MARITIME ORDER IN THE GLOBAL ERA

National Interest vs. Common Good of Humanity

Edited by

Hans Köchler

INTERNATIONAL PROGRESS ORGANIZATION

With the Truman Proclamation of 1945 a process for the expansive assertion of national interests by coastal states has been set in motion that led to an appropriation of areas of the sea the magnitude of which, in the words of Arvid Pardo, was "unprecedented in history." (…)

[The use of the remaining area of the sea beyond national jurisdiction] should not just be "equitable exploitation" of its resources for the benefit of all countries, ultimately driven by collective greed. In the face of global environmental challenges, the notion of common heritage must be complemented by the ideal of common good of humanity as guiding principle for sharing the wealth of the oceans, which ought to be more than a legalized version of dividing the booty.

(From the Foreword)

The texts published in this volume, which is dedicated to the memory of Elisabeth Mann Borgese and Arvid Pardo, were presented in September 2025 at an international roundtable consultation at the Phoenicia Hotel in Malta. Scholars and practitioners from Australia, Austria, Barbados, Belgium, China, Denmark, France, Germany, Italy, Malta, Norway, Spain, Türkiye, the United Kingdom, and the United States of America explore and analyze the challenges for maritime order in the geopolitical context. The chapters deal with: "Origins and Foundations of Ocean Governance," "Sovereignty, Conflict, and Maritime Boundary Delimitation," "Environmental Change, Resources, and Global Responsibility," and "Dispute Resolution, Jurisdiction, and Freedom of the Seas."

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MARITIME ORDER IN THE GLOBAL ERA

NATIONAL INTEREST VS. COMMON GOOD OF HUMANITY

Selected speeches and papers from an international roundtable consultation in Malta

Edited by

Hans Köchler

Vienna 2026

In memory of

Elisabeth Mann Borgese and Arvid Pardo

INTERNATIONAL PROGRESS ORGANIZATION

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The different citation styles used by the contributors of this publication have been maintained. Readers may also note variations in the capitalization of the word "State" (e.g., "State practice" versus "state practice") throughout this volume. The editor has elected to respect the individual authors' stylistic preferences regarding this term, reflecting diverse academic and regional conventions. However, consistency has been maintained within each individual contribution.
The editor cannot guarantee the accuracy of the information and statistics contained in the articles.

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Editorial Note

This volume contains speeches and papers delivered at, or submitted for, an international roundtable consultation convened by the International Progress Organization (I.P.O.) at the Phoenicia Hotel in Malta on 25 September 2025. The discussions in Malta followed previous debates hosted by the I.P.O. on "Responsibility in International Relations" in Vienna (2023) and on "Sovereignty and Coercion" in Istanbul (2024).

As the meeting was held in private, only the texts that the participants have made available for publication are included. Given the conversational nature of the original proceedings, readers may observe thematic intersections across the chapters; we have chosen to retain these convergences to highlight consensus on central legal questions.

The contributions vary in style and method, depending on whether the author focuses on conceptual analysis, the history of ideas, or legal critique. A general overview of the debate can be found in the Executive Summary in the Appendix.

The views expressed are solely those of the authors and do not necessarily reflect the views or policies of the International Progress Organization.

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Foreword by the Editor

In the face of ongoing geopolitical realignments, recent developments such as the controversy around Greenland, the disputes and confrontations in the South China Sea, the armed attacks in the Black Sea and the Caribbean, or the threats in regard to the Panama Canal – a "permanently neutral" international transit waterway under the jurisdiction of the eponymous republic – have highlighted the challenges that may arise for the rule of law and peace between nations when major global powers resolve to assert their national interests irrespective of the sovereignty of other states or the rights of third parties.

In the last few centuries, disputes over maritime sovereignty were the cause of tension or armed conflict in virtually all corners of the globe. With the Truman Proclamation of 1945, a process for the expansive assertion of national interests by coastal and, subsequently, island and archipelagic states has been set in motion that led to an appropriation of areas of the sea the magnitude of which, in the words of Arvid Pardo, was "unprecedented in history." The notion of "continental shelf," codified in the United Nations Convention on the Law of the Sea (UNCLOS), has become the rationale behind granting maritime states "sovereign rights" of exploitation in vast spaces of the ocean, with numerous overlapping claims of jurisdiction resulting in new scenarios of geopolitical confrontation. Also, the entitlement of islands, irrespective of the size of their territory, to a continental shelf cum exclusive economic zone (EEZ) that can be larger than the EEZ of big coastal states has led to complicated disputes over jurisdiction, particularly in terms of equity.

While, traditionally, rights of maritime sovereignty were tied to the *ability to control* (by military means), as in Cornelius van Bynkershoek's *De dominio maris dissertatio* (1742), or the *ability to exploit*, as in the Geneva Convention on the Continental Shelf (1958), UNCLOS defines

sovereign maritime rights in the sense of *entitlement*, resorting, in the process, to the fiction of a juridical continental shelf. Though generously accommodating the interests of maritime states, UNCLOS – unlike the Convention of 1958 – sets an absolute outer limit to the exercise of any kind of national sovereignty and, thus, to the greed justified by invoking it. The area of the sea and its resources beyond the limits of national jurisdiction are declared "the common heritage of mankind."

However, use of "the Area" under UNCLOS should not just be "equitable exploitation" of its resources for the benefit of all countries, ultimately driven by collective greed. In the face of global environmental challenges, the notion of *common heritage* must be complemented by the ideal of *common good of humanity* as guiding principle for sharing the wealth of the oceans, which ought to be more than a legalized version of dividing the booty. Rights entail responsibility. It is to be hoped that the paradigm of "common good," though not codified in the Convention, will serve as a kind of normative compass also for its overall implementation – especially in view of the permanent arbitration without which the Law of the Sea, with its often diplomatically vague and at times conflicting provisions, cannot exist. How to navigate the tension between the pursuit of national interests in the name of sovereignty, on the one hand, and a commitment to the global common good, on the other, will be one of the major challenges of the international community in the maritime domain.

The task has become even more difficult amidst an ongoing struggle, whether armed or economic and political, among the major global powers to delimit their *spheres of influence* vis-à-vis each other and, thus, renegotiate the international balance of power. Against this background, the de facto incorporation by the United Nations Convention on the Law of the Sea – and in a very generous manner, at that – of the principle "the land dominates the sea" has become an incentive for states to make new and exaggerated territorial claims, or not to relinquish their earlier claims to colonial possessions. In matters of doctrine, the Convention appears to establish a link between *tellurocracy* and *thalassocracy*, implicitly encouraging the latter and thus paving the way for a further expansion of the realm of power politics.

At the same time, the situation is aggravated by the overall lawlessness that has – notwithstanding the mantra of the "rules-based order" – characterized inter-state relations not just since the end of the power balance of the Cold War, but – overlooked by many – has been built into the Charter of the United Nations by virtue of the wording of Article 27(3). Against this background, the much-praised system of "collective security" is ineffective, indeed obsolete, whenever any of the great powers – i.e. permanent members of the Security Council – or their allies resort to the threat or use of force against another state. This has also been obvious in great power vigilantism on the high seas – as in recent acts of war and state piracy in the Caribbean – and in cases of threats of the use of force against other states' territorial sovereignty over islands or waterways.

When the great powers aggressively assert – and self-servingly negotiate – their national interests in neglect of the binding norms of international law, the sea may turn into a space of global conflict – and, in spite of an ever more comprehensive body of norms and regulations spanning the oceans, *pax in maribus* risks becoming a mere illusion.

Hans Köchler
Vienna, February 2026

Hans Köchler

Opening Remarks

I am pleased to welcome you at The Phoenicia. The name of our venue evokes the legacy of those who were, according to a Homeric scholion, "the first to plough the seas."[1] As early as around the 8th century BC, the Phoenicians had made Malta a base of their trade in the Mediterranean. Herodotus even claims that they had ventured into the waters beyond the Pillars of Hercules [Gibraltar].[2]

Fast forward to the 20th century: it was here, in this building, where, on 20 September 1964, Prime Minister Dr. George Borg Olivier hosted a state banquet on the eve of Malta's Declaration of Independence.

And it was off the coast of Malta where, in December 1989, the leaders of the United States and the Soviet Union, accommodated on their warships (the Soviet missile cruiser Slava and USS Belknap, anchored in the choppy waters off Marsaxlokk) informally declared the end of the Cold War. Few still remember the solemn words of General Secretary Gorbachev at a joint press conference with President Bush on board the Maxim Gorky, in the calmer waters of Marsaxlokk port: "The world is leaving one epoch and entering another. We are at the beginning of a long road to a lasting, peaceful era."[3] As member of the Mediterranean

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[1] "... πρῶτοι δὲ Φοίνικες τὰ μέγιστα διεπέρασαν πελάγη." (Schol. II, XXIII, 744 / ΙΛΙΑΔΟΣ Ψ. [23], quoted according to: *Scholia graeca in Homeri Iliadem [Scholia vetera]*. Ed. Hartmut Erbse. *Volumen quintum* [Vol. V] *scholia ad libros Y– Ω continens*. Berolini [Berlin], apud Walter de Gruyter et socios, 1977, p. 438)

[2] "… ἀπέπεμψε Φοίνικας ἄνδρας πλοίοισι, ἐντειλάμενος ἐς τὸ ὀπίσω δι' Ἡρακλέων στηλέων ἐκπλέειν ἕως ἐς τὴν βορηίην θάλασσαν …" (Ἡρόδοτος [Herodutus], Ἱστορίαι [The Histories], Book IV, chapter 42)

[3] Quoted according to BBC: *ON THIS DAY* (3 December 1989), https://bbc.co.uk/onthisday/low/dates/stories//december/3/newsid_4119000/4119950.htm.

Peace Committee and at the invitation of Malta's former Prime Minister, Dr. Karmenu Mifsud Bonnici, the International Progress Organization was taking part, here in Malta on 2-3 December 1989, in a meeting of peace advocates that coincided with the Summit.

Unfortunately, the optimism and enthusiasm about a new world order the two leaders had displayed at their – as I vividly recall – storm-lashed meeting in the Mediterranean could not be sustained. The march on the "long" road envisioned by Gorbachev was quickly interrupted by a series of unilateral assertions of power.

This brings me to the challenges before us right at this moment. What kind of *maritime order* can evolve in a geopolitical environment where Cold War bipolarity has vanished, but an even more complex and pervasive struggle for global dominance unfolds in which the oceans increasingly become a theater of competition? A new concert of powers seems to emerge, indeed a 21st century *maritime version* of the "Great Game," where, as in the 19th century, the unilateralism of the national interest prevails. This has become obvious in a new rush for the resources of the ocean that ignores the provisions of the United Nations Convention on the Law of the Sea (UNCLOS). The open challenge to the International Seabed Authority (ISA) by the U.S. President's Executive Order of 24 April of this year, entitled "Unleashing America's Offshore Critical Minerals and Resources," is a case in point. The bellicose language of the Executive Order betrays the real motive. The President evokes "unprecedented national security challenges in securing reliable supplies of critical minerals independent of foreign adversary control."[4] Although the U.S. is not a State Party to UNCLOS, the resources in the area beyond national jurisdiction can certainly not be claimed as "America's" resources, as the Order falsely suggests – unless one believes in something like "anarchy of the seas."

It was the previously mentioned first Prime Minister of independent Malta who early on warned of such unilateral action driven by the greed (under the cover of vital national interests) of powerful countries. In his speech at the Plenary Meeting of the General Assembly of

[4] President Donald J. Trump, The White House, Executive Orders, April 24, 2025, Section 1 ("Background").

the United Nations on 6 October 1967, Dr. Borg Olivier spoke about the consequences that could have resulted from the 1958 *Convention on the Continental Shelf*, then in force, which defined the limits of the continental shelf in terms of a country's *technological ability to exploit*. Introducing consideration of the common good of humanity into the discourse on maritime affairs, the Prime Minister lucidly explained what this "open-ended instrument,"[5] as he called the Convention, would imply for the exploration and exploitation of the resources of the ocean: "The formulation of this Convention might result in technologically advanced countries claiming to appropriate for their own exclusive benefit the sea-bed underlying the sea at any depth and at any distance from their coasts, as soon as they can exploit the natural resources thereof."[6] He thus suggested "the establishment of an international agency to assume jurisdiction, as *trustee for mankind*, over the sea-bed and ocean floor in order to ensure their orderly and rational exploitation, and that from the immense potential of the exploitation the poor countries should also benefit."[7] Also, the Prime Minister called for an "equitable solution to conflicting national claims …"[8] This was many years before brakes were put on to the Geneva Convention's "open-ended" approach, through the definition of the continental shelf under UNCLOS.

In line with the Prime Minister's approach, Malta's first Permanent Representative to the United Nations, Ambassador Arvid Pardo, in his seminal and far-reaching speech at the First Committee of the UN General Assembly on 1 November 1967, spoke of the "intolerable injustice that would reserve the plurality of the world's resources for the exclusive benefit of less than a handful of nations."[9]

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[5] *Official Records*, United Nations / General Assembly, Twenty-second Session, 1582nd Plenary Meeting, New York, 6 October 1967, Par. 123, p. 13.

[6] *Loc. cit.,* Par. 124.

[7] *Loc. cit.,* Par. 125. (Emphasis H.K.)

[8] *Ibid.*

[9] *Official Records*, United Nations / General Assembly, Twenty-second Session, First Committee, 1515th Meeting, Agenda item 92 ("Examination of the question of the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor …"), New York, 1 November 1967, Par. 91, p. 12.

He warned of "a competitive scramble for sovereign rights over the land underlying the world's seas and oceans, surpassing in magnitude and its implications last century's colonial scramble for territory in Asia and Africa."[10]

Thus, Malta was an early trendsetter in raising awareness for responsible ocean governance, emphasizing the shared responsibility of states, and Pardo laid out the elements of such a just maritime order. He introduced into UN phraseology the notion of the high seas as "common heritage of all mankind,"[11] quoting from a resolution that had been adopted by the *World Peace through Law Conference* earlier that year in Geneva.[12] The conference was attended by over 2,000 lawyers and judges from over 100 countries. Not least because of Pardo's indefatigable efforts as communicator of their message within the UN system, Article 136 of UNCLOS now reads: "The Area and its resources are the common heritage of mankind."

In view of his pioneering role in calling for a régime of the oceans that transcends the greed of the nation-state and incorporates a new paradigm beyond the essentially utilitarian approach, resembling the mindset of colonial exploitation, of the 1958 Geneva Convention, we would like to pay tribute to Arvid Pardo and dedicate our meeting to his memory.

We equally remember today the monumental role of Elisabeth Mann Borgese. Together with Ambassador Pardo, she raised global public awareness for ocean governance that protects the environment and resources of the sea for future generations. As initiator of the *Pacem in Maribus* conferences[13] and founder of the International Ocean Institute (IOI), now headquartered in Malta, Elisabeth Mann created a legacy of scholarship and civil responsibility *in rebus maritimis*. It may be worthy of attention that the delegation of land-locked Austria appointed Mrs. Mann as advisor in the negotiations for UNCLOS.

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[10] *Ibid.*

[11] *Loc. cit.*, par. 104.

[12] Resolution 15, adopted on 13 July 1967.

[13] The conferences started in Malta in 1970, with assistance of the government of Malta. The last conference was convened in 2013.

Arvid Pardo and Elisabeth Mann Borgese's lasting achievement is that they raised the issues of *shared responsibility* and *common good* in the negotiations on the law of the sea. Both, Pardo and Mann, also substantially contributed to bolstering Malta's influential role in maritime affairs. In addition to the IOI, the International Maritime Law Institute (IMLI), an affiliated institution of the International Maritime Organization (IMO) of the United Nations, is also located in Malta.

Today, more than three decades after UNCLOS entered into force, it remains to be seen how the principle of common heritage introduced by Pardo can eventually be preserved in a climate that is increasingly one of global anarchy – in the wake of the obvious failure of a hastily proclaimed "rules-based order." One may again pay attention to the sobering analysis, which he published shortly after the conclusion of the negotiations on UNCLOS in the early 1980s. According to the assessment of the "Father of the Law of the Sea" (as he is often called), the drafters of the Convention had "created a largely symbolic regime and excessively complicated institutions capable of efficiently carrying out few, if any, functions."[14]

This was indeed a premonition of sorts – as has become obvious in the predicament of the International Seabed Authority (ISA) vis-à-vis the unilateral steps of the Trump II administration.

Under evolving global conditions, an even greater challenge will be how to develop the common heritage principle further towards the notion of "common good of humanity." A subtle, implicit hint at the idea may be found in Art. 59 of UNCLOS, which states that parties involved in conflicts over rights and jurisdiction in the exclusive economic zone

[14] "The Flawed Rendering of the Common Heritage Principle": chapter in the article, "An Opportunity Lost," in: *Law of the Sea: U.S. Policy Dilemma*. Eds. B. H. Oxman, D. D. Caron, C. L. O. Buderi. San Francisco: ICS Press [Institute for Contemporary Studies], 1983, p. 22. – In this essay, Pardo also draws our attention to a problem UNCLOS faces due to its, in his opinion, being "grossly inequitable" in terms of the provisions on the continental shelf. In his view, "the provisions of the convention legalize absurdities." He illustrates the assessment by reference, *inter alia*, to the fact that under UNCLOS "the Pitcairn Islands with 60 inhabitants may legally claim control over the resources of a maritime area several times larger than that which can be claimed by the Federal Republic of Germany with more than 60 million people [in 1983 / H.K.]." (P. 20)

also must take into account "the importance of the interests involved (…) to the *international community as a whole*." (Emphasis H.K.) It will not anymore be sufficient to think just of how to e*qually share resources*; the overriding consideration must be how to *use them responsibly* in view of common survival. Increasing environmental threats that affect not only low-lying islands, but ultimately, and at various degrees, the entire international community, leave us no other choice. This concern is also reflected in the BBNJ Agreement that will soon enter into force and in which the Parties state that they "desire" "to act as stewards of the ocean in areas beyond national jurisdiction *on behalf of present and future generations*."[15]

It is indicative of the seriousness of the threat of climate change, with the rise of sea levels, that on 9 November 2023 Australia and Tuvalu in Rarotonga signed the "Falepili Union Treaty" that provides, *inter alia*, for what some commentators described as "climate refuge" for citizens of Tuvalu. The treaty perfectly highlights the importance of the idea of common good in today's maritime context. ("Falepili" in Tuvaluan means looking after your neighbors as if they were family.)

There are other challenges to maritime order under UNCLOS some of which I would like to briefly mention in closing.

As the Convention can only be fully implemented through arbitration and court rulings, one must ask how State Parties should deal, in the global constellation of today, with fellow State Parties that simply ignore the rulings and awards because they feel that they do not need to fear the consequences. This is indeed a major challenge to the international rule of law: rules without enforcement are not legal norms in the strict sense. They resemble non-committal wishes or moral principles.

On a more positive side, Malta and Libya have set an example of how to resolve a dispute over maritime sovereignty. Their Agreement of 10 November 1986, implementing the ICJ's judgment on the delimitation

[15] Preamble to the *Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction*, New York, 19 June 2023, entry into force: 17 January 2026. (Emphasis H.K.)

of the continental shelf,[16] demonstrated the spirit of good faith and co-operation that will be needed to comprehensively implement UNCLOS. (The Agreement was concluded on the basis of customary international law, but *informed* by UNCLOS, which had been adopted in 1982, but only became binding in 1994.)

Also, the community of State Parties is faced with the question as to how to deal with the fact that certain countries are not parties to UNCLOS. The most powerful among those few states is obviously not impressed by the *opinio juris* that UNCLOS – or basic provisions of it – has by now acquired the status of customary international law. The open contempt for the ISA displayed by the United States is a case in point.

Another serious issue for the maritime rule of law is how to deal with armed, and at times lethal, attacks against, sabotage, or abduction of, civilian, and in particular humanitarian, vessels and their crews by states in waters beyond their territorial jurisdiction, including in the exclusive economic zone of other states. The protracted armed conflicts in the Black Sea and Eastern Mediterranean regions, and recent incidents in the Caribbean Sea, have made the wider public aware of what is at stake when parties to a dispute interfere with the freedom of navigation or obstruct humanitarian missions by means that may include the use of military force. There must be no vigilante justice on the high seas!

Lastly, among the major challenges to maritime order is the assertion of sovereign rights over sea space on the basis of claims, often rooted in colonial history, to territorial sovereignty over distant islands, and the unilateral projection of national interests in "the Area" beyond national jurisdiction at the expense of the interests of all others.

In view of all of this, and against the background of deepening geopolitical instability and uncertainty, Elisabeth Mann's vision of *PAX IN MARIBUS* and Arvid Pardo's notion of the high seas as common heritage of mankind remain as relevant as ever – as a reminder to the conscience of nations.

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[16] International Court of Justice, *Case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*. Judgment of 3 June 1985. – Leġiżlazzjoni Malta, ACT No. II of 1987, signed: Agatha Barbara, President: *Malta-Libya Continental Shelf Delimitation (Ratification) Act*, 29 January 1987.

I

Origins and Foundations of Ocean Governance

Awni Behnam
Honorary President of the International Ocean Institute

Whither UNCLOS?

The International Ocean Institute's (IOI) development as knowledge-based institution began with Elisabeth Mann at its helm. Its establishment was triggered by the declaration of Arvid Pardo, Maltese Ambassador to the UN, at the General Assembly where he so courageously stated that the high seas are the Common Heritage of Humankind, a principle Elisabeth completely took to heart. In 1970, when still at the Centre for the Study of Democratic Institutions in the United States, and at the invitation of the Government of Malta, she convened a conference in Malta for the purpose of drafting a constitution for the oceans. She called that conference *Pacem in Maribus* and brought together the best and brightest minds: oceanographers, scientists, environmentalists, diplomats, lawyers, and industrialists. In her own words, Elisabeth in 1970 invited *"people of goodwill*" who realized that the doctrine of freedom of the sea beyond a three-mile limit (territorial waters) had become accepted international law, and thus had protected the enormous expansion of maritime trade since the 19th century. *Pacem in Maribus II* followed in 1971. Elisabeth soon realized that the conference needed support and assistance of an organized nature; hence, the IOI was born in 1972. That year, Elisabeth addressed the "Marine Revolution" as one of those "great disjunctures that have marked human history," describing it as a fundamental change in international relations; but she warned that there were already many ominous signs that it could turn out to be predominantly destructive. However, she would then demonstrate her enormous potential for pragmatism in her stated belief that "*Luddism did not work on land and it will not work under water.*" She believed that the realistic alternative was to harness and rationally direct the forces of the Marine Revolution, minimizing its destructive side effects. She demonstrated that as she strove to include in UNCLOS negotiations the ethical dimension expressed in the common heritage principle. As a pragmatist, she fully understood the limits

of political concessions. She settled for less, in the belief that processes were better than deadlocks.

Fifty years later, her legacy endures in the IOI. Through the Institute, Elisabeth's mission remains ingrained in those principles of social justice that gave rise to the constitution of the ocean and the notion of common heritage of humankind. Today, we face similar challenges from the scientific revolution that has resulted in unethical and destructive access to ocean resources and services, from the deepest seabed to the highest seamounts. IOI is a pragmatic institution devoted to pursuing a "*blue economy*" whose core tenet is living with and from the ocean in a sustainable relationship. Also, we face new threats ranging from climate change to destructive human practices in the ocean, from food security to global financial meltdowns that have proverbially taken us "back to the future."

In the Nexus Lecture, Elisabeth quoted T. S. Eliot:

> "Time present and time past
> Are both perhaps present in time future.
> And time future contained in time past."[1]

As a knowledge-based institution, the IOI is a living legacy of the prophetic founder who left us twenty-five years ago.

The Road to UNCLOS

Like no others, three human beings have defined the destiny of the law of the sea through their genius of thought, passion and craft: *Hugo Grotius, Arvid Pardo* and *Elisabeth Mann Borgese* (EMB). For centuries, the Grotius principle of freedom of the seas was unassailable – until that virtuous day when the then Ambassador of Malta, Arvid Pardo, on 1 November 1967, in a marathon speech at the UN General Assembly advocated a new principle for a new Law of the Sea, namely that of "common heritage of mankind," which transcends both concepts of sovereignty and freedom in human relations with the ocean. The

[1] *The Four Quartets*, No. 1: "Burnt Norton," I.

speech in its totality galvanized EMB who at that time was a fellow of the Centre for Democratic Institutions. She saw the relevance of Pardo's ideals for the Centre and her own beliefs, in particular as regards his emphasis on the peaceful use of the ocean and its living and non-living resources. This was to lead to several narratives that impacted the convening and processes of UNCLOS. As Pardo's intellectual partner, and inspired by Pope John XXIII's *Pacem in Terris*, she grafted Pardo's ideas into the framework of *Pacem in Maribus*, the series of conferences which she convened with the support of the Maltese Government and in the framework of the International Ocean Institute (IOI). As a think tank, the IOI was intended to enhance a broad interdisciplinary dialogue on ocean law and development, and to frame the issue of the use of ocean resources into an internationally agreed law in the context of evolving negotiations at UNCLOS.

She wrote: "We followed UNCLOS III very closely, analysed its emerging results, proposed new approaches and solutions. All major actors who participated in UNCLOS participated in Pacem in Maribus, coincidently the President of UNCLOS III, Shirley Amerasinghe, was also the President of the International Ocean Institute."[2]

EMB had both the personality and the opportunity to influence the decision-making process to a large extent. As the ultimate friendly persuader, she also used IOI and *Pacem in Maribus* as *bully pulpit*; she was both the antagonist and the pragmatist in the crafting of UNCLOS.

These were no ordinary times. This was a period of great expectations as the developing countries created, in 1964, with the birth of UNCTAD, a new system for multilateral diplomacy in the frame of the Group of 77, and used their newfound solidarity to change the status quo, not shying away from utilizing their voting majority.

As negotiations for a new constitution were underway in 1973 at UNCLOS III, developing countries were increasingly gaining their political independence and searching for economic self-sufficiency. Development was at the center of the United Nations agenda. An atmosphere of euphoria prevailed. Negotiations for a New International Economic

[2] "The Years of My Life," *Ocean Yearbook 18* (2004): 1-21; 13.

Order (NIEO) were also underway in several UN fora, and an optimistic commitment to global management including the Ocean through the institutions of the United Nations predominated.

Negotiators at UNCLOS focused on the linkages between the perceived New International Economic Order and the emerging Constitution of the Sea. EMB sought to combine both the principles of NIEO and the objectives of UNCLOS – unlike Arvid Pardo who was never happy about the way in which the NIEO was promoted by the newly independent developing countries, fearing the dilution of the concept of the Common Heritage at the negotiating table.

UNCLOS, after some ten years of politically charged negotiations, was finally adopted in 1983 as the Constitution of the Ocean.

After praising the achievements of UNCLOS in letter and spirit, EMB, in her 1999 Nexus lecture stated: "UNCLOS changed our understanding of the scope and meaning of the concept of sovereignty in several important ways." UNCLOS remains a major achievement, indeed it has become the basis for international ocean governance. First, it introduces limits to sovereignty by making peaceful settlement of disputes mandatory, including the establishment of a Tribunal (ITLOS) to adjudicate disputes relating to the interpretation and application of the Convention. It also introduced the duty of conservation and environmental protection, and in some cases of sharing responsibilities, as well as a duty to cooperate in resources management, marine scientific research, and technology. Second, UNCLOS transforms sovereignty; by disaggregating the concept into a bundle of rights – as sovereign rights, exclusive rights, jurisdictional and control rights – it provides for pluralistic sovereignty. Third, UNCLOS introduces a transcendent element into the concept of sovereignty through the notion of common heritage of mankind, a concept of "non-sovereignties." This is not to say that the convention is perfect. No human construct ever is perfect. The convention is riddled by political compromises, concessions to greed and power and vested interests, so much so that Arvid Pardo was bitterly disappointed by what he thought was a dilution, even a betrayal of his ideas. EMB, on the contrary, was surprised to see how much of historical design had survived the wrangling of the political arena from which no concept can emerge in its virginal purity. Arvid Pardo said the glass is half empty, EMB said the glass is half full.

As a Constitution of the Ocean, UNCLOS provided the conceptual legal framework for the development and elaboration of complementary legally binding conventions and treaties on sectoral issues, fisheries, environment, and non-binding guidelines and good practices. UNCLOS did not develop in a vacuum; it paralleled the development in other international fora such as UNCTAD, IMO, FAO and UNDP. Elisabeth identified eight areas by which the emerging Law of the Sea Convention in 1974 could reinforce the goals of developing countries in an emerging fair regime of new international economic rules in the game for development. The concept of sovereign equality of all states and the concept of common heritage of mankind changed the relationship between poor and rich to one of equal partners. The establishment of the EEZ within the 200-mile zone reinforced the sovereign right to resources and – in accordance with the approach of the NIEO – strengthened regional organizations and South-South cooperation (articles 122, 123, 276 and 277). We can also mention other equalizing factors such as: equitable participation of developing countries in financial decision making, promotion of technology cooperation and sharing of knowledge (Part XI and Part XIV of the Convention), and the assertion of a genuine conceptual link between the ship and the flag State, which reinforced developing countries' efforts at UNCTAD. The Convention also took into account the interests and rights of landlocked countries.

After the adoption of UNCLOS, EMB devoted herself and IOI to assisting developing countries in the ratification, and then to promoting the implementation of the Convention as it entered into force in 1994.

However, in terms of exercising acquired rights, the developing countries in the Group of 77 missed a golden opportunity to influence the course of the development of those rights. In 1976, the oil exporting members of the Group of 77 refused to include oil in the Integrated Programme for Commodities that was to lead to the establishment of the Common Fund for Commodities under the auspices of UNCTAD. That denial of the most important countervailing power the Group could have had in multilateral negotiations much to the pleasure of the developed countries showed early cracks in the unity and solidarity of the Group.

However, if one is to look for other milestones that were to lead to the dismantling of the multilateral development agenda, the invasions of Afghanistan in 1979 by the Soviet Union and of Iran by Iraq in 1980

come to mind. This is due not so much to their impact on the Soviet Union and Iraq but to their collateral effect on the Third World, and how the two invasions gave rise to jihadists and violent fundamentalism. The collateral damage resulted in the eventual marginalization of developing countries that were the champions of the solidarity-based group system in multilateral cooperation and negotiations. Those invasions struck at the heart of the developing countries' twenty-five years of unity in the Group of 77. On both occasions, the Group of 77 failed to take a moral stand and demonstrate clarity of purpose.

However, as early as 1996, Elisabeth Mann Borgese, then Honorary President of the IOI, was at the centre of an emerging international dialogue on globalization. She was frustrated at the way the principle of the Common Heritage of Humankind within UNCLOS was being ignored at international fora in favor of market solutions to ocean challenges promoted by the rush to embrace globalization. She recognized an increasing governance deficit in the lacklustre implementation of UNCLOS. Indeed, since its adoption in 1982 there had been a growing concern as to its effective implementation. In fact, by the beginning of the Nineties the ocean was no longer on the sustainable development agenda. While in 1992 at Rio 1 the ocean did not figure specifically in the text, nevertheless and perhaps cynically the language of UNCLOS was used very liberally in areas of conservation and the environment.

Rubens Ricupero wrote:

> "The second half of the 1990s witnessed the first major setbacks of the victorious path of globalization. The first and by far the most damaging of those setbacks was the growing frequency of monetary and financial crises. These crises were not the end of globalization, but they undoubtedly acted as a sudden revelation of its mortality, its inherent vulnerability. In that sense their role reminds me of what Paul Valéry wrote about the First World War and how that European civil war had shown Europe its mortality: 'Now we, civilization, we know that we are mortals.'"[3]

[3] Rubens Ricupero, "Address to the Regional Post-Doha Seminar on WTO Competition Issues for Latin America and the Caribbean," in: *Beyond Conventional Wisdom in Development Policy: An Intellectual History of UNCTAD 1964-2004*. United Nations Conference on Trade and Development (UNCTAD), 2004, p. 118.

It did not take a long time for the glitter to fade away, and early in the nineties there was already ample evidence to show that globalization without ethical-based governance tended to marginalize the poor among countries and within countries. When the protest against unbridled market forces and unfettered liberalization was unleashed, as in Seattle, the institutions imposing globalization were finally challenged as to their legitimacy.

As globalization took hold, Elisabeth became increasingly concerned that UNCLOS was undermined by a departure from ethically grounded governance toward market-oriented priorities for ocean governance, especially in shipping and maritime trade. The neglect of the ocean and the threats to its health and the sustainability of its resources weighed heavily on her conscience; she felt that globalization would eventually marginalize the vulnerable among the developing countries, particularly the least developed, and especially SIDS.

Elisabeth's concern and frustration with the lack of effective implementation of UNCLOS and compliance with its principles, particularly including the common heritage aspect, was triggered by the duplicity of some developed countries in their pretence to support developing countries in their aspiration to acquired rights under UNCLOS publicly, but denying it privately.

She strongly believed in a critical need for an institutional focus, in the form of a forum that brings the international community to address ocean challenges and threats under UNCLOS including capacity building for developing countries and countries in transition.

I personally was aware of her frustration when she asked me to write two lectures for the IOI training course in Halifax under the title *"The Unfulfilled Promise of the Seventies,"* later published in the Ocean Yearbook.

Stieglitz describes the hypocrisy of the advocates of the new age of globalization as they tried to deflect their mismanagement of its potential onto developing countries:

> "The advocates of globalization, when confronted with its glaring failures, try to shift the blame to the developing countries them-

> selves, to their corruption, to their lack of transparency, to their lack of resolve in making the needed reforms. There is little doubt that such problems exist in developing countries, just as they do in developed ones, and had they addressed their problems, the countries would be better off. But recognizing these problems does not really answer the critics of globalization. With or without corruption globalization in the way it had been carried out has worsened the plights of many developing countries."[4]

In his essay "Ethics, Markets and Government Failure and Globalization," he wrote:

> "… I want to look at certain ethical aspects of the way that globalization has proceeded in recent years. I shall argue that in the way that they have sought to shape globalization, the advanced industrial countries have violated some basic ethical norms. Institutions and policies which have governed globalization, while they may have served the interests of the advanced industrial countries, or at least special interests within those countries have not served well the interest of the developing world, especially the poor within those countries."[5]

Escaping the Resource Curse: The Imperative of Moral Clarity in Ocean Governance

Elisabeth Mann Borgese was deeply critical of the manner in which individual international organizations addressed sectoral issues of the ocean. She noted the absence of an interdisciplinary, horizontal approach and the failure to integrate ocean challenges and uses under a single, common framework. Consequently, she became increasingly

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[4] Joseph Stieglitz, "The Overselling of Globalization," in: *Globalization: What's New?* Ed. Michael M. Weinstein. New York: Columbia University Press, 2005, pp. 228-261; p. 229.

[5] Stieglitz, "Ethics, Market and Government Failure, and Globalization," in: *The Governance of Globalization: Proceedings of the Ninth Plenary Session of the Pontifical Academy of Social Sciences* (*Acta* 9). Eds. Edmond Malinvaud and Louis Sabourin. The Pontifical Academy of Social Sciences. Vatican City, 2004 (paper originally presented May 2–6, 2003), p. 203.

committed to changing the *status quo* by establishing a focused forum at the United Nations – one that would integrate ocean challenges, threats, and opportunities, and bring them specifically to the attention of the international community and the UN General Assembly (UNGA).

For that purpose, she decided to launch a new initiative, beginning with the *Year of the Ocean* in 1998. She sought the support of Ambassador Neroni Slade of Samoa (Chair of the Alliance of Small Island States – AOSIS) and the Maltese Government – backed strongly by Ambassador S. Borg and Minister G. W. Vella – to create a unique forum to address critical ocean issues and bring them to the attention of the UNGA.

Elisabeth was dissatisfied with the way ocean-related issues were left to the specialized "silos" of the UN system – such as UNCTAD, WTO, ILO, IMO, FAO, and WMO. Hence, she called upon President Guido De Marco of Malta during the plenary of the fifty-third session (1998) to address the assembly, calling for the creation of a forum to consider the closely interrelated problems of ocean space as a whole.

EMB, who understood intimately how the bureaucracy and culture of the UN system functioned, clarified that the proposal was not for creating a new institution, but rather a mechanism to enable the General Assembly to make better-informed decisions on ocean affairs and the Law of the Sea. Thus, the *United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea* (UNICPOLOS) was born. Housed within the institution of UNDOALOS, it proved to be a milestone and an indispensable mechanism in the history of addressing ocean governance.

It was not designed to replace the United Nations Convention on the Law of the Sea (UNCLOS) but to protect it as the "Constitution of the Ocean." It was envisaged by EMB as a process of the General Assembly – not for decision-making or rule making, but as a universal, informal consultative procedure. It brought together member states, civil society, business communities, and relevant institutions within the remit of UNCLOS to facilitate an annual review by the UN General Assembly. This review was intended to be effective and constructive, focusing on developments in ocean affairs, suggesting particular issues for consideration, and emphasizing areas where international cooperation should be enhanced.

Celebrating its first meeting in 2000, EMB wrote:

> "The establishment of UNICPOLOS by the General Assembly must be considered a breakthrough in the process of building a global system of ocean governance. It is the only body of the United Nations system with a membership comprising the whole membership of the General Assembly and intergovernmental and regional organisations as well as major groups of civil society, and with a mandate to consider the closely related problems of ocean space as a whole and reports to the UNGA …"

Beware of the Trap: A Precautionary Tale

Let us recall that the *UN Convention on a Code of Conduct for Liner Conferences*, adopted in 1974,[6] was hailed as the convention that ushered in the "New International Economic Order" (NIEO). However, it took some nine years before the Convention entered into force with sufficient and qualified ratifications by member states. In 1988, in accordance with Article 52 of the Convention, a Review Conference on the working of the Convention was held in Geneva.[7] The Review Conference was attended by 21 Ministers, mainly from West and Central

[6] UN Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences, Volume II, Final Act, New York. 1975.

[7] See A. Behnam, *Unfulfilled Promise of the Seventies* (*op. cit.*), p. 465. The "Code" was adopted in 1974 at a time when Shipping Conferences carried 80-90 percent of the liner trade. Due to various reasons the conditions changed and since the middle of the 1980s more than 50 percent of liner cargoes were shipped on non-Conference Lines. This had the effect that the proportion of cargoes carried by developing countries' shipping lines had generally decreased. Therefore, the developing countries' major concern was the extension of the scope of application of cargo sharing provisions of the Convention to all liner trades, which was opposed by developed countries and traditional maritime nations. In the light of the overall situation in shipping, the aims and objectives of the Convention were still relevant and supportive of the policy of developing countries. It was therefore important to consider very carefully any possible alternatives and/or changes. Bearing in mind that the wording of the Code represented a fragile compromise, which was reached after long and difficult deliberations, it was of fundamental importance not to upset the balance in the basic principles by amendments.

Africa,[8] led by the Minister of Defense of Côte d'Ivoire, who was the Chairman of the Ministerial Conference of West and Central African States on Maritime Transport (MINCOMAR). It is important to point out that, due to the institutional structures created in those countries, they had made the most advances in implementing the Code and had the greatest stake in the Review Conference. Their position was stated clearly: "The Review Conference was not intended to judge the validity of the Convention but rather to examine factors that had impeded its implementation."

At the heart of the issue in the Review Conference was the scope of application of the cargo-sharing formula, which the developing countries regarded as one of their most important "acquired rights" in an international agreement. However, during its three weeks the Review Conference did not get to discuss substance. Instead, it was deadlocked on the Rules of Procedure.

That deadlock developed due to the demands of developed countries – major maritime nations – that non-contracting parties to the Convention should have the right to vote, to amend, or to vote against amendments to the Convention. They insisted that no action could be taken on the scope of application, implementation, or interpretation of the Convention without the participation and agreement of the non-contracting parties, or otherwise, that all decisions must be taken by consensus. Furthermore, these countries insisted that office bearers also be elected from among the non-contracting parties, giving further powers to non-contracting states to influence the outcome of the Review Conference.

The developing countries did not accept this position. They insisted that voting rights should be exercised only by states which were contracting parties to the Convention. They even questioned the Secretariat's action in inviting non-contracting states to the Review Conference. Consequently, the Conference was unable to reach agreement on the majority required to adopt amendments to the Convention, as well as on other business. The developing countries argued that the demands of the developed countries for equal rights for non-contracting parties were in contradiction to the *Vienna Convention on the Law of Treaties*.

[8] For full treatment, see A. Behnam, *op. cit.*

After three weeks of deadlock, a resolution was adopted in November 1988 deciding that there was a need for a resumed session to complete the task. In the meantime, the developing countries continued their efforts to minimize the participation of non-contracting parties and keep the door open for changing the scope of the Convention. On the other hand, the industrialized countries wished to maximize the involvement of non-contracting parties, making it a "watertight" agreement to protect the interests of third parties. It was finally agreed to resume informal consultations to seek a solution to that impasse in October 1990, the year Guido De Marco was elected President of the UN General Assembly.

In that year, a final compromise package was agreed (much to the dissatisfaction of most, if not all, West African and other developing countries). In the final analysis, the agreement permitted non-contracting parties to participate in the Conference and gave these non-contracting states the same rights as contracting states in participation, decision-making, and voting.

The final outcome and bottom line of the Review Conference was that the scope of application of the sharing formula – the new "legal" interpretation (40-40-20) in the Code of Conduct – was limited to "Conference cargoes" and not to the nationally generated liner trade as developing countries had always interpreted, understood, or aspired to in terms of the intentions of the drafters. The perceived "acquired rights" of developing countries, after years of struggle for equity in the distribution of international labor in maritime transport, evaporated with the limitation of the cargo-sharing formula to "almost nothing" and the demise of Conference services. The Code of Conduct died a natural death before the end of the century.

The Parallel to UNCLOS

Elisabeth, in 1991, was very angry and never forgave "UNCTAD" as such. Myself, then a senior official of UNCTAD, personally sympathized with her sentiments, but the writing was on the wall. In 1991, Elisabeth was deeply engaged with President Guido De Marco, as President of the General Assembly, in the preparation for the Earth Summit at Rio in 1992. In the midst of all that, the report of the Re-

view Conference on the Code of Conduct passed through the General Assembly unnoticed.

It is doubtful that, had the President of the General Assembly been alerted to the dangerous legal precedent being set regarding the role of non-contracting parties in the review of binding international legal instruments, he could have reversed that decision; however, "the die had already been cast."

Some fourteen years later, over dinner, I had the occasion to reminisce on that "promise of the seventies" and the Code of Conduct with President Guido De Marco. We drew comparisons with the Law of the Sea. Particularly, we shared the same apprehension – a murmur recalled – of what would happen if such a review were to take place on UNCLOS.

In the meantime, technological advancements as well as the changed imperatives of global governance – globalization and the dominance of the single economic system – had overtaken UNCLOS. Many voices, including those of the International Ocean Institute (IOI), claiming a governance deficit in the ocean, solicited responses for a review of UNCLOS. This naturally evoked in me the pitfalls of such folly, given the consequences of the Review of the Code of Conduct for Liner Conferences.

The concern was that such a review of UNCLOS, given the precedent set by the review of the Liner Code, would undermine "acquired rights" that have been the ethical and moral basis of UNCLOS. In such a case, there is a likelihood of questioning the debate on its scope of application in the ocean beyond national jurisdiction. In my view, if a review were to take place, the prime losers would be the developing countries and countries in transition, as well as the least developed among them.

Elisabeth warned that the developing countries in the Group of 77[9] who negotiated UNCLOS with remarkable solidarity and passion, had

[9] A. Behnam, "Developing Countries in the Group of 77: A Journey in Multilateral Diplomacy 1964 to 2004," in: R. Macdonald and D. M. Johnston (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*. Leiden / Boston: Nijhoff, 2005, pp. 355-380. It is relevant to recall that Malta was a full-fledged member of the Group of 77 (prior to joining the EU).

now unraveled. Leaders such as Pardo, Elisabeth, and De Marco are no longer with us to lead the struggle for inclusive moral values, such as the protection of and benefit-sharing from common goods.

The Current Governance Landscape

Notwithstanding the basic governance framework provided by UNCLOS, ocean governance at the international level is a vast collection of binding and non-binding rules, protocols, and all other forms of hard, soft, and voluntary agreements. These are diffused among a myriad of sectoral, international, and regional organizations – IMO, UNCTAD, WTO, ILO, FAO, and others – that have the responsibility for monitoring implementation but lack the means and authority to ensure compliance and enforcement. Above all, they are incapable of ensuring coherence.

Particularly worrisome is the lacuna in the governance of ocean services on the high seas. This is evidenced by the absence of flag state control due to the existence of flags of convenience and criminality, overfishing and IUU fishing, destructive bottom and seamount trawling, deep-sea mining practices, exploitation of marine genetic resources, access to benefit-sharing from common goods, management of protected areas, and global warming and the melting of the ice cap, among many other challenges.

At the heart of these challenges are the treatment of ocean services on the surface, the water column, the seabed, and below the seabed beyond national jurisdiction, and the implementation deficit regarding the common heritage principle. The question thus arises: how do we convert challenges into opportunities in the service of humanity – that is, how do we accept progress without compromising equity principles and acquired rights?

All nations, and particularly developing countries, suffer the consequences of a huge governance deficit in the implementation of UNCLOS, particularly in enforcement and compliance. It is well understood that the acquired rights of developing countries in UNCLOS may not be replicable in today's culture and attitudes toward multilateral treaties or multilateral cooperation. Developing countries and the majority of developed countries recognize this dilemma. However, it is

possible to reach consensus on an agreement that would fill the deficit gap in the implementation of the spirit of UNCLOS.

Such an agreement has become necessary due to the changes that have taken place since the adoption and elaboration of UNCLOS and related instruments – whether in technology and science, in sustainable development policies, or in new and emerging dynamic sectors – which lead to differences in the legal interpretation of certain clauses of UNCLOS. Currently, all suffer the consequences of a stalemate in implementation, coherence, and especially, a lack of moral clarity.

The UN Secretary-General described the current state of multilateral cooperation by the term "in the abyss." At a time of such denial of developing countries' right to development and the safeguarding of their acquired rights, and with justice subjugated to self-interest, it would be suicidal to subjugate UNCLOS to "self-driven butchers."

Unlike a general review and a process of rewriting UNCLOS, an implementation agreement should focus not on unraveling the principles of UNCLOS but on seeking practical solutions to specific challenges in the light of the relevant legal instruments at hand. Such an implementation agreement would provide countries and regions with policy imperatives that do not impinge on acquired rights, such as the common heritage principle.

The Legacy of Elisabeth and De Marco

Today, we miss the pragmatism always displayed by Elisabeth and De Marco to go for the gain for humanity as a whole in seeking difficult solutions to complex challenges. The ocean community must not undermine acquired rights in addressing future challenges. We must respect the intentions of the founding fathers, based on respecting the spirit of UNCLOS, and address ocean-related challenges with moral clarity. Admittedly, this is a daunting task that Elisabeth and Guido would have wholeheartedly embraced.

Question of acquired rights and the future of UNCLOS

> "We are not now that strength which in old days
> Moved earth and heaven, that which we are, we are,
> One equal temper of heroic hearts,
> Made weak by time and fate, but strong in will
> To strive, to seek, to find, and not to yield."[10]

Jeffrey Sachs poignantly described the challenge: in implementing the MDGs, "we are not on track to get these considerations into national policy making. It is just not happening, and it is a very serious problem. Governments do not know how to do it, and they cannot face the vested interests and they can't keep these problems in the forefront; on all of the MDGs, we face the fundamental challenge that there are a lot of nice words and pretty much all promises that need to be made have been made. However, we are way off track on actually doing what needs to be accomplished."[11]

Today, the same doubts have clouded especially SDG 14 (regarding sustainable use of the oceans and marine resources). As we transit from one global aspiration to another, I ask you: how many of us remember last year's Summit of the Future or the "Nice Ocean Outcome" of this year?

Today, the legacy of Elisabeth is in the hands of a different generation of "people of goodwill." However, UNICPOLOS opened the door for civil society, relevant institutions, and stakeholders to enrich the debate with experts and science for policymakers to understand and comprehend the need for ocean governance in certain areas. The first subject that it addressed was IUU fishing, a neutral subject that brought all on board and consolidated the need for such an open-ended informal consultative process that drew the attention of decision-makers at the UNGA to consider what needs to be done.

Elisabeth died in 2002, and in 2004, the UNICPOLOS addressed the subject of new sustainable uses of the oceans, including the conserva-

[10] Alfred, Lord Tennyson, *Ulysses* (1833).

[11] Remarks attributed to Jeffrey Sachs in his capacity as Director of the UN Millennium Project.

tion and management of the biological diversity of the seabed beyond national jurisdiction. I still remember the large number of delegates at that meeting, paying tribute in their statements to Elisabeth and her contribution for what she started as a peaceful revolution in human international management of the ocean.

In 2004, and on the recommendation of the UNICPOLOS (now renamed ICP), the UN General Assembly established an Ad Hoc Open-Ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction – or, as another quirk of UN semantics, the working group on BBNJ. It was not an easy decision and was resisted by powerful countries.

IOI had continued the path of Elisabeth's mission by engaging in the process, delivering statements, and later publishing a paper titled *Biodiversity of the Ocean – An Issue of Governance*. Naturally, IOI took a position to support a call for the elaboration of an implementation agreement under UNCLOS, thus supporting the position taken by the EU, developing countries, and China. This was in contrast to that of the USA, Canada, Russia, the Republic of Korea, and Japan, who strongly objected to any such agreement.

It took ten years for the Working Group on Biodiversity Beyond National Jurisdiction (BBNJ) to conclude the debate and make its recommendation to the UNGA. The major controversy was the nature of the international instrument and its scope of application. From the early days, developing countries in the Group of 77 and China, and later the EU, supported a call for such an elaboration of an internationally legally binding instrument.

The post-2015 agenda and SDG 14

Let us recall that the second and interrelated ocean challenge was the launching in 2015 of the Post-Millennium Development Goals, *Transforming our world: the 2030 Agenda for Sustainable Development*, a set of 17 sustainable development goals and 169 targets. Among the goals was a stand-alone Sustainable Development Goal 14 (SDG 14) with 10 targets, with the aim to "Conserve and sustainably use the oceans, seas and marine resources for sustainable development."

When Rio +10 was convened in the summer of 2002, the international ocean community missed their champion, Elisabeth. She had been keen at the earlier preparatory stage to include Oceans on the agenda. It was somewhat understandable that the ocean was not on the priority list of development objectives of governments, given the challenges they were facing, ranging from chronic financial crises and climate change to security.

Later, by 2005, with the failure of globalization to deliver on promises of prosperity for all, it became a matter of urgency to address global sustainable development objectives. A summit was convened at the UN, which adopted a set of development goals better known as the Millennium Development Goals (MDGs). While the oceans did not figure directly in those goals, there was ample scope to include the health and sustainable use of ocean services and resources as an integrated necessity in any of the specific goals, such as environmental sustainability, the eradication of extreme poverty, the ecosystem approach, the protection of the marine environment from land-based pollution, fisheries, SIDS, and the coordination of UN activities, among others. Developing countries settled for less; it was the only option to keep the narrative on the ocean alive.

IOI did its share by pushing the envelope at international meetings and in the UN system. The author (in his role as President of the IOI) and the Executive Director together published a paper titled *IOI and the MDGs: A Stakeholder Contribution to Achieving the Millennium Development Goals*, which was delivered at the ICP and other fora. IOI called for a more effective response to mitigate the ever-increasing threats to the ocean. There is no doubt that the MDGs did not live up to expectations due to a lack of political will and insufficient resources, particularly for assisting developing countries. The glass remains half full.

In addition, there were also some ardent supporters of the need for action who went as far as to propose, at one time or another, a full review of UNCLOS. IOI expressed in several fora the dangers inherent in such a proposal, as it was highly likely to unravel UNCLOS altogether, and developing countries stood to lose valuable acquired rights. The author, then President of IOI, published a paper to that effect, and the representative of Malta at the Governing Board of IOI, the late Salvino Busuttil, conveyed to the Malta Representative at the UN and to de-

veloping countries that such a demarche was fraught with many unknowns. Thankfully, a policy of reason prevailed, and the controversy was laid to rest. I remain convinced that the acquired rights of developing countries in UNCLOS were not and are not replicable in today's culture and attitudes towards multilateral agreements, and an implementation agreement would provide countries and regions with policy imperatives that do not impinge on those rights under UNCLOS.

In 2010, at the IOI Beijing *Pacem in Maribus* meeting, the "Blue Economy" concept was articulated as homage to Elisabeth Mann Borgese's vision of a human-centric, sustainable relationship with the Ocean. That same year, the first *World Ocean Review* was published, and both books and themes were presented to the UN Secretary-General. In 2012, the author contributed as one of the drafters of the Secretary-General's *Ocean Compact*. At the same time, IOI's loud calls for UN oversight for all ocean affairs and for the appointment of a Special Representative of the Secretary-General for the Ocean were heard in many fora. The Secretary-General, Mr. Ban Ki-moon, in a departure from his predecessors' stances, took special and direct interest in ocean issues, and his support was crucial in securing a standalone Sustainable Goal 14 in the 2030 Sustainable Development Goals.

The Sustainable Development Goals adopted in September 2015 open new opportunities and represent a new era for the Ocean, since all Heads of State adopted – within the framework of these goals – SDG 14 with some ten specific targets. IOI immediately mainstreamed SDG 14 in its training programs and deliverables and convened seminars with the EU, the Commonwealth, and UNCTAD partners to focus on the opportunities for all in pursuing the implementation of SDG 14.

There is no denying that the SDGs enjoy wide support and high energy as they were developed bottom-up and not imposed from the top. Achieving the 2030 goals, however, will depend on mobilizing enormous financial resources from national, regional, and international institutions and the private sector.

To realize the objectives of SDG 14 is a once-in-a-lifetime opportunity for humans to save the ocean and the planet. It is a debt we owe to EMB not to give up because of insurmountable hurdles but to persevere to contribute to the realization of agreed targets by building the capacities

of human resources of developing countries and countries in transition. People of goodwill need to follow closely the progress at all levels.

After his historic visit to the IOI in November 2015, former Secretary-General of the UN, Ban Ki-moon, wrote to the IOI:

> "The International Ocean Institute has actively contributed to the development of ocean affairs and the law of the sea for more than thirty years and has made an important contribution in putting oceans on the Sustainable Development Agenda. … I encourage you to continue your important work to support the Sustainable Development Agenda through implementation in the years to come."

Unless the ocean community promotes a culture of responsibility, policies of reason, and benefit-sharing in the peaceful exploitation of ocean services and resources through science-based policymaking, there is no doubt that traditional negotiators will continue to resist changing the status quo, and the ocean will continue to deteriorate. It is time to stop this culture of procrastination and the pursuit of gains of one ocean sector at the expense of another. This requires a change of the current narrative to one of benefit-sharing that is both equitable and sustainable.

Conclusion: The Future of the Legacy

More than a decade since Elisabeth Mann Borgese's departure, her legacy lives on. The forthcoming negotiations, which may take as long as UNCLOS itself took to complete, will open new opportunities to all countries, but particularly Small Island Developing States.

To fully integrate UNCLOS into building the New International Economic Order does not, by any means, distract UNCLOS, or ask it to try to solve all the world's problems and thereby resolve nothing. It is a conceptual problem; it is a question of direction, of goal and purpose. As stated in *Pacem in Maribus* VII (October 1976):

> "In some areas the Law of the Sea Conference may indeed lead to the building of the new order: it may be pattern-setting. In other areas, where it depends on the building of this order by other

> means and fora, the very recognition of this fact may facilitate compromises at UNCLOS. In both cases, the joining of the issues would enhance both the building of the new international economic order and the making of the law of the sea. They potentiate each other."

The IOI must now step forward once more and be available to assist developing countries and countries in transition, particularly through building and developing human capacity, to be able to influence negotiations for the best outcome and to prepare their human resources for prospective implementation. Efforts should be guided by the spirit of António Guterres' message on the International Day of Multilateralism and Diplomacy for Peace (24 April 2024):

> "The International Day of Multilateralism and Diplomacy for Peace highlights a fundamental truth: no country can solve today's challenges alone. (...) But around the world, conflicts, climate catastrophe, poverty and inequalities create enormous obstacles to diplomacy and multilateral solutions. Collaboration is consumed by competition; dialogue is overtaken by relentless division. (…) We need to resurrect a new spirit of global cooperation to rebuild trust, heal divisions, and place humanity on the path to peace. (…) On this important day, I call on all governments and leaders to spare no effort to bridge divides, renew dialogue and trust, and deliver a peaceful future."[12]

Hence, our task is to be constructive and not destructive. Negating UNCLOS will be destructive and, in my opinion, a folly. However, while UNCLOS is not the Alpha and Omega of a legal framework for the Ocean, by 1995, time and the advancement of science and technology made it necessary to complement the Convention with an implementation agreement such as the implementation of Part XI in 1994 and the Agreement to Conserve and Manage Straddling Stocks and Highly Migratory Fish Stocks in 1995.

Technological developments indeed forced a need to assess the fragility and strengths of UNCLOS to address a new and evolving ocean para-

[12] "Secretary-General's message for 2024." Source: United Nations, https://www.un.org/en/observances/Multilateralism-for-Peace-day/messages.

digm of threats and opportunities, particularly in areas beyond national jurisdiction and in view of the necessity to protect the ocean's ecosystems and biodiversity.

Summary of Challenges

The governance deficit became critical in the damage done to the ocean and brought a focus on areas beyond national jurisdiction, underlined by:

- fragmented, institutional paralysis, lacking comprehensive coherence;
- inadequate implementation;
- lack of compliance by flag states with their duties under UNCLOS;
- lack of investment in collaborative monitoring and enforcement mechanisms;
- over-reliance on a sectoral approach to resources and their management;
- political and bureaucratic roadblocks in common practices;
- institutional vacuum in high seas governance;
- access to ocean resources and services driven by greed and not human-centered;
- a cynical approach to common heritage;
- increasing demand for resources and services facilitated by technological advances;
- absence of institutional oversight and holistic responsibility;
- proliferation of criminal ship registration practices;
- human rights abuse in treatment and recruitment of ships' crews.

We need moral clarity in moving forward. Let us not let that torch, which those two human beings lit, die in the absurd imagination that the world has changed.

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Bardo Fassbender

Elisabeth Mann Borgese and the Constitutionalization of the Law of the Sea

Introduction

Elisabeth Mann Borgese was one of only a few "independent" individuals who exerted substantial influence on the development of international law in the 20th century. She was born in Munich as the youngest daughter of the writer Thomas Mann and his wife Katia on April 24, 1918, in the last year of the First World War and also the year in which the revolutions in Germany, Austria and Hungary fundamentally changed the political landscape of Europe.[1] In 1939, she married the Italian writer, historian and literary scholar Giuseppe Antonio Borgese, adding his name to her surname.[2] A citizen of Canada, she died on February 8, 2002, during her winter holidays in Upper Engadine, Switzerland.

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[1] For a perceptive and well-written biography in German, based on interviews of the author with Elisabeth Mann in her later life, see Kerstin Holzer, *Elisabeth Mann Borgese: Ein Lebensportrait*. Berlin: Kindler, 2001. A catalogue published on the occasion of an exhibition in Lübeck in 2012 includes a number of insightful essays about Elisabeth Mann's personality, life and work, as well as many photos and a bibliography of her publications: Holger Pils & Karolina Kühn (eds.), *Elisabeth Mann Borgese und das Drama der Meere*. Hamburg: mareverlag, 2012. See also Wolfgang Clemens, "Elisabeth Mann Borgese – Dichterkindchen und Weltbürgerin," in: *Thomas Mann Jahrbuch*, Vol. 21 (2008), pp. 137-167, and Tirza Meyer, *Elisabeth Mann Borgese and the Law of the Sea*. Leiden/Boston: Brill Nijhoff, 2022, ch. 1 and passim. For biographic sketches accompanied by many expressive and interesting photographs, see Uwe Naumann (ed.), *Die Kinder der Manns: Ein Familienalbum*. Reinbek bei Hamburg: Rowohlt, 2005.

[2] When, in the following, I interchangeably use the names "Elisabeth Mann Borgese" and "Elisabeth Mann," this is only for stylistic reasons. Her friends and co-workers often used the abbreviation EMB.

When we think of individuals with a decisive influence on international law, some legal scholars will probably first come to mind. The "Oxford Handbook of the History of International Law," for instance, has entries for the 20th century on Lassa Oppenheim, Max Huber, Georges Scelle, Hans Kelsen, Carl Schmitt and Hersch Lauterpacht.[3] We can also think of important politicians like Woodrow Wilson and Franklin D. Roosevelt or, with a view on his influence on European integration after the Second World War, Robert Schuman. But there were very few women and men who did not primarily exert such influence in their professional or political role. As such (truly) independent individuals we can identify Bertha von Suttner (1843-1914), Eleanor Roosevelt (1884-1962), or Raphael Lemkin (1900-1959).

So, Elisabeth Mann is indeed a member of a very small group of people who managed to have a long-term impact on international law, and perhaps the only person with such an impact on the law of the sea in the era of the United Nations. I wish to thank the President of the International Progress Organization, Dr. Hans Köchler, who convened this Roundtable in Valletta, for giving me the opportunity to study more closely the work and life of Elisabeth Mann. It has truly been a joy to encounter again her energy, cheerfulness and indestructible optimism which also pertained to the development of international law and global governance.

Elisabeth Mann Borgese was an early and persistent proponent of a constitutional understanding of the law of the sea and, in particular, of the United Nations Convention on the Law of the Sea of 1982. Apparently, it was in 1972 that she first used the notion of "a constitution for the oceans" in her publications.[4] In my present contribution to the roundtable consultation, I want to explore what she meant, and wanted to convey, by using a constitutional language for the law of the sea. In a second part of my paper, the principal sources of her constitutional thought are discussed. In particular, I mention the influence exerted by Giuseppe Antonio Borgese and the Chicago "Committee to Frame

[3] See Bardo Fassbender & Anne Peters (eds.), *The Oxford Handbook of the History of International Law*. Oxford University Press, 2012, pp. 1152 *et seq.*

[4] See Elisabeth Mann Borgese, "A Constitution for the Oceans," in: *The Fate of the Oceans*, ed. by John J. Logue, with a preface by Arvid Pardo. Villanova, Pennsylvania: Villanova University Press 1972, pp. 1-24.

a World Constitution," by Ambassador Arvid Pardo, and by her father Thomas Mann. The third and last part briefly deals with the reception of Elisabeth Mann's idea of a "constitution for the oceans" in political and legal science. Can the Law of the Sea Convention be understood as a constitution, or as a part of a constitutional law of the international community?

That question, it must be admitted, is very much a "lawyer's question," or a question belonging to a type asked by legal scholars. It is a terminological question which matters to lawyers because until recently "constitution" was a notion used in public law almost exclusively in regard to the modern state. (Only) a state was said to have a constitution and a constitutional law, while international law – as a law governing the relations between independent states on the basis of equality and reciprocity – was meant to be devoid of a law fulfilling the functions of a constitution. By contrast, today the transfer, or "translation," of the constitutional idea from the sphere of the modern state to that of international law attracts the imagination of international lawyers. Nevertheless, that "lawyer's question" can help us to elucidate Elisabeth Mann Borgese's concept of international law, and especially the law of the sea.

Elisabeth Mann Borgese's Constitutional Understanding of the Law of the Sea

In a law review article published in 1998,[5] I had to devote substantial space to showing that there is no compelling reason to reserve the term "constitution" for the supreme law of a (sovereign) state but that, instead, the fundamental legal order of any autonomous community or body politic can be addressed as a constitution. This understanding entails a certain demystification of the institution of the (etatist) constitution and, with it, of the "sovereign state" as the former constitutional monopolist. The different approaches supporting such an understand-

[5] See Bardo Fassbender, "The United Nations Charter as Constitution of the International Community," in: *Columbia Journal of Transnational Law*, Vol. 36 (1998), pp. 529-619.

ing[6] (focusing, for instance, on an effective international protection of human rights in relation to states and international organizations, or on an improvement and expansion of international institutions) have in common that they aim at fostering international cooperation by consolidating the substantive legal ties between states as well as the institutional structures built in the past. The idea of a constitution in, or of, international law is summoned as an abbreviation for an increasingly differentiated and hierarchical law, and as a symbol of a (political) unity, which eventually shall be realized on a global scale.

In my own work, I have tried to give the idea of an international constitutional law a clearer and more concrete meaning by closely associating it with the United Nations Charter.[7] Drawing especially on the writings of the Austrian scholar Alfred Verdross (1890-1980), I suggested that the Charter, although it was formally created as a treaty, is characterized by a constitutional quality which in the course of the last decades has been confirmed and strengthened in such a way that today the instrument can be referred to as the (both substantive and formal) constitution of the international community. I argued that the Charter shows a number of strong constitutional features. In particular, the Charter includes rules about how the basic functions of governance are performed in the international community, that is to say, how and by whom the law is made and applied, and how and by whom legal claims are adjudicated. The Charter also establishes a hierarchy of norms (Article 103). I further tried to demonstrate that by understanding the Charter as a constitution we gain a standard allowing adequate (legal) solutions of issues such as the interpretation of the Charter, the relationship between its law and "general international law," the reform of the UN Security Council, or the question to what extent the Security

[6] For a description and analysis of those approaches, see Bardo Fassbender, "The Meaning of International Constitutional Law," in: Ronald St. J. Macdonald & Douglas M. Johnston (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*. Leiden/Boston: Brill Nijhoff, 2005, pp. 837-851, at p. 839 *et seq.*, p. 842 *et seq.*

[7] See, in particular, my article of 1998 (*supra* note 5) and my book *The United Nations Charter as the Constitution of the International Community*. Leiden/Boston: Martinus Nijhoff Publishers, 2009. For a later engagement with the pertinent issues, see Bardo Fassbender, "International Constitutional Law: Written or Unwritten?," in: *Chinese Journal of International Law*, Vol. 15 (2016), pp. 489-515.

Council is bound by international law. A principal reason for my suggesting that the UN Charter can be understood as the constitution of the international community was the intention to get out of the fog of the indistinct constitutional rhetoric by turning to one visible document as an authoritative statement of the fundamental rights and responsibilities of the members of the international community and the values to which this community is committed, as well as the basis of the most important community institutions. However, so far most legal scholars favoring the idea of international constitutionalism prefer to stay in conceptually vaguer worlds.[8]

It is against this background that I found it interesting to see that Elisabeth Mann Borgese was an early advocate of a constitutional under-

[8] In view of the present international situation and the collapse of fundamental rules of international law established in the post-World War II era, it may be permitted to quote the following remarks written some twenty years ago (*supra* note 6): "[T]he hesitancies to give the UN Charter a central place in a constitutional structure of the international community are also politically motivated. At the beginning of the twenty-first century, the position and role of the United Nations in international affairs find themselves under great stress. In turbulent times, the organization faces an environment which is partly openly hostile, partly disinterested, and partly friendly but not decisively supportive. Fundamental rules of the Charter, such as the ban on the use of force, are challenged, and the legitimacy of the Security Council, as the organization's institutional backbone, is called into question. And yet, and in my opinion deplorably, the members of the international community are far away from uniting their strength in an effort to give new life and vigour to the Charter system of international governance. To many, the Charter looks more and more like a monument of a distant past – an embodiment of an idea of collective security whose days are over. In this situation, can one dare to regard the Charter as the foundation of the entire house of contemporary international law? (…) Perhaps the UN era is drawing to a close, and only now, looking back, the peoples of the United Nations realize that they had a constitution. But the idea of a constitution of the international community will survive because it is both indispensable as a legal device and unrivalled as a symbol of unity of humankind realizing its existence in one world. If the future landscape of international relations will know a legal order at all, as an order based on the principles of self-determination, autonomy and equality of all nations, a universal constitution will be an essential element of that order. And just as much as the idea of a constitution of the international community will survive, the contribution the UN Charter has made to this idea's development will be unextinguishable in the book of world history." (Fassbender, "The Meaning of International Constitutional Law," at p. 850 *et seq.*, footnotes omitted.)

standing of the law of the sea. As mentioned before, it was apparently in 1972 that she introduced the notion of "a constitution for the oceans" into the law of the sea literature, using it in the title of a contribution to a book with a preface by Arvid Pardo.[9] Three years later, she used the same title for a chapter in a book about "peace, pollution, and potential of the Oceans" co-edited with David Krieger,[10] and once more in 1978 for an article in the San Diego Law Review[11] in which she critically examined the provisions of Part XI of the "Informal Composite Negotiating Text" released after the end of the Sixth Session of the United Nations Conference on the Law of the Sea in 1977. Part XI of the "Text" dealt with the regime governing the management of the resources of the deep seabed beyond the limits of national jurisdiction. In her report "The Future of the Oceans" submitted to the Club of Rome in 1986, chapters 4 and 5 were entitled "A Constitution for the Oceans: Systems-Maintaining" and "A Constitution of the Oceans: Systems-Transforming," respectively.[12]

So what exactly did Elisabeth Mann Borgese mean by "a constitution for the oceans"? What did she want to convey, or to achieve, by using that constitutional language? And is there a difference between that notion and the expression "international ocean regime" which she also used?[13]

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[9] See *supra* note 4.

[10] See Elisabeth Mann Borgese, "A Constitution for the Oceans", in: *id.* & David Krieger (eds.), *The Tides of Change: Peace, Pollution, and Potential of the Oceans*. Selected Papers of Convocations and Research Projects Sponsored by *Pacem in Maribus* in Preparation for the United Nations Conference on the Law of the Sea. New York: Mason/Charter, 1975, pp. 340-352. This volume also includes a chapter written by Arvid Pardo, "New Institutions for Ocean Space" (pp. 324-327).

[11] See Elisabeth Mann Borgese, "A Constitution for the Oceans: Comments and Suggestions Regarding Part XI of the Informal Composite Negotiating Text," in: *San Diego Law Review*, Vol. 15 (1978), pp. 371-408.

[12] See Elisabeth Mann Borgese, *The Future of the Oceans: A Report to the Club of Rome*. Montreal, Canada: Harvest House, 1986, pp. 69 *et seq.*, 93 *et seq.*

[13] See, *e.g.*, Elisabeth Mann Borgese, *The Ocean Regime: A Suggested Statute for the Peaceful Uses of the High Seas and the Seabed Beyond the Limits of National Jurisdiction*. Santa Barbara, California: Center for the Study of Democratic Institutions, 1968; *id.*, "Towards an International Ocean Regime," in: *Texas International Law Forum*, Vol. 5 (1969), pp. 218-234. Cf. Meyer, *Elisabeth Mann Borgese* (*supra* note 1), ch. 5 (pp. 105-124): "'The Ocean Regime' and the 'Draft Ocean Space Treaty'."

In her many pertinent publications, I could not find a systematic or comprehensive definition of the term "constitution for the Oceans." After all, she was not a lawyer interested in notions and terms and their exact meaning and relationships. Instead, she wanted to identify and solve practical problems. There is, however, a certain context in which the term "constitution" appears in her writings and speeches. Characteristic keywords for that context are "The New International Economic Order," "the world political and economic system," "the common heritage of mankind," "the common good," and "a new order for the Oceans and the world."[14] Let me quote, by way of example, a passage in her 1978 article in the San Diego Law Review:

> "The basic principle governing the conduct of States in the international seabed area is treatment of the area as the common heritage of mankind. It cannot be stressed enough that the adoption of this principle by the General Assembly as a norm of international law marked the beginning of a revolution in international relations. It has the potential to transform the relationship between poor and rich countries. It must and it will become the basis of the *new international economic order*, of which the Law of the Sea Convention, whether one likes it or not, is both a forerunner and an essential part."[15]

After the Convention had been signed, Elisabeth Mann wrote in 1983 in the journal "Scientific American":

> "[T]he Conference succeeded in writing a *'constitution for the oceans'* in 320 articles (organized in 17 main parts) and nine technical annexes. If the gist of this enormous work can be stated in one sentence, the Convention replaces the traditional laissez faire system of freedom of the seas with an emerging system of management. In place of the two-dimensional boundless sea the Convention deals with a finite three-dimensional resource, its depths of as much economic interest as its surface. […] The Convention

[14] See, *e.g.*, Mann Borgese, "A Constitution for the Oceans" (*supra* note 11), at pp. 371, 373, 374.

[15] Mann Borgese, "A Constitution for the Oceans" (*supra* note 11), at p. 375 *et seq*. (footnote omitted and emphasis added). See also Elisabeth Mann Borgese, "The New International Economic Order and the Law of the Sea," in: *San Diego Law Review*, vol. 14 (1977), at pp. 584-596.

> provides a *comprehensive global framework* for the protection of the marine environment, a new regime for marine scientific research and a comprehensive system for settling disputes. […] It updates and codifies traditional law. It defines rights as well as responsibilities for states and international organizations in establishing and enhancing a *new order in the world's seas and oceans*.
>
> The making of the new Law of the Sea engages all the issues the world community has to face in our age: food and energy, the arms race, communications and the 'information revolution,' trade, commodity policy, resource management and conservation, regional integration and the movements in science and technology that underlie many of these. It is as though all the issues were flowing together in the world ocean and the ocean had now become our *laboratory for the building of a new world order*. That order, we may hope, will prove more rational, more humane and more responsive to the real needs of the world than the old order that is disintegrating in hunger and violence.
>
> […] The Law of the Sea does not […] lead an autonomous existence. It must be seen as the expression of the order and disorder, intranational as well as international, of our time. If present trends continue in other sectors of international relations, states will exploit the loopholes, defects and contradictions of the Convention to plunder and pollute the ocean, exhaust its living resources and deploy their weapons in its depths. If states, on the other hand, turn to serious negotiation of balanced global development and peace, they will find that the Convention provides a *foundation for building a better world*."[16]

To give a third and last example, this is a quote from an article published by Elisabeth Mann Borgese in the San Diego Law Review in 1987:

> "The Maltese initiative [Ambassador Pardo's address of 1967] was a stunning event, probably unique in history in its consequences. What Malta proposed was a *new order for the seas and oceans, in*

[16] See Elisabeth Mann Borgese, "The Law of the Sea," in: *Scientific American*, Vol. 248, No. 3 (March 1983), pp. 42-47, at pp. 42, 48 (emphasis added).

> *essence a new order for the world*. It was an order, not based on competition and conflict, but on cooperation, on the revolutionary principle that the oceans are the common heritage of mankind and that the marine environment and its resources, therefore, had to be managed for the *common good of all* – through ocean institutions in which all states, whether landlocked or coastal, would participate, sharing the benefits, regardless of the stage of their technological or economic development.
>
> […] [The Law of the Sea Convention] is a framework, a beginning, from which to build something that otherwise could not have been built. This is its enormous merit. […] [O]ur generation can take some pride in having contributed, no matter how fumblingly and bunglingly, to the making of the new order for the seas and oceans, to the opening of new ways of thinking about world order, and to the hammering-out of a platform from which in the future a great many new initiatives can be launched."[17]

From the foregoing it appears that Elisabeth Mann was not concerned about a doctrinal or juridical, systematic definition of the notion of a "constitution for [or: of] the Oceans." She was not a trained lawyer or law professor, notwithstanding the excellent knowledge of the law of the sea, which she had acquired in hard work. And she did not connect her vocabulary with the contemporary literature of international law about an emerging "international constitutional law" although she was familiar with that literature. She knew, for instance, Wolfgang Friedmann's book about "The Changing Structure of International Law" of

[17] See Elisabeth Mann Borgese, "Foreword," in: *San Diego Law Review,* Vol. 24 (1987), pp. 595-601, at pp. 595, 598, 601 (emphasis added).

1964,[18] and also the author himself.[19] She was also familiar with Grenville Clark's and Louis B. Sohn's work "World Peace Through World Law" of 1958/1963,[20] which proposed a strongly revised United Nations Charter.[21] Further, as I explain below, her work for the Chicago "Committee to Frame a World Constitution" had provided her with a good knowledge of the historical development of Western constitutional thought, and of a number of state constitutions having features relevant to the project of a world constitution.

However, while she avoided an entanglement in academic legal discussions, her use of constitutional language with regard to ocean governance was not merely symbolic, or rhetorical, or metaphorical.

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[18] See, *e.g.*, Wolfgang Friedmann, *The Changing Structure of International Law*, London: Stevens, 1964, at p. 153: "New Fields of International Law: International Constitutional Law."

[19] Elisabeth Mann mentions him in a speech of 1999 in commemoration of Arvid Pardo: "With the help of the great international law expert Wolfgang Friedmann, author of a classic, *The Changing Structure of International Law*, I was in the process of developing a project proposal [for a three-year project on the emerging new Law of the Sea] – when, on November 1, 1967, Arvid Pardo, then Permanent Representative of Malta at the United Nations, among other things, delivered his historic address on the oceans at the United Nations. That struck like lightning, or I should say, like enlightening." See Elisabeth Mann Borgese, "Arvid Pardo: Retrospect and Prospect" (typewritten manuscript), at p. 2, in: Dalhousie University Archives, Elisabeth Mann Borgese Fonds, File MS-2-744, Box 345, Folder 4; available at https://findingaids.library.dal.ca/arvid-pardo-retrospect-and-prospect-by-elisabeth-mann-borgese. This document is one of many of Elisabeth Mann's papers (55.5 meters of textual records, kept in 370 boxes) which the Archives have made available in digital format.

[20] Grenville Clark & Louis B. Sohn, *World Peace Through World Law*. Cambridge, Massachusetts: Harvard University Press, 1958, 2nd, revised ed. 1962.

[21] See Elisabeth Mann Borgese, "The Years of My Life: The Nexus Lecture" (presented at the Nexus Institute, Tilburg, The Netherlands, on 12 May 1999), in: *Ocean Yearbook*, Vol. 18 (2004), pp. 1-21, at p. 8. Fully reprinted in: *Drama der Meere* (*supra* note 1), at pp. 206-225.

On the contrary, that use had a definite purpose.[22] It was meant to promote and bring forth, in essence,

- an international ocean regime that is as firm and binding as possible, not only based on a treaty that can be terminated any time,
- a legal regime binding on all states, without the right of a single state to opt out from particular rules,
- a regime providing for permanent institutions to administer and further develop the law, and to settle disputes between states,
- a regime that is an integral part of a larger global public order,
- a regime representing a new type of international organization, departing from the model of the first half of the 20th century,
- a regime connected with the goals and values of the UN Charter as expressed in its preamble and in Articles 1 and 2, in particular the maintenance of world peace, and beyond that, with the forms of government known as democracy and federalism, and
- an ocean regime, which could serve as a model (or "laboratory") for the governance of other fields of international relations (such as security and disarmament, economic and social development, or environmental protection).

Elisabeth Mann Borgese even saw the possibility of an "evolutionary transformation of the United Nations." At the end of an address delivered at the University of Texas School of Law in 1969, she said: "Let me

[22] In 1978, Elisabeth Mann called it "surprising that the Conference has done so little about *elaborating* the concept of common heritage and giving it a clear definition in legal and economic terms. For the outsider or newcomer to international law and the law of the sea, it is difficult to conceptualize the precise meaning of this new concept, which remains somewhat rhetorical and ethereal. Yet the components of a definition are all in the ICNT [Informal Composite Negotiating Text of 1977]." See Mann Borgese, "A Constitution for the Oceans" (*supra* note 11), at p. 376. The same could be critically said about her own (missing) elaboration of the concept of the Convention as a constitution. Yet the components of a definition are all in her writings and speeches …

close on this note of hope for an evolution of the United Nations initiated by the creation of an Ocean Regime. The goal that is taking shape if we follow this road is not likely to be a 'world state' in the traditional sense of 'state' or 'superstate.' More likely, it will be a flexible system of cooperative world communities, evolving new though already recognizable principles of democracy, federalism, planning, and law."[23] In that sense, one can also speak of a (partly) "aspirational" use of constitutional language.

The Sources of Elisabeth Mann Borgese's Constitutional Thought

As competently described by Betsy Baker[24] and by Tirza Meyer,[25] there was a strong influence exerted on her thinking and objectives by her husband Giuseppe Antonio Borgese (1882–1952)[26] and the work of the "Committee to Frame a World Constitution" established at the University of Chicago in 1945 with the support of the University's chancellor and former President Robert Maynard Hutchins. Hutchins became the President of the Committee,[27] and Borgese its Secretary-General. The Committee's cable address was "Oneworld, Chicago."[28] From 1946 to 1952, Elisabeth helped her husband formulating a "world constitu-

[23] See Mann Borgese, "Towards an International Ocean Regime" (*supra* note 13), at p. 234.

[24] See Betsy Baker, "Uncommon Heritage: Elisabeth Mann Borgese, *Pacem in Maribus*, the International Ocean Institute and Preparations for UNCLOS III," in: *Ocean Yearbook Online*, vol. 26 (2012), pp. 11-34, at p. 14 *et seq*.

[25] See Meyer, *Elisabeth Mann Borgese* (*supra* note 1), at pp. 19-34. See also Holzer, *Elisabeth Mann Borgese* (*supra* note 11), at p. 96 *et seq.* (about G. A. Borgese and his marriage with Elisabeth), and p. 119 *et seq.* (about the joint work on the world constitution project); and further Wolfgang Graf Vitzthum, "Sekretäre des Weltgeistes: Erich von Kahler und Elisabeth Mann Borgese," in: *id., Kleine Schriften II* (ed. by Stefan Talmon). Berlin: Duncker & Humblot, 2021, pp. 221-240.

[26] See Giovanni di Stefano, "Giuseppe Antonio Borgese: Porträt eines unruhigen Weltbürgers," in: *Drama der Meere* (*supra* note 1), at pp. 46-63 (with a bibliography of Borgese's publications).

[27] For his biography, see Edward Shils, "Robert Maynard Hutchins," in: *The American Scholar*, Vol. 59, No. 2 (Spring 1990), pp. 211-235.

[28] See the reproduction of the letterhead of the Committee, in: *Die Kinder der Manns* (*supra* note 1), at p. 209.

tion." As a part of her work for the Committee, she analyzed a number of national constitutions (among them those of the United States, Russia, China and India) and proposals for a world federation or government submitted by other organizations, and also dealt with subjects of constitutional history.[29]

The Committee adopted and published its "Preliminary Draft of a World Constitution" in 1948.[30] As Elisabeth Mann remembered forty years later, "[w]hile fully aware that our Constitution was not 'realistic' in the sense that the international community could adopt it in the immediate tomorrow, we intended it to be a blueprint pointing in the direction of a desirable, or probably, ineluctable future."[31]

The draft constitution included a brief "Declaration of Duties and Rights" of the individual world citizens, arranged in three paragraphs, A (duties), B (rights), and C, the latter reading as follows:

"The four elements of life – earth, water, air, energy – are the common property of the human race. The management and use of such portions thereof as are vested in or assigned to particular ownership, private or corporate or national or regional, of definite or indefinite tenure, of

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[29] See Meyer, *Elisabeth Mann Borgese* (*supra* note 11), at pp. 18, 32 *et seq.* The "Index of Committee Documents" in the annex of the *Preliminary Draft of a World Constitution* (*infra* note 30, p. 69 *et seq.*) lists thirteen papers authored by Elisabeth Mann Borgese. Most of these papers were published in the journal of the Committee, *Common Cause*, and are listed in the bibliography in *Drama der Meere* (*supra* note 1), at p. 247.

[30] Committee to Frame a World Constitution, *Preliminary Draft of a World Constitution*. Chicago, Illinois: The University of Chicago Press, 1948. In an article of the same year, Elisabeth Mann Borgese defended the Draft against criticism that it presented a "utopian picture of a perfect and maximal human society." See Elisabeth Mann Borgese, "Why a Maximalist Constitution?," in: *Bulletin of the Atomic Scientists*, Vol. 4, No. 7 (July 1948), pp. 199-204 (quotation at the very end). See also her introduction to a reprint of the Draft published in 1965: Elisabeth Mann Borgese, "Introduction," in: Center for the Study of Democratic Institutions (ed.), *A Constitution for the World*. Santa Barbara, California, 1965, pp. 3-24.

[31] See Mann Borgese, "The Years of My Life" (*supra* note 21), at p. 8 *et seq.* See also Elisabeth Mann Borgese, *Die Meer-Frau: Gespräch mit Amadou Seitz in der Reihe "Zeugen des Jahrhunderts"* (ed. by Ingo Hermann). Göttingen: Lamuv Verlag, 1993, p. 67 *et seq.*

individualistic or collectivist economy, shall be subordinated in each and all cases to the interest of the common good."[32]

In a speech held in 1999, Elisabeth Mann explained that provision of the draft:

> "The motto of that Constitution had been Pax *opus iustitiae* – Peace is the result of justice, or, in other words, world peace must be founded on international social justice, including the end of colonialism and of economic inequity. Economic equity, however, could not be attained on the basis of the present economic systems, whether Marxist or capitalist. These systems had to be transcended by one which declared 'the four elements of life' – *water*, which included both the oceans and fresh water; *land*, which included the minerals below the surface; *air*, which included the atmosphere and outer space; and *fire*, which included energy – to be the common property of all mankind."[33]

In 1964, Elisabeth Mann accepted Robert Hutchins' invitation to join the "Center for the Study of Democratic Institutions" in Santa Barbara, California. Between 1965 and 1975, the Center organized four international conferences about issues of world peace and organization named after Pope John XXIII's encyclical "Pacem in terris" of 1963.[34] Having learned of new and promising developments in the law of the sea, she convinced Hutchins in 1967 "that the prospect of seeing at least one of the 'four elements of life' declared to be a common heritage of mankind was indeed exciting and that a three-year project on the emerging new Law of the Sea would be a worthwhile undertaking, enabling us to bring the utopian ideals of the World Constitution into the arena of real politics."[35] Looking back, Elisabeth Mann expressly spoke of "the continuity between the utopian, academic efforts of the Chicago Committee (…)

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[32] See Preliminary Draft (*supra* note 30), at p. 6. According to the "Summary Report" of the Committee, a comment on the Draft, para. C was inspired by a speech of Hewlett Johnson, the Dean of Canterbury, delivered on September 26, 1943, in the Royal Albert Hall, London. See *Preliminary Draft*, at p. 49.

[33] See Mann Borgese, "Arvid Pardo: Retrospect and Prospect" (*supra* note 19), at p. 1.

[34] See Meyer, Elisabeth Mann Borgese (*supra* note 1), at p. 38 *et seq.*

[35] See Mann Borgese, "Arvid Pardo: Retrospect and Prospect" (*supra* note 19), at p. 1 *et seq.*

and, twenty years later, the global, political effort to frame what was to be called 'a Constitution for the Ocean'."[36]

But there was also an impact on Elisabeth Mann Borgese's constitutional thought of the efforts of Ambassador Arvid Pardo (1914-1999)[37] to declare the sea-bed and the ocean floor beyond the limits of national jurisdiction "a common heritage of mankind" to "be used and exploited for peaceful purposes and for the exclusive benefit of mankind as a whole,"[38] and to establish a comprehensive system of governance of the oceans under the aegis of the United Nations. She was especially intrigued by Pardo's holistic approach to the law of the sea, encompassing peace and security, protection of the environment, development, and a fair and equitable distribution of natural resources, also with a view to future generations. That approach very much corresponded with her vision of a constitution of the oceans; and it did not matter that Pardo himself avoided similar constitutional language.[39] In her lecture "The Years of My Life" of 1999 she confided that Pardo's "influence on my thinking and on my life is commensurate only to that of my parents and my husband."[40] She praised "his combination of prophetic vision and practical attention to detail," as well as his encyclopedic knowledge.[41]

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[36] See Mann Borgese, "The Years of My Life" (*supra* note 21), at p. 10.

[37] For an instructive and accurate account of his life, see Carl Q. Christol, "Arvid Pardo," in: *PS: Political Science & Politics*, Vol. 32, Issue 4 (Dec. 1999), pp. 777-778. See also Jean Buttigieg, "Arvid Pardo – A Diplomat with a Mission," in: *Symposia Melitensia*, No. 12 (2016), pp. 13-28.

[38] See Ambassador Pardo's famous speech in the First Committee of the UN General Assembly on November 1, 1967; UN General Assembly, Twenty-second Session, First Committee, 1515th and 1516th Meetings, UN Doc. A/C.1/PV.1515, pp. 1-15, and A.C.1/PV.1516, pp. 1-3 (quotation at p. 2).

[39] For an interesting reflection on a new law of the sea, and to what extent it was realized in the 1982 Convention, see Arvid Pardo, "Before and after," in: *Law and Contemporary Problems*, Vol. 46, No. 2 (1983), pp. 95-105. "For the first time in world history," he said, "a heterogeneous and bitterly divided world community has attempted to establish what some [*sic!*] have called 'a constitution for the oceans,' that is, a comprehensive conventional framework for man's activities in the marine environment" (at p. 97).

[40] See Mann Borgese, "The Years of My Life" (*supra* note 21), at p. 11.

[41] See Mann Borgese, "Arvid Pardo: Retrospect and Prospect" (*supra* note 19), at p. 2.

A third important source of Elisabeth Mann's constitutional thought was her father Thomas Mann – first and foremost his personality, and secondly his commitment to and work on questions of democracy, freedom, republicanism, world peace, human rights and international cooperation and solidarity.[42] It is remarkable and touching that she received from her father not only (as she often confessed) her love for the sea[43] but also the mental and intellectual faculties and interests which enabled her to successfully work for the protection of the sea and all its living and non-living resources. As the motto of the last chapter of her book "The Drama of the Oceans"[44] (published in 1975 to support the goals she pursued in the ongoing Law of Sea Conference by providing a panoramic view of the oceans and their utilization by man in the course of history) she chose a quotation from her father's novella "Tonio Kröger": "While I am writing, the sea is rushing beneath me, and I close my eyes. I look into an unborn and hazy world which wants to be formed and organized …"[45] And she closed the book with a passionate plea for the "love for nature and reverence for the powerful, the elementary, the vital and the beautiful of the oceans"[46] which could have

[42] It is impossible here to present, or even to outline, Thomas Mann's political thought and its development, in the course of a lifetime, with a view to Germany, Europe, the United States, and the world. His principal writings addressing these matters are compiled in a volume edited by Hermann Kurzke, *Thomas Mann, Essays,* Vol. 2: *Politische Reden und Schriften*. Frankfurt am Main: Fischer Taschenbuch Verlag, 1977. Kurzke is also the author of an outstanding biography of the writer: Hermann Kurzke, *Thomas Mann: Das Leben als Kunstwerk*. Munich: C. H. Beck, 1999 (English edition: *Thomas Mann: Life as a Work of Art*, Princeton University Press, 2002). – For the influence of Thomas Mann on his daughter's thought and writings, see also Peter Serracino Inglott, "Elisabeth Mann Borgese: Metaphysician by Birth," in: *Ocean Yearbook*, vol. 18 (2004), pp. 22-74.

[43] The importance of the sea for Thomas Mann and his work has become a research subject in its own right. See, *e.g.*, Volker Weidermann, *Mann vom Meer: Thomas Mann und die Liebe seines Lebens*. Cologne: Kiepenheuer & Witsch, 2023, and Uwe Naumann, "Die Manns und das Meer," in: *Niddener Hefte*, vol. 13 (2020), at pp. 89-99.

[44] Elisabeth Mann Borgese, *The Drama of the Oceans*. New York: Harry N. Abrams, 1975. German edition: *Das Drama der Meere*. Frankfurt am Main: S. Fischer, 1977.

[45] See Mann Borgese, *The Drama of the Oceans* (*supra* note 44), at p. 227 of the German edition.

[46] See Mann Borgese, *The Drama of the Oceans* (*supra* note 44), at p. 247 of the German edition.

been written by her father. Repeatedly she quoted extracts from her father's introduction to the German edition of the "Preliminary Draft of a World Constitution."[47]

The Reception of Elisabeth Mann Borgese's Idea of a "Constitution for the Oceans" in Political and Legal Science

How was Elisabeth Mann Borgese's constitutional understanding of the law of the sea received in political and legal science?

In substance, the preamble of the UN Convention on the Law of the Sea signed on December 10, 1982 incorporated most of the elements of Elisabeth Mann's constitutional idea: the comprehensive character of the Convention ("to settle […] all issues relating to the law of the sea"), its interconnection with "the maintenance of peace, justice and progress for all peoples of the world," the Convention as establishing "a legal order for the seas and oceans," its contribution to "the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries," its development of the principle of the common heritage of mankind, and its contribution to "the strengthening of peace, security, co-operation and friendly relations among all nations in conformity with the principles of justice and equal rights" and with the purposes and principles of the United Nations as set forth in the UN Charter.

In his statements at the final session of the Conference on the Law of the Sea in December 1982, the President of the Conference, Tommy T. B. Koh, referred to these elements when he answered the question "whether we achieved our fundamental objective of producing *a comprehensive constitution for the oceans*" in the affirmative. He closed by saying that the diplomats and lawyers negotiating the Convention

[47] See, e.g., Mann Borgese, "The Years of My Life" (*supra* note 21), at p. 9 *et seq.*

"worked not only to promote our individual national interests but also in pursuit of our common dream of writing *a constitution for the oceans*."[48]

I believe that this – often repeated and referred to[49] – evaluation and appraisal of the final text of the Convention by a voice so authoritative as that of the President of the Conference very much satisfied Elisabeth Mann's aspirations. She also certainly welcomed how the eminent Canadian international lawyer (and between 1978 and 1990 her colleague at Dalhousie University) Ronald St. John Macdonald characterized the Law of Sea Convention in 1999: "Just as the Charter of the UN stands as the mother constitution to the Law of the Sea Convention, the latter now stands as a constitution in its own right to the structure and process of continuing refinements [of the law of the sea]."[50]

Then again, Elisabeth Mann would probably have been less interested in a terminological or conceptual argument about the accuracy of the word "constitution" which has engaged the interest of a part of the international law and international relations literature. Shirley V. Scott, a senior lecturer at the University of New South Wales in Australia, for instance used the eight "features of the ideal constitution" which I had developed following Max Weber's methodology[51] in order to assess the applicability of the term "constitution" to the Law of the Sea Conven-

[48] See Tommy T. B. Koh, "A Constitution for the Oceans," adapted from statements by the President of the Third United Nations Conference on the Law of the Sea on 6 and 11 December 1982 at the final session of the Conference at Montego Bay (emphasis added). Available at https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf.

[49] See Reece Lewis, "The 'Constitution for the Oceans'? The Law of the Sea Convention as a Living Treaty," in: *International and Comparative Law Quarterly*, vol. 74 (2025), pp. 1-31, at p. 2 (with references in footnotes 4 to 9): "Ever since, this claim [that the Convention was a constitution] has been widely and routinely repeated by States, the European Union, UN Secretaries-General, the International Maritime Organization, in international courts and tribunals and by some leading scholars on the law of the sea." The author himself wants to demonstrate why the Convention is not a constitution and why a constitutional description should be avoided.

[50] See Ronald Macdonald, "The Charter of the United Nations in Constitutional Perspective," in: *Australian Year Book of International Law*, vol. 20 (1999), pp. 205-231, at p. 220.

[51] See Fassbender, "The United Nations Charter" (*supra* note 51), at 573-584.

tion.[52] The author concluded "that the LOS Convention displays a number of attributes characteristic of constitutions," and that the fact "that one or two characteristics typical of constitutions do not so readily apply to the LOS Convention in no way prevents it being thought of as a constitution."[53] By contrast, Professor Karen N. Scott of the University of Canterbury in New Zealand, while acknowledging the reasons for attributing a constitutional quality to the Convention, warned against certain "unintended consequences" of that attribution:

> "[D]escribing the Law of the Sea Convention as the 'constitution for the oceans' has not just created a strong backbone for the law of the sea, but it has also created a rod for its back or, to use a different metaphor, a straitjacket. It has and will continue to constrain developments within the parameters of its principles and concepts negotiated in the 1970s. Many of these, whether they relate to fisheries, maritime delimitation, marine conservation and equitable access to resources, are no longer fully apposite forty or sixty years on in a marinescape that has been transformed by climate, environmental, technological and geopolitical change. […] Abandoning the 'constitution' and its actual and perceived connotations and implications is a necessary first step to creating the legal and epistemological space to create a law of the sea fit for the Anthropocene."[54]

It is true that it is a key feature of a constitution "that it is enduring and difficult to change."[55] But does that prevent the Convention from

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[52] See Shirley V. Scott, "The LOS Convention as a Constitutional Regime for the Oceans," in: Alex G. Oude Elferink (ed.), *Stability and Change in the Law of the Sea: The Role of the LOS Convention*. Leiden/Boston: Martinus Nijhoff, 2005, pp. 9-38, at pp. 14-20.

[53] See S. V. Scott, "The LOS Convention" (*supra* note 52), at 20. See also Robin Churchill, "The 1982 United Nations Convention on the Law of the Sea," in: Donald Rothwell *et al.* (eds.), *The Oxford Handbook of the Law of the Sea*. Oxford University Press, 2015, pp. 24-45, at p. 44 *et seq.* (discussing "some consequences of significance [which] flow from such a designation"); Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea*. Manchester University Press, 4th ed. 2022, at p. 43; and Kirsten Sellars, A *"Constitution for the Oceans": The Long Hard Road to the UN Convention on the Law of the Sea*. Cambridge University Press, 2025.

[54] See Karen N. Scott, "The LOSC: 'A Constitution for the Oceans' in the Anthropocene?," in: *Australian Year Book of International Law*, vol. 41 (2023), pp. 269-298, at p. 297 *et seq.*

[55] See K. N. Scott, "The LOSC" (*supra* note 54), at p. 275.

"respond[ing] to new challenges and to changes in values and views in ocean governance"?[56] Constitutional amendment can be easier than that of an "ordinary" international treaty. The rules of the UN Charter about amendments (Articles 108 and 109) allow for majority decisions binding on all member states, in contrast to the rule traditionally applied to the amendment of international treaties – the requirement of consensus among the parties.[57] In any event, Elisabeth Mann would have seen the constitutional language rather as supporting the dynamic character of the law of the sea than an obstacle to progress and change.

Concluding Remarks

When this roundtable in Malta is meeting in the late summer of 2025, it can be safely said that Elisabeth Mann Borgese's characterization of the Law of the Sea Convention as a "constitution for the oceans," pronounced as early as in 1972,[58] has stood the test of time. The designation has found the support of governments, international organizations and legal scholars. In that sense, a "constitutionalization of the law of the sea" can be regarded as a part of Elisabeth Mann's intellectual legacy.

We do not know how Elisabeth Mann would assess the present state of the law of the sea and the development of the Law of the Sea Convention. She would certainly not shut her eyes to the shortcomings, difficulties and challenges that abound.[59] On the other hand, it is likely that, as so often, her optimism would have prevailed, an optimism of which her constitutionalism was an expression. In her lecture "The Years of My Life" she said:

[56] See K. N. Scott, "The LOSC" (*supra* note 54), at p. 276.

[57] *Cf.* Art. 316 para. 1 of the LOS Convention: "Amendments to this Convention, other than those referred to in paragraph 5, shall enter into force for the States Parties ratifying or acceding to them […]."

[58] See *supra* note 4.

[59] Professor Köchler speaks of "the flawed 'Constitution of the Sea,' which UNCLOS has become." See Hans Köchler, *Kastellorizo: The Geopolitics of Maritime Boundaries and the Dysfunctionality of the Law of the Sea*. Vienna: International Progress Organization, 2020, at p. 51.

> "Nothing human ever is perfect; and this Convention is riddled by political compromises, concessions to greed and power and vested interests, the struggle between the old and the new. So much so that Arvid Pardo […] was bitterly disappointed by what he thought was a dilution, even a betrayal of his ideas. […] Arvid Pardo said, the glass is half empty. I said, the glass is half full."[60]

In the same vein, she wrote in an article published in the year she died:

> "Rome was not built in a day. It would not be realistic to think the common heritage concept could be applied universally tomorrow. If we are not to catapult into Utopia, we must envisage a step-by-step process, without, however, losing sight of the whole. […] The next step, not into Utopia, but into the future, is greatly facilitated by what has already been achieved. Willy-nilly, *nolens volens*, the international community has already gone more than half way."[61]

Elisabeth Mann Borgese's constitutional reading of the law of the sea – one could also say: her constitutional project for the oceans – was an important part of that step-by-step process leading, hopefully, in the direction of a new model for international organization which the world urgently needs for its survival.

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[60] See Mann Borgese, "The Years of My Life" (*supra* note 21), at p. 14.

[61] See Elisabeth Mann Borgese, "The Common Heritage of Mankind: From Non-living to Living Resources and Beyond," in: Nisuke Ando *et al.* (eds.), *Liber Amicorum Judge Shigeru Oda*, vol. 2. The Hague / London / New York: Kluwer Law International, 2002, pp. 1313-1334, at p. 1333 *et seq.* See also *id.*, "Foreword" (supra note 17).

Tirza Meyer

The Power of Individuals in the Making of International Law: Taking Stock of a "Stock Story" about UNCLOS III

1. Rethinking the History of International Law

The Third Law of the Sea Conference (1974-1982), also known as UNCLOS III, is often described as one of history's most successful international conferences. It resulted in the Law of the Sea Treaty that was signed and later ratified with an Amendment to Part XI about seabed mining in 1994.

A legal contract based on international agreement cannot function without making sure it is cared for and updated, and that its provisions are enforced. In other words, it is very much like a living, evolving organism. This was neatly illustrated in 2024 when the International Seabed Authority (ISA) elected a new General Secretary with the potential to guide the work of the ISA in new directions,[1] and again in 2025 when the U.S. – which is not party to the treaty – announced that it would start seabed mining operations in the area reserved for the common heritage of humankind.[2] We have yet to see how well the law is equipped to meet such challenges.

While the law in its current form is a living and changing entity, that is also how it came about in the first place. The Law of the Sea Treaty evolved through a lively process of negotiation, shaped by individuals working to design it. In common effort and over the course of several decades, institutions were built and a legal framework was created that

[1] *The Secretary-General – International Seabed Authority,* January 1, 2025, https://isa.org.jm/the-secretary-general/.

[2] "Unleashing America's Offshore Critical Minerals and Resources," The White House, April 24, 2025, https://www.whitehouse.gov/presidential-actions/2025/04/unleashing-americas-offshore-critical-minerals-and-resources/.

is now being tested by unilateral action. The history of codifying the Law of the Sea and formulating new regulations for the deep seafloor is a tale of power struggles, trade-offs, victories and sacrifices – all of which are a normal part of the process of international law-making.

2. Historiographical Intervention: Stock Stories and Counter Stories

When we study international negotiations, we often focus on the institutions that are built and the treaties they produce. We also tend to home in on the most powerful players of the negotiations – such as charismatic political leaders – or the positions of key states who have specific interests in an outcome and are therefore vocal about their position. In this essay, I want to suggest shifting attention to those who are often overlooked – those who hold less favorable positions, and who have to adapt to changing alliances and seek influence through various channels like networks, relationships and platform building.

I want to make my point about power and influence of peripheral actors with the help of international law scholar Surabhi Ranganathan's essay, "The Seabed and the South: From Stock Stories to New Histories of International Lawmaking." In her essay, Ranganathan claims that the main narrative about UNCLOS "is a generic story of the making of constitutions,"[3] meaning that it follows a common narrative about power struggles and trade-offs that are settled by "enlightened moderation of wise men"[4] bringing rationality to a chaos-prone process, trying to find a middle ground of different wants and needs.[5]

Ranganathan argues that this dominant narrative about UNCLOS omits and even vilifies other perspectives, especially the perspective

[3] Surabhi Ranganathan, "The Seabed and the South: From Stock Stories to New Histories of International Lawmaking," *University of Cambridge Faculty of Law Research Paper*, no. 4 (February 2024): 11.

[4] *Ibid.*

[5] In her essay, Surabhi Ranganathan writes that the historiography of UNCLOS III has produced this stock story. I would rather call it a narrative based on how it is portrayed in much of legal writing about UNCLOS. There are, to date, very few works on the UNCLOS negotiations processes written by historians.

of the Global South. She shows how the delegates of the Group of 77 (G77) – a coalition of developing countries – were routinely presented as greedy troublemakers or seen as placing unrealistic expectations on the outcome of UNCLOS for the good of humanity. She uses legal scholar Richard Delgado's term "stock story"[6] to describe the dominant narrative of UNCLOS, which she describes as a "curated account of reality that serves to justify investment in existing structures."[7]

As a case in point, she examines how Cameroonian delegate Paul Bamela Engo, leader of the first committee working on the contentious seabed issue, was portrayed in most of the literature about UNCLOS. She writes: "Engo was viewed as having caused 'unnecessary complications and acrimony', driven by 'resentment', power-hungry, and keen to stamp his authority over the process despite lacking necessary political or drafting skills."[8] None of these descriptions accurately reflects his position, political background and expertise. Instead, Ranganathan argues that the U.S. used allegedly exaggerated G77 demands as an excuse for not ratifying the final treaty, thus putting blame on developing nations to rationalize its own shortcomings.[9]

In this essay, I seek to look further beyond the "stock story," by focusing on two other key figures at UNCLOS III – both of whom fought on the side of the G77 but did not come from developing countries themselves. I want to highlight the roles of Elisabeth Mann Borgese and Arvid Pardo, exploring how their trajectories through the convention might help us understand how individuals can succeed in getting their ideas into the negotiation process, and the obstacles they face. We will follow their work in the preparation period from 1967 to 1973, and

[6] See Richard Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative," *Michigan Law Review* 87, no. 8 (1989): 2411–41.

[7] Ranganathan, *op. cit.*, 2.

[8] Ranganathan, *op. cit.*, 4. She refers to comments made in Markus G. Schmidt, *Common Heritage or Common Burden? The United States Position on the Development of a Regime for Deap [sic: Deep] Sea-Bed Mining in the Law of the Sea Convention* (Clarendon Press, 1989), and in Alex G. Oude Elferink, "E. L. Miles, Global Ocean Politics: The Decision Process at the Third United Nations Conference on the Law of the Sea 1973–1982," *Netherlands International Law Review* 46, no. 2 (1999): 260–65, https://doi.org/10.1017/S0165070X00002448.

[9] Cf. Ranganathan, *op. cit.*, 2.

the "hot phase" of negotiations from 1973 to 1982. We will then move on to a short evaluation of their collaboration and legacies and finally place them into the larger context of the counter story of UNCLOS.

3. The Preparatory Phase (1967–1973): Collaboration and Idealism

There is a popular narrative about the moment the concept of common heritage of humankind was introduced in the Law of the Sea. The story goes that Maltese Ambassador Arvid Pardo stepped up at the General Assembly's First Committee in 1967 to speak about an idea. As he stood at the speaker's desk, the room was not even half full, and yet this session became known as a "'you should have been there' kind of moment."[10] In a lengthy speech – which covered the latest deep-sea technologies and even speculated on future developments and the immense potential wealth of deep-seafloor mineral deposits – Arvid Pardo suggested applying the principle of common heritage of humankind to the deep sea.[11]

Although this is a good story, several scholars have shown that Arvid Pardo was not the sole inventor of the concept, nor was he the first one to propose it.[12] Instead, the idea was already around, and his speech had been carefully curated and prepared behind the scenes.[13] The narrative about the Pardo proposal omits a longer and more complicated

[10] Tirza Meyer, *Elisabeth Mann Borgese and the Law of the Sea* (Brill Nijhoff, 2022), 66, https://brill.com/display/title/61104.

[11] UNGA, "Statement of Arvid Pardo," 1 November 1967, First Committee, 15th Meeting, UN Doc. A/C.1/PV.1515.

[12] Different forms of the concept were discussed in the years leading up to the Pardo proposal in various fora, for example, by U.S. president Lyndon B. Johnson. See: Lyndon B. Johnson, "Remarks at the Commissioning of the Research Ship – Oceanographer" (speech, Washington, DC, July 13, 1966), *The American Presidency Project*, http://www.presidency.ucsb.edu/ws/index.php?pid=27711. See also, Surabhi Ranganathan, "Ocean Floor Grab: International Law and the Making of an Extractive Imaginary," *European Journal of International Law* 30, no. 2 (2019): 573–600, https://doi.org/10.1093/ejil/chz027; Meyer, *Elisabeth Mann Borgese and the Law of the Sea*, 250-51.

[13] See Meyer, *Elisabeth Mann Borgese and the Law of the Sea*, 75–77.

backstory of the rise of international commons.[14] Nevertheless, he was the one who stepped up at the right time and in the right place.

The "Maltese Proposal" got a mixed reception. Some accused the Maltese of being puppets for the British, but my own research has shown that Arvid Pardo stood fully behind the idea and had worked hard to get permission to introduce it at the United Nations. His speech attracted other people who worked for similar causes. One of those was Elisabeth Mann Borgese. At the time she was based at the Centre for the Study of Democratic Institutions in Santa Barbara. Having worked on questions of world governance, she was fascinated by the prospect of extending her ideas out into the ocean.[15]

Pardo and Mann Borgese's intellectual cooperation was perhaps most productive in the preparation period that led up to the negotiations, running from 1967-1973.[16] During this time, their ideas for how to govern the ocean were holistic and idealistic, focusing on equally distributed access to resources in the ocean – especially for developing countries. They planned various get-togethers and conferences, the most

[14] For a critical examination of heritage and the commons that stems from viewing the ocean primarily as a resource see Hang Zhou and Jieyi Xie, "Revisiting Heritage in the Ocean: Common Heritage of [Hu]Mankind, Maritime Heritage and Beyond?," *International Journal of Heritage Studies* 30, no. 6 (2024): 687-702, https://doi.org/10.1080/13527258.2024.2315242.

[15] She was introduced to Pardo's idea through a letter by an "unknown gentleman." See MS-2-744, Box 43, Folder 17, 28 September 1967, in Meyer, *Elisabeth Mann Borgese and the Law of the Sea*, 63. New research about her intellectual background beyond world governance has been conducted in recent years: Sara Seck, "Elisabeth Mann Borgese: Ecology, Relationality, and Law of the Sea," in *Portraits of Women in International Law: New Names and Forgotten Faces?*, ed. Immi Tallgren (Oxford University Press, 2023), https://doi.org/10.1093/oso/9780198868453.003.0031. See also Jonathan Michael Galka, *In the Nodule Provinces: A History of the Ocean That Minerals Promised*, February 4, 2025, https://dash.harvard.edu/handle/1/42719660.

[16] It is difficult to compare the actual extent of their respective engagement. The archival sources for Elisabeth Mann Borgese are extensive. Much of her personal correspondence and writing is kept at the Dalhousie University Archive in Halifax. In comparison, there is a modest collection stored at the Arvid Pardo Archive in Malta. Most of the correspondence between them, however, is kept at Dalhousie.

notable of which were the *Pacem in Maribus Conferences* to which they invited a broad range of influential people to discuss ideas on how to govern the deep-sea floor.

If one looks through the lists of attendees at these conferences, it becomes clear that they were very well connected. For instance, one regular participant was the future President of the Law of the Sea Conference, Hamilton Shirley Amerasinghe.[17] They also attracted the interest of the G77 members, many of whom attended the first phase of the official negotiations having already been active members of the preparatory conferences at *Pacem in Maribus*.

Pardo and Mann Borgese used *Pacem in Maribus* to discuss their own drafts for a Law of the Sea Treaty, and when we compare the two drafts we can see how closely related their ideas about an ideal form of ocean governance were. The differences lay in the scope of their respective draft treaties – specifically the extent to which the ocean should be governed by collective agency.

Pardo wrote in a letter towards the end of his life that he was worried Elisabeth Mann Borgese's ideas were too radical and holistic.[18] However, if we examine his own Maltese "Draft Ocean Space Treaty"[19] and compare it to Elisabeth Mann Borgese's proposal, "The Ocean Regime,"[20] both are holistic in that they suggest applying the common heritage of humankind idea to the entire seafloor beyond national jurisdiction.[21] Although the scope of this essay does not allow me to go into detail on both proposals, the biggest difference lies in their potential applica-

[17] See MS-2-744, Folder 218, Box 33, Summary of Discussions, Planning Session on the Law of the Seas, February 24-26, 1968.

[18] See PR-Box: Personal Correspondences & Materials, undated letter from Dr. Arvid Pardo to Salvino Busuttil (handwritten note on the right corner), cc: Joe Friggieri, Fr Peter Serracino Inglott, Freddie Amato Gauci, Victor Gauci, Charlie Vella, Elizabeth Mann Borgese, ~~Victor Ragonesi~~.

[19] United Nations General Assembly, "Draft Ocean Space Treaty. Working paper submitted by Malta," a/ ac.138/ 3. (23. August 1971), available at http://repository.un.org/handle/11176/167474.

[20] MS-2-744, Box 175, Folder 21, *The Ocean Regime*, December 1970.

[21] See Meyer, *Elisabeth Mann Borgese and the Law of the Sea*, 119-124.

tion.[22] Elisabeth Mann Borgese designed her "Ocean Regime" proposal in a way that could make it applicable to the entire world[23] – and this was perhaps what Pardo meant by her proposal being too radical. None of the draft treaties made it to the negotiations at UNCLOS III, but they were discussed at the second *Pacem in Maribus* conference and in the ad hoc seabed committee. In this way, some of the ideas were potentially fed into the formation process of the Law of the Sea.

At the *Pacem in Maribus* conferences, Mann Borgese and Pardo created an arena for discussing ideas – in the form of draft treaties – in a formal but non-governmental setting, free from diplomatic or governmental constraints. Many of the regular attendees of *Pacem in Maribus* were members of the ad hoc seabed committee, which had the mandate to prepare the question of how to govern the seafloor beyond national jurisdiction.[24] Heading the ad hoc committee was the future president of UNCLOS III, Hamilton Shirley Amerasinghe.[25] While it is difficult to measure how much effect Mann Borgese and Pardo's ideas might have had on the convention itself, we can be certain that some ideas that

[22] For the foundation of Pardo's ideas see also Ranganathan, "Ocean Floor Grab: International Law and the Making of an Extractive Imaginary."

[23] See MS-2-744, Box 139, Folder 16, Lecture on the Ocean Regime by EMB. She states that the approach "cannot be partial or fractional."

[24] UN, Ad Hoc Committee to Study the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, ed., *Report of the Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction* (UN, 1968), 2, https://digitallibrary.un.org/record/784979. List of participants: Chairman: Mr. Hamilton Shirley Amerasinghe (Ceylon), Vice-Chairmen: Poland (Mr. Bohdan Tomorowicz – first two sessions; Mr. Aleksander Krajewski – third session), United Republic of Tanzania (Mr. Waldo E. Waldron-Ramsey – first two sessions; Mr. Akili B. C. Danieli – third session), Chile (Mr. José Piñera Carvallo – first two sessions; Mr. Fernando Zegers – third session), Norway (Mr. Jens Evensen – first two sessions; Mr. Einar-Frederik Ofstad – third session), Rapporteur: Mr. Victor J . Gauci (Malta), Economic and Technical Working Group, Chairman: Mr. Roger Denorme (Belgium), Vice-Chairman: Mr. R. C. Arora (India), Rapporteur: Mr. Anton Prohaska (Austria), Legal Working Group Chairman: Mr. Leopold Benites (Ecuador), Vice-Chairman: Mr. Alexander Yankov (Bulgaria), Rapporteur: Mr. Shaffie Abd El-Hamid (United Arab Republic).

[25] See UN, Ad Hoc Committee to Study the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, *Report of the Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction.*

were discussed at *Pacem in Maribus* have influenced the delegates who later negotiated the Law of the Sea Convention.

4. Negotiations 1973–1982: Diverging Paths

By the time the convention opened its first meeting in 1973, Arvid Pardo and Elisabeth Mann Borgese's paths were already diverging. Pardo was no longer leading the Maltese delegation, and this led to some puzzlement: "Ironically, the hero-figure of UNCLOS III reforms was left on the touchlines as an observer when the famous conference began officially in December 1973."[26]

Pardo's altered status came as a surprise to many of the delegates who had been involved in the *Pacem in Maribus* conferences. The background to this sudden demotion was that there had been a change of government in Malta. The new prime minister, Dom Mintoff, and his government struggled to decide what role they wanted Malta to play during UNCLOS III.[27]

To remedy the situation – and make sure the initiator of the common heritage of humankind principle could be present at the conference after his fall-out with the Maltese government – Pardo was appointed special consultant to the president of the Law of the Sea Conference in 1974.[28] However, he had lost the platform he would have needed to actively shape the negotiations as head of the Maltese delegation. From that point on, Arvid Pardo retreated into a less active role. In his place, Elisabeth Mann Borgese took over as symbolic figurehead for the common heritage principle – a transition that I have explored extensively in my research.[29]

Mann Borgese's work at the conference continued in a more active way despite many obstacles. She too had to find alternative ways into the

[26] Douglas Johnston and W. Michael Reisman, *The Historical Foundations of World Order* (Brill | Nijhoff, 2008), 58, https://doi.org/10.1163/ej.9789004161672.i-877.

[27] See Meyer, *Elisabeth Mann Borgese and the Law of the Sea*, 129.

[28] UN Doc A/CONF.62/INF.3/Rev. 1. See also Meyer, *Elisabeth Mann Borgese and the Law of the Sea*, 165.

[29] See Meyer, *Elisabeth Mann Borgese and the Law of the Sea*, 246-47.

negotiations, since the Maltese no longer wanted her associated with their delegation. But since she had never been a delegate or ambassador like Arvid Pardo, she had not lost her range of influence. Instead, she was still very much building it. Perhaps this made it easier for her to find new ways to insert herself into the negotiations. The first vehicle with which she entered the negotiations was the International Ocean Institute in Malta, which she had founded together with Pardo in the preparation period for organizing the *Pacem in Maribus* conferences.[30]

Representing the International Ocean Institute, she could attend the conventions as an NGO delegate. Some of the NGOs were not very popular, particularly once they started to voice their hopes for a just ocean order and a strong common heritage principle that would enable seabed mining revenue to go directly to developing states. In fact, it seems that even among other NGOs, these ideas sometimes caused alarm – and certain NGOs close to the U.S. appear to have actively disliked Mann Borgese.

One example was the Neptune Group. Miriam Levering, one of the initiators of the Neptune Group, was cited as having said in an interview: "We wanted to separate ourselves miles from her, because we felt she was looking at things from an abstract, academic, ivory-tower point of view up there in Dalhousie [Nova Scotia]."[31] The Neptune Group wrote of their assessment of Mann Borgese's work that she "[…] alienated many delegates by lecturing them on precisely what provisions the completed treaty should contain, including generous transfers to poorer nations of revenues from oil and other minerals."[32]

Here we can clearly see how the Neptune Group – which was based in the U.S. – had adopted the U.S.-driven narrative of greedy G77 demands, as set out by Ranganathan in her essay about the "stock story" of UNCLOS III. Instead of viewing Mann Borgese's efforts as an attempt to achieve equality and justice, they saw her as a disruptor. They were

[30] See the full list of PIM conferences at: International Ocean Institute, Pacem in Maribus, https://www.ioinst.org/about-1/ioi-story/pacem-in-maribus-pim-conferences/.

[31] Ralph B. Levering and Miriam L. Levering, "Citizen Action for Global Change: The Neptune Group and Law of the Sea." *Syracuse Studies on Peace and Conflict Resolution* (Syracuse University Press, 1999), 33.

[32] Levering and Levering, *ibid.*

not alone, and eventually the NGOs were silenced. In 1976, NGOs were not permitted to speak openly anymore.[33] This meant that Mann Borgese lost her direct influence and once more had to look for new ways of staying relevant in the negotiations on the convention.

Remarkably, she managed to return yet again by attaching herself to the Austrian delegation in 1976.[34] Austria had an interesting and often overlooked role during UNCLOS III. Austria is a land-locked country, meaning that despite being an industrialized state, the country's hopes for UNCLOS III aligned with the developing nations' needs for a strongly embedded common heritage of humankind principle and an effective International Seabed Authority.[35]

That a northern industrialized country could be working towards the same goals as the G77 nations is another of those nuances that does not fit with the simplified "stock story" of north against south that Ranganathan has begun to dismantle. It is likely that Mann Borgese was welcomed into the delegation because she was German-speaking. From then on until the end of the conference she was listed as an advisor to the Austrian delegation, and numerous letters between her and Ambassador Karl Wolf testify to the active role she played during those years in shaping the Austrian position.[36] In this way, she managed to stay relevant throughout the entire UNCLOS III negotiations up until the treaty was ratified.

5. Post-Convention: Evaluating their Collaboration and Legacies

We have now followed Mann Borgese and Pardo's ideas from their first exploration of the ideas of common heritage and holistic ocean governance to the obstacles they faced and compromises they had to make

[33] Cf. Betsy Baker, "Uncommon Heritage: Elisabeth Mann Borgese, Pacem in Maribus, the International Ocean Institute and Preparations for UNCLOS III," *Ocean Yearbook Online* (Leiden, The Netherlands) 26, no. 1 (2012): 30, https://doi.org/10.1163/22116001-92600099.ref.

[34] See Meyer, *Elisabeth Mann Borgese and the Law of the Sea*, 184.

[35] Other countries in that group would be Switzerland and Liechtenstein.

[36] See for example: MS-2-744, Box 87, Folder 4; MS-2-744, Box 89, Folder 1.

during the hot phase of negotiations. What can be learned from their involvement with UNCLOS III?

First, in the preparatory years, Elisabeth Mann Borgese and Arvid Pardo convened the *Pacem in Maribus* conferences – successfully creating a platform with strong ties to the ad hoc seabed committee, and gathering together important players who would become central to the negotiations. Through this platform, they tried to insert their ideas into the preparatory drafts. This, however, is where their paths diverged. This leaves us to focus on Mann Borgese in the following two points.

Second, Mann Borgese managed to build lasting institutions. The International Ocean Institute was very valuable in its NGO capacity early on – but most importantly, it carried through an idea that she really wanted to see materialize in Part XI of the Convention, which was capacity building and technology transfer. Thus, we can say that the International Ocean Institute is perhaps her most tangible legacy.

Third, she possessed flexibility and the ability to adapt. She set out with grand ideas of how to reach a more just world order through ocean governance, but when those ideas did not get enough support, she compromised. Even as she compromised, however, she was continually angling to reinsert some of her ideas back into the discussion (sometimes creating trouble for herself and making enemies even among the other NGOs). She never retreated or gave up when her vision was cut down – instead she adapted it to a new reality.

If we compare Pardo and Mann Borgese's trajectories, two different outcomes emerge. After his initial success introducing the principle of common heritage of humankind into the Law of the Sea Convention, Arvid Pardo became a symbolic figure, and he is now hailed as the "father of the Law of the Sea." Elisabeth Mann Borgese, on the other hand, had a less visible role in the main narrative, but managed to institutionalize her legacy through the International Ocean Institute, and succeeded in staying engaged during the negotiations.

6. Rethinking Power in the Counter-Story of UNCLOS III

How can Elisabeth Mann Borgese and Arvid Pardo's trajectories contribute to the counter-story that Surabhi Ranganathan has begun to uncover, shedding a different light on the demands of the developing world during UNCLOS III?

Elisabeth Mann Borgese and Arvid Pardo have both been ascribed positive roles in the aftermath of the convention – "father of The Law of the Sea"[37] and "mother of the ocean"[38] respectively – even though their core ideas about the use of the deep-sea floor for the common good of humanity were in line with what many of the states belonging to the G77 wanted: more fairly distributed resources, access to technology and a strong common heritage with revenue-sharing for a more just economic world order. Pardo and Mann Borgese also collaborated closely with many of the delegates of the G77 countries. Yet they were never vilified to the same extent as Paul Bamela Engo and other G77 delegates who, as Ranganathan has shown, have been viewed as radicals and troublemakers.

It is also interesting to note that countries like Austria – who involved Elisabeth Mann Borgese as an advisor in 1976 – are usually omitted in the simplified "stock story" about an industrialized North against a developing South. The story of Mann Borgese and Pardo shows how reductionist this narrative of a greedy South challenging a rational North really is.

There are two main reasons. First, there was no clear North-South divide determining what countries worked towards different purposes during the negotiations. Rather, the needs of participating states depended on a multitude of factors – for example whether or not they had a coastline, as illustrated by Austria's alignment during UNCLOS III. A nation's position in the negotiations could also vary depending on changes in domestic politics or the waxing and waning influence of

[37] MS-2-744, Box 345, Folder 4, Arvid Pardo, Retrospect and Prospects, 1999.

[38] Lucian M. Ashworth, "'Mother of the Oceans': Maritime Governance as a Template for a New Global Order in the International Thought of Elisabeth Mann Borgese (1918–2002)," *Global Studies Quarterly* 3, no. 1 (2023): ksad010, https://doi.org/10.1093/isagsq/ksad010.

individual actors like Pardo and Mann Borgese as they lost positions or gained new ones.

Second, the reductionist narrative omits the reasons why G77 members took such a strong stance on the question of the common heritage of humankind. The active engagement was a way of partaking in the resource distribution that happened during UNCLOS III, when large parts of the oceans were divided among the world's countries. As Ranganathan explains: "To Third World states […] the seabed did not simply represent a source of income. Although the money was important, what also mattered was equal participation in the activity itself and its regulation."

Interestingly, from the perspective of the "stock story," the fight for a more just ocean order was tolerated, even admired, when it came from within the industrialized countries – for example, with Mann Borgese and Pardo. When it came from the G77, however, their efforts were interpreted as greed and power grabbing. This is an interesting take if we view the same story through the lens of "anti-colonial worldmaking," as Surabhi Ranganathan suggested in her essay. Shifting the perspective, we can see that UNCLOS III was an opportunity for former colonized countries to actively shape their own fate for the first time.

To date, too little is known about the individual actors from the G77 and their role at UNCLOS. One reason for this is the challenge of finding archival material. A good place to start might be the Dalhousie University Archive, founded by Elisabeth Mann Borgese. She was in correspondence with most of the key actors of the G77, and the archive holds a plethora of official and personal letters.

What we can learn from Elisabeth Mann Borgese – a woman who actively aligned herself with the disadvantaged developing countries – is that it requires grit, flexibility and long-term strategizing to stay relevant in international negotiations. But it is also a cautionary tale of all the things that individuals cannot control personally: where they were born and whether or not that puts them among the group dominating the narrative.

During all those years, Mann Borgese remained an idealist at heart and became a realist in practice, bridging the alleged divide between

the "irrational" South and "rational" North – attributes that were in any case just artificial categories, created to undermine developing countries as they attempted to partake in the distribution of the huge resources of the ocean. The debate is still ongoing and will define the future of our planet.

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Juan Luis Suárez de Vivero

Maritime Order and World Order
The Geopolitical Dimension of UNCLOS

1. Introduction:
World Order, Maritime Order and Geopolitics

The media coverage of international events following the large-scale invasion of Ukraine and the change of presidency in the United States has led to the emergence of a series of epithets intended to underline the critical nature of the international panorama. World order and geopolitics have emerged with force in an attempt to describe the importance and seriousness of such situations.[1] "New world order," "recession," "crisis" or "geopolitical breakdown" have thus become commonplace in reports and analyses (European Parliament, 2017; World Economic Forum; Beirut security debates, 2023, among others). In this context, it is worth questioning to what extent these political and geographical disturbances impact or are reflected in the oceanic domain, the planet's main ecosystem.

It is not risky to attribute to the maritime space a condition of exceptionality due to the absence of equivalent impacts on the terrestrial domain. This conjecture is based on the following considerations:

- The United Nations Convention on the Law of the Sea, with its long period of negotiation, strengthens the tendencies to reinforce national positions (Lucchini, L., and Voelckel, M. 1978) by giving states

[1] In 2020, Bertrand Badie announced the overcoming of geopolitics by inter-social relations, a new reading of the world based on social facts ("Les relations internationales sont devenues inter-sociales": Bertrand Badie, *Inter-socialités: Le monde n'est plus géopolitique*. Paris: CNRS Editions, 2020). Three years later, Ian Bremmer stated: "This time is absolutely different (...). It's what I consider a geopolitical recession." (Quoted according to: *Uncharted territory: Navigating a "geopolitical recession"* – Goldman Sachs Exchanges – Date of recording: December 14, 2023, www.goldmansachs.com.)

the normative capacity for their territorial projection over maritime space (exclusive economic zone, continental shelf, archipelagic waters) in a process parallel to the internationalization and adoption of universal principles such as the declaration of the seabed as the common heritage of mankind. The broad normative coverage of this instrument led Ambassador T. B. Koh (1982) to speak of a "constitution of the oceans" which, in short, established a new oceanic order, indicating in the Preamble itself the desirability of the Convention establishing a "legal order."

- Since before its adoption (1982) and entry into force (1994), that is, during the 1970s and 1980s, states (existing and emerging from colonial status) proceeded to extend their jurisdiction over extensive marine areas in a demonstration of the persistence of the state-centric perspective of traditional geopolitics, demonstrating what Blake (2000) calls the "territorial instinct" of the modern State. This still open process with claims pending before the UN Commission on the Limits of the Continental Shelf (95 submissions at present) relates to more than 6.5% of the seabed coming under national jurisdiction.

- Thus, the ocean basins as a whole would be governed by a maritime order that guarantees the stability of a regulatory system of access and use and allows states to develop their possibilities of projecting their sovereignty and jurisdictional rights, as well as to settle their disputes peacefully by submitting them to arbitration institutions. These processes and instruments (read, maritime order)[2] entail geopolitical changes of considerable magnitude that cannot be described as geopolitical rupture or regression, although it could be argued that they constitute a kind of alternative in the (debated) process of state-building and the growth of a state's territorial base (Claessen and Hagesteijn, 2012) or "soft expansionism" (Strating *et al.*, 2024).

- In maritime space, therefore, a robust normative framework – the Convention alongside customary law – coexists at the same time as

[2] The concept of "good order at sea" is predicated on the stability, predictability, and adherence to established rules, norms, and principles, which could be considered a type of "quotidian" order produced by the daily behaviour and interactions of those who regularly use the seas, either as a mode of transport, exchange, exploitation, or control (Strating *et al.*, 2024, 4).

"due respect for the sovereignty of all States" (UNCLOS, Preamble) allows ample scope for unilateral declarations of projection into maritime space of sovereignty and jurisdictional rights by which states have pursued "soft expansionist" initiatives, which would explain, in general terms, the absence of geopolitical rupture or retreat and ultimately maritime exceptionalism.

- Though a state of stability and predictability can be ascertained for the maritime order over the last decades, it does not seem to be exempt from possible challenges: i) regional (South China Sea); ii) related to universal principles: e. g., the decline of international law as a normative ideal (Scott, 2018) and the questioning of the principle of the common heritage of mankind discussed in the BBNJ negotiations (De Lucia, 2020).

2. The Geographic Impact of UNCLOS

Over the last five decades (since UNCLOS III was convened), in the ocean basins as a whole, areas under national jurisdiction (EEZs plus extended continental shelf) account for nearly 50% of the space. At the regional level, the situation is very diverse (85% in the Arctic Ocean; 55% in the North Atlantic; 25% in the central-eastern Pacific). At the state level, 60% have a territorial base (land area plus maritime jurisdictions) with more marine area than land area; and in 60 of the 158 coastal states, the marine area accounts for more than 80% (Figure 1).

This highlights an unprecedented geopolitical transformation and, as a result, states have taken on a previously unparalleled responsibility for ocean governance (Figure 2).

The proliferation of borders is another of the effects of the expansion of state territory over maritime space, which, depending on regional geographic characteristics, generates geopolitical scenarios of varying complexity, accentuated in closed or semi-enclosed basins. Thus, in the Arctic Ocean, seven countries generate forty borders; in the Mediterranean, twenty-one countries generate sixty-three; in the North Atlantic, twenty-eight countries generate ninety-seven; and in the central-east Pacific, twenty-four countries generate seventy-eight borders. These data denote remarkable geopolitical activity, although most of these

new border contacts have yet to be formalized through the respective agreements and constitute a potential source of territorial disputes between states.

Regional perspectives: Arctic Ocean and Oceania

These two regions are characterized by the fact that they constitute scenarios in which vestiges of the old colonial and imperialist order survive, with political organizational structures – which could be described as transitional (such as the "administering power" institution) – that undermine stability and are a source of uncertainty for international relations. (Since 2009, Greenland has been immersed in a process towards possible independence, with the passing of the Act on Greenland Self-Government by the Danish Parliament on 12 June of that year.) In the field of the law of the sea, the territories that comprise the two regions provide the states that hold them with a considerable part of the regions' maritime spaces over which they exercise sovereignty and jurisdictional rights.

Although the Arctic region was already the subject of prominent interest associated with the effects of climate change, the new U.S. administration's annexationist claim to Greenland has accentuated its geostrategic relevance. President Trump's territorial claims over Greenland and Canada, if they come to fruition, would grant the United States control of approximately 45% of Arctic terrestrial territory and 35% of the EEZ in the Arctic area defined by the polar circle, compared to the current 5.4% and 4.8%. The Arctic region is also one of the clearest examples of how geographic factors can condition geostrategic decisions.

The territories of Greenland and Alaska, which can be considered exclaves of Denmark and the United States respectively, i.e. territories separated from the main territory and surrounded by other territory (in this case both land and sea). Svalbard would fall into the category of a special territory because of its legal status (according to the 1920 Svalbard Treaty). This island has a land area of 61,045 km^2, entirely within the Arctic Circle. The exclusive economic zone around the island is 796,819 km^2, which in turn represents 41% of the total Norwegian EEZ and 47% of the Norwegian Polar EEZ. Greenland, with a total area of 2,166,086 km^2 of which 1,826,215 km^2 is within the Arctic Circle, generates an EEZ of 1,330,088 km^2, which is more than 80%

of the total Danish EEZ. Alaska, with a total area of 1,723,337 km² of which 409,364 km² are within the Arctic Circle, generates an EEZ of 493,501 km² (20% of the U.S. EEZ and 5% of the Arctic EEZ). Taken together, the three territories (Greenland, Svalbard and Alaska) account for 25% of the total EEZ of the six countries bordering the Arctic Circle: Canada, Denmark, Norway, Iceland, Russia, and the United States. In short, more than 25% of the Arctic EEZ (Polar Circle) is generated by territories that have the geographical status of exclaves or a distinctive legal status (Svalbard). Svalbard provides Norway with almost half of the area of its entire EEZ. On the other hand, total waters under the EEZ regime occupy more than 79% of the basin (defined by the International Hydrographic Organization [IHO]) while the bed and subsoil outside national jurisdiction (Area) does not exceed 0.20%. At the national level, Russia holds 35% of the entire Arctic EEZ (IHO). Canada's internal waters account for 62% of the total internal waters of the basin (IHO) (Figure 3).

Regarding the Arctic circulation space, which is undergoing an intense process of environmental change, there are elements of geopolitical tension and vulnerability of an enduring, long-term nature: (i) the two major emerging shipping routes are themselves long bottlenecks with a disputed legal regime; (ii) navigation along these routes requires a variety of means, which not only hinders a regular and predictable regime of trade flows through them, but also implies a close dependence on coastal states. Only an (uncertain) transpolar route would reduce geopolitical vulnerability. The Arctic basin, and in particular the Northwest Passage,[3] is integrated into the geopolitical field of communications and data flow with the Far North Fiber submarine cable project between Ireland and Japan (17,000 km). In addition to reducing the length of this infrastructure in the global network, the Arctic route emerges as an alternative to the insecurity affecting cables in the Red Sea basin (90% of Europe-Asia flows). This is how the Arctic basin influences and extends its impact on a global scale, giving rise to a kind of "arctification" of international politics, on the basis of which non-coastal countries and supranational political entities adopt Arctic policies: China, India, South Korea, Italy, the United Kingdom, and the European Union (Figure 4).

[3] The Russian government's 12,500 km Polar Express cable runs along the waters off the Siberian coast and is scheduled to be fully laid by 2026.

Unlike the Arctic Ocean, the East Central Pacific is characterized as the domain of a large commons (high seas and Area), but it represents a commons with the presence of non-self-governing territories (C-24 list),[4] which generate extensive maritime spaces (geographical structure with a predominance of mini-insularity) under the jurisdiction of "administering powers" (Figure 5).

The provisions of UNCLOS turn small island territories into holders of extensive marine areas over which they can exercise jurisdictional rights either as part of other states or as independent states, thus constituting in the domain of political geography the so-called Big Ocean States (BOS) or Large Ocean States (LOS).[5] Some of these BOS/LOS occupy a prominent place in the ranking of the world's states in terms of size, including maritime space, such as Kiribati (20th) or Micronesia (21st) (Figure 6).

The evolution of international relations towards greater fragmentation and trends towards greater identity polarization (Lebow, 2008; Berenskoetter, 2017) have considerably expanded the groups of countries organized around different geographical, economic and political peculiarities in international treaty-making processes, sometimes increasing

[4] Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (also known as the "Special Committee on Decolonization" or the "C-24"), https://www.un.org/dppa/decolonization/en/nsgt.

[5] International Seabed Authority. *The International Seabed Authority and the Big Ocean States: Charting the Future for Resilient Prosperity*. Policy Brief 01/2024 (www.isa.org.jm). For the designation "large ocean States": Jumeau, R. (2013) *Small Island Developing States, Large Ocean States*. Expert Group Meeting on Oceans, Seas and Sustainable Development: Implementation and follow-up to Rio+20 (United Nations Headquarters, 18-19 April 2013); International Science Council (2024). *From Shores to Horizons: Empowering Science for the Future of Large Ocean States*, https://council.science/publications/sids4-declaration/; International Institute for Sustainable Development (2021), *Small Islands, Large Oceans: Voices on the Frontiers of Climate Change* (https://www.iisd.org/articles/deep-dive/small-islands-large-oceans-voices-frontlines-climate-change); World Food Programme (2024), *Large Ocean States: Partnering towards a resilient future* (https://www.wfp.org/publications/large-ocean-states-partnering-towards-resilient-future); Chan, N. 2018. "Large ocean states: Sovereignty, small islands, and marine protected areas in global governance." *Global Governance* 24: 537-55, downloaded from Brill.com12/19/2019 08:47:58AM via communal account. doi:10.1163/19426720-02404005.

the complexity of negotiations (UN, Meeting Coverage and Press Releases, 2022) and resulting in a set of categories listed and identified in the normative texts themselves. This is reflected in the BBNJ treaty: "… developing States Parties, in particular the least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States, archipelagic States and developing middle-income countries" (arts. 9, 17, 27, 40, 41 and 52). These categories are interrelated, redundant and complementary, both geographically and economically: membership in the coastal African states group does not preclude inclusion in the list of least developed countries, and geographical disadvantage alone is not a factor that justifies inclusion in this list. Together, the states belonging to these categories represent 77% of the members of the United Nations and, taking into account only the coastal countries, they account for 69%.

The EEZ, as is to be expected, constitutes the fundamental contribution to the overall computation of areas under national jurisdiction (96%) in a region dominated by insularity. However, both the territorial sea and the extended continental shelf are significant components (more than 3.5%). The EEZs generated within the three types of political-geographical configuration in the defined geopolitical framework (continental states, island states and dependent territories) generate values ranging from less than 1,000 square kilometers to more than 5 million (French Polynesia), with the average value of the EEZ being approximately 1 million square kilometers. Considering only the states (24), the largest EEZ is held by France as the administering power, and the smallest by Nicaragua. The delimited extended continental shelf (ECS) accounts for almost 4% of the total space under national jurisdiction, 50% of which corresponds to non-self-governing territories (French Polynesia, New Caledonia and Cook Islands).

If we exclude the administering powers (France, United Kingdom, United States), the states that top the ranking in terms of the size of their maritime jurisdictions are Kiribati and Micronesia, whose total population does not exceed 2.5 million inhabitants, with Marshall Islands, Solomon Islands, Fiji and Palau in the first half. Considering the total number of territories (states and dependencies), in the first half are the dependencies French Polynesia, Cook Islands, New Caledonia, Marianas-Guam and Pitcairn – the first three with jurisdiction over the extended continental shelf (Figure 7).

Nationalization, appropriation, privatization

In the context of the nationalization of seas and oceans, other processes, generally on a sub-national scale with strong social connotations, are gaining relevance: terms such as enclosure, appropriation, privatization, ocean grabbing or colonization nourish new visions in the field of social sciences when analyzing the impact and effects that the exploitation of marine resources (living and non-living) has on coastal communities, local economies or territories highly dependent on extractive activities for food security, and on their social, cultural and economic structures.

The different terms generally do not define procedures or actions of a legal nature, but rather designate and identify trends consisting of the allocation of resources to economic groups to the detriment of users and collectivities that are stripped of historical rights ("ocean grabbing"). A paradigmatic case, in this context, is individual transferable quotas (ITQs) as a fisheries management tool. Underlying policies often favour the fishing industry and large economic corporations to the detriment of subsistence uses, or they privilege other economic actors that compete for the same space – practices that usually occur within areas under national jurisdiction (*The Global Ocean Grab*, 2014; Bennett *et al.*, 2015; Knott and Neis, 2017). However, this same approach (ocean grabbing/privatization) is also applied to the Area and the principle that governs it (common heritage of humankind) as a mechanism that facilitates appropriation or enclosure, a circumstance closely related to marine genetic resources (Zalick, 2018; Ranganathan, 2019). There are also other conflicts linked to inequalities (ocean justice [Bennett *et al.*, 2022]), extractivism (Bruna, 2022), or to the vestiges of colonialism (Ranganathan, 2021).

Concluding remarks

The Arctic and Oceania illustrate how the spatial dimension of the United Nations Convention on the Law of the Sea functions as a mechanism for transforming the territorial basis of the state. They demonstrate that the Convention's geopolitical potential – understood here as a geographical element generating power and territorial influence – is intrinsically linked to the development of its normative provisions.

Implementation of the Convention inevitably establishes a new maritime-territorial order. This implies a geopolitical transformation that cannot be equated to a *rupture* or *retreat*. Rather, the coexistence of colonial vestiges alongside a global maritime order of sovereign, equal nations can be analyzed through the lens of Eisenstadt's (2000) theory of multiple modernities. In this context, the nation-state and its "territorial instinct" remain geopolitical constants, *instrumentalized* by the law of the sea – the only institutional path through which recent state territorial expansion has been realized.

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Figures

Figure 1

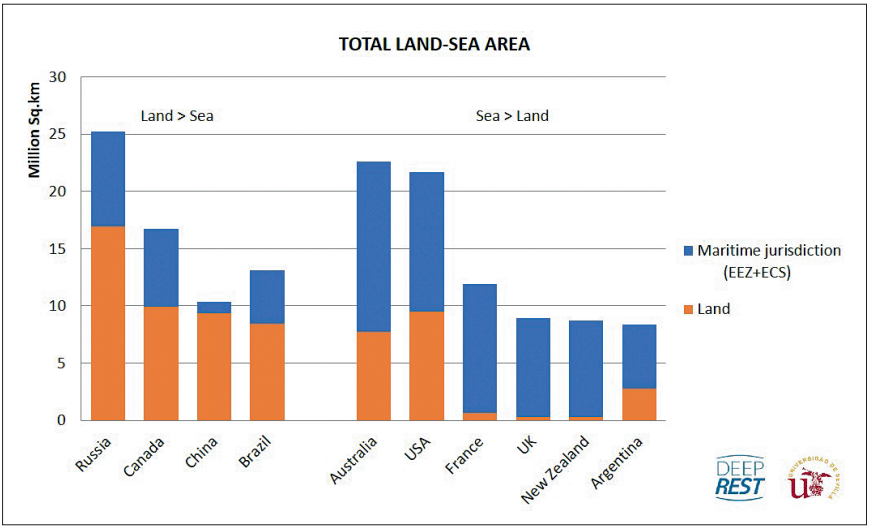


Figure 2

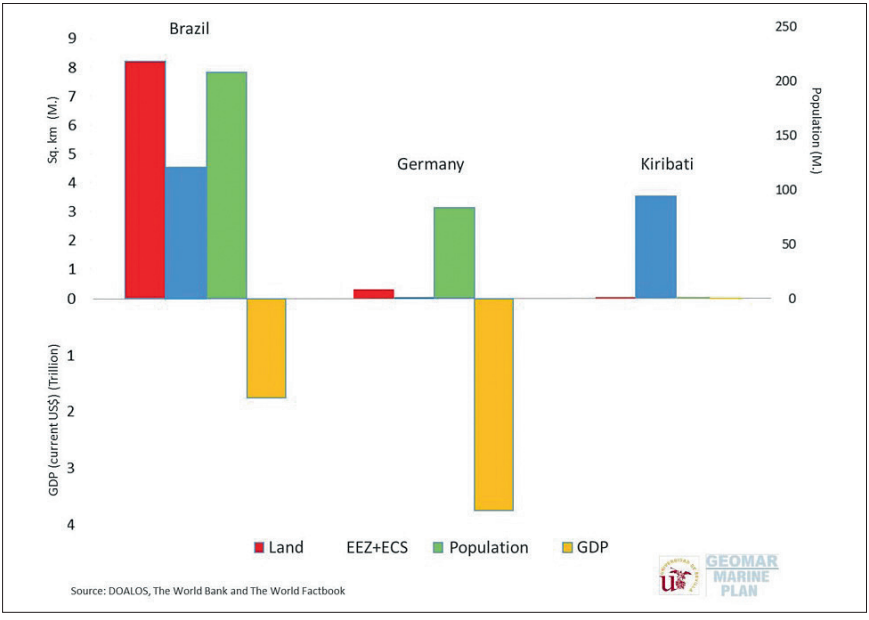
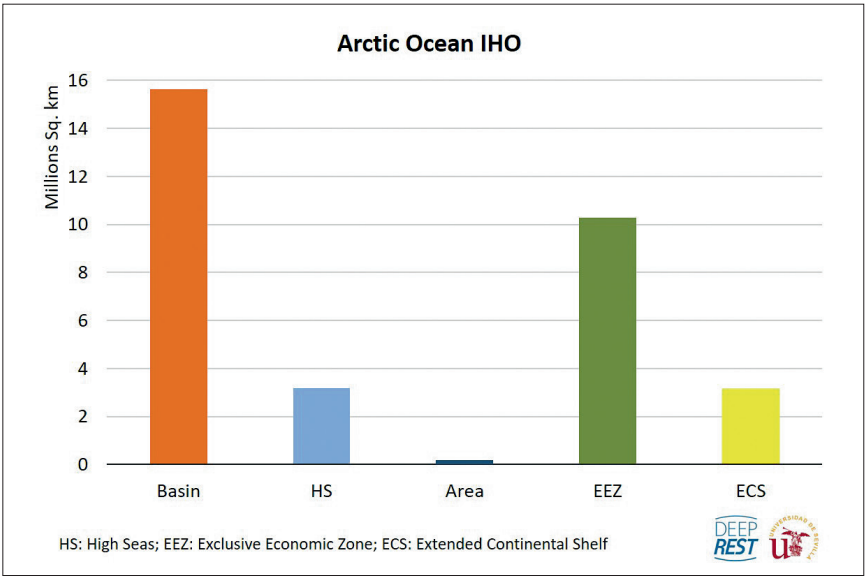


Figure 3



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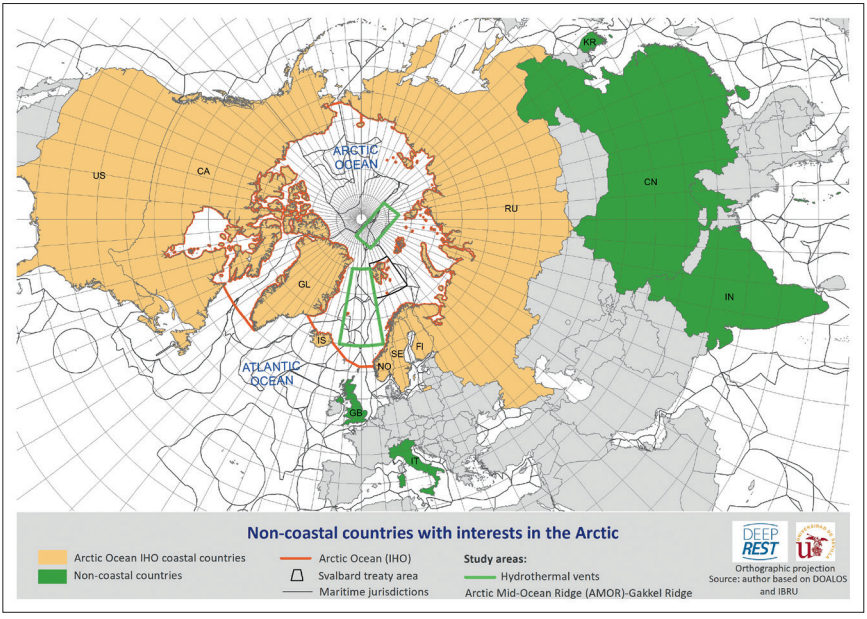

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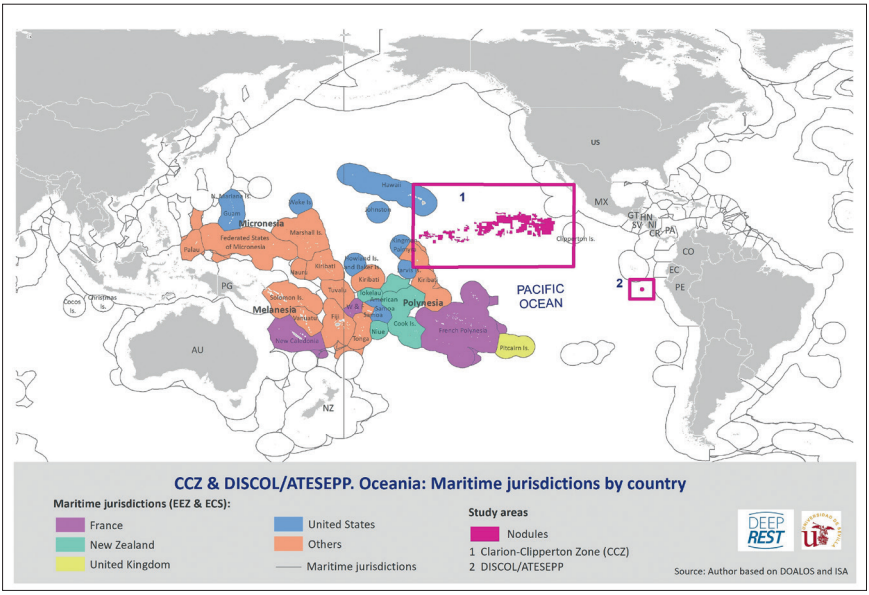


Figure 6

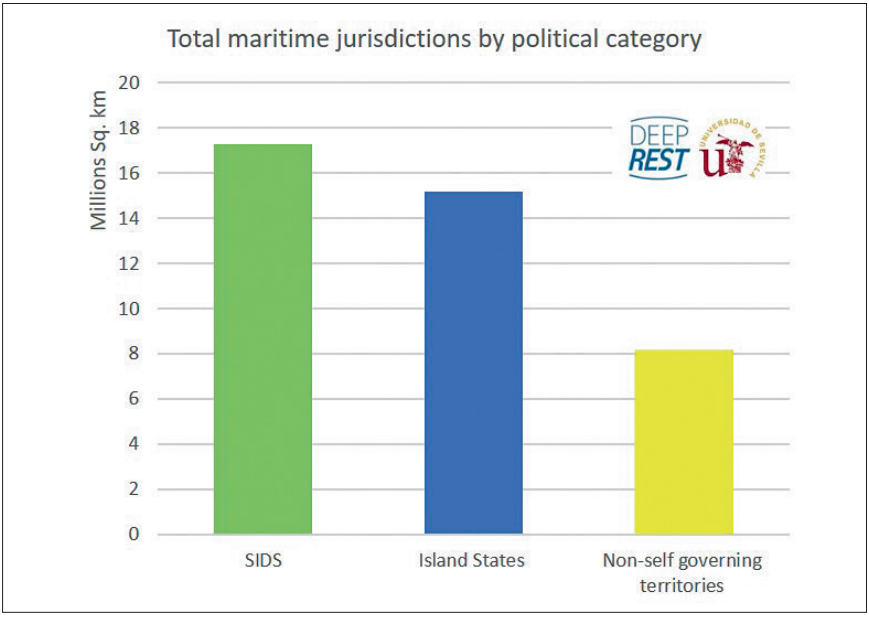
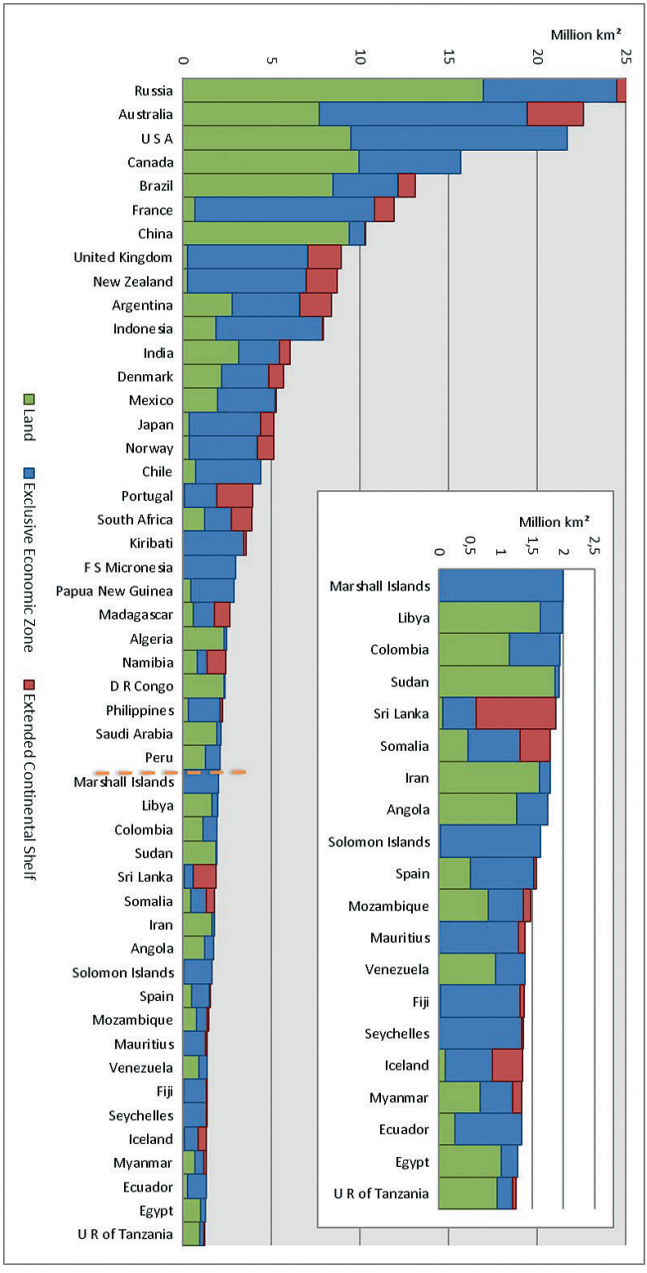


Figure 7


Million km²
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Australia
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India
Denmark
Mexico
Japan
Norway
Chile
Portugal
South Africa
Kiribati
F S Micronesia
Papua New Guinea
Madagascar
Algeria
Namibia
D R Congo
Philippines
Saudi Arabia
Peru
Marshall Islands
Libya
Colombia
Sudan
Sri Lanka
Somalia
Iran
Angola
Solomon Islands
Spain
Mozambique
Mauritius
Venezuela
Fiji
Seychelles
Iceland
Myanmar
Ecuador
Egypt
U R of Tanzania
Land
Exclusive Economic Zone
Extended Continental Shelf
Million km²
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1,5
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Marshall Islands
Libya
Colombia
Sudan
Sri Lanka
Somalia
Iran
Angola
Solomon Islands
Spain
Mozambique
Mauritius
Venezuela
Fiji
Seychelles
Iceland
Myanmar
Ecuador
Egypt
U R of Tanzania

II

Sovereignty, Conflict, and Maritime Boundary Delimitation

Rauf Versan

The Principles of Maritime Boundary Delimitation

1. General Considerations

Given the simple fact that the sea covers approximately 70% of the earth's surface, it becomes immediately self-evident that it is not only necessary but also imperative that there are and should be rules and principles which make up what may conveniently be called a comprehensive Law of the Sea.

Historically, the elementary rules of the Law of the Sea can be said to have developed from limited needs: The need of the sea for international commerce and navigation, the need for sustainable food resources from the sea, and the need for defensive margins against unexpected attacks from the sea. The first two constituted the rationale of the universal principle of the freedom of the high seas, and the last, the generally observed rule on the width of the territorial sea.

Although these needs are still the basic needs today, the means for legally addressing them will depend upon a variety of new legal and factual circumstances. Progress towards the regulation and handling of maritime boundary questions necessitates the rationalization of a multitude of technical issues. From a scientific point of view, these involve geographical, geomorphological and hydrographical realities which, in a given situation, can favor one state over another.

Unfortunately, in this kind of situations, legal settlements and diplomatic solutions, if reached at all, have tended to reflect the lowest common denominator of compromise. It is to the advantage of states that there should be clear and predictable legal rules and principles applicable to international maritime boundary delimitation so that effective standards can be developed on the basis of which boundary problems

and jurisdictional issues can be dealt with, agreed upon and, if need be, judicially settled. Given the political and economic sensitivity of boundary issues, the availability of such standards and their utility in international dispute settlement procedures are manifestly important.

Of the many aspects of maritime boundary delimitation, it is the concept itself, which has given rise to seminal questions of law. These questions, along with their implications in the political and economic fields, make it difficult for a solution, even a compromise, to be achieved. Indeed, such attempts have almost always been vexed by considerations of political and economic nature. The question is: How far are these considerations pertinent in the delimitation of maritime areas over which states claim sovereignty, or varying degrees of sovereign rights, as the case may be? An examination of the recent decisions by international courts and tribunals reveals an inclination to uphold these considerations: that a delimitation should not affect the parties' rights, off their coasts and in their proximity, in a way which would jeopardize not only their economic interests but also their security in the broadest sense.

Maritime boundary delimitation is the determination of the extent to which the states involved are each entitled to areas of the sea. It is a long and detailed process, which, in the absence of agreement to the contrary, cannot, of its nature, restrict or extend, let alone extinguish, that entitlement. Detailed rules of law, therefore, become imperative and the adoption of any given system of such law as well as the application of that system to a specific case is a matter the validity of which in relation to other states is subject to international law. This was recognized by the International Court of Justice in the Fisheries Case in the following passage:

> "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law."[1]

[1] Anglo-Norwegian Fisheries Case (United Kingdom/Norway), ICJ Reports, 1951, p. 20 at p. 132.

In the matter of maritime delimitation, it would be instructive if we begin by comparing the historic rules concerning land boundaries with the much more recent, but still developing, law for sea boundaries. The two in many ways differ from each other, not least as regards the general approach to a boundary issue. For a land boundary, the inquiry begins with a juridical and geographical history of the particular boundary in question, the main legal issue often being the proper interpretation of a boundary treaty which, at some time in the past, is deemed to have delimited that boundary. For a maritime boundary, on the other hand, the inquiry begins with certain *a priori* principles and rules from which the correct boundary appears to be deduced after taking into consideration the geographical features of the area in question. This fundamental difference between the rules governing land boundaries and those governing sea boundaries is reasonable enough, because a land boundary is primarily and essentially a matter between and affecting the territorial sovereignties it actually separates, whereas a sea boundary has always an international aspect.

This being so, the relationship between land and maritime zones is liable to arise in a variety of ways. Significantly, it arises in situations where a state, as a coastal state, is claiming sovereignty or sovereign rights in a relevant maritime area. Insofar as international law provides no explicit definition of a "coastal state," a dispute regarding this question would be a dispute regarding territorial sovereignty.[2] A valid title to the land territory would invest that state with the status of a coastal state under international law.

The relationship between land and maritime zones also becomes a material issue in situations where the principle "the land dominates the sea" finds expression. This principle does not directly affect the outcomes of marine boundaries, but determines the rules and methods to be resorted to in achieving those outcomes, such as the geographical or geological natural prolongation of the coast, distance from, or proximity to the coast, or correspondence of maritime areas to the configuration of the coast.

[2] Chagos Marine Protected Area Arbitration (Mauritius/United Kingdom), Permanent Court of Arbitration Award, 18.3.2015, para. 203 *et seq.*

It can be added in this vein that an international court or tribunal having general jurisdiction over disputes between parties may concurrently adjudicate disputes over land boundaries, sovereignty over islands and the consequent maritime delimitation. However, Article 298 (1)(a)(i) of the United Nations Convention on the Law of the Sea (UNCLOS) allows states to opt out of compulsory settlement of disputes relating to sea boundary delimitation; such disputes may be submitted to compulsory conciliation, but with the proviso that such submission excludes disputes that involve the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory.

2. Normative Considerations

Ever since the first attempts to formulate general rules in the 1930 Hague Codification Conference, and despite similar efforts by learned institutions and scholars, the quest for the adoption of suitable rules for maritime boundary delimitation has remained unfruitful. At the Third United Nations Conference on the Law of the Sea (UNCLOS III), maritime boundary delimitation between coastal states was one of the most difficult and contentious questions that had to be tackled. The question was not only one of formulating and agreeing upon clear and predictable rules of delimitation, but also one which, at the same time, would enable justice to be achieved. Under the 1982 Law of the Sea Convention, Articles 74 and 83 lay down as positive law the foundations for maritime boundary delimitation, thereby seemingly making redundant in most cases the need to rely upon the fundamental principle of equity in the matter of boundary delimitation. Many cases of delimitation are covered, as is foreseen under Articles 76 and 83 of UNCLOS, by specific boundary or delimitation agreements or, in the absence of such, by mutual recognition of parties' claims, or acquiescence through practice; it is, however, important that in the latter case,

> "Evidence of a tacit legal agreement must be compelling. The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed. A de facto line might in certain circumstances correspond to the existence of an agreed legal boundary or might be more in the nature of a provisional line or of a line for a specific, limited purpose, such as

> sharing a scarce resource. … [but it] is to be distinguished from an international boundary."[3]

It is only when the relevant case is not covered by any treaty or tacit agreement between the contesting states that Articles 76 and 83 require courts and tribunals to apply equitable principles on their own merit so that a delimitation of the contested areas can be effected.

In most cases, there is seemingly no longer a need to rely upon the fundamental principle of equity in addressing maritime boundary delimitations. However, equitable principles, as defined judicially since the North Sea Continental Shelf cases, continue to have a normative character as part of general international law. International courts and tribunals have occasionally applied equitable principles when assessing "relevant circumstances" or "factors to be taken into account" in boundary delimitation disputes.

There are various ways in which the principle of equity in its broadest sense may find its way into the international judicial or arbitral process.

In the first way, the international court or tribunal is specifically required to apply equity or equitable principles leaving aside the existing law, thereby assuming the position of a new law creator for the parties. This is known as "equity *contra legem*." The well known way in which this can be done is by requiring the court to decide a case *ex aequo et bono*, as provided in Article 38(2) of the Statute of the International Court of Justice.

The second possibility is where a treaty or a customary rule of international law prescribes the application of a rule which is itself expressed in terms of "equity" or "equitable principles." These wordings are essentially the same insofar as their purported result is not specifically elaborated. Here, it is the task of the international court to construct a solution by taking into consideration the entire substance of the dispute according to the needs of the case. There may be relevant precedents, but they do not control the end result. This is "equity *praeter legem*," i.e.

[3] Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea, ICJ Reports, 2007, p. 659 at para. 253.

equity *beyond* the law, but without contradicting existing legal rules. If a court decides to adjudicate on the basis of equity *praeter legem*, needless to say, there must be a clear basis in the law which allows the court to do so.

In the seminal North Sea Continental Shelf cases[4] the International Court of Justice, by agreement between the parties, was asked to decide what rules and principles of international law were applicable to the delimitation of the continental shelf between them. The Court rejected the rule of "equidistance / special circumstances" as the customary method of delimitation, determining that the provision of Article 6 of the 1958 Geneva Continental Shelf Convention did not constitute a rule of customary international law. It went on to determine that there were two controlling "basic legal notions": one was that delimitation must be the object of agreement between the states concerned; the other was that such agreement must be arrived at in accordance with basic equitable principles.[5] Customary international law itself required the application of "equitable principles,"[6] equidistance being only one of the methods for achieving an equitable result, and one which was indeed inapplicable in those particular cases precisely because it would not produce such a result.

The Court's inclination to rely on equity as "a basic legal notion" seems to stem from its consideration that it is capable of producing legal obligations for the contesting parties in the same way as, but independently of, the normative rules of law applicable to the subject-matter of the dispute. As the Court stated in its judgement, "In short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles."[7]

The justice of which equity is an emanation is not abstract justice but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability. Even though it looks with particularity to the peculiar circumstances of an instant case,

[4] ICJ Reports, 1969, p. 3.
[5] *Ibid.*, para. 85.
[6] *Ibid.*, para. 85-90.
[7] *Ibid.*, para. 85.

it also looks beyond it to principles of more general application. This is precisely why the courts have, from the beginning, elaborated equitable principles as being, at the same time, means to an equitable result in a particular case, yet also having a more general validity and hence being expressible in general terms; for, as the Court has also said: "the legal concept of equity is a general principle directly applicable as law."[8]

The Court's emphasis on equity as a guiding principle in continental shelf delimitations is a salutary contribution to judicial jurisprudence. This being so, the Court's approach regarding equitable principles and their application in achieving an equitable result cannot be said to have been followed consistently in subsequent international litigations. International courts and tribunals have occasionally resorted to various "methods" in the light of circumstances which were relevant in each individual case in order to be able to delimit a marine jurisdictional area on the basis of equitable principles leading to an equitable result. It is axiomatic that the Court itself, in the course of time, reverted to utilizing the equidistance/special circumstances method as the preferred or inferred method of delimitation, all the while loosely pointing out the principles which could be taken into consideration so that an equitable result can be reached.

3. The Methods of Delimitation

Articles 74 and 83 of UNCLOS address respectively the drawing of boundaries in the exclusive economic zone and the continental shelf of states within 200 nautical miles from their coasts. The provisions of these articles are of a very general nature and do not provide much by way of guidance for those involved in the maritime delimitation process. The aim of that process is to achieve an equitable solution. If two states have agreed on a maritime boundary on their own will, they are deemed to have achieved such an equitable solution. If, however, they fail to reach an agreement on their common border and the dispute is referred to the Court, it is the task of the Court to find an equitable solution in the delimitation dispute it has been called upon to adjudicate.

[8] Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), ICJ Reports, Judgment of 24 February 1982, p. 18 at para. 71.

International courts and tribunals over the last twenty years have developed a maritime delimitation methodology to assist with this task. In order to determine the maritime delimitation line, the courts and tribunals proceed in three stages.[9] In the first stage, they will establish the provisional equidistance line from the most appropriate base points on the parties' coasts. In the second, they will consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line so that an equitable result could be reached. In the third and final stage, the court or the tribunal will subject the envisaged delimitation line, whether this is the equidistance line or the adjusted line, to the disproportionality test. The aim of this test is to make sure, so far as the adjudicating court or tribunal is concerned, that there is no marked disproportion between the ratio of the lengths of the parties' relevant coasts and the ratio of the parties' respective shares in the relevant area to be delimited by the envisaged line, and thus to confirm that the delimitation has been equitably effected as required by UNCLOS.

It has to be reiterated that this three-stage approach is not a prescription by UNCLOS and therefore is not mandatory. It has been developed primarily by the International Court of Justice as part of its efforts to search for equitable solutions in the matter of maritime boundary delimitation as required by Articles 74 and 83 of the Convention. Other international courts and tribunals have also lent support to this approach, as evidenced by their case law. The approach is based upon objective, geographical criteria, also taking into account any relevant circumstances affecting the equitableness of the projected maritime boundary. An international court or tribunal will nevertheless abstain from resorting to this three-stage approach if there are factors which make the application of the equidistance method inappropriate, such as if the construction of an equidistance line from the coasts is not feasible, or when a reduced effect is to be given to islands. In such instances, international courts and tribunals have surreptitiously introduced additional layers of subjectivity; and the final "disproportionality test" has hardly been failed.

[9] For an early description, see Maritime Delimitation in the Black Sea (Romania/Ukraine), ICJ Reports, 2009, para. 116 *et seq.* – Cf. also, Maritime Delimitation in the Indian Ocean (Somalia/Kenya), ICJ Reports, 2021, paras. 119-131.

4. Conclusion

Sea boundaries have long been a matter of concern to states. Accordingly, it is not unusual that they have occasionally given rise to disputes which the parties have sometimes been able to settle by resorting to international courts and tribunals. Until relatively recently, international law limited states' maritime jurisdiction to a belt of coastal waters known as the territorial sea; consequently, when boundary disputes arose, they were related to this relatively narrow area, involving also associated matters such as fishing rights. However, with the expansion of states' maritime jurisdiction to 200 nautical miles or more, and with the emergence, in the second half of the last century, of the concepts of the continental shelf and the exclusive economic zone, maritime boundary disputes have acquired a new dimension.

Maritime boundary delimitation is one of the most discussed issues in international law, characterized by a combination of complex legal, political, economic, technical, historical and environmental elements. Many maritime boundaries remain undelimited, and an important number are disputed. A vast spectrum of geographical situations are encompassed, from adjacent states clustered together on a concave coastline to small islands facing a long coastline or the open ocean. Yet, international courts and tribunals are expected to adjudicate maritime delimitation issues in a principled manner, without recasting geography yet still reaching an equitable result.

The underlying consideration in maritime delimitation under international law is the significance accorded to objective legal criteria to enable certainty and predictability, along with a sound appreciation of the specific circumstances of each case, so that an equitable solution is reached. There is no doubt that certain trends in the case law have raised criticism. But, by offering certainty and predictability, rules and principles of international law, developed and refined through consistent judicial and arbitral practice, have played and will continue to play an important role as a stabilizing factor.

Stefan Talmon

Islands as a Cause and Subject of International Conflict

I. Introduction

There is hardly a week without island conflicts making the news.[1] Islands are true flashpoints for conflict. Nobody knows exactly how many islands exist in the seas and oceans, but estimates suggest that there are more than 86,500 islands ranging in size from 0.1 to 1 million km^2,[2] and nearly 700 billion nano-islands with a size of less than 0.1 km^2 (whereby this figure includes "micro-rocks" with at least 0.1 m^2). Of these nano-islands, approximately 370,000 range from 0.1 to 0.01 km^2.[3] The potential for conflict is thus almost infinite. In most cases, the cause of the conflict is not the island itself but the maritime entitlements generated by the island. Even the smallest island, with an area of only a few square centimeters, is entitled to a territorial sea of 12 nautical miles ("nm"), which can generate approximately 1,550 km^2 of territorial sea. More importantly, any proper island can generate at least around 430,000 km^2 of exclusive economic zone (EEZ) and continental shelf (CS). Some islands may even give rise to extended CS claims. By comparison, Germany's total EEZ area is less than 360,000 km^2. Most island

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1 See, e.g., Xinhua, "Japanese fishing vessel expelled after illegally entering territorial waters of China's Diaoyu Dao" (2 December 2025), https://english.news.cn/20251202/0c377e85f06747bc890f2ba88e1dcb52/c.html; WANA, "Iran's Three Islands: Symbols of Sovereignty, History, and Diplomatic Deadlock" (2 December 2025), https://wanaen.com/irans-three-islands-symbols-of-sovereignty-history-and-diplomatic-deadlock/.

2 Christian Depraetere, "The Challenge of Nissology: A Global Outlook on the World Archipelago, Part I: Scene Setting the World Archipelago" (2008) 3/1 *Island Studies Journal* 3-16 at 6.

3 Christian Depraetere and Arthur L. Dahl , "Island locations and classifications" in Godfrey Baldacchino (ed.), *A World of Islands: an island studies reader* (Charlottetown, P.E.I. : Institute of Island Studies, 2007), 57-105 at 68.

conflicts do not revolve around the island itself but rather concern the natural resources in the maritime zones generated by the island.

While some island conflicts have persisted for centuries, others have only recently emerged following the establishment of a 200 nm EEZ and legal CS in the 1982 United Nations Convention on the Law of the Sea (UNCLOS)[4] and the adoption of new formulae for measuring the outer limits of the CS.[5] Island conflicts generally lie at the intersection of history, politics, economics and law. They often also serve as an expression of nationalism. Island conflicts have led to the designation of special "National Days" for specific disputed Islands.[6] They have even triggered formal protests to Apple and Google Maps regarding the naming of islands, as well as instructions to local authorities and State-run universities not to display Google maps on their websites because some of them use foreign names for islands claimed by the State.[7] Island conflicts also have resulted in maps with disputed islands being included in national passports to bolster the State's claim to the islands in question, accompanied by the refusal of other claimant States to issue visas in these passports.[8]

Islands may be both the cause and subject of conflict. This paper will explore both aspects of island conflicts, but before doing so will examine the conflict potential of islands identified by Arvid Pardo and Elisabeth Mann Borgese, in whose memory the present conference is being held.

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[4] United Nations Convention on the Law of the Sea (UNCLOS), 10 December 1982 (1833 UNTS 397), Articles 55-57 and 76(1).

[5] See UNCLOS, Art. 76(4)-(6). Compare, on the other hand, the formulae in the Geneva Convention on the Continental Shelf, 29 April 1958 (499 UNTS 312), Article 1.

[6] See WANA, "Iran's Three Islands: Symbols of Sovereignty, History, and Diplomatic Deadlock" (n. 1 above).

[7] VOA, "Apple, Google Maps Run Afoul of South Korea" (1 November 2012), https://www.voanews.com/a/apple-google-maps-run-afoul-of-south-korea/1537372.html; AFP, "Japan takes issue with Google maps over disputed islands" (30 September 2013), https://japantoday.com/category/national/japan-takes-issue-with-google-maps-over-disputed-islands.

[8] BBC, "Vietnam refuses to stamp new Chinese passports over map" (26 November 2012), https://www.bbc.com/news/world-asia-20491426.

II. Arvid Pardo and Elisabeth Mann Borgese, and the Conflict Potential of Islands

In a note verbale to the Secretary-General of the United Nations, dated 17 August 1967, the Permanent Mission of Malta to the United Nations in New York, which was then headed by Ambassador Arvid Pardo, requested the inclusion of a new item in the agenda of the 22nd UN General Assembly on a "Declaration and treaty concerning the reservation exclusively for peaceful purposes of the sea-bed and of the ocean floor, underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind."[9] In the accompanying memorandum, Malta declared, *inter alia*, that the time had come to declare the sea-bed and the ocean floor underlying the seas beyond the limits of present national jurisdiction "a common heritage of mankind" that was not subject to national appropriation in any manner whatsoever.[10] On 1 November 1967, Ambassador Pardo introduced the request for a new agenda item in the First Committee of the General Assembly.[11] From the outset, he was well aware that islands and their entitlement to a CS constituted one of the biggest obstacles to the idea of large parts of the sea-bed and the ocean floor becoming a common heritage of mankind.

The 1958 Geneva Convention on the Continental Shelf recognized, *inter alia*, the right of the coastal State to exercise sovereign rights over the continental shelf defined as the seabed and subsoil of "the submarine areas adjacent to the coasts of islands" but outside the area of territorial sea to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the

[9] UN General Assembly, "Request for the inclusion of a supplementary item in the agenda of the 22nd session: Declaration and treaty concerning the reservation exclusively for peaceful purposes of the seabed and of the ocean floor, underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind. Note verbale dated 17 August 1967 from the Permanent Mission of Malta to the United Nations addressed to the Secretary-General," UN Doc. A/6695, 18 August 1967.

[10] *Ibid.*, 2, para. 3.

[11] UN General Assembly, 22nd Session, First Committee, 1515th Meeting, 1 November 1967, UN Doc. A/C.1/PV.1515, 1, para. 3.

natural resources of the said areas.[12] This, according to Pardo, gave "the governing Powers of islands such as Clipperton, Guam, the Azores, St. Helena or Easter, sovereign rights over millions of square miles of invaluable ocean floor" at the expense of the area that was to become a common heritage of mankind.[13] Pardo's aim, therefore, was to limit the CS entitlements of islands.

On 18 March 1969, Malta submitted a draft resolution for consideration by the UN General Assembly's Legal Sub-Committee of the Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction (the "Seabed Committee"). In that resolution, the UN General Assembly was to solemnly declare that the "sea-bed and ocean floor and the subsoil thereof subjacent to water more than … nautical miles from the nearest coast and more than 200 meters deep, *disregarding rocks and islands without a permanent settled population*, unquestionably are and must remain beyond national jurisdiction."[14] When Ambassador Pardo introduced the draft resolution in the Legal Sub-Committee on 20 March 1969, he explained the relevant part of the draft resolution as follows:

> "The draft resolution recommended that rocks and islands without a permanent settled population should be disregarded. In that connexion, it was important to be just and reasonable. It was natural for a coastal State to exercise sovereign rights over the resources adjacent to its coast, or for the international community to reserve the rights of islands that might one day emerge as independent States, but it was unacceptable that a remote rock such as Nightingale[15] should be considered on the same basis as populous States.

[12] Convention on the Continental Shelf, 29 April 1958 (499 UNTS 312), Article 1 (b).

[13] UN General Assembly, 22nd Session, First Committee, 1515th Meeting, 1 November 1967, UN Doc. A/C.1/PV.1515, 9, para. 67.

[14] UN General Assembly, Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, "Malta: draft resolution," UN Doc. A/AC.l38/11, 18 March 1969, 2 (italics added).

[15] Nightingale Island is an active volcanic island in the South Atlantic Ocean, 3 km² in area, part of the Tristan da Cunha group of islands. The island group is administered by the United Kingdom as part of the overseas territory of Saint Helena, Ascension and Tristan da Cunha.

> In stating its position, Malta, for its part, would disregard Fifla and Kuminett, two uninhabited islands belonging to it."[16]

Ambassador Pardo's suggestion of disregarding rocks and islands without a permanent settled population when determining a State's CS area faced immediate pushback from several States, including the United Kingdom, Japan and Mexico. Commenting on the Maltese draft resolution, the Norwegian representative stated that the "idea that rocks and islands without a permanent settled population should be disregarded might not command general support, for it was contrary to the generally accepted interpretation of international law."[17] Thus, when the UN General Assembly later that year adopted a resolution on the question of the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind, no special mention was made of rocks and islands.[18]

Ambassador Pardo, however, did not relent in his efforts to limit the "encroachment" of the CS of rocks and islands on the common heritage of mankind. At the 56th meeting of the Seabed Committee on 23 March 1971, he stated regarding islands:

> "Virtually uninhabited Arctic and sub-Antarctic islands could give their respective possessors the right to claim jurisdiction over millions of square miles of ocean space. The possession of St. Paul's Rocks, Fernando de Noronha, Trinidade and Martin Vaz, all virtually uninhabited, could more than double the potential claims of Brazil to ocean space. His delegation had calculated that potential claims based on the possession of islands inhabited by a total of less than 3 million people could cover nearly two-thirds of world ocean space.

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[16] UN General Assembly, Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, Second Session: Legal Sub-Committee, Summary Records of the 1st to 11th Meetings, 12 to 26 March 1969, UN Doc. A/AC.138/SC.1/SR.1-11, 23 June 1969, 66 (Malta).

[17] *Ibid.*, 78 (Norway).

[18] See UN General Assembly resolution 2574 (XXIV), 15 December 1969.

> The absurd results of claims founded on the possession of reefs or minute islands were unlikely to restrain the progressive trend towards a division of ocean space. Since, however, less than two dozen States would be the real gainers from that division, the overwhelming majority of the international community was certain to oppose it."[19]

During the meeting, Pardo also called for a "clear and precise definition of the outer limits of the coastal State's jurisdiction in ocean space."[20] He was motivated by the aim of "protect[ing] the interests of the international community over the widest possible area of ocean space."[21] Despite the "absurd results" of even the smallest island being entitled to a CS and the advantages granted to a few at the detriment of many, Pardo's idea to deny uninhabited islands a CS of their own did not gain traction.

At the 57th meeting of the Seabed Committee on 23 March 1971, he identified "the extent of jurisdiction that could legitimately be founded on the possession of islands" as one of the open questions.[22] He also outlined his ideas for a possible answer to the question as follows:

> "The 1958 Conventions generally did not make distinctions between methods of determining the territorial waters and continental shelves of islands and of continental coastal States. But it was now imperative to distinguish between archipelagos and islands that were independent States or could become independent States, and those that could never become independent States. A distinction must also be made between islands in close geographical proximity to the coast and isolated islands, and it must be decided whether rocks and shoals were islands for the purpose of fixing jurisdiction limits. If a 200 mile limit of jurisdiction could be founded on the possession of uninhabited, remote or very small islands, the effectiveness of international administration of ocean space beyond

[19] UN General Assembly, Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, Summary Records of the 45th to 60th Meetings, 12 to 26 March 1971, UN Doc. A/AC.138/SR.45-60, 7 June 1971, 159 (Malta).

[20] *Ibid.*, 160 (Malta).

[21] *Ibid.*, 166 (Malta).

[22] *Ibid.*, 167 (Malta).

> national jurisdiction would be gravely impaired. Furthermore, such islands sometimes had a scientific interest or economic importance out of proportion to their size by reason of the existence of substantial fisheries or mineral resources in their neighbourhood. For instance, possession of the Senkaku Islands, which were scarcely more than sandbanks and until recently were visited only by fishermen, was hotly disputed between three or four countries since it had been found that the area could supply perhaps as much as 10 per cent of the petroleum requirements of Japan.
>
> That meant that, in order to fill the gaps in the simplistic solutions of 1958, any future international treaty must include an article to the effect that any claim to jurisdiction over ocean space founded on the possession of islands should be given priority consideration in the context of the international [seabed] institutions. The problem would be simplified if a host of reefs, rocks, sandbanks and uninhabited islands were to be loaned or donated by their possessors to the future international institutions for utilization as international scientific research stations, bird, mammal or fish sanctuaries, experimental fish-breeding centres, and similar purposes."[23]

At the 63rd meeting of the Seabed Committee on 5 August 1971, Pardo introduced a "Draft Ocean Space Treaty."[24] The Draft Treaty addressed the question of "islands" in several places.[25] In the Introduction, it was stated that "Article 90 authorizing the [Seabed] Institutions to accept the transfer to their administration of islands" was to be considered one of the matters of major detail of the Draft Treaty.[26] The purpose of this article was, *inter alia*, "to facilitate a solution of the problem of the limits of jurisdiction over ocean space which can be claimed by a State by

[23] *Ibid.*, 167 (Malta).

[24] UN General Assembly, Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, Summary Records of the 61st to 67th Meeting, 19 July to 27 August 1971, UN Doc. A/AC.138/SR.61-67, 23 November 1971, 38 (Malta).

[25] For the text of the Draft Ocean Space Treaty, see UN General Assembly, Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Draft Ocean Space Treaty, Working Paper Submitted by Malta, UN Doc. A/AC.138/53, 23 August 1971.

[26] *Ibid.*, 8.

virtue of its sovereignty or control over certain categories of islands."[27] In Article 1(8), the Draft Treaty defined "island," in line with Article 10 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, as "a naturally formed area of land, surrounded by water, which is above water at high tide."[28] In Part II, Chapter IX, regarding the limits of coastal State jurisdiction in ocean space, the Draft Treaty distinguished between island States and islands. Article 37 read:

> "1. The jurisdiction of an island State or of an archipelago State extends to a belt of ocean space adjacent to the coast of the *principal island or islands* the breadth of which is 200 nautical miles. The principal island or islands shall be designated by the State concerned and notified to the competent organ of the International Ocean Space Institutions. In the event of disagreement with the designation made by the archipelago State any Contracting Party may submit the question to the International Maritime Court for adjudication.
>
> 2. The jurisdiction over ocean space that may be claimed by a State by virtue of its sovereignty or control over islands, other than those referred to in paragraph one, shall be determined in a special convention."[29]

Thus, only the "principal island or islands" of an island State or of an archipelagic State were to be entitled to 200 nm ocean space. The entitlements of the vast majority of other islands were to be deferred for later determination, with the hope that such entitlements would be denied.

On 13 July 1973, following up on the Draft Ocean Space Treaty, Malta presented "Preliminary draft articles on the delimitation of coastal State jurisdiction in ocean space and on the rights and obligations of

[27] *Ibid.*, 8.
[28] *Ibid.*, 10.
[29] *Ibid.*, 27 (italics added).

costal States in the area under their jurisdiction."[30] The preliminary draft articles largely reflected the views of Ambassador Pardo, who, at that time, was no longer Malta's permanent representative at the United Nations in New York but continued to lead Malta's delegation to the Seabed Committee.[31] The preliminary draft articles defined an "island" as "a naturally formed area of land, *more than one square kilometer in area*, surrounded by water, which is above water at high tide" and an "islet" as "a naturally formed area of land, *less than one square kilometer in area*, surrounded by water, which is above water at high tide." Jurisdiction over ocean space could *not* be claimed by a State by virtue of sovereignty or control over islets.[32] Islets were to have only a safety zone.[33] With regard to islands the preliminary draft articles provided:

> "2. The jurisdiction of an *island State* or of an archipelago State may extend to a belt of ocean space adjacent to the coast of the principal island or islands, the breadth of which is 200 nautical miles measured from baselines drawn in accordance with the provisions of chapter III of this Convention. (....)
>
> 3. When *islands are less than 10 square kilometres in area*, the jurisdiction of the State exercising sovereignty or control may extend only to a belt of ocean space, adjacent to the coasts of such an island, the breadth of which does not exceed 12 nautical miles measured from the applicable baseline."[34]

Ambassador Pardo explained the draft articles on islands and islets at an informal meeting of members of the Seabed Committee on 16 July 1973 as follows:

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[30] UN General Assembly, Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, Sub-Committee II, "Malta: Preliminary draft articles on the delimitation of coastal State jurisdiction in ocean space and on the rights and obligations of costal States in the area under their jurisdiction," UN Doc. A/AC.138/SC.II/L.28, 16 July 1973.

[31] In the Introductory Note to the preliminary draft articles, it was stated that the articles "do not necessarily represent the definitive views of the Government of Malta on all the complex matters dealt with therein." (*Ibid.*, 1.)

[32] Article 9 of the preliminary draft articles, *ibid.*, 6 (italics added).

[33] *Ibid.*

[34] Article 10 of the preliminary draft articles, *ibid.*, 6-7 (italics added).

> "We suggest distinguishing between islands and islets; the latter being naturally formed areas of land surrounded by water less than one square kilometer in area, which are above water at high tide. Islets, in our view, may be used as baselines, when they are less than 24 miles from the coast, but they would give rise to no claims for jurisdiction over the sea and would have no continental shelf. Two questions could be asked: why is it necessary to distinguish between islands and islets, a distinction which is contrary to present international law? And why, if a distinction is necessary, does my delegation define islets as being naturally formed areas of land less than one square kilometer in area? My reply to the first question is not legal; it is political and social. We are talking now not of coastal State sovereignty extending three, six or twelve miles from the coast, but of coastal State authority extending at least 200 miles from the coast: in these new circumstances, my delegation believes that it is totally unacceptable that isolated rocks and sandbanks be recognized as having an ocean space jurisdiction approaching half million square kilometers apiece; in addition, from a geological and geographical point of view, it is absurd to pretend that islets far from the coast have a continental shelf when by no stretch of the imagination can they be considered as parts of continents. The choice of one square kilometer (about 0.3 of a square mile) to define an islet is in part arbitrary; however, the studies which we have made of this question have shown that very few islets less than one square kilometer in area have a permanent indigenous population of any kind whose interests need protection: most islets are totally uninhabited and are seldom visited unless they happen to be in the immediate vicinity of a substantial mainland; in this case, of course, they could be utilized as points on straight baselines. In the few cases where islets have one or two dozen indigenous inhabitants, the interests of the inhabitants could be covered by appropriate regulations within the security zones which we propose."[35]

Pardo's "idealized regime governing all ocean space," however, was strongly opposed by island States and continental States that would

[35] Part of Dr. Pardo's Introduction of L.28 (relevant to islands), Annex 6 to Report of the New Zealand Delegation to the Last Session of the United Nations Committee on the Peaceful Uses of the Seabed, Geneva, 2 July – 24 August 1973, New Zealand Archives, R1768042, Law of the Sea Conference Papers, 1974-1975.

benefit from ocean space generated by islands. It was therefore not surprising that "Pardo's draft got nowhere."[36]

After 1973, Pardo's role shifted from an active participant in the negotiations of the new law of the sea treaty to a commentator on developments at the Third UN Conference on the Law of the Sea (UNCLOS III). In this endeavour, he was joined by Elisabeth Mann Borgese. Both took a close interest in the regime of islands and its repercussions for the international seabed area.

The text of the provision on islands – what is now Article 121 UNCLOS – emerged from informal consultations during the Third Session of UNCLOS III in May 1975. Although several amendments to the provision were suggested throughout UNCLOS III, the provision remained intact.[37] It read as follows:

> "1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
>
> 2. 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.
>
> 3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."[38]

Commenting on the island provision in the Single Negotiating Text ("SNT") in 1976, Arvid Pardo and Elisabeth Mann Borgese wrote:

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[36] Report of the New Zealand Delegation to the last Session of the United Nations Committee on the Peaceful Uses of the Seabed, Geneva, 2 July – 24 August 1973, New Zealand Archives, R1768042, Law of the Sea Conference Papers, 1974-1975.

[37] For the negotiating history of Article 121 UNCLOS, see Stefan Talmon, "Article 121" in Alexander Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary* (2017) 860-861.

[38] UNCLOS, Article 121.

"It is noted that even minute areas of land with few or no inhabitants, would be comprised within the definition of islands accepted by the Single Negotiating Text and that the expression 'rocks which cannot sustain human habitation or economic life' is far from clear. It is also observed that [under] the negotiating text proposal extending to islands, whatever their size, the vast extensions of jurisdiction envisaged for other land territory have highly inequitable implications, high conflict potential and lead to the unnecessary enclosure of several millions of square miles of ocean space.

The question of the extent of the maritime jurisdiction which should be attributed to islands is undoubtedly highly complex and cannot be resolved with absolute fairness to all the national and international interests involved, nevertheless it is possible to make proposals that are more constructive than those contained in the Single Negotiating Text.

It is suggested that areas of land surrounded by water which are above water at high tide be divided for the purposes of the law of the sea, into three categories based on the size of these areas. The categories suggested are: (a) areas less than one square kilometre in area; (b) areas between one and ten square kilometres in area; (c) areas more than ten square kilometres in area. Areas in category (a) could be points on baselines if in sufficient proximity to a sufficiently large land territory but would not generate any maritime jurisdiction whatsoever unless special circumstances were conclusively demonstrated. Areas in category (b) would be called islets; they would possess a territorial sea only. Islands would be areas of land surrounded by water more than ten square kilometres in area; they would possess a territorial sea and an exclusive economic zone. If this suggestion were adopted some of the unfortunate implications of the proposal on islands contained in the Single Negotiating Text could be mitigated."[39]

[39] Arvid Pardo and Elisabeth Mann Borgese, *The New International Economic Order and the Law of the Sea*, International Ocean Institute Occasional Paper No. 4 (1976) 28. For earlier criticism of the island provision by Elisabeth Mann Borgese, see Elisabeth Mann Borgese, "Raping or Managing the Oceans: Report on the Third Session of the Third U.N. Conference on the Law of the Sea, Special Session of the Club of Rome, Mexico, 23-27 July 1975," Elisabeth Mann Borgese Fonds, Dalhousie University Archives, File MS-2-744, Box 179, Folder 35.

During an academic seminar in February 1976, Arvid Pardo repeated his criticism of the island provision in the SNT and underlined its potential for conflict, saying:

> "Any small rock like for instance Lampione in the Mediterranean has according to the SNT the same rights to extensive marine areas as Tunisia and when since Lampione does actually have a few dozen inhabitants and there are a couple of fishermen there it's not a rock which cannot sustain human habitation. There are humans. There is human habitation. Yet it has the same type of rights as Tunisia and this is manifestly unjust. And this type of provision is likely to lead to dispute particularly when the delimitation of boundaries is left essentially to agreement between the states concerned modifiable by special circumstances and so on. It's inviting conflict and dispute and similar situations arise in various other parts of the world. Take the … South China Sea …, where there are innumerable small sandbanks, small rocks, which do indeed you do manage to set up a house on it but they are so small and yet they have baselines, territorial sea, contiguous zone, exclusive economic zone and continental shelf, and then you oppose this, the claim based on such little minute pieces of land to the claim of the coastal states in the area and here you really can get into serious conflict."[40]

In the following years, Elisabeth Mann Borgese continued to criticize the island provision and highlight its potential for conflict. In a paper from 1982, entitled "Law of the Sea: The Next Phase," she wrote:

> "If the hope had been that the new limits [of the EEZ] should be such as to forestall further expansion of claims which might entail conflicts and further increase inequalities among States, this hope has been deluded. There are three major loopholes through which expansion could proceed unchecked. (...)
>
> The second loophole is the lack of a proper definition of islands in Article 121. It may turn out to be difficult to draw the line between

[40] Elisabeth Mann Borgese, "Annotated partial transcript from a session on the U.N. Conference on the Law of the Sea (UNCLOS)," Elisabeth Mann Borgese Fonds, Dalhousie University Archives, File MS-2-744, Box 114, Folder 20.

> an 'island,' defined as a 'naturally formed area of land, surrounded by water, which is above water at high tide,' and which is entitled to an EEZ and a continental shelf, from a 'Rock which cannot sustain human habitation or economic life of its own' and is not entitled to and EEZ or a continental shelf of its own. The acquisition of tiny islands, or rocks claimed to be islands, may bestow vast ocean spaces and their resources. The Falkland Island conflict, alas, may be one in a long series of similar conflicts."[41]

In another paper on "The United Nations Convention on the Law of the Sea, 1982 and the Security of Small Island States," she wrote: "Another security threat identified was the taking of control over islands in order to gain 'control over far more important ocean spaces and resources.'" "The brief war for the possession of the tiny Parcel [Paracel] islands in the South China Sea (Hsisha Ch'Untao); the Falklands' war, may have had as much to do with offshore resources as with anything else." Islands "endowed with vast oceanic resource zones and/or the control of strategic waterways, may indeed increasingly become centres of attraction for a new type of ocean-oriented imperialism."[42]

In May 1983, Mann Borgese wrote:

"There are some aspects under which the Convention on the Law of the Sea fails as a potential contribution to peace. (...) peace must be founded on security of boundaries. The further extension of claims entails conflict. Those among us who had hoped that the Convention would set clearly defined, stable boundaries and thus halt further claims, again, have been disappointed. There are loopholes and ambiguities in the provisions on delimitation, which, so long as present trends continue, will invite further expansion of claims. The definition of … islands, offer[s] such loopholes and contain[s] such ambiguities. It is an easy prediction that – so long as present trends continue – any newly

[41] Elisabeth Mann Borgese, "Law of the Sea: The Next Phase (1982)," Elisabeth Mann Borgese Fonds, Dalhousie University Archives, File MS-2-744, Box 124, Folder 23.

[42] Elisabeth Mann Borgese, "The United Nations Convention on the Law of the Sea, 1982 and the Security of Small Island States," Elisabeth Mann Borgese Fonds, Dalhousie University Archives, File MS-2-744, Box 197, Folder 11.

discovered important economic resources anywhere in the oceans will be claimed by some coastal or island state."[43]

Two months later, in a speech to the International Club in Washington, D.C., she identified the island provision as one of the negative aspects of UNCLOS, saying:

> "[T]here can be no doubt that the Economic Zone makes the rich nations richer and the poor, poorer. It increases inequality, and therefore, the danger of conflict. Thirdly, there are aspects which simply had not been thought through by the advocates of the concept in the early seventies: for instance, that very tiny, sparcely [sic] populated islands in the Pacific are getting ocean spaces greater than those the People's Republic of China is getting: ocean spaces for which they have absolutely no use, ocean spaces, which, however, might awaken the appetites of States which might have use for them, and trigger a new brand of ocean-centered imperialism of which we see already examples in the Pacific. These are the negative aspects."[44]

With great foresight, both Arvid Pardo and Elisabeth Mann Borgese identified the high conflict potential of islands. This conflict potential will now be examined in more detail.

III. Islands as a Cause of International Conflict

The root cause of most international conflicts concerning islands is not the islands themselves but the maritime zones they generate. Islands give rise to conflicts over the existence and extent of maritime zones around them (in particular, EEZ and – extended – CS) and, more importantly, their resources. Island conflicts are thus primarily resource conflicts.

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[43] Elisabeth Mann Borgese, "Law of the sea: [drafts, notes, and background material]," Elisabeth Mann Borgese Fonds, Dalhousie University Archives, File MS-2-744, Box 232, Folder 21.

[44] Elisabeth Mann Borgese, "EBM speech manuscript, International Club, Washington, 9 June 1983," Elisabeth Mann Borgese Fonds, Dalhousie University Archives, File MS-2-744, Box 180, Folder 1.

First and foremost, the EEZs of islands give rise to fisheries conflicts. In the EEZ, the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and subsoil.[45] These rights are exclusive.[46] Fisheries conflicts may thus be triggered by States calling into question the legal status of land features as proper "islands," claiming that they qualify only as "rocks which cannot sustain human habitation or economic life of their own" and, consequently, do not have an EEZ of their own.[47] The areas in question would then be considered part of the high seas, where all States have the freedom to fish.[48] The State that claims an EEZ from an insular land feature, on the other, will treat unauthorized fishing as illegal and take necessary measures, including boarding, inspection, arrest and judicial proceedings, to ensure compliance with its fishery laws and regulations.[49]

For example, on 25 April 2016, the Japanese coast guard detained a Taiwanese fishing boat in waters 150 nm east-southeast of Okinotorishima, a tiny insular feature about the size of two king-size beds,[50] because the boat was allegedly operating within Japan's EEZ without permission. Japan threatened to prosecute the crew unless a security deposit of some U.S. $54,000 was made with the Japanese authorities.[51] Another example is Rockall – a tiny, uninhabitable rocky outcrop in the Atlantic Ocean, which is about 25 meters in extent at its base and 19 meters high. Until 1997, when it became a State Party to UNCLOS, the United Kingdom claimed a 200 nm fisheries zone around Rockall. The issue of whether Rockall was legally capable of generating an EEZ led to a fisheries conflict between the United Kingdom on the one hand and Ireland, Iceland, Denmark (via the Faroe Islands) on the other.[52]

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45 UNCLOS, Article 56 (1) (a).

46 See UNCLOS, Articles 61 (1) and 62 (2).

47 See UNCLOS, Article 121 (2).

48 See UNCLOS, Article 87 (1) (e).

49 See UNCLOS, Article 73 (1).

50 Jon M. Van Dyke, "Addressing and resolving the Dokdo matter," *The Korea Herald* (18 November 2008), LexisNexis.

51 Taiwan Today, "Taiwan calls on Japan to respect fishing rights in disputed waters" (27 April 2016), www.taiwantoday.tw/ct.asp?xItem=244193&ctNode=2194&mp=9.

52 See, e.g., Clive H. Symmons, "The Rockall Dispute Deepens: An Analysis of Recent Danish and Icelandic Actions" (1986) 35 *International and Comparative Law Quarterly* 344-373.

Similarly, islands give rise to conflicts over the exploration of natural resources in the CS around them. Coastal States exercise over the CS exclusive sovereign rights for the purpose of exploring it and exploiting its natural resources.[53] Thus, no one may undertake these activities in the CS around islands without the express consent of the coastal State.[54] However, by denying maritime land features the status of a proper island or by denying certain islands their CS entitlement based on their location, other States may explore for natural resources around these islands without requiring the consent of the territorial sovereign if the relevant area would otherwise fall within their own CS.

For example, Türkiye regularly sends survey vessels and explores for natural resources around the small inhabited Greek island of Kastellorizo, which lies less than 1.2 nm off the coast of Türkiye, arguing that it does not generate a CS of its own but rather falls within Türkiye's CS.[55] Türkiye, which is not a party to UNCLOS, claims that the "maximalist continental shelf claim of Greece is contrary to international law, jurisprudence and court decisions."[56] Greece, on the other hand, relying on UNCLOS, considers the Turkish exploration activities to be violations of its sovereign rights over the CS around Kastellorizo. In response to Türkiye sending a survey vessel to the area in August 2020, Greece put its entire armed forces on emergency alert.[57]

Conflicts over the existence of an EEZ and CS derived from islands also manifest in marine scientific research conflicts. Coastal States, in

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[53] UNCLOS, Article 77 (1) and (2).

[54] UNCLOS, Article 77 (2).

[55] See BBC, "Greece on alert as Turkey sends survey ship to disputed waters" (10 August 2020), www.bbc.com/news/world-europe-53723984. See also, generally, Hans Köchler, *Kastellorrzo: The Geopolitics of Maritime Boundaries and the Dysfunctionality of the Law of the Sea* (2020) 25-36.

[56] Republic of Turkey, Ministry of Foreign Affairs, "Statement of the Spokesperson of the Ministry of Foreign Affairs, Mr. Hami Aksoy, in Response to a Question Regarding the Statement of the Ministry of Foreign Affairs of Greece Concerning the Survey Activities of the Vessel Oruç Reis in the Eastern Mediterranean" (22 July 2020), www.mfa.gov.tr/sc_-66_-yunanistan-disisleri-bakanligi-nin-oruc-reis--dogu-akdeniz-deki-arastirma-faaliyetine-iliskin-yaptigi-aciklama-hk-sc.en.mfa.

[57] See Anthee Carassava, "Tensions Escalate Over Turkish Drilling Plans in East Mediterranean" (10 August 2020), www.voanews.com/a/europe_tensions-escalate-over-turkish-drilling-plans-east-mediterranean/6194191.html.

exercising their jurisdiction, have the right to regulate and authorize marine scientific research in their EEZ and on their CS;[58] such research may only be conducted with the consent of the coastal State.[59] Conflicts may arise when States conducting such research claim that no consent is required because a land feature does not qualify as a proper island and thus does not generate an EEZ or CS. For example, Japan claims a CS and an EEZ off Okinotorishima. While China acknowledges Japan's sovereignty over the islet, it has strongly protested against the assertion that it can generate an EEZ and CS, contending that it is a "rock" and not an "island." Consequently, China claims the right to conduct marine scientific research and other activities in the sea area surrounding Okinotorishima without seeking Japan's consent.[60] Japan, on the other hand, argues that "[m]arine scientific research in Japan's EEZ is not permitted without Japan's consent" and "performs necessary duties, checks foreign vessels' activities in the EEZ with necessary warnings given over the radio."[61]

Island conflicts may also arise as conflicts over the pollution of the maritime environment. When there are clear grounds or objective evidence that a vessel has in the EEZ of a State committed a violation of applicable rules and standards for the prevention, reduction and control of pollution from vessels, and when the violation results in a discharge causing major damage or threat of major damage to the coastline, related interests, or the marine resources of the coastal State, that State may require the vessel to provide information, undergo a physical inspection, and initiate proceedings, including the detention of the vessel, in accordance with its laws. While such a case has not yet been reported, the flag State of a vessel involved may challenge the authority of the coastal State to take measures against the vessel on the grounds that the alleged pollution did not occur in the EEZ, because the insular fea-

[58] UNCLOS, Article 246 (1).

[59] UNCLOS; Article 246 (2).

[60] See, e.g., Ministry of Foreign Affairs of the People's Republic of China, "Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on July 17, 2020" (18 July 2020), www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1798656.shtml.

[61] Ministry of Foreign Affairs of Japan, "Press Conference by Japan's Minister for Foreign Affairs Takeaki Matsumoto, Friday, June 24, 2011" (24 June 2011), www.mofa.go.jp/announce/fm_press/2011/6/0624_01.html.

ture from which it is measured constitutes a "rock" under Article 121 (3) of UNCLOS, rather than an island.

In practice, islands also frequently cause delimitation conflicts. The coasts of proper islands, like those of mainland territories, generate a territorial sea, contiguous zone, EEZ and (extended) CS.[62] Their high conflict potential arises from the fact that islands belonging to one State are often situated near the mainland or island territory of another State. Whenever an island of one State is located less than 24 nm from the mainland or island territory of another State, the territorial seas of the two States must be delimited. The same applies to the EEZ and CS whenever the relevant coasts are less than 400 nm apart. Additionally, islands may give rise to an extended CS or may face an extended CS claim generated by another island or a mainland coast, in which case overlapping claims will also need to be delimited. Island delimitation conflicts are usually exacerbated by the fact that these overlapping areas are valuable in terms of natural resources, both living and non-living. In such cases, the delimitation conflict will be part of a larger resource conflict. While some island delimitation conflicts have been settled through judicial or diplomatic means,[63] the large majority of these conflicts simmers beneath the surface and may erupt at any time.

Islands do not only cause delimitation conflicts, but, as envisaged by Arvid Pardo and Elisabeth Mann Borgese, they also create delineation conflicts. The coastal State must delineate the outer limits of its CS, where that shelf extends beyond 200 nm.[64] This includes the CS of islands. Any unjustified delineation of the CS of islands beyond 200 nm will automatically encroach upon the Area; that is, the seabed and ocean floor beyond the limits of national jurisdiction.[65] The Area and its

[62] UNCLOS, Article 121 (2).

[63] For an example of judicial settlement, see ICJ, *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, ICJ Reports 1993, 38. For an example of diplomatic settlement, see *Convention on Maritime Boundaries between the Government of the French Republic and the Government of the United Kingdom of Great Britain and Northern Ireland*, 25 October 1983 (1367 UNTS 182).

[64] UNCLOS, Article 76 (7).

[65] UNCLOS, Article 1 (1) (1).

resources are the common heritage of mankind.[66] Therefore, islands may create conflicts not only with individual States but with the community of States as a whole.

Information on the limits of the CS beyond 200 nm must be submitted by the coastal State to the Commission on the Limits of the Continental Shelf (CLCS), which shall make recommendations to the coastal State regarding the establishment of the outer limits of the CS. The limits of the CS established by a coastal State on the basis of these recommendations are final and binding.[67] When, in November 2008, Japan submitted a claim to an extended CS beyond 200 nm based on Okinotorishima, China immediately protested the claim, stating:

> "Since the *rock* of Oki-no-Tori Shima does not have any ground to claim continental shelf, it is not within the mandate of the Commission to make any recommendation on the portions of continental shelf both within and beyond 200 nautical miles measured from the rock of Oki-no-Tori Shima as contained in Japan's Submission. Therefore, the Commission is kindly requested not to take any action on the above mentioned portions."[68]

A similar note was sent by the Republic of Korea.[69] Japan responded that it was not for the CLCS to examine Japan's interpretation of Article 121 of UNCLOS and its determination of the legal status of Okinotorishima as an island that generates an (extended) CS.[70] Over the next four years, numerous notes verbales were sent, and statements were made by the States involved.[71] Paragraph 5(a) of Annex I to the Rules

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66 UNCLOS, Article 136.

67 UNCLOS, Article 76 (8).

68 Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/2/2009 (6 February 2009) (italics added).

69 Note Verbale from the Permanent Mission of the Republic of Korea to the United Nations to the Secretary-General of the United Nations, No. MUN/046/09 (27 February 2009).

70 Note Verbale from the Permanent Mission of Japan to the United Nations to the Secretary-General of the United Nations, No. SC/09/108 (25 March 2009).

71 See Michael Sheng-ti Gau and Si-han Zhao, "Outer limits of the continental shelf beyond CLCS recommendations and Article 76(8) of UNCLOS: With reference to Japan's Cabinet Order No. 302" (2022) 35 *Leiden Journal of International Law* 85-103 at 94-95.

of Procedure of the CLCS provides that "[i]n cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute."[72] On 19 April 2012, the CLCS decided that "it will not be in a position to take action to make recommendations on the Southern Kyushu-Palau Ridge Region (KPR) until such time as the matters referred to in the notes verbales have been resolved."[73] This meant that approximately 250,000 km^2 of Japan's claim to an extended CS of the southern Kyushu-Palau ridge based on Okinotorishima were not included in the CLCS's recommendation. The conflict over an extended CS based on Okinotorishima thus remains unresolved.

Finally, islands also give rise to navigation conflicts. The sovereignty of States extends to the territorial sea around their islands.[74] Low-tide elevations and artificial islands, on the other hand, do not generate a territorial sea of their own. Artificial islands can have only a 500-meter security zone around them.[75] The coastal State's sovereignty over the territorial sea is subject, *inter alia*, to the ships of all other States having the right of innocent passage.[76] However, there is no corresponding right of overflight in the territorial sea.

Navigation conflicts are triggered when States conduct so-called Freedom of Navigation Operations ("FONOPs") in the vicinity of maritime land features to challenge claims to a territorial sea, asserting that the land feature in question does not qualify as an island and thus cannot generate a territorial sea. For example, the United States regularly conducts FONOPs in the South China Sea to challenge Chinese claims to a territorial sea around what the United States considers built-up low-tide elevations, rather than proper islands. Such FONOPs consist either of military or other aircraft flying through the claimed territorial sea area or ships zigzagging through the territorial sea (rather than simply

[72] CLCS, Rules of Procedure of the Commission on the Limits of the Continental Shelf, CLCS/40/Rev.1 (18 April 2008), Annex I, para. 5 (a).

[73] CLCS, "Summary of Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission Made by Japan on 12 November 2008" (19 April 2012), 5, para. 20.

[74] UNCLOS, Article 2 (1).

[75] See UNCLOS, Article 60 (5).

[76] UNCLOS, Article 17.

traversing it) or conducting acts in transit that are considered non-innocent, such as weapons exercises, information gathering, survey activities, or the launching, landing or taking on board of an aircraft, helicopter or military device, or man-overboard drills. One such FONOP led to a near-collision of a U.S. Navy destroyer with a Chinese warship. On 30 September 2018, the U.S. Navy guided-missile destroyer, the "USS Decatur," operated within 12 nm of Gaven Reef and Johnson South Reef in the Spratly Islands, which the United States does not consider to meet the requirements of islands. While the United States claimed the right to freedom of navigation in the area, China viewed the U.S. operation as a violation of its sovereignty in the territorial sea around these islands. When the Chinese destroyer "PRC Lanzhou" attempted to force the U.S. destroyer to change course, the two ships almost collided.[77]

Navigation conflicts also arise when two States claim sovereignty over the same island. In this case, each State will assert its right to freely navigate in the territorial sea around its island and to fly aircraft through the airspace above its island and the surrounding territorial sea. However, the other State will accuse it of violating its sovereignty. For example, in April 2025, Japan and China accused each other of airspace violations in the territorial sea around the disputed Senkaku/Diaoyu Islands in the East China Sea. Japan claimed that "four China Coast Guard vessels entered Japan's territorial waters around the Senkaku Islands, and a helicopter launched from one of the China Coast Guard vessels intruded into Japan's territorial airspace around the islands."[78] Japanese forces responded by scrambling fighter jets. This, in turn, led China to accuse Japan of violating its airspace around

[77] See Luis Martinez, "Chinese warship came within 45 yards of USS Decatur in South China Sea: U.S." (2 October 2018), https://abcnews.go.com/Politics/chinese-warship-45-yards-uss-decatur-south-china/story?id=58210760. See also Ministry of Foreign Affairs, People's Republic of China, "Foreign Ministry Spokesperson Hua Chunying's Remarks on U.S. Warship's Illegal Entry into Waters Close to Nansha Islands" (2 October 2018), www.mfa.gov.cn/eng/xw/fyrbt/fyrbt/202405/t20240530_11349594.html.

[78] Ministry of Foreign Affairs of Japan, "Protest regarding the Intrusion of a China Coast Guard Vessel's helicopter into Japan's Territorial Airspace" (3 May 2025), www.mofa.go.jp/press/release/pressite_000001_01228.html.

the Diaoyu Islands.[79] In another example, on 16 November 2025, the Chinese Coast Guard sent several vessels into the territorial sea around the Senkaku/Diaoyu islands as part of "a rights protection cruise." A contingent of Japanese coast guard vessels blocked the Chinese vessels and warned them to leave, and each side accused the other of violating its territorial sovereignty in the sea area around the islands.[80]

IV. Islands as the Subject of International Conflict

While islands are the cause of fisheries, delimitation, navigation, and other conflicts, they are also the subject of conflicts themselves: sovereignty conflicts and status conflicts.

It is only in very few cases that, for historical, political or strategic reasons, a conflict will arise over the ownership of an island as such. Especially small, remote, and uninhabited islands would hold little interest for both continental and island States were it not for the EEZ and (extended) CS they generate. The principle that "the land dominates the sea" is one of the fundamental concepts of the law of the sea.[81] Sovereignty over the territorial sea, as well as sovereign rights and jurisdiction in the EEZ and CS, depends on sovereignty over coastal land territory. This principle explains why even small, uninhabited, or seemingly insignificant islands, islets, rocks, and atolls are often fiercely contested. Sovereignty over even a small island can serve as a maritime multiplier, granting a State sovereignty, sovereign rights and jurisdiction over vast expanses of ocean space and the resources therein (fish, oil, gas, minerals).

This illustrates the conflict between France and Madagascar over the Scattered Islands. Uninhabited and scattered across the Mozambique

[79] AP, "Japan and China accuse each other of violating airspace near disputed islands" (4 May 2025), https://edition.cnn.com/2025/05/04/asia/japan-china-accuse-airspace-violation-disputed-islands-intl-hnk.

[80] Brian Mcelhiney and Keishi Koja, "Chinese coast guard enters Senkaku waters after Japan warns it may use force" (17 November 2025), www.stripes.com/theaters/asia_pacific/2025-11-17/china-japan-senkaku-islands-taiwan-19792248.html.

[81] See *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment, ICJ Reports 1969, 3 at 51, para. 96.

Channel and the Western Indian Ocean, these islands – including Bassas da India, Europa, Juan de Nova, Tromelin, and the Glorioso Islands – have been under French sovereignty since colonial times. Madagascar, a former French colony, also claims them. While the land territory of these islands amounts to only about 43 km², these tiny islands, lacking a permanent civilian population, grant France jurisdiction over 640,400 km² of maritime area, roughly 6% of its total maritime domain.[82]

Conflicts concerning territorial sovereignty over islands are distinct from the law of the sea. The question of territorial sovereignty over maritime land features is determined by general international law. Territorial sovereignty over islands is acquired through discovery, effective occupation, cession, acquisitive prescription, and (in former times) conquest and annexation.[83] These modes of acquisition of territorial sovereignty are outside the scope of UNCLOS and thus do not fall under the Convention's compulsory dispute settlement regime, which is limited to "the interpretation and application of [the] Convention."[84] Unless States agree to submit such conflicts to the International Court of Justice ("ICJ") for resolution or resolve the sovereignty issue through diplomatic means, island sovereignty disputes remain open wounds in the relations between the States concerned, which can flare up at any time. Such conflicts are often instrumentalized for domestic political reasons, adding another complicating factor.

In order to underline their claim to sovereignty over islands, States land soldiers or other personnel on uninhabited islands and conduct flag-raising ceremonies there. This, in turn, gives rise to diplomatic protests over violations of territorial sovereignty and the landings and ceremonies conducted by the other claimant State(s).[85] Such conflicts

[82] Anaelle Jonah, "'Triangle of power': Madagascar wants control over the Scattered Islands. France says no" (25 April 2025), www.msn.com/en-gb/news/world/triangle-of-power-madagascar-wants-control-over-the-scattered-islands-france-says-no/ar-AA1Dy8CN?a%E2%80%A6.

[83] See Marcelo G. Kohen and Mamadou Hébié, "Territory, Acquisition," in *Max Planck Encyclopedia of Public International Law* (Online edition, November 2021) MN 7.

[84] See UNCLOS, Article 286.

[85] See, e.g., Kawala Xie, "China and Philippines clash over disputed Sandy Cay in the Spratly Islands" (28 April 2025), www.scmp.com/news/china/diplomacy/article/3308187/china-and-philippines-clash-over-disputed-sandy-cay-spratly-islands.

can easily turn violent when one side tries to prevent the other from conducting certain activities on the island.

Another indirect way States have chosen to manifest their sovereignty claims is by extending their Air Defense Identification Zones ("ADIZ") to remote islands and other maritime land features. This has sometimes resulted in overlapping ADIZs, which, in turn, have produced concomitant air traffic conflicts. When China established the East China Sea ADIZ on 23 November 2013, which included, among other areas, the airspace above and around the disputed Senkaku/Daioyu Islands and thus overlapped with Japan's ADIZ, the United States flew an unarmed B-52 bomber over the disputed area.[86] The Chinese ADIZ also incorporated the waters around the submerged Ieodo/Suyan Reef, which are claimed by both the Republic of Korea and China. This rekindled the conflict and triggered Korea to expand its own ADIZ to include the waters around Ieodo/Suyan Reef.[87]

The greatest potential for conflict arises, however, from the fact that States attempt to manifest their claim to sovereignty by extending their laws and regulations to disputed islands and their maritime zones, and by enforcing these laws and regulations against other claimant State(s) and their nationals. For example, on 12 December 2025, the Chinese Coast Guard prevented some twenty small-scale Filipino fishing boats from fishing in the vicinity of Xianbin Jiao/Escoda Shoal, using water cannons and dangerous blocking manoeuvres near the shoal.[88] While the Philippines lodged a diplomatic protest with the Chinese embassy in Manila over the incident in which Filipino fishermen were injured, a spokesperson for the Chinese Ministry of Foreign Affairs declared that the action was "legitimate, lawful, professional, restrained and beyond

[86] See BBC, "U.S. B-52 bombers challenge disputed China air zone" (26 November 2013), www.bbc.com/news/world-asia-25110011.

[87] Deutsche Welle, "S. Korea expands air zone" (8 December 2013), www.dw.com/en/south-korea-announces-expanded-air-defense-zone-over-disputed-area/a-17278550.

[88] Izel Abanilla, "PH denounces China's 'inhumane' acts over its fishermen in shoal incident" (16 December 2025), www.msn.com/en-ph/news/national/ph-denounces-china-s-inhumane-acts-over-its-fishermen-in-shoal-incident/ar-AA1SrOvo.

reproach" because it was "necessary to safeguard our territorial sovereignty and maritime rights and interests."[89]

Islands are not only the subject of territorial sovereignty conflicts but also of legal status conflicts. The question of whether a maritime land feature qualifies as a proper island, rock, low-tide elevation, artificial island, or submerged land feature (underwater rock or reef) determines whether it is entitled to certain maritime zones. Especially the tripartite distinction in Article 121 of UNCLOS between islands, rocks that can sustain human habitation or economic life of their own, and rocks that cannot has given rise to numerous status conflicts.[90] The status of the various maritime land features is a genuine law of the sea question governed by UNCLOS and subject to the Convention's compulsory dispute settlement regime. However, as already noted by Arvid Pardo and Elisabeth Mann Borgese, the term "rocks which cannot sustain human habitation or economic life" is far from clear. The arbitral tribunal's (flawed) application of Article 121 (3) of UNCLOS in the South China Sea arbitration between the Philippines and China[91] has further exacerbated the conflict over the South China Sea islands rather than resolved it.[92]

V. Conclusion

The aims of UNCLOS were, *inter alia*, to make "an important contribution to the maintenance of peace" and to "contribute to the peaceful uses of the sea and oceans," as well as to take "into account the interests and needs of mankind as a whole."[93] With regard to the "regime of islands," the Convention has not fully achieved these aims. On the contrary, islands have become both a subject and a cause of sometimes even military conflict. Several reasons for this can be identified.

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[89] Ministry of Foreign Affairs of the People's Republic of China, "Foreign Ministry Spokesperson Guo Jiakun's Regular Press Conference on December 15, 2025" (15 December 2025), www.fmprc.gov.cn/mfa_eng/xw/fyrbt/202512/t20251215_11773003.html.

[90] See Talmon (n. 37) 871 MN 32.

[91] For criticism of the arbitral tribunal's interpretation and application of the term "rock," see Talmon (n. 37) 868-872.

[92] See Talmon, *The South China Sea Arbitration: Jurisdiction, Admissibility, Procedure* (2022) 45-50.

[93] UNCLOS, Preamble, paras. 1, 4, 5.

First, the wording of Article 121 (3) of UNCLOS is not clear, thus allowing States to claim that even their smallest land features are either proper islands or, at least, rocks that can sustain human habitation or economic life of their own, and thus generate an EEZ and (extended) CS, rather than being rocks with only a territorial sea.

Second, Article 121 (2) of UNCLOS is very broad and allows vast expanses of ocean space to fall under national jurisdiction. In particular, Article 121 (2) enables States to claim large areas of (extended) CS for themselves at the expense of the Area, and thus ultimately to the detriment of the interests and needs of mankind.

Third, Article 121 (2) gives undue importance to islands which, without their maritime zone entitlements, would be of little to no interest to States. However, because of their maritime zones and the exclusive right to the natural resources within these zones, these islands become coveted prizes over which States are even prepared to go to war.[94]

Fourth, and most importantly, UNCLOS has multiplied the conflict potential of islands created by Article 121 (2) by expanding the breadth of the territorial sea from three to twelve nautical miles, introducing the concept of an automatic 200 nm legal continental shelf, allowing for a CS beyond 200 nm if certain geological and geomorphological conditions are met, and establishing a 200 nm EEZ. Prior to 1982, islands generated only a narrow (3 nm) territorial sea and a very limited CS. Consequently, the number of islands whose maritime zones overlapped with the maritime zones of islands or continental territory of other States was much smaller, leading to less potential for delimitation conflicts. Additionally, because of the narrow band of territorial sea and CS, the resource significance of islands was much more limited.

Arvid Pardo and Elisabeth Mann Borgese foresaw many of the conflicts caused by islands. For this reason, during the negotiations in the Seabed Committee, Ambassador Pardo attempted to limit the maritime entitlements of islands. Over the years, his approach became increasingly

[94] See, e.g., the brief military confrontations between China and Vietnam over the Paracel Islands in January 1974 and over several reefs in the Spratly Islands in March 1988.

restrictive. Initially, he simply suggested that rocks and islands without a permanent settled population and islands other than the principal islands of island States should not have a CS. He later categorized islands according to their size: islands with a land area of less than one square kilometer were to have no maritime zones of their own at all; islands with a land area between one and ten square kilometers were to have a territorial sea; and only islands with a land area of more than ten square kilometers were to have an EEZ and CS. This would have reduced the number of islands entitled to an EEZ and CS to a few thousand. Pardo's distinction between islands was arbitrary and driven by the goal of limiting the encroachment of the CS of islands on the Area. However, had his categories been adopted in UNCLOS, many of the present-day islands conflicts could have been avoided.

Murat Sümer

The Judicial Treatment of Islands in Maritime Boundary Delimitation

I. Introduction

Before the mid-twentieth century, coastal States generally limited their maritime jurisdiction to a narrow belt of 3 nautical miles (nm). However, in the aftermath of World War II, there has been a steady expansion of maritime claims, first through the recognition of the continental shelf (CS) and later with the development of the exclusive economic zone (EEZ). These new concepts were consolidated in the United Nations Convention on the Law of the Sea (LOSC).[1]

As maritime entitlements expanded at the expense of the high seas, States were brought geographically closer. This led to the multiplication of maritime disputes. Consequently, contested maritime boundaries became an unavoidable ramification of the enlarged maritime jurisdiction zones. Technological advances in offshore drilling during the latter half of the 20th century further intensified national interest in seabed resources. As States gained the capacity to exploit hydrocarbons at greater distances and depths, competition over maritime spaces further increased.

Naturally, these extended maritime zones become crucial issues for the international community as they grant coastal States extensive sovereign rights. In practice, however, the exercise of such rights is constrained by overlapping claims in the face of the competing entitlements. Delimitation arises precisely in this context, where the potential entitlements of two or more States overlap. In this respect, given the

[1] United Nations Convention on the Law of the Sea, adopted on 10 December 1982, entered into force on 16 November 1994, 1833 UNTS 397.

expansion of maritime zones, delimitation has become one of the most contentious issues in international law which international courts and tribunals have had to deal with quite often.[2]

In this context, a thorny issue is the question of islands, especially in complex geographical settings, particularly where one State's islands lie close to or on the "wrong side" of an equidistance line. Depending on their location, islands can distort the course of a boundary and cause inequitable results. International jurisprudence has therefore had to cope with the effects of insular features, developing case-specific methods to limit their unjustified impact. The distinction between entitlement and effect lies at the core of the riddle of islands in delimitation. Yet, despite their relevance, the judicial treatment of islands in delimitation, unlike their abstract capacity, has not always been addressed as much in the doctrine.[3]

Although an international maritime lawyer can see the difference between abstract capacity and effect of islands at first glance this may not be the case for lay people. Hence, there seems to be confusion in the discourse at times as regards the capacity and treatment of islands in delimitation. One should bear in mind that maritime boundary disputes are among the most sensitive of international conflicts. Since they concern sovereignty, sovereign rights over resources, and jurisdiction, they can easily lead to escalation and endanger international peace and security. Nevertheless, international law provides only limited assistance. Moreover, domestic political and emotional pressures may complicate

[2] Malcolm D. Evans, "Maritime Boundary Delimitation" in Donald R. Rothwell and others (eds.), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 255; Murat Sümer, "Circumnavigating the Aegean Question: Joint Development of the Aegean Sea by Greece and Türkiye" (2023) 11 *Peace & Security – Paix et Sécurité Internationales*, 2-3; Murat Sümer, "Geometry of Equitable Principles: The Role of Appropriate Base Points in the Three-Stage Delimitation Process" (2024) 7(1) DEHUKAMDER 155, 156-57.

[3] Shunji Yanai, "International Law Concerning Maritime Boundary Delimitation" in Malgosia Fitzmaurice and Norman A. Martínez Gutiérrez (eds.), *The IMLI Manual on International Maritime Law*, Volume I: *The Law of the Sea* (OUP 2014) 304-05; Clive Schofield, "The Trouble with Islands: The Definition and Role of Islands and Rocks in Maritime Boundary Delimitation" in Vaughan Lowe and Robin Churchill (eds.), *Maritime Boundary Disputes, Settlement Processes and the Law of the Sea* (Martinus Nijhoff 2009) 20-23; Malcolm D. Evans and Reece Lewis, I*slands, Law and Context: The Treatment of Islands in International Law* (Edward Elgar 2023) 1.

the disputes. Moreover, the ambiguity of existing regulations is exacerbated by a deficit in technical legal knowledge in bureaucracy and decision-making mechanisms. Arguably, this causes insecurity at the State level in addressing these issues through bilateral means or recourse to third-party dispute settlement mechanisms.

In addition, this lack of legal understanding can also encourage the consolidation of maximalist claims under the misconception that such claims are legally valid. Consequently, such disputes, particularly in complex geographical settings, often remain unsettled for long periods. Against this backdrop, this article attempts to analyze the legal framework governing islands, with particular attention to both their capacity to generate maritime zones and their treatment in the delimitation process in light of the international jurisprudence.

II. Legal Framework

LOSC codified the general principles on the delimitation of maritime boundaries. In this regard, Article 15 addresses the territorial sea, while Articles 74 and 83 govern the delimitation of the EEZ and CS, respectively. Article 15 essentially reiterates the earlier rule of the 1958 Geneva Convention on the Territorial Sea,[4] requiring that, where States have opposite or adjacent coasts, the territorial sea be delimited by the median line unless otherwise agreed, subject to exceptions for historic title or special circumstances. By contrast, Articles 74 and 83 were formulated in a rather different manner. This is an understandable choice, given the fundamental distinction between zones of full sovereignty and those conferring only sovereign rights. Besides, the wording of Articles 74 and 83 was the product of a hard-fought compromise. One group of States favored equidistance with adjustments for special circumstances, while another promoted a more flexible equitable principles approach. The deadlock was resolved in 1981 through a proposal which shifted the focus away from methodology and placed emphasis on the overarching goal of achieving an equitable solution.

[4] Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 516 UNTS 205.

The Convention thus deliberately refrained from prescribing a specific mandatory method by focusing only on the outcome. Articles 74 and 83 require delimitation based on international law to achieve an equitable solution. The Convention provides neither specific criteria nor a methodology for achieving this crucial outcome. Essentially, the LOSC regime entrusted this task to international jurisprudence to shape the State practice. And indeed, in the absence of detailed treaty rules, subsequent decisions of international courts and tribunals have progressively developed the applicable methodologies, establishing a body of case law that has reduced subjectivity in maritime boundary delimitation. Having said that, there is no universal mandatory technique for delimitation; indeed, there may never be one, as each case turns on to its own particular circumstances and context.[5]

2.1 The Capacity of Islands to Generate Maritime Zones

Article 121 stipulates that islands, like mainland coasts, may generate a full suite of maritime zones, whereas other insular features deemed as rocks can only have a territorial sea. A juridical island without neighboring coasts within 400 nm may produce 1,550 km² of territorial sea and can have claims up to 431,014 km² for the EEZ and CS. This underscores the high stakes of island disputes.[6]

Set out in Part VIII of the LOSC, Article 121 defines an "island" as a naturally formed land feature above water at high tide. Paragraph 1 lists four conditions for a feature to qualify as an island. Accordingly, it must be naturally formed, constitute an area of land, be surrounded by water, and remain above water at high tide. Paragraph 2 affirms that islands are entitled to the full suite of maritime zones, while paragraph 3 carves out the exception for rocks that cannot sustain human habitation or economic life of their own. Regarding the definition of islands,

[5] Stephen Fietta and Robin Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (OUP 2016) 24-27; Yanai (n 3) 314; Sümer (n 2) 161.

[6] Donald R. Rothwell, *Islands and International Law* (Hart Publishing 2022) 162-63; Clive Schofield (n 3) 20-23; Clive Schofield, *The Regime of Islands Reframed: Developments in the Definition of Islands under the International Law of the Sea* (Brill 2019) 9-15; Harry Hobbs and Donald R. Rothwell, *Towards a Legal Era of Islands: The International and Constitutional Legal Status of Island Territories* (CUP 2024) 618.

the South China Sea Arbitral Tribunal[7] aligned itself with the approach of the International Court of Justice (ICJ). The Tribunal emphasized that, although the size of a maritime feature may correlate with factors such as access to water, food, living space, and resources necessary for sustaining human habitation or economic life, yet size alone cannot determine whether a feature qualifies as a fully entitled island or a rock under Article 121. In this respect, it echoed the ICJ's finding that international law defines an island by whether it is naturally formed and remains above water at high tide, without imposing any minimum size requirement.[8]

Notably, Article 121 defines the abstract capacity of islands to generate maritime zones but does not address delimitation or sovereignty matters which are governed by other provisions of the LOSC or general international law. Thus, this is comparable to Articles 3, 57, and 76, which likewise set out the general entitlements to the territorial sea, EEZ, and CS without prescribing how such entitlements are to be treated when they overlap with the claims of other States.

Despite its ambitious, and perhaps misleading, title: "regime of islands," Part VIII is in fact confined to this single provision and thus falls short of establishing a comprehensive regime. It does not provide guidance on the treatment of islands in delimitation. Those matters must instead be resolved through Articles 15, 74, 83 and general international law as well as jurisprudence. In a nutshell, Article 121 defines only the generative capacity of islands. Whether that capacity translates into actual effect is determined elsewhere according to the particular circumstances of each case.[9]

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[7] The South China Sea Arbitration (Philippines v. China) (Award) (12 July 2016) PCA Case No 2013-19 https://pcacases.com/web/sendAttach/2086 accessed 28 September 2025.

[8] *Ibid*; Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, ICJ Reports 2012, p. 624, para. 37.

[9] Alexander Proelss (ed.), The *United Nations Convention on the Law of the Sea: A Commentary* (Hart Publishing 2017) 859–60; Evans (n 2) 262-63; Deniz Bölükbaşı, *Turkey and Greece: The Aegean Disputes* (Cavendish 2004) 482; Schofield (n 3) 24-25; Rothwell (n 6) 260-61; Evans and Lewis (n 3) 5-11.

2.2 The Impact of Islands on the Maritime Boundary Delimitation

Land territory is the legal source of a State's rights over its adjacent waters. The principle that the land dominates the sea was articulated as early as the beginning of the 20th century.[10] It was reaffirmed authoritatively in the North Sea Continental Shelf cases.[11] This principle remains foundational in the context of delimitation. In this regard, sovereignty over land entitles coastal States to maritime zones. A corollary of this principle is the rule of non-encroachment, requiring that each State's seaward projection be respected and that no abstract competing entitlement can cut off one mainland coast from the maritime space to which it is naturally entitled. Modern jurisprudence reflects this geography-centered approach. While the LOSC leaves the effect of islands undefined, practice shows that the decisive factor is geography. The ICJ stressed that, in delimitation, international law provides only the general requirement that equitable criteria must be applied. Yet those criteria are not exhaustively defined but are primarily determined in relation to the geographical features of the area. In this respect, the effect of islands is assessed in relation to the coastal projection of the mainland to prevent encroachment and preserve the balance inherent in the principle that the land dominates the sea. In practice, while islands are capable of generating maritime zones, they are accorded less weight than continental coasts in delimitation. Indeed, typically, islands cannot prevail over continental coasts. Hence, the influence of islands depends on the particular configuration, proportionality of coasts, and the broader circumstances of each case rather than their simple generative capacities. Notably, it is submitted that the islands, as features within the sea, remain vulnerable to being subordinated to the mainland.[12]

[10] Island of Palmas (Netherlands/USA) (Award) (4 April 1928) II RIAA 829, 839.

[11] North Sea Continental Shelf Judgment, ICJ Reports 1969, p. 3, para. 96.

[12] Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, ICJ Reports 1984, p. 246, para. 59; Malcolm D. Evans, "Relevant Circumstances in Maritime Boundary Delimitation: The Case Law" in Alex G. Oude Elferink, Tore Henriksen and Signe Veierud Busch (eds.), *Maritime Boundary Delimitation: The Case Law* (CUP 2018) 250-52; Fietta and Cleverly (n 5) 27-29, 67-71; Schofield (n 3) 31-37; Sean D. Murphy, *International Law Relating to Islands* (Brill Nijhoff 2017) 175-82, 207.

In the delimitation exercise, one of the most consistently recognized relevant circumstances is the distorting effect islands can exert on a provisional delimitation line. A common way to demonstrate distortion is to compare lines drawn with and without the island in question. International courts and tribunals have employed various techniques to address the disproportionate impact of islands such as granting them full or reduced effect. In some cases, courts and tribunals have opted for enclavement, preserving the island's 12 nm territorial sea but isolating it as a bubble within the other State's CS/EEZ, thereby preventing it from influencing the broader delimitation.[13] If islands are on the right side of the equidistance line but may cause distortion on the boundary line then they are usually given half effect. In other cases, tribunals have chosen to give an island no effect, disregarding it altogether as a base point in the drawing of the CS/EEZ boundary, while keeping its territorial sea.[14] Irrespective of the terminology, all these methods aim to ensure that islands do not distort the delimitation of outer maritime zones.[15]

The jurisprudence appears to confirm that islands are consistently treated as relevant circumstances when they threaten to distort the delimitation process. The treatment of islands ultimately depends on context. Geographical circumstances, and above all the location of an island, remain the primary concern in delimitation. To be more precise, the decisive factor is often an island's distance from its own mainland compared to that of the neighboring State or its proximity to the provisional delimitation line. Islands lying on the wrong side of a delimitation line form a disadvantaged sub-category. Disadvantaged islands, although acknowledged as sources of entitlement, are typically accorded only

[13] For example, the UK/France Continental Shelf Arbitration concerning the Channel Islands; the Dubai/Sharjah Arbitration concerning Abu Musa; Romania/Ukraine concerning Serpents' Island; and Bangladesh/Myanmar concerning St Martin's Island.

[14] For example, the ICJ's treatment of Filfla in the Libya/Malta case and Qit'at Jaradah in the Qatar/Bahrain case.

[15] See Channel Islands, Bangladesh/Myanmar, Newfoundland and Labrador/Nova Scotia, and Jan Mayen etc.

limited weight to prevent inequitable results. Location has thus consistently determined their impact in the delimitation of the maritime boundaries.[16]

III. Judicial Treatment of Islands in the Jurisprudence

Although Article 121 affirms that islands, like other land territory, generate maritime zones, their role in judicial delimitation is far more complicated. In principle, islands and mainland coasts enjoy equal entitlement. In practice, however, when their entitlements overlap with those of continental landmasses, islands frequently receive diminished effect. This creates a persistent tension between the formal capacity of islands and their unequal treatment in delimitation. The LOSC itself provides no express guidance on the effect of islands in cases of overlapping claims. As the International Tribunal for the Law of the Sea (ITLOS) has aptly noted, the impact of islands is case-specific in the absence of a universal rule.[17] Thus, each situation must be assessed considering its geography and circumstances, with the overriding objective of achieving an equitable solution.[18]

Although no exclusive rule germane to the treatment of islands in delimitation exists, certain practical techniques have nevertheless emerged over the years. International courts and tribunals typically assess islands in light of the specific circumstances of each case. Practice reveals a flexible spectrum of modalities. Even independent island States have not always enjoyed full or equal effect.[19] Although this may appear quite odd at first sight given the principle of sovereign equality of States, it reflects the correct approach. Judicial mechanisms are not designed to refashion geography or to equalize its inherent inequalities, but to take those inequalities into account in pursuit of equitable outcomes. Sover-

[16] Fietta and Cleverly (n 5) 73-76; Murat Sümer, "Equitable Considerations in the Delimitation of the Continental Shelf" (2023) *100 International Law Studies* 752, 767-68; Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), ITLOS Case No. 16, Judgment, ITLOS Reports 2012, p. 4, 318-19.

[17] *Ibid* (n 16) para 317.

[18] Evans (n 2) 273-74; Hobbs and Rothwell (n 6) 619.

[19] See the Libya/Malta case.

eign equality operates in law, but it does not eliminate the disparities of geography, such as the coastal lengths, which remain central to delimitation. The decisive factors have been geographical, such as distance and the relationship to mainland coasts. Whether the islands form the sole unit of entitlement, compete with continental land, or fall on the wrong side of a median line, the overarching objective has consistently been to reconcile entitlement with equity, preventing islands from producing disproportionate results in delimitation.[20]

Decisions of international courts and tribunals, as referred to in the ICJ Statute,[21] play a fundamental role in determining and clarifying the law applicable to maritime delimitation under Articles 74 and 83 of the LOSC. Both provisions establish that the delimitation of the EEZ and CS between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in the Statute of the ICJ to achieve an equitable solution. While this formula appears simple and deliberately open-textured, it is in fact far-reaching. According to ITLOS and the Arbitral Tribunal in the Barbados and the Republic of Trinidad and Tobago case, it permits reliance not only on treaty law and customary law but also on general principles of international law, as well as the interpretative contributions of courts, tribunals, and scholarly writing. In this respect, customary law, shaped in part by State practice and in part through decisions and awards, continues to have a particular significance in framing the considerations applicable to delimitation. In this sense, it was submitted that the law of maritime delimitation reflects a dynamic interplay between treaty provisions, custom, and jurisprudence, all directed toward achieving an equitable result.[22]

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[20] Ibrahim Ahmed El Diwany, "Legal Rules Applicable to the Equitable Maritime Boundaries Delimitation in the Eastern Mediterranean Sea: An Egyptian Perspective" (UN DOALOS, 2018) https://www.un.org/oceancapacity/sites/www.un.org.oceancapacity/files/eldiwany_ibrahim_un-nippon_researchpaper_15dec2018.pdf accessed 28 September 2025, 40-42; United Nations, *Handbook on the Delimitation of Maritime Boundaries* (DOALOS, UN 2000) 33-35.

[21] See Article 38.

[22] Barbados v. Trinidad and Tobago (Award) (11 April 2006) PCA Case No 2004-02 https://pcacases.com/web/sendAttach/1116 accessed 28 September 2025, paras 221-23; ITLOS (n 17) para 184.

Judge Wolfrum has gone further to observe that international courts and tribunals, in matters of maritime delimitation, exercise a "law-making function" which is a role anticipated and legitimized by Articles 74 and 83. This function is also reinforced by Article 287, which entrusts specified judicial institutions with the responsibility of interpreting the LOSC and, within its framework, progressively developing it. As UNCLOS III could not reach agreement on a specific method for delimiting EEZ and CS, it was left to the States themselves and, failing agreement, to judicial settlement. It is therefore both the task and the responsibility of international courts and tribunals to elaborate appropriate delimitation methodologies. Having said that they don't have a carte blanche and they must be guided by a paramount objective that the method applied must be capable of producing and ultimately does produce an equitable result.[23]

International jurisprudence has extensively addressed the treatment of islands in maritime boundary delimitation. The most significant body of case law has developed since the late 1970s, beginning with the UK/France Continental Shelf Arbitration,[24] which set important precedents on enclavement and partial effect. This coincided with the consolidation of broader maritime zones such as the CS and the EEZ under international law. Against this backdrop, the following section examines the leading cases to identify whether consistent principles or distinct patterns have emerged in the treatment of islands over the years.

3.1 The 1977 UK/France Continental Shelf Arbitration seems to be the first landmark case directly pertinent to the treatment of islands. The Channel Islands, significantly sizeable and considerably inhabited (around 195 km^2 with a population, in 1977, exceeding 100,000), lie just 6.6 nm from the French mainland but nearly 50 nm from the mainland of England. The Tribunal held that granting them full effect would "manifestly result in a substantial diminution" of the French CS.

[23] Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar) (Declaration of Judge Wolfrum) (14 March 2012) ITLOS Case No 16 https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/published/C16_RW.pdf accessed 30 August 2025; Sümer (n 16) 760-61.

[24] Delimitation of the Continental Shelf (UK v. France) (Decision of 30 June 1977 and 14 March 1978) XVIII RIAA 3 https://legal.un.org/riaa/cases/vol_xviii/3-413.pdf accessed 28 September 2025.

Although both the UK and France agreed that the equidistance line should be employed, they naturally disagreed regarding the impact of the Channel Islands. The Tribunal ultimately accepted France's position that the Channel Islands should be enclaved to preserve the appropriate balance between the two littoral States with broadly comparable coastlines. It therefore delimited the primary line between the two mainlands, ignoring the Channel Islands, but granted them a separate 12 nm enclave within the French shelf. With the enclavement method, the island retains its 12 nm territorial sea, but its broader influence on the boundary is neutralized. This strikes an equitable balance.

By contrast, despite France's arguments, the Scilly Isles were treated as part of UK's natural projection. Be that as it may, they were given only half-effect to avoid disproportionate projection. It was held that the Scilly islands could not be ignored without completely refashioning geography as they are closer to the UK's mainland, yet it was authoritatively noted that giving them full effect still would disproportionately distort the boundary. As a compromise, the Tribunal granted the Scillies half-effect, thus balancing their abstract capacity with equitable considerations. The Tribunal, upon acknowledging the presence of the State practice of giving partial effect to islands, which are located outside the territorial seas of their mainland, explained the half-effect method as follows. One line was drawn as if the islands in question were ignored, another as if they were fully counted, and the boundary was fixed midway between the two lines.

Besides, this award stressed that equity requires adjustments to counter disproportionate effect. But it also aptly noted that equity doesn't mean strict equality: "251 … The function of equity, as previously stated, is not to produce absolute equality of treatment, but an appropriate abatement of the inequitable effects of the distorting geographical feature. In the particular circumstances of the present case the half-effect method will serve to achieve such an abatement of the inequity."

On the other hand, it is also noteworthy that the Scillies; while anomalous, were not as distorting as the Channel Islands; this is why they were accorded half-effect. This dual approach of enclavement for the detached Channel Islands and partial effect for the Scilly Islands set an important precedent. And indeed, it was frequently cited in subsequent

jurisprudence in a way to justify the treatment of islands in other cases.[25] Enclavement and half-effect have since become a well-established technique in modern delimitation. The rationale is quite straightforward, i.e., granting such islands full effect would distort the equidistance line and unfairly diminish the entitlement of the opposite mainland.

3.2 The 1981 Dubai/Sharjah Arbitration also offers a clear illustration of the contextual treatment of islands in delimitation. The Tribunal confirmed the island of Abu Musa's entitlement to a full 12 nm territorial sea. However, the island was denied any effect in the CS delimitation, given such an extension would have produced a significant distortion. Therefore, the Tribunal made a sharp entitlement/delimitation distinction to avoid distortion and cut-off of neighboring shelf areas. In this respect, Kolb highlights the immediate success of the reduced effect of the islands concept following the 1977 UK/France Continental Shelf Arbitration which provided guidance in this case. Moreover, he aptly observed that although islands have inherent capacity to generate CS beyond their territorial seas, this entitlement is "subordinate to the requirement of equity arising in the context of delimitation."[26]

3.3 The 1982 Tunisia/Libya Continental Shelf decision[27] was rendered a few months before the adoption of the LOSC. In this case, the Court held that CS delimitation must be effected in accordance with equitable principles considering relevant circumstances, not by strict reliance on natural prolongation or equidistance. Among the relevant circumstances identified were the general configuration of the coasts, the marked change in direction of Tunisia's coastline, and the presence of Jerba and the Kerkennah Islands. Jerba is a large (514 km²), populated, and economically important island. It lies just off the southeastern coast of Tunisia. The Court acknowledged the presence of Jerba but declined to give it independent effect in constructing the delimitation line, noting that its inclusion or exclusion would not alter the geometry of the boundary because of its very close proximity to its mainland. Instead, it assimilated the island to the Tunisian mainland, treating it as part of the coastal façade. Yet, the ICJ considered it in the proportionality

[25] *Ibid* para 249-51; Fietta and Cleverly (n 5) 81-82, 187-195; Sümer (n 16) 767-68.

[26] Fietta and Cleverly (n 5) 215-20; Robert Kolb, *Case Law on Equitable Maritime Delimitation* (Brill 2021) 145-49.

[27] Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Judgment, ICJ Reports 1982, p 18.

assessment. This explains the divergence in commentary, with some stressing Jerba's lack of independent effect and others its incorporation into the coast. While geometrically irrelevant, the Court's choice to subsume Jerba rather than treat it as an independent circumstance prevented Tunisia's argument for seaward extension. Therefore, the treatment of Jerba island was indeed favorable to Libya.

The Court also carefully considered the treatment of the Kerkennah Islands (180 km², 11 nm offshore). By virtue of their size and position, these islands could not be ignored in the delimitation process. Nonetheless, the ICJ considered that giving them full effect would distort the line and cause excessive weight to these features. To avoid this imbalance, the Court granted the Kerkennah Islands only half effect despite being on the right side of the equidistance line in close proximity to their own mainland. In doing so, it referred to State practice and echoed the earlier treatment of the Scilly Isles in the UK/France Continental Shelf arbitration. The judgment seems to establish two concepts in jurisprudence. First, that entitlement does not necessarily guarantee full effect in delimitation. And secondly, even large, inhabited, and economically active islands may be given partial effect, like in the example of the Kerkennah islands, when equity requires it.[28]

3.4 The 1984 Gulf of Maine[29] dispute was the first international maritime boundary case decided after the adoption of the LOSC. The judgment was rendered by the Chamber of the ICJ constituted for this particular dispute rather than a full court.[30]

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[28] ICJ, Summary of the Judgment in the Case concerning the Continental Shelf (Tunisia/Libya) (24 February 1982) https://www.icj-cij.org/sites/default/files/case-related/63/6269.pdf accessed 15 September 2025; Bölükbaşı (n 9) 266-68; Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Hart Publishing 2019) 248-51; Fietta and Cleverly (n 5) 230-42.

[29] Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, ICJ Reports 1984, p. 246.

[30] Stephen M. Schwebel, "25th Anniversary Commemoration: The Gulf of Maine Maritime Boundary Delimitation – The Constitution of the Chamber" (2010) 15 *Ocean & Coastal Law Journal* 1 http://digitalcommons.mainelaw.maine.edu/oclj/vol15/iss2/4 accessed 21 September 2025; Edward McWhinney, *Judge Manfred Lachs and Judicial Law-Making: Opinions on the ICJ*, 1967-1993 (Brill Nijhoff 1995) 68-69.

Another early example of reduced effect for islands is found in the case where the ICJ Chamber accorded Canadian Seal Island, situated off Nova Scotia, only half effect. The Chamber accepted that Seal Island, given its size, permanent habitation, and location at the entrance of the Gulf, could not be ignored. At the same time, it stressed that full effect would be excessive as it would unrealistically shift the Canadian coastline seaward. The judgment is thus an illustration of the partial effect method. This entails the recognition of insular entitlements in principle while limiting their scope to prevent disproportionate consequences. More broadly, the Chamber's approach highlights the preference for geography as the decisive factor in delimitation, rather than economic or historical considerations. This emphasis is particularly significant as *Gulf of Maine* was the first decision of an international court after the adoption of the LOSC. It was delivered at a time when Articles 76 and 83 left a largely blank canvas for the development of maritime boundary delimitation rules. Building on the Anglo-French Arbitration, the *Gulf of Maine* judgment further consolidated the jurisprudential approach of adjusting the influence of islands to secure equity in delimitation.[31]

3.5 In the 1985 Guinea/Guinea-Bissau Arbitration,[32] the Tribunal reaffirmed that the customary law of delimitation provided only a few basic principles and the essential objective under Articles 74 and 83 is to achieve an equitable solution. It noted that each case was treated as a "unicum" requiring recourse to factors and methods drawn not only from geography but also from historical, political, economic, or other circumstances. However, subsequent case law didn't follow this approach of giving significant weight to non-geographical considerations.

Nonetheless, the Tribunal's treatment of islands is noteworthy. It distinguished coastal islands and the Bijagos Archipelago, which were

[31] Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, ICJ Reports 1984, p. 246, para 196, 222; ICJ, "Summary of the Judgment in Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/USA)" (12 October 1984) https://www.icj-cij.org/sites/default/files/case-related/67/6371.pdf accessed 28 September 2025, 133; Stuart Kaye, "Lessons Learned from the Gulf of Maine Case: The Development of Maritime Boundary Delimitation Jurisprudence since UNCLOS III" (2008) 14 *Ocean & Coastal Law Journal* 84, 99.

[32] Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau (Award) (14 February 1985) XIX RIAA 149-196.

treated as relevant in defining the general direction of the coast and in proportionality calculations, from scattered offshore islets, which were disregarded to avoid undue deflection of the line. The inclusion of the Bijagos Archipelago increased Guinea-Bissau's coastline by some 20 per cent, enabling the Tribunal to regard the parties' coasts as broadly equal. In this case, thus, islands were not treated as autonomous generators of entitlement, but as features whose effect depended on whether their inclusion supported a balanced and equitable outcome. Methodologically, equidistance was rejected because of the concavity of the West African coast and the cut-off effect it would have produced, accentuated by islands such as Alcatraz lying on the wrong side of the equidistance line. Instead, the Tribunal drew a line at right angles to the general direction of the coast, functionally akin to a corrected equidistance line, though without expressly endorsing that method.

The Award is notable for the flexibility it allows both as to methodology and to the range of relevant factors including non-geographical ones. For instance, the Tribunal pointed out the absence of mandatory delimitation methodology soon after the adoption of UNCLOS. It also addressed the problem of amputative effects. Notably, the principle of non-amputation thus emerged as an equitable rule for the cases involving concavities and islands on the wrong side of the median line.[33]

3.6 In the 1985 Libya/Malta case,[34] the ICJ was confronted with the unusual situation of delimiting between a mainland coast and an independent island State. The Court distinguished between entitlement to the CS and its delimitation. It noted that the entitlement rests on established legal principles, whereas Article 83 requires only that delimitation achieves an equitable resolution. Without prescribing a method, thus, the LOSC leaves States or, failing agreement, courts and tribunals to determine how equity should be applied. This flexibility extends to islands whose effect may be adjusted to prevent inequitable outcomes. In the case, both parties accepted that islands generate CS rights, but Libya argued that their effect may be reduced in delimitation, while Malta maintained that its independence entitled it to treatment equal to continental States. The Court took a middle path. It ignored Malta's

[33] *Ibid* 88-90, 149-196; Kolb (n 26) 287-301; Fietta and Cleverly (n 5) 277-79.

[34] Continental Shelf (Libya/Malta) Judgment, ICJ Reports 1985, p 13.

tiny islet of Filfla to avoid distortion, and then shifted the provisional median line northwards, in favor of Libya, citing the disparity in coastal lengths. The Court noted the 8:1 ratio in coastal lengths as a "very marked difference" requiring the median line to be shifted northwards, thereby reducing Malta's effect. The adjustment was justified by the marked disparity in coastal lengths and the wider geographical context of a semi-enclosed sea. Nonetheless, Judge El-Khani, while concurring in the judgment, still noted in his brief declaration that proportionality between the vastly different coastal lengths of the two States required a line further north than the one drawn by the Court. Such an adjustment would have enlarged Libya's share of the CS and correspondingly reduced Malta's entitlement further. Similarly, Judges Ruda, Bedjaoui and Jiménez de Aréchaga considered that the Court's adjustment did not go far enough and that still more CS area should have been allocated to Libya on grounds of proportionality.

The judgment established several principles. First, small insular features may be disregarded altogether. Second, and most notably, even large and populated islands (Malta is over 300 km² and its then population was around 340,000) may receive diminished effect when equity so requires, particularly when continental landmasses are involved. Third, the independence of an island State does not guarantee full effect. As the Court stressed, Malta could not be placed in a worse position because of its insularity, but proportionality nonetheless limited its projection. The broader lesson is that where disparities in coastal lengths are significant, courts and tribunals consistently adjust boundaries to prevent disproportionate results.[35] It is noteworthy that the Court also emphasized that although States are free to invoke a wide range of rel-

[35] Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation* (CUP 2015) 641-44; Evans and Lewis (n 3) 131-34, 158-64; Bölükbaşı (n 9) 270-71, 483; Tanaka (n 28) 248-51; ICJ, Summary of the Judgment in the Case concerning the Continental Shelf (Libya/Malta) (3 June 1985) https://www.icj-cij.org/sites/default/files/case-related/68/6417.pdf accessed 28 September 2025; Continental Shelf (Libya/Malta) (Declaration of Judge El-Khani) [1985] ICJ Reports 13 https://www.icj-cij.org/sites/default/files/case-related/68/068-19850603-JUD-01-01-EN.pdf accessed 18 September 2025; Continental Shelf (Libya/Malta) (Separate Opinion of Judges Ruda, Bedjaoui and Jiménez de Aréchaga) [1985] ICJ Rep 13 https://www.icj-cij.org/sites/default/files/case-related/68/068-19850603-JUD-01-03-EN.pdf accessed 18 September 2025.

evant circumstances either in negotiations or during the adjudication, a court must confine itself to those factors pertinent to the delimitation and the application of equitable principles. This clarification narrowed the scope of relevant circumstances, marking a shift to geography-related objective factors.[36]

3.7 The 1992 Saint Pierre and Miquelon arbitration[37] was linked to the overlapping entitlements of Canada and France. It illustrates how enclavement techniques can be adapted into hybrid solutions to moderate the negative effect of islands. The French Saint Pierre and Miquelon islands are in close proximity to the Canadian coast. France argued that they generate a full 200 nm EEZ and CS, while Canada insisted they should be confined to 12 nm enclaves, citing their proximity to Canada's vastly longer coastline. The tribunal rejected both extremes. Owing to the marked disparity in coastal lengths to the west, it granted the islands a 24 nm semi-enclave. Thus, it avoided complete enclavement granting just territorial sea. To the south, it recognized their unobstructed seaward frontage by awarding a narrow corridor, only 10.5 nm wide, extending 200 nm, creating a "mushroom-shaped" delimitation outcome. This creative compromise acknowledged France's claim to a seaward opening while preventing a major encroachment on Canada's projection. The case underscores that tribunals may creatively come up with highly unorthodox boundaries that combine partial, full, and no effect in different directions.[38]

3.8 In the 1993 Denmark/Norway case,[39] the ICJ dealt with two detached islands, namely, Greenland (Denmark) and Jan Mayen (Norway). This case is noteworthy as it provides insight into the methodology of island-to-island delimitation. The Court began with a provisional median line for CS and fisheries zones, then adjusted it for special/relevant circumstances. Two factors drove the adjustment. First, a marked

[36] ICJ (n 34) para 48.

[37] Case concerning the Delimitation of Maritime Areas between Canada and France (Award) (10 June 1992) XXI RIAA 265 https://legal.un.org/riaa/cases/vol_xxi/265-341.pdf accessed 28 September 2025.

[38] Fietta and Cleverly (n 5) 312-20; Murphy (n 12)188-89; Evans and Lewis (n 3) 135; Tanaka (n 28) 260-65; Rothwell (n 6) 196-97.

[39] Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, ICJ Reports 1993, p 38.

disparity in relevant coastal lengths (roughly 9:1 in Greenland's favor) required shifting the line toward Jan Mayen to avoid an inequitable apportionment. Second, equitable access to the fishery in the southern sector justified an additional eastward shift of the boundary. By contrast, other non-geographical factors such as population, socio-economic and security considerations were rejected as irrelevant. Both coasts were deemed capable of generating 200 nm entitlements. However, the smaller coastal front of Jan Mayen, as opposed to the longer coastline of the world's largest island, warranted reduced effect in delimitation. This confirmed the pattern that marked coastal length disparities can justify moderating an island's influence, even where the dispute is island-to-island and both sides enjoy full abstract entitlements.[40]

3.9 In the 1999 Eritrea/Yemen Arbitration (Second Phase),[41] the Tribunal delimited the Red Sea boundary after settling the issue of sovereignty in the First Phase. This decision was rendered five years after the entry into force of LOSC. The dispute concerned multiple island groups, including Eritrea's Mohabbakah and Haycocks and Yemen's Zuqar-Hanish, Jabal al-Tayr, and Zubayr. Yemen's mid-sea islands Jabal al-Tayr and Zubayr were denied effect beyond their territorial seas due to their distance from Yemen's mainland. The Tribunal acknowledged that achieving an equitable result inevitably raises the issue of the treatment of the mid-sea islands. It was noted that their effect on delimitation may change, depending on factors such as size, importance, and the wider geographical setting. The Award illustrates both the rejection of enclavement for islands closer to their own mainland and the tendency to neutralize remote mid-sea islands to prevent distortion.[42]

[40] ICJ, "Summary of the Judgment in Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)" (14 June 1993) https://www.icj-cij.org/sites/default/files/case-related/78/6745.pdf accessed 8 September 2025; Evans and Lewis (n 3) 162-66; Tanaka (n 28) 252-59.

[41] Eritrea v. Yemen (Award, Second Stage – Maritime Delimitation) (17 December 1999) PCA Case No 1996-04 https://pcacases.com/web/sendAttach/518 accessed 8 September 2025.

[42] *Ibid* para 117; Rothwell (n 6) 198-99; El Diwany (n 20) 40-42; Fietta and Cleverly (n 5) 344-55.

3.10 The 2001 Qatar/Bahrain judgment[43] illustrates the difficulties posed by small islands and low-tide elevations (LTEs) in maritime delimitation. The Court reaffirmed that under customary law and Article 121, islands, regardless of size, are in principle entitled to generate maritime zones. However, the ICJ also noted that their effect in practice may be curtailed where it would produce disproportionate or distortive outcomes. This approach is evident in the treatment of several Bahraini features. Qit'at Jarādah was recognized as an island under Article 121 but discounted, as it is regarded as a special circumstance. Thus, the boundary was drawn immediately east of it, confining its effect to a limited territorial sea. Fasht al Jarim, a large LTE, was given no effect at all, since its use as a base point would have conferred Bahrain an additional 550 km² of maritime space, an inequitable result in this case. Overlapping LTEs such as Fasht al Dibal were simply disregarded. By contrast, the Hawar Islands and Janan Island were given full effect, despite Qatar's objections that their proximity to its mainland coast warranted reduction. The Court treated them as relevant opposite coasts and rejected Qatar's call for a mainland-to-mainland delimitation. This aspect of the judgment has drawn criticism for inconsistency. Although some islands were neutralized or reduced to avoid distortion, the Hawar Islands, located only a short distance from Qatar's mainland, were granted full weight, a result seen by many commentators as disproportionately favorable to Bahrain. Overall, the judgment reflects the pragmatic but uneven manner in which insular features are handled. It also shows that tribunals are prepared to disregard islands to prevent distortion, but the threshold for such reduction remains case-specific in its context.[44]

3.11 In the 2007 Nicaragua/Honduras judgment,[45] the ICJ addressed both sovereignty over several small islands and the delimitation of maritime zones in the Caribbean. The Court confirmed Honduran sovereignty over Bobel Cay, Savanna Cay, Port Royal Cay, and South Cay, while Edinburgh Cay was attributed to Nicaragua. All were recognized

[43] Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, ICJ Reports 2001, p 40.

[44] Fietta and Cleverly (n 5) 365-78; Tanaka (n 28) 252-59; Evans and Lewis (n 3) 139-48.

[45] Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, ICJ Reports 2007, p. 659; Fietta and Cleverly (n 5) 454-65.

as islands under LOSC. Both parties accepted that each island was entitled to a 12 nm territorial sea, which the Court incorporated into its delimitation. For the maritime boundary, the Court constructed a bisector line, given the difficulties of applying strict equidistance along a concave and unstable coastline. Remarkably, the ICJ reaffirmed that islands, however small, are entitled to territorial seas, but their effect beyond 12 nm may be limited by the choice of method and by the search for equity.[46]

In his Separate Opinion, Judge Koroma concurred with the Court's choice of the bisector method but stressed the need to underline certain broader principles of delimitation. He recalled that international courts and tribunals have repeatedly emphasized geography as the primary factor in determining the appropriateness of any method. Judge Koroma further highlighted that equidistance, while scientifically sound and easy to apply, is not mandatory, as confirmed in a number of decisions and awards. According to him, it may in fact yield "extraordinary, unnatural or unreasonable" results if applied mechanically. The Court indeed found the equidistance method problematic in this case, given the difficulty of fixing reliable base points along a coast marked by small offshore islands and caves in unusual locations, as well as the unstable and shifting geography at the mouth of the River Coco caused by sediment accumulation. These difficulties were compounded by the parties' inability to agree on the geographic coordinates of the river's mouth. In light of these factors, the Court considered the adoption of the bisector method fully justified. It drew two straight lines along the coastal fronts of the States to form an angle and then established the maritime boundary by bisecting that angle with a line extending from the land boundary out to sea. This is an alternative approach commonly known as the angle-bisector method, proving especially useful when the employment of an equidistance line is not feasible. Notably, both –

[46] Rothwell (n 6) 201; ICJ, "Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)," Press Release (8 October 2007) https://www.icj-cij.org/sites/default/files/case-related/120/14053.pdf accessed 1 September 2025.

equidistance and bisector methods – are regarded as geometric techniques that can serve the law if they are used to achieve an equitable solution.[47]

3.12 In its 2009 Romania/Ukraine Judgment,[48] the ICJ applied the three-stage methodology which has become part of the *acquis judiciaire* of maritime delimitation. This approach has been repeatedly applied in subsequent decisions and awards. The case centered on the role of Serpents' Island which is a small feature located some 20 nm off Ukraine's mainland. The Court confirmed that Serpents' Island generated a 12 nm territorial sea, as agreed by the parties, but declined to give it any broader effect in terms of EEZ and CS. It refused to select base points on the island for the construction of the provisional delimitation line. The ICJ justified its disregard of this island by noting that it is not part of the general coastal configuration of Ukraine. Therefore, it could not serve as a base point. It also excluded it as a relevant circumstance; accordingly, it didn't shift the provisional equidistance line in favor of Ukraine. This judgment seems to confirm a consistent pattern of disregarding islands in selecting base points for the delimitation of the EEZ and CS if their inclusion would distort the boundary. The case thus reinforced the primacy of mainland coasts in the law of maritime delimitation.[49]

3.13 In the 2012 Bangladesh/Myanmar case,[50] ITLOS was asked to delimit the maritime boundary in the Bay of Bengal. The principal insular feature at issue was St. Martin's Island, located just 9 km off its mainland, the Bangladeshi coast. While it is geographically close to Bangladesh, it lies opposite Myanmar's mainland coast. The island has 8 km² in area, with a population of some 7,000. Thus, it is a significant feature

[47] Territorial and Maritime Dispute (Nicaragua v. Honduras) (Separate Opinion of Judge Koroma) (8 October 2007) https://www.icj-cij.org/sites/default/files/case-related/120/120-20071008-JUD-01-02-EN.pdf accessed 1 September 2025; Sean D. Murphy, "Part IV: Effects of Islands on Maritime Boundary Delimitation" (UN Audiovisual Library of International Law Lecture Series, 27 October 2016) https://legal.un.org/avl/ls/Murphy_LS.html accessed 18 August 2025.

[48] Maritime Delimitation in the Black Sea (Romania v. Ukraine) Judgment, ICJ Reports 2009, p 61.

[49] *Ibid* para 186; ICJ, "Maritime Delimitation in the Black Sea (Romania v. Ukraine) Press Release" (12 October 2009) https://www.icj-cij.org/sites/default/files/case-related/132/14985.pdf accessed 19 August 2025.

[50] ITLOS (n 16) p 4.

given its habitation, size, and economic activity. The Tribunal reiterated that there is no general rule on the effect of islands in delimitation. It went on stating that the treatment depends on the circumstances and may differ between the territorial sea and maritime zones beyond, such as EEZ and CS. For the territorial sea, St. Martin's was given full effect, as Article 15 provides for an equidistance line unless special circumstances justify departure from this rule. None applied here. For the EEZ and CS however, the Tribunal concluded that granting full effect would unduly distort the boundary by cutting off Myanmar's seaward projection. Although St. Martin's Island was recognized as a legitimate source of entitlement, its broader impact was curtailed to reconcile abstract entitlement with equity. Accordingly, it was ignored for the EEZ and CS.

Notably, in this case, ITLOS authoritatively stated that:

> "265. Concerning the question whether St. Martin's Island could serve as the source of a base point, the Tribunal is of the view that, because it is located immediately in front of the mainland on Myanmar's side of the Parties' land boundary terminus in the Naaf River, the selection of a base point on St. Martin's Island would result in a line that blocks the seaward projection from Myanmar's coast. In the view of the Tribunal, this would result in an unwarranted distortion of the delimitation line, and amount to 'a judicial refashioning of geography' (…). For this reason, the Tribunal excludes St. Martin's Island as the source of any base point. (….)
>
> 318. St. Martin's Island is an important feature which could be considered a relevant circumstance in the present case. However, because of its location, giving effect to St. Martin's Island in the delimitation of the exclusive economic zone and the continental shelf would result in a line blocking the seaward projection from Myanmar's coast in a manner that would cause an unwarranted distortion of the delimitation line. The distorting effect of an island on an equidistance line may increase substantially as the line moves beyond 12 nm from the coast.
>
> 319. For the foregoing reasons, the Tribunal concludes that St. Martin's Island is not a relevant circumstance and, accordingly, decides not to give any effect to it in drawing the delimitation line of the exclusive economic zone and the continental shelf."

This dual treatment shows a consistent jurisprudential pattern. As such, islands may enjoy full effect for the territorial sea but reduced or no effect beyond 12 nm if their influence creates inequitable results. As the ICJ had earlier observed in the Tunisia/Libya case, the treatment of islands "has varied in response to the varying geographical and other circumstances of the particular case." ITLOS echoed the same point, emphasizing that neither case law nor State practice indicates that there is a general rule; it depends on the particular circumstances of each case.[51]

In this respect, it would be remiss not to mention Judge Wolfrum and Judge Cot's critical observations on this case. Although Judge Wolfrum voted in favor of the judgment, in his declaration he expressed concern that the Tribunal had not sufficiently contributed to the progressive development of the *acquis judiciaire* on the treatment of islands. The Tribunal reiterated that the effect of islands depends on the geographic realities and the circumstances of the specific case and that there is no general rule, since each case is unique and requires treatment directed toward an equitable result. For Wolfrum, however, such a statement was unsatisfactory. According to him, this justification provided little guidance and lacked reasoning, stating only the obvious that geography matters and that the result must be equitable. In situations such as that of St. Martin's Island, he criticized the Tribunal and argued that it should have explained which considerations were decisive and which were not. By doing so, notably, it could have laid the foundations of a more general rule; but most notably, he argued that the Tribunal ought to have addressed key factors such as whether the mainland or the island was the dominant feature for delimitation, the proportional relationship between the island's size and the maritime area concerned, and whether freedom of access to the sea should have been a determining consideration. In sum, Wolfrum considered that the Tribunal missed an important opportunity to clarify the treatment of islands in delimitation and to strengthen the coherence of international jurisprudence.[52]

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[51] ITLOS (n 16) para 265, 318-19; Rothwell (n 6) 203-204; Robin Churchill, "The Bangladesh/Myanmar Case: Continuity and Novelty in the Law of Maritime Boundary Delimitation" (2012) 1(1) *Cambridge Journal of International and Comparative Law* 137, 141; Evans and Lewis (n 3) 183-84.

[52] Wolfrum (n 23).

Likewise, Judge Cot, in his separate opinion, also expressed reservations about the Tribunal's handling of the matter, despite supporting the overall judgment. Notably, for Judge Cot, the decisive factor is not an island's economic or social importance, nor even its size or geomorphology, but especially its location. According to him, the key questions are whether the island is fringing, whether it follows the general direction of the mainland coast, and whether it creates a disproportionate effect on the delimitation line.[53]

3.14 In the 2012 Nicaragua/Colombia case,[54] the ICJ was asked to delimit maritime zones between Nicaragua's extensive mainland coast and a series of small Colombian islands scattered in the Caribbean Sea. The Court dismissed Nicaragua's argument that the Colombian islands rest on its CS, reaffirming that geological and geomorphological factors are irrelevant when delimiting overlapping entitlements within 200 nm. It nevertheless recognized that the provisional median line would cut Nicaragua off from much of the area seaward of its coast, owing to the blocking effect of a few scattered islands. Such islands, the Court held, could not be treated as if they formed continuous mainland frontage due to their location. This cut-off effect was therefore a relevant circumstance warranting adjustment of the provisional line. At the same time, the Court emphasized that an equitable solution requires a delimitation line that enables both States' coasts to generate their maritime entitlements in a reasonable and balanced manner. Since the provisional median line drawn between Nicaragua's mainland coast and the Colombian islands would cut off Nicaragua from nearly three-quarters of the area seaward of its coast, the Court held that this cut-off effect constituted a relevant circumstance warranting adjustment of the provisional line to achieve equity.

Applying the three-stage methodology, the Court first drew a provisional median line between the relevant coasts. In identifying those coasts, it treated Nicaragua's long mainland frontage as the principal coastal projection, while limiting Colombia's relevant coasts to its islands. This

[53] Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar) (Declaration of Judge Cot) (14 March 2012) ITLOS Case No 16, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/published/C16_JPC.pdf accessed 18 September 2025.

[54] Nicaragua v. Colombia (n 8) p 62.

produced a substantial disparity between the relevant coasts which is 1:8.2 in Nicaragua's favour.[55] The Court acknowledged the marked disparity and deemed it necessary to adjust the provisional line, particularly in light of the overlapping maritime areas situated east of the Colombian islands. To avoid distortion, several insular features such as Quitasueño, Serrana, and Low Cay were disregarded as base points. The Court then considered the effect of Colombia's principal islands. It concluded that granting them full EEZ and CS entitlements would cut off Nicaragua's natural projection and result in inequity. Accordingly, at the second stage, it shifted the provisional line significantly eastward, producing what amounted to a weighted ratio of 1:3.44 in Nicaragua's favor. The Court applied the disproportionality test at the third stage and confirmed that the adjusted line was equitable. In applying the disproportionality test, the Court stressed that maritime delimitation does not require strict proportionality between the length of coasts and the allocation of maritime areas, but only the avoidance of a manifest imbalance that would undermine equity.

The court compared a coastal length ratio of about 1:8.2 with a maritime area ratio of roughly 1:3.44 in Nicaragua's favor and concluded that this divergence was not significant enough to render the outcome inequitable. In its final adjustment, the Court restricted Quitasueño and Serrana to 12 nm enclaves within Nicaragua's EEZ and CS, while the larger Colombian islands retained broader zones, though still constrained to prevent a cut-off. The result balanced entitlement with equity. Nicaragua preserved access seaward from its mainland, while Colombia retained jurisdiction around its islands without disproportionately curtailing Nicaragua's projection.[56]

Like in UK/France, more than one method was employed in this case. The Court first constructed an equidistance line, then shifted that line to account for the presence of certain islands, enclaved other islands, and finally applied the so-called mushroom method which was also used in Canada/France. This technique allowed Nicaraguan maritime

[55] The lengths of the relevant coasts are 531 km (Nicaragua) and 65 km (Colombia).

[56] Rothwell (n 6) 202-203; Evans and Lewis (n 3) 158-66; Nicaragua v. Colombia (n 8) para 212-16; ICJ, Summary of the Judgment of 19 November 2012 in the Territorial and Maritime Dispute (Nicaragua v. Colombia) (19 November 2012) https://www.icj-cij.org/sites/default/files/case-related/124/17180.pdf accessed 19 September 2025.

zones to project out to the full 200 nm both to the north and south of Colombia's islands. At the same time, the Court enclaved two small islands located at some distance from Colombia's main island group.[57]

3.15 In the 2018 Costa Rica/Nicaragua case,[58] the Court addressed the role of the Corn Islands, located some 26 nm off Nicaragua's coast (Great Corn Island, 9.6 km²; Little Corn Island, 3 km²; population approx. 7,400) and about 80 nm off Costa Rica's coast. The ICJ recognized that these Nicaraguan islands sustain economic life and population and therefore are entitled to an EEZ and CS. However, in the delimitation process the Court concluded that, given their limited size and significant distance from their mainland, they should receive only half effect, thereby adjusting the equidistance line in favor of Costa Rica.

The Court drew on earlier jurisprudence, including Bangladesh/Myanmar, where ITLOS stressed that the effect to be given to an island in the delimitation depends on the geographic realities and the circumstances of the specific case. This case illustrates a recurring pattern. The international courts and tribunals affirm entitlement but then reduce or discount the effect of islands in delimitation to avoid disproportionate results.

Moreover, the ICJ's treatment of the Corn Islands confirms that even islands lying on the "right" side of an equidistance line may be given less weight. This was much like in the cases of the Kerkennah Islands in Tunisia/Libya or Scilly Isles in UK/France which were given half effect to prevent distortion. Together, these cases demonstrate that although extremely important, the decisive factor is not solely an island's position (i.e. being on the right or the wrong side), but whether granting it full effect would upset the equitable balance.[59]

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[57] Murphy (n 47).

[58] Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua), Judgment, ICJ Reports 2018, p 139.

[59] Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua), Judgment, ICJ Reports 2018, p. 139, para 151-154; ICJ, Summary, 2 February 2018 available at: https://www.icj-cij.org/sites/default/files/case-related/157/157-20180202-SUM-01-00-EN.pdf; Tanaka (n 28) 252-59.

Furthermore, in this case, Nicaragua argued that the Santa Elena peninsula had a distorting effect on the equidistance line and requested the Court to discount its base points. In view of Santa Elena not being an island, the Court's decision is notable as it demonstrates that even mainland projections may be accorded a reduced effect when equity necessitates. The ICJ reiterated that islands and coastal projections can indeed exert a disproportionate influence on a median line, and that such an effect may necessitate an adjustment. While the Court found no basis for adjustment within the territorial sea, since the peninsula constituted a substantial part of Costa Rica's coastline, it reached a different conclusion for the EEZ and CS. There, potential base points on Santa Elena could control a significant portion of the equidistance line, hence, resulting in a significant cut-off of Nicaragua's coastal projections. To remedy this inequity, the Court applied the half-effect method, drawing a line midway between the full effect and no effect scenario. This section of the judgment demonstrates the Court's surgically precise and nuanced approach. In the territorial sea, where sovereignty is at stake, the threshold for adjustment is higher, but in the EEZ and CS, where only sovereign rights are concerned, the Court was willing to limit the effect of a significant projection when its impact proved inequitable. In its justification for giving half effect to a peninsula, the ICJ referred to Articles 74 and 83 imposing an equitable outcome.[60]

3.16 Finally, in the 2021 Somalia/Kenya case,[61] although the ICJ did not address any direct island dispute between the parties, yet islands still shaped the reasoning indirectly. In assessing whether the provisional equidistance line created an inequitable cut-off, the Court looked beyond the immediate coasts and considered the wider regional configuration. Kenya, situated between Somalia and Tanzania, faced a narrowing of its seaward projection, a problem accentuated by the presence of Pemba Island, a large, inhabited Tanzanian island lying close to its mainland. Although Pemba was not part of the dispute, its existence highlighted Kenya's cut-off and justified a northward adjustment of the line. The ICJ reiterated that adjustment is warranted where the cut-

[60] Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua), Judgment, ICJ Reports 2018, paras 171, 174, 193, 194, 195 and 198.

[61] Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Judgment, ICJ Reports 2021, p 206.

off effect is serious or significant. Even though the impact in that case was less pronounced than in earlier disputes, the Court still modified the line to prevent Kenya's entitlements from being unduly narrowed. The guiding principle remains that an equitable solution requires each coast to project its maritime entitlements in a reasonable and balanced manner. The case shows that islands may influence delimitation not only through their own entitlements but also indirectly, by shaping the broader geographical context in which equity is assessed.[62]

Taken together, the above-mentioned cases reveal no rigid rule but rather a pattern of context-driven solutions shaped by equity concerns for the treatment of islands. Indeed, jurisprudence demonstrates the range of judicial techniques used to manage the effect of islands in delimitation. In this respect, for instance, enclavement functions as a pragmatic compromise solution because it safeguards sovereignty over the island and prevents disproportionate consequences in delimitation. The enclavement technique reflects the broader principle that while islands enjoy entitlement in theory, their effect in practice is constrained by equity and the need to respect the dominant role of mainland coasts.[63]

Post-2009 decisions and awards reveal that international courts and tribunals consistently begin with a provisional delimitation line but adjust it where necessary to achieve an equitable result. Overall, case law confirms the primacy of geography as the dominant consideration – such as the length and configuration of coasts, and especially the presence of islands, or, to be more precise, their location. Furthermore, it can be deducted from the jurisprudence that the role of islands is determined less by their legal definition than by the circumstances in which they are situated. While islands are in principle entitled to the full range of maritime zones, their effect in delimitation has varied. The variation underscores the rather obvious, i.e. absence of a uniform rule, and confirms the uniqueness of every case. Dispute settlement mechanisms have therefore developed context-driven, case-specific solutions, with the varying treatment of islands becoming a recurring practice. Ulti-

[62] ICJ, "Summary of the Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)" (12 October 2021) https://www.icj-cij.org/sites/default/files/case-related/161/161-20211012-SUM-01-00-EN.pdf accessed 3 September 2025; Sümer (n 16) 763-64.

[63] Fietta and Cleverly (n 5) 81-82, 187-195; Evans and Lewis (n 3) 162-66; Rothwell (n 6) 196.

mately, equity has meant flexibility, with judicial discretion and creativity central to shaping the desired outcome. The treatment of islands illustrates a broader truth: while entitlement rules for islands are clear, the delimitation principles are not straightforward. Cottier opines that, ultimately, the challenge of islands cannot be resolved through technical models or descriptive practice alone.

Nonetheless, it is observed that geography remains the decisive lens through which islands influence delimitation. Certain tendencies emerge: islands close to and aligned with their mainland may usually be given full or half effect as part of the coastal façade. Remote, detached, or misaligned islands are more often discounted, through reduced weight, enclaving, or the abandonment of equidistance, to prevent disproportionate outcomes. This flexible, case-specific approach reflects the overriding aim of securing equitable results considering the unique geographical circumstances of each delimitation dispute.[64]

IV. Conclusion

The LOSC affirms that islands are entitled to generate maritime zones. Yet in practice, this potential does not guarantee full effect where overlapping claims exist. Therefore, taking Article 121 in isolation may be misleading. The LOSC is a package deal, and its provisions on ocean governance consistently interact and coexist. This is especially true for Article 121, which explicitly incorporates the Convention's delimitation rules through rules of reference set out elsewhere. As the provision makes clear, the maritime zones of an island are determined in accordance with the other provisions of LOSC applicable to other land territory. This means that the entitlement of islands is inseparable from the broader delimitation framework. The decisive test remains the achievement of an equitable solution. Therefore, Article 121 must be read together with Articles 15, 74, and 83. Entitlement is one thing,

[64] Tullio Scovazzi, "Maritime Boundaries in the Eastern Mediterranean Sea" (German Marshall Fund of the United States, Mediterranean Policy Program, June 2012) 6; Evans and Lewis (n 3) 129-31; Tanaka (n 28) 448-50; Derek Bowett, "Islands, Rocks, Reefs in Maritime Boundaries" in Jonathan I. Charney and Lewis M. Alexander (eds.), *International Maritime Boundaries* (Martinus Nijhoff 1993) 150-51; Cottier (n 35) 635-38.

but its practical effect is qualified by the overarching requirement of achieving an equitable solution in cases of overlapping claims. International courts and tribunals have consistently assessed the significance of islands within the context of maritime boundary delimitation, and their impact has varied across cases. Jurisprudence shows that islands belonging to mainland States are often subordinated when they compete with the mainland coasts of other States. Although not expressly stated in the LOSC, jurisprudence reveals a presumption in favor of the mainland.

Nevertheless, jurisprudence also emphasizes the uniqueness of each dispute; no single general rule governs the role of islands. It is futile to search for a mechanical, one-size-fits-all delimitation formula for the treatment of islands. Ultimately, an island's influence in delimitation depends entirely on geography and specific circumstances. The same island may have different impacts depending on varying scenarios and locations. The case law demonstrates flexible, case-specific treatment, utilizing techniques ranging from full effect to partial effect, enclavement, or exclusion. This flexibility reflects a consistent judicial effort to prevent inequitable outcomes, particularly where islands might cut off the natural projection of mainland coasts or create disproportionate results.

While the LOSC entitlement rules are clear, delimitation rules are not, and much of the law has developed through judicial innovation. The treatment of islands illustrates how courts balance abstract entitlement with equity in the absence of rigid treaty prescriptions.

In conclusion, the approach to the treatment of islands must be grounded in equitable principles, assessed in light of relevant circumstances, and must distinguish between an island's abstract capacity to generate maritime entitlements and the actual practical effect. The consolidation of the modern three-stage approach has been helpful in managing the influence of islands primarily through the careful selection of base points in the first stage. In practice, this often means disregarding islands in terms of points for EEZ and CS delimitation while granting them a 12 nautical mile territorial sea. It also involves considering the presence of islands when adjusting the provisional delimitation line in the second stage.

Despite this progress, international courts and tribunals have largely addressed islands only in the context of individual disputes rather than attempting to articulate broader principles. Since the *Black Sea* judgment refined the three-stage methodology, several cases have offered opportunities to develop a more systematic framework for the treatment of islands, but these have not been fully utilized. As a result, jurisprudence provides useful but fragmented guidance from disparate cases and contexts, rather than a coherent general framework. Therefore, a more explicit and authoritative articulation of an interpretative framework – perhaps not rigid rules – could enhance the clarity, legal stability, and predictability of the law regarding the question of islands.

III

Environmental Change, Resources, and Global Responsibility

Tullio Scovazzi

The Principle of Common Heritage of Humankind in the Biodiversity beyond National Jurisdiction Agreement

1. Introduction

The Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (New York, 2023)[1] will enter into force on 17 January 2026. The 60 ratifications needed for this purpose have been deposited.[2]

It has been remarked that the BBNJ Agreement constitutes four treaties in one,[3] addressing the subject-matters of marine genetic resources, area-based management tools, environmental impact assessment and transfer of marine technologies. This paper considers only marine genetic resources and tries to elaborate on the question of the application to this subject-matter of two fundamental principles belonging to international law of the sea. They are the principle of common heritage of mankind, which constitutes the most innovating aspect of the United

[1] Hereinafter: BBNJ Agreement. On the origins and preparatory works for the BBNJ Agreement see Gjerde, "Participant Report of the Expert Workshop on Managing Risks to Biodiversity and the Environment on the High Seas, Including Tools Such As Marine Protected Areas: Scientific Requirements and Legal Aspects," in *International Journal of Marine and Coastal Law*, 2001, p. 515; Scovazzi, "The Negotiations for a Binding Instrument on the Conservation and Sustainable Use of Marine Biological Diversity beyond National Jurisdiction," in *Marine Policy*, 2016, p. 188; Freestone (ed.), *Conserving Biodiversity in Areas beyond National Jurisdiction*, Leiden, 2019.

[2] Art. 68, para. 1, BBNJ Agreement.

[3] Bodansky, "Four treaties in one: The Biodiversity beyond National Jurisdiction Agreement," in *American Journal of International Law*, 2024, p. 299. On the agreement see also Andreone, "The Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction: A Critical Appraisal," in *Italian Yearbook of International Law*, 2023, p. 131.

Nations Convention on the Law of the Sea (Montego Bay, 1982),[4] and the principle of freedom of the sea, which has a time-honored tradition.[5]

2. The Principle of Common Heritage of Humankind

Under the UNCLOS, the Area, that is the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction,[6] is the common heritage of mankind,[7] together with its resources.[8]

The principle of common heritage of humankind is the most remarkable new element in the UNCLOS. While other elements in this treaty of codification, for instance, the exclusive economic zone, can be considered as the natural evolution of international law of the sea towards the progressive reduction of marine spaces subject to the regime of freedom, the concept of common heritage of humankind marks a qualitative change. It implies a third regime, which is different from the two previous and opposing regimes of sovereignty, applicable within the territorial sea, and freedom, applicable on the high seas.

The concept of common heritage of humankind was proposed for the first time in a memorable speech made on 1 November 1967 before the United Nations General Assembly by the representative of Malta, Arvid Pardo.[9] The opportunity for a new regime was provided by the technological developments that would have allowed within a relatively short time the exploitation of the polymetallic nodules that lie on the deep

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4 Hereinafter: UNCLOS.

5 Anonymous [Grotius], *Mare liberum, sive de jure quod Batavis competit ad Indicana commercia, dissertatio*, Lugduni Batavorum [Leiden], 1609.

6 As regards the seabed, the limit of national jurisdiction is the outer limit of the continental shelf (200 nm from the baselines of the territorial sea or the outer edge of the continental margin, under Art. 76, para. 1, UNCLOS).

7 The BBNJ Agreement uses the synonymous "humankind," probably to avoid gender-discriminating language. However, things do not change very much, as "mankind" includes the English word "man" and "humankind" the Latin word "homo," meaning "man" as well.

8 Art. 136 UNCLOS.

9 See the speech in Pardo, *The Common Heritage – Selected Papers on Oceans and World Order*, Valletta, 1975, p. 31.

seabed and contain economically valuable minerals, such as manganese, nickel, cobalt and copper. The application of the regime of sovereignty would have led to competitive extensions by coastal States of the limits of national jurisdiction. The application of the regime of freedom would have led to a race towards the appropriation of resources to be enjoyed under a first-come-first-served approach. The consequences of both scenarios would have been undesirable, involving political friction, economic injustice and risks of pollution. In short, as Pardo said, "the strong would get stronger, the rich richer."

The basic elements of the principle of common heritage of humankind are the interdiction of national appropriation, the designation of the Area for peaceful purposes, the use of the Area and its resources for the benefit of humankind as a whole, with special consideration for the interests and needs of developing countries, and the establishment of an international organization (the International Seabed Authority) in charge of the management of the resources.[10] All of them can be found in UNCLOS Part XI. Even if diluted by the subsequent 1994 Agreement relating to the Implementation of Part XI, which in fact amends the UNCLOS, the principle of common heritage of humankind has been retained and stands as a cornerstone of the UNCLOS.

The common heritage of humankind is a third option that is applicable to a particular kind of resources (mineral resources) located in a particular marine space (the seabed of the high seas). It does not totally replace the traditional regimes of sovereignty and freedom that remain applicable in other marine spaces and for other resources. However, it introduces a third regime of resource management that aims at being more equitable than the previous two regimes.

With the passing of time, the International Seabed Authority has approved regulations on prospecting and exploration for polymetallic nodules, polymetallic sulphides and cobalt-rich ferromanganese crusts. Draft regulations on exploitation of the same resources are under negotiation.[11]

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[10] Another element, which is common to all marine spaces, is the protection and preservation of the marine environment.

[11] See Consolidated Text of the Draft Exploitation Regulations, ISA Doc ISBA/29/C/CRP.1 of 16 February 2024.

3. The Conflict between Two Principles

Resources other than minerals can also be found in the high seas and its seabed, as these spaces are not a desert, notwithstanding the extreme conditions of temperature, pressure and obscurity. For instance, several species communities live where water springs from tectonically active areas (so-called hydrothermal vents). They depend on specially adapted micro-organisms able to synthesize organic compounds from the hydrothermal fluid of the vents (chemosynthesis). Their ability to survive extreme conditions makes the genes of these species of great interest to science and industry.

Neither the UNCLOS nor the Convention on Biological Diversity (Rio de Janeiro, 1992) or its Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (Nagoya, 2010) provide any specific legal framework for the exploration and exploitation of marine genetic resources beyond the limits of national jurisdiction.

Starting in 2006, the question of the regime of marine genetic resources was discussed at the intergovernmental level within the United Nations. Opposite views were put forward. Some States, primarily developing countries, took the position that the principle of common heritage of humankind also covered marine genetic resources.[12] Other States, mainly developed countries, supported the application of the principle of freedom of the sea, which entails freedom of access to marine genetic resources.[13]

The difference in positions went on, in an explicit or latent form, during the entire course of the BBNJ Agreement negotiations. It is interesting that the opposing positions started from the same position, namely, that the UNCLOS is the instrument regulating all activities that take place

[12] Report of the Ad Hoc Open-ended Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction, UN Doc A/61/65 (20 March 2006) para 71.

[13] *Ibid* para 72.

in the sea.[14] Why, when starting from the same assumption, did the two groups of States reach opposing conclusions? The best answer seems to be that the starting assumption itself is questionable.

There is no doubt that the UNCLOS is a cornerstone in the codification of international law.[15] Nevertheless, the UNCLOS, like any legal instrument, is linked to the period when it was negotiated (from 1973 to 1982). Being itself a product of time, the UNCLOS cannot stop the passing of time. While offering a solid basis for the regulation of many matters, it would be illusory to think that the LOSC is the end of any regulation. The international law of the sea is subject to a process of natural evolution and progressive development that is linked to new needs and activities.

In some cases, changes have been included in the UNCLOS context through so-called implementation agreements (evolution by integration). In other cases, one interpretation of an UNCLOS provision has prevailed over another plausible interpretation (evolution by interpretation). In other cases, the regime can only be drawn from customary international law, as the UNCLOS does not take any substantive position on the relevant question (evolution in another context). Finally, where the UNCLOS regime is clearly inadequate – it happens very seldom, but it may happen — another instrument has been adopted at the multilateral level (evolution through further codification).[16]

At the time when the UNCLOS was being negotiated, very little was known about marine genetic resources and the prospects for their exploitation. For evident chronological reasons, the potential economic value of units of heredity of certain marine organisms was not taken into consideration. The very words "marine genetic resources" do not appear anywhere in the UNCLOS text.

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[14] Joint Statement of the Co-Chairpersons of the Working Group, UN Doc A/63/79 of 16 May 2008, para 36. This assumption is constantly repeated in the resolution on oceans and the law of the sea that is yearly adopted by the United Nations General Assembly (see the preamble of the most recent Resolution 79/144 of 16 December 2024).

[15] See Murphy, "Durability, Flexibility and Plasticity in the UN Convention on the Law of the Sea," in *International Journal of Marine and Coastal Law*, 2024, p. 249.

[16] Examples relevant for the different cases are given in SCOVAZZI, "The Evolution of International Law of the Sea: New Issues, New Challenges," in *The Hague Academy of International Law – Collected Courses*, vol. 286, p. 125.

"Activities in the Area" are defined in the UNCLOS as "all activities of exploration for, and exploitation of, the resources of the Area"[17] and such resources are defined as "all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the sea-bed, including polymetallic nodules."[18] This means that the UNCLOS regime of common heritage of humankind does not apply *per se* to non-mineral resources, such as the genetic resources that are found in the Area at or beneath the sea-bed, or in the superjacent waters.

Nor can it be said that genetic resources are to be included among the marine living resources to which several UNCLOS provisions refer, in particular those relating to the exclusive economic zone, the continental shelf or the high seas. If these provisions are read in the light of their object and purpose, it is clear that the expression "marine living resources" is linked to fishing activities, that is, to activities different from the "utilization of marine genetic resources," which means "to conduct research and development on the genetic and/or biochemical composition of marine genetic resources, including through the application of biotechnology."[19]

While fishing is intended to catch the whole body of the targeted species (or a substantial part of it) for consumption or sale purposes, the utilization of marine genetic resources aims at extracting from the targeted species the functional units of heredity[20] and adapting them through biotechnology[21] in order to make new products or processes and patent them. For this kind of activity, there is no need for large quantities of living resources, as quality and difference are much more significant than quantity and similarity. A large added value is granted by the availability of advanced laboratories and the command of sophisticated technologies, and problems of protection of intellectual

[17] Art. 1, para. 1, UNCLOS.

[18] Art. 133, lit. a, UNCLOS.

[19] Art. 1, para. 14, BBNJ Agreement.

[20] "'Marine genetic resources' means any material of marine plant, animal, microbial or other origin containing functional units of heredity of actual or potential value" (Art. 1, para. 8, BBNJ Agreement).

[21] "'Biotechnology' means any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use" (Art. 1, para. 3, BBNJ Agreement).

property can easily arise. It would be completely illogical to apply to activities directed at genetic materials the UNCLOS rules relating to conservation and management of the living resources of the high seas.[22]

Given there is an easily explainable gap in the UNCLOS as regards marine genetic resources, it should also be emphasized that the principle of common heritage of humankind, which is proclaimed and applied with specific reference to the mineral resources of the Area, is endowed with an expansive character. The regime of the Area already includes subject-matters that are more or less linked to the exploitation of marine mineral resources, such as marine scientific research,[23] the preservation of the marine environment[24] and the protection of archaeological and historical objects.[25] It is logical to think that the aim of sharing benefits among all States is a basic objective for an instrument designed to "contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of humankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked."[26] The same objective can stand as a source of inspiration when the exploitation of new kinds of resources in spaces beyond national jurisdiction becomes feasible.

The application of the principle of freedom of the sea, which results in a "first-come-first-served" approach, would lead to inequitable and hardly acceptable consequences also in the field of genetic resources. Cooperative schemes, based on rules on access to resources and sharing of the relevant benefits, can be envisaged in an UNCLOS-related agreement establishing an international regime for marine genetic resources in areas beyond national jurisdiction. This would be in conformity with the principle of fair and equitable sharing of the benefits arising out of the utilization of genetic resources set forth in Art. 1 of the Convention on Biological Diversity and, subsequently, Art. 10 of the Nagoya Protocol. It is important to ascertain how far the BBNJ Agreement reflects the principle of common heritage of humankind.

[22] The BBNJ Agreement does not apply to fishing (Art. 10, para. 2, BBNJ Agreement).
[23] Art. 143 UNCLOS.
[24] Art. 145 UNCLOS.
[25] Art. 149 UNCLOS.
[26] Preambular para. 6 UNCLOS.

4. Sharing of Benefits in the BBNJ Agreement

Being the result of prolonged and complex negotiations, the BBNJ Agreement is prudently drafted so as to avoid as much as possible a quasi-theological conflict between two different principles that would have led to the need for a clear-cut choice between one or the other. The provision stating the general principles and approaches of the Agreement lists, among others, both common heritage of mankind and freedoms of the high seas.[27] The same provision also lists "the principle of equity and the fair and equitable sharing of benefits."[28] It is true that, in this way, the BBNJ Agreement does not directly link the sharing of benefits to the common heritage of humankind, although the former is a substantive component of the latter. However, looking at the practical result, it is also true that the BBNJ Agreement transposes into its provisions much of the principle of the common heritage of humankind.

To look more closely at the question, the BBNJ Agreement includes an aspect of the principle of freedom of the sea, insofar as it provides that activities relating to marine genetic resources are open to all States Parties and their nationals.[29] However, the same provision points out that, if access to the resources is free, the activities in question must be carried out in the interest of all States and for the benefit of all humanity,[30] implicitly rejecting the most undesirable aspect of freedom of the sea, that is, the first-come-first-served approach.

The machinery set forth by the BBNJ Agreement is based on the rules of publicity and accessibility. It provides that parties adopt the necessary legislative, administrative or policy measures to ensure that a broad range of information relating to activities on marine genetic resources is notified to the Clearing-House Mechanism.[31] Such information must be provided both before[32] and after[33] the taking place of the activities. Information also relates, if this is the case, to the utilization and

[27] Art. 7 BBNJ Agreement.
[28] Article 7, lit. d, BBNJ Agreement.
[29] Art. 11, para. 1, BBNJ Agreement.
[30] Art. 11, para. 6, BBNJ Agreement.
[31] Art. 12 BBNJ Agreement.
[32] Art. 12, para. 2, BBNJ Agreement.
[33] Art. 12, para. 5, BBNJ Agreement.

commercialization of genetic resources, including patents granted and sales of relevant products.[34] Upon notification of the information, the Clearing-House Mechanism automatically generates a BBNJ standardized batch identifier.[35]

Further, parties must ensure the deposit of marine genetic resources from the areas beyond national jurisdiction and their digital sequence information, together with their BBNJ standardized batch identifiers, in publicly accessible repositories and databases.[36] Access to repositories and databases under a party's jurisdiction may be subject to reasonable conditions.[37] Notably, the BBNJ Agreement provides that the confidentiality of information must be protected[38] – and this may be seen as a measure to safeguard intellectual property rights.

Benefits must be shared "in a fair and equitable manner" in order to "contribute to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction."[39] They include both non-monetary[40] and monetary benefits; it is the latter that mostly interest developing States. However, as a proof of the difficulties in dealing with the question of monetary benefits, the determination of the modalities for their sharing is reserved for a future decision by the Conference of the Parties to the BBNJ Agreement.[41]

Time will tell how this crucial question is addressed. Important in this regard is the rule that, if the Conference of the Parties is not able to reach consensus on the question, the decision on sharing modalities will be taken by a three-fourths majority of the Parties present and voting.[42]

[34] Art. 12, para. 8, BBNJ Agreement.
[35] Art. 12, para. 3, BBNJ Agreement.
[36] Art. 14, para. 3, BBNJ Agreement.
[37] As listed in Art. 14, para. 4, BBNJ Agreement.
[38] Art. 51, para. 6, BBNJ Agreement.
[39] Art. 14, para. 1, BBNJ Agreement.
[40] Non-monetary benefits are specified in Art. 14, para. 2, BBNJ Agreement.
[41] Art. 14, para. 7, first sentence, BBNJ Agreement.
[42] Art. 14, para. 7, second sentence, BBNJ Agreement.

This rule, which plays in favour of developing States, is balanced by an optional clause of self-exclusion for a period of up to four years available to each party.[43]

The additional rule that the provisions of the BBNJ Agreement apply – retroactively in a certain sense – to the utilization of marine genetic resources and digital sequence information on such resources collected or generated before the entry into force of the Agreement appears to work to the advantage of developing States. However, reflecting the balance between differing positions, an exception is admissible in the form of a reservation available to each party.[44]

[43] Art. 14, para. 8, BBNJ Agreement.

[44] Art. 10, para. 1, BBNJ Agreement. It appears that the developed States that have ratified the BBNJ Agreement so far have made extensive use of this exception.

Valérie Boré Eveno

Addressing Challenges of Sea-level Rise: From National Interests to Common Concern of Humankind

Sea-level rise has become one of the most alarming consequences of climate change. Over the past few decades, the rate of increase has accelerated significantly, and scientists warn that it could exceed one meter by the end of the century.[1] This phenomenon results directly from global warming, which causes continental ice to melt and oceans to expand as they warm.

The impacts are already visible, particularly in low-lying coastal areas. Habitats, resources, and even cultural heritage sites are threatened. Some people are forced to leave their homes, or even their countries. And for small island States such as Tuvalu or the Maldives, there is a real risk that their entire territory will disappear under water in the near future.[2]

Sea-level rise thus presents a wide range of challenges that transcend the defence of individual States' interests. It raises fundamental issues under international law, notably in law of the sea, but also with regard to statehood and the rights and protection of people affected by rising seas.

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[1] See, for example, Intergovernmental Panel on Climate Change, *The Ocean and Cryosphere in a Changing Climate: Special Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2022).

[2] See the discussions on this subject at the UN General Assembly: Informal plenary meeting on existential threats of sea-level rise amidst the climate crisis, 3 November 2023 [https://www.un.org/pga/78/2023/10/20/letter-from-the-president-of-the-general-assemblyinformal-plenary-meeting-on-sea-level-rise-3-nov-concept-note/]; High-level plenary meeting on the theme of "Addressing the threats posed by sea-level rise," 25 September 2024 [https://www.un.org/pga/78/high-level-meeting-on-sea-level-rise].

This contribution aims to demonstrate that, contrary to what the subtitle of this Roundtable (*"National Interest vs. Common Good of Humanity"*) might suggest, when it comes to addressing the challenges posed by sea-level rise, the defence of national interests is not necessarily incompatible with efforts to promote the common good of humanity. On the contrary, the two should be considered together. For this purpose, it is argued that the legal concept of "common concern of humankind" could provide a useful framework, even if this notion remains somewhat vague.[3]

The reasoning presented here could be applied to all challenges raised by sea-level rise. However, given the focus of this Roundtable on issues related to maritime order and the law of the sea, the analysis begins by examining how national maritime rights and interests may be affected by this phenomenon (1). It then considers how sea-level rise could be conceptualized as a *"common concern of humankind,"* tracing the development of this notion in international law (2). Finally, it explores how this concept could be operationalized to address the challenges posed by rising seas (3).

1. Impacts of Sea-Level Rise on National Maritime Rights and Interests

The potential implications of sea-level rise for national maritime entitlements were first brought to international attention in the late 1980s, notably through the initiatives of small island and low-lying coastal States, as reflected in the *Malé Declaration*.[4] Some legal scholars then questioned whether the rights enjoyed by vulnerable States over their

[3] Also suggesting that the concept of "common concern of humankind" be mobilized in the context of sea-level rise, see Aylin Yildiz's presentation at the Webinar organized by the British Institute of International and Comparative Law on 3 March 2021 [https://www.youtube.com/watch?v=Z-g0x1KRGEg; Event Report: https://www.biicl.org/documents/10719_rising_sea_levels_episode1_report.pdf].

[4] *Malé Declaration on Global Warming and Sea-level Rise*, adopted on 18 November 1989 [available at: http://www.islandvulnerability.org/slr1989/declaration.pdf]. See also Chapter 17 of Agenda 21 adopted at the Earth Summit in Rio in June 1992, which recognizes the vulnerability of SIDS to sea-level rise [https://www.un.org/french/ga/special/sids/agenda21/action17.htm].

adjacent maritime zones could be undermined by rising waters.[5] The answer was far from obvious as the United Nations Convention on the Law of the Sea (UNCLOS) is silent on the subject, an understandable omission given that it was adopted in 1982, before the question arose.

Nevertheless, the Convention recognizes that the starting point for the establishment of a coastal State's maritime zones is the baseline from which the breadth of its territorial sea is measured, whether it be the low-water line,[6] straight baselines,[7] or archipelagic baselines where the relevant conditions are met.[8] From these lines are measured the limits not only of the territorial sea (up to 12 nautical miles),[9] but also of the contiguous zone (up to 24 nautical miles),[10] the exclusive economic zone (EEZ, up to 200 nautical miles),[11] and the continental shelf (up to 200 nautical miles, or 350 nautical miles where the continental margin extends beyond that distance).[12] On the landward side of these baselines are also the internal waters,[13] and, in the case of relevant States, the archipelagic waters.[14] Within these various maritime zones, coastal States may exercise, depending on the case, full sovereignty (in internal and archipelagic waters), sovereign rights for the purpose of exploring and exploiting natural resources (in the EEZ and on the continental shelf), or limited enforcement and control powers (in the contiguous zone).

Yet, the legal challenge arises precisely from the fact that baselines rely on physical coastlines and maritime features that may be modified or even completely submerged due to sea-level rise. In this case, should

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5 See, notably, Alfred H. A. Soons, "The effects of a rising sea level on maritime limits and boundaries" (1990) 37 *Netherlands International Law Review* 207-232; David D. Caron, "When law makes climate change worse: rethinking the law of baselines in light of a rising sea level" (1990) 17 *Ecology Law Quarterly* 621-653.

6 UNCLOS, art. 5 (normal baseline).

7 UNCLOS, art. 7, 9 (mouths of rivers) and 10 (bays).

8 UNCLOS, art. 47.

9 UNCLOS, art. 3.

10 UNCLOS, art. 33.

11 UNCLOS, art. 57.

12 UNCLOS, art. 76.

13 UNCLOS, art. 8.

14 UNCLOS, art. 49.

their location be reviewed?[15] Some early doctrinal work recognized their ambulatory nature, implying that maritime limits should, in principle, move accordingly to respect the maximum distances prescribed by UNCLOS.[16] The States concerned could then lose significant portions of their maritime space and the associated rights to natural resources and activities that were previously under their jurisdiction. It could also exacerbate the risk of tensions between States over control of maritime zones whose boundaries would become uncertain or contested.[17]

In response to these risks, some have argued that States should be allowed to maintain the lines and limits established in accordance with UNCLOS, even if their coastlines change due to sea-level rise. This approach, known as the "fixed lines" thesis, is mainly based on a dynamic interpretation of the Convention, which also takes into account the

[15] For a detailed presentation of this problematic, see Valérie Boré Eveno, "Les impacts de l'élévation du niveau de la mer sur les limites maritimes : du flou juridique aux éclairages de la pratique" (2019) XXIV *Annuaire du droit de la mer* 57-89; and in V. Boré Eveno [Dir.], *Elévation du niveau de la mer et droit international : De l'adaptation à l'action* (Pedone 2022), the contributions of Alina Miron (pp. 97-114), Niki Aloupi (pp. 115-128) and Roberto Virzo (pp. 129-150).

[16] See International Law Association (ILA), R*eport of the Committee on Baselines under the International Law of the Sea* (Sofia, August 2012) [available at: https://www.ila-hq.org/index.php/committees]. That report stated that "the existing law of the normal baseline applies in situations of significant coastal change caused by both territorial gain and territorial loss. Coastal States may protect and preserve territory through physical reinforcement, but not through the legal fiction of a charted line that is unrepresentative of the actual low-water line" (p. 30).

[17] See Valérie Boré Eveno, "Les répercussions de l'élévation du niveau des mers sur les relations internationales: Défis juridiques et impacts géopolitiques" (2022) XXIII *Annuaire français de relations internationales* 721-737.

evolution of State practice.[18] Indeed, over the past decade, Small Island Developing States (SIDS) have been particularly active in promoting this position in multilateral fora[19] and have received increasing support from other States around the world. This is why the UN International Law Commission Study Group on sea-level rise in relation to international law, established in 2019 to examine the issue, was able to conclude that a general practice has emerged in favour of preserving the maritime rights of coastal States in this context.[20]

This interpretation has recently received (at least partial) judicial endorsement in the International Court of Justice's (ICJ) advisory opinion of 23 July 2025 regarding the Obligations of States in respect of Climate Change. Indeed, the ICJ stated that UNCLOS doesn't require States Parties to update their charts or geographical coordinates once they have been duly established in conformity with the Convention.[21] Although

[18] For a review of the literature, the practice and the various arguments in favour of this thesis, see the work of the ILA Committee on International Law and Sea-level Rise, in particular the Report of the Seventy-eighth Conference, held in Sydney, 19-24 August 2018, published in an edited version by D. Vidas, D. Freestone and J. McAdam (eds.), *International Law and Sea-level rise: Report of the International Law Association Committee on International Law and Sea-level Rise* (Leiden/Boston: Brill, 2019), and the ILA Resolution 5/2018 that endorsed this interpretation. For an overview of developments in practice, see also the *Interim Report of the ILA Committee on International Law and Sea-level rise*, published in the *ILA Report of the Eightieth Conference*, held in Lisbon, 19-24 June 2022, and the Final Report of this Committee (Part III), presented in Athens in June 2024, with the Resolution 1/2024 of the ILA [available at: https://www.ila-hq.org/index.php/committees].

[19] See, for instance, the *Pacific Islands Forum Declaration on Preserving Maritime Zones in the Face of Climate Change related Sea-level Rise*, 6 August 2021 [available at https://forumsec.org/publications/declaration-preserving-maritime-zones-face-climate-change-related-sea-level-rise].

[20] See, in particular, the first issues paper (2021), doc. A/CN.4/740, and the additional paper to the first issues paper (2023), doc. A/CN.4/761, by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law, as well as the final report of the Study Group (2025), doc. A/80/10, annex I.

[21] ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025, § 362.

some members of the Court[22] and several commentators[23] have characterized this conclusion as overly cautious, it nonetheless represents a significant development in international jurisprudence, one that aligns with the claims advanced by States most vulnerable to sea-level rise seeking to preserve their maritime entitlements. It's also notable that the Court framed its reasoning on the premise that "climate change is a common concern of humankind, one of the adverse effects of which is sea-level rise."[24] Indeed, this reference to the concept of "common concern of humankind" provides a useful conceptual lens, both to better understand the convergent evolution of State practice and to identify appropriate legal responses to the challenges posed by sea-level rise, issues that will be examined in the following points.

2. Sea-level Rise: a "Common Concern of Humankind"?

Unlike the concept of "common heritage of mankind" (a status recognized in particular for the international seabed area and its mineral resources), that of "common good of humanity" is not formally enshrined in international law. However, the concept of "common concern of humankind," which has been emerging in international law for

[22] See, notably, the Separate Opinions of Judge Aurescu and, more incidentally, of Vice-President Sebutinde (and, *contra*, the Declaration of Judge Tomka).

[23] See, for instance, Antoine De Spiegeleir and Armando Rocha, "Sea-Level Rise Reaches The Hague: Findings in Relation to the Law of the Sea in the ICJ's Climate Change Advisory Opinion" (2025/8/04) *VerfBlog* [https://verfassungsblog.de/law-of-the-sea-in-the-icjs-climate-change-advisory-opinion].

[24] ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025, § 364. For its part, the International Tribunal for the Law of the Sea, in its Advisory Opinion about Climate Change, did not rule directly on the substantive issues raised by sea-level rise (it was not seized of the matter), but it stated that it was "aware that climate change is internationally recognised as a common concern of humankind" and "also aware of the harmful effects that climate change has on the marine environment and the devastating consequences it has and will continue to have on small island States, which are considered to be among the most vulnerable to these effects." It was "with these considerations in mind" that the Tribunal provided clarification on the questions raised by the Commission (ITLOS, *Request for Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion of 21 May 2024, § 122).

some thirty years,[25] clearly reflects an awareness of the common good, not in a patrimonial sense as in the case of common heritage,[26] but in a philosophical or sociological one, namely regarding the possibility for human beings to live in harmony with nature, in a just society with multiple cultural expressions.[27] Indeed, although it remains a somewhat vague concept, the "common concern of humankind" refers to an issue that transcends national borders and generations, involving a sharing of responsibilities and collective action in response.[28]

It was precisely at Malta's instigation that, in 1988, the United Nations General Assembly recognized for the very first time that "climate change is a common concern of mankind," noting that "climate is an essential condition that sustains life on Earth."[29] This concept was later incorporated in the United Nations Convention on Biological Diversity (1992)[30] and in the UN Framework Convention on Climate Change,[31] whose preamble states that "change in the Earth's climate *and its ad-*

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[25] This is particularly the case in international environmental law. See, for example, F. Biermann, "Common Concern of Humankind: the emergence of a new concept of international environmental law" (1996) 34/4 *Archiv des Völkerrechts* 426-481.

[26] As the concept of "common heritage of mankind" has been controversial in international environmental law due to its proprietary connotations, the concept of "common concern of mankind" has emerged as an alternative, a compromise between national sovereignty and the common interests of mankind. See: UNEP, *The Meeting of the Group of Legal Experts to Examine the Concept of the Common Concern of Mankind in Relation to Global Environmental Issues*, Malta, 13-15 December 1990, edited by David J. Attard (1991).

[27] See the draft *Universal Declaration on the Common Good of Humanity*, presented at the People's Summit in June 2012, [https://www.humiliationstudies.org/documents/HoutartUniversalDeclarationoftheCommonGoodofHumanity.pdf].

[28] See Dinah Shelton, "Common Concern of Humanity" (2009) 39/2 *Environmental Law and Policy* 83.

[29] UNGA, *Protection of global climate for present and future generations of mankind*, A/RES/43/53, 6 December 1988, point 1. The Maltese representative (Alexander Borg Olivier) had requested in a letter to the Secretary-General of the United Nations that an item entitled "Declaration proclaiming that the climate is part of the common heritage of mankind" be included, but it was finally the concept of "common concern" that was favoured in the revised version of the resolution.

[30] Convention on Biological Diversity, concluded at Rio de Janeiro, 5 June 1992, United Nations, *Treaty Series*, vol. 1760, p. 79.

[31] United Nations Framework Convention on Climate Change, concluded at New York, 9 May 1992, *Treaty Series*, vol. 1771, p. 107.

verse effects are a common concern of humankind," a view reaffirmed in the Preamble to the 2015 Paris Agreement.[32]

Yet, as highlighted in the introduction, sea-level rise is one of the most dramatic consequences of climate change the impact of which extends far beyond the States most directly threatened. As Simon Kofe, then Foreign Minister of Tuvalu, said during COP26 (Glasgow, 2021), standing knee-deep in the Pacific Ocean: "We are sinking, but so is everyone else."[33] The purpose of his message was clear: to raise awareness that the consequences of sea-level rise affect all States. Beyond compromising the national maritime rights of the affected States, sea-level rise also affects the rights of the populations concerned, sometimes forced to migrate, and threatens their natural and cultural resources. It thus constitutes a potential source of instability and even conflict, thereby requiring coordinated action by States at the international level. This is also why the issue was later debated in the UN Security Council, notably on 14 February 2023, under the Maltese presidency.[34] As emphasized in this context by United Nations Secretary-General António Guterres, sea-level rise "is not just a threat in itself. It is a threat multiplier."[35] Now, the fact that an issue may be a threat to international peace and security is precisely one of the criteria, or even the "threshold," put forward by some legal scholars to identify a common concern of humankind.[36]

However, the concept remains far from universally accepted, as illustrated by the debates that have taken place in recent years within the International Law Commission (ILC) in the context of its work on the protection of the atmosphere, during which the notion of "common

[32] Paris Agreement, 12 December 2015, United Nations, *Treaty Series*, No. 54113, eleventh paragraph of the preamble.

[33] https://www.theguardian.com/environment/2021/nov/08/tuvalu-minister-to-address-cop26-knee-deep-in-seawater-to-highlight-climate-crisis.

[34] The Security Council considered the agenda item entitled "Sea-level rise: implications for international peace and security" at its 9260th meeting, on 14 February 2023. See S/PV.9260 and S/PV.9260 (Resumé 1). See also S/2023/79.

[35] https://news.un.org/fr/story/2023/02/1132292.

[36] See, in particular, the work led by Thomas Cottier at the University of Bern: T. Cottier and Z. Ahmad (eds.), *The Prospects of Common Concern of Humankind in International Law* (Cambridge University Press 2021), 39-42.

concern of humankind" was invoked. Although the draft guidelines adopted by the ILC in 2021 also acknowledge in their preamble that "atmospheric pollution and atmospheric degradation are a common concern of humankind," the accompanying commentaries reveal persistent divisions regarding the scope, content, and implications of this concept.[37] This may explain why it has not been used by the ILC Study Group that examined the issue of sea-level rise in relation to international law, nor by the ILA Committee on Sea-level Rise.[38]

Nevertheless, the concept of common concern of humankind offers an interesting perspective, as it makes it possible to reconcile the defence of national interests with the pursuit of the common good. How, then, could it be useful in addressing the challenges posed by sea-level rise? This question calls for an examination of its legal implications.

3. Legal Implications of the Concept of "Common Concern of Humankind" in the Context of Sea-level Rise

Although some authors have argued that "Common Concern of Humankind" could become a binding general principle of law,[39] it remains for now a "concept" that mainly reflects an awareness of the seriousness of a global-scale problem. Indeed, "[f]or a general principle of law to exist, it must be recognized by the community of nations,"[40] and it still appears too controversial for that. However, the fact that the concept is

[37] Draft guidelines on the protection of the atmosphere, with commentaries, adopted by the International Law Commission at its seventy-second session, and by the General Assembly on 9 December 2021, Doc. A/RES/76/112 (paragraph 3 of the Preamble and related commentaries).

[38] It is also noteworthy that this terminology was not included in the recent BBNJ 2023 agreement, even though France and the International Union for Conservation of Nature, in particular, had proposed that the concept of the common good be included in the treaty's preamble. See Jingchang Li and Wangwang Xing, "A critical appraisal of the BBNJ agreement not to recognise the high seas decline as a common concern of humankind" (2024) 163 *Marine Policy* [https://doi.org/10.1016/j.marpol.2024.106131].

[39] See, in particular, T. Cottier *et al., op. cit.* (note 36) 29-31.

[40] ILC, General principles of law: Texts and titles of the draft conclusions adopted by the Drafting Committee on second reading, seventy-sixth session Geneva, 28 April-30 May 2025, Doc. A/CN.4/L.1018, draft conclusion 2.

incorporated into certain international legal instruments and that international case law refers to it, either indirectly[41] or directly, as the ITLOS and the ICJ do in their 2024 and 2025 advisory opinions,[42] confirms its legal significance, if only by guiding the interpretation and application of the law. It can't be reduced to a mere factual statement.[43]

According to Professor Dinah Shelton, the "Common Concern" is "a general concept which does not connote specific rules and obligations, but establishes the general basis for the concerned community to act."[44] Instruments that mention the Common Concern don't challenge sovereignty or sovereign rights, which remain important in addressing the issues in question, but they suggest that international cooperation is necessary for this purpose.[45] Judge Cançado Trindade also emphasized that Common Concern of mankind requires "the engagement of all countries, all societies and all the social segments within the countries and societies." It encompasses "both present and future generations," focuses on the "causes of problems (both for their prevention and for the responses to be given)," and involves "equitable sharing of responsibilities."[46]

When examining the international regimes in which the concept is mentioned, one observes that it is indeed always connected to mechanisms for international cooperation, with arrangements for sharing respon-

[41] For example, in the *Gabcíkovo-Nagymaros* case, the ICJ recognizes "the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind." Recalling its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons* (ICJ, 1996), it emphasizes that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn" (*Gabcíkovo-Nagymaros Project* [Hungary/Slovakia], Judgment of 25 September 1997, ICJ Reports 1997, § 53).

[42] See *supra* (note 24).

[43] In this vein, see also Aylin Yildiz Noorda, "The International Protection of Persons Mobile in the Context of Disasters and Climate Change as a Common Concern of Humankind" *Climate Change, Disasters and People on the Move* (Brill/Nijhoff 2022) 194.

[44] Dinah Shelton, "Common Concern of Humanity" (2009)1 V *Iustum Aequum Salutare* 38.

[45] *Ibid* 37.

[46] Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (2nd ed., Martinus Nijhoff Publishers 2013) 351.

sibilities and implementation.[47] This is also what the ICJ stresses in its recent Advisory Opinion on climate change. After recalling that "climate change is a common concern of humankind, one of the adverse effects of which is sea-level rise," the Court emphasizes the customary obligation of States to co-operate in this context, an obligation that is also at the heart of the UN Charter, whose Article 1(3), in particular, commits States to "achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character." According to the Court, which expressly cites this Article, sea-level rise is therefore one of these problems. It then observes that "the duty to co-operate assumes particular significance in this context, requiring States to take, in co-operation with one another, appropriate measures to address the adverse effects of this serious phenomenon," and clearly specifies that "co-operation in addressing sea-level rise is not a matter of choice for States but a legal obligation."[48] It concludes that "the legal obligation to co-operate requires States, in the context of sea-level rise, to work together with a view to achieving equitable solutions, taking into account the rights of affected States and those of their populations."[49]

Admittedly, the ICJ does not detail these solutions, which, moreover, should go beyond maritime issues. Not only must States agree on the preservation of maritime limits and rights, but (perhaps more importantly) they must also address migration issues, ensure the protection of the human rights of threatened populations, and confront the question of maintaining statehood. However, the Court's interpretation of UNCLOS (according to which States are not required to update nautical charts or geographical coordinates in response to physical changes due to sea-level rise)[50] can be regarded as part of these solutions. Likewise, the Court's view that "once a State is established, the disappearance of

[47] See Aylin Yildiz Noorda's analysis applied to international climate and refugee regimes: *op. cit.* (note 43) 194. See also D. Shelton, *op. cit.* (note 44) 39. "Duty to cooperate," "securing compliance," but also "obligation to do homework" (that is to say, governments have an obligation to take measures to address common concerns within their own jurisdictions and territories) are the legal effects and implications highlighted in the work supervised by Thomas Cottier, *op. cit.* (note 36) 59 ff.

[48] ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025, § 364.

[49] *Ibid.*, § 365.

[50] *Ibid.*, § 362.

one of its constituent elements would not necessarily entail the loss of its statehood,"[51] although it does raise certain questions,[52] supports the rights of vulnerable States and their populations.

The International Law Commission's work points in the same direction. Even without explicitly referring to the notion of "Common Concern," it first acknowledged that "sea-level rise had become a global phenomenon that is creating global problems, with an impact on the international community as a whole."[53] Then, without going into detail here, the Commission ultimately encouraged, even before the development of specific instruments and mechanisms addressing climate change-related sea-level rise, a "contemporary interpretation" of existing instruments and rules of international law, one "that takes into account the duty to cooperate, equity, solidarity, self-determination, permanent sovereignty over natural resources, the preservation of existing rights and the maintenance of legal stability, certainty and predictability as cross-cutting principles that apply to the legal consequences of sea-level rise."[54]

In short, these are principles that reconcile the protection of the rights of the most vulnerable States and their populations affected by sea-level rise with the interests of the international community and the common good of humanity. The explicit recognition of sea-level rise as a common concern of humankind – even if not normative *per se* – should therefore support such an approach, provided it is accompanied by strengthened obligations of cooperation and action. In the end, this could provide helpful guidance to inspire the debates set to take place in 2026 at the United Nations General Assembly, with the aim of reaching a "concise, action-oriented and intergovernmentally negotiated declaration" in response to sea-level rise.[55]

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[51] *Ibid.*, § 363.

[52] See, attached to the Court's Advisory Opinion, the Declaration of Judge Tomka, who regrets the Court's lack of caution and rigor on this question.

[53] ILC, Final report of the Study Group on sea-level rise in relation to international law (2025), doc. A/80/10, annex I, p. 2, § 1.

[54] *Ibid.*, p. 12, § 58.

[55] See UN General Assembly decision 78/558 of 1 August 2024 ("Enhancing action on sea level rise"), which requests its President to organize a one-day high-level plenary meeting at its eighty-first session to continue discussions on the issue of sea-level rise, with a view to adopting a declaration agreed by consensus.

David S. Berry

Competition on the High Seas: Marine Biodiversity and Deep Seabed Resources

1. Introduction

The current chapter focuses on the interaction of a new international legal treaty – *the Agreement Under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ Agreement)* – and the deep seabed mining regime under the *United Nations Convention on the Law of the Sea (UNCLOS)*.[1] The *BBNJ Agreement* is scheduled to enter into force on January 17, 2026, as a result of recent receipt of the 60th instrument of ratification,[2] and the possibility of commercial deep seabed mining taking place in the near future is increasingly likely. A clash between the two regimes is becoming a possibility.

The chapter will explore whether the rules created under the *BBNJ Agreement*, together with other treaties and customary international law, may be used to regulate deep seabed mining in order to mitigate its harmful effects. The *BBNJ Agreement* applies to the water column in areas beyond national jurisdiction, but this paper will confine itself to

[1] UN (2023), *Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction* [BBNJ Agreement] (adopted 19 June 23, in force 17 January 2026), at https://treaties.un.org/doc/Treaties/2023/06/20230620%2004-28%20PM/Ch_XXI_10.pdf; UN (1982); *United Nations Convention on the Law of the Sea (UNCLOS)* (adopted December 10, 1982, in force November 16, 1994) 1833 UNTS 3, at https://treaties.un.org/doc/publication/CTC/Ch_XXI_6_english_p.pdf.

[2] See *BBNJ Agreement*, Art 68(1) and United Nations Treaty Collection, Status of Treaties, "10. Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (New York, 19 June 2023)" at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-10&chapter=21&clang=_en (19 Sep 2025).

an assessment of its applicability to the deep seabed in areas beyond national jurisdiction (ABNJ).[3]

The current chapter will commence with a brief assessment of the potential of deep seabed mining to harm the marine environment, in particular marine biodiversity. The second part will provide a short overview of relevant provisions of the *BBNJ Agreement*. In the third part the paper will assess whether the *BBNJ Agreement*, in conjunction with *UNCLOS*, could be used to create or uphold binding obligations that would regulate, restrict or prohibit deep seabed mining. This section expressly examines the relationship between the *BBNJ Agreement* and the International Seabed Authority's regime under *UNCLOS*. The final section will offer tentative conclusions.

2. Challenge: Deep Seabed Mining and the Potential Destruction of Marine Biodiversity?

The likelihood of deep seabed mining is becoming stronger. Several states have granted concessions to companies to explore and potentially mine areas of the deep seabed. The technology is available and the demand for rare minerals for renewable energy is high. The United States has sent clear signals that it is willing to move forward with mining, unilaterally if necessary.

At the same time, however, concerns have been expressed by scientists and international leaders about the impact of deep seabed mining on the marine ecosystem and marine biodiversity. Studies have suggested that disturbances of the deep seabed may have far reaching and long term negative consequences, both for the seabed and water column. Moreover, so little is known about deep sea ecosystems that the magnitude of the potential harm to marine life remains uncertain. The precautionary principle has been argued to support a moratorium on mining. This section will explore some of the scientific and economic concerns raised in relation to deep seabed mining.

[3] The *BBNJ Agreement* expressly applies to the deep seabed. Its scope applies to "areas beyond national jurisdiction"; "areas beyond national jurisdiction" is defined as meaning "the high seas and the Area": *BBNJ Agreement* Arts 3 and 1(2), respectively.

2.1 Nature of the Deep Seabed

The deep seabed, if defined as the seafloor located at depths greater than 200m, exists both within and beyond national jurisdictions.[4] For current purposes the focus will be upon the category of deep seabed falling in areas *beyond* national jurisdiction (ABNJ), which is covered by Part XI of *UNCLOS*. This seabed falls within the "Area," which is defined in Article 1(1)(1) of *UNCLOS* as meaning "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction." As provided in Articles 136-37 of *UNCLOS*, the Area and its resources are the common heritage of humankind, and no state may claim or exercise sovereignty or sovereign rights over the Area or any part of its resources; all rights in the resources in the Area are vested in mankind as a whole. Part XI has been modified by the *Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982* (the *1994 Agreement*), but the status of the Area as the common heritage of humankind remains unchanged.[5]

Under *UNCLOS*, overarching obligations to protect and preserve the marine environment and living resources of the oceans apply to both the high seas water column, under Part VII, and the deep seabed, under Part XII.[6]

[4] Nathalie Hilmi *et al.* (2026), "Governing the deep: Economic, ecological, and legal perspectives on deep-sea mining in areas beyond national jurisdiction," *Marine Policy* 183 (2026/01/01/ 2026): 17, https://doi.org/10.1016/j.marpol.2025.106887.

[5] UN (1994), *Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982* (adopted July 28, 1994, in force July 28, 1996) 1836 UNTS 3 *(1994 Agreement)*, at https://treaties.un.org/doc/Treaties/1994/11/19941116%2006-01%20AM/Ch_XXI_06a_p.pdf.

[6] See *UNCLOS* Section 2 of Part VII (high seas), on conservation and management of living resources of the high seas, and Part XII (protection and preservation of the marine environment). Specific provisions in Part XI (the Area) also create obligations in relation to marine scientific research in the Area (Art 143), and to protection of the marine environment (Art 145).

2.2 International Seabed Authority Regime

At the same time, under *UNCLOS* a regime exists to regulate mineral-related activities in the Area, including deep seabed mining. This is governed by the International Seabed Authority (ISA), an entity based in Kingston, Jamaica. The ISA, which recently celebrated its 30th anniversary, has 170 members, including the EU.[7]

The Area has become more important because it could be a source of some of the minerals needed for renewable energy and technology. The Area is a potential source of lithium, cobalt, nickel, copper, zinc, silver, gold and rare earth elements, which are heavily used in renewable energy projects, from wind turbines to electric vehicles, to batteries, as well as for high technology electronics, from cell phones and computers to medical and military technologies. Increasing demand has led to investors seeking to mine the seafloor for these minerals.[8] On the deep seabed, these minerals are believed to exist in polymetallic nodules, polymetallic sulphides (forming on hydrothermal vents) and cobalt-rich ferromanganese crusts (on seamounts).[9] Technology now exists to mine these locations with, for example, vacuum-like suction equipment being used to scoop up polymetallic nodules and top layers of sediment from the seabed.

2.3 Seabed Mining and the Marine Environment

Scientific studies have suggested that deep seabed mining could be severely detrimental to the marine environment, deep sea ecosystems,

[7] See generally ISA (2025a), "About ISA," at https://www.isa.org.jm/about-isa/ (18 Sep 2025).

[8] Oliver Ashford *et al.* (2025), "What We Know about Deep-Sea Mining – and What We Don't," *World Resources Institute* (23 Feb 2024), at https://www.wri.org/insights/deep-sea-mining-explained.

[9] *Ibid.*

biodiversity hotspots, and even to our planet's ability to produce oxygen and to the seabed's capacity to act as a carbon sink to combat climate change.[10]

Deep sea mining can harm marine life (1) directly, with heavy equipment crushing less mobile species and sediment plumes smothering and suffocating creatures, (2) through ecosystem destruction, with noise and light pollution impairing feeding and reproduction and the removal of nodules destroying marine habitats, and (3) through destruction of fisheries as a result of waste discharge.[11] In addition, polymetallic nodules, a potentially lucrative source of valuable minerals, appear to be home to ecosystems of life and may play a significant role in global oxygen production.[12]

The geographic scale of the potential impacts of deep seabed mining is extraordinary. A total area of 500,000 km^2 is estimated for activities in the Clarion-Clipperton Zone (CCZ) alone, which would produce noise and plume disturbance to at least 1.5 million km^2. When projected vertically through the three dimensional water column this would potentially disrupt 6 million km^3 of ocean.[13] Other studies have suggested a

[10] See e.g., Diva J. Amon *et al.* (2022), "Heading to the deep end without knowing how to swim: Do we need deep-seabed mining?," *One Earth* 5, no. 3 (03/18/2022): 220, at https://doi.org/10.1016/j.oneear.2022.02.013: "DSM [deep sea mining] is predicted to cause intense damage to some of the planet's most pristine habitats, many of which are also biodiversity hotspots, vulnerable marine ecosystems, and/or ecologically and biologically significant areas. For example, all 11 known active vent fields on the northern Mid-Atlantic Ridge are in exploration contract areas despite meeting multiple criteria for protection, including uniqueness or rarity, critical habitat, and importance for threatened, endangered, or declining species and/or habitats. Seamounts often support productive benthic and pelagic assemblages designated as biodiversity hotspots. The Clarion-Clipperton Zone (CCZ), which has the most mining interest for battery minerals currently, also shows extraordinary diversity (most of the many thousands of species are still undescribed) – a clear demonstration that not only do we have little knowledge, but also what we do know is concerning." [Citations omitted]

[11] Ashford *et al.* (2025), "What We Know about Deep-Sea Mining – and What We Don't."

[12] Planet-Tracker (2023), "The sky high cost of deep sea mining," 12, at https://planet-tracker.org/the-sky-high-cost-of-deep-sea-mining/. See also Sara Regassa (2024), "OpEd: Deep-sea mining: To Be or Not To Be," *McGill Journal of Economics*, at https://www.mjemcgill.com/opeds-and-newsarticles/deep-sea-mining-to-be-or-not-to-be.

[13] Amon *et al.* (2022), "Heading to the deep end without knowing how to swim: Do we need deep-seabed mining?," 221.

much larger impact.[14]

In addition, the duration of the harm caused to marine biodiversity has been of concern. Many authors suggest that deep sea mining necessarily entails a permanent loss of biodiversity.[15] A recent article in *Nature* demonstrated that after more than four decades post mining of an area for polymetallic nodules only some mobile species (but not other species) returned.[16]

Deep sea mining could also negatively affect social and governance systems in coastal communities, as a result of commercial land acquisition and development, and could affect the earth's carbon cycle by aggravating climate change.[17] Mining deep seabed minerals might put a mining concern (and its state of nationality, which is required to regulate it) on a collision course with various international legal obligations,

[14] As noted in Planet-Tracker (2023), "The sky high cost of deep sea mining," 5: "Our analysis estimates that mining minerals critical for the energy transition on land impacts biodiversity across 1–10 million km^3. Deep sea mining would cause impacts on an even larger scale. We estimate the total biosphere impacted by nodule mining in abyssal plains in international waters alone would be up to 25-75 million km^3, more than the volume of all freshwater in the world, including ice and snow. The risk of large-scale environmental impacts from deep sea mining is driven by a combination of the enormous spatial scale of mining activity and the spread of mining-related noise and sediment plumes."

[15] Holly J. Niner *et al.* (2018), "Deep-Sea Mining With No Net Loss of Biodiversity – An Impossible Aim," Perspective, *Frontiers in Marine Science* Volume 5 – 2018 (2018-March-01), 9 at https://doi.org/10.3389/fmars.2018.00053.

[16] Daniel O. B. Jones *et al.* (2025), in "Long-term impact and biological recovery in a deep-sea mining track," *Nature* 642, no. 8066 (2025/06/01), https://doi.org/10.1038/s41586-025-08921-3, 112, note: "the biological impacts in many groups of organisms are persistent, although populations of several organisms, including sediment macrofauna, mobile deposit feeders and even large-sized sessile fauna, have begun to re-establish despite persistent physical changes at the seafloor."

[17] Ashford *et al.* (2025), "What We Know about Deep-Sea Mining – and What We Don't."

including the 2022 Kunming-Montreal Global Biodiversity Framework, the UN Sustainable Development Goals, *UNCLOS* (see Article 145) and the *BBNJ Agreement*.[18]

2.4 Economic Value of Seabed Mining

Given the potentially significant environmental costs, some have attempted to calculate the economic potential of deep seabed mining. Several authors have argued that such mining will not be economically beneficial, indicating that it may have negative global economic effects and is not cost effective.[19] For example, it has been argued that the revenue obtained by the ISA from seabed mining (which must be shared with the international community) will be negligible. One study calculates that under a direct distribution model "more than half of States are forecast to receive less than $50,000 per annum in the medium term."[20] If a seabed sustainability model is used, the same authors suggest that

> "[d]eep-sea mining in the Area seems … unlikely to result in economically significant revenues on a global scale. The revenues forecast in this paper amount to less than 0.001% of the total GNI of the ISA's members, and even if all revenues were distributed to States and immediately spent, the established pattern of GDP per capita increasing from one generation to the next would continue. This

[18] Amon *et al.* (2022), "Heading to the deep end without knowing how to swim: Do we need deep-seabed mining?," 221.

[19] Hilmi *et al.* (2026), "Governing the deep: Economic, ecological, and legal perspectives on deep-sea mining in areas beyond national jurisdiction"; Mark Eisinger (2023), "Letter: Why deep-sea mining is on upper end of cost curve," *Financial Times*, at https://www.ft.com/content/fb5a68ba-36f1-4148-862a-04c1a310d51d; Victor Vescovo (2025), "The Economics of Deep-Sea Mining Don't Add Up," *Time* (May 22, 2025), at https://time.com/7287891/deep-sea-mining-economics-dont-add-up/.

[20] This figure takes into account all of the deductions required to run the ISA's regime, including distributing a share of profits to countries which have been harmed by the decrease in value of their land minerals, and relying upon equitable principles to take into account factors such as per capita income and population size: Daniel Wilde *et al.* (2023), "Equitable sharing of deep-sea mining benefits: More questions than answers," *Marine Policy* 151 (2023/05/01), 6, at https://doi.org/10.1016/j.marpol.2023.105572.

> seems to undermine an argument that inter-generational inequity justifies establishing a Seabed Sustainability Fund."[21]

In addition, it has been argued that seabed mining is not economically necessary. It has been suggested that there is an adequate supply of minerals on land, that changing technologies are moving away from deep sea resources (i.e., sodium-ion batteries), and that recycling can satisfy demand.[22]

Further, studies have suggested that environmental remediation costs could be staggering.[23] One paper goes so far as to suggest that deep sea ecosystem restoration post mining "is an illusion," and that the cost of such restoration would be higher than the revenue generated by the mining.[24]

2.5 Moratorium v. Unilateral Authorization

As a result of such concerns about the potential harmful effects of deep seabed mining on marine life and marine ecosystems, our lack of knowledge about the species that may be affected, and in line with the precautionary principle, several calls have been made for "a moratorium, precautionary pause, or ban on deep-sea mining, either in interna-

[21] *Ibid.*, 8.

[22] Ashford *et al.* (2025), "What We Know about Deep-Sea Mining – and What We Don't"; Amon *et al.* (2022), "Heading to the deep end without knowing how to swim: Do we need deep-seabed mining?," 221-22.

[23] Elizabeth Steyn (2024), "Deep seabed mining: Bad for biodiversity and terrible for the economy," *The Conversation*, at https://theconversation.com/deep-seabed-mining-bad-for-biodiversity-and-terrible-for-the-economy-243893; Planet-Tracker (2023), "The sky high cost of deep sea mining," 5.

[24] Planet-Tracker (2023), "The sky high cost of deep sea mining," 18-20. It is stated in *ibid.*, 23 that "Per km², the restoration cost we computed (USD 5.3–5.7 million) is higher than the revenue made from the sale of nodules (USD 4.4 million), and about twice as high as the cost of mining them (USD 2.7 million)."

tional waters, national waters, or both."[25] The Deep Sea Conservation Coalition, for example, lists 38 countries as being against deep seabed mining.[26]

In contrast, at the other end of the spectrum, the United States has taken the position that the international deep seabed regime created by the 1982 *UNCLOS* and 1994 *Agreement* is not applicable to the U.S., as a non-party to *UNCLOS*. The U.S. has also argued that such a regime is not binding as a matter of customary international law.[27] The U.S. President's recent Executive Order (April 24, 2025) has raised concerns about the potential for unilateral U.S. mining of the deep seabed in ABNJ. These concerns were reportedly raised by delegates at the ISA

[25] Deep Sea Conservation Commission (2025), "Voices Calling for a Moratorium: Governments and Parliamentarians," at https://deep-sea-conservation.org/solutions/no-deep-sea-mining/momentum-for-a-moratorium/governments-and-parliamentarians/ (17 September 25). See also Laurent Cipriani (2025), "Macron says imposing a moratorium on seabed mining is 'an international necessity' – The number of countries opposed to seabed mining has now risen to 36," *Le Monde*, 9 Jun 2025, at https://www.lemonde.fr/en/environment/article/2025/06/09/macron-says-imposing-a-moratorium-on-seabed-mining-is-an-international-necessity_6742172_114.html.

[26] On its website the Deep Sea Conservation Coalition lists 38 countries urging the following measures: (1) a moratorium (Federated States of Micronesia, Fiji, Palau, Samoa, Canada, New Zealand, Switzerland, Marshall Islands, Mexico, Peru, and the United Kingdom), (2) a ban (France), (3) a precautionary pause (Austria, Brazil, Croatia, Costa Rica, Chile, Cyprus, Dominican Republic, Ecuador, Finland, Germany, Greece, Guatemala, Honduras, Ireland, Kingdom of Denmark, Latvia, Luxembourg, Malta, Monaco, Panama, Portugal, Slovenia, Spain, Sweden, Tuvalu, Vanuatu). See *Governments and Parliamentarians – Deep Sea Conservation Coalition* (17 September 25).

[27] U.S. (2025), "U.S. Intervention on Agenda Item 8: International Seabed Authority Assembly, 30th Session, July 2025," at https://www.isa.org.jm/wp-content/uploads/2025/02/USA-statement-for-ISA-Assembly-July-2025.pdf (9 Nov. 2025).

Council's 30th meeting in discussions on the topic of unilateral deep-sea mining activities outside of the ISA regime.[28]

It should be noted, however, that scholars suggest that the effect of the U.S. Executive Order may be limited, given the outdated framework of the U.S. legislative scheme, the lack of reciprocal recognition by other states, the constraints of *UNCLOS*, the U.S.'s signature to the 1994 *Agreement*, and other rules of international law.[29] Mining outside of the ISA regulations may also breach existing exploration contracts between the mining concerns and the ISA.[30] Practical considerations from opera-

[28] See IISD (2025), "Summary report, 7-25 July 2025, 2nd Part of the 30th Annual Session of the International Seabed Authority" (18 September 2025), at https://enb.iisd.org/international-seabed-authority-isa-council-30-2-summary. As summarized in *ibid.*, the possibility of unilateral deep-sea mining activities outside of the ISA appears real: "The Metals Company USA LLC (TMC USA) has submitted an application for commercial recovery of deep-sea minerals in the high seas, under U.S. domestic legislation and outside of the international framework established by the UN Convention on the Law of the Sea (UNCLOS). The U.S., a non-party to UNCLOS, attended ISA-30 as an observer, and asserted that 'mining of the seabed is a lawful use of the high seas open to all states.' They repeated their long-held position that they are not bound by the UNCLOS rules on deep-sea mining. Yet, the Council remained divided, with persistent tension between urgency and caution." – See also Elizabeth Claire Alberts (2025), "The Metals Company applied to the U.S. for a deep-sea mining license," *Mongabay* (2025), at https://news.mongabay.com/2025/04/the-metals-company-applied-to-the-u-s-for-a-deep-sea-mining-license/.

[29] See, e.g., Coalter Lathrop (2025), "The Latest Trump Threat to International Law: Unilaterally Mining the Area," *EJIL Talk* (6 May 2025), at https://www.ejiltalk.org/the-latest-trump-threat-to-international-law-unilaterally-mining-the-area/; Ríán Derrig and Kahlil Hassanali (2025), "Understanding Executive Order 14285: On the Possibility of Authorizing Seabed Mining in Areas Beyond National Jurisdiction," *ASIL Insights* 29, no. 9 (2 Jul 2025), at https://www.asil.org/insights/volume/29/issue/9; Toby Fisher and Samantha Robb (2025), "Untouchable metals: How the obligations of UNCLOS States Parties limit the commercial viability of unilateral deep sea mining," *EJIL Talk* (23 June 2025), at https://www.ejiltalk.org/untouchable-metals-how-the-obligations-of-unclos-states-parties-limit-the-commercial-viability-of-unilateral-deep-sea-mining/; ASIL (2025), *Episode 54 – Is the Trump Administration's Deep Seabed Mining Program Violating International Law?*, podcast audio, International Law Behind the Headlines, at https://asil.org/resources/podcast/ep54 (18 September 2025).

[30] Ashford *et al.* (2025), "What We Know about Deep-Sea Mining – and What We Don't."

tional, to financing, to insurance, may also discourage companies from engaging in deep seabed mining outside of the *UNCLOS* regime.[31]

3. Applicability of the BBNJ Agreement to Deep Seabed Mining

The *BBNJ Agreement* could have implications for deep seabed mining, including restricting the ability of its parties to engage in mining activities that are not compatible with the *Agreement*. It may also have impacts upon non-parties, and this raises interesting issues under the law of treaties, as discussed later.

The *BBNJ Agreement* establishes a comprehensive regime for both conservation and sustainable use of marine biological resources in areas beyond national jurisdiction. Comprising 76 articles, falling within 12 Parts, along with two Annexes, the *Agreement* is a complex and comprehensive treaty. The *Agreement* will be governed by a number of organs, including the Conference of the Parties (COP), a Clearing-House Mechanism, a Scientific & Technical Body, a Secretariat, a Financial Mechanism and Finance Committee, a Capacity Building & Transfer of Marine Technology Committee, an Access and Benefit Sharing Committee, and an Implementation & Compliance Committee.

The substantive areas of the *Agreement* directly relevant to deep seabed mining are divided into three primary parts: (1) Part II, allowing for the creation of obligations in relation to marine genetic resources (MGRs), (2) Part III, authorizing the creation of area-based management tools

[31] In Vescovo (2025), "The Economics of Deep-Sea Mining Don't Add Up," the ability of The Metals Co (TMC) to mine the seafloor, or to finance and insure its operations, is doubted: "However, this [choice of the U.S. for deep seabed mining] has traded one problem – not getting a permit from the U.N.'s International Seabed Authority – for perhaps a worse one. What companies will actually perform the work to mine the seafloor? TMC's operational partners, Allseas and Glencore, are both Swiss firms. Will they willingly violate an international law to which their home country has signed on to? Will others? What about insurance and finance companies whose support seafloor miners will need to help their businesses run? Will the minerals thus mined be viewed like conflict minerals on the international market? They should be."

(ABMTs), including marine protected areas (MPAs), and (3) Part IV, setting out requirements for environmental impact assessments (EIAs).

Before looking at these parts, it will be useful to outline some of the binding obligations created by the *BBNJ Agreement*. Article 53 of the *BBNJ Agreement* sets out the binding obligation to make the Agreement effective, providing that "Parties shall take the necessary legislative, administrative or policy measures, as appropriate, to ensure the implementation of this *Agreement*." The obligation is one of result ("ensure") and would apply to both national and international measures. This obligation applies in full to all parties, since no reservations or exceptions to the *Agreement* are permitted.[32]

The general objective of the *BBNJ Agreement*, set out in Article 2, provides the treaty's goals:

> "The objective of this Agreement is to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, for the present and in the long term, through effective implementation of the relevant provisions of the Convention and further international cooperation and coordination."

Article 2 envisages these goals as being long term and sees the Agreement as playing a key role in both effective implementation of *UNCLOS* as well as in encouraging international cooperation and coordination. The latter is particularly important because the *BBNJ Agreement* is the latest in a number of treaties which apply to different areas beyond national jurisdiction. Unless the *Agreement* attracts universal ratification, its institutions will have to cooperate with non-parties and with regional and international organizations which include non-parties.

To this end, Article 8 sets out the broad cooperation obligation (which is reiterated in many places throughout the *Agreement*)[33] and particularly highlights the need to cooperate with other "legal instruments and frameworks and relevant global, regional, subregional and sectoral

[32] *BBNJ Agreement*, Art 70.

[33] For emphasis on the need for cooperation, see *BBNJ Agreement*, Arts 2, 8, 11, 14, 17, 22, 25, 39, 40, 41, 42, 43, 47, 50, 51, 56 and Annex II.

bodies" [this phrase will hereafter be abbreviated to "other bodies"]. Article 8 requires parties to promote cooperation between (1) parties and other bodies, (2) between other bodies, (3) within other bodies, and (4) in relation to two topic areas, namely, (a) marine scientific research and (b) development and transfer of marine technology.[34]

Several of the *Agreement's* provisions discuss the potential relationships of the *Agreement* and its institutions with other bodies. Interestingly, Article 25(6) specifies with respect to area-based management tools (ABMTs) adopted by the COP that a party which is not a member of another body, and which does not agree to apply an ABMT (i.e., objects), nevertheless remains bound by "the obligation to cooperate, in accordance with the Convention and this *Agreement*, in the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction."

The latter phrasing draws us back to the role of the *Agreement* as an implementing agreement for *UNCLOS*, and the continued binding force of *UNCLOS* for those that are parties to it. *UNCLOS* itself plays a strong role in protecting marine biodiversity in its provisions prohibiting harm to the marine environment (see Parts VII [high seas], XI [the Area], XII [protection and preservation of the marine environment]). Also, under Article 237 *UNCLOS* allows for protection of the marine environment

[34] BBNJ Agreement, Art 8 provides:

"1. Parties shall cooperate under this Agreement for the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including through strengthening and enhancing cooperation with and promoting cooperation among relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies in the achievement of the objectives of this Agreement.

2. Parties shall endeavour to promote, as appropriate, the objectives of this Agreement when participating in decision-making under other relevant legal instruments, frameworks, or global, regional, subregional or sectoral bodies.

3. Parties shall promote international cooperation in marine scientific research and in the development and transfer of marine technology consistent with the Convention in support of the objectives of this Agreement."

through other treaties.[35] Article 237(2) reminds us, however, that these obligations under other treaties should be carried out in a manner consistent with the general principles and objectives of *UNCLOS*.

Article 62 of the *Agreement* also provides a duty in relation to non-parties: "Parties shall encourage non-parties to this Agreement to become Parties thereto and to adopt laws and regulations consistent with its provisions." The status of non-parties as not being bound by the *Agreement* is preserved in Article 5(3).

3.1 Relationship between the *Agreement* and *UNCLOS*

As foreshadowed in *UNCLOS* Article 237(2), the relationship between the *BBNJ Agreement* and UNCLOS is seen as one of compatibility or consistency. Article 5 of the *BBNJ Agreement* sets out three important positions on the relationship between the Agreement and *UNCLOS*, the *Agreement* and other bodies, and the *Agreement* and non-parties:

> "1. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention. Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention, including in respect of the exclusive economic zone and the continental shelf within and beyond 200 nautical miles.
>
> 2. This Agreement shall be interpreted and applied in a manner that does not undermine relevant legal instruments and frameworks

[35] UNCLOS, Art 237 provides:

"1. The provisions of this Part [XII] are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in this Convention.

2. Specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general principles and objectives of this Convention."

and relevant global, regional, subregional and sectoral bodies and that promotes coherence and coordination with those instruments, frameworks and bodies.

3. The legal status of non-parties to the Convention or any other related agreements with regard to those instruments is not affected by this Agreement."

Similarly, the *BBNJ Agreement*'s COP is required to promote cooperation and coordination with other bodies, and to promote transparency in its decision-making processes.[36] Observers, including from states not party to the *Agreement*, may attend all meetings of the COP and its subsidiary bodies, and the COP is required to publicly disseminate information as well as facilitate participation of, and consultation with, other bodies.[37] Other organs of the *BBNJ Agreement* make provision for consultation with, or input from, other bodies.[38]

I will return to these provisions related to non-parties and the obligation not to undermine other treaties and bodies later, when looking at the role of the International Seabed Authority in relation to marine biodiversity.

For now, it will be useful to briefly examine the three *Agreement* regimes which might have an impact upon deep seabed mining, namely, the regimes applicable to: marine genetic resources (MGRs), area-based management tools (ABMTs), and environmental impact assessments (EIAs).

[36] *BBNJ Agreement*, Art 47(6)(c) and 48.

[37] *BBNJ Agreement*, Art 48.

[38] *BBNJ Agreement*, Arts 49(3) (Scientific and Technical Body), 50(4)(d) (Secretariat), 51(3)(f), 55(4) (Implementation and Compliance Committee).

3.2 Part II – Marine Genetic Resources (MGRs)

Part II sets out a regime applicable to marine genetic resources in areas beyond national jurisdiction.[39] This regime creates significant incentives to conserve MGRs by requiring fair and equitable sharing of the benefits of such resources, including through capacity building, technology transfer and marine scientific research.[40] The obligation to share benefits applies to both the MGRs themselves (the "wet stuff") and digital sequencing information derived from the resources. Part II does not apply to fishing activities and makes clear that states cannot claim sovereign rights or exercise sovereignty over MGRs in ABNJ.[41] It also provides that MGRs from ABNJ are for the benefit of all humanity.[42] Such a framework creates a legitimate interest for any party to protect MGRs and the associated DSI, and thus incentivizes, *inter alia*, regulating the environmental impacts of deep seabed mining.

For parties to the *Agreement*, a number of obligations arise in relation to MGRs. These range from the requirement (1) to notify any activities with respect to MGRs and DSI in ABNJ,[43] (2) to identifying any MGRs required with a BBNJ standardized batch identifier (generated by the Clearing House Mechanism),[44] (3) to ensuring that MGRs and DSI are deposited in publicly accessible repositories and databases,[45] (4) to providing access to the repositories and databases,[46] (5) to sharing mone-

[39] "Marine genetic resources" is defined in *BBNJ Agreement*, Art 1(8) as meaning "any material of marine plant, animal, microbial or other origin containing functional units of heredity of actual or potential value."

[40] *BBNJ Agreement*, Arts 9 and 14.

[41] *BBNJ Agreement*, Arts 10 and 11(4).

[42] Activities related to MGRs must be carried out for peaceful purposes: *BBNJ Agreement*, Art 11(7); they are also for the benefit of all humanity. *BBNJ Agreement*, Art 11(6) provides: "Activities with respect to marine genetic resources and digital sequence information on marine genetic resources of areas beyond national jurisdiction are in the interests of all States and for the benefit of all humanity, particularly for the benefit of advancing the scientific knowledge of humanity and promoting the conservation and sustainable use of marine biological diversity, taking into particular consideration the interests and needs of developing States."

[43] *BBNJ Agreement*, Art 12.

[44] *BBNJ Agreement*, Art 12(3).

[45] *BBNJ Agreement*, Art 14(3).

[46] *BBNJ Agreement*, Art 14(4).

tary benefits from MGRs and DSI.[47] If a deep seabed contractor is under the jurisdiction or control of a party, the party would be required to ensure that its activities do not breach these obligations. At a minimum, it would suggest that mining activities should be subject to stricter regulation to ensure that they do not harm MGRs or the benefits derived from them. It also might suggest, under the precautionary principle, that, if mining is to take place, MGR samples should be acquired to ensure that such genetic data is not irretrievably lost.

3.3 Part III – Area-based Management Tools (ABMTs)

Area-based management tools[48] have an even stronger potential to regulate the harmful environmental effects of deep seabed mining. Under Part III the COP has the power to create ABMTs, including marine protected areas (MPAs), which will be binding upon the parties. ABMTs under the *Agreement* could be applicable to the marine biodiversity of the water column and the deep seabed in ABNJ.[49]

The purposes or objectives of ABMTs under Part III include to "[c]onserve and sustainably use areas requiring protection, including through

[47] *BBNJ Agreement*, Art 14(7).

[48] The term "area based management tool" is defined in Art 1(1) of the *BBNJ Agreement* as meaning "a tool, including a marine protected area, for a geographically defined area through which one or several sectors or activities are managed with the aim of achieving particular conservation and sustainable use objectives in accordance with this Agreement."

[49] Note that although the *BBNJ Agreement* requires due regard for rights of states over seabed which falls under their jurisdiction, there is no similar requirement for seabed in ABNJ. Article 22(5) of the *Agreement* provides:

"5. Decisions and recommendations adopted by the Conference of the Parties in accordance with this Part shall not undermine the effectiveness of measures adopted in respect of areas within national jurisdiction and shall be made with due regard for the rights and duties of all States, in accordance with the Convention. In cases where measures proposed under this Part would affect or could reasonably be expected to affect the superjacent water above the seabed and subsoil of submarine areas over which a coastal State exercises sovereign rights in accordance with the Convention, such measures shall have due regard to the sovereign rights of such coastal States. Consultations shall be undertaken to that end, in accordance with the provisions of this Part."

the establishment of a comprehensive system of area-based management tools, with ecologically representative and well-connected networks of marine protected areas."[50] ABMTs are to be used not only to protect and preserve marine biodiversity, they also may be used to restore and maintain it. Part III also aims to strengthen cooperation and coordination of the use of ABMTs with other bodies.[51]

Overall, Part III sets out a comprehensive, participatory regime for creation of ABMTs, one which governs proposals, publicizes and engages in a preliminary review of them, and engages in widespread public consultations.[52] Consultations allow non-parties and other bodies (such as the ISA) to express their views and present scientific evidence in support of, against, or in relation to modifying, the proposed ABMT.

The COP may (1) itself create an ABMT, (2) adopt measures compatible with those adopted by other bodies, or (3) make recommendations to parties and other bodies to adopt (supportive) measures.[53] Article 22(2), however, makes clear that the COP must "respect the competences of, and not undermine, relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies."

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[50] *BBNJ Agreement*, Art 17(a).

[51] *BBNJ Agreement*, Art 17(b).

[52] *BBNJ Agreement*, Arts 19, 20 and 21, respectively.

[53] *BBNJ Agreement*, Art 22(1) provides:

"1. The Conference of the Parties, on the basis of the final proposal and the draft management plan, taking into account the contributions and scientific input received during the consultation process established under this Part, and the scientific advice and recommendations of the Scientific and Technical Body:

(a) Shall take decisions on the establishment of area-based management tools, including marine protected areas, and related measures;

(b) May take decisions on measures compatible with those adopted by relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies, in cooperation and coordination with those instruments, frameworks and bodies;

(c) May, where proposed measures are within the competences of other global, regional, subregional or sectoral bodies, make recommendations to Parties to this Agreement and to global, regional, subregional and sectoral bodies to promote the adoption of relevant measures through such instruments, frameworks and bodies, in accordance with their respective mandates."

This latter provision is particularly important in the context of the ISA and deep seabed mining activities.

In sum, Part III of the *BBNJ Agreement* allows for the creation of ABMTs, including MPAs, and these could apply to both the water column and seabed of areas beyond national jurisdiction. The *Agreement* will create binding obligations for parties to respect such ABMTs (subject to their right to object – see Article 23) and thus would have implications for parties having jurisdiction or control over deep seabed mining contractors. In this vein, Article 25(1) expressly provides that "Parties shall ensure that activities under their jurisdiction or control that take place in areas beyond national jurisdiction are conducted consistently with the decisions adopted under this Part."

With respect to non-parties, the *Agreement* requires parties to encourage them to adopt measures supporting COP decisions on ABMTs; it also reminds non-parties that they remain bound by their obligations under *UNCLOS*.[54]

3.4 Part IV – Environmental Impact Assessments (EIAs)

Part IV, which establishes requirements, standards (thresholds), processes and procedures related to EIAs,[55] could directly affect activities taken in relation to deep seabed mining by parties and nationals under their jurisdiction.[56]

The objectives of Part IV include to (1) "ensure that activities covered by this Part are assessed and conducted to prevent, mitigate and manage

[54] *BBNJ Agreement*, Art 25(5)-(6).

[55] The term "environmental impact assessment" is defined in Art 1(7) of the *BBNJ Agreement* as meaning "a process to identify and evaluate the potential impacts of an activity to inform decision-making."

[56] In fact, subject to provisions, which prevent duplication, a party to the *BBNJ Agreement* is arguably required to fulfil two EIA requirements in relation to deep seabed mining – (1) BBNJ Agreement requirements and (2) ISA requirements under *UNCLOS*. Since obligations related to EIAs fall squarely on parties themselves (the COP does not have a similar role in relation to ABMTs), the parties themselves would have to resolve the nature of their obligations under all applicable regimes.

significant adverse impacts for the purpose of protecting and preserving the marine environment."[57] Part IV also states the aims to "support the consideration of cumulative impacts and impacts in areas within national jurisdiction," "provide for strategic environmental assessments," and "achieve a coherent environmental impact assessment framework for activities in areas beyond national jurisdiction."[58] Under Article 28(1) parties are required to assess the potential impact of activities in ABNJ under their jurisdiction or control prior to authorizing them. An EIA (under Part IV or under national laws) is required if an "activity may cause substantial pollution of or significant and harmful changes to the marine environment in areas beyond national jurisdiction."[59]

The process for EIAs under Part IV includes a screening,[60] scoping, impact assessment and evaluation.[61] Parties also must ensure that they identify and analyze measures "to prevent, mitigate and manage potential adverse effects of the planned activities under their jurisdiction or control," consider "alternatives to the planned activity" and a possible environmental management plan.[62] Planned activities are subject to the requirements for public notification and consultation.[63] Requirements for EIAs are set out in Article 33. After the conclusion of the EIA, the decision as to whether or not to go ahead with a planned activity falls within the competence of the party who has jurisdiction over the activity.[64] Authorized activities remain subject to monitoring, reporting and review.[65] Part IV also allows for strategic environmental impact assessments and requires parties to promote EIAs in other bodies.[66]

[57] *BBNJ Agreement*, Art 27(b).
[58] *BBNJ Agreement*, Art 27(c)-(e).
[59] *BBNJ Agreement*, Art 28(2).
[60] *BBNJ Agreement*, Arts 30-31. A screening is required when "a planned activity may have more than a minor or transitory effect on the marine environment, or the effects of the activity are unknown or poorly understood": *BBNJ Agreement*, Art 30(1).
[61] *BBNJ Agreement*, Art 31.
[62] *BBNJ Agreement*, Art 31(1)(d).
[63] *BBNJ Agreement*, Art 32.
[64] *BBNJ Agreement*, Art 34(1).
[65] *BBNJ Agreement*, Arts 35, 36 and 37, respectively.
[66] *BBNJ Agreement*, Arts 39 and 29, respectively.

4. Focal Case Study: the *BBNJ Agreement* and the ISA Regime

The potential for conflict between the International Seabed Authority's (ISA) deep seabed mining regime and the biodiversity conservation obligations under the *BBNJ Agreement* may bring some of the issues discussed into focus.

Deep seabed mining in the Area falls under the competence of the ISA under *UNCLOS* (as modified by the 1994 *Agreement*). The ISA is to regulate deep seabed mining activities in the Area under exploration and exploitation regulations, in its Mining Code.[67] Three sets of exploration regulations, supplemented by recommendations, have been adopted by the ISA, covering the prospecting and exploration for mineral resources in the Area for polymetallic nodules (ISBA/19/C/17), polymetallic sulphides (ISBA/16/A/12/Rev.1) and cobalt-rich ferromanganese crusts (ISBA/18/A/11).[68] As noted by the ISA's Secretary-General in a report on the status of contracts for exploration, as of 24 January 2025 "30 contracts for exploration were in force, of which 19 were for polymetallic nodules, 7 for polymetallic sulphides and 4 for cobalt-rich ferromanganese crusts."[69]

Work on exploitation regulations has been ongoing since 2014 but has not yet been finalized. At its 30th session the ISA Council continued its work on the Revised Consolidated Text of the Draft Exploitation Regulations (ISBA/30/C/CRP.1).[70]

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[67] ISA (2025b), "The Mining Code," at https://www.isa.org.jm/the-mining-code/ (18 Sep 2025).

[68] *Ibid.*

[69] ISA (2025d), "Report of the Secretary-General to the Council: Status of contracts for exploration and related matters, including information on the periodic review of the implementation of approved plans of work for exploration, 30th Session, ISBA/30/C/2 (3 March 2025)," at https://www.isa.org.jm/wp-content/uploads/2025/03/ISBA_30_C_2_E.pdf.

[70] ISA (2025c), "The Mining Code: Draft exploitation regulations," at https://www.isa.org.jm/the-mining-code/draft-exploitation-regulations-2/ (18 Sep 2025); UN (2025), "Deep dive into the International Seabed Authority: Why it matters now," at https://news.un.org/en/story/2025/07/1165464 (18 Sep 2025); IISD (2025), "Summary report, 7–25 July 2025, 2nd Part of the 30th Annual Session of the International Seabed Authority."

The ISA also has been granted competence over protection of the marine environment in the Area, under *UNCLOS* Article 145, and has interpreted that competence to include not only the seabed, but the water column above it.[71]

Unlike the *BBNJ Agreement* organs, however, the ISA has to balance its mission to enable deep seabed mining (which I would argue is its primary purpose) with its obligations to protect the marine environment (a secondary purpose).[72] The ISA is aware of concerns about the impact of deep seabed mining on marine biodiversity. It has already started to think about the relationship between *UNCLOS*, the 1994 *Agreement* and the *BBNJ Agreement*. In a thoughtful and detailed 2024 study it has suggested several ways in which the ISA could contribute to the goals of the *BBNJ Agreement*.[73]

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[71] ISA (2024), "A review of the contribution of ISA to the objectives of the 2023 Agreement under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdictions," 42, at https://www.isa.org.jm/wp-content/uploads/2024/06/The_contribution_of_ISA_to_the_BBNJ_objectives.pdf (9 Nov. 2025). UNCLOS, Art 145, entitled "protection of the marine environment," provides:

"Necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities. To this end the Authority shall adopt appropriate rules, regulations and procedures for *inter alia*:

(a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities;

(b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment."

[72] The ISA also has faced challenges in creating a general environmental policy, despite widespread support. For the third year the ISA Assembly was unable to launch discussions on this topic: IISD (2025), "Summary report, 7-25 July 2025, 2nd Part of the 30th Annual Session of the International Seabed Authority."

[73] ISA (2024), "A review of the contribution of ISA to the objectives of the 2023 Agreement under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdictions."

4.1 MGRs

For example, in relation to MGRs, the ISA has launched a Deep-sea Biobank Initiative to give access to biological samples and marine genetic data, and a DeepData database (2019) through which the ISA makes publicly available the biggest and most complete global repository of environmental data and information on the deep-sea area.[74] In terms of the *BBNJ Agreement* objectives, the ISA does not have a direct function to regulate access to marine genetic resources, which are the focus of Part II of the Agreement. However, it can assist in the "generation of information about deep-seabed ecosystems as part of the exploration and exploitation processes and the dissemination of results and analysis from such activities."[75]

With respect to the potential for conflicts with duties under the *BBNJ Agreement* related to the required notification to the Clearing House Mechanism if marine genetic resources are sampled by a contractor, the ISA has suggested that *BBNJ Agreement* obligations may be subject to the ISA's authority under *UNCLOS*: "the potential imposition of these additional duties on a party to the 2023 Agreement will have no implications for the authorization of the activity to be carried out by a contractor, which will remain subject to approval by ISA in pursuit of its mandate under Part XI. Yet, there are likely to be challenges that arise in applying this new regime to activities also regulated by ISA under Part XI of UNCLOS."[76] The ISA suggests that such challenges could be overcome if strong linkages are formed between the BBNJ's Clearing House Mechanism and the ISA, with data being shared through the ISA's DeepData repository, with the possibility of the ISA using standardized batch identifiers as required in the *BBNJ Agreement*.[77]

The ISA is required to promote and encourage marine scientific research related to the Area and to disseminate the results, and this obligation would equally apply to MGRs (*UNCLOS* Art 143[2]). The ISA requires

[74] UN (2025), "Deep dive into the International Seabed Authority: Why it matters now."
[75] ISA (2024), "A review of the contribution of ISA to the objectives of the 2023 Agreement under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdictions," 46.
[76] *Ibid.*, 52.
[77] *Ibid.*, 53.

baseline studies and data from parties under exploration contracts with the ISA, including "data relating to biological communities on the sea floor or in the water column that may be affected by operations."[78] The required data includes "an assessment of in situ communities, including photo-documentation, but also the collection of biological samples."[79] The ISA promotes marine scientific research through its Partnership Fund (2020) and as part of its capacity building and technology transfer activities (the latter being limited by the terms of the 1994 Agreement). The ISA has suggested its capacity building model may be helpful to the *BBNJ Agreement*, and that it might provide a platform for the delivery of the objectives of Part V of the Agreement.[80]

4.2 ABMTs

In relation to ABMTs, the ISA has suggested that it could assist the BBNJ's COP by using several tools at its disposal.

For example, the ISA has highlighted the role its *Agreement of Cooperation* with the International Maritime Organization (IMO) could play in helping to coordinate ABMT-like activities between the IMO and ISA in areas beyond national jurisdiction.[81] The ISA points out that the IMO has a number of mechanisms that could be applied to vessels which would be used to service exploration and exploitation activities in the area. The ISA notes that

> "Existing IMO instruments include a number of such measures, including the possibility of navigational and routing measures adopted under the International Convention on the Safety of Life at Sea and the designation of Special Areas/Emissions Control Areas under the International Convention on the Prevention of Pollution from

[78] *Ibid.*, 47.

[79] *Ibid.*

[80] *Ibid.*, 63-68.

[81] The bilateral agreement was signed in 2016 and has been used to help coordinate activities of the two organizations in a number of areas: ISA and IMO (2016), "Agreement of Cooperation between the International Maritime Organization (IMO) and the International Seabed Authority (ISA)," at https://www.isa.org.jm/wp-content/uploads/2022/04/IMO.pdf (9 November 2025).

> Ships. By virtue of Guidelines adopted by the IMO Assembly, the IMO may also designate 'particularly sensitive sea areas' (PSSAs) in accordance with certain ecological, socioeconomic or scientific criteria, in which associated protective measures may be adopted. While all PSSAs adopted to date have been in areas within national jurisdiction, there is no geographical limit on the powers of the IMO to designate PSSAs. It is possible that this tool could be applied to ABNJ in the future."[82]

Combined actions of the ISA and IMO, when paired with actions of *BBNJ Agreement* organs, could create stronger and more effective ABMTs.

In relation to compliance with the *BBNJ Agreement's* possible ABMTs, as specified in Part III of the Agreement, the ISA has suggested that it could assist by: (1) disapproving areas for exploitation, (2) using regional environmental management plans (REMPs), and (3) designating areas of particular environmental interest (APEIs).[83] A REMP was adopted in 2012 by the ISA's Council in relation to the Clarion-Clipperton Zone (CCZ), and a network of nine APEIs was provisionally designated for the CCZ which bars all applications for approval of a plan of work for exploration or exploitation for at least five years.[84] In 2021, four further APEIs were added to the network.[85] The ISA has suggested that future REMPs could be implemented by the ISA in consultation with *BBNJ Agreement* organs. The ISA also may be able to assist or engage in parallel action with the *BBNJ Agreement's* COP in relation to environmental emergencies, under *UNCLOS* Article 162(2)(w);[86] emergency measures are available under Article 24 of the *Agreement* in relation to ABMTs.

However, the ability of the ISA to implement REMPs or APEIs, or to comply with ABMTs imposed by the Agreement's COP, may be limited by pre-existing contracts:

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[82] ISA (2024), "A review of the contribution of ISA to the objectives of the 2023 Agreement under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdictions," 59 (citations omitted).

[83] *Ibid.*, 54.

[84] *Ibid.*, 55.

[85] *Ibid.*

[86] *Ibid.*, 56.

A particular challenge may arise in practice if the COP recommends area-based management tools, including MPAs, for areas where ISA has already entered into contractual arrangements for exploration or exploitation. UNCLOS explicitly provides for security of tenure for contractors, and the contracts are legally binding on ISA. As a result, ISA has limited powers to interfere with the work being carried out under a contract or to revise, suspend or terminate the contract without the agreement of the contractor.[87]

This is a concern and may be an area for the ISA to contemplate in relation to its proposed exploitation regulations (which could be made subject to any existing or new BBNJ ABMTs). In addition, standard ISA contractual clauses may need to be redrafted to cover such a possibility for new contracts. The ISA could directly raise any potential conflicts with existing contractual rights when a BBNJ ABMT is being considered by the COP, during the consultation processes.[88]

4.3 EIAs

In terms of EIAs, the ISA does not impose robust requirements for an exploration contract – only a "preliminary assessment" – since the activities usually undertaken at this phase have been deemed by the ISA's Legal and Technical Commission (LTC) to have "no potential for causing serious harm to the marine environment."[89]

However, for exploration activities which may be *more impactful*, an EIA may be necessary prior to commencement.[90] The ISA's EIA process at present involves public consultations on the environmental impact statement (EIS) issued by the contractor. The EIS, if approved by the LTC, will be included in the program of activities under the contract,

[87] *Ibid.*, 57 (citations omitted).

[88] *Ibid.*, 57.

[89] *Ibid.*, 60.

[90] *Ibid.*; see also ISA (2023), "Legal and Technical Commission, Recommendations for the guidance of contractors for the assessment of the possible environmental impacts arising from exploration for marine minerals in the Area, ISBA/25/LTC/6/Rev.3 (4 August 2023)," at https://www.isa.org.jm/wp-content/uploads/2023/08/2315256E.pdf, recommendations 33-41.

and will be subject to mandatory monitoring. If the EIS is not approved, then the activity cannot take place. The final version of the EIS is published on the ISA's website along with the recommendation of the LTC. The ISA has carried out regional environmental assessments in the context of developing REMPs.[91]

A more detailed EIA regime is likely to apply to *exploitation* contracts. The ISA suggests that the current draft of the exploitation regulations closely mirrors the EIA procedures and requirements of the B*BNJ Agreement*.[92] Whether the ISA's EIA procedures will be equivalent, in terms of substance and procedure, to the *BBNJ Agreement's* procedures will have to be determined; the ISA suggests that its EIAs can be deemed equivalent under Article 29 of the *BBNJ Agreemen*t, and that in any event the BBNJ organs must apply the principle of consistency with *UNCLOS* in Article 5(1), and the principle of not undermining in Article 5(2) of the *BBNJ Agreement*.[93]

4.4 Cooperation Between ISA and *BBNJ Agreement* Organs

Cooperation between the ISA and *BBNJ Agreement* organs might be implemented in other ways. The ISA has highlighted that both the *BBNJ Agreement* and *UNCLOS* promote cooperation with other legal frameworks and institutions under Articles 47(6)(c) and 169, respectively. The ISA suggests that it could participate in ad hoc consultations with BBNJ organs. It also contemplates different modalities for more systematic relations including: (1) the ISA participating in meetings of the BBNJ COP as an observer, (2) the BBNJ Secretariat participating in the ISA Assembly as an observer, (3) the BBNJ Secretariat entering into administrative and contractual arrangements (including MOUs) with the ISA (under Agreement Article 50[4][d]), (4) organs of both the *BBNJ Agreement* and the ISA, such as the Scientific and Technical Body and the LTC, respectively, consulting with one another directly (see *UNCLOS*

[91] ISA (2024), "A review of the contribution of ISA to the objectives of the 2023 Agreement under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdictions," 61.

[92] See *ibid.*, 60-61.

[93] *Ibid.*, 62.

Article 163[13], *BBNJ Agreement*, Article 29[2]), or even (5) both institutions working together on Joint Work Programmes.[94]

4.5 ISA View on the Predominance of *UNCLOS*

Nevertheless, a concern that is raised in several passages in the ISA's commentary on the *BBNJ Agreement* is regarding the potential for clashes between the ISA's obligations under *UNCLOS* and the obligations of parties to the *BBNJ Agreement*. The ISA has urged caution regarding (1) the need for consistency with *UNCLOS* and (2) the requirement that the *BBNJ Agreement* not undermine other bodies. Such statements raise interesting questions about precedence between the two treaty regimes.

The ISA has expressed the view that the *BBNJ Agreement* was not meant to amend the previous *UNCLOS* regime, but rather to establish "complementary provisions which build upon and elaborate the legal framework enshrined in UNCLOS."[95] The ISA also points out that the *BBNJ Agreement* is not to "undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies."[96] The ISA states:

> "First and foremost, it is clear that the 2023 Agreement does not alter the mandate of ISA. To the contrary, the inclusion in the 2023 Agreement of a requirement for consistency with UNCLOS underlines that ISA can continue to exercise its responsibilities in overseeing the conduct of activities in the Area under Part XI of UNCLOS and the 1994 Agreement. Nevertheless, the overlap between the work of ISA and the provisions of the 2023 Agreement does call for

[94] *Ibid.*, 69-72.

[95] *Ibid.*, 15.

[96] The ISA offers two views of what the "not undermining" phrase would mean. The first is that BBNJ institutions are prohibited from acting within the scope of competences of existing institutions (i.e., once there is an overlap, BBNJ institutions cannot act); the second is that BBNJ institutions could act so long as the actions did not undermine the *effectiveness* of other existing institutions. Under the latter view, "further measures could be adopted if they are compatible with the objectives of existing measures developed by other organizations, even if they apply stricter standards": *ibid.*, 17.

> a clear understanding of whether ISA Members may have additional responsibilities in relation to activities in the Area if they decide to become a party to the 2023 Agreement, particularly in relation to parts II, III and IV of the Agreement."[97]

In other words, the ISA suggests that the *BBNJ Agreement* (1) must be interpreted in light of *UNCLOS*, and (2) the "not undermining" provision gives pre-eminence to the ISA and its role under *UNCLOS*.

Such a position may be overly formalistic. It does not do justice to the complicated nature of both the *BBNJ Agreement* and *UNCLOS*. Both treaties cover a wide range of matters related to the oceans, including formal requirements for the protection of marine resources. This is important because the ISA itself, and the deep seabed mining activities it will oversee, must be seen in light of *UNCLOS*' overarching requirement regarding protection of the marine environment. More so, it is likely that the *BBNJ Agreement* will create stronger obligations for the protection of the marine environment in the Area, in particular marine biodiversity, than the ISA's environmental standards under *UNCLOS*. After all, the ISA's primary function is to enable deep seabed mining, and therefore in its work the environment has been accorded secondary status. If this approach continues, granting primacy to the ISA might limit the effectiveness of the *BBNJ Agreement*.

The ISA's position is formally supported by the requirement in Article 5(1) of the *Agreement* that the *Agreement* be interpreted consistently with *UNCLOS*.[98] It is also supported by the rules related to successive treaties in Article 30 of the *Vienna Convention on the Law of Treaties (VCLT)*. Article 30(2) of the *VCLT* specifically provides that "[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail."

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[97] *Ibid.*, 73.

[98] The *BBNJ Agreement*, Art 5(1), provides:

> "1. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention. Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention, including in respect of the exclusive economic zone and the continental shelf within and beyond 200 nautical miles."

However, two points should be made here. Firstly, the phrasing in the *BBNJ Agreement* is different than that in the *VCLT*. It will be interesting to see whether "consistency" is interpreted to be the same as "compatibility" by the parties to the *BBNJ Agreement*. In considering such a question the parties will have to interpret the relation of the two treaties and decide whether the later treaty, the *BBNJ Agreement*, may impose more onerous obligations "consistently" with the earlier treaty, *UNCLOS*. In this context, it should be noted that Article 21(3) of Annex III to *UNCLOS*, which governs the ISA, specifically provides that the application of more stringent environmental laws by state parties to contractors that they sponsor "shall not be deemed to be inconsistent with Part XI."[99]

Secondly, the ISA's position appears to assume a hierarchy in *UNCLOS* itself, with the mining functions of the ISA being prioritized over obligations related to the protection of the marine environment. In other words, questions related to "consistency" may involve decisions on the hierarchy of different obligations in *UNCLOS* itself. Does *UNCLOS*, as a whole, interpreted in light of its objects and purposes, give greater priority to the deep seabed mining operations and mandate of the ISA than it does to the protection of the marine environment? The ISA itself has an obligation to protect the marine environment under *UNCLOS* Article 145, including to "adopt appropriate rules, regulations and procedures for *inter alia*: … (b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment." Moreover, does the requirement under Article 140 of *UNCLOS* that activities in the Area be for the "benefit of mankind as a whole" change the interpretation of Part XI – particularly in light of concerns about the harmful impact, and limited economic benefits, of deep seabed mining, as discussed above, and the beneficial role of the marine environment in combating climate change?

[99] Article 21(3) of *UNCLOS* Annex III, Basic Conditions of Prospecting, Exploration and Exploitation, provides:
"3. No State Party may impose conditions on a contractor that are inconsistent with Part XI. However, the application by a State Party to contractors sponsored by it, or to ships flying its flag, of environmental or other laws and regulations more stringent than those in the rules, regulations and procedures of the Authority adopted pursuant to article 17, paragraph 2(f), of this Annex shall not be deemed inconsistent with Part XI."

In addition, the ISA's position does not appear to consider the obligations related to marine biodiversity and marine environmental protection that arise under customary international law. International environmental law, including the emerging law related to climate change, has been held to impose a range of customary international legal obligations, as seen in three advisory opinions, two by the International Tribunal on the Law of the Sea (ITLOS) and one by the International Court of Justice (ICJ).[100]

These kinds of questions certainly will arise if there is a clash between an ISA decision to allow exploitation and a decision of the BBNJ COP in relation to, for example, an ABMT over the same area. Such questions could be resolved through the actions of the parties or of the BBNJ COP. They also could be raised before ITLOS. Article 187(1) of *UNCLOS* provides for a Seabed Disputes Chamber of ITLOS having jurisdiction over "disputes between States Parties concerning the interpretation or application of this Part [XI] and the Annexes relating thereto." Disputes might also be raised under *UNCLOS* Article 191, which grants the Seabed Disputes Chamber jurisdiction to issue advisory opinions "at the request of the Assembly or the Council on legal questions arising within the scope of their activities."[101]

[100] ITLOS (2011), "Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion," *ITLOS Reports 2011*; ITLOS (2024), "Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law"; ICJ (2025), "Obligations of States in Respect of Climate Change, 23 July 2025, General List No. 187."

[101] Note, however, that *BBNJ Agreement*, Art 47(7) limits the COP's power to ask advisory opinions in relation to other bodies:

"7. The Conference of the Parties may decide to request the International Tribunal for the Law of the Sea to give an advisory opinion on a legal question on the conformity with this Agreement of a proposal before the Conference of the Parties on any matter within its competence. *A request for an advisory opinion shall not be sought on a matter within the competences of other global, regional, subregional or sectoral bodies*, or on a matter that necessarily involves the concurrent consideration of any dispute concerning sovereignty or other rights over continental or insular land territory or a claim thereto, or the legal status of an area as within national jurisdiction. The request shall indicate the scope of the legal question on which the advisory opinion is sought. The Conference of the Parties may request that such opinion be given as a matter of urgency." [Emphasis added.]

5. Conclusions

The potential for clashes between deep seabed mining and marine environmental protection is increasing. The *BBNJ Agreement* establishes a comprehensive regime to protect marine biodiversity in areas beyond national jurisdiction, including in the Area. Proposed activities under the ISA's deep sea mining regime raise significant concerns for marine biodiversity, and this has been recognized by the ISA itself. The ISA has been actively engaging with the *BBNJ Agreement* and has suggested several ways in which it may support its activities. However, a concern remains about whether the ISA will be able to balance its two potential roles, on the one hand, as a mining authority and on the other, as a marine environment conservator. The ISA's expressed view of the relationship between the *BBNJ Agreement* and *UNCLOS* – with the latter being seen as predominant – also appears too formalistic or simplistic.

It is suggested that the real question may not be so much around the relationship of the *BBNJ Agreement* and *UNCLOS*, but rather about the relationship between different obligations imposed within *UNCLOS* itself. In that regard, recent developments in international environmental law, including the two recent advisory opinions issued by ITLOS and the ICJ, suggest that the wide range of treaties which impose obligations related to protection of the marine environment, when combined with similar obligations existing under customary international law, may tip the balance in favour of environmental protection. If so, parties to both the *BBNJ Agreement* and *UNCLOS* will have to guide and support the ISA in managing the necessary changes to its current trajectory. Since both *UNCLOS* and the *BBNJ Agreement* prioritize cooperation and coordination, and the ISA has already recognized several ways in which it could participate in, and support, *BBNJ Agreement* activities, a transition to an environmentally sensitive understanding of the resources of the area, in support of the common heritage of humankind, may be possible.

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From Pardo's Common Heritage Vision to Trump's Defiant Unilateralism: The U.S. Deep Sea Mining in "the Area" Undermines International Law and Risks a Global Race to the Bottom

Introduction

The main theme of this year's roundtable, as perceptively articulated by Professor Köchler, is especially timely. Defiant unilateralism is rising. A recent example is the U.S. President's Executive Order on "Unleashing America's Offshore Critical Minerals and Resources," issued in April 2025 to fast-track seabed mining permits, including in the areas beyond national jurisdiction (EO).

And Professor Köchler's decision to hold our roundtable in Malta is especially fitting. It was Malta's Permanent Representative, Dr. Pardo – "the Father of the Law of the Sea Conference" – who in his prophetic speech before the UN General Assembly in 1967 urged nations to recognize ocean resources beyond national jurisdiction as the "common heritage of mankind."

His vision lives out in the principles forming the common heritage regime under Part XI of UNCLOS and its 1994 Implementing Agreement. The first principle is: the Area and its resources are the common heritage of humankind. Other principles concern the legal status of the Area and its resources, which are set out in Article 137 of UNCLOS. It has three provisions, which can be distilled into one proposition: no one can claim, appropriate or alienate the resources of the Area other than in accordance with UNCLOS and the rules, regulations and procedures established by the International Seabed Authority (ISA).

The EO came just weeks after the ISA closed its 30th session without finalizing the rules, regulations and procedures for exploitation of mineral resources in the Area, thereby prolonging a global moratorium on

seabed mining. The EO directs federal agencies to proceed under the U.S. Deep Seabed Hard Mineral Resources Act of 1980. The Metals Company has already applied for two licenses and a recovery permit under this Act.

Those developments gave rise to debates whether under international law the United States can issue exploitation permits in the Area. Apologists of the EO argue that the United States, as a non-party to UNCLOS, can do it because provisions in Part XI of the Convention are not part of customary international law, and, even if they were, the United States has been a persistent objector. These arguments are wrong for the reasons set out below.

I. The provisions in Article 137 are binding as a matter of customary international law

The provisions in Article 137 are binding on the United States because they reflect customary international law.

A rule set forth in a treaty may reflect a rule of customary international law if that treaty rule has given rise to a general practice that is accepted as law, thus generating a new rule of customary international law. This requires that: "the provision concerned should … be of a fundamentally norm creating character"; State practice in regard to this provision be "extensive and virtually uniform"; and such practice should "show a general recognition that a rule of law or legal obligation is involved."[1]

These requirements are met in regard to Article 137. First, this provision has a fundamentally norm-creating character because it prohibits unilateral deep seabed mining activities outside of the UNCLOS regime by all actors.

Second, overwhelming state participation in UNCLOS has given this regime near-universal acceptance. Even non-State parties have participated in the ISA as observers, thus recognizing that unilateral mining in the Area is prohibited.

[1] *North Sea Continental Shelf*, Judgment, ICJ Reports 1969, 72, 74.

Third, the reaction by treaty parties to conduct in the Area by entities from non-parties or by non-parties themselves indicates a general recognition that a rule of law has been involved. This has been evident in the reaction to the declaration of The Metals Company USA to apply for commercial recovery permits under U.S. legislation. The declaration came a day before the conclusion of the 30th Annual Session of the ISA in March 2025. In response, both the ISA Secretary-General and member states reaffirmed the ISA's exclusive mandate to organize, control, and regulate activities in the Area for the benefit of humankind.[2] They mentioned Article 137 of the Convention as prohibiting any unilateral action.[3] Many of them stressed that this provision reflects customary international law.[4]

The same reasons animated international pushback against the EO. The ISA Secretary-General, reiterating the parties' position, stated that: "no State has the right to unilaterally exploit the mineral resources of the Area outside the legal framework established by UNCLOS. It is common understanding that this prohibition is binding on all States, including those that have not ratified UNCLOS."[5] The European Union, too, questioned the legality of U.S. seabed mining plans on the ground that UNCLOS "sets out the legal framework within which all activities in the Area must be carried out" and those "provisions reflect customary international law and are thus binding on all states irrespective of whether they have acceded to the Convention."[6] China took the same position, stating that: "According to international law, the international seabed area and its resources are the common heritage of mankind. The exploration and exploitation of minerals in the international sea-

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[2] Summary report, 17-28 March 2025 of the 1st Part of the 30th Annual Session of the International Seabed Authority, available at: https://enb.iisd.org/international-seabed-authority-isa-council-30-1-summary#brief-analysis-meeting.

[3] *Ibid.*

[4] *Ibid.*

[5] Statement on the U.S. Executive Order: "Unleashing America's Offshore Critical Minerals and Resources" on 30 April 2025, available at: https://www.isa.org.jm/news/statement-on-the-us-executive-order-unleashing-americas-offshore-critical-minerals-and-resources/.

[6] Statement of the European Commission on 28 April 2025, available at: https://www.euronews.com/my-europe/2025/04/28/european-commission-questions-legality-of-us-seabed-mining-plans#:~:text=The%20EU%20executive%20"deeply%20regrets,of%20the%20Sea%20(UNCLOS).

bed area must be carried out in accordance with [UNCLOS] and under the framework of the International Seabed Authority (ISA). The legal status and the exploitation and exploration regime of the international seabed are universally recognized and followed through in international practice."[7] Many other states raised the same objections on the same grounds.

Apologists of the EO are thus wrong that the United States is free to proceed unilaterally in the Area. The United States is bound by international customary law proscribing such unilateral action.

II. The U.S. cannot credibly rely on a persistent objector doctrine to justify any attempt at mining in the Area outside of the existing legal regime

Attempts to justify the EO based on a persistent objector doctrine fail the applicable requirements.

International law is clear that if a State establishes itself as a persistent objector, the rule is not opposable to it for so long as it maintains the objection.[8] But for this to happen, stringent requirements must be met: the objection must have been made *while the rule in question was in the process of formation*; it must be *clearly expressed*; it must be made *known to other States*; and it must be *maintained persistently* both *before* and *after* the rule of customary international law has emerged.[9]

These requirements are not met, given the relevant conduct of the United States starting from the 1970s.

Apologists of the EO conveniently ignored the *United States Oceans Policy* declared by President Nixon in May 1970. He "propos[ed] that all nations adopt … a treaty under which they would renounce all national

[7] Statement by Spokesperson of China's Ministry of Foreign Affairs during a press conference on 25 April 2025, available at: https://www.fmprc.gov.cn/mfa_eng/xw/fyrbt/lxjzh/202504/t20250425_11604503.html.

[8] *Fisheries Case*, Judgment, ICJ Reports, p. 131.

[9] ILC, *Draft Conclusions on Identification of Customary International Law,* Conclusion 15, Yearbook of the International Law Commission, 2018, Vol II, Part Two.

claims over the natural resources of the seabed beyond [their national jurisdiction] and … agree to regard [them] … as the common heritage of mankind."[10] Nixon stressed that "[t]he treaty should establish an international regime for the exploitation of [these] seabed resources" and put in place "international machinery [that] would authorize and regulate exploration and use of [such] resources."[11] This position is more consistent with the endorsement of, rather than the objection to, the rules for the deep seabed regime that were in the process of formation.

The United States maintained the same position when in December 1970 it supported (by affirmative vote) the United Nations General Assembly Resolution 2749 (XXV), which declared *inter alia* the principle that the mineral resources of the deep seabed are the common heritage of mankind and included key common heritage elements that would later find expression in Part XI of the UNCLOS, including in Article 137.[12] Apologists of the EO have conveniently overlooked this important fact, too.

Instead, they misleadingly refer to the 1980 Deep Seabed Hard Mineral Resources Act (DSHMRA), which created a U.S. licensing and permitting regime for deep seabed mining. Apologists claim that this Act amounted to a timely U.S. objection to the emerging international deep seabed regime. But they conveniently overlook two important aspects:

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[10] The U.S. President's Statement about United States Ocean Policy, 23 May 1070, available at: https://www.presidency.ucsb.edu/documents/statement-about-united-states-oceans-policy.

[11] *Ibid.*

[12] The Resolution 2749 (XXV) of 1970 affirmed that the deep seabed and its resources constitute the common heritage of mankind (para. 1), to be used only for peaceful purposes (para. 5); affirmed that all deep seabed mining activities would be "governed by the international regime to be established" (para. 4); prohibited states from exercising sovereignty over the deep seabed, and states and other actors from appropriating it (para. 2); prohibited states and other actors from "exercis[ing] or acquir[ing] rights with respect to the area or its resources incompatible with the international regime to be established and the principles of this Declaration" (para. 3); provided that "exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether land-locked or coastal, and taking into particular consideration the interests and needs of the developing countries" (para. 7, and see also para. 9); required implementation of marine environmental protections (para. 11).

First, the Act was intended only *as an interim measure* until the emergence of an acceptable international regime.

Second, anticipating the components of an acceptable international regime, the U.S. Congress incorporated into the Act the following basic elements: recognition of the principle of the common heritage of mankind; a disclaimer of sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of, any areas or resources in the deep seabed; recognition of payments to be made to an international organization with respect to hard mineral resources; provision of measures for protection of the marine environment; and establishment of a regime based on objective, non-discriminatory criteria and regulations. These basic elements are similar to the key principles now forming the international common heritage regime. And this shows that, when adopting the 1980 Act, the U.S. was not objecting to the emerging international rules on deep seabed mining.

That said, the 1980 Act set forth criteria that would need to be met for an international regime to be acceptable to the United States.[13] Based on those criteria, the U.S. initially raised objections to Part XI of the UNCLOS. Apologists of the EO focus only on this point. But they ignore three critical points. First, those objections did not concern the core elements of the common heritage principle, including those in Article 137 of the Convention; they concerned fiscal arrangements and costs to state parties, institutional arrangements, and the decision-making mechanisms.[14]

Second, all those objections were successfully resolved by the 1994 Agreement Implementing Part XI of the UNCLOS. As the U.S. has con-

[13] Namely, assured and non-discriminatory access for U.S. citizens, under reasonable terms and conditions, to deep seabed resources, and assured continuity in mining activities undertaken by U.S. citizens prior to entry into force of the agreement under terms, conditions, and restrictions that do not impose significant new economic burdens that have the effect of preventing continuation of operations on a viable economic basis (30 U.S.C. § 1401[1]).

[14] Message from the President of the United States transmitting UNCLOS to the U.S. Senate, 1994, 103rd Congress, 2nd Session, Senate, Treaty Doc. 103-39, p. 79.

sistently confirmed: "The 1994 Agreement revises … the objectionable provisions of Part XI. … [T]hese revisions satisfactorily address the objections raised by the U.S."[15]

Third, the United States signed this Agreement in July 1994 and provisionally applied it until November 1998 in the hope that UNCLOS and the Agreement would be ratified by the Senate; and since 1994 – for over 30 years – the U.S. has been an observer and significant contributor to the negotiations of the ISA, actively participating in each stage of the development of the ISA regulatory framework.

Apologists of the EO also pass into silence other important facts. Since 1994, after President Clinton pushed for ratification of UNCLOS and the 1994 Agreement, subsequent administrations supported U.S. accession to UNCLOS and ratification of the 1994 Agreement. Notably, during the Obama Administration, then-Secretary of State Hillary Clinton made clear that "U.S. policy extending back to President Nixon has taken the view that […] mining [in the Area] should be subject to international administration, primarily to enable companies to obtain secure title to mine sites in the deep ocean."[16] And she made "clear that there is no means for the United States to support its domestic deep seabed mining industry as a nonparty."[17] This is hardly the stance of a persistent objector.

The same position was expressed by the U.S. National Oceanic and Atmospheric Administration (NOAA), a specialized agency authorized by the 1980 Act to issue exploration licenses and commercial recovery permits to U.S. citizens for seabed mining activities in areas beyond national jurisdiction. The NOAA issued four exploration licenses. Apologists of the EO take this fact as a clear expression of the U.S. objection. But they ignore that those licenses had been issued 10 years before the UNCLOS entered into force and 12 years before the ISA became operational. Since 1984, the NOAA has not issued any exploration licenses, although it approved extension requests. And the NOAA has never issued any commercial recovery permits.

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[15] *Loc. cit.*, pp. 75ff.

[16] The Law of the Sea Convention (Treaty doc. 103–39): The U.S. national security and strategic imperatives for ratification, U.S. Senate, Committee on Foreign Relations, 23 May 2012, Statement by U.S. Secretary of State, H. Clinton.

[17] *Ibid.*

Moreover, two of the four exploration licenses have been surrendered. The other two are held by Lockheed Martin; and the NOAA made clear that Lockheed Martin cannot proceed with exploration under those licenses without international recognition of those rights. It officially explained that an exploration license issued under the 1980 Act only "gives the holder the exclusive right to explore a specific area, but only as against other U.S. entities. Any rights a U.S. company may have domestically are not secured internationally because U.S. companies are not able to go through the internationally recognized process at the International Seabed Authority established for Parties to the United Nations Convention on the Law of the Sea (UNCLOS)."[18] This official position undermined the argument that the United States has been a persistent objector; rather, it confirms that the United States has recognized that U.S. companies may exploit in the Area only within the internationally recognized process set out in UNCLOS and administered by the ISA.

Conclusion

The relevant record thus shows that the United States was far from being a persistent objector to the existing international deep seabed regime. Rather, the United States was an active architect of this regime and has been an active participator within this regime. It is thus bound by it as a matter of customary international law.

By bypassing this regime, the United States sets a dangerous precedent that could encourage others to pursue deep-sea mining unilaterally. This could trigger a "race to the bottom" with competing claims, geopolitical tensions, and no oversight.

It is respectfully submitted that the advantages for the United States in engaging with the international legal system are substantial and far outweigh the potential risks associated with unilateral action.

[18] A Notice by the National Oceanic and Atmospheric Administration on 9 July 2017, available at: https://www.federalregister.gov/documents/2017/09/07/2017-18994/deep-seabed-mining-approval-of-exploration-license-extensions.

IV

Dispute Resolution, Jurisdiction, and Freedom of the Seas

C. L. Lim

Law of the Sea Arbitration

I. Introduction

This paper approaches the issue of disputes engendered by the new regimes contained in the UN Convention on the Law of the Sea (UNCLOS) by taking a slightly different approach. It asks whether tribunals established under UNCLOS could aggravate an international situation where they choose to decide issues that are outside the four corners of UNCLOS,[1] rather than novel issues that had been introduced by UNCLOS. The original reason for establishing a system of compulsory adjudication under that treaty was that, while reservations had been expressed, it was thought in the end that the novel rules and regimes introduced by the new treaty would benefit from having a system of compulsory adjudication and that the existence of such a system might even deter disputes.[2]

However, there has been a discernible trend over the years of UNCLOS arbitration tribunals addressing contested issues outside the treaty, particularly issues of title and sovereignty – sometimes excluding such is-

[1] While this was written for delivery at the Malta Roundtable, some parts of what follows have drawn from the author's General Course at the Xiamen Academy of International Law given in the Summer of 2025, which were on the subject of "International Arbitration" more broadly. Those lectures will be published at a later date. Due to the unusual weather in Hong Kong, which had disrupted my flight, the organizers and colleagues were kind enough to have me speak by teleconference and I am grateful to them all. I regret very much not having been able to be present physically and having missed some of the discussions. I thank Professors Hans Köchler, Rauf Versan, and Alina Miron for the questions which they had put to me.

[2] J. G. Merrills *et al.*, *International Dispute Settlement*, 7th ed., Cambridge, Cambridge University Press, 2022, at p. 269.

sues ultimately for being outside their proper jurisdictional authority, but sometimes not. This phenomenon is also caused by international lawyers being called upon to advise upon how one might get a dispute, which in truth may have nothing to do with the law of the sea, or involves no real need for an interpretation of UNCLOS or for a decision about how UNCLOS might apply, before an international court or tribunal – indeed, any international court or tribunal. One of the ways of doing that is by using the provisions in UNCLOS precisely because UNCLOS offers an avenue of compelling another state to go before a court or tribunal. It involves what lawyers call "forum shopping." In a legal storm, any port will do, and it is the ability of international lawyers to accomplish precisely that which sometimes justifies the fees that we would charge. I do apologize if I have described it all somewhat crudely, but there seems to be no other way to put it plainly, and in any case framing or devising a claim and pleading it appropriately is not just a professional skill but a part of one's duty to the client.

What is important to bear in mind is that one is not before a chancery court, but that in the international context that could involve questions about the relations between states. In that context, what lawyers do ordinarily can result in the disruption of such relations to the detriment of international peace. The kinds of contested issues outside the four corners of UNCLOS which have been brought through UNCLOS compulsory dispute settlement have ranged from Mauritian self-determination and its sovereignty over the Chagos Islands, to Chinese claims to territory in the South China Sea, and sovereignty over Crimea. These are all extremely sensitive issues.

Without putting the focus on the South China Sea dispute, it was the only one of the three examples just mentioned where a long-standing dispute over title was addressed, whether wittingly or otherwise, in the Arbitral Tribunal's Final Award. The Tribunal did so in two steps. First, in its Award on Jurisdiction and Admissibility, by saying that even if such claims to title were based upon historic rights, whether those rights exist outside the Convention as some countries such as China might assert, or have been superseded by the Convention which neglects to use the term "historic rights" at all,[3] was itself a question which concerns

[3] In other words, by considering UNCLOS to be a comprehensive code.

the "interpretation or application" of the Convention within the meaning of article 288.[4] This, in its view, gave the Tribunal the jurisdiction to pronounce upon any Chinese claims to historic rights.[5]

Secondly, in its Final Award, the Tribunal then went on to address these claims to historic rights by stating (a) that it was not in any way deciding upon ownership of the Spratlys/Nansha Islands,[6] (b) that China in fact does not assert an historic title over waters of the South China Sea,[7] and (c) that its claims to living and non-living resources have been superseded by the new regimes under UNCLOS which govern exclusive economic zones and continental shelves.[8] The Chinese objections were, in this regard,[9] to item (b) above because China does and has in fact claimed title to waters in the South China Sea, and does not consider that the Tribunal had the jurisdictional authority to characterize these facts concerning the nature of its territorial claims, let alone to seek to extinguish them by doing so, and also to item (c) – i.e. that its claims to historic rights had become "superseded." While (c) may be jarring, there was some peculiarity in respect of item (b) where in saying that the Chinese never claimed what they say they have always done, the Tribunal compared the Chinese language version of the treaty text which uses the word translated as "historic title," but which in its public statements it did not use, where they had merely referred to their "rights" (as translated), and decided that where the Chinese did use "historic title" in an English version of one of their formal diplomatic communications, that was something of an inconsistency when all the above statements are viewed as a whole.[10] Were it only that a country's

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4 Article 288(1) states, that: "A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part."

5 *The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)*, Award on Jurisdiction and Admissibility of 29 October 2015, para. 168.

6 *The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Final Award, 12 July 2016, para. 272.

7 *Ibid.*, para. 227.

8 *Ibid.*, paras. 245-246, 271, 278.

9 For there are others, not least that the real dispute has nothing to do with interpreting or deciding upon the Convention's application, but is one of maritime delimitation which the Tribunal could not decide.

10 *The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Final Award, 12 July 2016, para. 227.

public statements were all so precisely tailored to the legal language of their treaty commitments.

The Arbitral Tribunal clearly thought that all it was doing was to state what it considered to be the facts which it had to address, and to explain how the regimes of the exclusive economic zone and continental shelf operate under UNCLOS. However, that issue was fundamentally territorial, which the Chinese in that case considered to be the real and actual dispute,[11] an issue which the Tribunals in *Mauritius v. UK*, and in *Black Sea and Sea of Azov Arbitration*,[12] managed to avoid, but which the *South China Sea Tribunal* did not, and as we shall see not for lack of trying.

II. Compulsory Adjudication

International lawyers conceive of the common good in terms of the spread of international adjudication. For example, in a well-known preface written in 1926, the American John Bassett Moore quoted the German publicist Emanuel von Ullmann for saying that the agreement to arbitrate answers the purpose of international law, which is to bring disputes to a peaceful settlement.[13] International lawyers also think of the maintenance of international peace in these terms, – the Dutch publicist de Louter viewed arbitration as a guarantee of universal peace,[14] and that international adjudication, of which international arbitration forms a part,[15] closes the most difficult gap in international law.

[11] See further, the late P. S. Rao's view, who once was India's legal advisor, in P. S. Rao, "The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility," (2016) 15 *Chinese J.I.L.* 265, at p. 306.

[12] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, Award Concerning the Preliminary Objections of the Russian Federation, PCA Case No. 2017-06, 21 February 2020, at para. 492.

[13] J. B. Moore, *International Adjudications: Ancient and Modern*, vol. 1 (Oxford, Oxford University Press, 1929), at p. li, referring to E. von Ullmann, *Völkerrecht* (Tübingen: J.C.B. Mohr (Paul Siebeck), 1908), at pp. 440 et seq.

[14] J. De Louter, *Le Droit International Public Positif*, vol. II (Oxford: Oxford University Press, 1920), p. 141; quoted in Moore, *International Adjudications*, above, at p. li.

[15] Moore, *International Adjudications*, above, at pp. xl-xlv.

This is what the conference participants at the United Nations Conference on the Law of the Sea, which took place from 1973 to 1982, eventually tried to do, to close the last gap in international law. They had initially disagreed about whether UNCLOS should provide for a system of compulsory dispute settlement but, as one writer has described the overall sentiment,[16] the treaty's provisions were so innovative that eventually they felt that disputes were inevitable, and that having a compulsory regime of dispute settlement would also deter disputes from breaking out. Due to Third World controversy over the impartiality of the International Court of Justice at the time UNCLOS was concluded, Part XV, Section 2 of UNCLOS entitled "Compulsory Decisions Entailing Binding Decisions" offers a choice of going to the International Court of Justice, a new International Tribunal for the Law of the Sea (ITLOS), or to international arbitration.[17] Having international arbitration as the default procedure was also what the delegations at UNCLOS chose in the form of article 297 of UNCLOS as we have it today.

III. "Lawfare"

Yet what if adjudication becomes a tool of escalation where otherwise diplomacy would have been compelled to take its natural course? Today we call that "lawfare" but that is maybe too potent a word.

Arbitration and adjudication can however be used as a part of a hostile campaign despite the fact that these modes of dispute settlement are seemingly peaceful and have long presented an alternative to war as an instrument for the settlement of international disputes. It is the mode of settlement that is peaceful,[18] but the idea that arbitration avoids or even prevents war is, as Christopher Greenwood says, something of a persistent myth.[19] The idea that international ar-

[16] J .G. Merrills *et al.*, *International Dispute Settlement*, above, at p. 269.

[17] UNCLOS, art. 287.

[18] E. von Ullmann, *Völkerrecht* (Tübingen: J. C. B. Mohr, 1908), at p. 440; Moore, *International Adjudications*, above, at p. l.

[19] Christopher Greenwood, "Arbitration and World Peace," in C. L. Lim (ed.), *Cambridge Companion to International Arbitration* (Cambridge: Cambridge University Press, 2021), at pp. 310-314.

bitration prevents wars is romance rather than reality, even if it can be used to help maintain the peace where peace terms require such oversight.

In truth, arbitration and adjudication are used to advance national interests, rather than being simply a neutral mode for the settlement of disputes. Arbitration can be used to advance the cause of justice too, such as a Mauritian claim to justice in relation to the Chagos Islands. Similarly, international adjudication can be used to put pressure on Israel. People might then say, "Well, that is just," depending upon one's point of view. What is also true, however, is that what is just or unjust is often also bound up with national interests and the advancement of one interest as against another.

IV. The Problem with the Finality of Awards

The problem is complicated by an additional factor, concerning the incomprehensiveness of the international arbitration system. We have an incomplete international system of inter-state arbitration, stemming from a failure to establish a supervisory mechanism in the mid twentieth century. The International Law Commission had proposed a rule that where a party alleges that the award is flawed the parties could set up another tribunal or failing that the International Court of Justice would have the authority to scrutinize the award and declare it invalid.[20] However, that work has not met with practical success. Today, if an award is contested because it is claimed to be flawed there is no necessary higher supervisory authority to scrutinize it, and to assess the truth of that claim.

International lawyers, however, would emphasize that an award is "final and binding." This notion, that – "just or unjust" – a state must submit even to a flawed award, Hugo Grotius had explained, was because, – as he put it, – between kings and peoples there is no higher authority.[21] Even if it was the accepted opinion in Grotius' time, or is

[20] See the International Law Commission's 1958 Model Rules on Arbitral Procedure, articles 35, 36, which the Commission presented following resistance to its earlier 1957 Draft Convention.

[21] See Moore, *International Adjudications*, above, at p. lxi, quoting Grotius.

the opinion of lawyers today, I do not believe it represents the view of states now. I would venture to suggest instead that every state claims a right to reject a flawed award, or at least that no state would relinquish such a right.

V. Three Types of Cases

It is against this backdrop about how international arbitration functions that I would ask us to imagine three kinds of cases arising under UNCLOS compulsory dispute settlement.

Italian marines shoot dead two Indian fishermen off the Indian coast. India brings a claim, asserting its jurisdiction over the Italian soldiers, which it had managed to capture and detain, because the incident had occurred in India's contiguous zone. Italy denies India's argument, arguing that the Italian ship was on the High Seas instead and that, therefore, jurisdiction belongs to the flag state. However, Italy had also argued that the Marines were doing their job and were entitled to immunity. Can an UNCLOS tribunal deal with international law questions of immunity? Yes, says the Tribunal in the *Enrica Lexie Arbitration*,[22] because that is incidental to the jurisdictional question. Simply, if there is immunity then there is no jurisdiction.[23] So the two questions are linked logically. I believe that is a permissible application of other rules of international law.

Compare a second case. Progressive opinion supports the self-determination of the Chagossian islanders who have been deprived of that right since the independence of Mauritius when the Chagos Islands was separated from Mauritius, with the promise under the Lancaster House agreement that it will be returned when a U.S. military base is no longer needed. However, can a UNCLOS tribunal deal with questions of sovereignty and self-determination? The answer, given by the majority of three members of the Tribunal in the *Chagos Marine Protected Area Arbitration*, was "no" whereas two of the other arbitrators, –

[22] *Italian Republic v. Republic of India (The "Enrica Lexie" Incident)*, Award, 21 May 2020.

[23] See above, *Italian Republic v. Republic of India (The "Enrica Lexie" Incident)*, Award, 21 May 2020, paras. 807-809.

Judges Kateka and Wolfrum, both of whom are also very distinguished, – would have allowed it.[24]

The two arbitrators just mentioned in the *Chagos Arbitration* did not believe the question of sovereignty had been put so broadly to the Tribunal in the first place, or (put more plainly) that Mauritius had placed the self-determination question before the Tribunal.[25] Unfortunately, counsel for Mauritius in his Hague Academy Lectures a few years later let the cat out of the bag, saying that it was Mauritius' intention precisely, which was to find a tribunal anywhere to which the self-determination question can be put; in this case, in the guise of asking if the UK in setting up a marine protected area was acting legitimately as the rightful coastal state:[26]

> "Mauritius could not bring a case directly against Britain to the Court in The Hague. The South West Africa route offered a possible alternative: to persuade the UN General Assembly to request an advisory opinion from the International Court of Justice on the decolonisation of Mauritius and the illegality of the detachment of Chagos.
>
> A second option was to find a treaty that offered access to the Court. (…)
>
> A third possibility was untested: to argue that the British proposal was illegal under UNCLOS because it violated Mauritius's fishing rights around Chagos and because Britain was not the 'coastal State' for Chagos and so had no right to declare an MPA."

[24] *In the Matter of the Chagos Marine Protection Area Arbitration before an Arbitral Tribunal Established under Annex VII of the United Nations Convention on the Law of the Sea*, Award of 18 March 2015, para. 215.

[25] *Award in the Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland*, 18 March 2015, Dissenting and Concurring Opinion of Judge James Kateka and Judge Rüdiger Wolfrum, R.I.A.A., vol. XXXI, pp. 585-606, at paras. 10-14.

[26] Philippe Sands, "Colonialism: A Short History of International Law in Five Acts," *Recueil des cours* (Collected Courses of the Hague Academy of International Law), Vol. 431 (2023), pp. 285-410, at pp. 358-359.

So, there we have it.

Now, let us take a third and by now famous example, that of the *South China Sea* case, in which a claim is brought saying that a country's claims to historic rights, which includes claims to territory, should not be recognized. Can an UNCLOS tribunal deal with this?

As with the other arbitrations mentioned, it partly depends upon how far you think a tribunal should apply other rules of international law outside UNCLOS.[27] But it also has to do with what the negotiators at the treaty conference would have allowed. As the earlier *Chagos* Tribunal had said, at paragraph 215:[28]

> "The negotiating records of the Convention provide no explicit answer regarding jurisdiction over territorial sovereignty. The Tribunal considers that the simple explanation for the lack of attention to this question is that none of the Conference participants expected that a long-standing dispute over territorial sovereignty would ever be considered to be a dispute 'concerning the interpretation or application of the Convention'."

The *Chagos* Tribunal would only have allowed such questions if they arose incidentally,[29] as, we might add, the immunity issue did arise in *The Enrica Lexie*. That is, only incidentally. However, the majority of the Chagos tribunal did not think that the territorial issue was merely incidental in that dispute.

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[27] There are some forty provisions in UNCLOS that refer to other international law rules more generally. I would focus on two in particular. The first is article 2(3), which states that: "The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law." The second is article 293(1) of UNCLOS, which has a different formulation: "other rules of international law not incompatible with this Convention." See Kate Parlett, "Beyond the Four Corners of the Convention: Expanding the Scope of the Jurisdiction of Law of the Sea Tribunals," (2017) 48 *Ocean Development and International Law* 284.

[28] *Award in the Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland*, 18 March 2015, R.I.A.A., vol. XXXI, pp. 359-606, para. 215.

[29] *Ibid.*, at para. 221.

As I have mentioned, the *South China Sea* Tribunal however saw the historic rights point as a question under article 288,[30] i.e. involving the interpretation and application of UNCLOS, saying at paragraph 246 of the Final Merits Award that:[31]

> "The Convention does not include any express provisions preserving or protecting historic rights that are at variance with the Convention. On the contrary, the Convention supersedes earlier rights and agreements to the extent of any incompatibility. The Convention is comprehensive in setting out the nature of the exclusive economic zone and continental shelf and the rights of other States within those zones. China's claim to historic rights is not compatible with these provisions."

VI. The Problem

Because UNCLOS allows UNCLOS tribunals to apply other rules of international law outside the Convention,[32] a dispute placed before a tribunal constituted under UNCLOS can be about potentially any subject of international law, yet the resultant awards may not hold against a respondent state that disagrees that the particular award is binding because of an excess of jurisdiction. Unless the parties choose themselves to submit the question to further adjudication, as has happened in a number of inter-state arbitrations over the years,[33] there is no compulsory adjudication to then go on to the further step of deciding the veracity of an objection to an award. The problem is real, especially

[30] Which states, in paragraph 4, that a court or tribunal referred to in Article 287 "shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part."

[31] *Philippines v. China*, Award on the Merits, 12 July 2016, para. 246.

[32] See note 16, above.

[33] See e.g. *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, Judgment of 18 November 1960, ICJ Rep. 1960, p. 192; *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, 1991 ICJ Reports 1991, p. 53; *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, Jurisdiction of the Court, Judgment, ICJ Reports 2020, p. 455.

where, as I have mentioned, the respondent state did not go "hand-in-hand" to arbitration with the claimant state.[34]

There is some suggestion that UNCLOS tribunals should not have the jurisdiction at all to apply other rules of international law outside the Convention, but that does not in my view state the true problem.[35] Rather, how can we tell if the extraneous rule was merely incidental such as in *The Enrica Lexie*, as opposed to what Mauritius' or the Philippines' real aim was in *Chagos*?

It has also been suggested that we ought to answer the question by asking what the "real and actual dispute" is about.[36] If the "real and actual dispute" falls under UNCLOS, then the tribunal can decide it, but otherwise it cannot do so. Yet that might amount to just another way of describing the general problem. In the *South China Sea* dispute the Tribunal considered that the way the Philippines had framed the dispute in the face of a Chinese Declaration which excluded maritime delimitation disputes nonetheless had captured a real and actual dispute. For their part, the Chinese say that is not the real dispute at all, and that there never was an abstract debate with the Philippines over what entitlements particular individual features of the Spratlys might have. What would have been the point of it?[37] The distinguished Tribunal might well have considered that it had done an adequate job in any case of avoiding all the potential pitfalls in delineating its jurisdictional authority with care. That is, (a) by excluding the question of ownership of the Spratlys/Nansha Islands, (b) in the way it had described what it believed to be the Chinese position regarding ownership of the waters of that part of the world, all in the absence of Chinese participation in

[34] See Maurice Mendelson, "Inter-State Arbitration: Current Issues and Contemporary Challenges," in Lim (ed.), *Cambridge Companion*, above, p. 326, at p. 333, attributing the expression to McNair.

[35] *Cf.* Parlett, "Beyond the Four Corners," above.

[36] See Rao, "The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility," above, at p. 306.

[37] I do take note that Professor Talmon has written publicly about this and shown that the Chinese reference to the Spratlys/Nansha in the singular ("the Nansha Islands is"), in their diplomatic communications, had been altered (to "the Nansha Islands are") in the submissions to the Tribunal, see Stefan Talmon, "Final Award in Sea Arbitration will be Flawed," *China Daily,* 9 July 2016.

the arbitral proceedings, and (c) in simply, in its view, explaining the operation of the specialized regimes of the treaty.

Another approach is that we might distinguish cases where a genuine legal issue has been put to the Tribunal from those that are an abuse of process; in fact, article 294(1) of UNCLOS provides for it where it says that:

> "A court or tribunal provided for in article 287 to which an application is made in respect of a dispute referred to in article 297 shall determine at the request of a party, or may determine *proprio motu*, whether the claim constitutes an abuse of legal process or whether *prima facie* it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is prima facie unfounded, it shall take no further action in the case."

However, such principles are likely easier to state than to apply. As if to test this point, the *South China Sea* Tribunal did in fact refer expressly to abuse of legal process, and to whether the claim is *prima facie* unfounded, at paragraph 128 of its Award on Jurisdiction and Admissibility:[38]

> "While the Tribunal is entitled to determine *proprio motu* whether the Philippines' claim constitutes an abuse of legal process or whether *prima facie* it is unfounded, it declines to do so in the present case. In light of the serious consequences of a finding of abuse of process or prima facie unfoundedness, the Tribunal considers that the procedure is appropriate in only the most blatant cases of abuse or harassment."

Had China joined in the dispute, it could have compelled the Tribunal to address the question, and in such case, the Tribunal would have had to address it. Yet China did not participate and did not ask the Tribunal to deal with the question, and so while the Tribunal refused to address the issue on its own, we can in truth say no more about what the Tribunal would have concluded then.

[38] *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award on Jurisdiction and Admissibility of 29 October 2015, para. 128.

To be sure, as has been mentioned at the outset, there have been other tribunals that have excluded from their jurisdiction a range of questions and activities, such as the question of Ukrainian sovereignty over Crimea in the *Black Sea and Sea of Azov Arbitration*, in which the Tribunal excluded any decision on the merits that would "directly or implicitly" decide that question;[39] or, more recently, where the dispute would concern military activities in the currently on-going *Ukrainian Vessels Arbitration*.[40]

When measured against these, and cases like the Chagos Arbitration between Mauritius and the United Kingdom, the South China Sea Award was something of a strange outlier and a product of very specific circumstances – one which we might hope will not be repeated anytime soon.

[39] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, Award Concerning the Preliminary Objections of the Russian Federation, PCA Case No. 2017-06, 21 February 2020, at para. 492.

[40] *Dispute Concerning the Detention of Ukrainian Vessels and Servicemen*, PCA Case No. 2019-28, Award on the Preliminary Objections of the Russian Federation, 27 June 2022.

Rebecca Strating

Assessing the Effectiveness of Maritime Dispute Resolution Mechanisms: Lessons from the Indo-Pacific

The international maritime order is undergoing profound shifts as states increasingly contest the meaning, interpretation, and application of the United Nations Convention on the Law of the Sea (UNCLOS). Nowhere is this more evident than in the Indo-Pacific, a region marked by overlapping sovereignty claims, strategic rivalries, and contested historical narratives. Two questions sit at the centre of this article: 1. How is territorialization shaping maritime order in Asia? 2. How are small and middle powers using maritime statecraft, including legal strategies and public diplomacy, to defend their interests and sovereign rights?

These questions emerge against the backdrop of long-standing concerns that the establishment of new maritime jurisdictions, especially the Exclusive Economic Zone (EEZ), would produce fresh disputes. Realist scholars predicted this dynamic early on. In 1985, Ken Booth warned that UNCLOS risked "territorializing" the oceans; that is, turning maritime spaces into objects of patriotic sentiment similar to land borders.[1] Decades later, M. Taylor Fravel observed that the regime designed to manage the oceans had "created new disputes that are similar to those over territory," largely because maritime zones came to be linked to resource entitlements, strategic advantage, and "exclusive rights."[2]

This process of territorialization is particularly evident in maritime East Asia, where legal ambiguity, unresolved sovereignty claims, and intensifying great-power competition have made compromise increasingly difficult and heightened states' security incentives to consolidate

[1] Ken Booth, *Law, Force and Diplomacy at Sea*, Routledge, 1985.

[2] M. Taylor Fravel, "Territorial and Maritime Boundary Disputes in Asia." In *Oxford Handbook of the International Relations of Asia*, edited by S. Pekkanen, J. Ravenhill, and R. Foot, 524-546. Oxford: Oxford University Press, 2014.

control over maritime areas. Nevertheless, despite their caution about third-party dispute settlement, several Indo-Pacific states have embraced UNCLOS mechanisms to clarify maritime boundaries and assert their entitlements. Crucially, these mechanisms have been most effectively deployed by smaller and middle powers in asymmetrical disputes, often enabling them to prevail against far larger states.

What has emerged is a distinctive form of small-power maritime statecraft, combining legal action with public diplomacy, strategic narrative competition, and coalition-building. Maritime disputes, in this sense, have become stages for image management, international persuasion, and legitimacy battles.

Territorialization and Maritime Order in the Indo-Pacific

As recent studies have shown, across the Indo-Pacific, the sea is becoming seen as the "equivalent of land territory in the conception of what constitutes sovereignty," occurring through legal and administrative means, artificial island-building, "social and cultural performance[s]" and "mass media, cartographic and national discourses."[3] Although the sea has traditionally been governed by different norms from land, the introduction of the EEZ and continental shelf regimes created areas where states could claim exclusive rights.

In the Indo-Pacific, this dynamic has given rise to several characteristic features. Small and/or uninhabited maritime features and maritime area have acquired elevated political symbolism, becoming focal points for national identity and prestige. Sovereignty claims are increasingly justified through historical narratives that are often selectively constructed to reinforce a state's position and are not always coherent with international law of the sea. Governments have also extended administrative practices typically reserved for land territories, such as creating nature

[3] Rebecca Strating, "Maritime Territorialization, UNCLOS and the Timor Sea Dispute," *Contemporary Southeast Asia*, 2018, 40(1): 101-125, 103; Edyta Roszko, "Maritime territorialisation as performance of sovereignty and nationhood in the South China Sea," *Nations and Nationalism* 21(2): 230-249, 231; Rebecca Strating and Joanne Wallis, "Maritime sovereignty and territorialisation: comparing the Pacific Islands and South China Sea," *Marine Policy*, 141: 105110.

reserves, delineating administrative districts, or establishing security patrol zones, into contested maritime spaces. These developments accompany heightened strategic anxiety, as states frame control over maritime zones as integral to their national security and economic future.

Once this territorialization dynamic takes hold, the domestic political costs of compromise can increase for leaders. Once asserted, it is difficult to wind back sovereignty claims. Yet even within this complex political environment, smaller states have demonstrated creativity in using international law to assert their rights.

Legal Statecraft and the Role of Narratives

One striking development across Indo-Pacific maritime disputes is the increasing reliance by smaller states on what Douglas Guilfoyle describes as "legal statecraft": the strategic use of international legal frameworks to pursue foreign-policy goals.[4]

Legal statecraft is rarely employed in isolation; rather, it forms part of a broader toolkit that includes public diplomacy and strategic communication efforts designed to shape global perceptions. It also involves narrative framing that presents legal claims as aligned with a rules-based order, as well as the strategic use of great-power rhetoric, particularly the language of international law, norms, and order, redirected back toward those same powers.[5] In addition, states often mobilize international institutions to increase the reputational costs of non-compliance, ensuring that legal arguments are reinforced through multilateral pressure and legitimacy.

This blend of legal and narrative approaches allows states with limited material capabilities to exert pressure on larger states, creating diplomatic incentives for compliance or negotiation.

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[4] Douglas Guilfoyle, "Litigation as Statecraft: Small States and the Law of the Sea," *British Yearbook of International Law*, 2023.

[5] Rebecca Strating, "The 'Rules-based Order' as Rhetorical Entrapment: Comparing Maritime Dispute Resolution in the Indo-Pacific," *Contemporary Security Policy*, 44(3): 372-409.

Case Study: Mauritius and the Chagos Archipelago

The agreement reached in 2024 between Mauritius and the United Kingdom over the Chagos Archipelago marked a significant reversal of longstanding British policy. For decades, the UK maintained sovereignty over the islands, designating them as the British Indian Ocean Territory. Mauritius challenged this through a calibrated combination of legal and diplomatic efforts.

Mauritius' strategy rested on several mutually reinforcing elements. It drew heavily on the 2019 Advisory Opinion of the International Court of Justice, which found that the United Kingdom had unlawfully detached the archipelago from Mauritius during decolonization. This was followed by endorsement from the UN General Assembly, which elevated the matter from a bilateral dispute to an international political issue. Mauritius also criticized the UK's creation of a Marine Protected Area, presenting it as a strategic maneuver inconsistent with decolonization principles. Throughout, it framed the dispute through a decolonization lens that emphasized sovereignty, self-determination, and the rectification of historical injustice. In response the UK attempted to argue that Mauritius was engaging in "strategic litigation" by inappropriately using UNCLOS to solve a sovereignty dispute.

The UK's eventual policy change highlighted the effectiveness of Mauritius' use of international reputational pressure anchored in legal and normative processes. Mauritius could not compel compliance through force. Instead, it demonstrated how sustained legal action combined with moral and political framing can shift the behaviour of a much larger state.

Case Study: Timor-Leste and Australia

The Australia–Timor-Leste maritime boundary negotiations illustrate another form of small-power legal statecraft. For years, Australia resisted boundary delimitation and withdrew from certain compulsory dispute settlement mechanisms under UNCLOS to maintain control over the negotiation agenda. This changed in 2016 when Timor-Leste initiated the first-ever compulsory conciliation under UNCLOS.

Two major reversals in Australian policy followed: 1. Ending its long-standing moratorium on maritime boundary delimitation in the Timor Sea. 2. Agreeing to participate in a facilitated negotiation process, despite historically preferring bilateral, non-judicial negotiations.[6] Timor-Leste supplemented its legal arguments with powerful public diplomacy. The narrative framed the issue in terms of equity, good neighbourliness, and the developmental importance of resource access for a new nation. Australia, by contrast, risked appearing inconsistent with its stated commitment to a "rules-based order."

The conciliation process itself demonstrated what might be described as "flexible pragmatism."[7] The proceedings more closely resembled facilitated bilateral negotiations than adversarial litigation, allowing both parties to engage constructively. Creative solutions, particularly those involving resource-sharing arrangements, opened space for meaningful compromise. As a result, political actors on both sides were able to frame the outcome as aligning with their respective national interests, reinforcing the legitimacy and durability of the agreement.

This case stands as a prominent example of how smaller states can use UNCLOS mechanisms to shape the policies of larger states, even when those larger states initially resist.

Case Study: India and Bangladesh in the Bay of Bengal

The Bay of Bengal maritime boundary arbitration, initiated by Bangladesh, involved a complex mix of maritime delimitation and a territorial dispute over a small land feature (New Moore/South Talpatti). The arbitral tribunal adopted an innovative solution by creating a "grey area" where India held rights to water-column resources, while Bangladesh held rights to seabed resources through its extended continental shelf claim.

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[6] Rebecca Strating, "Timor-Leste's Foreign Policy Approach to the Timor Sea: Pipeline or Pipedream?," *Australian Journal of International Affairs*, 71(3): 259-283.

[7] Rebecca Strating, "A 'New Chapter' in Australia-Timor Bilateral Relations? Assessing the Politics of the Timor Sea Maritime Boundary Treaty," *Australian Yearbook of International Law*, 2019.

This compromise produced an equitable outcome without forcing a zero-sum division of rights. Bangladesh was widely viewed as having gained the more substantial benefit, yet India accepted the outcome and complied with the judgment. This was another example of how maritime dispute resolution processes could be used flexibly and pragmatically to find a new solution.

The case demonstrated that even larger regional powers can be persuaded to accept binding decisions when the reputational, diplomatic, or long-term strategic costs of resistance outweigh the short-term benefits of holding firm.[8]

Broader Trends from ITLOS and Other Dispute Resolution Processes

Across these and related cases (e.g. ITLOS cases), several regional trends become clear:

- *Legal action is reinforced by diplomacy.* Litigation is most effective when embedded within broader narrative and diplomatic strategies, as seen in the Chagos and Timor Sea disputes.

- *Smaller states mirror great-power language.* Many Indo-Pacific states use the language of the "rules-based order" to hold regional powers accountable for their behaviour, repurposing the rhetoric typically used against China.

- *Regional assertiveness by major powers has strengthened UNCLOS elsewhere.* China's behaviour in the South China Sea has paradoxically encouraged other states to rely more heavily on international courts and tribunals in unrelated disputes.

- *Innovative legal solutions are possible.* The "grey area" solution in the India-Bangladesh case and the flexible arrangements in

[8] For further discussion on these three cases, see Rebecca Strating, "The 'Rules-based Order' as Rhetorical Entrapment: Comparing Maritime Dispute Resolution in the Indo-Pacific," *Contemporary Security Policy*, 44(3): 372-409.

the Timor Sea illustrate the capacity of dispute resolution mechanisms to generate creative, politically viable outcomes.

- *Dispute resolution is rarely linear.* Even when a ruling is accepted, it may not fully resolve underlying tensions or sovereignty questions.

- *Territorialization continues to complicate settlement.* In cases of mixed disputes, involving both territorial and maritime claims, making compromise can be difficult due to the use of sovereignty and historical narratives.

Applying these Lessons to the South China Sea

The South China Sea presents one of the most high-profile and strategically sensitive maritime disputes in the Indo-Pacific, alongside the Taiwan Strait and East China Sea. These disputes raise fundamental questions about the relationship between power and law: Can international legal mechanisms constrain great powers? And what happens when legal interpretations diverge sharply across states?

Several factors limit the likelihood that dispute resolution processes will be successfully applied. First, geography complicates resolution. The South China Sea disputes are characterized by contested territorial and maritime boundary claims involving multiple actors, including China, the Philippines, Vietnam, Malaysia, Brunei, Taiwan, and Indonesia. The South China Sea contains numerous islands, rocks, reefs, and low-tide elevations whose legal status varies under UNCLOS. The semi-enclosed geography creates a mosaic of overlapping claims that resist neat legal solutions. China asserts extensive historical rights through the "nine-dash line," while other claimants rely on legal definitions of islands, rocks, and EEZ entitlements. The sovereignty and maritime disputes are complicated by strategic and economic considerations, including vital shipping lanes, fisheries, and potential hydrocarbon resources.

Second, states employ historical, legal, and normative arguments to bolster their positions. China's historical narratives, in particular, clash with legal interpretations as it continues to emphasize historical rights and enduring presence. The 2016 Philippines arbitration ruling focused

on the legal status of land features, not sovereignty over them, yet China continues to prioritize history over geography or legal categorization in its political narratives.

Third, strategic vulnerabilities shape behaviour. China at least partially views the South China Sea through a defensive lens, including concerns linked to other powers (primarily the United States) having control in the "first island chain" to project influence and potentially threaten Chinese security.[9] At the same time, China frames U.S. presence as "maritime hegemony," arguing that the United States has no legitimate role in the South China Sea because it is neither a coastal nor a territorial claimant.

Fourth, great power exceptionalism persists. Both China and the United States illustrate different forms of exceptionalism. China's is regional and administrative, involving the creation of zones, nature reserves, and security regulations that attempt to expand its authority. In effect, it treats the South China Sea as part of Chinese territory subject to domestic law.[10] The U.S. reflects universal "exemptionalism," maintaining support for UNCLOS principles without ratifying the treaty. While the U.S. treats UNCLOS as customary law, in the face of China's challenges in the maritime Asia the lack of ratification makes it difficult for the U.S. to get narrative cut-through on the importance of UNCLOS.

Fifth, the regional context is complex. The eleven member states of the Association of Southeast Asian Nations (ASEAN) do not share a unified approach to managing disputes with China, and several Southeast Asian countries also have disputes among themselves. At the time of writing, a Code of Conduct (CoC) is being negotiated between ASEAN and China, but there is significant skepticism about whether it will effectively reduce tensions or whether it could undermine an UNCLOS-based order by enshrining principles that conflict with international law.

Finally, narrative competition is intensifying. Mirroring, counter-narratives, and disinformation efforts are increasingly widespread in maritime Asia. Competing stories about law, history, and legitimacy create

[9] The chain of islands stretching from the Kuril Islands down through Japan, Taiwan, the northern Philippines, and Borneo.

[10] See for example Isaac Kardon, *China's Law of the Sea*, Yale University Press, 2023.

an environment in which truth becomes contested and public diplomacy becomes weaponized.

Despite these limitations, there are a few reasons why countries consider maritime dispute resolution processes. The Philippines has had some success in combining legal strategies and public diplomacy. The 2016 arbitral ruling was a major legal victory for the Philippines, but the Duterte administration's decision not to publicly advocate for it blunted its international influence.

Under the Marcos administration, the Philippines' current strategy of "assertive transparency" (publicly criticizing and highlighting Chinese activities and maritime encounters) has become a notable example of information-led counter-grey-zone tactics. Analysts, however, are divided on its effectiveness. A comprehensive assessment remains lacking, although existing analysis suggests three core objectives: 1. strengthening national resilience, 2. building international support, 3. imposing reputational costs on China.

While the Philippines appears to have success with objective one and two, the third objective is the most difficult. While China does care about reputation, it has also developed sophisticated counter-narratives and disinformation tools that seek to legitimize its actions regionally and globally. Even when reputational costs are imposed, the strategic impact may be limited; in some cases, Philippine transparency efforts appear to have provoked stronger Chinese responses. There is a potential for the Philippines to again use maritime dispute resolution processes, particularly in its disputes with China in the West Philippine Sea.

Vietnam offers a contrasting model, preferring a quieter diplomatic approach while expanding capabilities and deepening strategic partnerships. However, it may also be the case that while Vietnam has been reluctant to use maritime dispute resolution processes under UNCLOS in its disputes with China (and other countries), it may find itself using these mechanisms to help bolster international support for its maritime claims. More research would be useful in comparing how individual states approach managing (if not resolving) disputes and developing new models for assessing the effectiveness of small state legal diplomacy in an increasingly contested maritime domain.

Conclusion: The Limits and Possibilities of UNCLOS in an Era of Power Shifts

Maritime sovereignty disputes in East and Southeast Asia remain among the most complex and entrenched in the world. Differing interpretations of UNCLOS, combined with territorialization dynamics, make the region fertile ground for tension. Yet the experiences of Mauritius, Timor-Leste, Bangladesh, and others illustrate that UNCLOS mechanisms can work, even in asymmetrical disputes, when smaller states strategically combine legal action with public diplomacy and narrative framing.

These successes, however, overwhelmingly involve non-great powers. While UNCLOS has substantially shaped maritime order, it has struggled to bind the behaviour of great powers, especially where major strategic interests are at stake. As the global balance of power shifts and as great powers actively challenge aspects of the so-called "rules-based order," the limitations of international maritime dispute resolution mechanisms become even more apparent.

Still, the Indo-Pacific experience demonstrates that international law remains a critical arena of contestation and statecraft. Smaller and middle powers continue to innovate within the law of the sea framework, using its tools to defend their rights, mobilize international support, and shape maritime order, even if larger structural challenges persist.

Kristina Siig

A New Approach to Coastal State Jurisdiction in the Exclusive Economic Zone at the Expense of Freedom of Navigation as a "Common Benefit"?

Prologue

The International Progress Organization engages with "topics such as democracy, human rights, dialogue of civilizations, conflict resolution, international law, and economic development." In doing so, it positions itself at the intersection of international relations and international law – a combination that is both timely and necessary. International law, when examined without regard to the geopolitical context in which it operates, risks becoming abstract and even appearing naïvely committed to legalism at moments when the rule of law is visibly under strain. Conversely, scholarship in international relations may overlook the extent to which international law can shape the strategic environment, even when its rules are imperfectly observed. The two fields are also linked at a foundational level: State practice continually influences how international law is interpreted and may, over time, become custom and thereby crystallize into law itself.[1]

This interaction becomes particularly evident when one examines the maritime order in the global era, the focus of this volume. At sea, questions of State jurisdiction are frequently complex and sometimes uncertain. Moreover, international trade has never been insulated from geopolitics; it has long served as an instrument of economic and political pressure, including through sanctions. As a result, rising geopolitical tensions inevitably shape how States use and regulate the oceans.

[1] ICJ Statute Article 38(1)(b).

In this essay, I examine emerging State practice in maritime law enforcement and consider how courts have assessed these developments. I supplement this analysis with aspects pertaining to international relations, as the approaches discussed here cannot be fully understood outside that context. My perspective is, however, that of a legal scholar, and my point of departure is therefore a rule of law based analysis. Other analytical frameworks are certainly possible. After all, the rule of law is itself a social construct open to debate. Yet I have not encountered an alternative construct that offers a more convincing foundation for international relations or for advancing human safety and prosperity. For now, then, this remains the framework through which I approach the subject.

1. Introduction

The right to freedom of navigation enables all States – including landlocked and otherwise coastally disadvantaged States – to participate in international maritime trade and commerce. Outside the territorial sea, coastal-State jurisdiction is therefore deliberately limited, allowing the freedoms of the high seas to function as a shared maritime infrastructure for global exchange. This system, developed primarily through customary international law and the earlier Geneva Conventions of 1958, was codified in the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which now forms the constitutional framework of the oceans. Although the United States and a small number of other States have not ratified the Convention, they nonetheless recognize the vast majority of its provisions as reflecting binding customary international law.

The system is structured around a dichotomy in which jurisdictional competences are divided between those generally attributed to coastal States and those attributed to other States, in particular the flag States of vessels using the oceans as transport infrastructure. As a general rule, conduct occurring on board a merchant vessel while it navigates the oceans falls within the jurisdiction of the flag State, which in most circumstances exercises exclusive law enforcement authority over the

vessel on the high seas.[2] Under the regime of innocent passage, this remains the default position even when the vessel transits through the territorial sea of another State.[3]

In this way, flag State jurisdiction restricts the ability of other States to assert their own jurisdiction. The rule based order established by UNCLOS therefore requires coastal and third States to refrain from interfering with the activities of foreign merchant vessels, insofar as those activities relate to the use of the oceans as a shared maritime infrastructure. The restriction on coastal or third-State jurisdiction applies to both, legislative enforcement and adjudicative jurisdiction, however, to different extents. Still, the exclusivity of the flag State is not absolute but centers around matters relating to *"collision or any other incident of navigation,"* as per UNCLOS Art. 97.

These dynamics became particularly visible in the Baltic and North Sea regions, which are among the most heavily trafficked maritime areas in Europe and serve as key routes for exports from Russia's principal westbound ports. Following Russia's invasion of Ukraine in February 2022, tensions escalated when Western States imposed sanctions on selected Russian exports and imports. Because these sanctions were multilateral but not universal, they could only be enforced where a sufficient jurisdictional link existed between the good or asset sanctioned and the sanctioning State. This limitation generated several forms of frustration.

First, the rules on freedom of navigation under UNCLOS restrict the enforcement of sanctions, even within territorial seas, and generally preclude coastal States in the Baltic and North Sea from taking action against non compliant vessels on the high seas or in exclusive economic zones.[4] Second, the sanctions reshaped the maritime oil sector by excluding "Western" insurers, financiers, importers, exporters, and shipowners from trade involving Russian oil. Their withdrawal opened space for market actors with fewer financial resources, older tonnage,

[2] UNCLOS Art 91, 94 and 97.

[3] UNCLOS Art 17, 18 and 19.

[4] UNCLOS Art 24(1)(b): "[Coastal States shall not] discriminate in form or in fact against the ships of any State *or against ships carrying cargoes to, from or on behalf of any State*." (Writer's emphasis.)

and – judging from the average age of vessels employed – potentially higher environmental risk. This shift heightened concerns about maritime safety and the possibility of environmental disasters, posing the question of what measures coastal States could take to curb the risk.

At the same time, the broad navigational freedoms guaranteed under UNCLOS and customary international law also introduced a degree of legal uncertainty for coastal States confronted with heightened concerns about sabotage and hybrid threats to offshore infrastructure. These concerns were not speculative: the Nord Stream 1 and 2 explosions in autumn 2022 demonstrated that critical subsea installations were vulnerable to deliberate interference, and that hybrid threats were something that States also had to counter at sea.

"Hybrid threats" is not a defined term in international law. Rather, it is a descriptive label for the use of military and non-military means – often covert, unattributed, or plausibly deniable – to pursue objectives that may be antagonistic in character. When such conduct occurs in peacetime, it must be assessed through the lens of peacetime legal regimes, including the law of the sea. This creates a structural tension: hybrid activities exploit the very freedoms of navigation and overflight that UNCLOS protects, while simultaneously generating factual ambiguity that complicates the application of coastal State rights and enforcement powers. The involvement of undeclared or private actors further blurs the line between lawful use of the seas and conduct that threatens the security of coastal States.

Against this backdrop, questions emerged as to whether UNCLOS (perceived as being designed for a more predictable maritime environment) provides coastal States with adequate tools to address grey zone activities that fall short of the thresholds for armed attack or law enforcement jurisdiction yet still pose significant risks to critical infrastructure.

In the following, I examine three examples of State practice through a legal lens, contextualized by relevant aspects of geopolitics and international relations. Each case involves suspected or confirmed sabotage and raises questions about how coastal States may respond to hybrid threats. Taken together, they allow for an assessment of how anticipated geopolitical or diplomatic consequences may shape – not necessarily the legal analysis itself, but certainly – the legal strategies adopted by

coastal States. This, in turn, provides a basis for evaluating whether a coherent and emerging pattern of State practice can be discerned.

As this is an essay, I limit my citations to reference to black letter rules and the existing legal scholarship directly relevant to the cases under discussion. However, because the factual background of several of these cases can only be reconstructed by drawing on multiple sources – many of them journalistic – the reader will not be entirely spared the dense footnoting normally characteristic of legal writing. For that, I offer my apologies in advance.

2. UNCLOS as a System of Regulation

UNCLOS is often described as *"the constitution of the oceans,"* though the label is somewhat misleading. What is beyond doubt is that it stands as the principal codification of the law of the sea. It brings together the four 1958 Geneva Conventions with a range of new regulatory frameworks – most notably those governing the Exclusive Economic Zone and the Area beyond national jurisdiction – creating a comprehensive, if composite, legal order.

For our purposes, it is essential to recall that UNCLOS was negotiated in the 1970s and early 1980s and is, in many respects, a product of its time. Drafted in the midst of the Cold War, it reflects a clear awareness that geopolitical tensions shape access to resources, international trade routes, and the division of maritime spaces. From this, we may derive two points. First, as discussed in Part I of this volume, UNCLOS is not only a landmark in international lawmaking but equally a testament to diplomacy and international relations. Tellingly, the word *"cooperate"* – in its various forms – appears 79 times in the Convention, underscoring the centrality of continued negotiated coexistence in the maritime domain. Second, the Convention is drafted with international tensions very much in mind, yet with the aim of preventing those tensions from escalating within the maritime sphere. In keeping with this, the Preamble states that the Convention seeks to establish, "with due regard for the sovereignty of all States, a legal order for the seas and oceans which will *facilitate international communication*, and will *promote the peaceful uses of the seas and oceans*, the equitable and efficient utiliza-

tion of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment."[5]

That being said, the concern that UNCLOS contains no provisions explicitly addressing the "shadow fleet" or "hybrid threats" is correct. This is not surprising: the term "hybrid warfare" did not emerge until 2007,[6] and the terms "shadow fleet" or "dark fleet" were only introduced in connection with the post-2022 Russia sanctions. Yet this absence of wording does not mean that UNCLOS is irrelevant to such situations, so long as the threat or antagonistic act does not amount to armed conflict, in which case the laws and practices of naval warfare would apply. Rather, it means that matters such as sanctions enforcement, environmental risks, and the protection of critical coastal State infrastructure must be addressed through different parts and articles of the Convention, often in conjunction with other applicable regimes.[7]

Accordingly, the relevant question is not, *"How does UNCLOS regulate the shadow fleet and hybrid threats?"* Instead, the questions to be asked are: What does UNCLOS say about freedom of navigation and sanctioned cargoes? What does UNCLOS say about freedom of navigation and environmental risks? And, finally, what does UNCLOS say about freedom of navigation and the protection of critical coastal State infrastructure? These questions will be considered below in connection with the discussion of State practice.

3. The Nord Stream 1 and 2 Incidents

3.1. The facts

On 26 September 2022, the Nord Stream 1 and Nord Stream 2 gas pipelines running from Russia to Germany through the Baltic Sea were subjected to multiple acts of sabotage in the Danish and Swedish Ex-

[5] UNCLOS, Preamble (4). (Writer's emphasis.)

[6] Seemingly, the term was introduced by F. G. Hoffmann in his article *Conflict in the 21st century: The Rise of Hybrid Wars*, Potomac Institute for Policy Studies (2007).

[7] See e.g. H. Ringbom (2025) *New Threats – Old Rules: Law of the Sea Issues Raised by Suspected Attacks on Submarine Infrastructure in the Baltic Se*a, Ocean Development & International Law, 56:3.

clusive Economic Zones (EEZs). Explosive devices had been attached to the pipelines, generating tremors measuring 2.1 and 2.3 on the Richter scale. The resulting gas leaks polluted the surrounding waters and the air column above the rupture sites, while also posing risks to the safe navigation of vessels and aircraft.

Danish authorities responded by establishing no sail and no fly zones of 5 × 5 nautical miles around the leaks in the Danish EEZ, and by declaring a 500 meter exclusion zone prohibiting unauthorized navigation and anchoring.[8] Sweden imposed comparable navigational restrictions. Both States deployed environmental and naval vessels to prevent marine traffic from approaching the affected areas and, once pipeline pressure had stabilized, to begin investigating the cause of the explosions. To facilitate this work, Sweden designated the immediate area as a crime scene and imposed a temporary no fly and no navigation zone.[9]

Looking at the economic interests involved, the gas contained in the Nord Stream pipelines was owned by PJSC Gazprom in which the Russian Federation holds a majority stake alongside numerous private minority shareholders. The pipelines themselves are owned by Nord Stream AG and Nord Stream 2 AG, respectively, both affiliated companies registered in Switzerland, and the infrastructure – though idle at the time – was intended to serve the German market. Denmark and Sweden therefore had little, if any, direct economic stake in the incident. Once the situation no longer posed navigational or environmental

[8] Danish Energy Agency, *Læk på Nord Stream 2 rørledning i Østersøen* (26 September 2022), www.ens.dk/presse/laek-paa-nord-stream-2-roerledning-i-oestersoeen; Danish Armed Forces, *Gas leak in the Baltic Sea* (27 September 2022), www.forsvaret.dk/en/news/2022/gas-leak-in-the-baltic-sea/, accessed 12 January 2026.

[9] See further on the Nord Stream incidents K. Siig, B. Feldtmann and F.M.W. Billing, "Introduction to UNCLOS 1982 as a System of Regulation," in *The United Nations Convention on the Law of the Sea*, *A System of Regulation*, Routledge, 2003, pp. 2ff; T. Koivurova and T. Winkel, "The Nord Stream Pipelines from the Viewpoint of Law and Geopolitics," in A. Lott (ed.), *Maritime Security Law in Hybrid Warfare, Publications on Ocean Development*, vol. 102, Brill, 2024, p. 195.

risks, their remaining concerns were limited to security interests and the broader interest in law enforcement.[10]

Both the Danish and Swedish investigations were discontinued in February 2024. Whereas both investigations had concluded that the gas pipes had been subjected to a deliberate act of sabotage, the countries lacked sufficient grounds to continue the investigations, Sweden citing lack of criminal jurisdiction,[11] Denmark, that it lacked the necessary basis for criminal proceedings in Denmark.[12] Under Danish criminal law, criminal prosecution should be halted both if there is no jurisdiction, but also if it is unlikely that prosecuting the matter (further) will lead to any results. (See Danish Code of Procedure §§ 721 and 749 regarding the so-called principle of opportunity.) It is therefore unclear if the decision to discontinue the investigation was based solely on lack of formal jurisdiction, or if more substantive aspects also played a part. The investigations continued in Germany, and interest has centered on certain Ukrainian citizens,[13] thereby also ruling out that Sweden or Denmark could base criminal jurisdiction on the citizenship of any suspected perpetrator.

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[10] D. Azaria and G. Ulfstein, "Are [sic!] Sabotage of Submarine Pipelines an 'Armed Attack' Triggering a Right to Self-Defence?" *EJIL: Talk!* 18 October 2022, ww.ejiltalk.org/are-sabotage-of-submarine-pipelines-an-armed-attack-triggering-a-right-to-self-defence/, accessed 12 January 2026.

[11] Swedish Prosecution Authority, press release: *The prosecutor closes the Swedish investigation concerning gross sabotage against Nord Stream* (7 February 2024), www.via.tt.se/pressmeddelande/3415150/the-prosecutor-closes-the-swedish-investigation-concerning-gross-sabotage-against-nord-stream?lang=en&utm, accessed 12 January 2026. The Swedish investigations had shown that no Swedish interest had been attacked, nor where the acts carried out on Swedish territory, or by Swedish citizens. Therefore, Sweden lacked criminal jurisdiction to prosecute the matter.

[12] Copenhagen Police Department, press release: *Københavns Politi og PET's fælles efterforskning af sprængningerne af Nord Stream indstilles* (26 February 2024), www.politi.dk/koebenhavns-politi/nyhedsliste/koebenhavns-politi-og-pets-faelles-efterforskning-af-spraengningerne-af-nord-stream-indstilles/2024/02/26, accessed 12 January 2026.

[13] See *PBS News* (quoting Associated Press), "Polish court blocks extradition and frees Ukrainian suspected in Nord Stream pipeline blasts" (17 October 2025), www.pbs.org/newshour/world/polish-court-blocks-extradition-and-frees-ukrainian-suspected-in-nord-stream-pipeline-blasts?utm, accessed 12 January 2026.

3.2. Legal aspects and diplomatic efforts

Although the incidents occurred outside Danish and Swedish territorial waters, they took place within each State's EEZ and Search and Rescue (SAR) Zones. Under UNCLOS, both States had jurisdiction over the environmental consequences of the leaks.[14] While the SAR Convention contains no similarly specific provisions, Denmark and Sweden would have SAR obligations whenever vessels or aircraft encountered difficulties due to the leak. The fact that both States employed enforcement powers in these respects appears to have raised no controversy; someone had to act, and the nearest coastal State was the obvious candidate.[15] This reasoning aligns with UNCLOS Article 59, which provides the framework for resolving conflicts over the attribution of rights and jurisdiction in the EEZ. It is the Convention's sole gap filling provision, and it states:

> "In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of *equity* and in the light of *all the relevant circumstances*, taking into account the *respective importance of the interests involved* to the parties as well as to the international community as a whole." (Writer's emphasis.)

Analyzing the coastal States' safety measures under UNCLOS Article 59 and considering *"the respective importance of the interests involved,"* there was no meaningful counter interest to weigh. Put bluntly, the supposed "right" to sail into waters so saturated with gas that a vessel would lose buoyancy and sink is not a right protected under UNCLOS. Indeed, it could easily be argued that the Danish and Swedish authorities would be under a duty to take safety measures – either directly under a teleological interpretation of the conventions themselves or under rules of necessity.

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[14] UNCLOS Art 56(1)(b)(iii).

[15] A narrow exception to this may be found reported in Hallands Nyheter (10 October 2022), *Han ifrågasätter Nord Stream avspärrningarna*, www.hn.se/nyheter/sverige/han-ifragasatter-nord-stream-avsparrningarna.ae278230-c477-5474-a95f-be3a44694201, accessed 12 January 2026.

Turning to the question of criminal jurisdiction, the situation becomes far less straightforward. Although UNCLOS Article 113 obliges States to criminalize the intentional damage of submarine cables and pipelines, the Convention does not specify whether a coastal State has jurisdiction in the aftermath of such an incident. This raises the question of whether the absence of an explicit rule should be read to imply that no coastal-State jurisdiction exists. Such a conclusion would create a catch 22. Because most States recognize some form of active personality jurisdiction – jurisdiction over their nationals as perpetrators – it is often impossible to determine whether a coastal State has jurisdiction until investigations have progressed far enough to identify the individuals involved.

Even so, applying the Article 59 balancing test, both Denmark and Sweden had a legitimate interest in securing the crime scene and conducting criminal investigations. The only conceivable counter interest would be the perpetrators' interest in avoiding detection, an interest UNCLOS does not protect. That point was never in dispute. The real issue was whether Denmark and Sweden could decide *who else* was permitted to approach the site for the purpose of conducting their own investigations. In particular, the question arose whether Russia – a State with an obvious economic stake in the pipelines – could conduct its own inquiry or at least participate in the investigations led by Denmark and Sweden. This question became even more salient given that cooperation with the German authorities had already been established.[16] Neither Denmark nor Sweden or Germany had any appetite in involving Russia in the investigations as the fear was that Russia was involved in the incident; the pipes had been idle at the time as Gazprom had frozen all contracts and deliveries through the pipes just before the incident. Russia, on the other hand, assumed U.S. involvement[17] and generally and sharply criticized the national investigations conducted by Denmark, Sweden, and Germany. In several UN Security Council meetings, Russian representatives argued that the blasts constituted international terrorism and claimed that the investigating States were conducting their inquiries in a manner that was nontransparent and

[16] See UNSC S/2023/126, Letter dated 21 February 2023 from the Permanent Representatives of Denmark, Germany and Sweden to the United Nations, addressed to the President of the Security Council, with Annex.

[17] UNSC S/PV.9144, 9144th meeting Friday, 30 September 2022 on the issue of Nord Stream.

politicized; they called for an independent international investigation under the auspices of the United Nations.[18] The Russian Ministry of Foreign Affairs echoed this position, accusing the three States of excluding Russia despite its clear economic stake in the pipelines.[19]

Generally, Russia rejected the legitimacy of the Danish, Swedish, and German investigations and sought to reframe the incident within the broader international counterterrorism framework. In this context, in September 2024, Russia officially submitted pre-trial claims against Germany, Denmark, Sweden, and Switzerland, citing the 1997 International Convention for the Suppression of Terrorist Bombings and the 1999 International Convention for the Suppression of the Financing of Terrorism.[20] At the time of writing (January 2026) it is unknown if the pre-trial claims have progressed to an actual case before the ICJ.

Applying the balancing test in UNCLOS Article 59, the States concerned each possessed a legitimate and legally cognizable interest in contributing to the criminal investigations, given the transboundary implications of the Nord Stream explosions and the absence of an expressly allocated competence under the Convention. At the same time, the investigations unfolded against a backdrop of heightened geopolitical antagonism in which competing strategic narratives and mutual suspicions undermined the minimum level of confidence necessary for cooperative fact finding. This dynamic ultimately prevented a coordinated investigative framework.

[18] The Ministry of Foreign Affairs of the Russian Federation (28 September 2024), Communiqué No. 1826-28-09-2024, *Foreign Ministry Spokeswoman Maria Zakharova's answer to a Rossiya Segodnya question regarding the two-year anniversary of the Nord Stream 1 and Nord Stream 2 pipeline explosions*, www.mid.ru/ru/foreign_policy/news/1972550/?lang=en, accessed 12 January 2026.

[19] United Nations, *At Security Council Meeting on Sabotage of Nord Stream Pipeline, Many Speakers Condemn Attacks on Critical Infrastructure, Stress Need for Accountability*, SC/15844, 4 October 2024, 9741st Meeting (AM).

[20] Fn. 16.

4. The Yi Peng 3 Incident

4.1. The facts

On 15 November 2024, the Chinese-flagged bulk carrier *Yi Peng 3* departed Ust Luga, Russia, carrying a cargo of Russian fertilizer. Two days later, two subsea data cables were found damaged: the C Lion 1 system linking Finland and Germany, and the BCS East-West Interlink connecting Sweden and Lithuania.[21] Finnish and Swedish authorities opened investigations, suspecting external interference.

Nine days after the damage, on 24 November, *Yi Peng 3* was identified as a vessel of interest based on AIS data[22] and its proximity to both sites. By then, the ship was already well underway in the Baltic Sea and had entered the Danish EEZ on its southbound voyage. Danish naval vessels followed it through the Great Belt. Perhaps for that reason, the vessel requested permission to anchor and subsequently did so in the Danish EEZ, roughly 20 km off Grenaa and just outside Danish territorial waters[23] where it was joined by Danish naval units.[24]

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[21] The Maritime Executive, *Chinese Ship Suspected of Subsea Cable Sabotage Has a Twisted Anchor* (24 November 2024), www.maritime-executive.com/article/chinese-ship-suspected-of-subsea-cable-sabotage-has-a-twisted-anchor, accessed 12 January 2026.

[22] AIS data refers to information transmitted by the Automatic Identification System (AIS) which is used for tracking and monitoring vessels to enhance maritime safety and navigation.

[23] The Maritime Executive, *WSJ: Chinese Ship Dragged Anchor for 100 Miles and Cut Two Cables* (27 November 2024), www.maritime-executive.com/article/wsj-chinese-ship-dragged-anchor-for-100-miles-and-cut-two-cables#:~:text=Swedish%20police%20investigators%20have%20completed%20their%20inspection%20of,the%20seabed%2C%20according%20to%20the%20Wall%20Street%20Journal, accessed 12 January 2026.

[24] Danish Defence Command, post on X, "Regarding the Chinese vessel Yi Peng 3: The Danish Armed Forces can confirm that we are present in the area near the Chinese vessel Yi Peng 3. The Armed Forces have no further comments at this time," quoted in *Maritimedanmark* (20 November 2024), available at: www.maritimedanmark.dk/forsvaret-bekraefter-tilstedevaerelse-ved-kinesisk-fragtskib , 12 January 2026.

In the days that followed, a rotating guard presence was established, including vessels from Germany and Sweden,[25] and multinational investigations were launched.[26] A Russian corvette also arrived in the vicinity, observing.[27] After intensive diplomatic negotiations that seem to have been ongoing from the time the vessel was identified as a vessel of interest,[28] on 19 December 2024, Chinese authorities permitted officials from Sweden, Germany, and Finland to observe while Chinese investigators boarded the vessel and interviewed the crew – a process facilitated by Denmark as the coastal State.[29] On 21 December, *Yi Peng 3* resumed its voyage.[30]

4.2. Legal aspects and diplomatic efforts

Formally, the coastal State measures taken by Denmark took place in the EEZ, but within the Danish straits. The Danish straits are governed by a combination of the Copenhagen Treaty of 1957 and the UNCLOS straits regime. Exactly how those two regimes interact may be debated, however, they both provide for *freedom of transit* through Danish waters, even if the Danish straits are so narrow that most of them would –

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[25] The Nordic Reporter, *Chinese "subsea cable cutter" still under guard of Baltic Sea navy vessels* (15 December 2024), www.nordicreporter.com/2024/12/chinese-subsea-cable-cutter-still-under-guard-of-baltic-sea-navy-vessels/?utm_source=copilot.com, accessed 12 January 2026.

[26] ScandAsia, *Swedish police boards: New developments in the Yi Peng 3 investigation* (20 November 2024), www.scandasia.com/swedish-police-boards-new-developments-in-the-yi-peng-3-investigation/?utm, accessed 12 January 2026.

[27] Helsingin Sanomat, *Välimerellä toimiva venäläinen sotalaiva ilmestyi salmeen, jossa tanskalaiset vahtivat kiinalaislaivaa* (22 November 2024), www.hs.fi/tutkiva/art-2000010853067.html, accessed 12 January 2026.

[28] DR (Danish public broadcasting corporation), *Storpolitisk drama i Kattegat: Danmark forhandler med Kina om sabotagemistænkt fragtskib* (25 November 2024), www.dr.dk/nyheder/indland/moerklagt/storpolitisk-drama-i-kattegat-danmark-forhandler-med-kina-om, accessed 12 January 2026.

[29] Reuters, *China lets Sweden, Finland, Germany, Denmark board ship in cable breach case* (December 19, 2024), www.voanews.com/a/china-lets-sweden-finland-germany-denmark-board-ship-in-cable-breach-case/7906994.html?utm; Finnish Broadcasting Company, *Finnish representatives board Chinese ship suspected of causing subsea cable damage* (December 19, 2024), www.yle.fi/a/74-20132627?utm, both accessed 12 January 2026.

[30] Swedish Coastguard, *Yi Peng 3 has left Scandinavia*, www.kustbevakningen.se/en/more-news/yi-peng-3-has-left-scandinavia/, accessed 12 January 2026.

bar the strait regimes – be either territorial or indeed internal waters. That said, neither UNCLOS nor the Copenhagen Treaty of 1857 prevents Danish naval vessels from supervising or following a ship they consider problematic, provided this does not *hamper* transit, using the UNCLOS wording.[31] The Copenhagen Treaty of 1857 arguably allows more latitude for Denmark as the coastal State, banning only "detention or hindrance" of transit; however for the purpose of the *Yi Peng 3* incident, the different wording seems not to influence the legal analysis.[32]

From Denmark's perspective, the events of 17-18 November 2024 gave rise to very limited – if any – genuine coastal State interests. The damaged cables did not serve Danish data traffic, were not owned by Danish entities, and were not located on Danish subsoil. It is therefore reasonable to assume that Denmark's shadowing of *Yi Peng 3* through the Danish straits until it anchored was undertaken at the request of other States with a direct stake in the incident. The motivations align more closely with international security concerns than with the rationales typically invoked under UNCLOS.[33] Still, if the Danish authorities had received credible information from Swedish or Finnish authorities indicating that *Yi Peng 3's* anchor had in fact damaged the subsea cables – whether intentionally, which would suggest sabotage, or at least through conduct amounting to vandalism – Denmark would have a legitimate coastal State interest in preventing any repetition of such behavior. The right of transit passage through international straits does not extend to actions that harm critical infrastructure. In this respect, UNCLOS Article 39 is clear: vessels exercising transit passage must *"refrain from any activities other than those incident to their normal modes*

[31] UNCLOS Art 44.

[32] UNCLOS provides that the coastal state shall not "hamper transit passage" (UNCLOS Art 44), whereas the Copenhagen Treaty of 1857 provides that Denmark shall not subject vessels to any "detention or hindrance" on their passage through the straits (Copenhagen Treaty of 1857, Art 1[1]). The Danish version of the treaty uses the terminology "arrest" or "stop" ("Anholdelse" / "Standsning"), suggesting that only physical hindrances are covered, whereas the original text in French uses the terms "détention ou entrave quelconque," which arguably would also include administrative or other preconditions that may de facto hinder unimpeded transit.

[33] Lloyd's List, *Has Denmark challenged the right of innocent passage? Watch Yi Peng 3 to find out* (22 November 2024), www.lloydslist.com/LL1151566/Has-Denmark-challenged-the-right-of-innocent-passage-Watch-Yi-Peng-3-to-find-out?utm, accessed 12 January 2026.

of continuous and expeditious transit." Conduct resulting in damage to essential installations falls outside that scope, and a coastal State is not required to tolerate it simply because the vessel is otherwise entitled to transit passage. Thus, Denmark, as the nearest coastal State, would be within its rights to monitor the vessel.

Against this backdrop, once *Yi Peng 3* had anchored, the purpose of the Danish naval presence changed. What initially may have served to prevent any further irregular behavior shifted toward discouraging the vessel from raising anchor and continuing its voyage. In practice, this posture was effective: the vessel remained where it was. As a result, the more difficult question of what the Danish navy or the other naval vessels present would have done – or could have done under UNCLOS – had the master attempted to proceed never arose.

Further, once the vessel stopped being in transit, it could be argued that the legal analysis should be supplemented with the rules in UNCLOS Part V on the EEZ, bringing the balancing of interest in Article 59 into play again.

In this context, it is notable that Danish personnel made no attempt to board the Chinese flagged vessel at any point. Denmark therefore never exercised physical control over the ship in the sense normally associated with enforcement action. Even so, the practical effect of the situation was that the vessel was *de facto* detained. For an older bulk carrier, any attempt to evade or outmaneuver a modern patrol vessel would in any case have been unrealistic. Whether China, as the flag State, formally accepted this situation remains unclear. What is clear is that Beijing was kept informed throughout and retained the option to object. It chose not to do so. Instead, Chinese authorities repeatedly indicated that discussions with Denmark were ongoing, suggesting at least a degree of tacit acceptance of how the situation was being man-

aged.[34] Viewed narrowly, the interests of the immediate coastal State, Denmark, and the flag State's interest in preserving its exclusive jurisdiction had been addressed through dialogue, and a practical solution was reached. In the broader context, however, the Finnish and Swedish prosecution services were not permitted to conduct their own investigations. They were limited to observing while officials affiliated with the Chinese accident investigation authority inspected the vessel and interviewed the crew – an opportunity that arose only after a significant delay by which time any evidence of sabotage or negligence, had it existed, would likely have been lost. The lessons learned – that flag State consent may be slow to obtain and that investigations risk becoming futile if not conducted in close temporal proximity to the alleged transgression – appear to have shaped the strategy and practice later adopted by the Finnish authorities, as discussed below in point 5 in relation to the Eagle S incident. Before turning to that, however, a brief comment is warranted on the notably by the book approach taken by the Danish authorities.

The Danish approach in the *Yi Peng 3* case must be understood within a broader industrial policy context. China is not only a powerful flag State; it is also a central trading partner for Denmark's globally active merchant fleet, which regularly operates in or near Chinese waters and ports. Challenging China's flag State jurisdiction in a case that had only an indirect impact on Denmark as a coastal State would have offered little strategic benefit while carrying the risk of retaliatory measures against Danish-flagged or Danish-controlled vessels. By opting for restraint, both Denmark and China were able to leave the political stage with a diplomatic win.

[34] The Maritime Executive, *China is Negotiating Over Access to Bulker Suspected of Subsea Sabotage* (29 November 2024), https://maritime-executive.com/index.php/article/china-is-negotiating-over-access-to-bulker-suspected-of-subsea-sabotage?utm, accessed 12 January 2026; DR (Danish public broadcasting corporation), *Storpolitisk drama i Kattegat: Danmark forhandler med Kina om sabotagemistænkt fragtskib* (25 November 2024), www.dr.dk/nyheder/indland/moerklagt/storpolitisk-drama-i-kattegat-danmark-forhandler-med-kina-om, accessed 12 January 2026.

5. The Eagle S

5.1. The facts

On 25 December 2024, the Cook Islands-registered *Eagle S* dragged its anchor for several hours in the Gulf of Finland, damaging at least fourteen subsea cables and a subsea gas pipeline. While the vessel was operating in the Finnish EEZ, the Finnish Coast Guard contacted the crew and instructed them to raise anchor; only one anchor surfaced. The Coast Guard then directed the tanker into Finnish territorial waters, where military personnel boarded the vessel by rappelling onto the deck, and subsequently placed it under arrest.[35] As far as may be ascertained, no contact with the flag State had been made – or attempted – before the boarding and arrest of the vessel.

At the time, the tanker was carrying oil subject to EU sanctions. However, on 16 January 2025, Finnish Customs announced that no sanctions-related charges would be brought against the crew, as the vessel had entered Finnish waters at the Coast Guard's request, negating any intent to import the cargo (unleaded petrol and diesel). On 2 March 2025, the tanker and most of the crew were released, though three officers – the master and two chief officers – remained in Finland under travel restrictions. They were ultimately charged with aggravated criminal mischief and aggravated interference with communications but – notably – not with having intentionally sabotaged the cables.

The case was heard before the Helsinki District Court in September 2025, with final arguments delivered on 10 September. Two days later, on 12 September, the remaining crew members' travel bans were lifted. On 3 October 2025, the Court held that the matter constituted an "incident of navigation" falling within the exclusive jurisdiction of the Cook Islands as the flag State.[36] Accordingly, the Helsinki District Court did not have jurisdiction to hear the case, resulting in its dismissal. The ruling was appealed by the prosecuting service. At the time of writing (January 2026) the appeal has not been heard.

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[35] H. Ljungberg, "När politiken äntrar juridiken: Om finska myndigheters bordning av. Eagle S," in Johan Schelin, *Sjörättsbiblioteket* No. 3/2025, p. 2.

[36] UNCLOS Art 97(1).

5.2. Legal aspects and diplomatic efforts

Notably, Finland did not engage with the flag State to resolve the situation or seek its consent before boarding the vessel or initiating criminal proceedings against the crew. Yet, by holding that UNCLOS Article 97(1), read together with Article 113, which obliges flag States to criminalize intentional and negligent damage to submarine cables and pipelines, displaced Finnish domestic rules on criminal jurisdiction, the District Court effectively reintroduced regard for the flag State through the back door. One may reasonably ask whether the outcome would have differed had flag State consent been obtained, given that exclusive flag State jurisdiction can, of course, be waived. This possibility appears to have been overlooked in the Finnish Coast Guard's legal assessment. It is also worth considering whether the Court would have reached its conclusion as readily had there been any indication that the crew had engaged in intentional sabotage. That was never alleged by the prosecution, which instead relied on charges grounded in gross negligence.[37]

Because the Court declined jurisdiction, it did not address further issues such as the lawfulness of the authorities' seizure of the vessel or the cable owners' potential tort claims for damage to the infrastructure. For now, all such questions must await the decision of the Court of Appeal. What can be said, however, is that the District Court treated UNCLOS largely as a *lex specialis*, leaving very limited scope for coastal State jurisdiction in cases of this kind.

6. Concluding Remarks: Emerging Patterns of State Practice?

Across the Nord Stream, *Yi Peng 3*, and *Eagle S* incidents, a discernible pattern of coastal State behaviour is beginning to take shape – one that reflects growing pressure on the traditional allocation of jurisdiction under UNCLOS. In each case, coastal States confronted significant damage to subsea infrastructure located in their Exclusive Economic Zones, and in each case, they initially adopted measures that pushed the

[37] H. Ringbom, "Eagle S och havsrätten," in Johan Schelin, *Sjörättsbiblioteket* No. 3/2025, p. 6.

boundaries of their established enforcement competences. These measures ranged from investigative initiatives in the EEZ (Nord Stream), to attempts to obtain access to a foreign flagged vessel (*Yi Peng 3*), to the full assertion of criminal enforcement jurisdiction, including boarding and arrest (*Eagle S*).

However, despite these assertive initial steps, the eventual legal outcomes consistently reaffirm the conventional jurisdictional framework of the Convention. In the Nord Stream investigations, both Denmark and Sweden ultimately refrained from asserting criminal jurisdiction, even in the face of confirmed sabotage, citing the limits of their competence. In *Yi Peng 3*, the coastal States accepted that access to the vessel and evidence depended on the consent of the flag State, and the investigation proceeded only under conditions set by China. And in *Eagle S*, the Helsinki District Court held that the matter constituted an "incident of navigation" within the meaning of UNCLOS, thereby falling under the exclusive jurisdiction of the Cook Islands as the flag State. The Court's dismissal of the case underscores the continuing strength of the flag State principle, even where the coastal State has suffered extensive damage to critical infrastructure.

Taken together, these cases suggest that while coastal States are increasingly inclined to test the outer limits of their enforcement powers in the EEZ – particularly where critical infrastructure and hybrid threat concerns are involved – formal legal processes continue to pull practice back toward a conservative interpretation of UNCLOS. The result is not yet a settled modification of the law, but rather a body of tentative and contested practice that may, over time, contribute to the evolution of customary norms concerning coastal State jurisdiction over security-related incidents in the EEZ.

The flag State principle may be exclusive, but it is not absolute. UNCLOS' Preamble emphasizes the promotion of a "legal order" and the "peaceful uses of the oceans," and it is difficult to reconcile those objectives with an interpretation under which flag State exclusivity over collisions and other maritime incidents would extend to intentional sabotage of critical infrastructure. Should courts ultimately confirm that such conduct falls outside the scope of the traditional incident of navigation regime, coastal States are likely to regard their enforcement jurisdiction in relation to the protection of, and response to attacks on, critical

infrastructure as correspondingly broader than what is reflected in the three cases examined above.

In that light, any future recalibration of the flag State principle in cases of intentional harm to critical infrastructure would necessarily prompt a corresponding reassessment of how the freedom of navigation is understood as a Common Benefit – one that remains fundamental, but not immune to qualification where the integrity of the shared maritime order is at stake.

As a final note, it is worth considering whether such developments may, over time, lead to the extensive legislative and enforcement jurisdiction ordinarily confined to the territorial sea – and the criminal jurisdiction over acts producing direct effects on the coastal state – being drawn into the EEZ through the balancing mechanism in UNCLOS Article 59. It is hoped not, as such an outcome would, in this writer's view, amount to an inequitable balancing of the parties' respective interests.

Bart Valeer Soens

Economic Warfare against the Freedom of Navigation

I. Naval Blockades under Different Forms, Past and Present

Naval blockades. In war, blocking seaports can be a highly effective way of attrition, as the British blockade of German ports during the Great War has shown, since it denies the enemy both the import of vital supplies as well as the export of foreign currency earning products. However, as Napoleon's attempted Continental Blockade has proven, maintaining naval blockades of any kind requires tremendous military resources, unless the ports in question are accessible solely through a sea strait,[1] in which case it suffices to block this chokepoint. When in 1912 the Italo-Turkish war prompted the Ottoman government to close the Dardanelles Straits to protect its capital Constantinople, this caused Russian Black Sea exports to drop by one third and almost wiped out the country's trading surplus.[2] Concern for the Straits, much more than Slavophile romanticism or *Tsargrad* phantasies, explains to a large extent Russia's belligerence in July 1914, as Tsar Nicholas II was willing to go to war rather than risk Berlin controlling the access to the Black Sea.[3] However, territorial annexation of straits merely enables the conquering state to prevent closure by the strait state, it will not prevent any other superior naval force to blockade the strait by sea. Nevertheless, the leverage a strait state gains over other states through territorial control of a chokepoint – and the ever-present temptation to use it – will always incentivize those states to seek control over the strait state. In that sense, control over the strait can be a curse much

[1] UNCLOS article 37 defines sea straits as "straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."

[2] McMeekin S., *The Ottoman Endgame*, New York 2015, Penguin Press, p. 65.

[3] Lieven D., *Towards the Flame*, 2015, Allen Lane, p. 101.

more than a blessing, as is exemplified by Iran's control over the Strait of Hormuz through which passes around 30% of global oil and LNG trade.[4] Iran's attacks on oil tankers transiting through the strait during the 1980-1988 First Gulf War, as well as occasional threats thereafter by certain Iranian officials to recommence the attacks, have done much to undermine international confidence in the country. It continues to provide pretexts to its enemies' belligerence and it remains to this day a latent threat to the security of West Asia.

Unilateral sanctions as surrogate blockades. Apart from the fact that most great powers may lack the military resources required to put these into effect, naval blockades of ports or sea straits would immediately be recognized as acts of aggression and could easily spiral out of control. In an attempt to achieve the same outcome with non-military means, the U.S., followed later by the EU states and the UK, has therefore resorted to unilateral economic sanctions designed to prevent privately owned merchant vessels from calling at a targeted country's ports and/or to load or discharge their goods. So-called *primary sanctions* of this type are extraterritorially applied administrative orders prohibiting vessel owners to engage in dealings with designated persons or entities. However, these sanctions are hard to police and enforce, especially when vessel operators are not conducting the prohibited trade in USD, which requires the intervention of a U.S. intermediary bank. This is why the focus has shifted to *secondary sanctions* prohibiting the *facilitation* of targeted trades, for instance by providing insurance services.[5]

The IG P&I reinsurance oligopoly. A vessel can hardly trade without insurance in place covering her owner's third party liabilities arising out of collisions, oil pollution or wreck removal obligations. Given that in case of serious incidents, shipowners can walk away from their responsibilities by declaring bankruptcy of the corporate entity owning the ship, both clients and port state authorities require shipping companies to have in place liability insurance by a reputable insurer and at a

[4] Gunathilake C. (2021), *Maritime Chokepoints and its Impacts on Global Economy if Disturbed*, p. 4, at www.researchgate.net/publication/355127192.

[5] Examples are Executive Orders 14024 and 14071 (U.S.) or Council Regulations (EU) 2023/427, (EU) 2022/2474, (EU) 2022/428, etc. U.S. primary sanctions designating individuals or corporate entities are administrative decisions by the Office of Foreign Asset Control (OFAC), based on a delegation of authority in executive orders.

limit in line with the potential damage. Meeting this market demand, liability cover for these risks is provided by twelve mutual insurers called Protection & Indemnity (P&I) Clubs.[6] The clubs have formed a cartel called the International Group of P&I Clubs (IG)[7] the main function of which is to buy common reinsurance from a syndicate of reinsurers led by AXA XL.[8] This allows the P&I clubs to offer liability insurance with a limit as high as 3.1 billion USD per accident, which is why the IG cartel is – somewhat reluctantly – tolerated by the European competition authorities.[9] Before the outbreak of the 2022 military conflict between NATO and Russia, the IG claimed to cover 90% of the world shipping fleet. The shipping market can therefore be represented as a knotted pyramid: at its basis, thousands of shipowners, in the middle the 12 IG P&I clubs and at the top a handful of reinsurance companies. The latter are all headquartered in the Collective West and carry out their business mainly in USD, which subjects them to U.S., UK and EU regulatory oversight. Thus, by subjecting the very few reinsurers underwriting the IG P&I contract to secondary sanctions, they are forced to provide their services on a discriminatory basis, which means that around 90% of shipowners need to comply with those sanctions or face the risk of losing a liability insurance cover essential to their business. This cascade effect is concretized by reinsurance warranties and compliance clauses in reinsurance contracts, giving reinsurers effective veto power over insurers' business activities involving countries in which certain individuals, entities or trades are subject to sanctions. Such leveraging of marine insurance for the furtherance of political goals amounts to a state-imposed abuse of a dominant market position.

The *shadow fleet*. With demand for sea transport stable but the offer of ships reduced as a result of unilateral sanctioning, freight rates for Russian oil have increased, creating a market opportunity for shipowners able to operate their ships outside the Western financial system. What

[6] Known under the following trade names: Britannia P&I, NorthStandard, London P&I, UK Club, Steamship Mutual, Shipowners Mutual, West of England, Skuld, Gard, Swedish Club, Japan P&I and American Club.

[7] See www.igpandi.org.

[8] Property & Casualty (P&C) and Specialty Risk Division of AXA (a global insurance and reinsurance company).

[9] Decision AT.39741 of 26 July 2012. See https://competition-cases.ec.europa.eu/cases/AT.39741.

propaganda outlets usually call the *shadow fleet* can be defined as these vessels which do not carry insurance backed by Western reinsurance.[10] Contrary to commonly spread perceptions, these ships are not *by definition* substandard or entirely uninsured, though a portion of these are. It is true, however, that a private insurance company with no access to the Western reinsurance market will never be able to offer the 3.1 billion USD limit IG P&I members enjoy.[11]

Failure of anti-Russian sanctions. In reaction to Western boycotts, Russia has managed to find new markets for its oil and gas exports. The importing countries can thus strengthen or diversify their energy supply chains and maybe take advantage of occasional suppliers' discounts. These benefits largely outweigh the cost of allowing in their ports ships which carry limited insurance; this is all the more so as the risk of accidents can be managed by strengthening port state control mechanisms. It is therefore no surprise that, according to certain analysts, the shadow fleet has expanded to around 800 ships and that the unilateral sanctions directed against marine insurance have failed in their intended purpose of denying transport capacity to the Russian economy. Faced with this – entirely predictable – failure, war propa-

[10] IMO Assembly Resolution A.1192(33) of 11 December 2023 has adopted a much narrower definition of the shadow fleet, which includes not only the requirement of inadequate liability insurance, but also, among others, the carrying out of unsafe operations. This (non-binding) resolution therefore is not helpful in establishing some kind of legal basis to treat solely the absence of adequate liability insurance as justification for imposing limits on the freedom of navigation, all the more so since the resolution does not define what it considers to be adequate insurance.

[11] Limits of non-IG P&I providers can be as low as 50 million USD. However, the OFAC sanctioning in January 2025 of Russian marine insurers Ingosstrakh and Alfastrakhovanie has provided the shadow fleet with access to significant additional insurance capacity, both in quantitative and qualitative terms.

gandists[12] have been exploring the idea to deny the right of transit to vessels categorized as belonging to the shadow fleet on the basis of the supposed inadequacy of their P&I insurance cover, notwithstanding the fact that the European Parliament has admitted that this is *impractical* or *impossible* under international law.[13] The most acute threat of a naval blockade comes from certain Northern European countries which,

[12] The most widely quoted study in this regard is that of the Brookings Institute, focused on the Baltic Sea. Tellingly, the study departs from the premise that international law (UNCLOS and the 1857 Treaty) does not allow impeding of transit rights for insurance reasons, even though the illegality of such measures is not conceded but instead presented as a "litigation risk." The author presents a scheme, purportedly legal under international law, which consists of a "voluntary" reporting of insurance in place by tankers operating in the Baltic Sea. If the disclosures are unsatisfactory, the vessel would be allowed to leave the Baltic Sea, but would be sanctioned by OFAC and/or other agencies should it return. The entire idea is chimeric. Against the threat of sanctions, there is nothing "voluntary" about the proposed insurance reporting scheme, and any verification or inspection mechanism undertaken by a coastal state would constitute a breach of the right of innocent passage or transit. As for OFAC sanctions, the agency in question already has amply used its authority to designate vessels regardless of whether these operate in the Baltic Sea or anywhere else. That should have taught the author that primary sanctions against ships are an ineffective remedy. Instead, what is proposed is to sanction shadow fleet vessels. In reality, a ship belongs to the shadow fleet precisely because it no longer relies on Western financial services providers and therefore will largely be immune to the effects of sanctioning. The author repeatedly refers to insurance verifications carried out by Turkish authorities in December 2022 for vessels transiting the Bosphorus, ignoring the fact that (i) such scheme was in breach of the Montreux Convention, (ii) presumably for that reason, the inspections have been discontinued after a short time, and (iii) no ships have been reported to have been denied transit because of insurance deemed inadequate. Kennedy, C. (2024), *Making the Baltic a Shadow-Free Zone*. Available at https://www.brookings.edu/wp-content/uploads/2024/05/20240528_ES_Sanctions_Kennedy_Final.pdf.

[13] European Parliamentary Research Service (2024), *Russia's Shadow Fleet, Bringing the Threat to Light*. This study references almost exclusively Ukrainian sources. Available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/766242/EPRS_BRI(2024)766242_EN.pdf.

under the guise of insurance checks for tanker vessels,[14] seem eager[15] to close the Danish Straits for Russian oil exports.

II. Right of Transit in Sea Straits: The Legal Framework

UNCLOS. The above mentioned examples of the Dardanelles, the Danish Straits and the Strait of Hormuz show that recognition of the right of transit in sea straits is essential to the security of both the strait state and the states dependent on the strait, just as the denial of such transit right can pose an existential threat to both. Before being codified in the 1982 UN Convention on the Law of the Sea ("UNCLOS"),[16] the right of innocent passage in territorial waters, from which the right of transit through sea straits has been derived as a more specific regime, was already a rule of customary international law.[17]

Part III of UNCLOS regulates straits used for international navigation. Article 38 confirms that in sea straits, *all ships and aircraft enjoy the right of transit passage, which shall not be impeded*. Transit passage is defined in the same article as *the exercise of the freedom of navigation solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or EEZ and another part of the high seas or EEZ*. Pursuant to article 39, ships in transit shall, *inter alia*, "refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait (…) and shall comply with internationally accepted regulations, procedures and practices for safety at sea (…) and for the prevention, reduction and control of pollution from ships." Article 42(1)(b) allows the strait state to regulate transit passage in respect of "the prevention, reduction and

[14] https://www.ft.com/content/8a485a6b-477e-4087-83f4-eca357082d71.

[15] Moreover, in the course of 2025, several Baltic Sea coastal states as well as France have detained vessels carrying Russian oil. However, these detentions have been based on allegations that these ships were involved in illicit activities (as opposed to insufficiency of insurance cover). As these allegations could not be proven, most of the vessels have been released after a short period.

[16] United Nations Convention on the Law of the Sea of 10 December 1982, (1982) 21 ILM 126; 1833 UNTS 3.

[17] Somers E., *Inleiding tot het Internationaal Zeerecht*, Antwerpen 1997, Kluwer Rechtswetenschappen België, p. 302.

control of pollution" from ships. However, the strait state can only do so "by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait." Importantly, article 42(2) provides that any such regulations "shall not discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage."

Part XII of UNCLOS grants coastal states certain rights in respect of the protection and preservation of the marine environment. However, article 233 confirms that this leaves unaffected the legal regime for straits as per Part III. The same article does, however, allow the strait state to take "appropriate enforcement measures" against ships "causing or threatening major damage to the marine environment of the straits" if the ship in question violated law or regulations regarding pollution prevention or the safety of navigation in the strait adopted in accordance with article 42(1).

The 1857 Treaty and the Montreux Convention. Article 35 UNCLOS states that the convention does not affect "the legal regime in straits in which passage is regulated (…) by long-standing international conventions (…)." The 1857 Treaty for the Redemption of the Sound Dues (the "1857 Treaty") and the 1936 Convention Regarding the Regime of the Straits (the "Montreux Convention") are two such conventions, respectively governing the Danish and Dardanelles Straits.

The 1857 Treaty provides that no charges shall be levied on passing ships and that no ship shall, in passing the Sound or the Belts, be subjected to any detention or hindrance. Although the treaty has been concluded between Denmark and a number of European states, Denmark has confirmed the *erga omnes* character of this commitment.[18] The Government of Denmark has taken the position that the right of passage in the straits as per the 1857 Treaty is that of non-suspendable innocent passage as per customary international law rather than the right of transit as per UNCLOS.[19] The right of innocent passage (as codified

[18] Oude Elferink, A. G., "The Regime of Passage through the Danish Straits," *The International Journal of Marine and Coastal Law* Vol. 15, N°4, p. 559.

[19] *Loc. cit.*, pp. 560-562.

by article 19 UNCLOS) is subject to more exceptions than the right of transit, but none of these pertain to absence of IG P&I insurance.[20] Denmark has adopted regulations governing marine traffic in the Straits, which has not caused any controversy. However, the 1857 Treaty does expressly forbid the imposition of compulsory pilotage.

The Montreux Convention provides in articles 1-6 that, in time of peace, merchant vessels shall enjoy complete freedom of transit and navigation in the Straits. The same applies in times of war when Türkiye is not a belligerent party. When Türkiye does consider itself to be threatened by immediate danger of war, navigation is subject to certain restrictions, but merchant vessels continue to enjoy the right of free transit. Transiting vessels can be subject to sanitary controls, but pilotage and towage remain optional. However, since 1994 marine traffic rules have imposed reporting systems and compulsory pilotage for certain vessels.

III. The Impossible Limitation of Transit Rights for the *Shadow Fleet*

Clear wording. The clear wording of UNCLOS, the 1857 Treaty and the Montreux Convention does not allow to deny ships carrying no or insufficient insurance passage through straits, nor even to halt vessels to carry out verification of insurance in place. To the extent that strait states are willing to admit that customary international law as codified by UNCLOS is complementary to the said treaties, potential support for

[20] In a study, the Atlantic Council has suggested that vessels carrying inadequate insurance should not be considered in innocent passage. Such supposition is premised on a misrepresentation of UNCLOS. The author asserts that "[v]essels [in innocent passage] must also obey the laws of the country whose waters they traverse and that those laws include the ship (…) possessing proper insurance." UNCLOS says no such thing and article 19 exhaustively lists what is not innocent passage. The author eventually does concede that it is impossible to impede transit of shadow fleet vessels. However, she attributes this not to the fact that it would constitute a breach of international law, but rather to the fear of Russia's supposed willingness to militarily enforce such transit rights (which would not be a breach of international law). Braw, E. (2024), *Russia's growing dark fleet: Risks for the global maritime order*, ch. V: "Can countries block the dark fleet?" Available at https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/russias-growing-dark-fleet-risks-for-the-global-maritime-order/#can-countries-block-the-dark-fleet.

such measures can be found only in articles 42 and 233, with the latter article however referring back to the former.

Absence of insurance as environmental threat. Article 233 UNCLOS allows enforcement measures against ships which cause or threaten major damage to the environment. The absence or insufficiency of liability insurance does not pose any such threat nor is it evidence of one: shadow fleet vessels do not carry IG P&I insurance because, by definition, they are sub-standard, but because their trading activities subject them to unilateral sanctions. Even if such an argument would be made, it would mean that by applying unilateral sanctions the strait state is itself creating the alleged threat to the environment in order to be able to detain the targeted vessel. The advocates of the insurance-based enforcement do indeed not attempt to hide or deny that their sole purpose is to disrupt Russian oil trade, and they invariably use environmental protection as a convenient pretext. Thus, it is evident that a strait state acting in such a way is not doing so in good faith. The circular reasoning is blatant: the strait state prohibits the vessel to buy what is considered adequate insurance and then halts the vessel because it has not bought adequate insurance. Even when supposing UNCLOS would permit to do so, blocking a ship for this reason would be disproportionate a remedy as the strait state could condition transit on the adherence to a compulsory insurance scheme it deems adequate, which should then be provided on a non-discriminatory basis (see *infra*).

Article 42 UNCLOS and the CLC. Strait states can regulate transit passage in respect of pollution risks under article 42. A breach of obligations by foreign ships exercising their right of passage under this article is a precondition for strait states to take enforcement measures against transiting ships under article 233. However, article 42 cannot serve to impose an insurance obligation because regulations under this article must *give effect to applicable international regulations*, and there is no general obligation on shipowners, neither under UNCLOS nor in customary law, to carry liability insurance, nor is there an obligation under UNCLOS on states to impose insurance on vessels as a condition for flying their flag. Insurance is imposed albeit under certain IMO conventions such as the Wreck Removal Convention,[21] the Maritime

[21] Article 12 of the Nairobi International Convention on the Removal of Wrecks 2007.

Labour Convention,[22] the Bunker Convention,[23] and the Civil Liability Convention (CLC).[24] The latter, in particular, has captured the imagination of the blockade proponents, which is not surprising since it applies to crude oil tankers.[25] The idea seems to be to pass an article 42 regulation imposing verification by the strait state of the shipowner's CLC insurance coverage, and to deny transit when the insurance is deemed inadequate,[26] which it inevitably will be when not provided by an IG P&I Club that, however, is prohibited from offering that service by the strait state itself! Not only would this go against the foundations of national sovereignty by elevating to customary law a convention subject to ratification by individual states, but it would also effectively deny transit passage to ships flying the flag of a country that has chosen not to sign the CLC, which would be a clear breach of article 90 UNCLOS, according to which every state has the right to sail ships flying its flag on the high seas.

Blue cards. In practice, most – if not all – oil tankers calling at Russian ports will carry pollution liability insurance and will fly the flag of CLC-adhering countries. However, a strait state verifying and judging the adequacy of such insurance would be usurping the authority of the flag state to which Article VII CLC confers the authority to issue the certificate attesting that insurance or financial security is in place, as confirmed by a so-called blue card issued by the insurer to cover the vessel's liabilities under the convention. The flag state has sovereign authority to decide which insurers or financial security providers it deems

[22] Regulation 2.5.2, Standard A2.5.2, Regulation 4.2 and Standard A4.2.1 §1(b) of the Maritime Labour Convention 2006.

[23] Article 7 of the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.

[24] Article VII of the International Convention on Civil Liability for Oil Pollution Damage 1969 and 1992.

[25] To be more precise, tankers carrying persistent oil.

[26] As proposed by Danish law firm Gorrissen Federspiel, which claims that UNCLOS article 220 confers to a coastal state inspection and detention rights in respect of compliance with the CLC insurance obligations. Apart from the fact that, as shown above, assuming such power would infringe upon flag state rights, this law firm, claiming to advise ship owners and charterers, seems not to have understood that article 220 does not apply to transit in sea straits; article 233 does, and it is much more restrictive than article 220. See https://gorrissenfederspiel.com/en/passing-through-russian-vessels-in-the-danish-straits/.

sufficiently reliable for issuing the certificate. Flag states not engaged in economic warfare against Russia therefore issue certificates on the basis of blue cards by companies sanctioned by Western states. Though states may refuse entry of vessels in their ports if they deem the security inadequate, it is impossible to see how extending those restrictions to ships in transit or innocent passage would not violate UNCLOS articles 38 and 90.

Non-discrimination. Strait states might take it one step further and try to impose a requirement on passing vessels to secure an insurance bond from a domestic provider covering their environmental liabilities. Under present conditions, this remains a mere aspiration as such a scheme would not find support in UNCLOS and even less so in the 1857 Treaty and the Montreux Convention, which expressly forbid the levying of tolls and dues. However, that doesn't mean that the case cannot be made that strait states *should* have such a right. Especially Türkiye can raise legitimate concerns over the safety of the Bosphorus and the Dardanelles given a long history of marine casualties in these treacherous waters. Guidance can be drawn from the U.S. *Oil Pollution Act*,[27] which requires every vessel calling at U.S. ports to provide a Certificate of Financial Responsibility (COFR) covering pollution liability by a domestic bond provider. Nevertheless, UNCLOS article 42(2) prohibits any regulation in respect of transit to discriminate in form or in fact against any state. Yet, such discrimination is precisely the intent of unilateral sanctions! Consequently, these sanctions cannot have the effect of denying the benefit of a compulsory insurance scheme to certain passing vessels based on their real or perceived affiliation with certain states. No matter how creative "economic warriors" and their propagandists might be in devising virtual naval blockades, they will always encounter a final and unsurmountable hurdle in article 42(2).

Conclusion

Notwithstanding the historic precedents, which have shown that disrespecting vessel transit rights can compromise a state's existential security interests, Western states have sought to impose a virtual naval

[27] Oil Pollution Act of 1990 – Public Law 101-380.

blockade on Russia and other countries by leveraging a reinsurance oligopoly to that end. Nevertheless, the targeted states have managed to keep their trade lanes open by calling on the services of a so-called *shadow fleet* of vessels, though it has come at the cost of decreased liability insurance coverage. In response, the idea has been circulated to deny transit passage in strategic sea straits because of limited insurance coverage. This however contravenes the clear wording of UNCLOS, of the 1857 Treaty, and of the Montreux Convention, which protect any merchant vessel's right of transit and innocent passage. Inadequate insurance does not constitute one of the few exceptions to this basic principle under UNCLOS. Vessel transit rights – or, for that matter, states' rights to sail ships under their flag – are not subject to a requirement that the vessel carry insurance. Specific IMO treaties such as the CLC that do require ships to carry insurance are not customary international law and leave it anyway to the flag state, and not to the strait state, to verify and enforce such an obligation. Any infringement of the right of transit or innocent passage based on the alleged inadequacy of marine liability insurance therefore constitutes a breach of international law.

V

Appendix

Executive Summary

Convened by the International Progress Organization and chaired by Professor Hans Köchler, the Phoenicia Roundtable brought together scholars and practitioners from Australia, Austria, Barbados, Belgium, China, Denmark, France, Germany, Italy, Malta, Norway, Spain, Switzerland, Türkiye, United Kingdom, and the United States of America to examine challenges of maritime governance in the face of global power shifts and mounting competition for ocean resources. Held in memory of Arvid Pardo and Elisabeth Mann Borgese, the two pioneers of the modern law of the sea, the event provided a multidisciplinary platform for critical reflection on the United Nations Convention on the Law of the Sea (UNCLOS) in the context of the dichotomy between national interests and the common good of humanity.

Key themes and objectives

The experts – jurists, diplomats, and maritime law scholars – dealt with problems of marine delimitation, in particular as regards the definition of the continental shelf and the status of islands under UNCLOS; the unilateral assertion of sovereign rights in the high seas; environmental issues of deep sea mining; challenges of sea level rise and threats to marine biodiversity; freedom of navigation in the context of international disputes and conflicts; and problems of maritime arbitration. The discussion also focused on the need to distinguish between disputes concerning territorial sovereignty over islands on the one hand, and conflicts over maritime rights derived from that sovereignty, on the other.

The roundtable further sought to explore the balance between state sovereignty and global responsibility, with discussions highlighting the ethical, legal, and geopolitical dimensions of maritime governance. The primary objectives were to:

- Reassess the balance between national interests and the global commons;
- Revisit the constitutional framework of ocean governance as envisioned under UNCLOS;

- Evaluate emerging challenges including sea-level rise, deep-sea mining, and biodiversity beyond national jurisdiction (BBNJ); and
- Explore cooperative legal and ethical frameworks to preserve ocean sustainability.

In his opening statement, the President of the International Progress Organization, Hans Köchler, highlighted the role of Malta in the development of the modern law of the sea and warned of a new rush for the resources of the ocean that ignores the provisions of the United Nations Convention on the Law of the Sea and challenges the authority of the International Seabed Authority. He also addressed the problem of how to deal with attacks against, or abduction of, civilian, and in particular humanitarian, vessels and their crews in international waters.

Session I – Foundations of Ocean Governance

This session set the intellectual foundation for the conference, recalling the legacy of Elisabeth Mann Borgese and Arvid Pardo.

Dr. Awni Behnam, Honorary President of the International Ocean Institute (Malta) and a former UN Assistant Secretary-General, emphasized the importance of ocean governance that is based on the principle of common heritage of mankind. He underscored the ethical challenges of humanity's exploitation of the ocean, tracing the evolution of ocean governance from ancient Sumerian codes to modern UNCLOS. He cautioned against undermining the normative foundations of UNCLOS and stressed that policies must evolve *within* its spirit to address sustainability and governance deficits.

Professor Bardo Fassbender from the University of St. Gallen (Switzerland) explored Elisabeth Mann's idea of a "Constitution for the Oceans," linking it to modern theories of international constitutionalism. He asked whether UNCLOS can be meaningfully understood as a subset of an international constitutional law and to what extent a constitutionalization of the law of the sea can be regarded as part of Elisabeth Mann Borgese's intellectual legacy.

Dr. Tirza Meyer from the Norwegian University of Science and Technology examined Elisabeth Mann Borgese's role in shaping the law of the sea and highlighted the power of individuals to influence history. She contrasted the constructive efforts of figures like Mann and Pardo with modern unilateralism, emphasizing the fragility of international norms.

Session II – Sovereignty, Conflict, and the Common Heritage

Professor Rauf Versan of Istanbul University (Türkiye) outlined key principles governing maritime delimitation, stressing that legal frameworks must balance geography, equity, and historical claims. He particularly addressed the challenges to the law of the sea that result from the rapid advancement of technology and the increased potential of exploration and exploitation in the area of the high sea.

Professor Stefan Talmon of the Universities of Bonn (Germany) and Oxford (UK) described how islands often fuel international conflicts, noting that in many cases disputes over maritime entitlements rather than territorial sovereignty drive tensions. He argued that UNCLOS offers tools for resolution but not complete remedies, as territorial sovereignty claims are outside its scope.

Dr. Murat Sümer of the Malta-based IMO International Maritime Law Institute of the United Nations discussed questions of treatment of islands in maritime boundary delimitation, showing how international jurisprudence limits the influence of small or remote islands to ensure fair outcomes.

Professor Tullio Scovazzi of the University of Milano-Bicocca (Italy) revisited the principle of "common heritage of humankind," emphasizing its incorporation into the 2023 BBNJ Agreement. He argued that benefit-sharing and environmental stewardship must underpin future governance of marine genetic resources.

Session III – Environmental Change, Resources, and Global Responsibility

Professor Valérie Boré Eveno of the University of Nantes (France) addressed the environmental and, subsequently, legal implications of sea-level rise, arguing for recognition of it as a "common concern of humankind." She suggested that the international community should reinterpret UNCLOS dynamically to preserve maritime rights amid climate change.

Professor David S. Berry of the University of the West Indies (Barbados) examined tensions between marine biodiversity protection and deep-sea resource extraction, particularly in light of the BBNJ Agreement's restrictions on harmful mining activities.

Yuri Parkhomenko, Partner at GBS Disputes law firm in New York (United States), criticized the 2025 U.S. Executive Order on deep-sea mining as a threat to international law and environmental stability, warning of a global "race to the bottom" unless multilateral norms are reaffirmed.

Professor Alina Miron of the University of Angers (France) analyzed the growing threat to undersea cables and pipelines, noting legal gaps in UNCLOS regarding hybrid warfare and acts of sabotage. She called for clearer norms on protecting critical infrastructure.

Session IV – Dispute Resolution, Jurisdiction, and Freedom of the Seas

Professor Chin Leng Lim of the Chinese University of Hong Kong (China) explored dispute settlement under UNCLOS, warning that arbitration can be turned into a form of "lawfare" when states use legal mechanisms strategically rather than cooperatively.

Professor Rebecca Strating of La Trobe University (Australia) reflected on lessons from the Indo-Pacific, noting that UNCLOS has enabled smaller states to assert their rights but remains less effective when confronting great powers. She particularly analyzed the use of dispute resolution mechanisms in the Indian and Pacific Oceans since the entering into force of UNCLOS in 1994.

Professor Kristina Siig of the University of Odense (Denmark) examined new assertions of coastal state jurisdiction in exclusive economic zones, questioning whether expanded national authority undermines the freedom of navigation as a "common good."

Bart Valeer Soens of the Belgian Society of Maritime Law described economic sanctions and subsequent insurance restrictions as forms of "economic warfare" against the freedom of navigation, highlighting risks to the neutrality of straits and the right of innocent passage in particular.

Closing Reflections and Conclusions

The roundtable concluded that the maritime domain is a central arena in which the tension between national sovereignty and collective responsibility is being tested and that the tension between the pursuit of national interests and considerations of the "common good of humanity" – integrating sustainability, equity, and peace as guiding norms, and including the interests of future generations – is one of the major challenges to maritime order in the 21st century.

There was consensus that UNCLOS, though imperfect, remains the cornerstone of maritime order, requiring dynamic interpretation and multilateral commitment.

Research projects and publications of the International Progress Organization on maritime affairs

Le conflit des Malouines

By Eric David (Université libre de Bruxelles, Belgium)
and General Edgardo Mercado Jarrín
(former Prime Minister of Peru)

Studies in International Relations, Vol. IX, 1984

**The Pacific Region:
National Self-determination versus
Superpower Hegemony and Continued Colonization**

Position Paper / I.P.O. Monitoring Group

International Progress Organization, Vienna, 18 October 1987

The Invasion of Panama and International Law

By John Quigley (Ohio State University, United States)

Studies in International Relations, Vol. XVI, 1990

**Kastellorizo:
The Geopolitics of Maritime Boundaries
and the Dysfunctionality of the Law of the Sea**

By Hans Köchler (University of Innsbruck, Austria)

Vienna: International Progress Organization, 2020

About the Contributors

Awni Behnam began his public schooling and cadetship in the United Kingdom (1952-1959). He served as a commanding officer in the Iraqi Navy from 1962 to 1969 and held an executive post in the shipping administration in Iraq (1969-1971). He joined the University of Wales Department of Maritime Studies in 1972 and became a member of the academic staff, lecturing in the Maritime Studies Department. Dr. Behnam holds a first degree in Business Administration (Al-Mustansiriya University, Baghdad), a Masters (MSc) in Development Economics, and a Doctorate (PhD) from the University of Wales (UK). He joined the United Nations at Geneva in 1977 as Economic Affairs Officer and became Assistant to the Director of the Shipping Division of UNCTAD before assuming responsibility as the chief of liaison with the Group of 77. He was promoted to the rank of Director in 1992, as the Secretary of the Trade and Development Board of UNCTAD.

In 1996, Dr. Behnam was appointed Executive Secretary of the Ninth United Nations Conference on Trade and Development. In 2008, he was invited by the UN Secretary-General to assume responsibility as the United Nations Commissioner-General at the World Expo in Shanghai at the level of Assistant Secretary-General. Having left his country of birth in 1972, he became a Swiss citizen in 1994.

Dr. Behnam, since early 1970, was a close friend and personal advisor to Elisabeth Mann Borgese, founder of the International Ocean Institute (IOI). On her departure, he was appointed as the President of the IOI and now serves as its Honorary President.

David S. Berry, PhD (Edinburgh), teaches and practices in the areas of public international law, regional integration law and international commercial arbitration. In his practice he has primarily served govern-

ments and regional and international organizations, including in the roles of deputy agent, counsel or legal adviser in cases before a range of international tribunals, including the Inter-American Court of Human Rights, the Caribbean Court of Justice, and an arbitral tribunal. He has served, *inter alia*, as legal adviser in the negotiations towards an *International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.*

Professor Berry is Fellow of the Chartered Institute of Arbitrators (FCIArb) and is a recipient of the Principal's Award for Excellence (Academic). He served for eight years as Dean of the Faculty of Law of the University of the West Indies, Cave Hill Campus, and for four years as University Dean of Law. He has published in the areas of constitutional law, indigenous rights, law of the sea and legal theory. His book, *Caribbean Integration Law* (Oxford University Press, 2014), is widely cited and used by jurists, practitioners and students across the West Indies.

Valérie Boré Eveno holds a Doctorate in Public Law from Paris 1 Panthéon-Sorbonne University and has been an Associate Professor of International Law at Nantes University (France) since 2006, where she teaches law of the sea and public international law. She is a member of the *Law and Social Change* (DCS) Laboratory at the Faculty of Law and Political Science of Nantes and an associate member of the *Sorbonne Research Institute for International and European Law* (IREDIES) at the Sorbonne Law School. She is also a Member of the International Association of the Law of the Sea (AssIDMer) and of the Board of the French Society for International Law (SFDI). In recent years, she has focused on issues relating to sea-level rise under international law. She edited the book *Élévation du niveau de la mer et droit international* (2022). She was also a member of the "International Law and Sea Level Rise" Committee of the International Law Association from 2020 to 2024 and has been a member of the "Protection of People at Sea" Committee. Lastly, she was an expert advisor of France on the request for an advisory opinion submitted in 2022 to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law.

Bardo Fassbender is emeritus Professor of International Law, European Law and Public Law at the University of St. Gallen, Switzerland. He

holds an LL.M. from Yale Law School and a *doctor iuris* from Humboldt University in Berlin. He was a Ford Foundation Senior Fellow in Public International Law at Yale University and a Jean Monnet Fellow at the European University Institute in Florence. He advised the Legal Counsel and Under-Secretary-General of the United Nations on the subject of "Targeted Sanctions of the UN Security Council and Due Process of Law." Before joining the University of St. Gallen in 2013, he held the chair in international law and human rights law at the Bundeswehr University in Munich (Germany). In the years 2019 and 2020, he was Vice Dean, and in 2021 and 2022 Dean of the Law School of the University of St. Gallen. His principal fields of research are public international law, United Nations law, comparative constitutional law and theory, and the history of international and constitutional law. His books include "UN Security Council and the Right of Veto: A Constitutional Perspective" (Kluwer Law International, 1998) and "The United Nations Charter as the Constitution of the International Community" (Martinus Nijhoff, 2009). He is co-editor of the series *"Studien zur Geschichte des Völkerrechts"* (Studies in the History of International Law, Nomos).

Hans Köchler is a graduate in philosophy *sub auspiciis praesidentis rei publicae* (the highest academic honors in Austria) and University Professor emeritus of Philosophy at the University of Innsbruck, having previously chaired the Department of Philosophy. He founded and presides over the International Progress Organization, an NGO in consultative status with the United Nations, and served as an international observer at the Scottish Court in the Netherlands ("Lockerbie Trial"), nominated by UN Secretary-General Kofi Annan. Köchler has published extensively on political and legal philosophy (e.g., "Global Justice or Global Revenge?" Springer, 2004), international relations and the UN, conflict resolution, cultural hermeneutics, and intercultural dialogue. He edits the book series "Studies in International Relations" and serves on the editorial boards of journals such as "Culture and Dialogue," "Open Philosophy," and "Indian Yearbook of International Law and Policy." Köchler has received numerous honors including an Honorary Professorship from Pamukkale University in Türkiye, honorary doctor degrees from Mindanao State University (Philippines) and Armenian State Pedagogical University, and awards like the Apostle of International Understanding medal (India), the Honorary Medal of the International Peace Bureau (Geneva), and the Gusi Peace Prize.

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Tirza Meyer holds a PhD from the Norwegian University of Science and Technology (NTNU), Trondheim, with a thesis on "Elisabeth Mann Borgese – Deep Ideology," and a B.A. in History and Philosophy from *Christian-Albrechts-Universität zu Kiel* (CAU), Germany. She was visiting scholar at the University of New South Wales (UNSW), Faculty of Law, in Sydney, Australia (2016), at the Oslo School of Environmental Humanities (OSEH) (2020-2023), and at the Fridtjof Nansen Institute, Oslo (2023-2024). Since 2022, she has been a Reference Group Member at the Norwegian delegation to the International Seabed Authority. She also serves as Guest Lecturer at the KTH Royal Institute of Technology and Stockholm University and participated in projects such as *The Mediated Planet: Claiming Data for Environmental SDGs* (FORMAS) (2021-2024) and *The High Seas and the Deep Oceans: Representation, Resources and Regulatory Governance* (3ROceans) (2016-2020). From 2019 to 2021 she was Postdoctoral Researcher at NTNU for the H*AV-ANSVAR Blue Humanities Initiative – NTNU Oceans Project*: "Humanoid Oceans – or an Ocean of Humanoids?"

Yuri Parkhomenko is a Partner at Gaillard Banifatemi Shelbaya Disputes (New York, USA). He is a graduate of Harvard Law School (LL.M., 2009), of The Fletcher School of Law and Diplomacy (MA in Law and Diplomacy, 2008), of Lund University Law School (MA, Public International Law, 2000), and of Ivan Franko National University of Lviv (Diploma in Public International Law, with honors, 1998). From 1998 to 2006, he was a member of Ukraine's Foreign Service, with assignments as Legal Advisor at the Embassy of Ukraine in the United States (2001-2006) and as Attorney-adviser at the Department of International Law of the Ministry of Foreign Affairs of Ukraine (1998-2001).

He represents States in their disputes with other States or foreign investors, advises governments on a wide range of international law issues, including the law of the sea, treaty law, international human rights, humanitarian law, sovereign immunity, conclusion and implementation of investment protection treaties, State succession, transboundary harm, sharing of resources, international watercourses, sovereignty and boundary disputes, and reparation. His experience includes, *inter alia*, cases before the International Court of Justice and International Tribunal for the Law of the Sea. He is a recipient of the Award for Outstanding Service (Ministry of Foreign Affairs of Ukraine, 2005) and was George B. and Helen J. Hargens Scholar at the Fletcher School of Law and Diplomacy (2006-2008).

Tullio Scovazzi was professor of international law at the Universities of Parma, Genoa, Milan and Milan-Bicocca, Italy. He taught courses at The Hague Academy of International Law and at the Academy of European Law (Florence), and was, *inter alia*, visiting professor at the universities of Brest, Paris I and Nice. He occasionally acted as legal expert of Italy or international secretariats in negotiations and meetings relating to the law of the sea, the environment, cultural properties and human rights. He is a member of the *Institut de Droit International*.

Prof. Scovazzi is the author or editor of numerous books and articles, especially in the fields of international law of the sea, international environmental law, and cultural law; e.g., *The Evolution of International Law of the Sea: New Issues, New Challenges* (Hague Academy of International Law, Recueil des Cours, vol. 286, 2000); Francioni & Scovazzi (eds.), *International Responsibility for Environmental Harm* (1991); Garabello & Scovazzi (eds.), *The Protection of the Underwater Cultural*

Heritage – Before and after the 2001 UNESCO Convention (2003). He was awarded the *Ordine al Merito della Repubblica Italiana* in the rank of *Commendatore* (2000) and a *honoris causa* degree by the Universidad Tecnológica del Perú, Lima (2009). He is a *Chevalier* of the *Ordre de Saint Charles*, Monaco.

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Prof. Siig serves as Coordinator for the *Blue SDU interdisciplinary research network* at SDU. From 2021 to 2024, she was Head of the *Scandinavian Star Task Force* (creating investigation design across employees with different backgrounds and competencies and handling external communications and political pressures). She is a member of the Academic Council at the SDU Faculty of Business and Social Science, a referee at the Scandinavian Institute of Maritime Law Yearly, and served on the Board of Editors of *Mercator* (an interdisciplinary maritime journal, discontinued in 2014) and Editor-in-chief of the Scandinavian Institute of Maritime Law Yearly.

Bart Valeer Soens is an Independent Legal & Insurance Consultant. He holds degrees from the University of Ghent (Master in Law, 2002, and Master in Maritime Science, 2003) and EHSAL Management School in Brussels (Master in Corporate Finance, post-graduate program). As marine consultant to ship owners and marine insurance brokers he focuses on drafting and negotiating charter parties, handling, adjusting, introducing and negotiating marine insurance claims, and managing contentious cases and contract disputes on behalf of ship owners.

Mr. Soens serves as guest lecturer on maritime law and marine insurance at the University of Antwerp, co-drafts a practitioner's handbook on maritime law (focusing on contracts of carriage, charter parties, casualties at sea, marine insurance, war risks, crewing and shipping intermediaries). He gave lectures at seminars and conferences on the Northern Sea Route, sustainable development, and the geo-economy of

marine insurance. He provides regular briefs to a selection of academics and analysts on geo-economic topics, with particular focus on the Red Sea and West Asia.

Rebecca Strating is Professor of International Relations at the School of Humanities and Social Sciences of La Trobe University, Melbourne, Australia, and Director of *La Trobe Asia*. She is also an Affiliate Expert at the National Security College of Australian National University (ANU). She obtained a PhD (Politics) and a BA (Journalism) from Monash University. Among her major publications are the books: *Blue Security in the Indo-Pacific*, Routledge (co-edited with I. Hall and T. Lee-Brown); *Girt by Sea: Re-imagining Australia's Security*, La Trobe University Press (with J. Wallis); *Australia on the World Stage*, Routledge (co-edited with B. Jones and B. Brooklyn), and journal articles such as: "Human rights at sea: The limits of inter-state cooperation in addressing forced labour on fishing vessels" (2023); "The 'Rules-based Order' as Rhetorical Entrapment: Comparing Maritime Dispute Resolution in the Indo-Pacific" (2024); "Norm contestation and the South China Sea: A regional power approach to defending maritime norms," *The Pacific Review* (2022); and "Strategic Competition in Oceania" (2022).

Prof. Strating is the winner (2023) of the *Bernard Brodie Award* (best article in Contemporary Security Policy) and of the recognition for *Research Excellence in Engagement and Impact* (School of Humanities and Social Sciences, La Trobe University).

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Dr. Sümer lectures on the public aspects of international maritime law and has coordinated IMLI's Course on the Peaceful Settlement of Maritime Disputes and the Delimitation of Maritime Boundaries since 2022. He has also served as a visiting fellow at several distinguished universities. Prior to his academic career, he served as a career diplomat from 2008 to 2019. He has published extensively on the public aspects of international maritime law. Dr. Sümer also serves on the Editorial

Board of *Peace & Security – Paix et Sécurité Internationales* (Euro-Mediterranean Journal of International Law and International Relations), published by the University of Cádiz in Spain.

Stefan Talmon is Professor of Public Law, Public International Law and European Union Law, and Director at the Institute for Public International Law at the University of Bonn, Germany. He is also a Supernumerary Fellow of St. Anne's College, Oxford, UK. Prior to taking up the chair in Bonn, he was Professor of Public International Law at the University of Oxford, where he also held visiting fellowships at All Souls College and Christ Church. Professor Talmon is the general editor of GPIL – German Practice in International Law (https://gpil.jura.uni-bonn.de). He practices as a Barrister from Twenty Essex, London, and frequently advises on questions of public international law. He has appeared as counsel and expert before the International Court of Justice, the European Court of Human Rights and international arbitral tribunals as well as domestic courts in England, Germany and the United States of America.

Rauf Versan is emeritus Professor of International Law at the Faculty of Political Science of Istanbul University, Türkiye. A graduate from the Law Faculty of Istanbul University, he undertook postgraduate studies in international law at Downing College, University of Cambridge, UK (LL.B., 1978; PhD, 1986). He served as Research Fellow at the Law Faculty of Heidelberg University and concurrently at the Max Planck Institute for Comparative Public Law and International Law at Heidelberg, Germany (1984-1985). Prof. Versan was Lecturer (1986-1993), *Privat-Dozent* (Associate Professor) (1993-2001), and Professor (2001-2021) at the Faculty of Political Science of Istanbul University. He served as *ad hoc* judge at the European Court of Human Rights (2007-2008) and as member of the Board of Trustees of the Turkish Education Foundation.

Juan Luis Suárez de Vivero is a Merchant Navy Officer and Emeritus Professor of Human Geography at the University of Seville, Spain. His research activity has focused on the geographical consequences of the United Nations Convention on the Law of the Sea, maritime policy and coastal-marine management. He is the author of more than one hundred academic publications in books and international journals (on topics such as Marine Policy, Ocean and Coastal Management, *Soci-*

ologia Ruralis, and Geopolitics). He is the author (with Juan Carlos Rodríguez Mateos) of the *Atlas of the European Seas and Oceans: Marine jurisdictions, sea uses and governance* (2007). Prof. de Vivero also has served as consultant for national and international organizations (European Parliament, European Commission, Mediterranean Action Plan, Inter-American Development Bank, IOC-UNESCO).

List of Acronyms

ABMT	Area-Based Management Tool
ABNJ	Areas Beyond National Jurisdiction
ADIZ	Air Defense Identification Zone
AFP	*Agence France-Press*
AG	*Aktiengesellschaft*
AIS	Automatic Identification System
ANU	Australian National University
AP	Associated Press
AOSIS	Alliance of Small Island States
APEI	Area of Particular Environmental Interest
ASEAN	Association of Southeast Asian Nations
ASIL	American Society of International Law
AssIDMer	*Association Internationale du Droit de la Mer* (International Association for the Law of the Sea, France)
AT	Antitrust
AXA XL	maritime insurance branch of French insurance company AXA
BBC	British Broadcasting Corporation
BBNJ	Biological Diversity in Areas beyond National Jurisdiction
BCS	Booster Compressor Station (East-West Interlink [gas pipeline])
BOS	Big Ocean States
CAU	*Christian-Albrechts Universität zu Kiel* (Germany)
CCZ	Clarion-Clipperton Zone
CLC	Civil Liability Convention (International Convention on Civil Liability for Oil Pollution Damage)
CLCS	Commission on the Limits of the Continental Shelf
CML	Chinese Mission Letter (UN)
CNRS	*Centre national de la recherche scientifique* (France)
CoC	Code of Conduct
COFR	Certificate of Financial Responsibility (U.S.)
COP	Conference of the Parties

COP26	Conference of the Parties (26th Session) (United Nations Framework Convention on Climate Change – UNFCCC)
CRP	Conference Room Paper
CS	continental shelf
CUP	Cambridge University Press
C-24	Committee of 24 ("Special Committee on Decolonization" – UN)
DCS	*Droit et Changement Social*
DEHUKAMDER	DEHUKAM Journal of the Sea and Maritime Law (Türkiye)
DR	Danmarks Radio
DOALOS	Division for Ocean Affairs and the Law of the Sea (UN)
DSHMRA	Deep Seabed Hard Mineral Resources Act (U.S.)
DSI	Digital Sequence Information
DSM	Deep Sea Mining
EBM	Elisabeth Mann Borgese
ECS	extended continental shelf
EEZ	Exclusive Economic Zone
EHSAL	*Economische Hogeschool Sint-Aloysius* (Saint Aloysius School of Economics, Brussels)
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
EJIL	European Journal of International Law
EO	Executive Order (U.S.)
EU	European Union
FAO	Food and Agriculture Organization (UN)
FCIArb	Fellow of the Chartered Institute of Arbitrators
FONOP	Freedom of Navigation Operation
FORMAS	*Forskningsrådet För Miljö, Areella Näringar Och Samhällsbyggande* (The Research Council for Environment, Agricultural Sciences and Spatial Planning, Sweden)
GBS	Gaillard Banifatemi Shelbaya Disputes (law firm, New York)
GDP	Gross Domestic Product
GNI	Gross National Income
GPIL	German Practice in International Law (Journal)
G77	The Group of 77

HAVANSVAR	"Ocean Responsibility" (Research project, "The Legal and Moral Responsibility for the Ocean," Norway)
HQ	headquarters
ICC	International Criminal Court
ICJ	International Court of Justice
ICNT	Informal Composite Negotiating Text
ICP	Informal Consultative Process (on Oceans and the Law of the Sea) [earlier: UNICPOLOS]
ICS	Institute for Contemporary Studies
IG	International Group
IG P&I	The International Group of P&I (Protection and Indemnity) Clubs
IHO	International Hydrographic Organization
IISD	International Institute for Sustainable Development
ILA	International Law Association
ILC	International Law Commission (UN)
ILM	International Legal Materials
ILO	International Labour Organization
IMLI	International Maritime Law Institute (IMO)
IMO	International Maritime Organization (UN)
IOC	Intergovernmental Oceanic Commission (UNESCO)
IOF	Institute for the Oceans and Fisheries
IOI	International Ocean Institute
IPO	International Progress Organization
IREDIES	*Institut de Recherche en Droit International et Européen de la Sorbonne*
ISA / ISBA	International Seabed Authority
ITLOS	International Tribunal for the Law of the Sea
ITQ	Individual Transferable Quota
IUU	Illegal, Unreported, and Unregulated (Fishing)
JIL	Journal of International Law
KPR	Kyushu-Palau Ridge Region
KTH	*Kungliga Tekniska högskolan* (KTH Royal Institute of Technology, Stockholm)
LLC (1)	Landlocked Countries
LLC (2)	Limited Liability Company
LNG	liquefied natural gas
LOS (1)	Law of the Sea
LOS (2)	Large Ocean States
LOSC	Law of the Sea Convention

LTC	Legal and Technical Commission
LTE	Low-Tide Elevation
MDG	Millennium Development Goals
MGR	Marine Genetic Resources
MINCOMAR	Ministerial Conference on Maritime Transport of West and Central African States
MN	Margin Number/Marginal Number
MOU	Memorandum of Understanding
MPA	Marine Protected Area
MS	Manuscript Series (Elisabeth Mann Borgese Archive)
MUN	Mission of the Republic of the Union of Myanmar (UN)
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
NIEO	New International Economic Order
nm	nautical mile
NOAA	National Oceanic and Atmospheric Administration (U.S.)
NTNU	*Norgens teknisk-naturvitenskapellige universitet* (Norwegian University of Science and Technology)
OFAC	Office of Foreign Assets Control (U.S.)
OSEH	Oslo School of Environmental Humanities
PBS	Public Broadcasting Service (U.S.)
P&C	Property & Casualty
PCA	Permanent Court of Arbitration
PEI	Prince Edward Island
PET	Danish Security and Intelligence Service
PH	Philippines, Republic of the
P&I	Protection and Indemnity
PIM	*Pacem in Maribus* (Conferences)
PJSC	Public Joint Stock Company
PR	Personal Records (Elisabeth Mann Borgese Archive)
PRC	People's Republic of China
PSSA	Particularly Sensitive Sea Area
REMP	Regional Environmental Management Plan
RIAA	Reports of International Arbitral Awards
Rio 1	"Rio Conference" / "Earth Summit" (United Nations Conference on Environment and Development, 1992)
Rio +10	The World Summit on Sustainable Development (2002)

Rio +20	United Nations Conference on Sustainable Development (UNCSD) (2012)
SAR	Search and Rescue
SC	Security Council (UN)
SDG	Sustainable Development Goals
SDU	University of Southern Denmark
SEA	Strategic Environmental Assessment
SFDI	*Societé Française pour le Droit International* (French Society for International Law)
SIDS	Small Island Developing States
SNT	Single Negotiating Text
TMC	The Metals Company (Canada)
TNI	Transnational Institute
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS (1)	United Nations Conference on the Law of the Sea
UNCLOS (2)	United Nations Convention on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNDOALOS	United Nations Division for Ocean Affairs and the Law of the Sea
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNICPOLOS	United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea
UNIDROIT	*Institut international pour l'unification du droit privé* (International Institute for the Unification of Private Law, Rome)
UNSC	United Nations Security Council
UNSW	University of New South Wales (UK)
UNTS	United Nations Treaty Series
U.S. / USA	United States of America

U.S.C.	United States Code
USD	United States Dollar
USS	United States Ship
VCLT	Vienna Convention on the Law of Treaties
VerfBlog	*Verfassungsblog* (Germany)
VOA	Voice of America
WANA (1)	West Asia and North Africa
WANA (2)	West Asia News Agency
WMO	World Meteorological Organization
WSJ	Wall Street Journal
WTO	World Trade Organization
3ROceans	The 3 Rs of the Oceans (Representation – Resources – Regulatory Governance)

Index of Names