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MARITIME ENERGY RESOURCES IN ASIA

Legal Regimes and Cooperation

Edited by Clive Schofield

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MARITIME ENERGY RESOURCES IN ASIA

Legal Regimes and Cooperation

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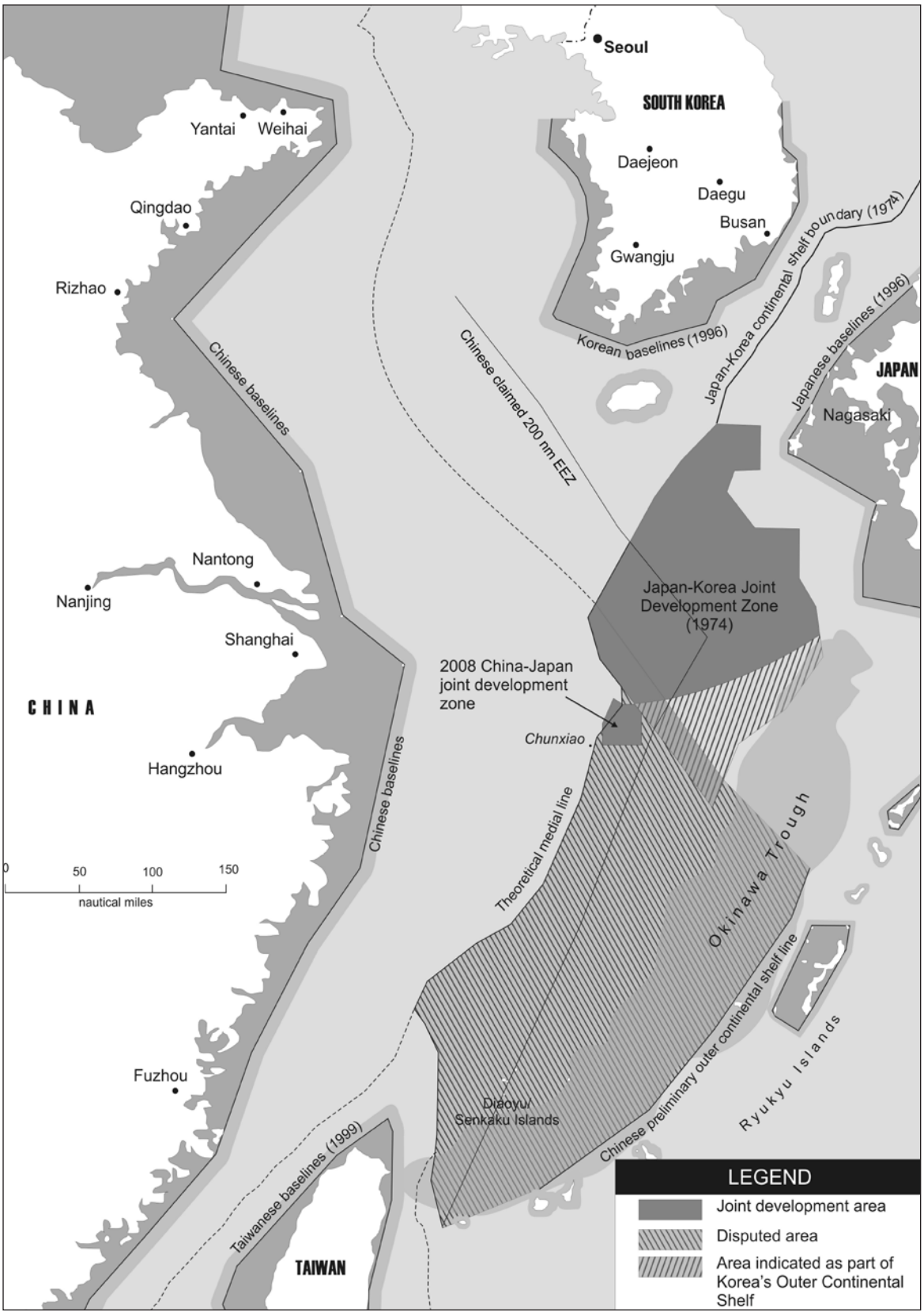

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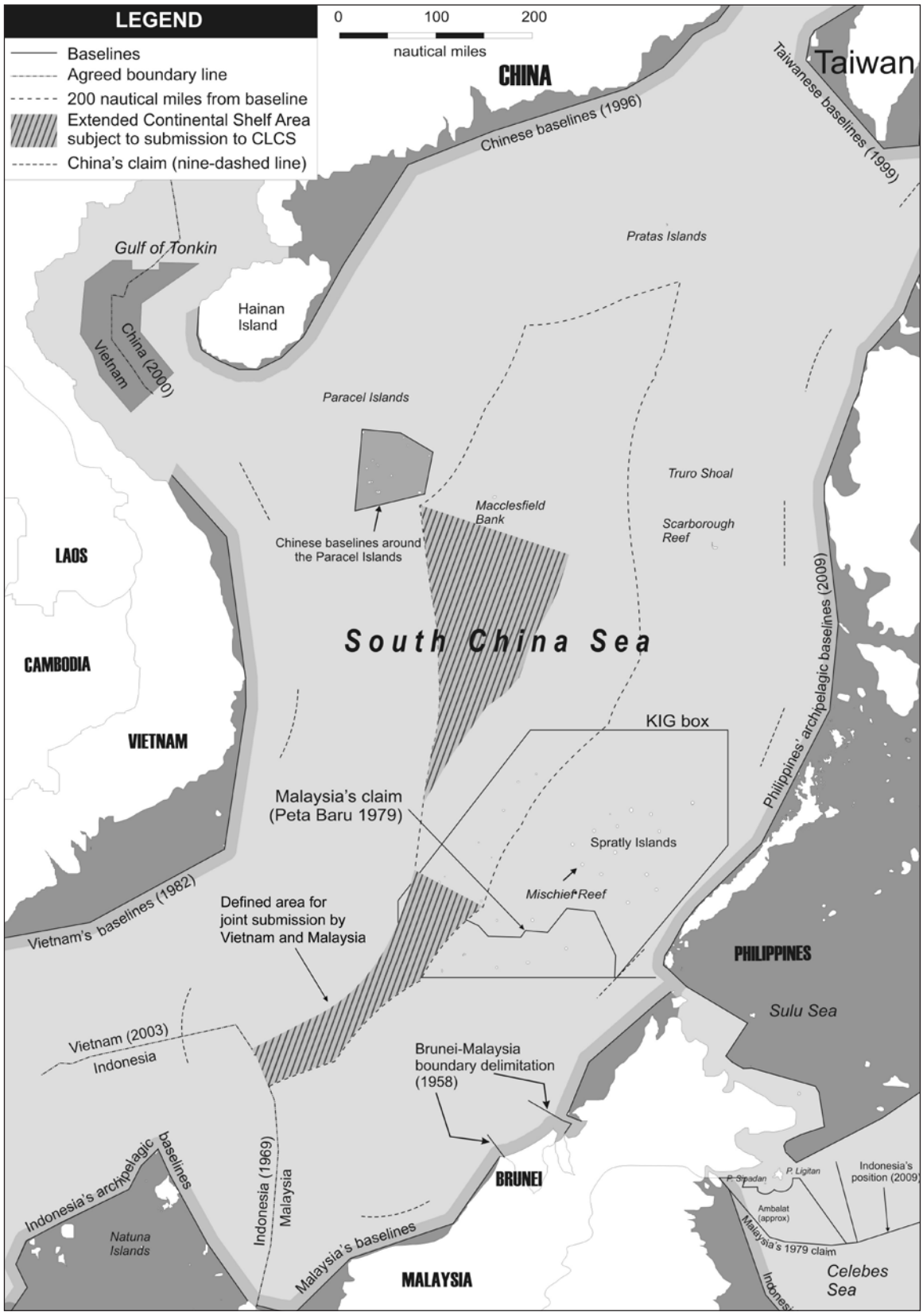

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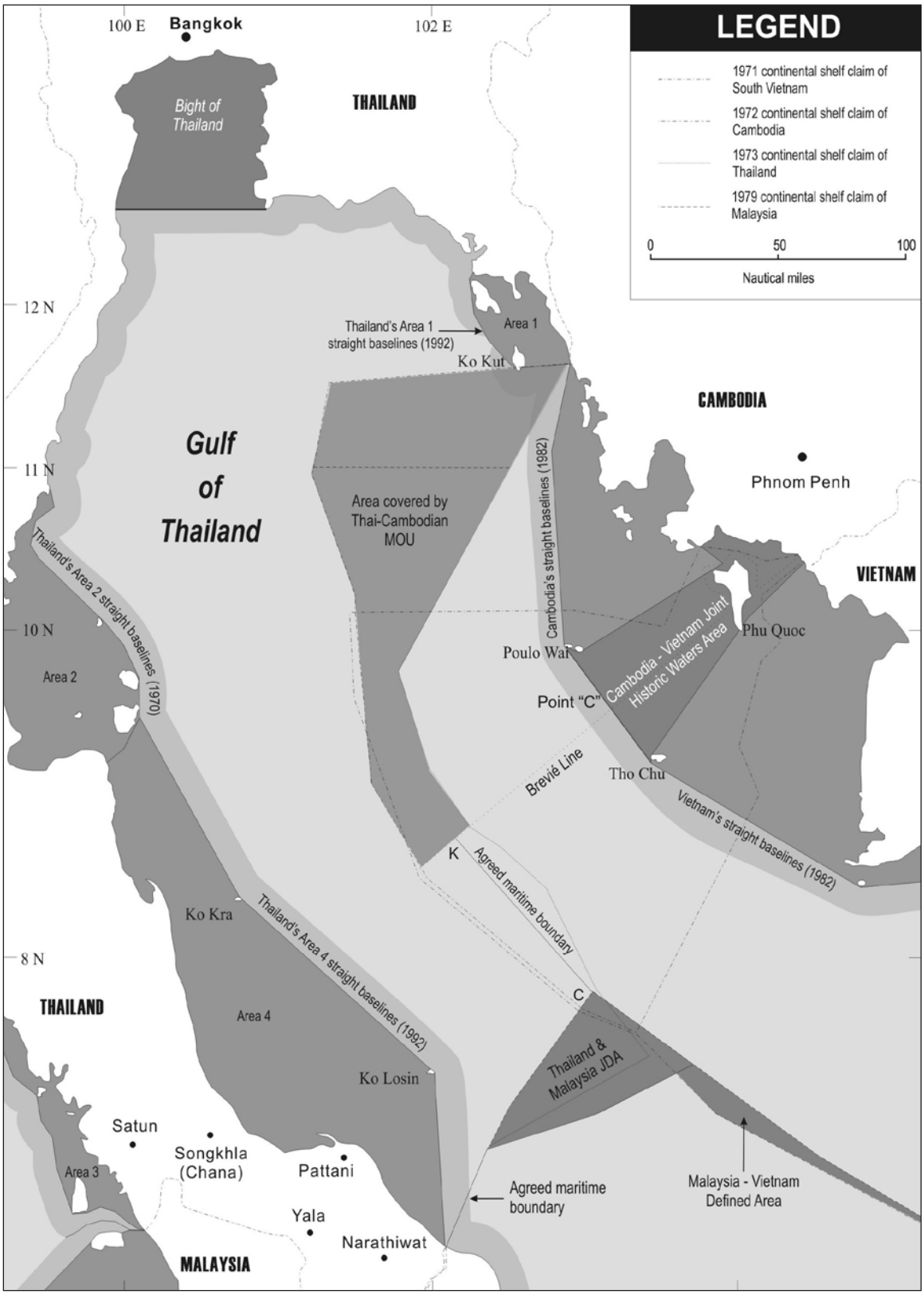

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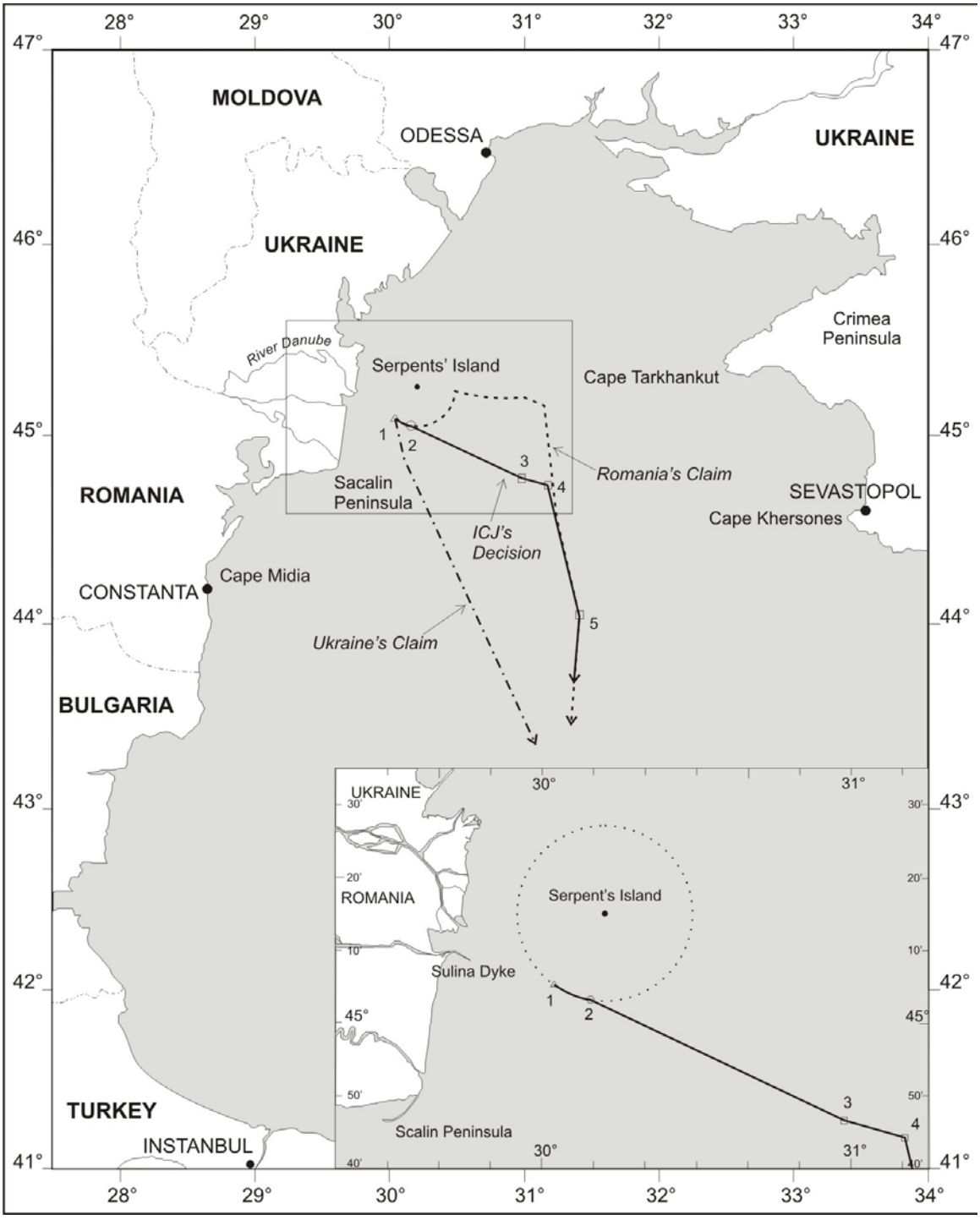

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Maritime Cooperation in Contested Waters: Addressing Legal Challenges in East and Southeast Asian Waters

Clive Schofield

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The semi-enclosed maritime spaces located off East and Southeast Asia are perhaps the most disputed maritime spaces in the world. They host a complex range of territorial and maritime disputes featuring multiple players. These disputes are also multifaceted in that they encompass a complex range of distinct yet often interrelated challenges, including excessive claims to baselines; territorial sovereignty disputes over numerous islands as well as discord over the capacity of predominantly small, isolated, and uninhabited insular features to support extensive claims to maritime spaces; fundamentally opposing views on the basis for maritime entitlements; and disputes over access to valuable marine resources. While many of these sources of contention are long-standing, significant recent developments have been evident, affecting these disputes in both positive and negative ways.

The inevitable consequence of this heady brew has been the existence of broad areas of overlapping claims to maritime jurisdiction in the East China Sea, South China Sea, and Gulf of Thailand. Where overlapping maritime claims exist, the resultant uncertainty over jurisdiction seriously complicates ocean resource management. The oceans remain an important source of living resources, with fisheries representing a major industry and playing a key food security role for many coastal states despite increasing rates of stock depletion. This is an especially acute concern in East and Southeast Asia, where fisheries provide the primary source of protein for hundreds of millions of people. Indeed, it has been suggested that the South China Sea alone accounts for as much as one-tenth of the global fish catch.

While this scenario would appear to urgently demand the comprehensive, ecosystem-wide, and thus transboundary management of these vulnerable living resources, overlapping claims to maritime jurisdiction and disputes undermine the achievement of such objectives. Instead, the sustainable management of, for example, fish stocks is severely hampered through, at the least, uncoordinated policies and, at the more severe end of the spectrum, potentially destructive and unsustainable competition for access to the resources in question. Moreover, such activities can lead to confrontation between rival fishing fleets, which in turn can lead to the involvement of the armed forces of the coastal states concerned, with the attendant potential for incidents, clashes, and ultimately escalation toward conflict. In short, rival maritime claims can act as a major irritant in bilateral and multilateral relations.

Offshore areas are also an increasingly important source of nonliving resources, most notably seabed energy resources, especially in the context of dwindling near-shore and onshore reserves of oil and gas, growing populations, and therefore rising resource demands, as well as improved technology that increasingly allows economically viable exploration and exploitation of offshore oil and gas resources under more hostile conditions, such as those found in deeper waters and further offshore. In this context it is important to note that the presence of overlapping claims generally tends to prevent access to any hydrocarbon resources that may be present in the disputed area. International oil and gas companies are known to be extremely reluctant to invest the enormous sums necessary to conduct offshore exploration, let alone exploitation, operations in the absence of fiscal and legal certainty and continuity. Seabed energy resources located in disputed areas, which could potentially have a crucial role to play in the economic well-being and political stability of the coastal states involved, therefore tend to remain untapped in the absence of maritime boundary delimitation or, alternatively, agreement on joint development. While discussion of marine resources tends to be framed in terms of access to fish and oil reserves, it should be noted that these are not the only resources that the oceans have to offer. A range of other

biological and mineral resources exist that are increasingly being exploited. Once again, the fact that broad maritime spaces off East and Southeast Asian shores are subject to competing maritime claims hampers the realization of the opportunities that these potential resources represent, as well as the proper management and protection of them.

It should also be observed that the maritime spaces of the East China Sea, South China Sea, and Gulf of Thailand include sea lanes of communication of global significance. The overlapping maritime claims and disputes that seem to pervade these waters represent a source of uncertainty and concern to marine users such as commercial shipping companies, as well as to the extraregional states with legitimate interests in freedom of navigation and the free and unfettered flow of global maritime trade.

The essays included in this report were commissioned as part of a National Bureau of Asian Research (NBR) project: "Maritime Energy Resources in Asia" (MERA). This is the second report arising from the MERA project. The first report outlined key geopolitical and strategic dimensions of the territorial and maritime disputes that beset the region, while providing insights into regional energy security concerns and the potential (or otherwise) of the seabed energy resources locked within disputed maritime areas to play a role in addressing these challenges. In contrast, this report addresses some of the key challenges and notable recent developments in the international legal sphere applicable to East and Southeast Asian maritime spaces. It then considers options for dispute settlement, or at least management, informed by these developments.

The complementary essays provided by Ian Townsend-Gault and Seokwoo Lee explore international legal regimes and the underlying legal basis for state cooperation in the world's oceans. Townsend-Gault's essay focuses on functional applications of the international law of the sea, arguing that functionally required maritime cooperation should be considered a natural aspect of a state's responsibilities in regard to proper ocean management and environmental protection. His essay emphasizes that legal cooperation outlined in international law does not exist in a vacuum; rather, international law presupposes global commitments to sustainable development, species survival, and the protection and preservation of the marine ecosystem and biosphere. In his assessment, failure by states to cooperate on these issues would represent an abrogation of their legal responsibilities.

While Townsend-Gault's essay addresses the functional approach to international law as it pertains to the oceans writ large, Lee delves deeper into the United Nations Convention on the Law of the Sea (UNCLOS) and the obligation to cooperate contained therein. After exploring international legal conventions that also contain clauses that emphasize cooperation, Lee analyzes the current status and adherence of states in Asia to the obligation to cooperate contained in UNCLOS. Through analysis of the operative clauses in the treaty, Lee finds that the convention "could be considered a prime example of obligations run amok." He notes that there are many expressions of obligation contained in the treaty, primarily substantive in nature, which oblige states to undertake cooperation of a continuing nature as opposed to one-time activities.

However, conflicting interpretations of the language have led to differing implementations of the obligation to cooperate. In order to bring states to a common interpretation of UNCLOS, Lee therefore advocates amending the convention to clarify the complexities evidenced by the multiple and varied ways in which the treaty outlines the obligation to cooperate. Recognizing that such an amendment to the UNCLOS regime is unlikely, he proposes that states in Asia reach a common consensus that would bring state practice into conformity.

The essay I co-authored with Andi Arsana examines a complex emerging issue relevant to the East China Sea and South China Sea disputes—submissions on the part of coastal states to continental shelf areas located beyond 200 nautical miles (nm) from their coastal baselines. The outer limits of such "extended continental shelf" areas are definable in accordance with UNCLOS, but their proper definition is by no means easily enacted; requires interaction with the relevant UN scientific and technical body, the Commission on the Limits of the Continental Shelf (CLCS); and has been a source of tensions and disputes among coastal states sharing the same continental margin.

Indeed, the process of gathering information and marshaling an extended continental shelf submission is itself difficult, highly technical, and resource-intensive, causing some interested states severe challenges over a considerable number of years. These extended continental shelf submissions arguably add a new and complicating dimension to the overall regional landscape or seascape inasmuch as many of the interested states share the same continental margins. Consequently, their extended continental shelf submissions potentially overlap and therefore appear to provide a fresh source of discord in the context of the already complex and seemingly intractable disputes in East and Southeast Asia.

While conflicting claims to seabed entitlements may simply compound an already tense and difficult maritime situation, Arsana and I argue that the submission of outer continental shelf claims, though they may overlap, has an upside for the region. In particular, the extended continental shelf submissions that have been made have significant potential implications for the legal status of disputed islands in the South China Sea. This is the case because if these islands are capable of generating 200-nm maritime zones, then no extended continental shelf areas exist in the central part of the sea. That submissions have been made indicates that the states making them regard the disputed islands as being incapable of generating 200-nm claims. Were all the littoral states to agree on this interpretation, the scope of the disputed areas within the South China Sea would be substantially reduced. We conclude that the submission of continental shelf claims creates greater maritime transparency, with states now better able to discern the details of other nations' maritime claims that may have previously been opaque. Indeed, the submissions made by states for parts of the central South China Sea and the reactions and counter-reactions to those submissions have proved especially instructive in the context of frequently ambiguous maritime claims. These developments are helpful because clarity with respect to maritime jurisdictional claims represents a fundamental starting point for the peaceful and equitable settlement of East and Southeast Asian maritime disputes.

The essay I co-authored with Dustin Kuan-Hsiung Wang then examines an issue that has been a source of long-standing uncertainty in the law of the sea—the regime of islands contained in Article 121 of UNCLOS and thus the maritime entitlements attributable to different types of insular features. This essay helps clarify the issue's legal context, with particular reference to the disputed islands and rocks in the South China Sea. Wang and I note that Article 121, paragraph 3, of UNCLOS, which distinguishes "rocks" from other types of islands, remains ambiguous and open to conflicting interpretations. We further determine that the drafting history of Article 121 is generally unhelpful as an aid to clarifying interpretation of the regime of islands. There is also no consistent trend in state practice on the issue, and an authoritative ruling from an international court or tribunal is presently lacking. Accordingly, as of the time of writing, no reliable way to distinguish between these types of insular features has emerged, despite the fact that to do so is

critical to determining their capacity to generate claims to maritime jurisdiction. That said, coastal states and international adjudicative bodies have and continue to be faced with problematic issues related to islands, especially in the context of the delimitation of maritime boundaries. Arguably, a trend is emerging whereby small, isolated, sparsely inhabited or uninhabited islands are awarded only a reduced effect in the generation of maritime claims and in the context of the delimitation of maritime boundaries.

These are positive developments, with implications for the disputed islands of East and Southeast Asia. They suggest that even if some of the disputed islands were deemed capable of generating extended claims to maritime jurisdiction, their maritime entitlements would very likely be severely restricted, especially when pitted against the surrounding mainland and main island territories. Acceptance of this view by, for example, the South China Sea claimant states would result in a significant narrowing of the area of overlapping maritime claims, thus simplifying the dispute.

In their essay, Jianwei Li and Ramses Amer examine historical and contemporary maritime disputes in the South China Sea as well as the various approaches to conflict management employed in the region. Their historical survey finds that, over time, the South China Sea has been a relatively stable region, with its enduring territorial disputes managed through a variety of measures. Several bilateral and multilateral disputes linger in the region, however, in spite of the 2002 negotiation of the Declaration on the Conduct of Parties (DoC).

Li and Amer highlight the many complexities of the South China Sea disputes, but display optimism about the progress that can be made through peaceful means. They note that while the DoC and the dialogue between China and the Association of Southeast Asian Nations (ASEAN) have been positive developments for the region, greater efforts are needed. Formal agreements have their benefits, as do less formal joint development ventures and other forms of conflict management. Li and Amer further assert that a lack of progress in negotiations and settlement regimes is not due to the method of settlement but is rather a result of a failure in political will. As was seen in the collapse of several agreements between Cambodia, Thailand, and Vietnam, many countries' domestic politics do not support agreements on hotly contested maritime delimitation issues. With regard to the South China Sea and the surrounding region, political will at multiple levels is the key factor in managing conflict on delimitation issues.

In an analysis aimed at applying recent developments in approaches to the delimitation of maritime boundaries to the current boundary disputes in East and Southeast Asia, Lowell Bautista examines the 2009 International Court of Justice (ICJ) ruling on the maritime delimitation dispute between Romania and Ukraine in the Black Sea. In applying the ICJ's landmark Black Sea methodology to Asia, Bautista aims to highlight the opportunities and drawbacks of such an approach.

The Black Sea case, which articulates a clear, three-stage approach to maritime delimitation, has the potential to serve as a good blueprint for resolving East and Southeast Asian maritime delimitation disputes. Bautista concludes that the Black Sea methodology should be applied to Asian disputes and the relevant considerations of each delimitation dispute taken into account. While the Black Sea methodology potentially offers an attractive way forward, Bautista notes that the mechanism for actually settling Asian disputes is unclear. Most maritime boundaries are settled through international negotiations, but states should look to international jurisprudence to provide authoritative interpretations of international law. Many methods of dispute resolution

remain available outside of international tribunals, but Bautista notes that at the heart of maritime delimitation settlements, disputing states must be willing to cooperate on a multilateral basis, submit to international law, negotiate in good faith, and manage political dynamics to allow for resolution.

Tara Davenport's essay examines the entrance of Asian states into joint development arrangements (JDA), the substantive negotiations leading to these arrangements, and the factors that contribute to the success of regional JDAs. With the aim of extracting historical lessons for today's seemingly intractable Asian maritime boundary issues, Davenport examines JDAs from the 1970s to the present day.

Ultimately, Davenport demonstrates that Asian states have profound incentives to enter JDAs to exploit the hydrocarbon resources of the South China Sea and East China Sea rather than accept the status quo. She finds that nations enter into JDAs to satisfy interests that include access to resources, securing investment, and accessing the technical capacity for energy exploration. Davenport also finds that, in negotiating JDAs, greater success is seen in negotiations that include strong legal footing, good bilateral relations between the negotiating states, and transparency in the talks to garner public support from domestic audiences. Provisions of successful JDAs, she further notes, adapt their institutional frameworks to the needs of the states, settle revenue-sharing issues (though revenue may not always be split equally), and contain agreement on downstream activity to the most detailed extent possible.

Collectively, these essays, in keeping with the MERA project as a whole, are animated by a desire to bolster efforts toward the peaceful settlement of the persistent territorial and maritime disputes that so bedevil friendly diplomatic relations among the states of East and Southeast Asia. As alluded to above, the previous report arising from the project traced the geopolitical and strategic dimensions of territorial and maritime disputes. Building on this foundation, the present report offers scholarly yet distinctly policy-oriented analysis of key international legal developments, concerns, and challenges. A range of avenues whereby obstacles to cooperation may be addressed with a view to promoting the fundamental aim of dispute settlement, or at least management, are provided. It is the sincere hope of the MERA team that these essays will provide some modest assistance to the interested parties in building peaceful maritime cooperation and enhanced regional ocean governance throughout the presently contested waters of the East China Sea, South China Sea, and Gulf of Thailand.

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Maritime Cooperation in a Functional Perspective

Ian Townsend-Gault

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EXECUTIVE SUMMARY

This essay argues that effective management of maritime resources, as well as the preservation and protection of the marine environment in enclosed and semi-enclosed seas such as the Gulf of Thailand, South China Sea, and East China Sea, is possible only if the littoral states cooperate with one another in the discharge of their obligations and the pursuit of their rights.

MAIN ARGUMENT

International cooperation is an essential feature of the modern world. Many activities of primary importance to the global community could not function, or function well, in its absence. The old unilateralist ethic that underpinned the law of the sea is giving way to the demands of functionally dictated cooperative imperatives required by contemporary appreciation of the task of optimum management of resources and the preservation and protection of the marine environment. International law, in turn, is responding to these demands by strengthening the normative foundation for cooperation at sea, thus developing the basic provisions applicable to the littoral states of enclosed and semi-enclosed seas.

POLICY IMPLICATIONS

- Functionally required maritime cooperation should be seen as a natural aspect of a state's responsibilities in regard to proper ocean management and environmental protection. The nature and level of cooperation should always be determined according to apolitical factors.
- Cooperation between states in an area where there is a marked degree of asymmetry of capacity should always be encouraged, but on the basis of mutual respect and regard for inalienable state rights.
- There are no legal barriers to cooperation in cases where it is agreed that any activity is without prejudice to the rights of the states concerned, whether boundaries between the states have been determined. Indeed, international law requires states to establish a temporary regime for maritime management in the absence of a boundary.
- In the South China Sea and East China Sea, any cooperative arrangement that requires the participation of Taiwan must find some means of securing Taiwan in order to be fully effective. There is no shortage of examples and precedents that can assist with this matter.

Cooperation between states in the pursuit of marine activities is required, strongly encouraged, or merely suggested in a variety of circumstances. The "cooperative ethic," in whatever form it takes, may be expressed in the provisions of a convention or derive from the rules of customary international law. There are also situations where this ethic derives from "soft" law, or where norms are still coalescing but have not yet reached the status of legal obligations. All too often, international lawyers are apt to analyze these developments from overly narrow perspectives. They ask, for example, if there is an actual "requirement" to cooperate, implying that a failure to do so amounts to the breach of an international obligation. When a treaty provides that states "should" do something, does this mean they "must" do it? What sort of obligation is entailed when states are enjoined to "make every effort" to do something? In a subsequent essay in this report, Seokwoo Lee subjects relevant provisions of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) to a searching analysis to elucidate the key aspects of this legal dimension.[1]

There is no doubt that these analyses are highly important, but it is equally important to appreciate the context in which the provision in question was formulated. This involves, *inter alia*, asking why a convention or a customary norm seeks to make an exception to the jurisdictional status quo. This is to the effect that states should identify the marine areas over which they are entitled to exercise sovereignty or sovereign rights for resources and other purposes, and then proceed to regulate ocean activities there as they see fit, taking account of concomitant obligations. The use of the concept of sovereignty means that such rights are exercised without reference to any other state or government. Indeed, the phrase "sovereign rights for the purposes of the exploration for and exploitation of" a resource,[2] used to describe the nature of exclusive economic zone (EEZ) and continental shelf rights, was chosen deliberately to invoke ultimate—and unilateral—state power. So if those rights are to be modified in some way, that is, a state is to exercise them in concert with a neighbor, it is surely pertinent to ask why. And the answers will rarely be purely legal in nature. They will, rather, be functional.

It is possible to trace the emphasis on the exercise of unilateral state power to the very foundations of the doctrine of the continental shelf in 1945.[3] The doctrine of the continental shelf was the first legal regime to provide unambiguously for what had hitherto been taboo—the exercise of coastal state rights seaward of the limits of the territorial sea, back then a mere 3 nautical miles (nm) wide. The justification for this radical jurisdictional extension was not merely that the world needed access to the oil and gas in the subsoil of the shelf, but that the only way to ensure orderly exploitation was for the proximate coastal state to assume the appropriate jurisdictional powers. This in turn flowed from the long-established tradition in Western legal systems, dating back to the Middle Ages, of ownership of an identified parcel of land entailing rights over what is beneath it. The notion of the commons gradually gave way to this exclusive proprietary model,

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[1] United Nations Division for Ocean Affairs and the Law of the Sea, "UN Convention on the Law of the Sea (UNCLOS)."

[2] The phrase was crafted by the International Law Commission as it worked on what would become the 1958 Convention on the Continental Shelf. The commission was responding to concerns by some states that recognizing rights of "sovereignty" over the shelf would lead, in time, to claims to enormous territorial seas, which a number of states had indeed made before the first UN Conference on the Law of the Sea in March/April 1958. Some conference participants wanted to delete the commission's formulation in favor of unadulterated sovereignty, but the majority of states preferred the "sovereign rights" formulation. It appears in Parts V and VI of UNCLOS to define the nature of state rights in the EEZ and the continental shelf.

[3] See the Preamble to the Truman Proclamation of September 1945, the first unambiguous claim to jurisdiction beyond the 3-nm limit: Executive Order no. 9633, *Code of Federal Regulations,* title 3 (1943–1948).

which held sway when oil and gas exploration and production began on an industrial scale in the United States in the second half of the nineteenth century.

This model works reasonably well for solid minerals such as coal, but not at all with fugitive substances such as oil and gas, and some of the legal challenges that arise will be considered in a subsequent section of this essay. It may also be important to remember that offshore oil and gas activities have always been controlled by states, while every other marine activity was once pursued by anyone and everyone under the freedom of the seas, and that this freedom was whittled down by encroaching state jurisdiction. Most ocean resources are fugitive, not fixed. This means that in some marine areas, resources contained in the water column are inherently transboundary, and therefore transjurisdictional. Resource ownership and management models based on enclosure within fixed boundaries, such as a wheat farm, simply do not transfer well to the modern offshore.

The thesis of this essay is that international law does not require cooperation merely for the sake of cooperation. States can cooperate with each other for any reason and in any way they choose, subject to the constraints of international law. The argument here is that the legal obligation to cooperate does not exist in a vacuum. It is the manifestation in language of a law of factors derived from science, ecology, or other practical considerations. If that dimension is ignored, the debate quickly becomes somewhat academic in the worst sense of that term. What is more, the functional goal identified by marine scientists, ecologists, resource managers, and the like, may be compromised. Given that international law presupposes a global commitment to sustainable development, species survival, and the protection and preservation of the marine environment and biosphere, such a result is, arguably, a breach of these legal duties on the part of the states concerned.

The Application of the Functional Approach

This section examines two aspects of functional maritime cooperation: first, with respect to an ocean area defined other than by the strict application of the basic rules of international law (i.e., sovereign rights exercised within a zone designated primarily by distance from a coast); and second, where cooperation is required with regard to a specific activity. The essay will not address the joint development of an area, since this will be discussed comprehensively in the subsequent essay by Tara Davenport. However, it is perhaps worth pointing out that UNCLOS clearly expects states party to a jurisdictional dispute that is not amenable to easy resolution to take some sort of action—and surely this is the key point—to provide for a measure of ocean governance and order in the meantime. UNCLOS is, after all, first and foremost concerned with governance, management, control, the discharge of responsibilities by coastal states, and the like. It therefore makes provision for jurisdictional disputes in which clear demarcation of states' rights and obligations is rendered temporarily impossible. To take the point further, it would be illogical, and certainly a failing, if the convention was to accept the proposition that marine areas that must at the end of the day fall under the jurisdiction of one state or another are, de facto, outside its regulatory schemes, and *res nullius* to all intents and purposes. Such a result would be difficult to equate with the noble aims enunciated in the preamble to the agreement.

Enclosed and Semi-Enclosed Seas

Part IX of UNCLOS is devoted to the somewhat exiguous "Regime of Enclosed or Semi-Enclosed Seas." An enclosed or semi-enclosed sea is defined as "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."[4] In other words, such ocean areas are natural features in that they are dominated by land, but the waters themselves fall within one of two legal, that is nonnatural, categories. There is no hint here of why enclosed or semi-enclosed seas should be singled out like this, or why they require a discrete regime.

UNCLOS goes on to encourage the littoral states off enclosed and semi-enclosed seas to cooperate in marine scientific research (MSR), the conservation of the living resources, and marine environmental protection.[5] The first point to make is that the close interconnections between these three topics are readily apparent: they are not separate "sectors," and indeed are not so regarded today. Again, however, there is nothing in the wording of Article 123 to suggest why the prescribed or hoped-for cooperation will be necessary, or what benefits may accrue from it. While the language is hardly the strongest in terms of the nature of the obligation, and Seokwoo Lee has considered the issues arising from it, I would like to take a different tack and argue that the choice of "legal" language may be less important than it appears. Despite the absence of detailed provisions, it is surely of no small importance to note that the framers of UNCLOS singled out these marine areas for special attention. There must have been a cogent reason for creating the category of "enclosed and semi-enclosed seas," and enjoining certain forms of cooperation between their littorals.

A brief perusal of the scientific and technical literature suggests why this might be so. Semi-enclosed seas, like the Gulf of Thailand, the South China Sea, and the East China Sea, form discrete marine ecosystems, and the more that is known about them—their physical properties, their living (and hence renewable) resources, and the anthropocentric threats they face—the better. Further, because these marine areas are either barely linked to the world's oceans (as with the Mediterranean, Adriatic, Aegean, Black, and Azov seas), or are cut off from larger water volumes to a considerable extent (as with the Gulf of Thailand), pollutants or any substances that have an impact on the marine environment in any way are effectively trapped there.

While the various marine uses have some impact on the environment, this may be insignificant compared to land-based sources of pollution. Consider, for example, the impact on the Black Sea of effluence carried by rivers such as the Danube and the Dnieper, which flow through some of the most industrialized parts of Europe, including areas where environmental standards were once not the highest. In the case of the Gulf of Thailand, the impact of shore-based industrial activities and runoff from the Chao Phraya River will be considerable. Two major rivers, the Mekong and the Red, debouch into the South China Sea, and cities such as Manila have major environmental

[4] "UNCLOS," art. 122.

[5] Ibid., art. 123.

impacts on the sea as well.[6] Similarly, the heavily populated Shanghai and Yangtze rivers, as well as many other conurbations and drainage basins, are inevitably contributing to the degradation of the East China Sea.

The extensive scientific literature on various aspects of enclosed and semi-enclosed marine environments points to the importance of information-sharing between littoral states, the better to inform policy and lawmaking. To take a hypothetical example, suppose that a semi-enclosed sea, which is within 200 nm of a coastline, is bounded by the territories of three states, and all maritime boundaries have been delimited. State A has no capacity for MSR, and State B is better able to conduct such activities, but only up to a point. State C, on the other hand, has research programs of international caliber. Since each state has absolute rights to control such activities within its own sector, and can, if so minded, make it difficult if not impossible for others to do so, information on their shared ecosystem can never be complete unless they agree to cooperate. In this example, such cooperation might take the form of joint MSR projects undertaken by experts from all three countries with the consent of their governments. This is not the point, of course—the goal of furthering MSR in the shared ecosystem in a manner that will inform policymaking by the three littorals will have been advanced.

The theme of technical and scientific cooperation is taken up by the 1992 Convention on Biological Diversity (CBD),[7] with particular reference to cooperation in promoting conservation and sustainable use of biological diversity, the development of national policies, and capacity building, especially where developing countries are concerned. Other relevant aspects of the CBD will be addressed in a subsequent section. This reasoning for MSR can be applied to the other sectors marked out for cooperation in enclosed and semi-enclosed seas. Unsustainable or dysfunctional fisheries practices permitted by one or more states will have a deleterious impact on the shared stock.

Similar functional arguments can be made for the promotion of the preservation and protection of the marine environment. Part XII of UNCLOS constitutes a codex for marine environmental protection, but is essentially a framework guiding state actions as regards legislating, monitoring, and enforcing. Its provisions were to be expanded very considerably by another instrument resulting from the 1992 UN Conference on Environment and Development (UNCED), namely section 2, chapter 17, of *Agenda 21*, which is devoted to the "Protection of the Oceans, All Kinds of Seas, including Enclosed and Semi-enclosed Seas and Coastal Areas and the Protection, Rational Use and Development of their Living Resources."[8] The chapter of note has 137 articles, dealing with the following program areas:[9]

1. integrated management and sustainable development of coastal areas, including exclusive economic zones
2. marine environmental protection
3. sustainable use and conservation of marine living resources of the high seas

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[6] To give some idea of the extent of these impacts, the following "Priority Issues/Areas of Concern" were noted in the 2005 *Operational Plan for the Manila Bay Coastal Strategy*: absence of integrated management framework, lack of awareness and capacity, lack of resources, water pollution (water quality, column, and sediment), harmful algal blooms, solid waste, toxic and hazardous waste, soil pollution, over-exploitation of resources, destruction/degradation of habitats and ecosystems, coastal hazards (natural and man-made), sea-level rise, changes in shoreline features, and destruction of historical, cultural, archaeological, and unique geological sites. Summarized from Manila Bay Environmental Management Project, *Operational Plan for the Manila Bay Coastal Strategy (OPMBCS)*, December 2005, sec. 3, table 1, http://www.pemsea.org/pdf-documents/publications/opmbcs.pdf.

[7] "Convention on Biological Diversity (CBD)," June 5, 1992, UN Certified True Copies of Multilateral Treaties Database, chap. 27, sec. 8, art. 18.

[8] UN Conference on Environment and Development (UNCED), *Agenda 21: Earth Summit—The United Nations Programme of Action from Rio* (New York: United Nations, 1993), sec. 2, chap. 17, http://www.un.org/esa/dsd/agenda21.

[9] Ibid.

4. sustainable use and conservation of marine living resources under national jurisdiction
5. addressing critical uncertainties for the management of the marine environment and climate change
6. strengthening international, including regional, cooperation and coordination
7. sustainable development of small islands

Each program area is structured more or less identically. The "Basis for Action," or the "why," is laid out, followed by the "objectives" of the relevant section. The required "Activities" are next specified,[10] and then the "Means of Implementation."[11] Chapter 17 applies to all ocean areas, but there are some provisions particularly applicable to enclosed and semi-enclosed seas. The program area dealing with "sustainable use and conservation of marine living resources of the high seas" includes a provision that "states should, where and as appropriate, ensure adequate coordination and cooperation in enclosed and semi-enclosed seas and between subregional, regional and global intergovernmental fisheries bodies."[12]

Exactly the same provision appears in the section on "sustainable use and conservation of marine living resources under national jurisdiction."[13] As to when such coordination and cooperation may be "appropriate," a better question might be to ask when states working together for purposes such as those under discussion could be "inappropriate." One answer to the first question might proceed from the underlying theme of *Agenda 21* and confirmed by reviews of progress with implementation, to the effect that states are not discharging their responsibilities to the level required. There are many and various reasons for this, but *Agenda 21* makes it clear that there is no reason why a state lacking capacity in one form or another should shoulder its burdens in isolation, unless it so desires.

These paragraphs must be read in the complete context of the extensive and detailed provisions of the respective program areas, which in turn should be seen against the background of Chapter 17—and indeed all of *Agenda 21* itself. For present purposes, it is sufficient to note the continuing focus on the obligations of the littoral states of enclosed and semi-enclosed seas. It should also be emphasized that the notion of cooperation at all levels, from bilateral to global, runs throughout Chapter 17.

Agenda 21 takes up where UNCLOS might be said to leave off: Chapter 17 is replete with references to the 1982 convention and the CBD. It is not a treaty, but was nevertheless adopted by 178 states at UNCED. This degree of approval, and the status accorded to it by UN member governments and commentators, is sufficient to give the agenda authority as something more than a set of guidelines. Questions regarding the normative force of *Agenda 21* can perhaps be addressed as follows: if the international community is dedicated to sustainable development of marine resources and the protection and preservation of the marine environment and biosphere—it being plainly understood what these obligations entail—then international adoption of this roadmap derives authority from the commitment to these overarching and fundamental goals. In other words, *Agenda 21* and subsequent UN-sponsored meetings convened to discuss progress

[10] "Activities" might include management-related activities, data- and information-sharing, and international and regional cooperation and coordination.

[11] "Means of implementation" include financing and cost evaluation, scientific and technical matters, human resource development, and capacity building.

[12] UNCED, *Agenda 21*, par. 17.59.

[13] Ibid., par. 17.89.

with its implementation[14] (which is another indicator of global commitment to it) is "the way forward." The origins of UNCLOS are to be found in state practice concerning zones of jurisdiction and in the four Conventions on the Law of the Sea from 1958. The origins of *Agenda 21* lie in the Stockholm Declaration on the Human Environment,[15] *Our Common Future*,[16] and the like. It might be argued that certain aspects of the law of the sea, including the nature and extent of state rights and responsibilities within the various zones of maritime jurisdiction, were settled by UNCLOS for the foreseeable future. This notion of quasi-permanence is entirely in keeping with the conceptualization of the convention as a "Constitution for the Oceans."[17] *Agenda 21*, on the other hand, like any resource- and environment-related regime, is an organic document that will continue to grow and be cultivated for decades to come.

The decade since the signing of UNCLOS, which was to enter into force two years after the 1992 UNCED in Rio de Janeiro, shows an advance in the conceptual approach of the earlier treaty. Here, MSR, living-resource conservation of all kinds, and the preservation and protection of the marine environment are fully integrated, in that no one issue can be addressed in isolation from the others. What is more, notions of action on the unilateral, bilateral, subregional, and global planes are also intermingled. It should not be forgotten that UNCLOS was signed almost 30 years ago. Few regimes governing natural resource development and management survive unchanged for so long. It should come as no surprise that other types of ocean activity should be included in the list of sectors marked for cooperation between enclosed and semi-enclosed sea littorals. There is a general tendency to view UNCLOS as a closed book, and a wholly comprehensive one at that. Neither view is correct.

It is suggested, therefore, that the question as to why littoral states of enclosed and semi-enclosed seas should cooperate is best posed to the technical experts in MSR, living-resource conservation and management, and the protection and preservation of the marine environment, and indeed anyone with ocean expertise in any sector or activity, not international lawyers. Having said this, note should be taken of a suggested approach to the implementation of Part X of UNCLOS drafted by the Maritime Cooperation Working Group of the Council for Security-Cooperation in the Asia-Pacific, and submitted to the ASEAN Regional Forum.

Marine Protected Areas and Single Ecosystem Management

In 1992 the UN convened the Conference on Environment and Development in Rio de Janeiro. The conference adopted a number of measures of outstanding importance,[18] including the CBD.[19] The goal of this agreement is to halt the extinguishing of species of flora and fauna, and to identify, preserve, and protect areas where biological diversity is under threat. Unlike the

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[14] For example, the Special Session of the General Assembly to Review and Appraise the Implementation of *Agenda 21*, June 23–27, 1997 ("Rio + 5") and the Earth Summit 2002 in Johannesburg ("Rio + 10").

[15] UN Environment Programme, "Declaration of the United Nations Conference on the Human Environment," in "Report of the UN Conference on the Human Environment" (Stockholm, June 5–16, 1972), http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503.

[16] World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987).

[17] This designation is attributed to Ambassador Tommy Koh, president of the Third United Nations Conference on the Law of the Sea from 1980 to 1982.

[18] These measures included the Rio Declaration on Environment and Development, *Agenda 21*, the Framework Convention on Climate Change, and the Statement on Forest Practices.

[19] The CBD was drafted by what came to be known as the Intergovernmental Negotiating Committee. The work of the committee culminated on May 22, 1992, with the Nairobi Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity. The Rio conference opened two weeks later.

approach of UNCLOS relating, for example, to the sustainable development of fisheries, the CBD is wholly science-based, with objective technical criteria to be applied as determined by groups of experts, as opposed to states acting individually or collectively.[20] For example, as a first step toward achieving the goal of preservation and protection, the treaty obligates states parties to assess biological diversity in areas subject to their jurisdiction, including the EEZ. The criteria and standards applicable to this exercise are available from bodies established by the convention.

Once areas of sensitive biodiversity have been identified, the state is required to take whatever measures are required for their protection. This can take the form of a protected area, within which activities can be closely controlled, or perhaps prohibited absolutely.

Single ecosystem management (SEM) is "a collaborative approach to management of resources with ecologically bounded transnational areas...done in an international context and consistent with...international law."[21] Widely hailed as a breakthrough in the promotion of optimum living resources management and ecosystem health, productivity, and protection, SEM is currently being applied in many parts of the world in projects funded, inter alia, by the Global Environmental Facility and supported by bodies such as the U.S. National Oceanic and Atmospheric Administration (NOAA).[22]

Application of this ecologically based concept brings together states that have not always had a record of cooperation. For example, the Bay of Bengal large marine ecosystem (LME) involves the participation of Bangladesh, India, Indonesia, Malaysia, Maldives, Myanmar, Sri Lanka, and Thailand. Six LME projects in the Asia-Pacific are outlined, including one in the South China Sea.[23] This initiative involves China, Indonesia, Malaysia, the Philippines, Taiwan, and Vietnam. A report on the South China Sea LME by S. Heileman deals with issues of productivity, fish and fisheries, pollution and ecosystem health, socioeconomic conditions, and governance.[24] The report is remarkable because it examines a wide variety of issues from different disciplinary perspectives, thereby offering the reader a formidable *tour d'horizon*. It includes significant data on the dollar value of living and renewable resources of all kinds, including surprising figures on mangroves and seagrasses. On the other hand, there are details of ecosystem and habitat destruction, questionable fisheries practices, growing environmental degradation, and socioeconomic matters such as dependence by coastal populations. All in all, it makes salutary reading for those who claim that the status quo in the area, as regards jurisdiction, marine management, and the like, is sustainable.

Spatially, the SEM of LMEs is based on "ecologically bounded" zones, not overlapping claims or the like. The world's richest area of marine biological diversity, the "Coral Triangle," is seen by the six states that share jurisdiction over it as a single entity, and they are beginning to approach its management accordingly.[25] We have here another example of a highly functional "zone,"

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20 The Conference of the Parties is the governing body of the convention, and Article 25 established the Subsidiary Body of Scientific, Technical, and Technological Advice to guide convention bodies and states parties in all aspects of implementation.

21 "U.S. Ocean Action Plan: The Bush Administration's Response to the U.S. Commission on Ocean Policy," National Oceanic and Atmospheric Administration (NOAA), 2004, 36.

22 The NOAA-supported initiatives are described in Kenneth Sherman et al., "Global Applications of the Large Marine Ecosystem Concept 2007–2010," NOAA Technical Memorandum NMFS-NE-208, June 2007. This section relies heavily on this document.

23 The other LME projects involve the Gulf of Thailand, the Sulu-Celebes Sea, the Indonesian Sea, the East China Sea, and the Yellow Sea.

24 S. Heileman, "South China Sea," National Oceanic and Atmospheric Administration, LME Brief no. 36, http://www.lme.noaa.gov/LMEWeb/LME_Report/lme_36.pdf.

25 The states sharing jurisdiction over the Coral Triangle include Indonesia, Timor-Leste, Papua New Guinea, Solomon Islands, the Philippines, and Malaysia.

the bounds of which are determined by the natural world rather than by accidents of political geography and history.

The discussion to date has focused on interstate cooperation, meaning central government to central government. It should not be forgotten that while lawmaking in many countries occurs at a central level, implementation and management is local, at the provincial or sub-provincial levels. This suggests that links between local governments of different countries may be an absolute necessity in the discharge of the international obligations of their respective states. This, in turn, requires a high degree of vertical integration within each state.

Hydrocarbon Fields Straddling Maritime Boundaries

In order to explain the legal issues arising here, it is necessary to review some of the functional foundations of natural resources law, and the way in which the law responds to the physical nature of the resource in question. Functional oil and gas licensing and management regimes always take into account the different physical properties of oil and gas. Oil, once produced, is relatively easy to manage; gas is not, and requires extensive infrastructure investment before production commences or the substance will be lost. In their natural states, *in situ*, both are wholly different from, say, coal. Hydrocarbons are found in reservoirs, and at enormous pressure. Once the reservoir is perforated, as with any pressure vessel, the substances try to escape by that route. It is the task of the company concerned to ensure that this escape is controlled at all times; otherwise a blowout ensues.

As production continues, natural pressure forces the substances within the reservoir to migrate toward the point or points of perforation. Suppose, however, that more than one interest holder has a stake in the field, but the well has been perforated by only one of them. It is very possible, indeed probable, that substances originally in the tract, or part of the reservoir owned by or subject to the jurisdiction of other interest holders, will be captured by the single producer. This was a common phenomenon in the petroleum-producing jurisdictions of the United States from the early days of the oil industry until the 1920s. Owners who thought they had been "robbed" sought the protection of the courts, which was not forthcoming. They were advised instead to compete with producing parties in an attempt to capture as much of the substances as they could.[26]

While this approach accords well with the spirit of laissez faire, it is utterly disastrous for a number of reasons. To effect the recovery of what is theoretically the maximum volume recoverable from any hydrocarbon deposit as economically and efficiently as possible, requires proceeding in accordance with a set of rules and principles known in the industry as "good oil field practice." These require, inter alia, drilling into a structure according to proven engineering principles, that is, placing wells where engineers dictate and not in order to engage in competitive production. Gas, air, or water should be re-injected to maintain pressure, and this task must also be done according to sound engineering principles. In short, assuming that a field has four owners, it is possible that there is no reason for drilling or production operations on the territory of all of them.

[26] The "rule of capture" was established in U.S. law toward the end of the nineteenth century. Some years later, in *Barnard v. Monongahela Natural Gas Co.*, 216 Pa. 362 (1907), the plaintiff wanted the gas company to stop producing from wells close to his property line on the grounds that substances from the subsurface of his land were being produced. The court refused to interfere, saying that the only remedy was for the plaintiff to do likewise—engage in competitive drilling. The court remarked, "This may not be a very good rule, but neither the courts nor the legislature have given us a better one."

Competitive drilling is wasteful and expensive, and prejudices the recovery of the maximum recoverable reserves.

This situation is bad enough, but competitive drilling has also led to overproduction. This in turn has resulted in an artificially low price for the product, and a lowering of the threshold at which a field is commercially viable. The result has been the premature abandonment of now-damaged reservoirs from which the maximum recoverable had not been recovered. The only way to address the problem has been for all interested owners to be encouraged, and if necessary, compelled,[27] to cooperate in treating the field as a single unit, and apportioning costs and proceeds in accordance with the percentage of the reservoir underlying their respective tracts of land. Ideally, one company acts as operator of the field on behalf of all, and wells are drilled and equipment is placed not in regard to tract boundaries, but in accordance with good oil field practice. This technique, known as unitization,[28] is thought of as a conservation measure, but is one that also preserves the correlative rights of interest holders.

By the early 1950s, it was clear that the international community was more than keen to follow the example of the United States in claiming jurisdiction over the continental shelf for the purposes of the exploration for, and exploitation of, natural resources. There were marked differences in the nature and extent of the claims, but the International Law Commission was working on proposals that might alleviate that situation, and that would bear fruit in the Convention on the Continental Shelf of 1958. One of the earliest treatments of what would soon be termed "continental shelf law" was published in 1954, in the work of M.W. Mouton, a Belgian admiral and international lawyer.[29] Mouton foresaw trouble ahead if continental shelf resources were divided by maritime boundaries. There would be competitive drilling and ill feeling between the parties if one of them thought that they had been taken advantage of. His advice, therefore, was, "no two straws in one glass": boundaries should be drawn around—rather than through—hydrocarbon fields.

It has been suggested that this view may have led Bahrain and Saudi Arabia to avoid dividing an oil field situated on the median line between them when concluding their continental shelf boundary treaty in February 1958, a few weeks before the first UN Conference on the Law of the Sea, which was to produce, inter alia, the Convention on the Continental Shelf. The field in question was enclosed in an irregular polygon, allocated to Saudi Arabia but with Bahrain entitled to 50% of the net proceeds.[30] The agreement did not resemble joint development in any shape or form but rather privileged the preservation of the unity of the deposit.

Unitization, however, does not require or respect the unity of the deposit. The latter concept is irrelevant once the parties commit to unitization. In any case, as the admiral did not perhaps appreciate, it is possible to demarcate the full dimensions of an oil field only after a lot of work has been done on it, including drilling, and production has commenced. His analysis leaves two questions: who will pay for this work to be done, and how will the allocation of the undivided field

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27 The U.S. Supreme Court upheld the right of state legislatures to compel cooperation as being in the public interest, as opposed to a "taking" without due process of law.

28 Unitization has been defined authoritatively as "a term…used to denominate the joint operation of all or some portion of a producing reservoir…Pooling [the bringing together of small tracts sufficient for the award of a well license] is important in the prevention of drilling of unnecessary and uneconomic wells, which will result in physical and economic waste. Unitization is important where there is separate ownership of portions of the rights in a common producing pool in order that it may be made economically feasible to engage in cycling [e.g., of gas condensate], pressure maintenance or secondary recovery operations [e.g. injection of water or gas] and to explore for minerals at considerable depth." For more, see Howard Williams and Charles Myers, *Manual of Oil and Gas Terms*, 5th ed. (New York: Matthew Bender, 1981), 800–801.

29 M.W. Mouton, "The Continental Shelf," *Recueil des Cours* 85, no. 1 (1954): 343–465.

30 "Frontier Agreement between the Kingdom of Saudi Arabia and the Government of Bahrain," February 22, 1958, UN *Treaty Ser.*, no. 1733.

be determined? Mouton had nothing to say on these matters, a classic example of the consequences of an analysis of a multifaceted issue from one point of view alone, a weakness to which lawyers are sometimes prone.

Neither the 1958 convention nor its 1982 successor contain a word on correlative rights and obligations of states when a maritime boundary is found to have divided a hydrocarbon field. But states clearly saw this as a possibility, as evidenced by a provision in the first boundary treaty signed after the entry into force of the 1958 convention. Article 4 of the 1965 continental shelf boundary treaty concluded by Norway and the United Kingdom states the following:

> If any single geological structure or petroleum field, or any single geological structure or field of any other mineral deposit, including sand or gravel, extends across the dividing line and the part of such structure or field which is situated on one side of the dividing line is exploitable, wholly or in part, from the other side of the dividing line, the Contracting Parties shall, in consultation with the licensees, if any, seek to reach agreement as to the manner in which the structure or field shall be most effectively exploited and the manner in which the proceeds deriving there from shall be apportioned.[31]

This is obviously a complete repudiation of the notion of the "unity of the deposit." It is unclear whether the framers of the treaty had any specific ideas as to how cross-boundary fields would be exploited effectively or the manner in which the proceeds would be apportioned. It may well have been seen as a contingency that might arise in the unforeseeable future. Nonetheless, the first exploration and production licenses awarded by both countries were exactly on their respective sides of the median line, as if anxious to know of the existence of such fields as soon as possible. It was for this reason that the first known international cross-boundary petroleum reservoir, the Frigg gas field, was discovered in the early 1970s. The development plan for the field was approved in 1974, it came on stream in late 1977, and production ceased in late 2004.[32]

At the time, the licensees on either side of the boundary were held by consortia led by the British and Norwegian subsidiaries of the French firm Elf Aquitaine, respectively. The legal departments of both were headed by North Americans, as there were relatively few lawyers with oil and gas experience in Britain or Norway at this time. The states treated the field as if it were in Texas or Alberta—they unitized it. A series of inter-consortium agreements provided for the appointment of an expert to make an initial assessment of the volume of the field and the percentages on either side of the boundary; it was recognized that these figures would be revised as more was learned about the field once production started. Other instruments took the form of a unitization agreement, and Elf Aquitaine Norway was appointed as operator to act on behalf of all other interest holders. Elf Aquitaine then submitted a cooperative development plan to the two governments.[33]

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[31] "Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway Relating to the Delimitation of the Continental Shelf Between the Two Countries," March 10, 1965, UN *Treaty Ser.* 551.

[32] Ministry of Petroleum and Energy of Sweden and the Norwegian Petroleum Directorate, *Facts 2010—The Norwegian Petroleum Sector* (Oslo, June 2010), 183.

[33] This author had the opportunity to examine the all-important intercompany agreements pertaining not only to Frigg, but also the Statfjord oil field, the largest in the North Sea, as part of his graduate research in 1977–8. A complete account of the complex private/public legal developments can be found in his paper, Ian Gault, "The Frigg Gas Field: Exploitation of an International Cross-Boundary Petroleum Field," *Marine Policy* 3, no. 4 (1979): 302–11.

In 1976, Britain and Norway concluded the first-ever treaty pertaining to the unitization of an offshore hydrocarbon deposit that cuts across international maritime boundaries.[34] They were to conclude more agreements relating to other cross-boundary fields, and Britain has also concluded a unitization agreement with the Netherlands. The Timor Sea Treaty between Australia and Timor Leste[35] calls for the unitization of fields straddling the boundary between the joint development zone established by that agreement and the continental shelf of either party. The sizeable Greater Sunrise field is subject to this provision.[36]

The successful North Sea experience shows that unitization constitutes an equitable solution to the problem of apportioning a divided oil field between two states. But it is a complex business, and requires peerless expertise in many fields and continuing political will and realism. For example, petroleum engineers determined that there was no need for any installations to be placed on the British sector of the Statfjord oil field. London wanted one purely to demonstrate British involvement, but was persuaded to drop this demand in light of the cost and because it was ultimately pointless. The Statfjord operation as a whole, said a senior lawyer with Mobil Oil UK, "came of age politically" at this point: the meaninglessness (and expense) of this empty gesture was obvious.[37]

The intense degree of cooperation required to bring these agreements into being, and a general recognition that the continental shelf boundary should not stand in the way of North Sea oil development, led to the adoption in 2005 of an overarching framework agreement on cross-border cooperation,[38] thus institutionalizing matters that had been addressed in an *ad hoc* fashion to this point. This was a case, in other words, where a functionally dictated cooperative regime was realized due to a high degree of mutual trust between two states and to their demonstrable success in resolving cross-boundary issues. The regime, in turn, should also be the means for the depoliticization of matters that many governments find difficult to address: the triumph of the functional (and also rational and efficient) approach.

This remarkably comprehensive agreement commits the two governments to facilitating cross-boundary projects and establishes the outline of regulatory processes and procedures that will apply for authorizing and/or approving activities between them, as well as coordinating such processes and procedures. The agreement, according to a British Foreign Affairs Office memorandum, also "provides for consultation between the two Governments on a wide range of

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34 "Agreement between the Government of the United Kingdom of Northern Ireland and the Government of the Kingdom of Norway Relating to the Exploitation of the Frigg Field Reservoir and the Transmission of Gas therefrom to the United Kingdom," May 10, 1976, UN *Treaty Ser.* 1098. Building on their unitization cooperation, Britain and Norway have also entered into agreements broadening their cross-boundary cooperation generally. See the "Framework Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway Concerning Cross-Boundary Petroleum Cooperation," July 10, 2007, U.K. *Treaty Ser*. 020/2007.

35 "Timor Sea Treaty between the Government of East Timor and the Government of Australia," May 20, 2002, UN *Treaty Ser*. 2258. See also the "Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea," January 12, 2006, UN *Treaty Ser*. 2483, http://www.dfat.gov.au/geo/east_timor/treaty_120113.pdf. For background and analysis, see Clive Schofield, "Minding the Gap: The Australia-East Timor Treaty on Certain Maritime Arrangements in the Timor Sea," *International Journal of Marine and Coastal Law* 22, no. 2 (2007): 189–234.

36 See the "Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste Relating to the Unitisation of the Sunrise Troubador Fields," March 6, 2003, UN *Treaty Ser*. 2483.

37 This contrasts with the demand made by the government of Timor-Leste that the resources of the Greater Sunrise field be piped to that country and processed there (which will require the construction of an oil refinery), as opposed to a pipeline to Darwin in the Australian north. The Australian licensees are far from happy with this demand.

38 UK Foreign and Commonwealth Office, "Explanatory Memorandum for the 2005 Cross-Boundary Petroleum Co-Operation Agreement Between the UK and Norway," http://www.fco.gov.uk/en/publications-and-documents/treaty-command-papers-ems/explanatory-memoranda/explanatory-memoranda-2006a/norwaycoop; and Secretary of State for Foreign and Commonwealth Affairs, "Framework Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway Concerning Cross-Boundary Petroleum Co-operation."

matters relating to cross-boundary projects, sets out principles relating to third party access to pipelines and promotes information sharing between the two Governments, regulatory authorities and relevant system operators to ensure safe, effective and stable operation of the systems."[39] As the memorandum makes clear, one objective of the agreement is to save time spent unnecessarily on negotiating agreements on a field-by-field basis.

Cooperation is not limited to matters of principle. The agreement includes provisions relating to cooperation and coordination with respect to a wide variety of operational issues, including health and safety, environmental issues, physical security, and decommissioning. It is clearly envisaged that officials from one state may, in some circumstances, require and shall be granted access to installations on the continental shelf of the other. An intergovernmental Framework Forum has been established to provide for regular consultations between officials of the two states, as have institutionalized cooperation between their licensees.[40]

The 2005 Framework Agreement is the outcome of a process that began with the Norway–United Kingdom boundary agreement of 1965 and its commitment to seek agreement on the means whereby cross-boundary deposits, or single geological structures as they are more properly called, should be exploited and the revenues apportioned. What is the impact of these developments globally? It can be argued that the presence of single geological structure provisions, modeled more or less on Article 4 of the Norway-UK agreement, in the vast majority of the world's maritime boundary treaties is evidence of an international determination that there should be no free-for-all when such fields are discovered. Functional, economic, and other rationales have been summarized, but here we are looking at the emergence of a legal rule that reflects these imperatives. Customary international law emerges from a constant and uniform practice accepted as law, an element international lawyers call *opinio juris*.[41] Not only is it possible to argue that international practice here is both constant and uniform, but the fact that the obligations are contained in treaties settle the sometimes elusive issue of the presence of opinio juris beyond doubt.

Such provisions are certainly to be found in almost all of the maritime boundary agreements in East and Southeast Asia except those that have no relevance to oil and gas.[42] Despite its growing popularity with the international community, it would be going too far to claim that unitization per se is a requirement of customary international law.[43] Some states prefer to divide resources of

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39 Foreign and Commonwealth Office, "Explanatory Memorandum."

40 Secretary of State for Foreign and Commonwealth Affairs, "Framework Agreement," art. 1.

41 The elements of customary international law are outlined by the International Court of Justice in a number of seminal cases, including the *North Sea Continental Shelf Case (Germany v. Netherlands, Germany v. Denmark)*, ICJ Rep. 3 (1969); and the *Haya de la Torre Case (Colombia/Peru)* (usually referred to as the Asylum Case), ICJ Rep. (1951), 71.

42 These agreements include "Agreement between the Government of Malaysia and the Government of Indonesia on the Delimitation of the Continental Shelves between the Two Countries," October 27, 1969, UN *Legal Ser.* 16, 417; "Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries," May 18, 1971, UN *Legal Ser.* 18, 433; "Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas Supplementary to the Agreement of May 18, 1971," October 9, 1972, UN *Legal Ser.* 18, 441; "Agreement between the Commonwealth of Australia and the Republic of Indonesia Concerning Certain Boundaries between Papua New Guinea and Indonesia," January 28, 1973, UN *Legal Ser.* 18, 444; "Agreement between the Government of the Republic of Indonesia, the Government of Malaysia and the Government of the Kingdom of Thailand Relating to the Delimitation of the Continental Shelf Boundaries in the Northern Part of the Strait of Malacca," December 21, 1971, *Limits in the Seas*, no. 81; "Agreement between the Government of the Union of Myanmar, the Government of the Republic of India and the Government of the Kingdom of Thailand on the Determination of the Trijunction Point between the Three Countries in the Andaman Sea," October 27, 1993, *Law of the Sea Bulletin* 30 (1996): 66; and "Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Indonesia Concerning the Delimitation of the Continental Shelf Boundary," June 26, 2003, UN *Treaty Ser.* 2457.

43 International examples continue to multiply. See "Treaty between the Federal Republic of Nigeria and the Republic of Equatorial Guinea Concerning their Maritime Boundary," September 23, 2000, UN *Treaty Ser.* 2205; "Treaty between Equatorial Guinea and Nigeria on Joint Exploration of Crude Oil, Especially at the Zafiro-Ekanga Oil Field Located at the Maritime Boundary of Both Countries," April 3, 2002, UN Division for Ocean Affairs and the Law of the Sea; and the unitization provisions of the Timor Sea Treaty.

potentially disputed fields equally, as is their right.[44] But the requirement to consult and cooperate clearly emerges from an examination of boundary treaties and state practice.

Conclusion

The base for the functional approach to legal development in the oceans is surely apparent from the foregoing. The functional approach requires an understanding of the nature of the substance or activity to be regulated or controlled. Without this information, it is almost impossible to understand why a particular requirement has been brought into being.

Second, where cooperation is functionally required, failure to make efforts to enter into an agreement may constitute a breach of an international obligation. This would be the case where cooperation is mandatory, and even if it is not, where the consequences of failing to cooperate are deleterious as regards the sustainable development of resources or harm caused to the marine environment or biosphere more generally.

Third, international practice shows that while states may appear to be surrendering a measure of unilateral control over offshore activities when they cooperate with their neighbors, they gain in the long run through securing the proper conduct of activities and the furtherance of good neighborliness. Ocean activities are, after all, seldom the only matters on the bilateral agendas of coastal states.

Finally, maritime cooperation promotes sound governance in the oceans. This in turn advances the international legal agenda, which in turn reflects the broader desire to promote good governance and the rule of law between states.

[44] In addition to the Bahrain–Saudi Arabia agreement cited above, see "Agreement on Settlement of the Offshore Boundary Lines and Sovereign Rights over Islands between Qatar and Abu Dhabi," March 20, 1969, UN *Legal Ser*. 16, 403, which provides, inter alia, for equal rights over the Hag el-Bunduq oil field, which is to be exploited by a company from Abu Dhabi.

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UNCLOS and the Obligation to Cooperate

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EXECUTIVE SUMMARY

This essay seeks to clarify the obligatory language in the UN Convention on the Law of the Sea (UNCLOS) in order to improve compliance with the convention.

MAIN FINDINGS

- The language of "shall" or "should" creates binding legal obligations for member states.
- The language of "may," although ostensibly of a voluntary nature, essentially creates a standard of obligation that does not infringe on the sovereignty of states.
- There are two general categories of obligation: the obligation to exchange information and the obligation to consult or negotiate. The duty to exchange information takes the form of publicity, notification, and other exchanges, whereas the duty to consult or negotiate appears to be an implicit expression of the duty to cooperate rather than an express legal obligation.

POLICY IMPLICATIONS

- The different wording utilized by the 162 states that have signed UNCLOS and the consequent variations of interpretation show that there is a need for policy changes. Otherwise, the lack of uniform adherence to the convention could make UNCLOS the subject of ridicule.
- Given the convention's silence regarding the manner of publicity and the implicit nature of certain provisions, negotiations for an amendment to UNCLOS are needed to clarify the complexity evident in the varieties of obligation.
- Policymakers must bear in mind that the duty to cooperate cannot be fulfilled by a one-time act. Rather, cooperation is a continuing process, and states thus must be willing to pursue and endure negotiations through which they can hold each other accountable.
- Domestic legislation in line with UNCLOS provisions is needed to ensure the compliance of member states, given that many Asian states do not directly implement treaty provisions but instead adopt similar domestic laws that courts then apply.

Ian Townsend-Gault's essay places maritime cooperation in the context of the development of the international law of the sea since 1945, as well as the larger goals of sustainable development of marine resources, and environmental and ecological protection and preservation. There is a role for international law in securing these objectives. The salient legal provisions are found in the 1982 United Nations Convention on the Law of the Sea (UNCLOS). The context in which these provisions were drafted has already been explored. This essay subjects them to a close analysis in order to determine the extent to which states are legally bound to act together with their maritime neighbors in any way, shape, or form.

There are many different expressions of obligations in UNCLOS, both substantive and procedural. In fact, the convention could be considered a prime example of obligations run amok. Typical expressions used in UNCLOS are "shall publish,"[1] "shall notify,"[2] "shall communicate,"[3] "shall cooperate,"[4] "shall enter into negotiation,"[5] "should cooperate,"[6] "may cooperate,"[7] "shall seek to agree upon,"[8] "shall promote international cooperation,"[9] and so forth. Such language is so obtuse and vague that, in order to convey any real meaning, one must cross-reference and utilize contextual clues. Sometimes, other inserted phrases such as "seek to," "should," and "make every effort to," seem to weaken the mandatory nature of the obligation, making it difficult to understand their respective impacts. This essay points out the various types of obligations in an effort to help the reader understand more clearly the seemingly complex provisions in the convention.

It is important to note that the substantive duty to cooperate, unlike a procedural duty, is a duty of a continuing nature—an obligation of conduct rather than a one-time commitment or result. Ultimately, clearer and more explicit provisions may be necessary to ensure full and continued compliance with the convention.

The General Obligation of Cooperation in International Law

International law demands and requires cooperation among states, a duty that can be traced back to the UN Charter, as well as other treaties and international jurisprudence. The UN Charter, with its near universal membership of 193 states, is an important source of the obligations of cooperation. The charter requires its members in Article 2, paragraph 2, to "fulfill in good faith the obligations assumed by them in accordance with the present Charter," the reason for this being "in order to ensure to all of them the rights and benefits resulting from membership."

The Vienna Convention on the Law of Treaties, which is understood as embodying principles of customary international law, states in its preamble that "the principles…of good faith and the *pacta sunt servanda* rule are universally recognized." The pacta sunt servanda rule, as defined in

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1 See, for example, United Nations Division for Ocean Affairs and the Law of the Sea, "UN Convention on the Law of the Sea (UNCLOS)," art. 211, par. 6.

2 For example, see ibid., art. 73, par. 4; art. 198; art. 211, par. 6; art. 217, par. 7; art. 231; and art. 254, par. 1.

3 For example, see ibid., art. 206; art. 211, par. 3; and art. 250.

4 For example, see ibid., art. 41, par. 3; art. 61, par. 2; art. 64, par. 1; art. 65; art. 66, par. 3; art. 66, par. 4; art. 69, par. 3; art. 70, par. 4; art. 94, par. 7; art. 98, par. 2; art. 100; art. 108, par. 1; art. 117; art. 118; art. 197; art. 199; art. 200; art. 201; art. 226, par. 2; and art. 235, par. 3.

5 For example, see ibid., art. 118; and art. 130, par. 2.

6 For example, see ibid., art. 43; and art. 123.

7 For example, see ibid., art. 129.

8 For example, see ibid., art. 63, par. 1 and 2.

9 For example, see ibid., art. 143.

Article 26, means that "every treaty in force is binding upon the parties to it and must be performed by them in good faith." In other words, once states have consented to be bound by certain treaties or agreements, they are also bound by the duty of good faith to honestly and sincerely carry it out.

The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, adopted by the General Assembly in 1970, emphasizes this obligation in its preamble: "the faithful observance of the principles of international law…and the fulfillment in good faith of the obligations assumed by States, in accordance with the Charter, is of the greatest importance for the maintenance of international peace and security." The importance of good faith obligation and the pacta sunt servanda rule has also been recognized by the International Court of Justice (ICJ) and various international scholars.[10]

UNCLOS similarly provides in Article 300 that "States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right."

The Current Status of and Adherence to UNCLOS

UNCLOS opened for signature in 1982 and entered into force in 1994. As of the time of writing, 162 states had ratified or acceded to the convention.[11] All the East Asian countries are signatories, although Cambodia and North Korea have yet to ratify the treaty.[12]

Of the eighteen cases before the International Tribunal for the Law of the Sea (ITLOS), the judicial body created by UNCLOS, one-third of the cases (cases 3–4, 12, and 14–16) involve Asian countries. According to an International Maritime Organization (IMO) report, piracy incidents in the South China Sea, numbering 134 in 2010, were second only to those occurring in East Africa.[13] These figures show that the ocean regime is of vital importance for the future of Asian countries.

The obligation to cooperate under UNCLOS takes many forms and thus has been subject to varying interpretations, with some cases even taken before the ICJ, such as the *MOX Plant Case*. The following sections discuss the different variations and categories of the obligation to cooperate, as well as possible policy recommendations that would aid future compliance with the convention's provisions.

Obligations as Prescribed in UNCLOS: Examples and Implications

Throughout UNCLOS, the obligation to cooperate can be found in the wordings of "shall" or "should," which create binding legal obligations for the member states.

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[10] *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Rep. 7 (1997), 78; Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003), 591–92; Robert Jennings and Arthur Watts, ed., *Oppenheim's International Law* (London: Longman, 1996), 584, §12 at 38; and International Law Commission, "Draft Articles on the Law of Treaties," 18th Session, UN Doc. A/6309/Rev. 1 (1966).

[11] "Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as at 03 June 2011," UN Division for Ocean Affairs and the Law of the Sea, http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm.

[12] Zou Keyuan, "Implementing the United Nations Convention on the Law of the Sea in East Asia: Issues and Trends," *Singapore Yearbook of International Law* 9, no. 1 (2005): 37–53.

[13] International Maritime Organization, "Reports on Acts of Piracy and Armed Robbery against Ships, Annual Report—2010," April 1, 2011, http://www.imo.org/blast/blastDataHelper.asp?data_id=30548&filename=169.pdf, par. 6

"Shall Cooperate"

The phrase "shall cooperate" creates a binding legal obligation for all UNCLOS members, which can easily be found in numerous articles concerning marine resources, research, and safety.[14] These provisions specify the scope and forum: the material scope is indicated with "shall cooperate in" and the forum with "in consultation with,"[15] "through,"[16] "by way of,"[17] or "on a…regional or global basis."[18] Due to the comprehensive nature of the obligation to cooperate, specific provisions are necessary for them to have any real meaning. In that sense, a textual approach would take precedence over contextual or objective approaches unless supplemented by state practice.

Interestingly enough, in the *MOX Plant Case*, both Ireland and the United Kingdom took the textual approach but reached different conclusions on the interpretation of Article 197. The United Kingdom took a narrow view in its counter-memorial, arguing that "article 197 covers only the requirement for States Parties to cooperate for the purpose of 'formulating and elaborating international rules, standards and recommended practices and procedures.' It does not cover or refer to cooperation on the management of sources of transboundary risk."[19] This view was criticized by Ireland in its rejoinder, which submitted

> first, that Article 197 does not oblige States Parties "to cooperate *for the purpose of* 'formulating and elaborating international rules, standards and recommended practices and procedures,'" as the United Kingdom puts it. Article 197 obliges States Parties "to cooperate *in* formulating and elaborating international rules, standards and recommended practices and procedures" (emphasis added). The difference is significant. The Convention does not stipulate that States Parties must come together in order to formulate and elaborate international rules.[20]

As noted by Ireland, the difference in the wording of "for the purpose of" and "in" has significant implications. Logically speaking, "doing A for the purpose of B" means that A is a method of accomplishing B. Thus, one can conclude that the duty to enter into consultation is a method of carrying out the duty to cooperate, or that it is implicit in the duty to cooperate. This is further affirmed in the *MOX Plant* and the *Land Reclamation* cases before ITLOS, where the tribunal used the words "shall cooperate and shall, for this purpose, enter into consultations."

Although international instruments usually support the general duty to cooperate, there is no definitive, authoritative statement providing the scope of that duty. However, as mentioned above, the duty to cooperate needs to have a clear and specific material scope or other terms of reference to have meaning as a legal obligation. Therefore, the phrases "shall cooperate for the purpose of B,"

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[14] This duty can be found in provisions regarding: (1) sea lanes and traffic separation schemes—art. 41, par. 5; (2) conservation and management of the living resources in EEZs and high seas—art. 61, par. 2; art. 64, par. 1; art. 65; art. 66, par. 3 and 4; art. 117; and art. 118; (3) fishing rights—art. 69, par. 3 and art. 70, par. 4; (4) inquiry into marine casualty or incidents of navigation—art. 94, par. 7; (5) repression of piracy—art. 100; (6) suppression of substance trafficking—art. 108, par. 1; (7) marine scientific research—art. 200 and art. 201; (8) transit of landlocked states—art. 130, par. 2; (9) protection and preservation of the marine environment—art. 197 and art. 235, par. 3; and (10) the pollution of the marine environment—art. 226, par. 2.

[15] For example, see "UNCLOS," art. 41, par. 5.

[16] For example, see ibid., art. 197.

[17] For example, see ibid., art. 98, par. 2.

[18] For example, see ibid., art. 69, par. 3; art. 70, par. 4; and art. 197.

[19] Counter-Memorial of the United Kingdom, *MOX Plant Case (Ireland v. United Kingdom)*, Permanent Court of Arbitration (PCA), par. 6.36, http://www.pca-cpa.org/upload/files/UK%20Counter%20-Memorial.pdf.

[20] Reply of Ireland, *MOX Plant Case (Ireland v. United Kingdom)*, (PCA, Mar. 7, 2003), par. 7.38, http://www.pca-cpa.org/upload/files/MOX%20Ireland%20Reply.pdf.

"shall cooperate to do B," and "shall cooperate in doing B" should be interpreted as implying that B has specified terms of reference that the duty to cooperate assumes.

"Should Cooperate"

Only two articles in UNCLOS, Articles 43 and 123, are phrased with the exhortatory "should." In the *MOX Plant Case*, the disputants, though having different views on the material scope of their obligation to cooperate, agreed that Article 123 is "hortatory, rather than mandatory," although it "may also have an effect upon the meaning of other provisions."[21]

Article 43 has a very distinctive nature. Here, states "should by agreement cooperate" in matters of navigational and safety aids and the prevention, reduction, and control of pollution. This type of duty was phrased as a mandatory obligation in Article 243,[22] whereas Article 43 specifies a method of cooperation that encourages states to further cooperation by reaching an agreement. It should be noted here that an agreement alone does not discharge the states from the duty to cooperate. Rather, the duty is one of a continuing nature.

"May Cooperate"

Most of the provisions related to cooperation are phrased with "shall" or "should," but there is one exception in Article 129, which reads:

> Where there are no means of traffic in transport in transit States to give effect to the freedom of transit or where the existing means, including the port installations and equipment, are inadequate in any respect, the transit States and land-locked States concerned may cooperate in constructing or improving them.

When considering the voluntary nature of this provision, its insertion seems unnecessary. The rationale behind this wording is due regard for the sovereignty of all states in establishing a legal order for the seas and oceans.[23] It further seeks to prevent derogation incompatible with the object and purpose of the convention that could occur in allowing two or more state parties to conclude agreements modifying or suspending the operation of provisions of the convention.[24] Therefore, Article 129 is a demonstration of the standard of cooperation that satisfies both the preamble and Article 311, paragraph 3.

"Obligation to Coordinate or Harmonize"

A careful reading of Article 123 seems to imply that there are minimum standards of cooperation, especially with regard to cooperation in the enclosed or semi-enclosed seas. The three listed items in Article 123 are obligations necessary in forming policies for the prevention, reduction, and control of pollutions from land-based sources,[25] though phrased with the expression "harmonize" rather than "coordinate." This was the claim made by Ireland in the *MOX Plant Case* regarding Article 197.[26]

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21 Reply of Ireland, *MOX Plant Case*, par. 7.17.

22 Article 243 states, "States and competent international organisations *shall cooperate, through the conclusion of bilateral and multilateral agreements*, to create favourable conditions for the conduct of marine scientific research" (italics added).

23 Preamble to "UNCLOS," par. 4.

24 "UNCLOS," art. 311, par. 3.

25 See also, "UNCLOS," art. 207, par. 3.

26 Reply of Ireland, *MOX Plant Case*, par. 8.85–86.

The Duty of Publicity, Notification, and Other Exchanges of Information

There are two large categories of obligations to be further discussed: exchange of information and consultation/negotiation. The exchange of information can be grouped into publicity, notification, and other exchanges of information.

Publicity. With regard to the publicity of information or reports, UNCLOS deliberately uses different expressions in accordance with their nature—those concerned with restrictions versus those concerning danger. Regarding restrictive practices, states are required to perform "due" publicity,[27] while "appropriate" publicity is required for information on dangers.[28] The term "danger" also applies to the depth, position, and dimensions of any installations or structures not entirely removed in exclusive economic zones (EEZ).[29] Although it is unclear how "appropriate" publicity differs from "due" publicity, considering that dangers demand more immediate care than mere restrictions, one may assume that "appropriate" implies a stricter level of publicity than "due."

Interestingly, UNCLOS is silent on the manner of publicity for information (i.e., on the limits of any "particular, clearly defined area" prescribed in Article 211, paragraph 6)[30] and for reports (i.e., of the results obtained by monitoring the risks or effects of pollution as prescribed in Article 204).[31] Nevertheless, when it comes to the latter, two possible interpretations can be suggested. The first is that the absence of adjectives such as "due" and "appropriate" implies that the manner of publicity is left to the discretion of the states concerned. However, this textual interpretation is not preferred because the information is concerned with activities likely to pollute the marine environment of other states, in which case the reports mentioned in Article 205 should not be different from the information related to restrictions of other states. In addition, Article 205 requires states to provide reports to international organizations that in turn will make reports available to "all states," which implies that publicity in this case is an obligation of result, rather than the obligation of conduct as is generally understood.

The "duty to make information available by publication" in Article 244, paragraph 1, also seems to indicate that UNCLOS is focused on the obligation of result.[32] The expression lacks words such as "appropriate" or "due," which is likely because the information obtained from marine scientific research is unrelated to the interests of other states or any danger to navigation or overflight.

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[27] For example, (1) laws and regulations regarding innocent passage through the waters of a coastal state, art. 21, par. 3; (2) sea lanes and traffic separation schemes in specific parts of its waters, e.g., the territorial sea, art. 22, par. 4; (3) straits used for international navigation, art. 41, par. 2 and 6, and archipelagic waters, art. 54; (4) suspension of innocent passage in specified areas of territorial seas, art. 25 par. 3; (5) laws and regulations relating to transit passage by states bordering the strait, art. 42 par. 3; (6) archipelagic baselines, art. 47; (7) laws and regulations relating to archipelagic sea lanes passage by the archipelagic states, art. 53 par. 7 and 10; (8) charts and lists of geographical coordinates of exclusive economic zones (EEZ), art. 75, par. 2 ("While States shall also deposit a copy of the charts and information with the General-Secretary of the United Nations, States shall deposit charts and relevant information, including geodetic data, permanently describing the outer limits of their continental shelves with the Secretary-General of the United Nations and the Secretary-General shall give due publicity thereto," art. 76, par. 9); and (9) particular requirements established by States for the prevention, reduction and control of pollution from vessels, art. 211, par. 3.

[28] This includes cases of the danger to navigation within territorial seas, per Article 24, paragraph 2; danger within or over straits, per Article 44; and danger within or over archipelagic sea lanes, per Article 54.

[29] "UNCLOS," art. 60, par. 3.

[30] Ibid., art. 211, par. 6.

[31] Ibid., art. 205.

[32] Article 244, par. 1 of UNCLOS stipulates that "States and competent international organisations *shall make available by publication* and dissemination through appropriate channels information on proposed major programmes and their objectives as well as knowledge resulting from marine scientific research."

The different expressions of obligations imposed on states in the convention provide an interesting cascading standard: (1) appropriate publicity, (2) due publicity, and (3) simple publicity.[33] Since the manner in which these obligations must be fulfilled is not specified in UNCLOS, it must inevitably be supplemented by subsequent state practice.

Notification. Unlike publicity, notifications must indicate the particular states to which information is being provided because it is a unilateral process, unless provided for otherwise.[34] Notifications, like publicity, have a cascading standard of expression: (1) to notify immediately or promptly, (2) to give warning, (3) to give due notice, and (4) to give simple notice.

There are two types of due notice or notification. The first type of due notification can be found in cases where states need to perform their duties within the jurisdiction of coastal states. This type is an adjustment to the new rules established by UNCLOS regarding archipelagic waters and EEZs, under which coastal states should be notified about submarine cables in their archipelagic waters and the intention to repair or replace them,[35] as well as the construction of artificial islands, installations, or structures within their EEZs.[36]

The second type of due notification, like due publicity, is focused on information related to the restriction of the interests of other states. For instance, when safety zones are established to ensure safe navigation, as well as the safety of artificial islands, installations, or structures within their EEZs, coastal states shall give due notice.[37] At the same time, coastal states must give appropriate publicity concerning the depth, position, and dimensions of artificial islands, installations, or structures within their EEZs.[38] Considering the difference between "due" and "appropriate" publicity mentioned above, the presence of structures can be understood as superseding the danger to navigation.

The ICJ characterized the general duty to warn of an imminent risk of significant harm as being based on elementary considerations of humanity,[39] which has received general support from international law scholars.[40] This duty is reiterated in Articles 198 and 211, paragraph 7 of the convention, but through the expression "to notify immediately or promptly" rather than "to warn."[41] This indicates that, unlike the implications of the term "to warn" in ICJ jurisprudence, the drafters of UNCLOS opted for the choice between the expressions "to notify immediately or promptly" and "to warn," depending on the imminence of danger. In other words, if the mere presence of the structures turns out to be an imminent danger to the navigation of vessels, the duty to warn under customary international law would apply. On the other hand, where enforcement measures are taken by coastal states against foreign vessels, prompt or immediate notification

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33 The language "cascading standard of expression providing for the particular obligation imposed on States Parties" is borrowed from the arbitral award of 2003 at the dispute concerning Article 9 of the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention). See Final Award, *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. UK and North Ireland)*, PCA, July 2, 2003, par. 129, http://www.pca-cpa.org/upload/files/OSPAR%20Award.pdf.

34 Typical examples of these states include: the flag state of vessels subject to law enforcement within territorial seas, per Article 27, paragraph 3; the flag state of vessels subject to law enforcement within EEZs, per Article 73, paragraph 4; the flag state of vessels concerned with any enforcement measures taken against foreign vessels pursuant to section 6 of Part XII, Article 231; and the neighboring land-locked states, geographically disadvantaged states, and coastal states with regard to marine scientific research under Article 246, paragraph 3, and Article 254, paragraph 1.

35 "UNCLOS," art. 51, par. 2.

36 Ibid., art. 60, par. 3.

37 Ibid., art. 60, par. 4 and 5.

38 Ibid., art. 60, par. 3.

39 *Corfu Channel Case (United Kingdom v. Albania)*, ICJ Rep. 4, 22 (1949).

40 Phoebe N. Okowa, *State Responsibility for Transboundary Air Pollution in International Law* (Oxford: Oxford University Press, 2000), 145, 167.

41 Article 198 uses the expression "shall immediately notify," and Article 211, paragraph 7 uses "prompt notification."

would be required because of the possibility of actual damage to the vessels.[42] Thus notification should be understood as facilitating law enforcement.

Exchange of information. The exchange of information is a two-way process that concerns available scientific information relevant to the conservation of the living resources of EEZs[43] and of high seas.[44] Concerning the meaning of the term "available," the Permanent Court of Arbitration (PCA) in the *OSPAR Convention* case concluded that the obligation was limited to information that was already gathered and readily available.[45] The nature of the obligation facilitates a two-way exchange of available scientific information: if a state provides information to a receiving state, it also has the right to request similar information from the receiving state, and the receiving state has a duty to respond. This responsibility can be characterized as a "duty to respond upon receiving information."

The Obligation to Enter into Consultation or Negotiation

Aside from the exchange of information, another obligation found in UNCLOS is that of entering into consultation or negotiation. Where the nationals of one state exploit the same living resources as that of another state, or where the nationals of different states exploit resources of the same area of high seas, Article 118 requires the concerned states to enter into negotiations, a practical method of performing the prescribed duty to cooperate.

There may be two possible interpretations of this duty: one as an implicit duty to cooperate, and another as requiring an express provision in order to be invoked as a legal obligation. The drafter's intention concerning this obligation is unknown, but we may infer a conclusion favorable to the former interpretation from the jurisprudence of ITLOS in the *MOX Plant Case*. The tribunal stated in its order that "the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under…the Convention and general international law and the rights which arise therefrom."[46] The tribunal further ordered that "Ireland and the United Kingdom shall cooperate and shall, *for this purpose*, enter into consultations forthwith in order to…(c) devise, as appropriate, measures to prevent pollution of the marine environment which might result from the operation of the MOX plant [italics added]."[47] In this case, it is the insertion of the phrase "for this purpose" that indicates that the duty to enter into consultation is to be a method of fulfilling the duty to cooperate. The tribunal reaffirmed this obligation in its order in the *Land Reclamation* case by holding that Malaysia and Singapore "shall cooperate and shall, for this purpose, enter into consultations forthwith."[48] Because of this affirmation, the first interpretation of implicit duty appears more acceptable.

Also in the *MOX Plant Case*, Ireland asserted that "states that are subject to a duty to coordinate must not adopt unilateral measures or practices whose effect would undermine measures or

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42 For example, see "UNCLOS," art. 231.

43 Ibid., art. 61, par. 5.

44 Ibid., art. 119, par. 2.

45 *OSPAR Convention* case, par. 106.

46 Order of Dec. 3, 2001, *MOX Plant Case (Ireland v. United Kingdom)*, International Tribunal for the Law of the Sea (ITLOS) case no. 10 (2001), par. 82.

47 Ibid., par. 89, par. 1.

48 Order of Oct. 8, 2003, *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, ITLOS case no. 12, par. 92 and 106.

practices adopted by the other State."[49] However, international law generally does not prohibit states from taking such measures. In fact, states should be allowed to take flexible measures unilaterally in accordance with changes in circumstances, as long as due regard is given to the sovereignty of states. This would only be logical because the term "coordinate" presupposes a difference in standards and consequence, giving rise to other procedural obligations such as duties to notify and consult.

Conclusion

The International Law Commission's commentary to the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities is noteworthy:

> The principle of cooperation between States is essential in designing and implementing effective policies to prevent or minimize the risk of causing significant transboundary harm. The requirement of cooperation of States extends to all phases of planning and of implementation.[50]

The statement is representative of the continuing nature of the duty to cooperate. The duty to cooperate cannot be fulfilled by a one-time act or activity; rather, states must cooperate in all phases of planning and implementation in order to meet the standards required. In that regard, the duty to cooperate is distinct from other procedural obligations, which can be fulfilled by one-time activities. Furthermore, since the duty to cooperate is performed through a two-way process, it would be correct to conclude that both the right to request cooperation and the duty to respond are implicit elements of the duty to cooperate. However, the right to request cooperation should be exercised in a manner that would not constitute an abuse of right, as prescribed in Article 300.

Policy Implications and Recommendations

Two main concerns arise in the interpretation of UNCLOS obligations: the manner of publicity, on which the convention is silent; and the implicit nature of certain provisions that appear to have been confirmed by ITLOS. Rather than keep nations and scholars guessing at the intent and requirements under the convention, another round of negotiations for an amendment to UNCLOS is recommended to clarify the complexity evident in the multitudinous varieties of obligations. If an amendment would be too long in coming, at least a regional consensus on certain obligations would help bring state practice into conformity and under control.

The PCA characterized the duty to cooperate as an obligation of conduct in the *OSPAR Convention* case, by stating that "shall cooperate" is mandatory language that requires contracting parties to take some action.[51] In some cases, however, the duty to cooperate seems to be a mixture of obligation of conduct and result, e.g., "shall cooperate through the conclusion of agreements" or "to make information available to all States." Such obligation of result should be made clear in order to have binding force on the states parties, and cannot be implied if not expressly provided for.

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[49] Ireland Memorial, *MOX Plant Case (Ireland v. United Kingdom)*, (PCA, July 26, 2002), par. 8.90, http://www.pca-cpa.org/upload/files/Ireland%20Memorial%20Part%20III.pdf.

[50] "Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries," in *Report of the International Law Commission*, 53rd Session, supp. no. 10, art. 4, par. 1.

[51] *OSPAR Convention* case, par. 129.

At the same time, policymakers must bear in mind that the duty to cooperate cannot be fulfilled by a one-time act. Rather, cooperation is a continuing process for which states must be willing not only to provide information but also to pursue negotiations through which they can hold each other accountable.

Last, further adoption of domestic legislation in line with UNCLOS provisions is recommended. Although international law is considered supreme over domestic laws in the constitution of most countries, there are countries such as China and Japan that do not directly apply international law in their courts. Rather, they adopt domestic legislation that coincides with international law and follows their domestic laws. In that regard, the adoption of domestic legislation is a pressing issue in ensuring compliance.

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Adding Further Complexity? Extended Continental Shelf Submissions in East and Southeast Asia

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EXECUTIVE SUMMARY

This essay examines submissions to the UN Commission on the Limits of the Continental Shelf (CLCS), with particular reference to East and Southeast Asia, and assesses their impact on the already complex and contentious maritime claims in the region.

MAIN ARGUMENT

Despite the fact that the majority of coastal states in East and Southeast Asia are parties to the UN Convention on the Law of the Sea (UNCLOS), their maritime claims in many cases have proved unclear. Recently, several regional states have submitted information on their outer continental shelf limits to the CLCS. The submissions made by coastal states in the region overlap with the maritime claims of neighboring states. This is in large part a consequence of the fact that such submissions encompass areas where territorial and maritime disputes still exist, such as the maritime areas in the vicinity of the Senkaku/Diaoyu Islands in the East China Sea and the Spratly Islands group in the South China Sea.

Accordingly, these submissions appear to add a further source of discord to the already highly complicated and contentious situation in the region due to preexisting territorial and maritime disputes. This view is supported by the fact that extended continental shelf submissions have incited a series of protests and counterprotests on the part of interested states. At the same time, however, these submissions, and the reactions that they have provoked from interested states, offer fresh insights and assist in the interpretation of previously unclear maritime claims.

POLICY IMPLICATIONS

- Extended continental shelf submissions may constitute an additional source of disputes in an already complex maritime jurisdictional environment.
- The counterpoint to this negative scenario is that these submissions, and the reactions of states to them, help clarify previously opaque maritime claims.
- While the maritime claims of East and Southeast Asian states are arguably becoming more distinct through the extended continental shelf submission process, this process has also brought into sharper focus differences between the positions of claimant states.
- More clearly defining and substantially narrowing the scope of overlapping claims in certain areas could provide a firmer basis for future dispute resolution.

This essay examines submissions to The United Nations Convention on the Law of the Sea of 1982 (hereinafter referred to as UNCLOS),[1] which provides the principal international law framework governing the maritime entitlements of coastal states. UNCLOS has gained widespread international recognition, and at the time of writing 161 states had become parties to it.[2] In accordance with UNCLOS, a coastal state is entitled to several maritime zones, namely, the territorial sea, the contiguous zone, the exclusive economic zone (EEZ), and the continental shelf (see below). Selected coastal states may also be entitled to archipelagic waters should they qualify as archipelagic states[3] and be able to construct legitimate archipelagic baselines.[4]

The definition of the continental shelf is governed by Article 76 of UNCLOS. The definition of the outer limits of the continental shelf, especially where the continental shelf extends seaward of 200 nautical miles (nm) of the coast, involves complex technical and legal rules and procedures (see below).[5] Unlike the definition of other zones' outer limits that can be finalized unilaterally according to relatively straightforward distance criteria—at least where no overlaps exist with the claims of neighboring states—the delineation of the outer limits of the continental shelf involves a technical body established in accordance with UNCLOS, the UN Commission on the Limits of the Continental Shelf (CLCS). In accordance with Article 76 of UNCLOS, coastal states wishing to establish the outer limits to their continental shelf rights beyond the 200-nm limit should submit information on their proposed outer limits to the CLCS. The CLCS then assesses such submissions and provides recommendations based on which coastal states may finalize the outer limits to their continental shelf rights.

The deadline for making such submissions on outer continental shelf limits was originally set at ten years after the entry into force of UNCLOS for that particular state,[6] although the deadline for many coastal states was, in fact, pushed back to May 13, 2009 (see below). The existence of this deadline led to a flurry of submissions. By this date, the CLCS had received 50 submissions (a figure that had, by the time of writing, become 59) and 41 sets of preliminary information (subsequently rising to 45 at the time of writing), including several submissions of both types from coastal states in East Asia and Southeast Asia.[7] Among these submissions, several are directly relevant to maritime jurisdiction in the East China Sea (preliminary submissions on the part of China and South Korea) and the South China Sea (submissions by Vietnam and a joint submission by Vietnam and Malaysia, together with submissions of preliminary information provided by Brunei and China).[8] Additionally, certain states, such as the Philippines, have at present made only partial submissions and have expressly retained their right to make additional partial submissions.

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1 The convention was adopted in Montego Bay, Jamaica, on December 10, 1982, and entered into force on November 16, 1994. UN Division for Ocean Affairs and the Law of the Sea, "United Nations Convention on the Law of the Sea (UNCLOS)."

2 UN Division for Ocean Affairs and the Law of the Sea, "Status of the United Nations Convention on the Law of the Sea, of the Agreement Relating to the Implementation of Part XI of the Convention and of the Agreement for the Implementation of the Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks," updated September 20, 2011, http://www.un.org/Depts/los/reference_files/status2010.pdf. The European Union is also a party to UNCLOS, bringing the total number of parties to 162.

3 "UNCLOS," art. 46.

4 Ibid., art. 47.

5 It is recognized that, technically, the correct abbreviation for a nautical mile is "M," with "nm"‘ referring to nanometers. However, "nm" is widely used by many authorities—for example, the UN Division for Ocean Affairs and the Law of the Sea—and appears to cause less confusion than "M," which is often taken to be an abbreviation for "meters."

6 "UNCLOS," ann. II, art. 4.

7 For a complete listing of continental shelf submissions, see "Submissions, through the Secretary-General of the UN, to the Commission on the Limits of the Continental Shelf, Pursuant to Article 76, Paragraph 8, of the UN Convention on the Law of the Sea of 10 December 1982," http://www.un.org/Depts/los/clcs_new/commission_submissions.htm.

8 "Submissions to the Commission on the Limits of the Continental Shelf."

East and Southeast Asia are, however, two geographic regions that host long-standing maritime disputes. Furthermore, such disputes are by no means solely maritime-related in character, as they include a number of sovereignty disputes, especially concerning islands (see below). On the face of it, the submissions on the part of regional coastal states that concern the outer limits of their continental shelf areas serve to highlight existing maritime and sovereignty disputes and may arguably exacerbate and add further complexity to them. Alternatively, the information contained in the submissions, as well as the responses to them, provides an avenue toward an enhanced understanding of regional claims to maritime jurisdiction. This represents a welcome departure from the long-standing uncertainties associated with such claims in the past. These developments will be investigated in this essay. The essay first addresses legal and technical developments in the continental shelf regime and particularly Article 76 of UNCLOS. Issues relating to the enduring maritime and sovereignty disputes in East and Southeast Asia and matters related to baselines will also be covered. Attention then turns to the deadline for submissions to the CLCS, particularly with respect to the alteration of these deadlines. In this context, the key actors and stakeholders involved, namely the relevant coastal states and the CLCS, are discussed. In particular, the existence and roles of the CLCS as a technical body are addressed. The essay will then consider the impact of submissions to the CLCS, as well as of the multiple protests and counterprotests that they have generated, on disputes in the East and South China seas and assess how these submissions have both increased the complexity of and offered assistance in clarifying maritime claims in the region.

An Overview of the Continental Shelf

The Legal Definition

Coastal states' entitlements to maritime zones/jurisdictions have developed over time in terms of their type, their breadth, and the rights and responsibilities that they offer for coastal states within them. The continental shelf is among those zones of maritime jurisdiction where a coastal state may exercise its sovereign rights, rather than full sovereignty. The definition of the continental shelf is set out in Article 76 of UNCLOS. However, it is worth noting that the definition of what constitutes the continental shelf was not introduced in 1982, the year of the adoption of UNCLOS, but has evolved over time. The definition of the continental shelf is a complex blend of legal, geological, geomorphological, and geodetic concepts,[9] which strongly suggests that a multidisciplinary approach is required in this context.

Historically, the concept of the continental shelf was heavily influenced by the United States Presidential Proclamation on the Continental Shelf on September 28, 1945, often termed the Truman Proclamation.[10] The Truman Proclamation was not, however, the first move to advance claims to maritime areas beyond the then generally 3-nm wide territorial sea. Notable developments in this regard include the division and subsequent annexation of the seabed of the Gulf of Paria between the United Kingdom (on behalf of Trinidad and Tobago) and Venezuela

[9] Philip A. Symonds, Olav Eldholm, Jean Mascle, and Gregory F. Moore, "Characteristics of the Continental Margin," in *Continental Shelf Limits: The Scientific and Legal Interface*, ed. Peter J. Cook and Chris M. Carleton (Oxford: Oxford University Press, 2000), 25.

[10] See "Truman Proclamation: Presidential Proclamation No. 2667—Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf," September 28, 1945. A proclamation was also made in respect of fisheries' jurisdiction seaward of the U.S. territorial sea limit.

in 1942,[11] and Argentina's Continental Shelf Decree of 1944.[12] Nonetheless, the Truman Proclamation was especially influential given that it was the United States taking this bold step. This proclamation therefore served as a key catalyst for the birth of the continental shelf concept, as well as more expansive claims to maritime jurisdiction generally. The Truman Proclamation provided for claims over parts of the adjacent continental shelf as follows:

> Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea-bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.[13]

Accordingly, the Truman Proclamation was also considered one of the first major challenges to the doctrine of the freedom of the seas.[14] On the other hand, the proclamation also reflected a growing "creeping coastal State jurisdiction," as coastal states increasingly advanced claims offshore in that era.

The claim made by the United States was then followed by other coastal states including Argentina (1946), Chile and Peru (1947), and Ecuador (1950), which asserted sovereign rights over a 200-nm zone that encompassed both the seabed and the water column.[15] The sporadic nature and lack of uniformity among coastal state claims helped motivate the international community to codify international law in order to govern coastal states' maritime entitlements and particularly their spatial extent. The first such effort conducted by the UN took place during the UN Conference on the Law of the Sea I in 1958 in Geneva. The conference produced four conventions, one of which deals with continental shelf issues.

The 1958 Convention on the Continental Shelf states that the continental shelf refers to "the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters (m) or, beyond that limit, to where the depth of the superjacent waters admits the exploitation of the natural resources of the said areas" or to "the seabed and subsoil of similar submarine areas adjacent to the coasts of islands."[16] This definition of the limits of the continental shelf as being reliant on depth of exploitation was problematic because it suggested that continental shelf limits could advance further offshore and into deeper waters as exploitation technologies evolved and improved over time. Such a definition was therefore effectively open-ended.[17] Efforts were made to revise the definition of continental shelf in the course of a second convention, held in 1960. Consensus on new rules was not, however, forthcoming. Fortunately, a

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11 J.I. Charney and L.M. Alexander, eds., *International Maritime Boundaries*, vol. 2 (Leiden: Martinus Nijhoff, 1993), 639–654. It is, however, worth noting in the present context that Article 5 of the treaty provides that the agreement refers "solely to the submarine areas of the Gulf of Paria, and nothing herein shall be held to affect in any way the status of the islands, islets or rocks above the surface of the sea together with the territorial waters thereof," per *International Maritime Boundaries*, 653.

12 The 1944 decree was the first explicit claim to coastal state jurisdiction over the continental shelf, termed the "epicontinental sea" of Argentina. See *Laws and Regulations on the Regime of the High Seas*, UN Document St/LEG/SER.B/1 (New York: United Nations, 1951).

13 "Truman Proclamation."

14 "The United Nations Convention on the Law of the Sea: (A Historical Perspective)," http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm.

15 "United Nations Convention on the Law of the Sea: (A Historical Perspective)."

16 "Convention on the Continental Shelf," April 29, 1958, UN *Treaty Ser*. 499, art. 1.

17 International Hydrographic Organization et al., *A Manual on Technical Aspects of the United Nations Conventions on the Law of the Sea*, Special Publication, no. 51, 4th ed. (International Hydrographic Bureau: Monaco, March 2006), chap. 1, 4–5.

new and comprehensive definition of continental shelf was achieved at a third convention, which resulted in the drafting of UNCLOS.[18]

Article 76 of UNCLOS consists of ten paragraphs dealing with the definition of the continental shelf and the procedures by which outer continental shelf limits may be delineated. Fundamentally, Article 76 provides the following:

> The continental shelf of a coastal State 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 nautical miles 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.[19]

The above quotation asserts that the continental shelf covers the seabed area beyond coastal states' territorial sea (that is, usually beyond 12 nm from the baselines) up to the edge of its continental margin. The other important point in this context is that the continental shelf should be the natural prolongation of landmass of the coastal state. In cases where the continental margin does not reach a distance of 200 nm, the coastal state is nonetheless entitled to a 200-nm continental shelf measured from its baselines.

In addition, paragraph 3 of Article 76 states:

> The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

The above paragraph confirms which parts of the seabed form the continental margin. It also outlines, in necessarily idealized and general terms, the geological and geomorphological structure of the continental shelf, as well as the fact that the continental shelf excludes the deep ocean floor, including its oceanic ridges and underlying subsoil.

It is also worth noting that UNCLOS states that "the rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation."[20] This provision indicates that a coastal state's rights over the continental shelf are inherent and do not need to be formally claimed. Nevertheless, coastal states need to delineate the outer limits of their continental shelf beyond 200 nm, the definition of which is governed by paragraphs 4, 5, and 6 of Article 76.

The Delineation of the Outer Limit of the Continental Shelf

The procedure for the delineation of the outer limits of a continental shelf were elaborated through the commission's scientific and technical guidelines (CLCS/11), which were adopted on May 13, 1999 (hereinafter referred to as the Guidelines of the CLCS).[21] Article 76 of UNCLOS, together with the guidelines, constitutes the main references for a coastal state in the definition of the outer limits of its continental shelf.

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18 "UNCLOS," art. 76.

19 Ibid., art. 76, par. 1.

20 Ibid., art. 77, par. 3.

21 The Scientific and Technical Guidelines of the Commission contains technical and scientific procedures to define the outer limits of the continental shelf. These are published in Commission on the Limits of the Continental Shelf (CLCS), "Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf," UN doc. no. CLCS/11, May 13, 1999.

In general, the delineation of the outer limits of a continental shelf involves two formula criteria and two constraints. With regard to the formula through which coastal states establish their entitlement to areas of outer continental shelf, these are either a line delineating points with 1% sediment thickness (Gardiner Line)[22] or a line with a distance of 60 nm from the foot of the continental slope (FOS) (Hedberg Line).[23] A coastal state may employ whichever of these two criteria is more advantageous. However, the final outer limit of a continental shelf should also comply with two constraints. First, it should not extend beyond 350 nm from the baseline.[24] Second, it should not go beyond the line of 100 nm from the 2,500-meter isobath.[25] As with the two formula criteria, a coastal state can employ the more advantageous option resulting from the combination of the two constraints. This tends to result in a composite outer continental shelf limit composed of portions of each of the four criteria (formulae and constraints) outlined above.

These formulae and constraints are combined to create a composite outer limit to the continental shelf by employing the above, as illustrated in **Figure 1** through an oblique-perspective, three-dimensional diagram, which shows the morphology of the seabed with the baseline and the 200-nm limit lines. It also illustrates the slope, FOS, continental rise, and abyssal plain where potential outer limits of continental shelf may lie. Another important feature is the thickness of sedimentary rocks. The illustration confirms that in order to delineate the outer limits of a continental shelf, a coastal state should first define its baseline—as the 200-nm and 350-nm measurements are dependent on the location of the baseline—and conduct surveys to map the morphology of its seabed.

Having briefly outlined the key criteria for delineating the outer limits of a continental shelf, it can be readily understood that delineating the outer limits of the continental shelf is a challenging process. There is no single number to indicate the precise breadth of a particular state's continental shelf rights because the breadth of continental margin itself is variable. Technically speaking, in order for a coastal state to know whether it is entitled to a continental shelf area beyond 200 nm from its baseline, it has to understand the relief and morphology of the seabed and the thickness of its sedimentary rocks.

Gathering the required data to support an outer continental shelf submission necessarily involves bathymetric surveys to define the morphology of the seabed, as well as seismic surveys to define the sedimentary rock thickness.[26] The gathered data of various types then needs to be analyzed and interpreted. Accordingly, the preparation of a submission undoubtedly requires the allocation of considerable resources, including scientific, technical, human, and financial commitments.[27] Further, it is worth observing that establishing entitlement to areas of extended continental shelf and defining their outer limits is an inherently multidisciplinary process involving expertise in geology, hydrography, geophysics, geodesy, and other geosciences-related disciplines, as well as law of the sea expertise.

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22 "UNCLOS," art. 76, par. 4.

23 Ibid.

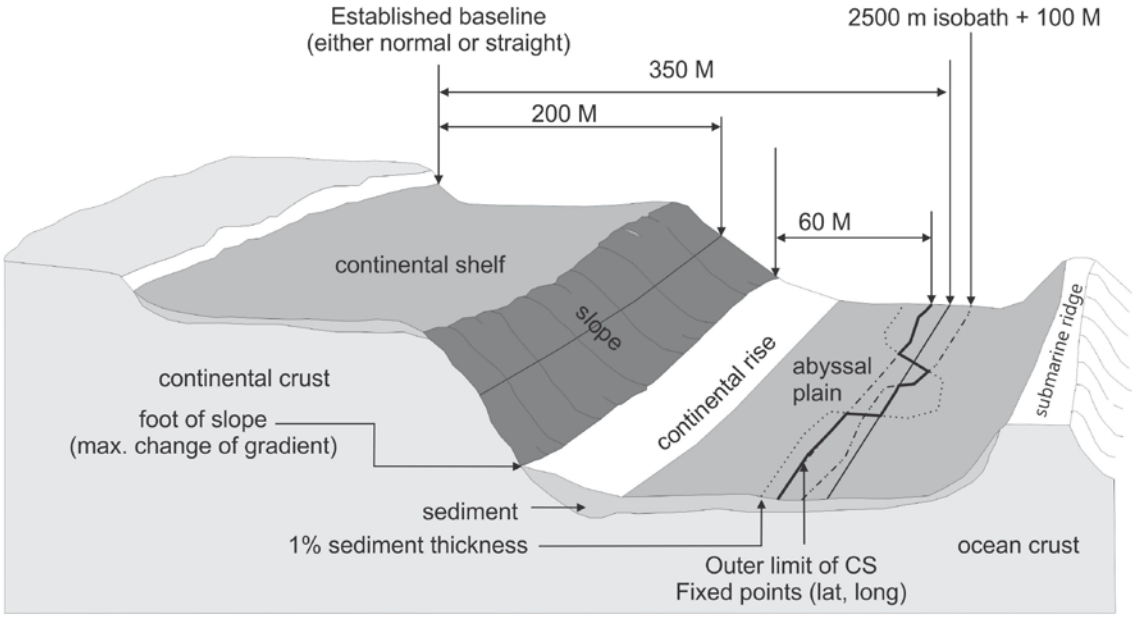
24 Ibid., art. 76, par. 5.

25 Ibid. The 2,500-meter (m) isobath is the line connecting points with a depth of 2,500 m.

26 See also "UNCLOS," art. 76, par 4–6; "Scientific and Technical Guidelines of the Commission," CLCS/11; and I. M. A. Arsana, "The Delineation of Indonesia's Outer Limits of Its Extended Continental Shelf and Preparation for Its Submission: Status and Problems" (New York: UN Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, 2007).

27 Arsana observes that a proper survey conducted in one particular location, such as the north of Papua (Indonesia), may cost up to $1,400,000, a figure that is comparable to the tuition fees for approximately 600 students studying geodetic engineering at Gadjah Mada University in Indonesia, with an average length of a five-year duration of study. See Arsana, "The Delineation of Indonesia's Outer Limits."

FIGURE 1 The outer limits of a continental shelf according to Article 76 of UNCLOS



SOURCE: I Made Andi Arsana and Clive Schofield, 2011. Used with permission.

The Terms of "Extended" or "Outer" Continental Shelf

The terms "extended continental shelf" or "outer continental shelf" are commonly used to refer to a continental shelf beyond 200 nm from the baseline.[28] In fact, such terms do not feature in UNCLOS. However, the term "extended continental shelf" is used in the Guidelines of the CLCS adopted in 1999.[29] To some extent this term suggests that the sovereign rights of coastal states over the continental shelf are somehow being extended. Such perceptions are misleading.

UNCLOS states quite explicitly that the entitlement of continental shelf is up to the outer edge of the continental margin.[30] If the continental margin is greater than 200 nm in breadth, then the coastal state's continental shelf entitlement will go beyond the 200-nm limit, subject to certain constraints, as noted above. However, if the continental margin does not, in fact, extend beyond 200 nm from baselines, such coastal states are nonetheless still entitled to a 200-nm continental shelf, in keeping with the introduction of the 200-nm EEZ.[31] This indicates that a coastal state is entitled to at least 200 nm of continental shelf measured from baselines, provided that there is no overlapping entitlement with its neighbors.

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[28] See, for example, M.T. Gau, "Third Party Intervention in the Commission on the Limits of the Continental Shelf Regarding a Submission Involving a Dispute," *Ocean Development and International Law* 40 (2009): 61–79; and A.G. Oude Elferink, "Outer Limits of the Continental Shelf and 'Disputed Areas': State Practice Concerning Article 76 (10) of the LOS Convention," *International Journal of Marine and Coastal Law* 21, no. 4 (2006): 461–87.

[29] CLCS, "Scientific and Technical Guidelines."

[30] "UNCLOS," art. 76, par. 1.

[31] Ibid., art. 56 and 76, par. 1.

While it is understandable why seabed areas beyond the 200-nm limit are often termed the "extended" or "outer" continental shelf areas, it is worth emphasizing that these terms do not appear in UNCLOS and should therefore be applied with care. Further, it should be noted that under the law of the sea, there is only the continental shelf and no "inner" or "outer" continental shelf. Accordingly, coastal states' sovereign rights over continental shelf areas seaward of the 200-nm limit from baselines are identical to those for continental shelf areas within 200 nm of the coast.

Issues of Uncertainty

Even though the delineation of the outer limits of the continental shelf is governed by Article 76 of UNCLOS and is supplemented by the Guidelines of the CLCS, uncertainties still exist. Delineation requires seabed data with high spatial and temporal resolution. With regard to data gathering and interpretation, uncertainties may arise due to variable data quality as well as different methodological approaches adopted in its processing.[32] Subjectivity in interpretation can also be another source of uncertainty. A notable example in this context is the definition of FOS, which is a very sensitive and controversial issue.[33] Two different experts may very well determine different FOS locations derived from the same set of data due to their different experiences and levels of expertise, as well as their differing interpretations of the legal and technical issues involved. This can be problematic for two or more neighboring states sharing the same continental margin that wish to make their continental shelf submissions to the CLCS. Even though they use the same set of data, independent data processing conducted by each state may lead to the construction of different outer limits of the extended continental shelf areas concerned, despite the fact that the same continental margin is under examination. Accordingly, a coordinated or even joint submission may be one way to minimize problems due to such differences.[34]

A further issue of uncertainty relates to ridges. In the definition of the outer limits of the continental shelf, special provision is made for ridges with regard to the application of the constraint line of 350 nm from baselines. The 350-nm constraint line is applicable to submarine ridges, but not to other "submarine elevations that are natural components of the continental margin, such as its plateaus, rises, caps, banks and spurs."[35] It is, however, far from easy to distinguish between submarine ridges and other submarine elevations. Unfortunately, this has not been clarified by the Guidelines of the CLCS, which merely states that "the issues of ridges will be examined on a case by case basis."[36] This statement seems to suggest that the CLCS itself has encountered challenges in dealing with submarine ridges issues.[37] A senior expert compares the submission of continental shelf to a poker game, with the definition of submarine ridges and analogous features characterized as the "wild card."[38] Consequently, it has been suggested that a

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32 C.H. Schofield and I.M.A. Arsana, "Beyond the Limits?: Outer Continental Shelf Opportunities and Challenges in East and Southeast Asia," *Contemporary Southeast Asia* 31, no. 1 (2009): 34.

33 R. Macnab, "The Case for Transparency in the Delimitation of the Outer Continental Shelf in Accordance with UNCLOS Article 76," *Ocean Development and International Law* 35 (2004): 2–9.

34 Schofield and Arsana, "Beyond the Limits," 35. Examples of such joint submissions include: (1) France, Ireland, Spain, and the United Kingdom (in the area of the Celtic Sea and the Bay of Biscay); (2) the Republic of Mauritius and the Republic of Seychelles (in the region of the Mascarene Plateau); (3) the Federated States of Micronesia, Papua New Guinea, and the Solomon Islands (concerning the Ontong Java Plateau); (4) Malaysia and Vietnam (in the southern part of the South China Sea); and (5) France and South Africa (in the area of the Crozet Archipelago and the Prince Edward Islands). For details see "Submissions to the Commission on the Limits of the Continental Shelf."

35 "UNCLOS," art. 76, par. 6.

36 CLCS, "Scientific and Technical Guidelines."

37 Schofield and Arsana, "Beyond the Limits," 35.

38 R. Macnab, "Submarine Elevations and Ridges: Wild Cards in the Poker Game of UNCLOS Article 76," *Ocean Development and International Law* 39, no. 2 (2008): 223–34.

coastal state may prepare its argument based only on its own interpretation of the relevant articles and the CLCS Guidelines.[39] At the end of the process, however, the CLCS may reject this unilateral judgment if it favors a contrary interpretation.

A final issue of uncertainty relates to transparency and confidentiality. After assessing a submission and making its recommendations, there is no obligation for the CLCS to publish such recommendations or release the scientific and technical data on which its assessment was based. Recommendations are only received by the submitting state, which is not obliged to make the recommendations public. Consequently, other states face a difficult task, as they are largely constrained from learning from previous submissions. In an encouraging development designed to at least partially overcome this problem, summaries of the commission's recommendations are now available on the CLCS website.[40] Further, one coastal state, New Zealand, has opted to publish in full the recommendations that it received from the CLCS.[41] It has been observed that this kind of publication "will enhance the transparency of the Article 76 process."[42]

The heavy workload facing the CLCS also constitutes a cause for concern, as acknowledged by the chair of the commission himself.[43] The commission has to date received over 50 submissions and several sets of preliminary information from coastal states. A seven-member subcommittee must be established to deal with each submission. The commission has only 21 members in total, so only three subcommittees can be formed at a time to work in parallel. At the CLCS's present two-year consideration rate per submission, several decades are likely to pass before the outer limits of the continental shelf can be finalized on a global basis. This scenario necessarily raises questions about the proper resourcing for and the procedures of the commission. Despite these challenges being well-known, little progress to address them has been made to date.

Deadline Issues

With regard to submissions by coastal states, UNCLOS defines the deadline as being within "10 years of the entry into force of this Convention for that State."[44] Even though many coastal states ratified UNCLOS soon after its first signature in the 1980s, the convention only entered into force on November 16, 1994. Accordingly, the deadline for those states that had become parties to the convention on or before November 16, 1994, was set at November 16, 2004.[45] However, it became apparent that many coastal states would not be ready to make their submissions by the required date. This was due to, among other reasons, the complex and time-consuming technical issues involved in the delineation of the outer limits of the continental shelf and the preparation of a submission.

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39 Macnab, "Submarine Elevations and Ridges," 234.

40 See "Recommendations Issued by the Commission on the Limits of the Continental Shelf," http://www.un.org/Depts/los/clcs_new/commission_recommendations.htm.

41 "Recommendations of the Commission on the Limits of the Continental Shelf (CLCS) in Regard to the Submission Made by New Zealand 19 April 2006," April 19, 2006, http://mfat.govt.nz/downloads/global-issues/cont-shelf-recommendations.pdf.

42 Schofield and Arsana, "Beyond the Limits," 41.

43 See, for example, "Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission–Nineteenth Session," CLCS/54, UN website, "Documents of the CLSC," http://www.un.org/Depts/los/clcs_new/commission_documents.htm#Statements%20by%20the%20Chairman%20of%20the%20Commission.

44 "UNCLOS," ann. II, art. 4.

45 Schofield and Arsana, "Beyond the Limits," 35–37.

A further relevant consideration in this context was that the CLCS itself was only established in 1997 and its official scientific and technical guidelines were not adopted until May 13, 1999.[46] Thus, only since 1999 have coastal states had specific guidelines on how to delineate the outer limits of their continental shelf areas beyond 200 nm. This was a key argument in favor of pushing the deadline for submissions back. Accordingly, the meeting of the states parties to UNCLOS used the date of the adoption of the CLCS Guidelines, May 13, 1999, as the new starting date for the ten-year clock.[47] Consequently, the deadline for many (though not all) coastal states to submit the information of their continental shelf became May 13, 2009. It is worth noting that this deadline was only applicable to those states that were parties to UNCLOS on or before the adoption of the CLCS Guidelines. Meanwhile, for other states, the deadline remains ten years after they become parties to UNCLOS.

One year before the May 2009 deadline, only eleven submissions had been made by coastal states. This was despite the fact that an estimated 80 or more states were potentially entitled to continental shelf areas beyond 200 nm from their baselines.[48] The dearth of submissions led the states parties to UNCLOS to once again review the issue of the deadline and the submission requirements involved. While it was decided that the deadline would not be changed, a meeting of the states parties to the Law of the Sea Convention in June 2008 opted to relax the requirement that a full submission be made in order to "stop the clock." Thus, coastal states, instead of being required to formulate a full submission (including data and documents) for consideration by the CLCS, may instead submit only "preliminary information indicative of the outer limits of the CS beyond 200 nautical miles and a description of the status of preparation and intended date of making a submission."[49] This, once again, does not change the deadline of submission but only modifies and relaxes the submission requirements. Supporting data and other requirements can be provided at a later date. It seems that this modification worked for many coastal states. By the time of the deadline applicable to many coastal states, May 13, 2009, the CLCS had received 43 sets of preliminary information.

Referring to the "chronological lists of ratifications of accessions and successions to the Convention and related Agreements,"[50] 128 states (and the European Union) had become parties to UNCLOS before May 13, 1999. Accordingly, the deadline for those 128 states to make submissions to the CLCS, should they be entitled to continental shelf beyond 200 nm from baselines, was May 13, 2009. In fact, around 70 coastal states made their submissions, either in full or on a preliminary basis, by the deadline.

While this figure was considerably higher than initially anticipated, it was somewhat lower than more recent appraisals. This perhaps indicates that some states discovered that they were unable

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46 "Report of the Sixth Meeting of States Parties," SPLOS/20, UN website, "Documents of the Meeting of States Parties to the UN Convention on the Law of the Sea," http://www.un.org/depts/los/meeting_states_parties/SPLOS_documents.htm.

47 The meeting of the states parties to UNCLOS in 2001 decided that the ten-year time period referred to in Article 4 of Annex II to UNCLOS "shall be taken to have commenced on 13 May 1999," considering that "it was only after the adoption by the Commission of its Scientific and Technical Guidelines on 13 May 1999 that States had before them the basic documents concerning submissions in accordance with article 76, paragraph 8, of the Convention." See also SPLOS/72, "Documents of the Meeting of States Parties to the United Nations Convention on the Law of the Sea," http://www.un.org/Depts/los/meeting_states_parties/SPLOS_documents.htm.

48 R. Van de Poll and C.H. Schofield, "A Seabed Scramble: A Global Overview of Extended Continental Shelf Submissions" (paper presented at the Advisory Board on the Law of the Sea [ABLOS] conference, Contentious Issues in UNCLOS—Surely Not?, Monaco, October 25–27, 2010), http://www.gmat.unsw.edu.au/ablos/ABLOS10Folder/ABLOS.htm.

49 See also "Decision of the Eighteenth Meeting of State Parties," available in "Documents of the Meeting of States Parties to the United Nations Convention on the Law of the Sea," http://www.un.org/Depts/los/meeting_states_parties/SPLOS_documents.htm.

50 "Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements," http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The United Nations Convention on the Law of the Sea.

to muster a strong case for a continental shelf beyond 200 nm from their baselines, or alternatively they took the view that the potential benefits of making a submission and securing extended continental shelf rights was outweighed by the costs involved in formulating a submission to the CLCS. In addition, a number of other states have yet to face the deadline for submission, because they have either become parties to UNCLOS after May 1999 or have yet to do so. Some of these states are understood to be preparing submissions at the time of writing. For example, Canada and the United States have been actively gathering data on their shared continental margin in the Arctic through a succession of joint surveys.[51] Having become a party to UNCLOS in 2003, Canada faces a CLCS submission deadline of 2013. For its part, the United States has yet to become a party to UNCLOS but nonetheless appears to be positioning itself for a submission on extended continental shelf rights as and when it does become one.

The UN Commission on the Limits of the Continental Shelf

Theoretically, the delineation of the outer limits of continental shelf is a unilateral process. However, as earlier mentioned, the process involves expert analysis by a specialized UN body called the Commission on the Limits of the Continental Shelf (CLCS).[52] The commission consists of 21 members with expertise in geology, geophysics, or hydrography.[53] Considering the commission's tasks, which relate to earth measurement and observation, expertise should also include other geosciences disciplines such as geodesy and geography. Importantly, the commission is not an adjudicative body in the sense that it does not assess the relative merits of competing submissions. Instead, the CLCS plays, or was intended to play, a technical role in evaluating whether coastal states through their submissions have fulfilled the requirements of Article 76 of UNCLOS.

However, the CLCS is working in an area that is not purely technical since it inevitably involves legal interpretations and political considerations. Indeed, it has been aptly termed "a technical body in a political world."[54] Upon assessing a particular submission, the CLCS makes "recommendations" to the coastal state on the basis of which the coastal state establishes continental shelf limits that are "final and binding."[55] Article 76 is specifically "without prejudice to the question of delimitation of the continental shelf" between states.[56] The commission cannot, therefore, consider a submission if it involves land and maritime disputes.

With respect to its role, the commission has been variously described as "the canary in the mine shaft,"[57] "the policemen who oversee the application of Article 76,"[58] and "a watchdog to prevent excessive coastal State claims."[59] While these terms suggest that the commission has a "gamekeeper" type of role—in essence safeguarding the scope of the international seabed area—

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51 See, for example, "U.S.-Canada Arctic Ocean Survey Partnership Saved Costs, Increased Data," National Oceanic and Atmospheric Administration (NOAA), December 15, 2011, http://www.noaanews.noaa.gov/stories2011/20111215_arctic.html.

52 See the official website of the UN Commission on the Limits of the Continental Shelf, http://www.un.org/Depts/los/clcs_new/clcs_home.htm.

53 "UNCLOS," ann. II, art. 2.

54 T. McDorman, "The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World," *International Journal of Marine and Coastal Law* 17, no. 3 (2002): 301–24.

55 "UNCLOS," art. 76, par. 8.

56 Ibid., art. 76, par. 10, and ann. II, art. 9.

57 P.F. Croker, "The Commission on the Limits of the Continental Shelf: Progress to Date and Future Challenges," in *Legal and Scientific Aspects of Continental Shelf Limits*, ed. M.H. Nordquist, J.H. More, and T.H. Heidar, (Leiden: Martinus Nijhoff, 2004), 221.

58 Croker, "Commission on the Limits of the Continental Shelf."

59 Ibid.

they are arguably misleading. Instead, it appears that the CLCS perceives its role as to assist those states making extended continental shelf submissions to secure continental shelf areas over which they are entitled to possess sovereign rights.

As previously noted, the process of gathering the necessary scientific and technical information, analyzing and interpreting this data, and then preparing a submission and presenting it to the CLCS, represents a complex, time-consuming, and expensive process. This observation is underscored by the fact that coastal states often need to form multidisciplinary teams from multiple government agencies in order to prepare their respective submissions. The commission's consideration of submissions from coastal states, its issuing of recommendations, and the subsequent fixing of final and binding outer continental shelf limits also takes considerable time and requires the coastal state to present and defend its submission. This process has raised a number of issues in respect to the commission's interpretation of certain aspects of Article 76. Further, the work and practice of the CLCS itself has excited considerable debate, especially in respect to the apparently rigorous nature of its assessment of submissions, the time that is required by the commission for the consideration of each submission, and the confidentiality issues as previously described.[60]

Geographical Setting and Enduring Disputes

Geographically, East and Southeast Asia together encompass a large number of coastal states. For the purposes of this essay, these states include Brunei Darussalam, Cambodia, China/Taiwan, Indonesia, Japan, Malaysia, the Philippines, Singapore, South Korea, North Korea, Thailand, and Vietnam.[61] Among these twelve states considered to be part of East and Southeast Asia, nine states were parties to UNCLOS before May 13, 1999. Accordingly, their deadline for continental shelf submissions, should they have extended continental shelf entitlements, was May 13, 2009.[62]

The East and South China seas are also two geographical areas that host long-standing territorial and maritime disputes. This essay will next analyze how the extended continental shelf submissions made by coastal states in the region may both add further complexity to the situation and alternatively offer increased clarity on the maritime claims of the coastal states. Prior to considering the extended continental shelf submissions themselves, however, the essay will first discuss issues related to the baselines along the coast from which maritime claims, including to an extent continental shelf rights, are measured.

Baseline Issues

One important aspect in the delineation of the outer limits of continental shelf areas relates to baselines. Baselines are fundamental to claims to maritime jurisdiction inasmuch as they consist of a series of points from which the outer limits of territorial sea and other maritime zones are

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60 See McDorman, "The Role of the Commission on the Limits of the Continental Shelf"; Macnab, "Submarine Elevations and Ridges"; and Schofield and Arsana, "Beyond the Limits," 33–41.

61 East Asia also includes land-locked states such as Laos and Mongolia. Laos, for example, has ratified UNCLOS and therefore is entitled to some access to ocean resources, including those of the continental shelf in accordance with Part X of UNCLOS.

62 For the dates on which countries ratified UNCLOS, see "Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as at 03 June 2011," http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm.

measured within the context of UNCLOS. Baselines are also partly used as a reference from which the outer limits of continental shelf are defined or measured. Baselines are used in defining the 200-nm limits and 350-nm constraint line.[63] Accordingly, such limits will reflect the type of baselines used by coastal states. In this context, it is notable that baselines are defined unilaterally by coastal states, and the CLCS has no role in assessing whether the baselines comply with the relevant provisions in UNCLOS. Excessive straight baseline claims may in turn, and problematically, result in excessive submissions for extended continental shelf rights, which could give rise to protests on the part of other interested states.

In East and Southeast Asia, baseline issues are especially intriguing because many coastal states claim straight or archipelagic baselines. Indonesia and the Philippines are two examples of archipelagic states in the region that have deposited lists of coordinates of their baselines to the UN secretary-general.[64] These two states have also submitted the outer limits of parts of their extended continental shelf to the CLCS, partially using their archipelagic baselines. It is worth noting in this context that the Philippines' 2009 archipelagic baselines have also excited debate, particularly from China on account of the inclusion of reference to part of the Spratly Islands (known as the Kalayaan Islands in the Philippines) as belonging to the Philippines' territory under the "regime of islands."[65] That said, the Philippines' new legislation appears to bring its baselines claims into conformity with UNCLOS, which had not previously been the case.[66]

Vietnam's straight baselines system is extensive and has been termed "radical,"[67] attracting diplomatic protests from the United States and Thailand.[68] China (and Taiwan) have similarly defined straight baselines, which have also attracted international criticism.[69] Malaysia's straight baselines are also potentially problematic, apparently fronting large sections of the coast that are neither highly indented nor fronted by a major fringe of islands. The term "apparently" is used here because Malaysia has yet to officially publish the exact location of its straight baselines, although their positions are suggested by maps released by Malaysia.[70] The straight baseline claims of Cambodia and, to a somewhat lesser extent, Thailand in the Gulf of Thailand are similarly questionable, though these states are not likely to make extended continental shelf submissions.

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63 "UNCLOS," art. 76, par. 5.

64 Indonesia deposited its baselines on March 11, 2009. See M.Z.N.67.2009.LOS of March 25, 2009, "Deposit by the Republic of Indonesia of a List of Geographical Coordinates of Points, Pursuant to Article 47, Paragraph 9, of the Convention," http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/IDN.htm. The Philippines deposited its baselines to the UN on April 1, 2009. See M.Z.N. 69.2009.LOS of April 21, 2009, "Deposit by the Republic of the Philippines of a List of Geographical Coordinates of Points, Pursuant to Article 47, Paragraph 9, of the Convention," http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/PHL.htm.

65 T.J. Burgonio and J. Guinto, "Arroyo Signs Controversial Baselines Bill," *Philippine Daily Inquirer*, March 12, 2009.

66 This is because the Philippines' previous claim to baselines related to straight baselines, within which internal waters are claimed, rather than to archipelagic baselines, within which archipelagic waters are claimed. Additionally, one of the previously claimed baseline segments, the closing of the Moro Gulf, measured 141 nm and therefore exceeded the maximum permissible length of 125 nm under UNCLOS. See art. 47, par. 2.

67 K. Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia* (Singapore: Oxford University Press, 1987): 16; and C.H. Schofield and M. Tan-Mullins, "Claims, Conflicts and Cooperation in the Gulf of Thailand," *Ocean Yearbook*, 22 (Leiden: Martinus Nijhoff, 2008), 75–116, 89.

68 The U.S. note of protest stated that "there is no basis in international law for the system of straight baselines provided in the declaration of November 12, 1982." See J.A. Roach and R.W. Smith, *United States Responses to Excessive Maritime Claims* (Leiden: Martinus Nijhoff, 1996), 102. For the text of Thailand's protest, see *UN Law of the Sea Bulletin* 7 (1986), 111.

69 See U.S. Department of State, "Straight Baseline Claim: China," *Limits in the Seas*, no. 117 (Washington, D.C.: Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State, 1996); and U.S. Department of State, "Taiwan's Maritime Claims," *Limits in the Seas*, no. 127 (Washington, D.C.: Bureau of Oceans and International Environmental and Scientific Affairs, 2005).

70 The positions of Malaysia's baselines are indicated most notably on the map that accompanied the Malaysia-Vietnam joint submission.

Extended Continental Shelf Submissions in East and Southeast Asia

By the May 2009 deadline for submissions on the outer limits of continental shelf, there were eight submissions that included coastal states located in East and Southeast Asia. These included submissions by Indonesia, Japan, the Philippines, Vietnam and Malaysia jointly, and Vietnam.[71] In addition, there were also four preliminary information submissions made by states in the region. The following subsections discuss the submissions and preliminary information made by those coastal states by addressing their geospatial extent and the possibility of disputes raised due to the submissions.[72]

Submissions in the East China Sea

The fundamental cause of the maritime disputes between China/Taiwan and South Korea on one hand and between China/Taiwan and Japan on the other in the East China Sea is profoundly different views as to the basis for entitlements to continental shelf rights in particular, and thus the appropriate method of maritime delimitation that is applicable in this area. An additional and serious complication in this context, though, is China/Taiwan and Japan's dispute concerning sovereignty over a group of small islands located in the southern part of the East China Sea—territories termed the Diaoyu Islands by China and the Senkaku Islands by Japan.

Japan has generally been understood to claim an equidistance or median line between opposing coastlines. A particularly problematic, not to say objectionable, aspect of such a claim from a Chinese perspective is that Japan is understood to use base points on the disputed Diaoyu/Senkaku Islands. That said, there have been indications that, apparently in response to China's extended continental shelf submission, Japan may view its maritime claims in the East China Sea as extending, in principle, to their full 200-nm extent, thus potentially expanding the area of overlapping maritime claims in the East China Sea.[73]

In contrast, China bases its claims on "natural prolongation" principles. According to this approach, each coastal state should have rights over that part of the continental shelf forming a natural prolongation of—that is, essentially connected to—its land territory into and under the sea. Thus, the location of the maritime boundary should be determined, or at least influenced, by the geophysical characteristics of the sea floor, notably its geology (composition and structure) and geomorphology (shape, form, and configuration). On this basis, the existence of the Okinawa Trough, considerably closer to Japan's Ryukyu Islands chain than to mainland China, would likely be significant. A natural prolongation-inspired continental shelf delimitation line coinciding with the Okinawa Trough would clearly be highly advantageous to China, leaving much of the East China Sea on the Chinese side of the line.

Preliminary submission of China. China submitted preliminary information related to its potential extended continental shelf on May 11, 2009.[74] The information primarily related to seabed areas underlying the East China Sea. In its preliminary information, China asserts that "in

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71 "Submissions to the Commission on the Limits of the Continental Shelf."

72 C.H. Schofield, I.M.A. Arsana, and R. Van de Poll, "The Outer Continental Shelf in the Asia-Pacific Region: Progress and Prospects," in *Law, Technology and Science for Oceans in Globalization*, ed. D. Vidas (Leiden: Martinus Nijhoff, 2010), 539–75.

73 Comment made by senior Japanese scholar at the Centre for International Law conference on "Joint Development and the South China Sea," National University of Singapore, June 16, 2011.

74 "Preliminary Information Indicative of the Outer Limits of the Continental Shelf Beyond 200 Nautical Miles of the People's Republic of China [translation]," May 11, 2009, http://www.un.org/depts/los/clcs_new/submissions_files/preliminary/chn2009preliminaryinformation_english.pdf.

accordance with Article 76" of UNCLOS, it has "continental shelf that extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."[75] In support of this view, China provided four profile lines extending seaward from selected base points.[76] Each profile line includes six points:

1. the starting point
2. the intersection point of the profile line and China's 200-nm limit
3. the point of maximum change in the gradient of the continental slope, that is, the FOS
4. the point of maximum water depth in the Okinawa Trough
5. the point 60 nm seaward from the FOS along the profile line
6. the end of the profile line[77]

Map 1 (see p. iii) illustrates China's preliminary information on the outer limits of its continental shelf. The four profile lines are essentially designed to fulfill the "test of appurtenance," that is, demonstrate that outer continental shelf areas exist seaward of the 200-nm limit measured from China's baselines in the East China Sea. Indeed, on the basis of these profile lines, China asserts in its preliminary information that the foot of its continental slope is located on the "west slope of the Okinawa Trough"[78] and that accordingly, the outer limits of China's continental shelf in the East China Sea is located along the axis of the Okinawa Trough. China's extended continental shelf preliminary submission is therefore consistent with China's long-standing arguments based on natural prolongation arguments.

The difficulty with such arguments is the fact that the areas of continental shelf that China asserts form part of its outer continental shelf in the East China Sea are, in fact, within 200 nm of a neighboring state—Japan. Although China's preliminary information makes no mention of other states specifically, it does contain a general statement in line with its "consistent position." China would delimit the continental shelf with its opposite or adjacent neighboring states through peaceful negotiations and "on the basis of the international law and the equitable principle."[79]

At the time of writing, China is understood to be engaged in preparing a full submission on the outer limits of its continental shelf and the submission will be made upon the completion of the preparation. However, China did not indicate the exact time frame for delivery of its full submission to the CLCS. For its part, Japan lodged a *note verbale* on July 23, 2009, asserting that the distance between the opposite coast of Japan and the People's Republic of China that is subject to China's continental shelf submission is less than 400 nm.[80] Accordingly, in Japan's view, the delimitation of the continental shelf in that area should be based on agreement between Japan and China "in accordance with Article 83" of UNCLOS—that is, the maritime boundary delimitation provisions applicable where EEZ rights overlap. Such a protest appears to indicate clearly the

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75 "Preliminary Information of China," 2.

76 The four base points used as the starting points for the profile lines were as follows: the Liangxiongdiyu (China's base point no.14, used twice for the first and second profile lines, which proceed offshore in different directions), the Yushanliedao (China's base point no.15), and the Taizhouliedao (China's base point no.17).

77 China made use of the General Bathymetric Chart of the Oceans (GEBCO) together with its own data and determined the location of the foot of slope by using CARIS LOTS software.

78 "Preliminary Information of China," 3.

79 Ibid., 4–5.

80 Letter of the Permanent Mission of Japan to the UN to the Secretary General of the UN, SC/09/246, July 23, 2009.

presence of a maritime dispute and this is highly likely to forestall the CLCS's consideration of submissions in this area.

It is notable that China reserved its right to make further submissions on the outer limits of its continental shelf beyond 200 nm in the East China Sea and "in other sea areas," a reference that could presage a Chinese submission in respect to parts of the central South China Sea.

Preliminary submission of Korea. The Republic of Korea[81] lodged preliminary information with the commission concerning seabed areas in the East China Sea on the same day as China, May 11, 2009.[82] According to Korea's submission of preliminary information, "the outer limits of the continental shelf in the East China Sea beyond 200 nm from the baselines from which the breadth of the territorial sea of Korea is measured are located in the Okinawa Trough." The preliminary information was stated as relating only to the part of the outer limits of Korea's continental shelf within the joint development zone (JDZ) established in 1974 between Korea and Japan.[83] Korea's outer continental shelf, as indicated through its submission of preliminary information, consists of four points seaward of the 200-nm limit measured from Korea's baselines anchored to two points on that 200-nm limit. The four points seaward of 200 nm from Korea coincide with the four points defining the southern limits of the JDZ, while the two anchoring points on the 200-nm limit as measured from Korea's baselines intersect with the JDZ's eastern and western limits respectively (see Map 1). Korea's preliminary information goes on to state that a full submission would be submitted in the future depending upon maritime delimitation with its neighbors. At the time of writing, a full submission had yet to materialize.

Korea's preliminary submission also indicated that Korea had since 1996 been actively negotiating with both China and Japan on the delimitation of maritime boundaries and that such consultations were ongoing.[84] As is the case for China's submission of preliminary information, Korea's preliminary outer continental shelf assertions related to seabed areas in that while they are over 200 nm from Korea, they are in fact within 200 nm of Japan. Japan lodged a note concerning Korea's preliminary information on July 23, 2009, the same day it submitted a response to China's preliminary information. Analogous to its response to China, Japan's response to Korea asserts that the distance between the opposite coast of Japan and Korea, which is subject to Korea's continental shelf submission, is less than 400 nm.[85] Accordingly, in Japan's view, the delimitation of the continental shelf in that area should be based on agreement between Japan and Korea "in accordance with Article 83" of UNCLOS. This clear indication of the presence of a maritime dispute suggests that it is highly unlikely, failing agreement among the parties concerned to the contrary, that the CLCS will be able to consider Korea's full submission when eventually received.

The remarkable and somewhat counterintuitive aspect of both China's and Korea's submissions of preliminary information, as noted above, is that they relate to areas of allegedly extended continental shelf that are in fact within 200 nm of the baselines of another state, Japan. Consequently,

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81 Hereinafter, "Korea."

82 "Preliminary Information Regarding the Outer Limits of the Continental Shelf Pursuant to Paragraph 8 of Article 76 of the United Nations Convention on the Law of the Sea 1982 and the Decision of the Eighteenth Meeting of States Parties to the UNCLOS," Republic of Korea, May 11, 2009.

83 "Agreement between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries," January 30, 1974 (entered into force June 22, 1978).

84 "Preliminary Information of Republic of Korea," 4.

85 Letter of the Permanent Mission of Japan to the UN to the Secretary General of the UN, July 23, 2009.

it would seem that a maritime dispute exists and the CLCS would be unable to examine the full submissions of China and Korea when they are in due course presented and subsequently offer recommendations. Indeed, it appears that the only way in which the commission could consider such submissions related to the East China Sea is if the interested states were to agree among themselves that the commission could proceed with its evaluation of these submissions without prejudice to the delimitation of maritime boundaries. Given the peculiar scenario of submissions for extended continental shelf rights within what another state regards as part of its EEZ, it is highly unlikely that the CLCS could examine the full submissions of either China or Korea, as and when they are received by the commission, since a clear maritime dispute exists.

Submissions in the South China Sea

Joint submission by Malaysia and Vietnam. Malaysia and Vietnam made a joint submission on May 6, 2009, for the seabed area seaward of the straight baselines fronting the mainland coasts of the islands off the Vietnamese mainland and Malaysia's Sabah and Sarawak regions in the southern South China Sea.[86] To the west, the area covered by the joint submission is limited by continental shelf boundaries agreed between Indonesia and Malaysia (1969) and between Indonesia and Vietnam (2003). The northeastern side of the area is provided by Vietnam's 200-nm limit, while the southeastern side is limited by Malaysia's and the Philippines' respective 200-nm limits as measured from the straight baselines along the mainland coasts of these states. The northern side of the area was defined by a line delineated 60 nm from the foot of the continental shelf intersecting with 200-nm limits measured from the baselines along the surrounding mainland and main island coasts (see **Map 2**, p. iv).

The area of outer shelf submitted by Malaysia and Vietnam is in the vicinity of the much disputed Spratly Islands and has consequently proved controversial. The joint submission prompted China to state in a diplomatic note directed to the UN secretary-general on the day after submission of Malaysia and Vietnam's joint claim that China has "indisputable sovereignty over the islands in the South China Sea," and that consequently, Malaysia and Vietnam's joint submission "seriously infringed China's sovereignty."[87] China's diplomatic notes "seriously request" that the CLCS not consider the submissions in question. It is also notable that China's protest notes included a map depicting the nine-dashed line mentioned above.

China's protests were met with counter-assertions on the part of both Malaysia and Vietnam in relation to the joint submission and from Vietnam concerning the northern area. Both the Malaysian and Vietnamese diplomatic notes stated that their submissions "constitute legitimate undertakings" in the implementation of their obligations as parties to UNCLOS.[88] The Malaysian note went on to emphasize that the joint submission was without prejudice to maritime delimitation or the existence of a maritime dispute in the region and that Malaysia had informed China of its position prior to the joint submission being made.[89] Vietnam's note was less conciliatory, restating Vietnam's position that the "Hoang Sa (Paracels) and Truong Sa (Spratlys) archipelagos are parts of Viet Nam's territory" and that "Viet Nam has indisputable sovereignty over these archipelagos."

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86 Executive Summary, "Joint Submission 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 1982 in respect of the southern part of the South China Sea," May 6, 2009.

87 Note from the Permanent Mission of the People's Republic of China addressed to the Secretary General of the UN, CML/17/2009, May 7, 2009.

88 Note from the Permanent Mission of Malaysia addressed to the Secretary General of the UN, HA 24/09; and Note from the Permanent Mission of the Socialist Republic of Vietnam to the UN addressed to the Secretary General of the UN, 86/HC-2009.

89 Note from the Permanent Mission of Malaysia, HA 24/09.

Vietnam's note further asserted that China's claims in the South China Sea, as shown on the map attached to the Chinese protest note,[90] have "no legal, historical or factual basis" and are therefore "null and void."[91]

On August 4, 2009, the Philippines also submitted a note verbale concerning the joint submission made by Vietnam and Malaysia.[92] It asserts that Malaysia and Vietnam's joint submission "lays claims on areas that are disputed," first because the areas overlap with the Philippines' continental shelf and second because of the "controversy arising from the territorial claims on some of the islands in the area including North Borneo."[93] Accordingly, the Philippines "is constrained to request the Commission to refrain from considering" the joint submission made by Vietnam and Malaysia. This note from the Philippines elicited responses from both Vietnam (August 18, 2009) and Malaysia (August 21, 2009). In their responses, both states asserted that their joint submission "constitute[d] legitimate undertakings" in the implementation of UNCLOS that conformed to the pertinent provisions of that convention and that the joint submission was without prejudice to future maritime boundary delimitation with their neighbors.[94] In addition, Vietnam also reaffirmed its "consistent position" that it has "indisputable sovereignty" over the Hoang Sa (Paracel Islands) and Truong Sa (Spratly Islands) archipelagos. For its part, Malaysia informed the UN secretary-general that it had never recognized the claims of the Philippines over its state of Sabah, formerly known as North Borneo. It further stated that the Philippines' claim over North Borneo "has no basis under international law" and asserts that Malaysia "respectfully requests the Commission to consider" the joint submission.[95] Despite Malaysia and Vietnam reaffirming their positions, in light of the protests and counterprotests outlined above, there appears to be little possibility that the CLCS will consider the joint submission.

Submission by Vietnam. One day after submitting a joint submission with Malaysia, Vietnam independently made a further submission to the CLCS concerning an area of seabed in the South China Sea, located to the north of the area subject to the joint submission with Malaysia.[96] The northern side of the area submitted was stated to be limited by an "equidistance line between the territorial sea baselines of Vietnam and the territorial sea baselines of the People's Republic of China," while the western side was limited by Vietnam's 200-nm limit measured from its territorial sea baseline.[97] The southern and eastern side of the continental shelf was a line defined pursuant to Article 76 of UNCLOS (see Map 2).[98]

Similar to the previous submission that Vietnam submitted jointly with Malaysia, this submission also provoked a strong protest from China. The basis of China's diplomatic note on this issue directed to the UN secretary-general again related to sovereignty over islands in the

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90 The Chinese map depicts the so-called "U-shaped line," which has sometimes been characterized as a general claim by China to the South China Sea as historic waters, territorial sea, or EEZ. Alternatively, the U-shaped line may indicate that all land territory (that is, islands) within the discontinuous line are claimed by China as being under its sovereignty.

91 Note from the Permanent Mission of Malaysia, HA 24/09.

92 Note verbale of the Philippine Mission to the UN to the Secretary General of the UN, no. 000819, August 4, 2009.

93 Ibid.

94 Note from the Permanent Mission of Malaysia to the UN addressed to the Secretary General of the UN, HA 41/09; and Note from the Permanent Mission of the Socialist Republic of Vietnam to the UN addressed to the Secretary General of the UN, 240/HC-2009.

95 Note from the Permanent Mission of Malaysia, HA 41/09.

96 Executive Summary, "Submission 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 1982, Partial Submission in Respect of Vietnam's Extended Continental Shelf: North Area (VNM-N)," May 7, 2009.

97 Executive Summary, Vietnam, 2.

98 Ibid., 2–3.

South China Sea. The Chinese protest note, perhaps unsurprisingly, therefore uses near-identical language to that used in relation to Malaysia and Vietnam's joint submission. Specifically, China stated that it has "indisputable sovereignty" over the islands in the South China Sea together with their "adjacent waters" and that it also holds "sovereign rights over the relevant waters as well as the seabed and subsoil thereof."[99] China's protest note further states that Vietnam's submission "seriously infringed China's sovereignty" and that accordingly China "seriously requests" the commission not to consider Vietnam's submission.

Vietnam similarly swiftly responded in the same manner that it had to the Chinese protest over its joint submission with Malaysia. Vietnam stated that its submissions to the CLCS "constitute legitimate undertakings" in the implementation of UNCLOS that conform to the pertinent provisions of that convention.[100] Vietnam further stated that the Hoang Sa (Paracel Islands) and Truong Sa (Spratly Islands) archipelagos "are parts of Vietnam" over which it has "indisputable sovereignty."[101] The Philippines also submitted a note verbale stating that Vietnam's submission encompasses "areas that are disputed because they overlap with those of the Philippines.'"[102] Vietnam responded swiftly to this note verbale by asserting once again that the submission made by Vietnam is without prejudice to future maritime delimitation with its relevant neighbors.[103] Analogous issues to those that arose in the wake of the joint Malaysian and Vietnamese submission in relation to the status of the disputed South China Sea islands also occurred after Vietnam's individual submission.

Further communications. Both the joint submission of Malaysia and Vietnam and the independent submission of Vietnam, together with the protest notes they provoked, led to further pertinent communications directed to the UN secretary-general. In particular, China's inclusion of a map showing the nine-dashed line with its protest notes regarding both the Malaysia-Vietnam submission and Vietnam's independent submission, led to protests from other interested states, notably Indonesia[104] and the Philippines,[105] with the latter note also generating a vigorous response from China.[106]

Indonesia used its note verbale of July 8, 2010, to the UN secretary-general to emphasize that it is not a claimant state in respect of the island sovereignty disputes in the South China Sea and that it has played "an impartial but active role" in establishing confidence-building measures among the claimant states. However, Indonesia observed that it has followed closely the debate over "the so-called 'nine-dotted-lines' map" and stated that "there is no clear explanation as to the legal basis, the method of drawing, and the status of those separated dotted lines." Indonesia also expressed the view, partially based on statements of Chinese officials, that the "remote and very

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99 For the English translation of China's reaction, see http://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf.

100 For Vietnam's response to China's reaction, see no. 86/HC-2009, http://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/vnm_re_chn_2009re_vnm.pdf.

101 Ibid.

102 Note verbale of the Philippine Mission to the UN to the Secretary General of the UN, August 4, 2009.

103 For Vietnam's response to the Philippines' reaction, see no. 240/HC-2009, http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/vnm_re_phl_2009re_vnm.pdf.

104 Note from the Permanent Mission of Indonesia to the UN to the Secretary-General of the UN, July 8, 2010, no. 840/POL-703/VII/10, http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/idn_2010re_mys_vnm_e.pdf.

105 Note from the Permanent Mission of the Republic of the Philippines to the UN to the Secretary-General of the UN, August 4, 2009, no.000819, http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/clcs_33_2009_los_phl.pdf.

106 "China Communication dated April 14, 2001," on the UN webpage, "Commission on the Limits of the Continental Shelf (CLCS) Outer Limits of the Continental Shelf beyond 200 Nautical Miles from the Baselines: Submissions to the Commission: Submission by the Socialist Republic of Viet Nam," http://www.un.org/Depts/los/clcs_new/submissions_files/submission_vnm_37_2009.htm.

small features" of the South China Sea "do not deserve exclusive economic zone or continental shelf of their own." Indonesia concluded that China's "nine-dotted-lines" map "clearly lacks international legal basis and is therefore tantamount to upset[ting] the 1982 UNCLOS."[107]

The Philippines' note of April 5, 2011, also rejected China's nine-dashed line map.[108] The note stated that the "Kalayaan Island group"—that is, the part of the Spratly Islands group claimed by the Philippines—constitutes an integral part of the Philippines over which the country has sovereignty and jurisdiction. The note went on to assert that the Philippines exercises sovereignty and jurisdiction over the waters around or adjacent to each of the features making up the Kalayaan Islands under the international law principle that "the land dominates the sea," as stipulated by UNCLOS. The Philippines also rejected China's claim to "relevant waters, seabed and subsoil" related to the islands of the Kalayaan Islands group, as this jurisdiction belongs to the Philippines.[109]

It is worth noting in this context that the Philippines has itself made a partial submission for extended continental shelf rights. The submission of the Philippines of April 8, 2009, relates to the Benham Rise region, located off the east coast of Luzon Island.[110] This partial submission itself is unlikely to be problematic because there are no overlaps anticipated with the submissions of neighboring states in the Benham Rise area. There have been suggestions, however, that the Philippines may make further partial submissions in relation to seabed areas near the Scarborough Shoal and the Kalayaan Islands group (the Spratly Islands).[111]

Such additional partial submissions, should they be made in respect of parts of the South China Sea, are highly likely to result in a further series of protests and counterprotests similar to those provoked by the aforementioned submissions of Vietnam, and Malaysia and Vietnam jointly. While at the time of writing China had yet to respond to Indonesia's note, as observed above, China replied to the note of the Philippines in robust terms. On April 14, 2011, China submitted a note verbale to the UN in reply to the Philippines' protest, reiterating its "indisputable sovereignty over the islands in the South China Sea" as well as over "adjacent waters" and "sovereign rights and jurisdiction" over "relevant waters as well as the seabed and subsoil thereof." China asserted that its sovereignty and related rights and jurisdiction "are supported by abundant historical and legal evidence."

The strongly worded Chinese note went on to state that the content of the Philippines' note of April 5, 2011, was "totally unacceptable to the Chinese Government," because "the so-called Kalayaan Island Group" claimed by the Philippines "is in fact part of China's Nansha [Spratly] Islands." Further, China argued that the Philippines had "never made any claims to the Nansha [Spratly] Islands or any of its components" prior to the 1970s and that since the 1970s, the Philippines had "started to invade and occupy some islands and reefs of China's Nansha [Spratly] Islands and made relevant territorial claims, to which China objects strongly." China went on

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107 Note from the Permanent Mission of Indonesia to the UN to the Secretary-General of the UN, July 8, 2010, no. 840/POL-703/VII/10, http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/idn_2010re_mys_vnm_e.pdf.

108 Note from the Permanent Mission of the Republic of the Philippines to the UN to the Secretary-General of the UN, April 5, 2011, no. 00028, http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/phl_re_chn_2011.pdf.

109 Note verbale of the Philippine Mission to the UN, no. 000228.

110 Executive Summary, "A Partial Submission of Data and Information on the Outer Limits of the Continental Shelf of the Republic of the Philippines Pursuant to Article 76(8) of the United Nations Convention on the Law of the Sea," http://www.un.org/Depts/los/clcs_new/submissions_files/submission_phl_22_2009.

111 For example, in the context of debates over the Philippines' revised baselines, Senator Edgardo Angara referred to the Reed Bank in the South China Sea as part of the extended continental shelf of the Philippines. See "Senators to Oppose Santiago Plan to Kill Baselines Bill," *Philippine Headline News*, April 27, 2008.

to state that such occupations and other related acts "constitute[s] infringement upon China's territorial sovereignty."[112]

China's note further argued that "illegal occupation" of Chinese territory on the part of the Philippines could not be used to support its territorial claims under the legal doctrine *ex injuria jus non oritur*—"a right cannot rise from a wrong." Finally, China's note advanced the view that the Chinese government had "since the 1930s" given publicity to the geographical scope of "China's Nansha [Spratly] Islands," which are therefore "clearly defined." China referred to the relevant provisions of UNCLOS together with the Law of the People's Republic of China on Territorial Sea and Contiguous Zone (1992) and the Law on the Exclusive Economic Zone and the Continental Shelf of the PRC (1998), and stated explicitly that "China's Nansha Islands is fully entitled to Territorial Sea, EEZ, and Continental Shelf."[113]

Preliminary submission of Brunei. Brunei Darussalam[114] made a submission of preliminary information to the CLCS on May 12, 2009.[115] In this initial submission, Brunei asserted that on the basis of the technical studies it had carried out thus far, its continental shelf extends beyond 200 nm from its relevant baselines. Brunei did, however, note "there may exist areas of potential overlapping entitlements in respect of its continental shelf beyond 200 nautical miles" and that its preliminary submission was made "without prejudice to any future delimitation of boundaries with other States."[116]

Brunei's preliminary submission states that the edge of its continental margin will be established in accordance with the Hedberg formula, that is, by fixed points not more than 60 nm from the foot of the continental slope.[117] The preliminary submission further states its full submission will demonstrate that "there is a continuous natural prolongation from the territory of Brunei extending across the areas known as the Northwest Borneo Shelf, the Northwest Borneo Trough, and the Dangerous Grounds to the edge of the deep ocean floor of the South China Sea Basin."[118] The term "Dangerous Grounds" is sometimes used on nautical charts and in hydrographic information to label the area occupied by the Spratly Islands group.

Brunei also indicated that its outer continental shelf lies within the 350-nm constraint line.[119] However, Brunei's preliminary information does not include any maps or charts, and it does not contain a list of coordinates of the outer limits of its continental shelf. Accordingly, it is not possible to tell the precise position of such lines.

It is clear from Brunei's preliminary submission that Brunei is highly likely to make a full submission in respect of areas of outer continental shelf already subject to the Malaysia-Vietnam joint submission considered above. Finally, while Brunei observed that it had made "significant progress," its full submission had "yet to be completed," but it anticipated making such a full

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112 Note verbale from the Permanent Mission of the People's Republic of China, CML 8/2011, April 14, 2011, http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2011_re_phl_e.pdf.

113 Note verbale from the Permanent Mission of the People's Republic of China.

114 Hereinafter, "Brunei."

115 "Brunei-Darussalam's Preliminary Submission Concerning the Outer Limits of Its Continental Shelf," May 12, 2009, available on UN webpage, "Preliminary Information Indicative of the Outer Limits of the Continental Shelf beyond 200 Nautical Miles," http://www.un.org/Depts/los/clcs_new/commission_preliminary.htm.

116 "Brunei-Darussalam's Preliminary Submission," 4. Brunei did, however, note that it had agreed maritime boundaries with Malaysia by virtue of two 1958 British Orders in Council as well as a territorial sea and EEZ boundary delimited through an Exchange of Letters dated March 16, 2009.

117 Ibid., 5.

118 Ibid., 6.

119 Ibid., 6.

submission to the commission "within 12 months."[120] However, at the time of writing, well beyond the twelve-month time frame mentioned, Brunei had yet to make its full submission.

Position Clarification

While on the one hand the extended continental shelf submissions and the reactions to them can be considered to have added complexity and contention to the maritime jurisdictional scenario in the South China Sea, as evidenced by the flurry of protests and counterprotests they provoked, there is a significant counterpoint to this view. In fact, these multiple submissions and the responses of interested states have arguably led to significant clarification in the position of some states. That said, this is a qualified step forward inasmuch as the submissions, and the diplomatic correspondence associated with them, have also served to highlight key differences between the states involved in maritime and territorial disputes in the East and South China seas. Such differences are particularly evident in the East China Sea, where China and Korea take a fundamentally different approach to maritime entitlements than does Japan. This has been underscored by the preliminary submissions advanced.

With respect to the South China Sea, however, there are signs of emerging clarity, in part stimulated by the extended continental shelf submissions process. Vietnam and Malaysia, for example, have clarified the location of their EEZ limits as being 200 nm from the baselines fronting their mainland and main island coastlines, rather than asserting 200-nm claims from islands that they claim among the Spratly Islands group. In addition, both states measured an extended continental shelf from their mainland territory, not from claimed islands among the Spratly Islands. With regard to sovereignty over some of the islands in the South China Sea, they confirmed their claims.

The Malaysia-Vietnam joint submission, together with Vietnam's independent submission, and the hints from the other littoral states that they may also make submissions, therefore, could have significant implications for the legal status of the South China Sea islands. Extended continental shelf areas only exist in the South China Sea if the disputed islands in that sea are incapable of generating extended maritime claims. If the South China Sea islands are capable of generating EEZ and continental shelf rights, then no area of potential outer continental shelf beyond 200 nm from the nearest island or mainland baseline exists. Thus, by making outer submissions or contemplating such submissions, several of the South China Sea coastal states appear to be strongly implying that the much disputed islands of the South China Sea are incapable of generating EEZ and continental shelf rights. However, it is also clear that China takes the contrary view. In any case, the commission will not likely consider the submissions because China and the Philippines have both claimed that the submissions involve territorial and maritime disputes. Both countries have specifically requested the commission not to consider both the independent submission of Vietnam and that of Malaysia and Vietnam jointly.

With respect to baselines, the Philippines brought its archipelagic baselines into line with the terms of UNCLOS. Similarly, Malaysia has also clarified its use of straight baselines along the northern coast of Borneo. Malaysia's straight baselines in this area are depicted clearly in maps accompanying its joint submission with Vietnam, despite the fact that at the time of writing, the coordinates of these baselines had yet to be officially published in the public domain.

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120 "Brunei-Darussalam's Preliminary Submission," 4, 7.

Further, while attention was in large part focused on China's inclusion of its nine-dashed line map with its protest notes, the language used in the Chinese protests is instructive. In particular, China's claims to "sovereignty" over waters "adjacent" to the disputed South China Sea islands and "sovereign rights" over "relevant waters as well as the seabed and subsoil thereof" are seemingly consistent with claims to territorial sea, EEZ, and continental shelf rights made from the disputed islands, as opposed to a claim to historic waters or similar within the nine-dashed line, as has been speculated.[121]

This view is underscored by the content of China's aforementioned note to the UN secretary-general of April 14, 2011. The note itself was a counterprotest to a protest note lodged on the part of the Philippines over China's use of the nine-dashed line map in its own protests directed against the extended continental shelf submissions of Vietnam alone and Malaysia and Vietnam jointly. China's April 14, 2011, note stated that it was China's view that the disputed islands are "fully entitled to territorial sea, EEZ and continental shelf." While the language used by China in its official communications to the UN in relation to extended continental shelf issues in the South China Sea is arguably consistent with maritime jurisdictional claims in accordance with UNCLOS, unfortunately it is not possible to be definitive on this point as China has yet to be explicit regarding the meaning of the nine-dashed line. Nonetheless, the fact that there is increasing clarity as to the maritime claims of the South China Sea claimant states is to be welcomed, as is the fact that these same states are collectively not only parties to UNCLOS but are increasingly articulating their maritime claims in accordance with its terms. The counterpoint to this apparent progress is that not only are certain maritime claims becoming clearer but, as a result, the differences that exist between them have been thrown into stark relief.

Concluding Remarks

In combination, East and Southeast Asia is a region hosting long-standing sovereignty and sovereign rights disputes. Sovereignty over islands, rocks, and reefs is one of the most infamous sources of conflict in the region. In addition, competing maritime claims are also important sources of interstate stress in the region. With these issues in mind, it is already clear that the maritime geopolitical scenario in the region is complicated. The obligation of coastal states in the region to submit information to the CLCS regarding the outer limits of their continental shelf areas has added a fresh dimension to these disputes, with both positive and negative implications.

Extended continental shelf submissions and disputes related to them arguably constitute an additional source of tension by adding further conflicts over sovereign rights on top of current issues, which are predominantly themselves sovereignty-related (that is, directly related to sovereignty over island territory). Among both the submissions and preliminary submissions, it is clear that overlapping entitlements of continental shelf between states clearly exist. Certain submissions encompassing disputed areas such as the East China Sea and the Spratly Islands potentially serve as fresh sources of stress among the concerned states in the region, thereby highlighting key differences among them. In addition, some states employ straight or archipelagic baselines, a practice that may be controversial in defining the outer limits of

[121] Sam Bateman and Clive Schofield, "Outer Shelf Claims in the South China Sea: New Dimension to Old Disputes," RSIS Commentaries, no. 65, July 2009; and Robert Beckman, "South China Sea: Worsening Dispute or Growing Clarity in Claims?" RSIS Commentaries, no. 90, August 2010.

their continental shelf. Controversy may occur because straight and archipelagic baselines may be excessive in their designations and the CLCS has no control over their quality and their compliance with UNCLOS.

It should, however, be recalled that many of the submitting states were merely reacting to the deadline set for such submissions in fear of potentially losing extended continental shelf rights. In this context, it should be re-emphasized that the CLCS itself lacks the mandate to resolve overlapping or competing submissions—this is a matter for coastal states to address among themselves. Further, although the efforts of coastal states in East and Southeast Asia in delineating the outer limits of continental shelf may add further complexity to the regional situation, the submissions and the subsequent series of reactions and counter-reactions are leading to a welcome clarification in the maritime claims of several states involved, especially the South China Sea claimant states.

Among all these submissions, the joint submission by Vietnam and Malaysia and the independent submission by Vietnam are particularly significant. The submissions have implications for the widely disputed Spratly Islands in the South China Sea, and involve the use of straight baselines by Malaysia and Vietnam.[122] In addition, the submissions include the part of the continental shelf where the Spratly Islands are located. These submissions have significant implications in terms of the insular status of these territories. The clear implication of these submissions is that, at least as far as the submitting states are concerned, the disputed islands of the South China Sea are incapable of generating EEZ and continental shelf rights.

Moreover, extended continental shelf submissions arguably have the potential to exert positive as well as negative influences on the conflict resolution process in the region. Due to increasing tensions, states in the region may arguably devote more attention to this issue and ideally devote greater efforts to overcoming the obstacles to dispute resolution that they are facing. Extended continental shelf submissions, therefore, have the potential to act as the catalyst for dispute resolution. Ultimately, however, it is up to the coastal states to transform these disputes into avenues of collaboration. The increasing clarity in the maritime claims of the states of East and Southeast Asia unveiled by the extended continental shelf submissions process should assist in this endeavor.

[122] Executive Summary of Joint Submission by Vietnam and Malaysia, available at "Commission on the Limits of the Continental Shelf (CLCS) Outer Limits of the Continental Shelf beyond 200 Nautical Miles from the Baselines: Submissions to the Commission: Joint submission by Malaysia and the Socialist Republic of Viet Nam," http://www.un.org/Depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm.

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The Regime of Islands under UNCLOS: Implications for the South China Sea

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EXECUTIVE SUMMARY

This essay explores the contentious issue of islands and their associated claims to maritime jurisdiction in international law with particular reference to the islands/rocks in East and Southeast Asia and especially the disputed islands of the South China Sea.

MAIN ARGUMENT

Islands remain a critical factor in maritime and territorial disputes in East and Southeast Asia, both with respect to sovereignty disputes over island territories and with regard to their capacity to generate maritime jurisdictional claims for the delimitation of maritime boundaries. The regime of islands, as provided in Article 121 of the UN Convention on the Law of the Sea (UNCLOS), remains unclear, and no authoritative ruling or consensus on its interpretation has yet emerged. Recent developments, however, have clarified the positions of some of the parties to the South China Sea islands disputes on this issue. There is also a trend toward reducing the effect of sparsely inhabited or uninhabited islands in the generation of maritime claims and the delimitation of maritime boundaries. The latter development suggests that disputed islands, even if deemed capable of generating extended claims to maritime jurisdiction, would have only a limited capacity to generate such claims compared with the surrounding mainland and main island territories. Acceptance of this view by, for example, the South China Sea claimant states would result in considerable narrowing of the area of overlapping maritime claims, thus significantly simplifying the dispute.

POLICY IMPLICATIONS

- An authoritative interpretation of Article 121 of UNCLOS, though highly desirable, is presently lacking, and both state practice and international jurisprudence are of only limited utility on this issue.
- It is increasingly clear that the parties to disputes over East and Southeast Asian islands take distinctly differing views on the capacity of certain features to generate broad maritime claims. This remains a key obstacle to the achievement of a peaceful settlement of regional maritime and territorial disputes.
- The trend toward minimizing the role of small, remote islands in the generation of claims to maritime space and the delimitation of maritime boundaries is encouraging and suggests approaches to overcoming the island/rock conundrum in the South China Sea. This should help moderate or reduce the scope of overlapping maritime claims and subsequently "defuse the bomb" of potential conflict over disputed islands in the region.

A critical source of dispute in both the East China Sea and South China Sea is the question not only of sovereignty over numerous disputed islands, but also their status in terms of international law and thus their capacity to generate extended claims to maritime jurisdiction. That is, the question is whether a particular insular feature is either an island capable of generating claims to exclusive economic zone (EEZ) and continental shelf rights, or a mere "rock" incapable of doing so. A related issue is the potential role of such features in the delimitation of international maritime boundaries. Consideration of the regime of islands in the international law of the sea is fundamental to such disputes and has proved to be an enduring source of contention among states and international legal scholars.

It is worth noting that a key cause of uncertainty and disputes internationally is that states tend to claim as much in terms of their rights as possible. While in principle such claims need to be made in accordance with international law, interpretations of international legal provisions can vary greatly. It is easy to observe such phenomena in the application and interpretation of certain articles provided in the United Nations Convention on the Law of the Sea of 1982 (UNCLOS).[1] A notable example in this context is provided by Article 121 of UNCLOS, concerning the regime of islands, and the contrasting interpretations of the article that different states adopt according to their national interests. As the interpretation of Article 121 deals with the status of rocks and islands, this inevitably affects a state's national interests in terms of claiming or not claiming potentially expansive areas of maritime jurisdiction.

This essay explores the regime of islands under UNCLOS and thus the interpretation of Article 121, paragraph 3, specifically, so that the legal context can be clarified and applied, as far as is possible, to the disputed islands and rocks in the South China Sea region. The development of Article 121 of UNCLOS is addressed, and the question of defining islands is examined prior to consideration of the critical question of distinguishing between islands capable of extended claims to maritime jurisdiction—that is, continental shelf and EEZ rights—and "rocks" which are, in accordance with Article 121, paragraph 3, of UNCLOS, deemed incapable of generating such claims. Relevant state practice as well as the judgments and decisions of the International Court of Justice (ICJ) and other international tribunals are assessed, including in particular appraisal of the 2009 case *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*. Discussion then turns to the question of the role of islands in generating claims to maritime jurisdiction and in the delimitation of maritime boundaries. The implications of the foregoing questions for the disputed insular features of the South China Sea are then explored.

It is not this essay's purpose to undertake a comprehensive review of the substantial literature that already exists on the regime of islands in international law.[2] However, the key elements of the regime of islands—its drafting history and subsequent practice concerning the treatment of islands—are addressed to provide necessary context. The authors suggest in particular that the critical issue is not the well-worn island/rock debate, but the role of small and often remote and

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[1] The convention was adopted in Montego Bay, Jamaica, on December 10, 1982, and entered into force on November 16, 1994. UN Division for Ocean Affairs and the Law of the Sea, "United Nations Convention on the Law of the Sea (UNCLOS)."

[2] See, for example, Jonathan I. Charney, "Rocks that Cannot Sustain Human Habitation," *American Journal of International Law* 93, no.4 (1999): 863–78; Alexander G.O. Elferink, "Clarifying Article 121 (3) of the Law of the Sea Convention: The Limits Set by the Nature of International Legal Processes," *Boundary and Security Bulletin* 6, no. 2 (1998): 58–68; Barbara Kwiatkowska and Alfred H.A. Soons, "Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own," *Netherlands Yearbook of International Law*, vol. XXI (1990), 139–81; J.R. Victor Prescott and Clive H. Schofield, *The Maritime Political Boundaries of the World* (Leiden: Martinus Nijhoff, 2005), 61–75; Jon M. Van Dyke and Robert A. Brooks, "Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources," *Ocean Development and International Law* 12, no. 3–4 (1983): 265–84; and Jon M. Van Dyke, Joseph Morgan, and Jonathan Gurish, "The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?" *San Diego Law Review* 25, no. 3 (1988): 425–94.

sparsely inhabited or uninhabited islands in generating claims to maritime jurisdiction and in influencing the course of international maritime boundaries. It is suggested here that some clarity is emerging in the latter respect. These developments are, in the view of the authors, of direct relevance to the numerous island-related disputes in East and Southeast Asia, and it is hoped that they may have a positive impact in terms of alleviating regional tensions, especially those concerning, for example, the Spratly Islands disputes in the South China Sea. In essence, it is hoped that, although the issue of islands and rocks remains an enduring source of disagreement and dispute, ways to minimize and overcome such disputes also exist.

The Regime of Islands under UNCLOS

In order to decide whether a particular insular feature can generate extended zones of maritime jurisdiction, that is, EEZ and continental shelf rights, it is necessary to closely examine the international legal regime of islands, as provided by Article 121 of UNCLOS:

> *Regime of islands*
>
> An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
>
> Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
>
> Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

Paragraph 1 of Article 121 identifies four key requirements for a feature to qualify legally as an island: an island must be "naturally formed," an "area of land," "surrounded by water," and "above water at high tide"—requirements for insular status that are relatively uncontroversial.[3] Further, paragraph 2 of Article 121 establishes that the maritime claims made from islands should be determined in the same manner as for "other land territory." This suggests that islands should be treated in the same fashion as mainland coasts.

However, Article 121, paragraph 3, of UNCLOS provides for a subcategory of islands, "rocks," which are incapable of supporting human habitation or an economic life of their own. Such features "shall have no exclusive economic zone or continental shelf."

It should be noted that the regime of islands does not include either artificial islands or low-tide elevations. According to Article 60, paragraph 8, of UNCLOS, artificial islands, together with artificial installations and structures, "do not possess the status of islands," "have no territorial sea of their own," and are to have no impact on the delimitation of maritime boundaries.[4] Low-tide elevations, which are submerged at high tide but above water at low tide, are incapable of generating maritime claims in their own right but may be used as base points for the measurement

[3] Prescott and Schofield, *Maritime Political Boundaries of the World*, 58–61.

[4] Safety zones of up to 500 meters (m) in breadth may be defined around such structures in accordance with UNCLOS, Article 60, paragraph 5, however.

of such claims if located wholly or partially within the breadth of the territorial sea as measured from the normal baseline of a state's mainland or island coasts.[5]

The Island/Rock Conundrum

It is clear that the distinction between an island capable of extended maritime claims (EEZ and continental shelf) and a mere "rock" that cannot generate such claims is a critical issue and a potential source of dispute between neighboring states.[6] What might be termed "full" island status confers an enormous advantage in terms of capacity to generate claims to maritime jurisdiction as compared to a feature being classified as a rock: if an island had no maritime neighbors within 400 nautical miles (nm), it could generate 125,664 square nautical miles (nm^2)—or 431,014 square kilometers (km^2)—of territorial sea, EEZ, and continental shelf rights. In stark contrast, a rock could generate a territorial sea claim of only 452 nm^2 (1,550 km^2).[7]

From an ordinary understanding, the term "islands" may be translated to mean anything from tiny sandbanks to large landmasses, all depending on the functional purposes of the usage by the state that owns it. As noted above, UNCLOS provides the international legal definition and maritime entitlements of an island through paragraphs 1 and 2 of Article 121. However, Article 121, paragraph 3, leaves unclear how the disadvantaged subcategory of island (the "rock") is to be identified. More specifically, there is no plain interpretation of the terms "sustain human habitation" or "an economic life of its own," which are both stipulated in Article 121, paragraph 3. Yet, as noted above, the distinction between an insular feature being capable of generating extended maritime claims as opposed to being a rock has enormous potential consequences in terms of the scope of maritime claims that can be made as well as in relation to the role of such features in maritime boundary delimitation. Moreover, this issue directly impacts the national interests of the coastal states claiming maritime zones from islands—that is, territorial sea, EEZ, and continental shelf rights within 200 nm and potentially even beyond the 200-nm limit. Inevitably, within the maritime claims potentially made from islands, valuable marine resources are also at stake in these debates.

These issues remain highly relevant to the island-related disputes that exist in the East China Sea and, particularly, the South China Sea. With respect to the South China Sea specifically, due to its complicated geographical, geological, geopolitical, and legal features, this region is often considered a key potential "flashpoint" in East Asia and is treated as one of the indicators for Southeast Asian security. There are more than one hundred insular features, including reefs, rocks, sandbanks, islets, and islands in the Spratly Islands group alone, which are claimed in whole or in part by Brunei, China, Indonesia, Malaysia, the Philippines, Taiwan, and Vietnam. As far as the "islands" in the Spratlys are concerned, the aforementioned island/rock issue is a crucial consideration as enormous potential claims to maritime areas, and the marine resources within them, are viewed as being at stake. Indeed, uncertainty over this issue might be one of the most important factors in amplifying conflicts in the region.

The inherently vague and imprecise wording in Article 121, paragraph 3, has led to sustained criticism of that section of UNCLOS.[8] For example, what do terms such as "human habitation,"

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[5] "UNCLOS," art. 13, par. 1.

[6] It should be noted in the context of a section devoted to island/rock issues that "rocks," as defined under Article 121 of UNCLOS, are a type of island such that the question of a feature being "an island or a rock" does not arise.

[7] For the purposes of these theoretical calculations, it is assumed that the insular features in question have no land area.

[8] See, for example, the literature cited in fn. 2.

"economic life," and "of their own" mean? Is there any qualitative element that could be employed to distinguish a rock from an island capable of being used to advance broad claims of maritime jurisdiction, specifically EEZ and continental shelf rights? It can, however, be noted that use of the word "or" between "human habitation" and "economic life of their own" suggests that an insular feature does not need both human habitation and an economic life of its own. Only one of these criteria must be met to remove the feature from the restriction of this provision.[9]

The absence of precise definitions for these terms has provided ample scope for often radically differing interpretations and therefore disputes on this issue. In seeking clarification on the interpretation of the regime of islands, the drafting history of Article 121 is considered with a view to offering insights as to the intentions of the drafters of these provisions of UNCLOS. The subsequent practices of states in their interpretation and application of Article 121, as well as the rulings of international courts and tribunals, may also play an important role in such clarification over time.

The Drafting History of Article 121 of UNCLOS

One key potential source of clarification is the drafting history of Article 121. Unfortunately, this article provides little assistance in terms of delivering clarity on the island/rock interpretational conundrum. Instead, examination of the drafting history merely tends to highlight the diversity of views adopted by interested states.[10]

For example, the physical size or area of the insular feature in question was a prominent theme in discussions regarding the means by which some insular features should have a restricted capacity to generate claims to maritime jurisdiction. This issue has generated intense debates as well as multiple, various proposals from individual states or groups of countries. For instance, during one of the early sessions of the Third UN Conference on the Law of the Sea (UNCLOS III) held in Caracas in 1974, Malta proposed draft articles that distinguished between "islands" and "islets" on the basis of size. While both islands and islets were defined as a "naturally formed area of land," the former were to be "more than one square kilometer in area" and the latter "less than one square kilometer in area."[11] According to the Maltese proposal, maritime claims from islands "less than 10 square kilometers in area" were to be restricted, and a special convention was to be drafted in respect of the maritime claims of other, larger islands, "taking into account all relevant circumstances."[12]

Additionally, Ireland proposed that features deemed to be islands should possess at least 10% of the land area and 10% of the population of the claimant state.[13] A group of fourteen African states similarly suggested that the maritime spaces of islands should be determined "according to equitable principles taking into account all relevant factors and circumstances," including island size, island population (or lack of), "contiguity to the principal territory," whether the island was "situated on the continental shelf of another territory," and the feature's geological and geomorphological

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9 Charney, "Rocks that Cannot Sustain Human Habitation"; and Jonathan L. Hafetz, "Article 121(3) and the Treatment of Islands under International Law," *American University of International Law Review* 15 (2000): 587–95.

10 See United Nations, *United Nations Conferences on the Law of the Sea, Official Records, Third Conference*, (1980; repr., Buffalo, New York: William S. Hein & Co., 2000). See also UN Division for Ocean Affairs and the Law of the Sea, *Régime of Islands: Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea* (New York: UN, 1988); and S.N. Nandan and S. Rosenne, eds., *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. 3 (Dordrecht: Kluwer Law International, 1995), 321–29.

11 UN Doc.A/AC.138/SC.II/L.28, art. 1. See Nandan and Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary*, 328.

12 UN Doc.A/AC.138/SC.II/L.28, art. 9, 11, and 15. See ibid., 328–29.

13 UN Doc.A/CONF.62/C.2/L.43 (1974).

structure and configuration.[14] The Romanian draft suggested a new category of insular feature—"islets and small islands."[15] According to this view, such features being "uninhabited and without economic life, which are situated on the continental shelf of the coast, do not possess any of the shelf or other marine space of the same nature."[16] Romania's proposals, similar to those of Malta and the aforementioned African states, were aimed at denying or restricting small insular features from the status of maritime zones accorded definition as "true" islands.[17]

Contrary views were, however, also prominent. Indeed, a number of states represented at the UN Convention on the Law of the Sea III were keen to preserve the status quo. Some states argued on principle that no distinctions of any kind should be made so long as an island was above water at high tide, arguing that it would not be possible to define a set of criteria for small islands or islets that could be applied to every geographical situation without producing an inequitable result in some cases. As the United Kingdom delegate pointed out,

> There was an immense diversity of island situations, ranging from large and populous islands of even larger continental states to small islands with self-sufficient populations, and that, inter alia, the attempt by some delegations to categorise islands in terms of size would not result in any generally applicable rules which would be equitable in all cases; and there was grave danger of discounting many islands of both absolute and relative importance.[18]

States in possession of numerous islands were keen to ensure that these features remained able to generate considerable associated maritime entitlements. For example, the representative of Greece reacted to the Maltese proposal by observing:

> The regime of islands could not be legally based on criteria of size, population, geographical location or geological configuration without jeopardising the principles of sovereign equality and the integrity of territorial sovereignty.[19]

Greece proposed draft articles that, while repeating the familiar formula that an island was "a naturally formed area of land surrounded by water which is above water at high tide," emphasized that islands form "an integral part of the territory of the State to which it belongs," that the territorial sea applicable to an island was to be determined in the same manner as for continental parts of the state, and that with regard to the continental shelf and the zones of national jurisdiction claimable from continental parts of the state, such claims "are as a general rule applicable to islands."[20] Regarding the breadth and limits of the territorial sea, a proposal by China echoed that of Greece, stating that these were "in principle, applicable to the islands belonging to [a] State."[21] Turkey suggested that the existence of islands should be a consideration in

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14 UN Doc.A/AC.138/SC.II/L.40. See Nandan and Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary*, 329–30. The fourteen states were Algeria, Cameroon, Ghana, Ivory Coast, Kenya, Liberia, Madagascar, Mauritius, Senegal, Sierra Leone, Somalia, Sudan, Tunisia, and Tanzania.

15 UN Doc.A/AC.138/SC.II/L.53. See Nandan and Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary*, 330.

16 Ibid.

17 Janusz Symonides, "The Legal Status of Islands in the New Law of the Sea," in *The Law of the Sea*, ed. Hugo Caminos (Dartmouth: Ashgate, 2001), 118; and John R. Stevenson and Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session," *American Journal of International Law* 69 (1975): 24–25.

18 C.R. Symmons, *The Maritime Zones of Islands in International Law* (The Hague: Martinus Nijhoff, 1979), 40.

19 UN Doc.A/AC.138/SC.II/L.29. See also Nandan and Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary*, 329.

20 The Greek proposal did further state that these provisions were "without prejudice to the regime of archipelagic islands." UN Doc.A/AC.138/SC.II/L.29. See also Nandan and Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary*, 329.

21 UN Doc.A/AC.138/SC.II/L.29. See also Nandan and Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary*, 329.

the delimitation of the continental shelf between opposite and adjacent states, which led Greece to essentially restate its position.[22]

Similarly, small island states argued that given their limited land resources, they should be entitled to an EEZ around all of their islands, irrespective of their size and characteristics. A proposal made by four Pacific island states sought to ensure that the maritime entitlements of islands were to be determined "in accordance with the provisions of the Convention applicable to other land territory," but without prejudice to the question of the delimitation of maritime boundaries or the regime of archipelagos.[23]

An attempt to tackle the problem of defining islands by size was undertaken by Robert Hodgson, a geographer at the U.S. Department of State. His 1973 research study, *Islands: Normal and Special Circumstances*, included a categorization of islands as follows: (1) rocks, less than .001 square mile in area, (2) islets, between .001 and 1 square mile, (3) isles, greater than 1 square mile but not more than 1,000 square miles, and (4) islands, larger than 1,000 square miles.[24]

Perhaps then, inevitably conflicting national interests dominated the shaping of the regime of islands at the UN Convention on the Law of the Sea III. While certain notable contributors to the debate, such as Romania, Turkey, and Denmark, were keen to minimize the effect of islands because doing so served their particular circumstances, other states in possession of such features, such as Greece and Venezuela, were keen to maximize potential claims from them. The ultimate consequence of these conflicting perspectives and proposals was the intentionally vague and ambiguous text of Article 121, paragraph 3. Accordingly, an assessment of the drafting history of Article 121 of UNCLOS appears to lead to a dead end as far as clarifying interpretation of the regime of islands is concerned. Some limited guidance is, however, provided by subsequent state practice and the decisions of international courts and tribunals.

State Practice

State practice regarding the regime of islands is, perhaps unsurprisingly, mixed. As previously noted, states tend to lean toward the maximum possible in respect of their claim to jurisdictional rights, as long as such claims are in accordance with international law. Thus, those states in possession of islands have naturally tended to advance expansive maritime claims from even extremely small, uninhabited, and remote insular features.

Perhaps the most extreme example of this type of practice is Japan's ongoing claims regarding the islets that make up Okinotorishima.[25] This feature, or features, also known as Douglas Reef, is a reef platform surmounted by a number of very small rocks, which are marginally above the high-tide level.[26] While the reef platform itself is reasonably substantial, measuring approximately five by two kilometers, at high tide only two small rocks measuring just a few meters in area are

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22 Nandan and Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary*, 329, 331–32.

23 UN Doc.A/CONF.62/C.2/L.30. See also Nandan and Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary*, 331.

24 R. Hodgson, *Islands: Normal and Special Circumstances*, Research Study (Washington, D.C.: U.S. Department of State, Bureau of Intelligence and Research, 1973).

25 See, for example, Y.H. Song, "Okinotorishima: A 'Rock' or an 'Island'? Recent Maritime Boundary Controversy between Japan and Taiwan/China," in *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea*, ed. S.Y. Hong and Jon M. Van Dyke (The Hague: Martinus Nijhoff, 2009), 145–76.

26 Prescott and Schofield, *Maritime Political Boundaries of the World*, 84–85. Yann-huei Song notes that at "highest tide" the two above-tide features are only 16 and 6 centimeters above the surface of the water, respectively. See Song, "Okinotorishima: A 'Rock' or an 'Island?'" in Hong and Van Dyke, *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea*, 148.

left above water. Indeed, both of these features have been described as being no "larger than king-size beds" at high tide.[27]

Nonetheless, Japan takes the view that these features are islands that generate claims to EEZ rights. Further, when Japan made its submission to the UN Commission on the Limits of the Continental Shelf (CLCS) on November 12, 2008, it included continental shelf areas extending to the south of Okinotorishima and seaward of its claimed 200-nm limit from that feature, along the Kyushu-Palau Ridge, apparently on the basis that these areas of seabed form a natural prolongation of Japan's land mass as represented by Okinotorishima.[28] It is notable, however, that the Chinese government responded to Japan's submission with the wording that "States Parties shall also have the obligation to ensure respect for the extent of the International Seabed Area…which is the common heritage of mankind, and not to affect the overall interests of the international community as a whole."[29]

In contrast to this expansionist trend, there are also instances, albeit somewhat more isolated in frequency, of states taking a more restrained approach in their maritime claims from islands. The most notable example in this context is the United Kingdom's reclassification of one small and remote feature, Rockall, from the status of an island previously considered a valid base point for 200-nm claims to one only able to generate territorial sea rights. Consequently, the United Kingdom executed a "roll-back" in its maritime jurisdictional claims from Rockall, resulting in the loss to the United Kingdom of around 60,000 nm^2 of maritime space previously claimed as part of the country's fishery zone.[30] Overall, therefore, state practice on this issue can therefore be viewed as somewhat contradictory and therefore does not offer conclusive guidance.

Resolutions Derived from International Courts and Tribunals

With regard to the jurisprudence of international courts and tribunals, unfortunately an authoritative interpretation of Article 121 from a body such as the ICJ remains lacking, not least because the court has opted to effectively sidestep the issue. While there were hopes, based on the pleadings of the parties to the Black Sea case, which featured detailed arguments on the interpretation of Article 121 of UNCLOS, that the ICJ would provide an authoritative ruling on this problematic provision of UNCLOS, this ruling did not eventuate. Rather than addressing the interpretation of Article 121, the court found that it did not need to address the island/rock question in order to delimit the maritime boundary at issue and in accordance with the request of the parties to the case.[31] The court did, however, address the specific role of the problematic island

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27 See Jon Van Dyke, "Speck in the Ocean Meets Law of the Sea," letter to the editor, *New York Times,* January 21, 1988; A.L. Silverstein, "Okinotorishima: Artificial Preservation of a Speck of Sovereignty," *Brooklyn Journal of International Law* 16, no. 2 (1990): 409; and Song, "Okinotorishima: A 'Rock' or an 'Island?'" in Hong and Van Dyke, *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea*, 147–49.

28 Japan's Submission to the Commission on the Limits of the Continental Shelf, http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/jpn_execsummary.pdf.

29 For the Chinese reaction to the submission made by Japan, see http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf.

30 House of Commons, *Hansard, Written Answers*, July 21, 1997, cols. 397–98. An identical statement was made in the House of Lords a day later on July 22, 1997 (House of Lords, *Hansard, Written Answers*, July 22, 1997, cols. 155–56), quoted in D.H. Anderson, "British Accession to the UN Convention on the Law of the Sea," *International and Comparative Law Quarterly* 46 (1997): 761–86, 778. See also C.R. Symmons, "Ireland and the Rockall Dispute: An Analysis of Recent Developments," *Boundary and Security Bulletin* 6, no.1 (1998): 78–93.

31 *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, ICJ Rep. (2009), par. 187, http://www.icj-cij.org/docket/files/132/14987.pdf.

in question, Serpents' Island,[32] with respect to the delimitation of a maritime boundary between the states involved, Romania and Ukraine.[33]

Nonetheless, there have been several cases before the ICJ that illustrate the methodology used by the court in terms of the treatment of islands in the delimitation of maritime boundaries. The following discussion will focus on the island issue in the respective cases. The first case is the 1985 *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, in which an islet, Filfla, became the center of discussion. Filfla is an uninhabited islet located about 2.7 nm south of Malta and was utilized by Malta as one of the base points to construct its straight baselines.

In considering whether the islet of Filfla could be used as a base point, the ICJ did not express any opinion on whether the inclusion of Filfla in the Maltese baselines was legally justified. Instead, the court took the position that "the equitableness of an equidistance line depends on whether the precaution is taken of *eliminating the disproportionate effect* [emphasis added] of certain islets, rocks and minor coastal projections."[34] The court thus found it equitable not to take account of Filfla in the calculation of the provisional median line between Malta and Libya so that the disproportionate effect could be eliminated.

The second case concerns the maritime delimitation between Qatar and Bahrain. In this case, whether Qit'at Jaradah is an island or a low-tide elevation was brought to attention. Qit'at Jaradah is a maritime feature located off the northwestern coast of the Qatari peninsula and to the northeast of the main island of Bahrain. At high tide, this maritime feature's length and breadth are about 12 and 4 meters (m), whereas at low tide they are 600 and 75 m. At high tide, its altitude is approximately 0.4 m.[35] The court recalled that the legal requirements for defining an island are that the feature be a "naturally formed area of land," "surrounded by water," and "above water at high tide," as provided in Article 121, paragraph 3, of UNCLOS. The ICJ concluded that the maritime feature of Qit'at Jaradah satisfied these criteria and that it was in fact an island.[36] However, the court also observed that Qit'at Jaradah is a very small island, uninhabited and without any vegetation. The tiny island is situated about midway between the main island of Bahrain and the Qatar peninsula. The ICJ therefore determined that if its low-water line were to be used for determining a base point in the construction of the equidistance line, and this line was taken as the delimitation line, a "disproportionate effect" would be given to an insignificant maritime feature. Consequently, in order to eliminate the disproportionate effect, the court deemed it necessary to ignore the effect of Qit'at Jaradah in the process of delimitation.[37]

The third case is the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*. In this case, the legal status of Bobel Cay, Savanna Cay, the Port Royal Cays, and South Cay were examined. The court noted that the parties did not dispute the fact that all of the cays remain above water at high tide. They thus fall within the definition and regime of islands under Article 121 of UNCLOS.[38] However, due to the fact that the 12-nm territorial

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[32] Ostrov Zmeinyy ("Serpents' Island" or "Insular Serpilor" in Romanian) is a small (0.135 km²) Ukrainian island, located approximately 19 nm from the terminus of the land boundary between the two states on the Black Sea coast. The location of Serpents' Island is such that it could substantially influence a maritime boundary delimitation between the two states on the basis of equidistance.

[33] *Maritime Delimitation in the Black Sea*, par. 187.

[34] *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, ICJ Rep. 13 (1985), par. 64.

[35] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, ICJ Rep. (2001), par. 197.

[36] Ibid., par. 195.

[37] Ibid., par. 219.

[38] *Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, ICJ Rep. (2007), par. 137.

seas of Bobel Cay, the Port Royal Cays, South Cay (Honduras), and Edinburgh Cay (Nicaragua) would create overlapping areas between them, the court found that delimitation of the territorial sea was necessary.[39]

The final and most recent decision is *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (hereafter referred to as the Black Sea case) delivered by the ICJ on February 3, 2009. The Black Sea is an inland sea area bounded by Russia, Georgia, Turkey, Bulgaria, Romania, and Ukraine. The delimitation concerned the area in the northwestern part of the Black Sea in the concavity formed by Romania's coast to the west and Ukraine's coast to the west, north, and east. The adjacent coasts of the parties, Romania and the Ukraine, meet at their shared land boundary terminus on the Danube River delta. Serpents' Island lies approximately 19 nm east of the Danube delta and belongs to Ukraine.[40] It is a natural feature that is above water at high tide, and has a surface area of approximately 0.17 km2 and a circumference of approximately 2,000 m.[41]

There was no sovereignty dispute over Serpents' Island; instead, the issue in large part concerned the maritime zones that the island could, or could not, claim. Indeed, the potential maritime claims from Serpents' Island played an important role throughout the drafting of Article 121 of UNCLOS, with particular reference to the role of this feature on the delimitation of maritime boundaries. The classification of Serpents' Island as a rock or as an island capable of generating extended maritime claims therefore has had significance beyond maritime delimitation issues between Romania and Ukraine, and has played a broader role in the development of the international law of the sea. More specifically, and unsurprisingly, the status and role of Serpents' Island became a key issue in the ICJ case.

Romania and Ukraine expressed different views on the status of Serpents' Island. Romania argued that no account should be taken of Serpents' Island as a base point for the purposes of constructing the provisional equidistance line, based on the following points:[42]

1. Romania claimed that Serpents' Island is a rock incapable of sustaining human habitation or an economic life of its own—in other words, no one can live on it without assistance. Therefore, Serpents' Island should have "no exclusive economic zone or continental shelf, as provided for in Article 121 (3) of the 1982 UNCLOS."
2. Romania further pointed out that when Ukraine notified the UN of the coordinates of its baselines used for measuring the breadth of its territorial sea, it made no reference at all to Serpents' Island.
3. In addition, Romania asserted that the use of Serpents' Island as a base point would result in an inordinate distortion of the coastline.

However, Ukraine, on the other hand, claimed that Serpents' Island was an island because it has inhabitants. Furthermore, Ukraine argued that because Serpents' Island has a coast, it follows that it has a baseline. As a result, it stated that there are base points on that baseline that can be used for plotting the provisional equidistance line. Ukraine pointed out that, contrary to Romania's claims and unlike with straight baselines, the UN does not need to be notified of "normal"

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39 *Maritime Dispute between Nicaragua and Honduras*, par. 302–5, 320.

40 "Treaty between Romania and Ukraine on the Romanian-Ukrainian State Border Regime, Collaboration and Mutual Assistance on Border Matters," June 17, 2003, UN *Treaty Ser*. 2277. See also *Maritime Delimitation in the Black Sea*, par. 35; and "Treaty on the Relations of Good Neighbourliness and Cooperation between Romania and Ukraine," June 2, 1997, UN *Treaty Ser*. 2159.

41 *Maritime Delimitation in the Black Sea*, par. 16.

42 Ibid., par. 124.

baselines, defined as the low-water mark around the coast. Ukraine therefore contended that given the island's proximity to the Ukrainian mainland, Serpents' Island should clearly be taken into account as one of the relevant base points for the construction of the provisional equidistance line. It noted that the belt of territorial sea that surrounds Serpents' Island partly overlaps with the area of territorial sea bordering the Ukrainian mainland. Consequently, "this island therefore represents what is commonly termed a coastal island."[43]

What, then, was the effect of Serpents' Island on the course of the maritime boundary delimited by the ICJ? During the process, Ukraine argued that Serpents' Island should be considered part of Ukraine's coast, because it "forms part of the geographical context and its coast constitutes part of Ukraine's relevant coasts."[44] In terms of this argument, Romania responded by arguing that Serpents' Island "constitutes merely a small maritime feature situated at a considerable distance out to sea from the coasts of the Parties";[45] therefore it is debatable that this island could be regarded as part of the coast. The court accepted Romania's perspective on this matter. The ICJ also expressed that "the coast of Serpents' Island is so short that it makes no real difference to the overall length of the relevant coasts of the parties."[46] The court went on to say that Serpents' Island cannot be viewed as part of Ukraine's coast because it is "lying alone and some 20 nautical miles away from the mainland" and thus "is not one of a cluster of fringe islands constituting 'the coast' of Ukraine."[47] Furthermore, the court stated that "to count Serpents' Island as a relevant part of the coast would amount to grafting an extraneous element onto Ukraine's coastline: the consequence would be a judicial refashioning of geography, which neither the law nor practice of maritime delimitation allows."[48]

In the Black Sea case, Romania argued that Serpents' Island should be ignored because it is "a rock incapable of sustaining human habitation or economic life of its own" under Article 121, paragraph 3, and because "using this island as a base point would result in an inordinate distortion of the coastline."[49] Ukraine asserted that Serpents' Island should be considered a "coastal island" because it is within 20 nm of Ukraine's coast and thus its territorial sea "partly overlaps with the area of territorial sea bordering the Ukrainian mainland."[50] Ukraine also argued that Serpents' Island is "indisputably an 'island' under Article 121, paragraph 2, of UNCLOS, rather than a 'rock' due to the reason that it can readily sustain human habitation and that it is well established that it can sustain economic life of its own. In particular, the island has vegetation and a sufficient supply of fresh water as well as appropriate buildings and accommodation for an active population."[51] In addition, Ukraine argued that Article 121, paragraph 3, "is not relevant to this delimitation because that paragraph is not concerned with questions of delimitation but is, rather, an entitlement provision that has no practical application with respect to a maritime area that is, in any event, within the 200-nm limit of the exclusive economic zone and continental shelf of a mainland coast."[52]

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43 *Maritime Delimitation in the Black Sea*, par. 126.

44 Ibid., par. 96.

45 Ibid., par. 92.

46 Ibid., par. 102.

47 Ibid., par. 149.

48 Ibid., par. 149.

49 Ibid., par. 124.

50 Ibid., par. 126.

51 Ibid., par. 184.

52 Ibid., par. 184.

Despite the parties directly addressing the definitional issues presented by the regime of islands and specifically Article 121, paragraph 3, of UNCLOS, the ICJ's ruling avoided giving a definition of the wording in Article 121, paragraph 3; it instead addressed the role that Serpents' Island should play in the delimitation and determined that this islet should have a 12-nm territorial sea, but otherwise no effect on the delimitation. The court also compared the Black Sea case with the continental shelf case between Libya and Malta in 1985. In the latter decision, the effect of Filfla was ignored.[53]

Following the discussion mentioned above, the ICJ started the process of delimitation "by drawing a provisional equidistance line" between the adjacent and opposite coasts of Romania and Ukraine in the north part of the Black Sea,[54] and then examined "whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result" so that the resolution could be consistent with Articles 74 and 83 of UNCLOS.[55] The court would then verify that the line did not lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each state by reference to the delimitation line. A final check for an equitable outcome entailed a confirmation that no great disproportionality of maritime areas is evident by comparing the ratio of coastal lengths.[56]

Putting this three-stage process into practice, the court found that Serpents' Island was entitled to 12 nm of territorial sea around it, but that the island had no other impact on the maritime delimitation between Romania and Ukraine: "As the jurisprudence has indicated, the Court may on occasion decide not to take account of very small islands or decide not to give them their full potential entitlement to maritime zones, should such an approach have a disproportionate effect on the delimitation line under consideration."[57] In other words, the "disproportionate effect" that Serpents' Island might have had in the delimitation process is the result that the court wanted to avoid. This was achieved by awarding Serpents' Island a 12-nm territorial sea and no impact on the EEZ boundary, though without specifying that the island is a mere "rock" within the meaning of Article 121, paragraph 3, of UNCLOS (see **Map 4**, p. vi).

The Role of Islands in the Delimitation of Maritime Boundaries

Overall, the text of Article 121, paragraph 3, of UNCLOS remains ambiguous. The relevant drafting history generally does not help clarify interpretations of the article. There is also no consistent trend in state practice on the issue, and an authoritative ruling from an international court or tribunal is presently lacking. Accordingly, at the time of writing, no reliable way to distinguish between these types of insular features has emerged, despite the fact that the definition of features is critical to determining their capacity to generate claims to maritime jurisdiction.

That said, as illustrated above, coastal states and international adjudicative bodies have been and continue to be faced with problematic issues related to islands, especially in the context of the delimitation of maritime boundaries. As a result, they have developed practical ways in which to

53 *Maritime Delimitation in the Black Sea*, par. 184.

54 Ibid., par. 119.

55 Ibid., par. 120.

56 Ibid., par. 122.

57 Ibid., par. 185.

deal with the challenge posed by islands in the context of the delimitation of maritime boundaries. Such approaches include, for example, affording islands reduced weight in the construction of equidistance lines or partially or wholly enclaving them. Indeed, it can be argued that the trend, in international jurisprudence at least, is toward awarding small islands a reduced effect in maritime boundary delimitation. This can be illustrated by reference to numerous cases, including several outlined above, especially in instances where such islands are located at a considerable distance offshore and the opposing coast or coasts are long enough such that a great disparity in relevant coastlines is evident.[58] This treatment of islands predominantly arises from the fact that such features would inevitably have a disproportionate and therefore inequitable impact on the construction of an equidistance-based boundary line.

While state practice and the rulings of international courts and tribunals are generally unhelpful with respect to directly addressing the island/rock issue, some rulings are instructive by implication. For example, in some instances islands have been used in the construction of continental shelf and EEZ boundaries. This necessarily implies that the feature in question is not a rock in accordance with Article 121, paragraph 3, of UNCLOS. An especially instructive example is the *Jan Mayen* case between Denmark and Norway.[59] Despite the great disparity in relevant coastal lengths between Norway's Jan Mayen Island and Greenland (around 9.2:1 in Greenland's favor),[60] as well as the enormous difference in area (377 km^2 for Jan Mayen compared to 2,166,086 km^2 for Greenland)[61] and the fact that Jan Mayen is uninhabited except for the personnel posted to the scientific research station located on the island, the court awarded Jan Mayen some, though not full, effect in constructing the maritime boundary line.[62] This result is consistent with state practice in maritime delimitation involving the island. Although in bilateral negotiations between Norway and Iceland the latter had initially argued that Jan Mayen was not entitled to an EEZ or continental shelf, these objections were subsequently abandoned by Iceland when it concluded two boundary agreements with Norway that recognized Jan Mayen's entitlement to an EEZ and continental shelf. The main reason appears to have been that Jan Mayen is too large to be regarded as a "rock," with an area of 373 km^2.[63] This experience suggests that even islands lacking a permanent, indigenous population may, under certain circumstances, be capable of generating extended maritime jurisdictional rights.

Implications for the Disputed Islands of the South China Sea

The South China Sea, with an area of approximately 3 million km^2 (equivalent to around 874,660 nm^2)[64] is not only the largest maritime area in the Southeast Asian region but also the

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58 For other related cases, see *Libya v. Malta*, *Jan Mayen*, *Libya v. Tunisia, Gulf of Maine*, *Qatar v. Bahrain*, and *Maritime Delimitation in the Black Sea*, all cases brought before the ICJ.

59 *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, ICJ Rep. 38 (1993); hereafter cited as *Jan Mayen* case.

60 *Jan Mayen* case, par. 61.

61 Area figures are according to "Greenland," CIA World Factbook, November 2011; and "Jan Mayen," CIA World Factbook, May 2011.

62 *Jan Mayen* case, par. 61–69.

63 Robin R. Churchill, "Claims to Maritime Zones in the Arctic—Law of the Sea Normality or Polar Peculiarity?" in *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction,* ed. Alex G. Oude Elfenink and Donald Rothwell (The Hague: Martinus Nijhoff, 2001), 120.

64 Hasjim Djalal, "South China Sea Island Disputes," in *Security Flashpoints: Oil, Islands, Sea Access and Military Confrontation*, ed. M.H. Nordquist and J.N. Moore (The Hague: Martinus Nijhoff, 1998), 109.

26th largest basin in the world.[65] The littoral states, in clockwise order from the north, are China, Taiwan, the Philippines, Malaysia, Brunei, Indonesia, Singapore, Thailand, Cambodia, and Vietnam. Influenced and motivated by the sea's geographical proximity, strategic importance, and economic interests, littoral states around the South China Sea started claiming territorial sovereignty over those islands or islets as early as the 1960s.[66] The current political situations of the islands in the South China Sea are as follows.

Pratas Islands. The Pratas Islands (*Dong-sha-chun-dao* in Chinese), 240 nm southwest of Taiwan at latitude 20°30'–21°31' north and longitude 116°–117° east, consist of two banks and an island.[67] This group of islands is under the administration of Taiwan. The Taiwanese Coast Guard is stationed on the biggest island, Pratas Island (*Dong-sha-dao*). There is a concrete runway of 4,500 m in length on Pratas, which is capable of accommodating C-130H cargo planes.[68] The sovereignty of the Pratas Islands is not contested.

Macclesfield Bank and Scarborough Shoal. Macclesfield Bank is a wholly and permanently submerged feature that is situated at latitude 15°20'–16°20' north and longitude 113°40'–115°00' east.[69] However, a rock feature, called Scarborough Shoal (or Reef), is located to the east of this bank. Sovereignty over Scarborough Shoal is disputed between China/Taiwan and the Philippines, as demonstrated by the inclusion of Scarborough Shoal in the 2009 revision of the baselines law of the Philippines.[70] Scarborough Shoal consists of a narrow belt of coral enclosing a lagoon and surmounted by small rocks, the tallest of which, South Rock, is 3 m high.[71]

Paracel Islands. The Paracel Islands (*Hsi-sha-chun-dao*) is an archipelago lying approximately 150–200 nm from both Hainan Island and Vietnam. It consists of about 130 barren uninhabited islands, all clustered in two groups, the Crescent group to the west and the Amphitrite group to the east.[72] The largest island, Woody Island (*Yung-hsin-dao*), is situated in the northeast and is about 1,950 m long and 1,350 m wide.[73] The People's Republic of China (PRC) has been in possession of the entire Paracel archipelago since a battle between the PRC and the former South Vietnam in January 1974.[74]

Spratly Islands. The Spratly Islands (*Nan-sha-chun-dao*) are located approximately 300 nm west of the Philippine island of Palawan, 300 nm east of Vietnam, and 650 nm south of Hainan. The Spratlys consist of approximately 150–180 insular features of various types.[75] Among these

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65 Mansor Mat Isa and Raja Mohammad Noordin, "The Status of the Marine Fisheries in the South China Sea" (paper presented at the First Working Group Meeting on Marine Scientific Research in the South China Sea, Manila, May 30–June 3, 1993), 2; and J. Morgan and M. Valencia, eds., *Atlas for Marine Policy in Southeast Asian Seas* (Berkeley: University of California Press, 1983), 4.

66 For a discussion on the causes of the overlapping claims among the littoral states, see Kuan-Hsiung Wang, "Bridge over Troubled Waters: Fisheries Co-operation as a Resolution to the South China Sea Conflicts," *Pacific Review* 14, no. 4 (2001): 531–51.

67 Chi-Kin Lo, *China's Policy towards Territorial Disputes: The Case of South China Sea Islands* (London and New York: Routledge, 1989), 5–6. See also United Kingdom Hydrographic Office (UKHO), *China Sea Pilot*, vol. 1, *Admiralty Sailing Directions*, 9th ed. (UKHO, 2010), 78.

68 Peter Kien-hong Yu, "Issues on the South China Sea: A Case Study," *Chinese Yearbook of International Law and Affairs* 11 (1991–92): 170–71.

69 Gerardo M.C. Valero, "Spratly Archipelago Dispute: Is the Question of Sovereignty Still Relevant?" *Marine Policy* 18 (1994): 315.

70 Republic Act No. 9522, March 10, 2009. See also "RP Stakes Claim to Part of Disputed Spratlys," Agence France-Presse, February17, 2009.

71 UKHO, *China Sea Pilot*, vol. 2, *Admiralty Sailing Directions*, 9th ed. (UKHO, 2010), 74.

72 John K.T. Chao, "South China Sea: Boundary Problems Relating to the Nansha and Hsisha Islands," *Chinese Yearbook of International Law and Affairs* 9 (1989), 68–69; and Jeanette Greenfield, *China's Practice in the Law of the Sea* (Oxford: Clarendon, 1992), 151. See also UKHO, *China Sea Pilot*, vol. 1, 75–78.

73 Ewan Anderson, *An Atlas of World Political Flashpoints: A Sourcebook of Geopolitical Crisis* (London: Pinter Reference, 1993), 160–61; and Choon-ho Park, *East Asia and the Law of the Sea* (Seoul: Seoul National University Press, 1983), 203.

74 For information on the battle, see Lo, *China's Policy towards Territorial Disputes,* 53–63.

75 For instance, D.J. Dzurek states that there are "more than 170 features with English names in the Spratly Islands." See D.J. Dzurek, *The Spratly Islands: Who's On First?* vol. 1 (Durham: International Boundaries Research Unit, 1996), 1.

features, only perhaps 48 are above water at high tide.[76] Inevitably, complex overlapping maritime claims are associated with the Spratlys. Taiwan, China, Vietnam, Malaysia, Brunei,[77] and the Philippines all lay claim to one or more parts of this disputed area. Currently, the largest island, Itu Aba Island (*Tai-pin-dao*), is under the control of the Taiwanese government, which has a coast guard corps of about 600 persons on the island.[78] The Taiwanese government built an airstrip on Tai-pin-dao in 2008.

Based on the language of Article 121, paragraph 3, of UNCLOS, there may be at least three elements to examine with regard to the status of islands and rocks in the Spratlys group, namely size, human habitation, and economic life. As noted above, there is no precise indication as to the size required for an island to be capable of generating EEZ and continental shelf rights.[79] Therefore, it would be difficult to decide if a feature is a rock or an island according to its size, though it can be observed that none of the disputed South China Sea islands are anywhere near the size of Jan Mayen Island.

As to the element of "human habitation," water supply might be one of the most important factors in clarifying the situation. This is because the existence of fresh water is an important indication that human habitation could be sustained. Furthermore, with the existence of fresh water, the island could provide food, including vegetables and fruits. According to reports, there are two islands in the Spratlys that could supply fresh water for daily use—these are Tai-pin-dao (Itu Aba Island), which is under the control of Taiwan, and Pagasa Island, which is occupied by the Philippines. Is it feasible then to conclude that only Taiwan and the Philippines could claim maritime zones around those two islands? Such a conclusion would be controversial and likely to raise objections.

With regard to "economic life," does fishing or oil and gas resource exploration and exploitation in waters surrounding the islands fulfill this requirement? If this is the case, then arguably the joint marine seismic undertaking agreements for parts of the South China Sea close to the Spratlys group would serve to render these islands as being capable of generating EEZ and continental shelf rights. Two such joint agreements were concluded in 2004 and 2005—the first was signed between the Philippines and China on September 1, 2004, and the second was signed between the two countries and Vietnam on March 14, 2005, and is known as the "Tripartite Agreement for Joint Marine Seismic Undertaking in the Agreement Area in the South China Sea."[80] The area covered by the agreements is 142,886 km² in size and was to be studied for a three-year period. Signatories to the agreements were the countries' respective state-owned oil companies—the China National Offshore Oil Corporation (CNOOC), the Philippine National Oil Company (PNOC), and the Vietnam Oil and Gas Corporation (PetroVietnam). Such cooperation implied a significant improvement of the relations among those parties that have disputes regarding the islands' sovereignty in the agreement area. These agreements have, however, since lapsed. The

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[76] The figure of 48 is provided by D.J. Hancox and John Robert Victor Prescott in *A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys amongst Those Islands* (Durham: International Boundaries Research Unit, University of Durham, 1995). However, some commentators offer lower figures. For example, Dzurek offers the number 36; see Dzurek, *Who's On First?* vol. 1.

[77] Brunei claims at least two islands that are situated in its exclusive economic zone. See C.C. Joyner, "The Spratly Island Dispute: Rethinking the Interplay of Law, Diplomacy and Geopolitics in the South China Sea," *International Journal of Marine and Coastal Law* 13, no. 2 (1998): 195–230.

[78] Itu Aba Island is 1,358 m long and 350 m wide, the total area is about 0.5 km².

[79] Marius Gjetnes, "The Spratlys: Are They Rocks or Islands?" *Ocean Development and International Law* 32, no. 2 (2001): 199.

[80] See Ministry of Foreign Affairs of the People's Republic of China, "Oil Companies of China, the Philippines and Vietnam Signed Agreement on South China Sea Cooperation," March 15, 2005, http://www.fmprc.gov.cn/eng/wjb/zwjg/zwbd/t187333.htm.

counterpoint to this view is that if seismic operations, or indeed fishing activities around islands, qualify as providing an "economic life" for the feature in question, then all islets, however small, could escape the disadvantageous categorization of being a rock. It is hard to imagine that this was truly the intent of the drafters of Article 121 of UNCLOS.

Overall, the potential capacity of even some of the islands to generate maritime zones has stimulated the littoral states to claim sovereignty over those islands or rocks. This, in turn, makes maritime delimitation in the South China Sea area more complicated. On the other hand, if these insular features are not capable of being used to advance such expansive maritime claims, their effect in maritime delimitation would be minimized. In other words, in the latter case, the outer limits of 200 nm shall be drawn from the coastline of the mainland and other accepted offshore islands. As a result, a high seas area would be created in the middle of the South China Sea and the area encompassed by overlapping claims to maritime jurisdiction would be significantly reduced.

Conclusion

Islands remain at the heart of the maritime and territorial disputes that bedevil the East China Sea and the South China Sea particularly. At present it remains impossible to discern with certainty whether a particular insular feature qualifies as an island capable of generating EEZ and continental shelf rights or is a mere rock that cannot. That said, it is clear that the majority of the features encompassed by the term "Spratly Islands" are not, in fact, islands or rocks at all, as only a limited number of the insular features in the group emerge above the high-tide level and are thus capable of generating claims to maritime jurisdiction in their own right.

A number of the disputed islands of the East China Sea and South China Sea do rise above high tide and so can be used as base points for the generation of maritime claims. Arguably some of these features may be capable of generating such extended maritime claims. It is also becoming clear, however, that the interested states hold different positions on this issue. The recent submissions relating to outer continental shelf limits and extended continental shelf rights in the South China Sea and the reactions and counter-reactions to these submissions suggest that while some South China Sea states, notably Malaysia and Vietnam, regard the disputed islands as incapable of generating EEZ and continental shelf rights, China takes the opposing view.

The developing trend in international jurisprudence (and to a lesser extent in state practice) toward awarding small, isolated, sparsely inhabited or uninhabited islands a reduced effect in the generation of maritime claims and in the context of the delimitation of maritime boundaries should, however, be taken into account. These developments strongly suggest that even if some of the disputed islands of the South China Sea are deemed capable of generating extended claims to maritime jurisdiction, their maritime entitlements will likely be severely restricted, especially when pitted against the surrounding mainland and main island territories. Acceptance of this view by the South China Sea claimant states would result in a significant narrowing of the area of overlapping maritime claims, thus simplifying the dispute.

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Recent Practices in Dispute Management in the South China Sea

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EXECUTIVE SUMMARY

This essay describes the dispute situation in the South China Sea and adjacent areas and studies the advantages and disadvantages of various approaches to dispute management, with a special focus on China's policy and practice.

MAIN ARGUMENT

Although there have been periods of tension among claimants, the South China Sea remains a reasonably stable area, and the maritime disputes are managed through various measures. A preference for bilateral approaches is evident and has resulted in both formal settlement and joint development arrangements. However, some bilateral disputes are still unresolved. Less tangible progress has been made in relation to multilateral disputes. Joint development has been proposed by some countries so as to shelve their territorial disputes for the short term in order to utilize nonliving resources. While the experiences gained from joint development in the Gulf of Thailand provide an alternative model for dispute management, such development has so far not occurred in the South China Sea proper. At the regional level, protracted negotiations resulted in the first regional document on the South China Sea, the Declaration on the Conduct of Parties (DoC) in 2002, followed by the Guidelines for the Implementation of the DoC in 2011.

POLICY IMPLICATIONS

- Bilateral efforts as well as regional initiatives, such as the 2002 DoC, are positive steps forward in terms of dispute management, but further efforts are needed.
- A correct assessment on the level of tension relating to the disputes in the South China Sea is crucial for dispute management in this area. The notion of a sharp increase in tension between claimants in the period 2009–11 cannot be substantiated, particularly not in comparison with developments in the 1990s.
- Progress made both in formal settlement and through other forms of management underscores the importance of the political will of the parties to the disputes for achieving results.
- The lack of progress can be attributed to the complexities involved in dispute situations and to a lack of political will among the parties to address the core dimensions of dispute situations.
- Aborted attempts at settling disputes or pursuing joint arrangements may result from the domestic politics of one or more of the parties involved.

This essay assesses the different approaches to dispute management utilized in the South China Sea with the aim of shedding light on their implications for the future of conflict management in the region. For the purpose of this study, the geographical area considered will include not only the South China Sea proper but also adjacent maritime areas such as the Gulf of Tonkin, the Gulf of Thailand, the Sulu Sea, and the Strait of Malacca. Dispute management includes both dispute settlement and conflict management,[1] and this essay examines the topic within these two broad categories. In the first category, the approaches applied and implemented include formal settlement through direct negotiations, international jurisprudence, and joint development arrangements (JDA). In the second category, various confidence-building measures (CBM) are outlined. Particular attention is devoted to China's perspectives as reflected by its related policies and practice.

The essay first lays out the dispute situation in the studied region. The overview of the disputes is divided into two categories: settled and unsettled. The following section analyzes the dispute management approaches applied in the South China Sea. Direct negotiations and international jurisprudence have been utilized to formally resolve some of the disputes. Pending final settlement, JDAs and various CBMs are practiced to prevent disputes from escalating. Bound by a mutually reached agreement, JDAs are used to temporarily settle disputes by shelving the issues of sovereignty and maritime delimitation. Therefore, in this study, JDAs are grouped into the "settled dispute" category. CBMs are intended to cultivate trust among relevant members in order to pave the way for final resolution. China's perspectives on dispute settlement and conflict management are studied by analyzing China's policies, followed by its practices in two cases—a settled case of the Gulf of Tonkin and an unsettled case concerning the South China Sea proper with Vietnam. This essay concludes that achievements have been made in managing maritime disputes and that remaining challenges require further efforts to maintain peace and stability in the region.

Geographical Scope

Areas of Water

As noted above, this study encompasses the South China Sea proper as well as the adjacent water areas, which can be seen as natural prolongations of the South China Sea proper. In terms of land, the South China Sea proper 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.

There are four adjacent areas of water discussed. These are the Gulf of Tonkin, located between Vietnam to the west and northwest, mainland China to the north and northeast, the island of Hainan to the east, and the South China Sea proper to the south; the Gulf of Thailand in the southwest, which lies between Thailand to the west and northwest, Cambodia and Vietnam to the north, Malaysia to the south, and the South China Sea proper to the east; the Sulu Sea, located between the island of Palawan to the northwest, Sabah to the southeast, the Sulu archipelago to the southeast, and the Visayas to the northeast; and the Strait of Malacca.

[1] Conflict management can be defined as a process encompassing the different techniques and means used to manage various conflict situations. Such techniques and means include the following: conflict prevention, conflict avoidance, conflict containment, conflict transformation, conflict settlement, and formal conflict resolutions. For more extensive discussions relating to conflict management, see C.R. Mitchell, *The Structure of International Conflict* (London: Macmillan, 1981), 253–79; and Kamarulzaman Askandar, "ASEAN and Conflict Management: The Formative Years of 1967–1976," *Pacific Review* 6, no. 2 (1994): 59–62.

Islands and Features

In the literature on the South China Sea proper, it is customary to refer to three particular groups of islands and one submerged bank when different land formations in the area are discussed, namely, the Paracel Islands, the Spratly Islands, the Pratas Islands, and the Macclesfield Bank. Additionally, there are four other island groups in the southwestern part of the South China Sea—the Anambas, Badas, Natuna, and Tambelan islands. These islands are likely not given the same attention as the ones mentioned earlier because Indonesia's ownership of them is generally recognized.

Maritime Disputes

The disputes in the South China Sea are complicated.[2] They include, *inter alia*, sovereignty disputes over land formations such as islands, the status of some insular features, and the issue of whether they can generate maritime zones. The related disputes can be studied from various perspectives; the focus of this study is the current status of the disputes. They are grouped into two categories—settled and unsettled—for the purpose of analyzing how they have been managed.

Unsettled Disputes

The unsettled disputes cover all the areas studied except the Gulf of Tonkin.[3] The disputes over the South China Sea proper involve many parties. China's and Taiwan's sovereignty claims to the Paracel Islands overlap with Vietnam's claim to these islands. China's and Taiwan's sovereignty claims to the Spratly Islands are other disputes with Vietnam that are bilateral—China-Vietnam—for those areas not claimed by other Southeast Asian countries, and major multilateral disputes for those areas also claimed by Brunei, Malaysia, and the Philippines. Furthermore, China's and Taiwan's claims within the "U-shaped dotted lines" in the South China Sea overlap to varying degrees with several other states' claims to exclusive economic zones (EEZ) and continental shelves. These include claims by Vietnam to areas off its eastern coast, by Indonesia to the area northeast of the Natuna Islands, by Malaysia to areas off its northern coast in the state of Sarawak and northwest of the state of Sabah, by Brunei to areas off its northern coast, and by the Philippines to the area west of the Philippine archipelago. Bilateral overlapping claims also exist among the neighboring Southeast Asian countries. Overlapping maritime claims are yet to be resolved between Malaysia and the Philippines.[4] While the issue of Indonesia's and Malaysia's overlapping claims in parts of the South China Sea located north of Tanjong Datu are still unsettled,[5] Vietnam and Indonesia need to delimit their EEZs.

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[2] "Dispute" in this study is used in the sense of a disagreement over territorial sovereignty that exists when claims over maritime zones overlap.

[3] For overviews of the unsettled disputes, see Ramses Amer, "Claims and Conflict Situations," in *War or Peace in the South China Sea?* ed. Timo Kivimäki (Copenhagen: Nordic Institute of Asian Studies Press, 2002), 28–40. For claims, see also Nguyen Hong Thao and Ramses Amer, "The Management of Vietnam's Maritime Boundary Disputes," *Ocean Development and International Law* 38, no. 3 (2007): 306–9.

[4] For studies on the Sabah dispute, see M.O. Ariff, *The Philippines' Claim to Sabah: Its Historical, Legal and Political Implications* (London: Oxford University Press, 1970); and Michael Leifer, *The Philippine Claim to Sabah* (Zug: Inter Documentation, 1968).

[5] Mark J. Valencia, *Malaysia and the Law of the Sea: The Foreign Policy Issues, the Options and Their Implications* (Kuala Lumpur: Institute of Strategic and International Studies, 1991), 46–48, 80–84, and 135; and J.R.V. Prescott, *The Maritime Boundaries of the World* (London and New York: Methuen, 1985), 226–30.

In the Gulf of Thailand, there is a multilateral dispute relating to an area of overlapping claims among Malaysia, Thailand, and Vietnam.[6] Bilateral disputes also exist between Cambodia and Thailand, and Cambodia and Vietnam, respectively. In the former case, a 2001 agreement has not yet been implemented, and reports that Thailand would withdraw from or terminate the agreement led to an official protest by Cambodia in November 2009.[7] Both sides have yet to reach a settlement regarding the overlapping claims to maritime zones in the Gulf of Thailand.[8]

In the case of Cambodia and Vietnam, some political actors within Cambodia have opposed the agreements signed with Vietnam in the 1980s, including the 1982 agreement on "historical waters."[9] New bilateral talks on the status of the borders between the two countries have been initiated.[10] The Supplementary Treaty to the 1985 Treaty on Delimitation of National Boundaries, ratified in October 2005, relates only to the land border and not to the maritime issues between the two countries.[11]

In the Sulu Sea as well as in the Celebes Sea, Malaysia and the Philippines need to delimit their maritime boundaries.[12] Furthermore, both countries have not yet formally settled the dispute over Sabah, which the Philippines still claims. The continental shelf boundary in the western Celebes Sea has not been delimited between Indonesia and Malaysia. In addition, the two countries have overlapping claims to an EEZ in the Strait of Malacca and in the western Celebes Sea.[13] Malaysia and Singapore have two disputes to resolve. First, following the ruling by the International Court of Justice (ICJ) in the case of Pedra Branca/Pulau Batu Puteh, Middle Rocks, and South Ledge, the maritime boundaries relating to jurisdictional zones in the area need to be settled. Second, the two sides have to agree on the offshore boundaries in the Straits of Johor and the Singapore Strait to the south of Singapore.[14]

Settled Disputes

Since 1969, efforts have been made by parties concerned to settle their maritime disputes. Indonesia was active in delimiting its maritime boundaries in the early years. From 1969 to 1973,

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[6] For an overview of the maritime conflicts and cooperative agreements in the Gulf of Thailand, see Victor Prescott, *The Gulf of Thailand* (Kuala Lumpur: Maritime Institute of Malaysia, 1998). The area is currently included in the joint development arrangement between Malaysia and Thailand but is recognized by the two countries as claimed by Vietnam. Author Ramses Amer's interviews with officials in Bangkok, December 1998, April 1999, and November 2000.

[7] "Thailand Terminates Maritime Pact with Cambodia," *Energy-pedia News*, November 9, 2009, http://www.energy-pedia.com/article.aspx?articleid=137744; and "Thailand to Cancel Thai-Cambodian Maritime Deal," *Maritime Updates*, November 16, 2009, http://www.maritimeupdates.com.

[8] Prescott, *The Gulf of Thailand*; and Clive Schofield, "Unlocking the Seabed Resources of the Gulf of Thailand," *Contemporary Southeast Asia* 29, no. 2 (2007): 301–3.

[9] For the full text of the agreement of July 7, 1982, see BBC, "Summary of World Broadcasts, Part Three, Far East," 7074 A3/7-8, July 10, 1982. The text of the agreement has also been reproduced in an English language version as "Appendix 2" in Kriangsak Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia* (Oxford: Oxford University Press, 1987), 180–81; and Ted L. McDorman, "Cambodia-Vietnam," in *International Maritime Boundaries,* vol. III, ed. Jonathan I. Charney and Lewis M. Alexander (Leiden: Martinus Nijhoff, 1998): 2364–65.

[10] During the 1990s there were periods of deep tension relating to border issues between Cambodia and Vietnam. For details on the ongoing talks and periods of tension, see Ramses Amer, "The Border Conflicts Between Cambodia and Vietnam," *Boundary and Security Bulletin* 5, no. 2 (1997): 80–91; and Ramses Amer, "Expanding ASEAN's Conflict Management Framework in Southeast Asia: The Border Dispute Dimension," *Asian Journal of Political Science* 6, no. 2 (1998): 47–48; and Ramses Amer, "Vietnam and Its Neighbours: The Border Dispute Dimension," *Contemporary Southeast Asia* 17, no. 3 (1995): 299–301.

[11] Nguyen Hong Thao and Hoang Hai Oanh, "Legal Aspects of the Supplementary Treaty to the 1985 Treaty on Boundary Delimitation between Vietnam and Cambodia," *Vietnam Law & Legal Forum* 12, no. 137 (2006): 17–20.

[12] Prescott, *Maritime Boundaries of the World*, 218–21 and 230; and Valencia, *Malaysia and the Law of the Sea*, 54–66, 80–85, and 136–37.

[13] Valencia, *Malaysia and the Law of the Sea*, 46–48, 80–84, and 135; and Prescott, *Maritime Boundaries of the World*, 226–30.

[14] Valencia, *Malaysia and the Law of the Sea*, 31–35, 37, and 136.

several agreements were reached between Indonesia and Malaysia[15] and between Indonesia and Thailand,[16] as well as among all three countries,[17] to delimit their territorial sea and continental shelf boundaries in the Strait of Malacca. The 1973 agreement between Indonesia and Singapore was supplemented by their 2009 agreement to delimit the territorial sea boundary between the two countries in the Strait of Singapore.[18] In 1979, Malaysia and Thailand resolved their territorial sea issues in the Strait of Malacca and in the Gulf of Thailand, and partially delimited their continental shelves in the latter.[19]

Vietnam has been active in resolving its border issues since the late 1990s.[20] It reached an agreement with Thailand in 1997 that delimited their continental shelf and EEZ boundaries in a disputed area in the Gulf of Thailand.[21] By the end of 2000, China and Vietnam had signed a delimitation agreement and a fishery cooperation agreement to resolve their maritime disputes in the Gulf of Tonkin.[22] In 2003, Vietnam and Indonesia signed an agreement on the delimitation of their continental shelf boundary in an area to the north of the Natuna Islands.[23]

Malaysia settled two dispute cases on the sovereignty over insular features through ICJ rulings, one with Indonesia in 2002[24] and the other with Singapore in 2008.[25] Additionally, Brunei and

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15 Indonesia and Malaysia were involved in the signing of three agreements in this period: "Agreement between the Government of Malaysia and the Government of Indonesia on the Delimitation of the Continental Shelves between the Two Countries," October 27, 1969, UN *Legal Ser*. 16; "Treaty between the Republic of Indonesia and Malaysia on Delimitation of Boundary Lines of Territorial Waters of the Two Nations at the Strait of Malacca," U.S. Department of State, http://www.state.gov/documents/organization/61516.pdf; "Agreement between the Government of the Republic of Indonesia, the Government of Malaysia and the Government of the Kingdom of Thailand relating to the Delimitation of the Continental Shelf Boundaries in the Northern Part of the Straits of Malacca," U.S. Department of State, http://www.state.gov/documents/organization/59574.pdf.

16 "Agreement between the Government of the Kingdom of Thailand and the Government of the Republic of Indonesia relating to the Continental Shelf Boundary between the two Countries in the Northern Part of the Straits of Malacca and in the Andaman Sea," UN *Treaty Ser*. 1103, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/THA-IDN1971CS.PDF.

17 "Agreement between the Government of the Republic of Indonesia, the Government of Malaysia and the Government of the Kingdom of Thailand relating to the Delimitation of the Continental Shelf Boundaries."

18 "Delimitation of the Territorial Seas of Singapore and Indonesia in the Strait of Singapore," United Nations, *Law of the Sea Bulletin*, no. 68 (2008), http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin68e.pdf; "Indonesia and Singapore's New Maritime Boundary," *Asian Surveying and Mapping*, April 29, 2009; and "Reviewing Indonesia's Maritime Issues," *Border Studies*, December 30, 2009, http://www.borderstudies.info/?p=899.

19 On October 24, 1979, Malaysia and Thailand signed the "Treaty between the Kingdom of Thailand and Malaysia relating to the Delimitation of the Territorial Seas of the two Countries," UN *Treaty Ser*. 1291, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/THA-MYS1979TS.PDF. It seems that the delimitation of the territorial sea boundary in the northern part of the Strait of Malacca between Malaysia and Thailand is identical to the continental shelf and EEZ boundaries in "Figure 16. Maritime Boundaries in the Andaman Sea," in Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia*, 98. On October 24, 1979, Malaysia and Thailand signed the "Memorandum of Understanding between the Kingdom of Thailand and Malaysia on the Delimitation of the Continental Shelf Boundary between the Two Countries in the Gulf of Thailand," UN *Treaty Ser*. 1291.

20 For details, see Nguyen and Amer, "The Management of Vietnam's Maritime Boundary Disputes," 305–24; Ramses Amer and Nguyen Hong Thao, "Vietnam's Border Disputes: Legal and Conflict Management Dimensions," in *Asian Yearbook of International Law, Volume 12 (2005–06)*, ed. B.S. Chimni, Miyoshi Masahiro, and Thio Li-ann (Leiden: Martinus Nijhoff, 2007), 111–27; Ramses Amer and Nguyen Hong Thao, "Regional Conflict Management: Challenges of the Border Disputes of Cambodia, Laos, and Vietnam," *Austrian Journal of South-East Asian Studies* 2, no. 2 (2009): 54–58, 61–72; and Nguyen Hong Thao, "Vietnam and Maritime Delimitation," in *Conflict Management and Dispute Settlement in East Asia*, ed. Ramses Amer and Keyuan Zou (Farnham: Ashgate, 2011), 171–99.

21 "Agreement between the Government of the Kingdom of Thailand and the Government of the Socialist Republic of Viet Nam on the delimitation of the maritime boundary between the two countries in the Gulf of Thailand," UN, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/THA-VNM1997MB.PDF.

22 "Agreement between the People's Republic of China and the Socialist Republic of Viet Nam on the Delimitation of the Territorial Seas, EEZs and Continental Shelves in Beibu Gulf," *Renda Changweihu Gongbao* [Gazette of the Standing Committee of the National People's Congress], National People's Congress, http://www.npc.gov.cn/wxzl/gongbao/2004-08/04/content_5332197.htm; and "Joint Statement on All-round Cooperation in the New Century Between the People's Republic of China and the Socialist Republic of Vietnam," Ministry of Foreign Affairs of the People's Republic of China, http://www.fmprc.gov.cn/eng/wjb/zzjg/yzs/gjlb/2792/2793/t16248.htm. The text has been reproduced in Nguyen Hong Thao, "Maritime Delimitation and Fishery Cooperation in the Tonkin Gulf," *Ocean Development and International Law* 36, no. 1 (2005): 41–44; and Zou Keyuan, "The Sino-Vietnamese Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin," *Ocean Development and International Law* 36, no. 1 (2005): 22–24.

23 Nguyen and Amer, "The Management of Vietnam's Maritime Boundary Disputes," 310.

24 *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, Judgment of December 17, 2002, ICJ Rep. (2002), http://www.icj-cij.org/docket/files/102/7714.pdf.

25 *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*, Judgment of May 23, 2008, ICJ Rep. (2008), http://www.icj-cij.org/docket/files/130/14492.pdf.

Malaysia seem to have resolved their maritime boundaries by their 2009 exchange of letters.[26] Countries bordering the Gulf of Thailand have come to some arrangements to settle their disputes temporarily. The first is the 1979 Malaysia-Thailand agreement to jointly exploit the resources in a "defined" area in their overlapping continental shelf.[27] The second is the 1982 agreement on "historical waters" between Vietnam and the then People's Republic of Kampuchea, under which the exploitation of the zone would be decided by "common agreement" pending final delimitation.[28] The third is the 1992 agreement between Malaysia and Vietnam to jointly develop an overlapping area of their continental shelf.[29]

Approaches to Management

Approaches to dispute management practiced in this region include final resolution through direct negotiations and international jurisprudence, temporary settlement through JDAs, and management through CBMs. Through the first two approaches, parties concerned formally settle their disputes over land sovereignty or overlapping maritime claims. The latter two strategies are utilized to achieve the goal of conflict containment and to build trust and confidence among disputants, with the intention to create a positive environment for future dispute settlement either through direct negotiation or third-party involvement. The four approaches practiced in this region are examined below.

Negotiated Settlement

An overview of settled disputes shows two periods of active settlement, one between 1969 and 1979 and the other from the 1990s to the present. The following analysis focuses on developments during the second period, specifically their relevant significance and their contribution to dispute settlement.

Thailand-Vietnam. The agreement of August 9, 1997, between Thailand and Vietnam is the first agreement in the region to use a single line for delimiting both the continental shelf and the EEZ between countries.[30] It is also the first settlement of a maritime dispute in the region since the 1982 United Nations Convention on the Law of the Sea (UNCLOS) went into effect. The settlement reaffirms the tendency of using a single boundary for both the continental shelf and the EEZ in an area that extends less than 400 nautical miles (nm) between opposite coasts. It is also of relevance in the context of the effects of islands for international maritime delimitation. For Vietnam, the 1997 agreement is its first on maritime delimitation.

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26 "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, http://bn.china-embassy.org/eng/wlxw/t542877.htm

27 Kriangsak Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia* (Oxford: Oxford University Press, 1987): 100–103 and 189–94.

28 Prescott, *Gulf of Thailand*; and Schofield, "Unlocking the Seabed Resources," 301–3.

29 The text of the agreement is reproduced in Ted L. McDorman, "Malaysia-Vietnam," in *International Maritime Boundaries*, vol. III, ed. Jonathan I. Charney and Lewis M. Alexander (Leiden: Martinus Nijhoff, 1998): 2341–4. See also Amer, "Vietnam and Its Neighbours: The Border Dispute Dimension," 306; Nguyen Hong Thao, "Joint Development in the Gulf of Thailand," *Boundary and Security Bulletin* 7, no. 3 (1999): 79–88; and Nguyen Hong Thao, "Les Délimitations Maritimes Concernant le Vietnam: Accords Conclus et Négociations en Cours," in *Le Vietnam et la Mer*, ed. Monique Chemillier-Gendreau (Travaux du colloque organisé les 16 et 17 juin 2000 par l'Association d'Amitié Franco-Vietnamienne) (Paris: Les Indes Savantes, 2002), 53–56.

30 For more detailed analyses, see Nguyen, "Joint Development in the Gulf of Thailand," 88–99; Nguyen Hong Thao, "Le Premier Accord de Délimitation des Frontières Maritimes du Vietnam," *Annuaire du Droit de la Mer, Tome I* (Paris: Pédone et Institut du Droit Économique de la Mer, Monaco, 1996), 259–73; and Nguyen Hong Thao, "Vietnam's First Maritime Boundary Agreement," *Boundary and Security Bulletin* 5, no. 3 (1997): 74–78.

Gulf of Tonkin. The maritime delimitation agreement of December 25, 2000, on the Gulf of Tonkin (hereafter Delimitation Agreement) is the first maritime boundary agreement between China and Vietnam. It is also China's first maritime boundary agreement. The negotiation could only be renewed and an agreement achieved after the full normalization of relations between the two countries. The maritime boundary agreement in the Gulf of Tonkin reaffirms the Vietnamese position of using a single line for both the continental shelf and EEZ in an area of less than 400 nm between opposite coasts. The Delimitation Agreement is also relevant from the following perspectives: the effects of coastal and outlying islands (e.g., Bach Long Vi), the role of low-tide elevations in delimitation, the issues of the outlet of a boundary river, and the question of a closing line for the gulf.[31] This case is analyzed in detail in the following section.

Indonesia-Vietnam. Between Indonesia and Vietnam, the 1990s did not produce a breakthrough in their negotiations on maritime disputes. The two countries failed to capitalize on their traditionally good bilateral relations. Furthermore, the impact of the Asian financial crisis on Indonesia brought other, more pressing needs to the agenda for Indonesian leaders. Thus, no progress was made in negotiating the maritime disputes, but stability was maintained. This state of affairs continued to prevail into the early 2000s,[32] until a breakthrough in 2003 led to the June 2003 agreement that settled the two countries' maritime dispute about overlapping continental shelf claims and established the first maritime boundary between the two countries. However, the EEZ boundary in the same area still needs to be settled. In this particular process of bilateral negotiation, the continental shelf and the EEZ seem to be separate issues.

International Jurisprudence

In the 2000s the ICJ issued judgments relating to two sovereignty disputes between Southeast Asian countries over insular formations.[33] The first judgment, given on December 17, 2002, concerned the dispute over Sipadan Island and Ligitan Reef between Indonesia and Malaysia.[34] The second judgment, made on May 23, 2008, concerned the dispute between Malaysia and Singapore over Pedra Branca/Pulau Batu Puteh, Middle Rocks, and South Ledge.[35] Both disputes involved small-sized features, and none of the claimed formations are permanently inhabited.

The cases and their judgments display some other similarities. Both cases are related to sovereignty disputes over small islands and reefs. Both procedures of judgment have invoked the principles of the original titles, which are based on historical arguments and maps; the titles of succession through different historical periods from feudal and colonial to the recent claimant states; and the "critical date" as well as "effectiveness." Both final judgments were made on the basis of effectiveness.

In the case over Sipadan Island and the Ligitan Reef, the ICJ noted that the measures taken to regulate and control the collecting of turtle eggs and the establishment of a bird reserve must be seen as regulatory and as administrative assertions of authority over claimed territory. These activities are "modest in number but…diverse in character and include legislative, administrative and quasi-judicial acts. They cover a considerable period of time and show a pattern revealing

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31 For more details, see Nguyen Hong Thao, "Maritime Delimitation and Fishery Cooperation in the Tonkin Gulf," 28–30.

32 For details on the nature of the disputes and talks up to 2000, see Nguyen, "Les Délimitations Maritimes Concernant le Vietnam," 56–58.

33 For a more detailed analysis of international jurisprudence, see Nguyen Hong Thao and Ramses Amer, "A New Legal Arrangement for the South China Sea?" *Ocean Development and International Law* 40, no. 4 (2009): 341–42.

34 *Case Concerning Pulau Ligitan*.

35 Ibid.

an intention to exercise State functions in respect of the two islands in the context of the administration of a wider range of islands."[36]

The ICJ considered unusual the fact that Indonesian authorities did not protest the earlier construction of lighthouses by the colony of North Borneo and by Malaysia afterward. On the basis of effectiveness, the court concluded that Malaysia had title to Sipadan Island and the Ligitan Reef.[37]

In the case over Pedra Branca/Pulau Batu Puteh, Middle Rocks, and South Ledge, the court found that the original title to Pedra Branca/Pulau Batu Puteh should remain with Malaysia as the successor to the Sultan of Johor. However, by the conclusion of the ICJ case, Singapore was determined to have sovereignty over the island. Singapore had carried out activities such as investigating shipwrecks within the island's territorial waters, surveying the waters surrounding the island in 1978, and planning to reclaim areas around Pedra Branca/Pulau Batu Puteh. Malaysia and its predecessors failed to respond to the activities of Singapore and its predecessors. Only in June 2003, after a special agreement on the dispute came into force, did Malaysia begin protesting Singapore's activities back in 1980. Taking into account the conduct of the two parties, the ICJ concluded that sovereignty over Pedra Branca/Pulau Batu Puteh had been passed to Singapore.[38] However, the ICJ found that the original title to Middle Rocks should remain with Malaysia as the successor to the Sultan of Johor.[39]

The ICJ did not have the opportunity to address the question of the relationship between the sovereignty dispute over maritime features and the possible disputes in relation to claims to maritime zones that may be generated from these features. In the special agreement submitted to the ICJ, Malaysia and Singapore asked only for a ruling on the issue of sovereignty separately for each of the three maritime features. They did not ask the ICJ to rule on the issue of maritime delimitation. For the South Ledge, the ICJ concluded that it belonged to the state in the territorial waters of which it is located.[40]

The conclusions of the ICJ in the two cases may serve as a basis for initiatives to submit the South China Sea dispute to international judicial agencies like the ICJ or the International Tribunal for the Law of the Sea (ITLOS). However, without the mutual consent of all parties in a dispute, the case cannot be brought to any such agency.

The decisions of the ICJ concerning sovereignty over islands and other maritime features imply that a party to a dispute that does not benefit from the ruling will perceive it as a loss. This way of thinking might discourage some claimants from bringing their cases to the ICJ due to fears that the ruling of the ICJ might not be to their advantage. In some cases, the ruling by the ICJ does not put an end to a dispute, but rather the dispute might re-emerge under new forms.

Joint Development

The concept of joint development first appeared in international law in the 1970s. By definition of the British Institute of International and Comparative Law, the term refers to "Category 1"—"inter-State cooperation" over the offshore oil and gas in a designated sea area that is under dispute

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36 *Case Concerning Pulau Ligitan*, par. 149.

37 Ibid., par. 147–48.

38 Ibid., par. 276.

39 Ibid., par. 290.

40 Ibid., par. 299.

among related parties.[41] With developments in state practice, the concept tends to enlarge to cover "Category 2"—cooperation on living resources in a jointly defined disputed sea area.[42]

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 for joint development of oil and gas may be the fear that the resources in question may fall on the "wrong" side of the delimitation line in the absence of knowledge of their exact location.[43] 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.[44] Meanwhile, JDAs are an attempt to fulfill an obligation under UNCLOS. Article 74, paragraph 3, and Article 83, paragraph 3, provide that, pending agreement on the delimitation of the EEZ and continental shelf, the states concerned, in a spirit of understanding and cooperation, are required to "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." This approach has been explored in some disputes in the South China Sea.

The state practice under Category 1 in the South China Sea includes the 1979 memorandum of understanding between Malaysia and Thailand for the exploration of resources in a "Defined Area" 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.[45]

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.[46] 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

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41 Zou Keyuan, "Joint Development in the South China Sea: A New Approach," *International Journal of Marine and Coastal Law* 21, no.1 (2006): 90.

42 Ibid., 91; and Kuan-Hsiung Wang, "Bridge over Troubled Waters: Fisheries Cooperation as a Resolution to the South China Sea Conflicts," *Pacific Review* 14, no. 4 (2001): 547.

43 Schofield, "Unlocking the Seabed Resources," 288.

44 Ibid., 298–99.

45 Ibid., 290; Zou, "Joint Development in the South China Sea," 94; and Nguyen, "Joint Development in the Gulf of Thailand," 83–84.

46 Nguyen, "Joint Development in the Gulf of Thailand," 83; and Schofield, "Unlocking the Seabed Resources," 299.

principle on joint development in the overlapping area, the modalities for such a trilateral scheme have yet to be agreed on.[47]

Negotiations over oil and gas exploitation in the maritime area where Malaysian and Bruneian claims overlap were conducted on August 25, 2003, and on August 30, 2005. Malaysia proposed a production-sharing agreement similar to the Malaysia-Thailand joint exploration agreement. Suspicious that the plan could entail conceding territorial claims, Brunei did not accept it. China's proposal of joint development with Brunei, raised during Chinese president Hu Jintao's visit in April 2005,[48] might have pressured Malaysia to move ahead in its negotiation with Brunei. In March 2009, Brunei and Malaysia 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.

Given the highly migratory and transboundary nature of marine living resources, coupled with the rapid pace of depletion of such resources in the South China Sea, actions in favor of joint and coordinated conservation and management of fishery resources cannot afford to be delayed any longer. Particularly in the marine area where no boundaries have been finalized, it is suggested that the conservation and management of fishery resources could be the starting point for cooperation ("Category 2"). This cooperation would ideally have a "spillover effect" on other areas of cooperation.[49]

In conclusion, JDAs in the South China Sea contribute to temporary settlement of maritime disputes by emphasizing common interests of economic gains. They help put the related disputes under control and are helpful for building trust among disputants. Until now, successful practices have only been developed bilaterally. Trilateral attempts have been initiated for marine areas with trilateral overlapping claims. However, it is still too early to predict how joint development can be managed multilaterally. Meanwhile, caution is needed when opting for joint development. With lack of political determination, this temporary arrangement may take time to materialize, as the Thailand-Malaysia case indicates. Furthermore, an agreement may open up a box of new problems if an "appropriate level of consent" has not been reached between related parties.[50]

The Confidence-Building Approach

In the South China Sea area, disputes have mainly been managed by the parties directly involved in disputes. The direct method might be considered the most effective means in dispute resolution, as parties are actually present to air their concerns, which may make future implementation easier. However, at the regional level, attempts have been initiated for the purpose of conflict containment by building confidence among disputants and drawing out a code of conduct.

The first regional attempt to manage the situation in the South China Sea was the initiative by Indonesia and Canada to hold the first workshop on managing potential conflicts in the South China Sea in 1990. The workshop was an informal proceeding to create a platform for policy-oriented discussion and possible cooperation. It was considered one of the first CBMs in the

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47 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 *Management and Resolution of Inter-State Conflicts in Southeast Asia*, ed. Kamarulzaman Askandar (Penang: Southeast Asian Conflict Studies Network, 2003), 117–18; and Nguyen, "Joint Development in the Gulf of Thailand," 86.

48 "President Hu Jintao Holds Talks with Bruneian Sultan Haji Hassanal Bolkiah," Ministry of Foreign Affairs of the People's Republic of China, April 20, 2005, http://www.fmprc.gov.cn/eng/topics/hjtfw/t193042.htm.

49 Wang, "Bridge over Troubled Waters," 547.

50 Schofield, "Unlocking the Seabed Resources," 298.

region. The ASEAN countries at the time, Vietnam, China, and Taiwan, sent their participants to the workshop on an informal basis as part of a track-two process. As of late November 2011, 21 workshops have been held where collective statements are issued stressing the need to settle the South China Sea disputes through peaceful means and emphasizing the principles that the parties should not resort to the use of force and that restraint should be exercised to avoid exacerbating disputes.[51] Through twenty years of efforts, the Indonesian workshop series has acted as a platform for relevant parties to discuss issues of common concern and to promote cooperation in less sensitive issues such as database exchange (by China), rising sea levels and methods of control (by Indonesia), and training projects (jointly by China and Chinese Taipei).

The second regional attempt was a document to regulate the conduct of related parties for the aim of dispute management. The document derived from the 1992 ASEAN Declaration on the South China Sea, which emphasizes the "necessity to resolve all sovereignty and jurisdictional issues pertaining to the South China Sea by peaceful means, without resort to force." It urges "all parties concerned to exercise restraint with the view to creating a positive climate for the eventual resolution of all disputes."[52]

The dispute regarding the Spratly Islands has caused periods of tension. One such period was triggered by the Mischief Reef incident of 1995 and served as a warning for regional states to adopt initiatives to prevent maritime disputes in the South China Sea from escalating into open conflicts. Consequently, ASEAN started promoting its own CBMs in response to the situation. After the Mischief Reef incident, ASEAN issued the 1995 Statement of the ASEAN Foreign Ministers on the Recent Developments in the South China Sea. The statement contended that all parties must apply the principles contained in the Treaty of Amity and Cooperation in Southeast Asia (TAC) as the basis for establishing a code of international conduct for the South China Sea for the purpose of creating an atmosphere of security and stability in the region.[53] Bilateral talks between China and the Philippines, and between the Philippines and Vietnam, respectively, resulted in two codes of conduct. The first was an eight-point code of conduct in the Joint Statement of the Republic of Philippines and the People's Republic of China Consultations on the South China Sea and on Other Areas of Cooperation of August 1995. The second was a nine-point code of conduct in the Joint Statement of the Fourth Annual Bilateral Consultations between the Philippines and Vietnam of November 1995.[54]

The admission of Vietnam into ASEAN in 1995 prompted the association to be more active in its response to the South China Sea situation. Under the umbrella of the association, the ASEAN code of conduct prepared by the Philippines and Vietnam was adopted and sent to China in 1999. The ASEAN code of conduct was based on documents such as the five principles of peaceful coexistence; the TAC; the ASEAN Declaration on the South China Sea of 1992; the ASEAN-China Joint Statement of December 16, 1997; the Joint Statement between the Philippines and China on the South China Sea and Other Areas of Cooperation of August 1995; the code of conduct agreed on between Vietnam and the Philippines in November 1995; and the Hanoi Plan of Action

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51 Hasjim Djalal, "The South China Sea—The Long Road Towards Peace and Cooperation," in S*ecurity and International Politics in the South China Sea: Towards a Co-operative Management Regime*, ed. Sam Bateman and Ralf Emmers (London and New York: Routledge, 2008), 175–89.

52 "ASEAN Declaration on the South China Sea, Manila, Philippines, 22 July 1992," Association of Southeast Asian Nations, http://www.aseansec.org/1196.htm.

53 "Treaty of Amity and Cooperation in Southeast Asia," Association of Southeast Asian Nations (ASEAN), http://www.asesansec.org/1217.htm.

54 Nguyen Hong Thao, "Vietnam and the Code of Conduct for the South China Sea," *Ocean Development and International Law* 32, no. 1–2 (2001): 105–30.

at the sixth ASEAN summit in 1998.[55] In 2002 the ten ASEAN countries and China signed the Declaration on the Conduct of the Parties in the South China Sea (DoC). In 2011, they adopted the "Guidelines for the Implementation of the DOC."[56]

The DoC is a framework for the conduct of all parties: ASEAN members directly or indirectly involved in the disputes as well as China. The declaration aims to avoid military action, promote the implementation of CBMs in less sensitive fields, and enhance mutual understanding between ASEAN and China. The parties concerned may explore or undertake cooperative activities in the fields of marine environmental protection; marine scientific research; safety of navigation and communication at sea; search and rescue operations; and transnational crime prevention, including but not limited to combating drug trafficking, piracy and armed robbery at sea, and illegal traffic in arms.

The third attempt at confidence-building consisted of multilateral cooperation activities to implement the principles stated in the DoC. On March 14, 2005, the Tripartite Agreement for Joint Marine Seismic Undertaking in the Agreement Area in the South China Sea was signed by the national oil companies of China, the Philippines, and Vietnam.[57] The agreement showed the determination of the involved parties to abide by the DoC. All activities in the agreement area must be discussed among the concerned parties. The tripartite agreement related to seismic survey and research in a 143,000-square-kilometer 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 parties expressed their "resolve to transform the South China Sea into an area of peace, stability, cooperation and development."[58] The cooperation undertaken by the three national oil companies was within the framework of marine scientific research and did not include any arrangements relating to exploitation of resources in the area.

The Joint Oceanographic Marine Scientific Expedition in the South China Sea is another example of cooperation in the spirit of the DoC. The initiative was launched by the 1994 agreement signed by then Philippine president Fidel V. Ramos and Vietnamese president Le Duc Anh to cooperate in marine scientific research and environmental protection in the South China Sea. Four expeditions were undertaken in April 1996, May 2000, April 2005, and April 2007, respectively. Participation in the marine research expeditions has since expanded to include participants from other countries as observers.[59] The establishment of "hotlines," organization of joint patrols, participation in antipiracy initiatives, and formation of mechanisms on security dialogues are proof of the self-restraint practiced by claimants to keep peace and stability in the region in the spirit of the DoC.

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55 Nguyen Hong Thao, "The 2002 Declaration on the Conduct of Parties in the South China Sea: A Note," *Ocean Development and International Law* 34, no. 3–4 (2003): 279–85; and Nguyen Hong Thao, "The Declaration on the Conduct of Parties in the South China Sea: a Vietnamese Perspective, 2002–2007," in *Security and International Politics in the South China Sea: Towards a Co-operative Management Regime*, ed. Sam Bateman and Ralf Emmers (London and New York: Routledge, 2008), 207–22.

56 "Guidelines for the Implementation of the DOC," ASEAN, http://www.aseansec.org/documents/20185-DOC.pdf.

57 The three companies are the Chinese National Offshore Oil Company (CNOOC), the Philippines National Oil Company (PNOC), and the Vietnam Oil and Gas Corporation (PetroVietnam). See "Tripartite Agreement for Joint Marine Seismic Undertaking in the Agreement Area in the South China Sea: Answer to Correspondent by Mr. Le Dzung, Spokesman of the Vietnamese Ministry of Foreign Affairs on 14th March 2005," Viet Nam Ministry of Foreign Affairs, http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns050314164241.

58 "Tripartite Agreement for Joint Marine Seismic Undertaking."

59 Nguyen, "The Declaration on the Conduct: Vietnamese Perspective," 207–22.

Various approaches have been utilized for managing disputes in the South China Sea. China is no doubt an influential factor affecting the trend of dispute management practice for the region. Therefore it is worthwhile to examine in more detail China's policy and practices in this regard.

China's Perspectives and Approaches

In the South China Sea, China faces territorial disputes with its neighboring coastal countries over some insular features and overlapping maritime claims. In handling these disputes, China follows its basic foreign policy emphasizing the PRC's relationship with neighboring countries.[60] The dual aims are to protect China's territorial sovereignty and marine rights as well as to maintain peace and stability in its neighboring area and the region as a whole. This approach is in line with the basic judgment made by the late leader Deng Xiaoping in 1985, who noted that "peace and development are the two themes in the current world." Only with a peaceful and stable region can China focus on its economic and social development. In the dispute over the South China Sea, the dilemma for China is a situation where protection of its territorial sovereignty and marine rights may challenge its friendly relations with its neighboring countries, which if out of control, could affect peace and stability in the region. China seems to have been searching for a position where its own interests can be taken into consideration while other disputant countries' interests can also be accommodated.

Dispute Management Policy

On the issue of dispute management among countries, China takes the stance of resolution through direct negotiation and consultation on the basis of respect for sovereignty and equality. During the series of discussions leading to UNCLOS, China repeatedly emphasized that negotiation and consultation is "a key way of dispute resolution. Of course, on the basis of consent, countries concerned may choose through consultation other peaceful means, including compulsory jurisprudence, to solve their disputes."[61] China holds that since disputes over the islands and maritime delimitation are "closely linked with the sovereignty and key interests of the parties concerned, as well as concern many complicated factors," such disputes can better be resolved through friendly negotiation and consultation, taking into consideration each other's reasonable and appropriate requirements.[62] On June 7, 1996, China ratified UNCLOS after approval by the Standing Committee of the Eighth National People's Congress. The official statement declares that "the People's Republic of China will effect, through consultations, the delimitation of the boundary of the maritime jurisdiction with the States with coasts opposite or adjacent to China respectively on the basis of international law and in accordance with the principle of equitability."[63]

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[60] China's current foreign policy emphasizes three types of relations: the relation with big powers is the key, that with neighboring countries is the essence, and that with all developing countries is the basis. Jin Rongcan and Dai Weilai, "New Trends and Impacts of Changes in Big Powers Relations," *Journal of Contemporary Asia-Pacific Studies* [*Dandai Yatai*] 1 (2008): 54.

[61] Gao Jianjun, *Zhongguo Yu Guoji Haiyang Fa* [China and the International Law of the Sea] (Beijing: Oceans, 2004), 22.

[62] *The Collection of Documents of Chinese Delegation to UN Meetings (January to June, 1979)* (Beijing: World Knowledge, 1979), 91–92; and Zhang Liangfu, *Zhongguo yu Linguo Haiyang Huajie Zhengdun Wenti* [Disputes over Maritime Delimitation between China and its Neighboring Countries] (Beijing: Oceans, 2006), 239.

[63] "China's Declaration Submitted to the United Nations upon its Ratification of the UNCLOS on 7 June 1996," UN, http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China%20Upon%20ratification.

Modern international law requires all countries to resolve their disputes by peaceful means and denounces use of force in dispute settlement. UNCLOS emphasizes this principle. All countries involved in the South China Sea disputes, including China, are obliged to settle peacefully their disputes over maritime issues including, inter alia, sovereignty over islands, maritime delimitation, marine resources management, and navigational rights.[64] China's guiding policy on maritime dispute management is reflected in its two basic laws on sea issues, the 1992 Law on Territorial Sea and Contiguous Zone and the 1998 Law on the Exclusive Economic Zone and Continental Shelf. While the 1992 law reemphasized China's sovereignty over the four groups of insular features in the South China Sea,[65] the 1998 law states that "where the claim of the People's Republic of China for the exclusive economic zone and the continental shelf overlaps with that of other country adjacent or opposite in their seacoasts, a boundary shall be determined under the principle of equity and based on the international law."[66]

To manage maritime issues 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 August 25, 2006, China submitted to the UN a declaration under Article 298 of UNCLOS, which ruled out the compulsory dispute settlement procedures concerning disputes over maritime delimitations, historic bays or titles, military activities, or those in which the UN Security Council exercises its functions.[67] One earlier Chinese government white paper on maritime affairs declares:

> In view of the strategy of peace and development, the Chinese Government upholds 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.[68]

Such a declaration, together with the aforementioned laws, 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." Application of this approach to the South China Sea

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[64] Section I of Part XV sets out the general provisions in regard to settlement of disputes. Article 279 is a restatement of a fundamental obligation to settle any dispute by peaceful means indicated in Article 33, paragraph 1, of the Charter of the United Nations including, *inter alia*, negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, and resort to regional agencies or arrangements. See *Charter of the United Nations*, UN, http://www.un.org/en/documents/charter/chapter6.shtml, Chapter VI, Article 33, paragraph 1.

[65] According to the Chinese concept, the English equivalent of the four archipelagoes of Xisha, Nansha, Dongsha, and Zhongsha refers respectively to the four groups of insular features of the Paracels, Spratlys, Pratus, and Macclesfield Bank plus Scarborough Shoal.

[66] "Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf," Asian Legal Information Institute, art. 2, par. 3, http://www.asianlii.org/cn/legis/cen/laws/lotprocoteezatcs790/.

[67] 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 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 of Article 298 of the Convention," United Nations Division for Ocean Affairs and Law of the Sea, http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China%20Upon%20ratification.

[68] "Zhongguo Haiyang Shiye de Fazhan [The Development of China's Ocean Affairs]," PeopleNet, http://www.people.com.cn/GB/channel2/10/20000910/226233.html; and Zhang Liangfu, *Zhongguo yu Linguo Haiyang Huajie Zhengdun Wenti* [Dispute over Maritime Delimitation between China and its Neighboring Countries] (Beijing: Oceans, 2006), 280.

issue was also first raised by Deng at his meeting with the Filipino 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," and that "maybe in several years' time, the Chinese Government could propose a solution acceptable to all parties concerned." In his meeting with his Filipino counterpart Corazon Aquino on April 16, 1988, Deng reiterated, "After many years of 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."[69] Deng's words at these two occasions can be deduced as meaning that China, by putting aside the dispute over the Spratlys, does not give up its sovereignty claim and that joint development is the practical choice for all parties concerned to manage their sovereignty dispute.

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*).[70] 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.

In conclusion, China emphasizes peaceful means for dispute settlement regarding the South China Sea issue and pending the final settlement, a JDA and cooperation on broader economic issues are proposed as the practical solution for dispute management for building confidence among relevant disputants. China's practice in handling its disputes with Vietnam in the South China Sea illustrates its general dispute management policy.

The Sino-Vietnamese Approach to Managing Maritime Disputes

Following full normalization of relations between China and Vietnam in November 1991, sharp differences relating to maritime disputes, i.e., overlapping claims to the Paracel and Spratly island groups, and to water and continental shelf areas in the South China Sea and the Gulf of Tonkin, caused tension during May–November 1992. Differences relating to oil exploration in the South China Sea and the signing of contracts with foreign companies for exploration led to tension during the periods April–June 1994, April–May 1996, and March–April 1997. During 1998 there was no extended period of tension relating to the territorial disputes, but shorter periods can be noted, such as in January that year along the land border and in the South China Sea during the months of April, May, July, and September. In 1999 there was no noticeable tension regarding the disputes in the South China Sea.[71] Developments in the 2000s demonstrate that this pattern of interaction relating to the disputes in the South China Sea has prevailed with continued

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69 Zhang, *Zhongguo yu Linguo Haiyang Huajie Zhengdun Wenti* [Dispute over Maritime Delimitation between China and its Neighboring Countries], 281–85.

70 Zou, "Joint Development in the South China Sea," 102.

71 For details, see Ramses Amer, "The Sino-Vietnamese Approach to Managing Boundary Disputes," *Maritime Briefing* 3, no. 5 (2002): 8–58.

dialogue and only limited periods of tension caused by the disputes in the area.[72] The most recent developments are addressed in the subsection on the South China Sea.

In order to manage their disputes, China and Vietnam initiated a system of talks and discussions that was both highly structured and extensive. From bottom to top, the system looked as follows: expert-level talks; government-level talks, i.e., talks involving deputy or vice ministers; foreign minister-level talks; and high-level talks, i.e., talks involving presidents, prime ministers, and secretaries-general of the Communist Party of China and the Communist Party of Vietnam (CPV).[73]

Expert-level talks were initiated in October 1992; up to late 1995, the talks focused on the Gulf of Tonkin. Government-level talks began in August 1993, and the thirteenth round of talks was held in January 2007.[74] Additional meetings have been held, with the most recent taking place in April 2011.[75]

The joint working group on the Gulf of Tonkin met seventeen times from March 1994 to the signing of the Agreement on the Delimitation of Territorial Seas, Exclusive Economic Zones, and Continental Shelves in the Gulf of Tonkin in December 2000. Expert-level talks on the disputes in the South China Sea proper, the so-called "sea issues," were initiated in November 1995 and the eleventh round of talks was held in July 2006.[76]

The Gulf of Tonkin

A closer look at the negotiation process on the Gulf of Tonkin shows that meeting frequency on a yearly basis did not differ much up to 1999.[77] In 2000 the number of meetings increased, with six rounds of expert-level talks being held that year (in March, May, June, September, October–November, and late November) compared with only one round of talks during 1999.[78] The Delimitation Agreement signed on December 25, 2000, stipulates the coordinates for tracing the maritime boundary between the two countries in the Gulf of Tonkin. On the same day, the two countries signed an agreement on fishery cooperation in the Gulf of Tonkin.[79] On April 29, 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

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72 For an overview of incidents during the 2000s, see Ramses Amer, "The Sino-Vietnamese Approach to Managing Border Disputes—Lessons, Relevance and Implications for the South China Sea Situation," in *The South China Sea: Cooperation for Regional Security and Developments, Proceedings of the International Workshop, Co-organized by the Diplomatic Academy of Vietnam and the Vietnam Lawyers' Association, 26–27 November 2009, Hanoi, Vietnam*, ed. Tran Truong Thuy (Hanoi: The Gioi and Diplomatic Academy of Vietnam, 2010), 264–67.

73 Amer, "The Sino-Vietnamese Approach to Managing Boundary Disputes," 9–14 and 50–58; Ramses Amer, "Assessing Sino-Vietnamese Relations through the Management of Contentious Issues," *Contemporary Southeast Asia* 26, no. 2 (2004): 329–31; Amer and Thao, "Vietnam's Border Disputes," 118–22; Ramses Amer and Nguyen Hong Thao, "The Management of Vietnam's Border Disputes: What Impact on Its Sovereignty and Regional Integration?" *Contemporary Southeast Asia* 27, no. 3 (2005): 433–34; and Ramses Amer and Nguyen Hong Thao, "Vietnam's Border Disputes: Assessing the Impact on Its Regional Integration," in *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam*, ed. Stéphanie Balme and Mark Sidel (New York: Palgrave Macmillan, 2007), 74–76.

74 "Viet Nam, China Hold Government-Level Border Negotiations," Viet Nam Ministry of Foreign Affairs, http://www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns070122102447. Only officially publicized talks are included.

75 "Viet Nam, China Talk Border-Related Issues," Viet Nam Ministry of Foreign Affairs, http://www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns110419090108.

76 The eleventh round of talks on "sea issues" was held July 10–12, 2006, per Amer, "The Sino-Vietnamese Approach to Managing Border Disputes—Lessons," 254. Only officially publicized talks are included.

77 This section is partly derived from Nguyen and Amer, "Management of Vietnam's Maritime Boundary Disputes," 312–13; and Amer and Nguyen, *Regional Conflict Management*, 62–63. Relevant sources are highlighted in footnotes.

78 For details about the talks, see Amer, "The Sino-Vietnamese Approach to Managing Boundary Disputes," 11–34 and 50–58.

79 Nguyen, "Maritime Delimitation and Fishery Cooperation in the Tonkin Gulf," 35–41; and Zou, "Sino-Vietnamese Fishery Agreement," 127–48.

in the Gulf of Tonkin were signed.[80] On June 30, 2004, both the boundary and fishery agreements entered into force following the completion of the ratification process.[81]

The delimitation-related negotiations centered on deciding a mutually acceptable framework or model for dividing the gulf. A core issue to be settled in the Gulf of Tonkin was which principle should be used in order to divide the gulf. In this context, the impact of islands was of crucial importance, particularly the Vietnamese-controlled Bach Long Vi Island. The first question was whether Bach Long Vi qualified as an island according to the provisions of UNCLOS. If it did, as argued by Vietnam, the island was entitled to full maritime zones, and more importantly its classification as an island would influence the tracing of a line of equidistance if the equidistance principle was applied in the Gulf of Tonkin. Logically, Vietnam would take the position that Bach Long Vi Island should have its full impact in any agreement on how to divide the gulf. On the other hand, China had an interest in minimizing the impact that the island would have on any agreed delimitation. This could be done by either arguing that Bach Long Vi is not an island in accordance with the provisions of UNCLOS, or by arguing that its impact should be minimized and possibly even disregarded.[82] For China to argue that Bach Long Vi was not an island would have been counterproductive, given that China had earlier controlled the island and claimed that the island was inhabited before it was handed over to Vietnam in the late 1950s.[83]An assessment of the agreed coordinates indicates that the impact of Bach Long Vi was not "valued" fully in the delimitation. However, in the agreement, it was partly "valued," as it was given a quarter of impact, i.e., 15 nm from the island.[84]

Another potentially complicating factor in the negotiations was the status of the Sino-French agreement of 1887. Vietnam would probably have favored using the agreement to delimit the Gulf of Tonkin since doing so would generally be to its advantage. China would have opposed using it by arguing that the 1887 agreement was only intended for determining administrative control over the islands in the gulf and did not apply to the water and the seabed in the gulf.[85] The eventual agreement reached indicates that if the status of the Sino-French agreement of 1887 was brought up during negotiations, both sides agreed that it would not have an impact on the delimitation of maritime zones in the Gulf of Tonkin. Thus, they agreed to use UNCLOS as the common legal basis for maritime delimitation in the gulf.

The agreed coordinates indicate that the two sides reached an agreement on a line of equidistance, albeit modified, having sorted out their differences relating to the question of how islands should affect the delimitation, in particular, Bach Long Vi Island.[86] As in the Thai-Vietnamese agreement of 1997, the Sino-Vietnamese agreement on the maritime boundary in the

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80 "Protocol on China-Vietnam Agreement on Fishery Cooperation in Beibu Bay Signed," *People's Daily*, June 25, 2004, http://english.people.com.cn/200404/30/eng20040430_142001.html.

81 "Two China-Vietnam Beibu Gulf Agreements Take Effect," *People's Daily*, July 1, 2004, http://english.peopledaily.com.cn/200407/01/eng20040701_148157.html.

82 The legal terminology used in this context is derived from Zou Keyuan, "Maritime Boundary Delimitation in the Gulf of Tonkin," *Ocean Development and International Law* 30, no. 3 (1999): 246. Information pertaining to the possible impact of Bach Long Vi Island on boundary delimitation is also derived from Zou, "Maritime Boundary Delimitation," 245–47.

83 Zou, "Maritime Boundary Delimitation," 245–46, 253.

84 Nguyen Hong Thao, "The Gulf of Tonkin: A Case Study of Dispute Settlement," in *Management and Resolution of Inter-State Conflicts in Southeast Asia*, ed. Kamarulzaman Askandar (Penang: Southeast Asian Conflict Studies Network, 2003), 210–13.

85 For an argument along similar lines, with a parallel drawn to the "Brévié Line" drawn in 1939 in the Gulf of Thailand, see Zou, "Maritime Boundary Delimitation," 238–40.

86 For more detailed analyses, see Nguyen, "The Gulf of Tonkin," 207–14; Nguyen, "Maritime Delimitation," 25–44; and Keyuan, "Sino-Vietnamese Agreement," 13–24.

Gulf of Tonkin uses a single line for both the continental shelf and the EEZ. The Delimitation Agreement is also relevant from the perspectives of the effects of coastal and outlying islands (e.g., Bach Long Vi), the role of low-tide elevations in delimitation, the issue of the outlet of a boundary river, and the question of a closing line for the gulf.[87] Article 7 also establishes an arrangement for exploitation of straddled oil and gas or other mineral resources.[88]

The completion of the ratification process has been followed by the initiation of expert-level talks on the delimitation of the area outside the entrance to the Gulf of Tonkin—also referred to as the mouth of the Gulf of Tonkin. The first meeting of the expert-level working group was held in January 2006 in Hanoi, and the fifth meeting was held in Hanoi in January 2009.[89]

The agreement on fishery cooperation in the Gulf of Tonkin (hereafter Fishery Agreement) is an example of a two-step solution for settling fishing disputes and delimiting the EEZ. The EEZ can be divided, but the application of the fisheries regime can be postponed in order to minimize economic dislocation for states. Meanwhile, related arrangements shall aim for better conservation and utilization of the living resources shared by both countries. From the beginning of the negotiation process, Chinese negotiators proposed that the fishery issue be handled carefully and that the fishery agreement be discussed together with the delimitation agreement, to which both sides consented.[90] Coordination and cooperation reflected in the fishery arrangements contribute to reasonable utilization and sustainable development of living resources as stated in the Delimitation Agreement.[91] According to the Fishery Agreement, the regime of 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).[92] The CFZ starts from the closing line of the gulf northward to latitude 20° N and extends both westward and eastward to 30.5 nm from the demarcation line.[93] It is a long-term cooperation arrangement. The allowable catch and quantity of operating fishing vessels for each party are determined annually by the Joint Fishery Committee (JFC) set up under the agreement on the basis of equity and mutual benefit.[94] As for the TA, the management is the same as the CFZ, but within four years, each party should take measures to phase out their vessels operating in the other party's EEZ.[95] The buffer zone has a breadth of 3 nm from the line of delimitation to both sides and adjacent to the boundary line to

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87 For more detail, see Nguyen, "Maritime Delimitation," 28–30.

88 For the straddled resources, Article 7 of the Delimitation Agreement requires that "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," reproduced by Keyuan, "Sino-Vietnamese Agreement," 24.

89 Amer, "The Sino-Vietnamese Approach to Managing Border Disputes—Lessons," 261. Note that only officially publicized talks are included.

90 "Zhongyue Beibu Wan Huajie Xieding Jieshao [Introduction to the China-Vietnam Agreement on Maritime Delimitation in the Beibu Gulf]," Ministry of Foreign Affairs of the People's Republic of China, http://www.fmprc.gov.cn/chn/pds/ziliao/tytj/tyfg/t145558.htm; and Baiying Kang and Jianwei Li, "Hainan's Role in the Management of South China Sea Issues: A Case Study of the Gulf of Tonkin," *Conflict Management and Dispute Settlement in East Asia,* ed. Ramses Amer and Keyuan Zou (Farnham: Ashgate, 2011), 208.

91 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 Keyuan, "Sino-Vietnamese Agreement," 24.

92 For more detail, see Keyuan, "Sino-Vietnamese Agreement," 30–32.

93 Guifang Xue, *China and International Fisheries Law and Policy* (Leiden: Martinus Nijhoff, 2005), 218.

94 Li Jianwei and Chen Pingping, "China-Vietnam Fishery Cooperation in the Gulf of Tonkin Revisited," in *The South China Sea: Towards A Region of Peace, Security and Cooperation*, ed. Tran Truong Thuy (Hanoi: Gioi and Diplomatic Academy of Vietnam, 2011), 308–9; Nguyen Hong Thao, "Conservation and Management of Marine Resources in Asia-Pacific: Who is Responsible?" *International Journal of Marine and Coastal Law* 19, no. 1 (2004): 81; and Nguyen, "Vietnam and Maritime Delimitation," 180.

95 Art. 11, par. 1 of the Fishery Agreement. Also see Xue, *China and International Fisheries Law*, 222.

the distance of 10 nm. The purpose of this zone is to avoid disputes caused by accidental illegal entry by small fishing boats of one party into the territorial sea of the other.[96]

The agreements were reached by direct negotiation and consultation at different levels—meetings of heads of both government delegations, negotiations at the government level, and meetings at the expert level. Meanwhile, the political will shown by both countries' top leaders was key to resolving the dispute and reportedly led directly to the agreement.

Several mechanisms were included to supervise the implementation of the two agreements. The JFC is in charge of the implementation of the Fishery Agreement. The committee was set up immediately after the agreement came into force, and under the committee there are two arrangements—the China-Vietnam Experts Group on fisheries resources in the Gulf of Tonkin and the law enforcement mechanism. At the time of writing, the JFC has held eight annual meetings, with the latest one being convened in August 2011.[97] The expert-level group organized a two-year joint research program in the CFZ from 2006 to 2007. The program included two phases with seventeen aerial surveys. Joint inspections were also arranged to monitor, control, and supervise fishing activities in the gulf. China and Vietnam held six working group meetings and five joint inspections from September 2006 to the end of 2010.[98] An agreement on joint oil exploration in the Gulf of Tonkin was signed on November 16, 2006.[99] All these post-agreement arrangements are beneficial to effective implementation of relevant agreements. They not only handle disputes in a coordinated way if disputes ever occur, but also contribute to confidence-building between China and Vietnam, which will help both countries resolve other disputes in the South China Sea.

The South China Sea Proper

Concerning the situation in the South China Sea proper, it can be noted that talks were initiated at a later stage than in relation to the Gulf of Tonkin.[100] Less progress has been achieved with regard to the disputes in the South China Sea proper, i.e., the competing sovereignty claims to the Paracel and Spratly island groups as well as the overlapping claims to waters and continental shelf areas to the east of the Vietnamese coast. Although expert-level talks have been initiated, the two parties have yet to agree on which disputes to include on the agenda, with Vietnam pushing for the inclusion of the Paracel Islands as an issue alongside that of the Spratly Islands, whereas China only wants to discuss the latter. To further complicate matters, China seems to view the disputes over waters and continental shelf areas as part of the Spratlys conflict or at least as overlapping with areas within the so-called "nine-dotted lines" claim displayed on China's official maps, whereas Vietnam views those areas as separate from the conflict over the Spratlys. It seems as if Vietnam does not want to initiate talks relating to the areas of overlapping claims in the South China Sea proper, as it would be interpreted as giving legitimacy to China's claims to those areas. In other

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96 Nguyen, "Maritime Delimitation," 31.

97 "Beibu Wai Yuye Zhixu Wending [Stable Fishery Order in Beibu Bay]," *China Fishery News*, September 12, 2011, http://szb.farmer.com.cn/yyb/html/2011-09/12/nw.D110000yyb_20110912_1-01.htm?div=-1.

98 For a discussion of how the Joint Fishery Committee functions, see Li and Chen, "China-Vietnam Fishery Cooperation in the Gulf of Tonkin Revisited," 303–17.

99 "Gov't Gives Nod to Tokin Gulf Oil Deal with China," Viet Nam Ministry of Foreign Affairs, http://www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns070105093635.

100 This section is partly derived from Ramses Amer, "Dispute Settlement and Conflict Management in the South China Sea—Assessing Progress and Challenges," in *The South China Sea: Towards A Region of Peace, Security and Cooperation*, ed. Tran Truong Thuy (Hanoi: Gioi and Diplomatic Academy of Vietnam, 2011), 264–7. Relevant sources are highlighted in footnotes.

words, Vietnam rejects the claims made by China through its "nine-dotted lines." Thus, of the three South China Sea issues to be addressed by the two countries, there is only agreement on putting one on the agenda for talks, namely the Spratly archipelago dispute, which is a multilateral conflict involving other claimants as well.

Of direct relevance in the context of this essay is how the two sides managed to bring under control the periods of deep tension in the 1990s. This was done through the establishment of mechanisms and principles regulating action in the South China Sea in order to prevent the reoccurrence of periods of tension.

The initiation of expert-level talks in 1995 was the first obvious move toward an institutionalized form of conflict management of the disputes in the South China Sea. The noticeable shift in how to deal with actions in the South China Sea taken by the other party appeared in a dispute in May 1998 relating to the activities of a Chinese exploration ship in areas also claimed by Vietnam. This issue was settled without leading to the deep tension that characterized an incident that was also caused by the activities of a Chinese exploration ship in March–April 1997.[101] As there are fewer public statements in connection with the May 1998 incident, it is difficult to fully assess how the more successfully managed incident played out. Obviously, less public rhetoric and more restraint by the two parties were contributing factors. Judging from Vietnam's official explanation, its approach by "diplomatic negotiations" and patience in dealing with China did bear fruit in connection with the May 1998 incident.[102]

An additional observation that can be drawn from the developments in 1998 is that both China and Vietnam were more reluctant to engage in longer periods of accusations and counteraccusations in connection with incidents in the South China Sea that caused tension in bilateral relations. However, this did not imply that either side refrained from publicizing their discontent or protesting actions carried out by the other party. The difference between 1998 and earlier years was that official complaint or accusation was stated on a limited number of occasions and was not followed by further public statements on the incident. This prevented an escalation in accusations and counter-accusations from taking place, and thus tension did not appear to have been as deep as in the 1997 incident.

The developments in 1999 were further indications of the progress made in the management of the disputes between China and Vietnam in the South China Sea. The assessment of progress is based on the level of tension in the area in 1999, i.e., public protests or criticism of the actions taken by the other country. The only public protest was made by Vietnam in late March in response to a Chinese decision to temporarily ban fishing in the South China Sea.[103] The low level of tension

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101 On March 15, 1997, *Voice of Vietnam* announced that China had sent "Kanta Oil Platform No. 3," together with two "pilot ships Nos. 206 and 208," to carry out exploratory oil drilling in areas lying within Vietnam's continental shelf. See BBC, "Summary of World Broadcasts, Part Three, Far East," 2870 B/4, March 18, 1997 (hereafter *BBC/FE*); and *BBC/FE* 2871 B/4, March 19, 1997. The first official Chinese reaction came on March 18, when a spokesman of the Ministry of Foreign Affairs said that China's "normal operation" within its EEZ and continental shelf was "indisputable" (*BBC/FE*, 2872 G/1, March 20, 1997). The bilateral dispute continued throughout March. Then, according to information carried by *Voice of Vietnam* on April 9, quoting a Vietnamese expert, the Chinese "rig" and its "tugboats" had been withdrawn from Vietnam's EEZ and continental shelf on April 1 (*BBC/FE*, 2889 B/3), April 10, 1997.

102 On May 20, 1998, a spokesperson from the Vietnam Ministry of Foreign Affairs stated that the Chinese ship *Discovery 08* was operating in the Spratly archipelago and even "deeply" into Vietnam's continental shelf, and that this was a violation of Vietnam's territorial sovereignty (*BBC/FE*, 3233 B/11, May 22, 1998). The Chinese response came on May 21, when a spokesman for the PRC Ministry of Foreign Affairs stated that China had "indisputable" sovereignty over the Spratly Islands and their surrounding waters and that the presence of Chinese ships in these waters for normal activities was within China's sovereign rights (*BBC/FE*, 3235 G/1, May 25, 1998). On May 22 the spokesperson for the Vietnam Ministry of Foreign Affairs said that the ship and two armed fishing vessels had withdrawn from Vietnam's "sea area." The Vietnamese approach to the problem was said to have been in line with the "persistent" policy of settling disputes through diplomatic negotiations. In this spirit, Vietnam had "patiently" maintained contact with China on the operation of the Chinese ships in Vietnam's "sea territory" (*BBC/FE*, 3236 B/12, May 26, 1998).

103 *BBC/FE*, 3496 B/4, March 30, 1999. Report carried by *Voice of Vietnam*.

could be explained in two ways. First, the two sides respected the status quo and refrained from actions that could otherwise have led to protest by the other side; consequently, there was virtually no tension. Second, actions were carried out that may have caused tension, but both sides opted to handle incidents without resorting to public protest or criticism of the other country. If the second line of explanation is pursued, it would be an indication that the two sides took further steps to contain and defuse situations that could have led to tension during 1999.

This is in line with the provisions of the joint declaration of February 27, 1999, issued in connection with the visit to China by the secretary-general of the CPV, relating to the mode of behavior to be implemented in order to solve "any differences" in the South China Sea. According to Section 3 of the joint declaration, the two sides agreed to maintain the "existing negotiation mechanism on the sea issues." They would try to find a "basic long-term solution" through negotiations. Pending a solution, they would discuss the possibility of engaging in bilateral cooperation in such areas as "protecting the sea environment, hydro-meteorology, and natural calamity prevention and control." They agreed to refrain from "any actions" that could "further complicate or widen the dispute." They also agreed to refrain from use or threat of use of force, and to "promptly" conduct discussions and "satisfactorily" resolve differences so that they would not affect the "normal development of bilateral ties."[104]

During 2000 no incidents relating to the South China Sea caused tension in bilateral relations. In fact, the two countries placed greater emphasis on conflict management in the South China Sea through engaging in further talks, exploring potential cooperation in certain fields, and exercising mutual self-restraint. This was most evidently displayed in the joint statement for comprehensive cooperation signed on December 25, 2000, by both countries' foreign ministers. Section IX is devoted to the South China Sea, and the two sides agreed to "maintain the existing negotiation mechanisms on marine issues and to persist in seeking a fundamental and everlasting solution acceptable to both sides through peaceful negotiations." Pending a solution, the two sides will actively explore possibilities of cooperating in "environmental protection, meteorology, hydrology, disaster prevention, and mitigation." They agreed not to take "actions to complicate or aggravate disputes" and not to resort to force or threat of force. Finally, they will consult each other in a timely manner if a dispute occurs and adopt a constructive attitude in order to prevent disagreements from impeding the development of bilateral relations.[105]

As noted above, developments during most of the 2000s demonstrate that this pattern of interaction related to disputes in the South China Sea has continued to prevail with continued dialogue and only limited periods of tension. However, during the period from 2009 to 2011, the level of tension periodically increased, and the South China Sea remains a cause for concern, although not to the degree it was in the 1990s. Vietnam's submissions to the Commission on the Limits of the Continental Shelf (CLCS) in May 2009—both individual and jointly with Malaysia—prompted China to officially protest and oppose the submissions.[106] The second half of 2009 and the year 2010 saw several arrests of Vietnamese fishermen by China, leading to Vietnamese

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104 "Vietnam-China Joint Declaration," reproduced in *Vietnam Law & Legal Forum* 5, no. 54 (1999): 13.

105 "Joint Statement on All-round Cooperation in the New Century between the People's Republic of China and the Socialist Republic of Viet Nam," Ministry of Foreign Affairs of the People's Republic of China, December 26, 2000, http://www.fmprc.gov.cn/eng/wjb/zzjg/yzs/gjlb/2792/2793/t16248.htm.

106 For details, see Ramses Amer, "Vietnam in 2009—Facing the Global Recession," *Asian Survey* 50, no. 1 (2010): 215; and Nguyen Hong Thao and Ramses Amer, "Coastal States in the South China Sea and Submissions of the Outer Limits of the Continental Shelf," *Ocean Development and International Law* 42, no. 3 (2011): 245–63.

protests.[107] In response to the heightened tension, the two sides decided—in connection with the visit to Vietnam by China's prime minister Wen Jiabao to participate in the East Asian Summit in late October 2010—to "seek satisfactory solutions to existing issues relating to" the South China Sea. According to the official Vietnamese report, the two sides also "reached consensus on speeding up negotiations on basic principles to settle sea issues, and satisfactorily settling fishermen and fishing boat issues."[108] However, the official Chinese report does not mention anything about fishermen and fishing boats.[109] One reason for the discrepancy might be that the Chinese version mentions what Prime Minister Wen Jiabao said, and to which Vietnam's prime minister agreed, at the talks on October 28, 2010. Future developments will indicate if the parties will address the issues relating to fishing boats. There have been no officially publicized complaints by Vietnam relating to the arrest of Vietnamese fishermen by the Chinese side since the talks in late October 2010.

Deep tension emerged in late May and early June 2011. It was linked to Vietnam's exploration activities and China's action against these activities, which prompted accusations and counter-accusations.[110] The tension was brought under control in late June 2011.[111] Talks that had earlier been initiated with the goal of agreeing on basic principles for the settlement of "sea-related issues" led to the signing of the Agreement on Basic Principles Guiding the Settlement of Sea-Related Issues in Beijing on October 11, 2011.[112] The signing took place in connection with the visit to China by the secretary-general of the CPV, Nguyen Phu Trong. In the joint statement issued during the summit visit, both sides stated their "political will and determination to settle disputes via friendship negotiation and talks in order to maintain peace and stability" in the South China Sea.[113]

This agreement has enhanced the mechanisms for the management of sea-related issues and disputes through a de facto bilateral "code of conduct," while the summit of October 2011 signals a renewed high-level push for better management of the sea-related issues after a three-year pause. The combination of these two factors creates more conducive conditions to manage and reduce tension between China and Vietnam in the South China Sea. The need has been addressed to enhance and expand the bilateral management approach relating to the South China Sea issues

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107 For details about incidents in 2009, see Amer, "Vietnam in 2009," 16; and Amer, "Dispute Settlement and Conflict Management in the South China Sea," 266. For details about incidents in 2010, see Ramses Amer, "Vietnam in 2010—Regional Leadership," *Asian Survey* 51, no. 1 (2011): 200; and Amer, "Dispute Settlement and Conflict Management in the South China Sea," 266.

108 "VN Sees Cooperation with China as Vital," Viet Nam Ministry of Foreign Affairs, http://www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns101029102131.

109 "Wen Jiabao Meets with His Vietnamese Counterpart Nguyen Tan Dung," Ministry of Foreign Affairs of the People's Republic of China, October 29, 2010, http://www.fmprc.gov.cn/eng/wjb/zzjg/yzs/gjlb/2792/2794/t765532.htm.

110 For China's case, see "Foreign Ministry Spokesperson Jiang Yu's Remarks on China's Maritime Law Enforcement and Surveillance on the South China Sea," Ministry of Foreign Affairs of the People's Republic of China, http://www.fmprc.gov.cn/eng/xwfw/s2510/2535/t826601.htm; and "Foreign Ministry Spokesperson Hong Lei's Remarks on Vietnamese Ships Chasing Away Chinese Fishing Boats in the Waters off the Nansha Islands," Ministry of Foreign Affairs of the People's Republic of China, http://www.fmprc.gov.cn/eng/xwfw/s2510/2535/t829427.htm. For Vietnam's case, see "Press Conference on Chinese Maritime Surveillance Vessel's Cutting Exploration Cable of PetroViet Nam Seismic Vessel," Viet Nam Ministry of Foreign Affairs, http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns110530220030; and "Foreign Ministry Spokesperson Nguyen Phuong Nga Answers Wuestion from the Media at the Press Conference on June 9th 2011 Concerning the Viking II Incident," Viet Nam Ministry of Foreign Affairs, http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns110610100618.

111 "Viet Nam-China Joint Press Release," Viet Nam Ministry of Foreign Affairs, http://www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns110626164203.

112 "Vietnam, China Sign Agreement on Basic Principles Guiding Settlement of Sea Issues," *Nhân Dân*, October 12, 2011, http://www.nhandan.com.vn/cmlink/nhandan-online/homepage/politics/external-relations/vietnam-china-sign-agreement-on-basic-principles-guiding-settlement-of-sea-issues-1.315961.

113 "Vietnam-China Joint Statement," *Nhân Dân*, October 16, 2011, http://www.nhandan.com.vn/cmlink/nhandan-online/homepage/politics/external-relations/vietnam-china-joint-statement-1.316664.

that was highlighted both by the May–June 2011 incidents and by the periodically increased tension during the period 2009–11.[114]

Concluding Remarks

Through an overview of the dispute situation and an analysis of management practices, this essay concludes that although there exist some periods of tension among the disputants, the South China Sea remains a reasonably stable area, and maritime disputes have been managed through various measures. A preference for bilateral approaches in dealing with maritime disputes can clearly be seen. This is in line with the general preference for bilateralism displayed by the countries of the region.[115]

Efforts have been made in resolving maritime disputes, which have resulted in some maritime delimitation agreements having been reached since the late 1990s, e.g., Thailand-Vietnam in 1997, China-Vietnam in 2000, and Indonesia-Vietnam in 2003. The ICJ has been involved in settling two cases of ownership of insular features, i.e., between Indonesia and Malaysia (ruling in 2002), and between Malaysia and Singapore (ruling in 2008). Some countries have developed JDAs to shelve their territorial disputes for the time being with the aim of utilizing nonliving resources, i.e., between Malaysia and Thailand, and between Malaysia and Vietnam. The JDAs developed in the Gulf of Thailand provide alternative models for bilateral JDAs. Thus far, the inconclusive attempts at resolution among Thailand, Malaysia, and Vietnam indicate the difficulties regarding multilateral arrangements. In the South China Sea proper, particularly the multilateral dispute situation around the Spratly Islands, relevant bilateral attempts are limited. The most interesting case thus far, that of the China-Philippines-Vietnam trilateral seismic survey, fell victim to the domestic situation of one of the parties. Furthermore, China's promotion of the concept of joint development in the South China Sea since the early 1990s has been perceived by Vietnam as an attempt to legitimize China's claims within the "nine dotted lines," which encompass over 80% of the South China Sea.[116]

Efforts have also been made at the regional level and thus far have resulted in the first regional document on the South China Sea involving all claimants, i.e., the DoC. Peaceful management of the maritime disputes in the South China Sea is in the common interest of all claimants. Recent development has seen a growing need for all claimants to reach a more binding code of conduct to restrain their activities in order to prevent disputes from escalating into open conflicts.

As a main claimant in the South China Sea dispute, China insists on direct bilateral negotiation and consultation in resolving the sovereignty disputes with neighboring countries in Southeast Asia. This policy has helped advance the resolution of maritime disputes in the Gulf of Tonkin, where resource exploitation and conservation seem to be under more efficient management than before. However, this mechanism seems to result in less progress in settling both bilateral disputes in the South China Sea proper and the de facto multilateral dispute over the Spratly Islands.

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114 For more details about developments in 2011 and a broader analysis, see Ramses Amer, "China, Vietnam and the South China Sea Disputes: Assessing the Implications of the May–June 2011 Incidents" (paper prepared for the Third International Workshop on "South China Sea: Cooperation for Regional Security and Development," Hanoi, November 3–5, 2011).

115 The preference for bilateralism in dealing with interstate relations has been evidently displayed in a recent book on the Southeast Asian region. See *International Relations in Southeast Asia: Between Bilateralism and Multilateralism*, ed. N. Ganesan and Ramses Amer (Singapore: Institute of Southeast Asian Studies, 2010).

116 For further discussion, please refer to Nguyen and Amer, "A New Legal Arrangement," 342–43.

Furthermore, from the early 1990s onward, China has participated in talks with other claimants at both first- and second-track meetings with the aim of promotion of confidence as well as more engagement. This has contributed to the overall stability in the region.

Despite positive developments, a number of bilateral disputes remain to be settled, as outlined in the first part of the essay. Some multilateral disputes are also unsettled, and the situation in and around the Spratly Islands is considered the most serious one from a regional perspective. Bilateral efforts and regional initiatives, such as the ASEAN-China dialogue, the 2002 DoC, and the "2011 Guidelines for the Implementation of the DOC," are positive steps in terms of conflict management, but further efforts are needed.

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The Implications of Recent Decisions on the Territorial and Maritime Boundary Disputes in East and Southeast Asia

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EXECUTIVE SUMMARY

This essay examines recent decisions of international courts and tribunals—specifically, the 2009 *Maritime Delimitation in the Black Sea* case between Romania and Ukraine—and draws implications for the territorial and maritime boundary disputes in East and Southeast Asia.

MAIN FINDINGS

- The judgment of the International Court of Justice (ICJ) in the Black Sea case is a landmark jurisprudential contribution to the development of the law of maritime delimitation. In this case, the ICJ explicitly provided a three-stage delimitation method—which, although not novel, is a clarification and clear articulation not seen in previous cases.
- The peaceful settlement of disputes over territory and over unresolved maritime boundaries is fundamental for the prevention of interstate conflict. Disputed territorial sovereignty and contested maritime boundaries impair maritime security, hamper effective interstate cooperation, compromise sustainable use of scarce natural resources, and hinder the flow of goods and resources. International adjudication offers one important way to resolve long-standing and apparently intractable disputes, especially concerning sovereignty over territory. However, this mode of dispute settlement is only one of the options open to states and is not necessarily ideal, as the vast majority of boundary agreements have resulted from diplomatic negotiations.

POLICY IMPLICATIONS

- States have an obligation under international law to cooperate, negotiate in good faith, and settle their disputes peacefully.
- The claimant states should be willing to submit their territorial and maritime disputes to any of the various dispute resolution mechanisms available under international law.
- The parties must be willing to negotiate on the basis of international law and in particular the provisions of the UN Convention on the Law of the Sea (UNCLOS).
- Maritime delimitation can only proceed after the sovereignty issues are resolved; these disputes must, therefore, be addressed first. However, states can set aside the issue of sovereignty and consider joint development of the resources as an option; or cooperate on other issues such as marine environmental protection, marine scientific research, and counterterrorism, without prejudice to their respective claims.
- The resolution of the disputes should consider the political dynamics and cultural sensitivities of the region and allow a greater role for intraregional mechanisms.

Maritime delimitation—and thus, jurisdictional certainty—is an essential requirement to ensure comprehensive and sustainable management of living resources and the preservation and protection of the marine environment.[1] Disputed territorial sovereignty and contested maritime boundaries impair maritime security, hamper effective interstate cooperation, compromise sustainable use of scarce natural resources, and hinder the flow of goods and resources.[2] In this regard, clearly delineated state boundaries remain important despite the growing trend toward a "borderless world" and increasing interdependence between nation-states. In fact, many of the world's territorial and maritime boundaries have yet to be resolved and delimited.[3] In the resolution of these disputes, states have the option to submit their competing claims before an international court or tribunal for adjudication. Consequently, there have been more judgments and awards concerning maritime boundary disputes than any other aspect of international law, an apparently continuing trend.[4] Alternatively, and more commonly, agreements may be negotiated on the basis of international law.[5]

The primary purpose of this essay is to provide a concise examination and assessment of the current state of international law on maritime boundary delimitation, especially recent developments in international case law or jurisprudence that have a bearing on maritime boundary delimitation. In particular, the delimitation methodology enunciated by the International Court of Justice (ICJ) in the *Maritime Delimitation in the Black Sea* case between Romania and Ukraine (hereafter referred to as the Black Sea case) has made an important contribution to the field.[6] This essay will examine the Black Sea case, along with other recent maritime boundary cases adjudicated at the international level, to determine whether the delimitation methodology may be applied as a tool of analysis in maritime boundary disputes in East and Southeast Asia.

In view of the wide range of issues and circumstances that are brought before a tribunal in adjudicating a case involving competing claims to territory, or with respect to the delimitation of overlapping claims to maritime jurisdiction, it is unnecessary to present a comprehensive survey of such factors in this essay. It is sufficient to note the salience of international jurisprudence on maritime boundary delimitation law, which is evident in its progressive influence in the definition and methods of delimiting maritime boundaries as well as its influence in reflecting and shaping state practice. The current state of jurisprudence will always strongly influence the negotiating positions of states in maritime boundary negotiations and resulting delimitation agreements, as well as the decision to submit a claim for adjudication, including the choice of legal bases for such

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1 Victor Prescott and Clive Schofield, *The Maritime Political Boundaries of the World* (Leiden and Boston: Martinus Nijhoff, 2005), 216–7; Gerald Blake, "Hydrocarbon and International Boundaries: A Global Overview," in *Boundaries and Energy: Problems and Prospects*, ed. Gerald Blake et al. (London and Boston: Kluwer Law International, 1998), 3–27; and Barbara Kwiatkowska, "Economic and Environmental Considerations in Maritime Boundary Delimitation," in *International Maritime Boundaries*, ed. Jonathan I. Charney and Lewis M. Alexander (Dordrecht and Boston: Martinus Nijhoff, 1993), 77–78.

2 Leszek Buszynski and Iskandar Sazlan, "Maritime Claims and Energy Cooperation in the South China Sea," *Contemporary Southeast Asia* 29, no. 1 (2007): 143; and W. Lawrence and S. Prabhakar, "The Regional Dimension of Territorial and Maritime Disputes in Southeast Asia," in *Maritime Security in Southeast Asia*, ed. Kwa Chong Guan and John K. Skogan (London: Routledge, 2007), 34–48.

3 Robert W. Smith, "A Geographical Primer to Maritime Boundary-Making," *Ocean Development and International Law* 12, no. 1 (1982): 3; Prescott and Schofield, *Maritime Political Boundaries*, 245; and Nuno Sergio and Marques Antunes, *Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of a Political Process* (Leiden: Martinus Nijhoff, 2003), 4–5.

4 Jonathan I. Charney, "Progress in International Maritime Boundary Delimitation Law," *American Journal of International Law* 88, no. 2 (1994): 227.

5 See, for example, Robert Kolb, *Case Law on Equitable Maritime Delimitation* (The Hague: Kluwer Law International, 2003); Kaiyan Homi Kaikobad, "Problems of Adjudication and Arbitration in Maritime Boundary Disputes," *Law and Practice of International Courts and Tribunals* 1, no. 2 (2002): 1–86; and Vladimir-Djuro Degan, "Consolidation of Legal Principles on Maritime Delimitation: Implications for the Dispute between Slovenia and Croatia in the North Adriatic," *Chinese Journal of International Law* 6, no. 3 (2007): 601–34.

6 *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, ICJ Rep. (2009), 61.

claims. States will rely and base their claims on international legal norms and principles on the basis of doctrines and circumstances accorded special weight by international courts and tribunals in cases of a similar nature. These are some of the reasons why decisions made by international courts and tribunals are important in maritime boundary delimitation.

The essay is divided into four sections. The first section provides a broad overview of the international law of maritime boundary delimitation. To that end, it discusses the relevant provisions of the United Nations Convention on the Law of the Sea (UNCLOS)[7] and relevant principles of international law on maritime boundary delimitation that have been enunciated and applied by international courts and tribunals in recent cases. Second, the essay examines the recent decision of the ICJ in the Black Sea case. The third section assesses the challenges and opportunities in applying the ICJ's delimitation methodology used in the Black Sea case to the territorial and maritime disputes in East and Southeast Asia. The final section provides key recommendations.

International Law on Maritime Boundary Delimitation

Maritime boundary delimitation is one of the most extensively researched fields in international law. The expansive literature is in large part a consequence of the slow progress in maritime delimitation. In fact, the majority of the world's maritime boundaries have yet to be settled. Over the last century, the extension of coastal state jurisdiction under UNCLOS and the emergence of new states have generated an expansion of maritime jurisdictional claims, overlaps between those maritime claims, and an attendant proliferation of "new" potential maritime boundaries.[8]

The development of the law through maritime boundary disputes adjudicated at the international level is well documented. Since the 1969 *North Sea Continental Shelf Cases*,[9] the issue of maritime delimitation—especially relating to the continental shelf and exclusive economic zones (EEZ)—has been the subject of many disputes that have come before international tribunals. Since the 1969 judgment, international jurisprudence has evolved considerably, especially against the backdrop of the entry into force of UNCLOS and its near universal acceptance,[10] as well as the crystallization and acceptance of many of its provisions as reflecting customary international law.[11] For these reasons, UNCLOS is an important basis for the delimitation of maritime boundaries, even between states not party to UNCLOS. For example, in the *Eritrea/Yemen* arbitration,[12] despite not being a party to UNCLOS, Eritrea agreed that the adjudication of its maritime boundary with Yemen be effected by reference to the rules in UNCLOS. Another example is the *Qatar v. Bahrain* case,[13] in which Qatar, though not being a party to UNCLOS, agreed that the relevant UNCLOS provisions applied to the case reflect customary law.

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7 United Nations Division for Ocean Affairs and the Law of the Sea, "UN Convention on the Law of the Sea (UNCLOS)."

8 Prescott and Schofield, *Maritime Political Boundaries*, 217–18.

9 *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, ICJ Rep. 3 (1969).

10 UNCLOS came into force on November 16, 1994. As of December 2011, 161 states and the European Union had ratified or acceded to UNCLOS.

11 See, for example, W.E. Butler, "Custom, Treaty, State Practice and the 1982 Convention," *Marine Policy* 12, no. 3 (1988); Leslie M. MacRae, "Customary International Law and the United Nations' Law of the Sea Treaty," *California Western International Law Journal* 13 (1983); and Louis B. Sohn, "Law of the Sea: Customary International Law Developments," *American University Law Review* 34, no. 2 (1985).

12 *Eritrea/Yemen (Phase One: Territorial Sovereignty and Scope of Dispute)*, Award of the Arbitral Tribunal, Permanent Court of Arbitration (PCA) (1998).

13 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, ICJ Rep. (2001).

The current docket of the ICJ includes two pending cases involving maritime boundary delimitation, one between Nicaragua and Colombia[14] and another between Peru and Chile.[15] There is also a pending case in the International Tribunal for the Law of the Sea (ITLOS) between Bangladesh and Myanmar concerning the delimitation of their maritime boundary in the Bay of Bengal.[16] However, the current state of international law on maritime boundary delimitation has been criticized for its indeterminacy.[17] This is because international law does not specify a particular method for the delimitation of maritime boundaries and only provides that they be "effected by agreement on the basis of international law," taking into account all of the relevant circumstances of the case to produce an equitable solution.[18] As the tribunal in the *Eritrea/Yemen* arbitration noted, the delimitation provisions of UNCLOS were "a last minute endeavor…to get agreement on a very controversial matter" and "were consciously designed to decide as little as possible."[19]

The judgment in the Black Sea case, therefore, is significant for clarifying and setting out the present state of the law on the issue of maritime delimitation in a structured way. The ICJ, on the basis of established state practice and its past jurisprudence, stated that the law in the area of maritime delimitation has developed a three-step approach that the court has to follow. This three-step approach will be discussed in detail below.

Maritime Boundary Delimitation and the Law of the Sea Conventions

The first codified rules on the delimitation of maritime zones were incorporated into the Geneva Conventions on the Law of the Sea of April 29, 1958.[20] The Convention on the Territorial Sea and the Contiguous Zone and the Convention on the Continental Shelf both contain provisions dealing with the delimitation of maritime zones.[21] The rules applicable to delimitation are different depending on the zones concerned.[22] Both conventions favor the median line except in cases of historic title or other special circumstances. It must be noted that UNCLOS prevails, as between states parties, over the 1958 Geneva Conventions.[23]

The history of maritime delimitation parallels the progressive development of the law of the sea. The extension of coastal state jurisdiction in UNCLOS subjected vast maritime areas previously part of the high seas to several resource-oriented regimes of coastal state jurisdiction. This has also required new maritime boundary delimitations because of overlapping maritime zones between

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14 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, instituted by Nicaragua on December 6, 2001, concerned "legal issues subsisting" between the two states "concerning title to territory and maritime delimitation" in the western Caribbean. On February 26, 2010, Costa Rica filed an application for permission to intervene in the same case, which is still pending resolution by the International Court of Justice (ICJ).

15 *Maritime Dispute (Peru v. Chile)*, instituted by Peru on January 16, 2008, concerned a dispute in relation, on the one hand, to "the delimitation of the boundary between the maritime zones of the two States in the Pacific Ocean, beginning at a point on the coast called Concordia, …the terminal point of the land boundary established pursuant to the Treaty…of June 3, 1929," and, on the other, to the recognition in favor of Peru of a "maritime zone lying within 200 nautical miles of Peru's coast, and thus appertaining to Peru, but which Chile considers to be part of the high seas." Quoted in "Peru Institutes Proceedings Against Chile with Regard to a Dispute Concerning Maritime Delimitation between the Two States," ICJ, Press Release, January 16, 2008.

16 *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, International Tribunal for the Law of the Sea (2011).

17 Charney, "Maritime Boundary Delimitation Law," 227.

18 "UNCLOS," art. 74, par. 1, and art. 83, par. 1.

19 *Eritrea/Yemen Arbitration (Stage Two: Maritime Delimitation)*, Award, Permanent Court of Arbitration (1999), par. 116.

20 The First United Nations Conference on the Law of the Sea (UNCLOS I), which took place in Geneva in 1958, resulted in four conventions that are often collectively known as the Geneva Conventions or the 1958 Conventions.

21 "Geneva Convention on the Territorial Sea and the Contiguous Zone (CTSCZ)," September 10, 1964, 15 U.S. *Treaty Ser*. 1606 and 516 UN *Treaty Ser.* 205.

22 "CTSCZ," art. 12, par. 1, and art. 24, par. 3; and "Convention on the Continental Shelf," April 29, 1958, UN *Treaty Ser.* 499, art. 6, par. 1.

23 "UNCLOS," art. 311. This rule would not apply between two parties if only one is party to UNCLOS. In this case, the Geneva Conventions would govern their relationship.

states. UNCLOS has been an important factor in this respect, shaping the nature and direction of the framework of rules, principles, practices, and lines of argument adopted by states and international tribunals in the process of maritime boundary-making.

Zones of jurisdiction and maritime limits. UNCLOS specifies rules for the maritime entitlement of coastal states to a territorial sea, a contiguous zone, an EEZ, and a continental shelf, and clearly sets the limits of the various maritime zones.[24] UNCLOS provides that every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles (nm) and to claim a contiguous zone of 24 nm, measured from baselines determined in accordance with the convention.[25] UNCLOS allows states to claim an EEZ that may extend up to 200 nm from the baselines from which the territorial sea is measured, within which they have sovereign rights to explore and exploit the natural resources.[26] The coastal state is also entitled to a continental shelf, which consists of 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 territorial sea is measured.[27] The coastal state exercises sovereign rights for the purposes of exploring and exploiting natural resources in its continental shelf.

The legal nature or status of a maritime zone that is the object of overlapping claims pending delimitation is particularly relevant for the process of negotiating and establishing a maritime boundary. The provisions of UNCLOS on delimitation—Article 15; Article 74, paragraph 1; and Article 83, paragraph 1—constitute the primary legal reference in maritime delimitation. However, the indeterminacy and ambiguity of the language contained in these provisions and consequent interpretation of these provisions have prompted states to resort to third-party dispute settlement procedures. In short, the UNCLOS provisions on maritime boundary delimitation enunciate only broad principles. This renders it impossible to accurately predict the results when applied to a particular dispute. The interpretation of UNCLOS provisions in ICJ and arbitration cases, however, has greatly enriched their application, thereby contributing to the development of customary international law and providing clearer guidance on this issue.

Baseline delineation. The starting point in the determination of a coastal state's maritime zones is establishing the points on the coast from which the outer limits of such zones are to be measured. This is the function of baselines. The baselines are used as the starting point from which to measure the breadth of the territorial sea,[28] contiguous zone,[29] EEZ,[30] and continental shelf.[31] The waters on the landward side of the baseline are known as internal waters. For archipelagic states, the waters enclosed by the baselines are called archipelagic waters, over which an archipelagic state exercises sovereignty.[32] Thus, the baseline also separates the maritime area (internal waters) where other states enjoy no general rights, from those maritime areas (the territorial sea and other zones) where

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24 UNCLOS contains detailed provisions on the different maritime zones: Articles 2–16 deal with the territorial sea; Article 33 describes the contiguous zone; Articles 55–75 pertain to the exclusive economic zone; and Articles 76–85 cover the continental shelf.

25 "UNCLOS," art. 33, par. 2 and 3.

26 Ibid., art. 56.

27 Ibid., art. 76.

28 Ibid., art. 3.

29 Ibid., art. 33, par. 2.

30 Ibid., art. 57.

31 Ibid., art. 76.

32 Ibid., art. 49.

other states do enjoy certain general rights. Under UNCLOS, the baseline is significant not only in the generation of maritime zones, but likewise for the enforcement of national jurisdiction and the calculation of the geographical limits of the various maritime zones. In maritime delimitation, baselines are essential in the measurement of equidistance-based delimitation lines.

UNCLOS provides for multiple methods for determining a state's baselines: (1) the normal baseline, according to Article 5, "is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State"; (2) the straight baseline, provided for in Article 7, can be employed when the coastlines are "deeply indented and cut into or if there is a fringe of islands along the coast in its immediate vicinity"; and (3) the archipelagic baseline, in accordance with Article 47, is a method of "joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1:1 and 9:1."[33] UNCLOS allows the coastal state to determine its baselines by any of the methods, which permits a range of circumstances,[34] other than the default low-water mark, where baselines can be drawn, including fringing reefs,[35] mouths of rivers,[36] bays,[37] ports,[38] roadsteads,[39] and low-tide elevations.[40] Normal baselines are by far the most common baseline used, although straight baselines are an important feature in East and Southeast Asia, as well as archipelagic baselines for key archipelagic states in the region.

Dispute settlement within the framework of UNCLOS. The dispute settlement mechanism provided under the legal framework of UNCLOS establishes a compulsory and binding framework for the peaceful settlement of all ocean-related disputes.[41] Part XV of UNCLOS requires states parties to settle any dispute concerning the interpretation or application of the convention by peaceful means in accordance with Article 2, paragraph 3,[42] of the Charter of the United Nations, and to seek a solution by the means indicated in Article 33, paragraph 1, of the charter. The charter lists the following means of peaceful settlement to be used by member states in settling their disputes: "negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their choice."[43] If a settlement has not been reached, UNCLOS stipulates that the dispute be submitted at the request of any party to the dispute to a court or tribunal having jurisdiction in this regard.[44] UNCLOS specifies those courts or tribunals as ITLOS, established in accordance with Annex VI of the convention, which

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33 The other requirements for the drawing of archipelagic baselines are provided for in "UNCLOS," art. 47.

34 Ibid., art. 14.

35 Ibid., art. 6.

36 Ibid., art. 9.

37 Ibid., art. 10.

38 Ibid., art. 11.

39 Ibid., art. 12.

40 Ibid., art. 13.

41 Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge: Cambridge University Press, 2005); Rosemary Gail Rayfuse, "The Future of Compulsory Dispute Settlement under the Law of the Sea Convention," *Victoria University of Wellington Law Review* 36, no. 4 (2005): 683–711; and Ann Sheehan, "Dispute Resolution under UNCLOS: The Exclusion of Maritime Delimitation Disputes," *University of Queensland Law Journal* 24, no. 1 (2005): 165–90.

42 Article 2 , paragraph 3, states, "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." "Charter of the United Nations," United Nations website, http://www.un.org/en/documents/charter/chapter1.shtml.

43 "Charter of the UN," art. 33.

44 "UNCLOS," art. 286.

includes the Seabed Disputes Chamber; the ICJ; an arbitral tribunal constituted in accordance with Annex VII of the convention; and a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.[45]

UNCLOS provides that when states have been unable to reach agreement within "a reasonable time,"[46] they are required to submit to compulsory conciliation.[47] However, the optional exceptions to the compulsory procedure in Article 298 show the clear intention to remove maritime boundary delimitation disputes from compulsory judicial settlement. These elaborate mechanisms are designed to preserve state sovereignty by giving states parties the freedom to choose the manner by which they will settle their differences.[48]

The dispute settlement mechanism within the framework of UNCLOS clearly creates an obligation among the claimant countries to settle their conflicting claims peacefully.[49] However, the principle of peaceful settlement of international disputes operates on the basis of the sovereign equality of states.[50] The compulsory settlement mechanism within the framework of UNCLOS is triggered as an option only when parties are not able to settle their differences by peaceful means of their choice. Yet even then, the submission of a dispute to such a forum depends on the willingness of the parties. This means that the effectiveness of this mechanism depends on the willingness of claimant states to formally invoke it.[51]

Some principles of international law on maritime boundary delimitation derived from international jurisprudence. Some principles of international law on maritime boundary delimitation derived from international jurisprudence include, first, the precept that land dominates the sea in terms of delimitation. This means that the right to maritime territory derives from the sovereignty of the coastal state over land territory. Second, jurisprudence has consistently treated coastal geography or geographic parameters as paramount in maritime boundary delimitation.[52] International courts and tribunals often look at the length and configuration of the relevant coasts and coastlines, proportionality, and the presence of islands, and tend to ignore or attach only limited weight to other arguments based on, for example, population, socioeconomic, and security considerations.[53] Third, areas of overlapping territorial sea are to be divided by the median or equidistance line method, unless otherwise required by historic title or special circumstances. Fourth, the

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45 "UNCLOS," art. 287. The availability of a variety of forums was a compromise to secure consensus during the negotiations for the compulsory dispute settlement provisions of UNCLOS. See Jonathan Charney, "The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law the Sea," *American Journal of International Law* 90, no. 1 (1996): 71.

46 "UNCLOS," art. 74, par. 2, and art. 83, par. 2.

47 "UNCLOS," art. 298, par. 1. The submission to the compulsory procedures is not automatic since states may still reserve the right under Article 298 to have such disputes exempted from the compulsory forums.

48 See and compare, "UNCLOS," Annex V, art. 3; Annex VI, art. 4; and Annex VII, art. 3; Tullio Treves, "Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice," *New York University Journal of International Law and Politics* 31, no. 4 (1999): 809; and A.O. Adede, Notes and Comments, "Law of the Sea: The Scope of the Third Party, Compulsory Procedures for Settlement of Disputes," *American Journal of International Law* 71, no. 2 (1977): 305.

49 A.O. Adede. "Prolegomena to the Disputes Settlement Part of the Law of the Sea Convention," *New York University Journal of International Law and Politics* 10 (1977–78): 253; Howard Schiffmann, "The Dispute Settlement Mechanism of UNCLOS: A Potentially Important Apparatus for Marine Wildlife Management," *Journal of International Wildlife Law and Policy* 1, no. 2 (1998): 293; and Louis B. Sohn, "Settlement of Disputes Arising Out of the Law of the Sea Convention" (1974-1975) *San Diego Law Review* 12, no. 3 (1975): 495.

50 See Ted L. McDorman, "Global Ocean Governance and International Adjudicative Dispute Resolution," *Ocean & Coastal Management* 43 (2000): 259. He asserts that the dispute settlement procedure of UNCLOS is not part of customary law and thus is only binding for those states that are parties to UNCLOS.

51 Barbara Kwiatkowska, "The International Court of Justice and the Law of the Sea: Some Reflections," *International Journal of Marine and Coastal Law* 11, no. 4 (1996): 491.

52 Chris Carleton, "Maritime Delimitation in Complex Island Situations: A Case Study on the Caribbean Sea," in *Maritime Delimitation*, ed. Rainer Lagoni and Daniel Vignes (Leiden: Martinus Nijhoff, 2006), 156.

53 Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Oxford: Hart, 2006), 121–2, 151–60.

appropriate methodology for delimiting the EEZ and continental shelf is first to determine the median or equidistance line and then to consider whether there are any relevant factors to take into account to achieve an equitable result. Fifth, a feature that remains above water at high tide is capable of generating territorial sea of up to 12 nm. These principles also derive from customary international law concerning maritime delimitation that has been developed and clarified in jurisprudence. Some of these principles will be discussed below.

The land dominates the sea. In international law, the legal title possessed by the state over its land territory is the "legal source of the power which a State may exercise over territorial extensions seaward."[54] As the ICJ stated in the 1951 Anglo-Norwegian *Fisheries* Case, "it is the land which confers upon the coastal State a right to the waters off its coasts."[55] This reiterates the statement of the arbitral tribunal in the 1909 *Grisbådarna* case that "the maritime territory is essentially an appurtenance of a land territory."[56] Thus, as the court stated in the *Continental Shelf (Tunisia v. Libya Arab Jamahiriya)* case, "the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it."[57] The entitlement of a coastal state to a continental shelf and an EEZ is based on the principle that the land dominates the sea through the projection of the coasts or the coastal fronts.[58] This general rule has been consistently affirmed by a long line of cases.[59] The ICJ in the Black Sea case reaffirmed this principle in the context of its discussion of relevant coasts, in which the court mentioned that relevant coasts perform two related legal functions in maritime delimitation: first, to determine what constitutes overlapping claims; and second, to check for disproportionality.[60]

The median or equidistance line and the equitable principles/relevant circumstances rule. The equidistance line is defined in both Article 12 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and in Article 15 of UNCLOS as the "the line every point of which is equidistant from the coastlines from which the breadth of the territorial sea of each two States is measured." The 1958 Geneva Convention on the Continental Shelf contains a similar definition, which differentiates between states with adjacent coasts and states with opposite coasts, for which it uses the term "median line," although technically speaking, such a line is also an equidistant line.[61] The median or equidistance lines are often described as both a principle and a method of delimitation. Equidistance is also by far the most popular method of maritime boundary delimitation applied to date.[62] While a large number of bilateral delimitation agreements follow the equidistance method, D.P. O'Connell and I.A. Shearer argue that there is insufficient practice "to establish its normative character,"[63] a view also shared by Jonathan Charney.[64] Thus, "it cannot be

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54 *North Sea Continental Shelf Cases*, 51, par. 96.

55 *Fisheries Case (United Kingdom v. Norway)*, ICJ Rep. (1951), sec. 133.

56 *Grisbådarna Maritime Frontier (Norway v. Sweden)*, Award of the Arbitration, RIAA XI, 155, 159; reprinted in *American Journal of International Law* 4 (1910): 186, 226.

57 *Continental Shelf (Tunisia v. Libya Arab Jamahiriya)*, Judgment, ICJ Rep. (1982), 61, par. 73.

58 *Maritime Delimitation in the Black Sea*, par. 77.

59 See, for example, *North Sea Continental Shelf Cases*, 51, par. 96; and *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, ICJ Rep. (2001), par. 185. For other cases that affirmed this principle, see Barbara Kwiatkowska, *Decisions of the World Court Relevant to the UN Convention on the Law of the Sea: A Reference Guide* (The Hague: Kluwer Law International, 2002), 2–3.

60 *Maritime Delimitation in the Black Sea*, Judgment, par. 78.

61 "Convention on the Continental Shelf," art. 6, par. 1.

62 Prescott and Schofield, *Maritime Political Boundaries*, 239–40.

63 D.P. O'Connell and I.A. Shearer, *The International Law of the Sea* (Oxford: Clarendon, 1982), 701.

64 Charney and Alexander, *International Maritime Boundaries*, xiii.

defended that equidistance is a binding rule of international law."[65] In case law, the ICJ ruled in the *North Sea Continental Shelf* cases that the equidistance principle was not a necessary consequence of the general concept of continental shelf rights, and was not a rule of customary international law.[66] The equidistance principle was first used in the *France-UK* arbitration, although there are numerous negotiated equidistance-based agreements that predate this case.[67] The arbitration tribunal in the *Guinea/Guinea-Bissau* case made clear that "the equidistance method is just one among many and…there is no obligation to use it or give it priority, even though it is recognized as having a certain intrinsic value because of its scientific character and the relative ease with which it can be applied."[68] In the *Libya v. Malta*,[69] *Gulf of Maine*,[70] and *Jan Mayen Island*[71] cases, the ICJ used the equidistance approach as a preliminary aid to analysis but adjusted the line in light of the differences in the length of the contending parties' coastlines.[72] This two-stage approach is what has been called the equidistance/special circumstances rule.[73] This rule involves the court drawing a strict equidistance line that gives full effect to all features, which the court then examines and adjusts on the basis of special circumstances (in respect to territorial sea delimitation) or relevant circumstances (in respect to EEZ and continental shelf delimitation) in order to achieve an equitable result.[74] This two-stage approach was applied in the *Qatar v. Bahrain*,[75] *Cameroon v. Nigeria*,[76] and *Nicaragua v. Honduras* cases.[77]

The role of islands. Disputes over islands brought before international judicial and arbitral tribunals usually address one or both of two key issues: sovereignty or ownership over the island and the effect of the island on delimitation. Cases decided at the international level that have resolved sovereignty disputes over island features include the *Clipperton*,[78] *Island of Palmas*,[79] *Minquiers and Ecrehos*,[80] and *Gulf of Fonseca*[81] cases. More recently, the *Eritrea/Yemen*[82] arbitration, the *Ligitan and Sipadan* case,[83] and the *Pedra Branca/Pulau Batu Puteh, Middle Rocks,*

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65 Alex G. Oude Elferink, *The Law of Maritime Boundary Delimitation: A Case Study of the Russian Federation*, (Dordrecht: Martinus Nijhoff, 1994), 41.

66 *North Sea Continental Shelf Cases*.

67 *France–United Kingdom: Arbitration on the Delimitation of the Continental Shelf*, 18 ILM (1979), 397, par. 85.

68 "Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau," *International Law Reports* 77, 681, par. 102.

69 *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, ICJ Rep. (1985), 46, par. 60.

70 *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States)*, ICJ Rep. (1984), 246.

71 *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, ICJ Rep. (1993), 69, par. 69.

72 Charney, "Maritime Boundary Delimitation Law," 44–245.

73 Prescott and Schofield, *Maritime Political Boundaries*, 240–41.

74 "UNCLOS," art. 15, 74, and 83.

75 *Qatar v. Bahrain*, par. 240.

76 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)*, Judgment, ICJ Rep. (2002), 441, par. 288.

77 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, ICJ Rep. (2007), par. 271.

78 *Arbitral Award of His Majesty the King of Italy on the Subject of the Difference Relative to the Sovereignty over Clipperton Island (France v. Mexico)*, Jan. 28, 1931, reprinted in *American Journal of International Law* 26 (1932), 390.

79 *Arbitral Award Rendered in Conformity with the Special Agreement Concluded on January 23, 1925, Between the United States of America and the Netherlands Relating to the Arbitration of Differences Respecting Sovereignty over the Island of Palmas (Miangas)*, April 4, 1928, reprinted in *American Journal of International Law* 22 (1928), 867, 909.

80 *Minquiers and Ecrehos Case (France v. United Kingdom)*, ICJ Rep. (1953), 47.

81 *Land, Island, and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua Intervening)*, ICJ Rep. (1992), 351.

82 *Eritrea/Yemen Arbitration*.

83 *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, ICJ Rep. (2002), 625.

and South Ledge case[84] have provided opportunities for international law to be enriched with the court's discussions of acquisition of territory. These cases examined evidence that dealt with issues such as discovery, critical date, historic title, effective occupation, acquiescence, prescription, and contiguity, which are all factors that determine the basis of title to territory in international law. These issues have been sufficiently addressed in literature and will not be discussed here. During the last century, the courts have emphasized actual and effective control and effective displays of sovereignty as the most critical factors, which are usually decisive if some level of acquiescence or acceptance can also be established.

The resolution of issues regarding sovereignty over island features is complicated enough, and once resolved, often present two other equally complicated issues regarding boundary delimitation: first, the maritime zones that the island feature can generate; and second, the effect of the island feature on the delimitation of boundaries between adjacent and opposite states. State practice, jurisprudence, and literature deal with the effect of island features on maritime boundary delimitation.[85] The definition of what constitutes an island in Article 121, paragraph 3, of UNCLOS, including the stipulation that such features must be "naturally formed" and "above water at high tide," are relatively uncontroversial and can be considered reflective of customary international law, although there is still no authoritative ruling that interprets this very contentious provision.

The danger of offering a generalization has been noted due to the variance in state practice and the fact that boundary delimitation cases are decided on the particular facts of each case. There are instances in which island features were given partial effect such as in *Libya v. Malta*, where the court shifted the equidistance line to reflect the disparity in relevant coastal lengths between the parties.[86] *Denmark v. Norway* was decided using a slightly modified approach in which the great disparity in coastal length, instead of merely being a test of equitability, had a direct bearing on the eventual location of the boundary line, in this case adjusted by the court toward Jan Mayen Island.[87] Additionally, courts have given islands "half effect" such as in the *France-UK* arbitration[88] and *Tunisia v. Libya*.[89] Islands have also been enclaved in such cases as the *France-UK* arbitration[90] with respect to the Channel Islands, or the *Eritrea/Yemen* arbitration with respect to the Hanish Islands.[91] Alternatively, islands have been ignored as a base point because of the size of the insular feature such as in the *Gulf of Maine* case.[92] Islands have also been disregarded in constructing boundary lines on the grounds that they are small and uninhabited, such as in the *Qatar v. Bahrain* case.[93]

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84 *Case Concerning Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*, Judgment of May 23, 2008, ICJ Rep. (2008).

85 Victor Prescott and Gillian Triggs, "Islands and Rocks and Their Role in Maritime Delimitation," in *International Maritime Boundaries,* vol. 5, ed. David A. Colson and Robert W. Smith (Leiden: Martinus Nijhoff, 2005), 3245–80.

86 *Libya v. Malta*, par. 73.

87 *Denmark v. Norway*, par. 61–69.

88 *France-UK*, par. 201–3, in relation to the Isles of Scilly.

89 *Tunisia v. Libya*, par. 128.

90 *France-UK*, par. 199.

91 *Eritrea/Yemen Arbitration*, par. 154–62.

92 *Gulf of Maine*, par. 210.

93 *Qatar v. Bahrain*, par. 219.

Maritime Delimitation in the Black Sea

The Black Sea case, decided by the ICJ in 2009, provides an opportunity to examine the current state of the jurisprudence and its probable direction given the pronouncements of the court. In this case, the ICJ explicitly provided a "delimitation methodology" defined in stages—which although not wholly novel, is a clarification and clear articulation not seen in previous cases. This section will consist of two subsections. The first subsection will provide a summary of the case, while the second will discuss the delimitation methodology used by the court in the case.

Summary of the Case

On February 3, 2009, the ICJ delivered its judgment in the Black Sea case. In this case, the ICJ was requested to draw a single maritime boundary delimiting the continental shelf and EEZ between Romania and Ukraine in the Black Sea. In a uniquely unanimous decision, the ICJ established a delimitation line defining the maritime boundary between the two states.

Both Romania and Ukraine are parties to UNCLOS.[94] However, since Ukraine had opted out of compulsory dispute settlement relating to sea-boundary delimitation under Article 298, paragraph 1, of UNCLOS, the dispute could not be settled according to the provisions of Part XV of the convention. Instead, the jurisdiction of the ICJ was based on the Treaty on Good Neighbourliness and Co-operation concluded between the two states on June 2, 1997, and in the Additional Agreement[95] concluded with reference to Article 2 of the treaty, which provided that if the states failed to reach an agreement within two years of the initiation of negotiations in January 1998, the issue would be settled by the ICJ. After six years of unsuccessful negotiations, Romania initiated proceedings against Ukraine on September 16, 2004.

Subject matter of the dispute. The two parties were in agreement that all the conditions for the ICJ's jurisdiction were satisfied at the time of the filing of the application. However, they disagreed over the exact scope of the jurisdiction conferred on the court. Ukraine argued that the jurisdiction of the ICJ was restricted to delimiting the continental shelf and EEZ between the parties. The court, according to Ukraine, had no jurisdiction to delimit other maritime zones pertaining to either of the parties and in particular to their respective territorial seas. In Ukraine's view, delimitation was to begin at the outer limit of the territorial waters of the two states, and the line to be drawn by the court should be a line dividing exclusively areas of the continental shelf and the EEZ. In response, Romania contended that the court was in the position to establish such a boundary for the continental shelf and the EEZ.

Scope of jurisdiction. In its judgment, the ICJ first clarified the scope of its jurisdiction and concluded that its jurisdiction covers the delimitation of the continental shelf and the EEZ of the parties and does not involve the delimitation of their territorial seas. Nonetheless, the court in discharging this task would "duly take into account the agreements in force between the Parties relating to the delimitation of their respective territorial seas." Further, the court ruled that in the exercise of its jurisdiction, the boundary drawn may coincide with the outer limit of the territorial sea of one of the parties.[96]

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[94] Romania ratified UNCLOS on December 17, 1996, and Ukraine did so on July 26, 1999.

[95] "Agreement Additional to the Treaty on the Relations of Good Neighbourliness and Co-Operation between Romania and Ukraine," concluded by exchange of letters between the Ministers of Foreign Affairs of Romania and Ukraine, June 2, 1997, UN *Treaty Ser*. 2159, 357 (Romanian letter), 363 (Ukrainian counterpart).

[96] *Maritime Delimitation in the Black Sea*, par. 30.

This issue was of particular importance due to the potential role in the delimitation of Serpents' Island (also known as Snake Island), a small Ukrainian island of approximately 0.17 square kilometers and situated about 35 kilometers to the east of the terminus of the land boundary between both states in the Danube estuary. The parties disagreed as to whether there already existed an agreed maritime boundary around Serpents' Island. The court concluded that under a 1949 *procès-verbal*, the boundary between Romania and the USSR would follow the twelve-mile arc around Serpents' Island, without any endpoint being specified. Under the 2003 State Border Regime Treaty, the endpoint of the state border was fixed at the point of intersection where the territorial sea boundary of Romania meets that of Ukraine. The ICJ further held that the 1949 instruments related only to the demarcation of the state border, not to any maritime limits. Thus, contrary to Romania's contention, there was no existing boundary separating the territorial sea of Ukraine from the continental shelf and the EEZ of Romania.[97]

Applicable law. The ICJ also addressed the preliminary legal issue of what constituted the applicable law between the parties.[98] The court ruled that UNCLOS, and in particular its relevant provisions for the delimitation of the EEZ and continental shelf, Articles 74 and 84, respectively, was the applicable law between the two states.[99] The court, however, in deciding the single maritime boundary between the parties, took into account agreements in force between the parties and acknowledged the principles embodied in the Additional Agreement, which the court applied to the extent that they are part of the relevant rules of international law.[100]

The ICJ also ruled that Romania's declaration made upon signature under Article 310 of UNCLOS, which provides that "uninhabited islands without economic life can in no way affect the delimitation of the maritime spaces belonging to the mainland coasts of the coastal States," would have no bearing on the court's interpretation of the relevant provisions of UNCLOS.[101] The court noted that Article 310 allows states to make declarations and statements when signing, ratifying, or acceding to the convention, provided these do not purport to exclude or modify the legal effect of the provisions of UNCLOS in their application to the state that has made a declaration or statement. Romania's declaration having no bearing on the court's interpretation, the ICJ applied the relevant provisions of UNCLOS, in accordance with Article 31 of the Vienna Convention on the Law of Treaties of May 23, 1969.[102]

The court, after dealing with the above preliminary questions, considered the question of what constituted the relevant coasts and relevant maritime area for delimitation.[103] The ICJ then set the methodology it would apply to the delimitation in the case.

Delimitation Methodology in the Black Sea Case

Over the years, the procedure adopted by international courts and tribunals involving maritime boundary disputes has been fairly uniform, although arguably very general, yielding radically different results from analogous circumstances. In the words of Charney:

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97 *Maritime Delimitation in the Black Sea*, par. 29.

98 Ibid., par. 31–42.

99 Ibid., par. 31.

100 Ibid., par. 42.

101 Romania's declaration was made upon signature (December 10, 1982) and confirmed upon ratification (December 17, 1996). See ibid., par. 35 and 42.

102 Ibid., par. 42.

103 Ibid., par. 77–114.

> First, they define the relevant geographical area and the area in dispute. Second, they identify the relevant areas and coastlines. Third, they spell out all the relevant considerations. Fourth, they develop a provisional line based upon an analysis of the relevant considerations. Fifth, they check that line against some of the considerations to determine whether the line is "radically inequitable" and, if so, they adjust it accordingly.[104]

The Black Sea case does not depart radically from this procedure. The judgment of the ICJ was generally consistent with the principles of international law as developed in previous jurisprudence.

The three-stage delimitation method enumerated by the ICJ in the Black Sea case consists of the following steps: (1) establish the provisional delimitation line equidistant between the states,[105] (2) consider any relevant circumstances that may require the adjustment of that provisional equidistance line,[106] and finally, (3) verify that the line does not lead to an inequitable result.[107]

Establishment of the provisional equidistance line. In order to draw the provisional equidistance line, the court had to first identify the base points on the parties' coasts from which the line could be drawn. For Romania, the court used the base points situated on the Sacalin Peninsula and the landward end of the Sulina Dyke, while Tsyganka Island, Cape Tarkhankut, and Cape Khersones on the Ukrainian coast were identified as appropriate base points, but critically did not include Serpents' Island, for reasons discussed below.[108] The ICJ noted that the provisional equidistance line constructed from these base points did not coincide with the provisional equidistance lines drawn by either state since the court decided to ignore some of the base points submitted by the parties.[109]

The question of the use of Serpents' Island as an appropriate base point for constructing the provisional equidistance line merits special attention.[110] Romania argued that Serpents' Island should not be considered a relevant base point for three reasons. First, Romania contended that the island is a rock incapable of sustaining human habitation or economic life of its own, and, consequently, it has no EEZ or continental shelf as stipulated in Article 121, paragraph 3, of UNCLOS. Second, Ukraine had made no reference to Serpents' Island when it notified the UN of the coordinates of its territorial sea baselines. Third, Romania argued that using this island as a base point would result in an inordinate distortion of the coastline.[111]

Ukraine, on the other hand, argued that Serpents' Island constitutes part of its coast for purposes of delimitation and is not merely a relevant circumstance to be considered after the provisional equidistance line has been established.[112] Ukraine also contended that Serpents' Island is "indisputably an island" under Article 121, paragraph 2, of UNCLOS since the island "has vegetation and a sufficient supply of water" as well as "appropriate buildings and accommodation for an active population."[113] Last, Ukraine asserted that Article 121, paragraph 3, is not relevant to

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104 Charney, "Maritime Boundary Delimitation," 234.

105 *Maritime Delimitation in the Black Sea*, par. 123–54.

106 Ibid., par. 158–68.

107 Ibid., par. 210–16.

108 Ibid., par. 140–41, 153.

109 Ibid., par. 157.

110 Ibid., par. 149.

111 Ibid., par. 124.

112 Ibid., par. 183.

113 Ibid., par. 184.

the delimitation since the article is not concerned with questions of delimitation but is rather an entitlement provision with no practical application to a maritime area within the 200-nm limit of the EEZ and the continental shelf of a mainland coast.[114]

The ICJ ruled that it was inappropriate to select any base points on Serpents' Island for the construction of a provisional equidistance line between the coasts of Romania and Ukraine for two reasons. First, the court reasoned that this case was unlike the *Eritrea/Yemen* case in which the arbitral tribunal placed base points on the low-water line of certain fringe islands because they were considered part of the very coastline of one of the parties. In the Black Sea case, Serpents' Island, lying alone and some 20 nm away from the mainland, is not one of a cluster of fringe islands constituting "the coast" of Ukraine. Second, to consider Serpents' Island a relevant part of the coast would amount to "grafting an extraneous element onto Ukraine's coastline" and produce "a judicial refashioning of geography," which neither the law nor practice of maritime delimitation authorizes.[115]

Relevant circumstances. The provisional equidistance line having been drawn, the court considered whether there were factors calling for the adjustment or shifting of that line in order to achieve an "equitable result." The ICJ considered the following potential relevant circumstances: (1) disproportion between the lengths of coasts,[116] (2) the enclosed nature of the Black Sea and other delimitation agreements in the region,[117] (3) the presence of Serpents' Island in the area of delimitation,[118] (4) the conduct of the states with regard to oil and gas, fishing, and naval patrols,[119] (5) any cutting-off effect,[120] and (6) the security considerations of the parties.[121]

The court acknowledged that these circumstances may in certain cases warrant an adjustment of the provisional equidistance line. However, it concluded that in this case such circumstances either were not present or, to the extent that they did exist, were insignificant or irrelevant. Therefore, there was no need for an adjustment of the provisional equidistance line drawn by the court.[122]

The disproportionality test. At the third and final stage of maritime delimitation, the ICJ checked that the boundary line and resultant allocation of maritime territory did not lead to any significant disproportionality by reference to the respective coastal lengths and the apportionment of areas that ensued. In this case the court, citing the *Guinea/Guinea-Bissau* arbitration, regarded disproportionality as a test of equitableness of the delimitation line it had constructed, after the line had been drawn.[123] The ICJ noted that the ratio of the relevant coastal lengths for Romania and Ukraine was approximately 1:2.8, and the ratio of the relevant maritime area allocated between Romania and Ukraine was approximately 1:2.1.[124] Therefore, the court found no significant disproportionality that required an adjustment of the equidistance line as constructed.

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114 *Maritime Delimitation in the Black Sea*, par. 184.

115 Ibid., par. 149.

116 Ibid., par. 158–68.

117 Ibid., par. 169–78.

118 Ibid., par. 179–88.

119 Ibid., par. 189–98.

120 Ibid., par. 199–201.

121 Ibid., par. 202–4.

122 Ibid., par. 216.

123 Ibid., par. 211.

124 Ibid., par. 215.

In conclusion, the court unanimously established a single maritime boundary delimiting the respective continental shelves and EEZs of Romania and Ukraine.

Challenges and Opportunities

The international legal rules and principles governing maritime delimitation distilled from state practice, judicial and arbitral decisions, and treaties are formulated at a high level of generality and abstraction. Consequently, the entire corpus of legal principles on maritime boundary delimitation should be treated, at best, as mere guidelines and not iron-clad rules to be applied in any situation. This is especially true with respect to territorial or sovereignty disputes that are decided on the basis of the particular facts of each case. The same is true of international cases in general. There is no doctrine of *stare decisis* in international adjudication whereby courts are formally bound by previous judgments. Instead, their rulings are binding only on the parties to a particular dispute. Nevertheless, in international maritime boundary law, the judgments of the ICJ and awards of *ad hoc* arbitration tribunals carry special weight.

Thus, it will be exceedingly complex, if not impossible, to actually apply the three-stage delimitation method enunciated by the ICJ in the Black Sea case to maritime disputes in East and Southeast Asia owing to the nature of the disputes, the number of the disputes, and the number of parties involved in the disputes in the region. The myriad of disputes in the region include those between Russia and Japan over the Kuril Islands/Northern Territories, Korea and Japan over the Dokdo/Takeshima/Liancourt Rocks in the Sea of Japan/East Sea, Japan and China over the Senkaku/Diaoyu Islands in the East China Sea, and China and the Philippines over Scarborough Shoal, as well as over the islands in the South China Sea involving Brunei, China, Malaysia, the Philippines, Taiwan, Vietnam, and Indonesia.[125]

The Application of the Delimitation Methodology in the Black Sea Case to Maritime Boundary Disputes in East and Southeast Asia

The delimitation of maritime boundaries is essentially a political matter and the likelihood of parties in the region submitting their maritime boundary disputes to an international court or tribunal for adjudication is very unlikely, for reasons to be discussed in the next section. However, while it will be particularly difficult to devise a framework of analysis using the Black Sea case delimitation methodology and apply it to the maritime boundary disputes in East and Southeast Asia, it is nonetheless useful to identify some salient and potentially critical points that apply across the territorial and maritime disputes in the region and in the process point to noteworthy details in specific disputes.

First is the imperative to address sovereignty issues before maritime delimitation can proceed. This undertaking would involve an assessment of the bases of the sovereignty claims of each of the parties, which need to be weighed against both each other and the relevant rules of international law. The contesting states would need to produce evidence supporting their claims on the basis of historic title, conquest, occupation, prescription, or activities that otherwise demonstrate actual, continued exercise of authority over the territory being claimed, with the intention and will to act as sovereign (*effectivités*)—activities that recent jurisprudence has held to be decisive in proving

[125] Although Indonesia does not claim any of the islands in the South China Sea, the "historic waters" claim of the People's Republic of China encroaches on the EEZ off Indonesia's Natuna Islands group.

title.[126] However, before the issue of effective control is addressed, the court must determine the critical date at which the dispute crystallized, so as to exclude in its determination acts that took place after that date, unless the acts are "a normal continuation of prior acts and were not undertaken to improve the legal position of the Party which relies on them."[127]

In the case of the South China Sea, the legal bases of title vary by claimant state and each claim must be carefully examined and weighed in relation to each other. For example, China and Taiwan base their claims to sovereignty on historical evidence, referring to archaeological finds and ancient documents. Vietnam's claim is essentially historical, Malaysia and Brunei rely on principles of UNCLOS, and the Philippines argues that the islands are *terra nullius* (territory that has never been subject to the sovereignty of any state, or over which any prior sovereign has expressly or implicitly relinquished sovereignty) and primarily relies on the principle of discovery.[128] If Japan and Korea choose to bring their dispute over the Dokdo/Takeshima/Liancourt Rocks to an international court, historical records that extend back at least several hundred years must be examined because both parties rely on them.[129] In the case of the Senkaku/Diaoyu Islands, China argues that it originally acquired the islands by discovery and immemorial possession, while Japan argues that it acquired the islands on the basis of discovery and annexation since they were terra nullius.[130]

The second imperative is that the parties negotiate on the basis of international law, particularly the provisions of UNCLOS. Most of the states engaged in territorial and maritime delimitation disputes in the region are signatories or parties to UNCLOS.[131] States parties to UNCLOS have the primary obligation under Part XV to resolve their disputes by peaceful means, and the general obligation to do so under international law.[132] On another level, even without going through the formal compulsory procedure in any of the forums available, the claimant countries using the other substantive provisions of the convention may define their maritime zone claims in accordance with the rules established in UNCLOS. These may include the following actions: specifying their precise claims, drawing and publishing the proper base points and baselines along their coasts, and negotiating to agree which features are islands. For example, almost all the coastal states in East and Southeast Asia have implemented straight baselines that have been criticized as "excessive,"[133] and clearly breach many of the conditions laid down in Article 7 of UNCLOS.[134] Since the starting point for the delimitation of maritime boundaries is often the construction of strict equidistance or median lines, excessive straight baseline claims need to be adjusted (or ignored) since they have

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126 *Frontier Dispute (Burkina Faso v. Republic of Mali),* ICJ Rep. (1986), 587, par. 63; *Dispute (Libyan Arab Jamahiriya v. Chad)*, ICJ Rep. (1994), 38, par. 75–76; and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, Merits, ICJ Rep. (2002), par. 68.

127 *Pulau Ligitan and Pulau Sipadan*, par. 135.

128 Lowell B. Bautista, "Thinking Outside the Box: The South China Sea Issue and the United Nations Convention on the Law of the Sea (Options, Limitations and Prospects)," *Philippine Law Journal* 81 (2007): 699–731.

129 Jon M. Van Dyke, "Legal Issues Related to Sovereignty over Dokdo and its Maritime Boundary," *Ocean Development and International Law* 38 (2007): 157–224.

130 Erdem Denk, "Interpreting a Geographical Expression in a Nineteenth Century Cession Treaty and the Senkaku/Diaoyu Islands Dispute," *International Journal of Marine and Coastal Law* 20 (2005): 98.

131 With the exception of Timor Leste, which has not signed or ratified UNCLOS, and Cambodia and North Korea, which have both signed but have yet to ratify the convention, all other states in East and Southeast Asia have signed and ratified UNCLOS.

132 "UNCLOS," art. 279.

133 J. Ashley Roach and Robert W. Smith, "Straight Baselines: The Need for a Universally Applied Norm," *Ocean Development and International Law* 31, (2000): 47–80.

134 Sam Bateman and Clive Schofield, "State Practice Regarding Straight Baselines in East Asia—Legal, Technical and Political Issues in a Changing Environment" (paper presented at the International Conference on Difficulties in Implementing the Provisions of UNCLOS, organized by the Advisory Board on the Law of the Sea (ABLOS), Monaco, October 16–17, 2008): 8–16.

the potential to deviate from the line of equidistance to the distinct advantage of the state that constructed them, which can complicate maritime boundary delimitation negotiations.

Third, the three-step approach enunciated by the ICJ in the Black Sea case should be applied in light of all relevant factual considerations obtained in each of these disputes. The construction of the median or equidistance lines that give full effect to the baselines of all features is straightforward and can be done with little difficulty by technical experts. The complexity lies in the identification of relevant circumstances that justify an adjustment of the provisional equidistance line so that the maritime delimitation does not result in an inequitable result. Malcolm Evans laments that the manner in which relevant circumstances have been examined and developed is "both confusing and, at times, apparently contradictory."[135] Robert Beckman and Clive Schofield point out that "it is notoriously difficult to predict the eventual course of currently undelimited maritime boundaries;"[136] and that attempting to apply the Black Sea case delimitation methodology to maritime disputes in East and Southeast Asia, a region that Charney considers "one of the most difficult areas for maritime boundary delimitation,"[137] would be no easy feat. The 2001 work of Victor Prescott and Schofield, which reviewed the undelimited maritime boundaries in the Asian Rim, including the territorial and maritime disputes in East and Southeast Asia, constructed lines of equidistance in each case and identified any possible relevant circumstances that may likely encourage deviations from the lines of equidistance constructed.[138]

A Reluctance to Submit Disputes to International Adjudication

As earlier noted, the likelihood of a dispute in the region being submitted to an international tribunal for resolution is very remote. There seems to be a general reluctance among Asian countries to submit their disputes for international adjudication.[139] With formal and covert dispute resolution mechanisms there are winners and losers, which inevitably results in one of the parties losing face, a situation that states find unacceptable and try hard to avoid if possible. The high degree of emotion involved in maritime and territorial disputes in Asia and the importance that Asian culture places on the maintenance of peace and good relations with neighbors make states reluctant to bring their neighboring states to a third-party dispute settlement procedure. In addition, the time and exorbitant costs involved in undertaking such a case in any of the available international forums also discourage countries in East and Southeast Asia. Further, another possible reason why submitting the dispute to international adjudication is not under serious consideration by the states concerned, is that the bases of their respective claims are not especially compelling in international law terms.[140]

Notably, the states in the region have very little experience in litigation at the international level. In Southeast Asia, only three disputes have been referred to the ICJ and just one case submitted to ITLOS. The first case referred to the ICJ was in 1959 between Cambodia and Thailand concerning

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135 Malcolm D. Evans, "Maritime Delimitation and Expanding Categories of Relevant Circumstances," *International and Comparative Law Quarterly* 40 (1991): 1.

136 Robert Beckman and Clive Schofield, "Moving Beyond Disputes over Island Sovereignty: ICJ Decision Sets Stage for Maritime Boundary Delimitation in the Singapore Strait," *Ocean Development and International Law* 40, (2009): 19.

137 Jonathan I. Charney, "Central East Asian Maritime Boundaries and the Law of the Sea," *American Journal of International Law* 89 (1995): 724.

138 Victor Prescott and Clive Schofield, "Undelimited Maritime Boundaries of the Asian Rim in the Pacific Ocean," *Maritime Briefing* 3, (2001).

139 Geoffrey Palmer, "International Law and the Reform of the International Court of Justice," in *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry*, ed. Antony Anghie and Garry Sturgess (Leiden: Brill, 1998), 579.

140 Clive Schofield and Ian Storey, *The South China Sea Dispute: Increasing Stakes and Rising Tensions* (Washington: Jamestown Foundation, 2009), 10.

the temple of Preah Vihear;[141] the second was in 1998 when Indonesia and Malaysia sought to resolve their sovereignty dispute over Pulau Ligitan and Pulau Sipadan;[142] and the third was in 2003 when Malaysia and Singapore jointly submitted a request to resolve their territorial disputes regarding Pedra Branca (known as Pulau Batu Puteh in Malaysia), Middle Rocks, and South Ledge.[143] The only case referred to ITLOS was the 2003 case submitted by Singapore and Malaysia concerning land reclamation activities carried out by Singapore that allegedly impinged upon Malaysia's rights in and around the Straits of Johor.[144]

The majority of territorial disputes in Southeast Asia have very little likelihood of being resolved through international adjudication, as states across the region view submission to an international tribunal as a remedy of last resort, preferring bilateral dispute resolution instead.[145] Moreover, many states in the region, such as China, Vietnam, Malaysia, and Brunei, do not recognize the compulsory jurisdiction of the ICJ. While the Philippines accepts the compulsory jurisdiction of the ICJ, it has made a reservation that excludes territorial disputes from its acceptance of the ICJ's compulsory jurisdiction.[146] Since the consent of the parties is the basis of ICJ jurisdiction, if states choose to bring their territorial and maritime disputes to the ICJ, they must first sign a special agreement accepting the jurisdiction of the ICJ. States also hesitate to submit a dispute to the ICJ for resolution on the grounds that the rulings of the ICJ are not binding, and because of concerns over the court's partiality.[147] Nonetheless, the decisions of the ICJ provide increasing clarity and uniformity of approach to maritime delimitation, which may increase the degree of predictability of results in future cases submitted for international adjudication.

Recommendations

International law provides a number of mechanisms for the avoidance and settlement of disputes, which include political means such as negotiation and consultation, mediation and good offices, conciliation, and investigation, and such judicial means as arbitration and international adjudication. This section will examine some of these modes of adjudication or dispute resolution in the East and Southeast Asian context.

Submission of Disputes to International Adjudication

International adjudication is a method of international dispute settlement that involves the referral of the dispute to an impartial, third-party tribunal—normally an arbitral tribunal or an international court—for a binding decision, usually on the basis of international law. While the discussion above noted the reluctance of most states in East and Southeast Asia to submit their disputes to an international tribunal, a long-term goal among states to ensure lasting resolution should still be the submission of their dispute to a third party for settlement. The claimant states

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141 *Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, ICJ Rep. (1962), 6.

142 *Pulau Ligitan and Pulau Sipadan*.

143 *Pedra Branca*.

144 *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, October 8, 2003, ITLOS case no. 12. The case was finally resolved after the settlement agreement between the parties was signed on April 26, 2005, with the tribunal playing a minimal role in its resolution.

145 See, for example, the settled maritime boundaries in the region, Charney, "Central East Asian Maritime Boundaries," 724.

146 "Philippines' Declaration Recognizing the Jurisdiction of the Court as Compulsory," January 18, 1972.

147 Eric A. Posner and Miguel F.P. de Figueiredo, "Is the International Court of Justice Biased?" *Journal of Legal Studies* 34 (2005): 603–24.

should show sincerity in their desire to settle their disputes and political maturity as independent and modern nations in the international community by seeking to negotiate a mutually acceptable settlement or, if such negotiations fail, by submitting their disputes to a third party for settlement.

Alternative Methods of Dispute Resolution

Other methods of dispute resolution available at the international level include negotiation, mediation, and diplomacy. These alternative modes of dispute resolution should be viewed within the context of the various regional initiatives and forums. For example, the potential for militarized conflict over a number of territorial as well as interstate disputes among ASEAN member states has been mitigated, if not always avoided, by the development of key ASEAN norms of non-intervention in the internal affairs of another state and respect for the independence and sovereignty of each member state. These norms are embodied in ASEAN's 1976 Treaty of Amity and Cooperation (TAC) in Southeast Asia.[148] The treaty, some scholars have argued, is the central pillar of ASEAN and the source of the norms of non-confrontation and consensus-building, which are key to maintaining peace, stability, and order in the region.

The enduring presence of maritime tension over disputed territories between and among the various ASEAN states may be unavoidable, but both the commitment of the member states to build regional cooperation and the institutionalization of multilateral forums have prevented the escalation or eruption of military confrontation and war. The 2002 Declaration on the Conduct of Parties in the South China Sea signed by ASEAN states and China, evinced a willingness among claimants to resolve disputes by peaceful means, to exercise self-restraint, and to approach disputes multilaterally.[149] While it has not entirely eliminated unilateral actions by claimants in the South China Sea, the declaration has arguably helped dissipate some tension among claimants and has provided a venue to address the issue within the region diplomatically.

Current developments within the framework of ASEAN could potentially expand the role of ASEAN in settling intraregional disputes. Recent events include the adoption by member states of the ASEAN Charter, which includes a chapter pertaining to the settlement of disputes, and the adoption of the ASEAN Dispute Settlement Mechanisms (DSM) in April 2009 to address disputes arising from differences in the interpretation and application of both the charter and other ASEAN instruments. The DSM provides for a variety of means to settle disagreements, including consultation between parties, mediation, arbitration, and the referral of unresolved disputes to the ASEAN summit.

Alternative Options Not Involving Sovereignty, Including Joint Development

The positions of states involved in maritime or territorial disputes may seem intractable from a domestic point of view, which is often an impediment for negotiations to proceed. However, on a variety of other issues such as trade, marine environmental protection, scientific research, and terrorism, the countries have invariably been more than willing to set aside their positions and cooperate, even with those states with which they have maritime or territorial disputes. In these instances, their differences in position are more prudently construed and take on secondary importance to other issues, thus permitting cooperation. The parties can also deliberately set aside

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148 "Treaty of Amity and Cooperation in Southeast Asia," February 24, 1976, UN *Treaty Ser*. 1025.

149 "The Declaration on the Conduct of Parties in the South China Sea," ASEAN and the People's Republic of China, November 4, 2002.

the issue of sovereignty and consider the joint development of resources as an option without prejudice to their respective claims.

An important initiative that proves that multilateral cooperation is possible is the Workshop on Managing Potential Conflicts in the South China Sea. This informal political process, initiated in 1990 by Indonesia with Canadian funding, sought to prevent violent conflict by promoting cooperation through confidence-building. The workshop participants come from the various claimant countries and attend in their private capacities, not as representatives of their respective governments, which effectively prevents discussion of any issue concerning sovereignty claims. The relaxed atmosphere of the workshop process, in which political and sensitive issues are not discussed, has proved to be one of the best ways to engage China in the South China Sea issue. Over time, the workshops have built trust among the claimant countries, allowing states to forge formal environmental cooperation in the South China Sea.[150]

While developing countries are keen to promote investments in maritime areas that are subject to competing sovereignty disputes or overlapping claims, investors are expectedly wary. The failure to settle overlapping claims has made such areas as the South China Sea and the Aegean Sea unattractive to investors. However, as has been shown in the case of the Red Sea region with respect to minerals between Sudan and Saudi Arabia, and the Timor Sea in the case of petroleum between Indonesia and Australia, coastal states may be willing to resort to the joint development of mineral deposits in areas of overlapping claims, even in the absence of an agreement to settle their claims. The Joint Marine Seismic Undertaking (JMSU) signed by the state-owned oil companies of China, Vietnam, and the Philippines in March 2005 committed the parties to jointly identify oil and natural gas deposits for possible future development. The agreement is indicative of the political will of the states to develop the disputed area jointly and their common desire to benefit from the natural resources in the disputed area.[151] The JMSU lapsed in June 2008, and since then, no other cooperative undertakings among the disputants have been launched. However, this apparent setback does not remove the rationale for scientific studies that will ascertain the resources in these disputed areas and on which potential future unilateral or joint development activities of an economic nature may be based.

Capacity-Building among States in East and Southeast Asia

East and Southeast Asian states are at varying stages of economic development with varying priorities and national goals. The region is also marked by great disparities between states in terms of naval and military strengths. There is also room for strategic analysis in this respect. The growing military, diplomatic, and economic power of China in the region and beyond has drastically altered the regional economic balance, which has enabled China to expand its political sphere of influence. The potential impact of China's reach has caused concern across the East Asian mainland, the Indian Ocean region, and the United States. The March 2009 incident involving the USNS *Impeccable* brought to the fore issues concerning China's growing assertiveness in enforcing what it regards as its maritime rights and China's interpretation of international maritime law, which in some instances is not shared by other states. The modernization of the People's Liberation

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150 Hasjim Djalal and Ian Townsend-Gault, "Managing Potential Conflicts in the South China Sea: Informal Diplomacy for Conflict Prevention," in *Herding Cats: Multiparty Mediation in a Complex World*, ed. Chester A. Crocker, Fen Osler Hampson, and Pamela Aall (Washington, D.C.: United States Institute of Peace Press, 1999), 107–33.

151 The Joint Marine Scientific Undertaking was signed on March 14, 2005, by the Philippine National Oil Company (PNOC), the China National Offshore Oil Corporation (CNOOC), and the Vietnam Oil and Gas Corporation (PetroVietnam).

Army Navy and its plan to develop blue water capabilities, which will give it the capacity to project its power into the region and beyond, will affect the maritime strategic environment as well as the tone and tenor of dialogue on regional maritime disputes.

However, in the meantime, before their disputes are submitted for international adjudication, instead of a military build-up states in the region should focus on securing the necessary resources to build capacity in other areas equally important in the resolution of their maritime and territorial disputes. Such areas include the ratification of and compliance with relevant international instruments, the drawing of legally defensible baselines, and improved capacity for maritime regulation and enforcement.

Governments across the region are aware that clearly defined maritime boundaries are indispensable for good relations among states and effective ocean management. However, only a few coastal states in East and Southeast Asia have established maritime boundaries with their neighbors. For many states in the region, the lack of a range of specialized legal and technical skills required in boundary delimitation is a serious impediment.

Conclusion

The persistent territorial disputes over maritime territories in East and Southeast Asia challenge the peace and stability of the region. These disputes exist alongside issues of unexplored resources that cannot be utilized and exploited because of sovereignty disputes. Often, disputed islands and rocks have little value per se; instead their real value lies in the maritime zones that they could potentially generate, which may contain valuable fisheries and mineral deposits such as oil and gas. It is also important to acknowledge the role of politics and nationalism and the symbolic value of seemingly worthless, tiny, uninhabited rocks apart from the value of any maritime zones they may generate.

While it can be safely asserted that the region is largely at peace and the disputes have not erupted into sustained military conflict, there still exist intermittent tensions among rival claimants. In the course of articulating or advancing their respective claims to disputed maritime areas, countries will often assert legal and historical arguments in support of their claims and take various steps to occupy disputed territory. This scenario plays out in disputed territories throughout East and Southeast Asia. As a result of such posturing, tensions remain high and the potential for armed conflict persists. Thus, the states involved must remain committed to cooperation, diplomacy, and peaceful means of settling disputes.

The value of establishing maritime boundaries on a sound basis in international law and which are therefore respected by the international community is self-evident. The fundamental purpose of maritime boundary delimitation is to provide clarity and certainty to all maritime states and users in order to minimize interstate conflict and promote the sustainable management and governance of the oceans. Uncertain boundaries increase political and security risks and may trigger intense diplomatic disputes. Unresolved boundaries likewise have serious economic consequences and may stall exploration of resources, disrupt fishing, impede shipping, and hamper environmental conservation measures, in addition to triggering intense diplomatic disputes. Conversely, the certainty of a nation's boundaries enhances stability and promotes peaceful relations among neighboring states sharing the same boundaries and resources.

The judgment of the ICJ in the Black Sea case is a landmark jurisprudential contribution to the progressive development of the law of maritime delimitation. In this case, the ICJ affirmed and clarified the delimitation methodology that has been consistently adopted by international tribunals in past jurisprudence and took the opportunity to clearly articulate a three-stage delimitation process. The value of this delimitation methodology is clear. However, applying this method alone cannot determine how the territorial and maritime disputes in East and Southeast Asia will actually be settled or predict the precise course of future delimitation lines. Nonetheless, the Black Sea case offers a significant step forward and provides a more detailed roadmap for future maritime boundary delimitation.

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Joint Development in Asia: Some Valuable Lessons Learned

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EXECUTIVE SUMMARY

This essay will examine joint development arrangements (JDA) in Asia and discuss the rationale for states entering into these JDAs, factors that influenced negotiations, and provisions that have contributed to the success of JDAs in Asia.

MAIN ARGUMENT

Despite contentious and seemingly intractable maritime territorial disputes in Asia's waterways, states in Asia have frequently adopted JDAs to enable the interim utilization of hydrocarbon resources in areas of overlapping maritime claims. Seven Southeast Asian states and three Northeast Asian states have been party to at least one JDA in the region. That said, there are still unresolved and contentious overlapping claims in the South China and East China seas, where joint development remains an important and viable option. By examining why states entered into existing JDAs, what influenced the negotiations, and which provisions contributed to their success, this essay will ascertain whether there are any valuable lessons from existing JDAs that can be used in future joint development regimes in the region. Ultimately, this essay hopes to demonstrate that states have every incentive to enter into JDAs and, indeed, have been able to successfully establish functional cooperative regimes for the exploration and exploitation of hydrocarbon resources despite considerable political, practical, and legal obstacles.

POLICY IMPLICATIONS

- States enter into JDAs for a variety of reasons depending on their needs and circumstances at the time. These include the need for hydrocarbon resources, technical and capacity assistance for the effective exploration and exploitation of hydrocarbon resources, a secure investment framework for oil companies, and good bilateral relations as well as peace in the region.
- A variety of factors can influence the negotiation of JDAs, and states that are considering entering into JDAs should be aware of these factors and how to manage them so as to facilitate negotiations. These factors include actual knowledge of hydrocarbon resources, the absence of sovereignty disputes over offshore features, public perceptions of JDAs, good bilateral relations between the states concerned, and the political will of these states.
- In negotiating the detailed provisions of JDAs, states should agree on provisions that suit their particular circumstances, as there is no such thing as a model JDA. However, states should still examine other JDAs to ascertain what has been successful and what has not worked.

The establishment of an exclusive economic zone (EEZ)[1] of 200 nautical miles (nm) and a continental shelf[2] under the 1982 UN Convention for the Law of the Sea (UNCLOS) has reportedly placed 87% of the world's known offshore hydrocarbon fields under coastal state jurisdiction.[3] The possibility of such vast untapped oil and gas resources has arguably motivated states to make maritime claims that maximize their maritime entitlements, resulting in a multitude of overlapping claims.

While UNCLOS places an obligation on states parties to delimit overlapping maritime claims by agreement in order to achieve an equitable solution,[4] negotiations on maritime delimitation can be long and protracted. Complicating such negotiations are the delimitation principles articulated by international courts and tribunals. While such principles are necessarily flexible to take into consideration a variety of circumstances, they have also given states a range of options in which to delimit their maritime zones, inevitably using principles that are most advantageous.[5] States are also often reluctant to resort to international adjudication due to the perception that there is too much to lose. In the meantime, hydrocarbon resources in overlapping claim areas remain unexploited, potentially hindering economic development of the states concerned and raising tensions, particularly when states undertake unilateral exploration and exploitation of such resources.

UNCLOS purports to provide a solution to this impasse in Article 74, paragraph 3, and Article 83, paragraph 3. It provides that if delimitation cannot be effected by agreement,

> 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 the transitional period, not to jeopardize or hamper the reaching of final agreement. Such arrangements shall be without prejudice to the final delimitation. (emphasis added)

"Provisional arrangements of a practical nature" are designed to "promote interim regimes and practical measures that could pave the way for provisional utilization of disputed areas pending delimitation," and entering into provisional arrangements "constitutes an implicit acknowledgement of the importance of avoiding the suspension of economic development in a disputed maritime area."[6]

Article 74, paragraph 3, and Article 83, paragraph 3, leave to the discretion of the state the type of "provisional arrangements of a practical nature" into which they may enter. They include a wide variety of arrangements, such as mutually agreed moratoriums on all activities in overlapping areas, joint development or cooperation on fisheries, agreements on environmental cooperation, and agreements on allocation of criminal and civil jurisdiction. One of the more common types of "provisional arrangements of a practical nature," however, appears to be the joint development of hydrocarbon resources.

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[1] Part V of the 1982 UN Convention on the Law of the Sea (UNCLOS) establishes a 200-nm EEZ regime whereby coastal states are given, *inter alia*, sovereign rights over living and nonliving resources of the waters superjacent to the seabed and of the seabed and its subsoil. See United Nations Division for Ocean Affairs and the Law of the Sea, "UN Convention on Law of the Sea (UNCLOS)," art. 56, par. 1, http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

[2] Similarly, Part VI of UNCLOS gives coastal states sovereign rights for exploring the continental shelf and exploiting its natural resources, which includes nonliving resources of the seabed and subsoil. See "UNCLOS," art. 77, par. 1.

[3] R. Churchill and V. Lowe, *The Law of the Sea*, 3rd ed., (Manchester: Manchester University Press, 1999), 162.

[4] "UNCLOS," art. 74, par. 1; and art. 83, par. 1.

[5] Based on past decisions, the factors that could be taken into account in delimitation are numerous, but coastal geographical factors have tended to play a dominant role. Such factors include the configuration of the coasts concerned, the length of the relevant coastlines, and the presence of islands. See J.R.V. Prescott and C.H. Schofield, *Maritime Political Boundaries of the World* (Leiden: Martinus Nijhoff, 2005), 219–20.

[6] *Guyana v. Suriname,* Award of the Arbitral Tribunal, Permanent Court of Arbitration (2007), par. 60.

The concept of joint development of hydrocarbon resources emerged in the 1950s.[7] However, despite considerable state practice since then, there has been little agreement on the definition of joint development of hydrocarbon resources.[8] It is usually used as a generic term[9] and extends from unitization of a single resource straddling an international boundary to joint development of a shared resource, where boundary delimitation is shelved because it is not feasible or possible at the time.[10] The most comprehensive and inclusive definition of joint development is said to be given by Rainer Lagoni as rapporteur to the Exclusive Economic Zone Committee of the International Law Association:[11]

> The co-operation between states with regard to the exploration for and exploitation of certain deposits, fields or accumulations of non-living resources which either extend across a boundary or lie in an area of overlapping claims.

States in Asia have frequently employed the joint development of hydrocarbon resources as a "provisional arrangement of a practical nature" pending delimitation of overlapping maritime claims. Seven Southeast Asian states[12] and three Northeast Asian states[13] have been party to at least one joint development arrangement (JDA).[14] Indeed, one scholar has suggested that joint development may be "a device of particular interest and appeal to Asian societies" due to their cultural predisposition to "consensus-building as well as in cooperative behaviour governed by rules that emphasize the collectivity rather than the individual."[15]

In light of their wide use in the region, this essay will examine the JDAs in Asia, focusing on the joint development of hydrocarbon resources within a disputed seabed area of overlapping continental shelf or EEZ claims where no boundary has been agreed. The purpose of this examination is to determine whether there are any valuable lessons to be learned from existing JDAs, which can then be applied to other unresolved and often contentious overlapping maritime claim areas in Asia such as the South China Sea and the East China Sea.

To this end, this essay will first give a brief overview of joint development practices in Asia. This will be followed by an analysis of the most valuable lessons learned from joint development practices in Asia relating to (1) the rationale for states entering into JDAs, (2) the factors that influenced the negotiation of JDAs, and (3) key provisions in JDAs that affected both their negotiation and their success. The overarching objective of this exercise is to demonstrate that the joint development of hydrocarbon resources in existing areas of overlapping claims in Asia is a viable policy option for states.

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7 Hazel Fox, Paul McDade, Derek Rankin Reid, Anastasia Strati, and Peter Huey, *Joint Development of Offshore Oil and Gas: A Model Agreement for States with Explanatory Commentary* (London: British Institute of International and Comparative Law, 1989), 54.

8 Thomas Mensah, "Joint Development Zones as an Alternative Dispute Settlement Approach in Maritime Boundary Delimitation," in *Maritime Delimitation*, ed. Ranier Lagoni and Daniel Vignes (Leiden: Martinus Nijhoff, 2006), 143–46.

9 Fox et al., *Joint Development of Offshore Oil*, 43.

10 Gao Zhiguo, "Legal Aspects of Joint Development in International Law," in *Sustainable Development and Preservation of the Oceans: The Challenges of UNCLOS and Agenda 21*, ed. M. Kusuma-Atmadja, T.A. Mensah, and B.H. Oxman (Honolulu: Law of the Sea Institute, 1997), 629–33.

11 Chidinma Bernadine Okafor, "Joint Development: An Alternative Legal Approach to Oil and Gas Exploitation in the Nigeria-Cameroon Maritime Boundary Dispute?" *International Journal of Marine and Coastal Law* 21, no. 4 (2006): 489–95.

12 The Southeast Asian states include Brunei, Malaysia, Thailand, Cambodia, Vietnam, Indonesia, and East Timor.

13 The Northeast Asian states include Japan, South Korea, and China.

14 The term "arrangement" is used as the JDAs adopted in Asia range from formal agreements to "in principle" understandings.

15 Yu Hui, "Joint Development of Mineral Resources—An Asian Solution?" *Asian Yearbook of International Law* 2 (1992): 87–112.

An Overview of State Practice on Joint Development in Asia

There has been one form of joint development or another in Asian waters, principally in Southeast Asian waters, the East China Sea, and the Timor Sea. The JDAs range from "in principle" JDAs, which usually express an intent to jointly develop but do not set out the detailed mechanism for interstate cooperation, to JDAs that establish a legal framework in which the joint exploration and exploitation of hydrocarbon resources is to occur.

JDAs in Southeast Asia

The Gulf of Thailand is an arm of the South China Sea semi-enclosed by Cambodia, Malaysia, Thailand, and Vietnam. The presence of oil and gas in the Gulf of Thailand has prompted all littoral states to claim both EEZs and continental shelf areas.[16] However, the size of the gulf means that no coastal state can claim a full 200-nm EEZ, leading to extensive overlapping maritime claims.[17] There are presently four JDAs in the Gulf of Thailand.

First is the 1979/1990 Malaysia-Thailand JDA, which consists of the 1979 Memorandum of Understanding (MOU) 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 (1979 MOU) and the 1990 Agreement between the Government of Malaysia and the Government of the Kingdom of Thailand and Other Matters Relating to the Establishment of the Malaysia-Thailand Joint Authority (1990 Agreement). This JDA is currently in operation and has been successful in the exploration and exploitation of hydrocarbons.[18]

Second is the 1982 Cambodia-Vietnam JDA established by the 1982 Agreement on Historic Waters of Vietnam and Kampuchea, which defines a specified zone that encompasses an area of 4,000 square nautical miles (nm^2) and is jointly claimed as historic waters.[19] The 1982 Cambodia-Vietnam JDA is an in-principle JDA in that it only provides that "exploitation of natural resources will be decided by common agreement."[20] To date, it is not certain if any such joint exploitation has taken place or what the extent of negotiations on this issue has been, and government upheaval in Cambodia has led to the non-implementation of many of the cooperative aspects of the agreement.[21] Accordingly, this JDA is classified as an in-principle JDA.

Third is the 1992 Malaysia-Vietnam JDA established by the 1992 Memorandum of Understanding between Malaysia and the Socialist Republic of Vietnam for the Exploration and Exploitation of Petroleum in a Defined Area of the Continental Shelf involving the Two Countries.[22] This JDA is still in operation and has been successful in the exploration and exploitation of hydrocarbons.[23]

Fourth is the 2001 Cambodia-Thailand JDA, which is reflected in the Memorandum of Understanding on the Area of Overlapping Maritime Claims to the Continental Shelf. The

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16 From June 1971 to May 1973, Cambodia, the former South Vietnam, and Thailand made unilateral claims to continental shelf areas that overlap in the central Gulf of Thailand. In 1979, Malaysia also issued a map claiming a continental shelf that overlapped with these claims. See Daniel J. Dzurek, "Maritime Agreements and Oil Exploration in the Gulf of Thailand," in *Boundaries and Energy: Problems and Prospects*, ed. Gerald Blake, Martin Pratt, Clive Schofield, and Janet Allison Brown (London: Kluwer Law International, 1998), 117.

17 Clive Schofield, "Unlocking the Seabed Resources of the Gulf of Thailand," *Contemporary Southeast Asia* 29, no. 2 (2007): 286.

18 See the Malaysia-Thailand Joint Authority (MTJA) website, http://www.mtja.org/.

19 "Agreement on Historic Waters of Vietnam and Kampuchea," July 7, 1982, art. 1.

20 Ibid., art. 3.

21 Jonathan Charney and Lewis Alexander, *International Maritime Boundaries*, vol. 3 (Leiden: Martinus Nijhoff, 1998), 2361.

22 The Malaysia-Vietnam JDA was signed on June 5, 1992.

23 Nguyen Hong Thao, "Joint Development in the Gulf of Thailand," *IBRU Boundary and Security Bulletin* (1999): 83.

overlapping claim area between Cambodia and Thailand is the largest disputed area in the Gulf of Thailand[24] and covers an area of approximately 7,500 nm^2 of maritime space.[25] The overlapping area was divided into two areas along the latitude 11° north parallel.[26] In Area I, north of the boundary, the parties agreed to attempt through further negotiations to define the maritime boundary, whereas south of the boundary, there would be further negotiations for joint development.[27] As negotiations on implementing the 2001 Cambodia-Thailand JDA are still ongoing, for the purposes of this essay, the 2001 Cambodia-Thailand JDA is also classified as an in-principle JDA.

The 2009 Malaysia-Brunei JDA is arguably also an example of joint development in Southeast Asian waters. In 2009 it was announced that Brunei and Malaysia had reached a 40-year commercial arrangement area agreement over the disputed Blocks L and M, located off Borneo.[28] The blocks had been subject to a dispute over ownership for some time, and both Malaysia and Brunei had awarded concessions for both blocks to foreign oil companies.[29] On March 16, 2009, Malaysia and Brunei agreed to an exchange of letters that established the final delimitations of the territorial sea, continental shelf, and EEZ of both states.[30] Blocks L and M were situated on Brunei's continental shelf; however, Malaysia was given unsuspendable rights of access for the exploration and exploitation of Blocks L and M in exchange for giving up its claims over these blocks.[31] Arguably, this agreement is not joint development in the absence of boundaries, as a boundary was actually agreed on. But unlike other overlapping continental shelf claims where a boundary was agreed on for dividing the overlapping claim area, this boundary delimitation placed the overlapping claims on one side of the boundary (and is therefore included in this examination).

The East China Sea

The East China Sea is of great interest to Taiwan, China, Japan, and South Korea because of "its proven or suspected hydrocarbon resources, its fishery resources and its seafloor deposits of metals."[32] The estimates of proven and suspected hydrocarbon resources vary significantly and although supposedly not very high by international standards, remain critical to energy-pressed Japan and China.[33] In the 1960s the belief that there were untapped resources in the seabed underneath the East China Sea prompted Japan, South Korea, and Taiwan to each make unilateral claims to the East China Sea.[34] By September 1970, seventeen seabed zones were established by these coastal states, with their unilateral claims overlapping to such an extent that only four of the seventeen zones were uncontested.[35] In December 1970, China responded by claiming sovereign

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24 Dzurek, "Maritime Agreements," 122.

25 Schofield, "Unlocking the Seabed Resources," 301.

26 Ibid., 302.

27 Ibid.

28 Johan Saravanamuttu, "Malaysia's Lucrative Approach to Joint Development in Troubled Seas," *Opinion Asia*, May 16, 2010.

29 Leszek Buszynski and Sazlan Iskandar, "Maritime Claims and Energy Cooperation in the South China Sea" *Contemporary Southeast Asia* 29, no. 1 (2007).

30 Saravanamuttu, "Malaysia's Lucrative Approach."

31 Ibid.

32 Reinhard Drifte, "Territorial Conflicts in the East China Sea—From Missed Opportunities to Negotiation Stalemate" (paper presented at the Conference on Dokdo, Yeungnam University, Daegu, May 13–14, 2009), http://www.japanfocus.org/-Reinhard-Drifte/3156.

33 Ibid.

34 Choon-Ho Park, "Oil Under Troubled Waters: The Northeast Asia Sea-Bed Controversy," *Harvard International Law Journal* 14 (1973): 212.

35 The four zones were uncontested largely due to their marginal location. See Park, "Oil Under Troubled Waters," 226.

rights over the continental shelf up to the Okinawa Trough and the resources underlying it.[36] Development of the oil potential of the East China Sea has been hampered by various island sovereignty disputes and conflicting continental shelf delimitation, complicated by the presence of the Okinawa Trough, a large concavity found just before the Ryukyu Islands of Japan.[37]

There are presently two JDAs within the East China Sea. First is the 1974 Japan–South Korea JDA, established under the Agreement Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries. While this JDA is still in force, there has to date been no discovery of commercially viable hydrocarbons. Second is the 2008 China-Japan JDA established by the 2008 Principled Consensus on the East China Sea Issue, which is essentially an in-principle JDA.[38] The consensus does not spell out detailed provisions on joint development and merely asserts that the two sides "through joint exploration, will select by mutual agreement areas for joint development" and that the two sides "have agreed to continue consultations for the early realization of joint development in other parts of the East China Sea."[39] The consensus also states that Chinese enterprises welcome the participation of Japan in the existing oil and gas field in Chunxiao, in accordance with the relevant Chinese laws governing cooperation with foreign enterprises in the exploration and exploitation of offshore petroleum resources. To date, there have been "no steps to concretize the Principled Consensus" and turn it into a binding agreement.[40] For purposes of this essay, the 2008 China-Japan JDA is also classified as an in-principle JDA.

The Timor Sea

The Timor Sea is bounded in the north by both Indonesia and East Timor and to the south by Australia. It is rich in hydrocarbon resources.[41] It is also subject to overlapping claims by Australia, Indonesia, and East Timor, and delimitation is complicated by the presence of the Timor Trough.[42]

There have been two JDAs within the Timor Sea, the 1989 Australia-Indonesia JDA and the 2002 Australia–East Timor JDA. The 1989 Australia-Indonesia JDA was established pursuant to the 1989 Treaty between Australia and the Republic of Indonesia on the Zone of Co-operation in an Area between the Indonesian Province of East Timor and Northern Australia. It covers an area between Australia and East Timor, which prior to 1975 had been under the colonial administration of Portugal but was invaded and annexed by Indonesia in 1975.[43] While Australia and Indonesia had an existing 1972 sea boundary, Indonesia refused to use this boundary as the boundary between Australia and East Timor. This was because the 1972 boundary favored Australia's natural prolongation arguments up to the axis of the Timor Trough rather than Indonesia's equidistance line approach.[44] The increasing irrelevance of the natural prolongation method of continental shelf

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36 Park, "Oil Under Troubled Waters."

37 Mark Valencia, "Context, Claims, Issues and Possible Solutions," *Asian Perspective* 31, no. 1 (2007): 127–28.

38 Gao Jianjun, "A Note on the 2008 Cooperation Consensus Between China and Japan in the East China Sea," *Ocean Development and International Law* 40, no. 3 (2009): 291–92.

39 Ibid.

40 Xinjun Zhang, "Why the 2008 Sino-Japanese Consensus on the East China Sea Has Stalled: Good Faith and Reciprocity Considerations in Interim Measures Pending a Maritime Boundary Delimitation," *Ocean Development and International Law* 42, no. 1–2 (2011): 53.

41 Swee Guan Lee, "Petroleum Development Area Timor Sea," available at http://www.geoexpro.com/exploration/timor-sea/.

42 For more on the overlapping claims, see Anthony Bergin, "The Australian-Indonesia Timor Gap Maritime Boundary Agreement," *International Journal of Estuarine and Coastal Law* 5, no. 4 (1990): 383.

43 Ibid., 384.

44 Bergin, "Australian-Indonesia Timor Gap," 384.

delimitation and its perceived unfairness to Indonesia[45] stalled maritime delimitation negotiations, and joint development under the 1989 Australia-Indonesia JDA was agreed to as a solution to this stalemate. This arrangement was largely successful in facilitating the joint exploration and exploitation of hydrocarbons but is no longer in force, having been replaced by the 2002 Australia–East Timor JDA.

The 2002 Australia–East Timor JDA consists of both the 2002 Timor Sea Treaty (TST) and the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS). The JDA was concluded after East Timor gained independence from Indonesia. Despite the initial reluctance of East Timor, the 2002 TST was signed to ensure continuity for existing activities in the Timor Gap. However, issues soon arose. First, East Timor wanted access to the Greater Sunrise field, which straddled the eastern outer limits of the boundary of the Joint Petroleum Development Area (JPDA), and contained an estimated 8.4 trillion cubic feet of gas and 295 million barrels of condensate.[46] A major Australian oil company, Woodside, held consortium rights to the field. Pursuant to the 2002 TST, East Timor and Australia had signed a unitization agreement that allowed East Timor to benefit from 18.1% of the proceeds from the Greater Sunrise field, according to the 90:10 split in revenue.[47] This was on the basis that 20.1% of the field lay within the JPDA, with the remaining 79.9% falling on Australia's purported side of the line.

East Timor accordingly argued that it was not bound by the area enclosed by the JPDA as defined by the previous Timor Gap Treaty, and claimed areas adjacent to the JPDA, thereby covering the Greater Sunrise field, which could be done by "defining lateral boundary lines perpendicular to the general direction of the coast of Timor Island, creating a corridor-type effect."[48] Australia disagreed with this "widening of the gap" and insisted that the Timor Trough should remain the boundary between the parties. Two other issues were whether the pipeline from the Sunrise field would lead to Dili or Darwin and where the liquefied natural gas processing operations would take place.[49] However, as both parties had every incentive to see the Greater Sunrise project succeed,[50] in 2006 the CMATS was signed, and entered into force on February 23, 2007. However, the JDA continues to be plagued by issues that delay its implementation.

The Rationale for JDAs in Asia

The Need for Hydrocarbon Resources

For the majority of JDAs in Asia, the need for hydrocarbon undoubtedly created a greater incentive to reach an agreement on joint development. It is axiomatic that most states are constantly searching for new sources of hydrocarbons to meet the increasing demand of their populations. Indeed, in many instances of JDAs in Asia, one factor that contributed to their conclusions was the

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45 Clive Schofield, "Minding the Gap: The Australian-East Timor Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS)," *International Journal of Marine and Coastal Law* 22 (2007): 190–98.

46 Ibid., 197.

47 Clive Schofield, "Blurring the Lines? Maritime Joint Development and the Cooperative Management of Ocean Resources," in "Frontier Issues in Ocean Law: Marine Resources, Maritime Boundaries and the Law of the Sea," ed. Harry Scheiber and Seokwoo Lee, *Issues in Legal Scholarship* 8, no. 1 (2009): 21.

48 Schofield, "Minding the Gap," 200.

49 Ibid., 203.

50 Ibid., 204.

declining supply of hydrocarbons from other sources. For example, the oil crisis of 1973,[51] which resulted in a debilitating shortage of oil for Northeast Asian states, coupled with growing demand, was a strong motivating factor for the 1974 Japan–South Korea JDA.[52] Similarly, Thailand was facing declining production in its Erawan fields when it concluded the 1979 MOU with Malaysia, and Australia was facing a similar situation in the Bass Strait.[53]

Apart from the need to address depleting supplies of hydrocarbon resources, the potential economic and social development for less developed countries from the exploitation of hydrocarbon resources is a considerable incentive to enter into JDAs. As noted by Clive Schofield in relation to East Timor:

> Successful resolution of the dispute and the significant additional revenue stream that this would, it is presumed, represent, is thus viewed as potentially making the difference between long-term sustainable development rather than under-development and dependency on aid.[54]

Most of the JDAs in Asia, excluding the in-principle JDAs, have been able to both explore and exploit the hydrocarbon resources in the overlapping claim areas. In the Malaysia-Thailand JDA, Malaysia and Thailand have undertaken oil exploration and exploitation without any major issues. Since 1994, there have been a total of 63 exploration wells drilled and 114 development wells drilled.[55] In the Malaysia-Vietnam JDA, four years after the conclusion of the commercial arrangement between the national oil companies of Malaysia and Vietnam, petroleum was extracted. Hence, according to one expert, the Malaysia-Vietnam JDA "can be viewed as a great success and vindication of the Malaysian-Vietnamese model of joint development in the Gulf."[56] The Australia-Indonesia JDA was also successful in that "numerous production sharing contracts have been approved, oil wells have been drilled, seismic surveys have been conducted and several major oil discoveries made."[57]

With regard to the Japan–South Korea JDA, to date there have been no discoveries of commercially viable oil and gas reserves.[58] Both Japan and South Korea launched drilling seven times in three districts of the joint development zone (JDZ) between 1980 and 1986, but saw no results suggesting the presence of oil or gas.[59] In 2006, South Korea reportedly proposed that Japan and South Korea conduct a joint field assessment of oil and gas in the JDZ as preliminary surveys had raised the possibility of undersea geographical features that could contain oil and gas.[60] The Australia–East Timor JDA has also faced issues in its implementation due to disagreements in downstream activities.[61]

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51 The 1973 oil crisis was caused by the embargo on oil supply imposed by the Organization of Arab Petroleum Exporting Countries (OAPEC) in response to the U.S. decision to supply Israeli military during the 1973 Arab-Israeli war.

52 Choon-Ho Park, "Joint Development of Mineral Resources in Disputed Waters: The Case of Japan and South Korea in the East China Sea," *Energy* 6, no. 11 (1981): 1135.

53 Bergin, "Australian-Indonesia Timor Gap," 384.

54 Schofield, "Minding the Gap," 204.

55 MTJA website, http://www.mtja.org/.

56 Nguyen, "Joint Development in the Gulf of Thailand," 83.

57 Lian A. Mito, "The Timor Gap Treaty as a Model for Joint Development in the Spratly Islands," *American University International Law Review* 13 (1997–98): 758.

58 Schofield, "Blurring the Lines?" 13.

59 "Korea, Japan to Resume Exploration of Continental Shelf," *Asia Pulse*, August 1, 2002.

60 "South Korea to Propose Joint Oil Exploration with Japan," *BBC*, May 26, 2006.

61 Ian Lewis, "Greater Sunrise under Threat," *Petroleum Economist*, March 21, 2011.

The Need for Technical and Capacity Assistance for the Development of Hydrocarbon Resources

Joint development makes it possible for developing states that lack capacity and expertise to obtain technical and other assistance for the efficient exploitation and management of resources.[62] For example, in the 1992 Malaysia-Vietnam JDA, Malaysia's national oil company PETRONAS carried out exploration and exploitation on behalf of PetroVietnam, Vietnam's national oil company, as the latter lacked the necessary expertise as well as petroleum legislation.[63]

The Need for a Secure Investment Framework

Exploration and exploitation of hydrocarbon resources in offshore areas is a capital-intensive venture that will most likely require the funds and expertise of private oil companies. Unsurprisingly, many oil companies are reluctant to invest in the disputed areas discussed above due to political and military uncertainties, with some companies even ceasing operations.[64] JDAs provide a secure investment framework for these companies.

This issue has been highlighted in several of the JDAs in Asia. For example, in the case of the 2001 Cambodia-Thailand JDA, Cambodia began awarding concessions to oil companies in the area in 1997, after potential oil and gas reserves were discovered in the overlapping areas.[65] However, exploration was apparently conditional upon a satisfactory resolution by Cambodia and Thailand on their overlapping claims to the area,[66] which no doubt contributed to the conclusion of the 2001 Cambodia-Thailand JDA.

The 1974 Japan–South Korea JDA was also motivated in part by the need to provide a secure investment framework for oil companies. In 1970, after Japan, Taiwan, and South Korea had made unilateral claims to the continental shelf beneath the East China Sea, all three states began to award oil exploration and exploitation contracts to Western oil interests for many of the overlapping zones.[67] However, after China strongly objected to the unilateral continental shelf claims of Japan, Korea, and Taiwan on the basis that it had sovereign rights over these continental shelf resources, the United States advised U.S. oil firms not to explore for oil deposits in the disputed areas.[68] This recommendation was aimed at preventing the oil disputes from affecting the détente between China and the United States at the time. All exploration activities in the Yellow Sea and the East China Sea, except those by the non-U.S. company Shell, had stopped by April 1971, although they resumed later, albeit with non-U.S. vessels.[69]

In the most recent example of joint development, both Malaysia and Brunei claimed blocks of hydrocarbon resources in an area of Borneo. Both Malaysia and Brunei had awarded concessions over these blocks to foreign oil companies in 2002–3. These foreign oil companies had on several

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62 Mensah, "Joint Development Zones," 149.

63 Nguyen, "Joint Development in the Gulf of Thailand," 82.

64 Fox et al., *Joint Development of Offshore Oil*, 39.

65 Dzurek, "Maritime Agreements," 124.

66 Royal Thai Navy, Captain Somjade Kongrawd, *Thailand and Cambodia Maritime Disputes*, http://www.navy.mi.th/judge/Files/Thailand%20Cambodia.pdf.

67 For example, Gulf Oil had signed contracts with Japan, Korea, and Taiwan, whereas Texaco and Shell had only signed contracts with Japan and Korea. Choon-Ho Park noted at the time that "the fact that foreign oil companies have sought to protect their interests by signing concession agreements with, or investing in the oil industry of all or both coastal states claiming sovereignty over a given area of the sea bed emphasizes the uncertainty concerning the legality of the various claims" and that the "divided allegiance of the oil companies may in the end help promote a more balanced settlement." See Park, "Oil Under Troubled Waters," 226.

68 Park, "Oil Under Troubled Waters," 232–33.

69 Ibid., 234.

occasions been forced to leave the area by both Bruneian and Malaysian patrol boats, prompting some foreign companies to cease all operations in the area.[70] This was no doubt a factor in both Malaysia and Brunei agreeing to jointly develop these blocks. Additionally, it may also point to a lesson for oil companies on the role that they can play in encouraging states to enter into JDAs. By refusing to operate in areas where there is legal and political uncertainty, oil companies can indirectly pressure states into entering JDAs.

The Need to Prevent Unilateral Activities in Disputed Areas

In many of the JDAs, while unilateral concessions or exploration in a given disputed area arguably heightened tensions, such actions were also partial reasons for why states decided to enter into JDAs.

For example, prior to the 1974 Japan–South Korea JDA, Japan, Taiwan, and South Korea began to award oil exploration and exploitation contracts to Western oil interests for many of the overlapping zones. Similarly, in the 1979/1990 Malaysia-Thailand JDA, prior to 1979, Thailand had awarded concessions in the northwestern part of the disputed area to Texas Pacific Oil and the southwestern part to Triton Energy.[71]

With regard to the 1992 Malaysia-Vietnam JDA, Malaysia had commenced hydrocarbon exploration activities in the disputed area from the 1980s onward and signed three petroleum ventures with foreign enterprises.[72] In 1991, one of these enterprises announced that there were gas reserves in the overlapping area. Vietnam protested and sent a note to the Malaysian minister of foreign affairs stating that the "friendly and cooperative spirit between the two countries did not allow any country to unilaterally grant to a third party the right to explore for and exploit petroleum in the overlapping area."[73] Both countries expressed a willingness to negotiate, and pending such negotiations, all exploration and exploitation activities carried out by PETRONAS were suspended.[74]

Unilateral exploratory activities by one state can serve as a catalyst for joint development as they are a tangible reminder to the other state that development of the resources can occur without them. The need to prevent such unilateral exploratory activities is arguably an incentive to agree to joint development.

Unilateral exploratory activities not only exacerbate tension between states,[75] but they may also breach the obligation to negotiate provisional arrangements of a practical nature as stated in Article 83, paragraph 3, of UNCLOS. In the 2007 *Guyana v. Suriname* arbitration, the tribunal found that Guyana had violated its obligation under Article 83, paragraph 3, on provisional arrangements of a practical nature. According to UNCLOS, Guyana should have, in a spirit of cooperation, informed Suriname of its exploratory activities in the disputed area, given Suriname official and detailed notice of the planned activities, offered to share the results of the exploration,

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70 Buszynski, and Iskandar, "Maritime Claims and Energy Cooperation."

71 David M. 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 and Coastal Law* 14, no. 2 (1999): 225–26.

72 Nguyen, "Joint Development in the Gulf of Thailand," 81.

73 Ibid.

74 Ibid.

75 As illustrated by the recent furor between China and Vietnam, and China and the Philippines, over unilateral exploratory activities by Vietnam and the Philippines in areas of the South China Sea.

given Suriname an opportunity to observe the activities, and offered to share all the financial benefits received from the exploratory activities.[76]

The Political and Security Rationale: The Need for Good Relations

Overlapping maritime claims can be a major irritant in relations between neighboring states, which can have detrimental effects for regional peace and security. Joint development provides a means to remove this irritant, albeit temporarily, in a way that does not compromise the claims or position of the states parties. Undoubtedly, the need for good relations with adjacent or opposite states is a major incentive for states to enter into JDAs.

For example, it has been suggested that Vietnam was beginning the process of entry into ASEAN at the time of the 1992 Malaysia-Vietnam JDA and that cooperation with Malaysia, a key ASEAN member state, was thus critical.[77] Similarly, the need to avoid or reduce military conflict has also motivated some states to enter into JDAs. For example, prior to the adoption of the 2001 Thailand-Cambodia MOU, continuous clashes between the Thai navy and the Cambodian marine police regarding fishing in the area of overlapping claims had heightened tension in the area.[78] Similarly, before the 2008 China-Japan JDA, increased patrols by Chinese military forces in the disputed area, particularly in areas where there were oil rigs or oil fields, signaled to Japan that it needed to act.[79]

Indeed, the belief of these states that JDAs contribute to the reduction in bilateral tensions has arguably been vindicated. After some of these JDAs were adopted, tensions significantly eased. In the case of the Japan–South Korea JDA, it is said that "despite the absence of commercial discoveries, the [Japan–South Korea JDA] performs a useful independent function in the removal of tension between the two States."[80] Similarly, the 2008 China-Japan JDA has been described as highly significant because it eased escalating tensions and contributed to peace and stability in the East China Sea.[81]

On a larger level, one important side effect of JDAs is that it is easier for states to cooperate in other areas, which again contributes to an improvement in relations. The goodwill and cooperation generated between Malaysia and Vietnam as a result of their 1992 JDA facilitated the two countries' 2009 joint submission to the UN Commission on the Limits of the Continental Shelf.

Factors Influencing the Conclusion and Implementation of JDAs

Defined Overlapping Claim Areas with a Legal Basis

A strong argument can be made that a clearly defined overlapping area based on articulated delimitation principles that have some legal basis facilitates states entering into JDAs. In all the JDAs, there was a clearly defined overlapping area in which the states had made clear their claims to the continental shelf by maps or statements. In the Thailand-Malaysia JDA, Thailand made

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76 *Guyana v. Suriname*, par. 478.

77 Charney and Alexander, *International Maritime Boundaries*, 2336.

78 Kongrawd, "Thailand and Cambodia Maritime Disputes," 3.

79 Ibid.

80 Fox et al., *Joint Development of Offshore Oil*, 117.

81 Gao, "Note on the 2008 Cooperation Consensus," 296.

unilateral continental shelf claims in the Gulf of Thailand in the 1970s,[82] and in 1979 Malaysia issued a map showing its territorial sea and continental shelf boundaries.[83] In the East China Sea, Japan and South Korea made respective claims to the continental shelf by unilaterally establishing offshore concession blocks and boundary limits in 1968–69.[84] China responded by claiming in 1970 both sovereign rights over the continental shelf up to the Okinawa Trough and the resources underlying it.[85] States were aware of what the other state was claiming and knew the extent of the area in dispute. This facilitated the conclusion of both the 1974 Japan–South Korea JDA and the 2008 China-Japan JDA, and the areas subject to joint development consisted of either the entire overlapping claim area (1974 Japan–South Korea JDA) or part of the overlapping claim area (2008 China-Japan JDA).

Furthermore, the states concerned had also made clear the delimitation principles that they had used to make their claims. For example, with respect to the 1979/1990 Malaysia-Thailand JDA, it was known that the overlap in continental shelf claims was caused by a disagreement over the use of Ko Losin, a feature located approximately 39 nm offshore, and 1.5 meters above water at high tide with a light beacon on it.[86] Thailand insisted that Ko Losin should be treated as a base point in measuring the continental shelf boundary at the expense of Malaysia, whereas Malaysia insisted that Ko Losin should not be used as a base point to extend Thailand's continental shelf. Similarly, for the 1992 Malaysia-Vietnam JDA in 1971, Vietnam claimed its continental shelf by drawing a median line between the coastal islands of Malaysia and Vietnam.[87] In Malaysia's 1979 map, the country claimed the continental shelf giving full weight to its island base points but discounted the Vietnamese island of Hon Da as a legitimate base point.

Moreover, the principles used to delimit these claims had some legal basis. For example, some of the states had used offshore features to measure their continental shelves. Negotiations of UNCLOS were going on at the time and the exact effect of such offshore features in generating maritime zones or in maritime delimitation was unclear. After the entry into force of UNCLOS, in light of Article 121, paragraph 3, of UNCLOS, the use of certain offshore features to generate an EEZ or continental shelf may now not be permissible. For example, with regard to the overlapping claims that led to the 1979/1990 Malaysia-Thailand JDA, Thailand's use of Ko Losin as a base point for its continental shelf boundary with Malaysia is dubious. First, Ko Losin may not qualify as an island under Article 121 of UNCLOS, and second, Thailand subsequently disregarded Ko Losin in its continental shelf boundary with Cambodia.[88] However, pre-UNCLOS, it is fair to say that the status of islands in delimitation was not yet settled and that there was some basis both for Thailand's claim in the 1979/1990 Malaysia-Thailand JDA and for Malaysia's claim in the 1992 Malaysia-Vietnam JDA.

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82 Dzurek, "Maritime Agreements," 117.

83 Asri Salleh, Che Hamdan Che Mogn Razil, and Kamaruzan Jusoff, "Malaysia's Policy towards its 1963–2008 Territorial Disputes," *Journal of Law and Conflict Resolution* 1, no. 5 (2009): 107–12.

84 Zhiguo Gao and Jilu Wu, "Key Issues in the East China Sea: A Status Report and Recommended Approaches," in Selig Harrison, *Seabed Petroleum in Northeast Asia: Conflict of Cooperation* (Washington, D.C.: Woodrow Wilson International Center for Scholars, 2005), 33.

85 Gao and Wu, "Key Issues."

86 Schofield, "Unlocking the Seabed Resources," 290.

87 Nguyen, "Joint Development in the Gulf of Thailand," 83.

88 Schofield, "Unlocking the Seabed Resources," 303.

Similarly, the use of the natural prolongation principle by both Korea[89] and China[90] vis-à-vis Japan in the East China Sea, and by Australia vis-à-vis Indonesia, to justify their continental shelf claims in the 1970s was arguably warranted, having been endorsed by the North Sea Continental Shelf Cases in 1969.[91] It was only in 1985 in the Libya/Malta case that the natural prolongation principle was dismissed by the International Court of Justice.[92]

These cases highlight the need for overlapping areas to be clearly defined and to have some legal basis at the time they were made and (arguably) at the time of negotiations of the JDA. Likewise, it will be more difficult to negotiate joint development if the overlapping area is based on more extreme claims that lack legal grounds. For example, in the 2001 Thailand-Cambodia MOU, the overlapping area was divided into two areas, one north of the boundary in which negotiations on maritime delimitation would continue and one south of the boundary in which negotiations on joint development would continue.[93] There was no way that Thailand would have accepted joint development north of the overlapping area, which would risk legitimizing Cambodia's claim to that area based on a 1907 Franco-Siamese boundary treaty.[94]

Joint development may accordingly be difficult in areas such as the South China Sea, where claimants such as China make general assertions of sovereignty over the waters surrounding the disputed Spratly Islands but have not clarified the extent or basis of such claims.[95]

Knowledge of Hydrocarbon Resources

Knowledge of the presence of hydrocarbon resources appears to be a double-edged sword. It has been observed that "the less awareness there is of the existence of resources in a disputed area, the easier it is to reach a compromise."[96] This is because "the discovery of new structures or deposits makes it difficult to reach a solution because the states concerned naturally tend to push their maximum claims."[97]

In many instances, however, the discovery of actual oil or gas reserves appears to introduce an added impetus for parties to conclude JDAs in the overlapping areas. For example, prior to the signing of the 1979 MOU between Thailand and Malaysia, drilling in 1971 by a Malaysian contractor and drilling in 1976 by a Thai concessionaire revealed the existence of gas[98] and undoubtedly pushed the parties toward joint development.[99] Similarly, Malaysia and Vietnam were also spurred into entering

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89 Between Korea and Japan, Japan's unilateral claims indicated that they were delimiting their continental shelf boundaries by applying the median line between Korea and Japan but using the islets of Danjo Gunto and Tori Shima as base points in determining the median line. In contrast, Korea argued that the islets could not be used as base points, and based on the natural prolongation principle, the presence of the Okinawa Trough between Korea and Japan constituted "special circumstances" under which the median-line delimitation principle cannot be applied as it interrupted the "natural prolongation" of Japan's land territory. See Park, "Oil under Troubled Waters," 212.

90 The East China Sea between Japan and China is less than 400 nm and both China and Japan have overlapping claims based on different interpretations of the Okinawa Trough. China claims that the continental shelf up to the Okinawa Trough is the natural prolongation of its mainland territory such that the Okinawa Trough constitutes the boundary between the two countries' continental shelves. Japan, on the other hand, claims that the median line between the two countries should be the continental shelf boundary. See Gao, "Note on the 2008 Cooperation Consensus," 292–93.

91 *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands)*, ICJ Rep. 4 (1969), 42.

92 *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment, ICJ Rep. 13 (1985), 29.

93 Schofield, "Unlocking the Seabed Resources," 301.

94 Ibid., 301–3.

95 Robert Beckman, "By the Book," *South China Sea Morning Post*, June 23, 2011, http://cil.nus.edu.sg/wp/wp-content/uploads/2010/12/SCMP-News-By-the-Book.pdf.

96 Nguyen, "Joint Development in the Gulf of Thailand," 86.

97 Ibid.; and Okafor, "Joint Development," 513.

98 "Exploration," MTJA website, http://www.mtja.org/exploration.php.

99 Ong, "Model for International Legal Co-operation," 225.

into the Malaysia-Vietnam JDA by the discovery of gas reserves in their overlapping claim area by a Malaysian concessionaire in 1991.[100] In another example, one major reason Australia was keen to consider joint development with Indonesia in the 1970s was a discovery of possible exploitable hydrocarbons in an area named Kelp in the north of the Timor Gap.[101]

Accordingly, the knowledge of hydrocarbon resources makes real the need for joint development as states are aware that they will not be able to unilaterally exploit the resources without consulting the other state. Ascertaining the nature and amount of hydrocarbon resources present in the disputed areas through joint surveys on a "without prejudice" basis can be an important step in bringing parties closer to joint development, despite the potential risk that it may have on the possibility of compromise between parties.

The Number of Parties and Claims by Third-Party States

All the JDAs discussed above have been concluded between two states, with the exception of the 1999 agreement by Vietnam, Thailand, and Malaysia to joint development of a small area that overlaps with the Malaysia-Thailand JDA.[102] This has several implications. First, it is infinitely easier to conclude JDAs with two parties than with three. Second, while the existence of claims by third-party states in a joint development area does not significantly hinder the conclusion of a JDA, such claims will inevitably have some impact on the agreement. For example, China claims part of the JDZ of the 1974 Japan–South Korea JDA. When Japan and Korea concluded their 1974 JDA, the Chinese government objected to the agreement on the basis that the "question of how to divide the continental shelf in the East China Sea should be decided by China and the other countries concerned through consultations," and that the Japan–South Korea JDA was "an infringement on China's sovereignty."[103] China also protested strongly when exploratory work began on the continental shelf.[104]

The existence of such claims by China did not appear to deter investment and exploration in the JDZ.[105] Indeed, one can also argue that with time, the JDZ will be accepted by the third-party claimant. For example, in 2008 both China and Japan reportedly shelved their plans to develop the Asunaro gas field because the site could potentially straddle the China–South Korea median line and stretch into the Japan–South Korea joint development area; neither country wanted to trigger a dispute with South Korea.[106] However, if significant discoveries are eventually made in the Japan–South Korea JDZ, China is very likely to protest, and this reaction will have consequences for the certainty that the JDA is supposed to create for investors and oil companies.

Another example is the 1979/1990 Malaysia-Thailand JDA. As mentioned above, the seaward part of the Malaysia-Thailand JDZ is also subject to a claim by Vietnam and covers approximately 256 nm^2. The 1997 Thailand-Vietnam maritime boundary agreement stated that Thailand and Vietnam, together with Malaysia, "shall enter into negotiations…in order to settle the tripartite

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100 Nguyen, "Joint Development in the Gulf of Thailand," 81.

101 Bergin, "The Australian-Indonesia Timor Gap," 384.

102 Nguyen, "Joint Development in the Gulf of Thailand," 79.

103 Choon-Ho Park, "The Sino-Japanese-Korean Sea Resources Controversy and the Hypothesis of a 200 Mile Economic Zone," *Harvard International Law Journal* 16 (1975): 44.

104 Schofield, "Blurring the Lines?" 13.

105 Fox et al., *Joint Development of Offshore Oil*, 209.

106 "Japan, China Drop Asunaro Gas Field Plan—Fear of Conflict with ROK Seen behind Move," *Daily Yomiuri*, June 21, 2008.

overlapping continental shelf claim area.[107] In 1999, Vietnam, Thailand, and Malaysia agreed in principle on joint development for a small overlapping area,[108] although there have been no subsequent reports of progress. A potential issue may be Vietnam's insistence on a three-way split in revenue from exploitation in the zone despite its claim overlapping with only a small area of the Malaysia-Thailand JDZ.[109] The potential claim of Vietnam in the "Tripartite Overlapping Claim Area" in the Malaysia-Thailand JDZ has meant that no exploration or exploitation has yet taken place there.[110]

Accordingly, for overlapping claim areas that are claimed by more than two parties, the preferable option would be to involve the third-party claimant in the JDA despite the difficulties in doing so. This would avoid a persistent challenge to the JDA by the third-party claimant and contribute to the legal and political certainty of the JDA.

The Absence of Sovereignty Disputes over Islands

Sovereignty disputes over islands can greatly complicate efforts to conclude JDAs. It was only an issue in two of the JDAs discussed, namely the 1982 Cambodia-Vietnam JDA and the 2008 China-Japan JDA. Notably, both of these are "in principle" agreements to jointly develop.

In the 1982 Cambodia-Vietnam JDA, one of the more contentious issues between the parties was sovereignty over Phu Quoc Island, Koh Ses Island, Koh Thmei Island, and the seaward islands of Poulo Wai and the Tho Chu Archipelago.[111] The continental shelf claims of both Cambodia and Vietnam in the 1970s were based on full sovereignty over all these islands, which resulted in a considerable overlap.[112] Under the 1982 Historic Waters Agreement, Cambodia effectively gave up its claim over Phu Quoc Island, which had previously been claimed by both Cambodia and Vietnam. This action arguably only formalized a situation that had been prevalent for some time.[113]

In contrast, in the 2008 China-Japan JDA, China and Japan chose to jointly develop an area north of the disputed Senkaku Islands, which effectively sidestepped the sovereignty dispute. China had proposed joint development in the area surrounding the Senkaku Islands, but this suggestion was rejected by Japan.[114]

The Malaysia-Brunei JDA did not involve sovereignty disputes over islands. However, 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, which were also claimed by Brunei. This action appeared to be in exchange for Malaysia and particularly its national oil company, PETRONAS, to be allowed to participate in the development of these blocks. The agreement is notable because it represents "a departure from current practice" whereby a state has given up its claim in exchange for joint development, instead of expressly preserving their claims.[115]

Clearly, it is significantly easier to jointly develop overlapping areas claimed from non-contested territory. The presence of sovereignty disputes over islands in certain areas in Asia, such as the

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107 Schofield, "Blurring the Lines?" 16–17.

108 Nguyen, "Joint Development in the Gulf of Thailand," 79.

109 Schofield, "Blurring the Lines?" 16–17.

110 MTJA website, http://www.mtja.org/.

111 Charney and Alexander, *International Maritime Boundaries*, 2357.

112 Ibid., 2358.

113 Schofield, "Unlocking the Seabed Resources," 295.

114 Gao, "Note on the 2008 Cooperation Consensus," 293.

115 Saravanamuttu, "Malaysia's Lucrative Approach."

Spratly Islands in the South China Sea and the Senkaku Islands in the East China Sea, is a serious obstacle to joint development of the adjacent waters of these features; however, using extensive "without prejudice" clauses, which will be discussed later, may allay concerns of states.

Public Perceptions of JDAs

There is a common misconception, particularly among national populations of states, that joint development of resources in overlapping claims involves a surrender of their sovereignty. Indeed, the perception of such inequality and unfairness may hinder both the successful conclusion and implementation of JDAs.

For example, with regard to the 2002 Australia–East Timor JDA, much was written by both the media and academics on whether the 2006 CMATS was the "best deal" for East Timor, with allegations that the negotiations were fundamentally unbalanced.[116] This rhetoric has arguably hindered negotiations on the implementation of CMATS.

Similarly, after the 2008 China-Japan JDA, differing interpretations of the consensus arose, with Japan claiming that the two countries were carrying out joint development of the Chunxiao field and China claiming that the consensus only covered capital participation and that Japan had acknowledged China's sovereign rights over Chunxiao.[117] This difference in understanding has held up talks on the conclusion of a JDA between China and Japan. The Malaysia-Brunei JDA also met with controversy, as it was perceived that Malaysia had given up its sovereign rights. It is unknown what effect this will have on negotiations of the commercial agreement between Malaysia and Brunei.[118]

There are a few important lessons to learn from the public or media reaction to these JDAs. First, the provisions in a JDA itself will play an important part in determining whether a JDA is fair and equal. This matter will be discussed below, but provisions such as equal representation on joint authorities, equal sharing of revenue, and "without prejudice" clauses will play a considerable role in demonstrating that a JDA is a "win-win" situation for the parties concerned.

Second, states need to manage the expectations of the public by educating them through the media and other avenues on the benefits of joint development and how such an agreement does not involve a surrender of sovereignty. For example, the slogan "Brothers Drinking from the Same Well," used in relation to the Malaysia-Thailand JDA, is an example of states portraying their JDA in a positive light to generate support for the arrangement.

Third, the appearance of transparency in the general negotiation process may also help manage public perceptions of JDAs. For example, the 2009 Malaysia-Brunei JDA was met with suspicion because it was shrouded in secrecy.[119] Similarly, the joint seismic survey by the Philippines, Vietnam, and China in an area of the South China Sea, which had the potential to be the precursor to joint development, also met with opposition because of the secrecy in which it was agreed.[120] This does not mean that states need to reveal every gritty detail of the negotiations, but they must at least appear to be transparent.

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116 Schofield, "Unlocking the Seabed Resources," 211–15.

117 Gao, "Note on the 2008 Cooperation Consensus," 296.

118 Saravanamuttu, "Malaysia's Lucrative Approach."

119 Ibid.

120 In the Philippines in particular, one reason that the public was vehemently opposed to the 2005 Joint Marine Seismic Undertaking between Vietnam, the Philippines, and China was because then president Arroyo had not consulted her foreign ministry before agreeing to it and the agreement itself was not made public. See Barry Wain, "ASEAN: Manila's Bungle in the South China Sea," *Far Eastern Economic Review*, January 18, 2008.

The Existence of Good Bilateral Relations

JDAs in Asia have tended to be concluded in periods of good bilateral relations between the states concerned. The 1979/1990 Malaysia-Thailand JDA took eleven years to implement, arguably in part because disputes over fishing rights, unrelated to continental shelf delimitation, had a detrimental effect on bilateral relations.[121] The 2001 Cambodia-Thailand JDA, which included a provision on jointly developing resources, has not yet been implemented because of the thorny bilateral relationship between the two countries. In 2009 the Thai government reportedly unilaterally revoked the MOU on the basis that it was negotiated by former prime minister Thaksin Shinawatra, whom Cambodia had apparently appointed as its economic adviser.[122] The situation now is likely to be even less conducive with the recent conflict over the Preah Vihear Temple. Similarly, the improvement in general bilateral ties between China and Japan since 2006 prompted by changes in Japanese leadership (namely the resignation of the famously nationalistic Junichiro Koizumi), also moved negotiations on the 2008 China-Japan JDA.[123]

Accordingly, in order to create a more conducive atmosphere for joint development, states should endeavor to take steps to improve their relationships. Such steps could include confidence-building measures, cooperative arrangements in more non-controversial areas (such as search and rescue and protection of the marine environment), and consultation and dialogue between high-level officials.[124]

The Political Will of Parties

The most important factor for both the successful conclusion and continuation of any JDA is arguably the political will of the states parties.[125] Such political will must be sufficient "to withstand domestic upheavals such as change in government or internal strife between both states."[126] As Ian Townsend-Gault puts it,

> A joint development arrangement is not a mechanical process, but rather a highly complex and complicated result of a series of dealings between the countries concerned over a range of issues, some of which may have little or nothing to do with the ostensible subject of the exercise. It should not be suggested lightly, and cannot take the place of any true mutuality of understanding between the two states. In other words, the conclusion of any form of joint development arrangement, in the absence of the appropriate level of consent between the parties, is merely redrafting the problem and possibly complicating it further.[127]

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121 Schofield, "Unlocking the Seabed Resources," 293.

122 Boonsong Kositchoetethana, "Tearing Up MoU on JDA Is So Wrong," *Bangkok Post*, November 20, 2009.

123 Alexander M. Petersen, "Sino-Japanese Cooperation in the East China Sea: A Lasting Arrangement?" *Cornell International Law Journal* 42 (2009): 460.

124 For example, the 2002 ASEAN-China Declaration on the Code of Conduct in the South China Sea calls on the claimants to engage in cooperative activities in environmental protection, marine scientific research, safety of navigation and communication at sea, search and rescue operations, and combating transnational crime, with the hope that such activities will foster good relations between the claimants.

125 Most scholars have made this assertion. See Ian Townsend-Gault and William Stormont, "Offshore Petroleum Joint Development Arrangements: Functional Instrument? Compromise? Obligation?" in *The Peaceful Management of Transboundary Resources*, ed. Gerald Blake, William Hildesley, Martin Pratt, Rebecca Ridley, and Clive Schofield (London: Graham & Trotman, 1995), 53; Schofield, "Unlocking the Seabed Resources;" and Okafor, "Joint Development."

126 Okafor, "Joint Development," 510.

127 Townsend-Gault and Stormont, "Offshore Petroleum," 52.

The importance of political will is exemplified in the 1979/1990 Malaysia-Thailand JDA. Implementation of the 1979 MOU between Malaysia and Thailand was delayed significantly because of the change in governments of both countries and officials, particularly in Thailand, where officials were unwilling to be involved in a scheme that would not be favored by successive governments.[128] Agreement on the implementation of the 1979 MOU was eventually reached in the 1990 agreement, however, and culminated in a successful and functional JDZ.

Political will is an ambiguous concept, and it is difficult to attribute its existence to any one particular factor. Indeed, some of the factors mentioned above, such as the presence and need for hydrocarbon resources and good bilateral relations, can generate the political will necessary to ensure both the conclusion of a JDA and its successful implementation.

Provisions in JDAs

While, as other scholars have noted, there is no such thing as a model agreement "due to differing political and economic systems, traditions of conflict and degrees of national sensitivity,"[129] the section below highlights some key provisions in JDAs in Asia and discusses what lessons can be learned from the way in which states parties have dealt with the issues arising in the provisions.

"In Principle" JDAs as Compared to More Detailed JDAs

There are at least three in-principle JDAs in Asia—the 1982 Cambodia-Vietnam JDA, the 2001 Cambodia-Thailand JDA, and the 2008 China-Japan JDA—in which the details of the JDA have not yet been agreed on, although there is an agreement to jointly develop resources. It would of course be preferable if parties could establish a comprehensive agreement on their respective rights and obligations when jointly developing their resources. However, the importance of in-principle agreements should not be underestimated. Such agreements reflect the compromise that could be achieved at that point in time and forms a starting point for negotiations. In-principle agreements also have the potential to frame future conduct. Parties will find it difficult to backtrack from joint development once they have committed to it in principle. A good example is the 1979/1990 Malaysia-Thailand MOU. The 1979 MOU was essentially an in-principle JDA, but both Malaysia and Thailand were committed to the spirit of cooperation it embodied and finally signed the 1990 agreement implementing the 1979 MOU. Similarly, it would be politically difficult for China and Japan to retract from their positions in the 2008 China-Japan JDA.

While it is acknowledged that parties should agree and include as much as possible in the agreement "to minimize the opportunities and risks of future disagreements that may affect the regime,"[130] it is also important to note a potential pitfall of overly detailed obligations in JDAs. As observed by Townsend-Gault, petroleum laws and licensing regimes are uncertain and tend to change to accommodate prevailing circumstances. The wealth of detail in, for example, the Australia-Indonesia JDA is arguably inimical to such flexibility. Any changes in the Australia-Indonesia JDA necessitated by shifting circumstances will require the consent of both parties and are subject to domestic treaty amendment procedures. Townsend-Gault concludes that "it is

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128 Okafor, "Joint Development," 511.

129 Fox et al., *Joint Development of Offshore Oil*, 115.

130 Chidinma Bernadine Okafor, "Model Agreements for Joint Development: A Case Study," *Journal of Energy and Natural Resources Law* 25 (2007): 102.

apposite to state that this degree of detail is exceptional, and that other states should be absolutely certain of what they are doing, and are fully aware of the consequences of their actions, before they attempt something of this sort."[131]

The Scope of the JDZ

States in the region have used different ways to determine the area of JDZs, and an examination of their methodology is instructive. Generally, the JDZs in the majority of the JDAs represent the whole area of overlapping shelf claims. In the Malaysia-Thailand JDA, the area in which the continental shelf claims of the two states overlap became subject to joint development.[132] For the Malaysia-Vietnam JDA, the agreement establishes a long, narrow "defined area," representing the overlapping claims.[133] In the 1974 Japan–South Korea JDA, the JDZ consisted of the overlap of 24,092 nm^2 enclosed by the outer limits of each party's claims to the continental shelf (with Korea measuring its continental shelf boundary through natural prolongation and Japan measuring through the median line). The JDA essentially accommodated both countries' delimitation arguments.[134]

However, using the entire overlapping claim area to determine the JDZ has its disadvantages. As noted by Schofield, "such uncritical acceptance of unilateral claims, which may have little or no legal validity, confers on them an inappropriate degree of significance and legitimacy" and may be seen as "encouraging states to adopt extreme claims."[135] For example, as previously mentioned, in the 1979/1990 Malaysia-Thailand JDA, Thailand's use of Ko Losin as a base point for its continental shelf boundary with Malaysia is arguably dubious, considering that Ko Losin may not qualify as an island under Article 121 of UNCLOS and that Thailand subsequently disregarded Ko Losin in its continental shelf boundary with Cambodia.[136]

An interesting alternative to using the entire overlapping claim area to determine the JDZ can be seen in the 1989 Australia-Indonesia JDA. The agreement established a "zone of cooperation" (ZoC) that covered 60,000 square kilometers. The ZoC reflected the maximum possible extent of the countries' claims, in that the northern extremity of the ZoC represents the maximum claim that Australia could make on the natural prolongation principle and the southern boundary of the ZoC represents the maximum claim by Indonesia based on the median line principle.[137]

While the ZoC encompasses the full extent of the overlapping claims of Australia and Indonesia, it divides the ZoC into three areas, and different joint development regimes with varying levels of cooperation are established in each area. Jurisdiction in Area B is under the control of Indonesia, but Indonesia is required to account for 10% of the petroleum-tax revenue generated in the area. Similarly, jurisdiction in Area C is under Australia, but Australia has agreed to account for 16% of

131 Townsend-Gault and Stormont, "Offshore Petroleum," 72.

132 Fox et al., *Joint Development of Offshore Oil*, 315.

133 "1992 Memorandum of Understanding between Malaysia and the Socialist Republic of Vietnam for the Exploration and Exploitation of Petroleum in a Defined Area of the Continental Shelf Involving the Two Countries (Malaysia-Vietnam JDA)," June 5, 1992, art. 1.

134 Gao, "Note on the 2008 Cooperation Consensus," 293.

135 Schofield, "Unlocking the Seabed Resources," 303.

136 Ibid.

137 Stuart Kaye, "The Timor Gap Treaty: Creative Solutions and International Conflict," *Sydney Law Review* 16 (1994): 79.

the tax revenue generated from petroleum.[138] Even though Areas B and C are under the jurisdiction of the individual states and the revenue-sharing is unequal, the arrangements under Areas B and C are still considered joint development areas.[139]

Area A, found between Areas B and C, "lies between the lines most strongly pressed by both Australia and Indonesia, and is the area where a compromise boundary between the two states proved impossible to draw."[140] The north boundary of Area A reflects Australia's position with regard to where it believes a permanent boundary should be established,[141] and the south boundary of Area A indicates Indonesia's view of the seabed boundary, based on an approximate median line between Australia and Indonesia. Area A is under the joint control of Indonesia and Australia, and management of resources is carried out by a joint ministerial council and joint authority.[142] Area A represents the part of the overlapping claim area to which Australia and Indonesia are not willing to give up their claims because they both believe that they legitimately have a claim to that area.

Another alternative for determining the JDZ (instead of using the entire overlapping area) is for the JDZ to only cover part of the overlapping claim area. For example, in the 2001 Cambodia-Thailand JDA, only part of the overlapping claims between Thailand and Cambodia was subject to joint development; the other part was subject to an agreement to continue negotiations on maritime delimitation as Thailand's claims in this area of overlapping claim were legally untenable.[143]

However, it should be borne in mind that jointly developing only part of the overlapping claim has its problems. As other scholars have noted, "maximum political advantage would be achieved if the [Joint Development] Zone were to involve all and not just simply part of the disputed area."[144] For example, in the 2008 Principled Consensus between China and Japan, the JDZ includes only part of the overlapping claim on the eastern side of the median line between China and Japan, as well as an area that is not subject to overlapping claims on the western side of the median line.[145] The vast majority of the proposed zone is located on the Japanese side of the median line, with only the northwestern corner of the joint area on the Chinese side of the line.[146] There is also provision for continued consultations on joint development in other parts of the East China Sea. This has caused uncertainty on whether either side needs to consult and notify the other party if conducting unilateral exploration and exploitation activities in other parts of the East China Sea. It has been said that the "case-by-case" arrangement proposed under the consensus cannot sustain the easing of tensions.[147]

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138 See Kaye, "Timor Gap Treaty," 80. Kaye suggests several reasons for the disparity in the tax revenues in Indonesia's favor. First, the fact that Indonesia had a stronger position on maritime delimitation and needed a greater incentive for participation played a role in Indonesia having to allocate a lower share of its revenue in Area C. Second was the fact that Area B under Australia's control was larger than Area C under Indonesia's control and thus, while Australia would be surrendering a greater share of its tax revenue, the size of that revenue would be far larger than Indonesia's tax return from Area C.

139 The arrangement would fall under Model III as suggested by Fox et al., in which one state manages the development of the JDZ on behalf of both with the other state's participation confined to revenue-sharing and monitoring. See Fox et al., *Joint Development of Offshore Oil*, 115.

140 Kaye, "Timor Gap Treaty," 81.

141 The boundary essentially adopts the 1972 boundary between Australia and Indonesia, which as mentioned above, is significantly closer to the Timor Trough and hence favors Australia's argument of natural prolongation.

142 Kaye, "Timor Gap Treaty," 81.

143 Schofield, "Blurring the Lines?" 303.

144 Fox et al., *Joint Development of Offshore Oil*, 316.

145 Gao, "Note on the 2008 Cooperation Consensus," 293.

146 Ibid., 293.

147 Gao, "Note on the 2008 Cooperation Consensus," 296.

"Without Prejudice" Clauses

One of the major "selling points" of JDAs is that they enable states to preserve their claims while at the same time pursuing the development of resources. As noted by Hazel Fox et al., "the stronger and more emphatic the 'without prejudice' clause would be, the more likely that States would enter into the joint development experiment."[148] However, it has also been observed that simple "without prejudice" clauses are equally as effective in preserving the positions of states parties to JDAs.[149] The extent of the "without prejudice" clause will depend on the circumstances of each JDA. For example, in the 1979/1990 Malaysia-Thailand JDA, there is no express "without prejudice" clause, although there is a clause stating that the parties will continue boundary delimitation negotiations.[150] The 1992 Malaysia-Vietnam JDA contains a simple statement that the agreement shall not "prejudice the position and claims of either party in relation to and over the Defined Area."[151]

More detailed "without prejudices" clauses can be seen in the 1974 Japan–South Korea JDA,[152] the 1989 Timor Gap Treaty,[153] and the 2002 TST.[154] The clauses state that nothing shall be interpreted as prejudicing the position of either state on permanent continental shelf delimitation or affecting the sovereign rights claimed by each contracting state to the seabed.

At the other end of the spectrum is the 2006 CMATS between Australia and East Timor in which one of the more robust "without prejudice" clauses can be found:[155]

> 1. Nothing contained in this Treaty shall be interpreted as:
>   a. prejudicing or affecting Timor-Leste's or Australia's legal position on, or legal rights relating to, the delimitation of their respective maritime boundaries;
>   b. a renunciation of any right or claim relating to the whole or any part of the Timor Sea; or
>   c. recognition or affirmation of any right or claim of the other Party to the whole or any part of the Timor Sea.
> 2. No act or activities taking place as a result of, and no law entering into force by virtue of, this Treaty or the operation thereof, may be relied upon as a basis for asserting, supporting, denying or furthering the legal position of either Party with respect to maritime boundary claims, jurisdiction or rights concerning the whole or any part of the Timor Sea.

This clause is also supplemented by a unique and detailed provision setting out a moratorium on each party's claim. The provision includes, *inter alia*, an agreement between Australia and

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148 Fox et al., *Joint Development of Offshore Oil*, 378.

149 D.H. Anderson, "Strategies for Dispute Resolution: Negotiating Joint Agreements," in *Boundaries and Energy: Problems and Prospects*, ed. Gerald Blake, Martin Pratt, Clive Schofield, and Janet Allison Brown (London: Kluwer Law International, 1998), 478.

150 "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," February 21, 1979, art. II.

151 "Malaysia-Vietnam JDA," art. 4, par. a.

152 "1974 Agreement Between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries," January 30, 1974, art. XXVIII.

153 "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 (Timor Gap Treaty)," December 11, 1989, art. 2, par. 3.

154 "Timor Sea Treaty between the Government of East Timor and the Government of Australia (Timor Sea Treaty)," May 20, 2002, art. 2.

155 See Schofield, "Minding the Gap," 205.

East Timor to not pursue their respective claims to sovereign rights, jurisdiction, and maritime boundaries during the duration of the CMATS; to not commence proceedings against each other that would directly or indirectly raise issues relevant to maritime delimitation in the Timor Sea; and to not rely on such findings even if they are made.[156] This provision can be attributed to Australia's wish to not revisit issues of maritime delimitation.

Robust "without prejudice" clauses such as the clause found in the CMATS may be suitable in situations where parties are especially concerned to preserve their claims (with suitable adjustment of language to take into account sovereignty disputes over features).[157] Such clauses can go a long way in allaying the concerns of states as well as their populations that they are not surrendering their claims in any way.

Institutional Arrangements for Managing Resources

States in Asia have adopted a diverse range of institutional arrangements for managing the exploration and exploitation of resources in JDZs, varying from complex joint authorities or commissions necessitating representation of officials from both states, to more flexible arrangements between national oil companies. Both have their advantages and disadvantages and will depend on the circumstances and needs of the states.

With regard to more complex institutional arrangements, the major disadvantage is the time taken to agree on the nature of the joint authority or commission established, which is related to the extent of the authority given to the joint authority and the degree of legal integration or harmonization that may be required.

For example, in the 1979/1990 Malaysia-Thailand JDA, there were considerable issues relating to the nature and extent of the joint authority established by the 1979 MOU. The joint authority was to "assume all rights and responsibilities on behalf of both Parties for the exploration and exploitation of the non-living natural resources of the sea-bed and subsoil in the overlapping area and also for the development, control and administration of the joint development area."[158] However, it was recognized that assumption of these rights would require "a common legal system, alteration in domestic legislation and a degree of harmonization" and ultimately a "new and special set of laws applying in the (Joint Development) Area," which would give the joint authority the powers of a licensor.[159]

The establishment of a joint authority was therefore considerably hampered by the fundamental differences between licensing systems in Malaysia and Thailand.[160] In Malaysia, a national oil company, PETRONAS, had been established, and "unequivocal rights for all petroleum activities and powers of licensing" delegated to it.[161] PETRONAS adopted a production-sharing system[162] that "required the use of detailed contract documents that covered methods and control of

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156 "Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea (CMATS)," January 12, 2006, art. 4.

157 For an extensive "without prejudice" clause that refers also to territorial sovereignty, see "Antarctic Treaty," December 1, 1959, art. IV.

158 "1979 MOU," art. III, par. 2.

159 Fox et al., *Joint Development of Offshore Oil*, 136.

160 Ong, "Model for International Legal Co-operation," 230.

161 Datuk Harun Ariffin, "The Malaysian Development of Joint Development," *Energy* 10, no. 3 (1985): 534–35.

162 Production-sharing systems are "essentially based on the concept of the owner of the resources (the state) engaging a third party (an oil company in the case of hydrocarbons) as contractors. The proceeds of the contractor's work or activity (i.e., the production) are shared between the state and the contractor on the basis of a previously agreed formula after the subtraction of costs." See Zhiguo Gao, *International Petroleum Contracts: Current Trends and New Directions* (London: Kluwer Law International, 1994), 71.

operations and management."[163] Production-sharing had never been done in Thailand, which instead had adopted a royalty-tax concession system.[164] Malaysia wanted to adopt the production-sharing system for the JDA, which would mean that licensing powers need not be retained by governments and could be delegated to the joint authority. Thailand, on the other hand, had "rarely established authorities outside direct ministerial control"[165] and was consequently cautious about giving such extensive powers to the joint authority.[166] At the same time, Malaysia was reluctant to establish an entirely new legal system for the JDA in which the joint authority would become a "government within a government."[167] Accordingly, negotiating the extent of licensing powers to be delegated to the joint authority was a protracted and detailed process that eventually took eleven years. (There were other factors, such as how to accommodate preexisting rights, which will be dealt with below).[168]

Of course, where political will is present, even complex institutional arrangements can be negotiated relatively quickly. For example, the 1989 Australia-Indonesia JDA took five years, from 1984 to 1989, to negotiate,[169] even though exploration and exploitation of resources was under the responsibility of two bodies—the ministerial council, whose role is essentially "supervisory and policy oriented," and the joint authority, which is responsible for the practical management of Area A.[170]

Another criticism of complex institutional frameworks managing joint development is the fact that they may lack flexibility and run the risk of unduly interfering with business operations. For example, it has been said that joint development under the Malaysia-Thailand Joint Authority is still subject to the joint approval of both governments and may unduly hinder exploration and exploitation activities.[171] Furthermore, such complex institutional frameworks arguably incur a great deal of costs that may not be offset by revenue from exploitation until much later.

At the other end of the spectrum, a more flexible approach to institutional frameworks can be seen in the 1992 Malaysia-Vietnam JDA and the 2009 Malaysia-Brunei JDA.[172] In the 1992 Malaysia-Vietnam JDA, both parties agreed to nominate their national oil companies, PETRONAS and PetroVietnam, respectively, to undertake exploration and exploitation of petroleum in the defined area.[173] Per the agreement, PETRONAS and PetroVietnam must enter into a commercial arrangement for the exploration and exploitation of petroleum, which is subject to the approval of both governments.[174] On August 25, 1993, both companies concluded a commercial arrangement that included the establishment of a coordination committee appointed by the national petroleum

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163 Ariffin, "Malaysian Development," 535.

164 Fox et al., *Joint Development of Offshore Oil*, 137. A royalty-tax concession system has been described as "an agreement from a state to permit a foreign company to develop its oil reserves on an exclusive basis in a defined area during the duration of the agreement. The terms of the concession ordinarily include a variety of auxiliary rights to the oil company and provision for royalty payment to the host country." See Gao, *International Petroleum Contracts*, 13.

165 Fox et al., *Joint Development of Offshore Oil*, 147.

166 Ong, "Model for International Legal Co-operation," 230.

167 Ibid., 230.

168 Ariffin, "Malaysian Development," 535.

169 Kaye, "Timor Gap Treaty," 78.

170 Ibid., 85.

171 Nguyen, "Joint Development in the Gulf of Thailand," 83.

172 The extent of the flexibility under the 2009 JDA may shift, as the commercial agreement between PETRONAS and Brunei is still being negotiated.

173 "Malaysia-Vietnam JDA," art. 3.

174 Ibid., art. 3, par. b.

companies to provide policy guidelines for the management of petroleum operations in the defined area, operating on the principle of unanimous vote. The coordination committee consists of eight members (four members from each company) with equal voting rights.[175] Chairmanship of the committee alternates between the two companies every two years.[176] PETRONAS undertakes all operations in the defined area under the coordination committee and remits to PetroVietnam its equal share of net revenue free of any taxes, levies, or duties.[177]

Malaysia appears to have favored this approached in the 2009 Malaysia-Brunei JDA. Both states 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 still being negotiated.[178]

The 1974 Japan–South Korea JDA perhaps represents a compromise between the complex institutional arrangements established under the 1979/1990 Malaysia-Thailand JDA and the 1989 Australia-Indonesia JDA, and the more flexible arrangements between oil companies in the 1992 Malaysia-Vietnam JDA. The JDZ in the Japan–South Korea JDA is presently divided into six subzones. Each state appoints one or more concessionaires in each subzone,[179] which have rights of exploration and exploitation. If a party authorizes more than one concessionaire with respect to one subzone, all such concessionaires shall have an undivided interest.[180] The method of selection of concessionaires is left to individual states, although the states have an obligation to notify each other of selected concessionaires. Concessionaires of both parties are required to enter into an operating agreement to carry out joint exploration and exploitation in the JDZ.[181]

Additionally, the parties established a joint commission[182] comprising foreign office and ministry of trade and industry officials from each state, which meets twice a year under a co-chairman.[183] The role of the joint commission is as a "forum for enquiry and implementing cooperation."[184] It is a "consultative body rather than a powerful joint authority," and therefore the joint commission has set up a joint subcommittee of experts for practical discussion of technical matters.[185] Accordingly, while the Japan–South Korea JDA avoids the complexity of having a supra-national joint authority, it also preserves a substantial role for state licensing authorities and has a joint body to facilitate dialogue and discussion. The workability of such an arrangement has not yet been tested due to the lack of commercially viable hydrocarbon resources.

The obvious advantage of such flexible approaches is illustrated by the fact that it took a much shorter time to negotiate the 1974 Japan–South Korea JDA (four years) and the 1992 Malaysia-Vietnam JDA (two years) compared to the 1979/1990 Malaysia-Thailand JDA (eleven years).

A flexible approach also avoids "grandiose structures" while making the joint development arrangement commercially attractive for investors and "appears to remove the necessity to

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175 Nguyen, "Joint Development in the Gulf of Thailand," 82.

176 Ibid., 82.

177 Ibid., 82.

178 "Malaysia-Brunei JDA," March 16, 2009, Part III, par. 1.

179 "1974 Agreement Between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries (Japan-South Korea JDA)," January 30, 1974, art. IV, par. 1.

180 "Japan-South Korea JDA," art. IV, par. 1.

181 Ibid., art. V.

182 Ibid., art. XXIV.

183 Fox et al., *Joint Development of Offshore Oil*, 117.

184 Ibid., 117.

185 Masahiro Miyoshi, "The Joint Development of Offshore Gas and Gas in Relation to Maritime Boundary Delimitation," *IBRU Maritime Briefing* 2, no. 5 (1999), ed. Clive Schofield.

harmonize the laws of two States with differing cultures and systems of thought."[186] Moreover, as will be explained below, preexisting rights granted by states to private entities before the establishment of the JDZ are better accommodated with less complex institutional arrangements that do not require as much integration between legal systems.

A disadvantage of flexible institutional arrangements is that they lack the certainty engendered by a joint governmental authority with clearly defined rights and responsibilities. Another issue in leaving the national oil companies responsible for jointly developing resources is that companies are inevitably only focused on oil and gas development and may not be willing or equipped to deal with other issues that arise in the JDZ, such as fisheries resources or the environment. Having a joint authority consisting of government officials may facilitate greater cooperation in other areas, as the mechanism for exchange and dialogue already exists through the joint bodies, even if the JDA establishing the joint authority only addresses exploration and exploitation of oil.

Notwithstanding the relative advantages and disadvantages of the types of institutional arrangements adopted by states in Asia, both types ultimately do not affect the exploration and exploitation of oil and gas resources. Both the Malaysia-Thailand JDA and the Australia-Indonesia JDA, despite having established a joint authority, have successfully extracted resources from the JDZ, as did the simpler and more flexible JDA between Malaysia and Vietnam.

Preexisting Rights

Preexisting rights are rights granted unilaterally by states prior to the establishment of the JDZ to private parties or to national oil companies for the exploration or exploitation of an overlapping claim area.[187] Such preexisting rights may create obstacles to effective joint development particularly if such right holders refuse to give up their claims. As mentioned above, it appears as if more complex institutional arrangements may pose difficulties to effective accommodation of preexisting rights.

This is illustrated in the Malaysia-Thailand JDA. Preexisting rights proved to be a major point of contention between parties, particularly because the institutional framework created by the 1979 MOU required Thailand to alter its petroleum licensing regime to accommodate the production-sharing contract regime. Article 3, paragraph 2, of the 1979 MOU provided that "the assumption of such rights and responsibilities by the Joint Authority shall in no way affect or curtail the validity of concessions or licenses hitherto issued or agreements hitherto made by either party."[188] Thailand had granted exploration permit licenses to Texas Pacific Oil, but the company was later not allowed to commence drilling due to ongoing negotiations between Thailand and Malaysia[189] and the acceptance by Thailand of the production-sharing system advocated by Malaysia. Texas Pacific had objected to a proposed arrangement whereby their interests would be converted or "grandfathered" into a share of a joint venture with PETRONAS, which was favored by Malaysia. Arguably, and as argued by the oil companies, this arrangement was contrary to Article 3, paragraph 2, of the 1979 MOU.[190] The problem was resolved in 1994 when the preexisting

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186 Fox et al., *Joint Development of Offshore Oil*, 128, 132.

187 Ibid., 207.

188 "1979 MOU," art. III, par. 2.

189 Fox et al., *Joint Development of Offshore Oil*, 138.

190 Fox et al., *Joint Development of Offshore Oil*.

concessions were incorporated into separate joint operating agreements between PETRONAS (for Malaysia) and PTT (for Thailand), which had taken over the Texas Pacific concession.[191]

A contrasting approach can be seen in the 1974 Japan–South Korea JDA. Preexisting rights were not explicitly recognized. Instead, both parties were free as "concurrent licensors for each subzone in the area, to grant new rights to existing concession holders if the States Parties choose."[192] Existing concession holders were given first rights to licenses for blocks on offer.[193]

Similarly, in the Malaysia-Vietnam JDA, Article 3, paragraph c, of the MOU provides that "both parties agree, taking into account the significant expenditures already incurred in the Defined Area, that every effort shall be made to ensure continued early exploration of petroleum in the Defined Area." This was in recognition of the concessions that Malaysia had previously awarded in the JDA. For preexisting production-sharing contracts, the two parties have agreed that those contractors will continue to carry out operations in the defined area, an agreement that "represents a Vietnamese compromise for technical and economic reasons and for the purpose of speeding up the optimum exploration and exploitation of petroleum in the arrangement area."[194] However, the existing contractors must update both parties of the progress of their petroleum activities, and any amendments, changes, and supplements to the production-sharing contracts are subject to the prior agreement of both parties.[195]

Competing Uses of the JDZ

If the JDZ falls within the EEZ of coastal states or under the high seas, competing uses in these maritime zones recognized by UNCLOS will also have to be taken into consideration. In the EEZ, the coastal state is accorded sovereign rights over living and nonliving resources and jurisdiction over the marine environment, marine scientific research, artificial installations, and structures.[196] However, other states also enjoy the freedom of navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, which are compatible with UNCLOS.[197] If the JDZ falls on the continental shelf beyond 200 nm, the water column above such a continental shelf is considered high seas and therefore subject to the high seas freedoms exercised by other states.[198]

It is important for JDAs to take into account such competing uses, and some of the JDAs in Asia appear at the very least to have recognized the existence of these competing uses. For example, in the Malaysia-Thailand JDA, rights conferred or exercised by the national authority of either party in matters of fishing, navigation, hydrographic and oceanographic surveys, the prevention and control of marine pollution, and other similar matters (including all powers of enforcement in relation thereto) shall extend to the JDZ, and such rights shall be recognized and respected by the joint authority.[199] Similarly, the Japan–South Korea JDA also states that activities in the JDZ shall

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191 Ong, "Model for International Legal Co-operation," 232.

192 Fox et al., *Joint Development of Offshore Oil*, 217.

193 Ibid.

194 Nguyen, "Joint Development in the Gulf of Thailand," 82.

195 Ibid., 82.

196 "UNCLOS," art. 56.

197 Ibid., art. 58, par. 1.

198 Ibid., art. 87.

199 "1979 MOU," art. IV.

be carried out "in such a manner that other legitimate activities in the Joint Development Zone and its superjacent waters such as navigation and fisheries will not be unduly affected."[200]

The 1974 Japan–South Korea JDA also recognizes the importance of safety of navigation. When exploration is carried out by surface vessels, the state that has authorized the concessionaires who are operators in the subzones must promptly inform the other government and mariners about exploration activities. States must also inform each other of exact locations of fixed installations and other details to ensure safe navigation.[201] The responsible government must also agree on measures to be taken to prevent collisions at sea.[202]

Another related issue is how JDAs accommodate the traditional fishing interests of other states in areas of the JDZ, as these fishing interests can affect the operation of the JDA. Article 5, paragraph 1, of the Japan–South Korea JDA states that operating agreements must provide for the accommodation of fishing interests. The parties also agreed to give administrative guidance to their concessionaires so that in advance of operations they will endeavor to adjust the fishing interests of the nationals concerned.[203] This includes guidance to the operators not to carry out exploratory activities during the fishing season of January through May.[204] A Japanese *ad hoc* mining law also provides for designated areas within the subzones of the JDZ where development of resources is limited in areas where fish are present.[205] Article 39 of the law requires concessionaires under the joint operating agreement to pay compensation to fishermen as a consequence of damage to fishing interests.[206] South Korea appears to have no equivalent law but reportedly collects a contribution from the concessionaire to compensate fishery interests.[207]

The Malaysia-Vietnam MOU does not deal with navigation and third-party rights, perhaps because the zone it covers is smaller than the Malaysia-Thailand zone and hence is less affected by fishing questions.[208]

Sharing of Revenue

While the JDAs in Asia include a wide range of fiscal provisions, from the sharing of revenue to taxation and customs, provisions on revenue-sharing will be the focus of this section as such provisions provide one of the key incentives for parties to enter into JDAs.

The majority of the JDAs provide for equal sharing of revenue between the parties.[209] This is essential as it ensures that the JDA is a "balanced arrangement,"[210] or at least is perceived as such, which makes it easier for states parties to conclude the arrangements.

However, there are instances where JDAs provide for an unequal sharing of revenue. For example, the 2002 Australia–East Timor JDA stipulates a 90:10 split in favor of East Timor (as

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200 "Japan–South Korea JDA," art. XXVII.

201 Masahiro Miyoshi, "The Japan–South Korea Agreement on Joint Development of the Continental Shelf," *Energy* 10, no. 3 (1985): 549.

202 "Japan–South Korea JDA," art. XX.

203 Fox et al., *Joint Development of Offshore Oil*, 121.

204 Miyoshi, "Japan–South Korea Agreement," 549.

205 "Japanese Ad Hoc Mining Law," art. 36.

206 Fox et al., *Joint Development of Offshore Oil*, 122.

207 Ibid.

208 Ibid.

209 For example, see "1979 MOU," art. III, par. 5; "Malaysia-Thailand Joint Authority Act 1990," May 30, 1990, art. 8, par. 2; "Malaysia-Vietnam JDA," art. 2, par. 3; and "Japan-South Korea JDA," art. IX.

210 Anderson, "Strategies for Dispute Resolution," 478.

opposed to the 50:50 split in the Australia-Indonesia JDA). This arrangement is estimated to give East Timor more than AUS$7 billion in revenue over twenty years, beginning in 2004.[211] There may be several reasons for Australia's acceptance of ostensibly less-favorable revenue-sharing terms. First, of course, is the fact that although Australia has a lesser share of revenue, at the time of entry into the 2002 TST, it stood to gain in downstream activities as all the oil and gas extracted from the joint development area would have been processed in Darwin.[212]

Second, Australia may have wanted to give East Timor every incentive to enter into the 2002 treaty. This intent is attributable to several factors. Arguably, Australia believed that it had a weaker claim to the Joint Petroleum Development Area compared to East Timor. As mentioned above, Australia's claim to the JPDA was based on outdated continental shelf delimitation principles such as natural prolongation, whereas East Timor argued for an equidistance line boundary.[213] Admittedly, however, Australia has not publicly admitted that its claim based on natural prolongation principles is weak and has consistently maintained its position.[214] Another more tangible factor is Australia's concern that agreeing to East Timor's claim for an equidistance boundary would have a "knock-on effect on its existing maritime boundaries with Indonesia."[215]

This illustrates that equal sharing of revenue is not necessarily the norm or the best practice, and that an unequal sharing of revenue may be necessary depending on the circumstances. For example, for states with considerably weaker claims to overlapping areas or to a smaller area of an overlapping claim, agreeing to reduce their share of revenue will ensure that they are still deriving some benefit from the joint development while giving the other state an incentive to allow them to participate.

Downstream Activities

The majority of the JDAs have no provisions for downstream activities, with the exception of the 2002 TST between Australia and East Timor which has a generic provision on pipelines.[216] However, in a number of instances, downstream activities have proved to be causes for conflict after the JDA was adopted. For example, in the 1979/1990 Malaysia-Thailand JDA, there were difficulties in bringing the extracted gas from the joint development area onshore through a Thai-Malaysian pipeline project that included the construction of a gas separation plant as well as offshore pipelines. The latter was reported to have roused considerable protest due to environmental pollution concerns and potential social and cultural impacts, particularly in Songkla in southern Thailand.[217] Despite these problems, construction on the pipeline started in mid-2003 and was completed in 2006–7, although some re-routing was necessary to alleviate protests.[218] In 2007 the gas separation plant was also operational, although that project had also been delayed.

After the conclusion of the 2002 TST, other points of contention between Australia and East Timor were, as previously mentioned, the issues of whether the pipeline from the Sunrise field

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211 David Ong, "The New Timor Sea Arrangement 2001: Is Joint Development of Common Offshore Oil and Gas Deposits Mandated under International Law," *International Journal of Marine and Coastal Law* 17, no. 1 (2002): 95.

212 Ong, "New Timor Sea Arrangement," 95.

213 Schofield, "Minding the Gap," 201.

214 Ibid., 201.

215 Ibid., 201.

216 "Timor Sea Treaty," art. 8.

217 Schofield, "Unlocking the Seabed Resources," 293.

218 "Thai-Malaysian Pipeline and Gas Separation Plant," *Hydrocarbons Technology*, http://www.hydrocarbons-technology.com/projects/thaimalaysia/.

would lead to Dili or Darwin and where the liquefied natural gas processing operations would take place.[219] The CMATS did not resolve this issue, and in early 2011 issues resurfaced in negotiations between Woodside and East Timor, as the Timorese want a pipeline built from the field to the gas liquefaction plant near Dili, which would provide jobs and boost the Timorese economy. Woodside, however, claims that piping the gas to Timor through a 3-km deep trench in the seabed makes the plan technically challenging and expensive. Timor is presently threatening to terminate the agreement in 2013.[220]

An important lesson from this situation is that states negotiating JDAs should have as much agreement as possible on downstream activities before entering into any JDA, although this could make the negotiations more contentious.

Applicable Law, Jurisdiction, and Enforcement

Provisions on applicable law, jurisdiction, and enforcement in JDAs are important, as they establish the legal framework governing states parties vis-à-vis each other, states parties and their contractors, and contractors and third parties.[221] As noted by Fox et al., "to avoid problems of dual or overlapping jurisdiction it may, therefore, be necessary to identify a particular set of national laws to be applied."[222] Legal frameworks enhance certainty for oil companies operating in the zone.[223] The choice is usually between the national laws and rules of one of the states parties, the national laws and rules of both of the states parties, or a new single law to govern petroleum activities in the zone.[224] Each of these options has advantages and disadvantages.

In the Malaysia-Thailand JDA, there is no express provision on the applicable law, and "the parties have refused to create a new third set of laws which a quasi-governmental agency would apply in the JDZ, while, in other offshore areas pertaining to each State, their own laws would apply."[225] However, rights conferred or exercised by the national authority of either party in matters of fishing, navigation, hydrographic and oceanographic surveys, the prevention and control of marine pollution, and other similar matters (including all powers of enforcement in relation thereto) extend to the JDZ, and such rights are recognized and respected by the joint authority. Both parties also agreed to have a combined and coordinated security arrangement in the joint development area.[226] This appears to suggest that for matters described above, the two states are exercising a concurrent jurisdiction.[227] The parties have also decided to divide criminal jurisdiction in the area along an arbitrary line,[228] which shall not in any way be construed as indicating the boundary line of the continental shelf between the two countries in the JDZ and prejudice the sovereign rights of either party in the JDZ.[229]

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219 Schofield, "Minding the Gap," 203.

220 Ian Lewis, "Greater Sunrise under Threat," *Petroleum Economist*, March 21, 2011.

221 Fox et al., *Joint Development of Offshore Oil*, 263.

222 Ibid., 263.

223 Ibid., 265.

224 Ibid., 279.

225 Ibid., 145.

226 "1979 MOU," art. V.

227 Fox et al., *Joint Development of Offshore Oil*, 145.

228 Ibid., 144; and "1979 MOU," art. V.

229 "1979 MOU," art. V.

The Malaysia-Vietnam JDA contains no express provision for applicable law in the defined area. However, by virtue of the fact that PETRONAS carries out all joint development operations, the applicable law for petroleum operations is the petroleum law of Malaysia.[230] Vietnam apparently agreed to this arrangement to avoid interfering with existing contractors in the defined area and because it lacked an adequate petroleum law at that time.[231]

In the Japan–South Korea JDA, Japanese law applies in the subzone where a Japanese concessionaire works as the operator, whereas Korean law applies in a subzone where a Korean concessionaire works as the operator. However, the law shifts from Japanese to Korean depending on whose concessionaire is operating in the subzone,[232] thereby making operations subject to differing requirements in respect of health, safety, construction, control of pollution, and other relevant matters.[233]

When it comes to damage resulting from exploration or exploitation of natural resources in the JDZ that has been sustained by nationals of either party or other persons who are resident in the territory of either party, actions for compensation for such damage may be brought by the nationals or persons in the court of one party:

a. In the territory of which such damage has occurred;
b. In the territory of which such nationals or persons are resident;
c. The territory which has authorized the concessionaire designated and acting as the operator in the subzone where the incident causing such damage has occurred.[234]

For the 1989 Australia-Indonesia JDA, Article 27, paragraph 1, provides that criminal jurisdiction is to be based on the nationality or permanent residency of either Australia or Indonesia. For nationals of third states, both Australia and Indonesia have jurisdiction subject to the caveat that a person shall not be subject to double jeopardy or double conviction,[235] with states consulting each other as to which is the most appropriate state to try a third-state offender.[236] Assistance in evidence collection and law enforcement can be the subject of agreements between Australia and Indonesia.[237] Civil claims arising out of activities taking place in Area A may be brought in the courts of the contracting state whose nationals or permanent residents have suffered damage, and the applicable law is the *lex fori*.[238] The JDA between Australia and East Timor reflects similar provisions.[239]

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230 Nguyen, "Joint Development in the Gulf of Thailand," 83.

231 Ibid., 83.

232 Miyoshi, "Joint Development of Offshore Gas," 13.

233 Fox et al., *Joint Development of Offshore Oil*, 129.

234 "Japan–South Korea JDA," art. XXI.

235 "Timor Gap Treaty," art. 27, par. 2.

236 Ibid., art. 27, par. 2.

237 Ibid., art. 27, par. 4.

238 "Timor Gap Treaty," art. 28.

239 Ibid., art. 14.

Conclusion

As discussed now at length, there are overlapping maritime claims in the South and East China seas, where joint development remains an important and practical option. This essay sought to demonstrate that (1) states in Asia have a variety of incentives to enter into JDAs, all of which will play differing roles depending on the circumstances of the situation, (2) states have been able to overcome serious issues when negotiating the actual provisions of JDAs and agree on a functional regime of cooperation, and (3) these functional regimes of cooperation have in the majority of cases been successful in the exploration and exploitation of oil and in enhancing relations between parties.

With that said, a note of caution is in order. Joint development is not a "solution to a jurisdictional problem"[240] and should not be seen as a panacea to all problems associated with overlapping maritime claims.[241] There are still considerable obstacles not only to negotiating JDAs but also to ensuring their continuity and sustainability, given the myriad factors that play a part in their success or failure. However, many of the states that are parties to existing JDAs are also the states with overlapping maritime claims in areas such as the South China Sea and the East China Sea, which at the very least demonstrates an amenability to the concept of joint development.[242] This essay has attempted to demonstrate that such states have every reason to overcome the practical, legal, and political obstacles to jointly developing hydrocarbon resources.

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240 Townsend-Gault and Stormont, "Offshore Petroleum," 53.

241 Clive Schofield, "No Panacea: Challenges in the Applications of Provisional Arrangements of a Practical Nature" (presentation at the 35th Center for Ocean Law and Policy Conference, Bali, June 22–24, 2011).

242 For example, at least four claimants to the South China Sea disputes are parties to at least one type of JDA in Asia, namely, Malaysia, Brunei, China, and Vietnam.

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