

23 *See*, *Guidelines for Navigation and Overflight in the Exclusive Economic Zone*, 16 September 2005, Tokyo, *available at* http://www.sof.or.jp/en/report/pdf/200509_20051205_e.pdf.

24 *Ibid.*

25 *Ibid.*

III Hydrographic Surveying and Military Intelligence Gathering

There is another grey area, which is also related to military intelligence gathering in the EEZ, i.e., hydrographic surveying when it is undertaken for military purposes. The International Hydrographic Bureau defines "hydrographic surveying" as "a survey having for its principal purpose the determination of data relating to bodies of water. A hydrographic surveying may consist of the determination of one or several of the following classes of data: depth of water, configuration and nature of the bottom; directions and force of currents; heights and times of tides and water stages; and location of topographic features and fixed objects for survey and navigation purposes".[26]

Although some wordings like "survey activities" and "hydrographic survey" appear in the LOS Convention, the Convention does not contain any provision specifically governing this kind of marine activity. The grey and ambiguous area is further widened in the context of the relevant provisions of the LOS Convention regarding marine scientific research (MSR).

The LOS Convention contains a whole part on MSR (Part XIII) with 6 sections and 28 provisions. It recognises the right of all States and competent international organisations in the world to conduct MSR in accordance with the Convention (Art. 238). MSR, as a good thing for human beings, should be promoted, and international cooperation in this respect is much appreciated. The conduct of MSR should follow the four principles below:

(a) MSR should be conducted exclusively for peaceful purposes;
(b) MSR should be conducted with appropriate scientific methods and means compatible with the LOS Convention;
(c) MSR should not unjustifiably interfere with other legitimate uses of the sea compatible with the LOS Convention and should be duly respected in the course of such uses; and
(d) MSR should be conducted in compliance with all relevant regulations adopted in conformity with the LOS Convention including those for the protection and preservation of the marine environment (Art. 240).

The LOS Convention sets forth different regulations regarding MSR conducted in different sea zones. For the territorial sea and internal waters, the coastal State has the exclusive right to regulate, authorise and conduct MSR. Without the express consent from the coastal State, MSR to be conducted by foreigners

26 IHO, HYDROGRAPHIC DICTIONARY (1994), *available at* http://www.iho.int/iho_pubs/standard/S-32/S-32-eng.pdf.

are not allowed therein (Art. 245). Such a provision is understandable since the territorial sea is commonly regarded as part of the territory of the coastal State.

For the EEZ and the continental shelf, the legal governance in the LOS Convention differs from that for the territorial sea. The coastal State, for the purpose of exercising its jurisdiction, has the right to regulate, authorise and conduct MSR in the EEZ and on the continental shelf. MSR should be conducted with the consent of the coastal State (Art. 246). It is noted that the word "express" does not appear here in the provisions for the MSR in the EEZ and continental shelf. This is because the legal status of the EEZ and the continental shelf is different from that of the territorial sea in that the coastal State can only exercise sovereign rights and jurisdiction over its EEZ and continental shelf, but not full sovereignty. However, there are still a number of requirements contained in the LOS Convention to protect the interests and respect the legitimate rights of the coastal State. The foreign related MSR projects in the EEZ and on the continental shelf of a coastal State should be carried out "exclusively for the peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind",[27] and should not unjustifiably interfere with activities undertaken by a coastal State in the exercise of its sovereign rights and jurisdiction under the LOS Convention.[28]

The researching State or international organisation bears the duty to comply with certain conditions to conduct its MSR. First, the research conductor has the duty to provide to the coastal State detailed information on the MSR to be conducted in the EEZ or on the continental shelf of the coastal State not less than six months in advance (Art. 248). Second, the conductor has the duty to comply with the following conditions: "(a) ensure the right of the coastal State, if it so desires, to participate or be represented in the marine scientific research project, especially on board research vessels and other craft or scientific research installations, when practicable, without payment of any remuneration to the scientists of the coastal State and without obligation to contribute towards the costs of the project; (b) provide the coastal State, at its request, with preliminary reports, as soon as practicable, and with the final results and conclusions after the completion of the research; (c) undertake to provide access for the coastal State, at its request, to all data and samples derived from the marine scientific research project and likewise to furnish it with data which may be copied and samples which may be divided without detriment to their scientific value; (d) if requested, provide the coastal State with an assessment

27 Art. 246 (3), LOS Convention.
28 Art. 246 (8), LOS Convention.

of such data, samples and research results or provide assistance in their assessment or interpretation; (e) ensure, subject to paragraph 2, that the research results are made internationally available through appropriate national or international channels, as soon as practicable; (f) inform the coastal State immediately of any major change in the research programme; (g) unless otherwise agreed, remove the scientific research installations or equipment once the research is completed".[29]

The coastal State has the right to require the suspension or cessation of any MSR activities in case of any non-compliance with the provisions in Articles 248 and 249 of the LOS Convention (Art. 253). On the other hand, the coastal State should not make excessive measures beyond the authorisation under the LOS Convention, otherwise it may be responsible and liable for them and should provide correspondent compensation.[30] It should be noted that under the LOS Convention, any MSR activity should not constitute the legal basis for any claim to any part of the marine environment or its resources (Art. 241). This is particularly important for disputed sea areas which are claimed by two or more countries. In practice, countries usually tend to maximize their use of evidences including MSR activities to justify their relevant territorial claims to a particular sea area or its resources.

It is clear from the above that the MSR regime focuses mainly on the MSR in the EEZ and on the continental shelf. The related provisions are most delicate and complex in comparison with the provisions on MSR in the territorial sea, or archipelagic waters. That part of the provisions were mostly debated during the UNCLOS III, reflecting the compromise between the advanced countries with strong MSR capability and the developing countries which are relatively poor and inadequate for sound MSR.

The LOS Convention contains no definition on MSR. During the UNCLOS III, the Chairman of the Third Committee included the flowing definition in the ISNT, Part III: "Marine scientific research means any study or related experimental work designed to increase man's knowledge of the marine environment".[31] However, such a definition was not finally included in the adopted Convention. The United States tried to define MSR as "the general term most often used to describe those activities undertaken in the ocean and coastal waters to expand scientific knowledge of the marine environment

29 Art. 249 (1), LOS Convention.

30 Art. 263 (2), LOS Convention.

31 *See* ALFRED H.A. SOONS, MARINE SCIENTIFIC RESEARCH AND THE LAW OF THE SEA 123 (1982).

and its processes".[32] Some scholars have tried to distinguish fundamental MSR from applied MSR in terms of application of the LOS Convention: whereas the former has to be granted in normal circumstances, the latter is subject to the coastal State's full discretion.[33] However, such a distinction does not seem to provide any help to clarify the unclear situation, and even the distinction itself causes problems since there is no clear-cut demarcation to define an MSR as fundamental or applied. The ambiguity of the MSR definition may cause problems for researching States, but have little adverse impact on costal States since they have a great discretionary power to decide whether an MSR is acceptable under Article 246 of the LOS Convention.

It is acknowledged that MSR and hydrographic surveying overlap to some extent. There is a reference in the LOS Convention which may help to some extent clarify the grey area existing between MSR and hydrographic surveying. According to Article 19 (2)(j), "the carrying out of research or survey activities" is prohibited when a foreign vessel exercises the right of innocent passage through the territorial sea. This legal expression contains the following two meanings: on the one hand, it distinguishes "research activity" from "survey activity", but on the other these two activities are given the same treatment.

In State practice, while the United States and the United Kingdom take the view that military hydrographic surveying is part of the freedoms of high seas related to "international lawful uses of the sea", Australia and Canada "are understood to seek permission of the coastal State before conducting hydrographic surveying in the EEZ of that State".[34] Some coastal countries like China hold the view that hydrographic surveying is part of MSR and have specific laws governing both MSR and hydrographic surveying.

In 2001, USNS *Bowditch*, an American military surveillance vessel, entered into China's EEZ in the Yellow Sea three times to carry out hydrographic surveying and was confronted by Chinese Marine Surveillance vessels. Chinese monitoring vessels followed the American ship and attempted to disrupt its operations. Even in one time a Chinese warship forced the *Bowditch* to leave the Chinese EEZ.[35] After the *Bowditch* Incident, China has tightened its control of hydrographic surveying in the maritime zones of its national jurisdiction.

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32 J. Ashley Roach and Robert W. Smith, United States Responses to Excessive Maritime Claims 425 (1996).

33 Wolf Plesman and Volker Röben, *Marine Scientific Research: State Practice versus Law of the Sea?* in Rüdiger Wolfrum (ed.), Law of the Sea at the Crossroads: The Continuing Search for a Universally Accepted Regime 375 (1991).

34 Sam Bateman, *Hydrographic Surveying in the EEZ: Differences and Overlaps with Marine Scientific Research*, 29 (2) Marine Policy 170 (2005).

35 *See* John Leicester, *Chinese Chase US Ship; Jet Crash Part of Spy Game*, Herald Sun, 4 April 2001, at 32; cited in Captain George V. Galdorisi and Commander Alan G. Kaufman, *Military*

One move was to revise the 1992 Law of Surveying and Mapping. The original provision governing foreign surveying activities has been revised as "Surveying and mapping to be conducted within the territory and other sea areas under the jurisdiction of the People's Republic of China by a foreign organization or individual must be approved by the competent department of surveying and mapping administration under the State Council together with the competent department of surveying and mapping administration of the Army, and shall comply with relevant laws and administrative rules and regulations of the People's Republic of China. A foreign organization or individual that conducts surveying and mapping within the territory of the People's Republic of China must adopt the form of joint venture or of cooperation with a relevant department or unit of the People's Republic of China, and shall not involve any State secret and endanger the State security".[36] The new provision contains some new changes in comparison with the old provision: (1) the original Article 19 has been moved ahead to be Article 7; (2) originally, such activity is only subject to the approval of the competent department of surveying and mapping administration under the State Council but now the approval is made by this department together with its counterpart in the Army; (3) Originally foreign organization or individual may conduct surveying and mapping alone within China's territory, but now such activity must be conducted in cooperation with the Chinese counterpart. It is noted that while some more restrictions are imposed, surveying and mapping by a foreign organization or individual may still be conducted alone after China's approval. Clearly, in China's eye, hydrographic surveying is not part of the freedoms of high seas.

The other reason for the revision of the Surveying and Mapping Law is connected to the implementation of the 1996 Regulations on the Management of the Foreign-Related Marine Scientific Research, which came into force from 1 October 1996.[37] The Regulations apply to the conduct of survey activities by international organizations, organizations and individuals of any foreign country within sea areas under China's jurisdiction. It is recalled that in the *Bowditch* Incident, the Chinese side asked the *Bowditch* to stop its illegal

Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict, 32 California Western International Law Journal 294 (2002).

36 Article 7 of the 2002 amended Law of Surveying and Mapping, People's Daily (in Chinese), 1 September 2002, at 5. The amended Law was adopted on 29 August 2002 and came into force on 1 December 2002. The English version of the 1992 Law is available in Office of Policy, Law and Regulation, State Oceanic Administration (ed.), Collection of the Sea Laws and Regulations of the People's Republic of China 300–313 (2001).

37 It is reprinted in Gazette of the State Council of the People's Republic of China 328–333 (1996) [in Chinese]. English version is available in Office of Law, Policy and Regulation.

activities without China's approval in accordance with the above Regulations, but the American vessel only replied that it was doing military hydrographic surveying in international waters. When China addressed the issue to the American side through diplomatic channel, the United States responded that military surveying was not MSR so that it was not subject to the LOS Convention and to the approval of the coastal State. Clearly, China leant a lesson from this Incident that the relevant laws and regulations governing MSR did not work in practice with the Americans when they carried out military hydrographic surveying in China's jurisdictional waters.

Finally, if hydrographic surveying, whether military or civilian, was not considered part of MSR, then there should be a need to establish a new legal regime to govern it. As long as the grey area exists, problems regarding survey activities in the EEZ between the coastal State and the conducting State will continue to arise. If hydrographic surveying can be regarded as part of MSR, military surveying could be then considered abuse of maritime rights of the law of the sea. It is interesting to note that two Chinese marine law enforcers revealed in their article that the *Bowditch* had applied to the Chinese authority for hydrographic surveying but due to some reasons its application was not approved.[38]

The Ministry of Land and Natural Resources adopted the Provisional Measures on the Management of Surveying and Mapping in China by Foreign Organizations or Individuals adopted on 20 November 2006 and the Measures took effect on 1 March 2007.[39] Accordingly, any surveying and mapping in China including the sea areas within China's jurisdiction should be conducted through the cooperation with a Chinese partner either in the form of joint venture or cooperative project, subject to the prior approval of the Chinese competent authorities of both civilian and military surveying and mapping. Several surveying and mapping activities are excluded from such Sino-foreign cooperation. Ocean surveying and mapping is one of them. There are a few points which need to be highlighted: 1. Although the Measures only use the term "other sea areas within the jurisdiction of the People's Republic of China", it is reasonably assume that China's EEZ is included; 2. Unlike the Law of Surveying and Mapping, this Measures for the first time clearly provided that any such activity should be approved by the competent authorities from both the

38 You Zhiyong and Zhang Youfeng, *Case Analysis of Foreign-Related Marine Law Enforcement in the East China Sea Zone*, in Xiamen University Ocean Law Centre (ed.), Collected Papers of the Symposium in Commemorating the 20th Anniversary of the Adoption of the UN Convention on the Law of the Sea 85 (2002)(in Chinese).

39 Text is *available at* http://www.gov.cn/ziliao/flfg/2007-01/22/content_503464.htm.

government and the army; 3. The exclusion of marine surveying and mapping implies that China has further tightened its laws and regulations on marine surveying and mapping, particularly in the consideration of military strategy as well as of natural resources information.

IV Final Remarks

Military intelligence gathering and military hydrographic survey in the EEZ of another State remains a controversial issue in international law and invites hot debates, particularly between China and the United States. The Chinese usually argue that military intelligence gathering and military hydrographic survey in the EEZ by foreign vessels and aircraft are not considered peaceful and thus violate the relevant provisions of the LOS Convention.[40] But in the US view, such activities are lawful, non-aggressive military activities consistent with the UN Charter, and can be conducted in the EEZ without the consent of the coastal State.[41] Their different legal positions are reflected in their respective state practice as is once again demonstrated by the 2009 *Impeccable* Incident in the South China Sea. The Sino-American debate is still going on and it is hoped that the two sides could reach some degree of common understanding through their military consultation mechanism.[42] It is reported that recently Chinese warships entered into the US EEZ near Guam,[43] but it is not clear whether such warships simply enjoyed the freedom of navigation under international law, sailing through the US EEZ or conducted military activities such as intelligence gathering or military hydrographic surveying in the EEZ of the United States. It would be very interesting if the latter was the case.

From a legal perspective, two reasons can at least explain the controversy concerning military intelligence gathering and military hydrographic surveying in the EEZ. First, the LOS Convention is not clear about whether hydrographic survey is part of the MSR, and some countries tend to separate it from the MSR regime. Second, the LOS Convention grants the EEZ a unique legal

40 *See* Moritaka Hayashi, *Military Activities in the Exclusive Economic Zones of Foreign Coastal States*, 27 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 801 (2012).

41 Hayashi, *ibid.*, at 801.

42 As we know, the two sides concluded an agreement on military maritime safety consultation in 1998 and hold regular bilateral talks. Text of the agreement is *available at* http://www.fas.org/nuke/control/sea/text/us-china98.htm.

43 *See*, *Chinese Navy Begins US Economic Zone Patrols*, 3 June 2013, *available at* http://johnib.wordpress.com/2013/06/03/chinee-navy-begins-us-economic -zone-patrols/.

status, i.e., a maritime zone within national jurisdiction but subject to the freedoms of high seas, and there are differences in interpreting such freedoms in State practice as discussed partly in this article. It is perceived that the world community needs to find a way to conciliate different State practices in this respect and enhance peace, security and the rule of law in the ocean. The future possible review conference for the LOS Convention should put this issue on its agenda to clarify the issue of military activities including military intelligence gathering and military hydrographic surveying in a foreign EEZ.

Marine Data Collection: US Perspectives

J. Ashley Roach[1]

1 Marine Data Collection

Coastal State jurisdiction over foreign marine data collection activities depends on which type of activity is involved and on the maritime zone in which it is conducted. The 1982 United Nations Convention on the Law of the Sea[2] (LOS Convention) does not use the term "marine data collection" which is used in this article as a generic term without legal content, as the umbrella under which to consider the various data collection activities in the marine environment.[3]

Under "marine data collection" the following five categories, with seven subcategories, are considered:

- Marine scientific research (MSR);
- Surveys
  - Hydrographic surveys; and
  - Military surveys;
- Operational oceanography
  - Ocean state estimation;
  - Weather forecasting; and
  - Climate prediction;
- Exploration and exploitation[4] of
  - Natural resources; and
  - Underwater cultural heritage (shipwrecks); and
- Monitoring and environmental assessment.

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1 This article is based upon the revised Chapter (15) on marine data collection in J.A. Roach and R.W. Smith, Excessive Maritime Claims (4th edition in preparation). An earlier version of this article appears in Nordquist, Moore, Beckman and Long (eds.), Freedom of Navigation and Globalization 285–302 (2015).

2 United Nations Convention on the Law of the Sea, opened for signature 10 December 1982 (entered into force 10 November 1994), 1833 UNTS 397 (hereinafter LOS Convention or Convention).

3 The term is also used by the US Navy: "Marine data collection is a general term used when referring to all types of survey or marine scientific activity (e.g., military surveys, hydrographic surveys, and marine scientific research)." US Chief of Naval Operations, OPNAV Instruction 3128.9F, *Diplomatic Clearance for US Navy Marine Data Collection Activities in Foreign Jurisdictions*, 1 July 2014, para. 4.a, *available at* https://cyrptome.org/dodi/2014/opnav-3128–9f.pdf.

4 The term "exploitation" is used in the sense of resource development and management.

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The LOS Convention uses, but does not define, the terms "marine scientific research," "hydrographic survey," "survey activities," "exploitation" or "exploration" and does not mention "military surveys," "operational oceanography" or their subcategories. Nevertheless, the concepts are distinct, and this article seeks to clarify those differences.

The relevant maritime zones where these activities take place are the territorial sea, the contiguous zone, the exclusive economic zone (EEZ), the continental shelf, the deep seabed beyond the limits of national jurisdiction (the Area), straits used for international navigation, and archipelagic sea lanes.

This article examines what is involved in each of these activities, reviews the applicable legal regimes, and demonstrates that surveys, operational oceanography, exploration and exploitation, and monitoring and environmental assessment are not marine scientific research regulated by Part XIII of the LOS Convention; rather they are subject to separate legal regimes.

Even though none of these five categories and seven subcategories is defined in the law of the sea, including the LOS Convention, it is necessary to understand what each entails to appreciate the legal regime applicable to each.

II US Views: What is MSR?

The most heavily regulated is the first category, marine scientific research (MSR). The LOS Convention devotes a whole part, Part XIII, containing 28 articles in six sections, to the subject of MSR. Although not defined in the Convention, "marine scientific research" is the general term most often used to describe those activities undertaken in the ocean and coastal waters to expand scientific knowledge of the marine environment and its processes.[5]

5 Office of Ocean and Polar Affairs, U.S. State Department, *Marine Scientific Research Authorizations*, *available at* https://www.state.gov/e/oes/ocns/opa/rvc/index.htm. Harriet Davies, *The Regulation of Marine Scientific Research: Addressing Challenges, Advancing Knowledge*, in Warner and Kaye (eds.), Routledge Handbook of Maritime Regulation and Enforcement 212 (2016); Stephens and Rothwell, *Marine Scientific Research*, in The Oxford Handbook of the Law of the Sea 561–562 (2015); G.K. Walker, General Editor, Definitions for the Law of the Sea: Terms Not Defined by the 1982 Convention 241 (2012), (recounting the unsuccessful attempts to define MSR during the Third UN Conference on the Law of the Sea (UNCLOS III)). *Compare* LOS Convention, Articles 243 ("scientists … studying the essence of phenomena and processes occurring in the marine environment and the interrelations between them" and 246(3) "to increase scientific knowledge of the marine environment for the benefit of all mankind"); A.H.A. Soons, Marine Scientific Research and the Law of the Sea 124 (1982), [hereinafter, Soons]. *See generally* M. Gorina-Ysern, An International Regime for Marine Scientific Research (2003). Japanese law does not define MSR. *See* Takada, *Marine Scientific Research*

The United States accepts this definition.[6] MSR includes physical oceanography, marine chemistry, marine biology, scientific ocean drilling and coring, geological/geophysical research, as well as other activities with a scientific purpose. It is distinguished from hydrographic surveys, from military activities (including military surveys), from operational oceanography, from exploration and exploitation of natural resources and underwater cultural heritage,[7] and

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in the Exclusive Economic Zone and Japan-China Agreement for Prior Notification (1995–2001), *Japanese Digest of International Law JD(III) 3*, 44 JAPANESE ANNUAL OF INTERNATIONAL LAW 2001 134 (2002).

6 *Marine Scientific Research Authorizations*, *supra* note 5; OPNAV Instruction 3128.9F, *supra* note 3, at para. 4.d.

7 *Ibid.* The State Department webpage reads:

> While the Law of the Sea Convention does not define marine scientific research, the term generally refers to those activities undertaken in the ocean to expand knowledge of the marine environment and its processes. The United States has identified some marine data collection activities that are not marine scientific research. These include prospecting for and exploration of natural resources; hydrographic surveys (for enhancing the safety of navigation); military activities including military surveys; activities related to Part XII of the Convention; the collection of marine meteorological data and other routine ocean observations – such as those monitoring and forecasting of ocean state, natural hazard warnings and weather forecasting, and climate prediction – including through the voluntary ocean observation programs of the Joint Intergovernmental Oceanographic Commission-World Meteorological Technical Commission on Oceanography and Marine Meteorology (JCOMM) and the Argo program; and activities directed at objects of an archeological and historical nature found at sea.

The OPNAVINST reads as follows:

> activities undertaken per Part XIII of [the LOS Convention] in territorial seas, archipelagic waters, straits for navigation, the EEZ, high seas, on the continental shelf, or in the Area… The purpose of MSR is to expand general scientific knowledge of the marine environment. MSR activities undertaken include physical and chemical oceanography, marine biology, fisheries research, scientific ocean drilling and coring, geological/geophysical studies, and other activities with a scientific purpose. Data collected as a result of MSR is made publicly available. MSR does not include prospecting and exploration of natural resources, hydrographic surveys, or military activities. This includes military surveys and environmental monitoring and assessment pursuant to Section 4 of Part XII of [the LOS Convention], to include operational oceanography.

See US State Department, *Commentary—The 1982 United Nations Convention on the Law of the Sea and the Agreement on Implementation of Part XI,* US Senate Treaty Doc. 103–39, at 80, *available at* https://www.foreign.senate.gov/publications/download/treaty-doc-103–39-united-nations-convention-on-the-law-of-the-sea. (hereinafter US Commentary) (MSR differs from hydrographic surveys and resource exploration). In discussing MSR for military purposes, Professor Soons does not mention military surveys or other military activities. Soons, *supra* note 5, at 135.

More recently, Professors Stephens and Rothwell and Harriett Davies have addressed new technologies that were not addressed in Part XIII. Stephens and Rothwell, *supra* note 5, at 562, 574–578; Davies, *supra* note 5, at 223–224.

from environmental monitoring and assessment pursuant to Section 4 of Part XII of the LOS Convention. Each of these is discussed in the following sections.

III Surveys

For the purposes of this analysis, there are two forms of *surveys*, hydrographic surveys and military surveys.

1 *Hydrographic Surveys*

"Hydrographic surveys" are activities undertaken to obtain information for the making of navigational charts and for the safety of navigation. Hydrographic surveys include the determination of the depth of water, the configuration and nature of the sea floor, the direction and force of currents, heights and times of tides and water stages, and hazards to navigation. This information is used for the production of nautical charts and similar products to support safety of navigation, such as Sailing Directions, Light Lists and Tide Manuals for both civil and military use.[8] Coastal, harbor and harbor approach charts of non-US waters and other products are published by the US National Geospatial-Intelligence Agency and made available to mariners of all countries.[9]

In many areas of the world, the production of up-to-date charts has had a positive impact on economic development in coastal areas, stimulating trade and commerce and the construction or modernization of harbor and port

8 *Cf.* Definition 46, *in* INTERNATIONAL HYDROGRAPHIC BUREAU, A MANUAL ON TECHNICAL ASPECTS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA–1982, 1–16 (2006), Appendix 1, *available at* http://www.iho.shom.fr/publicat/free/files/S-51_Ed4-EN.pdf, and in OPNAVINST 3128.9F, *supra* note 3, at para. 4.c. ("Hydrographic survey refers to marine data collection activities undertaken in the territorial seas, archipelagic waters, straits for navigation, the EEZ, high seas, and on the continental shelf for the production of nautical charts and similar products to support safety of navigation. Hydrographic surveys can include one or more of several classes of data, such as depth of water, configuration and nature of the natural bottom, direction and force of currents, heights and times of tides and water stages, and hazards to navigation."). The definition of "hydrographic survey" in Walker, *supra* note 5, is different:

> "the science of measuring and depicting those parameters necessary to describe the precise nature and configuration of the seabed and coastal strip, its geographical relationship to the land mass, and the characteristics and dynamics of the sea.... Hydrographic surveys may be necessary to determine the features that constitute baselines or base-points and their geographical position." *Ibid.*, at 227.

9 10 U.S.C. § 451 *et seq.* Nautical charts of US waters are produced by the Office of Coast Survey, National Oceanic and Atmospheric Administration (NOAA), *available at* https://www.nauticalcharts.noaa.gov/.

facilities. By helping safety of navigation for ships in transit, up-to-date charts also play a role in protecting coastal areas from the environmental pollution which results from wrecks of ships carrying hazardous cargoes and freighters. Data collected during hydrographic surveys may also be of value in coastal zone management and coastal science engineering.

The UN General Assembly in its annual resolution on oceans and the law of the sea has recognized the importance of hydrographic surveys and nautical charting:

> Recognizing further that hydrographic surveys and nautical charting are critical to the safety of navigation and life at sea, environmental protection, including the protection of vulnerable marine ecosystems, and the economics of the global shipping industry, and encouraging further efforts towards electronic charting, which not only provides significantly increased benefits for safe navigation and management of ship movement, but also provides data and information that can be used for sustainable fisheries activities and other sectoral uses of the marine environment, the delimitation of maritime boundaries and environmental protection ...
>
> 14. Encourages intensified efforts to build capacity for developing countries, in particular for the least developed countries and small island developing States, as well as coastal African States, to improve hydrographic services and the production of nautical charts, including electronic charts ...[10]

The 2016 resolution, after repeating the preambular paragraph quoted above, strengthened its operative paragraph on hydrographic surveys:

> 155. ... urges all States to work with [the International Hydrographic] Organization to increase the coverage of hydrographic information on a global basis to enhance capacity-building and technical assistance and to promote safe navigation, in particular through the production and use of accurate electronic navigational charts, especially in areas used for international navigation, in ports and where there are vulnerable or protected marine areas.[11]

10 UNGA Resolution A/RES/67/78, 11 December 2012. Similar paragraphs appear in earlier resolutions A/RES/66/231, A/RES/65/37A, A/RES/64/71, A/RES/63/111, A/RES/62/215, A/RES/61/222, A/RES/60/30, A/RES/59/24 and A/RES/58/240, *available at* http://www.un.org/Depts/los/general_assembly/general_assembly_resolutions.htm.

11 UNGA Resolution A/RES/71/271, 23 December 2016, para. 155. Both paragraphs were repeated in resolution A/RES/72/73, 5 December 2017, at 4–5 and para. 158.

Survey activities are not MSR. The LOS Convention distinguishes clearly between the concepts of "research" and "MSR" on the one hand, and "hydrographic surveys" and "survey activities" on the other hand. Article 19(2)(j) of the LOS Convention includes "research or survey activities" as being inconsistent with innocent passage in the territorial sea. Article 21(1)(g) authorizes the coastal State to adopt laws and regulations, in conformity with the provisions of the Convention and other rules of international law, relating to innocent passage through the territorial sea in respect of "marine scientific research and hydrographic surveys." Article 40, entitled "research and survey activities," provides that in transit passage through straits used for international navigation, foreign ships, including "marine scientific research and hydrographic survey ships", may not carry out "any research or survey activities" without the prior authorization of the States bordering the straits. The same rule applies to ships engaged in archipelagic sea lanes passage (Article 54). While Part XIII of the LOS Convention fully regulates MSR, it does not refer to survey activities at all.

This conclusion, that MSR is distinct from survey activities, is supported by other respected publications on this subject.[12]

12 For example, the UN MSR Guide notes that "'survey activities' ... are primarily dealt with in other parts ... of the Convention" rather than in Part XIII. UN, MARINE SCIENTIFIC RESEARCH: A GUIDE TO THE IMPLEMENTATION OF THE RELEVANT PROVISIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1 (1991), (hereinafter *MSR Guide*). This could indicate that these activities do not fall under the regime of Part XIII. The MSR Revised Guide states that "[t]he freedom [of scientific research] envisioned in Art. 87 is not limited to marine scientific research but also extends to such activities as hydrographic surveys." UN, MARINE SCIENTIFIC RESEARCH: A REVISED GUIDE TO THE IMPLEMENTATION OF THE RELEVANT PROVISIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (2010), at 16 para. 56 (hereinafter *MSR Revised Guide*), *available at* http://www.un.org/Depts/los/doalos_publications/publicationstexts/msr_guide%202010_final.pdf. Professor Soons has written: "From articles 19, 21 and 40, which use the term "hydrographic surveying" separately from "research," it follows that the term "marine scientific research," for the purposes of the Draft Convention, does not cover hydrographic surveying activities." (Soons, *supra* note 5, at 125.) Later in the same book, Professor Soons wrote: "With respect to hydrographic surveying (an activity which is not to be considered marine scientific research, although it is somewhat similar to it ...), it is submitted that this activity, when it is conducted for the purpose of enhancing the safety of navigation ..., must be regarded as an internationally lawful use of the sea associated with the operations of ships ... in accordance with article 58, and can therefore be conducted freely in the exclusive economic zone ...." (Soons, *supra* note 5, at 157). The United Kingdom agrees. 68 BRITISH YEARBOOK OF INTERNATIONAL LAW 609 (1997). *See also* Davies, *supra* note 5, at 220 *et seq.* and Stephens and Rothwell, *supra* note 5, at 570–572. A contrary position is taken by an Adjunct Senior Scholar at the National Institute for South China Seas Studies, Haikou, China, who argues, without supporting documentation, that the MSR consent regime was established in part because the information collected "may be used to undermine the security of the state." Valencia, *Some "Scientific"*

The Convention therefore limits survey activities during passage in the territorial sea, in straits used for international navigation and in archipelagic sea lanes, but does not limit the activities of survey ships in the EEZ.

Like MSR, survey activities in the territorial sea are expressly subject to coastal State consent.[13]

Again, like MSR, survey activities while in transit passage or archipelagic sea lanes passage with its concomitant rights are expressly subject to prior authorization of the States bordering straits or the archipelagic State.[14]

Seaward of the territorial sea, all States remain free to conduct surveys free of coastal State regulation or control.[15]

International law, as reflected in the LOS Convention, authorizes coastal States to claim limited rights and jurisdiction in an EEZ. The jurisdictional rights relate primarily to the exploration, exploitation, and conservation of natural resources, MSR, and the marine environment. Beyond the territorial sea, all States enjoy the freedoms of navigation and overflight and other related uses of the sea within the EEZ, provided that they do so with due regard to the rights of the coastal State and other States.[16] The conduct of surveys in the EEZ is thus an exercise of the freedoms of navigation and other internationally lawful uses of the sea related to those freedoms, such as those associated with the operations of ships, which Article 58 of the LOS Convention guarantees to all States. However, a hydrographic survey on a foreign continental shelf that involves exploration or exploitation of living or non-living resources of the continental shelf requires coastal State consent.

2 *Military Activities, including Military Surveys*

The LOS Convention recognizes that all States have, within the EEZ, in contrast to the territorial sea, the right to conduct military activities, provided that they do so with due regard to the rights of the coastal State and other States (Article 58(3)). Appropriate activities include normal ship operations, task force maneuvering, launching and landing of aircraft, operating military devices, military exercises, intelligence collection, weapons exercises, ordnance testing, and military surveys. There is no general competence of the coastal State over military activities in the EEZ. Therefore, military activities, including military

Surveys a Security Threat in the South China Sea, IPP REVIEW, 9 November 2017, *available at* http://www.ippreview.com/index.php/Blog/single/id/584.html.

13 Arts. 19(2)(j) and 21(1)(g), LOS Convention.

14 Arts. 40 and 54, LOS Convention,

15 Arts. 56(1)(b)(ii), 78 and 87(1)(f), LOS Convention.

16 Art. 58, LOS Convention.

surveys, conducted outside foreign territorial seas are not subject to coastal State regulation.[17]

"Military survey" refers to activities undertaken in territorial seas, archipelagic waters, straits used for international navigation, the EEZ, high seas, and on the continental shelf involving marine data collection (whether or not classified) for military purposes (e.g., not shared with the general public). Military surveys can include oceanographic, hydrographic, marine geological, geophysical, chemical, biological, acoustic, and related data.[18]

Military surveys are not specifically addressed in the LOS Convention and there is no language stating or implying that military surveys may be regulated in any manner by coastal States outside their territorial sea or archipelagic waters. The United States therefore considers it to be fully consistent with the LOS Convention that the conduct of such surveys is a high seas freedom and the United States reserves the right to engage in military surveys anywhere outside foreign territorial seas and archipelagic waters. To provide prior notice or request permission would create an adverse precedent for restrictions on mobility and flexibility of military survey operations. However, a military survey on a foreign continental shelf that involves exploration or exploitation of living or non-living resources of the continental shelf requires coastal State consent. The US Navy requires that coastal State permission be sought if a military survey or hydrographic survey is planned to be conducted in foreign territorial seas, archipelagic waters or straits used for international navigation.[19]

These definitions thus clearly distinguish between MSR, which the coastal State can regulate, and hydrographic survey and military survey activities, which are freedoms the coastal State cannot regulate outside its territorial sea.

A few States have questioned the activities of military survey and hydrographic vessels in their EEZs.[20] The United States has explained along the

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17 *See* Art. 56, LOS Convention, and Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea,* 24 VIRGINIA JOURNAL OF INTERNATIONAL LAW 847 (1984).

18 OPNAV Instruction 3128.9F, *supra* note 3, at para. 4.b. ("Military survey refers to activities undertaken in territorial seas, archipelagic waters, straits for navigation, the EEZ, high seas, and on the continental shelf involving marine data collection (whether or not classified) for military purposes (e.g., not shared with the general public). Military surveys can include oceanographic, hydrographic, marine geological, geophysical, chemical, biological, acoustic, and related data.").

19 OPNAVINST 3128.9F, *supra* note 3, at para. 6.b(2).

20 For example, China claims the right to approve all mapping and surveying activities in "sea areas under the jurisdiction of the People's Republic of China." Surveying and Mapping Law of the People's Republic of China, Presidential Order No. 75, 29 August 2002, effective 1 December 2002, Art. 2, *available at* http://www.asianlii.org/cn/legis/cen/laws/samlotproc506/.

foregoing lines why such survey activities are not subject to coastal State regulation.[21]

3 *Operational Oceanography*

Operational oceanography is the routine collection of ocean observations, such as temperature, pressure, current, salinity and wind, in all maritime zones. It may be conducted in the oceans, at the air-sea interface, and in the atmosphere. This data is used for the monitoring and forecasting of weather (meteorology), climate and ocean state (e.g., surface currents and waves). The data is transmitted from sensor to shore in near real time and is made available to the public in near real time.[22]

The various operational oceanography programs and data collection instruments are described in Section 15.11 of the third edition of *Excessive Maritime Claims* and need not be repeated here. They are described there to facilitate a better understanding why they are, for the most part, conducted in the exercise of the high sea freedoms of navigation and overflight, and are not MSR governed by Part XIII of the LOS Convention. Nevertheless, some coastal States remain concerned that some or all of this data collected within their EEZs may be of direct significance for the exploration and exploitation of natural resources, whether living or non-living, within their EEZs[23] and thus wish to have some say as to the collection and use of that data. In that regard, the 2016 UNGA resolution on oceans and law of the sea stated in one of its preambular paragraphs:

> Recognizing that ocean data buoys deployed and operated in accordance with international law are critical for improving understanding of weather, climate and ecosystems, and that certain types of ocean data buoys contribute to saving lives by detecting tsunamis, and reiterating its serious concern at intentional and unintentional damage to such buoys[.][24]

21 State Department telegram 092114, 8 April 1994, para. 6; 2001 Digest of United States Practice in International Law 698–699 (hereinafter *Digest*); 2003 *Digest*, at 728, 738; 2007 *Digest,* at 647–650; 2009 *Digest,* at 468–469; 2012 *Digest,* at 420–421; 2015 *Digest*, at 524–525, all *available at* https://www.state.gov/s/l/c8183.htm.

22 Operational oceanography has also been defined "as the activity of systematic and long-term routine measurements of the seas and oceans and atmosphere, and their rapid interpretation and dissemination," *available at* http://eurogoos.eu/about-eurogoos/what-is-operational-oceanography/. *See further,* Davies, *supra* note 5, at 222–223.

23 *Cf.* Arts. 56(1)(a) and 246(5)(a), LOS Convention.

24 UNGA Resolution A/RES/71/257, 23 December 2016, at 5; repeated in resolution A/RES/72/73, 5 Dec. 2017, at 5.

The world's oceans exhibit wide variability on both spatial and temporal scales. While designated by basins (e.g., Atlantic, Pacific, Indian, Southern), boundaries used to delineate them are geographical and somewhat artificial as the oceans interact on global as well as regional scales. For example, changes in overturning circulations (North Atlantic, Southern Ocean) eventually will impact all of the ocean basins thereby manifesting changes regionally. Like the atmosphere, the oceans do not recognize geopolitical boundaries. Similarly, the oceans' interactions with the atmosphere often manifested through changes in weather and storm patterns are global processes, reflected regionally.

Understanding of the global ocean provides the context for understanding and predicting regional and coastal variability. The key to understanding is observations, observations of the oceans globally, regionally and locally. The operational ocean observing system allows nations to:

- monitor, understand and predict weather and climate;
- describe and forecast the state of the ocean, including living resources;
- improve management of marine and coastal ecosystems and resources;
- mitigate damage from natural hazards and pollution;
- protect life and property on coasts and at sea; and
- enable scientific research.[25]

In view of the United States, operational oceanography is not MSR.[26] The large-scale programs of oceanographic data collection, described elsewhere,[27] that operate independently from the users of the data distinguish operational oceanography from MSR.

4 *Marine Meteorological Data*

It should be recalled that the Third UN Conference on the Law of the Sea decided that the collection of marine meteorological data is not marine scientific research regulated by Part XIII of the Law of the Sea Convention.

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25 These six bullets are what GOOS is designed to do. *See available at* http://www.ioc-goos.org/index.php?option=com_content&view=article&id=12&Itemid=26&lang=en. "Enable" means observe from which hypotheses are developed and tested, not conduct scientific research. *See* Subramanian et al. (eds.), *Impacts of Data Collected and Lessons Learned from Ocean Observing Systems Worldwide*, 50 MARINE TECHNOLOGY SOCIETY JOURNAL (2016).

26 Senate Ex. Rep. 110–9, 19 December 2007, at 13, *available at* https://www.congress.gov/110/crpt/erpt9/CRPT-110erpt9.pdf ("there are other activities, such as operational oceanography, that are also not considered marine scientific research"). F.H.TH. WEGELEIN, MARINE SCIENTIFIC RESEARCH: THE OPERATION AND STATUS OF RESEARCH VESSELS AND OTHER PLATFORMS IN INTERNATIONAL LAW 116 (2005) notes that the procedures for advance access request to a coastal State is "impracticable" and the "scientific value of their measurements would be significantly impaired if drifters had to be retrieved before they enter foreign waters and not be re-released before permission is obtained; conversely, the exact date of entry can usually not be predicted …, neither which foreign waters it may stray into."

27 *See* e.g., ROACH AND SMITH, *supra* note 1, Section 15.11, at 439–437.

In 1979 the Eighth WMO Congress noted that the Members of the WMO engaged in operational activities, such as the collection of meteorological information from voluntary observing ships, buoys, other ocean platforms, aircraft and meteorological satellites, as well as meteorological and oceanographic research activities, considered that "adequate marine meteorological data coverage from ocean areas, in particular from those areas in the so-called "exclusive economic zone," is indispensable for the issue of timely and accurate storm warnings for the safety of life at sea and for the protection of life and property in coastal and off-shore areas," and that SOLAS required States to issue warnings of gales, storms and tropical storms and to arrange for selected ships to take meteorological observations,[28] expressed the hope that the provisions on marine scientific research then being negotiated by the Third UN Conference on the Law of the Sea "would not result in restrictions on operational meteorological and related oceanographic observational activities carried out in accordance with international programmes such as WWW and IGOSS" and appealed to its Members to ensure that the Conference was "made aware of the vital need for observational data from sea areas for the timely issue of weather forecasts and storm warnings."[29]

On 20 August 1980, after the completion of the negotiations on the MSR articles at the Resumed Ninth Session of the Conference, the Chairman of the Third Committee announced that he was now in a position to reply to the letter from the WMO forwarding this Resolution. The Chairman stated he agreed with the content of the Resolution and that

> in his opinion, the provisions on marine scientific research would not create any difficulties and obstacles hindering adequate meteorological coverage from ocean areas, including areas within the exclusive economic zone, carried out both within the framework of existing international programs and by all vessels, since such activities had already been recognized as routine observations and data collecting which were not covered by Part XIII of the negotiating text. Furthermore, they were in the common interest of all countries and had undoubted universal significance.[30]

28 SOLAS 1960, regulation V/4, 536 UNTS 325–328. The current version is SOLAS 1974, regulation V/5 (rev. 2002), *quoted in* attachment 3 to Roach, *Marine Data Collection: Methods and Law*, *in* M. NORDQUIST, T. KOH AND J.N. MOORE (EDS.), FREEDOM OF THE SEAS, PASSAGE RIGHTS AND THE 1982 LAW OF THE SEA CONVENTION 205–208 (2009).

29 WMO Res. 16 (Cg-VIII), United Nations Conference on the Law of the Sea, March 1979, Doc. A/CONF.62/80, 9 Aug. 1979, XII *Official Records of the Third UN Conference on the Law of the Sea,* at 56 (hereinafter, Official Records), *available at* http://legal.un.org/diplomaticconferences/1973_los/vol12.shtml.

30 *Statement of Mr. Yankov*, XIV OFFICIAL RECORDS, at 103, para. 5.

Chairman Yankov repeated these comments in his Report of the Third Committee to the Plenary, without objection,[31] and so wrote to the WMO on 25 August 1980.

The WMO continues to be committed to the free and unrestricted international exchange of basic meteorological data and products which are necessary for the provision of services in support of the protection of life and property and the well-being of all nations, particularly those basic data and products required to describe and forecast accurately weather and climate. Members of the WMO are obligated under Article 2 of the WMO Convention, *inter alia*, to facilitate worldwide cooperation in the establishment of observing networks.[32]

The importance of marine meteorological data was recognized in the 2016 UNGA resolution on oceans and the law of the sea, as follows:

> Also recognizes the importance of navigational warning series based on marine meteorological data for the safety of ships and lives at sea and the optimization of navigation routes, and notes the collaboration between the World Meteorological Organization and the International Maritime Organization for the enhancement of these services and their extension to the Arctic region.[33]

IV Exploration and Exploitation

The LOS Convention contains separate regimes for exploration and exploitation of natural resources and for underwater cultural heritage.

1 *Natural Resources*

Exploration and exploitation of natural resources involves the searching for and removal of living or non-living natural resources found in the oceans or beneath the seabed. The term "natural resources" has four separate meanings in the law of the sea, depending on the maritime zone where they are located. First, the natural resources governed by the EEZ regime are the living and non-living natural resources (not further expressly defined) located within the EEZ.[34]

31 *Report of the Chairman of the Third Committee*, Doc. A/conf.62/L.61, 25 August 1980, para. 8, XIV OFFICIAL RECORDS, 133–134; XIV OFFICIAL RECORDS, at 15, para. 43.

32 WMO 12th Congress resolution 40 (Cg-XII) (1995), *available at* www.wmo.int/pages/about/resolution40_en.html.

33 UNGA Resolution A/RES/71/257, 23 December 2016, para. 156; repeated in resolution A/RES/72/73, 5 Dec. 2017, para. 159.

34 Art. 56(1)(a), LOS Convention.

Second, the natural resources governed by the continental shelf regime are the mineral and other non-living resources of the seabed and subsoil, together with the living organisms belonging to sedentary species.[35] Third, the natural resources of the deep seabed beyond the limits of national jurisdiction (the Area) are all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules;[36] this definition does not include living marine resources. Fourth, the natural resources of the high seas regime are referred to as "the living resources of the high seas" and include fish and marine mammals.[37]

Part V of the LOS Convention regulates exploration for and exploitation of the living and non-living natural resources located within the EEZ separately from the conduct of MSR within the EEZ.[38] Part VI of the Convention governs exploration for and exploitation of the mineral and other non-living resources of the seabed and subsoil, i.e., the continental shelf, together with living organisms belonging to sedentary species.[39] Part VI does not address MSR at all.[40] Thus it follows that, even though exploration and exploitation in both maritime zones are subject to exclusive coastal State control, those activities are not MSR.[41]

Part XI of the Convention and its Implementing Agreement regulate exploration for and exploitation of all solid, liquid or gaseous mineral resources *in situ* in the deep seabed beyond the limits of national jurisdiction at or beneath the seabed, including polymetallic nodules. Exploration and exploitation in the Area are subject to regulation by the International Seabed Authority. Article 256 provides that MSR in the Area is to be conducted in conformity with Part XI, particularly Article 143. Hence, exploration and exploitation of mineral resources in the Area is not MSR regulated by Part XIII.

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35 Art. 77(4), LOS Convention. Sedentary species are those organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant contact with the seabed or subsoil. *Ibid.*

36 Art. 133, LOS Convention. When recovered from the Area, these resources are referred to in the Convention as "minerals."

37 Part VII, Section 2, Arts. 116–120, LOS Convention.

38 *Compare* Arts. 56(1)(a) and 56(1)(b)(ii), LOS Convention.

39 Art. 77, LOS Convention.

40 MSR in the EEZ and on the continental shelf is regulated by Part XIII, Article 246 of the Convention.

41 Because they directly implicate exploration or exploitation of the natural resources of the continental shelf, Article 246(5) permits a coastal State to withhold its consent to the conduct of a MSR project on its continental shelf, *inter alia*, if (a) it is of direct significance for the exploration and exploitation of natural resources, whether living or non-living, (b) involves drilling into the continental shelf, or (c) involves the construction, operation or use of artificial islands, installations and structures.

2 Underwater Cultural Heritage (*UCH*)

Exploration and exploitation of underwater cultural heritage involves the search for, recording of, and removal of items of cultural heritage, such as artifacts from shipwrecks. These items are, of course, not natural but are man-made resources.

UCH is addressed in only two articles of the LOS Convention, Article 303 with regard to the contiguous zone, and Article 149 with regard to archaeological and historical objects found in the Area. UNESCO has developed a regulatory scheme for UCH found at sea that seeks to provide coastal States authority to regulate the search for and recovery of UCH located landward of the outer limit of a declared contiguous zone, and seaward of such a zone contrary to the allocation of rights and duties in the LOS Convention.[42]

Exploration for and exploitation of UCH is also not MSR.[43]

V Monitoring and Environmental Assessment

Section 4 of Part XII on the protection and preservation of the marine environment requires monitoring and environmental assessment of the risks or effect of pollution of the marine environment. In particular Article 204(1) requires States "to observe, measure, evaluate and analyze, by recognized scientific methods" these risks or effects. Article 204(2) requires States to keep under surveillance the effects of certain activities in order to determine whether these activities are likely to pollute the marine environment. Article 205 requires States to publish reports of the results obtained. Article 206 requires States to assess certain activities. All of these requirements are inconsistent with the MSR regime of Part XIII. Accordingly, monitoring and environmental assessment pursuant to Section 4 of Part XII is not MSR.[44]

VI Legal Regimes of MSR and Surveys under the 1958 Geneva Conventions

Prior to UNCLOS III, each coastal State possessed sovereignty over a narrow territorial sea and sovereign rights over its continental shelf for the purpose of exploring and exploiting its natural resources. High seas freedoms, including

42 Convention on the Protection of Underwater Cultural Heritage, Paris, 2001, *available at* http://unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/officialtext. For details, *see* Roach and Smith, *supra* note 1, at 549–552.

43 Wegelein, *supra* note 26, at 218–219.

44 OPNAV Instruction 3128.9F, *supra* note 3, para. 4.d.

the freedom to conduct surveys and MSR, appertained in the water column seaward of the territorial sea, and on the seabed seaward of the outer limits of the continental shelf.

The United States is a party to the four 1958 Geneva Conventions on the Law of the Sea, which established a regime—of sorts—for surveys and MSR.

The Continental Shelf Convention recognizes coastal State jurisdiction over MSR involving the continental shelf and physically undertaken there, but is silent regarding surveys. The coastal State is normally expected to give its consent if the request is in connection with purely scientific research and is submitted by a qualified institution. The coastal State has the right to participate or be represented in the research. The results of the research must be published.[45]

The High Seas Convention, expressly codifying customary international law, recognizes the freedom of the seas, including the water column over the continental shelf, without specifically mentioning MSR or surveys among its illustrative list of freedoms.[46] Nevertheless, the conduct of MSR was regarded as an exercise of the freedom of the high seas.[47]

The Territorial Sea Convention is silent on MSR and surveys, except to provide that the territorial sea and subjacent seabed and subsoil are under the sovereignty of the coastal State.[48] It follows that the consent of the coastal State must be obtained for research work in and under its territorial sea.[49]

The 1958 Fishing Convention is silent on marine scientific research.

Thus, the four 1958 Geneva Conventions contain very little treaty law on MSR and marine surveys. Nevertheless, prior to the LOS Convention, freedom to conduct MSR and marine surveys existed in most of the oceans seaward of the narrow territorial sea, and on the seabed seaward of 200 meters depth or where the continental shelf could not be exploited.

The 1958 regime is replaced by the detailed regime set out in the LOS Convention, for States parties to these treaties.[50]

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45 1958 Convention on the Continental Shelf, 499 UNTS 311, Arts. 5(1) & (8). Soons, *supra* note 5, at 56–58 examines the meaning of these two paragraphs, concluding that the customary international law rules are essentially the same as those set out in paragraphs 1 and 8 of article 5.

46 1958 Convention on the High Seas, 450 UNTS 82, Art. 2.

47 The United Kingdom agreement with the position may be found in 56 BRITISH YEARBOOK OF INTERNATIONAL LAW 1985 501 (1986). The United States concurs in this position. Professor Soons came to the same conclusion after reviewing the *travaux préparatoires*, state practice and the views of publicists. Soons, *supra* note 5, at 47–55.

48 1958 Territorial Sea Convention, 516 UNTS 205, Arts. 1–2.

49 56 BRITISH YEARBOOK OF INTERNATIONAL LAW 1985 501 (1986); Soons, *supra* note 5, at 46.

50 Art. 311(1), LOS Convention. On the MSR regimes in the 1958 Geneva Conventions and LOS Convention *see also* Stephens and Rothwell, *supra* note 5, at 563–576.

VII Legal Regime of MSR under the LOS Convention

During the decade-long negotiations that culminated in the opening for signature on 10 December 1982 of the LOS Convention, the United States sought to maximize the areas in which MSR could continue to be conducted free of coastal State control, to create a regime that maximized timely and unencumbered access by foreign researchers to areas under coastal State jurisdiction, and to maintain the right to conduct marine surveys seaward of the territorial sea free of coastal State control. These negotiations were conducted in the context of increasing acceptance of a 12-mile territorial sea under coastal State sovereignty, of the 200-mile exclusive economic zone (EEZ) under coastal State jurisdiction for economic purposes, and of an expanded continental shelf that was at least 200 miles wide, and could be even wider for the broad-margin States such as the United States.

The results of those difficult negotiations resulted in a diminution of the oceanic areas in which there was freedom of MSR, coupled with a consent regime for MSR in the EEZ and on the subjacent continental shelf,[51] as set out in Part XIII of the Convention, while the freedom to conduct surveys was largely unchanged.[52] In 1983, the President decided that, Part XI aside, the rest of the LOS Convention supported US interests, including that of encouraging freedom of MSR.[53]

During the decades following adoption of the LOS Convention, questions arose as to the legal status of the non-seabed provisions of the LOS Convention. Some of its provisions—mostly coastal State rights, including the right to control MSR have been widely accepted and thus came to be considered as part of international law. However, other provisions—mostly duties, including coastal State duties to foreign researchers regarding MSR—have not been adequately followed and thus are clearly binding only on States party to the Convention.

Within the territorial sea, the coastal State exercises complete sovereignty, and MSR is now clearly under its exclusive control. The LOS LOS Convention explicitly provides that the coastal State has "the exclusive right to regulate, authorize and conduct" MSR in its territorial sea, which may be "conducted only with the express consent of and under the conditions set forth by the

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51 Soons, *supra* note 5, at 261.

52 Annick de Marffy, *Marine Scientific Research*, *in* 2 DUPUY & VIGNES (EDS.), A HANDBOOK ON THE NEW LAW OF THE SEA 1140 (1991), ("the balance is tipped much more in favor of coastal States than in favor of researching States, and this is perhaps harmful to scientific research in general").

53 President's Ocean Policy Statement of 10 March 1983, *available at* http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/USA_1983_Statement.pdf. *See further* Section 10 *infra*.

coastal State."[54] Further, the LOS Convention expressly states that the "carrying out of research or survey activities" makes passage through the territorial sea not innocent[55] and expressly authorizes the coastal State to enact laws and regulations relating to innocent passage through the territorial sea in respect of "marine scientific research" as well as "hydrographic surveys."[56]

Under the LOS Convention, the regime of passage through straits used for international navigation does not in other respects affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters.[57] Accordingly, Article 40 provides that during transit passage through such straits, foreign ships, "including marine scientific research and hydrographic survey ships," may not carry out any research or survey activities" without the prior authorization of the States bordering straits. The same rules apply to archipelagic sea lanes passage.[58]

International law now recognizes the right of all coastal States to claim EEZs that may extend seaward 200 miles from their territorial sea baselines. Indeed, some 126 coastal States have done so.[59] International law further recognizes that within its EEZ a coastal State may exercise "jurisdiction as provided for in the relevant provision of [the LOS] Convention" over MSR.[60] International law also now recognizes the sovereign right of the coastal State to explore and exploit the natural resources of its continental shelf, which may, as in the case of the United States, extend beyond 200 miles, but in most cases no more than 350 miles from the territorial sea baseline.[61] The Convention provides the legal framework for the exercise of MSR jurisdiction in the EEZ[62] and on the continental shelf.[63]

54 Art. 245, LOS Convention.

55 Art. 19(2)(j), LOS Convention.

56 Art. 21(1)(g), LOS Convention.

57 Art. 34(1), LOS Convention.

58 Art. 54, LOS Convention.

59 *See* ROACH AND SMITH (3rd ed.), *supra* note 1, Chapter 7, Table 10.

60 Art. 56(1)(b)(ii), LOS Convention.

61 Art. 76, LOS Convention. *See* ROACH AND SMITH (3rd ed.), *supra* note 1, Chapter 8 for details.

62 Arts. 246, 248 and 252–253, LOS Convention set the conditions for the conduct of MSR in the EEZ. In particular, six months advance request is required and the results of the research cannot be distributed publicly until the results of the research are compiled and shared with the coastal State. Further, the coastal State may, in its discretion, withhold consent to the conduct of a MSR project of another State in its EEZ or on its continental shelf if the project, *inter alia*, is of direct significance for the exploration or exploitation of its natural resources, whether living or non-living, within its EEZ. Art. 246(5)(a), LOS Convention.

63 Art. 252, LOS Convention, sets similar conditions for the conduct of MSR on the continental shelf.

Seaward of the EEZ are the high seas, and seaward of the continental shelf lies the seabed beyond the limits of national jurisdiction. Here the LOS Convention clearly advances the rights of the scientific community by expressly recognizing, for the first time, that MSR is a freedom of the high seas that may be exercised by all States.[64] Further, all States, as well as the International Seabed Authority, are permitted to carry out MSR on the seabed beyond national jurisdiction.[65] On the other hand, the LOS Convention is silent regarding survey activities seaward of the territorial sea.

1 Conduct of MSR under the *LOS* Convention

The conduct of MSR is fully regulated by Part XIII of the LOS Convention which does not address or apply to marine surveys of any sort. The Convention confirms the right of all States and competent international organizations to conduct MSR[66] and the duty to facilitate the conduct of MSR in accordance with the terms of the Convention.[67] The Convention sets forth the rights and obligations of States and competent international organizations with respect to the conduct of MSR in different maritime areas.[68]

1.1 Territorial Sea

Article 245 recognizes the unqualified right of coastal States to regulate, authorize and conduct MSR in the territorial sea. Therefore, access to the territorial sea, and the conditions under which a research project can be conducted there, are under the exclusive control of the coastal State.[69]

1.2 Archipelagic Waters

As archipelagic waters are under the sovereignty of the archipelagic State, MSR there is subject to the consent of that State.[70]

1.3 International Straits and Archipelagic Sea Lanes

Part XIII contains no provisions specifically targeted to straits used for international navigation or archipelagic sea lanes. However, under article 40, during transit passage, ships "may not carry out any research … activities without the

64 Arts. 87(1)(f) and 257, LOS Convention.
65 Arts. 143 and 256, LOS Convention.
66 Art. 238, LOS Convention.
67 Art. 239, LOS Convention.
68 *See* UN, *MSR Revised Guide*, *supra* note 12, at 3–25 for a detailed summary.
69 *See also,* Arts. 21(1)(g), 19(2)(j)), 40 and 54, LOS Convention. There is no appeal if consent is refused or unreasonable conditions are imposed. 56 BRITISH YEARBOOK OF INTERNATIONAL LAW 1985 501 (1986).
70 Soons, *supra* note 5, at 153.

prior authorization of the States bordering straits." The same rule applies to such ships exercising the right of archipelagic sea lanes passage.[71]

1.4 EEZ and Continental Shelf

Under Article 246, coastal States have the right to "regulate, authorize and conduct" MSR in the EEZ and on the continental shelf. Access by other States or competent international organizations to the EEZ or continental shelf for a MSR project is subject to the consent of the coastal State. The consent requirement, however, is to be exercised in accordance with certain standards and qualifications.

In normal circumstances, the coastal State is under the obligation to grant its consent to requests to conduct MSR in its EEZ or on its continental shelf. (It is explicitly provided that circumstances may be normal despite the absence of diplomatic relations.[72]) The coastal State, nevertheless, has the discretion to withhold its consent if the research project is of direct significance for the exploration and exploitation of living or non-living resources; involves drilling, the use of explosives or introduction of harmful substances into the marine environment; or involves the construction, operation and use of artificial islands, installations or structures.[73] (The first of these grounds for withholding consent may be used on the continental shelf beyond 200 miles only in areas specially designated as under development.[74]) It may also withhold consent if the sponsor of the research has not provided accurate information about the project or has outstanding obligations in respect of past projects.[75] If requested, the coastal State must state the reasons for denying consent.[76] Otherwise, the researching State will not be in a position to determine what adjustments would be required to enable the project to proceed.

The consent of a coastal State for a research project may be granted either explicitly or implicitly. Article 248 requires States or organizations sponsoring projects to provide to the coastal State, at least six months in advance of the expected starting date of the research activities, a full description of the project. The research activities may be initiated six months after the request for consent, unless the coastal State, within four months, has informed the State or organization sponsoring the research that it is denying consent for one of the

71 Art. 54, LOS Convention.
72 Art. 246(3)–(4), LOS Convention.
73 Art. 246(5)(a–c), LOS Convention.
74 Art. 246(6), LOS Convention.
75 Art. 246(5)(d), LOS Convention.
76 CENTER FOR OCEAN LAW AND POLICY, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY, VOLUME 4, 519 (1991), at para. 246.17(d).

reasons set forth in Article 246 or that it requires more information about the project. If the coastal State fails to respond to the request for consent within four months following notification, consent may be presumed to have been granted.[77] This provision seeks to encourage timely responses from coastal States to requests for consent, which as noted below is not always the case.

Consent may also be presumed under Article 247 to have been granted by a coastal State for a research project in its EEZ or on its continental shelf undertaken by a competent international organization of which it is a member, if it approved the project at the time that the organization decided to undertake the project and it has not expressed any objection within four months of the notification of the project by the organization to the coastal State.

Article 249 sets forth specific conditions with which a State or competent international organization sponsoring research in the EEZ or on the continental shelf of a coastal State must comply. These include the right of the coastal State to participate in the project, in particular through inclusion of scientists on board research vessels; provision to the coastal State of reports and access to data and samples; assistance to the coastal State, if requested, in assessing and interpreting data and results; and ensuring that results are made internationally available as soon as practicable. Additional conditions may be established by the coastal State with respect to a project falling into a category of research activities over which the coastal State has discretion to withhold consent pursuant to Article 246.

If a State or competent international organization sponsoring research in the EEZ or on the continental shelf of a coastal State fails to comply with such conditions, or if the research is not being conducted in accordance with the information initially supplied to the coastal State, Article 253 authorizes the coastal State to require suspension of the research activities. If those carrying out the research do not comply within a reasonable period of time, or if the non-compliance constitutes a major change in the research, the coastal State may require its cessation.

1.5 The High Seas and the Area

Article 87 expressly recognizes conduct of MSR as a freedom of the high seas. Articles 256 and 257 further clarify that MSR may be conducted freely by any State or competent international organization in the water column beyond the limits of the EEZ, as well as in the Area, *i.e.*, the seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction.[78] Under

77 LOS Convention, Art. 252, LOS Convention.

78 If no EEZ is claimed, continental shelf restrictions apply only as stated in Article 246.

Article 143, research in the Area is to be carried out exclusively for peaceful purposes.

1.6 Research Installations and Equipment

The conditions applicable to MSR set forth in the Convention apply equally to the deployment and use of installations and equipment to support such research seaward of the territorial sea baseline.[79] Such installations and equipment do not possess the status of islands, though safety zones of a reasonable breadth (not exceeding 500 meters) may be created around them, consistent with the Convention. They may not be deployed in such fashion as to constitute an obstacle to established international shipping routes. They must bear identification markings indicating the State of registry or the international organization to which they belong, and have adequate internationally agreed warning signals.[80]

1.7 Responsibility and Liability

Pursuant to Article 263(1), States and competent international organizations shall be responsible for ensuring that MSR, whether undertaken by them or on their behalf and wherever conducted seaward of the territorial sea baseline, is conducted in accordance with the LOS Convention. Pursuant to Article 263(2), States and organizations shall be responsible and liable for any measures they take in contravention of the Convention in respect of research by other States, their natural or juridical persons or by competent international organizations and shall provide compensation for damage resulting from such measures. With respect to damage caused by pollution of the marine environment arising out of MSR undertaken by or on the behalf of States and competent international organizations, such States or organizations shall be liable pursuant to Article 235.[81]

VIII US Marine Scientific Research Policy

The LOS Convention solidifies coastal State control over MSR in waters subject to their jurisdiction, waters which now encompass considerably more of the globe than in 1958.[82] Nevertheless, US policy is to encourage freedom of

79 Art. 258, LOS Convention.

80 Arts. 259–262, LOS Convention. *See further* Stephens and Rothwell, *supra* note 5, at 574–576.

81 Art. 263(3), LOS Convention.

82 Accompanying Germany's instrument of accession to the LOS Convention was a declaration concerning MSR, which reads as follows:

MSR. That policy was fostered by the US decision, first stated in the President's Oceans Policy Statement of 10 March 1983,[83] and reaffirmed in October 1994, in the documents transmitting the LOS Convention to the US Senate for its advice and consent to accession,[84] not to claim jurisdiction over MSR in its EEZ. The United States declined to assert jurisdiction in its EEZ over MSR because of its interest in encouraging MSR and promoting its maximum freedom while avoiding unnecessary burdens. The Department of State is charged with facilitating access by US scientists to foreign EEZs under reasonable conditions. Consequently, since 1983 the US requests permission through diplomatic channels for US research vessels to conduct MSR within 200 miles of a coastal State asserting such jurisdiction.[85]

> Although the traditional freedom of research suffered a considerable erosion by the Convention, this freedom will remain in force for States, international organizations and private entities in some maritime areas, e.g., the sea-bed beyond the continental shelf and the high seas. However, the exclusive economic zone and the continental shelf, which are of particular interest to marine scientific research, will be subject to a consent regime, a basic element of which is the obligation of the coastal State under article 246, paragraph 3, to grant its consent in normal circumstances. In this regard, promotion and creation of favorable conditions for scientific research, as postulated in the Convention, are general principles governing the application and interpretation of all relevant provisions of the Convention.
>
> The marine scientific research regime on the continental shelf beyond 200 nautical miles denies the coastal State the discretion to withhold consent under article 246, paragraph 5(a), outside areas it has publicly designated in accordance with the prerequisites stipulated in paragraph 6. Relating to the obligation, to disclose information about exploitation or exploratory operations in the process of designation is taken into account in article 246, paragraph 6, which explicitly excluded details from the information to be provided.

UN, Multilateral Treaties Deposited with the Secretary-General: Status, *available at* http://treaties.un.org/pages/Participation/Status.aspx. (hereinafter UN, Multilateral Treaties Deposited).

83 When claiming its EEZ in 1983, the United States chose not to assert the right of jurisdiction over msr within the zone. President Reagan explained the rationale for not doing so, as follows:

> While international law provides for a right of jurisdiction over marine scientific research within such a zone, the proclamation does not assert this right. I have elected not to do so because of the United States interest in encouraging marine scientific research and avoiding any unnecessary burdens. The United States will nevertheless recognize the right of other coastal states to exercise jurisdiction over marine scientific research within 200 nautical miles of their coasts, if that jurisdiction is exercised in a manner consistent with international law.

President's Ocean Policy Statement, *supra* note 53.

84 US Commentary, *supra* note 7, at 80.

85 The United Kingdom similarly acts on behalf of British scientists seeking authorization to conduct MSR in foreign waters. *See*, 56 BRITISH YEARBOOK OF INTERNATIONAL LAW

The United States does not require its permission to conduct MSR in US waters unless any portion of the MSR is conducted within the US territorial sea, any portion of the MSR within the US EEZ is conducted within a national marine sanctuary, a marine national monument, or other marine protected areas (16 US Code § 1436), any portion of the MSR within the US EEZ involves the study of marine mammals or endangered species (16 US Code §§ 1371(a)(1), 1374(c), 1538), any portion of the MSR within the US EEZ requires taking commercial quantities of living marine resources (16 US Code § 1857(2) & (4)), any portion of the MSR within the US EEZ involves contact with the US continental shelf (43 US Code § 1340), or any portion of the MSR involves ocean dumping research (33 US Code § 1443). The United States has identified some marine date collections activities that are not MSR, as discussed in Sections 3–6 above.[86]

1 *Role of the US State Department in MSR*

Within the Bureau of Oceans and International Environmental and Scientific Affairs (OES) is the Office of Ocean and Polar Affairs (OPA). OPA is responsible for assuring that US MSR policy is adhered to in acquiring permission from the coastal State, when required for such research, and for coordinating and processing of the requests, as well as in processing requests from foreign researchers to conduct MSR in the US territorial sea. All applications for consent must be submitted to OPA via the Research Application Tracking System (RATS), an online data management system designed to improve the transparency and efficiency of OPA's implementation of the marine scientific research consent regime.[87]

IX Coastal State Practice Regarding MSR under the LOS Convention

Many coastal States are complying with the MSR regime of the LOS Convention,[88] perhaps in no small part with the assistance of a practical guide to

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1985 500 (1986). The United States would similarly request permission to conduct MSR on a continental shelf seaward of the 200 nm limit.

86 *Marine Science Research Authorizations*, *supra* note 5. The requirements of other countries may be viewed *at* http://www.state.gov/www/global/oes/oceans/notices.html (notices to research vessel operators 1976–1999). *See also* http://www.unols.org/publications/index.html#foreign.

87 Office of Oceans and Polar Affairs, *Research Application Tracking System* (*RATS*), *available at* https://www.state.gov/e/oes/ocns/opa/rvc/rats/index.htm.

88 Between 1983 and 1995, the US Department of State processed over 1600 requests for US research vessels to conduct MSR in territorial seas and EEZs of 140 States. Only 43 were

the implementation of the MSR provisions first published in 1991 by the UN's Office for Ocean Affairs and the Law of the Sea[89] and revised in 2010.[90] The Revised Guide "strongly encourage[s]" States to "harmonize their national legislation with the provisions of the Convention, and, where applicable, relevant agreements and instruments, to ensure consistent application of those provisions."[91]

There are, however, a number of States that are not complying with the Convention's MSR provisions. Some of them are party to the Convention (e.g., Brazil, Chile, Mexico, Russia); others are not (*e.g.*, Colombia). The problems the United States has encountered include the following:

– delays in responding to requests for ship clearances;[92]
– last minute denial of permission to conduct the research;[93]
– requiring all data, regardless of format, be provided immediately prior to departure from last port of call;[94]

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denied, and 148 were cancelled, principally because of the researchers non-compliance with the MSR regime. The various legislative enactments were briefly summarized in UN Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, The Law of the Sea: Practice of States at the time of entry into force of the United Nations Convention on the Law of the Sea 18, 37–38, 75–76, 83–84, 97–98, 134–135 and 182 (1994). National legislation is collected in UN Office for Ocean Affairs and the Law of the Sea, The Law of the Sea: National Legislation, Regulations and Supplementary Documents on Marine Scientific Research in Areas under National Jurisdiction (1989).

89 UN, *MSR Guide*, *supra* note 12. This pamphlet also suggests standardization of the forms for seeking consent and for granting permission to conduct MSR in areas of national jurisdiction.

90 UN, *MSR Revised Guide*, *supra* note 12.

91 *Ibid.*, at 37, para. 129, citing the general call for harmonization of national legislation in the annual oceans and law of the sea resolution, A/RES/63/111, para. 5 (2008).

92 The last sentence of Article 246(3) requires coastal States to establish rules and procedures ensuring that consent will not be delayed or denied unreasonably. The UN MSR Guide states the coastal State "should therefore respond as quickly as can reasonably be expected to requests for consent." UN, *MSR Guide*, *supra* note 12, at 11, para. 52. The Revised Guide states "it would be helpful of the coastal State could respond as quickly as can reasonably be expected to requests for consent." UN, *MSR Revised Guide*, *supra* note 12, at 41, para. 150.

93 *Ibid.*

94 Article 249(1)(b) sets no fixed time-limits for providing the preliminary reports, final results and conclusions of the research to the coastal State. Providing even a preliminary report prior to the ship"s departure is not practicable. Soons, *supra* note 5, at 190. Common practice is to provide the preliminary report 30 days after completion of the field portion of the research.

- requiring the data to be provided within a fixed time after leaving the coastal State's waters, rather than after completion of the cruise;[95]
- requiring copies of data collected in international waters, or in waters under another's country's jurisdiction;[96]
- requiring data to be held in confidence and not placed into the public domain;[97]
- requiring the cruise reports to be submitted in other than English;[98]
- requiring more than one observer to be on board;[99]
- requiring the observer to be on board during non-research legs of a voyage;[100]
- requiring research and port call requests to be submitted other than through the Foreign Ministry;[101]

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95 The UN MSR Guide states that "[a]ll efforts should be made to supply the final results and conclusions within a reasonable period of time" noting that the "time span between the end of the cruise and the availability of the final results can vary substantially depending upon the nature of the research." UN, *MSR Guide*, *supra* note 12, at 19 para. 92; UN, *MSR Revised Guide*, *supra* note 12, at 45, para. 170. Final reports usually take a year or longer to prepare.

96 The coastal State has no right under the Convention to receive such data until it is made public.

97 Article 249(1)(e) requires the data be made internationally available, unless it is of direct significance for the exploration and exploitation of natural resources. US law requires that US government-funded data must become part of the public domain unless classified or restricted for national security reasons. 44 US Code §§ 3501(2) & 3506(d)(1), as amended by the Paperwork Reduction Act of 1995, Pub. L. 104–113.

98 The Convention is silent on this question. The UN MSR Guide recommends that consideration be given to providing the coastal State with reports "written in a language which can be read by scientists of the coastal State." UN, *MSR Guide*, *supra* note 12, at 19, para. 93; UN, *MSR Revised Guide*, *supra* note 12, at 45 para. 171.

99 The right to participate under article 249(1)(a) is qualified to the extent that it must be "practicable." The UN MSR Guide notes that, if the right to participate is to be meaningful at all, the researching State "must always reserve space for at least one coastal State scientist on board," while recognizing only in extreme situations would that be impracticable, such as on a two- or three-man submersible. The Guide also cautions that "excessive demands should not be made." UN, *MSR Guide*, *supra* note 12, at 16, para. 78. Consistent with the UN MSR Guide's conclusion that "[t]he coastal State may be able to claim more than one participant only if, and to the extent that, there is space available," two scientific participants are generally permitted on board US research vessels when space allows. However, there may be occasions when participation is not practical, or, conversely, when more than two may participate. Soons, *supra* note 5, at 189. Similar advice is not contained in the MSR Revised Guide.

100 This is not authorized by Article 249.

101 Under Article 250, all communications concerning MSR projects "shall be made through appropriate official channels, unless otherwise agreed." Soons states that it is always most

- Foreign Ministry's failing to forward cruise reports to cognizant organization;[102] and finally
- Slow or incomplete staffing and coordination among interested coastal State bureaucracies.[103]

x Arctic Scientific Agreement

At the Arctic Council's Fairbanks Ministerial in May 2017, the eight Arctic coastal States (Canada, Denmark, Finland, Iceland, Norway, Russian Federation, Sweden and the United States) signed an agreement on enhancing international Arctic scientific cooperation.[104] The purpose of the agreement is to *enhance* cooperation in scientific activities in areas where a Party exercises sovereignty, sovereign rights or jurisdiction, including land and internal waters and adjacent territorial sea, EEZ and continental shelf, and areas beyond national jurisdiction in the high seas north of 62°N, in order to increase effectiveness and efficiency in the development of scientific knowledge about the Arctic.

By its terms, the Agreement is similar to the 2011 Arctic search and rescue agreement.[105] Although legally binding, the obligations are merely to "facilitate," defined in the agreement as "pursuing all necessary procedures, including giving timely consideration and making decisions as expeditiously

safe to use diplomatic channels. Soons, *supra* note 5, at 193. The MSR Revised Guide concurs. UN, *MSR Revised Guide*, *supra* note 12, at 39, para. 139.

102 To avoid problems the UN MSR Guide recommends also sending a copy directly to the coastal State scientists involved. UN, *MSR Guide*, *supra* note 12, at 19, para. 90; this advice is not repeated in the MSR Revised Guide. The Guide also recommends the researching State expressly inform the coastal State involved, after final results and conclusions of a research project have been provided to it, that all obligations related to a specific research project have in its opinion been fulfilled, to avoid invocation of Article 246(5) by the coastal State to withhold consent to future projects because of outstanding obligations to it from a prior research project. UN, *MSR Guide*, *supra* note 12, at 20, para. 99; UN, *MSR Revised Guide*, *supra* note 12, at 47, para. 178.

103 The UN MSR Guide points out the need for the coastal State to have a single office to process applications for consent and be able to coordinate the request among the relevant government agencies. UN, *MSR Guide*, at 9, paras. 42, 43, 46; UN, *MSR Revised Guide*, *supra* note 12, at 41, para. 147.

104 *Agreement on Enhancing International Arctic Scientific Cooperation*, with appendices, 11 May 2017 (entered into force May 23, 2018), TIAS 18-523, *available at* https://www.state.gov/e/oes/rls/other/2017/270809.htm.

105 *Agreement on Aeronautical Search and Rescue in the Arctic*, signed at Nuuk 12 May 2011 (entered into force 19 January 2013), TIAS 13–119, *available at* https://www.state.gov/documents/organization/205770.pdf.

as possible." Settlement of disputes is "through direct negotiations." Cooperation with non-Parties is at the Parties discretion.

The agreement entered into force for five years, and automatically renews for further periods of five years.[106]

XI Value of the LOS Convention Today for MSR

The foregoing assessment naturally casts doubt on the value today of the LOS Convention to the marine scientific research community. That need not be the case because the Convention is approaching universal acceptance. The Convention is now in force for 167 States and the EC.[107]

President Clinton submitted the Convention to the Senate for advice and consent in 1994. Regarding MSR, the President's Letter of Transmittal stated: "In light of the essential role of marine scientific research in understanding and managing the oceans, the Convention sets forth criteria and procedures to promote access to marine areas, including coastal waters, for research activities."[108] The Secretary of State's Report expanded on the importance of the Convention to MSR:

> The essential role of marine scientific research in understanding and managing the oceans is also secured. The Convention affirms the right of all States to conduct marine scientific research and sets forth obligations to promote and cooperate in such research. It confirms the rights of coastal States to require consent for such research undertaken in marine areas under their jurisdiction. These rights are balanced by specific criteria to ensure that coastal States exercise the consent authority in a predictable and reasonable fashion to promote maximum access for research activities.[109]

In his 2003 testimony on the Convention before the Senate Foreign Relations Committee, Legal Adviser Taft said:

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106 *Agreement on Enhancing International Arctic Scientific Cooperation*, *supra* note 104.

107 *See,* Chronological lists of ratification, *available at* http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea.

108 Sen. Treaty Doc. 103–39, *supra* note 7, at IV.

109 *Ibid.*, at VII; II *Digest* 1991–1999, at 1559–1560. *See further* Davies, *supra* note 5, at 214–215, 224–225. *See also* Stevenson and Oxman, *The Future of the United Nations Convention on the Law of the Sea*, 88 AMERICAN JOURNAL OF INTERNATIONAL LAW 488, 498 (1994).

> The essential role of marine scientific research in understanding and managing the oceans is also secured. The Convention affirms the right of all States to conduct marine scientific research and sets forth obligations to promote and cooperate in such research. It confirms the right of coastal States to require consent for such research undertaken in marine areas under their jurisdiction. These rights are balanced by specific criteria to ensure that coastal States exercise the consent authority in a predictable and reasonable fashion to promote maximum access for research activities. More U.S. scientists conduct marine scientific research in foreign waters than scientists from almost all other countries combined.[110]

The 2004 and 2007 US Senate Executive Reports state regarding MSR:

> Part XIII of the Convention recognizes the critical role of marine scientific research in understanding oceanic processes and in informed decision-making about uses of the oceans. Following a maritime zone approach, it provides coastal States with greater rights to regulate marine scientific research in their territorial seas than in the EEZ and on the continental shelf. All States have the right to conduct such research freely in high seas areas. Part XIII also provides for international cooperation to promote marine scientific research.[111]

So how can those coastal States be convinced to accept and carry out their new duties? More than a decade's experience before the Convention entered into force suggested little hope for doing so outside the Convention regime. However, in at least three ways the Convention helps make real the balance of interests reflected in the Convention's terms.

First, States party to the Convention are legally bound by their treaty relationships to comply with the Convention's provisions, which by their nature are more explicit than customary law.

Second, US accession to the Convention would finally place it on a level playing field with other countries. Coastal States would no longer have the excuse that they were bound by the Convention and the United States was not—a significant political improvement.

Third, the Convention provides a scheme for resolving MSR disputes with coastal States. This, in and of itself, is an improvement over the present situation.

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110 2003 *Digest*, at 718.

111 *Quoted in* ROACH AND SMITH (3rd ed.), *supra* note 1, Appendix 9.

Further, the dispute settlement regime, discussed next, is a major accomplishment. Indeed, it may provide the only way to restrain–and roll back–excessive coastal State constraints on the conduct of MSR.

1 *MSR Dispute Settlement Regime*

With regard to MSR, the Convention provides that "disputes concerning the interpretation or application of the provisions of this Convention with regard to marine scientific research shall be settled" by the compulsory dispute settlement procedures (CDS).[112] The Convention also provides that

> [a] dispute arising from an allegation by the researching State that with respect to a specific project the coastal State is not exercising its rights under articles 246 and 253 in a manner compatible with this Convention shall be submitted, at the request of either party, to [compulsory non-binding] conciliation under Annex V, Section 2, provided that the conciliation commission shall not call in question the exercise by the coastal State of its discretion to designate specific areas as referred to in article 246, paragraph 6, or of its discretion to withhold consent in accordance with article 246, paragraph 5.[113]

1.1 Exemptions from CDS

Article 297(2)(a) carves out two substantial exceptions:
- the exercise by the coastal State of a right or discretion under Article 246 concerning MSR in the EEZ and on the continental shelf; and
- a decision by the coastal State to order suspension or cessation of a research project in accordance with Article 253, because the research activities are not being conducted in accordance with the information communicated to the coastal State under which the consent was based; or the State fails to comply with the conditions established by the State under Article 249 regarding participation, receipt of preliminary results, access to all the data and samples derived from the research, assessment of that data when requested by the coastal State, ensuring international availability of the research results, informing the coastal State immediately of any major changes in the research program, or removal of the scientific research installations or equipment once the research is completed.

MSR exempted from CDS thus includes the following:

112 Arts. 264 and 297(2)(a), LOS Convention.
113 Art. 297(2)(b), LOS Convention.

- the general right to regulate, authorize and conduct MSR in the EEZ or on the continental shelf,[114] and
- the discretion to withhold consent for MSR in its EEZ or on the continental shelf if that project:
  - (a) is of direct significance for the exploration and exploitation of natural resources, whether living or non-living. However, Article 246(6) precludes a coastal State from exercising its discretion to withhold consent if the project is to be undertaken on the continental shelf beyond 200 miles, and outside specific areas the coastal State has at any time publicly designated as "areas in which exploitation or detailed exploratory operations focused on those areas" are occurring or will occur within a reasonable period of time;
  - (b) involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment;
  - (c) involves the construction, operation or use of artificial islands, installations and structures for economic purposes, and installations and structures which may interfere with the exercise of the rights of the coastal State in the EEZ or on the continental shelf; or
  - (d) contains inaccurate information communicated to the coastal State, or if the researching State has outstanding obligations to the coastal State from a prior research project.

1.2 Interim Measures

Two other provisions favor the coastal State:

- Article 265, Interim Measures, provides that pending settlement of a dispute, authorized MSR will not begin or continue "without the express consent of the coastal State concerned."
- Further, the provisions of Article 292 authorizing a tribunal or court to order the prompt release of vessels and crews applies by its terms only to detentions for fishing and pollution violations.[115] Thus there is no guaranteed right of prompt release if a foreign research vessel were detained by the coastal State for violating its MSR laws and regulations.

1.3 Opting Out of CDS for MSR

Article 264 provides that "disputes concerning the interpretation or application of the provisions of [the LOS] Convention with regard to marine scientific

114 Art. 246(1), LOS Convention.

115 *See* Arts. 73(2), 220(7) and 226(1)(b), LOS Convention.; *cf.* Art. 27(3), LOS Convention.

research shall be settled" in accordance with the sections on "compulsory procedures entailing binding decisions" and the limitations and exceptions thereon, set out in Part XV, Settlement of Disputes, Parts 2 [Articles 286–296] and 3 [Articles 297–299], respectively.

For parties to the LOS Convention, Article 286 provides that any dispute concerning the interpretation or application of the Convention shall, where no settlement has been reached by recourse to the general provisions in Section 1, Articles 279–285, of Part XV on the Settlement of Disputes, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under Section 2, Compulsory Procedures Entailing Binding Decisions. There is an exception to this provision pertaining to certain law enforcement activities.

Article 298(1)(b) permits a State, when signing, ratifying or acceding to the Convention or at any time thereafter, to declare in writing that it does not accept the procedures in Section 2 with respect to "disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297, paragraph 2 or 3".

Article 297(3) relates to fishing. Article 297(2) provides regarding MSR:

> 2. (a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to marine scientific research shall be settled in accordance with Section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute arising out of:
>
> (i) the exercise by the coastal State of a right or discretion in accordance with article 246; or
>
> (ii) a decision by the coastal State to order suspension or cessation of a research project in accordance with article 253.
>
> (b) A dispute arising from an allegation by the researching State that with respect to a specific project the coastal State is not exercising its rights under articles 246 and 253 in a manner compatible with this Convention shall be submitted, at the request of either party, to conciliation under Annex V, Section 2, provided that the conciliation commission shall not call in question the exercise by the coastal State of its discretion to designate specific areas as referred to in article 246, paragraph 6, or of its discretion to withhold consent in accordance with article 246, paragraph 5.

Thus the Convention provides that all disputes regarding MSR are subject to compulsory binding dispute resolution except those disputes regarding the coastal State's (a) discretion to grant or deny MSR applications in its EEZ or on its continental shelf, and (b) decision to order suspension of a research

project. However, the situations in these two exceptions are subject to compulsory non-binding conciliation.

As of November 2017, the following 17 States have exercised this right under article 298(1)(b): Belarus, Cabo Verde, Canada, Chile, China, Ecuador, Egypt, France, Greece, Mexico, Portugal, Republic of Korea, Russia, Thailand, Tunisia, United Kingdom and Uruguay.[116] Upon accession, the United States intends to exercise this option.[117]

1.4 Remedies for Improper Exercise of Discretion

What aspects of MSR then are subject to dispute resolution? Two important coastal State duties come to mind: (1) the duty of the coastal State to grant consent, in normal circumstances, for MSR projects in the EEZ or on the continental shelf; and (2) the duty to establish rules and procedures ensuring that such consent will not be delayed or denied unreasonably. Although these may not appear to be that significant, it seems that the very existence of these areas should provide the researching State leverage over the coastal State that is not implementing the MSR regime consistent with the terms of the Convention.

The United States now has very little leverage over recalcitrant coastal States, and there is little incentive for those States to change their laws, regulations or procedures. The mere fact that if the United States were party their non-compliance can be brought to compulsory dispute settlement can only be an improvement in the present situation, and should lead to greater conformity with the MSR regime in the Convention.

Thus, US accession to the LOS Convention would provide it the opportunity to use the CDS procedures, an opportunity not available while the United States remains outside the treaty regime.

Finally, US accession to the Convention would enable the United States to consider establishing a Freedom of MSR Program analogous to the NSC-directed State-Defense Freedom of Navigation Program that since 1979 has helped conform state practice to the navigational provisions of the Convention.[118] Similar results should be sought for MSR.

XII Conclusions

This article has demonstrated that not all methods of collection of data about the oceans are marine scientific research regulated by Part XIII of the Law of

116 UN, *Multilateral Treaties Deposited*, *supra* note 82.
117 US Commentary, *supra* note 7, at 87.
118 *See* ROACH AND SMITH (3rd ed.), *supra* note 1, Chapter 1.

the Sea Convention. The means of data collection are often the same, and may appear indistinguishable from MSR. The data collected may be the same or different. The *parameters* collected, their *intended* use, and the detailed *controls* on foreign MSR in the EEZ distinguish MSR from surveys, operational oceanography, exploration and exploitation of resources, and monitoring and environmental assessment.[119]

The article has also demonstrated that proposals that all forms of marine data collection should be under coastal State control[120] would deprive the people of all nations of the benefits of free and open access to data that enhance safety and environmental protection.

While the lack of agreed definitions of the various methods for marine data collection has resulted in differences of views on the legal regimes governing them, this article has sought to provide clarification and further understanding.

119 *See* the discussion in *ibid.*, at 82–83 and the text preceding, *supra* note 5.

120 *See, e.g.*, Julia Xue, *Marine Scientific Research and Hydrographic Surveys in the EEZs: Closing up the Legal Loopholes?,* in NORDQUIST, KOH AND MOORE, *supra* note 28*,* at 209–225; and Sam Bateman, *Hydrographic Surveying in the Exclusive Economic Zones – Is it Marine Scientific Research?,* in NORDQUIST, KOH AND MOORE, *supra* note 28*,* at 105–131.

Voluntary Observing Ship and Marine Scientific Research under the Law of the Sea

Hong Chang

1 Factual Background

Historical introduction. Vessel observation, as a significant part of stereoscopic monitoring of marine environment, has gained wide recognition and plays a crucial role in marine scientific research for centuries. In the beginning, the safety of navigation was the focal point of weather observing at sea. As early as 1853, Matthew Fontaine Maury of the U.S. Navy proposed the conveying of an international conference to coordinate the establishment of uniform observation systems at sea.[1] After that, most attending countries arranged their ship to transmit the observations to shore. However, during the past decades, with the further development of marine science and marine technology, combined with the threat of global warming and other environmental disasters, the requirements of large scale and real-time observations were more and more expanded.[2] A well-organized system for collecting observations at sea is generally considered as being necessary today. The Joint Technical Commission for Oceanography and Marine Meteorology (JCOMM), an expert intergovernmental organization, which is co-organized by the World Meteorological Organization (WMO) and the Intergovernmental Oceanographic Commission (IOC), consolidates and coordinates the observations, data management and service system of oceanography and marine meteorology.[3] JCOMM is composed of the Observations Programme Area, the Data Management Programme Area (OPA) and the Services Programme Area plus two Cross Cutting Task Teams on Satellite Data Requirements and Capacity Building.[4] The OPA is primarily responsible for the development, coordination and maintenance of the multi-mode marine observations by the means of global cooperation. The Ship Observation

1 For further details, *see* http://www.bom.gov.au/jcomm/vos/vos.html.

2 For more information, *see* http://www.bom.gov.au/jcomm/vos/documents/vos_brochure.pdf.

3 For information on the work of JCOMM, *see* http://www.jcomm.info/index.php?option=com_frontpage&Itemid=1.

4 For further details, *see* http://www.jcomm.info/index.php?option=com_content&task=view&id=89&Itemid=97.

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Team (SOT) is a subdivision of the OPA. Its main component is the Voluntary Observing Ships (VOS) Scheme.[5]

How the VOS scheme works. The data collected by VOS are used for the preparation of forecasts and warnings to help route ships and avoid severe weather conditions, to monitor the state of the oceans, for climatological data banks serving many purpose, and to build long-term records to monitor changes in the climate of the earth.[6] These data pertains to the atmosphere above the sea (temperature, dew point, cloud, weather, visibility and pressure) and to the surface of the sea (temperature, waves, currents and ice).[7]

The members of the WMO recruit all the ships of the VOS scheme. The representative responsible for recruiting is the Port Meteorological Officer (PMO) who plays a critical role in the running of the VOS scheme. The functions of the PMO also comprise maintaining accurate records of the ships, regularly visiting the ships, providing relevant service regardless of the ship's nationality and country of recruitment, and so on.[8] All the members of the VOS Fleet, no matter what are the nationalities of the ships and the country of recruitment, could share the observations around the related routes. It means that vessels offer their observations in return for obtaining the forecasting, warning service, and instrumentations. Besides, there are no direct costs for attending vessels. Communication charges for the transmission are exempt.[9]

Data management. Traditionally, Voluntary Observing Ships have measured and reported the atmospheric and sea surface conditions which are needed for meteorological forecasting.[10] There are two ways how the VOS data flows: observations are transmitted in real time, and observations are recorded in

5 For further details, *see* http://www.jcomm.info/index.php?option=com_content&task=view&id=21&Itemid=38.

6 *See* J. Ashley Roach, *Defining Scientific Research: Marine Data Collection*, in MYRON H. NORDQUIST, LAW, SCIENCE & OCEAN MANAGEMENT 541–574, 557 (2008).

7 *Ibid.*

8 For more introduction and detailed functions of PMO, *see*, http://www.bom.gov.au/jcomm/vos/pmo.html.

9 For the general information, *see*, http://www.bom.gov.au/jcomm/vos/vos.html; and http://www.bom.gov.au/jcomm/vos/vos.html, at 3. For the situation of USA, on the official website, *available at* http://www.vos.noaa.gov/us_vos.shtml, it is said that, "VOS operates at no cost to the vessel, with communication charges, observing equipment and reporting supplies furnished by the National Weather Service."

10 *See* http://gosic.org/goos/VOS-data-flow.htm#Voluntary%20Observing%20Ships.

paper or electronic logbooks.[11] In the first one, real time observations are transmitted to the National Meteorological and Hydrological Services (NMHSs) by using Geostationary Technology Satellite (GTS). Some NMHSs keep an archive of the data extracted from the GTS.[12] In regards to the latter, marine meteorological observations are recorded on board in special registers (logbooks), which are provided by national meteorological services. Then the PMO of the recruiting country collects the logbooks, transfers the observations from the logbooks to a magnetic media in a standard format, sends the data to global collecting centers in Germany and the United Kingdom, approximately once every three months. The two centers provide data to eight members who are responsible for the preparation of climatological summaries.[13]

New situation. The variables observed by VOS originally regard to the air or the sea surface, like dry-bulb temperature, dew-point temperature, sea surface temperature, air-sea temperature difference, visibility, weather, wind direction and speed, pressure, cloud, and waves.[14] Later, with the development of science, awareness grew that the most challenging scientific problems encompass two or more of the environmental sciences. Development of a theory of climate will require treating the oceans and atmosphere as a thoroughly interacting system,[15] since the atmospheric circulation cannot be understood apart from considering the ocean, and vice versa.[16] Practically, it is far from enough to conduct climate research only by considering the atmosphere. A new situation therefore developed that the scientists began to do climate research by using marine factors, say, taking some marine data and sea water samples from the ocean on VOS, like sea surface salinity, dissolved oxygen and seawater CO_2 partial pressure (pCO_2).[17] In this regard, the most prominent activities are the underway CO_2 measurements which now is conducted by many ocean research institutions. The oceans are the largest sustained sink of anthropogenic carbon dioxide from the atmosphere. Therefore, understanding the physical, chemical

11 *See*, Elizabeth C. Kent, et al., *The Voluntary Observing Ship Scheme, available at* https://abstracts.congrex.com/scripts/jmevent/abstracts/FCXNL-09A02a-1664333-1cw-p4a07_rev1.pdf, at 1. *See* the data flow diagram on http://www.bom.gov.au/jcomm/vos/dataflow.html.

12 Kent, et al., *supra* note 11, at 2.

13 For more detailed information about data management, *see*, http://www.bom.gov.au/jcomm/vos/vos.html; and http://gosic.org/gcos/vos-program-overview.htm.

14 *See* http://gosic.org/goos/VOS-data-flow.htm#Voluntary%20Observing%20Ships

15 Thomas A. Clingan, The Law of the Sea: Ocean Law and Policy 435 (1994).

16 *Ibid.*, at 435.

17 Research details *see* T. Steinhoff and A. Körtzinger, *VOS-based pCO2 measurements in the North Atlantic Ocean - does the DpCO2 change?, available at* http://ioc3.unesco.org/ioccp/pCO2_workshop/Posters/Steinhoff_SOCOV.ppt.

and biological processes involved, feedback effects, and the future of this sink is critical for reducing uncertainty of climate change. Scientists normally outfit those VOS with automated carbon dioxide analyzers as well as thermosalinographs (TSGs) to measure the temperature, salinity and partial pressure of CO_2 (pCO_2) in surface water and air in order to determine the carbon exchange between the ocean and atmosphere.[18]

The way that the scientists or the equipment can get on the vessel is quite simple: negotiating with the shipping company and the captain. This means no one would apply for the consent of the likely coastal States (according to the shipping routes) before the scientists and the equipment getting on the vessel to take measurements from the ocean.[19] This practice has already existed for decades and not too much attention has been paid to it. If the company or the captain agrees, the scientists are allowed to embark or they contact with the chief engineer to emplace the equipment. The measurements would be conducted along the shipping routes. With respect to the shipping company, some advanced clients require the commercial ships to wear a "green label," which means, in some circumstances, friendly environmental ships are more popular. Even more important, captains and engineers who care about the research of climate change are willing to promote and facilitate the development of climate research. All these make the measurements from ocean on the VOS more and more common. However, the way of data collection varies from the meteorological data collection as described in the foregoing. Neither the PMO nor transmitting the data to the National Meteorological and Hydrological Services (NMHSs) gets involved. The scientists who deploy the equipment have their own system of receiving the data from satellite.[20] If the data received is not continuous, scientists would know that something is wrong with the equipment. Either then they fix the problem or they can inform the chief engineer to deal with it. In plain terms, the shipping company or the captain voluntarily carry scientists or equipment for conducting measurements in the ocean. They provide necessary assistance to the scientists or keep an eye on the running of the automatic equipment, however, they have nothing to do with the data collection.[21]

The marine environment, which is both important for marine science and the law of the sea, is defined by Soons "as covering the water column, the

18 *See* http://www.pmel.noaa.gov/co2/story/Volunteer+Observing+Ships+%28VOS%29.

19 Conversation with Professor Arne from IFM-Geomar.

20 Conversation with Tobias Steinhoff who was a doctoral candidate under the supervision of Professor Arne.

21 *Ibid.*

seabed and subsoil, and the atmosphere immediately above the sea."[22] As stated above, the variables, both relevant to the ocean and meteorology are collected on VOS from the water surface, the underwater, the atmosphere immediately above the sea as well as the atmosphere non-immediately above the sea. The former ones, according to the definition, are the components of the marine environment. That is to say, these variables are collected in the marine environment. As long as the marine environment is involved, the situation might be complicated because of the existence of the "Constitution for the Oceans"[23] – United Nations Convention on the Law of the Sea (LOS Convention) which is an important contribution to the law of the sea. Traditionally, the law of the sea deals with the activities on and in the oceans, which were tied to the environment in which they take place. The LOS Convention sets out principles and norms for regulating the conducts that are relevant to maritime issues. In the Convention's preamble, it is expressly stated that "*Recognizing* the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of seas and oceans, …" Thus it can be seen that the goal of the LOS Convention is to provide the legal order for the uses of the seas and oceans. Since taking measurements on VOS from the oceans constitutes an ocean use which may affect maritime areas within and beyond the limits of national jurisdiction, legal issues therefore should be analyzed on the basis of the LOS Convention.

II Relationship between the Ocean Measurements on VOS and Marine Scientific Research

It should be noted, firstly, that the newly emerging practice of ocean measurements on VOS are distinguished from traditional data collection activities on VOS in terms of legal status. With respect to the VOS scheme, during the LOS Convention negotiations of the third committee, the Secretary-General of the

22 A.H.A. Soons, Marine Scientific Research and the Law of the Sea 124 (1982). *Also see*, Katharina Bork, et al., *The legal regulation of Floats and Gliders-In quest of a new regime?* 39 Ocean Development and International Law 303 (2008).

23 Statement of Ambassador Tommy Koh of Singapore, President of the Third United Nations Conference on the Law of the Sea, at the final session of the Conference at Montego Bay, Jamaica, on 11 December 1982; reprinted in UN Pub. Sales No. E.83.V.5, 1983, at xxxiii. Excerpted from Satya N. Nandan, *An Introduction to the 1982 United Nations Convention on the Law of the Sea*, in Davor Vidas et al., (eds.) Order for the Oceans at the Turn of the Century (1999).

World Meteorological Organization expressed the concern that some provisions on marine scientific research might have direct consequences on activities conducted by the World Meteorological Organization over the oceans. Specifically, the VOS Scheme was pointed out. The chairman of the Third Committee, realizing that the adequate marine meteorological data coverage, including that from areas within the exclusive economic zone, was indispensable for timely and accurate storm warnings for the safety of navigation and for the protection of lives and property in coastal and offshore areas, expressed that

> the pertinent provisions of the second revision of the text on marine scientific research would not create any difficulties or obstacles hindering adequate meteorological coverage from the ocean areas, including areas within the exclusive economic zone since such operational and research activities have already been recognized as routine activities within the terms of reference of the World Meteorological Organization and are of common interest of all countries with undoubted universal significance.[24]

While it is decided that the collection of marine meteorological data is not marine scientific research regulated by Part XIII of LOS Convention,[25] this newly emerging practice of ocean measurements on VOS may face a different situation.

1 *What is Marine Scientific Research*

Since there is no definition of the term "marine scientific research" in the LOS Convention, various views toward the definition therefore are expressed and most of them can be sorted into two categories that focus on distinct perspectives. Whereas one considers the term under the context of the legal regime whose purpose is indicating which activities are governed by the regime of MSR and which are not,[26] the other one stresses the peculiarities from the scientific point of view[27] that places more weight on the nature and essence of the relevant activities in abstract terms. According to the first category, it is stated:

> Marine scientific research is the general term most often used to describe those activities undertaken in the ocean and coastal waters to expand

24 *See* OFFICIAL RECORDS OF THE UNITED NATIONS THIRD CONFERENCE ON THE LAW OF THE SEA, VOLUME XIV, at 102–103, 133–134. Excerpted from Roach, *supra* note 6, at 203.

25 *Ibid.*

26 SOONS, *supra* note 22, at 5.

27 *Ibid.*

> scientific knowledge of the marine environment. It includes oceanography, marine biology, fisheries research, scientific ocean drilling and coring, geological/geophysical scientific surveying, as well as other activities with a scientific purpose.[28]

Thus, it can be seen that the disciplines constitute marine scientific research contain marine biology,[29] chemistry,[30] physics,[31] geology,[32] meteorology,[33] hydrograph[34] and oceanography.[35]

Turning then to the second one, the definition has been based on the general notion of research, which means diligent and systematic inquiry or investigation into a subject in order to discover facts or principles.[36] The ordinary meaning of the term "scientific research" is the investigation of a phenomenon, question, or problem conducted by the means and methods of science.[37] Marine scientific research may be regarded as such investigation concerned with the marine environment which is commonly understood as covering the water column, the seabed and subsoil, and the atmosphere immediately above the sea.[38] Therefore, marine scientific research can be defined as "any

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28 J. Ashley Roach and Robert W. Smith, Excessive maritime claims 248 (1994).

29 Marine biology is concerned with the living organisms of the sea, such as marine microbes, plankton, benthic organisms, …, marine reptiles and marine mammals. Excerpted from Florian H. Th. Wegelein, Marine Scientific Research 12 (2005).

30 Marine chemistry deals with the chemical properties of the sea water. *Ibid.*

31 Marine physics or physical oceanography is concerned with the physical characteristics of sea water. *Ibid.*

32 Marine geology is concerned with the tectonic situation of the sea floor, with submarine topography, terrestrial magnetism and paleomagnetism, gravity, quake and elastic wave, and sedimentation. *Ibid.*

33 Marine meteorology is concerned with the interactions and mutual influence between the oceans and the atmosphere. *Ibid.*

34 Hydrography is concerned with the aspects of navigation of the sea. Mapping of the sea floor, depth soundings, wreck search and tide schedules are the most prominent services for navigators. *Ibid.*

35 Oceanography, in the scientific community, denotes the holistic study of the marine environment, namely, the system of oceans and atmosphere from possible views of the marine sciences: " the scientific studies of ocean, its boundaries and bottom topography, its physics and chemistry and of its marine organisms, including the interrelations and interactions." *Ibid. See* Wegelein, *supra* note 29, at 12–17.

36 Mirjam Skrk, *The Prospects of Marine Scientific Research in the Contemporary Practice of States*, in Budislav Vukas, (ed.), Essays on the New Law of the Sea 340–368, 344 (1990).

37 Katharina Bork, *The legal regulation of Floats and Gliders-In quest of a new regime?* 39 Ocean Development and International Law 303 (2008). *Also see*, Soons, *supra* note 22, at 124.

38 *See* Soons, *supra* note 22, at 124.

investigation of a phenomenon occurring in the seabed or the subsoil, the water column, or the atmosphere directly above the water."[39]

2 *Do the Ocean Measurements on VOS Constitute Marine Scientific Research?*

As the foregoing analyzed, the emerging practice of ocean measurements on VOS has nothing to do with the framework of the WMO. Neither the data collection purpose nor the data management is as the same as the VOS Scheme, other than the use of VOS fleets. Based on the ordinary meaning of scientific research,[40] these VOS measurements and observations can fall within the scope of scientific research. Furthermore, in light of the definition of marine environment,[41] the conduct of measuring the parameters and taking samples from the ocean or from the atmosphere immediately above the sea[42] can be considered as activities in marine environment. In that case, consequently, the ocean measurements and observations on VOS can be deemed as marine scientific research.[43]

III Factual Analysis

Compared with the research vessel (R/V), VOS offers a simple and convenient platform for scientists to conduct marine scientific research.

Research vessel. Under the LOS Convention, other than the consent regime, Articles 248, 249 and 250 made extremely clear the duties of the research party.

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39 Bork, *supra* note 37, at 304.

40 *See* Skrk, *supra* note 36.

41 *See* Bork, *supra* note 37.

42 A research result shows these kinds of measurements. It is stated: [T]he following parameters are measured in continuous underway mode: Sea surface temperature, Sea surface salinity, Dissolved oxygen, Chlorophyll (fluorescence), Atmospheric and seawater pCO_2. Discrete water samples are taken for measurement of the following parameters (approx. 7 cruises annually): Dissolved inorganic carbon (DIC), Alkalinity, Nutrients, Total organic carbon and nitrogen (TON, TN), δ^{13}C-DIC, Salinity (for calibration of the TSG unit), Chlorophyll-a (for calibration of the fluorescence probe), Particulate organic carbon and nitrogen, ^{17}O-O_2 for productivity estimates (cooperation with Paul Quay, Univ. Washington, Seattle/USA, start in 2007). More details, *see* Steinhoff and Körtzinger, *supra* note 17.

43 Some parameters, like surface wind speed and direction, air temperature, cloud, wave, weather and visibility information, which measured by VOS are not in the marine environment. Therefore, the conduct cannot be deemed as marine scientific research. In this thesis, only the part, which is deemed as marine scientific research, will be analyzed. The details about what other parameters can be achieved by VOS *see* Kent et al, *supra* note 11, at 1.

Article 248 is about the duty to provide information to the coastal State,[44] combined with Article 249 that specifies the duty to comply with certain conditions.[45] Article 250 makes reference to the communications concerning marine scientific project, which should be made through appropriate official channels, unless otherwise agreed.[46] It can be seen that conducting marine scientific research in the exclusive economic zone or on the continental shelf of a coastal State, the procedures and the requirements are highly complicated and sometimes extra requirements have been put forward as well, like two cruises in two years.[47] It is said that "not less than six months in advance of the expected starting date of the marine scientific research project"[48] to provide the full description of the project. Practically, at least one or two years before the starting date, researchers have to prepare for the cruise, including applying for the funding.[49]

Voluntary Observing Ship. As the foregoing analysis show how VOS scheme works, the most attractive consideration for scientists is that there is no need to secure the consent from the coastal State for the measurement in the ocean during the VOS cruise. This means it is much easier for scientists to take measurements from the ocean on VOS rather than a research vessel. Leaving all the application processes out makes scientists more than happy to conduct marine

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44 *See* UNCLOS, *supra* note 1, MYRON H. NORDQUIST (ED.), UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY, VOLUME IV ARTICLES 192 TO 278 FINAL ACT, ANNEX VI 526 (1989), Article 248. It is included that the nature and objectives of the project, the method and means to be used, the precise geographical areas in which the project is to be conducted, the expected date of first appearance and final departure of the research vessels, the name of the sponsoring institution, its director and the person in charge of the project, and the extent to which it is considered that the coastal state should be able to participate or to be represented in the project.

45 *Ibid.*, at 537. These conditions including, ensuring, if requested, the right of the coastal state to participate or represented in the project without any payment or obligation to contribute towards the costs of the project; providing the coastal state, if requested, with preliminary report, final results and the conclusions after the completion of the research; providing the coastal state, if requested, access to all data and samples and the data which may be copied and samples which may be divided without detriment to their scientific value; providing the coastal state, if requested, the assessment of such data, samples and research results or assistance in their assessment; ensuring the research results are made internationally available; informing the coastal state immediately of any major change in the research program; and the last one is removing the scientific research installations or equipment once the research is completed, unless otherwise agreed.

46 *Ibid.*, at 554.

47 Conversation with Professor Arne.

48 Art. 248, LOS Convention.

49 Conversation with Professor Arne.

scientific research on the VOS if it could meet their research requirements. Furthermore, there are some other advantages which make the VOS scheme more attractive for scientists as well, like most of the VOS are commercial ships,[50] the sailing routes are comparatively regular and frequent. This is beneficial to some kinds of marine scientific measurements, like seawater temperature, salinity and ocean current. Additionally, cutting the cost, this may be not the primary factor to attract scientist, however, this can sometimes make a little impact.

As the LOS Convention is silent on the definition of marine scientific research as well as what it is constituted, it thus denotes that the LOS Convention is incapable of clarifying what activities should be subject to the legal regime of marine scientific research. Moreover, within the VOS scheme, there is another way of operation that is totally different from the legal regime of marine scientific research established in LOS Convention. Therefore, there must be a vacuum zone where marginal case happens there. That would be, on the one hand, for the sake of climate research, scientists would like to do all the kinds of observation including in the ocean on VOS while there are no legal norms regulating those activities. On the other hand, the original intention of VOS scheme is mainly for atmospheric weather forecasting and climate change studies[51] which could conduct research in the atmosphere freely without the limitation of borders. All of these make it possible to lead the marine scientific research that is conducted on VOS into an awkward position. Is it legal or illegal? How can it be protected?

The LOS Convention, in Articles 245 and 246 make it extremely clear that marine scientific research in the territorial sea, exclusive economic zone and on the continental shelf should be conducted under the consent of the coastal States. In a literal sense, the ocean measurements on VOS that are taken along the shipping routes cannot be seriously argued that the conduct is legal by virtue of the LOS Convention. The consideration about the feasible consequences becomes applicable since the LOS Convention in Articles 27–32 codify different rules between merchant ships and government ships which are operated for non-commercial purposes. While government-owned vessels that are operated for non-commercial purposes enjoy immunities from boarding by other States on the high seas or other marine zones of coastal States,[52] the merchant or civilian vessels may not enjoy these immunities to the same extent.[53]

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50 Kent et al, *supra* note 11, at 1.

51 *Available at* http://gosic.org/gcos/VOS-program-overview.htm

52 Art. 32, LOS Convention.

53 Arts. 27 and 28, LOS Convention. *See* MONTSERRAT GORINA-YSERN, AN INTERNATIONAL REGIME FOR MARINE SCIENTIFIC RESEARCH 16 (2003).

Similarly, the U.S. Coastal Guard issues that while oceanographic vessels so designated are exempt from most of the inspection laws of the U.S., as merchant vessels, they are subject to manning requirements under U.S. law.[54] Namely, for commercial ships, as the majority composition of VOS fleet, the factor of non-immunities is important to bear in mind. In some cases, it is horrible that the coastal States' domestic implementation of the international law applicable to foreign vessels for breaching of coastal State's regulations. The measures are beyond the purport of Article 253 which requires the coastal State to order the suspension or cessation of the MSR activities, including the impounding of the vessel and its scientific equipment, very large fines, and imprisonment of the chief scientist or the master of the vessel.[55] That make ocean measurements on VOS extremely dangerous. It happens sometime that coast guards get aboard to do routine inspection, whereas they may go for whether there is marine pollution, drug smuggling or other breach of regulations since they have no idea about the use of the scientific instruments and none of the crews or the scientists would mention it.[56] It is therefore concluded that a thorough protection from the legal ground is demanded. Some regulations are supposed to be worked out and make it black and white to ensure that there are legal basis for both research States and coastal States.

IV Legal Analysis

1 *Ocean Measurements Conducted on VOS are Pure Scientific Research*

It is well known that research that is "in accordance with this Convention (LOS Convention) exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind" can be considered as pure scientific research, which is promoted by the LOS Convention. In the case of ocean measurement on VOS, the measurement of marine data and the analysis of marine sample are effective means to investigate the climate change that is for the benefit of all mankind. It has come to light that climate change is more and more close to the lives of all the mankind. As the United Nations Secretary General has said, it is the major, overriding environmental issue of our time,[57] and represents one of the greatest social

54 Excerpted from GORINA-YSERN, *supra* note 53.

55 *See* GORINA-YSERN, *supra* note 53, at 17–18.

56 Conversation with Professor Arne.

57 *See* http://www.unep.org/climatechange/Introduction/tabid/233/language/en-US/Default.aspx.

and economic threats facing the planet as well.[58] In terms of the research purpose though, it is a subjective criterion. What make the coastal States most worried about are the exploration of nature resource and the territory security.

A Unrelated to Natural Resources Exploitation

Marine natural resources include living resources and non-living resources. Among the living resources, the costal State is more alert to fish catches which is threatened by Illegal, unreported, and unregulated (IUU) fishing and over fishing whenever an unknown vessel shows up whether for research or not. With respect to the non-living resources which are constituted, most importantly, by the mineral resources that are either dissolved in sea water, resting on the ocean floor, or found underneath it.[59] The initial period of non-living resources exploration that concerns the coast State most is to investigate the geographical and geological conditions of the ocean floor to obtain detailed information on offshore resources.[60] Learning the geographical and geological information of the ocean floor is a sophisticated research process,let along that surveys of potential resources need to be carried out for a considerable time and the technologies have already gone so advanced that the extra precision instruments are required. Against this background, the variables frequently taken on VOS, like sea surface salinity, dissolved oxygen and seawater CO_2 partial pressure (pCO_2),[61] are far from meeting the technical requirements of those forgoing applications. Other than that it is obvious that the emphasis of the measurements on VOS is just the marine data and sample, rather than catching fishes. Therefore, in this view of perspective, anxious of the coastal State seems superfluous.

B Not Endanger the Coastal State's National Security

Every country regards the maintenance of its military security as a matter of highest national priority. It is hard to image that oceanographic research has

58 *Available at* http://ec.europa.eu/environment/climat/home_en.htm.

59 Roger H. Charlier and Constance C. Charlier, *Ocean Non-Living Resources: Historical Respective on Exploitation, Economics and Environmental Impact*, 40 INTERNATIONAL JOURNAL OF ENVIRONMENTAL STUDIES 123–134 (1992). It is said that the dissolved minerals include salt, bromine and magnesium, iodine, potassium, brines, and suspended matter. The minerals from the sea floor include sand, gravel, shells, tin, phosphorus, sulphur, and polymetallic nodules. The minerals beneath the ocean floor include hydrocarbons, coal and others.

60 Teruhis Tsujino, *Exploration Technologies for the Utilization of Ocean Floor Resources: Contribution to the Investigation for the Delineation of Continental Shelf,* 24 QUARTERLY REVIEW 68 (2007).

61 For research details, *see* Steinhoff and Körtzinger, *supra* note 17.

no potential military application.[62]Whenever an oceanographer measures depth, water temperature, pressure or salinity anywhere in the ocean, the collected data could be of some possible use to navies.[63] Even worse, some conducts of military intelligence or subversive activities under the guise of, or along with, marine scientific research.[64] It is thus highly understandable that the most secure action for a coastal State would appear, such as restricting or preventing the access of the information about nearby waters. As for the respect of marine measurement on VOS, it should be born in mind that the purpose is for climate change studies, even though some of the variables taken by VOS may seem suspicious. However, it should not be ignored that there is, as mentioned before, a data management system in VOS scheme as well as the marine measurements on VOS. In terms of the marine data collected on VOS, each time after one research program on VOS, mostly one or two years, researchers would make the data open to public through various channels,[65] like putting the data on internet[66] which is beneficial to whole science circles or publishing papers[67] which is considered as scientific literature that as an important source of conducting marine scientific research.[68] Whereas admittedly, military intelligence data would not go to public field and still further unlikely to born published articles that are accessible to the whole world. It is generally regarded that "publication of the research findings in the open scientific literature is one indication of the distinction between open and proprietary research."[69]

62 *See* Warren S. Wooster, Freedom of Oceanic Research 161 (1973).

63 *Ibid.*

64 *See* Soons, *supra* note 22, at 32.

65 Conversation with Professor Arne.

66 For examples, *see* http://www.ioccp.org/UW.html and http://www.carboocean.org. The former one offers coordination service for the ocean carbon community. The latter one is for marine carbon sources and sinks assessment.

67 Such as, Steinhoff and Körtzinger, *supra* note 17, and *Assessment of the current ocean carbon sink and its implications for climate change and mitigation, available at* http://www.oceanobs09.net/plenary/files/Koertzinger_CarbonSink_3Ac_vfinal.pdf. The authors both conduct marine scientific research on voluntary observing ships which are named M/V Falstaff (Wallenius Lines, Sweden) and M/V Atlantic Companion (Atlantic Container Lines, USA).

68 There are two phases which constitute marine scientific research: collecting data on the one hand and interpretation of those data on the other. In many cases, data that already exist can be made use of conducting marine scientific research and the important source of already existing data is the scientific literature. For more information, *see* Soons, *supra* note 22, at 16.

69 *See* Wooster, *supra* note 62, at 168. For the same view, also *see* Soons, *supra* note 22, at 7. It is said that "Like is the case with fundamental marine scientific research, the results

Still everything has an exception. It is however irrational that uses denial to safeguard the uncertain "endangered" interests even though it is of doubt whether the contributions of researchers are all for science's sake. A set of legal regime about VOS marine scientific research is supposed to protect the "science sake" and prevent from coast States' interests getting dangerous. Furthermore, as for the conduct of ocean measurements on VOS, all the requirements and qualifications by virtue of LOS Convention will be observed. Under the view that the tendency towards promoting marine scientific research and benefiting all the human beings is overwhelming, the potential exceptional case should not be the excuse of holding up the pace of science development.

2 *Notifying Regime*

Under UNCLOS Article 246, it is expressly provided that marine scientific research shall be conducted with the consent of the coastal State in the exclusive economic zone and on the continental shelf. Nevertheless one thing should still be bore in mind that the consent regime is only applicable to the circumstance that when the research is conducted in EEZ or on the continental shelf of the coastal State. In the territorial sea, the coastal State enjoys sovereignty which denotes the legal status of the territorial sea is almost alike the internal waters (except for the innocent passage regime). As a consequence of sovereignty, access of foreign vessels to the territorial sea and internal waters specifically for the purpose of conducting marine scientific research is subject to the complete authority of the coastal State.[70] The coastal State may enact any regulation, either requires of prior consent or impose any condition, at its own discretion.[71] It would be thus much more complex to conduct marine scientific research in the territorial sea or internal waters. Furthermore as mentioned before, the commercial vessels are exempt from the immunities. The reason why this consideration should be made is that the commercial ships, which in most cases constitute the VOS fleet, normally would enter the respective Ports of the coastal State that means those ships not only go across the territorial sea but go into the internal water as well.

According to Soons, notifying regime was defined as "Consent of the coastal State would not required, but those conducting the research would have to notify the coastal State and comply with certain internationally agreed

of such research are generally published or made generally available in another way." And, at 17, the same view is readdressed that, "A basic characteristic of open scientific research is the fact that the results are made generally available by publishing them."

70 *See* SOONS, *supra* note 22, at 46.

71 *Ibid.*

condition."[72] With the case of ocean measurements on VOS as foregoing mentioned, it is suggested that the notifying regime can be used to substitute for the consent regime for several reasons. Firstly, it can be regarded that the measurements are conducted "exclusively for peaceful purpose and in order to increase scientific knowledge of the marine environment for the benefit of all mankind. Secondly, those measurements can hardly be counted as a large-scale marine scientific research project, which needs long time elaborate preparative work. They are merely the incidental products while those commercial vessels passing through the marine area. Thirdly, if conducting those measurements on the basis of coastal State's domestic law or LOS Convention, the application procedure would be so prolonged and complicated that does no good for the sake of science development. Furthermore, once the delay of clearance request interferes with the research cruise, the quality of observation results would be definitely impaired since the cruise of the VOS is usually regular and the observations are persistent as well. Viewed from these perspectives, accordingly, the clearance procedures probably can be omitted in order to saving time and increasing efficiency. Still, notifying must be given in advance because the coastal State is entitled to be acquainted with the situation.

In the meanwhile, other obligations and regulations those are fit for marine scientific research should be applied to the conduct of marine measurements on VOS alike. In the light of LOS Convention Article 248, the coastal State is entitled to be provided the full description of the name of the voluntary observing ship; the nature and objectives of the project; the method and means to be used; the precise geographical areas; the expected date of conducting research; the deployment of the equipment and its removal; the name of the sponsoring institution and the person in charge of the project; and the extent to which the coastal state is considered to be able to participate or to be represented in the project. Other than that, Article 249 addresses the duty to comply with certain conditions imposing on the research State, involving the right of coastal State to participate or be represented in the research project, and even more important is regarding the management of the research data, samples and results. These conditions are essential elements that could achieve balance between the interests of the coastal States and the international marine scientific community.[73] In this respect, it is submitted that it may be more reasonable for the conduct of ocean measurements on VOS that using notifying regime replaces the consent regime while all the other duties, guidelines and criteria are still as same as the regime of marine scientific research codified in LOS Convention.

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72 *See* SOONS, *supra* note 22, at 160.

73 *See* Nordquist, *supra* note 44, at 540.

3 *Jurisdiction Issue*

In terms of vessels' jurisdiction issue on the sea, the allocation could be detected in reference to the functions of the State in the maritime context. Three players thus should be brought in mind which are respectively: flag State, whose flag is flown; coastal State along whose coasts shipping routes pass by; and port State, at whose ports or anchorages shipping calls. Combined then with the legal regime provided in the LOS Convention in view of different marine areas, the jurisdiction issue, thus, would be considered in a comprehensive and reasonable way.

A High Seas – Flag State Jurisdiction

Flag State jurisdiction is the oldest expression of maritime jurisdiction. It is also coincidental to the jurisdiction that is exercised on the basis of nationality since ships are considered as a part of the national territory.[74] Churchill and Lowe addressed that "the ascription of nationality to ships is one of the most important means by which public order is maintained at sea. As well as indicating what rights a ship enjoys and to what obligations it is subject, the nationality of a vessel indicates which State is to exercise flag State jurisdiction over the vessel."[75] In view of Article 91 of the LOS Convention, "[e]very State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag" and "There must exist a genuine link between the State and the ship."[76] Furthermore, the International Tribunal on the Law of the Sea (ITLOS) clarified in the case of the M/V *"Grand Prince"* that if the domestic law of a State provides that the right of a ship to fly its flag is directly connected to the act of registration of the ship in that State, registration is the decisive factor with regard to the nationality of that ship.[77] The extent of jurisdiction exercised by the flag State is summarily set out in Article 94 of LOS Convention. It comprises the obligation to

74 Maria Gavouneli, Functional Jurisdiction in the Law of the Sea 34 (2007). However, there is some debate as to the nature of flag State jurisdiction. Some authors regard that view that flag State jurisdiction is the jurisdiction of territoriality tends to be obsolete. The assertion what is more acceptable is that flag State jurisdiction should be considered a kind of jurisdiction *sui generis*. Excerpted from Haijiang Yang, Jurisdiction of the coastal State over Foreign Merchant Ships in International Waters and the Territorial Sea 26 (2005).

75 R.R. Churchill and A.V. Lowe, The Law of the Sea 205 (1999).

76 The Convention, however, does not impart any solution to the basic problem concerning the definition of genuine link nor does it give any guidance on what conditions of registration would satisfy the "genuine link" requirement. *See* Rainer Vogel, *Flag States and New Registries*, in The Marine Environment and Sustainable Development: Law, Policy and Science (1993), at 421.

77 The *M/V "Grand Prince"* (Belize v. France), ITLOS Reports 2001, 17 (paras. 83)

effectively exercise jurisdiction and control in administrative, technical and social matters,[78] including the construction, equipment and seaworthiness of ships;[79] the manning of ships, labor conditions and the training of crews;[80] as well as the use of signals, the maintenance of communications and the prevention of collisions.[81] In the meanwhile, by virtue of paragraph 5 of Article 94 LOS Convention,[82] "[I]t becomes thus clear that the standards, which the State is called to uphold, are international rather than domestic – and consequently the ample facility to regulate the ship flying one's flag is in actual practice severely curtailed by globally agreed rules and regulations."[83]

Having established the freedom of high seas (Article 87, LOS Convention), it is clear that the order of the high seas was entrusted primarily to the flag State. Pursuant to Article 92, "[S]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas." The flag State jurisdiction accordingly becomes "the cornerstone on which the public order of the high seas is erected. Consequently, the strength of the overall regulatory system would necessarily rest upon the effectiveness of flag State jurisdiction."[84] The so-called "exclusive jurisdiction," however, could be challenged by the circumstances of slave trafficking[85] and piracy,[86] which are both offences under universal jurisdiction.[87] Any other intervention on a vessel on the high seas is strictly depended upon the primacy of flag State jurisdiction.[88]

In view of ocean measurements on VOS on the high seas, the flag State jurisdiction is applied equally. The VOS is protected on the high seas under international law by the flag State whose flag it is entitled, by registration, to fly. It is stated, "A vessel which is so registered and controlled enjoys a large degree of

78 Art. 94, para. 1, LOS Convention.

79 Art. 94, para. 3(a), LOS Convention.

80 Art. 94, para. 3(b), LOS Convention.

81 Art. 94, para. 3(c), LOS Convention.

82 It is provided that, "In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted in international regulations, procedures and practices and to take any steps which may be necessary to secure their observance."

83 Gavouneli, *supra* note 74, at 35.

84 *Ibid.*, at 162.

85 Art. 99, LOS Convention.

86 Art. 105, LOS Convention.

87 GAVOUNELI, *supra* note 74, at 159. Other than slave trade and piracy, the stateless vessels are assumed to be equated to pirate or slave vessels, which are subject to universal jurisdiction as well. For the same view, *also see* A.W. Anderson, *Jurisdiction over Stateless Vessels on the High Seas: An Appraisal under Domestic and International Law*, 13 JOURNAL OF MARITIME LAW AND COMMERCE 336 (1982).

88 GAVOUNELI, *supra* note 74, at 161.

immunity on the high seas from interference by the vessels of other States."[89] Furthermore, under LOS Convention, the freedom of high seas comprises conducting scientific research as well as marine measurements on the high seas. It is therefore submitted that while VOS passes through the high seas, the conduct of ocean measurements is under the exclusive jurisdiction of flag State. In the meanwhile, since it is under the freedom of high seas as well, no other States could exert intervention therein as long as the conduct is exercised with due regard for the interests of other States and also under the conditions laid down by the LOS Convention and other rules of international law.

B Exclusive Economic Zone – Concurrent Jurisdiction

Concurrent jurisdiction denotes that the competence is shared between the coastal State and other State.[90] With respect to further grasp its connotation, the legal status of the EEZ should be first ascertained under the sight of international law, specifically the LOS Convention. It is generally agreed that the exclusive economic zone constitutes a *sui generis* zone, neither a part of the high seas nor of the territorial waters.[91] The "*sui generis*" legal character of EEZ has three principle elements, which are respectively (1) the rights and duties that LOS Convention accords to the coastal State; (2) the rights and duties that LOS Convention accords to other State; (3) residual rights or jurisdiction that are not fall within either of the two previous categories.[92]

Under Article 56 of LOS Convention, the coastal State has acquired "sovereign rights" on the one hand and "jurisdiction" on the other. Rather the "sovereign right" and "jurisdiction" are exercised in a functionally limited way.[93] While the sovereign rights are exercised with regard to exploring, exploiting, conserving and managing natural resources and other economic activities, the jurisdiction was granted over certain activities, namely the establishment and use of artificial island, installation and structures; marine scientific research; and the protection and preservation of the marine environment. Furthermore,

89 *See* Anderson, *supra* note 87, at 335.

90 For the sake of addressing the legal issue regarding VOS, analysis that is relevant to "other State" would mainly focus on the "flag State."

91 The term "*sui generis* zone" was first used by the Chairman of the Second Committee of UNLOS III. *See* UNCLOS III, OFFICIAL RECORDS, VOLUME V 153 (1976). The terminology has been accepted by the leading textbooks on the field. *See* E.D. BROWN, THE INTERNATIONAL LAW OF THE SEA, VOLUME I 218 (1994); CHURCHILL AND LOWE, *supra* note 75, at 166. The note excerpted from Alexander Proelss, *The Law on the Exclusive Economic Zone in the Perspective: Legal Status and Resolution of User Conflicts Revisited*, 26 OCEAN YEARBOOK 87–112 (2012).

92 CHURCHILL AND LOWE, *supra* note 75.

93 *See* Proelss, *supra* note 91.

whereas the notion of "sovereign rights" signifies something less than sovereignty since it could only be exercised once an EEZ was proclaimed,[94] "jurisdiction" denotes an even more restricted exercise of competence.[95] It is addressed that "[t]he existence of sovereign rights creates a presumption of sovereignty for the coastal State which would supersede a jurisdiction claim by another State whereas claims of jurisdiction operate on the same level of equality and must be resolved through the standard dispute settlement procedures."[96]

The rights and duties of other States are set out in Article 58 of LOS Convention, which was described by Maria Gavouneli as "less specific and certainly more comprehensive."[97] They are primarily concerned with those freedoms expressly provided in Article 87 (freedom of high seas), namely the freedom of "navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses related to these freedom," with the exception of the freedom of fishing, which has become a sovereign rights of the coastal State and other related topics, including conduct marine scientific research as well as construct artificial islands and other installations. The "other internationally lawful uses," which are demanded to be "compatible with other provisions of this Convention," include, *inter alia*, "those associated with the operation of ships, aircraft and submarine cables and pipelines."[98] It is notable that, however, these freedom exercised by other State in EEZ are subject to measures relating to sovereign rights of the coastal State[99] as well as the general limitation governing all freedoms of the high seas.

As for the concurrent jurisdiction in the EEZ, which strikes a balance between the coastal State and other States, signifies the true nature of the EEZ. The coastal State and flag State which are endowed respectively with varied rights and duties can be assumed as two parallel players in maintaining the order of the EEZ. The fact that certain activities in the EEZ either fall within the jurisdiction of the coastal State or the flag State justifies the consent regime with regard to marine scientific research conducted in EEZ and the navigation freedom of foreign commercial vessels, which are engaging maritime

94 GAVOUNELI, *supra* note 74, at 64–65.

95 *Ibid.*

96 *Ibid.*

97 *Ibid.*

98 NORDQUIST, *supra* note 44, Volume II, at 564.

99 *Ibid.*, at 565. Article 58, para. 3 of the LOS Convention stipulated that "In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part."

commerce whilst passing through the coastal State's EEZ. With respect to the conduct of ocean measurements on VOS, as stated earlier, it constitutes marine scientific research and thus is theoretically subjected to the coastal State's jurisdiction. Due to the measurements are conducted during the course of passage through the coastal State's EEZ, those vessels, mostly commercial vessels, who have the freedom of navigation therein practically exercise real control over the conduct. Additionally, the consent regime has limited enforcement power in terms of the ocean measurements on VOS since it is not, as foregoing, necessarily applied to those measurements. Under the notification regime, other than the duties which are contained in the LOS Convention in Part XIII, which includes, providing information to the coastal State as well as complying with certain conditions, the researching State still needs to give advance notice to the coastal State. It is no other than the particular peculiarity, namely, incidental measurements, which do not constitute complex research project, combined with the freedom of navigation as well as the application of notifying regime, signifies that the vessels could exercise, to a certain degree, control over the measurements on VOS. That is to say, in the light of the flag State jurisdiction theory, the flag State is entitled some jurisdiction as well. Nevertheless, such category of jurisdiction can only be deemed as a complement to the coastal State jurisdiction when it cannot be exercised promptly or effectively. In that case, the flag State complements the coastal State in exercising jurisdiction over the ocean measurements on VOS, together constitute the essence of concurrent jurisdiction in the regime of the EEZ.

C Territorial Sea – Coastal State Jurisdiction

Pursuant to LOS Convention Article 2, the sovereignty of a coastal State extends to the territorial sea, which refers to the maritime waters stretching seaward from the baseline. The concept of coastal State sovereignty over the territorial sea was accepted, for the first time, at UNCLOS I, which was held in Geneva in April 1958,[100] as conventional international law.[101] At UNCLOS III, the debates were more on the limits than on the legal status of the territorial sea.[102] Eventually, under LOS Convention, the coastal State's sovereignty over the territorial sea was retained as well as the breadth of the territorial sea up to the maximum limit not exceeding 12 nautical miles even though in State practice the diversity of the breadth still exists.[103] Furthermore, the exercise of coastal State's sovereignty over its territorial sea is subject to the

100 UNCLOS I, OFFICIAL RECORDS, VOL. I, at 1.
101 YANG, *supra* note 74, at 121.
102 *Ibid.*, at 123.
103 *Ibid.*, at 124.

right of innocent passage, which assumed as the main restriction, compared with sovereignty over the land territory, imposed by international law. It can be asserted therefore that the right of innocent passage has been introduced to dilute the sovereignty of the coastal State in order to facilitate the navigational right of all other States. Nevertheless, the right of innocent passage can never be taken as equivalent to the freedom of navigation in the EEZ or on the high seas, either in content or extent. It is conferred the right to the coastal State that "take the necessary steps in its territorial sea to prevent passage which is not innocent."[104] And any contravention of the laws and regulations of the coastal State would expose the ships to potential punishment.[105] As far as the definition of "innocence" is concerned, the LOS Convention in Article 19, Para. 1 provided that so long as the passage "is not prejudicial to the peace, good order or security of the coastal State" as well as "take place in conformity with this Convention and with other rules of international law," it is then innocent. Rather, Article 19, Para. 2 goes further to enumerate twelve types of conduct which would be "prejudicial" to the peace, good order or security of the coastal State and therefore render the passage non-innocent.[106]

Having clarified the denotation of "innocent," the meaning of "passage" attaches more weight to analyze the legal issues of ocean measurements on VOS. The LOS Convention provides the definition of passage in Article 18, which consists of two categories: lateral passage and passage to or from a call at port facility either inside or outside internal water, within the context of the right of innocent passage.[107] Both of these two forms of passage are of great relevance to the analysis of measurements conducted on VOS. While the lateral passage signifies the passage without entering internal waters, which is the typical and traditional type in the context of innocent passage, the passage to or from a port facility either inside or outside internal waters might be aroused by "the desire to facilitate international navigation and trade on the one hand, and correspondingly, to contain coastal State jurisdiction over such passage operation on the other."[108] It is thus, compared with lateral passage,

104 *See* Art. 25 para.1, LOS Convention.

105 YANG, *supra* note 74, at 147.

106 With respect to the list of activities in Para.2 of Article 19, the US and the former USSR hold the connotation in an agreement that "Article 19 of the Convention of 1982 sets out in paragraph 2 an exhaustive list of activities that would render passage not innocent. A ship passing through the territorial sea that does not engage in any of those activities is in innocent passage." It is believed, contrarily, by Haijiang Yang that Para.2 only purported to exemplify the vague expression of the concept of innocent passage. By no means is Para. 2 designed to exhaust all cases in which passage would be rendered non-innocent. YANG, *supra* note 74, at 159–160.

107 YANG, *supra* note 74, at 151.

108 *Ibid.*, at 151.

more vulnerable.[109] In respect of coastal State jurisdiction, passage to or from a port facility depends completely upon the permission of the coastal State and therefore is more likely to be susceptible of the interference by the coastal State.[110] It is consequently submitted that, in the territorial sea, the coastal State jurisdiction always maintains the primacy; even under the regime of innocent passage it is still highly subjected to the coastal State's jurisdiction.

On account of the ocean measurements on VOS, it can fit both two categories of passage, either lateral passage or the passage to or from port facility. In the case of passage to or from port facility, it will become relevant to the issues of internal waters jurisdiction and port State jurisdiction, which will be dealt with later. In pursuance of Article 19 para.2 of the LOS Convention, carrying out survey activities or research would render the passage non-innocent. Moreover, under Article 25 the coastal State may take the necessary steps to prevent passage, which is not innocent. Due to that the Convention is keeping silent on declaring what "the necessary steps" should be, it is completely within the discretion of the coastal State to decide what steps should be taken.[111] Given that the foreign ships would fully fall under coastal State's jurisdiction if the passage is not innocent anymore,[112] the conduct of carrying out ocean measurements on VOS while the vessels are passing through the territorial sea, either in lateral passage or heading to the port facility, will fully fall within the coastal State's jurisdiction. The proposed "notifying regime" could mitigate in no way the obligation to observe the coastal State's jurisdiction, except only simplifying the clearance procedure, which for the sake of promoting science development as well as the benefit of all the mankind. Consequently, the conduct of ocean measurements on VOS should comply with the laws and regulations that adopted by the coastal State and that in the meantime fully subject to the administrative jurisdiction of coastal State.

D Internal Waters and Port – Coastal State Jurisdiction

Compared with the territorial sea, the absence of the right of innocent passage comprises the principal distinction of the internal waters.[113] Pursuant to Article 8 of LOS Convention, waters, except as provided in Part IV (Archipelagic

109 *Ibid.*, at 151.
110 *Ibid.*, at 151.
111 *Ibid.*, at 217.
112 CHURCHILL AND LOWE, *supra* note 75, at 87.
113 With the exception of the case that, according to Article 8 para.2, however, where the establishment of a straight baseline in accordance with the method set forth in Article 7 has the effect of enclosing as internal waters area which had not previously been considered as such, a right of innocent passage as provided in LOS Convention shall exist in those waters.

States), on the landward side of the baseline of the territorial sea form part of the internal waters, which normally comprises different kinds of waters, like bays, estuaries and ports, rivers and lakes.[114] They are deemed as an integral part of the territory of a coastal State and subject to the same legal regime as its land territory. The coastal State enjoys full territorial sovereignty over them. The issues with regard to the right of access to ports and the exercise of jurisdiction over foreign ships in ports have been always surrounded by severe controversies. Nevertheless, coastal State, in practice, generally admits foreign ships to their maritime ports and waterways that are open to international trade and navigation.[115] Whereas there is no general right of entry exists in customary law,[116] it is granted under treaty laws, which are most commonly bilateral treaties or multilateral Convention and Statute on the international level.[117] Under LOS Convention, it is implied that land-locked State enjoys the right of access to ports in Part X as well as Article 211 (3) provides that the coastal State shall give due publicity to those requirements, which are considered as conditions for the entry of foreign vessels into their ports or internal waters or for a call at their off-shore terminals.[118] With respect to the jurisdiction issue in internal waters, it is settled since the moment that the vessels enter coastal State's port and internal waters because they put themselves within the territorial sovereignty of the coastal State. The coastal State is entitled to enforce its laws and regulations against foreign vessels,[119] even though coastal State commonly enforce their laws and regulations only when its interests are endangered.[120]

A port State is always a coastal State, although the reverse is not always true.[121] "The creation of a separate port State jurisdiction is the direct consequence of the expansion of the coastal State's jurisdiction over the exclusive economic zone, especially in view of the enhanced environmental protection provisions included in the LOS Convention."[122] It can be seen thus that the port State jurisdiction, as the innovation of the enforcement system within the context of Convention,[123] was introduced on account of the increasing importance of marine environmental protection. With respect to the innovational

114 CHURCHILL AND LOWE, *supra* note 75.
115 YANG, *supra* note 74, at 48.
116 CHURCHILL AND LOWE, *supra* note 75.
117 *Ibid*. *See* also YANG, *supra* note 74, at 56–60.
118 YANG, *supra* note 74, at 59.
119 CHURCHILL AND LOWE, *supra* note 75.
120 *Ibid*.
121 GAVOUNELI, *supra* note 74, at 44.
122 *Ibid*.
123 NORDQUIST, *supra* note 44, at 260.

feature of port State jurisdiction, it is stated that "[t]he big difference lies in the "voluntary" character of the ship's presence in port. Whereas the principle of innocent passage shields the seagoing vessel from the jurisdiction of the coastal State, port State jurisdiction strengthens compliance with national rules and regulations without any interference with the freedom of navigation since entry into a port constitutes a voluntary submission of the vessel to the jurisdiction of the port State – either and both running concurrently with the original jurisdiction of the flag State."[124]

Coming then back to the ocean measurements on VOS, as those vessels voluntarily enter a port or internal waters of the coastal State, they accordingly put themselves under the jurisdiction of the coastal State. Given the practice that coastal State enjoys the discretion to leave the matters relating purely to internal affairs of the vessel to the authorities to the flag State,[125] foreign vessels are, to a certain extent, still subject to the jurisdiction of flag State. Nevertheless, local jurisdiction will be exercised when the activities affect the peace or good order of the port.[126] Ocean measurements conducted within the internal waters without consent, which is normally deemed as holding a prejudice against the peace and good order of the port cannot be allowed in any country, unless otherwise regulated by treaty between the coastal State and the flag State. Despite the application of notifying regime to the special case, namely ocean measurements on VOS when the vessels bound for the ports of coastal State passing through the territorial sea, coastal State jurisdiction still will be asserted over the measurements, as much as within the territorial sea.

4 *Other Emphasis*

In view of marine scientific research under LOS Convention, a lot of efforts have been made to strike a balance between the interests of the coastal State and the marine scientific community, which is primarily in Article 249. It provides access for the coastal State to all data, samples and research results as well as the assessment concerned and make the publication, and dissemination of information and knowledge through appropriate national or international channels. While the LOS Convention actively promotes the flow of scientific data and information and the transfer of knowledge resulting from marine scientific research,[127] it still should be noted that regarding the research results of a project which is of direct significance for the exploration and exploitation of natural resources,

124 GAVOUNELI, *supra* note 74, at 44.
125 CHURCHILL AND LOWE, *supra* note 75. *See* also YANG, *supra* note 74, at 84.
126 CHURCHILL AND LOWE, *supra* note 75.
127 *See* Art. 244, LOS Convention.

the prior agreement for making the results internationally available should be required.[128]

It is also guided by the general provision that States and competent international organizations shall promote and facilitate the development and conduct of marine scientific research in accordance with the LOS Convention.[129] In order to do so, all States shall promote international cooperation as well as create favorable conditions for the conduct of marine scientific research.[130] Ocean measurements on VOS, which are conducted exclusively for peaceful purposes and for the benefit of all humankind, therefore should be promoted. Other than that though, the researching State should, if requested so, provide access of the research data, sample and result to the coastal State. Meanwhile, technical assistance through meaningful cooperation should be encouraged as well.

V Summary

In light of the ever-increasing degree of ocean uses, which specifically point to ocean measurements on VOS, this article intends to review the legal status of the conduct by analyzing the fundamental legal regime of marine scientific research under the LOS Convention. More importantly, it re-examines the implementation of the LOS Convention and the potential ways for the resolution of conducting ocean measurements on VOS, which constitute marine scientific research, while the vessels are passing through the EEZ, territorial sea and internal waters where the coastal State enjoys jurisdiction, sovereign rights and sovereignty, respectively. Based on the special peculiarity of ocean measurements on VOS, compared with the consent regime that applies in Part XIII (marine scientific research) of the LOS Convention, the notification regime is suggested to introduce on account of practical considerations and convenient clearance procedures. In spite of the simplified clearance procedures, the rights and obligations that are vested due to the establishment of various marine areas by the LOS Convention and the legal regime of jurisdiction therein are still bound to be observed. Furthermore, as far as marine scientific research is concerned, legal regulations, which are provided in the LOS Convention in Part XIII, are likewise applicable.

128 *See* Art.249, LOS Convention.
129 *See* Art. 239, LOS Convention.
130 *See* Arts. 242 and 243, LOS Convention.

PART 4

Peaceful Means for Maritime Dispute Resolution

Unilateral Actions and the Rule of Law in Maritime Boundary Disputes

Anne Hsiu-An Hsiao

1 Introduction

The development of the modern international law of the sea regime has allowed States to extend their territorial claims and exercise of sovereignty beyond the traditional spatial domain. However, this has also led to overlapping maritime territorial or boundary claims among countries, resulting in an increase in the number of international disputes. States which face such kinds of situations often take unilateral measures to consolidate their own legal positions and safeguard important national interests, as international law imposes a certain disadvantage to a State who does "nothing" in response to another State's claim of rights that may challenge or prejudice its own. Interactions between the unilateral actions by two or more States involved in a certain dispute could lead to an escalation of the dispute; sometimes even armed conflict. In other words, unilateral actions are relevant to maintaining rule of law as well as peace and security in the international system. In relation to the management of maritime disputes, the governance of unilateral actions is arguably no less important than peaceful settlement of disputes. In fact, the former could be an indispensable component of the latter.

More recently, maritime disputes in some parts of the world have resurged and escalated, for example, in the South China Sea; in the East China Sea (particularly over the Senkaku/Diaoyu Islands), or between Israel and Lebanon in the East Mediterranean Sea. The range of actions States undertake vis-à-vis their rival claimants have not only proliferated but also diversified. The legality of some of those actions may also be questioned. Nonetheless, the issue concerning how international law and the law of the sea regulate a State's unilateral conducts in maritime dispute seems to have received much less attention in scholarly writings. This article will be a preliminary attempt to fill this gap. Apart from Introduction and Conclusions, the main body of the article will be divided into the following sections. The first section will provide a general categorization of unilateral actions in maritime boundary disputes, and explores their possible conceptual natures under international law. The second and third sections try to identify rules and principles relevant to States' unilateral

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actions under international law and the law of the sea regime, respectively. Although the article does not aim to address the problem of the conduct of States which arises in a maritime area where one party has an undisputed claim – for example, whether or not a coastal State's reaction to another State's certain activities in its undisputed maritime space is legal – the rules and principles discussed herein may be applied to those situations analogously, and vice versa.

II Categorization of Unilateral Actions in Maritime Boundary Disputes

Under the existing international law of the sea, different issues can arise in maritime boundary disputes. Most often the disputes occurring between two or more States with adjacent or opposite coasts involve competing claims of sovereignty or sovereign rights in areas where these States' maritime claims overlap, including contention over jurisdiction and exclusive rights over living resources or non-living resources within an overlapping exclusive economic zone (EEZ) or a continental shelf. Sometimes the disputes may be associated with the problems of sovereignty over some land features in the maritime area in question. Since maritime spaces are projected on the basis of "land dominates the sea", and a land feature that forms an "island" under the 1982 UN Law of the Sea Convention (UNCLOS) may be entitled to have a 200-mile EEZ and continental shelf (Art. 121(2)), the legal status of such land features and implications of their status may pose additional questions in some of the maritime disputes. Here it is not necessary to provide a comprehensive review of all the activities performed by States in the variety of disputes just mentioned. Suffice is to identify the common types of actions that State undertake in order to assure their legal claims and interests, by reference to relevant State practice.

The first relevant set of actions is associated with those acts that are particularly relevant to the test of "effectiveness" in determining a question of title to territory. The International Court of Justice, which has increasingly been called upon to adjudge territorial sovereignty and boundary disputes between States, has helped identify the general types of such actions. As the court stated in the *Territorial and Maritime Dispute* (Nicaragua v. Columbia) judgment: "[A]cts and activities considered to be performed *a titre de souverain* are in particular, but not limited to, legislative acts or acts of administrative control, acts relating to the application and enforcement of criminal or civil law, acts regulating

immigration, acts regulating fishing and other economic activities, naval patrols as well as search and rescue operations".[1]

States may conduct these actions as an exercise of their sovereignty or rights granted under international law. Or, these acts may represent the attempts by one State to establish or consolidate a territorial claim. When a State takes one of the measures in an area also claimed by another State, the measure may also constitute its response to those acts that have been carried out by that State.

The second set of State actions are related to the settlement of dispute. Under international law, a "dispute" is commonly understood as "a disagreement on a point of law or fact, a conflict of legal views or of interests",[2] and "it must be shown that the claim of one party is positively opposed by the other".[3] The most common action States take at the start of a dispute is to issue a diplomatic protest. In a situation where one State believes that its legal rights or interests have been violated by another State, the aggrieved State may pursue one of the following avenues to protect its rights or interests from further damage, and to seek remedy from the perceived harm-doing State: first, by initiating the peaceful dispute-settlement mechanisms under customary international law or according to particular treaty regimes that are applicable to both States; secondly, by adopting unilateral measures vis-à-vis the perceived violating State. In State practice, unilateral measures adopted in relation to a perceived unfriendly act, a violation or to a dispute take many forms. In territorial or boundary disputes, such measures range from non-coercive measures to coercive or even forcible measures. Non-coercive actions include: formal protest or condemnation; some legislative or administrative acts not involving forcible enforcement. Coercive and forcible actions include: limited trade or economic embargo; forcible enforcement such as arresting or expelling ships that are considered as conducting illegal activities in an area claimed by the enforcing State; conducting air or sea patrol or surveillance or military exercise in disputed waters; attempts to establish or "regain" control over territory under dispute by force.

The normal justification for the two sets of unilateral actions is associated with concept of "self-help", "self-protection", or "self-preservation". From the international law perspective, the concept of "self-help" has been founded on the assumption of international law being a horizontal legal system that lacks a supreme authority, the centralization of the use of force, and a differentiation

1 *Territorial and Maritime Dispute* (Nicaragua v. Columbia), ICJ Judgment, 19 November 2012, para. 80.

2 *Mavrommatis Palestine Concessions,* Judgment No. 2, P.C.I.J, Series A, No. 2, at 11.

3 *South West Africa, Preliminary Objections*, ICJ Judgment (1962), at 328.

of the three basic functions of law-making, law determination, and law enforcement typically entrusted to central organs.[4] Historically, it was common for States to resort to self-help to enforce their rights and protect their interests. Unilateral actions of self-help were intended to compel the targeted State to cease a perceived wrongful act, whether or not in the political, moral or legal sense, and offer reparation. The means of self-help could be any kind of measures, which had been generally divided into two conceptual forms: retorsion and reprisal. Retorsion refers to any lawful acts of retaliation by one State against another State's unfriendly or unlawful acts. Reprisal involves retaliatory acts that would normally be illegal but which may be rendered lawful by a prior illegal act committed by the targeted State.[5]

International law prior to 1945 had imposed very few restrictions on State's acts of self-help, like the experiences of humanity and good faith in the case of reprisal,[6] and aggressive war may be regarded as the extreme form of self-help. Consequently, it was inevitable that means of self-help were prone to abuse by politically, economically or militarily more powerful States in their bilateral relations with the weaker States. Since 1945, more restrictions have been imposed on reprisals, as a result of progressive developments in international law, particularly the limitations on self-defense and the rules concerning countermeasures under the law of State responsibility. Even though international law has remained largely a decentralized legal system, and acts of self-help continue to be a reality of life, States no longer enjoy the same degrees of liberty as before in undertaking any forms of self-help. To put it differently, a State cannot use self-help as a pretext for every action it decides to take against another State even though the latter might have committed an internationally wrongful act. Those rules concerning the lawfulness of "self-help" in international law are significant to the governance of State's unilateral actions in international relations including maritime boundary disputes, and they will be discussed in more detail in the next section.

III International Law Relating to the Governance of Unilateral Actions

One of the main roles international law plays is to maintain stability of international relations. Under the UN Charter, several norms have been developed

4 Peter Malanczuk, Akehurst's Modern Introduction to International Law 3 (2009).

5 *Cf* Malanczuk, *ibid.*, at 4; Thomas Giegerich, *Retorsion*, in Max Planck Encyclopedia of Public International Law, *available at* www.mpepil.com.

6 Bin Cheng, General Principles of Law: As Applied by International Courts and Tribunals, 97 (1953).

that are fundamental to the governance of unilateral actions by States in their relations with others. The first of such norms is the principle of peaceful settlement of disputes. As Article 2(3) of the UN Charter stipulates: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered". Article 33(1) further provides methods for settling a dispute: "The parties to any dispute, the continuation of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. Paragraph 2 of the article entrusts the UN Security Council the power to call upon the parties to settle their dispute peacefully whenever necessary.

Corresponding to the obligation for States to settle their disputes by peaceful means is the obligation for one State to refrain from the threat or use of force against another State. This obligation is stated in Article 2(4) of the UN Charter: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". The only exceptions to this rule are either in a situation of self-defense against an "armed attack", as provided in Article 51 of the UN Charter; or military enforcement actions authorized under Chapter VII of the UN Charter. The set of rules prohibiting the threat or use of force is generally regarded as reflecting customary international law,[7] as well as having acquired the status of *jus cogens* or peremptory norm.[8]

Within the context of general prohibition of threat or use of force, there are certain aspects that are very pertinent to the conduct of State in territorial disputes. First, the rules concerning the prohibition of threat or use of force are applicable to acquisition of territory. In the ICJ *Wall* advisory opinion of 9 July 2004, the court referred to UN General Assembly Resolution 2625 (XXV) of 1971, entitled Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, which states that "No territorial acquisition resulting from the threat or use of force shall be recognized as legal". According to the court, as it had stated in the *Nicaragua v. U.S.* judgment of 1986, "the principles as to the use of force incorporated in the Charter reflect customary international law … the same is true of its corollary entailing

7 *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. U.S.), Judgment (1986), paras. 187–190.

8 Christine Gray, International Law and the Use of Force 29 (2004).

the illegality of territorial acquisition resulting from the threat or use of force".[9] In addition, force can not be used to settle territorial dispute. In particular, self-defense cannot be invoked as a means to "regain" control of a piece of territory which the initiating State believes that it has a valid claim. Thus, in the *Jus Ad Bellum* partial award of 19 December 2005, the Eritrea/Ethiopia Claims Commission, in rejecting such an argument forwarded by Eritrea in justifying its taking of the Badme town that was administered by Ethiopia on 12 May 1998, held the view that even though the parties were in dispute concerning the boundary in the Badme area,

> However, the practice of States and the writings of eminent publicists show that self-defense cannot be invoked to settle territorial disputes. In that connection, the Commission notes that border disputes between States are so frequent that an exception to the prohibition of the threat or use of force for territory that is allegedly occupied unlawfully would create a large and dangerous hole in a fundamental rule of international law.[10]

Secondly, in the ICJ's dictum in *Nicaragua v. U.S.* case, it considered the relevant conditions that render a lawful self-defense. One is the existence of an "armed attack". The court took the view that an "armed attack" is to be understood as meaning not merely action by regular armed forces across an international border, but also the sending by a State of armed bands on to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack had it been carried out by regular armed forces.[11] The other is that a response in self-defense must meet the criteria of necessity and proportionality.[12] Since an "armed attack" refers to use of force of more grave scale and effects, the question may arise as to whether or not a State can justify the initiation of a threat or use of force in response to another State's prior forcible actions which do not amount to "armed attacks". With a strict reading of the UN charter or ICJ's dicta, no actual use of force may be justified except for self-defense against an "armed attack". This has been reflected in other legal regimes such as international law concerning State responsibility in relation to the use of countermeasures.[13] However, in some extreme situations, "threat" of force by a State as a response to limited use of

9 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, para. 87.

10 *Jus Ad Bellum* partial award, para. 10.

11 *Nicaragua v. U.S.*, paras. 187–190.

12 *Ibid.*, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996, paras. 41–42.

13 More discussions below.

force by another State might not be entirely ruled out. A case in point may be the British responses to the firings of Albania at two of its warships in the *Corfu Channel* case. In response to the firings on 15 May 1946, the United Kingdom sent warships through the North Corfu Strait on 22 October 1946. Albania contended, among others, that the passage of the British warships "was not an ordinary passage, but a political mission", because of reasons including: the ships were maneuvering and sailing in a combat formation with soldiers on board; the numbers of the ships and their armaments surpassed what was necessary in order to attain their object and showed an intention to intimidate and not merely to pass, etc.[14] The court observed that the UK had admitted that the object of sending the warships through the channel was not only to carry out a passage for purposes of navigation, but also to test Albania's attitude and assert its right of innocent passage. Also, the ships were at action stations so that they might retaliate quickly if fired upon again by Albania again, and they passed through the narrow channel close to the Albanian coast. The court held that the intention of the UK "must have been, not only to test Albania's attitude, but at the same time to demonstrate such force that she would abstain from firing again on passing ships", and concluded that the measures taken by UK did not violate Albanian sovereignty.[15] It appears that threat of force might be justified if a State which has been a victim of limited force by another State resorts to this means to deter the latter State from committing another act of force. That said, it should be stressed that even if an aggrieved State might be justified in resorting to "threat" in response to another State's use of force during peace time, such an option must be taken with extreme caution, and the established criteria for lawful self-defense should also apply.

The development of *jus ad bellum* has brought about serious limitations on State's use of force as a means of self-help. In addition, the issues concerning certain forms of self-help, namely "countermeasures", have attracted considerable attention in relation to the development of the law of State responsibility. During the long-running work of the International Law Commission on State responsibility, one of its most important tasks has been to establish a satisfactory regime for the settlement of dispute. Within the context of dispute settlement, the issue of disputes over countermeasures was regarded as of particular significance.[16] The Draft Articles Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission

14 *The Corfu Channel Case* (Merits), Judgment of 9 April 1949, at 30.

15 *Ibid.*, at 31.

16 James Crawford, *Counter-measures as Interim Measures*, 5 European Journal of International Law 65 (1994).

in 2001 contains a provision (Article 22)[17] that permits a State to take non-forcible means of reprisal, i.e., countermeasures, towards another State which has first committed a wrongful act under international law against itself, provided such measures meet certain condition. The first condition is that such measures are confined to non-forcible means of reprisal. The ILC has excluded belligerent reprisals from the scope of countermeasures under the Draft Articles on State Responsibility. It also distinguishes countermeasures with retorsion, namely unfriendly conduct which is not inconsistent with any international obligation of the State engaging in it, such as the prohibition of or limitation upon normal diplomatic relations or other contacts; embargos of various kinds or withdrawal of voluntary aid programs.[18] Permissible countermeasures are subjected to a number of requirements and limitations: First, the nature of the acts concerned must be non-forcible. They preclude the threat or use of force. (Draft Article 50(1)(a); Secondly, countermeasures should be directed at the responsible State and not at third parties. (Draft Article 49 (1) & (2)). Thirdly, countermeasures are instruments used to bring about cessation of and reparation for the internationally wrongful act and not a means of punishment. Therefore, they are temporary in nature and must be as far as possible reversible in their effects in terms of future legal relations between the two States concerned. (Draft Articles 49 (2), (3) and 53). Fourthly, countermeasures must be proportionate. (Draft Article 51). Fifth, countermeasures should not involve any breach of fundamental obligations under international law, particularly refraining from the threat or use of force; protection of fundamental human rights; refraining from reprisals based on humanitarian considerations; other peremptory norms of general international law. (Draft Article 50 (1).[19] Sixthly, countermeasures should meet the requirement of necessity. (Draft Article 25) The state of necessity arises under exceptional circumstances where the only way a State can protect an essential interest threatened by a "grave and imminent peril" is to take an action that is in breach of one of its international obligations. In ICJ's decision on

17 Article 22 reads as follows:
"*Countermeasures in respect of an internationally wrongful act.* The wrongfulness of an act of a state not in conformity with an international obligation towards another state is precluded if and to the extent that the act constitutes a countermeasure takes against the latter state in accordance with Chapter II of Part Three".

18 James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries 281 (2002).

19 *Cf.* Crawford, *supra* note 18, at 283.

Gabcikovo – Nagymaros Project case of 1997,[20] the court considers that the state of necessity is a ground recognised by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. Such ground for preclusion can only be accepted on an exceptional basis. The conditions for establishing such an exception need be strictly defined, which must be "cumulatively satisfied", and the State concerned would not be the sole judge of whether those conditions have been met.[21] The court drew from earlier ILC drafts the following conditions which reflect customary international law and were relevant to the identification of the existence of an "exceptional case": First, the State authoring the response otherwise in breach of one of its international obligations must have been occasioned by one of its "essential interests" being threatened by a "grave and imminent peril". Secondly, the act being challenged must have been the "only means" of safeguarding that interest. Thirdly, that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and finally, the State which is the author of the countermeasure must not have "contributed to the occurrence of the state of necessity.[22] These conditions have been consistently reflected in Draft Article 25 adopted by ILC in 2002.[23] All of the six requirements have been drawn from relevant State practice and are supported by the jurisprudence of major international cases.[24] Hence, they may be regarded as general principles of international law.

Finally, certain rules concerning the acquisition of territory may also play a role in determining the legal effect of unilateral actions of States in territorial disputes. One example may be the test of "critical date". The ICJ has consistently held that "it cannot take into consideration acts having taken place after the date on which the dispute between the parties crystallized unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them".[25]

20 *Gabcikovo – Nagymaros Project* (Hungary v. Slovakia), I.C.J. Judgment of 25 September 1997.

21 *Ibid.*, para. 51.

22 *Ibid.*, para. 52.

23 Crawford, *supra* note 18, at 183.

24 More recently in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* ICJ Rep 136, (2004) 43 ILM 1009, 9th July 2004, International Court of Justice, at para. 140.

25 *Columbia v. Nicaragua,* judgement, para. 68; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment,* para. 135.

IV Relevant Rules under International Law of the Sea Regime

UNCLOS has incorporated the main basic rules and principles of international law. The general principles of good faith and abuse of rights are stipulated in Article 300 of the convention. State parties are bound to fulfill their obligations under UNCLOS in good faith, and shall exercise their rights, jurisdiction and freedom recognized under the convention in a manner without unnecessarily or arbitrarily harming the rights of other States or the interests of the international community as a whole, or amounting to the misuse of power.[26] The language of Article 300 shows the inter-linkage between the two principles. The principle prohibiting the threat or use of force is embodied in Article 301 of the convention. The principle of peaceful settlement of dispute has been given significant weight in the UNCLOS. In particular, Part XV (Articles 279 – 299) of the convention is entirely devoted to the principles and mechanisms concerning the settlement of disputes. Article 279 provides that "State parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations, and to this end, shall seek a solution by means indicated in Article 33, paragraph 1, of the Charter".

In addition to those provisions that reflect existing rules of international law, special rules have also been developed under UNCLOS to deal with the relationship between and the unilateral conduct of State parties in maritime boundary disputes. For example, Article 123 requires States bordering an enclosed or a semi-enclosed sea to cooperate with each other. The most relevant provisions may be found in Articles 74 and 83 of the Convention. The two articles contain identical terms that deal respectively with the delimitation of EEZ and continental shelf between States with opposite or adjacent coasts. According to these articles, States concerned shall resolve the problem of delimitation by agreement in accordance with international law. (Paragraph 1) In the case that no agreement can be reached with a reasonable period of time, the States concerned shall resort to the dispute settlement procedures under Part XV of the UNCLOS. (Paragraph 2) Pending agreement on delimitation, "[T]he States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation". (Paragraph 3)

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26 *Cf.* NORDQUIST, ET AL (EDS.), COMMENTARY OF THE UNITED NATIONS LAW OF THE SEA CONVENTION, VOLUME V 150–152 (1989).

Finally, where there is an agreement in force between the States concerned, questions relating to the delimitation of EEZ/continental shelf shall be determined in accordance with the provisions of that agreement. (Paragraph 4)

Controversies over the legality of unilateral actions or countermeasures of two or more States with opposite or adjacent coasts can easily arise in the areas of overlapping EEZ or continental shelf claims. Until the maritime boundary is finally delimited, whether by agreement between the States concerned, or through third-party decisions, in theory the claimant States concerned are entitled to claim equal rights and jurisdiction within the overlapping areas.[27] As a result, whenever a State, in accordance with UNCLOS, exercises its rights or competence in relation to the overlapping EEZ or continental shelf, such as enforcing jurisdiction or exercising exclusive rights over living or non-living natural resources, those acts will have an impact on the rights and interests of other States that also make claims to the same area. Accordingly, Articles 74 and 83 of the UNCLOS lay down basic principles and procedures for States facing overlapping EEZ or continental shelf claims to conduct themselves and manage their disputes in accordance with the convention. However, Articles 74 and 83 have some notable limitations. First, while paragraph 2 imposes State parties the duty to resort to the dispute settlement mechanism in Part XV, if no agreement on delimitation can be reached within a reasonable period of time, the provision does not define what "reasonable" means. Also, Part XV concerns mainly the settlement of disputes regarding the interpretation or application of UNCLOS. (Article 279); and the means of settling a dispute primarily still depend on the agreed choices between the State parties concerned. The compulsory procedures entailing binding decision provided under Section 2, Part XV are subjected to limitations in Section 3, under which disputes relating to maritime boundary delimitations (Articles 15, 74, 83) can be excluded from the binding compulsory procedures by a declaration of the States concerned. The issues of territorial sovereignty are also excluded. Consequently, it is possible that negotiations on boundary delimitations can go on for a long time without any prospect for solution, particularly if States concerned are not willing to submit their dispute to a third-party decision.

Secondly, while paragraph 3 of Articles 74 and 83 has offered a progressive approach[28] for States to manage their legal relations before the issue of

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27 David M. Ong, *Joint Development of Common Offshore Oil and Gas Deposits: Mere Sate Practice or Customary International Law?,* 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 771–804, 773. (1999).

28 According to Rainer Lagoni, the drafting history of paragraph 3 of Articles 74 and 83 confirms that "it is in no way a codification of customary international law but represents an example of its progressive development"., Rainer Lagoni, *Interim Measures Pending*

delimitation is resolved, the terms of the paragraph seem so vague that difficulties can arise in regard to its interpretation. Paragraph 3 of Article 74 and 83 imposes dual obligations on States involved in either an EEZ or a continental shelf boundary delimitation dispute pending an agreed settlement. On the one hand, States concerned have a positive duty to make every effort to enter into provisional arrangements of a practical nature. On the other hand, during the transitional period, States concerned have a negative (or restrictive) duty not to jeopardize or hamper the reaching of the final agreement. However, the article provides no direct guidance for assessing issues such as when a State can be said to have fulfilled its obligation of "making every effort"; or whether or not a certain measure or situation amounts to "jeopardizing or hampering" the reaching of a final agreement, which can result in more disputes.

The drafting history of Articles 74 and 83, as well as a few international judicial cases has helped providing some clarifications to paragraph 3. To begin with, the draft history reveals that the article was not intended to impose a general moratorium on all activities in the overlapping EEZ or continental shelf. Rather, paragraph 3 was a negotiated compromise that allows continued utilization of the area to be delimited by the States concerned without jeopardizing or hampering the reaching of the final delimitation agreement and without prejudice to the existing claims or positions of the parties concerned. It is suggested that the provision reflects the general principle of "good faith". In regard to the positive duty, it has been widely supported that the basic duty of States concerned is to enter into negotiation in good faith. This applies to both delimitation in paragraph 1 and "provisional arrangements" in paragraph 3. In the *North Sea Continental Shelf* cases, the ICJ described the obligation to negotiation in good faith as "a principle which underlines all international relations", and stressed that such an obligation must be "meaningful". According to the court: "the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it".[29]

Maritime Delimitation Agreements, 78 AMERICAN JOURNAL OF INTERNATIONAL LAW 345–368, 354 (1984).

29 *North Sea Continental Shelf Cases* (Germany v. Demark/Germany v. the Netherlands), Judgment of 20 February 1969, para. 85(a).

With regard to the negative duty, namely the obligation not to jeopardize or hamper the reaching of the final agreement during the transitional period, the drafting history shows that the proposals to prohibit a State concerned from unilaterally undertaking all economic activities in a disputed maritime area, particularly exploration or exploitation of natural resources, were not adopted. Instead, this part of the article has created a duty to exercise mutual restraint for States involved in a boundary delimitation challenge. Such restraint is necessary since the unilateral use of the overlapping area by one State concerned will inevitably affect the rights and position of other States which also claim the area. According to a more pragmatic interpretation, States concerned should be free to exercise their rights and jurisdiction in an area of overlapping claims so long as they pay due regard to the rights of the other coastal States.[30] The crucial consideration for prohibiting certain unilateral actions will be whether or not those actions threaten to cause "irreparable prejudice" to the rights of the parties concerned or to the reaching of a final agreement. Thus, unilateral exploitation of oil or gas resources on a disputed continental shelf is generally regarded to be prohibited, while unilateral exploratory activities may raise some uncertainties.

The exact issue has come before the ICJ in 1976 in the disputes over Aegean Sea Continental Shelf between Greece and Turkey. Among others, Greece requested the court to indicate interim measures of protection under Article 41 of the ICJ Statute,[31] with regard to Turkey's alleged violations to its exclusive sovereign rights in the continental shelf which it claimed. Greece claimed that Turkey had violated its exclusive sovereign rights over its continental shelf in the Aegean Sea and caused irreparable prejudice to its exclusive rights to acquire information concerning the availability, extend and location of natural resources of the areas by granting permits in 1973 to Turkish State petroleum company for oil exploration and conduct seismic research during 1976, in an area over the continental shelf claimed by Greece based on certain Greek islands in the Aegean Sea. It also claimed that the activities complained would, if continued, aggravate or extend the dispute. Greece asked the court to direct both governments to (1) unless by mutual consent and pending the final judgment of the court in this case, refrain from all exploration activity or any scientific research in certain designated areas of the continental shelf; and (2) to

30 Lagoni, *supra* note 28, at 365.

31 In particularly, Article 41, paragraph 1 of the Statute provides: "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party".

refrain from taking further military measures or actions which may endanger their peaceful relations.[32]

The court considered that its power to indicate interim measures ought to be exercised when the rights of the parties concerned "might not be restored in full measures in the event of a judgment if that judgment is anticipated"[33] In the court's view, the Turkish activities complained by Greece had taken place in "an area in dispute", with respect to which Turkey also claims sovereign rights of exploration and exploitation.[34] The court stressed that "neither concessions unilaterally granted nor exploration activities unilaterally undertaken by either of the interested States concerned with respect to the disputed areas can be creative of new rights or deprive the other States of any rights to which in law it may be entitled".[35] The court also carefully examined the seismic operation conducted by Turkey. It found that the type of method used in the research had not been alleged to involve "any risk of physical damage to the seabed or subsoil or to their natural resources". The Turkish activities were all of the "transitory character", and "do not involve the establishment of installations on or above the seabed of the continental shelf". Neither had Turkey conducted any operations involving the actual appropriation or other use of natural resources of the areas of the continental shelf under dispute.[36] Based on these findings, the court did not think that there existed a risk of an "irreparable prejudice" to the rights at issue to justify recourse to its power to indicate interim measures of protection under Article 41.[37] The ICJ also rejected the request by Greece to order both States to refrain from military measures, by the reason that the request did not fall within the scope of Article 41. However, it did emphasize that the mutual obligations of Greece and Turkey under Article 2 (4) and Article 33 "are clearly imperative in their mutual relations, and in particular in regard to their present dispute concerning the continental shelf in the Aegean".[38]

The ICJ's deliberations of the "irreparable prejudice" of rights of parties concerned, and particularly the test of "any risk of physical damage to seabed or subsoil or their natural resources" for determining prohibitive actions in overlapping continental shelf are instructive. They are supported and supplemented by the UNCLOS and judicial decisions under the aegis of the treaty.

32 *Aegean Sea Continental Shelf Case* (Greece v. Turkey), Order of 11 September 1976, para. 2.
33 *Ibid.*, para. 27.
34 *Ibid.,* para. 28.
35 *Ibid.*, para. 29.
36 *Ibid.*, para. 30.
37 *Ibid.*, paras. 32–33.
38 *Ibid.*, para. 35.

Article 290 of UNCLOS endows a court or tribunal with prima facie jurisdiction over a dispute submitted to it under Part XV or Part XI, section 5, with the competence to prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending final decision. It appears that the test of "irreparable damage" may analogously apply to a dispute arising in an overlapping territorial sea area, as suggested in the *Land Reclamation* case of 2003 between Malaysia and Singapore.[39]

More significantly, the *Guyana/Suriname* arbitral award of 2007[40]is the first case where an international tribunal provides a detailed and authoritative interpretation and analysis of paragraph 3 of Articles 74 and 83 of the UNCLOS, taking account of both general international law and the relevant rules under the law of the sea. The case involves, *inter alia*, disputes between Guyana and Suriname, with regard to the lawfulness of certain unilateral actions and countermeasures conducted by each State over an area where the two States' claims of EEZ and continental shelves overlapped, in relation to an incident taking place on 3 June 2000. In the award, the arbitral tribunal established under Article 287 and Annex VII of the UNCLOS, made several points that are directly relevant to the present discussion:

First, the general principle prohibiting the threat or use of force under international law is applicable in a maritime delimitation dispute. Whether or not a particular situation constitutes the illegal threat or use of force depends on the merits of each case. In the *Guyana v. Suriname* case, the tribunal considered that the issuance of warning by the Suriname naval patrol boats to Guyana licensed foreign ships operating exploratory activities in the disputed area "to leave or face consequences" on 3 June 2000 amounted to unlawful threat of force. (para. 439) As a result, the court rejected Suriname's argument that the actions were lawful exercise of "law enforcement", even though it did recognize that under international law, force may be used in law enforcement activities, provided that such force is unavoidable, reasonable and necessary. (para. 445)

39 *Case concerning Land Reclamation by Singapore in and around the Straits of Johor*, (Malaysia v. Singapore), Order of 8 October 2003, paras. 23, 72. The International Law of the Sea Tribunal did not find that there was a situation of urgency or that there is a risk that the rights claimed by Malaysia with respect to an area of territorial sea would suffer "irreversible damage" pending consideration of the merits of the case by an arbitral tribunal established under Annex VII of the UNCLOS to render the court's prescription of provisional measures appropriate, para. 73.

40 Guyana and Suriname, Award of the Arbitral Tribunal Constituted pursuant to Article 287 and in accordance with Annex VII of the United Nations Convention on the Law of the Sea, 17 September 2007.

It also rejected its argument that those measures were lawful countermeasures in response to Guyana's internationally wrongful act in order to achieve cessation of that act. The tribunal held that peaceful means of addressing Guyana's alleged breach of international law were available to Suriname under UNCLOS (Part XV, Section 2 or recourse to provisional measures under Article 290). However, instead Suriname quickly resorted to measures involving threat of force, which could not have been lawful. (para. 446.)

Secondly, with regard to the positive duty contained in paragraph 3 of Articles 74 and 83, the arbitral tribunal opined that this obligation implicitly acknowledges the importance of avoiding the suspension of economic development in a disputed maritime area, as long as such activities do not affect the reaching of a final agreement. (para. 460) In addition, the language of the obligation imposes upon the parties a duty to negotiate in good faith, in the pursuit of a provisional arrangement. (para. 461) In this case, the tribunal found that Suriname did not fulfill its obligation to make every effort to enter into provisional arrangement with Guyana before or after the relevant disputes arose. In particular, after Suriname became aware of Guyana's concession holder's planned exploratory drilling in disputed waters, it decided to resort to self-help by issuing threat, instead of actively trying to engage Guyana in negotiation, or at least could have accepted Guyana's last minute invitation and negotiated in good faith and insisted during negotiation on the immediate cessation of the drilling plan as a condition to participation in further talks. (para. 476) Conversely, the tribunal also ruled that Guyana violated its positive duty by its conduct leading up to the incident on 3 June 2000. In the tribunal's opinion, Guyana should have been preparing exploratory drilling for some time before the incident. It should have informed Suriname directly of its plans instead of merely a press notification from the license holder and only tried to discuss about the modalities of it's the activities in the last minute. In short, Guyana should have tried to engage Suriname at a much earlier stage. Steps that it could have taken in accordance with the positive duty include (1) give Suriname official and detailed notice of its planned activities; (2) seeking cooperation of Suriname in undertaking the activities; (3) offering to share the results of the exploration and giving Suriname an opportunity to observe the activities, and (4) offering to share all the financial benefits received from the exploratory activities. (para. 477)

Thirdly, with regard to the negative duty contained in paragraph 3 – the duty not to hamper or jeopardize the reaching of a final agreement – the tribunal followed a similar line of reasoning as the ICJ did in its 1976 order in regard to the Aegean Sea. It made a legal distinction between two types of exploratory activities – seismic testing and exploratory drilling, and considered that only

those unilateral exploratory activities that "might cause permanent damage to the marine environment" in the area in dispute will lead to a violation of this duty, like exploratory drilling. Such activities should be "frozen in absence of a provisional arrangement" entered into by the parties concerned. By contrast, seismic activity[41] should be permissible in a disputed area. (para. 481) In case of an alleged violation to the negative obligation, and if bilateral negotiations failed to resolve the issue, a remedy is set out in the options for peaceful settlement under Part XV and Annex VII of UNCLOS, and States parties concerned should make use of such mechanism. (para. 482)

V Conclusions

In the light of the above investigation, it is clear that international law and the law of the sea regime do not prohibit all unilateral actions in maritime boundary disputes. However, unilateral actions do not exist in a "lawless" domain, either. Even though States may be the "masters of their own affairs", their power of discretion and resultant actions are expected to be guided and sanctioned by the existing principles and rules of international law, such as good faith, prohibition of threat or use or force, and peaceful settlement of disputes. This applies equally to States' unilateral actions in relation to territorial or boundary disputes, either land or maritime. Therefore, threat or actual use of force cannot be used except in the strictly defined contexts of self-defense or self-help. It cannot be initiated by States to regain territory or resolve territorial or boundary disputes. Under the UNCLOS regime, special rules have also been formulated that require States involved in EEZ or continental shelf delimitation disputes to actively cooperate with each other and to pay due regard to each other's rights and interests. The relevant obligations of States concerned include: to engage with one another in "meaningful negotiation" with regard to delimitation and related disputes, or concerning provisional arrangements to utilize resources in the overlapping areas, such as joint development or information – or profit – sharing; to conduct themselves in a manner consistent with relevant rules of international law, and without causing "irreparable damage" to the legal rights and interests of other State concerned or to the marine environment. Excessive enforcement actions and arbitrary or unreasonable

41 Seismic exploration is carried out by vessel traversing the surface of the high sea and causing small explosions to occur at intervals under water. These explosions will send sound waves through the seabed so as to provide information regarding the geophysical structure of the earth beneath it, Aegean Sea, ICJ Order of 1976, para. 30.

unilateral measures in overlapping maritime areas may constitute violations of good faith or abuse of rights, and could incur international responsibility. On the other hand, there also seems to be a trend towards gauging the legitimacy of countermeasures by taking into account whether the aggrieved State has first resorted to options of dispute settlement of disputes available to it to address the other State's perceived violation or protect its rights or interests before adopting those measures. With consistent interpretation by international courts and tribunals, those rules may be gaining importance. Consequently, while unilateral actions will continue to be an indispensable instrument for States demonstrate effectiveness or to address legal violation or non-compliance by other States in the foreseeable future, including acts of retorsion and legitimate countermeasures, international law and the law of the sea regime have provided some useful guidance that could help States avoiding the risk of aggravating disputes and law-breaking as a result of their arbitrary and excessive actions, and increasing the possibility of mutual confidence and cooperation.

Search and Rescue as an Enabler to Stimulate Cooperation in Areas of Tension

*Erik Franckx**

1 Introduction[1]

In early August 2012, President Ma of the Republic of China (Taiwan) proposed an East China Sea peace initiative at the occasion of the 60th anniversary of the coming into force of the Treaty of Peace between the Republic of China and Japan. His main proposal concerned a plea for cooperation on the exploration and exploitation of the resources in the area, but he also listed a few other areas by means of which the East China Sea could turn into a zone of peace and cooperation, one of them being search and rescue.[2]

The use of an agreement on search and rescue as vehicle for enhancing cooperation in the East China Sea, as proposed by President Ma, is certainly not new. Indeed, China and Japan had already started working on the conclusion of such an agreement.[3] At a high level meeting between the Ministers of Foreign Affairs of both countries on 22 May 2011 both sides were in agreement that the work, which had apparently already been started, should be expedited in order to reach an early conclusion.[4] When the Prime Ministers of both countries met in December 2011, it was stated that an agreement in principle had been

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1 Editors' Note: This article was selected from papers presented at two international conferences held in Hangzhou, China in 2012 and 2013, sponsored by the Centre for Ocean Law and Governance of Zhejiang University. The status of ratifications of treaties has not been updated and reflects the date of the conference to which it was submitted.

2 President Ma Proposes the East China Sea Peace Initiative, Taiwan In Depth, 5 August 2012, *available at* http://taiwanindepth.tw/ct.asp?xItem=194468&CtNode=1915.

3 The idea to start negotiations on this topic was apparently taken in 2010. Overview of Japan-China Summit Meeting, Website of the Ministry of Foreign Affairs of Japan, 31 May 2010, *available at* http://www.mofa.go.jp/region/asia-paci/china/summit_meet1005.html.

4 Overview of the Japan-China Foreign Ministers' Meeting, Website of the Ministry of Foreign Affairs of Japan, 22 May 2011, *available at* http://www.mofa.go.jp/region/asia-paci/china/sm1105.html. This was confirmed a few months later when both Ministers of Foreign Affairs met again. Overview of the Japan-China Foreign Ministers' Meeting, Website of the Ministry of Foreign Affairs of Japan, 4 July 2011, *available at* http://www.mofa.go.jp/region/asia-paci/china/fmm1107.html.

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reached between the parties.[5] When the rumor spread during the month of January 2012 that the conclusion of the agreement was imminent, the Japanese Chief Cabinet Secretary emphasized that discussions were still going on and that “some form of conclusion in the not too distant future” was to be expected, without however any precise deadline having been set.[6]

A few months later, moreover, at the occasion of the Fifth Trilateral Summit Meeting Among the People’s Republic of China, the Republic of Korea and Japan a Joint Declaration on the Enhancement of Trilateral Comprehensive Cooperative Partnership was adopted in which the parties, in order to enhance political mutual trust, welcomed the recent agreement in principle reached between China and Japan, and reaffirmed[7] the importance of enhancing cooperation in the field of search and rescue between the three parties.[8]

The above *tour d’horizon* clearly indicates that search and rescue cooperation has been on the agenda in the East China Sea for some time, either on a bilateral or trilateral basis. The present contribution intends to have a look at the manner in which cooperation in this field can enhance cooperation between States in this dispute prone region. After having defined the spatial extent of this study, the contemporary international legal framework governing search and rescue will be analyzed in general, followed by its application to the East China Sea more particularly. Based on a comparative approach with some other regions where search and rescue has been an issue between the parties, the final part will try to draw some conclusions for the East China Sea.

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5 Japan-People’s Republic of China Summit Meeting, Website of the Ministry of Foreign Affairs of Japan, 25 December 2011, *available at* http://www.mofa.go.jp/region/asia-paci/china/meeting1112.html.

6 Press Conference by the Chief Cabinet Secretary, Website of the Prime Minister of Japan and His Cabinet, 11 January 2012, *available* at http://www.kantei.go.jp/foreign/tyoukanpress/201201/11_p.html.

7 During the previous summit, held on 22 May 2011 right after the serious earthquake in Japan, closer cooperation in this domain had already been envisaged. *See* Summit Declaration, Website of the Prime Minister of Japan and His Cabinet, 22 May 2011, *available at* http://www.kantei.go.jp/foreign/kan/statement/201105/22jcke.html. Such trilateral cooperation based on the establishment of bilateral mechanisms had already been addressed in 2008. Action Plan for Promoting Trilateral Cooperation among the People’s Republic of China, Japan and the Republic of Korea, Website of the Ministry of Foreign Affairs of Japan, 13 December 2008, *available at* http://www.mofa.go.jp/region/asia-paci/jck/summit0812/action.html.

8 The Fifth Trilateral Summit Meeting Among the People’s Republic of China, the Republic of Korea and Japan: Joint Declaration on the Enhancement of Trilateral Comprehensive Cooperative Partnership, Website of the Prime Minister of Japan and His Cabinet, 13 May 2012, *available at* http://www.kantei.go.jp/foreign/noda/diplomatic/201205/13jck3_e.html.

II Spatial Extent

The focus of this article is on the East China Sea as defined by the International Hydrographic Organization in 1953 as Area 50.[9] It should be noted in this respect that the specific nomenclature used in this publication to describe the sea area in question, namely "Eastern China Sea (Tung Hai)",[10] has no juridical implications whatsoever as to the legal ownership of these water areas,[11] irrespective of the multiple references to China it may contain.[12] The present contribution has therefore no difficulty in using this official nomenclature in a paper focusing on rules of international law applicable to this area, because the use of this nomenclature, no matter how widespread, can never on its own merits be relied upon in order to attribute to China any legal rights over this maritime expanse.[13]

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9 International Hydrographic Organization, Limits of Oceans and Seas (Special Publication No. 28) 30–31 (1953), *available at* https://www.iho.int/iho_pubs/standard/S-23/S-23_Ed3_1953_EN.pdf. The limits of Area 50 are defined as follows: "*On the South.* The Northern limit of the South China Sea (49), thence from Santyo the Northeastern point of Formosa to the West point of Yonakuni Island and thence to Haderuma Sima (24°03' N, 123°47' E). *On the East.* From Haderuma Sima and thence to Okinan Kaku, the Southern extremity of Okinawa Sima, through this island to Ada-Ko Sima (Sidmouth Island) on to the East point of Kikai Sima (28°20' N) through Tanegra Sima (20°30' N) to the North point thereof and on to Hi-Saki (31°17' N) in Kyusyu. *On the North.* From Nomo Saki (32°35' N) in Kyusyu to the South point of Hukae Sima (Goto Retto) and on through this island to Ose Saki (Cape Goto) and to Hunan Kan, the South point of Saisyu To (Quelpart), through this island to its Western extreme and thence along the parallel of 33°17' North to the mainland. *On the West.* The mainland of China".

10 Also Area 49 follows a similar pattern and is named "South China Sea (Nan Hai)". The only difference is that Area 50 has been labeled "Eastern" instead of "East". Because East China Sea is today the commonly used geographical name, this denomination has been preferred in the present contribution.

11 *See* more generally on this point, E. Franckx, M. Benatar, N. Joe, and K. Van den Bossche, *The Naming of Maritime Features Viewed from an International Law Perspective*, 11 China Oceans Law Review 1–40 (2011) [Chinese translation, *ibid.*, at 41–69].

12 Such as the express reference to China in the denomination as well as the Chinese name in square brackets following it.

13 In this respect a further argument *ex abundanti* can be found in the express statement in the preface to the third edition of this 1952 publication, contained in its third paragraph, where it is stated that "[t]hese limits have no political significance whatsoever" (International Hydrographic Organization, *supra* note 9, at 2). Similar *caveats* are to be found on the accompanying maps (*ibid.*, sheet 1–3, notes on top of the map *in fine*). Nevertheless, making such an argument with respect to the South China Sea denomination, *see* F. Wu, *Historical Evidence of China's Ownership of the Sovereignty over the Spratly Islands*, in China Institute for Marine Development Strategy (ed.), Selected Papers of the Conference on the South China Sea Islands 111 (1992) [in Chinese], as mentioned by K. Zou, *Historic Rights in International Law and in China's Practice,* 32 Ocean Development and International Law 149, 161 (2001) at note 98.

The spatial extent of the East China Sea in other words corresponds *grosso modo* with the normal indication of this sea area on maps, excluding the Yellow Sea located to the North of it. The countries bordering this sea are consequently China, Japan and South Korea.

Taiwan, forming part of the southern boundary of Area 50, deserves special attention. Since its status as a State under contemporary international law is debated,[14] one could argue that it does not belong in the group of States bordering the East China Sea as defined above. On the other hand it cannot be denied that Taiwan has not only many ships in the area but also a developed Coast Guard Administration responsible for search and rescue.[15] Not including Taiwan in a paper on search and rescue in the East China Sea would therefore seem rather odd. With respect to fisheries the international community has tackled this specific problem by introducing the new notion of "fishing entities".[16] Even though the application of this new concept in practice is far from perfect, it has allowed Taiwan to become bound by certain multilateral treaty obligations with respect to fisheries, and sometimes even to draw rights from them.[17] It is with these *caveats* in mind that the present contribution will include Taiwan in the discussion.

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14 This is not the place to treat this issue in any detail. Suffice it to say that its status has been described as "a non-State territorial entity which is capable of acting independently on the international scene, but is most probably *de jure* part of China". *See* M. Shaw, International Law 235 (2008). Taiwan is not a member of the United Nations, and the chances of it ever becoming a member are rather slim, as indicated by failed past attempts. As stressed by P. Malanczuk, Akehurst's Modern Introduction to International Law, 372 (1997). Because many multilateral international conventions are only open to members of the United Nations, specialized agencies thereof, or States in general, Taiwan has not been able to become a party to most multilateral instruments relating to the law of the sea, unless specific provisions have been provided for to that extent in the agreements themselves.

15 *See* the official website of this administration, *available at* http://www.cga.gov.tw/GipOpen/wSite/ct?xItem=10850&ctNode=1354&mp=eng>).

16 This denomination in itself is interesting, for in international law the notion of entity has been defined in the following manner: "Élément dont la qualification juridique est douteuse, non précisée – souvent à dessein – par le locuteur ou sur laquelle il ne veut pas se prononcer". J. Salmon, (ed.), Dictionnaire de droit international public 432 (2001).

17 For a succinct overview with recommendations for improvement, *see* E. Franckx, Fisheries Enforcement. Related Legal and Institutional Issues: National, Subregional or Regional Perspectives 161–167 (2001), *available at* <http://www.fao.org/3/Y2776E/y2776e.pdf>). *See also* A. Serdy, *Bringing Taiwan into the International Fisheries Fold: The Legal Personality of a Fishing Entity*, 75 British Yearbook of International Law 183–221 (2004).

III Legal Framework

The duty to assist persons found at sea in danger of being lost stems from an old maritime tradition that already formed part of the early British Common Law,[18] a nation that, given its predominant interest in the formation of the law of the sea, believed that no new rule of international law could possibly emerge unless it was accepted by Great Britain.[19]

Belgium played a crucial role in the codification of this duty to render assistance. Even though the early attempts of the International Law Association[20] to codify the whole international maritime law failed,[21] it was through the *Comité Maritime International*, established in 1897 as a result of a purely Belgian initiative,[22] that finally the Convention of Salvage was adopted in Brussels in 1910, in which the following provision was for the first time incorporated in an international legal instrument:

> Every master is bound, so far as he can do so without serious danger to his vessel, her crew and her passengers, to render assistance to everybody, even though an enemy, found at sea in danger of being lost. The owner of a vessel incurs no liability by reason of contravention of the above provision.[23]

18 C.J. Colombos, The International Law of the Sea 345 (1967).

19 *Ibid.*, at 10.

20 About the Belgian involvement in the establishment of the International Law Association, *see for instance* E. Franckx, *De werkzaamheden van de International Law Association inzake marien milieurecht*, in E. Van Hooydonk (ed.), Zeeverontreiniging : preventie, bestrijding en aansprakelijkheid. 19, 22–23 (2004). *See also* by the same author in English: *The Work of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution and Its Implications for the Aegean Sea*, in B. Öztürk, (ed.), The Aegean Sea 2000 221, 221–222 (2000) and *The ILA Survey on Coastal State Jurisdiction with Special Reference to Regional Rules*, in H. Ringbom (ed.), Competing Norms in the Law of Marine Environmental Protection 59, 60–61 (1997).

21 Two conferences, sponsored by the Belgian government, were held in 1885 (Antwerp) and 1888 (Brussels). They failed however in their main objective.

22 As described in some detail in the historical section of the website of the *Comité Maritime International*, *available at* http://comitemaritime.org/History/0,273,1332,00.html.

23 Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea, signed on 23 September 1910 (entered into force 1 March 1913), Art. 11, *available at* http://www.admiraltylawguide.com/conven/salvage1910.html. This is an English translation of the original French text, which reads:

> Tout capitaine est tenu, autant qu'il peut le faire sans danger sérieux pour son navire, son équipage, ses passagers, de prêter assistance à toute personne, même ennemie, trouvée en mer en danger de se perdre. Le propriétaire du navire n'est pas responsable à raison des contraventions à la disposition précédente.

Even though this convention did not stand the test of time, mainly because of its lack to take into consideration environmental concerns, the duty to assist persons found at sea in danger of being lost substantially remained unchanged in the follow-up convention[24] adopted this time under the auspices of the International Maritime Organization.[25] In the meantime, this obligation had also been incorporated in the Convention on the High Seas[26] and the so-called SOLAS Convention.[27] At present, this rule also forms part of the Constitution for the Oceans, *i.e.* the United Nations Convention on the Law of the Sea, and reads as follows:

> Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
> (a) to render assistance to any person found at sea in danger of being lost;
> (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
> (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.[28]

24 International Convention on Salvage, signed on 28 April 1989, 1953 UNTS 193 (entered into force 14 July 1996), Art. 10, *available at* http://www.admiraltylawguide.com/conven/salvage1989.html. Hereinafter, 1989 Salvage Convention. The article now counts three paragraphs:
1. Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.
2. The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1.
3. The owner of the vessel shall incur no liability for a breach of the duty of the master under paragraph 1.

25 The Inter-Governmental Maritime Consultative Organization, as it was originally called, was established in 1948. In 1982 the name of the organization was changed into International Maritime Organization. Hereinafter, IMO.

26 Convention on the High Seas, signed on 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962), Art. 12, *available at* untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf.

27 Convention for the Safety of Life at Sea, signed on 1 November 1974, 1184 UNTS 277–453 (entered into force 25 May 1980), Chapter V, Regulation 10, *available at* http://www.austlii.edu.au/au/other/dfat/treaties/1983/22.html. Hereinafter, 1974 SOLAS Convention.

28 United Nations Convention on the Law of the Sea, signed on 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994), Art. 98, para. 1, *available at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Hereinafter, 1982 Convention. It should be noted that the 1958 Convention on the High Seas (*supra* note 26) and

But, as has been stressed in the legal literature, the obligation to render assistance should be distinguished from the obligation to rescue.[29] The former is a notion which has been purposefully kept vague in the different instruments leaving sufficient leeway to the master of the ship to fulfil this obligation.[30] The latter is an obligation only imposed on States and has been defined in a much more detailed way as will be demonstrated below.

The legal framework of search and rescue operations has to be found mainly in two international conventions. In chronological order they are the International Convention on Maritime Search and Rescue, adopted under the auspices of the IMO in 1979,[31] and the 1982 Convention. Both documents will be addressed in turn.

A *1979 SAR Convention*

The 1979 SAR Convention was the first international legal instrument dealing with the subject matter in any detail.[32] At present there are 103 States parties

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the 1982 Convention, contrary to most other legal documents mentioned in this respect above, do not attribute the obligation to render assistance directly to the master of the ship, but only indirectly though the flag State, which in turn must require the master of the vessel to act according to the obligation. The ultimate bearer of the obligation, nevertheless, always remains the master of the ship. The 1989 Salvage Convention is special in that it combines both approaches (*supra* note 24) because it places the main obligation on the master of the ship and reinforces it by requiring the State parties to adopt the necessary measures to enforce that obligation resting on the master of the vessel.

29 F.J. Kenney, and V. Tasikas, *The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea*, 12 PACIFIC RIM LAW AND POLICY JOURNAL 143, 151–159 (2003).

30 *Ibid.*, at 151–152.

31 International Convention on Maritime Search and Rescue, 27 April 1979, 1985 UNTS 118 (entered into force 22 June 1985), *available at* http://www.admiraltylawguide.com/conven/searchrescue1979.html; 2004 amendments *available at* http://www.navcen.uscg.gov/pdf/marcomms/imo/msc_resolutions/MSC155(78).pdf. Hereinafter, 1979 SAR Convention.

32 The general obligation for States to maintain adequate search and rescue services along their coasts was already to be found in the predecessor of the 1974 SOLAS Convention (*supra* note 27), namely the Convention for the Safety of Life at Sea, signed on 10 June 1948, 164 UNTS 113 (entered into force 19 November 1952), Chapter 5, Regulation 15, *available at* http://www.imo.org/KnowledgeCentre/ReferencesAndArchives/HistoryofSOLAS/Documents/SOLAS%201948%20UK%20Treaty%20Series.pdf. This regulation reads:

(a) Each Contracting Government undertakes to ensure that any necessary arrangements are made for coast watching and for the rescue of persons in distress at sea round its coasts. These arrangements should include the establishment, operation and maintenance of such maritime safety facilities as are deemed practicable and necessary having regard to the density of the seagoing traffic and the navigational dangers and should, so far as possible, afford adequate means of locating and rescuing such persons.

to the convention representing about 62.45 percent of the gross tonnage of the world's merchant shipping.[33] The convention itself is very short, consisting of only eight articles, of which six moreover concern the so-called final clauses of international agreements, namely those provisions dealing with amendments, the manner to become a party, entry into force, denunciation, deposit and registration, and languages. There is only one substantial article entitled "General Obligations Under the Convention", stating: "The Parties undertake to adopt all legislative or other appropriate measures necessary to give full effect to the Convention and its Annex, which is an integral part of the convention. Unless expressly provided otherwise, a reference to the Convention constitutes at the same time a reference to its Annex".[34]

The remaining provision, Article 2, has to do with the particular timeframe in which this convention has been negotiated, namely at the time that the law of the sea was being completely overhauled by means of the Third United Nations Conference on the Law of the Sea (1973–1982). It represents a standard clause which was often literally, or at least substantially, reproduced in many other agreements that touch upon law of the sea issues and that were concluded during this period of high uncertainty, which characterized this specific branch of international law at that time.[35]

The essence of the legal obligations of this convention is therefore to be found in the Annex attached to the Convention. Each State party is obligated to ensure that adequate search and rescue services are available in its coastal waters.[36] State parties are moreover encouraged to enter into search and rescue agreements with neighboring countries in the region.[37] After the adoption

(b) Each Contracting Government undertakes to make available information concerning its existing rescue facilities and the plans for changes therein, if any.

33 International Maritime Organization, *International Convention on Search and Rescue, 1979, as Amended: Accession by Indonesia*, IMO Doc. SAR.1/Circ.91, 30 August 2012, *available at* http://www.imo.org/OurWork/Circulars/Pages/IMODOCS.aspx.

34 1979 SAR Convention, *supra* note 31, Article 1.

35 Art. 2 reads as follows: "1) Nothing in the Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea convened pursuant to resolution 2750(XXV) of the General Assembly of the United Nations nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction. 2) No provision of the Convention shall be construed as prejudicing obligations or rights of vessels provided for in other international instruments". For a more elaborate analysis of this particular clause, *see* ERIK FRANCKX, THE RELATIONSHIP BETWEEN CITES, FAO AND RELATED AGREEMENTS: LEGAL ISSUES, Rome, Food and Agriculture Organization 29–35 (2011), *available at* http://www.fao.org/docrep/013/i1976e/i1976e00.pdf.

36 1979 SAR Convention, *supra* note 31, Annex, 2.1.1.

37 *Ibid.*, Annex, 2.1.3 to 2.1.6.

of the convention, the Maritime Safety Committee of the IMO divided the world into thirteen search and rescue areas.[38]

In these annexes one can also find for the first time a detailed definition of what has to be understood by search, namely "[a]n operation, normally co-ordinated by a rescue coordination center or rescue sub center, using available personnel and facilities to locate persons in distress", and rescue, namely "[a]n operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety".[39] The latter is not normally the ship rendering assistance.[40]

It has therefore been argued that if the duty to render assistance is required of the shipmaster,[41] the obligation to rescue rests only with the State.[42]

38 Information *available at* http://www.imo.org/about/conventions/listofconventions/pages/international-convention-on-maritime-search-and-rescue-(sar).aspx. Because the convention initially had difficulty in ensuring a sufficient amount of ratifications, a revised Annex was consequently adopted in 1998. A second amendment was adopted in 2004 in order to specify in some more detail the notions of "persons in distress" and "places of safety" (*ibid.*). This second amendment was a direct result of the *M/V Tampa* incident of 2001, when Australia refused the disembarkation of more than 400 persons rescued from a sinking Indonesian ferry. K. Gustafson Juras, J.E. Noyes, and E. Franckx, Law of the Sea in a Nutshell 41–42 (2010) and D.R. Rothwell and T. Stephens, The International Law of the Sea 162 (2010). The present analysis is based on the text of the 1979 SAR Convention including both amendments, which entered into force in January 2000 and July 2006 respectively.

39 1979 SAR Convention, *supra* note 31, Annex, 1.3.1 and 1.3.2.

40 *Ibid.*, Annex, 3.1.9, which reads: "Parties shall coordinate and cooperate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such coordination and cooperation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable".

41 As indicated *supra* note 28, it is only the enforcement of compliance with this duty to render assistance that can be delegated to States. *See also* M. Davies, *Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea*, 12 Pacific Rim Law and Policy Journal 109, 141 (2003).

42 Kenney & Tasikas, *supra* note 29, at 157. According to these authors only Art. 98, para. 1, sub b of the 1982 Convention (as reproduced *supra* note 28 and accompanying text) does at first sight not seem to follow this logic, unless one reads into "in so far as such action may be reasonably expected of them" the hypothesis that the vessel rendering assistance is exceptionally to be considered a "place of safety" (*supra* notes 39–40 and accompanying text).

B *1982 Convention*

The purpose of the drafters of the 1982 Convention was not to replace all pre-existing international conventions relating to the law of the sea. On the contrary, the 1982 Convention only deals with the general rules determining competences but leaves all technicalities to the relevant conventions already existing or still to be elaborated.[43] Even though the 1982 Convention, which is a document largely adhered to by the international community,[44] does touch upon the issue of search and rescue, it only states the general principle:

> Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.[45]

The details of the search and rescue regime, therefore, are still governed in essence by the 1979 SAR Convention today.[46]

IV Application to the East China Sea

In order to fully appreciate the application of the above-mentioned legal framework to the East China Sea, one has of course first to ascertain the manner in which the countries surrounding this area have been willing to subscribe to the relevant international legal instruments just mentioned. As indicated in Table 1, with the exception of Taiwan for obvious reasons explained above, all countries are a party to both documents. This stands in contrast to the South

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43 C. Douay, *Le droit de la mer et la préservation du milieu marin*, in: DANIEL BARDONNET AND MICHEL VIRALLY (EDS.), LE NOUVEAU DROIT INTERNATIONAL DE LA MER 231, 248 (1983).

44 At present 163 States and the European Union are legally bound by this international instrument.

45 1982 Convention, *supra* note 28, Art. 98, para. 2. This particular provision of the 1982 Convention moreover does not excel in clarity for it combines the words "promote", which seems to allow the coastal state a large margin of flexibility, with the words "adequate and effective", which on the other hand seem to restrict the leeway granted to that same State. For a detailed analysis, *see* A.E. Moen, *For Those in Peril on the Sea: Search and Rescue under the Law of the Sea Convention*, 24 OCEAN YEARBOOK 377, 384–403 (2010).

46 Stressing this more specific nature of the 1979 SAR Convention when compared to the 1982 Convention and the 1974 SOLAS Convention, *see* International Maritime Organization, *Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization*, IMO Doc. LEG/MISC.7, 19 January 2012, at 38.

TABLE 1 Status of Ratification

	1982 Convention		1979 SAR Convention	
	Signature	Ratification	Signature	Ratification
China	10 December 1982	7 June 1996	24 June 1985[a]	24 June 1985[a]
Japan	7 February 1983	20 June 1996	10 June 1985	22 June 1985
South Korea	14 March 1983	29 January 1996	4 September 1995	4 October 1995
Taiwan	/[b]	/[b]	/[c]	/[c]

a Applies to the Hong Kong Special Administrative Region with effect from 1 July 1997 and to the Macao Special Administrative Region with effect from 24 June 2005.
b Excluded from becoming a party according to Article 305 (1) of the 1982 Convention.
c Excluded from becoming a party according to Article 4 (1) of the 1979 SAR Convention.

China Sea where until recently the majority of coastal States were not a party to the 1979 SAR Convention.[47] Moreover, the countries in the East China Sea signed and ratified these two conventions at around the same time, with the exception of South Korea with respect to the 1979 SAR Convention, which only did so a decade after China and Japan.

The East China Sea forms part of the North-West Pacific search and rescue area as determined by the IMO,[48] where search and rescue operations are conducted by China, the Democratic People's Republic of Korea, Japan, the Philippines, the Republic of Korea and the Russian Federation. As stated in a note under this particular search and rescue area, however, "Areas of responsibility have not yet been defined by the above States. However, each country in the area has undertaken, on receipt of a distress alert, to ensure that action will be taken to coordinate [search and rescue] in the most expeditious manner".[49]

On the same map it is moreover indicated that Japan has limited the area for which this country is responsible as far as search and rescue is concerned in the east and the south by a line connecting the coordinates 52° 30' N / 165°

47 As stressed by S. Bateman, *Good Order at Sea in the South China Sea*, in S. Wu, and K. Zou (eds.), Maritime Security in the South China Sea: Regional Implications and International Cooperation 15, 21 and the table on 23 (2009). Since then, the convention has also entered into force for Indonesia on 23 September 2012. International Maritime Organization, *International Convention on Maritime Search and Rescue, 1979, as Amended: Accession by Indonesia*, IMO Doc. SAR.1/Circ.91, 30 August 2012, *available at* http://www.imo.org/OurWork/Circulars/Pages/IMODOCS.aspx.

48 See *supra* note 38 and accompanying text.

49 Information *available at* http://www.oceansatlas.com/unatlas/issues/emergencies/gmdss_sar/SARMAP.PDF.

E, 17° N / 165° E, and 17° N / 130° E. Because this line is totally located outside the East China Sea, the latter is rather covered by the last sentence of the same note on the map, which states that the search and rescue region of Japan is subject to bilateral discussions with the countries involved.[50]

Because this article is limited to the East China Sea, the following supplementary information can be added concerning that region proper. Japan has established 11 Maritime Rescue Coordination Centers, of which primarily two are responsible for the East China Sea region, namely the one located in Kagoshima, responsible for the Kagoshima area, and the other in Naha, responsible for the Okinawa area.[51] China has a central Center in Beijing, but also 18 associated coast radio stations.[52] Of the latter four are mainly responsible for the East China Sea as defined above, namely Fuzhou, Ningbo, Shanghai and Wenzhou.[53] The Republic of Korea, finally, had initially five main Maritime Rescue Coordination Centers, each of which had two sub Centers except for the Jeju Maritime Rescue Coordination Center, which had none. It was this last Center that was mainly responsible for the East China Sea.[54] However, in 2010 this country rearranged its Rescue Coordination Centers with the Jeju Rescue Coordination Center receiving a Rescue Sub Center, namely Seowipo

50 *Ibid.*

51 Japan submitted its search and rescue plan in 2005. *See* International Maritime Organization, *Global SAR Plan Containing Information on the Current Availability of SAR Services*, IMO Doc. SAR.8/Circ.1/Corr.3, 20 October 2005, at 11–22, *available at* http://www5.imo.org/SharePoint/blastDataHelper.asp?data_id=16608&filename=1-Corr-3.pdf. The corrections introduced by this country in 2010 do not change this basic structure. International Maritime Organization, *Availability of Search and Rescue (SAR) Services*, IMO Doc. SAR.8/Circ.3, 17 June 2011, at 160–172, *available at* http://www.imo.org/OurWork/Circulars/Pages/IMODOCS.aspx. Hereinafter, SAR.8/Circ.3.

52 For a description of the Chinese search and rescue structure, *see* for instance S. Hao, *Maritime Aspects of China's Humanitarian Operations Policy*, in A.S. Erickson, Goldstein, and N. Li (Eds.), China, the United States and 21st Century Sea Power: Defining a Maritime Security Partnership 236–251 (2010) and J. Zhang, *Commentary: Search and Rescue in the South China Sea and Regional Cooperation*, in Maritime Security in the South China Sea: Regional Implications and International Cooperation, *supra* note 47, at 255–261.

53 China submitted its search and rescue plan in 2006. International Maritime Organization, *Global SAR Plan Containing Information on the Current Availability of SAR Services*, IMO Doc. SAR.8/Circ.1/Corr.4, 21 April 2006, at 6–7, *available at* http://www5.imo.org/SharePoint/blastDataHelper.asp?data_id=14518&filename=1-Corr-4.pdf. Hereinafter, SAR.8/Circ.1/Corr.4. This plan has not been substantially changed since then. Compare with SAR.8/Circ.3, *supra* note 51, at 58–59.

54 The Republic of Korea submitted its search and rescue plan in 2006. SAR.8/Circ.1/Corr.4, *supra* note 53, at 39–41.

on the southern part of the island Jeju facing the East China Sea.[55] The Republic of Korea is moreover the only country giving the exact limits of the areas for which each of the five main Centers is responsible. For the Jeju Center this zone covers about the northwestern part of the East China Sea starting from 30° N in the south.[56] Since it covers that area in the east up to the Chinese mainland, a note adds that foreign territorial waters lying on the inside of the polygon are to be excluded.[57] It is to be noted that the northeastern part of the East China Sea is not covered in a similar way up to the coast of Japan, but rather splits the area roughly in two.[58]

In this far from perfect framework, the parties have felt the need to start cooperating in the field, *i.e.* by organizing joint search and rescue activities in the East China Sea. By way of examples, mention can be made of the 1999 joint operation between Japan and South Korea[59] or the joint exercise held between

55 There are still five Rescue Coordination Centers, of which two are new. The two that were replaced form part today of the 12 Rescue Sub Centers. SAR.8/Circ.3, *supra* note 51, at 239–242. Jeju, the capital of Jeju Island, faces the Korean peninsula.

56 SAR.8/Circ.1/Corr.4, *supra* note 53, at 41. The area is a polygon of which the outer boundary is determined by a line connecting the following nine points: a) 34° 00' 00" N / 126° 15' 00" E; b) 34° 00' 00" N / 127° 00' 00" E; c) 33° 15' 00" N / 128° 00' 00" E; d) 33° 12' 00" N / 128° 05' 00" E; e) 32° 30' 00" N / 127° 30' 00" E; f) 30° 00' 00" N / 125° 25' 00" E; g) 30° 00' 00" N / 121° 00' 00" E; h) 32° 14' 00" N / 121° 00' 00" E; and i) 34° 00' 00" N / 126° 15' 00" E. This polygon was slightly changed in 2010 with the addition of two more points, namely: a) 34° 00' 00" N / 126° 15' 00" E; b) 34° 00' 00" N / 126° 00' 00" E; c) 33° 56' 00" N / 126° 30' 00" E; d) 33° 56' 00" N / 127° 13' 30" E; e) 33° 15' 00" N / 128° 00' 00" E; f) 33° 12' 00" N / 128° 05' 00" E; g) 32° 30' 00" N / 127° 30' 00" E; h) 30° 00' 00" N / 125° 00' 00" E; i) 30° 00' 00" N / 121° 00' 00" E; j) 32° 14' 00" N / 121° 00' 00" E; k) 34 00' 00" N / 126° 15' 00" E. *See* SAR.8/Circ.3, *supra* note 51, at 242. The part south of Seju Island, however, remained largely unchanged. The northeastern part of the polygon only reaches up to parallel 32° 14' N, meaning that the area up to parallel 33° 17' N, *i.e.* the northern boundary of the East China Sea as defined for present purposes (see *supra* note 9) is not covered by the Jeju Coordination Center. In 2006 this zone was instead covered by the Mokpo Maritime Rescue Coordination Center, but after the changes introduced in 2010 this particular area appears no longer to be covered.

57 SAR.8/Circ.3, *supra* note 51, at 242. By means of the changes introduced in 2011 a new Rescue Coordination Center was established at Namhae, the field of operation of which covers the same area south of Seju already covered by the Seju Rescue Coordination Center. A note under the limits of the Namhae Center, however, reads "the area except for foreign territorial water and Jeju within a line connecting the above points".

58 *See* attached map in Annex 1.

59 M.J. Valencia, *Conclusions and Lessons Learned*, in M.J. VALENCIA (ED.), MARITIME REGIME BUILDING: LESSONS LEARNED AND THEIR RELEVANCE FOR NORTHEAST ASIA 149, 165 (2001).

the Chinese Shanghai and the Japanese Kagoshima Center.[60] This kind of co-operation seems to have been increasing over the years.[61]

It will be clear from the above analysis that the present-day unilateral implementation of the search and rescue obligations in the East China Sea under the 1979 SAR Convention is in urgent need of coordination by the coastal States. As the situation now stands, it is easily imaginable that this situation may at any time raise the tension instead of diminishing it. It should not be forgotten that the whole 1995 Imia/Kardak crisis in the Aegean Sea[62] started as a search and rescue incident, where the captain of a Turkish vessel in difficulty contested the competence of Greek vessels to intervene.[63] People lost their lives during the course of this incident, not because of being lost at sea, but rather by the manner in which this crisis was handled by the Greek and Turkish authorities in the aftermath of the incident. Moreover overlapping search and rescue regions in other parts of the Mediterranean have also given rise to increased tension,[64] indicating that this stepping stone for developing cooperation can easily lead to an adverse effect, if not properly managed.

60 Hao, *supra* note 52, at 244–245.

61 S.K. Kim, *Korean Peninsula Maritime Issues*, 41 Ocean Development and International Law 166–185 (2010). *See* for more recent examples, *see* Defense Ministry: South Korea Working to Forge Military Cooperation Pact with China, Indonesia Katakami, 21 May 2012, *available at* http://indonesiakatakami.wordpress.com/2012/05/21/defense-ministry-south-korea-working-to-forge-military-cooperation-pact-with-china, mentioning such joint exercises between China and the Republic of Korea, and B. Kligner, *Washington Should Urge Greater South Korean-Japanese Military and Diplomatic Cooperation*, The Heritage Foundation, 24 September 2012, *available at* http://www.heritage.org/research/reports/2012/09/washington-should-urge-greater-south-korean-japanese-military-and-diplomatic-cooperation, mentioning joint exercises between Japan, the Republic of Korea and the United States in 2012.

62 For more background on this crisis, *see* for instance M. Pratt and C. Schofield, *The Imia/Kardak Rocks Dispute in the Aegean Sea*, 4 Boundary and Security Bulletin 62–69 (1996); C.P. Economidès, *Les îlots d'Imia dans la Mer Egée: un différend créé par la force*, 101 Revue Générale de Droit International Public (1997); and E. Raftopoulos, *The Crisis over the Imia Rocks and the Aegean Sea Regime: International Law as a Language of Common Interest*, 12 International Journal of Marine and Coastal Law 427–446 (1997).

63 T. Korontzis, *The Competence of Hellas on Search and Rescue Items in the Aegean Area*, 4 Review of European Studies 89, 90 (2012).

64 S. Trevisanut, *Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?*, 25 International Journal of Marine and Coastal Law 523–542 (2010).

V Conclusions

Search and rescue could easily become a building block for regional cooperation in the East China Sea because all States are a party to the most relevant international treaties, namely the 1982 Convention and, foremost, the 1979 SAR Convention.[65] Besides punctual joint exercises at sea, as confidence building measures,[66] it is submitted that the States surrounding the East China Sea should try to conclude agreements between them clearly dividing their respective fields of operation. Incidents occurring in disputed or overlapping areas can easily deteriorate the general climate between the parties changing what appeared to be a building bloc to foster interstate cooperation into a slippery slope easily leading to an increased interstate animosity instead.

Very often it is thought that search and rescue cooperation is not very well suited in regions, such as the East China Sea, where maritime areas are disputed between the coastal States and established maritime boundaries are rather the exception than the rule. This, however, is not a fatality as illustrated by the recently concluded search and rescue agreement in the Arctic, an area of high tension where much of the maritime boundaries still have to be fixed in a definitive manner.[67] By means of a few simple lines on the map and a ditto savings clause[68] the Arctic rim countries were able to enter into a joint legally binding instrument.[69]

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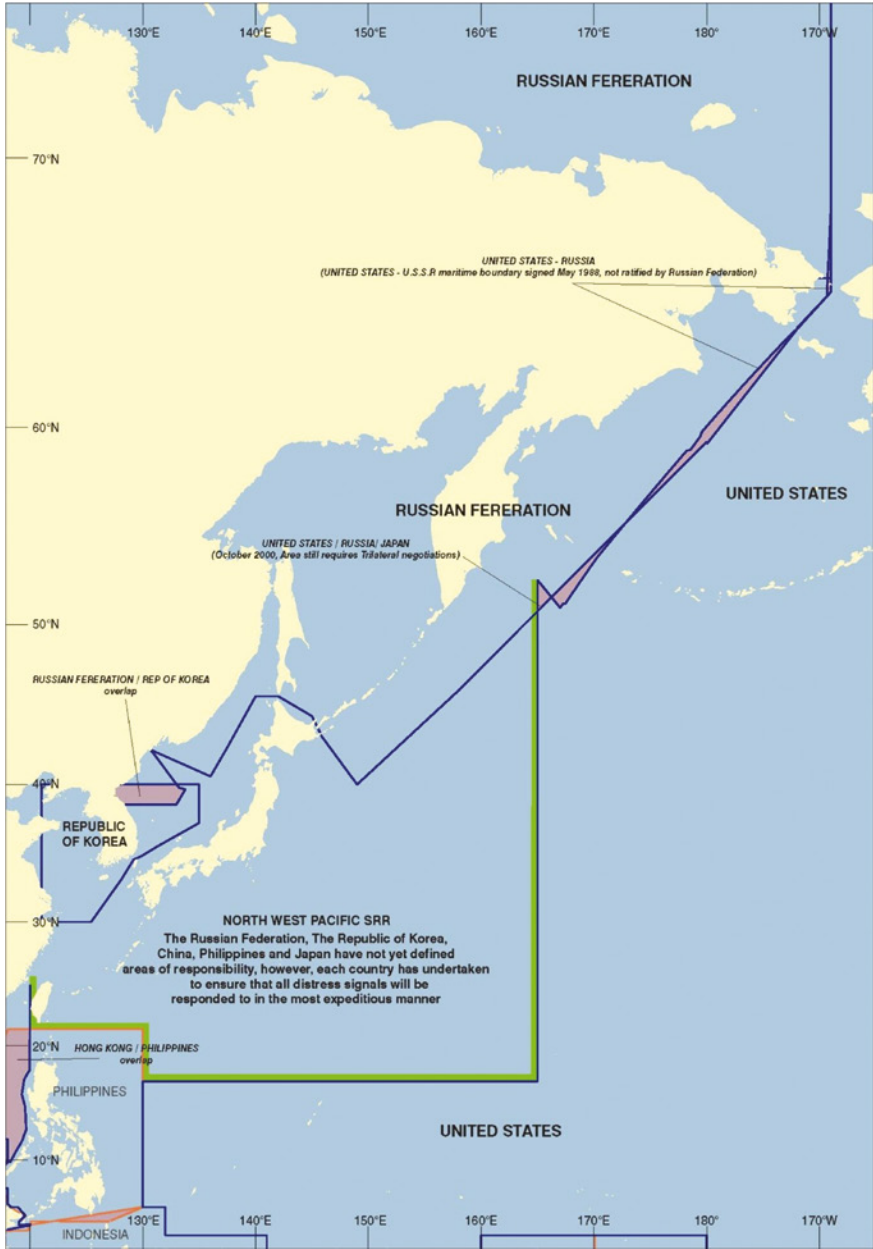
65 About the possibilities of search and rescue in southeast Asia generally and recommendations to develop cooperation in this respect, *see* S. Bateman, J. Ho, and J. Chan, *Good Order at Sea in the Southeast Asia*, RSIS POLICY PAPER 4, 38 and 45–46 (2009), *available at* http://www.rsis.edu.sg/publications/policy_papers/RSIS_Policy%20Paper%20-%20Good%20Order%20at%20Sea_270409.pdf.

66 China and the United States have been using this approach in order to try to alleviate their strained relations at sea. Y. Yi, *A PLA Navy Perspective on Maritime Security Cooperation*, in CHINA, THE UNITED STATES AND 21ST CENTURY SEA POWER: DEFINING A MARITIME SECURITY PARTNERSHIP, *supra* note 52, at 488, 497.

67 Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic. Multilateral, signed on 12 May 2011. As of 7 September 2012 this agreement had not yet entered into force (personal communication to the author by Ambassador A. Vasiliev, one of the two co-chairs that headed this Arctic Council Task Force), *available at* http://library.arcticportal.org/1474/.

68 Art. 3 (2) reads: "The delimitation of search and rescue regions is not related to and shall not prejudice the delimitation of any boundary between States or their sovereignty, sovereign rights or jurisdiction".

69 This is the first legally-binding instrument adopted under the auspices of the Arctic Council, a high level intergovernmental forum established in 1996, in a region governed primarily by a non-legally binding regime. As stressed by S.M. Kao, N.S. Pearre, and J. Fire-



ANNEX 1 IMO Availability of Search and Rescue (SAR) Services IMO Availability of Search and Rescue (SAR) Services

SOURCE: INTERNATIONAL MARITIME ORGANIZATION, *AVAILABILITY OF SEARCH AND RESCUE (SAR) SERVICES*, IMO DOC. SAR.8/CIRC.3, 17 JUNE 2011, ANNEX 4, AT 15.

There is no reason why a similar approach could not be applied to the East China Sea, especially in view of the fact that China, Japan and the Republic of Korea are all legally bound by the 1979 SAR Convention, and consequently also by its Annex containing a similar savings clause.[70] China moreover repeated this provision, with a specific reference to the exclusive economic zone and the continental shelf, in a declaration made at the time of submitting its instrument of approval to the 1979 SAR Convention.[71]

How Taiwan has to be involved in such closer cooperation is not obvious at present. Different options nevertheless exist, ranging from associate membership in the IMO, which could open the possibility to become a party to the 1979 SAR Convention, to *ad hoc* solutions worked out by China, Japan and the Republic of Korea, as has happened in the field of fisheries. Leaving Taiwan out of the picture might be a sensible solution in the short run, when countries are trying to overcome their own difficulties first, but seems to be a self-defeating proposition in the longer run.

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stone, *Adoption of the Arctic Search and Rescue Agreement: A Shift of the Arctic Regime Toward a Hard Law Basis?*, 36 MARINE POLICY 832, 832 (2012).

70 1979 SAR Convention, *supra* note 31, Annex, 2.1.7, which reads: "The delimitation of search and rescue regions is not related to and shall not prejudice the delimitation of any boundary between States".

71 At that time China made the following declaration: "The delimitation of search and rescue regions, as stipulated in the Annex to the Convention 2.1.7, is not related to and shall not prejudice the delimitation of any boundary between States, either is not related to and shall not prejudice the delimitation of any exclusive economic zone and continental shelf between States". *Available at* http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202012.pdf.

Notes and Commentaries

China's Air Defence Identification Zone: Towards the Crystallization of a New International Custom

*Matthias Vanhullebusch**

1 Introduction

The establishment of China's Air Defence Identification Zone (ADIZ) above the East China Sea in November 2013 has triggered many questions as to its legality under international law, including the law on the use of force, aviation law and the law of the sea.[1] Under the latter framework, the law has been ambivalent and has resulted in two distinctive practices in favour of the freedom of overflight on the one hand and the residual rights thesis on the other hand. A divergence persists in respect of the ADIZs that are established by developed and developing nations. Such division may prove to be an important factor for China to leverage support for its ADIZ in this grey area of international law. The common right to development of developing countries, which is tied to their respective exclusive economic zone (EEZ), can be a convincing argument for China to engage with these countries to secure their economic growth.

Furthermore, such potential support of numerous developing countries goes beyond China's foreign and security policies in the East China Sea. Their support can result in the crystallization of a new international custom in the long-term, namely one that constrains the freedom of overflight above the EEZ

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* Associate Professor of Law, Executive Director of the Asian Law Center, KoGuan Law School, Shanghai Jiao Tong University (PhD, School of Oriental and African Studies, University of London); Series Editor of Brill's Asian Law Series and the Routledge Studies on Asia in the World. Contact: matthias.vanhullebusch@gmail.com.

1 Jaemin Lee, *China's Declaration of an Air Defense Identification Zone in the East China Sea: Implications for Public International Law*, 18 Proceedings of the American Society of International Law (2014); Jae Woon Lee, *Tension on the Air: The Air Defense Identification Zones on the East China Sea*, 7 Journal of East Asia and International Law 274 (2014); Jinyuan Su, *The East China Sea Air Defense Identification Zone and International Law*, 14 Chinese Journal of International Law 271 (2015); Matthias Vanhullebusch and Wei Shen, *China's Air Defence Identification Zone: Building Security through Lawfare*, 16 The China Review: An Interdisciplinary Journal on Greater China 121 (2016); Suk Kyoon Kim, Maritime Disputes in Northeast Asia: Regional Challenges and Cooperation 63–64 (2017).

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when the coastal State extends its jurisdiction in the airspace above its EEZ instead. This note will examine two different practices that can crystalize into a new international custom favouring the freedom of overflight (Section 2) or the residual rights thesis (Section 3). Consecutively, it will explore the conditions that are necessary to increase the normative basis of an emerging custom advanced by China (Section 4). It will make use of the Theory on the Relational Normativity of International Law (TORNIL) that argues that norms, values and relationships are interdependent sources from which an international custom (in the making) derives its binding force.[2] From the perspective of relational governance, China will seek to manage its relationships with other (developing) countries in such a manner to draw support in defence of its own ADIZ practice and away from the other one.

II Practice One: ADIZ and the Communitarian Freedom of Overflight

According to the (Chicago) Convention on International Civil Aviation, an ADIZ is a "special designated airspace of defined dimensions within which aircraft are required to comply with special identification and/or reporting procedures additional to those related to the provision of air traffic services".[3] The Rules of Air adopted by the Council the International Civil Aviation Organization (ICAO) empower States to request compliance with "the rules and regulations relating to the flight and manoeuver of aircraft there in force" – even above the high seas.[4] Pursuant to the law of the sea, such measures have to balance with the communitarian freedom of overflight enjoyed above the high seas as well as above the EEZ of the coastal State.[5] Coastal States that establish an ADIZ above their EEZ must respect these freedoms as long as they are exercised peacefully[6] and pay due regard to the other States' interests.[7] Therefore, foreign aircraft – civilian

2 Matthias Vanhullebusch, *Governing Asymmetries on the Battlefield: Towards a Relational Normativity*, 9 CHINESE JOURNAL OF INTERNATIONAL POLITICS 307, 318 (2016); MATTHIAS VANHULLEBUSCH, GLOBAL GOVERNANCE, CONFLICT AND CHINA 51 (2018).

3 Convention on International Civil Aviation, opened for signature 7 December 1944, 61 Stat. 1180, 15 UNTS 295 (entered into force 4 April 1947), Annex 15.

4 *Ibid.*, Art. 12, annex 2, Rules of the Air, 2.1.1.

5 United Nations Convention on the Law of the Sea (UNCLOS), opened for signature Dec. 10, 1982, 21 I.L.M. 1261 (entered into force 16 November 1994), Arts. 87(1)(b), 58(1).

6 Art. 88, UNCLOS.

7 Art. 87(2), UNCLOS.

and military alike – of third States have to comply with those identification and reporting regulations adopted by the coastal State.[8]

The liberal perspective advanced by the U.S. acknowledges such equilibrium of communitarian and sovereign interests. However, it advocates that every nation has the right to exercise its freedom of overflight – especially for military purposes including surveillance – above the EEZ of the coastal State in a peaceful manner.[9] As a result, it opposes the extended jurisdiction of the coastal State to regulate all (military) activities of third States in the airspace above its EEZ. It refutes the transplantation of the restrictive domestic regulations on the overflight of aircraft over the landmass and above the territorial sea of the coastal State to the entire airspace above the latter's EEZ.[10] Such encroaching jurisdiction renders the communitarian freedom of overflight as applicable above the high seas[11] and enjoyed above the EEZ[12] of a coastal State from the beginning obsolete. The actual nature of the EEZ, a *sui generis* regime before the law of the sea, would, from this perspective, not justify extended jurisdiction on the basis of the sovereign rights that a coastal State exercises within its EEZ, namely related to the exploration and exploitation of living and non-living resources in the subsoil and the waters above.[13]

These nations favour the peaceful exercise of the freedom of overflight of aircraft above the EEZ of the coastal State, on the one hand, and the limited sovereignty of the coastal State to regulate such airspace, on the other hand. From this liberal perspective, at least eight countries have established such ADIZs that are currently still in force. Amongst those eight countries, six of them are developed (i.e., Canada, Japan, Norway, UK, US and South Korea) and two developing countries (i.e., India and Pakistan). Taiwan has also its own ADIZ that is still enforced and so had France and Italy respectively during the Algerian war for independence (1950s-1960s) and Balkan Wars (1990s-2000s).[14]

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8 Art. 58(3), UNCLOS.

9 UN Doc. A/CONF.62/WS/37 (1983).

10 Art. 17, UNCLOS. Unlike aircraft, an innocent passage for ships is permitted within the territorial sea of the coastal State and does not require the latter's consent.

11 Art. 87(1)(b), UNCLOS.

12 Art. 58(2), UNCLOS.

13 Art. 56, UNCLOS. *See also* Elizabeth Cuadra, *Air Defense Identification Zones: Creeping Jurisdiction in the Airspace*, 18 VIRGINIA JOURNAL OF INTERNATIONAL LAW 485 (1978).

14 Peter A. Dutton, *Caelum Liberam: Air Defense Identification Zones Outside Sovereign Airspace*, 103 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 10, 13, 17 (2009).

III Practice Two: ADIZ and the Sovereign Residual Rights Thesis

Unlike the first ADIZ practice, other coastal States have argued that they have complete jurisdiction to regulate the airspace above their EEZ. While UNCLOS defines explicitly the sovereign rights of the coastal State in its EEZ with particular reference to the economic exploitation and environmental protection of natural resources in the waters and subsoil thereof,[15] it also includes "other rights and duties".[16] Yet, the exercise of those sovereign residual rights – including the regulation of military activities in the airspace above the coastal State's EEZ – must equally pay "due regard to the rights and duties of other States" – especially those who claim their peaceful freedom of overflight.[17]

Amongst those countries that accept the residual right thesis, 10 nations have official positions on their right to and/or domestic laws that regulate military activities in their EEZ (i.e., Bangladesh, Brazil, China, India, Iran, Malaysia, Myanmar, North Korea, Pakistan and Uruguay). Five countries have actually asserted such right (i.e., Cape Verde, Kenya, the Maldives, Mauritius and Portugal). China and Guyana are the only countries that regulate all civilian and military overflight activities.[18] As a result, at least seven countries have in fact exercised their residual rights in the EEZ – in the waters and/or airspace above. Amongst those countries, only one is a developed Western nation (i.e., Portugal).

IV Crystalizing a New International Custom: Towards a Relational Normativity

Despite a scholarly view that all 168 countries who are a party to UNCLOS also adhere to the U.S. claim,[19] there remains uncertainty if their membership to this treaty substitutes for their *opinio juris* in order to consolidate an international custom to that effect. In fact, the actual practice of a limited number of States supporting either practice (8 in favour of the freedom of overflight and 7 in favour of the residual rights thesis) may not represent a so-called "appreciable section of the international community" – as once observed in the context of the legality of nuclear weapons by the Chinese Judge Jiuyong Shi in

15 Art. 56(1)(a), UNCLOS.
16 Art. 56(1)(c), UNCLOS.
17 Art. 56(2), UNCLOS.
18 Dutton, *supra* note 14, at 7.
19 *Ibid.*, at 7. Dutton, however, only supports this claim on the basis of the number of parties to UNCLOS.

the ICJ's Nuclear Weapons advisory opinion. In this respect, he continued that the limited practice and "material power" of nuclear weapons States might not constitute the foundation to establish an international custom on the use of such weapons since that would violate the principle of sovereign equality.[20]

Nonetheless, in the absence of greater participation of States in support of either practice of ADIZs, leading States – the US and China in particular – have sought to turn their positions and interests into customary international law. In the present study of China's ADIZ, it is therefore necessary to identify the techniques which China has pursued to advance its normative practice through military, economic and diplomatic strategies.[21] The U.S. Department of Defense reported as early as 2007 that Chinese "military strategists have taken an increasing interest in international law as an instrument to deter adversaries prior to combat" and that China "is shaping international opinion in favor of a distorted interpretation of the UN Convention on the Law of the Sea by moving scholarly opinion and national perspectives away from long-accepted norms of freedom of navigation and toward interpretations of increased sovereign authority over the EEZ, the airspace above it".[22]

China's legal strategy, however, goes beyond such mere lawfare.[23] In addition, its relational governance aims at instilling trust through a long-term process of negotiating political and security arrangements between the participants on the international plane (globally and regionally alike) to reach a synthesis on their initial opposing interests.[24] So far, in 2014, China and the U.S. have reached a Memorandum of Understanding to avoid potential conflicts between both militaries though they did not reach an agreement regarding their fundamental divergent interpretations on the law of the sea.[25] Regionally

20 *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. Reports 226 (July 8) (Declaration of Judge Jiuyong Shi).

21 Stanley Hoffmann, *The Study of International Law and the Theory of International Relations*, 57 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 26 (1963).

22 U.S. Department of Defense, *Annual Report to Congress on the Military Power of the People's Republic of China 2007, available at* http://www.defense.gov/pubs/pdfs/070523-China-Military-Power-final.pdf, at 13.

23 *Ibid.*; Eric Heginbotham, *China's ADIZ in the East China Sea*, LAWFAREBLOG, *available at* http://www.lawfareblog.com/2014/08/the-foreign-policy-essay-chinasadiz-in-the-east-china-sea/.

24 Yaqing Qin, *Rule, Rules, and Relations: Towards a Synthetic Approach to Governance*, 4 CHINESE JOURNAL OF INTERNATIONAL POLITICS 133 (2011).

25 Memorandum of Understanding between the Department of Defense of the United States of America and the Ministry of National Defense of the People's Republic of China Regarding the Rules of Behavior for Safety of Air and Maritime Encounters (Washington, 9–10 November 2014).

too, in 2017, China and ASEAN member States adopted the Framework for the Code of Conduct that could ensure more peace, prosperity and stability in the South China Sea.[26] The latter departs from the earlier distrust that reigned amongst the conflicting littoral states on the South China Sea ever since the Philippines had initiated arbitral proceedings against China and after the negative arbitral outcome against it.[27] Moreover, in 2017, India and Pakistan have joined the Shanghai Cooperation Organisation (SCO), another regional security body headquartered in Beijing.

Such confidence-building measures could be a first step for China to realign support for its ADIZ practice – at least with a regional section of the international community in these other but more certain areas of (maritime) security governance. Also in the economic realm, all ASEAN coastal States as well as other countries, including Bangladesh, India, Iran and Pakistan, along the Maritime Silk Road have joined China's One Belt One Road (OBOR) initiative and are members of its Asian Infrastructure Investment Bank (AIIB) since 2015.[28] Each of these various security, economic and diplomatic forms of cooperation between China and other coastal member States bilaterally or within a regional setting – institutional (AIIB, ASEAN and SCO) and non-institutional (OBOR) alike – have a common denominator whose content is sufficiently shared by each partner: security and development. Both values are inextricably linked and have been the basis for (re)new(ed) cooperation between China and various Asian coastal nations (with the exception of Japan and South Korea). They underscore the rationale behind the practice of extended jurisdiction over the airspace above the EEZ of those nations whose economic development has

26 Christian Shepherd and Manuel Mogato, *ASEAN, China Adopt Framework for Crafting Code on South China Sea*, REUTERS, 6 August 2017, *available at* https://www.reuters.com/article/us-asean-philippines-southchinasea-idUSKBN1AM0AY. The final adoption of the Code of Conduct as once envisaged in the Declaration on the Conduct of Parties in the South China Sea (Phnom Penh, 4 November 2002) aims to advance such common security and economic objectives.

27 *The South China Sea Arbitration* (The Republic of the Philippines v. The People's Republic of China), PCA Case No. 2013–19, Award (12 July 2016). *See also* Lowell Bautista, *The Philippines and the Arbitral Tribunal's Award: A Sombre Victory and Uncertain Times Ahead*, 38 CONTEMPORARY SOUTHEAST ASIA 349 (2016).

28 People's Republic of China, Chinese National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce, Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road (Information Office of the State Council, March 2015); Matthias Vanhullebusch, *China's Development Banks in Asia: A Human Rights Perspective*, in YUMIKO NAKANISHI (ED.), CROSS-FERTILIZATION IN HUMAN RIGHTS LAW: EUROPEAN AND ASIAN PERSPECTIVES 207 (2017).

an intimate security component. Without security at sea and in the air, the economic prosperity of Asia's emerging economies would be compromised.

On the long-term and from the perspective of TORNIL, China's promotion of the sovereign right of the coastal State to deny access of overflight to civilian and military aircraft of third States in the airspace above its EEZ – pursuant to its own domestic regulations that called into being an ADIZ to that effect, relies on three interdependent sources. Firstly, the norm itself that finds its origin in the residual rights thesis defined in Article 56(1) of UNCLOS that has been supported by the practice of 7 States. Secondly, the values that underpin the exercise of such sovereign prerogatives, namely the right to (peaceful) development, that has been gradually internalised amongst the developing countries along the Maritime Silk Road. Thirdly, the various sets of harmonious relationships based on trust and reconciliation of opposing interests that provide the fertile soil in which such new international custom can gain root.

Here, China's relational governance does not only have to manage a convergence of expectations within those relationships – in particular with (Asian) developing coastal States – on the binding force of its ADIZ practice based on shared security and economic values on the one hand. It must also seek to engage with the US not necessarily to align its position with its own but avoid conflict that would inevitably compromise all of China's relationships within its neighbourhood and beyond – thus, denying the fertile soil. Yet, the U.S. global role to promote its version of the international rule of law is diminishing which leaves a vacuum that China can exploit to project its normative projects including but not limited to its ADIZ practice.[29] In the long-term, China can convince more (Asian) developing coastal States to establish or readjust (in the case of India and Pakistan) their own ADIZ following Chinese characteristics that can outweigh the number of supporters to the U.S. practice.

V Conclusion

The crystallization of a new international custom in favour of extended jurisdiction of the coastal State over the airspace above its EEZ to deny overflight activities – civilian and military alike – has met different challenges that more than ever has exposed a deep divide between developed and developing countries. China has sought indirectly to pull support of the former ADIZ practice through its relational governance, namely by establishing trustworthy

29 *Endangered: American Influence Has Dwindled under Donald Trump. It Will Not Be Simple to Restore*, THE ECONOMIST, 11 November 2017.

relationships with its allies and (former) enemies through economic and security cooperation. Regardless of the form of the latter's governance, it can provide a fertile soil for those coastal States – Asian developing countries in particular – to lend their support to China's ADIZ model. Without their support, the residual rights thesis and the shared security and development values that underpin the emerging custom cannot give the new norm its binding force. Given the split practice amongst a small proportion of the members of the international community, reaching such common understanding will be difficult and fragile to sustain in particular as China would use the new (regional) custom to bolster its territorial claims in the disputed waters.

Indonesia's Practice in Combatting Illegal Fishing: 2015–2016

Arie Afriansyah[1]

1 Introduction

Oceans are notorious for being immeasurable, if not for the arbitrary delineations laid down by people and human-made institutions. The rules governing the use and utilization of the sea are one of the main focuses of international law. The law of the sea is a mixture of agreements and established or emerging customary international law developed over centuries. In considering a particular situation, one must thus consider carefully the legal position of the States involved[2] – and nowhere is this better exemplified than in the issue of illegal fishing. Illegal fishing practices often occur in developing countries that have a shortage in capacity and resources to implement effective measures of monitoring, control, and surveillance. Its impact is felt throughout the globe, from off the Western coast of Africa to archipelagos such as Indonesia, the Philippines, and Italy's coastal regions of Naples and Sicily.[3] Illegal fishing can occur in areas that are not under the jurisdiction of any country (i.e., the high seas), and can occur in areas that are under the jurisdiction of a country (i.e., the State's exclusive economic zone (EEZ), the territorial sea, and internal waters). In many regards, often the former is easier to regulate compared to the latter: illegal fishing done on the high seas primarily violate *international* standards – that is, provisions relating to the conservation and management established by Regional Fisheries Management Organizations, among other things. If illegal fishing is instead carried out in territory under State jurisdiction, not only is it

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1 Faculty of Law, Universitas Indonesia, Indonesia. The author would like to thank Andrea C. Purwandaya, Research Assistant at the Faculty of Law, Universitas Indonesia, for her help with the initial research needed for this article.

2 Anthony Aust, Handbook of International Law 279–302 (2010).

3 Donald Rothwell and Tim Stephens, *Illegal Southern Ocean Fishing and Prompt Release: Balancing Coastal and Flag State Rights and Interests,* 53(2) International and Comparative Law Quarterly 171–187 (2004). *See also,* Food and Agriculture Organization, Report of the Expert Workshop to Estimate the Magnitude of Illegal, Unreported and Unregulated Fishing Globally (2015); and Emily Andrews-Chouicha and Kathleen Gray, Why Fish Piracy Persists: The Economics of Illegal, Unreported, and Unregulated Fishing (2005).

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done without that particular State's consent, thereby a violation of international norms; it also raises other questions given the transnational nature of the affair.[4] In the case of Indonesia, illegal fishing has been a long-time national issue which has had little significant improvement in the last decades.[5] Impacts of illegal fishing have significantly affected the livelihood of Indonesian fisher communities and industries.[6] With a new strongly backed policy in securing natural resources of Indonesian waters, the government of Indonesia has taken a tougher action, sinking ships of illegal fishers in combatting illegal fishing.[7]

Various reactions have been directed to this policy especially from stakeholders affected by this policy.[8] Notably, some have argued that this action may violate the rules of international law and render Indonesia responsible for its internationally wrongful acts in sinking (foreign) ships.[9] In contrast, this paper argues that the Indonesian policy of sinking the ships of illegal fishers is actually in accordance with relevant international and national policies and legal instruments. Indonesia as a sovereign State has the prerogative to institute a new national policy in combatting illegal fishing which is in accordance with relevant international rights and duties as a coastal State. Such policy has been triggered by the negative impacts of illegal fishing to the Indonesian people. In addition, Indonesia's focus on maritime resources has revealed another problem in the fishing labour industry.

This article describes and analyses the practice of Indonesia in combatting IUU fishing, starts with the Global Maritime Fulcrum, a presidential policy which enjoys popular support amongst Indonesians. The state of Indonesia's fishing resources is discussed together with its rights and obligations as a coastal State under international law. Then, it considers the negative impacts of illegal fishing to Indonesia, which lead to the adoption of the new policy of sinking ships of illegal fishers. As additional information, the recent case of Benjina will be explored as it illustrates the complex issues surrounding the

4 Rothwell and Stephens, *supra* note 3.

5 Michael Heazle, John G. Butcher, *Fisheries Depletion and the State in Indonesia: Towards a Regional Regulatory Regime*, 31 Marine Policy 276–277 (2007).

6 *Ibid.*, at 278–281.

7 Steve Herman, *Indonesia Declares War on Illegal Foreign Fishing Vessels*, VOANEWS, 23 December 2014, *available at* http://www.voanews.com/a/indonesia-declares-war-on-illegal-foreign-fishing-vessels/2570346.html.

8 *See for example*, *Vietnam Concerned about Indonesia's Sinking of Fishing Boats*, Thanh Nien News, 20 August 2015, *available at* http://www.thanhniennews.com/politics/vietnam-concerned-about-indonesias-sinking-of-fishing-boats-50429.html.

9 Sunan J. Rustam, *A Legal Review of the "Sink the Vessel" Policy*, Jakarta Post Online, 6 December 2014, *available at* http://www.thejakartapost.com/news/2014/12/06/a-legal-review-sink-vessel-policy.html; and Aaron L. Connelly, *Sovereignty and the Sea: President Joko Widodo's Foreign Policy Challenges*, 37(1) Contemporary Southeast Asia 1–28 (2015).

fishing resources in Indonesia. The paper concludes with some of the current issues on illegal fishing within Indonesia's EEZ.

II The Widodo Administration and Global Maritime Fulcrum (*Poros Maritim*) Policy

Indonesia has long been dubbed as the epitome of an archipelagic nation. Situated in the middle of the Indian and Pacific Oceans, Indonesia exercises control over strategic points of sea-lanes of communication through several significant number of straits. A point that is often espoused is that Indonesia's geographical position offers opportunities for the State to play a significant role as a maritime power.[10] To this end, Indonesian President Joko Widodo took time in his inaugural speech to emphasize the need for Indonesians to work hard, "[and] restore Indonesia as a maritime power. The oceans, the seas, the straits and the bays are the future of our civilization. For far too long, we have turned our backs on the seas, the oceans, the straits and the bays to restore *Jalesveva Jayamahe* (at sea we are victorious), the motto of our forefathers. We should return back to sailing the seas." Most notably, the speech ended by quoting the nation's first President, Soekarno, who "…once said that to make Indonesia a great, strong, prosperous and peaceful nation, we need to have the spirit of the *cakrawarti* (brave sailors), who confronted the great tides and the mighty rolling waves." Through the use of seafaring metaphor, President Widodo had painted himself as, "the captain entrusted by the people," and his speech appealed to the people to, "come on board the Republic of Indonesia vessel and together we will sail toward Great Indonesia. We will roll open the stout sails. We will face all the ocean tides and waves with our own strength." In the same vein, he further emphasized the State's status and demography, "[a]s the third-largest democracy in the world, as the country with the largest Muslim population, as an archipelagic State, and as the largest country in Southeast Asia, will continue to pursue its independent-active foreign policy, dedicated to national interests, and to taking part in creating an international order that respects independence, eternal peace and social justice."[11] For the remainder of his

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10 David Willis, *Indonesia's New Geopolitics: Indo-Pacific or pacindo?* in PRIYA CHACKO (ED.), NEW REGIONAL GEOPOLITICS IN THE INDO-PACIFIC: DRIVERS, DYNAMICS AND CONSEQUENCES 74–94 (2016). *See also,* DINO P. DJALAL, THE GEOPOLITICS OF INDONESIA'S MARITIME TERRITORIAL POLICY (1996).

11 *Indonesia's President Remarks to the Ninth East Asian Summit, Naypyidaw, Myanmar,* RAPPLER, 13 November 2014, *available at* http://www.rappler.com/world/regions/asia-pacific/indonesia/74928-pidato-jokowi-indonesia-poros-maritim-dunia/. *See also,* Rene L. Pattiradjawane and Natalia Soebagjo, *Global Maritime Axis: Indonesia, China, and*

administration, President Joko Widodo seems committed to a vision of a, "sovereign, independent Indonesia with character based on the principle of '*gotong royong*.'" – mutual assistance.[12] Though in foreign policy terms, this is yet to be clear, *gotong royong* remains a central characteristic of Indonesian society – or at least, in political vocabulary. It is no wonder Joko Widodo wants to revive it as a principal ideal – hence his consistent usage of this rhetoric in Indonesia's foreign policy.[13] The suggestion – and perhaps currently, the creation – of a Global Maritime Fulcrum is one based primarily on an understanding and vision of the global geopolitical map. Current events and trends undeniably show an economic shift from Europe and America, to Asia: with Indonesia right in the midst of it. From a domestic perspective, it is clear that the Maritime Fulcrum consciously tries to emulate the Nusantara, particularly the 7th century era of Sriwijaya and the 14th century era of Majapahit. It is meant to encourage a sense of nationalism for Indonesia as a maritime State and to capitalize on the geopolitical reality that Indonesia spans between the Indian and the Pacific Oceans. Its nationalistic strain has made many draw parallels to Chinese President Xi Jinping's idea to create a Maritime "Silk Road," which seems similarly inspired by historical precedent.[14] Both have been characterized as reactions that allow the respective States to ward off external pressure, particularly for the Chinese vis-à-vis Southeast Asia. Its rose-tinted view of the past cleverly makes way for modern economic, trade, and financial cooperation – including developing marine natural resources.[15] In achieving these ideals, Indonesia faces tremendous challenges. By underlining her nature as an archipelagic nation in international cooperation, and using the concept of the Global Maritime Fulcrum as the center of domestic and regional development policies, studies have noted the difficulty of implementing modern foreign policy of the 21st century based on *gotong royong*.[16] Similar to what basic international relations theories would suggest, Indonesia's foreign policy implementation would likely be

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a New Approach to Southeast Asian Regional Resilience, 6(2) INTERNATIONAL JOURNAL OF CHINA STUDIES 175–185 (2015).

12 *Gotong royong* is frequently defined as mutual cooperation. This type of cooperation is unique because it is conducted without reservations in which issues and goals are elaborated before implemented through informal meetings and common interests. In Indonesia and other parts of Southeast Asia, *gotong royong* is seen when people contribute in togetherness of goods and labor to build common infrastructures such as schools, houses of worship, bridges, and roads without government involvement and budgetary assistance. *See*, T. Pranadji, *Penguatan Kelembagaan Gotong Royong dalam Perspektif Sosio Budaya Bangsa*, 27(1) JURNAL FORUM PENELITIAN AGRO EKONOMI 61–72 (2009).

13 Pattiradjawane and Soebagjo, *supra* note 11.

14 *Ibid.*

15 At the same time, it is a concept which aims to mitigate the disputes with small countries. Pattiradjawane and Soebagjo, *supra* note 11, at 180.

16 *Ibid.*

constrained by the interaction of geopolitical changes of big power national interests expanding their spheres of influence.[17] If the sole pillar of argument and central rallying point of the policy is based on Indonesia's nature as an archipelago, Indonesia must enable herself to achieve and ensure the economic development of its many islands. In addition, such development aims to project regionally and globally is supported by what is achieved domestically. In other words, better interconnectivity between Indonesia's many islands that will help enable Indonesia to take benefit of the implementation of the ASEAN community.[18] Recognized by the administration and ambitiously set to be achieved by 2025, it will provide a prospect for Indonesia to actively play an important role both in the regional and global arenas. Thus, the future of maritime connectivity is extremely essential for the economy, trade, food and energy security in the ASEAN region.[19] The strategic position Indonesia occupies between two oceans, along with the current administration's formulation of a maritime State identity, widens opportunities for the State to build a modern maritime industry and for maritime security. Deserting the view of Indonesia as an archipelagic nation and instead of seeing her as a maritime nation, able to connect and defend its many islands, and to sustainably utilize its marine resources, requires a change in mind-set as well as a change in strategy.[20]

III Issues on Indonesia's Marine Resources and Existing Legal Frameworks

Change of any kind are most effective when started at the top-level, and in bureaucracy, especially so.[21] This is exemplified by how quickly the presidential Maritime Fulcrum/*Poros Maritim* policy was put into action. Shortly after taking office, President Widodo instructed his Minister for Fisheries and Maritime Affairs, Susi Pudjiastuti, to seize and sink any foreign vessels found fishing illegally in Indonesian waters. Since then, the navy has sunk Chinese, Vietnamese, Thai, Malaysian and Papua New Guinean vessels.[22] Pudjiastuti's

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17 Willis, *supra* note 10.

18 *See* Seng Tan, *Indonesia among Powers: Will ASEAN Still Matter to Indonesia?* in CHRISTOPHER ROBERTS, ET AL (EDS.), INDONESIA'S ASCENT: POWER, LEADERSHIP, AND THE REGIONAL ORDER 287–307 (2015).

19 Leonard C. Sebastian, et al., *Beyond the Archipelagic Outlook: The Law of the Sea, Maritime Security, and the Great Powers*, in ROBERTS, ET AL (EDS.), *supra* note 18, 308–334.

20 *Ibid.*

21 Avinash Dixit, *Democracy, Autocracy, and Bureaucracy, available at* https://www.princeton.edu/~dixitak/home/DeAuBu04.pdf/.

22 *Penenggelaman Kapal* (Vessel Sinking), Kementerian Kelautan dan Perikanan (Ministry of Marine Affairs and Fisheries), 7 April 2016, *available at* http://kkp.go.id/2016/04/07/penenggelaman-kapal/.

execution of the policy has not been without controversies, and has become one of the administration's most well-known policies. While the program violates no international laws per se, it has upset Indonesia's neighbors, who have privately argued that Indonesia could enforce its laws in a less showy manner.[23]

Yet this ostentatiousness may be explained by the abundance of resources Indonesia has at its disposal. Indonesia has the world's biggest tuna fishery – it is also one of the least regulated. Tuna remains a highly migratory species that is deeply regulated in international frameworks.[24] Article 64 of the United Nations Convention on the Law of the Sea (UNCLOS),[25] as well as the 1995 Straddling and Highly Migratory Fish Stocks Agreement (Fish Stocks Agreement)[26] together provide that, where the species is found in an EEZ, the coastal State and other States fishing in the EEZ, or on the high seas beyond it, have a duty to cooperate in the conservation and management of the species.[27] The tuna regional fisheries management organizations attempt to manage tuna fisheries by strengthening conservation of stocks. To enhance international cooperation, Indonesia ratified UNCLOS in 1985 and the Fish Stocks Agreement in 2005. Throughout the decade, Indonesia became a member of numerous intergovernmental organizations mandated to manage tuna, including the Indian Ocean Tuna Commission (IOTC),[28] the Commission for the Conservation of

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23 Connelly, *supra* note 9.

24 ROBIN ALLEN, INTERNATIONAL MANAGEMENT OF TUNA FISHERIES: ARRANGEMENTS, CHALLENGES AND A WAY FORWARD (2010).

25 The United Nations Convention on the Law of the Sea – also called the Law of the Sea Convention or the Law of the Sea treaty – is the international agreement that resulted from the third United Nations Conference on the Law of the Sea (UNCLOS III), which took place between 1973 and 1982. The Convention, concluded in 1982, replaced four 1958 treaties. UNCLOS came into force in 1994. Text of the treaty, *available at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm/.

26 The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish. Text of the treaty, *available at* http://www.un.org/depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm/.

27 Aust, *supra* note 2, at 299.

28 The Indian Ocean Tuna Commission (IOTC) is an intergovernmental organization mandated to manage tuna and tuna-like species in the Indian Ocean and adjacent seas. The objective of the Commission is to promote the conservation and optimal utilization of tuna and tuna-like stocks covered by the IOTC Agreement, and to encourage sustainable development of fisheries. *See* http://www.iotc.org/ and also http://www.fao.org/fishery/rfb/iotc/en/.

Southern Bluefin Tuna (CCSBT),[29] and a cooperating non-member of the Western and Central Pacific Fisheries Commission (WCPFC).[30]

Aside from international norms and commissions, there are other concerns more practical in nature. For centuries, fishermen have used the traditional pole-and-line method for catching tuna. The method is quite simple: hooked bait is used to attract fish which are then caught one by one. Once a fish is hooked, the fisherman pulls the line to swing the fish on the deck. It is considered the most environmentally friendly means of fishing that ensures sustainability of tuna for future generations.[31]

However, many fishermen no longer practice this method. Dangerous fishing techniques that include using fish aggregation devices (FADs) are used to harvest more and more fish.[32] These are the primary reasons for the decline in tuna stocks.[33] These devices attract not just tuna but other creatures such as dolphins, sharks, whales, rays, turtles, sea birds, as well, thereby causing much destruction to marine life in the area.

Aside from that, research shows that around EEZs, another method – purse seining – is used to catch tuna.[34] In this method, entire schools of fish are caught through large nets called purse seines. These nets catch whatever comes their way, resulting in ample by-catch. This is yet another cause in the noticeable decline in tuna stocks in the ocean. Overfishing with these harmful, unsustainable methods to meet the growing demand for tuna is reducing the number of tuna in and around Indonesian waters.[35] The entire ecosystem

29 The objective of the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) is to ensure, through appropriate management, the conservation and optimum utilization of the global Southern Bluefin Tuna (SBT) fishery. The Commission is responsible for setting a total allowable catch (TAC) and its allocation among the members; takes decisions to support and implement fishery management; and acts as a coordination mechanism for member's activities in relation to the SBT fishery. *See* https://www.ccsbt.org/ and http://www.fao.org/fishery/rfb/ccsbt/en/.

30 The objective of the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC) is to ensure, through effective management, the long-term conservation and sustainable use of highly migratory fish stocks in the western and central Pacific Ocean in accordance with the 1982 United Nations Convention on the Law of the Sea and the 1995 UN Fish Stocks Agreement. *See* https://www.wcpfc.int/about-wcpfc and http://www.fao.org/fishery/rfb/wcpfc/en/.

31 *See* Allen, *supra* note 24.

32 *See* Amber Anwar, *The Tuna Question*, 17(12) SOUTHASIA 60–61 (2013).

33 *Ibid.*, *see also* Allen, *supra* note 24.

34 Uwe Tietze et al, Fishing with Beach Seines (2011). *See also* Peter K.J. Hahn et al, *Beach Seining*, in DAVID H. JOHNSON ET AL (EDS.), A SALMONID FIELD PROTOCOLS HANDBOOK, TECHNIQUES FOR ASSESSING STATUS AND TRENDS IN SALMON AND TROUT POPULATIONS 267–323 (.2007).

35 FOOD AND AGRICULTURE ORGANIZATION (FAO), PRESENT AND FUTURE MARKETS FOR FISH AND FISH PRODUCTS FROM SMALL-SCALE FISHERIES – CASE STUDIES

is also at stake due to overexploitation that is causing total chaos in the tropic chain. Due to the rise in temperature of the ocean's surface, fish are moving deeper into the ocean, away from the reach of the traditional fishermen whose methods are not designed to catch fish in the deep waters of the ocean.[36]

IV Indonesia's International Rights and Duties within the EEZ

First, it must be noted that in true transnational form, several international instruments, both binding and non-binding, provide guidance as to the prevention of illegal fishing:

1. Binding instruments: UNCLOS, the 1993 FAO Compliance Agreement,[37] the 2009 FAO Port State Measures Agreement,[38] and other relevant international agreements such as the 1995 UN Fish Stocks Agreement.[39]
2. Non-binding instruments: the FAO Code of Conduct for Responsible Fisheries (FAO Code of Conduct 1995),[40] and the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated Fishing (IPOA-IUU).[41]

FROM ASIA, AFRICA, AND LATIN AMERICA (2008), *available at* http://www.fao.org/3/a-i0230e.pdf/.

36 FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, INCREASING THE CONTRIBUTION OF SMALL-SCALE FISHERIES TO POVERTY ALLEVIATION AND FOOD SECURITY (2005).

37 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. Text of the agreement *available at* http://www.fao.org/docrep/meeting/003/x3130m/X3130E00.HTM/.

38 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. Text of the agreement *available at* http://www.fao.org/documents/card/en/c/915655b8-e31c-479c-bf07-30cba21ea4b0/. *See also* http://www.fao.org/fishery/psm/agreement/en for more information.

39 The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish. Text of the treaty: Text of the agreement *available at* http://www.un.org/depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm/.

40 To promote long-term conservation and sustainable use of fisheries resources, following a call from the International Conference on Responsible Fishing (1992) to strengthen the international legal framework for more effective conservation, management and sustainable exploitation and production of living aquatic resources, the 1995 FAO Conference adopted the FAO Code of Conduct for Responsible Fisheries. Text and information *available at* http://www.FAO .org/fishery/code/en/.

41 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated Fishing (FAO IPOA-IUU), *available at* http://www.fao.org/fishery/ipoa-iuu/en/.

Despite this, UNCLOS remains the only instrument to explicitly regulate law enforcement against illegal fishing practices conducted by foreign vessels in the EEZ. Article 73 states that:

1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.
2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.
3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.
4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.

There are two interests identified by the provision – that of the coastal State to take the actions needed to ensure compliance with their national laws; and that of the flag State to obtain the "prompt release," of the vessel and its crew following "reasonable bond" payment to the coastal State.[42] As a coastal State, Indonesia has implement those international rights and obligations into a number of national laws. Some of them are quite relevant to the legal enforcement for Indonesia's sovereign rights in the area of EEZ. They are:

- Law No. 5 Year 1983 on Indonesia's Economic Exclusive Zone;
- Law No. 17 Year 1985 on UNCLOS Ratification;
- Law No. 6 Year 1996 on Indonesian Waters;
- Law No. 17 Year 2008 on Navigation;
- Law No. 45 Year 2009 on Fisheries;
- Law No. 32 Year 2014 on Maritime Affairs (Ocean);
- Government Regulation No. 54 Year 2002 on Fisheries Activities;

42 International Tribunal for the Law of the Sea (ITLOS) case *Monte Confurco* case (France v. Seychelles), Prompt Release. *Available at* https://www.itlos.org/en/cases/list-of-cases/case-no-6/. *See also* Yoshifumi Tanaka, *Prompt Release in the United Nations Convention on the Law of the Sea: Some Reflections on the ITLOSJurisprudence*, 51(2) NETHERLANDS INTERNATIONAL LAW REVIEW 237–271 (2004); Heiki Lindpere, *Prompt Release of Detained Foreign Vessels and Crews in Matters of Marine Environment Protection*, 33(2) INTERNATIONAL JOURNAL OF LEGAL INFORMATION 240, 241 (2005) and Usmawadi Amir, *Penegakan Hukum IUU Fishing menurut UNCLOS 1982* (*Studi Kasus: Volga Case*) [Legal Enforcement against IUU Fishing under UNCLOS 1982 – Case Study: Volga Case] 12 JURNAL OPINIO JURIS, 68–92 (2013).

- Presidential Regulation No. 16 Year 2017 on Indonesia's Ocean Policy;
- Minister of Marine Affairs and Fisheries (MMAF) Decree No. Kep.60/Men/2001 on the Management of Fishing Vessels on Indonesia EEZ;
- MMAF Decree No. Per.16/Men/2010 on Fishing License for Fishing Vessels above 30 Gross Tonnage;
- MMAF Decree No. Kep/50/Men/2012 on the Implementation of the IPOA-IUU Fishing;
- MMAF Decree No. 17/Permen-KP/2014 on Special Investigator of Fisheries Crimes; and
- MMAF Decree No. 56/Permen-KP/2014 on the Moratorium Foreign Fishing Licensing on Indonesian Waters.

With these main rules and regulations, it can be argued that Indonesia has a sufficient legal basis to enforce its laws and to combat illegal fishing within its jurisdiction.

V Impacts of Illegal Fishing to Indonesia

Research has grouped the economic impact of illegal fishing into two interlinked categories, direct and indirect/secondary economic losses.[43] An example of direct losses is a reduction in catches, which significantly impacts the national income of coastal countries. A myriad of other examples of economic loss includes revenue from the boat landing, license fees, taxes evasion and other charges – all of which should have been paid to the State if the entire affair was conducted via legal means. Secondary losses include loss of income and jobs in the fishing industry, which would result in reduced demands for fishing equipment and vessels as well as product processing, packaging, marketing, and transportation.[44] To put it in more tangible terms, the Ministry of Maritime Affairs and Fisheries of Indonesia has estimated in various press statements over the years that illegal fishing has cost the country 30 trillion IDR (about 3.11 billion US$) per year.[45] Social impacts include loss of employment in the fishing industry, which in turn is caused by a depletion of stocks and reduced catches, and deficits for coastal communities whose lives depend heavily upon the sea: such as fishing communities and those who live on the shoreline.[46] Furthermore, said depletion can often lead to the import of fish – in Indonesia

43 Rothwell and Stephens, *supra* note 3, at 140.

44 *Ibid.*

45 *Illegal Fishing,* TEMPO, (18 March 2017), *available at* https://www.tempo.co/topik/masalah/1022/illegal-fishing/.

46 FAO, *supra* note 36.

especially – which ruffles nationalistic feathers;[47] or at least pique interest in supply chain management as to why States of origin (as in, originally possessing the raw materials/resources) are yet to be able to benefit without outsourcing processing and quality control to foreign States.[48]

The tangle with foreign States does not end with matters of trade, however. Given the transnational nature of oceans and maritime territory, impacts of illegal fishing can also spill over into the international arena and relations with other/neighboring States.[49] This is especially true in cases where illegal fishers and/or their vessels are of another country – either by nationality for the former, or flags for the latter; to name clearest examples. One of the most common fears articulated that attempts to explain aversion to foreign fishing vessels are non-regulation – that is, loopholes (legal or otherwise) that exist that may allow foreign vessels and crew to disavow the regulations where they fish – which may lead to unsustainability as well as over-exploitation.[50]

Besides the problems related to competition over the exploitation of resources, concerns over environmental degradation have also increasingly engaged the attention of governments and civil societies in Asia Pacific.[51] Threats to the marine ecosystem, among others, come from pollution, overfishing and destructive fishing practices.[52]

Overfishing,[53] in particular, is also a serious problem in the Asia Pacific. Unsustainable exploitation of resources is common throughout the region, as countries compete against each other to have the highest economic growth. The economic progress in the region has mostly depended on natural resource mining, living and non-living, on land and at seas. Environmental concerns have often been sacrificed for the sake of economic competitiveness. The economic crisis has worsened pressure on the environment as countries fall back on

47 *See* Connelly, *supra* note 9, at 23.

48 Enos Kabu and *Deviarbi Sakke* Tira, *Value Chain Analysis Towards Sustainability: A Case Study of Fishery Business in Kota Kupang, Indonesia*, 5(1) INTERNATIONAL JOURNAL OF ECONOMICS AND FINANCIAL ISSUES 150–154 (2015). *See also* ERNA M. LOKOLLO ET AL., STATUS AND PROSPECTS OF FEED CROPS IN SOUTHEAST ASIA: AN INTEGRATED REPORT (2006).

49 Andrews-Chouicha and Gray, *supra* note 3.

50 MELDA K. ARIADNO, WHAT IS THE INDONESIAN RESPONSIBILITY FOR HIGH SEAS FISHERIES? (2011). *See also* COMMONWEALTH EXPERT STUDY GROUP ON MARITIME ISSUES, OCEAN MANAGEMENT, A REGIONAL PERSPECTIVE: THE PROSPECTS FOR COMMONWEALTH MARITIME COOPERATION IN ASIA AND PACIFIC (1984).

51 Dewi Fortuna Anwar, *Resource Issues and Ocean Governance in Asia Pacific: An Indonesian Perspective*, 28(3) CONTEMPORARY SOUTHEAST ASIA 466–489 (2006).

52 *Ibid.*

53 Namely catching more fish than can be regenerated over a span of time. *See* Anwar, *supra* note 51.

natural resources to outgrowth exports. As one analyst points out, "environmental and natural resource friendly regulatory and enforcement regimes, even if they exist, are likely to be abandoned or ignored in an attempt to cut costs, increase production and expand exports."[54] Simply put; at seas, the unmaintainable policy of States in their territorial waters and EEZ has been compounded by the illegal fishing activities carried out by fishing boats registered to other countries.

VI Indonesia's National Policies and Campaigns to Combat Illegal Fishing

It remains one of Indonesia's national targets to bring the national fish stocks back to sustainable levels. This is even more so given the current administration's foreign policy, along with action plans formulated during the campaign: *Nawacita*. It is unsurprising to note that a good number of Indonesian nationals expect to hold the government to its promises.[55]

Minister Pudjiastuti has implemented a tougher policy against illegal fishing. Repeatedly characterized as being explosive,[56] and the highly publicized nature of some law enforcements (e.g., the sinking of illegal fishers' vessels) in Indonesia's EEZ are clearly hoped to have a deterrent effect. As of April 2017, the Ministry has seized and blown up around 317 foreign vessels operated illegally in Indonesian waters.[57] Additionally, the Ministry have also issued moratoriums of fishing license for foreign States.[58]

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54 *Ibid.*

55 MARCUS MIETZNER, REINVENTING ASIAN POPULISM: JOKOWI'S RISE, DEMOCRACY, AND POLITICAL CONTESTATION IN INDONESIA 54–61 (2015).

56 Liz Chong, *At Work with the FT: Susi Pudjiastuti, Indonesia's Fisheries Chief*, FINANCIAL TIMES (22 September 2016), *available at* https://www.ft.com/content/08164102-6849-11e6-a0b1-d87a9fea034f. Avantika Chilkoti, *Indonesian Fisherman Back Explosive Clampdown*, FINANCIAL TIMES, 8 April 2016, *available at* https://www.ft.com/content/507e9648-fbb0-11e5-b3f6-11d5706b613b.

57 Sara Schonhardt and I Made Sentana, *Indonesia Takes Explosive Approach to Illegal Fishing*, WALL STREET JOURNAL, 15 April 2016, *available at* https://www.wsj.com/articles/indonesia-takes-explosive-approach-to-illegal-fishing-1460704409. *See also* Iwan Supriyatna, *Menteri Susi: 236 Kapal Pencuri Ikan Ditenggelamkan Sepanjang 2016* [*Minister Susi: 236 Foreign Vessels Sinked over 2016*], KOMPAS.COM, 17 January 2017, *available at* http://bisniskeuangan.kompas.com/read/2017/01/17/165433626/menteri.susi.236.kapal.pencuri.ikan.ditenggelamkan.sepanjang.2016. Fabian Januarius Kuwado, *Lagi, 81 Kapal Pencuri Ikan Ditenggelamkan di Penjuru Indonesia* [Again, 81 Illegal Fishing Vessels were Sinked in Indonesia], KOMPAS.COM, 1 April 2017, *available at* http://nasional.kompas.com/read/2017/04/01/12003881/lagi.81.kapal.pencuri.ikan.ditenggelamkan.di.penjuru.indonesia.

58 The moratorium, regulated by Permen-KP No. 56/2014 (Maritime Affairs and Fisheries Ministerial Regulation No. 56/2014) not only prevents new fishing licenses from being

The campaign has been media focus since President Jokowi took office in 2014, and may very well become a noted practice in the international arena. Considering how well received it is by domestic constituents,[59] it is unlikely that the campaign will stop any time soon; including the prohibition of transhipment.[60]

Even so, there remains a split between the debate of the pros and cons of the policy, especially on the question of whether or not it actually improved the lives of the (small-scale) fishing communities. Said communities arguably continue to be focus of the campaign, which leads to larger, industrialized business to have much to contend to as well. The transnational nature of the issue has also caused Indonesia's Ministry of Foreign Affairs scrambling to ease any diplomatic complaints from flag States of the sunken vessels; especially during the beginning of the campaign. There has been a debate over (il)legality of the campaign especially legal enforcement on the EEZ. Most notably, there has been diplomatic tension with China over Natuna, and the Chinese assertion of the "nine-dash line."[61]

VII Letting That Sink In: The (I)llegality of Indonesia's Ship-sinking Policies

In Indonesia, the basis for law enforcement measures against illegal fishing is primarily UU No. 45 Year 2009 (amendment of UU No. 31/2004). Sanctions against foreign vessels perpetrators of illegal fishing include:

1. Fines/financial penalties;
2. Confiscation of fishing gear, catch, along with vessels used;
3. Detention of the vessels' crews and captains; and
4. The burning and/or sinking of said vessel.[62]

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issued to large fishing operations; it also outlaws the extension of licenses expiring within the six-month period. Regulation text *available at* http://www.astuin.org/content/permen-kp-no56-2014-moratorium-usaha-perikanan-tangkap-di-wpp-nri/ See also Tama Salim, *With Moratorium in Place, Susi Begins Massive Restructuring,* The Jakarta Post, 12 November 2014, *available at* http://www.thejakartapost.com/news/2014/11/12/with-moratorium-place-susi-begins-massive-restructuring.html/.

59 Chilkoti, *supra* note 56.

60 The act of off-loading a container from one ship and loading it onto another ship. Regulation text *available at* http://www.astuin.org/content/permen-kp-no-57-2014-menghentikan-kegiatan-transhipment-di-laut-wpp-nri/.

61 Evan Laksamana, *The Domestic Politics of Indonesia's Approach to the Tribunal Ruling and the South China Sea*, 38(3) CONTEMPORARY SOUTHEAST ASIA 382–388 (2016).

62 Rothwell and Stephens, *supra* note 3.

Indonesia does not impose criminal sanctions for (individual) foreign perpetrators of illegal fishing in Indonesian EEZ, as provided in Article 102 of UU No. 31/2004. Article 104 stipulates the conditions for prompt release – as per international norms – of a detained and its crew after the payment of a reasonable bond.[63]

The last of which – that is, ship sinking – remains the form of law enforcement that attracts hype and exposure, and seems to be especially administered by Indonesia in an effort to combat illegal fishing. Data from the Ministry of Maritime Affairs and Fisheries shows that the number of ships sunk increased dramatically over the last two years[64] – since President Widodo was inaugurated and took office.

The sinking of foreign vessel that committed illegal fishing has its own sets of standard operating procedures (SOP), namely:

1. Securing the crew;
2. Inventory of the equipment on the vessel, as well as emptying the vessel of fuel;
3. Documentation;
4. Setting aside (part of) the illegal catch for evidentiary purposes; and
5. Prepare and enclose minutes (*berita acara*).

Officials and institutions authorized to conduct such enforcement include the Ministry of Maritime Affairs and Fisheries (MMAF), the Indonesian Navy (TNI-AL), and the Indonesian National Police (Polri). The same three institutions are also authorized to pursue and halt vessels suspected of illegal fishing alongside another institution: the Coast Guard (*Badan Keamanan Laut* – Bakamla), the last of which was formed in 2013.

Ship sinking remains an effective means of Indonesian law enforcement to reduce the practice of illegal fishing by foreign vessels in Indonesian waters, especially in an area as vast as the EEZ. The issuance of Presidential Decree No. 115/2015,[65] which also put forward the establishment of Indonesia's Task Force on Illegal Fishing, aims to reinforce rule of law and the effort to bring together the strengths of the various aforementioned maritime institutions.

Despite its seemingly grandiose and highly-publicized nature, this particular policy of Indonesia does not run contrary to Article 73 of UNCLOS – rather, it can be argued that it is still in accordance with the provisions set forth by

63 *Ibid.*

64 *Penenggelaman Kapal, supra* note 22.

65 Peraturan Presiden No. 115 Year 2015 Tentang Satuan Tugas Pemberantasan Penangkapan Ikan secara Ilegal [Presidential Regulation No. 115 Year 2015 concerning Special Task Force against Illegal Fishing]. Regulation text *available at* http://kkp.go.id/wp-content/uploads/2016/10/PERPRES_NO_115_2015.pdf/.

Article 73(1) of the Convention. The sinking of foreign vessels that commit illegal fishing is a form of law enforcement; to ensure (State) compliance both to existing Indonesian domestic law as well as international standards. It is not done arbitrarily. Implicit agreement by the international community is also arguably shown, as there has yet to be a State that submits the practice or used it as grounds to bring Indonesia to tribunals responsible under the international regime (i.e., the International Tribunal for the law of the Sea (ITLOS)).

Fishing is far from the only maritime activity regulated under said international regime. It also boasts several other conventions that govern problems such as drug trafficking, maritime terrorism, illegal fishing, marine pollution, shipping, containers, trade, biodiversity and human trafficking.

VIII Slavery within the Fishing Industry: Violations of Human Rights in Indonesian Waters

It is then despairing that human trafficking can still be seen in the fishing industry as recently as 2016. The transnational nature of the human rights regime submits that slavery and forced labour – for that is what has happened – so prejudicial to the interests of all States, that it allows any State to exercise jurisdiction over them, wherever they take place and whatever the nationality of the alleged offender or victim.[66] An especially poignant case for Indonesia, that includes the island village Benjina in its territory, and lists the offending company (Pusaka Benjina Resources) as an Indonesian business entity.

In 2015, more than 300 slaves forced to work fishing in Indonesia were rescued in an effort of investigation.[67] The small harbor in the Island occupied by Pusaka Benjina Resources, whose five-story office compound stands out and includes the cage with the slaves. The company is the only fishing operation on Benjina officially registered in Indonesia, and is listed as the owner of more than 90 trawlers. However, the captains are Thai, and the Indonesian government is reviewing to see if the boats are really Thai-owned. The Arafura Sea provides some of the world's richest and most diverse fishing grounds, teeming with mackerel, tuna, squid and many other species. Although it is Indonesian territory, it draws many illegal fishing fleets, including from Thailand.

66 Aust, *supra* note 2, at 44. *See also* ANDREW CLAPHAM, HUMAN RIGHTS: A VERY SHORT INTRODUCTION (2007).

67 *AP Explore: Seafood from Slaves,* ASSOCIATED PRESS, *available at* https://www.ap.org/explore/seafood-from-slaves/. *See also* MARTHA MENDOZA ET AL., FISHERMEN SLAVES: HUMAN TRAFFICKING AND THE SEAFOOD WE EAT (2016).

The Associated Press (AP)[68] revealed a report that thousands of workers were being held against their will on an isolated island in often-brutal conditions. Slavery runs rampant in the industry, the AP investigation found, and some of the fish caught by slaves makes its way to grocery stores and markets throughout the world.[69]

Many of the slaves were originally from Myanmar and were trafficked through Thailand to the Indonesian fishing companies.[70] In response to the AP report,[71] officials from three countries went to a remote island of Indonesia to investigate how thousands of foreign fishermen wound up there as slaves and were forced to catch seafood that could eventually end up being exported to various countries.[72]

To further demonstrate the interlinking between States, businesses, and their dealings with international norms,[73] it must be noted that even before the publicizing of slavery in Benjina, the Thai government has promised a new national registry of illegal migrant workers, including more than 100,000 workers in the seafood industry. However, policing has now become even harder because decades of illegal fishing have depleted stocks close to home, pushing the boats farther and deeper into foreign waters.[74]

Meanwhile, the Indonesian government has continued to aim to clear out foreign poachers who take billions of dollars of seafood from the country's waters. As a result, more than 50 boats were docked in Benjina, leaving up to 1,000 more slaves stranded onshore and waiting to see what would happen next.[75]

68 Robin McDowell and Margie Mason, *Over 300 Slaves Rescued from Indonesia Island After AP Investigation Into Forced Labor*, Associated Press, 4 April 2015, *available at* https://www.ap.org/explore/seafood-from-slaves/over-300-slaves-rescued-from-Indonesia-island-after-ap-investigation.html.

69 Associated Press, *supra* note 67.

70 *Indonesia: Burmese Workers in Slave-like Conditions to Catch Seafood Supplying US Businesses*, Business and Human Rights Resource Center, 24 June 2015, *available at* https://business-humanrights.org/en/indonesia-burmese-workers-in-slave-like-conditions-to-catch-seafood-supplying-us-businesses/.

71 *AP Investigation: Men Forced to Work as Slaves to Catch Seafood for Global Supply*, US NEWS, 24 March 2015, *available at* https://www.usnews.com/news/business/articles/2015/03/24/ap-investigation-are-slaves-catching-the-fish-you-buy.

72 Claudia Koerner, *More than 300 Slaves Rescued in Indonesia after AP Investigation*, Buzzfeed News, 6 April 2015, *available at* https://www.buzzfeed.com/claudiakoerner/more-than-300-slaves-rescued-in-indonesia-after-ap-investiga?utm_term=.xnOQN-RovL#.qvAXEpGoe/.

73 Elena Shih, The Price of Freedom: Moral and Political Economies of the Global Anti-Trafficking Movement (2015).

74 FAO, *supra* note 3.

75 International Organization for Migration, *Final Group of Fisheries "Slaves" to be Repatriated from Indonesia*, IOM, (22 March 2016), *available at* http://www.iom.int/news/

Indonesian officials are trying to enforce laws that ban cargo ships from picking up fish from boats at sea. This practice forces men to stay on the water for months or sometimes years at a time, essentially creating floating prisons, and given the common practice of faking or duplicating licenses.

As of this article's writing, it has been almost two years since the AP report revealed deaths and slavery aboard fishing boats in Indonesian waters and sparked a mass rescue of men in Benjina and Ambon.

The testimony of more than 1,100 of these fishermen, as well as more than 280 returned Indonesian fishers, has since been pieced together by the International Organization for Migration (IOM) to form a detailed account of how those involved in IUU fishing on foreign vessels in Indonesia go about their business.[76] It has since been concluded that when compared to trafficking in persons in other sectors, exploitation in the fishing industry is among the most severe.[77]

On more lofty and quantifiable terms, it is safe to say that national laws were breached, fraudulent front companies established, different flags raised aboard vessels, and catch changed hands at sea until the fish entered the global supply chain where people were ignorant of its provenance and the human toll. The case, and the harrowing stories of the slaves contained within, is symptomatic of the insidious trade in people,[78] not only in the Indonesian and Thai fishing industries, but globally.

On the private side of things, it seems high time that businesses and consumers educate themselves and disavow, "criminal activity and exploitation potentially underpinning their profits or the fish on their plate."[79] In the public arena, recommendations have been made for the Indonesian government, including that investigators be trained to spot the signs of human trafficking. Minister Pudjiastuti has also announced that fisheries businesses must now comply with a "human rights audit," as part of the licensing process.[80]

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final-group-fisheries-slaves-be-repatriated-indonesia/.

76 International Organization for Migration, *Crimes at Sea Focus of New Indonesian Research, Maritime Security Forum Told*, IOM, 11 March 2016, *available at* http://www.iom.int/news/crimes-sea-focus-new-indonesian-research-maritime-security-forum-told/.

77 International Organization for Migration, *Human Trafficking in the Fishery Sector: The Benjina Case,* IOM, 15 June 2015, *available at* https://indonesia.iom.int/human-trafficking-fishery-sector-benjina-case/.

78 *Ibid.*

79 *Ibid*. *See also* Shih, *supra* note 73.

80 *Peraturan Menteri Kelautan dan Perikanan* (*Permen-KP*) *No. 2/2017 tentang Mekanisme Sertifikasi Hak Asasi Manusia pada Usaha Perikanan* [Ministerial Regulation of Marine Affairs and Fisheries No. 2 Year 2017 concerning Human Rights Certification Mechanism for Fishing Industries]. Regulation text *available at* http://www.hukumonline.com/pusatdata/detail/lt589c3f91867c0/node/534/peraturan-menteri-kelautan-dan-perikanan-nomor-2-permen-kp-2017-tahun-2017/. *See also* the Ministry's immediate

IX Conclusion

Illegal fishing is an act that is tremendously ecologically unsustainable, leading to overfishing and a myriad of issues – including slavery, taking into account of the Benjina case – if the lax nature of fishing regulations remains unabated. At first glance, the posture Indonesia's current administration has taken, especially when it comes to maritime matters, seems to be in accordance with the law. Though the notorious law enforcement measures may ruffle diplomatic feathers, it is inseparable from national politics and approach favoured by President Widodo. In fact, it would be easy to argue that it is an expression of sovereignty.

A great body of international instruments and conventions as well as bilateral and regional arrangements has been adopted to deal with various maritime issues. The problem may lie in the lack of ability in implementing many of these conventions and agreements, particularly among developing countries that have limited capacity and resources. As maritime issues are usually transnational in nature, it is imperative that countries cooperate with each other in overcoming most of these problems. Indonesia, as an archipelagic State with a vast area of waters upholding its tougher policy against illegal fishing, is indeed in accordance with both national and international law. Despite foreign diplomatic concern, Indonesia needs to consistently implement its policy due to its positive impact on fish stocks and the livelihood of fishing communities.

On the other hand, although non-State actors are increasingly taking an active part in ocean governance – such as the Associated Press exposé that revealed the distressing conditions of slavery in Benjina – ultimately, States bear the primary responsibility in ensuring the security of the waters under their national jurisdiction and in protecting their marine environment. Developing countries need financial support as well as technological and technical assistance from each other as well as other countries so that they can enhance their ability to protect their marine environment and prevent illegal acts in their national waters. At the same time, however, regional and international cooperation should not be seen to be overstepping on the sovereignty of particular States, especially on issues related to law enforcement at sea.

press release, *available at* http://kkp.go.id/2017/01/24/laporan-penelitian-dan-permen-sertifikasi-ham-awak-kapal-perikanan/.

Legal Materials

Participation in Multilateral Treaties

*Karin Arts**

Editorial Introduction

This section records the participation of Asian states in open multilateral law-making treaties which mostly aim at world-wide adherence. It updates the treaty sections of earlier Volumes until 31 December 2016. New data are preceded by a reference to the most recent previous entry in the multilateral treaties section of the *Asian Yearbook of International Law*. In case no new data are available, the title of the treaty is listed with a reference to the last Volume containing data on the treaty involved. For the purpose of this section, states broadly situated west of Iran, north of Mongolia, east of Papua New Guinea and south of Indonesia will not be covered.

Note

- Where no other reference to specific sources is made, data were derived from *Multilateral Treaties Deposited with the Secretary-General*, https://treaties.un.org/pages/participationstatus.aspx or, when not available there, from the *United Nations Treaty Series Online*, https://treaties.un.org/pages/UNTSOnline.aspx?id=2&clang=_en
- Where reference is made to the Hague Conference on Private International Law (HccH), data were derived from https://www.hcch.net/en/instruments/conventions
- Where reference is made to the International Atomic Energy Agency (IAEA), data were derived from http://ola.iaea.org/ola/treaties/multi.html
- Where reference is made to the International Civil Aviation Organization (ICAO), data were derived from https://www.icao.int/Secretariat/Legal/Pages/TreatyCollection.aspx
- Where reference is made to the International Committee of the Red Cross (ICRC), data were derived from https://www.icrc.org/applic/ihl/ihl.nsf/
- Where reference is made to the International Labour Organization (ILO), data were derived from http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0

* Professor of International Law and Development at the International Institute of Social Studies of Erasmus University Rotterdam (ISS), based in The Hague, The Netherlands.

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- Where reference is made to the International Maritime Organization (IMO), data were derived from http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202018.pdf
- Where reference is made to the United Nations Educational, Scientific and Cultural Organization (UNESCO), data were derived from http://portal.unesco.org/en/ev.php-URL_ID=12024&URL_DO=DO_TOPIC&URL_SECTION=201.html
- Where reference is made to WIPO, data were derived from http://www.wipo.int/treaties/en
- Where reference is made to the Worldbank, data were derived from www.worldbank.org/en/about/leadership/members#4 and www.worldbank.org/en/about/leadership/members#5
- Reservations and declarations made upon signature or ratification are not included.
- Sig. = Signature; Cons. = Consent to be bound; Eff. date = Effective date; E.i.f. = Entry into force; Rat. = Ratification or accession.

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State	*Sig.*	*Cons.*
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State	*Sig.*	*Cons.*
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State	*Sig.*	*Cons.*
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State	*Cons.*	*E.i.f.*
Myanmar	15 Dec 2016	not yet

Amendment to the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1995
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State	*Sig.*	*Cons.*
Iran		12 Jan 2016

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Entry into force: not yet

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Seoul, 12 November 2012
Entry into force: not yet

State	*Sig.*	*Rat.*
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State	*Sig.*	*Cons.*
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Pakistan	26 Sep 2001	17 Nov 2016

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State	*Sig.*	*Cons.*
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Korea (DPR)	3 Jul 2013	6 Dec 2016

Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2008
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State	*Sig.*	*Cons.*
Thailand		2 Sep 2016

International Convention for the Protection of All Persons from Enforced Disappearance, 2010
(Continued from Vol. 21 p. 246)

State	*Sig.*	*Cons.*
Sri Lanka	10 Dec 2015	25 May 2016

Humanitarian Law in Armed Conflict

International Conventions for the Protection of Victims of War, I-IV, 1949: *see* Vol. 11 p. 252.
Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977, *see:* Vol. 18 p. 107.
Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977, *see:* Vol. 12 p. 244.
Protocol III Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem, 2005: *see* Vol. 17 p. 171.

Intellectual Property

Convention for the Protection of Industrial Property, 1883 as amended 1979: *see* Vol. 12 p. 244.
Universal Copyright Convention, 1952: *see* Vol. 6 p. 251.
Protocols 1, 2 and 3 annexed to the Universal Copyright Convention, 1952: *see* Vol. 6 p. 251.
Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, 1957 as amended in 1979: *see* Vol. 13 p. 271.

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961: *see* Vol. 18 p. 109.
Convention Establishing the World Intellectual Property Organization, 1967: *see* Vol. 12 p. 245.
Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, 1971: *see* Vol. 18 p. 109.
Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties, 1979: *see* Vol. 6 p. 252.
Trademark Law Treaty, 1994: *see* Vol. 15 p. 222.
WIPO Performances and Phonograms Treaty, 1996: *see* Vol. 18 p. 109.
WIPO Copyright Treaty, 1996: *see* Vol. 18, p. 109.

Convention for the Protection of Literary and Artistic Works, 1886 as amended 1979
(Continued from Vol. 12 p. 244).
(Status as provided by WIPO)

State	*Party*	*Latest Act to which State is party*
Turkmenistan	29 May 2016	Paris

Madrid Union Concerning the International Registration of Marks, including the Madrid Agreement 1891 as amended in 1979, and the Madrid Protocol 1989
(Continued from Vol. 16 p. 168 and corrected from Vol. 21 p. 247)
(Status as provided by WIPO)

State	*Sig.*	*Rat.*
Cambodia		5 Jun 2015
Laos		7 Mar 2016

Patent Cooperation Treaty, 1970 as amended in 1979 and modified in 1984 and 2001
(Continued from Vol. 15 p. 221)
(Status as provided by WIPO)

State	*Sig.*	*Rat.*
Cambodia		8 Sep 2016

Patent Law Treaty, 2000
(Continued from Vol. 17 p. 172)
(Status as provided by WIPO)

State	*Sig.*	*Rat.*
Japan		11 Mar 2016

Singapore Treaty on the Law of Trademarks, 2006
(Continued from Vol. 20 p. 204)
(Status as provided by WIPO)

State	*Sig.*	*Rat.*
Japan		11 Mar 2016
Korea (DPR)		13 Jun 2016
Korea (Rep.)		1 Apr 2016

Beijing Treaty on Audiovisual Performances, 2012
(Continued from Vol. 21 p. 247)
(Status as provided by WIPO)

State	*Sig.*	*Rat.*
Korea (DPR)	26 Jun 2012	19 Feb 2016

Marrakesh Treaty to Facilitate Access to published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled, 2013
(Continued from Vol. 21 p. 247)
Entry into force: 30 September 2016
(Status as provided by WIPO)

State	*Sig.*	*Rat.*
Korea (DPR)	28 Jun 2013	19 Feb 2016
Sri Lanka		5 Oct 2016

International Crimes

Slavery Convention, 1926 as amended in 1953: *see* Vol. 15 p. 223.
Convention on the Prevention and Punishment of the Crime of Genocide, 1948: *see* Vol. 21 p. 249.
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956: *see* Vol. 14 p. 236.
Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963: *see* Vol. 9 p. 289.
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1968: *see* Vol. 6 p. 254.
Convention for the Suppression of Unlawful Seizure of Aircraft, 1970: *see* Vol. 8 p. 289.
Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971: *see* Vol. 8 p. 290.
International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973: *see* Vol. 7 p. 331.
Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, 1973: *see* Vol. 14 p. 236.
International Convention Against the Taking of Hostages, 1979: *see* Vol. 20 p. 206.
Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988: *see* Vol. 18 p. 111.
Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1988, *see* Vol. 12 p. 247.
International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989: *see* Vol. 11 p. 254.
Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991: *see* Vol. 15 p. 224.

Convention on the Safety of United Nations and Associated Personnel, 1994: *see* Vol. 11 p. 255.
International Convention for the Suppression of Terrorist Bombings, 1997: *see* Vol. 20 p. 206.
Statute of the International Criminal Court, 1998: *see* Vol. 16 p. 171.
International Convention for the Suppression of the Financing of Terrorism, 1999: *see* Vol. 17 p. 174.
Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime, 2000: *see* Vol. 21 p. 250.
Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention Against Transnational Organized Crime, 2001: *see* Vol. 21 p. 250.
Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 2005: *see* Vol. 18 p. 112.

United Nations Convention Against Transnational Organized Crime, 2000
(Continued from Vol. 21 p. 249)

State	*Sig.*	*Rat.*
Korea (DPR)		17 Jun 2016

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, 2000
(Continued from Vol. 20 p. 207)

State	*Sig.*	*Rat.*
Maldives		14 Sep 2016

United Nations Convention Against Corruption, 2003
(Continued from Vol. 17 p. 175)

State	*Sig.*	*Rat.*
Bhutan	15 Sep 2005	21 Sep 2016

International Convention for the Suppression of Acts of Nuclear Terrorism, 2005
(Continued from Vol. 20 p. 207)

State	*Sig.*	*Rat.*
Vietnam		23 Sep 2016

International Representation

(*see also*: Privileges and Immunities)
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, 1975: *see* Vol. 6 p. 257.

International Trade

Convention on Transit Trade of Land-locked States, 1965: *see* Vol. 17 p. 176.
Convention on the Limitation Period in the International Sale of Goods, 1974: *see* Vol. 6 p. 257.
UN Convention on Contracts for the International Sale of Goods, 1980: *see* Vol. 21 p. 251.
UN Convention on the Liability of Operators of Transport Terminals in International Trade, 1991: *see* Vol. 6 p. 257.
United Nations Convention on the Use of Electronic Communications in International Contracts, 2005: *see* Vol. 21 p. 251.

Judicial and Administrative Cooperation

Convention on Civil Procedure, 1954: *see* Vol. 20 p. 208.
Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 1961: *see* Vol. 17 p. 176.

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1965
(Continued and corrected from Vol. 9 p. 291)

State	*Sig.*	*Cons.*
Kazakhstan		15 Oct 2015
Vietnam		16 Mar 2016

Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 1970
(Continued from Vol. 16 p. 173)

State	*Sig.*	*Cons.*
Kazakhstan		26 Sep 2016

Labour

Forced Labour Convention, 1930 (ILO Conv. 29): *see* Vol. 19 p. 192.
Right to Organise and Collective Bargaining Convention, 1949 (ILO Conv. 98): *see* Vol. 19 p. 193.
Abolition of Forced Labour Convention, 1957 (ILO Conv. 105): *see* Vol. 19 p. 193.
Minimum Age Convention, 1973 (ILO Conv. 138): *see* Vol. 19 p. 193.
Worst Forms of Child Labour Convention, 1999 (ILO Conv. 182): *see* Vol. 19 p. 194.

Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO Conv. 87)
(Continued from Vol. 19 p. 192)
(Status as provided by the ILO)

State	*Rat. Registered*
Uzbekistan	12 Dec 2016

Equal Remuneration Convention, 1951 (ILO Conv. 100)
(Continued from Vol. 19 p. 193)
(Status as provided by the ILO)

State	*Rat. Registered*
Timor Leste	10 May 2016

Discrimination (Employment and Occupation) Convention, 1958 (ILO Conv. 111)
(Continued from Vol. 19 p. 193)
(Status as provided by the ILO)

State	*Rat. Registered*
Timor Leste	10 May 2016

Employment Policy Convention, 1964 (ILO Conv. 122)
(Continued from Vol. 8 p. 186)

State	*Rat. Registered*
Sri Lanka	3 Feb 2016

Promotional Framework for Occupational Safety and Health Convention, 2006 (ILO Conv. 187)
(Continued from Vol. 21 p. 252)
(Status as provided by the ILO)

State	*Rat. Registered*
Thailand	23 Mar 2016

Narcotic Drugs

Protocol Amending the Agreements, Conventions and Protocols on Narcotic Drugs, concluded at The Hague on 23 January 1912, at Geneva on 11 February 1925 and 19 February 1925 and 13 July 1931, at Bangkok on 27 November 1931 and at Geneva on 26 June 1936, 1946: *see* Vol. 6 p. 261.
Agreement Concerning the Suppression of the Manufacture of, Internal Trade in, and Use of, Prepared Opium and amended by Protocol, 1925, amended 1946: *see* Vol. 6 p. 261.
International Opium Convention, 1925, amended by Protocol 1946: *see* Vol. 7 p. 334.
Agreement Concerning the Suppression of Opium Smoking, 1931, amended by Protocol, 1946: *see* Vol. 6 p. 261.
Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, 1931, and amended by Protocol, 1946: *see* Vol. 7 p. 334.
Protocol bringing under International Control Drugs outside the Scope of the Convention of 1931, as amended by the Protocol of 1946: *see* Vol. 6 p. 262.
Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, 1936, amended 1946: *see* Vol. 6 p. 262.
Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, 1953: *see* Vol. 6 p. 262.
Single Convention on Narcotic Drugs, 1961: *see* Vol. 13 p. 276.
Single Convention on Narcotic Drugs, 1961, as Amended by Protocol 1972: *see* Vol. 21 p. 253.
Convention on Psychotropic Substances, 1971: *see* Vol. 13 p. 276.
Protocol amending the Single Convention on Narcotic Drugs, 1972: *see* Vol. 15 p. 227.
United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988: *see* Vol. 20 p. 210.

Nationality and Statelessness

Convention relating to the Status of Stateless Persons, 1954: *see* Vol. 17 p. 178.
Optional Protocol to the Vienna Convention on Diplomatic Relations concerning Acquisition of Nationality, 1961: *see* Vol. 6 p. 265.
Optional Protocol to the Vienna Convention on Consular Relations concerning Acquisition of Nationality, 1963: *see* Vol. 8 p. 187.

Nuclear Material

Convention on Civil Liability for Nuclear Damage, 1963: *see* Vol. 17 p. 179.
Joint Protocol Relating to the Application of the Vienna Convention (and the Paris Convention on Third Party Liability in the Field of Nuclear Energy), 1988: *see* Vol. 6 p. 265.
Convention on Early Notification of a Nuclear Accident, 1986: *see* Vol. 19 p. 196.
Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1986: *see* Vol. 19 p. 196.
Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, 1997: *see* Vol. 19 p. 196.
Convention on Supplementary Compensation for Nuclear Damage, 1997: *see* Vol. 16 p. 178.
Protocol to Amend the 1963 Convention on Civil Liability for Nuclear Damage, 1997: *see* Vol. 17 p. 180.

Convention on the Physical Protection of Nuclear Material, 1980
(Continued from Vol. 21 p. 254)
(Status as provided by IAEA)

State	*Sig.*	*Cons.* (*deposit*)
Myanmar		6 Dec 2016

Amendment to the 1980 Convention on the Physical Protection of Nuclear Material, 2005
(Continued from Vol. 20 p. 212)
(Status as provided by IAEA)

State	*Sig.*	*Cons.* (*deposit*)
Kyrgyzstan		26 Sep 2016
Myanmar		6 Dec 2016
Pakistan		24 Mar 2016

Convention on Nuclear Safety, 1994
(Continued from Vol. 18 p. 117)
(Status as provided by IAEA)

State	*Sig.*	*Cons. (deposit)*
Myanmar		6 Dec 2016

Outer Space

Treaty on Principles Governing the Activities of the States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 1967: *see* Vol. 16 p. 178.
Agreement governing the Activities of States on the Moon and other Celestial Bodies, 1979: *see* Vol. 10 p. 284.
Convention on Registration of Objects launched into Outer Space, 1974: *see* Vol. 15 p. 229.

Privileges and Immunities

Convention on the Privileges and Immunities of the United Nations, 1946: *see* Vol. 19 p. 197.
Convention on the Privileges and Immunities of the Specialized Agencies, 1947: *see* Vol. 7 p. 338.
Vienna Convention on Diplomatic Relations, 1961: *see* Vol. 19 p. 197.
Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, 1961: *see* Vol. 6 p. 269.
Vienna Convention on Consular Relations, 1963: *see* Vol. 19 p. 197.
Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 1963: *see* Vol. 6 p. 269.
Convention on Special Missions, 1969: *see* Vol. 6 p. 269.
Optional Protocol to the Convention on Special Missions concerning the Compulsory Settlement of Disputes, 1969: *see* Vol. 6 p. 269.
United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004: *see* Vol. 15 p. 230.

Refugees

Convention relating to the Status of Refugees, 1951: *see* Vol. 12 p. 254.
Protocol relating to the Status of Refugees, 1967: *see* Vol. 12 p. 254.

Road Traffic and Transport

Convention on Road Traffic, 1968: *see* Vol. 12 p. 254.
Convention on Road Signs and Signals, 1968: *see* Vol. 20 p. 213.

Sea

Convention on the Territorial Sea and the Contiguous Zone, 1958: *see* Vol. 6 p. 271.
Convention on the High Seas, 1958: *see* Vol. 7 p. 339.
Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958: *see* Vol. 6 p. 271.
Convention on the Continental Shelf, 1958: *see* Vol. 6 p. 271.
Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, 1958: *see* Vol. 6 p. 272.
United Nations Convention on the Law of the Sea, 1982: *see* Vol. 19 p. 198.
Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1994: *see* Vol. 19 p. 199.
Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea (…) relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995: *see* Vol. 20 p. 214.

Sea Traffic and Transport

Convention Regarding the Measurement and Registration of Vessels employed in Inland Navigation, 1956: *see* Vol. 6 p. 273.
International Convention for the Safety of Life at Sea, 1960: *see* Vol. 6 p. 273.
Convention on Facilitation of International Maritime Traffic, 1965 as amended: *see* Vol. 12 p. 255.
International Convention on Load Lines, 1966: *see* Vol. 15 p. 230.
International Convention on Tonnage Measurement of Ships, 1969: *see* Vol. 15 p. 231.

Special Trade Passenger Ships Agreement, 1971: *see* Vol. 6 p. 275.
Convention on the International Regulations for Preventing Collisions at Sea, 1972: *see* Vol. 19 p. 200.
International Convention for Safe Containers, as amended 1972: *see* Vol. 20 p. 215.
Protocol on Space Requirements for Special Trade Passenger Ships, 1973: *see* Vol. 6 p. 275.
Convention on a Code of Conduct for Liner Conferences, 1974: *see* Vol. 6 p. 276.
International Convention for the Safety of Life at Sea, 1974: *see* Vol. 15 p. 231.
Protocol Relating to the International Convention for the Safety of Life at Sea, 1974 as amended 1978: *see* Vol. 12 p. 256.
UN Convention on the Carriage of Goods by Sea, 1978: *see* Vol. 6 p. 276.
International Convention on Standards of Training, Certification and Watch-keeping for Seafarers, as amended, 1978: *see* Vol. 19 p. 200.
Protocol Relating to the International Convention on Load Lines, 1988: *see* Vol. 17 p. 183.
Protocol Relating to the International Convention for the Safety of Life at Sea, 1988: *see* Vol. 18 p. 120.

Nairobi International Convention on the Removal of Wrecks, 2007
(Continued from Vol 21 p. 256)
(Status as provided by IMO)

State	*Cons. (dep.)*	*E.i.f.*
China	11 Nov 2016	Not yet

Social Matters

International Agreement for the Suppression of the White Slave Traffic, 1904, amended by Protocol 1949: *see* Vol. 6 p. 278.
International Convention for the Suppression of the White Slave Traffic, 1910, amended by Protocol 1949: *see* Vol. 6 p. 278.
Agreement for the Suppression of the Circulation of Obscene Publications, 1910, amended by Protocol 1949: *see* Vol. 6 p. 278.
International Convention for the Suppression of the Traffic in Women and Children, 1921: *see* Vol. 6 p. 277.

Convention for the Suppression of the Traffic in Women and Children, 1921, amended by Protocol in 1947: *see* Vol. 6 p. 277.
International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, 1923: *see* Vol. 6 p. 277.
International Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications, 1923, amended by Protocol in 1947: *see* Vol. 6 p. 277.
International Convention for the Suppression of the Traffic in Women of Full Age, 1933: *see* Vol. 6 p. 277.
International Convention for the Suppression of the Traffic in Women of Full Age, 1933, amended by Protocol, 1947: *see* Vol. 6 p. 277.
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950: *see* Vol. 12 p. 257.
Final Protocol to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950: *see* Vol. 12 p. 257.
International Convention Against Doping in Sports, 2005: *see* Vol. 20 p. 217.

Telecommunications

Constitution of the Asia-Pacific Telecommunity, 1976: *see* Vol. 13 p. 280.
Convention on the International Mobile Satellite Organization (INMARSAT), 1976 (as amended): *see* Vol. 19 p. 202.
Agreement establishing the Asia-Pacific Institute for Broadcasting Development, 1977: *see* Vol. 10 p. 287.
Amendment to Article 11, Paragraph 2(a), of the Constitution of the Asia-Pacific Telecommunity, 1981: *see* Vol. 8 p. 193.
Amendments to articles 3(5) and 9(8) of the Constitution of the Asia-Pacific Telecommunity, 1991: *see* Vol. 9 p. 298.
Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, 1998: *see* Vol. 15 p. 232.
Amendments to the Agreement establishing the Asia-Pacific Institute for Broadcasting Development, 1999: *see* Vol. 10 p. 288.
Amendments to the Constitution of the Asia-Pacific Telecommunity, 2002: *see* Vol. 13 p. 280.

Treaties

Vienna Convention on the Law of Treaties, 1969: *see* Vol. 19 p. 203.
Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, 1986: *see* Vol. 6 p. 280.

Weapons

Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Warfare, 1925: *see* Vol. 6 p. 281.
Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 1963: *see* Vol. 6 p. 281.
Treaty on the Non-Proliferation of Nuclear Weapons, 1968: *see* Vol. 11 p. 262.
Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, 1971: *see* Vol. 6 p. 282.
Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 1976: *see* Vol. 21 p. 259.
Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed Excessively Injurious or to have Indiscriminate Effects, and Protocols, 1980: *see* Vol. 11 p. 263.
Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1992: *see* Vol. 21 p. 259.
Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 1997: *see* Vol. 13 p. 281.
Amendment of Article 1 of the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed Excessively Injurious or to have Indiscriminate Effects, 2001: *see* Vol. 12 p. 259.
Convention on Cluster Munitions, 2008: *see* Vol. 19 p. 204.

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1972
(Continued from Vol. 20 p. 220)
(Status as provided by ICRC)

State	*Sig.*	*Cons.*
Nepal	10 Apr 1972	1 Dec 2016

Comprehensive Nuclear Test Ban Treaty, 1996
(Continued from Vol. 19 p. 204)

State	*Sig.*	*Cons.*
Myanmar	25 Nov 1996	21 Sep 2016

Arms Trade Treaty, 2013
(Continued from Vol. 20 p. 220)

State	*Sig.*	*Cons.*
Korea (Rep.)	3 Jun 2013	28 Nov 2016

State Practice of Asian Countries in International Law

Bangladesh

*Sumaiya Khair**

Legislation

Plantation Workers' Welfare – Grants – Financial Assistance

***Bangladesh Tea Workers' Welfare Fund Act 2016* (*Act No.1 of 2016*)**

Drawing on the spirit of ILO Convention concerning Conditions of Employment of Plantation Workers 1958 (C110) and Recommendation concerning Welfare Facilities for Workers 1956 (R102), the Bangladesh Parliament enacted the Bangladesh Tea Workers' Welfare Fund Act 2016 (Act No.1 of 2016) on 9 February 2016 applicable to all permanent tea plantation workers working in tea gardens of Bangladesh (Section 1). The Act directs the government to form a Management Board, whose membership includes, *inter alia*, representatives from the Bangladesh Tea Workers Union (Section 4). The Board shall have the power to grant funds for government projects of workers and their families and invest in profitable schemes (Section 6). Money for the Board Fund may be received from grants or donations given by the government; grant or donation given by tea gardens, or any local authority or any organization and person; income from the money invested in the fund; and any other legitimate source (Section 7).

The Board may grant tea plantation workers financial assistance on various grounds. For example, if a worker is declared permanently disabled by a medical authority and hence retired, withdrawn or exempted from service; or if he retires from service; or if he dies within five years from the date of retirement (Section 8). Grants are available for the marriage of a daughter of a dead or disabled worker or who is in a particularly distressing situation (Section 9) and education of children of unemployed, dead or disabled worker (Section 11). Section 11 of the Act provides for special grants for any medical assistance including blood transfusion; purchase spectacles and other medical accessories for the body; burial or funeral; assistance for physical injury or accidental damage; and the purchase of textbooks.

* Professor, Faculty of Law, University of Dhaka, Bangladesh.

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Judicial Decisions

Money Laundering – Proceeds of Crime – Corruption – Principle of Territoriality – Doctrine of International Double Jeopardy – ICCPR – Application of International Law in Domestic Court

***Robin Chowdhury @ Misba Uddin v. Anti-Corruption Commission and others** [**Writ Petition No. 13488 of 2015, Judgment of 21 July 2016, High Court Division of the Supreme Court of Bangladesh** (**Special Original Jurisdiction**)]*

A Deputy Director (Special Enquiry and Investigation-1) of Anti-Corruption Commission, Respondent No. 2 in this case, lodged a First Information Report (FIR) on 20 May 2015, with the police implicating the writ Petitioner and others for committing offence under specific provisions of the Money Laundering Prevention Act 2012. It was alleged in the FIR that on 6 June 2012, the UK Home Office sent a Letter of Request for Legal Assistance in the matter of Robin Choudhury @ Misba Uddin to the Ministry of Home Affairs, Government of Bangladesh. The letter stated that the Petitioner worked for the FLP Solicitors (a law firm) in London from September 2007 to February 2008. During this period, the Petitioner made 13 fraudulent applications for mortgage, through which he obtained more than five million pounds and eventually, he remitted 160 million taka to Bangladesh through different bank accounts. Apart from this, he transferred large amounts of money in both British and Bangladeshi currencies from a joint account with his wife from London to Bangladesh. He deposited the said money in 50 accounts in 10 different banks in Sylhet in the name of his father, wife, uncle and brother-in-law. He also invested some portion of the money in the shares market and purchased land, flats, and furniture, the details of which were mentioned in the FIR. These facts signify that the writ Petitioner has committed an offence under the Money Laundering Prevention Act 2012.

It was also alleged that the Petitioner changed his name to Robin Chowdhury in London and obtained a driving license and a British passport in that name. The London Police arrested the Petitioner in August 2011 and charged him under relevant provisions of the Fraud Act 2006 for fraudulent mortgages and the Proceeds of Crime Act 2002 for money laundering. On 11 April 2013, the Petitioner was convicted and sentenced to imprisonment for eight years. A confiscation order was issued under the Proceeds of Crime Act 2002, whereby the Southwark Crown Court in the UK asked the Petitioner for details of his income, property, motor vehicles, bank accounts, etc. The Proceeds of Crime Act of the UK is essentially similar to the Money Laundering Prevention Act

of Bangladesh. The Petitioner provided all requisite information to the Crown Prosecution Service (CPS) and the concerned Court. On appeal, the Petitioner's sentence was reduced to six years and four months, which he is serving. The Petitioner was subsequently released on license.

The Anti-Corruption Commission (ACC) of Bangladesh (Respondent No. 1) initiated inquiries into the matter in lieu of which it obtained an order from Respondent No. 4, Senior Metropolitan Special Judge Dhaka on 2 January 2014 to freeze the bank accounts of the Petitioner and his wife and lodged an FIR as mentioned above against the Petitioner and four others. The learned counsel for the Petitioner maintained that the offence of money laundering is a transnational crime and the Petitioner had already faced prosecution for the same in the UK and awaiting the outcome. As such, he could not be prosecuted again in Bangladesh for the same offence. Alluding to the principle of "double jeopardy" as enshrined in the Constitution of Bangladesh and the Criminal Procedure Code 1898, which provide that no person shall be prosecuted and punished for the same offence more than once, the counsel for the Petitioner argued that the legal proceedings initiated against the Petitioner was unlawful and of no legal effect. The Petitioner's counsel also drew the attention of the Court to similar provisions enshrined in the International Covenant on Civil and Political Rights (ICCPR) to which Bangladesh is a signatory.

The ACC responded that, the investigating officer investigated the case with permission of the ACC in accordance with law and due process. On finding *prima facie* evidence of infringement of relevant provisions of the Money Laundering Prevention Act, the ACC lodged this FIR. The learned counsel for the Respondent pointed out that it was a settled decision of the Appellate Division of the Supreme Court of Bangladesh that criminal proceeding or investigation process cannot be challenged invoking Article 102 of the Constitution. Besides, the Petitioner being a fugitive from justice had no *locus standi* to file any application/petition before any court of law including this Court. He also explained that the offence of money laundering in the UK for which the Petitioner was convicted and the act of transferring money into different accounts in the names of his relatives were separate and distinct; as such, the principle of "double jeopardy" did not apply in this context.

The moot questions that confronted the Court were two-fold: firstly, whether Article 14(7) of the ICCPR or any other provisions of the same prohibit successive prosecution for the same conduct in which an accused was prosecuted and convicted in another sovereign country under its own law; and secondly, whether the principle of "international double jeopardy" doctrine would be applicable in this particular case.

The Court affirmed that the Bangladesh Constitution (Article 25(2)) contains provisions similar to Article 14(7) of the ICCPR which states that no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with law and penal procedure of each country. As such, there has not been any deviation from the Covenant. The doctrine reflected in Article 35(2) of the Bangladesh Constitution does not extend to any offender prosecuted and convicted in a country of distinct sovereignty, under its own statute.

The Court observed that the Petitioner essentially committed two offences by one act—one committed in the UK and the other in Bangladesh. The Court maintained that as a sovereign entity, Bangladesh has the power to determine independently what act shall constitute offences and to punish them under its laws in the same way UK prosecuted and convicted the Petitioner under its own laws.

The Court noted that:

> [The] territoriality principle is the most common basis of jurisdiction and is widely regarded as a manifestation of state sovereignty. At its simplest, the territoriality principle denotes that a sovereign state has jurisdiction over conduct or act or omission that occurs within its territorial borders. The 'separate sovereigns' doctrine allows for two states to prosecute for the same offence [that] occurred within [the] jurisdiction of both locations. Thus, [sic] [the] ICCPR does not prohibit successive prosecution of the offence committed by same course of conduct under a distinct law of a sovereign country.

The Court emphasized that prosecuting and convicting a Bangladeshi national for an offence committed beyond the territory of Bangladesh creates no bar for his or her successive prosecution for the "same act" in the exercise of power given under Bangladeshi laws. The money brought into Bangladesh by the Petitioner was eventually possessed, transferred and converted knowing that such property constituted the proceeds of crime. As such, the Petitioner committed a new and distinct offence of money laundering in Bangladesh. In the circumstances, the Court disagreed with the claim that the accused was being prosecuted twice for the "same offence" merely because he was convicted for the same act under the law of UK. The Court held that the Petitioner allegedly by a single act violated laws of two sovereign States and thereby committed two distinct offences and therefore, there has not been any breach of the doctrine of "double jeopardy".

In conclusion, the Court reiterated that the principle of "international double jeopardy" is not enforceable in domestic courts unless specifically incorporated in the domestic law. Since the principle has not been incorporated in the Prevention of Money Laundering Act of 2012, there was no scope to enforce it directly. That said, the Court recognized the significance of the "international double jeopardy" doctrine and noted that its decision in this particular case may have an impact on the development of the principle.

International Agreements

Bangladesh Signs Paris Agreement, New York, 22 April 2016

Bangladesh signed the Paris Agreement at the United Nations on 22 April 2016. The Minister for Environment and Forests of Bangladesh signed the Agreement at the General Assembly Hall in the presence of delegations from 171 countries.

The Paris Agreement, alternatively referred to as the Paris Climate Accord or Paris Climate Agreement, is an agreement within the United Nations Framework Convention on Climate Change (UNFCCC), addresses issues of greenhouse gas emissions mitigation, adaptation and finance. Building upon the UNFCC, the Paris Agreement urges all nations to pursue the common cause of combating climate change and to take appropriate measures to help developing countries adapt to its effects. One of the fundamental aims of this Agreement is to strengthen global efforts to keep the increase in global average temperature to well below 2°C above pre-industrial levels and to aim to limit the increase to 1.5°C, since this would significantly reduce the risks and the impacts of climate change. To this end, the Agreement recommends adequate financial flows and frameworks for new technology framework, capacity development, and transparency of action and support for vulnerable and developing countries.

Highlighting Prime Minister Sheikh Hasina's personal commitment to combating climate change, the Bangladesh Statement reaffirmed her Government's readiness to continue to support the comprehensive implementation of the Paris Agreement. The Statement reiterated that "collective wisdom and commitments are essential to implement the Paris Climate Agreement … We all must consider the urgency of acting now". It further observed that, "all countries need to be united in our collective journey, keeping in mind that one's non-compliance may threaten the existence of all. However, developed countries have to take lead in this case". Bangladesh flagged various pro-active initiatives undertaken by the Government to adapt to the effects of climate change by using its own resources and with international cooperation.

Bilateral Agreements/mous

Promotion and Reciprocal Protection of Investments between the Government of the People's Republic of Bangladesh and the Government of the Government of the State of Kuwait, 04 May 2016, Dhaka, Bangladesh

The Governments of Bangladesh and Kuwait entered into a bilateral agreement on 4 May 2016 in Dhaka, Bangladesh. The purpose of the agreement is to "create favorable conditions for the development of economic cooperation between both Parties and in particular for investments by investors of one Contracting Party in the territory of the other Contracting Party" through "promotion and reciprocal protection of such investments". The Contracting Parties recognized that this would stimulate business initiative and increase prosperity in both countries. Appropriate measures must be taken to ensure that investment activities are implemented in consonance with the laws of each Contracting Party (Article 13).

Each Contracting Party will ensure that investments are accorded fair and equitable treatment with full protection and security consistent with recognized principles of its laws and provisions of the Agreement (Article 3(2)) at par with its own investors (Article 4(1)). No unreasonable or discriminatory measure will be taken that is likely to impair the management, maintenance, use, enjoyment or disposal of the investments (Article 3(3)). Article 6 of the Agreement prohibits the nationalization or expropriation of investments except in the public interest on a "non-discriminatory basis and in accordance with due process of law and against prompt, adequate and effective compensation".

The Agreement has provisions for compensation for losses incurred by any Contracting Party due to war, armed conflict, revolution, state of national emergency, riot, revolt or insurrection (Article 7(1)). Contracting Parties shall ensure that such compensation is prompt, adequate and effective (Article 7(2)). Investors of each Contracting Party shall be entitled to free transfer of all payments in connection with the investment into and out of its territory (Article 9(1)). However, such transfer may be prevented or delayed in good faith and consistent with laws and regulations in the event of bankruptcy, insolvency or protection of the rights of creditors; criminal or penal offences; in compliance with judicial orders or judgements or administrative proceedings; taxation; social security, retirement and compulsory savings schemes (Article 1(4)(5)).

In the event of any dispute between the Contracting Parties, the matter shall be settled amicably, failing which it will be referred to international arbitration (Article 11(1)(2)). The arbitral tribunal shall take its decision by majority of votes (Article 11(5)).

Promotion of Economic and Technical Cooperation between Bangladesh and China, 14–16 October 2016

The Presidents of the People's Republic of Bangladesh and the People's Republic of China signed 27 deals worth billions of dollars during the latter's visit to Bangladesh on 14–16 October 2016. Significant among these are an agreement for increasing investment and production capacity building, under which 28 development projects will be supported with $21.5 billion in foreign aid; an economic and technical cooperation agreement for $80.3 million grant; a loan agreement of $700 million for Karnaphuli tunnel construction; a credit construction of $280 million for Dashekandi Sewerage Treatment Plant project; and four more loan deals with regards to purchase of six ships.

The Memoranda of Understanding (MOU) signed by both countries include MOUs on: China's "One Belt, One Road" initiative in which Bangladesh has joined, maritime cooperation, joint feasibility study on a free-trade area, new ICT framework, counter-terrorism collaboration, capacity building and sharing of information, tackling climate change risks, regional and international cooperation, and cooperation on power and energy sectors, river management including dredging and land reclamation, and culture.

Both countries announced 2017 as the Year of Friendship and Exchanges between China and Bangladesh.

Promotion of Economic Ties and Connectivity between Bangladesh and India, 9 March 2016

There has been notable progress in the bilateral relationship between Bangladesh and India as both countries stepped up initiatives to develop economic ties and connectivity. On 9 March 2016, Bangladesh signed an agreement with the Exim Bank of India to fund US$2 billion in low-cost loans for a number of social and development projects. This is the largest credit line that India has extended to any country.

The two countries have also signed key partnerships in the energy and power sectors pursuant to which Bangladesh will receive 100 megawatts of power from the 726-megawatt thermal power plant in Palatana, Tripura. The State-owned Indian electrical company, Bharat Heavy Electricals Limited, has signed an MOU on a US$1.6 Billion Power project in Khulna, Bangladesh.

Beyond this, Bangladesh and India have taken some important measures to enhance connectivity between the two countries. Bus services linking India and Bangladesh have been established and multiple agreements have been signed to enhance trade by improving maritime cooperation. This includes an MOU on the use of Chittagong and Mongla ports in Bangladesh to facilitate the movement of goods to and from India.

Promotion of Bilateral Trade between Bangladesh and Nepal, 11–12 May 2016

The Senior Commerce Secretary of Bangladesh and the Commerce Secretary of Nepal met at a bilateral meeting in Dhaka, Bangladesh on 11–12 May 2016 to discuss the promotion of bilateral trade, improvement of trade facilitation procedures, development of trade-related infrastructure, and reduction of non-tariff barriers. To this end, both countries entered into a number of joint agreements including an MOU between the Bangladesh Standard Testing Institute and the Nepal Bureau of Standards and Metrology for removal of technical barriers to trade; Agreement to harmonize sanitary and phytosanitary measures in agricultural products; Agreement to enhance facilities of land Customs stations, to facilitate increased trade between the two countries; Agreement to simplify visa and immigration process to promote tourism in both countries; and Agreement to participate in trade fairs of both countries.

Additionally, connectivity issues were discussed. Nepal requested for broad gauge conversion of the Radhikapur-India-Birol-Bangladesh rail line. Both countries agreed to bring the Singhabad, India-Rohanpur, Bangladesh rail transit facility into operation. Bangladesh committed to improve connectivity through Jamuna Bridge to enable Nepal to access the Mongla Port in Bangladesh. The delegation agreed to strengthen Bangladesh-Nepal connectivity through cooperation with India.

The countries further agreed to form a technical committee for the development of implementation modality of preferential market access for each other's goods and endorsed the final list of the products that was granted preferential market access, including 108 Nepali goods and 50 Bangladeshi goods.

Statements, Joint Conclusions, Resolutions

Joint Statement of the People's Republic of Bangladesh and the People's Republic of China on Establishing Strategic Partnership of Cooperation, Dhaka, 14 October 2016

His Excellency Mr. Xi Jinping, President of the People's Republic of China, paid a State visit to the People's Republic of Bangladesh on 14–15 October 2016 at the invitation of His Excellency Mr. Md. Abdul Hamid, President of the People's Republic of Bangladesh. This visit marked an important milestone in promoting bilateral relationship between China and Bangladesh as both countries reached a broad consensus on international and regional issues of common interest.

The two sides agreed that cooperation between China and Bangladesh, two developing countries with large populations, and their common development

and prosperity would contribute to the welfare of the two peoples and would promote the development of the region and their self-reliant growth. Both sides agreed to elevate the bilateral relations to the Strategic Partnership of Cooperation.

The two countries reiterated their adherence to the Five Principles of Peaceful Co-existence, respecting and supporting each other in choosing the paths of development according to the national conditions, and respecting and supporting each other's core interests and major concerns. Both countries appreciated each other's national sovereignty and territorial integrity.

The two sides agreed to enhance high-level exchanges, maintain frequent contacts between leaders of the two countries on the sidelines of multilateral fora, strengthen exchanges and cooperation at various levels between the two governments, legislative bodies, political parties, and peoples to deepen mutual trust at all levels.

The two countries agreed to enhance the alignment of their respective development strategies, fully tap the potentials of cooperation in various areas, work on the "Belt and Road Initiative" for sustainable development and common prosperity of the two countries.

The two sides agreed to expand and deepen trade and investment cooperation and identified infrastructure, industrial capacity cooperation, energy and power, transportation, information and communication technology, agriculture for mutual benefit. The relevant departments of the two governments will enhance policy exchanges in the above-mentioned areas and provide planning and guidance for the bilateral cooperation, increase investment and human resources development.

The two countries agreed that the Framework Agreement for Developing Cooperation on Production Capacity between Bangladesh and China would enhance the capacity of companies and financial institutions to improve investment and cooperation between them, in particular with respect to construction and operation of infrastructure, metallurgy and material, resource processing, equipment manufacturing, light industry, electronics and textiles, semiconductors and nanotechnology, industry clusters, and other areas. Both agreed to cooperate for developing and investing in the ICT sector and to continue their cooperation on river management, including dredging with land reclamation.

The two sides agreed to continue to promote balanced development of bilateral trade and to start feasibility studies on the establishment of China-Bangladesh Free Trade Area. The two sides believed that there are extensive potentials for cooperation in maritime affairs between the two countries, and agreed to establish a dialogue mechanism for maritime cooperation.

The Chinese side is willing to assist the Bangladeshi side in developing Blue Economy and strengthening its capacity in relevant areas.

Both sides believed that China and Bangladesh are important partners in South-South cooperation among developing countries and agreed to enhance bilateral and multilateral cooperation within the South-South cooperation Framework for effective implementation of the 2030 Agenda for Sustainable Development. China will provide support and assistance to Bangladesh in strengthening the capacity for disaster management, seeking waste management and water treatment solutions for both urban and industrial areas and developing earthquake resilient infrastructure.

The two countries agreed to provide more training opportunities for human resources and skills development for Bangladesh in areas of public administration, science and technology, agriculture, health care, and arts. China will continue to provide government scholarships for Bangladeshi students to study in China, and fund the outstanding young Bangladeshi scientists to work in China.

The two sides agreed to strengthen cultural and people-to-people exchanges and expand exchanges and cooperation in culture, education, tourism and other fields, and to promote interactions between the media, think tanks, youth, women organizations, non-governmental groups and local authorities of the two countries.

The two countries agreed to maintain military cooperation and exchanges at various levels and deepen cooperation in areas such as personnel training, equipment and technology and UN peacekeeping missions.

The two sides condemned terrorism in all its forms and manifestations. China agreed to support Bangladesh's efforts in combating terrorism and maintaining national security and stability and expressed its readiness to cooperate by sharing of information, capacity building and training. They agreed to explore the possibility of establishing a dialogue mechanism on countering terrorism.

Both sides are ready to enhance communication and coordination to pursue the establishment of BCIM Economic Corridor and to push for early consensus on the Joint Study Report and establish the governmental cooperation framework between the four parties to launch early harvest program.

The two countries reiterated that they would abide by the purposes and principles of the UN Charter and enhance their cooperation in UN and other international organizations, including enhancing coordination and cooperation in global issues such as sustainable development, energy, food security and other challenges and appeals of developing countries. They will work together to promote peace, stability, development and prosperity of the region and the world.

Statement under the Thematic Discussion on "Other Disarmament Measures and International Security" at the First Committee of the 71st Session of the UN General Assembly, 24 October 2016

In a statement underpinning its support for multilateralism in the pursuit of general and complete disarmament, Bangladesh emphasized the need for reinvigorating the UN Disarmament Machinery to add further impetus to inter-governmental negotiations on outstanding disarmament and nonproliferation issues. To achieve this, it underscored the importance of expansion of disarmament education and research and the mobilization of the use of social media tools to spread disarmament education and awareness to the wider public, including students at different levels. Appreciating the learning resources developed by the UN Office for Disarmament Affairs (UNODA), Bangladesh flagged the importance of facilitating enhanced inter-operability of such resources with national education curricula online, as appropriate. It also put on record its appreciation for the useful work continually being done by the UN Institute for Disarmament Research (UNIDIR), and stressed the need for ensuring enhanced and predictable resources for it to deliver on its mandates and help expand and manage its knowledge base for the genera l consumption of all Member States.

Bangladesh attached great importance to mainstreaming and preserving relevant environmental norms in the international legal regime concerning disarmament and arms control and asserted that the applicability or relevance of such legal norms to disarmament in the seabed and outer space should be studied and analyzed in depth.

Bangladesh expressed its concern over the potential misuse of the information and communication technology (ICT) to the detriment of international peace and security. It emphasized on the need to promote international cooperation to ensure information security, including through appropriate transparency and confidence building measures. In this context, Bangladesh acknowledged the contribution of the Group of Governmental Experts (GGE) established by the Secretary General pursuant to GA Resolution 70/237, and recommended the development of a comprehensive legal instrument through inter-governmental negotiations.

In conclusion, Bangladesh reiterated the importance of factoring in potential threats in the cyber-sphere, including new developments in artificial intelligence and other related fields, into the ongoing review of the implementation of the UN Security Council Resolution 1540 to prevent ICT platform from being exploited for the proliferation of weapons of mass destruction by terrorists and other unauthorized entities.

Statement under the Thematic Discussion on "Regional Disarmament and Security" at the First Committee of the 71st Session of the UN General Assembly, 25 October 2016

In a statement under the theme regional disarmament and security, Bangladesh acknowledged the critical importance of regional disarmament and security in the maintenance of international peace and security and stated that the notion of "strategic stability" that influenced the security doctrines of the nuclear weapon States in the region continues to be a major concern.

Bangladesh encouraged concerned stakeholders to push for a nuclear weapon-free zone in South Asia and the Middle East in the interest of sustainable peace, security and stability in the region. It attached great priority to unconditional and legally binding assurances to non-nuclear weapon states against the use or threat of use of nuclear weapons by nuclear weapons states. Bangladesh acknowledged that peaceful dialogue and diplomacy are best tools for promoting regional security and for creating conditions conducive to sustained and meaningful dialogues on disarmament and security issues.

Bangladesh recognized the useful role of the UN Regional Centre for Peace and Development (UNRCPD) in bringing together relevant experts and policy makers from the region to share views on issues of common concern. It acknowledged the contribution of UNRCPD's customized support to Bangladesh in promoting the implementation of the UN Program of Action on Small Arms and Light Weapons and the International Tracing Instrument, which have enabled Bangladesh to identify existing gaps and challenges in its legal, policy and institutional arrangements in ensuring compliance with the relevant Arms Trade Treaty provisions. Bangladesh expressed its desire to further its partnership with UNRCPD to support the ongoing work on developing a comprehensive National Control List in fulfillment of, *inter alia,* the obligations under UN Security Council Resolution 1540.

Bangladesh declared that it remains open to opportunities for further learning from the good practices in other regional countries in preventing proliferation of weapons of mass destruction and their possible acquisition by terrorists and other unauthorized non-state entities.

Statement of Bangladesh at the Security Council on Women, Peace and Security, 24 May 2016

Speaking on issues of conflict prevention and participation under the consolidated theme of Peace and Women, Bangladesh recommended further engagement with Africa to learn from one another's experience in promoting the role of women in peace, security and development. Witnessing a paradigm shift in

society's attitudes towards the role of women in the public sphere, including in conflict prevention and resolution, Bangladesh believed that it has much to contribute to the evolving conversation on the contributions of women and girls as active change agents in their respective communities.

Statements of Bangladesh at the Security Council Open Debate on Women, Peace and Security, October 2016

Speaking on implementation under the consolidated themes on Peace and Women, Bangladesh recalled with satisfaction the generation of the unprecedented level of interest in the global study on the implementation of resolution 1325 (2000) in 2016 in the wake of the adoption of resolution 1325 (2000) during its membership in the Security Council in 2000–2001. Following the adoption of resolution 2242 (2015), the issue of developing a national action plan featured prominently in the Bangladeshi policy discourse. Following preliminary discussions with UN-Women and other international partners, the Government of Bangladesh is exploring the opportunity to convene dialogues with a cross section of women and their representative organizations. In this context, Bangladesh has agreed to join the Spanish initiative to establish a network of national focal points.

Bangladesh stressed that the inherent resilience of Bangladeshi women convinces it of women's capacity to act as agents of change in the face of the humanitarian consequences they disproportionately suffer in different situations. Bangladesh is encouraged to see that this notion is gaining recognition in the humanitarian discourse. Bangladesh observed that the mandate of the Global Acceleration Instrument for Women and Peace and Security and Humanitarian Action has the potential to support further demonstration to that effect in response to specific needs in conflict and post-conflict settings.

In conclusion, Bangladesh underscored the importance of increased, sustained and coordinated mobilization of finances, and earmarking thereof, for giving effect to the women and peace and security agenda.

Speaking on participation and peacekeeping under the consolidated themes of Peace and Women, Bangladesh reiterated its commitment to enhance the role and participation of women, including in its national contingents, as part of its contribution to United Nations peacekeeping. Bangladesh maintained that so far some 1,047 women peacekeepers have been participating in various missions, including 774 police personnel. Bangladesh is currently in the process of detailing two female military observers, and planning to deploy women contingent commanders by 2021.

Speaking on sexual and gender-based violence under the consolidated themes of Peace and Women, Bangladesh stated that its peacekeepers know

that they must take decisive action to prevent and combat sexual and gender-based violence, as part of their broader mandate regarding the protection of civilians. Unequivocally condemning sexual exploitation and abuse by peacekeepers, Bangladesh stated that it has demonstrated its resolve to cooperate in implementing the comprehensive measures outlined in the Secretary General's enhanced program of action to combat this scourge.

Speaking on participation under the consolidated themes of Peace and Women, Bangladesh welcomed the adoption of the gender strategy by the Peace-building Commission and asserted that it has been particularly supportive of further strengthening women's participation and leadership in 2016 resolutions on peace-building architecture and mediation. Bangladesh expressed relief at learning about the mediated release and rescue of a number of women and girls held hostage by certain international and regional terrorist groups. Bangladesh urged the Security Council to continue efforts to secure the freedom of the remaining women and girls.

Bangladesh acknowledged the recent trend of increased women's representation in various peace negotiations, and in increasing gender-specific provisions in peace agreements. Referring to it national conditions in the aftermath of a peace accord signed with a local insurgent group in 1997, it stated how women were playing a critical role in advancing the accord's implementation, preventing reversion of the conflict, and building awareness and resilience against gender-based violence. The Bangladeshi Government has prioritized the further mainstreaming of women's participation in multidimensional efforts of the country to combat terrorism and prevent violent extremism.

Bangladesh recalled Prime Minister Sheikh Hasina's appeal to mothers to work as sentinels in their families and urged female teachers, elected representatives and women working at the grass-roots level to contribute actively towards a whole-of-society response against violent extremism and radicalization. Bangladesh reiterated its determination to push ahead with women's development and empowerment efforts to defeat the violent extremists and terrorists.

Speaking on under the consolidated theme of disarmament, Bangladesh recognized the differential impact of armed conflicts and proliferation of small arms on women and girls. In this connection, Bangladesh decided to cosponsor a draft resolution entitled "Women, disarmament, non-proliferation and arms control".

High Level Forum on a Culture of Peace, Permanent Mission of Bangladesh to the United Nations, New York, 01 September 2016

Following the United Nations General Assembly resolution tabled by Bangladesh titled "Follow-up to the Declaration and Program of Action on a

Culture of Peace", adopted by consensus on 3 December 2015, the President of General Assembly convened on 1 September 2016 a day-long High Level Forum on a Culture of Peace at the Trusteeship Council Chamber at the UN Headquarters. Since 1997, Bangladesh has been actively involved in bringing this resolution to UN General Assembly and has been tabling it since 2001. The High Level Forum provided an opportunity for the Member States and stakeholders to exchange their views on ways to build and promote the "Culture of Peace", which has become imperative in the conflict-ridden world of today.

In a full house chamber, more than forty countries made statements in the plenary segment, which is the highest among all High Level Forums held since 2012. The Permanent Representative and Ambassador of Bangladesh made the statement on behalf of the Bangladesh Delegation. He said a culture of peace is an aspiration of all humanity, the essence of the UN Charter, and imperative in the current global context. Promoting and inculcating a mindset of a culture of peace is at the core of peaceful and mutually respectful co-existence and dialogue among different civilizations, religions, faiths and beliefs around the globe. In the panel discussion, the Permanent Representative pointed out the critical linkage between the culture of peace and the Sustainable Development Goals that called for inclusive societies and accountable institutions at all levels.

The statements of the President of General Assembly and of the UNSG re-asserted and re-affirmed the commitment of the Member States towards building the culture of peace and the international community's determination to work more diligently for its realization. Along with other delegations, the UNGA President acknowledged the role of Bangladesh in promoting the issue of cultural of peace at the United Nations and beyond.

Second Follow-up Meeting on Bangladesh Sustainability Compact, Dhaka, 28 January 2016

The Partners of the Bangladesh Sustainability Compact – Government of Bangladesh, European Union, United States of America and the International Labor Organization (ILO) met in Dhaka on 28 January 2016 to assess the progress in the implementation of the Compact for securing respect for labor rights, occupational safety and health and promoting responsible business conduct in Bangladesh's ready-made garment and knitwear (RMG) sector based on the set of concrete mutually agreed on commitments by its Partners.

Reiterating their commitment to work collectively to improve the working conditions and workers' rights in the export oriented RMG sector, the Compact Partners recognized the progress made by Bangladesh since the last Follow-up Meeting towards meaningful and sustainable changes in the RMG

industry. These included *inter alia* the recent promulgation of implementing Rules under the Bangladesh Labor Act; the near-completion of initial safety audits by the Government of hundreds of RMG factories; the formal launch of the Better Work Bangladesh program with ILO/IFC; and the continuation of efforts to improve the capacity of the Department of Inspection for Factories and Establishments (DIFE), the Fire Service and Civil Defense Department (DFSCD) and the capital development authority (RAJUK), including through increase in staff and budgetary allocation.

They also appreciated the detailed update provided by Bangladesh, titled "Update by Bangladesh – Progress in Implementation on Outcome of the Review Meeting of the Sustainability Compact, as on 11 January 2016".

As next steps, the Partners focused on the following priorities:

- Ensure that trade union registration process is carried out smoothly and expeditiously in accordance with objective and transparent criteria;
- Upgrade the (Bangladesh) Directorate of Labor with additional staff and resources to effectively investigate and prosecute unfair labor practices in a timely and transparent manner and to promote harmonious industrial relations;
- Adopt necessary changes to the legal framework applicable in the EPZs to protect freedom of association and collective bargaining rights and to ensure that such rights are commensurate with those provided in the national labor law with participation of all stakeholders and the ILO.
- Ensure the effective implementation of the Bangladesh Labor Act and its Rules, in line with the relevant ILO Conventions, including with regard to Participation Committees and Safety Committees;
- Complete the recruitment of inspectors to ensure effective inspections in all active export-oriented RMG factories in the country, including their subcontracting factories, so that all RMG workers in Bangladesh are assured of a safe working environment;
- Undertake remediation and transparent monitoring through the DIFE website of all export-oriented RMG factories, according to the developed Corrective Action Plans, in a timely and effective manner in cooperation with relevant stakeholders.

The Compact Partners also underlined the need to reform Bangladesh's labor laws to ensure that they are in compliance with core ILO Conventions and to address the conclusions and recommendations of the ILO supervisory bodies, including with regard to freedom of association.

The Partners acknowledged the contributions of the private sector initiatives in making progress towards fulfillment of the Compact. They also recognized the importance for brands and retailers to adopt practices that promote

responsible business conduct in global supply chains and encouraged them to adopt a uniform code of conduct for factory audits in Bangladesh.

The Partners reiterated their commitment to help ensure that the further development and sustainability of the RMG sector in Bangladesh advance in line with improved workers' rights and safety.

State Practice of Asian Countries in International Law

Japan

*Kanami Ishibashi**

Human Rights

Hate Speech – Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior against Persons Originating from Outside Japan was enacted

Japan's first anti-hate speech law passed the Diet, marking an important step to halt racial discrimination. The Recommendations, as shown below, from the international human rights bodies significantly promoted this movement.

In 2014, the United Nations Committee on the Elimination of Racial Discrimination (CERD) strongly recommended the Japanese government to regulate hate speech by legislation. The Committee was concerned in the increase in racist discrimination demonstrations in Shin Okubo, Tokyo and Tsuruhashi, Osaka, which are targeting Korean residents.

The Committee is concerned about reports of the spread of hate speech, including incitement to imminent violence in the State party by right-wing movements or groups that organize racist demonstrations and rallies against foreigners and minorities, in particular against Koreans. The Committee is also concerned by reports of statements made by public officials and politicians amounting to hate speech and incitement to hatred. The Committee is further concerned by the propagation of hate speech and incitement to racist violence and hatred during rallies and in the media, including the internet. Furthermore, the Committee is concerned that such acts are not always properly investigated and prosecuted by the State party (Article 4). Recalling its general recommendations No. 35 (2013) on combating racist hate speech, the Committee recalls that measures to monitor and combat racist speech should not be used as a pretext to curtail expression of protest. However, the Committee reminds the State party of the importance of safeguarding the rights of vulnerable groups in need of protection against racist hate speech and hate crimes. The Committee recommends, therefore, that the State party take appropriate

* Associate Professor, Tokyo University of Foreign Studies, Japan.

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measures to: (a) Firmly address manifestations of hate and racism, as well as incitement to racist violence and hatred during rallies; (b) Take appropriate steps to combat hate speech in the media, including the Internet; (c) Investigate and, where appropriate, prosecute private individuals, as well as organizations, responsible for such acts; (d) Pursue appropriate sanctions against public officials and politicians who disseminate hate speech and incitement to hatred; and (e) Address the root causes of racist hate speech and strengthen measures of teaching, education, culture and information, with a view both to combating prejudices that lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and among racial or ethnic groups.[1]

Furthermore, the United Nations Human Rights Committee had made similar recommendations. In its Review related to the human rights situation of the country, it expressed concern to the Japanese government regarding a racist street campaign activity called "Hate Speech" (hatred expression) against Korean residents in Japan and recommended the prohibition of all advertising activities that discriminate residents.

In the "concluding observations," the Committee was concerned that actions to discriminate against foreigners such as hate speech and "Japanese only" display are expanding. The Committee described that "Japanese criminal and civil law do not adequately protect them."

Based on such observations, the Committee recommended that all propaganda that promote racial superiority or hatred inviting discrimination and violence should be banned. It urged the Japanese government to develop rules to punish criminals.

The Committee expressed concern at the widespread racist discourse against members of minority groups, such as Koreans, Chinese or Burakumin, inciting hatred and discrimination against them, and the insufficient protection granted against those acts in the Criminal and Civil Codes. The Committee also expresses concern at the high number of extremist demonstrations authorized, the harassment and violence perpetrated against minorities, including against foreign students, and the open display in private establishments of signs such as those reading "Japanese only" (Articles 2, 19, 20 and 27).

The State should prohibit all propaganda advocating racial superiority or hatred that incites discrimination, hostility or violence, and should prohibit

1 CERD/C/JPN/CO/7–9, *Concluding observations on the combined seventh to ninth periodic reports of Japan*, 29 August 2014, *available at* https://www.mofa.go.jp/files/000060744.pdf.

demonstrations that are intended to disseminate such propaganda. The State party should also allocate sufficient resources for awareness-raising campaigns against racism and increase its efforts to ensure that judges, prosecutors and police officials are trained to detect hate and racially motivated crimes. The State party should also take all necessary steps to prevent racist attacks and to ensure that the alleged perpetrators are thoroughly investigated, prosecuted and, if convicted, punished with appropriate sanctions.[2]

In response to the above recommendations from international society, Japan enacted the "Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior against Persons Originating from Outside Japan" and brought it into force on 3 June 2016. The Act does not oblige citizens to halt activities which lead to racial superiority or hatred that incites discrimination, hostility or violence, but obliges the government and the local authorities to take necessary measures to deal with the issues. Article 4 provides that "the government shall implement measures concerning efforts to eliminate unjustifiable discriminatory behavior against foreign nationals from outside Japan" and "is responsible for taking necessary advice to the local authorities." And also "local authorities shall endeavor to take measures in accordance with the actual circumstances of the concerned area, in light of the appropriate role sharing with the government concerning efforts to eliminate unfair discriminatory behavior against foreign nationals from outside Japan." For this purpose, the government and local authorities have to (1)prepare necessary consultation system to prevent or resolve disputes related thereto (Article 5), (2) conduct educational activities to resolve unjust discriminatory behavior against foreign nationals from outside Japan, and shall do necessary measures for that purpose (Article 6), and (3) conduct activities disseminating public understanding about the necessity of eliminating unjust discriminatory behavior against foreign nationals from outside Japan (Article 7). It is a concern that there is no penalty for violations provided by the Act. However, immediately after the law was enacted, the Kawasaki branch of the Yokohama District Court granted injunction against the planned hate speech demonstration[3] and even without any penalty, this is considered a good precedent to implement the Act for the future.

2 CCPR/C/JPNCO/6, *Concluding observations on the sixth periodic report of Japan*, 20 August 2014, *available at*: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fJPN%2fCO%2f6&Lang=en.

3 *Court bans planned anti-Korean hate speech rally in Kawasaki*, THE MAINICH, 3 June 2016, *available at* https://mainichi.jp/english/articles/20160603/p2a/00m/0na/017000c.

Revision of the Civil Code: Shortening the Woman's Remarriage Prohibition Period

On 1 June 2016, the Act revising a part of the Civil Code (Act No. 89 of 1896) was established and enforced on 7 June 2016. According to this revision, the woman's remarriage prohibition period was shortened from six months to 100 days after the date of cancellation of the previous marriage. It also clarifies the case where a woman can remarry even within the remarriage prohibited period.

The remarriage prohibition period is provided in Article 733, paragraph 1 of the Civil Code, which states that "a woman may not remarry unless six months have passed since the day of dissolution or rescission of her previous marriage." This prohibition has raised concerns since it only applied to women. The reason why the remarriage prohibition period was stipulated is to clarify the father of a child born after the dissolution of the marriage. Therefore, Article 733, paragraph 2 provides the exemption from paragraph 1, stating that "in the case where a woman has conceived a child before the cancellation or dissolution of her previous marriage, the provision of the preceding paragraph shall not apply from the day on which she gives birth." This is also prescribed in Article 772 of the Civil Code, which provides as follows:

> (1) A child conceived by a wife during marriage shall be presumed to be a child of her husband. (2) A child born after 200 days from the formation of marriage or within 300 days of the day of the dissolution or rescission of marriage shall be presumed to have been conceived during marriage.

Therefore, by establishing a remarriage prohibition period, it becomes easier to clarify whether it is a child of the former husband or the current husband.

In the Supreme Court decision on 16 December 2015 (2013 (o) No. 1079), the Court held that "the part beyond 100 days of the remarriage prohibition period is unconstitutional." Based on this judgment, the Diet legislated amendment to the Civil Code and now it enters into force. On the same day, 16 December 2015, there is another Supreme Court judgment which is also relevant to the rights of women. The Supreme Court denied that the "right not to be forced to change the family name" claimed by the plaintiffs is "not guaranteed by the constitution." The Court held that there is a benefit that you can realize that you are a member of your family and "although it can be presumed that there are many cases where the female side is disadvantaged it is alleviated by the spread of so-called common use." The Court concluded that the provision shown below, which obliged couples to use the same surname is not contrary to the constitution that requires gender equality in marriage legislation. Article 750 provides that a husband and wife shall adopt the surname of the husband or wife in

accordance with that which is decided at the time of marriage. However, such movements have been criticized in the international community.

For example, on 7 March 2016, the CEDAW (Committee on the Elimination of Discrimination against Women) regrets that its previous recommendations regarding existing discriminatory provisions have not been addressed. The Committee is particularly concerned that: (a) The Civil Code still prohibits only women from remarrying within a specified period of time after divorce notwithstanding the decision of the Supreme Court, which shortened the period from 6 months to 100 days; (b) On 16 December 2015, the Supreme Court upheld the constitutionality of Article 750 of the Civil Code that requires married couples to use the same surname, which in practice often compels women to adopt their husbands' surnames.[4] The Committee reiterated its previous recommendations (CEDAW/C/JPN/CO/5) and (CEDAW/C/JPN/CO/6) and urged the State party to, without delay revise legislation regarding the choice of surnames for married couples in order to enable women to retain their maiden surnames; and abolish any waiting period for women to remarry upon divorce.

4 CEDAW/C/JPN/CO/7–8, *Concluding observations on the combined seventh and eighth periodic reports of Japan*, 7 March 2016, *available at* http://www.gender.go.jp/international/int_kaigi/int_teppai/pdf/CO7–8_e.pdf.

State Practice of Asian Countries in International Law

Korea

*Buhm-Suk Baek**

Municipal Law – Treaties – Civil Procedure Law

Decision of Supreme Court concerning the "Judgment Execution"

Supreme Court Decision 2015Da207747 **(*decided on 28 January 2016*)**

Facts of the case

The plaintiff in this case is a U.S. national who works in the horse breeding industry in Kentucky, U.S. On 6 April 2007, he concluded a sales agreement to purchase a purebred mare named First Violin for USD150,000 with the defendant who runs a stud farm in Korea. But, on 14 April 2007, Dominican, born by the mare in this case, won a horse racing competition held in the U.S. Promptly, the defendant maintained that First Violin's market price is over one million U.S. dollars after the competition, and notified the plaintiff that the mare is not for sale. The plaintiff filed a lawsuit for breach of contract and claimed compensation for damage before the Woodford Circuit Court (Kentucky; hereafter the U.S. court) on 3 November 2008. On 27 August 2010, the U.S. court ordered the defendant to pay USD639,044 for damages as well as litigation costs, etc. As the defendant did not appeal, the judgment was then finalized. The defendant, however, filed a lawsuit before a Korean court.

Issues presented

1) The procedure of serving the defendant who is domiciled in Korea did not comply with the procedure set under the U.S. law for the litigation in the U.S., and 2) the recognition of the U.S. court ruling violated "sound morals and other social order" of Korea based on the Article 217 of the Civil Procedure Act of Korea, as the amount of damages was excessive.

Judgment

The Court dismissed all appeals based on the following reasoning:

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* Professor, Kyung Hee University, Korea.

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> …[T]hus, for a local government that freely loans property that is to be returned only after an indefinite period, it can be seen that just by being liable for the ordinary reinstatement, it has achieved to a considerable degree the legislative purpose of sharing the duty of national defense as originally intended by the Management and Disposal Act. As such, it is reasonable to interpret the scope of exemption from the obligation to reinstate under Article 6(2) of the Management and Disposal Act as being restricted to the scope of purpose of the free loan, i.e., the reinstatement of the ordinary status quo. Extending the interpretation beyond this line to obligate the local government to reinstate all the consequences of environmental contamination not originally anticipated, would be difficult to accept in terms of the legislative purport of the Management and Disposal Act, which centers on the certainty and expeditiousness of loan, as well as in terms of equity…

Comment

Overall, if a defeated defendant would be seen as having the opportunity to defend his actual interests in a foreign court proceeding, the court considered the defendant is deemed to have responded to the lawsuit as prescribed under Article 217(1)2 of the Civil Procedure Act. In addition, the court ruled that whether the recognition of the final judgment rendered by a foreign court etc. violates good morals or other social order of Korea or not should be decided based on the impact of the final ruling etc. on basic moral beliefs and social order which Korean laws aim to preserve and protect.

Human Rights – Treaties – Refugee

Decision of Supreme Court Decision on the "Revocation of Disposition of Refugee Status Non-recognition"

Supreme Court Decision 2013Du14269 **(*decided on 10 March 2016*)**

Facts of the case

The plaintiff is a national of the People's Republic of Bangladesh, who joined anti-government activities of the Parbattya Chattogram Jana Samhati Samiti (hereafter JSS) and the United People's Democratic Front (hereafter UPDF) as a member of the indigenous Jumma tribe of the Chittagong Hill Tracts of Bangladesh. He entered Korea on 7 September 2007 and applied to the defendant (Minister of Justice, Republic of Korea) for recognition of refugee status

on the grounds of a well-founded fear of being persecuted for reasons of race, political orientation, etc., if he were to go back to Bangladesh. But, the defendant rejected the application following the determination that the plaintiff's grounds for refugee recognition do not constitute a well-founded fear of being persecuted stipulated in Article 1 of the Refugee Convention. Then, the plaintiff brought a lawsuit seeking revocation of the disposition.

Issues presented

This case deals with 1) the method of assessing the credibility of a statement by a refugee applicant and the requirements for recognizing it; and 2) the method of proving the authenticity of a foreign official document submitted by a refugee applicant.

Judgment

The court ruled that it is difficult to recognize the credibility of the plaintiff's statement on the actuality or possibility of persecution based on the following reasoning:

> [A] statement shall: 1) contain concrete facts to such an extent as to sufficiently recognize the refugee applicant's allegations on the face of the statement; 2) without any omission of material facts; 3) have consistency and persuasive power, standing alone; and 4) conform to the contents of other evidence.

Comment

In this case, the Supreme Court confirmed that the applicant should bear the burden of proving the existence of a well-founded fear of persecution. If there is special circumstance for applicant to collect evidence, he/she is not required to prove the entirety of the alleged facts by objective evidence. Rather the facts should be deemed to be proven when it is reasonable to recognize them based on the credibility of the totality of the statements. Furthermore, the court confirmed that in assessing the statement by a refugee applicant, the overall credibility of the statement shall not be denied for the mere reason of discovering slight inconsistencies in the details of the statement, or detecting some exaggeration. Rather, the overall credibility should be assessed focusing on the essential content of the statement and considering emotional shock from the experience of genuine persecution, unsound psychological condition due to applicant's distress, limitations in memory due to the passage of time, and different sense of language arising from a cultural and historical background, etc.

Private International Law – Treaties – Jurisdiction

Decision of Supreme Court concerning the "Insurance Proceeds"

Supreme Court Decision 2015Da5194 (decided on 23 June 2016)

Facts of the case

The plaintiff in this case is a Korean corporation in the trade business, and the defendant is an American corporation in the insurance business which has a branch office in Korea. The Plaintiff entered into a cargo insurance agreement with the Defendant in Korea under the terms of WAIOP (With Average Irrespective of Percentage). Under this agreement, the insured recovers for certain inherent maritime perils regardless of the type or scale of maritime loss, as provided under the Institute Cargo Clauses of the Institute of London Underwriters (now the International Underwriting Association of London). But at the same time, the insurance agreement included an "OnDeck Clause," providing for the governing law, stating that "all questions of liability arising under this policy are to be governed by the laws and customs of England"; and with the provision that in the event the Plaintiff fails to notify the Defendant of the ondeck loading of insured cargos, the scope of coverage is to be limited to Free from Particular Average (FPA), under which general partial loss is not covered beyond "Washing Overboard." The Plaintiff enlisted Global Cargo Solution Co., Ltd. for marine cargo shipping from the port of Shanghai, China, to the port of Iskenderun, Turkey. The shipment was involved in an accident in which one of the four cargo units, i.e., a boiler, went overboard off the coast of Oman. The Plaintiff filed suit, claiming: 1) the "OnDeck Clause" is subject to the duty of explanation under the Act on the Regulation of Terms and Conditions of Korea; 2) the Defendant failed to adequately explain the "OnDeck Clause" to the Plaintiff; and therefore, 3) WAIOP, instead of the "OnDeck Clause," is applicable as the substance of the insurance contract.

Issues presented

In this case, one of the main issues is to decide, if the parties chose the governing law for only a part of the contract having foreign elements, the applicable law to other parts of contact for which the parties did not choose the governing law.

Judgment

The Court dismissed the appeal. This is because first, the "OnDeck Clause" is commonly included in English cargo clauses and is part of standard international terms and conditions in marine insurance market, which are generally

used by marine cargo insurers. And second, although it is erroneous for the lower court to have determined that the Act on the Regulation of Terms and Conditions of Korea does not apply to the instant insurance contract, it is ultimately justifiable for it to have determined that this Korean legislation does not apply to the "OnDeck Clause" on the ground that the Plaintiff was well aware of the content of the "OnDeck Clause."

Comment

The Court ruled that by citing Article 25(1), 25(2) and 26(1) of the Act on Private International Law, the governing law of the part for which the parties did not choose the applicable law shall be the law of the country most closely connected with the contract. The Court highlighted that the instant governing law clause did not designate the governing law for the entirety of the insurance contract. Rather, it provided that the said contract would follow English laws and customs to the extent of the insurer's "liability." As such, as to those matters not pertaining to the insurer's liability, the laws of Korea, having the closest connection with the instant insurance contract, shall be applicable.

Human Rights – Migration – Nationality Act

Decision of Supreme Court concerning the "Revocation of Disposition Disapproving Extension of Sojourn Period, etc"

***Supreme Court Decision 2015Du48846* (*decided on 14 July 2016*)**

Facts of the case and Issues presented

On 25 July 2006, a Pakistani man (Non-Party) entered the Republic of Korea under D3 (Industrial Trainee) status. On 17 June 2007, his left forearm was amputated when his hand got sucked into a sawdust crusher. Following the accident, he underwent an operation to remove his left forearm, and experienced post-traumatic stress disorder (PTSD). On 2 August of the same year, this man applied for change in sojourn status on the grounds that he needed medical treatment and was issued permission to change his sojourn status to G1 (Miscellaneous) status. Following the application for naturalization on 8 February 2013 pursuant to Article 5 of the Nationality Act, he was issued permission to change his sojourn status to F1 status which is issued to a citizenship applicant and was granted extension of stay by 8 February 2015. On 4 September 2012, the Plaintiff (a Pakistani woman) and this man got married in Pakistan and registered their marriage. The Plaintiff entered the Republic of Korea under C3 status on 2 September 2013 and then applied for permission to change her

sojourn status to F1 status on October 24 of the same year in order to care for her husband.

The Defendant (immigration office) investigated the circumstances of the Plaintiff and the husband and on 11 April 2014, following the investigation, disapproved the Plaintiff's application on the grounds that there were no extenuating circumstances for her to stay in Korea. The defendant pointed out the fact that 1) the husband (Non-Party) received a lump sum compensation for disability; 2) he did not appear to have been in a critical condition since he was able to manage on his own during that time; and 3) his wife did not have status of sojourn eligible for employment but was working on the side at home when she visited her husband in Korea. The lower court indicated that the Plaintiff applied for change in her sojourn status to care for her husband on the condition that her husband was qualified to be issued permission for naturalization. As the husband was not deemed qualified to apply for naturalization due to having failed to pass the required written exam on two occasions, the lower court ruled that the Plaintiff could not be expected to be issued permission to change sojourn status due to her standing and that there was no excess or abuse of discretionary power regarding such an instant disposition.

Judgment

The Supreme Court, however, reversed the judgment of the lower court with a reasoning that first, while legally staying in the Republic of Korea under D3 status, the husband's left forearm was amputated due to an occupational injury which left him seriously disabled; and second, as the possibility of the husband's condition worsening cannot be ruled out given that recurrent depressive disorder tends to cause additional stress, i.e., it is deemed necessary, from a humanitarian standpoint, to grant the Plaintiff to live with her husband during his legal sojourn period in Korea so that she can help him recover physically and emotionally. The Court seems to have carefully considered that he had approximately 10 months remaining to legally stay in Korea when the instant disposition was rendered and thus requiring her to maintain C3 status (the maximum stay per visit is only 90 days) is not rational even from a humanitarian perspective since it could hinder the Plaintiff's continuous care of her husband. The Court, therefore, maintained that the disadvantages likely to be imposed on the Plaintiff from the instant disposition trump the public interest to be gained. In the same vein, the instant disposition is against the principle of proportionality, thereby constituting an excess or abuse of discretionary power.

Comment

It seems that the Court recognized that even though the foreigner meets all the requirements stipulated under the relevant law, here the Article 24

(1) of the Immigration Control Act, the competent agency has discretion to determine whether or not to issue a permit in consideration of the foreigner's standing, purpose of stay, effect on public interest, etc. However, the Court emphasized that such a decision can constitute an excess or abuse of discretionary power if the competent agency commits a grave error on fact-finding or there is a violation of the principles of proportionality and equity.

Treaties – Inheritance Rights – South and North Korean Family Special Act

Decision of Supreme Court concerning "Recovery of Inherited Property"

Supreme Court Decision 2014Da46648 **(*decided on 19 October 2016*)**

Facts of the case & issues presented

The main issue in this case is if a North Korean who was unable to inherit from a South Korean decedent, whether the right to claim inheritance recovery under Article 999(2) of the Civil Act expires on the lapse of ten years from the date of infringement of inheritance rights or not.

Judgment

The Court pointed out that even if there had been a need to take into account the North Korean residents in disputes pertaining to inheritance between South and North Korean residents, this is a matter to be addressed within the bounds of reasonable statutory interpretation. It is necessary to carefully consider the purport of the institution of the limitation period on the exercise of claim for inheritance recovery under the Civil Act, the legislative purpose of the South and North Korean Family Special Act and pertinent provisions. As the recovery of inheritance has clearly influenced not only the pertinent heirs, but also the rights of third parties who subsequently purchased the inherited property, the recognizing an exception to the limitation period significantly beyond one stipulated under the Civil Act can pose a risk of seriously agitating the stability of legal relationships. To avoid such a disruption, the Court emphasized that any recognition of exceptional cases on the limitation period for inheritance recovery should be accompanied with a specific stipulation of provisions on extension of the limitation period as an exception and the period of extension. In other words, recognition of exceptional cases with respect to the limitation period for inheritance recovery would necessitate a coherent legislative procedure. In this sense, the Article 11(1) of the South and North Korean Family Special Act presumes that

the limitation period under Article 999(2) of the Civil Act is applicable also to the legal relationship pertaining to the inheritance recovery claims by a North Korean resident who could not inherit from a South Korean decedent. Therefore, the Court ruled that for North Korean residents, just as for South Korean residents, the claim for inheritance recovery expires upon the lapse of ten years from the date of infringement of inheritance rights under Article 999(2) of the Civil Act.

Comment

There is a dissenting opinion by five judges which maintained that if the Court interprets the South and North Korea Family Special Act to mean that even the inheritance claims of North Korean refugees who entered South Korea expire simply because ten years have lapsed from the date of infringement of inheritance rights, it is not accord with the spirit of the Constitution aspiring to both reach a consensus between South and North Koreans as a homogeneous nation and lay the foundation for peaceful reunification.

Legislation and Administrative Regulations

Act on Anti-Terrorism for the Protection of Citizens and Public Security (Enforcement 3 March 2016) (Act No. 14071, new enactment)

On 3 March 2016, the South Korean National Assembly passed the Act on Anti-Terrorism for the Protection of Citizens and Public Security, following strong criticism from non-governmental and human rights organizations, opposition political parties, and a week-long filibuster in parliament aimed at delaying the bill's adoption. Although virtually every State adopted new (or strengthened already existing) anti-terror legislation in the aftermath of 11 September, South Korea's Act had been stalled for 14 years. It was because the Act envisaged the expansion of the National Intelligence Service's (NIS) powers to survey and arrest not only terrorist suspects, but also dissenters of governmental policy more broadly.

The definition of "terror" in Article 2.1(a), unless strictly interpreted, can include any activity with a purpose to impede the exercise of the authority of the state, or local government. One such misinterpretation could include demonstrations against the State's or local government's policies. Furthermore, according to Article 2(3) of the Act, a "potential terrorist" includes anyone "who is reasonably believed to have prepared, conspired, propagated, or incited terrorism" without a clear reference on any legal process of assigning or delisting a potential terrorist. This is of particular concern, considering that the government has many times labeled peaceful protests as acts of terror and

a lack of a minimum safeguard for de-listing. As a point of reference, and for reasons of comparison, "incitement of terrorism" is defined by the Council of Europe's Convention on the Prevention of Terrorism as "the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed" (Article 5 (1)).

Moreover, under Article 9 of the Act, once listed as a potential terrorist, the NIS can extensively collect personal information, including sensitive information and location data, wiretap, tail, or even apply financial sanctions. Considering that safeguards to manage and monitor such abuses of power are highly insufficient, this legislation may become a tool that facilitates illegal intervention into people's privacy.

Similarly problematic is the broadness with which Article 12 defines "materials instigating or propagandizing terrorism." Such breadth of definition means that it is at the discretion of the government which paintings, writings, and other forms of expression will be defined as terrorist propaganda. Although South Korea is not alone in its use of "vague terms of uncertain scope", the former UN Secretary General has criticized the readiness with which the "glorification of terrorism" has become a frequent accusation, considering it to be an inappropriate restriction on expression.

North Korean Human Rights Act (entered into force on 3 March 2016, enforcement 4 September 2016, Act No. 14070)

According to the reports submitted by international organizations and other related organizations on human rights situation in North Korea, North Koreans are systemically repressed of their basic rights including civil and political rights as well as economic and social rights such as access to food, medicine and other necessities. The Act intends to protect and promote the full enjoyment of human rights and fundamental freedoms of North Koreans by laying the institutional foundation to draw up and carry out consistent and systematic North Korean human rights policies.

The purpose of this Act is to contribute to the protection and improvement of human rights of North Koreans by pursuing the right to liberty and right to life prescribed in the Universal Declaration of Human Rights and other international conventions on human rights (Article 1). In addition to efforts to protect and promote the human rights of North Koreans, the State shall also endeavor to improve North-South relations and to establish peace on the Korean Peninsula (Article 2). In order to provide advice on policies related to the improvement of human rights in North Korea, there is hereby established a North Korean Human Rights Advisory Committee in the Ministry of

Unification (Article 5). The Government shall promote inter-Korean human rights dialogue on important matters for the improvement of human rights in North Korea (Article 7). In providing North Korean authorities or agencies with any humanitarian assistance for North Koreans to promote human rights in North Korea, the State shall endeavor to ensure that the following matters are compiled with: 1) Assistance shall be delivered transparently in accordance with internationally recognized delivery standards; and 2) Assistance shall be provided preferentially for vulnerable social groups, such as pregnant women and infants (Article 8). In order to investigate the actual status of human rights in North Korea and to engage in research, policy development, etc. related to the improvement of human rights in North Korea, including inter-Korean dialogue on human rights and humanitarian assistance, the Government shall establish a North Korean Human Rights Foundation. (Article 10 to Article 12) In order to collect and record information on the status of North Korean human rights and information for the improvement of human rights in North Korea, there is hereby established a Center for North Korean Human Rights Records in the Ministry of Unification (Article 13).

State Practice of Asian Countries in International Law

Malaysia

*Shaun Kang**

Human Rights

Human Rights – Article 7, 1989 Convention on the Rights of the Child – Reservations to Treaties – DNA Paternity Testing

***Lee Lai Cheng** (**suing as the next friend of Lim Chee Zheng and Herself**) **v. Lim Hooi Teik** [2016] 1 LNS 1212, High Court, 31 October 2016*

This case relates to an application by the mother of a child to compel the defendant – the alleged father of the child – to undergo DNA testing to prove paternity. Counsel for the plaintiff cited among others, Article 7 of the 1989 Convention on the Rights of the Child (CRC), of which Malaysia is a State party to. Counsel for the plaintiff averred that Article 7 provides for the right of the child to know the identity of his parents. The High Court recognised that it was possible for the court to apply provisions of the CRC in domestic cases. An example is seen in the case of Lai Meng v Toh Chiew Lian [2012] 10 CLJ 479, where the court applied the best interest test as found in the CRC, to determine the issue of access to an illegitimate child.

However, in the present case, the High Court took note of Malaysia's reservation to several provisions of the CRC, including Article 7. The reservation states that "…the said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia". On that basis, the High Court referred to the relevant national law, Section 13 of the Births and Deaths Registration Act 1957, which relates to the exemption of giving information pertaining to the facts of conception until the birth of the child. The High Court held that Section 13 does not exempt a father from undergoing a DNA test for purposes of determining paternity. However,

* Research Associate, Centre for International Law, National University of Singapore.

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the High Court found that despite the absence of exemption, there is also no obligation imposed by the CRC and national laws for the father to undergo a DNA test. Accordingly, the High Court could not order the alleged father to undergo DNA testing.

Human Rights – Fundamental Liberties – 1966 International Convention on Civil and Political Rights – Criminal Law – Capital Punishment – Mental Disorder

Michael Philip Spears v. Ketua Pengarah Penjara Kajang & Anor* [2017] *3 CLJ 161, Court of Appeal, 18 November 2016

This case relates to an appeal by an individual on death row, against a High Court decision to strike out an earlier application, where the appellant had asked the court to set aside or quash the death sentence as he has been diagnosed with schizophrenia.

The appellant was sentenced to death by hanging in the year 2000. He had been in detention for more than 17 years and on death row for 14 years. The appellant argues that the prolonged detention was inhumane, cruel and/or degrading punishment and had subsequently led to him being diagnosed with schizophrenia.

The Court of Appeal found that the appellant's arguments were of arguable basis or foundation. In arriving at this conclusion, the Court of Appeal found support from a case decided by the Indian Supreme Court – Shatrughan Chauhan v Union of India [2014] 3 SCC 1. The case interprets Article 21 of the Constitution of India (equivalent to Article 5(1) Malaysia Constitution), regarding the right to life and personal liberty. In particular, the case law relies on the United Nations Commission of Human Rights' documents such as Resolution 2000/65 "The Question on Death Penalty" and Clause 89 of the Report of the Special Rapporteur or Extra-Judicial Summary or Arbitrary Executions "Restrictions on the use of Death Penalty". These documents elaborate on the prohibition of the use of death penalty on persons suffering from any form of mental disorder.

The Court of Appeal acknowledged the possibility that the UN documents may not hold relevance to Malaysia, unlike to India, as India is a party to the International Convention on Civil and Political Rights. However, the case law and UN documents were sufficient at this point, to establish that the appellant had a sufficiently plausible and arguable case which merits a hearing. Accordingly, the decision to strike out the application by the High Court was reversed.

Intellectual Property

Application of the Trips Agreement – Direct Application of Treaties in Malaysia – Registration of Trademarks

***Kraft Foods Schweiz Holding GmbH v. Pendaftar Cap Dagangan* [2016] 9 CLJ 558, High Court, 15 August 2016**

This case relates to a rejection of trademark registration by the trademark registrar. The registrar rejected the plaintiff's proposed mark on the basis that it did not qualify as a mark under the Trade Marks Act 1976. The plaintiff contended otherwise, arguing among others that, Article 15(1) of the TRIPS Agreement provides for a wide definition of trademark. In addressing the application of the TRIPS Agreement to the present case, the High Court acknowledged that Malaysia has been a State party to the Agreement since 1 January 1995. However, referring to previous case law, the High Court held that it cannot refer to the TRIPS Agreement as suggested by the plaintiff, as Parliament has not legislated for the inclusion and application of Article 15(1) of the Agreement into the Trade Marks Act 1976.

International Trade

Trade Agreement – Treaty Adoption and Ratification – Parliamentary Consent– TPP – CPTPP

Trans-Pacific Partnership/Comprehensive and Progressive Agreement for Trans-Pacific Partnership

On 27 January 2016, the Malaysian Government held a special parliamentary voting session to obtain support for the ratification of the Trans-Pacific Partnership (TPP). The special voting session is notable as ordinarily, the Government does not require parliamentary consent to ratify treaties. However, this session was held with the purpose of addressing public concerns on the potential effects of the TPP, and to gain public support for ratification. The motion to ratify was subsequently passed by 127 votes for, and 84 votes against, leading to Malaysia's participation in the adoption of the Agreement on 4 February 2016. Subsequently, following the withdrawal of the United States, Malaysia continued its participation in the negotiation for the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

Shipping

Shipping – ILO – 2006 Maritime Labor Convention – Implementation

Implementation of the 2006 Maritime Labor Convention

On 18 May 2016, Malaysia passed the Merchant Shipping Ordinance (Amendment) Bill 2016 which introduces new provisions to the Merchant Shipping Ordinance 1952. This follows Malaysia's ratification of the Maritime Labor Convention 2006 on 20 August 2013. Of note, the amendments apply to ships of five hundred gross tonnes or more.

The key provisions introduced include Section 90 which provides the minimum hours of rest for the seafarers on board a Malaysian ship. Also, Section 103, imposes an obligation on the owner of Malaysian ships and any foreign ship within Malaysian waters to provide adequate health protection and medical care for seafarers and to ensure that medical supplies are properly maintained and inspected.

Aviation

Aviation – ICAO – Independent Civil Aviation Authority – Civil Aviation Authority of Malaysia

Establishment of the Civil Aviation Authority of Malaysia

On 23 November 2016, the Malaysian Parliament passed the Civil Aviation Authority Bill 2016. The bill (subsequently, Civil Aviation Authority Act 2017), primarily establishes the Civil Aviation Authority of Malaysia, replacing the Department of Civil Aviation Malaysia (DCA). The main difference between the DCA and CAAM is that the latter operates as a statutory body, granting it independence in its management, including budget and human resources aspects. Autonomy over the human resources aspects are important as the 2016 International Civil Aviation Organization (ICAO) Universal Safety Oversight Audit Programme, highlighted the lack of qualified technical personnel at the DCA. The government believes that an independent civil aviation authority would be best positioned to address this concern. Further, the government noted that Malaysia is bound by the standards set by the ICAO as a State party to the Chicago Convention. Hence, the bill enables Malaysia to meet its treaty obligations, given that ICAO had requested States parties to the Convention to establish an autonomous civil aviation authority.

State Practice of Asian Countries in International Law

Philippines

*Jay L. Batongbacal**

Jurisprudence

Treaties – Obligations – Pacta Sunt Servanda – Effect on Municipal Regulations – Taxation

Air Canada v. Commissioner of Internal Revenue [***G.R. No. 169507, 21 January 2016***]
Air Canada, an offline air carrier selling passenger tickets in the Philippines through Aerotel, a general sales agent in the Philippines, sought a refund of income taxes for the period covering the 3rd Quarter of 2000 to the 2nd Quarter of 2002, paid to the Commissioner on Internal Revenue. The Commissioner based its assessment on provisions of the 1997 National Internal Revenue Code that imposed a 2.5% tax on gross billings and a 32% rate of income tax on foreign corporations engaged in business in the Philippines, but Air Canada invoked Article VIII of the 1977 Convention between the Philippines and Canada for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (the Philippines-Canada Tax Treaty) which provides that the Philippines will not impose a tax higher than 1.5% of the carrier's gross revenue derived from sources within the Philippines.

After payment under protest, Air Canada filed a petition for review with the Court of Tax Appeals and sought a refund of taxes erroneously paid. The Court of Tax Appeals held that Air Canada was not liable for the 2.5% tax on gross billings, but nevertheless liable for the 32% corporate income tax. Air Canada brought the decision to the Supreme Court upon a petition for review.

The Supreme Court ruled that Air Canada was not liable for either that 2.5% tax on gross billings nor the 32% corporate income tax. Since it was an offline air carrier that did not operate flights into and out of the Philippines, the tax on gross billings was not applicable as the National Internal Revenue Code defined "Gross Philippine Billings" as "the amount of gross revenue derived from carriage of persons, excess baggage, cargo and mail originating from the

* Associate Professor, University of the Philippines College of Law.

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Philippines in a continuous and uninterrupted flight, irrespective of the place of sale or issue and the place of payment of the ticket or passage document."

Neither could it be held liable for the corporate income tax considering the existence of an effective tax treaty between the Philippines and the home country of the foreign air carrier. The Philippines-Canada Tax Treaty was duly ratified on 21 December 1977 and became valid and effective on that date. The Court reiterated that a tax treaty is an agreement entered into by sovereign States "for purposes of eliminating double taxation of income and capital, preventing fiscal evasion promoting mutual trade and investment, and according fair and equitable tax treatment to foreign residents or nationals." It invoked the constitutional provision that the Philippines "adopts the generally accepted principles of international law as part of the law of the land," and *pacta sunt servanda* as basis for the application of the provisions of tax treaties entered into by the Philippines to its National Internal Revenue Code. Although Air Canada was deemed to be taxable as a resident foreign corporation due to the operation of Aerotel as its agent, it was nevertheless subject to not more than 1.5% tax on gross revenues pursuant to the Philippine-Canada Tax Treaty. The Court explained that tax treaties form part of the law of the land, and Philippine jurisprudence applied the statutory construction principle that specific laws prevail over general ones. Since the Philippine-Canada Tax Treaty is more specific that the general provisions of the National Internal Revenue Code, the former governs.

Human Rights

Universal Declaration of Human Rights – Treaties and Covenants – Rights Of The Child – Citizenship

***Poe-Llamanzares v. Commissionon Elections* [*G.R. No. 221697, 221698–700, 8 March 2016*]**

Several petitions before the Commission on Elections questioned the qualifications of Senator Mary Grace Natividad S. Poe-Llamanzares to run for President in the 2016 national elections due to her having been a found abandoned as a newborn infant in the Parish Church of Jaro, Iloilo Province in 1968. Petitioners argued, among others, that she could not be considered a natural-born Filipino citizen on account of the fact that she was a foundling. The Commission denied all of the petitions for disqualification, and its resolutions were all brought to the Supreme Court for review.

On the issue of citizenship of foundlings, the Supreme Court ruled that Senator Poe-Lllamanzares was to be considered a natural-born citizen consistently

with the provisions of Article 15 of the Universal Declaration of Human Rights (UDHR), Article 7 of the UN Convention on the Rights of the Child, and Article 24 of the International Covenant on Civil and Political Rights. The Court found that the three instruments all obligated the Philippines to grant nationality from birth and ensure that no child is stateless.

Further, the Court determined that it is a generally accepted principle of international law to presume foundlings as having been born of nationals of the country in which the foundling is found. It cited two conventions even though they were not ratified by the Philippines, namely, Article 14 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws and Article 2 of the 1961 UN Convention on the Reduction of Statelessness as giving effect to the UDHR. It also relied on evidence of State practice showing that at least sixty countries in Asia, North and South America, and Europe passed legislation recognizing foundlings as their citizens, while a survey demonstrated that 166 out of 189 countries recognized foundlings as citizens.

Law of the Sea

Coastal State – Territorial Sea – Submarine Cables

***Capitol Wireless v. Provincial Treasurer of Batangas* [*G.R. No. 180110, 30 May 2016*]**

The Province of Batangas assessed real estate taxes upon Capital Wireless, Inc. for owning and operating a submarine cable within the municipal waters of the Municipality of Nasugbu, Batangas, and sought to levy and auction the submarine cable system. Capital Wireless refused to pay the real estate taxes, arguing that the cable system lay outside of Philippine territory, and tried to prevent the levy and auction sale by filing a petition with the Regional Trial Court. Its petition was dismissed for failure to pay under protest and appeal the assessment to the Local Board of Assessment Appeals. Capital Wireless then appealed to the Court of Appeals, but the latter affirmed the decision of the Regional Trial Court. The case was then brought to the Supreme Court.

The Supreme Court denied the petition for failure to exhaust administrative remedies, but nevertheless affirmed the decision of the lower court declaring that submarine wires or cables used for communications may be taxed like other real estate. The Court deemed submarine cables to be akin to electrical transmission lines that qualify as "machinery" subject to real property taxes. It took judicial notice that Nasugbu was a coastal municipality and

its surrounding sea falls within the 12 nautical mile territorial sea of the UN Convention on the Law of the Sea, over which the country has sovereignty, thus the portion of the submarine cable lies within Philippine territory and falls within the jurisdiction of the local taxing authorities in accordance with the taxation powers delegated to municipalities and provinces under the Local Government Code. In the absence of either domestic legislation or international agreement exempting the submarine cables from taxation, Capitol Wireless was deemed liable for real property taxes on the submarine cable.

Exclusive Economic Zone – Continental Shelf – Dispute Settlement

In the Matter of the South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China [***PCA Case No. 2013–19, July 12, 2016***]

The Republic of the Philippines commenced arbitration proceedings against the People's Republic of China under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS) on 22 January 2013. The Philippines disputed the nature and basis of China's claim to extensive areas in the South China Sea, represented by the "nine-dash line" map; contested the source of maritime entitlements in the Spratly Islands region and Scarborough Shoal; and challenged the legality of China's actions against Philippine fishing and petroleum activities, as well as building of artificial islands, within the latter's exclusive economic zone and continental shelf. China refused to participate in the proceedings. After a mostly favorable determination of jurisdiction on 29 October 2015, the *ad hoc* tribunal rendered an Award on the Merits.

The Tribunal characterized China's claims in the South China Sea as a historic claim to living and non-living resources within the area enclosed by the "nine-dash line", and held that any and all such historic claims to waters beyond the territorial sea were relinquished and abandoned by China when it signed and ratified the UNCLOS, and agreed to the establishment of the EEZ and continental shelf regimes for all coastal States. It then found that none of the features in the Spratly Islands region and Scarborough Shoal were capable of generating their own EEZ and continental shelf, by laying down nine criteria for determining whether or not a maritime feature was to be legally deemed an "island" or a "rock" as described in UNCLOS Article 121. Among these criteria are the natural capacity to sustain human habitation or economic life without external additions or modifications, stable and self-sustained habitation, and a resident

population. In the absence of EEZ or continental shelf zones appertaining to any island, the sea areas around the Spratly Islands region and Scarborough Shoal could be considered as either part of the Philippine EEZ and continental shelf measured from the Philippines baselines, or part of the high seas.

The Tribunal then found that China's interference with Philippine fishing and petroleum activities, construction of one of seven artificial islands, dangerous maneuvering against Philippine ships, and failure to prevent Chinese fishermen from fishing in the Philippine EEZ were all in contravention of the Philippines' sovereign rights over its EEZ and continental shelf. It also found that the construction of artificial islands and failure to prevent its fishermen from engaging in destructive fishing practices violated China's obligations to preserve and protect the marine environment. Finally, it ruled that the construction of artificial islands also violated China's obligations to refrain from taking actions that cause permanent damage and irreparable harm to the marine environment, and from acting prejudicially against the rights of the Philippines and aggravating the dispute.

Treaties

Accession – Executive Agreement

Intellectual Property Association of the Philippines v. Executive Secretary Ochoa, et al. **[*G.R. No. 204605, 19 July 2016*]**

The Intellectual Property Association of the Philippines commenced a special civil action for certiorari and prohibition to challenge the validity of the Philippines' accession to the Madrid Protocol without the concurrence of the Philippine Senate on the ground that it was classified as an executive agreement by the Department of Foreign Affairs.

The Supreme Court dismissed the action, finding no grave abuse of discretion on the part of the Executive Branch's classification since it was done in light of existing State policies and legislation on intellectual property. The Court observed that there are no hard and fast rules on the propriety of entering into either a treaty or an executive agreement on any given subject as an instrument of international relations; the primary consideration for such a choice appears to be the parties' intent and desire to craft their agreement in a way that furthered their respective interests. It reiterated that the matter of form is subordinate to the effectiveness and binding effect or enforcement of the instrument, inasmuch as the parties, regardless of form, are obliged to comply with the principle of *pacta sunt servanda*.

Human Rights

Universal Declaration of Human Rights – Treaties and Covenants – Rights of the Child – Non-Discrimination

David v. Senate Electoral Tribunal **[*G.R. 221538, 20 September 2016*]**
The petitioner instituted *quo warranto* proceedings before the Supreme Court against Senator Mary Grace Poe-Llamanzares, seeking to unseat her as Senator for allegedly not being a natural-born citizen of the Philippines and therefore not qualified to hold such public office under the 1987 Constitution. It is alleged that she cannot be a natural-born citizen because she is a foundling whose parents, and therefore citizenship, are unknown according to the principle of *jus sanguinis*, and that she failed to establish her Philippine "blood line."

The Court dismissed the petition, citing among others, that even more basic that being citizens, foundlings are human persons whose dignity are valued and respected by civilized nations. In addition to provisions of domestic legislation and the Philippine Constitution, the Court invoked the UN Convention on the Rights of the Child which requires the States Parties to protect children's rights to immediate registration and nationality after birth, against statelessness, and against discrimination on account of their birth status. The Court also invoked the International Covenant on Civil and Political Rights which requires that children be allowed immediate registration after birth and to acquire a nationality, as well as be defended against discrimination. To deny them these rights, deprive them of citizenship, and render them stateless would impose undue burdens and discrimination, and undermine their development.

Treaties and Covenants – International Covenant on Civil and Political Rights

Ocampo, et al. v. Enriquez **[*G.R. No. 225973, 8 November 2016*]**
Petitioners challenged the decision of the Philippine Government to allow the burial of former President Ferdinand E. Marcos, who imposed authoritarian rule in the Philippines from 1972 to 1986, in the Libingan ng mga Bayani (National Heroes' Cemetery). They argued that the burial violates the rights of human rights victims to "full and effective" reparations provided under the International Covenant on Civil and Political Rights (ICCPR), the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by the UN General Assembly on

16 December 2005, and the Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity issued by the UN Economic and Social Council on 8 February 2005.

The Supreme Court demurred, arguing that the ICCPR and cited UN documents on reparations and combatting impunity only called for legislative measures, national measures and provisions for administrative or judicial recourse. The Court declared that the Philippines is more than compliant with its international obligations, and since the People Power Revolution on 25 February 1986 had done its share to respect, protect, and fulfill the country's human rights obligations.

Jurisdiction – Immunity from Jurisdiction

***Association of Medical Clinics for Overseas Workers v. GCC Approved Medical Centers Association* [*G.R. Nos. 207132 and 207205, 6 December 2016*]**

The Department of Health (DOH) issued an administrative order to stop the practice of "referral decking," or equal distribution of migrant workers among several clinics that were members of the GCC Approved Medical Centers Association (GAMCA) for purposes of securing medical clearances for their applications and permits to work overseas in the Gulf Cooperative Council States. The prohibition was issued in accordance with Section 16 of Republic Act No. 10022, which granted the DOH regulatory powers over all clinics that conduct medical examinations on Philippine migrant workers as a requirement for overseas employment. GAMCA filed a petition with the Regional Trial Court to annul the order of the DOH, arguing that the referral decking system was a requirement of the Gulf Cooperative Council States (GCC), which exempted the GAMCA from the prohibition of the DOH. The Association of Medical Clinics for Overseas Workers intervened in the proceedings on the side of the Department of Health. The court granted the petition and ordered the DOH to cease and desist from implementing the orders against GAMCA. The decision was brought to the Supreme Court on appeal.

The Court rejected GAMCA's argument that the referral decking system was a requirement of the GCC exempt from DOH regulation on the ground of sovereign equality and independence of States. While it recognized the principle of sovereign immunity, it also restricted such immunity to acts *jus imperii*, or public acts, and did not deem it extended to agents of foreign governments in the Philippines engaged in commercial transactions and complying with the latter's laws. GAMCA was unable to prove that the GCC extended its sovereign immunity to GAMCA. The Court also determined that the GCC's prerogative to apply visa requirements to any foreign nationals including overseas workers

who seek to enter their territory did not affect the legality of the prohibition against the referral decking system.

Treaties and Covenants – International Covenant on Civil and Political Rights

***Wilson v. Ermita* [*G.R. No. 189220, 7 December 2016*]**
The petitioner, a British national, was accused and charged with the crime of rape before the Regional Trial Court, but the conviction was subsequently acquitted on appeal due to serious discrepancies and inconsistent statements in the testimony of the victim. Pending appeal, he filed with the UN Human Rights Committee a case against the Philippines for violations of the International Covenant on Civil and Political Rights (ICCPR), particularly the provisions on the rights of the accused. After his release from detention he returned to the UK, and sought compensation from the Board of Claims of the Department of Justice, which awarded him damages. However, the petitioner was denied a visa to be able to return to the Philippines to collect such damages due to the presence of his name on the immigration watch list for previously overstaying in the Philippines and conviction of a crime. Subsequently, the UN Human Rights Committee issued a View stating that the compensation awarded by the Philippines did not take into account the seriousness of the breaches of his human rights, nor did it refund the amounts unjustly imposed upon him for overstaying his tourist visa which was directly attributable to his wrongful conviction. The petitioner wrote to the Executive Secretary to comply with the conclusions of the View of the UN Human Rights Committee. No action having been taken a year later, the petitioner filed an action for *mandamus*, arguing that by virtue of the doctrine of transformation, the View issued by the Committee constitutes part of international law and the Philippines is obliged to enforce the same.

The Supreme Court denied the petition, noting that while the Philippines was indeed a party to the ICCPR and Optional Protocol, and expressly recognized the competence of the UN Human Rights Committee, nowhere in the instrument is it stated that the View of the Committee forms part of the treaty. Any Views issued only display “important characteristics of a judicial decision” but are not per se decisions that may be enforced outright by Philippine courts, and therefore are mere recommendations to guide the State. Action on such recommendations are within the purview of the Legislative and Executive branches, not the Judicial branch whose power under the 1987 Constitution is limited to the settlement of actual controversies and interpretation of law.

International Agreements

Treaties – Agreements Concurred by the Philippine Senate

Ratification of the Articles of Agreement of the Asian Infrastructure Investment Bank, 5 December 2016

The Philippine Senate issued Resolution No. 33 concurring with the ratification of the Articles of Agreement of the Asian Infrastructure Investment Bank. The Articles of Agreement were signed in China on 31 December 2015, and establishes the Asian Infrastructure Investment Bank as an international financial institution.

State Practice of Asian Countries in International Law

Singapore

Jaclyn L. Neo and Rachel Tan Xi'En***

State Recognition – Kosovo

Singapore recognized the Republic of Kosovo as an independent State on 1 December 2016 and established diplomatic relations. Singapore is the fourth member State of the Association of Southeast Asian Nations (ASEAN) to recognize the independence of Kosovo. The other three States are Malaysia, Brunei, and Thailand.

Bilateral Investment Treaty – Standard of Review on Appeals in Jurisdictional Rulings – "Moving Treaty Frontier" ("MTF") Doctrine in Customary International Law – Interpretation of Treaty

***Sanum Investments Limited v the Government of the Lao People's Democratic Republic* [2016] SGCA 57**

On 29 September 2016, the Singapore Court of Appeal ("SGCA") released its decision in *Sanum Investments Ltd v the Government of the Lao People's Democratic Republic*, reversing the decision of the Singapore High Court which had previously held that an arbitral tribunal had no jurisdiction to hear the claims by a Macanese investor under the 1993 Bilateral Investment Treaty between the People's Republic of China and the Lao People's Democratic Republic ("PRC-Laos BIT").

This case relates to a dispute between a Macanese investor, Sanum Investments Limited ("Sanum") and the Lao Government. Sanum alleged that the Lao Government deprived it of the benefits it derived from its capital investment through the imposition of unfair and discriminatory taxes. An arbitral tribunal was constituted under the UNCITRAL Arbitration Rules, with the seat in Singapore. The arbitral tribunal rendered a preliminary award upholding its

* Associate Professor, National University of Singapore.
** Research Associate, Centre for International Law, National University of Singapore.

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jurisdiction and the Lao government then commenced challenge proceedings before the High Court in Singapore. The High Court held that the PRC-Laos BIT did not extend to Macau which resulted in Sanum's appeal to the SGCA.

Key Findings of the SGCA

First, the SGCA found that a *de novo* standard of review applied to jurisdictional rulings, consistent with Singapore case law, and this applied equally in investor-state arbitrations.

Second, the SGCA found that the PRC-Laos BIT equally applied to Macau based on the "moving treaty frontier" ("MTF") doctrine in customary international law, even if Macau had been under Portuguese rule when the PRC-Laos BIT was signed in 1993 and was only handed over to the PRC in 1999. A State's treaty would automatically extend to new territory that became a part of that state. The MTF doctrine applied as a matter of presumption to the BIT, and as none of the evidence adduced by the Lao Government could displace this presumption, the MTF doctrine applied to cover Macau after it was transferred.

Third, Laos had sought to adduce evidence after the arbitral award was issued by way of two Note Verbales ("NVs"). The SGCA found that the new evidence would be given weight if they were consistent with the evidence adduced before the critical date. However, the SGCA did not accord the NVs any weight because they contradicted the pre-critical date position.

Fourth, the SGCA rejected Laos' arguments that the NVs constituted subsequent agreement or subsequent practice under Article 31(3)(a) or (b) of the Vienna Convention on the Law of Treaties. This was because subsequent agreement or practice could not have retroactive effect and there was no evidence before the critical date to show that there was any agreement that the PRC-Laos BIT did not apply to Macau. Giving effect to the 2014 NVs could amount to effecting a retroactive amendment of the PRC-Laos BIT, which would not be permissible.

Fifth, in respect of Laos' second jurisdictional objection that Sanum's claims fell outside the scope of the dispute resolution clause in the BIT, the court agreed with a broad construction of the relevant clause ("Article 8(3)") and found that Article 8(3) permitted arbitration as long as the claims included a dispute over the amount of compensation. Considering the fork in the road provision in Article 8(3), the Court found that a narrow reading would violate the principle of effective interpretation as it would be open to a host state to avoid arbitration by not submitting the liability dispute to its courts altogether, which would render protection under Article 8(3) illusory. In this regard, the specific context surrounding Article 8(3) pointed in favour of a broad interpretation.

Arbitration – Applicability of Arbitral Clause in Main Contract

Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza Spa [2016] SGCA 53

In this case, the SGCA affirmed that a negotiable instrument is not governed by an arbitration agreement in an underlying contract unless that agreement is expressly incorporated into the negotiable instrument. Rals International Pte Ltd ("Rals") entered into a contract with Oltremare SRL, which contained an arbitration clause. The contract provided for payment to be made in cash instalments and promissory notes. The promissory notes were then assigned to a bank. However, when the bank presented the first four notes for payment, they were dishonoured by Rals. The bank sued Rals in the High Court, and Rals sought to stay the bank's claim under Section 6 of the International Arbitration Act. The High Court declined to stay the action.

Invoking *Larsen Oil and Gas Pte Ltd v Petropod Ltd* [2011] 3 SLR 414, Rals appealed to the SGCA on the sole ground that a widely drafted arbitration clause meant that the notes fell within its scope. It argued that arbitration clauses should be construed generously. In response, the bank argued that the notes did not fall under the arbitration agreement, and even if they did, the bank's status as an endorsee meant that its claim was outside the scope of the arbitration agreement.

The SGCA found in the bank's favor. Importantly, the SGCA stated that the rule of construction, as in the English case of *Fiona Trust & Holding Corporation and others v Privalov and others* [2007] 2 ALL ER (*Comm*) 1053 was that all disputes between parties to an arbitration agreement are assumed to fall within the scope of the agreement unless shown otherwise, but could not be applied when there were compelling reasons that would displace the assumed intention of the parties. Here, the obligations under the promissory notes were separate and autonomous from the main contract, as an obligation under such a promissory note was simply an unconditional promise in writing made by one person to another agreeing to pay a sum of money. Further, there was no term in the arbitration agreement or the main contract that expressly stated that the arbitration agreement was to encompass disputes arising out of the notes; neither was an arbitration agreement expressly incorporated into the notes. Ral's application was dismissed.

International Agreement – Paris Agreement

Singapore ratified the Paris Agreement in 2016. By ratifying the Agreement, Singapore formalized its pledge to reduce its Emissions Intensity by 36% from

2005 levels by 2030 and to stabilize emissions with the aim of peaking around 2030. The pledge builds on Singapore's existing commitment to reduce greenhouse gas emissions by 16% by 2020 from the business-as-usual level.

International Agreement – Domestic Incorporation

Parliament passed the Choice of Court Agreements Act on 14 April 2016 to domestically incorporate the Convention on Choice of Court Agreements done at The Hague on 30 June 2005. The law came into force on 1 October 2016.

International Agreement – Convention On Mutual Administrative Assistance in Tax Matters

Singapore ratified the Convention on Mutual Administrative Assistance in Tax Matters ("the Convention") on 20 January 2016. It signed the Convention on 29 May 2013. The Convention facilitates bilateral tax information exchange agreements between state parties. It was developed by the OECD and the Council of Europe, and entered into force in 1995. Among its signatories are all G20 countries, most OECD countries as well as major financial centres such as Singapore, Switzerland, and Luxembourg. Ratifying the Convention expands Singapore's network of partners for exchange of information on request and furthers Singapore's strong commitment to combat cross-border tax evasion.

International Agreement – Singapore-Australia Comprehensive Strategic Partnership

Singapore and Australia signed a first set of agreements on 13 October 2016 under the Comprehensive Strategic Partnership (CSP), a landmark pact that is expected to advance bilateral relations between the two countries. This first set comprised four Memorandums of Understanding (MOU) in the areas of defence, trade, science and innovation, and anti-drug trafficking. Under the defence initiatives, the Singapore Armed Forces (SAF) will be able to extend its training in Australia for 18 weeks a year with a larger contingent of troops. Both sides will also jointly develop new training facilities in Australia. With respect to trade, revisions will be introduced to the Singapore-Australia Free Trade Agreement, which will facilitate business travel between the two countries as well as improve access to government procurement in both countries. Further collaborations and matching contributions will be made in science

and innovation to support areas of mutual interests. This includes collaborations on research and development, the sharing of research space, and cooperation among tech start-ups from both sides. Lastly, the countries agreed to work together to counter international drug trafficking, including greater cooperation, joint trainings, as well as exchange of information and best practices among law enforcement agencies.

International Agreements – Bilateral Investment Treaties

Singapore signed three Bilateral Investment Treaties (BITs) in 2016, i.e., with Mozambique, Nigeria, and Iran. Of these, the Singapore-Iran BIT is of the most interest. It was signed on 29 February 2016, following a time of renewed interest among the business community with the lifting of sanctions against Iran. Singapore is the second country after Japan to sign a BIT with Iran following the lifting of United Nations sanctions in January 2016. The signing of the BIT took place in conjunction with a business delegation visit to Iran, which comprised representatives from the oil and gas, petrochemicals, logistics, infocommunications, and professional services industries.

International Agreements – Avoidance of Double Taxation Agreements ("DTAs")

Singapore signed several bilateral treaties concerning double taxation in 2016:

– Singapore and Cambodia signed an Agreement for the Avoidance of Double Taxation on 20 May 2016;
– Singapore and Ethiopia signed an Agreement for the Avoidance of Double Taxation on 24 August 2016; and
– Singapore and India signed a new Protocol to amend their bilateral DTA on 30 December 2016.

The Singapore-Cambodia and Singapore-Ethiopia DTAs clarify the taxing rights of both countries on all forms of income flows arising from cross-border business activities, and minimises the double taxation of such income. This will lower barriers to cross-border investment and boost trade and economic flows between the two countries.

The Singapore-India Protocol comes on the heels of the India-Mauritius DTA to phase out capital gains tax exemptions. As the capital gains tax exemption for shares in the Singapore-India DTA was pegged to the India-Mauritius DTA,

the Singapore-India DTA had to be similarly amended. The updated DTA preserves the existing tax exemption on capital gains for shares acquired before 1 April 2017, while providing a transitional arrangement for shares acquired on or after 1 April 2017. For shares acquired on or after 1 April 2017, there will be a two-year transition period, during which the capital gains from such shares will be taxed at 50% of India's domestic tax rate if the capital gains arise during 1 April 2017 to 31 March 2019. The new Protocol will be underpinned by stringent substance requirements which are unique to the Singapore-India DTA, and which ensure that the Protocol can only be enjoyed by tax residents with substantive economic activities.

The following treaties concerning double taxation also entered into force in 2016:

- The Singapore-Rwanda DTA entered into force on 15 February 2016.
- The revised Singapore-Thailand DTA entered into force on 15 February 2016.
- The Second Protocol amending Singapore's standing DTA with the United Arab Emirates entered into force on 16 March 2016. The revised terms include longer threshold periods to ascertain the presence of a permanent establishment and lower withholding tax rates for dividends and interest income.
- The revised Singapore-France DTA entered into force on 1 June 2016. The revised DTA offers improved terms such as lower withholding tax rates for dividends and includes anti-abuse provisions.
- The new Singapore-Lao People's Democratic Republic DTA entered into force on 11 November 2016.
- The Protocol amending the existing Singapore-Russian Federation DTA entered into force on 25 November 2016.
- The revised Singapore-Republic of South Africa DTA entered into force on 16 December 2016.

State Practice of Asian Countries in International Law

Thailand

*Kitti Jayangakula**

Treaties

Agreements Concurred by Thailand in 2016

Human Rights – Person with Disability – Optional Protocol to the Convention on the Rights of Person with Disabilities

The Royal Thai Government attaches great importance to the promotion and the protection of the rights and the empowerment of persons with disabilities in line with international standards by becoming a party to the Convention on the Rights of Persons with Disabilities (CRPD) since 28 August 2008.

On 2 September 2016, Thailand has become a party to the Optional Protocol to the CRPD and it will enter into force for Thailand on 2 October 2016, making Thailand the 90th country to become a party to the Optional Protocol. The accession to the OP-CRPD is in accordance with the Cabinet's resolution on 19 April 2016, which is a part of the current Government's endeavors to continue to promote and protect the human rights of people in Thailand.

This Optional Protocol allows for individual complaints to be submitted to the UN Committee on the Rights of Persons with Disabilities for any violation of the rights as enshrined in the CRPD. The OP-CRPD will also serve as another mechanism that helps strengthen the promotion and protection of the rights of persons with disabilities.

Labor Rights – ILO Convention No. 187 on the Promotion Framework for Occupational Safety and Health

On 23 March 2016, Thailand has become a party to the International Labor Organization (ILO) Convention No. 187 on the Promotional Framework for Occupational Safety and Health, 2006 (ILO Convention No. 187). The ratification reassures Thailand's commitment to improve working and living conditions for workers in compliance with international labor standards. This is the 16th

* Eastern Asia University, Thailand.

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ILO Convention ratified by Thailand, which will enter into force on 23 March 2017, 12 months after the ratification.

The ILO Convention No. 187 is one of the ILO's core instruments in safety and health at the workplace. The member States that ratify this Convention are obliged to formulate a policy and issue supporting domestic laws and regulations to ensure occupational safety and health and to effective implementation. The promotion of occupational safety and health is part of the ILO's agenda of decent work for all, in line with the ILO's Constitution which aims at protecting workers and preventing illness, injury and death at the workplace. The importance of decent work is also highlighted in Goal 8 of the Sustainable Development Goals (SDGs), which seeks to promote inclusive and sustainable economic growth, employment and decent work for all.

Occupational safety and health issues have been high on Thailand's National Agenda since 2007. In 2011, the Occupational Safety, Health and Environment Act was promulgated and was followed by National Master Plan on Occupational Safety, Health and Environment (2012 – 2016). MOL is currently drafting the 2nd National Master Plan (2017–2021) as a guideline to continuously promote safety and health in an appropriate environment for workers.

Labor Rights – Maritime Labor Convention

On 7 June 2016, Thailand has become a party to the Maritime Labor Convention, 2006 (MLC, 2006). The ratification reconfirms Thailand's commitment to improve working and living conditions for workers and seafarers in compliance with international labor standards. The MLC is the 17th ILO Convention ratified by Thailand, which is the 77th Member State to have ratified this landmark Convention. The MLC 2006 will enter into force on 7 June 2017, one year after its ratification.

The MLC 2006 outlines seafarers' rights, such as fair terms of employment, health protection, welfare measures and decent working and living conditions on-board ships. It establishes a strong compliance and enforcement mechanism based on flag State inspection and certification of seafarers' working and living conditions. This is supported by port State inspection of ships to ensure on-going compliance between inspections.

The ratification of the MLC, 2006 can be of tripartite benefit to ship-owners, seafarers, and governments: (i) for ship-owners, with the certificates of maritime labor compliance prescribed under the MLC, 2006, obstacles will be eradicated and entry into port of ratifying countries will be facilitated; (ii) for seafarers, they will be entitled to an international standardized protection in every process regarding recruitment, working and living on board outside of

working hours; (iii) for governments, they will be able to maintain maritime fleets which are internationally accepted and their international trade competitiveness will be enhanced.

Trafficking in Persons – ASEAN Convention Against Trafficking in Person Especially, Women and Children (ACTIP) – ASEAN Plan of Action against Trafficking in Persons, Especially Women and Children (APA)

Thailand deposited the Instrument of Ratification of the ASEAN Convention against Trafficking in Persons, Especially Women and Children (ACTIP) on 21 November 2015 in Kuala Lumpur, Thailand and the other ASEAN member countries jointly signed the ACTIP and endorsed the ASEAN Plan of Action against Trafficking in Persons, Especially Women and Children (APA). It is ASEAN's first regional legally-binding instrument to combat trafficking in persons, with the aim of strengthening regional cooperation against trafficking in persons among the ASEAN Member States. It builds on the ASEAN Declaration against Trafficking in Persons particularly Women and Children which was adopted in 2004. The purposes of this Convention are: 1) to prevent and combat trafficking in persons, especially women and children; 2) to protect and assist victims of trafficking in persons; and 3) to promote cooperation among the parties in order to meet these objectives.

On 24 July 2016, Thailand deposited the Instrument of Ratification of the ACTIP with the Secretary-General of ASEAN. The ratification of the Convention affirms Thailand's continued commitment to combating human trafficking and is consistent with the Government's policy which declared fighting human trafficking as a national agenda. It also underscores the Government's commitment to cooperate with the ASEAN Member States to jointly combat this crime. In addition, the implementation of the APA, Thailand has established a sub-committee to follow up by organizing meetings with concerned agencies to raise awareness of both ACTIP and APA and delegate line agencies to further initiate programs and activities to support the implementation.

Municipal Law

Children's Rights – The Prevention of the Adolescent Pregnancy Problem

On 30 March 2016, the National Legislative Assembly of Thailand enacted the Act for Prevention and Solution of Adolescent Pregnancy Problem B.E. 2559 (2016), which deals with the increasing number of adolescent pregnancy in

Thailand, which may affect children's rights recognized under the Convention on the Rights of the Child (CRC). It describes a prevention and solution strategy for educational establishments, and defines the powers and duties of the instituted "Prevention and Solution of the Adolescent Pregnancy Problem Committee".

The Act provides the clear definition of "adolescent", which refers to a person over ten years of age but not yet twenty years of age; while "pupil", means an adolescent who is receiving a basic education at a primary or secondary level, either general or vocational, or the equivalence, in a public or private educational establishment; and "student" means an adolescent who is receiving a higher education or the equivalence, in a public or private educational establishment (Section 3).

The Act provides an adolescent has the right to make a decision by himself and has the right to information and knowledge, right to reproductive health service, right to confidentiality and privacy, and right to social welfare provision, that are equal and non-discriminative, and is entitled to any other rights for the purpose of this Act accurately, completely and adequately (Section 5).

To comply with this, the Act also provides prevention and solution for education, service and business establishments respectively.[1] In addition, the Act provides social welfare relating to prevention and solution of the adolescent pregnancy problem as follows: (1) to promote and support Children and Youth

1 Section 6 provides that "An educational establishment shall undertake the prevention and solution of the adolescent pregnancy problem as follows:

(1) to provide teaching and learning on sexuality studies which is appropriate to age of pupils or students;

(2) to recruit and develop teaching personnel to be capable of providing sexuality studies and counselling on the prevention and solution of adolescent pregnancy problem to pupils or students;

(3) to establish a system of supervision, assistance and protection for pregnant pupils or students to receive education in a suitable and continuous manner, including establishing a referral system to ensure the receipt of an appropriate reproductive health service and social welfare provision.

The prescription of the categories of educational establishments and undertaking of the educational establishments in each category shall be in accordance with the rules, procedures and conditions as prescribed in the Ministerial Regulation."

Section 7 provides that "A service establishment shall undertake the prevention and solution of the adolescent pregnancy problem as follows:

(1) to accurately, completely and adequately provide information and knowledge on the prevention and solution of adolescent pregnancy problem to adolescent recipients of service;

(2) to provide counselling and reproductive health services which are up to the standard and consistent with the rights under section 5, to adolescent recipients of service, including establishing a referral system to ensure the receipt of appropriate social welfare provision.

Councils at the level of Changwat (province) and Amphoe (sub-province) to establish the children and youth networks in the areas to be the leaders in preventing, resolving, and monitoring the problem of adolescent pregnancy; (2) to promote and support the relevant State agencies and private organizations to coordinate, monitor, and assist pregnant adolescents and their families; (3) to provide vocational training in accordance with interests and proficiencies to pregnant adolescents, who intend to receive the training, prior and after childbirth, and to coordinate to procure suitable employment; (4) to provide alternative families in the case where adolescents are unable to raise the children themselves; (5) to provide other social welfare to promote the prevention and solution of adolescent pregnancy problem (Section 9) and provides the local administration shall have the powers and duties to undertake to ensure that adolescents in its local administrative area have the rights under section 5 (Section 10).

The Act sets up mechanism called "Prevention and Solution of the Adolescent Pregnancy Problem Committee" has powers and duties to propose policies and strategies on the prevention and solution of the adolescent pregnancy problem to the Council of Ministers for consideration; to propose a guideline for amendment to and revision of the law relating to the prevention and solution of the adolescent pregnancy problem to the Council of Ministers, and to submit opinions to the Ministers on the issuance of Ministerial Regulations under this Act; to submit a report on the prevention and solution of the adolescent pregnancy problem to the Council of Ministers at least once a year; to prescribe an operational guideline for State agencies and private organizations for the prevention, assistance, resolution, and remedy of the adolescent pregnancy problem, adolescent reproductive health problem, sexual violence, and sexual offences; to provide State agencies and private organizations consultation, recommendations, and solution to difficulties in the course of undertaking the

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The prescription of the categories of service establishments and undertaking of the service establishments in each category shall be in accordance with the rules, procedures and conditions as prescribed in the Ministerial Regulation."

Section 8 provides that "A business establishment shall undertake the prevention and solution of the adolescent pregnancy problem as follows:

(1) to accurately, completely and adequately provide information and knowledge on the prevention and solution of adolescent pregnancy problem to adolescent employees;

(2) to provide or support adolescent employees with an access to counseling and reproductive health services, including establishing a referral system to ensure the receipt of appropriate social welfare provision;

The prescription of the categories of business establishments and undertaking of the service establishments in each category shall be in accordance with the rules, procedures and conditions as prescribed in the Ministerial Regulation."

prevention and solution of the adolescent pregnancy problem; and to perform any other acts as prescribed by law to be the powers and duties of the Committee or as entrusted by the Council of Ministers.

Human Rights – Human Trafficking – Human Trafficking Cases Procedure

On 11 May 2016, the National Law Assembly approved the draft of the Procedure for Human Trafficking Cases Act B.E. 2559 (2016). This new law becomes effective on 25 May 2016. The main purpose of this Act is to increase the sufficient of the protection and suppression of human trafficking cases.

This Act institutes a number of key procedural measures to make the adjudication process less burdensome for victims: expediting the judicial process for trafficking cases, allowing video testimony, increasing witness protection and providing other support to victims to ensure their rights are fully protected. More importantly, it mandates more stringent consideration of bail for trafficking offenders to decrease their ability to flee.

According to this law, the trial of human trafficking cases will use the inquisitorial system without delay (Section 8) and in taking of evidence prior to the institution of an action or at a preliminary examination stage or during the trial permits the witness to testify via a video conference at any other Court or official place of business or any other place located in the country or in a foreign country and such testimonies shall be deemed as given by the witness in the courtroom (Section 9).

In case where the alleged offender or the accused has escaped during the proceedings or during trial by the Court, the period of time during which the escape of the alleged offender or the accused is in progress shall not be included in the computation of the period of prescription (Section 21) and such person shall be liable to imprisonment for a term not exceeding six months or to a fine not exceeding 10,000 THB or to both. Moreover, the Court has the competence to try and take evidence in the absence of the accused (Section 33(3)).

To solve the problems of diversion of cases, the delay on court consideration and the efficiency of cases administration, the Act provides the Supreme Court shall have the competence to accept a *Dika* appeal for trial when it is of the opinion that the issues to which the *Dika* appeal relates are the important issues deserving adjudication by the Supreme Court such as the issue is associated with public interests; the judgment or order of the division of human trafficking cases of the Court of Appeal has made the determination of an important legal issue in a conflicting manner or in a manner contrary to the

precedent judgments or orders of the Supreme Court; the judgment or order of the division of human trafficking cases of the Court of Appeal has made the determination of an important legal issue in respect of which there exists no precedent judgments or orders of the Supreme Court; the judgment or order of the division of human trafficking cases of the Court of Appeal is contrary to final judgments or orders of other Courts; or the accused is sentenced to death or life imprisonment by a judgment of the division of human trafficking cases of the Court of Appeal. (Section 45).

Labor Rights – Child Protection – Labor Protection Act

On 12 April 2016, Thailand's Cabinet approved the draft amendment to the Labor Protection Act in relation to child protection. On 17 November 2016, the National Legislative Assembly reviewed such draft and approved revisions of the Labor Protection Act. The Labor Protection Act (No. 5) was published in the Royal Thai Government Gazette to enter into force on 24 January 2017.

This is in line with Thailand's international obligations such as ILO Convention No. 138 (Minimum Age Convention, 1973). An important part of the amendment is to increase punishments that deal with child labor violations. For example, increased penalties are imposed on employers who hire workers below 15 years of age and below 18 years of age to work in hazardous or illegal jobs (Section 148/1). Punishments will include an imprisonment term of up to 2 years and/or a fine of 400,000 – 800,000 THB per employee (Section 148/2) (previously 6 months imprisonment and/or 200,000 THB).

Human Trafficking – Beggar – Forced Begging – Beggar Control Act

The Beggar Control Act B.E. 2559 (2016) was passed into law by the National Legislative Assembly on 4 March 2016 and came into effect on 28 July 2016. The previous Beggar Control Act of B.E. 2484 (1941) lacked provisions to punish individuals responsible for trafficking people into forced begging.

The new law forbids people from any and all forms of begging, direct or indirect. It also prohibits impromptu "displays of skill" on public footpaths, requiring performing artists to register with local authorities beforehand (Section 13). In contrast to the previous Act, which did not criminalize begging and only penalized runaways from social welfare facilities, it stipulates that beggars can be fined as much as 10,000 THB and/or jailed for up to one month (Section 19).

Penalties for traffickers and those seeking to benefit from begging are more severe: prison sentences of up to three years and fines as high as 30,000 THB (Section 22, paragraph 1). Government officials found complicit face more extreme punishments: up to five years in jail and/or up to 50,000 THB in fines (Section 22, paragraph 2).

This law was enacted to prevent and mitigate the risks of human trafficking. Its essence is regulating the protection and quality of life development of beggars, beggar control, setting screening mechanism for separating those "with skills" from beggars, and determining the criminal offence for persons who beg or exploit the physical disabilities or cognitive or mental impairment of others (Section 15). It also provides protection and quality of life development for persons who beg in 4 areas – medical (both physical and mental treatments), social (reintegration to the society), life skills, and occupational (occupation training) (Section 5).

State Practice of Asian Countries in International Law

Vietnam

Tran Viet Dung *

Treaties

Law on International Treaties – Implementation of International Treaties

Adoption of New Law on International Treaties

On 6 April 2016, at the 11th Meeting of the XIII National Assembly, the Law 108/2016/QH13 on International Treaties (the "Law on International Treaties 2016") has been adopted and would be enforced on 1 July 2016 as the replacement of the Law on Signing, Accession and Implementation of International Treaties 2005.

The Law on International Treaties 2016 contains 10 chapters and 84 articles, amongst which are 10 retained, 24 deleted, 73 amended and 20 new written articles compared with the former 2005 law. Remarkably, many provisions of the new law clearly specify related articles of the Constitution 2013 of the Socialist Republic of Vietnam, providing a flexible and effective legal framework for the signing and implementation of international treaties with the aim to promote the international integration of Vietnam.

One of the most significant revisions in the Law on International Treaties 2016 is the specification of the relationship between international treaties, the Constitution of Vietnam and other legal instruments. Accordingly, the Vietnamese legal instruments (including all laws and regulations) must comply with the treaties that Vietnam is a contracting party; however, the conclusion of international treaties must not be contrary to the Constitution. Article 6 of the Law on International Treaties 2016 specifically stipulates that if any legal document, except the Constitution, and a treaty to which Vietnam is a contracting party have different provisions on the same issue, the international treaty shall prevail. The Law has set the hierarchy of source of laws as follows: (i) the Constitution, (ii) international treaties, and (iii) other legal instruments.

* Ho Chi Minh City University of Law, Vietnam

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Another important point of the Law on International Treaties 2016 is the adoption of the definition of the term "international treaty," which significantly affects the status and contents of agreements concluded by the government and government agencies. Accordingly, "international treaty" is defined as "an agreement in written form concluded in the name of the State or in the name of the Government of the Socialist Republic of Vietnam with a foreign contracting party, that give rise to, change or terminate rights and obligations of the Socialist Republic of Vietnam under international law…"[1], which is consistent with the definition of treaty under Article 2.1(a) of the Vienna Convention on the Law of Treaties (1969). Based on the above mentioned, the State documents which fully meet the criteria of an international treaty must follow the negotiation and signing procedures stipulated by the Law. Declarations and political commitments that do not create rights and obligations under international law shall not be regarded as international treaties under the laws of Vietnam. In addition, the diplomatic documents regulated by provisions on the diplomatic administration and on the jurisdiction, functions of the state diplomatic agencies are also not quantified as treaty under the Law on International Treaties 2016.

Agreements and commitments on foreign borrowing if they are signed in the name of the State, the Government of Vietnam and foreign signatories such as the State, Foreign Government or the World Bank (WB) Asian Development Bank (ADB) are still considered as international treaties and fall under the scope of the Law. However, specific loan agreements in the name of the Government with foreign banks that have provisions governing the law of the lending country or the donor country will no longer be considered international treaties and the signing of such agreements shall be subject to regulations of the law on public debt management.[2]

Furthermore, the specification by the Law of the term "international treaties on human rights, fundamental rights and obligations of citizens" and "international treaties regarding the membership of Vietnam in important international and regional organizations," which are also prescribed in Article 70 of the Constitution 2013, is to differentiate international treaties on human rights, fundamental rights and obligations of citizens from international treaties on specific aspects of cooperation such as legal assistance, extraditory, transfer of prisoners, child adoption, crime prevention and other kinds of cooperation.[3]

1 Article 2.1, Law on International Treaties 2016.
2 Article 70.3, Law on International Treaties 2016.
3 Article 29.1 (c), Law on International Treaties 2016.

Lastly, there are significant revisions on the procedure on conclusion and implementation of international treaties to meet the practical requirements of international integration. The Law of International Treaties 2016 introduces a new chapter on summary order and procedures of negotiation, signing, amendment, supplementation or extension of a number of types of international treaty. In particular, the Law provides for two forms of shortening, including (i) a simplification of procedures (simultaneous submission of negotiation and signing of international agreements); and (ii) reduction of time limits and records. Hence, the summary order and procedure shall not apply to international treaties that fall under the authority of the National Assembly for ratification or accession, as these treaties have widespread effects on the legal system and thus, required full procedure of screening and strict assessment by the legislators.

Regarding the organization on implementation of the international treaties, the Law on International Treaty 2016 regulates in detail the roles and responsibilities of state agencies in planning, urging the formulation and submission for promulgation, amendment and supplementation or annulment of legal instruments to implement international treaties as well as appraising the conformity of legal documents with existing treaties. The two key agencies in this procedure is the Ministry of Foreign Affairs and Ministry of Justice, who shall regularly report to the Government and the Prime Minister on the implementation of international treaties.

The adoption of the Law on International Treaties 2016 has great political and legal implications in the domestic and foreign domains, creating a legal framework. It is important for the process of international integration of Vietnam in the future. The law has created favorable conditions for agencies to propose the signing of international treaties in a unified manner, creating mechanisms for coordination among agencies in signing, joining and implementing the treaties. International agreements in full, rhythm, in accordance with the provisions of law and international practice.

Criminal Law

Criminal Law – Law Enforcement – Mutual Legal Assistance in Criminal Matters – Execution

Treaty between the Socialist Republic of Vietnam and Hungary Concerning Mutual Legal Assistance in Criminal Matters

On 16 March 2016, the representatives of Socialist Republic of Vietnam and Hungary signed the Treaty between the Socialist Republic of Vietnam and

Hungary concerning Mutual Legal Assistance in Criminal Matters, witnessed by President Truong Tan Sang of Vietnam and members of the Hungary Ministry of Justice. [4]

Procurator General Nguyen Hoa Binh opined that the signing of the Treaty between the two States concerning Mutual Legal Assistance in Criminal Matters has significant political and legal meaning. This is the direct legal ground for the legal execution of authorities from the two countries to enhance their cooperation in the investigation, prosecution, adjudication of criminal cases in order to fight against crimes, especially cross-border crimes, as well as to protect citizens of the two countries. The Treaty is seen as a milestone to promote further cooperation in other fields between Vietnam and Hungary, as well as the symbol of the determination of the two States in executing international agreements in criminal law.

The Treaty between the Socialist Republic of Vietnam and Hungary concerning Mutual Legal Assistance in Criminal Matters consists of 24 articles covering the scope of mutual legal assistance, central authority, content and formation of the request, refusal or postpone of the assistance, executing request for assistance, service of documents, providing information and evidence, returning documents for the requested, investigation and restrain, collecting evidence and affidavit, arranging the temporary transfer of the person in custody to assist the investigation, requesting the assistance for investigation or provide evidence, special rules, ocating, restraining and forfeiting the proceeds and/or instruments of crime, providing documents, records, and evidence through diplomatic channels, transfer the criminal prosecution, security and limitation, protection of personal information, certification and authentication, representative and costs, relationa with other international agreements, consultation, dispute settlement and final provisions.[5]

Treaty between the Socialist Republic of Vietnam and the Republic of France Concerning Mutual Legal Assistance in Criminal Matters

On 6 September 2015, with the witness of the President of the Socialist Republic of Vietnam Tran Dai Quang and the President of the Republic of France Francois Hollande, the representatives of the two States signed the Treaty between the Socialist Republic of Vietnam and the Republic of France concerning Mutual Legal Assistance in Criminal Matters. The Treaty concerning Mutual

4 The Supreme People's Procurary of Vietnam (2016), *The Signing Ceremony of the Treaty between the Socialist Republic of Vietnam and the Hungary concerning Mutual Legal Assistance in Criminal Matters*, *available at* http://www.vksndtc.gov.vn/tin-chi-tiet-5590.

5 The Supreme People's Procurary of Vietnam (2016), *The Signing Ceremony of the Treaty between the Socialist Republic of Vietnam and the Republic of France concerning Mutual Legal Assistance in Criminal Matters*, *available at* http://www.vksndtc.gov.vn/tin-chi-tiet-5590.

Legal Assistance in Criminal Matters is a significant international instrument in criminal justice as well as the legal ground for contracting parties to provide each other ultimate assistance in the process of investigation, prosecution and adjudication in order to collect documents, evidence and follow procedures to bring justice in criminal cases.

The Treaty between the Socialist Republic of Vietnam and the Republic of France concerning Mutual Legal Assistance in Criminal Matters consists of the Preamble and 24 articles regarding the scope of mutual legal assistance, central authority, content and formation of the request, refusal or postpone of the assistance, executing request for assistance, service of documents, providing information and evidence, returning documents for the requested, investigation and restrain, collecting evidence and affidavit, arranging the temporary transfer of the person in custody to assist the investigation, requesting the assistance for investigation or provide evidence, special rules, ocating, restraining and forfeiting the proceeds and/or instruments of crime, transfer the criminal prosecution, voluntary exchange of information, information about criminal records, security and limitation, protection of personal information, certification and authentication, expenses, relation with other international agreements, consultation, dispute settlement and final provisions.

The Treaty is a remarkable milestone for the new stage of development in criminal mutual legal assistance between the two countries. After being ratified by the competent body, the Agreeement will become a legal framework to be directly applied in the process of drafting, sending and executing requests of mutual legal assistance in criminal matters between Vietnam and France. Thus, the cooperation of the two States would efficiently resolve criminal cases, as well as protect the legal rights of citizens of the two countries. Moreover, the signing of such Treaty also marked the success of the comprehensive partnership between Vietnam and France since 2013.

Diplomatic and Consular

The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 – Legal authorization – International law harmonization

The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965

In order to comply with the multilateral diplomatic policy and to actively initiate in the context of global intergration, on 10 March 2016, Vietnam

officially acceeded to The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 ("The Hague Convention 1965"). Therefore, since 1 November 2016, the Convention has entered into force for Vietnam. The Ministry of Justice of the Socialist Republic of Vietnam is designated to be the Central Authority in accordance with Article 2 of The Hague Convention 1965 and the one and only authority designated for the purpose of Article 6 and Article 9 of this Convention.

In the situation where Vietnam is making efforts toward judical and legal reforms, the accession to such a Convention would benefit the country in hamonizing its domestic provisions with international standards on legal authorization and legal proceedings. Besides, this also helps judicial bodies in Vietnam resolve existing problems arising from civil cases involving foreign elements in order to protect the legitimate rights and benefits of both Vietnamese and foreign citizen. Thus, with the aim to harmonize Vietnamese provisions with international agreement standard to execute The Hague Convention 1965, a range of Vietnamese domestic rules must be reviewed, changed and supplemented, regarding the channel of service, the sample of service request, the Confirmation of the service result and, especially, the mechanism to collect service fees. Hence, the Vietnam Ministry of Justice, together with the Ministry of Foreign Affairs and the People's Supreme Court, has issued the new Joint Circular No. 12/2016/ TTLT-BTP-BNG-TANDTC on 9 October 2016 regarding the procedures of mutual legal asistance in civil matters to replace the Joint Circular No. 15/2011/TTLT-BTP-BNG-TANDTC on 15 September 2011 guiding the application of certain provisions regarding mutual legal asistance in civil matters governed by the Vietnam Law on Mutual Legal Asistance 2007.

The new Joint Circular contains 5 chapters, 27 articles on principles, orders, procedures, authority regarding the mutual legal assistance on civil matters, as well as duties of governmental bodies relating to mutual legal assistance on civil matters. In comparision with the Joint Circulation No. 15/2011, the Joint Circulation No. 12/2016 introduces notable changes, supplements and replacements as follows:

i. With respect to the Vietnam authority to execute mutual legal assistance, according to Article 10 of the Joint Circulation No. 12/2016, the competent bodies to request such assistance are the People's Supreme Court, the People's High Court, the People's Court at provincial level, the Civil Enforcement Bureu at provincial level, the People's Supreme Procurary, the People's Procurary at provincial level, other competent organizations according to the law and bodies directly involved requesting a legal authorization. The People's Court, the People's Procurary and the

Civil Enforcement Bureu at district level, in the course of proceeding and enforcing a civil case which requires abroad legal authorization, shall prepare a dossier compliant with Article 11 of the Law on Mutual Legal Assistance and Article 11 of the Joint Circulation No. 12/2016, and send to the respective bodies at provincial level.

ii. Regarding the authority to execute foreign legal authorization on civil matters, according to Article 17 of the new Joint Circulation, the competent bodies are: (i) the People's Court at provincial level; (ii) the Civil Enforcement Bureu at provincial level in case the legal authorization concerning the legal enforcement of a civil case; and (iii) bailiff. Such provision is compliant with the practice and changes about the organizational structure, function and duties of related bodies according to the Law on People's Court Organization 2014, the Code on Civil Procedure 2015, Decree No. 61/2009/ND-CP on 24 July 2009 of the Government on the organization and operation of bailiff in Ho Chi Minh City and Decree No. 135/2013/ND-CP regarding the changes to Decree No. 61/2009/ND-CP.

iii. With regard to the collecting and payment of actual expenses incured from a civil legal authorization, Articles 7, 8 and 9 of the Joint Circulation No. 12/2016 are introduced and based on the new provisions of the Code on Civil Procedure 2015 and The Hague Convention 1965, respectively, concerning the collecting and payment of actual expenses incured from a civil legal authorization of Vietnam, the procedure on the transfer and advance payment of actual expenses incured from a civil legal authorization of Vietnam and the procedure on the transfer and payment of actual expenses incurred from such legal authorization.

iv. Relating to the service for overseas Vietnamese citizens, the Joint Circulation No. 15 had regulated specific provisions on the legal authorization procedures for such persons. Nonetheless, due to problems arising during the course of implementing the Joint Circulation No. 15 and according to advices from the People's Court at provincial level, on 14 July 2016, the Official Letter No. 140/TANDTC-HTQT issued by the People's Supreme Court, together with the Official Letter No. 2089/BNG-LS issued by the Ministry of Foreign Affairs, unified the proposal on drafting a Joint Circulation by the People's Supreme Court and the Ministry of Foreign Affairs regarding the service of documents for overseas Vietnamese. The extraction of such issue from the Joint Circulation No. 15/2011 to form a new separated joint circulation is practically neccessary and compliant with legal regulations.

Sovereignty – Territorial dispute

Vietnam objection to the ban on fishing by China – Territorial disputes in the South China Sea – Dispute settlement by peaceful measures

Statement by Vietnam on the objection to the ban on fishing imposed by the People's Republic of China, 17 May 2016

On 17 May 2016, the Vietnamese Ministry of Foreign Affairs has made an official protest against the ban on fishing imposed by the People's Republic of China since 1999. The document stressed that:

> Vietnam resolutely refuses and objects to such null and void regulations. First and foremost, Vietnam affirms that the country has full historical evidence and legal foundations to prove its sovereignty over Hoang Sa (Paracel) and Truong Sa (Spratly) archipelagoes.

The Government of Vietnam called on all concerned parties involved in territorial and other disputes in the South China Sea to adhere to the United Nations Convention of the Law of the Sea and asserted that such illegal actions could not challenge the truth about Vietnam's sovereignty over the Paracel and Spratly Islands.

The Vietnam spokeperson stressed that Vietnam resolutely asks China to respect Vietnam's sovereignty, to immediately end the wrongful actions, and to seriously abide by the Declaration of Conduct of Parties in the East Sea, as well as the Agreement on Basic Principles guiding the Settlement of Issues at Sea, between Vietnam and China.[6]

Statement by Vietnam on Territorial Disputes in the South China Sea in the 42nd G7 Summit held on 26 – 27 May 2016 in Mie, Japan

On 27 May 2016, the Prime Minister of Vietnam, Nguyen Xuan Phuc, attended the first round of the 42nd G7 summit held on 26 -27 May 2016 in Mie, Japan. This was the first time that the Socialist Republic of Vietnam participated in the G7 summit.

6 Ministry of Foreign Affairs Spokeperson Le Hai Binh's Press Conference on 17 May 2016, *Vietnam opposes the ban on fishing imposed in the South China Sea by China* [Việt Nam bác bỏ lệnh cấm đánh bắt cá của Trung Quốc ở Biển Đông], *available at* http://thanhnien.vn/the-gioi/viet-nam-bac-bo-lenh-cam-danh-bat-ca-cua-trung-quoc-o-bien-dong-703829.html.

At the beginning of his speech, the Vietnam Prime Minister stated that:

> We acclaim the prioritized topics in the discussion schedule of the Summit. They are indeed significant and urgent issues regarding the peace, stability and sustainable development of the Asia Pacific region in particular and the world in general.

The Prime Minister asserted that Vietnam is well aware that its own peace and development is part of the world's peace and welfare, and the contribution to the resolution of common challenges is the duty as well as the right of any country, regardless of its level of development. Then, he also stressed that the welfare and sustainable development of Vietnam, Asian region and the world is secured only if there is a peaceful and stable international environment, meanwhile the world has been facing the escalating conflicts in regions, especially problems concerning the marine and aviation security, safety and freedom in the South China Sea.

The unilateral and illegal actions against internaional law and regional agreement, such as the construction of large-scale artificial islands that alters the original status of such entities and military enforcement have seriously threatened the regional peace and stability. This situation requires the involved nations to restrain themselves and settle the dispute with peaceful measures compliant with international law, which includes the United Nations Convention on the Law of the Sea 1982 and the Declaration on the Conduct of Parties in the South China Sea 2002 (DOC), as well as enhancing the resort to diplomatic measures based on mutual trust, and looking forward to the future Code of Conduct of Parties in the East Sea (COC).[7]

The G7 leaders reaffirmed the importance of claims based on international law, not using force or coercion in trying to drive their claims, and seeking to settle disputes by peaceful means such as through judicial procedures, including arbitration. They expressed concern about the situation in the East China Sea and South China Sea and endorsed the G7 Foreign Ministers' Statement on Maritime Security.[8]

The Ise-Shima Summit is the first G7 Summit held in Asia in eight years, the G7 leaders together with outreach participants discussed quality infrastructure

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7 Prime Minister Nguyen Xuan Phuc's Speech in the 42nd G7 Summit held on 26–27 May 2016 in Mie, Japan, *The Prime Minister raises the South China Sea concerns in the extended G7 summit* [Thủ tướng nêu vấn đề Biển Đông tại hội nghị G7 mở rộng], *available at* http://vnexpress.net/tin-tuc/the-gioi/thu-tuong-neu-van-de-bien-dong-tai-hoi-nghi-g7-mo-rong-3410261.html.

8 Ministry of Foreign Affairs of Japan (2016), *G7 Ise-Shima Summit*, *available at* http://www.mofa.go.jp/ms/is_s/page4e_000457.html#section5.

investment and open and stable seas under the theme of "Asian stability and prosperity."

International Economic Law

Import-Export – GATT 1994 – Anti-dumping Law and Practices – Safeguard Investigation and Measures

Application of anti-dumping measures against certain imported stainless steel cold-rolled products to Vietnam originating from the People's Republic of China, Republic of Indonesia, Malaysia and Taiwan

On 29 April 2016, the Ministry of Industry and Trade of the Socialist Republic of Vietnam issued the Decision No. 1656/QD-BCT on the conclusion of the first review on anti-dumping measures against certain imports of stainless steel cold-rolled products.[9] Products under investigation include: (i) stainless steel cold-rolled coil or sheet containing a maximum of 1.2% carbon and a minimum of 10.5% chromium with or without other elements; and (ii) stainless steel cold-rolled coil or sheet has been annealed or heat-treated by other methods and pickled or skin passed to remove impurities on the surface. Such products have been subsequently processed (severed or sawed) provided that the process does not alter their technical characteristics.

Precedent to the decision, on 5 September 2014 the Vietnam Ministry of Industry and Trade issued the Decision No. 7896/QD-BCT on the imposition of anti-dumping measures against certain stainless steel cold-rolled products (referred to as "imports under investigation") imported into Vietnam from the People's Republic of China ("China"), Republic of Indonesia ("Indonesia"), Malaysia ("Malaysia") and Taiwan area ("Taiwan"). On 15 September 2015, the Ministry of Industry and Trade received the valid petition by Posco VST Co., Ltd and Inox Hoa Binh Joint-stock Company (the petitioners), on behalf of domestic producers, for a review on anti-dumping duty against stainless steel cold-rolled products imported into Vietnam according to Article 24 of the Anti-dumping Ordinance. On 21 October 2015, the Ministry of Industry and Trade, after examining the local producers' petition for review, issued the Decision No. 11353/QD-BCT on the review on anti-dumping measures against stainless

9 Ministry of Planning and Investment (2016), *The conclusion on the investigation against certain imported stainless steel cold-rolled products to Vietnam* [Kết quả rà soát chống bán phá giá một số sản phẩm thép không gỉ nhập khẩu], *available at* http://business.gov.vn/tabid/130/catid/10/item/14422/kết-quả-ra-soat-chống-ban-pha-gia-một-số-sản-phẩm-thep-khong-gỉ-nhập-khẩu.aspx.

steel cold-rolled products imported into Vietnam from three countries including China, Malaysia and Indonesia.

Pursuant to Article 25 of the Anti-dumping Ordinance and the investigation authority's conclusion of the review, the Ministry of Industry and Trade decided the revision of anti-dumping duty on foreign producers and exporters, amongst which the Yuan Long Stainless Steel Corp.from Taiwan is imposed the highest tax rate (37.29%), followed by the producers from China.

According to the Decision No. 1656, new anti-dumping duty rates shall take effect from 14 May 2016 to 06 October 2019, unless otherwise extended or reviewed as per the laws. Importers of products under investigation, when importing such products, must provide customs authorities with origin papers including Certificate of origin and Mill-test certificates from producers located in countries and territories having been investigated in this case.

On 17 September 2016, the Ministry of Industry and Trade issued the Decision No. 3465/QD-BCT on handling complaints of Bahru Stainless Steel Sdn.Bhd from Malaysia regarding the result of the first investigation on anti-dumping measures against certain stainless steel cold-rolled products imported into Vietnam, in which anti-dumping duty imposed on Bahru Stainless Steel Sdn.Bhd is adjusted to 9.31% from 9.55%.

Application of anti-dumping measures against the H-shaped steel products imported into Vietnam originating from the People's Republic of China (including Hong Kong)

On 7 July 2016, the Vietnam Competition Authority (VCA) received a petition from Posco SS Vina Company Limited saying that H-shaped steel products under the HS Code: 7216.33.00, 7228.70.10 và 7228.70.90 imported from China and Hong Kong have severely hit domestic steel producers.[10] There are five companies in Vietnam that produce H-shaped steel products, but Posco SS Vina is the only producer amongst those with an annual capacity of 700,000 tonnes. This makes the company eligible to represent all local H-shaped steel firms and file a lawsuit against imported products of the same type.

On 5 October 2016, the Ministry of Industry and Commerce issued Decision No. 3993/QD-BCT on initiation of an investigation into alleged dumping on

10 Vietnam Competition Authority (2016), *The temporary conclusion on the impose of anti-dumping measures against the H-shaped steel products imported into Vietnam originating from the People's Republic of China (including Hong Kong) (Case No. AD03)* [Dự thảo Kết luận sơ bộ vụ việc điều tra áp dụng biện pháp chống bán phá giá đối với một số mặt hàng thép hình chữ H nhập khẩu vào Việt Nam có xuất xứ từ Trung Quốc (bao gồm Hồng Kông) (Mã vụ việc AD03)] *available at* http://www.vca.gov.vn/NewsDetail.aspx?ID=3532&CateID=272.

H-shaped steel products imported into Vietnam originating from the People's Republic of China (including Hong Kong) (Case No. AD03). The period for investigation of dumping margins and injury caused to Vietnamese industry is from 1 April 2015 to 31 March 2016. According to Article 20 of the Ordinance on anti-dumping, the Minister of Industry and Trade may decide to impose temporary anti-dumping duties on products under investigation based on preliminary conclusions of the VCA. Therefore, the VCA called for importers and distributors of products under investigation to take this regulation into account before signing contracts with exporters.

Application of anti-dumping measures against imported steel products originated from the People's Republic of China (including Hong Kong) and the Republic of South Korea

On 3 March 2016, the Ministry of Industry and Trade issued Decision No. 818/QD-BCT on investigating the impose of anti-dumping measures against imported steel products which originated from the People's Republic of China (including Hong Kong), and the Republic of South Korea (Case No. AD02). It followed the petition of four local Vietnamese steelmakers requesting the Vietnam Competition Authority (VCA) for measures against the alleged price-dumped coated steel sheets from China (including Hong Kong) and Korea in the end of the year 2015. The VCA said it will look through evidence provided by the local enterprises and then hold a public consultation with related parties to calculate the exact anti-dumping margins. The duration for investigation is from 1 October 2014 to 30 September 2015.

On 1 September 2016, the Ministry issued Decision No. 3584/QD_BCT on the temporary anti-dumping duties against galvanized steel imports from China, Hong Kong and South Korea, which ranged from 4.02% to 38.34%. The duration of such anti-dumping duty imposed is 120 days, started from 16 September 2016 until 13 January 2017. This decision complies with Article 16 of the Vietnam Anti-Dumping Ordinance, Article VI of GATT 1994 and The Agreement on Implementation of Article VI of GATT 1994, commonly known as the Anti-Dumping Agreement, which regulated the time limit for investigation of the application of anti-dumping measures shall not exceed 12 months from the date of issuance of the investigation decision.

On 2 December 2016, according to Article 14 of the Ordinance No. 20/2004/PL-UBTVQ on the anti-dumping measures against goods imported to Vietnam and Article 29 Decree No. 90/2005 supplementing the Ordinance No. 20/2004/PL-UBTVQ on the anti-dumping measures against goods imported to Vietnam, the VCA, as the investigation authority, hold the consultation of the involved partied in the Case No. AD02 to exchange opinions. During the

meeting, while representatives from Vietnam affirmed their view that there were injuries for the local industry caused by the import of coated steel sheets, the Korean companies insisted that the import of such products from Korea had not caused or threatened to cause any injury to the Vietnam industry, according to the price per product and the market share of the Korea import of such goods during the investigation period. Both producers from Korea and China requested the investigation authority to adjust the calculation of their dumping margins. The VCA accepted and has continued the investigation of this case.

Safeguard investigation on imports of steel ingots and long steel products to Vietnam

On 29 December 2015, The Vietnam Competition Authority (VCA) under the Ministry of Industry and Trade has announced a safeguard investigation on imports of steel ingots and long steel products. This comes after Hoa Phat Steel Joint Stock Company (JSC), Southern Steel Co Ltd, Thai Nguyen Iron and Steel JSC and Vietnam-Italy Steel JSC called for safeguard measures against steel ingots and long steel products imported into Vietnam, which are under the HS code: 7207.11.00; 7207.19.00; 7202.20.99; 7224.90.00; 7213.10.00; 7213.91.20; 7214.20.31; 7214.20.41; 7227.90.00; 7228.30.10; 9811.00.00. The authority confirmed that the firms' petition is in line with the prevailing Vietnam regulations. Ministry of Industry and Trade also signed Decision No. 14296/QD-BCT approving the safeguard investigation into such imported products.

Until 7 March 2016, the Vietnam Ministry of Industry and Trade issued the Decision No. 862 on the imposition of temporary safeguard duties of 23.3% on steel ingots and 14.2% on long steel imported from a number of exporting countries from 22 March to 7 October 2016. Such safeguard duties are exempted for developing and least-developed countries whose imports into Vietnam do not exceed 3% the total imports into Vietnam, and the total imports of such group do not exceed 9% the total imports into Vietnam.

Following the Decision No. 862, on 18 July 2016, the Ministry introduced Decision No. 2968/QD-BCT on the exemption for certain steel ingots and long steel products from the application of temporary safeguard duties. Furthermore, on 26 September 2016, the Vietnam Minitry of Industry and Trade issued Decision No. 3914/QD-BCT on the exemption of safeguard measures against long steel products under HS Code 7227.90.00 used for sealing compound production in the year 2017. The exemption is granted for 10 producers, who may return the safeguard duties imposed on imported products in 2017 according to the Decision No. 2986.

International Dispute Settlement

WTO Dispute Settlement System

Communication from the Panel in the case Indonesia – Safeguard on Certain Iron or Steel Products (WT/DS4904 and WT/DS496/5)

The Indonesian government issued a three-year safeguard duty on flat-rolled products of iron or non-alloy steel imported from Vietnam, Taiwan and South Korea. Accordingly, the products face tariffs at 50 per cent in 2014, 46 per cent in 2015 and 41 per cent in 2016. Indonesia decided to impose the tariff on flat rolled products of iron or non-alloy steel on the basis of absolute volume of imported steel, instead of the percentage of total import values, as usual. The measure jeopardized the legitimate trading rights of the Vietnamese steel producers and exporters. Thus, Vietnam initiated dispute proceedings against Indonesia with the World Trade Organization (WTO) to challenge these safeguard measures.

On 1 June 2015, Vietnam requested consultations with Indonesia regarding a safeguard measure imposed by Indonesia on imports of certain flat-rolled iron or steel products and the investigation and determinations leading thereto. Vietnam claims that the measures are inconsistent with:

> Articles I:1, XIX:1(a) and XIX:2 of the GATT 1994; and Articles 2.1, 3.1, 4.1(a), 4.1 (b), 4.1(c), 4.2(a), 4.2 (b), 4.2(c), 12.2 and 12.3 of the Agreement on Safeguards.

The Panel on *Indonesia – Safeguard on Certain Iron or Steel Products* (WT/DS496) was established by the DSB on 28 October 2015 at the request of Vietnam. The Panel was finally composed on 9 December 2015.

The Communication of the Panel, dated 8 June 2016, explained that the beginning of the Panel's work has been delayed as a result of a lack of available experienced lawyers in the Secretariat. The Panel delivered that it did not expect to issue its final report to the parties before the second half of 2017.[11]

11 *Indonesia – Safeguard on Certain Iron or Steel Products*, Communication from the Panel on 8 June 2016.

Literature

Book Review

Anastasia Telesetsky, Warwick Gullett, and Seokwoo Lee (eds.)
Marine Pollution Contingency Planning: State Practice in Asia-Pacific States
(Brill/Nijhoff, 2018) vii + 233pp. Hardcover: €123.00

Shocking events that take place in many parts of human lives, either through execution of sinister motives, connivance of indecisive souls, human errors or combination of all of the listed, leave undeletable scars and agony behind even after the shockwaves go away. If any positives could be found by those events, it is that people learn valuable lessons from them and prepare for the future, however low the chance might be that such shocking events will repeat themselves. These preparations include making ready a handbook of measures that people may look up to and act upon when they see disasters and emergencies on the horizon or even when they find the earliest signs that those might materialize.

Such is the rationale of contingency planning, and one cannot find a more suitable case anywhere than in responses to marine pollution, the scope and scale of which is often times beyond human imagination and which also requires prompt and effective action to bring it under control without inflicting irreversible damage to the marine environment and to the lives of the people that rely on it. This book, based on the papers presented at a workshop held at the Korean Maritime Institute (KMI) on marine pollution contingency planning in collaboration with the Asia-Pacific Ocean Law Alliance in 2016, contains descriptions on the State practice of selected Asia-Pacific nations on how such marine pollution contingency planning gets made, what initial measures in case of marine pollution should and could be taken, what collaboration with neighboring countries could be mobilized if the extent of such marine pollution goes way beyond what one nation could cope with unilaterally.

Obviously, the development of such marine pollution contingency planning has been galvanized by shocking oil spills from ships and offshore facilities, such as the *Exxon Valdez* and the *Deepwater Horizon* accidents in the case of the United States, for example. In line with the process delineated above, devising effective strategies on dealing with massive marine pollution events have been based on the re-evaluation of the efficacy of earlier response mechanisms to

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such environment-damaging incidents and the updating of reporting procedures and coordination mechanisms, and so on. Whereas differences can be found among various State practices in how unique national circumstances are taken into account in contingency planning, those State practices at least share common focuses in the matter of enhancing awareness of risk factors, reassessing incumbent response mechanisms to marine pollution and disasters, and the ways in which past mistakes are duly reflected in the remaking of policies and measures to bring about better preparedness and responsiveness should such marine pollution occur again.

Questions may arise, however, even after collecting all State practices on the responses to marine pollution and making chronologies for each State in her efforts to effectively upgrade their contingency plans in the aftermath of marine pollution incidents. One may wonder, for instance, whether States have sufficiently strengthened their contingency plans, so that the measures based on such contingency plans would be effectively employed to respond to marine environmental damage caused by oil spills or other land- or ship-based pollution issues. Another question could be asked on whether States in the Asia-Pacific region have enough resources to mobilize when marine pollution indeed occurs, so that damage containment responses and swift cleanup action would follow when the initial signs are sighted of marine pollution affecting environments in the adjacent waters and beyond.

The first question is directly related to the effectiveness of each nation's marine pollution contingency plan. Respecting this, the authors of this book agree that the flurry of activities by State authorities in devising, revising and amending their contingency plans in the wake of catastrophic marine pollution incidents, which took place either within or without their jurisdictional areas, demonstrates the nations' acknowledgment that their previously held contingency plans had not anticipated the extent of damage to the marine environment and the scope of work to be done to contain such damage. While commending the States' willingness to act upon the new evidence of inadequacies found in their contingency plans, the authors also stress the importance of periodic reviews on the nations' exposure to disasters as well as on the continued effectiveness of their readiness to respond to such environmental hazards, in the form of oil transport, oil exploration and exploitation, chemical storage and other activities. (p.224)

An assumption here is that periodic reviews of the circumstances that nations are situated in would lead to identifying risk factors that had not been addressed before, while at the same time to prompting discussions on the formation of new measures that would successfully minimize such risks. The authors express their concerns that repeated risk assessments are not being made in some of the Asia-Pacific States, a fact that may compromise the

cautious optimism that have been presented in the analysis of the processes that brought about the strengthening of marine pollution contingency planning in the first beginning.

Answering the second question would definitely involve assessment of available resources that can be tapped for responding to marine disasters. These resources may well vary from one State to another, depending upon their economic development. What this book excels in is its focus on an overlooked aspect of resource deficiencies witnessed in the matter of contingency planning, which is the "recurring challenge of creating an emergency response communication network that can effectively link local, regional and national entities capable of providing practical responses to marine pollution incidences." (p.224) The maritime response mechanisms engage various governmental departments and agencies, such as the navy, the coast guard, as well as the diplomatic channels. Because of the complexities involved in relation to responding to marine disasters, more agencies are called upon to confront the issues. Given the fact that these agencies operate under different lines of command, information is not always shared and responses are not synchronized even within the same government. The challenges in sharing of information and coordination are always relevant when operational enforcement of given manuals are involved, and marine contingency planning is no exception. Furthermore, with potentially overlapping authorities and capabilities of agencies, uncertainty extends to which agencies should be included in response planning and execution. Therefore, the structured interagency response framework is urgently needed and this so-called whole-of-government framework, or in other words horizontal coordinating mechanism, should be included in the marine pollution response landscape.

Some authors of the chapters describe instances of international cooperation as a supplementary mechanism to cope with resource inadequacies in the bilateral and multilateral context. However, the extent of such international cooperation appears to be limited to countries that have shown historical interdependence, such as the ASEAN countries and the United States and Canada, although the prevalence of interconnected economic activities across borders suggests that more concerted contingency action networks are necessary between national agencies, especially in the case of offshore oil drilling in deep waters. Quite possibly, more and more instances of international cooperation will be witnessed with regard to supporting other nations' contingency planning, based upon the historical lessons that may be learned from stories of both successes and failures.

This book also successfully illustrates its value by not only focusing on the States' activities in the nature of contingency planning, which is in essence disaster relief planning, but also by emphasizing the importance of taking

control of, or simply reducing, risk inherent in chronic marine pollution. Acting proactively on risk factors of marine economic activities, whether offshore drillings or oil transportation, would lead to cost reduction compared to what would be inflicted upon people and the environment if such risk of marine pollution materializes to produce a marine disaster, understood as "an unmanaged hazard that seriously disrupts the functioning of a community or society and causes human, material, and economic or environmental losses that exceed the community's or society's ability to cope using its own resources." (p.10) Since the best strategy of responding to marine pollution is making sure that it does not happen, it would be natural for States to turn their attention to the possibilities of managing and reducing risks related to the economically beneficial but hazardous activities.

The conclusions and suggestions provided at the last chapter of the book, namely "proactive and adaptive management process," engagement of "local communities in contingency planning or response exercises," and the incorporation of "more cautionary thinking into deploying technologies to manage oil and hazardous substance release," (pp.225–227) are without doubt what nations should adopt to better design and implement marine pollution contingency plans across regions and continents. They are more pertinent in the Asia-Pacific context, however, because of the importance of ocean activities within the region and the almost irreversible character of certain massive marine environmental disasters that directly and adversely affect the broad local and national communities in every imaginable manner.

Whereas there is little that ought more to be desired from each chapter's analysis, the following areas could have been touched upon to have the synthesis of regional marine pollution contingency planning more comprehensive.

First, some authors of the book chapters mention limitation on financial resources or lack thereof as one of the main reasons for ineffective marine contingency plans in some of the jurisdictions, but they do not provide any numbers that could help present their main arguments in a convincing manner. Related to that point is the issue of turning disaster-response nature of contingency planning into a risk-management strategy that could be an outcome of the application of precautionary way of thought, as suggested by the conclusion of the book. No one would oppose the adoption of such an innovative strategy so long as it could produce a safer environment at less cost than would be the case if the marine pollution disaster should materialize and all efforts must be made to prevent the damage and restore the environment to its original condition. Numbers are not provided, however, in terms of cost savings or increased benefits, effectively hampering an informed judgment based on the pros and cons of policy tools. Perhaps the prioritization or mainstreaming

of marine pollution contingency planning over other policy objectives would allow for tapping the resources that have not been available for such policy purposes, but it would still not be able to answer the question of whether benefits of such prioritization would outweigh the expenditure that might be needed for mobilizing political capital.

Second, some Asia-Pacific developing nations' unfavorable economic conditions may well prompt discussions not only on the dimension of international cooperation but also on the possibility of capacity building in contingency planning, in the sense that their underdeveloped economies will not be able to provide enough national preparedness for marine pollution disasters should some of the risk factors become unmanageable and lead to massive environmental degradation in the broad areas. Whereas some authors mention the importance of engaging multilateral organizations to develop comprehensive disaster relief strategies for economically disadvantaged nations in Asia and the Pacific, more exploration of other possible ways for capacity building could have been tried in the form of technology transfer, education and training of personnel entrusted with the execution of contingency plans, and so on. The needs for such improvements are well described in the last page of the book, but it could have been elaborated more to provide ideas on how to move forward from the analyses of the State practice.

Nonetheless, the whole book presents itself as a well-structured collection of State practice in marine pollution contingency planning in Asia and the Pacific, as well as a useful guidebook for practitioners yearning to learn from other nations' examples. The concluding chapter of this book ends by suggesting that States should "plan for the best, expect the worst; because even if life is a play we need to rehearse." (p.228) While the former part of that revision of an old adage may be easily agreed to, the latter part may be further revised to read, "plan for the best, expect the worst; because *life is not a play and you live only once.*"

Sangmin Shim
Assistant Professor of International Law
Korea National Diplomatic Academy (KNDA)

International Law in Asia: A Bibliographic Survey – 2016

*Lowell Bautista**

Introduction

This bibliography provides information on books, articles, notes, and other materials dealing with international law in Asia, broadly defined. Only English language publications are listed. Most of the materials can be listed under multiple categories, but to save space each item is listed under a single category. Edited books, however, may appear more than once if multiple chapters from the book are listed under different categories. Readers are advised to refer to all categories relevant to their research. The bibliography is limited to new materials published in 2016 or previously published materials that have updated editions in 2016. The headings used in this year's bibliography are as follows:

1. General
2. States and statehood
3. IGOs
4. NGOs
5. Territory and jurisdiction
6. Territorial and maritime disputes–South China Sea
7. Seas and marine resources
8. Maritime security
9. Maritime law
10. Jus ad bellum and jus in bello
11. International criminal law and transnational crime
12. Peace and transitional justice
13. Security
14. Environment
15. Climate change
16. Development
17. Human rights–General
18. Human rights–Institutions and Organizations
19. Humanitarian law

* Senior Lecturer, School of Law, University of Wollongong; Executive Editor, *Asian Yearbook of International Law.*

20. Nationality, migration and refugees
21. Colonialism and self determination
22. International economic and business law–General
23. WTO and trade
24. Investment
25. Commercial law
26. Intellectual property
27. Cultural property and heritage
28. Dispute settlement
29. Arbitration
30. Private International law
31. Internet, data and communications
32. Air and Space
33. Miscellaneous

1 General

Bhandari, Surendra R., Global Constitutionalism and the Path of International Law: Transformation of Law and State in the Globalized World (2016).

Cheng, Chia-Jui (ed.), A New International Legal Order (2016).

Chesterman, Simon, *Asia's Ambivalence about International Law and Institutions: Past, Present and Futures,* 27(4) European Journal of International Law 945–978 (2016).

Chung, Eric, *The Judicial Enforceability and Legal Effects of Treaty Reservations, Understandings, and Declarations*, 126(1) Yale Law Journal 170–241 (2016).

Cottier, T., *Improving Compliance: Jus Cogens and International Economic Law*, 46 Netherlands Yearbook of International Law 329–356 (2016).

Crootof, Rebecca, *Change without Consent: How Customary International Law Modifies Treaties*, 41(2) Yale Journal of International Law 237–300 (2016).

Goldsmith, Jack, *The Contributions of the Obama Administration to the Practice and Theory of International Law Essays,* 57(2) Harvard International Law Journal 455–474 (2016).

Hall, Stephen, Principles of International Law (2016).

Hu, Jiaxing; Matthias Vanhullebusch; and Andrew Harding, Finance, Rule of Law and Development in Asia: Perspectives from Singapore, Hong Kong and Mainland China (2016).

Keith, James, Sir Kenneth, *Some Thoughts about Grotius 400 Years On,* 31(3) American University International Law Review 351–371 (2016).

Kolb, Robert, The Law of Treaties: An Introduction (2016).

Mathias, Stephen, *The Use of Force: The General Prohibition and Its Exceptions in Modern International Law and Practice,* in Chia-Jui Cheng (ed.), A New International Legal Order 73–98 (2016).

McWhinney, E., *The United Nations Charter, Chapter VII, Non-Use-of-Force and Non-Intervention in Contemporary International Law: The Sisyphean Labours of the Institut de Droit International on Defining and Controlling "Use of Force" today*, in Wolfrum R., Sersic M. and Sosic T.M. (eds.), Contemporary Developments in International Law: Essays in Honour of Budislav Vukas 821–839 (2016).

Mignolo, Walter D., *The Making and Closing of Eurocentric International Law*, 36 Comparative Studies of South Asia, Africa, & the Middle East 182–195 (2016).

Morgera, Elisa (ed.), Research Handbook on International Law and Natural Resources (2016).

Schmitt, Carl, *The Changing Structure of International Law*, 20(3) Journal for Cultural Research 310–328 (2016).

Vadi, V., *Jus Cogens in International Investment Law and Arbitration*, 46 Netherlands Yearbook of International Law 357–388 (2016).

2 States and Statehood

Barrow, Amy; and Joy L. Chia (eds.), Gender, Violence and the State in Asia (2016).

Calayag, Miguel Luigi L., *The Sovereign at its Shores: An Analysis on Australia's "Stop the Boats" Offshore Processing and Pacific Island Detention Policy for Refugees and Asylum Seekers,* 61 Ateneo Law Journal 944–964 (2016).

Candelaria, Sedfrey M.; and Elaine S. Mendoza, *Testing Constitutional Waters VI: Developments in Treaty-Making and the Enhanced Defense Cooperation Agreement,* 61 Ateneo Law Journal 1–31 (2016).

Candelaria, Sedfrey M.; and Jewelle Ann Lou P. Santos, *Testing Constitutional Waters VII: Nationality, Citizenship, and Foundlings as Pronounced in Poe-Llamanzares v. Commission on Elections*, 61 Ateneo Law Journal 29–67 (2016).

Cotula, Lorenzo, *Land, Property and Sovereignty in International Law*, 25(2) Cardozo Journal of International and Comparative Law 219–286 (2016).

Cruces, Juan J.; Tim R. Samples, *Settling Sovereign Debt's Trial of the Century*, 31(1) Emory International Law Review 5–48 (2016).

Etzioni, A., *Defining Down Sovereignty: The Rights and Responsibilities of Nations*, 30 Ethics & International Affairs 5–20 (2016).

Gonzalez, Carmen, *The Catalan National Identity and Catalonia's Bid for Independence,* 32(1) Connecticut Journal of International Law 115–146 (2016).

Hong, Ryan Nicholas, *Singapore's Transboundary Haze Pollution Act and the Shield of Sovereignty in Southeast Asia*, 34 Singapore Law Review 103–138 (2016).

Howland, Douglas, International Law and Japanese Sovereignty: The Emerging Global Order in the 19th Century (2016).

Hu, Henan, *The Doctrine of Occupation: An Analysis of Its Invalidity under the Framework of International Legal Positivism,* 15(1) Chinese Journal of International Law 75–138 (2016).

Juratowitch, Ben, *Waiver of State Immunity and Enforcement of Arbitral Awards*, 6 Asian Journal of International Law 199–232 (2016).

Kadir, M. Ya'kub Aiyub, *Application of the Law of Self-Determination in a Postcolonial Context: A Guideline Issue Focus: Imperialism Haunting the Twenty-first Century's International Law,* 9 Journal of East Asia and International Law 7–28 (2016).

Kahn, Jeffrey, *Protection and Empire: The Martens Clause, State Sovereignty, and Individual Rights*, 56(1) Virginia Journal of International Law 1–50 (2016).

Lee, Seokwoo; and Hee Eun Lee, The Making of International Law in Korea: From Colony to Asian Power (2016).

Lijiang, Zhu, *Chronology of Practice: Chinese Practice in Public International Law in 2015*, 15(3) Chinese Journal of International Law 639–689 (2016).

Lin, Li-Wen, *Behind the Numbers: State Capitalism and Executive Compensation in China,* 12(2) University of Pennsylvania Asian Law Review 140–185 (2016).

Mitchell, Ryan, *Manchukuo's Contested Sovereignty: Legal Activism, Rights Consciousness, and Civil Resistance in a "Puppet State"*, 3(2) Asian Journal of Law and Society 351–376 (2016).

Moon, William J., *The Original Meaning of the Law of Nations,* 56(1) Virginia Journal of International Law 51–82 (2016).

Nonato, Rester L. John, *The De Facto Two-China Policy of the Philippines,* 61 Ateneo Law Journal 607–629 (2016).

Ortmann, Stephan, *The Lack of Sovereignty, the Umbrella Movement, and Democratisation in Hong Kong,* 24(2) Asia Pacific Law Review 108–122 (2016).

Pandiaraj, S., *Sovereignty as Responsibility: Reflections on the Legal Status of the Doctrine of Responsibility to Protect,* 15 (4) Chinese Journal of International Law 795–815 (2016).

Pangalangan, Raphael A. Lorenzo, *The Building of the Public/Private Distinction Obsolescence of the State Action Doctrine*, 90 Philippine Law Journal 84–142 (2016).

Patel, Bimal N., The State Practice of India and the Development of International Law Dynamic Interplay between Foreign Policy and Jurisprudence (2016).

Takeshita, Keisuke, *Sovereignty and National Civil Procedure: An Analysis of State Practice in Japan,* 9(2) JOURNAL OF EAST ASIA & INTERNATIONAL LAW 361–378 (2016).

Wheatley, Steven, *The Emergence of New States in International Law: The Insights from Complexity Theory,* 15(3) CHINESE JOURNAL OF INTERNATIONAL LAW 579–606 (2016).

Yi, Ping, *The Final Splendour of an Aged Empire: Chinese Thought on International Law in the Early Twentieth Century,* 9 JOURNAL OF EAST ASIA AND INTERNATIONAL LAW 29–52 (2016).

3 IGOs

Alvares, Jose Enrique, *International Organizations and the Rule of Law: Challenges Ahead,* in CHIA-JUI CHENG (ED.), A NEW INTERNATIONAL LEGAL ORDER 147–187 (2016).

Blokker, Niels, *Asian and Pacific International Organizations: Mainstream or Sui Generis? An International Law Perspective* in CHENG, CHIA-JUI (ED.), A NEW INTERNATIONAL LEGAL ORDER 188–221 (2016).

Boon, Kristen E., *U.N. Sanctions as Regulation,* 15(3) CHINESE JOURNAL OF INTERNATIONAL LAW 543–577 (2016).

CONFORTI, B. AND C. FOCARELLI, THE LAW AND PRACTICE OF THE UNITED NATIONS (2016).

Daugirdas, Kristina, *How and Why International Law Binds International Organizations,* 57(2) HARVARD INTERNATIONAL LAW JOURNAL 325–383 (2016).

Kenny, Coman, *Responsibility to Recommend: The Role of the UN General Assembly in the Maintenance of International Peace and Security,* 3(1) JOURNAL ON THE USE OF FORCE AND INTERNATIONAL LAW 3–36 (2016).

Seah, Daniel, *Problems Concerning the International Law-Making Practice of ASEAN: A Reply to Chen Zhida,* 6 ASIAN JOURNAL OF INTERNATIONAL LAW 265–293 (2016).

Simon, Sheldon, *US-Southeast Asia Relations: ASEAN Centrality?* 18(1) COMPARATIVE CONNECTIONS: A TRIANNUAL E-JOURNAL ON EAST ASIAN BILATERAL RELATIONS 45–54 (2016).

4 NGOs

Longhofer, Wesley; Evan Schofer; Natasha Miric; David John Frank, *NGOs, INGOs, and Environmental Policy Reform, 1970–2010,* 94 (4) SOCIAL FORCES 1743–1768 (2016).

Mank, Randolph, *Reflections on the Role of Non-State Actors in Canada-Asia Relations,* 11(4) HAGUE JOURNAL OF DIPLOMACY 427–436 (2016).

Mikadze, Kirsten, *Uninvited Guests: NGOs, Amicus Curiae Briefs, and the Environment in Investor-State Dispute Settlement*, 12(1) JOURNAL OF INTERNATIONAL LAW & INTERNATIONAL RELATIONS 35–81 (2016).

Reimann, Kim D., *NGOs and Regional Networks Working Towards Peace and Reconciliation in Northeast Asia*, 4(1) KOREAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 52–73 (2016).

Sethi, S. Prakash; Janet L. Rovenpor, *The Role of NGOs in Ameliorating Sweatshop-like Conditions in the Global Supply Chain: The Case of Fair Labor Association (FLA), and Social Accountability International (SAI),* 121(1) BUSINESS & SOCIETY REVIEW 5–36 (2016).

5 Territory and Jurisdiction

Acikgonul, Y.E., *Reflections on the Principle of Non-Cut Off: A Growing Concept in Maritime Boundary Delimitation Law*, 47 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 52–71 (2016).

Askandar, K. and C. Sukim, *Making Peace over a Disputed Territory in Southeast Asia: Lessons from the Batu Puteh*, 3 THE JOURNAL OF TERRITORIAL AND MARITIME STUDIES 65–85 (2016).

Byers, Michael; Andreas Osthagen, *Why Does Canada Have So Many Unresolved Maritime Boundary Disputes*, 54 CANADIAN YEARBOOK OF INTERNATIONAL LAW 1–62 (2016).

Diehl, Paul F.; David Bowden, *Law and Legitimacy in Territorial Changes,* 32(1) CONNECTICUT JOURNAL OF INTERNATIONAL LAW 49–72 (2016).

Duchatel, Mathieu, *China's Policy in the East China Sea: The Role of Crisis Management Mechanism Negotiations with Japan (2008–2015),* 3 CHINA PERSPECTIVES 13–21 (2016).

Fei, Jie; Zhongping Lai, *New Historical Cartographic Records Supporting Chinese Sovereignty over the Diaoyu/Senkaku Islands,* 2016 CHINA OCEANS LAW REVIEW 44–64 (2016).

Gullett, Warwick, *Reconciliation in the Timor Sea,* 4(1) KOREAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 99–112 (2016).

Hara, Kimie, *Takeshima/Dokdo Problem in the San Francisco System,* 4(1) KOREAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 22–42 (2016).

Lee, Seokwoo, *Experiences in Dealing with Maritime Disputes,* 4(1) KOREAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 85–98 (2016).

Liste, Philip, *Geographical knowledge at work: Human rights litigation and transnational territoriality,* 22(1) EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS 217–239 (2016).

Liu, Dan, *The Historical and Legal Status of Pre-Modern Ryuku and the Sovereignty over the Diaoyu Islands,* 2016 CHINA OCEANS LAW REVIEW 109–154 (2016).

Olorundami, Fayokemi, *Revisiting the Libya/Malta Decision and Assessing its Relevance (or otherwise) to the East China Sea Dispute,* 15(4) CHINESE JOURNAL OF INTERNATIONAL LAW 717–740 (2016).

Palestini, Lorenzo , *The Territorial and Maritime Dispute (Nicaragua v. Colombia): On Territorial Sovereignty and the International Court of Justice's Failure to Rule on the Geographical Scope of the Archipelago of San Andres,* 15(1) LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 56–80 (2016).

Pinto, M. W. Christopher, *The Philippine Claim against China,* 4(2) KOREAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 151–157 (2016).

Shaw, Malcolm, *Self-determination, Uti Possidetis and Boundary Disputes in Africa,* in CHIA-JUI CHENG (ED.), A NEW INTERNATIONAL LEGAL ORDER 99–126 (2016).

Yee, Sienho, *The Recognition of the Existence of a Dispute regarding Sovereignty over Diaoyu Dao and Some Implications for the Parties and Other States, Especially the United States,* 15(4) CHINESE JOURNAL OF INTERNATIONAL LAW 849–858 (2016).

6 Territorial and Maritime Disputes–South China Sea

Abb, Pascal, *Punish the Philippines, Forgive Vietnam? The South China Sea Disputes in the Eyes of Chinese Experts,* in FELS E. AND VU T.-M. (EDS.), POWER POLITICS IN ASIA'S CONTESTED WATERS: TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA 139–158 (2016).

Bautista, Lowell, *The Philippines and the Arbitral Tribunal's Award: A Sombre Victory and Uncertain Times Ahead,* 38(3) CONTEMPORARY SOUTHEAST ASIA 349–355 (2016).

Baviera, Aileen S.P., *The Philippines and the South China Sea Dispute: Security Interests and Perspectives,* in STOREY, IAN; LIN CHENG-YI, (EDS.) THE SOUTH CHINA SEA DISPUTE: NAVIGATING DIPLOMATIC AND STRATEGIC TENSIONS 161–185 (2016).

Chang, Yen-Chiang, *Taiwanese Position in the South China Sea Dispute: Before and after the Permanent Court of Arbitration Award Regional Focus & Controversies,* 9(2) JOURNAL OF EAST ASIA AND INTERNATIONAL LAW 467–476 (2016).

FELS, E. AND T.-M. VU (EDS.), POWER POLITICS IN ASIA'S CONTESTED WATERS: TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA (2016).

Fels, Enrico; and Truongh-Minh Vu, *Introduction: Understanding the Importance of the Disputes in the South China Sea,* in FELS E. AND VU T.-M. (EDS.), POWER POLITICS IN ASIA'S CONTESTED WATERS: TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA 3–24 (2016).

Gau, Michael Sheng-ti, *The Agreements and Disputes Crystalized by the 2009–2011 Sino-Philippine Exchange of Notes Verbales and their Relevance to the Jurisdiction and*

Admissibility Phase of the South China Sea Arbitration, 15(2) Chinese Journal of International Law 417–455 (2016).

Gau, Michael Sheng-ti, *The Sino-Philippine Arbitration on the South China Sea Disputes and the Taiwan Factor Regional Focus & Controversies,* 9(2) Journal of East Asia and International Law 479–498 (2016).

Jenner, C.J. and Tran Truong Thuy (eds.) The South China Sea: A Crucible of Regional Cooperation or Conflict-making Sovereignty Claims? (2016).

Kivimaki, Timo, *Legalism, Developmentalism and Securitization: The Case of Territorial Disputes in the South China Sea,* in Fels E. and Vu T.-M. (eds.), Power Politics in Asia's Contested Waters: Territorial Disputes in the South China Sea 57–76 (2016).

Klein, Natalie, *Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions,* 15(2) Chinese Journal of International Law 403–415 (2016).

Lanteigne, Marc, *The South China Sea in China's Developing Maritime Strategy*, in Fels E. and T.-M. Vu (eds.), Power Politics in Asia's Contested Waters: Territorial Disputes in the South China Sea 97–116 (2016).

Li, Rex, *China's Sea Power Aspirations and Strategic Behaviour in the South China Sea from the Theoretical Perspective of Identity Construction,* in Fels E. and T.-M. Vu (eds.), Power Politics in Asia's Contested Waters: Territorial Disputes in the South China Sea 117–138 (2016).

Lim, Kheng Swe, *China's Nationalist Narrative of the South China Sea: A Preliminary Analysis*, in Fels E. and T.-M. Vu (eds.), Power Politics in Asia's Contested Waters: Territorial Disputes in the South China Sea 159–196 (2016).

Mitchell, R., *An International Commission of Inquiry for the South China Sea? Defining the Law of Sovereignty to Determine the Chance for Peace*, 49 Vanderbilt Journal of Transnational Law 749–817 (2016).

Noor, Elina, *The South China Sea Dispute: Options for Malaysia,* in Ian Storey; Cheng-Yi Lin, (eds.) The South China Sea Dispute: Navigating Diplomatic and Strategic Tensions 205–227 (2016).

Ohnesorge, Hendrik W., *A Sea of Troubles: International Law and the Spitsbergen Plus Approach to Conflict Management in the South China Sea,* in Fels E. and T.-M. Vu (eds.), Power Politics in Asia's Contested Waters: Territorial Disputes in the South China Sea 25–56 (2016).

Oude Elferink, A.G., *Arguing International Law in the South China Sea Disputes: The Haiyang Shiyou 981 and USS Lassen Incidents and the Philippines v. China Arbitration*, (2016) 31 The International Journal of Marine and Coastal Law 205–241 (2016).

Parameswaran, Prashanth, *Delicate Equilibrium: Indonesia's Approach to the South China Sea*, in Fels E. and T.-M. Vu (eds.), Power Politics in Asia's Contested Waters: Territorial Disputes in the South China Sea 319–336 (2016).

Pemmaraju, Sreenivasa Rao, *The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility*, 15(2) Chinese Journal of International Law 265–307 (2016).

Pham, Hung, *Philippines v. China: The South China Sea Finally Meets International Law*, 16(2) Chicago-Kent Journal of International and Comparative Law 1–12 (2016).

Sellars, Kirsten, *Rocking the Boat: The Paracels, the Spratlys, and the South China Sea Arbitration,* 30(1) Columbia Journal of Asian Law 221–262 (2016).

Sofaer, Abraham D., *The Philippine Law of the Sea Action against China: Relearning the Limits of International Adjudication,* 15(2) Chinese Journal of International Law 393–402 (2016).

Storey, Ian, *Rising Tensions in the South China Sea: Southeast Asian Responses,* in Ian Storey; Cheng-Yi Lin, (eds.) The South China Sea Dispute: Navigating Diplomatic and Strategic Tensions 134–160 (2016).

Storey, Ian; Cheng-Yi Lin, (eds.) The South China Sea Dispute: Navigating Diplomatic and Strategic Tensions (2016).

Talmon, Stefan, *The South China Sea Arbitration: Observations on the Award on Jurisdiction and Admissibility,* 15(2) Chinese Journal of International Law 309 –391 (2016).

Tanaka, Yoshifumi, *Reflections on the Philippines/China Arbitration,* 15(2) Law and Practice of International Courts and Tribunals 305–325 (2016).

Tuan, Hoang Anh, *A Vietnamese Perspective on the South China Sea Dispute,* in Storey Ian; Lin Cheng-Yi, (eds.) The South China Sea Dispute: Navigating Diplomatic and Strategic Tensions 186–204 (2016).

Whomersley, Chris, *The South China Sea: The Award of the Tribunal in the Case Brought by Philippines against China—A Critique,* 15(2) Chinese Journal of International Law 239–264 (2016).

Wu, Shicun; Keyuan Zou, Arbitration Concerning the South China Sea: Philippines Versus China(2016).

Yee, Sienho, *The South China Sea Arbitration Decisions on Jurisdiction and Rule of Law Concerns,* 15(2) Chinese Journal of International Law 219–237 (2016).

Yongming, Shi, *South China Sea Issue: A Dispute over the Order in East Asia,* 60 China International Studies 53–65 (2016).

Zhang, Xiaoyi, *Problematic Expansion on Jurisdiction: Some Observation on the South China Sea Arbitration Notes & Comments,* 9(2) Journal of East Asia and International Law 449–466 (2016).

7 Seas and Marine Resources

Bautista, Lowell, *The Role of Coastal States,* in R. Warner and S. Kaye (eds.), Routledge Handbook of Maritime Regulation and Enforcement 59–70 (2016).

Campins Eritja, Mar; Jaume Saura Estapà; Xavier Pons Ràfols, *Towards Improved Regional Co-operation over Water Uses in Central Asia: The Case of Hydroelectric Energy and Inland Fisheries,* 6 Asian Journal of International Law 119–158 (2016).

Forrest, Craig, *State Cooperation in Combating Transboundary Marine Pollution in South East Asia,* 30(1) Australian and New Zealand Maritime Law Journal 78–89 (2016).

Galang, Leo P. Arman, *The Outlaw of the Sea: Balancing Navigational Freedom and Maritime Interdiction Practices in the Context of Transnational Irregular Movement of People by the Sea,* 61 Ateneo Law Journal 274–384 (2016).

Gamage, Rajni Nayanthara, *Blue Economy in Southeast Asia: Oceans as the New Frontier of Economic Development,* 12(2) Maritime Affairs: Journal of the National Maritime Foundation of India 1–15 (2016).

George, Mary, *Implementation of the United Nations Law of the Sea Convention in Malaysia,* in Lee, Seokwoo; and Gullett, Warwick (eds.), Asia-Pacific and the Implementation of the Law of the Sea: Regional Legislative and Policy Approaches to the Law of the Sea Convention 78–103 (2016).

Giang, Nguyen Thai, *Implementation of the United Nations Law of the Sea Convention in Vietnam,* in Lee, Seokwoo; and Gullett, Warwick (eds.), Asia-Pacific and the Implementation of the Law of the Sea: Regional Legislative and Policy Approaches to the Law of the Sea Convention 130–150 (2016).

Hamamoto, Shotaro, *Paradoxical Role of Experts in the Whaling in the Antarctic Case,* 59 Japanese Yearbook of International Law 345–359 (2016).

He, Juan, *Enhancing Chinese Law and Practice to Combat Illegal, Unreported and Unregulated Fishing and Trade,* 19 Asia Pacific Journal of Environmental Law 4–28 (2016a).

Jia, Yu, *Exploitation of Resources in the Area and the Sponsoring State Responsibility: New Developments in China's Legislative Work concerning the Deep Sea,* 2016 China Oceans Law Review 11–26 (2016).

Keyuan, Zou, *Implementation of the United Nations Law of the Sea Convention in China,* in Seokwoo Lee; and Warwick Gullett (eds.), Asia-Pacific and the Implementation of the Law of the Sea: Regional Legislative and Policy Approaches to the Law of the Sea Convention 14–33 (2016).

Kojima, Chie, *Implementation of the United Nations Law of the Sea Convention in Japan,* in Seokwoo Lee; and Warwick Gullett (eds.), Asia-Pacific and the

Implementation of the Law of the Sea: Regional Legislative and Policy Approaches to the Law of the Sea Convention 34–52 (2016).

Lee, Seokwoo; and Warwick Gullett (eds.), Asia-Pacific and the Implementation of the Law of the Sea: Regional Legislative and Policy Approaches to the Law of the Sea Convention (2016).

Nurbintoro, Gulardi; and Haryo Budi Nugroho, *Biodiversity Beyond National Jurisdiction: Current Debate and Indonesia's Interest,* 6(2) Indonesia Law Review 283–306 (2016).

Park, Young Kil; Seokwoo Lee, *Implementation of the United Nations Law of the Sea Convention in Korea,* in Seokwoo Lee; and Warwick Gullett (eds.), Asia-Pacific and the Implementation of the Law of the Sea: Regional Legislative and Policy Approaches to the Law of the Sea Convention 53–77 (2016).

Rothwell, Donald R.; and Tim Stephens, The International Law of the Sea (2016).

Rusli, Hazmi; R. Dremliuga; Wan I. Talaat, *Legal Framework on the Marine Environment Protection of Straits used for International Navigation: Has It Been Effective in the Straits of Malacca and Singapore,* 9 Journal of East Asia and International Law 75–98 (2016).

Schatz, Valentin J., *Combating Illegal Fishing in the Exclusive Economic Zone - Flag State Obligations in the Context of the Primary Responsibility in the Coastal State,* 7(2) Goettingen Journal of International Law 383–414 (2016).

Stephens, D. *The Role of Courts and Tribunals in Maritime Regulation and Enforcement*, in R. Warner and S. Kaye (eds.), Routledge Handbook of Maritime Regulation and Enforcement 122–136 (2016).

Stephens, Shelby, *Show, Don't Tell: How Thailand Can and Must Make Advancements in the Fight against Human Trafficking in the Thai Fishing Industry Comments,* 31(3) Emory International Law Review 477–503 (2016).

Sun, Zhen, *Implementation of the United Nations Law of the Sea Convention in Singapore,* in Lee, Seokwoo; and Gullett, Warwick (eds.), Asia-Pacific and the Implementation of the Law of the Sea: Regional Legislative and Policy Approaches to the Law of the Sea Convention 104–129 (2016).

Tzeng, Peter, *Jurisdiction and Applicable Law under UNCLOS,* 126(1) Yale Law Journal 242–359 (2016).

Wagner, Benjamin K., *Lessons from Lassen: Plotting a Proper Course for Freedom of Navigation Operations in the South China Sea,* 9 Journal of East Asia and International Law 137–166 (2016).

Zhang, Xinjun, *The Latest Developments of the US Freedom of Navigation Programs in the South China Sea: Deregulation or Re-balance*, 9 Journal of East Asia and International Law 167–182 (2016).

8 Maritime Security

Galdorisi, George, *The United States Asia Pacific Maritime Security Strategy: Accelerating The U.S. Rebalance to the Indo-Asia-Pacific Region,* 42(7) Asia-Pacific Defence Reporter 86–89 (2016).

Koda, Yoji, *Maritime Security in the Region: SCS and ECS as Key Arenas for Converging Political Interests,* 23(2) Asia-Pacific Review 86–108 (2016).

Krause, Joachim; Sebastian Bruns (eds.), Routledge Handbook of Naval Strategy and Security (2016).

Patel, Bimal N.; Aruna Kumar Malik; William Nunes, Indian Ocean and Maritime Security: Competition, Cooperation and Threat (2016).

Till, Geoffrey (ed.), The Changing Maritime Scene in Asia: Rising Tensions and Future Strategic Stability (2016).

9 Maritime Law

Fitzmaurice, Malgosia; Norman A Martínez Gutiérrez; Ignacio Arroyo; and Elda Belja (eds.), The IMLI Manual on International Maritime Law, Volume 2: Shipping Law (2016).

Fitzmaurice, Malgosia; Norman A Martínez Gutiérrez; Riyaz Hamza (eds.), The IMLI Manual on International Maritime Law. Volume 3: Marine Environmental Law and Maritime Security (2016).

Kwok, David, *Maritime Arbitration and Cultural Differences,* 17 Asian Business Lawyer 75–94 (2016).

Marten, Brevan, *Maritime Law in the Asia-Pacific Region,* 30 (1) Australian and New Zealand Maritime Law Journal 64–66 (2016).

Ringbom, Henrik, *The European Union and International Maritime Law - Lessons for the Asia Pacific Region,* 30 (1) Australian and New Zealand Maritime Law Journal 67–77 (2016).

10 Jus ad bellum and jus in bello

Bannelier-Christakis, K., *Military Interventions Against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent*, 29 Leiden Journal of International Law 743—775 (2016).

Crawford, Neta C., *What is war good for? Background ideas and assumptions about the legitimacy, utility, and costs of offensive war,* 8(2) British Journal of Politics & International Relations 282–299 (2016).

Deeks, Ashley, *Multi-Part Tests in the Jus Ad Bellum,* 53 HOUSTON LAW REVIEW 1035–1064 (2016).

Farer, Tom; Frederic Bernard, *Killing by Drone: Towards Uneasy Reconciliation with the Values of a Liberal State,* 38(1) HUMAN RIGHTS QUARTERLY 108–133 (2016).

Finkelstein, Claire, *Killing in War and the Moral Equality Thesis,* 32(2) SOCIAL PHILOSOPHY & POLICY 184–203 (2016).

Flasch, Olivia, *The Legality of the Air Strikes against ISIL in Syria: New Insights on the Extraterritorial Use of Force against Non-State Actors,* 3(1) JOURNAL ON THE USE OF FORCE AND INTERNATIONAL LAW 37–69 (2016).

Grasten, M., *Whose Legality?: Rule of Law Missions and the Case of Kosovo*, in RAJKOVIC N.M., AALBERTS T.E. AND GAMMELTOFT-HANSEN T. (EDS.), THE POWER OF LEGALITY: PRACTICES OF INTERNATIONAL LAW AND THEIR POLITICS 320–342 (2016).

Hakimi, Monica; Jacob Katz Cogan, *The Two Codes on the Use of Force,* 27(2) EUROPEAN JOURNAL OF INTERNATIONAL LAW 257–291 (2016).

Harris, Thomas S., *Can the ICC Consider Questions on Jus Ad Bellum in a War Crimes Trial*, 48 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 273–302 (2016).

Hessel, Daniel J., *Founding-Era Jus Ad Bellum and the Domestic Law of Treaty Withdrawal,* 125(8) YALE LAW JOURNAL 2394–2444 (2016).

Janzen, Greg, *A Critique of the Right Intention Condition as an Element of 'Jus ad Bellum',* 15(1) JOURNAL OF MILITARY ETHICS 36–57 (2016).

Kilcup, James, *Proportionality in Customary International Law: An Argument against Aspirational Laws of War*, 17(1) CHICAGO JOURNAL OF INTERNATIONAL LAW 244–272 (2016).

Kreps, Sarah E.; Geoffrey P. R. Wallace, *International law, military effectiveness, and public support for drone strikes,* 53 JOURNAL OF PEACE RESEARCH 830–844 (2016).

Labrador, Dalia D., *New Technology for War: The Legality of Drone-Based Targeted Killings under International Law*, 16(2) CHICAGO-KENT JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 1–14 (2016).

Lieblich, Eliav*, Internal Jus ad Bellum,* 67(3) HASTINGS LAW JOURNAL 687–748 (2016).

Peperkamp, Lonneke, *On the Duty to Reconstruct after War: Who Is Responsible for 'jus Post Bellum'?,* 29(2) CANADIAN JOURNAL OF LAW AND JURISPRUDENCE 403–430 (2016).

van der Vyver, Johan D., *The ISIS Crisis and the Development of International Humanitarian Law,* 30(4) EMORY INTERNATIONAL LAW REVIEW 531–563 (2016).

VanLandingham, Rachel E., *Criminally Disproportionate Warfare: Aggression As A Contextual War Crime,* 48 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 215–272 (2016).

Wallach, Evan; Erik Thomas, *The Economic Calculus of Fielding Atonomous Fighting Vehicles Complaint with the Laws of Armed Conflict,* 18 YALE JOURNAL OF LAW AND TECHNOLOGY 1–25 (2016).

11 International Criminal law and Transnational Crime

Banteka, Nadia, *Mind the Gap: A Systematic Approach to the International Criminal Court's Arrest Warrants Enforcement Problem,* 49 (3) Cornell International Law Journal 521–563 (2016).

Denysov, S.; and N. Suyundykova, *Accounting of the Personal Characteristics a Realization of Criminal Responsibility by the Criminal Law of the Countries in Central Asia,* 2016 Juridical Science 42–49 (2016).

Guilfoyle, Douglas, International Criminal Law (2016).

Jain, Neha, *Judicial Lawmaking and General Principles of Law in International Criminal Law,* 57(1) Harvard International Law Journal 111–150 (2016).

Kim, Sangkul, *The Witness Protection Mechanism of Delayed Disclosure at the Ad Hoc International Criminal Tribunals,* 9(1) Journal of East Asia & International Law 53–73 (2016).

Lindsey, Tim; Kerstin Steiner, *Islam, the Monarch and Criminal Law in Brunei: The Syariah Penal Code Order, 2013,* 25(4) Griffith Law Review 552–580 (2016).

Ling, Bonny, *Human Trafficking and China: Challenges of Domestic Criminalisation and Interpretation,* 16 (1) International Relations of the Asia-Pacific 148–177 (2016).

Palmer, Emma, *Localizing International Criminal Accountability in Cambodia,* 16 (1) International Relations of the Asia-Pacific 97–135 (2016).

Sato, Hiromi, *The Separate Crime of Conspiracy and Core Crimes in International Criminal Law*, 32(1) Connecticut Journal of International Law 73–114 (2016).

Sellars, Kirsten, Trials for International Crimes in Asia (2016).

Stahn, Carsten, *Between Constructive Engagement, Collusion and Critical Distance: The ICRC and the Development of International Criminal Law,* 15 (1) Chinese Journal of International Law 139–166 (2016).

Tan, See Seng; Hitoshi Nasu, *ASEAN and the Development of Counter-Terrorism Law and Policy in Southeast Asia*, 39(3) University of New South Wales Law Journal 1219–1238 (2016).

12 Peace and Transitional Justice

Bryson, Anna, *Victims, Violence, and Voice: Transitional Justice, Oral History, and Dealing with the Past,* 39(2) Hastings International and Comparative Law Review 299–354 (2016).

Gowan, R., *The Security Council and Peacekeeping*, in Einsiedel von, S.,Malone, D.M. and Stagno Ugarte B. (eds.), The UN Security Council in the Twenty-first Century 749–770 (2016).

Gray, Christine, *The 2015 Report on Uniting Our Strengths for Peace: a New Framework for UN Peacekeeping?,* 15 (1) Chinese Journal of International Law 193–213 (2016).

Grenfell, K., *Detention in United Nations Peace Operations*, in Rose G. and Oswald B. (eds.), Detention of Non-state Actors Engaged in Hostilities: The Future Law 345–361 (2016).

Grenfell, K., *Partnerships in UN Peacekeeping*, (2016) 13 International Organizations Law Review 55–73 (2016).

Gue´ henno, J., *Robust Peacekeeping and the Limits of Force*, in Einsiedel von S., Malone D.M. and Stagno Ugarte B. (eds.), The UN Security Council in the Twenty-first Century 373–392 (2016).

Karlsrud, J., Norm Change in International Relations: Linked Ecologies in UN Peacekeeping Operations (2016).

Kyle, J., *The "New Legal Reality?" Peace, Punishment, and Security Council Referrals to the ICC*, 25 Transnational Law & Contemporary Problems 109–152 (2016).

Levin, J., J. Mackay and A. Nasirzadeh, *Selectorate Theory and the Democratic Peacekeeping Hypothesis: Evidence from Fiji and Bangladesh*, 23 International Peacekeeping 107–132 (2016).

Lourdes Veneracion-Rallonza, M., *Building the Women, Peace and Security Agenda in the ASEAN through Multi-Focal Norm Entrepreneurship*, (2016) 8 Global Responsibility to Protect 158–179 (2016).

Mileva, N., *State Responsibility in Peacekeeping*, 12 Utrecht Law Review 122–138 (2016).

Neuhold, H., The Law of International Conflict: Force, Intervention and Peaceful Dispute Settlement (2016).

Ouedraogo, Emile, *Ethnic Cleansing in International Law*, 54 Canadian Yearbook of International Law 188–226 (2016).

Turan, T., Positive Peace in Theory and Practice: Strengthening the United Nations's Pre-Conflict Prevention Role (2016).

13 Security

Auslin, Michael, *Japan's New Realism: Abe Gets Tough*, 95(2) Foreign Affairs 125–134 (2016).

Briones, Roehlano M., *Food Security Initiatives in Asia and the Impact of WTO Regulation,* in Ewing-Chow, Michael; and Slade, Melanie Vilarasau (eds.) International Trade and Food Security: Exploring Collective Food Security in Asia 49–61 (2016).

Carter, Ash, *The Rebalance and Asia-Pacific Security: Building a Principled Security Network,* 95(6) Foreign Affairs 65–75 (2016).

DeLisle, Jacques, *International Law in the Obama Administration's Pivot to Asia: The China Seas Disputes, The Trans-Pacific Partnership, Rivalry with the PRC, and Status Quo Legal Norms in U.S. Foreign Policy,* 48 Case Western Reserve Journal of International Law 143–176 (2016).

Ewing, J. Jackson, *Environmental Change, Food Security and Trade in Southeast Asia,* in Ewing-Chow, Michael; and Slade, Melanie Vilarasau (eds.) International Trade and Food Security: Exploring Collective Food Security in Asia 154–167 (2016).

Ewing-Chow, Michael; and Melanie Vilarasau Slade (eds.) International Trade and Food Security: Exploring Collective Food Security in Asia (2016).

Hornat, Jan, *The Power Triangle in the Indian Ocean: China, India and the United States,* 29(2) Cambridge Review of International Affairs 425–443 (2016).

Lee, Lavina; John Lee, *Japan-India Cooperation and Abe's Democratic Security Diamond: Possibilities, Limitations and the View from Southeast Asia,* 38(2) Contemporary Southeast Asia 284–308 (2016).

Scharf, Michael P., *How the War against ISIS Changed International Law*, 48 Case Western Reserve Journal of International Law 15–68 (2016).

Slade, Melanie Vilarasau, *Is there a role for international law in supporting systemic solutions to the food security challenge,* in Michael Ewing-Chow; and Melanie Vilarasau Slade (eds.) International Trade and Food Security: Exploring Collective Food Security in Asia 168–192 (2016).

Stigall, Dan E., *Counterterrorism, Ungoverned Spaces, and the Role of International Law,* 36 (1) SAIS Review of International Affairs 47–60 (2016).

Tan, See Seng; Hitoshi Nasu, *ASEAN and the Development of Counter-Terrorism Law and Policy in Southeast Asia,* 39(3) University of New South Wales Law Journal 1219–1238 (2016).

Thayer, C.A., *China's Naval Modernization and US Strategic Rebalancing: Implications for Stability in the South China Sea*, in C Jenner. and Tran Truong Thuy (eds.), The South China Sea: A Crucible of Regional Cooperation or Conflict-Making Sovereignty Claims? 223–240 (2016).

Tsuruoka, Michito, *NATO's Challenges as Seen from Asia: Is the European Security Landscape Becoming like Asia,* 25(1) Polish Quarterly of International Affairs 124–133 (2016).

14 Environment

Bath, Vivienne, *The Legal System in China and the Handling of Accidents and Disasters*, in Butt, Simon; Nasu, Hitoshi; and Nottage, Luke (eds.), Asia-Pacific

Disaster Management: Comparative and Socio-legal Perspectives 197–216 (2016).

Bekhoven, Jeroen van, *Public Participation as a General Principle in International Environmental Law: Its Current Status and Real Impact,* 11(2) National Taiwan University Law Review 219–271 (2016).

Butt, Simon, Disaster Management Law in Indonesia: From Response to Preparedness, in Butt, Simon; Nasu, Hitoshi; and Nottage, Luke (eds.), Asia-Pacific Disaster Management: Comparative and Socio-legal Perspectives 183–196 (2016).

Butt, Simon; Hitoshi Nasu; and Luke Nottage (eds.), Asia-Pacific Disaster Management: Comparative and Socio-legal Perspectives (2016).

Butt, Simon; Hitoshi Nasu; and Luke Nottage, *Disaster Management: Socio-Legal and Asia-Pacific Perspectives,* in Simon Butt; Hitoshi Nasu; and Luke Nottage (eds.), Asia-Pacific Disaster Management: Comparative and Socio-legal Perspectives 1–59 (2016).

Helen, Cook, *International Nuclear Law: Nuclear Safety, Emergency Response and Nuclear Liability,* in Simon Butt; Hitoshi Nasu; and Luke Nottage (eds.), Asia-Pacific Disaster Management: Comparative and Socio-legal Perspectives 279–296 (2016).

Cullet, Philippe, Differential treatment in international environmental law (2016).

de Jonge, Alice, *The Consultation Doctrine and Role in Strengthening Environmental Governance: The Case of Indonesia,* 2016 Lawasia Journal 31–60 (2016).

Donald, David C., *Conceiving Corporate Governance for an Asian Environment*, 12(2) University of Pennsylvania Asian Law Review 88–139 (2016).

Hassan, Parvez, *Good Environmental Governance: Some Trends in the South Asian Region,* 19 Asia Pacific Journal of Environmental Law 169–192 (2016).

Hey, Ellen, Advanced Introduction to International Environmental Law (2016).

Hoang, Van Nghia, *Enhancing Mechanism for Protection of Constitutional Rights in Viet Nam Today the Case of the Right to Environment,* 17 Asia-Pacific Journal on Human Rights & the Law 28–41 (2016).

Itakura, Takashi, *Current Issues with the Regulatory Framework for Managing Soil Contamination in China*, 19 Asia Pacific Journal of Environmental Law 119–146 (2016).

Kim, Da Young, *A Lesson from the Shale Revolution in the United States, Canada, and China,* 29(4) Georgetown Environmental Law Review 747–766 (2016).

Poto, Margherita, *Environmental Regulation in China through the Lens of the European Model,* 19 Asia Pacific Journal of Environmental Law 69–90 (2016).

Rheuben, Joel, *Government Liability for Regulatory Failure in the Fukushima Disaster: An Australian Comparison*, in Butt, Simon; Nasu, Hitoshi; and Nottage,

LUKE (EDS.), ASIA-PACIFIC DISASTER MANAGEMENT: COMPARATIVE AND SOCIO-LEGAL PERSPECTIVES 101–118 (2016).

Venuti, Stephanie, *Strengthening Environmental Rights and Protections within Development Law and Policy: A Vehicle for Mainstreaming Climate Action in Southeast Asia,* 18 ASIA PACIFIC JOURNAL OF ENVIRONMENTAL LAW 147–168 (2016).

15 CLIMATE CHANGE

Boer, Ben, *Climate Change and Human Rights in the Asia-Pacific: a Fragmented Approach*, in QUIRICO OTTAVIO; AND BOUMGHAR MAOULOUD (EDS.), CLIMATE CHANGE AND HUMAN RIGHTS: AN INTERNATIONAL AND COMPARATIVE LAW PERSPECTIVE 236–255 (2016).

Davies, Kirsten, *Ancient and New Legal Landscapes: Customary Law and Climate Change, a Vanuatu Case Study,* 19 ASIA PACIFIC JOURNAL OF ENVIRONMENTAL LAW 43–68 (2016).

Deng, Haifeng; Chiyuan Chen, *Common and Symmetrical Responsibility in Climate Change: A Bridging Mechanism for Adaptation and Mitigation,* 9 JOURNAL OF EAST ASIA AND INTERNATIONAL LAW 99–120 (2016).

Kunreuther, Howard; Rosemary Lyster, *The Role of Public and Private Insurance in Reducing Losses from Extreme Weather Events and Disasters,* 19 ASIA PACIFIC JOURNAL OF ENVIRONMENTAL LAW 29–54 (2016).

Liao, Tsung-Sheng, *MNCs under International Climate Change Regime: Recognizing Atmospheric Absorptive Capacity as the Common Heritage of Mankind,* 9(2) JOURNAL OF EAST ASIA AND INTERNATIONAL LAW 379–402 (2016).

Mayer, Benoit, *The Relevance of the No-Harm Principle to Climate Change Law and Politics*, 19 ASIA PACIFIC JOURNAL OF ENVIRONMENTAL LAW 79–104 (2016).

Narain, Sharneel, *Innocent Victims of Climate Change: A Case Study on the Fiji Islands Country Report,* 19 ASIA PACIFIC JOURNAL OF ENVIRONMENTAL LAW 193–238 (2016).

PRICE, SUSANNA; AND JANE SINGER, GLOBAL IMPLICATIONS OF DEVELOPMENT, DISASTERS AND CLIMATE CHANGE: RESPONSES TO DISPLACEMENT FROM ASIA PACIFIC (2016).

Pritchard, Bill, *Walking a Tightrope: India's Challenges in Meeting the 2030 Sustainable Development Agenda with Specific Reference to Climate Change Country Report,* 19 ASIA PACIFIC JOURNAL OF ENVIRONMENTAL LAW 139–147 (2016).

Segger, Marie-Claire Cordonier, *Advancing the Paris Agreement on Climate Change for Sustainable Development*, 5(2) CAMBRIDGE INTERNATIONAL LAW JOURNAL 202–237 (2016).

Struggles, Jonathan, *Climate Disasters and Cities: The Role of Local Government in Increasing Urban Resilience*, 19 ASIA PACIFIC JOURNAL OF ENVIRONMENTAL LAW 91–118 (2016).

16 Development

Alauddin, Mohammad; Samiul Hasan (eds.), Development, Governance and Environment in South Asia: A Focus on Bangladesh (2016).

Farah, Paolo Davide, *Trade and Progress: The Case of China,* 30(1) Columbia Journal of Asian Law 51–112 (2016).

Hasan, Samiul, *Governance, Politics and Development Management in Bangladesh,* in Mohammad Alauddin; Samiul Hasan (eds.), Development, Governance and Environment in South Asia: A Focus on Bangladesh 195–210 (2016).

Ong, Burton; Lye Lin-Heng; Joseph Chun, *Biological Diversity Conservation Laws in South East Asia and Singapore: A Regional Approach in Pursuit of the United Nations' Sustainable Development Goals,* 19 Asia Pacific Journal of Environmental Law 105–138 (2016).

Racioppi, Linda; Swarna Rajagopalan, Women and Disasters in South Asia: Survival, Security and Development (2016).

Reisman, W. Michael, *A Policy-Oriented Approach to Development,* 3(1) Journal of International and Comparative Law 141–148 (2016).

Venuti, Stephanie, *Strengthening Environmental Rights and Protections within Development Law and Policy: A Vehicle for Mainstreaming Climate Action in Southeast Asia,* 18 Asia Pacific Journal of Environmental Law 147–168 (2016).

17 Human Rights–general

Agrwal, M. B., Human Rights and Rural Law in South Asia (2016).

Byrnes, Andrew, *Whose International Law Is It? Some Reflections on the Contributions of Non-State Actors to the Development and Implementation of International Human Rights Law,* 59 Japanese Yearbook of International Law 14–50 (2016).

Chilton, Adam S.; Eric A. Posner, *The Influence of History on States' Compliance with Human Rights Obligations,* 56(2) Virginia Journal of International Law 211–264 (2016).

Davies, Sharyn Graham; Jazz Robson, *Juvenile (In)justice: Children in Conflict with the Law in Indonesia*, 17(1) Asia-Pacific Journal on Human Rights & the Law 119–147 (2016).

Dhaliwal, Shveta, Human Rights Mechanism in South Asia (2016).

Faiz, Pan Mohamad, *The Protection of Civil and Political Rights by the Constitutional Court of Indonesia,* 6(2) Indonesia Law Review 158–179 (2016).

Goto, Hiroko, *Will Prime Minister Abe's Womenomics Break Glass Ceilings in Japan Symposium Commentary*, 39(2) Hastings International and Comparative Law Review 441–458 (2016).

Hae-Bong, Shin, *Toward a Holistic Understanding and Implementation of Human Rights: Development of Norms and Practice under the International Covenant on Economic, Social and Cultural Rights,* 59 Japanese Yearbook of International Law 51–80 (2016).

Heng, Benjamin; Rain Liivoja; Daniel Ng; Bruce Oswald, *Military Justice in a Comparative and International Perspective: A View from the Asia Pacific,* 20(3–4) Journal of International Peacekeeping 133–142 (2016).

Hunt, Charles T.; Noel M. Morada, *Human Protection across Regions: Learning from Norm Promotion and Capacity Building in Southeast Asia and Africa,* 8(2–3) Global Responsibility to Protect 105–110 (2016).

Ishida, Kyoko, *Why Female Lawyers Get less - Multiple Glass Ceiling for Japanese Female Lawyers Symposium Commentary,* 39(2) Hastings International and Comparative Law Review 411–440 (2016).

Kirby, Michael, *Asia and Oceania LGBTI Law Reform: Breaking the Log-Jam,* 46(1) Hong Kong Law Journal 151–174 (2016).

Kitamura, Yasuzo, *The Influence of the International Covenant on Civil and Political Rights on Prisoners' Rights and Criminal Justice in Contemporary Japan,* 59 Japanese Yearbook of International Law 99–155 (2016).

Koh, Harold Hongju, *Global Tobacco Control as a Health and Human Rights Imperative Essays,* 57(2) Harvard International Law Journal 433–454 (2016).

Koji, Teraya, *The Impact of the International Covenants on Human Rights on the Rights of Foreigners in Japan,* 59 Japanese Yearbook of International Law 156–174 (2016).

Lenzerini, Federico, *The Safeguarding of Collective Cultural Rights through the Evolutionary Interpretation of Human Rights Treaties and Their Translation into Principles of Customary International Law,* in Jakubowski Andrzej (ed.), Cultural Rights as Collective Rights: An International Law Perspective 133–153 (2016).

Lewis, Bridget; and Rowena Maguire, *A Human Rights-Based Approach to Disaster Displacement in the Asia*-Pacific 6 The Asian Journal of International Law 326–352 (2016).

Nga, Le Thi, *Rights of Child Victims and Child Witnesses in Criminal Justice in Viet Nam,* 17(1) Asia-Pacific Journal on Human Rights & the Law 88–101 (2016).

Novak, Andrew, *The Role of Legal Advocates in Transnational Judicial Dialogue: The Abolition of the Mandatory Death Penalty and the Evolution of International Law,* 25(2) Cardozo Journal of International and Comparative Law 179–218 (2016).

O'Donnell, Therese; Craig Allan, *Identifying Solidarity: The Il Project On The Protection Of Persons In Disasters And Human Rights,* 49 George Washington International Law Review 53–95 (2016).

Obata, Kaoru, *Overview of A Half-Century of International Covenants on Human Rights; Inter-State Cooperation as the Original Infrastructure and Autonomous Institutionalization,* 59 Japanese Yearbook of International Law 1–13 (2016).

Radics, George Baylon; Yee Suan Poon, *Amos Yee, Free Speech, and Maintaining Religious Harmony in Singapore,* 12(2) UNIVERSITY OF PENNSYLVANIA ASIAN LAW REVIEW 186–243 (2016).

Riffel, Christian, *Human Rights Protection in the Asia-Pacific: What will be the Role of the TPP?* 14 OTAGO LAW REVIEW 339–350 (2016).

Roy, Raja Devasish, *International human rights standards and indigenous peoples' land and human rights in Asia: general overview and strategies for implementation,* in LENNOX CORINNE; AND SHORT DAMIEN (EDS.), HANDBOOK OF INDIGENOUS PEOPLES' RIGHTS 371–393 (2016).

Sharan, A., *From Non-intervention to R2P*, 56 INDIAN JOURNAL OF INTERNATIONAL LAW 81–94 (2016).

Sunga, Ricardo A. III, *Litigation and Alternative Dispute Resolution of the United Nations Human Rights Treaty Bodies,* 61 ATENEO LAW JOURNAL 698–720 (2016).

18 Human rights–Institutions and Organizations

Arsika, I Made Budi, *Advancing ASEAN Human Rights Norms through External Relations: Capacity, Advantages, and the Potential for External Interference,* 14(1) INDONESIAN JOURNAL OF INTERNATIONAL LAW 246–274 (2016).

Bellamy, A.J., *United Nations Action in Sri Lanka and the Responsibility to Protect*, in O'BANNON B.R. (ED.), REASSESSING THE RESPONSIBILITY TO PROTECT: CONCEPTUAL AND OPERATIONAL CHALLENGES 114–141 (2016).

Bhatia, Gautam, *Horizontal Discrimination and Article 15(2) of the Indian Constitution: A Transformative Approach*, 11 ASIAN JOURNAL OF COMPARATIVE LAW 87–110 (2016).

Bui, Hien, *The ASEAN Human Rights System: A Critical Analysis,* 11 ASIAN JOURNAL OF COMPARATIVE LAW 111–140 (2016).

Chen, Albert H.Y., *The Law and Politics of the Struggle for Universal Suffrage in Hong Kong, 2013–15,* 3(1) ASIAN JOURNAL OF LAW AND SOCIETY 189–207 (2016).

Chen, Chia-Ming, *Civil Disobedience as Transformative Power under a Non-Democratic Regime: Does the Umbrella Movement Undermine the Rule of Law*, 24(2) ASIA PACIFIC LAW REVIEW 87–107 (2016).

Couzigou, I., *The United Nations Security Council Sanctions and International Human Rights*, 10 VIENNA ONLINE JOURNAL ON INTERNATIONAL CONSTITUTIONAL LAW 277–311 (2016).

Hechler, Samantha, *Prosecuting Islamic State Members for Sexual and Gender-Based Crimes Committed against Yazidi Women and Girls*, 25(3) CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 595–624 (2016).

Iskandar, Pranoto, *Constitutionalizing Human Rights Universality in Nonconstitutional Legal System: Decoding Indonesian Human Rights Brouhaha*, 3(1) INDONESIAN JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 1–42 (2016).

Liljeblad, Jonathan, *The 2014 Enabling Law of the Myanmar National Human Rights Commission and the UN Paris Principles: A Critical Evaluation,* 9 Journal of East Asia & International Law 427–447 (2016).

Marsh, Luke, *The Strategic Use of Human Rights Treaties in Hong Kong's Cage-Home Crisis: No Way Out,?* 3(1) Asian Journal of Law and Society 159–188 (2016).

Mazzuoli, Valerio de Oliveira; Dilton Riberio, *The Pro Homine Principle as an Enshrined Feature of International Human Rights Law,* 3(1) Indonesian Journal of International & Comparative Law 77–100 (2016).

Panditaratne, Dinusha, *Decriminalizing Same Sex Relations in Asia: Socio-Cultural Factors Impeding Legal Reform,* 31(2) American University International Law Review 171–208 (2016).

Pascoe, Daniel, *What the Rejection of Anwar Ibrahim's Petition for Pardon Tells Us about Malaysia's Royal Pardon System*, 18 Asian-Pacific Law & Policy Journal 63–82 (2016).

Peterson, Vandana, *Speeding up Sexual Assault Trials: A Constructive Critique of India's Fast-Track Courts*, 18 Yale Human Rights & Development Law Journal 59–110 (2016).

Richmond, Sean, *Transferring Responsibility: The Influence and Interpretation of International Law in Australia's Approach to Afghan Detainees Special Section on Torture*, 17 Asia-Pacific Journal on Human Rights and the Law 240–256(2016).

Sarkin, J., *The Rise and Fall (and Supposed Rise Again) of the Responsibility to Protect (R2P) as a Norm of International Law: R2P in the Human Rights Landscape,* in O'Bannon B.R. (ed.), Reassessing the Responsibility to Protect: Conceptual and Operational Challenges 51–73 (2016).

Subedi, Surya P., *The UN Human Rights Special Rapporteurs and the Impact of their Work: Some Reflections of the UN Special Rapporteur for Cambodia,* 6 Asian Journal of International Law 1–14 (2016).

Sun, Shiyan, *The Problems of the Chinese Texts of the International Human Rights Covenants: A Revisit,* 15(4) Chinese Journal of International Law 773–494 (2016).

Vanhullebusch, Matthias, *Finance, Rule of Law and Human Rights in China,* in Hu, Jiaxing; Vanhullebusch, Matthias; and Harding, Andrew, Finance, Rule of Law and Development in Asia: Perspectives from Singapore, Hong Kong and Mainland China 168–194 (2016).

Vu, Giao Kien Cong; Tran, *Constitutional Debate and Development on Human Rights in Vietnam,* 11 Asian Journal of Comparative Law 235–262 (2016).

19 Humanitarian Law

Erdem, Mete, *Enforcing Conventional Humanitarian Law for Environmental Damage during Internal Armed Conflict*, 29(3) Georgetown Environmental Law Review 435–480 (2016).

Garwood-Gowers, A., *China's "Responsible Protection" Concept: Reinterpreting the Responsibility to Protect(R2P) and Military Intervention for Humanitarian Purposes*, 6 The Asian Journal of International Law 89–118 (2016).

Greenwood, Christopher, *International Humanitarian Law in Context*, in Chia-Jui Cheng (Ed.), A New International Legal Order 312–330 (2016).

Hessel, Daniel J., *The Pen and the Sword: International Humanitarian Law Protections for Journalism,* 41 Yale Journal of International Law 415–457 (2016).

Jones, J., *Humanitarian Intervention in a Multipolar World*, 15 Washington University Global Studies Law Review 161–190 (2016).

Sadat, Leila Nadya, *Putting Peacetime First: Crimes against Humanity and the Civilian Population Requirement,* 31(2) Emory International Law Review 197–270 (2016).

Seow, C., *Chasing the Frontier in Humanitarian Intervention Law: The Case for "Aequitas ad Bellum"*, 6 The Asian Journal of international Law 294–325 (2016).

Sterio, Milena, *The Karadzic Genocide Conviction: Inferences, Intent, and the Necessity to Redefine Genocide,* 31(2) Emory International Law Review 271–298 (2016).

20 Nationality, Migration and Refugees

Djelantik, Sukawarsini, *Regional Cooperation and Legal Protection to Indonesian Women Migrant Worker,* 14(1) Indonesian Journal of International Law 82–93 (2016).

Francis, Angus; and Rowena Maguire, Protection of Refugees and Displaced Persons in the Asia Pacific Region (2016).

Gallagher, Anne T.; and Fiona David, The International Law of Migrant Smuggling (2016).

Jung, Bongsoo, *Promoting Employment of Foreign Migrant Workers - Foreign Domestic Workers in Singapore,* 20 Korea University Law Review 105–122 (2016).

Khadria, Binod*, Migration and Development: a View from Asia,* in Anna Triandafyllidou (ed.), Routledge Handbook of Immigration and Refugee Studies 243–253 (2016).

Nurjaya, I Nyoman; and Rachmad Safa'at, *Access to Ecological Justice for the Marginalised People of Indonesia: Is It a Genuine or Pseudo Recognition and Protection?,* 6(1) Indonesia Law Review 97–110 (2016).

Orchard, Cynthia, *The Almaty Process: Improving Compliance with International Refugee Law in Central Asia,* 28(1) International Journal of Refugee Law 55–84 (2016).

Renshaw, Catherine, *Human Trafficking in Southeast Asia: Uncovering the Dynamics of State Commitment and Compliance,* 37(4) Michigan Journal of International Law 611–660 (2016).

Temprosa, Francis Tom, *The "Liberalization" of Refugee Naturalization: Some Insights in Republic v. Karbasi on the Gains and Deficits on the Law on Local Integration,* 61 Ateneo Law Journal 242–275 (2016).

van Bekhoven, Jeroen, *Identity Crisis: Taiwan's Law and Regulations on the Status of Indigenous Peoples,* 24(2) Asia Pacific Law Review 202–232 (2016).

Whelan, Jennifer, et al., *Abused and Alone: Legal Redress for Migrant Domestic Workers in Malaysia*, 6(1) Indonesia Law Review 1–38 (2016).

21 Colonialism and Self Determination

Aszkielowicz, Dean, *Australia's Pursuit of the Taiwanese and Korean 'Japanese' War Criminals*, in Kerstin von Lingen, (ed.), War Crimes Trials in the Wake of Decolonization and Cold War in Asia, 1945–1956: Justice in the Time of Turmoil 221–238 (2016).

Banerjee, Milinda, *Decolonization and Subaltern Sovereignty: India and the Tokyo Trial,* in von Lingen, Kerstin, (ed.), War Crimes Trials in the Wake of Decolonization and Cold War in Asia, 1945–1956: Justice in the Time of Turmoil 69–92 (2016).

Bihler, Anja, *The Legacy of Extraterritoriality and the Trial of Japanese War Criminals in the Republic of China,* in von Lingen, Kerstin, (ed.), War Crimes Trials in the Wake of Decolonization and Cold War in Asia, 1945–1956: Justice in the Time of Turmoil 93–116 (2016).

Boister, Neil, *Colonialism, Anti-Colonialism and Neo-Colonialism in China: The Opium Question at the Tokyo War Crimes Tribunal,* in von Lingen, Kerstin, (ed.), War Crimes Trials in the Wake of Decolonization and Cold War in Asia, 1945–1956: Justice in the Time of Turmoil 25–50 (2016).

Cribb, Robert, *The Burma Trials of Japanese War Criminals, 1946–1947,* in von Lingen, Kerstin, (ed.), War Crimes Trials in the Wake of Decolonization and Cold War in Asia, 1945–1956: Justice in the Time of Turmoil 117–142 (2016).

Form, Wolfgang, *Colonization and Postcolonial Justice: US and Philippine War Crimes Trial in Manila after the Second World War,* in von Lingen, Kerstin, (ed.), War Crimes Trials in the Wake of Decolonization and Cold War in Asia, 1945–1956: Justice in the Time of Turmoil 143–166 (2016).

Kim, Hang, *Universalism and Colonialism: Reconsidering Postwar Democracy in Japan,* 17(3) Inter-Asia Cultural Studies 481–495 (2016).

Polunina, Valentyna, *From Tokyo to Khabarovsk: Soviet War Crimes Trials in Asia as Cold War Battlefields,* in von Lingen, Kerstin, (ed.), War Crimes Trials in the

Wake of Decolonization and Cold War in Asia, 1945–1956: Justice in the Time of Turmoil 239–260 (2016).

Schoepfel, Ann-Sophie, *Justice and Decolonization: War Crimes on Trial in Saigon, 1946–1950*, in von Lingen, Kerstin, (ed.), War Crimes Trials in the Wake of Decolonization and Cold War in Asia, 1945–1956: Justice in the Time of Turmoil 167–194 (2016).

Schouten, Lisette, *Netherlands East Indies' War Crimes Trials in the Face of Decolonization*, in von Lingen, Kerstin, (ed.), War Crimes Trials in the Wake of Decolonization and Cold War in Asia, 1945–1956: Justice in the Time of Turmoil 195–220 (2016).

Shin, Ethan Hee-Seok, *The Comfort Women Reparation Movement: Between Universal Women's Human Right and Particular Anti-Colonial Nationalism,* 28(1) Florida Journal of International Law 87–158 (2016).

Lingen, von, Kerstin, (ed.), War Crimes Trials in the Wake of Decolonization and Cold War in Asia, 1945–1956: Justice in the Time of Turmoil (2016).

von Lingen, Kerstin; and Robert Cribb, *Justice in Time of Turmoil: War Crimes Trials in Asia in the Context of Decolonization and Cold War,* in von Lingen, Kerstin, (ed.), War Crimes Trials in the Wake of Decolonization and Cold War in Asia, 1945–1956: Justice in the Time of Turmoil 1–24 (2016).

22 International Economic and Business Law–general

Chien, Vivien; Andrew Godwin; Ian Ramsay, *Cross-Border Cooperation in Bank Resolution: A Framework for Asia,* 2016(1) Singapore Journal of Legal Studies 1–28 (2016).

Cho, Sungjoon; Jurgen Kurtz, *The Limits of Isomorphism: Global Investment Law and the ASEAN Investment Regime*, 17(2) Chicago Journal of International Law 341–369 (2016).

Laval, Sarah, *A Comparative Study of Party Autonomy and Its Limitations in International Contracts,* 25(1) Cardozo Journal of International and Comparative Law 29–76 (2016).

Lee, Mee-Hyon, *The Law and Politics of Islamic Finance in a Non-Islamic State: Sukuk in the Korean Capital Markets,* 7(1) Yonsei Law Journal 29–71 (2016).

Lingliang, Zeng, *Conceptual Analysis of China's Belt and Road Initiative: A Road towards a Regional Community of Common Destiny,* 15(3) Chinese Journal of International Law 517–541 (2016).

Mitchell, Andrew D.; Ana Maria Palacio, *Coordination in the Asian Financial Markets and the Case of TiSA,* (2) MANCHESTER JOURNAL OF INTERNATIONAL ECONOMIC LAW 206–249 (2016).

Sardinha, Elsa, *Towards a New Horizon in Investor-State Dispute Settlement: Reflections on the Investment Tribunal System in the Comprehensive Economic Trade Agreement* (*CETA*), 54 CANADIAN YEARBOOK OF INTERNATIONAL LAW 311–365 (2016).

Wang, Guiguo, *The Belt and Road Initiative in the Context of Globalization,* in CHIA-JUI CHENG (ED.), A NEW INTERNATIONAL LEGAL ORDER 279–294 (2016).

23. WTO AND TRADE

Agas, Felicisimo F. III; Donemark J.L. Calimon, *Taming the Unruly Horse: Philippine Public Policy and the New York Convention,* 61 ATENEO LAW JOURNAL 634–677 (2016).

Alauddin, Mohammad, *Trade among South Asian Nations: Experiences and Prospects,* in ALAUDDIN, MOHAMMAD; HASAN, SAMIUL (EDS.), DEVELOPMENT, GOVERNANCE AND ENVIRONMENT IN SOUTH ASIA: A FOCUS ON BANGLADESH 117–140 (2016).

BIGNAMI, FRANCESCA; AND DAVID ZARING (EDS.), COMPARATIVE LAW AND REGULATION: UNDERSTANDING THE GLOBAL REGULATORY PROCESS (2016).

Brown, Ronald C., *FTA's in Asia-Pacific: Next Generation of Social Dimension Provisions on Labor,* 26(2) INDIANA INTERNATIONAL & COMPARATIVE LAW REVIEW 69–101 (2016).

Chaisse, Julien; and Debashis Chakraborty, *Normative Obsolescence of the WTO Anti-Dumping Agreement--Topography of the Global Use and Misuse of Initiations and Measures,* 6 ASIAN JOURNAL OF INTERNATIONAL LAW 233–263 (2016).

Chow, Daniel C. K., *How the United States Uses the Trans-Pacific Partnership to Contain China in International Trade*, 17(1) CHICAGO JOURNAL OF INTERNATIONAL LAW 370–402 (2016).

Chow, Daniel C. K., *Why China Established the Asia Infrastructure Investment Bank,* 49(5) VANDERBILT JOURNAL OF TRANSNATIONAL LAW 1255–1298 (2016).

Creamer, C.D.; and Z. Godzimirska, *Deliberative Engagement within the World Trade Organization: A Functional Substitute for Authoritative Interpretations*, 48 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 413–461 (2016).

Creamer, C.D.; and Z. Godzimirska, (*De*) *Legitimation at the WTO Dispute Settlement Mechanism*, 49 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 275–321 (2016).

Du, Ming, *The Necessity Test in World Trade Law: What Now?,* 15 (4) CHINESE JOURNAL OF INTERNATIONAL LAW 817–847 (2016).

Fleuter, Sam, *The Role of Digital Products under the WTO: A New Framework for GATT and GATS Classification Comments,* 17(1) CHICAGO JOURNAL OF INTERNATIONAL LAW 153–177 (2016).

Huan, Cheng-Yi; and David S. Law, *Proportionality Review* of Administrative Action in Japan, Korea, Taiwan, in BIGNAMI FRANCESCA; AND ZARING, DAVID (EDS.), COMPARATIVE LAW AND REGULATION: UNDERSTANDING THE GLOBAL REGULATORY PROCESS 305–334 (2016).

Jiaxiang, Hu, *The WTO Dispute Settlement System at Twenty Years: From the Perspective of the WTO Compensation Mechanism,* 7(1) YONSEI LAW JOURNAL 1–26 (2016).

Li, Man, Rita Yi; Yu Li, Herru Ching; Cho Kei Mak; Po Kei Chan, *Rationales for the Implementation of Competition Law in EU, the US and Asia: Content Analysis and Data Visualization Approach,* 7(1) ASIAN JOURNAL OF LAW AND ECONOMICS 63–100 (2016).

Nedumpara, James J., *WTO, State and Legal Capacity Building: An Indian Narrative*, in CHOUKROUNE LEÏLA (ED.) JUDGING THE STATE IN INTERNATIONAL TRADE AND INVESTMENT LAW: SOVEREIGNTY MODERN, THE LAW AND THE ECONOMICS 33–52 (2016).

Ohnesorge, John, *The Regulatory State in East Asia*, in BIGNAMI FRANCESCA; AND ZARING DAVID (EDS.), COMPARATIVE LAW AND REGULATION: UNDERSTANDING THE GLOBAL REGULATORY PROCESS 92–108 (2016).

Ong, Burton; Lin Heng; Joseph Chun, *Regulating International Trade in Endangered Species-Transhipments of Cities-Listed Species via Singapore,* 2016(2) SINGAPORE JOURNAL OF LEGAL STUDIES 277–307 (2016).

Perez de las Heras, Beatriz, *European Union - Asia-Pacific Trade Relations: Tentative Bilateralism amidst Competing Plurilateral Initiatives,* 16(4) ROMANIAN JOURNAL OF EUROPEAN AFFAIRS 32–47 (2016).

Shaffer, Gregory, *How the WTO Shapes the Regulatory State,* in BIGNAMI FRANCESCA; AND ZARING DAVID (EDS.), COMPARATIVE LAW AND REGULATION: UNDERSTANDING THE GLOBAL REGULATORY PROCESS 447–479 (2016).

Wu, Mark, *The China, Inc. Challenge to Global Trade Governance,* 57(2) HARVARD INTERNATIONAL LAW JOURNAL 261–324 (2016).

24 Investment

Browning, Joel K., *Investor-State Dispute between Lone Star and Korea: Legal and Policy Analysis,* 9 JOURNAL OF EAST ASIA & INTERNATIONAL LAW 183–207 (2016).

Catalan, Adrian, *Mergers and Acquisitions in Hawai'i: Potential Obstacles for Asia-Based Investors,* 17 ASIAN BUSINESS LAWYER 121–152 (2016).

Choukroune, Leïla (ed.) Judging the State in International Trade and Investment Law: Sovereignty Modern, the Law and the Economics (2016).

Dizgovin, Farshad Rahimi, *Foundations of Specific Performance in Investor-State Dispute Settlements: Is It Possible and Desirable,* 28(1) Florida Journal of International Law 1–62 (2016).

Ganguli, Amal K., Role *of Indian Judiciary in the Realm of International Trade and Investment Law,* in Choukroune, Leïla (ed.) Judging the State in International Trade and Investment Law: Sovereignty Modern, the Law and the Economics 155–178 (2016).

Li, Yuwem; Cheng Bian, *A New Dimension of Foreign Investment Law in China - Evolution and Impacts of the National Security Review System,* 24(2) Asia Pacific Law Review 149–175 (2016).

Lin, Andrew Jen-Guang, *The Challenges and Contemporary Issues of Taiwan's Investor Protection System: A Model to Learn or to Avoid*, 11(1) National Taiwan University Law Review 129–217 (2016).

Losari, Junianto James, *Comprehensive or bit by bit: The acia and Indonesia's bits,* 6 Asian Journal of International Law 15–45 (2016).

Mitra, Trisha; and Rahul Donde, *Claims and Counterclaims under Asian Multilateral Investment Treaties,* in Choukroune Leïla (ed.) Judging the State in International Trade and Investment Law: Sovereignty Modern, the Law and the Economics 105–126 (2016).

Wartini, Sri, *The Impacts of Foreign Direct Investment to the Environment in Developing Countries: Indonesian Perspective*, 14(1) Indonesian Journal of International Law 296–324 (2016).

25 Commercial Law

Ashraf, Ameera and Andrew Riseley, *Recent Developments in Competition Law in Southeast Asia*, 12(2) Competition Law International 151–166 (2016).

Ma, Jingyuan; and Mel Marquis, *Business Culture in East Asia and Implications for Competition Law* 51(1) Texas International Law Journal 1–44 (2016).

Li, Man, Rita Yi; Yu Li, Herru Ching; Cho Kei Mak; Po Kei Chan, *Rationales for the Implementation of Competition Law in EU, the US and Asia: Content Analysis and Data Visualization Approach,* 7(1) Asian Journal of Law and Economics 63–100 (2016).

Ozery, Tamar Groswald, *Minority Public Shareholders in China's Concentrated Capital Markets - A New Paradigm,* 30(1) Columbia Journal of Asian Law 1–50 (2016).

Rooney, Kim M., *Conciliation and Mediation of International Commercial Disputes in Asia and UNCITRAL's Working Group on the International Enforcement of Settlement Agreements,* 8(4) ASIAN DISPUTE REVIEW 195–201 (2016).

Tiba, Firew, *The Emergence of Hybrid International Commercial Courts and the Future of Cross Border Commercial Dispute Resolution in Asia,* 14(1) LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW 31–54 (2016–2017).

Verga, Ma. V. Venarisse, *Commercial Arbitration in the Philippines in Light of the ASEAN Integration,* 61 ATENEO LAW JOURNAL 630–651 (2016).

Zhou, Yi, *Establishing a Deposit Insurance System in China: A Long-Awaited Move toward Deepening Financial Reform*, 16(2) CHICAGO-KENT JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 46–97 (2016).

26 INTELLECTUAL PROPERTY

Barizah, Nurul, *International Copyright Treaties and Its Implementation Under Indonesian Copyright Act; Is It A Better Access To Knowledge?,* 14(1) INDONESIAN JOURNAL OF INTERNATIONAL LAW 1–27 (2016).

Corthay, Eric, *The ASEAN Doctrine of Non-Interference in Light of the Fundamental Principle of Non-Intervention,* 17 ASIAN-PACIFIC LAW & POLICY JOURNAL 1 - 41 (2016).

Friedmann, Danny, *Protection against Abuse of Trademark Law in Greater China: A Brief Analysis of the People's Republic of China, Hong Kong, Macau, and Taiwan,* 47(2) CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 157–192 (2016).

Park, Sung Pil, *The Coordinating Role of Public International Law: Observations in the Field of Intellectual Property,* 9(2) JOURNAL OF EAST ASIA AND INTERNATIONAL LAW 321–340 (2016).

Parker, Matthew W., *Dying to Spite the Graveyard: Thailand and the Necessity of Creating a Culture-Based IP Enforcement Paradigm,* 18 ASIAN-PACIFIC LAW & POLICY JOURNAL 93–113 (2016).

Zhang, Guangliang, *China's Stance on Free Trade-Related Intellectual Property: A View in the Context of the China-Japan-Korea FTA Negotiations,* 24(1) ASIA PACIFIC LAW REVIEW 36–59 (2016).

27 CULTURAL PROPERTY AND HERITAGE

Aman, Takahiro Kenjie C.; Maria Patricia R. Cervantes-Poco, *What's in a Name?: Challenges in Defining Cultural Heritage in Light of Modern Globalization,* 61 ATENEO LAW JOURNAL 964–991 (2016).

Blake, Janet, *Collective Cultural Rights Considered in the Light of Recent Developments in Cultural Heritage Law,* in Jakubowski, Andrzej (ed.), Cultural Rights as Collective Rights: An International Law Perspective 60–84 (2016).

Chechi, A., *The 2013 Judgment of the ICJ in the 'Temple of Preah Vihear' Case and the Protection of World Cultural Heritage Sites in Wartime,* 6 The Asian Journal of International Law 353–378 (2016).

Francioni, Francesco, *The International Legal Framework for Enforcement of Cultural Rights*, in Jakubowski, Andrzej (ed.), Cultural Rights as Collective Rights: An International Law Perspective 253–271 (2016).

Inman, Derek, *From the Global to the Local: The Development of Indigenous Peoples' Land Rights Internationally and in Southeast Asia,* 6 Asian Journal of International Law 46–88 (2016).

Javonavic, Miodrag, *Cultural Rights as Collective Rights*, in Jakubowski, Andrzej (ed.), Cultural Rights as Collective Rights: An International Law Perspective 13–35 (2016).

Logan, William, *Collective Cultural Rights in Asia: Recognition and Enforcement,* in Jakubowski, Andrzej (ed.), Cultural Rights as Collective Rights: An International Law Perspective 180–203 (2016).

Nitiruchirot, Yodsapon, *The Challenges of Underwater Cultural Heritage Protection in the South China Sea,* 2016 China Oceans Law Review 244–267 (2016).

Nor, M. Z. A. Mohd; Zahid, *Competing Interests in the Underwater Cultural Heritage: A Question of Balance,* 9 Journal of East Asia and International Law 121–136 (2016).

Pena, Patricia Ruth E., *Recognition and Protection of Traditional Cultural Expressions: A Brief Overview of the International and Domestic Legal Regime*, 61 Ateneo Law Journal 1029–1044 (2016).

28 Dispute Settlement

Beckman, R., L. Bernard, H.D. Phan, T. Hsien-Li and R. Yusran (eds.), Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in ASEAN Instruments (2016).

Churchill, R., *Dispute Settlement in the Law of the Sea: Survey for 2015,* 31 The International Journal of Marine and Coastal Law 555–582 (2016).

DeLisle, Jacques, *International Law in the Obama Administration's Pivot to Asia: The China Seas Disputes, The Trans-Pacific Partnership, Rivalry with the PRC, and Status Quo Legal Norms in U.S. Foreign Policy,* 48 Case Western Reserve Journal of International Law 143–176 (2016).

Georgievski, S., *The International Court of Justice and Diplomatic Settlement of Disputes: Could ICJ Judgments Play an Effective Role in the Negotiation of Interstate Disputes?*, in Wolfrum R., Sersic M. and Sosic T.M. (eds.), Contemporary Developments in International Law: Essays in Honour of Budislav Vukas 709–728 (2016).

Grossman, Nienke, *Shattering the Glass Ceiling in International Adjudication,* 56(2) Virginia Journal of International Law 339–406 (2016).

Hegde, V.G., *India and International Settlement of Disputes*, 56 Indian Journal of International Law 1–40 (2016).

Nicholson, Jeremy, *Resolving Construction Disputes in Asia: How Will It Look in 2026,* 18(3) Asian Dispute Review 116–123 (2016).

Pinto, M., *Asia and Dispute Settlement: The Law of the Sea*, in Wolfrum R., Sersic M. and Sosic T.M. (eds.), Contemporary Developments in International Law: Essays in Honour of Budislav Vukas 755–769 (2016).

Sands, P., *Of Courts and Competition: Dispute Settlement under Part XV of UNCLOS',* in Wolfrum R., Sersic M. and Sosic T.M. (eds.), Contemporary Developments in International Law: Essays in Honour of Budislav Vukas 789–798 (2016).

Tams, C.J., *World Peace through International Adjudication?* in Justenhoven, H. and O'Connell M.E. (eds.), Peace through Law: Reflections on 'Pacem in Terris' from Philosophy, Law, Theology, and Political Science 215–254 (2016).

Xue, Hanqin; and Solene Guggisberg, *International Judiciary Practice in the Development of International Environmental Law: A Decade Review* in Cheng Chia-Jui (ed.), A New International Legal Order 127–146 (2016).

29 Arbitration

Ahuja, Sheila, *Arbitration Involving India: Recent Developments*, 18(3) Asian Dispute Review 132–139 (2016).

Caron, D.D., S.W. Schill, A. Cohen Smutny and E.E. Triantafilou (eds.), Practising Virtue: Inside International Arbitration (2016).

Catterwell, Chad; Catherine O'Keefe, *More Options for Multi-Party and Multi-Contract Disputes: A Review of the ACICA Arbitration Rules 2016,* 18(3) Asian Dispute Review 140–145 (2016).

Gayner, Oliver; Susanna Khouri, *Singapore and Hong Kong: International Arbitration Meets Third Party Funding,* 40(3) Fordham International Law Journal 1033–1046 (2016).

Kang, Christine, *Oriental Experience of Combining Arbitration with Conciliation: New Development of CIETAC and Chinese Judicial Peace,* 40(3) FORDHAM INTERNATIONAL LAW JOURNAL 919–952 (2016).

Kun, Fan, *Salient Features of International Commercial Arbitration in East Asia: A Comparative Study of China and Japan,* 5(3) AMERICAN UNIVERSITY BUSINESS LAW REVIEW 447–484 (2016).

Nottage, Luke, *The TPP Investment Chapter and Investor-State Arbitration in Asia and Oceania: Assessing Prospects for Ratification,* 17(2) MELBOURNE JOURNAL OF INTERNATIONAL LAW 313–348 (2016).

Pinkston, Jarred, *The Case for Arbitral Institutions to Play a Role in Mitigating Unethical Conduct by Party Counsel in International Arbitration,* 32(2) CONNECTICUT JOURNAL OF INTERNATIONAL LAW 177–216 (2016).

Rana, Rashda, *The Enforceability of Awards Set aside at the Seat: An Asian and European Perspective,* 40(3) FORDHAM INTERNATIONAL LAW JOURNAL 813–838 (2016).

Secomb, Matthew; Philip Tan; Thomas Wingfield, *Third Party Funding for Arbitration: An Opportunity for Singapore to Lead the Way in Regulation,* 18(4) ASIAN DISPUTE REVIEW 182–188 (2016).

Xiaoli, Gao, *The Impact and Future of the PRC Arbitration Law on Judicial Review of International Commercial Arbitration by the PRC Courts*, 18(2) ASIAN DISPUTE REVIEW 82–87 (2016).

30 PRIVATE INTERNATIONAL LAW

Autea, Arthur P., *The Evolution of Arbitration in the Philippines,* 61 ATENEO LAW JOURNAL 588–608 (2016).

Elbalti, Béligh, *The Jurisdiction of Foreign Courts and the Recognition of Foreign Judgments Ordering Injunction: The Supreme Court Judgment of April 24, 2014,* 59 JAPANESE YEARBOOK OF INTERNATIONAL LAW 395–419 (2016).

Francq, Stéphanie, *Party Autonomy and Regulation — Public Interests in Private International Law,* 59 JAPANESE YEARBOOK OF INTERNATIONAL LAW 300–344 (2016).

He, Qisheng, *Chronology of Practice: Chinese Practice in Private International Law in 2015,* 15 (4) CHINESE JOURNAL OF INTERNATIONAL LAW 859–901 (2016).

High, Anna, *It's Grace and Favor, It's Not Law: Extra-Legal Regulation of Foreign Foster Homes in China,* 12(2) UNIVERSITY OF PENNSYLVANIA ASIAN LAW REVIEW 357–406 (2016).

Kim, Jae Hyung; I. Y. Joseph Cho, *Protection of Personality Rights under Korean Civil Law,* 30(1) COLUMBIA JOURNAL OF ASIAN LAW 131–159 (2016).

Lin, Wendy, *The Territorial v. Transnational Approach to Enforcement of Arbitral Awards and its Impact on International Commercial Arbitration,* 61 ATENEO LAW JOURNAL 678–698 (2016).

Michaels, Ralf, *Towards a Private International Law for Regulatory Conflicts?,* 59 JAPANESE YEARBOOK OF INTERNATIONAL LAW 175–201 (2016).

Nishitani, Yuko, *Party Autonomy in Contemporary Private International Law: The Hague Principles on Choice of Law and East Asia,* 59 JAPANESE YEARBOOK OF INTERNATIONAL LAW 300–344 (2016).

Nishitani, Yuko, *Party Autonomy in Contemporary Private International Law — The Hague Principles on Choice of Law and East Asia,* 59 JAPANESE YEARBOOK OF INTERNATIONAL LAW 251–299 (2016).

Watt, Horatia Muir, *Jurisprudence without Confines: Private International Law as Global Legal Pluralism*, 5(3) CAMBRIDGE INTERNATIONAL LAW JOURNAL 388–403 (2016).

31 Internet, Data and Communications

Buchan, Russell, *Cyber Warfare and the Status of Anonymous under International Humanitarian Law,* 15 (4) CHINESE JOURNAL OF INTERNATIONAL LAW 741–772 (2016).

Company, Biel, *A Public Law Approach to Internet Standard Setting,* 7(1) GOETTINGEN JOURNAL OF INTERNATIONAL LAW 49–94 (2016).

Jin, Xiaoye, *Regulating China's Internet Money Market Funds: An Economic Perspective,* in JIAXING HU; MATTHIAS VANHULLEBUSCH; AND ANDREW HARDING, FINANCE, RULE OF LAW AND DEVELOPMENT IN ASIA: PERSPECTIVES FROM SINGAPORE, HONG KONG AND MAINLAND CHINA 324–354 (2016).

Kim, Keechang, *Korean Internet and Real Name Verification Requirement,* 20 KOREA UNIVERSITY LAW REVIEW 87–104 (2016).

Pastore, Jim, *Practical Approaches to Cybersecurity in Arbitration,* 40(3) FORDHAM INTERNATIONAL LAW JOURNAL 1023–1032 (2016).

Payne, Thomas, *Teaching Old Law New Tricks: Applying and Adapting State Responsibility To Cyber Operations*, 20(2) LEWIS & CLARK LAW REVIEW 683–715 (2016).

Sechenova, Marina, *Fahrenheit 451: Burning through the Great Firewall of China,* 3(1) INDONESIAN JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 283–314 (2016).

Shackelford, Scott J.; Scott Russell; Andreas Kuehn, *Unpacking the International Law on Cybersecurity Due Diligence: Lessons from the Public and Private Sectors,* 17(1) CHICAGO JOURNAL OF INTERNATIONAL LAW 1–50 (2016).

Shen, Weiwei, *Online Privacy and Online Speech: The Problem of the Human Flesh Search Engine,* 12(2) UNIVERSITY OF PENNSYLVANIA ASIAN LAW REVIEW 268–311 (2016).

32 Air and Space

Adinugrah, Antonius Satria, *The Rights and Obligations of the State in the Restoration of Cultural Heritage: A Review on International Law and the Practice of Indonesia,* 14 (1) Indonesian Journal of International Law 513–540 (2016).

Davalos, Juan, *International Standards in Regulating Space Travel: Clarifying Ambiguities in the Commercial Era of Outer Space,* 30(4) Emory International Law Review 597–622 (2016).

Gupta, Vishakha, *Critique of the International Law on Protection of the Outer Space Environment,* 14 (1) Astropolitics 20–43 (2016).

Hobe, Stephan, *Technological Development as a Challenge for the Development of Air and Space Law,* in Cheng Chia-Jui (ed.), A New International Legal Order 295–311 (2016).

Li, Yaning, *Standards to Identify and Decide the Legality of State Aviation Behaviors Performed in the South China Sea Region,* 2016 China Oceans Law Review 183–225 (2016).

Nugraha, Ridha Aditya; Deepika Jeyakodi; and Thitipon Mahem, *Urgency for Legal Framework on Drones: Lessons for Indonesia, India, and Thailand,* 6(2) Indonesia Law Review 137–157 (2016).

Salter, Alexander William, *Space Debris: A Law and Economics Analysis of the Orbital Commons,* 19(2) Stanford Technology Law Review 221–238 (2016).

Sand, Peter H.; Jonathan B. Wiener, *Towards a New International Law of the Atmosphere,* 7(2) Goettingen Journal of International Law 195–224 (2016).

Simatupang, Andika Immanuel, *State Responsibility over Safety and Security on Air Navigation of Civil Aviation in International Law,* 14(1) Indonesian Journal of International Law 275–295 (2016).

Wells, Todd, *Exploring the Space for Antitrust Law in the Race for Space Exploration,* 15 (2) Washington University Global Studies Law Review 381–401 (2016).

Zhang, Laura Wanlu, *Humanitarian Considerations in International Air Law*, 5(2) Cambridge International Law Journal 450–474 (2016).

33 Miscellaneous

Anheir, Helmut, et al., Global Civil Society 2011 (2016).

Chen, Lung-chu, The U.S.-Taiwan-China Relationship in International Law and Policy (2016).

De Visser, Maartje, *We All Stand Together: The Role of the Association of Asian Constitutional Courts and Equivalent Institutions in Promoting Constitutionalism,* 3(1) Asian Journal of Law and Society 105–134 (2016).

Fassbender, Bardo, *International Constitutional Law: Written or Unwritten?,* 15 (3) Chinese Journal of International Law 489–515 (2016).

Hafner-Burton, Emilie M.; Brad L. LeVeck; David G. Victor *How Activists Perceive the Utility of International Law,* 78 Journal of Politics 167–180 (2016).

Kent, Avidan; Jamie Trinidad, *International Law Scholars as Amici Curiae: An Emerging Dialogue (of the Deaf)?* 29 Leiden Journal of International Law 1081–1101 (2016).

Mohan, M. P. Ram, Nuclear Energy and Liability in South Asia: Institutions, Legal Frameworks and Risk Assessment within SAARC (2016).

Stasi, Alessandro, Elements of Thai Civil Law (2016).

Zurndorfer, Harriet, *Oceans of History, Seas of Change: Recent Revisionist Writing in Western Languages about China and East Asian Maritime History during the Period 1500–1630*, 31(1) International Journal of Asian Studies 61–94 (2016).

Dila Events

2016 DILA International Conference and 2016 DILA Academy and Workshop

The 2016 DILA International Conference entitled "Resolution and Prevention of International Environmental Disputes" and the 2016 DILA Academy and Workshop on "Japanese Contributions to the Development of International Law" and "State Practice in International Law in Asian States in the Year 2015" was held on November 4 to 7, 2016 on the campus of Meiji Gakuin University (Shirokane Campus) in Tokyo, Japan.

The conference opened in the morning of November 5 with a welcome address by Kanami Ishibashi, Tokyo University of Foreign Studies, Japan, and Seokwoo Lee, Chairman of the Development of International Law in Asia (DILA); Inha University Law School, Korea.

Session one of the conference was titled "Environmental Dispute Resolution and Prevention Part One" and was chaired by Kevin YL Tan, National University of Singapore. The first presenter, Yumiko Nakanishi, Hitotsubashi University, Japan, presented her paper titled "Various Systems Regarding Dispute Settlement of the European Union." The second presenter, Mari Koyano, Hokkaido University, Japan, presented her paper titled "Is Transboundary Environmental Co-operation Base on Procedural Obligations Possible in the Asian Region? Gaps between Asian Practice and 'Global' Trends." The final presenter of the session was Akiko Toi, Rakuno Gakuen University, Japan, who presented her paper titled "Collective Efforts to Combat Wildlife Crime in the Asia-Pacific" in which she aimed to review the nascent collaborative approach addressing wildlife crime focusing on the Asia-Pacific region.

Session two, titled "Environmental Dispute Resolution and Prevention Part Two" was chaired by Kimio Yakushiji, Ritsumeikan University, Japan. The first presenter, Kanami Ishibashi, presented her paper titled "The South China Sea Arbitration: Its Significance for Environmental Dispute Resolution and Prevention." The second presenter, Won-Mong Choi, Ewha Women's University, Korea, presented his paper titled "Trade and Environmental Governance in the FT Era: Sustainable Step for the Prevention of Global Clash between Trade and Environmental Regimes?" The final presenter of the session, Tran Viet Dung, Ho Chi Minh City University of Law, Vietnam, presented his paper titled "Environmental Disputes involving Foreign Investors in Vietnam: The Other Side of the FDI Coin and How to Solve It."

Session three was focused on "Climate Change Litigation" and was chaired by Tae-Hyun Choi, Hanyang University School of Law. The first presenter was

Sumudu Atapattu, University of Wisconsin Law School, USA, who presented her paper titled "Adjudicating Climate Change: How Useful is the Human Rights Framework?" in which she sought to present the pros and cons of using the human rights framework for damage caused by climate change. The second presenter was Yukari Takamura, Nagoya University, Japan, who presented her paper titled "Climate Litigation: Its Function and Challenges." The final presenter of the session was Deok-Young Park, Yonsei Law School, Korea, who presented on "Response to Climate Change and Ocean Fertilization" in which he analyzed the legal issues regulating ocean fertilization activities as carbon dioxide capture and storage.

The final session of the day was chaired by Seokwoo Lee. The first presentation was a co-authored paper by Eon Kyung Park and Tae-Gil Kim, Kyung Hee University Law School, Korea, titled "Status and International Cooperation Aspect of the Air Quality Control Law and Policy in Korea," presented by Tae-Gil Kim. The second presenter was Seongjae Rubin Lee, Hanjin Shipping, whose presentation was titled "The Challenges for International Regime of Oil Spills, What's the Alternative." The final presenter was Arie Afriansyah, Universitas Indonesia, whose presentation was titled, "Law Enforcement on Transboundary Air Pollution in Indonesia and ASEAN Context: Past, Present, and Future." The conference came to a close with final remarks by chairpersons Seokwoo Lee and Kanami Ishibashi.

The following day, November 6, the 2016 DILA Academy and Workshop was opened with a welcome address by Kanami Ishibashi and Seokwoo Lee.

Session one, titled "Japanese Contributions to the Development International Law: Part One" was chaired by Shotaro Hamamoto, Kyoto University, Japan. The first speaker of the session was Toshiya Ueki, Tohoku University, Japan, and his presentation was titled "Japan's Contributions to International Organizations: From a Historical Viewpoint." His presentation made up part one in a two part series with Yasu Mochizuki's presentation which followed. The second speaker of the session was Yasue Mochizuki, Kwansei Gakuin University, Japan, whose presentation was titled "Japanese 'Contribution' to the Development of International Law through the United Nations." The final speaker of the session was Kaoru Obata, Nagoya University, Japan, whose presentation was titled "Between Direct Prescription and Factual Effectiveness: Lessons from Shigejiro Tabata's Theory on Individual's Subjectivity in International Law."

Session two was titled "Japanese Contributions to the Development of International Law: Part Two" and was chaired by Toshia Ueki. The first presenter was Shotaro Hamamoto whose presentation was titled "Peaceful Settlement

of International Disputes and Japan." The second presenter was Kyo Arai, Doshisha University, Japan, whose presentation was titled "International Humanitarian Law and Japan." The third presenter was Yurika Ishii, National Defence Academy, Japan, whose presentation was titled "Japan's Anti-Piracy Efforts and its Contribution to International Law."

Session three was titled "State Practice in International Law in Asian States in the Year of 2015: Part One" and was chaired by Kevin YL Tan. Before the session began, a presentation which had been re-scheduled was given by Kyu-Rang Kim, Inha University Law School. Kyu Rang Kim presented her paper, co-written with Seong Won Lee, Inha University Law School, titled "The Waste You Left Behind: Polluter Liability as Tort Supreme Court Decision 2009 Da 66549." The session continued with presentations of State practice.

Buhm-Suk Baek, College of International Studies, Kyung Hee University, Korea, provided a survey of Korean practice in his presentation "The State Practice of International Law: Korea 2015–2016." Dustin Kuan–Hsiung Wang, Graduate Institute of Political Science, National Taiwan Normal University, Taiwan, followed with a presentation on notable developments regarding fisheries in his presentation "Cooperation on Law Enforcement in Fisheries Matters between Taiwan and the Philippines: A New Way to Reduce Maritime Disputes." Kanami Ishibashi then introduced notable developments and updates from Japan in 2015 in her presentation "Further Developments in Fukushima and Other New Movements for Implementing International Human Rights Law in Japan."

Session four was titled "State Practice in International Law in Asian States in the Year of 2015: Part Two" and chaired by Seokwoo Lee. Guifang Julia Xue, Chair Professor, KoGuan Law School, Director, Center for Rule of Ocean Law Studies Center for Polar and Deep Ocean Development, Shanghai Jiao Tong University, provided an update regarding Chinese practice in her presentation titled "China's Practice and Legislation in Deep Seabed Mining." Afterwards, Tran Viet Dung provided updates in Viet Nam State practice in his presentation titled, "Key developments in Viet Nam in the Area of International Economic Law." Kitti Jayangakula, School of Law, Eastern University, Thailand, introduced notable developments in the law of Thailand during 2015 in his presentation, "Thailand Practice in International Law 2015." Following, Kevin YL Tan introduced notable developments in Singapore in 2015. Sumudu Atapattu then provided updates with regard to the 2015 State practice of Sri Lanka. Arie Afriansyah also provided updates with regard to the State practice of Indonesia in 2015 on fighting illegal fishing in his presentation titled, "Indonesia's Practice in Combatting Illegal Fishing 2015–2016."

Afterwards, the 2016 DILA Academy and Workshop was closed with comments from chairpersons Kanami Ishibashi and Seokwoo Lee.

Seokwoo Lee
Co-Editor-in-Chief

Hee Eun Lee
Co-Editor-in-Chief