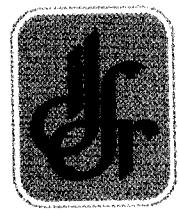

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Articles

THEME: Malaysia and Law of the Sea

SPECIAL REPORT

Review Essay

Books in Review

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THE LAW OF THE SEA AFTER TWENTY YEARS

Sam Bateman

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INTRODUCTION

Professor R.P. Anand, an eminent Indian scholar and historian of the Law of the Sea, wrote in 1982 that there have been "more changes and progress in ocean law since 1967 than in the previous 200 years"[1]. And the pace of change with the Law of the Sea has not slowed down since 1982. As a result of increased concern for the management of the world's oceans and their resources, and a proliferation of international treaties affecting ocean usage, developments in ocean law over the last twenty years are almost as significant as those, which occurred between 1967 and 1982.

Until the late 1970s or thereabouts, the mariner did not have to worry much about the law of the sea. Provided his vessel was more than three miles offshore, he was largely free to go wherever he pleased and do whatever he liked, including dumping waste into the sea. He was not concerned about laws that the nearby coastal State might have in force about marine pollution (and few States had such laws until quite recently), or indeed about any international conventions his country may or may not have ratified. Even in port, raw sewage could normally be discharged directly into the harbour. Then, if the mariner was also a naval officer, his ship could fire its weapons, launch its aircraft and generally conduct naval operations or exercises, almost indiscriminately, secure in the knowledge that he was simply exercising one of the freedoms of the high seas.

All this has changed over the last twenty years. The contemporary mariner now faces a strict regulatory environment with laws and regulations emanating from a range of international and regional agreements, as well as national legislation from his flag State. The issue of compliance with these laws

and regulations is another matter but at least on paper, the mariner of the present day is faced with many types of regulation. These cover what he must not dump over the side, and, in many areas of sea, they dictate the shipping lanes he must use and when he is obliged to report the position of his vessel. The naval officer must also consider the type of passage he is exercising, and what his ship can and cannot do, when he passes off the coast of a foreign country or through an international strait or the archipelagic waters of another country.

DEVELOPMENTS SINCE 1982

After the climactic years of the 1970s with the development of the "new" Law of the Sea at the Third UN Conference on the Law of the Sea (UNCLOS III) embodied in the 1982 UN Convention on the Law of the Sea (LOSC)[2], the 1980s were somewhat of an anti-climax. There was not a lot of change or further development of the Law of the Sea in the first decade after the LOSC was opened for signature. Countries were seemingly slow to grasp the full implications of the new Convention, and it was not until the 1990s that the pace of change gained momentum again. Some countries may also have been "sitting on the fence" watching what others were doing before deciding to act on the Convention.

It took over ten years for the Convention to achieve the necessary sixty ratifications to bring it into force. It came into force on 16 November 1994, one year after Guyana as the sixtieth State ratified it. In the following five years or so, another sixty or more countries raced to ratify it. The first sixty ratifications were almost all developing States; however, as of March 2002, 138 instruments of ratification, accession or succession to the LOSC have been deposited with the Secretary-General of the UN including those of developed States such as Australia, Germany, Iceland, Italy and the United Kingdom[3]. The United States remains outside the LOSC despite the active support for the Convention by defence and foreign policy interests.[4] Canada and Thailand are other significant States that have not yet ratified the Convention.

Growing environmental awareness led to the UN Conference on Environment and Development (UNCED) in Rio de Janeiro in 1992 and its agreement *inter alia* on *Agenda 21* with Chapter 17 relating specifically to the marine environment[5]. Associated developments have included the Biodiversity Convention and the establishment of the UN Commission on Sustainable Development (CSD) that has put emphasis on Law of the Sea issues, and new conventions. Many developments have been associated with increased concern for the threats to the marine environment posed by ships and shipping operations. This concern has been addressed in a series of new conventions

from the International Maritime Organization (IMO) dealing with issues such as liability for oil pollution, hazardous cargoes and emergency response to oil spills and disasters at sea. There has also been extensive revision of older IMO conventions on sea dumping, marine pollution, safety at sea and the training and certification of seafarers.

However, land-based activities are by far the main sources of marine pollution, although reducing land-based marine pollution (LBMP) has proven to be a very difficult and controversial task. LBMP is still not the subject of any binding regional or global agreement and remains the subject of "soft law" only. The LOSC only addresses it in the most general terms and "the controversies surrounding the issue ... were too large and diverse to be addressed at UNCED".[6] Nevertheless, the United Nations Environment Program (UNEP) convened a meeting in Washington in 1995 to address the problem and this resulted in a "soft law" instrument, the Global Programme of Action on the Protection of the Marine Environment from Land-Based Activities (GPA). Major highlights of the GPA were included in the *Washington Declaration*[7].

"Unfinished Business"

High Seas Fishing

The management of high seas fish stocks that might "straddle" the Exclusive Economic Zone (EEZ) of a coastal State and the adjacent high seas (*straddling stocks*) or alternatively, migrate from one EEZ or area of high seas to another EEZ or area of high seas (*highly migratory stocks* or *species*) was regarded as part of the "unfinished business" of UNCLOS III and the LOSC. The dispute in the mid-1990s involving Canada and the European Union nations is a well-known example of the difficulties that might emerge and the potential for disputation[8]. The problem arises in part from the inconsistent regulatory regimes established by the LOSC:

> The Convention actually helped create the difficulty by extending sovereign rights to 200 miles but preserving freedom to fish beyond subject only to uncertain and debatable restrictions to recognise coastal state rights, duties and interests over the same stocks within the EEZ. In exercising their sovereign rights, coastal states either eliminated entirely or significantly reduced foreign access to stocks within the EEZ, leading the fishing states concerned to focus on the high seas stocks.[9]

Concern over the problems of straddling fish stocks and highly migratory fish stocks led to the convening of an international conference between 1993 and 1995 to address the issues. The result was the *Agreement for the*

Implementation of the Provisions of the UN Convention on the Law of the Sea 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995 (the Stocks Agreement). The objective of the Agreement is to ensure the long-term conservation and sustainable use of these stocks with a specific requirement that coastal States and states fishing in the high seas shall have a duty to cooperate in the management of straddling stocks and highly migratory species[10]. It also provides for cooperative compliance and enforcement on the high seas. The Agreement entered into force on 12 December 2001[11] and has made "a truly significant contribution" to the implementation of the LOSC[12].

Seabed Mining

Deep seabed mining was another part of the "unfinished business" of the LOSC in that many developed countries, particularly the United States, had concerns about the regime for deep seabed mining in the LOSC. These countries wished to see a deep seabed minerals regime that incorporated free-market principles, in so far as possible, and protected the position of countries and companies that possessed the technological "know how" to undertake deep seabed mining. They were suspicious of the "Orwellian" nature of the *Enterprise* and the *Authority* that would be set up to manage deep seabed mining as "the common heritage of mankind". Or as one Australian mining industry leader reflected ten years after the completion of the LOSC in the context of the seabed mining regime, "we can now look back on the Law of the Sea Treaty, and wonder how it was possible that so much official time, enthusiasm and expense could be dedicated to promoting foolish, damaging nonsense".[13]

After several years of negotiation, the Agreement Relating to the Implementation of Part XI of the LOSC was opened for signature in November 1994 concurrently with the entry into force of the LOSC. This agreement came into force on 28 July 1996 and has now been ratified by 104 states[14]. It largely overcame the concerns that the industrialised countries had about the deep seabed-mining regime in LOSC Part XI and paved the way for wider acceptance and ratification of the LOSC than might otherwise have been the case. However, deep seabed mining is still not regarded as economic and the expectations held during the 1970s with the negotiation of the LOSC about the value of deep seabed minerals, such as manganese nodules, have not been realised. Deep seabed mining is not expected to be economically viable until well into the 21st Century[15].

Overview

The last decade or so has seen a plethora of international treaties dealing with some aspect of oceans governance, as well as the emergence of considerable "soft law" for achieving sustainable development of the maritime

environment and marine resources. The CSD has done a lot of work on oceans issues[16] and there is also the excellent audit of oceans issues in the Report of the Independent World Commission on the Oceans, *The Ocean Our Future*[17]. However, despite all this effort at the global level to establish programmes for action, including legal frameworks in "hard" and "soft" law, we still seem far away from an effective regime for international oceans governance. Many problems exist, particularly ones of compliance, implementation and equity.

There are no grounds for complacency that the "hard yards" have been covered and it is now just a matter of sitting back and letting it all happen. Nothing could be further from the truth. We still exist in a world where attitudes of "beggar thy neighbour", "survival of the fittest", "might is right", and "not in my backyard", as well as "the tragedy of the commons", are alive and well. These attitudes bedevil attempts at establishing effective management regimes for the oceans and seas of the world. After twenty years of developments in the Law of the Sea, many of the appropriate legal frameworks are in place but we are far from turning them into effective, operational regimes.

AREAS OF CONCERN

While the LOSC has brought countries together by making them more conscious of their maritime boundaries and the maritime interests they share with their neighbours, it has also introduced new tension points. Even when the Convention entered into force, there were still many "grey areas" which required resolution, including the new agreements to complete the "unfinished business" of the LOSC. The demarcation of maritime boundaries is a particularly difficult issue in complex geographical areas such as the marginal seas of East Asia, and political solutions are much more likely than legal ones. However, international law, as embodied in customary rules and treaty provisions, forms the foundation upon which political accommodation must be built. Thus the Law of the Sea continues to evolve as States interpret the rules or even deliberately alters those rules to further their perceived interests.

Many of the provisions of the LOSC lacked the clarity to remove all uncertainties in the Law of the Sea. This was particularly so with provisions relating to resources management and navigational regimes, some of which constituted "new" international law. Potential difficulties were apparent because some aspects of these regimes were uncertain or not universally accepted. The introduction of the EEZ regime required countries to delimit new maritime boundaries with each other - in many instances where sovereign interests had not previously overlapped. It also led to fears that countries would attempt to over-stretch their rights in the EEZ and make that zone a virtual territorial sea[18].

The process of wider coastal State control over adjacent waters is sometimes known as "creeping sovereignty" or "creeping jurisdiction". This may be in a geographical sense with, for example, the extension of the territorial sea to twelve nautical miles and the introduction of the two hundred nautical mile EEZ, or in a jurisdictional sense with coastal States seeking increased control over fisheries, vessel-source pollution and rights of passage in their adjacent waters. This latter process, which is sometimes referred to as "thickening jurisdiction"[19], has continued in recent years with growing coastal State concern over the health of the marine environment. Some coastal States have also sought to extend their jurisdictional limits offshore through devices such as extensive use of territorial sea straight baselines and claims to historic waters.

Exclusive Economic Zone

The EEZ was an important innovation in the LOSC. However, some doubts have emerged over the effectiveness of the EEZ regime for managing enclosed and semi-enclosed seas, including on the grounds of the difficulties of deriving straight-line maritime boundaries for seabed and water column jurisdiction and the transnational nature of environmental problems.[20] Developing countries pushed strongly for the introduction of the EEZ regime at UNCLOS III but the regime has not necessarily produced the anticipated benefits. In many ways the regime has produced a more favourable benefit-cost ratio for developed countries with relatively large areas of EEZ under their jurisdiction rather than that of the developing countries. The total size of the world's EEZs has been estimated at nearly 95,000 square kilometres of which a little over 40,000 square kilometres, or about 43 per cent, is under the jurisdiction of developed countries.[21] Also, with increased concern over the health of the world's oceans and seas, the full extent of the responsibility of coastal States for stewardship of their EEZs is not to be under-estimated. The sovereign rights to marine resources gained with an EEZ also carry significant costs with the associated obligations for preserving and protecting the marine environment and conserving species.[22]

There is considerable doubt about whether the EEZ regime has achieved the objectives expected of it. As Churchill has observed[23]:

> ...among the reasons given for the introduction of the EEZ were that it would produce economic benefit for developing states and lead to improved fisheries management everywhere. In fact, however, if one looks at the implementation of the EEZ in practice, few developing states have received significant economic benefit from it, and in many areas fisheries management is no better after the introduction of the EEZ than before.

Navigational Regimes

Innocent passage was the only navigational regime in the Law of the Sea prior to UNCLOS III but the extension of the width of the territorial sea and acceptance of the regime of the archipelagic State led to the new regimes in the LOSC of transit passage for international straits and archipelagic sea lanes (ASL) passage. These were necessary to accommodate the interests of maritime user States in the light of acceptance of the concepts of the archipelagic State and the EEZ, and the extension of the maximum width of the territorial sea from three to twelve nautical miles[24]. The maritime user States wanted a more liberal regime than innocent passage through archipelagic waters and international straits that would be available to both ships and aircraft and could not be suspended.

As the years have gone by since the LOSC was opened for signature, it has become apparent that navigational rights and freedoms in the *new* Law of the Sea are not quite as clear as the drafters of the Convention intended them to be[25]. Despite the long history of the freedom of navigation and the efforts made in the LOSC to ensure the preservation of traditional freedoms, many coastal States are introducing new regulations that amount to restrictions on passage in their adjacent waters. Concern for the preservation and protection of the marine environment is the usual imperative for these new regulations. Now twenty years after the introduction of the new passage regimes and clarification of innocent passage in the LOSC, there is still widely diverging opinion on many aspects of these regimes.

Innocent Passage

The rules applicable to *innocent passage* are contained in Part II Section 3 of the LOSC. It is the most restrictive of the passage regimes in the LOSC. It may be suspended in certain circumstances[26], submarines must travel on the surface and show their flag[27] and ships are prevented *inter alia* from operating organic aircraft[28]. Many countries still regard the obligation to allow foreign ships the right of innocent passage through their territorial sea as a significant limitation on their sovereignty over the territorial sea and a potential threat to their national security. Some coastal and archipelagic States maintain a requirement for prior notification or authorization for the innocent passage of certain vessels, particularly warships[29]. There are still over 40 States around the world that have this requirement including Cambodia, China, South Korea, North Korea, Indonesia, Philippines and Vietnam[30].

During UNCLOS III, several countries made unsuccessful attempts to include in the Convention the right to a coastal State to require prior notification or authorisation of warships for passage through the territorial sea[31]. Subsequently, the United States and the Soviet Union reached agreement on a uniform interpretation of the rules of innocent passage that included a specific statement that neither prior notification nor authorisation was required

for innocent passage[32]. The arguments against prior authorization or notification gain strength from the failure at UNCLOS III to have the requirement included in the Convention[33]. They are based on the view that such a requirement is incompatible with the freedom of navigation and the spirit of the Convention[34]. Requirements for prior authorization have much less justification than those for prior notification as they would seem specifically contrary to LOSC Article 24 that prohibits coastal State regulation that "hampers, denies, or impairs the right of innocent passage".[35]

A coastal State may establish restrictions upon the exercise of innocent passage of foreign vessels for reasons such as traffic management, resource conservation and environmental protection[36] but these should not effectively deny the right of innocent passage[37]. In certain circumstances, a coastal State may suspend innocent passage temporarily in specified areas of its territorial sea but these arrangements should not discriminate between different classes of ship and different countries[38].

Churchill and Lowe have observed that "there seems to be a general sense that the question is, for all practical purposes, best left without a clear answer"[39]. At this stage there might appear to be no customary rule one way or the other for the innocent passage of warships through the territorial sea.[40] The arguments in support of at least, prior notification of warship transit through a territorial sea may well gather strength in the 21st century and particularly in the East Asian seas, given the number of regional countries that require prior notification or authorisation of warship transit. It will come down to an argument between on the one hand, a majority of regional coastal and archipelagic States and on the other, the United States exercising "the incredible behaviour congenial to a major sea power"[41], supported possibly by Russia and Japan, as well as some Western countries such as the United Kingdom, Australia and France. Deciding factors may well be those of *idealism*, rather than *realism*, with the application of principles such as friendliness, cooperation, trust, transparency and good neighbourly behaviour.

Transit Passage

The regime of straits' transit passage gives all ships and aircraft the right to travel through international straits in their normal operational mode on, under or over the water[42]. Introduction of this regime overcame the difficulty that many straits, which had previously been high seas, became territorial seas when the legal territorial sea of a coastal State was extended to twelve nautical miles[43]. Without this regime, only the innocent passage regime would have been available through these straits and this is a more restrictive regime not available to aircraft or submerged submarines, and able to be suspended in certain circumstances by a coastal State. The principles governing the regime of transit passage are set out in Section 2 of Part III of the LOSC.

The LOSC makes clear that transit passage shall not be hampered or suspended[44]. Ships and aircraft exercising the right of transit passage must "refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait"[45]. They must comply with relevant international regulations[46], as well as with the regulations and laws of the coastal state that can be validly applied to them[47]. However, such regulations and laws must not discriminate between different ships and shall not "in their application have the practical effect of denying, hampering or impairing the right of transit passage".[48] Thus, while Article 41 of the LOSC allows States bordering straits to designate sea lanes and prescribe traffic separation schemes and Article 42 permits regulations to control and prevent pollution by the discharge of oil, oily wastes and other noxious substances, such regulations cannot operate to deny, hamper or impair the right of transit passage. Article 43, the so-called "burden sharing" article, provides for cooperation between user States and States bordering a strait on the provision of navigational and safety aids and the prevention of marine pollution, but it continues to be a vexed issue. For example with the Strait of Malacca, user States, other than Japan, have been reluctant to contribute to the costs.[49]

Coastal States bordering an international strait have from time to time contemplated compulsory pilotage schemes as part of their ability to control certain aspects of navigation that could impact upon the marine environment[50]. However, such schemes have not been introduced because refusing access to a strait to a vessel on the grounds that it would not accept a pilot would amount to hampering transit passage and be contrary to LOSC Article 44 in particular[51]. However, the coastal State may validly make a pilot a condition of entry for those ships that use the strait to enter one of its ports or subsequently pass through its internal waters away from the area of the strait[52].

It has been argued that the issue of international straits has been primarily discussed in political, military and strategic terms and much less in commercial and functional terms[53]. The concern is that the coastal States adjoining an international strait have considerable service responsibilities towards the vessels passing their shores (e.g. navigational aids, hydrographic charts and other navigational information, search and rescue services, and marine pollution contingency arrangements) but LOSC makes no provision whatsoever regarding any form of cost-recovery[54]. These considerations led a senior Malaysian strategic analyst to refer to the current straits' transit regime as being "fundamentally flawed" because it puts the entire burden of managing the straits on the coastal States[55]. The solution would appear to lie in a regime of shared responsibilities between the littoral and user States with the cooperation of IMO. However, once again, there is the consideration that whatever arrangements are introduced, they must not have the effect of hampering, denying or impairing the right of passage through the straits.[56]

The views have been expressed that: "in international practice the transit passage regime has been the subject of a series of exceptions, reservations, declarations, qualifications, attenuations" and "It is therefore possible to argue that the UNCLOS transit passage regime is still far from fully corresponding to present customary international law".[57] Churchill and Low agree that a general right of transit passage is not yet established in customary international law.[58] The United States takes a strongly contrary position. It views the right of free transit through international straits and archipelagoes as absolutely in accordance with customary law and essential for the global mobility of its forces.

Growing environmental concerns, particularly those arising from the risk of damage to the marine environment from shipping operations, have the potential to at least qualify some of the provisions of the LOSC relating to navigation, including the transit passage regime. While the tendency of States initially was to give freedom of navigation priority over environmental concerns, there is an increasing trend in national and international law towards the reversal of these priorities[59]. This could include a coastal State banning navigation in particular parts of an international strait although without fully denying passage through the strait[60]. The right of transit passage may be increasingly qualified in the future by the growing trend among coastal States to introduce measures for the protection of the marine environment which impact upon navigation. This reflects both the higher shipping traffic and increased carriage of cargoes potentially hazardous to the marine environment, as well as growing concern for the health of adjacent waters.

Archipelagic Sea Lanes Passage

Part IV of the LOSC established the regime of the archipelagic State, which allows States, which are constituted wholly of one or more groups of islands and meet certain other criteria specified in the Convention to draw archipelagic baselines joining the outermost islands and drying reefs. This regime is of great importance in East Asia and also in the wider Pacific Ocean due to the number of recognised archipelagic States in the region. The archipelagic State exercises full sovereignty over archipelagic waters qualified only by the regime of ASL passage, which allows ships of all nations the right of "continuous, expeditious and unobstructed transit" through archipelagic waters along sea-lanes which may be designated by the archipelagic State[61]. If sea lanes are not designated, then the right of ASL passage may be exercised through the routes normally used for international navigation[62]. Outside these sea lanes, ships of all nations have the right of innocent passage only and must abide by the more restrictive provisions of that regime, including recognition of the principle that the archipelagic State may temporarily suspend innocent passage[63].

Article 53 is the key article of the LOSC that describes the right of ASL passage. However, it contains several "grey areas" which could in the future be interpreted more in the favour of archipelagic States. On the issue of

designating or substituting sea lanes, or prescribing or substituting traffic separation schemes, an archipelagic State is required to "*refer* proposals to the competent international organisation with a view to their adoption"[64]. The IMO is generally regarded as the appropriate "competent international organisation", but what is less clear is whether the archipelagic state having referred a proposal to the IMO is then obliged to accept any IMO ruling. "Referring to" is obviously not the same as "seeking the approval of", and an archipelagic State may not have to follow the advice of the IMO. It may also be significant that the archipelagic State is required to refer proposals on sea lanes, while it is *in the process* of designating sea lanes[65], but States adjacent to international straits are required to refer proposals *before* designating sea lanes[66].

Maritime or *user* States wish to maximise the number of sea lanes through an archipelago. On the other hand, archipelagic States wish to minimise this number so as to maximise their potential control over foreign movement within their archipelago and to limit the freedoms available to foreign ships and aircraft. The maritime States base their argument on the unequivocal statement in LOSC Article 53(3) that ASLs and air routes "shall include all normal passage routes used as routes for international navigation or overflight".

In September 1991, the Sub-Committee on Safety of Navigation of the Maritime Safety Committee of the IMO was informed by the Indonesian delegation that Indonesia was in the process of deciding to establish several sea lanes through the Indonesian archipelago. The delegation identified the following routes as those being considered for ASL passage

- Sunda Straits - Karimata Strait in the Western part;
- Lombok Strait - Makassar Strait in the Central part; and
- Banda Sea - Moluccan Sea in the Eastern part.

Indonesia's proposal to designate these three North/South ASLs subsequently led to detailed analysis and discussion at the IMO as well as bilateral discussions between Indonesia and interested user States, particularly the United States and Australia, which were particularly concerned about the lack of an East-West ASL[67]. This activity culminated in IMO approval in 1998 of a document known as "General Provisions on the Adoption, Designation and Substitution of Archipelagic Sea Lanes" (GPASLs)[68]. The concept of partial designation of sea lanes appears not to be in line with LOSC Article 53 that requires the archipelagic State to designate all normal routes used for international navigation.[69] While the interests of user States is protected as they still have access to other routes, Indonesia still needs to complete the designation process.[70]

Meanwhile the focus of attention with ASL passage has now shifted to the Philippines. The Philippine situation will likely prove much more difficult than that of Indonesia. The Philippines generally took a stronger and more inflexible position than Indonesia at UNCLOS III on archipelagic State rights and associated passage regimes[71]. During UNCLOS III the Philippines consistently argued that the right of innocent passage in archipelagic waters could not be the same as it was in the territorial sea[72] and that its *archipelagic waters* are in effect *internal waters*[73].

There are three other main reasons why the implementation of the ASL passage regime is likely to be even more difficult in the Philippines than it was in Indonesia. First, the Philippine archipelago is more complicated than the Indonesian one with more scattered islands and reefs and less well-defined shipping channels. It will be much harder to follow the same process as adopted for Indonesian ASLs with the precise determination of the geographical limits of sea lanes[74]. The Philippines has a complex network of inter-island shipping routes with an already high incidence of major shipping disasters. Possible ASLs will cross through areas where there are extensive subsistence and commercial fishing operations[75]. Serious concerns are already held about the current state of the marine environment of the Philippines[76]. The dangers of ship-sourced marine pollution are likely to lead the Philippines to assert strict controls over the passage of shipping through its archipelago, perhaps even stricter than user States would regard as acceptable under the LOSC ASL passage regime.

Secondly, the Philippine archipelago sits astride major shipping routes between the Americas and southern China and Southeast Asia, as well as between northern Australia and the Lombok Strait and Northeast Asia. The narrowness of some of the straits in the Philippine archipelago that would likely be included in the system of ASLs highlights the difficulties that will be encountered in developing axis lines and applying the ten per cent rule in LOSC Article 53(5)[77].

Thirdly, there is the major political problem in the Philippines with the Treaty of Paris limits. On signing the LOSC, the Philippines made a declaration[78] that such signing did not affect the sovereign rights of the Philippines under the Treaty of Paris[79] and the Treaty of Washington[80], and that "the concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines"[81]. The Treaty of Paris limits are locked into Philippine public policy through the Cabinet Committee on Maritime and Ocean Affairs organised in 1994 insisting that the maritime territory of the Philippines is as defined in the Treaty of Paris[82]. It is unlikely that any Philippine politician or Minister will propose a change to this situation in the foreseeable future. While this is the case, it would seem that the problem of designating ASLs in the Philippine archipelago that accord with

the regime in the LOSC is unlikely to be solved. The Philippine delegate intervened on several occasions during the negotiations of GPASLs at the IMO to indicate that the Indonesian approach should not represent a precedent for future ASL designations by IMO.[83] Clearly the implementation of the ASL passage regime in the Philippines has a long and difficult road ahead.

WHERE ARE WE NOW?

This review of the Law of the Sea after twenty years reveals that the current situation is far from settled. Many uncertainties remain and much of the law that is in place is ineffective. It is almost as though that the changes in recent decades have occurred too swiftly and it would be prudent to take stock of what has been achieved and consolidate the changes that have occurred.

Two primary trends are evident that, at least superficially, appear to be in opposition to each other. The first is the increased *internationalisation* of the oceans. This is evident in the introduction of an international regime for the exploitation of the resources of the deep seabed; increased regulation of shipping to ensure marine safety and to reduce the risks of ship-sourced marine pollution prevention; and in the new regimes for managing fish stocks on the high seas. The establishment of these new regimes is completing the "unfinished business" of the LOSC to establish comprehensive international regimes for ocean usage. The process is supported by new conventions and "soft law" instruments. The high level of ratification of the LOSC amounts to the universalisation of the basic framework for international oceans management. It is facilitated by the new institutions that have been established to implement and manage relevant sections of the LOSC i.e. the International Seabed Authority (ISA), the International Tribunal for the Law of the Sea (ITLOS) and the Commission on Limits of Continental Shelf (CLCS). It is also evident in the increasing interest of the UN and its agencies in the oceans, including through the work of the CSD.

The other trend is increased *nationalisation* of the oceans with wider coastal State jurisdiction through the new regimes in the LOSC. Many States continue to seek further *nationalisation* of the oceans contrary to the international pressures that are tending to internationalise the issues. Indeed there is something about the Law of the Sea and international oceans governance that breeds hypocrisy. Nations can sign up for global programmes of action on the marine environment but then have little capacity for, or intention of implementing such programs at the national level. These programmes are rather like motherhood. They are unquestionably worthy of support and praiseworthy in a general sense but sometimes unwanted

and difficult for an individual. In another example of hypocrisy, countries may preach the virtues of something at the international level (say, the freedoms of fishing, navigation or marine scientific research or the importance of the marine environment) while pursing contrary practices in their own home waters.

These opposing trends of *internationalisation* and *nationalisation* underpin the current situation with the Law of the Sea. They may be both the *causes* and *effects* of further developments. One writer has suggested that "there is some mismatch between the developing international Law of the Sea, with its emphasis on national sovereign rights, and the situation in practice where multinational characteristics predominate"[84]. This mismatch becomes particularly important in areas such as the East Asian seas, which are largely enclosed by the EEZ regime and where *nationalisation* tends to stand in the way of multilateral approaches.

Some of the discussion in this paper implies criticism of the LOSC and its subsidiary regimes but this should not detract from the enormous achievements of the treaty. It has to be judged in its historical context. Terms such as "sustainable development", "the precautionary principle" and "integrated coastal zone management" were not in common use when the LOSC was negotiated. The weakest environmental provisions in the convention are those related to pollution from land-based sources even though so much marine pollution is from these sources. Whereas states have claimed rights under the LOSC in domestic legislation, they have been rather slower to legislate for their obligations, particularly the affirmative obligation to take action to protect and preserve the marine environment[85].

The LOSC was formulated in a period when there was much less concern for the health of the marine environment than there is at present and modern international environmental law was still very basic. Norms and principles for the preservation and protection of the marine environment have multiplied exponentially over the last twenty years. It is not surprising therefore that many of the apparent "gaps" in the LOSC arise in the area of environmental protection. The navigational regimes in the LOSC provide an example of the relatively lower level of concern for the marine environment than was current in the 1970s. The regimes of straits transit passage and ASL passage apply to "all ships and aircraft" and there is no direct right of the coastal or archipelagic State to prevent the passage of a vessel that might be perceived to be a serious threat to the marine environment. Legal scholars have pursued this issue extensively over the years but so far there is not a satisfactory resolution of the issue.

Looking particularly at East Asia, there are many examples of where State practice appears to be diverging from the conventional and traditional Law of the Sea. Examples include the use of territorial sea straight baselines and claims to deny rights of navigation and overflight beyond the limits of the territorial sea. We are yet to see whether this State practice will

subsequently gain legitimacy and acceptance as customary law. Suffice to note, however, that we are dealing with issues where the United States, as the principal guardian of the traditional Law of the Sea through its publication of excessive claims and the Freedom of Navigation (FON) program[86], may already be falling behind what is emerging State practice.

Two vital questions remain to be addressed in this paper. Should the LOSC be amended? Do we need a UNCLOS IV? The LOSC specifies two ways by which it might be amended. Article 313 allows for amendment "by simplified procedure" by which a State Party may propose an amendment to the Secretary-General of the UN which is then circulated to all other State Parties. It is rejected if any State Party objects to the amendment or its proposed adoption. Article 312 provides that after ten years from the date of entry into force of the Convention, a State Party may propose specific amendments to the Convention and request the UN Secretary-General to convene a conference to consider the amendments. The conference shall then be convened if not less than one half of the State Parties reply favourably to the request.

The tenth anniversary of the entry into force of the LOSC will be in 2004 and any State party may then initiate an amendment process, including a possible review conference. Opinion is divided on whether this process would be worthwhile. Some argue that it could be dangerous to open up to reconsideration any aspect of the carefully balanced convention. It would disturb the "package deal" quality and while the uncertainties and ambiguities in the Convention are acknowledged, these are better managed through the process of the gradual evolution of customary law rather than through the amendment process. The South-East Asian Programme in Ocean Law, Policy and Management (SEAPOL) intends to conduct a "Track Two" dialogue on the need or otherwise to review the LOSC over the next two years or so[87].

CONCLUSION

In 1985, the British strategic analyst, Ken Booth, noted about the LOSC that: "it is not so much an end in itself, as the end of the beginning. Historically speaking, UNCLOS III will come to be seen as the start of a new era in the international politics of the sea"[88]. This has proven accurate. The last twenty years have witnessed the formulation and implementation of a comprehensive international Law of the Sea regime enshrined in the LOSC and subsequent treaties and "soft law". New institutions, such as ITLOS and ISA, have now been established to have oversight of the Law of the Sea and areas of possible weakness in the convention ("the unfinished business") have been covered by new instruments, particularly the 1994 Implementing Agreement on Seabed Mining and the 1995 Agreement on Straddling Fish Stocks and Highly Migratory Stocks.

As we consider the Law of the Sea after twenty years, it is clear that, while there have been many developments, the "new" Law of the Sea is still far from settled. The pace of change in the Law of the Sea in recent decades has complicated the problem of achieving agreement on particular issues and it shows no sign of slowing down. "Grey areas" in the Law of the Sea and diverging state practice continue to emerge as countries try both to catch up with developments that have occurred and "to do their own thing" with interpreting and applying the new regimes. A great challenge remains in making the Law of the Sea work but this is a political challenge rather than a legal one.

NOTES

[1] R.P. Anand, *Origin and Development of the Law of the Sea* (The Hague: Martinus Nijhoff, 1982), 219.

[2] 1982 U.N. Convention on the Law of the Sea, done in Montego Bay, Jamaica, 10 December 1982, in force 16 November 1994 (LOSC in this paper).

[3] http://www.un.org/Depts/los/los94st.htm (accessed 30 March 2002).

[4] George V. Galdorisi and Kevin R. Vienna, *Beyond the Law of the Sea—New Directions for U.S. Oceans Policy* (Westport: Praeger, 1997).

[5] UN Conference on Environment and Development, Chapter 17: Protection of the Oceans, All Kinds of Seas, Including Enclosed and Semi-enclosed Seas, and Coastal Areas and the Protection, Rational Use and Development of their Living Resources. In *Agenda* 21, UN Conference on Environment and Development, Rio de Janeiro (3 - 14 June 1992).

[6] Biliana Cicin-Sain and Robert W. Knecht, *The Future of U.S. Ocean Policy* (Washington DC: Island Press, 2000), 274.

[7] 1995 Declaration on Protecting the Marine Environment from Land-Based Activities, done in Washington, 1 November 1995, reproduced in *Environmental Policy and Law* 26 (1996) 37.

[8] Sam Bateman, "Canada's Extended Maritime Jurisdiction", *Maritime Studies*, no. 76 (May/ June 1994): 20-21.

[9] William T Burke, "State Practice, New Ocean Uses and Ocean Governance under UNCLOS" in Thomas A. Mensah (ed), *Ocean Governance: Strategies and Approaches for the 21st Century*, Proceedings of the 28th Annual Conference of the Law of the Sea Institute (Honolulu: Law of the Sea Institute, 1996), 226.

[10] Biliana Cicin-Sain, "Earth Summit Implementation: Progress Since Rio", *Marine Policy* 20, no. 2 (1996): 123-143..

[11] It has now been ratified by 37 States. http://www.un.org/Depts/los/convention_agreements/convention_agreements.htm (accessed 30 March 2002).

[12] Moritaka Hayashi, "The 1995 UN Fish Stocks Agreement and the Law of the Sea" in D. Vidas and W. Ostreng (eds), *Order for the Oceans at the Turn of the Century* (Dordrecht: The Fridtjof Nansen Institute, 1999), 52.

[13] Hugh Morgan, "The potential for seabed resource development" in Ross Babbage and Sam Bateman (eds), *Maritime Change: Issues for Asia* (St. Leonards: Allen & Unwin, 1993) 95.

[14] http://www.un.org/Depts/los/convention_agreements/convention_agreements.htm (accessed 30 March 2002).

[15] Independent World Commission on the Oceans, *The Ocean Our Future* (Cambridge: Cambridge University Press, 1998) 68.

[16] Particularly at its Seventh Session in New York in April 1999 and at the Seventh London Oceans Workshop in December 1998. See web-site: http://www.un.org/esa/sustdev/oceans.htm.

[17] See note 15.

[18] Wayne S. Ball, "The Old Grey *Mare*, National Enclosure of the Oceans", *Ocean Development & International Law* 27, nos. 1-2 (1996): 97-124.

[19] Ibid., 103

[20] Jin-Hyun Paik, "Exploitation of Natural Resources: Potential for Conflicts" in Sam Bateman and Stephen Bates (eds), *Calming the Waters: Initiatives for Asia Pacific Maritime Cooperation,* Canberra Papers on Strategy and Defence No. 114 (Canberra: Strategic and Defence Studies, Centre, Australian National University, Autumn 1996) 177-8.

[21] World Resources Institute, *World Resources 1994-95* (Delhi: Oxford University Press, 1995) Table 22.6, 354-355.

[22] Edward P. Wolfers, "The Law of the Sea and Security in the South Pacific", *Maritime Studies*, no. 77 (July/August 1994): 22-29.

[23] Robin R. Churchill "Levels of Implementation of the Law of the Sea Convention: An Overview" in Vidas and Ostreng, *Order for the Oceans at the Turn of the Century*, 323.

[24] LOSC Article 3. Recognition of a 12 nautical mile limit to the territorial sea of a coastal state in the LOSC had a considerable impact upon navigation through international straits. It has been estimated that there were 153 straits around the world with least breadths of between 6 and 24 nautical miles that had previously included high seas "corridors" but became enclosed within the territorial sea of one or more coastal States with acceptance of the 12 mile limit. L. M. Alexander "Exceptions to the Transit Passage Regime: Straits with Routes of 'Similar Convenience'", *Ocean Development and International Law* 18, no. 4 (1987): 480-481.

[25] This lack of clarity is the subject of several papers in Donald R. Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea* (The Hague: Martinus Nijhoff Publishers, 2000).

[26] LOSC Article 25(3).

[27] LOSC Article 20.

[28] LOSC Article 19(2)(e).

[29] For example, China requires that foreign military vessels must obtain permission from the Chinese government in order to enter its territorial sea. Yann-huei Song and Zou Keyuan, "Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States", *Ocean Development & International Law* 31 (2000): 329; and Zou Keyan, "Innocent Passage for Warships: The Chinese Doctrine and Practice", *Ocean Development and International Law* 29 (1998): 201. i J.A. Roach and R.W. Smith, *Excessive Maritime Claims*, International Law Studies Vol. 66, (Newport R.I.: USN War College, 1994) Table 10, 158-159.

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

[31] Roach and Smith, *Excessive Maritime Claims*, 154-156; F. David Froman, "Uncharted Waters: Non-innocent Passage of Warships in the Territorial Sea", *San Diego Law Review* 21 (1984): 634 and 640; Zou Keyan, "Innocent Passage for Warships", 201; and Shao Jin, "The question of innocent passage of warships—After UNCLOS III", *Marine Policy* 13, no. 1 (January 1989): 57.

[32] USA-USSR, Agreement on the Uniform Interpretation of International Law Governing Innocent Passage, 22 September 1989, *International Legal Material* 28 (1989): 1444 and *American Journal of International Law* 84 (1989) Appendix 4, 239-242. For a recent commentary see Yasuyuki Yoshida, "The LOS Convention Innocent Passage Provisions for Warships: Text and Subsequent State Practice", in Douglas M. Johnston and Ankana Sirivivatnanon (eds), *Maritime Transit and Port State Control: Trends in System Compliance* (Bangkok: SEAPOL, 2000), 29-31.

[33] Froman, "Uncharted Waters", 642; and Roach and Smith, *Excessive Maritime Claims*, 156.

[34] U.S. Statement to UNCLOS III quoted in Ibid.

[35] Froman, "Uncharted Waters", 654.

[36] LOSC Article 21.

[37] LOSC Article 24(1)(a).

[38] LOSC Article 25. Rothwell perceived that this issue of discrimination was a factor in concluding that the Indonesian restriction on a Portuguese protest vessel entering Indonesian territorial waters was improper. Donald R. Rothwell, "The Voyage of the Lusitania Expresso: Coastal State sovereignty and innocent passage", *Marine Policy* 16 (1992): 427.

[39] R.R. Churchill and A.V. Lowe, *The Law of the Sea* 3rd ed. (Manchester: Juris Publishing, Manchester University Press, 1999), 90.

[40] Zou Keyan, "Innocent Passage for Warships", 209; and Shao Jin, "The question of innocent passage of warships", 67.

[41] Francis Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (London: Pinter, 1990), 149.

[42] For a description of the development of this regime see Donald R. Rothwell "International Straits and UNCLOS: An Australian Case Study", *Journal of Maritime Law and Commerce* 23, no. 3 (1992): 461-483.

[43] See note 24 above.

[44] LOSC Article 44.

[45] LOSC Article 39(1)(b).

[46] LOSC Articles 39(2) and (3).

[47] LOSC Article 42(4).

[48] LOSC Article 42(2).

[49] B.A. Hamzah, "International Funding for the Straits of Malacca", *MIMA Bulletin* 8, no. 1 (2000): 5-9. Hamzah suggests that China, Hong Kong, South Korea, Taiwan, Thailand, the Philippines and Liberia should contribute to the costs but then there is the problem of devising a mechanism for the cost-recovery. A basic question is whether the contribution should come from the governments or the shipowners.

[50] Donald R. Rothwell, "Navigational Rights and Freedoms in the Asia Pacific Following Entry Into Force of the Law of the Sea Convention", *Virginia Journal of International Law* 35, no. 3 (Spring 1995): 604-607.

[51] Stuart Kaye, *The Torres Strait* (The Hague: Martinus Nijhoff, 1996), 85.

[52] Ibid. Australia has been successful, with the concurrence of the IMO in introducing a compulsory pilotage scheme for parts of the Inner Route in the Great Barrier Reef because this route moves in part through Australia's internal waters.

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

[54] Ibid., 7.

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

[56] Gold, "Transit Services in International Straits", 2.

[57] Tullio Scovazzi, "Management Regimes and Responsibility for International Straits", *MIMA Issue Paper* (Kuala Lumpur: Malaysian Institute of Maritime Affairs, undated), 21.

[58] Churchill and Lowe, *The Law of the Sea*, 113.

[59] Fabio Spadi, "Navigation in Marine Protected Areas: National and International Law", *Ocean Development and International Law* 31 (2000): 285-302.

[60] Ibid., 294.

[61] LOSC Articles 53(1), (2) and (3).

[62] LOSC Article 53(12).

[63] LOSC Article 52(2)

[64] LOSC Article 53(9).

[65] LOSC Article 53(9).

[66] LOSC Article 41(4).

[67] Robin Warner, "Implementing the Archipelagic Regime in the International Maritime Organization" in Rothwell and Bateman, *Navigational Rights and Freedoms*, 170-187.

[68] Ibid., 170.

[69] Ibid., 176.

[70] Ibid., 186.

[71] Samuel Soriano, "Negotiating History of the Archipelagic Passage" in Maribel B. Aquilos, "Designation of Sea Lanes in the Philippines", *Ocean Law and Policy Series* 1, no. 1 (Jan-June 1997): 68.

[72] Barbara Kwiatkowska and Etty R. Agoes, *Archipelagic State Regime in the Light of the 1982 UNCLOS and State Practice*, Netherlands Cooperation with Indonesia in Legal Matters (Bandung : Indonesian Center for the Law of the Sea, Padjadjaran University, April, 1991) 19.

[73] Tomas Aquino, "Implications of Sea Lanes Designation on Safety of Navigation and Sovereignty Issues" in Aquilos, "Designation of Sea Lanes in the Philippines", 15.

[74] Warner, "Implementing the Archipelagic Regime", especially 177-184.

[75] Marciano Antoneo F. Carreon III, "Implications of the Designation of Sea Lanes on the Fisheries Sector" in Aquilos, "Designation of Sea Lanes in the Philippines", 34-35.

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

[77] Jay Batongbacal, "The Philippines' Right to Designate Sea Lanes in Its Archipelagic Waters Under International Law" in Aquilos, "Designation of Sea Lanes in the Philippines", 101-102.

[78] The U.S. and Australia, among others, both protested the declaration. Roach and Smith, *Excessive Maritime Claims*, 137-138.

[79] Signed by Spain and the U.S. on 10 December 1898. This is the basis of the "picture frame" claim to territorial sea by the Philippines that is not in accord with modern international law but has still not been rescinded.

[80] Signed by the U.S. and Great Britain on 24 January 1930, This established a border between the Philippines and British North Borneo (Sabah).

[81] http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm

[82] Jorge R. Coquia, "Some Legal and Constitutional Issues on Archipelagic Sea Lanes" in Aquilos, "Designation of Sea Lanes in the Philippines", 52.

[83] Warner, "Implementing the Archipelagic Regime", 187.

[84] Richard Hill, "Medium Power Strategy Revisited", *Working Paper No. 3*, (Canberra: RAN Sea Power Centre, March 2000), 4.

[85] LOSC Article 192.

[86] The FON Program operates on three levels: operational assertions by military units; diplomatic protests against excessive claims or other diplomatic representations by the State Department; and consultations between representatives of the Departments of Defense and State with representatives of the other State. Dennis Mandsager "The U.S. Freedom of Navigation Program: Policy, Procedure and Future" in Michael M. Schmidt (ed), "The Law of Military Operations—Liber Amicorum Professor Jack Grunawalt", *International Law Studies* 72 (Newport: Naval War College Press, 1998), 113.

[87] Douglas M. Johnston, "Challenges in the New Millenium", *SEAPOL Newsletter*, nos. 30-31 (November 2001): 8.

[88] Ken Booth, *Law, Force and Diplomacy at Sea* (London: Allen and Unwin, 1985), 206.

INTERNATIONAL RULES ON DECOMMISSIONING OF OFFSHORE INSTALLATIONS: SOME OBSERVATIONS

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What is decommissioning?

One of the difficulties in dealing with offshore platform decommissioning is the absence of a definitive legal definition on what constitutes decommissioning. Indeed the word "decommissioning" is not even found in major international legal documents on offshore platform decommissioning.

The term decommissioning does not appear in the 1958 Geneva Convention on continental Shelf; it is missing from the 1982 United Nations Convention on law of Sea (UNCLOS); it is also not defined in the 1989 International Maritime Organization (IMO) Guidelines and Standards. It is also not defined in 1992 Oslo and Paris Conventions (OSPAR) and other regional treaties that deal with marine pollution. Although not defined, all the above-mentioned international treaties mention of the need to abandon offshore platforms no longer in use.

Evidently the word decommissioning in respect of offshore installations has a recent origin. It became a concern to the international oil industry following the 1995 Brent Spar controversy; before the incident many would

refer to the concept of removing an abandoned offshore platform as abandonment. As a concept, decommissioning has a more comprehensive application and it is more inclusive than the term abandonment found in many treaties dealing with offshore installations. Both terms were often used interchangeably before the *Brent Spar* incident in 1995.

The process of decommissioning usually takes place after the offshore platform (in this case oil & gas platform) has been abandoned or ceased to be productive or operative. When production of gas or oil from a field becomes uneconomical, a decision may be made by the relevant regulatory agencies in conjunction with the operator of the platform to cease production, abandon the field and decommission the infrastructure. In Europe oil companies are legally required to submit to the Government, a decommissioning plan, a few years (2 to 5, depending on countries) before platform operations cease.

In practice, decommissioning and abandonment tend to describe the same process. The process to initiate platform decommissioning is usually undertaken by the operator of an oil or natural gas installation often in consultation with the regulatory agencies .The decision to decommission or not is usually the prerogative of the Government as in Europe and in the United States. In the United Kingdom, the process includes plan, gain approval for and implement the approval from the Department of Trade and Industry. Disposal or reuse of an installation when it is no longer needed or ceased to produce oil or gas as well site rehabilitation are treated as part of the decommissioning process in the UK.

Among the legal community, the term abandonment is widely used. The 1958 Geneva Convention on Continental Shelf, 1982 UNCLOS, 1989 IMO Guidelines, 1992 OSPAR refer to abandonment as the process of dismantling and disposal of the unused platform.

According to AM Forte, the confusion is an "unfortunate choice", and the word "decommissioning" is preferable substitute to describe the process and procedures associated with disposal of installations as well as site rehabilitation after they are no longer needed.[2]

In the UK, Norway and Holland, an environmental impact assessment is mandatory before an abandoned platform is decommissioned. The EIA is a process for anticipating the effects on the environment caused by a development. The objective of the EIA is to incorporate environmental considerations into the project planning and design stages, to ensure best environmental practice is followed. The EIA process also provides for an early airing of the concerns of stakeholders, which must be adequately addressed. Through an EIA it is possible to ensure that planned activities are in line with company policy and legislative requirements.

The process to decommission an installation is long and tedious. Getting the approval from the relevant authority for every step of the operation can be quite a challenge. In the UK the process can take between three to six years; but in countries where the legal framework and technical experience is still undeveloped, the process may take much longer.

In the UK, the procedure for platform decommissioning is spelt out in detail in *The Guidelines Notes for Industry: Decommissioning of Offshore Installations and Pipelines Under the Petroleum act 1988.*[3] Different countries have different policies.

The DTI's Offshore Decommissioning Unit in Aberdeen is responsible for coordinating the consideration and approval of decommissioning programmes for installations and pipelines in the UK. The Unit acts as a one-stop-shop whenever possible and will consult with the other Government Departments and Agencies who have an interest in the consideration of decommissioning proposals. There may, however, be occasions when the DTI will ask the Operator to make direct contact with a particular Government Department, for example, with the Ministry of Agriculture, Fisheries and Food (MAFF) on an aspect which may have specific implications for fisheries.

The decommissioning process differs between countries and does not necessarily follow the phases adopted by the DTI. For example, the proposed PETRONAS PMU Guidelines (Malaysia) have identified four phases: *pre-decommissioning, implementation, post decommissioning and field review.* Another approach is to divide the decommissioning process into four phases mainly for the purpose of environmental assessment: *cold phase, removal and disposal.* Whatever it is, the purpose of the decommissioning is to ensure a balanced and complete process.

For ease of understanding, the implementation process can be further divided into three practical phases:

- A first phase consists of rendering the redundant structure hydrocarbon and chemical free by, where appropriate, abandoning the wells, removing conductors/risers, flushing and cleaning the process/utility systems, ensuring all the vessels and pipe work are gas and oil free and preparing the components for the lifting/removal operations.

- A second phase involves the deconstruction and removal of the installation and associated components

- A third phase involves site restoration and regular monitoring and inspection of the site.

The scope of decommissioning will depend on the type of installation and what options are foreseen for the redundant installation, or whether deferral of final decommissioning is possible. Anyhow, irrespective of the option for decommissioning, the licensee or operator shall submit well in

advance a decommissioning plan to the relevant authorities once a decision has been made to abandon a platform. The operator must furnish adequate information, which shall include the necessary, technical, safety, environmental, fishing, navigation and financial information to the authorities. In the UK it is the Government through the DTI that has a final say on platform decommissioning often in consultation with all the stakeholders as well as the operator.

There seems to be a fine line between decommissioning and dumping. According to London Dumping Convention, 1972 dumping is defined as any deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man made structures at sea. It also includes the deliberate disposal at sea of vessels, aircraft, platforms or other man-made structures at sea. The 1996 Protocol to the London Dumping Convention expanded the definition of dumping to include *any storage of wastes or other matter in the seabed and the subsoil thereof from vessels, aircraft, platforms or other man-made structures at sea; and any abandonment or toppling at site of platforms or other man-made structures,* for the sole purpose of deliberate disposal. The 1996 Protocol, however, is more flexible. It allows for the disposal of platforms and man-made structures at sea so long as licensed by the national authorities.

Article 5 of Annex 111 to the 1992 Paris Convention For The Protection of The Marine Environment of the North–East Atlantic equates the whole or partial non-removal of disused offshore installations to dumping tolerated only if a permit has been issued by the competent national authorities again on-a-case-by-case basis. Indeed this policy becomes the corner stone for OSPAR. Similarly, the Baltic Convention, Reg 8 of Annex V1 on the prevention of pollution from offshore activities obliges the contracting parties to ensure that all abandoned offshore units are essentially removed and brought ashore under the responsibility of the owner. Anything left behind (i.e., partial removal) would be considered dumping.

Based on the practice in the UK, in evolving a policy on platform decommissioning, Third World oil-producing countries can benefit from the following conclusions:

Firstly, the Government, in this case the DTI, plays an important role in regulating and facilitating the process of platform decommissioning undertaken by the operator. The Government enacts the relevant legislation and maintains close liaison with the external parties and monitors the entire process. In the UK the Government provides tax breaks to the operator. In Norway, the Government pays the oil operator for undertaking the decommissioning activities.

Secondly, the process for decommissioning is long and tedious and that each platform is unique and no generic solution applies. The options for disposal have to be carefully analysed and they should be as transparent as possible for the stakeholders to support. In the case of the *Brent Spar*, the

Green Peace movement was able to mobilize support from the civil society against deep sea dumping although Royal Dutch Shell has received the blessing from the UK Government to dispose of the *Brent Spar* in the deeper part of the North Sea, as it was safe to the environment and shipping. It was not the question of failure in planning through or technical incompetence, but it was the failure of misjudgement on the part of Shell to underestimate the pressure from the Green Peace.

In the DTI Guidelines, due mention is made on the need to comply with international agreements & obligations, consultation with the stakeholders as well as the need to effectively monitor the various phases in the decommissioning process. While the onus is on the operator to undertake the task, a suitable monitoring regime must be in place and specified in the decommissioning programme.

The DTI requires that the operator submit inspection reports on a regular basis including proposals for any maintenance and remedial work that may be required. The reports should also be published by appropriate means. In the case of the UK, OSPAR requires that the operator submit a satisfactory EIA and monitoring regime *before* permission for decommissioning could be given. The DTI also requires that a post disposal report is submitted indicating how the disposal operation was carried out, any immediate consequences of the disposal that have been observed and confirmation that the disposal has been implemented in accordance with the terms of the decommissioning programmes.

What became very obvious in the UK decommissioning experience was the need for transparency, in balancing stakeholders' interest especially the citizen groups and that nothing should be taken for granted. In the case of the *Brent Spar*, the failure to deal effectively with pressure from the Green Peace movement has dented slightly Royal Dutch Shell's deep pocket. The company's initial estimates to decommission the *Brent Spar* was only 10 million pounds sterling; but by the time the floating storage was finally decommissioned in 1995 it cost Shell 60 million pounds sterling. Although the company recouped its reputation, as the Green Peace did admit it went overboard with its scientific calculations, the damage has been done.

Issues

Worldwide there are close to 7000 oil and gas installations/platforms; some 4000 in the Gulf of Mexico, one thousand thirty of them are in South East Asian waters. The rest are off Japan, Europe, Latin America and the Middle East. Many of them have been in service for more than fifteen years; some are over twenty years old. Many have been abandoned, waiting to be decommissioned. One can imagine the amount of steel structure and concrete to be removed from the bottom of the sea, some permitted to be left in *situ*.

Of course it costs money to decommission an installation. As an example, in 1995 it cost UK Shell sixty million pounds sterling to decommission the *Brent Spar*, a floating storage buoy. The total cost to remove all offshore installations in the North Sea alone would be colossal; imagine the cost to remove all the offshore installations in the world, which potentially will be abandoned as the fields mature.

In Malaysia alone a study has conservatively estimated it will cost PETRONAS, the national oil company, some 8 billion Malaysian ringgit (approximately US$2 billion) to remove some two hundred plus installations in offshore Malaysia.[4]

A legal framework to govern every aspect of platform decommissioning has been put into place in Europe through various treaty mechanisms. The two most important treaties that deal with platform decommissioning in Europe include the Oslo and Paris (OSPAR) conventions for the protection of Marine Environment in Northeast Atlantic. These regional treaties are intended to complement the international treaties on marine environment, most prominently the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matters and its 1996 Protocols as well as the MARPOL 73/78 Convention. But such legal framework is still absent in Third World countries; not a single oil producing state in the Third World has a comprehensive national legislation on platform abandonment.

The current interest on decommissioning preceded the controversial *Brent Spar*. There are at least three primary reasons rekindling interest on this topic. Firstly, the maturing of a large number of offshore oil and gas fields worldwide has raised the question of accountability, third party liability and good practices in the oil industry. Secondly, the issue of cost became an important concern to both oil industry and oil producing states. The cost of removing and disposing all the unused platforms is expectedly high. Removing the large structures in the deep sea can be costly. The question of who should bear the cost of platform decommissioning became a hot topic in Europe and elsewhere. Secondly, accompanying the unfinished debate of who should pay to remove the unused platforms was the growing global concern for a more responsible marine environment management regime. Coastal states came under pressure to adopt a more responsible approach to ocean governance, including taking steps to remove unused offshore platforms. Thirdly, concern for the freedom of navigation and, its corollary navigational safety has inspired the IMO to develop guidelines on removal of offshore platforms.

For the above reasons and, no doubt, for other reasons too, a consensus of opinion has emerged by the middle of 1980s on the need to establish a legal framework to deal with this topic. With the introduction of basic international standards on the continental shelf, some coastal states have

demanded for more teeth in dealing with this matter. National legislation to deal with platform decommissioning was introduced as in the UK and USA.

The earlier legislation in most Third World countries was found to contain nothing more than elementary requirement for the contractors or operators to plug wells once abandoned. The national legislation often imposed standards that were weak and unenforceable, such as "good oil field practices" and "normal oil field practices". The early oil contracts did not spell out details on decommissioning with regard to substantive issues like funding, responsibility and who should pay for what i.e., allocation of costs between oil companies and host states. In the absence of negotiated contractual obligations the burden is on the latter as the platforms are stuck to their seabed.

For countries-mainly Third World-with state oil companies a worst scenario has appeared. In the absence of specific contractual obligations with the operators/contractors, the ownership of about-to-be decommissioned structures was *conveniently* transferred to the state Oil Company or to the host government. Once the ownership of the platforms changes hands, the oil operators can no longer be held responsible for any decommissioning work.

It is a well-established practice that oil companies operating in Third World countries are reluctant to dismantle and dispose of disused platforms they had installed. To overcome this discrepancy many oil-producing countries (e.g. Malaysia and Indonesia) in the Third World are now considering legislation to provide for a platform abandonment regime. Such legal regime would of course incorporate a variety of legal rules under international law, national law and, of course, contract law.

For more than a decade now the oil and gas industry has been aware of a problem looming on the horizon: how to manage the costs of decommissioning the thousands of offshore oil and gas platforms all over the world? Within the last decade or so there has been a heightened concern over environmental issues with the industry being the target for greenhouse gas emissions. The need to be extra cautious with issues relating to ocean governance, in particular, the role of the industry in managing the fragile marine environment has made ocean dumping an awkwardly sensitive issue. At the same time, knowledge of economic, legal as well technical aspects of platform decommissioning has grown considerably over the years with the industry gaining invaluable experience from their decommissioning projects in the shallow Gulf of Mexico waters and in the deeper depths of the North Sea.

Many oil producing-developed states have specific laws and legislation dealing with platform decommissioning. In these countries, the legal framework is drawn up by the relevant Government agencies in consultation with the oil industry. The legal framework would define clearly the scope

of functions and responsibility for the removal as well as disposal of unused platforms due for decommissioning. In the developed world this legal framework is put into place prior to oil exploration and rightly so, as decommissioning forms an integral part of oil production and thus it should dovetail nicely into the process. This is also done to ensure fairness, predictability and a sense of certainty. But the Third World is only about to venture into platform decommissioning. This comes at a very awkward time: the resources are running out and the states are not able to raise new fund to undertake the costly task. The truth is, most developing states never plan for decommissioning purposes including earmarking of funds.

In the Third World, the burden of platform decommissioning remains with the Government or the responsibility of the national oil companies. In developed countries the oil industry accepts the responsibility of removing and disposing of their installations that are no longer in use. In the third world, the oil industry takes very little interest in the decommissioning of oil and gas platforms citing the absence of a national legislation on this matter. It is only lately that many production-sharing agreements in the third world, for example, are designed with the decommissioning in mind. Even then the oil industry will still look for fine prints or loopholes to escape responsibility and, in the process avoid cost and liability. Where they agree to undertake decommissioning, as in the case of Malaysia, the national oil company absorbs the costs; oil companies are allowed to claim their expenses through the mechanism of cost recovery.

In Malaysia under the current production-sharing contract, the oil industry can even recover their contribution to a special fund (managed by Petronas) on platform decommissioning. While the post 1998 production-sharing-contracts (PSC) in Malaysia do contain a provision for the contractor to decommission unused platforms, it lacks details and does not oblige the PSC contractors to remove and dispose of any abandoned installation.

Many oil production agreements stipulate a requirement to plug wells and undertake unspecified measures as appropriate to good oil field practices or industry practices in oil field operations before abandoning an oil field. What constitutes best practices is often determined by the oil industry and they tend to vary between companies and locations. Those considered best practices in European waters, for example, are not necessarily transferred to other parts of the world.

The oil industry always claims their operations are governed by the agreements they sign. Very often these agreements do not spell out the best practices except to state a general phrase in the agreement such as "appropriate oil field good measures". Such phrase is intended to be ambiguous and an escape hatch. To a good lawyer of an oil company such general phrase means nothing and provides the clients a certain comfort level.

As more platforms begin to mature world wide, the oil industry began to put increasing pressure on the international community to come out with international rules and guidelines before some oil producing states start drawing up unilateral legislation that could undermine their activities. Some states took up the call from the industry and began a process of consultation between like-minded parties. The result was the 1958 Convention on Law of the Sea, which among other important provisions has a special provision obligating state parties to remove *in entirety* all offshore installations.

The 1982 Law of the Sea Convention contains more flexible provisions. In particular, it allows for partial removal. UNCLOS has also widened the scope by enlisting the help of a competent organisation (i.e., the International Maritime Organisation). The mandate of the IMO covers navigational safety and marine environment. The resulting Guidelines and Standards produced by the IMO in 1989 set out a minimum for states to adopt.

However, the debate on platform decommissioning has triggered an examination by some oil-producing states of their exposure to risk in this area. For those states with production sharing agreements, it came as a surprise to discover that that the transfer of title to installations that had seemed so important to them implied a transfer of liability for decommissioning and the attendant bills. While states agreed some legislation on this is required, their approach differed depending on a variety of factors, most importantly power relationship and, the size of their reserve dictates the attractiveness or lack of it for investment. The oil industry will always be guided by profit margins.

Public international law regulates policy on removal and disposal of oil and gas installations at sea. Nonetheless states do enjoy a certain amount of discretion in designing and implementing national legislation on offshore installations. This freedom is closely tied to their international obligations. This should be taken to imply that the current international law concerning abandonment, removal and disposal of offshore installations has not been cast in stone. It is very likely that in future attitudes may change with regard platform decommissioning. The development of new technology will have an impact on attitudes and usually the law will adjust accordingly to reflect the change in attitude.

United Kingdom and United States were two dominant maritime powers in the 1950s pushing for an international treaty on platform abandonment under the pretext of freedom of navigation. The real motive is of course maritime security. In the years leading to the 1958 Convention on the Continental Shelf, it was the United Kingdom, with firm support from the United States that initiated the debate on this issue; first at the International Law Commission and later in the corridors of the United Nations.

In the 1950s the United Kingdom has not yet become an oil producing state. But the UK retained direct interest in the Royal Dutch/Shell and British Petroleum. Except for the Royal Dutch/Shell's interest in offshore Brunei

and in the Netherlands. Most of the productive oil fields owned and operated by the two British companies in the 1950s were in Middle East. But with success in Brunei waters and in the Gulf of Mexico, naval planners in the UK and USA saw the need for some preventive measures to enhance their freedom of navigation doctrine. Article 5.5 of the 1958 United Nations Convention on the Continental Shelf was intended to protect the maritime security interests of both nations. By insisting that all abandoned platforms be completely removed, the US and Great Britain could enjoy the freedom of navigation.

The offshore installations installed in the 1950s were relatively small and could be easily removed. None was actually in deep or treacherous water. Similarly the onshore installations in Texas, for example, were small pumping units and they were easily decommissioned after they had become redundant. The small Texas installations were used as benchmarks for the 1958 Convention on the Continental Shelf. Few then thought the new generation of offshore installations would be huge infrastructure, complete with landing pads for helicopters, hospitals, accommodation facilities, firewalls, etc. Anchored to the seabed these structures are not easily removed. Removing them could financially be a nightmare. Retaining them *in situ* could result in residual or third liability as well as a source of marine pollution.

The debate on offshore installations must also be seen in the context of the 1945 Truman Declaration on the Continental Shelf. Intended to demonstrate that the continental shelf was an extension of the landmass the declaration gave the US the right to exploit all natural resources on its continental shelf. Oil was one of the resources, which the United States wanted to have exclusive jurisdiction, and at the same time to deny other powers from exploiting it.

The 1958 Geneva Convention

The 1958 UN Convention on the Continental Shelf incorporated the Truman Declaration and other elements, including the following:

- The continental shelf is part of the land mass up to a depth of 200 meters, or beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas;
- The rights are exclusive to the extent that if the coastal states does not explore the continental shelf or exploit its resources no one may undertake these activities without the express consent of the coastal state;
- The exploration of the continental shelf should not interfere with navigation, fishing or the conservation of living resources;
- Methods for delimiting the continental shelf boundaries;

- Provision of a 500 meter safety zone around the installations;
- Any installation which is abandoned or disused must be entirely removed.

The 1958 Geneva Convention on the Continental Shelf sets the tone in public international law on the removal of offshore installations. This Convention spells out clearly the obligations of states with regard their responsibilities and duties on continental shelf. While states are permitted to extract oil and gas on the continental shelf, the Convention provides that such exploration and exploitation must not result in unjustifiable interference with the rights of other states (Article 5(1)). The construction as well as the operation of the installations is governed by this general rule (Article 5 (2)). A safety zone of 500 meters around the installation is provided for in Articles 5(2) and 5 (3). The critical provision, however, is Article 5(5), which reads:

> *"Any installations which are abandoned or disused must be entirely removed."*

This article makes it mandatory for state parties (57 of them, including Malaysia) to remove all the offshore installations. This is how the concept of total removal of offshore installations first gained currency in public international law.

Missing from the Convention are issues pertaining to disposal requirements. The treaty is also silent on how to deal with pipelines. It would appear that the pipelines are to be treated differently from the installations.

1982 UN Law of the Sea Convention (UNCLOS)

UNCLOS is a very comprehensive international treaty on ocean governance. It covers most legal aspects of the ocean space and its uses. They include navigation, over flight rights, resource exploitation and exploration, conservation of marine resources, shipping, marine environment, shipping and many other aspects of ocean governance. The provisos dealing with the disposal and removal of offshore installations must be appreciated in this context. The major concerns for ocean governance have lately revolved around the need to develop a sustainable marine environment regime and to facilitate navigational safety. These two factors, cost and the availability of new technology for platform removal, have triggered the need to develop a more flexible legal framework on platform decommissioning acceptable to the oil industry and the coastal states.

UNCLOS has entered into force on 16 November 1994.[5] On paper there seems to be a conflict of obligations between article 5.5 of the 1958 Geneva

Convention on the Continental Shelf and article 60.3 of 1982 UNCLOS. But in reality, if the Government so wishes, it can renounce its obligations under the former treaty as most of the provisions have been incorporated into UNCLOS. Until the Government does so, the obligations remain.

Article 60.3 of UNCLOS reads:

(3) *Due notice must be given of the construction of such artificial islands, installations or structures, and permanent means for giving warning of their presence must be maintained. Any installations or structures which are abandoned or disused shall be removed to ensure safety of navigation, taking into account any generally accepted international standards established in this regard by the competent international organization. Such removal shall also have due regard to fishing, the protection of the marine environment and the rights and duties of other States. Appropriate publicity shall be given to the depth, position and dimensions of any installations or structures not entirely removed.*

Article 60(3) is not a stand -alone provision. It must be read along with other provisions in UNCLOS in particular Articles 80,208 and 210. Article 80 applies to artificial islands, installations and structures on the continental shelf. Article 208 of UNCLOS requires coastal states to adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction, pursuant to articles 60 and 80. Such regulations and standards must not be less effective than international rules, standards, recommended practices and procedures. Article 210 deals with pollution from dumping. Coastal states are permitted to legislate on what can be dumped at sea. It is imperative that the national legislation is not less effective than established international rules and standards.

Since the oceans are treated as one sea, certain control mechanisms have been established towards a more integrated ocean management. States are encouraged to establish global standards to prevent, reduce and control such pollution. In general sea dumping is discouraged; in Europe it is banned following the *Brent Spar* episode. The policy of sea banning in Europe may soon gain global acceptance. The 1996 Protocols to the 1972 London Convention are slowly moving into that direction.

Of course in terms of scope, Article 60 applies mutatis mutandis to artificial islands, installations and structures on the continental shelf, according to Article 80. It has been argued that Article 60 is very ambiguous. While it envisages removal of abandoned and unused platforms, it subjects itself to lesser international standards. Under the 1958 Convention, the language is very clear: nothing less than total removal i.e., to be removed entirely. Under UNCLOS, it is only removal and the word "entirely" is omitted. The back tracking can be attributed to a few factors. First, the installations are getting very big, very cumbersome to remove in entirety. Second, the reluctance

on the part of the oil industry to fully participate in this exercise of total removal, mainly for reasons of cost. Third, a change of heart in the position of Great Britain, the major champion of both resolutions. Part of the UK's about turn decision has to do with the discovery of oil/gas in the deeper part of the North Sea and the pressure from the oil industry to treat installations in the deep water differently from those in shallow water.

The International Maritime Organization (IMO) was very quick to assert its competence in this respect even though the UK and the major maritime powers had not ratified the document. There are several reasons why the IMO did this. First, it wants to make sure that abandoned installations do not impede international navigation, particularly those in strategic straits and that the unused installations do not pollute the sea. Navigational safety and clean sea matters are within IMO's jurisdiction. Second, the explanation can be found in the nature of power politics at the IMO, an organization under the control of the major maritime powers, which make freedom of navigation their war cry. Third, to ensure coastal states comply with these obligations through another multilateral institution under their control as the industrial world has some reservations with UNCLOS.

Under UNCLOS coastal states have more flexibility as long as they comply with the international standards established for this purpose. The snag is IMO resolutions are not binding on state parties. However, the industrial world has argued that in this case the IMO resolutions are specific and since this is tied to UNCLOS, the resolution is binding when the UNCLOS Convention enters into force. This is to force compliance through the back door. Clearly, on this matter the industrial world had relied on power politics.

In other respects the UNCLOS provisions on platform decommissioning are quite similar with the 1958 Geneva Convention. There is no provision for site rehabilitation under UNCLOS. Oil and gas pipelines are also omitted. Surely the industry was familiar with the situation. It is possible that the matter is kept silent simply because the industry does not want to be responsible for what looks to be a very delicate post-removal matter or feels that the state should be responsible for that. Anyhow, site rehabilitation is now considered an important dimension of decommissioning. Periodical site monitoring could be a costly affair.

The IMO Guidelines

The IMO adopted a Resolution in 1989 on Guidelines and Standards for The Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone. By virtue of these guidelines, state parties are obliged to remove all abandoned and disused offshore installations on any continental shelf or in any exclusive economic zone *except where non-removal or partial removal is consistent with the guidelines.* By the same token, states are permitted to impose more stringent regulations than provided for in the Guidelines. In a sense, the Guidelines have set only the minimum standards.

There are two sections to the IMO Guidelines: Guidelines and Standards. The "Guidelines" provide for a case-by -case decision on whether to remove the abandoned installation or not with emphasis on the following:

- Any potential deterioration of the material and its impact on navigation and marine environment and other uses of the sea
- The costs, technical feasibility and risks of injury to personnel associated with removal of the installation or structure
- New uses for the platforms or other reasonable justification for allowing the platform or parts of it to remain on the seabed.

Where it pertains to the safety of navigation, the emphasis is on the proximity of the abandoned installations to sea-lanes or whether they are located in an approach to or in straits used for international navigation or in archipelagic waters. In other words there exists a general requirement to remove disused or abandoned platforms in straits, access to ports or in navigational routes. The determination of any potential effect on the marine environment should be based on scientific evidence.

Under the sub-heading "Standards", complete removal is required of all installations standing in less than 75 meters of water and weighing less than 4,000 tons in air (excluding deck and superstructure), and all installations placed on the seabed after 1998 standing less than 100 metres of water and weighing less than 4000 tons. The exceptions are those installations that have been assigned for new uses if permitted to remain partially or wholly in place or where the entire removal is not technically feasible or would involve an extreme cost or an extreme risk to the personnel and environment. The Standards further require that no installations should be placed on the continental shelf or in the EEZ after 1 January 1998 *unless the design and construction* is such that it makes it feasible to remove the installation in its entirety.

Existing installations in water depths of greater than 75 metres or weighing less 4000 tons can be wholly or partially left in place, provided they do not cause unjustifiable interference with other users of the sea. Installations, which are in straits used for international navigation or located in approaches to ports or in customary deep draught lanes and IMO adopted routing systems, must be removed. Any installation in the Straits of Malacca, for example, would be subject to this rule.

Where installations or structures remain above water they should be adequately maintained to prevent structural failure. In the case of partial removal, the coastal states must ensure an unobstructed water depth of no less than 55 meters above the structure to facilitate navigation. Coastal states are also required to ensure that any residue from the left over installations do not cause or result in a hazard to navigation. At the same time coastal states have obligation under the IMO Resolution to ensure that navigational aids are in place and maintained on those installations

that have been abandoned and that those installations not removed in entirety be marked on charts. States are also required to ensure that the legal title to the installations, which have not been fully removed to remain unambiguous and that the liability for future damages are clearly established.

The IMO Guidelines and Standards also make specific mention on converting abandoned platforms for use as artificial reefs. But states are required to make sure that the reefs are away from the customary traffic lanes and be consistent with the IMO Guidelines and other established standards for the maintenance of navigational safety standards.

There is also an environmental provision in the IMO Guidelines for compliance. Paragraph 3.3 states that the means of removing the installations should not cause a significant adverse effect on living resources. Some authorities exclude the use of explosives. What constitutes adverse environmental effects is not spelt out but left to the discretion of the coastal state.

The over riding concerns of IMO Guidelines are navigational safety and marine pollution. Nonetheless there is a notable absence of any environmental impact assessment as a standard procedure to be adopted. Presumably this is left to the discretion of coastal states. The purpose of the IMO Guidelines is to provide a set of minimum standards and leave the coastal states with wide discretionary powers on how to move forward.

It should be noted that the OSPAR regime applicable in North Sea is more stringent than the standards imposed in IMO Guidelines. For example, OSPAR does not permit deep sea dumping.

International Law Concerning the Disposal of Offshore Installations

Decommissioning is a complex process involving removal and disposal. But the law seems silent on the latter. Neither the 1958 Geneva Convention or UNCLOS have any reference to platform disposal. However, it is possible to establish some trends based on recent practices in platform decommissioning in Europe and also to examine some of treaty provisions. One treaty that deals with some aspects of platform disposal is the London Convention, 1972. It is also known as the London Dumping Convention. According to this Convention, abandonment *in situ* and toppling of offshore platforms are considered as dumping and thus subject to regulation by this Convention. In case a toppled platform was converted to an artificial reef, it was decided that it would still fall within the competence of the Convention. But in this case, a coastal state can exercise its discretion: to allow rig-to-reef conversion or not, so long as the reef would be consistent with the aims of the Convention. The USA welcomes rig-to-reef policy but Germany believes such policy prescription leaves too much discretion to coastal states.

But the Dumping Convention is silent on pipelines that have been abandoned. Is there necessity to remove pipelines or can they just be buried/ trenched considering that the process of natural sedimentation would anyhow bury the pipelines? If they are to be removed, what criteria should apply considering the engineering and economic practicality of the project and other concerns including sustainable environmental management?

The Dumping Convention operates by means of a licensing system, which distinguishes materials according to three classifications. There are those that may not be dumped at all (Annex 1), those that may be dumped if a license is granted by the state after consultation with other members of the Convention (Annex 11) and those that require special permit from the national authority (Annex 111). Applicants for a permit have to submit environmental impact assessments in advance.

This regime has been supplemented by a protocol to the Convention, which once ratified will supersede it. This is the London Convention Protocol of 1996.The protocol made sweeping changes to the concept of sea dumping. The main changes to the original convention are in the areas of definitions, dumping provisions and modern environmental principles. Among the definitional changes introduced in the LC Protocols are those concerning the "sea" and "platform". The term "sea" includes seabed and subsoil as well as the water column. By this definition disused platforms left on the seabed are included in this scope. Toppled structures and platforms left *in situ* will constitute dumping. The Convention does not define pollution but the LC Protocol defines it as anything that is introduced into the sea as a result of human activity that leads to or is likely to lead to deleterious impact on living resources and marine eco-systems.

The system of licensing is also modified. It has done away with the three categories of items that cannot be dumped and replaced them with one list of all waste and other materials that may be dumped. These are mainly inert or naturally occurring substances. Although the Protocol does not specify that abandoned platforms cannot be dumped at sea, it imposes an obligation on the operator of the platform not to dispose any item that may result in harm to the environment. Dumping anything in the sea for which there is insufficient data to predict likely outcomes is also not permitted. The LC Protocol puts emphasis on precautionary principle and "polluter pays" concept. The LC Protocol gives plenty of room to coastal states with regard sea dumping only to exhort states to be very responsible and to allow dumping only those that the states really believe that they will not harm the sea. And, when data is insufficient to determine its harmful impact, to refrain from it. In other words if states have doubt that by leaving an abandoned structure in *situ* could lead to some form of marine pollution then it should not be allowed.

In Europe, for example, there are very stringent rules on sea dumping following the *Brent Spar* episode in 1995. As a matter of principle; sea dumping of abandoned platforms is not permitted unless it is consistent

with general practice. The Oslo Convention and the Paris Convention govern sea-dumping activities in the EC countries. Both Conventions were replaced by the Convention for the Protection of the Marine Environment of the North East Atlantic (OSPAR). Annex 111 of OSPAR is concerned with the prevention and elimination of pollution from offshore sources. Articles 5,6,7 and 8 are directly applicable to the abandonment of offshore installations. Article 5 reiterates on the need for a permit before dumping. But it states that no permit is to be issued if the disused offshore installations including disused offshore pipelines contain substances which may result in hazards to human health, harm to living resources and marine eco-systems, damage to amenities or interference with other legitimate uses of the sea. States are required to consult other contracting parties before any permit is given.

In short the practice in Europe is moving towards banning deep-sea dumping of offshore platforms. Although some states in the EC have their own preferences and differences in opinions, they have been kept muted. This is because, according to one document, the disposal of decommissioned offshore installations in EC areas is a matter where the EC can exercise competence.

Such regional mechanisms/regimes do not exist in South East Asia although this region has a large share of offshore installations. As the old fields begin to mature, many installations installed for the primary purpose of oil production are no longer productive and slated for decommissioning. Presently there are some one thousand offshore installations in South East Asian waters that one-day will have to be decommissioned.

1958 Convention and UNCLOS

What is the relationship between the removal requirements in the 1958 Convention, UNCLOS and the IMO Guidelines? It is evident that there is a discrepancy between the provisions. In the 1958 Convention, the emphasis is on total removal. But in UNCLOS, the requirements are more flexible although as a general rule it still insists on removal. Both treaties are prima facie binding on the contracting parties. I have maintained elsewhere that despite claims by some that the treaty provisions have not become customary international law, the position is not very clear. One can make a case, however, that the provisions have provided strong evidence of state practice but they have not attained the status of customary international law. Moreover, the 1989 IMO Guidelines and Standards document is legally not binding.

The Way Forward

There is need to re-examine the practicality of the current legal regime on offshore platform decommissioning especially as they affect Third World countries. In the absence of a well-defined international legal regime, the Third World countries could adopt an easy way out by leaving the abandoned

platforms or toppling them *in situ*. In the long run this policy could pose danger to marine pollution and international navigation. This problem is less acute in Europe and America where national legislation is well placed. Moreover, in the developed countries the states are in a better position to deal with the oil industry. This is not so in the Third World that depends on foreign oil companies. The dependence limits their flexibility.

There is need to clearly define decommissioning in international law. Currently, the term is not defined though it is interchangeably with abandonment. Most treaties talk of abandonment when in reality it is meant to refer to the process of decommissioning.

Even the installations are not defined and as such not governed by any international norm. For example, the extensive pipelines at the bottom of the sea are not covered in the IMO Guidelines and OSPAR, the two legal regimes on platform decommissioning. Should not the pipelines' removal also be subject to some international legal regime? If so, who should initiate the process? Is the IMO the competent organization? What criteria should be used for pipelines?

OSPAR is a regional treaty and applicable only in Europe. The 1989 IMO Guidelines are binding on state parties. This makes compliance difficult. Besides not all oil producing countries are party to UNCLOS and IMO.

The cost to remove the installations is very high especially for those who have not made any financial arrangement to cover platform-decommissioning expenses. It is more acute for the developing oil producing countries with declining revenue to manage the mature oilfields. What need to be done? Can they leave the installations in the sea, as they have no financial means to remove them? In the absence of customary international law, how would states handle the concerns of residual liability? Would leaving the installations at sea compromise the other legitimate users of the sea? In the long run, could abandoned platforms be a source of marine pollution and pose a danger to international navigation?

One quick way out of the legal dilemma is for oil producing countries to enact a comprehensive national legislation on platform decommissioning covering every aspect of the decommissioning process discussed above. The 1989 IMO Guidelines could be used as the minimum standards for determining weight of jacket and water depth in removal options; it does not address all other relevant issues.

Third World countries, especially the oil producing states, should also take a more assertive approach on offshore decommissioning. Enacting a national legislation on offshore installations decommissioning would be a way forward.

NOTES

[1] This is an abridged paper in honour of Professor Kazoumi Ouchi of Chuo University, Japan. The original paper was first presented at The Global Conference on Oceans & Coasts at Rio +10,3-7 December 2001, UNESCO, and Paris, France.

[2] A.D.M Forte , "Legal aspects of Decommissioning" in D.G, Norman & J, Neilson (eds), *Decommissioning of Offshore Structures*, Springer, 1998.)

[3] The Guidelines Notes for Industry: Decommissioning of Offshore Installations and Pipelines Under the Petroleum Act 1988. (London, HMSO, 1999)

[4] Platform Abandonment Master Study, PETRONAS, 1997 (not published)

[5] Malaysia ratified UNCLOS on 14 October 1996. This means Malaysia has given its commitment to the treaty parties that it will honour all its obligations including the provisions on installations and structures in the EEZ and on its Continental Shelf.

INCORPORATION OF ENVIRONMENTAL LAW PRINCIPLES IN THE BOUNDARY TREATIES OF THE STRAITS OF MALACCA AND SINGAPORE

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INTRODUCTION

This article argues that the boundary treaties, concluded by Malaysia, Singapore, Indonesia and Thailand on the Straits of Malacca and Singapore need to be re-examined by the states concerned in order to incorporate significant environmental considerations given the current importance of international environmental law principles and the provisions of the 1982 Law of the Sea (1982 LOS) Convention.[1] The treaties are divided into colonial and post-colonial, for ease of reference to inter-temporal law and deal with the five maritime zones, namely the territorial sea, contiguous zone, continental shelf, exclusive economic zone and the high seas. Principles of international environmental law play a significant role in the sustainable use of the seas. Where any state engages in a pattern of unsustainable use of the seas or its resources even though such activity falls within the maritime jurisdiction of that state, that state may be said to be in violation of international environmental principles and of the 1982 LOS Convention.

This article urges the states of Malaysia, Indonesia, Singapore and Thailand to re-visit these sites and re-examine the boundary treaties, taking into consideration various environmental law principles that affect the living

and non-living resources even though they fall within their respective maritime sovereignty, sovereign rights, jurisdiction or control. The well-being of one state may produce deleterious consequences in other/s. What these problems are, if any, are not discussed in this article. While proof of problems is a sound basis for legal action, the new precautionary principle of international environmental law states that we need not wait for scientific uncertainty before legal redress. For example, some questions that may be raised under these treaties would include: would a project in one coastal state produce choking effects in its neighbour's maritime zones; or change tidal or seabed profiles; or adversely affect navigational capabilities of ships using coastal ports or the thalweg. It is equally important for states undertaking maritime works and expansion to consider the width and depth of the seas concerned. The presence of alternative routes and coral reefs and other aspects of marine ecology cannot be ignored. Whether new artificial islands are built or existing islands are enlarged, the interest of the international shipping, their right of passage and cabotage interests of neighbouring states has to be taken into consideration. Where there is an increase in size of islands, coastal states need to bear in mind that consequently their baselines will have to change and that their territorial seas and attendant maritime zones will be pushed further out to sea. This could affect existing maritime boundaries and treaties. Maritime states have to be mindful of the fact that the seabed and subsoil of the continental shelf are the inherent rights of coastal states. Any attempt at dredging these could amount to theft under national law. Coastal nations undertaking maritime development works also have to be alerted on the possibility that their work may threaten the safety or security of one or more coastal states. All the concerned states are required to study the environmental impact assessment report on any activity that impinges on the sustainable use and development of the seas. This has to be done irrespective of the presence or absence of municipal laws on environmental impact assessment requirements. To enable the coastal states to see that there is no environmental infringement of the seas concerned, data on the above issues should be deposited with the International Maritime Organisation or the regional bureau of the states concerned. Economic considerations are vital too but are not discussed in this article.

Since some of the treaties were concluded under general principles of international law and others on the basis of the 1958 Territorial Sea Convention (TSC) and the 1958 Convention on the Continental Shelf (CSC), references are made to these conventions and to the principles of maritime delimitation. This article discusses four aspects as follows: (1) principles of maritime delimitation; (2) colonial treaties; (3) post-colonial treaties; and (4) principles of international environmental and the marine pollution provisions of the 1982 LOS Convention.

PRINCIPLES OF MARITIME DELIMITATION

Delimitation principles of general international law

There are two sets of delimitation principles used in the demarcation of the above maritime zones.[2] One set of principles is used for the delimitation of the outer margin of the territorial sea, the contiguous zone, the continental shelf and the exclusive economic zone of the coastal state.[3] The other set of principles are used for the delimitation of maritime zones between adjacent and opposite states. The principles of delimitation of the zones between adjacent and opposite states in international law are found in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone[4] (1958 TSC), the 1958 Geneva Convention on the Continental Shelf[5] (1958 CSC), the 1982 LOSC and in international custom and judicial decisions.[6]

Sharma, on the technique of delimitation, wrote that at traditional international law the low-water mark was the starting point from which the territorial sea was measured. In the *Fisheries Case (UK* v *Norway)* (1951) *ICJ Reports* at 116 the question was whether the straight baseline method applied by Norway to determine the outer limit of a portion of its territorial sea, was valid in international law. While the Court upheld the traditional technique of employing the low-water mark for measuring the breadth of the territorial sea, it had to decide whether the relevant low-water mark was that of the mainland or of the *skjaergaard* (a Norwegian term embracing numerous islands, islets, rocks and reefs). The Court found that the *skjaergaard* were just an extension of the Norwegian mainland and based on this finding ruled that it was the outer line of the *skjaergaard* which should be taken into account in the delimitation of the Norwegian territorial waters. The Court explained that this solution was "dictated by geographical realities" and was influenced, in addition by "economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage"

Professor Sang-Myon Rhee in his article entitled "Sea Boundary Delimitation Between States Before World War II",[7] examines the early efforts to establish delimitation principles. The early states relied on the principles of equality and proportionality to delimit their rivers and lakes. Once the concept of the coastal sea had gained momentum, territorial seas also began to be delimited. States' concerns about the establishment of the outer limit of the seas and their delimitation were resolved by using various principles namely, the median line[8], the thalweg, perpendicular lines, lateral land boundary, historic title or other vested interests, equitable delimitation, latitudes, longitudes, or some other azimuth perpendicular to the general direction of the coast.

The median line principle is based on the notion that the sovereignty of each state extends to the middle of the maritime space. The median line principle later developed into the equidistance principle. It does not always

produce an equal division of the maritime space to be delimited between states. To attain equal division, equitable considerations have also been associated with the equidistance principle.[9]

Thalweg is a German word, which means the centre of the deepest or most navigable channel. The idea was to divide the navigable channel equally between the states such that the states had equal access to the channel for purposes of navigation. If the deepest channel was not navigable then states could use the next most suitable channel for navigation and divide that channel so as to distribute the navigable waters equally.[10] Under the thalweg principle what mattered was not the surface area of water but the ability to navigate along the thalweg where the larger and heavier vessels could navigate.[11] The thalweg principle was first adopted for the Rhine by the Peace Treaty of Luneville of 9 February 1801.[12] But the thalweg principle was not applicable to the delimitation of the territorial seas of either adjacent or opposite states. At best, it can be applied to bays and estuaries where the thalweg is identifiable.[13]

The other options are to use the land boundary or the perpendicular line, - that is, the straight line perpendicular to the coast where the dry land boundary abuts the sea.[14] A straight line perpendicular to the coast means a lateral territorial sea boundary, which is perpendicular to the general direction of the coast. In the *Grisbardana Case*[15] the Commission shifted the boundary from twenty degrees latitude to nineteen degrees latitude in the interest of equitable considerations. After World War I, states began to take a keen interest in the delimitation of their territorial seas. In 1936, S.W. Boggs finally developed the equidistance method, which consisted of a line every point of which is equidistant from the nearest point or points on shore.

Delimitation of Maritime Zones under the 1958 TSC and 1958 CSC, and the 1982 LOSC

Of the five maritime zones the coastal state has inherent rights to a territorial sea and a continental shelf. The other zones, including archipelagic status of archipelagic waters, must be claimed by states while the high seas being *res extra commercium* cannot be claimed. Every outer maritime limit must be established from a territorial sea baseline system. The starting point in maritime delimitation begins with a baseline from which the territorial sea of a state is drawn.

The 1958 TSC and 1958 CSC established for the first time, certain principles of delimitation of the territorial seas and the continental shelf. Article 3 of the 1958 TSC states that the normal baseline for measuring the territorial sea of a coastal state is the low-water line along the coast. There is an exception to this rule "in localities where the coast line of the coastal state is deeply indented and cut into, or if there is fringe of islands along the

coast in its immediate vicinity" (Article 4) in which case "the method of straight baselines joining appropriate points may be employed" Article 4 (4). Article 4 (4) takes into account the ratio of the ICJ in the *Anglo - Norwegian Fisheries Case*: "economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by a long usage". The outer limit of the territorial sea is defined in Article 6 as "the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea". These provisions were also incorporated in Articles 4 - 7 of the 1982 LOS Convention. The 1958 TSC and the 1982 LOS Convention defines an island as a naturally formed area of land surrounded by water, which is above water at high tide (Articles 10 & 12 respectively). The territorial sea of an island is measured in the same way.

There were no principles of delimitation of the exclusive economic zone before the advent of the 1982 LOS Convention. The 1958 TSC did not contain any principle of delimitation of an archipelago as the First United Nations Conference on the Law of the Sea (UNCLOS I) could not resolve the issue of an archipelago at that Conference.

The 1982 LOS Convention also deals with reefs (Article 6), internal waters (Article 8), mouths of rivers (Article 9), bays (Article 10), ports (Article 11) roadsteads (Article 12), and low tide elevations (Article 13). Article 14 allows a coastal state to determine its baseline by any approved method.[16]

Articles 3 to 16 of the 1982 LOSC provide for several baseline systems enumerated below. Article 3 provides that every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles. The outer limit of the territorial sea, according to Article 4, is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea. The normal baseline, which keeps shifting all along, based on Article 5, for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal state. The specific rules on reefs is provided in Article 6 which states that in the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal state.

A country may use either the straight baseline system or the low-water normal baseline. However, case law points out that the straight baseline system is to be preferred by countries having a highly indented coastline as outlined in Article 7.

Delimitation between opposite and adjacent coastal states

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way, which is at variance therewith. The line of delimitation between the territorial seas of these two coastal states shall be marked on large scale charts officially recognised by the coastal states. This provision is *in pari materia* with Article 15 of the 1982 LOS Convention.

Delimitation of a Mid - Ocean Archipelago

Neither the 1958 TSC nor the 1958 CSC contains any provision on mid-ocean archipelagoes. The concept of an archipelago was accorded formal recognition in Article 48, Part IV of the 1982 LOS Convention. Article 48 permits archipelagic states to have a territorial sea of their own which has to be measured in accordance with the provisions of Article 47, joining the outer most points of the outermost islands and drying reefs of the archipelago.

The outer limit of a mid-ocean archipelago is drawn like the Norwegian fjords using the system of straight baselines. This is provided for in Article 47(1) of the 1982 LOSC.[17] Shearer states that this is the link to international customary law for archipelagoes. Article 51 of the 1982 LOS Convention compels an archipelagic state to:

- respect existing agreements
- recognise traditional fishing rights
- recognise other legitimate activities of the immediately adjacent neighbouring states in certain areas falling within archipelagic waters
- respect existing submarine cables laid by other states and
- permit the maintenance and replacement of such cables upon receiving due notice of their location and the intention to repair or replace them.

Only States Parties to the 1982 LOS Convention would be bound by its provisions unless they represent international custom based on the decision in *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany* v *The Netherlands) (1969) ICJ Reports* 3 Para 72. Are mid-ocean archipelagos based on international customary law? Following the *North Sea Continental Shelf*

Cases Shearer argues that an international custom must be of a fundamentally norm creating character such as could be regarded as forming a general rule of law. The above may be regulated by bilateral agreements between the two concerned states. Such respect, recognition or permission does not prejudice the legal status of the archipelagic waters, of the air space over the archipelagic waters and of their bed and sub soil. Shearer finds that the measurements in Article 47 on the measurements of archipelagic baselines of the 1982 LOS Convention are "idiosyncratic" with no basis in history or doctrine except in the context of a package deal. Therefore, the regimes in Articles 53 and 54 will only apply to parties to the 1982 LOS Convention.[18]

Delimitation of the Continental Shelf

The geological continental shelf commences at the point where the land meets the sea; the legal continental shelf begins at the point on the sea-bed where the territorial waters of a coastal state end. Similarly, the geological continental shelf and the legal continental shelf end differently. U.L.F.Dieter Klemm states that "the outer limits of the continental shelf are its limits *vis-a-vis* the ocean or in terms of the 1982 United Nations Convention on The Law of the Sea *vis-a-vis* The International Sea Bed Area.[19] They are not the dividing lines between the states with adjacent or opposite coasts".

In addition, the International Court of Justice (ICJ) and other arbitration commissions gave their judgments in the *North Sea Continental Shelf Cases*[20], the *Anglo-French Continental Shelf Cases*[21], the *Tunisia /Libya Case*[22], the *Libya/Malta Case*[23], the *Jan Mayen Case*[24] and the *Gulf of Maine Case*[25]. Many of these cases were decided before the 1982 LOSC was finalised and some before it came into force. The controversy in this branch of the Law of the Sea is whether the 1958 CSC provisions on the delimitation of the continental shelf have slipped into international customary law or whether the cases referred to have done so.

The geological continental shelf, acquired a legal identity only in the last fifty years or so in the form of Article 1(a) of the 1958 CSC:

(a) ...the sea-bed and sub-soil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres, or beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas;

(b) ...the sea-bed and sub-soil of similar areas adjacent to the coasts of islands.

The 1982 LOS Convention modified this definition of the continental shelf as to its extent and outer limits. Article 76(1) states:

> The continental shelf of a coastal State comprises the sea-bed and sub-soil of the sub-marine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer

> edge of the continental margin, or to a distance of 200 nms from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

Where the outer edge of the continental margin extends beyond 200 nms, Article 76(5) of the 1982 LOS Convention provides:

> The fixed points comprising the line of the outer limits of the continental shelf on the sea-bed, drawn in accordance with paragraph 4(a)(i) and (ii) either shall not exceed 350 nms from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100nms from the 2,500 metres isobath, which is a line connecting the depth of 2500 metres.

Article 121 of the 1982 LOS Convention reiterates that islands also generate their own territorial sea, contiguous zone, exclusive economic zone and continental shelf and this has to be determined in accordance with the provisions of this Convention. The formula for delimitation of the continental shelf[26] and the Exclusive Economic Zone are found in Articles 74 and 83 of the 1982 LOS Convention.

Delimitation of the Exclusive Economic Zone (EEZ)

The legal delimitation of the exclusive economic zone is of fairly recent origin. It has its beginnings in the concept of the exclusive fishing zone. Before this was introduced into the debates of United Nations Conference on the Law Of the Sea III (UNCLOS III), many states had already claimed an exclusive fishing zone or an exclusive economic zone. Many states have claimed a comprehensive exclusive economic zone since this confers many sovereign rights on a coastal state. An exclusive economic zone is regarded as *sui generis* in nature: unlike the territorial sea and the continental shelf, which are vested rights of the coastal state, the EEZ must be claimed. Brown is of the view that the EEZ is not a zone *ab initio* and *ipso jure* and that there is a need to claim such a zone.[27]

BASELINES USED BY MALAYSIA, INDONESIA, SINGAPORE AND THAILAND

For the purpose of boundary determinations, Malaysia and Thailand seem to have adopted the straight baseline segments for a territorial sea baseline as Thailand decreed a system of straight baselines on 12 June 1970 and Malaysia decreed the same on 2 August 1969 for the purpose of boundary determination. Malaysian coastal waters are demarcated on the 1979 Map Showing the Territorial Waters and Continenetal Shelf Boundaries of Malaysia[28] but the baselines are not specified. Indonesia adopted the archipelagic baseline system on 18 February 1960. Forbes is of the view that in the vicinity of the Straits of Malacca and Singapore a system of

straight baselines is unnecessary in the light of an established continental shelf boundary and associated agreement with reference to navigation in the strait.[29] In the region of the Straits, the coastal states are unable to claim a full economic zone.

COLONIAL TREATIES

The colonial treaties namely, the Anglo-Siamese Treaty of 1909[30] and the Johore-Singapore Treaty of 1927[31] demarcate the boundary between Peninsular Malaya and Thailand in the Sungei Golok (River Golok) and between Johore, a state in Peninsular Malaya and Singapore in the Strait of Johore respectively. The principles of delimitation used were the thalweg, the mid-stream boundary line and the centre line of the main deep water channel (which is the same as the thalweg).

The Anglo-Siamese Treaty of 1909

On 10 March 1909, Great Britain and Siam signed a bilateral treaty[32] in Bangkok- as between two independent and sovereign equals - regarding the Cession and Boundaries of the Siamese Malay States of Kedah, Perlis, Kelantan and Terengganu. Ratifications were undertaken in London on 9 July 1909. The Treaty, *inter alia*, settled the issue of navigation. By this Treaty, the Siamese transferred to Great Britain the rights of suzerainty, protection, administration and control, which they had possessed over Kedah, Perlis, Kelantan and Terengganu. A British Advisor was then appointed to each of those four states. Johore too agreed to receive a General Advisor in 1914. These five states remained outside the Federation until after the Second World War. The bilateral treaty is significant for it expressly contains a clause to the effect that should a change in the frontier boundary be necessary, then no such rectification can be made to the detriment of Siam.[33] Section 1 of Annex I to the Treaty of 10 March 1909 states:

> The frontiers between the territories of His Majesty the King of Siam and the territory over which His suzerain rights have by the present Treaty been transferred to His Majesty the King of Great Britain and Ireland are as follows:
>
> > Commencing from the most seaward point of the northern bank of the estuary of the Perlis River and thence north to the range of hills which is the water shed between the Perlis River on the one side and the Pujoh River on the other; then following the watershed formed by the said range of hills until it reaches the main watershed or dividing line between those rivers which flow into the Gulf of Siam on the one side and into the Indian Ocean on the other;

following this main watershed so as to pass the sources of the Sungai Patani, Sungai Telubin, and Sungai Perak, to a point which is the source of the Sungei Pergau; then leaving the main watershed and going along the watershed separating the waters of the Sungei Pergau from the Sungei Telubin, to the hill called Bukit Jeli or the source of the main stream of the Sungei Golok. Thence the frontier follows the thalweg of the main stream of the Sungei Golok to the sea at a place called Kuala Tabar.

...Subjects of each of the parties may navigate the whole of the waters of the Sungei Golok and its effluents.

Effects of the Treaty of 1909[34]

The Anglo-Siamese Treaty of 1909 provided for a commission composed of Siamese and British officials charged with delimitation of the new frontier to be appointed within six months of the date of ratification of the Treaty.

Boundary Brief

The Malaysia-Thailand boundary extends for 314 miles from the Strait of Malacca on the west to the Gulf of Siam on the east. The demarcated boundary follows water divides in the west and center and the Golok River in the east.[35] The boundary Protocol to the Anglo-Siamese Treaty of 1909, which is still in force, has two significant features. The first is the reference to a 'rough sketch' of the boundary, the second, that no rectification of the boundary is to be made to the prejudice of the Siamese Government. That a map annexed to a Treaty is conclusive of its contents is established in the *Temple* case,[36] a case involving Thailand as well. Based upon the *Temple* case, the map to the Anglo-Siamese Treaty should also, therefore, be conclusive of its demarcations unless contracted to the contrary as found in the provisions of the 1927 Treaty between Great Britain and Johore concerning the Johore Strait. Article (i) of the 1927 Treaty provides *inter alia*, Should, however, the map owing to alterations in the channels, *etc*, appear at any time to conflict with the text of this Agreement, the text shall in all cases prevail.

The second significant point relates to the fact that no rectification of the boundary is to be made to the prejudice of the Siamese Government. Such a protection clause gives an impression that the treaties were concluded between two unequal parties. On the other hand, customary international law provides that states may conclude treaties and such conclusion of treaties is said to be valuable evidence of statehood and sovereignty as laid down in the *S S Wimbledon* case.[37]

What is the position of treaties like the Anglo-Siamese Treaty of 1909, which was concluded before the rule stated in Article 52 of the Vienna Convention on the Law of Treaties[38] was established?[39] The Soviet doctrine of 'unequal' treaties, not found in Article 52 may be cited here:

> The principle that international treaties must be observed does not extend to treaties which are imposed by force, and which are unequal in character...
>
> Equal treaties are treaties concluded on the basis of the equality of the parties, unequal treaties are those, which do not fulfill this elementary requirement. Unequal treaties are not legally binding...
>
> Treaties must be based upon the sovereign equality of the contracting parties.[40]

If a dispute arises on the 'unequal' clause of the Anglo-Siamese Treaty of 1909, the Soviet doctrine of unequal treaties may prove to be of some assistance.

The Anglo-Siamese Treaty of 1909 utilized the thalweg, that is, the line of maximum depth, as the precise national boundary along the course of the river in line with the international practice at the beginning of the nineteenth century. However, the utilization of the thalweg raises some problems, for instance, where the channel is relatively straight it is usual for the thalweg to move back and forth from positions near one bank to another, its precise delineation thus requires a detailed survey of the river bed.[41]

Using the Sungei Golok as an international boundary has raised many problems. The most significant problem in a 'maritime' context is that the river changes its course and so the thalweg shifts from one bank to another. As a result, in 1972, the mid stream boundary line was accepted as the international boundary between the two countries.[42]

The Johore - Singapore Treaty of 1927[43]

The 1824 boundary between Johore and Singapore was modified by the 1885 Johore Treaty[44] and restated rather more carefully in 1906 by Sir Laurence Guillemard (Governor and High Commissioner 1919 - 27). He redefined the frontier in connection with the requirements of the Imperial Naval Base, which was being established at Singapore. The result was the treaty, which was signed between Sultan Ibrahim of Johore and Guillemard's successor, Sir Hugh Clifford (Governor and High Commissioner 1927 - 29). In 1927, Britain and Johore entered into a treaty called the Great Britain-Johore Treaty of 1927: - "An agreement concerning the Johore Strait for purposes of retrocession of the waters and Straits of Johore.

Article IV required Parliamentary approval before the treaty could take effect and in the following year the Straits Settlements and Johore Territorial Waters (Agreement) Bill was introduced into the House of Lords. When the Bill was read the second time on 27 March 1928, Lord Lovat, the Parliamentary Under-Secretary at the Colonial Office, unwittingly drew attention to the paradoxical relationship that Britain had in her treaty relations with Malay Rulers: "The Sultan of Johore is a Sovereign Prince. He is directly under the protection of His Majesty ...". The Bill merely makes a slightly altered boundary inside the Empire. The Bill received the Royal Assent on 3 August 1928 and is known as the Straits Settlement and Johore Territorial Waters (Agreement) Act 1928. Another Agreement was the Boundary Treaty with Singapore. This Treaty was made between Sir Hugh Charles Clifford, Governor and Commander-in-Chief of the Colony of the Straits Settlement, on behalf of His Britannic Majesty, and His Highness Ibrahim bin Almorhom Sultan Abu Bakar, Sultan of the State and Territory of Johore. The importance of the Johore Treaty is that it is clear on what constitutes Johore Territorial Waters, that is, the territorial sea of Johore extended to three miles from the shore of the state.[45]

Generally delimitation of territorial sea boundaries between opposite states is based upon the median line. In the 1927 Johore Treaty, however, the States used the centre-line of the main deepwater channel of the Johore Straits. Article I states that the boundary between the territorial waters of the Settlement of Singapore and those of the State and Territory of Johore shall be an imaginary line following the centre of the deep - water channel in Johore Strait, between the mainland of the State and Territory of Johore on the one side, and the Northern shores of the islands of Singapore, Pulau Ubin, Pulau Tekong Kechil and Pulau Tekong Besar on the other side. Where, if at all, the channel divides into two portions of equal depth running side by side, the boundary shall run mid-way between these two portions. At the Western entrance of Johore Strait, the boundary, after passing through the centre of the deep-water channel eastward of Pulau Merambong, shall proceed seaward, in the general direction of the axis of this channel produced, until it intersects the three mile limit drawn from the low water mark of the South Coast of Pulau Merambong. At the Eastern entrance of Johore Strait, the boundary shall be held to pass through the centre of the deep-water channel between the mainland of Johore, westward of Johore Hill, and Pulau Tekong Besar, next through the centre of the deep-water channel between Johore Shoal and the mainland of Johore, southward of Johore Hill, finally turning Southward, to intersect the three-mile limit drawn from the low water mark of the mainland of Johore in a position bearing 192 degrees from Tanjong Sitapa. The boundary as so defined is approximately delineated in red on the map annexed and forms part of this agreement. Should, however, the map, owing to alterations in the channels, appear at any time to conflict with the text of the Agreement, the text shall in all cases prevail.

Article ii states that all those waters ceded by their Highnesses the Sultan and Tumungong of Johore under the Treaty of 2nd of August, 1824, which are within three nautical miles of the mainland of the State and Territory of Johore measured from the low-water mark shall be deemed to be within the Territorial waters of the State and Territory of Johore.

Article III points out that all islets within the territorial waters of the State and Territory of Johore, which prior to this Agreement formed part of His Majesty's Dominions, are ceded in full sovereignty and property to the Sultan of Johore and his heirs and successors forever.

POST-COLONIAL TREATIES

The post-colonial treaties used the equidistant median line, as in the Malaysia - Singapore territorial sea boundary in the Strait of Johore, and a modified equidistant line, as in the treaties with Thailand.[46]

Malaysia and Indonesia: Delimitation of the territorial waters

The Strait of Malacca is less than 24 nms wide in the region just below the One Fathom Bank. Accordingly, a treaty between the Republic Of Indonesia and Malaysia on Determination of Boundary Lines of Territorial Waters of the Two Nations at the Strait of Malacca was signed on 17 March 1970 and it came into force on 8 October 1971. By this Treaty, both countries established a boundary in a narrow section of the Straits by a median line. Article 1(1) states that the boundary lines of territorial waters of Indonesia and Malaysia at the Strait of Malacca in areas as stated in the preamble of this Treaty shall be the line at the center drawn from baselines of the respective parties in the said areas. Prior to the drawing of this boundary, the two states had already the previous year delimited their continental shelves. Three separate lines were drawn for this, one in the Strait of Malacca and two in the South China Sea. Charney and Alexander state that for Indonesia the territorial sea boundary coincides with the continental shelf boundary. In the case of Malaysia,

> two segments (points 5 - 7), about 40 nautical miles out of a total of 174 do not coincide with the shelf boundary; the line deviates slightly southward in favour of Malaysia, creating a sharp triangular 'gray zone' enclosed by Points 5, 6, and 7 on the Indonesian side. This is because Point 6, which lies beyond Malaysia's territorial sea, does not apply to Malaysia (Article 1(2)(b).[47]

Fresh problems arose for consideration on 10 March 1971 when Indonesia decided to exercise her sovereignty over the seas linking some 13,000 islands on the basis that she was an archipelagic state. Indonesia accorded great

importance and seriousness to promoting this doctrine, which transformed the legal regime from one of territorial seas to one of internal waters. Malaysia and Indonesia consented to two Memoranda of Understanding in 1974 and 1976 on the issue of the archipelagic concept.

The 1976 Memorandum of Understanding established the joint position on the proposed archipelagic concept. Malaysia formally recognised Indonesia as an archipelagic state and Indonesia in turn recognised the rights and other legitimate interests, which Malaysia traditionally exercised in the Indonesian archipelagic waters between East and West Malaysia as well as within its airspace, archipelagic waters, and territorial sea in the South China Sea. Malaysia's main concern was her right of access and communication through those waters whether by sea or air. Pursuant to this Memorandum, a bilateral treaty was concluded between the two governments after a series of meetings. The first meeting was held in Kuala Lumpur in February 1981, the second in Jakarta in June 1981. The third was held in two sessions, the first half was held in Kuala Lumpur from 1 - 7 October 1981 and the resumed second half in Penang from 23 - 28 November 1981. However, the Treaty was signed only on 25 February 1982 in Jakarta, eight months before the final draft of 1982 LOS Convention was finalised in Jamaica.

Malaysia and Indonesia: the status of archipelagic state and waters

The Treaty between Indonesia and Malaysia on the recognition of the Indonesian archipelagic state and waters was ratified on 25 May 1984. Instruments of ratification were exchanged between the Indonesian Ambassador to Malaysia, Encik Rais Bin, and the Secretary General of the Malaysian Ministry of Foreign Affairs, Tan Sri Zakaria Ali, at Wisma Putra, Kuala Lumpur.

For the purposes of this Treaty "archipelagic waters of the Republic of Indonesia" means all the waters enclosed by archipelagic baselines drawn in accordance with the laws and regulations of the Republic of Indonesia and in conformity with international law (Article 1(1)). "Territorial sea of the Republic of Indonesia" refers to a belt of sea adjacent to archipelagic baselines drawn in accordance with the laws and regulations of the Republic of Indonesia and in conformity with international law, the breadth of which is twelve nautical miles measured from such baselines. "Government ships" are vessels owned or used by the Government of Malaysia, including naval ships that are operated for official and non-commercial purposes. "Merchant ships" cover vessels registered or licensed in accordance with the laws and regulations in force in Malaysia that are operated for commercial purposes, including foreign merchant vessels

"State aircraft" means aircraft owned or used by the Government of Malaysia, including aircraft used in military, customs and police services and other aircraft used for official or non-commercial purposes. "Civil aircraft" means all aircraft, other than state aircraft, registered or licensed in accordance with the laws and regulations in force in Malaysia.

"Traditional fishing" is understood to mean fishing by Malaysian traditional fishermen using traditional methods in the traditional areas within the territorial sea and archipelagic waters of the Republic of Indonesia lying between East and West, and "traditional fishermen" refers to Malaysian fishermen who, as their basic means of livelihood are engaged directly in traditional fishing in the designated Fishing Area, referred to in paragraph 2 (e) of Article 2 of this Treaty. The "traditional fishing boat" covers any boat owned and used by Malaysian traditional fishermen specifically for traditional fishing in the designated Fishing Area and "fishing vessel" is any vessel, other than a traditional fishing boat, owned and used by Malaysian fishermen. "Foreign fishing vessel" is understood to mean any foreign fishing vessel on joint venture with Malaysian nationals or under any other arrangements with the Government of Malaysia.

The significance of the Treaty lies in Article 2, which recognises the following rights and interests of Malaysia in Indonesian archipelagic waters. On Malaysia's part, Malaysia recognises and respects the legal regime of the archipelagic state claimed by the Republic of Indonesia. Notwithstanding this, the Republic of Indonesia continues to respect existing rights and other legitimate interests which Malaysia has traditionally exercised in the terrritorial sea and archipelagic waters as well as in the airspace above the territorial sea, archipelagic waters and the territory of the Republic of Indonesia lying between East and West Malaysia. It recognises:

- the right of access and communication of Malaysian government ships, merchant ships and fishing vessels including foreign fishing vessels and State and civil aircraft;
- traditional fishing rights of Malaysian fishermen in designated areas;
- legitimate interests relating to the existence, protection, inspection, maintenance repair and replacement of existing submarine cables and pipelines including the laying of new lines after notification;
- legitimate interests in the promotion and maintenance of law and order through co-operation with the appropriate authorities of the Government of Indonesia;
- legitimate interests in undertaking joint search and rescue operations;
- legitimate interests in co-operation with Indonesian authorities in marine scientific research for the purposes of the protection and preservation of the marine environment.

The Treaty provides for consultation and co-operation in the implementation of its various provisions.[48]

Malaysia-Singapore Agreement Relating to the Strait of Johore 1995

The state of Johore in Malaysia is separated from Singapore by a ribbon of water called the Strait of Johore (Johore Strait)[49] discussed earlier. The territorial sea boundary between Malaysia and Singapore in the Strait of Johore was concluded on 3 August 1928 with the enactment of the Straits Settlements and Johore Territorial Waters (Agreement) Act by Britain. It gave legislative effect to an Agreement concluded between the British Crown and the Sultan of Johore. The method used for delimitation of the territorial waters was the centre line of the main deep water channel passing between their shores, also known as the *thalweg*. But this Act was later considered outdated and it became essential for the two countries to review it for various reasons discussed below.

On 10 March 1980 Malaysia and Singapore started a joint hydrographic survey of the strait, which was completed on 10 October 1980. The two coastal states agreed to change the thalweg delimitation to a median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two states is measured. The survey showed that there was a shift in the deep water channel, resulting in a change of the sea border, presumably due to Singapore's efforts at land reclamation. It was believed that the application of Article 12 of 1958 TSC (equivalent to Article 15 of the 1982 LOS Convention) would enable the boundary to be drawn in such a manner as to minimise the loss of territorial waters to both Johore and Singapore and help to reduce the number of bends in the shorelines of both countries when the boundary was drawn.

The purpose of the 1995 Agreement relating to the Strait of Johore, dated 7 August 1995, is to delimit precisely the territorial waters boundary in accordance with the Straits Settlements and Johore Territorial Waters Agreement 1927. The Preamble states that based upon the successful completion of the joint hydrographic survey on 12 May 1982 and the adoption of its report by Malaysia and Singapore on 16 April 1985, the two countries desired to enter into an agreement to delimit precisely the territorial waters boundaries between Malaysia and the Republic of Singapore in the areas described in Article 1 of the 1927 Agreement. Article 1 deals with the Boundary, which reads as follows:

Article 1

The Boundary

1. The territorial waters boundary between Malaysia and the Republic of Singapore as described in Article 1 of the 1927 Agreement is defined by straight lines joining the points, the geographical coordinates of which are specified in Annex I.

2. The latitude and the longitude of the geographical coordinates specified in Annex I have been determined on the Revised Keratu Datum, Everset Spheroid (Malaya), Malaysian Rectified Skew Orthomorphic Projection (Projection Tables Published by the Directorate of Military Survey, Ministry of Defence, United Kingdom-March 1965). Chart Datums used are as described in the Joint Hydrographic Survey Fair Series 1980/1982 listed in Annex II.

3. As an illustration, the territorial waters boundary referred to in paragraph 1 is shown in red on the map attached hereto as Annex III.

4. Where the actual location of the points specified by the geographical coordinates in Annex I or any other points along the boundary is required to be determined, it shall be determined jointly by the competent authorities of the Contracting Parties.

5. For the purpose of paragraph 4 of this article, the term "competent authorities", in relation to Malaysia shall mean the Director-General of Survey and Mapping, Malaysia and any person authorized by him, and in relation to Singapore shall mean the Head of the Mapping Unit, Ministry of Defence, Singapore and any person authorized by him.

Article 2 states that this Boundary is final. The preferred method of dispute settlement concerning the interpretation or implementation of this Agreement, as highlighted in Article 3, is by consultation or negotiation. Article 4 governs the relationship with the 1927 Agreement, for it provides that in the event of an inconsistency between Article 1 of the 1995 Agreement and Article 1 of the 1927 Agreement, Article 1 of the 1995 Agreement prevails.

Malaysia and Thailand: Delimitation of the territorial seas

The Treaty Between The Kingdom of Thailand and Malaysia Relating to the Delimitation of the Territorial Seas of the Two Countries delimiting the territorial seas in the Strait of Malacca and in the Gulf of Thailand, was signed and ratified on 24 October 1979 and entered into force on 15 July 1982. The two countries of Malaysia and Thailand are adjacent to each other in the region of the Strait of Malacca and in the Gulf of Thailand. The territorial waters of both countries in the region of the Straits overlap between the islands known as the Butang Group and Pulau Langkawi. The boundaries are delimited without reference to a baseline, perhaps due to the smooth coastline of the two countries. In the Strait of Malacca the equidistant method of delimitation is used. The boundary in the Gulf of Thailand presented a problem. The Sungei Golok between Malaysia and Thailand is their land boundary. The principle of delimitation under the colonial treaty was the thalweg of the river. The parties to the present Treaty

experienced some difficulty with the application of the thalweg principle in this case. The difficulty lay in fixing a solid location, a permanent basepoint due to the presence of sand-shifts at the starting point of the river and seabed.[50]

Along with the signing of this Treaty the parties also concluded a Memorandum Of Understanding on the Delimitation of the Continental Shelf Boundary in the Gulf of Thailand and in the South China Sea.

Indonesia and Singapore: Territorial sea boundary in the Strait of Singapore

The Agreement Stipulating the Territorial Sea Boundary Lines Between Indonesia and the Republic of Singapore in the Strait of Singapore[51] was signed on 25 May 1973 and entered into force on 29 August 1974. Indonesia ratified it on 3 December 1973. Charney states that the need for the current agreement with Indonesia arises out of the fact that the Strait of Singapore is part of what constitutes the Strait of Malacca where the traffic is so dense that it has to be very carefully regulated by the coastal states." The maritime boundary is a modified equidistant line. There are three turning points on the east measured from low tide elevations. The other three turning points on the west are closer to Indonesia. One of them, Point 2, is located within the Indonesian archipelagic baseline because of the deep draft tanker route around the particular spot.[52] They are also measured from low tide elevations off the coast of Singapore and the archipelagic baselines of Singapore. Charney and Alexander are of the view that although the agreement does not expressly specify the method of delimitation employed, it is clear that the three on the basepoints on the east were based on the equidistant method and the other three on the west were measured differently.[53]

Indonesia and Malaysia: Delimitation of the Continental Shelves

The Agreement Between the Government of the Republic of Indonesia and the Government of Malaysia Relating to the Delimitation of the Continental Shelves Between the Two Countries[54] was signed on 27 October 1969 and entered into force on 7 November 1969. With this Agreement, the continental shelves between Indonesia and Malaysia are divided by three lines in all, one line in the Strait of Malacca, and two in the South China Sea. This Agreement was concluded before the territorial waters treaty between Indonesia and Malaysia. The line drawn in the Strait of Malacca is a median line about 339 nms long. This line was extended by a 1971 Indonesia-Malaysia-Thailand agreement to a tri-junction, called the Common Point, defined in the Agreement between the Governments of the Republic of Indonesia, The Government of Malaysia and the Government of the Kingdom of Thailand Relating to the Delimitation of the Continental Shelf Boundaries in the Northern Part of the Strait of Malacca on 21 December 1971. The second line is also a median line, about 310 nms long drawn between the Malayan Peninsular and the Indonesian islands in the South

China Sea. The northern terminus of this line is equidistant from the territories of Indonesia, Malaysia, Thailand and Vietnam.[55] The third line, which is about 264 kms long, is also drawn in the South China Sea. It is a lateral line drawn from the terminus of the Indonesian-Malaysian land boundary on the northern shore of Borneo. Most of the Agreement areas are less than 200 metres deep and are believed to contain exploitable mineral deposits.[56] Alexander and Charney are of the view that:

- all these three segments of the boundary were drawn mostly by equidistance from the parties' basepoints to divide their continental shelf;[57]
- the first segment drawn in the Strait of Malacca reasonably follows the coastal configurations on both sides;
- the second segment is equidistant from the baselines on both sides;[58] and
- the third baseline is a negotiated line situated west of what would be the lateral median line.[59]

The next question is whether these lines coincide with the territorial sea boundary of 1970. Charney and Alexander are of the opinion that the line does not coincide in the southern part of the Strait of Malacca but that it does so in the northern terminus. However, the present boundary was left unfinished to be extended to the "Common Point" as agreed on in the Indonesia-Malaysia-Thailand Agreement of 1971.[60]

The principal features of the Agreement are as follows:

(a) the boundaries of the continental shelves between Indonesia and Malaysia connect geographical coordinates referred to as points indicated on charts. The actual location of these points at sea shall be determined by a method to be mutually agreed upon by the competent authorities of the two Governments.[61]

(b) It does not in any way affect any future agreement, which may be entered into between the two Governments relating to the delimitation of the territorial sea boundaries between the two countries.[62]

(c) The procedure for the recovery of unitised deposits of mineral resources from the agreement areas are specified.[63] It states that if any single geological petroleum or natural gas structure extends across the straight lines referred to in Article 1 and the part of such structure which is situated on one side of the said lines is exploitable, wholly or in part, from the other side of the said lines, the two Governments will seek to reach agreement as to the manner in which the structure shall be most effectively exploited.

(d) Disputes between the two Governments arising out of the interpretation or implementation of this Agreement shall be settled peacefully by consultation or negotiation.[64] However, environmental considerations did not play a part in the delimitation exercise.[65]

Indonesia and Thailand: Delimitation of a Continental Shelf Boundary

The Agreement between the Government of the Republic of Indonesia and the Government of the Kingdom of Thailand Relating to the Delimitation of a Continental Shelf Boundary between the Two Countries in the Northern Part of the Strait of Malacca and in the Andaman Sea[66] was signed on 17 December 1971 and entered into force on 16 July 1973. The boundary between Indonesia and Thailand consists of an 89 nms long line located at the entrance to the Strait of Malacca,[67] traversing a broad submarine depression.[68] This Agreement was made in the full knowledge of the Indonesian-Malaysian-Thai Agreement to be signed four days later, extending these boundary south-eastwards to the Malaysian tri-junction. Article II requires the parties to agree on the best method of exploiting any single oil or gas field, which straddles the boundary. Geographic considerations were central to the delimitation of this boundary[69]. Economic, biological, ecological or scientific considerations did not influence its position.[70] Article III requires the two Governments to settle any dispute arising out of the interpretation or implementation of this Agreement peacefully by consultation or negotiation.

Malaysia and Thailand: Memorandum of Understanding on Delimitation of the Continental Shelf Boundary

The Memorandum of Understanding between the Kingdom of Thailand and Malaysia on the Delimitation of the Continental Shelf Boundary between the Two Countries in the Gulf of Thailand[71] was signed and ratified on 24 October 1979 and entered into force on 15 July 1982. The continental shelf boundary of approximately 29 nms in length is a simplified equidistant lateral delimitation, which starts at the seaward terminus of the territorial sea boundary. The parties were unable to agree on the legal status of a Thai rock known as 'Ko Losin'. The area around the rock became a disputed area. For one point in the boundary the parties agreed to use a point formerly applied in the Boundary Protocol annexed to the Treaty between Siam and Great Britain of 10 March 1909. As a result the boundary line has a tiny zigzag.[72] Therefore, at the seaward terminus of the shelf boundary, the parties disagreed on the delimitation further offshore.[73] The parties also signed a Memorandum of Understanding on the Establishment of a Joint Authority for the Exploration and Exploitation of the Resources of the Seabed with respect to the disputed area of Ko Losin, which came into force together with this agreement.[74] There were no particular economic, environmental or unusual geographic considerations shown in the agreement.

Thailand and Malaysia: Establishment of a Joint Authority for the Exploitation of the Resources of the Seabed in the Gulf of Thailand

Simultaneously with the Malaysia - Thailand Gulf of Thailand Continental Shelf Boundary, the parties signed a Memorandum of Understanding on the Establishment of a Joint Authority for the Exploration and Exploitation of the Resources of the Seabed which establishes the Joint Authority known as the "Malaysia-Thailand Joint Authority"[75] for the exploration and exploitation of the non-living natural resources of the seabed and sub-soil of the disputed area of the continental shelf boundary in the Gulf of Thailand for a period of fifty years commencing from the date this MOU came into effect.[76] Article I states that the area of overlap is bounded by straight lines. Article II provides that the parties have agreed to resolve all problems of boundary delimitation by negotiations or such other peaceful means as agreed by the parties and in Accordance with the Agreed Minutes of the Malaysia-Thailand Officials' Meeting on Delimitation of the Continental Shelf Boundary Between Malaysia and Thailand in the Gulf of Thailand and in the South China Sea, 21 February-1 March 1978. According to the provisions of Article III(2), the Joint Authority assumes all rights and responsibilities on behalf of both parties, for the development, control and administration of the joint development area.[77] Article IV provides that the rights conferred or exercised by the national authority of either Party in matters of fishing, navigation, hydrographic and oceanographic surveys, the prevention and control of marine pollution and other similar matters shall extend to the joint development area and such rights shall be recognised and respected by the Joint Authority.[78]

Malaysia and Thailand: Establishment of the Joint Authority

The Agreement between the Government of Malaysia and the Government of the Kingdom of Thailand on the Constitution and Other Matters Relating to the Establishment of the Malaysia-Thailand Joint Authority concluded on 30 May 1990 sets out in twenty-two articles various aspects relating to the legal status and organisation of the Joint Authority. There are provisions on juristic personality and capacity,[79] the purpose,[80] membership,[81] and procedure.[82] Provisions on personal liability, emoluments, and powers and functions are found in Articles 5, 6, and 7 respectively. Article 8 is devoted to production sharing and Articles 9 to 12 to financial provisions. The regulations and relations with other organisations are dealt with in Articles 13 and 14. Article 15 states the procedure for the amendment of the Acts. Customs, excise and taxation are discussed in Articles 16 and 17. All other miscellaneous provisions such as entry into force and termination, application, amendment, settlement of disputes and signature are covered in Articles 18 to 22.

INTERNATIONAL ENVIRONMENTAL LAW PRINCIPLES

The treaties concluded by the various states parties do not reflect any environmental law principles that the delimitations should have taken note of. There are several important environmental principles for this century, laid down by Chapter 17 of Agenda 21 that compel us to re-examine and re-negotiate where necessary, boundary delimitations that seem to adversely coastal states right to sustainable use and development of their maritime resources. Adede has set out thirty environmental law principles when drafting an environmental treaty.[83] The treaties discussed in this paper ought to be revised *mutatis mutandis* in the light of the following thirty environmental principles *mutatis mutandis* advanced by Adede, which are found in several environmental conventions and are grounded in the 1982 LOS Convention as far as possible. Some significant provisions recognized by Adede are provisions based on the precautionary principle (scientific evidence clauses) as in Article 3 of the Climate Change Convention and provisions recognising the principle of common but differentiated responsibility and the concept of inter-generational equity as in Article 3(1) of the Climate Change Convention. Equally important are provisions based on "polluter pays principle" as provided in Articles 3 - 5 of the Convention on Civil Liability for Oil Pollution Damage from Off-shore Operations[84] and provisions extending rights under an environmental treaty to non-parties as in Article 234 of the 1982 LOS Convention. It is necessary that an environmental treaty has provisions on specially protected areas as in Article 234 of the 1982 LOS Convention; provisions on the right of sovereignty over natural resources as in Article 15(1) of the Convention on Biological Diversity and provisions on co-operation to protect the global commons as in Principle 21 of the Stockholm Declaration and in Article 4 of the Convention on Biological Diversity.

Besides the above environmental law principles, Adede points out that the very first environmental consideration that needs to observed is that there has to be certain provisions on the general obligation of states to protect and preserve the environment when exercising sovereign rights to exploit their natural resources. This is in accordance with Principle 21 of the Stockholm Declaration and which is endorsed in Part XII of the 1982 LOS Convention. There should also be provisions on the obligation to take measure to prevent, reduce and control pollution of the marine environment as endorsed in Article 194 (1) of the 1982 LOS Convention and provisions on the obligation not to transfer environmental harm from one State to another or not to substitute one form of environmental harm for another as endorsed in Article 195 of 1982 LOS Convention.

Further, treaties should have provisions on the obligation to co-operate in undertaking research and systematic scientific observation (monitoring) as laid down in Article 5 of the 1992 United Nations Framework Convention on Climate Change (1992 Climate Change Convention), Annex V thereto; provisions on co-operation on scientific research and training as laid down in Article 6 of the 1992 Climate Change Convention, Annex V thereto; and

provisions on co-operation on exchange of information as spelt out in Article 200 of the 1982 LOS Convention. There should also be provisions on public education and awareness of programmes and measures for dealing with issues under a treaty as found in Articles 8 and 12 of the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation.[85] The importance of provisions on environmental impact assessment as highlighted in Articles 205 and 206, 1982 LOS Convention; provisions on transfer of environmentally sound technology and on technical assistance to developing countries as laid down in Article 266 of the 1982 LOS Convention; provisions on access to natural resources and distribution of benefits of scientific research as set out in Article 16 of the 1992 Convention on Biological Diversity; and provisions relating to financial resources and mechanisms as articulated in Article 203 of the 1982 LOS Convention and/or the establishment of an international fund as set up under the 1969 and 1992 CLCs cannot be denied. The treaties also need to incorporate provisions on prompt notification of environmental emergencies is deemed as part of customary international as enunciated in the *Corfu Channel Case,*[86] in Article 198 of the 1982 LOS Convention and in Article 5(1) of the 1990 OPRC; provisions on contingency plans and assistance in case of environmental emergency arising from accidents as laid down in Article 199 of the 1982 LOS Convention and Article 3 of the 1990 OPRC; and provisions on disclosure of potential dangers to the environment (non-accident situations) as spelt out in Article 19 of the Convention on Biological Diversity. Similarly there is a requirement for provisions on monitoring of compliance with and implementation of an international treaty as stated in Article 154 of the 1982 LOS Convention; provisions establishing procedures for verification of alleged violations of an environmental treaty as in Article 6 of MARPOL 73/78; and provisions establishing subsidiary institutions on scientific, technological and technical advice as in Article 10 of the Climate Change Convention.

Every treaty must contain provisions encouraging the adoption of further international legal instruments relating to a treaty as highlighted in Article 197 of the 1982 LOS Convention and on encouraging state parties to adopt domestic measures and national legislation and strategies to implement a treaty as in Article 1 of the Association of South-East Asian Nations Agreement on the Conservation of Nature and Natural Resources. Where applicable a treaty should also incorporate provisions on trade and environment as in Article 5 of the Climate Change Convention and in Para 39.3(d), Chapter 39 of Agenda 21.[87] Any such treaty should have provisions relating to mechanisms for amending or reviewing technical parts of an environmental treaty or its technical annexes either based on the IMO model on "tacit acceptance" [88] or by the "explicit acceptance" procedure laid down in Article 40 of the 1969 Vienna Convention on the Law of Treaties. Finally, there has to be a clause that deals with provisions relating to the question of liability and compensation as set out in Article 235(3) of the 1982 LOS Convention and provisions relating to the settlement of disputes as set out in part XV of the 1982 LOS Convention.

CONCLUSION

This article discussed the colonial and post-colonial treaties that were concluded between the coastal nations on the delimitation of the territorial sea and the continental shelf. These treaties involved demarcation and division of water column, seabed and living and non-living resources. They have not taken into consideration the sustainable development of the living and non-living resources of the waterway for they are not based on the preventive and precautionary principles. There may be several reasons for this omission, for example, that these treaties were concluded before the 1982 LOS Convention and Chapter 17 of Agenda 21 were. The treaties concluded in the post colonial period concerning the Straits of Malacca and Singapore did not reflect any environmental considerations. Those concluded over the Gulf of Thailand over the joint exploitation of resources do contain some environmental provisions. These treaties show the demarcation of maritime territory of States Parties, and consequently their jurisdiction over the sea.

It is very important for the states to know the extent of the geographic maritime area that they claim and consequently over which they have to exercise due diligence by carrying out activities that prevent and eliminate marine pollution from occurring, particularly the prevention of oil spills as spelt out in the 1969 and 1992 Civil Liability for Oil Pollution Conventions. Joint and continuous hydrographic studies need to be carried out in the Straits of Malacca and Singapore such that the strait states are aware of the changes in the seabed and shift of deep water channels which have to be made public to the international shipping community as part of the due diligence exercise of the strait states. Two treaties on the Gulf of Thailand were included here to show that environmental considerations did play a part in those treaties, which concerned the joint exploitation of natural resources, by Malaysia and Thailand. Boundary treaties are environmentally significant because of the due diligence requirement spelt out in the 1969 and 1992 CLC. These boundary treaties do not refer to the concept of pollution or of sustainable development as understood in international environmental law today.

It is argued that these treaties have to be re-examined and reworked by the States, under the procedural guidance laid down in Article 43 of the 1982 LOS Convention, by taking into account the international environmental law principles and adopting a holistic approach based on a sound marine environmental theory adopted by these states.

NOTES

(1982) 21 *ILM* 1261.

[2] Dickson F.D., "Jurisdiction at the Maritime Frontier" (1929) 40 *Harvard Law Review* at 1 to 29: Brown M., "Protective Jurisdiction" (1940) 34 *AJIL* at 112 to 116; Oda S., "The Concept of the Contiguous Zone" (1962) 11 *International Comparative Law Quarterly* at

131 to 153: Fell L.C., "Maritime Contiguous Zones" (1964) 69 *Michigan Law Review* at 848 to 864: Oxman B., "The Preparation of Article 1 of the Convention on the Continental Shelf" (1971 - 1972) 3 *JMLC* at 245 to 305, 445 to 472, 683 to 723. Churchill R.R. and Lowe A.V., *The Law of the Sea* (Manchester: Manchester University Press: 1983), at 101 to 107: O'Connell D.P., *The International Law of the Sea - Vol 2*, Shearer I.A. (Ed.) (Oxford: Clarendon Press: 1982) at 1034 to 1061: Brown E.D., The Legal Regime of Hydrospace (London: Stevens and Sons: 1971) at 3 to 73.

[3] This case generated a considerable number of adverse comments. The results found expression in the 1958 Convention on the Territorial Sea. See Sharma S.P., "Territorial Sea" in *Encyclopaedia of Public International Law, Law of the Sea, Air And Space, Vol 11* (Amsterdam: North - Holland: 1989) at 330.

[4] 516 *UNTS* 205.

[5] 499 *UNTS* 311.

[6] Colombos C.J., *International Law of the Sea* (6th Ed.), (London: Longmans Green and Co. Ltd.: 1967) at Chapter 3. O'Connell D.P., *The International Law of the Sea Vol.2*, Shearer I.A. (Ed.), (Oxford: Clarendon Press: 1982) at 475 to 500; Mc Dougal M.S. and Burke W.T., *The Public Order of the Oceans: a contemporary international law of the sea* (New Haven: New Haven Press: 1987) at Chapters 3, 4 and 5.

[7] (1982) 76 *AJIL* at 555.

[8] In 1661 Norway and Sweden established a fjord boundary in the Bay of Christiana; Peace Treaty of 17 September 1809 between Finland and Sweden; Raritan Bay Treaty of 16 September 1833 between New Jersey and New York of the United States; Treaty between China and Great Britain signed at Nanking on 29 August 1842, (93 *CTS* at 465); Treaty Between Great Britain and the United States signed at Washington on 15 June 1846 (100 *CTS* 39).

[9] Sang-Myon Rhee, at 585.

[10] Charney J.I., "The Delimitation of Lateral Seaward Boundaries Between states in a Domestic Context" (1981) 75 *AJIL* at 28 to 68 at 46; Some American cases on thalweg,

Louisana v Missisippi 202 US 1 (1906); *New Jersey v Delaware* 295 US 694 (1935); *New Jersey v New York*, 283 US 336, 342; *Arkansas v Tennessee* 310 US 563, 571 (1940); *People v Central RR Co of New Jersey*, 42 NY 283 (1870).

[11] Sang-Myon Rhee, at 586.

[12] Treaty of Peace Between the Emperor, the Empire and France signed at Luneville on 9 February 1801, 55 *CTS* at 475 .

[13] Sang-Myon Rhee, at 564.

[14] Sang-Myon Rhee, at 565. The *Grisbardana Case (Norway v Sweden)* 1909 *Hague Court Reports* 121 at 127 used the straight perpendicular line to the coast to divide the lobster fishing ground of Grisbardana between Norway and Sweden.

[15] *Ibid.*

[16] *Ibid* at 330 to 331.

[17] See Shearer I.A. and O'Connell D.P., "Mid-Ocean Archipelagoes in International Law" (1971) 45

[18] Article 53 deals with right of archipelagic sea lanes passage and Article 54 deals with *inter alia* duties of ships and aircraft during such passage.

[19] See in "Continental Shelf", *Encyclopaedia of Public International Law*, Vol 11, at 99. For the Truman Declaration on the Continental Shelf, see Proclamation 2667, Policy of the United States with respect to the Natural Resources of the Sub-Soil and Sea-Bed of the Continental Shelf, 28 September 1945, Department of State Bulletin, Vol (13) (1945) at 485.

[20] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)* (1969) *ICJ Reports* at 3.

[21] *Continental Shelf Arbitration (France v UK)* (1979) 18 *ILM* at 397.

[22] *Case Concerning the Continental Shelf (Tunisia v Libyan Arab Jamahiriya)* (1982) *ICJ Reports* at 18; See Brown E.D., "The Tunisia - Libya Continental Shelf Case, A Missed Opportunity" (1983) 7 *International Journal of Ocean Affairs* at 142 to 162; Christie D.R., "From the Shoals of Ras Kapouda to the Shores of Tripoli: The Tunisia/Libya Continental Shelf Boundary Delimitation" (1983) 13 *GJICL* at 1 to 30; Feldman M.B., "The Tunisia/Libya Continental Shelf Case: Geographic Justice or Judicial Compromise" (1983) 77 *AJIL* at 219 to 238; Herman L.L., "The Court Giveth and the Court Taketh Away: An Analysis of the Tunisia/Libya Continental Shelf Case" (1984) 33 *ICLQ* at 825 to 858; Hodgson D.C., "The Tunisia-Libyan Continental Shelf Case" (1984) 16 *CWRJIL* at 1 to 37.

[23] *Continental Shelf Case (Libyan Arab Jamahiriya v Malta)* Application for Permission to Intervene, (1984) *ICJ Reports* at 3.

[24] (1981) 20 *ILM* 797 at 803.

[25] *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* (1984) *ICJ Reports* at 4.

[26] Emery K.O., "Geological Limits of the Continental Shelf" (1981) 10 *ODIL* at 1 to 11.

[27] Brown E.D., *The International Law of the Sea, Vol.1* (Aldershot: Dartmouth: 1994) at 218.

[28] Published by the Pengarah Pemetaan Negara (Director of National Mapping) Rampaian 97, Cetakan 1-PPNM; see Notification of a New Map of the Continenetal Shelf of Malaysia *(Pemberitahu Mengenai Peta Baru Pelantar Benua Malaysia)* Jil. 23, No 26, Tambahan No 1, No 5745, 21 December 1979.

[29] Forbes V.L., *The Maritime Boundaries of the Indian Ocean Region* (Singapore: Singapore University Press: 1995) at 42.

[30] Allen J. de V., Stockwell A. .J, Wright L.R (Eds.) "A Collection of Treaties And Other Documents Affecting The States of Malaysia 1761 - 1963, Vol II" (London: Oceana Publications Inc.: 1981) at 332 to 336.

[31] *Ibid* at 114 to 116.

[32] *Id* at 114 to 116.

[33] Section 3 of Annex I to the Treaty of 10 March 1909: Boundary Protocol. It reads:

...If during the operations of delimitation it should appear desirable to depart from the frontier as laid down herein, such rectification shall not under any circumstances be made to the prejudice of the

[34] Rachagan S. and Dorall R.F., "Rivers as International Boundaries: The Case of the Sungei Golok, Malaysia-Thailand" (1976) 42 *Journal of Tropical Geography* at 47 to 58.

[35] See International Boundary Study, No. 57, 15 November 1965. Malaysia - Thailand Boundary, Department of State, United States of America.

[36] (1962) *ICJ Reports* at 6 to 26. In this case, the International Court of Justice (ICJ) was asked to rule that Cambodia, and not Thailand, had sovereignty over the Temple of Preah Vihear and that Thailand should both remove the armed guards and other persons it had placed in the Temple since 1954 and return sculptures and other objects it had taken from there.

In 1904, the boundary between Cambodia (then a protectorate of France) and Thailand (then Siam) in the wild, remote and sparsely populated area of Preah Vihear was determined by a treaty between France and Siam. The treaty stated that it was to follow the watershed line and provided for the details to be worked out by a Mixed Franco-Siamese Commission.

> 1. Surveys were conducted by technical experts for the Commission on the basis of which a map was prepared. This clearly placed the Temple in Cambodia. The Commission neither approved the map nor met after the map had been drawn up. Cambodia relied upon the map. Thailand, argued, *inter alia*, that the map embodied a material error because it did not follow the watershed line as the treaty required. It argued this even though the Court found the Siamese had received and accepted the map. The Court considered that the character and qualifications of the persons who saw the Annex 1 map on the Siamese side would alone make it difficult for Thailand to plead an error-in-law. These persons included the members of the technical experts for the Commission and formed an essential basis of its consent to be bound by the treaty.
>
> 2. Paragraph 1 shall not apply if the state in question contributed by its own conduct to the error or if the circumstances were such as to put that state on notice of a possible error.
>
> 3. An error relating only to the wording of the text of a treaty does not affect its validity; Article 79 then applies.

Error or mistake plays a much less important part in the law of treaties in international law than it does in the contract law in municipal law. Treaties are generally concluded with considerable care. The Vienna Convention on the Law of Treaties 1969 (1969) 8 *ILM* 679 does not have a retroactive effect: Article 4 of the Convention reads:

> Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by states after the entry into force of the present Convention with regard to such states. Other related issues on sketches of boundaries and maps proper include: When the rough sketch of the boundary and the maps were drawn up were both states parties involved in the exercise? What were the character and qualifications of the persons who saw the rough sketch of the map? When a material error is found on the map and it is consented to by both parties, especially when (1) it is contributed by the conduct of the party pleading the error, or (2) the party pleading the error could have avoided it, or (3) if the circumstances were such as to put that party on notice of a possible error, then the court according to the Temple case has to consider the character and qualifications of the persons who saw the map and conclude that no error occurred which was not without the consent of the party pleading otherwise.

The Vienna Convention on the Law of Treaties 1969 provides for the issue of error in Article 48 in the following terms:

> 1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation, which was assumed by that State to exist at the time when the treaty was concluded the very Commission of Delimitation within whose competence this sector of the frontier, had lain.

Were a rectification necessary to the Treaty of 1909 due to some geographical development, could Thailand still argue that it has to be made to its advantage only? If there were some geographical developments occurring on the Malaysian side of the boundary which call for a new boundary or for the old boundary to be modified, why would Malaysia desire to make the necessary rectification to protect Thai interests at the expense of Malaysia's sovereignty. How far binding is that unfair and unequal term/clause? An answer may be found in the international law on accretion and avulsion in the acquisition of title to territory.

The general principle of international law is that if accretion occurs on a boundary river (between two states), then the international boundary changes, whereas with cases of avulsion the international boundary will remain where it was originally established. If the river is navigable, the boundary will follow the thalweg; viz, the centre of the navigable channel. If a river is not navigable, the middle of the river stream will constitute the boundary. Otherwise, principles of accretion, avulsion and prescription could also be used for purposes of demarcation of title to territory.

[37] *France, Italy, Japan and the United Kingdom* v *Germany* (1923), *PCIJ Reports* Series A, No 7.

[38] (1969) 8 *ILM* 679.

[39] See the unsettled issue of Gibraltar, claimed by both Spain and Great Britain, which was captured in 1704 from Spain by a British/Dutch expedition during the war. Spain later ceded it to Great Britain. The relevant treaty provision is Article X of the Treaty of Utrecht, 1713.

[40] Kozhevnikov (Ed.), *International Law* (1961) at 248.

[41] See Rachagan S. and Dorall R.F., at 50.

[42] See Rachagan S. and Dorall R.F., at 48 to 55. Many issues arise for consideration in the context of treaty law where treaties were concluded between colonial powers and an entity which may or may not be recognized as possessing international personality and which may or may not be recognized by the international community.

These issues are relevant for all treaties. Every treaty has four elements, *viz* (1) the capacity of parties or international personality of states to conclude treaties, (2) manifestation of an intention to act under international law, (3) *consensus ad idem* or the meeting of wills must be present and (4) the parties must have the intention to create moral obligations. In the conclusion of treaties, attention must be paid to the following details *inter alia*: treaty making power in international law, the form of the treaty, signature and ratification, reservations, registration of treaties and language of the treaty and material content of the treaties.

In 1942, when Britain concluded the Treaty Relating to the Submarine Areas of the Gulf of Pacia on behalf of Trinidad and Venezuela, the states parties agreed on a median line delimitation in the Gulf of Pacia. The effect of the delimitation was that in essence they divided up the seabed in the Gulf between themselves and accorded unto themselves sovereign rights in each territory and acknowledged the sovereignty of the other. The first few instances of claims to the continental shelf were thus concluded, long before the legal concept of the continental shelf itself was established.

[43] Allen J. de V., Stockwell A. J. and Wright L. R., at 114 to 116.

[44] Johore Treaty of 11 December 1885, Allen J. de V., Stockwell A. J. and Wright L. R., at 72 to 74.

[45] Article ii of the Treaty in Allen J. de V., Stockwell A. and Wright L.R.

[46] Charney J.I. and Alexander L.M. (Eds.) (Eds.) *The American Society of International Law:*

International Maritime Boundaries, Volume I (Dordrecht: Martinus Nijhoff Publishers: 1993) at 1029.

[47] *Ibid* at 1029.

[48] Besides the Treaty another document called "Record of Discussion" was signed. Unlike the treaty, which bears the signatures of the Ministers of Foreign Affairs from both governments, the Record of Discussion was separately signed by the respective leaders of the negotiating teams.

[49] Charney J.I. and Alexander L.M. (Eds.), Note 46 at 1093

[50] Charney J.I. and Alexander L.M. (Eds.), Note 46 at 1091. The parties were reported to have been looking into the possibility of constructing a permanent structure if at all possible, Charney J.I. and Alexander L.M. (Eds.), Note 46 at 1093.

[51] Charney J.I. and Alexander L.M. (Eds.), Note 46 at 1050.

[52] Charney J.I. and Alexander L.M. (Eds.), Note 46 at 1050.

[53] Charney J.I. and Alexander L.M. (Eds.), Note 46 at 1050 and 1051.

[54] National Legislative Series, UN Doc. No: ST/LEG/SER.B/16 (1974) at 417: (1970) 9 *ILM* 1173.

[55] Charney J.I. and Alexander L.M. (Eds.), Note 46 at 1019.

[56] Charney J.I. and Alexander L.M. (Eds.), Note 46 at 1021.

[57] Charney J.I. and Alexander L.M. (Eds.), Note 46 at 1020.

[58] Charney J.I. and Alexander L.M. (Eds.), Note 46 at 1021.

[59] Charney J.I. and Alexander L.M. (Eds.), Note 46 at 1022.

[60] Charney J.I. and Alexander L.M. (Eds.), Note 46 at 1022.

[61] Article 1(3).

[62] Article 3.

[63] Article 4.

[64] Article 5.

[65] Charney J.I. and Alexander L.M. (Eds.), Note 46 at 1021.

[66] National Legislative Series, UN Doc. No. ST/LEG/SER.B/437 (1976): US Department of State, Limits in the Seas No. 81 (1978).

[67] Charney J.I. and Alexander L.M. (Eds.), Note 46 at 1456.

[68] Charney J.I. and Alexander L.M. (Eds.), Note 46 at 1456.

[69] "It appears that geography had a very important influence on the location of this line. The two opposite coasts have quite different characters. The Indonesian coast of Sumatra consists of a fairly smooth gently curved coast with some prominent headlands. The only variation occurs at the western end of Sumatra where a number of medium and small islands are located close to the main island. The Thai coast has some marked embayment and several offshore islands. Some of them are closely integrated with the mainland while some stand

as far as 30 nms off the coast. The two Governments seemed to have agreed to use the nearest points of each territory" See Charney J.I. and Alexander L.M. (Eds.), Note 46 at 1457.

[70] Charney J.I. and Alexander L.M. (Eds.), Note 46 at 1456.

[71] Charney J.I. and Alexander L.M. (Eds.), Note 46 at 1099.

[72] Charney J.I. and Alexander L.M. (Eds.), Note 46 at 1100.

[73] Charney J.I. and Alexander L.M. (Eds.), Note 46 at 1099.

[74] Committee for Coordination of Joint Prospecting for Mineral resources in Asian Offshore Areas (CCOP), 14 CCOP Newsletter, Bangkok, (Nos 3 and 4 July, July - December 1989); Kittichaisaree K., *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia.*

(Singapore: Oxford University Press: 1987) at 100 to 101; Pachusanond, "Thailand and the Settlement of Dispute in the 1982 Law of the Sea Convention", *SEAPOL STUDIES No. 2 (c),* Institute of Asian Studies, Chulalongkorn, University, Bangkok, (undated, mimeo) at 34 to 36.

[75] Charney J.I. and Alexander L.M. (Eds.), Note 46 at 1107.

[76] Article III(1).

[77] The assumption of such rights and responsibilities by the Joint Authority in no way affects or curtails the validity of concessions or licences that have been issued or agreements or arrangements already made.

[78] Annex III of the MOU states that the Thai EEZ is established adjacent to the EEZ of Malaysia in the Gulf of Thailand (16 February 1988). However, there is a discrepancy in this date as the Annex also refers to 23 February 1981.

[79] Article 1.

[80] Article 2.

[81] Article 3.

[82] Article 4.

[83] Adede A.O., *International Environmental Law Digest* (Amsterdam: Elsevier: 1993) at 99 to 208.

[84] (1977) 16 *ILM* 1450.

[85] (1990) 30 *ILM* 735.

[86] (1949) *ICJ Reports* at 22.

[87] U.N. Doc.A/CONF.151/26 (Vol. III) at 101.

[88] See Adede A.O., "Amendment Procedures for Conventions with Technical Annexes: The IMCO Experience" (1977) 17 *VJIL* at 201.

INTERNATIONAL LAW AND THE DISPUTE OVER SOVEREIGNTY IN THE SOUTH CHINA SEA: MALAYSIA'S POLICY

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INTRODUCTION

The end of colonization and the surrender of the Japanese in World War II created a complicated situation to the question of sovereignty and ownership of the islands in the South China Sea, particularly the Spratlys and Paracels. In addition to that, the introduction of UNCLOS (United Nations Law of Sea Convention) in early 80s complicated the matter further by allowing a legal basis for what is known as the exclusive economic zone (EEZ). The International Court of Justice and the United Nations can make the matter worse if the issue is brought to these institutions for debate on sovereignty. While the international organisations can act as an arbiter, one or two of the claimants refuse to support any effort to internationalise the issue. The progress thus far had been mainly through informal dialogues or deliberation at bilateral forum. The subject of discussions were mainly revolving around the "art of diplomacy". On the other hand, the act on the ground among the conflicting states is completely different and on occasions run opposite to the diplomacy of reconciliation.

This article is an attempt to look at the legality of the assertions of sovereignty among the claimants. It will briefly deal with the way in which the disputing parties stake their claims to the Spratlys while providing an analysis in terms of the strength of the claim. Secondly, it is in the interest of this work to state Malaysia's policy on the issue, both from the perspectives of international law and a strategic point of view.

International Law and the Viability of the Claimant's Assertion of Sovereignty

The idea of sovereignty as a legal basis concomitant to international law towards territorial claims has been only recognized since the post-colonial era in Southeast Asia. Indeed the pre-colonial era noticed the freedom of movement among people without taking into account of national frontiers. Although history has clearly interpreted the existence of various kingdoms, such entities have never remained unchallenged to carve permanently a legal base over territorial claim like in the west. In reality, it was an era where technological developments and strong political will toward boundary demarcation had not been taken seriously. Expansionism and the existence of empires were mainly drawn along vague and non-precise boundaries such as rivers, mountains, people and others indicators.

However, in the present situation, particularly since the United Nations Conference on the Law of the Sea (UNCLOS), the issue of territorial claim in the maritime environment has entered a new era. There are various ways states could claim disputed territories or waters with a strong legal procedure. Indeed, in most cases the room for legal debates is still ample which in turn tend to frustrate the process of settlement over the maritime disputes.

It is in this manner, the process for a settlement over maritime disputes in the South China Sea will be prolonged in the future. Most of the conflicting claims over the disputed areas are based on the principles of overlapping territorial and maritime claims. These areas do not cause much debate in terms of conflicting claims. In contrast, the question of sovereignty over Paracels and Spratlys is unique and, to date, subject to much dispute. All parties have their own versions to enhance their claims while interpreting them under the perspective of international law.

However, "the idea of sovereignty as an internationally recognized principle, defining the wall of legitimate authority around political space, has no exact parallel in East Asian legal and political history and the area of state and its various compartments was not a function of legal limit but of social organisation, history and loyalty of subjects".[1] Hence, the rise of an Asian concept of a "nation state" during the period of decolonisation predominantly after the Pacific War and with the introduction of international law, in the early days of the United Nations Conference on the Law of the Sea became the basis for declaring sovereignty rights over maritime space. The sudden realization that the whole South China Sea was "up for grabs" induced some nations to declare sovereignty based on their own history as evidence.

To date, China, Taiwan and Vietnam are the only states to present comprehensive historical argumentations (pre-20th century) and there cannot be any doubt that in this respect, China is in a more favourable position than Taiwan or Vietnam.[2] Certainly, China does not want any other power to dominate the strategic waters that had once enjoyed as a historical legacy.

China's settlement of the Paracels in the South China Sea seems to go back to the Han dynasty in which a chronicle appeared in the eastern Han period (25 to 220 A.D.) mentioning the existence of those islands, whilst Chinese coins, the oldest dating back to the rule of Emperor Wang (3 B.C. to 23 A.D.), are said to have been found in Paracels.[3] In 1947, further historical artifact, the Chinese temple, was discovered on Wood Island in the Paracels. It was estimated to be more than a hundred years old[4] and clearly asserts China's sovereignty based on historical background.

However, in the case of the Spratlys, no such ancient sources have been identified. The only evidence that seems to clearly notify the Chinese presence on the Spratlys was in 1867, when the crew of a British survey ship met some fishermen from Hainan on Itu Aba of the Spratlys and secondly, in 1883, when the Chinese government successfully stopped a German expedition to the Spratlys through diplomatic pressure.[5] Though China seems to claim undisputed sovereignty in the South China Sea, no proper historical documents or ancient discoveries appear to support the effective occupation of the Chinese in the Spratlys. Hence, the Chinese claim of sovereignty based on historical background in the Spratlys seems unclear. Moreover, according to Professor Steven Kuan-tsyh Yu of the National Taiwan University, the historical grounds advanced by both China and Taiwan, with respect to their claims to the Paracels, "are, in principle, the same as those advanced by both governments to justify these claims".[6]

In addition, the presence of Taiwanese "sovereignty" in the Spratlys also seems to complicate the question of China's sovereignty in the South China Sea. In the quest for sovereignty, both states seem to use similar historical accounts. Until recently, the leadership in Taipei considered Taiwan as part of China as a whole and the 1991 election revealed the rejections of being an independent state.[7] Leaders in Taipei also announced before the election that Taiwan stood for one state and two systems. But in the case of South China Sea, the Taiwanese government considered the Japanese renunciation in the bilateral treaty of 1951 as a clear indication of its sovereignty over the islands in that region,[8] thus, making the issue more complex. Historically, Taiwan has also regarded itself as the successor to China.

The Taiwanese authority sent its first naval expedition to the South China Sea after the Pacific War and today it continues to occupy the Pratas archipelago and Itu Aba in the Spratlys. In 1946 and 1947, Taiwan sent a naval task force of four ships to the area; two of which occupied Itu Aba and two of the Paracels. However, the Chinese takeover of Hainan immediately forced Taipei to withdraw all its garrisons from the Paracels. Their absence in the Spratlys between 1950 and 1956 was also due to the Communist takeover of the mainland. The rise of the Filipino claims with the invention of Kalayaan territory in 1956 was subject to Taiwanese protest and Taipei decided to re-occupy Itu Aba by stationing a naval unit permanently to enhance its sovereignty.[9]

Amazingly, both China and Taiwan claim a similar area involving almost the entire South China Sea, including the four major archipelagoes of Spratlys, Paracels, Macclesfield Bank and Pratas, which certainly reflects a "one Chinese" claim. In addition, in several events, Beijing seems to portray a mutuality of interest between itself and Taiwan over the claims in the South China Sea. For example, a document of the Chinese claims on Paracels and Spratlys has mentioned Beijing Foreign Ministry as stating that "For years, the Taiwan authorities of China have maintained a military garrison on Taiping Island (Itu Aba), the biggest among the islands".[10] In addition a Beijing administrative decision excluded the Pratas group, under the control of Taiwanese forces. At the same time it reported to Taipei on the developments in the Paracels and the establishment of a new administrative province to take responsibility for jurisdiction over the South China Sea Islands.[11]

The presence of Taiwan in the South China Sea, although an advantage for China as a whole, also has the potential to confuse the issue of Chinese sovereignty. Taipei's territorial claims in the South China Sea have been reasserted on several occasions since 1952 and most recently with the 1988 incident (Sino-Vietnam clash), but China's offers to assist Taiwan in defending that claim have been rebuffed by Taipei,[12] hence, bringing in the "two China" conflict to complicate further the crisis of the Spratlys. It seems that both China and Taiwan are again becoming rivals and they have yet to solve their own problems on the issue of sovereignty in the South China Sea. Indeed, this was pointed out in the 1991 Bandung Conference by Pangiran Osman of the Brunei Ministry of Foreign Affairs, when he said:

> The presence of Taiwanese 'sovereignty' in the Spratlys Islands complicates the issues, extending the disputes of 'Two China' in the Far East, to the arena of Southeast Asia political questions. It will be most difficult to contemplate requesting both China and Taiwan to sit down on a territorial and jurisdictional settlement in the South China Sea whilst they maintain the status quo across the Formosa Strait[13]

On the same issue, Professor Steven Kuan-tsyu Yu Taiwan also acknowledged this complexity: both Beijing and Taipei are rivals in the internal politics of China and in the case of the South China Sea, each claims to represent China as a whole, as he affirms, "thus there is nothing like territorial disputes between them as understood internationally".[14]

The Vietnamese claims of sovereignty to the Paracels and Spratlys are not based on a long historical period as the Chinese. Moreover, they have difficulty in proving the continuity of their own state and territory from its status as a Chinese province (between 221 B.C. and 939 A.D.) until the period of French colonisation and the final formation of the present Vietnamese state.[15] Historically, the earliest event that serves as a basis for Vietnamese sovereignty claims in the South China Sea seems to date back

to 1700 with the foundation of "Do Houng Sa" society which used the Paracels for commercial purposes. The following Nguyen dynasty emperors reactivated the society in 1802, hoisted the Vietnamese flag in the Paracels in 1816 and additionally constructed a pagoda in 1834.[16]

Vietnamese claims over sovereignty in the post Pacific War era were asserted in 1951 San Francisco peace conference. None of the states at that time protested the Vietnamese claim over the Paracels and Spratlys. In contrast the conference voted for the rejection (with 46 votes, 3 against and 1 abstention) when an amendment was about to be made on the peace treaty to return the archipelago to China.[17] Thus, it is a clear fact that the San Francisco treaty only noted the Japanese renunciation of rights over these territories.

Provided the historical information given by Vietnam is true, "as a state" it apparently showed a definite interest in the Paracels somewhat earlier than did China.[18] In this respect, Vietnam was the only state to fulfill the criteria of "effective occupation" in international law before the Pacific War. Vietnam had consolidated its occupation and established sovereignty by organising the Paracels brigades for the purpose of exploitation in a state capacity. There are numerous written works on those brigades being operated in the Paracels and Spratlys during the reigns of the Nguyen lords (1558-1786) and Nguyen dynasties (1902-1945), which have been described by Vietnamese Government documents.[19] In contrast, until recently, China's undisputable sovereignty" has not been proven in terms of effective occupation.

Unlike China and Vietnam, the Philippines, Malaysia and Brunei do not base their claim for sovereignty in the Spratlys on a long historical account, but more in terms of proximity. For the Philippines, its basis for claiming the Spratlys areas was initiated by Tomas Cloma, a Filipino private businessmen who discovered those islands. Cloma claimed that he discovered the islands in 1947, established several colonies in that area, and named the archipelago Kalayaan (freedom land) while sending a note to the Filipino government at that time.[20] However, Cloma's claims through his letter were addressed not on behalf of the government of the Philippines, but as the claims of the "citizens of the Philippines'.[21] Nevertheless, the Philippines claims on Spratlys was strongly established in 1978 through the signing of the Presidential Decree (No. 1596). The 1978 Presidential Decree claims Kalayaan for the Philippines because "these areas do not legally belong to any state or nation, but, by reason of history, indispensable need, and effective occupation and control "which are" vital for the security and economic survival of the Philippines'.[22] The decree also asserted that in accordance with international law, the claims of offers "have lapsed by abandonment and cannot prevail over that of the Philippines".[23] The Philippines, since 1972, has managed the "Kalayaan" area through a separate municipality within the province of Palawan.

Malaysian claims do not comprise the entire archipelago of the Spratlys. It claims the islands located to the extreme south of Spratlys because they lie within its continential shelf. The first Malaysian claim was established after the immediate release of its map of the continental shelf in 1979, which shows some of the islets under its national jurisdiction.[24] Malaysia does not base its claim for sovereignty on historical grounds. All other parties disapprove its claim in the Spratlys whilst Malaysia considers some of the islets as not part of the Spratlys. Malaysia's claim to the Spratly islands based on the rights of the continental shelf is seen as unconvincing "because it is not the waters which give title to the islands, but islands which confer rights to waters".[25]

Brunei's claim to the Spratlys is not clearly defined. It is argued that Brunei's drawing of maritime boundaries (continental shelf) is extended naturally without taking international legal consideration of its neighbours,[26] hence, lessening the strength of its claims into the Spratlys area. To date, Brunei has not occupied any islets. Brunei only claims Louisa Reef, the southern most reef of the Spratlys. In addition, unlike other claimants, Brunei maintains a low profile over its claim.

In summary, the issue of sovereignty in the South China Sea, particularly in the Spratlys, is sensitive and confusing. Each of the conflicting states has their own version for their legal basis for claiming sovereignty. Although it is not in the interests of this research to justify the legality of their claims, it is important to note that the legal evidence provided by each of the claiming parties is disputable. In the case of Chinese claim to Spraltys, maritime expeditions and the use of some islands as shelter for fishing do not reflect state activities for effective occupation. In the case of Vietnam, its historical existence as a nation state is questionable in order to accept its effective state occupation of the islets. The discovery and occupation, in a private capacity (the Cloma incident), also does not enhance the Philippine's claim to ownership of the islands. Finally, the Malaysian claim for islands, based on its view of the continental shelf, can also be disputed in international law. In addition, there are parties who claim almost the entire South China Sea as internal waters on the basis of historical precedent. The view cannot "be regarded as serious, nor should it be treated with respect" based on perspective of international law.[27]

Moreover, international understanding on the implications of the Law of Sea is still developing and it is questionable as to whether it can provide an absolute settlement for a unique case like the Spratlys. In such circumstances, it seems there is no alternative, but that the conflicting states may depend on force, as a policy instrument to defend their claim to sovereignty. No state is willing to accept the present status quo.

There is also a fear of China, regarded as the emerging superpower and a major power in the South China Sea, that whilst Beijing, has in the past, expressed the desire for co-operation, it continues to maintain its stand of "undisputable sovereignty". This reflects the tactic of Chinese diplomacy

which poses a question mark on the entire issue. Unlike the conflicting states which are willing to sacrifice their national interest to justify the common benefit, there are possibilities that there might be no alternative to the use of force to defend their strategic interests.

Indeed, although all delegates to the Bandung Workshop in July 1991 were receptive to the idea of forming joint authority in Spratlys, some seemed to advocate that the sovereignty issue should be first resolved. However, governments believe that most of the territorial disputes in the South China Sea can be resolved peacefully. Such an assumption is made based not only on the improved relationship among littoral states but because of the increasing potential for joint exploration of natural resources and also as there are good prospects for settlements. To date the littoral states have not, so far, engaged in war over the overlapping territorial and maritime claims. Each country has agreed not to exploit the resources, in these areas, unless an agreement is reached.

Although disputed archipelagoes such as the Paracels and Pratas are controlled by the military forces of China and Taiwan, to date, their status quo remains unchallenged. Obviously, Vietnam has been deterred from making any military attempt to recapture the Paracels since 1974. It is also unlikely that China and Taiwan would go to war over the Pratas islands or the Macclesfield Bank. Disputes in such areas can be resolved through bilateral negotiation or joint development. However, these reasons may not be absolute, but are discussed to increase our perception of whether the entire South China Sea is a potential flashpoint. The only area, at the moment, seen as a potential flashpoint is the Spratlys.

In sum, evidence that are historical in nature, particularly related to archaeological artifacts or even ancient maps do not necessarily tend to receive strong support for territorial claims under the international law. With regards to two of the major claimants over the territorial disputes in the South China Sea, who often refer historical evidence for sovereignty claims, however, have to succumb to the fact that the history of the colonial powers in Southeast Asia's also rich in similar means. If such historical means are used as evidence, it will in turn invite other external powers like France, Britain and so on to pursue their interest on the basis of occupation or even for drawing some of the ancient maps. Hence, it does not bring much rationale for a constructive settlement, but further delaying the process.

Therefore, despite being in an unclear state, the various claimants in the South China Sea continue to pursue their evidence in an antagonistic manner. Each of the claimants including Vietnam, China, Taiwan, Malaysia, Philippines and Brunei has, to some extents find an alternative avenue for the debate over sovereignty. However, it is also more evident over the years that the United Nations Convention on the Law of Sea does not have the means to resolve the issue with equal justice. The settlement can only be reached by abandoning sovereignty. If sovereignty is one issue that must

be resolved before any efforts for joint-exploration could be seen, then the conflicting parties have no alternative but to shelve the so-called "sovereignty status".

Malaysia's Strategic Policy on Territorial Disputes in the South China Sea

Malaysia's claim to the South China Sea is solely based on the UNCLOS procedure. Its publication of a map in 1979 asserting its maritime boundaries which includes some of the islets and atolls within the 200 nautical mile of EEZ made Malaysia as an important player or stake holder in the scramble for territories in the South China Sea. However there are two crucial points that must be accounted on Malaysia's claim in the so called disputed areas of the South China Sea. Firstly, Malaysia is not claiming the entire Spratlys. Therefore its dispute with the other claimant are partial on the basis of the overlapping maritime zone.

Secondly, it is also interesting to note that Malaysia's map on territorial waters was not subjected to formal protest from the United States.[28] The US is often known for keeping alert on maritime claims of regional countries. More so, the American maritime strategy straddles through all the strategic waters around the globe. And the South China Sea has been an important area in terms of sea lanes.

In line with Malaysia's EEZ map, it now occupies Terumbu Layang-layang, Ubi and Mantanani. Where national security is concern, the decision of occupying these islets was strategic. If Malaysia would have failed in that endeavour, it will be facing a scenario which confronted the Philippine in 1995. China occupied Mischeef Reef and has built large structures that can accommodate the stationing of its naval vessels and soldiers. Intelligence reports indicate that the PRC's naval vessels regularly visit the area.

Malaysia's occupation of some of the islets have expanded in terms of activities. While there are facilities for stationing the military, the government has allowed tourism to grow. It had offered private companies to bring tourist to Terumbu Layang-layang for diving and bird watching. The islands occupied by Malaysia are fully protected by the Royal Malaysian Navy. Naval vessels, anti aircraft guns and other military facilities are visible in ensuring the defence and ownership of the islands.[29]

Malaysia's policy of stationing military facilities and developing tourism in that area are generally subjected to protests from other claimants including China, Vietnam, Philippines and Taiwan. However, Malaysia can expect the ASEAN claimants renouncing the use of force in this area. The only worry that could affect Malaysia's control can be seen from the emerging China's military activities in the Spratlys region. It is doubtful that other claimants would want to use force to overthrow the military from the occupied islands. China too, on occasions maintains a stand of not using force. However its actions are not clear since the 1995 Mischeef Reef development.

In 1999, Malaysia's development of structures for scientific research at Terumbu Peninjau and Siput was protested by both China and the Philippines.[30] Prime Minister Mahathir responded to the protest by the Philippines by saying that Malaysia never questioned the occupation of Terumbu Laksamana by the Philippines. Similarly, Amboyna Cay is also occupied by Vietnam. Malaysia considers the development of structures in the areas as within its EEZ. These activities are seen as vital for scientific research. In fact, most of the other claimants also conduct a variety of research in the disputed territories. Malaysia stood firm on defending its sovereignty. Defending national sovereignty in the South China Sea is a difficult task. It requires sizeable maritime assets both in terms of naval patrol boats as well as air power capabilities. Given the Sipadan and Pandanan hostage crisis, it is predictable that Malaysia's maritime surveillance and power projection capabilities will grow steadily in the years ahead.

Malaysia's Policy on Territorial Disputes: From the International Law Perspective

Territorial dispute in Spratlys is a unique case where Malaysia has no choice but to use its military to defend its claim and its EEZ as well. If Malaysia neglects the occupied islands, it will be grabbed by others. But this does not mean that Malaysia believes in the use of force as a way for settling disputes in the South China Sea. Malaysia's defence policy clearly states that the use of force is the last means in settling dispute. Being a member of ASEAN, it also subscribes to the principle of no use of force. In this regard, Malaysia demonstrates its strong support to international organisations and legal regimes that are in place for resolving conflict.

The adoption of UNCLOS witnessed Malaysia adhering to all cardinal rules of continental shelf, territorial waters, marine and environmental laws of maritime affairs. It is also working closely with regional countries on efforts towards a regional code of conduct in the maritime environment. Similarly, Malaysia also adheres to standards set by the International Maritime Organisation (IMO) and other UN conventions on maritime affairs. On the whole, Malaysia's practise has been in line with the international law.

Where territorial disputes are concern, Malaysia's positive approach towards resolving them amicably can also be seen in several other cases. Malaysia's maritime dispute on the ownership of Ligitan and Sipadan has been referred to the International Court of Justice. This has significantly improved its bilateral relations with Indonesia. In the case of Pulau Batu Puteh, Malaysia and Singapore have agreed to deliberate the case at ICJ as well. This on the whole indicates Malaysia's respect for international law.

The problems with international law and UNCLOS are manifold. The attempt to exercise sovereignty by most of the claimant are disputable under international law. UNCLOS can offer some solution, but the case of Spratlys

is entirely unique to be resolved using UNCLOS parameters. Claimants are now generally using history, discovery, effective occupation, effective administration and so on as evidence. However, most of claimants confront evidentiary problems. Old maps are not clear to show evidence. Black dots are not clear signs to show ownership of island using ancient maps. Colonialism and traditional tributary relationship between claimants and later the arrival of France into the scene complicates the entire assertion of sovereignty based on what has been regarded by China and Vietnam as historic waters.[31] The above are difficult issues that can provide solutions through internal law. Using UNCLOS can only solve problems of a few of the claimants. And this will surely be contested by others who reject an UNCLOS approach using the maritime boundaries demarcation principles.

Where Malaysia is concerned, it has been quite successful in resolving other overlapping maritime boundary problems using the law of sea convention. In most instances, Malaysia and disputed parties have adhered to the principle of equidistance as a way to demarcate overlapping maritime boundaries. The remaining disputed areas will be resolved by joint exploration and development approach. The Gulf of Thailand will be a successful case to demonstrate Malaysia's friendly approach using the available international law and maritime regime for settling disputes. Similar approach has been adopted in dealing with Vietnam and Indonesia in other overlapping maritime zone. Boundary demarcation in the Straits of Malacca is also another case that indicates Malaysia's policy in line with international law.

In the case of the Spratlys, policies of most claimants are ambiguous. Actions and statements of policies do contradict one another where real practices on the ground are concern. Like some of the other claimants, Malaysia supports ideas and suggestions that signify cooperation.

CONCLUSION

Malaysia's policy over the Spratlys and the rest of disputed areas in the South China Sea are consistent with the practice of the international law, particularly in line with the UNCLOS regime. However the question of sovereignty will remain as the contentious issue among the claimants. Most of the claims can be disputed through international law. Like other claimants, the stationing of the military and other administrative practice to ensure the status of occupation in international law is something understandable within the context of realpolitik. However, this has not hampered Malaysia from resolving its maritime disputes using the international legal regimes and via cooperative means. Where the national policy on overlapping claims is concern, it has sufficient record and successful cases of resolving conflict through peaceful means. Its policies are primarily in line with international law. The problem now remains whether international law can resolve the question of sovereignty in the South China Sea.

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THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA AND CHAPTER 17 OF AGENDA 21: MALAYSIA'S OBLIGATIONS TOWARDS THE CONSERVATION OF THE MARINE ENVIRONMENT

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Introduction: UNCLOS and Chapter 17 of Agenda 21

The management of global seas depends partly on the successful implementation of the many international instruments (conventions, treaties, programmes and protocols), which governs sea use and activities. To date there are at least 47 such instruments, which come under the purview of the United Nations, and its subsidiary bodies such as the International Maritime Organisation (IMO).[1] Of these instruments, two have gained prominence in the area of ocean governance, particularly in the protection and conservation of the marine environment.

The first is the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which embodies an overall framework for governing the oceans as a global common and for managing the many resources and uses of the oceans. As of 6 February 2002, 138 States have become party to UNCLOS.[2] In principle, and in theory, at least, this represents a significant global

commitment towards the better management of our seas. In as far as the protection of the marine environment is concerned, Part XII of UNCLOS stipulates that "States have the obligation to protect and preserve the marine environment" and "shall take, individually and jointly as appropriate, all measures consistent with this convention that are necessary to prevent, reduce and control pollution of the marine environment".[3]

The second major instrument, available to States in the effort to protect and conserve the marine environment, is the Agenda 21 document, specifically Chapter 17 of Agenda 21 on the protection of oceans. Chapter 17 is a blueprint for national, regional and international actions to protect the seas and its resources from pollution, over-exploitation of natural resources and natural phenomenon's such as climate change[4]. This year will mark the tenth anniversary of the 1992 United Nations Conference on Environment and Development (UNCED). This year will also see the programmes developed during the UNCED process under ambit of the Agenda 21 document go through another round of evaluation and assessment[5]. The evaluation would include an assessment of the efforts undertaken globally, regionally and nationally towards the sustainable development of the seas and its resources as contained in Chapter 17 of Agenda 21. The report card for the world's oceans and coasts will be of great interest for those who work in the area of marine environment management.

UNCLOS and Chapter 17 form part of the legal and programmatic framework towards the sustainable development of the world's oceans and its resources. Much however depends on country level implementation of the provisions and programmes under these two documents. This article examines the provisions of UNCLOS related to the protection of the marine environment and the programmes contained in Chapter 17 of Agenda 21 in relation to the same matter.

Malaysia's Obligations

Malaysia became a party to UNCLOS on 13 November 1996 and as a participant at UNCED also supports the principles and programmes contained in the Agenda 21 document. These commitments translate to Malaysia needing to initiate national action to implement the various provisions and programmes of the two documents. This section examines Malaysia's obligations to protect the environment as a signatory to UNCLOS and as a country, which subscribes to the Principles of the Rio Declaration and the programmes of Chapter 17 of Agenda 21. The examination is on two areas common to both documents namely prevention of marine pollution from vessel-based and land-based sources and the sustainable use of marine resources in areas under national jurisdiction and the high seas.

Prevention of marine pollution

In the area of marine pollution prevention, Articles (Art) 192 and 194 of UNCLOS provides the overall legal basis for the protection of the marine environment from all sources of pollution. These provisions are further elaborated in Article 207 to 212, which focuses on pollution from all possible sources and activities.[6] In comparison, Chapter 17 provides a comprehensive plan of action for implementing the provisions of UNCLOS. Furthermore, the period preceding UNCLOS saw the completion of negotiations for the Global Programme of Action for the Prevention of Marine Pollution from Land-Based Activities (GPA), which outlines national actions needed to protect the marine environment form land-based pollution. A comparison of the provisions of UNCLOS and the programme of action under Chapter 17 of Agenda 21 is given in Table 1.

The three instruments described above provide a degree of protection to the marine environment from land-based and vessel-based pollution. Countries could gain more comprehensive package of protection by ratifying a number of international conventions developed specifically to address different facets of marine pollution and provides compensation for losses caused by marine pollution.[7] These conventions include:

- The International Convention for the Prevention of Pollution from Ships, 1973 and protocol of 1978 (MARPOL 73/78);
- The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (The London Convention);
- The International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990 (OPRC);
- The International Convention on Salvage, 1989 (Salvage Convention, 1989); and
- The Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC 1969) and Convention on the Establishments of an International Fund for Compensation for Oil Pollution Damage, 1971 (The Fund Convention).

In addition to the key maritime conventions noted above, there are other maritime conventions, which contributes to the protection of the marine environment by ensuring safety of navigation, quality of seafarers, safety of life at sea and carriage of goods.[8] In addition, governmental efforts to protect the marine environment are also supported by initiatives undertaken by agencies of the United Nations such as the IMO, the United Nations Environment Programme (UNEP) and the United Nations Development Programme (UNDP). There are for example twelve regional seas programme managed by UNEP throughout the world aimed at providing a regional basis for marine environment protection while at the same time supporting national initiatives in this area.[9]

Table 1: A Comparison of UNCLOS and Chapter 17 Provisions On the Prevention of Marine Pollution

Provisions of UNCLOS		Chapter 17 Programmes	
Art 192	States have the obligation to protect and preserve the marine environment.	General provision	States, in accordance with the provisions of UNCLOS on the protection of the protection and the preservation of the marine environment, commit themselves, in accordance to their policies, priorities and resources to prevent, reduce and control degradation of the marine environment.
Art 194	States shall take all measures necessary to prevent, reduce and control pollution of the marine environment.		
Art 207	Prevent, reduce and control pollution of the marine environment from land-based sources.	Para 17.24-17.29	Outlines a programme of action for the, prevention reduction and control of the degradation of the marine environment from land-based activities. This has since been reemphasised and elaborated in the GPA.
Art 208	Prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction and from artificial islands, installations and structures.	Para 17.30-17.34	Outlines a programme of action for the prevention, reduction and control of degradation of the marine environment from sea-based activities including shipping, dumping, offshore oil and gas platforms and ports.
Art 209	Prevent, reduce and control pollution of the marine environment from activities in the Area.		
Art 210	Prevent, reduce and control pollution of the marine environment by dumping.		
Art 211	Prevent, reduce and control pollution of the marine environment from vessels.		
Art 212	Prevent, reduce and control pollution of the marine environment from the atmosphere.		

Source: United Nations Convention on the Law of the Sea; Agenda 21.

Sustainable Use of Resources in Areas under National Jurisdiction

The regime for sustainable use of marine resources under UNCLOS is a precursor to the present debate on the decline of the world fisheries resources. The provisions of Art 116 - 120 of Part VII (High Seas) and Art 61 - 67 of Part V (Exclusive Economic Zone) call for countries to conserve living resources in the Exclusive Economic Zone and the high seas at a time when capture fisheries was still growing at a fast rate. The situation now with regard to fish stocks level is very alarming. The Food and Agricultural Organisation (FAO) in its *State of the World fisheries Report 2000* reports that of the main fish stocks worldwide, 47 to 50 have reached full exploitation level while between 15 to 18 percent are overexploited, with a further 9 to 10 percent of the main world fish stocks being depleted. While this is a slight improvement over the past few years, the outlook for the world's fisheries could hardly be described as healthy.[10]

The concern over the world's fisheries resources is not to be understated given that many in developing countries depend on food fish as a source of readily available and cheap protein. This and the fact that 95 per cent of all fisheries landings are from national waters explain the emphasis given to achieving sustainable use of fisheries resources in areas under national jurisdiction – the territorial waters and EEZ.[11] This however should not distract from the fact that there is also tremendous pressure on fish stocks in the high seas. The concern is reflected in Resolution 55/8 of the United Nations General Assembly, which was adopted on 30 October 2000, which among others reaffirmed the obligations on States to cooperate in the implementation of the provisions of UNCLOS pertaining to straddling socks and marine living resources of the high seas. In addition, the same resolution also called on States to report measures taken to support the global moratorium on all large-scale pelagic drift-net fishing on the high seas.[12]

Chapter 17 of Agenda 21 further elaborated on the problems of high seas fisheries in Paragraph 17.45 and summarised the situation as one where there is insufficient monitoring and regulation of an overcapitalised industry which is largely unregulated with large fleet sizes[13]. To address the problems, the implementation of the UNCLOS and Chapter 17 provisions pertaining to fisheries resources management is supported by programmes managed by the Food and Agricultural Organisation (FAO). These include the voluntary Code of Conduct for Responsible Fisheries, which provides general principles for fisheries management and is designed to assist countries manage their fisheries industry.[14] Table 2 provides a comparison of the provisions of UNCLOS and the programmes of Chapter 17 on the conservation of fisheries resources.

Apart from depleting the resource base of the industry, unsustainable fishing practices will also affect the coastal and marine ecosystems. This is particularly true in instances where destructive fishing gears and methods are used. In the high seas this involves the use of gears such as large-scale drift nets while closer to shore, destructive fishing practices include the use of explosives, cyanide and trawls.[15]

Table 2: A comparison of UNCLOS and Chapter 17 Provisions

Provisions of UNCLOS		Chapter 17 Programmes	
Art 61	Protecting living resources in the EEZ from overexploitation through proper conservation and management measures.	General provisions Para 17.75	States commit themselves to the sustainable use of marine living resources in areas under national jurisdiction
Art 62	Promote the objective of optimum utilisation of the living resources in the EEZ.	Para 17.78 - 17.79	States shall ensure that marine living resources in the EEZ and other areas under national jurisdiction is managed according to the provisions of UNCLOS including the provisions related to straddling stocks and highly migratory species.
Art 63	Adoption of cooperative measures necessary to conserve and developed shared fisheries stocks occurring within the EEZ of two or more countries.		
Art 64	Cooperation between countries to conserve and utilise highly migratory species in an optimum manner.		
Art 65	Encourage countries to conserve and to cooperate in the conservation of marine mammals and to participate in existing international bodies for the conservation of cetaceans.	Para 17.76	Encourages countries to adopt stringent measures for the conservation of marine mammals and to participate through existing international bodies for the management, conservation and study of cetaceans.
Art 66	Cooperation in the management of anadromous stocks.	Para 17.81	Promotion of recreational and tourism activities based on marine living resources.
Art 67	Responsibility of coastal States to manage catadromous species.	Para 17.82 - 17.83	Countries should support the sustainability of small-scale artisanal fisheries, local communities and indigenous peoples.
		Para 17.84	Analyse the potential of aquaculture.
		Para 17.85	Prohibit the use of destructive fishing practices.

Provisions of UNCLOS		Chapter 17 Programmes	
		Para 17.86	Identification and protection of ecosystems with levels of biodiversity and productivity.
Art 116	Provides countries with the rights to fish in high	Para 17.44	Recognised the rights of States to exploit living resources in the high seas as provided for by Art 116 of UNCLOS.
Art 117	Duty of countries to conserve living resources in the high seas.	Para 17.46	States commit themselves to the conservation and sustainable use living resources in the high seas.
Art 118	Cooperation among countries to conserve living resources on the high seas.	Para 17.49	States should take action to ensure that fisheries activities in the high seas are managed in accordance with the provisions of UNCLOS.
		Para 17.50 - 17.54	Duties of States to manage fisheries on the high seas by regulating registration and flagging of vessels, reducing incidental catches, reporting of catch levels and prohibiting destructive fishing practices.
Art 119	Duty of countries to maintain the level of population of exploited species and protect species associated with exploited species.		

Sources: United Nations Convention on the Law of the Sea; Agenda 21.

Other Conventions

UNCLOS and Chapter 17 of Agenda 21 are not the only instruments for the protection of the marine environment. Apart from the conventions aimed at preventing pollution from vessels such MARPOL 76/78, the London Convention and the Salvage Convention there are other conventions related to marine environment protection, which has linkages with UNCLOS and Chapter 17.

Para 17.85 and 17.86 of Chapter 17 of Agenda 21 and Art 119 of UNCLOS alluded to the relationship between fisheries activities and conservation of biological diversity. This relationship is further emphasised in the Jakarta Mandate on Marine and Coastal Biological Diversity of the Convention on Biological Diversity. One of the thematic areas of the Jakarta Mandate is sustainable use of marine resources, which among others reaffirmed the link between fisheries and biological diversity and cautioned against the impact of overexploitation of fisheries resources and the use of destructive fishing practices on biological diversity. In addition, the Jakarta Mandate also supports the aims of UNCLOS and Chapter 17 of Agenda 21 in achieving sustainable use of marine living resources in areas under national jurisdiction and on the high seas.[16]

Malaysia's Commitments and Actions

Malaysia has made clear commitments towards attaining sustainable development and protection of the environment. These could be discerned from the policy statements made in the five-yearly Malaysia Plans beginning with the Third Malaysia Plan (1976 - 1980). These policy statements have been progressively strengthened with specific programmes aimed at sustainable use of natural resources and protection of the environment.[17] These commitments are also reflected in Malaysia's submissions at UNCED[18] and subsequent sessions of the United Nations Commission on Sustainable Development (UNCSD).

A number of authors have examined Malaysia's actions in implementing UNCLOS[19] and Chapter 17 of Agenda 21.[20] The reviews have in general followed the format of Agenda 21 programmes, which suggest that countries adopt measures at three levels (policy, legislation and programme or activity) to implement international treaties and programmes at achieving sustainable development. This section discusses Malaysia's commitment and actions in implementing the provisions of UNCLOS and Chapter 17 of Agenda 21.

Policy and Legal Responses to UNCLOS and Chapter 17

UNCLOS and Chapter 17 provide Malaysia with a framework for conserving and protecting the marine environment. The suggested framework includes the call on countries to develop appropriate policies and legislation to protect the marine environment and ensure the sustainable use of marine resources.[21]

Malaysia has made significant progress on the legal aspects of marine environment protection even before her ratification of UNCLOS in 1996. The Fisheries Act, 1985 and the Exclusive Economic Zone Act, 1984 for example, mirror the UNCLOS provisions for the sustainable use of living resources in the EEZ. Recent amendments to the Fisheries Act have also incorporated provisions for the protection of endangered species such as

turtles as stipulated in the Convention on Biological Diversity. Similarly the Environmental Quality Act, 1978 and the Exclusive Economic Zone Act, 1984 and the Merchant Shipping ordinance protect Malaysia's sea areas from vessel-based pollution. Minor gaps however exists where regional cooperation and the protection of the marine environment from dumping is concerned. Malaysia's position has also been strengthened with the ratification of MARPOL 73/78 in 1997.[22]

In terms of policy development, the post-UNCED period saw the development of several key macro-policy documents aimed at environmental protection in general. These policies include the National Policy on Biological Diversity and the drafts of the National Policy on the Environment and the National Coastal Zone Policy. The development of these policies will strengthen existing policies already in place such as the Third National Agriculture Policy. In addition, the Government of Malaysia has also made a commitment to review the administration of the country's maritime sector as part of the 8th Malaysia Plan initiative towards better management of natural resources. The review will examine ways to protect the marine environment from being degraded by marine pollution, loss of biological diversity and will identify ways of reducing multiple-use conflicts between the different uses of the sea.[23]

Programmatic Responses to UNCLOS and Chapter 17

The comprehensive policy and legal framework, which Malaysia has to protect the marine environment, needs to be supported by an effective implementation programme. The National Conservation Strategy study carried out by the Economic Planning Unit in 1993 identified policy implementation and enforcement of laws as two areas which needs to be improved on where environmental protection in general is concerned.[24] A similar situation has also been observed in marine environment protection. The present system for the protection of the marine environment and sea-use management in general is based on sectoral interest resulting in a fragmented approach towards management.[25] While the promised 8th Malaysia Plan Review may address some of these problems, there are pressing issues that need to be addressed immediately. These issues include the deterioration of marine and coastal biological diversity as a result of pollution, overexploitation and ecosystems loss.

Recognising the immediacy of the problems, the Government has launched several programmes to address in an integrated manner some of the causes of the degradation of the marine environment. These programme include pilot projects on integrated coastal zone management in the States of Sabah, Penang and Sarawak. In addition research work is also being undertaken to improve the management of specific ecosystems such as coral reefs and sea grass beds as well as to improve the management of the country's marine

parks. However without the comprehensive review proposed for the 8th Malaysia Plan these initiatives may be undertaken within a policy vacuum and would still result in a non-holistic approach to protecting the marine environment.

Conclusion

UNCLOS and Chapter 17 of Agenda 21 provide countries with blueprints for the protection of the marine environment. When adopted into national laws, policies and programmes, both instruments provide useful tools for countries aiming to protect the marine environment from pollution and overexploitation of resources. Malaysia's ratification of UNCLOS and itís acceptance of the Chapter 17 of Agenda 21 programme of action for the protection of the seas, strengthens the ongoing efforts in the country to protect the marine environment. These international instruments, however, need to be adopted into national policies, laws and programmes before they could contribute towards managing the country's marine environment. Malaysia's progress in the area of convention ratification, policy development and legislation has been significant but this has not been fully supported by on-the-ground programmes to implement policies and enforce national laws.

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THREATS TO THE STRAITS OF MALACCA ENVIRONMENT, RESPONSES AND RESOLUTIONS

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Introduction

The Straits of Malacca (SOM) is very strategic waterway. Together with the Singapore Strait, it spans from the Indian Ocean to the South China Sea and serves as the primary Sea Line of Communication (SLOC) for ships from Europe and the Middle East to Northeast Asia and the Asia Pacific region. There is no doubt to the importance of the Straits in terms of international economics, security and the environment.

A typical voyage from the Arabian gulf port (Rasnatunah) to Yokohama Japan would be 1000 nm longer through the Lombok-Makasar Straits as compared to the shorter Malacca-Singapore Straits. This route would add an estimated total increased cost between US $ 84 billion to US$ 250 billion a year for shippers.[1]

For the littoral states, the SOM is a primary conduit for trade. More than 80% of Malaysia's trade passes through the straits. The strait is also an important source of food to the coastal states. From 1990 to 1998, more than 60 % of the fish landed in Malaysia comes from the Straits of Malacca. Only since late 1998 the contribution of fish catch from the Straits has somewhat decreased to more than 50% of the total catch. The estimated value of aquaculture and mariculture products for the Straits of Malacca amounted to RM 214.4 million. Contribution of fish catch on the Indonesian side of the Straits of Malacca is only second to the fishery landing of the north coast of Java.[2]

Marine tourism development off the SOM is another major economic contribution to the economies of the littoral states. The development of marine resorts from Tanjung Piai in the south of Peninsular Malaysia to the island of Langkawi represents an investment of billions of dollars and this will depend on the clean waters of the straits and its related resources and biodiversity to attract tourist to spend their tourist dollars to help the littoral countries to develop their economies.

Finally, it is important to note that the SOM is a life support system to the littoral states of the straits from the point of view of food production. Pollution control, foreign exchange, climate, recreation and environmental management of the SOM play a vital part in the daily lives of the people of the littoral states.

The total value of marketable and non-marketable goods provided by the straits is estimated to be some US$ 5.6 billion while the value of the shipping contribution of the straits is a further US$ 600 million annually.[3] Given such importance of the straits, the government of Malaysia spends considerable sums of money to ensure safe navigation of the straits and in the management of pollution in the straits.[4] Cost of managing the straits from 1984 to 1997 could be broken down to US $ 1 billion for the development of infrastructure including navigation buoys, light houses, oil spill equipment, vessel traffic system radar (VTLS), etc. Operating cost adds another 1 billion, cost of hydrographic survey adds another 70 million while the cleanup of the more than 30 oil spills on the Malaysian side of the straits costs US $ 34 million-not considering the compensation for loss income, equipment and stock to the fishermen and aquaculturists affected by such spills. The costs to other littoral states of the straits are also quite considerable although perhaps less considering the amount of landmass directly littoral to the straits. User states cannot continue to expect the littoral states to continue subsidizing them in providing the cost of keeping the straits safe for navigation and pollution. This is especially pertinent in that they enjoy financial benefits by using the services provided for safe navigation in the straits. To the extent that some East Asian states namely Japan, China, South Korea, Taiwan and Hong Kong have become major owners of oil tankers regularly employed on the Persian Gulf-East Asian route, they should assume some responsibility in helping to ensure safe navigation and environment protection in the Malacca Straits. Environmental dangers are related to increased shipping traffic in the choke points of Asia and especially since the evidence of low-level nuclear waste in Asian seas emerged.[5]

The objective of this paper is therefore to evaluate the various threats to the Malacca Straits environment. These threats will impact on the natural function of the straits such as a) a SLOC b) natural resource and food provider to the littoral states c) recreational opportunities and tourism development

d) defense and e) a life support system. The threats come from various internal and external sources and may impact on the littoral state's sovereignty over the straits waters itself. This paper identifies the kinds of options available to the littoral states and recommends actions required to reduce or negate the threats to the SOM environment and achieve sustainable development of the straits.

UNCLOS and Article 43

The United Nations Convention of the Law of the Sea (Article 43) clearly outlines that User States and States bordering a strait should by agreement cooperate:

> *(a)* in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation; and
>
> *(b)* for the prevention, reduction and control of pollution from ships.

This article was suggested by a user state as an inducement to the coastal states to adopt the regime of "transit passage" through the "straits used for international navigation", instead of insisting on the regime of "innocent passage" in such straits that form part of their territorial seas.[6] The inducement of accepting the regime of transit passage was in the terms of improvements of safety of navigation and in terms of protection of the environment pollution caused by ships. The term used for the straits as "straits used for international navigation" in UNCLOS is adopted after very careful deliberations as it was the contention of littoral states such as Malaysia and Indonesia that a large part of the straits runs through their territorial waters whereby the regime of "innocent passage" should prevail. Notwithstanding this compromise and a joint statement by the three littoral States of Indonesia, Malaysia and Singapore in 1971, many writers still casually refer to the Straits of Malacca as an "international straits". Whether this is an intention or not towards creeping jurisdiction by user states and maritime nations is unclear.

Cooperating to manage the straits

Some 20 years have passed since the adoption of UNCLOS 1982 and not much has been achieved on the implementation of article 43. The expectations of coastal states pertaining to cooperation in the safety of navigation and environmental protection have been neglected whereas the inducement for transit passage through territorial waters has not been fulfilled. This has caused many problems and controversy on the part of

coastal states to shoulder the high costs of providing and maintenance of navigation aids and equipment required for the safe navigation in the straits. The adverse impacts of increased shipping, risk of pollution from ships, land-based pollution and the safety of navigation has suffered and present a threat to the SOM environment. While most Asian countries are the major users of the East Asian SLOCs, yet only Japan, has voluntarily cooperated with the littoral states to improve the safety of navigation in the Malacca and Singapore Straits through the initiative of the Tripartite Technical Experts Group (TTEG) and the Malacca Straits Council. The International Maritime Organization (IMO) is instrumental to the establishment of Traffic Separation Scheme of the Malacca and the Singapore Straits, Mandatory Ship Reporting (STRAITREP) and in the development of Electronic Navigation Chart (ENC) and Electronic Chart Display Information System (ECDIS) in the SOM. However, much remains to be done especially as it relates to the protection of the marine environment, pollution contingencies, technical transfer and capacity building. Pollution of the SOM from ship and land based sources remains a major threat to the SOM environment.

Threats to the Straits environment

The SOM receives pollution from two primary sources, namely land and sea- based sources. This can be further subdivided into agricultural, industrial and domestic wastes coming from land-based activities that discharge directly into the Straits, or into the rivers that empty into the Straits. Sea-based sources include operational and accidental discharges and the more sinister dumping of toxic and solid waste from unscrupulous operators. Another area that has come into prominence of late is the threat of airborne pollutants that are deposited into the sea especially since the haze episode of 1997 and its impact on human health and safety of navigation in the Straits.

Land based pollution

In a review of pollution issues of the SOM, it is concluded that there are a variety of sources of pollutants to the straits with high levels of total suspended solids, E- coli and oil and grease in the marine waters.[7] Indications also point towards localized problems with heavy metal components derived from industrial waste. Further, there are indications that in some locations, current pollution levels pose threats to human health and of economic loss to tourism, fisheries and other industries dependent on marine water quality.

The levels of total suspended solids (TSS) BOD, COD, oil and grease have further increased from the earlier figures given by DOW in 1997.[8] This increase in pollution in the South China Sea and surrounding seas is attributed to industrial output, energy consumption driven by the region's economic growth and increased consumption due to increasing population.[9] The South China Sea has not only become an interstate highway in the world economy but also a sink for regional environmental pollution, industrial effluents and recipient to spills and dumpings of vessels in transit. Other sources of land-based pollution include domestic sewage, industrial wastes, agricultural waste and solid waste.[10]

Threats from sea-based sources

Threats of pollution from sea-based sources include a long list characterized by operational discharges (including deballasting, tank cleaning, bilge water and sludge and discharge from small vessels). Accidents, oil spills, anti-fouling paints including trybutyltin (TBT), oil and gas operations, mining, aquaculture and dredging account for the other sources of sea-based pollution. From 1978 to 1994, marine casualties including all types of vessels numbered to 476.[11] Compared to other types of vessels, general cargo carriers, oil tankers and bulk cargo vessels showed a high incidence of maritime accidents. The positive correlation between the number of accidental oil spills and the number of vessels transiting the SOM was recorded from 1976 to 1997.[12] Of the latest concern is the enhanced probability of the occurrences of vessel collision during the haze episodes. In the period of 40 days during September and October 1997, three incidences of vessel collision occurred in the SOM and the adjoining Singapore Straits. The collisions resulted in the sinking of a 31,000 ton cargo ship, spillage of 21,000 tons of oil from *M.V.Evoikos* and the sinking of a fishing boat. A number of near misses was also reported during this period. It is important to note that an air crash involving a Boeing 747 killing all the passengers and crew aboard after missing the runway at Medan airport occurred during this period as well.

Deballasting

Aside from the pollution caused by accidental spillage of oil, the problem of operational tank cleaning is also prevalent from the large number of tankers estimated at 1/3 of the number of vessels transiting the straits. The enclosed and calm waters of the Straits lend itself to ease and convenience of deballasting and tank cleaning after the vessel leave the high seas and before coming into port for a new consignment of cargo.

This deballasting of waters has led to problems of oil in ballast water, tank cleanings and more recently of the introduction of alien species that wreck havoc to the biological diversity of the local environment. The introduction of zebra mussels into Australia for instance, required large scale poisoning of total harbours that killed both the alien and local species with a long period of succession before the return to a fraction of the original biodiversity of the area.

There have been several detentions of vessels with toxic waste in metal drums and plastic containers of toxic and hazardous materials on deck suspected carrying out dumping of these materials in the Straits waters. The dumping of solid waste and garbage by unscrupulous mariners while transiting in the Straits add further to the problem of pollution in the Straits. These actions are normally performed at night when surveillance is difficult and apprehension and detention tenuous.

Ultra Hazardous Waste

The passage of nuclear powered vessels and nuclear transport vessel in the Straits reserve a special mention as a major threat to the Straits. The carriage of ultra hazardous goods such as Irradiated Nuclear Fuels (INF) Plutonium (Pu) and High level Radioactive Waste (HLW) are not covered under any specific Liability and Compensation regime.[13] Further, the carriage of such materials is normally done by shippers registered under Flags of Convenience and to hastily formed companies with assets no more than the ship and a rented office. This has led to the support for the right to ban such ships as the *Pacific Pintail* from the Exclusive Economic Zones (EEZ) of Chile, Brazil and Argentina. Puerto Rico and the Dominican Republic have rejected the ship's passage through the Canal de la Mona Strait in the Caribbean Sea. The requirement of ship reporting for vessels transiting the Straits (STRAITREP) should be strictly adhered to so that littoral states can be prepared for any eventuality. The various principles of international law such as the obligation of states to preserve the marine environment, (UNCLOS Art. 192) jurisdiction of the coastal states to protect and preserve the marine environment in the EEZ (UNCLOS Art.56 (1), the right of coastal state to protect itself from grave danger to its security and the precautionary principle should be applied to eliminate this threat to the Straits environment. Prudent action itself would stop any respectable shipmaster from using the congested SOM from the transport of Ultra Hazardous cargo through the narrow and shallow (draft restricted) shipping channel. Nevertheless, littoral states of SOM should a) pass appropriate legislation, b) notify the flag state and other interested states of their decision, with reasons, c) apply their laws in a non- discriminatory manner d) advice affected vessels passage

through the states EEZ and prohibit them from doing so and monitor the course of the vessel, and e) lodge a diplomatic protest to the flag state if the vessel continues to navigate through its EEZ.

Threats to SLOC

Security and access to Sea Lines of Communications (SLOC) is of primary importance to the Asia Pacific region as they form the highways for vast trade flows of this rapidly growing region. The threats to include military and non-military concerns have been categorized.[14] Military threat to SLOCs include conflict between the regional countries as well as sea mines while those of non-military nature include natural disasters, accidents, piracy and creeping jurisdiction of regional and maritime nations. The major SLOC's in the ASEAN and the East Asian region include the SOM (including the Phillip Channel and the Strait of Singapore), South China Sea and the Lombok and Macassar Straits. More than half of the world's merchant fleet capacity sails through these Straits. As an economic lifeline, almost a trillion dollar value of the international trade uses the major East Asian region SLOCs. From another perspective, trade using these SLOCS as a percentage of GDP is more than 21% for South Korea, Hong Kong and Taiwan, 10% for Japan and 12 % for Australia. The US dependence on these SLOCs is around 4%. Some 90% of Malaysia's trade is conducted through maritime transport.[15] Growing dependence of all regional powers to the economic importance of SLOCs suggests that there are no regional or maritime powers imposing military threats to the regional SLOCs. Non military dangers however, pose a more threatening presence to SLOCs especially natural disasters, accidents, piracy, pollution and "creeping jurisdiction" of maritime nations as well as littoral states.

Piracy

Piracy poses a real danger in the SLOCs especially in the Straits of Malacca and Singapore. The narrow confines of the Straits and relatively shallow depth at choke points require ships to navigate at slow speed. This mode of operation lends the ships to dangers of piracy and sea robberies. In 1992/ 93, more than two third of pirate attacks took place in the Asia Pacific region. In 1994, the International Maritime Bureau (IMB) figures places the Straits of Malacca – Indonesia - Singapore straits third with 10 cases after Indonesia, Papua New Guinea with 23 and the Hong Kong- Luzon-Hainan Triangle with 16 out of a total figure of 90 cases reported throughout the world shipping lanes. In the Malacca and Singapore straits, international cooperation and effort by the littoral states such as coordinated efforts by their navies through joint exercises have significantly reduced piracy incidents

in recent years. The recent economic crisis that hit the Asian region again increased the number of piracy. The threat of piracy has many negative impacts to trade insurance and freight rates thus reducing the competitiveness of imports and exports from this region. The new proposed CSCAP Guidelines for Regional Maritime Cooperation explicitly recognize the importance of cooperation in the maintenance and enforcement of law and order at sea, including the prevention of piracy, drugs smuggling and other crimes at sea.

The above declaration has been recently sounded in many international fora and conventions clearly showing the interest on the part of international agencies and maritime nations leaning towards sending ships and other forms of enforcement in the Straits of Malacca and Singapore on the pretext of patrol and escort. These actions to be conducted within the territorial waters of Indonesia and Malaysia (in the SOM) are quite unacceptable and a threat to the sovereignty of the littoral States.

Both Indonesia and Malaysia have clearly shown their capability in maintaining the safety of navigation in the Straits and in the protection of the Straits against pollution. What is required is that user states contribute towards the maintenance of these services provided for by the coastal states. Public sentiment in littoral states is that littoral states should not bear the burden for the promotion of safety of passing ships or improvements in aid of international navigation, especially if the transiting ship does not contribute to their economy or does not stop in their ports.

User and maritime nations also fear the creeping jurisdiction of coastal states through increasing regulation, port state control, and setting of special traffic schemes that could restrict navigation in the Straits. This is a legitimate concern, which can be allayed through a more transparent and responsible attitude towards the development of a truly regional approach in cooperation towards management of the Straits. The legality of Singapore adopting voluntary pilotage in the SOM (through the territorial waters of Malaysia and Indonesia) have further contributed to this fear and distrust by maritime nations and especially the coastal states.

Options and resolutions

In attempting to remove the threats posed to the Straits of Malacca, there has been no shortage of recommendations from scholars and practitioners from the littoral states and the international arena and maritime nations. Certain basic principles have to be adhered to so as not to "reinvent the wheel" or introduce new regimes or doctrines to those already agreed to by nations during the 30 years of negotiations that resulted in the adoption

of the UNCLOS 1982 the principles under UNCHE 1972 in Stockholm and those of UNCED 1992 in Rio. On the legal status of the Straits, the UNCLOS have in its wisdom chosen to use the term "Straits used for international navigation" not "international straits" or any other nomenclature thus reducing the feelings of threat and suspicion of creeping jurisdiction of maritime nations or other non-littoral states to gain control of what is essentially territorial waters of the littoral states.

Article 43 of UNCLOS should be implemented by the efforts of user states, littoral states and other stakeholders including shipping concerns and beneficiary states, through assistance of a competent international organization like IMO. Various forms of cooperative arrangements have been proposed including global funding for navigational safety and environmental protection[16] Management fund[17] private and public sector partnership,[18] voluntary contributions and System Compliance.[19] While there are both positive and negative parts to the above proposals, perhaps the easiest approach is that of expanding the Malacca Straits Fund to include contribution by all the beneficiaries of the use of the Malacca Straits. Presently only the three littoral states of Indonesia, Malaysia, and Singapore and Japan oversees the efforts towards the safety of navigation through a joint hydrographic survey, provision of navigational aids, provision of stockpiles of oil spill response equipment and the revolving fund for immediate operation of oil spill mitigation actions. Such contribution can also be in the form of provision of needed equipment for oil spill contingencies, capacity building, technology transfer and other related activities.

To reduce the threat of land-based pollution, the coastal states should develop policies, legal instruments, monitoring and enforcement capabilities. Capacity building, effluent technology, public education and public relations efforts, fiscal and non-fiscal incentives will further enhance efforts towards reducing land-base pollution. Efforts to develop Integrated Coastal Zone Management such as that by the Government of Malaysia will enhance the achievement of this goal.

It has been said that poverty is a major cause for pollution. Similarly piracy stems from extreme poverty and requires the concerted effort of public education, employment opportunity, economic development, intelligence, monitoring and enforcement. The apparent wilderness, lawlessness, poverty and nothing more to lose attitude of humans, can lead to various forms of desperate measures. A more comprehensive effort by international and regional organizations to combat poverty and efforts by developed economies and New Industrialised Countries to fight abject poverty can help reduce and perhaps eliminate piracy. At the same time nations must outlaw with the highest form of punitive action all forms of piracy and not harbour or deal with such incidents by national or uniformed groups.

In 1971, a ministerial level meeting of the three littoral states of Indonesia, Malaysia and Singapore was convened in Singapore to address the outstanding issues in the Straits of Malacca and Singapore such as the safety of navigation, protection of the marine environment, need for cooperation in search and rescue, contingency plans for marine pollution and the legal status of the straits. The meeting reached several decisions that have shaped the various policies and implementation to address the outstanding issues.

These include

a) the safety of navigation in the Straits of Malacca and Singapore is the responsibility of the coastal states.

b) the three governments agree on the need for tripartite cooperation on the safety of navigation in the two straits.

c) agreement to establish a high level committee of the Straits of Malacca and Singapore consisting of only officials of the three littoral states.

d) that the Straits of Malacca and Singapore are not international straits while recognizing their use for international shipping. The Government of Singapore takes note of this position by Indonesia and Malaysia.

e) on this basis of understanding, the three governments approved the continuation of the hydrographic survey.

The tripartite Committee of Senior Officials met intensively in the following years to work on the agreement and further set up the Tripartite Technical Experts Group (TTEG) that deliberated on the substantive issues of safety of navigation of the Straits. The cooperation carried out through the TTEG and the Malacca Straits Council (funded by Japan) has achieved a lot in terms of promotion of safety of navigation, survey of the Straits and navigation channels, provision of navigational aids, production of updated navigation charts and the set up of the Malacca Straits fund for the immediate remedial action to combat oil pollution caused by ships in the two straits. On the last account in 1999, the total asset of the fund was a meager US$ 3,517,000.

Many outstanding issues remain, such as the use of the fund only relates to the actual cost of cleaning up operation and consequential damages (such as loss of equipment and income of fishermen but not "environmental damage" which is equally if not more important than the other damages. Extensive industrialization of the coast of the Straits has brought about the spectre of land-base pollution to the fore. The recent extensive land reclamation along the coasts particularly in the Singapore Straits and Phillip channel requires

careful study in terms of the short and long term impact of land reclamation on the marine life, ecosystem and biodiversity. The impact of such reclamation to the oceanography of the straits, safety of navigation aside from other socio, and economic threats to the straits need immediate attention.

After some 30 years since the convening of the Tripartite Committee of Senior Officials of the Strait of Malacca and Singapore, the significance of the World Summit on Sustainable Development to be held in Johannesburg, South Africa in 2002 and the threats to the Straits of Malacca and Singapore environment, the time is most opportune for the convening of this committee to try and resolve outstanding issues and identified threats to the Straits of Malacca and Singapore. Perhaps the concept of system compliance of the Straits[20] could be further refined and developed for the sustainable development of the Straits. The time for action is now; least the spectre of threat to SOM will loom even greater.

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SPECIAL

REPORT

ANTARCTICA: MALAYSIA AND THE RECENT PRIME MINISTERIAL EXPEDITION

by

Ambassador S. Thanarajasingam

Introduction

The Malaysian Prime Minister Dato Seri Dr. Mahathir Mohamad led a Malaysian expedition to Antarctica from February 6-13, 2002, twenty years after Malaysia had raised the issue of Antarctica at the United Nations (UN). He indeed became the first Malaysian Prime Minister, as well as one of the few Heads of Government to visit this continent. In one of his early decisions as Prime Minister, Dato Seri Dr. Mahathir Mohamad instructed Wisma Putra in 1981 to raise the issue of Antarctica at the United Nations to ensure that it became the common heritage of mankind. The Malaysian Prime Minister in his speech at the 37th Session of the United Nations General Assembly in New York on 29th September 1982, referred among others, to the issue of Antarctica and explained as to why the United Nations had to be directly involved with this issue.

> **"There remain certain areas in the world which are not covered by any international agreement. According to present norms, territories colonized by the old colonial powers must be decolonized, i.e. returned to the natives or the original inhabitants. The United Nations concern with this issue is reflected in the Permanent Committee on Decolonisation. However, there are still land areas, which have neither natives nor settlers. There is, therefore, no one to inherit the land and to set up viable governments, should the claims of the metropolitan**

powers be given up. Because of this, little attention has been paid to these areas.

It is now time that the United Nations focus its attention on these areas, the largest of which is the continent of Antarctica. A number of countries have in the past sent expeditions, which have not limited themselves to mere scientific exploration, but have gone on to claim huge wedges of Antarctica for their countries. These countries are not depriving any natives of their lands. They are therefore, not required to decolonize. But the fact still remains that these uninhabited lands do not legally belong to the discoverers in as much as the colonial territories do not belong to the colonial powers.

Like the seas and the sea-beds, these uninhabited lands belong to the international community. The countries presently claiming them must give up so that either the United Nations administer these lands or the present occupants act as trustees for the nations of the world.

Presently, exploitation of the resources in the Antarctica is too costly and the technology is not yet available. But no doubt, the day will come when Antarctica can provide the world with food and other resources for its development. It is only right that such exploitation should benefit the poor nations as much as the rich.

Now that we have reached agreement on the Law of the Sea, the United Nations must convene a meeting in order to define the problem of uninhabited lands, whether claimed or unclaimed, and to determine the rights of all nations to these lands. We are aware of the Treaty of Antarctica concluded by a few nations, which provides for their co-operation for scientific research and prohibits non-peaceful activities. While there is some merit in this Treaty, it is nevertheless an agreement between a select group of countries and does not reflect the true feelings of members of the United Nations or their just claims. A new international agreement is required so that historical episodes are not made into facts to substantiate claims." [1]

Following this speech and countless lobbying efforts, including various meetings, an item entitled **"The Question of Antarctica"** was included for the first time in the agenda of the Thirty Eight Session of the UN General Assembly at New York. The first debate on this item began on 28 November 1983 in the First Committee of the UN General Assembly, more than 14 months after the Prime Minister's first reference to Antarctica at the UN on 29 September 1982.

Why Antarctica ?

In a letter dated 11 August 1983 and addressed to the UN General Assembly to include a supplementary item in the Agenda of the 38th Session of the

UN General Assembly, the Charge d' Affaires of Malaysia to the UN, Mr. A.W. Omardin and the Permanent Representative of Antigua and Barbuda Mr. Lloydaton Jacobs, representing number of like-minded developing countries, explained the importance of Antarctica and its relevance to the United Nations. The letter, interalia, stated:

"Antarctica constitutes approximately 8.9 per cent of the earth's land surface, covering six million square miles of land mass, ice and waters. It is the last undeveloped continent, unsettled with no original inhabitants. It lies in unique isolation in a triangle formed by the geographical extension of the southern most part of South America, Africa, Asia and Australia. Surrounded by the three largest oceans - the Pacific, Indian and the Atlantic, the continent was "according to Rarotogan legends" first discovered by a Polynesian, Ui-te-Rangoria, around A.D. 650.

Early interest on Antarctica was mainly for frontier claims and colonization through discovery, occupation and propinquity. Later, scientific and environmental co-operation was initiated, leading to the signing in 1959 of the Antarctic Treaty, which attempts to manage the conflicting territorial claims on the continent and to promote other objectives such as seeking to guarantee that Antarctica, in the interest of science and progress of all mankind, be used exclusively for peaceful purposes and not become the scene or object of international discord.

Antarctica is of considerable environmental, climatic and scientific significance to the world. This has prompted scientists of various disciplines and from many nations within the framework of the Antarctic Treaty to collaborate and carry out important studies and research, inter alia, in magnetic fields, weather systems distribution of earthquakes, effects of solar flares and the preservation of whales, seals and marine living resources, with the view to promoting international co-operation in environmental conservation and preservation of the world's ecosystem. Antarctica could also have considerable economic potential in harvesting of living and non-living resources.

Despite the progress made in these collaborative scientific efforts, there is need to examine the possibility for a more positive and wider international concert through a truly universal framework of international co-operation through the United Nations, to ensure that activities carried out in Antarctica are for the benefit and in the interest of mankind as a whole." [2]

Thus began an international challenge at the UN to the 1959 Antarctic Treaty over the future of Antarctica for the benefit of mankind. The signatories to the Treaty, led by the Antarctica Treaty Consultative Parties (ATCP) maintained that the Treaty remained valid, insisting that it should be retained

outside the ambit and purview of the United Nations. The ATCP which enjoyed full membership as opposed to the limited membership of non-consultative Parties, emphasized that the Treaty was open to all countries and those seeking consultative status could achieve it by:

> **"demonstrate its interest in Antarctica by conducting substantial scientific research activity there, such as the establishment of a scientific station or the dispatch of a scientific mission."** [3]

Following the debate at the First Committee of the UN General Assembly in 1983, Malaysia and its supporters tabled a Resolution on the **Question of Antarctica** which, interalia, called for the establishment of Antarctica as a common heritage of mankind under the jurisdiction of the United Nations in place of the existing exclusive Antarctic Treaty System (ATS). The **"Question of Antarctica"** remains to this day as an agenda of the United Nations, with Malaysia initiating a draft General Assembly resolution on Antarctica and supported by a large number of the developing countries. At the 48th session of the General Assembly in 1993, for the first time since the Antarctica issue was raised, the draft resolution was adopted by consensus on the basis of the Chairman's text, rather than a text initiated by Malaysia, reflecting greater understanding and cooperation between the co-sponsors of the resolution and the members of the ATCP that had earlier opposed the Malaysia-initiated resolution.

At the 54th session of the General Assembly, as further demonstration of greater cooperation between the two sides, delegates to the First Committee agreed that the **Question of Antarctica** be considered on a triennial basis rather than annually. Malaysia, along with the other co-sponsors of the Antarctica resolution, had agreed to the triennial arrangement on account of the fact that through our efforts at the United Nations there was greater transparency and accountability on the part of the ATCP countries. While the UN Secretary-General himself had not been invited to attend the consultative meetings of the ATCP - as Malaysia had called for - the Executive Director of UN Environment Programme had been invited to attend these meetings and had provided useful information pertaining to these meetings and other relevant information on Antarctica to the UN Secretary-General, thereby greatly assisting him in the preparation of his annual report to the General Assembly on the subject. At the same time Malaysia was mindful of the declining interest showed by its traditional co-sponsors and supporters, as evidenced by the decreasing number of delegations taking part in the debate on the subject. In recent years the debates on Antarctica in the First Committee had been characterized by greater understanding and convergence of views than the confrontation of past years and this had an impact on the attitudes of delegations.

While the Malaysian UN initiative contributed towards international awareness of the vital importance of Antarctica to the world's climate, environment and security, it made limited headway in providing an alternative to the Antarctic Treaty itself. The ATCP countries were formidable in their

opposition and strenuously lobbied other countries, especially developing countries and those in the then Soviet bloc. Prominent developing countries such as India and China acceded to ATCP status while other developing countries were diverted due to other pressing issues. The struggle by Malaysia and its friends to promote and protect the Antarctic environment was a principal factor which galvanized international public opinion against the attempt at mineral exploitation by some ATCP in Antarctica, which many feared would cause irrevocable damage to the fragile Antarctic ecosystem. Faced with the international outcry, including in their own countries, the ATCP countries agreed to a 50-year moratorium beginning in 1992 against mineral exploitation.

Direct Involvement in the Continent

Aside from raising the issue of Antarctica at the UN and other fora, Malaysian officials undertook visits to the continent. The first Malaysian to visit Antarctica was by the Director General of the Department of Chemistry Mr. Amarasingam followed by Ambassador Tan Sri Zain Azraai who was then Malaysia's Permanent Representative to the UN. He was accompanied by the Science Advisor to the Prime Minister Professor Dr. Omar bin Abdul Rahman. Subsequently, Dr. Ling Liong Sik the Minister of Transport became the first cabinet Minister to visit the Antarctica in a visit organized by New Zealand.

13. These series of high level visits over the years facilitated the recent visits of Malaysian scientists to the Antarctica. To sustain Malaysia's scientific interest and involvement in Antarctica, the Malaysian Academy of Science established a Task Force on Antarctica. Over the last four years, Malaysian scientists had undertaken studies relating to atmospheric science, micro organisms and radio communications.

The Prime Ministerial Expedition, February 6-13, 2002

Against this backdrop, the Prime Minister who had initiated Malaysia's involvement in Antarctica two decades ago led an expedition by ship to the continent from February 6-13, 2002. The Prime Minister was accompanied by his wife Datin Seri Dr. Siti Hasmah Haji Mohd Ali, Minister of Defence Dato' Sri Mohd Najib Tun Hj. Abdul Razak, his wife Toh Puan Indera Datin Sri Rosmah Mansor, the Minister of Science, Technology and the Environment Datuk Law Hieng Ding, his wife Datin Ngui Soon Leng, the Minister of Foreign Affairs Datuk Seri Syed Hamid Albar and his wife Datin Seri Sharifah Aziah Syed Zainal Abidin.

The 60-ought member delegation also included the Secretary General to the Foreign Ministry Dato' Ahmad Fuzi Hj. Abdul Razak, the Malaysian Permanent Representative to the United Nations in New York Ambassador Hasmy Agam, the Malaysian Ambassador to Argentina, Ambassador Dato' Santhananaban, the Undersecretary for American Affairs at the Foreign

Ministry Ambassador S. Thanarajasingam, Mr. Mohamed Elias Abu Bakar, the Deputy Principal Private Secretary to the Prime Minister, the Science Advisor to the Prime Minister Tan Sri Datuk Dr. Ahmad Zaharudin Idrus and four Malaysian scientists. Other notables included business tycoons Mr. Ananda Krishnan and Tan Sri Arumugam, both of whom were instrumental in organizing the expedition. The Editor-in-Chief of The New Straits Times, Tan Sri Abdullah Ahmad and his wife were also part of the expedition.

The expedition began on the morning of February 6, 2002 as the Russian icebreaker ship "*KAPITAN DRANITSYN*" left the Argentine port of Ushuaia, which prides and promotes itself as the southernmost city in the world. The ship, which could accommodate 100 passengers, included a crew of 90 consisting of 75 Russians while the rest were guides, who gave lectures on board and were the tour guides at the landings in various parts of Antarctica. "*KAPITAN DRANITSYN*" came fitted with two helicopters and 4 motorised dinghies. It took two days of sailing nearly 1000 nautical miles across the rough Southern Seas through the Beagle Channel and the Drake Passage before the ship reached the peninsula of Antarctica. At Antarctica, the members of the expedition visited Paradise Bay, Neko Harbour, Lemaire Channel, Penola Strait, Pleneau and Cuverville Island. The expedition members were mesmerized by the pristine beauty of the ice and snow-clad continent. The wild life - the penguins, seals, whales, and birds, fascinated the Malaysians. After 4 days at Antarctica, the expedition left for Ushuaia through Cape Horn, on a memorable two-day return journey marked by strong winds which made the ship tilt 45%, wild 8-storey high waves and with very few, having escaped motion sickness.

THE NEXT STEP

The Question of Antarctica will be coming for debate again this year at the upcoming 57th session of the General Assembly. Following the Malaysian Expedition to Antarctica, led by the Prime Minister and taking into cognizance the increasing involvement of Malaysian scientists in Antarctic research, Malaysia would have to formulate an appropriate position that would strike a balance between its diplomatic position of championing Antarctica as a common heritage of mankind and its continuing conduct of scientific research on the continent with the cooperation of the ATCP countries, particularly New Zealand, which has been assisting Malaysia over the past few years.

END-NOTES

[1] Speech by the Malaysian Prime Minister at the 37th Session of the United Nations General Assembly, New York on 29 September 1982

[2] Letter entitled *Request for the Inclusion of a Supplementary Item in the Agenda of the Thirty Eighth Session of the United Nations General Assembly dated 11 August 1983.*

[3] Article IX.2 of the Antarctic Treaty, Washington 1st December 1959 (Entry in Force 23 June 1961)

Review Essay

GLOBALIZATION IN SOUTHEAST ASIA: NON-TRADITIONAL SECURITY ISSUES OR INTERNATIONAL POLITICAL ECONOMY CONCERNS?

Eul-Soo Pang

Andrew T.H. Tan and J.D. Kenneth(eds), Non-Traditional Security Issues in Southeast Asia, Singapore: Select Publishing, 2001. pp 581

It should be made clear from the outset that the paper is written by a North American academic specializing in the international political economy of Latin America, more specifically the Southern Cone. This is a comparative review essay on a seminal book, entitled *Non-Traditional Security Issues in Southeast Asia*, edited by Andrew T. H. Tan and J.D. Kenneth Boutin (Singapore: Select Publishing for Institute for Defence and Strategic Studies, 2001). The book will be of interest to those studying developmental issues in general and in particular, the making of security issues emanating from non-security causes. The book also offers non-Asianist specialists something to think about: Latin American policy makers and academics need to learn from the Asian experience, while Asianists, as opposed to Asians, need to know more about Latin America.[1] This is especially important, because for the past fifteen years, East Asia has opted to enthusiastically refine its neomercantilism, while Latin America has embraced neoliberalism with some trepidations and abandoned its earlier populist model of state-led economic development. In 1982, Brazil's gross domestic product was 55 percent larger than the combined total of the Four Asian Tigers-Korea, Taiwan, Hong Kong and Singapore. The manufacturing output of the four tigers was about 76 percent of Brazil's, although none of the four has natural resources of their own. It made good sense, given the size of population and market, for Latin America to opt for import-substituting industrialization (ISI) policies, while East Asia adopted export-promoting industrialization (EPI) models. In 1980, Brazil's exports represented 9.6 percent of its GDP value, while Korea's reached 40 percent of its GDP.[2] In 1998, the Asian Tigers jointly claimed the combined output of $915 billion, while Brazil $768 billion, or 16 percent larger.[3] As the world has learned from the Mexican *peso* meltdown in 1994-95 and its subsequent *tequila* effect throughout the Western Hemisphere and the Asian financial crisis of 1997-98 and its

global contagion effect, the two regions are economic competitors in the global economy and finance. Investors pulled money out of Latin American in 1995 and invested in Asia. In 1998, the same moved money from East Asia to Latin America. How well Asia and Latin America, the two dynamic growth poles of the world for the coming decades, respond to internal and external security and non-security issues is of paramount importance to the regions and to the world.

The book is read and examined from a distinct intellectual tradition wherein security issues defined in other parts of the world are quite different from those perceived in Southeast Asia. *Internal security* drove the international political economy of the Southern Cone countries. As early as in the 1960s, the fusion of "security and development" was wide-spread throughout Latin America, wherein the alliance of the military and technobureaucratic elites had successfully forged a developmental state (distinct from Chalmers Johnson's Japanese developmental state[4]), in which military confrontations with neighbors became the last of the regimes' preoccupations. This has not been the case in Southeast Asia, especially among Singapore, Malaysia, and Indonesia. Rather the internal security of containing and even eradicating the leftist political opposition became the paramount concern of the Latin American armed forces. National development was seen as a tool to integrate the nation, or was used as a vehicle in modern state-building and nation-forging. Also, the Latin American armed forces, much like the counterpart of Indonesia today, were fully autonomous and did not consider civilian elected politicians fit to be their superiors. The Latin Americanization of the Indonesian armed forces is a real possibility, if the current secessionist wars expand and if Megawati's political leadership is no more effective than Wahid's.

When the Latin American civilian regime turned out to be leftist or pro-Marxist, Washington preferred to support the armed forces directly, often bypassing and even ignoring the government. Such *sub rosa* ties during the Cold War era undermined the state sovereignty of anti-American regimes and tended to promote the rise of pro-U.S. but undemocratic repressive regimes. Washington encouraged the military to military diplomacy backed up by the training of Latin American military officers in the United States and the Canal Zone in Panama. In the process, the U.S. foreign policy also undermined democracy building in Latin America. Thus, the Latin developmental state (*estado de desarrollo* in Spanish and *estado desenvolvimentista* in Portuguese) was architected by the armed forces, but the implementation of economic planning was relegated to the elite state technocratic bureaucracy, or technobureaucracy. As in Indonesia's "Berkeley Mafia," many technobureaucrats of Latin America were trained in the elite universities in the United States. And others had careers in the World Bank or the International Monetary Fund. These technobureaucrats have been steeply influenced by what the later turned out to be the "Washington Consensus," a euphemism and harbinger for neoliberalism.

Some became presidents of their countries. Carlos Salinas of Mexico and Alejandro Toledo of Peru became presidents of their countries, while both studied in the United States and Toledo worked in the World Bank.

Internal security concerns prompted the armed forces to focus on the eradication of such homeland security risks as Marxist guerrillas, civilian opposition, often accused of being Marxist sympathizers, and ideologically duped young university students clamoring for social democracy or socialism. The tripartite foundation or *tripé* of the state bureaucracy, domestic capitalists and multinational corporations focused on economic development. This "dependent development" model[5] *cum internal security regimes* became the bedrock of the Latin American international political economy from the 1960s to the 1980s[6], when neoliberalism became a fad and began to erode the old state-centric model. Washington swiftly abandoned its traditional Cold War security allies south of the Rio Grande in the name of democracy and free market.

Seventeen contributors who wrote a chapter each came from the elite academic world of security and non-security international relations specialists with one journalist who works for a bank in Singapore. Singapore is represented by five contributors including the two volume editors, followed by Australia four, Indonesia and the United Kingdom two each, and the United States, Canada, Brunei, Hong Kong and South Africa one each. The volume emerged from the research project funded by a Ford Foundation grant and housed at the Institute of Defence and Strategic Studies (IDSS) in Singapore's Nanyang University. The topics covered by the book are: globalization and security; regional institutions and security; governance in plural societies and security; and environmental security. Security is the common glue of the volume, albeit the concept for "alternative security," not the military-driven one, is the chief concern of the book. It is refreshing to see that the IDSS, a government-funded think tank of Singapore, published a book full of essays, some of which are quite critical of the Southeast Asian governments and their inept policies, and others critical of corruption, cronyism, but silent on the three septuagenarians who have invented modern Southeast Asia: Lee Kuan Yew, Suharto, and Mahathir bin Mohamad. The first is retired; the second overthrown but still remains powerful and untouchable; and the third still in office, planning another electoral victory in 2003. Several chapters exhibit propagandistic anti-Americanism, a ritual among the Latin American and French media, ambitious academics, and vociferous politicians; none of the chapters examines the Asian or Confucian values, the intellectual trophy of the bygone era when Asia was growing at 10 percent a year; and none dares to predict the future of an assertive China that can alter the regional security landscape overnight. The book is no hagiography, no propaganda tract, and a good start for more critical scholarship.

The structure, thus the tone of the book itself, tells much about the perception of the traditional and nontraditional security approaches in Singapore: five on Southeast Asia's broader issues; five on APEC, AFTA, ASEAN, ASEAN plus Three, and EAEG; three on Indonesia; two on the environment and natural resources; one each on ethnicity and illegal poaching and migrants. It should be mentioned that Indonesia receives much attention, while none of the 17 chapters deals with Singapore. Sandwiched between two greater Islamic states and within the Malay security zone, the city-state either does not have nontraditional security issues, or no one wants to write about. Coming from Singapore, however, the book is a bold challenge to the traditional approaches and even a beginning of something new down the pike.

The volume editors define the etiology, shape and content of the "non-traditional" security in the broadest contexts possible: human, environmental, political, economic, social, cultural, and any and all non-military security issues since the end of the Cold War as well as those hibernating during the Cold War but reemerging since. This means anything social, political, economic, environmental and even diplomatic issues can be non-traditional security concerns, too broad to be conceptually useful and too diffuse to establish an analytically firm subfield.

The monumental transformation of the global and regional security regimes since 1991 (and not to mention since September 11, 2001-the book had been in the offing and published before the horrific event-) has created a new discipline for the field and at the same time has freed the conceptual "strait-jacket" of traditional security studies from purely politico-military matters; as in elsewhere, the region's non-governmental organizations (NGOs) drive such nontraditional security agenda in the environment and human rights. The advent and intensification of globalization in the 1990s added more insecurity. The Asian financial crisis of 1997-98 destroyed in some countries much of the economic gains of the 1980s and early 1990s and robbed "elite governance" (read authoritarian rule) of the legitimacy to remain in power.

In Indonesia, it provoked regime instability or insecurity (three presidents since May 1998); in Malaysia, the government experienced a jolt in the 1999 election, though the Barisan Nasional government was able to hold on to its 2/3 majority in the Parliament with the Chinese votes; in Thailand, it stirred up a storm of internal reform rhetoric but avoided tanking any radical action; and in Singapore, the bedrock of the regional economic stability and the icon of modernization, the government allowed the devaluation of the mighty Singapore dollar. In the Philippines, one-time "sick man of Asia" the politics continues as usual, without significant regime changes and fundamental structural reforms. Islamic insurgency in the south and rising urban crime in Manila has given a good excuse to postpone all reforms. These events and abrupt changes in the region are too broad and complex to become analytically classified as security issues, even non-traditional, but the contributors insist that they have played a role in the regional security.

Although a dictionary defines "security" as "measures adopted to guard against attack, theft or disclosure[7]" more scholarly definitions include two aspects: that "most threats to a state's *security* arise from outside its borders and that these threats are primarily, if not exclusively, military in nature...."[8] If military confrontations are what a good security policy helps a nation-state avoid, sound economic, social, inter-cultural, ethnic, and public policies can help the nation-state, supranational regimes like ASEAN/AFTA, APEC, the EU, and to a lesser extent, MERCOSUR and NAFTA reduce or even eliminate potential instability and insecurity. By recognizing and articulating the changes wrought about by the end of the Cold War, globalization and its neoliberalism, the regional economic development of the 1970s-90s, and the rise of China as the region's superpower have rendered the traditional definition of security meaningless and even "no longer adequate and appropriate in meeting the challenges ahead."[9] This volume identifies both formidable challenges and analytical dilemmas for the nontraditional security concept, if it were to stand alone as a subdiscipline of international relations or political science.

In Southeast Asia and Latin America, the roles of the state in economic and social development have been different and even contrasting: the Latin American state promoted inward-looking import-substitution industrialization (ISI) policies while the Asian states nurtured outward-looking export promoting industrialization (EPI)[10], after a brief experiment with ISI. Both thrived on economic nationalism, one xenophobic and another *anti-yanqui*, as nation-state building tools. Latin America's bountiful resources and bigger domestic markets allowed the ISI model viable for three to four decades. In East Asia, the small domestic markets, except for China and Indonesia, forced the early abandonment of ISI, led by Japan, and opted for EPI by the early 1970s, but the state retained the tight control of credit allocation, market access, and organized labor. This model of *the state leads, the market follows* chose winners and losers by granting private monopolies and oligopolies to the well chosen few domestic and international supporters of the governing elites.[11]

Indonesia under Suharto and Chile under Pinochet were the examples par excellence. Both Asian and Latin American political economies required 'elite governance" and used the internal Communist threat as the justification for strong rule. In Asia, external threat has played a key role as well. Externally supported and financed insurgencies were abounding in both Southeast Asia and Latin America. China, the Soviet Union, North Korea, Czechoslovakia, and Cuba played prominent roles in Southeast Asia and Latin America, as the Cold War strategy in the Communist bloc called for begetting a thousand Vietnams and a thousand more Cubas around the world, or Che Guevarra's *foco* theory in practice.[12] As internal security in Southeast Asia and Latin America advanced, the political democratization was put on the back burner. This suited the domestic elites and the U.S. foreign policy well.

And finally, the economic globalization of the 1990s has witnessed the rise of neoliberalism and injected "good governance" doctrine, often demanded by multinational firms and investors, in marketplace around the globe and has set in motion a massive democratization process of political and social institutions in Latin America, Eastern Europe, East Asia, and parts of Africa. But the similar trends are slow in coming throughout Southeast Asia with a few exceptions. What has happened to Indonesia in May 1998 can be seen as the collapse of the unitary [read arbitrary, or imperfectly integrated] state for the ethnically pluralistic and centrifugal society. In spite of the proverbial photograph of the general crouched over a document of the country's financial surrender in front of the stern-faced and cross-armed Frenchman, Michel Camdessus, managing director of the International Monetary Fund, the demise of Suharto was caused by the mass defection of the dictator's praetorian guards, unfaithful state bureaucracy (the Berkeley Mafia), and disloyal business cronies.

External forces brought Indonesia opportunities for betrayal, abandonment, ambition, and resurgence of old rivalry, as well as social reform, economic revitalization, and democratic renewal. Revolution comes about as the work of a few well chosen elites; but its success depends on the defection of the inner constituents of the state power to the revolution by failing to live up to their pledge of defending the state as an institution and symbol of unity.[13] After the "revolution," each of the inner groups vies for power and the protracted *jihad* eventually destroys their own power base and ultimately the state they built and sustained. No reform, fewer revitalization projects, and backward march in democracy building. Globalization played a role, no doubt, but not in the context of the democratization of the Southeast Asia's pluralistic societies. (p. 13) In fact, one can argue the opposite: globalization has challenged the existing political economy model-unitary, *dirigiste* and developmentalist, often the core logic of the Asian and Latin American authoritarian polities. Throughout the region the social, cultural, and economic pluralism collides, unleashing such nonstate actors as tribes, ethnic groups, religions, and other traditional societal groups to surge, making afresh irredentist claims, and allowing the insurgent to build new alliances across state borders, most often along the cultural and religious lines globally. This makes the traditional concept of the state as a unit of analysis in security studies less useful and even out of date, hence the need for nontraditional security concepts.

The September 11 attacks in New York and Washington have changed the global landscape of studying security issues, traditional and nontraditional alike. The nation-state as a unit of security preparedness no long holds. No country can buy good security alone. Regional "collective" security arrangements or regimes, such as the NATO, the Rio Treaty, the SEATO, the CENTO, the Warsaw Pact, and ANZUS, to cite a few prominent past and present examples that operated within well-defined geographic confines, seem either languishing, remodeling or gone forever. In Southeast Asia, there are disturbing signs that the traditional security issues have overtaken the nontraditional: the secessionist movements in Acheh, West Papua, and

other islands, Indonesia's inability to retain East Timor; simmering opposition of PAS in Malaysia; Thai Muslim and Karen revolts; Myanmar's entrenched junta (Latin Americans *invented* the junta); Muslim insurgency in southern Philippines; painfully slow political transition and economic opening in the three Indo Chinese states; Megawati's recent acknowledgment of the possible linkages between Indonesia's Islamic fundamentalists and the Al-Qaeda organization; and finally Macapagal's ready acceptance of the U.S. military assistance in training the Philippine armed forces in counterinsurgency tactics.[14] Furthermore, it has become blurred in the minds of the governing elites in Singapore and Malaysia if enemies of the regimes are indeed al-Qaedas, or both. In Indonesia, Megawati has to play to the domestic audience to survive, meaning she cannot afford to round up *en masse* Indonesian and Arab members of al-Qaeda, while Kuala Lumpur and Singapore pressure Jakarta to arrest the usual suspects as terrorists. All these developments driven by new global security concerns and post-September 11 events require the regional security issues a revisit and potential disagreements on the issues within the region can impair important regional agenda, such as APEC, AFTA, EAEG, and ASEAN plus Three.

The contributors claim that non-traditional security in Southeast Asia has come most prominently from the negative impact of globalization-hedge funds, money speculation, and volatile stock markets, and if untamed, globalization will provoke more insecurity for the region. This also represents the core of antiglobalization perspectives and resistance to broad and necessary reforms in international political economy.[15] And coincidentally, the resistance relates to the antiglobalization bias often championed by regional political leaders. The post-Cold War redefinition of capital movements in form of foreign direct investment (FDI) and foreign portfolio investment (FPI), food and resources deficiencies, and spill-over effects of the environmental degradation caused by the three decades of unhindered and unprecedented economic growth and record-setting infrastructure expansion, all of these have further wreaked nontraditional security havoc throughout the region. Let's take a look at what the brave seventeen souls have said about the nontraditional security issues of the region.

Part One: Globalisation and Security: Kanishka Jayasuriya argues that the region's "embedded mercantilism" (p. 26) was stiffly challenged by the liberalizing, deregulating, and privatizing forces of globalization and Southeast Asia failed to live up to the benefits of its EPI miracle. A few well connected firms and ruling elites reaped the benefits of the so-called neoliberal reforms. What Jayasuriya should have delved into is the malfunction of the *deepening* alliance of the multinational corporations, the local capitalists, and the mercantilist state, the drivers of the region's key economic miracle and globalization.

Lim Kian Tick argues that the Malaysian opposition to a greater Pacific trading and investment grouping emanates from Mahathir's desire to internationalize the historical legacy of the "Malay dilemma." Malaysia has successfully used ASEAN and "ASEAN Way" to advance its agenda:

continue to consolidate the economic gains by the Malays and defend them to the tilt, while opposing any Pacific grouping dominated by the United States, a moral equivalent of a Malaysia dominated by powerful Chinese merchants and industrialists. (p. 60) The Malaysian rejection to seek the assistance from the IMF in the wake of the regional financial crisis can be seen as warding off the external attempt to unravel the Malay-dominated state-market relationship, thus contributing to the Indonesian-styled demise of the hard earned economic, political, and social status. This would have brought about massive insecurity to Malaysia and could have destabilized the UMNO hegemony.

Jonathan Woodier writes about the global "juggernaut of cultural imperialism" (p, 71) of the Western (read American) media that first erodes and then destroys the sovereignty of Southeast Asian states as culturally and politically biased news (lies to some Southeast Asian governing elites), alien cultural products, consumerism, and other sinister infidel influences are disseminated across the border by the greedy and uncaring multinational news conglomerates. They can undermine the regional states' legitimacy. If they cannot be stopped, they must be moderated by the strong Asian *dirigiste* state. But much of the woes and biases that the region's media complains are home grown: the military in Thailand, the Suhartos in Indonesia, the unabashed anti-Western rhetoric of the Malaysian government, and the unapologetically tight fisted press restraint in Singapore remain unchallenged. These are not the topics that invite scrutiny *only* from the global media; domestic criticism is also growing. But there are signs that even Singapore is relaxing; the middle class in Malaysia gets their news from the Internet; Thai middle class turns its back against the "politics as usual" news management by the government; the educated and rich Indonesians learn to manipulate the Megawati government for their own benefits; and the once intractable but practically bankrupt generals of the Myanmar junta are eager to talk to the opposition. This is hardly the fault of the global media.

Part Two: Regional Institutions and Security: James Ferguson is optimistic about the ability of ASEAN to ride the herd of the much larger and more powerful (economically and militarily) China, Japan, and Korea for the region's rise in global diplomacy as a powerhouse, the now famous ASEAN plus Three. The premise that ASEAN-10 can work as a single group in their relationship to a more assertive Middle Kingdom, a recession-plagued and burned out Japan, and a cynical and xenophobic Korea wallowing in the sea of corporate debt is quixotic at most. Ferguson believes that the ASEAN support for China's entry into the World Trade Organization has paved the way for a closer collaboration between the region and China, but he avoids making comments on the prospect that a low-cost China will crush many of higher than low-cost Southeast Asian countries in global

free trade. Southeast Asia needs to move upward in its production technology to successfully compete against China. He also doubts if the South China Sea disputes will ever be resolved to the satisfaction of ASEAN, given China's unabashed historical claim over the islets, islands, and features scattered throughout the sea. A fly in the ointment.

Derek McDougall observes that ASEAN willfully supported Indonesia's sovereignty in East Timor for regional solidarity and the preservation of the ASEAN practice of non-interference in the domestic affairs of the member states, or the ASEAN Way. So did Australia and the United States but for the reasons of the Cold War-Timorese insurgents embraced Marxism and many were trained in Soviet bloc countries and even Cuba. It was the days when Christian insurgents went to Cuba, while the Muslims went to Libya. However, once Indonesia agreed that the United Nations could conduct a referendum that resulted in the overwhelming vote for independence, a carnage followed in East Timor. ASEAN stayed out, while Australia and the United States called for a humanitarian intervention to stop the wanton killing of the pro-independence voters and the innocent. Japan, Australia, the United States, and the European Union, all outsiders to the region, did more for East Timor than ASEAN. One might point out that the Catholic East Timor, once abandoned by Portugal, a weakling of Europe in 1975, had no supporter in Southeast Asia, not even the Philippines. By the early 1990s, the European Union and ASEAN began to forge a potential trade pact, and this time, the still weakling Portugal was able to bring the entire weight of the European Union onto ASEAN to bear. Globalization has helped East Timor but hurt Indonesia. Much of ASEAN's exports go to the EU, Japan, and the United States, and the grouping cannot ignore the *realeconomik*, if there is such a word. The sovereignty of Indonesia could wait. A half of the small island was not worth defending and sacrificing the region's economic recovery from the Asian financial crisis and a lucrative trade prospect with the EU. Its intra-ASEAN trade since the 1970s has never surpassed over 22 percent of the total. Indonesia's share of the regional trade is insignificant relative to its population. The importance of Indonesia still remains political, not economic, to the region. Has ASEAN shot itself in the foot on the issue of East Timor?

Helen Nesadurai is more bullish on ASEAN and its future: "economic cooperation in ASEAN could itself be considered to be a non-traditional security issue" (p.198). May be. The elite governance has been buttressed and reinforced by sterling economic performance. The longevity, and therefore, legitimacy, of the governing elite depends on how long it could sustain the miracle economy. As long as people are satisfied with what they get, the elite could remain in power. To Nesadurai, this constitutes the "security dimension of economics" (p. 198). AFTA has made more advancement in institutionalizing its trade practices than APEC, Nesadurai

argues, and hence offers a greater chance of success than the United States-dominated neoliberal market framework. Perhaps, she is right. Perhaps not. What is not clear in the chapter is that the past and current trade network is not proliferating *within* the region, but still continues the same trend of relying on the external linkages: the United States, Japan, and the EU are and continue to be Southeast Asia's major trading and investment partners. Will Singapore be happy with the current trend? Will Malaysia go up a notch to the status of the region's informatics superpower with the help of China? Will Japan gracefully give up its nanotechnology to Malaysia without fuss? Will Korea transfer 3-D wireless technologies to Vietnam for the sake of the ASEAN plus Three solidarity? These are questions that Nesadurai could have asked and answered in her paper.

Shaun Narine dismisses any possibility that an Asian Monetary Fund (AMF) can function like ASEAN, especially based on its informalism. This fine chapter reviews more why the AMF should not be created in East Asia than why the region needs one. In the wake of the Asian financial crisis of 1997-98, Japan, Thailand, and others proposed the creation of an Asian Monetary Fund as a way of asserting Asia's independence from the Washington-dominated International Monetary Fund. No Southeast Asian academics and media ever point out that the Europeans dominate the IMF: since its birth, all managing directors have been European. America should be blamed less for the follies of the Fund. All of its picky conditionality, imperious Article IV consultations, and humiliating recommendations of austerity cannot be incorporated into the AMF, Narine says. There are more potential pitfalls that will elicit resistance from the regional governments than support. Although Narine's focus is on Southeast Asia, it might be worthwhile to consider hypothetical cases: Will Korea in another financial crisis accept Japan's conditionality, disguised as the AMF remedy, as gracefully as the democratic Philippines demanding a regime change in Myanmar as a condition to rescue the financially bankrupt junta?

William Tow is pessimistic about the future of ASEAN, the dominant institution that has brought to the region peace and stability for over three decades. That system has been put to the most severest of test. Tow presents three ways to look at the regional integration: *constructivism, securitisation* and *human security*. Whichever prism one chooses to look at ASEAN, the picture is not pretty. The rising economic crises and slowdowns, political instability, secessionist movements, and cultural clashes among various ethnic and religious groups have weakened the members' desire to subject themselves to collective whims of ASEAN. The *realist* instinct to defend one's national interest predominates. One example is Malaysia's fretting over Singapore's multiplying bilateral trade and investment ties outside the region that will constitute the "back door" for Japan, Australia, and even worse, the United States to enter a lucrative AFTA market. The city state argues that this is

no Pandora's Box. On the contrary, it will bring all kinds of benefits, albeit, through the "backdoor" of Singapore.[16] The real issue should be stated more bluntly: Malaysia does not want Singapore to be the keeper of either ASEAN backdoor or front door.

Part Three: Governance in Plural Societies and Security: Ooi Giok Ling takes an incisive look at the region's inter-ethnic relations replete with conflicts, rivalries, and violence and the inconsistent political reality of Southeast Asia: its governments are not pluralistic, while societies are. The failure for government to reflect the societal reality (in democracy, politicians are as good as people who elect them, as one U.S. senator said) is well scrutinized. Political repression and military violence have held in check the region's inter-ethnic tensions and instability of the ethnically pluralistic polities. The critical question is whether the destabilization of the state in one country caused by ethnic cleavages, religious conflicts, and cultural clashes can spread insecurity throughout the region, as in the case of the Asian financial crisis of 1997-98.

What happened to the Chinese in Indonesia helped Mahathir win in the 1999 election. The two-third majority in the parliament was the manifestation of the insecurity of the unsettled Chinese and truculent Indian voters, while many ethnic Malays, but not all bumiputras, deserted the Barisan Nasional, the ruling coalition. The moral judgment of Suharto's rule notwithstanding, the 32-year stability in Indonesia helped attract FDI by guarantying peace and stability for entire Southeast Asia. Suharto was good for the region's prosperity.[17] Conversely, the descent of Indonesia into an utter social chaos and political collapse can stop the flow of FDI into the region. The Chinese, the economically dominant minority in many countries throughout Southeast Asia and, so willing to leave their land of birth in time of crisis, have been questioned of their loyalty. In Vietnam, this brought about the mass expulsion of Chinese from bureaucracy, the armed forces, the party, and all security-related agencies (p. 296). China objected Vietnam's mistreatment of its historic sojourners, while Indonesia, Malaysia, Brunei, and to a lesser extent, Singapore have used ethnic boundaries in nation-building and limiting the perimeters of their participation in governance. The time has come for Southeast Asia to reshape its current political economy model.

Shafruddin Hashim discusses the unnatural dimension of the state-building in the archipelagic Indonesia. Javanese constitute less than 45 percent of its 220 million people. This single ethnic group has overwhelmingly dominated since independence the republic of 17,000 islands and islets with 490 different ethnic groups. Hashim comes close to admitting that the experience is precarious and almost untenable. Globalization has compounded the inter-ethnic insecurity, as local tribal groups and other special interest NGOs have secured international support, thus first eroding the power of

the central government, then globalizing the seemingly domestic issues, and thus provoking Javanese retaliation. No fewer than 48 political parties contested in the 1999 parliamentary election. The provinces clamor more autonomy, fair revenue sharing, and some full independence as in Acheh and West Papua. The armed forces remain the linchpin of holding the archipelagic state, first having played a role in independence and then in holding the diverse 17,000 islands together, if necessary, through military repression and even petty conquest. Under Suharto's rule, the armed forces legitimized their *dwi fungsi* in security and socio-political arena. The military have the corporate interests to defend and will not subject themselves to civilian authorities. Hashim fears that in the absence of genuine decentralization of both political and economic power, Indonesia will not survive during its second half of the century of independence. The full weight of the Latinization of the Indonesian armed forces is yet to come.

Dewi Fortuna Anwar's chapter, like two others in the volume, deals with the future of Indonesia's survival as a single nation-state. Like the Soviet Union and Yugoslavia before it, Indonesia is at crossroads of dire predicaments of the pull and push forces of internal and external origins. The large-scale internal migration from the crowded islands such as Java and Madura to Kalimantan, Irian Jaya, Ambon, and other places in the 1960s and 1970s decidedly had a political motive. Tracks of choicy lands were given out to the carpet-beggars, while civil servants, the police, and the military came from the center to rule the periphery. Corporations, mining and logging companies in particular, tended to hire Madurese and Javanese. Small trade and commerce were in the hands of the transmigrants. The perks enjoyed by the transmigrant elite were often denied to the indigenous peoples. Dewi argues that like Hashim, the very survival of Indonesia is at stake, unless the current crisis is seized as an opportunity to implement profound reforms. But how? She did not say.

Rizal Sukma focuses on the secessionist movement in Acheh. As it turned out, the Achehnese were resisting the colonial occupation by the Portuguese as early as the 1520s, followed by the Dutch occupation which the brave people of the island fought from 1873 to 1913, and after 1953 the neocolonialist Javanese rulers. Seen in this historical context, the Achehnese "independence" movement is protracted but normal. Like Dewi Anwar before him, Sukma is torn. Islam, the religion of 90 percent of Indonesians who communicate each other with the Malay language, has failed to instill the sense of national community. Islam has never treated all the children of Mohammed equally. One reason is that Muslims of Javanese origin dominate Aceh; unlike Christian colonizers before them, the Javanese employ the ideology of a single nationhood to suppress Achehnese irridentism and deny their wishes. It is confusing. Acheh ceases to be part of Indonesia controlled by Java and has become an internal colony ruled by Muslim brothers. This

is intolerable. Sukma argues that the trial of human rights violators from the armed forces and police will solve the secessionist movement. Given the historical struggle of the Achehnese since the 1520s, that may be too simplistic a solution. Like other chapters on Indonesia, the perspective is from the center toward the periphery, not from the periphery to the center. Perhaps, the volume editors should have invited at least one contributor from the archipelagic periphery. Perhaps, the ASEAN way would not allow this.

Ian Taylor comes across as an intellectual *engage* who has the axes to grind against the U.S.-dominated APEC and its neoliberal agenda. The chapter helps understand Mahathir's foreign policy better than any public announcements from Putra Jaya. Getting rid of the United States from the Pacific is no answer to Asia's current and future problems, however. Like the French intellectual tradition and the Cold War era international relations approach, Taylor's is one-sided. His objective is to expose the American hypocracy and warn of its ultimate goal of taking inroad into the Asian market for its multinational and global corporations. Taylor should be reminded that as of 1980 the trade between Japan and Four Asian Tigers with the United States surpassed in value that with entire Western Europe. Europe is America's military concern and even a security obsession, while Asia has been America's unfulfilled historical market since the days of John Calhoun. On another issue, Taylor errs: after the financial crisis, U.S. corporations were gobbling up bankrupt Asian firms left and right, which Taylor sees as part of the long-term conspiracy by American capitalism [read imperialism].

On the contrary, European and Japanese banks' exposure to Asia before July 1997 when the whole Asian miracle became undone was several times greater than American banks'. Japanese and European investors were busy trying to protect their loans and investment; Americans had money to burn when the price was cheap; their bank lending was tiny compared to Japan and Europe's. Finally, Taylor applauds that the Asian states are pulling back from their commitment (read lip service and never serious about abandoning the statist power enjoyed by a single ethnic group) from neoliberalism. Given the collapse of neoliberal Argentina in December 2001, Asian political leaders should sit up straight and listen: it was not the neoliberal globalization that brought down Argentina; it was the abuse of political power, absence of profound societal reforms, resistance to political change, and legendary corruption from the lowest to the highest place in the government, the court, and the legislature, whose combined weight was too brutal for hardworking Argentines to bear and brought down the government of Fernando de la Rua. There is little Eduardo Duhalde can do, if he wants to remain president. He may be Argentina's Wahid. No amount of retreating from neoliberalism can save parts of Asia, as Taylor

seems to believe. Lee Kuan Yew is right: the Asian recovery came too early, too soon, and too easily for deep reforms to take root.[18] The next round of crisis can be more severe and will be fatal to Asia's mercantilist state-market coalition.

Part Four: Environmental Security: Lorraine Elliott persuasively points to the double-edged sword that Asia is holding: pollution created by the decades of unfettered industrialization and resource depletion that can cloud the future of the region. Acknowledging the prevalence of the two sides of the same coin-environmental degradation and resource depletion-in the current thinking on Southeast Asia's development, Elliott proposes that Southeast had better restore "political stability, economic development, and social welfare" (p. 458), the shortest road to environmental security. She points out that the confidence building measures have taken place among ASEAN members and that there are signs that collective recognition of the twin problems and willingness to cooperate among governmental officials have been increasing. She skirts the whole decades of ASEAN Way that has permitted Indonesia to spread haze throughout the region, while no one criticized Indonesia, the anchor of the regional's security and while people (tourists included) were forced to breathe unhealthy air in two years in a row.

Evelyn Goh's Mekong River Basin chapter is enlightening but offers a daunting task ahead not just for the riverine states, but also for entire ASEAN-10. Sixty-two million people from China, Myanmar, Thailand, Laos, Cambodia, and Vietnam live off the river. An intelligent exploitation and cooperative arrangements of sharing the common hydro-resources are the non-traditional security issues. China plans to build seven dams to divert the upstream water; Thailand has a less ambitious plan of tapping the hydro-resources; Laos talks about its long-term "hydroindustrialization," as it exports 70 percent of its electricity generated from the Mekong to Thailand, representing 14 percent of Laos' total exports. Only 20 percent of the hydro-resources in Laos is currently tapped for this purpose. Goh whimsically points out that no environmental impact assessment can be done in Laos, because there is no baseline data. Hence, once pollution and depletion take place and since no one can say what the pre-industrialization level of the unspoiled nature was like, environmental mitigation has to be a guess work, thus opening up official resistance to restoration.

N. Ganesan's nontradtional security issues are illegal fishing and illegal immigration freshly emerging from the post-Cold War era that have strained the regional relations. Southeast Asia has had two "security complexes": the Malay Archipelago Complex and Indochina Security Complex. The end of the Cold War has brought about sea change to the region: the former still exists but the latter disappeared. What this change means over time,

Ganesan does not enlighten the reader. When it comes to the illegal tapping of Malaysia's maritime resources, the ASEAN Way ceases to prevail. Thai trawlers illegally fishing in the Malaysian waters are seized periodically and Kuala Lumpur lodges formal protests to Bangkok, Malaysia's most important bilateral partner, bar none. Thai trawlers are required to buy fishing permits from Myanmar in the north; the rule is one permit per ship. The problem is akin to computer program piracy. One license is copied over and over again on many Thai fishing vessels to the displeasure of the annoyed Burmese authorities. Ganesan advises the fuller use of the existing bilateral state agencies to resolve the problems. Anything new here?

The final chapter written by Mark Valencia at the East-West Center, Honolulu is also the most explosive: the conflict resolution of overlapping territorial claims in the South China Sea: the Spratlys, the Paracels, and thousands of "features" and islets without indigenous peoples. Hence, China has claimed that it is the "rightful owner" of all South China Sea. Why else is it called the South China Sea, or Nanyang? Vietnam, China, and Taiwan have conflicting claims in the eastern part of the sea, while Malaysia, the Philippines, and Brunei stake their claims in the south and western part of the South China Sea. Oil, natural gas, and fisheries are the bounties in dispute. But it is hardly a nontraditional security issue. It is a security issue: 70 percent of Japan's oil imports flows through here; the United States claims the freedom of sea doctrine around the globe and is unwilling to concede to China which claims there is no such a thing as the freedom of sea. In 1975, everyone began to claim 200 nautical miles for economic exploitation. The Paracel Island, once under Vietnamese tutelage, was forcibly taken over by a strong claimant, China. China bans all foreign ships within 12 miles from its coast and opposes all naval exercises in the South China Sea. Valencia walks through various possible options, many of which are either non issues as far as China is concerned, or as an unacceptable minefield to ASEAN contestants.

In 1999, ASEAN offered China a code of conduct for the sea, which Beijing peremptorily rejected. As the rightful owner, China was willing to discuss one on one, but not collectively, meaning that it is the landlord of the sea and anyone willing to live in the region must get China's permission. In 1999, Malaysia unilaterally built a fort and a helipad on Erica and Investigator Reefs, both claimed by China, the Philippines, Taiwan, and Vietnam. So much for the ASEAN Way. ASEAN has polished conflict avoidance to the level of art. And the conflicting and competing strategic interests in the South China Sea can create difficulties for the region, as China becomes more assertive. ASEAN's confidence building will lead to confidence collapsing. It is a stalemate for life.

The volume is an interesting exercise in search of the elusive concept of nontraditional security. Many chapters read like traditional IR essays; others political sociology of ethnicity and fragmentation of the state system; still others are pure international political economy analyses of the Asian financial and current crises. The earlier political economies of ISI in Latin America and EPI of East Asia have prepared each region to respond quite differently to the challenges of globalization. All contributors to the volume accept the abbreviated definition of globalization as economic integration, a *la neoliberalisme*. Latin America shed the statist tradition quickly, somewhat in the manner that the former Soviet Union discarded the Marxist model, allowing itself to be economically integrated with the outside world, however painful it might have been. East Asia, excepting Taiwan and Korea, was slow in shedding its dirigiste garb, in part because of the single ethnocentric domination of the state and the market, and any opening under the duress of globalization has been seen as an external security threat to the state system and worse, as the U.S. conspiracy.

Opposition to APEC from small traders to nationally prominent industrialists and bankers throughout Southeast Asia and Northeast Asia is deeply rooted in the closed, then open tradition of EPI that has shaped today's behavior of the regional political economies. Mahathir and his intellectual followers' dream of creating the Asian only East Asia Economic Cooperation led by Japan is one manifestation. APEC is seen as a perfect Trojan horse for the United States to advance its agenda in Asia Pacific. Yet none complains that ASEAN has provided a stage for Malaysia to advance its agenda against Western countries and within the region. This is curious because by Mahathir's own admission, Malaysia's largest market is the United States and the country's biggest investors are American firms.[19] And those who study ASEAN and its politics should be warned that the grouping has always been defined by such strong personalities as Suharto and Mahathir. Their willingness to use the ASEAN stage to promote their own national interests has kept the organization lively and even dynamic. ASEAN is sinking without Suharto and it will die without Mahathir. Southeast Asia has to wait for a long time for another Suharto and Mahathir to appear and grace the stage. Does any of the contributors remember SEATO?

What remains to be studied is how ISI and EPI political economies behave differently in globalization. The political outcome of privately financed industrialization as in Britain and the United States, and partly in France was liberal democracy and free market economy. State-financed and -directed industrialized political economies like Germany, Italy, Russia, and Japan produced political authoritarianism, fascism and communism. Simplistic it may seem, the Latin America of ISI embracing neoliberalism should frame a socially more open political economy than the Asia of EPI, wherein the state had deliberately kept foreign competition at bay and nurtured the

domestic 'private' interests of the dominant ethnic group under state aegis. What has happened to Latin America and Russia was a shock treatment; what has happened to China and East Asia is a relatively painless transformation that seeks to reduce the social cost of confrontation and the extreme pains of rapid political regime change. But the reality is otherwise. The inevitable have been postponed for the time being.

The World Bank reports that the income inequity of China, which has had half a century of egalitarian communism and that of the United States which has had an unabashedly socially unjust capitalism for 200 years are virtually identical: Top 20 percent of Americans and Chinese share 46.4 and 46.6 percent of their respective national income, while the poorest bottom fifth of the population take home less than 5.2 and 5.9 percent, respectively.[20] Malaysia and Brazil share a similar income distribution profile, among the worst in terms of social justice: Top 20 percent of Brazilians garners 63.8 percent of the national income and the counterpart in Malaysia enjoys the slightly lower 53.8 percent.[21] How does this social injustice affect nontraditional security in the Americas and East Asia?

The security studies field after the Cold War has withered like anthropology. Primitive villages and pre-modern indigenous peoples are short in supply. Anthropologists have branched out, often tripping themselves into politics, economics, sociology, and even history. In fact, some of the best history monographs are written by anthropologists: Marvin Harris, Eric Wolf, and others, to name a few.[22] But the Cold War in Europe has ended, but the one in Asia is just beginning. What is wrong with studying the Cold War in Asia? China versus the United States, Japan versus China, an upcoming rejuvenated Russia against China, and possibly, a united Korea against Japan? This is just for Northeast Asia alone.

For Southeast Asia, the contributors do not need my help in identifying security pitfalls, but here are some: Instead of going the way of the Soviet Union or Yugoslavia, how about Indonesia as a new Iran or a new Taliban country at the doorstep of Singapore and Malaysia? What if Singapore abandons Southeast Asia and realigns itself militarily with the United States and creates a new trading bloc of powerhouse, Pacific-7—Singapore, Japan, Australia, Canada, the United States, and Mexico, the last three being NAFTA. And we had better put New Zealand in, before we forget it. There are open skies treaties and other bilateral and multilateral trade and finance agreements among Pacific-7. The Magnificent Seven will give heartache to Southeast and heartburn to China. They share many common history and current assets: all except for Japan were former colonies of Europe and struggled to gain independence from the Whiteman and succeeded. Japan "sinned" in the 1930s and 1940s, but Pacific-7 are more willing to forget and forgive than China, Korea, and some Southeast Asian countries about Japan's past cruelties

and indiscretions. Except for Japan, others in the group are Christians or Christians are welcomed and tolerated, as in Singapore. Countries like the United States even welcome and tolerate Muslims, Buddhists, and Chinese food. All seven are dynamic mature or emerging capitalism; the majority are democracies or democracies in the making, societies with liberal open values, and free market or market-*friendly* economies. The combined GNPs of Pacific-7 stand at awesome US$13,479 billion in 1998.[23] That year, the world's total GNPs reached US$28,835 billion. The share of Pacific-7 came close to half (46.7 percent) the world's output. The Asian members (Japan, Singapore, and Korea) are key investors in North America, Australia, and Canada. Two of the world's major banking centers are in the group; two of the Asian financial powers are in the group; and finally, the world's most advanced technologies are produced and much of the world's R&D facilities outside the European Union are located in Pacific-7. With these assets, the group can consolidate its position as the inner core of APEC or any Pacific-basin grouping, if not in the world. Southeast Asia may opt to stay out, but Latin America, or much of it, will join, thus making it even a bigger trading bloc and investment club. The possibility of a Free Trade Area for the Americas by 2005 looks more real now than three years ago. This 34-country grouping will add more weight. Such development can rewrite the principle of Southeast Asia's security, traditional and nontraditional, for decades to come.

The discipline of international political economy (IPE) emerged in the late 1970s and 1980s both in the United Kingdom and the United States. Those unhappy with the pedestrian "area studies" as well as looking into Asia, Latin America, Africa, and other regions of the world through the single window of political science, history, economics, or sociology were in search for better integrated approaches. IPE came to be defined as the study of relationship between the state and the market, on one level and on another, a group of states and a group of markets. All interactions and intersections between an individual state or market with a group of states or markets are the purviews of IPE. Political decisions of one country can have devastating effects on the economy of another, as in the interest rate hike by the Federal Reserve of the United States on Latin America, while the collective decision of the EU on East Timor at the urging of Portugal has had a major impact on Indonesia and ASEAN. In the United Kingdom where more IPE programs are offered, political science and international relations oversee the growth and diversification of the discipline. In the United States and Canada, the strong presence of economics and economic history, as well as other disciplines, is well recognized. Seen in this context, the nontraditional security issues in the book can be legitimate concerns of IPE as well. They can provide a solid linkage to subdisciplines of international relations, political science, history, and sociology. This intellectual bridge-building is an important role for academics, and the book does that task admirably.

In this sense, the book is the old wine in a new bottle: that seventeen people can write about Southeast Asia and its diverse issues in a single prism of security is in itself an achievement unparalleled. For those who study similar issues in Latin America, the Middle East, and Africa, just to confine to developing parts of the world, the volume is both instructive and suggestive: *instructive* because Asian dirigiste state and its governing elite behave much in the same way as the counterpart in other parts of the world and *suggestive* because the time has come for all scholars of similar interests to meet and compare notes. Southeast Asia is not that unique as practioners would have us believe.

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ENDNOTES

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BOOK
REVIEW

SEPTEMBER 11 WHY DID IT HAPPEN?

Jatswan S. Sidhu

James R. Hoge, Jr. and Gideon Rose (eds.), *How Did This Happen? Terrorism and The New War,* New York: BBS, 2001. 324 pp

The September 11 terrorist attacks on the World Trade Center and the Pentagon not only created shock waves around the world but more importantly raised one pertinent question: Why did it happen? This edited work is an attempt by a group of renowned and eminent writers to find answers to that very question that baffles everyone. The work comprises a collection of 23 articles from scholars, journalists, diplomats and policy-makers, with a brief introduction by the editors. Contributors, amongst others, include notable writers like Brian M. Jenkins, Fouad Ajami, Karen Armstrong, Walter Laquer, Milton Bearden, Samuel R. Berger, Richard K. Betts, Joseph S. Nye, Richard Butler, William J. Perry, Michael Mandelbaum, and Fareed Zakaria. The work, broadly divided into two major sections, not only provides insights into the causes of September 11 but also presents some policy options for American policy makers.

Brian M. Jenkins, a renowned author of a few works on terrorism, attempts to analyze the structural organization, motives as well as motivations of the 19 men that were involved in the skyjackings on September 11. In his "Organization of Men — Anatomy of a Terrorist Attack" (pp. 1-14), Jenkins argues that the greatest weapon of these men was not high technology but human resolve — the willingness to sacrifice their own lives. He also notes that the Al-Qaeda represents a new generation of religious terrorists that operate like spider-webs and are also highly motivated to kill, even in large numbers. Jenkin proposes that America undertake a thorough study of the Al-Qaeda network prior to embarking on an assault on this organization because "cold-blooded mass murder requires cold-blooded analysis" (p. 2). Easily said than done, it is in reality a difficult task and would depend

not just on information gathering by the American intelligence community but also of the Arab world and more importantly, how much of this information is shared.

In "The Uneasy Imperium — Pax Americana in the Middle East" (pp. 15-30), Fouad Ajami traces the recent history of American policies towards the Middle East and how most of these have backfired, thereby resulting in the growth of hatred against the former, that took the form of religious fundamentalism. He highlights the fact that those who hijacked the planes on September 11 were all Arabs and not Afghans. He suggests that American policies towards the region be reviewed on the premise of working with most, if not all, Arab states rather than just demonizing and punishing a few. This would mean undoing all past policies that have proved counter-productive and implementing a new set that would enable the Americans to be viewed as a friend rather than an enemy. Apart from that and more importantly, it would require a deep understanding of the intricacies of the Arab world.

Michael Scott Doran's "Somebody Else's Civil War — Ideology, Rage and the Assault on America" (pp. 31-52) highlights that September 11 is a testimony of the reality that America is embroiled in an intra-Muslim ideological battle, namely that between the disenfranchised masses against their corrupt and incompetent rulers. He argues that failure of political Islam to bring about political change coupled with America's support for certain authoritarian regimes have created a fertile breeding ground for the growth of religious fundamentalism in the Middle East. The task ahead for America, apart from annihilating Al-Qaeda and the like, is to "adopt a set of policies that would ensure significant number of Muslims, not Muslim regimes, identify their interest with that of the former" (p. 51). These would include, amongst others, support for democratization and development in the Middle East rather than upholding corrupt and inefficient regimes.

In her essay "Was it Inevitable? — Islam through History" (pp. 53-70), Karen Armstrong provides an excellent historical analysis of Islam. According to her, the September 11 incident marked a watershed in the history of Islam because what had started as an attempt at reform *(islah)* and renewal *(tajdid)* centuries ago has now taken the garb of religious militancy in the name of *jihad*. She asserts that "nothing in the history of Islam and its relations with the West made anything like the attacks of September 11 inevitable" and concludes that, "the terrorists and their cohorts hijacked not only several planes, but one of the world's great religion as well" (p. 70). Worthy of mention here is that her essay attempts to provide a balanced view of Islam rather than looking at the religion with a jaundiced eye — as has been the case all along.

Through a general but meaningful historical essay, Walter Laquer provides a refreshing account into the development of terrorism particularly in the twentieth century. In his essay entitled "Left, Right and Beyond — The Changing Face of Terror" (pp. 71-82), Laquer argues that whilst the 1960s and 1970s was an age of ideological terrorism, the decades beyond witnessed the growth of religious groups — the result of a decline in political doctrines. He asserts that, like their counterparts of the early decades who eventually became history, religious terrorism would surely see the same fate and fade away. It is important to note that Laquer understates the motivational factors behind religious terrorism, which according to most scholars are more highly sustainable when compared to ideological groups. In addition, he rightly asserts that the face of terror would be more dangerous in future especially in view of the development of modern weaponry and its accessibility to terrorists groups.

"Graveyard of Empires — Afghanistan's Treacherous Peaks" (pp. 83-96) by Milton Bearden provides a historical perspective of Afghanistan and how this country has successfully warded off invasions from the Russians and the British in the nineteenth century and Soviet occupation in the 1980s. The main point Bearden attempts to drive home is that one should thoroughly understand centuries of Afghani history before embarking on any military endeavor in the country, whether it is aimed at replacing the Taliban or even in pursuit of the Al-Qaeda. He cynically concludes that, "any doubters should ask the British and the Russians" (p. 95).

In fighting the menace of terrorism, the United States has to rely on multilateralism and in no way can it go alone. Rajan Menon's "The Restless Region — The Brittle States of Central and Southeast Asia" (pp. 97-108) provides useful details into the stakes as well as opportunities for the states bordering Afghanistan in their support for the American-led war on terrorism. These states are namely India, Pakistan, China, Uzbekistan and Russia. According to him it is highly beneficial for all these states to join America in its attempt to address this scourge because what appears to be an American problem is also everybody's as well. For India, Russia, Uzbekistan and China, America's war on terrorism has provided these states with the golden opportunity to settle some of their own problems at home, namely that related to Islamic resurgence and secessionist demands. Pakistan, on the hand, is caught in a precarious position because the earlier governments had played a vital role in not just shoring-up support for the Taliban but also providing it with new recruits from the hundreds of *madrasas* (Islamic religious schools) in Pakistan.

"The Kingdom in the Middle — Saudi Arabia's Double Game" (pp. 109-122) by F. Gregory Gause, takes a peek into the genesis of the problem whereby he contends that all along Saudi Arabia, though an American ally,

has been playing a double game. He argues that Saudi Arabia has been both an American ally as well as the source of terrorism or militant Islam due to its support for Wahhabism at home in ensuring its own political survival. The political fortunes of the Al Saud family are very much tied to the ideological justification provided by the Wahhabi *ulama* (clergy) but the cause of concern is the latter's austere and puritanical interpretation of Islam. At the same time, pressuring the Saudi regime to democratize would be unwise at the moment, because it would only allow more men like Bin Laden to come into power. What is important is for the regime itself to realize this predicament and overcome it with the necessary reforms.

The essay by Samuel R. Berger and Mona Sutphen entitled "Commandeering the Palestinian Cause — Bin Laden's Belated Concern" (pp. 123-128) takes a peek into how far the Palestinian issue influenced Osama Bin Laden's cause. Both argue that Bin Laden has been merely using the Palestinian cause to garner support for his cause of *ummahtism* and rejects the idea of pluralism. His "ultimate twin towers are Pakistan and Saudi Arabia" (p. 124) from where the process of creating an Islamic *ummah* would embark. As such, Bin Laden's real enemy, according to the authors, is pluralism and development because the eventual creation of a Palestinian state coupled with the development process in the region would definitely weed out extremism. It is here that the writer understates the complexity of the Palestinian issue. Whilst it might not be Bin Lade's major concern, the Palestinian issue does provide men like Bin Laden with the opportunity of mobilizing Muslim masses against the West and namely the Americans. More importantly, America's lack of political will to find a solution to the Palestinian issue only heightens the present hatred against it amongst the Muslims. One cannot deny that the long-term solution to annihilating Middle Eastern terrorism is to address the Palestinian problem — a fact ignored by the authors.

As has been asserted by most scholars, weeding out the Al-Qaeda by launching a military campaign alone will not be sufficient. More importantly, it must also include an assault to paralyze Al-Qaeda's extensive financial network. William F. Wechsler's "Strangling the Hydra — Targeting Al-Qaeda's Finances" (pp. 129-144) attempts to throw light into the complex issue of financial support and transfer of funds especially in view of the highly liberalized banking sector in the West. Efforts to curb transfers via the banking industry might prove successful but attempts at even understanding the traditional *hawala* system will require a long time. The latter is a system whereby transfer of funds only requires a phone call, fax or e-mail from one *hawaladar* to another. Through this illegal process, funds from a client in one country are transferred to a recipient in another without involving actual wire transfers or contact with formal banks — a practice rampant in the Middle East and South Asia, where large amounts of funds find their way through the Western world. It might take a long time to address this complex issue of informal transfer of funds but what is immediately needed are policies to streamline and increase surveillance on the extremely liberalized banking sector. Although an antithesis to the

idea of liberalization, increased surveillance would ensure a cleaner banking industry and even perhaps address other issues related to money laundering.

Richard K. Betts, on the other hand, provides useful insights and future challenges to the intelligence community on how they might confront this new issue of borderless terrorism. His essay on "Intelligence Test — The Limits of Prevention" (pp. 145-162) details how the end of the Cold War brought about marginalization of America's intelligence community mainly due to the absence of a visible threat like that which appeared during the Cold War. The post-September 11 period will however, witness the strengthening of this community mainly through reorganization exercises and increased funding and powers. Betts appeared to have missed out one major point — the issue of racial composition in intelligence communities. In line with the age-old saying — fight fire with fire — more non-white Americans must be recruited into its intelligence community. Such a move has greater potential of providing better access to vital information on terrorist activities.

In "The All-Too Friendly Skies — Security as an Afterthought" (pp. 163-182) Greg Easterbrook provides a chilling account of the airline industry especially in America. He analyses how America's liberal space policies led to the September 11 attacks such that deregulation of the industry not only made travel easier and faster but also increased its vulnerability, mainly due to a high volume of traffic. Easterbrook proposes a thorough look into security procedures in the whole airline industry and not just at airports or in airplanes alone. He however cautions that increased security can take its toll on the airline industry by creating backlogs. In contrast, it can also increase confidence in the industry, especially at a time when both credence and confidence are low.

All along, American policies have stressed on military build-up with the latest weaponry due to the notion that acquisition of this weaponry would ensure both domestic and international security. As a result, American policy makers have totally neglected the non-military agencies that play an equally important role in ensuring homeland security. Stephen E. Flynn's "The Unguarded Homeland — A Study in Malign Neglect" (pp. 183-198) focuses on the neglect towards the roles played by namely the United States Coast Guard and Customs Services in ensuring homeland security. These agencies have been badly equipped and understaffed despite a dramatic increase in traffic, of both people and goods, at America's coastal and land borders. The solution to these agencies playing a greater role in homeland security lies not just in increased funding and staffing, as stressed by the author, but should also take into consideration the training aspect. A bigger fleet with large numbers of Coast Guards will not provide the desired result if all these men are ill-trained and as long as vital information is not shared amongst the various agencies.

The three major reasons that led to the September 11 attacks, according to Joseph S. Nye are: complacency; budget slashes or rather an unwillingness to spend money; and fragmented bureaucratic structures and procedures of the American government. He contends that the first two were simply blown away in the face of September 11 but the more difficult task ahead is to ensure greater coordination between the various agencies involved with domestic security. In his article on "Government's Challenge — Getting Serious About Terrorism" (pp. 199-210), Nye argues that the military campaign is just one option but the challenge ahead is to make America's openness less vulnerable and more secure. Nye advocates a top-down reorganization of the government at all levels so that every agency, department or unit plays its respective role in beefing-up domestic security. Although he does make some useful suggestions about the reorganization at the top, the revamp at the bottom remains fairly vague.

In his essay on "Germ Wars — The Biological Threat from Abroad" (pp. 211-216), Richard Butler provides useful information on the likelihood of a biological threat in the face of the September 11 attacks. This, according to him, was visible from the numerous anthrax attacks that plagued America immediately after September 11. He proposes that international cooperation be heightened to address the issue and that all states be required to comply to the 1972 Biological Weapons Convention in the strictest sense and not merely be signatories to it. In reality, it is an uphill easy task because America and the West should lead the way for compliance to all the international conventions. Only then can America call for strict adherence to these conventions from other states. Let's not overlook the fact that most of these weapons are Western creations.

In line with Butler's concern about the increased threat of biological terrorism, Laurie Garrett's "Countering Bioterrorism — Who's in Charge" (pp. 217-224) advocates that a broader view of security be adopted — one that would also include strengthening the role of public health. The fact that law enforcement and defense officials normally seize the center-stage in any outbreak is a testimony of how public health officials are forced to take the backseat. In reality, such an eventuality requires both playing equally important roles because, whilst the law enforcement and defense officials are busy identifying the source of outbreak and apprehending the suspects, public health officials on the other hand, should ensure containing further spread of the outbreak and manage societal responses. Although an excellent suggestion, this should, however, first start with addressing the deteriorating standards of America's public health sector since the last few decades. Though not mentioned by the author, this should also include, amongst others, greater accessibility to public health for all Americans by increasing the role of the state in this sector.

William J. Perry's "The New Security Mantra — Prevention, Deterrence, Defense" (pp. 225-240) highlights the danger of proliferation of weapons of mass destruction — namely nuclear and biological weapons — falling into the hands of not just rogue states but also terrorist groups. He provides

some useful suggestions to American policy makers namely those in charge of security on some of the available strategies and options in addressing this new threat. As the title rightly suggest, the three major pillar of this 'new security thinking' should include prevention, deterrence and defense. In line with the policy of prevention, America must not only seek closer cooperation from other powers but also advocate strict adherence to all the treaties pertaining to non-proliferation of such weapons. To ensure that economically weak nations with such weapons (Russia) do not sell their technology, increased financial aid can prove to be highly useful. Secondly, the nuclear and conventional weapons arsenal presently at its disposal can sufficiently uphold the policy of deterrence. Finally, and in line with defense, America must develop a credible intelligence network, with the ability to provide fore warnings to the government. Coupled with this is an aggressive campaign against terrorist's bases and their state sponsors. Perry's call for a new defense 'mantra', if taken seriously by American policy makers, should mark a paradigm shift in American security thinking away from the Cold War.

Similarly, "Waging the New War — What's Next for the U.S. Armed Forces" (pp. 241-254) by Wesley K. Clark focuses on the dire need to bring about a transformation in the American military. Although since the end of the Cold War, such suggestions have come forth, however, the purpose, scope and essential nature of this transformation, have not been specified. According to Clark, the debate on "readiness" is over and transformation would now require how to adapt the existing organizations, procedures and capabilities to address a different kind of war. This would of course, be driven by the scope and purpose of a specific mission, the adversaries being confronted as well as the environment in which such a military operation is undertaken. He argues that the war on terrorism cannot be fought through airpower alone, but with ground troops in many different roles. In practice, transforming a military that was molded and trained to confront visible threats before and after the Cold War would, amongst others, involve a reorientation of mindsets. Such a task would require a re-examination of the whole establishment, perhaps with greater emphasis on the aspects of training and skill acquisition.

In connection, Michael Mandelbaum's "Diplomacy in Wartime — New Priorities and Alignments" (pp. 255-268) presents an additional perspective on how America can address the scourge of terrorism. Amongst others, it would require some form of diplomatic realignments such that America must convince the world, especially the major powers as well as the Islamic world, that they are equally vulnerable to this kind of attack. Also, joint collaboration is a necessary prerequisite to ensure success in this war against terrorism. In line with Menon's piece, this essay too focuses on the need for multilateralism to achieve the anticipated results. Apart from emphasizing on the important role of bilateral and multilateral diplomacy in war, no mention is, however, made of the usefulness the United Nations towards achieving this end. Given the right mandate and necessary support, the

United Nations can play a more effective role in ensuring that most nations, if not all, participate in combating this scourge. More importantly, it would also advance the problem to the international stage, rather than just being perceived as an American or Western problem — as is the case at present.

Apart from the general shock wave that September 11 unveiled, the economic repercussions of these attacks were equally devastating such that the American economy and especially the airline industry saw a dramatic decline. Martin N. Baily's piece entitled "Stirred but Not Shaken — The Economic Repercussions" (pp. 269-282) provides useful analyses into the economic impact of the September 11 attacks. He concludes that though the American and world economy was undoubtedly shaken in the aftermath of September 11 but in view of strong economic fundamentals, the American economy will surely rebound — and so will the world economy. Whilst it is true that a boom in the American economy can spur the world economy, it is equally erroneous to state that under the present circumstances such likelihood is possible. This is because most of East Asia was still recuperating from the 1997 financial crisis when September 11 occurred, thereby landing a double-blow on their economies. In fact, a rebound in the world economy will take a longer time than the author has anticipated. Apart from that, it must be remembered that since 1945, American foreign investments, to a great extent, have been responsible for the push towards industrialization in many parts of the world. With Americans and its government's installations being more vulnerable in many parts of world, even American multinationals might cut back outward-bound investments for fear of becoming terrorist targets in future. This can result in extreme adverse effects on the world economy and especially on the developing world — an issue not addressed at all in the entire book.

Alan Wolfe's "The Home Front — American Society Responds to the New War" (pp. 283-294) confronts issues pertaining to present and future responses by the American society in the wake of the September 11 attacks, especially in view of the long-standing respect for multiculturalism in the country. Wolfe believes that American civil liberties will strengthen despite a general assumption that such liberties would be strangled in view of a looming threat and the need to tighten security measures by shoring up a big government. Based on the isolated incidences of retaliations against Muslims and other minorities in the aftermath of September 11, he argues that the tenets of American multiculturalism remained unshaken. Such a conclusion is far fetched because with security authorities on high alert such a probability was perhaps reduced. What remains to be addressed officially as yet is how will the government manage race relations in post-September 11 America. The animosity towards Muslim Americans is an issue that needs to be addressed immediately so that they are not viewed with a jaundiced eye and as part of the problem. In fact, in a broader sense this should also include other minorities and their eventual integration into

the American society. Visiting a few mosques and meeting leaders of certain minorities is not a long-term solution. The task ahead is to address the issue concerning national integration.

In "The Cold War is Finally Over — The True Significance of the Attacks" (pp. 295-307), Anatol Lieven argues that until September 11, American security priorities were still rooted in the Cold War attitudes and structures. The evidence of this is related to namely three points: firstly, the attempt to cast Russia and China as major threats to American interest; secondly, the strategy of national missile defense (NMD) and finally, American policy towards Israel. The failure to understand that since the end of the Cold War states were in fact forging partnerships in an era of economic integration, rather than forging military alliances. Lieven also states that most Muslim states have miserably failed to carve a niche in the path of development. It is extremely erroneous to make such a claim because whilst most Muslim states might be extremely underdeveloped, even more non-Muslim states fall into the same category. What is important is to address the defects in the international economy and to review aid policies in order to ensure proper channeling.

The final essay by the renowned writer Fareed Zakaria entitled "The Return of History — What September 11 Hath Wrought" (pp. 307-318) draws attention to the return of politics to the center-stage even though most scholars had argued that since the end of the Cold War economics mattered more than politics. In total contrast with Wolfe, Zakaria argues that the return of politics would bring about a reduction in liberties enjoyed by Americans. According to him "American exceptionalism is finished. American innocence is lost. Irony is dead" (p. 312)..In contrast with Francis Fukuyama who argued in 1989 that the end of the Cold War marked "the end of history" and the spread of liberal democracy, Zakaria on the other hand, asserts that the era after September 11 will witness "the return of history" mainly due to the strengthening and expansion of government with an increased role that would surely take its toll on political and civil liberties. Such an assertion might be true in America or even the West but in many parts of the world where democracy remains an alien word, nothing would have changed.

One major weakness of this work, despite the presence of great minds, is the absence of views from foreign writers. It may appear, from this book that answers to all these questions and problems can be provided by American thinkers, when in actual fact the problem lies beyond American soil. The solution to this problem must take into consideration views and inputs of foreign writers because these can benefit American policy-makers. What happened on September 11 is directly related to America's policies namely that to the Islamic world. As such, engaging a few experts from the Middle East and other parts of the world would have surely provided an in-depth view of the problem. More importantly, it is also high time that the Americans accept the fact that they might not be in a position to define and decide everything, especially in a borderless world.

Nevertheless, the work presents an invaluable repository of opinions and suggestions that would not only attract the attention of academics, students and policy-makers but also the man on the street. More importantly, issues discussed in this work can provide insights, lessons and suggestions for other nations who are in the same predicament. One case in point is Easterbook's revelation on the total neglect of security in the American airline industry. Views presented in this work are also diversely rich — a reflection of the various backgrounds of the writers — and points to the complexity of the issue discussed. The complexity of the very issue at hand clearly points to the fact that all these contributors can only provide useful insights and some solutions to the problem, not all.

Majority of the writers do share some common views such as the fact that most American policy makers either had been informed or knew about the possibility of such a devastating attack, but the question was when and how. None could anticipate the magnitude of the attack. September 11 will surely remain a stigma in modern American history for a long time to come and confronting this new threat would require determination, perseverance, careful planning and cooperation. More importantly, it would also require the Americans to stop lending a deaf ear to the diverse opinions around the world, especially that of dissent. Under no circumstances does America have the ability to address and confront this 'new threat, alone!

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THE TRANSFIGURATION OF INTERNATIONAL ORDER

Marie-Aimée Tourres

Charles A. Kupchan, *Emanuel Adler, Jean-Marc Coicaud and Yuen Foong Khong (eds). Power in transition, the peaceful change of international order. Tokyo: United Nations University Press, 2001. 173 pp+ index.*

According to the six authors contributing to Power in transition, today's predominance of the United States will not last indefinitely: "the unipolarity is likely to wane in the near term". A world of multiple centre of power will slowly replace the present unipolar landscape. Indeed, at present, the world order is a function not just of America's preponderant resources, but also of its willingness to use them to underwrite international order. But there are limits. Over much of the world, the older principle of a more international balance of power will make a come back as the best guide to world peace. Such a change may however arise in many ways. It can be achieved peacefully as well as it can be the outcome of a previous period of chaos not to say war. Unfortunately, in most cases, war has been the historical norm, one of the reasons being that power transitions are at first and foremost contestations over power.

But, besides war, according to C. Kupchan, power in transition and systemic change can also lead to two other outcomes: cold peace (stability based on competition and mutual deterrence) or warm peace (stability based on cooperation and mutual reassurance). Subsequently, the book raises the question of whether the impending transition to multipolarity power system can be managed peacefully and under what conditions and through what causal mechanisms can this occur.

To answer these questions, the conceptual core of the study turns around three main concepts, which are benign character, order, and legitimacy. It is argued that peaceful transition is a product of these three variables working in sequential fashion.

History is not a good basis for prediction, since every historical event is unique and since, despite all our backsliding, we do make progress in understanding the world and dealing with its problems. Nevertheless, used

with care, history can teach important lessons for the contemporary era and alert us to the possibilities and limits of successful action. Yet, the authors attempt to show how the lessons of the past speak to the challenges of the future. Each chapter adds a stone to the subject, drawing upon three specific historical case studies, which are looked at a different angle by each contributor.

The first case study is the Concert of Europe over the period of 1815-1848. It was characterised by steps toward mutual attribution of benign character, as well as some agreement on order and legitimacy. For 30 years between the Congress of Vienna and the revolutions of 1848, the great powers resolved their disputes without resorting to force. Even when states fundamentally disagreed with each other, they would abstain from sanctioning the decision but would not block it. States recognised spheres in which others were dominant, and hence could manage crises on their own. As a result, it embodied a peaceful phase in European diplomatic history.

The second case is the United States and Great Britain rapprochement in the late nineteen and early twentieth centuries. It is one of history's clearest examples of a peaceful power transition. With a start at war after which both countries spent decades eyeing each other suspiciously and maintaining fortifications along the Canadian border, the disputes have been settled and the two countries becoming lasting partners.

The last case is the Association of South-East Asian Nations (ASEAN), which has been created after the Indonesian's decision to end its policy of "Konfrontasi" (confrontation) with its immediate neighbour, Malaysia. Since then ASEAN stands out as an example of sovereign states agreeing to pursue multilateral aims for the ultimate goal of managing power differentials among members. Its distinctive style of negotiation and dispute resolution, which are resolved by working through informal networks, and by building a consensus, makes it a current interesting study. It illustrates the importance of benignity, order, and legitimacy in managing power relations among members of a security community.

These historic cases are exploited throughout the book for the understanding of what variables enable at that time the major power shifts to occur without war. J. Davidson and M. Sucharov, in chapter 5, look at them in a deeper way by applying the theoretical framework of the book to the three cases of power management. They conclude by saying that benignity is perhaps the most powerful variable, but the addition of legitimacy and order makes the framework not only a necessary cause of peaceful power management but a sufficient one as well.

The notion and the positive role of benign character in a systemic change are however developed before by C. Kupchan in chapter 2. Explaining peaceful transition involves probing under what conditions rival states construct benign images of one another's character and then move on to craft a mutually acceptable and legitimate order. Kupchan looks for the

conditions under which American power could be perceived as benign. In this context, he speaks of the generosity of the hegemonic power. His conclusion highlights that "cultural affinity does seem to matter in the formation of stable zones of peace".

Yuen Foong Khong goes one step further in chapter 3 by examining the concept of international order. Subsequently, based on four other historical cases of rising powers in the Asian Pacific—Japan's rise in the late nineteenth century, the United States at the turn of the twentieth century, Indonesia's in the 1960s and its aftermath, and the rise of China since the 1980s- he identifies preconditions that appear to increase the likelihood that contenders for primacy reach agreement on order. He argues that, when it comes to order, the relevant states, which need to enjoy an affinity of identity, must be able to arrive at a mutually acceptable agreement on the central dimension of order. But, Yuen Foong Khong realise that even through the US and China succeed in sending each other signals of benign intent, reaching agreement on order in East Asia will not be an easy task. The situation is, indeed, complicated by the role of Japan, which continues to follow America's lead in the region. Yuen's hypothesis as for the elements of order that are most in need of negotiation during power transition entail forging a consensus on hierarchy (the rising challenger must be accorded meaningful participation in shaping the new rules of the game) and on basic rules concerning trade and the use of force; procedures for managing territorial change; and inter-state relations that is mutual recognition of spheres of influence.

Nevertheless, peaceful transition depends not just on the emergence of a mutually acceptable international order, but also on the extent to which that order is legitimate. In a broader political and normative context, the notion of democratic hegemony becomes the challenge. Although international legitimacy is not required, it facilitates a consensus on order and makes that order more durable and resilient as explained by J-M Coicaud in chapter 4. Based on the three above-mentioned case studies, he highlights that, among others arguments, strong states have the domestic conditions which facilitate compromise and reciprocity. National integration and legitimacy at home thus strengthen a state's ability to promote socialisation and legitimacy at the international level. Yet a legitimate international order rests on acceptance of change, reciprocity, respect, and democratic norms. If this can be reached, the result would be an international system ready for an able to withstand change rather than yet another static hegemonic system that seeks to perpetuate itself in the name of order as has been the case of the United States up to present.

In the last chapter, E. Adler introduces the additional concept of security community as well as the changes in the institutional context within the subject of power transition by focussing on social learning. According to Adler, if the change is not just the material distribution of power but also the mechanism of change itself, then the coming power transition should occurs peacefully. He ended up with an interesting comment for further research: "it would be useful to speculate whether or not there is a distinct

possibility that, in the future, not only will the nature and mechanisms of power transitions change, but, rather, power transitions as we know them may come to an end".

The closing chapter by C. Kupchan concludes that most probably the next systemic change may, in fact, bear little resemblance to past transitions. According to the author one of the most likely near-term challenge is an Europe in the midst of integration. Moreover, even if the US maintains its economic and military supremacy, effective unipolarity also depends upon America's willingness to continue expending its resources and serving as the global protector and guarantor of last resort. His argument is that "changes in the nature of power and in the nature of the polities that wield power mean that a coming shift in the structure of the system may take place in a new international environment.". Kupchan ends the overall debate by discussing how the relatively benign character of the reigning hegemony is likely to affect relations with rising challenges as well as the implications of the emergence of security communities for systemic change.

To sum up, by addressing the question of how to prepare for the waning of American hegemony and the resultant geopolitical consequences, the authors all agree to conclude that the United States but also the international community as a whole must start to address how to manage this coming transition in the global system. Understanding the sources of structural change is in fact important in figuring out how to manage it. All the argumentations are clearly explained and can be understood by all. Power in transition is indeed very well structured around a good historical perspective which is wisely used as a base for present thoughts and analyses. Moreover, while edited volumes are becoming the present panacea, an increasing number of them end up to be a rough compilation of texts put one after another under a loose common theme. This is not the case of the chapters of this book, which follow a constructive and strict logic.

Notes: For further reading, Canadian diplomat Lionel Gelber's study "The rise of Anglo-American Friendship: A study in World Politics, 1898-1906 (London: Oxford University Press, 1938) is an insightful account of the United States and Great Britain past relationship. On the wider subject of democracy, power and war, Francis Fukuyama's 'The end of History ?" (National interest, Summer 1989) is among the most succinct (but extremely controversial) statement article of the "impossibility of war" thesis.

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