



Council for Security Cooperation in the Asia-Pacific

MEMORANDUM 6

THE PRACTICE OF THE LAW OF THE SEA IN THE ASIA PACIFIC

The practice of the Law of the Sea has significant security implications in the Asia Pacific, particularly in the Western Pacific and East Asia where there are numerous straits used for international navigation, several major archipelagic States and large areas of ocean and sea claimed as exclusive economic zone (EEZ). Some regional States have made declarations and statements on signing, ratifying or acceding to the 1982 UN Convention on the Law of the Sea (UNCLOS) or have introduced subsequent domestic legislation that suggest different positions on particular Law of the Sea issues.¹ Greater clarity and understanding of the Law of the Sea, particularly navigational regimes and the rights and obligations of coastal States in offshore zones, offer potential for maritime confidence and security building measures (MCSBMs).

Many provisions of UNCLOS have confidence-building effects. UNCLOS prescribes procedures for the settlement of maritime disputes by peaceful means. UNCLOS also clarifies the principles for delimiting maritime boundaries between adjacent and opposite States and for establishing the EEZ regime. It reduces the risk of conflict arising from disputes over claims to offshore areas. General acceptance of the navigational regimes in UNCLOS should mean that there is less risk of misunderstanding when warships of one State transit the waters of another.

This memorandum addresses areas of difference in the practice of the Law of the Sea in the Asia Pacific. It facilitates understanding of the different positions of States and is the result of deliberations over several years by the CSCAP Maritime Cooperation Working Group.²

Straight baselines. There is wide variance in State practice regarding the application of the rules on straight baselines for determining the inner limits of the territorial sea. However, there is a common understanding that:

- The normal baseline for measuring the breadth of the territorial sea is the lower water line along the coast as marked on large-scale charts officially recognised by the coastal State;

¹ All CSCAP members have now ratified UNCLOS with the exception of Cambodia, Canada, North Korea, Thailand and the United States. The European community has formally confirmed its participation in UNCLOS. The declarations, and statements made by States on signing, ratifying or acceding to UNCLOS are available at http://www.un.org/depts/los/convention_agreements/convention_declarations.htm

² In 1997 an ASEAN Regional Forum (ARF) Track II Working Group on Preventive Diplomacy referred a paper on the Freedom of Navigation to CSCAP and this memorandum is partly the result of that referral.

- States are permitted to sue straight baseline systems when the conditions set forth in UNCLOS are demonstrably present; and
- Straight baselines for determining the limits of the territorial sea are not the same as archipelagic baselines for enclosing archipelagic waters.

Historic bays. A State may validly claim title to a bay on historic grounds if it can show that it has for a considerable period of time claimed the bay as internal waters and has effectively, openly and continuously exercised its authority therein, and that during this time the claim has received the acquiescence of other States. It is axiomatic that no further claims should be made to historic bays. It is also the case that the legitimacy of historic bay claims that already exist is by no means accepted by all States.

Navigational regimes. Three separate navigational regimes may be distinguished: innocent passage, straits' transit passage and archipelagic sea lanes (ASL) passage. Innocent passage is the most restrictive of these regimes with no associated right of overflight. Some regional States have claims that require advance notification or authorisation for the innocent passage of warships through the territorial sea or archipelagic waters. Other States dispute these on the grounds that innocence of passage is not a matter of type of vessel or cargo. While transit and ASL passage have three fundamental elements in common (i.e. non-suspendability, the right of passage *in the normal mode and the right of overflight*), they are two distinct regimes *sui generis*.

Straits used for international navigation. Straits used for international navigation through the territorial sea between one part of the high seas or an exclusive economic zone and another part of the high seas or an EEZ are subjected to the legal regime of transit passage. The regime of transit passage applies throughout the strait and approaches to and from the strait.

Normal mode of transit. UNCLOS does not define what constitutes the "normal mode" of transit for ASL and straits transit passage. The transit by aircraft of international straits is specifically permitted in UNCLOS and it is accepted that a normal mode of transit for submarines is submerged when operating conditions permit. The normal mode includes deployment of naval and air forces in a manner consistent with the security needs of the forces in transit. However, the nature of tactical activities conducted by ships and aircraft in their normal mode is subject to disagreement. With fishing vessels, the reference to the "normal mode(s)" in Articles 39(1)© and 53(3) of UNCLOS cannot be interpreted as permitting unauthorised fishing while navigating in areas subject to straits' transit or ASL passage.

Archipelagic state issues. UNCLOS Part IV establishes the regime of the archipelagic State that recognises the unique political and historical integrity of some States that are comprised wholly of islands and groups of islands. However, the regime has several "gaps" with regard to defining the extent of jurisdiction that archipelagic States can exercise within their archipelagic waters. For the purpose of coastal State jurisdiction over vessel-source pollution and marine scientific research, references to the territorial sea in Part XII and Part XIII of UNCLOS should be read to include archipelagic waters. The cooperation of user States whose vessels are engaged in passage through archipelagic waters is important for the effective management of archipelagic waters.

Rights and duties within EEZs. An area of disagreement relates to the ability of a coastal State to introduce regulations that have the effect of restricting or denying freedoms of navigation and overflight in all or part of its EEZ. Subject to the resource-related rights and environmental protection obligations of the coastal State, the freedoms of navigation and overflight in the EEZ, or above the continental shelf where it extends beyond 200 miles, are the same as those on the high seas. Some countries argue that they may legitimately

establish security zones that extend into the EEZ, and/or have placed restrictions on the type of cargo that might be carried in the EEZ, and/or have claimed that other States are not authorised to carry out military exercises or manoeuvres in the EEZ without the consent of the coastal State. Authority to impose these restrictions is not generally accepted.

EEZ and continental shelf boundaries. The EEZ and continental shelf regimes are separate. The limits of the EEZ are not affected by geological and geomorphological conditions while the continental shelf regime is intended for the seabed area and this is affected by geological and geomorphological conditions.

Regime of islands. Whether or not a particular piece of land is an Island is important both in establishing the extent of national jurisdiction offshore and in maritime boundary negotiations between adjacent or opposite States. UNCLOS Article 121 defines an island as “a naturally formed area of land, surrounded by water, which is above water at high tide”. A rock is a category of island but a rock that cannot sustain human habitation or economic life of its own cannot generate an EEZ or continental shelf although it might generate a territorial sea. Artificial islands, man-made installations or structures, although above water at high tide, cannot be regarded as islands, and therefore cannot have a territorial seas, EEZ or continental shelf.

Enclosed and semi-enclosed seas. The regime of enclosed or semi-enclosed seas, established by UNCLOS Part IX, is particularly important in East Asia where there are many such seas. This regime has considerable potential for helping to mould cooperative efforts for the management of regional seas and their resources. Littoral States of a semi-enclosed sea are required to cooperate with one another more closely than would otherwise be the case with coastal neighbours.

Marine scientific research and hydrographic surveying. Different opinions exist as to whether coastal State jurisdiction extends to activities in the EEZ such as hydrographic surveying and collection of other marine environmental data that is not resource-related or is not done for scientific purposes.³ While UNCLOS has established a clear regime for maritime scientific research, there is no specific provision in UNCLOS for hydrographic surveying. Some coastal States require consent with respect to hydrographic surveys conducted in their EEZ by other States while it is the opinion of other States that hydrographic surveys can be conducted freely in the EEZ.

Sovereignty and sovereign rights at sea. The failure to distinguish clearly between sovereignty and sovereign rights is at the core of many Law of the Sea related disputes among States. There is a clear distinction between the exercise of sovereignty within internal waters, archipelagic waters and the territorial sea, and the exercise of sovereign rights in the EEZ and on the continental shelf. “Sovereign rights” pertain to a functional jurisdiction (notably over resources and environmental protection) that is more limited in character than “sovereignty”.

This memorandum has identified issues where national policies and positions on aspects of the Law of the Sea differ in the Asia Pacific. While States will generally argue that their position is consistent with UNCLOS and customary law, divergent positions do exist and while this is the case, there is potential for tension and even conflict. Rather than recommending solutions to areas of difference, this memorandum is an exercise in transparency and understanding. Through knowledge of each other’s perspectives, States may be better able to address the real concerns and issues behind their disagreements.

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³ The U.S. regards military surveying as similar to hydrographic surveying and thus part of the high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to those freedoms, and conducted with due regard to the rights and duties of the coastal State.