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Utrecht Centre for Water, Oceans and Sustainability Law

Report on the Expert Workshop

"Sovereignty, a shape-shifting concept in ocean governance?"

Utrecht, 13 June 2019

Edited by

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CONTENT

Introduction

This report presents the outcome of the closed expert workshop entitled 'Sovereignty: a shape-shifting concept in ocean governance?', held by the Sustainable Ocean Project (ERC Starting Grant Agreement No. 639070) at Utrecht University. The workshop brought together experts to reflect on the modern-day meaning(s) and function(s) of 'sovereignty' over ocean space and marine non-living resources, especially in the light of emerging challenges in ocean use and governance. The workshop was divided in to two panels, a roundtable followed each panel, and these were chaired by Principal Investigator of the Sustainable Ocean Project, Professor Seline Trevisanut.

Panel I, 'Sovereignty over the sea in theory and practice', examined tensions and interactions between traditional connotations and functions of sovereignty and its role in today's changing legal and physical environment. The panellist included Professor Yoshifumi Tanaka (University of Copenhagen), Professor Duncan French (University of Lincoln), and PhD candidate Rozemarijn Roland Holst (Utrecht University, Sustainable Ocean project).

Panel II, 'Sovereignty over marine energy resources: between Scylla and Charybdis?', investigated functions of sovereignty regarding the regulation of the exploitation of marine energy resources, in the context of relevant international environmental and international investment law obligations. The panellist included, Dr. Anna De Luca (Bocconi University), Dr. Ilias Plakokefalos (University of Athens), and PhD candidate Nikolaos Giannopoulos (Utrecht University, Sustainable Ocean project).

The report presents the outcome of the panel sessions and the round-table discussions that followed. The programme and the outlines of the given presentations are available in the Annex to this report.

Panel I – Sovereignty over the sea in theory and in practice

Presentations

Panel I began with the contribution of **Tanaka** on the law of the *dédoublement fonctionnel* in connection with the protection of community interests at sea. Under the title, "**Rethinking the Law of *dédoublement fonctionnel* in the Protection of Community Interests at Sea**", Tanaka focused on the protection of the marine environment, in light of port State jurisdiction, port State control, and the establishment of marine protected areas on the high seas. First of all, Tanaka addressed the changing legal paradigms in the law of the sea. He put

forward two paradigms and drew comparisons based on six factors: aims, actors, concepts, principles, compliance and nature.

On the one hand, there is the traditional paradigm (Paradigm I) which is rooted in a 'Law of Divided Oceans.' It aims to reconcile the individual interests of States, through the delimitation

of marine areas into different maritime and jurisdictional zones. The primary actors in this paradigm are States. The concept is based on spatial division, as depicted in the UNCLOS. This paradigm follows the principles of freedom and sovereignty; given this, compliance with legal rules is based on reciprocity of obligations and rights among States. The underlying nature of this legal paradigm is that of co-existence of different (possibly diverging) State interests over the sea.

On the other hand, a new paradigm (Paradigm II) grounds itself on the 'Law of Our Common Ocean'. The aim of this paradigm is to safeguard community interests. It gives due regard to both States and non-State actors. A conceptual difference with the traditional paradigm is that the new one gives focus to the unity of the ocean. It follows the principles of international cooperation; and compliance takes the form of a regulatory framework within institutionalized mechanisms.

Setting out these differences are paramount to Tanaka's argument that Paradigm I is somewhat inadequate for the protection of community interests. These are for several reasons. The collective nature of community interests cannot be divided into the interests of each individual State. Paradigm I consequently falls short of providing an appropriate framework on issues such as natural resources and marine biodiversity conservation. In such cases, the principle of reciprocity can also appear deficient, thus Paradigm I inadequately or possibly fails to encourage States' measures to protect the natural environment.

Given these limitations, Tanaka calls for Paradigm II as the most appropriate legal form in securing community interests. Paradigm II thus seeks to cover existing gaps in relation to community interests.

Paradigm II or the "Law of Our Common Oceans", as he phrased it, has a number of potential benefits in light of current ocean governance. It promotes the unity of the oceans in contrast to the current zonal regime, and enhances the principle of international cooperation which will replace the principle of reciprocity. However, both Paradigms I and II are not mutually exclusive. The concept of the unity of ocean waters within Paradigm II finds support in Scelle's "domaine public international" and that of Bastid's "espaces d'intérêt international." Tanaka highlights that this can be useful in understanding the form of Paradigm I.

Having set out these paradigms, Tanaka moved on to the role of Scelle's *dédoublement fonctionnel* and its individual application in the context of the law of the sea. The concept *dédoublement fonctionnel* comes into play via the dual role of State organs as municipal organs on the national level and as international organs with concern for the common good on the international level.

Consequently, the concept of *dédoublement fonctionnel* might play a catalytic role in the absence of a central organ in international law to manage a range of different activities. One example is Article 218 UNCLOS concerning port State jurisdiction. This charges State organs with the function to "institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State". This demonstrates the double function that State organs could play for marine environmental protection. Nonetheless, there are also certain limitations with regards to port State jurisdiction and subsequently for the concept of *dédoublement fonctionnel*, namely the lack of incentives for port States to exercise control, the lack of institutional coordination, as well as the ideological nature of the concept of community interests.

The institutionalisation of *dédoublement fonctionnel* may prove a crucial step in overcoming these hurdles. Memoranda of Understanding (MoUs), arguably a form of institutionalisation, have been established and used to promote cooperation in terms of port State controls. However, problems continue to exist. Notably, there are uneven performance of port State inspection (e.g. Black Sea MoU, Tokyo MoU); uneven inspection rate between regional MoUs; differences in the status of ratifications of the relevant instruments among Member States to MoUs (e.g. MARPOL Annex 6); as well as weak mechanisms for the review of port State inspection. Additionally, the non-legally binding nature of MoUs does not facilitate their equal and proper implementation, and does not assist in consolidating State responsibility in case of violations.

A further example of the institutional application of *dédoublement fonctionnel* is marine protected areas (MPAs) in areas beyond national jurisdiction (ABNJ). Tanaka highlighted the network of OSPAR MPAs which promotes the protection of community interests with regards to marine biodiversity in ABNJ. Despite this, several challenges persist, namely, the legality of OSPAR MPAs; the opposability of these tools to third States; the compatibility of MPAs in the high seas with the freedom of navigation.

Tanaka reached the following tentative conclusions.
1: There is a need to reconsider the function of sovereignty of port State jurisdiction within the framework of Paradigm II.
2: There is tension between the collective nature of community interests and the decentralized nature of the international legal system. The individual application of the law of *dédoublement fonctionnel* presents both advantages and certain drawbacks for this issue. The same applies for its institutional application.

3: To overcome these obstacles, it is perhaps necessary to enhance the legitimacy of regional measures and initiatives. The manner in which to do so, however, remains a crucial question.

The second panellist, **French**, dealt with the question, **what if UNCLOS were negotiated today**, in light of today's approaches to sovereignty and to the marine (and global) environment. Crucially, there exist competing and paradoxical interests within UNCLOS. If it were to be negotiated today, on the one hand, the dynamics that allowed consensus to emerge in 1982 are less evident now. On the other hand, there is a different reality that seems to push in other directions, this is all the more, given new issues have arisen that were not even considered during the negotiations of UNCLOS.

French made the initial point that UNCLOS was a product of its time since several political and diplomatic factors shaped the content of the convention. For example, the importance of blocs (i.e. G77 and China), as well as the "environmental movement" and the 1972 Stockholm conference. Despite its age, the UNCLOS has rightly been labelled as the "Constitution for the oceans" since it encompasses certain constitutional characteristics, namely: timeliness; permanence; comprehensiveness; certainty; embedded values; communal balancing of varying interests; as well as other thematic points.

It is important to consider how UNCLOS accommodates renegotiation. There already exist several features in terms of amendment, adaptation and change that could allow for a renegotiation of UNCLOS. For instance, article 312-316 UNCLOS provide the necessary basis to amend the Convention, while implementation agreements have enabled UNCLOS to adapt to current needs (e.g. 1994 and 1995 Agreements). In addition, it is able to facilitate the evolution of customary norms (e.g. EIA, precautionary principle) through the adoption of related treaties and soft law instruments.

Nonetheless, the 1982 treaty does not include a number of issues currently considered as priorities in the international agenda. This includes climate change, land reclamation, acoustic pollution and so forth. French focused on the possible renegotiation of Part XII of UNCLOS regarding the protection of the marine environment, which he conceded would not be an easy feat.

Part XII is a complex, novel, and inclusive part of the Convention and encompasses a lot of different norms. However, changes might include, among others, the setting of objectives; the zonal variations; the liability and responsibility of States; the issue of extraterritoriality; and port State jurisdiction. Significant factors that might play a key role in shaping the new content of this Part/Convention are "big politics" (the politics of the US, China, the Russian Federation – if they are significantly different from 1982); the integration of new issues (i.e. climate change, sea level rise); as well as the "big paradox" of environmental law (e.g. linear normative impulse v. political inaction and evidential certainty).

Overall, French put forward a number of speculative points on what UNCLOS might look like if it was concluded in 2019. To note, this list is not exhaustive.

1: potentially humanitarian considerations and human rights issues;
2: area-based management tools;
3: the explicit protection of the marine environment in ABNJ;
4: the operationalization of the normative framework;
5: the possible extension of territorial jurisdiction in the EEZ;
6: and inclusion of further exceptions in the flag State jurisdiction.

Panel I concluded with the contribution of **Roland Holst**. The main thrust of her argument questioned the central position of sovereignty in the law of the sea, in light of the conditional and interdependent nature of States' rights and duties under the law of the sea, and the interaction of sovereign interests and common interests. The concept of common interests, she argued, is a (non-legal) umbrella term encompassing a number of notions, for example, community interests or global public goods. However, emerging common interests increasingly reveal tensions with the traditional connotations of sovereignty. This is given that States might frame their individual interests as common interests (e.g. the case of the Chagos Archipelago).

Roland Holst gives due regard to the fact that the concepts of sovereignty and freedom have shaped the law of the sea. The traditional sovereignty concept reflects the strict reciprocal Westphalian notion of inter-state relations, and a self-legitimizing conception of sovereignty; yet, this perception of sovereignty is difficult to uphold against the backdrop of changing circumstances. Emerging global challenges (e.g. sea-level rise, climate change etc.) have raised doubts as to the adequacy and practicality of sovereignty-based regimes to effectively protect certain interests shared by the international community. This raises the question as to **whether sovereignty poses an obstacle to the regulation of global goods and common interests**.

Though the Westphalian idea of sovereignty might be more difficult to uphold today, instead of deconstructing (the role of) sovereignty altogether 'under the pressure' of common interests, a contemporary conception of sovereignty as an inherently conditional and functional concept is proposed.

The law of the sea shows various examples of ways in which the existing legal framework can already accommodate certain (emerging) common interests. Roland Holst pinpointed four distinct common interests-manifestations within the UNCLOS. This is first through the management of common areas, as is visible in the provisions regarding the high seas that illustrate the balance of rights and duties of States. Secondly, the common heritage of mankind principle can be seen as the institutionalisation of community interests. Thirdly, the protection of the marine environment under Part XII provides for *erga omnes* obligations of States to protect and preserve the marine environment. Fourthly, in terms of the enforcement of common interests, port State jurisdiction, although discretionary, provides a method for

'policing' in the public interest. Whilst UNCLOS' dispute settlement system might not be fully adaptive to the protection of community interests, it does have several relevant features in this respect, such as the availability of provisional measures to protect the marine environment, or the ability of the International Seabed Authority (ISA) to instigate actions against States and private entities.

In conclusion, Roland Holst remarked on the possibilities UNCLOS poses for the protection of community interests and the mixed picture of consonance and dissonance between sovereignty-based concepts and common interests within UNCLOS. While community and individual interests can both be accommodated in the same regime, a functional perception of sovereignty does not eliminate the limitations inherent in either concept. It remains a vehicle to serve the

changing individual and collective interests of States. Yet, international law can give expression to the considerations and principles that inform decision-making and the exercise of rights. These principles and their respective weight evolve; hence a conception of sovereignty is needed that is responsive to changes in law and in fact.

Q and A Session (Panel 1)

Q: How do you link your proposal of *dédoublement fonctionnel* to the issue of trusteeship? How does this proposal of *dédoublement* differ from trusteeship?

Tanaka: There are commonalities between the two notions, but the *dédoublement* is considered an international version of trusteeship. The same applies for the *domaine public international*. The main point of divergence, however, is that these concepts are different between the national and international level. The *dédoublement* concerns the mechanism to achieve the community interest so it is a mechanism of realization; theoretically, it takes on more of a procedural nature as juxtaposed to trusteeship. In theory, it could be argued that the *dédoublement* can function, but the real question is if this is actually practical. The theory must be proven by State practice.

Q: There exists two intriguing issues within this proposal: one concerns the notion that the oceans are inherently public and common areas: is territorial sovereignty a fiction then? The unity of the ocean as a concept is connected to the ecosystem approach and holistic approach. The second concern is related to the proposition that the land dominates the sea. Should this proposition be taken literally, especially within the context of the destruction of the sea from the land?

Tanaka: We should consider the inter-linkage between sea and land, and the ecosystem as a whole. There is a need to introduce new viewpoints in order to achieve the ocean unity but also build on the existing concepts.

Q: Should UNCLOS be renegotiated today? Would you follow the same logic?

French: It comes back to the paradoxical scheme of environmental law and if the land indeed dominates the sea. How to make the law of the sea more progressive? The current provisions do seem to provide for more ambitious actions but, in general, UNCLOS seems to be quite balanced.

Q: The UNCLOS was presented as a "Constitution for the oceans" in 1982, but given the current challenges should we go beyond this qualification as a constitution?

French: That is why I consider it as a metaphor rather than a reality. Universal ratification leads to viewing it as a constitution, but the constitutionality is more of a legal term than a practical one. The term constitution is a myth, as in reality the constitutionalism probably does not apply.

Q: Do you think that the accommodation of community interests in UNCLOS is an inherent part of UNCLOS?

Roland Holst: There is a balance of the interests inherent in the Convention, but a lot of issues remain open, so there is the scope of application but also the need to further evolve. It is a question of changes in circumstances and knowledge, and how we interpret some terms. Community interests is an umbrella term that may include several relevant concepts.

Q: Is it really possible to pursue community interests in the current international setting?

Alex Oude Elferink: It is the role of judges in international arbitration, to promote and define the concept of community interests. The same applies to MPAs. Community interests in litigation (in the future) will probably increase, so judges will play a critical role. One has to see the current mechanisms that are relevant to this end, as well as the gap-filling mechanisms and their role in the protection of community interests. Probably there is no single answer to this question. Also, the private sector (mainly in connection to the Area) plays an important role in defining community interests, but in order to do so the concept of community interest might be problematic in itself.

French: A distinction should be made between community and sovereignty interest. The need to move beyond the setting in which it is 'individual State vs. the international community'. Under an alternative paradigm the role of the States and non-State actors can be rethought. The non-State actors are not benign. Just as we open up this notion: a discussion on what is 'good' will of course bring its own challenges.

Panel II – Sovereignty over marine energy resources: between Scylla and Charybdis?

Presentations

The first speaker, **De Luca**, conducted an inquiry concerning international limitations on State sovereignty in connection with foreign investments. More specifically, her presentation focused on **old and new approaches to foreign investment protection in the context of State sovereign right over energy resources**.

De Luca presented general observations on the relationship between customary international law and treaty law. She emphasised how investor-state dispute settlement (ISDS) is not a system autonomous from general international law, in particular in the field of State responsibility. The rules of customary international law do not only have a residual role of filling lacunae but are an important piece of the legal framework, such as the rules on State sovereignty.

She then examined the approaches followed by both customary and treaty law which balanced State sovereignty over natural resources with foreign investment protection. State sovereignty to some extent is a corollary of general rules and principles of customary international law. This makes sovereignty a ground element in governing and guiding the interpretation and surveillance of the application of treaties.

State sovereignty and the principle of permanent sovereignty over natural resources govern the economic relations of all States with private actors (the right to expropriate and nationalize, the right to regulate economic activities etc.). Investment treaties of older and newer generation arguably reflect such concepts. When applied into the field of investment, specific legal implications arise, primarily, the compensatory approach and the liability approach.

The compensatory approach is the only one compatible with the principles of State sovereignty and permanent sovereignty. De Luca explained that the two principles prevent tribunals from ordering restitution or specific performance in favour of foreign investors, with monetary damages being the only remedy compatible with said principles. The rationale of the compensation rule was explained in the Liamco v. Libya case, and subsequently by the Iran-US tribunal in the Amoco case. The former affirmed that restitution is not compatible with sovereignty; the latter that in no legal system do private interests prevail over well-established public objectives. Nonetheless, these approaches were disregarded by many arbitral tribunals which relied instead on the ILC Draft Articles on State Responsibility and thus gave primacy to restitution as opposed to compensation.

The State liability/compensatory approach has further legal implications. In investment cases, economic loss must be sustained by the claimant investor in order to bring an investment claim. Therefore, in the absence of damages suffered by the investor there is simply no breach of an investment treaty provision. However, there were investment cases in which investment tribunals followed a diverging approach; for instance, one tribunal found an indirect expropriation occurred without economic damages being suffered by the investor (the Biwater Gauff case). Such odd approach can be explained once again on an improper application by tribunals of the State Responsibility Articles. Moreover, on the one hand, the ILC and its State Responsibility Articles moved away from the traditional understanding that linked damage and wrongfulness; on the other, the Articles are not meant to apply international obligations towards individuals, or international obligations that can be invoked by person or entity, other than the State.

De Luca pointed out that tribunals' disregard of the afore-mentioned legal implications of the principle of permanent sovereignty has resulted, to a certain extent, in a unjustified overhaul of the balance between the expectations of investors and the bona fide needs of governments to act in the public interest. Such overhaul of the balance has crystalized in the traditional formula of State's right to regulate in the public interest versus the obligation to compensate foreign investors. Essentially, older treaties did not explicitly spell out the principle of permanent sovereignty, and its multiple legal implications (such as the compensatory approach and the limitation on tribunals on remedies and reparation, as well as the existence of economic damage, and a causal link between the latter and the challenged State conduct). Older treaties nonetheless assume and presuppose them. Notwithstanding, some tribunals, inappositely relying on State Responsibility Articles, have overlooked the principle of permanent sovereignty over natural resources. De Luca concluded that as a result, we are witnessing a reaction of States in the new generation of treaties where there is an over emphasis on State's right to regulate on the

basis of the State's public power doctrine. Consequently, regulatory measures enjoy a presumption of legality while the obligation to compensate remains.

Plakokefalos, the following panellist, investigated **law-making and responsibility in the law of the sea**, asking whether there were new uses and new problems. He raised the subject of the relatively recent use of technologies of renewable energy development at sea. The existing provisions in UNCLOS do not govern the development of renewable energy resources at sea. This illustrates subject areas that are relatively new and hardly implemented.

Consequently, the question is whether there is a need for a framework to deal with the protection of the environment and navigation. Such framework should also remove obstacles and enhance the development for new uses of energy. An important issue in this respect would be the relation of this framework with other regimes (e.g. the international legal regime of climate change).

The primary question raised was whether there is room and the need for the development of a specialized legal framework regarding renewable energy within the UNCLOS system. Plakokefalos made a comparative analysis with the development of the deep seabed mining regime, given that this was completed after the adoption of UNCLOS. Drawing from the deep seabed mining regime, Plakokefalos tackled two aspects of developing a specialized legal framework, which are law-making (via secondary legislation in the form of regulations) and responsibility.

There are key questions to carefully consider with regards to law-making and responsibility. With respect to the former, this includes: what form the legal framework for the development of renewable energy resources at sea should take; within what context; and whether there is also the need for the development of institutional structures. Concerning responsibility, the necessary questions are whether there is a need for special rules; which aspects of responsibility would be fit to tackle; and whether the scope of the rules of responsibility should be widened so as to capture more actors than States and international organizations.

Considering the deep seabed mining regime from a law-making perspective can provide clearer illustration of this process. This regime is governed primarily by the Mining Code adopted by the International Seabed Authority (ISA); but also governed by exploration contracts with private and public entities using standard clauses. Plakokefalos points out that such contracts created new and complex relationships between States, international organizations, and private entities. Whilst the premise in law-making remained the principle of common heritage of mankind, with caution against simply handing over resources to developed countries, there were still many questions unanswered or left open. For instance, questions arose as to how to deal with incentives for private initiative. This required a series of rights and obligations, such as allowing mining but pairing it with an obligation of transfer of technology. Accordingly, the complexity of legal relations in terms of law-making almost always requires that a balance of interests is struck; for this reason the deep seabed mining regime provides for dispute settlement procedures that include private entities.

With regard to responsibility, Plakokefalos argued that the absence of the question of contribution to common damage in the deep seabed mining regime was a striking one. Yet, there do exist innovative features of the deep seabed mining regime, e.g. features to accommodate the multiplicity of the actors on both sides. Whilst these were considered welcome development, one question remained: should the regime be built as new problems appear? Or would a more cautious approach, leaving an open door to accommodate future issues be more preferable?

With regard to sovereignty, deep seabed mining has a very tenuous link given that the Area (where it takes place) is a common heritage of mankind. In contrast, renewable energy follows the classical zonal approach, which implies varying degrees of sovereignty depending on the maritime zone where the production or its effects take place. Considering that anyone could develop projects within the territorial sea, the EEZ, or even the high seas, a key

question to ask is what would be the effect on other maritime activities, such as fisheries? Accordingly, Plakokefalos noted, that this has yet to be answered.

Although UNCLOS does not include provisions on renewable energy resources at sea, Plakokefalos explained that these are slowly being identified through research. However, according to him, the relevant research is arguably insufficient, so long as it remains untested at sea. Given that the future prospects of renewable energy at sea is highly promising (to meet and exceed the energy needs of many populations), this raises more questions. How will the precautionary approach be applied here? Would it be useful or not? The applicable primary restrictions, such as the obligation to prevent environmental harm and due diligence, may for the time being be enough; and other more concrete primary rules on innovation or environmental impact assessments (EIAs) will be beneficial. The Deepwater Horizon case is an illustration of this, seeing that disregard for simple EIA guidelines has been closely linked to the accident.

In conclusion, Plakokefalos underlined that things are slowly moving forward through negotiations and consensus building. Perhaps the existing institutional machinery such as the ISA could be a forum to discuss issues of renewable energy development, as this would be more effective than building a new convention. Nevertheless, his intention was not to reach concrete conclusions, rather, Plakokefalos attempted to contribute to ongoing discussions on the legal consequences of new uses of the sea by posing more refined questions.

The final panellist, **Giannopoulos** engaged with the question on **sovereign rights over offshore energy resources**. The reality is that since offshore energy exploitation became more feasible from the mid-20th century, it has become a very important catalyst for the development of the law of the sea. Bearing this in mind, Giannopoulos conducted an analysis of his ensuing question.

Giannopoulos first examined recent historical developments in the law of the sea to showcase their interconnection with the interest of exploiting offshore resources. He noted that, the 1945 Truman Proclamation supported claims of exclusive rights over hydrocarbon resources.

Following this, with the adoption of the 1958 Geneva Convention on the Continental Shelf, the continental shelf regime was developed, not only with regards to water depth, but also with the inclusion of an exploitability criterion. Crucially, the Convention had also recognized for the first time States possessed sovereign rights over hydrocarbon resources.

With regards to UNCLOS, sovereignty over offshore energy resources has never been considered absolute. Territorial sovereignty could not be applied in the same manner as on land because of the interconnected nature of exclusive rights of coastal States over energy resources within their EEZ and continental shelf, and third States sovereign rights and freedoms. UNCLOS, consequently, requires coastal States to show due regard for the rights of third States and vice versa. Similarly, the general obligation of States to protect and

preserve the marine environment (art. 192 UNCLOS, Principle 21 of the 1972 Stockholm Declaration) was by no way an absolute obligation. Rather, such obligation must be counterbalanced by the sovereign right over resources and other relevant socio-economic factors.

Following this, Giannopoulos questioned whether developments in international marine environmental law and investment law restricted the exercise of sovereign rights? To answer this question, he dealt first with the nature of the obligation to protect the marine environment. UNCLOS mostly includes obligations of conduct, and thus due diligence has been particularly important in ensuring States provide the expected level of care by placing an obligation to take appropriate measures. Such obligation however does not carry much weight on its own, as wide discretion is often given to States to determine what measures they should take or which they deem appropriate. This is rooted in a general predilection towards the avoidance of blanket prohibitions.

The concept of due diligence is important in the environmental regulation of offshore energy. The reason being that development activities are not easily attributable to States, as these are usually undertaken by private actors. ITLOS Seabed Chamber Advisory Opinion sheds some light here. Giannopoulos pointed out that the Chamber affirmed that due diligence is a variable concept as it depends a lot on the circumstances. This he considered to be both a weakness and a strength; in one respect this makes due diligence a flexible standard which can evolve over time, so that States constantly have to reconsider the standard of care. Consequently, the higher the risk, the higher the standard of care that is expected. In another respect, specialized treaty bodies might have a role to raise awareness about risks and to inform on ways to avoid pollution. This would require States to apply best available techniques and the precautionary principle.

The next question Giannopoulos dealt with was whether there were any objective elements to due diligence. The focus consequently shifted to the evolving normative contours of due diligence. The plausible answer is yes, as due diligence is an integrative tool. Part XII of UNCLOS could be, through systemic integration (Art. 31.3.(c) Vienna Convention on the Law of Treaties) and evolutionary interpretation, interpreted as embedded in wider environmental obligations stemming from relevant MEAs. Furthermore, these environmental agreements can have implications over the relevant obligations by providing benchmarks as to the level of care.

For Giannopoulos, precise environmental standards give basis to define the normative content of due diligence.

Overall, Giannopoulos emphasised that sovereignty and sovereign rights at sea were never meant to be absolute, as they were designed to be limited by sovereign rights of third States and common interests, such as the protection of the marine environment. The duty to protect the marine environment is an *erga omnes* obligation, which is applicable in both within and

beyond national jurisdiction. Accordingly, this involves a more enhanced restriction compared to the no harm principle. This should not be seen as impairing the concept of sovereignty, rather it enhances this, as self-restriction is an exercise of sovereignty. The other side of the coin of self-restriction is that a State can also decide to withdraw from their international commitments. Giannopoulos contended that, even if States could opt out of such treaty-based obligations, the question of avoiding customary international law based restrictions is different. Therefore, they need to meet at least the minimum standard of due diligence as defined by those norms binding upon them.

Q and A Session (Panel 2)

Q: To what extent could the concept of "due regard" restrain sovereign rights in energy exploitation? Could the utilization of domestic law help advance new concepts for the UNCLOS?

Giannopoulos and Plakokefalos: "Due regard" could include an obligation to exercise due diligence in the context of the rights of third States with a view for protecting the marine environment. Domestic law could serve as an extra layer of protection when there are sponsorships to deep seabed exploitation and therefore more layers of protection might lead to easier attribution of responsibility.

Q: Are the development of extra layers really helpful?

Giannopoulos: Not necessarily because the contract and thus the extra layer would only be between two actors.

Q: Is there an argument that the application of the precautionary principle should apply less even-handedly to renewable resources since the latter will boost development?

Giannopoulos: The precautionary principle should apply in a stricter way in the regulation of offshore marine renewables than fossil fuels. However, the obligation to protect the marine environment allows for balancing interests, therefore it could lead to a less stringent application of any restricting rules. Nonetheless, you either have an obligation or not. The issue of concepts might not allow for providing solutions to certain questions such as this one.

Q: Best available techniques and best available practice: should these principles be applied differently for developing States?

Giannopoulos: It is a problem that these techniques are actually considered as cost effective, as they water down the practices and the available means to protect the marine environment.

Q: On what basis could systemic interpretation be applied in to the terms of UNCLOS? In what direction would the interpretation go?

Giannopoulos: Such an interpretation would be based on the object and purpose of the convention, as well as the text of the treaty and the intention of the parties. According to article 31 para 1 and 31(3)(c) of the Vienna Convention.

Conclusion

This report outlines the outcome of the two panel sessions and round-table discussions held by the Sustainable Ocean project during the expert workshop on Sovereignty and Ocean Governance, held on the 13 June 2019.

The outcome of this workshop will be useful in developing the research in this project. Mainly, it assisted our two PhD candidates Nikolaos Giannopoulos and Rozemarijn Roland Holst, in testing out their research at its current stage, through discursive contribution of participants.

The Sustainable Ocean team would like to thank all the participants to the workshop for the lively discussions and insightful comments, and express its gratitude to Isik and Vassilis, our students of the Public International Law LLM programme, for contributing to the drafting of the present workshop report.

The expert workshop was organised thanks to the financial support of the European Research Council (grant agreement No 639070 - SUSTAINABLEOCEAN).

S. Trevisanut, P.I. of the Sustainable Ocean Project, opening the Expert Workshop.

Group picture of all the participants to the workshop (see below the complete list)

Panel I (from left to right): D. French, Y. Tanaka, R. Roland Holst

Panel II (from left to right): I. Plakokefalos, N. Giannopoulos, A. De Luca

Annex

SUSTAINABLEOCEAN Project
Expert Workshop, Thursday 13 June 2019

Sovereignty: a shape-shifting concept in ocean governance?

The Sustainable Ocean Project (ERC Starting Grant Agreement No. 639070) is hosting an expert workshop entitled '*Sovereignty: a shape-shifting concept in ocean governance?'* in Utrecht, the Netherlands, in June 2019. The aim of this half-day workshop is to bring together experts to reflect on the modern-day meaning(s) and function(s) of 'sovereignty' over ocean space and marine non-living resources, especially in the light of emerging challenges in ocean use and governance.

Introduction to the workshop theme:

In traditional positivist legal doctrine, 'sovereignty' is often understood in terms of 'territorial sovereignty', intertwined with the concept of statehood itself and with the perception of international law as a strict inter-state order built on state consent. Applying this territorial conception of sovereignty to ocean space is not necessarily self- evident as the oceans are intrinsically interconnected, dynamic and different in character from any form of land territory. Yet, 'sovereignty' has always been a fundamental pillar of the law of the sea, the development of which is famously characterised by a continuous struggle between the ever further seaward expanding sovereignty of coastal states over natural resources on the one hand, and the freedoms of the high seas on the other hand.

The incrementally extended assertions of sovereignty over maritime spaces have heavily influenced the development of the law of the sea since the mid-20th century. The inheritance of this classic 'sovereignty versus freedom' narrative is reflected in the fundamental structure of the modern law of the sea set out in the UN Convention on the Law of the Sea (UNCLOS) in two different ways: its zonal jurisdictional system; and the ways in which UNCLOS attempts to balance conflicting interests of states, as well as 'common interests' within each of these jurisdictional zones. Sovereignty in the law of the sea has never been absolute, and under UNCLOS 'sovereignty' and 'sovereign rights' are qualified by a complex web of limitations, conditions and specified interrelationships with other (external) rules and principles of international law. Tension between the traditional connotations of the sovereignty concept and fundamentally changing circumstances is furthermore highlighted by the impacts of global challenges, such as climate change or the loss of biodiversity, on the state of our oceans and how we use them. At the same time, global energy demand is rocketing, initiating a strong momentum for the multiplication of offshore energy generation activities. As new economic activities at sea develop at an unprecedented scale, the oceans

serve as an arena where competing interests of states are measured against each other. Against this background, the concept of sovereignty is central to the research conducted within the Sustainable Ocean project.

Workshop format:

The organisers warmly invite speakers to reflect on these or related themes from their own perspective. The aim of the workshop is twofold: to brainstorm with experts about core issues that the Sustainable Ocean project engages with; to give the opportunity to the PhD students within the project to get useful feedback on their interim findings. (The event will not result in a publication)

The workshop format consists of two panels composed of three speakers, each followed by a round table discussion with all participants.

Panel I, on '*Sovereignty over the sea in theory and practice*', welcomes panellists to reflect on the tensions or interactions between the traditional connotations and functions of sovereignty and its role in today's changing legal and physical environment. This includes (but is not limited to) questions relating to the conceptualisation of (legal) limitations and conditions inherent to the exercise of sovereignty and sovereign rights, as well as questions concerning the relationship between sovereign rights and common interests. PhD candidate Rozemarijn Roland Holst, who has been working on this topic with a focus on UNCLOS' legal framework and general legal theory, will participate in this panel.

Panel II, on '*Sovereignty over marine energy resources: between Scylla and Charybdis?*', invites panellists to consider the functions of sovereignty regarding the regulation of the exploitation of marine energy resources, in the context of the relevant international environmental and international investment law obligations. The focus will be on the normative impacts of marine environmental law and investment law on the sovereign discretion of states to regulate offshore energy production activities. PhD candidate Nikolaos Giannopoulos, who has been working on the potential interactions (or lack thereof) between the two regimes, will participate in this panel.

The workshop's participants will be limited to the speakers, the members of the Sustainable Ocean project team, and a small number of interested colleagues and students, to allow for fruitful discussions.

Programme

Sovereignty: a shape-shifting concept in ocean governance?

Stijlkamer, Janskerkhof 2/3, Utrecht University

13.00 – 13.30 Welcome coffee & opening by Prof. Seline Trevisanut & Sustainable Ocean Project team

13.30 – 14.30 ***Panel I: Sovereignty over the sea in theory and practice***

Speaker I: **Yoshifumi Tanaka** (University of Copenhagen)
"Rethinking the Law of *dédoublement fonctionnel* in the Protection of Community Interests at Sea"
Speaker II: **Duncan French** (University of Lincoln)
"Sovereignty & the marine (and global) environment: what if UNCLOS were negotiated today*?"*
Speaker III: **Rozemarijn Roland Holst** (Utrecht University)
"Sovereignty and Common Interests: On Consonance and Dissonance in the Law of the Sea"

14.30 – 15.00 round table discussion/Q&A

15.00 – 15.30 Coffee

15.30 – 16.30 ***Panel II: Sovereignty over marine energy resources: between Scylla and Charybdis?***

Speaker I: **Anna De Luca** (Bocconi University)
"Balancing state sovereign right over energy resources with foreign investment protection: of old and new approaches"
Speaker II: **Ilias Plakokefalos** (University of Athens)
"Law Making and Responsibility in the Law of the Sea: New Uses, New Problems?"
Speaker III: **Nikolaos Giannopoulos** (Utrecht University)
"Sovereign rights over offshore energy resources: between the Devil and the deep blue sea"

16.30 – 17.00 round table discussion/Q&A

17.00-18.00 Drinks for all participants

18.00 Dinner

ABSTRACTS AND RECOMMENDED MATERIAL OF PANELLISTS

PANEL I: *Sovereignty over the sea in theory and practice*

"Rethinking the Law of *dédoublement fonctionnel* in the Protection of Community Interests at Sea"

Yoshifumi Tanaka, University of Copenhagen

As Hedley Bull observed, '[t]he maintenance of order in any society presupposes that among its members, …, there should be a sense of *common interests* in the elementary goals of social life' (H Bull, *The Anarchical Society: A Study of Order in World Politics*, 3rd edn, Palgrave, 2002, p. 51). Arguably, this statement is true of the maintenance of the international legal order. In this connection, it is noticeable that the concept and rules concerning community interests which encompass fundamental values shared by groups of States or the international community as a whole begin to be enshrined in international law, and the law of the sea is no exception. Noting this point, this presentation seeks to reconsider the significance of the law of *dédoublement fonctionnel* in the protection of community interests at sea with specific focus on the protection of the marine environment. First, I will present a perspective on the changing paradigm of the law of the sea. Related to this, some scholars' thoughts focusing on the unity of the ocean will be briefly reviewed. Second, I will examine some relevant provisions of the UN Convention on the Law of the Sea which relate to the individual application of the law of *dédoublement fonctionnel*. Particular focus will be on the port State jurisdiction set out in Article 218 of the Convention. Next, as an example of the institutional application of the law of *dédoublement fonctionnel*, I will examine the issue of the high seas marine protected areas set out under the OSPAR Convention and their limitations. Finally, I will present tentative conclusions.

Selected Bibliography

Y. Tanaka, 'Protection of Community Interests in International Law: The Case of the Law of the Sea,' *Max Planck Yearbook of United Nations Law*, Vol. 15, 2011, pp. 329-375.

Y. Tanaka, 'The Institutional Application of the Law of *Dédoublement Fonctionnel* in Marine Environmental Protection: A Critical Assessment of Regional Regimes,' *German Yearbook of International Law*, Vol. 57, 2014, pp. 143-179.

G.B. Burdeau, 'Georges Scelle et le droit de la mer' in C. Apostolidis and H. Tourard (eds.), *Actualité de George Scelle* (Dijon, Editions Universitaires de Dijon, 2013), pp. 149-160.

"Sovereignty & the marine (and global) environment: what if UNCLOS were negotiated today?"

Duncan French, University of Lincoln

International law changes, and not always in a linear, progressive fashion. It ebbs and flows like the tide, often between internationalism / global rules & governance, and entrenchment of national sovereignty. UNCLOS has (rightly) been viewed as a key achievement in the post-WWII/ post-decolonisation world order. The inclusion of a specific part – and other rules – on marine environmental protection and marine conservation is undoubtedly part of broader achievement. But what if UNCLOS were negotiated today? How would its provisions on environmental protection look today? This paper suggests that there are a number of competing, inconsistent, and paradoxical forces that pull against each other. On the one hand, the dynamics that allowed consensus to emerge in UNCLOS III are less evident now. On the other hand, there is a scientific reality that would seem to push in the other direction. Moreover, there are new issues; not even considered by 1982. So would UNCLOS 2019 be a noticeably better or worse document than we had in 1982?

Selected Bibliography

IISD, "Negotiations on Governance of Marine Genetic Resources in the High Seas Move Forward" (April, 2019) https://sdg.iisd.org/news/negotiations-on-governance-of-marine-genetic-resources-in-the-high-seas-move-forward/

L. Kotzé and D. French, "A critique of the Global Pact for the environment: a stillborn initiative or the foundation for *Lex Anthropocenae*?" International Environmental Agreements (2018) https://link.springer.com/article/10.1007/s10784-018-9417-x

R.Barnes, "The Continuing Vitality of UNCLOS" (2016) https://www.researchgate.net/profile/Richard_Barnes15/publication/317387386_The_Continuing_Vitality_of_UNCLOS/links/59382edeaca272bcd18162d3/The-Continuing-Vitality-of-UNCLOS.pdf?origin=publication_detail

S. Sefrioui , "Adapting to Sea Level Rise: A Law of the Sea Perspective" (2017) https://link.springer.com/chapter/10.1007/978-3-319-51274-7_1

Sovereignty and Common Interests: On Consonance and Dissonance in the Law of the Sea"

Rozemarijn Roland Holst, Utrecht University

Sovereignty retains a central place in the law of the sea, but as an inherently conditional notion. It is qualified by an increasingly complex web of limitations and obligations that balance the exercise of coastal State sovereignty with individual rights and interests of other States, as well as with certain 'common' interests. Yet, tensions between the traditional connotations of the sovereignty concept and interests shared by the international community at large continue to emerge, and become increasingly pressing in the face of fundamentally changing circumstances. Global challenges, such as the impacts of climate change, large-scale biodiversity loss, and wide-spread pollution, are having a profound impact on the functioning of the ocean, and consequently on our current and future use thereof. When it comes to effectively accommodating and protecting the interests shared by the international community in sustaining the variety of uses, ecosystem services and resources for which we rely on our oceans, the strictly reciprocal Westphalian notion of inter-state relations is often observed to fall short, and the traditional self-legitimising conception of 'sovereignty' or 'sovereign rights' is scapegoated as an obstacle to governing them effectively.

Instead of deconstructing the role of sovereignty altogether 'under the pressure' of common interests, this paper proposes a contemporary conception of sovereignty as an inherently conditional and functional concept. It uses the illustrative lens of the law of the sea to shed light on the ways in which the existing legal framework can accommodate (emerging) common interests. First, it will briefly discuss different critiques on - and (evolving) understandings of the sovereignty concept, and relate these to different notions of 'commonality' in positive international law and legal theory. It will then consider the distinct ways in which common interests are accommodated within UNCLOS; a treaty that bears witness to wider developments in international law and uniquely contains a variety of common interest manifestations within a single regime. Finally, tentative conclusions will be drawn as to why the reality of modern ocean governance provides examples of both consonance and dissonance between sovereignty-based concepts and common interests; illustrating the functionality, as well as the limitations inherent in both concepts.

Selected Bibliography

Benvenisti E and Nolte G (eds), *Community Interests across International Law* (Oxford University Press 2018)

Besson S, 'Community Interests in International Law: Whose Interests Are They and How Should We Best Identify Them?' in E Benvenisti and G Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018

Brunnée J, 'Common Areas, Common Heritage, and Common Concern' in J Brunnée, D Bodansky and E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2008)

Hey E, 'Global Environmental Law: Common Interests and the (Re)Construction of Public Space' (2009) 1 Iustum Aequum Salutare 41

Koskenniemi M, 'What Use for Sovereignty Today?' (2011) 1 Asian Journal of International Law 61

Peters A, 'Humanity as the A and Ω of Sovereignty' (2009) 20 The European Journal of International Law 513
Simma B, 'From Bilateralism to Community Interest in International Law' (1994) 250 Recueil des Cours 217

Wolfrum R, 'Identifying Community Interests in International Law' in E Benvenisti and G Nolte (eds), *Community Interests across International Law* (Oxford University Press 2018)

Young M, 'Fragmentation, Regime Interaction and Sovereignty', *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (Cambridge University Press 2015)

PANEL II: *Sovereignty over marine energy resources: between Scylla and Charybdis?*

"Balancing state sovereign right over energy resources with foreign investment protection: of old and new approaches"

Anna De Luca, Università Luigi Bocconi

State sovereignty, which includes the traditional concept of "permanent sovereignty over natural wealth and resources" as specific manifestation covering economic relations of host States with private individuals (especially foreigners), is a well-established customary and general principle encompassing the right of States to regulate in the general interest. This in turn includes the right to expropriate and nationalise, as well as the right to regulate economic activities of foreign individuals within its area by adopting measures less impairing than expropriations and nationalisations.

However, to use the words of the introduction to this Workshop with reference to UNCLOS sovereignty, such concept, also when operating vis-à-vis foreign investments (and especially those in the energy sector), has never been considered as absolute. Sovereignty, or to better say its exercise in connection with foreign investments, has always been conceived as subject to international limitations. The validity of sovereignty as a relative concept subject to the rules of international law has never been seriously questioned on an international plane, not even during

the decolonization period, despite the developing States' claim to the contrary. At that time the vexed issue mainly concerned the substantive content of the rules of international law on foreign investment protection, rather than their existence and functioning as limitations to sovereign right of states to regulate.

Against this background, I will examine first the approaches followed by both customary and treaty law to balance State sovereignty over natural wealth and resources with foreign investment protection; the 'traditional' liability and compensatory approaches will be mentioned in this respect. Secondly, I will focus on the ECT, which is one of the few multilateral treaties on investment protection, and the only one dealing with energy investments. The analysis will put a spotlight on the peculiarities of the ECT, as compared to other investment treaties. Such peculiarities are shaped on the specific features of economic activities in the energy sector; among those features are their long-term nature, the extremely high sunk costs, and the significant negative externalities for the environment in a broad meaning. Finally, I will look at the most recent State practice, and its approaches to balancing State sovereign right to regulate with foreign investment protection with a special focus on energy matters. I will present some tentative conclusions on whether i) the approaches in the most recent State practice constitute contemporary propositions of old approaches, or rather present some novelties; and ii) there is a need for new approaches specifically tailored on energy investments and their protection.

Selected Bibliography

Barra and Bąk, Mobilising Sustainable Energy Investments in Africa, ECS Special Paper, September 2016.

Chowdhury, "Permanent Sovereignty over natural resources: Substratum of the Seoul Declaration", in de Waart, Peters and Denters, International Law and Development, Martinus Nijhoff Publishers, 1988, 59 ff..

Fatouros, "An International Legal Framework for Energy", 332 RCADI (2007).

Higgins, "Taking of property by the State: Recent developments in international law," 176 RCADI (1982- III).

De Luca, Non-Pecuniary Remedies under the ECT, https://energycharter.org/fileadmin/DocumentsMedia/Occasional/Non-Pecuniary_Remedies_under_the_ECT.pdf

De Luca, "Investor-state arbitration as a 'sub-system' of State responsibility", International Economic Law No. 26, 2017, 27 ff. (published annually by the Japan Association of International Economic Law).

Viñuales, "Sovereignty in Foreign Investment Law", in Douglas, Pauwelyn and Viñuales (eds.), The Foundations of International Investment Law, Oxford, 2014, 317 ff.

"Law-Making and Responsibility in the Law of the Sea: New Uses, New Problems?"

Ilias Plakokefalos, National and Kapodistrian University of Athens

The UN Convention on the Law of the Sea (LOSC or the Convention) while being concluded in 1982 anticipated problems that would appear much later in time. The most prominent one was the regulation of the activities in the deep seabed for which the Convention constructed a special regime, with special rules on responsibility, and intricate approaches to law-making. The deep seabed regime (after becoming tailored to fit the needs of the developed States) started a life of its own producing legal materials that create complex relationships between States, international organizations, and private entities. First, the International Seabed Authority (ISA) adopted the Mining Code which includes regulations for deep seabed mining. Second, it began entering into exploration contracts with private and public entities by using standard clauses that also contain significant provisions regarding the obligations and rights of each party to the contract. Besides the deep seabed, however, there are still newer uses of the sea that the Convention does not directly regulate, or does not provide for the development of a special regime.

For the purposes of this roundtable, the focus will be placed on renewable energy sources. Tidal, current, and wave energy, offshore wind energy, as well as salinity gradients are not being dealt with directly in UNCLOS. The potential problems (protection of the environment, navigation etc.) are slowly being identified. The need for a framework that removes obstacles and enhances the development of renewable energy at sea has also been pointed out. Finally, the relationship with other regimes, such as climate change, must be studied further.

Drawing from the deep seabed regime, the question will be whether there is room and need for the development of a specialized legal framework regarding renewable energy in the law of the sea. The specialized features of the deep seabed touch upon law-making (with the ISA being able to produce secondary legislation in the form of regulations as well as concluding contracts with public and private entities) as well as responsibility. A distinguishing feature in this regard is that States, international organizations and private entities bear obligations whose breach is an internationally wrongful act. It is useful to examine how both these aspects, law-making and responsibility, play out in the context of renewable energy at sea. The aspect of law-making is important because it must be carefully considered what form a legal framework should take, within what context, and whether there is also the need for the development of institutional structures. At the other end of the spectrum lies the issue of responsibility. Here the questions are whether special rules are required, which aspects of responsibility are already fit to tackle the problems posed by renewable energy at sea, as well as whether there is a need for the responsibility rules to capture more actors than States and international organizations.

Deep seabed mining has a very tenuous link with sovereignty in the sense that the Area (where it takes place) is considered common heritage of mankind. Renewable energy on the other hand lends itself to more classical concepts of varying degrees of sovereignty depending on the maritime zone where the production or its effects take place. This discrepancy shall be crucial

in the analysis. An analysis that is not expected to lead to concrete answers but rather to more refined questions regarding the legal consequences of new uses of the sea.

"Sovereign rights over offshore energy resources: between the Devil and the deep blue sea"

Nikolaos Giannopoulos, Utrecht University

Following the Second World War, incremental claims for the seaward expansion of State sovereignty over natural resources have been heavily influential in the development of the law of the sea. Inter alia, the vital interest of coastal States in exploiting marine energy resources worked as a catalyst in the zonal demarcation of the oceans and the allocation of exclusive sovereign rights to coastal States. However, due to their interconnected nature, oceans defy the "transplant" of a traditional conception of territorial sovereignty in many respects. Sovereignty and sovereign rights over marine energy resources are inherently restrained: they must bend before international obligations of the coastal State. These obligations operate as counterbalances to the exercise of sovereignty. In that sense, sovereign rights are limited by the environmental rules and standards with which the State shall comply. Their due diligence obligations require a delicate balance between sovereign rights and the duty to diligently protect the marine environment. Refusal to take necessary action exposes the undiligent State to international responsibility. Similarly, States have voluntarily committed themselves to restrain the exercise of their sovereign rights over, among other, their marine energy resources in a way that does not breach international investment obligations. Even though those international law "fragments" have developed largely independently from each other, they are creating partly overlapping obligations for States in this context, as they both aim to restrict States' authority in regulating their offshore energy resources. In other words, they both try to shape the "right to regulate" of the host State, which is a basic attribute of the sovereign rights over natural resources in marine areas within their jurisdiction.

But is sovereignty over marine energy resources actually "walking the plank"? Have normative developments in marine environmental law confined the States' sovereign discretion to regulate the energy resources within their jurisdiction or do they still allow wide "margin of appreciation" in the implementation of their environmental obligations? Do investment law obligations impact the sovereign right and duty of States to take measures for the protection of the marine environment? The tentative conclusion is that there is no conflict between the sovereign rights and duties of States, but the development of international law has led to a more nuanced conception of sovereign rights over marine energy resources.

Selected Bibliography

Danae Azaria (2016) 'The Scope and Content of Sovereign Rights in Relation to Non-Living Resources in the Continental Shelf and the Exclusive Economic Zone', *Journal of Territorial*

and Maritime Studies, 5-27

Virginie Barral (2016) 'National sovereignty over natural resources: Environmental challenges and sustainable development' in Elisa Morgera and Kati Kulovesi (eds) *Research Handbook on International Law and Natural Resources,* Edward Elgar, 3-25

Duncan French (2001) 'A reappraisal of sovereignty in the light of global environmental concerns', *Legal Studies,* 376-399

Caroline Henckels (2016) 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TTP, CETA, and TTIP', *Journal of International Economic Law,* 27-50

Bernard Oxman (2006) 'The Territorial Temptation: A Siren Song at Sea', *The American Journal of International Law,* 830-851

Franz Xaver Perrez (1996) 'The Relationship Between Permanent Sovereignty and the Obligation not to Cause Transboundary Environmental Damage', *Environmental Law,* 1187-1212

Nico Schrijver (1997) 'International Environmental Law: Sovereignty versus the Environment?' in *Sovereignty over Natural Resources: Balancing Rights and Duties,* Cambridge University Press, 218-235

Workshop Participants: Sovereignty: a shape-shifting concept in ocean governance?

SUSTAINABLEOCEAN Project

Thursday 13 June 2019

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