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UNCLOS and its Limitations as the Foundation for a Regional Maritime Security Regime

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ABSTRACT

The 1982 UN Convention on the Law of the Sea (UNCLOS) provides the foundation for an effective regional maritime security regime. However, this large and complex Convention is not without its limitations. There are many examples of apparent non-compliance with its norms and principles, and the United States, as a key player in regional maritime security, is still not a party to it. The root causes of these problems lie in basic conflicts of interest between countries on law of the sea issues, the "built-in" ambiguity of UNCLOS in several of its key regimes, and the geographical complexity of the East Asian region in particular.

This paper discusses key limitations of UNCLOS; particularly the use of territorial sea baselines, navigational regimes, exclusive economic zones (EEZs), and some other issues covered by the Convention, such as piracy, hot pursuit and the responsibilities of flag States. The paper concludes that uncertainty in the law of the sea is likely to grow and that State practice in East Asia, under the influence of domestic politics and regional tensions, may well continue to diverge from more traditional views of the law. The challenge in building an effective regional maritime security regime is to recognise the limitations of UNCLOS and to negotiate a regional consensus on aspects of the Convention that are less than clear or where differences of view exist.

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He has written extensively on defence and maritime issues in Australia, the Asia-Pacific and Indian Ocean. During 2002, he held a fellowship at the East-West Center in Honolulu to research developments with coast guards in the Asia-Pacific region. His current research interests include regional maritime security, the strategic and political implications of the Law of the Sea, and maritime cooperation and confidence building. He is now a Co-Chair of the Council for Security Cooperation in Asia Pacific (CSCAP) Study Group on Capacity Building for Maritime Security Cooperation, and Editor of the journal Maritime Studies.

UNCLOS and its Limitations as the Foundation for
a Regional Maritime Security Regime

INTRODUCTION

Maritime security regimes are of necessity based on the framework provided by the 1982 UN Convention on the Law of the Sea (UNCLOS).[1] This large and complex convention provides the constitution for the oceans and the basis for the jurisdiction that a country may exercise at sea in its various roles as a coastal,[2] port,[3] or flag State.[4] It sets out the rights and duties of a State with regard to the various uses of the oceans and prescribes the regime of maritime zones that establishes the nature of State sovereignty and sovereign rights over ocean space and resources. UNCLOS also provides the principles and norms for navigational rights and freedoms, flag State responsibility, countering piracy, rights of visit, hot pursuit and regional cooperation, all of which are relevant to the maintenance of security and good order at sea.

UNCLOS now has a great many State parties but its effectiveness is still open to question in a number of areas. Many examples can be found of apparent non-compliance with UNCLOS. These include the uses and abuses of straight territorial sea baselines, a reluctance to acknowledge the rights and duties of other States in the exclusive economic zone (EEZ), and the failure of flag States to observe the "genuine link" requirement in UNCLOS Article 91 and to fulfil their duties as flag States under Article 94. The general

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[1] United Nations Convention on the Law of the Sea, December 10, 1982, U.N. A/CONF.62/122, 1982, *reprinted in the Law of the Sea Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index,* UN Sales No. E.83.V.5, 1983 and 21 I.L.M. 1261, 1982 (referred to in this paper as UNCLOS).

[2] A coastal State exercises jurisdiction over waters under national sovereignty (i.e. internal waters and territorial sea, as well as archipelagic waters in the case of an archipelagic State) and has jurisdiction over its contiguous zone, exclusive economic zone and continental shelf in respect of the rights and duties identified in relevant articles of UNCLOS. As a general proposition, the jurisdiction of a coastal State over its maritime zones diminishes as the distance of the zone from the coast increases.

[3] A port State exercises jurisdiction over vessels entering its internal waters for whatever purpose, and has the right to deny access to such waters if international law or its domestic laws are not observed. Vessels with sovereign immunity are exempted from the jurisdiction of a port State but would normally seek diplomatic clearance before entering port.

[4] A flag State is a State which grants vessels using international waters, regardless of type and purpose, the right to fly its flag and, in so doing, gives the ships its nationality. There must be a genuine link between the State and the ship (UNCLOS Article 91(1)), and the State shall issue ships granted the right to fly its flag documents to that effect (UNCLOS Article 91(2)).

problem of countries in the Asia-Pacific region acting inconsistently with UNCLOS has been described as follows:

> For those member countries of CSCAP which are now parties to the UNCLOS, several of them have enacted maritime legislation and made maritime claims to sovereignty, sovereign rights or jurisdiction over ocean areas in the Asia-Pacific region, that are considered inconsistent with the terms of the UNCLOS. These conflicting/overlapping/excessive maritime claims have the potential to retard or block the process of building an ocean governance regime for the Asia-Pacific region. They also have the potential to disrupt regional stability and peace.[5]

UNCLOS has some important limitations as the foundation for a regional maritime security regime for East Asia in particular. In part these are a consequence of the relatively complex maritime geography of the region with its numerous islands, archipelagos and narrow shipping channels. However, the limitations also flow from the complexity of UNCLOS itself, its numerous "built in" ambiguities, and the pace of development of the law of the sea. These factors reflect generalised global considerations rather than the peculiarities and requirements of particular regions of the world. Countries in East Asia exhibit many varying perspectives of key areas of the law of the sea, and no clear regional view is evident on many issues. It also remains a matter of concern that the United States and Thailand are still not parties to UNCLOS, and perhaps the United States is becoming even further away from ratification. It is a major limitation of UNCLOS as a foundation for a regional maritime security regime that the United States is still outside of the Convention. The main problem the United States had initially with ratification was the attitude of the powerful mining lobby in the United States to Part XI of UNCLOS dealing with deep seabed mining. More recently, however, the concern has shifted to the security environment with perceptions that ratification of UNCLOS could inhibit maritime operations by forces of the United States.[6]

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[5] Yann-Huei Song, "A Survey of Acceptance of the Selected International Maritime Instruments by Member Countries of CSCAP" in Institute for International Relations (IIR), "Objectives and Principles of Good Governance: The Contribution to Regional Security", *Proceedings of the Sixth Meeting of the CSCAP Maritime Cooperation Working Group,* Hanoi, IIR, September 1999, p. 63.

[6] Frank Gaffney, **"'River Kwai Syndrome" Plays in Law of the Sea",** Commentary, *US Naval Institute Proceedings,* March 2005, Vol. 131, No.3, p.2. This article argues that UNCLOS is defective on national security, sovereignty, economic, and judicial grounds. It gains significance because it was published in a prominent position in the USN's main professional journal.

Background

Professor R.P. Anand, an eminent Indian scholar and historian of the law of the sea, wrote in 1982, when UNCLOS was finally agreed, that there have been "more changes and progress in ocean law since 1967 than in the previous 200 years".[7] Furthermore, the pace of evolution of the customary law of the sea has not slowed down. Particularly through increased concern for the health of the world's oceans and a proliferation of international treaties affecting ocean usage, the developments in the law of the since 1982 are almost as significant as those that occurred between 1967 and 1982. There are clear implications of these developments for maritime security, particularly in a region such as East Asia, where there is a relatively high level of maritime activity, and overlapping or disputed maritime zones of jurisdiction.

The basic clash of interests between, on the one hand, coastal States wishing to extend and tighten their jurisdiction over maritime space and on the other, maritime or user States seeking to maintain maximum freedoms of navigation and overflight, has important implications for regional security. For example, a coastal or archipelagic State might justify restrictions on rights and freedoms in its adjacent waters for reasons of national security. It is concerned about protecting its sovereignty and sovereign rights in these waters, and in ensuring that foreign vessels and aircraft do not operate in those waters in a way that might be prejudicial to its security. However, other States, particularly maritime or user States, see any restrictions imposed by a coastal State on navigation and overflight as impacting negatively on *their* maritime security, particularly their naval mobility and their ability to undertake defensive operations.

UNCLOS was formulated in a period when there was less concern for the health of the marine environment than there is at present. Norms and principles for the preservation and protection of the marine environment have multiplied exponentially over the last twenty years or so. It is not surprising therefore that many of the apparent "gaps" in UNCLOS arise in the area of environmental protection. The navigational regimes in UNCLOS provide an example of the underdeveloped level of concern for the marine environment evident in the 1970s. The regimes of straits transit passage and archipelagic sea lanes (ASL) passage apply to "all ships and aircraft" and there is no direct right of

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[7.] R.P. Anand, *Origin and Development of the Law of the Sea,* The Hague, Martinus Nijhoff, 1982, p.219.

the coastal or archipelagic State to prevent the passage of a vessel that might be perceived to be a serious threat to the marine environment. Legal scholars have pursued this issue extensively over the years but so far there is not a satisfactory resolution of the issue.

Tensions over law of the sea issues may become more significant in the future. Major Western navies are structuring their forces for littoral operations and power projection,[8] while regional navies, including in East Asia, continue to focus on sea denial operations intended to deny their littoral waters to the forces of a possible adversary. Expeditionary operations in the littoral waters of other States clearly require maximum freedoms of navigation and overflight while sea denial is supported by applying restrictions on those freedoms.

In many ways the East Asian seas are now the global focus of law of the sea disputes. All the critical issues with resolving ambiguities in the law of the sea, and the different points of view on particular jurisdictional issues and the freedoms of navigation and overflight, may be found in these seas. Tensions between regional practice with the law of the sea and the general law of the sea, as set out in UNCLOS, may become more evident in the future. As a leading American marine policy expert noted some years ago, "The Asian theater will be critical for shaping state practice in the law of the sea and determining whether or not the 1982 Convention will really constitute the law in being."[9]

The major development and conceptualising of the law of the sea during the 1960s and 1970s, reflected in UNCLOS largely pre-date economic growth in East Asia. This economic growth has been associated to some extent with concurrent growth, actual and potential, in the political and strategic power and influence of the region. The power and influence of the region in regard to the development of the new law of the sea has followed a similar pattern. The so-called "Asian Group" was rather ineffectual at the 3rd UN Conference on the Law of the Sea (UNCLOS III),[10] and with the notable exception

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[8] Geoffrey Till provides an excellent contemporary review of how navies, predominantly Western, are changing to reflect a focus on expeditionary operations in *Seapower: a Guide for the Twenty-First Century*, London, Frank Cass, 2004.

[9] Edward L. Miles, "U.S. Security Interests in a Post-Cold War World and the Law of the Sea", paper prepared for Anton, D., Charney, J., and O'Connell, M.E., *Essays in Honor of Louis Henkin,* 1997, p.8

[10] Edward L. Miles, *Global Ocean Politics – The Decision Process at the Third United Nations Conference on the Law of the Sea 1973 – 1982,* The Hague, Martinus Nijhoff Publishers, 1998, p. 24.

of the archipelagic State regime, probably achieved little in terms of furthering regional interests in the law of the sea. A somewhat different convention may have resulted if it had been negotiated in the 1990s or the 21st Century (rather than in the 1970s) when Asian countries may have presented a more coordinated approach (e.g. on some aspects of the UNCLOS navigational regimes) although achieving the necessary consensus would still have been difficult.

The pace of change in the law of the sea in recent decades has compounded the problem of achieving regional agreement on particular issues, and it shows no sign of slowing down. This creates a situation which is fertile ground for "grey areas" in the law of the sea and diverging State practice to emerge as countries try both to catch up with developments and "to do their own thing". As has been observed with regard to China, "The rapid pace of development of law of the sea accounts in part for the ambiguities and gaps in PRC positions on disputes over maritime boundaries." [11]

POLITICAL AND STRATEGIC FACTORS

Different Perspectives

Traditionally the law of the sea involved a clash of interests between coastal States and maritime *user* States but the situation is now more complex. It is no longer sufficient to

think simply of coastal State interests because coastal States might also be straits States[12], archipelagic States[13], geographically disadvantaged States[14], leading shipping

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[11] Greg Austin, *China's Ocean Frontier: International Law, Military Force and National Development,* St. Leonards, Allen & Unwin, 1998, p. 57.

[12] A *straits State* is one which lies adjacent to a strait used for international navigation. UNCLOS introduced the regime of transit passage that allows a right of passage through such a strait to all ships and aircraft. This passage shall not be impeded and the right of passage cannot be suspended. This regime is thus a significant qualification on the sovereignty and sovereign rights of a coastal State in its adjacent waters where they are part of an international Strait.

[13] UNCLOS Articles 46 and 47 set out the main criteria that should be met before a country can claim the status of an archipelagic State. First, the country must be constituted wholly by one or more archipelagos or islands. Secondly, the islands and groups of islands should form an intrinsic geographical, economic and political entity, or have been historically regarded as such. Thirdly, maximum and minimum limits are set to the area of water that can be included within the archipelago. When legitimate archipelagic baselines are drawn around the outer limits of the islands and drying reefs comprising the archipelago, the ratio of the area of the water to the area of land, including atolls, must lie between 1 to 1 and 9 to 1. Waters within those baselines are *archipelagic waters* over which the archipelagic State exercises full sovereignty not unlike the sovereignty exercised by all coastal States over internal waters and the territorial sea. The regime is of great importance in the Asia Pacific

or fishing countries, industrialised or developing countries, and so on. For example, Singapore is both a straits State and a major maritime *user* State with some different priorities to its neighbours, Indonesia and Malaysia. Conflicts of interest between regional countries over marine environmental protection, the exploitation and management of marine resources and maritime boundary delimitation are amply evident in the seas of East Asia.

In one sense, different perspectives of law of the sea issues between regional countries are influenced *by* international developments with the law of the sea but in another sense, they may have an influence *on* the development of the international law of the sea. An example of the former situation is provided by the numerous conflicting claims to sovereignty over islands in the region, which have intensified over the last twenty years with a consequential destabilising impact on regional security. While these islands only generated a small territorial sea, they were not deemed important, but now with even small islands potentially generating extensive maritime resource zones under the current law of the sea, they have assumed much greater strategic, economic and political importance and are leading to greater *nationalisation* of the oceans. An example of where regional States are influencing the development of the law of the sea is provided by how regional states, particularly the straits and archipelagic States of Southeast Asia, are influencing customary law relating to the new navigational regimes introduced by UNCLOS and their implementation.

The law of the sea sets the rules and principles for different uses of the sea and for the relations between States in the maritime domain. However, when considering relations between States, politicisation of the issues is to some extent inevitable,[15] and

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region due to the number and size of legitimate archipelagic States in the region (i.e. Indonesia, Philippines, Papua New Guinea, Solomon Islands, Vanuatu and Fiji).

[14] UNCLOS Article70 (2) defines *geographically disadvantaged States* as meaning "coastal States, including States bordering enclosed or semi-enclosed seas, whose geographical situation makes them dependent upon the exploitation of the living resources of the exclusive economic zones of other States in the sub-region or region for adequate supplies of fish for the nutritional purposes of their populations or parts thereof, and coastal States which can claim no exclusive economic zones of their own."
Singapore is clearly a geographically disadvantaged State but Thailand, Cambodia and North Korea are other regional countries that might be able to argue that status.

[15] Chris Rahman, "Linking Maritime Regimes to Regional Security: Some Caveats and Observations" in Sam Bateman (ed), *Maritime Cooperation in the Asia-Pacific Region: Current Situation and Prospects,* Canberra Papers on Strategy and Defence No 132, Strategic and Defence Studies Centre, Australian National University, Canberra, 1999, p. 96.

the law of the sea is no exception in this regard. While UNCLOS exhorts regional countries to cooperate, particularly in enclosed and semi-enclosed seas,[16] there is also a paradox. The Convention permits the extension of maritime space under some form of national jurisdiction, particularly through the introduction of the EEZ. Thus it supports and actually encourages *nationalistic* approaches to managing the maritime domain. However, such approaches inhibit the development of cooperation and effective international regimes. This paradox is very apparent in the seas of East Asia where countries are generally determined to obtain maximum benefit from their rights under UNCLOS. These nationalistic approaches quite fundamentally limit the prospects for maritime cooperation and regime-building in the region.

PARTICULAR LIMITATIONS

Territorial Sea Baselines

Despite the old adage that "good fences make good neighbours",[17] sometimes it is physically impossible, for a variety of reasons, to build good fences, particularly in the sea. This is the case in East Asia mainly because the geography of the region, with its concave areas of coast, numerous islands and longstanding historic claims, means that many boundaries, or at least their end points or turning points, will require the agreement of three, or even more, countries. However, it is also due to the liberal interpretations by regional countries of the principles in UNCLOS for drawing straight territorial sea baselines.

Territorial sea baselines are the start-point from which all maritime zones are measured. Unfortunately, there is scope for countries to declare "excessive" baselines that have the effect of extending their claimed maritime jurisdiction. Although the other party in a maritime boundary delimitation will inevitably question the legitimacy of baseline claims, "excessive claims" do have the effect of ostensibly moving any line of

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16 The *regime* of enclosed or semi-enclosed seas is established by UNCLOS Part IX. It is particularly important in East Asia. Geographical concavity along the continental coast coastline of East Asia and the numerous off-lying archipelagos and islands create a large array of enclosed or semi-enclosed seas. From North to South, these seas include: the Sea of Okhotsk, Sea of Japan (or East Sea to the Koreans) Yellow Sea, East China Sea, South China Sea, Gulf of Thailand, Java Sea, Sulu Sea, and the Timor and Arafura Seas, as well as the Andaman Sea in the West.

17 Attributed to Robert Frost, *Mending a Wall,* in J.M. and M.J. Cohen, *The Penguin Dictionary of Quotations,* 1st ed., Harmondsworth, Penguin Books, 1960, p. 163.

equidistance further away from the coast and can serve as an opening position in boundary negotiations.

Territorial sea baselines may be either normal or straight. Normal baselines are less controversial under international law.[18] They are simply the low-water line directly corresponding to the coastline marked on large-scale charts officially recognised by the coastal State.[19] These baselines are the starting point for establishing a State's jurisdiction over maritime jurisdictional zones. They close off internal waters of the coastal State concerned and provide the inner limit of the offshore zones (i.e. territorial sea, contiguous zone, EEZ and continental shelf). In turn, they establish the outer limit of these zones. It follows that if States can shift baselines further out to sea, the area of the offshore zones will be automatically extended without altering the maximum width of these zones as allowed under international law. Territorial sea straight baselines are not to be confused with archipelagic baselines that are subject to the different rules.

UNCLOS Article 7 establishes three criteria for drawing straight baselines.[20] These are first, they should only be used in localities where the coastline is deeply indented, or if there is a fringe of islands along the coast in its immediate vicinity".[21] Secondly, "[t}he drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently linked to the land domain to be subject to the regime of internal waters".[22] Thirdly, "account must be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage".[23] These seemingly strict criteria are interpreted very loosely or even ignored in the practice of States,[24] particularly so in East Asia. Scovazzi has suggested that there is a customary trend towards flexible and liberal criteria in drawing straight baselines and

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[18] Kriangsak Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia,* Singapore, Oxford University Press, 1987, p. 13.

[19] UNCLOS Article 5

[20] U.S. Department of State, "Straight Baseline Claim: China", *Limits in the Seas No.117*, Bureau of Oceans and International Environmental and Scientific Affairs, 9 July 1996.

[21] UNCLOS Article 7(1)

[22] UNCLOS Article 7(3)

[23] UNCLOS Article 7(6)

[24] Austin, *China's Ocean Frontier*, p. 182.

that the U.S. is the only country resisting this trend,[25] but this has been strongly disputed by Roach.[26]

Coastal States have a powerful incentive to make maximum use of straight baselines as it enables them to maximise the extent of their maritime jurisdiction. It may also be advantageous in maritime boundary delimitation[27]. As Prescott has explained:

> It seems probable that the unjustified use of straight lines is primarily designed to increase the width of the combined zone of internal and territorial waters for security purposes. States may also use such lines to gain an advantage in negotiating common boundaries with neighbouring states.[28]

Almost all East Asian countries (i.e. Cambodia, China, Japan, North Korea, South Korea, Malaysia, Myanmar, Philippines, Thailand and Vietnam) have used a straight baseline system. In most cases, the use of straight baselines has been controversial and judged by the U.S., in particular, to be "excessive", and thus subject to diplomatic protest, as well as the operational assertion of navigational rights by U.S. ships under the Freedom of Navigation (FON) program. Generally the use of straight baselines in the region confirms the view expressed by Prescott in that the concept of straight baselines has been distorted beyond recognition by increasingly liberal interpretations of the key criteria in UNCLOS Article 7.[29]

In 1996 China claimed a system of straight baselines along most of its mainland coast and around the Paracel group of islands in the South China Sea. A detailed analysis of this baseline system by the U.S. Department of State was highly critical of the system as most of China's coastline does not meet the UNCLOS criteria for applying straight

[25] Tullio Scovazzi, "The Establishment of Straight Baselines Systems: The Rules and the Practice" in Davor Vidas and Willy Ostreng (eds), *Order for the Oceans at the Turn of the Century,* Dordrecht, The Fridtjof Nansen Institute, 1999, pp. 445-456.

[26] J. Ashley Roach, "Salient Issues in the Implementation of Regimes under the Law of the Sea Convention: An Overview" in Vidas and Ostrng (eds), *Order for the Oceans,* p. 436

[27] However, Sohn found that systems of straight baselines were explicitly taken into account in rather less than one-third of the boundary agreements negotiated. Louis B. Sohn, "Baseline Considerations" in Jonathan I. Charney and Lewis M. Alexander, *International Maritime Boundaries*, Vol.1, Dordrecht, Martinus Nijhoff Publishers, 1992, p. 157.

[28] J.R.V. Prescott, "Straight and Archipelagic Baselines" in Gerald Blake (ed), *Maritime Boundaries and Ocean Resources,* London, Croom Helm, 1987, p. 39.

[29] Prescott, "Straight and Archipelagic Baselines", p. 40.

baselines.[30] There would seem to be little substance in China claiming that its entire coastline meets the criteria for employing straight baselines.[31] The straight baselines closing off the Eastern entrance to the Qiongzhou Strait between Hainan and the Chinese mainland is particularly objectionable in view of both its method of drawing and the implications for the freedom of navigation.[32]

Navigational Regimes

UNCLOS and customary international law identify three distinct navigational regimes:

- innocent passage applying to the territorial sea and archipelagic waters;

- transit passage through straits used for international navigation; and

- archipelagic sea lanes (ASL) passage through archipelagic waters.

Innocent Passage

The rules applicable to *innocent passage* are contained in Part II Section 3 of UNCLOS. UNCLOS Article 19 sets out the activities that constitute non-innocent passage, but questions of interpretation and jurisdiction arise with respect to some of these activities. Innocent passage is the most restrictive of the passage regimes. It may be suspended in certain circumstances,[33] submarines must travel on the surface and show their flag,[34] and ships are prevented, *inter alia,* from operating organic aircraft and must not engage in any activity that is prejudicial to the peace, good order and security of the coastal State.[35] Innocent passage applies only to ships and there is no associated right of overflight. Practical problems arise with determining the activities of a ship that are "prejudicial to the peace, good or security of the coastal State".[36]

Many countries regard the obligation to allow foreign ships the right of innocent passage through their territorial sea as a significant limitation on their sovereignty and a potential threat to their national security. The major problem with the innocent passage regime in

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[30] U.S. Department of State, "Straight Baseline Claim: China", *Limits in the Seas No.117*, p. 3.

[31] Max Herriman, "China's Territorial Sea Law and International Law of the Sea", *Maritime Studies,* No. 92, January-February 1997, p. 16.

[32] In any case China has expressed the position that international shipping does not have a right of innocent passage in this strait. Herriman, "China's Territorial Sea Law", p. 17.

[33] UNCLOS Article 24

[34] UNCLOS Article 20

[35] UNCLOS Article 19

[36] UNCLOS Article 19(2)

East Asia, and indeed generally, is the requirement of some coastal and archipelagic States for prior notification or authorization of the innocent passage of warships. The arguments against prior authorization or notification gain strength from the failure during UNCLOS III to have the requirement included in the Convention despite the efforts by a number of countries to have it included.[37] There is also some evidence of a practice that where a State has some requirement for prior notification of warships transit, this might be met on an informal basis by a low-level contact or briefing note by a naval attaché to the local naval authorities.[38] This practice constitutes an important confidence-building measure that reduces the risk of disputation, or even conflict, over the issue.[39]

There are over 40 States around the world that have a requirement for prior notification or authorisation of warship entry into the territorial sea. These include the following East Asian countries: Cambodia, China, South Korea, North Korea, Indonesia, Philippines and Vietnam.[40] China specifically stipulated the requirement in a Declaration on ratifying UNCLOS that included the following statement:

> The People's Republic of China reaffirms that the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice the right of a coastal State to request, in accordance with its laws and regulations, a foreign State to obtain advance approval from or give prior notification to the coastal State for the passage of its warships through the territorial sea of the coastal State.[41]

Another difficult issue with innocent passage lies in the determination of whether or not the passage of a particular vessel is non-innocent. The burden of proving non-innocent

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[37] F. David Froman, "Uncharted Waters: Non-innocent Passage of Warships in the Territorial Sea", *San Diego Law Review*, Vol.24, No.3, June 1984, p.642.

[38] R.R. Churchill and A.V. Lowe, *The law of the sea*, 3rd ed., Manchester, Manchester University Press, 1999, p. 90.

[39] For further discussion of confidence building aspects of the law of the sea in the Asia-Pacific region, see Sam Bateman, "Maritime Confidence and Security Building Measures in the Asian Pacific Region and the Law of the Sea" in James Crawford and Donald R. Rothwell (eds), *The Law of the Sea in the Asian Pacific Region,* Dordrecht, Martinus Nijhoff, 1995, pp. 223-236.

[40] J.A. Roach and R.W. Smith, *Excessive Maritime Claims,* International Law Studies Vol.66, Newport R.I., USN War College, 1994, Table 10, pp. 158-159,

[41] United Nations, *"The Law of the Sea: Declarations and statements with respect to the United Nations Convention on the Law of the Sea and to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea"*, (United Nations publication, Sales No. E.97.V.3). See also, Yann-huei Song and Zou Keyuan, "Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States", *Ocean Development & International Law,* Vol.31, 2000, p.329; and Zou Keyan, "Innocent Passage for Warships: The Chinese Doctrine and Practice", *Ocean Development and International Law,* Vol.29, 1998, p. 201.

passage appears to rest with the coastal State as the enforcement authority.[42] This might be problematic in terms of proving whether a vessel is engaging in one of the activities in UNCLOS Article 19(2) that are deemed to be "prejudicial to the peace, good or security of the coastal State". For example, it would be hard to prove an act "aimed at collecting information to the prejudice of the defence or security of the coastal State",[43] as there might be no external indication (e.g. additional aerials to collect communications or electronic intelligence) that such an act was being carried out.

Transit Passage

The regime of straits' transit passage gives all ships and aircraft the right to travel through straits used for international navigation in their normal operational mode on, under or over the water.[44] Transit passage is defined as the exercise of the freedom of navigation and overflight by ships and aircraft through an international strait "between one part of the high seas or an exclusive economic zone and another part of the high seas or exclusive economic zone".[45] Passage must be "continuous and expeditious", but this does not preclude entering or leaving a State bordering the strait, subject to the entry requirements of that State.[46]

Coastal States adjoining a strait used for international navigation (the *straits' States*) have considerable service responsibilities towards the vessels passing their shores (e.g. navigational aids, hydrographic charts and other navigational information, search and rescue services, and marine pollution contingency arrangements) but UNCLOS makes no provision regarding any form of cost-recovery. Compulsory pilotage schemes have been considered from time to time as a means of enhancing navigational safety and cost recovery, but they have not been introduced because refusing access to a strait to a vessel on the grounds that it would not accept a pilot would amount to hampering transit passage and be contrary to UNCLOS Article 44 in

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[42] Froman, "Uncharted Waters", p.658.

[43] UNCLOS Article 19(2)

[44] The principles governing the regime are set out in Section 2 of Part III of the UNCLOS. A more extensive discussion of transit passage in the region may be found in Sam Bateman, "The Regime of Straits Transit Passage in the Asia Pacific: Political and Strategic Issues" in Donald Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea,* The Hague, Martinus Nijhoff Publishers, 2000, pp. 94-109.

[45] UNCLOS Article 38(2).

[46] Ibid.

particular.[47]

Many difficult issues have been encountered with implementing the transit passage regime in the Malacca Strait. The argument is particularly relevant that the issue of international straits has been primarily discussed in political, military and strategic terms and much less in commercial and functional terms.[48] Malaysia has explored various methods of obtaining financial contributions from the international shipping community to cover the costs of providing services for ships passing through the Strait. A senior Malaysian strategic analyst has referred to the straits' transit regime as being "fundamentally flawed" because it puts the entire burden of managing the straits on the coastal States.[49] In a clear restriction on a particular type of vessel using the straits, both Indonesia and Singapore backed Malaysia's insistence that Japanese plutonium shipments should not be routed through the Malacca Strait.[50]

The application of UNCLOS Article 43, the so-called "burden sharing" article that provides for cooperation between user States and States bordering a strait on the provision of navigational and safety aids and the prevention of marine pollution, is particularly problematic. User States, other than Japan, have been reluctant to contribute to the costs. However, the ongoing incidence of piracy and armed robberies against ships in the straits and the threat of maritime terrorism have focussed attention on the extent to which the principles of Article 43 might be extended to cover the security of shipping. In addition to the costs of providing for maritime safety and pollution response in the straits, the littoral States are now challenged to increase their patrol and surveillance activities in the straits against the threats of piracy and maritime terrorism.

[47] Stuart Kaye, *The Torres Strait*, The Hague, Martinus Nijhoff, 1996, p. 85. The International Maritime Organization (IMO) Maritime Safety Committee at its meeting in December 2004 agreed to a proposal from Australia and Papua New Guinea to introduce compulsory pilotage for vessels transiting the Torres Strait and the Great Northeast Channel. This could be an interesting precedent for other international straits.

[48] Edgar Gold, "Transit Services in International Straits: Towards Shared Responsibilities", *MIMA Issue Paper,* Kuala Lumpur, Malaysian Institute of Maritime Affairs, 1995.

[49] Hamzah, B.A., "The Security of Sealanes : The Search for an Equitable Straits Regime", Paper for Eighth International Conference on Sea Lanes of Communication (SLOC), Bali, 24-27 January, 1993, pp. 17-18. Alternative methods of covering the costs are explored in various papers in Hamzah bin Ahmad (ed), *The Straits of Malacca: International Cooperation in Trade, Funding and Navigational Safety,* Kuala Lumpur, Pelanduk, 1997.

[50] Jon M. Van Dyke, "Sea Shipment of Japanese Plutonium under International Law", *Ocean Development and International Law*, Vol.24, 1993, pp.399-403.

These issues were the focus of a major conference in Kuala Lumpur in October 2004 hosted by the Maritime Institute of Malaysia (MIMA) on "The Straits of Malacca: Building a Comprehensive Security Environment". In opening the conference, the Deputy Prime Minister of Malaysia, Datuk Seri Najib Razak, stated that "There should be no more free rides for countries using the Straits of Malacca and user nations must contribute towards the safety and security of the sea lane".[51] In addition to Japan, the user States that come to mind include the United States, China, South Korea and Taiwan.

The issue of burden sharing was high on the agenda of the high level conference organised by the Indonesian Government and the International Maritime Organization (IMO) in Jakarta, 7–8 September 2005. This meeting considered ways and means of enhancing safety, security and environmental protection in the Straits of Malacca and Singapore.[52] It resulted in the Jakarta Statement on Enhancement of Safety, Security and Environmental Protection in the Straits of Malacca and Singapore.[53] This Statement acknowledged the rights and obligations in UNCLOS, in particular Article 43, and "invited the IMO to consider, in consultation with the littoral States, convening a series of follow on meetings for the littoral States to identify and prioritize their needs, and for use States to identify possible assistance to respond to those needs, which may include information exchange, capacity-building, training and technical support."[54]

This is a worthy declaration but reaching agreement on burden sharing will not be easy. Politics inevitably enter the debate. Japan rather enjoys its monopoly position as the one user State involved in the management of the straits, and has been rather less than enthusiastic in the past with sharing this position with other user States, particularly China. As was demonstrated by their reaction in 2004 to the U.S. proposed Regional

[51] M.K. Megan, "Najib: Free rides in straits must end", *New Straits Times*, October 12, 2004, p.8.

[52] 93rd Session, IMO Council 15-19 November 2004. The United Nations General Assembly in a resolution adopted on 10 November 2004 encouraged the Secretary-General of the IMO to continue work on safety and security in the straits in collaboration with the littoral States and user States.

[53] Republic of Indonesia and International Maritime Organization, *Jakarta Statement on Enhancement of Safety, Security and Environmental Protection in the Straits of Malacca and Singapore*, IMO/JKT 1/2 dated 8 September 2005.

[54] Ibid., pp. 5-6.

Maritime Security Initiative,[55] both Malaysia and Indonesia are sensitive to any attempt to "internationalize" management of the Malacca-Singapore Straits that might compromise their sovereignty and sovereign rights in the area.

Archipelagic Sea Lanes Passage

With the two largest, and most vocal, archipelagic States (i.e. Indonesia and the Philippines) located in the region, the regime of the archipelagic State is of great importance in Southeast Asia. In accordance with UNCLOS Part IV, the archipelagic State exercises full sovereignty over archipelagic waters qualified only by the regime of ASL passage, which allows ships and aircraft of all nations the right of "continuous, expeditious and unobstructed transit" through archipelagic waters along and over sea lanes which may be designated by the archipelagic State.[56] If sea lanes are not designated, then the right of ASL passage may be exercised through the routes normally used for international navigation.[57] Outside these sea lanes, ships of all nations have the right of innocent passage only,[58] and there is no right of overflight. The vast difference in operational terms between the liberal nature of the ASL passage regime and the restrictions with innocent passage has made the identification of ASLs a vexed issue with an archipelagic State seeking to minimise the number of sea lanes and the user States wishing to maximize the number. Interpreting the rules for drawing sea lanes, as set out in UNCLOS Article 53(5) in particular, is also proving more complex than may have been anticipated.[59]

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[55] The Regional Maritime Security Initiative (RMSI) was launched by the U.S. in May 2004 with the intention of establishing a cooperative regime for maritime security in the Malacca Straits but at least initially, it was perceived as heavy-handed and insensitive by Malaysia and Indonesia. Major elements of the RMSI include increased situational awareness, information sharing, a decision-making architecture and interagency cooperation. For a fuller description of the RMSI see: ADM Tom Fargo USN, Commander, US Pacific Command, Address to MILOPS Conference in Victoria, British Columbia, 3 May 2004, pp. 3-5 (available on website at:
http://www.pacom.mil/speeches/sst2004/040503milops.shtml)

[56] UNCLOS Article 53

[57] UNCLOS Article 53(12)

[58] UNCLOS Article 52(1)

[59] UNCLOS Article 53(5) refers to continuous axis lines for ASLs from entry to exit and that ships and aircraft shall not deviate more than 25 nautical miles from either side of such axis lines, provided that ships and aircraft shall not navigate closer to the coast than 10 per cent of the distance between the nearest points on islands bordering the sea lane. The experience with Indonesia's designation of ASLs has shown that, implementing these rules, has required hydrographers and navigators from the archipelagic State and the user States to negotiate on virtually every mile of an ASL.

Indonesia

Indonesia's proposal to designate three North/South ASLs in the early 1990s led to detailed analysis and discussion at the IMO,[60] as well as bilateral discussions between Indonesia and interested user States, particularly the United States and Australia.[61] This activity culminated in IMO approval of the "General Provisions on the Adoption, Designation and Substitution of Archipelagic Sea Lanes" (GPASL).[62] The concept of partial designation of sea lanes is not in line with UNCLOS Article 53(4), which states that the ASLs and air routes "shall include all normal passage routes used as routes for international navigation or overflight". While the interests of user States are protected through still having access to other routes, there was an outstanding onus on Indonesia to complete the designation process. This has now been addressed by Indonesian with the promulgation of Indonesian Government Regulation No.37/2002.[63] This regulation legislates for the three North/South ASLs but does not make clear whether this is a complete or partial designation of sea lanes. While the regulation does not necessarily exclude the designation of further ASLs, it does imply that for the time being the right of ASL passage is only available in the designated ASLs and that only innocent passage will apply elsewhere in Indonesia's archipelagic waters. Article 15 of Indonesian Government Regulation 37/2002 "strongly envisages that ships and aircraft may exercise archipelagic sea lanes passage *only* through the designated archipelagic sea lanes."[64]

The main vexed issue with the designation of Indonesian ASLs is the availability of an East/West sea lane through the archipelago via the Java Sea, and linking the three

[60] C. Johnson, "A Rite of Passage: The IMO Consideration of the Indonesian Archipelagic Sea-Lanes Submission", *The International Journal of Marine and Coastal Law,* Vol.15, No.3, August 2000, pp. 317-332.

[61] Robin Warner, "Implementing the Archipelagic Regime in the International maritime Organization" in Rothwell and Bateman, *Navigational Rights and Freedoms and the New Law of the Sea,* pp. 170-171.

[62] Indonesia's proposal to designate three North/South archipelagic sea lanes (ASLs) and the General Provisions on the Adoption, Designation and Substitution of Archipelagic Sea Lanes (GPASL) were adopted at the 69th meeting of the IMO's Maritime Safety Committee (MSC) in May 1998. GPASL form part of the IMO Ships Routeing Publication.

[63] Indonesian Government Regulation No. 37/2002, Relating to Rights and Obligations of Foreign Ships and Aircraft when exercising Rights of Archipelagic Sea Lane Passage via the Established Archipelagic Sea Lanes, enacted by the President of the Republic of Indonesia in Jakarta, June 28, 2002.

[64] Dhiana Puspitawati, "The East/West Archipelagic Sea Lanes Passage Through the Indonesian Archipelago", *Maritime Studies 140,* January/February 2005, p. 7.

North/South lanes. The user States, Australia in particular with the regular movement of both merchant vessels and warships through the archipelago from Northwest Australia to Southeast Asia, have been concerned that this ASL should be declared. However, declaration of this sea lane has steadfastly been resisted by Indonesia, mainly due to environmental and security sensitivities with the Java Sea.[65] However, there are now some indications that Indonesia may be prepared to consider an East-West sea lane.[66]

Philippines

The Philippines is now investigating implementation of the ASL passage regime in its archipelago. Its situation will likely prove even more difficult than that for Indonesia. This, along with the practical problems encountered with designating ASLs in Indonesia, suggests the difficulty of applying the general international rules, as embodied in UNCLOS, in particular geographic, environmental and political contexts.

There are four main reasons why the situation with the Philippines is likely to be even more problematic than that for Indonesia. First, the Philippines generally took a stronger and more inflexible position than Indonesia at UNCLOS III on archipelagic State rights and associated passage regimes.[67] During UNCLOS III, the Philippines consistently argued that the right of innocent passage in archipelagic waters could not be the same as it was in the territorial sea,[68] and that its *archipelagic waters* are in effect *internal waters*.[69] Additionally, the Philippine delegate intervened on several occasions during

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[65] Rear Admiral Abdul Hakim, "A Proposal in the International Seminar on SLOC", presented at Eighth International Conference on the Sea Lanes of Communication (SLOC), Bali, January 24-27, 1993. This paper alarmed other countries, especially the U.S. and Australia, because of its forthright nature, and the reference to criteria for the designation of sea lanes, other than the navigational considerations recognised in UNCLOS Article 53. David Lague, "Australia to Fight Shipping Bans", *The Sydney Morning Herald*, 11 April 1996, p.11; and John McBeth, "Waters of Strife: Washington Opposes Proposed Sea-Lanes", *Far Eastern Economic Review*, 29 February 1996, p. 30

[66] Puspitawati, "The East/West Archipelagic Sea Lanes Passage", p. 8.

[67] Samuel Soriano, "Negotiating History of the Archipelagic Passage" in Maribel B. Aquilos, "Issue Focus: Designation of Sea Lanes in the Philippines, *Ocean Law and Policy Series,* Vol.1, No.1, Jan-June 1997, p. 68.

[68] Barbara Kwiatkowska and Etty R. Agoes, *Archipelagic State Regime in the Light of the 1982 UNCLOS and State Practice*, Netherlands Cooperation with Indonesia in Legal Matters, Bandung: ICLOS, UNPAD, April, 1991, p.19; and Jay L. Batongbacal, "A Philippine Perspective on Archipelagic State Issues", *Maritime Studies 122,* January/February 2002, pp. 18-31.

[69] Tomas Aquino, "Implications of Sea Lanes Designation on Safety of Navigation and Sovereignty Issues" in Aquilos, "Issue Focus: Designation of Sea Lanes in the Philippines", p.15.

the negotiations on GPASL at the IMO to indicate that the Indonesian approach should not represent a precedent for future ASL designations by the IMO.[70]

Secondly, the Philippine archipelago is more complex than the Indonesian one with more scattered islands and reefs and less well-defined shipping channels.[71] It will be harder to follow the same process as adopted for Indonesian ASLs with precise determination of the geographical limits of sea lanes. The Philippines has a complex network of inter-island shipping routes with a high incidence of major shipping disasters. Possible ASLs will cross through areas where there are extensive subsistence and commercial fishing operations.[72] There are serious concerns about the state of the marine environment of the Philippines.[73] The dangers of ship-sourced marine pollution are likely to lead the Philippines to assert strict controls over the passage of shipping through its archipelago.

Thirdly, the Philippine archipelago sits astride major shipping routes between the Americas and southern China and Southeast Asia, as well as between northern Australia and the Lombok Strait and Northeast Asia. The narrowness of some of the straits involved highlights the difficulties that will be encountered in developing axis lines and applying the ten per cent rule in UNCLOS Article 53(5).[74] Other international shipping routes lie immediately to the North of the Philippines through the Luzon Strait between Taiwan and the Philippines, and to the South between Mindanao and Indonesia. Parts of these routes may pass through Philippine archipelagic waters.

Lastly, there is the major political problem in the Philippines with the Treaty of Paris limits (the so-called "picture frame" territorial sea around the Philippine archipelago). On signing UNCLOS, the Philippines made a declaration that such signing did not affect

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[70] Warner, "Implementing the Archipelagic Regime", p. 187.

[71] Jay Batongbacal, "The Philippines' Right to Designate Sea Lanes in Its Archipelagic Waters Under International Law" in Aquilos, "Issue Focus: Designation of Sea Lanes in the Philippines", p.108.

[72] Marciano Antoneo F. Carreon III, "Implications of the Designation of Sea Lanes on the Fisheries Sector" in *ibid.,* pp.34-35.

[73] Miguel D. Fortes, "Marine Scientific Research in the Philippines: Status, Problems and Prospects" in Sam Bateman and Stephen Bates (eds)*, The Seas Unite: Maritime Cooperation in the Asia Pacific Region,* Canberra Papers on Strategy and Defence No 118, Strategic and Defence Studies Centre, Australian National University, Spring 1996, pp. 122-128

[74] Batongbacal, "The Philippines' Right to Designate Sea Lanes", pp. 101-102.

the sovereign rights of the Philippines under the Treaty of Paris,[75] and that "the concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines".[76] The Treaty of Paris limits are locked into Philippine public policy and it is unlikely that any Philippine politician or Minister would propose a change to this situation.

Normal Mode of Transit

The mode of transit adopted by ships and aircraft exercising transit and ASL passage is another potentially difficult issue with the implementation in East Asian waters of the UNCLOS navigational regimes. Ships and aircraft exercising the freedom of transit passage are required to "refrain from any activities other than those incident to their normal modes of continuous and expeditious transit".[77] Similarly, ASL passage means the exercise "of the rights of navigation and overflight in the normal mode".[78] But what is the normal mode of transit for a ship, submarine or aircraft?

It is generally accepted that the normal mode of transit for submarines is submerged. However, safety concerns have been raised about submarines transiting the Philippine archipelago submerged due to the risk of their getting caught up on the fishing nets or fish aggregating devices that are used extensively in Philippine archipelagic waters.[79] The types of operation that might be conducted by transiting ships and aircraft are also problematic. What are the limits for example on the defensive screens, evasive tactics, air cover, etc that might be used by a naval task force exercising the right of ASL passage? Indonesian Government Regulation No. 37/2002 declares that "when exercising right of Archipelagic Sea Lane Passage, foreign military and warships must

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[75] Signed by Spain and the U.S. on 10 December 1898. This is the basis of the "picture frame" claim to territorial sea. This "picture frame" purports to describe the area of land and water under the sovereign jurisdiction of the Philippines.

[76] United Nations, *"The Law of the Sea: Declarations and statements with respect to the United Nations Convention on the Law of the Sea and to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea"*, (United Nations publication, Sales No. E.97.V.3).

[77] UNCLOS Article 39(1) (c)

[78] UNCLOS Article 53(3)

[79] Batongbacal, "A Philippine Perspective on Archipelagic State Issues", p. 27. Batongbacal points out that the *Ehime Maru* tragedy off Pearl Harbor in 2001 was not an isolated incident and that from 1983 to 1999, U.S. Navy submarines were involved in 42 collisions in various parts of the world.

not conduct military exercises or exercise any type of weapons with ammunition"[80] However, the maritime powers would view exercising as part of the normal mode of warship transit.

Exclusive Economic Zones

Differences of view have also emerged in East Asia over the rights and duties of coastal States in their EEZs vis-à-vis those of other States. This is particularly an issue with regard to the rights of other States to conduct certain activities such as military operations, military surveying, intelligence collection and hydrographic surveying in the EEZ of a coastal State without the permission of that State.[81]. Some coastal States require that their consent be given to such activities while others, particularly the United States, argue strongly that the activities are part of the freedoms of navigation and over flight. As most of the waters of concern for maritime security in East Asia are within EEZs, this is an important issue for maritime regime building in the region.

Negotiation of the EEZ regime at UNCLOS III was difficult and complex with widely divergent points of view about the status of the new zone. One major group, the "territorialists", mainly comprising developing countries, saw the EEZ as an extension of national jurisdiction in which the coastal States would enjoy sovereignty subject to certain limitations. However, this position was sharply disputed by the maritime powers, led by the United States and the then Soviet Union, who saw the zone as a part of the high seas where coastal States had some rights over offshore resources. The compromise reached was that the EEZ should be regarded as a separate zone in its own right ("*sui generis*"), which was neither high seas nor territorial sea.[82]

Now some twenty-five years later, this political "tug of war" has not gone away, and the EEZ remains "a zone of tension between coastal State control and maritime State use of the sea".[83] The United States has steadfastly maintained a liberal interpretation of the

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[80] Indonesian Government Regulation No. 37/2002 Article 4(4).

[81] See discussion in Ship and Ocean Foundation (SOF) and East-West Center (EWC), *The Regime of the Exclusive Economic Zone: Issues and Responses,* A Report of the Tokyo Meeting, 19-20 February 2003, Honolulu, East-West Center, 2003 (available on website at: http://www.EastWestCenter.org/res-rp-publicationdetails.asp?pub_ID=1418)

[82] Churchill and Lowe, *The law of the sea*, p. 166.

[83] George V. Galdorisi and Kevin R. Vienna, *Beyond the Law of the Sea – New Directions for U.S. Oceans Policy*, Westport, Praeger, 1997, p.257.

rights and freedoms other States enjoy in the EEZ of a coastal State, and has coined the expression "international waters" to describe collectively the high seas, the EEZ and the contiguous zone.[84] On the other hand, some coastal States have sought to strengthen ("thicken") the extent of their jurisdiction over their EEZ by for example, claiming that other States should only conduct military activities and hydrographic surveys in that zone with their consent.

There has been a series of incidents and disputes in East Asian seas that might have spiralled out of control into open conflict.[85] With the aims of clarifying the rights and duties of both coastal States and user States in an EEZ, and of providing an important regional maritime confidence and security building measure (MCSBM), a group of senior officials, legal experts and maritime specialists (now known as the EEZ Group 21) has been meeting in the region to address relevant issues.[86] The meetings were sponsored primarily by the Ship and Ocean Foundation of Japan (now the Ocean Policy Research Foundation)[87] with the objective of producing a set of non-binding, voluntary principles ("Guidelines"), which would provide the basis for a common understanding and approach to issues arising from the implementation of the EEZ regime.

The last meeting of the EEZ Group 21 held in Tokyo 15-16 September 2005 reached agreement on "Guidelines for Navigation and Overflight in the Exclusive Economic Zone".[88] The proposed Guidelines are non-binding in nature. They set out broad principles of common understanding regarding certain aspects of navigation and over

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[84] U.S. Navy, *The Commander's Handbook on the Law of Naval Operations,* NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.7, p. 1-6 (available on website at: http://www.nwc.navy.mil/ILD/Commander's%Handbook.htm)

[85] Major incidents include the March 2001 confrontation between the U.S. Navy survey vessel *Bowditch* and a Chinese frigate in China's EEZ; the April 2001 collision between a U.S. EP3 surveillance plane and a Chinese jet fighter over China's EEZ; the December 2001 Japanese Coast Guard pursuit of and firing at a North Korean spy vessel in its and China's EEZ; and Vietnam's protest against Chinese live fire exercises in Vietnam's claimed EEZ.

[86] The meetings were held in Bali (June 2002), Tokyo (February 2003), Honolulu (December 2003), Shanghai (October 2004), and Tokyo (September 2005).

[87] Other sponsors of separate meetings have included the East-West Center, Honolulu; the Centre for South East Asian Studies, Jakarta; and the School of International and Public Affairs, Shanghai Jiao Tong University.

[88] The Guidelines and associated materials are attached as an Annex to S Bateman, "Hydrographic and Military Surveys in the EEZ – The Path Towards Prospective Guidelines", Paper for 4th Biennial ABLOS Scientific Conference 'Marine Scientific Research and the Law of the Sea', International Hydrographic Bureau and Salle des Varietees, Monaco, 10–12 October 2005 (available at: http://www.gmat.unsw.edu.au/ablos/ABLOS05Folder/ablos05_papers.htm).

flight in the EEZ, including military and intelligence gathering activities, but do not create legally binding obligations between States. In keeping with their non-binding nature, the Guidelines are framed in exhortatory rather than obligatory language. They may be generally regarded as reflecting the need for better understanding of the rights and obligations of States conducting activities in the EEZ of another country. They represent a consensus among the Group 21 members on issues that are at present contentious and a potential source of tension and dispute in the region.

Other Issues

Flag State Responsibilities

UNCLOS Article 91 requires that every State shall fix conditions for the right to fly its flag, and there must be a "genuine link" between the State and the ship. However, ships flying a "flag of convenience"[89] will rarely have such a link with the flag State, and the relevant ship registry may not even be in the country concerned. Cambodia and Myanmar are Southeast Asian countries that have been declared "flag of convenience" countries by the International Transport Workers' Federation.[90]

UNCLOS Article 94 requires that flag States should effectively exercise their jurisdiction and control in administrative, technical and social matters over ships flying their flag. However, much of the breakdown in law and order at sea can be traced to the fact that some flag States are not discharging their responsibilities in accordance with this article when ship flying their flag commit offences at sea. This is the case for virtually all categories of maritime crime, but particularly illegal fishing, drug and arms trafficking, offences against the environment and human smuggling. Vessels committing these crimes usually are registered ships under the jurisdiction of a flag State rather than vessels without nationality.

Piracy

UNCLOS includes a specific regime for countering piracy on the high seas in its Articles 100-107. These extend to the EEZs of coastal States by application of UNCLOS Article

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[89] A flag of convenience ship is one that flies the flag of a country other than the country of ownership. Cheap registration fees, low or no taxes and freedom to employ cheap labour are the motivating factors behind a shipowner's decision to "flag out".

[90] Global Policy Forum, "A Brief Guide to Flags of Convenience", http://www.globalpolicy.org/nations/flags/guide.htm (accessed 10 April 2006)

58(2). However, this regime does not apply in circumstances where the act of armed robbery or seizure of a vessel is within the sole jurisdiction of one State or another. This is the case where the act occurs within the territorial sea, archipelagic waters or internal waters (where these zones are as defined in UNCLOS),[91] or when the act is committed by persons who are already onboard the ships as passengers, crew members or stowaways. In the former situation, the act is within the sole jurisdiction of the relevant coastal State, while the latter circumstances are within the jurisdiction of the flag State of the vessel affected. Similar considerations apply to acts of terrorism under current international law.

The 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) was introduced to close the gap created by the limited definition of piracy. These limitations were brought to light by the *Achille Lauro* incident in 1985. This was not an act of piracy because the terrorists, who seized the ship, were travelling as passengers onboard the vessel.[92] The SUA Convention extends coastal State enforcement jurisdiction beyond the territorial limits, and in particular circumstances, allows exercise of such jurisdiction in an adjacent State's territorial sea. An IMO Diplomatic Conference in October 2005 adopted new Protocols to the SUA Convention and its related protocol on Fixed Platforms. These provide an international treaty framework for combating and prosecuting individuals who use a ship as a weapon or means of committing a terrorist attack, or transport by ship terrorists or cargo intended for use in connection with weapons of mass destruction programs.[93] A mechanism is also provided to facilitate the boarding in international waters of vessels suspected of engaging in these activities.

Rights of Visit

UNCLOS Article 110 identifies the circumstances when a foreign flag vessel can be stopped on the high seas, i.e. if the flag State gives its permission, it is stateless, it is a

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[91] Most such acts in Asian waters occur within these zones rather than in EEZs or on the high seas.

[92] The *Achille Lauro* affair occurred in the Mediterranean when Arab terrorists took over the cruise line, killing an elderly American tourist in the process. It was not an intentional terrorist act rather an unfortunate incident resulting after four terrorists trying to get to Israel were caught off guard when a steward entered their cabin and found them cleaning their weapons. The *Achille Lauro* affair, however, has had major consequences, including disputes between the United States and other countries on issues of criminal jurisdiction.

[93] U.S. Department of State, "Protocols to the United Nations Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA)", *Fact Sheet*, October 21, 2005.

pirate ship, it is transporting slaves, or is being used for unauthorized broadcasting. Outside these circumstances, there is no legal justification for stopping a ship on the high seas, or in the EEZ if the vessel is not suspected of an offence covered by the rights and duties of a coastal State in its EEZ (i.e. for a resource-related or environmental offence). However, it has been an objective of the United States with the Proliferation Security Initiative (PSI) and amending the SUA convention to broaden the circumstances in which a ship may be stopped on the high seas or in an EEZ to include if it is suspected of terrorism or carrying weapons of mass destruction (WMD), their delivery systems or related materials.

Hot Pursuit

UNCLOS Article 111 sets out the regime for hot pursuit. Hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued if the pursuit has not been interrupted.[94]

The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State. However, in the context of pursuing a pirate or terrorist vessel, consideration has been given to the concept of "reverse" hot pursuit that would allow such a vessel to be pursued into the territorial sea of a coastal State. Malaysia is currently discussing the possibility of reverse hot pursuit agreements with Indonesia and the Philippines to allow their navies and coast guards to pursue pirates into each other's waters.[95] This would be a welcome development that would enhance the fight against terrorism, piracy and armed robberies against ships.

Regional Cooperation

International and regional cooperation are common themes in UNCLOS, as well as in other regimes for maritime safety and security. Part XI of UNCLOS deals with the

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[94] Hot pursuit may also apply from the EEZ in respect of offences related to coastal State rights and duties in that zone.

[95] "Discussion on 'hot pursuit' agreements", *New Straits Times* online, 30 May 2005, http://www.nst.com.my/Current_News/NST?Friday/National/NST32351662.txt (accessed 31 May 2005)

situation of enclosed and semi-enclosed seas and places a particularly strong responsibility on States bordering such seas to cooperate with each other in the exercise of their rights and duties. This regime is of importance to Southeast Asia because the main seas in the region (i.e. the Gulf of Thailand, the South China Sea and the Andaman Sea) all fall within the category of a semi-enclosed sea.

Greater cooperation between regional countries would markedly improve law and order at sea in the region. It would assist in overcoming the capacity shortfalls in some countries and assist in establishing an environment where the countries that are more advanced with their maritime security arrangements set a lead for the less well advanced ones. Yet despite these benefits, regional maritime security cooperation remains underdeveloped in the region.[96]

While UNCLOS exhorts regional countries to cooperate, there is also a paradox. The Convention permits the extension of maritime space under some form of national jurisdiction, particularly through the introduction of the EEZ. Thus it supports and actually encourages *nationalistic* approaches to managing the maritime domain. However, such approaches inhibit the development of cooperation and effective international regimes. This paradox is very apparent in the seas of Southeast Asia where countries are generally determined to obtain maximum benefit from their rights under UNCLOS. These nationalistic approaches quite fundamentally limit the prospects for maritime cooperation and regime-building in the region.

CONCLUSIONS

This paper has highlighted problems with implementing the general law of the sea as set out in UNCLOS and in the effectiveness of this Convention as the foundation for a regional maritime security regime. There are problems in dealing with matters that UNCLOS is silent upon, such as the prior notification of warship transit in the territorial sea and military activities in the EEZ; and in implementing the general international rules embodied in UNCLOS both at a regional level and in a meaningful operational manner. These problems of implementation arise, for example, with identifying and

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[96] John F. Bradford, "The Growing Prospects for Maritime Security Cooperation in Southeast Asia", *Naval War College Review*, Summer 2005, Vol.58, No.3, pp. 63-86.

delineating ASLs, and with applying the "burden sharing" principles for transit passage as set out in UNCLOS Article 43. While States will generally argue that their position is consistent with UNCLOS and customary law, divergent positions clearly do exist and while this is the case, there is potential for tension and even conflict.

The law of the sea is a dynamic phenomenon. While the words in UNCLOS may remain static, their interpretation will change over time. In many instances, there is a lack of guidance in UNCLOS as to how to do things. For example, UNCLOS Articles 74 and 83 talk about achieving an equitable solution with the delimitation of maritime boundaries but then give no guidance on what is "equitable". Also, as Robin Churchill has noted, UNCLOS frequently anticipates where bilateral treaties might be necessary between neighbouring countries to implement provisions of the UNCLOS but then "gives very little or no guidance as to what the substantive content of such bilateral treaties or arrangements might be".[97]

A key area of possible further research is the analysis of State practice with the law of the sea. There are many examples of where State practice appears to be diverging from the conventional and traditional law of the sea. Examples include the use of territorial sea straight baselines and claims to deny rights of navigation and overflight beyond the limits of the territorial sea. We are yet to see whether this State practice will subsequently gain legitimacy and acceptance as customary law. Suffice to note, however, that we are dealing with issues where the United States, as the principal guardian of the traditional law of the sea through its publication of excessive claims and the FON program, may already be falling behind what is emerging State practice. Unfortunately appreciation of this variance may reduce the likelihood of the United States becoming a party to UNCLOS.

The United States has adopted the stance that, with the exception of Part XI, the other substantive rules in UNCLOS represent customary international law. However, one writer has put a contrary view.[98] His central argument is that it is no longer possible for the United States to assume that its military interests in the use of ocean space are

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[97] Robin R. Churchill, "Levels of Implementation of the Law of the Sea Convention: An Overview" in Vidas and Ostreng (eds), *Order for the Oceans,* p. 321.
[98] Charles E. Pirtle, "Military Uses of Ocean Space and the Law of the Sea in the New Millenium", *Ocean Development and International Law,* Vol.31 2000, pp. 7-45.

adequately protected by the UNCLOS and that the treaty itself is immune from global change.[99] Similarly, Greig has argued that "many 1982 provisions constituted new law" and "it is difficult to understand how the more detailed rules for regulating such regimes can be regarded as having automatic effect as customary law".[100] Significantly the two regimes to which Greig is referring, the concepts of the archipelagic State and the EEZ, are major new elements of international law in UNCLOS with profound implications for coastal State rights and the interests of other States through freedoms of navigation and overflight.

Uncertainty in the law of sea is likely to grow and the United States, in particular, will find increasing difficulty in maintaining its strict interpretation of navigational regimes and coastal State jurisdiction. East Asia will be critical in shaping developments with the international law of the sea of the future. In doing so, State practice in this theatre, under the influence of nationalistic domestic politics and regional tensions, may well diverge from the orthodox, largely Western view of the customary law of the sea.

None of this is to suggest that there is a need to amend UNCLOS. It would be extremely difficult to obtain the necessary consensus in the contemporary world. UNCLOS was a magnificent achievement for the 1970s and 80s and it remains a careful balance of the rights and duties of the different categories of State. However, its limitations must also be appreciated. A common regional understanding of aspects of the law of the sea where uncertainty exists, including coastal state rights in the EEZ and aspects of the navigational regimes established by UNCLOS, would constitute an important maritime confidence and security building measure (MCSBM). While differences on navigational issues do not usually cause problems, they can become dangerous when tensions exist, and any measures at all that would have the effect of limiting the scope for disputation would be advantageous. The challenge in building an effective regional maritime security regime is to recognise the limitations of UNCLOS and to negotiate a regional consensus on aspects of the Convention that are less than clear or where differences of view exist.

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[99] Ibid., p.10.

[100] Donald W. Greig, "Sources of International Law" in Sam Blay, Ryszard Piotrowicz and B. Martin Tsamenyi, *Public International Law – An Australian Perspective,* Melbourne, Oxford University Press, 1997, p. 73.

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