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Cooperative Mechanisms and Maritime Security in Areas of Overlapping Claims to Maritime Jurisdiction

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Abstract

This chapter outlines progress in the delimitation of maritime boundaries and some of the problems relating to overlapping claims to maritime jurisdiction. It is contended that the incomplete nature of the maritime political map of the world is problematic, in particular because lack of delimitation inevitably equates to jurisdictional uncertainty and this is highly likely to be detrimental to maritime security. Alternatives to maritime boundary delimitation - cooperative mechanisms in areas of overlapping jurisdiction - are then addressed, including their emerging applicability to maritime security issues as well as the Southeast Asian experience.

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COOPERATIVE MECHANISMS AND MARITIME SECURITY IN AREAS OF OVERLAPPING CLAIMS TO MARITIME JURISDICTION

Clive Schofield

Introduction

This chapter outlines progress in the delimitation of maritime boundaries and some of the problems relating to overlapping claims to maritime jurisdiction. It is contended that the incomplete nature of the maritime political map of the world is problematic, in particular because lack of delimitation inevitably equates to jurisdictional uncertainty and this is highly likely to be detrimental to maritime security. Alternatives to maritime boundary delimitation – cooperative mechanisms in areas of overlapping jurisdiction – are then addressed, including their emerging applicability to maritime security issues as well as the Southeast Asian experience.

Progress Maritime Boundary Delimitation

The mosaic of international maritime boundaries around the world's oceans is profoundly incomplete. The need for such boundaries is longstanding but has increased markedly in step with the tremendous increase in the maritime space coming under the jurisdiction of coastal states in the post-World War II period. Indeed, it has been calculated that as much as 44.5% of the oceans could be subject to some national claim to maritime jurisdiction were every coastal state to claim a full 200 nautical mile (nm) Exclusive Economic Zone (EEZ) and advance claims to extended continental shelf jurisdiction beyond 200nm where applicable.[1]

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1 J.R.V. Prescott and C.H. Schofield, *The Maritime Political Boundaries of the World* (Martinus Nijhoff Publishers, Leiden/Boston, 2005), chapters 2 and 10.

As a consequence of the significant spatial extension of coastal state claims offshore, particularly as a consequence of the enthusiastic adoption of 200nm EEZ claims around the world, there has been a proliferation in the number of potential maritime boundaries worldwide. Inevitably a profusion of overlapping jurisdictional claims and offshore boundary disputes have also emerged as states seek to secure the maximum maritime entitlements for themselves. The international law rules governing the delimitation of maritime boundaries laid down in the United Nations Convention on the Law of the Sea (LOSC) provide only minimalist guidance as to how such disputes may be resolved, particularly in respect of the broad resource-oriented national zones of sovereign rights, the continental shelf and EEZ.

While Article 15 dealing with the delimitation of the territorial sea favours equidistance as a method of delimitation, unless the States concerned agree otherwise or there exists an "historic title or other special circumstances" in the area to be delimited, this is not the case for the continental shelf and EEZ.[2] For the EEZ and continental shelf, LOSC Articles 74 and 83 respectively use the same general language, calling for agreement to be reached on the basis of international law in order to achieve "an equitable solution".[3] No preferred method of delimitation is indicated and thus the LOSC's 'rules', if one can term them that, on delimitation are open to wildly conflicting interpretation. Additionally, sovereignty disputes, especially over islands, have complicated matters and made a number of conflicting claims to maritime space extremely hard to resolve.

Of an estimated 427 potential maritime boundaries around the world, only about 168 (39%) have been formally agreed. Many of these have been settled only partially, that is, the settlement is incomplete in terms of boundary length and/or functionally in respect of the maritime

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2 The Law of the Sea Convention (UNCLOS) (United Nations, New York, 1983), Article 15.

3 Ibid., Articles 74 and 83.

zones delimited, for instance seabed only but not water column.[4] In terms of the number and complexity of overlapping jurisdictional and sovereignty claims, Southeast Asian waters are perhaps the most disputed regional seas the world over. These claims are complicated by the presence of territorial disputes over islands and have been exacerbated by increasing concerns over securing maritime resources, especially oil and gas. Less than half of the potential maritime boundaries in Southeast Asia have been even partially resolved, leaving substantial zones of overlapping claims to maritime jurisdiction. Is this a problem and why should the resolution of, or at least management of, these competing claims be a priority?

The Purpose and Value of Maritime Boundaries

It can be contended that the delimitation of maritime boundaries provides clarity and certainty to all maritime states and users, helps to minimise the risk of friction and conflict by eliminating a source of bi- and multilateral dispute and removes barriers to cooperation, thus enhancing the potential for cooperative maritime enforcement and enhanced maritime security. Greater compliance with international obligations with respect to jurisdiction, security and freedom of navigation can have direct and tangible benefits to the states involved as well as other maritime users. The facilitation of common approaches to maritime jurisdiction and legislation can thus lead to enhanced

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4 Prescott and Schofield, *Maritime Political Boundaries*, chapter 10. Based on US Department of State figures updated by the author. See, United States Department of State, 'Maritime Boundaries of the World', *Limits in the Seas*, No. 108 (Bureau of Oceans and International Environmental and Scientific Affairs, Washington D.C., 1988). This analysis was allied to the review of agreements contained in the *International Maritime Boundaries* series. This figure excludes the seven potential boundaries of the Caspian Sea, which for this analysis are not considered to be maritime boundaries, as well as potential 'boundaries' between coastal states and the International Sea Bed Authority concerning the outer limit of the continental shelf. Additionally, multiple delimitations relating to the same maritime boundary situation are excluded as are internal delimitations such as those amongst the Emirates that now make up the UAE. See J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries*, vols. I and II (Martinus Nijhoff, The Hague, 1993); J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries*, vol. III, (Martinus Nijhoff, The Hague, 1998); J.I. Charney and R.W. Smith (eds.), *International Maritime Boundaries*, vol. IV (Martinus Nijhoff, The Hague, 2002); and R.W. Smith and D. Colson, (eds.), *International Maritime Boundaries*, vol. V (Martinus Nijhoff, The Hague, 2005).

economic security. Additionally, maritime delimitation can also facilitate the sustainable management and preservation of important ocean resources.

Conversely, lack of delimitation often equates to extensive overlapping claims to jurisdiction and this situation tends to exacerbate management problems. Within such contested zones, access to seabed resources potentially crucial to the well-being and political stability of the coastal states involved is prevented. Similarly, with regard to significant living resources, competing claims can lead to uncoordinated policies and potentially destructive and unsustainable competition and friction between rival states which have the potential to escalate into political and even military confrontation.

Furthermore, overlapping claims undermine maritime security as the LOSC, and coastal states themselves, tends to favour exclusively national maritime enforcement measures, in spite of the way in which the marine environment transcends national maritime claims and boundaries.[5] It can be argued that overlapping claims areas represent potential lacunae in maritime enforcement as, where jurisdiction is contested, it follows that surveillance and enforcement will remain similarly uncertain, or at least ill coordinated.

Maritime boundary delimitation can therefore be viewed as essential to the full realisation of maritime security, the peaceful management of ocean resources and regional peace and prosperity. It is for these reasons that CSCAP has repeatedly argued in favour of the delimitation of maritime boundaries and resolution of maritime jurisdictional disputes, for example:

> ***Maritime Boundary Delimitation***
>
> Boundary delimitation between opposite and/or adjacent States would assist cooperation to achieve law and order at sea. Regional States should move expeditiously to resolve existing boundary disputes to ensure that jurisdiction might properly be exercised in applicable zones. If boundaries cannot be resolved, economies should be prepared to enter

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5 B.H. Oxman, 'Political, Strategic, and Historical Considerations', in Charney and Alexander (eds.), *International Maritime Boundaries*, vol. I, 2-40, at p. 4.

> into some form of provisional arrangements for the maintenance of law and order in the disputed area without prejudice to their positions in the boundary negotiations.[6]

Alternatives to Delimitation

Although maritime boundaries are the dominant means of governing and defining national claims to maritime jurisdiction and are clearly the type of management regime favoured by coastal states, it is clear that many overlapping claims to maritime jurisdiction, especially those involving sovereignty disputes over islands of which there are numerous examples in the Asia-Pacific region, are likely to be extremely hard to resolve in the foreseeable future. In this context it is therefore worth considering alternatives to the delimitation of international boundaries and the adoption of cooperative mechanisms providing for shared rather than unilateral management of maritime space. The principle form of cooperative mechanism to emerge in the maritime context in recent years is maritime joint development zones.

The legal rationale for joint development is provided by LOSC Articles 74(3) and 83(3) dealing with the delimitation of the exclusive economic zone and continental shelf respectively. These articles state, in identical terms, that:

> Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.[7]

Joint development zones have attracted considerable enthusiasm from commentators as a means of overcoming seemingly intractable maritime boundary disputes. Where the parties concerned appear to be deadlocked and there appears to be little prospect of agreement on a boundary line in the foreseeable future, it has been argued that joint development

6 CSCAP Memorandum No.8.

7 UNCLOS, Articles 74(3) and 83(3).

agreements seem to offer an ideal way forward, placing the focus squarely on "a fair division of the resources at stake, rather than on the determination of an artificial line".[8]

According to their advocates, maritime joint development affords the parties concerned the opportunity to retain their claims whilst simultaneously pushing forward with the development or management of the resources or environment involved without undue delay. The existence of 'without prejudice' clauses in this context provides an effective means by which sovereignty concerns can be sidestepped and legal concerns over compromising jurisdictional claims can be addressed. A good example of this type of clause is Article 4 dealing with the non-renunciation of claims in the Nigeria and Sao Tomé and Príncipe treaty establishing a joint zone between them of 2001:

> 4.1 Nothing contained in this Treaty shall be interpreted as a renunciation of any right or claim relating to the whole or any part of the Zone by either State Party or as recognition of the other State Party's position with regard to any right or claim to the Zone or any part thereof.
>
> 4.2 No act or activities taking place as a consequence of this Treaty or its operation, and no law operating in the zone by virtue of this Treaty, may be relied on as a basis for asserting, supporting or denying the position of either State Party with regard to rights or claims over the Zone or any part thereof.[9]

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8 E.L. Richardson, 'Jan Mayen in Perspective', *American Journal of International Law*, 82 (1988), 443-458. See also S.P. Jagota, 'Maritime Boundary and Joint Development Zones: Emerging Trends', *Ocean Yearbook*, 10 (1993) 110-131; K. Lagoni, 'Interim Measures Pending Maritime Delimitation Agreements', *American Journal of International Law*, 78 (1984), 345-368; D. Ong, 'Southeast Asian State Practice on the Joint Development of Offshore Oil and Gas Deposits', in Blake et al. (eds.), *The Peaceful Management of Transboundary Resources* (Graham and Trotman, London, 1995), 77-96; and M. Miyoshi, 'The Joint Development of Offshore Oil and Gas in Relation to Maritime Boundary Delimitation', *Maritime Briefing*, 2, 5, (International Boundaries Research Unit, Durham, 1999).

9 'Treaty between the Federal Republic of Nigeria and the Democratic Republic of Sao Tomé' and 'Príncipe on the Joint Development of Petroleum and other Resources, in respect of Areas of the Exclusive Economic Zone of the two States', (21 February 2001), Article 4 . For treaty text see: <www.un.org/Depts/los/legislationandtreaties.htm>

In fact, these provisions are based on the British Institute of International and Comparative Law's (BIICL) pioneering work on drawing up a 'model' joint development agreement. The inclusion of the BIICL's draft provisions in a formal treaty establishing a joint zone represents a welcome and encouraging example of an academic or 'track-two' process having a clear impact on policy-making in the real world.[10]

Entering into a joint development arrangement can also be viewed as a cooperative approach rather than the potentially confrontational quest for a geographically precise and legally final and binding traditional boundary line. As a result cooperative mechanisms can be viewed as a means of conflict prevention and, ideally, as a form of confidence building mechanism. It has been observed that:

> Such arrangements enable States to make use of the disputed areas and to conduct normal relations there. In the absence of such arrangements, State may feel compelled at some cost, to forcefully challenge each other's actions in the area to maintain their legal rights.[11]

The delimitation of a boundary line also raises concerns that the resources at stake may end up on the 'wrong' side of the line. This is often a consideration where seabed energy resources are at stake as the precise location of reserves is frequently not known until exploration starts in earnest and test wells are drilled. Joint development removes the need to define a boundary line and thus circumvents this problem – removing it as a potential deterrent to agreement.[12]

The alternate view is that it seems inappropriate to promote joint development simply on the basis that the contending parties to a dispute over overlapping maritime claims have proved unable to resolve their differences. It can also be argued that if joint zones are based on the

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10 H. Fox (ed.), *Joint Development of Offshore Oil and Gas* (British Institute of International and Comparative Law, London, 1989).

11 J.I. Charney, 'Progress in International Maritime Delimitation Law', *American Journal of International Law*, 88 (1994), 227.

12 C.H. Schofield, 'Joint Development Zones: Constructive Solution or Complication?', in *Ocean Management Related to Maritime Zones*, Proceedings of Regional Symposium on Maritime Boundary Delimitation of the Organisation of Eastern Caribbean States (St. Lucia, July 1996) 60-80.

limits of such overlapping claims areas, as tends to be the case, then this serves to encourage and reward extreme unilateral maritime claims. Furthermore, the practical task of establishing and maintaining such potentially dauntingly complex arrangements should not be underestimated as this requires considerable political commitment from all parties as they do represent a significant challenge to state sovereignty. Indeed, it has been stated that:

> The conclusion of any joint development arrangement, in the absence of the appropriate level of consent between the parties, is merely redrafting the problem and possibly complicating it further.[13]

In this context it is also reasonable to observe that if seabed resources are at stake, as is often the case, development of those resources is likely to take decades to realise. International oil companies demand political, legal and financial certainty before they make the multi-million dollar commitments that are required to pursue hydrocarbon exploration operations. Continuity is therefore a requirement which means that any cooperative mechanism must be founded on a strong bilateral political relationship and thus be able to survive a change in government in one or both states concerned.

These concerns are exacerbated by sensitivities over security cooperation. The parties may harbour fears over intelligence gathering by the 'other' side in the joint zone. This reinforces the point that political will remains a crucial factor in joint zones, just as it is in the realisation and subsequent management of a maritime boundary agreement.

Nevertheless, it is clear that emerging state practice appears to favour joint development arrangements and that such arrangements are in line with international law, including the LOSC. Joint development arrangements therefore do offer a flexible and practical way forward

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13 W.G. Stormont and I. Townsend-Gault, 'Offshore Petroleum Joint Development Arrangements: Functional Instrument? Compromise? Obligation?', in Blake et al. (eds.) *The Peaceful Management of Transboundary Resources*, (Graham and Trotman, London, 1995), 52. Similarly, Jagota has noted that "sensitive security conditions in the area, incompatible political relations between the disputants, vertical or dependent economic relations, reluctance to transfer technology or to co develop [sic] technology, and other similar inconsistencies may generate resistance to joint development zones, with or without a maritime boundary." ('Maritime Boundary and Joint Development Zones', 117).

for states with seemingly intractable disputes over overlapping maritime claims with their neighbours. Furthermore, a number of precedents exist, including in the Southeast Asian and East Asian regional context.

Cooperative Mechanisms in Southeast Asia

Southeast and East Asia boasts considerable experience in terms of cooperative mechanisms and maritime joint development zones. The region hosts two joint zones which have been established in addition to the delimitation of a maritime boundary. These are the agreement concluded between Australia and Papua New Guinea (PNG) in 1978 concerning the Torres Strait[14] and China and Vietnam straddling their maritime boundary agreement in the Gulf of Tonkin (Beibu Gulf to China) of 25 December 2000.[15] The former agreement is of particular note as it is complex and creative and provides an excellent example of a cooperative mechanism that, unlike many, is not focussed on seabed resources. The Torres Strait agreement was especially innovative in that within the protected zone, established with the aim of guarding traditional fishing activities and regulating the exploitation of commercial fisheries, separate continental shelf and fisheries boundaries were delimited. This feature of the agreement, coupled with its detailed regulatory regime addressed the 'problem' of existence of several Australian islands located near to the PNG coast and thus on the 'wrong' side of the median line between the two states' mainland coastlines. As a result of the dual boundary approach, these islands fall on the Australian side of the fisheries boundary but the PNG side of the continental shelf jurisdiction line.[16] The Gulf of Tonkin agreement relates

14 'Treaty between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, including the Area Known as Torres Strait, and Related Matters', (18 December 1978, entry into force 15 February 1985). For treaty text, see <www.un.org/Depts/los/legislationandtreaties.htm>.

15 Agreement between the People's Republic of China and the Socialist Republic of Viet Nam on the Delimitation of the Territorial Sea, the Exclusive Economic Zone and Continental Shelf in Beibu Bay/Gulf of Tonkin (25 December 2000). For treaty text, see <www.un.org/Depts/los/legislationandtreaties.htm>

16 C.H. Schofield and M.A. Pratt, 'Cooperation in the Absence of Maritime Boundary Agreements: The Purpose and Value of Joint Development', in *The Aegean Sea 2000*, Proceedings of International Symposium on the Aegean Sea (Bodrum, Turkey, 5-7 May, 2000), 152-164.

to joint fisheries activities and was vital to securing agreement on delimitation of the two states' maritime boundary in that area.

Several other arrangements have also been established in the absence of maritime delimitation. These include the long-standing joint zone between Japan and South Korea in the East China Sea which was concluded in 1974. This agreement represents a classic example of a joint zone concerned with enabling seabed exploration activities to proceed where deadlock had been reached on continental shelf boundary negotiations.[17] The Gulf of Thailand also hosts two fully-fledged cooperative arrangements, both concerned with seabed resources, between Malaysia and Thailand of 1979[18] and between Malaysia and Vietnam of 1992.[19] The contrast between these two arrangements is stark. The Thai-Malaysian agreement is institutionally complex and took over 10 years to implement as a consequence of disputes over previously granted concessions as well as faltering political will.[20] In contrast, the Malaysia-Vietnam agreement avoids regime-building in favour of a simple, practical arrangement facilitating resource exploitation through cooperation between the two states' national oil companies. In both cases costs and revenues are to be shared equally.[21] Another joint arrangement within the Gulf of Thailand is that between Cambodia and Vietnam dating from 1972. This is a somewhat peculiar arrangement, dealing as it does with joint historic waters located within the two states' straight baseline claims. The joint development mosaic in the Gulf of Thailand also appears set to become yet more complex as Cambodia and Thailand

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17 Miyoshi, 'The Joint Development of Offshore Oil and Gas', 12-14.

18 Memorandum of Understanding between the Kingdom of Thailand and Malaysia on the Delimitation of the Continental Shelf Boundary between the Two Countries in the Gulf of Thailand (24 October 1979, entry into force 15 July 1982). For treaty text, see <www.un.org/Depts/los/legislationandtreaties.htm>

19 Memorandum of Understanding between Malaysia and the Socialist Republic of Vietnam for the Exploration and Exploitation of Petroleum in a Defined Area of the Continental Shelf Involving the Two Countries (5 June 1992, entry into force 4 June 1993).

20 Agreement between the Government of Malaysia and the Government of the Kingdom of Thailand on the Constitution and Other Matters Relating to the Establishment of the Malaysia-Thailand Joint Authority (30 May 1990); Miyoshi, 'The Joint Development of Offshore Oil and Gas', 14-17. See also, Ong, 'Southeast Asian State Practice'.

21 Miyoshi, 'The Joint Development of Offshore Oil and Gas', 21.

signed a Memorandum of Understanding in June 2001. This accord commits them to delimitation in the northern part (above 11° N. latitude) of their large area of overlapping claims in the Gulf of Thailand, coupled with the establishment of a joint development zone to the south, although no formal agreement has yet been forthcoming.

Perhaps the most sophisticated maritime joint development zone developed around the world was the Timor Gap Zone of Cooperation between Australia and Indonesia established through a Treaty signed in December 1989 with additional detailed regulations being added in 1991. Covering an area of 60,500 km² the Timor Gap arrangement was divided into three sub zones. The initial duration of the agreement was 40 years, to be followed by successive terms of 20 years. The agreement became defunct, however, with Timor Leste's (East Timor) independence. The Timor Gap was a complex yet also highly innovative and comprehensive maritime joint development zone and many commentators have suggested that it represents a 'model' for joint development elsewhere around the world.[22]

On independence East Timor maintained that it was not bound by any of the agreements related to East Timor's territory entered into by Jakarta – including the Timor Gap joint development zone. A breakthrough was made in 2002, however, when an interim arrangement, termed the Timor Sea Treaty (TST), was signed.[23] The TST established a Joint Petroleum Development Area (JPDA) which encompasses the central part of the old Australia-Indonesia joint zone. Unlike the other joint zones mentioned, sharing of revenues within the JPDA is unequal with East Timor set to receive a 90% share of government revenues therein. The TST entered into force in April 2003, allowing production of natural gas from the Baya-Undan field located within the JPDA from February 2004.[24]

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22 Fox, *Joint Development of Offshore Oil and Gas;* and Miyoshi, 'The Joint Development of Offshore Oil and Gas', 17-20.

23 'Timor Sea Treaty' (Dili, 20 May 2002, entry into force 2 April 2003). For treaty text, see <www.un.org/Depts/los/legislationandtreaties.htm>

24 C.H. Schofield, 'Dividing the Resources of the Timor Sea: A Matter of Life and Death for East Timor', *Contemporary Southeast Asia,* 27(2) (August 2005), 255-280.

Additionally, a number of joint fisheries agreements have been established in East Asia. These include ones between China and Japan in the East China Sea of 11 November 1997, Japan and South Korea in the East China Sea and Sea of Japan (East Sea to Korea) of January 2000 and China and South Korea in the Yellow Sea of 30 June 2001.[25] These agreements emerged as a result of all three States ratifying the LOSC and claiming EEZs in 1996, resulting in overlapping entitlements and a renewed need for either maritime boundary delimitation or a mechanism to deal with their overlapping claims until such boundary agreements are put in place.

Together these agreements represent a significant step forward in cooperative management of shared resources and the establishment of a conflict avoidance architecture. All three agreements share the virtue that they are based on the LOSC regime, having stemmed from each state's EEZ claims. They are also based on shared interests and recognition of their mutual, functional requirement for cooperation in order to conserve and manage fisheries resources that are under severe pressure. Perhaps most significantly, the joint arrangements have helped to stabilise bilateral fisheries relations and reduce conflicts. The agreements also have the potential to act as confidence-building mechanisms in the longer term as bilateral contacts and relationships are being deepened through the establishment of joint institutions such as Joint Fisheries Committees. These cooperative mechanisms relating to fisheries have tended to encourage the promulgation of fresh enforcement legislation and even though enforcement takes place on a flag State basis, indirect enforcement cooperation is encouraged. These positive outcomes have proved achievable as a consequence of the provisional nature of the agreements which are without prejudice to final maritime boundary delimitation.

The joint fisheries zones in East Asia do have significant drawbacks. A key problem relates to their geographical scope. They are incomplete, covering only parts of East Asia's maritime space and lack an ecosystem-

25 The China – Japan agreement was signed on 11 November 1997 and entered into force on 1 June 2000; the South Korea – Japan agreement entered into force in January 1999; and the China – South Korea agreement entered into force on 30 June 2001. See S.P. Kim, 'The UN Convention on the Law of the Sea and New Fisheries Agreements in North East Asia', *Marine Policy*, 27 (2003), 97-109.

wide approach. Indeed, there are large "current fishing patterns" zones where fishing is uncoordinated and unregulated. Another problematic issue is that there are overlaps between the various zones. Furthermore, enforcement is on a flag state basis with minimal joint enforcement envisaged and, crucially, there are no provisions for enforcement against third parties. The latter issue is especially problematic in the East China Sea where Taiwan is a party to none of the agreements, yet Taiwanese fishermen are very active in these waters. It is also worth observing that the agreements have themselves been a source of controversy, protests and dispute within the participating countries, often because of their perceived relationship to sovereignty disputes over islands.

Overall, however, the joint fisheries zones in the East Asia represent an encouraging migration of rhetoric on cooperation into practical joint management and cooperative enforcement and information sharing. As such, these bilateral mechanisms offer potential building blocks for regional agreement and multilateral approach to ocean management.[26]

Eleven cooperative mechanisms have therefore been negotiated throughout the region with a further joint zone currently subject to negotiations. This demonstrates that there is an abundance of enthusiasm, experience and capacity in Southeast and East Asia for cooperative mechanisms.

Cooperative Mechanisms and Maritime Security

How have issues of security, enforcement and criminal jurisdiction been handled in joint development zones in the absence of delimitation? Perhaps unsurprisingly, most maritime joint development zones have been inspired by the desire to gain access to or manage resources, especially seabed resources. The provisions of such agreements have therefore been limited in terms of maritime security. However, more recent, post 9/11, agreements have proved to be more explicit in dealing with these concerns.

For example, in the agreement establishing a joint zone between Nigeria and São Tomé and Príncipe, Article 9 establishes a Joint Authority and lists its functions including the following specific clauses:

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26 For a full analysis of these provisional fishery agreements see ibid., 107.

(h) Controlling the movements into, within and out of the Zone of vessels, aircraft, structures, equipment and people;

(i) The establishment of safety zones and restricted zones, consistent with international law, to ensure the safety of navigation, petroleum activities, fishing activities and other development activities and the effective management of the Zone;

(k) The regulation of marine scientific research;

(o) The preservation of the marine environment...

(r) Requesting action by the appropriate authorities of the States Parties consistent with this Treaty, in respect of the following matters:

(i) Search and rescue operations in the Zone;

(ii) Deterrence and suppression of terrorist or other threats to vessels and structures engaged in development activities in the Zone; and

(iii) The prevention or remedying of pollution;[27]

Furthermore, under Article 43 dealing with security and policing in the Zone it is stated that:

43.1 The States Parties shall...jointly conduct defence or police activities throughout the Zone...

43.2 If and to the extend that either State Party shall fail to comply...then without prejudice to any other rights the other State Party may have, nothing in this Treaty shall prevent that other State Party from separately carrying on such activities to such an extent as it considers necessary or appropriate.

43.3 The States Parties shall consult with each other...

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[27] 'Treaty between the Federal Republic of Nigeria and the Democratic Republic of Sao Tomé and Príncipe on the Joint Development of Petroleum and other Resources, in Respect of Areas of the Exclusive Economic Zone of the Two States' (21 February 2001), Article 9.

> 43.4 This article is without prejudice to any other basis for the conduct of defence or police activities which either State Party may have under international law.[28]

Similarly, the Timor Sea Treaty establishing a Joint Petroleum Development Area between Australia and Timor-Leste contains specific provisions in respect of both surveillance and security:

> ***Article 18. Surveillance***
>
> (a) For the purposes of this Treaty, Australia and East Timor shall have the right to undertake surveillance activities.
>
> (b) Australia and East Timor shall cooperate on and coordinate any surveillance activities carried out in accordance with paragraph (a).
>
> (c) Australia and East Timor shall exchange information derived from any surveillance activities carried out in accordance with paragraph (a).
>
> ***Article 19. Security measures***
>
> (a) Australia and East Timor shall exchange information on likely threats to, or security incidents relating to, exploration of petroleum resources in the JPDA.
>
> (b) Australia and East Timor shall make arrangements for responding to security incidents in the JPDA.[29]

While these provisions are broad indeed they do show how "provisional arrangements of a practical nature" can address issues other than the exploitation and management of seabed or living resources. It is increasingly likely that this will prove the case in the future.

An alternative way to address the issue of maritime security in zones of overlapping claims to jurisdiction, but one which avoids the need to enter into a formal agreement establishing a cooperative mechanism such as a joint zone, is to enter into informal operational arrangements.

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28 Ibid., Article 43.

29 'Timor Sea Treaty' (Dili, 20 May 2002), Articles 18 and 19.

In circumstances where achieving even a non-prejudicial provisional arrangement of a practical nature is problematic, practically orientated operational understandings offer an alternative way forward. In this context the arrangements in place between the United Kingdom maritime enforcement authorities and their French and Irish counterparts for the policing of their respective "grey zones" of overlapping fisheries zone claims provide an excellent example of what can be achieved. Close contact is maintained between the operational units charged with patrolling the respective fisheries zones and they coordinate amongst themselves as to who will police the grey zones, and when. Where a vessel is apprehended fishing illegally, they are prosecuted under the jurisdiction of whichever state's enforcement patrol made the arrest. In this case cooperation is substantially aided by the fact that the parties are close allies with longstanding navy-to-navy cooperation in place and that the relevant rules and regulations are harmonised as part of the common EU fisheries 'pond'. It must be recognized that the scenario is substantially different in Southeast and East Asia. Nonetheless, such engagement at the operational level must be viewed as highly desirable and an ideal and laudably practical way to help ensure maritime security and enforcement in overlapping claims areas even in the absence of any formal agreement among the parties concerned.

Conclusions

Given the fluid nature of the marine environment and thus the way in which many marine resources transcend artificial political boundaries, as well as the transnational nature of many marine activities, it may seem odd to advocate a system of international maritime boundaries. Nonetheless, most states seem to prefer unilateral management regimes and this is reflected in the LOSC. While maritime boundary delimitation may not necessarily represent the ideal basis for integrated management of ocean affairs, it does represent the dominant approach adopted by coastal states to govern maritime rights and responsibilities. On this basis it can therefore be argued that maritime delimitation is preferable to broad zones of overlapping claims, competing activities and lack of coordinated ocean management. A comprehensive network of delimited

maritime boundaries can therefore provide a clear framework for maritime surveillance, enforcement activities and thus maritime security.

Where maritime boundary delimitation proves problematic, however, the LOSC provides for "provisional arrangements of a practical nature" – maritime joint development zones and cooperative mechanisms – and this type of approach is increasingly supported by state practice. Indeed, Southeast and East Asia are leading the way in terms of applying this type of practical oceans management and conflict avoidance mechanism and this argues that there is already considerable practical experience and capacity within the region. This provides hope that the numerous remaining zones of overlapping claims in the region can be addressed in a similar manner. The way in which cooperative mechanisms have been adapted to address security concerns is also a positive development and a fresh opportunity as well as challenge for the states concerned.

Although joint zones or similar cooperative mechanisms should not be entered into lightly, they can be viewed as being preferable to contested overlapping claims areas. Nonetheless, the practical efficacy of such cooperative mechanisms, with regard to maritime security or any other function, is, ultimately, fundamentally dependent on the degree of genuine cooperation among the parties as well as their joint capacity to undertake the considerable responsibilities entailed.