

Royal Australian Navy

Sea Power Centre
and
Centre for Maritime Policy

Analysis of Contemporary and Emerging Navigational Issues in the Law of the Sea

Martin Tsamenyi & Kwame Mfodwo

November 2001



University of Wollongong
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Working Paper No. 8

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Sea Power Centre Working Papers

The Sea Power Centre Working Paper series is designed as a vehicle to foster debate and discussion on maritime issues of relevance to the Royal Australian Navy, the Australian Defence Force and to Australia and the region more generally.

About the Author

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SCOPE AND CONTENT OF THE PAPER

This paper identifies, analyses and assesses contemporary as well as emerging navigational issues under the 1982 Law of the Sea Convention (the LOSC) a decade or so after the Convention's entry into force. The discussion is in three parts:

- Part I provides a brief overview of the place of navigation in the LOSC text and also identifies observable trends with respect to excessive maritime claims since the Convention entered into force.
- Part II is more specific to Australian concerns and interests, providing a survey of State practice in the maritime areas of most strategic concern to Australia. A preliminary assessment of the extent of excessive claim in the region is also provided. The discussion is supported by analysis of the content of contemporary navigational rules.
- Part III identifies a range of trends and issues, which are likely to lead to change in the current framework of rules.

The types of emerging as well as persistent trends discussed in more detail in Part III are:

- The effect of excessive maritime claims on the current rules;
- The effects of incremental and "gap-filling" activities by competent international organisations and other bodies;
- Pressures from public-interest non-governmental organizations (NGOs) in response to broad cultural shifts and changes in international public opinion;
- The impact of "at-sea" operations by political insurgents, terrorist groups and organised criminal gangs;
- Pressures driven by technological developments and innovations.

Considerations of space prevent us from subjecting a key freedom of navigation issue to detailed analysis in its own right. The issue is the question of the extent to which the navigation regime within the Convention is being re-shaped by developments with respect to other parts of the Convention. A good example of this interaction is the question of the impact of the ongoing evolution of the Convention's exclusive economic zone/fisheries provisions on the freedom of

navigation provisions. Where relevant, this question of the inter-relationship between the different parts of the Convention is highlighted, for example, under the heading "incremental and gap-filling activity by competent international organizations" or in the discussion of "excessive maritime claims".

In overall terms, the paper demonstrates that the LOSC regime and the provisions on navigation within it continue to evolve rapidly and in unanticipated ways.

PART I NAVIGATION IN THE LAW OF THE SEA CONVENTION TEXT

This section of the paper provides an introduction to the detailed discussion presented in Parts II and III by reviewing (1) the place of navigation in the LOSC regime; (2) the kinds of excessive claims that currently place pressure on the regime.

First, as a core maritime activity, navigation (including the rights of over-flight associated with commercial and naval vessels) occupies a prominent place in the Convention text. Roughly one-third of the text is concerned with navigational issues, especially Parts II-V, VII and XII, all of which reflect compromises and trade-offs with respect to navigation essential to the consensus approach which made the Convention possible.

Second, the Convention has different functional zones, each of which has a distinct legal regime for navigation. This approach of functional differentiation was essential to achieving a balance between the interests of the maritime powers and coastal States. Thus each zone recognises rights of navigation in a manner consistent with and appropriate to the overall purpose and essence of the specific zone. To support the demarcation and identification of these zones, the LOSC also provides an elaborate framework for the declaration of a variety of baselines. It is from these baselines that the zones are generated.

Finally, the Convention ensures that the rights of navigation agreed during the negotiations are protected and guaranteed by the dispute settlement mechanisms under the Convention. Although this aspect of the LOSC is yet to be tested, a framework exists for addressing many of the areas of disputation likely to arise under the Convention.

Excessive Maritime Claims

Since the LOSC was negotiated, the delicate balance achieved with respect to the navigational regimes under the Convention has nevertheless come under significant pressure from State practice in the following areas:

- *Unrecognized claims to historic waters;*
- *The use of baselines which fall outside the rules of the LOSC for measuring the breadth of the territorial sea and other maritime zones;*

- Other claims to jurisdiction over maritime areas in excess of 12 miles, such as security zones that attempt to restrict high-seas freedoms;
- Contiguous zones at variance with Article 33 of the LOSC;
- Exclusive economic zone (EEZ) claims not consistent with Part V of the LOSC;
- Continental shelf claims inconsistent with Part IV of the LOSC;
- restrictions on the innocent passage of military and commercial vessels;
- Restrictions on the innocent passage of ships owned or operated by States and used only on government or non-commercial service;
- Restrictions on the innocent passage of nuclear-powered warships or warships and naval auxiliaries carrying nuclear weapons or specific cargoes;
- Laws requiring advance notification or authorisation for innocent passage by warships and naval auxiliaries through the territorial sea or EEZ, or applying discriminatory requirements to such vessels;
- Territorial sea claims that overlap straits used for international navigation, thereby changing the status of such straits to impose passage requirements in contravention of the LOSC requirements;
- Archipelagic claims which are not in conformity with the LOSC.

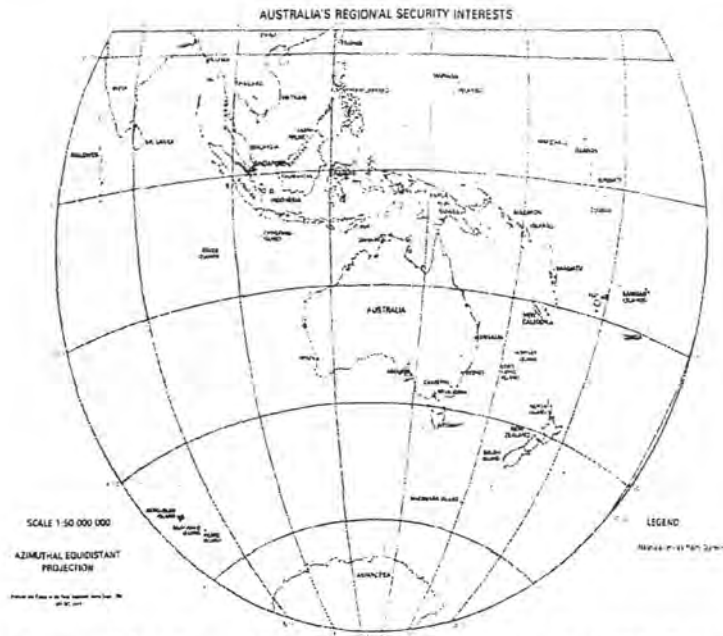
PART II STATE PRACTICE IN AUSTRALIA'S ADJACENT MARITIME REGION

Australia's Adjacent Maritime Region

This section discusses State practice in areas of strategic maritime importance to Australia. This region (categorised in this paper as Australia's Adjacent Maritime Region (AAMR)) comprises the high seas and the maritime zones associated with the States listed below (see also Map 1). The notion of an AAMR as used here approximates to the regional area of Australian strategic interest set out by Paul Dibb¹ in his review of Australia's defence capabilities in the mid 1980s. To reflect changes in international relations and geo-politics since the 1980s, our use of the AAMR concept draws in a few more States than were suggested by the Dibb Review.

Australia's Adjacent Maritime Region

| | |
|---------------------------------------|---|
| Australia | Viet Nam |
| Bangladesh | Brunei Darussalam |
| Cambodia | China |
| Democratic People's Republic of Korea | Fiji |
| Vanuatu | India |
| Indonesia | Japan |
| Kiribati | Malaysia |
| Maldives | Marshall Islands |
| Micronesia (Federated States) | Myanmar |
| Nauru | New Zealand |
| Niue | Pakistan |
| Palau | PNG |
| Philippines | Republic of Korea |
| Russian Federation | Samoa |
| Singapore | Solomon Islands |
| South Africa | Sri Lanka |
| Thailand | Tonga |
| Tuvalu | The United Kingdom overseas territories in the region |
| US Territories in the Region | French Territories in the Region |
| Cook Islands | |



Map 1. Australia's Adjacent Maritime Region (adapted from Paul Dibb, Review of Australia's Defence Capabilities 1986)

The Status of the Law of the Sea Convention and its Maritime Zones in the AAMR

The current status of the LOSC in the AAMR as well as the form and extent of maritime claims, are set out in Table 1 below.

Table 1: National Claims to Maritime Zones and Ratification of the Law of the Sea Convention in the AAMR

| State | LOSC Ratification/ Accession | Use of SB? | Claim to AS Status? | TS? | CZ | EEZ | FZ | CS 1982 or CS 1958 | Claims to CS outer limit |
|---------------------------------------|------------------------------|------------|---------------------|-------|--------------------------------|--------|------|--------------------|--------------------------|
| Australia | 1994 | Yes | | 12 nm | 24 nm | 200 nm | | 1982 | CM/200 nm |
| Bangladesh | No | Yes | | 12 nm | 18 nm | 200 nm | | 1982 | CM |
| Brunei | 1996 | | | 12 | | 200 nm | | 1982 | N/A |
| Darussalam | No | Yes | | 12 nm | 24 nm | 200 nm | | | 200 nm |
| Cambodia | 1996 | Yes | | 12 nm | 24 nm | 200 nm | 1982 | | CM/200 nm |
| China | 1995 | | | 12 nm | 200 nm | 200 nm | | 1982 | CM/200 nm |
| Cook Islands | | | | 12 nm | 50 nautical mile military zone | | | | CM/200 nm |
| Democratic People's Republic of Korea | | | | | | | | | |
| Korea | | | | | | | | | |
| Fiji | 1982 | | Yes | 12 | | 200 | | 1982 | Depth: 200nm or expl. |
| France | 1996 | Yes | | 12 | 24 | 200 | | 1982 | Depth: 200nm or expl. |
| France - New Caledonia | | | | 12 | 24 | 200 | | 1982 | Depth: 200nm or expl. |
| French Polynesia | | | | 12 | 24 | 200 | | 1982 | Depth: 200nm or expl. |
| French Southern and Antarctic Lands | | | | 12 | 24 | 200 | | 1982 | Depth: 200nm or expl. |

| State | LOSC Ratification /Accession | Use of SB? | Claim to AS Status? | TS? | CZ | EEZ | FZ | CS 1982 1982 or CS 1958 | Claims to CS outer limit |
|---|------------------------------|------------|---------------------|--|-------|--------|----|-------------------------|--------------------------|
| France - Tromelin | | | | 12 | 24 | 200 | | 1982 | Depth: 200nm or expl. |
| France – Glorioso, Juan de Nova, Europa & Bassa da India Islands, Clipperton Island | | | | 12 | 24 | 200 | | 1982 | Depth: 200nm or expl. |
| India | 1995 | | | 12 nm | 24 nm | 200 nm | | 1982 | CM/200 |
| Indonesia | 1986 | | Yes | 12 nm | | 200 nm | | 1982 | N/A |
| Japan - mainland | 1996 | Yes | | 12 nm | 24 nm | 200 nm | | 1982 | CM/200 nm |
| Japan – Straits claim | | | | 3 nm limit – Soya & Tsugaru Straits | | | | | |
| Japan – Straits claim | | | | 3 nm limit western channels Tsushima and Osumi Straits | | | | | |
| Kiribati | | Yes | Yes | 12 nm | | 200 nm | | | N/A |
| Malaysia | 1996 | | | 12 nm | | | | | Depth: 200nm or expl. |

| State | LOSC Ratification /Accession | Use of SB? | Claim to AS Status? | TS? | CZ | EEZ | FZ | CS 1982 1982 or CS 1958 | Claims to CS outer limit |
|-------------------------------|------------------------------|------------|---------------------|---|-------|-----------------------|----|-------------------------|--------------------------|
| Marshall Islands | 1991 | | Yes | 12 nm | 24 nm | 200 nm | | 1982 | N/A |
| Micronesia (Federated States) | 1991 | | | 12 nm | | 200 nm | | 1982 | N/A |
| Myanmar | 1996 | Yes | | 12 nm | 24 nm | 200 nm | | 1982 | CM/200 nm |
| Nauru | 1996 | Yes | | 12 nm | 24 nm | 200 nm | | 1982 | N/A |
| New Zealand | 1996 | Yes | | 12 nm | 24 nm | 200 nm | | 1982 | CM/200 |
| Niue | | | | 12 nm | | 200 nm or median line | | | N/A |
| Pakistan | 1997 | Yes | | 12 nm | 24 nm | 200 nm | | 1982 | CM/200 |
| Palau | 1996 | | | 3 nm | | 200 nm | | 1982 | N/A |
| PNG | 1997 | | Yes | 12 nm 3 nm in certain areas | | 200 nm | | 1982 | Depth: 200nm or expl. |
| Philippines | 1984 | | Yes | Rectangle defined by coordinates Extends beyond 12 nm | | 200 nm | | 1982 | Depth of expl |
| Republic of Korea | 1996 | Yes | | 12 nm | 24 nm | 200 nm | | 1982 | N/A |
| Russian Federation | 1997 | Yes | | 12 nm | 24 nm | 200 nm | | 1982 | CM/200 |
| Samoa | 1995 | Yes | | 12 nm | | 200 nm | | 1982 | |

| | | | | | | | | | |
|------------------------|------|-----|-----|-------|-------|--------|--|------|---------|
| Singapore | 1994 | | | 3 nm | | | | 1982 | |
| Solomon Islands | 1997 | | Yes | 12 nm | | 200 nm | | 1982 | 200 nm. |
| South Africa | 1997 | Yes | | 12 nm | 24 nm | 200 nm | | 1982 | CM/200 |
| Sri Lanka | 1994 | Yes | | 12 nm | 24 nm | 200 nm | | 1982 | CM/200 |

| State | LOSC Ratification/ Accession | Use of SB? | Claim to AS Status ? | TS? | CZ | EEZ | FZ | CS 1982 1982 or CS 1958 | Claims to CS outer limit |
|-------------------------------|------------------------------|------------|----------------------|--|-------|---|---|-------------------------|--------------------------|
| Tonga | 1995 | Yes | | 12 nm | | 200 nm | | 1982 | N/A |
| Tuvalu | | Yes | | 12 nm | 24 nm | 200 nm | | | N/A |
| United Kingdom general | 1997 | Yes | | 12 nm – all but see 3 nm below | 24 nm | 200 nm Pitczim, South Georgia South Sandwich Turks and Caicos | 200 nm mainland & Turks and Caicos British Indian Ocean Territory | 1982 | Defined by co-ordinates |
| United Kingdom – other | 1997 | Yes | | 3 nm - Pitcairn British Indian Ocean Territory | 24 nm | 200 nm | | 1982 | Defined by co-ordinates |
| United States | No | | | 12 nm | 24 nm | 200 nm | | 1958 | CM/200 |
| Vanuatu | 1999 | Yes | Yes | 12 nm | 24 nm | 200 nm | | 1982 | CM/200 |
| Viet Nam | 1994 | Yes | | 12 nm | 24 nm | 200 nm | | 1982 | CM/200 |

Key

SB - Straight Baselines

AS – Archipelagic State

CZ – Contiguous Zone

TS - Territorial Sea

EEZ – Exclusive Economic Zone

FZ - Fisheries Zone

CS - Continental Shelf

CS 1982 – party to Continental Shelf rules under UNCLOS

CS 1958 – party to 1958 Geneva Convention on the Continental Shelf

CM – Continental Margin only

CM/200 – outer edge of the continental margin, or to 200 nautical miles where the outer edge does not extend up to that distance

Depth: 200 nm or exploitability

NA – information not available

Maritime Boundaries in the AAMR

Overall, the AAMR has a significant number of problem areas with respect to maritime boundary delimitation. Tensions in inter-state relations, which constrain maritime boundary delimitation, are driven principally by competing claims to natural resources (fish, offshore minerals and offshore oil and gas). As Table 2 demonstrates, the majority of possible maritime delimitations in the AAMR have not yet been undertaken. There are also several disputes with respect to land territory, which arguably spill over and affect the climate for negotiations with respect to maritime boundaries.² It is in the Asian segment of the AAMR that there is the largest number of unsettled maritime boundaries. Although boundaries amongst most of the South Pacific Island States are still not precisely demarcated, the long-standing and robust regional fisheries co-operation arrangements in the region lessen the extent to which maritime boundaries act as a driver of conflict. Table 2 below illustrates the status of maritime boundaries in the Asian segment of the AAMR.

Table 2: Maritime Boundaries in the Asian Segment of the AAMR³

| States | Territorial Sea | EEZ | Continental Shelf |
|-----------------------|---------------------------|---------------------------|---------------------------|
| Australia-Indonesia | Delimitation not Required | Yes – partially completed | Part |
| Indonesia-Malaysia | Yes | No – not done | Yes. |
| Indonesia-Singapore | Yes | | Delimitation not Required |
| Indonesia-Thailand | Delimitation not Required | Not yet undertaken | Yes |
| Indonesia-Philippines | Not yet undertaken | Not yet undertaken | Not yet undertaken |
| Indonesia-India | Delimitation Not Required | Not yet undertaken | Yes |
| Indonesia-Vietnam | Delimitation not Required | Not yet undertaken | Not yet undertaken |

| | | | |
|----------------------|---------------------------|---------------------------|---------------------------|
| Indonesia-China | Delimitation not Required | Not yet undertaken | Not yet undertaken |
| Malaysia-Singapore | Not yet undertaken | Delimitation not Required | Delimitation not Required |
| Malaysia-Thailand | Not yet undertaken | Not yet undertaken | Not yet undertaken |
| Malaysia-Philippines | Not yet undertaken | Not yet undertaken | Not yet undertaken |
| Malaysia-Vietnam | Delimitation not Required | Not yet undertaken | Not yet undertaken |
| Myanmar-India | Not yet undertaken | Not yet undertaken | Not yet undertaken |
| Myanmar-Thailand | Not yet undertaken | Not yet undertaken | Not yet undertaken |
| Cambodia-Vietnam | Not yet undertaken | Not yet undertaken | Not yet undertaken |
| Thailand-India | Delimitation not Required | Not yet undertaken | Yes |
| Thailand-Vietnam | Delimitation not Required | Not yet undertaken | Not yet undertaken |
| China-Vietnam | Not yet undertaken | Not yet undertaken | Not yet undertaken |
| China-Taiwan | Not yet undertaken | Not yet undertaken | Not yet undertaken |
| Philippines-Taiwan | Delimitation not Required | Not yet undertaken | Not yet undertaken |
| Japan-Taiwan | Not yet undertaken | Not yet undertaken | Not yet undertaken |
| China-South Korea | Delimitation not Required | Not yet undertaken | Not yet undertaken |
| China-North Korea | Not yet undertaken | Not yet undertaken | Not yet undertaken |

| | | | |
|-------------------------|---------------------------|--------------------|--------------------|
| South Korea-Japan | Delimitation not Required | Not yet undertaken | Yes (Part only). |
| North Korea-Japan | Delimitation not Required | Not yet undertaken | Not yet undertaken |
| Japan-Russia | Not yet undertaken | Not yet undertaken | Not yet undertaken |
| North Korea-South Korea | Not yet undertaken | Not yet undertaken | Not yet undertaken |
| North Korea-Russia | Not yet undertaken | Not yet undertaken | Not yet undertaken |
| South Korea-Russia | Delimitation not Required | Not yet undertaken | Not yet undertaken |

Use of Baselines in the AAMR

Baselines are crucial to determining what rights of passage exist in the various maritime zones, since baselines act as the datum for the determination of all maritime zones under the LOSC. As was stated by the ICJ in the *Fisheries Case*, the determination of baselines is not a purely internal or municipal matter – it is governed by international law:

The delimitation of sea areas has always had an international aspect; it cannot be dependent merely upon the will of the coastal state as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal state is competent to undertake it, the validity of delimitation with regard to other states depends upon international law.⁴

The current rules for drawing baselines are set out in Articles 5 through 11, 13 and 14 of the LOSC. They are virtually identical to the content of Articles 3 through 13 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. The LOSC rules differentiate between normal baselines (which follow the low-water line along the coast) and straight baselines (these ignore the line of the coast). The LOSC provides that the usual baseline is the low water mark.

[T]he normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognised by the Coastal State.⁵

It is customary international law that the straight baseline system is permissible in certain narrow circumstances reflecting particular geographical conditions. This was recognised in the *Convention on the Territorial Sea and Contiguous Zone* and is repeated in the LOSC. Thus,

as a limited exception to the normal baseline rules, the LOSC permits deviations based on straight baselines, in localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity. In such cases the method of straight baselines joining appropriate points may be employed.⁶ Essentially straight baselines are permitted where a combination of geography and normal baselines would produce a complex pattern, including enclaves of territorial seas and high seas.

Properly drawn straight baselines may push the territorial sea out-wards to some extent but are not likely to do so to a significant extent. They may also alter the area, which can be claimed as internal waters to some degree but again do not do so markedly. Freedom of navigation is negatively affected by (a) extensive use of straight baselines; (b) extremely lengthy straight baseline segments. Large areas become enclosed as internal waters subject to full sovereignty whilst the overall area that can be claimed as territorial sea, exclusive economic zone and contiguous zone may also expand – a good example of what has been described as “creeping jurisdiction”. Rights of overflight are also affected by extravagant straight baselines. A striking example of the extensive use of straight baselines is across the Gulf of Martaban by Myanmar. Effectively an area of 14,300sq miles are enclosed as Myanmar internal waters – an area the size of Denmark.⁷

Non-Conforming Straight Baselines in the AAMR

The majority of States in the Asian segment of the AAMR use straight baselines as their basic starting point for determination of their maritime zones.⁸ (see Table 3 below). Only India, Malaysia and Sri Lanka have not adopted a straight baseline system. Acquiescing or objecting to the baseline is likely to prove crucial in determining its validity.⁹

Customary International Law and Straight Baselines

There is currently no rule deriving from treaty law or judicial decisions, which states, the length that straight or normal baselines should have. The only instance in which there is an agreed specification is with respect to lines closing the mouths of bays, which are limited to 24 nm under Article 10 of the LOSC. Accordingly, unless actions establishing extravagant straight baselines directly conflict with the interests of other States (usually other coastal States), such baselines may acquire legitimacy over time under customary international law.

Another possibility which may lead to straight baselines crystallizing into customary international law is where two or more States agree to use extensive straight baselines as part of their process of determining their maritime boundaries. In the case of the Thailand-Malaysia boundary, Thailand's straight baselines in one segment connect three offshore islands with the Thailand-Malaysia boundary, with the seeming acquiescence of Malaysia.

Table 3: AAMR Straight Baselines Inconsistent with LOSC¹⁰

| State | Straight Baselines | Australian Protest | Other protests |
|--------------|--|--------------------|----------------|
| Bangladesh | Straight baselines along the contour of the Bay of Bengal based on underwater coordinates along the 10 fathom-depth contour. | No | United States |
| Cambodia | Straight baselines linking points of the coast and the furthest points of the furthest islands. | No | United States |
| China | Entire coastal length (art 3 Law on the Territorial Sea of the People's Republic of China (1996). | No | United States |
| Japan | Straight baselines of excessive length | No | United States. |
| The Maldives | Baselines ranging from 2.75 to 55 nm from the coast effectively creating a rectangle around the Maldivian Islands. | No | United States. |

| | | | |
|-------------|---|-----|--|
| Myanmar | 222 nm straight baseline across the Gulf of Martaban. | No | United States |
| North Korea | Straight baselines in the Yellow Sea and Sea of Japan. | No | United States, USSR, Japan. |
| Pakistan | Straight baselines for whole coastline. Coast does not meet geographic requirements of LOSC and line limits in LOSC are exceeded. | No | United States, India. |
| Philippines | Straight baselines enclosing the archipelago not in accordance with LOSC. | Yes | United States, Bulgaria, Byelorussia, Czechoslovakia, Ukraine, and the former USSR |
| Russia | System of straight baselines in the Pacific Ocean and Sea of Japan. | No | United States |
| South Korea | Straight baselines where coast does not conform to requirements. | No | United States. |
| Taiwan | Straight baselines around Formosa and also connecting to offshore features and islands. Only 4 segments in the baseline system use the low-water line with only 7 points located on the mainland of Formosa. | No | |
| Thailand | Straight baseline enclosing Gulf of Thailand. Three other areas of straight baselines. | No | United States, Germany on behalf of EU. |
| Vietnam | 10 straight baseline systems in excess of the norms of international practice. | No | United States |

Historic Waters

Historic waters constitute a recognised exception to the rules governing the drawing of baselines. To qualify as historic, there must be open, effective, continuous and well established usage of the waters by a State as internal waters, and recognition of acquiescence in that status by other States. Such waters are therefore unlikely to lie across the path of normal inter-state navigation routes.¹¹ The main impact of a historic waters claim is that the waters become "internal" and are thus not open to navigation and overflight without permission.¹²

All claims to historic bays in the AAMR are contested by the United States.¹³ There is also evidence of protest by other States (see Table 4 below).

Table 4: AAMR: Non-conforming Claims to Historic Waters

| States | Claim | Protest |
|---|--|---|
| Russia | Peter the Great Bay. | Japan, UK, France, Germany, Sweden, Canada and USA. |
| Cambodia and Vietnam – Bilateral Agreement 1982 | Part of the Gulf of Thailand. | USA, Thailand, Singapore, Germany |
| Vietnam | Part of the Gulf of Tonkin. | USA, China, Thailand, France. |
| India and Sri Lanka | Gulf of Manaar and Palk Bay. | USA |
| Australia | Four small bays on the South Australian Coast – Anxious, Rivoli, Encounter, Lacepede Bays. | USA |

The Territorial Sea

Article 3 of the LOSC provides that every State has the right to establish a territorial sea of up to 12 nautical miles measured from baselines determined in accordance with the Convention. Within this zone the Coastal State is sovereign. However an equally weighty principle of international law is that all ships of all States enjoy the right of innocent passage through the territorial sea of other States. From the point of view

of restrictions on freedom of navigation in the Territorial Sea, current concerns revolve around the following issues:

- How Coastal States interpret the content of the right of innocent passage as set out in the LOSC.
- The impact of permissible restrictions on innocent passage, on the concept itself.
- Legitimate enforcement measures with respect to "non-innocent" passage.
- The scope and content of restrictions on innocent passage which go beyond the LOSC norms.

The Right of Innocent Passage in the Territorial Sea

It is established under customary and conventional international law that all ships enjoy the right of *innocent passage* in the territorial sea of another State.¹⁴ Passage is defined as: navigation through the territorial sea for the purpose of (a) traversing that sea, (b) proceeding to or from internal waters ... and 'shall be continuous and expeditious'.¹⁵ Under the LOSC, passage is innocent 'so long as it is not prejudicial to the peace, good order or security of the coastal state'.¹⁶ The LOSC further elaborates on what may be considered 'non-innocent' passage:¹⁷ Non-innocent passage is:

- any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- any exercise or practice with weapons of any kind;
- any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
- any act of propaganda aimed at affecting the defence or security of the Coastal State;
- the launching, landing or taking on board of any aircraft;
- the launching, landing or taking on board of any military device;
- the loading or unloading of any commodity, currency or person contrary to the fiscal, immigration or sanitary laws and regulations of the Coastal State;

- any act of willful and serious pollution contrary to this Convention;
- any fishing activities;
- the carrying out of research or survey activities;
- any act aimed at interfering with any systems of communication or any other facilities or installations of the Coastal State;
- any other activity not having a direct bearing on passage.

Under the LOSC, a coastal State cannot impose requirements that have the practical effect of denying or impairing passage.¹⁸

The LOSC also lists matters in respect of which a coastal state may adopt laws and regulations relating to *innocent passage* through the territorial sea. These include:¹⁹

- the safety of navigation and the regulation of maritime traffic;
- the protection of navigational aids and facilities and other facilities or installations;
- the protection of cables and pipelines;
- the conservation of the living resources of the sea;
- the prevention of infringement of the fisheries laws and regulations of the coastal state;
- the preservation of the environment of the coastal state and the prevention, reduction and control of pollution thereof;
- marine scientific research and hydrographic surveys;
- the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the Coastal State.

Foreign ships exercising the right of *innocent passage* are required to comply with any such laws and regulations.²⁰ The prescriptive power of the coastal State is limited with regard to the design, construction, manning and maintenance of foreign vessels in that any regulations must conform to generally accepted international rules or standards,²¹ except in ice covered areas, where coastal state regulation may be stricter.²²

It is important also to note that government vessels, including warships, enjoy *sovereign immunity*; a government vessel in non-innocent passage can be diverted from the territorial sea but may not be interfered with for

the purpose of inspection, detention or the institution of legal proceedings against it.²³

No explicit provision for enforcement of these powers is specified but it is implied,²⁴ and in certain instances a coastal State is allowed to exercise criminal or civil jurisdiction.²⁵ A coastal State can arrest a vessel or escort it out of the territorial sea, providing that the action taken is proportional to the threat posed by the foreign vessel and consistent with the 'infringement' of the coastal state's laws that may have occurred.²⁶ A coastal State can also steer a ship through safe routes. The list of areas where coastal State enforcement is allowed closely mirrors that of art 19, suggesting that coastal State regulations form an inherent part of the concept of *innocent passage*. This implies that an infringement of coastal State regulations would be prejudicial to the 'peace, good order or security' of the coastal State such that passage would be rendered non-innocent.²⁷

A coastal state can also temporarily suspend passage in certain circumstances.

The Coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specific areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for its security, including weapons exercises.²⁸

This 'national security' exemption is open to widely varying interpretations. It has been argued that "national security", as defined by the coastal state, will prevail over the interests of foreign vessels seeking to exercise the right of *innocent passage*.²⁹ This makes the right of *innocent passage* potentially fragile, as was demonstrated in the 1995 declaration of an exclusion zone by France around Mururoa Atoll for the purpose of nuclear tests.³⁰ Despite the fact that this exclusion zone was to last for a year, and thus could not be characterised as 'temporary' for the purposes of the LOSC art 25(3), it failed to draw any international protest.³¹ This demonstrates that States practice is a more accurate guide to the state of international law than the strict terms of the LOSC.³² It does appear, however, that "national security" is limited to military security, and could not be used for other reasons such as economic or environmental reasons.³³

The Impact of Legitimate Regulation of Foreign Vessels on the Right of Innocent Passage

In evaluating the extent to which innocent passage is currently restricted or under threat, it is important to factor in the practical impact of the extensive measures of regulation, which are legitimately in place under the LOSC Article 21. Such regulation co-exists with the right of innocent passage and is driven by a range of considerations, including safety at sea, environmental concerns and the need to protect vessels from armed robbery in the Territorial Sea. Currently the bulk of regulation of the Territorial Sea emanates principally, from the IMO, or passes through IMO channels of approval when proposals for regulation are made unilaterally, bilaterally or multilaterally by States. It is fair to argue that these measures still place considerable stress on the broad principle of freedom of navigation despite their legitimacy. Indeed in many cases, measures to ensure safety at sea are functionally and practically equivalent to requiring advance notification of passage or even prior permission before passage.

Restrictive Controls on Innocent Passage

Excessive restrictions on innocent passage which go beyond the LOSC norm can be categorised in more detail as follows:³⁴

- Imposition of time limits on passage.
- Imposition of "prohibited zones".
- Requirements of compulsory pilotage for vessels subject to sovereign immunity.
- Restrictions of passage to specified sea-lanes.
- Prior notification requirements for Warships.
- Prior permission requirements for Warships.
- Numerical limitations on Warship presence in the Territorial Sea.
- Restrictions on presence and passage of Nuclear-powered Warships.
- Controls over passage by vessels carrying hazardous, ultra-hazardous and/or radioactive cargoes.

Those key issues which are going to dominate innocent passage in the territorial sea in the medium to long term are (a) passage of warships, (b) the transport of hazardous and ultra-hazardous substances through the

territorial sea, and (c) ship Reporting Systems and Vessel Monitoring Systems. These are discussed briefly below.

(a) Passage of Warships in the Territorial Sea

There has been a long-standing debate as to whether or not a coastal State can require prior notification or authorisation as a prerequisite for the enjoyment of *innocent passage* by warships of a foreign state. Such a requirement is not present in either the Convention on the Territorial Sea and Contiguous Zone or in the LOSC, although such a provision was proposed for both Conventions.³⁵ State practice on this issue has been mixed, with some maritime States contesting any such regime.³⁶

One argument in support of a requirement of notification or authorisation rests on the interpretation of art 19(1) the LOSC: "Such passage shall take place in conformity with this Convention *and with other rules of international law*" (emphasis added). It could be argued that such a requirement exists at customary international law, as demonstrated by State practice (see Table 2), and is not specifically prohibited by either the LOSC or the Convention on the Territorial Sea and Contiguous Zone.³⁷ A contrast is also drawn between the provisions in relation to *transit passage* (see below), which refer to 'all ships', and the provisions in relation to *innocent passage*, which refer only to 'ships'.³⁸

In contrast, it is argued that there are strong textual reasons for asserting that a requirement for either authorisation or notification would be inconsistent with the LOSC. A requirement for prior authorisation would be in clear conflict with the prohibition on coastal States imposing requirements that have the effect of 'denying or impairing the right of innocent passage'.³⁹ Furthermore, articles of both the LOSC and the Convention on the Territorial Sea and Contiguous Zone relate to the navigation of submarines and non-compliance by warships with laws and regulations of coastal States, implying such a right of *innocent passage*.⁴⁰ Indeed, the list of *non-innocent passage* contained in art 19(2) clearly indicates that the activities in (a)-(f) are concerned primarily with warships, and would be superfluous if such a right of *innocent passage* did not exist.⁴¹

Although the textual arguments outlined indicate that a requirement for prior notification is contrary to the LOSC. Nevertheless, as can be seen, there is some State practice for such a requirement, present in both domestic legislation and declarations on the signature or ratification of

the LOSC, although these actions have not gone unchallenged (See Table 6).

(b) Transport of Hazardous and Ultra-Hazardous Substances through the Territorial Sea

International law regarding the transportation of hazardous and ultra-hazardous substances through the territorial sea of coastal States is in a state of continual development. There is a wide body of international instruments that regulate different segments of the transportation chain for such materials.⁴² However, there are no international agreements or regulations restricting the passage of nuclear powered vessels, oil tankers or the carriage of nuclear weapons, radioactive material or other hazardous cargo – hence the navigation of such vessels is free and cannot be regulated under art 211 of the LOSC.⁴³ Coastal States can, in the territorial sea, require such vessels to confine their passage to sea-lanes, carry documents and observe precautionary measures.⁴⁴ There appears to be a trend towards the recognition of a right of prior notification for transportation of such substances through the territorial sea.⁴⁵ Such a right is recognised in the Basel Convention on the Control of Transboundary Movement of Hazardous Waste and their Disposal in relation to the movement of wastes. Other international instruments,⁴⁶ and growing sympathy for coastal State concerns over shipments, suggest a trend towards recognition of such a right.⁴⁷ Further support is also argued to stem from the precautionary principle (see below).⁴⁸

Although the LOSC does not require that foreign vessels carrying hazardous cargo are to submit to a regime of prior consent. The wide range of protests that have been made against shipments of ultra-hazardous wastes, and prohibitions of the movement of such wastes through a State's waters, may indicate an emerging or emerged regime requiring notice, consultation and assessment.⁴⁹

An emerging principle that may one day govern the transport of ultra-hazardous materials is the "precautionary principle". This principle requires ocean users to exercise caution, where there is scientific uncertainty. However, the principle, as yet, lacks a defined content, consistency in interpretation and is present mainly in non-binding international instruments, such as the Rio Declaration on Environment and Development and Agenda 21. Nevertheless, some academics argue that the principle lays down specific responsibilities such as undertaking relevant research, developing non-polluting technologies, notifying a

State through which such material shall pass, consulting with such a State to enable precautions to be taken and avoiding activities that present uncertain risks to the marine environment.⁵⁰

(c) Ship Reporting Systems and Vessel Monitoring Systems

Another emerging issue is whether a coastal State can mandate either a Ship Reporting System (SRS) or Vessel Monitoring System (VMS) in the territorial sea and international straits. Regulation V/8-1⁵¹ adopted under the Safety of Life at Sea Convention authorises the IMO to adopt SRSs. The wording of this Regulation mimics that of Regulation V/8,⁵² which requires IMO approval for mandatory routing systems (though it is doubtful that this Resolution intended to modify the Convention regime, where the final decision rests with the State).⁵³ Since coastal State jurisdiction with regard to the regulation of maritime traffic is explicitly recognised under the LOSC. The identity of texts may imply unilateral rights over SRSs. Regulation V/8-2⁵⁴ allows for Vessel Traffic Systems (VTSs) to be mandatory only in the territorial sea, and do not require IMO approval.⁵⁵ It has also been argued that a VMS or SRS is justified by the provisions of the LOSC defining the term *innocent passage*, as a monitoring system would enable a coastal state to ensure compliance with these provisions.⁵⁶ However, some doubt exists as to whether coastal States can unilaterally impose and enforce such systems within the territorial sea.⁵⁷

AAMR State Practice with Respect to the Territorial Sea

This section provides an overview of current AAMR State practice with respect to different elements of the innocent passage regime discussed above. The areas covered are:

- The extent of specific recognition of the right of innocent passage in legislation.
- Non-conforming provisions asserting control or prohibition rights over innocent passage.
- Claims to regulate passage by warships.
- Claims to regulate passage by vessels with hazardous, ultrahazardous or radioactive cargoes.

Table 5: Innocent Passage in National Legislation in the AAMR

| State | Innocent Passage in Legislation |
|------------------|---|
| Bangladesh | Simply recognises innocent passage |
| Fiji | Simply recognises innocent passage |
| Indonesia | Restates LOSC provisions |
| Kiribati | Simply recognises innocent passage |
| Marshall Islands | Simply recognises innocent passage |
| Myanmar | Convention on the Territorial Sea and Contiguous Zone |
| Solomon Islands | Simply recognises innocent passage |
| South Korea | Restates LOSC provisions |
| Sri Lanka | Relies on the text of the Convention on the Territorial Sea and Contiguous Zone |
| Thailand | Simply recognises innocent passage |
| Tuvalu | Simply recognises innocent passage |
| United States | Simply recognises innocent passage |
| Vanuatu | Simply recognises innocent passage |

Table 6 Non-conforming Territorial Sea provisions in the AAMR

| State | Enforcement Power Claimed |
|--------------------|---|
| Bangladesh | General enforcement power over ships in <i>innocent passage</i> and <i>non-innocent passage</i> . |
| Canada | Specific power of enforcement over innocent passage including diversion. |
| China | Enforcement right over <i>non-innocent passage</i> , including diversion (Territorial Sea Law art 10) |
| Russian Federation | Specific power of enforcement over <i>innocent passage</i> including diversion. |
| South Korea | Specific power over <i>non-innocent passage</i> , not including diversion. |

| | |
|---------------|---|
| Sri Lanka | Specific power over <i>non-innocent passage</i> , not including diversion. |
| South Africa | Specific power of enforcement over <i>non-innocent passage</i> , not including diversion. |
| United States | Specific power of enforcement over <i>innocent passage</i> , including diversion. |

Table 7: Innocent Passage of Warships: Non-Conforming State Practice in the AAMR⁵⁸

| State | State Practice for Restrictions on Passage | Protest |
|-------------|--|---------------|
| Bangladesh | Requires prior authorisation | United States |
| Cambodia | Requires prior authorisation | United States |
| China | Requires prior authorisation | United States |
| India | Requires prior notification | United States |
| Indonesia | Requires prior notification | United States |
| Myanmar | Requires prior authorisation | United States |
| Philippines | Requires prior authorisation | United States |
| Sri Lanka | Requires prior authorisation | United States |
| Taiwan | Requires prior notification | |
| Vietnam | Requires prior authorisation | United States |

Table 8: State Practice with Regard to Rights over Ships Carrying Hazardous Cargoes in the Asia-Pacific/Indian Ocean Regions⁵⁹

| State | Action Regarding Hazardous Substances |
|--------------------|--|
| Canada | Claims right of prior notification |
| Malaysia | Claims right of prior authorisation |
| Philippines | Prohibits such cargoes |
| Russian Federation | Opposes both notification and authorisation with respect to such cargoes |
| Thailand | Opposes both notification and authorisation with respect to such cargoes |
| United States | Opposes both notification and authorisation with respect to such cargoes |
| Japan | Opposes both notification and authorisation with respect to such cargoes |

Transit Passage through Straits Used for International Navigation

The LOSC establishes a *sui generis* regime of *transit passage* for straits used for international navigation.⁶⁰ Straits used for international navigation subject to the regime of transit passage are those that connect one part of the high seas or EEZ with another part of the high seas or EEZ.⁶¹ This regime is not applicable to straits that have a high sea or EEZ corridor or straits governed by long term agreements.

“Transit passage” is defined as:

The exercise in accordance with this Part (Part III) of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.⁶²

The most important aspect of the transit passage regime for maritime States is that it is non-suspensible.⁶³ In contrast with *innocent passage*, it also provides a right of overflight.⁶⁴ Straits used for international

navigation are of significant strategic importance in the AAMR. The Straits of Malacca, Singapore and Ombai-Wetar, provide the critical link with the Pacific.⁶⁵

One key ongoing problem with regards to the *transit passage* regime through straits used for international navigation is the scope of “routes of similar convenience;” Under the LOSC, the regime of *transit passage* does not apply where there is a route through the high seas or through an EEZ in a strait that contains similar convenience in respect of navigational and hydrographical characteristics.⁶⁶ *Freedom of navigation* exists in the middle of such a strait. Ships entering the territorial sea within such a strait are subject to the legal regime of *innocent passage*.⁶⁷ As the maximum width of the territorial sea is 12 nm, such a strait would need to be greater than 24 nm to permit *freedom of navigation*.

Of 256 international straits, 60 have such a width. In the Asian region, the Formosa Strait between China and Taiwan is an example of such a strait.⁶⁸ 52 straits have a breadth of less than 6 nm. As no State claims a territorial sea of less than 3 nm, these straits have no high seas passage.⁶⁹ 53 Straits are between 6 and 24 nm. Although most of these straits are overlapped by territorial seas, some coastal states claim a territorial sea breadth of less than 12 nm such that there still exists a high seas/EEZ route. In the Asian region, such straits include:⁷⁰

- Korea (Tsushima) Strait, West: South Korea/Japan – route 7 nm wide.
- Osumi-kaikyo: Japan – route 11 nm wide.
- Soya-kaikyo (La Perouse Strait): Japan/Sakhalin – Former USSR – route 7.7 nm wide.
- Tsugaru-kaikyo: Japan – route 4 nautical miles wide.

It appears, however, that no routes of ‘similar convenience’ exist in these straits to which this provision could apply.⁷¹ Furthermore, the LOSC provides no criteria for determining what navigational and hydrographical characteristics should be used.⁷² There is also no minimum width for an alternative route.⁷³ The IMO may play a crucial role in resolving these issues.⁷⁴

Archipelagic Sea Lanes Passage

The legal entity of an archipelagic state and the legal regime of *archipelagic sea lanes passage* (ASLP) constitute important innovations under the LOSC.⁷⁵ The LOSC allows an archipelagic state to draw strait

baselines around the outermost islands of the archipelago, including the main islands of the archipelago. The ratio of the area of water to the area of land must be between 1:1 and 9:1.⁷⁶ An archipelagic State has sovereignty over its archipelagic waters that 'extends to the air space over the archipelagic waters as well as the subsoil and the resources contained therein'.⁷⁷ Seven of the 14 states of the world claiming archipelagic status (Indonesia, the Philippines, Kiribati, Papua New Guinea, Solomon Islands, Tuvalu and Vanuatu), and one of the potential claimants (Tonga), are situated in the AAMR.⁷⁸

This definition of an archipelagic State is unlikely to crystallize into customary international law as it is not 'of a fundamentally norm creating character such as could be regarded as forming the basis of a general rule of law'.⁷⁹ The definition is an idiosyncratic measurement with no basis in history or doctrine, in contrast to the 12 nm territorial sea, which has historical antecedents and widespread representative participation in its creation.⁸⁰ However, it may be the case that widespread designation, use of and acquiescence to designated archipelagic sea lanes may see the crystallization of archipelagic sea lanes passage into customary international law, without a customary definition of an archipelago.⁸¹

There are interpretational issues in relation to the archipelagic states regime. Archipelagic States - particularly Indonesia and the Philippines - consider their archipelagic waters to have a status more sovereign than territorial waters. The Philippines claims them as internal waters.⁸² However, maritime States emphasise the freedom of navigation aspects of the archipelagic regime.⁸³

Under the LOSC, the Archipelagic State may designate sea-lanes and air routes suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters or adjacent territorial sea.⁸⁴ Such lanes are to be 'defined by a series of continuous axis lines' from entry to exit,⁸⁵ require the approval of a 'competent international organisation'⁸⁶ and should 'include all normal routes used as routes for international navigation or overflight'.⁸⁷

Archipelagic sea-lanes passage (ASLP) is defined as the right of navigation or overflight 'between one part of the high seas or exclusive economic zone and another part of the high seas or exclusive economic zone'.⁸⁸ Article 54 of the LOSC incorporates arts 39, 40, 42 and 44 of the *transit passage* regime into the ASLP regime. Use of the designated sea-lanes is mandatory for the use of ASLP, although when no such lanes

have been promulgated, ASLP can still be utilised 'through routes normally used for international navigation',⁸⁹ and archipelagic states can designate traffic separation schemes.⁹⁰ Therefore, Archipelagic States may not suspend or hamper ASLP, in contrast to *innocent passage*.⁹¹

Ships or aircraft exercising ASLP must 'operate in the normal mode solely for the purpose of continuous, expeditious and unobstructed passage' and not 'deviate more than 25 nautical miles off the axis lines'.⁹²

The fact that passage is allowed 'in the normal mode' has been regarded as of particular significance for warships as it allows them to conduct manoeuvres, carry out flying operations and, for submarines, conduct submerged transit.⁹³ However, the fact that the phrase 'normal mode' is qualified by '*solely* for the purpose of continuous, expeditious and unobstructed passage' (emphasis added) indicates that there are some limits to the extent to which such activities can be undertaken.

Aircraft enjoy the right of overflight through all normal routes that traverse the archipelago, unless sea-lanes have been designated, when overflight is restricted to routes above the sea-lanes.⁹⁴

Concerns over the risks to the marine environment posed by shipping and increased shipping traffic in the Asian region are likely to lead to more extensive regulation at both the international and national levels. One probable result of this is that the freedom of navigation through international straits and archipelagic waters is likely to become more restricted as coastal States seek to extend their control over adjacent waters on environmental grounds.⁹⁵

Freedom of Navigation and the Exclusive Economic Zone

The Exclusive Economic Zone (EEZ) represents one of the major modifications of the freedom of the seas brought about by the LOSC. This remains a developing area since. Although the concept of an EEZ is now recognised as customary international law, the content of the rights and duties associated with an EEZ have not yet crystallized into custom, as many States claim powers beyond or different to those contained in the relevant provisions of the LOSC.⁹⁶

The EEZ gives a coastal State 'jurisdiction' to protect and preserve the marine environment, regulate marine scientific research and oversee artificial islands and installations. It also gives the coastal State 'sovereign rights' for the purpose of economic exploration and

exploitation of the resources of the zone. Despite these ostensible limitations on coastal State jurisdiction, some States claim rights beyond this, including prohibiting foreign military uses of the sea.

The EEZ cannot extend beyond 200 nautical miles from the baselines used to measure the territorial sea. The EEZ, thus, subjects a vast area of what previously constituted the high seas to some form of coastal State jurisdiction, and removes the freedoms to fish and conduct scientific research previously granted under the 1958 Conventions.

The EEZ regime ostensibly preserves many aspects of the freedom of the seas by preserving 'the freedoms referred to in article 87, of navigation and over-flight and of the laying of submarine cables and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines and compatible with other provisions of this Convention.'⁹⁷ Where rights are not allocated, any conflict is to 'be resolved on the basis of equity in light of all the relevant circumstances, taking into account the respective importance of the interests of the parties involved as well as to the international community as a whole'.⁹⁸

Rights for naval exercises in the EEZ are not specifically allocated under the LOSC. Some states argue that military uses of the EEZ by foreign states is prohibited by Article 58(1) as they are either incompatible with the reservation of the high seas for peaceful purposes, or not 'lawful uses' of the sea.⁹⁹ Certainly in times of high tensions, naval exercises may be characterised as a threat of the use of force under UN Charter art 29(4) and the LOSC art 301.¹⁰⁰ The allocation question may have to be resolved using the Article 59 principles stated above.

In relation to non-navigation uses of the sea, the freedom of the seas is reduced in the EEZ in that a coastal State is given exclusive jurisdiction for the construction of artificial islands and installations and structures concerned solely with resource, marine scientific research or environmental purposes, or if such structures may interfere with the exercise of the rights of the coastal State in its EEZ. However, this does not necessarily prohibit the construction of military installations or devices, unrelated to the environment, resources or research.¹⁰¹

Navigation on the High Seas

The concept of freedom of the high seas was one of the foundation stones of international law. It is based on the perceived characteristics of ocean space as indivisible and available. With the exception of a narrow belt of territorial sea close to a coastal State, it was impracticable for a State to claim or hold vast expanses of ocean territory. Similarly, until recently, the main uses of the ocean were fishing and navigation, neither of which had an adverse impact on uses of the ocean by other States, largely due to technological limitations. From the twin premises of indivisibility and availability, two conclusions followed: first, the oceans must not be appropriated; second, they should be freely accessible. These conclusions are the foundation of the 'freedom of the seas', which basically allowed any State free access to or use of the seas, especially for navigation, providing such use did not adversely impinge on the rights of others.

However, technological advance. The growth of populations, national and international environmental consciousness and consequential pressure on food and energy and intensified nationalism of countries have brought about substantial changes in how the seas are regulated. Resulting in reductions to the premise of freedom of the seas – and an increasing reliance on regulation by coastal States, and trends, in some geographical and subject matter areas, to international regulation of ocean spaces.

Prior to the 1982 LOSC, the most significant instruments defining the extent of freedom of the seas were the four 1958 Geneva Conventions¹⁰² – which were largely reflective of customary international law. Under the 1958 regime, the high seas are the paradigm for the freedom of the seas. No state may validly purport to subject any part of them to sovereignty (indivisibility) and the freedom of the high seas can be exercised by all States (accessibility).¹⁰³ The Convention on the High Seas lists four freedoms in a non-exhaustive list of the activities that comprise the 'freedom of the high seas':

- Freedom of navigation.
- Freedom of fishing.
- Freedom of laying submarine cables and pipelines.
- Freedom to fly over the high seas.

These freedoms are not unlimited, but must be 'exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas'. The determination as to whether an activity can be categorised as a freedom of the high seas essentially requires a judgment as to whether a) it involves an attempt to subject part of the seas to sovereignty and b) whether it is exercisable with reasonable regard to other users.¹⁰⁴

The Convention on the High Seas contains the beginning of limitations on the freedom of the high seas in relation to pollution, including provisions requiring national regulation to prevent the pollution of the seas by oil and by radioactive waste, radioactive materials and other harmful agents.¹⁰⁵ The trend on limiting environmental damage from the exercise of high seas freedoms is also evidenced by the Convention on Fishing and Conservation of the Living Resources of the High Seas, which imposes limitations on the freedom of the high seas to fish by requiring States to adopt measures to conserve living resources.¹⁰⁶

The LOSC substantially curtailed the traditional concept of freedom of the seas as a result of the impact of the various zones of jurisdiction created under the LOSC. Part VII of the LOSC continues the tradition of the high seas; however, the list of high seas freedoms is more extensive than under the 1958 Convention on the High Seas. According to Article 87 of the LOSC, the freedom of the high seas include:

- Freedom of Navigation.
- Freedom of overflight.
- Freedom to lay submarine cables and pipelines (subject to Part VI).
- Freedom to construct artificial islands and other installations (subject to Part VI).
- Freedom of fishing.
- Freedom of scientific research (subject to Part VI and XIII).

Again, no part of the high seas can be subjected to sovereignty and the freedoms must be exercised with due regard to other States in the exercise of their freedoms.¹⁰⁷ However, these high seas freedoms are attenuated by the fact that the area of high seas is greatly reduced due to the creation of the EEZs, the expansion of the territorial sea and the creation of archipelagic waters, all of which are outside the high seas.¹⁰⁸ This has effectively subtracted about 40% of ocean space from the high

seas as defined under the 1958 Convention on the High Seas.¹⁰⁹ The LOSC's provisions on fishing and pollution control also represent new restrictions on what activities are free from control on the high seas.¹¹⁰

The LOSC purports to reserve the high seas 'for peaceful purposes' and also prohibits the threat or use of force against the territorial integrity or political independence of any state.¹¹¹ This raises the question as to whether military uses of the sea, previously encompassed within the freedom of the high seas, are now prohibited. The logical and realistic interpretation, however, is that these articles merely reiterate the customary prohibition on the use of force contained in art 2(4) of the UN Charter.

The LOSC accepts military activities at sea as a normal fact of life.¹¹² The existence of warships is accepted and they are granted privileged status. Military activities are listed among those constituted as 'non-innocent' – implying that such activities are lawful outside the territorial sea. Finally, there is an optional exclusion from compulsory judicial settlement of disputes involving military activities.¹¹³

In addition to the impact of the various zones of jurisdiction recognised by the LOSC, special mention needs to be made of the environment as an area of international law having a strong impact on navigation through the various maritime zones of jurisdiction. The concern for the environment has resulted in other conventions, including the *International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties*, the *Convention on the Prevention of Pollution from Ships* and the *London Dumping Convention*. Part XII of the LOSC also contains extensive provisions on the marine environment. While many of these conventions create an 'enclave' for military uses of the sea, exempting them from the application of the provisions (eg LOSC art 236), this 'enclave' status may be under threat. There are certainly 'civil society' pressures for military uses of the sea to come under regulation, and this is spilling over into State backed pressure.

PART III

LONG TERM PRESSURES ON THE FREEDOM OF NAVIGATION REGIME

Taking into account the complex interplay amongst the relevant players and forces, the analysis presented here isolates five broad types of pressure as having significance for the LOSC regime.

1. Excessive Maritime Claims and Practices

As already discussed, this category of pressure takes the form of legislative and other forms of State practice associated with sovereign authority. To the extent that it constitutes a pressure on the LOSC regime, it typically takes the form of claims to jurisdiction or actual governmental practices, which deviate from, go beyond or "exceed" the norms set out in the Convention text. There is no indication that it will cease any time soon.

Excessive maritime claims can be categorised as follows:

- creeping jurisdiction over 'old' resources - oil, fisheries etc.;
- creeping jurisdiction over 'new' resources - energy from the sea, marine bio-technology, marine bio-prospecting;
- thickened jurisdiction – eg. increased management of navigation by techniques which are de-facto forms of notification and prior approval - vessel traffic management schemes GPS, satellites etc.;
- formalistic responses by technologically and economically marginalised States to the widening gaps between themselves and the limited number of States which have ever-increasing technological and economic capacities.

In many cases, such pressures and claims represent efforts to re-assert positions taken in the Third Law of the Sea (UNCLOS III) negotiations but ultimately found unacceptable. Such pressures and claims may acquire validity in the absence of counter - claim and protest by interested States.

It is difficult to make accurate predictions of future trends with respect to these categories of excessive claim. However, it is possible to make some projections on future trends using historical information. The historical information that is probably of most use in this regard is information on positions taken by States during the UNCLOS process. Where the

positions taken during the UNCLOS negotiations reflected the fundamental interests of the States concerned, such information is arguably a useful, though not fully conclusive indicator of likely challenges to the current regime when analysed with other pertinent information.

2. Cumulative Changes Wrought by Progressive Development of the Law of the Sea

Progressive development of the law of the sea has an impact on the navigation regime principally through (1) efforts to fill in gaps in the regime; (2) use of the international dispute settlement system. In contrast to pressure arising from "excessive" claims, this type of pressure is legitimate and is indeed required by the Convention given that the LOSC is no more than a framework treaty. Cumulative change of this sort in fact provides an excellent example of what is known in international law theory as "the progressive development of international law". Given that the work of the relevant organisations is incremental, cumulative, decentralised and often uncoordinated, activity of this type deserves attention as an easily overlooked source of unanticipated change.

The various international organisations active in marine affairs lead much of this effort on the basis of their official mandates under general international law and in many cases, in accordance with mandates set out in the Convention text. It will be recalled in this regard that the LOSC, in many cases, requires that "competent international organisations" further address key matters in the Convention. Other sources of progressive development and "gap-filling" are regional integration organisations and marine regional organisations. Regional approaches are a legitimate driver of the evolution of the law of the sea since in many cases, the region (however defined) provides the most appropriate scale for action on marine issues. The last five years have seen various regional organisations addressing the LOSC regime in a more detailed way in accordance with their specific regional circumstances.

Despite the importance and legitimacy of these efforts, the key issue is that these developments have the *potential* to precipitate unsatisfactory change in the LOSC regime, where "fleshing out" the Convention has the effect of altering the original and delicate balance of rights and duties set out in the text and agreed on a consensual basis during the negotiations. Incremental and cumulative change which destabilises the Convention

regime may occur (1) because of the decentralised and uncoordinated character of international organisation activity and/or (2) because the technical characteristics of a particular issue leads to implementation measures which impose pressure on other aspects of the LOSC regime.

Although it is difficult to accurately chart the extent to which cumulative change is impacting on the original regime, some areas where significant progressive development has occurred is with respect to (a) implementing the LOSC regime in a more detailed way (eg. Port State control regimes); and (b) identifying and filling gaps in ancillary regimes - (eg. liability and compensation; controls over immigration, piracy and drugs).

3. Pressures due to cultural shifts, changes in international public opinion and the enhanced influence of civil-society actors

This type of pressure clearly has a long range/long-term character and influences both States and international organisations in unpredictable ways. The principal conduit for these diffuse pressures is the internationally active non-governmental organizations (NGOs), with some degree of support from sympathetic governments, international organisations and the mass media. Whilst most pressure on navigational rules comes from NGOs with an explicit maritime agenda (for eg. Greenpeace and WWF) the influence of NGOs active in other arenas (eg human rights NGOs, animal welfare NGOs, trade and development NGOs) should not be overlooked as these groups also contribute to the overall process of norm change in international law generally.

An excellent example of this type of pressure is the heightened and generalised public concern in all countries with regard to the ecological health of the oceans. In legal and political terms this is evidenced in the growing calls for the application of the precautionary principle to all uses of the sea.

There are fundamental changes in the structure of the international system, which support these cultural shifts and heighten their impact on the original LOSC regime. Such changed factors include:

- Shifts in the overall architecture of international relations & international law leading to enhanced roles, legitimacy and autonomy for non-State actors (public interest NGOs, corporates, and the global mass media – eg. CNN; BBC World)

- A specific and concrete enhancement of the immediate and long-term significance of environmental NGOs such as Greenpeace and WWF-International)
- A more diffuse enhancement of the legitimacy of NGOs concerned with humanitarian issues, development assistance and human rights (eg. the Red Cross, Medicin Sans Frontieres, Oxfam, Amnesty International, Human Rights Watch)
- The interactive role of these NGOs with the global mass media.

4. "At-sea" operations by political insurgents, terrorist groups and organised criminal gangs

The last decade has seen various non-State actors with political, religious, quasi-criminal and fully criminal agendas extend their activities to the near-shore and in some cases the high seas itself. The spectrum of activities engaged in by these groups ranges from piracy through to small-scale organised naval action against recognised governmental authorities. There has recently been one "at-sea" incident involving suicide attacks on an oil tanker off Sri Lanka. The scope and scale of activities by such groups may be quite extensive in situations where the recognised governmental authorities are weak or the particular State is undergoing internal stress. However, even well organised and fully functioning States may not be immune from "at-sea" actions especially of the suicidal type. An area of particular concern in this regard is the carriage of highly hazardous cargoes, including radioactive cargoes and also nuclear-powered vessels or vessels with nuclear armaments. In the AAMR, "at-sea" activity with military or terroristic intent appears to be a central feature of activities by groups such as the Liberation Tigers of Tamil Eelam (LTTE) and the Abu Sayyaf terrorist group.

Organised criminal activity is also rife in the AAMR and is principally focused on smuggling (eg. drugs, illegal migrants, arms). However such actions now involve sophisticated operations by fleets of boats run in a professional manner and utilising the latest technologies and innovations. As a consequence of activity by organised "people-smuggling" groups, Australia's regime of border protection and control has already undergone significant change. Significant uncertainty has also been generated with respect to Australia's subscription to the rules of emergency rescue at sea, where such rules can be used to subvert Australian sovereignty and border protection requirements. The

trajectory of these developments in "at-sea" activity cannot be easily charted. However there is much room for concern with respect to these actions. Enhanced rights of search and increased transparency requirements may well be a legitimate response to this problem, which alters the balance of high seas freedoms in favour of Coastal States, Port States and other adjacent States. Flag States may also be called upon to undertake more vigorous long-distance enforcement of their responsibilities.

5. Pressures driven and supported by technological developments

This category of pressure is driven principally by: (a) the high pace of innovation in the telecommunications and information technology sectors; (b) the extent to which key technologies advance intensive supervision, surveillance and management of ocean spaces; (c) the speed with which such technologies can be commercialised.

Key technologies, which have a particular impact on navigation, include satellite-based vessel monitoring systems (VMS); voyage data recorders (VDR) and Automatic identification systems (AIS). These technologies pose a fundamental challenge to the freedom of the seas principle in that interested States as well as regional associations of States (coastal States; Port States; Flag States) can now control the use of the seas much more intensively than before.

More generally, an assessment of pressure on the LOSC navigational regime arising from technological developments can usefully differentiate between the following drivers although in practice, they are interlinked: (a) the information technology revolution, (b) the revolution in shipping technologies; (c) the impact of the so-called Revolution in Military Affairs (RMA). Considerations of space only allow a brief mention of key features of these pressure types.

Information technology

Those aspects to do with the information technology revolution and its long-range effects can be summarised as follows:

- Computerisation and data fusion, especially with respect to shipping management (ports, customs, financial transactions) and shipping database information (location data, cargo, passage data);
- Increased transparency of shipping at sea including potential vulnerability to cyber-attack and locating data for physical attack

- Enhanced capabilities and roles for Port State Control and Enforcement under the LOSC and other conventions with likely impacts on current LOSC consensus on freedom of navigation

Shipping Technologies

The revolution in shipping technologies is interlinked with the information technology revolution and has many features with long-range effects. Key areas of change with respect to ship type (eg. large cruise ships, high-speed ships and double-hulled ships) are good examples of innovations with the potential to change the current regime. Together with the spread of automation and the principle of minimal staffing of ships, there are significant foreseeable impacts on environmental catastrophes, piracy, interdiction and a range of other matters.

The Revolution in Military Affairs

RMA aspects with impact on law of the sea rules include the increasing deployment of wide area, space-based, airborne, ground and sea-based sensors with the networking of these systems to make air, surface and sub-surface environments more transparent. The power implicit in these systems and the fact that they are available only to a few States will encourage other States to become more strident in defensive assertions of creeping and thickened jurisdiction. Legal claims of right will thus be made as a response to objective weakness.

FREEDOM OF NAVIGATION: LOOKING AHEAD

The review presented above indicates that the freedom of navigation regime in the Convention is under significant multiform pressure. Whilst excessive maritime claims are often focused on as the principal source of pressure, such claims are probably manageable sources of pressure on the current regime. It is arguably the less visible and less predictable long-term pressures, which are likely to impact more decisively on the framework of rules over the next 30 years. In this respect, areas where more analytical work would be useful include:

- diffuse pressures on the navigation regime based on shifts in social and cultural attitudes.
- trends in activity by the relevant international organisations.
- the impact of technological pressures.

- pressures to alter the balance of high seas freedoms to help counter terrorist and insurgent threats.
- pressures to alter the balance of high seas freedoms to address environmental and conservation concerns.

Notes

- ¹ Paul Dibb, Review of Australia's defence capabilities – A report to the Minister of Defence, AGPS, (1986).
- ² See Appendix in R. Swinterton and D. Ball, 'A Regional Regime for Maritime Surveillance and Information Exchanges' (September-October 1994) *Maritime Studies* 1, 16.
- ³ S. Bateman, 'Economic Growth, Marine Resources and Naval Arms in East Asia – A Deadly Triangle' (1996) 22 *Marine Policy* 297, 302.
- ⁴ *Anglo-Norwegian Fisheries Case* [1951] ICJ Rep 116.
- ⁵ LOSC art 5.
- ⁶ LOSC, art 7. Convention on the Territorial Sea and Contiguous Zone art 4(1); See also *Anglo-Norwegian Fisheries Case* [1951] ICJ Rep 116, 128-9.
- ⁷ J. Roach and R. Smith, *United States Responses to Excessive Maritime Claims* (1994) 13.
- ⁸ J. Roach and R. Smith, 'Straight Baselines: The Need for a Universally Applied Norm' (2000) 31 *Ocean Development and International Law* 48.
- ⁹ Churchill and Lowe, *The Law of the Sea* (1988) 46-47.
- ¹⁰ Roach and Smith, 2000, *supra*. n. 8, 47.
- ¹¹ I. Shearer, 'Navigation Issues in the Asian Pacific Region' in J. Crawford and D. Rothwell (eds), *The Law of the Sea in the Asian Pacific Region* (1995) 199, 208.
- ¹² Roach and Smith, 1994, *supra*. n. 7 23-34; I. Shearer, 'Navigation Issues in the Asian Pacific Region' *supra*. n. 11, 208.
- ¹³ Roach and Smith, 1994, *supra*. n. 7 23-34; I. Shearer, 'Navigation Issues in the Asian Pacific Region', *supra*. n. 11, 208.
- ¹⁴ LOSC art 17.
- ¹⁵ LOSC art 18.
- ¹⁶ LOSC art 19.
- ¹⁷ LOSC art 19(2).
- ¹⁸ LOSC art 24(1).
- ¹⁹ LOSC art 21(1).
- ²⁰ LOSC art 21(4); Convention on the Territorial Sea and Contiguous Zone art 17.
- ²¹ LOSC art 21(2).
- ²² LOSC art 211(6).
- ²³ K. Hakapaa and E. J. Molenaar 'Innocent passage – past and present' (1999) 23 *Marine Policy* 131, 138.
- ²⁴ K. Hakapaa and E. J. Molenaar 'Innocent passage – past and present' *supra*, n. 23, 135.

- ²⁵ LOSC arts 27 (Criminal) and 28 (Civil); Convention on the Territorial Sea and Contiguous Zone arts 19(1) (Criminal) and 20 (Civil).
- ²⁶ D. Rothwell, 'The Mururoa Exclusion Zone' (July-August 1995) *Maritime Studies* 12, 13.
- ²⁷ K. Hakapaa and E. J. Molenaar 'Innocent passage – past and present' *supra*, n. 23, 136-137.
- ²⁸ LOSC art 25(3).
- ²⁹ D. Rothwell, 'The Mururoa Exclusion Zone' *supra*, n. 26, 14.
- ³⁰ D. Rothwell, 'The Mururoa Exclusion Zone' *supra*, n. 26, 14.
- ³¹ D. Rothwell, 'The Mururoa Exclusion Zone' *supra*, n. 26, 14.
- ³² D. Rothwell, 'The Mururoa Exclusion Zone' *supra*, n. 26, 14.
- ³³ K. Hakapaa and E. J. Molenaar 'Innocent passage – past and present' *supra*, n. 23, 134.
- ³⁴ Roach and Smith, 1994, *supra*, n. 7 143-163.
- ³⁵ M. Herriman, 'China's Territorial Sea Law and International Law of the Sea' *Maritime Studies* (January-February 1997) 17-18.
- ³⁶ For example, Italy's declaration, Statements by the UK, France and Federal Republic of Germany at UNCLOS III as cited in K. and E. J. Molenaar 'Innocent passage – past and present, *supra*, n. 23, 138.
- ³⁷ M. Herriman, 'China's Territorial Sea Law and International Law of the Sea', *supra*, n. 35, 18.
- ³⁸ Z. Keyuan, 'Innocent Passage for Warships: The Chinese Doctrine and Practice' (1998) 29 *Ocean Development and International Law* 195, 204.
- ³⁹ LOSC art 24(1) and also K. Hakapaa and E. J. Molenaar 'Innocent passage – past and present', *supra*, n. 23, 138.
- ⁴⁰ Convention on the Territorial Sea and Contiguous Zone arts 14(2) and 23; LOSC arts 20, 30; See also Z. Keyuan, 'Innocent Passage for Warships: The Chinese Doctrine and Practice', *supra*. n. 38, 204.
- ⁴¹ Z. Keyuan, 'Innocent Passage for Warships: The Chinese Doctrine and Practice', *supra*. n. 38, 210.
- ⁴² Relevant treaties are: International Convention for the Safety of Life at Sea (1974); International Convention for the Prevention of Pollution from Ships (1973) as modified by the Protocol of 1978; International Maritime Dangerous Goods Code; International Convention on Civil Liability for Oil Pollution Damage (1992); International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992); International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances (1996); Convention Relating to Civil Liability in the Field of Maritime Carriage for Nuclear Material (1971).
- ⁴³ I. Shearer, 'Navigation Issues in the Asian Pacific Region', *supra*. n. 11, 221.

- ⁴⁴ LOSC arts 22(2) and 23: I. Shearer, 'Navigation Issues in the Asian Pacific Region', supra, n. 11, 221.
- ⁴⁵ K. Hakapaa and E. J. Molenaar 'Innocent passage – past and present', supra, n. 23, 142.
- ⁴⁶ The following treaties maintain the approach taken under the Basel Convention: Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and Their Disposal (1996), IAEA Code of Practice on the International Movement of Radioactive Waste (1990), European Council Directive, Council Directive 93/75/EEC, 1993 OJ (L 247) 19; Convention for the Protection of the Mediterranean Sea against Pollution (1976) but see also Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (1991), Central American Regional Agreement on the Transboundary Movement of Hazardous Wastes, Convention to Ban the Importation into Forum Island Countries of Hazardous Wastes Within the South Pacific Region (1995).
- ⁴⁷ K. Hakapaa and E. J. Molenaar 'Innocent passage – past and present' supra, n. 23, 142.
- ⁴⁸ J. Van Dyke, 'Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials' (1996) 27 *Ocean Development and International Law* 379, 382.
- ⁴⁹ For example South Africa and Portugal wanted Japan not to transit their EEZs with radioactive materials; Brazil, Argentina, Chile, South Africa, Nauru and Kiribati, Antigua and Barbuda, Colombia, the Dominican Republic, the Federated States of Micronesia, Fiji, Indonesia, the Philippines, Puerto Rico and Uruguay all maintained strong protest against transiting their maritime zones. See further J. Van Dyke, 'Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials' (1996) 27 *Ocean Development and International Law* 379, 387.
- ⁵⁰ J. Van Dyke, 'Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials' 379.
- ⁵¹ IMO Res MSC.31(63).
- ⁵² IMO Res MSC.46(65).
- ⁵³ K. Hakapaa and E. J. Molenaar 'Innocent passage – past and present', supra, n. 23, 133.
- ⁵⁴ IMO Res MSC.65(68).
- ⁵⁵ K. Hakapaa and E. J. Molenaar 'Innocent passage – past and present', supra, n. 23, 134.
- ⁵⁶ J. Knauss and L. Alexander, 'Coastal States' Rights to Monitor Ship Movement' (2000) 31 *Ocean Development & International Law* 377, 379.
- ⁵⁷ K. Hakapaa and E. J. Molenaar 'Innocent passage – past and present', supra, n. 23, 134.

- ⁵⁸ K. Hakapaa and E. J. Molenaar 'Innocent passage – past and present', supra, n. 23, 143.
- ⁵⁹ K. Hakapaa and E. J. Molenaar 'Innocent passage – past and present', supra, n. 23, 142.
- ⁶⁰ LOSC Part III (arts 34-45).
- ⁶¹ LOSC art 37.
- ⁶² LOSC art 38(2).
- ⁶³ G. Priestnall, 'The Regime of Archipelagic Sea Lanes Passage and Strait's Transit Passage – Similarities and Differences' (September-October 1997) *Maritime Studies* 1, 4.
- ⁶⁴ F. Talaie, 'Analysis of the Provisions of the LOS on the Exceptions to the Right of Transit Passage through International Straits and Related Issues' (May-June 1998) *Maritime Studies* 15, 15.
- ⁶⁵ R. Roy-Chaudhury 'Maritime Security in the Indian Ocean Region' (September-October 1996) *Maritime Studies* 1, 1.
- ⁶⁶ LOSC art 36.
- ⁶⁷ LOSC art 36.
- ⁶⁸ F. Talaie, 'Analysis of the Provisions of the LOS on the Exceptions to the Right of Transit Passage through International Straits and Related Issues', 16-17
- ⁶⁹ F. Talaie, 'Exceptions to the Right of Transit Passage through International Straits and Related Issues', supra, n. 68, 17.
- ⁷⁰ F. Talaie, 'Exceptions to the Right of Transit Passage through International Straits and Related Issues' supra, n. 68, 17.
- ⁷¹ F. Talaie, 'Exceptions to the Right of Transit Passage through International Straits and Related Issues', supra, n. 68, 19.
- ⁷² F. Talaie, 'Exceptions to the Right of Transit Passage through International Straits and Related Issues', supra, n. 68, 19.
- ⁷³ F. Talaie, 'Exceptions to the Right of Transit Passage through International Straits and Related Issues', supra, n. 68, 19.
- ⁷⁴ F. Talaie, 'Exceptions to the Right of Transit Passage through International Straits and Related Issues', supra, n. 68, 19.
- ⁷⁵ LOSC Part IV: G Priestnall, 'The Regime of Archipelagic Sea Lanes Passage and Strait's Transit Passage – Similarities and Differences', supra, n. 63, 5.
- ⁷⁶ LOSC art 47.
- ⁷⁷ LOSC art 49.
- ⁷⁸ I. Shearer, 'Navigation Issues in the Asian Pacific Region' supra, n. 11, 199.
- ⁷⁹ *North Sea Continental Shelf Cases* [1969] IUCJ Rep 3, para 72.
- ⁸⁰ I. Shearer, 'Navigation Issues in the Asian Pacific Region', supra, n. 11, 204-205.

- ⁸¹ I. Shearer, 'Navigation Issues in the Asian Pacific Region', *supra*, n. 11, 205.
- ⁸² G. Priestnall, 'The Regime of Archipelagic Sea Lanes Passage and Strait's Transit Passage – Similarities and Differences', *supra*, n. 63, 9.
- ⁸³ G. Priestnall, 'The Regime of Archipelagic Sea Lanes Passage and Strait's Transit Passage – Similarities and Differences', *supra*, n. 63, 9.
- ⁸⁴ LOSC art 53(1).
- ⁸⁵ LOSC art 53(5).
- ⁸⁶ LOSC art 53(9).
- ⁸⁷ LOSC art 53 (4).
- ⁸⁸ LOSC art 53(3).
- ⁸⁹ LOSC art 53(12).
- ⁹⁰ LOSC art 53(6).
- ⁹¹ LOCS art 44 as incorporated by art 54.
- ⁹² LOSC art 53(5).
- ⁹³ G. Priestnall, 'The Regime of Archipelagic Sea Lanes Passage and Strait's Transit Passage – Similarities and Differences', *supra*, n. 63, 7.
- ⁹⁴ LOSC art 53(3).
- ⁹⁵ S. Bateman, 'Regional Efforts for Marine Cooperation – Current Situation and Prospects' (May-June 1999) *Maritime Studies* 10, 21.
- ⁹⁶ B. A. Boczek 'Peacetime Military Activities in the Exclusive Economic Zone of Third Countries' (1988) 19 *Ocean Development and International Law* 445, 446.
- ⁹⁷ LOSC art 58(1).
- ⁹⁸ LOSC art 59.
- ⁹⁹ B. A. Boczek 'Peacetime Military Activities in the Exclusive Economic Zone of Third Countries', *supra*, n. 96, 445.
- ¹⁰⁰ B. A. Boczek 'Peacetime Military Activities in the Exclusive Economic Zone of Third Countries', *supra*, n. 96, 456.
- ¹⁰¹ B. A. Boczek 'Peacetime Military Activities in the Exclusive Economic Zone of Third Countries', *supra*, n. 96, 453.
- ¹⁰² These include: the Convention on the Territorial Sea and Contiguous Zone; the Convention on the Continental Shelf; the Convention on the High Seas and the Convention on Fishing and Conservation of the Living Resources of the High Seas.
- ¹⁰³ Convention on the High Seas art 2.
- ¹⁰⁴ Churchill and Lowe, *The Law of the Sea* (1988), 168.
- ¹⁰⁵ Convention on the High Seas arts 24-25.
- ¹⁰⁶ Convention on Fishing and Conservation of the living Resources of the High Seas art 1.
- ¹⁰⁷ LOSC arts 87-88.

- ¹⁰⁸ LOSC art 86.
- ¹⁰⁹ A. L. Morgan, 'The New Law of the Sea: Rethinking the Implications for Sovereign Jurisdiction and Freedom of Action' (1996) 27 *Ocean Development and International Law* 5, 18.
- ¹¹⁰ A. L. Morgan, 'The New Law of the Sea: Rethinking the Implications for Sovereign Jurisdiction and Freedom of Action', *supra*, n. 109, 19.
- ¹¹¹ LOSC art 88.
- ¹¹² B. A. Boczek 'Peacetime Military Activities in the Exclusive Economic Zone of Third Countries', *supra*, n. 96, 457.
- ¹¹³ LOSC art. 298(1)(b).

