ISSN 2464-9724

Maritime Safety and Security Law Journal

2015
Issue 1

Maritime Safety and Security Law Journal

Editorial Assistants

COST EUROPEAN COOPERATION IN SCIENCE AND TECHNOLOGY

COST is supported by EU Framework Programme Horizon 2020

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Maritime Safety and Security Law Journal

A Word from the Editor-in-Chief

The idea of launching a peer-reviewed journal on specific issues related to maritime security and safety was developed within the framework of Cost Action IS1105 MARSAFENET. This network, founded in 2012, brings together international scholars and experts working on legal aspects of maritime safety and security.

The aim of the Maritime Safety and Security Law Journal (MarSafeLaw Journal) is to highlight the most recent and relevant developments in the field of maritime safety and security without necessarily adopting a clear and definitive distinction between these two concepts. It is not always beneficial to distinguish between safety and security in the maritime domain, where an integrated approach that takes into account all kind of activities and their impact on humans and the planet is necessary. Moreover, many languages (such as Italian and Spanish) use the same term to denote what in English is referred to as safety or security. Hence, the title of the journal embraces both concepts with the aim of covering a wide range of issues and to accommodate a broad array of research interests, focusing on the legal aspects and analysis of maritime safety and security, yet not excluding the possibility to enrich it with new perspectives and approaches stemming from other disciplines.

The contributions to the MarSafeLaw Journal were acquired through invitations and a call for papers. This dual approach to soliciting articles ensures the involvement of established scholars as well as early career researchers. The main idea is to offer a space where different backgrounds, opinions and points of view can be accepted and coexist, limited only by the requirement of a superior scientific standard. Indeed, the MarSafeLaw Journal strives to offer open-access articles of a high scientific quality, which is ensured through a system of double-blind peer-review.

The publication of the first issue of the MarSafeLaw Journal was only made possible due the ardent and fruitful cooperation of its enthusiast Editors (in alphabetical order: Claudia Cinelli, Kamrul Hossain, Kiara Neri and Anna Petrig) – who, through their effort, dedication and vision, have enabled what was once just an ambitious idea to become a reality. I would also like to thank the Editorial Assistant, Maria Orchard, the members of the Scientific Board and the external (anonymous) reviewers for their professional and unconditional support and their generous assistance.

The ambition is now to continue publishing this journal for many years to come, even after the Cost Action MARSAFENET comes to an end.

Gemma Andreone
Editor-in-Chief

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South China Sea Tension on Fire: China's Recent Moves on Building Artificial Islands in Troubled Waters and Their Implications on Maritime Law

Yi-Hsuan CHEN[1]

Abstract

In recent years, China has created artificial islands (or 'large constructions') on several reefs located in the South China Sea, which the adjacent states also claim sovereignty over. Such acts have thus been regarded as a significant move by China to further expand its power and influence in this area and have again raised tensions in the South China Sea region. This article aims to analyse the implications of these artificial islands under the United Nations Convention on the Law of the Sea (UNCLOS). Firstly, an overview of the main artificial islands in the world will be conducted. Secondly, the author will examine the relevant provisions within the context of UNCLOS. Then, a case study concerning China's recent construction of large artificial islands will be carried out, followed by analysis of this action under the UNCLOS. Finally, given that the UNCLOS remains silent on the definition of an artificial island, the application of relevant provisions could turn out to be confusing and disconnected. Hence, the author suggests that either a specific amendment should be made to the UNCLOS, or a code of conduct should be concluded in order to settle the disputes arising in this region.

Keywords

South China Sea, UNCLOS, artificial island, China, Nansha Islands, maritime code of conduct

1. Introduction

Since 2014, China has been creating artificial islands atop several reefs in the Nansha Islands (Spratly Archipelago) located in the South China Sea, which the Philippines, Vietnam, Malaysia, Brunei and Taiwan also claim sovereignty over. Recently, a satellite image showed that China has been building a runway on the Yongshu Island (Fiery Cross Reef), which could serve both military and civilian purposes and which is assumed to be part of China's plan to land military aircrafts in the area. Such acts have thus been regarded as a significant move by China to further expand its power and influence in this area, which has again raised tensions in the South China Sea region.

1 Yi-Hsuan Chen, Soochow University, Taiwan, LL.M. The author would like to thank Professor Wan-Chun Ho and the reviewers of this journal for their kind advice while drafting this article. The author can be reached at yishuan915@gmail.com. This article reflects the law, jurisprudence and doctrine in place as of May 2015.

This article therefore endeavours to analyse the implications of these artificial islands under the United Nations Convention on the Law of the Sea (UNCLOS).[2] In the first section of this article, the basic concept of an artificial island will be briefly introduced, followed by an overview of the existing artificial islands worldwide. Secondly, the author will examine the relevant provisions within the context of the UNCLOS. Subsequently, a case study concerning China's recent construction of large artificial islands and facilities on top of the reefs will be carried out, followed by an analysis of this action under the UNCLOS. Finally, owing to the fact that the UNCLOS remains silent on the definition of an artificial island, the author will conclude by offering observations and providing possible solutions, specifically on the case of the South China Sea.

2. Basic concept of artificial islands

Artificial islands are man-made 'constructions created by man's dumping of natural substances like sand, rocks and gravel',[3] rather than those formed by Mother Nature. They are surrounded by water and remain above sea level during high tide.[4] The functions of such islands could vary from deep-water ports or airports to the housing of nuclear power plants.[5] In addition, some artificial islands have been built to isolate certain groups of people, while others were constructed to mitigate coastal erosion and the rise of sea levels resulting from global warming.[6] More recently, given that the oceans contain abundant resources that humans need, states have begun to construct artificial islands as a way of extending their land territory into the sea in order to gain easy access to such resources.[7]

While the construction of artificial islands has certain advantages, such as an increase in land area and to satisfy the needs of human activities, such acts still have drawbacks. The creation of these islands not only results in high expenses[8] but could lead to serious marine environmental damage[9] and

2 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

3 Alfred H A Soons, 'Artificial Islands and Installations in International Law' (1974) Occasional Paper Series 22, University of Rhode Island Law of the Sea Institute, 3 <https://repositories.tdl.org/tamug-ir/handle/1969.3/27383> accessed 25 July 2015.

4 Bahman Aghai Diba, 'Legal Regime of the Artificial Islands in the Persian Gulf' (*Payvand Iran News*, 9 July 2009) <http://payvand.com/news/09/sep/1071.html> accessed 21 May 2015.

5 Soons (n 3) 1.

6 Fabrizio Bozzato, 'Dryland: Artificial Islands as New Oceanscapes' (2013) 17 Journal of Futures Studies 1, 2-5.

7 Nikos Papadakis, 'Artificial Island in International Law' (1975) 3 Maritime Studies and Management 33, 33.

8 Sigurdur Sigurdarson and others, 'Icelandic-Type Berm Breakwater for the Hambantota Artificial Island Revetment, Application of Geometrical Design Rules' (2014) 34 Coastal Engineering Proceedings 1, 4.

9 Huakun Yan and others, 'Simulation of Different Sea-Crossing Traffic Route Structures' Effects on the Marine Environment for the Dalian Large-Scale Offshore Airport Island' (2014) 52 Journal of Hydraulic Research 583, 596.

the destruction of the ecosystem.[10] Additionally, it is of great concern that land subsidence and soil liquefaction could occur during earthquakes.[11]

To date, there are numerous artificial islands in existence worldwide, including the Flevopolder, which was built by the Netherlands and is currently the largest.[12] Moreover, other European countries, such as Austria, Germany, Denmark, France and the United Kingdom, and Asian countries, such as Japan, Singapore and Malaysia, as well as the United States, have also constructed artificial islands to serve different purposes, mainly for the reclamation of land, the creation of floating cities and other forms of infrastructure, the exploitation of natural resources, scientific research, tourism, immigration centres for the purpose of combating diseases or to cope with hydrological natural disasters.[13]

3. 'Artificial island-relevant' provisions within the context of the UNCLOS

While going through the content of the UNCLOS, one could find several provisions containing the term 'artificial islands'. Yet the UNLCOS does not explicitly define the specific meaning and legal status of the term.[14] Therefore, in this section, the relevant provisions concerning artificial islands will be discussed.[15]

3.1 'Islands' under the UNCLOS

Throughout history, artificial islands have, from time to time, been treated as natural islands if they meet certain conditions, including 'formulations surrounded by water', 'remaining permanently above the surface at high tide' and 'the competence for human to inhabit'.[16] However, Article 121(1)

10 'Land Reclamation: The Advantages and Disadvantages' (14 September 2013) <www.zulkarnainazis.com/2013/09/land-reclamation-advantages-and.html> accessed 3 July 2015.

11 ibid.

12 Erik Lacitis, 'Decades of Toxic Waste Dredged from the Duwamish' (*The Seattle Times*, 22 March 2014) <www.seattletimes.com/seattle-news/decades-of-toxic-waste-dredged-from-the-duwamish/> accessed 21 May 2015.

13 New World Encyclopedia, 'Artificial Island' <www.newworldencyclopedia.org/entry/Artificial_island> accessed 3 July 2015; Grigoris Tsaltas, Tilemachos Bourtzis and Gerasimos Makis Rodotheatos, 'Artificial Islands and Structures as a Means of Safeguarding State Sovereignty against Sea Level Rise: A Law of the Sea Perspective' (6th ABLOS Conference "Contentious Issues in UNCLOS – Surely Not?", Monaco, October 2010).

14 Florentina Moise, 'Islands and Their Capacity to Generate Maritime Zones: Case Law Romania V. Ukraine' (2008) <www.duo.uio.no/bitstream/handle/10852/22760/template_thesis.pdf?sequence=1> accessed 6 July 2015.

15 In fact, the term 'artificial islands' could also include other artificial installations and constructions. However, the discussion in this article mainly focuses on artificial islands *per se*.

16 Keyuan Zou, 'The Impact of Artificial Islands on Territorial Disputes over the Sparatly Islands' (*East Sea/ South China Sea Studies*, 21 July 2011) <http://nghiencuubiendong.vn/en/conferences-and-seminars-/second-international-workshop/597-the-impact-of-artificial-islands-on-territorial-disputes-over-the-sparatly-islands-by-zou-keyuan> accessed 22 May 2015.

UNCLOS stipulates that: 'An island is a naturally formed area of land, surrounded by water, which is above water at high tide.' In light of this provision, several conditions should be considered in the determination of 'islands' in a legal sense. Firstly, an 'island' should constitute an 'area of land', which should further meet two elements: (1) 'an insular feature must be attached to the seabed', and (2) 'it must have the nature of *terra firma*'.[17] Moreover, there is also no criterion regarding the size of an island in Article 121, and this has been reaffirmed by the International Court of Justice (ICJ) in the *Qatar v Bahrain* case.[18] Secondly, an island must be surrounded by water. Finally, referring to Article 121(1), an island should be 'naturally formed' and 'above water at high tide'. Despite the fact that the provision does not explain to what extent a land above water at high tide could be seen as an island, it could probably be inferred that the provision intended to exclude islands that are completely man-made and those that would be submerged by the ocean during high tide (also known as 'low-tide elevations') from being able to obtain the legal status of islands under the Convention. In fact, Articles 60(8) and 80 UNCLOS further prescribe that an artificial island constructed in the Exclusive Economic Zone (EEZ) or on the continental shelf 'does not possess the status of [an] island'. Additionally, as compared to the islands specified in Articles 10(2) and 121(2), which could be used as a base point to measure sea zones, artificial islands within the context of Article 60(8) 'have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf'. The wording of the above-mentioned provisions thus supports such an argument.

On the other hand, it is highly debated whether the legal status of islands should be decided according to the factors provided for in Article 121(3),[19] as the provision does not expressly state what a 'rock' is, nor does it identify the differentiating line between 'rocks' and 'other types of islands'.[20] Consequently, the relationship between Article 121(1)-(2) and Article 121(3) has become questionable: should Article 121(3) be read in conjunction with the previous two paragraphs? Are 'rocks' in Article 121(3) a sub-category of islands or are they an exception to the regime of islands set out in paragraphs 1 and 2?[21]

Further, the vague relationship between rocks and islands also brings into question whether an island should meet the 'socio-economic' requirements provided for in paragraph 3, not to mention that the wording of Article 121(3) *per se* does not clarify whether the concept of 'economic life' should be of a productive or commercial nature only,[22] or whether the phrase 'of their own' should be strictly interpreted as 'a State could not create necessary conditions by injecting an artificial econom-

17 Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press 2012) 63.

18 See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain Case (Qatar v Bahrain)* (Merits) [2001] ICJ Rep 97.

19 UNCLOS, art 121(3) provides that: 'Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.'

20 Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea* (Manchester University Press 1999) 50.

21 See Tanaka (n 17) 66.

22 ibid.

ic life, based on resources from its other land territory',[23] for this would appear to contradict with the precedent of Jan Mayen.[24]

3.2 The legality of constructing artificial islands in different maritime zones

As is set out in Article 11 UNCLOS,[25] artificial islands do not qualify for permanent harbour works. This suggests that coastal states are not entitled to claim the rights associated with the permanent harbour works in the determination of the baseline and measurement of maritime zones when it comes to artificial islands. Besides, the UNCLOS still contains other provisions that are applicable to artificial islands. Hence, in the following content, the permissibility of building artificial islands in different maritime zones will be examined.

3.2.1 Internal waters and territorial seas

Since the sovereignty of a coastal state extends to its internal waters and territorial seas,[26] the state reserves the right to construct an artificial island in these areas. However, exceptions to the right of innocent passage enjoyed by other coastal states or land-locked states could be claimed if: (1) 'the establishment of straight baselines has the effect of enclosing as internal waters areas which had not previously been considered as such',[27] or (2) in the case of territorial seas.[28] Therefore, when an artificial island is to be built, other states' rights of navigation should be taken into consideration. However, this is not to suggest that these types of islands cannot be constructed in regions that foreign ships sail through on a regular basis. If (1) there is 'no alternative site for their location and if the benefits resulting from the construction of the island ... in that particular area outweigh the inconvenience it causes to navigation',[29] (2) such siting does not 'cause injury in or to the territory of other States',[30] or (3) as long as it does not infringe the use of the contiguous zones and the adjoining territorial sea of another state,[31] the construction would be permissible.

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23 Derek William Bowett, *The Legal Regime of Islands in International Law* (Oceana Pubn 1978) 34.

24 See Tanaka (n 17) 67.

25 UNCLOS, art 11 provides that: 'For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast. Off-shore installations and artificial islands shall not be considered as permanent harbour works.'

26 UNCLOS, art 2(1) provides that: 'The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.' Art 2(3) further provides that: 'The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.'

27 UNCLOS, art 8(2).

28 UNCLOS, art 17.

29 Nilkos Papadakis, *The International Legal Regime of Artificial Islands* (Brill Archive 1977) 4.

30 ibid 5.

31 ibid.

3.2.2 The Exclusive Economic Zone (EEZ)

Article 56(1)(b)(i) UNCLOS entitles coastal states to exercise jurisdiction to establish and use artificial islands. Article 60(1)(a) and (2) further elaborates that a state owns the exclusive right 'to construct and to authorize and regulate the construction, operation and use of' and enjoys 'exclusive jurisdiction over'[32] artificial islands, and these provisions aim to ensure the comprehensive establishment of regulatory authority of coastal states.[33] Moreover, coastal states have the discretion to establish safety zones, which all ships must respect,[34] around the artificial islands and such zones should conform to international standards.[35] Yet the interests of other states, for instance rights of navigation, should be taken into account by a number of safeguards pursuant to the same Article.[36] Last but not least, as mentioned above, artificial islands do not have territorial seas, nor do they have any impact on maritime delimitation.[37]

3.2.3 Continental shelf

Basically, a coastal state is allowed to exercise its sovereign rights over its continental shelf for exploration and exploitation purposes.[38] With regard to artificial islands built in such zones, the UNCLOS reemphasised the rationale delivered in Article 5(4) Continental Shelf Convention.[39] As a result, by making Article 60 UNCLOS *mutatis mutandis* applicable to Article 80 UNCLOS, artificial islands constructed on the continental shelf are not granted territorial seas, nor do such islands affect the delimitation of the maritime zones.

3.2.4 High seas and 'the Area'

Although the UNCLOS recognises the construction of artificial islands in such zones as a freedom of the high seas,[40] the Convention prohibits states from subjecting 'any part of the high seas to [their]

32 Including jurisdiction in terms of customs, fiscal, health, safety and immigration laws and regulations: UNCLOS, art 60(2).

33 Erik Jaap Molenaar, 'Airports at Sea: International Legal Implications' (1999) 14 The International Journal of Marine and Coastal Law 371, 375.

34 UNCLOS, art 60(6).

35 UNCLOS, art 60(4)-(5).

36 UNCLOS, art 60(3) and (7).

37 UNCLOS, art 60(8).

38 UNCLOS, art 77(1).

39 Convention on the Continental Shelf (adopted 29 April 1958, entered into force 10 June 1964) 499 UNTS 311; art 5(4) of the Convention on the Continental Shelf provides that installations and devices that are under the jurisdiction of a coastal State 'do not possess the status of islands, they have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea of the coastal State.'

40 UNCLOS, art 87(1)(d).

sovereignty',[41] and thus denies any claims on maritime zones stemming from such islands.[42] This principle is also applicable to the International Sea Bed Area,[43] for under Article 147(2)(e) UNCLOS, installations used to carry out activities in the Area do not have a 'territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf'.

4. Case study: China's moves on building artificial islands in troubled waters

4.1 Troubled waters? An overview of the South China Sea dispute

The South China Sea dispute has had a long history, with ten countries[44] bordering the area in question. The importance of the South China Sea lies in its significant sources of energy (oil and natural gas), its function as a strategic passage route (for surveillance, sea-lane interdiction and other naval operations), its abundance of fisheries resources and its use as a legal basis for claiming maritime zones.[45] Hence, the region has always been an area with ongoing clashes of sovereignty claims, which have drawn great international concern.

The disputes in the South China Sea can mainly be attributed to the overlapping EEZs of the adjacent countries in some areas of the Spratly Islands.[46] In fact, before the entitlement of EEZs under the UNCLOS, there were no apparent disputes in the region.[47] Since Brunei took the lead and issued its claim over a portion of the Spratly Islands in 1988, China, Vietnam, Malaysia, the Philippines and Taiwan have all subsequently made their respective sovereignty claims to the islands.[48] Given that the primary focus of this article regards China's recent activities in the South China Sea, the following content will thus discuss the claim made by China.

41 UNCLOS, art 89.

42 Churchill and Lowe (n 21) 51.

43 ibid.

44 Namely Taiwan, China, the Philippines, Vietnam, Brunei, Malaysia, Indonesia, Singapore, Thailand, and Cambodia. However, the main claimants in this region are the first seven countries mentioned above.

45 Yann-Huei Song, 'United States and Territorial Disputes in the South China Sea: A Study of Ocean Law and Politics' (2002) 1 Maryland Series in Contemporary Asian Studies 1, 19-25.

46 Mary Fides A Quintos, 'Artificial Islands in the South China Sea and Their Impact on Regional (in)Security' (2015) 2 FSI Insights 1-11.

47 Shicun Wu, *Solving Disputes for Regional Cooperation and Development in the South China Sea: A Chinese Perspective* (Elsevier 2013) 4.

48 ibid.

4.2 China's recent moves on building artificial islands in the South China Sea

4.2.1 A review of China's claim in the South China Sea

As is known, China has claimed all of the islands and most of the South China Sea for historical reasons, it but has not defined the borders of sovereignty claimed in those waters.[49] Such a claim can be traced back to the Xia Dynasty (2183-1752 B.C.), when the entire South China Sea was claimed by China.[50] In 1947, the Republic of China (ROC) government drew an eleven-dash line (U-shaped Line) in the South China Sea on the Chinese map, which included 'the Spratly Islands and other chains that the ruling KMT party declared, were now under Chinese sovereignty'.[51] Later on, in 1953, the People's Republic of China (PRC) government reissued a nine-dash line, which had deleted the two dashes that were once claimed by the former government in the Gulf of Tonkin, to reinforce its claim of historical waters.[52] Since the international maritime regulatory regime began to develop, China has codified its claims via domestic legislation. Among these laws, the combination of the 1992 Law on the Territorial Waters and Their Contiguous Areas and the Law on the Exclusive Economic Zone and the Continental Shelf provides the Chinese government with a basis for claiming four-fifths of the South China Sea.[53]

After China's ratification of the UNCLOS in 1996, its assertion and tactics in the South China Sea have become more prominent with regard to the diplomatic, administrative and military aspects.[54] These strategies have thus triggered constant maritime disputes in these contested waters.

4.2.2 China's recent establishment of artificial islands in the South China Sea

In 2014, China was spotted shipping construction materials for the creation of new islands in the Spratly Archipelago.[55] Then, in February 2015, satellite images showed that China had initiated its reclamation work on six of the reefs in the Archipelago, with the expansion of a few small, concrete platforms into a 'large facility' atop of the Gaven Reefs and by constructing an 'air strip capable' island

49 Jeremy Page and Trefor Moss, 'China's Claim in the South China Sea: The Short Answer' (*The Wall Street Journal*, 27 May 2015) <http://blogs.wsj.com/briefly/2015/05/27/chinas-claims-in-the-south-china-sea-the-short-answer/> accessed 28 May 2015.

50 Xavier Furtado, 'International Law and the Dispute over the Spratly Islands: Whither UNCLOS?' (1999) 21 Contemporary Southeast Asia 386, 388.

51 Mohan Malik, 'Historical Fiction: China's South China Sea Claims' (2013) 176 World Affairs 83, 88.

52 Li Jinming and Li Dexia, 'The Dotted Line on the Chinese Map of the South China Sea: A Note' (2003) 34 Ocean Development & International Law 287, 290.

53 M Taylor Fravel, 'China's Strategy in the South China Sea' (2011) 33 Contemporary Southeast Asia: A Journal of International and Strategic Affairs 292, 294; see also Malik (n 51) 89.

54 See Fravel (n 53) 299-310.

55 Joel Guinto, 'China Builds Artificial Islands in South China Sea' (*Bloomberg Business*, 19 June 2014) <www.bloomberg.com/bw/articles/2014-06-19/china-builds-artificial-islands-in-south-china-sea> accessed 28 May 2015.

with a runway that serves military and civilian purposes along the Yongshu Island.[56] In fact, similar infrastructures were also built on the Johnson South Reef and the Hughes Reef.[57] A few months later, artillery weapons were detected on these islands, moved there by China.[58] These continuous actions have again aroused deep concern worldwide, and the international community is highly suspicious that China intends to utilise the islands as a basis for strengthening its land reclamation.

In mid-2015, Chinese officials reaffirmed that such projects 'do not affect the freedom of navigation and overflight enjoyed by all countries in accordance with international law in the South China Sea.'[59] They also stated that these constructions are 'well within the scope of China's sovereignty and [are] justified, legitimate and reasonable',[60] due to its sufficient historical evidence and non-disputable claims of rights and interests in this area.[61]

4.3 Analysis

In this section, the author attempts to analyse the aforementioned case of China under the UNCLOS and to provide possible solutions.

56 Greg Torode, 'China to Project Power from Artificial Islands in South China Sea' (*Reuters*, 19 February 2015) <http://uk.reuters.com/article/2015/02/19/uk-southchinasea-reefs-china-idUKKBN0LN0JE20150219>, accessed 28 May 2015; Katie Hunt, 'Report: China Building New Islands in Disputed Waters' (*CNN*, 18 February 2015) <http://edition.cnn.com/2015/02/17/asia/china-south-china-sea-reclamation/> accessed 28 May 2015; Jeremy Bender, 'China Is Building Its First Runway on a Disputed Island Chain in the South China Sea' (*Business Insider*, 16 April 2015) <www.businessinsider.com/china-constructing-runway-in-south-china-sea-2015-4 > accessed 28 May 2015.

57 Paul Vale, 'Beijing Constructs Chain of Artificial Island Fortresses in Disputed Region of South China Sea' (*The Huffington Post UK*, 20 February 2015) <www.huffingtonpost.co.uk/2015/02/20/chin-building-chain-of-island-fortresses-in-disputed-region-of-south-china-sea_n_6721364.html> accessed 28 May 2015.

58 Matthew Rosenberg, 'China Deployed Artillery on Disputed Island, U.S. Says' (*The New York Times*, 29 May 2015) <www.nytimes.com/2015/05/30/world/asia/chinese-artillery-spotted-on-spratly-island.html?_r=0> accessed 29 May 2015; James Rush, 'Artillery Weapons Detected on Artificial Islands Built by China, US Claims, in What It Calls a "Disturbing" Development in South China Sea' (*The Independent*, 29 May 2015) <www.independent.co.uk/news/world/asia/us-claims-artillery-weapons-have-been-detected-on-artificial-islands-built-by-china-in-what-it-calls-a-disturbing-development-in-south-china-sea-10284280.html> accessed 29 May 2015.

59 Christopher Bodeen, 'Artificial Island in South China Sea Almost Finished, Is "Lawful, Reasonable and Justified," Government Says' (*National Post*, 16 June 2015) <http://news.nationalpost.com/news/world/artificial-island-in-south-china-sea-almost-finished-is-awful-reasonable-and-justified-government-says> accessed 5 July 2015.

60 Katie Hunt, 'Island Building in South China Sea "Justified," Says Chinese Admiral' (*CNN*, 1 June 2015) <http://edition.cnn.com/2015/06/01/asia/china-defends-island-building/> accessed 5 July 2015.

61 ibid.

4.3.1 The fuse of conflicts: the missing definition of 'artificial island' within the UNCLOS

Chinese government officials have refused to comment on the satellite images of the expansion of its constructions in the South China Sea.[62] As a matter of fact, China has never officially confirmed that it is building artificial islands in the South China Sea. Instead, they tend to call these objects 'facilities' or 'constructions'.[63] Therefore, the main issue is whether these objects can be classified as artificial islands under the UNCLOS.

Unfortunately, as mentioned in this article, given that the UNCLOS lacks a clear definition of what an artificial island is[64] and that there is no case law that directly addresses this issue, different interpretations can be made. Some suggest that artificial islands are lands with the characteristic of human intervention in their formation process,[65] while others argue that artificial islands 'are created by expanding existing islets, construction on existing reefs, or amalgamating several natural islets into a bigger island',[66] or describe an artificial island as 'a temporary or permanent fixed platform made by man surrounded by water and above water at high tide'.[67] Nevertheless, in practice, the distinction between a 'naturally-formed' island and an 'artificial' one is not always easy to determine: it could be stated that an artificial island constructed from the ground up falls within the scope of artificial islands, but what about the situation where a state builds a dam in the sea and the sand brought in by the current eventually accumulates into an island? Should such an island be considered as naturally or artificially formed?[68] The contested objects in the case of China were constructed on or extend from the foundations of reefs or naturally-formed islands. Therefore, such objects are actually combinations of natural and artificial factors, which would lead us back to the deadlock of what constitutes an artificial island within the context of UNCLOS. Consequently, the ambiguity of the subject matter referred to in the artificial island-related UNCLOS provisions certainly left a loophole that could weaken the legal effects of the Convention.

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62 Jeremy Page and Julian E Barnes, 'China Expands Island Construction in Disputed South China Sea' (*The Wall Street Journal*, 18 February 2015) <www.wsj.com/articles/china-expands-island-construction-in-disputed-south-china-sea-1424290852> accessed 29 May 2015.

63 See Shannon Tiezzi, 'Chinese Official: South China Sea Construction "Primarily for Civilian Purposes"' (*The Diplomat*, 28 May 2015) <http://thediplomat.com/2015/05/chinese-official-south-china-sea-construction-primarily-for-civilian-purposes/> accessed 30 May 2015.

64 Tracing back to the history of law-making, on one hand, the relevant report of the 1930 Codification Conference mentioned that 'the definition of the term "island" did not exclude artificial islands'. On the other hand, however, Article 6 of the draft articles on continental shelf, adopted in 1953, provided that 'installations necessary for the exploration and exploitation of the continental shelf did not possess the status of island'. Therefore, divergence existed on this issue from the very beginning. *Summary Record of the 260th Meeting*, extract from the Yearbook of the International Law Commission Vol 1 (1954) 90.

65 See Tanaka (n 17) 64.

66 Bahman Aghai Diba, 'Legal Regime of the Artificial Islands in the Caspian Sea' (*Payvand Iran News*, 12 May 2011) <www.payvand.com/news/11/dec/1046.html> accessed 30 May 2015.

67 Rudolf Bernhardt, *Encyclopedia of Public International Law* (Law of the Sea: New York 1989) 38.

68 Churchill and Lowe (n 20) 50.

4.3.2 Could China's act of building artificial islands really strengthen its sovereign claims in the region?

As previously mentioned, China has long asserted its sovereign rights through historical claims, mainly with the nine-dash line. However, such arguments are generally rejected by scholars, since they fail to meet the requirements of 'historic waters'.[69] According to the interpretation of the ICJ in the *Anglo-Norwegian Fisheries* case, the term 'historic waters' ordinarily means 'waters which are treated as internal waters but which would not have that character were it not for the existence of historic title'.[70] Despite the argument that 'the regime of historic waters could not be an exception because there were no general rules of international law' regarding the determination of historical waters,[71] the nine-dash line does not seem to be compatible with the three basic elements of a title to historic waters, which are: (1) the exercise of authority over the area, (2) the continuity of the exercise of authority, and (3) the acquiescence of other states.[72]

Regarding the first and second elements, all of the maps issued by China before 1909 marked the Hainan Province as its southernmost point, which did not include the South China Sea.[73] Besides, the frequent fishery activities in the area could not be considered as sufficient evidence to support the exercise of governmental authority. In addition, Tran Truong Thuy pointed out that China officially admitted in Article 1 of the Declaration of the Government of the People's Republic of China on China's Territorial Sea[74] that the 'islands are separated from the mainland *by the high sea*', so China ought to acknowledge that it does not own the right to exercise authority in the area.[75] As for the third element, it is apparent that the adjacent states have been radically objecting for the past several decades to China's claim in the South China Sea.[76] The recent developments of the ongoing *Sino-Philippine*

69 Tran Truong Thuy, 'China's U-Shaped Line in the South China Sea: Possible Interpretations, Asserting Activities and Reactions from Outside' (30 September 2012) 2-6 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2233274> accessed 4 June 2015.

70 *Anglo-Norwegian Fisheries between United Kingdom and Norway Case (United Kingdom v Norway)* (Judgment) [1951] ICJ Rep 130.

71 Tanaka (n 17) 57.

72 UN Secretariat, 'Juridical Regime of Historic Waters, Including Historic Bays', UN Doc A/CN.4/143 (F) [1962] Yearbook of the International Law Commission 3.

73 Thuy (n 69) 3-4.

74 Art 1 of the Declaration of the Government of the People's Republic of China on China's Territorial Sea provides that: 'The breadth of the territorial sea of the People's Republic of China shall be twelve nautical miles. This provision applies to all territories of the People's Republic of China including the Chinese mainland and its coastal islands, as well as Taiwan and its surrounding islands, the Penghu Islands, the Dongsha Islands, the Xisha Islands, the Zhongsha Islands, the Nansha Islands and all other islands belonging to China which are separated from the mainland and its coastal islands by the high seas.' The full text of the Declaration is available at <www.chinausfocus.com/wp-content/uploads/2014/08/Annex1-4.pdf> accessed 25 July 2015.

75 Thuy (n 69) 4.

76 See generally Mark J Valencia, 'Wither the South China Sea Dsiputes' in Tran Truong Thuy, Nguyen Thuy Minh and Le Thuy Trang (eds), *The South China Sea: Cooperation for Regional Security and Development* (Diplomatic Academy of Vietnam 2009).

Arbitration case also support this point.[77] Hence, it could likely be inferred that China intends to reinforce its sovereign claims in the South China Sea by building the said constructions. But would such moves actually help? These moves would likely result in meeting the requirement of the first element, but would be inconsistent with the second and third elements; for, on the one hand, the creation of the constructions was just recently initiated, and whether it fits the definition of 'continuous' in terms of length of time might be arguable. On the other hand, the nearby states expressed their opposition when they discovered China's recent conduct in the South China Sea.[78] Consequently, China's acts of building artificial islands would perhaps not strengthen its original claims, but shall instead lead to more conflicts.

4.3.3 Possible solutions

4.3.3.1 Fixing the lacuna by amending the UNCLOS

At this point, it is worth exploring why the UNCLOS avoided defining the term 'artificial islands'. Keyuan Zou assumed that based on the findings in Nikos Papadakis's work, there are various sorts of artificial islands,[79] and each and every type has its own respective legal status,[80] which might attribute to the complexities of definitional problems.[81] However, the avoidance of defining such terms would make the application of 'artificial island-related' provisions confusing, for there is no standardised criteria when it comes to the determination of what constitutes an artificial island under the UNCLOS regime, and should this remain unclarified, the discussion regarding the application of the relevant articles would be meaningless.

It is also worth noting that a definition of artificial islands was provided for in the draft of the Convention on Offshore Units, Artificial Islands and Related Structures Used in the Exploration for and Exploitation of Petroleum and Seabed Mineral Resources, proposed in 2001 by the Comité Maritime International, which has cooperated with the IMO Legal Committee for many years. Under this Convention, an artificial island shall refer to:

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77 However, China had refused to participate in the arbitral proceedings. See generally Michael Sheng-Ti Gau, 'The Sino-Philippine Arbitration on the South China Sea Disputes: A Case Study on the Efficacy of Unclos Annex Vii Tribunal' (2015 ILA-ASIL Asia-Pacific Research Forum 'Integrating the Asia-Pacific: Why International Law Matters?', Taipei, May 2015). For the latest updates on this case, see Permanent Court of Arbitration, *The Republic of the Philippines v The People's Republic of China* <www.pca-cpa.org/showpage65f2.html?pag_id=1529> accessed 2 August 2015.

78 Hunt (n 60).

79 Types of artificial islands mentioned in Nikos Papadakis's book include sea cities, artificial islands for economic use, fisheries and fish-farming, installations for the exploitation of non-natural resources, entertainment installations, military installations, *etc*, see Papadakis (n 29).

80 Zou (n 16).

81 ibid.

> a permanent installation or structure rigidly affixed to the sea bed and used or intended for use for Economic Activities, including wellheads and associated equipment, but shall not include [pipelines] or installations formed from natural dredged materials or fill of natural origin.[82]

Therefore, such examples could probably serve as a reference for any amendments to the UNCLOS in the future.

However, one challenge to this solution lies in the difficulties of implementation. Given that the nature of the UNCLOS is a treaty, the State Parties still possess the right to make reservations to specific provisions or even choose to withdraw from it altogether, which turns out to be the same dilemma that most international conventions face. Such shortcomings could further lower the legal effects of the Convention and its potential governance in the international community.

4.3.3.2 'Artificial island-related' provisions as customary international law?

The making of customary international law consists of two factors, namely 'a constant and uniform usage practised by the States' and '*opinio juris*'.[83] Unlike treaties that are only binding to contracting states, customary international law is binding to all states once they have come into being.

It is often stated that a number of provisions within the UNCLOS possess the characteristics of customary international law, such as those on innocent passage and navigational rights and freedoms.[84] Meanwhile, Yoshifumi Tanaka has also discussed the customary law nature of Article 121 UNCLOS, stating that dating back to the time when the 1980 UNCLOS draft was issued, the Conciliation Commission regarded Article 121(1)(2) as a reflection of 'the present status of international law'.[85] Furthermore, in the *Qatar v Bahrain* case, the ICJ elaborated that Article 121(2) UNCLOS reflects the characteristics of customary international law.[86] As for Article 121(3), it is quite difficult to find evidence proving the requirements of state practices and *opinio juris* that constitute customary international law, since it is rare for states to incorporate the provision into their domestic legislation, and the domestic courts of the states do not deal with cases concerning the provision.[87]

As for the construction of artificial islands, apart from the absent uniform definition of an artificial island, whether customary international law could be formed in such a scenario is questionable, for the state practices of building artificial islands have never been consistent and have not gone through

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82 Art 1.1(a) of the Convention on Offshore Units, 'Artificial Islands and Related Structures Used in the Exploration for and Exploitation of Petroleum and Seabed Mineral Resources' (2004) <www.comitemaritime.org/Uploads/Newsletters/2004/Binder1.pdf > accessed 6 July 2015.

83 Malcolm N Shaw, *International Law* (Cambridge University Press 2008) 75-76.

84 James L Malone, 'The United States and the Law of the Sea after UNCLOS III' (1983) 46 Law and Contemporary Problems 29, 33.

85 Tanaka (n 17) 67.

86 ibid.

87 ibid.

the test of time. Hence, even though it is not uncommon to codify customary international law into treaties, customary international law concerning artificial islands has not been made under the current conditions.

4.3.3.3 Code of conduct

China and ASEAN have signed the Declaration on the Conduct of Parties in the South China Sea, an unofficial agreement between the two parties in 2002,[88] which 'set out four trust and confidence building measures and five voluntary cooperative activities'.[89] In this Declaration, the parties reaffirmed that 'the adoption of a code of conduct in the South China Sea would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective'.[90] However, the code of conduct on the South China Sea is still going through the negotiating process and has not yet come to be.[91]

By examining the existing international or regional codes of conduct, one would discover that they fit the elements of soft law.[92] Although the codes of conduct are not binding on the parties, they serve more flexible purposes compared to those of treaties, and have thus been adopted more frequently in the modern international community. Through the negotiation of an international code of conduct, which specifically defines an artificial island, or a regional code of conduct on the South China Sea, such a solution could be a feasible alternative to the amendment of the UNCLOS.

88 Ed Flanagan, 'China May Build "Artificial Island" in Disputed Waters' (*NBC News*, 9 June 2014) <www.nbcnews.com/news/world/china-may-build-artificial-island-disputed-waters-n126101> accessed 5 June 2015.

89 Carlyle A Thayer, 'Asean's Code of Conduct in the South China Sea: A Litmus Test for Community-Building?' (2012) 10 The Asia-Pacific Journal 20 <www.japanfocus.org/-Carlyle_A_-Thayer/3813/article.html> accessed 26 July 2015.

90 ibid.

91 See generally Carlyle A Thayer, 'Asean, China and the Code of Conduct in the South China Sea' (2013) 33 SAIS Review of International Affairs 75; Clint Richards, 'Code of Conduct for South China Sea Unlikely, Yet ASEAN Made Progress' (*The Diplomat*, 11 August 2014) <http://thediplomat.com/2014/08/code-of-conduct-for-south-china-sea-unlikely-yet-asean-made-progress/> accessed 5 June 2015; 'US Condemns China's Reclamation in South China Sea, Urges Regional Agreement on Code of Conduct' (*EMerging Equity*, 30 May 2015) <http://emergingequity.org/2015/05/30/u-s-condemns-chinas-reclamation-in-south-china-sea-urges-regional-agreement-on-code-of-conduct/> accessed 5 June 2015.

92 Christine M Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 International and Comparative Law Quarterly 850, 851.

5. Conclusion

As was expressed by Judge Oda of the ICJ in the *Qatar v Bahrain* case:

> Modern technology might make it possible to develop small islets and low-tide elevations as bases for structures, such as recreational or industrial facilities. Although the 1982 United Nations Convention does contain some relevant provisions (e.g. Arts 60 and 80), I consider whether this type of construction would be permitted under international law and, if it were, what the legal status of such structures would be, are really matters to be reserved for future discussion.[93]

In summary, the construction of artificial islands could indeed stimulate conflicts on national sovereignty, maritime security, and the utilisation and development of natural resources. If not properly dealt with, such conflicts could raise tensions in ongoing international disputes and already troubled waters. Over the past 18 months, China has reclaimed more than 2,000 acres of land in the South China Sea, which is far more than the sum of those claimed by other neighbouring states.[94]

Although the UNCLOS gives coastal states the right to construct artificial islands, such states are obliged to comply with the rules of the Convention and pay due respect to other states' rights in the respective maritime zones. Nevertheless, the rights and obligations mentioned above should be built on the premise that an unambiguous definition of an artificial island be given. Such a problem could be directly dealt with by amending the UNCLOS, but as was mentioned in this article, such an approach has its flaws. Besides, due to the fact that customary international law relating to artificial islands cannot be formed under the current circumstances, the most appropriate solution might be the conclusion of a code of conduct. Once the rules and a definition of an artificial island are laid down and regulated, the extent to which a state is entitled to build artificial islands could be determined. Such an agreement thus has the potential to diminish the current disputes and lead to better cooperation in the region.

93 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain Case (Qatar v Bahrain)* (Judgement of 16 March 2001, Separate Opinion of Judge Oda) 125 <www.icj-cij.org/docket/files/87/7031.pdf > accessed 6 July 2015.

94 Charles Clover and Geoff Dyer, 'US Struggles for Strategy to Contain China's Island-Building' (*Financial Times*, 7 June 2015) <www.ft.com/intl/cms/s/0/54414c0e-0a6f-11e5-82e4-00144feabdc0.html> accessed 8 June 2015.

Maritime Safety and Security Law Journal

Vessel Protection Detachments and Maritime Security: An Evaluation of Four Years of Italian Practice

Gian Maria FARNELLI[1]

Abstract

This article was prompted by the Italian Government's recent decision to stop embarking vessel protection detachments (VPDs) on board Italian vessels. This decision was related to the well-known *Enrica Lexie* case, which involved a dispute between Italy and India regarding two Italian marines for the alleged killing of two Indian fishermen in 2012. Since 2010, the possibility to embark VPDs on board commercial ships as a means for countering pirate attacks has been greatly discussed within international fora. Such a possibility was addressed in the 2011 IMO Best Management Practice as 'the recommended option when considering armed guards' on board. Yet, since 2011, this approach has proved to be controversial. While VPDs have proved to be effective in the Italian experience, a host of sensitive legal issues have arisen, and the present contribution aims at addressing them. This article will first provide an overview of international practice concerning VPDs. Secondly, it will focus on Italian state practice, highlighting its key points and drawbacks through a critical analysis of the thorniest issues. Lastly, some concluding remarks will be made regarding the opportunity for other countries to follow the Italian example.

Keywords

vessel protection detachments, counter-piracy operations, international law of the sea, Enrica Lexie case, Italian state practice, use of lethal force

1. Introduction

On 19 March 2015, the Italian Minister of Defence, Ms. Pinotti, testified before the Italian Joint Senate and Lower House Foreign Affairs and Defence Committee on Italian participation in international peace operations. During her speech relating to the well-known *Enrica Lexie* case,[2] Ms. Pinotti stated that the:

> Italian commitment in the fight against piracy will also change. Italy will continue to be part of Operation Atalanta, *but it will stop providing Vessel Protection Detachments for embarkation on Italy-flagged merchant vessels*, as well as Italy's participation in NATO Operation Ocean Shield. The decision was taken considering the recent positive trend showing a significant decrease in pirate at-

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2 See Section 4, below.

> tacks, as well as the finalization of merchant vessels' defense procedures. The Government acknowledged the last Parliamentary decisions, in particular as regards the request to re-asses our participation in counter-piracy activities on the basis of developments in the issue of the two Italian marines detained in India.[3]

From this declaration accrues that, after four years of embarking vessel protection detachments (VPD or VPDs) on board Italian-flagged private vessels,[4] the Italian Government has decided to stop using them, even though it has not yet amended the relevant legislative provisions.

The decision by Italy to no longer rely on VPDs is of particular relevance since it is one of the few states that comprehensively regulates the use of VPDs. Furthermore, Italy is among a handful of states that has had to deal with disputes concerning the activities of VPDs, namely in the *Enrica Lexie* case. In other words:

> No country other than Italy regulated the use of both the VPD and the PCASP in organic and comprehensive form on the basis of an approach that privileges the role of the State in maintaining the public order at sea protecting also nationals. The Italian initiative represents, in conclusion, *a model for both the international institutions and the industry* that will be faced in the future with the need to adopt legislative or soft law instruments … to avoid the 'present state of anarchy at sea'.[5]

Even though one may agree with the proposition that the Italian regulation of VPDs could serve as a model for other states, this should not be done without a critical assessment of the Italian normative framework, practice and legal issues relating to VPDs. This article aims at doing precisely this.

The article at hand will first provide an overview of international practice with regard to the establishment and activities of VPDs. Second, it will focus on the Italian legislation on the use of VPDs by highlighting the most relevant legal issues arising from it, which will be addressed in a subsequent section at the example of the *Enrica Lexie* case. In conclusion, it will consider whether, from a normative and practical perspective, the Italian legal framework on VPDs could be a model for other states aiming to regulate the use of VPDs.

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3 Ministry of Defence, 'International Missions: Minister Pinotti' (19 March 2015) <www.difesa.it/EN/Primo_Piano/Pagine/audiz.aspx> accessed 1 July 2015 (emphasis added). This statement by the Italian Minister was in response to a parliamentary inquiry on the *Enrica Lexie* case. For the Italian full text of the inquiry, see 'Legislatura 17 Atto di Sindacato Ispettivo n. 301559. Atto n. 301559' <www.senato.it/japp/bgt/showdoc/showText?tipodoc=Sindisp&leg=17&id=845587> accessed 1 July 2015.

4 The very first Italian VPD was embarked on the *M/N Montecristo* on 2 November 2011, pursuant to Italian Law no. 130/2011; see Section 3, below.

5 Fabio Caffio, 'Protecting merchant ships by means of vessel protection detachments (VPD) and privately contracted armed security personnel (PCASP): the Italian experience' in Angela del Vecchio (ed), *International Law of the Sea* (Eleven 2014) 191, 201 (footnotes omitted, emphasis added).

2. The use of VPDs in international practice

The international community defines VPDs as 'military or law enforcement units embarked on a civilian ship in order to protect it against potential attacks'.[6] As noted by NATO, this means of protecting vessels from pirate attacks in the waters off the coast of Somalia and in the Indian Ocean has proved to be less resource demanding than others.[7]

Ever since the International Maritime Organisation (IMO) endorsed the use of VPDs as a preferred means for direct protection in its 2011 Best Management Practices against Somalia Based Piracy (BMP4),[8] a number of states have enacted legislation in order to allow this type of protective measure to be implemented on vessels flying their flag[9] or on World Food Programme (WFP) ships.[10]

The use of VPDs has sparked scholarly debate about the potential benefits and disadvantages of this practice. Some authors maintain that the international community should address the piracy threat with measures that do not continuously drain public financial resources,[11] and therefore support the idea of self-defence measures by seafarers. Other scholars, however, point to a number of problems arising from the use and storage of weapons on board private ships navigating through foreign territorial waters.[12] This issue concerning the law of the sea is among the thorniest and brings up the questions of a potential breach of the rules concerning innocent passage,[13] a derogation from the one

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6 Thomas M Jopling, 'The Growing Threat of Piracy to Regional and Global Security' (5 April 2009, NATO Doc. 023 CDS 09 E) para 62, fn 24 <www.nato-pa.int/Default.asp?SHORTCUT=1770> accessed 1 July 2015.

7 Ibid, para 80, whereby '[c]ompared with individual escorts, VPDs provide a simpler and less resource-intensive means of protection'; see also Kiara Neri, 'The use of force by military vessel protection detachments' (2012) 51 ML&tLoWR 73, 74.

8 IMO, 'Best Management Practices for Protection against Somalia Based Piracy', annex to MSC.1/Circ.1339 (14 September 2011) 39, para 8.15 ('BMP4'), para 8.15 stipulates: 'The use, or not, of armed Private Maritime Security Contractors on-board merchant vessels is a matter for individual ship operators to decide following their own voyage risk assessment and approval of respective Flag States. This advice does not constitute a recommendation or an endorsement of the general use of armed Private Maritime Security Contractors. … Subject to risk analysis, careful planning and agreements the provision of Military Vessel Protection Detachments (VPDs) deployed to protect vulnerable shipping is the recommended option when considering armed guards'.

9 Apart from Italy, whose legislation will be dealt with in the following, also France, Germany, Norway, the Netherlands and the United Kingdom, amongst others, have been using VPDs in order to protect vessels flying their flags; see Marten Zwanenburg, 'Military vessel protection detachments: the experience of the Netherlands' (2012) 51 ML&tLoWR 97, 98, fn 4.

10 The embarkation of VPDs on World Food Programme (WFP) vessels has been endorsed by the UN Security Council in most of its resolutions concerning Somali piracy. See, *inter alia*, UNSC Res 2184 (12 November 2014) UN Doc S/RES/2184/2014, para 29. Even states not permitting VPDs on board vessels flying their flag, such as Serbia, have been providing military protection on board WFP vessels; see *EU Navfor Somalia News*, 'Serbian autonomous vessel protection detachment ensures protection of World food programme ship' (8 October 2014) <www.eunavfor.eu/serbian-autonomous-vessel-protection-detachment-ensures-protection-of-world-food-programme-ship/> accessed 1 July 2015.

11 See, *inter alia*, Robert S Jeffrey, 'An efficient solution in a time of economic hardship: the right to keep and bear arms in self-defense against pirates' (2010) 41 JML&C 507, 533.

12 See, amongst others, Clive Symmons, 'Embarking vessel protection detachments and private armed guards on board commercial vessels: international legal consequences and problems under the law of the sea' (2012) 51 ML&tLoWR 21.

13 ibid 61 ff. On the issue of armed personnel on board vessels and innocent passage, see, by way of analogy, Anna Petrig, 'The use of force and firearms by private maritime security companies against suspected pirates' (2013) 62 ICLQ 667, 679 ff.

flag-one law principle[14] and the degree of force authorised by the United Nations Convention on the Law of the Sea (UNCLOS) during self-defence activities.[15]

Even though the above issues concerning the law of the sea in general have not been comprehensively dealt with,[16] or solved, by legal doctrine, state practice has generally moved towards the acceptance of, or has even endorsed, the embarkation of VPDs on board commercial vessels. The UN Security Council expressed its approval in the following terms:

> *Noting* the efforts of flag States for taking measures to permit vessels sailing under their flag transiting the High Risk Area (HRA) to embark vessel protection detachments and privately contracted armed security personnel (PCASP), and *encouraging* States to regulate such activities in accordance with applicable international law and permit charters to favour arrangements that make use of such measures.[17]

In light of this, it can be argued that the international community generally recognises the advantages of the use of VPDs on board private vessels, notwithstanding the potential legal issues arising from the reliance on this type of protective measure.

3. Italian legislation on VPDs

As already mentioned, a number of states and international non-governmental organisations[18] have highlighted the potential advantages of using VPDs on board private vessels, while the IMO and the Security Council have even endorsed such a measure.[19] Italy is among a number of states that have regulated the use of VPDs. Concretely, it enacted a specific provision (Article 5; later referred to as 'VPD Law') relating to VPDs and privately contracted armed security guards (PCASG) when issuing

14 This issue occurs exclusively when a VPD is embarked on board a foreign ship, as French and Estonian domestic legislation seem to allow; see *EU Navfor Somalia News*, 'EU naval force: Estonian vessel protection detachment operating on a French vessel' (21 March 2013) <www.eunavfor.eu/eu-naval-force-estonian-vessel-protection-detachment-operating-on-a-french-vessel/> accessed 1 July 2015. On the one flag-one law principle, which is implicitly provided for in Article 92 of the United Nations Convention on the Law of the Sea (UNCLOS), see Myron H Nordquist, Satya N Nandan, Shabtai Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Vol III, Kluwer 1995) 122 ff.

15 See Neri (n 7).

16 Various scholars have analysed the topics pertaining to VPDs and the law of the sea from different perspectives, but their solutions were not taken into account by state or international organisation practices. Nonetheless, the in-depth examination of those works has to be considered as a necessary complement to the present contribution. As such, see, among others, Matteo Tondini, 'Some legal and non-legal reflections on the use of armed protection teams on board merchant vessels: an introduction to the topic' (2012) 51 ML&tLoWR 7; Symmons (n 12); Neri (n 7); Zwanenburg (n 9).

17 UNSC Res 2184 (n 10).

18 Amongst others, the maritime section of the International Chamber of Commerce, ie the International Maritime Bureau.

19 See the instruments referred to in Section 2, below.

Law no. 130/2011,[20] pursuant to EU Council Joint Actions 2008/749[21] and 2008/851[22] as subsequently amended.[23]

Article 5 VPD Law provides for the conclusion of a memorandum of understanding between the Ministry of Defence and the Italian ship-owner association (Confitarma) on the use of VPDs.[24] However, the provision does not define the composition of a VPD, its geographical scope of operation or its duties.[25] The VPD Law only provides that military personnel on VPD duty shall comply with the guidelines and rules of engagement issued by the Ministry of Defence and that they are appointed law enforcement officers and auxiliaries with regard to the crime of piracy as provided for in Articles 1135-1136 of the Italian Navigation Code.[26] Furthermore, it stipulates that the costs of embarking VPDs shall be borne by the private ship-owner and, generally speaking, 'no new or additional burdens to the public budget shall stem from the implementation of [such provisions]'.[27]

Following the enactment of the mentioned Article 5 VPD Law,[28] the Ministry of Defence issued De-

20 Art 5 of the Law no. 130 of 2 August 2011, on conversion and amendment of the Decree Law no. 107 of 12 July 2011, containing the extension of the participation of Italy in international operations pursuant to UNSC Res 1970 (2011) and 1973 (2011), as well as urgent counter-piracy measures (Italian title: 'Conversione in legge, con modificazioni, del decreto-legge 12 luglio 2011, n. 107, recante proroga degli interventi di cooperazione allo sviluppo e a sostegno dei processi di pace e di stabilizzazione, nonché delle missioni internazionali delle forze armate e di polizia e disposizioni per l'attuazione delle Risoluzioni 1970 (2011) e 1973 (2011) adottate dal Consiglio di Sicurezza delle Nazioni Unite. Misure urgenti antipirateria'), *Italian official journal*, 5 August 2011 (VPD Law). For a non-official translation of the relevant paragraphs of Article 5, see Caffio (n 5) 198-99.

21 Council Joint Action 2008/749/CFSP on the European Union military coordination action in support of UN Security Council resolution 1816 (2008) (EU NAVCO) [2008] OJ L259/39.

22 Council Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast [2008] OJ L301/33, in particular Article 2(a) providing that: 'Under the conditions set by the relevant international law and by UNSC Resolutions 1814 (2008), 1816 (2008) and 1838 (2008), Atalanta shall, as far as available capabilities allow: … (a) provide protection to vessels chartered by the WFP, including by means of the presence on board those vessels of armed units of Atalanta, in particular when cruising in Somali territorial waters'.

23 Joint Actions 2008/749/CFSP and 2008/851/CFSP were amended through Council Joint Actions 2009/907/CFSP ([2009] OJ L322/27), 2010/437/CFSP ([2010] OJ L210/33), 2010/766/CFSP ([2010] OJ L327/49) and 2012/174/CFSP ([2012] OJ 89/69).

24 VPD Law, art 5(1).

25 VPD Law, art 5(4). The Italian legislation also provides for the residual possibility of using PCASGs on board Italian-flagged vessels for protective purposes under specific requirements. They must notably comply with BMP4 self-protection standards; furthermore, only in cases where VPD personnel are not available, they can be used, since the *ratio legis* is to maintain the state's monopoly on the use of force. The issue of PCASGs in Italian law falls outside the scope of the current contribution, but for an analysis of the topic, see Greta Tellarini, 'Il ricorso a personale armato come misura antipirateria: l'impiego di guardie giurate private a bordo delle navi mercantile italiane' [2014] RdRdN 207.

26 VPD Law, art 5(2). The same is provided for in Article 4(4) of the memorandum of understanding concluded between the Ministry of Defence and the Italian ship-owner association on 11 October 2011, see n 30, below.

27 VPD Law, art 5(6-ter) (author's own translation). The Italian passage reads as follows: '[d]all'attuazione del presente articolo non devono derivare nuovi o maggiori oneri a carico della finanza pubblica'.

28 VPD Law, art 5(1).

cree no. 212 of 1 September 2011, which defines the geographical scope of VPD operations.[29] Moreover, the Ministry concluded a memorandum of understanding with Confitarma on 11 October 2011,[30] which provides the legal basis for embarking VPDs on board Italian vessels. It also provides a definition of a VPD as a military unit composed of military personnel, preferentially from the Navy, embarked on trading vessels.[31]

Subsequently, specific contracts were signed between the Ministry of Defence and individual ship-owners on the basis of the so-called 'Format Convention', which is a model convention.[32] The Format Convention mainly specifies the rules contained in the VPD Law, in particular with regard to the allocation of decision-making powers and responsibilities. Moreover, it adds the requirement that ships on which VPDs are embarked must comply with BMP4 passive-protection[33] standards.[34] Only those ships can rely on active-protection measures, such as VPDs or PCASGs.

4. Legal challenges arising from the use of VPDs: the *Enrica Lexie* case

VPDs have been used to protect Italian-flagged vessels ever since they were first deployed on board the *M/N Montecristo* on 2 November 2011. Up until 31 December 2013, more than 247 Italian vessels

29 Decree of the Ministry of Defence no. 212 of 1 September 2011, on the delimitation of the geographical scope of the embarkation of VPDs (Italian title: 'Individuazione degli spazi marittimi internazionali a rischio di pirateria nell'ambito dei quali può essere previsto l'imbarco dei Nuclei militari di protezione (NMP)'), *Italian official journal*, 12 September 2011. The area is delimited by Article 2(1) as follows: 'a section part of the Indian Ocean delimited by the Bab El Mandeb Strait on the north-western border, by the Hormuz Strait on the northern border, by the 12th parallel on the southern border and by the 78th meridian on the eastern border'. That area overlaps the so-called High Risk Area, which is a maritime area whose 'western border … runs from the coastline at the border of Djibouti and Somalia to position 11 48 N, 45 E; from 12 00 N, 45 E to Mayyun Island in the Bab El Mandeb Straits. The eastern border is set at 78 E, the southern border is set at 10 S and the Northern Border set at 26 N' (International Bargaining Forum, 'Revision of the IBF High Risk Area in the Gulf of Aden and Indian Ocean' (2011) www.ukpandi.com > knowledge > industry issues > piracy and maritime security > Piracy - Revision of IBF High Risk Area - effective 1st April 2011, accessed 1 July 2015.

30 The full Italian text of the memorandum is available at <http://unipd-centrodirittiumani.it/public/docs/A_101011_Protocollo_Difesa_CONFITARMA_UG.pdf> accessed 1 July 2015 (MoU).

31 ibid, art 1. The Italian version reads as follows: 'Nucleo Militare di Protezione (di seguito NMP): nuclei militari, costituiti da personale della Marina Militare o altra Forza Armata, imbarcabibili su Navi mercantili ed in grado di assicurarne la protezione da atti di pirateria o depredazione armata'.

32 The full Italian text of the Format Convention is available at <http://unipd-centrodirittiumani.it/public/docs/B_101011_Convenzione_Difesa_CONFITARMA_UG.pdf> accessed 1 July 2015 (Format Convention).

33 A passive-protection measure is a measure that does not require a human to operate it, such as fences or microwave sensors systems; on this, see Mariusz Kastek and others, 'Passive automatic anti-piracy defense system of ships' <www.researchgate.net/publication/258521296_Passive_automatic_anti-piracy_defense_system_of_ships> accessed 1 July 2015. Conversely, an active protection measure is a human measure, which requires some degree of training, such as VPDs. For a general overview, see Olanipekun M Kayode, 'Active and passive security at sea: the case study of the Gulf of Guinea' <www.academia.edu/8901668/Active_and_Passive_Security_at_Sea_Case_Study_of_the_Gulf_of_Guinea> accessed 1 July 2015.

34 Format Convention (n 32) art 3(1).

relied on VPDs.[35] While in the vast majority of cases, no particular legal issues arose, the *Enrica Lexie* or so-called 'Italian marines' case brought up a number of such issues, which are discussed next.

The circumstances of the case are, in a nutshell, the following: on 15 February 2012, the Italian oil tanker *Enrica Lexie* was sailing towards Djibouti through the Indian Ocean. It was approached by an Indian fishing vessel, *St. Antony*, 20.5 nautical miles off the coastline of the Indian State of Kerala. Since the Indian fishing vessel was not flying any flag and was ignoring both the calls for identification and the warnings by the tanker, the Italian VPD allegedly mistook it for a pirate ship and shot at its hull. Subsequently, the *St. Antony* sailed toward to the Indian coast and the *Enrica Lexie* continued its route towards Djibouti.

The Mumbai Maritime Rescue Coordination Centre contacted the shipmaster of the *Enrica Lexie* when the tanker was 38 nautical miles off the Indian coast, asking him to sail to the Cochin port in Kerala (India) in order to participate in the investigation into an incident of piracy that had occurred near the *Enrica Lexie* position. On the basis of the ship-owner's instructions and with the consent of the VPD team leader, shipmaster Commander Vitelli set sail towards the Indian port. Upon arrival at Cochin on 16 February 2012, the shipmaster was informed by the Indian authorities that an inquiry into the murder of two Indian fishermen embarked on the *St. Antony* had begun. On 19 February 2012, the Indian authorities arrested two of the six VPD members. Domestic Indian criminal proceedings were subsequently commenced against two of the marines embarked on the *Enrica Lexie*. This prompted an international dispute between India and Italy, which remains on-going. Hence, many legal questions relating to the use of VPDs are not yet settled. In the following, three specific issues, which are not comprehensively and satisfactorily covered by the Italian regulation of VPDs, will be discussed.[36]

35 See 'NMP – Nuclei Militari di Protezione' <www.marina.difesa.it/cosa-facciamo/operazioni-in-corso/nuclei-militari-protezione/Pagine/nuclei-militari-protezione.aspx> accessed 1 July 2015; no newer data is available.

36 For a general overview of the case and the issues pertaining to the law of immunities and the law of the sea, see Valeria Eboli and Jean Paul Pierini, 'Coastal State jurisdiction over vessel protection detachments and immunity issues: the *Enrica Lexie* case' (2012) 51 ML&tLoWR 117; Natalino Ronzitti, 'The *Enrica Lexie* incident: Law of the sea and immunity of State officials issues' (2012) 22 IYIL 3; Natalino Ronzitti, 'La difesa contro i pirati e l'imbardo di personale militare armato sui mercantile: il caso della *Enrica Lexie* e la controversia Italia-India' (2013) 96 RDI 1073; Gian Maria Farnelli, 'Back to Lotus? A recent decision by the Supreme Court of India on an incident of navigation in the contiguous zone' (2014) 16 ICLR 106.

4.1 Decision-making powers and responsibilities on board ships protected by VPDs

The Italian legislation identifies three persons to whom different degrees of decision-making powers are attributed: the company,[37] the shipmaster and the VPD team leader. Pursuant to the Executive Decree of the Ministry of Infrastructure no. 349/2013,[38] the company managing the ship, as defined by the Decree itself, is responsible for the assessment of the risks connected to the embarkation of military personnel on VPD duty,[39] the matter of their 'familiarisation' with the crew[40] and the fulfilment of requirements with regard to life-saving appliances,[41] such as life-jackets.

As regards the allocation of responsibilities between the shipmaster and the VPD team leader while the ship is in transit, a functional criterion applies. On the one hand, the Format Convention[42] provides that the shipmaster will be exclusively responsible for all activities relating to navigation, namely setting the route, steering and equipping the ship, which also includes passive-protection measures, the arrangement of which should not lie within the responsibility of the VPD team leader.[43] In other words, the shipmaster is fully responsible for the security and safety of the ship, its crew and shipment, with regard to all measures not falling within the responsibility of the VPD team leader. On the other hand, the VPD team leader is in charge of actions taken in order to repel and gather evidence on pirate attacks.[44] Moreover, it is the team leader who decides on a potential surrender of the ship to alleged pirates.[45] A lacuna exists, however, as Italian law does not specify whether the consent of the VPD team leader is required in order to surrender the ship to foreign authorities. Indeed,

37 Article 2(1)(d) of the Decree of the Ministry of Infrastructure 349/2013 defines a company as the ship-owner or any other natural or legal person who undertook the responsibility to verify the compliance of the ship with the IMO International Safety Management Code (IMO Res A.741(18) (4 November 1993)) (Italian version: 'Company: l'armatore della nave o qualsiasi altra organizzazione o persona, quali il gestore oppure il noleggiatore a scafo nudo, che ha assunto dall'armatore la responsabilità dell'esercizio della nave e che, nell'assumere tale responsabilità, ha convenuto di assolvere a tutti i compiti e le responsabilità imposti dal codice ISM').

38 Decree of the Ministry of Infrastructure no. 349 of 13 April 2013 on technical and administrative procedures relating to the safety of navigation and maritime security with regard to urgent counter-piracy measures (author's translation; Italian title: 'decreto di disciplina delle procedure tecnico-amministrative afferenti alla materia della sicurezza della navigazione (safety) e la sicurezza marittima (maritime security) in relazione alle misure urgenti antipirateria') <www.guardiacostiera.it/ACFE38/Decreto_Dirigenziale_349_2013.pdf> accessed 1 July 2015.

39 ibid, art 6; such an evaluation is required by BMP4 (n 8) as a matter of 'risk assessment and approval of respective Flag States'.

40 ibid, art 8.

41 ibid, art 7; article 7(2) provides that under exceptional and justified circumstances, a ship may be allowed to derogate the security and safety requirements of the International Convention for the Safety of Life at Sea ((signed 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278) in embarking a VPD. However, the notion of 'exceptional and justified circumstances' is not further clarified in the Decree, as legal literature has highlighted; see Tellarini (n 25) 219-20.

42 Format Convention (n 32) art 4.

43 ibid, art 4(1)-(2).

44 ibid, art 5(1).

45 ibid, art 4(6).

at first glance, one could make the case that such a decision rests either with the shipmaster or the company, since it pertains to navigation in general. Nonetheless, considering the public function that the Italian legislation bestows upon VPDs, one could conversely make the case that a private entity has no power to divert a state official from his duties.

As a matter of practice, the only relevant case regarding the decision-making powers and responsibilities in this connection is, again, the *Enrica Lexie* case. The various reconstructions of the circumstances leading up to the incident itself, and in particular those that led to the decision to sail towards the Cochin port, suggest that the shipmaster discussed the issue with the ship-owner, as well as the VPD team leader, and decided to sail into Indian waters only after securing the consent of the latter. Hence, it seems that in the *Enrica Lexie* case the shipmaster deemed the consent of the team leader to be required (at least implicitly) by Italian law before he decided to surrender the ship to foreign authorities. Therefore, one could argue that the VPD Law, as applied in practice, provides the team leader with a certain decision-making role, and therefore responsibility, with regard to navigation.

However, various scholars have suggested that the VPD team leader could be obliged to give his consent in cases where foreign authorities ask a ship to head towards their territorial waters in order to cooperate in the investigation of a piracy incident.[46] Indeed, if the surrender of the ship, or its diversion towards a state's territorial waters, has to be envisaged as a means of cooperating in the fight against piracy, the team leader may be duty-bound to act in such a way pursuant to Article 100 UNCLOS, which requires states to cooperate in the fight against piracy.[47] Therefore, the decision-making role of the team leader may broaden, since he may also be obliged to make the ship follow a specific route in order to prevent it from breaching an Italian international obligation pursuant to Article 100 UNCLOS.

4.2 VPDs as state officials

Another relevant issue arising out of the *Enrica Lexie* incident concerns the qualification of Italian VPD members as state officials. India equates VPD personnel to private armed guards,[48] even though such a proposition is not supported by international law.

While international law does not provide a clear definition of state officials, it links this qualification

46 See Eboli and Pierini (n 36).

47 Eboli and Pierini (n 36) 135, eg, state that in the *Enrica Lexie* case '[t]he Italian servicemen were apparently requested by local authorities to moor at the Port of Kochi in order to cooperate in identifying a group of pirates apprehended by the Coast Guard. This request may indeed amount to an obligation for the Italian NMP members, due to the international obligation of States to cooperate in repressing piracy, under Article 100 of UNCLOS'.

48 India has implicitly maintained this position during a recent session of the *Shared Awareness and Deconfliction* ('SHADE') Conference, whereby 'Privately Contracted Armed Security Personnel (PCASP) could pose a potential threat to maritime security, necessitating both domestic and international response. Incidents of *MV Enrica Lexie* and MC *Seaman Guard Ohio* in the Indian maritime zones are indicative of such risks' (SHADE, 'Inputs for Threat Assessment: India', on file with the author, para 19).

to a number of factual and formal criteria.[49] In order to allay the lingering doubts surrounding such a qualification, the International Law Commission (ILC) Special Rapporteur on immunity of state officials from foreign criminal jurisdiction, Escobar Hernández, held that:

> [A] number of conclusions can be drawn for determining the criteria for identifying what constitutes an official …:
>
> (a) The official has a connection with the State. This connection can take several forms (constitutional, statutory or contractual) and can be temporary or permanent. The connection can be de jure or de facto;
>
> (b) The official acts internationally as a representative of the State or performs official functions both internationally and internally;
>
> (c) The official exercises elements of governmental authority, acting on behalf of the State. The elements of governmental authority include executive, legislative and judicial functions.[50]

These criteria for determining who is an official are based on the assumption that the qualification whether a person qualifies as an official is a matter of domestic law.[51] Hence, in order to determine whether VPD personnel on board Italian-flagged ships qualify as officials, Italian law must be applied.

As mentioned earlier,[52] the VPD Law qualifies VPD members as law enforcement officers and auxiliaries. Therefore, pursuant to Article 55(1) of the Italian Criminal Procedure Code, they shall receive criminal offence reports, gather evidence and take every other measure necessary to ensure the prosecution of alleged offenders.[53] Hence, from a formal perspective, an Italian VPD carries out a public function and should therefore be considered as being composed of state officials. Moreover, during the parliamentary discussions that led to the VPD Law, a number of experts, both academics and military personnel, referred to the factual public nature of the functions carried out by VPD person-

49 See, on the matter in point, Ronzitti (n 36) 1093-100.

50 ILC, 'Third report on immunity of State officials from foreign criminal jurisdiction by Concepción Escobar Hernández, Special Rapporteur' (2 June 2014) UN Doc A/CN.4/673, 38-39, para 111.

51 Amongst others, see the ILC Draft articles on State responsibility, whereby '[a]n organ includes any person or entity which has that status in accordance with the internal law of the State' (ILC, 'Articles on responsibility of States for internationally wrongful acts' (2001) 2 YbILC 31, 40). Special Rapporteur Escobar Hernández analysed those elements in her third report. See ILC (n 50) paras 50-110.

52 See Section 3, above.

53 Italian Criminal Procedure Code, art 55(1). The Italian version reads as follows: '[l]a polizia giudiziaria deve, anche di propria iniziativa, prendere notizia dei reati, impedire che vengano portati a conseguenze ulteriori, ricercarne gli autori, compiere gli atti necessari per assicurare le fonti di prova e raccogliere quant'altro possa servire per l'applicazione della legge penale'.

nel[54] and pointed out that they act under the direct guidance and orders of the Ministry of Defence,[55] i.e. within the Italian institutional framework. Lastly, in its diplomatic actions following the *Enrica Lexie* incident, Italy maintained:

> The Italian Navy Military Department that operated in international waters on board of the ship Enrica Lexie must be considered as an organ of the Italian State. ... Their conduct has been carried out in the fulfilment of their official duties in accordance with national regulations (Italian Act nr. 107/2011), directives, instructions and orders, as well as the pertinent rules on piracy contained in the 1982 UN Convention on the Law of the Sea and in the relevant UN Security Council Resolutions on the Piracy off the Horn of Africa.[56]

Therefore, as a matter of domestic law, which is the applicable law according to international law, one can argue that there is no doubt whatsoever that Italian law bestows to VPD personnel a formal, as well as factual, official qualification.

However, one may argue as India did, that the private nature of the financial resources utilised to cover the costs of such a *sui generis* kind of operation shifts its role from a public to a private one, akin to that of PCASGs. However, this argument is not backed up by international law. As two Italian scholars maintain, 'the fact that ship-owners are requested to contribute to the mission's costs does not affect the intrinsically public and sovereign nature of the functions performed by NMP/VPDs.'[57] The ILC's definition of the 'governmental', and therefore public, nature of a function confirms the latter view:

> Beyond a certain limit, what is regarded as 'governmental' depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise.[58]

From this follows that the ILC did not consider the nature of the financial resources utilised to carry out a specific function as being relevant for defining its public or private nature. Moreover, a solution similar to the one implemented by Italy was also considered by other states, namely the United King-

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54 See, eg, Angela del Vecchio, 'Operazioni di contrasto della pirateria in acque internazionali. Audizione della Prof. Angela del Vecchio' <www.senato.it/documenti/repository/commissioni/comm04/documenti_acquisiti/InterventoDel%20Vecchio.pdf> accessed 1 July 2015, who maintained that servicemen are state organs and therefore every conduct or unlawful use of armed force they carry out will entail the international responsibility of Italy.

55 See Bruno Branciforte, 'Operazioni di contrasto della pirateria. Impiego di Vessels Protection Detachment (VPD)/Nuclei Militari di Protezione (NMP). Audizione del Capo di Stato Maggiore della Marina Militare, Ammiraglio di Squadra Bruno Branciforte' <www.senato.it/documenti/repository/commissioni/comm04/documenti_acquisiti/Intervento%20amm.%20sq.%20Branciforte.pdf> accessed 1 July 2015, who maintained that the deployment of VPDs serves the purpose of safeguarding Italian vessels and their shipments, as well as the safety of Italian maritime lanes without attributing military functions to the shipmaster.

56 *Republic of Italy thr. Ambassador & Ors. v. Union of India & Ors.* (2013) SCoI 1 (Supreme Court of India), para 44 (citing *Italian Note Verbale 95/533*, 29 February 2012).

57 Eboli and Pierini (n 36) 123.

58 ILC (n 51) 43.

dom. The UK Foreign Affairs Commission stated that:

> [V]essel protection detachments are an attractive option, but we acknowledge that resources are extremely limited at present. We conclude that the Government should engage with the shipping industry to explore options for the industry to pay for vessel protection detachments of British naval or military personnel on board commercial shipping.[59]

Overall, state practice arguably points to the fact that even though VPD services are paid for by private entities, namely ship-owners, their official nature is not affected in any way.

Summing up the above considerations, notwithstanding some doubts on the matter in point, Italian military personnel on VPD duty should be qualified as state officials.

4.3 VPDs as law enforcement officers

A last issue relating to the Italian VPD Law, which was brought up by the *Enrica Lexie* case, concerns the qualification of military personnel on VPD duty as law enforcement officers and auxiliaries. Such a qualification implies that VPD members are authorised to receive criminal complaints and to take all necessary measures aimed at facilitating criminal prosecutions. The latter activities are carried out pursuant to the specific regime laid down for Italian participation in international missions.[60] Such a qualification brings up two distinct issues: whether VPD personnel are allowed to apprehend piracy suspects and the potential use of lethal force by VPD personnel.

As to the first issue, one may argue that Italian law is in potential breach of UNCLOS, which provides that only warships and other ships 'clearly marked and identifiable as being on government service'[61] may seize pirate ships and apprehend alleged pirates.[62] Hence, UNCLOS does not empower VPDs to carry out seizures of piracy suspects as an exception to the generally applicable exclusive flag state jurisdiction.[63] The BMP4 are in line with this when stating that '[m]ilitary Vessel Protection Detachments (VPDs) *deployed to protect vulnerable shipping* is the recommended option when considering armed guards',[64] i.e. stressing the exclusive protective role of VPDs. The authority to seize pirate ships may not be derived from UN Security Council resolutions either; Resolution 2184 (2014)

59 Foreign Affairs Commission, 'Piracy off the coast of Somalia. Tenth report of session 2010-12' HC (2012-01) 1318 (40).

60 VPD Law, art 5(2). This article refers to Law no. 12 of 24 February 2009 on the extension of the Italian participation in international missions (Italian title: 'proroga della partecipazione italiana a missioni internazionali') and Law no. 197 of 29 December 2009 on urgent measures for the extension of development cooperation interventions, peace-keeping operations, as well as international military and police operations (Italian title: 'disposizioni urgenti per la proroga degli interventi di cooperazione allo sviluppo e a sostegno dei processi di pace e di stabilizzazione, nonché delle missioni internazionali delle Forze armate e di polizia').

61 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) art 107.

62 UNCLOS, art 105.

63 UNCLOS, art 92.

64 BMP4 (n 8) 39 (emphasis added).

on Somali piracy, for example, reads as follows:

> *Noting* the efforts of flag States for taking measures to permit vessels sailing under their flag transiting the High Risk Area (HRA) to embark vessel protection detachments and privately contracted armed security personnel (PCASP), and *encouraging* States to regulate such activities in accordance with applicable international law and permit charters to favour arrangements that make use of such measures, ...
>
> Notes the importance of securing the safe delivery of WFP assistance by sea, and welcomes the on-going work by the WFP, EU operation ATALANTA, and flag States with regard to Vessel Protection Detachments on WFP vessels.[65]

These paragraphs from Resolution 2184 stress the protective role of VPDs, in particular with regard to securing the safe delivery of humanitarian aid. Moreover, Resolution 2184, like its predecessors,[66] highlights the fact that any counter-piracy measure must be in accordance with applicable international law, namely UNCLOS.[67] Therefore, international law does not seem to recognise an active counter-piracy role on the part of VPDs, namely interception measures, or the power to carry out police enforcement operations against piracy suspects.[68]

However, if one was to maintain that the UN Security Council resolutions authorise VPDs to carry out counter-piracy operations under Chapter VII and the 'all necessary means' formula,[69] one should consider that Italian military personnel on VPD duty are entitled to investigate exclusively any circumstances amounting to piracy as defined by Italian law. The Italian Code of Navigation defines piracy as an act of pillaging against a ship, or against its cargo, or an act of violence against a person on board a ship.[70] As will be demonstrated in the following, this definition is different from the international definition codified in Article 101 UNCLOS.

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65 UNSC Res 2184 (n 10) 13 and o.p. 29.

66 In particular, see UNSC Res 2077 (2012) UN Doc S/RES/2077/2012, 10 and o.p. 31, and UNSC Res 2125 (2013) UN Doc S/RES/2125/2013, 15 and o.p. 28.

67 See, among others, UNSC Res 2184 (n 10) 7 and o.p. 14.

68 Nonetheless, VPDs may retain a counter-piracy role with regard to the detention of pirates captured during self-defence operations; see Natalino Ronzitti, 'The Use of Private Contractors in the Fight against Piracy: Policy Options' in Francesco Francioni, Natalino Ronzitti (eds), *War by Contract. Human Rights, Humanitarian Law and Private Contractors* (OUP 2011); Petrig (n 13).

69 The Security council authorised the '[u]se, within the territorial waters of Somalia, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery at sea' (UNSC Res 1846 (2008) UN Doc S/RES/1846/2008, o.p. 10); from the wording follows that the authorisation has a limited *ratione loci* scope of application.

70 See Italian Code of Navigation, art 1135. The original version of this article reads as follows: '[i]l comandante o l'ufficiale di nave nazionale o straniera, che commette atti di depredazione in danno di una nave nazionale o straniera o del carico, ovvero a scopo di depredazione commette violenza in danno di persona imbarcata su una nave nazionale o straniera, è punito con la reclusione da dieci a venti anni. … Per gli altri componenti dell'equipaggio la pena è diminuita in misura non eccedente un terzo; per gli estranei la pena è ridotta fino alla metà.'

Article 101 UNCLOS defines piracy as an illegal act of violence carried out by a private person for private ends from a private ship against another vessel on the high seas.[71] Considering the above, a particular crime, for example mutiny, an act of maritime terrorism[72] or an act of armed robbery at sea,[73] may be qualified as piracy under Italian law, while it does not necessarily fulfil the definition of piracy under international law. In such a case, a member of a VPD is entitled, or even obliged, to carry out non-protective law enforcement activities pursuant to Italian law, even though this will most probably violate the provisions pertaining to the exclusive jurisdiction of the flag state under international law. Hence, the recognition of law enforcement functions to VPD personnel may amount to a breach of international law, since it potentially obliges Italian state officials to violate UNCLOS, notwithstanding the possible implicit authorisation given to VPDs to seize alleged pirate ships provided by the UN Security Council.

Turning to the issue of the use of force, one has to consider whether VPDs may resort to lethal force if the circumstances so require. Under the Italian VPD Law, military personnel are seemingly empowered to do so when it is necessary to protect the vessel itself, their own lives or the lives of the crew. Such a proposition stems from the amendment that the last sentence of Article 5(2) VPD Law made to Law no. 197/2009, which provides that VPDs carry out their duties pursuant to Italian Law no. 197 of 29 December 2009, whereas military necessity is substituted by the necessity to protect the vessel.[74] Further, Article 4(1-sexies) of Italian Law no. 197/2009 provides that military personnel who

71 The relevant UNCLOS provision reads as follows: '[p]iracy consists of any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: … (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; … (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; … (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; … (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)'. There is a wide range of literature on the definition of piracy. For an overview of the matter in point see, among others, Yoram Dinstein, 'Piracy jure gentium' in Holger Hestermeyer and others (eds), *Coexistence, Cooperation and Solidarity* (Brill-Martinus Nijhoff 2012).

72 Some authors maintain that maritime terrorism and piracy are being progressively subsumed in the general category of maritime violence; see, eg, Scott Davidson, 'International law and the suppression of maritime violence' in Richard Burchill, Nigel D White, Justin Morris (eds), *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (CUP 2005); Gian Maria Farnelli, 'Terrorists under the Jolly Roger? Recent Trend on Piracy and Maritime Terrorism' in Gemma Andreone, Giorgia Bevilacqua, Giuseppe Cataldi and Claudia Cinelli (eds), *Insecurity at Sea: Piracy and Other Risks of Navigation* (Giannini 2013).

73 IMO, 'Code of practice for investigation of the crimes of piracy and armed robbery against ships', annex to A.26/Res.1025 (10 January 2010) 4, defines an act of armed robbery at sea as '(1) any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea; … (2) any act of inciting or of intentionally facilitating an act described above'. A comprehensive discussion of this definition falls outside the scope of the present contribution; for a specific overview, see Robin Geiβ and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011).

74 VPD Law, art 5(2) (author's translation). The Italian passage reads as follows: 'all'articolo 4, commi 1-sexsies e 1-septies […della] legge 29 dicembre 2009, n. 197, intendendosi sostituita alla necessità delle operazioni militari la necessità di proteggere il naviglio'.

use lethal force in compliance with the rules of engagement are not punishable.[75]

As is apparent, the Italian legal framework on VPDs does not lay down any specific rule with regards to the use of lethal force. Lacking such a specific prohibition on the use of lethal force, and considering the general entitlement of law enforcement officials to use proportionate force in carrying out their duties,[76] one could maintain that – under Italian law – Italian VPDs are entitled to use lethal force in a number of situations, notably in cases of an imminent threat to the their own lives or the lives of the crew, or where the security of the vessel is endangered.

However, when using potentially lethal force, military personnel on VPD duty should follow international standards relating to the use of force in law enforcement operations irrespective of their national rules of engagement, in order to avoid incurring international responsibility.

Even though no treaty exists on the matter in point, the UN elaborated a set of principles on the use of force by law enforcement officials,[77] the importance of which is recognised by the international community.[78] Specifically, Principle 9 provides:

> Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are

75 Law no. 197 of 29 December 2009, art 4(1-sexies). The Italian passage reads as follows: '[n]on è punibile il militare che, nel corso delle missioni di cui all'articolo 2, in conformità alle direttive, alle regole di ingaggio ovvero agli ordini legittimamente impartiti, fa uso ovvero ordina di fare uso delle armi, della forza o di altro mezzo di coazione fisica, per le necessità delle operazioni militari'.

76 It is undebatable that a law enforcement official may use lethal force in counter-piracy operations. Indeed, the International Tribunal for the Law of the Sea maintained that '[a]lthough the [LOS] Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances … These principles have been followed over the years in law enforcement operations at sea. The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force' (*M/V 'Saiga' (No. 2) (Saint Vincent and the Grenadines v Guinea)* (Merit, Judgment of 1 July 1999) ITLOS Reports 1999, paras 155-56). According to Douglas Guilfoyle, 'Written Evidence to the HC Foreign Affairs Committee by Prof. Guilfoyle' (2011-07) HC 1318-Ev.2, cited in Foreign Affairs Commission (n 59) 35, '[t]here is no absolute requirement that one exhaust all non-lethal methods before turning to potentially lethal force; warning shots are expected where possible but are not (and could not be) an absolute requirement. In some situations an imminent and serious threat will make the use of lethal force as a first recourse unavoidable, reasonable and necessary … In practice, many navies have lawfully targeted and killed suspect pirates on precisely this basis, especially in situations of hostage rescue or where piracy suspects present an imminent threat but have not yet fired a weapon'.

77 'UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials' (7 September 1990) UN Doc A/CONF.144/Rev.1.

78 See UN High Commissioner for Human Rights, 'Human Rights Standards and Practice for the Police' (2004) UN Doc HR/P/PT/5/Add.3. The language utilized by the High Commissioner implies that, in his opinion, those standards are part of general international law.

> insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.[79]

Moreover, if law enforcement officials must resort to lethal force, it should be done in such a way that minimizes damage and injury, respects and preserves human life[80] and only 'in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm'.[81] Lastly, they are prohibited from using 'those firearms and ammunition that cause unwarranted injury or present an unwarranted risk.'[82] In other words, the UN principles generally require that lethal force is used *ultima ratio* and pursuant to a careful proportionality assessment.

Considering the above, we can conclude that VPD members may resort to lethal force in order to protect their own lives and the lives of the crew. However, they are arguably in breach of international law when using lethal force to protect the ship when there is no life at stake because this is deemed to be disproportionate, even though Italian law arguably empowers them to do so.

5. Concluding remarks

This article highlighted the most important elements of the regulation concerning VPDs, at both the international and Italian levels. We first sketched a 'silhouette' of international practice on the use of VPDs, with specific regard given to IMO recommendations and UN Security Council resolutions. Subsequently, the Italian regulations were analysed and discussed in the context of the *Enrica Lexie* case.

From this analysis follows that Italian practice implicitly endorsed a decision-making role for the VPD team leader in relation to navigation, namely with regard to the surrender of a vessel to pirates or foreign authorities, even though the Italian VPD Law foresees that the shipmaster has ultimate authority and control over the vessel. Moreover, it was demonstrated that Italian military personnel on VPD duty should be considered state officials, and therefore enjoy all the relevant immunities, even though the financial resources used to cover the costs of the operation are private in nature. Lastly, the issue of VPD members as law enforcement officers and auxiliaries was addressed, showing the relevant issues with regard to the protective role that international law grants military personnel on VPD duty, as opposed to the law enforcement role that the Italian law bestows upon them.

The last issue is probably the thorniest one. It was shown that Italian law breaches its international obligations under the UNCLOS, in so far as it empowers and obliges VPD personnel to carry out law enforcement operations outside the legal framework of the law of the sea. In particular, the apprehension of piracy suspects by military personnel embarked on a private ship as a VPD may amount

79 UN Basic Principles (n 77) Principle 9; for an in-depth analysis of this issue, see Neri (n 7).

80 UN Basic Principles (n 77) Principle 5(b).

81 ibid, Principle 11(b).

82 ibid, Principle 11(c).

to a breach of Articles 92, 105 and 107 UNCLOS, since only governmental ships are authorised to exercise universal enforcement jurisdiction against pirates and pirate ships as an exception to the exclusive jurisdiction of the flag state.

In sum, one may agree that the Italian experience has been a 'role model' with regard to VPD regulation.[83] However, states that are considering this model should be aware of its weak points, especially with regard to the role and powers of VPDs, which may trigger liability issues.

83 Caffio (n 5).

Maritime Safety and Security Law Journal

Conflict or Cooperation? The Implications of China's New Fishing Regulations

Wendy Wan-Chun HO[1]

Abstract

The new Chinese fishing regulations, which were passed by the Hainan province in 2013 and went into effect in 2014, has exemplified the growing assertiveness of China and intensified the heated South China Sea disputes. The South China Sea has been a productive fishing ground and full of aquaculture resources. Nonetheless, in recent years, fishing in the area has become a politically sensitive topic due to the geopolitical tensions and security concerns among the claimant states. This article intends to provide an analytical review of the current fight for fishing rights in the South China Sea and to offer possible solutions. The article argues that solving fishing disputes through multilateral cooperation, rather than unilateral actions, in the South China Sea is an urgent task and a win-win solution. First, the article attempts to analyse the new Chinese fishing regulations and the impact on future multilateral cooperation in the South China Sea within the context of the 1982 UNCLOS and international law. It further looks into the implications of the burgeoning Asian economic integration for future joint actions to conserve and manage marine resources in the area. Lastly, the article explains Taiwan's position in current South China Sea disputes and explores Taiwan's role in shaping a multilateral fishery management scheme in these disputed waters.

Keywords

UNCLOS, South China Sea, EEZ, fishery resources, conservation, cooperation

1. Introduction

The South China Sea (SCS) – which comprises a stretch of about 1.4 million square miles in the Pacific Ocean encompassing an area from Singapore and the Malacca Straits to the Strait of Taiwan, spanning west of the Philippines, north of Indonesia and east of Vietnam – is one of the world's most resource rich regions. The SCS is also located on a major international shipping route between the Indian Ocean and Northeast Asia. This semi-enclosed area, as defined in Article 122 of the United Nations Convention on the Law of the Sea (UNCLOS), is home to hundreds of thousands of marine

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species and encompasses a tremendous diversity of ecosystems.[2] Its rich marine resources provide its bordering states with food security and serve as an important source of economic growth contributing to income and employment. For example, it is estimated that the bordering countries of the SCS produce nearly a quarter of the world's caught tuna, including three quarters of the world's production of canned tuna.[3] The SCS has proved to be a productive fishing ground and is full of aquaculture resources. Nonetheless, in recent years, fishing in the area has become a politically sensitive topic due to the geopolitical tensions and security concerns among the claimant states.[4]

The bordering states have sought every opportunity not only to claim sovereignty in the territorial disputes but also to fight for exclusive rights to the rich maritime resources in the SCS. While vast benefits are generated by fishing in the SCS, the area's integrity is threatened due to destructive fishing methods, decades of intensive fishing and marine pollution. The ongoing tensions in the area have also hindered comprehensive surveys and cooperation schemes in the exploration and conservation of fishery resources in the region. According to a recent study conducted by the Asia-Pacific Fishery Commission (APFC) of the Food and Agriculture Organization of the United Nations (FAO), China is by far the largest producer of captured fish in the region (15.7 million tonnes) representing 32 per cent of the total regional production.[5] The same report also estimated that the majority of the stocks or species groupings in the SCS subregion are overfished or fully-fished. In some cases, the species groups are even scored as depleted.[6] The maritime disputes of the SCS are developing as areas of acute tension and political conflict. Nonetheless, the common interest of fishery conservation has often been overlooked. The lack of an agreement among the claimant states to manage jointly the fishery resources in the area has jeopardised the sustainability of the marine resources in the SCS.

The new Chinese fishing regulations, which were passed by the Hainan province and went into effect in 2014, have exemplified the growing assertiveness of China and intensified the heated SCS disputes. Since the announcement of the new fishing regulations of the Hainan Province, the regulations have been criticised as provocative by other claimant states in the SCS and the United States. The announcement of the new fishing regulations also raised concerns about China's effort to exercise jurisdiction over all fishing activities in the disputed SCS.[7]

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2 Alberto A Encomienda, 'The Marine Environmental Protection in the South China Sea: An UNCLOS Paradigm' in Myron H Nordquist and others (eds), *Recent Developments in the Law of the Sea And China* (Martinus Nijhoff 2006) 173; United Nations Convention on Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397, art 122.

3 Song Yann-huei, 'A Marine Biodiversity Project in the South China Sea: Joint Made in the SCS Workshop Process' (2011) 26(1) The International Journal of Marine and Coastal Law 119, 121.

4 ibid 143.

5 UN FAO (Asia-Pacific Fishery Commission), 'Regional overview of fisheries and aquaculture in Asia and the Pacific 2012' (2012) 15 <www.fao.org/docrep/017/i3185e/i3185e00.pdf> accessed 20 July 2015.

6 ibid.

7 Taylor Fravel, 'Hainan's New Fishing Rules: A Preliminary Analysis' (*The Diplomat*, 10 January 2014) <http://thediplomat.com/2014/01/hainans-new-fishing-rules-a-preliminary-analysis/> accessed 30 May 2015.

This article intends to provide an analytical review of the current fight for fishing rights in the SCS and to offer possible solutions. It argues that solving fishing disputes through multilateral cooperation, rather than unilateral actions, in the SCS is an urgent task and a win-win solution. Despite the complicated territorial claims, the unity of ASEAN countries within the increasing Asian economic integration provides a good opportunity to induce China to form a cooperative framework for marine resource management in the disputed area. First, the article attempts to analyse the new Chinese fishing regulations and its impact on future multilateral cooperation in the SCS within the context of the 1982 UNCLOS and international law. It further looks into the implications of the burgeoning Asian economic integration for future joint actions to conserve and manage marine resources in the area. Lastly, the article explains Taiwan's position in current SCS disputes and explores Taiwan's role in shaping a multilateral fishery management scheme in these disputed waters.

2. The new Hainan fishing regulations

2.1 The purpose

The Hainan Provincial People's Congress amended the Hainan Province's implementation regulations (banfa, 办法) of China's national fishery law on 29 November 2013 and they took effect on 1 January 2014.[8] The new Hainan fishing regulations were passed to implement China's national fishery law in the province of Hainan. Article 1 of the Hainan fishing regulations states that one of the main purposes of the regulations is to secure and enhance the conservation and exploration of fishery resources in accordance with the rules under China's national fishery law. This provision of the new Hainan fishing regulations echoes the statement in Article 1 of China's national fishery law. It shows that the law seems to be formulated for the purposes of enhancing the protection, development and reasonable utilisation of fishery resources, developing artificial cultivation, protecting fishery workers' rights and interests, and boosting fishery production, so as to meet the requirements of the socialist construction and the needs of the people.[9]

2.2 The scope of the regulations and the fishery: do the regulations cover the South China Sea?

Although China has not been able to provide concrete statements to support its territorial and maritime claims (referred to as the 'U-shaped line' or 'dashed line') in the SCS, China has still been

8 No. 16 Announcement of the Standing Committee of the People's Congress of Hainan Province, 29 November 2013 (CN) <www.hainan.gov.cn:1500/data/law/2013/12/1900/> accessed 1 June 2015.

9 Art 1 of the China's national fishery law provides that 'the law is formulated for the purpose to enhance protection, value-added development and appropriate utilization of fishery resources, to develop artificial cultivation, to protect the legal rights of the producers of fishery products, to promote the development of fishery products in order to satisfy the socialist construction and the people's needs.' (translation by the author) 'Fisheries Law of the People's Republic of China' <www.soa.gov.cn/zwgk/fwjgwywj/shfl/201211/t20121105_5200.html> accessed 1 May 2015.

insistent of its jurisdiction in the area.[10] In the new Hainan fishing regulations, Article 2 defines the scope of application of the new regulations. It provides that the fishing regulations apply to the methods of fishery production, management and conservation and other fishery related activities conducted in the internal waters, tidal flats and all other maritime areas within the jurisdiction of Hainan. According to China's claim, the jurisdiction of Hainan province covers Hainan Island, the Xisha (Paracel) Islands, the Zhongsha (Macclesfield) Islands and the Nansha (Spratly) Islands as well as their surrounding sea areas.[11] China further set up Sansha city to administer the Xisha, Zhongsha and Nansha islands and their surrounding waters in the SCS in 2012.[12]

Article 2 of China's national fishery law provides that the law applies to fishery production activities conducted in internal waters, tidal flats, territorial seas, the exclusive economic zone and all other waters within the jurisdiction of China. Article 14(3) of the implementation rules of China's national fishery law classifies the inshore and offshore fishing grounds of the SCS. It explains that the 'inshore fishing grounds' refer to the area on the Eastern side of 112 degrees East Longitude and inside the waters of 80 meter isobaths and the Western side of 112 degrees East Longitude and inside the waters of 100 meter isobaths of the SCS. The areas outside the inshore fishing grounds are thus the 'offshore fishing grounds'. Since the article does not set the outer limit of the offshore fishing grounds, the fishing grounds identified here in fact cover almost all areas of China's disputed 'U-shaped line' in the SCS and encroach on both Vietnam's and the Philippines' claims of exclusive economic zone (EEZ) areas.[13]

Additionally, China proclaimed 200 nautical miles of the EEZ and continental shelf in its declaration upon ratification of the 1982 UNCLOS in 1996.[14] China further enacted its Exclusive Economic Zone and Continental Shelf (EEZ/CS) Law in 1998 to ensure its sovereign rights and jurisdiction in its claimed EEZ and continental shelf. Article 2(1) of the EEZ/CS Law clarifies that China's EEZ extends as far as 200 nautical miles measured from the baseline. Article 3 emphasises that China enjoys sovereign rights to conserve, explore and exploit marine resources and has the right to exercise jurisdiction over marine scientific research and the protection of the marine environment in its EEZ. Article 5 further requires that foreign individuals or organisations conducting fishing activities in

10 Robert Beckman, 'The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea' (2013) 107 AJIL 142, 155.

11 Decision of the 7th National People's Congress of the People's Republic of China on the Establishment of the Hainan Province, 13 April 1988 (CN); 'Geographical location of Hainan Province described by the government of Hainan' <http://en.hainan.gov.cn/englishgov/AboutHaiNan/200909/t20090910_7125.html> accessed 2 June 2015.

12 'China establishes Sansha City' (*Xinhua News*, 24 July 2012) <http://news.xinhuanet.com/english/china/2012-07/24/c_131734893.htm> accessed 30 May 2015.

13 It is noteworthy that China and Vietnam reached a maritime delimitation agreement relating to the Gulf of Tonkin in 2000. The two sides also signed a fishery agreement the same year to cooperate in managing, conserving and exploiting the fishery resources in the Gulf of Tonkin (Beibu Gulf). Map of China's Dashed Line is available at <www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf> accessed 25 July 2015.

14 United Nations Division for Ocean Affairs and the Law of the Sea, China's Declaration upon Ratification of UNCLOS (7 June 1996) <www.un.org/depts/los/convention_agreements/convention_declarations.htm#China Upon ratification> accessed 2 June 2015.

China's EEZ to seek approval from Chinese authorities and to comply with Chinese laws.

Also Article 2 of China's Territorial Sea and Contiguous Zone Law states that the land territory of China includes the Dongsha islands, Xisha islands, Zhongsa islands, Nansha islands and all other islands belonging to China. By specifically identifying the names of the islands in the SCS, China affirmed its sovereignty over these islands. The claim is reiterated in China's Notes Verbale in 2009, in which it insisted that 'China has indisputable sovereignty over the islands in the SCS and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters.'[15] China's 2011 Notes Verbale further clarified that China has indisputable sovereignty over Nansha Island. China's Nansha Island is fully entitled to territorial sea, EEZ and continental shelf based on the UNCLOS and China's EEZ/CS Law and Territorial Sea and Contiguous Zone Law.[16]

Therefore, under current Chinese laws, the maritime areas administered by the Hainan province constitute about 2,000,000 square kilometres, which is more than half of the SCS and covers all islands in the area. Regardless of the conflicting claims in the SCS, the scope of application of the new Hainan fishing regulations, according to China's claim, covers the disputed areas.[17] With respect to the fishery administration, the structure of China's fishery management is a mixture of central and provincial governments' responsibilities. The central and provincial governments cooperate to carry out national fishery law enforcement. Article 6(3) of the new regulations states that in addition to specific sea areas designated to the fishery administration authority by the State Council, fishing production in the rest of the sea areas is administered and supervised by the fishery administration agency under the provincial government. Article 6 of the implementation rules of the national fishery law requires the fishery administration authority under the State Council to establish a fishery management agency in the sea area of the SCS. Hence, both Hainan province and the central government have the responsibility to administer and manage fishing activities and production in the SCS. The administrative areas of the provincial and central governments is defined based on the classification of the inshore and offshore fishing grounds described in the previous paragraph. The provincial government is entitled to administer fishing activities within the waters enclosed by a trawler restriction line and the inshore fishing grounds, while the central government governs the offshore fishing grounds.[18]

2.3 Major disputed content of the new Hainan fishing regulations

The most controversial part of the new Hainan fishing regulations is that they require foreigners and foreign ships in the SCS to seek approval from the Chinese authority. According to Article 35 of the new regulations, all foreigners and foreign fishing vessels conducting fishing production and fishing resource surveys in the jurisdictional waters of the Hainan province must receive approval

15 People's Republic of China, Note Verbale (7 May 2009) CML/18/2009.

16 People's Republic of China, Note Verbale (14 April 2011) CML/8/2011.

17 See (n 13).

18 Guifang Xue, *China and International Fisheries Law and Policy* (Martinus Nijhoff 2005) 87.

from the relevant department of the State Council. This requirement was adopted to comply with Article 8 of China's national fishery law because the old Hainan fishing regulations (Article 21) only required that all vessels from other provinces and foreign vessels conducting fishing activities in Hainan jurisdictional waters seek approval from the relevant 'provincial authority' instead of the 'national authority'.[19] Nonetheless, after the announcement of the new fishing regulations, neither the central government nor the provincial government of Hainan further specified which department of the State Council is entitled to grant approval and oversee the application process.

The Hainan regulations do not mention the legal liability of foreign fishing vessels that do not comply with the approval requirements. Nevertheless, Article 46 of China's national fishery law clearly indicates that foreigners and foreign fishing vessels conducting fishing activities and fishery resource surveys without prior authorisation may be expelled. The fishing catches and fishing gear are subject to confiscation and a 50,000 Yuan fine (in Renminbi currency) may be imposed. In a serious case, the fishing vessels may be confiscated and criminal charges may be filed.

After the new Hainan fishing regulations came into effect in 2014, the State Oceanic Administration announced that China planned to establish a regular patrol system in Sansha city to secure China's maritime interests. In May 2015, the city of Sansha commissioned an advanced law enforcement ship vessel with the support of the Ministry of Agriculture and the State Oceanic Administration to patrol the waters around Macclesfield Bank, claimed by China as Zhongsha.[20]

3. Current EEZ regime under the UNCLOS

To assess the Hainan fishing regulations involves a discussion of the issues of delimitation and the management of marine resources under the current UNCLOS EEZ regime. In an area of overlapping jurisdictions and shared resources, the implementation of the EEZ is likely to result in conflicts and controversies in fisheries policy because different countries have different perspectives on values regarding fishery resources and various capacities in regulating fishery activities.

3.1 The current EEZ regime under the UNCLOS

The 1982 UNCLOS, which China signed in 1982 and ratified in 1996,[21] creates a legal framework to govern the oceans and seas throughout the world. This universal legal structure has had significant influence on the structure of the international fishery regime and national fishery polices. The creation of the EEZ regime under the UNCLOS has emasculated the principle of freedom of fishery on the high seas. The new regime also represented a major shift in the regulation of oceans activities

19 The original Hainan fishing regulations were passed in 1993 and first amended in 2008.

20 Ben Blanchard and Huang Yan, 'China to start regular patrols from island in South China Sea' (*Reuters*, 21 January 2014) <www.reuters.com/article/2014/01/21/us-china-seas-idUSBREA0K0G220140121> accessed 1 June 2015.

21 See China's Declaration upon Ratification of UNCLOS (n 14).

and access to marine resources. This revolutionary change in the law of sea allows coastal states to have sovereign rights and jurisdiction for the purposes of exploiting and exploring marine resources in the area. In effect, the vast majority of the ocean fishing resources has been handed to the coastal states.[22]

3.2 Sovereign rights on the living resources

The key provision in the UNCLOS regarding the EEZ regime is Article 55, which clearly states that the EEZ is a *sui generis* regime that belongs to neither the high seas nor to the sovereignty of coastal states. It provides that 'the exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the right and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.'[23]

With regards to the rights and duties of the EEZ, Article 56 UNCLOS further provides that the coastal states have 'sovereign rights' to explore, exploit, conserve and manage the living natural resources in the EEZ. Additionally, the provision also indicates that the coastal states have jurisdiction, but not sovereign rights, with regards to marine scientific research. The term 'sovereign rights' indicates that the coastal states do not have sovereignty over the EEZ, but they do have all other rights to adopt necessary measures for the conservation and use of natural resources in the EEZ. The sovereign right of the EEZ is exclusive but not preferential.[24]

3.3 Conflicts in the EEZ: the delimitation of the maritime boundary

With respect to the delimitation of the EEZ, Article 74 UNCLOS provides that the delimitation of the exclusive economic zone 'shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.'[25] Under the current law of the sea regime, the principle that maritime delimitation is governed by international law is well-established, instead of being left for each coastal state to determine for itself.

Nonetheless, the UNCLOS contains no provisions addressing the issue of how to settle the conflicting sovereignty claims over land or land features in the seas. As in the case of *Pedra Branca*, the ICJ pointed out that states need to first determine which one has sovereignty over the island before

22 R R Churchill and A V Lowe, *The Law of the Sea* (Manchester University Press, first published 1983) 160-62.

23 ibid 166.

24 See Malcolm D Evans, 'Maritime Boundary Delimitation: Where Do We Go from Here?' in David Freestone, Richard Barnes and David M Ong (eds), *The Law of the Sea: Progress and Prospects* (OUP 2006) 138.

25 Churchill and Lowe (n 22) 191.

they can proceed with negotiation on a delimitation agreement.[26] Hence, maritime boundaries cannot be delimited until the sovereignty issue is decided. Article 74(2) UNCLOS further provides that if an agreement of delimitation cannot be reached through negotiation, the states can resort to the mechanism of compulsory binding dispute settlement provided for in Part XI of the UNCLOS. However, Article 298 provides that states have a right to opt out of the compulsory dispute settlement procedures in respect of disputes concerning the interpretation or application of the provisions on maritime boundary delimitation.[27] Furthermore, Article 74(3) provides that:

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

Thus, states unable to reach a delimitation agreement may work together to establish a joint area to manage and exploit fishery resources.[28]

4. Conservation and management of fishery resources in the EEZ

The establishment of the EEZ regime has significantly altered the distribution of fishery resources. Nonetheless, the rules under the UNCLOS provide little guidance regarding the extent to which the coastal states may regulate foreign vessels in its EEZ for the purpose of marine conservation, not to mention in the area of overlapping EEZs claimed by different countries.

The establishment of the EEZ regime also entitles the coastal states to manage and monitor the fishery resources. An effective mechanism to conserve and mange fisheries in the EEZ is of fundamental importance since over 90 per cent of commercial fisheries are located within the EEZs. The coastal states are entitled to the sovereign right to manage the marine resources within their EEZ. These rights are also subject to a number of duties. Article 61 UNCLOS provides that the coastal states bear the duties to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal states and competent international organisations, whether subregional, regional or global, shall cooperate to adopt international instruments to achieve the above stated goals and to determine the total allowable catch (TAC) of the living resources in the EEZ. The coastal states are also required to 'promote the objective of optimum utilization of the living resources in the exclusive

26 *Case Concerning Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rock and South Ledge (Malaysia/Singapore)* (Merits) [2008] ICJ Rep 12.

27 Churchill and Lowe (n 22) 454-55.

28 ibid 198-99.

economic zone without prejudice to article 61.'[29]

Additionally, the UNCLOS gives the coastal states broad discretion to take measures in regulating fishing activities conducted by foreign vessels. Article 62(4) elaborates the types of laws and regulations that the coastal states may employ for the purposes of conservation and utilisation of the living resources. These include licenses, fees and remuneration, species restrictions and catch quotas, age and size of the fish, fishing seasons and areas, permitted vessels and equipment, required information, fisheries research, observers or trainees, landing, joint ventures, training and transfer of technology, and enforcement. Article 62(5) requires the coastal states to give due notice of conservation and management laws and regulations.

5. Assessment of the Hainan fishing regulations under the current UNCLOS EEZ regime

Setting aside the competing sovereignty claims over the islands and disputed maritime boundaries in the SCS, the Hainan fishery regulations are in fact compatible with the EEZ rules under the UNCLOS for the following reasons.

First, China is entitled to issue regulatory measures for the conservation and exploitation of marine resources within its claimed EEZ in the SCS. China has made a territorial claim over the islands in the SCS and claim 200 miles of the EEZ in its Territorial Sea and Contiguous Zone Law and EEZ/CS Law. China has further reiterated its territorial and jurisdictional claims in the area in the two Notes Verbales, from 2009 and 2011, submitted to the United Nations Secretary-General.[30] Therefore, the new fishery regulations govern the maritime areas that China claims as their territorial waters and EEZ.

Second, according to the statement above, the purpose of the new Hainan fishery regulations is to strengthen the regulation of fishing activities and to protect fish stocks in the SCS. From this point of view, the new regulations are compatible with the UNCLOS, which gives the coastal states the sovereign rights of exploitation and exploration of fishery resources in their claimed EEZ. Additionally, the coastal states enjoy broad discretion in adopting measures or instruments to regulate fishing activities in their EEZ. Hence, the requirement of the new fishing regulations, which asks foreign vessels to seek approval from Chinese authorities, is not a contravention of the UNCLOS.

Third, as a matter of fact, China has made no clear argument that the controversial 'dashed line' is intended to depict a unilateral maritime boundary claim. Even if the issue of maritime boundary de-

29 Ma Carmen A Ablan and Len R Garces, 'Exclusive Economic Zones and the Management of Fisheries in the South China Sea' in Syma A Ebbin, Alf Håkon Hoel and Are K Sydnes (eds), *A Sea Change: The Exclusive Economic Zone and Governance Institutions for Living Marine Resources* (Springer 2005) 146-49.

30 Masahiro Miyoshi, 'China's "U-Shaped Line" Claim in the South China Sea: Any Validity Under International Law?' (2012) 43 Ocean Development & International Law 1, 5-6.

limitation arises, the delimitation of maritime boundaries in the overlapping jurisdictions in the SCS requires China to negotiate and reach an agreement with other claimant states in the SCS under the current rules of the UNCLOS. However, it is unlikely that China and the claimant states will be able to reach a delimitation agreement in the near future due to the growing tensions in the area. China has made its refusal to participate in the proceedings of international tribunals clear.[31] Therefore, before a final maritime delimitation can be decided by either an international tribunal or an agreement is made among claimant states, the bordering states cannot be prevented from claiming their EEZ and imposing regulatory measures in order to regulate the exploitation and exploration of marine resources in the SCS. In other words, as one of the claimant states in the SCS, China's actions with regards to the regulation of the fishery resources is not without legal grounds under the current EEZ regime. Nevertheless, China's regulations cannot prevent other claimant states from taking similar measures in regulating or conducting fishing or other related activities in their claimed EEZ.

Nevertheless, the above analysis is subject to several caveats. First, as discussed in the previous paragraph, the UNCLOS does not govern the issues of competing sovereignty claims over territorial disputes. Since sovereignty over the islands in the SCS is still in dispute, the overlapping EEZ claims cannot be examined and delimited under the UNCLOS. Second, China's claimed maritime zones in the SCS appear to overlap with those claimed by other bordering states. Hence, the kinds of rights and jurisdiction China can assert in the SCS remained unresolved.

6. Conclusion

Even though the new Hainan fishing regulations are compatible with current EEZ rules under the UNCLOS, this does not necessarily imply that China enjoys the exclusive right to exploit and manage fishery resources in the disputed SCS.

6.1 Conflict or cooperation: why is cooperation a better solution?

It is true that the new Hainan fishing regulations do not articulate new policy measures regarding foreign vessels in the disputed SCS. However, the intention of China to re-emphasise the old regulations at a time when tensions in the area are escalating is not trouble-free.[32] In an area of overlapping jurisdictions and shared resources, the implementation of EEZs is likely to result in conflicts and controversies in fishery policy since different countries have different perspectives on values regarding fishery resources and various capacities in regulating fishery activities.

Acting alone without recourse to international cooperation and negotiation could undermine the international law of the sea regime and jeopardise political stability, economic development and

31 Beckman (n 10) 158.

32 Carl Thayer, 'China's New Fishing Regulations: An Act of State Piracy?' (*The Diplomat*, 13 January 2014) <http://thediplomat.com/2014/01/chinas-new-fishing-regulations-an-act-of-state-piracy/ > accessed 1 June 2015.

environmental protection in the SCS area. Therefore, how to deal with the fishery issues in the SCS remains challenging and closely related to China's rise in the Asia-Pacific region.

As a matter of fact, the delimitation of overlapping EEZs can be more than drawing a boundary line.[33] Apart from the territorial and maritime disputes in the SCS, forming a cooperative regime in fishery resource conservation, as mentioned in Article 74(3) UNCLOS, is in fact a win-win solution for all. First, a cooperation regime would have little effect on the disputed claims over the maritime boundary, but it would help significantly with regard to easing the potential conflicts in the area. It is difficult to settle the overlapping maritime territorial disputes in the area of the SCS because the UNCLOS contains no provisions to deal with this type of case. Nonetheless, to form a regional or multilateral cooperation scheme intended to preserve the depleting fishery resources is not only an urgent task, but it is also a practical step towards reducing the increased tensions in the area and pave the way to peaceful solutions of the territorial claims. There is no doubt that the disputes of territorial claims and the overlapping jurisdictions in the SCS are unlikely to come to an end in the near future due to the complexity of the involved political and economic concerns. Yet a multilateral agreement regarding the exploration and management of marine resources in the area will neither jeopardise the Chinese territorial claims nor will it diminish Chinese assertions.

Second, a cooperation framework will enhance the conservation and preservation of the deteriorating fishery resources in the area. Aside from political concerns, the marine resources in the SCS are of great importance to the bordering countries from both an economic and an environmental perspective. Current fishery resources in the area are facing a crisis of depletion and overfishing. Hence, it is urgent for the bordering states to bring joint actions to manage and preserve fish stocks in the SCS.

Third, from the Chinese perspective, China's leadership in fostering the joint actions will provide clear and convincing evidence of China's willingness to comply with international law, will strengthen its leading position and garner support from its neighbouring states in the region.

6.2 Taiwan's perspective

Although the status of Taiwan as a country has remained questionable and its role in the various SCS disputes is often overlooked, it is impracticable to exclude Taiwan from the discussions surrounding SCS disputes due to Taiwan's active role in distant water fishing industries and Taiwan's long-term claims of territory and jurisdiction in the area.[34] Additionally, Taiwan has occupied Taiping Island (Itu Abu), the largest of the Spratly Islands since 1956.[35] For the past few years, Taiwan has

33 Churchill and Lowe (n 22) 198-99.

34 Fu-Kuo Liu, 'Taiwan's South China Sea policy Revival' in Pavin Chachavalpongpun (ed), *Entering Uncharted Waters? ASEAN and the South China Sea* (Institute of Southeast Asian Studies 2014) 223.

35 The Ministry of Foreign Affairs of the Republic of China (Taiwan), Statement on the South China Sea No. 001 (7 July 2015) <www.mofa.gov.tw/en/News_Content.aspx?n=1EADDCFD4C6EC567&s=EDEBCA08C7F51C98> accessed 15 July 2015.

remained mostly silent as tensions have risen among the claimants because of the blurry cross-straits relations. The recent conflicts in the SCS have not only jeopardised Taiwan's claims in the SCS, but they have also endangered the security and welfare of Taiwanese fishing vessels. In order to safeguard the benefits of Taiwan's fishing industry, the Taiwanese government took a proactive step and proposed a peace initiative in the SCS to avert the heated conflicts and reduce tensions.[36] Although China is unlikely to accept the plan, the idea is plausible. In fact, a joint agreement focusing on the management of fishery resources will be a more practical and less controversial way for Taiwan to have a say in current SCS debates. From a political perspective, the status of Taiwan as a fishing entity has been well-recognised by several international organisations. Moreover, for economic reasons, active participation in an international forum helps to secure Taiwan's economic interest in the SCS. Lastly, from a legal point of view, it is the duty of the coastal states to ensure the sustainability of fishery resources under the UNCLOS.

36 J R Wu, 'Taiwan offers South China Sea peace plan to avert "major conflict"' (*Reuters*, 26 May 2015) <http://uk.reuters.com/article/2015/05/26/uk-taiwan-south-china-sea-idUKKBN0OB07T20150526> accessed 1 June 2015.

Maritime Safety and Security Law Journal

M/V Guanabara: Japan's First Trial on Piracy under the Anti-Piracy Act

Yurika ISHII[1]

Abstract

This article analyses the Tokyo High Court's decision of 18 December 2013 in the *M/V Guanabara* case, which was Japan's first case on piracy under the Anti-Piracy Act of 2009. It was an appeal submitted by two Somali pirates, who were seized by US forces and transferred to Japan where they were convicted by the Tokyo District Court for their involvement in a pirate attack against the *M/V Guanabara*, a Bahamian oil tanker operated by a Japanese company. The article discusses the main holdings of this judgment, which are as follows: first, the Court held that it has adjudicative jurisdiction under customary international law. It argued that the second sentence of Article 105 UNCLOS stipulates a conflict of law rule and does not prohibit a non-seizing state from exercising its adjudicative jurisdiction. Second, the Court found that the transfer of the piracy suspects from the US, a state that does not impose the death penalty for acts of piracy, to Japan, a state that foresees the death penalty as a possible sentence for piracy, did not violate Article 6(1) ICCPR on the right to life. Lastly, with regards to the sentences, the Court sustained the appealed judgment, which took the intermediate value of the upper and lower limits of the range of possible punishments provided for under the Anti-Piracy Act.

Keywords

prosecution of piracy, Japan's Anti-Piracy Act of 2009, universal jurisdiction on piracy, Article 105 UNCLOS, Article 6(1) ICCPR

1. Introduction

This case commentary analyses the Tokyo High Court's decision of 18 December 2013,[2] which was Japan's first case on piracy under the Act on Punishment of and Measures against Piracy (Anti-Piracy Act)[3].

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2 Tokyo High Court, 66(4) High Court Reporter (*Kosai Hanrei Shu*) 6, *reprinted in* 1407 Hanrei Taimuzu 234 (M/V Guanabara case) <www.courts.go.jp/app/files/hanrei_jp/188/084188_hanrei.pdf> accessed 8 July 2015.

3 Act of 24 June 2009, No 55; for an English translation, see 'Act on Punishment of and Measures against Acts of Piracy' (2010) 53 JYBIL 838.

Japan's penal code recognises criminal jurisdiction based on the territoriality,[4] flag state,[5] active personality,[6] passive personality[7] and protective principles[8]. In addition, the code applies to anyone who commits, outside the territory of Japan, those crimes that are governed by treaties, such as anti-terrorism conventions.[9] However, Japanese law had rarely recognised universal jurisdiction until the Anti-Piracy Act was enacted in 2009. This Act provides criminal jurisdiction over an act of piracy where both the offender and victim vessel are non-Japanese.[10] The law was necessary because, while Japan, an island country with little natural resources, relies heavily on maritime commerce, more than 95 per cent of the vessels used for such transaction are registered in foreign states.[11]

The first case to which the Anti-Piracy Act was applied was the *M/V Guanabara* case. On 5 March 2011, four Somali men boarded the *M/V Guanabara*, a Bahamian oil tanker operated by a Japanese maritime commerce company, on the high seas. They attempted to hijack the vessel for the purpose of extorting a ransom. When they first found the vessel, they kept firing their automatic guns while they approached to it; after they boarded, they smashed into the operation room and turned the steering wheel, broke down locked doors to search for the crew, and shot at the door of the captain's room. However, they did not succeed in taking over control of the vessel.

The next day, the United States navy seized the attackers and transferred them to the Japan Coast Guard (JCG) officer on the Japan Maritime Self-Defense Force (JMSDF) naval vessel on the high seas. The alleged offenders were thereupon taken to Japan. All of them were prosecuted before the Tokyo District Court.

The present case comment is on the Tokyo High Court's judgment against two of the four alleged offenders. The Tokyo District Court found them guilty[12] of having attempted to commit an act of piracy[13] as co-perpetrators[14]. They both appealed against the judgments, which the Tokyo High Court

4 Penal Code, Act No 45 of 1907, art 1(1).

5 Penal Code, art 1(2).

6 Penal Code, art 3.

7 Penal Code, art 3bis.

8 Penal Code, art 2.

9 Penal Code, art 4bis.

10 Anti-Piracy Act, art 2.

11 For the background and characteristics of this Act, see Mariko Kawano, 'The First Experience of Prosecution under the Japanese Anti-Piracy Act of 2009' in Gemma Andreone (ed), *Jurisdiction and Control at Sea: Some Environmental and Security Issues* (Giannini Editore 2014) 115; Atsuko Kanehara, 'Japanese Legal Regime Combatting Piracy: The Act on Punishment and Measures Agaisnt Act of Piracy' (2010) 53 JYBIL 469.

12 Judgment of 1 February 2013. See Kawano (n 11); Jun Tsuruta, First Prosecution of Somali Pirates under the Japanese Piracy Act: The Guanabara Case (2014) 7 J of East Asia & Int'l L 243.

13 Anti-Piracy Act, arts 3(2) and (1), citing art 2(1).

14 Penal Code, art 60, which provides the following on co-principals: 'Two or more persons who commit a crime in joint action are all principals.'

dismissed. One of the defendants appealed the judgment, which the Supreme Court dismissed.[15]

In their appeal before the High Court, the defendants claimed that the District Court should have dismissed the case because the prosecution was illegal[16] and the sentencing was unjust. With regard to the first claim of illegal prosecution, they substantiated their appeal with three arguments, which are presented in the following.

First, the defendants claimed that Articles 6 and 8 of the Anti-Piracy Act are unconstitutional and, as a consequence, the prosecution should have been dismissed. These provisions stipulate that the JCG and the JMSDF respectively are entitled to use arms when it is necessary to enforce the law. The argument by the defendants was that these provisions run counter to the Constitution, which, *inter alia*, provides that the maintenance of forces at sea is prohibited.[17]

Second, the defendants insisted that the District Court lacked jurisdiction under both international law and Japanese domestic law to adjudicate the case. The argument was that Article 105 of the United Nations Convention on the Law of the Sea (UNCLOS)[18] does not constitute an exception to the exclusive jurisdiction of the flag state as recognised under customary and treaty law in terms of *adjudicative* jurisdiction, while it does in terms of *enforcement* jurisdiction. Concretely, the first sentence of Article 105 UNCLOS provides that on the high seas every state may exercise its enforcement jurisdiction to 'seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates,' and to 'arrest the persons and seize the property on board.' Hence, it provides for universal enforcement jurisdiction. The second sentence of the same article merely provides that the 'courts of the State which carried out the seizure' (the seizing state) may exercise its adjudicative jurisdiction to 'decide upon the penalties to be imposed' and to 'determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.' As per the defendants, this second sentence of Article 105 UNCLOS does not provide for adjudicative jurisdiction to a state other than the seizing state (i.e. the non-seizing state).

Furthermore, they sustained that domestic law does not confer universal adjudicative jurisdiction either. The Anti-Piracy Act provides for universal jurisdiction only over those criminal suspects who are arrested by Japanese officials[19] and not over those arrested by officials of another state. As a consequence, Japan, as the non-seizing state, had no criminal jurisdiction over the suspects who were seized by US forces.

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15 Judgment of 16 June 2014 (unpublished).

16 Code of Criminal Procedure, Act No. 131 of July 10, 1948, arts 338 and 339(1), which provide that the court shall dismiss the case when the prosecution was unlawful and the sentencing was not correct.

17 Constitution of Japan, art 9(2) (promulgated on 3 November 1946, came into effect 3 May 1947) stipulates: 'In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.'

18 United Nations Convention on Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS).

19 Anti-Piracy Act, arts 2-4.

Third, the defendants claimed that their transfer was illegal for two reasons. One reason put forward to support the claim was that they would have enjoyed more due process rights either in the US, the seizing state, or the Bahamas, the flag state of the victim vessel, as compared to the rights they were granted in Japan. They argued that their procedural rights were denied from the time they were arrested throughout the trial, including the rights to have legal assistance and free assistance of an interpreter. Counsel was not immediately assigned after they were arrested, and they faced communication difficulties through the trial process because they had to rely on two interpreters: one translating from Somali to English and another from English to Japanese.

The other argument as to why their transfer from the US to Japan was illegal was that it violated the right to life stipulated in Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR).[20] In *Judge v Canada*,[21] the Human Rights Committee (HRC) stated that it is a violation of Article 6(1) ICCPR for an abolitionist state to deport a person to another state where a death sentence has been pronounced against him without first ensuring that the death penalty will not be carried out. In the present case, the defendants were transferred from the US, where the death penalty is not imposed for acts of piracy, to Japan, where the Anti-Piracy Act foresees the death penalty as a potential punishment, without any assurance that it ultimately would not be carried out. Hence, the defendants argued that their transfer from the US to Japan was in violation of Article 6(1) ICCPR and the ensuing criminal prosecution was therefore illegal and null.

2. The judgment of 18 December 2013

The Tokyo High Court dismissed all of these claims for the following reasons First, the Court held that it was not necessary to decide on the constitutionality of the Anti-Piracy Act in the present case.[22] The provisions applied by the District Court were Articles 2 and 3, and not Articles 6 and 8, the constitutionality of which the defendants questioned in their appeal. In Japan, a constitutional review is only undertaken if necessary to resolve the case. In the present case, no such necessity was recognised.[23]

Second, and most importantly, the Court gave its interpretation of jurisdiction over acts of piracy under international law, stating that since ancient times, the act of piracy has been considered to be *hostis humani generis*, which threatens the general safety of maritime transportation.[24] Under the universality principle, it is recognised that every state may exercise its jurisdiction to address acts of

20 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

21 *Roger Judge v Canada*, Communication No 829/1998, UN Doc CCPR/C/78/D/829/1998 (2003).

22 1407 Hanrei Taimuzu 238 (the judgment is only available in Japanese. The following segments were translated and paraphrased by the present author.)

23 ibid.

24 ibid.

piracy.[25] In the case of Somali piracy as well, there are many examples where a state seizes a suspect, transfers him to a third state, and the third state accepts, prosecutes and adjudicates him.[26] In addition, with regard to the factual situation and state practice under customary international law,[27] the Court took into account that Article 100 UNCLOS sets out a duty to cooperate in the repression of piracy[28] and concluded that 'therefore, under international law, every State is entitled to exercise its jurisdiction against the act of piracy.'[29]

The Court then continued its interpretation of the second sentence of Article 105 UNCLOS. It recognised that Article 105 does not *oblige* but rather *permits* states to exercise their jurisdiction against piracy.[30] In particular, it noted that the jurisdiction that every state has with regard to piracy is not newly established under UNCLOS; rather, it has been recognised under customary international law since 'ancient times'.[31] Therefore, the claim put forth by the defendants was not consistent with this history and the object and purpose of the provision.[32] In its substance, Article 105 provides that the seizing state may exercise jurisdiction preferably against the non-seizing states, which includes states that have a stake in the case, on the premise that every state may exercise jurisdiction, and in order to ensure fair and prompt adjudication and to safeguard the human rights of alleged pirates, as the seizing state has detained the suspects and retains the evidence.[33]

The Court continued by finding that the District Court seemed to have adopted the same interpretation, and thus the claim on international law was unfounded because the defendants did not understand the judgment correctly.[34] The claim on domestic law also had no basis because its understanding of universal jurisdiction and the interpretation of Article 105 were different from that of the High Court.[35] As a consequence, the Court dismissed the claim by the defendants that the District Court had no criminal jurisdiction over them.

Third, as to the legality and validity of the transfer of the defendants, the Court found that the right of defence had not been substantially violated. If states exist where the rights of the defendants could be more properly ensured, that fact does not itself invalidate the prosecution of the current case nor does it deny the Court jurisdiction over the case.[36]

25 ibid.
26 ibid.
27 ibid.
28 ibid.
29 ibid.
30 ibid.
31 ibid.
32 ibid.
33 ibid.
34 ibid.
35 ibid.
36 ibid.

On the claim that Article 6 ICCPR was violated, the Court noted that while the ICCPR has been incorporated into Japanese domestic law, the interpretation of the defendants cannot be supported by the words of Article 6(1). Moreover, the views of the HRC are not legally binding, even on State Parties; Japan had not ratified the First Optional Protocol, which established the individual complaints mechanism, so that the normative impact of the HRC's views is further limited.[37] In addition, the Court took into account that the HRC treated abolitionist and retentionist states differently, and noted that only abolitionist states are under an obligation not to extradite a person to a retentionist state if it is reasonably expected that the death penalty would be imposed upon the person. Since both Japan and the US are retentionist states, no such obligation exists, and thus the transfer of the defendants did not violate the ICCPR, and the prosecution was not illegal and void.[38]

As to the sentencing, the District Court's judgment weighed the fact that the attempt was not completed against the danger and viciousness of the act, finding that the defendants' case fit in neither the upper limit nor the lower limit of the range of possible sentences but in the midpoint of the two limits.[39] It then considered several factors to adjust the term of imprisonment. As per the High Court, the appealed judgment relied upon no unreasonable facts, and the defendants' claim therefore lacked reason.

3. Analysis

3.1 The second sentence of Article 105 UNCLOS

The first and most important issue of the present decision was the basis of Japan's adjudicative jurisdiction. In the *M/V Guanabara* case, it was the US navy that seized the piracy suspects, and the defendants argued that Japan as a non-seizing state did not have adjudicative jurisdiction. The High Court understood the second sentence of Article 105 UNCLOS as a conflict of law provision and that it did not exclude the adjudicative jurisdiction of the non-seizing state.

There are three points of view as to whether the exercise of adjudicative jurisdiction of a non-seizing state is permissible under the second sentence of Article 105 UNCLOS.[40]

First, there is the view that the exercise of criminal jurisdiction by non-seizing states is not permissible under customary international law or the UNCLOS. According to these authors, the provision grants the competence to criminally prosecute exclusively to the seizing state (*forum deprehension-*

37 ibid 239.

38 ibid.

39 ibid.

40 For a concise summary of the arguments and relevant materials, see Robin Geiss and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011) 148. See also Daniel Patrick O'Connell, *International Law of the Sea* 2 (1987) 977; Paul Fauchille, *Traité de droit international public* 1 (8é ed, 1925) 88.

is).[41] However, such a characterization of adjudicative jurisdiction over piracy has been considered as not appropriate in light of the history of piracy regulation and state practice. In addition, if every state is permitted to exercise their jurisdiction over pirates, the interpretation that the article prohibits a non-seizing state from exercising its adjudicative jurisdiction is unreasonably narrow.[42]

The two other positions on Article 105 UNCLOS are based on the view that customary international law permits the exercise of adjudicative jurisdiction by every state. This view that customary international law provides for adjudicative jurisdiction for non-seizing states is widely supported by state practice and notably evidenced by the fact that a number of states and the EU have concluded transfer agreements with regional states, such as Kenya, the Seychelles and Mauritius.[43]

While there is agreement that customary international law provides for adjudicative jurisdiction, the two positions differ with regard to the interpretation of the second sentence of Article 105 UNCLOS.

Some authors take the stance that the provision should be read as simply reaffirming the rule established under customary international piracy law, i.e. that the prosecution of piracy suspects takes place based on the domestic law of the seizing state when it is prosecuted in that state. The jurisdictional basis for the prosecution of piracy suspects is supported by customary international law. Robin Geiss and Anna Petrig support this view, as it is generally consistent with the wording of the provision as well as the explanation of the Virginia Commentary.[44] However, one could argue that this view contradicts the wording of the second sentence of Article 105 UNCLOS, which explicitly limits the scope of the provision to the seizing state.

Other authors argue that Article 105 UNCLOS has the effect of a conflict of law rule, thereby solving competing jurisdictional claims by according priority to the seizing state to prosecute the case, without actually conferring a basis for the exercise of adjudicative jurisdiction. There is no contention that, under the second sentence of Article 105 UNCLOS, the seizing state has priority in exercising jurisdiction over other states interested in prosecuting the case, including the flag state and the national state of the piracy suspect or the victims. While the non-seizing state cannot claim priority in exercising adjudicative jurisdiction to the seizing state, and it does not have the same opposability

41 See Fauchille (n 40).

42 For this point, see Kazuhiro Nakatani, 'Kaizoku kōi no Shobatsu oyobi Kaizoku Kōi heno Taisho ni Kansuru Hōritsu' (2011) 1385 Juristo 68 (in Japanese).

43 See, eg, Exchange of letters for the conditions and modalities for the transfer of persons having committed acts of piracy and detained by the European Union-led Naval Force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya [2009] OJ L79/49. For the further state practice, see Tullio Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia' (2009) 20 Eur J Int'l Law 399; James Thuo Gathii, 'Jurisdiction to Prosecute Non-National Pirates Captured by Third States under Kenyan and International Law' (2009) 31 Loy LA Int'l & Comp L Rev 363.

44 Geiss and Petrig (n 40) 149; Satya Nandan and Rosenne Shabtai, *United Nations Convention on the Law of the Sea 1982: A Commentary* 2 (1993) 216, state that '[t]he second sentence of Article 105 implies that the courts of the State which carried out the seizure will apply national law, including, where appropriate, the national rules governing the conflict of laws.'

against the other non-seizing state as the seizing state, the provision does not prohibit non-seizing states from exercising adjudicative jurisdiction.[45] The Djibouti Code of Conduct provides that the seizing state has a 'primary right' to adjudicate piracy suspects and stipulates that this right may be waived.[46] This provision of the Djibouti Code is consistent with this interpretation.

The High Court's decision supported the last view.[47] It recognised the adjudicative jurisdiction under customary international law and held that the second sentence of Article 105 UNCLOS as 'providing that the seizing State can exercise primary jurisdiction against the other States, including States who have a stake in the case.' The Court correctly understood the relationship between customary international law and Article 105 UNCLOS.

It should be noted that the Court referred to Article 100 UNCLOS as part of the basis for the jurisdiction. However, it is undisputed that this provision does not provide any exception to the exclusive jurisdiction of the flag state. Therefore, the reason why the Court added this part is not clear. Arguably, the Court referred to this provision as the basis for international cooperation in the form of transfers of piracy suspects; and in that case, it is not incorrect, although unnecessary.

3.2 Article 6(1) ICCPR

The second issue was the legality of the transfer of the piracy suspects from the perspective of international human rights law. The Anti-Piracy Act provides for the death penalty[48] while the US anti-piracy law does not, hence the defendants argued that the transfer was contrary to the right to life enshrined in Article 6(1) ICCPR. The High Court correctly denied this allegation.

The restriction under international human rights law extends to the procedure of extradition or transfer of criminal suspects. However, it is rare that a state is prevented from transferring an individual because of such a restriction.

In the present case, it was disputed whether the transfer from the US to Japan was contrary to Article 6(1) ICCPR. There is no serious dispute that Article 6 ICCPR does not prohibit the death penalty itself, and that it treats abolitionist states and retentionist states differently.

The view that the defendants brought forward to support their claim was *Judge v Canada*.[49] In this case, the question submitted to the Human Rights Committee was whether Canada violated the author's right to life under Article 6 ICCPR by deporting him to the US, where a sentence of death had already been imposed upon him, without first ensuring that that sentence would not be carried out.

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45 Akio Morita (2013) Hanrei Watch No.23 (Case Comment); Akio Morita, 'Kokusaihō jō no Kaizoku ni taisuru Kokka Kankatsuken no Kakuchō' (2013) 110 *Hogaku Shirin* 110.

46 Djibouti Code of Conduct, IMO Doc C102/14, 3 April 2009, Annex, art 4(7).

47 The Court seems to have relied upon the interpretation supported in the case comment of Morita (n 45).

48 Anti-Piracy Act, art 4.

49 *Judge v Canada* (n 21).

The author had already been sentenced to death before he fled from the US to Canada. In answering the question, the HRC stated that Canada, as a State Party that has abolished the death penalty, violated the author's right to life under Article 6(1) ICCPR by deporting him to the US where a death sentence against him was pronounced without first ensuring that the death penalty would not be carried out.

The HRC acknowledged that by interpreting Article 6(1) and (2) ICCPR in this way, abolitionist and retentionist States Parties are under different obligations. It considered this to be an inevitable consequence of the wording of the provision itself, which, as becomes clear from the *travaux préparatoires*, sought to appease divergent views on the issue of the death penalty in an effort to find a compromise among the drafters of the provision. As per the HRC, the *travaux préparatoires* express that, on the one hand, one of the main principles of the Covenant should be abolition of the death penalty, but that, on the other hand, capital punishment still existed in certain countries for which abolition would create difficulties.[50] The death penalty was seen by many delegates and bodies participating in the drafting process as an 'anomaly' or a 'necessary evil'.[51] It would therefore appear logical to interpret the first paragraph of Article 6(1) ICCPR providing for the right to life in a broad sense, while the second paragraph, which addresses the death penalty, should be interpreted narrowly.[52]

For these reasons, the HRC considered in *Judge v Canada* that Canada, as a State Party that has abolished the death penalty, violated the author's right to life under Article 6(1) ICCPR by deporting him to the US, where he was under a sentence of death, without first ensuring that the death penalty would not be carried out – irrespective of the fact that it had not yet ratified the Second Optional Protocol to the Covenant Aiming at the Abolition of the Death Penalty.[53] The HRC recognised that Canada did not itself impose the death penalty on the author.[54] However, by deporting him to a country where he was under sentence of death, Canada established the crucial link in the causal chain that would set in motion the execution of the author.[55] As such, the ambit of the view was limited to the obligations of the *abolitionist* state.

It should be noted that there is an argument that even retentionist states are obliged to ensure that the receiving state complies with the obligations provided under Article 6(2) and (5) ICCPR.[56] However, in the case at hand, the defendants did not raise this point and the Court did not examine it.

The Court held that the views of the HRC did not extend to the present case because both Japan and the US are *retentionist* states. This judgment was appropriate as it correctly understands the distinc-

50 ibid, para 10.5.

51 ibid.

52 ibid.

53 ibid, para 10.6.

54 ibid.

55 ibid.

56 For the analysis of this issue, see Anna Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (Brill 2014) 350.

tion between retentionist and abolitionist states underlying Article 6 ICCPR.

3.3 Sentence

The District Court imposed on each defendant a sentence of ten years of imprisonment. When it decided the sentence, it took the midpoint between the upper and lower limits of the sentencing range provided for under the Anti-Piracy Act.[57] It then considered several factors, such as the seriousness of the crime (i.e. its commission was thoroughly planned and the tanker was with 24 crew members and crude petroleum worth 37 million dollars) and the role played by the defendants (i.e. they played the lead role in organising the attack and pursuing the plan) to adjust the sentence.[58]

Under Japan's Penal Code, the punishment may be reduced for a person who commences a crime without completing it , but such a reduction is not mandatory unless the offender voluntarily abandoned the commission of the crime.[59] In the present case, the Court did not reduce the punishment although the crime was ultimately an attempted crime, stating that they almost hijacked the vessel and the act of threat was dangerous.

In addition, the Court can reduce a sentence for mercy. The defendants argued that this was their first time attempting to commit piracy and that they were working diligently for their families who lived in poverty so they deserved a reduction in their sentences. However, the Court took the view that the defendants committed the offence due to their interest in making a profit (i.e. they were expecting rewards of 40,000 to 50,000 dollars) and did not reduce the sentence.

The High Court held that the lower court's decision regarding the sentencing was appropriate and dismissed the claims of the defendants.[60]

The reasoning pertaining to the sentence seems to reflect the change in Japan's judicial system, which introduced a quasi-jury system in 2004.[61] In Japan, the judge relies on a sentencing standard ('Ryokei Sōba'), which is a standard inferred from precedents. Up until the late 1990s, a judge used to have wide discretion in deciding the final sentence, although he relied on the sentencing standard, and the sentencing method was heavily criticised as being opaque. Because the quasi-jury system was introduced, the court started to change its way of sentencing. It categorises the offenses based on social factors and decides the sentence based on similar precedents and statistics so that one could see the reason for the sentence from the judgment.

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57 The lower limit of the imprisonment for an act of piracy is five years and the upper limit is twenty years (Anti-Piracy Act, art 3(1); Penal Code, art 12(1)).

58 For the decision of the Tokyo District Court, see Tsuruta (n 12) 247.

59 Penal Code, art 43.

60 1407 Hanrei Taimuzu 239.

61 See Act on Criminal Trials with Participation of Saiban-in (Quasi-Jury), Act No. 63 of 2004, amended, Act No. 44 of 2011. Trials under the new system started in 2009.

The present case was the first to arise under the Anti-Piracy Act, and consequently, there was no standard based on precedents. The Court relied on the sentence for provided in the Act and then took into account factors of the case. Domestically, it could be supported, as it is a method to secure the clarity and transparency in deciding the sentence.

4. Concluding remarks

As the analysis of this comment shows, the *M/V Guanabara* case is a noteworthy precedent in terms of both international and domestic legal points of view, as it clarified the Japanese Court's interpretation of Article 105 UNCLOS and Article 6(1) ICCPR. Since international cooperation between states is necessary in order to address the criminal phenomenon of piracy and armed robbery at sea, an analysis of state practice is crucial. This clarification by the Court regarding how it understands and interprets international law will serve as a step towards the development of the argument on piracy.

It should be noted that piracy, in particular Somali piracy, is a global issue and the sentencing procedure in each domestic court requires further research. In this regard, Eugene Kontorovich did an empirical study on penalties imposed for the offence of piracy,[62] and the present case would serve as valuable data for such a study.

62 Eugene Kontorovich, 'The Penalties for Piracy: A Discussion Paper' (One Earth Future Foundation, 2012) <http://oneearthfuture.org/> accessed 8 July 2015.

Maritime Safety and Security Law Journal

Military Exercises in the Exclusive Economic Zones: The Chinese Perspective

Silvia MENEGAZZI[1]

Abstract

Over the past several decades, multilateral discussions concerning the law of the sea have resulted in a growing recognition of the importance of maritime resources and space by many of the world's nations. The 1982 UN Convention on the Law of the Sea (UNCLOS) is a comprehensive treaty that went into effect on 16 November 1994 in order to create a legal regime governing the peaceful use of the oceans and its resources. The UNCLOS provides guidance on various maritime matters, ranging from pollution to environmental protection, from resources rights to military activities. The Convention also created Exclusive Economic Zones (EEZ). Such zones extend two hundred nautical miles from the shores of coastal states. In particular, the EEZ regime developed new principles relating both to the rights and the responsibilities of coastal and maritime states within their sphere of influence, including how to conduct military exercises. Whereas in the West, states are mostly agreed on the fact that navigation and military exercises should be based on the concept of 'navigational freedom', within non-Western contexts (i.e. East Asia), a widely shared opinion is that foreign battleships engaging in military operations in a country's EEZ are considered to be harmful to the country's national security and such activities should therefore be prohibited. Within such a framework, this article intends to investigate the Chinese perspective with regards to military activities in the EEZ. In doing so, it is argued that despite acknowledging the need of both coastal and maritime states to extend surveillance and control beyond their territorial seas, misunderstandings regarding military activities in foreign EEZs are bound to increase if both parties do not simultaneously take both views into account.

Keywords

military activities, Exclusive Economic Zones (EEZ), United Nations Convention on the Law and Sea, UNCLOS, sovereignty, China, East Asia

1. Introduction

This article aims to contribute to the debate surrounding the historical and political narratives that over time have shaped the different, and in many cases hostile, positions taken towards the man-

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agement of military activities in the Exclusive Economic Zone (EEZ) by coastal states and maritime powers.[2] Whereas in the West, a consistent majority of states believe that navigation and military exercises need not be conducted with the consent of the coastal state, within non-Western contexts (i.e. East Asia, Latin America or Africa), a widely shared opinion is instead that foreign vessels engaging in military operations in a country's EEZ may be harmful to the country's national security, and such activities should therefore be prohibited or at least conducted *with the consent of the coastal state*. In order to better exemplify the complicated puzzle of military activities in the EEZ regime, this article illustrates how the issue has been discussed in a non-Western context, and more precisely, in the East Asian region.[3] In light of the recent attention by the international community and the scholarship regarding China's growing role in the region, the analysis focuses on the position of the People's Republic of China (PRC) as a case study.

In the last decade, due to the fast-growing security concerns at issue between China and other East Asian countries (such as on-going territorial disputes with Vietnam and the Philippines in the South China Sea), as well as between China and the United States, the Chinese perspective is indeed an interesting case to study in order to understand why this topic has become particularly crucial when considering the status of maritime affairs in the region. For this purpose, we will first describe the historical development of the EEZ regime in the United Nations Convention on the Law of the Sea (UNCLOS), intended to highlight the need to acknowledge an 'Asian perspective' on the matter. This is because, despite discussions about the EEZ regime that date back to the late 1950s, misunderstandings between coastal and maritime states, driven by Western-led biases and maintained by Latin American, African and Asian states, are rarely taken into account when dealing with the East Asian region. In particular, the narrative that underpins China's current position on the EEZ regime appears to receive even less consideration over time; instead, the PRC's stance is often defined as assertive or increasingly aggressive when compared with the past, even though such a view does not take into account the historical narrative that has contributed to China's behaviour. For this purpose, the third section intends to broadly contextualise China's position on the EEZ regime. The aim is to show that, since the beginning, Western-led biases together with national security concerns have been two important determinants that affect the debate concerning the Chinese perspective on the EEZ regime. On top of this, political rivalries in the region have further contributed to make the EEZ regime as problematic and controversial as it is today. The fourth section will discuss the main historical and political narratives that have shaped China's position on the UNCLOS with a focus on its most relevant articles about the EEZ regime (Articles 55 and 58). The article concludes that despite the high level of multilateral maritime cooperation achieved over the last 50 years, in the East Asian

2 With regard to this debate, maritime states/powers are often opposed to coastal states. For the purposes of this article, the term refers to those countries that see maritime power and the management of oceans' resources as strategically important in order to increase their power potential at the global level.

3 In the literature, international regimes are defined as a set of principles, norms, rules and procedures, implicit or explicit, around which actors' expectations converge around a specific issue area. See Stephen D Krasner, 'Structural causes and regime consequences: Regimes as intervening variables' in Stephen D Krasner (ed), *International Regimes* (Cornell University Press 1983) 372.

region the current status of the disputes dealing with military activities in the EEZ are unlikely to be solved by relying on international law-making standards and procedures alone; instead, multilateral solutions should also be incentivized by improving the political conditions and dialogue among states. Last but not least, the intent of this article is not to discuss in detail the legal merits of the UNCLOS or the EEZ regime. Rather, other than the general overview on the current state of affairs that will be provided, the main focus is directed at contextualising the discourse within a larger perspective – in particular, the relevance of such debate in the broader field of international relations.

2. The UNCLOS and the EEZ Regime: historical developments

Historically, there has always been a clear distinction between 'territorial waters' and the 'high seas'. Whereas the former refers to a belt of coastal waters extending to 12 nautical miles from the baseline of a coastal state, the latter denotes open waters with unrestricted navigation for all. Since the UNCLOS entered into force in 1994, State Parties have been provided with an international regime aimed at peaceful maritime and ocean management. At present, 167 states plus the European Union have ratified the Convention.[4] Nevertheless, although the treaty was established as a comprehensive means of addressing a wide range of legal issues in the maritime context, the Convention is ambiguous about the issues concerning the military domain and the use of force in the oceans.[5] More specifically, it does not 'explicitly regulate military activities in the EEZ or the high seas'.[6] In the UNCLOS, EEZs are considered to be highly strategic areas of interest, which have a profound impact on the management and conservation of the *resources* of the oceans. Essentially, the Convention recognises 'the right of the coastal States to have jurisdiction over the resources of some 38 million square nautical miles of ocean space', where 'to the coastal State falls the right to exploit, develop, manage and conserve all resources – fish or oil, gas or gravel, nodules or sulphur – to be found in the waters, on the ocean floor and in the subsoil of an area extending 200 miles from its shore'.[7]

Despite the principles set out in the UNCLOS regulating the management of the resources of the coastal states in the EEZs, no provision has been provided with regards to *how* and *which* military activities should be conducted in such areas. For instance, amongst the main points of contention is that within the broad category of so-called military activities, the confusion with regards to *how* such activities have been defined by different countries over time further complicates the puzzle. That is, although maritime activities in the military sphere are often addressed generically as 'military exercises', in the case of military activities in the EEZs, disagreements have emerged with regards to

4 For a chronological list of ratifications, see the United Nations Division of Ocean Affairs and the Law of the Sea, available at <www.un.org> (last updated 7 January 2015).

5 Jing Geng, 'The Legality of Foreign Military Activities in the Exclusive Economic Zone under UNCLOS' (2012) 28(74) Utrecht Journal of International and European Law 22.

6 ibid 24.

7 United Nations Division of Ocean Affairs and the Law of the Sea, 'The United Nations Convention on the Law of the Sea, A historical perspective' (1998) <www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm#Exclusive%20Economic%20Zone> accessed 25 July 2015.

states' Surveillance and Research Operations (SROs), Marine Scientific Research (MSRs) and hydrographic surveys.[8] For instance, the United States does not consider MSRs to be neither military activities nor hydrographic surveys. In this light, such activities are not considered to be the same as resource exploration and they do not require the consent of the coastal state. According to China, however, MSR activities should be carried on with the consent of the coastal state and the research results, similarly to hydrographic surveys, should benefit both parties. Moreover, they should not be publicly published.[9]

From the outset, the innovation of the UNCLOS lay in the fact that for the very first time in the international law domain, coastal states and maritime powers (apparently) had come to an agreement on many contentious issues concerning the law of the sea. For this reason, the treaty was initially considered to be a significant innovation with regards to international treaty making and the management of ocean issues. At the same time, during the Third UN Conference (UNCLOS III) in 1973, it became clear that the UNCLOS had become a double-edged sword in the realm of international law-making: that is, the Convention was not only an instrument to address international law practices and misunderstandings, but it was also an instrument that further exacerbated the divide among states concerning the international management of the oceans.

More clearly, to some states, the position of maritime powers towards the EEZ regime was representative of the great political dilemma anchored in the legacies and power dynamics established with the bipolar international system as a result of the Cold War conflict. Specifically, the main implication was that in the 1970s, a discrete number of developing states began to share in the idea that both the United States and the Soviet Union – the two preeminent naval powers at that time – had the sole common interest of ensuring that the evolving legal regime governing the international seas had as a main priority the protection of their global interests (maritime and naval interests). This motivation helps explain why, since negotiations started at the end of the 1950s, some countries were already sceptical about the real success of such initiative and were struggling to instead conclude an agreement where they would be assured that the rights of developing states would also be guaranteed.[10]

Going back to the genesis of the EEZ regime within the UNCLOS, it was indeed the United States that first inaugurated the debate over EEZs' territorial rights. In the immediate aftermath of WWII (specifically, on 28 September 1945), the United States declared its willingness to control marine

8 For an updated analysis of the current debate on the Exclusive Economic Zone, see Gemma Andreone, 'The Exclusive Economic Zone' in Donald R Rothwell, Alex G Oude Elferink, Karen N Scott and Tim Stephens (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015).

9 Yang Fang, 'Exclusive Economic Zone (EEZ) Regime in East Asia Waters: Military and intelligence-gatherings activities, Marine Scientific Research (MSR) and hydrographic surveys in an EEZ' (2010) RSIS Working Paper No 198, 11 <www.rsis.edu.sg/wp-content/uploads/rsis-pubs/WP198.pdf> accessed 25 July 2015.

10 Together with the United States and the Soviet Union, France, Japan and the United Kingdom formed a special interest group called 'the Great Maritime Powers'. See Robert Beckman and Tara Davenport, 'The EEZ Regime: Reflections after 30 Years' (LOSI Conference Paper, Seoul, 2012) 1-41.

resources and coastal fisheries beyond its territorial seas, claiming state sovereignty over the high seas.[11] Yet this declaration – from here on known as the 'Truman Proclamation' – was perceived as a real watershed in the domain of international law. Just two years later, two other states, Chile and Peru, declared full authority over the ocean zones extending 200 miles from their coasts.[12] From 1948 to 1951, other Latin American states followed the United States' claim about the EEZ, with the result that a second fundamental turning point occurred in 1952. It was when, with the 'Santiago Declaration', that the Governments of Chile, Ecuador and Peru for the first time proclaimed 'as a norm of their international maritime policy that they each possess *exclusive sovereignty* and jurisdiction over the sea along the coasts of their respective countries to a minimum distance of 200 nautical from these coasts'.[13] The above declarations resulted in the first ever United Nations Conference on the Law of the Sea held between 1956 and 1958, an international event that profoundly affected the course of discussion with regards to dispute management between coastal and maritime states. Although the United Nations rejected the proposal of the Santiago Declaration, which was to recognise the 'exclusive' sovereignty of the coastal states in the EEZ, it nevertheless 'provided a small victory for those seeking extending coastal States control, recognizing sovereignty rights of coastal States on the soil and subsoil of the coastal shelf beyond the territorial sea'.[14] Almost two decades after the Santiago Declaration, at the beginning of the 1970s, other Asian and African states declared their support to Latin America countries, thus adding further doubts as to whether the benefits of joining UNCLOS were more real for the developing states or the developed ones. That Latin American countries were not working alone was highlighted first with the Colombo Meeting in 1971, followed by the Addis Ababa Declaration of 2 July 1973. The position of these countries was rooted in the fact that the debate concerning the law of the sea was still too Western-biased and thus in line with the Cold War's dynamic of juxtaposing 'developed vs. developing' countries. The result was a Working Paper titled 'The Exclusive Economic Zone Concept' presented by Kenya, within which it was clearly affirmed that 'the present regime of the high seas benefits only the developed countries'.[15] In this light, African and Asian states decided to support the cause of their predecessors, therefore sustaining at the international level the idea that the regime of the high seas was in fact contributing to the on-going divide between developing and developed countries.

In the context of international law, an exhaustive analysis with regards to the debate over military exercises in the Exclusive Economic Zones is provided by Valdorisi and Kaufman's work. According

11 According to Prof Ji, the US has always sustained its own interpretation of the EEZ regime, as exemplified by the fact that it continues to use the phrase 'international waters' rather than 'high seas' whereas the former is never mentioned in the UNCLOS. See Ji Guoxing, 'The Legality of the "Impeccable Incident"' (2009) 5(2) China Security 16.

12 George V Valdorisi and Alan G Kaufman, 'Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict' (2002) 32(2) California Western International Law Journal 253, 259.

13 Moreover, 'the exclusive jurisdiction and sovereignty over this maritime zone shall also encompass exclusive sovereignty and jurisdiction over the seabed and the subsoil thereof'. Chile, Ecuador and Peru. Declaration on the maritime zone (signed at Santiago on 18 August 1952) 1006 UNTS 325 (emphasis added).

14 Following the Santiago Declaration, the Latin American states signed two other international agreements in 1970, the Montevideo Declaration on the Law of the Sea and the Lima Declaration, see Valdorisi and Kaufman (n 12) 261.

15 See the Report of the Thirteenth Session of the Asian-African Consultative Committee (Lagos, January 1972) 18-25.

to the authors, the real puzzle is due to the fact that, despite the many declarations advanced by states prior to the UNCLOS in the 1950s and despite the fact that 'food for thought' had been provided by different cultural contexts (ranging from the United States to Latin American countries to Asian and African states), all coastal states 'did not purport to seek sovereignty for its own sake, for the sake of territorial expansion, or for defense of the nation from a military threat'[16]. More clearly, 'they rationalized their need for sovereignty as needed to protect and utilize natural resources of their marine environment'.[17] To put it even more pragmatically: 'Their interests were *economic* and *environmental* in nature'.[18] Although recognising that security interests were already perceived to be of strategic importance both to coastal and maritime states when initially debating on the EEZ, at that time they were not seriously taken into consideration not only in the course of the various declarations but also during the treaty's drafting with the result that, at present, misunderstandings over military exercises within Exclusive Economic Zones are still at stake. This complexity further explains why the lack of attention given to (coastal and maritime states') national interests and security concerns resulted in the fact that today the EEZ regime remains a *sui generis regime*. It is neither inclusive (i.e. the effective possibility for maritime states to exercise sovereignty rights over the EEZ *jointly* with coastal states) nor exclusive (i.e. the rights of coastal states to exclude *a priori* maritime states from conducting military exercises in the EEZ).

If we move from the sphere of international law to the context of international politics, although solutions concerning military activities in the EEZ are often considered to be solvable only through the implementation of so-called Marine Policy Regimes, the level of agreement reached among the main actors involved is quite low.[19] In this light, it is unlikely to underestimate the political implications that were at stake in the course of the UNCLOS Conferences since the beginning, especially with regards to the degree of 'universal applicability' of the EEZ regime. More specifically, since negotiations initiated in the 1950s, we have seen two main overlapping dynamics: (1) Western-led biases affecting developing countries' view of the divide between coastal states and maritime powers as a consequence of the 'East vs. West' divide; and (2) the predominance of the environmental and economic dimensions over security concerns. However, the political implications with regards to military activities in the EEZ were not considered a top priority to either group both before and after the establishment of the UNCLOS (1982).

At the same time, both coastal and maritime states face a further challenge today: unlike when the UNCLOS was signed, the bipolar international system has now been replaced by a fast-paced multipolar order. As Peter Katzenstein affirmed:

16 Valdorisi and Kaufman (n 12) 262.

17 ibid.

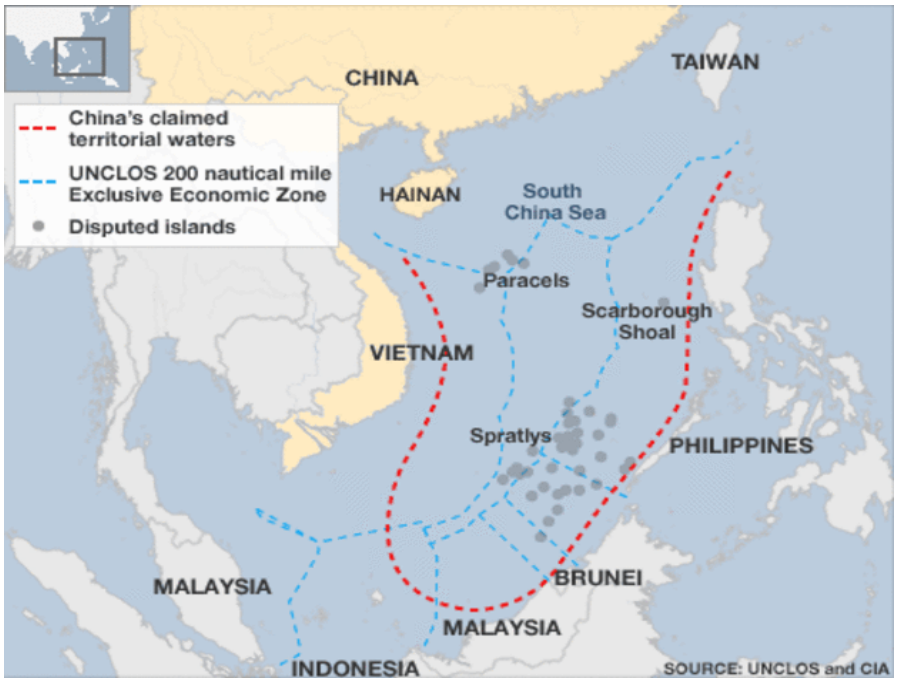
18 ibid (emphasis added).

19 A Marine Policy Regime is 'a set of agreements among a defined group of actors specifying: (1) the distribution of power and authority for the marine geographical region; (2) a system of rights and obligations for the members of the group; and (3) a body of rules and regulations that are supposed to govern the behavior of the members', see Mark J Valencia, 'Regional Maritime Regime Building: Prospects in Northeast and Southeast Asia' (2000) 31 Ocean Development & International Law 223, 231.

> The end of the Cold War has altered fundamentally the way we see the world. … Power politics is now occurring in complex regional context that undercut the stark assumption of the international system as unmitigated anarchy and these regional contexts are making possible a variety of processes that put into question some conventional categories of analysis.[20]

Therefore, the necessity to both coastal states and maritime powers to emphasise security concerns over economic and environmental activities in the EEZ also increased vis-à-vis the strategic role played by regions and emerging countries in world affairs, within which East Asia and the PRC are two exemplificative cases. Similarly, the security priorities of states not only within their own territorial borders, but also in the marine and ocean environments, have moved beyond proper territorial rights and often include overlapping regional and global interests and dynamics. In the following, we will discuss the Chinese views on the EEZ regime.

Fig. 1 The South China Sea Dispute



Source: Eurasia Review, 2012

20 Peter J Katzenstein, 'Regionalism and Asia' (2000) 5(3) New Political Economy 353, 353.

3. China and the EEZ regime: a matter of national security

The dichotomy of 'developing vs. developed countries' in the UNCLOS exemplifies how, since the end of the 1950s, the discussion concerning states' interests in the EEZ was driven by a commonality of interests among the different stakeholders involved with the treaty's discussion and its implementation. At the same time, the priority of economic and environmental interests over security concerns accounted for the fact that military activities in the EEZ were not problematized enough so as to found a common working ground for both coastal and maritime states. In 2004, Galdorisi and Kaufman offered four main reasons why military activities in the EEZ by foreign nations are becoming more and more relevant: the accelerating peace of globalisation, the tremendous increase in world trade, the rise in the size and quality of the navies of many nations, and technological advances that exploit oceanic rise.[21] Today, however, we believe that one more reason, which does not exclude any of the above, is particularly relevant when analysing the current status of the EEZ regime, and that is the growing attention devoted by China to military affairs, both within its regional sphere of influence (i.e. East Asia) as well as from a global perspective, as the PRC's stance towards the EEZ regime demonstrates.

The debate concerning the Chinese position in the EEZ is linked, according to many, to the growing assertiveness of China regarding international affairs, and in particular, with regards to the implementation of its military defence apparatus as an instrument to deal with sovereignty and territorial disputes *within* and *outside* its territorial borders in the East Asian region.[22] Specifically, whereas in the past China has always maintained a 'low profile' in disputed waters, emphasising the development of trade and economic relations in its interactions with Southeast Asian claimants, today's China has not only reclaimed land on a large scale for the construction of buildings and ports, as in the Spratly Islands for instance, but it has also expanded its naval presence in the EEZs of other countries (Guam, Australia and Hawaii).[23]

On top of this, a major point of concern was the first public Chinese Military Strategy White Paper released by the Chinese Ministry of National Defense on 26 May 2015.[24] Since then, the White Paper has become a subject increasingly analysed by Western and Chinese media outlets.[25] Within the document, Beijing exemplified the main threats China would be able to face with a modern mili-

21 Valdorisi and Kaufman (n 12) 255.

22 Julian Ryall, 'US-China war "inevitable" unless Washington drops demands over South China Sea' (*The Telegraph*, 26 May 2015) <www.telegraph.co.uk/news/worldnews/asia/china/11630185/US-China-war-inevitable-unless-Washington-drops-demands-over-South-China-Sea.html> accessed 25 July 2015.

23 Xue Li and Xu Yanzhuo, 'China Should Adjust its South China Sea Policy' (*The Diplomat*, 8 June 2015) <http://thediplomat.com/2015/06/china-should-adjust-its-south-china-sea-policy/> accessed 25 July 2015.

24 Ministry of National Defense, 'China's Military Strategy' (*The State Council Information Office of the People's Republic of China*, May 2015) <http://eng.mod.gov.cn/Database/WhitePapers/> accessed 25 July 2015.

25 '中国政府发表《中国的军事战略》白皮书' (Chinese government published 'China's military strategy' White Paper, Xinhua, 26 May 2015 <http://news.xinhuanet.com/politics/2015-05/26/c_1115407433.htm> accessed 25 July 2015).

tary apparatus, including new threats from 'hegemonism, power-politics and neo-interventionism'.[26] More specifically, the main strategic tasks of modernised armed forces for the Chinese leadership when focusing on maritime operations would be a shift in the focus of the People's Liberation Army (PLA) Navy from 'offshore water defense' to 'open seas protection'.[27] To some, it signifies that 'the PLA is seeking to shift away from a narrow focus of defence of its territory and near-periphery toward the ability to defend and secure Chinese national interests further abroad'.[28] In particular, Beijing will be following a two-path strategy: in the South China Sea, it is building up its maritime surveillance forces in the area and strengthening effective control over the features it occupies. At the same time, Chinese vessels are expanding their areas of interest in order to assert Beijing's interests in what is called the 'nine-dash line'.[29]

Yet, from the Chinese perspective, the PRC's position on the EEZs seems easy to understand, and it would not be based on China's willingness to play a hegemonic role within or outside the East Asian region. As explained in 2014 by the Chinese Minister of Defense, China 'makes no compromise, no concession and no trading in the fight of what is considered to be a matter of *national sovereignty*'.[30] In this light, China's rights within its own EEZ are not an expanding strategy of the recent shift from 'offshore water defense' to 'open seas protection', but are only driven by Beijing's *core interests* at stake, primarily national sovereignty. Indeed, to justify China's position on the EEZs only because of this 'new assertiveness' sounds like a partial explanation. As a matter of fact today, with respect to the EEZ regime, many other states, which are not even considered to be part of the developing world anymore, have argued for a different understanding of how military activities in the EEZ should, or at least could, be conducted. For instance, the PRC is not standing alone when asserting that the UNCLOS poorly considered the view of many non-Western states over the EEZ regime; indeed, in addition to China, 27 other states have already expressed their growing concern over the issue, including Cambodia, India, Malaysia, Thailand, Vietnam, Bangladesh and the Maldives. Considering the stance of Brazil, for instance, when ratifying the UNCLOS in 1988, Brazil declared that 'the Brazilian Government understands that the provisions of the Convention do not authorize other States to carry out military exercises or maneuvers, in particular, those including the use of weapons

26 See Ministry of National Defense, 'China Military Strategy' (n 24).

27 For an exhaustive analysis of China's PLA, see Dennis J Blasko, *The Chinese Army Today. Tradition and Transformation for the 21st Century* (2nd ed, Routledge 2012).

28 Nong Hong, 'Messages from China's National Defense White Paper' (*Asia Maritime Transparency Initiative*, 2 June 2015) <http://amti.csis.org/messages-from-chinas-national-defense-white-paper/> accessed 25 July 2015.

29 Gregory Poling, 'Beijing's South China Sea strategies: consolidation and provocation' (*East Asia Forum*, 28 March 2015) <www.eastasiaforum.org/2014/03/28/beijings-south-china-sea-strategies-consolidation-and-provocation/> accessed 25 July 2015.

30 Jeff M Smith and Joshua Eisenman, 'China and America clash on the High Seas: the EEZ challenge' (*The National Interest*, 22 May 2014) <http://nationalinterest.org/feature/china-america-clash-the-high-seas-the-eez-challenge-10513> accessed 25 July 2015 (emphasis added).

or explosives, in the exclusive economic zones, without the consent of the coastal States'.[31] This is why, according to Zanotti, 'the exclusive economic zone does not fall either under the concept of sovereignty prevailing in the territorial seas, or under the concept of freedom, which characterizes the high seas'.[32]

Nonetheless, it is also true that the PRC is the coastal state that appears to be the most reluctant to allow foreign countries to conduct military activities within its own EEZ, stressing that the issue represents a matter of national security. At the same time, despite the emphasis placed by China on its sovereignty principles, the controversy seems to be supported also by the legal misunderstandings that have emerged from the UNCLOS itself. Therefore, rather than considering the Chinese position on the EEZ merely as a direct manifestation of China's 'offensive strategies' at the regional or even global level, we should also consider that in fact many ambiguities exist within the domain of international law concerning the management of the seas and oceans. According to some scholars, the effectiveness of the UNCLOS depends not only on its implementation or application procedures, but even more so on 'how the Convention can be interpreted by the different States involved in the dispute' (both coastal and maritime).[33]

4. Historical and political narratives of relevant articles related to the Chinese position on the EEZ Regime

Without a doubt, through a legal perspective, the greatest puzzle is driven by the fact that the EEZ regime is indeed a *sui generis regime*.[34] However, as noted by Yang Fang, 'the seas of East Asia are so problematic that many countries have overlapping EEZs, which are caused in some instances by the use of excessive territorial sea straights baseline'.[35] On top of this, further incomprehension is due to Article 58 UNCLOS, which, despite specifically addressing the meaning of 'freedom of navigation' within the treaty, does not consider the issue of security and military interests when dealing with freedom of navigation. More clearly:

> In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply

31 Differently, in 1995, the Italian Government declared, that, 'according to the Convention, the coastal State does not enjoy residual rights in the exclusive economic zones. In particular, the rights and jurisdiction of the coastal States in such zone do not include the right to obtain notification of military exercises or manoeuvres or to authorize them': see Tullio Scovazzi, 'The Evolution of International Law of the Sea: New Issues, New Challenges' (2001) 286 Recueil Des Cours: Collected Courses of the Hague Academy of International Law 39, 164.

32 ibid 164-65.

33 Beckman and Davenport (n 10) 3.

34 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS) art 55.

35 Yang Fang (n 9) 3.

> with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.[36]

In this light, practical problems arise because 'with respect to military uses of the EEZ, the Convention does not make clear whether military activities are included in the freedoms of navigation and overflight and other internationally uses of the sea available under articles 58 and 87 of the LOS Convention'.[37] It means that Article 58 is not clear on how so-called 'freedoms' with regards to 'other internationally lawful uses of the seas' would include military exercises/activities. Therefore, the question concerning which type of military activities can or should be allowed, as well as how they can be conducted within a country's EEZ, was left unresolved.[38]

China has always being considered an active participant in the discussion surrounding the UNCLOS. From 1973 to 1982, the Chinese delegation attended all 12 sessions conducted over a decade. On 12 December 1982, China signed the Convention and finally ratified it on 15 May 1996. In particular, the Chinese working papers that were presented to UNCLOS III were related to nine fundamental aspects: (1) the territorial seas, (2) the straits and use for international navigation, (3) the EEZ, (4) the continental shelf, (5) the area beyond the limits of national jurisdiction, (6) marine environmental protection, (7) marine research, (8) transfer of marine technology, and (9) dispute settlements.[39] Shortly after the ratification, during the 3rd Meeting of the Ninth National People's Congress in 1998, China passed the Law of the People's Republic of China on the Exclusive Economic Zone and Continental Shelf. With a total of 16 articles, the Law illustrated for the very first time the Chinese position on those issues that were left largely unresolved by the UNCLOS regarding the EEZ and, in particular, MSR. With regards to surveillance and research operations, two main articles are considered to be the most relevant. The first is Article 9, according to which foreign states carrying out marine scientific research within China's EEZ should comply first and foremost with the laws and regulations of the People's Republic of China.[40] The second is Article 12, which clarifies that if the Chinese government perceives that its laws and regulations concerning its EEZ are being violated, it has the right to adopt 'necessary measures' in order to ensure compliance with the PRC's legal

36 UNCLOS, art 58.

37 Sam Bateman, 'The Regime of the Exclusive Economic Zone: Military Activities and the Need to Compromise?' in Tafsir Malick Ndiaye and Rudiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement Disputes* (Brill 2007) 572.

38 In particular, with regards to 'freedoms of navigation', see UNCLOS, art 87.

39 Keyuan Zou, 'China's exclusive economic zone and continental shelf: developments, problems and prospects' (2001) 25 Marine Policy 71.

40 Law of the People's Republic of China on the Exclusive Economic Zone and Continental Shelf, art 9: 'All international organizations, foreign organizations or the individuals shall obtain approval from the competent authorities of the People's Republic of China for carrying out marine scientific research in its exclusive economic zone and on its continental shelf, and shall comply with the laws and regulations of the People's Republic of China.'

settings.[41]

Notwithstanding the fact that, as a State Party, China should comply with the UNCLOS's laws and regulations, maritime states are similarly required to comply with the laws and regulations adopted by the coastal states, if and only if such laws are in accordance with the Convention and other rules of international law. The result is that, 'if a coastal State adopts laws and regulations on matters over which it does not have jurisdiction under UNCLOS, there is no obligation on other States to comply with such laws and regulations'.[42] More specifically, it means that although Chinese leadership requires maritime powers to conduct SROs or MSR under the guidance and/or with the permission of the coastal state as stated by Chinese law, other states, such as the United States, are more likely to appeal to Article 58 UNCLOS – which does not specify which military activities can be conducted – believing that research activities in the EEZ are part of the freedoms of lawful use of the seas and therefore does not require them to be accountable to the Chinese jurisdiction.

However, despite the controversial understandings about the regulation of military activities in the EEZ, MSR, SROs and more generally, UNCLOS' regulation, we could ask whether the Chinese perspective has brought into question international law simply because of the UNCLOS' different interpretations by coastal and maritime powers, or rather whether there could be other factors at stake. That is, in the East Asian region, contention and discontent are not exclusively driven by legal misunderstandings or by the inaccuracies of international law, but rather, being that East Asia is a region heavily affected by growing political rivalries, the 'hard core complexity' of the issue inevitably requires including the territorial disputes of the region itself. On top of this, the United States' ambition in the region has further exacerbated the context of such disputes: from 2001 to 2014, a substantial number of maritime incidents occurred between the PRC and the United States in the EEZ of East Asia.[43] Moreover, as was clearly stated in the 2014 CRS Report for Congress, from the standpoint of US strategic policy, if China may be seeking to dominate its near-seas region, it would be highly significant, because it has been a longstanding US strategic goal to prevent the emergence of a regional hegemon in one part of Eurasia or other.[44]

Against this background, we can affirm that at present two main narratives stand out to explain China's position on military activities in the EEZ. The first should be considered within a global perspective and is rooted in the fact that when dealing with oceans' management and maritime disputes,

41 Law of the People's Republic of China on the Exclusive Economic Zone and Continental Shelf, art 12: 'The People's Republic of China may, in the exercise of its sovereignty right to explore, exploit, conserve and manage, the living resources in the exclusive economic zones take such measures, including, boarding, inspection, arrest, detention and judicial processes, as may be necessary to ensure compliance with the laws and regulations of the People's Republic of China. The People's Republic of China shall have the rights to take necessary measures against the violation of its laws and regulations in the exclusive economic zone and on the continental shelf, to pursue the legal responsibilities by law and may exercise the right of hot pursuit.'

42 Beckman and Davenport (n 10) 11.

43 See Ronald O'Rourke, 'Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes involving China: Issues for Congress' [2015] Congressional Research Service 1-99.

44 ibid 21.

since the end of the 1950s, the international community has had to confront numerous difficulties on how to enforce a legal (binding) international framework with universal applicability despite the bipolarization of the world system and the cultural divide between the East and the West. In other words, the first narrative deals with the real possibility of establishing an international maritime regime combining the interests of both coastal states and maritime powers. However, the result was that regardless of the fact that the UNCLOS was initially considered to be a successful tool in managing maritime disputes 'worldwide', scepticism has grown with regards to its universal applicability. According to the author's analysis, China would fit perfectly within such a picture. He postulates that when the Chinese Government sent delegations to the Third UN Conference of the Law of the Sea, China used this international event to attack those considered by China as the two 'superpowers' – the former Soviet Union and the United States – thus 'accusing them of hegemonism in the global oceans rather than deliberating detailed provisions in favour of its national interests'.[45] The second narrative is bound instead to a regional dimension, particularly to the specificity of China's role and strategies within the region. As a matter of fact, although the issue of maritime security has always been considered to be a global issue, the concept of maritime security when applied to the South China Sea still presents 'its own uniqueness'.[46] This is why, not only within the domain of international politics but also from a legal perspective, the misinterpretations existing within the UNCLOS resulted in a necessity to expand understanding about China's position. More clearly, according to Dupuy and Dupuy, the PRC's stance towards the EEZ regime in the South China Sea is bound to the concept of so-called 'historic rights', according to which the degree of confusion and controversy in international law is coupled with the argument that, since the 1950s, China has been reclaiming extensive territorial claims and sovereignty rights in the South China Sea, and in particular, 'the Pratas (Dongsha), Paracels (Xisha), Macclefield bank (Zhongsha) and the Spratlys (Nansha)'.[47]

At the same time, when it comes to military exercises in the East Asian region, the United States' predominant position should be considered as another highly destabilizing factor driving China's behaviour. This is because President Obama's 'pivot to Asia' was interpreted by Beijing as a clear counter-measure used by the US government to impede China's growing economic and geopolitical power. However, as exemplified by scholarship in the PRC, the China-United States rivalry once again stands as a partial explanation for the Chinese position in what could be defined as a more holistic approach. In an article published in 2011, Jin Yongming, Director of the Research Center of Law and Sea at the Shanghai Academy of Social Science, stated that the South China Sea dispute (南海问题 *nanhai wenti*) implies two different types of legal disputes: the first is the dispute between China and the ASEAN countries (that is, the South China Sea dispute). In this regard, sovereignty rights about

45 Keyuan Zou, 'China's Ocean Policymaking: Practice and Lessons' (2012) 40 Coastal Management 145, 146.

46 See Sichun Wu and Keyuan Zou, Maritime Security in the South China Sea: Regional Implications and International Cooperation (Ashgate 2009).

47 Florian Dupuy and Pierre-Marie Dupuy, 'A legal analysis of China's Historic Rights claims in the South China Sea' (2013) 107 The American Journal of International Law 124, 126.

reefs and seas, as well as national interests, are the main priorities driving the PRC's behaviour.[48]

The second dispute refers specifically to the China-United States military activities in the EEZ 专属经济 区内的军事活动 (*zhuanshu jingji qu nei de junshi huodong*), with a focus on how different interpretations emerged with regards to military measurement activities and joint military exercises. In this light, the United States' stance to freely navigate other states' coastal waters in the region without asking permission of the coastal state and by claiming the right to respect freedom of navigation would be in substance just an expedient to freely conduct military activities within China's EEZ. According to the author, the real issue at stake is whether so-called military measurement activities could be classified as marine scientific research activities, given the fact that the UNCLOS did not specifically addressed such a concern.[49]

As such, he suggested that the solutions to the problem would have to be addressed in a distinct manner: whereas with ASEAN countries (such as Vietnam or the Philippines), which all claim ownership of the territory, consultations should be conducted bilaterally, or preferably multilaterally, through the involvement of regional institutions.[50] With the United States, the military activities' controversy should be addressed by studying the UNCLOS, with the intent to reach an agreement over the EEZ, as well as through the use of bilateral dialogues, such as the China-US Asia Pacific Consultation Mechanism (中美亚太事务磋商机制 *zhong mei yatai shiwu cuoshang jizhi)*.[51] In this regard, the two solutions pinpoint the two different dimensions or rather the two types of 'ad hoc' regional strategies China intends to follow: regional multilateral organisations and forums with ASEAN States, and the use of international law-making mechanisms or bilateral forums with the United States.

5. Conclusion

Is it fair to interpret China's position on the EEZ regime as a consequence of the growing role the PRC is willing to play with regards to maritime security and ocean management within and outside the East Asian region? Or would it be more appropriate to contextualise the Chinese position within the historical and political narratives that have shaped the non-Western perspectives of the UNCLOS and the EEZ regime since the 1950s? In fact, Beijing seems to have dismissed the image of a low profile country in the region, where instead a certain growing assertiveness when conducting military activities in the EEZ seems to better explain China's national interests within and outside the 'nine-dash line'. This is why US officials have often portrayed the Chinese position as 'doublethink behaviour' – that is, Chinese officials consider the UNCLOS text as sacrosanct, but they reserve themselves

48 See Jin Yongming, '中美专属经济区内军事活动 争议的海洋法剖析' (A Dissection of Disputes between China and the United States over Military Activities in the Exclusive Economic Zone by the Law of the Sea) (2011) 19(11) Pacific Journal 74.

49 ibid 76.

50 ibid

51 ibid 74.

the prerogative to supersede the treaty language whenever it goes against China's national interests and sovereignty principles.[52]

Yet, as illustrated above, the main source of contention between coastal and maritime states lies in the fact that ever since the first discussions over EEZs in the 1950s, the rationalisation of interests advanced by both groups of states was heavily dependent on their economic and environmental interests rather than security concerns. The result was that, in the 1970s, what was driving states' interests within the UNCLOS discussion was mainly the exploitation and the management of the oceans' resources and thus, during the drafting of the Convention and subsequent ratifications, security concerns were only partially taken into account. At the same time, this article illustrated that another narrative was also at stake within the UNCLOS's initial settlement, which was the fact that developing states (in Asia, Africa and Latin America) were not sharing the same interests and ideas regarding military activities as the two major naval powers of that time, the United States and the Soviet Union. The result is that still today, overlapping concepts exist with regards to how such activities have been defined. The main divergences are particularly due to the fact that whether the United States distinguishes military activities and hydrographic surveys from MSR – where the former are not related to resource exploration and therefore they believe (in line with the UNCLOS) that such activities need not conducted with the consent of the coastal states – the PRC adopted a different view, that is, Article 58 UNCLOS, which stated that 'all States should have due regard to the rights and duties of coastal States and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of the international law in so far as they are not incompatible with this part'.[53] On top of this, despite overlapping definitions and different legal interpretations, China is in fact pursuing a double regional strategy with regards to military activities in the EEZ: whereas its behaviour stands as highly competitive towards the United States due to their current political rivalry in the Asia-Pacific region, China's regional strategy towards ASEAN States seems, to a certain extent, less concerned by competition dynamics, driven by China's willingness to strengthen multilateral mechanisms with institutional platforms like the Expanded ASEAN Maritime Forum. In this light, political dialogues – through diplomatic channels, such as Track-II Diplomacy and think tank symposiums – might provide concrete measures in order to fill the gap left by the UNCLOS with regards to security and military interests and activities in the EEZ.

52 James R Holmes, 'China's Doublethink on the Law of the Sea' (*The Diplomat*, 5 June 2013) <http://thediplomat.com/2013/06/chinas-doublethink-on-the-law-of-the-sea/> accessed 25 July 2015.

53 UNCLOS, art 58; see also Yang Fang (n 9) 8-9.

Maritime Safety and Security Law Journal

Building upon the Developments in the Law of the Sea: The Extension of the Concept of Sustainable Development to Outer Space

Katarzyna POGORZELSKA[1]

Abstract

The current legal regime regulating activities in outer space does not provide for rules capable of handling the complex process of developing the mining industry in outer space. This article proposes extending the concept of sustainable development to the domain of outer space. The application of sustainable development to outer space can be better understood in light of developments that have taken place in the law of the sea, particularly developments associated with the concept of the common heritage of mankind, which is believed to be at the heart of sustainable development when it comes to the governance of common spaces. The experiences learned while drafting Part XI of the UNCLOS and its subsequent amendment by the 1994 Agreement provide necessary insight into the drafting process, which can help identify possible obstacles and serve as a model to follow while developing space law.

Keywords

sustainable development, law of the sea, outer space law, common heritage of mankind, natural resources, province of mankind

1. Introduction

We are on the eve of expanding the mining industry into outer space. At the moment, there are no legal rules capable of handling the reality of the complex process of industrialisation of outer space. Current space law is an important and valuable set of general principles that ensures the peaceful use and exploration of space: it safeguards space from military uses and nuclear weapons, it guarantees the freedoms of use and exploration, and establishes basic rules for cooperation, responsibility and liability in outer space.[2] But it is a general body of law that needs further development through its *lex*

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2 For the rules on military uses, nuclear weapon, guarantees on the freedoms of use, responsibility and cooperation, see Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (adopted 27 January 1967, entered into force 10 October 1967) 610 UNTS 205 (Outer Space Treaty, OST); for liability rules, see Convention on International Liability for Damages Caused by Space Objects (adopted 29 March 1972, entered into force 1 September 1972) 961 UNTS 187 (Liability Convention).

specialis.[3] Space law was created at the very beginning of the space era that began with the launch of Sputnik 1 in 1957. It was drafted in a way that allowed for the important fundaments to be laid down, while also being general enough to encompass future developments. Since then, outer space has developed from a 'two party club' (the United States and the Soviet Union) into a widespread activity with various types of stakeholders.[4] The commercialization of space and future expansion of the mining industry into space raises many questions, such as those concerned with governance of resources, distribution of benefits and environmental impact. Space law, as created at the height of the Cold War, on one hand reflects the fears of opening up a new field for military competition and, on the other hand, the excitement relating to space exploration.[5] It does not account for the problems that became evident with passing time, like the proliferation of space debris. The laissez-faire approach has contributed greatly to the extensive pollution of Earth orbits to the point that most of the objects in the orbits are now space debris, which endanger functioning satellites and can lead to the so-called 'Kessler syndrome.'[6] As we now know, the reaction of the international community in terms of legal regulation of the space debris issue was not timely enough. Space law, which is practically void of any clear rule concerning environmental issues,[7] was not able to influence the conduct of states so as to prevent pollution of orbits, and space debris therefore proliferated.

In order to better handle the issue of the expansion of the mining industry into space, the creation of new rules is necessary: first, in order to manage the resources; and, second, to avoid possible environmental problems, which cannot be accurately predicted at the present time. To this end, a fine balance between regulating non-existing activities and doing it too late must be struck. The Moon Agreement provides that states 'undertake to establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the Moon as such exploitation is

3 For this purpose *lex specialis* is understood as 'a particular rule [that] may be considered an application of a general standard in a given circumstance' within the same particular international legal regime [Martti Koskenniemi, *Report of the Study Group on the Fragmentation of International Law* (2006) 49].

4 For the expanding spectrum of stakeholders in the space sector, see Gabriel Lafferranderie and Daphné Crowther (eds), *Outlook on Space Law over the Next 30 Years* (Kluwer Law International 1997) 21-64; Lotta Viikari, *The Environmental Element in Space Law: Assessing the Present and Charting the Future* (Martinus Nijhoff 2008) 21-28. On the commercial use of outer space and legal implications, see Isabella Henrietta Ph Diederiks-Verschoor and Vladimír Kopal, *An Introduction to Space Law* (Kluwer Law International 2008) 106-21. On the diversification of actors and stakeholders, and its impacts on outer space law see, eg, Ingo Baumann, 'Diversification of Space Law' in Marietta Benkö and Kai-Uwe Schrogl (eds), *Space Law: Current Problems and Perspectives for Future Regulation*, *vol. 2* (Eleven International Publishing 2005) 49.

5 See Joanne Irene Gabrynowicz, 'Space Law: Its Cold War Origins and Challenges in the Era of Globalization' (2004) 37 Suffolk University Law Review 1041.

6 See Donald J Kessler and Burton G Cour-Palais, 'Collision Frequency of Artificial Satellites: The Creation of a Debris Belt' (1978) 83:A6 Journal of Geophysical Research 2637, 2656. The authors demonstrated a direct correlation between the growing number of objects in orbit and the number of collisions between such objects. Through mathematical modelling, they portended that 'the debris flux will increase exponentially with time' even without any new launches.

7 The Moon Agreement, the most relevant international treaty from the environmental standpoint, has not been signed by any space powers [Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (adopted 18 December 1979, entered into force 11 July 1984) 1363 UNTS 3 (Moon Agreement)]. As of 15 January 2015, it enjoys 16 ratification and 4 signatures, see <www.unoosa.org/pdf/limited/c2/AC105_C2_2015_CRP08E.pdf> accessed 25 June 2015.

about to become feasible'[8]. Thus far, mining of the Moon is not feasible; therefore, the development of specific rules at this stage would mean regulation of a non-existent activity. Such law would have little chance to endure. Nevertheless, the concept of sustainable development is flexible enough to become part of today's space law. Its role would not be to strictly regulate future mining of space resources, but rather to set it up in light of the integration of economic, social and environmental values. The application of sustainable development would help shape future state practice according to agreed upon values and would prevent the establishment of state practice driven by unilateral interests.

The process of adopting the concept of sustainable development to outer space could borrow from the solutions already present in the legal regime for sustainable use and protection of the seas. In general terms, the problems related to the use and exploration of the seas and outer space are very much alike. Many analogies between the legal regimes of the seas and outer space can be drawn, in particular with respect to their legal statuses, use of resources or environmental protection. Yet legal responses provided by the two regimes differ in many ways. While the applicable space law only touches on the issues at a generic level or suggests further legal developments, the law of the sea has already addressed them on a far more specific level. The United Nations Convention on the Law of the Sea (UNCLOS)[9] has adopted the modern concept of sustainable development and linked to it the concept of the common heritage of mankind (CHM),[10] designed to achieve sustainability in common spaces. The attempt to introduce the CHM concept to space law via the Moon Agreement[11] has not been met with political acceptance, which was reflected in the low number of ratifications.[12] The lessons from the processes behind the adoption of the UNCLOS and the subsequent 1994 Implementation Agreement[13] could help facilitate the extension of sustainable development to outer space, in order to establish an effective regime for the managements of resources and environmental protection.

However, sustainable development carries with it issues and problems that have enveloped the concept over the years. These tend to be associated with the indeterminacy of sustainable development and uncertainty of its normative status.

This article postulates the extension of the concept of sustainable development to the domain of outer space. It briefly analyses various interconnections between the seas and outer space. It then introduces the concept of sustainable development in order to determine the legal grounds for its adoption. In order to determine the feasibility of the extension and the rationale behind it, as well as

8 Moon Agreement, art 11(5).

9 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into in force 16 November 1994) 1833 UNTS 3 (UNCLOS).

10 The UNCLOS does not use the actual phrase 'sustainable development', but it incorporates all elements of sustainable development [Jonas Ebbesson and others (eds), *International Law and Changing Perceptions of Security* (Koninklijke Brill 2014) 196]; Part XI of the UNCLOS provides for rules relating to the CHM.

11 Moon Agreement, art 11.

12 Moon Agreement, art 11.

13 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (adopted 28 July 1994, entered into force 16 November 1994) 1836 UNTS 3 (Implementation Agreement).

to anticipate obstacles and possible solutions, the analysis turns to the developmental process of the law of the sea, in particular the evolution of the concept of the common heritage of mankind.

2. The importance of recognising the integration of natural and man-made systems

The Preamble to the UNCLOS recognises that 'the problems of ocean space are closely interrelated and need to be considered as a whole.'[14] This formal acknowledgement of the unity of concerns within the marine sphere is actually a first step towards a holistic approach to problems of ocean, land, air and outer space.[15] Because these systems are parts of one natural system that also integrates human-made systems, the environmental concerns, as well as the economic and social issues arising from their use, are inseparable. Subsequently, the development of regulatory regimes must strive for improved systemic integration, which reflects the integration of natural and man-made systems.[16] The concept of sustainable development is a holistic approach that accounts for the unity of natural systems; it also integrates them with the human-made economic and social systems.[17] Such a holistic approach helps to integrate conflicting values and can serve as an auxiliary means of achieving systemic integrity of international law.[18]

The recognition of integration of the systems under the umbrella of sustainable development is an important characteristic of the changes introduced to the law of the sea by the UNCLOS. The embracement of sustainable development and its legal instruments[19] by space law can be better understood and accepted in light of the changes proposed by the UNCLOS. Sustainable development provides important guidance and also allows for flexibility since, despite the unity, each particular system calls for a custom-tailored approach that accounts for the differences.

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14 UNCLOS, Preamble.

15 Jan van Ettinger, Alexander King and Peter B Payoyo, 'Ocean governance and the global picture' in Peter B. Payoyo (ed), *Ocean governance: sustainable development of the Seas* (United Nations University Press 1994).

16 On the importance of systemic integration and sustainable development see, eg, ILA Report, 'International Law on Sustainable Development' (2006).

17 On a holistic nature of sustainable development see, eg, Michael Decleris, *The law of sustainable development: General principles, A Report produced for the European Commission* (European Communities 2000) 55ff: He finds the schools of development and ecology as extreme because they are one-sided hence suffering from deficient logical method. The first, which is purely analytical, isolates man from his environment and examines his economic action in its own right and over a relatively short timescale (4 to 30 years). The second, although holistic, is pseudo-systemic because while it focuses on ecosystems, it ignores the unique qualities which distinguish mankind from all other living systems. It does indeed have a long-term perspective, but does not correctly grasp the dynamics of ecosystems since it rejects the coexistence of natural and cultural development.

18 In first place, systemic integrity of international law is guaranteed by Article 31(3)(c) of the Vienna Convention on the Law of Treaties [Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention)].

19 For the elements of sustainable development, see section 3.2 below.

2.1 How are the natural systems of seas and outer space connected?

Outer space and the seas constitute a unity when viewed from the aforementioned systemic perspective. But they also differ in many ways, one of which is that the oceans directly support life on earth and the survival of humanity depends on them. The environment of outer space, on the other hand, seems to be hostile for humans; hence, the protection of the space environment *per se* does not have much support in legal doctrine. What is widely supported by the international community, however, is the sustainability of use of outer space.[20] This is because the use of space is *indirectly* vital for human survival. The missing link is technology. Technology has made the use of space possible for the benefit of humanity. The importance of space science and space applications for education, health, environmental monitoring, management of natural resources, disaster management, meteorological forecasting and climate modelling, navigation and communications was formally noted and translated into a broader international context for the first time by the Third United Nations Conference on the Exploration and Peaceful Uses of Outer Space (UNISPACE III), held in Vienna in July 1999. The resulting resolution 'The Space Millennium: Vienna Declaration on Space and Human Development'[21] provides a strategy to address global challenges through the use of space science and technology and their applications in addressing the challenges of sustainable development.

Outer space is an integral aspect of management of the seas, and its use strongly contributes to the sustainability and security of the maritime sector. Within Earth observation programs, via remote sensing satellites, a considerable amount of information is gathered about the Earth's physical, chemical and biological conditions. The data includes, *inter alia*, radar images of sea-ice conditions, data on wind, waves, currents, the Earth's gravity, sea, ice and land surface topography, temperature, ocean and land surface radiance/reflectance, measurements of the state of the oceans' ecosystems, water quality, pollution monitoring, salinity and much more. The high-accuracy, near real-time data is then used in applications enhancing marine safety (e.g. marine operations, oil spill containment, ship routing, search and rescue applications), marine resource management (e.g. fish stock management), climate and seasonal forecasting (e.g. climate change monitoring, ice sea seasonal forecasting), and monitoring marine and coastal environments (e.g. ice sheet surveys, water quality, coastal

20 The issue of sustainability of outer space has been analysed within the scope of the UNCOPUOS since 2008, when the informal preparatory group was formed. The topic was formally brought to the agenda of the UNCOPUOS in 2010, which resulted in the creation of the UNCOPUOS Working Group on Long-Term Sustainability of Space Activities. The first meeting of the new Working Group took place same year in conjunction with the 53rd session of the UNCOPUOS. The Terms of Reference of the Working Group were approved in 2011 [Terms of reference and methods of work of the Working Group on Long-Term Sustainability of Outer Space Activities of the Scientific and Technical Subcommittee, UN COPUOS Report, Annex II, A/66/20].

21 'Space Millennium: Vienna Declaration on Space and Human Development' in *Report of the Third United Nations Conference on the Exploration and Peaceful Uses of Outer Space*, UN Doc A/CONF.184/6 (18 October 1999) 6; see also United Nations Office for Outer Space Affairs (UNOOSA), Solutions for the World's Problems (UNOOSA 2006).

activities, pollution control, coastal erosion).[22]

Apart from remote sensing satellites, there are also navigation satellites. The positioning services provided by them result in improved ship navigation, traffic management, seaport operations, offshore exploration and fish finding.[23]

Telecommunication satellites enable communication between various subjects, which translates, for example, into improved safety of seafaring ships, search and rescue services, monitoring of vessels in sensitive areas (like international waters), and fleet management services for commercial users. The maritime sector also benefits from general communication-enabling broadband internet and satellite-based communication.[24]

From a broader perspective, satellite data, services and technology are all part of our daily lives. They help to advance human economic, social and environmental well-being. They enable development of the cross-cutting policy tools that rely on scientific data and information, which should be a critical factor in strategic decision-making and law-making, particularly in the domain of sustainable maritime development.[25] The sustainability of this interrelation is therefore vital for sustainable development on earth. To this end, the sustainability-oriented development of a legal framework for outer space is very important.

22 One of the boldest Earth observation programmes is European 'Copernicus' developed by the European Commission in cooperation with the European Space Agency (ESA) [Copernicus Regulation: COM(2013) 312 final/2]. For the mission details see: ESA Copernicus: <www.esa.int/Our_Activities/Observing_the_Earth/Copernicus/Marine_services> accessed 21 May 2015. For other ESA maritime relevant missions see: Gravity Field and Steady-State Ocean Circulation Explorer <www.esa.int/Our_Activities/Observing_the_Earth/The_Living_Planet_Programme/Earth_Explorers/GOCE/Objectives, Soil Moisture and Ocean Salinity <www.esa.int/Our_Activities/Observing_the_Earth/The_Living_Planet_Programme/Earth_Explorers/SMOS/Objectives> accessed 21 May 2015, Cryosat <www.esa.int/Our_Activities/Observing_the_Earth/CryoSat> accessed 21 May 2015.

23 See, eg, Galileo Mission (agreed upon officially on 26 May 2003 by the EU and the ESA <www.esa.int> accessed 25 July 2015), Galileo fact sheet <http://download.esa.int/docs/Galileo_IOV_Launch/Galileo_factsheet_2012.pdf> accessed 14 April 2015.

24 Telecommunication satellites also play an important role in maritime security. An example is ESA's SAT-AIS initiative (Satellite Automatic Identification System): the ESA ATRES Programme: From Satcom products to services, 2 <http://esamultimedia.esa.int/multimedia/publications/BR-305/> <http://telecom.esa.int/telecom/www/object/index.cfm?fobjectid=30922> accessed 21 May 2015.

25 Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An Integrated Maritime Policy for the European Union, COM (2007) 574 final, Point 3.2.3. Further down the Communication says that 'the Commission will take steps towards a European Marine Observation and Data Network, building *inter alia* on the GMES initiative'.

3. The concept of sustainable development

3.1 Is there an international obligation to carry out activities in space in a sustainable way?

In 1992, the international community adopted the Rio Declaration on Environment and Development (Rio Declaration).[26] Principle 27 of the Rio Declaration conveys the necessity for further development of international law in the field of sustainable development; however, it does not mention outer space. While the seas have benefited from the adoption of the concept of sustainable development, the outer space regime strays from the general developments in international law in this respect. In June 2011, the Committee on the Peaceful Uses of Outer Space (COPUOS) adopted the 'Terms of reference and methods of work of the Working Group on Long-term Sustainability of Outer Space Activities',[27] in which it suggested the extension of the concept of sustainable development to the domain of outer space as a topic for examination.[28] In later communication, sustainable development was replaced with the 'sustainability' of outer space, which can convey different values and can be shaped separately from the difficult topics linked to sustainable development, such as intragenerational equity that inevitably involves a debate over the global distribution of wealth.

It has been stated, and rightly so, that the development of concepts in international law reflects the spirit of the particular historical period.[29] Sustainable development emerged as a concept in international law and politics in order to reconcile the economic, social and environmental needs of the world.[30] The environmental degradation of interdependent large-scale ecosystems, transboundary in their nature, prompted the industrialised world to seek a new partnership with the developing and least-developed countries.[31] What they met on the other side was poverty that impeded any debate on environmental protection. Out of this 'encounter' came the realisation that any economic activity should integrate environmental and social needs – and so sustainable development was born.

The legal status of sustainable development has been heavily debated since its emergence.[32] Different approaches and different legal methodologies usually lead to different conclusions, ranging from the deprivation of sustainable development of any legal content, through finding its normative

26 UNGA, The Rio Declaration on Environment and Development, UN Doc A/CONF.151/26 (vol. I) (Rio de Janeiro, 14 June 1992) (The Rio Declaration).

27 Terms of Reference (n 20).

28 ibid 53.

29 Rüdiger Wolfrum, 'The principle of the common heritage of mankind' (1983) 43 Houston Journal of International Law 312, 312 [cited in Helmut Tuerk, 'The idea of the common heritage of mankind' in Norman A Matrinez Gutierrez (ed), *Serving the Rule of International Maritime Law* (Routledge 2010) 156].

30 See, eg, Marie-Claire Cordonier Segger and Ashfaq Khalfan, *Sustainable Development Law: Principles, Practicies and Prospects* (Oxford University Press 2004) 103.

31 See Peter Bautista Payoyo, *Cries of the Sea: World Inequality, Sustainable Development and the Common Heritage of Humanity* (Martinus Nijhoff Publishers 1997) 117.

32 Cordonier Segger and Khalfan (n 30) 2.

strength in the hands of judges, to attributing to it the status of a customary rule or that of a general principle of law.[33] One can notice, however, that passing time has strengthened the concept, which may suggest its evolution towards a binding norm of international law as a customary rule or rather a general principle.[34] This article postulates that, based on legal testing, sustainable development can be accepted as a binding principle of international law and is therefore applicable to outer space law. However, the lack of a clear confirmation of its status by jurists leaves it prone to different interpretations. This factor, coupled with the lack of a formal acceptation of sustainable development by the space law regime, leaves space law cut off from the modern legal developments taking place in international law.

3.2 The notion of sustainable development

The mostly cited and widely accepted definition of sustainable development can be found in the Report of the World Commission on Environment and Development (UNWCED), also known as the Brundtland Report. Sustainable development is a development 'that meets the needs of the present without compromising the ability of future generations to meet their own needs.'[35]

The definition points to two core components of sustainable development: first, the equitable meeting of present needs (the intragenerational equity), and second, a focus on not hindering future generations from meeting their needs (intergenerational equity).[36] Since then, from the extensive discussion and use of the concept, a general recognition of three aspects of sustainable development

33 See section 3.3 below.

34 Eg, Brownlie in the 5th edition of his monograph *Principles of Public International Law* stated that sustainable development remains 'problematic and nebulous', while acknowledging its changing nature [Ian Brownlie, *Principles of Public International Law* (5th edn, Oxford University Press 1998) 287]. In the 6th edition, the words 'problematic and nebulous' were removed and specific elements of SD were identified [Ian Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press 2003) 276-77]. Moreover, he analyses sustainable development in the section on emergent principles. See also Christina Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law* (Martinus Nijhoff Publishers 2009).

35 UN World Commission on Environment and Development, *Report of the World Commission on Environment and Development: Our Common Future* (1987) para 27 <www.un-documents.net/our-common-future.pdf> accessed 23 July 2015. A more recent and more expansive definition can be found in the preamble to the ILA New Delhi Declaration: 'the objective of sustainable development involves a comprehensive and integrated approach to economic, social and political processes, which aims at the sustainable use of natural resources of the Earth and the protection of the environment on which nature and human life as well as social and economic development depend and which seeks to realize the right of all human beings to an adequate living standard on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom, with due regard to the needs and interests of future generations' [ILA, 'New Delhi Declaration of Principles of International Law Relating to Sustainable Development' (The 70th Conference of the International Law Association, New Delhi, April 2002) <http:/cisdl.org/tribunals/pdf/NewDelhiDeclaration.pdf> accessed 25 July 2015 (New Delhi Declaration)

36 See, eg, Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 2001) 12-15.

has emerged.[37] First, the economic aspect, that an economically sustainable system must be able to produce goods and services on a continuing basis; second, the environmental aspect, that an environmentally sustainable system must maintain a stable resource base that requires maintenance of biodiversity, atmospheric stability, and other ecosystem functions; third, the social aspect, that a socially sustainable system must achieve distributional equity, adequate provision of social services and political accountability and participation.[38] Overall sustainability is therefore to be achieved through integration of economic, environmental and social values. The principle of integration is key to achieving sustainable development; and integration can be ensured by the specific tools and procedures that are an integral part of sustainable development.[39]

The goals of sustainable development are multidimensional and complex, just like the path leading to them. From the systemic point of view, this is what constitutes a 'good' concept. On the one hand, it is easy to grasp, but on the other, its complexity allows for better reflection on the intricate nature of reality. It obviously raises questions on how to balance objectives, how to judge success or failure, or which value should be given precedence.[40] To this end, sustainable development provides for flexibility, which allows for the adoption of a set of tools custom-tailored for a particular domain. As is often highlighted, the three principles outlined above resonate at a common-sense level. Because of its 'inescapable logic',[41] sustainable development satisfies the criterion for wide applicability that accounts for differences among various legal regimes.

3.2.1 Conceptualisation of the legal content

The UN Conference on the Human Environment, held in Stockholm in 1972, created considerable momentum for conceptualisation of the theoretical framework of sustainable development. The concept of sustainable development was then set out in more detail in the 1992 Rio Declaration. While the Stockholm Conference and the UNWCED were politically important to the conceptualisation of sustainable development, it was the Rio Conference that consolidated its meaning and provided the impetus for developments in the scope of international law.[42] Although the Rio Declaration does not

37 See, eg, Nico Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (Martinus Nijhoff Publishers 2008); Nico Schrijver and Friedl Weiss (eds), *International Law and Sustainable Development: Principles and Practice* (Brill Academic Publishers 2004); Cordonier Segger and Khalfan (n 30); Boyle and Freestone (n 36).

38 Jonathan M Harris, 'Basic Principles of Sustainable Development' (2000) 5-6 <http://notendur.hi.is/~bdavids/UAU101/Readings/Harris_2000_Sustainable_development.pdf> accessed 10 May 2015.

39 See Centre for International Sustainable Development Law (CISIL) <http://cisdl.org/tribunals/overview.html> accessed 25 June 2015.

40 Norgaard points out that we can 'maximize' only one objective at a time. Norgaard concludes that 'it is impossible to define sustainable development in an operational manner in the detail and with the level of control presumed in the logic of modernity.' [Cited in Harris (n 38) 6].

41 *Case Concerning the Gabčikovo-Nagymaros Project Case* (*Hungary v Slovakia*) (Separate Opinion of Judge Christopher Weeramantry) [1997] ICJ Rep paras 88, 95.

42 Dire Tladi, *Sustainable Development in International Law: An Analysis of Key Enviro-Economic Instruments* (Pretoria University Law Press 2007) 11-37.

offer a definition of sustainable development, it does consolidate the meaning of sustainable development through the 27 principles that represent the formative elements of sustainable development, both substantive and procedural. With the Rio Declaration, a system of values and tools emerged, which enabled integration of the economic, environmental and social aspects of human development.[43]

First of all, Principle 1 of the Rio Declaration seals the anthropocentric character of the concept of sustainable development through the open statement that 'human beings are at the centre of concerns for sustainable development'.[44] It is widely seen as a departure from the environmentally oriented Brundtland Report. The 'three pillar' approach that builds on integration of the equally important environmental, economic and social issues was reaffirmed by subsequent conferences on sustainable development that took place in Johannesburg in 2002[45] and Rio de Janeiro in 2012[46] and is widely reflected in international law.

The substantive elements of sustainable development are mainly set out in Principles 3-8 of the Rio Declaration. They encompass the sustainable utilisation of natural resources, the integration of environmental protection and economic development, the right to development and the principle of equity in the allocation of resources for both present and future generations (intra- and inter-generational equity).[47] The procedural elements are found in Principles 10 and 17, which deal with public participation in decision-making processes and environmental impact assessments.[48] The Delhi Declaration of the International Law Association (ILA) also provides for a list of substantive and procedural elements of sustainable development.[49] These elements represent goals and means to achieve them. While intra- and inter-generational equity represent an ideal or a goal that states should strive for, the essence of sustainable development lies in the employed means, most notably in the integration of environmental, economic and social values, which, in turn, can be implemented through various procedural elements of sustainable development provided for in the Rio Declaration. For this reason, sustainable development is also perceived as a concept of means.[50]

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43 The UNGA referred to the Rio Declaration as 'containing fundamental principles for the achievement of sustainable development, based on a new and equitable global partnership' [A/RES/48/190].

44 In contrast to the Stockholm Declaration, which inclined towards environmental concerns.

45 See UNGA, Johannesburg Declaration on Sustainable Development (in Report of the World Summit on Sustainable Development, Annex I, A/CONF.199/20, Johannesburg, 4 September 2002) (The Johannesburg Declaration).

46 See UNGA, Rio+20 Declaration ‚The Future We Want' (in Report of the UN Conference on Sustainable Development, Chapter I - Annex, A/CONF.216/16 Rio de Janeiro, 22 June 2012) (The Rio+20 Declaration).

47 Boyle and Freestone (n 36) 9.

48 ibid.

49 New Delhi Declaration (n 35).

50 See Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23 The European Journal of International Law 377.

3.3 Grasping the legal nature of sustainable development

Indeed, for many scholars the answer to the question of the legal status of sustainable development is quite straightforward: sustainable development is an important philosophical or political objective, but it is not a legal one. Although a lot of room is usually left for other interpretations, many highlight that the connection of sustainable development with law is restricted to the fact that, as a political objective, it impacts international negotiations; hence, it contributes to law formation while remaining separate from it.[51]

Nevertheless, there is an increasing number of voices that perceive it as a norm with normative value.[52] First, the concept was introduced as a legal proposition in the Rio Declaration. The Rio Declaration, apart from enjoying worldwide acceptance, is formulated in terms of rights and obligations and uses prescriptive language in order to modify the conduct of various subjects. Its legal scope was further reflected in a large number of other binding and non-binding legal documents.

Nevertheless, in order to be recognised as a positive norm of international law, the rule must emanate from one of the sources of international law: conventions, custom or general principles of law.[53]

Sustainable development is ubiquitous in international law. In international treaty law, it is an agreed upon objective of many international treaties, at both the global and regional levels.[54] As such, sustainable development can therefore be considered as part of the treaty's 'object and purpose', as defined by the Vienna Convention on the Law of Treaties (Vienna Convention),[55] and therefore directly relevant in the interpretation of provisions of the treaties[56] and binding on State Parties.

The concept often appears as an objective, or a reference in a preamble, in most international statements and declarations related to environmental, social and economic issues since the 1992 Rio de

51 ibid 378.

52 According to Virally, a proposition will have legal scope when it is formulated 'with the intention to modify . . . elements of the existing legal order, or . . . that its implementation effectively achieves this result' [M Virally, 'Le role des "principes" dans le developpement du droit international' in Faculte de droit de l'Universite de Geneve, Institut universitaire des hautes etudes internationales, *Recueil d'etudes de droit international en hommage a Paul Guggenheim* (1968) (cited in Barral (n 50) 383)].

53 Statute of the International Court of Justice (San Francisco, 24 October 1945, in force 26 June 1945) art 38.

54 See Cordonier Segger and Khalfan (n 30) 281-94.

55 Vienna Convention, arts 31 and 33.

56 The concept of sustainable development can be considered part of the object and purpose of the following international treaties (examples): the 1992 *UN Convention on Biological Diversity* and its 2000 *Cartagena Protocol*, the 1992 *UN Framework Convention on Climate Change* and its 1997 *Kyoto Protocol*, the 1994 *UN Convention to Combat Desertification and Drought*, the 1994 *North American Free Trade Agreement*, the 1995 *Straddling Fish Stocks Agreement* of the 1982 *UN Convention on the Law of the Sea,* the 2000 *Cotonou Partnership Agreement* between the European Union and the African Caribbean and Pacific countries, the 2001 *International Treaty on Plant Genetic Resources for Food and Agriculture*, and many others.

Janeiro Earth Summit.[57]

The UNCLOS itself is a great example of incorporating sustainable development into the legal regime governing the seas. Although it does not use the actual phrase 'sustainable development', it incorporates all the elements of sustainable development.[58]

In this pantheon of instruments, the Treaty on the Functioning of the European Union (TFEU) constitutes a noble example.[59] It is a high-ranking international treaty and specifically imposes an obligation on European countries to 'work for the sustainable development of Europe'.[60] The treaty also included outer space in the common competences;[61] therefore, through this treaty obligation, European countries are obliged to work towards the sustainable development of Europe, including outer space.

Although the concept of sustainable development is widely accepted by various international treaties, it was never accepted as a part of the space law regime. Consequently, there is no treaty obligation to develop sustainably in outer space.[62]

The concept of sustainable development could be directly applied to space activities if it enjoyed the status of a customary rule or a general principle of law. However, determining whether a norm has achieved the status of a recognised source of international law is no easy feat. In the case of sustainable development, the doctrine is divided. Some argue that the concept is intrinsically incapable of achieving such a status.[63] According to Lowe, sustainable development lacks norm-creating character, which rules out its possible status as a customary rule or general principle of law.[64] Its normativity cannot be assessed according to classic proof of *opinio iuris* or generality of state practice because it is a changing concept with content prone to different interpretations, and is therefore unable to result in uniform, widespread and continuous state practice. For proponents of a systemic approach, sustainable development is an obligation that simply might not fit within positivist reductionist thinking[65] because it belongs to the realm of a modern legal regime that actually accounts for the challenges of today.

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57 The World Trade Organisation (WTO) recognises sustainable development among its objectives, what was later confirmed in the 2001 Doha Declaration: 'We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement.' The WTO Appellate Body found in the *US – Shrimp Case*, that '[t]his concept has been generally accepted as integrating economic and social development and environmental protection.'

58 Ebbesson and others (n 10) 196.

59 Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/49 (TFEU).

60 TFEU, art 3(3).

61 TFEU, arts 4(3) and 189.

62 The concept of sustainable development was developed much later.

63 Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 2001) 23.

64 ibid 23-25.

65 See Decleris (n 17).

Turning to the courts' decisions in order to find an answer, two cases need to be considered. The International Court of Justice (ICJ) approached the issue of defining the legal status of sustainable development in the *Gabčikovo-Nagymaros Project* case. In the judgement, the ICJ invoked '*the concept* of sustainable development' stating that it reconciles economic development with protection of the environment.[66] The reliance of the Court on the concept of sustainable development has attributed sustainable development with a legal function. Notwithstanding the judgement, the separate opinion of the Vice-President of the Court, Judge Weeramantry, describes sustainable development as 'more than just a concept' and as 'a principle with normative value'.[67] In the *Pulp Mills* case, the ICJ further contributed to the legal evolution of the concept of sustainable development. However, like in the *Gabčikovo-Nagymaros* case, the Court was unwilling to affirm sustainable development as a binding norm of international law. It refers to sustainable development as an 'objective'.[68] The separate opinion of Judge Trindade, however, describes sustainable development as one of the principles of international environmental law.[69] The court avoided classifying it as a classical source of international law, yet its classification as a concept or objective gives sustainable development a normative status at least as an element of the process of judicial reasoning.

To that end, Lowe argues that as 'sustainable development is a meta-principle, acting upon other legal rules and principles – a legal concept exercising normativity, pushing and pulling the boundaries of true primary norms when they threaten to overlap or conflict with each other.'[70] But he sees such normative status of sustainable development as a component of judicial reasoning that acquires a normative value through decisions of the courts, not as a primary rule of the conduct of states.[71]

Without a firmly established status as a customary rule or a general principle, there are warranted doubts that there is a general obligation placed on states to develop sustainably. Nonetheless, recently, more scholars are insisting that its presence in international treaties and in a countless number of other international documents is a great token of *opinio iuris* and probably determinant of state practice.[72] But determining uniform state practice on the implementation level is difficult, if not impossible, due to the evolutive and complex nature of sustainable development.

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66 *Case Concerning the Gabčikovo-Nagymaros Project* (n 41) 7.

67 Separate opinion of Judge Christopher Weeramantry (*Case concerning the Gabčikovo-Nagymaros Project*) [ibid, paras 88, 95].

68 *Case Concerning Pulp Mills on the River Uruguay* (*Argentina v Uruguay*) [2010] ICJ Rep 14, para 177.

69 *Case Concerning Pulp Mills on the River Uruguay* (*Argentina v Uruguay*) (Separate opinion of Judge Cançado Trindade) [2010] ICJ Rep 14, para 6, See also para 132ff.

70 Lowe (n 63) 31.

71 ibid.

72 See Barral (n 50).

3.4 Evolutive nature of sustainable development

Sustainable development is an evolutive concept, which means that its substance varies *ratione temporis*, *personae*, *materiae and loci*,[73] as was highlighted by the Brundtland Report: 'sustainable development is not a fixed state of harmony, but rather a process of change'.[74]

According to Barral, because sustainable development is intrinsically evolutive, its content is difficult to identify and probably immune to clear legal definition. She observes that the efforts to define it clearly led some to conclude that it is empty of substance or incapable of legal classification.[75]

The indeterminacy argument regarding sustainable development is not a new one.[76] It was also invoked regarding established principles. The realists introduced the indeterminacy argument to demonstrate that the application of the principles of deductive reasoning to the set of legal materials did not and could not uniquely determine the outcome of particular cases. This is also the case for sustainable development. To some extent, flexibility is a main strength and drawback of the principles in general. Yet, as mentioned before, sustainable development challenges legal researchers in one more way. It is an evolutive concept. Change is its nature. Its substantive and procedural elements have to change in order to be sustainable. Therefore, the concept's substance inherently varies *ratione temporis*, *personae*, *materiae and loci.*

The overarching coherence, however, can be found in the fact that sustainable development is always accepted as an objective to aspire to.[77] Many legal instruments talk about the promotion of sustainable development or about striving to achieve it. They therefore point to sustainable development as a norm guiding the conduct of states – but as a norm of means, not a norm of results.[78] Although a state might not be developing in a sustainable way, it is obliged to *strive* to develop in a sustainable way. This can be read as an obligation to employ specific instruments to achieve it. The Rio Declaration provides for a range of instruments that constitute substantive and procedural elements of sustainable development. These means, however, would have to vary so as to be sustainable in a given (changing) reality. The complex nature of sustainable development does not allow for a strictly positivist assessment of its normative scope, unless two assumptions are put in place: first, that sustainable development is an evolutive concept; second, that it is a norm of means, not results.

There is one last view that sustainable development enjoys: it is also perceived as an 'emerging area of law' at the intersection of environmental and developmental laws.[79] This seems to be in line with

73 ibid 392.

74 The Brundtland Report (n 35) 17.

75 Barral (n 50) 382ff.

76 *See* John Hasnas, 'Back to the Future: From Critical Legal Studies Forward to Legal Realism, Or How Not to Miss the Point of the Indeterminacy Argument' (1995) 45 Duke Law Journal 84.

77 Barral (n 50) 388.

78 ibid 390ff.

79 See Cordonier Segger and Khalfan (n 30).

Principle 27 of the Rio Declaration, which calls for 'further development of international law in the field of sustainable development.' In this case, applicability of the objective of sustainable development could be secured by Article III of the Outer Space Treaty (OST), which makes general international law applicable to space law.

Is sustainable development a part of international law? The answer is yes. At least as an objective with normative status determining state conduct, not only judicial reasoning, as an accepted principle of environmental law,[80] or arguably as a customary rule or a general principle of law, and possibly as an 'emerging area of law' in its own right.[81] Despite the disagreement on its legal status, sustainable development has been given great recognition in international law and furnished with the capacity to impact law-making processes. As Schrijver and Weiss point, sustainable development is not going to disappear from sight because it has already established its credentials in the legal realm.[82]

4. Rationale behind applying the concept of sustainable development to outer space law

Space law is particulate law,[83] a self-contained system of rules that is governed by a set of specific principles[84] developed to deal with the practical problems of use and exploration of outer space.[85] It consists of an international binding treaty regime, declarations and guidelines, industry guidelines, regional and national laws and arrangements. The core of the system constitutes legal instruments created by the UNCOPUOS[86] during the 'golden age' of space law-making.[87] The OST[88] is regarded as the *Magna Carta* of outer space that enshrines fundamental principles relating to the use and exploration of outer space. Moreover, it serves as the foundation for the other four major international

80 In the *Iron Rhine* case the tribunal was of the view that international law today 'require[s] the integration of appropriate environmental measures in the design and implementation of economic development activities', and that this integration requirement means that 'where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm', which 'has now become a principle of general international law' [PCA, Iron Rhine case (*Belgium v Netherlands*), Award of the Arbitral Tribunal of 24 May 2005, 29 <www.pca-cpa.org/showpage.asp?pag_id=1155> accessed 25 July 2015]. The European Union has accepted a sustainable development as a principle of environmental law [TFEU, art 37].

81 Sustainable development law is found at the intersection of three principal fields of international law: international economic law, international environmental law and international social law. Sustainable development law refers to emerging substantive body of legal instruments, norms and treaties, supported by distinctive procedural elements, (CSIL) <www. Cisil. org> accessed 25 July 2015.

82 Schrijver and Weiss (n 37).

83 Francis Lyall and Paul B Larsen, *Space Law: A Treatise* (Ashgate 2009) 2.

84 Koskenniemi (2006) (n 3) 65ff..

85 Lyall and Larsen (n 83) 2.

86 For the accomplishments and history of the UNCOPUOS see, eg, S Neil Hosenball, 'The United Nations Committee on the Peaceful Uses of Outer Space: Past Accomplishments and Future Challenges' (1979) 7(2) Journal of Space Law 95-114.

87 Gennady M Danilenko, 'Outer Space and the Multilateral Treaty-Making Process' (1986) 4 High Technology Law Journal 218.

88 See OST (n 2).

conventions, i.e. the Rescue Agreement,[89] the Liability Convention,[90] the Registration Convention[91] and the Moon Agreement.[92] These five treaties are regarded by most as the controlling authority for human activities in outer space.

Space law in its current shape cannot be regarded as an operative regime for future activities in space, particularly resource mining. First, it is too general, and second, it permits a reductionist interpretation of its rules that ignores current developments.

The application of the concept of sustainable development to space law could contribute to its revitalisation. The accepted legal passage for this process can be found in Article III of the OST, which makes general international law applicable to space law.[93] Moreover, Article 31(3)(c) of the Vienna Convention[94] requires that a treaty be interpreted in light of the rules of international law. This rule should not be limited by the principle of contemporaneity[95] since the intentions of the negotiating parties during the space law-making process were to use general, framing provisions capable of encompassing future developments.[96] Interpretation of the treaty should therefore account for the temporary developments in international law, such as sustainable development. It would be damaging to the space law regime to freeze it in the reality of the 1960s as activities in outer space are pinned to the fast-changing technological developments. 'International law is a truly living law which can shift in content from day to day in order to meet ... the challenge arising from man's venture into new frontiers'.[97] Sustainable development could help to revitalise space law by setting up both existing and future rules in light of modern developments that take place in international law, especially on the eve of industrial changes relating to the excavation of resources of celestial bodies that must entail drawing up new rules.

It also looks like sustainable development is slowly paving its way to outer space law. Most of all, it is not extrinsic to space law. From the contemporary perspective many provisions of the OST can

89 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (adopted 22 April 1968, entered into force 3 December 1968) 672 UNTS 119.

90 Liability Convention (n 2).

91 Convention on Registration of Objects Launched into Outer Space (adopted 14 January 1975, entered into force 15 September 1976) 1023 UNTS 15.

92 Moon Agreement (n 7).

93 It states that States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the Moon and other celestial bodies, in accordance with international law [OST (n 2)].

94 Vienna Convention (n 18).

95 According to which a treaty must be interpreted in the context of the law applicable at the time of its conclusion [See Island of Palmas Case *(Netherlands, USA)* II RIAA (1928) 829, 845 and 839] unless Parties agreed otherwise and decide to allow the interpretation of the treaty to follow modern legal developments [See ILC Commentaries to the Draft Articles on the Law of Treaties [1966] ILC Yrbk 187, paras 16, 242].

96 Nandasiri Jasentuliyana, 'Space Debris and International Law' (1998) 26(2) Journal of Space Law 139, 141.

97 Bin Cheng, *Studies in International Space Law* (Clarendon Press 1997) 680.

be seen as a passage of sustainable development to the domain of outer space.[98] There are also many multilateral regulatory initiatives advancing the issue of sustainability of outer space.[99]

5. Learning from the law of the sea: the relevance of a legal regime governing the deep seabed for the development of outer space law

The process of applicability of sustainable development to outer space can be better understood and conducted if the experiences and developments in other branches of international law, particularly the law of the sea, are taken into account. The legal regimes of the seas and outer space are often subject to a comparative analysis because the domains they regulate are alike in many ways. The seas and outer space have stimulated the human imagination for centuries. They have both been areas of progressive conquest directly dependent on technological developments. Their legal statutes have been going through similar changes, with the law of the sea being a step ahead of space law.

Nevertheless, unlike the relatively recent space law, the general law of the sea has matured in a slow process that is as old as sailing itself.[100] Even the changes introduced by the UNCLOS, although revolutionary in many ways, were accompanied by heavy debate and tested by passing time. The current regime governing the seas represents a truly international consensus on the new type of philosophy and approach to the issues relating to the management of resources, including global commons. This is where the strength and legitimacy of the law of the sea lies, as a model legal instrument for governing areas beyond national jurisdiction. Albeit not perfect, it provides for normative solutions that serve as a good model of reference while developing the more feasible space law under the umbrella of sustainable development.

The UNCLOS is a comprehensive legal instrument focused on the sustainable use and management of the seas. The conclusion of the UNCLOS was in response to the pressing problem of environmental degradation of natural resources of the seas. Before the UNCLOS, the use of the seas was settled in the Westphalian reality based on the sovereignty of states and the theory of a big sea. The growing population, unsustainable fisheries and the belief that oceans are capable of absorbing all the waste that is the result of human economic activity ended with the degradation of both marine resources and the marine environment (as predicted by Hardin's theory drawing on the tragedy of the com-

98 Eg, Article I of the OST provides that outer space shall be free for exploration by all States on a basis of equality without discrimination of any kind. This Article can be seen as a passage for the concepts of inter- and intra-generational equity in space law.

99 The COPUOS Working Group on Long-Term Sustainability of Space Activities The LTSSA (2010), the International Code of Conduct for Outer Space Activities (first version adopted in 2008), the draft Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force against Outer Space Objects (submitted in 2008), the UNGA Group of Governmental Experts on the transparency and confidence building in outer space (2010).

100 The maritime customs began to be accepted throughout the European continent in the middle ages [Malcolm N Shaw, *International Law* (6th edn, Cambridge University Press 2008) 19].

mons).[101] The UNCLOS is a great example of incorporating sustainable development into the legal regime in order to tackle the problems of environmental degradation and depletion of resources of global commons. Although it does not use the actual phrase 'sustainable development', it incorporates all the elements of sustainable development.[102] The process of negotiation and acceptance of the UNCLOS, as well as the innovative solutions it introduces, serves as a great model to build upon.

5.1 Global commons and use of resources

The sustainable use of natural resources is probably the most visible substantive element of sustainable development. The use of natural resources has been a constant subject of international competition. The scarcity and finite nature of natural resources raise tensions among states and are often believed to be a primary driving force behind states' conduct on the international arena.

So far, the resources that have been exploited in outer space are Earth orbits, which are mainly used by satellites and are cluttered with space debris. Meanwhile, the seas offer a whole range of resources, including food. The common ground between the seas and outer space with respect to resources is reached when it comes to mineral mining.

The international community has developed a few different types of legal regimes to govern natural resources: (1) within their territorial limits, states exercise sovereign rights over natural resources; (2) in cases of international rivers and migratory species, they share the resources; (3) states also recognise the *res communis* status, which is the area beyond national jurisdiction where, as in the case of the high seas, no user has exclusive rights to resources and no one can exclude others from exploiting them, but capturing resources results in exclusive property rights. Lastly, (4) some parts of *res communis* can have the special status of *res communis omnium* or (arguably) *res communis humanitatis*.[103] The key concept of this category is 'the common heritage of mankind', but it can also take shape of 'the province of all mankind', as in the case of outer space.

5.2 The common heritage of mankind and the province of mankind

In 1970, the UN General Assembly adopted Resolution 2749 recognising the CHM as the principle governing the exploitation of the international seabed. The concept of the CHM was subsequently adopted by the UNCLOS to govern the 'Area'.[104] Under Article 136 UNCLOS, the 'Area' – which is the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction, and its resources – are the common heritage of mankind.

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101 See Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 Science 1243.

102 Ebbesson and others (n 10) 196.

103 For the doctrine proposition on distinction between *res communis omnium* and *res communis humanitatis* see Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law* (Martinus Nijhoff Publishers 1998) 40-42.

104 UNCLOS (n 9).

The CHM was the main innovating aspect of the UNCLOS with respect to the previous law of the sea regime. While other important innovations, such as the exclusive economic zone, were to some extent an evolutionary development of the system, the introduction of the CHM had a revolutionary character.[105] The CHM was specifically designed to achieve aspects of sustainable development in the scope of common spaces. It presupposes a regime different from both the traditional concepts of sovereignty and freedom. It is also argued that the CHM has introduced a new type of subject to international legal relations: mankind.[106]

Borgese points to five principles underpinning the concept of the CHM: (a) the principle of non-appropriation; (b) the principle of shared management; (c) the principle of a 'common benefit for mankind as a whole' implying an equitable distribution of benefits; (d) the principle of use for exclusively peaceful purposes; and (e) the principle of conservation for future generations, which reiterates the principle of sustainable development in the oceans.[107]

Although the CHM had been conceived prior to the adoption of the OST in 1967, it was not incorporated into it. The novel notion of the 'the province of all mankind' was used instead, which many scholars consider to be the functional and legal equivalent of the common heritage of mankind. Others argue that the two terms, as applied in two different treaties for different purposes, cannot be used interchangeably. Nevertheless, outer space, along with the seabed, ocean floor and subsoil thereof, are often categorised as the CHM. This approach is reflected in the ILA Delhi Declaration that calls '[t]he resources of outer space and celestial bodies and of the sea-bed, ocean floor and subsoil thereof beyond the limits of national jurisdiction as "the common heritage of humankind"'.[108]

However, the *de facto* status and provenance of the 'province' and 'heritage' concepts differ. The term 'province of all mankind' was coined in 1966 by the USSR in the drafting process of the OST

105 Borgese commented: 'The basic principle, the motor force of the "marine revolution", is the concept of the Common Heritage of Mankind. It cannot be stressed enough that the adoption of this principle by the XXV General Assembly as a norm of international law marked the beginning of a revolution in international relations' [cited in Ettinger and Payoyo (n 14) <http://archive.unu.edu/unupress/unupbooks/uu15oe/uu15oe0p.htm> accessed 20 May 2015].

106 Some scholars insist on legal personality of mankind. Eg, Cocca suggests that 'the international community has recognized the existence of a new subject of international law, namely mankind itself, and has created jus commune humanitatis' [Aldo A Cocca, 'The Common Heritage of Humankind Doctrine and Principles of Space Law – An Overview' [1986] Proceedings of the Colloquium on the Law of Outer Space 150]; Markoff points to the fact that with the CHM, mankind was for the first time recognised as a subject of international order and a premier beneficiary of use and exploration of outer space [M G Markoff, *Traité de droit internacional public de l'espace* (Friburg 1973) 272, cited in Fabio Tronchetti, *The Exploitation of Natural Resources of the Moon and Other Celestial Bodies: A Proposal for a Legal Regime* (Martinus Nijhoff Publishers 2009) 126].

107 Elisabeth Mann Borgese, 'The Common Heritage of Mankind: From Non-living to Living Resources and Beyond' (cited in Nisuke Ando and others (eds), 2 Liber Amicorum Judge Shigeru Oda (2002) 1313).

108 New Delhi Declaration (n 49). During the recent discussions at the UN on a third UNCLOS implementing agreement on conservation and sustainable use of marine biodiversity beyond national jurisdiction the developing countries took the position that the CHM regime should be extended to cover marine genetic resources [The UN Informal Consultative Open-ended Process on Ocean and Law of the Sea (6-10 April 2015) <www.un.org/depts/los/consultative_process/consultative_process.htm> accessed 15 July 2015].

and then it found its way into Article 1 of the OST.[109] The USSR insisted on 'the province of all mankind' because it refused to recognise the CHM, mainly for ideological reasons, as being rooted in bourgeois Roman law.[110] The less developed countries insisted that 'the province of all mankind', like the CHM, means that all nations have vested rights in common resources and these should be shared equitably among them. The US also saw the two concepts as indistinguishable but as an expansion of *res communis* governed by the principle of freedom.[111] As a result, in the negotiating process of the UNCLOS, the less developed countries led the move away from 'the province of mankind' as contained in the OST (in the negotiation of which, they had no real power) and turned to 'the common heritage of mankind'.[112]

Since the very beginning, the CHM was to serve as a novel managing mechanism for the seas beyond national jurisdiction,[113] as an alternative to the freedom of the seas.[114] 'The province of all mankind', on the other hand, since the very beginning, has functioned as an equivalent of the principle of freedom of the seas. It was underpinned by the theory of a big sky with a laissez-faire approach to activities in outer space. This approach was somehow understood, given that space exploration had just begun. The launch of Sputnik 1, apart from sparking fears of a military space race, awakened a tremendous thirst for space exploration. The set of freedoms provided by the OST was an incentive for the development of the space industry. The content of the five treaties adopted by the UNCOPUOS are a fair reflection of the hopes and fears of the time.[115] Nevertheless, it soon became obvious that, despite the immensity of space, the usable outer space is a 'congested, contested, and competitive'[116] finite resource. Just as in the case of the seas, the need for sustainable management of resources became obvious.

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109 'The exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind' [OST, art 1].

110 Dekanzov (1974) (cited in Joanne Irene Gabrynowicz 'The "province" and "heritage" of mankind reconsidered: a new beginning' (2nd Conference on Lunar Bases and Space Activities of the 21st Century, Proceedings from a conference held in Houston, TX, April 1988).

111 ibid. In practice, this interpretation was guiding the states' conduct in outer space until the moment when the actions were taken to tackle the problem of space debris.

112 ibid.

113 The CHM was originally intended as a concept that would revolutionise the law of the sea by applying to all ocean space and resources. But in 1967, Arvid Pardo suggested applying it to the limited entity of the seabed.

114 Freedom of the high seas, developed by the Dutch jurist Hugo Grotius (1583–1645), creates an open access regime allowing for its laissez-faire use. Presently, however, the concept of freedom of the sea is not absolute and needs to be understood in the context of the present legal regime and in relation to the other potentially conflicting uses and interests.

115 Gabrynowicz (2004) (n 5) 1042.

116 The US National Security Space Strategy (2011) 1 <www.defense.gov/home/features/2011/0111_nsss/docs/NationalSecuritySpaceStrategyUnclassifiedSummary_Jan2011.pdf> accessed 25 July 2015.

5.3 The CHM: the perplexing concept

The CHM eventually made its way into the Moon Agreement. Article 11 calls the resources of the Moon and other celestial bodies a common heritage of mankind.[117] As in the case of the seas, the acceptance of the CHM in the context of outer space turned out to be problematic. The fact that the main space-faring states refrained from adopting the Moon Agreement clearly demonstrates the issue.[118]

On the one hand, many scholars see the continued relevance of the CHM concept in the management of the global commons, but on the other hand, there are significant difficulties surrounding its acceptance by states.[119] Despite many legal drawbacks, the true nature of the problem is political and therefore is a subject for a political solution.[120] The element of common and equitable sharing of benefits associated with the exploitation of resources and governance via a common management regime entails an international discord. The line of division runs between the 'haves' and the 'have-nots'.

The changes to the CHM introduced by the 1994 Implementation Agreement[121] allowed for wide acceptance of the concept.[122] The introduced changes, in spite of softening the CHM concept, managed to keep its spirit and gained worldwide acceptance.[123]

The launch of the 1994 Implementation Agreement was possible due to the relaxed position of less developed countries in the face of a diminishing interest in mining the seabed.[124] The situation relating to outer space is now quite different. There is a great interest in mining minerals with huge investments being made in the development of relevant technology, but the ambiguity and ramifications of the terms have left space law as one of the least stable and least clarified areas of international law,[125] continuously deterring the progress of resource extraction in outer space.

The concept of sustainable development is characterised by far greater acceptance than the CHM. The lack of political will to accept sustainable development is to a large extent due to the fact that

117 Moon Agreement, art 11.

118 As of 15 January 2015, the agreement enjoys 16 ratification and 4 signatures (n 7).

119 See Tronchetti (n 106).

120 Gabrynowicz (1988) (n 110).

121 The Implementation Agreement (n 13).

122 The main changes introduced by the Implementation Agreement are: introduction of a consensus as a primary voting system; different representation on the Council; a market-oriented approach towards the issue of technology transfer; reduction of the fees; adoption of fifteen-year timetables providing for more economic certainty for investors [John E Noyes, 'The Commmon Heritage of Mankind: Past, Present, and Future' (2012) 40:1-3 Denver Journal of International Law and Policy 447].

123 In practice, no state is actively pursuing any alternative deep seabed mining regime. Activity is taking place only under the UNCLOS Convention/1994 Implementation Agreement regime [ibid 465].

124 Tronchetti (n 106) 83ff.

125 Yun Zhao, 'An Iinernational Space Authority: A Governance Model for a Space Commercialization' (2004) 30 Journal of Space Law 279.

it is identified with the CHM when it comes to governance of the common spaces. However, the acceptance of sustainable development would not mean automatic acceptance of the CHM in the form proposed by the Moon Treaty because a solution that does not enjoy wide acceptance cannot yield sustainable results. The applicability of sustainable development would require re-examination of the status of outer space with respect to natural resources when the time is ripe. Sustainable development, once applied, would draw a framework of values with the potential to ensure the sustainable use of outer space. Such a framework approach would help prevent the possible development of custom based on the practice of states that currently have the technology necessary to extract resources, leaving the 'have-nots' stranded.[126]

The CHM concept in outer space has great potential to manage the common resources of outer space but it needs to be re-examined, just like in the case of the seabed. One needs to keep in mind that the reluctance to accept the CHM as introduced by the UNCLOS was mainly due to the proposed *lex specialis*, while the aversion to the CHM in outer space is mainly due to the very general wording and lack of clarity. If we are to enter the new era of mining the mineral resources of outer space, the space law regime must develop. The changes introduced by the Implementation Agreement in the law of the sea in that respect can definitely serve as a good example. In the meantime, the application of sustainable development would secure important values while also leaving room for new legal developments.

Nevertheless, the extraction of resources must first be feasible and sustainable economic activity be made possible. Sustainable development recognises the importance of the human-made systems, including the economic system, and as a result, economic issues could be given priority in order for mining to be feasible at all. As the example of the seabed shows, the extended debate over non-existing economic activities may lead to an impasse with respect to the extraction of resources. While the impasse in the excavation of resources from the seabed can be justified by the environmental concerns, the extraction of minerals from celestial bodies, apart from technological issues, primarily poses political and legal problems.

5.4 Delimitation of outer space

There is at least one more way that future developments in outer space can benefit from the law of the sea. There is a trend in outer space law that proposes different legal regimes for outer space depending on where the activity takes place. Currently, outer space holds one legal status that is by no means clear, neither in terms of the nomenclature nor the interpretation.[127] Furthermore, there is an ongoing debate on the delimitation of outer space from air space. As the two regimes are subordinat-

126 With the unclear legal status in place, various parties, foreseeing potential profit, have started their own projects aiming at space. The United States has also executed a series of bilateral Memoranda of Understanding with Partner States concerning outer space activities. With no clear-cut rules and regimes in place, the activities are carried out subject to Partner States' own interpretations [Noyes (n 122) 465].

127 See Part 5.2 above.

ed to different jurisdiction regimes (*res communis* and sovereignty respectively) a natural question for a lawyer is where does 'space' begin? Space law does not settle the issue, nor does doctrine agree on an answer.[128] Because of this lack of agreement, the 'working' border has been set up at the altitude of 100 km, known as Kármán Line.[129]

The homogeneous legal status of outer space does not seem likely to endure in the long-term. In the years preceding the finalisation of the OST, the issue of space and celestial bodies was already being discussed.[130] It was argued that celestial bodies were physically markedly different from their largely void surroundings, such as orbits, and should therefore be subject to a separate legal regime, which was reflected in the wording of the international space treaties. Space law did dot approach the issue directly but uses the phrase 'outer space and celestial bodies' when defining the scope of its provisions, which can suggest that there is a possibility of installing two separate legal regimes depending on the physical characteristics of their subject matter. Also, the Moon Agreement postulates a distinct legal status for the Moon, namely the CHM.[131] To this end, the various types of jurisdiction employed by the law of the sea suggest that the introduction of similar changes with respect to outer space could be a viable solution. The status of airspace begs a comparison with territorial waters. The legal status of 'other areas' of outer space would have to be a mix of different determinants mostly dependent on the subject matter (celestial body, orbits, unused space, deep space, etc.) and probably in light of a functional approach.

6. Conclusion

Since a viable system of law presupposes continuous law-making activity,[132] the development of space law is inevitable. The extension of the concept of sustainable development to the domain of outer space would help keep the system viable, coherent and integrated into general international law. Its adoption would resemble the development of the existing legal system, rather than a radical change.

Just like in the case of the seas, the future governance of mineral resources in space needs to be established. The application of sustainable development to outer space would draw a necessary frame-

128 Not all the researchers supported a delimitation of outer space understood as a permanently marked boarder between airspace and outer space. A number of them presented so called 'functional approach', and postulated that regulation should depend on the nature of the activity rather than on its location. This division in the debate between proponents of 'spatialism' and 'functionalism' has been ongoing till present days [see, eg, Frans G von der Dunk, 'The Delimitation of Outer Space Revisited: The Role of National Space Laws in the Delimitation Issue' (1998) Paper 51 University of Nebraska, Space and Telecommunications Law Program Faculty Publications].

129 The Fédération Aéronautique Internationale, '100km Altitude Boundary for Astronautics' <www.fai.org/icare-records/100km-altitude-boundary-for-astronautics> accessed 28 July 2015.

130 See the reports of the Working Group III of the International Institute of Space Law (IISL) on the legal status of celestial bodies, published in the 1962-1966 IISL Proceedings of the colloquium on the law of outer space.

131 Moon Agreement, art 11.

132 Danilenko (n 87).

work for this process. The concept of the common heritage of mankind is believed to be at the heart of sustainable development when it comes to the governance of common spaces. Nevertheless, its current form, as put forth by the Moon Treaty, has not been accepted by the main space-faring states. To this end, the experiences learned from drafting Part XI of the UNCLOS and its amendment by the 1994 Agreement can serve as model to follow.

Unlike the UNCLOS, the OST is merely a broad framework, which is waiting to be filled with precise rules. As the debate in the law of the sea shows, the developed and developing countries have all demonstrated that they want their share of space exploration, and generally for the same reasons. This points to the probability that, if properly facilitated within a supportive structure of sustainable development, cooperation and compromise can occur. [133]

133 Gabrynowicz (1988) (n 110).

Maritime Safety and Security Law Journal

Introducing Maritime Spatial Planning Legislation in the EU: Fishing in Troubled Waters?

Antonia ZERVAKI[1]

Abstract

Maritime spatial planning (MSP) is a process that enhances comprehensive management of marine space in line with the ecosystem-based approach. Initially introduced as a tool for environmental protection and conservation at the national level, it is nowadays associated with the expansion and intensification of human activities, mainly of an economic nature, in offshore waters and the first attempts for cross-border coordination and cooperation. This expansion in MSP objectives has brought to the forefront the need to introduce institutional mechanisms that would enhance uniformity in states' practice and the conditions required for cross-border cooperation, taking into account the lack of universally agreed upon rules in this domain. The adoption of the 2014 EU Directive establishing a framework for maritime spatial planning constitutes the first attempt to regulate MSP regionally. This article discusses the content of the new act, its position in relation to the European acquis and the international law of the sea and its implications on Member States' management of the marine space falling under their jurisdiction.

Keywords

maritime spatial planning, EU maritime policy, maritime governance, ocean governance, ecosystem-based management

1. Introduction

Maritime spatial planning (MSP) is considered to be one of the cutting edge practices in ecosystem-based management due to its comprehensive perception of marine space. Introduced as a horizontal policy tool in the EU integrated maritime policy in 2007, it seemed to facilitate the implementation of the ambitious EU maritime governance model, by enhancing Member States' capacity to administer in a comprehensive manner the various sectoral policies implemented or having an impact on marine space. Although the European Commission's contribution was initially restricted to policy guidelines, MSP soon gained momentum in the EU; the prioritisation of MSP in the Euro-

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pean Commission's agenda coincided with the institution's efforts to reverse the impact of the global financial crisis on the European economy. Thus, although initially introduced as a tool for the conservation of marine sustainability, the growing interest vested in offshore activities, as well as the prime concern in economic dimensions of maritime affairs, contributed to the Commission's reappraisal of MSP both in relation to its content as well as in terms of its legal form.

In this context, the launching of a legislative procedure on behalf of the Commission in March 2013 catering for integrated coastal zone management (ICZM) and MSP constituted a very ambitious venture, being the first attempt to introduce an international legal framework for MSP. This shift from soft law to legally binding rules, however, has become a highly contentious issue within EU institutions and among Member States. The criticism received was mainly due to the confusion created in relation to the proposed act's contested conformity with EU fundamental principles, Member States' reluctance to adopt MSP legislation at the EU level since their practice in this domain was far from uniform and the institutional ambiguity derived from the lack of universally agreed rules on MSP. A Directive catering solely for to MSP was finally adopted in July 2014, having undergone several changes both in terms of its substantive as well as its procedural provisions.

This article discusses the EU's approach to MSP within the broader context of MSP evolution and practice, by analysing the content of the new MSP Directive as well as its position vis-à-vis the European *acquis* and international law of the sea. These issues will be examined in light of the obligations introduced for Member States and the challenges that go hand in hand with the Directive's implementation in the different European maritime regions.

2. MSP: an evolving concept and practice

2.1 The emergence and evolution of MSP

Spatial planning of the marine environment emerged in the early 1980s as an environmental conservation management process used by national authorities in order to address the challenges arising from stress exposure of marine protected or sensitive areas due to anthropogenic activity and/or natural processes. Australia is considered to be a pioneer in this domain since it was the first to introduce MSP at the Great Barrier Reef Marine Park[2] management scheme in 1981.[3] MSP proliferated around the globe in the 1990s and 2000s; several countries have adopted legislative measures and

2 Based on a multiple zoning system, established by the Great Barrier Reef Marine Park Act (AU) 1975 applying to an area of 344,400 km^2.

3 Jon Day, 'The need and practice of Monitoring, Evaluating and Adapting Marine Planning and Management – Lessons from the Great Barrier Reef' (2008) 32 Mar Policy 823. For an elaborate account of the MSP profile and its evolution, see Richard Kenchington and Jonathan Day, 'Zoning, a fundamental cornerstone of effective Marine Spatial Planning: lessons learnt from the Great Barrier Reef, Australia' (2011) 15 J Coast Conservat 271.

institutional mechanisms for the design and implementation of spatial plans in the marine waters under their jurisdiction.[4] These projects were conducted depending on the spatial scale of their application, namely:

(a) in large marine areas, based on the philosophy of large marine ecosystems,[5] as in the cases of the Eastern Scotian Shelf Integrated Ocean Management Plan[6] under Canada's Oceans Act of 1997[7] or Great Britain's English territorial sea and Exclusive Economic Zone (EEZ) MSP under the 2009 Marine and Coastal Access Act;[8] and

(b) in marine areas of a smaller scale, as in the cases of the Florida Keys National Marine Sanctuary in the USA,[9] China's functional zoning system[10] and most of the European countries (Belgium,[11]

4 For a comprehensive account of national MSPs, see Steven Jay and others, 'International Progress in Marine Spatial Planning' (2013) 27 OCYB 171; Nicole Schaefer, Vittorio Barale, 'Maritime spatial planning: opportunities & challenges in the framework of the EU integrated maritime policy' (2011) 15 J Coast Conservat 237, 244; UNESCO, 'MSP around the world' <www.unesco-ioc-marinesp.be/msp_around_the_world> accessed 10 June 2015.

5 The concept of large marine ecosystems first appeared in the 1995 Global Environment Facility Operational Strategy. See Global Environment Facility, 'GEF Revised Operational Guidelines' (1995) GEF/C.6/3, 57, 68. The term refers to maritime regions of about 200,000km^2 or greater, defined not by administrative criteria but by bathymetry, hydrography, productivity and trophic interaction. However, it should be taken into account that states' maritime jurisdiction is a prerequisite for MSP implementation, thus reference to the concept of large marine ecosystems is made in terms of the size of the area falling into the scope of a management plan, which lies within the jurisdictional limits of coastal states but still, due to its breadth, constitutes an ecological entity. At the regional or international level, the perception of marine space as large marine ecosystems is anticipated to foster 'harmonization of law [among states], participation in regional institutions and efforts, creation of treaty regimes, and provision for dispute settlement'. See Lawrence Juda, Timothy Hennesey, 'Governance Profiles and the Management of the Uses of Large Marine Ecosystems' (2001) Ocean Dev & Int'l L 43, 57.

6 This integrated ocean management plan, completed in 2008, covers an area of 325,000km^2. UNESCO, 'Marine Spatial Planning Initiative – Canada (ESSIM)' <www.unesco-ioc-marinesp.be/msp_practice/canada_essim> accessed 8 June 2015.

7 Ocean Act (Canada) 1996, enacted in 1997.

8 Marine and Coastal Access Act (UK) 2009. Section 55 of the Act delegated the Marine Management Organization to conduct MSP for the territorial sea and EEZ of England, corresponding to a total of 253,000 km^2. See UNESCO, 'Marine Spatial Planning Initiative – United Kingdom (England)' <www.unesco-ioc-marinesp.be/msp_around_the_world/united_kingdom_england> accessed 6 June 2015.

9 Introduced in 1997, MSP for Florida Keys National Marine Sanctuary covers an area of 9,600 km^2. UNESCO, 'Marine Spatial Planning Initiative – United States (Florida Keys)' <www.unesco-ioc-marinesp.be/spatial_management_practice/united_states_florida_keys> accessed 5 June 2015.

10 China has introduced a system of Marine Functional Zoning Plans (MFZP) with the Law of the People's Republic of China on the Use of Sea Areas, adopted in 2002. This system allocates human activities using a zoning system designed according to the ecological and geographical specificities of each maritime subregion. MFZP is currently applied on China's territorial sea, covering an estimated area of 174,000 km^2. UNESCO, 'Marine Spatial Planning Initiative – China' <www.unesco-ioc-marinesp.be/spatial_management_practice/china> accessed 5 June 2015.

11 Covering an area of 3,600 km^2, UNESCO, 'Marine Spatial Planning Initiative – Belgium' <www.unesco-ioc-marinesp.be/spatial_management_practice/belgium> accessed 5 June 2015. A Royal Decree was adopted in Belgium in March 2014 on MSP for the Belgian part of the North Sea, covering the territorial sea, the continental shelf and the EEZ. See also Erik Olsen and others, 'Integration at the Round Table: *Marine Spatial Planning in Multi-Stakeholder Settings*' *(2014) 9* PLoS ONE e109964.

Germany,[12] the Netherlands,[13] etc.).

In the European seas, however, due to the proximity of adjacent or opposite states and the jurisdictional fragmentation of the marine space thereof, it soon became evident that small-scale MSP projects confined the effectiveness of MSP processes. In this context, the first transboundary project was realised in the Wadden Sea region by Germany, Denmark and the Netherlands,[14] while a number of pilot projects followed, sponsored by the European Commission, such as the Plan Bothnia in the Baltic Sea,[15] the Maspnose Plan in the North Sea[16] or the most recently launched Adriplan in the Adriatic-Ionian Sea.[17]

2.2 MSP conceptual and normative premises

What is evident from the above-mentioned state and regional practice is that MSP implementation,

(a) while taking into account local needs and specificities, is related to a comprehensive perception of the marine space, which transcends administrative boundaries and focuses on the biophysical and geographical features of larger maritime areas;
(b) whether conducted and implemented at the national level or regionally, has been consistent with international law allocating states' rights and obligations at sea;[18]
(c) encompasses a gradual shift from conducting MSP strictly for environmental management to a more comprehensive perception of spatial allocation of human activities and natural

12 MSP in Germany covers an area of 33,100 km² (approximately 28,600 km² in the North Sea and about 4,500 km² in the Baltic Sea), UNESCO, 'Marine Spatial Planning Initiative – North/Baltic Seas' <www.unesco-ioc-marinesp.be/msp_practice/germany_north_baltic_seas> accessed 5 June 2015. MSP jurisdiction is shared by German federal authorities for the EEZ and German federal sates for the territorial sea.

13 In the Dutch part of the North Sea, covering both territorial waters and the EEZ in an area of about 58,000 km², UNESCO, 'Marine Spatial Planning Initiative – The Netherlands' <www.unesco-ioc-marinesp.be/spatial_management_practice/the_netherlands> accessed 5 June 2015.

14 Within the framework of the tripartite cooperation for the protection of the marine environment launched in the 1970s, inaugurated with the adoption of the Joint Declaration on the Protection of the Wadden Sea in 1982; the Declaration was updated in 2010 making explicit reference to ICZM and MSP activities. See Joint Declaration on the Protection of the Wadden Sea, 9 December 1982 and Sylt Declaration and 2010 Joint Declaration, 11th Trilateral Governmental Conference on the Protection of the Wadden Sea, Westerland/Sylt 18 March 2010 <www.waddensea-secretariat.org/trilateral-cooperation/organisational-structure> accessed 14 May 2015.

15 Project Plan Bothnia – A Maritime Spatial Planning Process in the Baltic Sea (2010-2012) <http://planbothnia.org/about/> accessed 6 June 2015.

16 Project MASPNOSE – Maritime Spatial Planning in the North Sea (2010-2012) <www.wageningenur.nl/en/show/Maspnose-Maritime-spatial-planning-in-the-North-Sea.htm> accessed 6 June 2015.

17 Project ADRIPLAN - Adriatic Ionian Maritime Spatial Planning (2013-2015) <http://adriplan.eu/index.php/project/objectives> accessed 5 June 2015.

18 For a comprehensive analysis of the international legal regime on maritime spatial planning, see Frank Maes, 'The International Legal Framework for Marine Spatial Planning' (2008) 32 Mar Policy 797; MRAG, 'Legal Aspects of Maritime Spatial Planning', Final Report to DG Maritime Affairs and Fisheries, Framework Service Contract, No. FISH/2006/09-LOT-2, October 2008; and HELCOM, 'Joint HELCOM-VASAB Maritime Spatial Planning Working Group Report 2010-2013' (2013).

processes on the marine space.

The latter were confirmed by UNESCO's[19] first attempt to provide a definition and codify the main principles for MSP development and implementation. According to UNESCO, MSP constitutes

> a [public] process of analyzing and allocating parts of three dimensional marine spaces to specific uses, to achieve ecological, economic and social objectives that are usually specified through the political process; [the latter] usually results in a comprehensive plan or vision for a marine region. MSP is an element of [ecosystem-based] sea use management.[20]

Thus, the MSP objective is the delivery of a comprehensive spatial plan (CSP) for a specific marine area or ecosystem. A CSP is discerned by its three-dimensional character since it addresses activities taking place on the seabed and subsoil, the water column and the surface of the sea. According to the European Commission, '[t]ime should also be taken into account as a fourth dimension, as the compatibility of uses and the "management need" of a particular maritime region might vary over time'.[21] Maritime spatial plans contain the general vision as well as the operational objectives to be realised in a certain time span, describe the management, assessment and review procedures and make use of existing or introduce new - where necessary - institutional provisions for the management of competing human activities in specific marine areas, usually through the introduction of zoning methodology and/or a permit system.[22]

The most significant MSP components could be codified as follows.

2.2.1 Ecosystem-based approach to the marine space

In spite of the fact that the concept of ecosystem-based approach is lacking a 'universally agreed

19 UNESCO's Intergovernmental Oceanographic Commission (IOC) and the Man and the Biosphere Programme organised the first international workshop on the use of MSP as a tool to implement ecosystem-based, sea use management in 2006. See UNESCO, 'Marine Spatial Planning Initiative – MSP Workshop 2006 <www.unesco-ioc-marinesp.be/msp_workshop_2006> accessed 2 June 2015. It should be mentioned that the Man and the Biosphere Programme, introduced in 1971, was the first attempt by the international community to implement a zoning system for the preservation of natural and cultural resources. See UNESCO, 'Man and the Biosphere Programme' <www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/man-and-biosphere-programme/> accessed 5 June 2015.

20 This is a consolidated definition from Charles Ehler and Fanny Douvere, *Visions for a Sea Change. Report of the First International Workshop on Marine Spatial Planning. Intergovernmental Oceanographic Commission and Man and the Biosphere Programme*, IOC Manual and Guides No 46, ICAM Dossier No 3 (UNESCO 2007) 13; and Charles Ehler and Fanny Douvere, *Marine Spatial Planning: a step by step approach toward ecosystem-based management. Intergovernmental Oceanographic Commission and Man and the Biosphere Programme*, IOC Manual and Guides No 53, ICAM Dossier No 6 (UNESCO 2009) 7, 10, 18.

21 Commission of the European Communities 'A Roadmap for Maritime Spatial Planning: Achieving Common Principles in the EU' (Communication) COM (2008) 791 final, 9.

22 Ehler and Douvere, *Marine Spatial Planning: a step by step approach toward ecosystem-based management. Intergovernmental Oceanographic Commission and Man and the Biosphere Programme* (n 20) 22. See also Hermanni Backer, 'Transboundary Maritime Spatial Planning: A Baltic Sea Perspective' (2011) 15 J Coast Conservat 279, 280.

definition',[23] there is a minimum consensus on its main features[24] at the international level,[25] namely (a) its comprehensive character, encompassing both ecosystemic and biological features and processes as well as political and socio-economic parameters;[26] (b) the perception of marine space as an ecological unity[27] often requiring intergovernmental cooperation; (c) the threefold approach to the marine environment encompassing application of the precautionary principle, the sustainable use of marine resources and the restoration of marine ecosystems; (d) the participatory decision-making processes, involving stakeholders and local communities' involvement in the design, implementation and assessment of management plans; (e) the adoption of institutional processes that allow for the integration of different sectoral policies in strategic and management planning; and (f) the decisive role of marine knowledge both in terms of the output of scientific research and traditional/indigenous experience and practice.

In this context, the main parameters for ecosystem-based MSP[28] may be discerned into *institutional*: ranging from the adoption of national legislation and institutional mechanisms for the effective implementation of relevant international and regional legal instruments; *managerial*: such as the adoption of 'high level' and 'operational goals' or the use of systematic monitoring, assessment and the adoption of adaptive management processes; and *knowledge-oriented*: marine knowledge is not restricted to the findings of conventional marine scientific research, that is the study of the marine environment and its processes; marine knowledge for MSP purposes entails the broadening of the scientific spectrum in order to consider the findings of other disciplines, mainly social sciences, such

23 Report on the Work of the United Nations Open-Ended Informal Consultative Process on Oceans and the law of the Sea at its Seventh Meeting, UN Doc A/61/156 (17 July 2006) 2.

24 Although this consensus seems to be contested in practice when ecosystem-based principles are further specialized. See Rachel D Long and others, 'Key principles of marine ecosystem-based management' (2015) 57 Mar Policy 53.

25 According to the United Nations Open-Ended Informal Consultative Process on Oceans and the Law of the Sea, an ecosystem-based approach should, *inter alia*, '(a) Emphasize conservation of ecosystem structures and their functioning and key processes in order to maintain ecosystem goods and services; (b) Be applied within geographically specific areas based on ecological criteria; (c) Emphasize the interactions between human activities and the ecosystem and among the components of the ecosystem and among ecosystems; (d) Take into account factors originating outside the boundaries of the defined management area that may influence marine ecosystems in the management area; (e) Strive to balance diverse societal objectives; (f) Be inclusive, with stakeholder and local communities' participation in planning, implementation and management; (g) Be based on best available knowledge, including traditional, indigenous and scientific information and be adaptable to new knowledge and experience; (h) Assess risks and apply the precautionary approach; (i) Use integrated decision-making processes and management related to multiple activities and sectors; (j) Seek to restore degraded marine ecosystems where possible; (k) Assess the cumulative impacts of multiple human activities on marine ecosystems; (l)Take into account ecological, social, cultural, economic, legal and technical perspectives; (m) Seek the appropriate balance between, and integration of, conservation and sustainable use of marine biological diversity; and (n) Seek to minimize adverse impacts of human activities on marine ecosystems and biodiversity, in particular rare and fragile marine ecosystems', ibid 2-3.

26 Howard I Browman and Konstantinos I Stergiou (coord), 'Politics and socio-economics of ecosystem-based management of marine resources' (2005) 300 Mar Ecol Prog Ser 241.

27 In line with the reference of the Preamble of the United Nations Convention on the Law of the Sea that 'the problems of ocean space are closely interrelated and need to be considered as a whole'. United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

28 Based on the elaborate discussion of ecosystem-based MSP in Stelios Katsanevakis and others, 'Ecosystem-based marine spatial management: review of concepts, policies, tools and critical issues' (2011) 54 Ocean Coast Manag 807.

as economics, law and politics. Apart from the scientific input to MSP, the latter benefits from traditional knowledge as a basis for the sustainable use of marine resources. Last but not least, activities related to marine knowledge are not confined to research but also include the use of best practices for the organisation of data as well as their availability (both in terms of interoperability and open access).[29]

It should be mentioned that the relationship between the institutional and managerial dimensions of ecosystem-based MSP is Janus-faced: on the one hand, these two processes seem to be complementary; on the other hand, given the lack of international regulation in this domain, they reflect the normative-functionalist divide in international law theory since MSP prioritises the attainment of given project-based objectives and not the 'normative questions about the ends of the action'.[30]

2.2.2 Governance principles underlying MSP

According to the UNESCO best practices[31] on the administrative and institutional organisation of the MSP process, the following principles should prevail:

(i) The integration principle: MSP, being an inter-sectoral venture, should integrate different policies falling under the competence of different authorities (e.g. different ministries) or levels of state organisation (depending on the degree of decentralisation of power in a state).

(ii) The transparency principle: MSP decisions should be open to public scrutiny, while the right of access to relevant information should be ensured.

(iii) The public trust principle, relating to the development of local communities' or societal confidence in the objectives and final outcome of the MSP process.

As far as the political process of MSP is concerned, according to UNESCO's definition, MSP constitutes a public process. This means that public engagement, defined as 'the practice of involving members of the public in the agenda-setting, decision-making, and policy-forming activities of organisations/institutions responsible for policy development',[32] should be ensured. Political science theory discerns three types of public participation:[33]

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29 Andrus Meiner, 'Integrated Maritime Policy for the European Union. Consolidating Coastal and Marine Information to Support Maritime Spatial Planning' (2010) 14 J Coast Conservat 1.

30 According to Koskenniemi's critique on international law's managerial approach. See Martti Koskenniemi, 'The Politics of International Law: 20 Years Later' (2009) 20 EJIL 7, 15.

31 See Ehler and Douvere, *Marine Spatial Planning: a step by step approach toward ecosystem-based management. Intergovernmental Oceanographic Commission and Man and the Biosphere Programme* (n 20) 40.

32 Tyler D Knowlton, 'Public Engagement: Building Institutional Capacity', Institute of Public Policy, OP 1 (University of Central Asia 2013); Gene Rowe, Lynn J Frewer, 'A Typology of Public Engagement Mechanisms' (2005) 30 Sci Technol Hum Val 251, 253.

33 ibid 254-56.

(i) Public communication/information: the public is informed about an initiative proposed by the competent authorities. Here, the information follows one direction, since feedback on the public's reaction is not pursued in this type of initiative.

(ii) Public consultation: in this case the aim of the competent authorities is to receive the public's reaction and contributions in relation to a proposed initiative.

(iii) Public participation: it ranges from the organisation of interactive workshops to participatory decision-making processes (using a referendum, or in participatory management schemes often used in the domain of areas where environmental conservation schemes are applied).

The type of public involvement, as well as the degree of institutionalisation of the relevant MSP processes, depends on the constitutional and administrative system as well as the political culture of different countries. During the last several decades, however, there has been a proliferation of regional instruments and legislation that have contributed to the establishment of common standards for public engagement, especially in the domain of environmental protection with the Aarhus Convention[34] and the EU legislation on Environmental Assessment[35] featuring as the most illustrative examples.

3. MSP in the EU: the challenges of institutionalisation

3.1 The route to Ithaca: from standard-setting to secondary legislation

MSP was initially conceived as a policy tool that would support decision-making in the different policy domains of EU maritime policy, which constituted the organisation's first attempt to adopt

34 United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention). The Aarhus Convention caters for the obligation of public authorities to disseminate information related to the environment, the right of access of the public to environmental information held by public authorities, the participation of the public in environmental decision-making and the access to justice for environmental issues.

35 Council Directive (EU) 2011/92 on the assessment of the effects of certain public and private projects on the environment (Environmental Impact Assessment - EIA Directive) [2011] OJ L 26/1 as amended by Council Directive (EU) 2014/52 on the assessment of the effects of certain public and private projects on the environment [2014] OJ L 124/1 and the Council Directive (EC) 2001/42 on the assessment of the effects of certain plans and programmes on the environment (Strategic Environmental Assessment – SEA Directive) [2001] OJ L 197/30.

an integrated approach vis-à-vis maritime affairs.[36] Spatial planning had a strong environmental element at the time, since it was perceived as 'a fundamental tool for the sustainable development of marine areas and coastal regions, and for the restoration of Europe's seas to environmental health',[37] through the management of competing uses of the seas. Since European institutions were lacking decision-making competence in this area, the European Commission decided to codify common principles and guidelines through soft law documents in order to reinforce Member States' commitment to their implementation.[38]

In this context, and within the timeline set by the Action Plan accompanying the Blue Paper on Integrated Maritime Policy,[39] the European Commission published a Roadmap for MSP in 2008 defining MSP as 'a tool for improved decision-making' that would function as 'a framework for arbitrating between competing human activities and managing their impact on the marine environment' with an 'objective … to balance sectoral interests and achieve sustainable use of marine resources in line with the EU Sustainable Development Strategy'.[40] While in the 2008 Roadmap, environmental primacy is still preserved, two conceptual elements prevail: first of all, MSP is presented as purely managerial in character since it is perceived as a governance tool, and not a process as defined by UNESCO, to be used in order to support existing sectoral policies; secondly, the MSP concept transcends its environmental functional character being associated to the 'competitiveness of the EU's maritime economy', perceived as a 'framework providing legal certainty and predictability' and promoting 'investment in such sectors, which include offshore energy development, shipping and maritime transport, ports development, oil and gas exploitation and aquaculture, boosting Europe's capacity to attract foreign investment'.[41]

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36 Commission of the European Communities, 'An Integrated Maritime Policy for the European Union' (Communication) COM (2007) 575. See also Sylvain Gambert, 'The Integrated Maritime Policy of the European Union' in Bilian Cicin-Sain and others (eds), *Routledge Handbook of National and Regional Maritime Policies* (Routledge 2015) 495; Yves Auffret, 'Les perspectives de l'Union Européenne en matière d'affaires maritimes et en particulier les développements de la politique maritime de l'Union Européenne' in Institut du Droit Economique de la Mer (eds), *Droit international de la mer et droit de l'union Europeenne. Cohabitation, confrontation, coopération?* (Pedone 2014) 25; and Timo Koivurova, 'A Note on the European Union's Integrated Maritime Policy' (2009) 40 Ocean Dev & Int'l L 171.

37 Commission, 'An Integrated Maritime Policy for the European Union' (n 36) 6.

38 According to the 2007 Communication, '[d]ecision-making competence in this area lies with the Member States. What is needed at European level is a commitment to common principles and guidelines to facilitate the process in a flexible manner and to ensure that regional marine ecosystems that transcend national maritime boundaries are respected', ibid.

39 In line with the Action Plan accompanying the 2007 Communication, the Commission '[b]uilding on existing EU initiatives with a strong maritime spatial planning dimension, including the ICZM Recommendation and the proposed Marine Strategy Directive, which introduces elements of maritime spatial planning, … will propose a road map in 2008 to facilitate and encourage the further development of maritime spatial planning in the Member States. In 2008, it will examine the needs and different options, including for zoning, to making compatible different maritime activities, including the maintenance and strengthening of biodiversity'. See Commission of the European Communities, 'Accompanying document to the Communication - An Integrated Maritime Policy for the European Union' (Commission staff working document) SEC (2007) 1278 final, 9.

40 Commission, 'A Roadmap for Maritime Spatial Planning' (n 21) 2.

41 ibid 3.

In this context, the 2008 Roadmap identifies ten key principles[42] for MSP implementation in the EU. These principles could be classified according to their function in the MSP process, as follows:

(a) management principles: detailed objective-setting, including arbitration mechanisms in cases of conflicts of sectoral interests; functional approach to management plans according to the area and type of activity; integration of monitoring and evaluation procedures;
(b) governance principles: stakeholder participation (including cross-border consultation) and transparency; adoption of legislative and administrative measures at the national level, including the creation of an administrative body for MSP coordination; consistency with terrestrial spatial planning; cross-border cooperation;
(c) horizontal principles: organisation of data and scientific knowledge activities in order to promote effective MSP.

However, the 2008 Roadmap did not have the homogenising effect anticipated by the Commission; according to its 2010 Communication, some Member States have followed diverse approaches, while in other cases no significant progress has been achieved.[43] Taking into account the fragmented legal and institutional landscape in the EU Member States, as well as the intensification and diversification of human activities at sea, the European Commission decided to launch a legislative initiative in this domain.

The proposal on a Directive establishing a framework for MSP and ICZM was published in March 2013.[44] The proposed legislative act became a highly contentious issue among EU institutions and Member States. The main criticism was related to the legal basis of the MSP legislative venture, since the Lisbon Treaty does not make any references to spatial planning,[45] and its contested conformity

42 ibid 10-11; see also Schaefer and Barale, 'Maritime spatial planning: opportunities & challenges in the framework of the EU integrated maritime policy' (n 4).

43 European Commission, 'Maritime Spatial Planning in the EU – Achievements and Future Development' (Communication) COM (2010) 771 final, 6.

44 European Commission, 'Proposal for a Directive of the European Parliament and of the Council establishing a framework for maritime spatial planning and integrated coastal zone management' COM (2013) 133 final. On the analysis of the Commission's proposal, see Antonia Zervaki, 'Regional Approaches to Maritime Spatial Planning: the case of the Mediterranean Sea' in Eva Vázquez Gómez and Claudia Cinelli (eds), Regional Strategies to Maritime Security. A Comparative Perspective (Tirant lo Blanch 2014) 133, 147-53.

45 The Lisbon Treaty caters for spatial development and territorial cohesion (article 174 TFEU) and not for land or maritime space uses in the sense of terrestrial or maritime spatial planning. See A Faludi, 'Beyond Lisbon: Soft European Spatial Planning' (2010) 46 Plan Rev 14.

to the subsidiarity[46] and proportionality[47] principles. Other concerns were related to the reservations expressed by Member States due to the differentiated MSP national policies and the subsequent cost of their harmonisation with the prospect of a common EU MSP legal framework. Leaving aside the administrative and economic burden of applying common standards to MSP development, the Directive proposal raised significant concerns due to the promotion of cross-border cooperation: the idea of pursuing coordination with other Member States, as well as bordering third states, was not appreciated by most national authorities, due to the differentiated legal and administrative frameworks applying in different countries and the existence of pending maritime disputes that would undermine the coordination of joint MSP ventures.

3.2 Objectives and content of MSP in the EU

The institutional and political turmoil that followed the Commission's launching of the legislative initiative finally led to a political compromise that has limited the latter's scope of application; the 2014 Directive[48] is limited to spatial planning of the marine environment excluding ICZM,[49] since Member States did not reach an agreement on adopting legislative measures in this domain,[50] due to the impact such an act would have had on the decision-making processes of national planning authorities.[51]

The Directive defines MSP as a 'process by which the relevant member state's authorities analyze

46 Eight national parliaments have submitted negative reasoned opinions, questioning the conformity of the proposed act with the subsidiarity principle in line with the new procedure introduced by the Treaty of Lisbon (Art 12 TEU and Protocol 1 TEU) <www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2013/0074%28COD%29&l=en#tab-0> accessed 12 June 2015. Conformity with subsidiarity principle was also raised in the European Parliament, among European Political Parties as well as in the form of Parliamentary Question to the Commissioner. See <www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc53dbcb6ed013e7f0b51a27709.do.> accessed 12 June 2015 and Question for written answer to the Commission, Rule 117, Patricia van der Kammen (NI) [Parliamentary Question] E-010797-13, 23 September 2013. Commissioner Damanaki's reply argued that the draft Directive is in line with the subsidiarity principle since it consists of provisions of procedural nature and does not prescribe Member States' options in terms of the content of the MSP process. See Answer given by Ms Damanaki on behalf of the Commission [Parliamentary Question] E-01078, 25 November 2013.

47 In its opinion, the Committee of the Regions openly questioned (a) the EU's competence in this domain, making reference to a breach of the proportionality principle, and (b) the legislative procedure to be followed, whether the proposed act should be adopted according to the ordinary legislative procedure or according to Art 352 TFEU requiring unanimity on behalf of the Council. See Committee of the Regions, Proposed Directive for Maritime Spatial Planning and Integrated Coastal Zone Management (Opinion) NAT-V-030, 103rd Plenary Session, 7-9 October 2013.

48 Council Directive (EU) 2014/89 establishing a framework for maritime spatial planning [2014] OJ L 257/135.

49 The Directive mentions that it will not 'interfere with member states' competence for town and country planning' and that it does not apply in cases member states 'apply terrestrial planning to coastal waters or parts thereof'. Preambular clause (17).

50 EU decision-making concerning town and country planning and land use (with the exception of waste management) is exempted from the ordinary legislative procedure and requires unanimity (unless the Council decides unanimously to follow the ordinary legislative procedure). See Art 192 TFEU.

51 It should be mentioned that, with the exception of the 2002 Recommendation on ICZM and the ratification of the Protocol on Integrated Coastal Zone Management in the Mediterranean in 2010, there is no secondary legislation in this domain. See (n 50); Council Recommendation concerning the implementation of Integrated Coastal Zone Management in Europe [2002] OJ L 148/24 and Protocol on Integrated Coastal Zone Management [2010] OJ L 34/19.

and organize human activities in marine areas to achieve ecological, economic and social objectives'.[52] It is evident that this definition is founded on three premises: first of all, MSP is considered as a process; secondly, Member States remain the protagonists in maritime spatial planning design and implementation; and thirdly, the MSP concept is founded on the pursuit of environmental, economic and societal welfare. However, these premises seem to be partially deconstructed by other provisions of the Directive, as indicated in the analysis provided below.

3.2.1 The MSP process and Member States' room for manoeuvre

The purpose of defining MSP as a process in the Directive's text was twofold. First of all, it was related to the institutional and legal concerns raised during the legislative procedure concerning the lack of EU competence in establishing measures in this domain following the ordinary legislative procedure as well as the act's contested conformity with subsidiarity and proportionality principles; the argument of the European Commission that the proposed act would not create a new policy, but a process to support existing policies finally prevailed. In this context, the Directive's legal basis was finally founded on the provisions of the Treaty of Lisbon concerning existing policies,[53] falling under the category of shared[54] or exclusive[55] competences of the organisation: article 43(2) TFEU concerning the pursuit of the objectives of the common fisheries policy, article 100(2) TFEU on sea transport, article 192(1) TFEU on the organisation's environmental policy and article 194(2) TFEU on the Union's energy policy.

Secondly, reference to a 'process' connotes that Member States' obligations are confined to procedural issues. In this context, the Directive further stipulates that maritime spatial plans will build on existing national policies and governance structures and that it 'shall not interfere with member states' competence to design and determine [their] format and content';[56] so far, states' decision-making autonomy is confirmed, to be conditioned, however, by the obligation set for policy and institutional conformity with certain requirements set out in the Directive[57] concerning:

(a) the general framework for the realisation of MSP in the EU marine waters: plans should be founded on an 'enhanced' ecosystem-based approach, taking into account not only 'environmental, economic and social aspects', but 'safety aspects' as well[58] (the latter being a new addition in the 2014

52 Art 3(2).

53 A practice also used in other acts adopted within the framework of the integrated maritime policy, such as the Regulation establishing a programme for the support of the integrated maritime policy adopted in 2011. See Regulation (EU) 1255/2011 establishing a programme to support the further development of an Integrated Maritime Policy [2011] OJ L 321/1.

54 According to Art 4 TFEU.

55 The conservation of marine biological resources under the common fisheries policy constitutes the only exclusive competence of the organization in the domain of maritime spatial planning according to Art 3 TFEU.

56 Art 4(3).

57 Art 4(6).

58 Art 6(b).

text also taking into consideration the proliferation of legislation on the safety of offshore economic activities);[59]

(b) land-sea interaction:[60] the Directive, although excluding ICZM from its scope of application, aims to promote coherence between MSP and existing states' practice in integrated coastal management or equivalent formal or informal practice;

(c) MSP transboundary cooperation: Member States bordering marine waters are obliged to cooperate[61] while, in the case of Member States bordering third states, there is a more tempered reference to cooperation since Member States 'shall endeavor, where possible, to cooperate with third countries'.[62]

The Directive also provides for the involvement of the public in decision-making processes. Although their participation in the final decision is not foreseen, interested parties should be informed 'at an early stage',[63] while consultation processes should involve relevant stakeholders as well as authorities and the public concerned.[64] Last but not least, access to information on the plans once finalised is ensured.[65] According to the Directive's provisions, public participation in MSP information and decision-making seems to remain modest, leaving to the discretion of states the option of a more enhanced public involvement.

However, the Directive is anticipated to trigger lobbying and deliberation processes at the national and local levels, as well as among the different levels and branches of the national administrations, moderating competent authorities' power to fully determine the outcome of the process. Additionally, reference is made to the fact that relevant provisions of the EU legislation shall be applied; there is a significant amount of EU legislation concerning stakeholder participation and information related to

59 Reference is made to the Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil (adopted 14 October 1994, entered into force 24 March 2011) UN Reg No I 48454 (Offshore Protocol) <www.unepmap.org/index.php?module=content2&catid=001001001> accessed 10 June 2015, Annex III (2007) to the Convention on the Prevention and Elimination of Pollution from Offshore Installations (adopted 22 September 1992, entered into force 25 March 1998) 2354 UNTS 67 (OSPAR Convention) <www.ospar.org/html_documents/ospar/html/ospar_convention_e_updated_text_2007.pdf> accessed 10 June 2015, and the Council Directive 2013/30 (EU) on safety of offshore oil and gas operations [2013] OJ L 178/66. See Maria Gavouneli, 'Energy installations in the Marine Environment' in Jill Barrett, Richard Barnes (eds), *UNCLOS – A Living Instrument* (BIICL & Hart 2015).

60 Arts 7 and 6(a).

61 The wording of Art 11 leaves little room for doubt: 'as part of the planning and management process, member states bordering marine waters shall cooperate with the aim of ensuring that maritime spatial plans are coherent and coordinated across the marine region concerned'.

62 Art 12.

63 Art 9(1).

64 Art 9(1).

65 Art 9(2).

MSP, mainly derived from the environmental policy[66] or the spatial planning information domains.[67] What is interesting though is that environmental legislation to be applied in the domain of MSP consultation also provides for institutionalised consultation on issues of a transboundary character.[68] Thus, public participation processes in certain MSP dimensions will transcend national borders, a prospect that will enhance scrutiny of national decisions (or even intentions) at the regional level.

3.2.2 MSP environmental, economic and social dimensions: a delicate (im)balance

The Directive constantly refers to the ecosystem-based approach,[69] which combines natural and biological features and processes with socio-economic parameters, as an intrinsic component of MSP. However, the prioritisation of economic activities is evident in the wording of the Directive's subject matter: establishing a framework for MSP under the overall objective of promoting 'sustainable growth of maritime economies, the sustainable development of marine areas and the sustainable use of marine resources'.[70] Reference to the sectoral objectives to be pursued by Member States through MSP confirms the emphasis on economic activities: the development of energy sectors at sea, maritime transport, fisheries and aquaculture sectors, tourism and raw materials extraction; these activities constitute the core policy goals to be promoted in MSP.[71] The Directive aims at ensuring the conditions of 'certainty and predictability' for economic activities at sea. The latter will be ensured by the adoption of a legal framework on MSP.[72] Moving one step further, the Directive aims at the reduction of administrative and coordination costs (e.g. the creation of a one-stop shop for

66 Comprising the implementation of the relevant provisions of Aarhus Convention, through Council Regulation (EC) 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L 264/13 and Council Directive (EC) 2003/35 providing for public participation in respect of the drawing up of certain plans and programs relating to the environment [2003] OJ L 156/17; also relevant provisions from the Council Directive (EU) 2014/52 amending Council Directive (EU) 2011/92 on the assessment of the effects of certain public and private projects on the environment (Environmental Impact Assessment) [2014] OJ L 124/1 and the Council Directive (EC) 2001/42 on the assessment of the effects of certain plans and programmes on the environment (Strategic Environmental Assessment) [2001] OJ L 197/30.

67 Council Directive (EC) 2007/2 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE) [2007] OJ L 108/1.

68 The Strategic Environmental Assessment Directive provides for transboundary consultations among Member States (Art 7) in case of potential transboundary effects of a plan or programme prepared to be applied on the territory of one state will have an impact on the environment of another Member State. Accordingly, Art 7(4) of the Environmental Impact Assessment Directive stipulates that '[t]he Member States concerned shall enter into consultations regarding, inter alia, the potential transboundary effects of the project and the measures envisaged to reduce or eliminate such effects and shall agree on a reasonable time-frame for the duration of the consultation period. Such consultations may be conducted through an appropriate joint body'.

69 Art 5(1), preambular clause (14).

70 Art 1(1).

71 Art 5(2)

72 See Policy Research Corporation, *Study on the Economic Effects of Maritime Spatial Planning, Report carried out on behalf of the European Corporation* (European Commission, Brussels 2010).

investment,[73] the avoidance of duplicate assessments,[74] etc.). Hence, it is evident that MSP legislation mainly constitutes an instrument for the realisation of the Blue Economy agenda of the European Commission,[75] mostly through the creation of a stable environment in order to attract investors for offshore activities.[76]

3.2.3 MSP implementation in practice

The main challenges for Member States in implementing the Directive range from purely procedural issues to the association of the new act with the European *acquis*, regional institutions and MSP processes within the broader international geopolitical context.

According to the timeframe set by the Directive, Member States should designate the competent authority or authorities for MSP implementation by September 2016, transpose the Directive into their national legal order by the same time and furnish maritime spatial plans by March 2021.[77] Almost seven years may seem like a reasonable period for the preparation of national authorities to implement the Directive, yet the success of this process depends on a number of parameters. First of all, the lack of uniformity in Member States' MSP legislation and practice: some states already have relevant legislation and have proceeded to MSP implementation as mentioned above, while other states are still in the process of designating the competent authorities.[78] Taking into account the fact that the construction of the required legal, institutional and political MSP apparatus is a laborious multilevel and complex process, seven years may not suffice in certain cases.[79] Secondly, the Directive provides an orientation concerning Member States' options in relation to the activities to be incorporated in MSP at the national level; however, simply transferring the text of the Directive into national law may not meet the needs of the MSP process, especially in countries with no experience in MSP. Each state will have to adjust and specify the framework provided by the Directive according to its strategy and operational objectives concerning the marine space under its jurisdiction. This requires a comprehensive approach that entangles different levels of government and various authorities sharing competences. In this case, apart from the administrative burden and the time-consuming consensual political processes, there is always the risk of undermining the MSP process due to existing or new

73 ibid 16.

74 In the case of wind farm installation projects in Germany, both cost and time required for their realization is confined since the authorities have conducted a strategic environmental assessment for MSP providing for areas dedicated for that purpose. Gregor Erbach, 'Spatial Planning for the Blue Economy', Library Briefing, European Parliament Library (2013) 6.

75 European Commission, 'Blue Growth - opportunities for marine and maritime sustainable growth' (Communication) COM (2012) 494 final.

76 Explicitly mentioned in preambular clause (5).

77 Art 15.

78 See *Declaration for the Development of MSP in Greece* (11th Panhellenic Symposium of Oceanography and Fisheries, Lesvos, May 2015) <www.symposia.gr/wp-content/uploads/2015/06/MSP_declaration_web.pdf> accessed 15 June 2015.

79 It took five years for the adoption of the UK Marine and Coastal Access Act of 2009, which provides for MSP as well as for the competent authority, the Marine Management Organization, while in the case of Canada's, the elaboration of the Eastern Scotian Shelf Integrated Management Plan was initiated in 1998 and was concluded in 2008. See (n 6) and (n 8).

institutional and political cleavages.

Another challenge for MSP implementation is related to the European *acquis*. In terms of the content of the MSP process at the national level, the Directive provides a non-exhaustive list of uses, activities and interests to be considered and integrated into Member States' spatial plans at sea: aquaculture and fishing areas; installations and infrastructures for the exploration, exploitation and extraction of oil, gas and other energy resources, of minerals and aggregates, and for the production of energy from renewable sources; maritime transport routes and traffic flows; military training areas; nature and species conservation sites and protected areas; raw material extraction areas; scientific research; submarine cable and pipeline routes; tourism and underwater cultural heritage.[80] It should be mentioned that most of the policies included in this indicative list are regulated by EU secondary legislation. Additionally, the majority of these acts belong to the 'new generation' of EU law which is characterised by quantified objectives and elaborate timeframes,[81] the latter becoming automatically part of Member States' MSP processes. This will certainly render MSP more technocratic in character and will certainly prescribe Member States' options in relation to the uses of marine space.

Last but not least, cross-border cooperation also raises many issues in terms of its applicability in different European maritime regions. Undoubtedly, the multiplicity of established legal, institutional and administrative mechanisms, especially when the unifying effect of EU legislation is missing in relation to third countries, renders cooperation ventures more difficult. Secondly, the fact that there are still many pending disputes and claims being raised among Member States[82] and between Member States and third states[83] is a parameter that should not be neglected, since the MSP process needs clearly defined maritime jurisdiction of the coastal states. This problem is accentuated by the fact that most of these areas are under increasing pressure due to the intensification of human activities in relation to maritime transport, fisheries and the exploitation of natural resources.[84] Thirdly, the lack of jurisdictional uniformity over maritime space in relation to the nature and the extent of

80 Art 8.

81 Eg, the objective of attaining a 20 per cent share of renewable energy by 2020 set by the Directive for the promotion of renewable energy, see Art 3 of the Council Directive (EC) 2009/29 on the promotion of the use of energy from renewable sources [2009] OJ L 140/63; the objective of good marine environmental status foreseen by the Framework Marine Strategy Directive, see Art 1(1) of the Council Directive (EC) 2008/56 establishing a framework of Community action in the field of marine environmental policy (Marine Strategy Framework Directive) OJ L164/19; the Fisheries' Regulation targets of the progressive restoration and preservation of fishing stocks by 2015 where possible and by 2020 the latest for all stocks, Art 2(2) of the Council Regulation (EU) 1380/2013 on the Common Fisheries Policy [2013] OJ L 354/22.

82 Such as the UK-Spanish dispute over Gibraltar or the pending maritime delimitation between Croatia and Slovenia (the two countries signed an arbitration agreement in 2009). See Gino Naldi, 'The Status of the Disputed Waters Surrounding Gibraltar' (2013) 28 IJMCL 701; Giuseppe Cataldi, 'Prospects for the Judicial Settlement of the Dispute between Croatia and Slovenia over Piran Bay' in N Boschiero and others (eds), *International Courts and the Development of International Law* (Asser Press 2013).

83 Such as the dispute between Greece and Turkey in the Aegean, but also the friction caused in the Eastern Mediterranean region by Turkey's reaction to the declaration of the EEZ of the Republic of Cyprus and the delimitation agreements with Egypt and Israel. For an account of the recent developments, see Haritini Dipla, 'Ressources énergétiques et limites maritimes en mediterannée orientale' (2011) XVI ADM 63.

84 ibid; Jesus V Baeza, 'The Law of the Sea and Environmental Problems in the Strait of Gibraltar' (2011) 14 JIWLP 51.

Member States' maritime zones should be considered as a decisive factor for effective cross-border cooperation.[85] Fourthly, the framework of interstate cooperation is not clear. The Directive does not create new coordinating bodies or structures for that purpose; it instead delegates the coordination of regional cooperation mainly to the existing regional seas conventions.[86] However, the role of these regional institutions is not explicitly defined. This may not be a problem in the Northern marine areas where regional cooperation in MSP is more advanced, but it may prove counterproductive in the Mediterranean or the Black Sea regions, where institutional coherence among coastal states is comparatively low.

3.3 The 2014 Directive and the law of the sea

Pan-European adherence to the UN Convention on the Law of the Sea (UNCLOS) by Member States, as well as at the EU level, has always been considered as an asset for the development and implementation of national, not to mention cross-border, spatial planning activities in the European Union.[87] However, the relation of MSP to international regulation of maritime affairs was one of the issues that raised much attention during the legislative procedure. In an attempt to reassure Member States that the introduction of secondary rules on spatial planning at sea would not alter their rights and obligations vis-á-vis maritime space, reference to the UNCLOS was reinforced in the 2014 Directive as compared to the previous EU documents related to MSP; according to the latter, the relationship of the UNCLOS to effective MSP implementation unfolds in three levels.

85 Although the existence of EEZ is considered by the Commission as a significant parameter for effective implementation of MSP, not all European coastal states have declared such a zone. Additionally, the existence of partial or derivative EEZs, such as Spain's Fishing Protection Zone or Slovenia's Ecological Protection Zone, makes the situation more complex. As far as the different extent of maritime zones, Greece and Turkey constitute an illustrative example since they have a 6 n.m. territorial sea in the Aegean.

86 Arts 11 and 12.

87 According to the Community's Declaration submitted upon accession to UNCLOS, a distinction is made between the organisation's exclusive competences on the one hand, and shared competences with Member States on the other. In terms of MSP implementation, the following EU competences should be mainly taken into account: (a) the conservation and management of sea fishing resources, which fall into the first category; (b) research and technological development and development cooperation with regard to fisheries which constitutes a shared competence; (c) with regard to maritime transport, in relation to 'safety of shipping and the prevention of the marine pollution contained inter alia in Parts II, III, V, VII and XII of the Convention, the Community has exclusive competence only to the extent that such provisions of the Convention or legal instruments adopted in implementation thereof affect common rules established by the Community. When Community rules exist but are not affected, in particular in cases of Community provisions establishing minimum standards, member states have a competence, without prejudice to the competence of the Community to act in this field. Otherwise, competence rests with the member states'. The Declaration also mentions the case of the organisation's complementary competences in relation to the promotion of cooperation on research and technological development with non-member countries and international organisations, with regard to the provisions of UNCLOS Parts XIII and XIV. Last but not least, the Declaration stipulates the evolving character of the organisation's competences, which is a significant parameter in the relation between EU and UNCLOS *vis-à-vis* the former's rights and obligations in the marine space in relation to MSP, both in terms of its internal as well as its external policies. See Declaration concerning the competence of the European Community with regard to matters governed by the United Nations Convention on the Law of the Sea of 10 December 1982 and the Agreement of 28 July 1994 relating to the implementation of Part XI of the Convention, <www.un.org/depts/los/convention_agreements/convention_declarations.htm> accessed 3 June 2015.

First of all, as far as the concept of integrated management, a constituent part of MSP, is concerned, the Directive is in line with the UNCLOS' comprehensive approach to the 'problems of the ocean space', which 'are closely interrelated and need to be considered as a whole'.[88]

Secondly, as far as Member States' MSP jurisdiction[89] is concerned, the Directive recognises the UNCLOS' role on the spatial allocation of rights and duties of states at sea, since it stipulates that '[p]lanning of ocean space is the logical advancement and structuring of the use of rights granted under UNCLOS and a practical tool in assisting Member States to comply with their obligations'.[90] Thus, Member States will have to furnish spatial plans to be applied in the 'marine waters'[91] defined as 'waters, the seabed and subsoil on the seaward side of the baseline from which the extent of territorial waters is measured extending to the outmost reach of the area where a Member State has and/or exercises jurisdictional rights, in accordance with the UNCLOS',[92] while it is explicitly mentioned that EU MSP legislation 'shall not affect the sovereign rights and jurisdiction of Member States over marine waters which derive from relevant international law, particularly UNCLOS'.[93] In this context, reference is also made to the fact that the application of this Directive 'shall not influence the delineation and delimitation of maritime boundaries by the member states in accordance with the relevant provisions of UNCLOS'.[94]

Thirdly, the MSP philosophy of 'enhanced' cross-border cooperation[95] is in line with the UNCLOS' provisions on bilateral, regional and international cooperation;[96] this is evident in the conditions stated in the Directive for the cooperation among Member States and between Member States and third states. It should also be mentioned that in the case of cooperation with third states, reference to international law in general (and not strictly to the UNCLOS) implies both conventional and customary law; this stipulation is intentional, taking into account the fragmented institutional landscape due to the non-uniform participation of coastal states in the various international instruments, including the UNCLOS, in the different EU maritime regions.

4. Concluding remarks

88 Preambular clause (3).

89 See (n 18).

90 Prambular clause (7).

91 Art 2(1).

92 With the exception of waters adjacent to the countries and territories mentioned in Annex II to the Treaty and the French Overseas Departments and Collectivities. Art 3(4) of the MSP Directive makes direct reference to the definition of 'marine waters' provided in Art 3(1a) of the Marine Strategy Directive.

93 Art 2(4).

94 ibid.

95 Art 1(2).

96 Art 118 on the cooperation of states in the conservation and management of living resources, Art 123 on the cooperation of states bordering enclosed or semi-enclosed seas, Art 129 on the cooperation in the construction and improvement of means of transport, Art 197 on cooperation on a global and regional level constitute illustrative examples.

Making MSP a legal obligation for Member States will definitely enhance uniformity in both the perception and the implementation of sea management in the different European sea basins. Member States will have to furnish spatial plans in a specified timeframe and in a concise form, taking into account the minimum requirements for spatial planning set out by the Directive discussed above. From an institutional standpoint, MSP will become an issue of scrutiny for the EU bureaucratic (on behalf of the Commission), parliamentary (on behalf of the Parliament)[97] and judicial (on behalf of the EU Court) branches.

Another interesting element is the institutionalisation of public involvement in information and decision-making procedures. Reference to the latter in the Directive's corpus is quite general, allowing states to choose the appropriate channels of communication; it also leaves room for accommodating different information and consultation standards and procedures foreseen in EU legislation. In the second case, stakeholders' involvement may transcend conventional information and consultation processes at the national level and involve cross-border processes, enhancing regional scrutiny, on an ad hoc basis, on MSP development and implementation.

As far as the content of the plans is concerned, the Directive, although prioritising economic activities, introduces a significant novelty, since it builds upon an enlarged perception of the ecosystem-based approach, by linking the traditional environmental-social-economic triptych to safety. However, reference to safety covers only accidental risks, leaving aside security issues that are related to acts committed with criminal intent (terrorism and other crimes at sea); thus, security issues' lacuna in the Directive needs to be filled, taking into account the growing instability and extremism, especially in areas in the broader European neighbourhood.

Additionally, the future prospects of MSP, as well as the role of the EU in the broader context of international initiatives in this domain, should not be undermined. First of all, during the last several decades, we have witnessed a systematic effort of states to expand their jurisdiction in the marine space, with the EEZ declarations in the Mediterranean Sea and the increase of claims submitted to the Commission on the Limits of the Continental Shelf constituting illustrative examples. Since states' competence in relation to MSP depends on the nature and the extent of maritime zones falling under their jurisdiction, MSP implementation is anticipated to continue to expand at least spatially in the years to come.

Secondly, the 2014 Directive constitutes the first international, albeit regional, legal framework for MSP. However, it is expected to have an impact on third states' legislation for the conduct of sea management plans through the accession or association processes as well as the prospects within the framework of the European Neighborhood Policy architecture. Moreover, the international dimension of EU maritime policy and the role of the organisation in shaping future initiatives related to ocean governance tools, such as MSP, should also be considered. The European Commission has recently launched a consultation in order to formulate its future policy on international ocean gov-

97 Art 14(2).

ernance.[98] In terms of MSP-related issues, the lack of a specialised international legal framework, as well as the expansion of such plans in the high seas[99] in order to ensure more effective environmental conservation and sustainability, constitute some of the issues to be considered by the stakeholders involved.

The incorporation of MSP in the EU corpus juris has proved to be a difficult task. Member States will now have to move to the implementation phase. Effective implementation will be determined by several parameters, such as the varying levels of state MSP performance and experience, the different institutional and administrative capacities and perceptions concerning the uses of the marine environment, pending or new disputes that may arise and the growing unrest in the surrounding geopolitical milieu. Regardless of the outcome of the process, the Directive's success will be related to its contribution to the shift of focus from the construction of comprehensive policy and legal frameworks at the national, regional and international levels to the implementation of integrated operational plans. The time to move from standard setting to the operational deployment of MSP in the EU seems to be ripe…

98 European Commission, 'Consultation on International Ocean Governance' <http://ec.europa.eu/dgs/maritimeaffairs_fisheries/consultations/ocean-governance/index_en.htm> accessed 22 June 2015.

99 Michelle Portman, 'Marine Spatial Planning: Achieving and Evaluating Integration' (2011) 68 ICES J Mar Sci 2191; Nicole Schäfer, 'Maritime spatial planning: about the sustainable management of the use of our seas and oceans' in Timo Koivurova and others (eds), *Understanding and strengthening European Union-Canada relations in law of the sea and ocean governance* (Lapland Printing Centre 2009) 89, 101-02; Jeff Ardron and others, 'Marine spatial planning in the high seas' (2008) 32 Mar Policy 832.