

## **Conference on the Law of the Sea and Maritime Security**

Japanese-German Center Berlin, 26 February 2016\*

### *Brief outline of the Conference's thematic structure and methodology*

The Conference on the Law of the Sea and Maritime Security was hosted by the Japanese-German Center Berlin (JDZB) and the German-Japanese Association of Jurists (DJJV), with the support of the Embassy of Japan to Germany. The event took place on 26 February 2016 and congregated a high-profile group of participants and stakeholders with long-standing experience on topics related to maritime affairs, marine geopolitics, and maritime legal dispute settlements. Throughout the Conference, topics of interest to Japan and Germany were intensely debated. With a view to combining presentations by subject matter, the conference was structured into four thematic panels, each having three to four panelists and being followed by questions and answers.

The first panel, entitled “Ocean Governance”, was chaired by Dr. Monika-Yuki Franz-Delmuth and offered participants an overview on current Japanese and German ocean governance policies and priorities. The panel leveled the ground for further discussion on the geopolitics of the South and East China Sea (SCS and ECS) as well as on the Japanese relations with neighboring countries, which was the focus of the second and third panels on “Coastal State Rights and Entitlements” and “Maritime Security Issues” respectively.

The fourth panel promoted a thematic shift and emphasized legal aspects of ocean affairs, mainly in light of the United Nations Convention on the Law of the Sea (UNCLOS). Panelists provided insights on existing compulsory dispute settlement procedures under UNCLOS, on impasses regarding the extension of a State's continental shelf (CS), and on the on-going China-Philippines arbitration proceedings.

### *Welcoming remarks*

In her inaugural words to participants and stakeholders attending the conference, *Dr. Friederike Bosse*, Secretary General of the Japanese-German Center Berlin, highlighted the complex political, economic, and military context in East Asia. The region is currently shaken by political turmoil that calls not only for closer cooperation between directly involved and interested third States, but also for deeper debates on maritime security affairs concerning East Asia.

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\* This report portrays the main lines of argument of the Conference, and it summarizes the presentations and discussions according to the understanding of the author. We therefore ask that single remarks not be quoted as literal statements of the speakers.

In a deeply interconnected world, where problems are globally caused and consequences are experienced worldwide, solutions are also to be found through dialogue, cooperation, and partnership. In this sense, current tensions in East-Asia allow one to conclude that Japan expects more from Germany and Europe alike. Further engagement in Asia is seen as necessary, engagement inspired by the international rule of law and aimed at long-lasting regional order and peace.

In entertaining potential solutions for ongoing tensions, it is inevitable that the relevance of ASEAN (Association of Southeast Asian Nations) is emphasized, given the history of good relations between Japan and the Association and the need for comprehensive dialogue between interested parties.

In a scenario marked by tensions between politics and the rule of law, there is a need for representatives from different fields of expertise and countries to combine their efforts in understanding the current situation and eventually designing avenues of action. Therefore, expectations from the conference included fruitful debates and insights for better understanding ongoing tensions.

Welcoming remarks were also offered by *Dr. Jan Grotheer*, President of the German Japanese Association of Jurists (DJJV). In his comments, Dr. Grotheer took advantage of the opportunity to acknowledge the work of the Association and its members in assisting the organization of the conference and in spreading the word regarding German legal developments in Japan and vice versa.

### *Panel I – Ocean Governance*

Panel I focused on the basic principles and priorities underlying ocean government policies undertaken by both Japan and Germany. Topics addressed were of a less controversial nature, as the panel had a rather descriptive character. Noteworthy is the interesting combination within the panel of political aspects of governance with legal options for dispute resolution under UNCLOS. This relationship between politics and international law influenced the entire Conference. The broad issues dealt with in this panel paved the way for discussions on more sensitive topics relating to maritime security.

The first presentation was held by *Ambassador Ishii Masafumi* (Embassy of Japan to the Kingdom of Belgium) and aimed at detailing the Japanese perspective on contemporary ocean governance issues. Current Japanese priorities concerning ocean matters include: (a) to maintain freedom and safety of navigation in accordance with international law, mainly because in the view of the Ambassador neither Japan nor China have an appetite for crises or tensions given their propensity to disturb the flow of goods; (b) to maintain access to global commons and to promote a sustainable use of natural ocean resources, including fisheries and deep water natural resources; (c) to foster the solution of conflicts in accordance with international law, that being the reason why Japan opposes the use of force or coercion for advancing maritime claims and insists on the need for States to settle disputes by peaceful means according to UNCLOS; and (d) to estab-

lish crisis management mechanisms (as *ultima ratio*) in order to decrease the likelihood of conflicts. Regarding this last priority, it is inevitable that it requires creating conditions for direct dialogue between navies operating on the seas, just as it is advisable to coordinate teams and ease tensions on the ground.

Alongside State priorities, the most daunting challenges to ocean governance, according to the Japanese perception, include the implementation of UNCLOS provisions and the clarification of hermeneutic divergences, such as those rules relating to exclusive economic zones (EEZ). On this challenge, to have the United States ratify UNCLOS would be of absolute relevance to the global, uniform implementation of the Convention. However, whether that will happen in the near future is still a question mark.

A second challenge relates to the need for additional rule-making efforts, in which the codes of conduct (COS) represent a possible way to reach the peaceful solution of international maritime crises. For these efforts, the East Asia Summit (EAS) would be responsible for bringing all relevant powers of the region together, for specifying who takes the lead in what context, and for discussing topics including crisis management. A third challenge is for States to use traditional tools where possible, e.g. to sign fishery agreements, especially in the South China Sea (SCS), or other sorts of law-enforcement agreements. Fishery agreements may have a limited effect, as they do not solve political tensions or cover maritime boundary issues, but they are still relevant in cooling tensions in problematic regions.

Moreover, challenges include: the need to promote respect for internationally binding decisions (for peaceful conflict settlement); the need for a new framework for crisis management, as the Japan-China Sea-Air Contact Mechanism and Codes for Unplanned Encounters at Sea; the need to invest massively in dynamic and adaptive capacity building through various institutions, such as the Japanese Official Development Assistance (ODA); and the need to be prepared for new challenges, such as arctic and space exploration. Finally, Ambassador Ishii addressed the challenge of deploying other diplomatic and military methods to promote an effective governance of the oceans. A possible means would be to deepen defense cooperation between Japan and the North Atlantic Treaty Organization (NATO).

On the German perspectives in respect of ocean governance, *Ambassador Rainer Lassig* (Head of Division, Special Areas of International Law, Federal Foreign Office) highlighted possible political and legal standpoints. Politically, Germany supports the European Union Maritime Strategy, a multi-sectoral initiative to be implemented by a broad-ranging plan of action structured along five different axes: international trade; enhancement of information exchange; capacity building; risk management; and research and training. Still on the political sphere, a particularly relevant document is the G7 Declaration of Foreign Ministers concluded after the Lübeck Meeting in 2015; this is due to the concerns expressed against unilateral actions in the South China Sea, including land reclamations, and due to the obligation of G7 States to confront excessive maritime claims.

The juridical aspects of the German approach to ocean governance are multiple, and for that reason the presentation focused on two specific points. Firstly, consideration was had of the Ems-Dollart Treaty between Germany and the Netherlands (signed in 2014, but entering into force in 2016), which not only settles a historic maritime dispute by leaving open the question of boundary delimitation but also regulates responsibilities and rights of use for the coastal sea between three and twelve nautical miles from the coast of both countries. Besides this, the Treaty also governs the construction of a joint offshore wind energy farm and provides for the combined monitoring of maritime traffic on shared waters. Secondly, focus was placed on the negotiations on a potential implementing agreement on the Protection of Biodiversity in Areas beyond National Jurisdiction (also known as BBNJ).<sup>1</sup> From a legal perspective, it was observed that a major viewpoint difference exists between Germany and Japan regarding the negotiations; whereas Germany is pushing for the agreement, Japan views it with skepticism, possibly due to fisheries' interests. However, despite individual issues, Ambassador Lassig stressed that Germany and Japan share a history of common understanding, and both countries work friendly and confidently together to advance the cause of maritime security worldwide in accordance with the international rule of law.

The following presentation, held by *Prof. Dr. Henning Jessen* (Hamburg University), focused on the dispute settlement mechanisms established under UNCLOS. Initially, he offered a concept of “dispute”, understood as the difference of points of view on law and/or facts that are positively opposed by another party. The first dispute settlement mechanism analyzed was peaceful means of solution, in line with UNCLOS Articles 286 and 287. Nonetheless, where no peaceful resolution is reached, resort to compulsory procedures is possible. Based on Annexes VII and VIII of UNCLOS (cases relating to “ordinary” or “special” matters, respectively), one of the conflicting parties can bring the dispute to the International Court of Justice (ICJ) or to the International Tribunal on the Law of the Sea (ITLOS), or to an arbitral tribunal.

According to Prof. Jessen, ITLOS possesses a more flexible statute compared to the ICJ. Under ITLOS, non-ratifying States can become parties to a dispute before the specialized tribunal. In fact, even private parties may come before the bench, as in the Arctic Sunrise Prompt Release Request (2011), in which Greenpeace acted as *amicus curiae*. In this sense, ship owner associations and non-governmental organizations may have a voice during judicial proceedings.

UNCLOS sets a variety of procedures at the disposal of parties, with particular relevance being given to the “prompt release” of vessels and crew. The political sensitivity involving prompt release requests is well illustrated by the Arctic Sunrise case (between the Netherlands and Russia), in which a powerful State – Russia – rejected the jurisdic-

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1 Negotiations on a BBNJ Implementing Agreement have gained momentum, and the latest development was the adoption in June 2015 of a resolution by the UN General Assembly determining the launch of negotiations in 2017 on that issue.

tion of the Tribunal and did not take part in the proceedings. The practice of “no-show” has devastating consequences for the rule of law on maritime issues. Noteworthy is also ITLOS’ competence to award financial compensations, as was the case in the M/V Saiga proceedings (1997) and the obligation of Guinea to pay US\$ 2 million to San Vincent due to the illegal detention of the vessel.

Moreover, cases before the Tribunal have also had environmental principles at their core, as in the Mox Plant Case, between Ireland and the United Kingdom in 2001, and in the land reclamation case between Malaysia and Singapore in 2003. In both circumstances, environmental questions were at the core of the dispute.

Prof. Jessen concluded that ITLOS has had a “slow” success story, in which the variety of cases brought before the Tribunal is gradually increasing, something indicating that the international society is growing progressively more confident in the role of the Tribunal. From this perspective, there is room for optimism. However, the denial of jurisdiction in “politically sensitive” cases by “powerful” UNCLOS ratifying States is a major threat to the entire system.

A short debate followed the first panel, and questions on the phenomenon of “toothless decisions” and the difficulty in enforcing ITLOS verdicts arose. Panelists agreed that the sole alternatives are international pressure, boycotts, and reputational costs, which should not be underestimated. The lack of legitimacy in the international arena is not to be neglected as an influential factor.

Another question dealt with the relationship between the courts and whether there could be contradiction and competition between ITLOS and ICJ. Panelists shared the view that there is neither contradiction nor competition, as ITLOS represents the more specialized instance, but States maintain the sovereign discretion to turn to the ICJ or to the Permanent Court of Arbitration (PCA) in law of the sea related cases.

A question on the practice of “maritime lawfare” (a play on words in relation to “warfare”), and whether Germany and Japan are willing to use this term and practice it, was advanced by one of the participants. Despite being an apparently negative term, it is considered a way to implement UNCLOS by waging law claims and, in this sense, is valid.

### *Panel II – Coastal States Rights and Entitlements*

In his presentation, *Prof. Dr. Yanagihara Masaharu* (Kyushu University) detailed the Japanese domestic legislation concerning the delineation of maritime zones (territorial sea, 200 nm fisheries zone, and the continental shelf), followed by a brief overview on the Japanese land mass (380,000 km<sup>2</sup>) and its EEZ (4.050.000 km<sup>2</sup>), which is twelve times larger than the land area. Because of its location eastward of China, the view was expressed that Japan constitutes a sort of “natural barrier” to Chinese ambitions to reach the Pacific Ocean. Therefore, a most pressing issue is to know precisely where one can fish (two powerful fishing nations with massive fleets) and exploit other natural resources.

As part of the Japanese strategy, the country has concluded bilateral agreements on fisheries and other marine natural resources. Currently, there is a plurality of treaties bringing to life a complex web of agreements and mutual bonds, which ultimately signals a possible peaceful resolution of conflicts in the region.

Initially, Japan signed a continental shelf agreement with South Korea (1974) and then a fisheries agreement (1999) in order to draw a “fisheries provisional line” with that neighbor. Another relevant treaty is the Japan–China fisheries agreement, signed in 2000, which establishes a “median water zone” and fishing quotas agreed to by both States.

Concerning non-living resources, especially gas, there is a joint development agreement with China aimed at enabling the exploitation of the “Asunaru” offshore gas field. Noteworthy are also the Japan–Taiwan fishery arrangements, having the simple status of arrangements since the international society does not recognize Taiwan as a State. In parallel, China and Korea also signed a bilateral fisheries agreement in 2001, establishing a “provisional measure zone” and “transitory fishing zone”.

Nonetheless, there remain issues between these parties, and little coordination exists among the mentioned instruments. Given that each State decides unilaterally on its 200 nm EEZ and CS, overlapping claims are practically inevitable. In view of this, Prof. Yanagihara suggests the adoption of a more comprehensive multilateral boundary treaty as a long-lasting solution.

Concerning recent tensions in Sino-Japanese waters, in 2010 a Japan-UK defense meeting final document agreed not only that unilateral land reclamation is illegal and to be opposed, but also that maritime boundaries are to be clearly defined according to UNCLOS provisions. One of the “heated questions” between both Japan and China is whether or not the features of Okinotorishima constitute islands according to UNCLOS Article 121. The question remains unresolved, and Japan claims that at the time the islands were granted to Japan there was no UNCLOS.

During the debate, the speaker was asked to provide reasons why is it so difficult to reach a trilateral security agreement in the East China Sea. According to him, such an agreement is certainly desirable, but agreements can be interpreted in varied ways, and it seems to be very difficult to design lines that could be interpreted in the very same way.

The first presentation of the afternoon began with the analysis of *Dr. Ernst Uhlrau* (Former President; Federal Intelligence Service) on the geopolitical factors that steer Chinese actions along its coast. The relevance of resources for a country with 1.3 billion inhabitants and the fourth vastest land mass in the world is undeniable. Not only water (to supply dry provinces of the country), but also energy and food resources are key points of any analysis. The relevance of transport routes is similarly not to be neglected.

Another factor lies in the economic approach, which is vital to the cohesion of the Chinese society. During the Chinese transition to an exports model, led by Deng Xiaoping (during the 1980s), an implicit agreement between the Communist Party and the people offered economic growth in exchange for “good societal behavior”. Therefore, it

comes as no wonder that China's policies have ever since been about opening new markets and exploring investment frontiers via Africa and Latin America.

Concerning the South China Sea, the "9 Dash Line" came about in the 1940's in the time of the Republic of China, under the rule of Chiang Kai-shek, but it was later embraced by the Communist regime. Initially, the line was designed from the point of view of resources, since no historical entitlement was claimed back then. In fact, throughout history China has – until recently – not given much attention to the SCS to the extent of its being termed a "latecomer to the Sea".

As offshore exploitation became more and more important, the use of oil and gas deposits in the area was inevitable. This generated conflicts in the region, which was the case in the micro naval war between China and Vietnam in 1974. After the financial crisis of 2008, China assumed the role of being the economic engine of the region and in parallel developed its ability to become active in maritime matters. The Chinese have been tackling piracy off the Somali coast and established a base in Djibouti. Recently, China has modernized its navy and acquired aircraft carriers. Therefore, the escalation of tensions is natural and triggers a sort of "frozen conflict".

As a result, Chinese actions have attracted US attention to the area. Under the geopolitical concept of "Pivot Asia", the Freedom of Navigation Operations (FONOPs) are a priority in countering excessive maritime claims. China has protested vehemently against these operations and has reaffirmed its sovereignty over the disputed islands in the SCS, some of which are already hosting commercial flights.

Currently, the conflict is on "stand by", with the US engaging in FONOPs and China resisting them. Major US worries include: the fourfold increase in China's military spending in recent years; the closer cooperation between China and Russia aiming at improving response skills in maritime conflict scenarios; and the massive infrastructure projects on ports and on transportation networks, including the plan to establish a central Asia route from China to Germany. Regionally, trade volume is also a challenge to the US, as commerce between China and regional countries is due to increase, whereas with the US it is due to decrease.

Nonetheless, one thing will remain unchanged: China will continue to be a volatile player with strengths and frailties in the eyes of the international community. Recent doubts on the solidity of Chinese economic development, with Chinese industries running at over-capacity, add fuel to that perception. International relations history shows that a focus on domestic difficulties is usually distracted by military maneuvers and a starker patriotic stance, and this could be just the case with the militarization of the SCS.

Japan's security policies to counterpart Chinese ambitions are not yet very clear. Both countries have a difficult relationship marked by "ups and downs", and they have different military ambitions in the region. While further power projections are expected from both parties, the reemergence of nationalistic policies in China and South Korea seems to be an issue of much concern to the Japanese authorities. Therefore, the need to forge coalitions with neighbors is imminent.

### *Panel III – Maritime Security Issues*

The presentations held in the third panel of the Conference displayed a vibrant geopolitical approach and offered views on the recent ratcheting up of tensions in the SCS. *Dr. Michael Paul* (German Institute for International and Security Affairs (SWP)) highlighted both the military escalation, as Beijing has placed missile launchers on disputed islands, and the legality and relevance of the US FONOPs in this context. He gave a brief legal overview on the *mare liberum* principle, on the shared resources regime, and on the notion of “global commons” in the modern law of the sea.

The move to oppose the *mare liberum* is historically known as *mare clausum* and results in the “territorialization of the seas”, according to which a coastal state exercises sovereignty over the waters near its shore. The argument is straightforward: coastal countries should have the right to regulate military activities in their maritime zones. However, China allegedly claims exclusive access to its entire EEZ, what would ultimately represent a breach of UNCLOS and the international principle of the freedom of the seas. If taken too radically, this claim would imply the collapse of the international system, as sea lanes would be entirely privatized. Other countries in the region, such as the Philippines, Malaysia, and Vietnam have explicitly opposed Chinese claims.

Therefore, UNCLOS has kept the right of innocent passage on territorial waters, despite other States’ jurisdiction and sovereignty (Article 17). This right may be exercised without previous permission. Thus, the US initiated its FONOPs in 1979 to make sure there is no acquiescence to excessive sovereignty claims. The program encompasses civil and military exercises as well as cooperation measures with regional nations. Recent FONOPs were conducted in October 2015 and January 2016, purportedly designed in strict accordance with international law. Given that Beijing also carries out its own FONOPs and possesses a navy capable of monitoring the high seas, current tensions between the US and China represent a real threat.

Another objective of such operations is to demonstrate that the construction of artificial islands does not generate an EEZ or a “territorial sea” (TS). In the case of reefs and shoals, one should not even refer to a “right of innocent passage” because there is no coastal baseline and consequently no sovereignty over adjacent maritime zones. By doing so, the US expects to prevent severe limitations to the world’s most important trade channel.

Difficulties in reaching a diplomatic solution are, therefore, clear. Due to sacrosanct domestic claims by Beijing and due to Washington’s willingness to uphold the *mare liberum* principle, there is room for escalation whenever a FONOP is led. Among measures to ease tensions, bilateral cooperation and joint maritime usage of the shared sea as well as the implementation of capacity-building programs could represent viable steps towards peace and security in the area.

The next presentation, by *Captain Dr. Nakamura Susumu* (Japan Maritime Self-Defense Force; Command and Staff College) analyzed the specific Chinese maritime

claims in the South- and East China Sea. These claims are allegedly drawn from excessive baselines placing the totality of the SCS under Chinese jurisdiction; additionally, airspace above the EEZ is not recognized as international airspace and legal military activities in the entire region are opposed.

A detailed historic panorama of the Chinese advancement in the SCS shows that since 1950, after the French withdrawal from the region, China first claimed the Paracel Islands, later the Spratly Islands (1988), the Mischief Reef (1995), and finally the Scarborough Shoal (2012). Initially, claims were of a pure territorial nature. However, as natural resources were discovered in the area, economic benefits became the chief motivation to have a larger EEZ.

A special focus was given to the Chinese “9 Dash Line”, designed initially in the 1930s when the Republic of China asserted that the islands in the SCS were part of its territory. Since then, the line has been constantly changing, something showing inconsistency in its claims. In 2014, the US officially objected to the “9 Dash Line”, stating that it matches neither general international law nor UNCLOS on the basis that maritime boundaries cannot be established unilaterally but only by means of negotiation.

Equally problematic to Japan are the Chinese theories of “state jurisdiction area” and “ocean territory”, which allegedly consider the EEZ as territorial sea. According to China, the EEZ does not constitute international waters, and based on that it criticizes the FONOPs carried out by the US. In order to hamper US involvement in the region, Beijing counts on three major “warfarers” (media, legal and psychological) to address the issue domestically and internationally. Capt. Nakamura also mentioned growing concerns over devastating ecological effects that the artificial construction of islands have on the ecosystem and marine environments of the SCS.

Regarding the East China Sea, maritime boundaries are unsettled and overlapping claims with Japan exist, especially regarding the Senkaku Islands. Despite the unclear boundaries, China has installed sixteen offshore oil platforms in the disputed area and since 2012 has sharply increased the number of operations on the territorial sea around the disputed islands – with all of that allegedly being in violation of mutually agreed notification systems imposing six months’ notice prior to any action on the contested waters, a rule that has repeatedly been disregarded by Beijing.

Following that presentation, *Dr. Wolfgang Pape* (Policy Officer; Center for European Policy Studies (CEPS)) aimed at shifting the approach from confrontation to cooperation in the region. In order to do so, he identified potential causes to ongoing tensions and advanced his own theory on the best approach to ease them. Firstly, one should not neglect the problem of the “Asian paradox”, a dualism between high-level and interdependent economic exchanges, but low-level regional political interaction, due mainly to historical differences. Secondly, the culture of “name and shame” in Asia also represents an obstacle to the implementation of political cooperation.

With a particular focus on East Asia, it is clear that countries have global traders but nationalistic politicians. In one of the tightest trade networks in the whole world, business

people are warm and welcoming, whereas politicians are “ice cold” in interactions with each other. In fact, political leaders hardly ever connect in substantive exchanges, as was the case between Abe, Park and Xi for more than three years. The peril of such paradox is clear: not talking leads to extremism and inspires nationalisms and hate speech.

In this troubled scenario, Taiwan’s contribution could shed light on possible ways to approach issues. Based on field visits, Dr. Pape attested that despite the Japan-Taiwan fishery agreement of 2013, fishermen from both countries were more pragmatic and cooperated directly with each other without the need for an imposed treaty.

Therefore, one possible avenue to ease tensions in the region is to shift focus from the Western-imposed concept of “nation” towards a multilateral attitude. Dr. Pape believes that an “omnilateral” system would represent an even better alternative, in which local governments build up policies from the local level with civil society participation. Such an idea could work since Asia has traditionally been flexible, with governance based on networks of interested actors (instead of merely “States”).

The interconnectedness of today’s world is incompatible with conventional mindsets. Asia needs to surpass unresolved problems from World War II and combine efforts to shape an Asian identity, which would serve as ground for further unity based on commonalities between traditions from China, Japan, Korea and neighbors. There are already several initiatives to foster amity, peace, cooperation, joint development of resources, and hotlines for times of emergency – among other projects in the area. In fact, whenever the idea of sovereignty is put aside for a moment, cooperation emerges in several ways. This has been the case with the trilateral cooperation CKJ (China, Korea, and Japan) and with the establishment of the “Trilateral Cooperation Secretariat” in 2011.

In the light of the above, the concluding proposal advanced by Dr. Pape is to abandon confrontation at the nation’s frontlines and move towards cooperation with all stakeholders omnilaterally.

In his presentation titled *European Soft Power in Asian Seas*, Dr. Joshua Walker (Transatlantic Fellow in the Asia Program; German Marshall Fund of the United States) began by emphasizing how relevant Europe and Asia are in terms of world population, trade, and naval power. Both continents together represent approximately 62.5% of the world’s population and 57% of the world’s GDP. Mutual trade volume amounts to 809 billion EUR, of which a great share is dedicated to manufactured, technological, and high value-added goods.

A current challenge to stability between those continents is China’s defiance of the maritime rule of law. Asian countries are in the uncomfortable position of opposing Chinese claims, a reason why Western allies are so relevant. In order to tackle that, Europe and Asia need to combine efforts and strengthen cooperation, both in civil and in military terms, particularly as the traditional US strategy of conventional warfare does not suit the complexity of tensions in East Asia.

In this scenario, one should distinguish conventional from unconventional actions (escaping the traditional divide between “military and non-military”). From this angle,

Beijing adopts unconventional measures, in a more subtle and fluid approach to its interests, unlike more conventional players, such as Russia. China insists on handling maritime border disputes on a one-to-one basis, and the role of European nations would be precisely to oppose that and to foster multilateral approaches.

Among the alternatives, the NATO-Japan partnership constitutes a feasible and promising approach to balance political struggles in the region.<sup>2</sup> Both parties would benefit immensely from that cooperation, especially Germany, to whom the work on a framework such as NATO proves relevant for long-term, peaceful negotiations in East Asia.

Moreover, the US counts on European soft power in Asia, especially after realizing that one State cannot solve the world's problems. In order to avoid isolationism, a concerted multipolar approach would pose a major challenge to China, and NATO's involvement would complicate Beijing's strategies. By having NATO engaged in the SCS and ECS, interested countries would leave the traditional bipolar approach and invest in multipolarity. This idea, however, did not pass without criticism from the participants.

During the debate, participants inquired as to the likelihood of an active NATO-Japan partnership leading to confrontation and Beijing's sense of feeling trapped. Despite acknowledging this possibility, Dr. Walker believes that NATO should not restrict itself to the North Atlantic but should promote cooperation worldwide, for instance with the help of partners such as Japan and India in terms of intelligence, navy drills, and closer defense collaboration. NATO is also a means through which Germany could interact on complex issues in Asia.

Another query focused on the US ability to handle "frozen conflicts", such as the ones created and managed by Russia and China, where authoritarianism acts as a fertile ground for these conflicts. Additionally, it was noted that while multipolar approaches are relevant, personal diplomacy is not irrelevant, as could be the case in a possible agreement between Mr. Abe and Mr. Putin.

#### *Panel IV – Dispute Settlement According to UNCLOS*

The widespread significance of UNCLOS in the international arena lies, among other points, in the fact that "it provides a comprehensive regulatory regime for all matters maritime, without being the typical framework convention so frequently encountered in other branches of international law."<sup>3</sup> Having that in mind, the three presentations comprising this panel focused on legal aspects related to the law of the sea.

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2 Japan was the first partner outside the original geographic area of NATO. In fact, according to the official website of the Organization, "Japan is the longest-standing of NATO's 'partners across the globe'". Available at: [http://www.nato.int/cps/en/natohq/topics\\_50336.htm](http://www.nato.int/cps/en/natohq/topics_50336.htm). Visited on: 23 March 2016.

3 See M. GAVOUNELI, From uniformity to fragmentation: the ability of the UN Convention on the Law of the Sea to accommodate new uses and challenges, in: Strati et al (eds.), Unre-

Firstly, *Prof. Dr. Kawano Mariko* (Waseda University) held a speech on the maritime dispute settlement procedures available in international law, with a particular reference to the Japanese experience with those procedures. She analyzed not only the peaceful means of dispute solution but also the so-called “compulsory jurisdiction”, which combines the prohibition against threats or the use of force with the obligation to settle disputes in accordance with the rule of law. It is founded on UNCLOS Part XV, Section II, and among its main provisions is the one attributing discretion to States to choose among the adjudication bodies to entertain a dispute.

In order to resort to compulsory jurisdiction, interested parties need to fulfill certain conditions, such as the obligation to exchange views (UNCLOS Article 283). This was the case in the Southern Bluefin Tuna dispute (1999), the Chagos Archipelago case (2011), the Arctic Sunrise case (2011), and the Philippines v. China arbitral award (2015). Additionally, States must submit a declaration accepting Sections II (compulsory jurisdiction) and III (limitations and exceptions to the compulsory dispute settlement) and choose the means for the settlement of the dispute.

The compulsory dispute settlement system contributes to the final legal settlement of disputes. Further, UNCLOS offers mechanisms enabling States to jointly use natural resources in disputed maritime areas pending a final decision, in line with Articles 74 and 83. In such cases, interested parties are required to abstain from unilateral measures that could negatively alter the disputed area, as in the arbitration between Guiana and Suriname (2007).

The Japanese experience in international dispute settlement bodies includes the 1999 Southern Bluefin Tuna cases between Japan and Australia, and between Japan and New Zealand, which were heard by ITLOS. As a result, Japan abided by the provisional measures order issued by the Tribunal, which considered that the parties should “act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of Southern Bluefin Tuna”.<sup>4</sup> Another case is the one between Japan and Australia (with New Zealand later joining the action as intervenor) on whaling practices in the Antarctic, adjudicated by the ICJ in 2014. In that matter, the Court concluded that the Japanese whaling program was not purely scientific and that the capture of whales was illegal. Consequently, Japan voluntarily abided by the decision and submitted another scientific whaling program to the scrutiny of the International Whaling Commission (IWC).

Dr. Kawano concluded by stating that most effective way to prevent disputes is to encourage effective cooperation before conflicts surface. Nonetheless, in face of the

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solved issues and new challenges to the Law of the Sea: time before and time after. (Leiden: Nijhoff 2006) p. 205.

4 Provisional Measures Order, *Southern Bluefin Tuna Cases between New Zealand and Japan, and Australia and Japan*, International Tribunal for the Law of the Sea, 27 August 1999, para. 77.

difficulties in settling disputes by peaceful means, resort to compulsory dispute settling mechanisms represents a hope in solving conflicts in a civilized and definite fashion.

Following that explanation, *Prof. Dr. Andrew Serdy* (University of Southampton) dedicated his presentation to the analysis of legal impasses relating to the outer limit of Bangladesh's continental shelf and the delimitation of maritime boundaries with neighboring countries. Generally, coastal states have sovereign rights over the continental shelf (UNCLOS Article 77); the continental shelf consists of the seabed and subsoil of the submarine areas extending beyond a state's territorial sea throughout its continental margin and is limited to 200 nautical miles.

However, in line with UNCLOS Article 76, and based on technical and scientific data, countries may forward submissions to the Commission on the Limits of the Continental Shelf (CLCS),<sup>5</sup> a permanent body created by UNCLOS that is responsible for analyzing the geographic data and accepting claims or calling for revised submissions. In the current system, there is strong incentive for coastal States to make submissions because of the final and binding nature of the recommendations by the Commission.

The presentation focused specifically on the overlapping maritime boundary claims on the Bay of Bengal between Bangladesh and Myanmar, a dispute ultimately settled by ITLOS in 2012. The case was entertained despite a clear impasse over Bangladesh's submission to the CLCS and its blockade by neighboring countries. Prof. Serdy analyzed the decision issued by ITLOS and reached the conclusion that the establishment of a much-commented "grey zone" between both parties is not the only problem. The production of "grey areas", where one of the States has sovereign rights on the seabed and the other has rights over the water column, is grounded on UNCLOS Article 78. These areas were not anticipated by the drafters of the Convention but are not excluded by the wording of the Convention, and they were the solution turned to by ITLOS to settle the dispute.<sup>6</sup>

The other grave issue is the troublesome relationship between ITLOS and the CLCS. Based on the Commission's own Rules of Procedure, submitting States were over-implementing Article 76 (10) of the Convention and blocking each other's submissions to the CLCS, alleging that the Commission cannot examine submissions over disputed areas. The problem in the specific case emerged when "despite the absence of CLCS recommendations, which should come logically first, ITLOS was prepared to extend the boundary with Myanmar beyond 200 nm".

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5 The Commission is one of the treaty bodies devised by UNCLOS. It is responsible for scrutinizing submissions for the recognition of outer CS requests and, in parallel, offering states legal and technical advice for drafting submissions. Marked by an interdisciplinary body of experts, the CLCS started office on 1996. The structure, composition, and functions of the Commission are stated in Annex II of UNCLOS.

6 Before the ITLOS ruling, Australia and Indonesia had already signed an agreement in 1997, not yet into force, that served as an example of a possible "grey area" between countries with overlapping claims.

It is unfortunate that those Rules are still valid. The CLCS interprets opposing claims as disputes and thus gives States leeway to halt procedures before the Commission indefinitely. Prof. Serdy is of the view that the CLCS should be able to entertain submissions despite objections raised, given the body's neutral nature. If this does not happen, a solution for such cases would be a mutual lifting of objections from all interested parties so that the CLCS could perform its work. Only recently, after fifteen years of uncritical acceptance of the flawed CLCS Rules of Procedure, States have begun complaining about the indefinite blockage of their CLCS submissions by disputes, what might lead to different approaches by both States and the Commission in the future.

Finally, *Dr. Suzette Suarez* held the last speech of the Conference, analyzing the Philippines-China arbitration proceedings and their prospects of easing tensions and settling disputes in the SCS. Initially, she offered a brief overview on the UNCLOS dispute settlement mechanisms, according to which member States may resort to compulsory arbitration in the event of a failure of previous peaceful solutions attempts.

Grounded on that option, the Philippines forwarded fifteen submissions against China to the arbitral tribunal pursuant to UNCLOS Annex VII. Among the legal questions raised, the Philippines wished to clarify the law applicable to ongoing disputes in the SCS and whether the Chinese "9 Dash Line" is in accordance with UNCLOS. Moreover, the Philippine delegation inquired whether certain geographical features in the disputed area (such as reefs, shoals, and sand banks) are rocks or low-tide elevations and therefore not entitled to being deemed maritime zones at all. Noteworthy was also the attempt to bring ecological considerations into the discussion, based on the argument of the harmfulness of Chinese activities to pristine ecosystems in the region.

To date, China has not demonstrated a willingness to take part in the proceedings. Beijing asserts that the Philippines breached a bilateral binding agreement as well as UNCLOS when it decided to initiate arbitral proceedings without having exhausted negotiations first. Secondly, China is of the view that the arbitral tribunal has no jurisdiction, given that the Chinese have opted out from the compulsory procedure in line with its written declaration lodging reservations to maritime delimitation disputes.

Despite China's "no-show", in November 2015 the arbitral tribunal published a preliminary ruling upholding its jurisdiction to entertain some of the legal questions raised. It concluded that the bilateral agreement was not a binding instrument but a mere arrangement that did not impede the acquisition of jurisdiction for the case. Additionally, some questions brought before the judges are of neither a territorial nor maritime boundary dispute nature. They involve the interpretation of the Convention on different aspects, and the arbitral tribunal may decide on matters of interpretation regarding the Convention's norms. According to the above ruling territorial aspects will not be prejudiced, as the arbitral tribunal will not adjudicate on territorial assertions.

Dr. Suarez finished her presentation by cautiously concluding that the arbitral ruling does not embody the means to lead to a final settlement *per se*. Indeed, the conflicting parties will need to resume negotiations immediately after its publication if a long-

lasting solution is to be found. A positive aspect is that the ruling has narrowed down the scope of disputed issues, something that could suggest better chances of having an assertive decision on the merits of the case. Moreover, a pronouncement by the arbitral tribunal would instantaneously become a source of international law, as it would be the first of its kind to address the question of the legal nature of islands, rocks, and low tide elevations.

The overall impact of the Conference is undoubtedly positive, as the presentations covered a wide range of complex political and legal issues and examined several different scenarios connected to maritime security challenges in Asia. Practitioners and political strategists shared views with international lawyers in a fruitful dialogue balancing “Realpolitik” perceptions and idealist views concerning maritime dispute settlement. The Conference’s core final message is that of the need to develop a *modus vivendi* regulating relations between States in the seas around China, an end to be met through different means such as further cooperation, regional integration, and respect for the rule of law in international maritime matters.

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