Environmental, Extremist, Economic: New Challenges to International Security

5 – 10 August 2018

International Tribunal on the Law of the Sea

Official Study Guide

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Words of welcome

Honorable members of the Court,

It is our greatest pleasure to welcome you to this year's edition of Berlin International Model United Nations. The International Tribunal for the Law of the Sea is a body very rarely simulated during MUN conferences, mostly because - contrary to International Court of Justice or International Criminal Court - the vast majority of its cases are resolved within a few weeks or months. That is why for the purpose of this committee, we have come up with two fictional (yet very probable) cases - both revolving around the most intense maritime disputes - the Arctic (topic A) and the South China Sea (topic B). In order for you to get a whole MUN-court experience we have also decided to simulate one case and one request for an advisory opinion to make sure that all of you will stand a chance to engage and challenge your inner lawyer.

We wish you the very best in your preparations and should you have any questions, do not hesitate to contact us.

With cordial greetings,

Charlotte Verhamme and Hanna Sokolska

Presidents of International Tribunal on the Law of the Sea

Committee Overview

International Tribunal on the Law of the Sea

The International Tribunal for the Law of the Sea (ITLOS) is an international judicial body established by the United Nations Convention on the Law of the Sea of 10 December 1982 ("the Convention") to adjudicate disputes concerning the interpretation or application of the Convention and all matters specifically provided for in any other agreement conferring jurisdiction on the Tribunal. The Convention governs all legal matters concerning the ocean space and its resources (fishing, pollution, maritime delimitation, navigation, status of ships, scientific research, and exploration and exploitation of natural resources). The Tribunal has its seat in Hamburg in the Federal Republic of Germany. Its Statute ("the Statute") is contained in Annex VI to the Convention.

The Tribunal is composed of 21 judges who are recognized experts in the field of the law of the sea. The judges are elected by the States Parties to the Convention for a term of nine years and may be re-elected. In the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution must be assured (Statute, article 2, paragraph 2). There must be no fewer than three members from each geographical group as established by the General Assembly of the United Nations (Statute, article 3).

The Tribunal is open to States Parties to the Convention in accordance with article 20, paragraph 1, of the Statute. The expression "States Parties" includes States and the other entities referred to in article 305 of the Convention (international organizations and certain self-governing associated States and territories), which become parties to it (Convention, article 1, paragraph 2).

The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with the Convention. It also includes all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal (Statute, article 21). The Tribunal has jurisdiction to deal with disputes (contentious jurisdiction) and legal questions (advisory jurisdiction) submitted to it.

UNCLOS

UNCLOS is an acronym for the **United Nations Convention for the Law of the Sea**. The convention is also sometimes referred to as the Law of the Sea Convention or the Law of the Sea treaty. UNCLOS, as a law of the sea came into operation and became effective from 16th November 1982.

However, the first time such a proposal was announced before the United Nations was in the year 1973. Over the course of nine years, with representations from over 160 countries coming forward, UNCLOS came into existence. The background of UNCLOS covers can be explained in detail as follows:

Before the nautical law of UNCLOS came into force, there existed a school of thought known as freedom-of-the-seas, most notably represented by Hugo Grotius in *Mare Liberum (1609)*. This doctrine had first come into operation during the 17th century. As per this law, there were no limits or boundaries set to the aspect of marine business and commercial activities.

Over the years and centuries as technology developed and the needs of the people across the world grew, a problem emerged: Over-exploitation of the sea's resources was immensely felt towards the middle of the 20th century and many nations started recognizing the need to ensure the protection of their marine resources.

Starting with United States in the 1945, many countries across the world brought the natural resources found in their oceans' continental shelf under their jurisdiction.

Some of the countries that exercised this power were Argentina, Canada, Indonesia, Chile, Peru, Ecuador and even countries like Saudi Arabia, Egypt, Ethiopia and Venezuela.

Since the usage of the marine reserves rose even more in the 1960s and since missile launch pads also starting getting based in the oceanic bed, it became imperative that a specific regulation be placed to ensure proper protection and jurisdiction of the marine reserves.

In 1967, the Third United Nations Conference on the Law of the Sea was convened. In this conference, the UN ambassador from Malta Mr. Arvid Pardo requested for a legal power that could bring about international governance over the oceanic floor and bed. Such a legal power would also ensure that there would not be any problems arising between various countries over the oceanic floor and bed space.

In a major way, it was this UNCLOS III that paved the way for the now existing nautical law.

Jurisdiction of ITLOS

The Tribunal has jurisdiction over all disputes concerning the interpretation or application of the Convention, subject to the provisions of article 297 and to the declarations made in accordance with article 298 of the Convention.

Article 297 and declarations made under article 298 of the Convention do not prevent parties from agreeing to submit to the Tribunal a dispute otherwise excluded from the Tribunal's jurisdiction under these provisions (Convention, article 299).

The Tribunal also has jurisdiction over all disputes and all applications submitted to it pursuant to the provisions of any other agreement conferring jurisdiction on the Tribunal. A number of multilateral agreements conferring jurisdiction on the Tribunal have been concluded to date.

Advisory jurisdiction

The Seabed Disputes Chamber is competent to give an advisory opinion on legal questions arising within the scope of the activities of the Assembly or Council of the International Seabed Authority (article 191 of the Convention).

The Tribunal may also give an advisory opinion on a legal question if this is provided for by "an international agreement related to the purposes of the Convention" This means that any state can request an advisory opinion when there is a dispute regarding the UNCLOS rules. (Rules of the Tribunal, article 138).

Topic A: Case Aurora Borealis

Introduction and historical background

Ever since the first explorers trudged north in search of the Earth's axis, coastal nations have held claims on the territory and the waters of the North Pole. The race has heated up in recent years, though, keeping pace with the discovery of oil and gas. The area is now thought to hold 13% of the world's untapped oil reserves and up to 30% of undiscovered natural gas. Unlike the Antarctic, which belongs to no one and is governed by international treaty, the Arctic resources lay on a neutral territory, and the eight countries that ring the region — Russia, Finland, Sweden, Norway, Iceland, Denmark, Canada, and the United States — have grown increasingly assertive, holding military exercises and even reopening nearby Cold War-era bases. The key to unlocking the region's untold billions is a U.N. treaty that defines where countries are entitled to lay claim to undersea resources. These claims are better known as continental shelf claims.

Prior to World War II, coastal states enjoyed sovereignty over only a narrow territorial sea, three to four nautical miles in extent. It was dramatically changed after the war by the 1945 Truman Proclamation whereby 'the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control'. The doctrine further developed in the Convention on the Continental Shelf in 1958 and was later written into the 1982 convention.

Up to now, Arctic coastal states have followed the rule-based UNCLOS procedure and submitted their claims to the Commission on the Limits of the Continental Shelf (CLCS).[1] Russia was the first country to make such a submission to the CLCS in 2001 and also the first to which the Commission issued recommendations in 2002. Russia was requested by the CLCS to gather additional scientific data, in early August 2015, Russia made a revised submission to the CLCS. Norway made a submission in 2006 and has now received recommendations from the CLCS according to which it is gradually drawing the outermost limits of its continental shelf.

Denmark made its submission in December 2014, Canada is currently undertaking surveys to collect further data, and the United States has published the results of its continental shelf programme.[2]

It is likely that these continental shelf claims will be settled in an orderly fashion. First, it is in the common interests of all Arctic coastal states to have as large continental shelves as possible, something that an orderly settlement can produce cost-effectively. Secondly, and as mentioned, the coastal states have committed themselves via the 2008 Ilulissat Declaration to 'orderly settlement of any possible overlapping claims'.

Growing uncertainty

While at the moment the settlement of continental shelf claims is likely to take happen in an orderly fashion, recently there have been some changes of circumstance that could make it jeopardize this. The biggest threat at the moment is the relations between Russia and other Arctic Ocean Coastal states.

[1] Oceans and Laws of the Sea, United Nations, www.un.org/depts/los/clcs_new/clcs_home.htm (access: 4.07.2018)
[2] Timo Koivurova, Juha Käpylä & Harri Mikkola Continental shelf claims in the Arctic, www.files.ethz.ch/isn/193235/bp178.pdf (access: 4.07.2018)

Russia is dependent on the energy sector for its socio-economic development.[3] Regretfully Russia's oil and gas reserves are steadily being depleted. Consequently it is forced to find new reserves and as such the reserves in the Arctic are becoming more and more important for the Russian frontier energy regions, most notably the Arctic. Consequently, Russia has considered it prudent to endorse UNCLOS in the Arctic not only to gain access to new resources, but also to generate a stable and predictable investment and operating environment as a necessary enabler of regional socio-economic development.

However, Russian Arctic ambitions are becoming increasingly difficult to realize. This is not only because of the challenging operating conditions in the Arctic, but also because Western sanctions against Russia hinder the possibility for further economic development.

Russia has invested considerable amounts of capital in the development of the Arctic. The development of Arctic can be compared with the Soviet space programme of the 1960s and 70s, both project where used to show the states greatness and as ground for technological development. If the Arctic economic potential does not materialize, it could further deteriorate relations between Russia and the West.

Further reasons for concern in the region is the fact that Russia's consistent commitment to international law can no longer be taken for granted under the current regime. In the Arctic, Russia has failed to respect UNCLOS in the case of the 2013 case between the Netherlands and Russia over the capture of the Greenpeace ship Arctic Sunrise.[4]

[3] Fiona Hill, Energy Empire: Oil, Gas and Russia's Revival, www.brookings.edu/wp-content/uploads/2016/06/20040930.pdf. (access: 4.07.2018)
[4] Arctic Sunrise Case, www.itlos.org/en/cases/list-of-cases/case-no-22/

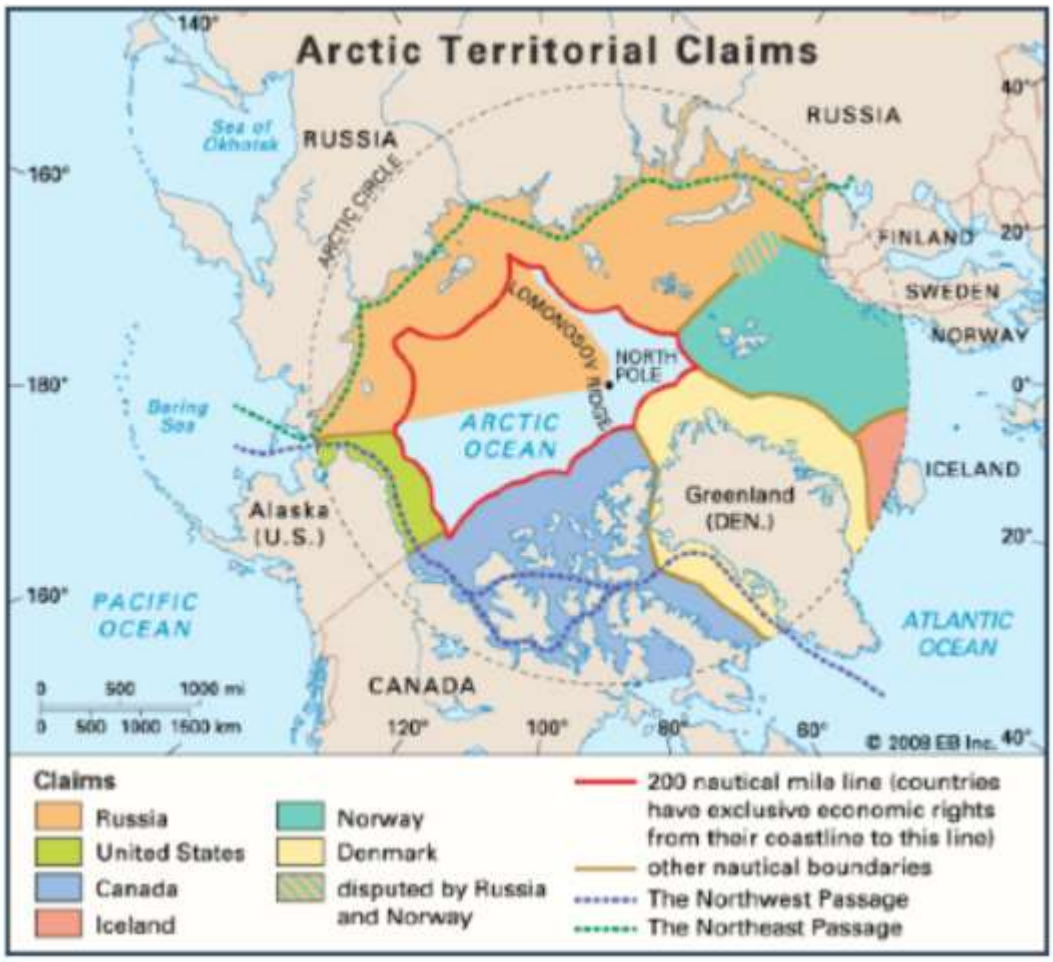
More importantly, the annexation of Crimea and the ongoing conflict in Ukraine highlight even more clearly that Russia is prepared to dismiss international norms and commitments it has previously endorsed. As a result, Western perceptions of Russia and its intentions have deteriorated. We see widespread distrust of Russia in the West today, particularly between what the Russian leadership says and what it does. Unlike the Soviet Union, contemporary Russia under President Vladimir Putin is seen as a very unpredictable power in Europe.

Given these developments, the emerging question is whether or not one should expect Russia to remain consistently committed to its legal and diplomatic obligations in the Arctic, including the established maritime order and its foundational legal corpus, UNCLOS. At the very least, Russia's recent track record does raise concerns in this respect that need to be considered also in the context of continental shelf claims. On the bases of the forgoing we are going to build a fictive case.

With respect to the Arctic Russia has been known to send mixed signals. In the late 2000s, Russia made what appeared to be a unilateral claim to the seabed of the North Pole while at the same time endorsing UNCLOS and resolving a border dispute with Norway in the Barents Sea. More recently, during the conflict in Ukraine, Russia's public endorsements of international law and cooperation have coexisted with bolder rhetoric about the territorial value of, and Russia's territorial designs on, the Arctic.

Growing military capabilities, especially in a time of uncertainty about Russia's intentions, may reintroduce the classic security dilemma[5] to the Arctic. This means that military actions of one state (Russia) can cause other states to react in a similar way.

5 Ken Booth and Nicholas J. Wheeler, The security dilemma revisited: a paradigm for international security in the twenty-first century
www.tandfonline.com/doi/abs/10.1080/13642987.2010.513092?src=recsys&journalCode=fjhr20



Facts of the case

Ever since the demise of the Soviet Union in 1991, the Russian Federation has lived in the shadow of the superpower the Soviet Union once was. Its current president has done his best to reinstate the status of superpower. The Russian Federation has shown its possible strength in gas disputes with the Ukraine that also affected the European Union.

In July 2007, this ambition to regain the status of superpower took on a new form. The Russian Federation organized an expedition to the North Pole, consisting of the nuclear icebreaker *Rassia* and the research vessel *Akademik Fedorov*.

This expedition, dubbed *Arktika 2007* by the Russian Authorities had at its official goal to investigate the structure of the Earth's crust. Most notably the expedition is set to find out whether the Lomonosov Ridge is attached to the bottom of the Siberian Sea. This information is important since it might support a territorial claim made by the Russian Federation in 2001.

On 1 August 2007, the real purpose of the expedition becomes clear. Video images relayed from the *Akademik Fedorov* shows its two manned mini *MIR* submarines planting a Russian flag on the bottom of the Pole Abyssal Plane at the exact location of the geographic North Pole.[6] In an accompanying statement, the Russian Government states that as of this date the Russian Federation reinforces its territorial claim made in 2001 and regards the North Pole as Russian territory (Continental Shelf). Consequently claiming that all the natural resources belong to the Russian Federation.[7] Additionally, similar claims are made for the Lomonosov Ridge, which is also claimed by Canada,[8] the Alpha Ridge and the Mendeleev Ridge, three submerged mountain ranges in the Arctic Ocean.

For years this dispute was being dissolved through diplomatic means. However due to rising tensions between Russia and the West all talks around the arctic are suspended until further notion. On the 28 of March 2018 Russia resent the video claiming the arctic resources for itself.

At the same time the video images and the statement of the Russian Government are sent across the world, NORAD (North American Aerospace Defense Command) receives warning that a large number of Russian Tu-95 'Bear' bombers and different kinds of warships have taken off at their base in Nova Zembla and are heading in different directions, most notably towards, Canada, Denmark and the United States.

[6] www.reuters.com/article/us-russia-arctic/new-soil-samples-prove-the-arctic-is-ours-russia-idUSL2082113920070920 (access: 4.07.2018)
[7] Article 76-77 UNCLOS
[8] www.youtube.com/watch?v=iyDd343UxRQ (access: 4.07.2018)

Fighter planes are scrambled to intercept the bombers that return back to Russia just before entering the territorial waters of the countries concerned. These incidents were common during the Cold War.

The United States openly denounces the Russian claims with regards to the North Pole resources. In a statement broadcast live on CNN the American Secretary of State says that the North Pole is in joint ownership of the world and cannot be subject to claims of individual nation states. In order to underline this statement the SSGN *Ohio*, a nuclear submarine, surfaces through the ice some 300 meters away from the *Rassia* and the *Akademik Fedorov* on 15 April 2018. In addition, fighter planes are scrambled from Thule Air Force Base (located in Greenland) that conduct low level flyovers over both Russian ships two times a day.

The Canadian response is less open, but much more direct. In all secrecy, a highly trained and specialized commando unit is sent to the North Pole. Their task is to reclaim, with force if necessary, the North Pole for Canada, which has also made a territorial claim based on the Continental Shelf.[9] On board of the Canadian Icebreaker *Labrador* the commando unit heads towards the North Pole. Eventually, helicopters on board of the *Labrador* will drop the commando unit within a reasonable distance of the Lomonosov Ridge, after which the last leg of their journey will be done on foot.

Alarmed by all the claims with regard to ownership of the North Pole an unlikely candidate enters the playing field. The Inuit Circumpolar Conference issues a statement that the North Pole is at least the spiritual property of the Inuit people who believe that it is the origin of the Aurora Borealis (Northern Light). This electromagnetic phenomenon is believed by the Inuit to be a viewing pane into the next life, where they can see the spirits of their ancestors dance.

[9] www.youtube.com/watch?v=iyDd343UxRQ&t=104s

In view of recent events the Inuit Circumpolar Conference has decided to issue a territorial claim on the North Pole, in order to assure worldly ownership next to spiritual ownership.

The Inuit Circumpolar Conference underlines that it wants no part in the rising tension over the North Pole, but at the same time warns that there are more radical elements in the Inuit community that want matters dealt with more efficiently.[10]

In the meantime matters are becoming less friendly over the North Pole. The crews of the *Ohio*, the *Rassia* and the *Akademik Fedorov* are engaged in a mutual staring game, while flyovers are becoming more frequent. The Tu-95's are now accompanied by *Admiral Grigorovich*-class ships. These ships are sent to the northern territorial water of Canada and US. The flyovers are becoming increasingly aggressive with also cross the North Pole on their flights to US and Canadian airspace. They are now carrying full armament while normally these flights are conducted with unarmed planes.

The last contestant for North Pole ownership, Denmark, tries to make use of its EU membership to extort influence over the matter. In the European Council meeting the Danish Prime Minister asks the support of the other EU member states to its claim of the North Pole. The European Council agrees to support the Danish claim and states that the European Union will do all what lies within its power to convince the Russian Federation to denounce the claim of ownership of the North Pole. In the European Council statement an ambiguous reference is made to the EU-Russia association agreement.

[10] Tip: try to link the un convention indigenous peoples rights and territory claims www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

On 20th June 2018, a large explosion rips through the cold Greenland air as the control tower of Thule Air Force Base is destroyed. In the hours that follow the attack is claimed by the Inuit Liberation Front, an until now unknown group that, as is mentioned in the statement, fights for rightful ownership of the circumpolar region.

From Russia the news comes that there are 'problems' with 'irregulars' at a submarine base on the Chukchi Peninsula. Although there are no official statements, it is believed that the ILF is also active in the Russian Federation. The attack on Thule AFB claims seven casualties, five US Air Force personnel and two Danish civil engineers working on Thule AFB. Both the US and the Danish government are outraged and appeal to the Inuit Circumpolar Conference to control their people. The Conference denies any involvement in the attack. However unknown sources from within the Conference state that the ILF is formed from primarily Inuits based in Canada.

Over the North Pole, events also take a turn for the worse. On the evening of the 30 June fighting breaks out on the *Rassia*. When dawn breaks, it is seen that instead of the Russian flag the *Rassia* now flies the Maple Leaf of Canada, and the Canadian commandos that have boarded the *Rassia* issue a statement that the Canada has reinstated sovereignty over the North Pole. In addition, the *Akademik Fedorov* must allow boarding by Canadian commandos and must facilitate a second trip to the North Pole by mini submarine to replace the Russian flag with a Canadian flag. The *Ohio* is summoned to leave Canadian territory. The US commander refuses to leave however knowing that two US aircraft carrier groups are steaming towards the Arctic in order to compensate for the loss of Thule AFB and just being informed by his sonar officer that two Russian Akula class attack submarines have come into range.

At the same time the Russian Government's brings the case before the ITLOS. It asks for the immediate release of *Rassia* and its crew, the conviction of Canada for all its actions and to settle the continental shelf claims between Canada and Russia. Until the case becomes before the court a staring match is held between the three parties.

The Judges of the ITLOS are assembling during BerlinMUN 2018 to judge the action of Canada as US is not party to the treaty.

Questions which the judgement should answer

1. Are the claims on the Arctic frozen?
2. Was Canada right in boarding and use force against the Academic Federov?
3. Was the claim of Russia on the Arctic in accordance with international law?
4. Can the actions of Russia be seen as a form of aggression according to UNCLOS?
5. Are the claims on Arctic made by planting flags in accordance with International Law?
6. Can Canada be kept responsible for the aggressions by ILF?

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Topic B: Request for an advisory opinion on the freedom of navigation in the South China Sea

Introduction

The South China Sea has always been subjected to numerous territorial disputes, which have risen in tension in recent years after Chinese attempts at widening their borders through establishing extraterritorial islands being subjected to their jurisdiction. Surrounding countries have renamed the see as methods of soft support of their claims in terms of nomenclature – "West Philippine Sea" in Philippines or "Luzon Sea" in Indonesia. Nevertheless, those political maneuvers were external projections, aiming at increasing right to claim territories, of deeper disputes such as Indonesian, Chinese, and Taiwanese claims over waters NE of the Natuna Islands or Vietnamese, Chinese, and Taiwanese claims over waters west of the Spratly Islands (additionally some or all of the islands themselves are also disputed between Vietnam, China, Taiwan, Brunei, Malaysia, and the Philippines).

On the account of lack of the settlement of the territorial disputes has caused numerous legal consequences, with the merit of the request being one of them – limitation of freedom of Navigation in violation of Article 87(1)a of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). On 15th of May 2018 USS John S. McCain sailed near Mischief Reef (Chinese artificial island) and has encountered four anti-ship missiles aimed at surrounding waters, as a mean of "protecting sovereignty of Chinese waters" and "engaged in unauthorised broadcasting[11]" as described by Chinese Defense Ministry.

[11] Being an exception under the UNCLOS – "Several exceptions [from Freedom of Navigation] are provided for: if the vessel is engaged in piracy, slavery or unauthorised broadcasting"

In response, the US has submitted a claim to ITLOS for recognising a direct violation of freedom of Navigation by Chinese military, as said waters are not-recognised, therefore international ones, the chamber has to release an advisory opinion (or opinions) on that matter.

The South China Sea region is a semi-enclosed sea – part of the Pacific Ocean, encompassing an area from the Karimata and Malacca Straits to the Strait of Taiwan of around 3,500,000 square kilometres (1,400,000 sq mi).

The sea carries a great strategic importance; one-third of the world's shipping passes through it carrying over $3 trillion in trade each year, it contains lucrative fisheries that are crucial for the food security of millions in Southeast Asia, and huge oil and gas reserves are believed to lie beneath its seabed.

Due to the number of claimants, the complexity of the claims and the wide range of interests involved, the South China Sea has been called the "mother of all territorial disputes". The region will probably be a centre of future economic growth in East Asia and is sometimes called a "second Persian Gulf". There are obvious possibilities for joint development and cooperative management regimes to exploit the resources, but the many overlapping maritime claims to sovereignty throw up impediments.

Historical Background

The history of the South China Sea is full of clashes that could provoke escalation. In 1946, China declared the Spratly islands as part of its Guangdong province. In 1947, the Philippines claimed some of the Spratlys as well as the Scarborough Reef. The first military clash occurred in 1974 in the Paracels between China and Vietnam, resulting in Vietnamese expulsion and the death of Vietnamese soldiers. In response, South Vietnam occupied part of the Spratlys. In 1978, the Philippines claimed the entire area and revised their country's map. The first naval skirmish involving China and Vietnam ensued in 1988 off the Spratly Islands, with Vietnam incurring over 70 casualties and losing control of six "islands" or maritime features.

Under such tensions, China passed laws in 1991 to formally assert control over the whole South China Sea. Organized by Indonesia, the six main claimants in the South China Sea agreed to resolve the disputes peacefully and refrain from unilateral actions that could increase tensions. Two years later, China and Vietnam engaged in another skirmish near Vietnam's claimed Sin Cowe East. Under mounting criticism, China pledged not to use force and negotiate the Spratlys. In 1995, China engaged the Philippines in a skirmish near the ill- named Mischief Reef, effectively expanding the conflict beyond a rivalry. Over time, the Philippines has also had minor skirmishes with Vietnamese and Malaysian forces.

The states in the South China Sea thus have overlapping, mutually incompatible claims. This explains the tension and interstate rivalry in the region.

The international legal framework against which to assess the maritime claims of the South China Sea states is provided by UNCLOS as it outlines the provisions relating to the definition of baselines along the coast, the spatial dimensions of claims to maritime jurisdiction, coastal and other state rights and responsibilities within such zones. Finally and importantly, UNCLOS also deals with the delimitation of maritime boundaries where overlapping claims occur. Furthermore UNCLOS includes at least two significant provisions that relate to the territorial disputes in question. First, the UNCLOS legally introduces Exclusive Economic Zones (EEZs), within which a Member State enjoys sovereign exploitation rights over natural (living and non-living) resources. The perimeter of an EEZ extends from land's low water line out **200 nautical miles**. Foreign states may still navigate freely and fly overhead as well as lay underwater cables and submarine pipes. Second, the UNCLOS formalized the Continental Shelf as a natural extension of the land territory (which is limited to 12 nautical miles, Article 3 UNCLOS), subject to the Member State's control. For legal application, the Continental Shelf can extend to the edge of the continental margin, the point at which the shelf descends to an abyssal plain on the ocean floor.

Since the South China Sea is a semi-enclosed sea, article 123 of the UNCLOS treaty is also important, as it provides the groundwork for negotiations: "States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavor, directly or through an appropriate regional organization: (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea; (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment; (c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area; (d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article."

In tandem with the EEZ, UNCLOS limits the jurisdiction of the continental margin control at least 200 and up to 350 nautical miles. Within the Member State's continental shelf but beyond its EEZ, it may exploit only non-living natural resources. Crucially, the UNCLOS attributes to islands their distinct EEZ and Continental shelf jurisdictions. This is the crux of control for the claimants of the strategic islands. Both EEZ and Continental shelf are legal consequences of territorial sovereignty over land.

All Member States in the South China Sea have therefore an interest to establish territorial sovereignty over the islands if they want to benefit from the EEZ and Continental shelves attached to those. Claims on territorial sovereignty are mainly based on de facto control and historical precedent. Ambiguity in overlapping EEZ boundaries adds to the complexity of each state's claim. While UNCLOS contains several provisions to solve overlapping EEZs and continental shelves, these provisions are disputed in terms of their implementation and can be abrogated by individual bilateral treaties.

With regard to mainland coasts of the states surrounding the South China Sea, several states take the view that their coasts are sufficiently deeply intended and cut into or fringed with islands in their immediate vicinity to justify the definition of systems of straight baselines as provided for under Article 7 of the UNCLOS treaty. Claims for such straight baselines have been made by Cambodia, China (and Taiwan), Thailand and Vietnam. Two of the South China Sea littoral states, Indonesia and the Philippines, are archipelagic states and have defined archipelagic baselines in accordance with Article 47 of UNCLOS. Except for Cambodia, all Member States in the South China Sea have signed and ratified the UNCLOS. China claims nearly all of the South China Sea. Referred to on maps as the "cow's tongue," China's asserted territorial reach encompasses all of the Spratly Islands as well as the Paracel Islands. All these elements have resulted in a set of conflicting claims in the region, as the map below clearly demonstrates:

In 2002, the ASEAN countries together with China signed a **"Declaration on the Conduct of Parties in the South China Sea"**. In it, China and ASEAN promised "co-operation" and "self- restraint", they recognised "the need to promote a peaceful, friendly and harmonious environment" and said they would abide by the UN Convention on the Law of the Sea (UNCLOS), and work towards a code of conduct. Nine years later, the two sides agreed to a vague set of guidelines to implement the declaration. In July 2016, China agreed to expedite talks about a code of conduct. Some believe that decision was driven by the election of Rodrigo Duterte to the presidency of the Philippines. Duterte's predecessor, Benigno Aquino, had filed a case against China within the International Court of Justice[12], accusing it, among others, of violating UNCLOS. The tribunal mostly ruled in favor of the Philippines. But Duterte, more favorably disposed towards China than Aquino, offered to "set aside" the ruling.

[12] See: Permanent Court of Arbitration case no. 2013-19

Facts of the case

On 6 August 2017, ASEAN and China agreed on a new framework. They agreed on a three- step process to start the negotiations of an actual code - the announcement of the adoption of the framework, convening a new meeting to discuss the modalities for the negotiations of the Code and announcement of the start of a "Code of Conduct" (COC) negotiation by the leaders of ASEAN and China in the upcoming summit in November 2017. But China said the third step will depend on the stability in the South China Sea, "if there is no major disruption from outside parties." The joint communiqué of the 50th ASEAN ministerial released in Manila "took note of the concerns by some ministers on the land reclamations and activities in the area which have eroded trust and confidence, increased tensions and may undermine peace, security and stability in the region." The communique also emphasized the "importance of non-militarization and self-restraint in the conduct of all activities by claimants and all other states, including those mentioned in the DOC that could further complicate the situation and escalate tensions in the South China Sea."

In the "Declaration on the Code of Conduct" (DOC), there are several interesting principles. The first objective is "To establish a rules-based framework containing a set of norms to guide the conduct of parties and promote maritime cooperation in the South China Sea". The second objective is "To promote mutual trust, cooperation and confidence, prevent incidents, manage incidents should they occur, and create a favorable environment for the peaceful settlement of the disputes." The third objective is "To ensure maritime security and safety and freedom of navigation and overflight". The parties to the DOC also "reaffirmed their respect for and commitment to the freedom of navigation in and overflight above the South China Sea".

According to Ian Storey, "ensure" sounds slightly stronger than "respect for and commitment to", and underscores the concern of some ASEAN states that the dispute risks undermining freedom of navigation, especially if China declared an Air Defence Identification Zone (ADIZ) (see infra) over the South China Sea as it did over parts of the East China Sea in November 2013. China's position is that the dispute does not threaten freedom of navigation.

The "Principles" section is divided into four parts. The first principle is that the COC is "Not an instrument to settle territorial disputes or maritime delimitation issues." The second principle is a commitment to the "purposes and principles" of the United Nations Charter, the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the Treaty of Amity and Cooperation, the Five Principles of Peaceful Coexistence and "other universally recognized principles of international law". The third principle is a "Commitment to full and effective implementation of the DOC". The fourth principle is "Respect for each other's independence, sovereignty and territorial integrity in accordance with international law, and the principle of non-interference in the internal affairs of other states."

According to Ian Storey, there are several elements currently missing in the new Code of Conduct (COC) in the making. First, the framework does not mention the geographical scope of the COC, including whether it will apply to both the disputed Paracels and Spratly Islands or only to certain areas. During the negotiations, Vietnam had argued that the names of the two archipelagos be included, but as consensus could not be reached they were omitted. So long as the COC applies to the entire South China Sea, this may not present a problem. Second, while the text mentions "mechanisms for monitoring of implementation", it is silent about enforcement measures and arbitration mechanisms should one party accuse another of violating the code. Generally speaking, ASEAN eschews enforcement clauses in its agreements.

Nevertheless, the absence of enforcement measures and arbitration mechanisms will weaken the effectiveness of the final Code of Conduct.

Problems which the advisory opinion shall address:

1. The Tribunal jurisdiction, or lack of such, over the dispute,
2. The status of the disputed waters – if they are territorial (and hence falling under national regulations) or international,
3. The legitimacy of the incident, whether the sides acted accordingly based upon the conclusions of question 2,

Bibliography and recommended reading

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Storey, I. (2017) *Assessing the ASEAN-China Framework for the Code ofConduct for the South China Sea*

XXX (2002) Declaration on the Conduct of Parties in the South China Sea, 4 November 2002, 3 p.

Extra information: Sources of International Law

A Judge needs to cast a judgment on a case in accordance with international law. Therefore, it is important that Judges are familiar with what international law is – meaning the sources of international law and how it is applied.

Article 38 (1) of the ICJ Statute clarifies which sources may be consulted while deciding on a case. Those sources are (1) international conventions, (2) international customary law, (3) general principles of law and (4), as a subsidiary means of interpretation, the teachings of highly qualified publicists and other juridical decisions.

1. International Conventions

A convention or, as it is often referred to, a "treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[13] That means that two or more States have agreed to voluntarily adhere to specific rules. The rules laid out in a convention are only binding on States that have signed and ratified that convention. It is therefore necessary to check to which treaties the Parties of the case at hand are a party.

2. International Customary Law

Applying this body of law will probably be the most difficult but at the same time the most interesting part of the discussion. First of all, rules of custom are binding on all States across the globe. However, they are usually not laid down in writing, have not been agreed on expressively and therefore remain rather vague. As set out in the North Sea Continental Shelf Case customary law arises as a consequence of the widespread state practice carried out in the belief that the practice is required by law. So, in order for a rule of custom to be established, two prerequisites have to be met.

[13] Article 2 (1a) of the Vienna Convention on the Law of Treaties.

Firstly, there has to be widespread state practice and, secondly, this practice has to be accompanied by an opinio juris.

State practice is the objective element of a custom. What has to be proven is that state practice of a certain rule is consistent and widespread. For example, even before any kind of codification the immunity of foreign diplomats has always been a rule followed by sovereign states even before there was a written convention.[14] However, the duration of the practice does not always guarantee customary status. A new rule has the change to become customary law, if many (in one specific area) or all states in the world agree that it is customary law. State practice can be proven by looking into legislation, press releases, diplomatic statements, websites of the foreign ministry, policy statements, politicians' statements, legal advisors' statements etc.

Opinio juris is a concept that the action carried out by a state was a legal obligation. It is the subjective element of customary law, and therefore always open for debate. For opinio juris there needs to be proven that a state adheres to a certain rule not out of convenience, habit or coincidence or political expediency but because it feels truly legally obliged to do so. It is sometimes difficult to determine where to find a state's "opinion". However, just like the state practice it can be found through press releases, diplomatic correspondence, commentaries on legal instruments or parliamentary debates (for example the Hansard of the British House of Commons).

TIP: A good source to use for determining if a rule is the work of the International Law Commission (ILC) of the United Nations. The ILC is a specialised body whose task it is to promote "the progressive development of international law and its codification."[15] It is therefore the ILC that tries to take down in writing many of the existing rules of international custom.

[14] The Vienna Convention on Diplomatic Relations of 1961
[15] Article 1 (1) of the Statute of the International Law Commission.

3. General Principles of Law

General principles of law are norms of a wide- ranging character that are recognised in the municipal law of States.[16] They can be in written or unwritten form. Many legal systems around the world share some of the most basic legal principles. It is for this reason that these become part of international law as well. A few examples of these principles are: good faith, the principle of proportionality, the rules of lex posterior and lex superior, sine poena sine lege and of course pacta sunt servanda.

4. Judicial Decisions and Teachings

When taking in to account judicial decisions one has to keep in mind that the ITLOS just like the ICJ is not bound by precedent.[17] However, the ICJ and ITLOS have a close relationship and has used judgements of the ICJ to support its own legal reasoning. Consequently previous decisions from ITLOS and ICJ can be used in the judgement. Consulting domestic judicial decisions or judicial decisions of the European Court of Human Rights, the Inter-American Court of Human Rights or other international court and tribunals can also be useful although, these judgements can only be used for support and cannot be the main argument.

As last form of international law article 38(1) of the ICJ-Statute mentions highly qualified publications. However these sources much like judgements have no binding character. They can only be used as a supporting argument. Remember that opinions of such publicists are not sources of international law per se but rather have a complementary character. If a gap in international law is found, one may then explain that this gap exists and refer to what highly regarded legal scholars have suggested to fill the gap. However, the opinion may never be referred to as the law itself.

[16] Alain Pellet in: Statute of the International Court of Justice. A Commentary at p. 766 para. 249.
[17] Article 59 ICJ-Statute.

TIP: when referring to scholarly literature, make sure that the author has significant standing in the international community. Not every professor of international law is a highly qualified publicist in the light of Art. 38 (1) lit. d) ICJ-Statute.

As a rule of thumb, it is safe to say that everyone who has served either as an ICJ Judge or as a member of the ILC can be referred to as a highly qualified publicist (these include: Ian Brownlie, James Crawford, Christine Gray, Rosalyn Higgins, Herschel Lauterpacht, Vaughan Lowe, Christian Tomuschat, etc.). It is a good indicator when their opinion is shared by many other scholars. The ILC as a whole is a highly qualified publicist, as well.