LOSI Conference Papers, 2012

“Securing the Ocean for the Next Generation”

Papers from the Law of the Sea Institute, UC Berkeley–Korea Institute of Ocean Science and Technology Conference, held in Seoul, Korea, May 2012

Proceedings edited by Prof. Harry N. Scheiber, LOSI
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Assistant Editor: Emily A. Gardner

Seabed Activities and the Protection and Preservation of the Marine Environment in Disputed Maritime Areas of the Asia-Pacific Region

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This paper was presented at the tenth in a series of annual international conferences organized and sponsored or co-sponsored by the Law of the Sea Institute, School of Law, University of California, Berkeley, USA. The May 2012 conference was jointly sponsored and co-organized in collaboration with the Korea Institute of Ocean Science and Technology (KIOST, formerly KORDI), and hosted by KIOST on May 21-24, 2012 in Seoul, Korea. This was the third LOSI-KIOST collaboration in conferences and publications.

Seabed Activities and the Protection and Preservation of the Marine Environment in Disputed Maritime Areas of the Asia-Pacific Region

Vasco Becker-Weinberg[*]

Abstract:

The existing conflicts in the Asia-Pacific region regarding the delimitation of maritime boundaries and sovereignty over islands and other features has not deterred several coastal States from allowing the construction and use of offshore installations and structures for the purpose of exploring and exploiting the mineral resources found in disputed maritime areas. These unlawful actions constitute a considerable threat if coastal States do not adopt the necessary measures to protect and preserve the marine environment from pollution by seabed activities, and to safeguard the safety of navigation and other important activities, such as fishing.

The United Nations Convention on the Law of the Sea ("UNCLOS") provides that coastal States must give due notice of the presence of offshore installations and structures and establish safety zones around them. The Convention further determines that coastal States are entitled to exercise jurisdiction over offshore installations and structures. UNCLOS does not, however, refer to the rights and obligations of coastal States in disputed maritime areas regarding exploration and exploitation activities and the construction and use of offshore installations and structures, or, for that matter, to their removal or decommissioning.

This paper takes into consideration the circumstances of the Asia-Pacific region, which are briefly described in section 1. It then identifies, in section 2, the rights and obligations of States in disputed maritime areas. Subsequently, in section 3, it will refer to the law of the sea framework applicable to the protection and preservation of the marine environment, specifically concerning transboundary harm or damage caused by pollution from seabed activities. In section 4, the paper will examine the international legal regime applicable to offshore installations in disputed maritime areas and the respective exercise of jurisdiction by coastal States. Finally, section 5 will forward some conclusions on coastal States' obligations regarding seabed activities in disputed maritime areas.

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1. The paradigm of the Asia-Pacific region

The Asia-Pacific region provides a relevant case-study for the analysis of the rights and obligations of neighbouring coastal States in disputed maritime areas, due to the complexity of this region in respect of ongoing maritime delimitation disputes, as well as sovereignty disputes regarding islands or other features and their adjacent maritime areas, which in many cases entail the claims of more than two States at one time.[1]

The intricacy of the geopolitical circumstances of the maritime disputes in the Asia-Pacific region is further accentuated by the increasing demand in the past decades for fossil fuels and the expectation of its continued demand in the years to come due to the population and economic expansion of this region. Currently the use of this energy source accounts for more than four-fifths of the global primary energy supply and of which oil and gas corresponds to its largest take.[2]

As a result, most countries in the Asia-Pacific region consider securing access to energy sources a national priority. Moreover, these States share the general perception that significant parts of the seabed and subsoil have a great hydrocarbon potential. In addition, fisheries represent an important share of the revenue and subsistence of many of the populations in the region. In fact, the Asia-Pacific region includes valuable and interrelated marine ecosystems that together have some of the richest marine biological diversity in the world

[1] On the difficulties facing maritime delimitation in the South China Seas and in particular regarding the delimitation of boundaries between South Pacific States and between East Asian States, *see* SHICUN, Wu, ""Joint Development": an ad hoc solution to the South China Sea Dispute" *in* 2 China Oceans Law Review (2007) 1-10; YU, Steven Kuan-Tsyh, "The law of EEZ/Shelf boundary delimitation: the practice of States in the South China Sea" *in Proceedings of the International Law Association (ILA) First Asian-Pacific Regional Conference*, ed. Chinese Society of International Law (1996) 45-48; ROTHWELL, Donald R., "The law of the sea in the Asian-Pacific region: an overview of trends and developments" *in Proceedings of the International Law Association (ILA) First Asian-Pacific Regional Conference*, ed. Chinese Society of International Law (1996) 58; PRESCOTT, Victor/SCHOFIELD, Clive, "Undelimited maritime boundaries of the Asian Rim in the Pacific Ocean" *in* 3-1 Maritime Boundaries (2001) 1-68; ELY, Northcutt/MARCOUX, J. Michel, "National seabed jurisdiction in the marginal sea: the South China Sea" *in Limits to National Jurisdiction over the Sea* (edits.) YATES III, George T./YOUNG, John Hardin, ed. University Press of Virginia, (Charlottesville: 1974) 103-151; ELY, Northcutt/PIETROWSKI, Robert F., "Boundaries of seabed jurisdiction off the Pacific coast of Asia" *in* 8 Nat. Resources Law (1975-1976) 611-629; MA, Ying-Jeou, "The East Asian seabed controversy revisited: relevance (or irrelevance) of the Tiao-yu-T'ai (Senkaku) islands territorial dispute" *in* 2 Chinese Y. Int'l L. & Affairs (1982) 1-44; CHAO, K.T. "East China sea: boundary problems relating to the Tiao-yu-T'ai islands" *in* 2 Chinese Y. Int'l L. & Affairs (1982) 45-97; DONALDSON, John/WILLIAMS, Alison, "Understanding maritime jurisdictional disputes: the East China Sea and beyond" *in* 59-1 J. Int'l Affairs (Fall/Winter 2005) 135-156.

[2] Organization of the Petroleum Exporting Countries, *World Oil Outlook 2011*, available online <http://www.opec.org/opec_web/static_files_project/media/downloads/publications/WOO_2011.pdf>.

and are also an important source of ecological and economic support of a large part of the world's population.[3]

Maintaining security and stability in the Asia-Pacific region is also essential for the international community as whole, particularly when considering that the greater part of the world's goods are transported using shipping routes that go through this region, and, that it is the most important loading and unloading area in the world.[4]

The significant regional efforts made under the umbrella of the Association of Southeast Asian Nations ("ASEAN") have provided a relevant impetus for regional stability, as well as important developments regarding the protection and preservation of the marine environment.[5] This is the case, for example, of the ASEAN Minerals Cooperation Action Plan 2011-2015, which includes the promotion of environmentally and socially sustainable mineral development, particularly through the recognition of best practices, capacity building and exchange of knowledge,[6] and, the creation, together with the Coordinating Body of the Seas of East Asia, of a Working Group on the Coastal and Marine Environment to promote a coordinated and harmonised approach to the establishment and management of marine protected areas networks in the region.[7] Additional examples of cooperation include, *inter alia*, the establishment of a regional programme for Partnerships in Environmental Management for the Seas of East Asia that involves States of the region, and also several national and regional entities,[8] the Memorandum of Understanding ("MoU") of 1994 on Port State Control in the Asia-Pacific

[3] United Nations, Asia Development Bank, *Green Growth, Resources and Resilience. Environmental Sustainability in Asia and the Pacific*, ed. UN-ESCAP/ADB/UNEP (Bangkok: 2012).

[4] United Nations Conference on Trade and Development, *Review of Maritime Transport 2011*, Report by the UNCTAD Secretariat, p. 10, available online <http://archive.unctad.org/en/docs/rmt2011_en.pdf>.

[5] Article 1(9) of the ASEAN Charter; The Declaration on the Conduct of Parties in the South China Sea, made on November 4th, 2002; The Philippines Proposal dated August 16th, 1999 of the ASEAN-China Code of Conduct in the South China Sea; The Joint Statement of the Meeting of Heads of State/Government of the Member States of ASEAN and the President of the People's Republic of China, made in December 16th, 1997; The Joint Declaration by the Republic of the Philippines-Peoples Republic of China Consultations on the South China Sea and on Other Areas of Cooperation and the Joint Declaration on the Fourth Annual Bilateral Consultations between the Socialist Republic of Vietnam and the Republic of Philippines, both made in August 10th, 1995; The ASEAN Declaration on the South China Sea, made in July 22nd, 1992; The Manila Declaration on the South China Sea, made in July 1992; The Principles of Bandung of 1991; The Treaty of Amity and Cooperation in Southeast Asia, made on February 24th, 1976; The Declaration of Bangkok, made on August 8th, 1967.

[6] Hanoi Declaration on Sustainable ASEAN Connectivity in Minerals, adopted at the Third ASEAN Ministerial Meeting on Minerals, December 9th, 2011. Also *see* Joint Press Statement the Third ASEAN Ministerial Meeting on Minerals, December 9th, 2011, available online <http://www.aseansec.org/>.

[7] Available online <http://www.aseansec.org/14541.htm>.

[8] Available online <http://beta.pemsea.org/>.

Region, and, the respective Code of Good Practice for Port State Control Officers.[9]

However, the settlement of certain maritime disputes, such as those regarding islands and their adjacent maritime areas, has been an especially difficult endeavour, particularly since UNCLOS does not include rules applicable to the settlement of land boundary disputes and merely provides an unclear formula applicable to the characterization of islands and the indication of the maritime areas that they are allowed as a result.[10]

The fact that certain coastal States in the Asia-Pacific region do not clarify their claims regarding the legal title and the maritime area they consider to be disputed also constitutes a significant impediment for the resolution of maritime disputes in this region and contributes even further towards the ongoing deadlock situation, hindering the chances for the delimitation of maritime boundaries or the implementation of provisional arrangements.

As a result, and contrary to international law, many coastal States adopt unilateral actions such as granting of exploitation and exploration rights and the occupation by military force of many islands and features in order to hypothetically strengthen their claims to the respective maritime areas, as happens most notably in the Spratly Islands.

This current practice carries a potential environmental risk and does not safeguard the interests of other competing activities, namely conservation and maintenance of fish stocks and the safety of navigation.

However, over the years, several coastal States in the Asia-Pacific region have entered into joint development agreements of offshore hydrocarbon deposits, which have provided a valid legal alternative to overcome deadlock situations and that have been particularly useful when the settlement of maritime delimitation disputes by agreement or even with the intervention of a third party would ultimately lead to a long-term procedure incompatible, at least, with the energy needs of these States.[11] Still, some joint development agreements implemented thus far have not included provisions

[9] Available online <http://www.tokyo-mou.org/>.

[10] Article 121 of UNCLOS. *See* NORDQUIST, Myron H., "Textual interpretation of article 121 in the UN Convention on the Law of the Sea" *in Coexistence, Cooperation and Solidarity*. *Liber Amicorum Rüdiger Wolfrum*, vol. 1, edits. HESTERMEYER, Holger P./KÖNIG, Doris/MATZ-LÜCK, Nele/RÖBEN, Volker/SEIBERT-FOHR, Anja/STOLL, Peter-Tobias/VÖNEKY, Silja, ed. Martinus Nijhoff Publishers (Leiden/Boston: 2012) 991-1036.

[11] *See* BECKER-WEINBERG, Vasco, *Joint development agreements of offshore hydrocarbon deposits: an alternative to maritime delimitation in the Asia-Pacific region*, in: CHINA OCEANS LAW REVIEW, vol. 13, 60-101. Also *see*, BECKER-WEINBERG, Vasco, "Joint Development in the Gulf of Tonkin and Northeast Asia" *in Beyond Territorial Disputes in the South China Sea: Legal Frameworks for the Joint Development of Hydrocarbon Resources*, edited by Robert Beckman, Clive Schofield, Ian Townsend-Gault, Tara Davenport and Leonardo Bernard, ed. Edward Elgar Publishing (Cheltenham: 2013); (et.al) *Conference on joint development and the South China Sea - Conference Report*, available online <http://cil.nus.edu.sg/wp/wp-content/uploads/2011/06/Report-of-CIL-Conference-on-Joint-Development-and-the-South-China-Sea-2011-04.08.2011.pdf>.

on the protection and preservation of the marine environment or regarding offshore installations and structures. This is the case, for example, of the joint development regime established in by Malaysia and Vietnam.[12]

In contrast, the Timor Gap Treaty signed by Indonesia and Australia, before the independence of East Timor,[13] and the Timor Sea Treaty between the latter and Australia,[14] established a comprehensive regime for the protection and preservation of the marine environment. Both treaties predicted the creation of obligations for States and private operators in the joint development area, including on cooperation to prevent and minimize pollution of the marine environment arising from the exploitation and exploration activities. These regimes further granted the necessary attributions to the joint entities created under the same for the purpose of preventing and minimizing pollution of the marine environment, such purposes including: executing prior environmental assessments of maritime areas to be developed, defining safety and restricted zones to ensure the safety of navigation and of petroleum operations, issuing regulations on environmental protection and assessments, establishing contingency plans for combating pollution and requesting assistance with pollution prevention measures, amongst others.[15]

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[12] Agreement between the Government of Malaysia and the Government of the Kingdom of Thailand on the Constitution and Other Matters Relating to the Establishment of the Malaysia-Thailand Joint Authority, made in Kuala Lumpur on May 30th, 1990, published at 1 Int'l Maritime Boundaries (edits.) CHARNEY, Jonathan I./ALEXANDER, Lewis M., The American Society of International Law, ed. Martinus Nijhoff Publishers (Dordrecht/Boston/London:1993) 1111-1123. Memorandum of Understanding between Malaysia and the Socialist Republic of Vietnam for the Exploration and Exploitation of Petroleum in a Defined Area of the Continental Shelf Involving the Two Countries, made in Kuala Lumpur on June 5th, 1992, published at 3 Int'l Maritime Boundaries (edits.) CHARNEY, Jonathan I., ALEXANDER, Lewis M., The American Society of International Law, ed. Martinus Nijhoff Publishers (The Hague/Boston/London: 1998) 2341-2344.

[13] Article 33(1) of the Timor Gap Treaty signed between Australia and Indonesia on December 11th, 1989, available online <www.austlii.edu.au>.

[14] Timor Sea Treaty, available online <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS-TLS2002TST.PDF>. Also see Exchange of Notes Constituting an Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste Concerning Arrangements for Exploration and Exploitation of Petroleum in an Area of the Timor Sea between Australia and East Timor, made in Dili on May 20th, 2002, available online <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUSTLS2002EX.PDF>.

[15] Articles 8a), i), j), and m) and 18(2) Timor Gap Treaty, articles 30, 34 and 37(1) Annex B (Petroleum Mining Code for Area A of the Zone of Cooperation) Timor Gap Treaty; article 10 and Annex C Timor Sea Treaty. The Timor Treaty also provided that the Designated Authority had the function of controlling movements within and from the joint development area (JPDA), and also that limited liability corporations and limited liability entities shall be liable for damages or expenses incurred as a result of pollution. The Timor Gap Treaty also established in article 27 of Annex B (*Petroleum Mining Code for Area A of the Zone of Cooperation*) Timor Gap Treaty that the Joint Authority could instruct operators to remove property or pollution or take all actions necessary for the conservation and protection of the

Also the MoU on the Greater Sunrise oil fields that was signed by East Timor and Australia provided that the legislation on environmental protection referred in the annex to the agreement that it would be amended from time to time as applicable for the purpose of protection of the environment, being that the respective regulatory authorities would administer this legislation.[16]

Slightly less detailed, the joint development agreement between Japan and South Korea[17] determined that both States would agree on measures to prevent collisions and pollution at sea resulting from the exploration and exploitation activities in the joint development area.[18] This agreement also provided that nationals or residents of either State that suffered damages from such activities could seek compensation under the law and jurisdiction of the State in which the said damages occurred, or, in which such nationals or persons resided.[19] This joint development agreement stated that concessionaries would be severally and jointly liable and that the applicable law would be that of the State of the relevant concessionaire, given that their sources are considered as extracted from the continental shelf of that State.[20]

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marine environment. In fact, section 5.1c), d) and e), and Section 6.6g)ii) Annex C (Model Product Sharing Contract between the Joint Authority and (Contractors)) Timor Gap Treaty provides that operators on entering into product sharing contracts with the Joint Authority undertook to take the necessary precautions to avoid interference with navigation and fishing, to develop an environmental management plan to be approved by the Joint Authority, prevent pollution of the marine environment, pay for the costs associated with clean-up of any pollution from any petroleum operations, to remove property upon termination, and to include environmental restoration in its closing down costs.

[16] Article 21 of the Memorandum of Understanding between the Government of the Democratic Republic of Timor-Leste and the Government of Australia relating to the Exploitation of the Sunrise and Troubadour Petroleum Fields in the Timor Sea, made on March 6th, 2003, available online <http://www.timorseada.org>.

[17] Agreement between Japan and the Republic of Korea Concerning the Establishment of Boundary in the Northern Part of the Continental Shelf Adjacent to the Two Countries, made in Seoul on February 5th, 1974, published at 1225 UNTS (1981) 104-105. This agreement, together with the maritime delimitation agreement, ended the maritime dispute on the delimitation of the continental shelf between the two countries in the East China Sea. Agreement between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries, made in Seoul on January 30th, 1974, published at 1225 UNTS (1981) 114-126.

[18] Article 20: "*The Parties shall agree on measures to be taken to prevent collisions at sea and to prevent and remove pollution of the sea resulting from activities relating to exploration or exploitation of natural resources in the Joint Development Zone.*"

[19] Article 21: "*1. When damage resulting from exploration or exploitation of natural resources in the Joint Development Zone has been sustained by nationals of either Party or other persons who are resident in the territory of either Party, actions for compensation for such damage may be brought by such nationals or persons in the court of one Party (a) in the territory of which such damage has occurred, (b) in the territory of which such nationals or persons are resident, or (c) which has authorized the concessionaire designated and acting as the operator in the subzone where the incident causing such damage has occurred. 2. The court of one Party in which actions for compensation for such damage have been brought under paragraph 1 of this article shall apply the laws and regulations of that Party.*"

[20] Article 21(3).

On the other hand, the MoU signed by Thailand and Malaysia[21] determined that both States would exercise and enforce their rights regarding the preservation and protection of the marine environment.[22], Moreover, without prejudice to Malaysia's sovereign rights,[23] each State would establish criminal or civil jurisdiction in certain parts of that area in accordance with the respective national legislation. In addition, oil platforms straddling the line dividing jurisdiction would be designated as Malaysian or Thai.[24]

Despite the disparity between different joint development agreements and the fact that most do not establish a comprehensive regime on the protection and preservation of the marine environment by pollution from seabed activities, States are subject to certain obligations in disputed maritime areas under international law and in particular under the law of the sea. This ought to be considered when granting rights to operators in disputed maritime areas.[25]

2. Rights and obligations of States in disputed maritime areas

The rights and obligations of States in the seas and oceans depend on the spatial organization of the different maritime areas. These areas can be generally divided into those that are subject to the jurisdiction or sovereignty of coastal States (the territorial sea, the contiguous zone, the EEZ and the continental shelf) and those beyond coastal State jurisdiction, (the high seas,

[21] Memorandum of Understanding between the Kingdom of Thailand and Malaysia in the Establishment of a Joint Authority for the Exploitation of the Resources of the Sea-bed in a defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand, made in Chiang Mai on February 21st, 1979, published at TANGSUBKUL, Phiphat, *ASEAN and the Law of the Sea*, ed. Institute of Southeast Asian Studies (Singapore: 1982) 130-133. In the same year, the two States signed a second MoU identifying the points to be considered for the purpose of delimitating the continental shelf boundary between the two countries in the Gulf of Thailand, while further undertaking to continue negotiations towards final delimitation. *See* Memorandum of Understanding between the Kingdom of Thailand and Malaysia on the Delimitation of the Continental Shelf Boundary between the Two Countries in the Gulf of Thailand, made in Kuala Lumpur on October 24th, 1979, available online <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/THA-MYS1979CS.PDF>.

[22] Article 4(1): "*The rights conferred or exercised by the national authority of either Party in matters of fishing, navigation, hydrographic and oceanographic surveys, the prevention and control of marine pollution and other similar matters (including all powers of enforcement in relation thereto) shall extend to the joint development area and such rights shall be recognized and respected by the Joint Authority.*"

[23] Article 5 of the 1979 MoU and article 18(1) and (3) of the Malaysia-Thailand Joint Authority Act 1990 (Act 440), of January 23rd, 1991.

[24] Section 18(6)b),c) and d) of the Malaysia-Thailand Joint Authority Act 1990 (Act 440), of January 23rd, 1991.

[25] *See* ONG, David, "The progressive integration of environmental protection within offshore joint development agreements" in *Exploitation of Natural Resources in the 21st Century*, (edits.) FITZMAURICE/Malgosia, SZUNIEWICZ/Milena (The Hague/London/New York: 2003) 113-141.

or The Area) where all States enjoy duties and freedoms. Additionally, as a result of opposing or overlapping maritime claims, certain maritime areas may be potentially subject to the jurisdiction or sovereignty of more than one coastal State. In such cases, when States fail to reach an agreement on the delimitation of maritime boundaries, UNCLOS provides that States may either settle the matter by agreement or resort to one of the Convention's compulsory dispute settlement mechanisms.[26] Yet, there is no obligation for States to proceed with the delimitation of maritime boundaries. States are only subject to the rule that delimitation of maritime boundaries should be settled by agreement and in accordance with international law, without prejudice to the general obligation for all States to settle international disputes by peaceful means and refraining from the threat or use of force.[27]

Furthermore, States frequently choose not to submit the settlement of a dispute on the delimitation of maritime boundaries to a compulsory mechanism partly due to the uncertainty of its outcome. Consequently, deadlock situations regarding the delimitation of maritime boundaries are susceptible to continuing for generations without any progress. In some instances they are instrumental for promoting nationalistic rhetoric and may inevitably result in conflict between the relevant States, creating regional and even global instability.

UNCLOS establishes that pending the delimitation of maritime boundaries, States may agree to implement provisional arrangements of a practical nature that do not hinder the final delimitation of maritime boundaries.[28] These arrangements are particularly relevant when the access to and the development of valuable marine natural resources hangs in the balance.

In order to determine the existence and extent of a conflict between two or more States regarding opposing or overlapping maritime claims, States are required to make their claims known and to substantiate them by providing their theories of legal title and the identification of the relevant maritime area.

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[26] Part XV of UNCLOS.

[27] Article 2(3)(4) of the Charter of the United Nations, made in San Francisco on June 26th, 1945, available online <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf>. On maritime delimitation *see*, BROWN, E.D. *The International Law of the Sea, Volume I, Introductory Manual*, ed. Dartmouth (Aldershot, Brookfield USA, Singapore, Sydney: 1994) 160, 161-207; CHURCHILL, R.R./LOWE, A.V., *The Law of the Sea*, ed. Manchester University Press (Manchester: 1999) 183; ROTHWELL, Donald R./STEPHENS, Tim, *The International Law of the Sea*, ed. Oxford and Portland, Oregon: 2010) 397; TANAKA, Yoshifumi, *The International Law of the Sea*, ed. Cambridge University Press (Cambridge: 2012) 186; EVANS, Malcolm D., "Maritime boundary delimitation: where do we go from here?" *in The Law of the Sea: Progress and Prospects*, edited by FREESTONE, David/BARNES, Richard/ONG, David, ed. Oxford University Press (Oxford: 2006) 137-160.

[28] Articles 74(3) and 83(3) of UNCLOS. Also *see* Article 7(3)(5)(6) and 31(1) of the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of December 10th, 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, made in New York on December 4th, 1995

The ability for two or more States to enter into a maritime delimitation agreement or to implement a provisional arrangement such as joint development agreement of offshore hydrocarbon deposits regarding disputed maritime areas is strictly related to the legal title upon which these States substantiate their respective claims.[29]

For the purposes (1) of verifying whether a maritime claim of one State is opposed by two or more States and (2) of revealing the existence of a conflict as a result of opposing claims, it is not sufficient that a State declares that a dispute exists, or that the interests of two or more States are in conflict. Also, the mere denial of a dispute does not demonstrate its actual non-existence, nor is the unilateral maritime delimitation of one State opposable and necessarily superior to the potential claim of other States.[30] It is necessary that the claim of one State is positively opposed by that of another State.[31] In other words: a dispute of overlapping entitlements occurs when the valid legal titles upon which States sustain their respective maritime claims are in conflict, given that the recognition of a claim of one State would necessarily imply the exclusion of part or all of the claim put forward by another State.[32]

The legal entitlement of coastal States to maritime areas and the rights resulting therefrom, particularly the exclusive right to develop the resources found in the continental shelf, are attached to and directly derive from coastal States' sovereignty over the territory which the continental shelf is adjacent to.[33] Adjacency is the paramount criterion for determining the legal status of the continental shelf. This is independent of the fact that the notion of natural prolongation is not considered as a legal title for the purpose of maritime

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[29] Separate Opinion of Vice-President Oda, *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, §40.

[30] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984,* §87, §89, §112, §113. On the value and binding nature of unilateral acts and declarations by States under international law, *see Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, 267-268, §43-§46, and 472-473, §46-§49.

[31] *Case of the Mavrommatis Palestine Concessions, Judgment, P.C.I.J. 1924, Series A - No. 2*, 11; *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949,* 181-182; *Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950*, 74; *South West Africa Cases (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment of 21 December 1962, I.C.J. Reports 1962*, 328; *Case concerning the Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment of 2 December 1963, I.C.J. Reports 1963*, 27.

[32] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, §37, §38. Also *see* Permanent Court of Arbitration, *The Island of Palmas Case (or Miangas) (US v. Netherlands), Award of the Tribunal, 4 April 1928,* §839; *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal, Judgement, 14 March 2012, I.T.L.O.S. No. 16, 2012,* §395, §398.

[33] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, §39-§43; *Aegean Sea Continental Shelf, Judgement, I.C.J. Reports 1978,* §86; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982,* §34, §48; *Continental Shelf (Libyan Arab Jarnahiriya/Malta), Judgment, I.C.J. Reports 1985*, §49.

delimitation, but rather as one of several circumstances that should be taken into account in order to achieve an equitable solution to delimitation.[34]

The continental shelf is a legal concept connected with the principle that the land dominates the sea, and, the rights of exploration and exploitation of the continental shelf derive *ispo jure* from coastal States' sovereignty over the land mass.[35] Likewise, with regard to the EEZ, only the coastal State that is holder of a valid legal title may proclaim for that State the area beyond and adjacent to the territorial sea, and therein exercise the respective rights and jurisdiction. However, when considering the legal status of the EEZ in comparison with the territorial sea and the high seas, it should be noted that this is, as Churchill and Lowe state, "a separate functional zone of a *sui generis* character."[36]

It is the entitlement of coastal States that generates their right to maritime delimitation and necessarily to exercise jurisdiction and sovereignty over the adjacent maritime areas, or, the implementation of provisional arrangements. As a result, entitlement confers the right of coastal States to develop the marine natural resources found in the disputed maritime areas, as well as, the obligation to protect and to preserve the marine environment, including establishment of safety zones around oil rigs ensuring the safety of navigation and of these structures, without prejudice to other lawful uses of the said maritime area by other States. Furthermore, the entering into effect of provisional arrangements does not alter States' entitlement or the status of the relevant maritime area, particularly concerning the allocation of its sovereignty through final delimitation, or, the exercise of rights and obligations by the relevant States.

Such provisional arrangements are subject to the principle of *res inter alios acta* and therefore are not opposable and may not create obligations or rights for third States without their consent.[37] Additionally, the legal regime that such arrangements create and whichis applicable to the respective maritime area must be subject to the limits of maritime jurisdiction, namely having due regard for the rights and freedoms of third States, such as the right to lay submarine cables and pipelines, the freedom of navigation, and, the undertaking of activities regarding international cooperation and promotion of

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[34] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, §43, §96; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, §68, §70, §73, §75; *Continental Shelf (Libyan Arab Jarnahiriya/Malta), Judgment, I.C.J. Reports 1985*, §61, §62; *Case Concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine), I.C.J. Reports 2009*, §77, §99.

[35] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, §96; *Aegean Sea Continental Shelf, Judgement, I.C.J. Reports 1978,* §86; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, §185; *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal, Judgement, 14 March 2012, I.T.L.O.S. No. 16, 2012*, §432, §433.

[36] CHURCHILL/LOWE, *supra* note 27, 166.

[37] Article 34 of the Vienna Convention on the Law of Treaties, made in Vienna on May 23rd, 1969.

marine scientific research.[38] When these agreements are signed after the delimitation of maritime boundaries, they constitute cooperative efforts between two or more States that are also subject to the aforementioned limits of maritime jurisdiction and rights of third States, thus being consistent, to a certain extent, with the non-absolute protection of territorial sovereignty under international law.[39]

However, as the content of provisional arrangements essentially depends on the discretionary powers of States, they may not necessarily include provisions regarding the fulfilment of certain obligations that international law, and in particular law of the sea, establish for coastal States regarding maritime areas under their jurisdiction or sovereignty. Similarly, the question of the legal regime applicable to disputed maritime areas would also have relevance in the event that States should fail to reach an agreement on the delimitation of maritime boundaries, or, on the implementation of a provisional arrangement of a practical nature. This is the case, for example, of the obligation of States to protect and to preserve the marine environment, as well as establishing the jurisdiction and the applicable law of oil platforms operating in disputed maritime areas.

Pending the delimitation of boundaries of a disputed maritime area, States must inform all legitimate claimant States of their intention to develop offshore hydrocarbon deposits found in a disputed maritime area, including the identification and location of such resources as it is known to that State. In this case, no exploitation or exploration activities, particularly drilling of the continental shelf, may be undertaken without the previous consent of all relevant States. The lack of self-restraint would inevitably lead to competitive drilling and potential waste of resources and could result in severe environmental consequences. Should two or more States grant their consent for the undertaking of such activities in a disputed maritime area or after the respective delimitation of maritime boundaries, they ought to share information on the precise extent of these activities with neighbouring States should they include the development of common resources, or, if they take place close to a boundary line or the limits of a maritime area subject to cooperative development or claimed by other States.

The complexity of these matters has to be measured with respect to the relations between different claims and in consideration of the interests of neighbouring coastal States that have no claim regarding the disputed maritime area but may nonetheless be affected by environmental damage occurring therein, taking into account the extent of the rights and obligations of neighbouring coastal States regarding the protection and preservation of the marine environment pending the delimitation of maritime boundaries.

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[38] Articles 58(1), 78(2), 79, 87(1)a), 112 and Part XIII of UNCLOS.

[39] ANDRASSY, Juraj, "Les relations internationales de voisinage" *in* 79 Recueil de cours de L'Académie de droit internationale de La Haye (1951-II), 102-103; CHURCHILL/LOWE, *supra* note 27, 200, 151-157.

According to the statistics of the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection ("GESAMP"), the annual number of accidental sea-based oil spills of 34 tonnes and over corresponded to 1,668 during 1968 to 1999, with offshore exploration and production activities responsible for merely 76. The findings of GESAMP also establish that of those spills of 34 tonnes and over, offshore exploration and production activities during the same period amounted to 906,905 spills of a total 17,658,869, having an overall oil input into the marine environment of 1,5% between 1968 and 1977. Yet, of 6,000 oil and gas installations operating in the global marine environment, only 950 are located in the Asia-Pacific region, including manned and unmanned structures. In this respect, the GESAMP report shows that there is a lack of information from many areas of the world where the offshore industry is operating under less demanding regulatory regimes, or, where oil input data is not readily available, such as in Southeast Asia.[40]

This is also the case, with regard to information on the decommissioning and removal of oil and gas offshore installations. There are several in the Asia-Pacific region rapidly reaching the end of their service, and, which therefore carry a considerable risk for the marine environment if their impact is not duly assessed, as well as risks to navigation and other uses of the sea.

In this respect, the Northeast Atlantic Ocean, where there are a significant number of oil and gas offshore installations operating at great depths, offers valuable lessons that could be implemented in the Asia-Pacific region. In fact, the Convention for the Protection of the Marine Environment of the North-East Atlantic ("OSPAR") provides that States shall take all possible steps to prevent and eliminate pollution from offshore sources.[41] It also establishes the prohibition of dumping of wastes or other matter from offshore installations, as well as the dumping, and the prohibition of leaving wholly or partly in place, of disused offshore installations.[42] In this respect, it

[40] GESAMP (IMO/FAO/UNESCO-IOC/UNIDO/WMO/IAEA/UN/UNEP Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection). 2007. *Estimates of Oil Entering the Marine Environment from Sea-Based Activities. Rep. Stud. GESAMP No. 75, 96*, 24-26, 43, 47, 63.

[41] Convention for the Protection of the Marine Environment of the North-East Atlantic, made in Paris on September 22nd, 1992 and entered into force on March 25th, 1998, available online <http://www.ospar.org/>. *See* PATERSON, John, "Decommissioning of offshore installations" *in Oil and Gas Law. Current Practice and Emerging Trends* (edits.) GORDON, Greg/PATERSON, John, ed. Dundee University Press (Dundee: 2007) 149-185; PROELß, Alexander, *Meeresschutz im Völker- und Europarecht. Das Beispiel des Nordostatlantiks*, ed. Duncker & Humblot (Berlin: 2004) 215-221; AYOADE, Morakinyo Adedayo, *Disused Offshore Installations and Pipelines. Towards "Sustainable Decommissioning"*, ed. Kluwer Law International (The Hague/London/New York: 2002) 47-77.

[42] Article 5 of OSPAR and articles 3(1) and 5 of Annex III of OSPAR. Also *see* Section 2 of OSPAR Decision 98/3 on the Disposal of Disused Offshore Installations, Ministerial Meeting of the OSPAR Commission, adopted in Sintra on July 22nd-23rd, 1998, and entered into force on February 9th, 1999.

is worth recalling the international standards for the removal of abandoned and disused installations and structures prepared by the International Maritime Organization (IMO) to ensure the safety of navigation and prevent potential adverse effects on the marine environment.[43]

Taking into account the example of OSPAR and considering the absence of an appropriate national and regional regulatory framework on the decommissioning of oil and gas offshore installations and relevant infrastructures such as storage facilities and pipelines, there is evidently a need in the Asia-Pacific region to address these matters particularly as States face potential liability for damages caused by these installations, as well as regarding their decommissioning operations. However, the considerable investment required for the decommissioning and removal of such installations, particularly those operating in deep waters, in addition to the absence of an inventory of the number and location of installations currently in use or abandoned in this region, makes understanding the full extent of these matters a very difficult task.[44]

International law provides that States are subject to procedural duties and in particular the duties of exchanging information and consultation, which take into account the principle of cooperation regarding the protection and preservation of the marine environment and also the principle of *bona fide*, which provides that States may not exercise their rights within their territory in such a manner as to cause harm or damage to neighbouring States.[45]

However, the interrelation or "functional link" between procedural and substantial obligations is not always evident, particularly when international courts or tribunals recognize compliance with substantial obligations, despite the fact that procedural obligations have been breached. This is the case, for example, if a claimant State would not notify a neighbouring State of its intent to develop offshore hydrocarbon deposits located in a disputed maritime area close to the boundary line of that State, thus not creating "the conditions for successful co-operation between the parties," but acting, nonetheless, with "due diligence in respect of all activities which take place under the

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[43] IMO resolution A.672(16), *Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone*, adopted on October 19th, 1989; IMO resolution A.671(16), *Safety Zones and Safety of Navigation Around Offshore Installations and Structures*, adopted on October 19th, 1989. Also *see* article 60 of UNCLOS.

[44] *See* SANDS, Philippe, *Principles of International Environmental Law*, 2nd ed., ed. Cambridge University Press (Cambridge: 2003) 826-868. For example, OSPAR monitors the development of offshore installations and maintains an updated inventory of all oil and gas offshore installations in the OSPAR maritime area. This database includes the name and ID number, location, operator, water depth, production start, current status, category and function of the installations.

[45] International Law Association, *Report of the International Committee on the Legal Aspects of the Conservation of the Environment,* by Prof. Dietrich Rauschning (Manila Conference 1978) 390-411 and (Belgrade 1980) 548-550. *See* SMITH, Brian D., *State Responsibility and the Marine Environment: the Rules of Decision*, ed. Clarendon Press (Oxford: 1988) 83-85; ANDRASSY, *supra* note 39, at 80.

jurisdiction and control," adopting "appropriate rules and measures" and "also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party."[46]

In this respect, the memory of recent environmental catastrophes including the Mobile Offshore Drilling Unit[47] ("MODU") Deepwater Horizon in the Gulf of Mexico should provide a sufficient motive to encourage cooperation and also to serve as a reminder of the challenges facing coastal and neighbouring States and the vulnerability of the marine ecosystem with regard to seabed activities. In fact, although the present paper does not include MODUs in its scope, it should be noted that the Deepwater Horizon was a foreign-flagged unit that had been built and operated in accordance with the 1989 IMO MODU Code,[48] and, that its flag State used recognized organizations to conduct the required surveys and audits. Moreover, the US Coast Guard had also periodically performed safety examinations. However, despite Deepwater Horizon having all required documents certifying compliance with applicable international requirements imposed by the US Coast Guard and the flag State,[49] a report concluded that the accident was the result of "poor risk management, last-minute changes to plans, failure to observe and respond to critical indicators, inadequate well control response,

[46] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, §113, §197. *See* Joint Dissenting Opinion of Judges Al-Khasawneh and Simma, *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, §26, §27.

[47] Mobile Offshore Unit is a vessel which can be readily relocated and performs an industrial function involving offshore operations other than those traditionally provided by vessels covered by Chapter I of the International Convention for the Safety of Life at Sea (1974 SOLAS). MODU is a unit capable of engaging in drilling operations for the exploration for, or exploitation of, resources beneath the sea-bed such as liquid or gaseous hydrocarbons, sulphur or salt. *See* IMO resolution A.891(21), November 25th, 1999.

[48] 1989 Code for the Construction and Equipment of Mobile Offshore Drilling Units adopted by IMO resolution A.649(16) and concerns MODUs built since May 1st, 1991. The 1989 MODU Code superseded the 1979 MODU Code adopted by IMO resolution A.414(XI) and was updated and revised by the 2009 MODU Code adopted by IMO resolution A.1023(26). The new Code is expected to apply to units whose construction begins on or after January 1st, 2012.

[49] US Coast Guard, *Report of Investigation into the Circumstances Surrounding the Explosion, Fire, Sinking and Loss of Eleven Crew Members aboard the Mobile Offshore Drilling Unit Deepwater Horizon in the Gulf of Mexico, April 20 – 22, 2010*, Vol. I (Systems and responsibilities within U.S. Coast Guard purview under the U.S. Coast Guard-Minerals Management Service Memorandum of Agreement dated March 27th, 2009), MISLE Activity Number: 3721503. This accident claimed the lives of 11 persons and injured 16 others and poured hydrocarbons into the Gulf of Mexico for 87 days, causing the largest oil spill in history of the US - almost five million barrels of oil were discharged from the Macondo well into the Gulf of Mexico - and significant environmental damage, affecting the lives of hundreds of thousands of people living in coastal communities.

and insufficient emergency bridge response training by companies and individuals."[50]

Therefore, when States undertake or grant the right for exploitation and exploration activities of non-living marine natural resources in disputed maritime areas, they are required to comply with their procedural and substantial obligations and to protect and preserve the marine environment in these areas as established by international law and the law of the sea. Nevertheless, the balance between States' obligations regarding environmental protection and the development of marine resources is a delicate one, and one which has been described as mankind's "uneasy love affair with the sea".[51]

3. Protection and preservation of the marine environment in the law of the sea

Until the entering into force of UNCLOS, the protection and preservation of the marine environment had not received the legal substance that is currently recognizable in the transversal and multidisciplinary character of the Convention's normative framework.[52]

The 1958 Geneva Convention on the Continental Shelf merely provided that the exploration of this maritime area and the exploitation of its resources should not unjustifiably interfere with the conservation of living resources, and, further, that the coastal State was obliged to undertake in the safety zones created around offshore installations all appropriate measures for the protection of the living resources of the sea from harmful agents.[53] In the 1958 Geneva Convention on the High Seas, however, there is a clear reference to the prevention of pollution by discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and subsoil. This Convention also refers to the adoption of measures and international cooperation to prevent pollution from dumping of radioactive waste.[54]

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[50] The Bureau of Ocean Energy Management, Regulation and Enforcement, US Department of the Interior, *Report Regarding the Causes of the April 20, 2010 Macondo Well Blowout, September 14, 2011*.

[51] WENK, Edward, *The Politics of the Ocean* (Seattle/London: 1972) 6, 177-184.

[52] For a conceptual and historical appraisal of international environmental law, *see* REDGWELL, Catherine, "International Environmental Law" *in International Law*, 3.ed., edits. EVANS, Maclom D., ed. Oxford University Press (Oxford: 2010) 687-721; SAND, Peter H., "The evolution of international environmental law" *in The Oxford Handbook of International Environmental Law*, edited by BODANSKY, Daniel/BRUNNÉE, Jutta/HEY, ELLEN, ed. Oxford University Press (Oxford: 2007) 30-43; SANDS, *supra* note 44, 3-122, 391-458; FITZMAURICE, Malgosia, "*International Protection of the Environnent*" *in* 293 Recueil de cours de L'Académie de droit internationale de La Haye (2001) 22-47; WOLFRUM, Rüdiger, "Means of ensuring compliance with and enforcement of international environmental law" *in* 272 Recueil de cours de L'Académie de droit internationale de La Haye (1998) 9-154; YANKOV, Alexander, "The concept of protection and sustainable development in the marine environment" *in* 18 Ocean Yearbook (2004) 267-283.

[53] Article 5(1) and (7) of the 1958 Geneva Convention on the Continental Shelf.

[54] Articles 24 and 25 of the 1958 Geneva Convention on the High Seas.

Over the years, several non-binding and programmatic instruments have increased awareness of the need to protect and preserve the marine environment, essentially by making recommendations and providing guidelines, and also by promoting the adoption of regional and global measures. Most of these instruments had a ground-breaking effect and received wide acceptance due to their non-binding nature, thus allowing for swift adoption and avoidance of complex ratification procedure. Some of the guidelines established by these instruments eventually contributed towards the formation of international customary law regarding the protection and preservation of the marine environment. In time, they were integrated into agreements as mandatory provisions, such as those included in Part XII of UNCLOS, which also received a significant degree of acceptance.[55] For example, the Declaration of the 1972 UN Conference on the Human Environment ("UNCHE") affirmed in Principle 21 the sovereign right of every State to exploit its resources pursuant to its own environmental policies. It further recognized the responsibility of every State to ensure that activities within their jurisdiction or control would not cause damage to the environment of other States or the areas beyond the limits of national jurisdiction. The UNCHE Declaration also stated in Principles 22 and 24 that States should cooperate to further develop international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction, as well as to effectively control, prevent, reduce and eliminate adverse environmental effects, having due regard for the sovereignty and interests of all States. The Declaration additionally emphasized the importance of sharing "in the best spirit of co-operation and good-neighbourliness"[56] technical data relating to the work to be carried out by States within their national jurisdiction with a view of avoiding significant harm that may occur in the environment of the adjacent areas.[57]

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[55] BIRNIE, Patricia/BOYLE, Alan/REDGWELL, Catherine, *International Law & the Environment*, 3rd edition, ed. Oxford University Press, (Oxford, New York: 2009) 387; DUPUY, Pierre-Marie, "Formation of customary international law and general principles" *in The Oxford Handbook of International Environmental Law*, edited by BODANSKY, Daniel/BRUNNÉE, Jutta/HEY, ELLEN, ed. Oxford University Press (Oxford: 2007) 455-456. Other examples after the entry into force of UNCLOS include: the UN Fish Stocks Agreement in the reference made in the Preamble to the Chapter 17 of Agenda 21 concerning the sustainable use and conservation of marine living resources of the high seas (sections 17.44 to 17.69); the Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of December 29th, 1972, made in London on November 7th, 1996; or the Convention on Biological Diversity, made in Rio de Janeiro on June 5th, 1992 and entered into force on December 29th, 1993.

[56] UN Resolution of the General Assembly n. 2995 (XXVII), December 15th, 1972. Also *see* article 74 of the UN Charter.

[57] The Declaration was approved during the first global environment conference, the 1972 United Nations Conference on the Human Environment held in Stockholm. *See* A/CONF.151/26 (Vol. I), *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No.

UNCHE Declaration Principle 21 was also reaffirmed by the UN Resolution of the General Assembly n. 44/228, which added that States should contribute towards the preservation and protection of the global and regional environment in accordance with their capacities and specific responsibilities, and, that they are responsible for the damage to the environment and natural resources caused by activities within their jurisdiction or control. To this end, the Resolution supported the notion of action plans for the common management of eco-systems and critical environmental problems at the national, regional and global levels.[58]

Consequently, following the 1972 UNCHE and also the UN Resolution of the General Assembly n. 2997 (XXVII) that established the Governing Council of the UN Environment Programme,[59] several regional seas programmes were implemented including in the Asia-Pacific region, namely the Action Plan for the Protection and Sustainable Development of the Marine and Coastal Areas of the East Asia Region ("EAS")[60] and the Action Plan for the Protection, Management and Development of the Marine and Coastal Environment of the Northwest Pacific Region ("NOWPAP").[61]

Overall, these regional seas programmes were established for the purpose of managing defined marine and coastal ecosystems, and for developing regional databases, making environmental assessments, monitoring and controlling pollution, implementing cooperative programmes, particularly on the sustainable use and development of marine resources and development and improvement of capabilities. NOWPAP and EAS created, respectively, the NOWPAP Regional Coordinating Unit[62] and the already mentioned

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E.73.II.A.14. and corrigendum), chap. I. Also *see* UN Resolution of the Economic and Social Council n. 1346 (XLV), July 30th, 1968 and UN Resolution of the General Assembly n. 2398 (XXIII), December 3rd, 1968, recommending and calling the UN to convene a Conference on the Human Environment; and article 3 of the Charter of Economic Rights and Duties of States, adopted by the UN Resolution of the General Assembly n. 3281 (XXIX), December 12th, 1974.

[58] Section I(7), (8), (12) of the UN Resolution of the General Assembly n. 44/228, December 22nd, 1989. This Resolution decides to convene the 1992 UN Conference on Environment and Development. Also *see* UN Resolutions of the General Assembly n. 1803 (XVII), December 14th, 1962; n. 3201 (S-VI), May 1st, 1974; n. 3362 (S-VII), September 16th, 1975; n. 1514 (VX), December 14th, 1960; n. 1515 (XV), December 15th, 1960; and n. 626 (VII), December 21st, 1952.

[59] Also *see* UN Resolutions of the General Assembly n. 2993, n. 2994 and n. 2996 (XXVII), December 15th, 1972.

[60] The Action Plan for the Protection and Sustainable Development of the Marine and Coastal Areas of the East Asia Region is available online <http://www.unep.org/regionalseas/programmes/unpro/eastasian/default.asp>. The EAS involves ten countries: Indonesia, Malaysia, Philippines, Singapore, Thailand, Australia, Cambodia, China, Republic of Korea and Vietnam.

[61] The Action Plan for the Protection, Management and Development of the Marine and Coastal Environment of the Northwest Pacific Region, available online <http://www.unep.org/regionalseas/ programmes/unpro/nwpacific/default.asp>. The NOWPAP involves four countries: China, Republic of Korea, Japan and Russia.

[62] Available online <http://www.nowpap.org/>.

Coordinating Body on the Seas of the East Asia[63] for the purpose of overseeing the implementation of these actions plans.

In 1992, the UN held the Conference on the Environment and Development in Rio de Janeiro approving the well-known Agenda 21 and which essentially provided an outline for sustainable development. Chapter 17 included non-binding recommendations and guidelines relating to the pollution of the marine environment from various sources, as well as on how to develop strategies and plans to protect and preserve the marine environment at the global, regional and national levels.[64]

The major contribution of Agenda 21 was that it emphasized the need for an integrated approach to marine and coastal areas, particularly through international and regional cooperation and coordination.[65] However, in addition to not addressing the issue of the sustainable development of disputed maritime areas and not including, like most non-binding instruments, any reference to dispute settlement mechanism in the event of environmental damage, it merely referred in Section 17.30(C) that States should assess existing regulatory measures to address discharges, emissions and safety and the need for additional measures regarding the degradation of the marine environment from offshore oil and gas platforms.

UNCLOS altered the perception of the relation between States and the oceans, casting a strong light upon the connection between the different marine ecosystems as well as introducing on new terms the duty to cooperate as a fundamental principle in the prevention of marine pollution. This is

[63] Available online <http://www.cobsea.org/>.

[64] Chapter 17 of Agenda 21: "*Protection of the Oceans, all kinds of Seas, Including Enclosed & Semi-enclosed Seas, & Coastal Areas & the Protection, Rational Use & Development of their Living Resources*". Agenda 21 was adopted during the 1992 UN Conference on Environment and Development that took place in Rio de Janeiro, of which also resulted the Rio Declaration on Environment and Development (A/CONF.151/26, Vol. I), the Statement of Forest Principles, the United Nations Framework Convention on Climate Change (A/CONF.151/26, Vol. III) and the United Nations Convention on Biological Diversity. The Convention and respective Protocols are available online <http://www.cbd.int/convention/text/>. In 1997 the UN adopted the Programme for the Further Implementation of Agenda 21, *see* General Assembly A/RES/S-19/2, September 19th, 1997.

[65] Agenda 21 was followed by the Johannesburg Declaration on Sustainable Development adopted at the 2002 World Summit on Sustainable Development and the Plan of Implementation of the World Summit on Sustainable Development, which recognized that ensuring the sustainable development of the oceans requires an effective global and regional coordination and cooperation, acknowledging in this respect the importance of States ratifying or acceding and implementing UNCLOS and also the relevance of Chapter 17 of Agenda 21 for achieving sustainable development. *See Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August–4 September 2002* (United Nations publication, Sales No. E.03.II.A1 and corrigendum), chap. I, resolution 1, annex. Also *see* UN Resolution of the General Assembly n. 55/1999, December 20th, 2000. The next Summit will take place in 2012, in Rio de Janeiro. *See* UN Resolution of the General Assembly n. 64/236, December 24th, 2009. More information on the summit is available online <http://www.earthsummit2012.org/>.

particularly true with regard to the adoption of preventive measures and the control of the sources of pollution, rather than merely dealing with its consequences and the responsibility for damaging or causing harm to the marine environment. In the Preamble, UNCLOS refers to a legal order for the seas and oceans that will simultaneously promote the efficient utilization of marine natural resources and the protection and preservation of the marine environment, entrusting all States to cooperate to this end on a global and regional basis.[66]

As mentioned, under UNCLOS the protection and preservation of the marine environment is a general but not a vague obligation. This is the case, for example, with regard to transboundary effects of pollution and the obligation of States to prevent transboundary harm or damage.[67] In this respect it has been the established understanding of international law that no State has the right to use or permit the use of its territory in such a manner as to cause injury to the territory of another State,[68] including, to a certain extent, when States claim that they were unaware that their territory had been used in such a manner.[69] Thus the adage, which is also an exertion of the Anglo-American common law: *sic utere tuo alienum non laedas* (one must use his own so as not to damage that of another).

Despite the fact that the organization of the different maritime areas under UNCLOS does not take into consideration the management of marine ecosystems,[70] the general principle is that all States have the obligation to protect and preserve the marine environment as a whole, including the high seas, and that, in so doing, shall take all measures necessary to ensure that activities under their jurisdiction or control do not cause damage by pollution to other States and their environment, such as pollution from oil platforms.[71] For instance, coastal States may adopt laws and regulations relating to

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[66] Articles 197 to 199, 204, 208(1),(2),(4) and (5), 211(1), 214, and 217(1) of UNCLOS. *See The MOX Plant Case (Ireland v. United Kingdom), Request for provisional measures, I.T.L.O.S .No.10, 2001,* §82; *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, I.T.L.O.S. No.12, 2003*, §92; *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Requests for Provisional Measures, Order, I.T.L.O.S. Nos. 3 and 4, 1999*, §78. Also *see* MALJEAN-DUBOIS, Sandrine/RAJAMANI, Lavanya, *La mise en oeuvre du droit international de l'environnement/Implementation of International Environmental Law*, L'Académie de droit international de La Haye, ed. Martinus Nijhoff Publishers (Leiden/Boston: 2011) 484-488.

[67] Article 194(2) of UNCLOS.

[68] *Trail Smelter Case (United States, Canada) 16 April 1938 and 11 March 1941, UN Reports of International Arbitral Awards, vol. III, 1965*. Also *see Corfu Channel case, Judgment of April 9th, 1949, I.C.J. Reports 1949*, 22; *Case concerning Right of Passage over Indian Territory (Merits), Judgement of 12 April 1960, I.C.J. Reports 1960*, 19, 43.

[69] *Corfu Channel case, Judgment of April 9th, 1949, I.C.J. Reports 1949*, 18.

[70] *Case Concerning Delimitation of Maritime Areas between Canada and France (St. Pierre et Miquelon), 95 I.L.R. 1992*, 645, §87; *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, §231-§238, §240; *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, §75, §76.

[71] Articles 192 to 194 of UNCLOS.

innocent passage through the territorial sea regarding the preservation of the environment and the prevention, reduction and control of pollution,[72] as well as laws on the preservation of the environment in the internal waters where States have full sovereignty.[73] In the territorial sea, UNCLOS provides that any passage by a foreign ship shall be considered "not innocent" if it practices any act of wilful and serious pollution and that the coastal State may exercise its powers of enforcement as provided by UNCLOS for the purpose of protecting and preserving the marine environment.[74]

Likewise, States bordering straits used for international navigation may adopt laws and regulations relating to transit passage with respect to the prevention, reduction and control of pollution, as well as exercise the respective powers of enforcement for violation of such laws and regulations, thus allowing for an exception to the rule of non-impediment of the right of passage.[75]

Coastal States also have jurisdiction in the EEZ with regard to the protection and preservation of the marine environment and may adopt laws and regulations to prevent, reduce and control pollution of the marine environment from installations and structures under their jurisdiction.[76] These States may further exercise powers of enforcement regarding pollution from foreign vessels in the EEZ[77] and adopt laws and regulations to prevent, reduce and control pollution of the marine environment as a result of activities undertaken in the seabed.[78]

Additionally, UNCLOS also provides that in certain circumstances States are subject to a reinforced obligation of cooperation regarding the protection and preservation of the marine environment. This is the case, for example, of the legal regime applicable to enclosed or semi-enclosed seas, exemplified by those in the Asia-Pacific region, whereby the respective bordering States shall endeavour, directly or through an appropriate regional organization, to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment.[79] Also, States using or bordering straits used for international navigation have a reinforced obligation of cooperation in respect of prevention, reduction and control of pollution from ships.[80]

With regard to the legal regime applicable to the high seas, UNCLOS establishes that the rights of coastal States and their legitimate interests shall

[72] Article 21(1)f) of UNCLOS.
[73] Article 8 of UNCLOS. Also *see Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America), Merits, Judgment. I.C.J. Reports 1986*, §212, §213, §251.
[74] Article 220(3) of UNCLOS.
[75] Article 42(1)b) of UNCLOS.
[76] Article 56(1)b)(iii) of UNCLOS.
[77] Article 220(3) of UNCLOS.
[78] Articles 56(3), 193 and 194(3)c) of UNCLOS.
[79] Article 123(b) of UNCLOS.
[80] Article 43(b) of UNCLOS.

not affect the right of other coastal States to undertake the necessary measures to prevent, mitigate or eliminate any danger to its coastline or related interests from pollution or threat thereof or from other hazardous occurrences relating from or caused by any activities in the Area.[81] Additionally, the Sea Bed Authority has the right to adopt the appropriate measures for the protection of the marine environment,[82] while the Seabed Disputes Chamber has jurisdiction on disputes concerning the liability of the Authority for wrongful acts in the exercise of its powers and functions.[83]

However, UNCLOS did not establish similar rights for neighbouring coastal States regarding disputed maritime areas on the basis of their lawful entitlement, nor is there any rule regarding the responsibility for the prevention of environmental damages that may occur in these maritime areas.[84] As previously mentioned, there is a connection between, on the one hand, the obligation of States to protect and to preserve the marine environment, and on the other hand, the exercise of their rights of sovereignty and jurisdiction over a certain maritime area or, for that matter, regarding vessels flying their flag or that are voluntarily within a port.[85]

The obligation to protect and preserve the marine environment requires that States undertake all measures to ensure that activities and installations under their jurisdiction or control are carried out and operate in a manner not to cause damage or pollution, and without unjustifiably interfering with the activities of other States.[86] In this respect, States must monitor the risks and effects of the activities occurring under their control and inform other States of these risks and effects and of possible consequences that such activities might have, as well as determine the appropriate means to deal with them.[87] In the event that damage or pollution occurs, the relevant States must ensure that it does not spread beyond the maritime areas where States exercise sovereign rights, in order to mitigate or limit the damage sustained.[88]

Consequently, States are responsible for failing to adopt the necessary measures to prevent or mitigate damages, or to inform a neighbouring State of the existence of a risk of transboundary harm or damage, without prejudice to

[81] Articles 142(3), 209, 215 of UNCLOS.
[82] Article 145 of UNCLOS.
[83] Article 187(e) of UNCLOS and article 22 of Annex III of UNCLOS.
[84] Article 221 of UNCLOS extends the jurisdiction of coastal States regarding the adoption of enforcement measures beyond the territorial sea to protect their coastline from pollution or the threat of pollution resulting from maritime casualties.
[85] Articles 94, 211, 217 and 218 of UNCLOS.
[86] Article 194(2) and (4) of UNCLOS. Also *see Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* §29.
[87] *The MOX Plant Case (Ireland v. United Kingdom), Request for provisional measures, I.T.L.O.S. No. 10, 2001,* §82, §84, §89(1). Also *see Lac Lac Lanoux Arbitration (France v. Spain), 24 I.L.R. 1957*, 133; *Corfu Channel case, Judgment of April 9th, 1949, I.C.J. Reports 1949*, 18.
[88] Article 194(2), (3)c) and (4) of UNCLOS. Also *see Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997,* §80.

the liability of States for damages resulting from internationally wrongful acts or which might result from establishing a link between the non-fulfilment of the previously mentioned obligations and the extent of damages, thus confirming the objective and subjective elements of State responsibility.[89]

Furthermore, reparation, or full remediation, must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[90] However, this might prove to be a difficult task if, for example, operators that cause environmental damage as a result of seabed activities undertaken in disputed maritime areas are not subject to and do not have assets in the jurisdiction of the coastal State or the harmed neighbouring coastal State. Or, when effective control of the operator's environmental conduct is lacking or the home-State fails to enforce international regulations and standards.[91] In this last case, the obligations of coastal and neighbouring States to prevent and to protect the marine environment in disputed maritime areas must be clearly established to determine the possibility of or successful reparation of the affected neighbouring coastal State.

Should there be a conflict between, the development of marine natural resources or the undertaking of other activities such as marine scientific research in disputed maritime areas,[92] and the obligation to protect and to preserve the marine environment as a result of pending delimitation of maritime boundaries, there would inevitably be a situation where neighbouring coastal States could only do very little to ensure that activities taking place in disputed maritime areas do not cause environmental damage to their populations and territories.

UNCLOS provides that States may follow one of the compulsory mechanisms for the settlement of disputes set out in the Convention for the violation of specified international rules and standards for the protection and preservation of the marine environment, provided that these mechanisms are applicable to the relevant coastal State and have been established by UNCLOS or through a competent international organization or diplomatic conference in accordance with the Convention.[93] This is the case, for example, of the rules and standards included in some of the international legal instruments that

[89] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, §152; *Phosphates in Morocco (Italy v. France), P.C.I.J. 1938, Series A/B - No. 74,* §48; *Dickson Car Wheel Co. Case (1931) (US v. Mexico)*, 4 R. Int'l. Arb. Awards, 678. Also *see* Y.I.L.C., *Second Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur, The Origin of International Responsibility*, UN Doc. A/CN.4/233 (1970) 187.

[90] *The Factory at Chorzów (Claim for Indemnity), The Merits, P.C.I.J. 1928, Series A - No. 17*, §48.

[91] MORGERA, Elisa, *Corporate Accountability in International Environmental Law*, (Oxford University Press: Oxford 2009) 25-24, 44-46.

[92] Articles 240(d) and 263(1)(3) of UNCLOS.

[93] Articles 297(1)c) and 287 of UNCLOS.

provide the framework applicable to seabed activities and which will be s analysed below.[94]

In addition, UNCLOS also provides that the International Tribunal for the Law of the Sea may prescribe appropriate provisional measures to prevent serious harm to the marine environment.[95]

The Convention further establishes that States must provide recourse under their legal systems for prompt and adequate compensation or other relief with respect to damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction, and, also to cooperate in the implementation and development of existing international law and also regarding responsibility and liability.[96] In this respect, States should harmonize and enforce environmental standards and rules, as well as provide for adequate legal means to ensure prompt and adequate compensation in respect of damages caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.[97]

UNCLOS also establishes that its provisions regarding the protection and preservation of the marine environment pursuant to Part XII are without prejudice to specific obligations assumed by States in other international legal instruments concluded previously to the Convention, as well as in instruments which may be concluded in furtherance of the general principles set forth in UNCLOS.[98]

However, although there is an intergenerational responsibility towards securing the oceans and seas[99] and especially in the high seas where all States have an interest regarding the preservation of the marine environment,[100] in the case of disputed maritime areas, neighbouring States may only pursue

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[94] Article 288 of UNCLOS.

[95] Article 290(2) of UNCLOS.

[96] Articles 235 and 304 of UNCLOS.

[97] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, §33. On the national implementation of international environmental law *see*, REDGWELL, Catherine, "National implementation" *in The Oxford Handbook of International Environmental Law*, edited by BODANSKY, Daniel/BRUNNÉE, Jutta/HEY, ELLEN, ed. Oxford University Press (Oxford: 2007) 929-946. Also *see* REDGWELL, Catherine, "From permission to prohibition: the 1982 Convention on the Law of the Sea and Protection of the Marine Environment" *in The Law of the Sea: Progress and Prospects*, edited by FREESTONE, David/BARNES, Richard/ONG, David, ed. Oxford University Press (Oxford: 2006) 188-189.

[98] Articles 237 and 311 of UNCLOS. *See* BOYLE, Allan, "Relationship between international environmental law and other branches of international law" *in The Oxford Handbook of International Environmental Law*, edited by BODANSKY, Daniel/BRUNNÉE, Jutta/HEY, ELLEN, ed. Oxford University Press (Oxford: 2007) 135.

[99] Article 30 of the Charter of Economic Rights and Duties of States, adopted by the UN Resolution of the General Assembly n. 3281 (XXIX), December 12th, 1974. Also see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* §29; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, 78, §140.

[100] *Request for an Examination of the Situation in Accordance with paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, I.C.J. Reports 1995*, 306, §64.

claims against the relevant coastal State based on the latter's responsibility for damages suffered and not in representation of any community or collective interest or on the basis of an *actio popularis.*[101] Naturally any such claims must be made without prejudice to the obligation of States to undertake all measures necessary to effectively control, prevent, reduce and eliminate adverse environmental effects.

UNCLOS recognized and accepted the protection and preservation of the marine environment as a community or collective interest that benefits every State. Yet, despite the growing awareness of the existence of community or collective interest, international law and in particular the law of the sea has not provided the right of each State to intercede on behalf of that same interest in areas subject to the jurisdiction or sovereignty of other States or to which two or more States are entitled to, even if ultimately every State has an interest in the protection and preservation of the marine environment due to the its interconnectivity. Dispute settlement mechanisms included in UNCLOS have maintained the bilateralism that has reflected the standing of international jurisprudence on this subject, thus not allowing a State to pursue a case based on collective or community interests.[102]

4. The Legal regime applicable to seabed activities in disputed maritime areas

UNCLOS makes a clear distinction between, on the one hand, installations and structures, and on the other hand, "ships," which are not defined in the Convention and are also often referred to as vessels. The immediate consequence of this distinction is that the concept of flag State jurisdiction

[101] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, §88. Also *see* Dissenting Opinion of Judge Jessup, 387-388, *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*; Separate Opinion of Judge Jessup, 425, *South West Africa Cases (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment of 21 December 1962, I.C.J. Report 1962*; Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Arechaga and Sir Humphrey Waldock, 369-370, 521-522, *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*; Dissenting Opinion of Judge de Castro, 387-390, *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*. Also *see*, Article 48 of the 2001 ILC Draft Articles on Responsibility of States for International Wrongful Acts.

[102] *See* SANDS, *supra* note 44, 184-191; FITZMAURICE, Malgosia, "International responsibility and liability" *in The Oxford Handbook of International Environmental Law*, edited by BODANSKY, Daniel/BRUNNÉE, Jutta/HEY, ELLEN, ed. Oxford University Press (Oxford: 2007) 1020-1022. For a possible interpretation of Article 288(1) of UNCLOS allowing a State to pursue a case based on community interests, *see* WOLFRUM, Rüdiger, "Enforcing community interests through international dispute settlement: reality or utopia" *in From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, ed. FASTENRATH, Ulrich/GEIGER, Rudolf/KHAN, Daniel-Erasmus/PAULUS, Andreas/VON SCHORLEMER, Sabine/VEDDER, Christoph, ed. Oxford University Press (Oxford: 2011) 1132-1145; Also *see* SIMMA, Bruno, "From bilateralism to community interest in international law" *in* 250 Recueil de cours de L'Académie de droit internationale de La Haye (1994) 217-384.

which is referenced in respect of the right of navigation and of binding on a ship subject to the exclusive legislative and enforcement jurisdiction of a State is not extendable to oil platforms.[103] In other cases, such as pollution by dumping, the Convention does not limit its application merely to ships or vessels.[104] However, even though many international legal instruments dealing with marine pollution by ships specifically or tacitly exclude installations or structures,[105] some normative frameworks establish that certain obligations regarding the protection and preservation of the marine environment should be considered with respect to oil platforms. This is the case of the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation ("OPRC 1990"),[106] the 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf ("SUA PROT")[107] and the 2005 Protocol to SUA PROT ("SUA 2005"),[108] the 1972 International Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter ("LC 1972")[109] and the 1996 Protocol to the 1972 London Convention ("LC PROT 1996"),[110] and

[103] Articles 90 and 91 of UNCLOS.

[104] Articles 1(5), 210 and 216 of UNCLOS.

[105] This is the case, for example, of the 1954 International Convention for the Prevention of Pollution of the Sea by Oil; 1969 International Convention on Civil Liability for Oil Pollution Damage and 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (and 1984, 1992 and 2003 Protocols); 1972 Convention on the International Regulations for Preventing Collisions at Sea (and 1987); International Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties Act; 1996 International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea.

[106] OPRC 1990 was done at London on November 30th, 1990, and entry into force on May 13th, 1995. In the Asia-Pacific region, as considered in this paper, China, Japan, Malaysia, Singapore and Thailand are contracting States. Available online <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202012.pdf>.

[107] SUA PROT was done at Rome on March 10th, 1988, and entry into force on March 1st, 1992. In the Asia-Pacific region, as considered in this paper, Brunei, Cambodia, China, Japan, Philippines and Viet Nam. Available online <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202012.pdf>.

[108] SUA 2005 was done at London on October 14th, 2005, and entry into force on July 28th, 2008. None of the countries in the Asia-Pacific region, as considered in this paper, are contracting States. Available online <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202012. pdf>.

[109] LC 1972 was done at London on December 29th, 1972, and entry into force on August 30th, 1975. In the Asia-Pacific region, as considered in this paper, China Japan Philippines, Republic of Korea are contracting States. Available online <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202012.pdf>.

[110] LC PROT 1996 was done at London on November 7th, 1996, and entry into force on March 24th, 2006. In the Asia-Pacific region, as considered in this paper, China and the Republic of Korea are contracting States. Available online

the 1973 International Convention for the Preservation of Pollution from Ships ("MARPOL 73/78").[111]

In the first case, the OPRC 1990 provides that States shall require operators of oil platforms under their jurisdiction to have oil pollution emergency plans and to comply with oil pollution reporting procedures, including procedures for reporting any observed event at sea involving a discharge of oil or the presence of oil. In addition, upon receiving an oil pollution report, States shall inform all States whose interests are affected or likely to be affected by such oil pollution incident. The OPRC 1990 further provides that each State shall establish a national system for responding promptly and effectively to oil pollution incidents and, amongst other relevant procedures, allow the use of its territory for departure and arrival of transportation engaged in responding to an oil pollution incident. States shall also cooperate in technical cooperation and research and development programmes regarding oil pollution, as well as promote bilateral and multilateral cooperation in preparedness and response.[112]

In addition, the SUA, PROT, and SUA 2005 extended the applicability of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention") to oil platforms and therefore States should accordingly establish jurisdiction and implement a legal regime concerning criminal offences for acts committed against a fixed platform, such as those used for the purpose of exploration or exploitation of resources of the sea-bed. The SUA PROT and SUA 2005 also established the applicability of the dispute settlement mechanism provided by the SUA Convention. As a result, any dispute concerning the interpretation or application of these legal instruments may be submitted to arbitration or the International Court of Justice in accordance with the terms provided by the SUA Convention.[113]

Similarly to LC 1972, LC PROT 1996 also includes in the definition of dumping "platforms and other man-made structures at sea". Consequently, the obligation for States to prohibit, prevent, reduce and eliminate pollution caused by dumping or incineration at sea, as well as the principles of

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<http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202012.pdf>.

[111] MARPOL 73/78 was done at London on November 2nd, 1973, and entry into force on October 2nd, 1983, and as amended by Protocols of 1973 and 1978. Protocol of 1997 added Annex 6. MARPOL 73/78 replaced the 1954 London Convention for Prevention of Pollution of the Sea by Oil, *see* article 9(1) of MARPOL 73/78. In the Asia-Pacific region, as considered in this paper, Brunei, Cambodia, China, Indonesia, Japan, Malaysia, Philippines, Republic of Korea, Singapore, Thailand and Viet Nam are contracting States. Available online <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202012.pdf>.

[112] Articles 3(2), 4(1)a)ii) and b)ii), 5(1)c), 6, 7(3), 8, 9 and 10 of OPREC 1990.

[113] Articles 5, 7, 10 to 16 of SUA Convention (SUA PROT/SUA 2005).

precautionary approach and polluter-pay are applicable to oil platforms.[114]

However, most significantly, LC PROT 1996 provides that States shall apply the measures required to implement this legal framework to all "platforms and other man-made structures believed to be engaged in dumping or incineration at sea within which it is *entitled to exercise jurisdiction in accordance with international law" (emphasis added*), taking appropriate measures to prevent and if necessary punish acts contrary to LC PROT 1996.[115] This Protocol provides that States shall engage in regional and technical cooperation and assistance, promote and facilitate scientific and technical research, and also develop procedures regarding liability arising from the dumping or incineration at sea of wastes or other matter.[116] LC PROT 1996 also establishes a mechanism for the settlement of disputes, providing an arbitral procedure for that purpose, unless States agree to use one of the procedures referred in article 287(1) of UCNLOS in the terms provided by in Part XV of this Convention.[117]

Lastly, MARPOL 73/78 includes floating platforms in its definition of ship and as such extends to oil platforms all those provisions that are susceptible of being applicable to these installations. Accordingly, States should enforce the obligations undertaken within MARPOL to floating platforms operating under their authority, without prejudice of their sovereign rights over the sea-bed and subsoil adjacent to their coasts for the purpose of development of natural resources. However, even though certain obligations were in fact only construed having ships in mind and not installations or structures, some important provisions are applicable and their enforcement may significantly contribute towards the protection and preservation of the marine environment from pollution by oil platforms. This is the case, for example, with regard to the obligation of monitoring and reporting incidents and conducting investigations, procedures for the settlement of disputes, communication of information and promotion of technical cooperation.[118] In this respect, Reg. 39 of Annex I concerning categories of discharges that may be associated with the operation of oil platforms refers that only the discharge of machinery space drainage and contaminated ballast of these installations should be subject to MARPOL 73/78, being all other therein referred not within the scope of this Convention.

However, it would seem that States' obligations included in the aforementioned international legal instruments presume the location of the maritime area where oil platforms are located to be within the jurisdiction of a coastal State. These obligations include the right to adopt laws and regulations

[114] Article 3(1)a)i) of LC 1972; articles 1(4.1.1), 2, 3(1)(2), 4, 5, of LC PROT 1996. In accordance with article 23 of LC PROT 1996, the latter will supersede LC 1972 between contracting States of both instruments.
[115] Articles 10(1.3) and (1.4) of LC PROT 1996.
[116] Articles 12 to 15 of LC PROT 1996.
[117] Article 16 and Annex 3 of LC PROT 1996.
[118] Articles 2(4) and 3(1)b) and (2), 8(1), 10, 11, 12 and 17 of MARPOL 73/78.

to prevent, reduce and control pollution of the marine environment from installations and structures under their jurisdiction and activities in the seabed,[119] as well as regarding pollution from foreign vessels.[120]

With regard to the high seas, the law of the sea establishes a compromise between the freedom to construct installations and structures and the right to create safety zones around them, on the one hand, and, the obligation for States to safeguard the underlying freedom of the high seas on the other. The high seas regime has a residual application to all parts of the sea that are not included in the EEZ, the territorial sea, the internal waters or archipelagic waters, thus guaranteeing the functional relation between the different maritime spaces, particularly the exercise of the freedoms of other States in the EEZ. Consequently, installations and structures may not represent a high seas appropriation to the relevant State and should not interfere or hamper the rights of third States, namely the freedom of navigation and the right to lay cables and pipelines.[121]

In contrast, the EEZ regime clearly rules that States shall exercise "exclusive" jurisdiction over installations and structures in these areas.[122]. However, UNCLOS provides for the integration of the regimes of the EEZ and the high seas and the continental shelf by subsidiarily applying the regime of the EEZ to artificial islands, installations and structures when placed in the high seas or the continental shelf,[123] as well as the regime of the continental shelf to submarine cables and pipelines on the bed of the high seas.[124] Similarly, the rights of coastal States over the continental shelf, or those granted or exercised pursuant to the regime of the Area, do not affect the legal status of the respective superjacent waters.[125]

As a result, considering that there is no body of law that establishes jurisdiction over offshore oil rigs that are located in the high seas, nor are there exceptions to the rule of exclusive jurisdiction of States over installations and structures located in the high seas as it occurs regarding ships and vessels, the applicable law should be that of the consenting State while exercising its freedom to construct installations and structures.[126]

Likewise, since coastal States may not appropriate to themselves any disputed maritime areas pending the delimitation of boundaries, jurisdiction

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[119] Articles 56(1)b)(iii)(3), 193 and 194(3)c) of UNCLOS.
[120] Article 220(3) of UNCLOS.
[121] Articles 87 and 89 of UNCLOS.
[122] Articles 60(1), (2), (3) and (4) of UNCLOS.
[123] Article 86 and articles 60 *ex vi* 80 and 87(1)(d) of UNCLOS.
[124] Articles 58(2), 79(4)(5) and 112 of UNCLOS.
[125] Articles 78 135 of UNCLOS.
[126] *S.S. Lotus (France v. Turkey), 1927 P.C.I.J., Series A - No. 10,* pp.18-19. Also *see Award between the United States and the United Kingdom relating to the rights of jurisdiction of United States in the Bering's sea and the preservation of fur seals, decision of 15 August 1893*, Reports of International Arbitral Awards, vol. XXVIII, 263-276. ESMAEILI, Hossein, *The Legal Regime of Offshore Oil Rigs in International Law*, ed. Dartmouth/Ashgate (Aldershot/Burlington USA/Singapore/Sydney: 2001) 88.

regarding oil rigs located in these areas ought to be established based on the entitlement of the relevant States to grant the right to develop the resources of the seabed. This form of entitlement includes the right to consent, authorize and regulate the construction, operation, use and decommission of oil rigs and other installations necessary for the exploitation and exploration activities. Entitlement is the foundation for determining the right to enter into provisional arrangements and defining the maritime area that may be considered for this purpose.

In addition, in disputed maritime areas, the principle of territorial sovereignty should also be given, *mutatis mutandis*, some consideration in view of the said underlying rule of entitlement,[127] particularly concerning, on the one hand, the non-admissibility of neighbouring States intervening in the territory lawfully claimed by one or more States, and on the other hand, the correlative obligation of coastal States to protect and preserve the marine environment in these areas in the terms previously described.[128] It is the case where, in disputed maritime areas, neighbouring States are subject to the maxim "*cui non licet quod est minus, utique non licet quod est plus*" (who cannot do less, cannot do more).

Consequently, and without prejudice of other relevant international legal instruments, contracting States of OPRC 1990, SUA PROT and SUA 2005, LC 1972 and LC PROT 1996, and MARPOL 73/78 should also enforce the relevant obligations regarding the protection and preservation of the marine environment regarding oil platforms located in disputed maritime areas.

5. Conclusions

States claiming disputed maritime areas must first and foremost make their claims and respective substation known. States with opposing or overlapping claims are further subject to the obligation to negotiate in good faith and to make every effort to enter into provisional arrangements of a practical nature. This duty includes the obligation to share information regarding mineral resources found in disputed maritime areas, including the location of these resources and the intent to undertake exploration and exploitation activities. Pending an agreement on provisional arrangements, States are subject to an obligation of mutual-restraint regarding these activities.

States authorizing seabed activities in maritime areas before the delimitation of maritime areas must also comply with their obligations regarding the protection and preservation of the marine environment and must ensure that these activities are developed consistently with international environmental laws and regulations, as well as other relevant international standards and guidelines. States must ensure that the necessary laws and

[127] *Case concerning Right of Passage over Indian Territory (Merits), Judgement of 12 April 1960, I.C.J. Reports 1960*, 11.

[128] Permanent Court of Arbitration, *The Island of Palmas Case (or Miangas) (US v. Netherlands), Award of the Tribunal, 4 April 1928,* §839.

regulations are adopted and enforced, including those applicable to offshore installations, and that these are duly reflected in the relevant provisional arrangements, as well as agreements signed with operators.

Furthermore, seabed activities in disputed maritime areas must also have due regard for the rights of third States. Accordingly, States must control, prevent, reduce and eliminate adverse environmental effects of these activities, and inform neighbouring States of the risks and effects of seabed activities under their control and their possible consequences. States must further ensure that pollution resulting from seabed activities does not spread and should seek to mitigate and limit its damages. To this effect, States must adopt the necessary measures and legal framework that safeguard the rights of neighbouring States, including the relevant reparation mechanisms.

Neighbouring States may bring claims against coastal States for any breach of obligations concerning the protection and preservation of the marine environment under UNCLOS or other international legal instruments, although it may be difficult to demonstrate the relation between the environmental damage of one State and the assessment that the breach has been committed based on the *non-facere* of another State of the applicable rules regarding the protection and preservation of the marine environment and that, consequently, the latter is responsible.

Therefore, it is the case that the well-known saying that “good fences make good neighbours” is evidently not applicable to the marine environment. The unique connectivity between marine ecosystems and the ineffectiveness of maritime boundaries to prevent pollution from spreading, require that States cooperate. It remains of the utmost importance to bring unwilling States to comply with environmental rules and standards, particularly as there is a general limitation of international law regarding the control of compliance of and the enforcement by States of such rules and standards. Consequently, coastal States in the Asia-Pacific region must enhance regional cooperation by exchanging information on seabed activities and offshore installations, in addition to strengthening mutual restraint and adopting and enforcing effective measure for the protection and preservation of the marine environment in disputed maritime areas.