COMMENTARY: PROPERTY RIGHTS IN AREAS BEYOND NATIONAL JURISDICTION—NOT TOO LATE FOR A PROPER DEBATE?

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Introduction

As a quasi-record of the proceedings in the relevant session of the Symposium, this contribution does not seek to take issue with Barnes’s excellent paper but merely to add a few pertinent and, it is hoped, provocative observations. Because of space constraints, the reader’s familiarity with the basic legal framework applicable to international fisheries under Articles 63, 64 and 116–119 of the United Nations Convention on the Law of the Sea (LOS Convention) is assumed.

The first thing one notices in any discussion of property rights in areas beyond national jurisdiction (ABNJ) is a conceptual obstacle: the lack, in public international law, of any law of property as such. States do buy and sell commodities to each other, extend loans to each other and so on, but these are essentially commercial transactions that are either embodied in treaties, or the transaction is conducted under the system of domestic law of one of the parties or sometimes a third State. The closest that traditional international

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2 Adopted on 10 December 1982; 1833 UNTS 3.
4 One of the better known examples is the post-war line of credit of $3.75 billion extended by the United States to the United Kingdom (Financial Agreement between the Governments of the United States of America and the United Kingdom of Great Britain and Northern Ireland of 6 December 1945 (126 UNTS 13)). Although not a loan, the reparations of 132 billion gold marks quantified by the Reparation Commission under Article 233 of the Versailles Treaty (Treaty of Peace with Germany of 28 June 1919 (1919) 13 AJIL Supplement 151) afford another illustration of how a debt from one State to another can be incurred and given recognition in a treaty.
5 For example, in the Norwegian Loans case ([1957] ICJ Reports 9), the bonds issued by Norway and purchased by French investors were governed by Norwegian, not international law. The International Court of Justice (ICJ) found that it had no jurisdiction to decide the case. There
law comes to a regime of property independent of national legal systems concerns the law on the acquisition of territory. More recently, however, the recognition of the tragedy of the commons at the heart of certain global-scale problems has produced on the international plane some tentative steps towards property-like solutions. The most prominent of these is the creation of an emissions trading system envisaged under the Kyoto Protocol to the Framework Convention on Climate Change, but this is both very complex and still at an early stage of development, 2008 having been the first year in which a significant number of transactions took place.

On the face of it, the freedom of fishing on the high seas seems a more formidable barrier to creation of property rights in fisheries than in the case of harmful emissions, since under Article 116 of the LOS Convention fishing is a positive right subject to certain qualifications, whereas there is no such freedom to pollute the atmosphere. Rather, since the Trail Smelter arbitration as long ago as 1941 established the wrongfulness of cross-border air pollution, in this instance from a point source, the problem has been one of proving causation in the form of relative contributions to damage by multiple polluters or diffuse sources: even if there is scientific consensus that the cause of damage suffered by a low-lying State from, say, rising sea-levels is anthropogenic global warming, this will be of no avail to that State.

The shift in thinking that is nonetheless beginning to make property rights seem possible can best be traced in the evolution of the views of one of the law of the sea greats, Judge Oda. At the start of his career he was doubtful as to whether extending exclusive coastal State jurisdiction even to twelve nautical miles from the territorial sea baseline (as the Second United Nations

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is a great deal of practice and case law on compensation for expropriation of property of foreign nationals, but the character of the assets as property is still rooted in the domestic law of the expropriating State.

5 United Nations Framework Convention on Climate Change of 9 May 1992 (1771 UNTS 107) and the Protocol to the Framework Convention on Climate Change (Kyoto Protocol) of 11 December 1997 (2303 UNTS 162); see “Decision 12/CMP.1, Guidance relating to registry systems under Article 7, paragraph 4 of the Kyoto Protocol” and “Decision 13/CMP.1, Modalities for the accounting of assigned amounts under Article 7, paragraph 4 of the Kyoto Protocol” Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol in its first session (30 March 2006) UN Doc FCCC/KP/CMP/2005/8/Add. 2 (available at ⟨http://unfccc.int⟩) 21 and 23 respectively.

6 See “Table 3, Transaction volume for the international transaction log” Annual report of the administrator of the international transaction log under the Kyoto Protocol: Note by the secretariat (27 November 2008) UN Doc FCCC/KP/CMP/2008/7 (available at ⟨http://unfccc.int⟩) 10, indicating that of the 12,049 transactions that took place from November 2007 to October 2008, more than three quarters were in a single month (October 2008).

7 Trail Smelter (United States v. Canada) (1941) 3 Reports of International Arbitral Awards 1905, reprinted in (1941) 35 AJIL 684.