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International Law of the Sea

MICHAEL A. BECKER AND ERNESTO J. SANCHEZ*

I. United Nations Convention on the Law of the Sea

A. THE UNITED STATES AND UNCLOS

Supporters of the United States' accession to the 1982 United Nations Convention on the Law of the Sea (UNCLOS) made little progress in 2009, despite a new administration in the White House and a Democratic majority in both houses of Congress.¹ Like the Clinton and Bush administrations before it, the Obama administration expressed strong support for U.S. accession to the Convention.² This was not a surprise. For more than a decade, the Convention has received enthusiastic endorsements from a wide range of interest groups, including the military and diplomatic corps, the shipping industry, oil and gas concerns, and environmentalists.³ Moreover, melting ice in the Arctic and potential opportunities for the United States to secure rights to previously inaccessible oil and natural gas deposits seemingly provided new momentum to the cause.

But competing legislative priorities, including comprehensive health care reform, climate change legislation and an overhaul of the financial regulatory system ultimately left little opportunity to move the Convention through committee to a full vote on the floor of the U.S. Senate, despite plans to do so.⁴ While there are plans to try again in 2010,

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1. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf [hereinafter UNCLOS].

2. Secretary of State Hilary Clinton stated unequivocally in her confirmation hearing that U.S. accession to UNCLOS would be a priority for the Administration and that joining the Convention was "long overdue." See Allison Winter, *Sen. Kerry Looks For Window To Ratify Law of the Sea*, N.Y. TIMES, May 7, 2009, available at <http://www.nytimes.com/gwire/2009/05/07/07greenwire-sen-kerry-looks-for-window-to-ratify-law-of-the-12208.html>. Secretary Clinton reiterated the Administration's position in a letter dated October 26, 2009 to Senator John Kerry, Chairman of the U.S. Senate Committee on Foreign Relations, and offered "strong support for U.S. accession to the convention" in advance of future hearings. See also Letter from Hillary Clinton, Sec'y of State, to John Kerry, Chairman, Comm. on Foreign Relations (Oct. 16, 2009), available at <http://www.oceanlaw.org/downloads/ClintonToKerryLugar-16Oct09.pdf>.

3. See SCOTT G. BORGERSON, COUNCIL ON FOREIGN RELATIONS, THE NATIONAL INTEREST AND THE LAW OF THE SEA, COUNCIL SPECIAL REPORT NO. 46, 3 n. 4 (2009).

4. See Winter, *supra* note 2; see also Lauren Morello, *U.S. Pushes for Law of the Sea Ratification as New Arctic Mapping Project Begins*, N.Y. TIMES, July 29, 2009, at A1.

mid-year elections may complicate such efforts; moderate senators facing re-election will likely find themselves under pressure from the determined minority of senators that has successfully thwarted previous efforts to join the Convention with a barrage of arguments that a former Bush Administration official described as “inaccurate, outdated, or incomplete.”⁵

B. RATIFICATION OF UNCLOS AND RELATED AGREEMENTS BY OTHER STATES

While the United States maintained its outlier status, the Dominican Republic, Chad, and Switzerland each acceded to the Convention in 2009, which has now been joined by 159 countries and the European Union.⁶ In addition, Nigeria, Indonesia, and Tuvalu each ratified the Agreement for the Implementation of the Provisions of the Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.⁷ That instrument now counts seventy-six states parties.⁸

Notably, a new treaty aimed at closing ports to ships involved in illegal fishing was opened for signature in 2009. The Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing was approved by the governing conference of the Food and Agriculture Organization, a U.N. agency, on November 25, 2009.⁹ Parties to the agreement commit to preventing vessels engaged in illegal fishing practices from entering their ports or introducing their illegal catch into international markets—a significant development considering the traditional emphasis on flag state monitoring.¹⁰ The agreement, which has already been signed by the United States and the European Union, will enter into force once twenty-five countries have ratified it.

C. COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF

International law provides that coastal states have sovereign rights to the exploration and exploitation of resources in the continental shelf extending as far as 200 nautical miles from the country’s coastal baseline.¹¹ The state can claim an “extended continental shelf” if it can provide geophysical evidence of a “natural prolongation” of the continental shelf beyond the 200 nautical mile limit.¹² Extended continental shelf claims are administered

5. John B. Bellinger III, Legal Advisor, U.S. Dep’t of State, Remarks at the Law of the Sea Institute, Berkeley, Cal. (Nov. 3, 2008), available at <http://www.oceanlaw.org/index.php?module=News&func=display&sid=83>.

6. See Div. for Ocean Affairs & Law of the Sea, United Nations, Chronological List of Ratifications of Accessions and Succession to the Convention and the Related Agreements as of 08 January 2010, http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#TheUnitedNationsConventionontheLawoftheSea (last visited Jan. 14, 2010) [hereinafter Chronological List].

7. See 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, Aug. 4, 1995, 2167 U.N.T.S. 88, available at http://www.un.org/Depts/los/convention_agreements/fish_stocks_agreement_declarations.htm.

8. See Chronological List, *supra* note 6.

9. Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Nov. 18-23, 2009, C 2009/LIM/11-Rev.1., available at <ftp://ftp.fao.org/docrep/fao/meeting/018/k6339e1.pdf>.

10. *Id.*

11. UNCLOS, *supra* note 1, arts. 56, 76.

12. *Id.*

by the Commission on the Limits of the Continental Shelf (CLCS), an independent body established pursuant to UNCLOS.

In 2009, the CLCS continued to review pending applications and received fifty new complete submissions and thirty-nine preliminary submissions—more submissions than the CLCS had received in its entire history.¹³ The dramatic increase reflected the fact that May 2009 marked the end of a ten-year submission deadline for many states.¹⁴ The high volume of submissions, which relate to claims from all over the world, raised serious concerns about the capacity of the CLCS to issue recommendations in a timely manner. Previous reports had estimated that it could take as many as twenty-five years to process the current backlog.¹⁵ Efforts to expand capacity, for example, by creating additional sub-commissions to review the applications remain under consideration.¹⁶ Furthermore, as described below, the CLCS announced that it had suspended indefinitely a pending application by Myanmar due to an ongoing maritime delimitation dispute with Bangladesh.¹⁷

II. Developments in the Arctic

A. U.S. ARCTIC POLICY

In its waning days, the administration of President George W. Bush announced a new U.S. Arctic policy that broadly set forth “American military, economic, and diplomatic priorities in increasingly accessible Arctic waters.”¹⁸ The first such review since 1994, the presidential directive noted that “[t]he United States is an Arctic nation, with varied and compelling interests in the region.” The review described “[f]reedom of the seas” as “a top national priority” and stated that the United States would “assert a more active and influential national presence to protect its Arctic interests and to project sea power throughout the region.”¹⁹ It also described the need to “develop greater capabilities and capacity” in the region, but failed to provide details on additional funding to expand the existing U.S. fleet of ice breakers—one of the current limitations on U.S. capacity in the region.²⁰

13. See Press Release, Secretary of Commission, Press Conference by Secretary of commission on Limits of Continental Shelf (May 13, 2009), available at http://www.un.org/News/briefings/docs/2009/090513_Sea.doc.htm [hereinafter CLCS Press Release]; see also Div. for Ocean Affairs & Law of the Sea, United Nations, http://www.un.org/Depts/los/clcs_new/commission_submissions.htm (last visited Jan. 12, 2010) (regarding the status of pending submissions).

14. States must submit applications to the CLCS within ten years of the entry into force of UNCLOS for that state. However, for states that joined the Convention prior to May 13, 1999, the ten-year period was reset to that date, which marked the first issuance of scientific and technical guidelines relating to the applications. See CLCS Press Release, *supra* note 13.

15. *Id.*

16. *Id.*

17. William Boot, *Weekly Business Roundup*, THE IRRAWADDY, Nov. 21, 2009, http://www.irrawaddy.org/article.php?art_id=17262&page=2. See also notes 46–59, *infra*.

18. Andrew C. Revkin, *Ice Retreat Prompts Bush Shift in Arctic Policy*, N.Y. TIMES, Jan. 13, 2009; see *Directive on Arctic Region Policy*, 45 WEEKLY COMP. PRES. DOC. 47 (2009), available at http://www.marad.dot.gov/documents/Arctic_Policy_White_House.pdf [hereinafter Arctic Policy].

19. See *Arctic Policy*, *supra* note 18.

20. Thomas Omestad, *Bush Signs Off On New U.S. Arctic Policy*, U.S. NEWS & WORLD REP., Jan. 12, 2009, <http://www.usnews.com/news/world/articles/2009/01/12/bush-signs-off-on-new-us-arctic-policy.html>.

B. COMMERCIAL PASSAGE THROUGH THE NORTHERN SEA ROUTE

Meanwhile, new scientific data confirmed that temperatures continued to rise and seasonal ice cover continued to decrease in the region. The United States Geological Survey reported that “in the past 30 years, average temperatures in the Arctic have increased at almost twice the rate of the planet as a whole.”²¹ This has resulted in the “substantial retreat and thinning of the Arctic sea ice cover.”²² It has also opened up new possibilities for commercial and military transit of two historically ice-covered waterways: the Northwest Passage (a series of straits and channels through the northernmost section of North America) and the Northern Sea Route (NSR) along Russia’s northern coast.

Significantly, in August 2009, two German-owned ships—the *Beluga Fraternity* and *Beluga Foresight*—obtained the necessary permits from Russian authorities to successfully undertake and complete what was reported to be the first transit of the NSR by a non-Russian commercial vessel.²³ Historically, Russia has required its own commercial vessels to pay a tariff and to accept the assistance of state-operated icebreakers when transiting the NSR.²⁴ The *Beluga* vessels, which transited the NSR while en route from South Korea to the Netherlands, were accompanied by a Russian icebreaker for a significant portion of the voyage.²⁵ While this may represent the opening of the NSR to seasonal commercial traffic on a semi-permanent basis, it remains to be seen how Russia will balance its right to exercise regulatory authority over the route with the freedom of navigation principles enshrined in UNCLOS and customary international law.²⁶

III. Conflicts At Sea

A. SOUTH CHINA SEA INCIDENT

In March 2009, tensions flared between the United States and China when five Chinese vessels reportedly blocked and surrounded the U.S.N.S. Impeccable, a U.S. surveillance ship, operating approximately seventy-five miles south of Hainan Island in the South

21. U.S. Geological Survey, U.S. Climate Change Science Project, Past Climate Variability and Change in the Arctic and at High Latitudes (Jan. 2009), available at <http://downloads.climate-science.gov/sap/sap1-2/sap1-2-final-report-all.pdf>.

22. *Id.*

23. *German Ships Successfully Make “Arctic Passage,”* REUTERS, Sept. 12, 2009, <http://www.reuters.com/article/idUSTRE58B01K20090912> [hereinafter *German Ships*]. However, at least one report suggested that two other non-Russian commercial vessels transited the route in 1997. See Andrew C. Revkin, *Commercial Arctic Passage Nearing Goal*, N.Y. TIMES, Sept. 4, 2009, <http://dotearth.blogs.nytimes.com/2009/09/04/commercial-arctic-passage-nearing-goal/>.

24. Claes Lykke Ragner, ‘DEN NORRA SJÖVÄGEN’ [THE NORTHERN SEA ROUTE] IN BARENTS-ETT GRÄNSLAND I NORDEN (Torsten Hallberg ed., 2008), available at <http://www.fni.no/doc&pdf/clr-norden-nsr-en.PDF>.

25. See *German Ships*, *supra* note 23.

26. The prospect of the “first foreign commercial traffic to ever pass along the route” was cited by retired diplomats in a July 10, 2009 letter to the National Security Adviser urging U.S. accession to UNCLOS. Letter from Retired Diplomats, to General James Jones, Nat’l Security Adviser (July 10, 2009), available at http://www.oceanlaw.org/downloads/Wirth_et_al_to_Gen_Jones-LOS_7-10-09.pdf (urging U.S. accession to UNCLOS).

China Sea.²⁷ A spokesperson for the U.S. Navy claimed that the Chinese had attempted to use a grappling hook “to snag a cable that the Impeccable was using to tow an underwater listening device known as a Surtass array,” and one of the Chinese vessels reportedly came within twenty-five feet of the U.S. vessel.²⁸ In response, the Impeccable, which carried no armaments, attempted to repel the Chinese vessel with fire hoses, causing the Chinese crewmembers to strip to their underwear.²⁹ The U.S. Navy then dispatched a guided-missile destroyer to the region to protect the Impeccable for the duration of its mission.³⁰

In the confrontation’s immediate aftermath, China accused the United States of violating international law by “conduct[ing] activities in China’s exclusive economic zone in the South China Sea without China’s permission.”³¹ Other comments by Chinese officials indicated that China considered the Impeccable to have exceeded the limits of innocent passage.³² But under international law, as codified by UNCLOS, the regime of innocent passage applies only to vessels transiting the territorial sea, which extends twelve nautical miles from the coast, or an international strait.³³ By contrast, the Impeccable was operating in China’s 200 nautical mile exclusive economic zone (EEZ), where vessels are entitled to the same navigational rights that apply on the high seas.³⁴ As one U.S. based commentator explained, “[t]he U.S. was collecting undersea data that is related to war-fighting and is not banned by the treaty rules covering exploitation of resources in the economic zone. . . . The Chinese are just angry that the U.S. Navy can watch them.”³⁵ Others characterized the incident as “legal warfare” or “lawfare”—a broad strategic effort by China “to shape international opinion in favor of a distorted interpretation of the Law of the Sea by shifting scholarly views and national perspectives away from long-accepted norms of freedom of navigation and toward interpretations of increased coastal state sovereign authority.”³⁶ Through such efforts, “[t]he goal is to renegotiate the essential bargain of the Law of the Sea Convention through a patient, persistent effort at reinterpretation.”³⁷

27. Mark McDonald, *U.S. Navy Provoked South China Sea Incident, China Says*, N.Y. TIMES, Mar. 10, 2009, <http://www.nytimes.com/2009/03/10/world/asia/10iht-navy.4.20740316.html> [hereinafter U.S. Navy Provoked]; see also Mark Thompson, *Behind the Sea Spat Between the U.S. and China*, TIME, Mar. 12, 2009, <http://www.time.com/time/world/article/0,8599,1884724,00.html>.

28. McDonald, *supra* note 27. Notably, Hainan is the site of a large and growing underground naval facility for Chinese submarines, including the new Shang-class nuclear-powered attack subs. Thompson, *supra* note 27.

29. James Kraska, *Sovereignty at Sea*, 51 SURVIVAL 13 (2009), available at http://pdfserve.informaworld.com/833757_731219516_911401097.pdf.

30. Ann Scott Tyson, *Destroyer to Protect Ship Near China*, WASH. POST, Mar. 13, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/12/AR2009031203264.html>.

31. McDonald, *supra* note 27.

32. Kraska, *supra* note 29, at 13.

33. See UNCLOS, *supra* note 1, arts. 3, 17, 19, 45.

34. See *id.* arts. 58, 87.

35. Thompson, *supra* note 27.

36. James Kraska & Brian Wilson, *China Wages Maritime ‘Lawfare’*, FOREIGN POLICY, Mar. 11, 2009, http://experts.foreignpolicy.com/posts/2009/03/11/china_wages_maritime_lawfare (explaining that China is by no means the only state that has tried to engage in “lawfare” to extend coastal state control by imposing navigational restrictions within the EEZ). See also Kraska, *supra* note 29, at 16-17.

37. Kraska, *supra* note 29, at 16.

B. NORTH KOREA AND U.N. SECURITY COUNCIL RESOLUTION 1874

In May 2009, North Korea received harsh international criticism after conducting another nuclear test, its first since October 2006.³⁸ In particular, the U.N Security Council issued Resolution 1874, which imposed an enhanced package of sanctions and called upon United Nations members “to inspect vessels, with the consent of the flag State, on the high seas, if they have information that provides reasonable grounds to believe that the cargo of such vessels” includes materials relating to nuclear proliferation or other prohibited armaments.³⁹ Resolution 1874 further directed that if the flag state fails to consent to a high seas inspection, the flag state instead “shall direct the vessel to proceed to an appropriate and convenient port for the required inspection by the local authorities.”⁴⁰ If the flag state refuses to cooperate entirely, such conduct is to be reported to the Security Council.⁴¹ Notably, the resolution did not authorize the use of force and did not provide a legal basis for the inspection of non-consenting North Korean ships.⁴² It did, however, require states to refrain from providing bunkering services, such as the provision of fuel or supplies, to North Korean vessels suspected of transporting illicit cargo.⁴³

Just days later, the new international sanctions regime reportedly deterred the *Kang Nam 1*, a North Korean vessel, when it reversed course while en route from North Korea to Myanmar, allegedly with a shipment of banned cargo that included rifles and rocket launchers.⁴⁴ The U.S. Navy had been tracking the vessel.⁴⁵ Later in the summer, United Arab Emirates authorities seized an Australian-owned ship, the Bahamian-flagged ANL-Australia, which was allegedly carrying a North Korean cargo of illicit weapons to Iran.⁴⁶

C. BAY OF BENGAL MARITIME BOUNDARY DISPUTE

In October 2009, Bangladesh initiated separate international arbitrations pursuant to the dispute resolution provisions of UNCLOS against Myanmar and India to resolve

38. *North Korea Conducts Nuclear Test*, BBC NEWS ONLINE, May 25, 2009, <http://news.bbc.co.uk/2/hi/8066615.stm>.

39. S.C. Res. 1874, ¶ 12, U.N. Doc. S/RES/1874 (June 12, 2009), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/368/49/PDF/N0936849.pdf?OpenElement> [hereinafter S.C. Res. 1874].

40. *Id.* ¶ 13.

41. *Id.* ¶ 16. Notably, North Korea’s test was followed only weeks later by the announcement that South Korea had official endorsed the Proliferation Security Initiative (“PSI”) Statement of Interdiction Principles. See Press Release, U.S. Dep’t. of State, ROK Endorses Proliferation Security Initiative Principles (May 26, 2009), available at <http://www.state.gov/r/pa/prs/ps/2009/05/123842.htm> (explaining that the PSI is an informal multinational network of states aimed at disrupting the trafficking of weapons of mass destruction).

42. Neil MacFarquhar, *U.N. Security Council Pushes North Korea by Passing Sanctions*, N.Y. TIMES, June 13, 2009, <http://www.nytimes.com/2009/06/13/world/asia/13nations.html>.

43. See S.C. Res. 1874, *supra* note 39, ¶ 17.

44. Choe Sang-Hun, *South Korea Says Freighter From North Turns Back*, N.Y. TIMES, July 7, 2009, <http://www.nytimes.com/2009/07/07/world/asia/07korea.html>.

45. *Id.*

46. *Australia Probes North Korea Weapons for Iran Seizure*, REUTERS, Aug. 30, 2009, available at <http://www.reuters.com/article/idUSTRE57T0YG20090830>.

long-standing maritime boundary disputes in the resource-rich Bay of Bengal.⁴⁷ All three states are parties to UNCLOS.

The commencement of proceedings was just the latest development in a dispute that previously gained widespread attention in late 2008, when Bangladeshi warships were deployed to confront ships from South Korea's Daewoo Group engaged in oil and gas exploration on Myanmar's behalf, and accompanied by Myanmar warships, in disputed waters.⁴⁸ Earlier in 2008, Bangladesh had auctioned off exploration rights to undersea territory that it claims, a move that Myanmar had immediately protested.⁴⁹ A flurry of high-level diplomatic talks at the end of 2008 prevented the dispute from escalating into military conflict at that time.

Meanwhile, Myanmar made a submission to the CLCS on December 16, 2008 for the extension of its continental shelf in the Bay of Bengal.⁵⁰ The submission expressly claimed that "the area of continental shelf that is the subject of this submission is not subject to any dispute between Myanmar and other States," noted only that "[d]elimitation negotiations between Myanmar and Bangladesh are ongoing," and concluded that the submission therefore "has been made without prejudice to the eventual delimitation."⁵¹

Bangladesh submitted a strongly-worded rejoinder to Myanmar's submission.⁵² Specifically, Bangladesh claimed that "the unresolved delimitation in the Bay of Bengal" clearly did constitute a dispute under the Rules of Procedure of the CLCS, which thus required the CLCS to refrain from considering the submission.⁵³ Otherwise, Bangladesh asserted, the CLCS risked "endorsing disputed baselines," despite it having "no competence over questions of baselines from which the breadth of the territorial sea is measured."⁵⁴ The issue remained unresolved when Myanmar made a formal presentation in support of its submission to the CLCS in August 2009,⁵⁵ but the CLCS formally suspended its consideration of Myanmar's claim as of November 18, 2009.⁵⁶

47. Press Release, Foley Hoag LLP, Foley Hoag Retained by Bangladesh for Arbitrations against India and Myanmar over Boundaries in Bay of Bengal's Resource-Rich Waters (Oct. 13, 2009) [hereinafter Foley Hoag].

48. Alan Johnson, *Bangladesh and Burma in Oil Row*, BBC NEWS ONLINE, Nov. 13, 2008, <http://news.bbc.co.uk/2/hi/7706261.stm>; Simon Roughnead, *Burma, Bangladesh Border Build Up*, ISN SECURITY WATCH, Oct. 21, 2009, <http://www.globalpolicy.org>.

49. Huma Yusef, *Bangladesh-Burma (Myanmar) Maritime Boundary Dispute Escalates*, CHRISTIAN SCIENCE MONITOR, Nov. 4, 2008, <http://www.csmonitor.com/World/terrorism-security/2008/1104/p99s01-duts.html>.

50. See CONTINENTAL SHELF SUBMISSION OF UNION OF MYANMAR: EXECUTIVE SUMMARY (Dec. 2008), available at http://www.un.org/Depts/los/clcs_new/submissions_files/mmr08/mmr_es.pdf.

51. *Id.* at 3-4.

52. Note Verbale from the Permanent Mission of Bangladesh to the U.N. Secretary General (July 23, 2009), available at http://www.un.org/Depts/los/clcs_new/submissions_files/mmr08/clcs16_2008_mmr_bgd_e.pdf.

53. *Id.* ¶¶ 2, 8.

54. *Id.* ¶ 5.

55. Commission on the Limits of the Continental Shelf, *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*, CLCS/64, ¶¶ 35-40 (Oct. 1, 2009).

56. *U.N. Body Defers Action on Myanmar's Territorial Waters Claim*, INDO-BURMA NEWS, Nov. 18, 2009, <http://www.indoburmanews.net/archives-1/2009/november-2009/un-body-defers-action-on-myanmar-s-territorial-waters-claims/> [hereinafter *UN Body*].

In the interim, Bangladesh initiated the above-referenced arbitrations against Myanmar and India. Counsel for Bangladesh, the Washington, D.C.-based law firm Foley Hoag, noted that “foreign oil companies holding exploration licenses from Bangladesh, including ConocoPhillips and UK-based Tullow Oil plc, have been intimidated by warships from Myanmar within waters Bangladesh claims as its own.”⁵⁷ Furthermore, as a result of negotiations with Myanmar and India that, according to Foley Hoag lawyer Paul Reichler, have been “deadlocked for years,” the “exaggerated claims of Myanmar and India [. . .] have effectively prevented Bangladesh from exploiting potentially huge deposits of oil and natural gas located off its coast.”⁵⁸

Bangladesh’s complaint against Myanmar focuses on the alleged granting of concessions to territory that Bangladesh claims as its own, while the complaint against India states that India has denied Bangladesh “any portion of its continental shelf whatsoever beyond 200 nautical miles” in a manner “inconsistent with the principles and rules established by UNCLOS.”⁵⁹ While Myanmar was reportedly “disappointed” by the decision to initiate proceedings, Indian authorities noted that the arbitration could finally settle the long-running “tripartite maritime dispute.”⁶⁰

IV. Maritime Piracy

As of October 2009, global piracy figures had already surpassed the total number of attacks reported in 2008. The Piracy Reporting Centre of the International Chamber of Commerce’s International Maritime Bureau reported 306 incidents over the first nine months of 2009, as opposed to 293 for all of 2008.⁶¹ This increase was directly attributed to heightened piracy activity off the coast of Somalia, where forty-seven attacks occurred in the first nine months of the year, compared to twelve for the same period in 2008.⁶² Somali pirates also attacked ships in the Gulf of Aden, the shipping lane connecting the Red Sea and the Indian Ocean, with 100 incidents occurring in the first three quarters of 2009 versus fifty-one for the same period in 2008.⁶³

The situation continued to draw extensive international attention, with foreign navies heightening their presence in the region. And the criminal prosecution of captured Somali pirates, one in the United States and others in Kenyan courts, represent significant rule of law developments.

A. MULTILATERAL RESPONSE

The U.N. Security Council adopted three resolutions in 2008 with the aim of encouraging states to take a more proactive role in ensuring maritime security off the Somali

57. Foley Hoag, *supra* note 47.

58. *Id.*

59. *Id.*

60. *UN Body*, *supra* note 56.

61. *Unprecedented Increase in Somali Pirate Activity*, ICC Commercial Crime Services, Oct. 21, 2009, http://www.icc-ccs.org/index.php?option=com_content&view=article&id=376:unprecedented-increase-in-somali-pirate-activity&catid=60:news&Itemid=51.

62. *Id.*

63. *Id.*

coast.⁶⁴ In 2009, another resolution called on Somali pirate groups to support the 2008 Djibouti Agreement, an accord between the Transitional Federal Government of Somalia and an opposition alliance for the cessation of hostilities in Somalia.⁶⁵

A multinational naval response, already in progress, continued. On January 8, 2009, the U.S. Navy announced the formation of Combined Task Force 151, a twenty nation naval coalition that would engage in counter-piracy operations off the Somali coast.⁶⁶ Japan, South Korea, and China also dispatched ships to the region.⁶⁷

At the non-military level, international donors, at a U.N.-sponsored conference on April 23, 2009, pledged over US\$250 million to aid the Transitional Federal Government of Somalia.⁶⁸ These funds included \$134 million to increase the African Union (AU) peacekeeping force in the region from 4,350 troops to 8,000 troops and \$31 million for Somali security forces.⁶⁹ The U.N. Secretary General told the conference that piracy was “a symptom of anarchy and insecurity on the ground” and that enhanced “security on the ground will make less piracy on the seas.”⁷⁰ Somali President Sharif Ahmed received loud applause after promising to do “everything imaginable” to stabilize Somalia and stating that “[i]t is our duty to pursue these criminals not only on the high seas, but also on terra firma.”⁷¹ That said, one news report stated that these “comments may ignore reality” given that pirate leaders enriched with ransom money may wield more power than President Ahmed’s “shaky government.”⁷²

B. THE MV MAERSK ALABAMA HIJACKING CASE

Perhaps the most notable attack of 2009 was the seizure of the cargo ship MV Maersk Alabama almost 300 miles off the Somali coast by four pirates on April 8, 2009, the first such occurrence involving a ship registered under the American flag since the early nineteenth century.⁷³ Following stiff resistance from crewmembers who managed to capture

64. See S.C. Res. 1816, ¶¶ 7, 14, U.N. Doc. S/RES/1816 (Jun. 2, 2008) (authorizing states cooperating with Somalia’s transitional government to “[e]nter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea”); S.C. Res. 1838, ¶¶ 2-3, U.N. Doc. S/RES/1838 (Oct. 7, 2008) (calling upon interested states “to take part actively in the fight against piracy on the high seas off the coast of Somalia, in particular by deploying naval vessels and military aircraft” to the region); S.C. Res. 1846, ¶¶ 6, 9, 14, 15, U.N. Doc. S/RES/1846 (Dec. 2, 2008) (generally calling on states to cooperate in facilitating the investigation and prosecution of persons responsible for acts of piracy).

65. See Agreement Between The Transitional Federal Government Of Somalia And The Alliance For The Re-Liberation Of Somalia, June 11, 2008, available at [http://unpos.unmissions.org/Portals/UNPOS/Repository%20UNPOS/080609-FinalsignedagreementbetTFG&ARS\(36\).pdf](http://unpos.unmissions.org/Portals/UNPOS/Repository%20UNPOS/080609-FinalsignedagreementbetTFG&ARS(36).pdf).

66. U.S. To Lead New Anti-Pirate Force, BBC NEWS ONLINE, Jan. 8, 2009, <http://news.bbc.co.uk/2/hi/africa/7817611.stm>.

67. See Japan To Deploy Ships Off Somalia, BBC NEWS ONLINE, Jan. 28, 2009, <http://news.bbc.co.uk/2/hi/africa/7855120.stm>.

68. Donors Pledge Over \$250 Million for Somalia, ABC NEWS ONLINE, Apr. 23, 2009, <http://abcnews.go.com/International/wireStory?id=7407956>.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. Edmund Sanders & Julian E. Barnes, *Somali Pirates Hold U.S. Captain*, L.A. TIMES, Apr. 9, 2009, <http://articles.latimes.com/2009/apr/09/world/fg-somali-pirates9>; See also Larry McShane, *Navy Ship Arrives to Aid American Crew That Fought off Somali Pirates*, N.Y. DAILY NEWS, Apr. 9, 2009, <http://www.nydailynews.com/>

the pirates' ringleader temporarily, the pirates kidnapped the ship's captain and fled on a lifeboat.⁷⁴ A U.S. Navy destroyer, the USS Bainbridge, was subsequently dispatched to the vicinity.⁷⁵ While the MV Maersk Alabama then continued to its ultimate destination in Kenya, a three-day cat-and-mouse game of negotiations and minor skirmishes between the Navy and the pirates ensued, culminating with Navy SEAL snipers killing three pirates on the lifeboat and facilitating the captain's rescue.⁷⁶

A fourth pirate who had previously surrendered to the Navy for medical treatment on account of earlier struggles with the ship's crew, Abduwali Abdukhadir Muse, was transported to New York and charged with piracy and other crimes in federal court—the first U.S. piracy prosecution in over a century.⁷⁷ The federal statute underlying the piracy charge is clear: "Whoever on the high seas commits the crime of piracy as defined by the law of nations and is afterwards brought into or found in the United States shall be imprisoned for life."⁷⁸

C. KENYAN PIRACY COURTS

Other states involved in anti-piracy efforts off the Somali coast have also prosecuted piracy suspects accused of attacking their nationals in their own courts. But under agreements with the United States, the United Kingdom, and the European Union, Kenya has emerged as the venue of choice for Somali piracy cases.⁷⁹

In principle, this development is consistent with the UNCLOS provision stating that "[a]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."⁸⁰ But despite the existence of Kenyan statutes defining piracy as a crime punishable by life imprisonment, Kenya has not redrafted its laws to reflect its ratification of UNCLOS.⁸¹ Concerns have also been raised that the agreements between Kenya and other countries that authorize such prosecutions have been negotiated in secret and without approval by the Kenyan parliament.⁸² A U.S. Coast Guard expert noted that justifying Kenya's prosecution of piracy suspects presents a "pretty daunting" challenge because a case may concern U.S. Navy personnel "involved with Somali pirates who may have attacked a Panamanian vessel with a Filipino crew being tried in a Kenyan court."⁸³ One news report called the impris-

news/national/2009/04/08/2009-04-08_somali_pirates_seize_usflagged_cargo_ship_with_21_american_sailors_says_diplomat.html.

74. *U.S. Negotiators Try to Persuade Pirates to Free Captain*, CNN ONLINE, Apr. 10, 2009, <http://www.cnn.com/2009/WORLD/africa/04/09/ship.hijacked/index.html>.

75. *See id.*

76. *U.S. Captain Rescued from Pirates*, Apr. 13, 2009, BBC NEWS ONLINE, <http://news.bbc.co.uk/2/hi/africa/7996087.stm>.

77. Benjamin Weiser, *Pirate Suspect Charged as Adult in New York*, N.Y. TIMES, Apr. 21, 2009, at A1, available at <http://www.nytimes.com/2009/04/22/nyregion/22pirate.html>.

78. Piracy Under Law of Nations, 18 U.S.C. § 1651 (2009).

79. Jeffrey Gettleman, *Rounding Up Suspects, the West Turns to Kenya as Piracy Criminal Court*, N.Y. TIMES, Apr. 24, 2009, at A8, available at <http://www.nytimes.com/2009/04/24/world/africa/24kenya.html>.

80. UNCLOS, *supra* note 1, art. 100.

81. *See* Daniel Howden, *The Jailed Pirates That Nobody Wants*, THE INDEPENDENT (UK), Apr. 14, 2009, <http://www.independent.co.uk/news/world/africa/the-jailed-pirates-that-nobody-wants-1668268.html>.

82. *See id.*

83. *Id.*

oned piracy suspects “guinea pigs in an experiment in international law” assisted by corrupt Kenyan government officials who will divert to themselves foreign aid meant to improve the Kenyan judicial system.⁸⁴ It remains to be seen whether the Kenyan piracy courts will serve the cause of the international rule of law or give rise to a series of messy jurisdictional nightmares.

V. Dispute Resolution

A. INTERNATIONAL COURT OF JUSTICE

The International Court of Justice (ICJ) rendered final judgments in two cases concerning maritime boundary issues in 2009.

1. *Romania v. Ukraine*

In 1997, Romania and Ukraine signed a treaty reaffirming their existing borders and agreed to commence negotiations concerning each state’s EEZ and the pertinent continental shelf on the Black Sea.⁸⁵ Maritime delimitation was economically significant to both states because it would determine each nation’s respective right to develop oil and gas reserves potentially located on the continental shelf.⁸⁶ The Court ultimately made straightforward use of the equidistance method to establish a single Black Sea boundary between Romania and Ukraine, beginning in the northwestern part of the Black Sea near the eastern Romanian coast and extending roughly parallel to the Sea’s northern and eastern coastlines respectively. One commentator noted that the Court’s decision remains unlikely “to stir much excitement or controversy within the delimitation community.”⁸⁷

The 1997 treaty provided for resort to the Court in the event of unsuccessful delimitation negotiations, a reason Romania cited for initiating proceedings in 2004.⁸⁸ Romania and Ukraine, in a 2003 treaty, had been able to agree only that the outer limits of their respective territorial seas intersected at a point roughly to the west of Ukraine’s uninhabited Serpents’ Island, located approximately twenty nautical miles east of the Danube River delta’s land boundary terminus.⁸⁹ The Court, mainly on the basis of the 2003 treaty, held that a final delimitation would begin at that point, referred to as Point 1.⁹⁰

84. *Id.*

85. Treaty Between Romania And Ukraine On The Romanian-Ukrainian State Border Regime, Collaboration and Mutual Assistance On Border Matters, art. 2, June 2, 1997, 2159 U.N.T.S. 335.

86. See, e.g., *Black Sea Debate Rolls On*, ENERGY IN EAST EUROPE, Sept. 17, 2004, available at 2004 WLNR 21685589.

87. Coalter G. Lathrop, *International Decision: Maritime Delimitation In The Black Sea (Romania v. Ukraine)*, 103 AM. J. INT’L. L. 543, 547 (2009). Essentially, the equidistance method involves the drawing of “an equidistant median line between two countries with opposite continental shelves.” Dabney Welsh, *Access To Our Backyard Reserves: A Final Resolution Of The Gulf Of Mexico’s Maritime Boundaries*, 23 HOUS. J. INT’L. L. 609, 633-34 (2001); See also UNCLOS, *supra* note 1, art. 15.

88. Application Instituting Proceedings, Maritime Delimitation In The Black Sea (Rom. v. Ukr.) ¶ 3 (Sept. 16, 2004), available at <http://www.icj-cij.org/docket/files/133/8268.pdf>.

89. Collaboration and Mutual Assistance on Border Matters, art. 1, Rom.-Ukr. June 17, 2003, 2277 U.N.T.S. 3, ¶ 21.

90. See Maritime Delimitation in the Black Sea (Rom. v. Ukr.), (Feb. 3, 2009) ¶¶ 55-66, available at <http://www.icj-cij.org/docket/files/132/14987.pdf>.

But the subsequent proposed delimitations proceeded in different directions primarily on account of the states' disagreements over the relevance of Serpents' Island to the boundary line.⁹¹

Romania's proposed delimitation proceeded from Point 1 (which Romania identified in its submissions to the Court as Point F) along a twelve nautical mile arc denoting the Serpents' Island territorial sea limit, then in a straight, eastward direction until reaching the line equidistant between the states' adjacent coasts.⁹² This delimitation proceeded further along the line equidistant between the states' adjacent coasts until reaching the line median between the states' opposite coasts.⁹³ The delimitation thereafter followed the line median between the states' opposite coasts to one final point in the center of the Black Sea.⁹⁴

Ukraine's proposed delimitation, however, allowed Romania far less maritime territory. From Point 1, the Ukrainian delimitation, disregarding the Serpents' Island arc, went in a nearly perfectly southward direction, following a relatively short median line between Romania's mainland coast and the Serpents' Island coast.⁹⁵ The delimitation then turned a bit more to the southeast, but still ended west of the Romanian delimitation at "a point where the interest of third States [i.e., Bulgaria to the west and Russia to the east] potentially come into play."⁹⁶

The Court first addressed what segments of coastline were relevant to delimitation "in order to determine what constitutes in the specific context of a case the overlapping claims" in regard to EEZs and to have a basis for ensuring that the ratios of each state's coastal length and maritime areas falling on either side of the delimitation would not be disproportionate.⁹⁷ To this effect, the Court found that the entire Romanian coast should affect the delimitation.⁹⁸ But the coasts of Ukraine's Yavorlyts'ka Gulf at the mouth of the Dnieper River to the northeast and the Karkinit's'ka Gulf further south, with the Crimean Peninsula jutting out westward from the southern end, should not, the Court concluded, because they faced each other and did not "project in the area to be delimited."⁹⁹ The Court also found that the Serpents' Island coastline was "so short" that it made "no real difference [in determining] the overall length" of the states' coasts for purposes of the delimitation.¹⁰⁰

These considerations underlay the Court's three-stage delimitation methodology. First, the Court identified "the appropriate points or points on the [states'] relevant coast or coasts which mark a significant change in the direction of the coast, in such a way that the geometrical figure formed by the line connecting all these points reflects the general direction of the coastlines."¹⁰¹ Forming a three-point provisional equidistance line, the Court selected two base points on the Romanian coast and three base points on the

91. See *id.* ¶¶ 179-188.

92. *Id.* ¶ 12.

93. *Id.*

94. *Id.*

95. *Id.* ¶ 13.

96. *Id.*

97. *Id.* ¶ 78.

98. *Id.* ¶ 88.

99. *Id.* ¶¶ 98-114.

100. *Id.* ¶ 102.

101. *Id.* ¶ 127.

Ukrainian coast.¹⁰² Next, the Court, on the basis of the 2003 treaty, made minor adjustments to the equidistance line to start the final boundary at Point 1.¹⁰³ No other factors (e.g., disproportionate coastal lengths, conduct of the parties, security considerations, the presence of Serpents' Island in the delimitation area) necessitated, in the Court's view, further such adjustments. The ultimate ratios of the coastal lengths for and the relevant area between Romania and Ukraine respectively—1:2.8 and 1:2.1—also satisfied the Court that no disproportionality would result from the final delimitation.¹⁰⁴

The final delimitation line, then, began at [Point F] and followed the twelve nautical mile Serpents' Island arc briefly until the intersection with the line equidistant from the adjacent Romanian and Ukrainian coasts.¹⁰⁵ Following that equidistance line eastward until it became affected by the base points on the opposite Romanian and Ukrainian coasts, the delimitation line subsequently turned in a southerly direction to follow the line equidistant between these opposite coasts.¹⁰⁶ The delimitation line ended at the point in the Black Sea "beyond which the interests of third States may be affected."¹⁰⁷

This decision continues the Court's use of equidistance as "the general rule for the delimitation of [a state's] territorial sea," without giving the method rigid priority over other delimitation approaches in regard "to fixing an all-purpose boundary covering the territorial sea, the exclusive economic zone, and the continental shelf."¹⁰⁸ Nonetheless, Ukraine, from a territorial standpoint (i.e., obtaining territory from which to drill for oil and natural gas reserves), won a clear victory in this case.

2. *Costa Rica v. Nicaragua*

On September 29, 2005, Costa Rica initiated proceedings concerning navigational and related rights on the section of the San Juan River running along the Nicaraguan border from an inland point eastward to the Caribbean Sea.¹⁰⁹ An 1858 Treaty of Limits (Treaty) had established Nicaragua's dominion and sovereign jurisdiction over the river itself, but also affirmed Costa Rica's navigational rights on the river's lower area.¹¹⁰ The legal bases of these rights and their precise extent, however, remained in dispute for over a century thereafter.¹¹¹ In its application instituting proceedings, Costa Rica specifically cited re-

102. *Id.* ¶ 154.

103. *Id.* ¶¶ 205-209.

104. *See id.* ¶¶ 215-216.

105. *Id.* ¶ 206.

106. *Id.*

107. *Id.* ¶ 209.

108. Pieter Bekker & Ana Stanic, *The ICJ Awards Sovereignty over Four Caribbean Sea Islands to Honduras and Fixes a Single Maritime Boundary between Nicaragua and Honduras*, ASIL INSIGHTS, Oct. 17, 2007, available at <http://www.asil.org/insights/2007/10/insights071017.html> (commenting on Territorial and Maritime Disputes Between Nicaragua and Honduras in the Caribbean Sea, 2007 I.C.J. 120 (Oct. 8, 2007)).

109. Dispute Regarding Navigational And Related Rights (Costa Rica v. Nicar.) (July 13, 2009) ¶ 1, available at <http://www.icj-cij.org/docket/files/133/15321.pdf>.

110. *Id.* ¶ 19.

111. The Court summarizes several historical episodes concerning the dispute between Costa Rica and Nicaragua over navigational rights on the San Juan River, including an 1888 arbitration award regarding the Treaty rendered by U.S. President Grover Cleveland, a 1916 ruling by the Central American Court of Justice that Nicaragua's grant of rights to the United States to build an inter-oceanic canal through the river violated the Treaty, a 1956 agreement to facilitate and expedite river traffic, and several other incidents whereby Nicaragua supposedly infringed upon Costa Rican navigational rights. *See id.* ¶¶ 20-27.

strictions on the navigation of Costa Rican boats and their passengers on the river by Nicaraguan authorities since the late 1990s, evidenced through the imposition of charges, obligations to stop for identification at Nicaraguan military posts, limitations to free moorage, and other measures hampering “free and expeditious transit.”¹¹²

The Court concluded that the Treaty defined the law governing the immediate dispute by granting Costa Rica a perpetual right of navigation along the pertinent segment of the river “con objetos de comercio,” a phrase that both states translated differently.¹¹³ Costa Rica’s translation of the phrase’s first three words—“con objetos de” or “for the purposes of”—was, in the Court’s view, more accurate in giving the whole phrase a “coherent meaning.” Nicaragua’s proposed translation to this effect—“with articles of”—did not make as much sense in context (*i.e.* perpetual right of navigation “with articles of commerce” vs. perpetual right of navigation “for purposes of commerce.”).¹¹⁴

In addition, the Court found that because the Treaty was entered into for an unlimited duration, the meaning of the term “commerce” would evolve according to when the Treaty was applied and would not be restricted to the meaning understood at the time of ratification. Consequently, the Court found that “commerce” encompassed the transportation of persons, which could be commercial in character if a price was paid to the carrier, and not just the transportation of goods.¹¹⁵

Other Treaty provisions, the Court held, allowed for the navigation of vessels belonging to inhabitants of villages on the Costa Rican riverbank for such everyday necessities as taking children to school or obtaining medical treatment.¹¹⁶ But, as a general rule, the Court also found that navigation by Costa Rican vessels for other purposes, such as police patrols, that had no connection to financial gain did not qualify as activities undertaken “for purposes of commerce” under the Treaty.¹¹⁷

In the Court’s view, then, Nicaragua could regulate Costa Rican navigation so long as the exercise of free navigation “for purposes of commerce” was not hampered and the regulations were legitimate, nondiscriminatory, and reasonable.¹¹⁸ The Court also held that Nicaragua was obligated to notify Costa Rica of such regulations, but not necessarily prior to their adoption.¹¹⁹ Nicaragua could also lawfully stop and request identification of boat passengers, require departure clearance certificates for reasons of navigational and environmental safety, prohibit nighttime navigation, and require Costa Rican vessels to fly the Nicaraguan flag.¹²⁰ But Nicaragua could not impose visa or tourist card requirements, charges for departure clearance certificates, or restrictions on subsistence fishing in the river by Costa Rican nationals.¹²¹

112. Application Instituting Proceedings (Costa Rica v. Nicar.) ¶ 8, (Sept. 29, 2005), *available at* <http://www.icj-cij.org/docket/files/133/8268.pdf>.

113. *See id.* ¶¶ 36-37, 42-45.

114. *Id.* ¶ 52.

115. *See id.* ¶¶ 63-71.

116. *See id.* ¶¶ 73-79.

117. *See id.* ¶¶ 80-84.

118. *See id.* ¶¶ 86-87.

119. *See id.* ¶¶ 91-97.

120. *See id.* ¶¶ 103-110, 125-132.

121. *See id.* ¶¶ 111-124, 134-144.

Only some of these conclusions were unanimous, with two judges appending separate opinions and one judge ad hoc appending a declaration.¹²² On the whole, however, the decision did not arouse much controversy in the highest levels of either the Costa Rican or Nicaraguan governments. One major Costa Rican newspaper called the decision “Solomonic.”¹²³ And Costa Rican Foreign Minister Bruno Stagno commented approvingly on the judgment, while Nicaraguan President Daniel Ortega stated: “We have all won here.”¹²⁴

B. INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

The International Tribunal for the Law of the Sea (ITLOS)¹²⁵ heard no new cases in 2009. Notably, however, the Tribunal amended its rules regarding the posting of a reasonable bond in prompt release cases.¹²⁶ Specifically, the Tribunal sought to address the fact that in two of its prompt release cases—the *M/V “SAIGA” Case* and the “*Juno Trader*” *Case*—several months passed before the seized vessels were released by the detaining states in compliance with the Tribunal’s rulings. These delays were attributed to practical difficulties relating to providing the required financial security. As a result of the recent amendments, “the Tribunal now has the option to determine, on a case-by-case basis, whether a bond or other financial security is posed with the detaining states or with the Registrar of the Tribunal.”¹²⁷ In short, this will prevent a detaining state from refusing to accept (or otherwise not promptly accepting) a duly-authorized financial guarantee to secure the release.

122. *See id.* ¶ 146.

123. Erick Carvajal, *La Haya prohíbe cobro de peaje a Costa Rica por navegar río nicaraguense*, AL DIA, Sept. 14, 2009, 2009 WLNR 13373967.

124. *Id.*

125. For more information on ITLOS, *see* <http://www.itlos.org>.

126. Statement by Judge Jorge Jose Luis Jesus, President of ITLOS, Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, New York, Oct. 27, 2009, http://www.itlos.org/start2_en.html (follow “News” hyperlink, then follow “Statements of the President” hyperlink, follow “Statement Given to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 27 October 2009” hyperlink). Nine of the thirteen cases that ITLOS has heard since its establishment have involved the prompt release of seized vessels. *Id.* President Jesus also stated that nine of the thirteen cases that ITLOS has heard since its establishment have involved the prompt release of seized vessels. *Id.*

127. *Id.*