Journal of Territorial and Maritime Studies is co-edited by Yonsei Institute for North Korean Studies and the Northeast Asian History Foundation. It is published twice a year—Winter/Spring and Summer/Fall—by McFarland & Company, Inc., Publishers, Box 611, Jefferson, North Carolina 28640 U.S.A., 336-246-4460. ISSN 2288-6834. Rhonda Herman, president. Robert Franklin, founder and editor-in-chief. Steve Wilson, vice president and editorial director. Karl-Heinz Roseman, vice president, sales and marketing. Lisa Camp, executive editor. Kathi Price, finance officer. Kim Hadley, director of operations.

Annual subscription rates are $125 for institutions and $50 for individuals. Subscribers outside the United States add $20 for additional postage. Subscription inquiries and back issue requests to McFarland by mail at Box 611, Jefferson NC 28640, by phone at 800-253-2187, by fax at 336-246-5018, or online at www.journalofterritorialandmaritimestudies.net.

Editorial Correspondence should be addressed to Jongyun Bae, Department of Political Science, Yonsei University, Seoul, South Korea 46056 or emailed to jtms@yonsei.ac.kr. For additional information, visit www.journalofterritorialandmaritimeaffairs.net.

Indexed and abstracted in SCOPUS, Proquest, JSTOR Security Studies database, Current Geographical Publications, Searchworks, the Digital Library of Korean Studies, SUNCAT and Researchgate.

Published by McFarland & Company, Inc., Publishers, December 31, 2021

Journal of Territorial and Maritime Studies

McFarland
ISSN 2288-6834 (Print)

연세대학교 통일연구원
Yonsei Institute for North Korean Studies

동북아역사재단
NORTHEAST ASIAN HISTORY FOUNDATION

Vol. 9, No. 1 Winter/Spring 2022

Journal of Territorial and Maritime Studies

Volume 9, No. 1
WINTER/SPRING 2022

Contents

Editor's Comments

Dear *JTMS* Readers,

At this point in the COVID19 pandemic and its waves upon waves it might seem imprudent to be optimistic. Vaccinations have been rolled out with impressive efficiency in many of the wealthy economies of the world while the developing world still faces a stark reality of the pandemic without the necessary doses of vaccines to bridge the gap. Vaccine nationalism and vaccine diplomacy have figured into the international relations of the pandemic world. Therefore, any optimism needs to be tempered with a degree of mindfulness that the issues that have always plagued state to state relations persist. The money spent to make the vaccines represents both the potential of collaboration to address a serious international issue while highlighting the way inequalities between have and have not states pose a serious obstacle to forming consensus and achieving parity. These challenges will survive COVID19 and complicate the agenda for climate change policy, international legal enforcement, territorial issues, and security concerns. Needless to say, we all need hope, but we also need pragmatism and even-headed analysis of these issues. As always, the team at *JTMS* has done its best to curate the best articles available to us to provide some analysis of these issues so that we may look upon the future with guarded and informed optimism.

In this issue's first article, Emilia Justyna Powell and Sara McLaughlin Mitchell analyze how countries' domestic legal traditions influence their selection of dispute settlement procedures under Article 287 (ITLOS, ICJ, Annex VII/VIII arbitration) of the 1982 UNCLOS treaty. The theory suggests that common law countries are supportive of UNCLOS generally and amenable to multiple forums of Article 287 dispute settlement. Civil law countries prefer the ICJ as a dispute settlement forum, while Islamic law states prefer arbitration approaches under Article 287. Using descriptive statistics and logit models to analyze decisions by all 194 countries to (1) sign (92%) or ratify (84.5%) UNCLOS and (2) make an optional Article 287 declaration (29% of States Parties), the authors find that states' domestic legal traditions have a strong influence on states' preferred dispute resolution forum(s) in the UNCLOS regime. Common law countries are supportive of UNCLOS generally and many of the dispute resolution forums available in Article 287. Civil law countries choose the ICJ most often under Article 287, while Islamic law states prefer Annex VII/VIII arbitration.

In the second article of the issue, José Manuel Martín Osante specifies what maritime transport is covered by Spanish regional regulations, in order to specify the scope of Spanish Maritime Navigation Act 14/2014 of July 24. Likewise, the relationship between the Maritime Navigation Law and international Conventions ratified and in force in Spain, regulating issues related to maritime navigation, is studied in order to understand their respective scopes of application. Osante finds that Spanish autonomous communities cannot regulate

legal-private aspects of maritime transport carried out for commercial purposes, but they will be able to regulate maritime transport that is within autonomous competence (between ports or points of the same autonomous community), carried out for non-commercial purposes (recreational, sports…). The option of the Spanish Maritime Navigation Act 14/2014 regulating some maritime institutions (internal cases) by referrals to the international Conventions (not applicable to internal cases), determines that the regulation of internal cases, is the planned in the Convention.

The third offering of the issue, by Joshua Tallis, argues that the latest U.S. tri-service maritime strategy (*Advantage at Sea*) requires the sea services (Navy, Marine Corps, Coast Guard) to assess the strategic role of seapower in countering violent non-state actors, balanced against a larger agenda of great power competition, offering a theoretical structure for assessing seapower's strategic effects against non-state actors. First, Tallis traces intellectual histories through U.S. strategic texts, developing a foundation for how, why, and when maritime strategies account for non-state actors. Second, he builds on Thomas Schelling's division of how forces are operationalized in order to trace the strategic effects of seapower vis-à-vis the concepts of deterrence, assurance, and compellence. Tallis finds, in most cases, seapower appears to play a non-strategic role in deterring, assuring, or compelling non-state threats—that is to say, naval power has operational use, but seapower is rarely strategically decisive. The nearest exception is in seapower's role assuring some allies and partners facing imminent threats from non-state groups. Meanwhile, seapower remains, in aggregate, important for preserving the international order, resulting in a paradox: even as the effects from day-to-day competition at sea build to the strategic benefit of sea services (in this case, those of the U.S.), the incremental actions of sea services are often non-strategic in nature and thus risks systemic underinvestment and undervaluing.

In our fourth article, Su Wai Mon argues that boundary disputes, whether terrestrial or maritime, involve the issue of State sovereignty or territorial integrity, the core interest of the nation. There is a range of consequences if the disputed parties are unable to reach an agreement to settle the claims such as denial of nations' access to disputed areas, depriving nations' interests over marine resources as well as creating tensions between them and limitations in performing law enforcement activities. The author argues that the existing unsettled maritime boundary disputes are a threat to sustainable maritime security in Malaysia. She finds that sustaining a nation's maritime security by means of effective law enforcement against various threats is essential. Unsettled maritime boundary disputes create grey areas in claiming jurisdiction and eventually lead to the ineffective maritime law enforcement. Realizing practical and existing challenges stemming from the unsettled boundary disputes is essential to stimulate motivation of the countries to beef up negotiation efforts aiming for the peaceful settlements with counter-claimants.

Last but not least, Edcel John A. Ibarra explores the roles of the Association of Southeast Asian Nations (ASEAN) in cooperation on conflict resolution in the South China Sea. Employing the issues approach to international relations, Ibarra introduces an original framework that breaks down the South China Sea disputes into their component issues and identifies the types of conflict resolution and modes of cooperation implied in each. He finds that ASEAN-led cooperation on conflict resolution in the South China Sea has concentrated on concluding a code of conduct with China as an attempt at conflict prevention, management, and transformation. Progress has been slow, but efforts can be complemented

by engaging in cooperation of other types (e.g., conflict settlement), in other modes (e.g., "minilateralism"), and on other issues (e.g., maritime rights, maritime power projection, and marine economic development).

I would like to thank our editorial board and staff for their dedication in spite of the continued challenges of the pandemic. I would also like to thank our authors and readers for their continued faith in *JTMS*. May you and yours enjoy good health and happiness in 2022.

Jongyun Bae
Editor

Forum Shopping for the Best Adjudicator: Dispute Settlement in the United Nations Convention on the Law of the Sea

Emilia Justyna Powell and *Sara McLaughlin Mitchell*

Structured Abstract

Article Type: Research Paper

Purpose—This study analyzes how countries' domestic legal traditions influence their selection of dispute settlement procedures under Article 287 (ITLOS, ICJ, Annex VII/VIII arbitration) of the 1982 UNCLOS treaty. The theory suggests that common law countries are supportive of UNCLOS generally and amenable to multiple forums of Article 287 dispute settlement. Civil law countries prefer the ICJ as a dispute settlement forum, while Islamic law states prefer arbitration approaches under Article 287.

Design, Methodology, Approach—The authors use descriptive statistics and logit models to analyze decisions by all 194 countries to (1) sign (92%) or ratify (84.5%) UNCLOS and (2) make an optional Article 287 declaration (29% of States Parties).

Findings—The results show that states' domestic legal traditions have a strong influence on states' preferred dispute resolution forum(s) in the UNCLOS regime. Common law countries are supportive of UNCLOS generally and many of the dispute resolution forums available in Article 287. Civil law countries choose the ICJ most often under Article 287, while Islamic law states prefer Annex VII/VIII arbitration.

Practical Implications—Domestic law provides clues about how countries will support international institutions and identifies which states are most amenable to out of court bargaining.

Keywords: dispute, ICJ, ITLOS, legal traditions, maritime, UNCLOS

email: epowell4@nd.edu; sara-mitchell@uiowa.edu

Journal of Territorial and Maritime Studies / Volume 9, Number 1 / Winter/Spring 2022 / pp. 7–33 /
ISSN 2288-6834 (Print) / DOI: 10.2307/JTMS.9.1.7 / © 2022

I. Introduction

Many international organizations, such as the United Nations Convention on the Law of the Sea (UNCLOS), call for the peaceful settlement of disputes in their charters. These provisions influence states' conflict management strategies, as states who belong to peace-promoting international organizations turn to third-party conflict management more frequently.[1] States have numerous peaceful dispute settlement procedures at their disposal for resolving competitive interstate issues, ranging from bilateral negotiations, to non-binding third party settlement such as good offices, conciliation, or mediation, to binding settlement through an arbitration panel or an international court.[2] Existing scholarship demonstrates that states' willingness to work through international courts or other conflict management forums depends on a variety of factors such as regime type, capabilities, issue salience, ties to potential mediators, past success rates, and state age.[3] Similarities between domestic legal traditions and the legal design of international courts also influence states' willingness to work through binding forums. Civil law countries are more likely to recognize the compulsory jurisdiction of the International Court of Justice (ICJ) than common law or Islamic law countries, which results in more effective conflict management in the shadow of the ICJ for civil law dyads in conflict.[4, 5]

We analyze states' forum selection for dispute settlement procedures in the 1982 United Nations Convention on the Law of the Sea. UNCLOS has taken on increasing importance in the past several decades as the number of new competitive claims to maritime zones has increased rapidly and militarization of maritime conflicts occurs frequently,[6] as recent clashes over the Spratly and Senkaku/Diaoyu Islands demonstrate.[7] In fact, the proportion of the law of the sea disputes in relation to disputes dealing with other issue areas has grown rapidly.[8] Reflective of these patterns, an unprecedentedly large part of UNCLOS deals with dispute settlement provisions.[9] Article 287 of UNCLOS stipulates that states have a procedural choice for peaceful settlement if a dispute dealing with interpretation or application of the Convention arises. State parties can choose one of four compulsory procedures *a priori*, and they can specify their rank order of these procedures. The four dispute settlement forums include the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice (ICJ), and two types of arbitration.[10] Third party conflict management options are utilized if states cannot come to agreement through other peaceful conflict management strategies, such as bilateral negotiations, with Annex VII arbitration serving as the default procedure for UNCLOS members. While most countries have joined UNCLOS, the use of Article 287 declarations is much less frequent, with only 29% of States Parties making them.[11]

The wide choice of settlement procedures within the UNCLOS framework is truly unprecedented in both general international law and more specifically within the law of the sea. Generally, international agreements either do not provide for the mandatory resolution of disputes or they include reference to only one peaceful resolution venue, such as treaties with compromissory clauses recognizing the jurisdiction of the ICJ.[12] In the context of the law of the sea specifically, the corresponding rules of the 1958 Geneva Conventions on the Law of the Sea constituted "merely an optional protocol."[13] UNCLOS dispute resolution provisions, referred to as a "cafeteria" approach to compulsory settlement, contrasts sharply with any other treaty within the substantive area of law of the sea.[14] Adede suggests

the UNCLOS system for peaceful settlement should be considered as "one of the pillars of the new world order in the ocean space itself."[15]

Considering the wide choice of settlement options offered by UNCLOS, what helps to explain why some states choose one venue over others or why some states make no declarations under Article 287—which in essence indicates a preference for arbitration? Why would some states explicitly commit to arbitration versus more formal in-court proceedings? Also, why are some states hesitant to resort to the court established by UNCLOS (ITLOS) in comparison with the ICJ, a pre-existing international court, while others identify ITLOS as their preferred forum for resolving maritime disputes? We argue that states engage in strategic forum shopping in order to choose a venue best suited to satisfy their foreign policy preferences.[16] Familiarity with legal processes of judicial forums increases predictability of judicial outcomes, thus states are more likely to select a binding forum that uses legal rules and principles that resemble their domestic legal traditions. The four potential venues offered by the UNCLOS regime differ considerably from one another and incorporate different procedures. We argue that legal procedure and structural design of ITLOS, the ICJ, and arbitration tribunals constitute important factors that states take into consideration while navigating through the UNCLOS dispute resolution regime.

We show that the dispute resolution procedures of the UNCLOS regime incorporate common law countries' desire for flexibility in conflict management. Common law countries prefer the multiplicity of options and the default procedure of arbitration, especially given their resistance to the use of the International Court of Justice as the primary adjudicator for resolving maritime conflicts.[17] This flexibility in the UNCLOS dispute settlement procedures results in a higher level of ratification or accession of UNCLOS by common law states relative to civil law, Islamic law, and mixed law states. In contrast, civil law ratifying states are most likely to select the ICJ court as their preferred conflict management forum. This follows from our theory of strategic forum shopping, as the similarities between legal rules of the ICJ and the civil law tradition enhance civil law states' comfort levels in working with the World Court. We also find that civil law countries are amenable to specifying the ITLOS court as an acceptable binding forum for the management of maritime disputes. Our theory and analyses show the important links between domestic law and international legal forums for dispute settlement.

II. Forum Shopping in the UNCLOS Regime

Nine years of negotiations that led to the 1982 United Nations Convention Law of the Sea were extremely complex, as over 150 states representing different cultural, geographical, and legal traditions tried to come to a bargaining outcome acceptable to most sides.[18] UNCLOS negotiations were conducted by three main committees.[19] The First Committee dealt with the "Area" and how resources in the open sea and deep sea beds would be handled.[20] The Second Committee dealt with states' rights on a variety of issues, including the territorial sea limit, the size of exclusive economic zones (EEZs), the continental shelf, access to the sea, and coastal states' rights. The Third Committee focused on environmental issues, such as marine preservation, scientific research, and pollution. The dispute

settlement aspects of the treaty were negotiated by many states from 1974 onward and were seen as crucial for reaching agreement on the other terms of UNCLOS.[21]

> Some states including the United States, have publicly stated that agreement on compulsory dispute settlement is an essential element of an overall "package"…. There is simply too much room in the treaty for misunderstanding, abuse of power, and interference with rights on the basis of unilateral interpretation.[22]

The President of the UNCLOS proceedings, Ambassador H. Shirley Amerasinghe, made a similar remark:

> Dispute settlement procedures will be the pivot upon which the delicate equilibrium of the compromise must be balanced. Otherwise the compromise will disintegrate rapidly and permanently…. Effective dispute settlement would also be the guarantee that the substance and intention within the legislative language of the Convention will be interpreted both consistently and equitably.[23]

Yet, while recognizing the importance of dispute resolution provisions, states could not agree on a single conflict management venue. Alongside many other factors, domestic legal traditions played a role in shaping the various states' preferences toward UNCLOS dispute resolution procedures. As the scholarship demonstrates, states representing the different domestic legal traditions perceive international law, international treaties, and international institutions in a unique manner.[24] These different vantage points are shaped by the reality that international law is taught and practiced differently within the distinct municipal systems.[25]

During negotiations, a large group of states including several civil law countries such as Denmark, Switzerland, and Sweden, pressed for the full involvement of the International Court of Justice as a long-standing, experienced international adjudicator. States representing the civil legal tradition argued that conflicting jurisdiction in the international adjudication sphere could occur if too many forums for settlement were created under UNCLOS. According to these states, the ICJ "should not be deprived the opportunity to increase its jurisdiction over such an important area as the law of the sea."[26] This negotiation tactic can be understood when we consider the legal similarity between the ICJ and civil law rules and procedures. The civil legal tradition, rooted in the laws of the Roman Empire, largely relies on the written letter of law, or codes, which meticulously regulate each substantive and procedural area of law.[27] During the UNCLOS negotiations, some civil law states' representatives pushed for a stipulation that would allow states a freedom of choice of the settlement venue. The Dutch representative, Professor Riphagen, proposed that each party to the UNCLOS Convention be given the ability to "select the court or tribunal it prefers."[28] Unsurprisingly, however, it was civil law states who argued for a strong position of the ICJ in the UNCLOS settlement regime. While negotiating the order of settlement venues in article 287, Netherlands and Switzerland proposed that the ICJ, as the main judicial organ of the UN, be given the first place—the place of honor.[29]

Other states, including many common law countries such as the United States and Australia, favored establishing a more specialized Law of the Sea Tribunal, which would be better able to handle the technicalities of maritime disputes.[30] Common law, which originated on the British Isles, is based on the *stare decisis* doctrine, whereby judges are bound by precedents established in previous judgments.[31] As a relatively flexible legal system, common

law embraces a large degree of judicial creativity.[32] In the hopes of creating a more flexible, adjudicative forum with embedded common law features, several common law states proposed that a special Law of the Sea Tribunal would be "less conservative than the International Court of Justice, would better understand the new law of the sea, and would be more representative of various legal systems and the different regions of the world."[33] The United States advocated for "a system that will ensure … uniform interpretation and immediate access to dispute settlement machinery in urgent situations, while at the same time preserving the flexibility of states to agree to resolve their disputes by a variety of means. The parties to a dispute should be free to choose by agreement any method of dispute settlement that they consider suitable."[34] Some common law states, including the United Kingdom, spoke in favor of even more efficient and flexible international venues for settlement, especially arbitration.[35]

Because most of the negotiations took place during the 1970s, subsequent drafts of the Convention had to accommodate wishes of the socialist states who "perceived western international tribunals as bourgeois."[36,37] Socialist states questioned the general ideal of binding third-party tribunals of an adjudicative nature. The USSR representative argued that disputes within states' coastal or EEZ areas should not be subject to third party dispute settlement.[38] The USSR also opposed awarding standing to non-state actors in the UNCLOS court. Instead of supporting ITLOS or the ICJ, representatives of socialist states pressed for highly specialized arbitration, which would enable the disputants to freely choose the arbitrators.[39]

Several Islamic law states such as Algeria, Iraq, and Lebanon participated in UNCLOS negotiations.[40] Islamic law, the world's third major legal tradition, is based primarily on religious sources stipulating principles of human conduct.[41,42] In contrast to the secular character of modern international law, the main sources of Islamic law, the Qur'an or the Sunna, are closely connected to Islamic faith.[43] Unlike other international treaties, many substantive provisions of UNCLOS express principles historically present in the Islamic legal tradition.[44] Indeed, law of the sea, in a form highly compatible with modern international law, occupies a relatively prominent place in original sources of Islamic law. UNCLOS dispute settlement provisions incorporate Islamic law states' preference for flexibility in conflict management. The Convention's emphasis on informal dispute resolution, and in particular, conciliation,[45] reflects traditional values of the Islamic legal tradition. Indeed, though courts are not forbidden altogether by the Qur'an, there is a deep-rooted belief in Islamic law that informal methods such as mediation and conciliation stand above in-court proceedings. Courts should be used as the last resort option.[46] Not surprisingly, therefore, during the Convention negotiation process, the majority of Islamic law states did not explicitly declare the ICJ or ITLOS as their forum of choice. In that sense, Islamic law states, including several African states, were generally skeptical of obligatory third-party venues that other states advocated for. These states felt uneasy with the concept of binding adjudicative proceedings, since their own legal systems traditionally relied on informal, consensus-building, and community-based dispute settlement. But, more generally, Islamic law states frequently express mistrust in the global order.[47]

Article 287, the choice of procedure article, is the direct result of states' unwillingness to agree on a single third-party forum that would render a decision should informal mechanisms fail. UNCLOS offers states a choice of different settlement venues in the event of a

dispute dealing with interpretation or application of the Convention: ITLOS, the ICJ, or an arbitral tribunal. If states choose the same forum, this forum hears their potential disputes. If states choose a different forum or make no declaration at all, then arbitration is the obligatory default forum.[48] Consequently, despite the fact that only about a quarter of the Convention's ratifying states have explicitly chosen a preferred forum, the dispute settlement system applies to all state parties. There is no ability to completely opt out.[49] Unless the disputants reach an alternative agreement, the dispute will have to be submitted to arbitration, giving arbitration a leading jurisdictional role.[50]

States may select their own means of dispute settlement outside of UNCLOS.[51] Moreover, states maintain the ability to attempt resolution via other venues and methods stemming from bilateral, regional, or general treaties. Diversification of settlement options was essential because many treaties regulating specific issue areas within law of the sea include their own dispute settlement provisions.[52] Article 287 was also designed to strike a bargain in UNCLOS negotiations due to their varied preferences for dispute settlement procedures.[53]

Considering the Convention's emphasis on states' consent, freedom of choice, and their ability to use procedures other than UNCLOS, do states' declarations matter? As in any other issue area of international law, it would be naïve to expect that all states will unconditionally agree to submit their disputes to compulsory and binding adjudication or arbitration.[54] Thus, the Convention merely echoes and confirms established state practice.[55] Indeed, in all disputes—maritime and otherwise—states are most likely to prefer bilateral negotiations over third-party resolution venues.[56] As one of our interlocutors noted, "statistically, I would say that the great majority of interstate disputes, including territorial and maritime disputes, are solved via diplomatic means of dispute settlement."[57]

The availability of several different venues for settlement within the scope of the Convention raises the possibility of forum shopping.[58] In the context of domestic litigation, forum shopping can be defined as a litigant's attempt "to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict."[59] However, it is important to note that states' search for the best international venue is somewhat different from the domestic version of forum shopping. According to Powell and Wiegand, "States' strategic quest for the best settlement venue—the gist of international forum shopping—is idiosyncratic since decisions to use binding, nonbinding, or bilateral techniques entail broad choices between types of conflict management techniques."[60] When specifying their choice of a preferred venue for peaceful resolution in the UNCLOS regime, states can do so *a priori*, that is upon signing, ratifying, or acceding to the Convention (or later). This behavior is strategic. Article 282 of the Convention gives priority to any existing compulsory dispute settlement mechanisms that are binding on the disputants. Thus, if the disputing parties have previously agreed to give jurisdiction to a specified settlement venue that entails a binding decision, such as the ICJ or the International Maritime Organization, then neither party can object to that venue's jurisdictional powers. As such, Article 282 of the Convention is a mechanism that "precludes forum shopping as well as questions of overlapping litispendence—questions that might follow from conflicting choices made by the disputing parties."[61]

Forum shopping that states engage in within the UNCLOS regime is unique. Selecting the ICJ, ITLOS, or arbitration involves fairly comprehensive choices between types of settlement techniques and not choices between specific judges. In the words of Ioannis

Kostantinidis, "strategy comes in when a state decides at some point, prior to the emergence of a dispute or while a dispute erupts, to make a declaration under Article 287 of the UN Convention of the Law of the Sea."[62]

Nevertheless, like domestic litigants, states strategically attempt to find a venue that will most likely yield a favorable outcome in a potential maritime dispute. There are numerous principles in international law designed to restrict states' propensity to engage in forum shopping, such as the doctrine of *lis alibi pendens* and the *res judicata* principle. The former prohibits states "to commence another set of competing proceedings concerning the same dispute before another judicial body." The *res judicata* principle states that "the final judgment of a competent judicial forum is binding upon the parties" and therefore cannot be re-litigated.[63]

We argue that these two rules, and the fact that the Convention includes several contingencies designed to curtail forum shopping, are unable to completely curb states' aptitude to carefully and strategically pick and choose from among available UNCLOS venues. As early as the negotiation phase of the Convention, some states appeared to be aware of the potential for forum shopping. Several civil law states, who argued for a strong position of the ICJ, emphasized that allowing the choice of venue under Article 287 may create a "danger of having too many tribunals which might render conflicting decisions."[64] The final version of Article 287 endows states with a choice of settlement procedures; this choice just has to be made in advance. As a result, states do forum shop—they just have an option to do it *a priori*. Several scholars openly discuss the real possibility of forum shopping among UNCLOS settlement venues. Seymour describes the ICJ and Annex VII tribunals as ITLOS' "primary competitors."[65] Similarly, Charney pronounces the settlement system provided by the Convention as "a system of free competition" for "business."[66] In general, the main issue with UNCLOS settlement provisions is the availability of several appropriate forums in which substantive laws may be interpreted and applied.[67] According to Boyle, this fragmentation can leave an "empty shell which can be filled only if the parties agree on consensual submission of the dispute to whatever forum they choose."[68]

Maritime dispute resolution entails still some uncertainty over substantial provisions of international law. There is no single international judicial body endowed with the power to create and interpret the international law of the sea though quite a bit of jurisprudence has been now accumulated, which considerably alleviates states' uncertainty vis-à-vis the law of the sea.[69] Yet, there is a need for balancing flexibility and predictability in the context of maritime law, since maritime disputes deal with an "infinite variety of geographical and non-geographical situations."[70, 71] The ICJ, ITLOS, and a host of arbitral ad hoc tribunals have issued substantively important judgments, yet these tribunals are not always in agreement with each other on maritime principles. States representing different legal traditions often do not view international law the same way, as, "there may be few common reference points among the many international jurists."[72] As a result, uncertainty over substantive interpretation of international law ensues.[73]

This uncertainty is especially acute in the law of the sea, where different adjudicative forums have adapted divergent norms on important issues such as delimitation of the continental shelf.[74] Though considerable progress toward crystallizing maritime law has been made, as Tanaka notes, "as the law is still developing, it is difficult to identify a solid and definitive legal framework."[75] In general, one of the most common criticisms launched

toward UNCLOS is that its provisions are in many places vague, and tend not to impose specific obligations. Yet, given its comprehensive breadth of the Convention, it was arguably never the intention for UNCLOS to provide meticulous rules and solutions regarding every single aspect of maritime law.[76] In a way, therefore, by opening themselves up to a binding form of resolution—arbitration and adjudication—states may largely lose control over the outcomes of bargaining over highly salient issues, as the costs for reneging on judgments rendered by international courts are extremely high.[77]

UNCLOS offers states an attractive way to mitigate this uncertainty. The possibility of several forums being charged with solving a dispute entails "procedural fragmentation" of international law.[78] Different forums employ different sets of procedures. Before an adjudicator or a quasi-adjudicative forum decides on a case, the facts of a particular dispute and interpretations of international norms are funneled through the venue's institutional procedures. In particular, arbitration tribunals are "captive to their own legal design."[79] Every tribunal, is in a way its own "self-contained system (unless otherwise provided)."[80] These differences in procedure can have colossal effects on interpretation of substantive international law. International law would not be faced with different substantive interpretations if there was no choice between dispute resolution forums. Faced with uncertainty and at the same time driven to win cases, states strategically make commitments to specific resolution forums offered by UNCLOS. The goal is to *a priori* select a venue that will not only yield the most preferred outcome for a state, but also reduce the uncertainty caused by the resolution procedure itself. Procedural fragmentation offered by UNCLOS under Article 287 mitigates states' uncertainty.

To increase predictability of final settlement, states simply prefer to use settlement methods that resemble their own domestic legal institutions. Uncertainty about how a forum will adjudicate in a specific maritime case is mitigated if procedures of a particular venue are familiar.[81] This alignment of international and domestic procedures provides a level of comfort, confidence, and willingness to accept the outcome as legitimate. This is an important reality. Scholars argue that the authority of an institution to produce binding decisions comes about not only by the outcome and the substance of decisions, but also by the procedure employed to produce the decision.[82] Thus, where points of procedural convergence occur between a state's domestic legal system and a settlement venue, these can supplement legitimacy of the international legal mechanisms in the eyes of the particular state.[83]

States can anticipate that a third-party forum will engage in a particular method of legal interpretation if the two sets of legal rules, domestic law and the legal design/procedure of an international court, align with one another. Consequently, not all international resolution venues are viewed as equally attractive by potential joining states. There are procedural or "structural biases" embedded in different resolution venues offered in the UNCLOS framework.[84] These procedural biases precondition states representing some domestic legal traditions to naturally gravitate towards specific venues. Procedural bias is quite different from a bias resulting from politics, economic pressure, or from personal preferences of the intermediaries.[85]

Historical analysis reveals reasons for the implanting of structural biases into international settlement venues. The originators of new courts embed design principles from their domestic legal traditions in the rules of the court to reduce uncertainty in the future with respect to the types of cases the court will hear, the types of judgments it will render,

and the procedures that will be employed in judicial processes. For example, the originators of the Permanent Court of International Justice (PCIJ) designed the Court according to legal principles and procedures from the Roman/civil law tradition by rejecting *stare decisis* and emphasizing *bona fides* and contractual compliance. This design feature was taken into account by later joiners to the court, as civil law countries have been three times more likely to accept compulsory jurisdiction of the World Court than common law or Islamic law countries. On the other hand, the negotiated compromise in Rome that resulted in a hybrid system of legal rules for the International Criminal Court stemming from both common law and civil law, produced nearly equal rates of signature and ratification of the Rome Statute by common law and civil law states (Mitchell and Powell 2011).[86]

We recognize that factors unrelated to domestic legal systems also shape states' choices of settlement venues. Power relations, strategic considerations, strength of legal claims, domestic political concerns, regime type, the cost and length of proceedings, as well as issues of future compliance influence states' decisions to pre-select dispute settlement forums and mechanisms.[87] It is also crucial to recognize that in designing a strategy of dispute resolution, each disputant is guided by their legal advisers, who usually have extensive experience in dealing with maritime law.[88] As Hans Corell noted, "First of all, in a country, there are always legal advisers in the governments."[89] Indeed, considerations such as the possibility to fashion the third party's rules of procedure, the right to appoint the adjudicator/arbitrator, the broader geopolitical background, and pertinent maritime jurisprudence shape forum choices. Legal advisors and state counsel play important role in evaluating limitations and strengths of their client's claims.[90] Nonetheless, congruence between domestic legal design and the legal design of international resolution venues exerts an important measure of influence on states' forum choices. In the next section, we elaborate on how the design of the ICJ and ITLOS align with states' domestic legal systems, and we derive several hypotheses connecting legal systems to states' Article 287 forum choices.

III. Dispute Resolution in UNCLOS

Adjudication by two distinct courts constitutes an inherent feature of UNCLOS dispute resolution. The ICJ and ITLOS are permanent, independent international courts with largely fixed composition and non-negotiable rules and procedures. Their judges are institutionally separated from disputants and have salary and tenure protection. Consequently, these courts are independent of the interests of the disputants, which may not necessarily be the case with arbitral tribunals.[91] Whether a dispute goes to a more general adjudicator, the ICJ, or a more specialized judicial body, ITLOS, the parties choose a method that entails fairly strict adherence to international law by the adjudicator, strict regulation of procedure, membership, jurisdiction, and nature of disputes admitted. Collectively, these legal features make these courts formal and stringent when compared with arbitration offered in the UNCLOS regime.

There are important similarities between the institutional design of ITLOS and the ICJ. The designers of both courts drew on legal concepts and procedures of the civil legal tradition. For example, in the spirit of civil law, both courts embrace the doctrine of good faith (*bona fides*)[92] and formally reject the doctrine of the precedent (*stare decisis*).[93] Additionally,

both institutions embrace a high degree of formality, thoroughly regulating the conduct of the adjudicators and the disputing parties.[94] Shared commitment to these principles is evident in the courts' statutes and jurisprudence.[95]

Despite both courts' commitment to formality, the drafters of UNCLOS modified ITLOS procedures to increase the Court's effectiveness, user-friendliness, and practicality.[96, 97] Consequently, ITLOS has unique procedural features that are absent in the ICJ.[98] These features include the setting of a fixed date for the opening of oral proceedings, the ability of judges to exchange views concerning the conduct of the case and written pleadings, a special Seabed Disputes Chamber, and the use of electronic means of communication.[99] These additional rules are informed by the practice of international adjudication and the nature of maritime disputes. Interestingly, the Tribunal's Rules were designed by the first set of the Tribunal's members, which largely accounts for their practical nature.[100] To sum up, although the ICJ and ITLOS share design feature from the civil legal tradition, ITLOS' practical and, to some extent, flexible nature makes the Court considerably closer to the common law tradition.[101]

Arbitration featured in the UNCLOS Convention is a useful alternative to adjudication. Arbitration has many advantages such as its flexibility, speediness, and disputants' ability to retain considerable control over the tribunal's composition. Indeed, states perceive their ability to appoint the arbitrators themselves as a valuable characteristic of arbitration. The hope is that careful selection of bench members will increase a disputant's chances of a favorable outcome.[102] As noted earlier, there are two arbitration options a state may use within the UNCLOS regime.[103] First, states may choose a more general Annex VII arbitration, or a special Annex VIII arbitration. The latter entails submitting the dispute to a forum that is specialized in a specific genre of dispute, such as fisheries, marine scientific research, or navigation. This type of arbitral tribunal may be composed of technical experts and members of specialized agencies whose backgrounds make them particularly well suited to decipher highly technical maritime cases.[104] Interestingly, the proceedings before the Annex VIII arbitral tribunal may be relatively limited, as these panels may conduct fact-finding alone that may be sufficient to settle a dispute between the parties.[105]

In addition to Annex VII or VIII arbitration, arbitration constitutes a default resolution option in UNCLOS. As Tables 2 and 3 show, a little more than a quarter of countries ratifying or acceding to the Convention a priori choose a specific method of settlement. This suggests that an overwhelming majority of states parties to UNCLOS have *not* made a specific dispute resolution declaration under Article 287. Yet, according to the "residual rule" of Article 287, there is no option to completely opt out of the compulsory dispute settlement system. Unless the parties reach an alternative agreement, the dispute will have to be submitted to arbitration (under Annex VII). This stipulation grants arbitration a prime position within the UNCLOS framework. Treves captures this reality well by writing that "the Court and the Tribunal are in competition, together and not one against the other, with arbitration. Arbitration is the procedure that states parties can declare under Article 287, that they are presumed to prefer in the absence of a declaration, and that applies whenever two parties to a dispute have not expressed the same preference."[106]

Interestingly, arbitration—as a much more flexible and less formal method of settlement—shares important similarities with the common legal tradition.[107] Whereas adjudication entails delegating a dispute to a permanent court with largely fixed composition, in arbitration, the disputants may choose the arbitrators.[108] Similar to common law in-court

proceedings, an arbitral tribunal is more flexible than a court in the process of reaching a decision. As a general rule, an arbitral panel can base its decision not only on international law, but also on certain principles agreed upon by the parties, equity, and sometimes principles of a domestic legal system. Finally, UNCLOS arbitration tribunals have shown remarkable enthusiasm for established jurisprudence by citing previous decisions of the ICJ, ad hoc tribunals, and ITLOS. This mirrors judicial decision-making and the practice of *stare decisis* in the common legal tradition.[109] Illustrative of these dynamics is the award by the arbitral tribunal in the *Barbados-Trinidad and Tobago* case[110]: "It is furthermore necessary that the delimitation be *consistent with legal principle as established in decided cases*, in order that States in other disputes be assisted in the negotiations in search of an equitable solution that are required by Articles 74 or 83 of the Convention."[111]

Clearly, different dispute resolution venues available in UNCLOS bear resemblance to different domestic legal traditions. Consequently, we expect that common law states are most likely to sign onto the Convention. As a legal international document, UNCLOS allows for an unprecedented degree of flexibility in the choice of peaceful resolution venues. Moreover, arbitration tribunals provided for in the Convention resemble, to a large degree, the common law approach to dispute resolution. The privileged position of arbitration as a default option for settlement is likely to attract common law states to sign and ratify the Convention. The flexibility of arbitration and the repeated use of precedents by the UNCLOS arbitration tribunals make this default option especially attractive for common law states. At the same time, we anticipate that common law states will be unlikely to explicitly commit to either of the adjudicative forums specified in Article 287. When compared with arbitration, both the ICJ and ITLOS procedural rules largely stem from the civil legal tradition, which makes these forums less attractive to common law states. However, because ITLOS' structure is much more flexible and amenable to judicial creativity, we expect that common law states should be slightly more amenable to ITLOS if they select a standing court for dispute settlement.

Hypothesis 1: Common law states are more likely to ratify/accede to UNCLOS than civil law, Islamic law, and mixed law states.

Hypothesis 2: Common law states that have ratified/acceded to UNCLOS are less likely to choose either of the adjudication forums (ICJ, ITLOS) under Article 287 as their preferred forums relative to civil law, Islamic law, and mixed law states. Common law states should demonstrates a preference for the ITLOS court over the ICJ under Article 287.

We also anticipate that all else equal, civil law states are most supportive of the ICJ and ITLOS, as both of these forums resemble the civil law's approach to dispute resolution. As noted earlier, civil law states have been very supportive of the ICJ and this historically-solidified commitment should be evident within the UNCLOS framework. The relationship between states representing the civil legal tradition and ITLOS is likely to be different. Used to very formalized in-court procedure and comfortable with formal adjudicators, civil law states will be most likely to choose the ICJ as an acceptable forum within the UNCLOS regime.[112] Due to a high level of similarity between ITLOS and the ICJ, civil law states should also be open to ITLOS as a potential adjudicator.

Hypothesis 3: Among states ratifying/acceding to UNCLOS, civil law states are most likely to choose the ICJ or ITLOS as their preferred forums when compared with common law, Islamic law, and mixed law states.

Since informal proceedings are considered morally and ethically superior to adjudication, Islamic law states ratifying UNCLOS are likely to be hesitant to commit to either the ICJ or ITLOS. Having developed primarily from ideas of the Western world, international law embraces the view that a distinction between law and religion must be strictly observed. Neither the ICJ nor ITLOS explicitly incorporate principles of the Islamic legal tradition into their jurisprudence.[113] Thus we expect that Islamic law states should be drawn towards informal dispute resolution methods while attempting to resolve their maritime disputes. Importantly, since UNCLOS allows states to seek settlement by peaceful means of their own choice regardless of the dispute resolution procedures outlined in the Convention, we expect that Islamic law states should be more willing to ratify UNCLOS relative to other international treaties.[114] At the same time, these states should be unlikely to explicitly commit to ITLOS, the ICJ, or arbitration through Article 287 declarations. Instead, being supportive of the general idea of the peaceful settlement of disputes—largely promoted by the Qur'an—Islamic law states will try to resolve their disputes via other, more informal venues. However, if they make an optional declaration under Article 287, they should choose a form of arbitration as the most flexible approach.

Hypothesis 4: Islamic law states that ratify/accede to UNCLOS are least likely to specify any preferred forum for peaceful resolution when compared with civil law, common law, and mixed law states.

IV. Analyses

To evaluate our theoretical arguments linking domestic legal traditions and states' preferred dispute resolution forums in UNCLOS, we collected data on states' decisions to sign, ratify, or accede to UNCLOS. We took as our reference point any country listed on the UNCLOS website page specifying the "Status of the Convention and of the related Agreements, as of 12 December 2020."[115] We also included any state identified as a system member by the Correlates of War dataset from 1982 to 2020.[116] The total number of states that meet these criteria is 194, with 92.3% signing UNCLOS. The data for ratification/accession are presented in Table 1. Among the 194 countries in the world, 164 (84.5%) have ratified or acceded to UNCLOS.

Table 1: Ratification/Accession of the UNCLOS Treaty (as of 2020)

Ratify UNCLOS	Civil law	Common law	Islamic law	Mixed law	Total
No	20 (19.8%)	2 (4.2%)	5 (19.2%)	3 (15.8%)	30 (15.5%)
Yes	81 (80.2%)	46 (95.8%)	21 (80.8%)	16 (84.2%)	164 (84.5%)
Total	101 (52.1%)	48 (24.7%)	26 (13.4%)	19 (9.8%)	194

$\chi^2 = 6.42$ ($p = 0.093$)

Table 1 stratifies ratification/accession decisions by states' domestic legal traditions focusing on the four major legal traditions in the world: civil law, common law, Islamic law, and mixed law.[117] The data fit with our theoretical expectations (Hypothesis 1), showing that common law states have the highest level of support for UNCLOS. Of common law countries, 95.8% have ratified the treaty (with the United States and Bhutan being the only exceptions).[118] This is a much higher rate of treaty ratification in comparison to states with civil law (80.2%), Islamic law (80.8%), or mixed law (84.2%) traditions. The success of common law states in the UNCLOS negotiations to push for a flexible arbitration approach to dispute resolution enhanced these states' willingness to support the institution. Moreover, the fact that arbitration constitutes the default option under the Convention constitutes an additional incentive for these states. As stipulated above, if a state fails to directly declare a forum, or if the disputing states choose different settlement venues, the residual jurisdiction belongs to an arbitral tribunal. Thus, common law states have been very open to signing onto the Convention. After all, the act of signature/ratification constitutes an important signal of their willingness to peacefully resolve their maritime disputes. What's most important, however, is the fact that they can do so via their favorable flexible venue—an arbitral tribunal.

The overall UNCLOS ratification rate is much higher for common law states when compared to these states' support for other global institutions. Less than half of all common law states have ratified the ICC's Rome Statute, while a mere one-fifth of common law states have ever recognized the compulsory jurisdiction of the World Court (PCIJ/ICJ).[119] Common law states have also repeatedly resorted to the UNCLOS arbitration procedures without explicitly choosing Annex VII or VIII arbitration in their Article 287 declarations. Australia and New Zealand commenced arbitration proceedings against Japan under Annex VII of the UNCLOS Convention in the *Southern Bluefin Tuna Cases* despite the fact that arbitration was not the choice of procedure of either applicant.[120] A similar situation took place in the Barbados and Trinidad and Tobago dispute related to the delimitation of the Exclusive Economic Zone and Continental Shelf between them.[121] Neither of these states chose Annex VII arbitration as their choice of a resolution venue. In fact, Barbados has not to this day made a choice of procedure declaration, and Trinidad and Tobago's first forum of choice is ITLOS, followed by the ICJ as a second option.

The results pertaining to UNCLOS ratification rates of Islamic law states (80.8%) are quite interesting, showing a higher ratification rate than for civil law states (80.2%). This level of support for the Law of the Sea Convention is much higher relative to Islamic law states' support for other major international courts; fewer than 25% of Islamic law countries have ratified the Rome Statute or recognized the compulsory jurisdiction of the World Court.[122] Islamic support for UNCLOS accords with our theory because the default arbitration procedures in UNCLOS are much closer to the Islamic law approach to the peaceful resolution of disputes with its emphasis on acknowledgment, apology, and forgiveness.[123] As Tables 2 and 3 demonstrate, however, Islamic law states do not typically commit to formal adjudicative forums such as the ICJ (4.8%) or ITLOS (9.5%), preferring instead more informal means of settlement.[124] Particularly attractive to these states is conciliation, regulated by Article 284 of the Convention.[125] The Montreux compromise that was struck in the 1975 Geneva sessions created a dispute settlement procedure that was attractive to a much larger swathe of countries given its more flexible approach to dispute settlement, with a selection among the various binding forums.

Our second stage of data collection focuses on states' declarations under Article 287 of UNCLOS. This information comes from the UNCLOS website on the "Settlement of disputes mechanism."[126] As noted earlier, states can select among four forums (ICJ, ITLOS, Annex VII arbitration, or Annex VIII arbitration), they can rank order their preferences among the forums, and they can opt to leave a particular forum as undesignated. For example, in its 2002 declaration, Australia recognized the ITLOS or ICJ courts as acceptable adjudicators for disputes arising in the context of UNCLOS, with no rank ordering between them. Austria, on the other hand, ranks three of the forums under Article 287 with the ITLOS court first, the Annex VIII arbitration tribunal second, and the ICJ third. Some states, such as Greece, choose only a single acceptable forum (ITLOS).

We created three dummy variables to capture Article 287 declaration information. The first variable for the ITLOS court equals one if a state opts for this forum first and zero otherwise. No state rank ordered ITLOS below the first rank order. The second variable is coded one if a country notes that the ICJ is an acceptable adjudicator under Article 287 and zero otherwise; this includes the rank order of the ICJ in the first, second, or third position.[127] Our final variable captures states' selection of the arbitration procedures under either Annex VII or Annex VIII. Annex VII is the default procedure if no declaration is made, yet ten countries (such as Russia) declare this forum, nonetheless. Only 11 countries specify the Annex VIII arbitral tribunal as acceptable. Due to these small frequencies, we combine the arbitration options into a single dummy variable, with 8.25% of countries choosing one of the two arbitration options.

Table 2: Article 287 Declaration Recognizing ICJ as an Acceptable Forum

Accept ICJ as Forum	Civil law	Common law	Islamic law	Mixed law	Total
No	57 (70.4%)	43 (93.5%)	20 (95.2%)	16 (100.0%)	136 (82.9%)
Yes	24 (29.6%)	3 (6.5%)	1 (4.8%)	0 (0.0%)	28 (17.1%)
Total	81 (49.4%)	46 (28.1%)	21 (12.8%)	16 (9.8%)	164

$\chi^2 = 18.2$ ($p < 0.001$); includes only countries who have ratified UNCLOS.

Table 3: Article 287 Declaration Recognizing ITLOS as an Acceptable Forum

Accept ITLOS as forum	Civil law	Common law	Islamic law	Mixed law	Total
No	50 (61.7%)	40 (87.0%)	19 (90.5%)	16 (100.0%)	125 (76.2%)
Yes	31 (38.3%)	6 (13.0%)	2 (9.5%)	0 (0.0%)	39 (23.8%)
Total	81 (49.4%)	46 (28.0%)	21 (12.8%)	16 (9.8%)	164

$\chi^2 = 19.7$ ($p < 0.001$); includes only countries who have ratified UNCLOS.

Tables 2 and 3 present the descriptive information for ITLOS and ICJ forum selection by states' domestic legal traditions. Supportive of hypothesis 3, civil law countries have the highest preference for the International Court of Justice, with 29.6% of civil law states

recognizing this court in an Article 287 declaration (among those states that have ratified or acceded to the treaty). Consistent with hypotheses 2 and 4, only 6.5% of common law states and 4.8% of Islamic law states agree to work with the ICJ to resolve maritime disputes. This meshes well with prior findings that civil law countries are much more supportive of the World Court than states with other legal traditions due to its civil law design.[128] The ITLOS court finds a higher level of support among common law (13%) and Islamic law states (9.5%), yet civil law countries select this forum with the highest percentage (38.3%), also supporting hypothesis 3. This pattern can be explained by the similar legal design of the ITLOS and ICJ courts, as civil law countries could expect similar rules and procedures to be utilized, even though the ITLOS court is somewhat less formal in its procedures. As expected, common law states prefer ITLOS to the ICJ. More than twice as many common law states recognize ITLOS as an acceptable forum for settlement relative to the ICJ (13% versus 6.5%). Although these statistics are much smaller when compared with declarations placed by civil law states (26.9% and 38.3%), they convey an important message: the flexibility of ITLOS seems to attract common law states, which historically have been reluctant to accept jurisdiction of the civil law based, more formal ICJ.

Table 4: Forum Selection in the UNCLOS Regime under Article 287

	Model 1	Model 2	Model 3
	ICJ	*ITLOS*	*Annex VII or VIII*
Civil Law	1.626**	1.507***	2.519*
	(0.673)	(0.552)	(1.295)
Islamic Law	0.652	0.254	2.788*
	(1.270)	(0.938)	(1.549)
Capabilities	-0.475	7.775	30.357*
	(21.585)	(13.564)	(15.546)
Polity Score	0.132***	0.053*	0.080
	(0.047)	(0.032)	(0.051)
Constant	-3.171***	-2.201***	-4.734***
	(0.714)	(0.534)	(1.346)
N	132	132	132
Pseudo R^2	0.17	0.10	0.12
Wald χ^2	22.72***	16.17***	11.46**

* p<.10,
**p<0.05,
*** p<0.01

In Table 4, we analyze states' selection of dispute settlement procedures under Article 287 using multivariate logit models. We control for two additional factors beyond domestic legal traditions: capabilities and regime type.[129] In their analysis of the ICJ, Mitchell and Powell (2011) found that powerful states were less supportive of compulsory jurisdiction relative to weaker states, while democratic countries were more likely to support the World

Court than autocratic states. The basic results presented in the cross-tabulations in Tables 2 and 3 find confirming support in Table 4. The coefficient for civil law is positive and significant for each type of forum under Article 287, supporting our third hypothesis.[130]

Overall, the ICJ's level of activity stemming from the UNCLOS Convention is much lower than the activity on ITLOS and the Annex VII and VII arbitration. The initial hopes that the ICJ would play a leading role in the settlement of UNCLOS disputes have not yet been realized. However, states that do file their cases with the ICJ are for the most part civil law states. Prominent examples include the *Territorial and Maritime Dispute* between Nicaragua and Colombia, and *Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea*.[131] Interestingly at the time of application, Nicaragua and Honduras had not made an Article 287 declaration. Since then, however, both of these civil law states have demonstrated a clear partiality towards the ICJ by stipulating that the Court is their first-choice venue. It is especially evident in the wording of Nicaragua's declaration, which states that Nicaragua "accepts only recourse to the International Court of Justice."[132] Islamic law countries are similar to common law (reference category) and mixed law states (dropped due to perfect collinearity) in their support levels for the ICJ or ITLOS courts.

While we anticipated theoretically (hypothesis 4) that Islamic law states would eschew Article 287 declarations relative to countries with other legal traditions and find evidence consistent with that (Table 4, Models 1 and 2), we find nonetheless that they are more likely than common law states to prefer an arbitration forum (Table 4, Model 3). This is consistent with a more flexible approach to dispute settlement and the number of states who have made these claims is relatively small (Egypt and Tunisia). We also find that more powerful states prefer the arbitration procedures under Annex VII or Annex VIII, which is consistent with Posner and Yoo's claim that powerful actors prefer the flexibility and design specific nature of arbitration tribunals.[133] Less powerful states, on the other hand, value more legalized, binding third-party methods as they provide legal venues where the disputants are treated evenly, regardless of their capabilities. The divergence of views regarding UNCLOS dispute settlement between the two types of states, more and less powerful, became apparent during the UNCLOS III negotiations. Delegates from developing states believed that embedding third party dispute settlement provisions into the Convention "would counterbalance political, economic, and military pressures from powerful states." Indeed, developing states strongly favored the creation of a new tribunal with jurisdiction over maritime law cases. These states viewed the ICJ as not sufficiently representative of the evolving character of the international community in the post-colonization era.[134] Stronger states, like the U.S., argued in favor of more flexible provisions, which would "deter new unilateral state claims that had questionable legal support."[135]

Democratic countries show more affinity for dispute resolution through international courts (either the ICJ or ITLOS) in comparison to less democratic states. This fits with Mitchell and Powell's findings that democracies are more likely to sign onto international courts like the ICJ and ICC and that they have more durable commitments to those courts.[136] Our results also support the arguments advanced by the democratic legalistic perspective that links the democratic commitment to the principle of rule of law to democracies' support for more legalized methods of peaceful resolution.[137] In the context of territorial disputes, Allee and Huth find that leaders of states in democratic dyads become more interested in third party legal methods when the domestic audience costs of a bilateral negotiated settlement are expected to be high.[138]

Ultimately, we need more in-depth analysis of the influence of these dispute settlement choices on states' behavior in interstate maritime disputes. Other studies have examined the influence of UNCLOS ratification on peaceful and militarized settlement attempts to resolve diplomatic disagreements over maritime areas. Mitchell and Powell's empirical results suggest that states belonging to UNCLOS experience slightly more militarized disputes over maritime claims than states outside of UNCLOS (although the difference is not statistically significant).[139] On the other hand, UNCLOS members are more likely to resort to third-party dispute settlement strategies and less likely to start new diplomatic claims over maritime spaces. Considering one study's data set of maritime conflicts,[140] we find that only two militarized disputes ever occurred over maritime claims involving two UNCLOS members who have made Article 287 declarations, and both cases occurred in 1982, the year of treaty signature: Argentina–United Kingdom over the Falklands and Greece-Turkey over the Aegean Sea. This suggests that states can reach peaceful agreements more effectively in the shadow of UNCLOS when they have more effectively signaled their preferences for binding settlement procedures.[141]

Our results suggest that states' domestic legal traditions have a strong influence on their preferred dispute resolution forum in the UNCLOS regime. Common law states, pushing for the arbitration options and the new ITLOS tribunal in the UNCLOS negotiations, were happy with the ultimate flexible design of the institution. This resulted in nearly universal ratification of UNCLOS by common law states. Civil law states are more wary of ratifying UNCLOS as they would have preferred the ICJ as the primary dispute settlement forum given the similarities between their legal traditions and the World Court. We find, however, that among those civil law countries who ratify or accede to UNCLOS, they are much more likely to opt for the ICJ or ITLOS as their preferred forum for dispute settlement. This stems from the rules and procedures employed by the two courts, rules that uphold important principles in the civil law tradition such as bona fides, lack of *stare decisis*, and formality of procedures.

V. Conclusion

The recent proliferation of international courts in different substantive areas of international law gives states many incentives to forum shop for the best court when attempting to settle interstate disputes. In the arena of conflicts over maritime zones, countries have multiple choices for dispute settlement procedures. The current structure of the United Nations Law of the Sea Convention (UNCLOS) fosters states' ability to choose peaceful settlement venues that are best suited to fulfill their expectations concerning dispute resolution. This treaty is unique as it is "one of an extremely small number of global treaties that prescribe mandatory jurisdiction for disputes arising from the interpretation and application of its terms."[142] States have numerous grounds for preferring one tribunal or adjudicator over another in what Noyes calls "a system of open competition" created by the UNCLOS Convention.[143]

UNCLOS offers a variety of binding conflict forums (Article 287), including the International Tribunal for the Law of the Sea, the International Court of Justice, and two arbitration mechanisms (Annex VII & VIII). The flexible dispute settlement procedures in the

UNCLOS regime and the default arbitration procedures make the treaty appealing to common law countries, with close to universal ratification among all common law countries in the world. On the other hand, civil law countries have more reluctance to join UNCLOS in part because the regime did not elevate the International Court of Justice to the preferred forum for maritime dispute settlement. The civil law design of the ICJ makes this an attractive forum for civil law countries. Islamic law countries have provided a higher level of support for UNCLOS than other courts like the ICJ and have recognized arbitration forums through Article 287 more often than common law states because the flexibility of the dispute settlement procedure mimics the less formalized procedures for resolving disputes in the Islamic legal system. In short, we demonstrate that countries' legal traditions influence their preferred forums for managing maritime disputes.

These results support other research linking domestic legal traditions and international courts such as the International Court of Justice and the International Criminal Court. States push for legal design principles that are based on their domestic legal traditions when negotiating new international treaties. These design elements influence the behavior of later joiners to the court, such as states who came into existence following the 1982 signature of UNCLOS. The shadow of the court operates most effectively for countries who share its legal principles; thus, the next stage of our research entails an examination of interstate bargaining in the context of UNCLOS. Indeed, the fact that compulsory binding settlement venues exist within a regime matters. As Charney suggests, "their very availability encourages settlement by holding the promise of being invoked if voluntary methods fail."[144] According to our argument, pairs of common law states should be able to reach agreements and comply with them more readily than dyads with civil law, mixed law, or Islamic law states or dyads where states have different legal systems, as the acceptability of the binding arbitration default mechanism makes it a plausible option. The fact that multiplicity of forums exists within the UNCLOS regime intensifies the "out of court effects."[145, 146]

Our paper examines the *a priori* declarations states can make under Article 287 of UNCLOS. Yet we could also take our research once step farther and examine the selection of forums once disputes arise. Future research will compare cases that go to the ITLOS, ICJ, or arbitration panels to see if states' preferences for conflict management forums carry over to their selection of courts/panels for specific disputes. We could also tap into data collected by the Issue Correlates of War (ICOW) project[147] which records data on diplomatic conflicts over maritime areas, which would also allow for an analysis of whether states opt for the forums they pre-designate in UNCLOS. We might determine if common law states are more successful in maritime disputes given their strong support for the UNCLOS regime. Taking our research forward will help us understand more fully the process by which countries select distinct forums for managing interstate issues and how their domestic legal traditions influence those choices.

Notes

1. The phrase "dispute settlement" is used in UNCLOS. Following the terminology in the literature, in this paper we also use the term "conflict management" to describe states' efforts to peacefully settle their contentions. Thus, the terms "dispute settlement" and "conflict management" are used interchangeably; Stephen E. Gent, and Megan Shannon, "Decision Control and the Pursuit of Binding Conflict Management: The Ties That Bind," *Journal of Conflict Resolution* 55(5) (2011), pp. 710–734, https://doi.org/10.1177/0022002711408012. According to Jacob Bercovitch and Patrick M. Regan, "conflict

management is widely understood to be an attempt by actors involved in conflict to reduce the level of hostility and generate some order in their relations. Successful conflict management may lead to (a) a complete resolution of the issues in conflict (a change in behavior and attitudes), or as is more common in international relations, to (b) an acceptable settlement, ceasefire or partial agreement"; "The Structure of International Conflict Management: An Analysis of the Effects on Intractability and Mediation," *International Journal of Peace Studies* 4(1) (1999) pp. 1–19. In this context it is also useful to recall Article 2(3) of the UN Charter, which requires states to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered."

2. In good offices, a third party is asked to assist the disputing states in negotiating a peaceful settlement. During the process of conciliation, a third party takes into consideration all elements of the dispute and formally offers terms of a settlement. In mediation, the disputing states ask a third party to influence their perceptions or behavior in the context of the dispute, providing a more active role for the third party in the negotiating process (Jacob Bercovitch and Jeffrey Z. Rubin, *Mediation in International Relations: Multiple Approaches to Conflict Management* [New York: St. Martin's Press, 2011]; Malcolm N. Shaw, *International Law, 5th ed.* [New York: Cambridge University Press, 2003]).

3. Gary L Scott and Craig L. Carr, "The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause," *American Journal of International Law* 81(1) (1987), pp. 57–76, https://doi.org/10.2307/2202131; Beth A. Simmons, "See You in 'Court'? The Appeal to Quasi-Judicial Legal Processes in the Settlement of Territorial Disputes," in Paul F. Diehl (ed.), *A Road Map to War: Territorial Dimensions of International Conflict* (Nashville: Vanderbilt University Press, 1999).

4. Sara McLaughlin Mitchell and Emilia J. Powell, *Domestic Law Goes Global: Legal Traditions and International Courts* (Cambridge: Cambridge University Press, 2011).

5. We argue that it is not only possible, but also conceptually useful to classify legal traditions into categories that share important characteristics. As most scholars agree, this process of classification should be based on identifying fundamental elements of a legal system, through which "the rules to be applied are themselves discovered, interpreted and elaborated" (Rene David and John E. Brierly, *Major Legal Systems in the World Today* [London: Stevens, 1985], 20). However, all legal scholars agree that legal traditions are internally intricate and complex. For discussion of different categorizations of domestic legal systems, and issues of increasing cross-fertilization between them, see Sara McLaughlin Mitchell and Emilia J. Powell, *Domestic Law Goes Global: Legal Traditions and International Courts* (Cambridge: Cambridge University Press, 2011). For Islamic law states' preferences toward international dispute resolution, see Emilia Justyna Powell, "Islamic Law States and Peaceful Resolution of Territorial Disputes," *International Organization* 69(4) (2015), pp. 777–807, https://doi.org/10.1017/S0020818315000156, and Emilia Justyna Powell, *Islamic Law and International Law: Peaceful Resolution of Disputes* (Oxford, UK: Oxford University Press, 2020).

6. Paul R. Hensel and Sara McLaughlin Mitchell, "From Territorial Claims to Identity Claims: The Issue Correlates of War (ICOW) Project," *Conflict Management and Peace Science* 34(2) (2017), pp. 126–140, https://doi.org/10.1177/0738894216652160; Sara McLaughlin Mitchell, "Clashes at Sea: Explaining the Onset, Militarization, and Resolution of Diplomatic Maritime Claims," *Security Studies* 29(4) (2020), pp. 637–670, https://doi.org/10.1080/09636412.2020.1811458.

7. Analyzing data from the Issue Correlates of War (ICOW) Project on diplomatic issue conflicts, the authors show that 41.8% of territorial claims, 28.7% of maritime claims, and 11.2% of river claims have experienced one or more militarized disputes over the issue in question. Thus, diplomatic disagreements over maritime zones result in militarized conflict frequently, although the average dispute severity levels are lower for disputes involving maritime issues. Hensel and Mitchell (2017). For more detailed information on maritime claims, see Mitchell (2020).

8. I.V. Karaman, *Dispute Resolution in the Law of the Sea* (Martinus Nijhoff, 2012), https://doi.org/10.1163/9789004212015.

9. According to Karaman (2012), provisions on dispute settlement "make up almost a quarter (22 per cent) of all of its provisions" (p. 12).

10. States can choose an arbitral tribunal with a general jurisdiction constituted under Annex VII, or a special arbitral tribunal constituted under Annex VIII of UNCLOS. For Annex VII arbitration, the members of the arbitral tribunal do not need any specific legal qualifications, while under Annex VIII arbitration, a list of experts is drawn up in several areas such as fisheries, navigation, and marine scientific research. The tribunal must have at least four of five members coming from this expert list; see Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge, UK: Cambridge University Press, 2005), pp. 56–57.

11. 71% of countries (147 of 194) who have ratified or acceded to UNCLOS do not choose any specific

dispute settlement mechanisms, thus most countries accept Annex VII arbitration as the default settlement procedure if the issue cannot be resolved through negotiations. Among the 29% of countries selecting a forum, the most popular forum is the ITLOS court (N=39), followed by settlement through the International Court of Justice (N=28). Data taken from http://www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm. See Sara McLaughlin Mitchell and Andrew P. Owsiak, "Judicialization of the Sea: Bargaining in the Shadow of UNCLOS," *American Journal of International Law* 115(4) (2021), pp. 579–621, https://doi.org/10.1017/ajil.2021.26.

12. Guzman shows that out of 100 treaties registered with the United Nations Treaty Series, 80 treaties had no mandatory dispute settlement mechanism. See Andrew T. Guzman, "The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms," *Journal of Legal Studies* 31(2) (2002), pp. 303–326, https://doi.org/10.1086/340811.

13. J.G. Merrills, *International Dispute Settlement* (New York: Cambridge University Press, 2017), p. 197, https://doi.org/10.1017/9781316683149.

14. Alan E. Boyle, "Dispute Settlement and the of the Sea Convention: Problems of Fragmentation and Jurisdiction," *International and Comparative Law Quarterly* 46(1) (1997), pp. 37–54, https://doi.org/10.1017/S0020589300060103.

15. A.O. Adede, "Settlement of Disputes Arising Under the Law of the Sea Convention," *American Journal of International Law* 69(4) (1975), pp. 798–818, 798, https://doi.org/10.2307/2200624.

16. For definition of the term "forum shopping," see p. 12.

17. The United States was the key negotiating common law state in the mid–1970s arguing in favor of establishing a new court for UNCLOS. The Montreux formula that emerged in the 1975 Geneva sessions was a compromise proposed by a civil law state (Netherlands), which suggested a choice between three forums for dispute settlement: the ICJ, ITLOS, or an arbitration panel. See A.O. Adede, *The System for Settlement of Disputes Under the United Nations Convention on the Law of the Sea* (Boston: Martinus Nijhoff, 1987).

18. UNCLOS negotiations occurred in three stages. UNCLOS I began in 1958 and led to agreements on the territorial sea and contiguous zone, the continental shelf, the high seas, and fishing and conservation. UNCLOS II convened for a month in 1960 but produced no significant agreements. UNCLOS III began in 1973 and was voted on in 1982, with 130 states voting in favor, 4 against, and 17 abstaining. See Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* (Oxford, UK: Hart Publishing, 2010), p. 14.

19. John R. Stevenson and Bernard H. Oxman, "The Third United Nations Convention on the Law of the Sea: The 1974 Caracas Session," *American Journal of International Law* (69) (1975), p. 3, https://doi.org/10.2307/2200189.

20. The "Area" constitutes 50% of the earth's area and is "defined in Article 1(1) of the LOSC to mean 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.' These limits of national jurisdiction are either 200nm from the territorial sea baselines, or further beyond this distance out to the limits of the outer continental shelf established by states in conformity with Article 76 of the LOSC." Rothwell and Stephens 2010, 121–123.

21. See Adede (1987) for a detailed analysis of the UNCLOS dispute settlement negotiations including the 1974 Caracas session, the 1975 Geneva session, the 1976–1977 New York sessions, and the 1978 Geneva session.

22. Stevenson and Oxman 1975, p. 795.

23. Adede 1987, p. 89.

24. For in-depth discussion of comparative international law, see Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier, and Mila Versteeg (eds.), *Comparative International Law* (New York: Oxford University Press, 2018), https://doi.org/10.1093/oso/9780190697570.001.0001; and Anthea Roberts, *Is International Law International?* (New York: Oxford University Press, 2017). Also, see Dana Zartner, *Courts, Codes, and Custom: Legal Tradition and State Policy Toward International Human Rights and Environmental Law* (Oxford: Oxford University Press, 2014), https://doi.org/10.1093/acprof:oso/9780199362103.001.0001; and Shintaro Hamanaka and Sufian Jusoh, "Domestic Legal Traditions and International Cooperation: Insights from Domestic and International Qualification Systems," *International Political Science Review* (August 2021), https://doi.org/10.1177/01925121211028472.

25. In this context, we wish to emphasize that domestic legal traditions are not monolithic, but instead hybrid. Thus, though our categorization focuses on the major legal traditions: civil, common, and Islamic, there is much diversity within each of these categories. We follow an established practice in the study of comparative law of accepting a classification that provides "an initial picture," while recognizing that no legal classification can constitute "a perfect fit to the real world." See Mathias Siems, *Comparative Law* (Cambridge: Cambridge University Press, 2014) pp. 73–74. Thus, we are keenly aware of the fact that

any classification, including that of domestic legal traditions, or legal families constitutes a relatively rough cut at critical evaluation of the world's legal topography. Furthermore, we recognize that being part of the same legal tradition does not take away the inherent complexity of each domestic jurisdiction. By way of illustration, Scotland, though part of the United Kingdom, a common law country, has a hybrid legal system which strong influences of the civil legal tradition. The same is true for Quebec, where civil matters are regulated according to the principles of civil law. Common law governs over other substantive areas of law, including criminal law and public law. For more information, see Herbert M. Kritzer (ed.), *Legal Systems of the World: A Political, Social, and Cultural Encyclopedia* (Santa Barbara, CA: ABC-CLIO, 2002).

26. Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn, *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht, Netherlands: Martinus Nijhoff, 1982), p. 41.

27. H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford, UK: Oxford, 2014).

28. Nordquist et al. 1982, p. 43.

29. This procedure was challenged by some states such as Argentina on the grounds that the ICJ had optional jurisdiction and thus it would not be appropriate to give it mandatory jurisdiction (Klein 2005, p. 15).

30. The United States held informal consultations with more than 35 delegations towards the end of 1974 and proposed a compulsory dispute settlement procedure establishing the Law of the Sea Tribunal (Adede 1987, p. 13).

31. Siems 2014.

32. Research in legal history and comparative law shows that legal systems vary in their degree of formalism and flexibility (Merryman 1985; Djankov et al. 2002; Koch 2003; and Author). Common law is more flexible than civil law. In comparison with civil law, common law is based on a more freely and dynamic interpretation of rules, as common law judges often create law that amends or builds on the preexisting legal structure. Elaborating on the differences between the civil and common law traditions, Jouannet (2006, p. 309) aptly notes that "Americans [common law] see law as an all-encompassing sociological and political phenomenon, while the French [civil law] see it exclusively as a body of rules and principles."

33. Nordquist et al. 1982, p. 42.

34. The United States also argued that the ICJ was not sufficient for settling maritime disputes because it handled only cases between countries and many maritime issues involved conflicts between private entities and states. See Adede 1987, p. 15.

35. See Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn, *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht, Netherlands: Martinus Nijhoff, 1982), pp. 41–42. Another argument for establishing ITLOS is that specializing in an area of law, such as the law of the sea, brings benefits. This argument, however, may not be advanced only regarding common law states. As legal research demonstrates, all domestic legal systems use some degree of specialization in courts. Common law states use specialized courts in areas such as small claims, traffic, tax, family issues, and bankruptcy. Civil law states, on the other hand, use specialized courts for ordinary private law matters, such as contract, property, employment law, or administrative law. See Gillian Hadfield, "The Levers of Legal Design: Institutional Determinants of the Quality of Law," *Journal of Comparative Economics* (36) (2008), pp. 43–73, https://doi.org/10.1016/j.jce.2007.10.002. In the Islamic legal tradition, religious sharia courts are often used to hear matters of private, family law. See Powell 2020.

36. Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge, UK: Cambridge University Press, 2005), p. 56.

37. Governance in socialist states operates according to socialist law. Most comparative law scholars view socialist law "as a novel outshoot from the civil law family." See W. Partlett, and E.C. Ip, "Is Socialist Law Really Dead?" *New York University Journal of International Law and Politics* 48(2) (2016), p. 463. Socialist law embraces that idea that ownership over the means of production is to be public, relies on a substantially enlarged public law sector, and minimizes the influence of private law. As a legal system firmly anchored in Marxist philosophy of command-style market, the socialist legal system demands that much land and other property is public or belongs to collectivities instead of individuals. In addition, public law is exceedingly formal, full of meticulous rules, and the communist party, as the preserver of the socialist legal order, is largely responsible for the implementation of the legal system. See Glenn 2014.

38. Adede 1987, pp. 83–84.

39. UNCLOS became the first general treaty in which the USSR and its allies "agreed to provisions on binding third-party dispute settlement." See John E. Noyes, "The International Tribunal for the Law of the Sea," *Cornell International Law Journal* 32 (1998), pp. 109–182.

40. We define an Islamic law state "as a state with an identifiable substantial segment of its legal system that is charged with obligatory implementation of Islamic law in personal, civil, commercial, or criminal law, and where Muslims constitute at least 50 percent of the population" (Emilia Justyna Powell, *Islamic Law*

and International Law: Peaceful Resolution of Disputes [Oxford, UK: Oxford University Press, 2020: 1]). See Emilia Justyna Powell, "Not So Treacherous Waters of International Maritime Law: Islamic Law States and the UN Convention on the Law of the Sea," in Anthea Roberts, Pierre Verdier, Paul Stephan, and Mila Versteeg (eds.), *Comparative International Law* (Oxford: Oxford University Press, 2017), pp. 571–594; and Emilia Justyna Powell, *Islamic Law and International Law: Peaceful Resolution of Disputes* (Oxford, UK: Oxford University Press, 2020).We also recognize the contested nature of the term "Islamic law state." See, for instance, Wael Hallaq, *The Impossible State* (New York: Columbia University Press, 2013).

41. Glenn 2014; Powell 2020.

42. The concept of sharia is distinct from the concept of Islamic law sensu stricto. Sharia is a more encompassing concept and refers to the expression of God's will for humans. Thus, sharia cannot be equated merely to a system of laws. See Khaled Abou El Fadl, "Conceptualizing Shari'a in the Modern State," *Villanova Law Review* 56(5) (2012), pp. 803–817. As Bassiouni explains, "the *sharī'a* and Islamic law are distinct from one another. The latter is complementary to the *sharī'a*, which is the primary source, or *aṣl* (*uṣūl*, plural)." See Bassiouni M. Cherif, *The Shari'a and Islamic Criminal Justice in Time of War and Peace* (New York: Cambridge University Press, 2014), https://doi.org/10.1017/CBO9781139629249.

43. The Qur'an is the sacred book of the Muslims, the Sunna records the practices, sayings, and silences of the Prophet Muhammad. Judicial consensus (*ijma*) and analogical reasoning (*qiyas*) constitute juridical techniques and serve as subsidiary sources in the Islamic legal tradition.

44. For in-depth analysis of Islamic law of the sea, see H.S. Khalilieh, *Islamic Maritime Law: An Introduction* (5) (1998). For an analysis of the Islamic milieu's relation with UNCLOS, see Powell 2017.

45. Article 284 identifies conciliation as a tool for dispute settlement. The clause has a *ratione temporis* limitation, though, because it applies only to disputes that arise after UNCLOS enters into force. See Anne Sheehan. "Dispute Settlement Under UNCLOS: The Exclusion of Maritime Delimitation Disputes," *University of Queensland Law Journal* 24 (2005), pp. 165–190.

46. Wael B. Hallaq, *Sharia: Theory Practice Transformations* (Cambridge: Cambridge University Press, 2009), https://doi.org/10.1017/CBO9780511815300.

47. Powell 2020.

48. If a state party does not make a declaration under Article 287, the default dispute settlement procedure is arbitration through Annex VII.

49. Several categories of law of the sea disputes deal directly with issues of sovereignty. Section 3 of UNCLOS lists these categories.

50. See Karaman 2012. The use of a binding forum of arbitration as the default dispute settlement strategy acts as a form of self-binding delegation for UNCLOS members (Alter 2008).

51. In that case, according to Article 281, UNCLOS dispute resolution procedures will apply only if "no resolution is reached through that means and if the parties did not exclude any further procedure in so choosing" (Klein 2005, p. 34).

52. Additionally, Article 283 of the Convention accords primacy to informal dispute settlement mechanisms, such as bilateral negotiations, or other diplomatic means.

53. While the four different binding settlement options in Article 287 are all third-party binding techniques, they are quite distinct from one another. These methods' differences stem precisely from the fact that UNCLOS drafters could not agree on a single binding forum. This multiplicity of different binding forums listed in Article 287 is indeed "an open invitation for the potential applicants to race for the tribunal which is the best suited for them." See Karaman 2012, p. 252. Different procedures suit different countries—this is the core of our argument. For instance, while the more general Annex VII arbitration operates according to procedures highly similar to traditional arbitration used in other areas of international law, the Annex VIII special arbitration is unquestionably unique. The special arbitration may be employed only for a specific set of disputes (dealing with fisheries, marine scientific research, navigation, and pollution from vessels and by dumping, preservation and protection of marine environment). Perhaps most importantly, law does not need to constitute the main bases for deciding a dispute, but it is "regarded more as another type of useful expertise." See Merrills 2017, p. 191. Finally, these special arbitral tribunals are composed according to patterns largely characteristic to conciliation and not arbitration.

54. Gary Goertz, Paul F. Diehl, and Alexandru Balas, *The Puzzle of Peace: The Evolution of Peace in the International System* (Oxford: Oxford University Press, 2016), https://doi.org/10.1093/acprof:oso/9780199301027.001.0001.

55. The disputants can at any time abandon the UNCLOS settlement techniques and resort to any peaceful method of their own choice.

56. According to Goertz, Diehl, and Balas (2016, p. 178), in the context of territorial claims

(1816–1986), binding third-party methods have been the last choice for countries and are outnumbered by mediation and bilateral negotiations. For an insightful analysis of the use of non-formal and formal legal mechanisms in the context of land, river, and maritime claims, see Owsiak and Mitchell (2019).

57. Author's interview (EJP) with state counsel and consultant Ioannis Kostantinidis, Qatar, January 11, 2021. Also cited in Emilia Justyna Powell and Krista E. Wiegand, *The Peaceful Resolution of Territorial and Maritime Disputes* (Book Manuscript, 2021).

58. For an in-depth analysis of international forum shopping, see Aletta Mondre, *Forum Shopping in International Disputes* (Basingsoke, UK: Palgrave Macmillan, 2015), https://doi.org/10.1057/9781137466655. For empirical analyses of forum shopping in the context of territorial disputes, see Emilia Justyna Powell and Krista E. Wiegand, "Strategic Selection: Political and Legal Mechanisms of Territorial Dispute Resolution," *Journal of Peace Research* 51(3) (2014): 361–374, and Krista E. Wiegand and Emilia Justyna Powell, "Past Experience, Quest for the Best Forum, and Peaceful Attempts to Resolve Territorial Disputes," *Journal of Conflict Resolution* 55(1) (2011): 33–59.

59. See Black, Henry Campbell, Joseph R. Nolan, and Michael J. Connolly, *Black's Law Dictionary* (Eagan, MN: West Publishing Company, 1979).

60. Emilia Justyna Powell and Krista E. Wiegand, *The Peaceful Resolution of Territorial and Maritime Disputes* (Book Manuscript, 2021).

61. See Tullio Treves, "Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice," *New York University Journal of International Law and Politics* 31 (1999), pp. 809–820. Article 282 of the Convention states: "If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree."

62. Author's interview (EJP) with state counsel and consultant Ioannis Kostantinidis, Qatar, January 11, 2021. Also cited in Powell and Wiegand (2021).

63. Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford: Oxford University Press, 2003), pp. 22–23, https://doi.org/10.1093/acprof:oso/9780199274284.001.0001.

64. Nordquist et al. 1982, p. 41.

65. Jillaine Seymour, "The International Tribunal for the Law of the Sea: A Great Mistake?" *Indiana Journal of Global Legal Studies* 13(1) (2006), p. 12, https://doi.org/10.2979/gls.2006.13.1.1.

66. See Jonathan I. Charney, "The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea," *American Journal of International Law* 90(1) (1996), pp. 69–75, https://doi.org/10.2307/2203752. The scholarship disagrees on whether forum shopping is a positive or a negative phenomenon. For instance, Karaman (2012, p. 313) writes that "forum shopping is in general a positive phenomenon, since it embodies one of the main principles of international law: settlement of disputes by any peaceful means of the States' own choice."

67. Rosemary Rayfuse, "The Future of Compulsory Dispute Settlement Under the Law of the Sea Convention," *Victoria University of Wellington Law Journal* 36 (2005), pp. 683–711, https://doi.org/10.26686/vuwlr.v36i4.5624.

68. Boyle 1997, p. 47.

69. For discussion of predictability and flexibility of international maritime law, see Tanaka (2006). Also, see Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford: Oxford University Press, 2011), https://doi.org/10.1093/acprof:oso/9780199566532.001.0001, for an argument that increased flexibility in the application of UNCLOS may be required in light of maritime security considerations.

70. Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Portland, OR: Hart Publishing, 2006), p. 5.

71. For more recent development of maritime law in specific areas, see, among others, Natalie Klein, Guilfoyle Douglas, Md Saiful Karim, and Rob McLaughlin, "Maritime Autonomous Vehicles: New Frontiers in the Law of the Sea," *International and Comparative Law Quarterly* 69 (2020), pp. 719–734, https://doi.org/10.1017/S0020589320000226.

72. Colin B. Picker, "International Law's Mixed Heritage: A Common/Civil Law Jurisdiction," *Vanderbilt Journal of Transnational Law* 41 (2008), pp. 1085–1140.

73. As Shaw argues, "One is therefore faced with the problem of discovering where the law is to be found and how one can tell whether a particular proposition amounts to a legal rule." See Malcolm N. Shaw, *International Law, 5th ed.* (New York: Cambridge University Press, 2003), p. 66.

74. Arguably, many provisions of UNCLOS have been clarified via subsequent caselaw. An example is

the concept of "unattributed rights" in the exclusive economic zone. According to Article 59 of the Convention, any conflict over these rights "should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole."

75. Tanaka 2006, p. 7.

76. For more information, see Massimo Lando, *Maritime Delimitation as a Judicial Process* (Cambridge: Cambridge University Press, 2019), https://doi.org/10.1017/9781108608893=. He provides an in-depth analysis of the interplay between states and international tribunals in the evolution of the maritime delimitation process.

77. Richard B. Bilder, "International Dispute Settlement and the Role of International Adjudication," in Charlotte Ku and Paul F. Diehl (eds.), *International Law: Classic and Contemporary Readings* (Boulder, CO: Lynne Rienner, 1998), pp. 233–256.

78. Karaman 2012, p. 247.

79. Powell 2020, p. 108.

80. *Prosecutor v. Dusko Tadič aka "DULE,"* Decision on In the Defense Motion for Interlocutory Appeal on Jurisdiction of October 2, 1995, 35 ILM 1996, 35–74, par. 11.

81. When we refer to an international court's procedures, we are adopting a definition similar to Brown (2007, 8): "'procedure' includes not only the conduct of proceedings, including the power of international courts to rule on preliminary objections, the adduction of evidence, and the exercise of incidental powers, during and after the adjudication on the merits, but also the constitution of international tribunals and questions relating to their jurisdiction."

82. John R. Hibbing and John R. Alford, "Accepting Authoritative Decisions: Humans as Wary Cooperators," *American Journal of Political Science,* 48(1) (2004), pp. 62–76, https://doi.org/10.1111/j.0092-5853.2004.00056.x; Tyler 1990.

83. In an important way, domestic legal systems provide states with clues about a venue's behavior and "the decision-making process itself" (Powell 2020, p. 108). Judge Hardy Cross Dillard of the ICJ has directly referred to the issue of familiarity: "[W]hile perhaps regrettable, it does not seem unnatural that those in charge of the foreign affairs of governments should prefer to settle disputes by processes with which they are familiar, that are flexible, and that remain under their control, rather than risk a settlement through processes with which they are less familiar, that appear more rigid, and that entail a loss of control." See Hardy Cross Dillard, "The World Court: Reflections of a Professor Turned Judge," *American University Law Review* 27(2) (1978), pp. 205–250.

84. Powell 2020.

85. See, for instance, Laurence R. Helfer and Anne-Marie Slaughter. 2005. "Why States Create International Tribunals: A Response to Professors Posner and Yoo," *California Law Review* 93(3) (2005), pp. 901–956 and Eric A. Posner and John C. Yoo, "Judicial Independence in International Tribunals," *California Law Review* 93(1) (2005), pp. 1–74.

86. Sara McLaughlin Mitchell and Emilia J. Powell, *Domestic Law Goes Global: Legal Traditions and International Courts* (Cambridge: Cambridge University Press, 2011).

87. See Alter 2014; Davis 2012; Goertz, Diehl and Balas 2016; Huth, Croco, and Appel 2013; Scott 2014; Emilia Justyna Powell and Krista E. Wiegand, *Peaceful Resolution of Territorial and Maritime Disputes*, Sara McLaughlin Mitchell and John Vasquez, eds., *What Do We Know About War?* (Lanham, MD: Roman and Littlefield, 2021, 191–205.

88. Emilia Justyna Powell and Krista E. Wiegand, *The Peaceful Resolution of Territorial and Maritime Disputes* (Book Manuscript, 2021).

89. Author's interview (EJP) with Hans Corell, former Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations, Stockholm, Sweden, January 13, 2021. Also cited in Powell and Wiegand (2021).

90. Interestingly, state counsels involved in international law of the sea cases are usually based in London, Paris, and the U.S. Frequently, therefore, litigation teams are designed to represent both civil law and common law approaches.

91. Sicco Rah and Tillo Wallrabenstein 2006. "Sustainability Needs Judicial Support: What Does the International Tribunal for the Law of the Sea (ITLOS) Offer in This Respect?" in Peter Ehlers and Rainer Lagoni (eds.), *International Maritime Organisations and Their Contribution Towards a Sustainable Marine Development* (Hamburg, Germany: Lit Verlag, 2006), pp. 285–316.

92. *Bona fides*, or the good faith principle has three constitutive moral elements: honesty, fairness, and reason. See Reinhard Zimmermann and Simon Whittaker, *Good Faith in European Contract Law* (New York: Cambridge University Press, 2000). Good faith has been recognized by the ICJ in several judgments,

including the Norwegian Fisheries case (1951), the North Sea Continental Shelf cases (1969), and the Nuclear Test cases (1973). Following the ICJ, ITLOS has explicitly referred to *bona fides* several times, often referring to its treatment by the ICJ (The Volga case, 2002).

93. For the lack of official doctrine of the precedent, see Articles 33 and 124 of the Rules of UNCLOS and Article 59 of the ICJ Statute. These provisions limit the court judgment's binding force only to the disputants and to the case in question. Interestingly, the ICJ referred to "its settled jurisprudence on maritime delimitation" in a recent ruling (*Maritime Delimitation in the Black Sea [Romania v. Ukraine],* Judgment February 3, 2009, ICJ Reports 2009, p. 61).

94. In this context we wish to highlight that the distance between common and civil legal traditions regarding formality of in-court proceedings has narrowed considerably. Particularly notable are changes in common law procedure since the late 1990s including, for example, the introduction of the uniform rules of civil procedure in the United Kingdom. For more information on this topic, see Neil Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System* (Oxford: Oxford University Press, 2003); and Colin Lockhart, Andrew Hemming, and Tania Penovic, *Civil Procedure in Australia* (LexisNexis Butterworths, 2014).

95. For instance, ITLOS refers to the ICJ's treatment of international legal doctrines and rules and often cites its judgments to support its own legal reasoning (See, for instance, de la Fayette 2000). The ICJ has sent all of its publication to ITLOS "as a friendly gesture to a fellow judicial organ." See Rao 2002, p. 296.

96. Merrills 2017, pp. 200–201.

97. In this context it is interesting to note that ICJ and ITLOS proceedings are, in many aspects, similar. In particular, the practice of dispute settlement in either forum invariably has a formal presentation of the parties' oral arguments and the repeated exchange of complex written pleadings (both stages in rounds).

98. We describe only differences and similarities between ITLOS and the ICJ that pertain to our argument, and thus deal with legal characteristics of the two courts. We acknowledge that there are several other differences not associated with inter-legal traditions differences.

99. Rao, P. Chandrasekhara. 2002. "ITLOS: The First Six Years," in J.A. Frowein and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law vol. 6* (Netherlands: Kluwer Law International), p. 217, https://doi.org/10.1163/138946302775159389.

100. In comparison, 109 Articles constitute the Rules of the International Court of Justice.

101. Yet, in comparison with domestic courts in either common or civil law jurisdictions, the ICJ and ITLOS are much less prescriptive in terms of their procedural rules. Indeed, disputes between states—sovereign entities—are unique, and international judges, regardless of their legal background, recognize the political sensitivities of maritime contentions. Also, there are very strict time limits before ITLOS in the special procedure for prompt release of fishing vessels.

102. Natalie Klein (ed.), *Litigating International Law Disputes: Weighing the Options* (New York: Cambridge University Press, 2014), https://doi.org/10.1017/CBO9781139062008.

103. Also, state-parties can choose to set up an arbitral tribunal by agreement, pursuant to UNCLOS provisions that allow states to select any peaceful means of their choice. See Merrills 2017, p. 187.

104. The arbitrators are to be experts in the fields of fisheries, protection of the marine environment, marine scientific research, and navigation (Annex VIII, Art. 2).

105. UNCLOS, Annex VIII, Art. 5.

106. Tullio Treves, "Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice," *New York University Journal of International Law and Politics* 31 (1999), p. 817.

107. Cassese, Antonio. *International Law*, 2d ed. (Oxford, UK: Oxford University Press, 2005); Louise De La Fayette, "ITLOS and the Saga of the Saiga: Peaceful Settlement of a Law of the Sea Dispute," *The International Journal of Marine and Coastal Law* 15(3) (2000): 355–392, https://doi.org/10.1163/157180800X00163.

108. Arbitrators do not have to be international judges. For example, in the ICJ *Argentina–Chile* case of 1966 (38 ILR, p. 10), the tribunal consisted of a lawyer and two geographical experts.

109. See Pieter H.F. Bekker, "Taking Stock Before ITLOS Takes Off: A Citation Analysis and Overview of the Maritime Delimitation Case Law," Paper presented at Sixth ABLOS Conference, Monaco, October 27, 2010. Interestingly, Annex VII arbitral tribunals, despite their relatively young age when compared with the ICJ, have referred to ICJ decisions and arbitral awards "even more frequently than the ICJ itself" (Bekker 2010, p. 6).

110. For example, the arbitral award in Barbados-Trinidad and Tobago contains "43 references to all available ICJ precedents and six references to four of the six 'pure' ad hoc decisions, while the award in Guyana-Suriname refers 39 times to all available ICJ precedents and 11 times to four ad hoc awards" (*Ibid.*).

111. Emphasis added by the authors.

112. In this context, it is important to note that many civil law states have adopted legislation that

introduces more flexible procedures of dispute settlement, including alternative dispute resolution (ADR). In general, ADR, such as mediation, provide less costly alternatives to in-court litigation. These methods are frequently seen as better able to further interests of all parties concerned. Moreover, the use of ADR reduces the pressure on often overburdened courts while providing cost savings for the parties. See Klaus J. Hopt and Felix Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2012).

113. Powell 2015, Powell 2020.

114. This is quite distinct from the behavior of Islamic law countries towards other international courts. Only five Islamic law countries have ratified the Rome Statute, whereas only six Islamic law countries have ever recognized the compulsory jurisdiction of the World Court (Mitchell and Powell 2011).

115. Oceans and Law of the Sea UN, "Settlement of Disputes Mechanism," August 30, 2019, http://www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm, accessed October 18, 2021.

116. The Correlates of War Project, http://www.correlatesofwar.org/, accessed October 18, 2021.

117. This data is taken from Mitchell and Powell (2011) which describes the histories and characteristics of each major legal tradition. Mixed legal systems combine elements from two or more major legal traditions (e.g., common and Islamic law). Importantly, in our dataset, following an accepted methodology in the scholarship, we use only major legal systems, as defined by Gamal Moursi Badr, "Islamic Law: Its Relation to Other Legal Systems," *American Journal of Comparative Law* 26(2) (1978), p. 187, https://doi.org/10.2307/839667. A major legal system must have a substantial geographical influence, and its influence over state governance must be long-lived (see Mitchell and Powell 2011, 22). We recognize that there are other domestic legal systems, or traditions, that do not meet these requirements, such as the Confucian legal tradition, or socialist law. See Glenn 2014.

118. We should point out that President George W. Bush also pushed for the United States to finally ratify UNCLOS, yet the Senate did not agree.

119. Mitchell and Powell 2011.

120. New Zealand has not made an Article 287 application; Australia declared ITLOS and then ICJ as its choices of venues. Award on Jurisdiction and Admissibility rendered 08/04/2000, available at Reports of International Arbitral Awards, "Reports of International Arbitral Awards: Southern Bluefin Tuna (New Zealand–Japan, Australia-Japan)," https://legal.un.org/riaa/cases/vol_XXIII/1-57.pdf, accessed October 20, 2021.

121. Award by the Permanent Court of Arbitration, April 11, 2006.

122. Mitchell and Powell 2011; Emilia Justyna Powell, "Not So Treacherous Waters of International Maritime Law: Islamic Law States and the UN Convention on the Law of the Sea," in *Comparative International Law*, Anthea Roberts, Pierre Verdier, Paul Stephan, and Mila Versteeg, eds. (Oxford: Oxford University Press, 2018, pp. 571–594).

123. George E. Irani and Nathan C. Funk, "Rituals of Reconciliation: Arab-Islamic Perspectives," *Arab Studies Quarterly* 20(4) (1998), 53–73.

124. Our multivariate models show that Islamic law states are more likely than common law states to select Annex VII or Annex VIII arbitration under Article 287.

125. Article 284 of the Convention states: "A State Party which is a party to a dispute concerning the interpretation or application of this Convention may invite the other party or parties to submit the dispute to conciliation in accordance with the procedure under Annex V, section 1, or another conciliation procedure."

126. Oceans and Law of the Sea UN, "Settlement of Disputes Mechanism," August 30, 2019, http://www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm, accessed October 18, 2021.

127. 75% of states rank the ICJ first, 18% rank it second, while 7% rank it third. We should note that three countries declared the ICJ to be an unacceptable forum: Cuba, Guinea-Bissau, and Algeria. We code the ICJ variable as zero for these cases.

128. Mitchell and Powell 2011.

129. The capabilities measure is each state's CINC score in the year they ratified or acceded to UNCLOS. The CINC score reports a state's percentage of total systemic military (personnel, expenditures), economic (energy consumption, coal/steel production), and demographic capabilities (total/urban population); the average for our sample is .005. For regime type, we use the Polity score (in ratification year) which subtracts a state's autocracy (0–10) score from its democracy (0–10) score. These dimensions are based on the competitiveness of political participation, the level of constraints on the chief executive, and the openness and competitiveness of chief executive recruitment. The average for our sample is 2.4. Inclusion of regime type removes several common law countries from the analysis because many island states do not have Polity scores, but this does not bias results on our other variables of interest.

130. Common law states are the reference category. Mixed law countries also get removed from the model because none have signed an Article 287 declaration. We get similar results using the La Porta et al.

(1999) categorization for legal systems based on colonial legacy; countries with British colonial legacy are less likely to recognize ITLOS or the ICJ through Article 287 declarations than countries with other colonial legacies (French, German, Socialist, or Scandinavian).

131. ICJ Judgments 12/13/2007, 05/04/2011 (*Nicaragua v. Colombia*), and 10/08/2007 (*Nicaragua v. Honduras*), available at: https://www.icj-cij.org/en/case/124/judgments. However, because of the timing of UNCLOS ratification by the disputing parties, Seymour (2006, p. 13) argues that "it is not clear that they [these cases] necessarily demonstrate a general preference for the ICJ."

132. See ITLOS, "Declarations of States Parties Relating to Settlement of Disputes in Accordance with Article 287 (Choice of Procedure)," 2011, https://www.itlos.org/en/main/jurisdiction/declarations-of-states-parties/declarations-made-by-states-parties-under-article-287/, accessed on October 20, 2021.

133. Posner and Yoo 2005.

134. These sentiments contributed to the size of ITLOS bench being substantially larger than that of the ICJ. On developing states' preferences more generally, see Klein (2014) and Douglas Guilfoyle, "Governing the Oceans and Dispute Resolution: An Evolving Legal Order?" in Danielle Ireland-Piper and Leon Wolff (eds.), *Global Governance and Regulation: Order and Disorder in the 21st Century* (New York: Routledge, 2020).

135. Noyes 1998, p. 115.

136. Mitchell and Powell 2011.

137. William Dixon, "Democracy and the Peaceful Settlement of International Conflict," *American Political Science Review* 88 (1) (1994), pp. 14–32, https://doi.org/10.2307/2944879.

138. Todd L. Allee and Paul K. Huth, "The Pursuit of Legal Settlements to Territorial Disputes," *Conflict Management and Peace Science* 23 (4) (2006), pp. 285–307, https://doi.org/10.1080/07388940600972644.

139. Mitchell and Powell 2011.

140. Stephen C. Nemeth, Sara McLaughlin Mitchell, Elizabeth A. Nyman, and Paul R. Hensel, "Ruling the Sea: Managing Maritime Conflicts Through UNCLOS and Exclusive Economic Zones," *International Interactions* 40(5) (2014), pp. 711–736, https://doi.org/10.1080/03050629.2014.897233.

141. Mitchell and Owsiak (2021) confirm these out of court bargaining patterns. The authors find no cases of binding settlement in dyads where both states have accepted the ICJ or ITLOS through Article 287 declarations. Thus, states can avoid going to court in situations where it is most plausible.

142. Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge, UK: Cambridge University Press, 2005), p. 2.

143. Noyes 1998, p. 175.

144. Charney 1996, p. 71.

145. Bilder 1998.

146. Mitchell and Owsiak (2021) find that states who jointly declare the same Article 287 forums (e.g., both prefer ITLOS) are more likely to utilize bilateral negotiations to resolve ongoing maritime disputes. Thus, states do bargain more effectively in the shadow of international courts. However, this article does not examine how domestic legal traditions interact with UNCLOS commitments to influence maritime disputes.

147. Hensel et al. 2008; Hensel and Mitchell 2017.

Biographical Statements

Emilia Justyna Powell is an Associate Professor of Political Science and Concurrent Associate Professor of Law at the University of Notre Dame. She has written extensively on international law, international courts, international dispute resolution, the Islamic legal tradition, and Islamic constitutionalism. Her prominent publications include *Islamic Law and International Law: Peaceful Resolution of Disputes* (Oxford University Press, 2020) and *Domestic Law Goes Global: Legal Traditions and International Courts* (Cambridge University Press, 2011).

Sara McLaughlin Mitchell is the F. Wendell Miller Professor of Political Science at the University of Iowa. She is the author of six books and more than sixty journal articles and book chapters. She has received over 1.1 million dollars in external grants. She received the ISA Quincy Wright Distinguished Scholar Award (2015) and served as President of the Peace Science Society (2014–2015). She is co-founder of the Journeys in World Politics workshop.

Spanish Maritime Navigation Law: Some Territorial Questions[1]

José Manuel Martín Osante

Structured Abstract

Article Type: Research paper

Purpose—To specify what maritime transport is covered by Spanish regional regulations, in order to specify the scope of Spanish Maritime Navigation Act 14/2014 of July 24. Likewise, the relationship in Spain between the Maritime Navigation Law and international Conventions ratified and in force in Spain, regulating issues related to maritime navigation, is studied to understand their respective scopes of application.

Design, Methodology, Approach—Under the division of powers between central government—"the State"—and the devolved regional governments—"autonomous communities" (provided for in the Spanish Constitution and under the provisions of the Royal Legislative Decree 2/2011 of September 5 approving the Consolidated Text of the Law on State Ports and the Merchant Marine)—those autonomous communities with coastlines have taken over authority in matters of maritime transport carried out exclusively between points or ports of each respective autonomous community. It is therefore necessary to examine the regulations of the Spanish autonomous communities, the State law, and the international Conventions on maritime navigation to know the respective scope of application of these regulations.

Findings—The Spanish autonomous communities cannot regulate legal-private aspects of maritime transport carried out for commercial purposes, but they will be able to regulate maritime transport that is within autonomous competence (between ports or points of the same autonomous community), carried out for non-commercial purposes (recreational, sports…). The option of the Spanish Maritime Navigation Act 14/2014 of regulating some maritime institutions (internal cases) by referrals to the international Conventions (not applicable to internal cases), determines that the regulation of internal cases, is the planned in the Convention.

Practical implications—Useful for professionals in the maritime and port sector, for public administration workers and for undergraduate and postgraduate students in law.

Email: *martin.osante@ehu.es*

Journal of Territorial and Maritime Studies / Volume 9, Number 1 / Winter/Spring 2022 / pp. 34–49 /
ISSN 2288-6834 (Print) / DOI: 10.2307/JTMS.9.1.34 / © 2022

Originality, Value—After the first years of application of the Spanish Maritime Navigation Act 14/2014, and given the scarcity of studies on the matter, it is necessary to specify its scope of application.

Keywords: autonomous communities, autonomous powers, international maritime conventions, maritime navigation, maritime transport, ports, State powers, uniformity of maritime law

I. The Distribution of Authority Between the State and the Autonomous Communities: Special Reference to Maritime Transport and Ports

1.1 Maritime Transport

The scope of authority of Spain's autonomous communities in matters of maritime transport is limited by Article 149.1.20 of the Spanish Constitution (referred to here by its Spanish acronym CE), which states that the State holds exclusive authority in "merchant marine" matters, so authority for any maritime transport that can be included under the "merchant marine" concept cannot be devolved to the regions but is reserved solely for the central authorities.

In this regard, an examination of the provisions of Royal Legislative Decree 2/2011 of September 5 Approving the Consolidated Text of the Law on State Ports and the Merchant Marine (LPEMM) is of interest. Art. 6.1 of the said Law sets limits on the meaning of the phrase "merchant marine" by listing a number of areas of authority of the State in regard to maritime navigation, including "a) Maritime transport operations, except those that take place exclusively between ports or points of the same autonomous community, provided that the said community has authority in this matter, with no connections to ports or points of other territories."[2] This means that the authority on matters of maritime transport that the autonomous communities can take on (and indeed have taken on) must refer to maritime transport carried out exclusively in the waters of each respective autonomous community,[3] i.e., between points of ports of that autonomous community with no connections with points or ports of other autonomous communities or other territories (e.g., points or ports in other countries).[4]

Under this distribution of authority, the statutes of autonomy of all the coastal autonomous communities except Galicia include an express take-up of authority on matters of maritime transport. Specifically, the Statute of Autonomy of the Basque Country[5] (Art. 10.32) attributes exclusive authority to that autonomous community on matters of maritime transport with the following wording: "32. Railways, overland, maritime, river and cable transport, ports, heliports, airports and the Meteorological Service of the Basque Country, without prejudice to the provisions of Article 149.1.20 of the Constitution…." Similarly, Law 2/2018 of June 28 on Ports and Maritime Transport in the Basque Country (LPTMPV) envisages the regulation of "ports" and "maritime transport" under the authority of the said community.[6]

Along these lines, the Statute of Autonomy of Andalusia[7] (Art. 64.1.2) envisages the region

as having sole authority over "maritime and river transport of passengers and freight carried out entirely within the waters of Andalusia." Similarly, the Statute of Autonomy of Asturias[8] states that the Principality of Asturias has sole authority over "maritime transport carried out exclusively between ports or points of the autonomous community with no connections with ports or points of other territories" (Art. 10.6). With almost identical wording, Art. 30.6 of the Statute of Autonomy of the Balearic Islands[9] states that the region has sole authority over "maritime transport carried out exclusively between ports or points of the autonomous community with no connections with ports or points of other territories." Sole authority "over maritime transport that takes place entirely within the confines of the archipelago" is also assigned to the Autonomous Community of the Canary Isles under Art. 160.1 of its Statute of Autonomy.[10] The same goes for the Statute of Autonomy of Cantabria,[11] as per Art. 24.7.

The Statute of Autonomy of Catalonia[12] assigns authority to the region in matters of maritime transport under Article 169.6: "Article 169. Transport. 6. The Autonomous Community shall have sole authority on matters of maritime and river transport carried out entirely within Catalonia, with respect for the authority of the State on merchant marine and port matters. This includes: a) the regulation, planning and management of maritime and river transport of passengers; b) administrative actions in the performance of services and the exercising of activities concerned with maritime and river transport; c) the requirements for the exercising of activities." However, the Statute of Autonomy of Galicia[13] does not expressly mention the sole authority of the region on matters of maritime transport carried out entirely within Galicia.[14] The Statute of Autonomy of the Region of Murcia[15] declares the sole authority of the region on matters of "maritime transport between ports or points of the autonomous community with no connections with ports or points of other territories" (Art. 10.4). In the case of the Statute of Autonomy of the Community of Valencia,[16] Art. 49.1.15 establishes that the autonomous community government has sole authority over "Railways, overland, maritime, river and cable transport, ports, airports, heliports, and the Meteorological Service of the Community of Valencia, without prejudice to the provisions of points 20 and 21 of subsection (1) of Article 149 of the Spanish Constitution."

In line with the provisions of Articles 149.1.20 of the CE and Article 6.1 of the Law on State Ports and the Merchant Marine (LPEMM), and in line with the authority assumed by the coastal autonomous communities on matters of maritime transport, there is a need to examine how this devolved authority is coordinated with the regulation of maritime transport envisaged in Spanish Maritime Navigation Act 14/2014 of July 24 (SMNA). The following can be asserted:

1. The legislators who drew up the SMNA took into account the distribution of authority between the State and the autonomous communities, as shown in Final Provision 6 ("Titles of Authority"), which states that "this Law is drawn up pursuant to the provisions of Articles 149.1.6 and 20 of the Spanish Constitution, under which the State holds sole authority on matters of mercantile, procedural and merchant marine legislation."
2. Authority on mercantile and procedural legislation is held solely by the State (Article 149.1.6 CE), with such legislation being understood to mean the regulation under private law of mercantile matters and not the regulation under public law or the structuring of or intervention in certain sectors of the economy.[17] Thus, private-

law aspects of maritime transport carried out for trade purposes (the framework of liability for damages arising from maritime transport of passengers or freight, collisions, privileges, limitations on liability, piloting, towing, etc.) and procedural issues (regulation of preventive attachment of vessels or craft, etc.) are under the sole authority of the State. As a result, the regulation in private law of maritime transport for trade purposes envisaged in the SMNA (contracts on matters of transport, towing, piloting, collisions, salvage,[18] limitations on liability, etc.) applies to both transport between ports or points of the same autonomous community (for which authority lies with each region) and transport between ports or points of different autonomous communities (for which authority lies with the State).

3. Regional regulations on maritime transport do not envisage full regulation of such transport but focus on the areas of devolved authority in maritime transport as an economic activity.[19] They thus cover public-law aspects such as structuring, taking into account that sole authority for mercantile legislation lies with the State. Thus, private-law aspects of maritime transport not regulated under regional legislation are subject to the SMNA and to such other State, autonomous community and international level regulations as may be applicable.

4. Article 149.1.6 CE attributes sole authority to the State on matters of mercantile and procedural legislation, but the statutes of autonomy of the autonomous communities with coastlines declare that they hold authority over maritime transport in generic terms, without excluding mercantile or procedural aspects. Indeed, there is no need to specify such exclusions in mercantile and procedural matters, as they are already attributed exclusively to the State. However, in the particular case of the Basque Country, regional authority extends also to maritime transport for non-mercantile purposes. This can be deduced firstly from Articles 1 and 2 of Law 2/2018 of June 28 on Ports and Maritime Transport in the Basque Country, which does not require the maritime transport in question to be carriage for reward, and secondly from the explanatory statements for the said Law (paragraph 6), which indicate that the regulation is intended to cover "maritime transport needs of a commercial, fishing and recreational nature." Accordingly, the maritime transport for which the Basque Country holds authority extends also to transport for sports, recreational, research and other non-mercantile purposes. In such cases, the reservation for the State of authority on mercantile legislation does not seem to be applicable. However it is considered under Article 149.1.6 CE that private-law aspects of maritime transport for sporting, recreational and research purposes must be regulated by the State.[20] We believe that the Basque Law on Ports and Maritime Transport could have regulated these private-law aspects, but the fact is that it does not do so.

1.2 Ports

Ports are closely linked to maritime transport, given that they are natural locations or artificial infrastructures that facilitate such transport. Accordingly, an awareness of the legislative framework on ports is of interest here. The basic lines are established in Articles 148.1.6 and 149.1.20 CE.

The distribution of authority for ports set out in the Spanish Constitution is based on

Article 148.1.6, which envisages that the autonomous communities may take on authority on matters of "ports of refuge, marinas and recreational airports and, in general, those which do not engage in commercial activities," while Art. 149.1.20 CE specifies that the State holds sole authority over "ports of general interest"[21] (as also stated in Art. 11.1 LPEMM[22]). In line precisely with the provisions of Articles 148.1.6 and 149.1.20 CE, the ten autonomous communities with coastlines (Andalusia, Asturias, the Balearic Islands, the Canary Isles, Cantabria, Catalonia, Galicia, Murcia, the Basque Country and Valencia) have taken over ownership of all their marinas and other ports except those considered of general interest.[23] In any event, it cannot be deduced from the said provisions that the purpose of the wording in the Constitution was to establish an orderly classification of ports, but rather to merely specify which ports fell under the authority of the State and which under that of the autonomous communities.[24]

The delimitation envisaged in the Constitution as to which ports are under the authority of the State and which under that of the regional governments is imprecise. It states that ports of general interest are under State authority and ports of refuge, marinas and ports where there are no commercial operations may be controlled by the autonomous communities, but it does not specify who has authority over commercial ports which are not classed as being of general interest. The Constitution must not be understood as stating that trading ports and ports of general interest are the same thing. It does not give the State exclusive authority over "commercial ports" but over "ports of general interest."[25] The argument that they are one and the same thing would substantially restrict the areas of authority of the autonomous communities. This is why the LPEMM first draws a distinction in Article 2.4 between two categories, i.e., "commercial"[26] and "non-commercial" ports,[27] and then specifies in Article 3.4 that a number of ports are not classed as "commercial." This is an attempt to specify the possibility of the autonomous communities taking over authority for such non-commercial ports under Art. 148.1.6 CE, a provision which enables them to be given authority over ports which "do not conduct commercial activities," insofar as they are not ports "of general interest." The latter are above the authority of the autonomous communities and are defined and delimited in Article 4 LPEMM.

Article 4.5, para. 2 of the LPEMM does, however, acknowledge the possibility that the autonomous communities may hold authority over ports classed as "commercial" under the LPEMM: "Commercial operations at ports under the authority of the autonomous communities may only be carried out if the ministries indicated in the foregoing paragraph give their authorisation […]." Under this provision, and taking into account that the Constitution does not draw any equivalence between commercial ports and ports of general interest, it can be stated that the autonomous communities hold authority over commercial ports which are not ports of general interest.[28]

II. The Maritime Navigation Law and International Conventions[29]

2.1 Internal and International Maritime Regulation: Approach to the Problem

The legal framework covering maritime navigation is characterised by a broad range of uniform or international regulations in a number of sectors, such as carriage of freight,

carriage of passengers, collisions, salvage, privileges, limitation of liability, marine pollution, arrest of ships, etc., that coexist with internal or domestic maritime legislation. This double regulation—internal and international—is a source of contradictions and leads operators to face situations of great legal uncertainty, as it is often no simple matter to determine when it is internal regulations that must be applied and when it is international regulations.[30]

In this regard it must be taken into account that international conventions are directly applicable in Spain and form part of the body of law once they have been ratified and published in the BOE [Spanish Official Gazette], in line with Article 96.1 of the Spanish Constitution and Article 1.5 of the Spanish Civil Code. Nor can international conventions be repealed or modified by internal Spanish legislation. Specifically, the provisions of such conventions can only be repealed, amended or suspended in the manner envisaged in the treaties themselves or under the general rules and regulations of international law.

A distinction must be drawn here between universal and non-universal conventions.[31] Universal conventions are those which are applicable to both international and domestic events (e.g., the 1993 Maritime Liens and Mortgages Convention,[32] the 1989 Salvage Convention[33] and the 1976 International Convention on Limitation of Liability for Maritime Claims[34]), while non-universal conventions are applicable to international events but not to domestic ones (e.g., the 1910 Collision Convention,[35] the Hague-Visby Rules,[36] the 1974 Athens Convention 1974[37] and the Arrest of Ships Convention 1999[38]).

One of the goals of the SMNA is precisely to coordinate its contents with international maritime law so as to overcome the current contradictions between the different international conventions in force in Spain and the various domestic provisions governing the relevant matters, as indicated in Point 1 of its Preamble.[39] Accordingly, Article 2 of the SMNA establishes under the heading "Sources and interpretation" that "1. This Act shall be applied as long as it does not oppose the terms set forth in the international treaties in force in Spain and the legal provisions of the European Union that regulate the same matters (…)," and "2. In all cases, for interpretation of the provisions of this Act, the provisions contained in the international treaties in force in Spain and the convenience of promoting uniform regulation of the matters it forms shall apply." This goal of ensuring uniformity seeks to put an end to the much-criticised dual provisions that exist in such matters in many fields in which Spain has ratified various international conventions on the one hand, but has domestic legislation on the other that often fails to comply with those conventions. This is pointed out in Point II of the Preamble to the SMNA.[40]

In any case, these lines will show whether or not the legislative technique used in Spanish law is conducive to the uniformity of maritime law, and whether the internal regulations adopted in Spanish law are necessary or not, taking into account that international conventions ratified by Spain are already part of its internal legal system. On the other hand, the scope of Article 2 of the Spanish Act will be examined. That article establishes the priority application of the conventions over domestic legislation, and the need for the rules of Spanish law to be interpreted in accordance with the provisions of international law to foster uniformity.

2.2 Legislative Technique Used in the Maritime Navigation Law

The legislative technique used in the Spanish Maritime Navigation Act 14/2014 (SMNA) to coordinate the national regulation with the contents of the international

conventions is different from the one adopted in the Proposal of 2004. In the Proposal it was decided to reproduce the full contents of the conventions in the internal law. Indeed, the Proposal regulated completely the different maritime institutions, including institutions that were already regulated in international conventions which were previously part of the Spanish domestic legal system and whose scope of application extended to domestic factual cases.[41] In these cases where maritime institutions are regulated by universal conventions (applicable to internal and international cases), the Spanish legislator's wording in the 2004 Proposal tried to match the one referred in those conventions, but used more suitable terms to our legal system. The writers of the Proposal recognizes this in the Explanatory Memorandum: "When writing the precepts of the Law incorporated into the conventions, it has been sought to use the appropriate concepts and terminology to our own legal system; this technique has the advantage that it offers a compact text without the need for the person applying the rule to refer to texts other than the general included in the Law."[42] On the other hand, the writers adopted also a regulation for the maritime institutions contemplated in non-universal conventions (not applicable to internal cases).

The legislative technique of the Proposal of 2004 consisted, in short, in a duplication of the texts of the International conventions in the Internal Law, although the duplication was not literal; in the Internal Law, some slight modifications were introduced or the contents of the conventions were partially reproduced.[43] This technique was criticized because it presented the inconvenience of generating a double regulation of the same maritime institutions, the international regulation (the conventions) which was already part of the Spanish legal system due to its publication in the Official State Gazette and the internal regulation (Spanish Maritime Navigation Law) which reproduced—with nuances—the text of the conventions.[44] Additionally, the modification of the International conventions would not have an immediate reflection in the Spanish internal Maritime Navigation Law, as it would be necessary to modify the Internal Law (to adjust it to the convention), so the reforms could not present the necessary agility for a better protection of the maritime sector.[45] The criticism of 2004's legislator option and the problems created by the duplicity of regulations led to reject this technique of duplication.

The legislative technique of the 2004 Proposal, rather, the duplication of the conventions, was replaced by the referral to the conventions. The Spanish legislator, taking as a starting point the text of 2004, started to eliminate its duplications of the conventions, with the intention of suppressing the international and national double regulation. Instead of reproducing at all the conventions, the Spanish legislator regulates the maritime institutions conducting a referral to the existing international convention regarding to the specific maritime institution. This technique is already present in General Maritime Navigation Bill of 2006, as well as in the later ones of 2008 and 2013, and in the current law (SMNA 2014).[46] Specifically, the remission made by the SMNA 2014 to international conventions is double, a general one in its Article 2, recognizing the hierarchical superiority of international conventions and the specific referrals foreseen in each institution that already had an international regulatory convention.[47]

The general remission of the Article 2 SMNA establishes: "1. This Act shall be applied as long as it does not oppose the terms set forth in the international treaties in force in Spain and the legal provisions of the European Union that regulate the same matters (…),"

admitting with it, explicitly, that the conventions will be of preferential application with respect to the Internal Law (SMNA 2014).

The SMNA 2014 incorporates several specific referrals to the conventions as well. Indeed, the aforementioned Law frequently uses the technique of referral to the international convention in force in Spain to determine the source applicable to a particular maritime institution (maritime liens and mortgages, limitation of liability, collision, salvage, arrest of ships, etc.). In other words, the national law itself establishes that the regulation of a particular maritime institution is the one contained in the international convention. However, the Spanish legislator does not limit itself to collecting this referral to the international convention but, after this referral, it proceeds to regulate some specific aspects of the different maritime institutions, thus increasing the possibilities of friction between the two (international and national) legal texts.

The specific referrals that the Spanish Law (SMNA) completes to the international conventions are: *Maritime liens*: Article 122 SMNA, *Carriage of goods*. Liability of the carrier for loss, damage or delay: Article 277 SMNA "Liability regime"; *Passage contract*. Article 298 SMNA "Regime of liability"; *Collisions*. Article 339.1 SMNA "Legal regime and concept of collision"; *Salvage*. Article 357 SMNA "Legal regime"; *Limitation of liability*. Article 392 SMNA "Right to limit liability"; *Arrest of ships*. Article 470.1 SMNA "Nature and regulation of the measure."

III. Consequences of the Legislative Technique Used

3.1 Generic Referral to the International Conventions

1st. The general referral of the Article 2.1 SMNA (under the title "Sources and interpretation"), "1. This Act shall be applied as long as it does not oppose the terms set forth in the international treaties in force in Spain (…)," in which the hierarchical superiority of the International conventions is recognized, is unnecessary as it reiterates what is already provided in Article 96.1 of the Spanish Constitution and in Article 1.5 of the Spanish Civil Code.[48] This forecast contained in Article 2.1 SMNA does not add anything with respect to what has already been foreseen in our system, so its absence would not alter the source regime.

2nd. As regards to the reference contained in Article 2.2 SMNA, "2. In all cases, for interpretation of the provisions of this Act, the provisions contained in the international treaties in force in Spain and the convenience of promoting uniform regulation of the matters it forms shall apply," has as purpose the uniform application of the provisions of international conventions. However, as has been already indicated,[49] it is a rule that has not possibilities of effective practical implementation, given that there is not a unique judiciary that applies the convention and sets uniform criteria for interpreting and applying the conventions, it is that each Member State shall apply the conventions through their respective national court, and the decision of the Supreme Court of a Member State is not binding for other Member States. It should be added that SMNA 2014 is an internal law and, in its provisions, together with the referral to the conventions, there are Articles regulating maritime

institutions either complementing or putting aside the convention. In this case, in which the internal law does not follow the convention, it cannot be used as an interpretive criterion "the convenience of promoting uniform regulation," because the rule does not have an international origin but internal and the purpose of the internal regulation is precisely to depart from the uniformity.[50]

3.2 Specific Referral to the Conventions Applicable to Internal and International Cases

The specific referrals made by the SMNA to universal conventions, that is, applicable to internal and international cases, are in Articles 122 SMNA (referral to the Convention on Maritime Liens and Mortgages, done at Geneva, on May 6, 1993), 357 SMNA (referral to the International Convention on Salvage, done at London on April 28, 1989) and 392 SMNA (referral to the Protocol of 1996 that amends the Convention on Limitation of Liability for Maritime Claims, done at London on November 19, 1976). These referrals would come to reiterate what the Articles 96.1 Spanish Constitution and 1.5 Spanish Civil Code already stipulate, that is, that regulations governing the aforementioned maritime institutions are those contained in the international conventions. The conventions belong to our internal legal system once they are published in the BOE [Spanish Official Gazette], and they constitute the applicable norm to the maritime institutions contemplated in aforesaid conventions. The specific referrals of the SMNA do not add nothing to what our system plans in general terms for matters regulated in international conventions. In this sense, the referrals are redundant, but at the same time clarifying as they specify the legal regime applicable to maritime liens, salvage and limitation of liability.

However, doubts about the legislative technique used arise because the Spanish legislator (SMNA) is not limited to making a specific referral to the conventions, but then specifies that the regulatory source is not only the convention to which it refers, but also the (internal) provisions that are added in the SMNA itself.[51] Thus, together with the referral to the convention we have an additional regulation in the internal law (SMNA).

In this sense, the provisions adopted by the SMNA, additionally to the convention (to which the SMNA is forwarded), could complement the convention when regulating those aspects which it leaves to the Member States to regulate with their internal laws. These SMNA internal rules are perfectly valid: by observing the system of sources in particular, they do not contradict the convention, since they are adopted within the margins of the convention and under the provisions of the convention. To this type of internal provisions refers the Preamble of the SMNA, Section II, when supports: "This also explains the legislative technique used, based on referral to the conventions in force in each matter, reserving to the Act the role of providing content to the room that such international treaties leave to the States."[52] These spaces (the room) would be completed with the Articles of the SMNA which follow to the referral to the international convention. Among these articles could be found, for example, the Articles 399.2 and 403 SMNA about liability limitation.[53]

Nevertheless, not all provisions of the SMNA, in addition to the referral to the conventions, are limited to filling in the spaces that the conventions leave to the Internal Law.[54] In the SMNA we can find Articles reiterating aspects already regulated in the international conventions, that is, applicable to internal and international cases. These provisions of

the SMNA generate a situation of double regulation, internal (SMNA) and international (the convention referred by the SMNA itself), about the same maritime institution. This happens, for example, with the Articles 396 SMNA (claims subject to limitation) and 397 SMNA (claims excluded from limitation). And this double regulation is what Spanish legislator expects to avoid with the SMNA, as is pointed out in the Preamble, Section II: "This objective of uniformity implies the aim to put an end to the much-criticized dual provisions that exist in such matters in many fields in which, on one hand, Spain has ratified different international conventions and, on the other, we have domestic legislation that, in many cases, does not comply with these." These provisions of the SMNA which regulate issues already regulated in the convention do not have legal effectiveness, as the convention is hierarchically superior and given that the SMNA regulates issues that it doesn't have to regulate, because they are already provided for in the convention and the convention is already part of our domestic legal system.[55] This double regulation, like we have advised, should not generate legal problems if the Articles of the SMNA and the conventions (LLMC…) present the same wording, but problems may arise if the drafts of the two regulations do not coincide.[56] In any case, the referred internal provisions, which reiterate the contents of the universal conventions, should not have been incorporated to the SMNA, since the conventions are already part of our system and the referrals that the SMNA makes to the conventions would be sufficient to confirm their application to internal or domestic cases.

3.3 Specific Referrals to the Conventions Applicable Only to International Cases

The SMNA contains referrals to international conventions whose scope of application is limited to cases with an international element in order to specify the regulatory rules of a maritime institution. This happens, for example, with the Article 339 SMNA regarding to collision (which refers to 1910 Convention for the unification of certain rules of law relating to Collision between vessels) or the Article 470 SMNA about the arrest of ships (which refers to the 1999 International Convention on the Arrest of Ships). As a consequence of these referrals, the internal or domestic governing regulation of the maritime institution (collision, arrest…) will be the international convention, since the Spanish legislator decided so. Being that the internal cases that were out of the scope of the conventions, the SMNA had the faculty of freely regulating those institutions and has chosen to regulate them by referrals to international conventions.[57]

The abovementioned option of the SMNA of regulating some maritime institutions' internal cases by referrals to the international conventions (not applicable to internal cases), determines that the regulation of internal cases is the planned in the convention. But, the regulatory status of the conventions is the same as an internal law: that is, it does not have a hierarchically higher status to that of the internal law (the SMNA), because it is the internal legislator who, through the SMNA, adopts as regulation what is provided in the convention, for cases that were not planned in the aforementioned convention.[58] Then, the Spanish legislator can complement, modify, expand or reduce the contents of these conventions through the SMNA, because the regulation of the convention takes the internal law status and therefore the SMNA can be fully adjusted to the provisions of the convention, but may also deviate from it according to what the Spanish legislator considers appropriate because the SMNA

is free to decide how it regulates those internal cases (cases that were outside the scope of the Convention).[59]

And indeed, the Spanish legislator is not limited to refer to the conventions to set the regulation of the collision or the arrest, but after the referral to the convention adopts an additional regulation in the SMNA that comes to nuance, complement or directly to deviate from the convention. This is the case with the Article 342 SMNA that establishes the regime of joint and several liability of both ship operators for personal and material damages caused to third parties, arising from the shared blame approach, while the 1910 collision convention (Article 4) provides joint and several liability only for personal injuries and not for materials.

Therefore, the final writing of the SMNA has made a great effort to eliminate the double regulation of maritime institutions internal and international, but, as we have already indicated throughout the present work, it has not been possible to eliminate that double regulation, so interpretive problems can arise and the judges must make an effort to try to solve them.[60]

IV. Conclusions

Article 149.1.6 CE attributes sole authority to the State on matters of mercantile and procedural legislation, but the statutes of autonomy of the autonomous communities with coastlines declare that they hold authority over maritime transport that takes place exclusively between ports or points of the same autonomous community with no connections to ports or points of other territories. The autonomous communities cannot regulate legal-private aspects of maritime transport carried out for commercial purposes, but they can regulate maritime transport that is within autonomous competence (between ports or points of the same autonomous community), carried out for non-commercial purposes (recreational, sports…).

SMNA 2014 is an internal law and, in its provisions with the referral to the conventions, there are articles regulating maritime institutions either complementing or putting aside the convention. In this case, in which the internal law does not follow the convention, it cannot be used as an interpretive criterion for "the convenience of promoting uniform regulation" (Article 2.2 SMNA), because the internal regulation does not have an international origin and the purpose of the internal regulation is precisely to depart from the uniformity.

The specific referrals made by the SMNA to universal conventions, that is, applicable to internal and international cases, would come to reiterate what the Articles 96.1 Spanish Constitution and 1.5 Spanish Civil Code already stipulate—that regulations governing the aforementioned maritime institutions are those contained in the international conventions.

The option of the SMNA of regulating some maritime institutions' internal cases by referrals to the international conventions (not applicable to internal cases), determines that the regulation of internal cases is planned in the convention. But, the regulatory status of the conventions is the same as an internal law; that is, it does not have a hierarchically higher status to that of the internal law (the SMNA), because it is the internal legislator who, through the SMNA, adopts as regulation what is provided in the convention for cases

that were not planned in the aforementioned convention. Then, the Spanish legislator can complement, modify, expand, reduce … the contents of these conventions through the SMNA.

Notes

1. This paper has been produced under the research project "*El transporte ante el desarrollo tecnológico y la globalización: nuevos desafíos jurídicos del sector marítimo y portuario*" ["Transport in the Face of Technological Development & Globalization: New Legal Challenges for the Maritime and Ports Sector"] funded by the Spanish Ministry of Science & Innovation and by the European Regional Development Fund (MICINN/ERDF/EU) (Ref. PID2019-107204GB-C32). Principal researcher: José Manuel Martín Osante.

2. Specifically, the matters included under the "merchant marine" concept in Article 6.1 of the LPEMM for the purposes of that Law are the following: "a) Maritime transport operations, except those that take place exclusively between ports or points of the same Autonomous Community, provided that the said Community has authority in this matter, with no connections to ports or points of other territories; b) The structuring and control of Spain's civil fleet; c) Safety of navigation and human life at sea; d) Maritime safety, including the power to provide piloting services, to determine what towage services are required in ports and the availability of both in emergencies; e) Maritime salvage on the terms envisaged in Article 264; f) The prevention of pollution from vessels, fixed platforms and other facilities located in waters in which Spain holds sovereignty, sovereign rights or jurisdiction and the protection of the marine environment; g) The technical and operational inspection of vessels, crews and freight; h) The structuring of maritime traffic and communications; i) The monitoring of the location, flags and registration of civil shipping and its despatching, without prejudice to the relevant prior authorisations from other authorities; j) Assurance of fulfilment of obligations on matters of national defence and civil protection at sea; k) Any other service attributed by law to the Administration as regulated under Title II of Book Two of this Law."

2. "Merchant marine" is not deemed to include the structuring of the fishing fleet in the field of fishing *per se*, the structuring of the fishing sector or inspection in either of these fields."

3. As stated in Ignacio Arroyo, *Curso de Derecho Marítimo* 3rd ed. (Cizur Menor, 2015), p. 199, in reference to "maritime transport when it takes place in the inshore maritime waters of the shoreline of an Autonomous Community"; and in Juan Luis Pulido Begines, *Curso de Derecho de la Navegación Marítima* (Madrid: Tecnos, 2015), p. 65, on indicating that the authority for maritime transport recognised in certain statutes of regional autonomy is limited to "maritime transport carried out exclusively in the waters of each Community."

4. If maritime transport operations involve stopovers in ports or points outside the autonomous community, that transport does not fall under the authority of the autonomous community, as indicated in José Luis Gabaldón García and José María Ruiz Soroa, *Manual de Derecho de la Navegación Marítima* 3rd. ed. (Madrid-Barcelona: Marcial-Ponts, 2006), p. 130, in reference to general regional autonomous community authority in matters of "maritime transport."

5. Framework Law [*Ley Orgánica*] 3/1979 of December 18 on the Statute of Autonomy of the Basque Country (Spanish Official Gazette nº 306, 22.12.1979; Basque Official Gazette nº 32, 12.1.1980).

6. As indicated by Iñaki Zurutuza Arigita, "Los Servicios Portuarios y su Regulación en la Ley de Puertos y Transporte Marítimo del País Vasco," in José Manuel Martín Osante (dir.), *Navegación de Recreo y Puertos Deportivos: Nuevos Desafíos de su Régimen Jurídico* (Madrid: Marcial Ponts, 2019), pp. 58–60, https://doi.org/10.2307/j.ctv1grb9g2.6, the area of application of the LPTMPV extends to ports and maritime transport. The author indicates he specific scope of the Law in relation to both matters.

7. Framework Law 2/2007 of March 19 on the Reform of the Statute of Autonomy of Andalusia, Spanish Official Gazette nº 68, March 20, 2007.

8. Framework Law 7/1981 of December 30 on the Statute of Autonomy of Asturias, Spanish Official Gazette nº 9, 11.1.1982.

9. Framework Law 1/2007 of February 28 on the Reform of the Statute of Autonomy of the Balearic Islands, Spanish Official Gazette nº 52, January 3, 2007.

10. Framework Law 1/2018 of November 5 on the Reform of the Statute of Autonomy of the Canary Isles, Spanish Official Gazette nº 268, June 11, 2018.

11. Framework Law 8/1981 of December 30 on the Statute of Autonomy of Cantabria, Spanish Official Gazette nº 9, November 1, 1982.

12. Framework Law 6/2006 of July 19 on the Reform of the Statute of Autonomy of Catalonia, Spanish Official Gazette nº 172, July 20, 2006.

13. Framework Law 1/1981 of April 6 on the Statute of Autonomy of Galicia, Spanish Official Gazette nº 101, 28.4.1981.

14. This contrasts with the provisions on ports, where sole authority is expressly assumed by Galicia. Indeed, Article 27.9 of the Statute of Autonomy of Galicia (Framework Law 1/1981 of 6 April on the Statute of Autonomy of Galicia, Spanish Official Gazette nº 101, 28.4.1981) includes among the areas of authority held exclusively by Galicia that of "ports, airports and heliports not certified as being of general interest by the central government, ports of refuge, marinas and recreational airports"; Article 28.6 attributes to the region the authority to develop legislation and enforce central government legislation on matters of fishing ports." For details, see Francisco Torres Pérez, "Aspectos jurídicos de la gestión del sistema portuario de Galicia," in José Manuel Martín Osante (dir.), *Navegación de Recreo y Puertos Deportivos: Nuevos Desafíos de su Régimen Jurídico* (Madrid: Marcial Ponts, 2019), pp. 128 *et seq*., https://doi.org/10.2307/j.ctv1grb9g2.9.

15. Framework Law 4/1982 of June 9 on the Statute of Autonomy of the Region of Murcia, Spanish Official Gazette nº 146, 19.6.1982.

16. Framework Law 1/2006 of April 10 on the Reform of the Statute of Autonomy of the Community of Valencia, Spanish Official Gazette nº 86, 11.4.2006.

17. See Manuel Broseta, "Ponencia Sobre el Estado Actual y Perspectivas del Derecho Mercantil," in *Centenario del Código de Comercio* Vol. I (Madrid: Ministry of Justice, 1986), p. 434; and Alberto Díaz Moreno, "El Derecho mercantil en el marco del sistema constitucional de distribución de competencias entre el Estado y las Comunidades Autónomas," in Juan Luis Iglesias Prada (coord.) and Aurelio Menendez, *Estudios Jurídicos en Homenaje al Profesor Aurelio Menéndez* (Madrid: Civitas,1996), pp. 234–241, especially p. 241.

18. Cf. Alberto Díaz Moreno, op. cit., p. 232 (nº 9) who, prior to the entry into force of the SMNA, stated that "the authority to dictate regulations which, strictly from a private-law viewpoint, regulate issues of assistance, salvage, towing, finds and removals lies solely with the State, by virtue of Art. 149.1.6 CE."

19. As indicated in José Luis Gabaldón García and José María Ruiz Soroa, op. cit., pp. 129–130.

20. On this issue, some interesting remarks have been made by Andrés Recalde, "El Objeto y el Ámbito Material de la Ley de Navegación Marítima" in Alberto Emparanza and José Manuel Martín Osante, *Comentarios Sobre la Ley de Navegación Marítima* (Madrid: Marcial Ponts, 2015), p. 45, who examines the SMNA and states that it is "questionable" whether Art. 149.1.6 CE on the sole authority of the State on matters of mercantile and procedural legislation "justifies the State holding authority to regulate recreational navigation or navigation for research purposes"; and by Alberto Díaz Moreno 1996, pp. 255 & 262, who states that "the law on maritime and air navigation must also be placed under the heading of mercantile legislation" (remarks made while Book III of the Code of Commerce ("On Maritime Trade") was in force, and thus prior to the entry into force of the SMNA).

21. As stated by Román Eguinoa De San Román, *Derecho Comunitario y Puertos de Interés General. Un Análisis del Modelo Portuario Estatal a la Luz fel Reglamento (UE) 2017/352 del Parlamento Europeo y del Consejo de 15 de Febrero de 2017 por el que se Crea un Marco Para la Prestación de Servicios Portuarios y se Adoptan Normas Comunes Sobre la Transparencia Financiera de los Puertos* (Barcelona: Atelier, 2017), p. 91. Specifically, Annex I of the LPEMM contains a list of ports of general interest in the following terms: "The following are ports of general interest and therefore, under Article 149.1.20.a of the Spanish Constitution, under the sole authority of the State administration: 1. Pasaia and Bilbao in the Basque Country. 2. Santander in Cantabria. 3. Gijón-Musel and Avilés in Asturias. 4. San Cibrao, Ferrol and its estuary, A Coruña, Vilagarcía de Arousa and its estuary, Marín and the Pontevedra estuary and Vigo and its estuary in Galicia. 5. Huelva, Seville and its estuary, Cadiz and its bay (including Puerto de Santa María, the Cadiz customs-free zone, Puerto Real, Bajo de la Cabezuela and Puerto Sherry), Tarifa, Bahía de Algeciras, Malaga, Motril, Almería and Carboneras in Andalusia. 6. Ceuta and Melilla. 7. Cartagena (including the Escombreras basin) in Murcia. 8. Alicante, Gandía, Valencia, Sagunto and Castellón in the Community of Valencia. 9. Tarragona and Barcelona in Catalonia. 10. Palma, Alcúdia, Maó, Eivissa and La Savina in the Balearic Islands. 11. Arrecife, Puerto Rosario, La Hondura, Las Palmas (including Salinetas and Arinaga), Santa Cruz de Tenerife (including Granadilla), Los Cristianos, San Sebastián de la Gomera, Santa Cruz de la Palma and La Estaca in the Canary Isles."

22. Article 11.1 LPEMM states that "Under the provisions of Article 149.1.20 of the Constitution the central State administration holds exclusive authority over ports of general interest, classified as such pursuant to this law." The background to these regulations can be seen in Pablo Acero Iglesias, *Organización y Régimen Jurídico de los Puertos Estatales* (Cizur Menor: Aranzadi Thomson Reuters, 2002), pp. 43 *et seq*.

23. As stated by Ignacio Arroyo 2015, p. 886; and Ignacio Arroyo and José Alejo Rueda, "Del Contrato de Arrendamiento Náutico," in Ignacio Arroyo Martinez and José Alejo Rueda Martinez (dirs), *Comentarios a la Ley 14/2014, de 24 de julio, de Navegación Marítima* (Cizur Menor: Aranzadi Thomson Reuters, 2016), p. 983. For example, Art. 10.32 of the Statute of Autonomy of the Basque Country (Framework Law 3/1979 of December 18 on the Statute of Autonomy of the Basque Country, Spanish Official Gazette nº 306, 22.12.1979) establishes that the said autonomous community holds exclusive authority on matters of "ports" provided that they are not classed as ports of general interest. Specifically, the said article 10.32 declares the sole authority in the following areas: "32. Railways, overland, maritime, river and cable transport, ports, heliports, airports and the Meteorological Service of the Basque Country, without prejudice to the provisions of Article 149.1.20 of the Constitution; contracting centres and cargo terminals for matters of transport." The Statute of Autonomy of Andalusia (Framework Law 2/2007 of March 19 on the reform of the Statute of Autonomy of Andalusia, Spanish Official Gazette nº 68, 20.3.2007) envisages the sole authority of the autonomous community over "ports of refuge, marinas and recreational airports and, in general, ports, airports, heliports and other transport infrastructures in the territory of Andalusia not classed in law as being of general interest to the State" (Art. 64.1.5). Similarly, sole authority for ports is assigned to the Autonomous Community of the Canary Isles under Art. 161.1 of its statute of autonomy (Framework Law 1/2018 of November 5 on the reform of the Statute of Autonomy of the Canary Isles, Spanish Official Gazette nº 268, 6.11.2018): "Article 161. Transport infrastructure. 1. The Autonomous Community of the Canary Isles shall hold sole authority for ports, airports, heliports and other transport infrastructures not classed as being of general interest to the State, and enforcement authority over ports and airports classed as being of general interest when the State does not reserve the right to manage same directly." The Statute of Autonomy of Catalonia (Framework Law 6/2006 of July 19 on the reform of the Statute of Autonomy of Catalonia, Spanish Official Gazette nº 172, 20.7.2006) grants the autonomous community authority on matters of ports in Art. 140.1: "Article 140. Transport infrastructures and communications. 1. The Regional Government shall have sole authority over ports, airports, heliports and other transport infrastructures in the territory of Catalonia which are not classed in law as being of general interest." Along the same lines, Art. 27.9 of the Statute of Autonomy of Galicia (Framework Law 1/1981 of April 6 on the Statute of Autonomy of Galicia, Spanish Official Gazette nº 101, 28.4.1981) includes among the areas where Galicia has sole authority "ports, airports and heliports not classed as being of general interest to the State, plus ports of refuge, marinas and recreational airports." Art. 28.6 grants the community authority in the development of legislation and the enforcement of State legislation on matters of "fishing ports." Cf. Francisco Torres Pérez 2019, pp. 128, *et seq*. In the case of the Statute of Autonomy of the Community of Valencia (Framework Law 1/2006 of April 10 on the reform of the Statute of Autonomy of the Community of Valencia, Spanish Official Gazette nº 86, 11.4.2006), Art. 49.1.15 establishes that the regional government has sole authority over ports: "[…] ports, airports, heliports and the Meteorological Service of the Community of Valencia, without prejudice to the provisions of points 20 and 21 of subsection (1) of Article 149 of the Spanish Constitution."

24. For all cases, see María Zambonino Pulito, *Puertos y Costas: Régimen de los Puertos Deportivos* (Valencia: Editorial Tirant lo Blanch, 1997), pp. 68–69.

25. See Pedro Escribano Collado, "Las Competencias de las Comunidades Autónomas en Materia de Puertos," *Revista de Administración Pública* 3(102) (1983), pp. 2315 *et seq*.; and Jesús Pardo López, "Planeamiento y Ordenación Urbanística en los Puertos de Interés General," *Ciudad y Territorio* (80) (1989), p. 43.

26. The definition of "commercial port" can be found in Art. 3 LPEMM: "1. Commercial ports are those which, by reason of the nature of the traffic through them, meet the technical, safety and administrative control requirements for them to engage in commercial port activities, i.e., loading, off-loading, stowage, unloading, transfer and storage of goods of all types, with volumes or forms that call for the use of mechanical equipment or specialist facilities. 2. Passenger traffic (other than local or river traffic) and the supplying and repair of vessels are also classed as "commercial activities." Accordingly, for a port to be classed as "commercial" it must host "commercial port activities." The following are not classed as such (Art. 3.3 LPEMM): "a) the unloading and handling of fresh fish other than within the scope of the port service of goods handling; b) the mooring, anchoring, stopover, supplying, repair and maintenance of fishing, recreational, military and other vessels belonging to the State and public administrations when those activities are carried out within the scope of their authority and must necessarily be conducted in port service areas; c) loading and unloading operations conducted manually because it is not financially viable to use mechanical equipment; d) the use of facilities and the operations and services required to conduct the activities indicated in this subsection."

27. As stated in Art. 3.4 LPEMM, "The following are not classed as commercial ports under this law: a) fishing ports devoted exclusively or fundamentally to the unloading of fresh fish from vessels used to

catch same, or which serve as home ports for such vessels and provide them with some or all of the necessary mooring, anchorage, stopover, supply, repair and maintenance services; b) ports used to provide vessels with sufficient shelter in case of storms, provided that they do not engage in commercial port operations with the exception of sporadic or low-level operations; c) ports intended to be used solely or fundamentally by sports or recreational vessels; d) ports for which a combination of the aforesaid uses is envisaged." Regarding this distinction between commercial and non-commercial ports, see María Zambonino Pulito 1997, pp. 74–77.

28. For all cases, see María Zambonino Pulito 1997, p. 75.

29. A highly interesting source of information on this issue is José María Ruiz Soroa, "El Derecho uniforme en la Ley de Navegación Marítima," in Alberto Emparanza and José Manual Martín Osante (dirs.), *Comentarios Sobre la Ley de Navegación Marítima* (Madrid: Marcial Pons, 2015), p. 49, *et seq*.

30. See Juan Luis Pulido Begines, *Curso de Derecho de la Navegación Marítima* (Madrid: Tecnos, 2015), p. 37.

31. As pointed out by José María Ruiz Soroa, 2015, p. 52.

32. The International Convention on Maritime Liens and Mortgages (Geneva, 1993).

33. The International Convention on Salvage (London, 1989).

34. The Convention on Limitation of Liability for Maritime Claims (London, 1976).

35. Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels (Brussels, 1910).

36. The Hague Rules as Amended by the Brussels Protocol 1968.

37. Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (Athens, 1974).

38. International Convention on the Arrest of Ships (Geneva, 1999).

39. Similarly, Ana Belén Campuzano and Enrique Sanjuán, "El Derecho Marítimo en España: La Ley de Navegación Marítima," in Ana Belén Campuzano and Enrique Sanjuán (dirs.), *Comentarios a la Ley de Navegación Marítima* (Valencia: Tirant lo Blanch, 2016), p. 22.

40. Along these lines, José María Alcántara, "Los Tratados Internacionales en la Nueva Ley de Navegación Marítima," in Asociación Española de Derecho Marítimo, *Comentarios a la Ley de Navegación Marítima* (Madrid: Dykinson, 2015), p. 45.

41. Like observes, José María Ruiz Soroa 2015, p. 50.

42. See *Memorandum* (paragraph "planteamientos generales") in the *Propuesta de Anteproyecto de Ley General de la Navegación Marítima* (Madrid: Ministerio de Justicia, 2004), p. 14.

43. In this sense, José María Alcántara Gonzalez, "Propuesta de Anteproyecto de Ley General de la Navegación Marítima: Algunas Reflexiones Desde la Plaza y una Valoración," *Derecho de los Negocios* 16(178–179) (2005), p. 11, p. 14.

44. See Julio Carlos Fuentes Gómez, "El Largo Proceso de Elaboración de la Ley de Navegación Marítima," in Asociación Española de Derecho Marítimo, *Comentarios a la Ley de Navegación Marítima* (Madrid: Dykinson, 2015), p. 31.

45. In this line, José María Alcántara 2015, p. 49.

46. This change of legislative technique, from the full duplication to the simple referral, deserves a positive valuation to the General Council of the Judiciary, like explains in its *Informe al Anteproyecto de Ley de Navegación Marítima*, Madrid, December 20, 2012, pp. 28–30: "In the dilemma between a tedious regulation, which makes a transposition to our internal law of the regulation contained in the mentioned international instruments, or the use of the technique of referrals to the content of the international texts applicable to the different aspects of maritime navigation, the text of the Preliminary Bill chooses this second possibility. This, which is also what the 2006 and 2008 Preliminary Bills did, contrasts with the technique followed in the 2004 Proposal, where the content of each convention was included in the articles, adapting it to the concepts and terminology appropriate to our legal system (...) the option accepted in the Preliminary Bill deserves a favourable opinion, although it might be advisable to introduce some greater precision in the referral provisions to the text of the Treaties."

47. Just as specifies, José María Ruiz Soroa 2015, pp. 50–51.

48. In this sense, also consider unnecessary the referral about the priority of the international conventions of the Article, José María Alcántara 2015, p. 48; and Ignacio Arroyo Martinez, "Título Preliminar. Disposiciones Generales," in Ignacio Arroyo and José Alejo Rueda Matinez, *Comentarios a la Ley 14/2014, de 24 de Julio, de Navegación Marítima* (Cizur Menor: Aranzadi Thomson Reuters, 2016), p. 84.

49. Ignacio Arroyo 2016, p. 86.

50. José María Ruiz Soroa 2015, p. 51.

51. Lays out and solves these doubts in the right way, José María Ruiz Soroa 2015, pp. 52–54.
52. In the same way, Ana Belén Campuzano and Enrique Sanjuán, 2016, p. 23.
53. The Preamble of the SMNA in its section IX refers to this issue, highlighting how the SMNA completes the regime of limitation of liability provided in the International Convention LLMC 1976/96: "Title VII, which concerns limitation of liability, simplifies the previous—domestic and international—regimes, which are fairly confusing. It does so based on the Convention on Limitation of Liability for Maritime Claims, done at London on 19th November 1976 (LLMC), amended by the Protocol of 1996, the regime of which *is completed in this Title*."
54. In this sense, José María Alcántara 2015, p. 57.
55. See José María Ruiz Soroa 2015, pp. 53–54, who lays out how these rules of the SMNA which overwhelm the universal convention space do not have legal effectiveness.
56. José María Ruiz Soroa 2015, p. 54; and, in the same way, José María Alcántara 2015, p. 57, 60.
57. Cfr. Ana Belén Campuzano and Enrique Sanjuán 2016, p. 23.
58. Like specifies José María Ruiz Soroa 2015, p. 55.
59. In this sense José María Ruiz Soroa 2015, pp. 55–56.
60. Some conclusions in this line, criticism of the legislative technique used by SMNA in relation to its relationship with international conventions, can be consult in José María Ruiz Soroa 2015, p. 60; and, in the same way, José María Alcántara 2015, p. 60.

Biographical Statement

José Manuel Martín Osante has been Professor of Commercial Law at the Faculty of Law of the University of the Basque Country since 2009. He teaches in master's and doctoral degree programs at various Spanish and foreign universities (among other countries, in Cape Verde, Colombia, El Salvador, France, Guatemala and Italy), and is a regular speaker at national and international congresses of transport. He leads a project funded by the Spanish Ministry of Science & Innovation and by the European Regional Development Fund (MICINN/ERDF/EU) (Ref. PID2019-107204GB-C32): "Transport in the face of technological development & globalisation: new legal challenges for the maritime and ports sector." He is the executive director of the *Spanish Journal of Transport Law* and has worked for five years in the Administration of Justice as Judicial Secretary.

Small Threats and Sea Service Strategy: Seapower and Its Role in Countering Non-State Threats

Joshua Tallis

Structured Abstract

Article Type: Research Paper

Purpose—The latest U.S. tri-service maritime strategy (*Advantage at Sea*) requires the sea services (Navy, Marine Corps, Coast Guard) to assess the strategic role of seapower in countering violent non-state actors, balanced against a larger agenda of great power competition. This offers a theoretical structure for assessing seapower's strategic effects against non-state actors.

Design, Methodology, Approach—This article pursues its analysis through two phases. First, we trace intellectual histories through U.S. strategic texts, developing a foundation for how, why, and when maritime strategies account for non-state actors. Second, we build on Thomas Schelling's division of how forces are operationalized in order to trace the strategic effects of sea power vis-à-vis the concepts of deterrence, assurance, and compellence.

Findings—In most cases, seapower appears to play a non-strategic role in deterring, assuring, or compelling non-state threats—that is to say, naval power has operational use, but seapower is rarely strategically decisive. The nearest exception is in seapower's role assuring some allies and partners facing imminent threats from non-state groups. Meanwhile, seapower remains, in aggregate, important for preserving the international order, resulting in a paradox: even as the effects from day-to-day competition at sea build to the strategic benefit of sea services (in this case, those of the U.S.), the incremental actions of sea services are often non-strategic in nature and thus risks systemic underinvestment and undervaluing.

Practical Implications—Seapower and naval power are not synonyms, and policymakers and academics should move to thinking about seapower in a more expansive and systemic manner in order to rectify the gap between seapower's moderate effect on non-state actors and its overall strategic value to the international system.

email: Tallisj@cna.org

Journal of Territorial and Maritime Studies / Volume 9, Number 1 / Winter/Spring 2022 / pp. 50–73 / ISSN 2288-6834 (Print) / DOI: 10.2307/JTMS.9.1.50 / © 2022

Originality, Value—Non-state threats will not disappear, despite the shifting U.S. and global focus to competition with great powers. Consequently, it remains critical for sea services to define how threats other than great powers integrate into maritime strategy and the strategic toolkits of seapower.

Keywords: coast guard, maritime security, navy, piracy, terrorism

I. Introduction

The U.S. Defense Department emphasis on competition with China and Russia has redirected the American military services away from small threats in favor of great power competitors. Yet violent non-state threats remain a feature of the global security landscape, particularly for the three U.S. sea services (the Navy, Marine Corps, and Coast Guard), which are actively deployed day-to-day. To efficiently address the persistent risks posed by non-state actors, it is valuable for the sea services to assess how small threats relate to their larger strategic responsibilities. This article is therefore written with the U.S. sea services as the central point of analysis, responding to U.S. national and maritime strategies. The implications of this analysis, however, produce results applicable to the study and theory of seapower more broadly. Moreover, U.S. strategy (and the discourse around U.S. intentions) has implications for the strategies and signaling of many U.S. allies and partners, which makes it again important to understand the drivers of maritime security concepts in U.S. maritime strategy.

The prominence of violent non-state groups in the strategic frameworks of the U.S. sea services is not static. From the demise of the Soviet Union until the attack on the USS *Cole*, terrorism and criminality were generally out of sight in Navy and Marine Corps strategic documents, while the Coast Guard was principally focused on narcotics and irregular migration. September 11 changed that, and for more than a decade the U.S. sea services' strategic interest in non-state actors grew steadily, from al-Qaeda to jihadist terrorism to a host of non-ideological actors such as pirates and traffickers. They were joined in this interest by a global coalition of naval and coast guard partners and through international programs such as the container security initiative and the proliferation security initiative. Today, with renewed focus on major state threats, a general reduction in interest in non-state challenges has slowly yielded to focuses on other types of non-state risks, namely illegal fishing. The "Plus One" category remains as nebulous as it is persistent.

For the U.S. sea services, violent non-state threats remain a feature of the security landscape. Although the prominence of such threats in U.S. maritime strategies has declined, a renewed focus on major state threats has not wholly eliminated the request from American policymakers for the sea services to counter non-state actors. The same is true of maritime strategy. The latest U.S. tri-service maritime document (*Advantage at Sea*), like its 2000s predecessors, invokes the role of maritime forces in managing a wide range of small-scale threats, even given a broader reorientation towards major powers. The resulting strategic tension—a framework focused on great powers but inclusive of smaller threats and actors—requires greater attention. Such attention would mean understanding the strategic connections between non-state threats and sea service contributions. And one way to explore that issue is to ask, how do the sea services address the threats that seem to relate least to great

power competition—violent non-state actors? What is the collective value of the U.S. sea services (i.e., seapower) when facing these threats?

If seapower is the tool that the sea services collectively bring to policymakers, how does that capability align with the threats and challenges posed by violent non-state actors? Where is seapower valuable as an instrument against non-state threats, and where might it not be? By focusing on seapower and its relationship to non-state threats, we are pushed into a conversation on the *strategic* applicability of the sea services in countering such actors, not simply their tactical or operational potential.

In a prior monograph,[1] we explored the strategic linkages between the concepts of maritime security (or good order at sea) and great power competition. In it, we looked at how the U.S. sea services can learn from two decades of executing low-end missions by asking how maritime security relates to competition with major powers. We concluded that low-end missions are integral to day-to-day competition with China and Russia if we define the nature of that contest as one over control of the international rules-based order. As a result, we should understand day-to-day competition at sea as preserving core norms, such as the free flow of commerce and freedom of navigation, while countering any adversary efforts to slowly erode those norms.

That interpretation of day-to-day competition's role in managing longitudinal shifts in power based on small adverse actions accreting over time is one that the tri-service strategy embraces, noting that a feature of maritime competition is "[denying] our rivals' use of incremental coercion."[2] At a high strategic level, there is a clear connection between small-scale threats and sea service contributions to U.S. objectives countering high-end competitors. What is left is to understand how non-state actors fit into that formulation.

In the analysis below, we address that gap, drawing out the unique challenge of connecting sea service strategy to non-state threats. We find that even as the result of sea service activities to counter non-state threats may yield strategic benefits for the U.S., the tools that the sea services bring to bear are often not decisive in resolving non-state challenges. This disjoint, discussed more in the conclusion, underscores the core challenge in efficiently addressing non-state threats in an era dominated by a focus on great powers. Although the effects from day-to-day competition at sea aggregate to strategic gains for the U.S., the incremental actions of the U.S. sea services are often non-strategic in nature, and thus risk systemic underinvestment and undervaluing in strategy and by policymakers. Resolving that dilemma will remain a key challenge of operationalizing any tri-service strategy that attempts to incorporate non-traditional threats into a larger framework focused on major powers.

II. On Seapower

Despite the ubiquity of the word, seapower is difficult to define.[3] At its broadest, seapower is taken to be the result of a virtuous cycle between "maritime commerce" and "naval supremacy," which in the intellectual tradition of Mahan makes for the bedrock of national power.[4] Unlike land power or air power, seapower is uniquely expansive in its bundling of economic and military influences. As naval historian Geoffrey Till summarizes: "Seapower can be seen as a tight and inseparable system in which naval power protects the maritime assets that are the ultimate source of its prosperity and military effectiveness."[5]

When used by maritime analysts, seapower is often intended in a narrower way: as a stand-in for naval power. Yet as one naval scholar notes, "sea power and combat capability are not the same thing."[6] Moreover, naval power is itself a flexible idea. The latest U.S. maritime strategy, the December 2020 tri-service document *Advantage at Sea*, defines naval power broadly as "the influence of naval forces across all domains," and invokes the relatedly broad idea of "integrated all-domain naval power" as its central feature. The latter phrase is defined as "synchronizing the complementary capabilities, capacities, roles, investments, and authorities of the Naval Service," which "multiplies the traditional influence of sea power to produce a more competitive and lethal total force."[7]

In order to approach the question of non-state threats and their relationship to seapower, it is useful to distill the discussion of strategy and seapower down to two more manageable questions:

- What does it mean for a naval activity to be strategic?
- What does naval power accomplish?

With respect to strategic effects, Nicholas Lambert offers a useful framework for how to measure if an action certifies as strategic. Such an act must (1) "aim directly at achieving an overarching *political goal*," and it must (2) "include a path to end hostilities on acceptable terms: There must be an 'off-switch."[8] When we say an act or campaign is strategic, it therefore speaks to these larger ideals, which themselves are a function of a deeper description of seapower as more than purely a military activity.

With respect to what navies do, we can borrow from Thomas Schelling's broader distillation of how military force is operationalized. These functions can be broadly summarized as: (1) dissuading actors from undertaking unwanted behavior, (2) providing allies and partners with the confidence that a given country remains a reliable partner, and (3) using force when necessary to pressure actors to comply with the preferences of a given country. In other words, the sea services' strategic activities, and thus the constituent functions of seapower, fall into the buckets of deterrence, assurance, and compellence.

Deterrence is a familiar concept in strategic studies. It speaks to the threat of violence as a tool to dissuade an adversary from a course of action that is undesired by the other party. The means by which such a threat is most successfully delivered is a matter of intense debate, but the underlying goal remains to avoid the use of force.

And if deterrence is about the threat of violence to dissuade an action, compellence is about the *use* of violence to force a concession from an adversary. Thomas Schelling offers the term as a means to differentiate deterrence from more coercive courses of action (the latter of which require a competitor to give something up), and the distinction can alternatively be seen through contrasting dissuasion and persuasion.[9]

Finally, while deterrence and compellence focus on the threat and use of violence against adversaries, assurance helps us capture the role of military forces as tools for messaging to allies and partners. This is not to be confused with the necessary reassuring quality embedded in deterrence—the implicit promise that if an adversary declines to pursue an escalatory action, the counterparty will continue to avoid the use of force. Assurance is about signaling to allies and partners the credibility of a country's commitment to their mutual strategic obligations, whatever those may be.

The breakdown of seapower into deterrence, assurance, and compellence is not the only

way to divide seapower into functions—something to which we will return in the conclusion. In U.S. strategies from the Cold War through today, the sea services have organized their value propositions to the nation according to spectrums of conflict, specific capabilities, conceptual strategic imperatives, regions of operation, and more.[10] Yet at a strategic level, our breakdown captures well the breadth of rationales for what military force does, and by extension why the sea services do what they do—and for us here, how that relates to non-state actors.

To explore the strategic relationship between the sea services and non-state actors, we will begin with an assessment of how U.S. maritime strategy has incorporated non-state maritime threats over the last 30 years. This outline sets the stage for a more detailed focus to follow on how non-state actors, and the tools the sea services bring to bear, fit under the umbrellas of deterrence, assurance, and compellence. We conclude with lessons for the future development of maritime strategies and how they can continue to incorporate non-state threats into frameworks aimed more at major powers.

III. Non-State Actors and Sea Service Strategy

Non-state actors remain relevant to U.S. (and others') national interests. Operationally, these threats pose real risks to U.S. maritime forces operating at sea. Strategically, non-state actors of suitable scale can undermine key tenets of the rules-based order, such as the state monopoly on violence or the free flow of maritime commerce. Yet the way the sea services—and the Navy in particular—describe the relationship between non-state actors and maritime strategy is not static. Understanding the shifts in how the U.S. sea services think about non-state actors is valuable context for describing the latitude that the services have in how they choose to link non-state threats to their strategic concepts. It also helps set into context, for non–U.S. allies and partners, important intellectual undercurrent shaping U.S. signaling and messaging.

3.1 The Persistence of Non-State Threats

The era of the Global War on Terror seems to be coming to a very slow end for the United States. Yet the asymmetric use of large U.S. naval assets against non-state threats—and the targeting of large U.S. platforms by non-state actors—remains a feature of operating at sea.

In the early morning hours of October 13, 2016, the destroyer USS *Nitze* launched several Tomahawk land attack cruise missiles (TLAMs) into points on Yemen's western coast, just north of the Bab el-Mandeb at the southern mouth of the Red Sea. The strike was the penultimate move in a two-week clash pitting the U.S. Navy against a Yemeni insurgent group, the Houthis. Twelve days prior, on October 1, forces affiliated with the Houthis had launched anti-ship cruise missiles (ASCMs) at an Emirati transport ship. The vessel sustained serious damage, and the attack marked the first incident since Hezbollah's targeting of the INS *Hanit* a decade earlier in which a non-state group used an ASCM against maritime targets.

In response, the U.S. Navy dispatched three vessels to secure the straits for U.S. and commercial traffic after the initial attack: USS *Mason* (DDG 87), USS *Nitze* (DDG 94), and USS *Ponce* (AFSB 15). These ships, most notably the *Mason*, soon came under fire themselves.

On October 9, *Mason* fought off what appeared to be two ASCMs (a third, which fell short, was launched about an hour later), likely making history as the first U.S. warship to fire an Evolved SeaSparrow Missile (ESSM) and Standard Missile-2 (SM-2) in a real world ASCM defense scenario.[11] The *Mason* faced and defeated fire again on October 12, prompting the TLAM strike early on October 13 against three radar sites believed to be associated with the attacks. The limited strike was aimed at dissuading the Houthis without plunging the U.S. into the ongoing conflict, which the U.S. indirectly supported through Saudi Arabia until 2021. Yet the engagement only concluded after both *Mason* and *Nitze* came under fire from five more missiles on October 15.[12]

In a world where U.S. strategy is rebalancing to a focus on major competitors, it is notable that the most sustained real-world assault on American warships since the 1980s Tanker War arose from a non-state group operating at a critical global maritime chokepoint.

Threats from non-state actors to sea services do not just manifest at the tactical level—they are operationally and strategically relevant as well. Proxy warfare, for example, is a staple of competition among large powers.[13] Consequently, non-state actors may find support from states seeking to undermine other major powers' positions in key regions, which may include providing material support to groups with maritime aspirations.

Strategically, the U.S. sea services emphasize maintaining the international rules-based order as a key maritime contribution to strategic competition. As stressed in the introduction to *Advantage at Sea*: "Our security and prosperity depend on the seas. Since the end of World War II, the United States has built, led, and advanced a rules based international system through shared commitments with our allies and partners…. That system is now at risk."[14] One component of maintaining that system is ensuring that the entities which live outside of it, violent non-state actors, do not undermine the economic and security benefits that come from those countries that participate within its rules. Despite *Advantage at Sea*'s emphasis on China and Russia, the document makes this connection explicitly: "Other rivals, including … violent extremist organizations, and transnational criminal organizations, also continue to subvert the international rules-based order."[15] The task of maintaining the order may include minimizing the disruptive activities of terrorists, pirates, and other rogue actors with the capacity to threaten commerce or sovereignty on a large scale.[16] Consequently, it is useful to understand how maritime strategies have addressed such issues in the past.

3.2 The Perennial "Plus One"

Over the last three decades, U.S. maritime documents have related to the risks and strategic position of non-state threats in different ways. Across strategies since 9/11, it has become common to include some "other" adversary category, to account for the persistence of non-state challenges even as focuses shift with administrations. For some time, the most common way to differentiate among types of threats was through the "4+1" framing, reflecting the challenges posed to the U.S. by China, Russia, Iran, and North Korea (the "4"), and

the transnational challenges that are present globally (the "+1"). Though the phraseology has come out of fashion, the idea of the "Plus One" remains useful because it captures the inherent flexibility in how American policymakers think about non-state challenges.

The size and importance of the Plus One has proven dynamic. As the actors posing the least (truly, no) existential threat to the United States, and the most fungible of the 4+1's competitors, the erstwhile Plus One category has over time expanded and contracted according to events and expediency. We can trace three broad eras in maritime strategy that characterize this ebb and flow starting at the fall of the Soviet Union.

3.3 Peace Dividend, 1991–2001

In the aftermath of the Cold War, the sudden shift in geopolitical winds from a competitive bipolar world to one with a single hegemon precipitated a rethinking of how the United States should exercise power, where it should do so, towards what ends, and with what resources. A combination of surplus materiel,[17] new strategic concepts, and limited geopolitical risk all became driving factors in a growing U.S. Navy involvement in low-end operations and "operations other than war."

"…From The Sea" (1992) was the first major post–Cold War maritime (Navy and Marine Corps) strategy and captures well the changing focus of maritime services unburdened by peer competition. In strategic terms, the document marked a U.S. shift from sea control to power projection. In operational terms, the strategy marked a departure from securing sea lines of communication (SLOCs) in the north Atlantic to assuring joint expeditionary operations and global forward engagement.[18] The strategy was also as much a response to budgetary realities as to changes in the operational environment. Facing a peace dividend and Joint Chiefs of Staff chairman General Colin Powell's force reduction concept, the Navy's best effort to stave off steep budget cuts would come from an ability to remain relevant in the new world order. A 1994 follow-on strategy, "Forward … From the Sea," largely expanded on those themes. The document maintains an emphasis on joint forcible entry in the littorals while including a more forceful rhetorical premium on the role of maritime forces not just winning wars but preventing conflicts in the first place.

Among the most significant legacies of this era was the reemergence of the littorals in the Navy's strategic consciousness. A historically blue water Navy faced, in the early 1990s, the responsibility to operate near green coastal waters. Yet even as the Navy was drawn towards a greater focus on projecting power and influence ashore, the nature of the U.S. adversary remained predominantly conventional. States remained the dominant threat against which the Navy and Marine Corps would operate. Naval strike support in Desert Storm and the NATO bombing campaign in Yugoslavia are emblematic. Discussions of maritime security missions were, therefore, largely absent from these strategies. While "…From the Sea" mentions, for the first time in a major U.S. maritime strategy, maritime interdiction operations, neither the 1992 nor 1994 white paper outright addresses terrorism, piracy, or constabulary missions such as counterdrug operations.[19]

None of that is to say that non-state actors were entirely ignored in the post–Cold War drawdown. One Navy document, *Navy Doctrine Publication-1* (NDP-1, 1994), did broach some of these topics. There is a full section in that document devoted to operations other than war, in which NDP-1 notes the potential role of naval forces in a range of low end

contingencies, including (inter alia) counterterrorism, migration interdiction, humanitarian assistance, counterdrug operations, and public health operations.[20] And at an operational level, we can see some sea-based activity against non-state actors via Operation Infinite Reach, the 1998 ship-launched cruise missile strike against al-Qaeda targets in Afghanistan and Sudan. Yet, at a strategic level, NDP-1 had modest influence within the Navy, and thus precipitated no serious reorientation to such missions.[21] The Coast Guard, with its law enforcement remit, was of course oriented to address narcotics trafficking and migrant interdiction in this period, and the "war on drugs" discourse had elevated their significance. Yet, with the possible exception of drug traffickers, these non-state missions were not consistently seen as of strategic national security significance. All that would change with the attacks of September 11, 2001.

3.4 9/11, 2001–2014

In 2000, with the al-Qaeda attack on the destroyer USS *Cole* (DDG-67), the Navy faced a tragic preview of the destructive ambition of a motivated terrorist organization. For most Americans, however, the jihadist brand of internationalized terrorism came to public consciousness one year later with the attacks in New York and Washington, D.C., and the crash of Flight 93 in southwest Pennsylvania, on September 11.

It is an understatement to say that 9/11 fundamentally shifted U.S. military and foreign policy, with global implications. For nearly two decades thereafter, defense strategy was occupied by two land wars fought predominantly against non-state forces. Stability operations became core missions across parts of Africa, the Middle East, Southwest Asia, and Southeast Asia. This era and these missions emboldened an arm of naval strategy called post-modernism, a movement that takes as its central principle the role of navies as collective defenders of the global system's common goods. Post-modern naval theory is characterized by using sea control and expeditionary capabilities to support humanitarian assistance, good order at sea, and cooperative maritime diplomacy.[22]

Maritime security is elemental to this strategic vision of what sea services do. Maritime security operations are key components of good order at sea, stability operations, and humanitarian assistance, which captured well the types of missions a counterterrorism focus would require. Admiral Michael Mullen's concept of the Thousand Ship Navy was representative of this post-modern thinking and just how high it reached in naval circles. The concept held that navies would not just secure the seas to leverage them for national self-interest. Rather, they would work collectively to defend an international system against predation at all levels. Under this framing, the very concept of seapower shifts "from a focus on dominance to a focus on supervision."[23]

The strategic pinnacle of this movement was the tri-service *Cooperative Strategy for 21st Century Seapower* (CS21, 2007). The strategy is not a pure representation of post-modernism, but rather illustrates a clash of ideas inside the U.S. sea services less than a decade after 9/11. The document is an amalgamation of the two dominant competing naval strategic camps—the ascendant post-modernists and the more familiar blue water (Mahanian) traditionalists. As one naval analyst explored, CS21 navigates these camps by incorporating two themes: (1) collective defense of the maritime system (post-modernism), and (2) maintenance of forward deployed credible combat power (traditionalism).[24] These themes can be seen in the

strategy's discussions of "globally distributed, mission-tailored forces" and "regionally concentrated, credible combat power," respectively.[25] This inclusion of post-modern naval concepts of good order at sea into a tri-service capstone document elevated non-state actors to new strategic heights for the sea services. The strategy speaks explicitly of terrorism, piracy, and drug trafficking. The maritime forces would, henceforth, be responsible for countering a very wide range of non-state threats at sea, which themselves were at the heart of what it meant for sea services to operate in defense of the common maritime good. And these requirements were further bolstered by developments of new programs reliant in part on maritime forces. The proliferation security initiative, launched in 2003, was sparked by (and consistent with) the Bush administration's emphasis on interdiction.[26] Likewise, the container security initiative, led by Customs and Border Protection, aimed a heightened degree of focus on the role of the maritime space in transporting hazardous materials related to non-state threats.

3.5 Great Power Resurgence, 2014–Present

In 2015, the maritime services published a revised (truly, a replacement) Cooperative Strategy document (*A Cooperative Strategy for 21st Century Seapower: Forward, Engaged, Ready*, CS21R). While the document spent more rhetorical space detailing maritime security issues than the original,[27] the tide had already begun to turn in the sea services' practical interest in pursuing non-state actors.

The clearest moment marking the start of this era may be the illegal Russian annexation of Crimea in 2014. That campaign effectively reset NATO's relationship with Russia, producing a reengaged Navy and Marine Corps interest in the European theater and contributed to the eventual reinstatement of the U.S. Second Fleet in the Atlantic. Concurrently, China's rise had become increasingly salient by that time, and Russian intervention in Syria had metastasized into a stronger position in the Eastern Mediterranean. The revised Cooperative Strategy speaks more to this newly competitive geostrategic environment than it does to an interest in non-state threats.

This sentiment was crystalized in the 2018 *National Defense Strategy* (NDS). The NDS unclassified summary is explicit in its conclusion that state competition has regained supremacy as the central defense planning factor. The summary notes, "Inter-state strategic competition, not terrorism, is now the primary concern in US national security."[28] Terrorism remains a threat in need of attention, but the NDS summary only mentions one group specifically (ISIS) and sidelines countering other forms of illicit non-state activity predominantly to operations in Africa.[29]

Today, after the initial pivot to "great power competition," there is a discernable effort to refine an understanding of the role of non-state and small-scale threats in a U.S. maritime strategy focused on strategic competitors. The 2020 tri-service strategy is representative of this movement. The document remains clear that competition with great powers is the sea services' central focus: "*Advantage at Sea* is a Tri-Service Maritime Strategy that focuses on China and Russia, the two most significant threats to this era of global peace and prosperity."[30] Yet the inclusion of the Coast Guard into any maritime strategy precipitates references to both rule of law, generally, and non-state actors, specifically. Partially for this reason, *Advantage at Sea* includes a section that specifically argues the importance of preserving the

international rules-based order, and good order at sea, as part of a larger strategy of competition. As with the 2007 Cooperative Strategy, the incorporation of the Coast Guard into a maritime strategy (even one focused on major powers) again augurs questions regarding the role of seapower in addressing non-state threats.

At the same time as the Coast Guard's inclusion in *Advantage at Sea* pushes U.S. maritime strategy back towards a need to incorporate non-state issues, concerns over China's expansive approach to maritime competition is further bending the paradigm on the relevance of non-state threats in maritime strategy. The result is a growing U.S. emphasis on a slightly different set of non-state issues, namely illegal fishing (not to mention state-adjacent irregular threats such as distant-water fishing fleets). This focus is evinced in the Coast Guard's release of a 2020 counter illegal fishing strategy,[31] and several fishing-related studies mandated as recently as the 2021 National Defense Authorization Act.

IV. Seapower's Value Proposition

With an understanding of how the Plus One has changed over time, we are now well-positioned to explore the detailed questions of this paper—what role does seapower play in deterring non-state adversaries? What audiences are of significance for U.S. assurance activities, and how do the U.S. sea services support that agenda? Can maritime forces compel terrorists, and if so, compel them to do what? This section delves into the intersection of seapower, violent non-state groups, and the topics of deterrence, assurance, and compellence. And again, though the focus here is on U.S. sea services and their strategies, the theoretical architecture from this analysis is broadly applicable to other naval forces and theorizing on seapower generally.

4.1 Deterrence

With its roots in analyzing the prospects of nuclear conflict, the study of deterrence has since evolved in numerous directions, including strands on conventional deterrence and deterrence in cyberspace. Among the expanded research applications for deterrence theories is a body of analysis that gained particular salience after 9/11 on the idea of deterring non-state actors, specifically terrorists.[32] Could they be deterred? And if so, for our purposes, what role would seapower play in effecting that deterrence? Do the answers to those questions apply to other forms of non-state threats?

4.1.1 Deterring Terrorism. A survey of literature on non-state deterrence suggests: "The area of greatest and most important consensus is that deterrence remains viable and relevant, even in dealing with terrorism."[33] Underneath that broad conclusion, however, lies open questions about how to adapt the deterrence construct for non-state applications. In contrast to deterring a nuclear adversary,[34] terrorists pose no existential threat to the US's national survival, and thus deterrence against such actors is more unidirectional than mutual.[35] This asymmetry proves problematic when pursuing deterrence against non-state threats. As one academic poses, how do you deter "organizations that 'lack a return address' against which to retaliate?"[36]

Probably the largest obstacle to applying deterrence concepts to non-state actors is the disparity between objectives among states and terrorists. A state could deter another state from aggression while not challenging the fundamental existence of that state—indeed, this is the norm. It is more politically challenging for states to deter terrorists from attacking them while permitting the groups to remain intact. As one study summarizes, "deterrence and eradication do not fit together easily"[37] This is problematic when considering our requirements for what qualifies as a strategic action, given that such an act would need to be linked to a political objective and a plausible path towards the end of hostilities.

One way in which this tension can be resolved is through a narrower strategy of dissuading smaller terrorist or militant movements from joining with larger brands like al-Qaeda or ISIS. In such case, the U.S. might signal that it will not target smaller local groups provided they neither receive nor deliver material support to organizations of U.S. national interest.[38] As we can already see, the implications of deterring terrorist groups imply some measure of tolerance for their persistence in some form or some regions, which is politically problematic (even if realistic).

Proposed means of deterring terrorist organizations wrestle with these issues in different ways. Indirect deterrence focuses on raising the risks to those who might aid in terrorism rather than the actual terrorists themselves.[39] By shrinking the pool of support delivered to terrorists, the scale or volume of successful attacks should diminish. This approach is similar to deterrence by punishment, but with the punishment aimed at third parties; "a particular leader may not be easily deterrable, but other elements of the system" that supports terrorism may be.[40] One expert, writing of al-Qaeda, notes that characterizing the group "as a system opens the door to deterrence by punishment," since those "who are not themselves eager to sacrifice their own lives for the cause can be threatened with retaliation for their role in facilitating terrorist operations."[41] Indirect deterrence could even be extended to the states that sponsor terrorism, a slightly more conventional deterrence equation but one complicated by attribution challenges (proving a state sponsored a group or attack).

When considering deterrence by punishment against those supporting terrorist organizations, sea-based air and missile strikes are a clear and common tool. Critically, deterrence by punishment need not require the use of seapower, or any military force for that matter—prison can be deterrent enough in some cases. But where kinetic tools are sought, seapower provides one of many platforms for delivering precision strikes against malicious actors.

Yet not all forms of deterrence are amenable to the threatened use of seapower, and some of the concepts that appear ascendant now are much less oriented around the potential use force compared to the military coercive campaigns of the last two decades. Deterrence by denial, for example, might attempt to persuade terrorists that they have no hope of achieving their attack or objective, or that the net benefit of a planned attack will be less than the costs incurred.[42] This approach is largely one of homeland security, counter radicalization, intelligence sharing, and target hardening. Demonstrating community and political resilience is another element, signaling that even successful attacks will not provoke the responses that terrorists hope for.[43] A report by the National War College noted of this deterrent perspective, the "bottom line is that terrorists must believe that ultimately their efforts would be futile."[44] It is difficult to discern a clear role for seapower in this approach,[45] other than in contributing to a massive retaliatory attack.

If we look to 9/11 as a case study in the failure to deter a non-state adversary from

staging an attack, what can we learn about deterring non-state threats? To answer that question, it is useful to distill deterrence down to its two fundamental components: the capability to act, and the credibility to threaten that act.[46] Given that al-Qaeda's leaders likely knew that the U.S. had the military capability to degrade, even destroy the organization, the deterrence failure seems to lie principally in the question of credibility—the US's willingness to use force (as perceived by terrorists). An attitude common among those who choose terrorism as a tactic is that the more powerful adversary lacks the wherewithal to follow through on a sustained campaign of violence. Such was the case with Osama bin Laden's theory of the U.S., believing that the country lacked the stomach for a protracted struggle. Extrapolating from U.S. withdrawals from Vietnam, Lebanon, and Somalia, as well as bin Laden's personal experience with the Soviet exit from Afghanistan, he believed that superpowers would not pursue al-Qaeda indefinitely—even in light of the 1998 Infinite Reach cruise missile strikes. This was reflected in a 1998 interview in which bin Laden explains: "We have seen in the last decade the decline of the American Government and the weakness of the American soldier who is ready to wage cold wars and unprepared to fight long wars. This was proven in Beirut when the Marines fled after two explosions. It also proves they can run in less than 24 hours, and this was also repeated in Somalia."[47]

Seapower's naval function is largely a matter of capability. And when matching U.S. capabilities to that of non-state actors, there can be no question of the US's material overmatch. As we have seen in Iraq and Afghanistan, matching operational concepts to make best use of those capabilities in a protracted campaign is complicated, but feasible. Where non-state actors—terrorists, in particular—perceive the greatest gap is in credibility. And here, seapower cannot substitute for political signaling and strategic communication. Seapower is only one part of national power, but the entirety of that national power failed to stop the attacks of September 11 in part because the adversary did not believe in the political credibility of American use of force. Whether the sustained U.S. reaction thereafter, which did include seapower through carrier-launched airstrikes and cruise missile strikes, proved otherwise to future terrorist threats is asking to prove a negative, but is at least possible.

4.1.2 Deterring Crime. As groups move into the category of criminal actor, the application of deterrence becomes simpler (in theory, if not in practice). Reducing profit margins for a given illicit commodity or raising the risk of handling that commodity would, at a certain point, dissuade any rational business actor from dealing in such a commodity at scale.

One potential example of successful deterrence against maritime crime, and one involving the use of seapower, is counterpiracy off of the Horn of Africa. A sustained multinational multi-sector (naval and commercial) campaign conspired over several years to make Somali piracy unduly expensive and risky. In some cases, it also included moderate or tacit cooperation with erstwhile competitors, such as the Russian navy. As with most real-world cases of deterrence, it is difficult to draw a straight line from specific efforts to the lack of criminal activity today, but it is likely that some combination of these factors played critical roles in the stark declines in Somali piracy.

In 2011, Somali piracy peaked at 237 reported incidents according to International Maritime Bureau statistics. In response, the international community collaborated to raise the costs and risks of conducting piracy. First, best management practices were implemented

across the shipping industry. These included: training merchant crews to stand piracy watches, disseminating ship handling guidance for evasive maneuvering, publicizing appropriate piracy reporting channels, installing passive (e.g., barbed wire) and active (e.g., fire hoses) barriers to boarding, and building citadels (safe rooms) onboard to wait out pirates who may have successfully boarded. Collectively, these practices raised the cost of piracy by reducing the success rate of attacks and forcing pirates to invest more in fuel, food, and time at sea. Higher failure rates therefore resulted in higher operating costs. Eventually, the deployment of armed guards also increased the risk of failure—pirates aim for easy prey and could be dissuaded by a quick, credible display of force. No vessel with an armed escort was ever successfully boarded.

Concurrent with mariners' efforts to reduce the rewards of piracy, world navies aimed to raise the risks. Maritime patrols coordinated by NATO, the EU, the U.S., and other independent actors brought sustained presence to the Horn of Africa. These patrols were initially insufficient to raise the risk and deter would-be pirates. The absence of a legal regime across the region for addressing piracy was a major obstacle that complicated the prosecution of pirates once they were captured. This resulted in what became known as a "catch and release" policy, whereby detained pirates were simply sent back to Somalia. The risk was evidently not so great. The adoption of new legal regimes in the region for prosecuting pirates, notably in Kenya, changed that dynamic and considerably raised the risk of participating in piracy. Eventually, the international naval presence, mixed with new legal frameworks, meant that capture by a U.S. or European-flagged warship could now credibly result in long term imprisonment. Rumors abounded that capture by other nations could result in an even less palatable outcome.[48]

Some elements of the piracy example obtain in other cases, including expanding legal authorities to make at sea interdictions more of a meaningful threat. The proliferation security initiative, for example, partially aimed to resolve a legal gap made evident in 2002, when a Spanish warship interdicting a suspected weapons smuggling vessel off the coast of Yemen failed to secure the legal authority to seize missile components found onboard. And as with the terrorism example, there are likely spaces where non-state activities merge with state activities. North Korea, for example, engages in maritime (and terrestrial) criminal activity to evade sanctions and smuggle goods and cash into the country, though such instances are out of scope for this analysis.

Although some initial activities of the Somali counterpiracy initiative can be described as acts of compellence, the long-term result (which more often relied on the threat of force rather than its actual employment) appears to be a case of deterrence success. Whereas attacks (actual and attempted) were at 237 in 2011, 2015 was a standout year with 0 attacks. Piracy numbers can wax and wane with latitude, so there is no telling where an individual year's tally will go, but the overall trend has certainly plummeted compared to the late 2000s. Given the range of activities and actors involved in counter piracy, from NATO and EU patrols to mariner self-defense and target hardening initiatives, it is hard to decipher what elements were most critical in precipitating the ultimate decline in attacks. Nevertheless, it is reasonable to conclude that naval power, U.S. and otherwise, played a role in deterring pirates. Indeed, that the counter-piracy initiative was cross sectoral is a more robust example of a truly seapower based approach to a maritime challenge, spanning as it did the integration of naval power and commercial actors.

4.1.3 Summary. We can see, in the cases of terrorism and maritime crimes, that seapower can play a role, though not as large as one might originally expect. In particular, when looking at the issue of terrorism, credibility and, by extension, political solutions to the challenge are much more substantive levers than sea-based kinetic capabilities. Yes, the sea services have a demonstrated capacity to conduct counterterror operations from the sea. Whether the threat of those actions deter terrorists, and whether that approach to counterterrorism is particularly efficacious, is much less clear. And if we take strategic effects to mean advancing political goals and achieving a path towards the end of hostilities, the zero-sum nature of many U.S. overseas counterterror campaigns makes it challenging for seapower to contribute strategically.

Meanwhile, other non-state actors may be more susceptible to targeted campaigns of deterrence, in part because the ability to threaten economic and operational costs is simpler to assess. Piracy, narcotics trafficking, human trafficking, and other illicit businesses ultimately respond to risk incentives. The challenge here becomes more a matter of when these issues are seen as *political*. As explored in the prior section, they may be, as in 2007 when the sea services collectively described instability as a core strategic concern. Today, with the scope of the Plus One changing (and smaller than in 2007), the fact that seapower can achieve operational deterrent effects against criminal actors abuts the reality that these effects are increasingly seen as non-strategic (i.e., non-political).

4.2 Assurance

Deterrence addresses the threat of violence as a tool of dissuasion, aimed against competitors. Assurance takes the opposite framing, focusing on the benefits to allies and partners of that latent military capacity. And when focusing, not on threats but on friends, we can understand countering terrorism and maritime insecurity as comprising a broad coalition of actors. Those actors are divisible into two categories:

- Extra-regional supporters, who have an interest in suppressing non-state actors but are not inhabitants of the primary affected region, and
- Those local stakeholders who most immediately face the risks and challenges of terrorism or maritime crimes.

Extra-regional supporters include a wide swath of U.S. allies and partners working in concert with the U.S. in competition against non-state actors. In Afghanistan, for example, the NATO-led operation included that alliance's more than two-dozen nations, along with contributions from countries from Australia to Georgia.[49] More broadly, dozens of nations provided some measure of support for Operation Enduring Freedom, the US's global war on terror, including everything from combat operations to logistics support to overflight permissions. Counterterrorism has even brought some occasional unexpected partnerships of convenience—Iran, for example, was a notable opponent of ISIS and an uneasy partner in the effort to defeat that group in Iraq.

International partnerships are critical for the information sharing and burden sharing made necessary by the transnational and protracted nature of counterterror, counter-piracy, and counter-narcotics operations. Still, terrorism (like any transnational crime) is local in occurrence. As a consequence, local stakeholders play an irreplaceable role as partners

in countering non-state threats. Countries close to hotspot regions—whether the Philippines, Nigeria, Colombia, or Iraq—are the only ones that can deliver sustained attention to the endemic social, political, and economic challenges that shape the local security environment.

The nature of assuring allies and partners can be said to break down according to the two audiences of extra-regional supporters and local stakeholders. For extra-regional supporters, as the general emphasis on non-state actors diminishes, there is likely less immediate need to provide assurance that the U.S. is committed to countering non-state threats far from shore—if they were ever desired in the first place. The remaining threats are largely remote, geographically, or an issue for intelligence and law enforcement. An American aircraft carrier off the coast of France does not serve to assure the French government of the US's commitment to supporting counterterror or counterpiracy in the Sahel.

For local stakeholders, however, the presence of the U.S. sea services can provide some relevant assurances, especially given the existential risks some of these nations face from terrorism, insurgency, or organized crime. Presence illustrates a tangible commitment on the part of the U.S. to stand by nations threatened by instability, as in supporting foreign internal defense or counterinsurgency operations. One example of this assurance was the presence of U.S. Navy assets in support of Joint Special Operations Task Force—Philippines. The Navy, supporting U.S. special operators and the Philippine military, provided sustained presence in assistance to counterinsurgency operations in the Mindanao region.

Of course, the extent to which local stakeholders are in search of assurance regarding U.S. commitments to regional stability is not quite as clear as, for example, interest in U.S. assurances vis-à-vis state threats such as Russia, China, Iran, or North Korea. In Southeast Asia, for example, nations such as Malaysia and Indonesia have historically been opposed to U.S. presence near territorial waters, which may stem from concerns over maintaining sovereignty across large archipelagic territories. Moreover, local stakeholders do not always share the US's focus on terrorism. Some are more concerned about IUU fishing and human trafficking (such as Indonesia and Malaysia) or piracy (such as Singapore). Nor is it always the case that the expenditure of seapower resources on those assurance missions are the most efficient use of scarce assets. Yet seapower does have an advantage over other forms of military support, given that over the horizon presence can assure allies (and meet U.S. defense needs) while providing for the ability to meet other national obligations on short notice.

U.S. Navy, Marine Corps, and Coast Guard–led training and exercise programs are also potential tools in signaling an assured U.S. interest in regional stability. U.S. programs such as Africa Partnership Station, Africa Maritime Law Enforcement Program, Southern Partnership Station, Continuing Promise, Maritime Law Enforcement Initiative, Oceania Maritime Security Initiative, and Caribbean Basin Security Initiative are all examples of programs that rely on or utilize seapower to build international capabilities to combat transnational crime or terrorism. For many partner nations, such as those in the Caribbean or the Gulf of Guinea, these programs are a primary linkage with the U.S. military, though the dedication of U.S. assets afloat for such activities is often outcompeted by higher profile demands in other parts of the world.

Where maritime assets are deployed, one of the underlying justifications may involve a more expansive concept of assurance. Training for maritime security missions promote

interoperability, capacity building, and U.S. access, all of which are U.S. goals in countering Chinese and Russian influence and may assure partners that the U.S. remains attuned to their interests. Examples of programs that meet this dual use threshold might include Cooperation Afloat Readiness and Training (CARAT) and Southeast Asia Cooperation and Training (SEACAT) with Asian partners, and Obangame Express, Cutlass Express, and Phoenix Express with African ones.

Finally, it is worth considering that the different sea services may also contribute to different assurance signals. For example, though scarce, use of Coast Guard assets may signal that the U.S. sees a given region or threat as at least partially constabulary (rule of law) related, which would invite a different kind of U.S. action. Relatedly, the visibility of assets to a host population can be an important component of how assuring a signal is. For many partners, the sea services' capacity to provide support without an onshore footprint is a critical political asset, and one that uniquely differentiates the sea services from their terrestrial counterparts. Allies likely perceive different assurances based on the scale of U.S. commitments, the sea service assets employed, and the service engaging in the gesture.

4.2.1 Summary. With deterrence, the question was whether non-state actors were subject to being deterred. With assurance, the issue pivots back to state actors. And though more geographically removed partners may find some assurance in U.S. maritime forces conducting maritime security or counterterrorism missions abroad, the change in the security environment over the last half decade means that the issues for which many European or Asian allies seek assurance are infrequently those of non-state actors. Yet for U.S. allies and partners in other regions, local presence, particularly presence that is over the horizon, can be a core reminder that the U.S. remains engaged with local needs. Seapower is uniquely suited to provide that assurance, balanced as it is towards providing over the horizon support. Moreover, that support is indeed explicitly political in nature, and so meets an important condition for qualifying as "strategic." And as the battle for influence among great powers migrates around the world, such assurances may play an important role in U.S. regional strategies of competition with Russia and China in places such as West Africa or Latin America.

4.3 Compellence

As with deterrence, compelling terrorists or criminals (through the use of force rather than the mere threat thereof) implies there is some level or nature of activity that the United States would find permissible from non-state organizations. Compellence and eradication are not synonyms, and the use of force to persuade an actor to abandon a given course of action would suggest that some alternative course of action is acceptable. That is a difficult line to hold, particularly politically, and particularly with respect to terrorist organizations. In practical terms, however, the concept is not as foreign as it at first seems.

4.3.1 Compelling Terrorists. Terrorist campaigns are political in nature, and thus they are often best resolved by political (not entirely military) solutions. Here, the link to naval power is evident at a tactical and operational level, but far more ambiguous on that strategic and political plane.

Notably, some groups are susceptible to functional eradication through the application of hard power and the passage of time. Many terror organizations do not find sustained support even among a minority of a community, while others (like the Basque ETA or the Weather Underground in the U.S.) simply lose salience and die out. In these cases, seapower can play a role in delivering strikes, though eradication strategies strain the limits of compellence, unless compellence were interpreted at the individual level, not the group level (i.e., individuals were persuaded to abandon the cause).

Compelling a terrorist group, as a collective organization, to abandon violence and pursue political change through less lethal means is often the ideal end to more durable campaigns of terroristic violence. The end of hostilities in Northern Ireland offers one example. The 1998 Good Friday Agreement represented a military victory of the British state against the Provisional Irish Republican Army. However, the military victory did not mark the absolute destruction of the IRA, whose political arm (Sinn Fein) remains a dominant force in Northern Irish politics. An organized campaign of counterterror by the state, alongside a willingness to pursue a political settlement, successfully compelled a terrorist organization to abandon violence without entirely disbanding the group. More recently, the transition of the FARC in Colombia from an armed insurgency to a political party is a contemporary example of the same compellence framework in action.

Operation Infinite Reach's 1998 strikes, in response to al-Qaeda's embassy bombings, may be one of the clearest examples of the US's attempt at this version of compellence targeting a non-state group. In that instance, the strikes were aimed less at deriving a durable political settlement and more at demonstrating resolve to punish acts of violence staged against U.S. interests and personnel. The Afghan and Sudanese governments were likely also key audiences in the strike.

Finally, there are coercive approaches that, though often found in literature on non-state deterrence, would manifest as compellence if the threat of violence translated into practical use. Such techniques include older (and largely discredited) ideas of massive retaliation and collective punishment, as well as more modern iterations such as targeted assassinations.[50] These manifestations of coercion are often tactically proficient when countering terrorist actors but would prove strategically effective only if they (1) pushed a terrorist organization to negotiate, or (2) resulted in enough attrition so as to effectively dissolve a movement. As above, seapower can play a role in that coercive campaign, but it is rarely likely to be essential. Often, U.S. seapower's kinetic tools have been applied somewhat indefinitely in suppression of non-state force, less so than in the likely pursuit of a political settlement or eradication.

4.3.2 Compelling Criminals. When looking to criminal actors, compellence's clearest applicability may be at the mission level. Tactically, counter-trafficking operations employ strategies of compellence as a fundamental tool of enforcement. Operation MARTILLO, coordinated by Joint Interagency Task Force—South in the Caribbean, offers an example. Drug runners in the early 2010s had become proficient in moving cocaine from South America to Central America via routes along the Central American coast. This enabled traffickers to move narcotics from their points of origin (typically in Colombia) via sea along coastal routes to make landfall along the coast of Central America, where governments were unable to stop the flow of drugs north through Mexico into the United States. MARTILLO aimed to use the presence of U.S. and partner nation assets in the littorals to compel traffickers

further out into blue waters, where U.S. seapower predominated, shifting the advantage to the authorities.[51] As then-Coast Guard Commandant Admiral Zukunft noted, traffickers have "very few allies at sea, and that's where we do have the upper hand."[52]

At a tactical level, MARTILLO was a likely success. JIATF-S interdicted 272 metric tons of cocaine, $10.7 million in cash, and seized 198 vessels and aircraft during the first two-and-a-half years of the operation, coinciding with potential declines in trafficking up to 43% in Western Caribbean littorals.[53] It is difficult to assess the efficacy of this approach on a strategic level, however. The sums of money involved in illicit crimes are staggering,[54] the durability of the narcotics trade is impressive, and access to data on illicit activity is difficult. If interdiction is the preferred counter-narcotics approach, coercive measures at sea are likely superior to air or land-based approaches. As SOUTHCOM commander Admiral Faller noted in his 2020 posture statement, "In an operating area that is 11 times larger than the United States: the Coast Guard and JIATF-South continue to be among the best investments in the US government."[55] Yet as an overall policy for countering drug use, interdiction does not achieve strategic results. As one recent review found, from the Government Accountability Office to the CIA to RAND, assessments as far back as the late Cold War consistently reflect that "interdiction alone cannot raise cocaine traffickers' costs and risks enough to make a difference, regardless of how well [the Department of Defense] carries out its detection and monitoring mission."[56] Compellence, specifically as applied through the use of seapower, is not a big enough tool to change the risk calculus for Caribbean narcotics traffickers.

4.3.3 Summary. The applicability of compellence (persuasion through force) to terrorism varies depending on whether we understand the target of the persuasion to be an individual or a group. Use of force to persuade individuals to abandon their cause (or avoid joining in the first place) is feasible and can include a role for seapower in the delivery of that military force. The efficacy of such an approach is a different matter, and the durability of protracted terrorism campaigns shows that at least some groups can and do withstand efforts to dismantle their membership.

When looking at those groups that have proven durable, the conversation turns to a government's willingness to permit an organization to transition from violent to political over time. As one of many instruments for delivering kinetic effects to push that transition, seapower can contribute to campaigns of compellence, provided those contributions are linked to advancing some prospective political solution. The Sri Lankan military's campaign against the Tamil Tigers may be the clearest example of maritime coercion in practice, leading largely to the terror group's collapse. Yet in the cases of the IRA and the FARC, where the UK and Colombia were respectively successful in pushing terrorist campaigns into the political sphere, seapower was not a decisive factor in the protracted internal conflict.

By our criteria, a strategic action is one that helps achieve a larger political goal, and one that includes a plausible pathway to end hostilities. Naval power may have operational utility in compelling terrorist actors to abandon violence, yet the strategic effect of military campaigns is often disconnected from larger political agendas to end a conflict. (This is by no means a unique feature to seapower.) Still, the logic is at least theoretically clear. That is less the case with criminal organizations. Many types of crime are not obviously amenable to political resolution. And so, while coercive actions at sea can be tactically useful in compelling criminals to change their tactics (as in the case of Caribbean narcotics traffickers), such

approaches are not necessarily strategic because they are not linked to political goals and an end of hostilities.

V. Conclusions

The role of seapower in countering "Plus One" threats—pirates, terrorists, traffickers, and others—seems simultaneously valuable yet often non-central. We can see this across the three pillars of seapower we investigated: deterrence, assurance, and compellence.

Deterrence and compellence share some similarities, for which the evidence does not suggest that seapower has been indispensable in those efforts. The sea services surely provide means for delivering effects to deter or compel non-state adversaries. And we saw qualified successes in seapower's contributions to actions like Somali counter-piracy efforts or the Coast Guard's use of compellence as a means to gain a tactical upper hand against cartels in the Caribbean. Yet the location of the threat (largely onshore) and the frequent need for more calibrated (not to mention, non-kinetic and political) responses minimize the scope in which sea services can make *strategic* contributions to deterring or compelling non-state threats. Wayne Hughes' Corbettian invocation that the seat of purpose is on land, not at sea, helps set this conclusion in its wider context.[57]

That maxim echoes in our review of seapower and assurance as well, though here seapower plays a more substantive and truly strategic function. For those allies and partners for which the threat from non-state actors is remote (or a law enforcement issue), seapower is of some but less direct application. Yet for those nations more directly (perhaps existentially) threatened by non-state actors, U.S. seapower provides real assurances precisely because it takes the landward context into account by minimizing the U.S. footprint. Seapower can provide sustainable and over the horizon support, which may be particularly welcome in regions where U.S. presence is best served without boots on the ground (both for local considerations and U.S. domestic politics). Where U.S. power is best felt but not seen, seapower is uniquely adept to assure allies.

5.1 Lessons for Maritime Strategy

These uneven results for the role of seapower in countering non-state threats offer some food for thought, not only for the authors of the latest U.S. tri-service maritime strategy, but for this author's own work as well. In a prior monograph, we found that small-scale maritime security missions contributed to great power competition between the U.S. and its rivals. In that assessment, we concluded that preserving and reinforcing core norms at (and from the) sea—incrementally, over time—was a major feature of how the U.S. sea services could contribute to competition with China and Russia short of open conflict. We concluded that, in addition to China and Russia:

> A wider variety of actors can corrode an order so that it becomes less effective and desirable over time. Corrosion may not result in an immediate replacement of the order but can precipitate its general weakening and disintegration, which benefits the actors with the highest stakes in revising the rules (i.e., rival great powers). Preventing such corrosion is a function of long-term order maintenance. And since serious corrosion from any actor redounds to

the benefit of rival great powers, any corrosive threat to the international order is relevant to GPC.[58]

This is reflected in the latest tri-service strategy. As asserted in *Advantage at Sea*, one of the core features of sea service competition below crisis levels is that it "denies our rivals' use of incremental coercion" to reshape global norms.[59] Thus, at a level of high strategy, maritime security, and its attendant focus on smaller threats and non-state actors, links clearly to U.S. strategic objectives even in an era of competition with great powers.

And yet in this analysis, we found that some key concepts of seapower—the ideas of deterrence, assurance, and compellence—are often ill-suited for explaining how the sea services' strategic attributes relate to non-state threats. In most cases, seapower appears to play a non-strategic role in deterring, assuring, or compelling non-state threats—that is to say, naval power has operational use, but seapower is rarely strategically decisive. We are left with an unusual result, in which good order at sea is instrumental in pursuing the high-level systemic interests of U.S. policymakers, while the strategic capabilities that the sea services bring to bear seem less obviously important. This tension illustrates three important issues regarding the dynamic between non-state threats and naval power.

1. The strategic result / non-strategic capability paradox: If seapower's core attributes do not seem overwhelmingly relevant to countering non-state threats, what does that mean for the idea that promoting good order at sea is a core component of competition with great power rivals? The sea services seem to offer a strategic contribution to day-to-day competition, including denying non-state actors the opportunity to erode the value of the international maritime system. The sea services therefore extract incremental gains for the U.S. from acts that, individually, are not themselves strategic in nature. The result is a paradox, where desired strategic ends are sought through tools that are not always highly prized. In the same way that dredging may not be a strategic capability for the Chinese navy, but the long-term results of a Pacific island-building campaign are, so too is maritime security's results strategic for the U.S., even as its component parts often are not. This poses some unique challenges for the sea services, which face countervailing pressures to engage in order-maintenance activities (like countering non-state threats) while simultaneously seeking budget relief by cutting seemingly non-strategic capabilities. Whereas larger projects or operations clearly geared toward great power war (like submarine construction) may be protected, those that could be instrumental in avoiding the conditions for conflict (perhaps, Mark VI patrol boats) face higher burdens of justification. Acknowledging that tension is a necessary prerequisite for putting cost-savings into strategic context.
2. Restoring a systemic vision of seapower: Mahan's definition of seapower was opaque but we can say with confidence that it was at least system-spanning—U.S. naval power was integrated with its economic and political maritime elements.[60] The goal of identifying more observable functions of seapower in this paper, to bridge the divide between high strategy and actual naval power, led us to the concepts of deterrence, assurance, and compellence. Yet these three concepts are ultimately oriented around doing *something* to specific actors—you deter or compel adversaries, you assure your allies and partners, but in all cases, you are acting on units within the system. If seapower is central to preserving a beneficial international order,

the concept likely must be understood in terms that speak to that systemic impact, not just to the individual units. This requires, first, disarticulating seapower and naval power. Naval power is about combat credibility and is likely well-captured by the three ideas of deterrence, assurance, and compellence. Meanwhile, seapower should be more comprehensively understood, as a nexus between the sea as military maneuver space and the sea as a cornerstone of the international system. This lesson is conceptual in nature, but concepts are critical to building strategies that reflect policymaker preferences. This description of seapower also invites clearer roles for other instruments of U.S. national power, namely the economic and diplomatic contributions to seapower. Given that non-state threats are often indicative of deeper structural issues in a given region, it makes sense to assume that a more systemic understanding of seapower would make for more effective sea service contributions to countering non-state challenges.

3. Matching strategic ends to operational means: If deterrence, assurance, and compellence do not provide a profoundly valuable construct for matching sea service attributes with their strategic directive to promote the health of the international order, what approach might bear greater fruit? In addition to the above recommendation to place seapower in its wider context, a companion approach would be to focus more on the sea services' unique operational elements. Indeed, the plurality of U.S. Navy strategies between 1970 and 2010 have been organized by capability,[61] in part because operational attributes may be the most meaningful differentiator between the various services. Along these lines, the 2007 tri-service *Cooperative Strategy* uses core capabilities as a means to describe how the sea services would implement their strategic goals, invoking operational concepts such as forward presence, deterrence, sea control, power projection, maritime security, and humanitarian assistance. Meanwhile, *Fleet Tactics* describes operational constants as: maneuver, firepower, counterforce, and command and control, many of which have clear application to targeting non-state threats.[62] As with seapower, there is no one right answer when describing the sea services' operational attributes. Moreover, a focus on operational attributes alone is unwise—there are many things the sea services are *capable* of doing, but only so much that they should *prioritize* doing. And yet an assessment of the operational contributions the sea services can deliver when countering non-state threats is valuable if guided by the larger strategic focus on the non-state actors that can present meaningful challenges to global governance.

Non-state threats will not disappear, despite the shifting U.S. focus to competition with great powers. Prior research and extant tri-service maritime strategy imply that countering non-state threats is strategically relevant to managing the risks that great powers can pose to the international system. Addressing non-state threats is also often the right thing to do. Done in partnership with host governments, helping suppress illegal fishing, or human trafficking, or piracy, or terrorism are all net positives. Consequently, it remains critical for the U.S. sea services to define how threats other than great powers integrate into maritime strategy and the application of seapower. *Advantage at Sea*, and the ebb and flow of the "Plus One" in U.S. strategy, simultaneously show that this work is as relevant as it is incomplete.

Notes

1. Joshua Tallis, *Maritime Security and Great Power Competition: Maintaining the U.S.-led International Order,* Center for Naval Analysis (Arlington, VA: CNA, 2020).
2. U.S. Department of Defense, *Advantage at Sea: Prevailing with Integrated All-Domain Naval Power* (Washington, D.C.: Department of Defense, 2020), p. 10.
3. Geoffrey Till, *Seapower: A Guide for the Twenty-First Century 3rd ed.* (New York: Routledge, 2013), p. 23.
4. AT Mahan, quoted in Till 2013, p. 57.
5. Till 2013, p. 17.
6. Nicholas Lambert, "What Is a Navy For?" *Proceedings Magazine* 147(4) (2021).
7. U.S. DoD 2020, p. 7.
8. Lambert 2021.
9. Thomas C. Schelling, *Arms and Influence* (New Haven, CT: Yale University Press, 1966), p. 71.
10. Peter Swartz, *U.S. Navy Capstone Strategies and Concepts (1970–2010) Vol. 1*, Center for Naval Analysis (Alexandria, VA: CNA, 2011), p. 30, https://doi.org/10.21236/ADA564887.
11. Sam LaGrone, "USS Mason Fired 3 Missiles to Defend from Yemen Cruise Missiles Attack," *USNI News*, October 11, 2016, https://news.usni.org/2016/10/11/uss-mason-fired-3-missiles-to-defend-from-yemen-cruise-missiles-attack, accessed October 28, 2021.
12. Geoff Ziezulewicz, "Four Ship Crews Receive Combat Action Ribbon," *Navy Times*, November 3, 2017, https://www.navytimes.com/news/your-navy/2017/11/03/four-ship-crews-receive-combat-action-ribbon/, accessed October 28, 2021.
13. William Rosenau and Zack Gold, *The Cheapest Insurance in the World? The United States and Proxy Warfare*, Center for Naval Analysis (Arlington, VA: CNA, 2019).
14. *U.S. DoD* 2020, p. 1.
15. *Ibid.*
16. Tallis 2020.
17. In 1989, the Navy was just two years removed from a Cold War end-strength high of 594 ships. See U.S. Department of the Navy, "U.S. Navy Active Ship Force Levels, 1986–1992," *U.S. Navy History and Heritage Command*, November 17, 2017, https://www.history.navy.mil/research/histories/ship-histories/us-ship-force-levels.html#1986, accessed July 26, 2018.
18. Peter Swartz, *U.S. Navy Capstone Strategies and Concepts (1991–2000): Strategy, Policy, Concept, and Vision Documents*, Center for Naval Analysis (Alexandria, VA: CNA, 2012), p. 32, https://doi.org/10.21236/ADA564879.
19. Swartz 2012, pp. 48–49, 89.
20. U.S. Departments of the Navy and Homeland Security, *Naval Doctrine Publication 1: Naval Warfare* (Washington, D.C.: Pentagon, March 2010), p. 22.
21. Swartz 2012, pp. 72–73.
22. Till 2013, p. 35.
23. Joshua Tallis, *The War for Muddy Waters: Pirates, Terrorists, Traffickers, and Maritime Insecurity* (Annapolis, MD: Naval Institute Press, 2019), p. 25.
24. Peter Haynes, *Towards a New Maritime Strategy: American Naval Thinking in the Post-Cold War Era* (Annapolis, MD: Naval Institute Press, 2015), pp. 217–222.
25. U.S. Departments of the Navy and Homeland Security, *A Cooperative Strategy for 21st Century Seapower* (Washington, D.C.: Pentagon, October 2007).
26. Susan J. Koch, "Proliferation Security Initiative: Origins and Evolution," *National Defense University*, occasional paper 9 (2012), pp. 4–5.
27. Joshua Tallis, "The New U.S. Maritime Strategy," *Center for International Maritime Security*, March 13, 2015, http://cimsec.org/new-us-maritime-strategy/15507, accessed October 28, 2021.
28. U.S. Department of Defense, *Summary of the 2018 National Defense Strategy* (Washington, D.C.: Pentagon, 2018), p. 1.
29. The early months of the Biden administration have brought renewed focus on transnational issues, as evinced in the 2021 interim National Security Strategy, though the overall NDS-inspired focus on great power competitors remains largely dominant in defense planning.
30. U.S. DoD 2020, p. 1.
31. U.S. Department of Homeland Security, "Illegal, Unreported, and Unregulated Fishing Strategic Outlook," *U.S. Coast Guard*, https://www.uscg.mil/iuufishing/, accessed May 4, 2021.

32. It was not universally acknowledged after 9/11 that deterrence was applicable to terrorism. Colin Gray, writing in 2003, captured the sentiment as a "crisis of deterrence." Gray also broaches the relationship between rationality and deterrence, at a time when many commentators disputed that terrorists could be understood as rational actors. Not all terror deterrence requires the belief that terrorists themselves are rational (external elements, like financiers, may be subject to rational deterrence and thus indirectly mitigate the likelihood of an attack). Gray also notes that actors can be rational in pursuit of seemingly unreasonable objectives. Richard Betts similarly addresses the point of rationality, noting the "instrumental reasoning" behind the use of terrorism as a tactic. See Richard K. Betts, "The Soft Underbelly of American Primacy: Tactical Advantages of Terror," *Political Science Quarterly* 117(1) (Spring 2002), pp. 19–36, https://doi.org/10.2307/798092. Also noteworthy, as we will see in our analysis, is Gray's emphasis on the role of land power in post–9/11 non-state deterrence. Colin S. Gray, *Maintaining Effective Deterrence* (Carlisle, PA: U.S. Army War College, August 2003).

33. Jeffrey Knopf, "The Fourth Wave in Deterrence Research," *Contemporary Security Policy* 31(1) (April 2010), p. 2, https://doi.org/10.1080/13523261003640819.

34. There is, separately, an entire specialized literature on deterring WMD terrorism, given the unique challenges of detecting radiological material, as well as the unique propagandistic value of a successful attack. See Knopf 2010, p. 18; Lewis A. Dunn, *Can Al Qaeda Be Deterred from Using Nuclear Weapons?*, Occasional Paper 3 (Washington, D.C.: NDU, July 2005).

35. Knopf 2010, pp. 3–4.

36. *Ibid.*, p. 9.

37. Paul Davis and Brian Jenkins, *Deterrence and Influence in Counterterrorism* (Santa Monica, CA: RAND, 2002).; Knopf 2010, p. 11.

38. Robert F. Trager and Dessislava P. Zagorcheva, "Deterring Terrorism: It Can Be Done," *International Security* 30(3) (Winter 2005/2006), pp. 99–102, https://doi.org/10.1162/isec.2005.30.3.87; Knopf 2010, p. 12.

39. Knopf 2010, p. 10.

40. Davis and Jenkins 2002; Knopf 2010, p. 10.

41. Knopf 2010, p. 10.

42. Andrew Morral and Brian Jackson suggest that understanding decision-making processes can improve deterrence by denial. By characterizing how terror organizations select targets and weigh risks, they propose that deterrent measures can be made more effective. They also consider the second-order consequences of effective deterrence by denial, which may inadvertently make other targets more attractive. See Morral and Jackson, *Understanding the Role of Deterrence in Counterterrorism Security* (Santa Monica, CA: RAND, 2009), https://doi.org/10.7249/OP281.

43. Davis and Jenkins 2002; Knopf 2010, p. 12; Matthew Kroenig and Barry Pavel, "How to Deter Terrorism," *The Washington Quarterly* 35(2) (April 2012), pp. 31–33, https://doi.org/10.1080/0163660X.2012.665339.

44. U.S. National War College, National Defense University, *Combating Terrorism in a Globalized World* (Washington, D.C.: National War College, November 2002), pp. xxii, 41; Knopf 2010, p. 13.

45. There are also non-kinetic models with potential applicability to terrorism, such as "deterrence by counter-narrative" (delegitimizing terrorist violence, thereby shrinking the pool of recruits). See Knopf 2010, p. 10.

46. See, for example, Jesse C. Johnson, Brett Ashley Leeds, and Ahra Wu, "Capabilities, Credibility, and Extended General Deterrence," *International Interactions* 41(2) (2015), https://doi.org/10.1080/03050629.2015.982115.

47. "The World: Osama Bin Laden, in His Own Words," *New York Times*, August 23, 1998, https://www.nytimes.com/1998/08/23/weekinreview/the-world-osama-bin-laden-in-his-own-words.html, accessed October 28, 2021.

48. Terry McKnight and Michael Hirsh, *Pirate Alley: Commanding Task Force 151 Off Somalia* (Annapolis, MD: Naval Institute Press, 2012), p. 31.

49. Ernesto Londono, "Georgia's Role as U.S. Coalition Partner Has Honed Its Army, Bolstered NATO Hopes," *Washington Post*, August 13, 2014, https://www.washingtonpost.com/world/national-security/georgias-mettle-as-us-coaltion-partner-has-honed-its-army-bolstered-nato-hopes/2014/08/13/431f192a-1bea-11e4-ab7b-696c295ddfd1_story.html?utm_term=.d3a285c7f869, accessed October 28, 2021.

50. Knopf 2010, pp. 10, 14–16, 19; Daniel Whiteneck, "Deterring Terrorists: Thoughts on a Framework," *Washington Quarterly* 28(3) (2010), pp. 187–199, https://doi.org/10.1162/0163660054026452.

51. Charles Michel, "Written Statement of Rear Admiral Charles Michel: Director, JIATF South,"

Testimony before the Subcommittee on Border and Maritime Security, House Committee on Homeland Security, June 19, 2012.

52. Meghann Myers, "In War with Drug Traffickers, Coast Guard Stretched Thin," *Navy Times*, October 18, 2014, https://www.navytimes.com/news/your-navy/2014/10/18/in-war-with-drug-traffickers-coast-guard-stretched-thin/, accessed October 28, 2021.

53. Posture Statement of General John F. Kelly, USMC, Commander, U.S. Southern Command, before the 113th Congress, House Armed Services Committee, February 26, 2014, p. 42.

54. One estimate holds that the top seven drug trafficking organizations in Mexico net $30 billion annually. Charles Pickard, "Evolved Capabilities in Mexican Drug Trafficking: A 21st Century Profile of Transnational Organized Crime," *Small Wars Journal*, May 8, 2018, http://smallwarsjournal.com/jrnl/art/evolved-capabilities-mexican-drug-trafficking-21st-century-profile-transnational-organized, accessed October 28, 2021.

55. Posture Statement, Admiral Craig S. Faller, USN, Commander, U.S. Southern Command, before the Senate Armed Services Committee, January 30, 2020, pp. 11–12.

56. Collin Fox, "Kill the Drug War: Death, Decisions, and the Limits of Military Power," *War on the Rocks*, February 25, 2021, https://warontherocks.com/2021/02/kill-the-drug-war-death-decisions-and-the-limits-of-military-power/, accessed October 28, 2021.

57. Wayne P. Hughes, Jr., and Robert P. Girrier, *Fleet Tactics and Naval Operations 3rd ed*. (Annapolis, MD: Naval Institute Press, 2018), p. 24. On Corbett, see Till 2013, p. 346.

58. Tallis 2020, p. iii.

59. U.S. DoD 2020, p. 10.

60. As one example of this more systemic attitude, Mahan believed that "the principal goal of sea power was to create political leverage to bring an end to conflict on favorable terms by deranging the enemy's economy and society. The (Navy's) operational objective, the enemy fleet, was the subordinate means to the main political object." The extension of that approach means that, though "Naval officers are in the business of sharpening the point of the spear … sea power and combat capability are not the same thing."

61. Swartz 2011, p. 30.

62. Hughes and Girrier 2018, chap. 9.

Biographical Information

Joshua Tallis is a political-military analyst specializing in Arctic strategy and maritime security. He is a research scientist at the Center for Naval Analyses and an adjunct professor at The George Washington University. He holds a Ph.D. in international relations and is the author of *The War for Muddy Waters: Pirates, Terrorists, Traffickers, and Maritime Insecurity*. The views here do not reflect those of CNA or the U.S. Navy.

The Practical Implications of Unresolved Maritime Boundaries: Special Reference to the Malaysian Position

Su Wai Mon

Structured Abstract

Article Type: Research Paper

Purpose—Boundary disputes, whether terrestrial or maritime, involve the issue of State sovereignty or territorial integrity, the core interest of the nation. There is a range of consequences if the disputed parties are unable to reach an agreement to settle the claims, such as denial of nations' access to disputed areas, depriving nations' interests over marine resources as well as creating tensions between them and limitations in performing law enforcement activities. This paper argues that the existing unsettled maritime boundary disputes constitute a threat to sustainable maritime security in Malaysia.

Design, Methodology, Approach—The existing maritime boundary disputes involving Malaysia are thoroughly identified and the implications of undefined maritime boundaries are examined, including jurisdictional lacunae and maritime security concerns.

Findings—Sustaining a nation's maritime security by means of effective law enforcement against various threats is essential. Unsettled maritime boundary disputes create grey areas in claim jurisdiction and eventually lead to the ineffective maritime law enforcement. Realizing practical and existing challenges stemming from the unsettled boundary disputes is essential to stimulate motivation of the countries to beef up negotiation efforts aiming for the peaceful settlements with counter-claimants.

Practical Implications—Malaysia is a maritime nation with a lengthy coastline and it has ongoing maritime boundary issues with its neighboring countries although some of them have been settled successfully by means of agreements. Malaysia is sharing actual and perceived maritime boundaries with Brunei, Indonesia, Singapore, Thailand and Vietnam. This

email: suwai.mon@um.edu.my

Journal of Territorial and Maritime Studies / Volume 9, Number 1 / Winter/Spring 2022 / pp. 74–96 / ISSN 2288-6834 (Print) / DOI: 10.2307/JTMS.9.1.74 / © 2022

study encourages Malaysia to actively participate in negotiation processes to reach mutual agreements with any counter-claimants as part of an effort to ensure maritime security in Malaysia.

Originality, Value—This study provides the nexus between unsolved maritime boundaries and the sustainable maritime security with reference to the Malaysian position.

Keywords: dispute settlement, law enforcement, Malaysia,
maritime boundary, maritime security

I. Introduction

Malaysia is a maritime nation with a lengthy coastline and there are still ongoing maritime boundary issues with its neighboring countries, although some of them have been settled successfully by means of agreements. Malaysia is sharing actual and perceived maritime boundaries with Brunei, Indonesia, Singapore, Thailand, Vietnam and the Philippines as shown in Figure 1.

Figure 1. Illustration of Malaysia and its bordering states (Source: courtesy of Encyclopædia Britannica, Inc., copyright 2002; used with permission).

II. Maritime Boundary Agreements Between Malaysia and Its Neighboring Coastal States

Malaysia, a country of Southeast Asia, is formed with a total area of 330,252 square kilometers (sq. km), which includes two land masses: West Malaysia or Peninsula Malaysia and East Malaysia on Borneo Island where the two parts are separated by the South China Sea.[1] The geographic condition of Malaysia encapsulates the most common boundary problems faced by coastal countries throughout Southeast Asia. Malaysia's territorial and maritime disputes are located in "the Gulf of Thailand, the Andaman Sea, the Straits of Melaka, the Straits of Singapore, the South China Sea, the Sulu Sea and the Celebes Sea."[2]

While there are existing maritime boundary disputes which have yet to be resolved, Malaysia could settle some of its claims by means of agreements. The following table summarizes the maritime boundary agreements which were successfully entered into between Malaysia and its neighboring coastal states.

Signatories	Type of boundary	Date signed	Entry into Force	Regional Area
Indonesia-Malaysia	Continental Shelf	27 October 1969	7 November 1969	Straits of Malacca and South China Sea
Indonesia-Malaysia	Territorial Sea	17 March 1970	8 October 1971	Straits of Malacca
Malaysia-Thailand	Territorial Sea and Continental Shelf	24 October 1979	15 July 1982	Gulf of Thailand
Indonesia-Malaysia-Thailand	Continental Shelf	21 December 1971	16 July 1973	Straits of Malacca
Malaysia-Vietnam	Common Area	5 June 1992	5 June 1992	South China Sea
Malaysia-Singapore	Territorial Sea	7 August 1995	7 August 1995	Johor Straits

Summary of Maritime Boundary Agreements between Malaysia and its Neighboring Coastal States. (Source: MIMA)[3]

There are several situations where the coastal states may encounter maritime boundary disputes. One of the major maritime territorial disputes is based on the overlapping offshore claims which first became a significant problem when states started to claim their areas of continental shelf boundaries under national jurisdiction.

The unsettled maritime boundary issues create several loopholes in sustaining maritime security such as denial of nations access to the disputed areas, depriving them of the benefits of the marine resources in the areas as well as creating tension between them. In addition, it is also challenging for the coastal states to assert their sovereignty and exercise their sovereign rights in the disputed maritime areas. Moreover, it is challenging for the authorities to exercise law enforcement actions effectively against various security threats occurring in these areas due to the uncertainty of jurisdictional rights. There can also be the political tensions affecting bilateral relationships of the states if the conflict remains unresolved by means of an agreement.

This article aims to streamline the implications of unresolved maritime boundaries creating grey areas on asserting jurisdiction in exercising maritime law enforcement against various maritime security threats in Malaysia. Ineffective law enforcement undermines the

primary aim of protecting territorial sovereignty as well as national security. Analysis of the existing maritime boundary disputes for Malaysia corroborates existing maritime security threats and the practical law enforcement problems faced by the law enforcement authorities in the disputed areas. This article concludes with the recommendation for Malaysia to further strengthen the efforts in reaching the mutual agreements with its counter claimants. And it is also advised that Malaysia should explore alternative initiatives by peaceful means in cases where it faces challenges in reaching the mutual agreements.

III. Ongoing Maritime Boundary Disputes in Malaysia

Despite the successful settlements of maritime boundary disputes by means of agreements, Malaysia is still required to overcome the challenges emanating from the rest of the pending maritime boundary disputes with its neighboring countries, in particular, Indonesia, Singapore, the Philippines and Brunei. It is also noteworthy that Malaysia is one of the claimants in the South China Sea disputes. This section discusses the issues concerning the ongoing maritime boundary disputes involving Malaysia.

3.1 Malaysia and Indonesia

Malaysia gained independence on 31 August 1957. It participated in the first UN Conference of the Law of the Sea (UNCLOS-I) and ratified the four 1958 Geneva Conventions.[4] Malaysia adopted its continental shelf Act on July 28, 1966, and proclaimed the extension of its territorial sea from 3 nm to 12 nm on 2 August 1969. Based on its national legislation and in compliance with bilateral agreements with Indonesia, Malaysia could delimit its continental shelf boundary in the Straits of Malacca and South China Sea and territorial sea boundary in the Straits of Malacca, respectively. The terrestrial boundary of Malaysia and Indonesia is limited to the island of Borneo, separating the Indonesian regions of Kalimantan barat and Kalimantan Timur from the Malaysian states of Sabah and Sarawak while remainder of the two countries' borders are separated by the water bodies of the Strait of Malacca, including the Strait of Singapore and the South China Sea. Malaysia has yet to settle their maritime boundaries "in the Strait of Malacca (exclusive economic zone, and territorial sea in the Southern part of the straits), South China Sea (exclusive economic zone), and Sulawesi Sea (territorial sea, exclusive economic zone and continental shelf)."[5]

On December 21, 1979, Malaysia published its new map called "Peta Baru Menunjukkan Sempadan Perairan dan Pelantar Benua Malaysia" (New Map Showing the Territorial Waters and Continental Shelf Boundaries of Malaysia) and officially proclaimed its Exclusive Economic Zone (EEZ) on April 25, 1980. The release of 1979 map created tensions and disputed by its neighboring countries including Indonesia. The new boundaries of Malaysia's territorial waters, exclusive economic zone and continental shelf in the 1979 Map, particularly on the northern part of the Borneo Island had greatly overlapped with those of Indonesia's Kalimantan which is located on the southern part of the same land. Indonesia also made unilateral claim to an EEZ in its official map of 2009 and 2010 which extends well to the

north and east of the agreed continental shelf boundaries established with Malaysia under the 1969 bilateral agreement.[6]

It is interesting to note that Malaysia indicates its intention to use the single line approach for the continental shelf and exclusive economic zones based on its declaration in particular, paragraph 7, upon the ratification of the UNCLOS 1982. The declaration of Malaysia can be read as follows:

> Malaysian Government interprets article 74 and article 83 to the effect that in the absence of agreement on the delimitation of the exclusive economic zone or continental shelf or other maritime zones, for an equitable solution to be achieved, the boundary shall be the median line, …. Malaysia is also of the view that in accordance with the provisions of the Convention, namely article 56 and article 76, if the maritime area is less or to a distance of 200 nautical miles from the baselines, the boundary for continental shelf and exclusive economic zone shall be on the same line (identical).[7]

It should be noted that the delimitation of EEZ became a matter of concern only after the UN Convention on the law of the Sea 1982 came into force as a result of the Third United Nations Conference on Law of the Sea (UNCLOS III) while the previous bilateral agreements of delimiting continental shelf (1969 Agreement) and territorial sea (1971 Agreement) boundaries between Malaysia and Indonesia were based on the 1958 Geneva Conventions. Regarding delimitation of EEZ boundaries in the Malacca Strait, it is not viable for both Malaysia and Indonesia to claim the maximum EEZ boundary of 200 nautical miles as prescribed in the UNCLOS 1982 as the Strait is too narrow that the width at opening of the Straits near the northern tip of the Sumatra Island is less than 400-nm width. Based on the Malaysia's declaration upon ratification of UNLOS 1982, it is clear that Malaysia intends to use the single boundary line for both EEZ and continental shelf, which is also reflected in its new map, Peta Baru, published in 1979. In addition, Malaysia intends to maintain the status quo as agreed in 1969 continental shelf agreement as it claims that the "EEZ boundary limits for both countries are based on the outer boundary lines of continental shelf stipulated in the 1969 Agreement."[8]

On the other hand, the Indonesian government claims that the "common boundary limits of EEZ between the two countries have yet to be determined as they are not based on the previous 1969 Continental Shelf Boundary Agreement." The disagreement over the boundary lines of EEZ between the two countries is illustrated in their respective national map. Based on the map issued by the Unitary State of the Republic of Indonesia (NKRI) and published by the Geospatial Information Board (BIG), Indonesia's EEZ claim in the Straits is different from that of Malaysia.[9] Currently, both Malaysia and Indonesia have made unilateral claims regarding the EEZ boundaries as shown in Figure 2.

Therefore, a question could be raised whether to follow the single boundary line approach as agreed in 1969 Continental Shelf Agreement or to re-negotiate for the new and separate EEZ boundaries for Malaysia and Indonesia. Article 83 (4) of the UNCLOS 1982 states that the States are required to follow the agreement in force between the States concerned on questions relating to the delimitation of the continental shelf.[10] In cases where both countries opt for renegotiation of EEZ boundary lines, the only option is to terminate the 1969 agreement by consent of both parties[11] which might not be prudent to do so since it will also affect the previously agreed boundary line for continental shelf in

Figure 2. The unilateral claims of EEZ Boundaries by Malaysia and Indonesia (Source: Arsana, 2013).

the Strait of Malacca. Furthermore, the border treaties are sacred documents once they are signed and difficult to terminate even for a good reason.[12] It should be noted that 1969 Agreement addresses the continental shelf boundary only in the Strait of Malacca and much of the complex boundary issues for the delimitation of (territorial sea, exclusive economic zone and continental shelf) in the Celebes Sea between Malaysia and Indonesia remain unsolved. As far as Indonesia is concerned, it would prefer and keen for renegotiation of maritime boundaries with its neighbors and the countries across the Malacca Strait including Malaysia since there may be changes of boundary lines after it acquired the full international recognition as an archipelagic state in 1982.[13] In addition, Indonesia believes that there should be separate boundary lines for continental shelf and exclusive economic zones since they are both under the different legal regimes under the UNCLOS 1982.

3.2 Malaysia and Singapore

Malaysia and Singapore, littoral States to the Straits of Malacca, share maritime boundaries and not all of the maritime territorial disputes have been resolved. The boundary dispute between the two States is nothing new since Singapore's separation from Federation of Malaysia in 1965. With regard to the maritime boundary delimitation between Malaysia and Singapore, the landmark decision of the International Court of Justice on the issue of sovereignty over the Pedra Branca, Middle Rocks, and South Ledge plays an important role in determining clear-cut maritime boundaries between the countries.

The settlement of maritime boundary disputes takes several years of negotiations to reach the mutual agreement between the states concerned. In addition, even in cases where the states opt for the third-party dispute resolution, such as bringing the case to the World Court, the execution and implementation of the decision of the Court is not an easy task without the mutual understanding and keen efforts to execute the judgement of the court by the state parties to the dispute. The ICJ's landmark decision of the sovereignty issue over Pedra Branca/Pulau Batu Puteh is one of the most relevant case studies as the illustration of the challenging task of delimitation of maritime boundaries.

3.2.1 Issue of Sovereignty Over Pedra Branca/Pulau Batu Puteh. In 1979, Malaysia published a map entitled "Territorial Waters and Continental Shelf Boundaries of Malaysia" (published by the Director of National Mapping, Malaysia) (hereinafter "the 1979 map"), which showed the outer limits and co-ordinates of the territorial sea and continental shelf claimed by Malaysia. The Map illustrates the island of Pedra Branca/Pulau Batu Puteh as lying within Malaysia's territorial waters. On February 14, 1980, Singapore lodged a diplomatic protest indicating its objection against Malaysia's claim over Pedra Branca and requested that the 1979 map be corrected.

There was a series of inter-governmental talks over the sovereignty issue of Pedra Branca in 1993–1994 which did not bring resolution of the matter. In 1995, Singapore signed an agreement with Malaysia to "precisely map out territorial water boundaries" according to the Straits Settlements and Johor Territorial Waters Agreement 1927.[14] However, the issue of sovereignty over Pedra Branca was not resolved by this agreement.

During the first round of talks in February 1993 "the question of the appearance of Middle Rocks and South Ledge was also raised." Since the bilateral negotiations were a failure, both parties agreed to submit the dispute to the International Court of Justice. The Special Agreement was signed in February 2003, and notified to the Court in July 2003.[15] In 2008, the Court gave decision which includes: "the sovereignty over the Pedra Branca/Pulau Batu Puteh belongs to Singapore; sovereignty over the Middle Rocks belongs to Malaysia; and sovereignty over South Ledge belongs to the State in the territorial waters of which it is located."[16] Therefore, the ICJ left the question of South Ledge to be settled amicably between the two countries.[17]

3.2.2 Application for Revision of ICJ's 2008 Judgement. While the implementation is still pending, in February 2017, Malaysia applied for revision of ICJ's 2008 judgement according to Article 61 of the Statute of the ICJ.[18] Malaysia cited three documents[19] in its application and contented that "the Court would have reached a different conclusion if it had been aware of this new evidence."[20]

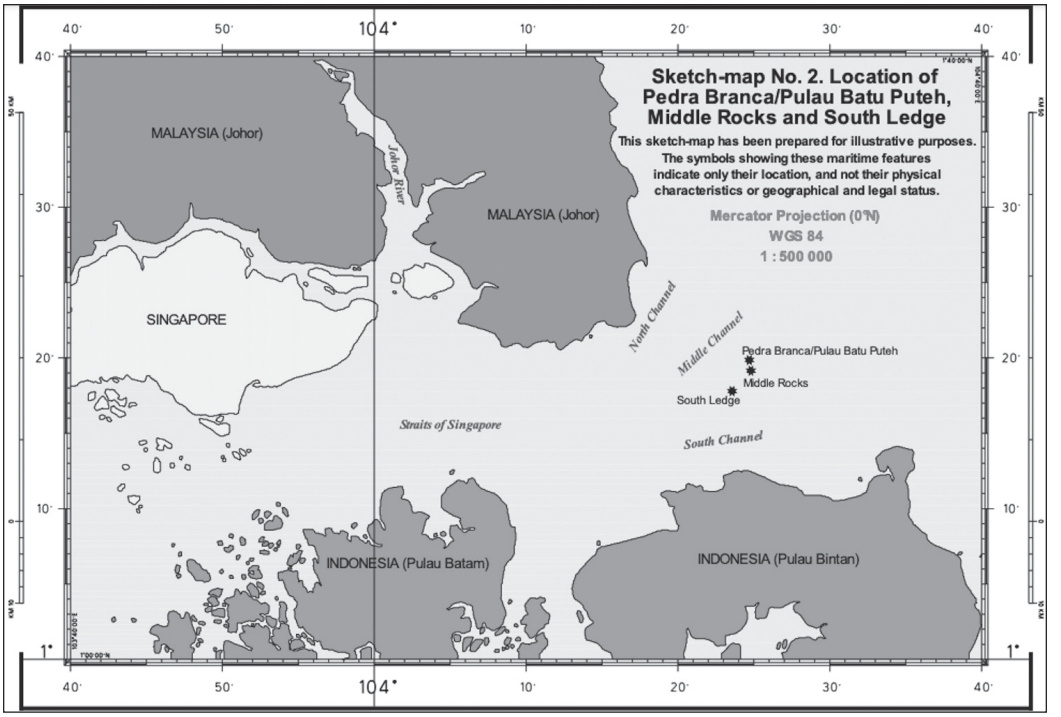

Figure 3: Illustration of the location of Pedra Branca, Middle Rocks and South Ledge (Source: IILSS—International Institute for Law of the Sea Studies).

Again, on June 30, 2017, Malaysia applied to ICJ for interpretation of its 2008 Judgement according to Article 60 of the Statute of the ICJ. However, on May 28, 2018, Malaysia informed ICJ that "it would discontinue the two applications it filed in 2017 challenging ICJ's decision to award Pedra Branca to Singapore."[21] The reasons for this decision of Malaysia were not provided. Singapore also supported Malaysia and informed the ICJ that it agreed with Malaysia's decision. The ICJ, in letters dated May 29, 2018, informed Malaysia and Singapore that the court had placed on record the discontinuance, by agreement of the parties, of the proceedings instituted on February 2, 2017, and June 30, 2017, by Malaysia against Singapore, and directed that the cases be removed from the Court's List.[22]

After the closure of the reapplication of Malaysia to the ICJ, things were quiet between Malaysia and Singapore in terms of conversation regarding the implementation of the 2008 Judgement. On October 24, 2018, a situation arose where Malaysia extended its Johor Bahru port limits which led to the tensions between the two countries, and Singapore claimed that such extension of Johor port limits is clearly an encroachment of Singapore's territorial waters off Tuas.[23]

3.2.3 Issues on Extension of Port Limits. The agreement signed in 1995 to delimit precisely territorial waters boundaries in the Johor Strait resolved the Singapore's rejection to the 1997 Malaysia's map. In 1987, Malaysia published its Johor Bahru port limits, which follows the territorial sea limits claimed in its 1979 map.[24] It is also noted that Singapore and Malaysia made slight amendments of their port limits in 1997[25] and 1999[26] respectively. For

the next 20 years, those limits remained intact without any protest from both parties. However, on October 25, 2018, Malaysia published changes to Johor Bahru port limits through Malaysia's Federal Gazette in a document published by the Attorney-General Chambers.[27] Singapore claimed that the new extension of port limits was significantly "eastward beyond the territorial sea claims made by Malaysia's 1979 map."[28]

On December 4, 2018, Singapore lodged strong protest against Malaysian Port limit extension requesting that Malaysia to "refrain from any further unilateral action and also to amend the gazette notification." However, Malaysia argued that it did not touch Singapore's territorial waters by the extension of port limit. According to Singapore Transport Minister Khaw Boon Wan, there were 14 intrusions by Malaysian government vessels, from Malaysian Maritime Enforcement Agency and Marine Department Malaysia, into Singapore's territory and therefore, Malaysia's action is "a serious violation of Singapore's sovereignty and international law." As retaliation, Singapore extended its port limit of Tuas on December 6, 2018.[29]

On December 7, 2018, Malaysia proposed that both countries to "cease and desist" from sending assets into "disputed areas." However, Singapore rejected the proposal and it rather required Malaysian government vessels to leave its waters and to revert the status quo that had been placed before October 2018.[30]

3.2.4 Mutual Agreement to Suspend the Extension of Port Limits. Despite the maritime tensions that have been festering between the two countries for months after Malaysia's extension of Johor port limit in October 2018, both Malaysia and Singapore could reach

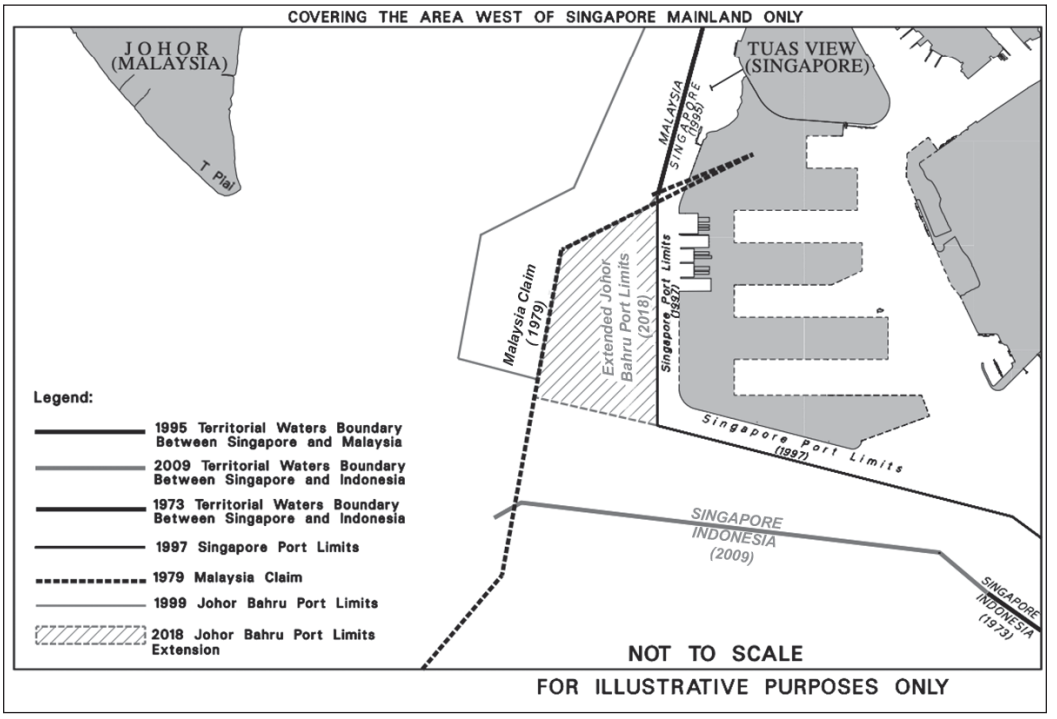

Figure 4: Illustration of the Disputed port limits in the Johor Strait (Source: Singaporean Ministry of Transport).

an agreement to restore the status quo in their disputed maritime border area on March 14, 2019, where both countries' foreign ministers met in Malaysia and a joint statement was released after the meeting that "the two countries have mutually agreed to suspend expansions of their port limits which created the overlapping area that is in question as well as cease all commercial activities and not anchor government vessels in the area."[31]

They have also agreed to set up a committee for maritime boundary delimitation. In the event where the committee is unable to reach an amicable solution on delimitation, both countries are willing to resort to an appropriate international third-part dispute settlement procedure on terms to be mutually agreed by the parties.[32]Although there has been progress for negotiations on delimitation of maritime boundaries between Malaysia and Singapore, the finalized agreement and execution of 2008 Judgement are yet to be implemented. It is noted that territorial and boundary delimitations issues are one of the most sensitive bilateral or international disputes particularly where various national interest including sovereignty and territorial integrity issues are involved.

3.2.5 International Disputes Settlement Mechanisms. Both Malaysia and Singapore possess the favorable record of settling disputes at international forum in accordance with international law. Apart from the Pulau Batu Puteh case, in July 2003, Malaysia instituted a statement of claim at the Permanent Court of Arbitration (PCA) against Singapore regarding the dispute concerning land reclamation by Singapore in and around the Straits of Johor by invoking the provisions of the 1982 UN Convention on the Law of the Sea and referring the dispute to arbitration, under Annex VII of the Convention. Subsequently, Malaysia applied to the International Tribunal for the Law of the Sea (ITLOS) for provisional measures to stop Singapore's land reclamation works pending the outcome of the arbitration. Malaysia alleged that land reclamation works by Singapore in Pulau Tekong and Tuas View Extension impinged on Malaysia's territorial waters, caused pollution and other adverse harm to the marine environment in the Straits of Johor.[33] Finally, both countries could reach the Settlement Agreement, which had been signed on April 26, 2005, and the Tribunal awarded upon the agreed terms of the agreement at the request of the parties.

The said Settlement Agreement provides:

> This Agreement is in full and definitive settlement of the dispute with respect to the land reclamation and all other issues related thereto. The Parties agree that the issue pertaining to the maritime boundaries be resolved through amicable negotiations, without prejudice to the existing rights of the Parties under international law to resort to other pacific means of settlement.[34]

According to Singapore's Minister of Foreign Affairs, Dr. Vivian Balakrishnan, "Singapore believes that maritime boundary delimitation is best resolved through negotiations, to reach an amicable settlement acceptable to all parties."[35] In cases where negotiations are unsuccessful, Singapore is prepared to resort to an appropriate international dispute settlement procedure, on terms mutually agreed by the parties in compliance with the Singapore's declaration under Article 298 (1) (a) of the UNCLOS 1982.[36] As far as Malaysia is concerned, it has a significant record of respecting international law from its resort to international dispute resolution procedure in the cases of Pulau Batu Puteh, Pulau Sipadan and Ligitan as well as Singapore's land reclamation case. It is just a matter of time that both countries will be able to resolve all the maritime boundary disputes by amicable means.

3.3 Malaysia and the Philippines

Malaysia and the Philippines have to negotiate their "maritime boundaries in South China Sea (territorial sea, exclusive economic zone and continental shelf boundaries of adjacent states), Sulu Sea (territorial waters), and Sulawesi Sea (territorial sea, exclusive economic zone and continental shelf boundaries)." The maritime boundaries between these two countries in the South China Sea could be complicated by the overlapping claims of other states.

Maritime boundary delimitation in the Sulu Sea is even more contentious because of the Philippines' claim of sovereignty over North Borneo (Sabah).[37] Therefore, it is not an easy task unless both countries bilaterally reach a peaceful agreement on the issue of the Philippines's territorial claim over North Borneo (Sabah). The Philippines have been enduring territorial claim over Sabah and it officially proposes that North Borneo (Sabah) forms part of the Philippine territory based on historic right or title. Currently, Sabah is under the sovereignty of Malaysia, where it was incorporated into the Federation of Malaysia in 1963.[38] The question of sovereignty claims over Sabah by the Philippines comes into light because of the proposed shift to a federal system of government by Philippines President Rodrigo Duterte's administration. In drawing up proposals for this new model of government, a member of the Philippines consultative committee included Sabah as part of the Philippines' territory. The proposal includes 12 States and he suggested Sabah is to be added as 13th State of

Figure 5: Map of Sabah, Malaysia (https://www.sabah.gov.my/cms/?q=ms/content/pengenalan [Sabah State Government]).

the Philippines.[39] On the other hand, Malaysia contends that it clearly objects the Philippines' claim and Sabah has been recognized by the UN and by other countries worldwide as a Malaysian territory and therefore, there should be no further attempt by the Philippines claiming that Sabah is their territory.[40]

However, Malaysian Prime Minister's recent visit to Manila in March 2019 signifies the peaceful bilateral relations between the two countries. According to the Prime Minister Tun Dr Mahathir Mohamad, there is no claim over Sabah by the Philippines.[41] Both leaders Tun Dr Mahathir and President Duterte expressed their desire to "further strengthen the existing harmonious bilateral relationships between the two neighbors."[42]

3.4 Malaysia and Brunei

Malaysia has unsettled maritime territorial disputes with Brunei Darussalam due to overlapping claims over continental shelf and EEZ areas in South China Sea region. Brunei also claims Louisa Reef which is under Malaysia control.[43] However, "on 16 March 2009 Brunei Darussalam and Malaysia issued a Joint Statement announcing among others the signing of Exchange of Letter between the Prime Minister of Malaysia and Sultan of Brunei which aims to end a longstanding boundary dispute between the two states." This agreement legally ends the maritime boundary disputes that caused tensions between the two States. It is noted that they were even near armed conflict in the past.[44]

At the 21st Annual Leaders' Consultation between Brunei Darussalam and Malaysia which was held in Bandar Seri Begawan, Brunei Darussalam, on 23 November 2017, both leaders agreed to further strengthen bilateral relations for the "significant growth in political, economic and strategic issues of mutual interest, based on the firm foundation of common values and traditions between the two countries."[45] The negotiations based on the provision of the Exchange of Letters relating to maritime access is still underway. In the recent meeting of leaders from both Malaysia and Brunei in March 2019, they "encouraged their officials to explore innovative ways to develop maritime cooperation between the two countries. In this regard, the two leaders welcomed the ongoing discussions between their officials in this field with a view to having a Memorandum of Understanding (MoU) on Maritime Cooperation."[46]

3.5 Malaysia's Claims Over Spratly Islands in the South China Sea

Malaysia is also involved as one of the claimants in the *South China Sea disputes,* the most contentious problem in the region. There are six claimants to be the owner of the Spratly Islands in the South China Sea, namely China, the Philippines, Malaysia, Vietnam and Brunei Darussalam, and Taiwan. Except China and Taiwan, the other four claimants are ASEAN countries. The claims over the Spratly Islands remain unsettled until today.[47] Among the six claimants, China and Vietnam are the only States which claim sovereignty over the entire island group while the Philippines, Malaysia and Brunei only claim the title to a portion.[48] In addition, all the claimants are parties to the United Nations Convention on Law of the Sea 1982.

Although one may argue that Spratly Islands dispute is not a matter of maritime boundary delimitation dispute but a dispute over the title of islands, the ICJ in its judgment on

the *Nicaragua v. Honduras* case (see para 114 of the Judgment)[49] clearly stated that delimitation and sovereignty issues are interrelated. In the Spratly Islands dispute, only after the determination of title over the islands, the maritime boundary can be delimited among the countries.

Both Malaysia and Brunei made claims to "the Southern portion of the Spratly Islands based on their geographic proximity to the islands."[50] Among other claimants, China being the superpower in the region, it has been doing various unilateral activities in the disputed areas despite the protest from the other claimants such as building artificial islands, encroaching into the EEZ of other claimants, conducting military trainings in the disputed areas etc. Moreover, China is not likely to honor any decision made by international courts, PCA or ICJ since it had already challenged and rejected the jurisdiction of the PCA's decision on South China Sea Arbitration (The Republic of the Philippines v. People's Republic of China) in 2016.[51]

Figure 6: Illustration of claimants in the South China Sea Dispute (Source: David Lai, *The United States and China in Power Transition* [Carlisle, PA: Strategic Studies Institute, U.S. Army War College], December 2011).

IV. Maritime Boundary Disputes and Malaysian Maritime Security: The Nexus

As discussed in the previous section, Malaysia still has unsettled maritime boundaries with Indonesia, Singapore, Brunei and the Philippines. Moreover, being one of the claimants in the long-standing South China Sea disputes, the national maritime security and other economic interests of Malaysia are at stake. There can be numerous challenges for a country with undefined and disputed maritime boundaries. One of the significant implications is that the existence of such disputes creates grey area in exercising state jurisdiction, and it eventually led to the situations where national maritime security and ocean governance is compromised.

Malaysia is one of the littoral states to the Strait of Malacca, one of the busiest trade routes where nearly 100,000 vessels pass through each year, accounting for about one-quarter of the world's traded goods.[52] In addition, Malaysia is a maritime nation where sea area is 4 times its land mass, possessing a long tradition of maritime activities and various maritime interests. The maritime industry is the major contributor to Malaysian economy since 95% of Malaysian trade by volume is seaborne. Nowadays, maritime interests in Malaysia are not only limited to trade and shipping activities but also extend to very crucial matter of security and defense.[53] There are various security threats endangering Malaysian maritime security including piracy and armed robbery at sea, maritime terrorism, marine environmental pollution and Illegal Unreported and Unregulated (IUU) Fishing, human and drugs trafficking and other maritime crimes. In order to suppress those crimes by the Malaysian authorities and the law enforcement agencies, the jurisdictional clarity for exercising their territorial jurisdiction is of paramount importance.

Currently, there are few examples where Malaysian maritime security is compromised as a result of undefined maritime boundaries. As discussed earlier, the EEZ boundary issue is yet to be resolved between Malaysia and Indonesia in the northern part of the Straits of Malacca which create lacuna in exercising law enforcement actions such as apprehending hundreds of fishermen of either country in the "grey area" for allegedly committing illegal fishing, an offence under the law of both nations.[54] Negotiations are still ongoing and both counties agreed in February 2012 to "no longer arrest fishermen of either countries in the 'grey area' but instead would only instruct them to leave the area."[55] Despite the challenges, they could enter into a Special Agreement on overlapping areas. Regarding this, an officer of the Royal Malaysian Navy commented as follows:

> We have the Special Agreement with Indonesia in the overlapping area. They do not arrest our boats and neither do we. We see that their boats are fishing but we just drive them away. Last time the Minister said that every time we catch them, we sent them to jail and their family got nothing to eat. They are very poor people. Therefore, rather than putting them in the jail, we send them back. I think that this is the better solution so far.[56]

It is also noted that many of arrested fishermen claimed innocent as they were allegedly arrested in their own national waters. In the past, the alleged detention of fishermen or confiscation of vessel has occasionally triggered diplomatic protests and frictions, undermining the cordial relations of both countries.[57] Despite having mutual understanding of not to arrest the fishermen in the grey area as an ad hoc solution to the existing jurisdictional

challenge, it is still an imperative for both Malaysia and Indonesia to resolve the boundary issue by means of finalized bilateral Agreement on the delimitation of EEZ boundary line between the two countries.

The same situation occurs in Sulu and Celebes Sea where there is no defined maritime territory between Malaysia and the Philippines, creating a "grey area" in asserting jurisdiction, to perform law enforcement activities against rampant security threats, such as piracy, armed robberies, illegal immigration, and kidnapping for ransoms (KfR) by the non-state actors. The Lahat Datu Intrusion by the Sulu militants in 2013 was the most significant security threat to the Malaysian sovereignty and territorial integrity. Despite several efforts taken by the Malaysian government to thwart security threats in the area including the improvement of enforcement capabilities such as the establishment of Eastern Sabah Security Zone (ESSZONE)[58] and Eastern Sabah Security Command (ESSCOM),[59] it is still a challenge to avert cross-border kidnappings or Kidnapping for Ransom (KfR),[60] particularly by the Islamic separatist groups from Southern Philippines such as Abu Sayyaf Group (ASG). The most recent incident took place on Jan 16, 2020 where "five Indonesian fishermen were abducted from the eastern edge of Sabah waters off Lahad Datu by a kidnap-for-ransom group linked to the notorious Abu Sayyaf from southern Philippines."[61]

For the time being, while the maritime boundaries of the states concerned are yet to be defined by agreements, cooperative mechanisms are the only solutions to suppress the maritime security threats in the eastern coast of Sabah. Sustaining maritime security is the integral part of national security and protection of territorial sovereignty. Therefore, the issues or threats undermining sustainable nation's maritime security are required serious attention. In order to curb the criminal activities particularly KfR incidents in the eastern coast of Sabah, the three countries of Malaysia, Indonesia and the Philippines could reach an agreement in 2016, namely, "Standard Operating Procedures" which allows "joint operations in all three nations' territorial waters—including the right to chase suspected pirates across boundary lines in 'hot pursuit' enforcement actions."[62] This joint-patrol agreement is an attempt to thwart the occurrence of security threats in the Sulu Sea such as piracy and kidnapping for ransoms (KfR) cases perpetrated by terrorist organization Abu Sayyaf, which is associated with ISIS and Al Qaeda.[63]

In addition, the most recent dispute between Singapore and Malaysia over extension of port limits underlines the significance of defined maritime boundary demarcation between neighboring countries. The presence of government vessels in disputed waters may lead to the political tensions between the disputed countries and create more difficult situations for the countries to settle the dispute by amicable means. Such a situation occurred in October 2018, where Singapore claimed that the presence of Malaysian law enforcement vessels in the disputed territorial waters were clearly an encroachment of Singapore's sovereignty and a violation of international law. Currently, although both countries maintain the status quo of their port limits prior to 25 October 2018 incident, the dilemma for jurisdictional clarity is still significant particularly that the disputed area is part of the territorial waters of both countries where they can exercise territorial sovereignty.

In July 2021, Singapore announced that its land reclamation works around Pedra Branca shall be started by end of the year in order to improve existing facilities such as berthing for vessels and additional logistics, administrative support and communications facilities. According to the Singapore's Ministry of National Development (MND), the development

works aim for the "greater awareness over the waters around Pedra Branca, and to respond more quickly to maritime safety and security threats."[64] This announcement could be a concern for Malaysia since the delimitation of territorial waters between Malaysia and Singapore is yet to be finalized according to the ICJ's 2008 Judgement. According to the ICJ's ruling, Pedra Branca was awarded to Singapore, Middle Rocks to Malaysia, and the sovereignty over the South Ledge belongs to the State in whose territorial waters is located. Therefore, the question of sovereignty over the South Ledge is left to be resolved by the disputed parties through bilateral negotiations. Recently on 23 November 2021, The Malaysia-Singapore Joint Technical Committee (MSJTC) met virtually to "continue discussions on the implementation of the International Court of Justice (ICJ) Judgment on Pedra Branca, Middle Rocks and South Ledge."[65] It is suggested that finalizing the negotiations for delimitation of precise territorial waters boundary should be the priority for both countries rather than to commence the reclamation works while the boundary dispute remain unresolved. In cases where should any disputes arise due to the Singapore's reclamation works, it will further delay the bilateral negotiations, trigger diplomatic tensions and both countries "will remain lost in borderless waters."[66]

Similarly, the alarming situations to the Malaysian maritime security are also present in the disputed areas in the South China Sea. In recent years, the waters off Sabah within Malaysia's EEZ (in South China Sea) have been the area with apparent territorial challenges. According to the Minister from Prime Minister's Department of Malaysia, People's Liberation Army Navy (PLAN) vessels had encroached into Malaysia's maritime zone[67] in the South China Sea nearly once a year since 2011.[68] In addition, the reports confirmed that the foreign fishermen who encroached into the Malaysian EEZ had received military training. However, Malaysia maintains its bilateral relation with China. Since 2012, Malaysia has started military trainings and exercises with China despite its territorial dispute with the country in the South China Sea.[69] In 2015, China conducted the first joint military drill with Malaysia where more than 1,000 Chinese troops involved, the largest ever between Beijing and an ASEAN country.[70] According to the officer from the Royal Malaysian Navy, "Malaysia and Myanmar can be identified as the ASEAN countries with close relations to China. Moreover, Malaysia stays neutral regarding the disputes between Super Powers, for example, between China and the United States. It welcomes military vessels from both countries to Malaysian Ports. Malaysia believes that there must be a peaceful solution to settle boundary claims in the South China Sea."[71] Despite being the country with unsettled maritime boundary disputes, Malaysia deals with its counter claimant in very diplomatic ways and its efforts in term of keeping peace and understanding with its neighboring countries is to be appreciated.

V. The Way Forward

The delimitation of maritime boundaries is easier said than done. Basically, the disputes exist before the boundary line is drawn and generally disappear after the line or a series of lines is determined and agreed upon.[72] It is not a straightforward task particularly when the dispute arises concerning sovereignty over islands and rocks, one of the major causes of pending maritime delimitation. One of the examples is the long-standing sovereignty

dispute between Malaysia and Singapore concerning the ownership of islands/rocks of Pedra Branca, Middle Rocks, and South Ledge, which has been settled by the International Court of Justice (ICJ).[73]

Disputes over islands[74] can be identified as the most difficult problems to be solved in maritime boundary delimitation by means of negotiation. This is because the UNCLOS gives privilege to the coastal states having sovereignty over the offshore island to claim extended maritime territories since the islands can possess their own territorial sea, exclusive economic zone and the continental shelf of their own.[75] Article 121 (2) of the UNCLOS 1982 differentiates between islands and "rocks which cannot sustain human habitation or economic life" are not entitled to exclusive economic zone or continental shelf. It is found that most maritime disputes over offshore islands have not been resolved. In addition, many of the disputes over offshore islands involve more than two States with claims, for example, the South China Sea disputes which involve six countries with claims over some or all of the islands in the Spratly archipelago.[76] When the defined maritime delimitation is absent, it creates various problems regarding asserting sovereignty in the case of territorial sea. In other maritime zones beyond the 12 nautical miles territorial sea, the disputes arise concerning the sovereign rights over natural resources, including fisheries, oil and natural gas.

Although the legal framework is clear with the delimitation of the territorial sea in general,[77] it is necessary to enter into an agreement or bilateral treaty to delimit the territorial seas with neighboring countries. In addition, it is more challenging for the delimitation of EEZ boundaries since the UNCLOS 1982 does not specifically mention the method used for EEZ delimitation where Article 74 only mentions that delimitation is carried out to achieve an equitable solution. The method and approach to be used to achieve the equitable solution is left to be negotiated by the States concerned. To date, Malaysia has entered into delimitation agreements such as the agreements with Indonesia and Thailand with regard to the delimitation of territorial seas in 1970[78] and 1979[79] respectively. Moreover, the Exchange of Letters signed between Malaysia and Brunei in 2009 which established the final delimitation of maritime boundaries, territorial sea, continental shelf and exclusive economic zone of the two Countries has resolved the outstanding bilateral issues by means of amicable settlement after 20 years of tough negotiations between the two Countries.[80]

It is noteworthy that maritime boundary negotiations do not start at the negotiation table. Before negotiations commence, it is essential to establish the clear and solid national position since such delimitation process is "a complex, multi-dimension, and multi factored processed."[81] In Malaysia, there are various agencies overseeing the national maritime interest and security, including the National Security Council, Fisheries Department, Marine Department of Malaysia, Department of Environment, Malaysian Maritime Enforcement Agency, the Royal Malaysian Navy and the Marine Police. Therefore, all the relevant departments and stakeholders are required to come out with the national position reflecting all of its interest in a particular segment of maritime borders which will be used as the fundamental national approach to be used throughout the negotiation process. In addition, there are several issues involved in negotiating maritime boundary delimitation such as advanced legal knowledge, technical expertise, and most importantly the political will of the parties. In addition, geographical situation and types of national interest involved are varied depending on the country to which Malaysia is dealing with. Moreover,

compliance with international law and norms require the strong political will of the countries involved. As far as Malaysia is concerned, it has a favorable record of trusting the international adjudication process and respecting international rule of law. It could just be in a matter of time that Malaysia can settle its pending maritime boundary dispute with its neighboring countries by peaceful means as enshrined in the Article 33 of the Charter of the United Nations. Nevertheless, negotiating maritime boundaries can be a decade long process and thus Malaysia must have a clear and sustained policy in handling maritime boundaries delimitation. In terms of national policy, Malaysia deals boundary disputes with its neighbors by means of friendly and diplomatic approach instead of using an aggressive and hostile manner.

The maritime boundary negotiations between Malaysia and Indonesia were resumed on 15–19 November 2018 in Melaka, Malaysia. These negotiations have entered the 34th Technical Meeting on the Determination of the Maritime Boundary between Indonesia and Malaysia. According to the Ministry of Maritime Affairs and Fisheries (KKP), the negotiations continued the 33rd technical meeting that took place in Bandung, West Java in March 2018.[82] Negotiations with Singapore were also continued since January 2020.[83] As for the negotiations with the Philippines, Malaysia first needs to overcome the Philippines' claim of sovereignty over North Borneo (Sabah) before reaching the peaceful mutual agreement between two countries for delimitations of maritime boundaries in the Sulu and Celebes Sea.

Malaysia is encouraged to beef up its efforts to end jurisdictional dilemma and to reach mutual agreement for clear-cut maritime delimitations with its neighboring countries. In cases where there is an existing competing claim with grey area for exercising law enforcement activities, it is suggested that countries concerned are required to "make every effort … not to jeopardize or hamper the reaching of the final agreement" in accordance with the article 74 (3) and 83 (3) of the UNCLOS 1982 while following general international law not to aggravate the disputes and escalate tensions among the competing claimants.[84]

VI. Conclusion

Malaysia's negotiations concerning maritime boundary delimitation are still ongoing, however, the process is complex and time consuming. Malaysia is a nation which resorts to amicable means when it comes to dispute resolution with its counter claimants. To date, it has involved in various cooperative mechanisms in sustaining nations' maritime security such as Malacca Straits Patrol (MSS),[85] Eyes in the Sky (EiS)[86] in the Straits of Malacca and Trilateral Maritime Patrol (TMP)[87] and the Trilateral Air Patrols (TAP) and Eastern Sabah Security Command (ESSCOM) to secure the Sabah eastern seaboard. The efforts of various cooperation and collaborations among the interested countries in the disputed maritime territories as well as in the areas with rampant maritime security threats such as piracy have to be acknowledged particularly for the decrease of piracy incidents to some extent in the Straits of Malacca in recent years. Currently, the immediate attention is required for the delimitation of maritime boundaries in the eastern coast of Sabah, in the Sulu and the Celebes Sea since the area is prone to various security threats including Kidnapping for Ransoms (KfR) by non-state actors coming from the southern Philippines. Since ensuring national security by

protecting territorial integrity and sovereignty of the nation is of paramount concern, Malaysia is encouraged to actively participate in negotiation processes to reach the mutual agreements with every counter-claimant for settling unresolved maritime boundary disputes.

Notes

1. Mohd Ayop Abd Razid (ed.), *Malaysia: Facts and Pictures* (Kuala Lumpur: Department of Information Services Malaysia, 2005), p. 2. See also Jameah Mohd Jan (ed.), *Malaysia: Official Year Book* (Kuala Lumpur: Department of Information Services Malaysia, 2004), p. 71.

2. Asri Salleh, "Dispute Resolution Through Third Party Mediation: Malaysia and Indonesia," *Intellectual Discourse* 15(2) (2007), 147–165.

3. Vivian L Forbes and Mohd Nizam Basiron, "Unresolved Maritime Boundaries and Implications for Maritime Security in Southeast Asia," *MIMA Bulletin*, vol. 17 (1) 2010, 3.

4. Mary George, "Implementation of the United Nations Law of the Sea Convention in Malaysia," in Seokwoo Lee and Warwick Gullett (eds.), *Asia-Pacific and the Implementation of the Law of the Sea* (Leiden: BRILL-Nijhoff, 2016), pp. 78–103, https://doi.org/10.1163/9789004310711_006.

5. Amrih Jinangkung, "Maritime Boundary Disputes Among ASEAN Member Countries: Could ASEAN Do Something?" *Opinio Juris: Jurnal Hukum Dan Perjanjian Internasional* 17 (2012). See also Jeffrey J. Smith, "Brunei and Malaysia Resolve Outstanding Maritime Boundary Issues," *American Society of International Law, Law of the Sea Report* 1 (2010).

6. B.A. Hamzah, V.L. Forbes, Jalila A. Jalil and M.N. Barisan, "The Maritime Boundaries of Malaysia and Indonesia in the Malacca Strait: An Appraisal," *Australian Journal of Maritime and Ocean Affairs*, 6(4) (2014), pp. 207–226, https://doi.org/10.1080/18366503.2014.956856.

7. United Nations Treaty Collection, Status of Treaties, UNCLOS December 10, 1982, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec, accessed on 9 October 2021.

8. Wildani Angkasari, Kamarulnizam Bin Abdullah, Asmar Binti Abdul Rahim and Mohammad Zaki Bin Ahmad, "Indonesia—Malaysia Dispute Over Maritime Boundaries in the Northern Region of the Malacca Straits: Implication to Fisheries Management Regime," *Journal of Critical Reviews* 7(3) (2020). https://doi.org/10.31838/jcr.07.03.104.

9. *Ibid.*

10. UNCLOS 1982, article 83 (4).

11. VCLT, 1969, Article 54—"Termination of or withdrawal from a treaty under its provisions or by consent of the parties: The termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the other contracting States."

12. Article 62 (2) of the Vienna Convention on Law of Treaties 1969 states that "a fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty if the treaty establishes a boundary."

13. John G. Butcher and R.E. Elson, *Sovereignty and the Sea: How Indonesia Became an Archipelagic State* (National University of Singapore Press, 2017), https://doi.org/10.2307/j.ctv1xz0cq.

14. "Maritime Dispute: Timeline of Actions Between Singapore and Malaysia from 1979," *Today Online*, December 6, 2018, https://www.todayonline.com/singapore/maritime-dispute-timeline-actions-between-singapore-and-malaysia-1979, accessed October 9, 2021. On October 19, 1927, Governor of Straits Settlements (UK) and Sultan of Johor signed the "Straits Settlements and Johor Territorial Waters Agreement" to determine the border between the island and Johor along the Straits of Johor.

15. https://www.icj-cij.org/files/case-related/130/130-20080523-JUD-01-00-EN.pdf, accessed September 7, 2021.

16. *Ibid.*

17. The International Court of Justice, "Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)," May 23, 2008, https://www.icj-cij.org/en/case/130, accessed January 30, 2021.

18. Article 61 of the Statute of the ICJ provides that "revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence."

19. The first document is "a confidential telegram sent from Singapore's top colonial official to the British Secretary of State for the Colonies in 1958 in which the Governor proposed establishing 'a corridor of international waters' passing only one mile from Pedra Branca." According to Malaysia, the telegram signifies that Governor "did not consider the island of Pedra Branca to be part of Singaporean territory." The second document was a report about a naval incident near Pedra Branca: a British Navy ship could not go to the aid of a Malaysian vessel being followed by an Indonesian gunboat because it was "still inside Johor territorial waters." Malaysia's argument was that "military authorities responsible for Singapore's defense at that time did not view the waters around Pedra Branca as belonging to Singapore." The third document is a map of naval operations in the Malacca and Singapore straits from 1962 which showed Singapore's territorial waters as Malaysia argued that "it did not extend to the vicinity of Pedra Branca."

20. Tham Yuen-C, "ICJ Makes Public Details of Malaysia's Bid to Revise 2008 Pedra Branca Judgment," *Straits Times*, February 10, 2017, https://www.straitstimes.com/politics/icj-makes-public-details-of-malaysias-bid-to-revise-2008-pedra-branca-judgment, accessed May 7, 2019.

21. *Ibid.*

22. *Ibid.*

23. "Singapore, Malaysia Maritime Dispute: A Timeline," *Channel News Asia*, December 6, 2018, https://www.channelnewsasia.com/news/singapore/singapore-malaysia-maritime-dispute-port-limits-timeline-11006762, accessed May 7, 2021.

24. *Ibid.*

25. In 1997, "Singapore's port limits to the west of Raffles Lighthouse are extended slightly for better regulation of shipping traffic in the vicinity. Until 2018, this was the last time Singapore amended its port limits." *Ibid.*

26. In 1999, "Malaysia publishes its amended Johor Bahru port limits, which still tracks the territorial sea limits claimed in its 1979 map." *Ibid.*

27. Federal Government Gazette P.U. (B) 587 "Declaration of Alteration of Port Limits for Johore Bahru Port" dated October 25, 2018 (the "Gazette Notification"), Port Circular No. 88/2018 dated November 11, 2018 ("PC 88/2018"), and Notice to Mariners No. 164/2018 dated November 22, 2018 ("NtM 164/2018").

28. "Singapore, Malaysia Maritime Dispute: A Timeline," *Channel News Asia*, December 6, 2018, https://www.channelnewsasia.com/news/singapore/singapore-malaysia-maritime-dispute-port-limits-timeline-11006762, accessed May 7, 2021.

29. *Ibid.*

30. *Ibid.*

31. Kentaro Iwamoto, "Malaysia in Transition, Singapore and Malaysia Make Major Breakthrough in Maritime Dispute," *Nikkei Asia*, March 14, 2019, https://asia.nikkei.com/Politics/Malaysia-in-transition/Singapore-and-Malaysia-make-major-breakthrough-in-maritime-dispute, accessed October 9, 2021.

32. *Ibid.*

33. Tommy Koh and Jolene Lin, "The Land Reclamation Case: Thoughts and Reflections," *Singapore Year Book of International Law and Contributors* 1(7) (2006).

34. *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor* (Malaysia v. Singapore), Award on Agreed Terms, September 1, 2005, para. 23.

35. "Transcript of Minister for Foreign Affairs Dr. Vivian Balakrishnan's Ministerial Statement on Singapore-Malaysia Relations and Supplementary Questions and Answers During Parliament Sitting," January 14, 2019, https://www.mfa.gov.sg/Newsroom/Press-Statements-Transcripts-and-Photos/2019/01/Ministerial-_Statement_Transcript, accessed October 9, 2021.

36. Singapore filed declaration on December 12, 2018. This declaration means that other States Parties to UNCLOS cannot unilaterally commence third party arbitration or adjudication against Singapore in respect of maritime boundary disputes. Singapore likewise cannot unilaterally commence third-party arbitration or adjudication against other UNCLOS States Parties for such disputes. It must be by mutual agreement: both sides have to agree to the terms of third-party arbitration or adjudication in the event that bilateral negotiations are unsuccessful. See United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI6&chapter=21&Temp=mtdsg3&clang=_en#EndDec, accessed October 9, 2021.

37. Anna Malindog-Uy, "Sabah: Malaysia's or Philippines'?" *The Asean Post*, October 8, 2020, https://theaseanpost.com/article/sabah-malaysias-or-philippines, accessed October 9, 2021.

38. See *Agreement Relating to Malaysia: United Kingdom of Great Britain and Northern Ireland and Federation of Malaya, North Borneo, Sarawak and Singapore 1963*. https://treaties.un.org/doc/publication/unts/volume%20750/volume-750-i-10760-english.pdf, accessed on 2 December 2021.

39. Ian Nicolas Cigaral, "Proposed Federal Gov't Set-Up Wants Sabah Included in Philippine Territory," *PhilStar Global*, January 30, 2018, https://www.philstar.com/headlines/2018/01/30/1782857/proposed-federal-govt-set-wants-sabah-included-philippine-territory, accessed October 10, 2021.

40. Anna Malindog-Uy, "Sabah: Malaysia's or Philippines'?" *The Asean Post*, October 8, 2020, https://theaseanpost.com/article/sabah-malaysias-or-philippines, accessed October 9, 2021.

41. Nikko Fabian, "No Such Sabah Claim, Says Dr. M.," *The Daily Express*, March 8, 2019, http://www.dailyexpress.com.my/news/132076/no-such-sabah-claim-says-dr-m, accessed May 7, 2019.

42. *Ibid.*

43. Ramses Amer, "Managing Border Disputes in Southeast Asia, Kajian Malaysia," *Jld* 18(1–2) (2000).

44. Amrih Jinangkung, "Maritime Boundary Disputes Among ASEAN Member Countries: Could ASEAN Do Something?" *Opinio Juris: Jurnal Hukum Dan Perjanjian Internasional* 17 (2012); see also Jeffrey J. Smith, "Brunei and Malaysia Resolve Outstanding Maritime Boundary Issues," *American Society of International Law, Law of the Sea Report* 1 (2010).

45. "Joint Statement on the 21st Annual Leaders' Consultation Between His Majesty Sultan Haji Hassanal Bolkiah Mu'izzaddin Waddaulah, Sultan,Yang Dr-Pertuan of Brunei Darusslam, and the Honourable Dato Sri Mohd Najib Tun Abdul Razak, Prime Minister of Malaysia, Bandar Seri Begawan, Brunei Darussalam," November 23, 2017.

46. Azura Abas, "Slew of Cooperation on the Cards Between Malaysia and Brunei," *Strait Times*, March 5, 2019, https://www.nst.com.my/news/nation/2019/03/466161/slew-cooperation-cards-between-malaysia-and-brunei, accessed May 7, 2019.

47. Nina Roca, "Whose Land Is It Anyway? The Territorial and Maritime Dispute Over the Spratly Islands," *Florida International University Law Review* 12(2) (2017), p. 392, https://doi.org/10.25148/lawrev.12.2.10.

48. *Ibid.*

49. *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua v. Honduras*), Judgment, I.C.J. 2007.

50. Roca 2017.

51. "PCA Press Release: The South China Sea Arbitration (*The Republic of the Philippines v. The People's Republic of China*)," July 12, 2016, https://pca-cpa.org/en/news/pca-press-release-the-south-china-sea-arbitration-the-republic-of-the-philippines-v-the-peoples-republic-of-china, accessed May 7, 2019.

52. Krishnadev Calamur, "High Traffic, High Risk in the Strait of Malacca," *The Atlantic*, August 21, 2017, https://www.theatlantic.com/international/archive/2017/08/strait-of-malacca-uss-johnmccain/537471/, accessed October 9, 2021.

53. Hanizah Idris and Ruhanas Harun, "Malaysia as a Maritime Situation: Prospects and Challenges" (Jati: Bilangan, 2004), p. 22.

54. M. Mohd Rusli, A. Khin Maung Sein, W. Wan Talaat and M. Mustafa, "Erecting Malaysia's Maritime Fence Over the Straits of Malacca and Singapore," *AALCO Journal of International Law*, 3(1) (2014), pp. 111–120.

55. *Ibid.*

56. Excerpted from "Interview with the Rear Admiral Dato' Pahlawan Mior Rosdi Bin Dato' Mior Mohd Jaafar at the Royal Malaysian Navy Base, Kuala Lumpur," April 8, 2015. The original recording of the interview is with the author.

57. Angkasari et al. 2020.

58. "ESSCOM was established under the Preservation of Public Security Regulations 2013. It is headed by Sabah Chief Minister and assisted by a chief executive office,r who will be a member of the public and be responsible for coordinating and safeguarding the functions and activities of the security forces and government departments and agencies in implementing all initiatives in ESSZONE."

59. Eastern Sabah Security Zone (ESSZONE) (Malay: Zone Selamat Sabah Timur) was launched on March 25, 2013, by the Prime Minister, Datuk Seri Najib Tun Razak. ESSZONE covers 10 districts of the east coast of Sabah, namely Kudat, Kota Marudu, Pitas, BCS, Sandakan, Kinabatangan, Lahad Datu, Kunak, Semporna and Tawau.

60. For a more detailed work on KFR, particularly in Southeast Asia, please refer to Mohd Kassim Noor Mohamad, "Kidnap for Ransom in South East Asia: The Case for a Regional Recording Standard," *Asian Criminology* (3) (2008), pp. 61–73. https://doi.org/10.1007/s11417-007-9040-1; "Storey Ian, Securing South East Asia's Sea Lanes: A Work in Progress," *Asia Policy* (6) (July 2008), pp. 95–128, https://doi.org/10.1353/asp.2008.0025.

61. Justin Zack, "Armed Forces Views Recent Kidnappings in Sabah Waters Very Seriously," January

23, 2020, https://www.thestar.com.my/news/nation/2020/01/23/armed-forces-views-recent-kidnappings-in-sabah-waters-very-seriously, accessed October 9, 2021.

62. "Salu Sea Joint Patrol Agreement Signed," *Maritime Executive*, August 2, 2016, http://maritime-executive.com/article/sulu-sea-joint-patrol-agreement-signed, accessed August 3, 2021.

63. *Ibid.* Indonesian Defense Minister Ryamizard Ryacudu said, "Implementation of the agreement must be conducted as soon as possible due to the high intensity of threats, such as the hostage-taking of several Indonesians by militant groups," The nations have not yet reached an agreement on whether the right to pursue suspects will extend onto land. Their three navies have already begun combined sea patrols.

64. Kenneth Cheng, "Singapore to Reclaim Land Around Pedra Branca to Build Facilities to Improve Maritime Safety and Security," *Today Online*, July 5, 2021, https://www.todayonline.com/singapore/singapore-reclaim-land-around-pedra-branca-build-facilities-improve-search-and-rescue, accessed October 10, 2021.

65. Joint Press Statement by H.E. Dato' Saifuddin Bin Abdullah, Minister of Foreign Affairs, Malaysia and H.E. Dr Vivian Balakrishnan, Minister for Foreign Affairs, Republic of Singapore: Ninth Meeting of the Malaysia-Singapore Joint Technical Committee on the Implementation of the International Court of Justice Judgment on Pedra Branca, Middle Rocks and South Ledge, 23 November 2021, https://www.mfa.gov.sg/Newsroom/Press-Statements-Transcripts-and-Photos/2021/11/20211125-Malaysia-Singapore-Joint-Press-Statement, accessed on 2 December 2021.

66. Mohd Hazmi Bin Mohd Rusli, "Pedra Branca: Lost in Borderless Waters," *The Jakarta Post*, July 13, 2020, https://www.thejakartapost.com/paper/2021/07/12/pedra-branca-lost-in-borderless-waters.html.

67. Malaysian Maritime Enforcement Agency (MMEA) Act, Section (2): "Malaysian Maritime Zone" means the internal waters, territorial sea, continental shelf, exclusive economic zone and the Malaysian fisheries waters and includes the air space over the Zone.

68. Elina Noor, "Security Challenges for Malaysia: Defending the Nation State," in *Security Outlook of the Asia Pacific Countries and Its Implications for the Defense Sector*, NIDS Joint Research Series (15) (2017), p. 66.

69. *Ibid.*, 71.

70. Jason Ou, "China, Malaysia Start Joint Military Exercise," *Straits Times*, September 19, 2015, https://www.straitstimes.com/asia/east-asia/china-malaysia-start-joint-military-exercise, accessed May 7, 2021.

71. Excerpted from "Interview with the Rear Admiral Dato' Pahlawan Mior Rosdi Bin Dato' Mior Mohd Jaafar" at the Royal Malaysian Navy Base, Kuala Lumpur, on April 8, 2015. The original recording of the interview is with the Author.

72. Vivian L. Forbes and Mohd Nizam Basiron, "Unresolved Maritime Boundaries and Implications for Maritime Security in Southeast Asia," *MIMA Bulletin* (17)(1) (2010), p. 3.

73. On May 23, 2008, the International Court of Justice (ICJ) determined that sovereignty over Pedra Branca, the largest feature, rests with Singapore whilst Malaysia holds sovereignty over Middle Rocks. Interestingly, the Court did not specifically determine ownership of South Ledge, which is a Low Tide Elevation. This settlement by the ICJ is an important decision that is likely to affect the delimitation of maritime boundaries in the Singapore Strait involving Indonesia, Malaysia, and Singapore. See "Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)," ICJ Judgment Summary, May 23, 2008, https://www.kln.gov.my/pbp-icj/images/icj_judgment/14506.pdf, accessed January 30, 2021.

74. Article 121 (1) of the UNCLOS: "An island is a naturally formed area of land, surrounded by water, which is above water at high tide."

75. Article 121 (2) of the UNCLOS: "Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory."

76. M. Taylor Fravel, "Territorial and Maritime Boundary Disputes in Asia," in Saadia M. Pekkanen, John Ravenhill, and Rosemary Foot (eds.), *Oxford Handbook of the International Relations in Asia* (New York: Oxford University Press, 2014).

77. Article 15, the UNCLOS 1982 provision on "delimitation of the territorial sea between States with opposite or adjacent coasts."

78. "Treaty between the Republic of Indonesia and Malaysia relating to the Delimitation of the Territorial Seas of the Two Countries in the Straits of Malacca," made on March 17, 1970, in order to delimit the territorial seas of both countries in the Straits of Malacca. *See also* Mohd Hazmi Mohd Rusli and Lowell B. Bautista, "Drawing Malaysia's Line Over the Straits," *Research Online, University of Wollongong*, 2014; Vivian L. Forbes, *Indonesia's Maritime Boundaries* (Malaysian Institute of Maritime Affairs: 1995), p. 22, https://doi.org/10.1080/07266472.1995.10878436.

79. "Treaty Between the Kingdom of Thailand and Malaysia Relating to the Delimitation of the Territorial Seas of the Two Countries," made on October 24, 1979, to strengthen the existing historical bonds

of friendship between the two countries. The coasts of two countries are adjacent to each other in the northern part of the Straits of Malacca as well as in the Gulf of Thailand. *See Also* Choon-Ho Park, "Treaty Between the Kingdom of Thailand and Malaysia Relating to the Delimitation of the Territorial Sea of the Two Countries," in Jonathan I. Charney and Lewis M. Alexander (eds.), *International Maritime Boundaries, Malaysia-Thailand (Territorial Sea*) Vol. 1 (Martinus Nijhoff, 1993), 1096–1098.

80. "Border Issues Between Malaysia, Brunei Solved: Official," *People's Daily Online*, November 5, 2015, http://en.people.cn/90001/90777/90851/6971863.html, accessed May 4, 2021. See also Salma Yusof, *The Law of Maritime Delimitation and the Malaysian Practice* (Ph.D. Thesis, International Islamic University Malaysia, 2014), p. 241.

81. Eddy Pratomo, "Negotiating Maritime Boundaries," *Journal of Legal, Ethical and Regulatory Issues* (21)(3) (2018).

82. Angkasari et al. 2020.

83. "Singapore, Malaysia Continue Discussions on Implementation of International Court Ruling on Pedra Branca," https://www.channelnewsasia.com/singapore/singapore-malaysia-continue-discussions-implementation-international-court-ruling-pedra-branca-786206, accessed on 2 December 2021.

84. Clive Schofield, "Options for Overcoming Overlapping Maritime Claims," *The Journal of Territorial and Maritime Studies* (8)(2) (2021), pp. 21–41.

85. Malacca Strait Patrol (MSP) involves Indonesia, Malaysia, Singapore and Thailand, which "conduct coordinated naval and air patrols while facilitating the sharing of information between ships and the Monitoring and Action Agency (MAA)." The Republic of Singapore Navy (RSN) is hosted the 14th MSP Joint Coordinating Committee (JCC) Meeting from January 15 to 16, 2020, attended by representatives from Indonesia, Malaysia, Singapore, and Thailand. "Singapore Hosts the 14th Malacca Straits Patrol Joint Coordinating Committee Meeting," *MINDEF Singapore*, January 15, 2020, https://www.mindef.gov.sg/web/portal/mindef/news-and-events/latest-releases/article-detail/2020/January/15jan20_nr2, accessed January 30, 2021.

86. The Eyes-in-the-Sky (EiS) initiative between Malaysia, Indonesia, Singapore and Thailand provides "coordinated aerial surveillance of the Singapore and Malacca Straits." "Launch of Eyes in the Sky Initiative (EiS)," *National Archive of Singapore*, https://www.nas.gov.sg/archivesonline/data/pdfdoc/MINDEF_20050913001.pdf, accessed January 30, 2021.

87. The Trilateral Maritime Patrol (TMP) arrangement between Indonesia, Malaysia and the Philippines is to ensure that militant threats such as the Islamic State (IS) do not use the Sulu Sea to gain entry into the countries. TMP also includes joint air and sea patrols by the three nations. TMP also allows the right of hot pursuit within the territorial waters of the three countries. Justin Zack, "Malaysia, Indonesia and the Philippines launch Trilateral Maritime Patrol," *The Star*, June 19, 2017, https://www.thestar.com.my/news/nation/2017/06/19/malaysia-indonesia-and-the-philippines-launch-trilateral-maritime-patrol/#k2rcjWj1W725s3Pb.99 accessed January 31, 2021.

Acknowledgment

Thanks to Dr. I Made Andi Arsana of the Department of Geodetic and Geomatic Engineering at Universitas Gadjah Mada, Indonesia, for sharing an original map to use in this article. The figure ultimately was not usable here although the author is grateful for the reply and permission.

Biographical Statement

Su Wai Mon is a senior lecturer at the Faculty of Law, University of Malaya. She obtained her LL.B. (Hons) from Dagon University, Yangon and completed her postgraduate studies, Master of Comparative Laws (MCL), and Ph.D. from the International Islamic University Malaysia (IIUM). Her Ph.D. emphasizes Malaysian maritime security, particularly maritime law enforcement. Her areas of research interest include maritime security, International Law of the Sea and public international law. She is also a graduate of the Seventh Session of the Yeosu Academy of the Law of the Sea.

Issue-Based Cooperation on Conflict Resolution in the South China Sea: Exploring Roles for ASEAN Beyond the Code of Conduct[1]

Edcel John A. Ibarra

Structured Abstract

Article Type: Research Paper

Purpose—This article explores the roles of the Association of Southeast Asian Nations (ASEAN) in cooperation on conflict resolution in the South China Sea.

Design, Methodology, Approach—Employing the issues approach to international relations, this article introduces an original framework that breaks down the South China Sea disputes into their component issues and identifies the types of conflict resolution and modes of cooperation implied in each.

Findings—ASEAN-led cooperation on conflict resolution in the South China Sea has concentrated on concluding a code of conduct with China as an attempt at conflict prevention, management, and transformation. Progress has been slow, but efforts can be complemented by engaging in cooperation of other types (e.g., conflict settlement), in other modes (e.g., "minilateralism"), and on other issues (e.g., maritime rights, maritime power projection, and marine economic development).

Practical Implications—The findings can help foreign policy makers craft targeted strategies to enhance cooperation on conflict resolution in the South China Sea.

Originality, Value—The article offers an original framework that can be used to examine other aspects of conflict resolution in the South China Sea or analyze similar multiparty conflicts.

Keywords: ASEAN, code of conduct, conflict resolution, issues approach, South China Sea

email: eaibarra@alum.up.edu.ph; ORCID iD: 0000-0002-1804-0321

Journal of Territorial and Maritime Studies / Volume 9, Number 1 / Winter/Spring 2022 / pp. 97–115 / ISSN 2288-6834 (Print) / DOI: 10.2307/JTMS.9.1.97 / © 2022

I. Introduction

Growing uncertainty from recurring tensions in the South China Sea underscores the urgency of cooperation to resolve the disputes. The South China Sea lies at the heart of Southeast Asia. As the leading organization in the region, the Association of Southeast Asian Nations (ASEAN) holds a duty to facilitate cooperation on conflict resolution in the South China Sea in line with its aim to promote regional peace and stability. However, ASEAN's role has itself been uncertain. Previous studies have suggested that the association can play only a limited role in dealing with the South China Sea disputes. Yet the South China Sea disputes are a collection of quarrels over several distinct issues, and it remains untested whether indeed ASEAN can play only limited roles across all those issues. Looking into each component issue of the South China Sea disputes is crucial in order to exhaust potential opportunities for ASEAN-led cooperation on conflict resolution. In the end, I argue that on some issues, ASEAN may indeed play only limited roles, but on other issues, the association may be better poised to play lead roles in facilitating cooperation on conflict resolution.

This article offers an original framework for analyzing ASEAN's role in conflict resolution in the South China Sea. Overall, I acknowledge that the South China Sea disputes revolve around several distinct issues. There is no South China Sea *dispute*, in the singular, only the South China Sea *disputes*, in the plural. This article is not the first to recognize this fact, but unlike previous studies, it goes beyond identifying the issues that make up the South China Sea disputes. Following the issues approach to international relations, I suggest that each component issue of the South China Sea disputes implies a distinct approach to cooperation on conflict resolution. For ASEAN, this means that different types of conflict resolution and different modes of cooperation must be pursued depending on the issue. Ultimately, an issue-based outlook would require that ASEAN not limit itself to dealing with China to help resolve the South China Sea disputes.

This article proceeds as follows. In section II, I review the reasons why previous studies have claimed that ASEAN can play only a limited role in conflict resolution in the South China Sea. Section III introduces an original framework for analyzing cooperation on conflict resolution by issue, and section IV adapts said framework to the South China Sea disputes. In section V, I apply the framework. I examine ASEAN's approach to cooperation on conflict resolution in the South China Sea and then explore how the association may improve on its handling of the disputes. In the conclusion, I consider other potential applications of the framework.

II. Limits to ASEAN-Led Cooperation on Conflict Resolution in the South China Sea

Previous studies have suggested that ASEAN can play only a limited role in conflict resolution in the South China Sea. They list three reasons.

First, ASEAN consists of ten countries with different standings in the South China Sea disputes: four are territorial and maritime claimant states (Brunei, Malaysia, the Philippines, and Vietnam), one is a maritime claimant state (Indonesia), and five are non-claimant

states (Cambodia, Laos, Myanmar, Singapore, and Thailand). Because some ASEAN member states are also claimant states, the association may not be a neutral third-party mediator.[2] Furthermore, member states' different standings also produce different interests. Thus, ASEAN will always face the challenge of harmonizing a diverse, even discordant, pool of policy preferences on the South China Sea disputes.[3]

Second, ASEAN member states are divided on their perceptions of the threat that China's behavior in the South China Sea poses to regional peace and stability. These divisions do not necessarily correspond to a member state's standing in the disputes. Still, a member state's threat perception of China affects its preferred approach to conflict resolution for ASEAN. On the one hand, some ASEAN member states have been troubled by China's rising coercive power and its increasing assertiveness in the South China Sea. They prefer that ASEAN play a lead role in dispute resolution. On the other hand, other ASEAN member states have downplayed the so-called China threat. They prefer that ASEAN keep a low profile to avoid antagonizing China as a partner on other issues, especially infrastructure and economic development. These internal divisions effectively disunite ASEAN into "factions," with each member state pulling the association toward their own favored kind of relationship with China.[4] Among ASEAN member states, Indonesia, the Philippines, Singapore, and Vietnam have been labelled as typically more active on the South China Sea disputes, while Brunei, Cambodia, Laos, Malaysia, Myanmar, and Thailand have been regarded as typically more conservative.[5] The factions, however, are not set: a member state may slide into a different faction over time as it calibrates its foreign policy on the South China Sea disputes.

Finally, external pressures amplify ASEAN's internal divisions on the South China Sea disputes. Most pronounced are pressures from China and the United States. On the one hand, China disagrees with ASEAN member states on the types of conflict resolution and modes of cooperation appropriate for dealing with the South China Sea disputes. China avoids talks of settling the territorial and maritime jurisdiction issues, and prefers dealing with each ASEAN claimant state bilaterally. ASEAN, meanwhile, has wanted to deal with China collectively, as a group.[6] On the other hand, the United States has increased its engagements in the South China Sea, giving rise to a new area of rivalry with China. In turn, intensifying China–U.S. competition complicates ASEAN's attempts at keeping a balance between the two great powers.[7] Some ASEAN member states have welcomed renewed U.S. engagement in the region as a counterbalance to China, but others have expressed worry that U.S. involvement in the disputes would only heighten tensions in the South China Sea.

Unfortunately, ASEAN cannot change the fact that some of its member states are also claimant states in the South China Sea. ASEAN also cannot prevent the great powers from advancing their interests in the waterway. But ASEAN could overcome internal divisions—if only member states would agree on a common policy on the South China Sea disputes. ASEAN, however, is limited by its consensus-based decision-making structure. This structure prevents ASEAN from responding proactively to contentious issues, like the South China Sea disputes, because a single negative vote by any member state—even one that is not a direct party on the issue in question—can paralyze the association.[8] This structural limitation went on full display in 2012. ASEAN failed to issue a joint communiqué for the first time in its history because Cambodia refused to allow the Philippines' request to mention what, in hindsight, turned out to be China's seizure of the Scarborough Shoal in the South China Sea.[9]

In sum, previous studies have claimed that the association's composition, internal divisions, and external pressures, together with a consensus-based decision-making structure, limit ASEAN-led cooperation on conflict resolution in the South China Sea.

III. Issue-Based Cooperation on Conflict Resolution

3.1 The Issues Approach to International Relations

When previous studies say that ASEAN can play only a limited role in conflict resolution in the South China Sea, they talk about the disputes as a whole. They seem to overlook the fact that the South China Sea disputes consists of several issues, each substantively distinct from the other. ASEAN may not necessarily play only limited roles across all component issues of the South China Sea disputes, and indeed, on some issues, it may even be poised to play lead roles. The issues approach attempts to overcome this oversight in the existing scholarship. As a perspective in analyzing politics, the issues approach posits that "the functioning of any type of political system can vary significantly from one issue-area to another."[10] In this article, an *issue-area* or *issue* denotes "a disputed point or question, the subject of a conflict or controversy."[11]

In international relations, the issues approach rests on three key assumptions.[12] First, states pursue different foreign policy goals depending on the issue. Realism assumes a singular, overarching goal for foreign policy: attaining military security for survival. Yet this goal may not be a state's primary concern across every issue. On some issues, a state may instead direct its foreign policy to achieve other goals. Second, states behave differently depending on the issue. Issues vary in importance to a state based on the values at stake. In general, states tend to exert more effort to prevail in issues more important to them.[13] Finally, states activate different foreign policy instruments depending on the issue. Realism emphasizes the primacy of military force in foreign policy. Yet the use of military force may not apply to all issues. Instead, on any given issue, a state can employ a range of instruments, from peaceful means (such as diplomacy) to the use of military force, to achieve foreign policy goals. In essence, the issues approach therefore aligns with Robert O. Keohane and Joseph S. Nye, Jr.'s theory of complex interdependence. In contrast to realism, complex interdependence recognizes that attaining military security is not always the sole end and that the use of military force is not always the best means.[14]

Applied to international conflict resolution, the issues approach proposes breaking down an international conflict into its distinct component issues. Identifying the distinct issues that make up a conflict is crucial. Each issue may require a different type of action for conflict resolution. Moreover, in a multiparty conflict, such as the South China Sea disputes, each issue may involve a different set of direct parties and, thus, require a different mode of cooperation. Briefly put, the issues approach acknowledges that international cooperation to deal with a conflict may need to employ different types of conflict resolution and occur in different modes depending on the issue.

The next subsections explore the two dimensions of cooperation on conflict resolution: types of conflict resolution and modes of cooperation.

3.2 Types of Conflict Resolution

A *conflict* or *dispute* is the converse of an issue; specifically, it refers to "an incompatibility of positions" over an issue or a set of issues.[15] By extension, *conflict resolution* denotes

> a range of formal and informal activities undertaken by parties to a conflict, or outsiders, designed to limit and reduce the level of violence in conflict, and to achieve some understanding on the key issues in conflict, a political agreement, or a jointly acceptable decision on future interactions and distribution of resources.[16]

This definition implies that conflict resolution covers a variety of actions. This point is often overlooked. Indeed, most previous studies of ASEAN's role in conflict resolution in the South China Sea skip expounding a definition of conflict resolution. The few that do define the concept narrowly, equating it to reaching a settlement.

Following Jacob Bercovitch, Victor Kremenyuk, and I. William Zartman, I distinguish between four distinct types of conflict resolution.[17] First, *conflict prevention* refers to measures to "contain disputes before they become violent."[18] It aims to reduce, if not remove, triggers that would escalate tensions. An example is restricting the use of force between the parties through an agreement, or through deterrence or restraint. Second, *conflict management* signifies "a range of mechanisms or procedures … that help in containing conflict situations … or in limiting the destructive effects of ensuing conflict behavior."[19] It aims to establish mechanisms to mitigate violence. In practice, it usually means appealing to existing international institutions or creating new ones to de-escalate tensions. Conflict management mechanisms are normally established to respond to an ongoing crisis, but such mechanisms may also be set up in advance, to be triggered should a crisis erupt. An example is instituting high-level channels of communication between the parties. Third, *conflict settlement* represents "a social situation where the armed conflict parties in a (voluntary) agreement resolve to peacefully live with—and/or dissolve—their basic incompatibilities and henceforth cease to use arms against one another."[20] It aims to reach a conflict-ending agreement. In territorial and maritime disputes, conflict settlement entails the determination of sovereignty over the contested features and the delimitation of overlapping boundaries, typically enshrined in a treaty signed by the parties or in a decision handed by a mediator or an international tribunal. Finally, *conflict transformation* refers to "a process of engaging with or transforming the relationships, interests, [and] discourses … [that support] the continuation of violent conflict."[21] It aims to turn competition into cooperation and to build trust between the parties. Examples include undertaking joint initiatives and strengthening other areas of the parties' relationship.

The typology here is contested. To begin with, scholars disagree on the use of "conflict resolution" as the umbrella term to describe the positive handling of conflicts. Some use the terms "conflict management," "conflict regulation," "conflict engagement," and "conflict transformation." Nonetheless, I use the term "conflict resolution" because it was the earliest umbrella term used in the field, and it still enjoys wide usage among scholars and practitioners.[22] More serious, scholars debate the conceptual hierarchy implied in using an umbrella term. On the one hand, Niklas L.P. Swanström and Mikael S. Weissmann advocate integrating the concepts, stressing that "a theory that differentiates between conflict

prevention, conflict management and conflict resolution risks being counterproductive when applied to a reality in which these concepts are in fact indistinguishable."[23] On the other hand, other scholars argue that conflict management, conflict resolution, and conflict transformation are philosophically distinct concepts that cannot be subsumed under an umbrella term.[24] Nonetheless, although the four types of conflict resolution presented above differ in approach, the desire to reduce unnecessary violence remains constant among the types. Moreover, the typology above admits the possibility of conceptual overlaps. After all, the typology aims not to impose clear-cut categories but to offer a conceptual tool for differentiating from one another the many actions that help in bringing about conflict resolution.

3.3 Modes of Cooperation

Conflict resolution implies cooperation—that is, states must coordinate their foreign policies toward the common goal of conflict resolution. The definition of conflict resolution presented above recognizes that a state can cooperate with another state either as a direct party to the same conflict or as a third party to an external conflict. In most previous studies of ASEAN's role in conflict resolution in the South China Sea, the claimant states are assumed to be the only direct parties. Yet in the issues approach, a state's standing—that is, whether it is a direct party or a third party to the conflict—is not set; instead, it varies depending on the issue. The distinction between being a direct party and being a third party matters because even though third parties can help facilitate conflict resolution, cooperation must ultimately occur between the direct parties. Indeed, even third-party mediation requires the willingness of the direct parties to participate in the proceedings.

International relations scholars commonly divide cooperation into two modes: *bilateral* (between two parties) and *multilateral* (among at least three parties). These modes differ not only in quantity but also in quality. In the bilateral mode, cooperation is selective—that is, undertaken only with a favored partner, which usually enjoys terms unique to it. Bilateral cooperative relationships often exhibit reciprocity based on expected immediate gains, ordinarily from quid pro quos.[25] Meanwhile, in the multilateral mode, cooperation features "'generalized' principles of conduct," "indivisibility," and "diffuse reciprocity"—that is, member states enjoy uniform rather than selective treatment, share the same costs and benefits, and reciprocate based on expected gains not only upon membership but also over the long term.[26]

Multilateral cooperation is often assumed to be superior to bilateral cooperation. Yet the appropriateness of either mode depends on the requirements of the specific issue in question. In particular, it depends on how many direct parties are implicated in the issue. Thus, more important than distinguishing between the bilateral and multilateral modes is identifying whether cooperation is *exclusive* or *inclusive*—that is, whether it excludes some direct parties or includes all direct parties. Bilateral cooperation is often assumed to be exclusive, but it is not necessarily so if the issue in question involves only two direct parties. If, however, the issue involves at least three direct parties, bilateral cooperation is necessarily exclusive, sealing off other direct parties from the cooperative initiative. Similarly, multilateral cooperation can be exclusive or inclusive. On the one hand, multilateral cooperation is exclusive if, on the issue in question, it involves some but not all direct parties (e.g., if

cooperation includes only three parties on an issue involving at least four states). This exclusive mode of multilateral cooperation is also called "minilateral" cooperation, where membership consists of only the most-able and most-willing states, often the great powers.[27] On the other hand, multilateral cooperation is inclusive if, on the issue in question, the membership comprises all direct parties. This inclusive mode of multilateral cooperation can become overly inclusive, however, if the membership involves not only all direct parties but also some third parties. Such overly inclusive multilateral cooperation can potentially slow down foreign policy coordination.[28]

In sum, issue-based cooperation on conflict resolution accepts that often, no single solution exists to deal with an international conflict. Instead, a conflict often consists of several distinct issues, and each component issue of a conflict requires a different type of conflict resolution and mode of cooperation. Cooperation on conflict resolution must therefore adapt to the requirements of the very issue under dispute.

IV. Issues in the South China Sea Disputes

In the South China Sea disputes, several distinct issues are at stake. Some scholars have recognized this fact even though they have not grounded their analyses in the issues approach. Peter Dutton identifies three distinct issues in the South China Sea disputes: "sovereignty" (ownership of islets), "jurisdiction" (the extent of marine spaces that states may legally claim as part of their boundaries), and "control" (the extent of coastal states' rights in their marine spaces vis-à-vis other states' rights).[29] Aileen S.P. Baviera identifies two more distinct issues: military competition for sea control (particularly among the great powers) and maritime security (including piracy and armed robbery at sea, maritime terrorism, and marine environmental protection).[30] Combining these works, I identify three sets of issues in the South China Sea disputes: core issues, traditional security issues, and nontraditional security issues. From a legal standpoint, issues concerning territorial sovereignty, maritime boundaries, and maritime rights do sit at the root of the conflict. But these are not the only issues countries quarrel over in the South China Sea. Maritime security is also an issue in the disputes. Maritime security, however, covers several challenges best treated as separate issues. Nonetheless, these issues can generally be divided into traditional (i.e., military-related) or nontraditional (i.e., nonmilitary-related) matters. Issues concerning traditional maritime security relate to territorial defense and sea control, and maritime power projection. Meanwhile, issues concerning nontraditional maritime security relate to maritime law enforcement (including against piracy and armed robbery at sea, and maritime terrorism), safety of navigation, and maritime search and rescue; marine environmental protection, fisheries management and marine scientific research; and marine economic development, especially fisheries development and offshore oil and gas development.

4.1 The Core Issues

The core issues are the root causes of the disputes. They relate to territorial and

maritime jurisdiction. There are three distinct core issues: territorial sovereignty, maritime boundaries, and maritime rights.

First, the territorial sovereignty issue concerns the ownership of disputed islets in the South China Sea. The disputed islets are the Pratas Islands in the northeast, the Paracel Islands in the northwest, Scarborough Shoal in the east, and the Spratly Islands in the south.[31] In the Pratas Islands, the territorial sovereignty issue concerns only China and Taiwan. In the Paracel Islands, the issue involves China, Taiwan, and Vietnam. In the Scarborough Shoal, the issue concerns China, Taiwan, and the Philippines.[32] And in the Spratly Islands, the issue involves China, Taiwan, Vietnam, the Philippines, Brunei, and Malaysia. China, Taiwan, and Vietnam claim the whole Spratly Islands, while the Philippines, Brunei, and Malaysia claim only varying portions of the island group.

Second, the maritime boundaries issue relates to the geographical aspect of maritime jurisdiction. It concerns the extent of marine spaces that states may legally claim in the South China Sea. On the one hand, this issue involves the same states that claim territorial sovereignty over islets in the South China Sea—that is, insofar as those islets can legally generate maritime zones.[33] On the other hand, the maritime boundaries issue also concerns all states that surround the South China Sea because their main landmasses generate exclusive economic zones (EEZs) and continental shelves. Indeed, there remain several outstanding overlapping claims to EEZs and continental shelves between the coastal states of the South China Sea, namely, China, Taiwan, Vietnam, the Philippines, Brunei, Malaysia, and Indonesia. While Indonesia officially maintains that it is not a claimant state in the South China Sea, it claims an EEZ and continental shelf generated from the Natuna Islands, lying southwest of the Spratly Islands. These maritime zones overlap with the EEZs and continental shelves of Malaysia and Vietnam and the maritime claims of China and Taiwan. Thus, while Indonesia is not a territorial claimant state, having staked no sovereignty claim to any disputed islet in the South China Sea, it is a maritime claimant state because of its claim to an EEZ and continental shelf in the waterway.

Finally, the maritime rights issue relates to the substantive aspect of maritime jurisdiction. It concerns the scope of the rights of the South China Sea coastal states to regulate in their maritime zones the activities of other states. These rights are enshrined in international law, particularly the 1982 United Nations Convention on the Law of the Sea (UNCLOS), but states have interpreted the relevant provisions differently. Those differing interpretations, in turn, have created friction not only among the South China Sea coastal states but also between those coastal states and the South China Sea user states—extra-regional countries with blue-water navies or other distant-water fleets that operate in the South China Sea. The issue over maritime rights is most pronounced between China and the United States on the matter of freedom of navigation and innocent passage by military vessels in the South China Sea.

Among the maritime claimant states, China and Taiwan have the most expansive maritime jurisdictional claims, both in terms of the geographical extent of their maritime claims and the substance of the rights they ascribe to those claims. They base their claims on historic rights, but the South China Sea Arbitration found that such claims to maritime jurisdiction, particularly China's "nine-dash line," exceed the geographical and substantive limits set by UNCLOS and are therefore invalid.[34] Despite the ruling, China and Taiwan still insist on their historic rights in the South China Sea. China, in particular, is cordoning waters

within the nine-dash line for its exclusive use, discouraging other coastal states from enjoying resources even within their own legitimate EEZs and continental shelves.

4.2 Traditional and Nontraditional Security Issues

Disputes on the core issues give rise to other issues related to the traditional and nontraditional aspects of security in the South China Sea.

From a traditional security lens, the unresolved core issues have encouraged rivalry not only among the claimant states but also among the great and middle powers. Among the claimant states, there is the issue of territorial defense and sea control. The claimant states feel that they must defend their claimed islets and marine spaces, so they are building up their militaries and fortifying their outposts in the South China Sea. Among the great and middle powers, especially those that boast blue-water navies, there is the issue of maritime power projection. The South China Sea disputes have incited insecurity among the naval powers, not least because of China's growing capability to seal the waterway off from the navies of extra-regional states. In response, the United States and its allies have been conducting naval operations and exercises in the South China Sea to project their military capabilities and affirm their operational presence in the region. This dynamic is also a manifestation of intensifying great-power rivalry between the United States, which is trying to maintain its naval superiority in the western Pacific, and China, which is fast becoming more confident and capable in pursuing its interests in the South China Sea.

From a nontraditional security lens, the unresolved core issues complicate maritime governance. The overlapping claims create ambiguities as to which state is responsible for managing specific areas in the South China Sea. In practice, the claimant states compete to demonstrate effective administration of their claimed islets and marine spaces. These jurisdictional ambiguities, amplified by the lack of cooperation among the claimant states, create a situation in which maritime crimes, such as piracy and armed robbery at sea, maritime terrorism, and trafficking in drugs, firearms, and persons, may thrive. Jurisdictional ambiguities also present a problem in preventing and responding to maritime casualties and carrying out search and rescue operations, potentially threatening safety of life at sea. In addition, the marine environment may continue to experience degradation due to the lack of sufficient cooperation to address marine pollution and marine habitat destruction and coordinate marine scientific research efforts. Food supplies may also be affected because fish are dependent on healthy marine habitats protected from illegal and unsustainable harvesting. The conflict may affect economic development too, including energy security, due to the insufficient capacity or outright inability of some claimant states to develop marine resources, especially fisheries and offshore oil and gas, in the contested areas.

4.3 Implications for Cooperation on Conflict Resolution

True to the issues approach, no single solution exists that will solve simultaneously all issues in the South China Sea disputes. Instead, each component issue of the South China Sea disputes requires a different approach to cooperation on conflict resolution. These are summarized in Table 1.

Table 1. Issue-Based Cooperation on Conflict Resolution in the South China Sea

Issue	Type of conflict resolution	Direct parties	Mode of cooperation
Core			
Territorial sovereignty	Settlement	Territorial claimant states*	Inclusive; bilateral or multilateral
Maritime boundaries	Settlement	Territorial and maritime claimant states†	Inclusive; bilateral or multilateral
Maritime rights	Settlement	Coastal states,‡ user states,§ and the international community	Exclusive or inclusive; bilateral or multilateral
Traditional security			
Territorial defense and sea control	Prevention and management	Territorial and maritime claimant states	Exclusive or inclusive; bilateral or multilateral
Maritime power projection	Prevention and management	Great and middle powers‖	Exclusive or inclusive; bilateral or multilateral
Nontraditional security			
Maritime law enforcement, safety of navigation, and maritime search and rescue	Transformation	Coastal states, regional states, and the international community	Inclusive; multilateral
Marine environmental protection, fisheries management, and marine scientific research	Transformation	Coastal states and interested states and international organizations#	Inclusive; multilateral
Fisheries and offshore oil and gas development	Transformation	Coastal states	Exclusive or inclusive; bilateral or multilateral

* Brunei, China, Taiwan, Malaysia, the Philippines, and Vietnam.
† The territorial claimant states plus Indonesia.
‡ The territorial and maritime claimant states.
§ The great and middle powers that do not have coastal access to the South China Sea but operate blue-water navies that navigate the waterway (e.g., Australia, Japan, and the United States)
‖ In particular, states with blue-water navies that navigate the South China Sea, including China.
Pursuant to UNCLOS, Article 123.

To deal with the core issues, the direct parties must cooperate on conflict settlement. Cooperation should occur in three configurations: between the territorial claimant states; between the maritime claimant states; and between the coastal states (i.e., the territorial and maritime claimant states) and the user states. To settle the territorial sovereignty and maritime boundaries issues, inclusive modes of cooperation are needed to bring in all relevant direct parties. In areas claimed by only two claimant states, bilateral cooperation is the only way. But in areas claimed by three or more claimant states, such as the Spratly Islands, bilateral and exclusive multilateral cooperation would only complicate the situation, especially if the excluded parties would reject the settlements reached without them. In these multiparty disagreements, inclusive multilateral cooperation is ideal. Meanwhile, to settle the maritime rights issue, any mode of cooperation will help. The maritime rights issue is a matter of differing interpretations of international law. Ideally, it should be sorted out by the international community through inclusive multilateral negotiations at the UN. Nonetheless,

disagreements specific to the South China Sea may be discussed first through exclusive multilateral negotiations in a smaller forum. Such a forum may, for example, consist of only the coastal states and the user states. Success at this level can potentially be replicated at higher levels.

Cooperation on conflict settlement alone will not eliminate all issues. For traditional security issues, cooperation on conflict prevention and management is needed to avoid armed confrontation and, if clashes do occur, limit the extent of violence. On the one hand, the claimant states must cooperate among themselves to manage arms races and military competition. On the other hand, the great and middle powers, especially China and the United States, must also cooperate to avoid miscalculations in their respective military operations in the South China Sea. In both situations, either inclusive or exclusive modes of cooperation will help because any agreement to limit the use of force between any of these countries will benefit all other countries.

For nontraditional security issues, cooperation on conflict transformation is needed. These issues are best treated as regional, even international, concerns because of the transnational nature of the threats and their impacts. Thus, cooperation must include as many affected or potentially affected countries as possible, from regional states to the international community, to effectively deal with the challenges. For the issues of marine environmental protection and fisheries management, UNCLOS provides a framework for cooperation. Article 123 mandates that the coastal states of a semi-enclosed sea, such as the South China Sea, should coordinate efforts to manage fisheries, protect the marine environment, and conduct marine scientific research. This coordination can occur among the coastal states or with other interested countries and international organizations. No similar cooperative framework exists for fisheries and offshore oil and gas development except for the establishment of "provisional arrangements" in legitimately overlapping EEZs and continental shelves under Articles 74 and 83 of UNCLOS. The claimant states will therefore have to negotiate a new cooperative framework. Ideally, cooperation must include all claimant states, but exclusive joint development arrangements between two or more countries can potentially promote further practical cooperation in larger groups.

V. Revisiting ASEAN-Led Cooperation on Conflict Resolution in the South China Sea

5.1 The ASEAN–China Code of Conduct

Despite internal divisions on the South China Sea disputes, ASEAN has been able to agree on one common approach to cooperation on conflict resolution: negotiating a code of conduct (COC) with China.[35] ASEAN first raised the idea of a COC in the 1992 ASEAN Declaration on the South China Sea. A COC was meant to bring China to agree to certain rules of behavior and embrace the spirit of cooperation in the South China Sea. Since then, concluding a COC has sat at the core of ASEAN-led cooperation on conflict resolution in the South China Sea. Unfortunately, a COC has proven tough to negotiate. ASEAN member states and China arrived at a deadlock during the first round

of negotiations that started in 1999. Faced with the prospect of no agreement, the parties decided to water down the document and downgrade it from a legally binding agreement to a nonbinding political declaration. The result was the 2002 Declaration on the Conduct of Parties in the South China Sea (DOC). The parties, however, vowed in paragraph 10 of the DOC that they would continue working together to adopt a COC in the future. ASEAN member states and China began the second round of negotiations on a COC in 2017. Thus far, they have been able to agree on a Single Draft Negotiating Text, adopted in 2018.

While a COC remains under negotiation, the DOC provides the main framework for ASEAN-led cooperation on conflict resolution in the South China Sea. The DOC touches on conflict prevention, management, and transformation, but not conflict settlement. The DOC contributes to conflict prevention in two ways. First, paragraph 5 encourages ASEAN member states and China to exercise self-restraint and build mutual trust and confidence. Second, an "early harvest measure" adopted under the DOC in 2016—the Joint Statement on the Application of the Code for Unplanned Encounters at Sea (CUES) in the South China Sea—helps prevent incidents between the parties' navies in the waterway. The DOC contributes to conflict management by providing mechanisms for dialogue to sort out disagreements and de-escalate tensions between ASEAN member states and China. One such mechanism is the hotline communications platform among ASEAN–China senior officials for maritime emergencies in the South China Sea, adopted as another early harvest measure under the DOC in 2016. Other mechanisms include the many forums under the ASEAN–China Dialogue Relations framework, such as the Joint Working Group on the Implementation of the DOC. The DOC contributes to conflict transformation by providing a framework for practical cooperation between ASEAN member states and China. Paragraph 6 encourages the parties to collaborate on the issue-areas of marine environmental protection, marine scientific research, safety of navigation, search and rescue, and transnational crimes at sea, among others. The DOC, however, does not directly touch on conflict settlement. Nonetheless, paragraph 4 mentions that the parties will settle the core issues peacefully in accordance with international law.

ASEAN–China cooperation under the DOC represents an inclusive multilateral mode of cooperation on the issues of territorial defense and sea control, maritime law enforcement, maritime search and rescue, and marine environmental protection, among others. Yet on the issue of territorial defense and sea control, in particular, it is overly inclusive, because it involves the non-claimant ASEAN member states, which are not direct parties to the issue.

Even with the DOC, ASEAN-led cooperation on conflict resolution in the South China Sea remains insufficient for at least two reasons. First, although violent conflict has not erupted since 2002, the DOC has yet to address the issue of territorial defense and sea control. Indeed, the declaration has not prevented the parties from militarizing their outposts in the South China Sea or employing paramilitary or "gray zone" tactics to assert de facto control over their claimed islets and marine spaces. Slow progress on this issue may be partly attributed to the over-inclusiveness of ASEAN–China cooperation. Second, the DOC has so far brought about limited practical cooperation on nontraditional security issues. Only two early harvest measures have been pursued, touching on only two issues. The joint statement on CUES helps enhance safety of navigation, and the hotline

communications platform can help in timely maritime search and rescue. ASEAN member states and China did adopt a Declaration for a Decade of Coastal and Marine Environmental Protection in the South China Sea in 2017, but there is no action plan yet to kick off actual cooperation.

Unfortunately, there is no guarantee that a COC would be significantly better than the DOC. It remains to be seen what the final COC will look like. The Single Draft Negotiating Text simply collates the individual proposals of ASEAN member states and China. It is replete with contradictory provisions, and there are no reliable hints as to which of these provisions will prevail in the final text.[36]

5.2 Beyond the Code of Conduct: Opportunities for ASEAN

ASEAN must explore approaches other than concluding a COC with China to facilitate cooperation on conflict resolution in the South China Sea. Rather than devise a catch-all strategy, like concluding a COC, ASEAN must devise specific strategies that adapt to the demands of each component issue of the South China Sea disputes. A COC remains worthwhile to address some issues, but for other issues, other approaches may be more appropriate.

For ASEAN to play a lead role in cooperation on conflict resolution in the South China Sea, it must first reflect on its standing in each component issue of the disputes. Previous studies have argued that ASEAN's composition precludes the association from assuming the role of a neutral third party, yet this applies only on some issues. Whether ASEAN as a whole is a direct party or a third party to the South China Sea disputes depends on the issue in question. ASEAN is both and neither.

First, on the issue of maritime rights, ASEAN is a direct party because all member states are also state parties to UNCLOS.[37] ASEAN may therefore play a role in conflict settlement. For example, the association may promote regional norms and practices on freedom of navigation in international forums. It may also bring together the South China Sea coastal states and the user states, which are also direct parties on this issue, to discuss disagreements about the rights of states to undertake and regulate activities at sea. ASEAN may also support, if not lead, discussions in international forums to clarify ambiguous provisions of the law of the sea with regard to the rights and obligations of coastal and user states.

Second, on the issues of maritime law enforcement, safety of navigation, and maritime search and rescue, ASEAN is a direct party because crimes at sea and maritime casualties are transnational problems that require cooperation among regional states and the international community. ASEAN may thus lead in cooperation on conflict transformation. Paragraph 6 of the DOC already provides a framework for cooperation with China on these issues, but ASEAN member states and China have yet to embark on a joint initiative. The hotline network for maritime emergencies has a potential to spill over to enhance cooperation on maritime search and rescue. Cooperation on these issues may not necessarily occur between all ASEAN member states and China. Ultimately, although cooperation on these issues must ideally occur in an inclusive mode, a joint initiative may begin in an exclusive bilateral or multilateral mode and then gradually include more countries. Thus, the participation of all ASEAN member states and China, though ideal, is not necessary for cooperation on

maritime law enforcement and maritime search and rescue in the South China Sea. ASEAN, moreover, may also cooperate with countries other than China to deal with these issues in the South China Sea.

Third, on the issues of marine environmental protection and fisheries management in the South China Sea, ASEAN could be a direct party if the claimant states would invite the non-claimant member states under Article 123 of UNCLOS to coordinate marine habitat preservation and fisheries conservation efforts in the waterway. Again, the DOC provides a framework for cooperation with China on these issues. Though the list of issue-areas for ASEAN–China cooperation in paragraph 6 is non-exhaustive, it explicitly mentions marine environmental protection and marine scientific research. Cooperation on marine scientific research is needed if ASEAN member states and China are to develop a collaborative fisheries management regime.

Fourth, on the issue of maritime power projection, ASEAN is a third party, because this issue concerns only the blue water–capable great and middle powers, especially China and the United States. ASEAN's standing on this issue, however, allows the association to potentially play the role of a neutral third-party mediator between the naval powers. ASEAN should profess that its interests on this issue are merely to prevent incidences between these powers' navies in the South China Sea and provide a mechanism for dialogue and de-escalation should tensions heighten. Short of mediation, ASEAN may also consider negotiating another COC that includes naval powers other than China. Baviera and Leszek Buszynski separately argue that as the risk of China–U.S. confrontation increases, an ASEAN–China COC becomes less relevant.[38] Indeed, a COC limited only to ASEAN member states and China would not address incidences between the great and middle powers, especially between China on the one hand and the United States and its allies on the other hand.

Finally, on the issues of territorial sovereignty, maritime boundaries, territorial defense and sea control, fisheries, and offshore oil and gas development, ASEAN is neither a direct party nor a third party, because these issues concern only the territorial and maritime claimant states. Still, ASEAN may play some roles.

On the issues of territorial sovereign and maritime boundaries, ASEAN may facilitate cooperation on conflict settlement by assisting the claimant member states in setting up negotiations among themselves, or possibly even offering mediation. Not all disagreements on these issues include China anyway, and some are legitimately only between ASEAN member states. These include the overlapping EEZs and continental shelves in the southern sector of the South China Sea beyond the legitimate limits of China's EEZ and continental shelf.

On the issue of territorial defense and sea control, concluding a COC remains ASEAN's best bet on conflict prevention and management. ASEAN–China cooperation in this regard, however, is overly inclusive, because this issue does not concern the non-claimant ASEAN member states. Moreover, while the current round of COC negotiations seems promising, ASEAN member states and China may again arrive at a deadlock because they are still dealing with the same sticking points that have dragged down talks during the first round of negotiations. To complement existing efforts, ASEAN must consider exclusive bilateral and multilateral cooperation on conflict prevention and management by supporting bilateral COCs and an ASEAN-only COC. Doing so can even potentially move COC discussions with China forward. There are two precedents. First, in 1995,

China and the Philippines reached an agreement on a set of principles for a COC. This eventually served as the model for ASEAN's version, which member states started to draft in 1996 only among themselves. The process became inclusive only in 1999, when ASEAN member states began consulting with China. Second, in 2012, ASEAN was already prepared to restart talks on a COC, even though China insisted on implementing other provisions of the DOC first. ASEAN again attempted to draft its own a COC, which, along with other developments, eventually triggered China to agree to commence COC discussions in 2013.[39]

On the issue of fisheries and offshore oil and gas development, ASEAN may lead cooperation on conflict transformation by helping member states enhance their capacities to sustainably exploit fish and ocean hydrocarbon resources. More broadly, ASEAN may also lead in promoting cooperation on marine economic development.

Some would argue that ASEAN gave up its role in conflict resolution in the South China Sea when it agreed to meet with China not as a single actor but as a group of 10 individual states, effectively making ASEAN–China cooperation an 11-party affair rather than a two-party (i.e., bilateral) arrangement. Yet the distinction may be irrelevant. The institutional weakness of the ASEAN Secretary-General or even the ASEAN Chair means that the association will almost always operate as a group of individual states rather than a coherent actor under the banner of a single representative. This applies not only to ASEAN–China cooperation. Indeed, ASEAN cooperation with an external partner is almost always an 11-party affair. More important, ASEAN may play roles in cooperation on conflict resolution in the South China Sea outside the ASEAN–China Dialogue Relations framework.

In sum, two insights emerge. First, ASEAN should not limit itself to conflict prevention, management, and transformation under the DOC or a future COC. Indeed, there are also opportunities for ASEAN to facilitate cooperation on conflict settlement, as well as opportunities to enhance cooperation on conflict prevention, management, and transformation beyond the DOC or a COC. Second, ASEAN should not limit itself to cooperation with China under the ASEAN–China Dialogue Relations framework. On the issues of maritime rights, territorial defense and sea control, maritime power projection, fisheries, and offshore oil and gas development, for example, an exclusive mode of cooperation is sufficient. China's participation, though ideal, is not necessary. China's unwillingness to participate in initiatives toward conflict resolution should therefore not be a deterrent. China may therefore be excluded on cooperation on some issues until such time that it is willing to participate in the initiative. Moreover, China is not the only other direct party on several issues, such as the maritime rights issue and nontraditional security issues.

VI. Conclusion

This article has introduced an original framework that breaks down the South China Sea disputes by issue and identifies the type of conflict resolution and mode of cooperation implied in each issue. The framework can serve scholars and foreign policy makers alike in three ways. First, it can be used to show the range of possibilities for cooperation on conflict resolution in the South China Sea available to states and international organizations.

Second, it can be used to assess whether any given cooperative initiative in the South China Sea indeed helps move the conflict closer toward resolution. Finally, it can be used to analyze other multiparty conflicts similar to the South China Sea disputes.

Applying the framework to analyze ASEAN's role in conflict resolution in the South China Sea, I have qualified the conclusion in previous studies that the association can play only a limited role. I have argued that, instead, ASEAN may play lead roles in the South China Sea disputes depending on the specific issue in question. ASEAN-led cooperation on conflict resolution has so far concentrated on concluding a COC with China, which represents inclusive multilateral cooperation on territorial defense and sea control, and nontraditional security. Progress, however, has been slow. Exclusive cooperation among some or all ASEAN member states can complement and even potentially pave the way for eventual collaboration with the entire ASEAN–China Dialogue Relations framework. ASEAN may also use this approach to jump-start cooperation on crimes at sea and marine environmental protection under the DOC. Outside the DOC, ASEAN may consider expanding practical cooperation to cover other issues, such as fisheries management, fisheries development, and offshore oil and gas development. Finally, ASEAN may also lead international cooperation in regulating tensions from maritime power projections and resolving disagreements about maritime rights, but such cooperation should also include the great and middle powers as user states of the South China Sea.

The potential roles for ASEAN I have identified in this article can help Southeast Asian foreign policy makers explore additional initiatives for conflict resolution in the South China Sea. But it remains to be seen whether, in practice, Southeast Asian foreign policy makers can muster the political will required to push ASEAN into lead roles in South China Sea conflict resolution. Nonetheless, I have shown that, at least in theory, ASEAN may play more roles in conflict resolution. ASEAN should not be limited to cooperation under the ASEAN–China Dialogue Relations framework. If cooperation with China is not working, then ASEAN should be prepared to pursue cooperation in other modes or on other issues. If it is difficult to find a common position within ASEAN, then the association should at least not hinder member states that are willing to engage in practical cooperation. Ultimately, cooperation is needed not only between ASEAN member states and China but also among all direct parties in different modes and on different issues in order to comprehensively deal with the South China Sea disputes and hopefully bring about durable peace in the region.

Notes

1. This article is based on a on a paper presented at the Fifth Ocean Dialogue in Hanoi, Vietnam, in June 2019.

2. Ramses Amer, "The South China Sea: Achievements and Challenges to Dispute Management," *Asian Survey* (55)(3) (May/June 2015), pp. 618–39, https://doi.org/10.1525/as.2015.55.3.618.

3. Ralf Emmers, "ASEAN's Search for Neutrality in the South China Sea," *Asian Journal of Peacebuilding* (2)(1) (2014), pp. 61–77, https://doi.org/10.18588/201405.000019; Munmun Majumdar, "The ASEAN Way of Conflict Management in the South China Sea," *Strategic Analysis* (39)(1) (2015), pp. 73–87, https://doi.org/10.1080/09700161.2014.980545.

4. Majumdar 2015.

5. Emmers 2014; Majumdar 2015; Ian Storey, "Rising Tensions in the South China Sea: Southeast Asian Responses," in Ian Storey and Lin Cheng-yi (eds.), *The South China Sea Dispute: Navigating Diplomatic and Strategic Tensions* (Singapore: ISEAS Publishing, 2016), pp. 134–60, https://doi.org/10.1355/9789814695565-007.

6. David Scott, "Conflict Irresolution in the South China Sea," *Asian Survey* (52)(6) (November/December 2012), pp. 1019–42, https://doi.org/10.1525/as.2012.52.6.1019; Rodolfo C. Severino, "ASEAN and the South China Sea," *Security Challenges* (6)(2) (Winter 2010), pp. 37–47.

7. Emmers 2014; Robert Yates, "ASEAN as the 'Regional Conductor': Understanding ASEAN's Role in Asia-Pacific Order," *Pacific Review* (30)(4) (2017), pp. 443–61, https://doi.org/10.1080/09512748.2016.1264458.

8. Christopher B. Roberts, "ASEAN, the 'South China Sea' Arbitral Award, and the Code of Conduct: New Challenges, New Approaches," *Asian Politics and Policy* (10)(2) (2018), pp. 190–218, https://doi.org/10.1111/aspp.12391.

9. Emmers 2014.

10. James N. Rosenau, "Pre-Theories and Theories of Foreign Policy," in *The Study of World Politics* (London: Routledge, 2005), p. 187.

11. Robert Randle, *Issues in the History of International Relations* (New York: Praeger, 1987), p. 1, quoted in Paul R. Hensel et al., "Bones of Contention: Comparing Territorial, Maritime, and River Issues," *Journal of Conflict Resolution* (52)(1) (2008), p. 118, https://doi.org/10.1177/0022002707310425.

12. Paul R. Hensel, "Contentious Issues and World Politics: The Management of Territorial Claims in the Americas, 1816–1992," *International Studies Quarterly (*45)(1) (March 2001), pp. 81–109, https://doi.org/10.1111/0020-8833.00183.

13. Hensel et al. 2008.

14. Robert O. Keohane and Joseph S. Nye, Jr., *Power and Interdependence*, 4th ed. (Boston: Longman, 2012), pp. 22–24.

15. Jacob Bercovitch, Victor Kremenyuk, and I. William Zartman, "Introduction: The Nature of Conflict and Conflict Resolution," in Jacob Bercovitch, Victor Kremenyuk, and I. William Zartman (eds.), *The SAGE Handbook of Conflict Resolution*, Jacob Bercovitch, Victor Kremenyuk, and I. William Zartman (eds.) (Los Angeles: SAGE, 2009), p. 3, https://doi.org/10.4135/9780857024701.n1.

16. Jacob Bercovitch and Richard Jackson, *Conflict Resolution in the Twenty-First Century: Principles, Methods, and Approaches* (Ann Arbor: University of Michigan Press, 2009), p. 1, https://doi.org/10.3998/mpub.106467.

17. Bercovitch, Kremenyuk, and Zartman 2009. To avoid confusion, I use "conflict settlement" for actual conflict resolution.

18. Fred Tanner, "Conflict Prevention and Conflict Resolution: Limits of Multilateralism," *International Review of the Red Cross (*82)(839) (September 2000), p. 541, https://doi.org/10.1017/S1560775500184615.

19. C.R. Mitchell, *The Structure of International Conflict* (Basingstoke, England: Macmillan, 1989), p. 255.

20. Peter Wallensteen, *Understanding Conflict Resolution: War, Peace, and the Global System* (London: SAGE, 2002), p. 50.

21. Hugh Miall, "Conflict Transformation: A Multi-Dimensional Task," in Alex Austin, Martina Fischer, and Norbert Ropers (eds.), *Transforming Ethnopolitical Conflict: The Berghof Handbook* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2004), p. 70, https://doi.org/10.1007/978-3-663-05642-3_4.

22. Oliver Ramsbotham, Tom Woodhouse, and Hugh Miall, *Contemporary Conflict Resolution*, 3rd ed. (Cambridge, England: Polity, 2011), pp. 9–10. Evidence of the use of "conflict resolution" as an umbrella term can be seen in the title of the field's foremost journal, the *Journal of Conflict Resolution*, established in 1957, and the titles of many foundational books published in the field.

23. Niklas L.P. Swanström and Mikael S. Weissmann, *Conflict, Conflict Prevention, Conflict Management and Beyond: A Conceptual Exploration* (Uppsala: Central Asia–Caucasus Institute and Silk Road Studies Program, Summer, 2005), p. 28.

24. Conflict management assumes that disputes are inherent in social life; hence, they cannot be eliminated, only managed. By contrast, conflict settlement assumes that disputes can be resolved, hinging only on the parties' willingness to negotiate an agreement or to appeal to a third party. Meanwhile, conflict transformation emphasizes that reaching a settlement is insufficient: the parties must also change their attitudes toward each other if they are to resolve their disputes sustainably. Eileen Babbitt and Fen Osler Hampson, "Conflict Resolution as a Field of Inquiry: Practice Informing Theory," *International Studies Review* (13)(1) (March 2011), pp. 46–57, https://doi.org/10.1111/j.1468-2486.2010.00997.x; Miall 2004.

25. David H. Capie and Paul M. Evans, *The Asia-Pacific Security Lexicon* (Singapore: Institute of Southeast Asian Studies, 2002), quoted in Aileen S.P. Baviera, "Territorial and Maritime Jurisdiction Disputes in East Asia: Comparing Bilateral and Multilateral Approaches," in William T. Tow and Brendan

Taylor (eds.), *Bilateralism, Multilateralism and Asia-Pacific Security: Contending Cooperation* (Abingdon, England: Routledge, 2013), p. 103.

26. John Gerard Ruggie, "Multilateralism: The Anatomy of an Institution," *International Organization* (46)(3) (Summer 1992), pp. 570–72, https://doi.org/10.1017/S0020818300027843. Some scholars contest these qualities. For instance, James A. Caporaso points out that bilateral cooperation can sometimes exhibit diffuse reciprocity, while Zartman and Saadia Touval observe that multilateral cooperation can sometimes be selective, as in military alliances and trading blocs. James A. Caporaso, "International Relations Theory and Multilateralism: The Search for Foundations," *International Organization (*46)(3) (Summer 1992), pp. 599–632, https://doi.org/10.1017/S0020818300027843; I. William Zartman and Saadia Touval, "Introduction: Return to Theories of Cooperation," in I. William Zartman and Saadia Touval (eds.), *International Cooperation: The Extent and Limits of Multilateralism* (Cambridge: Cambridge University Press, 2010), pp. 1–11, https://doi.org/10.1017/CBO9780511761119.001.

27. Miles Kahler, "Multilateralism with Small and Large Numbers," *International Organization (*46, Issue 3 (Summer 1992), pp. 681–708, https://doi.org/10.1017/S0020818300027867.

28. Christer Jönsson and Karin Aggestam, "Diplomacy and Conflict Resolution," in Jacob Bercovitch, Victor Kremenyuk, and I. William Zartman (eds.), *The SAGE Handbook of Conflict Resolution* (Los Angeles: SAGE, 2009), pp. 33–51, https://doi.org/10.4135/9780857024701.n3.

29. Peter Dutton, "Three Disputes and Three Objectives: China and the South China Sea," *Naval War College Review* (64)(4) (Autumn 2011), pp. 42–67, available at https://digital-commons.usnwc.edu/nwc-review/vol64/iss4/6, accessed October 22, 2021.

30. Baviera 2013.

31. China and Taiwan also claim the Macclesfield Bank, a completely submerged feature located between the Paracel Islands and the Scarborough Shoal. However, the legality of these claims to underwater features is dubious. Under international law, only land features that are above water at high tide can be subjected to territorial sovereignty.

32. In the *South China Sea Arbitration*, a United Nations arbitral tribunal ruled that nationalities of other states, including Vietnam, also have traditional fishing rights in the shoal's 12–nautical mile territorial sea. *South China Sea Arbitration* (Philippines v. China), PCA Case No. 2013–19, Award of July 12, 2016, para. 805 (Arbitral Tribunal Constituted Under Annex VII to the 1982 United Nations Convention on the Law of the Sea), available at https://pcacases.com/web/sendAttach/2086.

33. The tribunal in the *South China Sea Arbitration* found that the islets in the Spratly Islands can legally generate, at best, only 12–nautical mile territorial seas. Thus, the Spratly Islands cannot generate exclusive economic zones of up to 200 nautical miles or continental shelves of up to 350 nautical miles. Award of July 12, 2016, paras. 643–46.

34. *South China Sea Arbitration*, Award of July 12, 2016, paras. 277–78.

35. Besides a COC, there are other ASEAN-led mechanisms that can provide a framework for cooperation on conflict resolution in the South China Sea. These mechanisms include the ASEAN Regional Forum, which has a three-stage framework for conflict resolution, and the Treaty of Amity and Cooperation in Southeast Asia (TAC), which establishes a High Council to help settle international conflicts. These mechanisms, however, are rarely invoked. ARF remains focused on first two stages of its framework for conflict resolution. Meanwhile, the High Council of the TAC has yet to be formally established. Moreover, these mechanisms offer general guidelines, which are not specific to the South China Sea disputes.

36. A leak of the Single Draft Negotiating Text was published in Carl Thayer, "A Closer at the ASEAN–China Single Draft South China Sea Code of Conduct," *The Diplomat*, August 3, 2018, https://thediplomat.com/2018/08/a-closer-look-at-the-asean-china-single-draft-south-china-sea-code-of-conduct/, accessed October 22, 2021.

37. Cambodia has ratified UNCLOS under its municipal law, but it has yet to deposit an instrument of ratification with the UN Secretary-General. See Mech Dara, "National Assembly Approves UN Convention on Sea Law," *Phonm Penh Post*, December 24, 2019, https://www.phnompenhpost.com/national/national-assembly-approves-un-convention-sea-law, accessed October 22, 2021.

38. Aileen S.P. Baviera, "An ASEAN Perspective on the South China Sea: China–ASEAN Collision or China–U.S. Hegemonic Competition?" in Pavin Chachavalpongpun (ed.), *Entering Uncharted Waters? ASEAN and the South China Sea* (Singapore: ISEAS Publishing, 2014), pp. 88–111, https://doi.org/10.1355/9789814380270-007; Leszek Buszynski, "Chinese Naval Strategy, the United States, ASEAN and the South China Sea," *Security Challenges* (8)(2) (Winter 2012), pp. 19–32.

39. Leszek Buszynski, "ASEAN, the Declaration on Conduct, and the South China Sea," *Contemporary*

Southeast Asia (25)(3) (2003), pp. 343–62, https://doi.org/10.1355/CS25-3A; Carlyle A. Thayer, "ASEAN, China and the Code of Conduct in the South China Sea," *SAIS Review of International Affairs* (33)(2) (2013), pp. 75–84, https://doi.org/10.1353/sais.2013.0022.

Biographical Statement

Edcel John A. Ibarra is a Foreign Affairs Research Specialist at the Center for International Relations and Strategic Studies, Foreign Service Institute, Philippines, and a graduate student of international studies at the Department of Political Science, University of the Philippines Diliman. The views in this article do not reflect the views of the Foreign Service Institute, the Department of Foreign Affairs, or the government of the Philippines.

Book Reviews

JTMS publishes short summaries of all books received and complete reviews of selected books. Parties interested in reviewing books not listed here should contact the book review editor. Authors and/or publishers interested in having a summary or review of a maritime and territorial studies related book appear in our journal should send a complimentary copy to the book review editor. All reviews should be sent to the book review editor, Alexander M. Hynd (jtmsbookreviews@gmail.com) and cc'd to the managing editor, Dr. Lonnie Edge (jtms@yonsei.ac.kr).

Books currently available for review are:

- Belov, Martin (ed.) (2021). *Territorial Politics and Succession: Constitutional and International Law Dimensions*, Palgrave Macmillan.
- Bryant, Rebecca & Reeves, Madeleine (eds.) (2021). *The Everyday Lives of Sovereignty: Political Imagination Beyond the State*, Cornell University Press.
- Buszynski, Leszek, and Do, Thanh Hai (eds.) (2021). *The South China Sea: From a Regional Maritime Dispute to Geo-Strategic Competition*, Routledge.
- Cathcart, Adam, Green, Christopher, and Denney, Steven (eds.) (2021). *Decoding the Sino-North Korean Borderlands (Asian Borderlands)*, Amsterdam University Press.
- Frettingham, Edmund, and Hwang, Yih-Jye (eds.) (2021). *Maritime and Territorial Disputes in the South China Sea: Faces of Power and Law in the Age of China's Rise*, Routledge.
- Heritage, Anisa, and Lee, Pak K. (2020). *Order, Contestation and Ontological Security-Seeking in the South China Sea: Governance, Security and Development*, Palgrave Macmillan.
- Kittichaisaree, Kriangsak (2021). *The International Tribunal for the Law of the Sea*, Oxford University Press.
- Moore, Cameron (2021). *Freedom of Navigation and the Law of the Sea: Warships, States and the Use of Force*, Routledge.
- Natoli, Tommaso, and Riccardi, Alice (eds.) (2019). *Borders, Legal Spaces and Territories in Contemporary International Law*, Springer.

McF

Journal of Territorial and Maritime Studies / Volume 9, Number 1 / Winter/Spring 2022 / pp. 116–117 / ISSN 2288-6834 (Print) / DOI: 10.2307/JTMS.9.1.116 / © 2022

- Otto, Lisa (ed.) (2020). *Global Challenges in Maritime Security: An Introduction*, Springer.
- Pappa, Marianthi (2021). *Non-State Actors' Rights in Maritime Delimitation: Lessons from Land*, Cambridge University Press.
- van Logchem, Youri (2021 expected). *The Rights and Obligations of States in Disputed Maritime Areas*, Cambridge University Press.

Call for Papers and Style Guide

JTMS Summer/Fall 2022 Issue

The *Journal Territorial and Maritime Studies* (*JTMS*) is soliciting submissions for its Summer/Fall 2022 issue. JTMS is a SCOPUS indexed interdisciplinary journal of research dealing with the political, security, legal, and historical dimensions of terrestrial and maritime territorial disputes. The journal is sponsored by the Northeast Asia History Foundation with editorial offices hosted by Yonsei University in South Korea. The journal provides an academic medium for the announcement and dissemination of research results in the fields of history, international law, international relations, geography, peace studies, and any other relevant discipline. The journal covers all continental areas across the world, and it discusses any territorial and maritime subjects through the various research methods from different perspectives; moreover, practical studies as well as theoretical works, which contribute to a better understanding of territorial and maritime issues, are encouraged.

For consideration in the Summer/Fall 2022 issue, manuscripts should be submitted electronically to *jtms@yonsei.ac.kr* by February 1, 2022. Submitted papers should include four major sections: the title page, structured abstract, main body, and references. The title page should contain the title of the paper, the author's name, the institutional affiliation, and keywords. To be considered, manuscripts must follow the *JTMS* style guide available on our website. A length of maximum 9,000 words is preferred for an article, including endnotes, and approximately 2,000 words for a review. Inquiries may be sent via the email address provided above.

Our style guide and other journal information may be found on our website at: *http://www.journalofterritorialandmaritimestudies.net/*.

JTMS Call for Blog Entries

The blog of *Journal of Territorial and Maritime Studies* welcomes submissions for blog entries. This forum is intended to discuss topics related to recent territorial and maritime news, research, and policy. It is hoped that this blog will help bring a fresh perspective on how to deal with territorial and maritime issues and the complexities these issues present.

Those wishing to submit a blog post can send their post to jtms@yonsei.ac.kr along with the author's contact info, bio, and a recent photo.

Journal of Territorial and Maritime Studies / Volume 9, Number 1 / Winter/Spring 2022 / pp. 118–122 /
ISSN 2288-6834 (Print) / DOI: 10.2307/JTMS.9.1.118 / © 2022

Style Guide

General Guidelines

JTMS is a scholarly journal. Paragraphs must be fully developed without contractions, first and second person pronouns, repetition, jargon, sexist language, awkward syntactical constructions. Use a limited number of succinct headings and subheadings that are underlined or italicized as appropriate. Carefully honed style that is in a mellifluous prose is as important as substantive content. *JTMS* recommends authors ask colleagues whose writing style they respect for help with review and revision. Please note that all accepted material is subject to editorial emendation.

Length: Research articles should be no more than 9,000 words, commentary essays no more than 4,000 words and book reviews no more than 2,000 words.

Format: Research should be saved as Microsoft Word document formatted Times New Roman, 12-point font, double-spaced. There should be generous margins, no right-hand justification, and pages numbered consecutively.

Title Page: Title page must include 1.) the title of the paper, 2.) author's contact information including name, affiliation, address, phone number, fax number, email address, 3.) A structured abstract (see samples below) and few key words of the paper.

Biography: Author's biographical statement (75 words or less) must be underneath his/her contact information. This will be edited and published in the *Journal of Territorial and Maritime Studies*.

Headings: *JTMS* uses three levels of headings. Major headings (heading level 1) are center justified in bold with no indentation of the first sentence following the heading. Secondary heading (heading level 2) is left justified in italic with the first sentence after the heading indented. Tertiary heading (heading level 3) is left justified in italic with the first sentence after the heading beginning on the same line.

Tables & Figures: Insert each table or figure on a separate page at the end of the text. Indicate the position of the table or figure in the text (e.g., Insert Table 2 here). The page containing the table or figure should be placed after the page that first references the table/figure in the text. Authors have the responsibility of providing high quality figures and images in tiff format and with a resolution of 800 dpi or higher. Supporting materials may be submitted as hard copies for scanning or through e-mail submission. Please forward all materials to the editor.

Endnotes: Use full citation endnotes with no bibliography or reference list. Endnotes should be brief, used sparingly, and consecutively numbered with superscript Arabic numbers. Please convert all footnotes to endnotes.

Book

1. Robert Jervis, *The Meaning of the Nuclear Revolution: Statecraft and the Prospect of Nuclear Armageddon* (Ithaca, NY: Cornell University Press, 1989), p. 167.

2nd Non-Consecutive Endnote

2. Jervis 1989, p. 160.

3. Ibid., p. 50.

Journal

2. David Karl, "Proliferation Pessimism and Emerging Nuclear Powers," *International Security* 21(3) (1996–97), p. 89.

Website

3. Sangwon Yoon and David Lerman, "Hagel Calls on North Korea to Tone Down Rhetoric," *Bloomberg News*, April 11, 2013, *http://www.bloomberg.com/news/2013-04-10/south-korea-braces-for-possible-missile-test-from-north-today.html*, accessed January 21, 2014.

Legal Case Citations

Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001, pp. 101102, para. 205.

Non-consecutive citations:

ICJ Reports 1978, supra note 18, p. 50, para. 102.

Newspaper Article

4. Andrei Lankov, "Stay Cool. Call North Korea's Bluff," *New York Times*, April 9, 2013.

Footnote

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

One File: Submit the paper as one file in the following order: Title, Structured Abstract, Text, Endnotes, Tables and Figures, and Biographical Statement.

Structured Abstract

Article Classification: JTMS categorizes articles into the following 6 classifications: Research Paper, Viewpoint, Technical Paper, Conceptual Paper, Case Study, and General Review. Please write *one* of the categories in which your paper belongs on the article title page.

The article title page must include a structured abstract with 4–5 of the following subheadings: 1.) Purpose, 2.) Design/Methodology/Approach, 3.) Findings, 4.) Practical Implications, 5.) Originality/Value. The structured abstract, including keywords and article classification, must be 200 words or less.

Structured Abstract Samples

Sample 1

Article Type: Research Paper

Purpose—Some scholars imprint an academic discipline by their contribution to the manner in which people think and research, namely, by putting forward novel concepts and insights. The purpose of this paper is to examine the impact of Sumantra Ghoshal's work on the study of subsidiaries and multinational enterprises and organizational formats for foreign operations.

Design, Methodology, Approach—A bibliometric study on Bartlett and Ghoshal's well-known book *Managing Across Borders: The Translational Solution* is performed to assess its impact in international business (IB) research. The entire record of publications in the top leading IB journal, Journal of International Business Studies (JIBS), is examined.

Findings—Theoretically supported, Ghoshal's work was keenly influenced by his corporate experiences and his constant questioning of the dominant theories and assumptions. The analyses in this paper show the impact of the work on the "transnational solution," namely, on the understanding of multinationals and subsidiaries, thus being one of the most notable contributions for IB research over the past 20 years.

Practical Implications—Useful for graduate students and in writing a literature review, this paper presents an interesting manner to examine a scholar's and a theory's impact on a discipline.

Originality, Value—This paper presents an extensive bibliometric analysis of research published over a time span of 22 years in international business studies.

Sample 2

Article Type: Research Paper

Purpose—While many studies on institutional environment have primarily focused on the influence of the host country environment, limited insights have been offered on how the different dimensions of home institutions affect firm internationalization. This paper aims to fill this gap by investigating the effects of regulatory institutions at home.

Design, Methodology, Approach—Using country governance quality to proxy quality of regulatory institutions, this study attempts to reveal how regulatory institutions at home facilitate a multinational enterprise's (MNE's) international expansion and why the influence differs in different country clusters. Using hierarchical linear modeling and cluster analysis, proposed hypotheses were tested with a three-year panel 511 firms from 38 countries.

Findings—The results provide substantial support for authors' hypotheses that MNEs with high governance quality at home are more engaged in internationalization than those with low governance quality at home. Moreover, differences in institutional effect do exist between country clusters.

Practical Implications—This study provides evidence that while country difference exists, governance quality at home can facilitate MNE's expansion into foreign markets. This finding will help managers of any MNEs to consider country-level factors and evaluate the governance quality at home before committing resources into foreign operations.

Originality, Value—Building on the institutional environment literature, this theory and results make original contributions by underscoring how the consideration of regulatory institutions at home can significantly improve understanding of institutional influence on MNEs. The findings have important implications for both international business researchers and managers of MNEs.