

# Certain Controversial Issues in the Development of the International Law of the Sea

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## Abstract

It is recalled that the United Nations Convention on the Law of the Sea ("Law of the Sea Convention," or "LOSC") has come into force for more than two decades. However, there are still remaining issues, some left over by the Third United Nations Conference on the Law of the Sea, such as innocent passage for warships, and some emerging in the course of its implementation, such as generic resources on the high seas. This ~~presentation chapter~~ selects four such areas for discussion including straight baselines, regime of islands, military activities in the Exclusive Economic Zone ("EEZ"), and maritime historic rights. By discussing these issues, it is suggested that there be a review conference for the LOSC in the near future.

## Introduction

The current marine legal order in the world has been principally established by and maintained under the LOSC, which is commonly regarded as the constitution for the oceans, having incorporated previously existing conventional and customary rules and norms concerning the oceans. Pursuant to the provisions of the LOSC, a coastal State has the right to establish maritime zones under its jurisdiction: the internal waters inside the baselines which are used to measure the extent of the maritime zones and the; ~~the~~ territorial sea of 12 nautical miles (nm), ~~the exclusive economic zone~~ (EEZ) of 200 nm, and ~~the~~ continental shelf of 200 nm (or up to 350 nm in some cases); as measured outward from the baselines. Within these maritime zones, a coastal State is entitled to enjoy either sovereignty or sovereign rights and to exercise its jurisdiction and enforce its laws and regulations in accordance with international law.

So far as of 2017, the LOSC has ~~entered into~~ been in force for more than 20 years. As it is recalled, the adoption of the LOSC was a 'package deal' comprising considerable compromises and ambiguities. Thus it is understandable that some controversial issues, such as innocent passage for warships, are left over by the LOSC, while others, such as military activities in the EEZ, are emerging from the implementation of the LOSC. This paper selects four areas for discussion including straight baselines, regime of islands, military activities in the EEZ, and maritime historic rights. The conclusion is the suggestion ~~By discussing these issues, it is suggested~~ that there be a review conference for the LOSC in the near future.

## Straight Baselines

According to the LOSC, straight baselines can be used when the coastal lines meet either of the following conditions: ~~1-~~ in localities where the coastline is deeply indented and cut into, or if there is

a fringe of islands along the coast in its immediate vicinity.<sup>1</sup> The Convention further provides that “[t]he drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.”<sup>2</sup> (Article 7) It can be seen that the use of the straight baselines is limited subject to the above two conditions. In other words, this method is a supplement to the use of normal baselines.

Although there are no specific technical details about how to draw straight baselines, the United States takes the position that in order to meet the LOSC criteria,<sup>3</sup>

straight baseline segments must not depart to any appreciable extent from the general direction of the coastline, by reference to general direction which in each locality shall not exceed 60 miles in length; and result in sea areas situated landward of the straight baseline segments that are sufficiently closely linked to the land domain to be subject to the regime of internal waters.<sup>3</sup>

However, in State practice, however, in particular in East Asia, the use of straight baselines to measure maritime zones is more common than the use of normal baselines. China uses the method of straight baselines to define the limits of its territorial sea. As for the People’s Republic of China (PRC), the 1958 Declaration on China’s Territorial Sea declared that (1) The breadth of the territorial sea of China should be 12 nautical miles, which applies to all territories of China, including the Chinese mainland and its coastal islands, as well as all other islands belonging to China; and (2) China’s territorial sea would take, as its baseline, the line composed of the straight lines connecting basepoints on the mainland coast and on the outermost of the islands; the water area extending 12 nautical miles outward from the baseline would be China’s territorial sea, and the water areas inside the baseline would be China’s inland waters, including the Bohai Sea and the Chiungchow Strait.<sup>4</sup> But at that time the PRC Government did not publicize any geographical coordinates. Only in May 1996 was part of such baselines around the mainland and the Xisha Islands (Paracel Islands) publicized.<sup>5</sup> The publicized baselines are divided into two sets: one comprising 49 base points along features on, and adjacent to, its mainland coast and on Hainan Island beginning at point 1 (*Shandong gaojiao*) on the eastern tip of the Shandong peninsula situated to the southeast of Bohai, south to point 49 situated on the west coast of Hainan Island; and the other comprising 28 base points encompassing the Paracel Islands in the northern part of the South China Sea. However, p

Parts of the baselines have been criticized for not being consistent with the criteria set forth in the LOSC. The United States takes the view that “m

Much of China’s coastline does not meet either of the two LOS Convention geographic conditions required for applying straight baselines. And, for the most part, the waters enclosed by the

<sup>1</sup> Article 7-(1) of the LOSC.

<sup>2</sup> *Ibid.*

<sup>3</sup> J. Ashley Roach and Robert W. Smith, *United States Responses to Excessive Maritime Claims*, 2nd ed. (The Hague: Martinus Nijhoff, 1996), 64-65.

<sup>4</sup> An English version may be found in Office of Policy, Law and Regulation, State Oceanic Administration (ed.), *Collection of the Sea Laws and Regulations of the People’s Republic of China*, 3rd Edition (Beijing: Ocean Press, 2001), 197.

<sup>5</sup> Declaration on the Baseline of the Territorial Sea of the People’s Republic of China, 15 May 1996, see Office of Policy, Law and Regulation, *ibid.*, 206-209.

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new straight baseline system do not have the close relationship with the land, but rather reflect the characteristics of high seas or territorial sea.”<sup>6</sup>

Further analysis gives the details about how China’s straight baselines deviate from the LOSC criteria. For example, the coastline from the Shandong peninsula to the area of Shanghai (point 1 to point 11) is essentially smooth with no fringing islands and few indentations. Thus, it is argued, the

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<sup>6</sup> Bureau of Oceans and International Environmental and Scientific Affairs, United States Department of State (BOIESA), *Limits in the Seas: Straight Baseline Claim: China*, No.117, 9 July 1996, 3.

straight baseline method should not apply.<sup>7</sup> The other criticism of China's straight baselines is that the archipelagic straight baselines encircling the Parcel Islands should not be used because the PRC is not a mid-ocean archipelagic State.<sup>8</sup>

Similar to China, other East Asian countries also have problematic baselines. The United States lodged a protest, in an *aide mémoire*, against a system of ~~ten-10~~ straight baseline segments declared by Vietnam in November 1982. ~~It and~~ took the view that the baselines claimed by Vietnam did not meet the corresponding criteria and "there is no basis in international law" for such ~~a~~ system of straight baselines.<sup>9</sup> Further, ~~it stated that~~ "[e]ven if the Mekong delta qualifies the coastline in this locality as deeply indented, the islands selected are not appropriate as basepoints."<sup>10</sup>

The United States also criticized the baselines claims made by Japan and ~~South-the Republic of~~ Korea (~~South Korea~~). For Japan, its coastline in many locations does not meet the LOSC geographic conditions required for applying straight baselines.<sup>11</sup> As for South Korea, while acknowledging that its coastline is deeply indented in several areas and there are areas off the coast which are fringed with islands, the United States regards the means by which South Korea has drawn particular straight baseline segments in several locations as not meeting the LOSC criteria.<sup>12</sup>

In December 1998, Taiwan publicized part of its baselines, including those encircling the Taiwan Island and Penghu Islands.<sup>13</sup> The Penghu Channel, once used to be an international waterway, has thus become part of ~~Taiwan's~~ internal waters ~~of Taiwan~~. The straight baseline segments which encircle the whole Penghu Islands are clearly problematic ~~if they are when~~ examined under the criteria of the LOSC, ~~for multiple reasons, and~~ ~~The~~ United States officials ~~also~~ criticized these straight baselines drawn by Taiwan as not consistent with international law.<sup>14</sup>

Baselines are critical for the measurement of maritime zones under national jurisdiction as well as for maritime boundary delimitation between neighboring coastal States. Thus problematic baselines ~~will definitely~~ cause ~~subsequent issues problems~~ in the above two areas. When a ~~coastal State uses~~ ~~problematic baselines to designate a~~ maritime zone ~~designated by a coastal State with problematic baselines, then~~ it will become controversial under international law and challengeable by other countries. Potential maritime disputes or conflicts ~~would will~~ then arise. ~~As it is seen in~~ East Asia, many of the coastal States have drawn "excessive" straight baselines in the eyes of the United States. There is an interesting phenomenon in East Asia that "bad baselines beget bad baselines."<sup>15</sup> Now all the countries concerned have realized the need to delimit maritime boundaries between

<sup>7</sup> See *ibid.*, 5.

<sup>8</sup> See *ibid.*, 8. For further reference, see Hyun-Soo Kim, "The 1992 Chinese Territorial Sea Law in the Light of the UN Convention," *International and Comparative Law Quarterly*, Vol. 43, 1994, 896-899; and Daniel J. Dzurek, "The People's Republic of China Straight Baseline Claim," *IBRU Boundary and Security Bulletin*, Summer 1996, 77-89.

<sup>9</sup> Roach ~~and~~ & Smith, *supra* note 2, 102.

<sup>10</sup> W. Michael Reisman ~~and~~ & Gayl S. Westerman, *Straight Baselines in International Maritime Boundary Delimitation* (New York: St. Martin's Press, 1992), 133.

<sup>11</sup> Bureau of Oceans and International Environmental and Scientific Affairs, United States Department of State (BOIESA), *Limits in the Seas: Straight Baseline and Territorial Sea Claims: Japan*, No. 120, 30 April 1998, 2.

<sup>12</sup> BOIESA, *Limits in the Seas: Straight Baseline and Territorial Sea Claims: South Korea*, No. 121, 30 September 1998, 2.

<sup>13</sup> See *United Daily News* (Taipei) (in Chinese), 1 January 1999.

<sup>14</sup> See J. Ashley Roach ~~and~~ & Robert W. Smith, "Straight Baselines: The Need for a Universally Applied Norm", *Ocean Development and International Law*, Vol. 31, 2000, 65. For further details, see J. Ashley Roach, "An International Law Analysis of Taiwan's Maritime Claims," *Taiwan International Law Quarterly*, Vol. 2-(1), March 2005, 256-268.

<sup>15</sup> Roach and Smith, "Straight Baselines: The Need for a Universally Applied Norm," *supra* note 13, 53.

them. It is unknown whether they will use the existing baselines as points of departure to undertake maritime boundary delimitation or if they will reach an agreement to use a unified standard to adjust their baselines before settling the maritime boundary issues.

### Regime of Islands

According to the LOSC, an “island” “is a “naturally formed area of land, surrounded by water, which is above water at high tide.”<sup>16</sup> This definition contains ~~a number of four~~ essential factors: (i) a piece of land; (ii) naturally formed; (iii) surrounded by water; ~~and that is~~ (iv) above the sea surface at high tide. But the Convention does not explain to what extent a piece of land surrounded by water and above water at high tide can be regarded as an island. Once defined as an island, it is treated as a piece of land which can have its own territorial sea, EEZ and continental shelf.

For the purpose of measuring the breadth of the territorial sea, in the case of islands situated on atolls or of islands having fringing reefs, then the baseline is the seaward low-water line of the reef.<sup>17</sup>

In State practice, some countries use the term “island” in a very broad sense. Like Japan, ~~#which~~ names “Okinotori” as “*shima*” (island in Japanese). China uses the term “*qundao*” (archipelagoes or groups of islands in Chinese) to name all the features, even including some permanently submerged features such as Macclesfield Bank in the South China Sea. The Spratly Islands in Chinese is called *Nansha* Archipelago. In 2010, China adopted the Regulations on the Naming of Sea Islands,<sup>18</sup> where the term “sea islands” has been given ~~both a two meanings: one specific and one a general meaning;~~ ~~a-~~ According to the general meaning, “sea islands” can include archipelagoes, groups of islands, islands, reefs, banks, submerged reefs and banks.<sup>19</sup> In ~~State~~ practice, even for the same maritime geographic feature, there are different names from different countries. ~~For example,~~ Scarborough Reef in Chinese is *Huangyan* Island, ~~and~~ *Okinotorishima* in Chinese is *Chongzhiniao* Reef. However, ~~it should be noted,~~ as it is stated in the South China Sea arbitration case, ~~that~~ “the name of a feature provides no guidance as to whether it can sustain human habitation or an economic life of its own.”<sup>20</sup>

The LOSC further provides in Article 121 that “Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”<sup>21</sup> ~~Given As there is a big~~ ~~the substantial~~ difference ~~between an island and a rock~~ in ~~terms of~~ maritime zone generation, coastal States attempt to consolidate a tiny piece of maritime land in order to get it qualified as an island. The recent example is *Okinotorishima* (Douglas Reef) of Japan.<sup>22</sup> ~~As suggested by~~ ~~While the~~ International Hydrographic Bureau ~~suggests that~~, a rock has an area less than 0.001 square miles (or 2,590 sq. m.),<sup>23</sup> ~~but~~ there are ~~numerous~~ other different definitions ~~based on different~~

<sup>16</sup> See Article 121 of the LOSC.

<sup>17</sup> Article 6 of the LOSC.

<sup>18</sup> The Chinese version of the Regulations is reprinted in 2 *China Oceans Law Review* (2010), 331-334.

<sup>19</sup> Article 28 of the 2010 Regulations, *ibid.*, at 334.

<sup>20</sup> The South China Sea Arbitration Award of 12 July 2016, available at <http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf>, para 482.

<sup>21</sup> Article 121(3) of the LOSC.

<sup>22</sup> Yann-huei Song, “Okinotorishima: A ‘Rock’ or an ‘Island’? Recent Maritime Boundary Controversy between Japan and Taiwan/China,” in Seoung-Yong Hong ~~and~~ & Jon M. Van Dyke (eds.), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Leiden: Martinus Nijhoff, 2009), at 148; also see Yann-huei Song, “The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features Situated in the Pacific Ocean,” 9 *Chinese Journal of International Law* (2010), 663-698, in particular, 691-94.

<sup>23</sup> Cited in Leticia Diaz, Barry Hart Dubner and Jason Parent, “When Is a ‘Rock’ an ‘Island’?—Another Unilateral Declaration Defies ‘Norms’ of International Law,” 15 *Mich. St. J. Int’l L.* (2007), at 535.

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criteria and parameters. Thus the problem of how to define an island still remains a controversial issue in international law.

The South China Sea arbitration has touched upon the regime of islands and explained in details the differences between an island and a rock. According to the arbitral award issued on 12 July 2016, “the use of the word “rock” does not limit the provision to features composed of solid rock. The geological and geomorphological characteristics of a high-tide feature are not relevant to its classification pursuant to Article 121(3).”<sup>24</sup> Furthermore, “[t]he status of a feature is to be determined on the basis of its natural capacity, without external additions or modifications intended to increase its capacity to sustain human habitation or an economic life of its own.”<sup>25</sup>

As for “human habitation,” according to the Tribunal

“the critical factor is the non-transient character of the inhabitation, such that the inhabitants can fairly be said to constitute the natural population of the feature, for whose benefit the resources of the exclusive economic zone were seen to merit protection. The term “human habitation” should be understood to involve the inhabitation of the feature by a stable community of people for whom the feature constitutes a home and on which they can remain.”<sup>26</sup>

As for the term “economic life of their own,” it is “linked to the requirement of human habitation, and the two will in most instances go hand in hand.”<sup>27</sup> In other words, “[t]he Tribunal considers that the “economic life” in question will ordinarily be the life and livelihoods of the human population inhabiting and making its home on a maritime feature or group of features.” Additionally, Article 121(3) makes clear that the economic life in question must pertain to the feature as “of its own.” Economic life, therefore, must be oriented around the feature itself and not focused solely on the waters or seabed of the surrounding territorial sea. Economic activity that is entirely dependent on external resources or devoted to using a feature as an object for extractive activities without the involvement of a local population would also fall inherently short with respect to this necessary link to the feature itself. Extractive economic activity to harvest the natural resources of a feature for the benefit of a population elsewhere certainly constitutes the exploitation of resources for economic gain, but it cannot reasonably be considered to constitute the economic life of an island as its own.<sup>28</sup>

In the Tribunal’s view, the text of Article 121(3) is disjunctive, such that the ability to sustain either human habitation or an economic life of its own would suffice to entitle a high-tide feature to an exclusive economic zone and continental shelf. However, as a practical matter, the Tribunal considers that a maritime feature will ordinarily only possess an economic life of its own if it is also inhabited by a stable human community. One exception to that view should be noted for the case of populations sustaining themselves through a network of related maritime features. The Tribunal does not believe that maritime features can or should be considered in an atomized fashion. A population that is able to inhabit an area only by making use of multiple maritime features does not fail to inhabit the feature on the grounds that its habitation is not sustained by a single feature individually. Likewise, a population whose livelihood and economic life extends across a constellation of maritime features is

<sup>24</sup> The South China Sea Arbitration Award of 12 July 2016, available at <http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf>, para. 482.

<sup>25</sup> *Ibid.*, para. 541.

<sup>26</sup> *Ibid.*, para. 542.

<sup>27</sup> *Ibid.*, para. 543.

<sup>28</sup> *Ibid.*, para. 543.

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not disabled from recognising that such features possess an economic life of their own merely because not all of the features are directly inhabited.<sup>29</sup>

Then the Tribunal also considers the capacity of a maritime feature to sustain human habitation or an economic life of its own, and takes the view that “The capacity of a feature is necessarily an objective criterion” and has no relation to the question of sovereignty over the feature. According to it, the principal factors cited that contribute to the natural capacity of a feature include the presence of water, food, and shelter in sufficient quantities to enable a group of persons to live on the feature for an indeterminate period of time. “Such factors would also include considerations that would bear on the conditions for inhabiting and developing an economic life on a feature, including the prevailing climate, the proximity of the feature to other inhabited areas and populations, and the potential for livelihoods on and around the feature.”<sup>30</sup>

The Tribunal considers that

the capacity of a feature should be assessed with due regard to the potential for a group of small island features to collectively sustain human habitation and economic life. On the one hand, the requirement in Article 121(3) that the feature itself sustain human habitation or economic life clearly excludes a dependence on external supply. A feature that is only capable of sustaining habitation through the continued delivery of supplies from outside does not meet the requirements of Article 121(3). Nor does economic activity that remains entirely dependent on external resources or that is devoted to using a feature as an object for extractive activities, without the involvement of a local population, constitute a feature’s “own” economic life.<sup>31</sup>

~~The decision notes that there are instances where the inability or ability to sustain human habitation is clear. A lack of vegetation, drinkable water, and other sundries required for survival would make obvious the inability. If a feature is entirely barren of vegetation and lacks drinkable water and the foodstuffs necessary even for basic survival, it will be apparent that it also lacks the capacity to sustain human habitation; conversely, where such resources are readily available, it is obviously habitable. The opposite conclusion could likewise be reached where the physical characteristics of a large feature make it definitively habitable.~~<sup>32</sup>

The South China Sea arbitral award, though attempting to interpret Article 121 of the LOSC, has raised a number of controversial issues in the law of the sea concerning islands, groups of islands, or even archipelagic States and waters. The Tribunal re-defined the definition of an island in Article 121: there would be no ‘island’ in the meaning of Article 121 and the high tide geographic features are divided into two categories: fully-entitled island and rock. If a high tide geographic feature would become a fully-entitled island, it must meet the criteria set forth by the Tribunal, such as permanent residence, natural food and water, etc. Second, the Tribunal eliminated the meaning of the phrase “economic life of its own” in Article 121 (3) by subjecting it to “human habitation”. In the eye of the Tribunal, without “human habitation,” “economic life” becomes meaningless. Such an explanation raises the question of how to interpret the relevant wordings in this paragraph: does the word ‘or’ mean in parallel one or the other, or mean ‘and’ or ‘plus’? It seems that there is suspicion of excessive, if not abusive, interpretation by the Tribunal of the relevant provisions in the LOSC.

<sup>29</sup> *ibid.*, para. 544.

<sup>30</sup> *ibid.*, para. 545.

<sup>31</sup> *ibid.*, para. 547.

<sup>32</sup> *ibid.*, paras. 540-548.

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Another related issue ~~is about~~ concerns artificial islands. While there is no definition under the LOSC, there are attempts in the international law academia to define “artificial islands.” The *Encyclopedia of Public International Law* defines artificial island as a temporary or permanent fixed platform made by man surrounded by water and above water at high tide.<sup>33</sup>

The LOSC to some extent defines the legal status of artificial islands. Its definition on islands clearly excludes any artificial island. Article 60 provides that “Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.”<sup>34</sup> While artificial islands do not generate any maritime zones, coastal States are allowed to establish safety zones around them. But such safety zone around an artificial island should not exceed a distance of 500 meters, “measured from each point of their outer edge, except as authorized by generally accepted international standards or as recommended by the competent international organization.”<sup>35</sup>

Artificial islands constructed on natural rocks and reefs with the nature of permanence have become a new issue in international law. China (PRC) has occupied several reefs in the Spratlys since 1988 and, for the purpose of military stationing or ~~for~~ other purposes, it built artificial structures on these reefs (Johnson South/Chigua Reef, Subi/Zhubi Reef, Gaven/Nanxun Reef, Cuarteron/Huayang Reef, Hughes/Dongmen Reef, and Mischief/Meiji Reef). Some of them have been later expanded to become more like artificial islands, such as the one established on Fiery Cross/Yongshu Reef. ~~The~~ Swallow Reef (*Terumbu LayangLayang* in Malay), occupied by Malaysia, has been massively reclaimed and has a fishing port, 15-room diving resort and a 1.5 km airstrip. In this sense, ~~it is~~ the international law community has acknowledged that due to artificial installations, for many of the islands, “it has become difficult to distinguish what is the natural feature and what is man-made.”<sup>36</sup>

While ~~it is~~ safe to say that the relevant provisions of the LOSC are applicable to natural islands and artificial islands, the legal status of the hybrid category is special and difficult to define under the LOSC, and even under ~~the~~ applicable international law as a whole. If it is defined as a natural feature, it is mixed with artificial installations and structures; if it is defined as an artificial island, it is not artificially fixed to the sea bed, but rather is supported by a natural base such as a reef whether above water at high tide or not. Apparently, there is no regulation in international law governing such ~~kind of~~ natural and artificial combinations. The relevant 1958 Convention on the Continental Shelf contains provisions only concerning the construction of artificial islands on the continental shelf as it provides that the coastal State is entitled to construct and maintain or operate on the continental shelf installations and other devices necessary for its exploration and exploitation of its natural resources, but such artificial installations and devices do not possess the status of islands.<sup>37</sup>

The issue of artificial islands is related to the application of Article 121-(3) of the LOSC concerning rocks. The current situation of artificial construction in the South China Sea or elsewhere has been in fact triggered by this provision since States, in order to extend their maritime spaces, make every effort ~~in to~~ turning those “rocks” into “islands” ~~which that~~ can fulfill the conditions of sustaining human habitation or economic life of their own. The *Okinotorishima* is a typical example as mentioned above.

<sup>33</sup> Rudolf Bernhardt, *Encyclopedia of Public International Law*, Law of the Sea Volume (1989), at 38.

<sup>34</sup> Article 60 of the LOSC.

<sup>35</sup> *Ibid.*

<sup>36</sup> Robert W. Smith, “Maritime Delimitation in the South China Sea: Potentiality and Challenges”, 41 *Ocean Development and International Law* (2010), at 223.

<sup>37</sup> Article 5 of the 1958 Convention on the Continental Shelf.

The question is whether such artificial construction on the reef has changed its legal status. As expressed by China, the construction of artificial facilities on the reef “will not change its legal status.”<sup>38</sup> However, this is only China’s legal position regarding the *Okinotorishima* and it is contrary to the real intention of Japan. What Japan has done and will do is to make the reef fulfill the conditions prescribed in Article 121(3) of the LOSC so as to enable Japan to claim not only territorial sea, but also EEZ and continental shelf from that reef. Thus the ultimate purpose of Japan is to change the legal status of the reef.

Due to the opposition of China and South Korea, the Commission on the Limits of the Continental Shelf suspended its consideration of Japan’s submission concerning the part at least partially generating from *Okinotorishima* (Southern Kyushu-Palau Ridge Region) while giving its recommendations for other parts of Japan’s extended continental shelf claims.<sup>39</sup> But this setback does not inhibit Japan from unilaterally claiming EEZ as well as continental shelf (though limited to 200 nm) allegedly generating from that reef.

Recently, China’s massive reclamation activities in the South China Sea have caught the attention of the international community. Some describe the reclaimed lands as artificial islands, while others argue that the reclamation is subject to the international law of territorial acquisition and conform to one of the five types of territorial acquisition: accretion.

#### Military Activities in the EEZ

According to the LOSC, all the seas in the world shall be used peacefully, and any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations, shall be prohibited.<sup>40</sup> From this basic legal principle, military activities with threatening potentials should not be carried out in the EEZs of other countries.

As we know, there is a controversy over whether the conduct of military activities in the EEZ of another country is legitimate. Some States may invoke Article 58(1) of the LOSC to justify their military activities in other countries’ EEZs. The provision reads:

“(1) In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention”.

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Freedoms in the high seas provided in Article 87 are thus applicable to the EEZ as long as they are not contrary to other provisions of the LOSC. According to maritime powers such as the United States, the wording freedoms “such as those associated with the operation of ships, aircraft and

<sup>38</sup> See Qin Jize, Li Xiaokun and Cheng Guangjin, Japan atoll expansion “hurts neighbors”, *China Daily*, 11 February 2010, available at [http://www.chinadaily.com.cn/world/2010-02/11/content\\_9461259.htm](http://www.chinadaily.com.cn/world/2010-02/11/content_9461259.htm).

<sup>39</sup> For details, see UN Doc CLCS/74, 30 April 2012, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/326/32/PDF/N1232632.pdf?OpenElement>.

<sup>40</sup> See Art. 301 of the LOSC.

other]" implies the legality of naval maneuvers in a foreign EEZ.<sup>41</sup> One view even considers military exercises, aerial reconnaissance and all other activities of military aircraft freedoms of the high seas if due regard is paid to the rights and interests of third States.<sup>42</sup> As advocated, since the LOSC mainly provides the rights of navigation and overflight, while keeping silent on the rights of military activities, a maritime superpower must defend and enforce such rights for its security interests.<sup>43</sup>

Then the question is whether military use constitutes an internationally lawful use of the ocean. The LOSC does not mention the military use, so that it becomes a gray area which leads to different interpretations. This lack of mention is criticized as one of the major defects in the new LOSC.<sup>44</sup> On the other hand, it is argued that without an express mention in the Convention, military use is hardly regarded as one of such lawful uses. However, such this argument may not be convincing. According to a fundamental legal principle, nothing is illegal if there is no law to make it so.<sup>45</sup> Following this, military use is not prohibited since there is no such prohibition in the LOSC. Second, as the LOSC affirms that matters which are not regulated under it should be continually governed by general international law including customary law. If it is traced back to look at through history, military activities were consistently allowed under customary international law, though in the implied form. In that sense, military activities could be considered a historically lawful use of the high seas.<sup>46</sup> Third, it is admitted that there is recognized difficulty in inferring that the establishment of the EEZ has limited foreign military operations other than pure navigation and communication from the text and legislative history of Article 58 of the LOSC.<sup>47</sup>

No specific regulation on military activities in foreign EEZs under international law does not mean that they can be conducted in the EEZ at random. It should be borne in mind that the circumstances now are fundamentally different from those in the past. There was and still remains no controversy regarding the military activities conducted in the high seas which was and is open to all. The EEZ, however, is different from the high seas in that it is an area under national jurisdiction. While military activities are allowed there, the factor of national jurisdiction must be taken into account. There should be some kind of check-and-balance mechanism for foreign military activities in the EEZ. It is hard to understand the logic of the argument that while marine scientific research in the EEZ is subject to the consent of the coastal State, military activities can be conducted freely without any check by the coastal State. On the other hand, even if the military use is an internationally lawful use, it can be argued according to arguably the LOSC that it is limited to navigation and overflight, and other rights as provided in Article 87 of the Convention. This can be seen from some domestic EEZ legislations, such as Suriname's.<sup>48</sup>

<sup>41</sup> See Boleslaw Adam Boczek, "Peacetime Military Activities in the Exclusive Economic Zone of Third Countries," *Ocean Development and International Law*, Vol. 19, 1988, 450.

<sup>42</sup> Kay Hailbronner, "Freedom of the Air and the Convention on the Law of the Sea," 77 AJIL (1983), 503.

<sup>43</sup> See Charles Pirtle, "Military Uses of Ocean Space and the Law of the Sea in the New Millennium," *Ocean Development and International Law*, Vol. 31, 2000, 8-9.

<sup>44</sup> Shao Jin, "Legal Problems Concerning Military Use of Exclusive Economic Zones and Continental Shelves," *Chinese Yearbook of International Law* (in Chinese), 1985, at 183.

<sup>45</sup> For example, "*nullum crimen sine lege*" (no crime without law); and "*nullum crimen nulla poena sine lege*" (no criminal punishment without law).

<sup>46</sup> See Douglas Guilfoyle, "Maritime Security," in Jill Barrett and Richard Barnes (eds.), *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law, 2016), at 356.

<sup>47</sup> Francesco Francioni, "Peacetime Use of Force, Military Activities, and the New Law of the Sea," *Cornell International Law Journal*, Vol. 18, 1985, 216.

<sup>48</sup> As it provides, all nations, with the observance of the international law, enjoy: "... 4. Freedom to exercise internationally recognized rights in connection with navigation and communication," Art. 5 of Law concerning

In practice, coastal States, including Bangladesh, Brazil, Cape Verde, India, Malaysia, Pakistan, and Uruguay explicitly restrict unapproved military exercises or activities in or over their EEZs conducted by other countries. Iran also lays down laws restricting foreign military activities in its EEZ by stipulating that “[f]oreign military activities and practices, collection of information and any other activity inconsistent with the rights and interests of the Islamic Republic of Iran in the exclusive economic zone and the continental shelf are prohibited.”<sup>49</sup> ~~Because of t~~This legal provision ~~caused,~~ ~~there was~~ a diplomatic row between Iran and the United States. The United States lodged a protest ~~against it by~~ stating that the prohibition of military activities contravenes international law and the United States reserves its rights in this regard. In reply ~~to the United States protest~~, the Iranian diplomatic note states that due to the multiplicity of economic activities, it is possible that such activities, for which the coastal State enjoys sovereign rights, could be harmed by military practices and maneuvers; accordingly, those practices which affect the economic activities in the EEZ and the continental shelf are ~~thus~~ prohibited.<sup>50</sup> It is interesting to note that the Iranian explanation does not deny the right of foreign military activities in the EEZ and the only reason for their prohibition ~~results~~ ~~is in~~ their possible harm to economic activities there.

The regulations above are made under the rationale that military activities are inherently potential threats to ~~the~~ peace and good order of the coastal States. While such regulations are understandable, it should be borne in mind that not all military activities are threatening. Contrarily, some military activities, such as the activities undertaken by the UN peacekeeping forces, are indispensable to maintain peace and good order. In the same thinking, some civilian activities may be threatening, ~~as and this can be~~ illustrated by a severe marine pollution accident caused by a civilian activity or illegal fishing in the EEZ. In such context, what we should look into is not the form of a certain activity, but its nature. If a military activity is threatening in nature and ~~conducted~~ with clear bad intention and/or in a hostile manner, it should be banned in the EEZ. Otherwise, it can be allowed under certain conditions laid down by the coastal State, similar to the marine scientific research regime under the LOSC. There is no reason why the coastal State is prevented from regulating foreign military activities in its EEZ while it is allowed to regulate foreign marine scientific research there.

It is worth mentioning that the East-West Center recently organized several workshops on “military and intelligence gathering activities in the EEZ.” The launch of this series of workshops was triggered by the EP-3 Incident between China and the United States. The first one was held in Bali, Indonesia in June 2002, which focused on identifying disagreements and contrasting positions as

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the extension of the territorial sea and the establishment of a contiguous economic zone of 11 June 1978, in Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, *The Law of the Sea: National Legislation on the Exclusive Economic Zone* (New York: United Nations, 1993), 351. Honduras’ law contains a similar provision (Art. 2 of Decree No. 921 of 13 June 1980 on the Utilization of Marine Natural Resources). ~~See~~ See Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations (1993), *ibid.*, 129.

<sup>49</sup> Art. 16 of Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea, 1993, in Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, *The Law of the Sea: Current Developments in State Practice No. IV* (New York: United Nations, 1995), 67.

<sup>50</sup> See Protest from the United States of America, 11 January 1994; and Comments from the Islamic Republic of Iran concerning the viewpoints of the Government of the United States of America regarding the Act on Marine Areas in the Persian Gulf and the Oman Sea, in Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations (1995), *ibid.*, 147-151.

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well as on areas of possible mutual understanding and agreement.<sup>51</sup> The Honolulu Meeting in December 2003 drafted some guidelines for military and intelligence gathering activities in ~~the~~ EEZs, based on the disagreement between maritime powers and developing coastal countries.<sup>52</sup> Through these efforts, it is hoped that some consensus can be reached in the world community regarding military and intelligence gathering activities in ~~the~~ EEZs, in particular in connection to a possible review of the LOSC after its entry into force for 10 years.

### Historic Rights

There is no established definition of the term "historic rights" under international law. However, some scholars have attempted to explain it in their own ways. For example, according to Yehuda Blum, "the term 'historic rights' denotes the possession by a State, over certain land or maritime areas, of rights that would not normally accrue to it under the general rules of international law, such rights having been acquired by that State through a process of historical consolidation."<sup>53</sup> Blum further explains that "historic rights are a product of a lengthy process comprising a long series of acts, omissions and patterns of behaviors which, in their entirety, and through their cumulative effect, bring such rights into being and consolidate them into rights valid in international law."<sup>54</sup> Other scholars use the term "historic rights" to indicate "those rights which a state has acquired vis-à-vis one or more other states by effectively exercising those rights, with the acquiescence of the state or states concerned."<sup>55</sup>

Like the concept of "historic bays," the concept of historic waters is not ~~definitive-clearly defined~~ in international law either. A scholarly definition was offered by Leo Bouchez: "[h]istoric waters are waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights with the acquiescence of the community of States."<sup>56</sup> In international judiciary, the International Court of Justice (~~ICJ~~) gave a definition of "historic waters" in the *Fisheries Case*: "[b]y 'historic waters' are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title."<sup>57</sup> According to the late Daniel O'Connell, there are three circumstances which could be considered as historic waters: (1) bays, claimed by States which are greater in extent, or less in configuration, than standard bays; (2) areas of claimed waters linked to a coast by offshore features but which are not enclosed under the standard rules; and (3) areas of claimed seas which would, but for the claim, be high seas because they are not covered by any rules specially concerned with bays or delimitation of coastal waters (*maria clausa*).<sup>58</sup>

<sup>51</sup> For details, see East-West Center, *Military and Intelligence Gathering Activities in Exclusive Economic Zones: Consensus and Disagreement: A Summary of the Bali Dialogue* (East-West Center, 2002).

<sup>52</sup> See Hasjim Djalal, Alexander Yankov and Anthony Bergin, "Draft guidelines for military and intelligence gathering activities in the EEZ and their means and manner of implementation and enforcement," *Marine Policy*, Vol. 29-(2), 2005, 175-183.

<sup>53</sup> Yehuda Z. Blum, "Historic Rights," in Rudolf Bernhardt (ed.), *Encyclopaedia of Public International Law*, Instalment 7 (Amsterdam: North-Holland Publishing Co., 1984), at 120.

<sup>54</sup> Blum, *ibid.*, at 121.

<sup>55</sup> Sperduti, "Sul Regime Giuridico dei Mari", 43 *Rivista di Diritto Internazionale*, 58, 72; cited in Andrea Gioia, "Tunisia's Claims over Adjacent Seas and the Doctrine of 'Historic Rights'", *Syr. J. Int'l L. & Com.*, Vol. 11, 1984, at 328.

<sup>56</sup> Leo J. Bouchez, *The Regime of Bays in International Law*, 1964, at 281.

<sup>57</sup> *Fisheries Case* (U.K. v. Norway), 1951 I.C.J. 132 (Judgement of Dec. 18).

<sup>58</sup> Daniel Patrick O'Connell, *The International Law of the Sea* (Oxford: Clarendon Press, 1982), Vol. 1, at 417.

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Accordingly, the concept of "historic waters" is usually applicable to bays and gulfs. Once established as historic waters, the waters in question are then regarded as internal waters. There may be exceptions to this rule, i.e., some historic waters claimed by States are not bays or gulfs, but rather open seas, which could be seen from in the practice of the Kingdom of Tonga.

The United Nations International Law Commission (ILC) had discussed the concept of historic waters, and in 1962 the UN Secretariat, upon the request of the ILC, prepared the study on the juridical regime of historic waters, including historic bays. The study examined the elements of title to historic waters, the issues of burden of proof, the legal status of waters regarded as historic waters, and the settlement of disputes. However, it did not give a conclusive concept of historic waters and the standard according to which this concept could be applied.<sup>59</sup> Generally speaking, there should be three conditions to be fulfilled to sustain a historic water claim. They are (1) the exercise of the authority over the area; (2) the continuity over time of this exercise of authority; and (3) the attitude of foreign States to the claim.<sup>60</sup>

The term "historic rights" is a general framework which is directly linked to the terms "historic waters" and "historic bays". However, we have to realize that the term "historic rights" is not equivalent to "historic waters" or "historic bays", though "historic rights" may carry a broader meaning including other closely related concepts such as historic title, historic waters, and historic bays. The term "historic rights" also covers certain special rights without involving a claim of full sovereignty, such as historic fishing rights which a State might have acquired in particular areas of the high seas.<sup>61</sup> Since the term "historic rights" contains an element of non-exclusiveness, the criteria for its establishment must be more lenient than those applicable to "historic title" or "historic waters".

The UNCLOS III did not discuss the issue of "historic rights" or "historic waters".<sup>62</sup> However, a variant term of historic bay and/or historic title is mentioned in the LOSC relating to bays, delimitation of the territorial sea between States with opposite or adjacent coasts, and limitations and exceptions in the settlement of disputes. Article 10 (6) provides that "[t]he foregoing provisions [on bays] do not apply to so-called 'historic' bays".<sup>63</sup> Article 15 does not allow the median line to apply to special circumstances such as "by reason of historic title" for the delimitation of the territorial seas of the two States.<sup>64</sup> The last provision in the LOSC which mentions the historic bays or titles is Article 298 which permits the contracting States to exclude the compulsory procedure provided for in the LOSC from applying to the disputes "involving historic bays or titles".<sup>65</sup> It is obvious that the LOSC deliberately avoids the issue of "historic rights" or "historic waters" and

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<sup>59</sup> See U.N. Doc. A/CN.4/143, at 6.

<sup>60</sup> UN Doc. A/CN.4/143, *ibid.*, at 13.

<sup>61</sup> See Bouchez, *supra* note 54, at 238. (As regards claims to historic rights over parts of the sea, a distinction must be made between (1) historic rights resulting in sovereignty over a certain part of the sea, and (2) historic rights establishing special fishing rights.) See also Yehuda Blum, *Historic Titles in International Law* (The Hague: Martinus Nijhoff, 1965), 247-248. (Both categories of such rights may justly be termed "historic rights". It would appear, however, that only the first kind of historic rights relates to "historic waters" properly so-called, whereas the second deals with what may be termed "non-exclusive historic rights", in the sense that they do not imply a claim of full sovereignty.)

<sup>62</sup> During the conference, the proposal advanced in 1976 by Colombia regarding the standards of claiming historic waters was discarded. See UNCLOS III *Official Records* (1977), Vol. 5, at 202.

<sup>63</sup> Articles 10(6), 15, and 298-(1)(a)(i) of the LOSC.

<sup>64</sup> The LOSC, *ibid.*

<sup>65</sup> The LOSC, *ibid.*

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leaves it to be governed by customary international law as reaffirmed by its preamble.<sup>66</sup> ~~On the other hand~~ Conversely, the Convention bears some implications for the concept of "historic waters" in that those waters are related to the territorial seas or internal waters, since ~~the mentioning in the Convention only mentions them~~ appears in the sections of the rules for the territorial sea regime and the settlement of territorial disputes.

On 26 June 1998, China officially promulgated the Law on the Exclusive Economic Zone and the Continental Shelf in which Article 14 provides that "the provisions of this Law shall not affect the historic rights enjoyed by the People's Republic of China."<sup>67</sup> It is generally agreed that this clause is connected to China's claim to the South China Sea within the U-shaped line. The provision on historic rights can be understood in the following three interpretations: (1) it might be interpreted to mean that the sea areas which could not become China's EEZ and/or continental shelf should have the same legal status as EEZ and/or continental shelf; (2) it might be interpreted to mean that the sea areas which embody China's historic rights are beyond the 200 nm limit; and (3) it might be interpreted to mean that the sea areas which embody China's historic rights but lie within the 200 nm limit can have an alternative management regime different from the EEZ and or continental shelf regime.<sup>68</sup>

When it comes to China's historic rights in the South China Sea, it is inevitable to look at the U-shaped line. ~~The U-shaped, a line with has~~ nine segments off the Chinese coast on the South China Sea, as displayed in the Chinese map and ~~its bearing the official Chinese name is of~~ "traditional maritime boundary line" (chuantong haijiang xian).<sup>69</sup> On 1 December 1947, the Ministry of Interior renamed the islands in the South China Sea and formally allocated them into the administration of the Hainan Special Region. Meanwhile, the same ministry prepared a location map of the islands in the South China Sea. This official map remains in place up to today and there was no protest until ~~the human beings entered into the early~~ 21<sup>st</sup> century. Based on the U-shaped line, China has claimed all the geographic features and their adjacent waters to be Chinese territory, its rights to marine resources adjacent to these features, and exercise of its maritime jurisdiction. While China has never claimed that the waters within the U-shaped line are Chinese historic waters, China has enjoyed historic rights within the line in addition to the maritime entitlement under the LOSC. ~~As we know~~ discussed above, the rules governing historic rights are a special regime in international law, exceptional to general rules of the LOSC. It is illogical, and completely incorrect, to assume that the Chinese territorial and maritime rights in the South China Sea are only historic rights. In fact, the Chinese historic rights are complementary to China's general rights under international law.

The existence of historic rights is widely recognized by the members of the international community including the Philippines. The Philippines only denies the existence of China's historic rights in its EEZ. However, without the delimitation of a maritime boundary between China and the Philippines, the

<sup>66</sup> The preamble of the LOSC affirms that "matters not regulated by this Convention continue to be governed by the rules and principles of general international law."

<sup>67</sup> See *People's Daily* (in Chinese), 30 June 1998. An unofficial English version was translated and published by this author and reprinted in Zou Keyuan, *China's Marine Legal System and the Law of the Sea* (Leiden: Martinus Nijhoff, 2005), 342-45. Another variant English translation is available in *Law of the Sea Bulletin*, No. 38, 1998, 28-31.

<sup>68</sup> Zou Keyuan, "Historic Rights in International Law and in China's Practice," *Ocean Development and International Law*, Vol. 31, 2001, at 162.

<sup>69</sup> See Zou Keyuan, "The Chinese Traditional Maritime Boundary Line in the South China Sea and Its Legal Consequences for the Resolution of the Dispute over the Spratly Islands," *International Journal of Marine and Coastal Law*, Vol. 14(1), 1999, 27-55.

limit line of the latter's EEZ is not clear. The Philippines attempts to seek the limit line of its EEZ/continental shelf from the ad hoc tribunal by awarding to it the so-called maritime entitlement and negating the maritime entitlement of China in the South China Sea under LOSC, ~~much less including~~ China's historic rights under general international law. To the Philippines' great pleasure, the South China Sea arbitral tribunal fulfilled its wish by awarding it a big win ~~to it~~. However, the tribunal's interpretation of historic rights is controversial in many aspects.<sup>70</sup>

After the arbitral award, China, for the first time, made an express statement that it enjoys historic rights in the South China Sea. According to the statement,

China has territorial sovereignty and maritime rights and interests in the South China Sea, including, inter alia: i. China has sovereignty over Nansha Zhudao, consisting of Dongsha Qundao, Xisha Qundao, Zhongsha Qundao and Nansha Qundao; ii. China has internal waters, territorial sea and contiguous zone, based on Nansha Zhudao; iii. China has exclusive economic zone and continental shelf, based on Nansha Zhudao; iv. China has historic rights in the South China Sea.<sup>71</sup>

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Clearly, China does not recognize the arbitral award in respect to historic rights.

## Conclusion

The development of the law of the sea depends upon the needs of the international community and also, ~~mainly~~ primarily, on state practice. Since the adoption of the LOSC in 1982, there are many areas contributing to the development of the law of the sea. There are at least three visible sources of contributions. First is ~~the~~ state practice, which can be seen through the domestic laws and regulations of states concerned in relation to the law of the sea and ocean affairs, through bilateral agreements between states concerned in relation to maritime boundary delimitation, maritime environmental protection, fisheries management, etc., and through regional arrangements made by groups of states governing maritime security, marine environmental protection, fisheries management, and marine scientific research. ~~It is no doubt that t~~ he development of international law including the law of the sea depends upon state practice. Second is the contributions of international organizations and institutions such as the International Maritime Organization, UN Food and Agricultural Organization, and international judicial bodies including the International Court of Justice and the International Tribunal for the Law of the Sea. It is worth mentioning that ad hoc arbitral tribunals also contribute to the development of the law of the sea. Third is the contribution of the LOSC mechanism itself. Since 1994, when the Convention entered into force, there have been two associated agreements adopted under the LOSC umbrella,<sup>72</sup> and it is perceived anticipated that a new one on genetic resources is to be adopted in the near future. The institutions

<sup>70</sup> For details, see Keyuan Zou, "Historic Rights in the South China Sea Arbitration Case: A Preliminary Reflection", *Asia Pacific Journal of Ocean Law and Policy*, Vol. 1-(2), 2016, 268-272.

<sup>71</sup> Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea, 12 July 2016, available at [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1379493.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1379493.shtml).

<sup>72</sup> They are the 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, and the 1995 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

established in accordance with the LOSC, such as the International Seabed Authority and the Commission on the Limits of Continental Shelf contribute considerably to the development of the law of the sea.

Nevertheless, law is always imperfect. There are defects and shortcomings in any legal system, and the law of the sea system is no exception. Even if law is good and adequate, it ~~could~~ can be abused or misused when conditions ultra vires prevails. The controversial issues discussed above need to be further clarified and solved with the development of the law of the sea. One possible channel is through the review conference mechanism provided for by the LOSC.<sup>73</sup>

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<sup>73</sup> Article 312 of the LOSC provides that<sup>4</sup>

After the expiry of a period of 10 years from the date of entry into force of this Convention, a State Party may, by written communication addressed to the Secretary-General of the United Nations, propose specific amendments to this Convention, other than those relating to activities in the Area, and request the convening of a conference to consider such proposed amendments. The Secretary-General shall circulate such communication to all States Parties. If, within 12 months from the date of the circulation of the communication, not less than one half of the States Parties reply favourably to the request, the Secretary-General shall convene the conference.<sup>5</sup>

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