

The Principle of the Domination of the Land over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenges

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Abstract: For long, customary law has held firm control over maritime issues of international importance, but the advent of UNCLOS III raises the question as to the extent to which customary law can keep a reserved domain. It is proposed to examine two narrow issues revolving around the principle that ‘the land dominates the sea’ (Principle of Domination). The basic submission is that this principle is a general principle of international law, developed by way of customary law and judicial decisions. As part of customary law, it always parallels the system established under the UNCLOS, and interplays with the latter in, among others, mixed disputes, namely, disputes that involve the interpretation or application of a mix of substantive rules of the law of the sea and other branches of public international law. The conclusion is that, within the law of the sea, the Principle of Domination means not a complete transposition of coastal sovereignty to the adjacent areas of sea. Its impact is thus much weakened by another general principle of the law of the sea, namely, the freedom of the high seas. But the existence of the principle in customary law can restrict the scope of applicability of the UNCLOS, and consequently, the jurisdiction of such tribunals as referred to in Article 287 UNCLOS. This article suggests, however, that mixed disputes may still be decided by those tribunals in a certain way.

Keywords: Principle of Domination; innocent passage; continental shelf, sovereign rights, mixed disputes, Huangyan Island (Scarborough Shoal), Article 298 (1)(a)(i) UNCLOS, Article 293 UNCLOS

I. Introduction

The law of the sea, as a staple branch of public international law, has been in the ascendance during the past two decades and, given its intensive use in today’s world, will continue to hog headlines around the world for the foreseeable future. Suffice it

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to say that, with perhaps the exception of the heyday of the Third United Nations Conference on the Law of the Sea (UNCLOS III), there has never been a better moment in the history of the modern law of the sea for international lawyers to ply their trade in this field. That is said with the history of the discipline in mind since, for long, it had been an area where customary international law had held firm control over all maritime issues. The advent of UNCLOS III raises the question as to the extent to which customary law can keep a reserved domain for itself, and the degree to which customary law and the product of the conference in the form of the United Nations Convention on the Law of the Sea (UNCLOS)¹ interplay in cases where some aspects of the disputes in question are not regulated by the Convention.

As *Morgenthau* once observed, “the main bulk of the concepts and principles of international law has been derived from municipal civil law,” and those concepts and principles are embedded in extraordinarily stable interests of a municipal legal system in which they flourish and mature.² He then identified “the classical field of traditional international law” that had developed since the 16th century, “originating in the permanent interests of states,” among which there were the “wide fields of maritime law.”³ Stability has been the prominent characteristic of the modern law of the sea in peacetime until, not without some irony, UNCLOS III produced the “Constitution for the Oceans” in 1982.⁴ The initial phase following the entry into force of the Convention has been smooth. But, with the increasing awareness among States parties to the UNCLOS of the usefulness of various regimes laid down in the Convention, the dawn of the 21st century has been awakened to a flurry of submissions by the States parties to claim the portion of the continental shelf that extends beyond 200 nautical miles (nm) measured from the baselines for the territorial sea.⁵ The receding of the Arctic ice due to an increasingly warm atmosphere

¹ United Nations Convention on the Law of the Sea, 10 December 1982, UNTS 1833, 3 (UNCLOS).

² *Hans J. Morgenthau*, Positivism, Functionalism, and International Law, *American Journal of International Law (AJIL)* 34 (1940), 260, 278–279.

³ *Ibid.*, 279.

⁴ *Tommy T. B. Koh*, A Constitution for the Oceans, in: United Nations (ed.), *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index* (1983), xxxiii. See also UN Office of Legal Affairs (OLA), *United Nations Convention on the Law of the Sea at Thirty: Reflections* (2013).

⁵ Commission on the Limits of the Continental Shelf, Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, 12

has opened up new prospects for seafarers in the once-forbidden zone for navigation.⁶ In parallel, claims to maritime entitlements have stirred emotions in areas of sea previously tranquil and calm, such as those contained in the Philippine notification for arbitration under Annex VII UNCLOS with regard to the South China Sea and transmitted to China as its intended adversary in January 2013.⁷ Then, in May 2013, the lawlessness of illegal, unregulated, and unreported fishing activities, having festered for some time, prompted the Sub-Regional Fishery Commission in West Africa to seek an advisory opinion from the International Tribunal for the Law of the Sea (ITLOS), bringing into focus the extent of the power of this specialised tribunal of international law.⁸ There are other developments in this field with States seeking solutions from under the constitutional order of the UNCLOS. Reference is made to the threat to, and destruction of, marine bio-systems and to the fledgling business of the exploitation of resources in the Area.⁹ The challenges faced by the law of the sea, and especially the rules of the UNCLOS, are palpable, multiplying, incisive, and urgent.

It is against this multi-faceted new reality that this article is developed by looking retrospectively at the journey that the modern law of the sea has covered and the

April 2002, CLCS/32, paras. 5 and 10 (the Russian Federation was the first State party to present its submission to the commission on 20 December 2001). Also see *Galo Carrera*, The Commission on the Limits of the Continental Shelf, in: UN OLA (note 4), 5. Mr *Galo Carrera*, in his capacity as the Chairperson of the Commission, estimated that, eventually, the number of submissions on the limits of the continental shelf would approach 120(!).

⁶ Arctic Council, Arctic Marine Shipping Assessment 2009 Report, available at: http://pame.is/images/03_Projects/AMSA/AMSA_2009_report/AMSA_2009_Report_2nd_print.pdf (accessed on 2 February 2015). See also *Bing Bing Jia*, The Northwest Passage: An Artificial Waterway Subject to a Bilateral Treaty Regime?, *Ocean Development and International Law (ODIL)* 44 (2013), 123.

⁷ *Note Verbale* No. 13-0211 from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, 22 January 2013, available at: https://www.dfa.gov.ph/index.php/component/docman/doc_download/56-notification-and-statement-of-claim-on-west-philippine-sea?Itemid=546 (accessed on 29 January 2015). See also *Stefan Talmon/Bing Bing Jia*, The South China Sea Arbitration: A Chinese Perspective (2014).

⁸ ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, available at: <http://www.itlos.org/index.php?id=252&L=1AND1%253D1> (accessed on 29 January 2015).

⁹ *E.g. Helmut Tuerk*, Austria, in: UN OLA (note 4), 20; and *Kari Hakapää*, Finland, in: UN OLA (note 4), 37; *Allotey Odunton*, The International Seabed Authority, in: UN OLA (note 4), 3 (in his capacity as Secretary-General of the Authority, he mentioned a total of seventeen contracts in the Area, concluded by the end of 2013).

responses this body of law has conjured up in meeting the needs of States to constantly achieve an equilibrium of conflicting and evolving national interests in the oceans. It may be observed that, to its credit, the law has been remarkably adaptable and resilient in testing times of international affairs. Such adaptability and resilience will only enhance its perceived objectivity and authority and encourage its acceptance by all members of the international society. One day perhaps, the UNCLOS will emulate the example of the Charter of the United Nations (UN Charter)¹⁰ to attain a genuine constitutional status in this world.

Due to limited space, it is not proposed to deal with even the most salient points of controversy, past and present, in the law of the sea but to examine two narrow issues revolving around the principle that ‘the land dominates the sea’ (Principle of Domination).¹¹ The basic submission of this article is that this principle is a general principle of law, developed by way of customary law and judicial decisions. It can be paraphrased as the domination of the territorial status and regime of the coast over the legal status and regime of the adjacent sea, including, where appropriate, the subjacent sea-bed and subsoil. While underpinning the law of the sea from the very beginning, it has taken on renewed importance after the UNCLOS entered into force in 1994. As part of customary law, it always parallels the system established under the Convention and interplays with the latter in, among others, mixed disputes, namely disputes that involve the interpretation or application of a mix of substantive rules of the law of the sea and other branches of public international law. The parallel is implicitly acknowledged in the preamble of the UNCLOS with reference to matters unregulated by the Convention and its Article 76 (1). Needless to say, the full implications of this interplay between a general principle of the law of the sea and a treaty can only be known after they clash in a concrete dispute.¹²

¹⁰ Charter of the United Nations, 26 June 1945, UNCIO 15, 335.

¹¹ Cf. some of the references in *Barbara Kwiatkowska*, *Decisions of the World Court Relevant to the UN Convention on the Law of the Sea: A Reference Guide* (2002), 2–3.

¹² There was an interesting argument by Ambassador *Pardo* of Malta in his monumental speech in 1967 that “the vastest land masses” could be dominated from the sea, which could in turn be dominated from the sea floor, if technology were to be invested to allow physical occupation and military use of large areas of the seabed beyond the continental shelf, UN GAOR, 22nd Session, First Committee, 1515th Meeting, 1 November 1967, UN Doc. A/C.1/PV.1515 (1967), para. 47. The speech spanned two sessions of the First Committee during the day.

This article will highlight the way in which the law of the sea reacts to changes in State practice as engendered by the advancement of the knowledge and technology of humankind. The distinct and yet entirely reasonable Principle of Domination was given the judicial imprimatur in 1969 by none other than the International Court of Justice (ICJ) on the cusp of the commencement of the monumental UNCLOS III. From hindsight, while it is natural for the Court to proclaim this principle on the basis of its own experience, that principle may not be helpful in widening the jurisdiction of tribunals as defined in Part XV Section 2 UNCLOS. The dominance of the land over the adjacent sea-belt begs practical questions to which State practice has yet to respond definitively. As has been said above, only two questions will be explored here. One is the true effect of the Principle in the adjacent sea area. The other is the fascinating relationship between the Principle and the UNCLOS's system of compulsory jurisdiction.

This article is divided into five sections. First, the Principle of Domination has made a much earlier manifestation in connection with the fundamental question of the law of the sea: the extent of the territorial sea. The determination of the extent has been accompanied by the establishment of other zones of control and function. However, the nature of the territorial sea is obviously different from that of the other zones. Is it because the dominance of the land over the sea is lessened in proportion to the distance of areas of sea from the coast?

Secondly, the principle is considered as settled in the jurisprudence of the ICJ. But what has the Court said of it and in which context?

Thirdly, the true value of the principle becomes clear in its application to, among others, the notion of the continental shelf. Full sovereignty does not apply to the seabed beyond the 12 nm limit for the territorial sea. In other words, coastal sovereignty, full-fledged over the land territory up to the 12 nm limit, has been reduced to a few sovereign rights.

Fourthly, it appears that the efficacy of an important part of the law of the sea, namely the part regarding the entitlement to, and delimitation of, maritime zones, relies to a considerable extent upon another branch of international law, *i.e.* the one relating to the acquisition of territorial sovereignty (over the land concerned). If so, does the threshold of the applicability of the law of the sea, including the UNCLOS, stop at the point where the land meets the sea, with the consequence that the

jurisdiction of relevant tribunals over such maritime disputes as those covered by, or related to, the UNCLOS would be confined to the seaward side of that point? This may be a situation undesirable as seen from one angle but inevitable from another since, within the law of the sea, there is little room for rules of territorial acquisition, except for specific provisions on the territorial sea and archipelagic waters.

Lastly, a word of conclusion will be given. Although the preceding points for discussion appear to be selective, they cling to a common thread in, and indeed the perennial cause for, the development of the law of the sea, that the law rests always upon a balance between the freedom of the seas on the one hand and national interests in the control of the seas, including subjacent sea-bed and subsoil, on the other (*i.e.* the Principle of Domination).

II. The Principle and the Genesis of the Modern Law of the Sea

The modern law of the sea for peacetime had not taken on a codified form until the 1958 Geneva Conventions¹³ were adopted.¹⁴ The prominent feature of the pre-1958 era was the general acceptance of the rule that the coastal State could claim control over a continuous belt of sea that ran along its coastline, whether or not the coastline was lined with batteries of artillery. Indeed, even in the time of *Grotius*, it was recognised that a portion of the great seas of the world could be acquired “as belonging to a territory” “in so far as those who sail in that part of the sea can be compelled from the shore as if they were on land.”¹⁵ It was a nod to claims to a *dominium maris*. While relevant rules of customary law could not be pinpointed as to their formative moment, as they moved from the cannon-shot rule and the one-league rule to a three nm limit between the 16th and 18th centuries,¹⁶ the existence of the

¹³ Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, UNTS 516, 205; Convention on the High Seas, 29 April 1958, UNTS 450, 11; Convention on Fishing and Conservation of the Living Resources of the High Seas, 29 April 1958, UNTS 559, 285; Convention on the Continental Shelf, 29 April 1958, UNTS 499, 311.

¹⁴ *Robin Churchill/Vaughan Lowe*, *The Law of the Sea* (3rd ed. 1999), 13–15.

¹⁵ *Hugo Grotius*, *De Jure Belli ac Pacis* (1625), lib. II, cap. III, s. xiii, 2, cited in: *Phillip C. Jessup*, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), 5.

¹⁶ *H. Kent*, *The Historical Origins of the Three-Mile Limit*, *AJIL* 48 (1954), 537, 548–550, 552; *Daniel O’Connell*, *The International Law of the Sea*, vol. I (ed. by Ivan Shearer 1982), 124–151.

basic principles of the freedom of the high seas and of protection within waters adjacent to the coast had already been recognised by the time the *North Atlantic Coast Fisheries Arbitration* between Great Britain and the United States was concluded in 1910.¹⁷ The Arbitral Tribunal stated that:

The old rule of the cannon-shot, crystallized into the present three marine miles measured from low water mark, may be modified at a later period inasmuch as certain nations claim wider jurisdiction [...]. There is an obvious reason for that. The marginal strip of territorial waters based originally on the cannon-shot, was founded on the necessity of the riparian State to protect itself from outward attack, by providing something in the nature of an insulating zone, which very reasonably should be extended with the accrued possibility of offense due to the wider range of modern ordnance.¹⁸

The statement was reflective of the Principle of Domination. The widening capability for offence by warships or coastal batteries, however, has never ceased growing in subsequent times. Partly because of that, there had never been a generally accepted width for the territorial sea between 1910 and 1982. In addition, it may be recalled that the Arbitral Tribunal in *Grisbadarna* referred to the fundamental principles of the law of nations, “*tant ancien que moderne*,” according to which “*le territoire maritime est un dépendance nécessaire d’un territoire terrestre*.”¹⁹

When the 1958 Convention on the Territorial Sea and the Contiguous Zone was adopted, the negotiating States could not settle on a width for the territorial sea one way or another. Article 1 of the Convention only recognised that the sovereignty of the coastal State extended beyond its land territory and internal waters “to a belt of sea adjacent to its coast, described as the territorial sea.” That sovereignty, in addition, extended to the air space above the territorial sea as well as its bed and subsoil.

The anxiety over coastal sovereignty and jurisdiction creeping beyond three nm from the baselines had soon reached a climax in 1967 when the international

¹⁷ See the US representative *Root’s* arguments in the arbitration, quoted in *Jessup* (note 15), 5. *North Atlantic Coast Fisheries Case* (Great Britain, United States), Arbitral Award of 7 September 1910, Reports of International Arbitral Awards (RIAA) XI, 167, 205.

¹⁸ *North Atlantic Coast Fisheries Case* (note 17), 205.

¹⁹ *Grisbadarna Case* (Norway, Sweden), Arbitral Award of 23 October 1909, RIAA XI, 155, 159.

community was aroused into action by the prospect that the deep sea and the ocean bottoms might be grabbed and held by States for strategic and military purposes.²⁰

One of the main achievements of UNCLOS III is a maximum limit for the territorial sea, as laid down in Article 3 UNCLOS. The article provides that “[e]very State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.” The legal status of this belt of sea has also inherited the version as contained in the 1958 Convention. The customary status of this width has clearly been established.²¹ Although the so-called ‘territorialist’ States remain as a group, insisting on a wider territorial sea up to 200 nm,²² there is no denying the powerful pull of the UNCLOS in harmonising State practice in this regard.²³

It may be observed that even in the territorial sea, the domination of the coastal State is limited in comparison with its absolute sovereignty over the land hemmed in by its coast. Reference is made to, among others, the regime of innocent passage in this belt of sea. There is a customary right of innocent passage available to foreign shipping, as recognised in Article 17 UNCLOS. The article provides: “Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.” Thus, in an area of sea over which the

²⁰ *H. Shirley Amerasinghe*, The Third United Nations Conference on the Law of the Sea, in: Myron Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. I (1985), 1, 3–4. See also *Shigeru Oda*, *New Trends in the Regime of the Seas: A Consideration of the Problems of Conservation and Sharing of Marine Resources*, in: *id.* (ed.), *Fifty Years of the Law of the Sea* (2003), 45, 47–80.

²¹ See UN OLA, *Table of Claims to Maritime Jurisdiction*, available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf (accessed on 17 January 2015). While the table is unofficial, and updated as of 15 July 2011, some 136 States, including non-parties to the UNCLOS (e.g. the US), adopted the 12 nm limit for the territorial sea. See also ICJ, *Territorial and Maritime Dispute* (Nicaragua v. Colombia), Judgment of 19 November 2012, ICJ Reports 2012, 624, para. 177.

²² *Cf. Janusz Symonides*, Poland, in: UN OLA (note 4), 90; Myron Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993), 75, 79.

²³ Many supporters of the 200 nm territorial sea have given up on that notion in favour of the territorial sea limit established by the UNCLOS: *Francisco Orrego Vicuña*, *Trends and Issues in the Law of the Sea as Applied in Latin America*, ODIL 26 (1995), 93, 94 (as of the time of publication of that paper, 15 of 22 Latin American States had adopted the 12 nm limit, including five that had rolled back their previous claims to the 200 nm limits. The five States were Argentina, Brazil, Nicaragua, Panama, and Uruguay. The current group of supporters for the 200 nm limit includes Benin, Ecuador, El Salvador, Peru, and Somalia: *cf.* UN OLA (note 21).

coastal State has sovereignty in accordance with international law, the sovereignty is not absolute by reason of the limits set by the same body of law. The declaratory nature of Article 17 UNCLOS is unmistakable from its wording. This fact may place the Principle of Domination in perspective inasmuch as its practical effect is concerned.

Without dwelling on this piece of well-known history,²⁴ attention is switched to the exposition of the principle by the ICJ since 1969. It is to be seen below that the Principle of Domination has a decreasing effect upon legal regimes of the sea when the distance from the coast increases.

III. The Principle in the ICJ Jurisprudence

It seems that the first time this principle made an appearance before the ICJ was in the *Anglo-Norwegian Fisheries* case, decided in 1951.²⁵ During the proceedings, the British Reply stated that:

It is the configuration of the land, whether a continuous line of land or consisting of broken island fringes, that may bring areas of sea within the territory of a State. In law, it is the tendency of the land or lands to enclose the sea that gives relevance to the geographical facts.²⁶

Counsel for the UK, the late *Sir Humphrey Waldock*, argued during the oral proceedings that:

[I]t is in the law of coastal waters alone that the applicable principles must be found. We say that, under general international law, the principle is that maritime territory is accessory to the land [...]. It follows – we contend – from that principle that the maritime belt in principle extends from the limit of the land which the law defines as the low-tide mark along the coast.²⁷

²⁴ Nandan/Rosenne (note 23), 75–82.

²⁵ ICJ, *Fisheries Case* (United Kingdom v. Norway), Judgment of 18 December 1951, ICJ Reports 1951, 116.

²⁶ *Id.*, *Fisheries Case* (United Kingdom v. Norway), UK's Reply of 28 November 1950, Pleadings, Oral Arguments, Documents, vol. II, 291, 660, para. 488; see also para. 492.

²⁷ *Id.*, *Fisheries Case* (United Kingdom v. Norway), Reply by Professor *Waldock* of 18 October 1951, Pleadings, Oral Arguments, Documents, vol. IV, 394, 397–398. See also *Humphrey Waldock*, *The Anglo-Norwegian Fisheries Case*, *British Yearbook of International Law* (BYIL) 28 (1951), 114, 148.

In reference to “the close dependence of the territorial sea upon the land domain,” the ICJ stated in its judgment that “it is the land which confers upon the coastal State a right to the waters off its coasts.”²⁸ That statement seemingly harked back to what was stated in the *Grisbadarna* arbitral award, as quoted above.

In *Minquiers and Ecrehos*, the French government contrasted its own position based on this principle and the opposing view of the British government it portrayed as based on *Selden’s* doctrine of *mare clausum*.²⁹

In the celebrated *North Sea Continental Shelf Cases* in 1969, the ICJ stated, in a more comprehensive way, that:

The doctrine of the continental shelf is a recent instance of encroachment on maritime expanses which, during the greater part of history, appertained to no-one. The contiguous zone and the continental shelf are in this respect concepts of the same kind. In both instances the principle is applied that the land dominates the sea; it is consequently necessary to examine closely the geographical configuration of the coastlines of the countries whose continental shelves are to be delimited. This is one of the reasons why the Court does not consider that markedly pronounced configurations can be ignored; for, since the land is the legal source of the power which a State may exercise over territorial extensions to seaward, it must first be clearly established what features do in fact constitute such extensions. Above all is this the case when what is involved is no longer areas of sea, such as the contiguous zone, but stretches of submerged land; for the legal régime of the continental shelf is that of a soil and a subsoil, two words evocative of the land and not of the sea.³⁰

This statement was made in the course of the Court’s deliberation of which factors might be considered by the parties to the cases in search for a solution to the dispute of delimitation pending between them. In its words, “it is a truism to say that the determination must be equitable; rather is the problem above all one of defining the means whereby the delimitation can be carried out in such a way as to be recognized as equitable.”³¹ For that purpose, the Court went on to state that:

²⁸ ICJ, *Fisheries Case* (note 26), 133.

²⁹ *Id.*, *The Minquiers and Ecrehos Case* (United Kingdom/France), Pleading of Professor Gros of 28 September 1953, Pleadings, Oral Arguments, Documents, vol. II, 190, 200 (“*La revendication du Gouvernement de la République est au contraire fondée sur la prédominance de la terre sur la mer*”).

³⁰ *Id.*, *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, ICJ Reports 1969, 3, para. 96. See also *Pardo* (note 12), para. 57.

³¹ ICJ, *North Sea Continental Shelf Cases* (note 30), para. 92.

[T]here is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.³²

Among the three factors considered by the Court in light of the preceding statement was the Principle of Domination. By the judgment, the principle in question already had an enlarged scope in respect of the possession or control by the coastal State of adjacent areas of sea and the attendant sea-bed and subsoil.³³

Before moving further, it may be added that the principle was first mentioned in the case by the Netherlands in its Counter-Memorial, submitted to the Court on 20 February 1968.³⁴ The relevant part of the submission reads as follows:

[T]he Federal Republic's alleged principle of the "just and equitable share" and [...] its proposed "sectoral division" of part of the North Sea [...] are in total conflict with the established principles and rules of international law governing the delimitation of maritime areas. Thus, they misconceive the very nature and the operation of these principles and rules, which are based upon the doctrine "*la terre domine la mer*" and not vice versa. The rules of international law in this sphere take the coast as their starting point, and not the – in any case imaginary – middle of the sea.³⁵

It may be further added that this doctrine was also mentioned by Professor *Riphagen* of the Netherlands in his rejoinder during oral proceedings on 7 November 1968.³⁶

³² *Ibid.*, para. 93.

³³ *Ibid.*, Dissenting Opinion of Vice-President *Korotkiy*, 155, 159 ("Although Bracton might have considered the sea coast '*quasi maris accessoria*,' which was historically understandable, not only the territorial sea but also the continental shelf may now be considered as 'accessories' of or, in the words of the Judgment in the *Fisheries* case, as 'appurtenant to the land territory'").

³⁴ *Id.*, *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Counter-Memorial submitted by the Government of the Kingdom of the Netherlands of 20 February 1968, available at: www.icj-cij.org/docket/files/52/9339.pdf (accessed on 27 February 2014).

³⁵ *Ibid.*, para. 166.

³⁶ *Id.*, *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Rejoinder of Professor *Riphagen* of 7 November 1968, 212, 222, available at: www.icj-cij.org/docket/files/52/9359.pdf (accessed on 15 March 2014) ("the accepted concept that *la terre domine la mer* rather than the other way round").

The Court would repeat this principle in subsequent cases of maritime delimitation. In 1978, the Court held that:

[I]t is solely by virtue of the coastal State's sovereignty over the land that rights of exploration and exploitation in the continental shelf can attach to it, *ipso jure*, under international law. In short, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State. It follows that the territorial régime – the territorial status – of a coastal State comprises, *ipso jure*, the rights of exploration and exploitation over the continental shelf to which it is entitled under international law.³⁷

There was no ambiguity in the statement, and the rights pertaining to the continental shelf were derivative of the sovereignty of the coastal State over the coast. The principle was invoked for the purpose of establishing the link between the notion of the continental shelf and the territorial status of Greece and would have allowed the Court to assume jurisdiction over this dispute but for the reliance placed by Turkey, on the basis of reciprocity, upon the Greek reservation (b) to the 1928 General Act for Pacific Settlement of International Disputes.³⁸

In 1982, the ICJ stated that “the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it.”³⁹ But the word ‘title’ may be conducive to some mild confusion,⁴⁰ unless it is understood merely as the causal or foundational fact or act to enjoy specific rights over submarine areas adjacent to the coast. In other words, it has no resemblance to a full complement of sovereign rights that come with the control of a land territory by a State.

In 2002, the Court gave the principle a broader scope of application by stating that:

In previous cases the Court has made clear that maritime rights derive from the coastal State's sovereignty over the land, a principle which can be summarized as “the land dominates the sea” [...]. It is thus the terrestrial territorial situation that must be taken as starting point for the determination of the maritime rights of a coastal State. In accordance with Article 121, paragraph 2, of the 1982 Convention on the Law of the Sea, which

³⁷ *Id.*, *Aegean Sea Continental Shelf* (Greece v. Turkey), Jurisdiction, Judgment of 19 December 1978, ICJ Reports 1978, 3, para. 86.

³⁸ *Ibid.*, para. 90.

³⁹ *Id.*, *Continental Shelf* (Tunisia/Libyan Arab Jamahiriya), Judgment of 24 February 1982, ICJ Reports 1982, 61, para. 73.

⁴⁰ *Ian Brownlie*, *Principles of Public International Law* (7th ed. 2008), 119.

reflects customary international law, islands, regardless of their size, in this respect enjoy the same status, and therefore generate the same maritime rights, as other land territory.⁴¹

This is not the end of the story, though. In 2009, in yet another maritime delimitation case, the Court reiterated this principle in the following statement: “The title of a State to the continental shelf and to the exclusive economic zone is based on the principle that the land dominates the sea through the projection of the coasts or the coastal fronts.”⁴²

In the light of the preceding pronouncements, it is reasonable to assume that the Court has not considered the principle as only applicable to the adjacent seabed off the coast but to all maritime zones generated from the coast. It must be considered a settled principle of law following this line of authorities. Additionally, the consistency of the Court’s view is beyond doubt that the territorial sovereignty of the coastal State must be the starting point for determining the maritime rights to which the State is entitled under international law, whether the rights appertain to the continental shelf or else. This point is significant for the second issue to be discussed below.

States, and especially those involved in maritime disputes, tend to accept this principle in guiding their action. In the run-up to the Philippine Notification of 22 January 2013 to initiate arbitration with China under Annex VII UNCLOS, the two governments had outlined their respective positions with reference to the principle. In the *note verbale* of 5 April 2011,⁴³ the Philippine government declared that:

[T]he Philippines, under the Roman notion of *dominium maris* and the international law principle of “*la terre domine la mer*” which states that the land dominates the sea, necessarily exercises sovereignty and jurisdiction over the waters around or adjacent to each relevant geological feature in the KIG as provided for under the United Nations Convention on the Law of the Sea (UNCLOS).

⁴¹ ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), Merits, Judgment of 16 March 2001, ICJ Reports 2001, 40, para. 185.

⁴² *Id.*, *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), Judgment of 3 February 2009, ICJ Reports 2009, 61, para. 77.

⁴³ The Philippines’ *Note Verbale* No. 000228, 5 April 2011, available at: http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/phl_re_chn_2011.pdf (accessed on 17 January 2015).

On 14 April 2011, the Chinese government responded in a *note verbale*,⁴⁴ that:

Since [the] 1970s, the Republic of Philippines started to invade and occupy some islands and reefs of China's Nansha Islands and made relevant territorial claims, to which China objects strongly. The Republic of Philippines' occupation of some islands and reefs of China's Nansha Islands as well as other related acts constitutes infringement upon China's territorial sovereignty. Under the legal doctrine of "*ex injuria jus non oritur*," the Republic of Philippines can in no way invoke such illegal occupation to support its territorial claims. Furthermore, under the legal principle of "*la terre domine la mer*," coastal states' Exclusive Economic Zone (EEZ) and Continental Shelf Claims shall not infringe upon the territorial sovereignty of other states.

One point deserves attention of this statement. Any claim by the Philippines to maritime zones in the South China Sea cannot rely on its occupation of the islands or insular features therein without running foul of the rule of *jus cogens* of non-use of force to effect changes of territorial status.⁴⁵ That unlawfulness will undermine any claim based on the Principle of Domination.

However, the application of the Principle of Domination is not without questions, some of which may not have been fully anticipated when the UNCLOS was adopted in 1982.

IV. The Principle's Influence on the Notion of the Continental Shelf

The notion of the continental shelf does not reflect a dominant relationship between the land and its adjacent sea-belt, together with the subjacent seabed and subsoil. The current regime of the continental shelf seemingly operates independently of the principle. Due to Article 76 UNCLOS and several cases of maritime delimitation decided before the ICJ, the practice in this area has developed to effectively sidestep the Principle of Domination, by ridding itself of the element of

⁴⁴ Chinese Note Verbale CML/ 8/2011, 14 April 2011, available at: http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf (accessed on 17 January 2015).

⁴⁵ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV) of 24 October 1970: "The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal".

natural prolongation, especially where the shelf lies within 200 nm from the baselines for measuring the territorial sea. It may be observed that, even at the beginning of the regime, there was a generally accepted reduction in number of sovereign rights of the coastal State in the shelf. The land concerned under the principle extends seawards and merges with the seabed far and away. But the sovereign rights over the appurtenant seabed and subsoil are much fewer than those over the land. The figurative characteristic of the principle does not give a full account of the difference between its content and the reality in which it is thought to be operating. Moreover, it has no effect upon the water column above the shelf.

As to the relevance of the Principle of Domination to the notion of natural prolongation, reference is made to what the Court stated in the *Aegean Sea Continental Shelf* case:

The question for decision is whether the present dispute is one “relating to the territorial status of Greece”, not whether the rights in dispute are legally to be considered as “territorial” rights; and a dispute regarding entitlement to and delimitation of areas of continental shelf tends by its very nature to be one relating to territorial status. The reason is that legally a coastal State’s rights over the continental shelf are both appurtenant to and directly derived from the State’s sovereignty over the territory abutting on that continental shelf. This emerges clearly from the emphasis placed by the Court in the North Sea Continental Shelf cases on “natural prolongation” of the land as a criterion for determining the extent of a coastal State’s entitlement to continental shelf as against other States abutting on the same continental shelf [...]. As the Court explained in the above-mentioned cases, the continental shelf is a legal concept in which “the principle is applied that the land dominates the sea”.⁴⁶

The statement just quoted shows that the Court was careful as to the nature of the rights involved in a continental shelf dispute. But importantly, it placed renewed emphasis on the criterion of natural prolongation which, in its view, reflected the Principle of Domination. So much for the emphasis. Later decisions of the Court, however, have chiselled away at the role of the criterion. It is suspected that the principle underpinning it may become peripheral in the course of this development. The preceding concern will be tested by brief reference to practice.

⁴⁶ ICJ, *Aegean Sea Continental Shelf* (note 37), para. 86.

The emergence of the notion of the continental shelf has a recent past.⁴⁷ The Truman Proclamation of 28 September 1945 stated that:⁴⁸

[T]he Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.

In the preamble of the proclamation, it was stated that “the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it,” and that “these resources frequently form a seaward extension of a pool or deposit lying within the territory.”⁴⁹ All this laid the foundation on which the International Law Commission prepared the draft treaties for the 1958 Geneva Conference on the Law of the Sea (UNCLOS I).

The rights provided for under the 1958 Convention on the Continental Shelf were clearly linked to the exploration and exploitation of the natural resources in the continental shelf. It may be recalled that that linkage did not contradict but in fact fall within the purview of the reference in the Truman Proclamation of 1945 to “control and jurisdiction.” One reading of the reference was that it was no more than another expression of a claim to sovereignty by the US over the adjacent, submarine areas.⁵⁰ In other words, the expression “sovereign rights” in the 1958 Convention could have signified sovereignty.⁵¹ That sovereignty, however, would be subject to the restrictions imposed by the Convention in that it was confined to the exploitation of the resources in the shelf and that it could not affect the legal status of the water

⁴⁷ The appellation of ‘continental shelf’ was first used by a geographer in 1898: see *Petroleum Dev (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi*, Award of 28 August 1951, reprinted in: *International and Comparative Law Quarterly (ICLQ)* 1 (1952), 247, per Umpire Lord Asquith, quoted in: *Marjorie Whiteman*, *Digest of International Law* 4 (1965), 747.

⁴⁸ Proclamation No. 2667, Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea-Bed of the Continental Shelf, XIII Dept. of State Bulletin, No. 327, 30 September 1945, 485.

⁴⁹ *Ibid.*

⁵⁰ *Hersch Lauterpacht*, *Sovereignty over Submarine Areas*, *BYIL* 27 (1950), 381, 390.

⁵¹ It may be recalled that, in his dissenting opinion in the *North Sea Continental Shelf Cases* in 1969, Judge *Tanaka* still stated that “the continental shelf belongs exclusively to the coastal State according to the principle fixed by law which gives the definition of the continental shelf,” *ICJ, North Sea Continental Shelf Cases* (note 30), 180. Indeed, this concern with the nature of the expansion of coastal State powers over the seabed and subsoil was the cause for Malta to take the lead, in 1967, in advocating the establishment of “some form of international jurisdiction and control over the sea-bed and the ocean floor underlying the seas beyond the limits of present national jurisdiction,” *Pardo* (note 12), para. 6.

column above the seabed, nor the airspace above the water.⁵² That regime in the 1958 Convention might not have fully reflected State practice outside the UNCLOS I, which largely laid claim to sovereignty over the continental shelf, rather than some rights that would fall short of it or only appertain to some activities on the shelf.⁵³ In the light of those circumstances, it would be even more understandable that a limit to the continental shelf be set precisely and quickly because, unchecked, national exercise of jurisdiction and control over the shelf could eventually intrude upon the international seabed area that would later become the ‘common heritage of mankind’ under Article 136 UNCLOS.⁵⁴

The efforts by States before and in 1958 in forging the notion of the continental shelf had subsequently inspired the ICJ to state one of the important principles of the regime. In its 1969 judgment in the *North Sea Continental Shelf Cases*, the ICJ, in regard to “the most fundamental of all the rules of law relating to” the continental shelf, held that:⁵⁵

[T]he rights the coastal State has in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso jure* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources.

Later, in paragraph 96 of the judgment, the Court mentioned the Principle of Domination.⁵⁶ In another part of the judgment, the Court also held that:

What confers the *ipso jure* title which international law attributes to the coastal States in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion, – in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea.⁵⁷

⁵² Art. 3 Convention on the Continental Shelf.

⁵³ *Lauterpacht* (note 50), 390–391. Malta saw as much of this trend in State practice: *Pardo* (note 12), paras. 68–70, 90 (“Current international law encourages the appropriation of this vast area by those who have the technical competence to exploit it”, and by “this vast area” it was meant to signify “the seabed and the ocean floor” that occupied nearly 75% of the land area of the earth).

⁵⁴ ICJ, *Continental Shelf* (note 39), Dissenting Opinion of Judge *Jimenez de Arechaga*, 61, 123.

⁵⁵ *Id.*, *North Sea Continental Shelf Cases* (note 30), para. 19.

⁵⁶ See *supra*, III.

⁵⁷ ICJ, *North Sea Continental Shelf Cases* (note 30), para. 43.

No explanation was given as to why the extended part of the land territory lost the full complement of sovereign rights. In any case, reliance may be placed upon the 1958 Convention itself for the curtailment of those rights. The Convention, it must be added, reflected post-1945 State practice which, triggered by the Truman Proclamation, had quickly coalesced into customary law.⁵⁸

Throughout its sessions, UNCLOS III had witnessed a rather uniform support among negotiating States for the notion of natural prolongation.⁵⁹ The UNCLOS duly includes it in the juridical definition of the continental shelf. Article 76 (1) UNCLOS states:

The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

There is, therefore, every reason to believe that the Principle of Domination remains alive in the constitutional order of the UNCLOS. But there has been a parallel development outside the UNCLOS that may derail this principle. Symptomatic of this development is the ICJ's judgment in the 1985 *Libya/Malta* case.⁶⁰ During the proceedings, Libya maintained that, under Article 76 UNCLOS, only the reference to natural prolongation represented customary law, whereas Malta argued that the Article consecrated the distance principle.⁶¹ The Court stated that:⁶²

This is not to suggest that the idea of natural prolongation is now superceded by that of distance. What it does mean is that where the continental margin does not extend as far as 200 miles from the shore, natural prolongation, which in spite of its physical origins has throughout its history become more and more a complex and juridical concept, is in part

⁵⁸ *Pardo* (note 12), para. 59 (Ambassador *Pardo* noted the general acquiescence of the then international community to the US position).

⁵⁹ UNCLOS III, Working Paper, UN Doc. A/CONF.62/L.4 (1974), Art. 19, para. 2 (Canada, Chile, Iceland, India, Indonesia, Mauritius, Mexico, New Zealand, and Norway); US proposal of 1975, in: Nordquist/Nandan/Rosenne (note 20), 848; the Evensen Group's proposal of 1975, *ibid.*, 849; the proposal by the Arab Group (1978), *ibid.*, 859; UNCLOS III, Informal Single Negotiating Text, UN Doc. A/CONF.62/WP.8/Part II (1975), Art. 62; UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), Art. 76.

⁶⁰ ICJ, *Continental Shelf* (Libya/Malta), Judgment of 3 June 1985, ICJ Reports 1985, 13.

⁶¹ *Ibid.*, para. 34.

⁶² *Ibid.*

defined by distance from the shore, irrespective of the physical nature of the intervening sea-bed and subsoil. The concepts of natural prolongation and distance are therefore not opposed but complementary; and both remain essential elements in the juridical concept of the continental shelf.

The impact of the Court's finding has been such that there has since been the tendency of ignoring all other considerations within the 200 nm limit in the great majority of post-1985 cases involving the delimitation of the continental shelf.⁶³ It has led one writer to saying that the 1985 case "marked a significant turning point," as "[n]atural prolongation in a physical sense, for all practical purposes, was dead."⁶⁴

It may be asked whether the Principle of Domination retains vitality after this. It is submitted that it does, regardless. As the Court has since declared, Article 76 (1) UNCLOS reflects customary law:⁶⁵

The Court notes that Colombia is not a State party to UNCLOS and that, therefore, the law applicable in the case is customary international law. The Court considers that the definition of the continental shelf set out in Article 76, paragraph 1, of UNCLOS forms part of customary international law. At this stage, in view of the fact that the Court's task is limited to the examination of whether it is in a position to carry out a continental shelf delimitation as requested by Nicaragua, it does not need to decide whether other provisions of Article 76 of UNCLOS form part of customary international law.

There is therefore no difficulty to treat the element of natural prolongation in this provision as part of customary law, too. It follows that the element will retain a separate being in future practice. As it reflects the Principle of Domination, the latter has become entrenched and reaffirmed in the UNCLOS accordingly.

However, the recognition of the principle in the UNCLOS is not wholesale, and in any case, there is no question of a subsumption of the principle into the Convention. What will be considered next is the case in which the principle, from its existence outside the Convention, produces a restrictive effect upon the jurisdiction of those tribunals referred to in Article 287 UNCLOS over disputes concerning the interpretation or application of the Convention.

⁶³ *Jonathan Charney*, International Maritime Boundaries for the Continental Shelf: The Relevance of Natural Prolongation, in: Nisuke Ando *et al.* (eds.), *Liber Amicorum Judge Shigeru Oda*, vol. II (2002), 1011, 1025.

⁶⁴ *David Colson*, The Delimitation of the Outer Continental Shelf between Neighbouring States, *AJIL* 97 (2003), 91, 101.

⁶⁵ ICJ, *Territorial and Maritime Dispute* (note 21), para. 118.

V. The Scope of the UNCLOS and the Principle

The second issue arising with the Principle of Domination concerns the effect of its application upon the scope of the UNCLOS and consequently, the jurisdiction of those tribunals referred to in Article 287 UNCLOS. Can they deal with territorial disputes? The principle itself, as seen by the Court in the *North Sea Continental Shelf Cases*, does not so much suggest a duopoly of the law of the land territory and the law of the sea as a coherency of the two bodies of law.⁶⁶ If so, to what extent the two laws are necessarily related in practice?⁶⁷ This heading is chiefly concerned with the issue of mixed disputes, in which territorial disputes over maritime features are joined with claims to maritime zones and disputes of delimitation.

At first sight, this issue appears to be pertinent only to those tribunals in the exercise of such jurisdiction as laid down in the UNCLOS. It does not necessarily arise in courts or tribunals entitled to operate under a parallel head of jurisdiction. The ICJ, for instance, may not be bound to restrain its jurisdiction because of this limitation of the UNCLOS if the case at bar is submitted to it in accordance with its Statute or a special agreement between the parties to the case.⁶⁸ But when a dispute is submitted to the Court by a State party to the UNCLOS having made a declaration under Article 287 UNCLOS, choosing the Court for the purpose of the Article, the Court will have to confine its jurisdiction over the dispute to that part concerning the interpretation or application of the UNCLOS. For its jurisdiction is ultimately defined by Article 288 (1) UNCLOS, which confirms that the Court, in this case, shall have jurisdiction over the relevant part of the dispute. This reasoning of course applies where the whole dispute is concerned with the interpretation or application of the UNCLOS. The ICJ, like other tribunals under Article 287 UNCLOS, has additional jurisdiction over other international agreements under Article 288 (2)

⁶⁶ There is support in academic writings: cf. *Julia Litzwan*, *Stability for Maritime Boundary Agreements*, *Yale Journal of International Law* 37 (2012), 153, 169.

⁶⁷ Some suggest an international marketable title as the common denominator for these two bodies of law: *Lea Brilmayer/Natalie Klein*, *Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator*, *New York University Journal of International Law and Politics* 33 (2000–2001) 703, 749 and 767.

⁶⁸ Art. 38 Statute of the International Court of Justice opens with the words “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it.” There is no restriction on the types of dispute that may be submitted to the Court or on the formulation of the disputes so submitted. Statute of the International Court of Justice, 26 June 1945, UNCTAD 15, 355.

UNCLOS. The Statute of the ITLOS⁶⁹ has broadened the scope of the jurisdiction of the tribunal in a similar fashion, with Article 21 Annex VI UNCLOS stipulating that “[t]he jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.” The condition of “in accordance with this Convention” must be read as confining the jurisdiction of the ITLOS over “disputes” to those concerning the interpretation or application of the Convention. Let’s return to this point later.

A former President of the ICJ has made the remark that “many maritime delimitation cases require the Court to decide, as a preliminary step, questions of sovereignty over disputed islands or certain coastal regions of land territory.”⁷⁰ In *Qatar v. Bahrain* the Court indeed expressed that “[i]t is thus the terrestrial territorial situation that must be taken as starting point for the determination of the maritime rights of a coastal State.”⁷¹ As was shown above, that finding followed from the recall by the Court of the Principle of Domination. The Court made the statement in the course of determining the sovereignty over certain islands, so that relevant coasts of the parties might be ascertained for measuring the breadth of the territorial sea.⁷² It is noted that the case was brought before the Court in respect of territorial and maritime disputes between the parties by way of standing bilateral agreements.⁷³ Can this finding be applicable to a court or tribunal operating under Article 288 UNCLOS?⁷⁴ The significance of this inquiry is that, if the answer to the above question is in the affirmative, judicial bodies other than the ICJ may find a wider jurisdiction for peaceful settlement of disputes with a maritime dimension.

⁶⁹ Statute of the International Tribunal for the Law of the Sea, Annex 6 to the UNCLOS, 10 December 1982, UNTS 1833, 561.

⁷⁰ *Shi Jiuyong*, Maritime Delimitation in the Jurisprudence of the International Court of Justice, *Chinese Journal of International Law* 9 (2010), 271, 275.

⁷¹ ICJ, *Maritime Delimitation and Territorial Questions* (note 41), para. 185.

⁷² *Ibid.*, para. 184.

⁷³ *Id.*, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment of 1 July 1994, ICJ Reports 1994, 112, para. 41.

⁷⁴ Art. 288 (1) UNCLOS provides: “A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part”.

Otherwise, mixed disputes may have to be left aside by them due to a lack of jurisdiction.

The heading is to be considered from two angles. On the one hand, it is thought that the relevance of Article 298 (1)(a)(i) UNCLOS to the Principle of Domination is rather limited because it is part of an optional course open only to the States parties.⁷⁵ Whether it limits the jurisdiction of the tribunals referred to in Article 287 UNCLOS may bring into play the provision of Article 288 (4) UNCLOS.⁷⁶ On the other hand, the general lack of jurisdiction *ratione materiae* of UNCLOS over disputes of territorial sovereignty may provide the Principle of Domination with a more comprehensive role in limiting the jurisdiction of the tribunals under Article 287 UNCLOS.⁷⁷ For where a territorial dispute is part of the subject-matter of a maritime dispute relating to delimitation, the former must be resolved before the latter can be considered. Where a tribunal seized of the maritime dispute relies on the UNCLOS for its jurisdiction, it will find itself unable to bypass the territorial dispute in question, for which the UNCLOS has no applicable rule. In that sense, the maritime dispute is dominated by the territorial dispute, with the consequence that the jurisdiction of the tribunal is subordinated to the jurisdiction from another source that can cover and settle the territorial dispute.

But the aforementioned first angle will be considered, on the ground that it is a meaningful issue for those States parties that have filed an Article 298 UNCLOS declaration with regard to the disputes of delimitation or involving historic bays or title.

Article 298 (1)(a) UNCLOS provides as follows:

When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it

⁷⁵ Cf. Declarations of States parties relating to Settlement of Disputes in accordance with Article 298 (Optional Exceptions to the Applicability of Part XV, Section 2, of the Convention), available at: http://www.itlos.org/fileadmin/itlos/documents/basic_texts/298_declarations_June_2011_english.pdf (accessed on 17 January 2015), displaying 33 declarations made under Article 298 UNCLOS.

⁷⁶ Art. 288 (4) UNCLOS states that “[i]n the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal”.

⁷⁷ Myron Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. V (1989), 88, para. 297.1 (referring to Ambassador *Galindo Pobl's* statement at the second session of the conference in 1974, that there was need to exclude from obligatory jurisdiction “questions directly related to the territorial integrity of States”).

does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:

(a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission.

The quoted part of the Article raises two points. First, the Article as a whole is an optional clause. States parties are free to decide to make an exclusionary declaration or otherwise. If they do not, the disputes listed thereunder are not excluded from the compulsory procedures set forth in Part XV Section 2 UNCLOS. Secondly, Article 298 (1)(a)(i) UNCLOS allows not only the exclusion of maritime delimitation disputes but also of those concerning territorial status of maritime features, namely, historic bays or other areas or features subject to historic title. That clause, therefore, allows the exclusion of two types of dispute from Section 2. It is the latter type of dispute that bears upon our discussion of the Principle of Domination. Since the notion of 'historic title' is not defined in the UNCLOS, it is accepted for present purposes that it could mean a title to sovereignty over a maritime feature, among other interpretations.

The basic presumption of this Section is that, if a dispute mixes aspects of territorial acquisition (by way of historic title) and maritime entitlement (as a prerequisite to delimitation), an exclusionary declaration tabled under Article 298 (1)(a)(i) UNCLOS will exclude the dispute altogether from the reach of Part XV Section 2 UNCLOS. There is, accordingly, no residual dispute for the compulsory procedures in Part XV Section 2 to deal with. There is, furthermore, no need to consider whether the dispute is chiefly about delimitation or historic bays or titles. The only condition before the exclusionary effect is triggered is that the dispute involves, to whatever degree, delimitation according to Articles 15, 74, and 83 UNCLOS, or historic bays or titles. If so, the dispute falls within the scope of an Article 298 (1)(a)(i) UNCLOS declaration.

But what happens to a State party that has not filed a declaration under Article 298 (1)(a)(i) UNCLOS? Opinions differ,⁷⁸ and this article offers yet an alternative view.

Article 298 UNCLOS is an optional restriction of the jurisdiction of the Article 287 UNCLOS tribunals, and it reflects the Principle of Domination only to the extent of historic bays or titles. But that principle can certainly assume a more fundamental role in restricting the jurisdiction of those tribunals. It can indeed exclude the applicability of the UNCLOS altogether before the issue of territorial sovereignty is determined in a given case. If the tribunals under Article 287 UNCLOS cannot decide such an issue, they may have to relinquish jurisdiction over the dispute, including the maritime claims. The fundamental role played by the Principle of Domination is therefore that, if States parties without Article 298 UNCLOS declarations seek to avoid the compulsory procedures of Part XV Section 2, recourse may be had to the principle in arguing that, since the UNCLOS is generally silent on matters of territorial acquisition, with a couple of exceptions, a mixed dispute will be excluded from those procedures. This is particularly true when the mixed dispute clearly involves a component concerning territorial sovereignty as the prerequisite both to the determination of the extent of maritime entitlement and to any subsequent delimitation. For the sovereignty over a maritime feature in dispute is always critical for the resolution of a maritime delimitation dispute. If it belongs to a certain State party, maritime entitlement and maritime delimitation will ensue, naturally.

In view of the division of opinions in this regard, this article aligns with the better representation of the general position taken by the negotiating States during

⁷⁸ P. Chandrasekhara Rao, *Delimitation Disputes under the United Nations Convention on the Law of the Sea: Settlement Procedures*, in: Tafsir Malick Ndiaye/Rüdiger Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes* (2007), 877, 887–892; Irina Buga, *Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma of Law of the Sea Tribunals*, *International Journal of Marine and Coastal Law* 27 (2012), 59, 68–72. *Contra*: Louis B. Sohn, *Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?* *Law and Contemporary Problems* 46 (1983), 195, 198; Paul C. Irwin, *Settlement of Maritime Boundary Disputes: An Analysis of the Law of the Sea Negotiations*, *ODIL* 8 (1980), 105, 114–115; Bernard Oxman, *The Third United Nations Conference on the Law of the Sea: The Ninth Session* (1980), *AJIL* 75 (1981), 211, 233.

UNCLOS III, as indicated in some of the writings.⁷⁹ In addition, the preamble of the UNCLOS affirms that “matters not regulated by this Convention continue to be governed by the rules and principles of general international law.” The intention for that reserve must be that, as the UNCLOS cannot cover all rules and practices in international law, customary law on related subject-matters will come to the aid of those States parties who find themselves in a void of law in maritime disputes. A good example of the regulatory gaps in the UNCLOS is that of the illegal, unreported, unregulated fishing activities on the high seas or in the exclusive economic zone. While the UNCLOS includes provisions that may be taken as relevant to the control of such activities, it does not include direct measures that tackle them full on. Some States parties to the UNCLOS, like the Member States of the Sub-Regional Fisheries Commission, may have found the Convention not very handy in their situation so that they resort to other instruments to deal with them.⁸⁰

In comparison with this gap in relation to certain fishery activities, which is a quintessential matter of the law of the sea, the gap in respect of acquisition of territorial sovereignty is even more likely, or indeed natural, to exist in the UNCLOS. But this logic does not compel any argument that tribunals under Part XV Section 2 UNCLOS must therefore possess jurisdiction over the aspect of relevant disputes relating to territorial acquisition. There is no such inevitability. Apart from the preceding reference to the general intent of the negotiating States at UNCLOS III, there is another reason for this.

⁷⁹ *Oxman* (note 78), 211, footnote 109 (as Chair of the English Language Group of the Conference Drafting Committee at UNCLOS III, his words carry weight for ascertaining the true intention of the negotiating States on this point that “[t]he Convention does not deal with questions of sovereignty or other rights over continental or insular land territory-questions that can hardly be regarded as incidental or ancillary”).

⁸⁰ *Cf.* Technical Note, submitted by the Permanent Secretariat of the Sub-Regional Commission to the ITLOS in March 2013 in Case No. 21, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Technical_Note_eng.pdf (accessed 17 January 2015). The Note explains that “the 2001 International Plan of Action to Prevent, Deter and Eliminate IUU Fishing and the 2009 Port State Measures Agreement include important provisions aimed at reinforcing the powers of the coastal State in the fight against IUU fishing. These legal instruments, especially the 2009 Agreement, are binding on the SRFC Member States and are helpful to these countries, whose fragile economies suffer serious damage from IUU fishing. These instruments bring major innovations to classic international law [...]. Accordingly, it is particularly useful for the SRFC Member States to know precisely what their rights and obligations are in this connection, especially the newly created rights and obligations”. (6) The reasons for the Secretariat to bring the matter before the ITLOS, therefore, had first to do with some international instruments other than the UNCLOS.

Jurisdiction is granted under the UNCLOS, as in other treaties, within specified limits. The limits are determined by the purposes and objects of the treaty in question, to which the States parties have given their consent. Indeed, the lack of substantive rules of territorial sovereignty in the Convention determines that there be a corresponding lack of jurisdiction on the part of the Article 287 UNCLOS-linked tribunals over territorial disputes.⁸¹ These latter disputes must be deemed to be unrelated to the interpretation or application of the UNCLOS. A truncated jurisdiction as such is not abnormal but a necessary concession, in the present context, for the whole Section 2 to be adopted at UNCLOS III. If the ICJ receives an application from a State party to the UNCLOS on the basis of the latter's declaration under Article 287 UNCLOS, it is in the same jurisdictional straitjacket, so to speak, as other tribunals under that Article. There is no differential treatment among those Article 287 UNCLOS tribunals. The coherency of the law of the land and that of the sea, broached at the start of this section in reference to the Court's view in the *North Sea Continental Shelf Cases*, becomes, eventually, a duopoly under the current rules of the UNCLOS. It is the innate set-up of the Convention that results in this deficit in jurisdiction for the tribunals.

The preceding discussion may be put to test in a concrete case, that of Huangyan Island, to which both China and the Philippines claim sovereignty. Can it be claimed, as the Philippines does,⁸² that the whole dispute over this feature is reduced to a matter of maritime entitlement, in addition to a partial consideration of the legal status of the feature under Article 121 UNCLOS? Or should it be maintained, as China has claimed, that the UNCLOS "is not the legal basis to determine the territorial sovereignty of the Huangyan Island and cannot change the fact that the island belongs to China?"⁸³ It is interesting to note that the Philippine Notification and Statement of Claim does not say anything on the lack of provisions in the

⁸¹ Cf. Alan Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, ICLQ 46 (1997), 37, 49–50.

⁸² *Note Verbale* No. 13-0211 (note 7), para. 31: "Scarborough Shoal [...] are submerged features that are below sea level at high tide, except that each has small protrusions that remain above water at high tide, which qualify as 'rocks' under Article 121 (3) of the Convention, and generate an entitlement only to a Territorial Sea no broader than 12 M; and China has unlawfully claimed maritime entitlements beyond 12 M from these features".

⁸³ Ministry of Foreign Affairs, People's Republic of China, Foreign Ministry Spokesperson *Hong Lei's* Remarks on Philippine President's Speaking of the Huangyan Island Incident in His State of the Nation Address, 25 July 2012, available *via*: www.fmprc.gov.cn (accessed on 15 February 2014).

UNCLOS on territorial sovereignty. It does, however, concede that both China and the Philippines claim sovereignty over Huangyan Island.⁸⁴ The Philippines also suggest that the maritime zone allegedly claimed by China around the island has somehow encroached upon the Philippine continental shelf and the exclusive economic zone measured from Luzon and Palawan.⁸⁵ It is not clear whether the Philippine counsel are prepared to recognise Chinese sovereignty over this feature by arguing that the island is entitled to only a 12 nm territorial sea. In any case, the seabed within that limit is also a part of the continental shelf naturally prolonging seawards from the coast, as a close reading of Article 76 (1) UNCLOS will so reveal. Consequently, there is, by necessity, a stage of delimitation of the continental shelf involved in this dispute between China and the Philippines, among other things. The whole dispute regarding Huangyan Island is thus composed of, at minimum, three components: 1) territorial sovereignty; 2) maritime entitlement; and 3) maritime delimitation under Article 83 UNCLOS. Two points suggest themselves.

First, it would be unlikely to serve the purpose of Annex VII UNCLOS procedures if the arbitral tribunal in this case defined the whole dispute in terms only of the second component, as mentioned above. For that will solve nothing substantial of the whole dispute. It is clear that entitlement is meaningless if it does not pertain to a specific coast, *i.e.* the coast of a certain State. The dispute, like others claimed by the Philippines with regard to the South China Sea in the pending arbitration case, has always been perceived by China and the Philippines, as well as other littoral States of the South China Sea, as comprising two layers: one of territorial disputes and the other of maritime delimitation.

In the Declaration on the Conduct of Parties in the South China Sea,⁸⁶ dated 4 November 2002, Point 4 stated that:

The Parties concerned undertake to resolve their *territorial and jurisdictional disputes* by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with

⁸⁴ *Note Verbale* No. 13-0211 (note 7), para. 20.

⁸⁵ *Ibid.*, para. 24.

⁸⁶ Declaration on the Conduct of the Parties in the South China Sea, available at: <http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea> (accessed on 17 January 2015). Signed by the foreign ministers of the 10 Member States of the ASEAN and of China.

universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea (emphasis added).

In a joint press statement between China and the Philippines, issued on 3 September 2004 during the State visit of China by Philippine President *Macapagal-Arroyo*, it was stated that:

The two sides reaffirmed their commitment to the peace and stability in the South China Sea and their readiness to continue discussions to study cooperative activities like joint development *pending the comprehensive and final settlement of territorial disputes and overlapping maritime claims in the area*. They agreed to promote the peaceful settlement of disputes in accordance with universally-recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea. They agreed that the early and vigorous implementation of the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea will pave the way for the transformation of the South China Sea into an area of cooperation⁸⁷ (emphasis added).

Second, it is recalled that the ICJ has been consistent in respect of the Principle, quoted at length in section III, above. In mixed disputes, the Court always takes the territorial status of the coast as the starting point in the determination of maritime rights in contention. The Court's statement in the *Aegean Sea Continental Shelf* case between Greece and Turkey is resounding:

In short, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State. It follows that the territorial régime – the territorial status – of a coastal State comprises, *ipso jure*, the rights of exploration and exploitation over the continental shelf to which it is entitled under international law.⁸⁸

The legal rights in the continental shelf are an inherent part of the legal regime of the coastal land from the edge of which the shelf is projected seawards. Any case involving overlapping continental shelf areas will fall squarely under the Court's logic. Moreover, the matter of entitlement can only follow after a determination of the relevant coast and the relevant baselines, which in turn depends on which State possesses sovereignty over the coast in question.⁸⁹ Without a coast defined by

⁸⁷ Chinese Foreign Ministry, Joint Press Statement of the Government of the People's Republic of China and the Government of the Republic of the Philippines, 3 September 2004, available *via*: www.fmprc.gov.cn (accessed 24 February 2014).

⁸⁸ ICJ, *Aegean Sea Continental Shelf Case* (note 37), para. 86.

⁸⁹ *Ibid.*, para. 186.

reference to a specific State, there is no practical sense in talking solely of a hypothetical scenario concerning a maritime feature's entitlement. Such entitlement is laid down in international law anyway, and there is no dispute on that front. As for the generator of the entitlement in this respect, the Philippines claim that: "[U]ntil April 2012, Philippine fishing vessels routinely fished in this area [...]. Since then, China has prevented the Philippines from fishing at Scarborough Shoal or its vicinity."⁹⁰

It may be wondered what would follow if all the preventive action complained of took place within the 12 nm limit of the island – which is very much in the 'vicinity' of the feature. It may be added that, under the UNCLOS, even a rock in terms of Article 121 (3) UNCLOS is an island under both the Convention and customary law,⁹¹ and that the way baselines are drawn around an atoll could add a further dimension to the equation.⁹² More details of the complaint are required before a meaningful examination is made of the claim of the Philippines.

In this light, the separation of the sovereignty issue and the delimitation aspect from the issue of maritime entitlement of Huangyan Island is not only artificial, but overlooks the inherent link between sovereignty, entitlement, and delimitation. To resolve a dispute of this complexity in this manner may not be conducive to a permanent settlement.

As has been said above in relation to Article 298 (1)(a) UNCLOS, once a mixed dispute involves any of the exclusionary elements mentioned in the provision, it is excluded completely from the compulsory procedures of Part XV Section 2 UNCLOS if a State party has made a declaration in accordance with Article 298 (1) UNCLOS. China filed just such a declaration on 25 August 2006.⁹³ But supposing China did not make that declaration, it would still be entitled to rely on the Principle

⁹⁰ *Note Verbale* No. 13-0211 (note 7), para. 21.

⁹¹ ICJ, *Territorial and Maritime Dispute* (note 21), paras. 37 and 183.

⁹² Art. 6 UNCLOS on 'reefs,' provides that "[i]n the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State".

⁹³ UN OLA, *Law of the Sea Bulletin* 62 (2006), 14. It reads: "The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention".

of Domination by pointing out that the dispute, with its aspect of territorial sovereignty in contention, cannot be resolved completely without determining the locus of that sovereignty. This point, it may be stressed, is not a matter concerning the interpretation or application of the UNCLOS.

A related issue in this regard is the role of Article 293 (1) UNCLOS. Can it attract the jurisdiction of the courts or tribunals mentioned in Article 287 UNCLOS? If so, the jurisdiction of those bodies could be widened. It is submitted that it cannot.

Article 293 (1) UNCLOS runs as follows: “A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.” The function of this provision is clear. It defines the sources of law open to the Article 287 UNCLOS-linked tribunals. However, it is plain that sources of law and sources of jurisdiction must be distinguished. Jurisdiction, being the power to deal with certain kinds of cases by a court or tribunal, is vested by way of explicit provisions of a constituent treaty or statute for such a body. The treaty or statute, in contrast, only lists the sources of law, leaving the content of applicable law to the judgment and expertise of the members of the court or tribunal. Within the framework of the constituent treaty or statute, the content of applicable law rests on a secondary, derivative level, in comparison with the primary level on which jurisdiction resides. Relying on such as Article 293 (1) UNCLOS to found the jurisdiction of the Article 287 UNCLOS tribunals would be, at maximum, itself a dispute concerning the interpretation or application of UNCLOS. However, it is felt that the court or tribunal will not lightly assume that such a dispute exists, given the availability of clear rules under Article 288 UNCLOS.

Although the UNCLOS is silent on substantive rules of territorial acquisition, except for those of the territorial sea and archipelagic waters, it does point to a possible solution in respect of mixed disputes, whereby they may be decided by the ITLOS and the arbitral tribunals. Article 288 (2) UNCLOS states that:

A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.

Article 21 Annex VI UNCLOS recognises a similar competence of the ITLOS. This type of competence does not cover disputes concerning the interpretation or application of the UNCLOS but those of the international agreement in question. A

mixed dispute may accordingly be brought before these tribunals by way of an agreement between the parties to the dispute, *ad hoc* or otherwise. In that situation, Article 293 UNCLOS can be applied. But the jurisdiction is conferred by a separate agreement, not Article 293 UNCLOS. As for an Annex VII tribunal, there is no provision similar to Article 21 Annex VI UNCLOS. It shall therefore rely on such agreements as referred to in Article 288 (2) UNCLOS to deal with mixed disputes.

VI. Conclusion

The conclusion is that, within the law of the sea, the Principle of Domination means not a complete transposition of coastal sovereignty to the adjacent areas of sea, but only of some out of the full complement of sovereign rights of a State over its territory. Its impact is much weakened by another general principle of the law of the sea, namely, the freedom of the high seas, which has over the ages exerted a restraining effect upon the expansion of national sovereignty in the oceans, including the superjacent air space and subjacent sea-bed and subsoil. In the balance thus achieved between freedom and control, the rule of law in the world's oceans is generally assured. The power of the coastal State is considerably limited over the adjacent sea, not because it cannot dominate it physically, but because the law of the sea prevents that domination from becoming full-blown. The principle has therefore served useful purposes in the development of the modern law of the sea and has been affirmed implicitly in Article 76 (1) UNCLOS.

The respect for the principle as shown under Article 298 (1)(a)(i) UNCLOS is partial in scope and optional in nature. But the parallel existence of the principle in customary law, however, is more impressive in practical consequences in that it can restrict the scope of applicability of UNCLOS and, consequently, the jurisdiction of such tribunals as referred to in Article 287 UNCLOS and relevant annexes of the UNCLOS to disputes concerning the interpretation or application of the Convention and such agreements as recognised under Article 288 (2) UNCLOS and the annexes. The principle as such is more than anything else a principle of general international law and not restricted to the law of the sea. It delineates the border between the law of the land and the law of the sea. It places the former before the latter in terms of precedence. It goes without saying that such mixed disputes as

discussed in this article cannot be satisfactorily resolved without deciding all their aspects, top among which is the issue of territorial sovereignty of maritime features involved in these disputes.

This article suggests that mixed disputes may still be decided by those tribunals mentioned in Article 287 UNCLOS in a certain way, even though the general lack of jurisdiction *ratione materiae* of the UNCLOS over issues of territorial sovereignty will again thrust the consensual requirement to the fore of international maritime affairs before the compulsory procedures of Part XV Section 2 may be initiated due to such provisions as Article 288 (2), Article 299,⁹⁴ and Article 21 Annex VI UNCLOS. Article 299 UNCLOS, for instance, allows a State party armed with an Article 298 (1) UNCLOS declaration to enjoy the additional benefit of exempting itself from the purview of Part XV Section 2 UNCLOS by withholding consent to any further agreement between itself and the other party to a dispute.

⁹⁴ Article 299 (1) UNCLOS provides that “[a] dispute excluded under article 297 or excepted by a declaration made under article 298 from the dispute settlement procedures provided for in section 2 may be submitted to such procedures only by agreement of the parties to the dispute”.