

**LAW OF THE SEA AND OCEAN GOVERNANCE IN SOUTHEAST ASIA:
COMPARATIVE LESSONS FROM EUROPE ON PRAGMATISM AND PRINCIPLE**

Professor Ronán Long
National University of Ireland Galway

Introduction

One of the most pressing challenges in contemporary law of the sea relates to how best to reconcile the increased assertion by States of territorial sovereignty over offshore geographical features, such as islands, rocks and low-tide elevations, with the corresponding curtailment of navigation freedoms, which are so crucial for the effective functioning of the world's ocean trading routes.¹ Nowhere are the on-going processes of the "territorialization" of maritime space, creeping jurisdiction and the militarization of disputes, more evident than in the South China and East China Seas, two regional seas through which high volume ship-borne trade passes daily.

When considering the destabilizing effects of the crises in the South China Sea (SCS) and the risks that it poses to the orderly functioning and stability of international trade, it is pertinent to recall that the great French political theorist and jurisprudential scholar, Montesquieu, observed presciently in his celebrated work, *De L'Esprit Des Lois* (The Spirit of the Laws, 1758) that:

"...the natural effect of commerce is to lead to peace. Two nations that trade together become mutually dependent: if one has an interest in buying, the other has one in selling; and all unions are based on mutual needs".²

Almost two hundred years later, the writings and political creed of Montesquieu, the progenitor of the principle of interdependence, profoundly influenced the political philosophy of Jean Monnet and Robert Schuman, who subsequently became the forefathers of European integration. Common rules on trade and the harmonization of over three-dozen other policy areas have since contributed to stability in Europe and have engendered regional support for the maintenance of a peaceful economic and political union, that is founded on the rule of law

¹ The chapter is updated from a paper presented by R. Long, Contemporary Trends in EU Law, High-Level Workshop: "Maritime Issues and UNCLOS: Sharing European/EU and Asian Approaches to Territorial Disputes", Halong Bay, Vietnam, June 4-5, 2015. Originally published online in Vietnamese: Các Xu Hướng Đương Đại: Nghề Cá Liên Minh Châu Âu, Môi Trường Biển Và Quản Lý Biển (Hanoi: EU-Vietnam Strategic Dialogue Facility, 2015). This is scheduled for publication in Vietnamese in a volume co-edited by E. Franckx and T. Thuy (Hanoi: Vietnamese Diplomatic Academy, 2016), as well as by Brill in a volume edited by M. Nordquist, J. Norton Moore, R. Long, *International Marine Economy: Law and Policy* (Leiden/Boston: Brill, 2017). For comparative purposes and at appropriate points in the text below, the author also draws from his publication, R. Long "Law of the Sea; The North-East Atlantic and North Sea" in D. Rothwell, A. Oude Elfink, T. Stephens, (Eds.), *Oxford Handbook On The Law Of The Sea*, (Oxford, Oxford University Press, 2015) 647-671..

² C. Montesquieu, *De l'esprit des lois* (Geneva: 1758). For modern version see L. Versini, Sorbonne. (Paris: Sorbonne, Éditions Gallimard, 1995) 2 volumes: vol I: pp. 1 à 604 ; vol. II: pp. 605 à 1628. The passage quoted *supra* is cited by A. Hirschman, *The Passions and the Interests* (Princeton: Princeton University Press, 1977) 80. Also cited by J. Plender *Capitalism: Money, Morals and Markets* (London: Biteback Publishing Ltd., 2015) at text close to note 103 therein.

and a free trade system.³ Undoubtedly, they are the *sina qua non* of European Union (EU) integration.

Similarly, the 1982 United Nations Convention on the Law of the Sea (the Convention) and its associated agreements contribute enormously to clarity and certainty in the rule of law as it applies to the ocean and related matters.⁴ By doing so, this sophisticated web of international and regional treaties fosters the healthy development of the global economy and growth of international trade and commerce. Nonetheless, a striking feature of the implementation of the law of the sea by coastal States worldwide is their continued obsession with advancing territorial claims and the projection of maritime zones from a broad swathe of coastal and oceanographic features.⁵ In many instances, as is evident from the specialist literature,⁶ their practice in this regard does not always conform to the letter or indeed to the spirit of the prescriptive norms set down by the Convention. This appears to be particularly the case in the South and East China Seas regions.⁷

In marked contrast and somewhat ironically in view of the turbulent and territorial nature of European history, the precise legal status of offshore features has not contributed to the same degree of political tension or acrimonious dispute between the 23 coastal Member States that make-up the EU.⁸ Indeed, it appears that apart from the intractable issues associated with irregular migration across the Mediterranean Sea, the relative stability of ocean law related matters in Europe can be partly attributed to the progressive role of EU law in establishing a common framework for regional trade, the management of offshore activities, including most notably, fisheries, as well as the adoption of a unified trans-national approach to the protection and preservation of the marine environment.⁹ Allied to this and independently of the EU, several European Member States and neighboring coastal States have taken a pragmatic role to the management of transboundary hydrocarbon resources, as well as to the delineation and delimitation of maritime boundaries.¹⁰ Indeed, in some notable instances, they have rolled-back excessive maritime claims in the North Sea and the North Atlantic and demonstrated considerable constraint in establishing exclusive economic zones in the Mediterranean Sea, with a view to averting tension with neighboring States within the region.¹¹

³ Art 3(5), Treaty of European Union.

⁴ 1833 U.N.T.S. 3 / 21 ILM 1261 (1982). Entered into force on 16 November 1994. As of 25 May 2016, 167 States Parties and the European Union. There are 30 non-parties to the Convention including the United States, El Salvador, Colombia, Venezuela, Peru, Turkey, Israel, Iran, Libya, Cambodia, North Korea, Eritrea, Syria and the United Arab Emirates, as well as 17 land-locked States.

⁵ See, *inter alia*: A Roach and R. W. Smith, *Excessive Maritime Claims*, 3rd edn (Leiden/Boston: Martinus Nijhoff, 2012).

⁶ *Ibid.*

⁷ See, for example, A. Roach, "China's Shifting Sands in the Spratlys", 19(5) ASIL 15 July 2015. Available at: <http://www.asil.org/insights/volume/19/issue/15/chinas-shifting-sands-spratlys>

⁸ T. Treves, L. Pineschi (eds.), *The Law of the Sea, The European Union and its Member States*, (Leiden/Boston: Martinus Nijhoff, 1997) *passim*.

⁹ R. Long, "The Inexorable Rise of the Law of the Sea Convention within the European Legal Order" in Michael Lodge, Myron H. Nordquist, (ed.), *Peaceful Order in the World's Oceans: Essays in Honor of Satya N. Nandan*, (Leiden/Boston, Nijhoff, 2014) pp.157-185.

¹⁰ R. Long "Law of the Sea; The North-East Atlantic and North Sea" in D. Rothwell, A. Oude Elfink, T. Stephens, (Eds.), *Oxford Handbook On The Law Of The Sea*, (Oxford, Oxford University Press, 2015) 647-671.

¹¹ See discussion on UK and German practice *infra*. On practice on maritime claims in the Mediterranean Sea, see I. Papanicolopulu, The Mediterranean Sea in Donald Rothwell, Alex Oude Elferink, Karen Scott and Tim Stephens, *The Oxford Handbook of the Law of the Sea* (Oxford: OUP, 2015), 604-625, at 611.

With a view to sharing knowledge on European regional practice, the discussion in this paper highlights contemporary trends in the EU's approach to fisheries management, marine environmental protection, maritime spatial planning, ocean governance, as well as the cooperative practice of the Member States in submitting joint-submissions to the Commission on the Limits of the Continental Shelf under Article 76 of the Convention.¹² On all of these matters, it is increasingly evident that the EU and its constituent Member States are pursuing a functional approach to the implementation of the Convention, with pragmatism trumping principle in many instances. This in turn has helped deflate tensions regarding long-standing maritime boundary and resource related issues. Ultimately, it is not beyond the bounds of possibility that such an approach could be germane to the resolution of maritime disputes elsewhere in the world including those that have become part and parcel of regional affairs in Southeast Asia. Indeed, in the period after the Annex VII Arbitration Tribunal renders its judgment on the merits phase of the arbitration between the Philippines and China, expected in June 2016, there may well be a need for all concerned parties to search for innovative solutions to the longstanding disputes that have characterized bilateral and regional relations in the SCS most notably.¹³

Steady evolution of EU policy

The EU's approach to regional tensions over maritime disputes in the SCS and East Sea has evolved in a relatively fragmented fashion and against the backdrop of increased international concerns about the militarization of the dispute and its impact on ocean trading routes. That said, the EU and China have maintained diplomatic relation for over 40 years and have joint interests in promoting a robust and effective international trading system.¹⁴ Over the past decade, nonetheless, diplomatic tensions have been increasingly manifest between China and countries in the Asia region including Taiwan, Vietnam, the Philippines, Malaysia and Brunei. In December 2015, the European Parliament highlighted a steady progression of recent regional events that are a cause for EU concern including: the on-going protests of the pro-democracy Umbrella Movement in Hong Kong; the shift from 'responsive diplomacy' to 'proactive diplomacy' in Chinese foreign policy; the publication of the White Paper on China's military strategy, which places greater emphasis on safeguarding its maritime rights and interests; the failure of China to uphold and apply key provisions in the Law of the Sea Convention to help resolve territorial and maritime disputes in the South and East China Sea; the continued Chinese support for North Korea and the growing proliferation of weapons of mass destruction within the region; along with the consolidation of links between Russia and China in the period *post* the Ukrainian and Crimean crises.¹⁵ A veritable list of misdemeanors that influences the relationship between the EU and China for the foreseeable future, including their bilateral relations on law of the sea and trade related matters.

¹² See discussion on continental shelf claims *infra*.

¹³ Permanent Court of Arbitration, Case No. 2013-19, *The Republic of Philippines v. The People's Republic of China*, 22 January 2013. Available at: <http://www.pcacases.com/web/view/7>.

¹⁴ The EEC and China established diplomatic relations on the 6 May 1975.

¹⁵ European Parliament Committee On Foreign Affairs, Report on EU- China, 2.12.2015. Motion for a European Parliament Resolution on EU-China Relations, at paras O-T. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2015-0350+0+DOC+PDF+V0//EN>

Against this background, it is thus surprising to note that a quick review of the stop-start evolution of international affairs within the region reveals that the EU appears to have demonstrated nothing short of a degree of apathy or indifference to the escalating nature of maritime disputes in the South China Sea up until 2012.¹⁶ A sea change in EU policy occurred with the visit of the EU High Representative for Foreign Affairs and Security Policy to Phnom Penh in July 2012 and with the signing subsequently of the accession instrument to the Treaty of Amity and Cooperation in Southeast Asia.¹⁷ The latter is aimed at promoting peace, stability and cooperation in the region, as well as the settlement of disputes by peaceful means. Moreover, it provides a framework for the EU to work with ASEAN Member States towards the resolution of territorial and other disputes within the region.

The principles set out in the Treaty of Amity and Cooperation in Southeast Asia reflect the obligations that arise under EU treaty law including upholding the values of respect for human dignity, freedom, democracy, equality and respect for human rights.¹⁸ Moreover, as is well known, in its relationship with the wider world, the Union is committed to the progressive development of international law and the principles set out in the United Nations (UN) Charter.¹⁹ Crucially, the Union's action on the international scene must be guided by the principles that inspired its own creation and continue to guide its functioning on a day-to-day basis.²⁰ Following on from this, the Union is compelled to 'promote multilateral solutions to common problems', utilizing the UN framework and international law to address matters concerning third countries, international and regional organizations.²¹

In all law of the sea related matters, the aforementioned EU treaty obligations inform Union action at global and regional levels including any future measures that impinge upon regional matters in Asia. They also provide the legal basis underpinning the Union's status as an international legal actor that is party in its own right to the Convention, the 1994 Implementation Agreement, the 1995 Fish Stocks Agreement, and many other international agreements pertaining to maritime matters.²² At the same time, it is also important to keep in mind that the 28 Member States that make up the Union are also party in their own right to the Convention and related agreements.²³ As a result, the geopolitical and strategic considerations that have a bearing on the formulation and implementation of Union policies concerning the law of the sea are complex and are influenced by the Member States, as well as the role of the Union as a supranational regional integration organisation committed to the promotion of international trade and to the free-flow of navigation and communications at a

¹⁶ Y. Song, K. Zou, *Major Law and Policy Issues in the South China Sea: European and American Perspectives* (Farnham: Ashgate, 2014) at 295.

¹⁷ Council Decision 2012/308/CFSP of 26 April 2012 on the accession of the European Union to the Treaty of Amity and Cooperation in Southeast Asia, OJ L 154/1, 15.06.2012.

¹⁸ Article (Art) 2, Treaty European Union (TEU).

¹⁹ Art. 3(5), TEU.

²⁰ Art. 21, TEU.

²¹ *Ibid.*

²² Art. 306 and Art. 3 of Annex IX, Convention. The EU is party to both Convention and the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 August 1995 (the Fish Stocks Agreement). Dec. 98/392/EC OJ L 179 (23 June 1998); Dec. 98/414/EC, OJ L 189/14 (3 July 1998); Decision 96/428/EC, OJ L 177/24 (16 July 1996). The EU has also accepted the FAO Compliance Agreement. Council Dec., OJ L 177, 16.7.1996, p. 24.

²³ See T. Treves, L. Pineschi (Eds.) *The Law of the Sea, The European Union and its Member States* (The Hague: Kluwer Law International, 1997) *passim*.

global level, as well as the sustainable use of offshore resources and the protection of the marine environment.²⁴

Over the past decade, EU policy has been slow to focus on maritime claims in Asia. Moreover, the EU and the Member States, for obvious reasons, have not and are unlikely to take a stand on the merits of the various sovereignty claims over offshore features in the SCS specifically. That said, the EU institutions and the European Parliament have voiced their concerns about the building of military facilities, as well as the dangers posed by the confrontations between naval vessels and military aircraft, along with the possible establishment of an air defence identification zone in and over the South China Sea.²⁵ The Parliament has called upon all parties involved to avoid unilateral provocative actions and has emphasised the importance of compulsory dispute settlement under the Part XV of the Convention.²⁶ Moreover, the Parliament considers it “regrettable that China refuses to acknowledge the jurisdiction of both UNCLOS and the Court of Arbitration” but considers that:

“..a way forward for a possible peaceful resolution of the tension in the areas of the South and East China Seas is the negotiation and joint implementation of codes of conduct for the peaceful exploitation of the maritime areas in question, including the establishment of safe trade routes and quotas for fishing or attribution of areas for resource exploration; endorses the urgent call by the 26th ASEAN Summit for the speedy adoption of a Code of Conduct in the South China Sea; welcomes the agreement reached recently between China and ASEAN to speed up consultations on a Code of Conduct for the disputes in the South China Sea; takes note of Taiwan's 'South China Sea Peace Initiative' aimed at reaching a consensus on a code of conduct and the establishment of a mechanism allowing all sides to cooperate in the joint exploitation of natural and marine resources in the region; supports all actions enabling the South China Sea to become a ‘Sea of Peace and Cooperation’”.²⁷

The Parliament has also asked the EU High Representative for Foreign and Security Policy to identify the risks to peace and security in the region including those that impinge upon the freedom and safety of navigation, as well as other European interests.²⁸ Furthermore, there have been a number of calls within the EU institutions for the EU to take a more proactive approach and to act as “a deal broker” by demonstrating how it has resolved similar territorial, maritime and resource related disputes in Europe. For instance, the 2012 East Asia Policy Guidelines notes the importance of the South China Sea for the EU and suggests that it should offer, at the behest of relevant parties, to share information on dispute settlement, the sustainable management of resources, as well as maritime security cooperation in sea areas that are subject to maritime disputes.²⁹

Assuming that the relevant parties make such a request, considerable care needs to be taken with the latter suggestion for a whole range of *de jure* reasons pertaining to the *sui generis*

²⁴ R. Long “The Inexorable Rise of the Law of the Sea Convention within the European Legal Order” in Michael Lodge, Myron H. Nordquist, (ed.), *Peaceful Order In The World's Oceans: Essays In Honor Of Satya N. Nandan*, (Leiden/Boston: Nijhoff, 2014) 157-185.

²⁵ Motion for a European Parliament Resolution on EU-China Relations, *op. cit.* note 14, para 41.

²⁶ *Ibid* para 42.

²⁷ *Ibid.*

²⁸ *Ibid*, para 43.

²⁹ EU Guidelines on the EU's Foreign and Security Policy in East Asia, 15 June 2012.

Available at:http://eeas.europa.eu/asia/docs/guidelines_eu_foreign_sec_pol_east_asia_en.pdf

nature of the EU institutional and treaty architecture. For instance, a notable point of distinction between the EU and Asian States is that the Union provides strong institutional structures and law-making bodies for giving effect to law of the sea obligations including the duty of cooperation that arises for States bordering enclosed or semi-enclosed seas.³⁰ As is well known, the Convention requires such States to coordinate their actions regarding the conservation and management of living resources, the protection of the marine environment and the undertaking of marine scientific research.³¹ Undoubtedly, the EU has sought to discharge these obligations in a coherent fashion by fostering a strong regional approach to fishery management, marine environmental protection, maritime spatial planning, maritime security, as well as maritime governance more generally. Crucially, in all its actions both internally and externally, the Union is fully committed to the peaceful settlement of disputes through its own dispute settlement procedures in the European Court of Justice or by reliance on international dispute settlement in disputes with third countries, such as Part XV of the Convention.³² Nonetheless, the proposed suggestion has considerable merit and there is little doubt but that the littoral States that border the East and South China Sea have much to gain from identifying the key elements in the EU approach to ocean governance and with working with the EU and the Member States towards achieving acceptable solutions to the challenges posed by maritime disputes. In this regard, it should not be forgotten that the EU and China have worked together successfully on several law of the sea related matters including anti-piracy operations in the Gulf of Aden.

Before turning to these topics, it is pertinent to say a little more about the attribution of law-making powers between the Member States and the Union. This is important because in many ways it makes the Union unique as a rule-based body with a long and successful history of integration and economic prosperity.

Union and the Member States: the attribution of legal powers

One of the most complex areas of Union law for those that are unfamiliar with the working of the supra-national European institutions is the precise attribution of legal powers (competence) between the Union and the Member States in relation to the subject matter of Convention and other international agreements pertaining to the ocean.³³ This attribution is not helped by the fact that Union competences are in a perpetual state of progressive development in favour of the EU.³⁴ In other words, Union law is not static but is in a steady state of promoting greater integration and ever-closer cooperation between the Member States, and in certain instances with third countries. This is a defining characteristic of the Union as a supra-national regional integration organization that makes it fundamentally different from other international bodies such as the Asia-Pacific Economic Cooperation (APEC), which is the forum for economic cooperation in the Asia-Pacific region. In marked contrast to the EU, however, APEC does not have the same legal capacity or institutional capacity to undertake any of the tasks associated with ocean governance or the

³⁰ Art. 123, UNCLOS.

³¹ Art 123 (a)-(d), UNCLOS.

³² R. Long, "The European Union and Law of the Sea Dispute Settlement" in J. Barrett et al. (ed.) *Convention A Living Instrument* (London: British Institute of International and Comparative Law, 2015), 35 pp..

³³ L. Lijnzaad "Declarations of Competence in the Law of the Sea, A Very European Affair" in M Lodge MH Nordquist (ed.) at 186-207.

³⁴ Declaration made pursuant to Art 5(1) of Annex IX to the Convention and to Art 4(4) of the Agreement, OJ L 179/1, 23.06.1998. Case C-459/03, [2006] ECR I-4635.

implementation of the Law of the Sea that are discharged on a regular basis by the EU. As pointed out by your author previously,³⁵ the key point is that the Union advances regional and multilateral cooperation in law of the sea related matters by adopting laws and policies within its fields of competence and by using utilising international law to enter into agreements with third countries and international bodies.³⁶

Instructively, the Court of Justice has held that the Convention is an “integral part” of the European legal order pursuant to Article 216(2) of the Treaty on the Functioning of the EU.³⁷ The Union and the Member States are thus under a duty to both uphold and implement its wide-ranging provisions. That said, it is not always easy to discern which provision of the Convention are a Union competence or remain within the prerogatives of the Member States. Some guidance on this subject can be obtained from the instrument of formal confirmation deposited by the European Community (EC) with the Secretary-General of the United Nations in 1998,³⁸ which contains an important declaration indicating the competence that the Member States had transferred to the EC at that particular time concerning matters governed by the Convention and the Part XI Agreement, as well as a more general declaration under Article 310 of the Convention concerning fishing activities outside of the exclusive economic zone.³⁹ The 1998 Declaration is not a definitive list on the allocation of competences, as the EU treaties have since been amended on many subject matters that are directly applicable to advancing regional cooperation in maritime affairs including extensive provisions on: transport, competitiveness, the coordination of economic policies of the Member States, research and technological development, as well as on environmental protection and the prudent use of natural resources.⁴⁰

Since the early 1980s, one of the fields where the Union has exercised its law-making powers extensively is within the domain of commercial sea fisheries. This is significant because fisheries remain a fertile area for regional cooperation in Northeast and Southeast Asia, and one of the most crucial subject matters where there is a pressing need for the introduction of sustainable management systems and effective measures to combat IUU fishing. Two aspects of the Union’s fisheries policy merit further elaboration here as they demonstrate fundamental differences from the approach adopted by APEC, which has working groups on fisheries and marine resource conservation but is unable to advance a regional approach to some of the key tasks in fisheries management.

Sharing fishery resources: internal dimension

³⁵ This passage is replicated from: R. Long, “Law of the Sea; The North East Atlantic and North Sea”, in D. Rothwell, A. Oude Elfink, T. Stephens, (Eds.), *Oxford Handbook On The Law Of The Sea*, (Oxford, Oxford University Press, 2015) 647-671.

³⁶ Art 21, TEU.

³⁷ Case C-459/03 *Commission v. Ireland* [2006] ECR I-4635, para. 82 citing *inter alia*: Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, para. 36. Indeed, the Court has since held that the FAO Compliance Agreement, the Fish Stocks Agreement and the third country fishery partnership agreements are all integral parts of the EU legal order, see Case C-73/14, *Council of the European Union v European Commission* [2015] not yet reported, para. 69.

³⁸ Council Decn. 98/414/EC, OJ L 189/14, 3.07.1998.

³⁹ Annex II of Council Decn. 98/392, OJ L 179, 23.06.1998. See COM(97) 37.

⁴⁰ Arts 43(2), 91(1), 100(2), 173(3), 175, 188, 192(1), 194(2), 195(2), Treaty on the Functioning of the European Union (TFEU) OJ C 115/1, 9 May 2008.

The conservation and management of marine biological resources, including fisheries, is an exclusive Union competence and the EU has adopted a large corpus of laws and policies in the form of the common fishery policy (CFP) since the early 1970s.⁴¹ This legislation has extensive geographical, material and personal scope.⁴²

As your writer has noted elsewhere, one unique feature of the common fisheries policy (CFP) is that European fisheries are a common pool resource within the region and all Union fishing vessels (that is to say, vessels flying the flag of a Member State) enjoy, in principle, equal access to the waters under the sovereignty and jurisdiction of other Member States.⁴³ In practice, however, access is curtailed by the principle of relative stability, which stipulates that the allocation of fishing opportunities is based upon a predictable share of the stocks for each Member State, as well as the protection of the entitlements of local populations dependent upon fisheries.⁴⁴ Moreover, access arrangements to the coastal waters up to 12 nautical miles from the baselines is restricted to those vessels that have traditionally operated from ports on the adjacent coasts.⁴⁵ Keeping coastal fisheries for the exclusive use of local fleets that have strong economic ties with coastal State is undoubtedly a common feature of fisheries management worldwide. Indeed, this approach ought to be a fundamental feature for any putative regional scheme established in the SCS in line with international best practice.

At a practical and operational level, many facets of fisheries management and enforcement are undertaken by the Member States, who operate within Union rules, and allocate fishing opportunities to vessels on the basis of environmental, social and economic criteria such as historic catch levels. As a result of EU laws and policies, regional fisheries law amounts to a highly technical legislative code addressing many matters including fishing licences and permits, management plans, technical conservation measures, fleet size limitations, economic incentives, as well as detailed quota and fishing effort restrictions.⁴⁶

Similar to the experience in other global regions, the management of fisheries in Europe has been particularly problematic and requires constant adjustment and reform.⁴⁷ According to the European Commission, the traditional difficulties besetting the CFP included all of the following: unsustainable fisheries, fleet overcapacity, non-compliance by the industry with their conservation obligations, short-term management practices, government subsidies, environmentally destructive fishing practices and the failure to adhere to scientific advice.⁴⁸

For countries bordering the East Sea and South China Sea, it may be interesting to note that the European fisheries policy has developed a very distinctive regional focus over the past decade. More specifically, in line with a major reform of the policy that came into effect in 2014, the policy is focused on sea-basins, namely: the North Sea, the Celtic Seas, the Bay of Biscay and the wider Atlantic, the Baltic Sea, the Mediterranean and the Black Seas, with the

⁴¹ Art 3(1)(d), TFEU. This passage on the CFP is replicated from: R. Long, "Law of the Sea; The North East Atlantic", in D. Rothwell, A. Oude Elfink, T. Stephens, (Eds.), *Oxford Handbook On The Law Of The Sea*, (Oxford, Oxford University Press, 2015) 647-671.

⁴² Art 1, Reg 1380/2013 OJ L 354/22 28 December 2013.

⁴³ Art 5 Ibid.

⁴⁴ Art 16 Ibid.

⁴⁵ Art 5(2) and Annex 1 Ibid.

⁴⁶ RR Churchill D Owen *The EC Common Fisheries Policy* (OPU Oxford 2010).

⁴⁷ J. Raakjaer, *A Fisheries Management System in Crisis: The EU Common Fisheries Policy* (Aalborg: Aalborg University Press, 2009).

⁴⁸ COM(2009)163.

overall objective of achieving greater sustainability, together with enhanced economic, social and employment benefits for the sector.⁴⁹ Markedly, the basic fishery regulation prohibits the practice of discarding fish back into the marine environment (a long-term weakness in the CFP) and provides for the use of multi-annual plans for the management of selected fisheries, as well as the application of the ecosystem and precautionary approaches to the various tasks undertaken in fisheries management.⁵⁰ Under the CFP, there is scope for the Member States to adopt implementation measures to give effect to the policy at a regional level, as well as an advisory role in management for regional stakeholder consultative bodies, known as Advisory Councils.⁵¹

Member States are obliged to apply common rules on enforcement and to ensure compliance with the regulatory scheme pertaining to illegal, unreported and unregulated (IUU) fishing.⁵² Again the latter aspect of Union law is relevant to countries in the East Sea and South China, or for countries from the region with vessels that are operating on the high seas, that is to say in areas beyond national jurisdiction. These rules are significant, in so far as:

- The Union can blacklist countries that do not take appropriate action against illegal fishing activities or contrary to international efforts to curb IUU fishing;
- Only marine fisheries products validated as legal by the competent flag state or exporting country must validate fishery products before they can be exported/imported to the Union;
- The Union gives full effect to the enforcement and compliance measures and lists adopted by Regional Fisheries Management Organisations (RFMOs).⁵³

Most importantly, the operators of fishing vessels who fish illegally anywhere in the world, under any flag, face substantial penalties under Union law that is aimed at depriving them of their illicit gains.⁵⁴ This approach of course accords fully with the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing,⁵⁵ as well as the International Plan of Action on the same subject.

IUU fishing remains the most pressing marine environmental concern in the SCS.⁵⁶ Furthermore, there is some support in the academic literature that IUU fishing leads to other illegal activities in the region including fuel and people smuggling, as well as drug trafficking.⁵⁷ All in all, the absence of an elaborate regional model for fisheries management in the South China Sea is very different from the collaborative approach taken by the EU. At a regional level, the Coordinating Body on the Seas of East Asia and the Southeast Asian Fisheries Development Centre, with representation from China, Indonesia, Malaysia, the Philippines, Singapore, Thailand, Cambodia, and Vietnam, have a very limited inter-

⁴⁹ Reg 1380/2013.

⁵⁰ Arts 2, 9, 10, 14 *ibid*.

⁵¹ Annex III, Reg. 1380/2013.

⁵² Arts 36-39 Reg. 1380/2013. Reg 1005/2008 L 286/1 29.10.2008.

⁵³ *Ibid*.

⁵⁴ Reg. 1005/2008, Com Reg 1010/2009.

⁵⁵ Not yet in force. Comes into effect after the deposit of twenty-fifth instrument of ratification with the Director-General of the FAO.

⁵⁶ A. Witter, L. Teh, X. Yin, W. L. C. Rashid Sumaila, Taking Stock and Projecting the Future of South China Sea Fisheries, Fisheries Economics and Changing Ocean Research Units, The Global Ocean Cluster, Institute for the Oceans and Fisheries, the University of British Columbia, Vancouver, BC, Canada. Available at: http://oceancanada.org/wp-content/uploads/2015/03/FCWP_2015_99_Witter.pdf

⁵⁷ Sea Resources Management, Case study of Illegal, Unreported and Unregulated (IUU) fishing off the east coast of Peninsular Malaysia. APEC Publication No. 208-FS-01.4. (Singapore: Asia-Pacific Economic Cooperation, 2008), cited at 25 *ibid*.

governmental mandate in relation to the marine environment and fisheries. Similarly the geographical scope and mandates of two Asia and Pacific regional fisheries management bodies, the Asia-Pacific Fishery Commission and the Western and the Central Pacific Fisheries Commission, do not allow them to play an active, effective or direct role in combatting IUU fishing in the South China and East Seas. IUU activity thus continues to be an on-going problem with most of it taking place at coastal State level or in fisheries that are shared between neighbouring States.⁵⁸ For this reason, port state measures are unlikely to be very effective in combatting illegal practices.⁵⁹ Moreover, many IUU vessels target high value migratory species, such as tuna.⁶⁰ Accordingly, only joint management measures can ensure the sustainability of fisheries in the longer-term. There are some precedents with Vietnam and China adopting a bilateral agreement for fisheries in the Gulf of Tonkin, which came into force in 2004.⁶¹ There are a number of other important initiatives including the conclusion of a fisheries law enforcement agreement Philippines and Taiwan that is applicable in the area where the respective EEZs overlap.⁶² There have been some suggestions that there is a pressing need to establish some form of a regional scheme administered by a regional organisation similar to the schemes that operated in the Europe's regional seas, such as the International Baltic Sea Fisheries Commission.⁶³ Significantly, at the time of writing, none of the coastal States that border the South China Sea or East Sea had ratified the 2009 FAO Agreement on IUU Fishing.⁶⁴ Furthermore, three of the world's leading fishing powers, Vietnam, the Philippines and Taiwan are yet not party to the 1995 Fish Stocks Agreement. In the case of Taiwan, it is unable to become party to the Agreement and to most international fisheries treaties, because it is not a UN member or one of its specialised agencies, and because of the limited number of States that maintain diplomatic relations with the government in Taipei. Nonetheless, it appears that there is an urgent need for the littoral States in the East and South China Sea to become party to multilateral agreements on the management and conservation of fisheries, as well as those that are aimed at improving compliance with high seas fisheries obligations and that are aimed at combatting IUU fishing.

External dimension of EU fisheries

Similar to many countries in Asia, Europe is a major global actor in international fisheries and has vessels that operate in third country waters and within the constraints of a highly regulated framework that is closely supervised by the European institutions and the Member States. As such, the Union's approach to the management and conservation of straddling and highly migratory fish stocks is fully consistent with the scheme advanced by the Fish Stocks

⁵⁸ See, Introduction to illegal fishing in Asia and the Pacific Simon Funge-Smith, FAO Regional Office for Asia and the Pacific The 9th Asia Regional Partners' Forum on Combating Environmental Crime (ARPEC) 22-23 June 2010, United Nations Conference Center, Bangkok, Thailand.

⁵⁹ *Ibid.*

⁶⁰ *Id.*

⁶¹ Y. Huang, H. Mingming, "Implementation of the Sino-Vietnamese Fishery Agreement: Mainly Chinese Perspective" (2013) 4(3) *Beijing Law Review* 103-119.

⁶² Agreement Concerning the Facilitation of Cooperation on Law Enforcement in Fisheries Matters on November 5, 2015.

⁶³ K. Zou, The South China Sea, in D. Rothwell, A. Oude Elfink, T. Stephens, (Eds.), *Oxford Handbook On The Law Of The Sea*, (Oxford, Oxford University Press, 2015) at 644.

⁶⁴ On the 3 March 2016, the following States and regional economic integration organization were party to the 2009 Agreement: Australia, Barbados, Chile, Costa Rica, European Union – Member Organization, Gabon, Iceland, Mauritius, Mozambique, Myanmar, New Zealand, Norway, Oman, Palau, Republic of Korea, Seychelles, Somalia, South Africa, Sri Lanka, Saint Kitts and Nevis, United States of America, Uruguay

Agreement and international fisheries law more generally.⁶⁵ Notably, the Union is a member of 17 RFMOs, made-up of 6 RFMOs concerned with the management of tuna stocks and 11 non-tuna RFMOs. Under the Basic Fisheries Management Regulation, the Union's approach to participation in the work of RFMOs is based on giving full effect to the best available scientific advice so as to ensure that fishery resources are managed sustainably.⁶⁶

The Union has concluded 19 sustainable fisheries partnership agreements with third countries, many of which are concerned with access to tuna stocks under regional arrangements.⁶⁷ Briefly stated, these agreements accord with both Convention and the Fish Stocks Agreement in that they only provide for access to the surplus stocks in coastal State waters.⁶⁸ This is particularly important as many of the tuna agreements are with developing States. The agreements aim to foster conservation and environmental sustainability, as well as setting down rigorous rules in relation to compliance with Union fisheries laws and human rights obligations. In relation to the latter, each agreement has a generic "human rights clause", aimed at guaranteeing respect for democratic principles and human rights, as laid down in the Universal Declaration of Human Rights and other relevant international human rights instruments.⁶⁹ The agreements are fully consistent with the Union's development policy objectives and should not therefore be viewed solely as fisheries agreements *per se*.

There are a number of features of sustainable fisheries partnership agreements that merit highlighting for countries in Asia that have similar type agreements with developing states. First, the financial cost of the agreements and all of their substantive provisions are open to public scrutiny and are debated in both the European Parliament and the Council. In order to ensure absolute transparency, the terms of the agreements are freely accessible on the Internet. Secondly, the Union pays for access to fishing rights and must also support the following: the development of the local fishing industry; measures to combat IUU fishing; fostering scientific research; as well as improving fisheries control and surveillance, fishery resource management and the health and hygiene conditions of fishery products. In other words, the agreements must develop the national fishing sector in the coastal state. Thirdly, agreements are based upon the best available scientific advice and apply similar management and conservation standards to those that are applicable to vessels fishing in Union waters.⁷⁰ Where possible, the agreements contain a clause prohibiting the granting of more favourable conditions to vessels of third countries fishing in those waters.⁷¹ The latter requirement of course has a bearing on the opportunities that are open to countries in Asia and elsewhere to negotiate similar agreements.

Prior to re-negotiation of an agreement or a protocol to an agreement, the European Commission undertakes a comprehensive *ex-ante* evaluation and this includes a stock assessment.⁷² Moreover, the Union is the only entity worldwide that makes public its international fishery agreements and evaluations. Furthermore, any Member State or European institution (the European Parliament, the Council or the Commission), may obtain

⁶⁵ Op. cit. note 5.

⁶⁶ Art. 29(2), Reg. 1380/2013.

⁶⁷ Tuna stocks: Cape Verde, Comoros, Côte d'Ivoire, Gabon, Kiribati, Madagascar, Mauritius, Mozambique, São Tomé and Príncipe, Senegal, Seychelles. Mixed fisheries: Greenland, Guinea-Bissau, Mauritania and Morocco. Northern agreements: Faroe Islands, Iceland and Norway.

⁶⁸ Article 62(2) and (3), Convention.

⁶⁹ Art. 31(6), Reg. 1380/2013.

⁷⁰ Art. 31(3), Reg. 1380/2013.

⁷¹ Art. 31(6)(a), Reg. 1380/2013.

⁷² Art. 31(1), Reg. 1380/2013.

the opinion of the Court of Justice as to whether an agreement is compatible with the objectives and tenor of the European treaties.⁷³ This approach ensures that appropriate procedures are in place for oversight and judicial scrutiny. Perhaps it is also appropriate to point out that the Court of Justice European Union has held that authorisation is required from the European Commission for EU flagged vessels to fish in third country waters and that there is a prohibition on the use of bare-boat charters for this purpose.⁷⁴ This will help close the possibility of Union nationals utilising flags of convenience to circumvent the terms and conditions that apply under fisheries partnership agreements concluded by the Union with third countries.

The well-established procedures that apply in the EU to the negotiation and conclusion of fishery agreements can be compared with the practice of China, which is also one of the world's major fishing powers. In 2012, for example, a study prepared for the European Parliament noted that China had 79 fisheries agreements with third countries, many of which were characterised by a lack of transparency and whose terms remained outside the public domain due to their political and commercial sensitivity.⁷⁵ According to the European Parliament study, the Chinese distant water fishing fleet is most active in West Africa and Latin America, where their activities have led to “unsustainable use of fisheries resources and have negatively impacted the socioeconomic development of host countries”.⁷⁶ The same study noted that IUU fishing on the part of Chinese vessels is widespread with more than half of the IUU vessels identified in Guinean waters as Chinese.⁷⁷ Moreover, 200 Chinese industrial vessels were observed operating in Liberia despite the country having only granted 17 fishing licences to these vessels.⁷⁸ Allegedly, Chinese longline vessels are also implicated in IUU fishing in Southeast Asia.⁷⁹ Significantly, the EU has actively sought to encourage China to adopt a more transparent approach to the negotiation of international fishery agreements.⁸⁰ Undoubtedly, the EU faces a tougher negotiation environment with third countries, particularly in Africa, who often have more flexible negotiation options with China, and as a result whose distant water fleet activities are often culpable of IUU fishing.⁸¹ On its part, the EU has sought to advance further cooperation with China in addressing IUU fishing and a joint working group was established for this purpose in 2016.⁸²

Marine Strategy Framework Directive

International best practice suggests that fisheries should not be regulated in isolation without having regard to the conservation and ecological status of the broader marine environment.

⁷³ Art 218(11), TFEU.

⁷⁴ Case C-565/13, *Ahlström and Others*, 9.10.2014.

⁷⁵ R. Blomeyer, I. Goulding, D. Pauly, A. Sanz, K. Stobberu, *The Role of China in World Fisheries*, (Brussels: EU, 2012). Available at: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/pech/dv/chi/china.pdf.

⁷⁶ *Ibid* at 71.

⁷⁷ *Ibid* at 72.

⁷⁸ *Ibid* at 72.

⁷⁹ *Ibid* at 79.

⁸⁰ *Ibid*.

⁸¹ *Ibid*.

⁸² See Joint Press Release between the EU and the Ministry of Agriculture on cooperation on Fisheries, 22 October 2015. Available at: http://eeas.europa.eu/delegations/china/press_corner/all_news/news/2015/20151022_en.htm.

Indeed, according to the European Commission, ecological sustainability is a pre-requisite for the attainment of the economic and social sustainability of marine resources, such as fisheries.⁸³ In line with international trends, the Union has adopted several comprehensive and sophisticated legal instruments that are aimed at protecting and preserving the marine environment including most notably the Marine Strategy Framework Directive (MSFD).⁸⁴ The instrument is very much focused on advancing a regional cooperative model for the protection and preservation of the marine environment and provides a useful example of Member State collaboration at a pan-European level.

The MSFD provides a blueprint for marine environmental protection in Union law and is the principal means for the implementation of the ecosystem approach in decisions concerning the management and use of all marine resources in sea areas under the sovereignty and jurisdiction of the Member States.⁸⁵ One of the thematic strands running through the MSFD is the need to foster the integration of environmental concerns into European policies on maritime matters. The MSFD requires the Member States to achieve good environmental status (GES) of all sea areas under their national sovereignty and jurisdiction by 2020.⁸⁶ The quality of the environment is assessed on the basis of eleven qualitative descriptors for determining GES, which are shown on Table 1 below.

Table 1: Qualitative descriptors for determining good environmental status

Number	Descriptor
1	Biological diversity is maintained. The quality and occurrence of habitats and the distribution and abundance of species are in line with prevailing physiographic, geographic and climatic conditions.
3	Populations of all commercially exploited fish and shellfish are within safe biological limits, exhibiting a population age and size distribution that is indicative of a healthy stock.
4	All elements of the marine food webs, to the extent that they are known, occur at normal abundance and diversity and levels capable of ensuring the long-term abundance of the species and the retention of their full reproductive capacity.
6	Sea-floor integrity is at a level that ensures that the structure and functions of the ecosystems are safeguarded and benthic ecosystems, in particular, are not adversely affected.
9	Contaminants in fish and other seafood for human consumption do not exceed levels established by Community legislation or other relevant standards.
11	Introduction of energy, including underwater noise, is at levels that do not adversely affect the marine environment.

⁸³ COM(2009)163, 22.04. 2009, p.8.

⁸⁴ Dir. 2008/56/EC OJ L 164/19, 25 June 2008. See R. Long, "The EU Marine Strategy Framework Directive: A New European Approach to the Regulation of the Marine Environment, Marine Natural Resources and Marine Ecological Services", 29 (1) (2011) Journal of Energy and Natural Resources Law 1-45.

⁸⁵ On the ecosystem approach see Recital 44 and Article 1(3), Dir. 2008/56/EC.

⁸⁶ Dir. 2008/56/EC.

The overall scheme of protection is regional in so far as the MSFD requires the establishment of a number of marine regions and sub-regions in the Baltic Sea, the North-east Atlantic Ocean, the Mediterranean Sea and the Black Sea. These areas are coterminous with the geographical boundaries of the existing Regional Seas Conventions. The Directive sets down a firm schedule for the various tasks that need to be undertaken for the attainment of GES. Thus, each Member State had to develop strategies by 2012, which contained a detailed assessment of the state of the environment, a definition of “good environmental status” at the regional level, as well as the establishment of clear environmental targets and monitoring programmes for the on-going assessment and the regular update of the targets. Each Member State must then draw up a programme of cost-effective measures by 2015 in coordination with other Member States in their marine region with a view to achieving or maintaining GES by 2020. Prior to the implementation of any new measure there is a requirement to undertake an impact assessment that contains a detailed cost-benefit analysis of the proposed measures. The MSFD provides a legal basis for the adoption of Union measures in instances where Member States cannot achieve their environmental targets. Supplementing the MSFD, Commission Decision 2010/477/EU sets out the detailed criteria and methodology for the attainment of GES in marine waters.⁸⁷

The MSFD has three features that may be of interest to countries bordering the East Sea/South China Sea. First, the Directive does not envisage the adoption of horizontal management measures at the Union level, but entails the adoption of operational and implementation measures through the regional seas agreements, such as the OSPAR and Barcelona Conventions. Secondly, implementation of the MSFD is intended to bring about a major shift in the emphasis of Union law-making in so far as maritime regulation and decision-making will no longer be organised exclusively along the vertical lines of sector policies such as fisheries, but will become more integrated in form and content at a horizontal level across a range of policies.⁸⁸ Thirdly, the MSFD promotes a sea-basin approach where management measures are to be harmonized at a regional or sub-regional level.

Finally, it is worth noting that as a consequence of this general shift in emphasis under Union environmental legislation, it should be noted nonetheless that future regulatory measures will focus on mitigating the impacts of particular activities on the wider marine regions and will not be limited by the maritime boundaries of the Member States. That is to say, measures are to be adopted to reduce impacts on entire marine ecosystems or parts thereof.⁸⁹ For this reason, the MSFD is inclusive in scope and mandates expressly the Union to work with the regional authorities and other sectors to improve maritime governance so that “all interested parties are given early and effective opportunities to participate in [its] implementation... involving, where possible, existing management bodies or structures, including Regional Sea Conventions, Scientific Advisory Bodies and Advisory Councils”.⁹⁰ This approach is unquestionably the best example in Union marine environmental law of a collaborative approach that is very much contingent upon regional cooperation and further integration between the Member States and third countries acting collectively in the interest of the common good. Similarly, the approach of course is four square with the regional approach to environmental protection advanced by the Convention.⁹¹

⁸⁷ Commission Dec., OJ L 232/14, 2.9.2010.

⁸⁸ COM(2008) 395 final. 26.6.2008, p. 8.

⁸⁹ Descriptors 1, 3, 4 and 6 of Dir. 2008/56/EC.

⁹⁰ Article 19(1) of Dir. 2008/56/EC.

⁹¹ Article 197, UNCLOS.

Instructively, as far back as 1996, China has called for the implementation of the ecosystem approach in the China Ocean Agenda 21 and its application in the Yellow Sea ecosystem.⁹² The question remains however on how to implement the approach in practice in the absence of political agreement and in the absence of appropriate structures and decision-making bodies at a regional level.

Maritime spatial planning

A topic of common concern for countries bordering and the East Sea/South China Sea region as well as for the Union and the Member States, is how to make the best use of maritime space for different economic and development purposes. In recent years, the Member States of the Union are increasingly committed to implementing sophisticated planning systems governing the use of maritime space in sea areas under their sovereignty and jurisdiction in the form of marine/maritime spatial planning (MSP).⁹³ In a major initiative, the Union adopted a Directive establishing a framework for MSP in July 2014.⁹⁴

The MSP Directive aims to promote the sustainable growth of maritime economies, the sustainable development of marine areas and the sustainable use of marine resources.⁹⁵ The objectives of the instrument include contributing to the sustainable development of the energy sectors at sea, the planning and management of maritime transport, fisheries and aquaculture, and the preservation and protection of the environment, including improving resilience to climate change impacts.⁹⁶ The MSP Directive is also intended to facilitate the implementation of the many Union policies and strategies that are applicable to the marine environment.

Apart from establishing an appropriate framework for conflict avoidance and resolution, the normative methodology advanced by the MSP Directive is clearly aligned with applying an ecosystem-based approach to the sustainable use of marine and coastal resources, including fishery resources and offshore energy infrastructure.⁹⁷ A particular focus is on the integrated planning and management of infrastructure and systems that traverse the maritime boundaries of the Member States, such as infrastructure associated with the production of renewable energy, seabed cables, and shipping routes and lanes.⁹⁸ At one level, this approach is foursquare with the Union's Integrated Maritime Policy (discussed below), which identifies the integrated management of various sector activities as one of the main ways to promote growth of the maritime economies in the Member States.⁹⁹

The MSP Directive goes a long way towards addressing some of the planning issues concerning offshore development in Union waters. More specifically under the scheme advanced by the Directive, Member States must establish and implement spatial plan(s), as

⁹² K. Zou, The South China Sea, in D. Rothwell, A. Oude Elfink, T. Stephens, (Eds.), *Oxford Handbook On The Law Of The Sea*, (Oxford: Oxford University Press, 2015) at 644 and note 83.

⁹³ These include Belgium, Germany, Portugal, Sweden, the Netherlands and the UK.

⁹⁴ Dir. 2014/89/EU. This section is taken from R. Long, "Offshore Renewable Energy Development: Legal Challenges and Policy Conundrums in EU" 34(4) (2014) *International Journal Of Marine And Coastal Law* 690-715.

⁹⁵ Art 5(1), Dir. 2014/89/EU.

⁹⁶ Art 5(2), Dir. 2014/89/EU.

⁹⁷ Recitals 1, 3, 13, 14 and 22, as well as Art. 5 (1), Dir. 2014/89/EU.

⁹⁸ Art 8(2), Dir. 2014/89/EU.

⁹⁹ COM (2007) 575.

soon as possible, and at the latest by 31 March 2021.¹⁰⁰ The geographical scope extends to marine waters, that is to say the sea and subsea areas that are under the sovereignty and jurisdiction of the Member States, as defined in other Union instruments.¹⁰¹ Other than infrastructure associated with energy installations, the plans adopted by the Member States must take into consideration: aquaculture areas, fishing areas, maritime transport routes and traffic flows, military training areas, nature and species conservation sites and protected areas, raw material extraction areas, scientific research, tourism, and underwater cultural heritage.¹⁰² Most importantly, Member States must cooperate on issues of a transnational nature and by means of the appropriate regional seas structures, and or networks or structures of Member States' competent authorities, and or by using methods that meet the requirements of the Union's sea-basin strategies, as outlined above.¹⁰³ Furthermore, every effort must be made to cooperate with third countries in the planning and management of offshore activities.¹⁰⁴ Again, this approach is clearly relevant for countries in other ocean regions including the East Sea/South China Sea.

The MSP Directive is therefore very much premised on the establishment and implementation of coherent planning mechanisms that apply across regional seas basins. As pointed out by the European Commission, the cross-border effects of economic activities undertaken at sea cannot be alleviated by a planning system that is structured on a purely national basis and which pays little or no regard to trans-national impacts.¹⁰⁵ In addressing this shortcoming, the MSP Directive notes that the Preamble of the Convention states that issues relating to the use of ocean space are closely interrelated and need to be considered as a whole.¹⁰⁶ Furthermore, MSP is the "logical advancement and structuring of the use of rights" granted under the Convention and a practical tool that assists Member States to comply with their international and regional obligations.¹⁰⁷

For countries bordering the East Sea and South China Sea, as can be seen from the discussion this far, if one has to highlight one distinctive feature of Union policies and other law of the sea related instruments, such as the CFP and the MSFD,¹⁰⁸ is that they apply a regional approach to the management and utilisation of marine resources and the protection of the marine environment. The MSP Directive does not prescribe in detail how regional cooperation mechanisms on spatial planning should look or work in practice because of the differences between various marine regions, or sub-regions and coastal zones and this remains an issue to be resolved by the Member States.¹⁰⁹ Nonetheless, the approach is foursquare with the Convention and is a strong indicator of the sophisticated approach taken by the Union, the Member States and neighbouring countries to resolving difficult law of the sea matters that involve the implementation of area-based management tools.

Marine protected areas

¹⁰⁰ Art. 15(3), Dir. 2014/89/EU.

¹⁰¹ Art. (3)4, Dir. 2014/89/EU.

¹⁰² Art. 8(2), Dir. 2014/89/EU.

¹⁰³ Art. 11, Dir. 2014/89/EU. ,

¹⁰⁴ Art. 12, Dir. 2014/89/EU.

¹⁰⁵ SWD (2013) 65, at p.24.

¹⁰⁶ Recital 7, Dir. 2014/89/EU

¹⁰⁷ Ibid. Preamble and Art. 56(2) LOS Convention.

¹⁰⁸ See (n 164).

¹⁰⁹ Recital 20, Dir. 2014/89/EU.

In addition to the MSFD, the Union has a comprehensive code of instruments that are aimed at nature conservation and protecting marine biodiversity including the Habitats and Birds Directives.¹¹⁰ These instruments have been applied to establish a comprehensive network of marine protected areas (MPAs) at a pan-European level. More specifically, the instruments set down specific obligations on the Member States as regards the establishment and management of special protection areas (SPAs) and special areas of conservation (SACs). The network of SPAs and SACs established under the Birds and Habitats Directives is referred to as the NATURA 2000 network, which is a pan-European ecological network of protected areas. Within this network, Member States are required to protect biodiversity by taking a number of measures including: the designation of protected areas for the birds, habitats and species listed in the directives; the maintenance or restoration of protected habitats and species at a favourable conservation status; the adoption of appropriate conservation and management measures for the designated sites; undertaking “appropriate assessment” of plans and projects likely to have a significant effect on the integrity of an SAC. There is also a strict scheme of protection for the fauna and flora listed in Annex IV of the Habitats Directive, including several species of marine mammals, which must be protected within their entire natural range, both inside and outside the Natura 2000 sites. Member States are required to undertake appropriate monitoring and enforcement, as well as to report to the Commission on the implementation of the Directive every six years.

Utilising the procedures set out in the Directives, the Union had established 936 marine SPAs and 1848 marine sites of community importance by 2015.¹¹¹ The vast majority are in the territorial waters of the Member States but the network also extends to 9 MPAs in areas beyond national jurisdiction (ABNJ), the latter are designated by OSPAR Contracting Parties under the OSPAR Convention.¹¹²

Four brief comments have been made previously by your author in the *Oxford Handbook of the Law of the Sea* about the regional approach taken by the Union to the establishment and creation of MPAs, which can also be taken into consideration in the context of exploring the possibilities for improving ocean governance in the East and South China Sea.¹¹³ Firstly, designations in the EU are made on the basis of scientific merit and in order to achieve conservation objectives including mitigating the potential threat of damage from human activities.¹¹⁴ Secondly, the establishment of MPAs conforms to international law and multilateral initiatives taken in conformity with the Law of the Sea Convention and the 1992 Convention of Biological Diversity.¹¹⁵ The practical aspects of MPA management nevertheless require a strong collaborative approach at a regional level with bodies such as the North East Atlantic Fisheries Commission (NEAFC), which has adopted area-based management measures restricting fishing activity in OSPAR’s MPAs in ABNJ. Thirdly, the network complements the MSFD (described above) and should therefore not be viewed in isolation from the overall scheme of regional environmental protection.¹¹⁶ Finally, the success of MPAs

¹¹⁰ Dir. 92/43/EEC, OJ L 206/7, 22.7.1992. Dir. 2009/147/EC, OJ L 20/7, 26.1.2010.

¹¹¹ http://ec.europa.eu/environment/nature/natura2000/barometer/docs/SCI_EU27.pdf

¹¹² OSPAR 2012 Status Report on the OSPAR Network of Marine Protected Areas (OSPAR London 2013) at 9.

¹¹³ R. Long, *The North-East Atlantic and North Sea, Handbook On The Law Of The Sea*, (Oxford, Oxford University Press, 2015) 647-671

¹¹⁴ OSPAR Recommendation 2003/3 adopted by OSPAR 2003 (OSPAR 03/17/1, Annex 9), amended by OSPAR Recommendation 2010/2 (OSPAR 10/23/1, Annex 7).

¹¹⁵ Decision VII/28 by the seventh Conference of Parties (COP 7, Kuala Lumpur, 2004) to the Convention of Biological Diversity on Protected Areas (Arts 8 (a) to (e)).

¹¹⁶ Part IV B *supra*.

in the Atlantic and in Europe's regional seas is very much contingent upon the quality and effectiveness of the management measures and scientific monitoring programmes, which will only become apparent in the fullness of time.

Again it needs to be emphasised that slow progress has been made under UNEP's East Asian Seas Programme in advancing environmental protection at a regional level, as well as under the Partnerships in Environmental Management for the Seas of East Asia PEMSEA. One authoritative and comprehensive study has argued cogently how a network of MPAs in the South China Sea could help diffuse regional tensions and foster greater cooperation between the parties in dispute.¹¹⁷

Environmental impact assessment

The Law of the Sea Convention sets down an express obligation on States Parties to assess the potential effects of planned activities under their jurisdiction or control, which may cause substantial pollution of or significant and harmful changes to the marine environment.¹¹⁸

In the EU, environmental impact assessment (EIA) and strategic environmental assessment (SEA) are applied as procedural tools by the Member States to assess and mitigate the adverse environmental effects of development projects, plans and programmes.¹¹⁹ Briefly stated, the former requires that certain classes of projects be subject to assessment before they are approved due to their nature, size, location, or their potential to have significant effects on the environment. Projects listed in Annex 1 of the EIA Directive, such as large port developments, are subject to mandatory assessment and projects listed in Annex II are subject to assessment where there are likely effects on the environment. In contrast, the SEA Directive takes a much broader approach and provides for the strategic assessment of certain plans and programmes on the environment. Significantly, both the EIA and SEA Directives require national bodies in the Member States to take the views of the public and other stakeholders into consideration *ex-ante* and before a particular development, project, plan or programme is approved or authorised by the licensing or regulatory authority. By and large, both directives have improved the quality, accountability and legitimacy of environmental and planning decisions in relation to both onshore and offshore developments.¹²⁰

The Union obligations to undertake EIA and SEA must again be viewed in light of obligations that arise under international and regional law. In particular, EIA of fishing activity is required under several international instruments including the Fish Stocks Agreement, which requires coastal and flag States to "assess the impacts of fishing, other human activities and environmental factors on target stocks and species belonging to the same ecosystem or associated with or dependent upon the target stocks."¹²¹ There is also an obligation on States

¹¹⁷ Vu Hai Dang, *Marine Protected Areas Network in the South China Sea: Chartering a Course for Future Cooperation* (Leiden/Boston: Nijhoff 2014) at 26.

¹¹⁸ Article 206, UNCLOS

¹¹⁹ DIR. 2011/92/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, L26/1, 28.1.2012; DIR. 2001/42/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, OJ L 197/30, 21.7.2001.

¹²⁰ Stuart Bell, Donald McGillvray and Ole W. Pedersen, *Environmental Law, 8th edition* (Oxford: OUP, 2013), 452-497.

¹²¹ Article 5(d) of the Straddling Fish Stocks Agreement.

and the Union to assess the impact of fishing on non-target and associated or dependent species and their environment, and adopt plans, which are necessary to ensure the conservation of such species and to protect habitats of special concern. Similarly, a prior assessment of the impact of fishing activities on the Antarctic environment or on dependent or associated ecosystems must be undertaken under the 1998 Protocol on Environmental Protection to the Antarctic Treaty (the Madrid Protocol).¹²² For this reason, all States with vessels engaged in bottom longline fishing must submit EIAs to the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) for review and approval. Three important RFMOs in the Atlantic (the NEAFC, NAFO and SEAFO) require impact assessments in relation to bottom trawling in new fishing areas or when new scientific information becomes available. Other relevant instruments are the United Nations General Assembly resolutions 61/105, 64/72 and 66/68, which call for the assessment of the impacts of bottom fishing on vulnerable marine ecosystems on the basis of the best available scientific information.

Note should also be taken of Regulation (EC) No 734/2008, which prohibits the use of bottom gears in the High Seas without prior impact assessment for fishing activity in international waters not regulated by Regional Fisheries Management Organisations.¹²³ This requires the carrying out of prior scientific assessment and the publication of the results of the assessment. There are also rigorous regulatory requirements concerning: special fishing permits, VMS, observers, reporting to the Commission on catches and fishing plans, and the invocation of serious infringement procedures in relation to fishing in areas that are assessed.¹²⁴ Union measures also accord with the FAO Deep Sea Fishery Guideline, which offer specific guidance regarding assessing the significant adverse impacts in vulnerable marine ecosystems.¹²⁵

Although international law is inherently weak when compared to the comprehensive and legally binding nature of EU law outlined above, the law on EIA has nonetheless evolved significantly over the past decade and much of the impetus for developments in this regard has been driven by the jurisprudence of international courts and tribunals. Specifically, in the *Pulp Mills Case*, the International Court of Justice stated that: “an obligation arises in this regard once there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource”.¹²⁶ In *Nicaragua v Costa Rica* that if the EIA “confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk.”¹²⁷ The requirements of undertaking EIA in relation to activities that impinge upon the international seabed area were addressed by the Seabed Disputes Chamber of ITLOS in an advisory opinion, where it expressed the view:

¹²² Article 8 of the Madrid Protocol

¹²³ OJ L 201/8,

¹²⁴ Article 6 of Regulation (EC) No 734/2008.

¹²⁵ FAO. International Guidelines for the Management of Deep-sea Fisheries in the High Seas.

Dir.s internacionales sur la gestion de la pêche profonde en haute mer. Directrices Internacionales para la Ordenación de las Pesquerías de Aguas Profundas en Alta Mar. Rome/Roma, FAO. 2009. 73p.

¹²⁶ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ rep 14, p.83, para. 204.

¹²⁷ *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* [2015] ICJ 15 December 2015, p. 45, para 104.

“The [ICJ]’s reasoning in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction; and the Court’s references to “shared resources” may also apply to resources that are the common heritage of mankind. Thus, in light of the customary rule mentioned by the ICJ, it may be considered that environmental impact assessments should be included in the system of consultations and prior notifications set out in article 142 of the Convention with respect to “resourcedeposits in the Area which lie across limits of national jurisdiction”.¹²⁸

In addition to the jurisprudence of courts and tribunals, there are a number of international treaties providing far more detail on the substantive and procedural aspects of EIA and SEA including: the 1991 ESPOO Convention on Environmental Impact Assessment (EIA) in a Transboundary Context of the United Nations Economic Commission for Europe;¹²⁹ as well as the Protocol on Strategic Environmental Assessment (SEA) to the Convention on Environmental Impact Assessment in a Transboundary Context;¹³⁰ which are both in force.

Significantly, in the context of the SCS, one of the key issues raised by the Philippines in the Annex VII Arbitration is that China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal and Second Thomas Shoal by its island-construction campaign. Indeed, this is one of the issues to be addressed at the merits phase of the arbitration concerns the Tribunal the likelihood of the Tribunal following both the International Court of Justice in the *Nicaragua v Costa Rica* case and ITLOS in the *Malaysia v. Singapore* case and hold that that China should have undertaken an *ex ante* evaluation of the risk of significant transboundary harm and should consulted in advance affected states within the region.¹³¹

In the overall context of maritime activities in Southeast Asia, it should also be borne in mind that there are many other EIA models that arise under sector specific treaties and regional frameworks including procedures adopted by the FAO and RFMOs in relation to deep-sea fishing activity.¹³² Again, all of these models are relevant to any discussion of the assessment of the environmental impacts of fisheries in Southeast Asia.

New international instrument on biodiversity beyond national jurisdiction

The Union has been a major promoter of international efforts to adopt a new implementing instrument under the Convention that provides for the conservation and sustainable use of

¹²⁸Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), Advisory Opinion Case 17, [2011] ITLOS Rep. 10 at para 148.

¹²⁹1989 U.N.T.S. 309

¹³⁰ Into force 11 July 2010.

¹³¹ Case Construction of a Road in Costa Rica along the San Juan River (*Nicaragua v. Costa Rica*), ICJ, 16 December 2015: Case concerning Land Reclamation by Singapore in and around the Straits of Johor, *Malaysia v Singapore*, Award, (2005) XXVII RIAA 133, ICGJ 372 (PCA 2005), 1st September 2005, Permanent Court of Arbitration.

¹³² On the obligation to undertake EIA under several marine environmental treaties, see D. Rothwell, T. Stephens, *The International Law of the Sea*, 2Ed., (Oxford and Portland Oregon: Hart Publishing, 2016) 524-525.

biodiversity in areas beyond national jurisdiction. Much progress has been made on this issue at the UN over the past decade, which culminated with the Ad Hoc Open-ended Informal Working Group making recommendations to the General Assembly on the scope, parameters and feasibility of an international instrument under the Convention.¹³³ The General Assembly subsequently decided to prepare for the decision on the launch intergovernmental negotiations on a binding instrument within the framework of the Convention and to make a decision in this regard by the end of the 72nd session.¹³⁴ Moreover, it decided to convene a Preparatory Committee to meet over 2016-2017, which is open to all members of the UN, specialized agencies and parties to the Convention, as well as observers including those representing civil society, and which is tasked with making substantive recommendations on the elements of a draft text of an international legally binding instrument under the Convention.¹³⁵ The General Assembly in turn is tasked with deciding the commencement date of an intergovernmental conference to consider the PrepCom recommendations on the elements and to elaborate the text of an international legally binding instrument under the Convention.¹³⁶ The negotiations will address a package of topics which were agreed in 2011, specifically: “the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, in particular, together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, environmental impact assessments and capacity-building and the transfer of marine technology”.¹³⁷

The first session of the Preparatory Committee took place in March-April of 2016 and was attended by 91 States Parties to the Convention including many from Southeast Asia,¹³⁸ 10 non-parties,¹³⁹ as well as the EU. The EU and the Member States are committed to working with G77 and China, including countries bordering the SCS/East Sea to bring this process to a successful conclusion. Indeed, although the UN process is very much focused on elaborating a comprehensive scheme for the protection and use of biodiversity in ABNJ, many of the instruments and tools under discussion are also clearly germane and applicable to the challenges posed by marine resource use in disputed areas of the SCS/East Sea. At the first session of the Preparatory Committee proceeded in a collegiate and constructive fashion with a view to identifying areas of mutual understanding and agreement.¹⁴⁰

¹³³ UN Resolution A/69/780, annex, sect. I.

¹³⁴ UN Resolution A/RES/69/292.

¹³⁵ UN Resolution A/RES/69/292, para 1(a).

¹³⁶ UN Resolution A/RES/69/292, para 1(k).

¹³⁷ UN Resolution A/RES/69/292, para 2.

¹³⁸ Algeria, Argentina, Australia, Austria, Bangladesh, Barbados, Belgium, Belize, Brazil, Bulgaria, Burkina Faso, Cabo Verde, Cameroon, Canada, Chile, China, Congo, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Ecuador, European Union, Fiji, Finland, France, Gabon, Germany, Ghana, Greece, Honduras, Iceland, India, Indonesia, Iraq, Ireland, Italy, Jamaica, Japan, Kenya, Lebanon, Lesotho, Lithuania, Madagascar, Malaysia, Mauritius, Mexico, Micronesia (Federated States of), Monaco, Morocco, Mozambique, Myanmar, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Palau, Papua New Guinea, Paraguay, Philippines, Poland, Portugal, Russian Federation, Saudi Arabia, Senegal, Singapore, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, Spain, Sri Lanka, State of Palestine, Sudan, Swaziland, Sweden, Switzerland, Thailand, Togo, Tonga, Trinidad and Tobago, Tunisia, United Kingdom of Great Britain and Northern Ireland, Uruguay, Vanuatu, Viet Nam, Zambia.

¹³⁹ Venezuela (Bolivarian Republic of), Peru, El Salvador, Turkey, Holy See, Israel, Iran, United Arab Emirates, United States of America, Republic of Korea.

¹⁴⁰ Chair’s overview of the first session of the Preparatory Committee, Annex II, at 19-20, available at: http://www.un.org/depts/los/biodiversity/prepcom_files/PrepCom_1_Chair's_Overview.pdf. Also, see, R. Long, M. Rodríguez Chaves, “Anatomy of a new international instrument for the conservation and sustainable use of marine biodiversity in Areas Beyond National Jurisdiction: First Impressions Of The Preparatory Process” (2016) 25(2) *Journal of Environmental Liability: Law, Policy and Practice* (in press).

Union's approach to maritime governance

The Union's approach maritime affairs embraces a complex array of legal actors, instruments and sector policies that operate at international, regional and national levels within the Member States.¹⁴¹ Moreover, at a pan-EU level, it is advanced in the form of the Union's Integrated Maritime Policy (IMP), which is well established and aimed at achieving the following objectives:

“...[ensuring] synergies and coherence between sectoral policies bring added value and fully respect the principle of subsidiarity. Furthermore, it should be developed as a tool to address the challenges facing Europe's sustainable development and competitiveness. It should take particular account of the different specificities of Member States and specific maritime regions which should call for increased cooperation, including islands, archipelagos and outermost regions as well as of the international dimension.”¹⁴²

The European Commission has stated that the “aim of the IMP is to promote the sustainable growth of both the maritime economy in particular, and the coastal regions more generally, by improving coordination between the different sectoral policies and by developing crosscutting tools.”¹⁴³ Similarly, the European Parliament has stated that the primary objective of the IMP “is to maximise the sustainable development, economic growth and social cohesion of coastal, island and outermost regions through coherent and coordinated maritime-related policies and relevant international cooperation.”¹⁴⁴

In 2015, the EU undertook a public consultation and review of its ocean governance policy. The public consultation concluded that the framework is not effective as evidenced by pollution, overexploitation of resources, climate change and ocean acidification.¹⁴⁵ Also in October 2015, Commissioner Vella, who has responsibility for the environment and maritime affairs in the European Commission, visited China as part of the stakeholder consultation process with key international actors and to discuss how global ocean governance could be improved through a specific programme of actions. The Commissioner noted in his press release pertaining to the visit that:

“Global environmental and maritime challenges cannot be tackled by Europe alone. As two of the world's biggest economies, the EU and China's role is fundamental to ensuring a greener future. heir work in shaping ocean governance, developing

¹⁴¹ This section draws from: R. Long “Principles and normative trends in European Union ocean governance” in C. Schofield, S. Lee, M. Kwon (ed.), *The Limits Of Maritime Jurisdiction* (Boston/Leiden, Brill/Nijhoff, Publishers, 2014), 629-726.

¹⁴² Doc. 16616/1/07, REV 1, Presidency Conclusions of European Council Meeting, Brussels, 14.02.2008, para. 58. Available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/97669.pdf

¹⁴³ COM (2009) 536 final, Brussels, 15.10.2009.

¹⁴⁴ European Parliament Report on the proposal for a regulation of the European Parliament and of the Council establishing a Programme to support the further development of an Integrated Maritime Policy, COM(2010)0494 – C7-0292/2010 – 2010/0257(COD), 30.05.2011.

¹⁴⁵ European Commission, Summary of the results of the public consultation on international Ocean Governance (Luxembourg: EU, 2016). Available at: http://ec.europa.eu/dgs/maritimeaffairs_fisheries/consultations/ocean-governance/doc/ocean-governance-summary_en.pdf

resource efficient and circular green economies can deliver growth, jobs and a safer environment”¹⁴⁶

Within the Southeast Asia region, however, the EU and APEC have markedly different approaches to ocean governance stemming from their very different treaty and institutional structures. APEC works around the traditional rubric of inter-governmental meetings supported by specialist working groups including APEC’s Ocean and Fisheries Working Group (OFWG). The importance of the latter working group must be viewed against the high productivity of countries within the region, which are estimated to account for over 80 % of global aquaculture production 65% of sea fisheries.¹⁴⁷ Clearly, the concerns of APEC extend well beyond the SCS/East Sea regions, nonetheless, the OFWG provides a useful forum for discussing matters of common concern that go beyond fisheries and aquaculture including food security, climate change, marine scientific research and technology transfer, as well as the blue economy. In 2015, 16 APEC economies attended the annual meeting of the OFWG and considerable progress was made on updating APEC’s Marine Sustainable Development Report and Action Plan.¹⁴⁸ Significantly, APEC members consider that they share “one ocean” and recognise “the urgent need for ocean cooperation due to the complex and trans-boundary nature of ocean and coastal issues and challenge”.¹⁴⁹ In this regard, the Xiamen Declaration, which was adopted by APEC Ocean related ministers calls for the “establishment of more integrated, sustainable, inclusive and mutually beneficial partnership through ocean cooperation among APEC members on a range of collaborative and concerted actions.¹⁵⁰ Specifically, the Xiamen Declaration identifies four areas of integrated ocean management for such cooperation, namely: (1) Coastal and marine ecosystem conservation and disaster resilience; (2) The role of the ocean on food security and food related trade; (3) Marine science, technology and innovation; and (4) Blue Economy.¹⁵¹

Collaborative approaches to the outer limits of the continental shelf

The paper has focused on Union law. At the same time, it should be noted that there are many other topics covered by Convention that come within the exclusive competence of the Member States, which have been subject to collaborative action on the part of the Member States, such as in relation to the submission of extended continental shelf claims beyond 200 miles to the Commission on the Limits of the Continental Shelf (CLCS) under Article 76 of Convention. Clearly, these matters also have a bearing of the exploration and exploitation of marine resources.

¹⁴⁶ *Ibid* at 16. Also, see European Commission Presses Release, 12 October 2015. Available at: http://europa.eu/rapid/press-release_MEX-15-5825_en.htm.

¹⁴⁷ APEC, *Harvesting Currency: The importance of fisheries and aquaculture for APEC economies* (APEC, 2009).

¹⁴⁸ Chile; People’s Republic of China; Hong Kong, China; Indonesia; Japan; Republic of Korea; Malaysia; Papua New Guinea; Peru; the Philippines; the Russian Federation; Singapore; Chinese Taipei; Thailand; the United States; and Viet Nam. See: http://mddb.apec.org/Documents/2015/OFWG/OFWG2/15_ofwg2_summary.pdf

¹⁴⁹ APEC Ocean Cooperation in the Asia Pacific Region. Available at:

<http://library.pcw.gov.ph/sites/default/files/Annex%20G%20-%20APEC%20Ocean%20Cooperation%20in%20the%20Asia%20Pacific%20Region.pdf>

¹⁵⁰ *Ibid*.

¹⁵¹ *Id*.

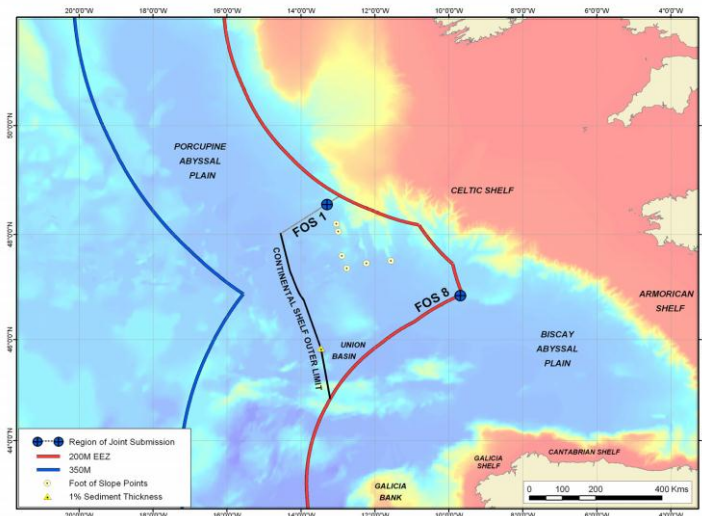
Most notably, Ireland, France, Spain and the UK lodged a joint submission with the CLCS in May 2006, claiming an area of continental shelf that measures about 80,000 sq km in the area of the Celtic Sea and the Bay of Biscay, and lies beyond 200 miles from the baselines of each State (see Figure 1 below). This joint submission, which was prepared collectively, was submitted to the CLCS without prejudice to the ultimate delimitation of the boundaries of the continental shelf between the four States concerned.

For each of the four States this joint submission represented a partial submission in respect of a portion only of the outer limits of the continental shelf appurtenant to it that lies beyond 200 miles from its baselines. The outer limit as projected in the submission is based on both sediment thickness (the Irish formula) and on the basis of the “60 miles from the foot of the slope” distance criterion (the Hedberg formula), as set out in Art.76 of the Convention. The area of continental shelf that is the subject of the joint partial submission is not claimed by any other State.

On 24 March 2009, the CLCS adopted the “Recommendations of the Commission on the Limits of the Continental Shelf in regard to the Joint Submission made by France, Ireland, Spain and the United Kingdom of Great Britain and Northern Ireland in respect of the area of the Celtic Sea and the Bay of Biscay on 19 May 2006.”¹⁵²

This novel solution set an important international precedent. Moreover, it expedited the CLCS submission process and it is anticipated that the delimitation of this area will be agreed between the four States concerned on the basis of applicable principles of international law in due course. In the alternative, there may be scope to establish a joint development and management zone should the parties so decide.

Figure 1: Article 76 Joint Submissions¹⁵³



¹⁵² Information on Article 76 of Convention and the Executive Summaries of the joint submission of France, Ireland, Spain and the UK can be found at:

[Http://www.un.org/Depts/los/clcs_new/clcs_home.htm](http://www.un.org/Depts/los/clcs_new/clcs_home.htm)

¹⁵³ Source: Executive Summaries of the joint submission of France, Ireland, Spain and the UK.

Cross-Border Unitization Agreements, Joint Venture and Joint Development Zones

There are several examples of agreements to exploit and share petroleum resources across maritime boundaries in Europe.¹⁵⁴ Generally, they provide a useful mechanism for resolving the exploration and exploitation of cross-boundary petroleum reserves in instances where there is political willingness to cooperate and reach agreement on how best to share available or potential resources. The precise arrangements governing the exploration and exploitation of such resources vary considerably and extend from broad cooperative agreements to intricate jurisdictional and revenue sharing systems. In some instances, they are unitization agreements concerning a single deposit and in other cases they entail the establishment of a joint venture approach. As such, they must be distinguished from joint development zones, where the agreement sets out the arrangements between two states to develop and share in agreed proportions the resources found within a disputed area, that is to say where a boundary agreement remains undetermined.¹⁵⁵

Thus, for example, the 1976 Frigg Field Agreement, which relates to an area that straddles across the UK/Norway continental shelf boundary, addresses the apportionment of the reserves as a single unit (unitisation), as well as regulates matters such as safety, taxation, dispute settlement, but does not affect the rights and jurisdiction of the parties.¹⁵⁶ The Statfjord Agreement also applies in the North Sea, between Norway and the United Kingdom, defines the term "reserves" and has a number of other features, which distinguish it from the 1976 Frigg Field Agreement. There are other examples of different approaches to the management of cross-boundary resources, including the 1974 Agreement between France and Spain, which allows each State to retain its sovereignty and jurisdiction over an area of 814 nm², but at the same time provides a legal basis for joint ventures between the companies operating in each sector, as well as the export of the resources from the respective sectors. Significantly, the prescribed arrangement does not affect the legal status of the superjacent waters or airspace.¹⁵⁷ The agreed continental shelf boundary delimits the jurisdictional zones of each state in the joint area.

All of these cross-border arrangements are matters that fall within the exclusive competence of the Member States, independently of the Union.

In marked contrast to the joint-approach to hydrocarbon resources that pervades in state practice in Europe, China, the Philippines and Vietnam have awarded oil concessions unilaterally in disputed areas of the SCS. Moreover, States within the region have shown scant regard for the obligations that arise under the Convention, which requires States to make every effort to enter into provisional arrangements of a practical nature and not to jeopardize or hamper the reaching of a final agreement, pending the delimitation of the EEZ and/or the

¹⁵⁴ See, *inter alia*: Hazel Fox, et al., *Joint Development of Offshore Oil and Gas: A Model Agreement for States for Joint Development with Explanatory Commentary* (London: British Institute of International and Comparative Law, 1989); H. Fox, *Joint Development of Offshore Oil and Gas*, Vol. 2, (London: British Institute of International and Comparative Law, 1990).

¹⁵⁵ *Ibid.* The latter zones have a legal basis in Articles 74(3) and 83(3) of UNCLOS.

¹⁵⁶ Norway-United Kingdom. "Agreement relating to the exploitation of the Frigg Field Reservoir and the transmission of gas therefrom to the United Kingdom, done at London on 10 May 1976," Treaty Series N. 113, 1977.

¹⁵⁷ Art 6, France-Spain. "Convention sur la delimitation des plateaux continentaux des deux Etats dans le Golfe de Gascogne (Golfe de Biscaye), signee a Paris le 29 Janvier 1974," United Nations Document ST/LEG./SER.B/19, 445.

continental shelf between States with opposite or adjacent coasts.¹⁵⁸ Indeed, one authority has concluded that it is hard to find state practice within the region where a party has actually refrained from undertaking hydrocarbon related activities in acknowledgement of a duty under the Convention.¹⁵⁹ There are four provisional joint-development agreements in the SCS region that are over a decade old between Malaysia and Thailand (1979/1990), Malaysia and Vietnam (1992), Malaysia and Thailand (1999), as well as Cambodia and Thailand (2001).¹⁶⁰ The joint seismic survey agreement concluded between China, the Philippines and Vietnam in 2005 is no longer in force.¹⁶¹

What do we learn from the EU approach?

The traditional focus of the EU and the Member States is on addressing sovereignty and economic issues pertaining to the ocean by means of a normative rule-based approach firmly rooted in the Convention and through its own unique legal order. In addition and in marked contrast to the approach taken by three permanent members of the Security Council (United States (a non-party to the Convention), the Russian Federation and China), the EU has shown a strong commitment to international dispute settlement and to discharging its obligations under Part XV of the Convention.¹⁶² Thereby strengthening the international legal order.

The meeting of the G7 States in June 2015 highlighted the risks posed by large-scale land reclamation in the South China Sea and the escalating tension in the East Sea. One of the ironies resulting from the rising fears of China and its burgeoning military is that there is a rapprochement between the United States and Vietnam, as well as with other countries within the region.¹⁶³

For countries in other ocean regions including the littoral States of Southeast Asia, there are a number of trends evident in the Union's functional approach to the implementation of the law of the sea in the domains of fisheries management, environmental protection and maritime governance, which demonstrate that pragmatism frequently trumps the principle of exclusive State sovereignty over resources and unilateralism in relation to maritime governance more generally. The principal features of the EU approach are as follows:

- I. Based on the rule of law and strict observance and development of international law including Convention and related international agreements;
- II. Acceptance that all problems and challenges related to management of human activities in relation to ocean space are inter-related and need to be considered as a whole in line with the principle of inter-dependence;

¹⁵⁸ Articles 74(3) and 83(3), UNCLOS.

¹⁵⁹ BIICL Project, Obligations of States under Articles 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas, Draft section 3.3.6, State Practice in the South East Asia and South China Sea Region (London: BIICL, 2016)(copy with the author), 54-67, at 61.

¹⁶⁰ *Ibid.*, at 64.

¹⁶¹ *Id.*

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¹⁶³ *Financial Times*, 21-22 May 2016, at 6.

- III. A high level of protection and improvement in the quality of the environment, a prudent use of natural resources, the promotion of scientific and technological advancement;
- IV. The promotion of regional solutions to regional problems. Particularly in the form of sea-basin strategies, which acknowledge the unique political, geographical, economical context of each maritime region. That is to say, one size does not fit all;
- V. Adoption of integrated approaches to maritime governance for cross-sectoral collaboration and stakeholder consultation at European, regional and national levels.
- VI. Development of cross-thematic policy tools such as maritime spatial planning, comprehensive marine knowledge and data, and integrated maritime surveillance.
- VII. Promotion of sustainability, ecosystem-based management and the precautionary principle under the CFP and the MSFD.
- VIII. Promotion of the Union as a strong international actor in multilateral and regional fora.
- IX. Clear linkages with other Union policies on trade, research, energy and competition.
- X. Adopting a leadership role and collaborative approach in its relations with third countries.