TOWARDS AN INTERNATIONAL LEGAL DUTY OF OCEAN COOPERATION?

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INTRODUCTION

This paper explores the rules of international law, as well as relevant state practice, pertaining to maritime cooperation. Its scope therefore includes formal and informal arrangements whereby states have decided to blur, or establish some alternative to, the usual rules pertaining to exclusive jurisdiction at sea. This can be done for a number of purposes: the joint exploration and exploitation of agreed areas for oil and gas activities, the cooperative development of individual oil or gas fields, joint fishing zones, or other areas within which a variety of activities by the authorities and/or nationals of the states concerned are envisaged. There are other types of arrangement, usually informal, whereby countries have agreed, de facto, to respect historically established boundaries for certain jurisdictional purposes, without prejudice to a final formal agreement. The emphasis in all cases is the same: not allowing differences concerning the extent of maritime jurisdiction to get in the way of exploration, exploitation, monitoring, enforcement: in short, the ensemble of rights and obligations that coastal states enjoy and are required to observe in the oceans.

It might be as well to say at the outset that this writer acknowledges that joint development of the petroleum resources of an area is not the same thing as the cooperative development of an individual field. But that difference is immaterial here: this paper seeks to draw legal conclusions from different manifestations of state behaviour – where two or more sovereign entities agree to cooperate.

It will be clear from the above that the impetus for such arrangements is almost entirely practical and functional. Having said this, it is true that states can and do establish legal relations almost on a pro forma basis—for the sake of establishing relations. This of course has its place in the establishment of a desirable degree of neighbourliness, be this on a bilateral, sub regional, or regional basis. But this is particularly required where there has been a history

of tension between the actors concerned, or when a new entity has emerged, as was the case with Timor Leste in Southeast Asia.

The motive for entering into a legal agreement does not affect the validity of the measure, but this paper is less concerned with what I call pro forma treaties. Rather, its focus is on the contribution that cooperation arrangements which have a practical and functional purpose make to the development of international law in general, and in the specific context of the jurisdictional impasse in the South China Sea.

INTERNATIONAL COOPERATION AND INTERNATIONAL LAW

The concept of the sovereign equality of states lies at the heart of modern international law.[1] International lawyers, at least in western countries, agree that the concept derives from two treaties signed in 1648 that ended the Thirty Years' War, which are known collectively as the "Peace of Westphalia". These treaties laid down, for the first time, the unshakable rule that states were sovereign within their own boundaries, and had the unimpeachable right to organize themselves (with respect to form of government, religion, etc.) in any way they chose, and without reference to any other country. As a corollary to this, no other country had a right to interfere with these decisions which, in the context of 1648, meant that one state could not use its disapproval of the "official" religion of another as a pretext for invasion, no matter how great the degree of divine justification or sanction it was claiming. From this we derive also the notion embedded in Article 2(7) of the Charter of the United Nations: no state has the right to interfere with matters which are essentially within the domestic jurisdiction of another.[2]

So far so good, but, arguably, the notion of precisely what Article 2(7) means in 2009, more than 60 years after the charter was drafted, is a matter for interpretation. At one end of the spectrum sit those countries which believe in undiluted sovereignty in virtually each and every circumstance. No matter what a state does within its boundaries, and no matter what the effects are on others (with particular reference to its neighbours), this exercise of rights is unimpeachable. At the other end of the spectrum are those who claim that, in a mutually

[1] Cf. Article 2(1) of the Charter of the United Nations: The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles…(1) The Organization is based on the principle of the sovereign equality of all its Members. See also the elaboration in Article 1 of the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, Resolution 2625 (XXV), October 24, 1970.

[2] The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles…(7) Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll.

interdependent world, and given the technological capacity of states to inflict serious and indeed permanent damage on others, e.g. resulting from certain environmental decisions such as the diversion of rivers and the like, states are entitled to speak out where they regard their vital interests as being, or potentially being, under attack. For countries which regard themselves as part of the Western tradition of law, some variation of this second option would come naturally. For common law countries, the applicable rule is summarized thus: no one can use their rights in a way that impacts materially on the rights of others. Civil law jurisdictions have a broadly similar principle, which one might claim to be one of the "general principles of law recognized by civilized nations" for the purposes of Article 38(1)(d) of the Statute of the International Court of Justice.[1] If this view is correct, then the "absolute sovereignty" view cannot be sustained, or at least as literally as some countries maintain. In addition to any legal arguments that might be made, it may also be said that this view of state power derives from an essentially simplified view of international relations, one that would certainly appeal to nearly independent states keen to forge international ties for themselves and, where necessary, repudiate arrangements made on their behalf by colonial powers.

In addition, it is necessary to remember that the international legal landscape in 1945 bears little resemblance to that pertaining today. The extraordinary and intricate network of legal relationships that have built up in areas such as trade, banking and other aspects of the international financial system, human rights, the environment, the oceans, policing, anti-terrorism—this architecture evolved relatively quickly in the not too recent past. The specialized agencies of the United Nations had a lot to do with this. But the essential point here is that many of these agreements, most of which take the form of "law-making treaties", dealt with areas for once considered to be the exclusive prerogative of domestic law. In other words, the members of the international community have decided to evolve an increasing number of international standards with the express intention of harmonizing domestic legal norms in these areas. This creates a mutuality of rights and obligations with respect to these agreements undertaking, which means that the "matters within the domestic jurisdiction" argument does not apply. When a country ratifies a treaty, it gives every other state party the right to observe and comment on the means it chooses to discharge its obligations to implement. Conversely, of course, that country has a similar right vis-à-vis other parties. Put this way, the modern international legal system seems designed to promote states keeping the activities of others under review.

Again, not all countries would agree with this view put as simply as it appears here. And it is important to stress that other countries have a right of being seen to interfere in the affairs of others only when a violation of an international norm is apprehended or has taken

[1] Available at: http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0

place. So long as countries remain true to the letter and spirit of their obligations, it is entirely their business as regards the means chosen to do so.[1]

In this writer's view, the international community has, over the past six decades, if not before, elected to develop an extensive network of international obligations which, at least for those states that participate therein, and nearly every state does, reduce the category of matters which are "essentially within the domestic jurisdiction of a state" not to extinction, but quite considerably. One of the effects of this is to shift the emphasis in the development of jurisdictional matters from unilateralism, to the point where, at very least, the views of other countries become important. This, in turn, leads to a new spectrum: at one end, countries that will admit that the "views" of other countries should be "considered" when a decision is being taken, and those that admit that other countries, such as neighbouring states, have rights with respect to the discharge of some of the functions of the state. One of the candidate topics for consideration and placement in this spectrum is the whole notion of international cooperation.

In the introduction, it was suggested that the most useful definition of international cooperation has to do with practicality and functionality. To expand on this, the thesis would be that, where a given activity either cannot be undertaken by one state acting alone, or where the concerted activities of states are either essential or merely preferable, issues of obligation might arise. Put broadly, the argument being advanced here is that some matters that fall within the jurisdiction of states cannot by their very nature be addressed successfully by unilateral action. The only alternative of this is some sort of harmonized action, brought about by mutual agreement.

International cooperation has a long history, though it took some time for the elusive element of legal obligation to be discernable. Indeed, the world's oldest surviving treaty, dating from the second millennium BCE, is what we would term a mutual assistance and defence pact, whereby the parties agreed that an attack on one was an attack on both, and assistance would be forthcoming accordingly. Cooperation in the broader sense was to be found elsewhere in the ancient world, for example, between countries which had adopted Islam.

[1] There is a vigorous debate in scholarly circles arising from the fact that states take radically different views of what constitutes "implementation" of a provision, and this results from marked differences in the legal traditions and legal cultures of states. While a discussion of these matters is not relevant here, it should be noted that while the implementation of some provisions is relatively straightforward, and the room for interpretive maneuver nil, or virtually so, other matters are fraught with greater difficulty. Take, for instance, the difference of opinion worldwide as to what does, or does not constitute a "law".

In the more modern sense, the end of the Napoleonic Wars in 1815 marks as good a beginning as any. That year saw the meeting of the Congress of Vienna, where the leading European statesmen of the day met in order to determine how to deal with the conclusion of a war which had had unparalleled impact on the continent. This meeting in turn gave rise to an institutional form of security cooperation, the "Concert of Europe". Under this system, the representatives of the leading powers would meet in an attempt to resolve, and if necessary, impose solutions on, matters thought to threaten continental security. The concert system came to an abrupt end with the Franco-Prussian War of 1870/1, and was not revived as such.

The 19th century did however see the inauguration of a well-established institutional phenomenon, the international organization. The first two were admittedly regional and sectoral, being concerned with rights over the Rhine and Danube Rivers. That being said, they offer us an excellent example of practical and functional cooperation: countries recognizing that not only was concerted action required to maintain the international navigability of these two rivers, but in order for this to be assured, a discrete body, a commission, had to be created to discharge these obligations on behalf of the riparians.

The First World War offered many opportunities for cooperation of different kinds, but for present purposes, the most telling was the Allied Maritime Shipping Council, a body that oversaw the coordination of the merchant navies of the countries opposed to Germany and its allies. The principle responsibility of this commission was to ensure the continuous movement of food, personnel, and ammunitions from North America to Europe. This, in effect, required the creation of a body that treated the merchant fleets of the allies as one force, and disposed them accordingly.[1]

There is no mention of international cooperation as such in the covenant of the League of Nations, the body intended to serve as a forum, inter alia, for international concerns over peace and security, established by the Treaty of Versailles, 1919. By contrast, the promotion of international cooperation is declared to be one of the "objectives" of its successor body, the United Nations.

The charter provisions on cooperation are somewhat brief, but the same might be said for other important elements of the proposed new world order that some thought it was

[1] This effort was highly successful. One of those primarily responsible for it was the young French businessman Jean Monnet, who was to use this experience, and that of early World-War II cooperation between France and Britain, in his designs for European unification, an effort that was to bear fruit in the Schuman Plan of 1950, which led to the establishment of the European Coal and Steel Community in 1951, and in 1957 with the creation of the European Economic Community and the European Atomic Energy Community, all collectively known today as the European Union.

ushering in. There was a clear need for the principles underlying the charter to be amplified, and this process eventually bore fruit in the 1970 Declaration of Friendly Relations between States.[1] This has a chapter devoted to the subject of international cooperation. It reads as follows:

> **The duty of States to co-operate with one another in accordance with the Charter**
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> States have the duty to co-operate with one another, irrespective of die differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.
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> To this end:
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> (a) States shall co-operate with other States in the maintenance of international peace and security;
> (b) States shall co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forma of racial discrimination and all forma of religious intolerance;
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> (c) States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention;
>
> (d) States Members of the United Nations have the duty to take joint and separate action in co-operation with the United Nations in accordance with the relevant provisions of the Charter.
>
> States should co-operate in the economic, social and cultural fields as well as in the field of science and technology and for the promotion of international cultural and educational progress. States should co-operate in the promotion of economic growth throughout the world, especially that of the developing countries.

The declaration is precisely that—a declaration. It does not, in and of itself, have the force of law, and nor was it intended to do so. However, a document adopted by the general assembly and described as an elaboration of "principles of international law" cannot be said to be without significance. Accordingly, to measure the full impact of the declaration, it is necessary to undertake an analysis of cooperative agreements since its promulgation with a view to determining whether the states concerned can be said to have entered into the arrangement in question out of a sense of legal obligation, as opposed to functional necessity which suites their convenience.

International law – Treaty and custom

[1] *Declaration on Principles of International Law concerning Friendly Relations and accordance with the Charter of the United Nations*, Resolution 2625 (XXV), October 24, 1970.

At this point, a brief discussion of the nature of customary international law might assist those who do not have legal training. International law derives from two sources, treaties, and custom. A treaty, sometimes known as convention, charter, covenant, agreement, is defined as an agreement concluded between two or more states in writing and intended to create legal relations between them. The law on treaties, which includes provisions on conclusion, entry into force, interpretation, reservations, amendment, termination, having codified and developed by the Vienna Convention on the Law of Treaties, 1969.[1]

Insofar as there is a hierarchy of sources of international law, treaties appear to sit at the top of it. The reasons for this are not too difficult to see: a treaty is a most specific obligation, and because it is in writing, its liniments should be reasonably clear, particularly where the subject matter is complex. The essence of a treaty, of course, is the fact that it is an obligation undertaken voluntarily. Indeed, the Vienna Convention provides that agreements apparently entered into under force or duress are of no effect.

The second source of international law, and one which was of the greatest importance until the second half of the last century, is customary international law. While the definition of a treaty presents few problems, customary international law is another matter altogether. Put simply, this is law derived from custom, meaning, a constant uniform practice accepted as law. All elements of this definition are important. Consistency and uniformity alone will not create a rule of law. It may tell you that there is a generally accepted practice in a given area, but not necessarily that it is followed because the country concerned feels that it is under an obligation to do so. One of the leading textbooks on public international law gives the example of foreign naval vessels exchanging salutes when they meet on the high seas. This is of a custom or usage, but it is not one supported by law. In other words, a ship from State A which fails to salute a ship from State B is not involving its country in a dereliction of an international legal obligation. It might appear discourteous, or even insulting, but it is not a violation of a rule of law.

International lawyers call this legal element the opinio juris. This is a more elusive concept. In this paper, attention will be drawn to a number of international arrangements. Some of them can appear to conform with obligations in the Law of the Sea Convention, but

[1] Vienna Convention on the Law of Treaties, Vienna, May 23, 1969, in force January 27, 1980. This is neither the time nor the place to explore this point more fully, but international lawyers are continually cautioning colleagues trained in other disciplines to be aware of the fact that there are, perhaps unknown to them, rules on matters such as treaty interpretation, and the appropriate significance to attach to the fact that a matter is dealt with, or conversely ignored, by an international agreement. The freedom of manoeuvre as regards interpretation, in particular, is rather more constrained than many appear to think.

are they intended to be perceived in this way? Are they examples of the discharge of an obligation, or merely an arrangement that two or more states wish to implement because it was convenient or advantageous for they do so? Similarly, as regards customary law, it can be argued that where two or more states have an interest in an oil and gas field that straddles a maritime boundary, good oilfield practice suggests that they should not undertake exploitation unilaterally, but rather cooperate according to established principles of the petroleum industry. Many coastal states have included provisions which are triggered by the discovery of such fields. For them, the option of seeking some form of cooperative development does not exist. But what if a maritime boundary exists, but no such provision calling for discussions or negotiations on a mutually agreeable means of proceeding exists? Were the states concerned to enter into an agreement which instituted some form of cooperative development and, in some way or other, indicated that they were doing so because they believed unilateral exploitation of the field to be unlawful, then it could be said that they were recognizing the existence of not merely a custom, but a rule of customary law. Unfortunately, the states do not always clarify the rationale behind their acts to enable commentators to draw conclusions from them.

To conclude on the point of cooperation as a general rule of international law, it is suggested that the international community, in general, has become habituated to working with neighbours bilaterally, sub-regionally,

Zones of Cooperation in the Oceans

Maritime zones of cooperation have proliferated considerably since France and Spain led the way in 1975. What used to be called "joint development" arrangements, meaning agreements for the joint development of the petroleum resources of a disputed area, have been supplemented by others where the focus is either elsewhere, e.g. fisheries, or multi-purpose. Perhaps the important common element is the decision to set aside, or at least vary, the "exclusive jurisdiction" rule which lies at the heart of both the regimes of the Exclusive Economic Zone and the continental shelf – though, as will be seen, maritime cooperation is perfectly feasible where rigorous insistence on the enforcement of the boundary lies at the heart of the arrangement. There are an infinite variety of ways in which this can be done, and it might perhaps be said that more detailed categorisation is pointless until further agreements emerge. The common element of cooperation, no matter what form this takes, is sufficient for present purposes.

Much, but not all, of the current law of the sea is to be found in the United Nations Convention on the Law of the Sea of 1982.[1] Articles 74(3) (delimitation of the EEZ) and 83(3) (delimitation of the continental shelf) provide as follows:

Pending agreement as provided for in paragraph 1, 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.

The spirit and intention of these provisions is clear: differences regarding the course of a maritime boundary should not impede ocean development and management. Some states have crafted ways to surmount jurisdictional differences, but it might be too much to say that agreements entered into since 1982 have been in pursuance of a legal duty pursuant to the Convention. Regimes which provide for forms of maritime cooperation (with respect to petroleum exploration and production, unless otherwise noted) have been concluded between:

- France and Spain in the Bay of Biscay[2];
- Japan and South Korea in the East China Sea[3];
- Saudi Arabia and Sudan in the Red Sea (submarine minerals)[4];
- Iceland and Norway in the North Atlantic between the Norwegian island of Jan Mayen and Iceland;
- Malaysia and Thailand (with the partial participation of Viet Nam) in the Gulf of Thailand[5];

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[1] *United Nations Convention on the Law of the Sea*, Montego Bay, December 10, 1982, in force November 16, 1994, in UNTS vol 1833 p.3, also available at http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.

[2] *Convention between the Government of the French Republic and of the Spanish State on the delimitation of the continental shelves of the two states in the Bay of Biscay*, Paris, January 29, 1974, in force December 12, 1975, Limits in the Seas No. 83.

[3] *Agreement between Japan and the Republic of Korea Concerning the Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries*, Seoul, February 5, 1974.

[4] *Agreement between Sudan and Saudi Arabia Relating to the Joint Exploitation of the Natural resources of the Sea-bed and Sub-soil of the red Sea in the Common Zone*, Khartoum, May 16, 1974, ratified and in force August 26, 1974 (ST/LEG/SER.B/18, p.452).

[5] *Memorandum of Understanding between the Kingdom of Thailand and Malaysia on the Establishment of the Joint Authority for the Exportation of the Resources of the Sea-Bed in a Defined Area of the Continental Shelf of*

- Australia and Papua New Guinea in the Torres Strait (aboriginal fishers)[1];
- Malaysia and Viet Nam in the Gulf of Thailand[2];
- Australia and Timor Leste in the Timor Sea[3];
- Jamaica and Venezuela in the Caribbean (multi-purpose, emphasis on fisheries)[4];
- Joint fisheries management zone between Trinidad and Tobago and Venezuela;
- Guinea and Guinea Bissau;
- Argentina and the United Kingdom in ocean areas around the Islas Malvinas/Falkland Islands (another multi-purpose arrangement, possibly terminated by Argentina)[5];
- China and Viet Nam in the Beibu Gulf (fisheries)[6];

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the Two Countries in the Gulf of Thailand, Chiang Mai, February 21, 1979, and *Agreement between the Government of the Kingdom of Thailand and the Government of Malaysia on the Constitution and Other Matters relating to the Establishment of the Malaysia- Thailand Joint Authority*, Kuala Lumpur, May 30, 1990.

[1] *Agreement between the Commonwealth of Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as the Torres Strait, and Related Matters*, Sydney, December 18, 1978.

[2] *Memorandum of Understanding between Malaysia and the Socialist Republic of Viet Nam for the Exploration and Exploitation of Petroleum in a Defined Area of the Continental Shelf involving the Two Countries*, Kuala Lumpur, June 5, 1992.

[3] See http://www.austlii.edu.au/au/other/dfat/special/etimor/index.html, which includes unitisation agreements for fields straddling the boundary of the joint development area. For a comprehensive overview see Schofield, *Blurring the lines: maritime joint development and the cooperative management of ocean resources*, Issues in Legal Scholarship, 8 (1) (2009).

[4] *Maritime Delimitation Treaty Between Jamaica And The Republic Of Colombia,* Kingston, November 12 1993, in force March 14, 1994 in UNTS, 26 United Nations Law of the Sea Bulletin 50 (1194); Limits in the Seas No. 125 *Jamaica's Maritime Claims and Boundaries.*

[5] *UK-Argentina Joint Declaration on Co-operation over Offshore Activities in the South West Atlantic* (see the International Journal of Marine and Coastal Law, Vol.11, No.1, Kluwer International, 1996).

[6] The conclusion of a boundary agreement led to one on fisheries: *Agreement on the Delimitation of the Territorial Seas, Exclusive Economic Zones and Continental Shelves in the Beibu Gulf between the People's Republic of China and the Socialist Republic of Vietnam*, Beijing, December 25, 2000, in force June 30, 2004; the Fishery Agreement Fishery Agreement was signed in June 2004, and ratified on 30 June 2004. See Zou Keyuan, The Sino-Vietnamese Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin, *Ocean Development & International Law,* 36:13–24, 2005. The author's translation of the boundary agreement is appended to the paper. See also the same author's "Sino-Vietnamese Fishery Agreement for the Gulf of Tonkin," 17 *International Journal of Marine and Coastal Law*, 2002: 127–148.

- Nigeria and Sao Tomé and Principe (not restricted to oil and gas); and

- Agreements to "unitize" oil and/or gas field straddling an agreed continental shelf or maritime boundary (of which there are several in the North Sea area).

These agreements vary widely as regards nature, scope, and purpose, governance, area of operation, and what one might term seriousness of purpose. Arguably, none of this matters: an agreement establishing a comparatively loose form of cooperation is no more or less legally binding than one setting forth a detailed regime. The important point to note is that the states concerned have agreed on a jurisdictional variation, one that is an exercise of sovereign rights, but which also appears to respect such rights on the part of another state with respect to an area, or a natural resource deposit.

It may perhaps be appropriate for me to note that, based on the near universality of provisions in boundary treaties which commit states to seek a consensual form of proceeding with a cross-boundary oil and gas field[1], there is a rule of customary international law that prohibits the unilateral development of such fields. The 1982 Convention says nothing on this subject at all: a major omission, perhaps. Furthermore, the states concerned are under a duty to seek for a an equitable means of exploiting divided oilfields: North Sea practice has shown that this can be done in a way that respects the correlative rights of interest holders, compromises no-one, and results in the optimum development of the resource. It is hard to see how such a result can be impeached.[2] Without a high level of cooperation not just between states but, and perhaps more importantly, their licensees, optimum production from the field might be impossible. It might not be possible to argue that the adoption of unitisation itself is a duty, but it has the virtue of practicality, and is well known within the oil industry.[3]

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[1] E.g. Article 4 of the *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway Relating to the Delimitation of the Continental Shelf Between the Two Countries* (1965) (551 U.N.T.S., 213; 1965 U.K.T.S.; Cmnd. 2757, in force June 29, 1965): "If any single geological structure or petroleum field, or any single geological structure or field of any other mineral deposit, including sand or gravel, extends across the dividing line and the part of such structure or field which is situated on one side of the dividing line is exploitable, wholly or in part, from the other side of the dividing line, the Contracting Parties shall, in consultation with the licensees, if any, seek to reach agreement as to the manner in which the structure or field shall be most effectively exploited and the manner in which the proceeds deriving therefrom shall be apportioned". The 2000 Beibu Gulf boundary agreement between China and Viet Nam (supra, note 18) includes a simplified but effective version of this provision.

[2] The first such field brought to production was developed pursuant to the provisions of the *Agreement between the Government of the United Kingdom of Northern Ireland and the Government of the Kingdom of Norway Relating to the Exploitation of the Frigg Field Reservoir and the Transmission of Gas Therefrom to the United Kingdom,* London, May 10, 1976. This Treaty was concluded pursuant to Article 4 of the 1965 continental shelf boundary agreement referred to in the previous note.

[3] Unitisation requires that the field be treated as a single unit: the usual practice is for one company to act as "operator" on behalf of all the others, regardless of nationality, and wells are drilled according to the best

MARITIME BOUNDARIES - NOT THE FINEST HOUR FOR INTERNATIONAL LAW?

It can of course be argued that "provisional measures" that result in zones of cooperation (as opposed to divided oil and gas fields) would not be necessary if states could conclude the necessary boundary agreements. International law and practice has, arguably, developed reasonably clear rules and criteria which would facilitate this. But they are not, perhaps, clear enough, and some of the blame of this must be laid at the door of international courts and tribunals.[1] In the North Sea Continental Shelf Cases, the International Court of Justice appeared to suggest that the "natural prolongation of the seabed" might be an important factor in boundary delimitation. Shortly afterwards, Indonesia appeared to agree, allowing the Timor Trough to mark the seaward extent of its continental shelf opposite Australia – to the marked advantage of the latter.[2] The United States position on the maritime boundary with Canada in the Gulf of Maine was based on this notion: the Court rejected it in favour of a modified equidistance line.[3]

Ideas and concepts come and go, but those which are unhelpful should be sent to the grave sooner rather than later, and in unambiguous terms. The years preceding the First United Nations Conference on the Law of the Sea of 1958 saw some discussion of the desirability of preserving the "unity of the deposit" – avoiding the division of oil or gas fields. This may have played a role in the Bahrain – Saudi Arabia continental shelf boundary treaty of February 1958.[4] But the notion is totally impracticable. Ascertaining the extent of a deposit takes time

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judgment of engineers. The costs and proceeds are divided in accordance with the proportion of the field located within the jurisdiction of each state (or interest holder) as divided by the boundary, before production started. For a survey of how this was done as regards the first offshore field to be unitisated internationally, with an account of the crucial role played by the licenses of Norway and the United Kingdom, see my paper "The Frigg Gas Field - Exploitation of an International Cross-Boundary Petroleum Field", 1979 *Marine Policy*, p. 302.

[1] The 2009 judgment of the ICJ in Romania v Ukraine is, unfortunately, another somewhat unhelpful contribution to the jurisprudence, in that the applicable principles on which the Court relied are far from obvious.

[2] See, for example, the Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries, Canberra, May 18, 1971, in force November 8, 1973 (ST/LEG/SER.B/18, p.433; Limits in the Seas, No. 87); the Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas Supplementary to the Agreement of May 18, 1971, Jakarta, October 9, 1972, in force November 8, 1973 (ST/LEG.SER.B/18, p.441); and the Agreement between the Commonwealth of Australia and the Republic of Indonesia Concerning Certain Boundaries between Papua New Guinea and Indonesia, Canberra, January 28, 1973, in force November 8, 1973 (ST/LEG/SER.8/18, p. 444; Limits in the Seas, No. 87).

[3] *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada v. United States of America), 1984 I.C.J. Reports 246, also available at cij/icj.org.

[4] *Agreement Concerning Delimitation of the Continental Shelf between the Kingdom of Saudi Arabia and the Government of Bahrain*, Riyadh, signed and ratified February 22, 1958, provides not only for a continental shelf

and a great deal of money – and then what? On what criteria would a field be allocated to one state or another? In any event, the technique of unitisation, developed by the oil industry in the producing jurisdictions of the United States in the early 1900s provides for the optimum development of a divided field, while preserving the rights of all interest holders – a fact that international lawyers of the 1950s did not seem to be aware of. This concept has definitely disappeared in general state practice.

My own view is that there is more certainty on the leading criteria governing lawful claims to maritime jurisdiction than some appear to believe. Arguably, efforts to forge a greater degree on consensus on this would promote international maritime boundary conclusion. This requires greater rigour on the part of states, and international courts and tribunals.

The Elements of Maritime Cooperation

Ocean cooperation has many virtues, including that of confidence building. While this result is admirable, and possibly essential in many cases, it sometimes tends to obscure the fact that there are harder, more functional reasons, for two or more states to work together. This is recognised in the Law of the Sea Convention, especially as regards the littoral states of an enclosed or semi-enclosed sea. It is surely relevant to state that this writer is of the opinion that the South China Sea/Gulf of Thailand qualifies as semi-enclosed for the purposes of the Convention. The applicable rules are found in Part IX:

ENCLOSED OR SEMI-ENCLOSED SEAS

Article 122

Definition

For the purposes of this Convention, "enclosed or semi-enclosed sea" means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.

Article 123

Cooperation of States bordering enclosed or semi-enclosed seas

States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:

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boundary, but also the sharing of net revenues from a disputed oilfield, worked by Saudi Arabia on behalf of both governments.

(a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;

(b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;

(c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;

(d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.

Enclosed and semi-enclosed seas are singled out in this way because they are likely to comprise one or more large marine ecosystems.[1] Ideally, the approach to management should be holistic and coordinated in other for the states concerned to discharge the responsibilities to areas subject to their jurisdiction, including making provision for the sustainable development of living resources, protection of habitat, and the preservation and protection of the marine environment. It should not be forgotten that obligations flow from other international instruments, such as the Convention on Biological Diversity, 1992.

The ecosystem management approach seems to challenge the rights states enjoy over marine areas subject to their jurisdiction, but the legal systems of the world accept that rights and obligations go hand in hand. It simply cannot be argued that exercises of sovereignty or sovereign rights are unlimited: the basic rules of state responsibility suggest otherwise. And, if experience in marine areas such as the Baltic, Mediterranean, Caribbean, and Black Seas is any guide, the approach passes the all important test: it works, it produces results. Some subjects – air traffic control is a very obvious one – simply require by their nature a cooperative approach.

In the South China Sea, attention tends to focus on the possibility of oil and gas resources. But there are many, many other issues, some of major concern today, with no element of the hypothetical present. The risk to the major source of protein for hundreds of millions of people, habitat destruction, the lacking of monitoring and enforcement as regards fisheries and marine pollution: the list is a long one. And it has to be addressed. The thesis presented here is that the semi-enclosed sea regime presents the littorals with a framework within which they can act. International practice furnishes many example of cooperative structure which have achieved a great deal in a comparatively short time-frame. It is a matter of

[1] There is a large scientific literature on marine ecosystems and their management: this writer, no scientist, found the following to be helpful: Sherman, *The Large Marine Ecosystem Concept: Research and Management Strategy for Living Marine Resources,* Ecological Applications, Vol. 1 No.4 (November, 1991), pp.350-360; and Gumbine, *What is Ecosystem Management?* Conservation Biology, Vol.8 No.1, March 1994, pp.27-38.

establishing priorities: this presents challenges, but that alone cannot really excuse a failure to attempt to surmount the difficulties.[1]

CONCLUSIONS: INTERNATIONAL COOPERATION – OPTION OR OBLIGATION?

I begin my concluding thoughts by remarking this I have sought to place maritime cooperation within the broader context of inter-state obligations. International law dealing with cooperation does not divide neatly into one set of rules applicable to the oceans, and another set relating to everything else. Rather, the sub-set of norms evolved by states in their maritime dealings both draws upon and contributes to the broader theme.

International law is not neutral: it both presumes and requires good faith on the part of states in their dealings with each other. To my mind, this would require abstention from the making of exaggerated claims to rights or jurisdiction, and an acceptance of the applicable norms and concepts which have been developed through state practice and agreements. Those states which have ratified the 1982 Convention should be required to live up to the letter and spirit of the obligations they accepted freely. Much is at stake in the South China Sea. The ecosystem is fragile, and vulnerable. The food security of hundreds of millions of people is dependent upon it. If the littoral states cannot or will not to the necessary measures, unilaterally and collectively, then that ecosystem will fail. The human consequences are incalculable, to say nothing to the betrayal of the inheritance of future generations.

These arguments should and must be set against those who insists that the only matters for serious discussion are sovereignty over islands and maritime jurisdiction. Important as they are, they must not obscure other items on the sub-regional agenda. International law and practice offers several ways forward: it is for the governments concerned to display the political will to fulfill their obligations with the enthusiasm that they claim their rights.

[1] Many of the problems, challenges, and opporunities in the South China Sea have been identified in the course of meetings held as part of the project Managing Potential Conflicts in the South China Sea. See Djalal and Townsend-Gault, "Managing Potential Conflicts in the South China Sea: Informal *Mediation in a Complex World*, Washington, D.C., United States Institute of Peace Press, 1999 pp. 107-134, Diplomacy for Conflict Prevention", in Crocker, Hampson and Aall, eds., *Herding Cats: Multiparty Mediation in a Complex World*, Washington, D.C., United States Institute of Peace Press, 1999 pp. 107-134. *;* Clive Schofield and Ian Townsend-Gault, "Brokering Cooperation Amidst Competing Maritime Claims: Preventative Diplomacy in the Gulf of Thailand and South China Sea", in Chircop et al., eds, *The Future of Ocean Regime-Building: Essays in Tribute to Douglas M. Johnston*, Leiden, Martinus Nijhoff Publishers, 2009, pp. 643-671; and Ian Townsend-Gault, "The Contribution of the South China Sea Workshops – the importance of a functional approach", in Bateman and Emmers, eds., *Security and International Politics in the South China Sea: Towards a cooperative management regime*, London and New York, Routledge, 2009, pp.189-206.