

# Challenges to Public Order and the Seas

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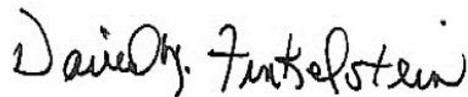
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# Challenges to Public Order and the Seas

by

Mark E. Rosen, JD, LLM<sup>1</sup>

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) serves as a durable legal platform for the allocation rights and responsibilities as world populations grow and greater stresses are placed on oceanic areas for purposes of transit and harvestable resources. The Convention took nearly two decades to produce and is the largest single international negotiating project ever undertaken. Over 150 states signed this comprehensive document, which contains 320 articles and nine annexes, and over 130 nations have since ratified it. It covers virtually every aspect of the conduct of nations in the ocean environment.<sup>2</sup>

The Convention established new concepts, including that of a 200 nautical mile (NM) exclusive economic zone (EEZ) in which a coastal state would enjoy the right to harvest the living marine and seabed resources.<sup>3</sup> Additionally, the Convention confirmed the concept of coterminous maritime zones including territorial seas, contiguous zones, exclusive economic zones (EEZ), and continental shelf areas. Finally, the 1982 UNCLOS also established important new institutions, including the International Seabed Authority, which licenses exploitation of marine resources in “the Area,” i.e. areas in the deep ocean which are beyond a coastal state’s claims, as well as the International Tribunal for the Law of the Sea. In establishing coterminous maritime zones—in which the resource rights of coastal states are delinked from the rights of the international community to those maritime areas for transit, overflight, and other recognized high-seas freedoms—the LOS Convention carefully balanced the rights of various competing interests.

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<sup>1</sup> The views expressed in this paper are those of the author alone and do not represent the views of CNA or any of its sponsors.

<sup>2</sup> As of May 6, 2013, a total of 157 states had signed UNCLOS and 144 states had ratified the treaty, including amendments which went into force in 1996. The United States has signed the Agreement on Part XI of the LOS Convention, which amends the original Convention, but, as of this writing it has not ratified the Part XI Agreement. Interestingly, the United States signed (1995) and ratified (2001-2003) an Implementing Agreement under the LOS Convention dealing with fish stocks that straddle the EEZ or the waters of one or more countries. For the status of the United Nations Convention on the Law of the Sea, of the Agreement relating to the implementation of Part XI of the Convention, and of the Agreement for the implementation of the provisions of the Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks, see <http://www.un.org/depts/los/referencefiles/status2002.pdf> (last visited May 6, 2013).

<sup>3</sup> Technically, the right to minerals and other seabed resources is governed by Part VI of the LOS Convention, which codifies the rights of states to establish 200 NM continental shelves from their coastlines, subject to reduction in the case of an opposing state’s continental shelf, or expansion to a maximum breadth of 350 NM if the so-called broad continental margin meets certain geological tests.

A series of four Conventions had been finalized in 1958. But the 1960s and 1970s brought a proliferation of territorial sea claims in excess of the limit then in effect: 3 nautical miles.<sup>4</sup> As a result, the 1982 LOS Convention was negotiated in order to reaffirm and stabilize the principles established in the earlier four. Among other things, the 1982 LOS Convention updated the earlier 1958 Conventions by concretely addressing the measurement and breadth of territorial seas,<sup>5</sup> the high seas,<sup>6</sup> and continental shelf areas.<sup>7</sup>

The Convention, some believe, has become an international state of mind. It was the first major international treaty negotiation in which many emerging nations had ever participated. According to former United Nations Secretary-General Javier Perez de Cuellar, the 1982 United Nations Convention on the Law of the Sea “embodies the will of an overwhelming majority of nations from all parts of the world, at different levels of development, and having diverse geographical characteristics.”<sup>8</sup> Many have written that the Convention represents a commitment to the rule of law and a basis for the conduct of affairs among nations.

What is necessary for an effective system of ocean governance? This question was answered by two men who were perhaps the greatest theorists on this topic: professors Myres McDougal and William Burke. In *The Public Order of the Oceans*, the seminal work that they co-authored in 1962, they postulate a number of key principles that are essential to the durability of any international agreement regulating the seas,<sup>9</sup> including:

- A body of complementary yet highly flexible prescriptions which accommodate the interests of both coastal and non-coastal states;

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<sup>4</sup> For a discussion of these claims and U.S. efforts to roll back those claims, see J. Ashley Roach and Robert W. Smith, eds., *Excessive Maritime Claims*, U.S. Naval War College International Law Studies (Blue Book Series), vol. 66 (1994) and J. Ashley Roach and Robert W. Smith, “Excessive Maritime Claims” Martinus Nijhoff Publishers (2012). See also Dept of State, Bureau of Oceans Affairs, “Limits of the Seas: U.S. Response to Excessive National Maritime Claims,” no. 112 (1992).

<sup>5</sup> 15 U.S.T.S. 1606, T.I.A.S. No. 5639 (entered into force Sep 10, 1964).

<sup>6</sup> 13 U.S.T.S. 2312, T.I.A.S. No. 5200 (entered into force Sep 30, 1962).

<sup>7</sup> 15 U.S.T.S. 471, T.I.A.S. No. 5578 (entered into force June 10, 1964). The Fourth 1958 Convention is entitled the “Convention on Fishing and Conservation of Living Resources on the High Seas.” See 17 U.S.T.S. 138, T.I.A.S. No. 5969.

<sup>8</sup> George V. Galdorisi and Alan Kaufman, “Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict,” *California Western International Law Journal* 32 (2001-2002): 253, 257. Authors cite Shruti Ravikumar, “Adrift at Sea: U.S. Interests and the Law of the Sea,” *Harvard International Review* 22, no. 2 (summer 2000): 38.

<sup>9</sup> Myres McDougal and William Burke, *Public Order of the Oceans* (New Haven: Yale University Press, 1962). See chapter 1.

- An accommodation between those states with exclusive resource rights and the general rights of the international community to use the seas as a medium for commerce and other peaceful purposes;
- A recognition that some ocean resources lie beyond the scope of national jurisdiction and that the exploitation of those resources cannot be limited to only those with the technology to acquire them;
- The exclusive competence of states to confer their national character upon ships flying their flag;
- A responsibility of states to manage their resources in an environmentally sane manner, particularly when an incident within their borders has effects beyond those borders;
- A process of “interaction” in which states can make claims to certain interests and those claims will be “authoritatively” endorsed or rejected.

To preserve the opposing interests of coastal and non-coastal interests, the 1982 LOS Convention was negotiated to address some of theoretical objectives set forth by McDougal and Burke. From the standpoint of U.S. interests, the LOS Convention was negotiated during the height of the Cold War, in which there were basically three competing factions: (a) major maritime states such as the United States and the USSR, which wanted broad rights to ocean access; (b) the developing countries that made up the G-77, which were mostly concerned with gaining access to marine resources and revenues commensurate with their population size; and (c) coastal states, which were interested in being able to exclusively exploit and protect their coastal resources and being able to hold the navies of the major maritime powers at arm’s length. Issues of importance to the U.S. Navy—such as transit passage, military overflight, high-seas exercises, and unrestricted submerged operations—were at the forefront of the U.S. negotiating position and, in this regard, the 1982 LOS Convention was a great success.

The failure of the United States to ratify the 1982 LOS Convention undermines U.S. military (and economic) actors from realizing the clear gains that were made in the 1982 Convention because the United States is shut out of important discussions (and institutions) in which the 1982 Convention is being interpreted and implemented. The LOS Convention should be ratified at the earliest possible opportunity; that point needs no further elaboration. However, a real question—without ascribing fault to the U.S. non-accession to the Convention—is whether there are conditions at sea which threaten the framework which the framers envisioned. Put another way, are there forces at work which threaten to undermine the promise of the Public Order at Sea that is so eloquently described by McDougal and Burke and codified in the LOS Convention?

## The historical predicate and question presented

The issue of military activities in foreign EEZs continues to be a friction point between the United States and China and some other nations.<sup>10</sup> Because this issue pits the United States against China, it has gained currency in Law of the Sea circles and has dominated the headlines, especially following the EP3 incident in April 2001. Textual arguments can be made on both sides of this issue: the United States maintains that the list of high-seas freedoms is illustrative and that other high-seas freedoms also apply. The negotiating history is also cited in support of the U.S. view that the list of activities is illustrative and the drafters did not intend to exclude military activities from the list of freedoms.<sup>11</sup> China and some other nations argue that the concept of military activities in the EEZ should have been explicitly addressed. They also assert that Article 301—which provides that the seas shall be used for peaceful purposes—trumps this argument since military activities are not peaceful in character and the presence of naval forces in one’s littoral areas is objectively unpeaceful. China can also point to the UNCLOS accession statement of Brazil (and some other states), which dispute the right of the U.S. and other states to conduct military maneuvers or exercises in foreign EEZs—especially those involving the use of weapons or explosives. Brazil would not have made such an assertion had it not believed that the question was still open for debate.

As in any major international negotiation, some issues were dealt with extensively while others received less attention, or, in the case of the EEZ entitlements, less fidelity. Even though the EEZ issue absorbs considerable time and attention by leaders in both countries over the permissible limits of the seas, this particular issue is especially amenable to negotiation among the parties. Drawing a parallel from the Cold War, the relative sizes of the U.S. and Soviet navies were much larger and the stakes (a naval conflict that could eventually lead to war) were considerably higher. Ultimately, the United States and the Soviet Union concluded an Incidents at Sea Agreement in 1972 and a second agreement covering Dangerous Military Activities in 1989,<sup>12</sup> following serious disagreements in the Black Sea between the two countries over the meaning of “innocent passage in foreign territorial waters.” When viewed through the lens of history, there is no reason why the United States and China cannot negotiate some similar type of accommodation—particularly because the issue is a bilateral irritant between the United States and China and because it is confined to questions relating to the meaning of words in the text of the LOS Convention in which there is a fairly comprehensive negotiating history and specific

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<sup>10</sup> See, generally, Galdorisi and Kaufman, “Military Activities.” Note 8.

<sup>11</sup> *Ibid.*, 266, 274.

<sup>12</sup> Implementation guidance for these two agreements can be found in the Navy OPNAV Instruction 5711, at [www.fas.org/irp/doddir/navy/opnavinst/5711\\_96c.pdf](http://www.fas.org/irp/doddir/navy/opnavinst/5711_96c.pdf).

facts in dispute.<sup>13</sup> Given that there is well defined context for negotiations, it is reasonable to project that in time this issue can and will be ameliorated. That would appear to be especially in China's interest, given the increased global security interests of its navy, which will ultimately take advantage of the high-seas rights that the U.S. Navy claims as lawful and legitimate under the regime of the high seas.

While issues relating to military activities in EEZs are capable of reasoned discussion and negotiation, there are other types of disputes which are far more troubling. Recalling the basic principles put forth by McDougal and Burke on the foundational elements for Public Order at Sea, there are three more systemic issues in ocean governance that are much more concerning than the issue of military activities in foreign EEZs because of their global implications and because they have the potential to undo the careful balances that are established in the LOS Convention between the rights of coastal states and maritime states. These issues include the continued proliferation of excessive maritime claims, the decline in the concept of flag state control, and a permissive legal regime when it comes to marine law enforcement. If these three major issues are left unaddressed, it will create a perception that the world community is walking away from the 1982 LOS Convention and may stymie the progressive development of other global instruments that are derivative of the LOS Convention and regulate maritime activities. Most of these conventions have been negotiated under the auspices of the International Maritime Organization (IMO) shipping, including the 1974 International Convention for Safety of Life at Sea, as amended (SOLAS); the 1972 International Regulations for the Prevention of Collisions at Sea, as amended (COLREG 1972); the 1972 London Dumping Convention of; and the 1973 Convention Relating to the Prevention of Pollution from Ships, as amended and supplemented via the 1978 Protocol (MARPOL).<sup>14</sup> Similarly, perceptions that the LOS Convention was no longer authoritative could stymie the progressive development of regional fisheries agreements and/or undercut global implementation of the High Seas Driftnet Ban<sup>15</sup> and the United Nations Fish Stocks Agreement of 1995 (also known as the Straddling and Highly Migratory Fish Stocks Agreement).

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<sup>13</sup> Other states, including Brazil and India, maintain similar restrictions. As indicated in the text, however, this problem seems to be recurrent only between the United States and China. Also, the United States does not contest the right of foreign warships to exercise high seas freedoms in U.S. waters. Russian warships have historically operated in U.S. waters on both coasts, and there are reports that Chinese warships have been spotted in the EEZ adjacent to Guam. The United States has never protested these actions.

<sup>14</sup> The IMO is currently involved in the negotiation of a mandatory "Polar Code" which applies to all shipping that travels into the Arctic. That particular instrument is derivative of a number of conventions, including SOLAS and MARPOL.

<sup>15</sup> The basis for the ban is a series of UN General Assembly resolutions, including 44/225 and 46/215.

In terms of maintaining stability in the international legal regime, three baskets of issues will be separately discussed, namely: the resurgence in the number and type of excessive maritime claims; a breakdown in the fundamental contract between coastal states and maritime states saying that coastal states cede their right to regulate shipping off their shores in exchange for the promise that flag states will responsibly exercise regulatory jurisdiction; and a permissive legal regime at sea, which enables pirates, criminals, illegal fishermen, and terrorists to operate—in certain areas—without fear of apprehension or arrest. On this last issue, ship owners can cite good business reasons for deciding to register their ships in a distant locale and apply the law of that jurisdiction. However, coastal states derive no benefits from these arrangements, which circumvent local labor and tax laws, as well, depending on the flag, the use of modern equipment, and the environmental standards.

### Excessive maritime zone and territorial claims

In the period leading to the negotiation of the 1982 LOS Convention, excessive maritime claims usually related to excessive territorial sea claims. With the advent of different maritime zones resulting from the

LOS Convention (see figure 1), there are now many types of excessive claims. They include the misuse of the authority to establish straight baselines; improper establishment of archipelagic baselines; requirements for prior notification or permission for shipping to pass through certain areas (including warships and vessels carrying certain types of cargo); restrictions on peaceful military activities in areas to which high-seas freedoms pertain; and the establishment of illegal security zones, such as those established by North Korea and Syria.<sup>16</sup> Additionally, and perhaps of more immediate interest, there has been a proliferation of claims to ocean territory which are derivative of claims of sovereignty over small patches of land in the ocean. This is especially problematic in the South China Sea and East China Sea, although there are many other examples in which

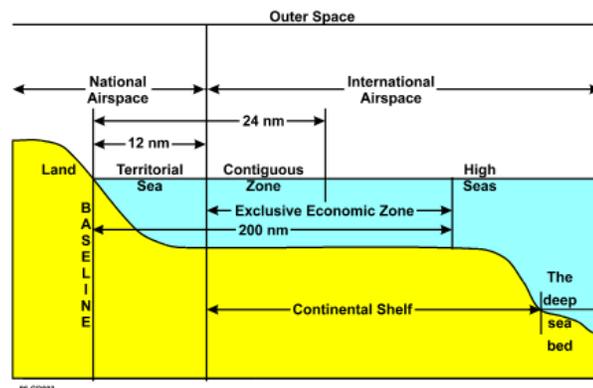


Figure 1. Source: U.S. Navy

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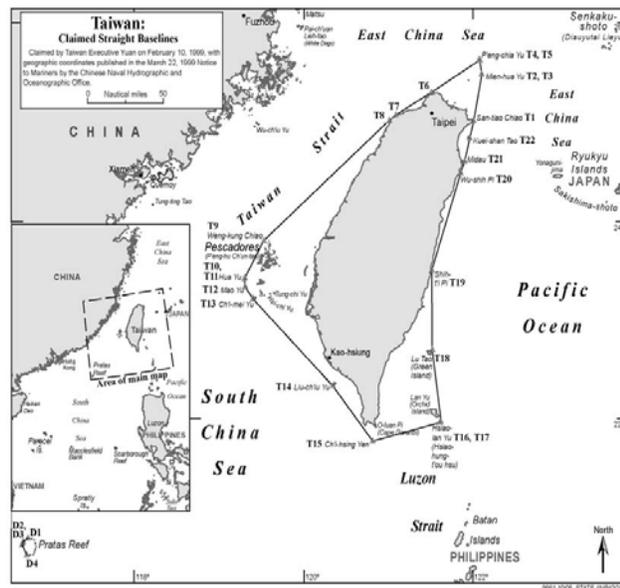
<sup>16</sup> The Law of the Sea Convention (Art 33) permits coastal states to establish 24 NM contiguous zones in which a state may enforce its customs and its fiscal, immigration, and sanitation laws. Security is not among the stated rationales, although the practical effect of the establishment and enforcement of a proper contiguous zone will afford a coastal state enhanced security against illegal activities in and around its coastline.

friends and allies have used mid-ocean territorial claims to acquire large areas of ocean space.

### Excessive straight baseline claims

Coastal states are permitted under Article 7 of the LOS Convention to establish straight baselines in one of two circumstances: to enclose fringing islands or to smooth out a highly irregular coastline. If a coastal state does not meet the objective test set forth in Article 7,<sup>17</sup> the maritime zones depicted in figure 1 should be computed from the low-water mark on the state's coastline—i.e., the use of straight baselines is the exception and not the rule.

Even though the issue of straight baselines does not frequently draw much attention, a couple of important points must be noted. First, all ocean zones which affect both security and resources are derived from the baseline. Thus, a straight baseline which is excessive has the practical effect of pushing maritime zones much farther seaward than would otherwise be the case. Given that some states have claimed straight baselines well over 50 NM from the shore, the effects are immediately evident if one simply looks at how these zones project into the seas; they result in the acquisition of hundreds of square miles of ocean territory. Second, if a country claims straight baselines, the waterspace between the straight baseline (which is a substitute for the physical coast) and the actual shoreline is considered to be internal waters. Illegally leveraging the straight baseline rules has the practical effect of creating a security or “keep out” zone since the maritime states have no rights to traverse the inter-



**Figure 2**  
Source, Dept of State, Limits of the Seas No. 127, Pg. 11

<sup>17</sup> The U.S. Department of State has published its own interpretation of Article 7 in Report No. 106, “Limits of the Sea” (August 31, 1987). Similarly, the United Nations Office of Ocean Affairs published its own interpretative guidance on the use of straight baselines in 1989. That publication is often referred to as the “uniform rules” on straight baselines. See [http://www.un.org/Depts/los/doalos\\_publications/publicationtexts/The%20Law%20of%20the%20Sea\\_Baselines.pdf](http://www.un.org/Depts/los/doalos_publications/publicationtexts/The%20Law%20of%20the%20Sea_Baselines.pdf).

nal waters of a coastal state without prior consent. This includes no right of ships to pass nearby in innocent passage.<sup>18</sup>

Well over 60 states claim straight baselines, and many of those claims are excessive.<sup>19</sup> For example, in figure 2 which shows the straight baseline claims of Taiwan, one can easily see the effects of the excessive baseline claims: huge swaths of territory are acquired in the north moving towards the Senkaku Islands, and there is an especially large projection which moves west in the Taiwan Strait. Apart from the fact that it results in the unwarranted acquisition of ocean territory, the creation of an internal waters enclave in a major portion of the Taiwan Strait is extremely deleterious to international maritime traffic, which must either respect the illegal claim and navigate around the area, or risk being arrested. On a technical level, the use of fringing islands can only be used if the islands move in the same general direction as the coast. It is quite clear that the few islands adjacent to Taiwan neither are directly associated with the coastline nor move in the same direction. Furthermore, the size of the individual baseline segments is exaggerated. International opinions differ on the maximum length of a single baseline segment, although the consensus seems to be between 24 and 48 NM.<sup>20</sup> Taiwan has a number of individual segments which exceed 48 NM. Of note, the baseline segment that projects from northern Taiwan to the Pescadores and moves in the same general direction is 110 NM.

In addition to Taiwan, China and Vietnam both have significantly excessive straight baseline claims. The effect of these claims is to unlawfully close off significant areas of the South China Sea as internal waters and to increase the claims of those countries to resources. Vietnam and China both have robust navies that are capable of protecting and enforcing these excessive claims. The claims have the practical effect of exacerbating and complicating the disputes in the South China Sea, as well as restricting the sea space that would otherwise be available for high-seas fishing.

### **Illegal archipelagic claims**

A separate but related issue which undermines the authoritative character of the LOS Convention is archipelagic claims for continental states. When China established its system of straight baselines in 1996, it drew a series of baselines which enclosed the Parcel

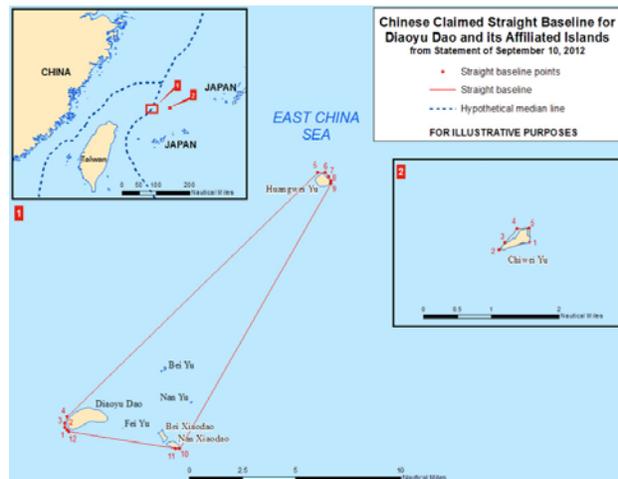
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<sup>18</sup> Recall that the regime of innocent passage involves the right of a ship to traverse (“cut the corner,” so to speak) of another state’s territorial sea when in transit. Such transit needs to be “continuous and expeditious.” There is no right to overflight, and submarines can only claim innocent passage when on the surface with their flags flying.

<sup>19</sup> Roach and Smith, *Excessive Maritime Claims*, ch. 4.

<sup>20</sup> See page 3 of <http://www.state.gov/documents/organization/57673.pdf>. The U.S. view is that the segments cannot be longer than 24 NM, particularly because that is the maximum length that a state can draw to enclose a bay.

Islands. The mere claim to the territory is provocative in and of itself, because Vietnam has aggressively asserted that it is the rightful owner of this small group of islands in the South China Sea. The fact that China drew a series of lines which enclosed all of those islands—much as archipelagic states like Indonesia or the Philippines did in establishing a system of archipelagic baselines to encapsulate all of the islands within those states—is deeply troubling because it flies in the face of the LOS Convention. The United States and other countries protested this action because the entitlement to establish archipelagic baselines is limited under Article 47 of the LOS Convention to only “a state constituted wholly by one or more archipelagoes and...other islands.” Since China is a continental state, no reasonable parsing of the language of Article 47 could justify this action. Given that the waters it enclosed arguably represented internal waters which are off limits to maritime traffic, the practical effect was to create a demilitarized zone in the middle of the South China Sea where ships could not otherwise pass. Even assuming that China could establish such an associated archipelago, it should respect the rights of other states to use “normal routes” for international navigation and overflight<sup>21</sup> through the Parcel area until such time as it has designated sea lanes through the area.



**Figure 3**  
Source: Roach, ASIL Insights, No. 17, Issue 7

China is not the only continental country to make a quasi-archipelagic claim via the use of straight baselines;<sup>22</sup> however, this example is egregious because these islets, sandbanks, and reefs have no permanent inhabitants. The practical effect of this claim leverages a few small scraps of land to acquire an “archipelagic” area of 5,800 square miles,<sup>23</sup> in the middle of the South China Sea shipping channels. What’s more, the enclosed area grossly exceeds the land-to-water ratio which an archipelagic state must achieve in order to claim a straight baseline.<sup>24</sup>

History repeats itself. On September 10, 2012, China announced that it was establishing a system of baselines enclosing the Diaoyu (Senkaku) Islands in the South China Sea as

<sup>21</sup> See Article 53.4 of the LOS Convention.

<sup>22</sup> Denmark created a similar system around the Faroe Islands, and the UK did so for the Falklands.

<sup>23</sup> See [http://en.wikipedia.org/wiki/Paracel\\_Islands](http://en.wikipedia.org/wiki/Paracel_Islands).

<sup>24</sup> See Article 47.1. The land-to-water ratio needs to be between 1:1 and 1:9. The land area in the Paracels is roughly 1.5 square miles. The water area, as noted, is nearly 5,800 square miles.

depicted in figure 3.<sup>25</sup> These straight baselines are egregious because the land-to-water ratio in the area enclosed is far below the ratio that an archipelagic state must meet. Furthermore, the language of the claim does not recognize the rights of maritime states to transit in the area. As is the case with the Paracels, a claim to internal waters is much more restrictive than it would be if this were a legitimate claim to archipelagic status.<sup>26</sup>

### Illegal historic waters claims

The most controversial and unlawful claim in Asia—even when compared to North Korea’s 50NM security zone—is China’s nine-dash line claim to the entirety of the South China Sea (figure 4, the blue lines). Indeed, the characterization of China’s action as a “historic” claim would probably be regarded by most international lawyers as unduly generous.

Many political analysts have tried to put their own interpretative spin on the reason behind this particular action by the Chinese. In the course of multiple meetings with Chinese Law of the Sea specialists, there does not even seem to be a consensus within the Chinese government as to the intent of proffering the map in public debates. One thing, however, is clear. In 2009, Vietnam made a submission to the UN Commission on the Limits of the Continental Shelf (CLCS). In response to that submission, China sent a letter to the UN Commission which attached a more modern version of the nine-dash line chart and made this statement:



**Figure 4**  
Source: The Economist, March 24, 2012

China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map). The above position is consistently held by the Chinese Government and is widely known by the international community.

<sup>25</sup> Discussed in J. Ashley Roach, “China’s Straight Baselines Claims: Senkaku (Diaoyu) Islands,” American Society of International Law, *Insights* 17, issue 7. Figure 3 is taken without modification from Capt. Roach’s paper.

<sup>26</sup> If China’s intent was to establish an archipelago, a system of sea lanes through this enclosed area needs to be identified. Until it is, ships and aircraft are entitled to use all “normal routes” through the area.

Had this statement said something like “the government of China claims all of the land territories in the areas enclosed by the dashed lines and the appurtenant maritime zones (as allowed by the 1982 Law of the Sea Convention),” China’s position would at least be open to reasoned discussion. However, the Chinese ratified the LOS Convention in June 1996. While they acknowledged sovereignty over their “archipelagos and islands” [*sic*] in their June 7, 1996 statement upon ratification,<sup>27</sup> they said absolutely nothing with regard to rejecting the core principles of the LOS Convention regarding maritime zone delimitation or even suggesting that they were laying claim to the entire South China Sea based on historic rights.

Even had the Chinese suggested or asserted that they had a historical claim to virtually all of the waters in the South China Sea (as is clearly suggested in their statement to the CLCS), it is important to note that “historic” rights only come into play in a limited number of instances under the LOS Convention. First, a coastal state may lay claim to a “historic” bay and use a closure line in excess of 24 NM if certain tests can be met. Second, in the context of delimitation of opposite or adjacent boundaries, historic fishing practices or other historic evidence can be used by a dispute settlement body to make an “equitable” adjustment to a boundary which would otherwise be established using equidistant principles. Third, the historic groupings of islands, as a single archipelagic state, can be a factor in the establishment of archipelagic boundaries. Finally, passage rights through certain straits can be governed by regimes set forth in longstanding (historic) agreements, such as the Montreux Convention, which governs passage through the Turkish Straits. Obviously, none of those circumstances apply in this case.

### **Mid-ocean territorial disputes**

The last category of “excessive” claims which undermine the overall integrity of the LOS Convention, and, in the modern era, could be a major source of conflict, is that of claims to largely uninhabited oceanic territory that drive large swaths of oceanic territory. This problem is not confined to a single country. Given the fact that an inhabited island that otherwise meets the tests in Article 121 of the LOS Convention of being able to support “human habitation” or “economic life of their own” is able to drive the full panoply of maritime zones, including its own EEZ and continental shelf, it stands to reason that states would take a maximalist position when it comes to



**Figure 5 1**Source: Wikipedia

<sup>27</sup> See

[http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm#China%20Upon%20ratification](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China%20Upon%20ratification).

mid-ocean claims. One stark example of this phenomenon is Okinotorishima, pictured above in figure 5.<sup>28</sup> This particular maritime feature has no fresh water and no vegetation; yet possession of it significantly helps enhance Japan’s claim to an EEZ and continental shelf adjacent to the Bonin Islands which is nearly 863,000 kilometers—larger than the state of Alaska.

No contemporary dispute is more dangerous than the current territorial dispute between Japan, China, and, to a lesser extent, Taiwan, over sovereignty of the Diaoyu/Senkaku (D/S) Islands in the East China Sea. These particular islands are uninhabited and have been under Japan’s administrative control since 1971. Both Japan and China (and Taiwan) have elaborate arguments to support their claims to sovereignty prior to 1971, the year that the United States ceded control of the D/S Islands back to Japan as part of the Okinawa Reversion Treaty.

As noted above, China asserts that the D/S Islands are part of China and has drawn a series of straight baselines which encompass the outermost features of the islands. Presumably, China claims these areas as internal waters. Japan has not published any special coordinates concerning the islands, but Japan has a generic national law in which it claims a 200 NM EEZ and continental shelf off all its claimed territories. A logical extension of that principle can be seen in figure 6, which denotes the effects of giving the D/S Islands a complete maritime zone vis-à-vis delimitation of the opposing maritime zones of Japan and China in the East China Sea. If, for example, Japan could legally establish sovereignty over the D/S Islands and prevail on the question of whether they constitute “islands” within the meaning of Article 121, it would acquire a very large amount of ocean territory (shaded area),<sup>29</sup> which would be exclusively available for fisheries and oil and gas extraction.

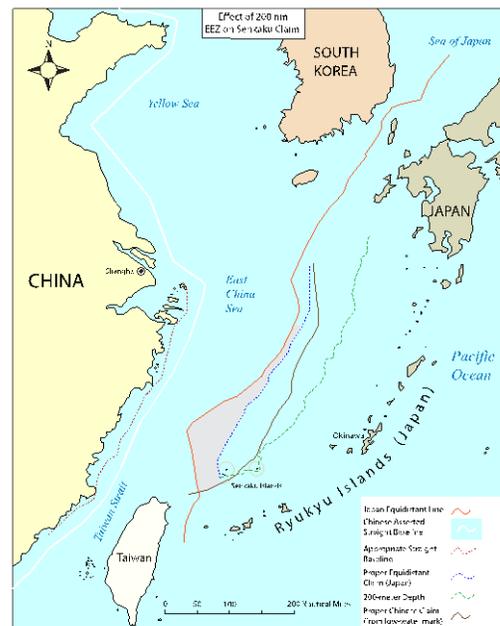


Figure 6 - Source, CNA Graphics 2013

<sup>28</sup> All of the structures on this “island” are man-made. There is no fresh water or vegetation. China protested Japan’s claim that this feature was an island in 2004.

<sup>29</sup> Estimates vary as to actual amount that Japan would acquire, although 40,000 sq. km is the figure most commonly used.

Given that these ocean territories are currently uninhabited and have been so since the 1940s when a fish-processing plant was abandoned,<sup>30</sup> it is very doubtful that a court would hold that these five islets and three barren rocks (which make up less than 6 sq km altogether) would be classified as “islands” according to Article 121 and awarded full maritime zones, because of the distorting effect that the island claim would have on the delimitation of the opposing maritime zones of Japan based on the Ryuku Island chain and Chinese mainland, respectively. Two recent decisions by the International Court of Justice (ICJ) in the *Matter of Serpent Island: Romania vs. Ukraine* (2009)<sup>31</sup> and *Nicaragua vs. Colombia*<sup>32</sup> and the 2012 litigation between *Myanmar and Bangladesh* before the International Tribunal of the Law of the Sea (ITLOS)<sup>33</sup> suggest that a contemporary court would apply a very strict test and either rule that these features are not true islands (as per Article 121) or, alternatively, rule that these minor “islands” cannot be used to significantly distort the continental shelf and EEZ claims of Japan and China. The net result (given the fact that China has excessive straight baselines along its coastline that should be walked back closer to its shore) is a boundary similar to the blue line in figure 6, in which D/S Islands would be given a modest 12 NM zone surrounding the islands.

### **Overall trends in maritime claims**

A major impetus for the negotiation of the 1982 LOS Convention was the desire to stem the increase in excessive territorial sea claims which, if unchecked, would lead to conflicts over passage rights and resources. Put another way, a major objective of the LOS Convention and the genius of delinking resource rights from the rights of maritime states to use the water column for passage, overflight, research, telecommunications, and resource exploitation (with proper authorization by the coastal state) was to stabilize the situation and make all states winners. Indeed, the fact that accession to the LOS Convention is nearly universal can also be attributed to the fact that the Convention addressed the concerns of some interests that had previously been unaddressed in the four 1958 UN Conventions and customary law. These included environmental protection, the enhanced rights of coastal states to enact non-discriminatory regulations in polar waters, the rights of landlocked states, a strong bias in favor of research and scientific management of fish-

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<sup>30</sup> In 1910, a Japanese entrepreneur, Koga Tatsushirō, constructed a bonito-processing plant on the islands with 200 workers. The business failed in 1940, and the islands have remained deserted ever since. See [http://en.wikipedia.org/wiki/Senkaku\\_Islands](http://en.wikipedia.org/wiki/Senkaku_Islands).

<sup>31</sup> Available at <http://www.icj-cij.org/docket/files/132/14985.pdf>.

<sup>32</sup> 2012 ICJ report available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=124>.

<sup>33</sup> Int'l Tribunal of the Law of the Sea, Case No. 16, Mar 14, 2012. Discussed in Mark E. Rosen, *Myanmar vs. Bangladesh: The Implications of the Case for the Bay of Bengal and Elsewhere* (Alexandria, VA: CNA, 2013). Available at <http://www.cna.org/research/2013/myanmar-bangladesh>.

eries, and the economic participation of landlocked and developing countries in the harvesting of resources beyond the national jurisdiction of any single state.

The difficulty today is that some of the disputes involve major world actors, including Japan, China, and, yes, the United States.<sup>34</sup> Given that, there is a danger that a new international attitude will prevail that the 1982 Law of the Sea Convention does not represent shared global values, particularly when states such as China take actions to assert legal positions which have no legal basis—such as the nine-dash line. When such a country, which is the world’s second largest economy and is a permanent representative to the UN Security Council, acts in this fashion, there is always the risk that other states will feel emboldened to make their own excessive claims or otherwise take liberties with the Convention norms if they perceive it to be in the interest of their nation. In other words, “If China can do it, why can’t we?”

The fact that China is the author of these new egregious claims is especially disturbing given the turbulence in the Asia Pacific region. Regional actors such as Indonesia and the Philippines<sup>35</sup> both recently finished conducting surveys and engaging in extensive consultations with regional states and the major maritime powers<sup>36</sup> in order to establish a system of archipelagic baselines which conform to principles in the LOS Convention, and both countries have either established or are establishing sea lanes through their waters. Even though these designations are imperfect, both countries have followed a proper consultative process (especially in regard to their designation of sea lanes and the role of the IMO) and their claims can, more or less, be justified by the language of the LOS Convention. No such statement can be made concerning China’s actions, particularly in regard to the nine-dash line claim and its archipelagic claims.

The United States and other major maritime powers have been collaborating with Indonesia and the Philippines to resolve any remaining differences regarding their archipelagic claims. One can only hope that the same can be done to walk back the excessive baseline claims of Vietnam, Myanmar, and Taiwan because, as indicated previously, they have the

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<sup>34</sup> The United States is listed here not because it has established and maintained a series of extreme excessive maritime claims but because it is the sole major industrialized nation that has failed to ratify the LOS Convention. This absence of participation is viewed by some as diluting the authoritative character of the LOS Convention.

<sup>35</sup> Philippine baselines are codified in RA 9522 (Archipelagic Baselines Law). Before the Philippines established modern archipelagic baselines, the country had claimed an extremely large “treaty box,” which encompassed the island nation. That box had its origins in the 1898 Treaty of Paris—the treaty that concluded the Spanish American War in which the Spanish ceded control of the Philippines to the United States.

<sup>36</sup> Personal knowledge of the author, who participated in some of the early talks. Indonesia established baselines through a series of domestic regulations commencing in 1960 and ending in 2008.

practical effect of creating illicit internal waters or “keep out” zones in areas that should be available for littoral movements. But, so long as China, in particular, and others are perceived as acting above the law, it is hard to predict when and whether these excessive claims will ever be rolled back. Worse, they could be strengthened in a game of one-upmanship.

### ***A laissez faire approach to flag state enforcement: the flag of convenience problem***

McDougal’s basic formula for public order on the oceans postulates a balance between the international community’s rights to shared enjoyment of the global commons; the interests of coastal communities; and the corresponding rights of mariners, fishermen, and commanding officers of warships to enjoy high-seas freedoms and various freedoms of transit and overflight.

One cardinal rule of international law is that ships shall sail under the flag of only one state and, save for a few exceptional circumstances, that state will exercise exclusive enforcement and criminal jurisdiction over the activities aboard the vessels. This basic rule was recognized in the 1927 *Lotus* decision of the International Court of Justice and is now codified in the LOS Convention, which requires that there be a “genuine link”<sup>37</sup> between the ship’s owners and the state whose flag is being flown. The LOS Convention also recognizes the important legal principle that there is equality among states and the sovereignty of each state to regulate its own internal affairs—including management of its flag vessels. The 1982 LOS Convention is the framework establishing the balance between these competing interests. That is, in exchange for giving the flag state nearly exclusive jurisdiction over the activities onboard the vessel, the LOS Convention has a corresponding requirement, under Article 94.1, that a flag state must “effectively exercise its jurisdiction and control in administrative, technical, judicial, and social matters over ships flying its flag.” The principle of flag state control and enforcement is essential to ensure that LOS norms are upheld; there are no international police forces, special prosecutors, or standing courts to cite individuals or rogue states with violations.

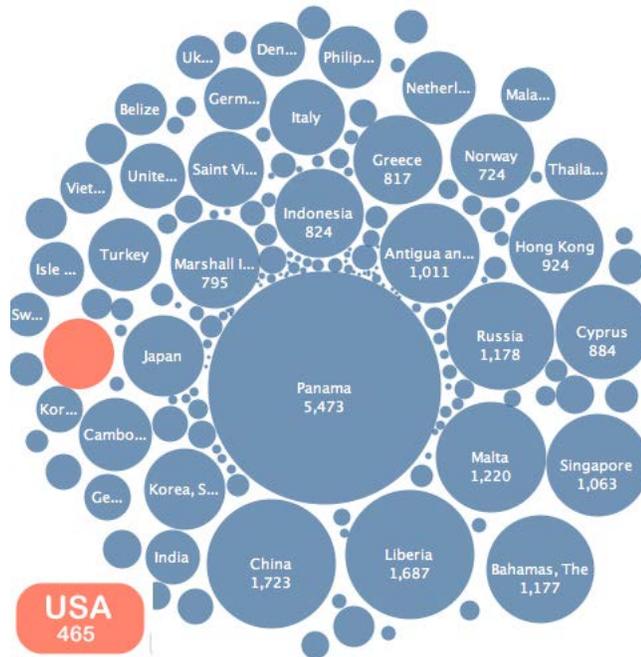
Most of the transnational issues discussed in this paper involved actor(s) using a ship from a flag of convenience (FOC) country which had officers and crewmembers who probably had no national connection with either the ship owner or the flag state. A 2003 study by the U.S. Maritime Administration (MARAD) found that competitive pressures have prompted a continuing decline in the national flag registries in developed countries.

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<sup>37</sup> The “genuine link” theory emanates from the famous *Nottenbohm* decision of the International Court of Justice. Judgment of Apr. 6, 1955 [1955], I.C.J. Rep. 4. The “genuine link” requirement is codified in Article 91 of the LOS Convention.

Now the most frequent visitors to U.S. ports are FOC vessels with crews from countries that are not affiliated with the flag state (except for Greece).<sup>38</sup> Figure 7 shows FOC registries, which account for well over 50 percent of the world’s merchant fleet.

The MARAD study concluded that competitive pressures and declining wages continue to push professionals from developed countries out of the maritime field. MARAD concludes, “The crew nationality data appears to portend the greater use of officers from low cost crewing centers even as the supply of top officers from developed countries struggles to replace itself.” Malta, for example, is a leading FOC registry state for European ship owners, although flags from Panama, Liberia, the Marshall Islands, Cyprus, Antigua, and Barbuda are also in heavy use.<sup>39</sup>



**Figure 7**  
Source: Konrad, John in gCaptain, Oct 2007

Safety and adherence to labor standards constitute another major problem with FOC registries. The current system of FOC registry has stimulated a “race to the bottom” among some flag states in terms of the costs of complying with current crewing and material requirements. The profit margins in the operation of ships are so slim that ship owners have gravitated to FOC registries, where they can take advantage of less rigorous inspections and, more importantly, obtain access to inexpensive rated and non-rated seamen from third-world countries, most notably the Philippines and China. With globalization, there is now robust competition among FOC registries that use their lax standards to lure ship registrations. The most popular states (on the U.S. target list) include Antigua/Barbuda, the Bahamas, Cambodia, the

<sup>38</sup> United Nations Conference on Trade and Development (UNCTAD), *Review of Maritime Transport 2009* (Dec 2009): 36.

<sup>39</sup> See [http://www.isl.uni-bremen.de/products\\_services/publications/pdf/COMM\\_4-2005-short.pdf](http://www.isl.uni-bremen.de/products_services/publications/pdf/COMM_4-2005-short.pdf). According to the London-based International Transport Workers Federation, there are 34 flag of convenience (FOC) countries: Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda (UK), Bolivia, Burma/Myanmar, Cambodia, Cayman Islands, Comoros, Cyprus, Equatorial Guinea, Faroe Islands (FAS), French International Ship Register (FIS), German International Ship Register (GIS), Georgia, Gibraltar (UK), Honduras, Jamaica, Lebanon, Liberia, Malta, Marshall Islands (USA), Mauritius, Moldova, Mongolia, Netherlands Antilles, North Korea, Panama, Sao Tome and Principe, St Vincent, Sri Lanka, Tonga, and Vanuatu. See <http://www.itfglobal.org/flags-convenience/flags-convenience-183.cfm>, last accessed on May 10, 2013.

Cayman Islands, Honduras, Malta, Panama, and St. Vincent/Grenadines.<sup>40</sup> Some registries not only advertise on the internet but even allow registration on-line.<sup>41</sup>

FOC vessels are generally older than the average age of the rest-of-the-world fleet. Many of the detentions by port state control authorities involve aging and badly maintained FOC vessels. Casualties are also higher among FOC vessels. In 1997, 46 percent of all losses in absolute tonnage terms were accounted for by just eight FOC registers. The top 10 registries in terms of tonnage lost as a percentage of the fleet include five FOC registers: Cambodia (1st), St. Vincent (5th), Antigua (8th), Cyprus (9th), and Belize (10th). The pedigree of the oil tanker *Prestige*, which broke in half off the Spanish coast, causing devastating environmental damage, illustrates the problem:

On 11 November 2002 the oil tanker *Prestige*, flying the flag of the Bahamas, under the command of a Greek captain with a crew of Filipinos and Romanians, chartered by a Liberian-registered company based in Switzerland and probably owned by Russian nationals, ran into a storm as it carried its load of 77,000 tons of heavy fuel oil from Latvia to Singapore. The tanker was operating legally, but only just. At 26 years old, it was older than most currently operating oil tankers. It had only a single hull, making an oil spill more likely if an accident occurred. For a variety of reasons—the age and condition of the vessel and the international nature of the crew among them—the ship could not have been legally registered in the United States or most European states. Its owners would not have wanted to register it there anyway; the environmental, safety, and labor laws they would have had to follow would have been too strict, and the fees and taxes too high.<sup>42</sup>

The FOC problem also has a major security component. For years, small governments have allowed criminals to register ships anonymously and gain access to their flag in order to transport everything from drugs to illegal immigrants. There is evidence that FOC

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<sup>40</sup> For a detailed breakdown, by tonnage and average age of ships, see the International Transport Workers Federation (ITF) website at: [http://www.itfseafarers.org/ITF\\_statistics.cfm](http://www.itfseafarers.org/ITF_statistics.cfm). It is noteworthy that Japan, Germany and the United States are among the top five countries in terms of ship ownership. The percentage of the ships from those countries which utilize foreign flags is, respectively, 91%, 82% and 78%.

<sup>41</sup> See, for example, Corporate and Maritime Administrator for the Republic of the Marshall Islands, “Vessel Registration and Mortgage Procedures-Register IRI,” at <http://www.register-iri.com/content.cfm?catid=28>. Quote is from DeSombre, “Globalization and Environmental Protection on the High Seas,” unpublished paper delivered at the Annual American Political Science Association (2003), at [http://www.ceu.hu/polsci/Illicit\\_Trade-CEU/Week5-DeSombre.doc](http://www.ceu.hu/polsci/Illicit_Trade-CEU/Week5-DeSombre.doc).

<sup>42</sup> See [http://www.ceu.hu/polsci/Illicit\\_Trade-CEU/Week5-DeSombre.doc](http://www.ceu.hu/polsci/Illicit_Trade-CEU/Week5-DeSombre.doc).

registries were exploited by al-Qaeda to transport supplies used to blow up the U.S. embassies in Kenya and Tanzania.<sup>43</sup> Ships registered by the Cambodia Shipping Corporation (CSC) were found smuggling drugs and cigarettes in Europe, breaking the Iraq oil embargo, and engaging in human trafficking and prostitution in Europe and Asia.<sup>44</sup>

The London-based International Transport Workers Federation (ITF) has written extensively for many years that ships registered under FOCs have been, and will continue to be, used to transport explosives and terrorists. The ITF argues that the FOC system is inherently corruptible:

Corruption and lack of accountability are endemic in the FOC system, which is built on two pillars: no questions asked of ship owners and no questions answered to anyone else. When a ship is registered with one of these flags, a curtain of secrecy descends—as valuable if you're a terrorist as if you're a money launderer, someone who wants to sink a ship for insurance, or work its crew half to death before abandoning them unpaid in a foreign port.

FOC registries are also deleterious to international business and trade because they provide legal cover for unscrupulous ship owners—the owner can remain anonymous and use anonymity to escape liability when things go wrong. When dangerous ships sink or pollute waters, the ship owner can hide behind limited legal liability schemes or claim bankruptcy in FOC countries. Most recently, the operators of the Deepwater Horizon Oil Rig (Transocean - registered in the Marshall Islands) sought to limit their liability to roughly \$27 million for the multi-billion dollar BP rig blowout in the Gulf of Mexico in 2009.<sup>45</sup> When this happens, the coastal states that play “host” to the vessel become responsible for the cleanup and remediation costs. Likewise, the owners of the cargoes or their insurers often have no recourse when these ships are lost.

In the cost-competitive freight environment, FOC vessels are well positioned to gain an increased market share as reputable national flags decline. Depending on which FOC is involved, there is a fair probability that the flag state is not party to the relevant IMO Conventions.<sup>46</sup> The Organization for Economic Cooperation and Development (OECD)

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<sup>43</sup> See, for example, *The Economist*, May 18, 2002.

<sup>44</sup> See Robert Neff, "Flags that hide the dirty truth," Asia Times Online (Korea section), April 20, 2007, at <http://www.atimes.com/atimes/Korea/ID20Dg03.html>.

<sup>45</sup> Ultimately the owner of the exploration license (BP) absorbed most of the liability costs.

<sup>46</sup> According to a 2012 Report by the International Chamber of Shipping (ICS) and the International Shipping Federation (ISF), the following Open Registry States are particularly troubling: Albania, Bolivia, Congo, Honduras, Myanmar, and Sao Tome & Principe. See: <http://www.ics->

has concluded that FOC non-observance of these safety standards distorts competition across the entire shipping industry.<sup>47</sup> Moreover, another OECD study has found that owners of sub-standard ships manage to externalize the costs associated with these ships, and that they rarely suffer serious economic loss from the problems that arise from lack of adherence to collective standards.<sup>48</sup> The OECD concludes that the current system, in which sub-standard ship operators get away with breaking the rules, shows no sign of declining: there's too much money to be made in this grey market.

The 1982 LOS Convention was one of the first multinational international instruments that imposed important duties on flag states to ensure that owners and operators of vessels use the seas in a manner which does not put the marine environment at risk. Coastal states have the authority to detain or seize vessels responsible for causing material or environmental damage in their waters, provided that the vessel: (a) has been identified as an offender; (b) is making a port call to the country in which the damage occurred or a third country which has an enforcement agreement with the country where damage occurred;<sup>49</sup> or (c) has been caught "red handed" discharging oil or other waste in violation of the coastal state's laws.<sup>50</sup> Indeed, the clear preference in the LOS Convention is for the unrestricted passage of military and non-military traffic through international straits, archipelagic waters, and foreign territorial seas.

Article 44 of the LOS Convention stipulates that coastal states may not hamper or delay the transits of vessels through international straits, but allows for coastal states to install navigational and other safety aids and *encourages* (but does not require) user states to enter into agreement with the states bordering straits to help bear the cost of these improvements.<sup>51</sup> As one can imagine, there is no incentive for ship owners, especially those from FOC registry states, to participate in cost-sharing arrangements that increase the safety in navigationally constrained areas. Turkey, for example, is expressly prohibited

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[shippingfacts.org/shippingfacts/uploads/File/FlagStatePerformanceTable2012.pdf?SID=ab20816115c0f49eb3082985ef24fd96](http://shippingfacts.org/shippingfacts/uploads/File/FlagStatePerformanceTable2012.pdf?SID=ab20816115c0f49eb3082985ef24fd96).

<sup>47</sup> Organization for Economic Cooperation and Development, *Competitive Advantages Obtained by Some Ship owners as a Result of Non-Observance of Applicable International Rules and Standards* (Paris: OECD, 1996).

<sup>48</sup> SSY Consultancy and Research, Ltd. (for the OECD Maritime Transport Committee), *The Cost to Users of Substandard Shipping* (Paris: OECD Directorate for Science, Technology, and Industry, January 2001). The report notes that much of the cost is borne by the insurance industry.

<sup>49</sup> See note 77 and accompanying text concerning port state control MOUs.

<sup>50</sup> Under Article 111 of the LOS Convention, if coastal authorities are in "hot pursuit" of a vessel that committed an offense inside the coastal state's territorial sea, they may pursue that vessel outside of the territorial sea.

<sup>51</sup> Article 43, LOS Convention.

by the Montreux Convention from requiring oil tankers (some of which are quite large) carrying Caspian oil to embark pilots in order to make the treacherous passage through the Turkish Straits. As a consequence, Turkey has had to bear almost all of the costs of installing a Vessel Traffic Services (VTS) system in the straits<sup>52</sup> and almost all of the cleanup costs from over 250 serious marine accidents in the straits since 1982.

The Malacca and Lombok/Makassar Straits in Southeast Asia are another heavily burdened area in which a comprehensive cost-sharing system does not yet exist. Over 100,000 oil tankers and container and cargo vessels transit the Straits of Malacca and Singapore each year and carry over 3 million barrels of crude oil through the straits each day. In the nearby Indonesian Archipelago, the Lombok/Makassar Strait is heavily used mainly by very large crude carriers.

A related concern is the transport of radioactive waste from Europe to Japan through the Asia-Pacific region—in particular, through the Straits of Malacca. Coastal states along the routes have expressed concern, and Malaysia, like some other countries, has demanded that the vessels not enter its territorial waters. Indonesia cannot close its international archipelagic sea lanes, but it has called on Japan not to use Indonesian waters to transport radioactive waste. In this overall debate, shippers and maritime states have the law on their side because passage rights through straits, archipelagic sea lanes, and coastal territorial seas (in innocent passage) are allowed without interference or discrimination based on flag or cargo. However, so far as can be determined, nothing has been done to provide financial assistance to coastal states in order to increase their response capabilities, install navigation aids, etc., to mitigate the devastating effect of an accident involving these types of hazardous cargoes. From an ocean policy perspective, coastal states, such as Malaysia and Indonesia, are in a “box”: they are legally constrained from doing anything to regulate hazardous transits near their coastlines and thus are under great pressure to enact unilateral claims in order to protect their marine resources and their coastal populations. Such unilateralism upsets the balance which the 1982 LOS Convention sought to establish.

The continued heavy use of straits and other sensitive sea areas by irresponsible shipping—many flying FOCs—has taken its toll. Asia and Africa have few effective controls on ocean dumping. Manila Bay and the adjacent freshwater Laguna de Ray have been covered with a blanket of plastic bags and similar garbage for many years. All major shipping routes in Asia are polluted to some degree. Many ships deliberately dump oil wastes into the water to avoid having to pay to have their tanks cleaned. Some areas have reportedly suffered more than 25 oil slicks in a 10,000-sq. km area at any given time, mostly resulting from collisions or grounding. The Turkish Straits experience a serious accident

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<sup>52</sup> The original cost of installing the system was set at \$20 million.

involving ships carrying hazardous or noxious materials almost every year. Collectively, these oil spills seriously affect marine life and have a very negative effect on fishery stocks and human health.

Likewise, coastal states have no effective legal recourse against ships involved in unsafe operations, illegal fishing, or vessel source pollution, because of the inherent difficulties of identifying culprits. Efforts to curtail pollution from ships as a result of legal dumping (i.e. substances other than oil or plastics), oil pollution, and air emissions have been stymied at the IMO because the organization operates on the basis of consensus and FOC registry states wield considerable power behind the scenes. It is hardly in the interest of a FOC flag state to support new and costly regulations which benefit coastal states. Similarly, if an offending vessel enjoys a FOC registry, the coastal states will be highly unlikely to realize an adequate legal remedy. The vessel owners can hide in the FOC legal system, and the value of the vessel (assuming it is arrested in a port of call pursuant to legal proceedings) is often insufficient to pay for the costs of a pollution incident or accident. In the case of vessel air pollution, coastal states have no remedies at all. That said, maritime states, including the United States, are understandably leery of increased coastal state regulation because no one wants to see a system of mandatory reporting of ship movements or toll booths at the world's ocean chokepoints.

All FOC registries are not equal: some ships with foreign registration are world-class platforms which conform to the highest standards of seaworthiness. FOC registration is very often a defensible rational business decision to lower one's operating costs and regulatory burden. However, the assumption that this purely economic decision is costless ignores the expenses and difficulties which FOC registries impose on ocean governance, because:

- The LOS presumes that states have equal rights and capabilities to regulate shipping under their jurisdiction.
- The LOS presupposes that states have parallel interests in enforcing relevant international seaworthiness and pollution control standards.
- Some FOC registries are being used to provide a legal safe harbor to a disproportionate number of substandard vessels.
- FOC registration provides a degree of anonymity to a ship owner who is seeking to limit his/her liability in the event of an incident.
- Some FOC registries provide a limited legal safe harbor for transnational criminals and even terrorists to operate anonymously.
- FOC registry countries are less likely than other states to have a political interest in participating in global initiatives to protect the marine environment, conserve/manage ocean resources, or spend money on initiatives to increase maritime safety.

## A permissive legal regime at sea: weak afloat authorities

### Trends in maritime security: terrorists' uses of the seas

Since the September 11<sup>th</sup> attacks, some ships or cargoes have come under control of terrorists or associated support groups. The most notorious case was in March 2002, when it was widely reported that the Norwegian intelligence service had identified 23 ships that were under al Qaeda control. In July 2002, the Royal Canadian Navy captured suspected al Qaeda members operating a speedboat in the Gulf of Oman (the USS *Cole* scenario). This was followed in October 2002 by a small boat attack on the French supertanker *Limburg* off the Yemeni coast by suspected terrorists. Then, in February 2004, the al-Qaeda-linked Abu Sayyaf group bombed a super ferry in Manila harbor, killing more than 100 passengers.<sup>53</sup> In August 2005, the USS *Kearsarge* (LHD-3) and USS *Ashland* (LSD-48) dodged a rocket attack launched from Aqaba, Jordan, while they were in the harbor. The notorious 2008 attack in Mumbai also originated at sea.<sup>54</sup>

The Liberation Tigers of Tamil Ealim (LTTE) are reputed to have been involved in the hijacking of MV *Cordiality* in 1997, which resulted in the death of five Chinese crewmembers, and of MV *Farah* in 2007.<sup>55</sup> The military defeat of the LTTE does not necessarily spell the end of criminal activity at sea; indeed, some analysts report a resurgence in arms-smuggling operations extending throughout South and Southeast Asia.<sup>56</sup> Finally, in 2010, the Japanese-flagged MV *Star*, a VLCC (very large crude carrier) oil tanker, was rocked by an explosion from a small boat laden with explosives while it was at anchor in the United Arab Emirates. The attack was attributed to terrorists.

It is probably safe to say that this activity has subsided somewhat, due to the Proliferation Security Initiative (PSI)<sup>57</sup> and aggressive tactics by some port states; however, there is

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<sup>53</sup> Barry Desker, "Protecting the Malacca Straits," *IDSS Commentaries* (2005). See: <http://community.middlebury.edu/~scs/docs/desker-malacca%20strait%20security.pdf>.

<sup>54</sup> VADM Raj Nath, "Terrorist Attacks from Sea," *Indian Defense Review* 24, Issue 1 (29 Apr 2011). The terrorists used a hijacked ship to travel from Karachi to Mumbai, where they launched their attack.

<sup>55</sup> A. Jayawardane, "Terrorism at Sea in South Asia," *RISII* (2009), at <http://www.rsis-ntsasia.org/activities/conventions/2009-singapore/Amal%20Jayawardane.pdf>.

<sup>56</sup> Pau Khan Khup Hangzo, "Non-Traditional Security Challenges in the Indian Ocean Region," in Sam Bateman, Jane Chan, and Euan Graham (eds.), *ASEAN and the Indian Ocean: The Key Maritime Links*, RSIS Policy Paper, 2011, p. 30.

<sup>57</sup> The Proliferation Security Initiative (PSI) was founded in 2003 by the United States. It is a collaborative enforcement concept, consisting of information sharing and joint patrols, in which each participating country relies on its own enforcement authorities to interdict the transfer of weapons of mass destruction (WMD), the delivery systems, and related materials to state and non-state actors. NATO essentially adopted the PSI as a operating concept in 2006. See:

every reason to believe that terrorists and transnational criminals will continue to use the high seas for nefarious purposes, because the fundamental legal, economic, and regulatory rules which favor unrestricted (and unregulated) use of the high seas have not changed since 9/11. The MV *Star* incident exemplifies a number of legitimate fears: that terrorists would sink a ship carrying hazardous or noxious cargoes near a major metropolitan area; that they would use a ship to carry a large weapon (such as a fertilizer bomb); that they would scuttle a ship carrying crude oil or some other hazardous material to obstruct a navigational chokepoint; or that they would intentionally cause environmental damage by discharging their cargo in an environmentally sensitive area. Similarly, ferries and cruise liners remain an attractive soft target because they are packed with people who have little opportunity to escape.

Some argue that there is little evidence that pirates and terrorists are merging;<sup>58</sup> however, even though the groups don't directly support one another, it is the strong view of the author that maritime security deficiencies create a climate in which either can flourish. Nowadays, 80-90 percent of global trade moves by container and that trade is concentrated in a few "mega ports." A single terrorist incident—perhaps involving a cargo container—could have a series of impacts on the world economy if one of these mega ports had to go into lockdown. In a simple extrapolation analysis from the West Coast port strike in 2012, which idled the ports of Long Beach and Los Angeles, the *Chicago Tribune* estimated that the 10-day strike cost the U.S. economy roughly \$1 billion per day<sup>59</sup> and it took nearly six months for markets to recover. Because the U.S. economy relies so heavily on imports to satisfy basic needs and because U.S. manufacturing has shifted to the "just in time" model, an attack on the relatively soft target of shipping containers could have devastating economic impacts.

### **Piracy and hijacking**

Pirate attacks on merchant shipping involve hijacking, homicide, robbery, and theft. They pose dangers to the crews, passengers, and coastal communities because once pirates have completed their criminal mission they often leave the ship adrift. This greatly increases the risk of environmental disaster if the ship becomes involved in a collision or grounding. One Sri Lankan analyst described it as follows:

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[http://www.nato.int/nato\\_static/assets/pdf/pdf\\_2006\\_09/2010\\_03\\_D011B221E26B40D891C22D0CA8A7D9AC\\_active\\_endeavour2008-e.pdf](http://www.nato.int/nato_static/assets/pdf/pdf_2006_09/2010_03_D011B221E26B40D891C22D0CA8A7D9AC_active_endeavour2008-e.pdf).

<sup>58</sup> RAND, *The Maritime Dimension of International Security* (2008), available at: <http://www.rand.org/pubs/monographs/MG697.html>.

<sup>59</sup> See [http://articles.chicagotribune.com/2012-12-02/news/sns-rt-us-usa-port-losangelesbre8b101r-20121201\\_1\\_west-coast-ports-container-terminals-warehouse-union](http://articles.chicagotribune.com/2012-12-02/news/sns-rt-us-usa-port-losangelesbre8b101r-20121201_1_west-coast-ports-container-terminals-warehouse-union).

In the recent past there has been an upsurge of piracy attacks around the world which has caused estimated world wide losses of US\$13 to US\$16 billion per year. Ships have been attacked and hijacked particularly in the Gulf of Aden, along the east coast of Africa, the Bay of Bengal, and the Strait of Malacca. It has been reported that the number of attacks within the first nine months of 2009 have already surpassed last year's due to the increased pirate attacks in the Gulf of Aden and off Somalia. Between January and September the number of attacks rose to 306 from 293. The pirates boarded the vessels in 114 cases and hijacked 34 of them so far in 2009. Gun use in pirate attacks has gone up to 176 cases from 76 last year.<sup>60</sup>

Even though the total number of incidents of criminal activity is statistically down from past years, the International Chamber of Commerce's International Maritime Bureau stated in January 2012: "802 crew members taken hostage in 2011 also marks a decrease from the four-year high of 1,181 in 2010. Overall in 2011, there were 45 vessels hijacked, 176 vessels boarded, 113 vessels fired upon and 105 reported attempted attacks. A total of eight crew members were killed throughout the year, the same number as 2010."<sup>61</sup> The Red Sea/Gulf of Aden was recently added as one of the five regional piracy hotspots. In addition to this recent spike in activity, the ferocity and sophistication of attacks seems to be on the rise. Data on pirate attacks in the Strait of Malacca and the South China Sea continue to register significant amounts of activity and disclose involvement by organized crime.<sup>62</sup> In addition to the South China Sea, attacks are prevalent in the Brazilian and Ecuadorian ports as well as ports in Somalia and in Nigeria, Benin, and other West African countries.

The declines in the total number of incidents have not resulted in a sizeable drop in the number of kidnap incidents in which crewmembers or cargoes are seized for ransom. Further, when criminals seize a vessel, the vessel's original flag is often removed and replaced with that of another state. This is a problem not only for the vessel's flag states, crews, and owners, but also for coastal states, because these flag-switching ruses create confusion among enforcement officials. Another disturbing trend is the increased involvement by organized criminal gangs in transnational maritime crimes. Like flag switching, sophisticated cross-border piratical syndicates can often confound enforcement officials. Most incidents are non-violent, but there has been a noticeable rise in the

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<sup>60</sup> Jayawardane, "Terrorism at Sea in South Asia," 2.

<sup>61</sup> ICC Commercial Crime Service, "Piracy Attacks in East and West Africa Dominate the World Report," Jan 19, 2012, at <http://www.icc-ccs.org/news/711-piracy-attacks-in-east-and-west-africa-dominate-world-report>.

<sup>62</sup> Source: Re CAAP ISC, *Piracy and armed robbery against ships in Asia – Annual Report, 2012*.

past five years in the number of violent episodes and the number of incidents involving political groups.

### **Smuggling and trafficking in illegal migrants**

Drugs and illegal aliens are routinely smuggled in small boats but also hidden among otherwise legitimate cargoes on large commercial ships. The financial rewards are staggering: “snakeheads” from mainland China earn between \$35,000 and \$80,000 per migrant.<sup>63</sup> Reliable statistics are hard to come by, but a 2012 report by the United Nations Office on Drugs and Crime<sup>64</sup> (in Vienna) did an in-depth study into human smuggling and found that many of the estimated 50 million illegal migrants per year were transported at sea and that much of this activity was directed by organized criminal elements. Despite an increase in U.S. Coast Guard apprehensions, much of the seaborne smuggling (of people originating in Asia) takes place as individuals disembark in Mexico and then either move across the porous land border or hide aboard small Mexican fishing vessels.<sup>65</sup> A typical method of smuggling migrants at sea is to use two vessels. A larger vessel, such as a fishing trawler or cargo ship, will carry the migrants on an open-ocean voyage to a predetermined location on the high seas, where they will transfer to a small boat for the transit to a landing site. At that point, the boat crew and smugglers will abandon the migrants.

The *New York Times* estimates that 250,000 persons left Ecuador alone on fishing boats from 2000 to 2004—most were probably destined for the United States. That same report quotes immigration officials who estimate that Western Hemispheric alien smuggling is a \$20-billion-a-year business.<sup>66</sup> The quantity of people and dollars involved in this illicit enterprise is much larger if generalized to the world stage.<sup>67</sup>

The LOS Convention contains the general principle of international law that ships have the nationality of the state whose flag they are entitled to fly (Article 91(1)). Ships are

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<sup>63</sup> The UN General Assembly has taken some action to criminalize the smuggling of migrants through the negotiation of a protocol to the Convention Against 2003 Transnational Organized Crime. While in many respects the protocol follows the model for dealing with war criminals—prosecute or extradite—and establishes migrant smuggling as a universal crime, it isn’t clear that it does anything to deal with the misuse of maritime flags to further alien smuggling.

<sup>64</sup> UNODC, “Smuggling Migrants by Sea” (2011), at [http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue\\_Paper—Smuggling\\_of\\_Migrants\\_by\\_Sea.pdf](http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper—Smuggling_of_Migrants_by_Sea.pdf).

<sup>65</sup> *Ibid.*, p. 17.

<sup>66</sup> Ginger Thompson and Sandra Ochoa, “By a Back Door to the U.S.: A Migrant’s Grim Sea Voyage,” *New York Times*, June 13, 2004.

<sup>67</sup> *The Economist* (October 6, 2005) estimated that smugglers rake in roughly \$5 billion per year from this type of smuggling.

subject to the exclusive jurisdiction of the flag state on the high seas, other than in exceptional cases provided for in treaties (which cede law enforcement jurisdiction to other states) and very restrictive conditions in the UNCLOS Convention.<sup>68</sup> The flag state has a duty to exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag (Article 94). A New UN Migrant Smuggling Protocol<sup>69</sup> establishes a system (similar to the bilateral formula which the United States has used in the counter-drug arena) wherein national authorities are, in theory, available on a moment's notice to give permission to board their flag vessels if their ships are stopped by a warship and are suspected of illegal activity. Of course, this right to board and arrest as a proxy for the flag states requires three things: (a) a willing flag state that gives consent to board; (b) the presence of a warship; and (c) a state that is willing to give refuge to a vessel laden with impoverished migrants and to participate in the prosecution of the criminals who organized the voyage.

### **State-sponsored criminal enterprises: North Korea**

The most ominous development in the illegal use of the seas came as the result of back-to-back seizures of two North Korean ships by the Japanese and the Australians in 2004. Both North Korean ships were involved in trafficking narcotics.<sup>70</sup> (Japanese authorities had long suspected North Korea of using its flag to traffic amphetamines and other illicit drugs.) The Australian seizure involved 110 pounds of heroin with an estimated street value of \$48 million. At that time, a Japanese lawmaker described the incident as “nothing less than state-organized crime.” If the North Koreans are willing to rent out their flag to narcotics traffickers, it is not difficult to envision North Korean flagged merchant vessels, or even North Korean warships, being used to transport contraband or being used by terrorists or their agents.

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<sup>68</sup> The main exception is Article 110 of the LOS Convention, which enables warships to exercise their right of visit over a foreign ship (other than one entitled to sovereign immunity) on the high seas if there is strong evidence that the ship is flying a false flag or is without nationality. Additionally, a coastal state can exercise law enforcement authority in its 24 NM contiguous zone if there is a reasonable suspicion that a vessel present therein either has violated or is about to violate coastal state laws pertaining to customs, environment, and immigration.

<sup>69</sup> The Migrant Smuggling Protocol Supplements the United Nations Transactional Organized Crime Convention (UNTOC).

<sup>70</sup> Interestingly, the August 2004 edition of *Sea Watch*, a maritime journal published in Singapore, reported that North Korean agents were actively recruiting shipowners to use the North Korean flag. [http://72.14.209.104/search?q=cache:ITvleOXe-QAJ:www.seasia.com.sg/base/newsletter/seawatch\\_aug2004.pdf+Malta+%2B+FOC+%2B+registries+%2B+2005&hl=en&gl=us&ct=clnk&cd=28](http://72.14.209.104/search?q=cache:ITvleOXe-QAJ:www.seasia.com.sg/base/newsletter/seawatch_aug2004.pdf+Malta+%2B+FOC+%2B+registries+%2B+2005&hl=en&gl=us&ct=clnk&cd=28).

## **Enforcement challenges**

Thus far, we have documented three significant challenges to public order and the oceans: (a) a shadow FOC registry system which is not legally accountable to others in an oceans law and policy sense and which provides a safe haven for marginal ship owners as well as criminals, smugglers, and terrorists; (b) limited law enforcement entitlements on the high seas for states other than that flag state; and (c) inadequate remedies for coastal states to recoup the costs they bear as a result of imprudent use of the seas by FOC and other states. And, while the 1982 LOS Convention and customary international law invest special powers in warships to enforce public order on the seas, there are many loopholes that prevent warships of other than the flag state from doing so.

## **Definitional issues: piracy**

Piracy is recognized in customary international law and the LOS Convention as a “universal” crime which all states have a duty to suppress. Warships have a corresponding right to interdict and arrest pirate vessels on the high seas and to board vessels involuntarily—i.e., without permission from the vessel crew—if they are stateless and suspected of piratical acts. Piracy is defined as illegal acts of “violence or detention or any acts of depredations” committed by the crew or passengers of a private ship or aircraft in or over international waters against another ship or aircraft. To constitute a textbook case of piracy, the incident must have occurred on or over international waters for private purposes. Acts done for political purposes or crimes committed in port are not considered piratical acts even though statistics often group the incidents together. The requirement of demonstrating that illicit action is for “private gain” or that it occurred outside another state’s jurisdiction has impeded enforcement efforts by the world’s navies and coast guards. As of yet, there has been no concerted effort to broaden the concept of piracy so that it captures all acts of “maritime terrorism” by individuals who commit crimes against ships for ideological reasons or have some type of state sponsorship.

Because of the narrowly drawn definition of piracy, the world’s navies—especially those that are participating in the Proliferation Security Initiative (PSI) or in other counter-piracy operations—derive most of their enforcement powers on the high seas from either bilateral agreements or the right of visit codified in Article 110 of the LOS Convention. The right of visit allows warships from third-party states to approach and conduct an involuntary boarding of vessels that are suspected of piracy, unauthorized broadcasting, or slave trade. In cases of questionable nationality, the LOS Convention also recognizes the rights of warships to conduct an involuntary boarding of ships on the high seas to verify the nationality (flag) of ships that are unflagged or flying under false colors. This power extends only to verification of the ship’s papers, but the masters will often consent to a search of their vessels.

## Limited boarding entitlements

The United States has broadened the scope of Article 110 via the negotiation of about 25 bilateral agreements with a number of states which, in essence, provide U.S. enforcement authorities with a “limited power of attorney” to board their flag vessels involuntarily if those vessels are suspected of engaging in illicit drug trade (the most common) and, in some cases, migrant smuggling. The New Migrant Smuggling Protocol (discussed above) also follows this model in the case of ships suspected of human trafficking. However, actual consent by the flag state is a necessary ingredient unless a finding can be made that justifies boarding to verify the nationality of a stateless vessel. No matter how irresponsible the captain or crew are or how illicit the cargo is, warships have no power to stop, detain, or board vessels on the high seas if the vessel is legitimately registered in a particular flag state and that flag state acknowledges its registry and refuses permission to board.

To address the limitations on the right of non-flag-state authorities to interdict ships suspected of criminal or terrorist activity, major maritime states sought to close some of the major enforcement gaps in the IMO by pushing for an expansion of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA). That Convention was adopted by the IMO following the *Achille Lauro* incident and follows—in a very general sense—the same model as for the prosecution of war criminals: states in possession of a war criminal must either prosecute or extradite. Following 9/11, the IMO’s Legal Committee began deliberating on changes to SUA, which were then adopted into a new Protocol in 2005. Two notable changes are contained in the Protocol:

A new offense was created under SUA to criminalize the unlawful international transport of weapons of mass destruction (WMD) aboard a ship.<sup>71</sup> A new provision authorizes any state encountering a ship suspected of carrying WMD to conduct an involuntary boarding and search of the vessel if the flag state gives permission or fails to respond to a boarding request within four hours.

SUA continues to look to the flag state to apprehend or prosecute those guilty of criminal acts at sea or to extradite them. There is also a provision in the new SUA changes in which state parties may, after notifying the IMO Secretary General, conduct an involuntary boarding if the flag state has not responded to a request to board within four hours vis-à-vis vessels involved in suspected trafficking of WMD. If the flag state refuses permission to board, there does not appear to be any recourse against the vessel. There are

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<sup>71</sup> <http://www.imo.org/About/Conventions/ListOfConventions/Pages/SUA-Treaties.aspx>. The Protocol to SUA was adopted in 2005 and entered into force on July 28, 2010.

no third-party rights to interdict or board vessels suspected of harboring terrorists, carrying conventional weapons, or being involved in inchoate terrorist activities.

### **Building upon changes to SUA and the ISPS Code**

Complementing the recent SUA changes are recently approved changes to IMO's International Ship and Port Security (ISPS) Code, which became effective on July 1, 2004. That Code reaffirms the right of port state officials to conduct arrival or in-port inspections of ships to ensure that visiting vessels are not discharging unauthorized weapons, incendiary devices, or explosives without prior notice and approval. That right to inspect does not affect the right of all port states to inspect non-sovereign immune vessels inside of the territorial sea to search the vessel's papers and cargo when there is a basis for believing that the ship presents a security risk. Moreover, the concept of port state control extends to the right of port states to board, inspect, and, where appropriate, detain a merchant ship which is engaged in an act of pollution, has observable safety defects, or has logs and/or SOLAS certificates that are not in proper order.

Unfortunately, these regulations do not cover vessels that are going to countries with lax inspection systems or vessels that are simply in transit. Also, no matter how promising the port state control initiatives and the pending SUA changes are, the reality is that the SUA amendments will take a number of years to be adopted and fully implemented by all flag states. Also, it should not be forgotten that the specialized SUA rules only apply to ships involved in suspected trafficking of WMD. Moreover, even if the changes to SUA are ratified by many governments and then ordered into effect, those FOC states which have not ratified the changes could resist any requests to conduct involuntary searches of their vessels. Accordingly, absent universal ratification of the recent SUA changes, terrorists and perpetrators of organized crime will simply shift their activities to those flags of convenience states that provide a safe haven from recently enacted SUA regulations.

The IMO is often criticized for moving at glacial speed; however, much credit is due to that organization for its rapid brokering of the 2005 Protocol to the SUA Convention to deal with the WMD threats involving vessels. Furthermore, the institution of the ISPS Code helps ensure that ports and vessels do a better job of security planning and make security investments. Despite these advances, we are once again confronted with a gap between the goal of the LOS Convention—to have a permissive regime in which there are controlling international norms—and the truth at sea. Much blame can be attributed to the FOC issue since it allows unscrupulous operators and criminals to acquire ships and register in whatever state offers them the greatest protection against actions by coastal states and the lowest regulatory costs. If the enforcement entitlements were stronger, they could enhance the ability of states to protect themselves. One place to start is to expand

the right of approach and visit. Also, piracy, unauthorized broadcasting, and slave transport are the only “universal crimes” recognized under the LOS—and, even there, the definition of piracy needs refinement. The list needs to be broadened to include smuggling of illegal migrants, drugs, weapons, certain types of hazardous materials, and perhaps other types of contraband.

## **Some final points, and recommendations**

### **Keeping the LOS Convention as the baseline**

The fact that gaps have emerged in the 1982 Convention should come as no surprise and should not be taken as an indication that the Convention is flawed. States must address these emerging gaps by using the 1982 Convention as a baseline and applying supplemental instruments and actions—not by negotiating another agreement. It took nearly 20 years for the 1982 LOS Convention to be negotiated. With the rapid onset of planetary changes and the melting of polar ice, it is quite clear that we don’t have 20 years to negotiate another arrangement.

In crafting a set of recommendations, it is once again appropriate to reflect upon Burke and McDougal’s prescription for Public Order of the Oceans, especially in the context of the three baskets of challenges which we are now facing (excessive maritime claims, a breakdown in the fundamental contract between coastal and maritime states, and a permissive legal regime at sea). Solutions need to restore some of the balance of interests that were codified in the 1982 Convention between coastal states and maritime states and between the “have” states and the “have not” states so that:

- Entitlements to borders and resource are once again rules based and stabilized.
- Ocean actors have a responsible entity (flag state) monitoring their activities at sea so that their exercise of “freedom of the seas” does not burden the rights of others.
- The seas do not become a safe haven for criminal or terrorist enterprises simply because no enforcement authority is present and authorized to detect, deter, or defeat their illegal actions.

### **Confronting excessive maritime claims**

The recent increases in excessive maritime claims have the potential to seriously destabilize LOS Convention norms, especially when major industrialized countries such as China are involved in the illegal activities. Unfortunately, Article 298 of the LOS Convention enables states acceding to the convention to opt out of mandatory dispute settlement for a range of disputes, including most categories of “sea boundary” disputes and disputes

concerning military activities at sea and the propriety of law enforcement actions at sea. Given this issue, the United States and other major industrialized countries should give serious consideration to using political pressure to voluntarily push countries into dispute settlement. The recent decisions by the International Tribunal for the Law of the Sea concerning Myanmar and Bangladesh and two recent cases by the International Court of Justice—the Serpent Island case and the very recent dispute between Colombia and Nicaragua—firmly establish that international courts have “turned the corner” and are adept at applying the legal principles contained in the LOS Convention while, at the same time, not incentivizing states to engage in “island hopping” in order to carve up large swaths of ocean territory. These courts also have displayed an uncanny amount of political acumen to arrive at conclusions in which both sides are able to claim some measure of victory.

To set the stage for greater use of international courts, the United States should reconsider its withdrawal from the mandatory jurisdiction of the court during the Reagan administration in 1986 following an adverse decision in the Nicaragua Mining Case.<sup>72</sup> Given the stakes involved in a serious military conflict in the East China Sea or South China Sea involving a U.S. ally, principled U.S. leadership on the necessity of using courts to solve these sorts of issues is worthy of close consideration. Even though the United States might be *perceived* as sacrificing some sovereignty in the overall process, it can ill afford the “treaty trap” of getting dragged into a major conflict in the South or East China Sea involving a tiny scrap of oceanic territory.

On a technical level, the United States—perhaps in conjunction with other OECD states that do not have a vested interest in the major island or baseline disputes—should develop normative guidance which elaborates on the meaning of Article 121 vis-à-vis the entitlement to a full maritime zone. Similar to the UN’s publication in 1989 of interpretative guidance on establishment of straight baselines, an authoritative piece should be written and issued by the UN’s Division for Ocean Affairs. Given the recent trend in the case law to be very strict in not awarding full maritime zones to islands (if they would interfere with maritime zones from coastal states), there is a high probability that such a normative document would be beneficial and could guide future political and legal decisions. Also, given that a variety of countries—including those mentioned in this paper—have chosen to establish systems of straight baselines which grossly exceed the authorized standards, the United States should seek to “internationalize” this problem. It can and should push for action in the UN General Assembly (where there is no Chinese veto) to censure states that maintain excessive straight baselines. The United States might also enlist the aid of

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<sup>72</sup> Howard N. Meyer, “Isn’t it Time We Rejoin the World Court?” *George Mason’s History News Network*, May 26, 2003 (accessed on May 13, 2013), <http://www.hnn.us/articles/1465.html>.

like-minded maritime states to assist in conducting Freedom of Navigation protests and operational assertions.<sup>73</sup>

### **Confronting the FOC problem**

To restore the balance of interests between coastal states and maritime states as set forth in the LOS Convention, the principle of flag state control needs to be strictly enforced. If it is not, the result is a structural enforcement gap that provides legal safe havens for transnational criminals, terrorists, and unscrupulous ship owners, and, in the case of some flags, creates a regulatory “race to the bottom.” It is true that a global system of shipping that complies with all of the relevant rules may cost more at the front end and developing countries may want exceptional treatment. But there is overwhelming evidence that some categories of FOC vessels are among the world’s worst shipping. Given the parameters of international law that there must be a genuine link between the flag and the ship to assure adequate enforcement, there is no reason that flags of convenience registries should continue to be tolerated. There also is no reason that a developing country would want to risk its coastal resources and its security interests to allow those ships to operate in its waters.<sup>74</sup> It would seem far more beneficial to all countries if maritime investment capital remained “ashore” and did not move to states unconnected with their maritime activities. An increase in national registries could also result in more employment opportunities for local mariners and could build professionalism among regulatory authorities in coastal states.

When the question of FOC is debated, some argue that elimination of the practice would drive up the worldwide cost of shipping product around the globe because it would decrease competition among responsible freight haulers who are able, as in the case of a U.S. entity, to hire much cheaper foreign labor and sustain a lower cost of regulatory compliance. This argument has merit when it comes to many U.S.-owned ships that are registered in such places as the Marshall Islands and otherwise comply with all modern IMO standards because the U.S. Port State control system keeps them honest. It is true that this outsourcing of the U.S. flag may lower the cost of the end product—say, a pair of tennis shoes made in China and sold at Walmart. However, with FOC shipping, the United States cannot realize the employment and tax benefits associated with being able to regulate and tax shipping that is effectively connected with a U.S. retail enterprise such as Walmart. This costs the U.S. economy in the long run.

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<sup>73</sup> For a list of FON assertions from FY 1991 to present, see: <http://policy.defense.gov/OUSDP/Offices/ASDforGlobalStrategicAffairs/CounteringWeaponsofMassDestruction/FON.aspx>.

It also comes as no surprise that international labor, regional fishing organizations, and environmental groups have been seeking a ban on the FOC registry system. The relatively benign example of a Marshall Islands registered ship is not universal around the world, and many FOC ships do not even adhere to basic international labor standards. Additionally, as indicated above, many FOC ships are involved in illegal fishing and smuggling, and—regardless of whether their flag state has signed up to the IMO—deviate from accepted international standards regarding vessel source pollution. While the Walmart example may not be sufficient to tip the scales in favor of a global effort to eliminate this type of shipping, the behavior of many FOC vessels vis-à-vis nations which have little or no enforcement power does tip the balance in favor of insisting upon strict compliance with the LOS norms that there be a genuine link between the flag and the ship owner.

Short of a major diplomatic conference to negotiate an entirely new set of norms over flag state control and enforcement, there are less draconian options that policy-makers might consider in order to help contain the problems brought on by the FOC system. As things now stand, FOC states have political power at the IMO—which operates largely on the basis of consensus—and suggestions to put FOCs out of business cannot be reasonably followed at the IMO. But actions can be taken outside of the IMO. If states (in the broadest sense) stipulate that reforms to the FOC system are a necessary condition for access to their markets, they may eventually see the elimination of the FOC system.

In no particular order, suggestions include:

- Require states to use their contracting or tax authority to prevent their citizens from expensing the costs of transport for goods or services that are transported on a FOC vessel. Thus, for example, if goods purchased from a supplier in China are shipped to Los Angeles on a Liberian flag vessel, the seller of the goods in Los Angeles would not be able to write off the transportation costs as a cost of business under the U.S. internal revenue laws. The OECD would be a good place to begin developing such standards, which would need to be consistently implemented among all states.
- Bring a case or cases before the International Tribunal for the Law of the Sea to openly challenge FOC registrations as illegal under the LOS Convention because there is no genuine link between the flag and the owner, captain, and crew.
- Institute a standardized global vessel-marking system which allows for the permanent electronic marking and clear identification of vessel ownership to aid in law enforcement, regardless of any changes in the flag or name of the vessel.
- Push for more aggressive action within the OECD and WTO to recognize that use of FOC vessels distorts trade and should result in sanctions in a trade setting via the imposition of some type of punitive duty against cargoes which are transport-

ed on vessels from irresponsible FOC countries. The U.S. Coast Guard, for example, uses FOC “irresponsibility” criteria to differentiate among flag states for inspection purposes. A similar approach could be taken against cargoes being transported aboard irresponsibly operated vessels. Such a suggestion is not really far-fetched: the absence of environmental or labor regulations has long been recognized as a form of subsidy if a nation uses the absence of responsible regulation in order to gain an advantage for its own trade.

### **Strengthening enforcement regimes**

The problems with the current definition of *piracy* can be largely overcome through increased use of boarding agreements. That said, a new anti-piracy convention which addresses piracy, terrorism, and other serious criminal enterprises at sea (such as human trafficking and smuggling of narcotics and weapons) is not a bad idea. A close examination of the “Prosecute or Extradite” norm established in the 1970 Air Piracy Convention<sup>75</sup> is worthwhile given the current difficulties in prosecuting Somali pirates. Currently, when pirates are apprehended by states with modern penal systems, they simply gain a pathway out of their impoverished conditions. This enforcement model needs to be replaced with a system that deters piracy. A system favoring quick trials at sea (to minimize costs to the victims) followed by incarceration in the flag country or immediate vicinity of where the pirates came from should eliminate the current system, which, in some respects, rewards pirates with the promise of reasonable accommodations and the hope of citizenship in the country where they are ultimately confined.

If an effort to establish a new regime is deemed too difficult, broadening the SUA agreement to include a broader range of criminal or terrorist enterprises would be appropriate.<sup>76</sup> The problem of substandard shipping is partially being addressed through the sys-

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<sup>75</sup> *Convention for the Suppression of Unlawful Seizure of Aircraft*, December 16, 1970. Available at: <http://www1.umn.edu/humanrts/instree/hague1970.html>.

<sup>76</sup> The United States sought to broaden the scope of SUA at the 86th meeting of IMO’s Legal Committee on April 28–May 2, 2003. The United States wanted to include offenses against the security of navigation (terrorism) in the range of offenses requiring action by the flag state. The new definition, which was hotly debated, included criminal sanctions for ship owners and masters that knowingly transported terrorists, illicit cargoes, or weapons of mass destruction. Some delegations were uneasy with the definitions of terrorist activities and the evidentiary standards that would be needed before a ship could be boarded. There were also some concerns—probably unfounded—that a master could be surprised to have his ship boarded by naval commandos because he was unaware that he was carrying a nefarious cargo. The United States also sought to establish a reciprocal consent to boarding regime among SUA parties that was patterned after the procedures used in the counterdrug area, where flag states have given advance consent to board if certain conditions were met. Unfortunately, the United States did not make much headway on this particular issue because not all states that participated in the SUA meetings were fully conversant with this reciprocal boarding concept, which the United States and other major maritime powers have used successfully in the counterdrug arena.

tem of port state control, although smaller vessels and countries outside the MOU structure can escape scrutiny.<sup>77</sup> The Port State Control MOU system may be effective in denying the worse FOC vessels access to major commercial ports of many OECD countries. But why should any ship be allowed to operate if it doesn't subscribe to all of the relevant IMO standards and isn't regularly inspected by competent coast-guard-like authorities? As noted previously, more universality in the standards for ship design, construction, operation, *and* inspection will cost more at the front end—especially among developing countries. However, those costs will easily be offset by advantages once developing countries can responsibly manage their ocean resources and thereby sustain their populations.

Since it is difficult to determine which vessels are violating the rules against vessel source pollution on the high seas, it's usually hit or miss whether a coast guard or navy vessel will catch a polluting vessel *in flagrante-delicto*. The same is true with regard to illegal fishing, much of which occurs in the littoral areas of states that lack the resources to have vigorous enforcement. This type of theft or spoilage of a coastal state's resources because it lacks the funds to invest in a strong navy or coast guard is unconscionable and undermines the purposes of the LOS Convention to promote a licensing, not a larceny, scheme wherein coastal states can sustainably manage the resources in the EEZ. Drawing from history, in 1992 the UN General Assembly (UNGA) enacted a worldwide ban on large-scale driftnet shipping. In doing so, it invited all member states to report instances of this very destructive practice. In any event, in response to this UN Moratorium,<sup>78</sup> the United States banned the practice and enlisted the aid of DOD (particularly the Navy) to actively assist in global reporting of suspected violations of the driftnet ban on the high seas. There is no reason why, in the context of SUA or a stand-alone effort, warships of all nations could not be charged with an affirmative legal obligation to report suspected violations of another state's fisheries laws so that the coastal state can initiate action against the offending flag state or individual vessels.

One might also envision an UNGA resolution which “codifies” the right of warships to approach and visit any vessel engaged in illegal fishing in order to verify that the vessel is in fact operating under the control of a legitimate flag and that it has a proper license from the coastal state to fish in specified waters. Likewise, if a warship happens upon a vessel and there is an oil sheen or new waste in the water, it seems reasonable to author-

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<sup>77</sup> Because of the large costs involved, there is no incentive for shipowners—especially those from FOC nations—to want to pay routine pollution cleanup costs, since the LOS Convention has exceptionally strong provisions which protect the right of vessels from all flag states to exercise freedom of navigation. Also, unless a suspect vessel makes a port call or discharges cargo in a port that is subject to rigorous Port State Control inspections, there is little opportunity to catch offenders.

<sup>78</sup> U.S. Law endorses the UN General Assembly Action: 16 U.S.C. Sec. 1826.

ize the warship to approach and visit the suspected offender in order to see whether it had authority to make such overboard discharges. If it did not, the warship should be able to detain the offending vessel until coastal authorities can respond.

## Conclusion

When McDougal and Burke wrote about ocean governance, they envisioned a scheme of “mutual tolerance” of others’ activities coupled with “shared use of and shared competence over” the great common resources and a rational system of handling problems.<sup>79</sup> But it appears that we have reached the point where states are unwilling or unable to embrace the principles of “shared use” because of pressures from populations, politics, and other issues. Similarly, rational resolution of disputes is today an aspiration and not a reality when it comes to matters at sea. McDougal and Burke state: “The ancient fable of a group of monkeys on one end of seesaw is relevant: a single monkey may be able to race to the other end and pluck grapes from vines on an overhanging tree but if all of the monkeys suddenly raced, no monkey gets any grapes.”<sup>80</sup> Reasonable minds can and will differ as to whether any single issue identified in this paper is so severe as to cause a collapse in oceans governance and on what the timing of such a collapse might be. But it would be foolhardy to think that freedom of the seas is guaranteed as an inalienable right of mankind. Freedom comes at a cost. Now is the time to make an honest assessment of the state of oceans governance and make the political investments necessary to preserve Public Order on the Seas.

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<sup>79</sup> McDougal and Burke, *Public Order of the Oceans*, 1138.

<sup>80</sup> *Ibid.*, 52.



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