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 not a party to it. The root causes of problems in East Asia lie in basic conflicts of interest between regional 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 region. 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 may 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 United States, in particular, may 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. The challenge in building an effective regional maritime security regime is to recognize 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.
Introduction

Maritime security regimes are of necessity based on the framework provided by the 1982 UN Convention on the Law of the Sea (UNCLOS). 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, port, or flag state. 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

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)).
5 As of June 4, 2007, there were 155 parties to UNCLOS. A list of parties to UNCLOS may be found on the Web site of the UN Division for Ocean Affairs and Law of the Sea, available at http://www.un.org/Depts/los/reference_files/
is still open to question. 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 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.6

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 generalized 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. Cambodia, North Korea, Thailand, Timor-Leste and the United States are still not parties to UNCLOS.7

It is a major limitation of UNCLOS as a foundation for a regional maritime security regime that the United States remains 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, there have been some perceptions that ratification of UNCLOS could inhibit maritime operations by forces of the United States. A recent article in the USN Institute Proceedings argued that UNCLOS is defective on national security, sovereignty, economic, and judicial grounds. On May 15, 2007, President Bush made a statement urging that the Senate act favorably on U.S. accession during the first session of the 110th U.S. Congress. However, the matter remains controversial in the United States with an active debate between supporters of U.S. ratification and those who oppose this step.

**Background**

Professor Ram Prakash 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.” Furthermore, the pace of evolution of the customary law of the sea has not slowed down, particularly due to increased concern for the health of the world’s oceans.

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8 Frank Gaffney, “‘River Kwai Syndrome’ Plays in Law of the Sea,” Commentary, *U.S. Naval Institute Proceedings*, Vol. 131, No. 3 (March 2005), 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.
and a proliferation of international treaties affecting ocean usage. 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. Thus a coastal state might seek to place restrictions on military operations by another country in its EEZ, or require that a foreign warship seek prior authorisation or provide prior notification of its passage through its territorial sea. 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 past 20 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 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 have not found a satisfactory resolution of the issue.¹²

Tensions over law of the sea issues may become more significant in
the future. Major Western navies are largely structuring their forces for littoral operations and power projection. On the other hand, regional navies 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 restrictions on those freedoms support sea denial.

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.”

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. Regional countries are generally seeking greater control and wider jurisdiction over their littoral areas than were acceptable to the major Western maritime powers at the time of the 3rd UN Conference on the Law of the Sea (UNCLOS

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13 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).

III). Security in all its forms, but particularly resources security, is a major driving force for these wider controls. Here regional countries are trying to exploit perceived ambiguities and “gaps” in UNCLOS to achieve their security goals, but this approach might lead to what the United States refers to as “excessive maritime claims.”

The so-called “Asian Group” was rather ineffectual at UNCLOS III, and with the notable exception 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. This creates a situation which is fertile ground for “gray 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.” In the case of 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.”

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15 Excessive maritime claims might be defined as claims by coastal states to sovereignty, sovereign rights, or jurisdiction over ocean areas that are inconsistent with the terms of the 1982 LOS Convention. A full description of typical excessive maritime claims might be found in U.S. Department of State, Bureau of Oceans and Environmental and Scientific Affairs, “United States Responses to Excessive Maritime Claims,” Limits in the Seas No. 117, 1992, available at http://www.state.gov/documents/organization/58381.pdf, pp. 7–8.


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,18 archipelagic states,19 geographically disadvantaged states,20 leading shipping or fishing countries, industrialised or developing countries, and so on. For

18 A “strait 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.

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

20 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 also be able to argue that status.
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 past 20 years with a consequential destabilizing 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 nationalization 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.

**Particular Limitations**

*Territorial Sea Baselines*

Despite the old adage that “good fences make good neighbors,” 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 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. In accordance with UNCLOS Article 5, they are simply the low-water line directly corresponding to the coastline marked on large-scale charts officially recognized by the coastal state. 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 different rules.

UNCLOS Article 7 establishes three criteria for drawing straight baselines. These are firstly that 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.” 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.” 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 evi-
enced by long usage.” These seemingly strict criteria are interpreted very loosely or even ignored in the practice of states, particularly so in East Asia. Scovazzi has suggested that there is a customary trend toward flexible and liberal criteria in drawing straight baselines and that the United States is the only country resisting this trend. However, this was strongly disputed by Roach.

Coastal states have a powerful incentive to make maximum use of straight baselines as it enables them to maximize the extent of their maritime jurisdiction. It may also be advantageous in maritime boundary delimitation although Sohn found that systems of straight baselines were explicitly taken into account in rather less than one-third of the boundary agreements negotiated. 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 neighboring states.

Almost all East Asian countries (i.e. Cambodia, China, Japan, North Korea, South Korea, Malaysia, Myanmar, the 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 United States, 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. Gener-

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ally the use of straight baselines in the region has been distorted beyond recognition by increasingly liberal interpretations of the key criteria in UNCLOS Article 7.

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 baselines.26 There would seem to be little substance in China claiming that its entire coastline meets the criteria for employing straight baselines.27 The straight baseline 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. In any case China has expressed the position that international shipping does not have a right of innocent passage in this strait.28

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

28 Ibid., p. 17.
Section 3 of UNCLOS. UNCLOS Article 19 sets out the activities that constitute non-innocent passage, such as operating organic aircraft and engaging in an activity that is prejudicial to the peace, good order and security of the coastal state. Innocent passage is the most restrictive of the passage regimes. UNCLOS Article 24 provides that innocent passage may be suspended in certain circumstances, and Article 20 that submarines must travel on the surface and show their flag. Innocent passage applies only to ships and there is no associated right of over-flight.

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 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.29 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.30 This practice constitutes an important confidence-building measure that reduces the risk of disputation, or even conflict, over the issue.31

There are over 40 states around the world that have a requirement for prior notification or authorization of warship entry into the territorial sea. These include the following East Asian countries: Cambodia, China, South Korea, North Korea, Indonesia, the Philippines and Vietnam.32

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.33

Another difficulty 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 passage appears to rest with the coastal state as the enforcement authority.34 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,”35 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.

35 UNCLOS Article 19 (2).
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. 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.” 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.

Coastal states adjoining a strait used for international navigation (the straits’ states) have considerable service responsibilities toward 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 particular. Australia has recently introduced a compulsory pilotage regime for the Torres Strait that some regard as contrary to UNCLOS.

Many difficult issues have been encountered with implementing

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36 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.
37 UNCLOS Article 38(2).
38 Ibid.
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.\footnote{Edgar Gold, “Transit Services in International Straits: Towards Shared Responsibilities,” \textit{MIMA Issue Paper} (Kuala Lumpur: Malaysian Institute of Maritime Affairs, 1995).} 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.\footnote{Alternative methods of covering the costs are explored in various papers in Hamzah bin Ahmad, ed., \textit{The Straits of Malacca: International Cooperation in Trade, Funding and Navigational Safety} (Kuala Lumpur: Pelanduk, 1997).}

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 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 focused 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.

The issue of burden-sharing was high on the agenda of the high-level conference organized by the Indonesian government and the International Maritime Organization (IMO) in Jakarta in September 2005 and in a subsequent meeting organized by the IMO and the Malaysian Government in Kuala Lumpur in September 2006. The Jakarta meeting resulted in the Jakarta statement on Enhancement of Safety, Security and Environmental Protection in the Straits of Malacca and Singapore, which acknowledged the rights and obligations in UNCLOS, in particular Article 43.\footnote{Republic of Indonesia and International Maritime Organization, \textit{Jakarta statement on Enhancement of Safety, Security and Environmental Protection in the Straits of Malacca and Singapore}, IMO/JKT document 1/2 dated Sept. 8, 2005.}
The meeting in Kuala Lumpur determined that user states and countries that benefit from ships transiting the Malacca Strait should contribute on a voluntary basis to navigational safety and marine environmental protection. The idea of a toll for transit was rejected. Singapore, Indonesia and Malaysia tabled six projects at the meeting that could be funded by user states. These covered wreck removals; building up capacity to respond to hazardous incidents; a demonstration project for AIS transponders on small ships; setting up a tide, current and wind management system; replacement and maintenance of navigational aids; and replacement of those damaged by the tsunami in 2004. However, there was no agreement on a framework covering how costs might be shared although China and the United States apparently indicated their willingness to contribute.

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. If sea lanes are not designated, then the right of ASL passage may be exercised through the routes normally used for international navigation. Outside these sea lanes, ships of all nations have the right of innocent passage only, and there is no right of over-flight. 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

45 UNCLOS Article 53.
46 UNCLOS Article 53(12).
47 UNCLOS Article 52(1).
archipelagic state seeking to minimize 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.48

Indonesia

Indonesia’s proposal to designate three North/South ASLs in the early 1990s led to detailed analysis and discussion at the IMO,49 as well as bilateral discussions between Indonesia and interested user states, particularly the United States and Australia.50 This activity culminated in IMO approval of the “General Provisions on the Adoption, Designation and Substitution of Archipelagic Sea Lanes” (GPASL).51 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

48 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.


51 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.
addressed by Indonesian with the promulgation of Indonesian Government Regulation No. 37/2002. 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 No. 37/2002 “strongly envisages that ships and aircraft may exercise archipelagic sea lanes passage only through the designated archipelagic sea lanes.”

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 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. However, there are now some indications that Indonesia may be prepared to consider an East-West sea lane.

The Philippines

The Philippines is 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.

52 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.
54 Ibid., p. 8.
There are four main reasons why the situation with the Philippines may 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. 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, and that its archipelagic waters are in effect internal waters. Additionally, the Philippines delegate intervened on several occasions during the negotiations on GPASL at the IMO to indicate that the Indonesian approach was not a precedent for future ASL designations.

Secondly, the Philippines archipelago is more complex than the Indonesian one, with more scattered islands and reefs and less well-defined shipping channels. 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. There are serious concerns about the state of the marine environment of the Philippines. The dangers of ship-sourced marine pollution are likely to lead the

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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 straits highlights the potential difficulties in developing axis lines and applying the ten per cent rule in UNCLOS Article 53(5). 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 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 the sovereign rights of the Philippines under the Treaty of Paris, and that “the concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines.” 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 difficult issue with implementing the UNCLOS navigational regimes in the region. 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

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60 Signed by Spain and the United States on Dec. 10, 1898. This is the basis of the Philippine “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.

and expeditious transit.”62 Similarly, ASL passage means the exercise “of the rights of navigation and overflight in the normal mode.”63 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 in the fishing nets or fish aggregating devices that are used extensively in Philippine archipelagic waters.64 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 not conduct military exercises or exercise any type of weapons with ammunition”65 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.66 Some coastal states

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62 UNCLOS Article 39(1) (c).
63 UNCLOS Article 53(3).
64 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.
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") neither high seas nor territorial sea.67

Now some 25 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.”68 The United States has steadfastly maintained a liberal interpretation of the 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.69 On the other hand, some coastal states have sought to strengthen (“thicken”) the extent of their jurisdiction over their EEZs 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.70 With the

67 Churchill and Lowe, The law of the sea, p. 166.
70 Major incidents include the March 2001 confrontation between the U.S. Navy
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, a group of senior officials, legal experts and maritime specialists (now known as the EEZ Group 21) has met to address relevant issues. The meetings were sponsored primarily by the Ship and Ocean Foundation of Japan—now the Ocean Policy Research Foundation.

The EEZ Group 21 developed “Guidelines for Navigation and Overflight in the Exclusive Economic Zone.” These are non-binding in nature. They set out broad principles of common understanding regarding certain aspects of navigation and overflight in the EEZ, including military and intelligence gathering activities. They are framed in exhortatory rather than obligatory language and reflect the need for better understanding of the rights and obligations of states conducting activities in the EEZ of another country.

Other Issues

Flag State’s 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” will

71 Meetings were held in Bali (June 2002), Tokyo (February 2003), Honolulu (December 2003), Shanghai (October 2004), and Tokyo (September 2005).
73 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 labor are the motivating factors behind a shipowner’s decision
rarely have such a link with the flag state, and the relevant ship registry may not even be in the country concerned. Cambodia, Mongolia and Myanmar are East Asian countries that are regarded as “flag of convenience” countries.74

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 ships 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 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),75 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.

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75 Most such acts in Asian waters occur within these zones, rather than in EEZs or on the high seas.
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 traveling as passengers onboard the vessel.76 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 (WMD) programs.77 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 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

76 The Achille Lauro affair occurred in the Mediterranean when Arab terrorists took over the cruise liner, killing an elderly American tourist in the process. It was not an intentional terrorist act, but 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.

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 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.78

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 has been 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.79 Such an arrangement would help to counter 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 IX of UNCLOS deals with the situation of enclosed and semi-

78 Hot pursuit may also apply from the EEZ in respect of offences related to coastal state rights and duties in that zone.
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 East Asia because main seas in the region (e.g. the East and South China Seas) all fall within the category of a semi-enclosed sea.

Greater cooperation among 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.80

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. Problems of implementation arise, for example, with identifying and 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 positions are 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 Churchill has noted, UNCLOS frequently anticipates where bilateral treaties might be necessary among 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.”

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. However, these are issues, which the United States, as the principal guardian of the traditional law of the sea through its publication of excessive claims and the FON program, is strongly opposed to, but is unable to challenge them legally while not a party to UNCLOS.

Uncertainty in the law of sea may grow, and the United States in particular, may 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 theater, 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 1980s 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-building measure. 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 recognize 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.