海洋法に関する国際シンポジウム

アジアの海における法の支配

―平和と安定への航海図―

主催： 外務省

日 時： 平成27年2月12日（木） 10：00～17：00
13日（金） 10：00～13：00
会 場: 三田共用会議所 講堂（東京都港区三田2-1-8）

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INTERNATIONAL SYMPOSIUM ON THE LAW OF THE SEA

The Rule of Law in the Seas of Asia

Navigational Chart for Peace and Stability

hosted by the Ministry of Foreign Affairs of Japan

Date : 12 (10:00-17:00) and 13 (10:00-13:00) February, 2015
Venue : Mita Kaigisho Auditorium (2-1-8, Mita, Minato-ku, Tokyo)

* 本シンポジウムの基調講演，サマリーを含むパネル報告及び質疑応答における議論で示される見解の全ては各個人のものであり，外務省及び日本政府の見解等を示すものではありません。

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* Views expressed in the keynote speech and the panel presentations including the written summaries and views expressed during the Q&A sessions of this symposium are those of the speakers or authors and do not reflect the views of the Ministry of Foreign Affairs or the Government of Japan.

プログラム

2 月 12 日(木)

9:30　開場・受付開始

10:00　オープニング・セッション

10:00　**開会の辞**

外務大臣　**岸田　文雄**

10:10　**基調講演**

柳井　俊二　国際海洋法裁判所裁判官(前同裁判所所長)

10:30　第一部　国連海洋法条約に基づく海域における沿岸国の権利と権原

コーディネーター:　河野　真理子　早稲田大学法学学術院教授

10:30　**トゥーリオ・トレヴェス**　ミラノ大学法学部教授，元国際海洋法裁判所裁判官

「国連海洋法条約に基づく海域における沿岸国の権利の法的性質」

坂元　茂樹　同志社大学法学部教授

「歴史的水域及び権利の再検討:国連海洋法条約との適合性」

西本　健太郎　東北大学大学院法学研究科准教授

「400 海里未満の海域における延長大陸棚の主張から生じる問題」

11:45　コーヒーブレイク　(於:　レセプションホール)

12:05　質疑応答

13:00　昼休み

14:30　第二部　境界未画定海域の法レジーム

コーディネーター:坂元　茂樹　同志社大学法学部教授

14:30　**奥脇　直也**　明治大学法科大学院教授

「境界未画定海域における自制と協力の義務」

ロバート・G・ヴォルテッラ　ロンドン大学ユニバーシティカレッジ法学部客員教授
ヴォルテッラ・フィエッタ弁護士事務所

「国連海洋法条約第 74 条 3 及び第 83 条 3 の下での自制義務及び協力義務の違反と，かかる違反への可能な対応(紛争の裁判所への付託を含む。)」

Programme

February 12 (Thu)

9:30 Doors Open, Registration

10:00 Opening Session

10:00 **Opening Remarks**

His Excellency Mr. Fumio KISHIDA Minister for Foreign Affairs of Japan

10:10 **Keynote Speech**

His Excellency Judge Shunji YANAI International Tribunal for the Law of the Sea (ITLOS)
Former President

10:30 Segment 1: Coastal States' Rights and Entitlements at Sea based upon UNCLOS

Coordinator: Mariko KAWANO Professor, Faculty of Law, Waseda University

10:30 **Tullio TREVES** Professor, Faculty of Law, State University of Milan
Former Judge of ITLOS

"Legal Nature of Coastal States' Rights in the Maritime Areas under UNCLOS"

Shigeki SAKAMOTO Professor, Faculty of Law, Doshisha University

"Historic Waters and Rights Revisited: UNCLOS and beyond?"

Kentaro NISHIMOTO Associate Professor, School of Law, Tohoku University

"Issues Arising from Extended Continental Shelf Claims in Maritime Areas less than 400 Miles in Width"

11:45 Coffee Break (in Reception Hall)

12:05 Discussion Session

13:00 Lunch Break

14:30 Segment 2: Development of Legal Regimes Governing the Period pending Final Agreement of Delimitation

Coordinator: Shigeki SAKAMOTO Professor, Faculty of Law, Doshisha University

14:30 **Naoya OKUWAKI** Professor, School of Law, Meiji University

"Obligation of Self-Restraint and Cooperation of Coastal States in Maritime Areas pending Delimitation"

Robert G. VOLTERRA Visiting Professor, Faculty of Law, University College of London
Partner of Volterra Fietta (Law Firm)

"The Infringement of Obligations of Self-Restraint and Cooperation under Article 74-3 and 83-3 and Possible Strategies to Bring Disputes Emanating from Such Infringement before Relevant Courts and Tribunals"

グエン・ティー・ラン＝アイン ヴェトナム外交学院南シナ海研究所 副所長

「最終的な海洋境界画定に達するまでの間の暫定取決：成功事例の検討」

15:45 コーヒーブレイク （於： レセプションホール）

16:05 質疑応答

17:00 終了

18:15 城内 実 外務副大臣主催レセプション （於： レセプションホール）

2 月 13 日（金）

9:30 開場

10:00

第三部 国連海洋法条約と海洋紛争の平和的解決

コーディネーター： 奥脇 直也 明治大学法科大学院教授

10:00 **河野 真理子** 早稲田大学法学学術院教授

「国連海洋法条約に基づく強制的紛争解決制度の意義と課題」

張 新軍 清華大学法学院准教授

「雌鶏，卵，ひよこ： 混合紛争の管轄権に関するジレンマとフィリピン対中国仲裁事件」

マチアス・フォルトー パリ西大学教授（国際法），国連国際法委員会委員

「仲裁手続への第三国参加： 国連海洋法条約附属書 VII に基づく仲裁の二極的性格と同条約の多極的性格の間のギャップを埋める可能な手段として」

11:15 コーヒーブレイク （於： レセプションホール）

11:35 質疑応答

12:30

クロージング・セッション

12:30 総評

12:55 **閉会の辞**

吉田 朋之 外務省国際法局参事官

13:00 終了

	NGUYEN Thi Lan-Anh Deputy Director-General, Institute for South China Sea Studies, Diplomatic Academy of Vietnam "Interim Arrangement pending Maritime Delimitation: Some Successful Practices"
15:45	Coffee Break (in Reception Hall)
16:05	Discussion session
17:00	End of the First Day
18:15	**Reception hosted by Mr. Minoru KIUCHI, State Minister for Foreign Affairs (in Reception Hall)**

February 13 (Fri)

9:30	Doors Open
10:00	**Segment 3: UNCLOS and Settlement of Disputes at Sea** Coordinator: Naoya OKUWAKI Professor, School of Law, Meiji University
10:00	**Mariko KAWANO** Professor, Faculty of Law, Waseda University "Compulsory Dispute Settlement Procedures under UNCLOS: Their Achievements and New Agendas"
	ZHANG Xinjun Associate Professor, School of Law, Tsinghua University "The Hen, the Egg and the Chicken: Jurisdictional Dilemma of Mixed Disputes and the *Philippines v. China* Case"
	Mathias FORTEAU Professor of Public International Law, University of Paris Ouest Member of the International Law Commission of the UN "Third-party Intervention as a Possible Means to Bridge the Gap between the Bilateral Nature of Annex VII Arbitration and the Multilateral Nature of the UNCLOS"
11:15	Coffee Break (in Reception Hall)
11:35	Discussion Session
12:30	**Closing Session**
12:30	Concluding Remarks by Panelists
12:55	**Closing Remarks** **Tomoyuki YOSHIDA** Deputy Director-General, International Legal Affairs Bureau Ministry of Foreign Affairs of Japan
13:00	End of the Symposium

基調講演者・パネリスト紹介

基調講演者

柳井　俊二（やない・しゅんじ）

国際海洋法裁判所（ITLOS）裁判官，前同裁判所長

1961 年	東京大学法学部第二類卒業
1961 年	外務省入省
1990 年	条約局長兼海洋法本部長
1997 年	外務事務次官
1999 年	駐米特命全権大使
2002 年	中央大学法学部・法科大学院教授
2005 年-	国際海洋法裁判所裁判官
2007 年-	早稲田大学特命教授
2009 年-	社団法人国際法協会日本支部会長
2011-2014 年	国際海洋法裁判所所長

国際海洋法裁判所（ITLOS）裁判官，前 ITLOS 所長（2011 年から 2014 年）。長年にわたり外務省に勤務し，条約局長兼海洋法本部長，外務事務次官，駐米特命全権大使等要職を歴任。退官後は，中央大学及び早稲田大学で国際公法の教鞭をとった。2005 年から現職。3 年間の ITLOS 所長在任中は，付託される事案が集中する中で ITLOS を指揮。この間，2 事案の暫定措置命令を発出し，2 件の本案判決を言い渡した。

Keynote Speaker & Panelists

Keynote Speaker

H.E. Judge Shunji YANAI

Judge of the International Tribunal for the Law of the Sea (ITLOS)
Former President of ITLOS

1961	LL.B., Faculty of Law, University of Tokyo
1961	Ministry of Foreign Affairs of Japan
1990	Director-General, Treaties Bureau/Law of the Sea Headquarters
1997	Vice-Minister for Foreign Affairs
1999	Ambassador Extraordinary and Plenipotentiary of Japan to the United States of America
2002	Professor of International Law, Graduate School of Law of Chuo University
2005-	Judge of the International Tribunal for the Law of the Sea
2007-	University Professor, Waseda University
2009-	President, International Law Association (Japan Branch)
2011-2014	President, International Tribunal for the Law of the Sea

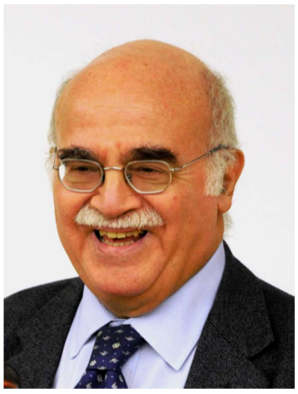
Judge of the International Tribunal for the Law of the Sea (ITLOS) (2005-), former President of the Tribunal (2011-2014). Before joining ITLOS, Judge Yanai had a long career in the Ministry of Foreign Affairs of Japan, assuming key posts as Director-General, Treaties Bureau/Law of the Sea Headquarters, Vice-Minister for Foreign Affairs and Ambassador of Japan to the United States. After retirement, he taught public international law at Chuo University and Waseda University of Japan. As President of ITLOS, he led the Tribunal during its busiest years in which the Tribunal produced two orders prescribing provisional measures of protection and two judgments on the merits.

パネリスト

(in order of seniority)

トゥーリオ・トレヴェス

ミラノ大学法学部教授，元国際海洋法裁判所裁判官



1972-1980 年	伊各地の大学で教鞭を執る。
1973-1982 年	伊政府代表団として第三次国連海洋法会議に出席
1980 年	ミラノ大学法学部教授
1984-1992 年	国連伊政府代表部法律顧問。 伊政府代表団として，安保理等に出席
1999-2011 年	国際海洋法裁判所(ITLOS)裁判官
2012 年	弁護士事務所 Curtis, Mallet-Prevost, Colt & Mosle(ミラノ支社)上席顧問に就任
2013 年	チモール海条約に基づく仲裁裁判 (東チモール対豪州)の裁判長に任命
2013 年	Durzit Integrity 号事件（マルタ対サントメ・プリンシペ）(国連海洋法条約附属書 VII に基づく仲裁)の裁判官に任命

この他，ペルー対チリ海洋境界画定事件及びニカラグア対コロンビア海洋境界画定事件（国際司法裁判所）において，当事国の補佐人を務める。

伊ミラノ大学法学部教授。元 ITLOS 裁判官（1996 年から 2011 年）。第三次国連海洋法会議の全セッションにイタリア代表団メンバーとして参加するなど，海洋法に精通。ITLOS 設立当初から 15 年にわたり ITLOS 裁判官を務め，海底紛争裁判部部長として，同裁判部初の勧告的意見の発出を指揮した（第 17 号事案）。ハーグアカデミー理事。

奥脇　直也（おくわき・なおや）

明治大学法科大学院　教授

1969 年	東京大学法学部　卒業
1971 年	東京大学大学院法学政治学研究科公法専攻修士課程　修了
1976 年	東京大学大学院法学政治学研究科公法専攻博士課程　修了（法学博士）
1976 年	東京工業大学工学部　助教授
1986 年	東京工業大学工学部　教授
1988 年	立教大学法学部　教授
2000 年	東京大学大学院法学政治学研究科　教授
2010 年	明治大学法科大学院　教授（現職）

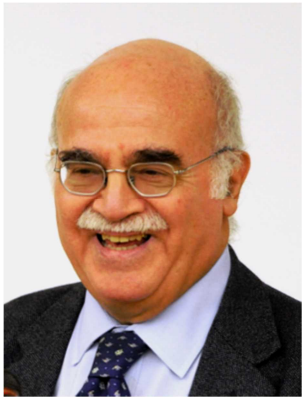
明治大学法科大学院教授。東京大学名誉教授。法学博士（東京大学）(学位論文「国際紛争における「法適用」の観念－実用国際法学への序説－」)。2003 年から 2006 年まで，国際法学会理事長を務め，現在は同学会名誉理事。この他，国際法協会（ILA）日本支部代表理事（2014 年から）及び日本海洋政策学会会長（2014 年から）を務める。研究テーマは，国際紛争解決制度論，海洋管轄権論，国際秩序構造変動論等。

(in order of seniority)

Panelists

Tullio TREVES

Professor, Faculty of Law, State University of Milan, Former Judge of ITLOS



1972-2012	Tenured Professor (ordinario) of the Italian Universities
1973-1982	Member of the Italian delegations to all sessions of the Third United Nations Conference on the Law of the Sea
1980	Professor of Public and Private International Law at the Law Faculty of the State University of Milano
1984-1992	Legal Adviser to the Permanent Mission of Italy to the United Nations in New York
1996-2011	Judge of the International Tribunal for the Law of the Sea
2012	Senior International Law Consultant, Curtis, Mallet-Prevost, Colt & Mosle LL:P, Milan Office
2013	Chairman of the Arbitral Tribunal of the Arbitration under the Timor Sea Treaty (*Timor-Leste v. Australia*)
2013	Judge of the Arbitral Tribunal of the *Duzgit Integrity* Arbitration (*Malta v. São Tomé and Príncipe*) under Annex VII to the United Nations Convention on the Law of the Sea
	Counsel in cases at the ICJ *(Peru v. Chile, Nicaragua v. Colombia*)

Professor of the Faculty of Law, State University of Milan. Former Judge of ITLOS. Having participated in all sessions of the Third UN Conference on the Law of the Sea as a member of the Italian Delegation, he possesses vast and profound knowledge of the Law of the Sea. He served as Judge of ITLOS for 15 years since its establishment, and, as President of the Seabed Disputes Chamber, he led the Chamber in the Case No. 17 in which it rendered its first advisory opinion. Member of the Curatorium of the Hague Academy of International Law and of the Institute of International Law.

Naoya OKUWAKI

Professor, School of Law, Meiji University

1969	LL.B, Faculty of Law, the University of Tokyo
1971	LL.M, Graduate Schools for Law and Politics, the University of Tokyo
1976	Completed doctoral course, Graduate Schools for Law and Politics, the University of Tokyo (Doctor of Law)
1976	Associate Professor, Division of Humanities and Social Science, Department of Engineering Tokyo Institute of Technology
1986	Professor, Division of Humanities and Social Science, Department of Engineering Tokyo Institute of Technology
1988	Professor, Department of Law, Rikkyo University
2000	Professor, Graduate Schools for Law and Politics, the University of Tokyo
2010	Professor, School of Law, Meiji University

Professor of the School of Law, Meiji University. Professor Emeritus of the University of Tokyo. Doctor of Laws (the University of Tokyo, dissertation: "Notion of 'Application of Law' in International Disputes: Introduction to the Studies of Practical International Law"). President (2003-2006) and Member Emeritus (present) of Japanese Society of International Law (JSIL). He also assumes positions as Vice-President of Japan Branch of ILA (2014-) and President of Japan Society of Ocean Policy (2014-). His themes of research are among others: International dispute settlement system, maritime jurisdictions, and structural changes in international legal order.

坂元　茂樹　（さかもと･しげき）

同志社大学法学部･法学研究科　教授

1974 年　　関西大学法学部　卒業
1976 年　　関西大学大学院法学研究科博士課程前期課程　修了
1978 年　　関西大学大学院法学研究科博士課程後期課程　依願退学
1978～1991 年　琉球大学 (助手，専任講師，助教授を歴任)
1986～1987 年　ミシガン大学アナーバー校ロースクール客員研究員
1991 年　　関西大学法学部　教授
2003 年　　神戸大学大学院法学研究科　教授
2007 年　　法学博士（神戸大学）
2013 年　　同志社大学法学部･法学研究科　教授(現職)

同志社大学法学部教授。神戸大学名誉教授。法学博士（神戸大学）（学位論文「条約法の理論と実際」）。2008 年から 2013 年まで，国連人権理事会諮問委員会委員。国際海洋法裁判所における「みなみまぐろ」事件（豪及び NZ 対日本）においては，日本政府の弁護人を務めた。研究テーマは，条約法，海洋法，国際人権法，国際紛争処理等。

河野　真理子（かわの･まりこ）

早稲田大学法学学術院　教授

1983 年　　東京大学教養学部　卒業
1985 年　　東京大学大学院総合文化研究科修士課程　修了
1989 年　　ケンブリッジ大学法学修士課程　修了
1990 年　　東京大学大学院法学政治学研究科博士課程中退
1990 年　　筑波大学社会科学系　専任講師
1998 年　　筑波大学社会科学系　助教授
2004 年　　早稲田大学法学学術院　教授(現職)

早稲田大学法学学術院教授。法学修士（ケンブリッジ大学）。総合海洋政策本部参与（2012 年から）。2009 年，ハーグ国際法アカデミーにて特別講義（「平和的な国際紛争解決プロセスにおける司法手続の役割」）を行ったほか，国連オーディオビジュアル･ライブラリーでもファカルティーとして講義を行っている。紛争の平和的解決，国家責任法を専門とする。

Shigeki SAKAMOTO

Professor, Faculty of Law, Doshisha University

1974	LL.B., Faculty of Law, Kansai University
1976	LL.M., Graduate School of Law, Kansai University
1978	Completed doctoral course, Graduate School of Law, Kansai University
1978-1991	Associate Professor,Faculty of Law and Letters, University of Ryukyus
1986-1987	Visiting Research Scholar, School of Law, University of Michigan Ann Arbor
1991	Professor of International Law, Faculty of Law, Kansai University
2003	Professor of International Law, Graduate School of Law, Kobe University
2007	Doctor of Laws (Kobe University)
2013	Professor of the Faculty of Law, Doshisha University

Professor of the Faculty of Law, Doshisha University. Professor Emeritus of Kobe University. Doctor of Laws (Kobe University, dissertation: "Theory and Practice of the Law of Treaties"). Member of the Advisory Committee of the UN Human Rights Council (2008-2013). He served as an Advocate for the Government of Japan in "Southern Bluefin Tuna" Cases (Australia and NZ v. Japan) under UNCLOS Part XV. His research interests cover law of treaties, law of the sea, international human rights law and international dispute settlement.

Mariko KAWANO

Professor, Faculty of Law, Waseda University

1983	B.A., Faculty of Liberal Arts, the University of Tokyo
1985	M.A., Graduate School of Arts and Sciences, the University of Tokyo
1989	LL.M, University of Cambridge
1990	Completed doctoral course, Graduate Schools for Law and Politics, the University of Tokyo
1990	Assistant Professor of International Law, Institute of Social Sciences, University of Tsukuba
1998	Associate Professor of International Law, Institute of Social Sciences, University of Tsukuba
2004	Professor of International Law, Faculty of Law, Waseda University

Professor of the Faculty of Law, Waseda University. LL.M. in Cambridge. Councilor of the Headquarters for Ocean Policy of the Government of Japan (2012-). She lectured in the summer course on public international law at the Hague Academy in 2009 ("The Role of Judicial Procedures in the Process of the Pacific Settlement of International Disputes") and at the Audiovisual Library of International Law (AVL) of the UN. Her interests focus upon international dispute settlement and law of state responsibility.

ロバート G. ヴォルテッラ

ロンドン大学ユニバーシティカレッジ法学部 客員教授
ヴォルテッラ・フィエッタ弁護士事務所

1987 年　カナダ・ウェスタンオンタリオ大学　学士
1989 年　カナダ・ヨーク大学オスグッドホール校ロースクール　学士（法学）
1991 年　カナダ弁護士（事務弁護士・法廷弁護士）登録
1992 年　英ケンブリッジ大学トリニティ校　修士（法学）
1992 年　カナダ・ヨーク大学オスグッドホール校ロースクール准教授
1994 年　英ケンブリッジ大学　リサーチフェロー，法学部教員
1996-2011 年　英仏の有名国際弁護士事務所にて活躍
2000 年　英ロンドン大学ユニヴァーシティ・カレッジ法学部　客員教授
2009 年　英ロンドン大学キングス・カレッジ地理学部　客員上級講師
2001 年　英弁護士（事務弁護士）登録
2005 年　英弁護士（法廷弁護士）登録
2011 年　弁護士事務所 Volterra & Fietta 設立

弁護士（カナダ，英国）。国際公法を専門とする弁護士事務所 Volterra & Fietta の共同経営者。国際司法裁判所（ICJ）等における，UNCLOS に基づく境界画定紛争や，投資紛争等，数多くの国際裁判や仲裁の事案で補佐人又は弁護人を務める他，仲裁では仲裁人としても活躍。その傍ら，ロンドン大学ユニヴァーシティ・カレッジ等で，客員教授として教鞭をとる。

張 新軍

清華大学法学院 准教授

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パネル・プレゼンテーション要旨
Summary of Panel Presentation

第一部　国連海洋法条約に基づく海域における沿岸国の権利と権原
Segment 1: Coastal States' Rights and Entitlements at Sea based upon UNCLOS

The Legal Nature of Coastal States' Rights in the Maritime Areas under UNCLOS

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Former Judge of ITLOS

In today's international law there is a variety of maritime zones in which the coastal State exercises sovereignty, sovereign rights or jurisdiction to the exclusion of other States. The rights of the coastal State are nevertheless limited by the rights of other States to conduct certain activities in the same areas. In the exclusive economic zone, the key rule to ensure the coexistence of the rights of the coastal State and those of other States is the "due regard" rule.

Difficulties may arise in order to classify certain activities as belonging to the category of those falling under the coastal States' rights or to those that are free for all States. The intervention of dispute-settlement bodies can be very important to solve this problem, as it has happened as regards bunkering.

Certain maritime areas are automatically appurtenant to the costal State, others require proclamation. Also for certain parts of areas not requiring proclamation, such as the territorial sea beyond a minimum of three nm or the continental shelf beyond 200 nm, a proclamation is nevertheless necessary.

"Potential" maritime areas, namely areas in which the coastal State is entitled to establish a maritime area, but has not done so, are under the regime of the area as it is at present, but in the application of the due regard rule States should take into account the expectations of the State entitled to transform the potential area into an actual one. The continental shelf beyond 200 nm is a special case of potential area because the transformation from potential into actual, so that the eventual proclamation becomes "final and binding", requires a procedure, involving the CLCS, whose end result is uncertain as to whether the edge of the continental shelf margin is beyond 200 nm and, if so, as to where the external limit is.

Lateral delimitations, as those in the Bay of Bengal decisions of 2012 and 2014, adopting lines different form the equidistant one give rise to "grey areas" lying within 200 nm from one State and beyond from the other. These are areas in which the delimitation line divides the continental shelf between two States while the overlying waters remain subject to the exclusive economic zone sovereign rights and jurisdiction of the State for which the grey area lies within 200 nm. The due regard rule, and, possibly, cooperative arrangements should play a role for shaping the regime applicable to these areas.

Disputed areas may be the subject of delimitation agreements or of judicial or arbitral decisions. Pending delimitation, States in dispute sometimes try to develop practice so as to accumulate evidence of their rights and some other times abstain from exacerbating the dispute. Third

States should consider the area not as free but under the jurisdiction of a State, and avoid conduct recognizing one State as entitled to rights to the exclusion of the other, lest the latter consider their attitude hostile. Articles 74, para 3, and 83, para 3, indicate various forms of good faith conduct the contending States shall "make every effort" to follow pending delimitation agreement.

It may be observed, as a conclusion, that while every maritime area described in UNCLOS has its own regime consisting of rights and obligations of different categories of States, the interpretation of the provisions defining the activities to which these rights and obligations apply may give rise to difficulties. The picture of the different areas and of their regime in UNCLOS is a static one. Further difficulties arise when transformation occurs or may occur and the picture becomes dynamic. The due regard rule and good faith concepts – together with the possibility of submitting the question to adjudication – may be helpful.

Historic waters and rights revisited: UNCLOS and beyond?

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Under the international law, there is no primary definition for "historic waters". Although Article 10(6) of UNCLOS provides for "historic bays", it acknowledges only the existence of such concept under the public international law. Consequently, it does not provide for the definition of such concept.

According to Professor O'Connell, the following three categories of seaward areas have been claimed as historic waters: (1) bays which are greater than standard bays provided for in Article 10 of UNCLOS; (2) areas of waters linked to a coast by offshore feature but which are not enclosed under the standard rules; (3) areas of seas which would, but for the claim, be high seas because not covered by any rules specially concerned with bays or delimitation of coastal waters. As distinctive in the third category, the category of historic waters has not been supposed to be a general doctrine under the international law. Instead, it plays the role as a concept to explain the individual institution which was established in the historical context.

On 26 June 1998, China promulgated the Law on the Exclusive Economic Zone and the Continental Shelf, which provides that "the provisions of this Act shall not affect the historic rights of the People's Republic of China" (Article 14). This article seems to be aware of the presence of its so-called "nine-dashed line" in the South China Sea.

In China, there are four legal interpretations of nine-dashed line as follows: (1) the idea that the line serves as the 'line of attribution of the islands therein' or the line drawn on the map in order to display the will or intention regarding the occupation of the islands within the nine-dashed line; (2) the line delineates the 'scope of the historical rights', including the realm in which the rights to conduct fishery and develop resources have been historically exercised; (3) the interpretation of the line as the 'limits of the historical waters' that indicate the bounds to which China's sovereignty historically and traditionally reaches out; (4) the concept of the line as the 'traditional border line', according to which the traditional sphere of Chinese influence is delineated. What makes this issue particularly difficult is that China has not specified its maritime claims. If China considers the nine-dashed line as delineating "historic waters", is their claim justifiable under the international law?

According to a Chinese official, UNCLOS is not applicable to the nine-dashed line under the rule of non-retroactivity, because it entered into force in 1994, 47 years later since the Chinese

government submitted the official nine-dashed line map. Is this claim valid?

As just described, the legal nature and meaning of the nine-dashed line are very ambiguous, and its validity under UNCLOS is very controversial. The purpose of this presentation is to examine the legal meaning of the nine-dashed line in the South China Sea in light of UNCLOS and customary international law.

Issues Arising from Extended Continental Shelf Claims in Maritime Areas less than 400 Miles in Width

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The United Nations Convention on the Law of the Sea (UNCLOS) provides an objective but complex definition of the continental shelf. Under Article 76 of UNCLOS, coastal States are entitled to 200 nautical miles of continental shelf, or to the outer edge of the continental margin where it extends beyond that distance (the "extended continental shelf"). The outer edge of the continental margin, in turn, is to be established according to the formula under paragraphs 4 to 6 of the Article. A major innovation of UNCLOS is that this definition is combined with a procedure at the Commission on the Limits of the Continental Shelf (CLCS). The CLCS, comprised of experts in the field of geology, geophysics or hydrography, considers the submissions from coastal States in light of the formula in Article 76, and makes recommendations. The limits of the continental shelf established by a coastal State on the basis of these recommendations will be "final and binding".

In 2012, People's Republic of China and the Republic of Korea respectively made their submissions concerning their extended continental shelf in the East China Sea. This was the first time the Commission was faced with a submission in a maritime area less than 400 nautical miles between opposite coastal States. The CLCS has decided to defer consideration of the submissions in view of the *notes verbales* sent by Japan. The decision of the CLCS seems to be based on the fact that Japan has invoked paragraph 5(a), Annex I of its Rules of Procedure concerning submissions in case of a "dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes". However, the submissions raise the more fundamental question whether they fall under the mandate of the Commission in the first place.

Article 76(8) of UNCLOS provides that coastal States shall submit information on the limits of the continental shelf beyond 200 nautical miles from the territorial baselines to the CLCS. It has been contended that a literal interpretation of the provision should not preclude submissions in areas under 400 nautical miles, since the "baselines" in the provision should be read as the baselines of the coastal State. However, the provision needs to be read in light of the context of the whole continental shelf regime, and especially the *raison d'être* of the procedure at the CLCS. From the records of the negotiation at the Third United Nations Conference on the Law of the Sea, it is clear that the complex definition of the continental shelf was a result of a compromise between the narrow margin and broad margin States. The CLCS was created to oversee the implementation of this complex definition that incorporated some scientific concepts, and to ensure that coastal States would comply with the formula under Article 76.

In this sense, Article 76 of UNCLOS essentially concerns the entitlement of the coastal State to its continental shelf and the delineation of the outer limits of the continental shelf. To delineate the continental shelf is to establish the boundary line between the continental shelf and the Area, as

opposed to establishing the boundary line between adjacent or opposite coastal States (delimitation). The primary role and function of the CLCS is thus to prevent encroachment upon the Area, which is the common heritage of mankind. Conversely, submissions unrelated to the issue of delineation should be considered as outside it mandate. Therefore, the CLCS should not consider submissions in maritime areas less than 400 nautical miles where only delimitation issues may arise.

Even leaving aside the question of the role and function of the CLCS, there seems to be little utility in determining the precise extent of the coastal State's entitlement to the continental shelf prior to delimitation of the relevant area. It is well known that in the 1985 *Libya/Malta* case, the International Court of Justice decided not to give any role to the concept of natural prolongation in delimiting maritime areas less than 400 nautical miles. The *Libya/Malta* case signaled the start of a new jurisprudence replacing natural prolongation with distance as the basis for entitlement to 200 nautical miles of the continental shelf, and thus using an equidistance-based approach as a delimitation method. Moreover, in this line of jurisprudence, the matter was never regarded as delimitation of an "extended continental shelf" overlapping with another State's 200 nautical mile zone.

While the demise of natural prolongation in maritime delimitation has often been attributed to the advent of the EEZ, the same trend may be seen with respect to the extended continental shelf. In the *Bangladesh/Myanmar* case, the International Tribunal for the Law of the Sea rejected Bangladesh's argument based on natural prolongation. Importantly, the tribunal confirmed that there is in law only a single continental shelf rather than an inner and outer continental shelf, and delimited the area based on an adjusted equidistance line. State practice on extended continental shelf delimitation agreements also show a trend towards equidistance-based delimitation. Thus, even if delimitation in areas within 400 nautical miles were to be reconstructed as an issue concerning the "extended continental shelf", States would achieve little by establishing the limits of its entitlement in areas that are subject to delimitation with other States. There is no good reason for the CLCS to carry out such valueless tasks, which in any case, were not envisaged by the negotiators of UNCLOS.

In view of the above, it must be concluded that the more plausible interpretation is that there is no role for the CLCS under UNCLOS in maritime areas less than 400 nautical miles. Although essentially a technical and scientific body, the work of the CLCS has been an important contribution to the rule of law in the oceans, ensuring that coastal State's outer limits of its continental shelves may be justified under Article 76 of UNCLOS. This important mechanism for delineation of the coastal State's entitlements vis-à-vis the Area should not be misused for advancing claims concerning the legal-political process of maritime delimitation.

第二部　境界未画定海域の法レジーム

Segment 2: Development of Legal Regimes Governing the Period pending Final Agreement of Delimitation

Obligation of Self-restraint and Cooperation of Coastal States in Maritime Areas pending Delimitation

Naoya OKUWAKI
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The focus of my presentation will be placed on obligation of self-restraint by coastal States bordering

the seas of Asia pending the final delimitation of sea areas. Self-restraint here is same as is used in the Declaration on the Conduct of Parties in the South China Sea of 2002. It is provided in Articles 74 (3) and 83 (3) of the UNCLOS that, pending final agreement of delimitation of the exclusive economic zone (EEZ) or continental shelf, "the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement." As it is a time-consuming process to reach final delimitation, during the transitional period, it is not enough to comply with a passive duty of self-restraint. States bordering the sea of Asia should also promote positive cooperation among them, by way of making efforts towards provisional arrangements of a practical nature, to cope with various problems to achieve a sustainable use of the sea area.

Unfortunately however, due to the fact that delimitation issues remain unresolved in many parts of the seas of Asia, it is sometimes difficult to negotiate even for the provisional arrangements, even though the UNCLOS stipulates in the same Articles that such arrangements shall be without prejudice to the final delimitation.

In order to enhance negotiation to create cooperative framework, it is also required that States concerned shall consult each other with a view to reaching agreement before taking unilateral actions, exchange information about facts of the dispute, if it happens, and explain their legal positions clearly, consistently, and with utmost transparency, in the light of the UNCLOS and, when there are gaps in it, with reference to general international law. This is because it is natural that States have different views of international law and different interpretation of the UNCLOS in particular.

Articles 74 (3) and 83 (3) of the UNCLOS provide for the obligation not to hamper or jeopardize in reaching final agreement. This obligation is induced as necessary implication of the obligation to conduct negotiations in good faith to arrive at a final solution of delimitation. However, what conduct may constitute a breach of it is not specified in the text. So, first of all, it must be clarified that what may constitute violation of this obligation of self-restraint. According to some precedents of the international courts, although very limited in number, it is a general rule that unilateral acts which cause a permanent physical change to the marine environment would generally have the effect of jeopardizing or hampering the reaching a final agreement on the delimitation of the maritime boundary. It should be noted that the physical change here is not confined to conduct of drilling of the seabed, but may include any physical change that is irreversible, or practically impossible to remove once introduced.

It should also be remembered, however, that it is suggested in one of the international court's decision that, as the process of resolving the delimitation disputes is time-consuming, in deciding what conduct constitutes hampering the final agreement, it must be careful not to stifle ability of coastal States to pursue economic development in a disputed area. It will be difficult to balance this requirement of the needs for economic development with the obligation of self-restraint in general terms that may be objectively applicable in all cases.

Therefore, the only thing that we can do at this moment is to suggest some generally recommended practice of self-restraint, through pointing out only some of the elements of activities that may hamper or prejudice the final agreement, in order to fill up gaps that UNCLOS and general international law does not cover in concrete terms, and make it applicable in particular situations on case by case basis. In doing so, it must also be taken into account that Article 123 of the UNCLOS provides for a special obligation of States bordering an enclosed and semi-enclosed sea to cooperate in the exercise of their rights and in the performance of their duties.

The purpose of my presentation is to activate the confidence building process through effectuating mutual self-restraints, given that the all the coastal States in the Asian region commit to create a marine order on the basis of the rule of law and compliance to international law.

The Infringement of Obligations of Self-Restraint and Cooperation under Articles 74(3) and 83(3) and Possible Strategies to Bring Disputes Emanating from such Infringement before Relevant Courts and Tribunals

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1. The UN Convention on the Law of the Sea ("UNCLOS").
   a. UNCLOS is often described as a "constitution for the oceans", as it establishes the legal framework for all uses of the oceans.
   b. UNCLOS enjoys wide ratification in general and specifically among East Asian States. The only States in the region not to have ratified UNCLOS are North Korea and (of relevance because of the Northern Mariana Islands) the United States.
   c. As with all international law, UNCLOS attempts to provide a normative framework for stability and security to the international community.

2. UNCLOS envisages that the delimitation of maritime boundaries will be the result of, first and foremost, agreement. However, in the interim period before States have reached agreement on the delimitation of their maritime boundaries, States are under an obligation to exercise self-restraint and to cooperate. Self-restraint and cooperation are critical components of an inter-State normative framework for stability and security.

3. To this end, Articles 74(3) and 83(3) of UNCLOS set out legal rules that are compulsory and directive. They provide that:

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

4. The meaning and scope of the obligations of self-restraint and cooperation under UNCLOS.
   a. Articles 74(3) and 83(3) represent a compromise between promoting activities in a disputed maritime area and preventing unilateral activities in that area.
   b. UNCLOS does not set out a list of activities that would be prohibited by the obligation to exercise self-restraint under Articles 74(3) and 83(3). The assessment of whether an activity falls foul of the obligation of self-restraint under Articles 74(3) and 83(3) will be explored.
   c. In relation to the obligation to cooperate, it must be noted that the obligation is one to "make every effort", to negotiate in good faith, rather than actually to enter into a provisional arrangement. Provisional arrangements can take many different forms.

5. Self-restraint and cooperation are thus fundamental, non-derogable norms embedded within UNCLOS.

6. The settlement of disputes that arise in relation to the obligations of self-restraint and cooperation is regulated by Part XV of UNCLOS. The most relevant provisions of Part XV of UNCLOS will be identified and applied to the context of North East Asia.
   a. Settlement of disputes by peaceful means.
   b. Compulsory procedures.
   c. Exempted disputes.
   d. Relevant declarations of North East Asian States.
   e. Potentially relevant concurrent jurisdictions.

7. The power of courts and tribunals to award provisional measures under UNCLOS will be covered in depth.

a. UNCLOS gives a court or tribunal seized with a dispute submitted to it the power to prescribe "any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision" (Article 290).
b. Provisional measures may prove to be a useful tool in relation, in particular, to disputes regarding breach of the obligation of self-restraint.

8. Practical strategies to bring disputes emanating from infringement of the obligations of self-restraint and cooperation before relevant courts and tribunals.

a. Bringing a self-standing claim for the violation of Article 74(3) and/or 83(3) along with a request for provisional measures to restrain the conduct of activities that violate Articles 74(3) and 83(3). The potential jurisdictional hurdles with respect to Article 298(1) declarations will be considered.
b. Bringing a maritime boundary delimitation case and requesting provisional measures (or, if a maritime boundary delimitation case has already been initiated, then, as part of that case, requesting provisional measures) to restrain the conduct of activities violating Articles 74(3) and/or 83(3).
c. Other potential options:
    i. The UN Security Council;
    ii. Regional bodies;
    iii. Global bodies
    iv. Dispute resolution options under bilateral treaties relating to disputed zones e.g., joint development agreements.

Interim Arrangement pending Maritime Delimitation: Some Successful Practices

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Entering provisional arrangements pending delimitation agreements has been provided for under Articles 74(3) and 83(3) as an obligation. Compliance with the obligation, many states in the East Asia region have successfully concluded some cooperation arrangements. This paper will examine three successful state practices in different areas of cooperation and identify elements that lead to their successes.

1. Cambodia and Vietnam historical water agreement

As two adjacent states, the different maritime claims between Vietnam and Cambodia created an overlap of approximately 14,580 nm^2. Cambodia's claim was based on the so-called Brévié line, a colonial administrative and police jurisdiction line. Vietnam claimed that Brévié line could only be used for islands division and proposed another line for maritime boundary.

In 1982, Cambodia and Vietnam signed a Historical Waters Agreement establishing the overlapping maritime zone as their joint historical waters. The scope of the historical water, which is placed under internal water regime, is 4000 nm^2 and defined by straight lines connecting specific co-ordinates. Within the joint historical water, the parties agreed (i) to use the Brévié line for islands

division; (ii) to jointly exercise their jurisdiction by undertaking surveillance and patrols and (iii) to jointly exploit the resources by allowing local fishermen of both countries to ontinue their existing fishing activities and by concluding further common agreement. The two countries also agreed on the no prejudice principle in order to hold negotiations on maritime boundary delimitation 'at a suitable time' in the future.

2. Malaysia and Vietnam joint development

As to opposite states in the South China Sea, the continental shelf claims of Vietnam and Malaysia introduced in 1971 and 1979 respectively created an overlapping area of 2,500 km^2. In 1991, the test from one of the three petroleum contracts signed between Malaysia and foreign enterprises showed considerable amount of oil and gas reserves in the overlapping area. These developments led to Vietnamese protests, requesting Malaysia to refrain and expressing Vietnamese willingness for negotiation.

Malaysia showed its goodwill by suspending the exploration activities and entered into negotiation with Vietnam. The two countries could not delimit their maritime boundaries but concluded the Memorandum of Understanding (MOU) on joint development in 1992. The Preamble of the MOU affirms that Malaysia and Vietnam desire to strengthen cooperation for their best interests through "an interim arrangement for the purpose of exploring and exploiting petroleum in the seabed in the overlapping area". Under the MOU, the two countries established a 'Defined Area' to conduct joint petroleum exploration and exploration under the regime of continental shelf.

The costs and benefits derived from the exploration and exploitation in the Defined Area are equally borne and shared by Vietnam and Malaysia. Two national oil companies, PETRONAS and PETROVIETNAM, were authorised to conduct the cooperation activities. Accordingly, PETRONAS and PETROVIETNAM concluded a commercial arrangement on 25 August 1993 and established Coordination Committee. The Coordination Committee consists of 8 equal representatives from two sides and functions to manage petroleum operations in the Defined Area under the principle of unanimity. The applicable law for the cooperation is the law of Malaysia and the exploitation products will be exported onshore with Malaysian customs procedures. Cooperation is conducted 'without prejudice' to the future maritime delimitation between Malaysia and Vietnam.

3. China and South Korea joint fishing agreement

As two opposite countries with a distance less than 400 nm, China and South Korea have overlapping maritime zones in the Yellow Sea. In 1992, the two governments began negotiation and resulted in the conclusion of the final Fisheries Agreement in 2000 (came into force in 2001). In addition, the two also reached a Memorandum of Understanding (MOU) to promote the conservation, rational utilization of marine living resources and maintain a proper order of fishing operations at sea.

The 2000 Fisheries Agreement established three zones for joint fisheries management based on the Exclusive Economic Zone (EEZ) regime.

The Provisional Measure Zone, defined by concrete co-ordinates and located in the middle of the Yellow Sea, is subject to "joint conservation measures and quantitative management measures" as adopted by the two countries at the recommendation of the Joint Fisheries Committee and taking into account the effect on traditional fisheries.

Two Transitional Zones in similar size, also defined by co-ordinates and located along two sides of the Provisional Measure Zone, were placed under joint management of the two countries for only four years. During this interim period, each country would grant fishing license and phase out their fishing activities in the other country's transitional zone where the EEZ regime would be gradually implemented. After four years, the Transitional Zones would become the EEZ of the more adjacent country for the remaining validity of the Agreement.

Two current Fishing Pattern Zones are designed in the north and the south of the Provisional Measure Zone to maintain the current fishing order. These zones, however, are not defined by concrete

co-ordinates. In these zones, each country will not enforce their laws and regulations on fisheries against nationals and fishing vessels of the other. In fact, the current fishing pattern is interpreted as free fishing as before the conclusion of the Agreement, fishermen of the two have enjoyed free fishing in most parts of the Yellow Sea.

In addition to the three zones, the Agreement also provided two additional zones, namely the Special Prohibition Zone and the Fisheries Conservation Zone off the Yangtse River, in which South Korea and China can exercise their own jurisdiction and regulations respectively.

All the fisheries management regimes under the 2000 Agreement are "without prejudice" and thus will not affect final maritime delimitation. The agreement will be valid for an initial period of five years and will be automatically extended if not otherwise terminated by the parties.

Concluding remarks

States concerned in the three discussed practices have successfully established cooperation mechanisms while preserving the opportunities for final maritime delimitation. Their successes were achieved due to certain factors. First, of the most importance is the good will of the parties. Good will can be seen from the way they conduct self-restrain to the willingness to negotiate and make concession based on international law. Second, it is the creativity of the parties in building the practical cooperation mechanisms to jointly share the resources and jointly manage order in the overlapping maritime zones. Last but not least is the "no prejudice" clause that ensures no harmful effect to the future final maritime delimitation may be produced from the provisional arrangements.

第三部　国連海洋法条約と海洋紛争の平和的解決
Segment 3: UNCLOS and Settlement of Disputes at Sea

Compulsory Dispute Settlement Procedures under UNCLOS: Their Achievements and New Agendas

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Chapter XV of UNCLOS establishes a system that enhances the compulsory jurisdictions of international courts and tribunals. More than thirty years have passed since the adoption of UNCLOS and the precedents have accumulated. Therefore, this might be a good opportunity to examine the achievements of the dispute settlement system under UNCLOS by referring to these precedents and to consider its new agendas for the maintenance of peace and security in ocean affairs.

For the purposes of those discussions, this paper will take up the following four salient issues: first, the significance and limits of the enhanced jurisdictions of international courts and tribunals under UNCLOS; second, problems of compliance with or the enforcement of the decisions of international courts and tribunals; third, the relationships or conflicts between some of the particular features of maritime disputes and the basic principles of the procedures of international courts and tribunals; and, fourth, the development and clarification of the law of the sea through the decisions of international courts and tribunals.

As far as the first issue is concerned, it may be appropriate to start the arguments with by revisiting the findings of the Arbitral Tribunal in the Southern Bluefin Tuna cases concerning the

requirements to be satisfied for the unilateral reference of a dispute under UNCLOS. Admitting "a parallelism" of a framework convention and an implementing convention, the Tribunal concluded that the dispute settlement procedure provided in the implementing convention excluded the compulsory jurisdiction under UNCLOS in accordance with Article 281 (1) (b). It further commented that "UNCLOS falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction entailing binding decisions" and noted the existence of "a significant number of international agreements with maritime elements, entered into after the adoption of UNCLOS, exclude with varying degrees of explicitness unilateral reference of a dispute to compulsory adjudicative or arbitral procedures." We should examine how the courts and tribunals have argued the requirements for the exercise of compulsory jurisdiction in the subsequent cases. In addition to the jurisdictional issues relating to the principal proceedings, the competence of the International Tribunal for the Law or the Sea (ITLOS) in the proceedings for the prescription of provisional measures will also be briefly discussed because of its significant role in arbitration under UNCLOS.

The problems with the enforcement of the decisions of international courts and tribunals are the second issue for discussion. The enhanced compulsory jurisdiction system does not contribute to the successful settlement of an international dispute without effective compliance with the decisions in unilaterally referred cases. Therefore, the effectiveness of compulsory jurisdictions should not be examined only by discussing the issues of jurisdiction or admissibility. However, it is also important to consider how to ensure meaningful compliance with the decisions of an international court or tribunal in unilaterally referred cases. Although the decisions of international courts and tribunals are accorded with a "legally binding" effect, they are, in some cases, not complied with and, moreover, the international community lacks the ultimate measures for their enforcement against a sovereign State. The issue of one Party's non-appearance will also be discussed briefly, in light of ensuring the effectiveness of the compulsory jurisdiction system.

In relation to the third issue, two particular features of maritime disputes in the present international community should be pointed out. First, it is necessary to note that the subject-matter of a dispute relates to the compatibility of national legislations or enforcement measures of the Respondent with UNCLOS or international legal rules in several maritime dispute cases. This reflects the increasing importance of the national legal system of a contracting State in the process of complying with the obligations and exercising its rights under UNCLOS. At the same time, it is necessary to consider the scope of the competence of international courts and tribunals to examine the legality or compatibility of the national legal systems of a sovereign State. The cases concerning measures taken against foreign vessels may constitute important precedents for the purposes of these discussions.

As the second particularly significant feature of maritime disputes, multilateral elements in one maritime dispute should be pointed out. In the maritime dispute cases of today, conflicting rights and interests of several States are involved in very complicated ways. It should be discussed how and to what extent international courts and tribunals are able to function effectively with their procedures of an essentially bilateral nature. It is true that the procedures for the intervention of a third party are provided in order to cope with the multilateral elements of an international maritime dispute, however, it should be questioned whether these procedures for intervention provide a sufficient solution for settling international disputes of a multilateral nature. It may be important to consider the role or contribution of international courts and tribunals to the maintenance and control of peace and security in ocean affairs through their decisions.

For the purposes of the discussion of the fourth and last issue, it should be noted that the Parties in the pleadings of recent maritime disputes refer to various precedents of different jurisdictions in order to support their arguments as the evidence of exiting legal rules and that the international court or tribunal, in response to those arguments, examines whether those decisions reflect the legal rules that are applicable to the case before it. It seems that this process has allowed for an active interaction among various jurisdictions and their contribution to the clarification and development of the rules of the law of the sea as a means of achieving unity. In this sense, the co-existence of various international courts and tribunals has produced a positive effect. At the same time, however, the

problems of forum shopping or conflicts of different international jurisdictions cannot be ignored. It should also be noted that the problems of misuse or abusive use of compulsory jurisdictions have been pointed out. The substantial effectiveness of and the sufficient trust in compulsory jurisdictions may be ensured by the sound administration of justice.

The Hen, the Egg and the Chicken: Jurisdictional Dilemma of Mixed Disputes and the *Philippines v. China* Case

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Under the premise of the dispute settlement mechanism for party states to the 1982 United Nations Convention on the Law of the Sea ("UNCLOS"), the Republic of the Philippines initiated Annex VII Arbitration "with respect to the dispute with China over the *maritime jurisdiction* of the Philippines in the West Philippine Sea". The Chinese government refused to accept the Notification and returned it to Manila, repeatedly indicated the position of non-acceptance of and non-participation in this arbitration on the ground that "the Arbitral Tribunal manifestly has no jurisdiction over the present arbitration."[1] In particular, China had emphasized:

> … The claims for arbitration as raised by the Philippines *are essentially concerned with maritime delimitation* between the two countries in parts of the South China Sea, and thus *inevitably involve the territorial sovereignty* over certain relevant islands and reefs. However, such issues of territorial sovereignty are not the ones concerning the interpretation or application of the UN Convention on the Law of the Sea (UNCLOS). Therefore, given the fact that the Sino-Philippine territorial disputes still remain unresolved, the compulsory dispute settlement procedures as contained in UNCLOS should not apply to the claims for arbitration as raised by the Philippines. Moreover, in 2006, the Chinese Government made a declaration in pursuance of Article 298 of UNCLOS, excluding disputes regarding such matters as those related to maritime delimitation from the compulsory dispute settlement procedures, including arbitration."[2]

While being fully aware of territorial dispute and maritime delimitation dispute pending between China and the Philippines in the South China Sea, the Philippines tried to separate or quarantine territorial dispute and the maritime delimitation dispute from its submissions. China perceived that the Philippines was navigating a narrow jurisdictional route yet within the realm of "mixed disputes" with regard to its submissions, i.e., the submitted disputes necessarily involve pending concurrent territorial sovereignty and/or maritime delimitation disputes, which are either explicitly recognized to lie beyond the "interpretation or application of this Convention" or have been excluded by China from the jurisdiction in her 2006 Declaration made pursuant to Article 298.

It is believed that such "mixed disputes" had overwhelmingly constituted a true jurisdictional barrier to the Philippines' submission of the dispute over *maritime jurisdiction*, no matter how it had been packaged by the applicant. It can be read that a decision on the Philippines' submissions would

[1] Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (2014/12/07) http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml

[2] Foreign Ministry Spokesperson Hua Chunying's Remarks on the Philippines' Efforts in Pushing for the Establishment of the Arbitral Tribunal in Relation to the Disputes between China and the Philippines in the South China Sea (2013/04/26), http://www.fmprc.gov.cn/eng/xwfw/s2510/2535/t1035577.shtml.

not only depends on the findings on the concurrent territorial dispute; but also the consequence of any decision of the Philippines' submission would amount to a decision on maritime delimitation dispute, both of which fall outside of the Tribunal's jurisdiction in the instant case.

To better understand the inherent relation in such mixed disputes, this study suggests a hen-egg (fertilized)-chicken metaphor for such a jurisdictional objection argument as it appears at the title of this paper: how can a dispute on "egg" survive in the jurisdictional scrutiny without looking at the concurrent disputes regarding hen and/or chicken when a court or tribunal manifestly does not have jurisdiction over the latter ones? Mixed disputes refer to a situation when multiple disputes are present, and the judgment on a submitted dispute is *dependent* on the finding in an concurrent dispute (the hen and the egg relation) or its effect *amounts to a determination of* an concurrent dispute (the egg and the chicken relation). When consent has not been found in the concurrent disputes with regard to the hen and the chicken that had not been duly submitted, by virtue of intrinsic relationship of hen-egg and egg-chicken, a court or tribunal will not exercise jurisdiction to adjudicate the submission on the egg.

While a number of issues regarding jurisdiction and admissibility in *the Philippines v. China* have been raised by China and have already drawn attention from academia, this study only examines the jurisdictional dilemma of mixed disputes. This paper first looks at jurisdictional debate involving the notion of mixed disputes in two Annex VII arbitral cases, i.e., *Guyana v. Suriname* and *Mauritius v. U.K*. The examination finds the potential as well as difficulties for the notion of mixed disputes to sustain jurisdictional objection under the scheme of UNCLOS dispute settlement, especially in relation to a reading *a contrario* of article 298, paragraph 1(a), which seems to have put some limit on the application of an otherwise generic jurisdictional barrier. This finding rather encourages the exploration of case law and doctrinal debate with regard to what kind of relationship in the mixed disputes constitutes a generic jurisdictional objection. By revisiting the *Monetary Gold* case, the *East Timor* case, the *Phosphate Lands in Nauru* case and *Malaysia v. Singapore* case, it concludes that, mixed disputes may sustain a generic jurisdictional objection under two conditions: 1) There are logical links of dependence or consequence between the mixed disputes, under which the unsubmitted dispute constitutes the very subject matter of the submitted dispute. The logical link has to be ascertained in the preliminary stage by looking at the merits case by case. 2) the dispute so mixed with the submitted dispute falls outside the jurisdiction for the lack of consent, either a consent from the third Party, or consent from the Parties to the unsubmitted-yet-logically-linked dispute. It follows a continuation of discussion on the counter-arguments against the generic jurisdictional barrier of mixed disputes: the "real dispute" argument, the argument based on the principle of effectiveness or inherent jurisdiction, and the argument based on *A contrario* reading of Article 298 (1) of the UNCLOS. It concludes that none of these arguments can lead to noteworthy deterioration of the strength of jurisdictional objection arising from mixed disputes. The major finding in this part of research will apply to the instant *the Philippines v. China* case.

Third-Party Intervention as a Possible Means to Bridge the Gap between the Bilateral Nature of Annex VII Arbitration and the Multilateral Nature of the UNCLOS

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The purpose of this paper will be to assess the appropriateness and explore the feasibility of developing

third-party intervention before Annex VII Arbitral Tribunals for disputes on the interpretation or application of the UNCLOS.

It may seem at first sight quite odd to discuss on the possibility of third-party intervention before Annex VII Arbitration Tribunals. Indeed, third-party intervention is not provided for in Annex VII, and moreover, it does not seem compatible with the bilateral nature of arbitral tribunals, which are controlled by the parties to the dispute.

On the other hand, Annex VII Arbitration forms part of a multilateral convention (the UNCLOS being sometimes labeled as "the Constitution for the oceans") and disputes on application or interpretation of the UNCLOS are not of a purely bilateral nature. There is then a need to reconcile the bilateral nature of ad hoc arbitration with the multilateral nature of the rules and disputes at stake. To some extent, third-party intervention could be particularly well-suited to reach that goal.

Third-party intervention would permit indeed, first, to guarantee some kind of uniformity in the interpretation of the UNCLOS by courts or tribunals competent to settle bilateral disputes (there is indeed an implicit legal principle according to which multilateral treaties cannot be interpreted differently by different tribunals). By allowing any Contracting State to submit its own interpretation of the treaty involved and by allowing thus the Court or Tribunal to be well-informed of the views of all the Contracting States, third-party intervention reduces the risk of conflicting or disputed interpretations. Third-party intervention would also guarantee the protection of third States in case of bilateral disputes affecting their legal interests, that is to say in cases where the bilateral dispute is not separable from other, possible disputes (such as, for instance, environment disputes or some maritime delimitations).

Actually, a comparison with other comparable treaties shows that similar multilateral conventions with a regime of compulsory jurisdiction (such as the WTO, the European Union or the European Convention on Human Rights) encompass the possibility of third-party intervention, which is quite often resorted to. Moreover, third-party intervention is possible before the ITLOS and the ICJ. In these circumstances, it is quite difficult to understand why it would be precluded before Annex VII Tribunals which belong, together with the said permanent courts, to the same system of compulsory jurisdiction under Part XV of UNCLOS.

Admittedly, third-party intervention is not expressly mentioned in the rules applicable to Annex VII Arbitration (be it in Annex VII itself or in the rules of arbitration adopted so far by Annex VII Arbitral Tribunals). This omission does not prevent however Annex VII arbitral tribunals from accepting third-party intervention, including without the consent of the parties to the dispute, for the following reasons. First, third-party intervention is not expressly mentioned in Annex VII but it is neither expressly excluded. Second, recent existing case-law could provide a basis to grant the permission to intervene. Third, and more importantly, Annex VII Tribunals, which are established within a framework of compulsory jurisdiction regarding UNCLOS disputes, have been granted the power to determine their own procedures. These tribunals could actually use this power – as other arbitral tribunals did in other contexts – to grant permission to a possible third-party intervener.

If this possibility is open to UNCLOS States Parties (as it is already before the ICJ and the ITLOS), it is our position that the consent of the parties to the dispute would not be required (at least if the third-party does not want to become a party to the case). It would not be necessary either to establish a link of jurisdiction between the parties to the dispute and the intervening party.

The main challenge, in fact, would rather be to find appropriate mechanisms to make third-party intervention attractive. Third-party interventions have been considered over time indeed as a quite irrelevant, useless tool before the ICJ and the ITLOS. The case-law of the ICJ on this matter has been moreover quite erratic and may have dissuaded States to have recourse to it. There is room then for finding a more flexible formula which would be more adapted to suited States' needs and concerns. In particular, and following the well-established practice before the WTO and the suggestion recently made by Judge Gaja, it could be quite appropriate to give the right to any UNCLOS State Party to submit (short) written observations in cases affecting one of its legal interests or involving issues of

UNCLOS interpretation, which are of common concern. Such a "soft" intervention would be easily manageable, would be seen by the parties to the dispute as being less intrusive than a more classical form of intervention and at the same time would give the opportunity to Annex VII Arbitral Tribunals to receive elaborated views on the broader implications of its decision on the interpretation and application of UNCLOS.