

Papers in Australian Maritime Affairs

No. 22

Freedom of Navigation in the Indo-Pacific Region



Stuart Kaye

SEA POWER CENTRE - AUSTRALIA





FREEDOM OF
NAVIGATION IN
THE INDO-PACIFIC
REGION

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Stuart Kaye

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Papers in Australian Maritime Affairs

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About the Author

Stuart Kaye was appointed to a Chair in Law at the University of Melbourne in 2006. Prior to that, he was the Dean of Law at the University of Wollongong from 2002-06, and Head of School at James Cook University Law School from 2001-02. He holds degrees in arts and law from the University of Sydney, winning the Law Graduates' Association Medal, and a doctorate in law from Dalhousie University. He is admitted as a barrister of the Supreme Courts of New South Wales, Tasmania and Queensland, and of the High Court of Australia.

Professor Kaye has a research interest in the law of the sea and international law generally, and has published extensively in these areas. He has written a number of books including *Australia's Maritime Boundaries* (2nd edn, 2001), *The Torres Strait* (1997), *Human Rights in International and Australian Law* (with R. Piotrowicz)(2001), and *International Fisheries Management* (2001). He was appointed by Australia to the International Hydrographic Organization's Panel of Experts on Maritime Boundary Delimitation in 1995 and in 2000 was appointed by Australia to the List of Arbitrators under the 1991 Madrid Protocol to the Antarctic Treaty. He was made a Fellow of the Royal Geographical Society in 2007.

Professor Kaye is the current Chair of the Australian International Humanitarian Law Dissemination Committee. He has undertaken consulting work for government and industry, including the Australian Departments of Defence; Agriculture, Forestry and Fisheries; Finance; Environment and Heritage and Geoscience Australia, AusAid, the Canadian International Development Agency, the Canadian Department of Fisheries and Oceans, the US Navy and the Commonwealth Secretariat. He has presented papers in Australia, New Zealand, Canada, the United States, the European Union, southern Africa, the South Pacific and South East Asia. He appeared for the Government of Tasmania in constitutional litigation in the High Court of Australia in *Grain Poll of Western Australia v Commonwealth* (2000) 202 CLR 479.

Professor Kaye is also a legal officer in the Royal Australian Navy Reserve, principally providing advice on operations and international law.

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Abbreviations

ADF	Australian Defence Force
ASL	Archipelagic Sea Lanes
EEZ	Exclusive Economic Zone
IMO	International Maritime Organization
ISPS	<i>International Ship and Port Facility Security Code</i>
LOSC	<i>United Nations Convention on the Law of the Sea 1982</i>
MV	Merchant Vessel
nm	nautical mile
NWC	(United States) Naval War College
RAN	Royal Australian Navy
USN	United States Navy

Emerging Issues in the Law of the Sea to 2020 and their Impacts for Australia and the Indo-Pacific Region

International law generally, and the law of the sea in particular, exert a tremendous influence on Australian interests, not merely in the oceans around the continent, but within the Australian economy generally. Australia asserts its jurisdiction over the largest maritime area in the world, with an exclusive economic zone (EEZ) and continental shelf over 1.5 times the size of mainland Australia,¹ and a search and rescue responsibility covering 10 per cent of the globe.² Over 95 per cent by volume of Australian international trade reaches Australia by sea.³ Over 99 per cent of the data traffic passing along communications links reaches Australia through fibre optic submarine cables.⁴ The Australian fishing industry, although small by world standards, generates over \$50 billion per annum into the national economy.⁵ More fundamentally, over 85 per cent of the Australian population lives within an hour of the coastline, all of which provides a strong domestic security imperative for the Australian Defence Force (ADF) and other Government agencies to keep Australia's maritime areas adequately under surveillance and protected. The law of the sea has a direct impact on ensuring these interests can be protected and the means and mechanisms available to Australia to do so. This paper examines relevant trends in the law of the sea that impact upon Australian interests, and assesses regional law of the sea practice.

In part, this paper has been prepared as an analysis of, and response to, the paper entitled *A Stronger and More Prosperous World through Secure and Accessible Seas* prepared at the United States Naval War College (NWC) under the direction of the then Stockton Professor of International Law, Craig Allen. That paper was the result of a workshop on the future legal global order and was attended by 42 legal experts, from the United States and 10 other States working in government and academia, in November 2006. The workshop participants, on a non-attributable basis, attempted to predict the shape and content of international law as it would affect global legal order between 2006 and 2020. This paper will examine the conclusions reached by the experts in the NWC paper and comment on their conclusions. As an effort at prognostication, it is impossible to evaluate the validity of the conclusions reached, as it relates to events that have yet to occur, and may not occur for over a decade into the future. It will however, attempt to test the probability of the experts' predictions, in the light of current developments and past State practice.

Freedom of Navigation

Given Australia's strong reliance on its seaborne trade, the ability of vessels to navigate without substantial restriction around the world is a critical issue. Even though the bulk of this trade is carried in vessels registered in other States, it is vital to Australian interests that the guarantees in the *United Nations Convention on the Law of the Sea 1982* (LOSC) providing for freedom of navigation are retained, upheld and respected by all States.⁶ The unlawful restriction of the sea lines of communication between Australia and the rest of the world could devastate the Australian national economy, and it is in Australia's interest to support the existing international legal regime, which has proven so effective in keeping international sea lanes open and flowing.

The key feature of the NWC paper is the survey of experts with respect to the likelihood of change to the regime for freedom of navigation in the LOSC in the foreseeable future. The experts indicated, in varying percentages, their thoughts on whether provisions in respect of maritime claims and freedom of navigation were being undermined. While one response to these suggestions would be the author's own predictions, one more certain response is to analyse State behaviour in the past 25 years to determine whether erosion of the LOSC is actually taking place, and in what areas that erosion is most pronounced. In this way, objective State behaviour can be compared with the predictions to test their validity, as it is unlikely that the rejection of the LOSC by a large number of States would happen instantaneously or spontaneously. Rather it would be marked by a gradual build-up of contrary practice that can be charted and analysed.

The NWC paper noted that there was a substantial likelihood of instability in the regimes for innocent passage, transit passage and archipelagic sea lanes (ASL) passage. They stated:

Navigation freedoms cannot be taken for granted in the coming years. The experts were asked if they believed the following navigation regimes would remain stable between now and 2020:

- 38% believed that the innocent passage regime would not remain stable;
- 41% said the same thing about transit passage through international straits; and
- 51% did not believe archipelagic sea lanes passage would remain stable.

95% of the experts believed that more States will claim the right to exercise jurisdiction and control over military activities in their EEZ by 2020.⁷

It is submitted that instability and failure of LOSC regimes for freedom of navigation would not occur instantaneously, but rather would emerge over time through contrary

State practice. In order to test the likelihood of failure, State practice with respect to maritime zones and freedom of navigation will be examined statistically, to determine whether such contrary behaviour, as might be expected prior to regime failure is evident.

The first relevant example of State practice for freedom of navigation is in respect of the territorial sea. Prior to the third United Nations Conference on the Law of the Sea (UNCLOS III) conducted over the period 1973-82, the width of the territorial sea was an issue of great contention. Disagreement over the issue of the width of the territorial sea was principally responsible for the failure of the League of Nations Conference for the Codification of International Law 1930⁸ and of UNCLOS II (1960),⁹ where it was the principal issue for the Conference to resolve. By UNCLOS III, the width of the territorial sea was less of an issue, with the emergence of the EEZ as an accepted concept, and consequently there was little contention in the adoption of 12 nautical miles as the maximum breadth of the territorial sea in article 3 of the LOSC.¹⁰

It is apparent from the selection of State practice that the LOSC reflects a consensus on the distance of 12 nautical miles, as shown in Table 1.

Distance	No. of States – 1982	No. of States – 2007
3nm	20	6
12nm	94	136
13-199nm	8	1
200nm	15	6
Other	2	1

Table 1: State practice – width of the territorial sea¹¹

Table 1 shows that 12 nautical miles was the favoured distance for the width of the territorial sea by 1982, with 68 per cent of States using that distance, and a further 14 per cent using distances of less than 12 nautical miles, which is consistent with article 3. This means that only 18 per cent of littoral States were using distances for their territorial sea that were inconsistent with the LOSC. By 2007, 89 per cent of littoral States were using 12 nautical miles, and a further four per cent using lesser distances. This is a significant improvement and demonstrates some normative effect around article 3.

This conclusion is also supported by the practice of some of those States whose territorial sea claims are inconsistent with the LOSC. For example, Benin, Congo, Somalia, Liberia, and Togo assert a territorial sea of 200 nautical miles, but do so from legislation that predates the LOSC.¹² This suggests these States have been lax in updating their legislative regimes rather than deliberately flouting the LOSC.

Similar results can be seen in a selection of Asia-Pacific States using the same criteria, as shown in Table 2.

Distance	No. of States – 1982	No. of States – 2007
3nm	6	1
12nm	38	46
200nm	5	2
Other	1	1

Table 2: State practice – width of the territorial sea (Asian and Pacific States)

If anything, the dominance of 12 nautical miles in a contemporary context is more pronounced in the Asia-Pacific region. Ninety-four per cent of regional States were in compliance with the LOSC in 2007, up from 88 per cent in 1982.

While the width of the territorial sea achieving a strong consensus mitigates against the fracturing of the navigational regimes referred to in the NWC paper, it is by no means the only relevant factor. State practice in relation to restrictions upon navigation also needs to be considered. Freedom of navigation has its origins in Hugo Grotius' response to the Spanish and Portuguese claims of control over the oceans and territories outside of Europe by virtue of the Papal Bull and Treaty of Tordesillas.¹³ These documents purported not only to give control over territory outside of Europe, but also provided for exclusive seaborne trading rights in the South Atlantic and Indian Oceans.¹⁴ In reaction to this assertion, Grotius produced his seminal work, *Mare Liberum*, asserting that the oceans were incapable of appropriation by States, and that the ships of any State could journey anywhere on the world's oceans.¹⁵

In the modern law of the sea, freedom of navigation was perceived as equally important, and this status was reflected in the now superseded Geneva Conventions on the Law of the Sea. Article 14 of the *Convention on the Territorial Sea and Contiguous Zone 1958* guaranteed a right of innocent passage to vessels, non-suspendable for waters in international straits, and article 23 indicated explicitly that such rights were available to warships.¹⁶ Freedom of navigation on the high seas was guaranteed in article 2 of the *Convention on the High Seas 1958*,¹⁷ with article 3 of the *Convention of the Continental Shelf Convention 1958* ensuring that the status of waters above a State's continental shelf remained as high seas, and therefore enjoying freedom of navigation.¹⁸ These efforts had been prefaced by the International Court of Justice in 1949, in the *Corfu Channel Case*, which confirmed the right of innocent passage, available even to warships, passing through 'straits used for international navigation'.¹⁹ The Court was also prepared to state that foreign vessels, including warships, during peacetime had a right of innocent passage through all international straits.

The current LOSC maintains the approaches found in the *Corfu Channel Case* and the Geneva Conventions on the Law of the Sea. It deals with navigation in two distinct contexts. Firstly, it examines freedom of navigation in the territorial sea and archipelagic waters. Three passage regimes are established in these waters: innocent passage, transit passage and ASL passage. It then considers freedom of navigation in areas beyond national sovereignty in article 87.

The regime of innocent passage deals with navigation by ships only in the territorial sea of a coastal State, and as noted above, it retains the same approach as that used in the *Convention on the Territorial Sea and Contiguous Zone 1958* and the *Corfu Channel Case*. LOSC article 17 grants ships the right of innocent passage through the territorial sea, while the remaining articles in section 3(A) indicate how that right is circumscribed. Essentially vessels are required to transit in a continuous and expeditious fashion, on the surface of the ocean. Such passage cannot be impeded, except on a non-discriminatory and temporary basis for essential security purposes.²⁰

LOSC article 19 indicates the activities of a vessel that are considered inconsistent with a right of innocent passage:

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.
2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:
 - (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
 - (b) any exercise or practice with weapons of any kind;
 - (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
 - (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
 - (e) the launching, landing or taking on board of any aircraft;
 - (f) the launching, landing or taking on board of any military device;

- (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
- (h) any act of wilful and serious pollution contrary to this Convention;
- (i) any fishing activities;
- (j) the carrying out of research or survey activities;
- (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
- (l) any other activity not having a direct bearing on passage.

This list does not render passage undertaken by warships, or even squadrons of warships, contrary to innocent passage, nor does it permit a coastal State from excluding warships from its waters for failure to notify the coastal State or seek its authorisation. This is supported by the view taken by the International Court of Justice in the *Corfu Channel Case* of the passage of the four British warships along the Channel that led to the damage to HM Ships *Saumarez* and *Volage*.²¹

The coastal State has the ability to regulate certain matters with respect to a vessel exercising a right of innocent passage, as listed in LOSC article 21(1):

The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:

- (a) the safety of navigation and the regulation of maritime traffic;
- (b) the protection of navigational aids and facilities and other facilities or installations;
- (c) the protection of cables and pipelines;
- (d) the conservation of the living resources of the sea;
- (e) the prevention of infringement of the fisheries laws and regulations of the coastal State;
- (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;
- (g) marine scientific research and hydrographic surveys;
- (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.

Laws on these subjects cannot be applied to a foreign warship or other sovereign immune vessel, but can provide a basis for a claim by the coastal State against the flag State of the offending warship. A warship or other vessel can only be ordered to depart the territorial sea in the event that it breaches the laws of the coastal State.²²

For transit passage through international straits, and ASL passage through archipelagic waters, the regime is even more generous to transiting vessels. There can be no suspension of transit or ASL passage in any circumstances, and the range of laws available to a coastal State applicable to such vessels is also reduced as is evident in LOSC article 42 and by extension through article 54 to ASL passage:

1. Subject to the provisions of this section, States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of all or any of the following:
 - (a) the safety of navigation and the regulation of maritime traffic, as provided in article 41;
 - (b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait;
 - (c) with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear;
 - (d) the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits.
2. Such laws and regulations shall not discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage as defined in this section.
3. States bordering straits shall give due publicity to all such laws and regulations.
4. Foreign ships exercising the right of transit passage shall comply with such laws and regulations.
5. The flag State of a ship or the State of registry of an aircraft entitled to sovereign immunity which acts in a manner contrary to such laws and regulations or other provisions of this Part shall bear international responsibility for any loss or damage which results to States bordering straits.²³

While the LOSC makes it clear there is freedom of navigation on the high seas, the same freedom is extended to the EEZ by article 58(1).²⁴

The right of freedom of navigation on the high seas and the EEZ is limited so a vessel must have ‘due regard’ for the rights of others.²⁵ As such, there is no explicit limitation based upon security to the benefit of the coastal State beyond that associated with the rights of others. So for example, the only restriction on the undertaking of military exercises on the high seas and EEZ of another State would be subject to the non-interference with the rights of other users.²⁶ The issue of military activities in the EEZ will be explored below.

Within the territorial sea, and in some circumstances beyond it, a number of States assert what may best be described as a ‘security jurisdiction’. That is to say, they purport to regulate, restrict or exclude third State vessels from their adjacent waters, even though the only support for such a jurisdiction in the LOSC is implicit and derives from the Convention’s definition of innocent passage not being prejudicial to the peace and security of the coastal State.

A coastal State has a right to regulate certain matters with respect to a vessel exercising a right of innocent passage, although these do not refer to security interests.²⁷ The rights of the coastal State are essentially directed at ensuring the territorial sea has safe navigation, criminal activity affecting the coastal State, including immigration and customs, is prohibited, and unauthorised fishing and pollution do not occur.

Nor does the regime of the contiguous zone give rise to a right to restrict or regulate passage. There is no justification within the text of the LOSC that permits a jurisdiction based around security concerns to be included within the regime of the contiguous zone, especially as it is part of the EEZ which explicitly has guarantees of freedom of navigation. The contiguous zone is dealt with in a single article, and does not refer to security directly, or even by implication.²⁸

A large number of coastal States assert security zones in their territorial sea and beyond, into the EEZ. The range of measures varies considerably, and does not easily lend itself to the type of statistical representation undertaken above. Overall, in excess of 60 coastal States have asserted some form of restriction or notification. It is therefore necessary to summarise the nature of various coastal State measures in tabular form in Table 3.

State	Type of Rights Asserted
Albania	Warships require prior special authorisation
Algeria	Authorisation must be obtained for warships 15 days prior to their passage; exception: <i>force majeure</i>
Antigua and Barbuda	Warships require prior authorisation
Bangladesh	Warships require prior authorisation; contiguous zone of 18nm with security interests

State	Type of Rights Asserted
Barbados	Warships require prior authorisation
Brazil	Prohibition of the boarding, searching and capturing of vessels in the EEZ; military exercises and manoeuvres may be conducted in the EEZ only with the consent of Brazil
Bulgaria	24nm ('control rights')
Cambodia	Control of all foreign activities on the continental shelf, irrespective of their purpose; contiguous zone of 24nm with security interests
Cape Verde	Warships require prior authorisation; prohibition of 'non-innocent use' of the exclusive economic zone, including weapons exercises
China	Requires prior notice for transports of waste in territorial sea and EEZ; warships require prior authorisation; contiguous zone of 24nm with security interests
Congo	All ships require prior authorisation
Costa Rica	Fishing vessels must announce their passage through the EEZ beforehand
Croatia	Warships must announce their passage; the number of warships is limited
Denmark	Warships and governmental ships are required to notify the Danish authorities prior to their passage through territorial waters if that involves passage through the Great Belt, the Samsø Belt or the Øre Sound; prior authorisation is required for more than three warships passing through at the same time
Djibouti	Prior notice required of any passage of nuclear-powered ships and ships carrying nuclear or other radioactive material
Ecuador	'Special area to be avoided'
Egypt	Warships have to announce their passage in advance; ships carrying nuclear material or other hazardous substances require prior authorisation; contiguous zone of 24nm with security interests
El Salvador	Expressed concern at UNCLOS III in respect of military activities in the EEZ
Estonia	Warships and research vessels must announce their passage 48 hours in advance; authorisation must be applied for nuclear-powered ships 30 days; prior to their passage

State	Type of Rights Asserted
Finland	Warships and governmental ships have to announce their passage in advance
Gambia	Asserts the right to prohibit navigation in certain areas of its continental shelf
Greece	Claims only a 6nm territorial sea but 10nm of airspace for air traffic control purposes
Grenada	Warships require prior authorisation
Guinea	Taking photographs and transporting toxic or hazardous material are considered a criminal offence
Guyana	Warships have to announce their passage in advance
Haiti	Passage prohibited to ships carrying waste or materials with an inherent health or environmental hazard; prohibition of the passage of all vessels carrying waste or materials that are environmentally harmful or detrimental to health; furthermore claims the right to exercise the control required in the EEZ in order to ensure navigational safety and prevent violations of financial, customs, health and environmental protection regulations; contiguous zone of 24nm with security interests
India	Warships have to announce their passage in advance; prior consent to military exercises and manoeuvres in the EEZ and on the continental shelf; contiguous zone of 24nm with security interests
Indonesia	Warships and all vessels other than merchant ships must announce their passage in advance; within 100nm ships are not allowed to stop, anchor or cruise 'without legitimate cause'
Iran	Warships, submarines, nuclear-powered ships as well as ships carrying nuclear or other hazardous materials require authorisation; prohibition of 'military activities and practices' in the EEZ and on the continental shelf; contiguous zone of 24nm with security interests
Latvia	Reserves the right to regulate the passage of warships
Libya	Innocent passage to be announced in advance and allowed during daylight hours only; four exclusion zones
Lithuania	Warships require prior authorisation if this is required by the flag state
Malaysia	Prior consent to military exercises and manoeuvres in the EEZ and on the continental shelf

State	Type of Rights Asserted
Maldives	Warships require prior authorisation; with regard to the EEZ, acknowledge only the right of innocent passage; make entry of fishing and research vessels into the EEZ conditional upon prior consent
Malta	Asserts the claim for warships to obtain prior authorisation
Mauritania	Reserves the right to restrict navigation and aviation in or above the EEZ if this is necessary for reasons of national security
Mauritius	Warships must announce their passage; apparently makes the passage of warships and submarines through the EEZ conditional upon prior approval
Myanmar	Warships require prior authorisation; claims the right to restrict the freedom of navigation and overflight in its exclusive EEZ zone of 24nm with security interests
Namibia	Claims sovereign rights with regard to financial, customs, immigration and health regulations in the EEZ as well
Nicaragua	25nm security interests, 15 days advance notification for warships and military aircraft, seven days for civilian traffic
North Korea	62nm military zone 50nm seaward of the territorial sea; all ships and aircraft require prior approval
Oman	Warships, nuclear-powered ships, submarines and ships carrying hazardous loads require prior authorisation
Pakistan	Warships require prior authorisation; supertankers, nuclear-powered ships and ships carrying nuclear materials are required to announce their passage in advance; claims authority to regulate transit through parts of the EEZ and enact and enforce all regulations required for controlling activities in the EEZ; contiguous zone of 24nm with security interests
Peru	Prior consent to military exercises and manoeuvres in the EEZ and on the continental shelf
Philippines	Expressed concern at UNCLOS III in respect of military activities in the EEZ
Poland	Reserves the right to regulate the passage of warships
Portugal	With regard to the EEZ, acknowledges only the right of innocent passage
Romania	Reserves the right to regulate the passage of warships
São Tomé and Príncipe	Reserves the right to regulate the passage of warships

State	Type of Rights Asserted
Saudi Arabia	Reserves the right to regulate the passage of nuclear-powered ships; contiguous zone of 18nm with security interests and navigation
Senegal	Expressed concern at UNCLOS III in respect of military activities in the EEZ
Seychelles	Warships are required to announce their passage in advance
Slovenia	Reserves the right to regulate the passage of warships
Somalia	Warships require prior authorisation
South Korea	Warships and government ships have to announce their passage three days in advance
Sri Lanka	Warships require prior authorisation; contiguous zone of 24nm with security interests
St. Vincent and Grenadines	Warships require prior authorisation
Sudan	Warships require prior authorisation; the right of innocent passage may be suspended for security reasons; contiguous zone of 18nm with security interests
Syria	Warships require prior authorisation; 41nm security interests
United Arab Emirates	Warships require prior authorisation; nuclear-powered ships and ships with nuclear or hazardous loads must announce their passage in advance; contiguous zone of 24nm with security interests
Uruguay	Asserts the right to prohibit military exercises in the EEZ
Venezuela	15nm national and security interests
Vietnam	Warships require authorisation to be applied for at least 30 days prior to passage; passage restricted to three warships at a time; contiguous zone of 24nm with security interests, submarines are required to navigate on the surface and to show their flag; aircraft are not allowed to land on board ships or be launched from them; on-board weapons have to be set in 'non-operational' mode prior to entry into the zone
Yemen	Warships require prior authorisation; nuclear-powered ships or ships carrying nuclear materials must announce their passage in advance; contiguous zone of 24nm with security interests
Yugoslavia	Warships must announce their passage 24 hours in advance

Table 3: State practice – freedom of navigation and security²⁹

The number and scope of these restrictions raise the possibility that some aspects of freedom of navigation under the LOSC are under pressure from States asserting some form of 'security jurisdiction'. The measures summarised in Table 3 clearly amount to restrictions upon the freedom of navigation in terms of access and notification that are inconsistent with the LOSC. The question to ask is whether these restrictions are undermining the LOSC protections on freedom of navigation in the manner indicated in the NWC paper.

It is submitted that while this level of activity contrary to the LOSC is a matter for concern, it does not amount to a new and evolving threat to the regimes of innocent, transit and ASL passage. Most of these security restrictions are many years old, and in any case, are not enforced by their coastal States. Certainly the United States maintains an active Freedom of Navigation program that provides for operational challenges to perceived unlawful restrictions.³⁰ With some high profile exceptions, most notably the attitude of China in respect of innocent passage through its territorial sea and the Taiwan Straits, there does not seem to be a groundswell of challenge to the existing order beyond what has subsisted for many years. It is submitted that there is no greater likelihood of the failure of the navigation regime in the LOSC than at any time in the past two decades.

A number of States have also sought to assert the right to deny vessels carrying ultra-hazardous cargoes, most notably nuclear materials for reprocessing or disposal, passage through not only their territorial sea, but even their EEZ. These States have often been motivated by particular incidents, where vessels have been likely to pass through their waters on planned voyages between other States. Such voyages between Europe and Japan have elicited responses from States in Africa, South America and the South Pacific.

The LOSC provides little direct assistance for States who wish to assert the right to deny passage to vessels carrying ultra-hazardous cargoes. There is no indication in the LOSC of any restriction that can be placed on navigation in the EEZ based on the nature of the cargo. Indeed, the LOSC appears to indicate the reverse situation is the case; that is, that ships carrying hazardous cargoes can navigate freely. This can be seen in respect of the exercise of innocent passage for ships carrying nuclear or other hazardous materials in article 23:

Foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements.

Rather than indicate duties owed to the coastal State, and the option of that State to deny passage, article 23 indicates that special precautionary measures drawn from other instruments ought to be complied with. No similar provision exists for the EEZ.

The rationalisation for States seeking to exclude shipping is based upon their jurisdiction in the EEZ over environmental matters. It is argued by these States that the ultra-hazardous nature of the cargo poses such a threat to the environment that they have a right to prevent the possibility of irreparable harm occurring. At the very least, they have a right to be notified of a voyage carrying such cargo, if only to be prepared to respond appropriately to an accident or other disaster, should one occur.

Examples of State practice from States that take the view that freedom of navigation can be circumscribed because of a ship's cargo cover a range of situations. As a result of the break up of the oil tanker *Prestige* in November 2002, Spain and France asserted that they would undertake inspections of singlehulled oil tankers in excess of 15 years old passing through their EEZs, and if the vessels were found to be unseaworthy, they would not be permitted to remain in the EEZ.³¹

Further examples can be drawn from international reactions to shipments of radioactive materials around the world, particularly since the 1990s. The voyages of the *Pacific Pintail*, *Pacific Teal* and *Pacific Swan* and the *Atatsuki Maru* carrying highly radioactive material attracted protests from a significant number of States, and led States such as Argentina, Chile, Antigua and Barbuda, Colombia, Dominican Republic, New Zealand, South Africa and Mauritius to all purport to exclude vessels carrying radioactive ultrahazardous cargo from their EEZs. Voyages were also condemned by Caricom, representing the Caribbean States, and the South Pacific States.³² States who have asserted that they do not permit nuclear cargo vessels in their territorial sea or EEZ are noted in Table 4.

Antigua and Barbuda	Malaysia
Argentina	Malta
Brazil	Nauru
Chile	New Zealand
Columbia	Oman
Dominican Republic	Papua New Guinea
Egypt	Peru
Fiji	Philippines
Guinea	Saudi Arabia
Indonesia	Singapore
Iran	South Africa
Haiti	Venezuela
Kiribati	Yemen

Table 4: States that have objected to nuclear ships passing through their territorial seas or exclusive economic zones

From this data, the LOSC does not appear to have exerted a similar normative impact in the context of freedom of navigation. A large number of States purport to restrict or regulate navigation in their territorial seas or beyond without reference to the LOSC, and in apparent contravention of it. Much of this activity is concentrated in the area of security, but there are significant numbers of States also purporting to limit or regulate the navigation rights of vessels carrying ultra-hazardous cargos, as shown in Table 5.

Coastal State assertion of Jurisdiction	Percentage %
No position	48
Security only	34
Environmental only	9
Security and Environmental	9

Table 5: Freedom of navigation – position on restrictions by coastal States

Surprisingly, when considered in the context of coastal States only, those States seeking restriction or regulation make up 52 per cent of the international community. This raises the question as to whether the LOSC in the context of freedom of navigation represents customary international law, and whether such behaviour might serve in the long term to undermine the efficacy of the LOSC in this or other areas. It would certainly be a matter of concern that so large a proportion of the international community have taken the view that restriction of innocent passage in certain circumstances is permissible, although it is debatable that this is sufficient to foresee the destruction of the freedom of navigation regimes within the LOSC.

Freedom of Navigation in Archipelagos

Freedom of navigation is particularly significant to Australia, as many of the world's archipelagic States are in the Asia-Pacific region. To Australia's north, Indonesia, Papua New Guinea, Fiji, the Solomon Islands, Vanuatu, and further afield the Philippines and Kiribati, all claim archipelagic status. Archipelagic States can claim that the waters between their islands are part of their sovereignty, limiting passage rights to innocent passage except along ASL. Such ASL are designated by the archipelagic States, in consultation with the International Maritime Organization (IMO), or failing a formal declaration, are routes normally used for international navigation.

In the context of ASL passage, State practice is so limited it is not possible to undertake the type of analysis engaged in above. Although many States in Australia's region are archipelagos, and have proclaimed archipelagic baselines, only Indonesia has

proclaimed any ASL at all. This is evident from a limited survey of archipelagic State practice in our region.

Archipelagic	Baselines	LOSC Compliant	ASL
Fiji	Yes	Yes	No
Indonesia	Yes	Yes	Partial
Kiribati	No	Unlikely	No
Papua New Guinea	Yes	Yes	No
Philippines	Unofficial	No	No
Solomon Islands	Yes	Yes	No
Vanuatu	Yes	Yes	No

Table 6: Regional archipelagic State practice

A number of points can be made in relation to Table 6. First, with the exception of the Philippines, whose practice doesn't comply with international law, and has no support from any other States, all the archipelagic States have baselines which comply closely with the LOSC, if they have baselines at all. This is not suggestive of a failure of the LOSC, but rather it is exerting a normative impact upon international practice.

Second, international practice concerning ASL passage is at a relative basic stage, even though the LOSC has been in force for over a decade. This also does not suggest that there is a likelihood the LOSC is under threat, as the interim position of using routes normally used by international navigation pending the proclamation of ASL, has not proven unacceptable to most archipelagic States in the past 13 years, and it is also the most advantageous position for maritime States wanting freedom of navigation. For the LOSC to be under threat of destabilisation, it would be logical to expect some countervailing State practice.

The exception in all of this is Indonesia, which is the only archipelagic State that has any ASL in place at all. Indonesia is committed to the concept of the archipelagic State to a greater extent than any other State, and much of the text of the LOSC was drafted to reflect Indonesian practice. However, in spite of this compliant practice, it is significant to note that some Indonesian perceptions of the application of international law are often significantly at variance with the LOSC. In the context of ASL, Indonesia proposed in 1996 only three north-south lanes. The absence of over 10 other routes used by international navigation led to significant international protest from maritime States, including Australia, the United States, the United Kingdom and Japan. In this environment, Indonesia commenced negotiations with the IMO, with Australia and the United States participating. In 1998, Indonesia formally adopted three lanes, but these were explicitly stated to be a 'partial designation', leaving the way open for maritime States to regard any route used by international navigation as an ASL.

Statements by Indonesia since the partial designation make it clear that it has a different view. Senior Indonesian officials have avoided all reference to the ASL designation as partial and indicated that ASL passage is only possible in the lanes and not on routes used by international navigation. Indonesia has passed legislation dealing explicitly with ASL passage. *Act No. 6* of 8 August 1996 provides for 'peaceful crossing rights' and 'archipelagic sea channel crossing rights'. The former appears to equate to the regime of innocent passage under the LOSC and Indonesia reserves the right to 'temporarily postpone peaceful crossing' of its territorial sea and archipelagic waters for 'the protection of its security, including the purpose of arms/weapons training'. For ASL passage this is inconsistent with LOSC article 54 which applies article 44 of the transit passage regime prohibiting suspension of passage. The Indonesian legislation also provides that submarines and other submerged vessel are required to navigate on the surface and show their flag in this mode of passage, which is also not consistent with 'normal mode' in the ASL passage regime.

Rights of ASL passage are preserved in the legislation but only in 'specially stipulated sea channels'. This is contrary to the negotiation of the partial designation of ASL, which was intended to allow other lanes normally used for international navigation to be available for ASL passage, consistent with the LOSC. If Indonesian practice in this regard remains unique, then the threat to ASL passage as a viable legal regime is certainly containable. If Australia and other maritime States continue to assert their rights of ASL passage through the archipelago's principal sea routes, and not merely along the three designated routes, then these protests will effectively quarantine Indonesia's behaviour.

Military Operations in the Exclusive Economic Zone

Military activities and operations in the EEZ of third States was also considered in the NWC paper. Beyond the territorial sea, the LOSC confirms there is freedom of navigation for all vessels, as well as a number of other freedoms. Article 87 provides:

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:
 - (a) freedom of navigation;
 - (b) freedom of overflight;
 - (c) freedom to lay submarine cables and pipelines, subject to Part VI;

- (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
- (e) freedom of fishing, subject to the conditions laid down in section 2;
- (f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

The impact of this provision finds its way into the regime of the EEZ by virtue of article 58, which expressly incorporates rights of freedom of navigation and overflight.

The issue of military activities, including surveillance, in the EEZ of another State is one not directly dealt with in the LOSC.³³ While the LOSC makes it plain that military exercises and weaponry testing in the territorial sea of a coastal State would be contrary to the regime of innocent passage, there is no equivalent restriction articulated with respect to other maritime zones. However, neither is there any authorisation with respect to such exercises, with there being no inclusion of military exercises or related activities in the list of freedoms.

The lack of direct reference to military activities is not fatal to the case for the conduct of surveillance in the EEZ of another State. The rights listed in article 87(1) are by no means an exhaustive list, and are merely specifically enunciated examples. This is explicit in the use of the phrase 'inter alia'. Further, the freedoms of the high seas are described as being subject to the conditions set down in the LOSC and 'other rules of international law'. The use of this language makes it clear that the LOSC is not intended to be the only source of law in relation to the use of the high seas or EEZ.

If the case for freedom to undertake military surveillance in another State's EEZ can be made, it is clearly subject to some qualification. For this the crux of the issue will essentially turn on the meaning of the phrase 'with due regard'. This qualification is applied to high seas freedoms generally in article 87(2), and it would seem logical that one must have due regard to the rights of others while navigating through the EEZ.³⁴

Undertaking surveillance of another State from that State's EEZ would not, in the ordinary course of events, be without due regard for other ships or aircraft. In the case of a ship, the act of navigating safely, with data gathering sensors deployed would not necessarily interfere with other vessels' use of the waters, unless the use of a sensor, such as a towed array, in some way impeded fishing or navigation. With aircraft, it is submitted that the prospect of such inconvenience is even more unlikely.

One issue that could be relevant in assessing the legitimacy of military surveillance from the EEZ or high seas relates to whether such surveillance might constitute a threat to international peace and security, and therefore be illegitimate. The LOSC provides limited assistance through article 88 which provides: the high seas shall be reserved for peaceful purposes.

A wide reading of this provision would, in theory, see great limitation of the uses of warships on the high seas, and the potential circumscription on intelligence gathering. When read with the Preamble, which invokes the LOSC's role in the furtherance of peace and security in the world,³⁵ it suggests only peaceful uses of the sea are permissible. By extension this could be drawn into the EEZ, as article 58 adopts the high seas freedoms in the LOSC, and explicitly includes article 88 in this list.³⁶ Similarly, the provisions with respect to marine scientific research under Part XIII of the LOSC indicate that marine scientific research can only be undertaken for peaceful purposes.³⁷ A case could be made that military surveillance from the high seas or another State's EEZ were incompatible with the LOSC.

Such an interpretation has not been favoured by many States or publicists.³⁸ The *San Remo Manual on Armed Conflicts at Sea*, which sought to update and consolidate the law of armed conflict at sea, makes it clear that armed conflict at sea can take place on the high seas, and in certain circumstances in the EEZ of a neutral State.³⁹ The Manual allows that provided belligerents have due regard to the uses to which another State may wish to put its EEZ and avoid damage to the coastal State, then armed conflict can occur in the EEZ of a neutral State. Clearly, if armed conflict can occur in another State's EEZ, it is difficult to assert that surveillance conducted in a passive way is contrary to international law.

First, such an interpretation would be difficult to reconcile with the regime of innocent passage that is applicable to warships. Any warship may constitute a danger to States in its vicinity. By its very nature, such a ship is designed to engage in, or assist other ships engage in armed conflict. It may be difficult, if not impossible, to determine whether a transiting warship has activated passive sensors, and certainly inconsistent with international law to stop and board such a vessel to ascertain this, given the sovereign immune status of the vessel.⁴⁰

None of the above analysis undermines the legitimacy that voyages intended to be a threat to international peace are unlawful. Certainly a ship purporting to exercise a right of innocent passage that was in another State's territorial sea for the purpose of intelligence gathering as a prelude to armed conflict would not be consistent with the LOSC. An argument could also be made that a similar voyage that remained in the EEZ might also be unlawful, as its intention was to assist a manifestly unlawful act. However, in such a case it is the wider behaviour and motivation that would render such a journey unlawful, not the actual act of navigation itself. Consequently, routine intelligence gathering flights or voyages through another State's EEZ would

not of themselves be illegal, unless they formed a prelude to an unauthorised attack on another State.

The NWC paper also considered briefly the crash landing of a United States Navy (USN) aircraft on Hainan Island in 2001 in the context of military activities in the EEZ. On 1 April 2001, there was a mid-air collision between a Chinese F-8-II 'Finback' fighter and an American EP-3E Aries aircraft, off the southern coast of China. The Chinese fighter crashed into the sea, resulting in the loss of its pilot, Wang Wei; the American EP-3E was severely damaged, and ultimately made an emergency landing at Lingshui airfield on Hainan Island in China. The aircrew of the American aircraft were arrested, and the incident sparked a diplomatic crisis. Thirteen days later the aircrew were released, as was the aircraft in June 2001, when it was airlifted from China by a leased Russian Antonov cargo aircraft.⁴¹

The collision followed a series of close passes and shadowing of American EP-3Es by Chinese fighters. The fighters were attempting to deter the American aircraft from passing close to the Chinese coast, and utilise the EP-3E's highly sophisticated intelligence gathering capabilities. China regarded the flights as essentially 'spy flights' and considered them contrary to international law. The United States attitude was that the aircraft were in international airspace, and therefore were exercising their freedom of overflight in international law. Both States had been in dispute over similar flights for a considerable period of time prior to this incident, with it being the regular practice of Chinese fighter pilots in flying at extremely close range to American planes, ostensibly to deter them from continuing. Several near misses had occurred during earlier flights prior to the collision in this incident.

The collision between the United States and Chinese aircraft occurred in international airspace as recognised by both States.⁴² It also took place outside a 24 nautical mile security zone claimed by China, but not recognised by the United States.⁴³ While the EP-3E ultimately did enter Chinese national airspace, and landed on Chinese territory, it was also not disputed by both States that this incursion was motivated entirely by the distress the aircraft was in as a result of the collision. The key issue in this context relates to the activities undertaken by the aircraft prior to the collision.

The Chinese objection to the flights centred on their purpose. China considered the activities as being overt intelligence gathering by another military power, which were designed to provide detailed information that could be used in any conflict. Such activities therefore, according to China, undermined international peace and security of the EEZ, and therefore were not lawful.⁴⁴ The Chinese Foreign Affairs Ministry stated:

The act of the US side constitutes a violation of the UN Convention on the Law of the Sea (UNCLOS), which provides, among other things, that the sovereign rights and jurisdiction of a coastal State over its Exclusive

Economic Zone, particularly its right to maintain peace, security and good order in the waters of the Zone, shall all be respected and that a country shall conform to the UNCLOS and other rules of international law when exercising its freedom of the high seas.⁴⁵

For China, the collision that subsequently occurred was as a result of an unlawful and unwanted activity, that the Chinese aircraft, like others before it, was doing its best to intimidate and deter without the use of force.

The United States' view was that any activity that occurs in international airspace should be treated as legal, unless it involves hostilities against another friendly power. The use of passive systems to collect information from an area not subject to national jurisdiction is therefore entirely legitimate. The actions by the Chinese pilots in flying at close range to American aircraft in international airspace was reckless, and endangered their lives as well as those in the EP-3E's, as was tragically demonstrated on 1 April 2001.

While the Chinese objections are understandable, and in other circumstances intelligence gathering flights could be a provocative prelude to an armed conflict, the American position probably more closely reflects the current content of international law. Freedom of navigation in international airspace is not regulated, at least for State aircraft. If there is no restriction on the flight path on such an aircraft, it is not tenable to restrict the use of sensors on board. To forbid its movement on the basis of its status as a military State aircraft would effectively end all freedom of navigation, even on the high seas, which is manifestly not the intention of the LOSC, State practice or the International Court of Justice in the *Corfu Channel Case*.⁴⁶

Again, the threat posed to existing international structures is present, but stable, insofar as it has not significantly increased in recent years. Although China would be reluctant to concede it, the US position in respect of the crash landing of its aircraft on Hainan Island was probably borne out by events, and suggests that a robust approach to the assertion of maritime rights can be effective in maintaining international regimes.

Maritime Security

The NWC paper also considered some maritime security issues, although they are not explored to the same extent as those in respect of navigation. This emphasis is surprising, as it is in the area of maritime security that most development within the law of the sea has taken place in the last decade.

In the years since the 11 September 2001 terrorist attacks against the United States, there have been a number of developments that potentially have implications with

respect to boarding ships at sea. The implications of each of these measures will be considered in turn.

The *International Ship and Port Facility Security Code*

The *International Ship and Port Facility Security (ISPS) Code* has been instituted under the auspices of the IMO to provide for greater security for ships and port facilities in an environment more conscious of the risks of terrorist attack.⁴⁷ In the context of boarding and interdiction of vessels, the ISPS Code does not provide for boarding of vessels at sea by States other than the flag State.

SUA Convention

Negotiated in the wake of the hijacking of the cruise liner *Achille Lauro* in the 1980s, the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (SUA Convention) provides a framework for dealing with terrorist and like acts against ships at sea.⁴⁸ It was negotiated in part because the traditional definition of piracy, as reflected in LOSC article 110 required the activities to have been committed for private ends, which may not include terrorist acts as perpetrators might be motivated by a political cause.

Parties to the SUA Convention have a wide jurisdiction to deal with offences against shipping, including seizing a ship, performing acts of violence against individuals on a ship, or damaging a ship or its cargo to endanger its safe navigation. While jurisdiction to make laws to create offences for these activities is widely construed, being based on flag or the physical presence of a vessel in the territorial sea, or even attempted coercion of the State concerned or its nationals, the SUA Convention does not authorise boarding of a ship at sea by any State other than the flag State. Further, the Preamble of the SUA Convention provides 'matters not regulated by this Convention continue to be governed by the rules and principles of general international law', which would appear to limit non-flag State intervention to acts covered under article 110 of the LOSC, which would essentially be acts of piracy. The only mechanism that might permit another State to have a role is in article 8 of the SUA Convention, which provides the master of a vessel may hand individuals over to a 'receiving State', other than the flag State.

The adoption of the SUA Convention by States was initially slow, but gathered pace strongly in the years following the 2001 terrorist attacks. Since that time, further diplomatic efforts to extend the scope of the Convention have been pursued within the IMO, leading to the adoption of a Protocol to the SUA Convention in late 2005.⁴⁹

The principal focus of the 2005 SUA Protocol is on weapons of mass destruction and their non-proliferation, but the amendments also create additional offences of using a ship as a platform for terrorist activities,⁵⁰ as well as the transportation of an individual who has committed an offence under the SUA Convention,⁵¹ or any of another nine

listed anti-terrorism conventions.⁵² However, for the purposes of this discussion article 8*bis* potentially widens the scope for third party boarding of ships and needs to be specifically considered.

The operative provision for a third party boarding of a vessel at sea is article 8*bis*(5) of the 2005 SUA Protocol. It provides:

5. Whenever law enforcement or other authorized officials of a State Party ('the requesting Party') encounter a ship flying the flag or displaying marks of registry of another State Party ('the first Party') located seaward of any State's territorial sea, and the requesting Party has reasonable grounds to suspect that the ship or a person on board the ship has been, is or is about to be involved in the commission of an offence set forth in article 3, 3*bis*, 3*ter* or 3*quater*, and the requesting Party desires to board,

(a) it shall request, in accordance with paragraphs 1 and 2 that the first Party confirm the claim of nationality, and

(b) if nationality is confirmed, the requesting Party shall ask the first Party (hereinafter referred to as 'the flag State') for authorisation to board and to take appropriate measures with regard to that ship which may include stopping, boarding and searching the ship, its cargo and persons on board, and questioning the persons on board in order to determine if an offence set forth in article 3, 3*bis*, 3*ter* or 3*quater* has been, is being or is about to be committed, and

(c) the flag State shall either:

(i) authorize the requesting Party to board and to take appropriate measures set out in subparagraph (b), subject to any conditions it may impose in accordance with paragraph 7; or

(ii) conduct the boarding and search with its own law enforcement or other officials; or

(iii) conduct the boarding and search together with the requesting Party, subject to any conditions it may impose in accordance with paragraph 7; or

(iv) decline to authorize a boarding and search.

The requesting Party shall not board the ship or take measures set out in subparagraph (b) without the express authorisation of the flag State.

This provision provides that a third State may board after ascertaining the nationality of a vessel suspected of committing an offence under article 3 or its related amendments,

notifying the flag State and obtaining the consent of the flag State. In the absence of this consent from the flag State, a boarding cannot take place. A mechanism does exist to try to avoid intransigence by the flag State, where the flag State may lodge a declaration in article 8*bis* granting a right to board four hours after request to board, or a declaration permitting boarding by other State parties.

If evidence of a past, current or imminent offence is discovered in the course of a boarding, the flag State still retains jurisdiction, but it may authorise the boarding State to detain the vessel, its cargo and crew pending further instructions. It is clear from the text that the flag State is to remain in control, and that a boarding and subsequent discovery of an offence does not act as a basis for the boarding State to take over the matter. Article 8*bis* in part states:

7. The flag State, consistent with the other provisions of this Convention, may subject its authorisation under paragraph 5 or 6 to conditions, including obtaining additional information from the requesting Party, and conditions relating to responsibility for and the extent of measures to be taken. No additional measures may be taken without the express authorisation of the flag State, except when necessary to relieve imminent danger to the lives of persons or where those measures derive from relevant bilateral or multilateral agreements.

8. For all boardings pursuant to this article, the flag State has the right to exercise jurisdiction over a detained ship, cargo or other items and persons on board, including seizure, forfeiture, arrest and prosecution. However, the flag State may, subject to its constitution and laws, consent to the exercise of jurisdiction by another State having jurisdiction under article 6.

The practical upshot of these measures is that State parties to the SUA Convention and 2005 SUA Protocol, when the latter enters into force, will be able to board each other's vessels at sea, with each other's consent. This consent may be expedited through declarations being made, but will still be required to found any further action. The 2005 Protocol also envisages cooperation between States with respect to how such boardings and subsequent action might take place.⁵³

Proliferation Security Initiative

The Proliferation Security Initiative is an informal international understanding that provides a basis for cooperative action at sea to deal with vessels suspected of carrying weapons of mass destruction or related equipment to non-state actors. It is not a treaty and therefore is not binding, but rather a statement of intention indicated by States, indicating how they plan to cooperate and what steps might be taken to intercept a suspected cargo. A number of States have indicated their strong support

for the Proliferation Security Initiative, while many more have shown an interest in participating.⁵⁴

In the context of boarding and interdiction, there has been a Statement of Interdiction Principles made by the Proliferation Security Initiative States, and a portion of this is directly relevant to the boarding and interdiction of vessels at sea:

Take specific actions in support of interdiction efforts regarding cargoes of [weapons of mass destruction], their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks, to include:

- (a) Not to transport or assist in the transport of any such cargoes to or from states or non-state actors of proliferation concern, and not to allow any persons subject to their jurisdiction to do so.
- (b) At their own initiative, or at the request and good cause shown by another state, to take action to board and search any vessel flying their flag in their internal waters or territorial seas or areas beyond the territorial seas of any other state that is reasonably suspected of transporting such cargoes to or from states or non-state actors of proliferation concerns, and to seize such cargoes that are identified.
- (c) To seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other states and to the seizure of such [weapons of mass destruction]-related cargoes in such vessels that may be identified by such states.
- (d) To take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified; and (2) to enforce conditions on vessels entering or leaving their ports, internal waters or territorial seas that are reasonably suspected of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.⁵⁵

This Statement provides for two distinct jurisdictional bases for boarding a vessel. The first is flag State jurisdiction, where a flag State undertakes to board and search vessels flying its flag reasonably suspected of carrying weapons of mass destruction or related material and to seize such cargo if found. This is clearly consistent with international

law, as such enforcement is restricted to the flag State's waters, or waters beyond its jurisdiction, but outside the territorial sea of another State.

Flag State jurisdiction is also available to third States where the flag State undertakes to 'seriously consider' providing consent to the boarding States to board, search and if necessary seize the cargo. It is significant that while the possibility of third State action is clearly contemplated, States supporting the Statement are only obliged to 'seriously consider' rather than to acquiesce to a third State boarding.

The second basis of jurisdiction for boarding and interdiction is territorial jurisdiction, where the flag State of the vessel concerned is not relevant. This has the coastal State asserting jurisdiction over a vessel because of its presence in the territorial sea, without necessarily obtaining the consent of the flag State. There has been significant academic debate over the legality of this territorial basis for stopping and boarding ships, and seizing cargoes. Certainly, it would not *prima facie* seem consistent with a right of innocent passage and the restrictions on the exercise of criminal jurisdiction by a coastal State over vessels passing through their territorial sea.

While a number of arguments can be raised in support of the legality of such an interception, including the right of a coastal State to act in its individual or collective self-defence, there has not been support for this mode of action to date in the United Nations Security Council. The Council may make a resolution pursuant to Chapter VII of the *United Nations Charter*, if it feels the application of force would assist in combating a threat to international peace and security, and therefore could provide legitimate authority for a coastal State to stop and board a suspect vessel in its territorial sea, or even outside it.⁵⁶ Security Council Resolution 1540 urges States to prohibit the transit of weapons of mass destruction to non-state actors, but it does not create any positive duty upon States to undertake interdiction of such vessels. The Resolution only authorises such action as is 'consistent with international law',⁵⁷ and therefore boarding a suspect vessel in the territorial sea may not be legitimate.

One issue that has occurred with the development of the PSI has been the conclusion of ship boarding agreements between the United States and a number of flag States with open registries. These agreements permit the United States to stop and board vessels flagged in the participating States, often with short term notice and permission periods, in order to search and seize weapons of mass destruction or associated delivery systems. The agreements are mostly reciprocal, so in theory participating States could exercise identical powers over suspect United States flagged vessels, but practically speaking the prospect of this occurring is remote. At the time of writing, seven such agreements had been concluded, with another yet to enter into force. The agreements are with Panama, Liberia, the Marshall Islands, Croatia, Belize, Cyprus and Malta, with an agreement with Mongolia yet to enter into force.⁵⁸

Regional initiatives

The NWC paper refers to regional developments as being significant and increasingly common. This is a logical and reasonable assessment of international practice in a number of areas, most notably in fisheries management and environmental protection. Similar structures with respect to security may also emerge in the years to come, something which is already happening in specific subject areas within Australia's region.⁵⁹

In terms of non-proliferation, the NWC paper poses a relatively pessimistic future with up to 30 nuclear armed States and concern that the *Treaty on the Non-proliferation of Nuclear Weapons 1968* will collapse under the pressure caused by the emergence of new nuclear States. It should be noted that the workshop on which the NWC paper is based took place in the wake of the North Korean nuclear test, and in an environment where UN responses to the nuclear activities of North Korea and Iran were proving ineffectual. In the months since November 2006, North Korea has apparently accepted a diplomatic solution to bring about nuclear disarmament.⁶⁰ While the situation with Iran remains tense, the prognostication of the collapse of the *Treaty on the Non-proliferation of Nuclear Weapons 1968* is much less likely than previously.⁶¹

Regional responses to ocean issues are, as was pointed out in the NWC paper, significant in a number of areas, most notably in the context of fisheries and environmental protection. Australian participation in regional arrangements of this nature is common, and sees national participation across a number of instruments. These are listed in Table 7.

Treaty	Year	Australian Participation
Plant Protection Agreement for the Asia and Pacific Region	1956	Yes
The Antarctic Treaty	1959	Yes
Convention for the Conservation of Antarctic Seals	1972	Yes
Convention on Conservation of Nature in the South Pacific	1976	Yes
South Pacific Forum Fisheries Agency Convention	1979	Yes
Convention on the Conservation of Antarctic Marine Living Resources	1980	Yes
South Pacific Nuclear Free Zone Treaty	1985	Yes

Treaty	Year	Australian Participation
Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, Noumea	1986	Yes
Protocol for the Prevention of Pollution of the South Pacific Region by Dumping	1986	Yes
Protocol Concerning Co-operation in Combating Pollution Emergencies in the South Pacific Region	1986	Yes
South Pacific Fisheries Convention	1987	Yes
Convention for the Prohibition of Fishing With Long Drift Nets In the South Pacific	1989	Yes
Protocol to the Antarctic Treaty on Environmental Protection	1991	Yes
Convention for the Conservation of Southern Bluefin Tuna	1992	Yes
Agreement for the establishment of the Indian Ocean Tuna Commission	1993	Yes
Agreement establishing the South Pacific Regional Environmental Programme	1993	Yes
Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region (The Waigani Convention)	1995	Yes
South Indian Ocean Fisheries Agreement	2006	Not yet in force
South Pacific Regional Fisheries Management Convention	-	Under negotiation

Table 7: Regional environmental and fisheries treaties

It is evident from this list that Australia has been heavily engaged in the region in participating in regional fisheries and environmental agreements. Australia is equally significantly engaged in security cooperation throughout the region, with formal relationships existing with New Zealand, Singapore, Malaysia, Papua New Guinea and most recently Indonesia. Were there to be regional developments in responding

to security or other measures at a regional level, Australia would certainly be engaged in those developments, and would in all likelihood play a leading role.

Refugees

The NWC paper also expressed concern at the stability of the regime for refugees, in the face of large movements of displaced persons. At international law, the treatment of refugees claiming asylum is, like the duty to render assistance, of great age, and has been incorporated into modern treaty law. The *Convention relating to the Status of Refugees 1951* and its 1967 Protocol deal with the obligations upon State Parties, including Australia, in dealing with refugees arriving in its territory.⁶² A refugee is defined under article 1 as a person with a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, who is outside their country of nationality, and is unwilling or unable to seek its help, and is unwilling to return. Most importantly is the obligation upon States under article 33 of the Refugees Convention, which contains the *non-refoulement* principle:

1. No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

This provision restricts a State that has individuals with refugee-status from deporting those individuals to where they might be persecuted, and has the effect of restricting the similar expulsion of any person claiming such status at least until that claim has been reviewed.

The standard which is set by international law is determined domestically by State Parties, and in the case of Australia is found in the operation of the *Migration Act 1958*.⁶³ This Act adopts the international standard, and puts in place review mechanisms, which themselves can be subject to administrative review by a specialised agency. These procedures typically take many months, and as a result detention centres have been established at a variety of locations to house asylum-seekers pending the resolution of their status.

While influxes of people claiming refugee status have, from time to time, placed these systems under pressure, there is little reason to suggest that international law will change to meet the demands of larger movements of people. In times of war in parts of Africa, hundreds of thousands if not millions of people have been displaced, bringing about vast humanitarian crises. While these crises are serious and have caused tremendous difficulties for the receiving States and the international community, there has been no serious effort by States to revisit the content of the *Convention relating to the Status of Refugees 1951*.⁶⁴

Regional Practice in the Law of the Sea

Regional practice in relation to the law of the sea varies greatly, and is significant to Australia insofar as it may negatively impact upon freedom of navigation through the region. The assessment of regional practice contained here is brief, and will be in the form of a short summary of each State's practice. It is intended that detailed summaries of regional State practice in the law of the sea will be produced in a subsequent work.

Regional Attitudes to Security Jurisdiction

All States in Australia's region claim the full range of maritime zones, to the maximum extent permissible, with the exception of Singapore, which still only claims a three nautical mile territorial sea. As such, all of those considered below have a 12 nautical mile territorial sea and 200 nautical mile EEZ. Further, these zones are applied to all areas which they claim, including the Spratly Islands and elsewhere.

China

China has a restrictive law of the sea practice, particularly with respect to freedom of navigation. Its restrictive approach is exacerbated by the use of territorial sea baselines that are in excess of what is permitted under the LOSC, which have the effect of greatly extending Chinese jurisdiction out to sea. Illegal basepoints have been used, and the baselines themselves enclose coastal areas which are neither deeply indented, masked by fringing islands, or possess any other justification.

Chinese legislation requires that warships receive prior authorisation before entering Chinese territorial waters. Such a requirement is inconsistent with the rules for innocent passage. China also asserts a right to a security jurisdiction within its contiguous zone. Since the contiguous zone under the LOSC limits jurisdiction to fiscal, immigration, sanitary and customs jurisdiction, as assertion over matters pertaining to security is also contrary to international law.

China also requires notice of shipments of waste through its territorial sea and EEZ. While there are special requirements for the shipment of nuclear materials through the territorial sea, these do not extend to the EEZ, and do not apply to all types of waste passing through the territorial sea.

Fiji

Fiji's claims of jurisdiction over the territorial sea and other maritime zones reflect international law closely, with legislation guaranteeing the right of all vessels to exercise a right of innocent passage through the territorial sea. Its archipelagic baselines are largely in accordance with international law, and although legislative provisions to do so exist, no ASL have been proclaimed.

India

India claims the full range of maritime zones in accordance with international law; however, its practice with respect to foreign vessels and military exercises is restrictive and in breach of international law. India has a requirement of notice to be given by foreign warships prior to entering its territorial sea.

In addition, India also asserts a security jurisdiction over the contiguous zone. Since the contiguous zone under the LOSC limits jurisdiction to fiscal, immigration, sanitary and customs jurisdiction, as assertion over matters pertaining to security is also contrary to international law.

India also seeks to restrict access and activities in its EEZ. It requires prior permission to be given of any military exercises or manoeuvres taking place in its EEZ. India also requires 24 hour notice of vessels carrying 'dangerous goods and chemicals, oil, noxious liquid and harmful substances and radioactive material'. There is no basis in international law for these measures.

Indonesia

It is significant to note that Indonesian perceptions of the application of international law are often significantly at variance with more widely accepted interpretations. This is most clearly seen in relation to ASL. After the initial Indonesian proposal in 1996 of designating only three North-South lanes, and no others, there was significant international protest from maritime States, including Australia, the United States, the United Kingdom and Japan. As a result of this protest, when Indonesia commenced negotiations with the IMO, Australia and the United States participated in the discussions. In the final wash-up, in 1998, Indonesia was able to keep its three lanes, but these were explicitly stated to be a 'partial designation', leaving the way open for maritime States to regard any route used by international navigation as an ASL.

However, statements by Indonesia since the partial designation make it clear that it has a different view. The statement released by the Indonesian Foreign Minister immediately following the adoption of the ASL does not use the word partial anywhere in the text, and there was no reference to any of the discussions with other States although the history of lodgement of the proposal with IMO was referred to. In unreported statements in Jakarta in 2003, an Indonesian Foreign Ministry official stated that the

designation should not be treated as partial, and that ASL passage ought to be limited only to the designated lanes.

Indonesia has promulgated legislation dealing explicitly with ASL passage. *Act No. 6 of 8 August 1996* provides in Chapter III for 'peaceful crossing rights' and 'archipelagic sea channel crossing rights'. The former appears to equate to the regime of innocent passage under the LOSC. In accordance with the regime of innocent passage under LOSC article 25, Indonesia reserves the right to 'temporarily postpone peaceful crossing' of its territorial sea and archipelagic waters for 'the protection of its security, including the purpose of arms/weapons training'. Submarines and other submerged vehicles are required to navigate on the surface and show their flag in this mode of passage.

The part of Chapter III dealing with ASL passage is of greater concern. It provides for such passage according to the LOSC, but only at 'specially stipulated sea channels'. This is contrary to the negotiation of the partial designation of ASL, which was intended to allow other lanes to be used. In the absence of a designated ASL, the LOSC permits routes normally used for international navigation to be used for ASL passage. Since the three existing Indonesian lanes are not intended to be a complete designation, it follows other routes used for international navigation retain their status as being used as ASL. ASL passage cannot be validly suspended by the archipelagic State at any time, and is also applicable to aircraft, which is not the case for innocent passage. Further, Australia takes the view, along with other maritime States, that ASL passage allows transit in 'normal mode', which includes submerged submarine transit, and the undertaking of all usual shipboard activities and security measures.

Malaysia

Malaysia relies heavily upon the benefits to its economy arising from the freedom of navigation through the Malacca Strait, and accordingly its legislation upholds the freedom of navigation in a manner consistent with international law.

More controversially, Malaysia has taken the view that military exercises in its EEZ require Malaysian consent. There is nothing in the LOSC that indicates that any such jurisdiction exists. The only restrictions imposed upon States seeking to undertake military exercises in another State's EEZ is to have due regard for the uses of others, and to do nothing which impedes the coastal State from exercising its jurisdiction. As such, while exercises could not be undertaken in a fashion to endanger a fishing fleet or oil platform, there is no justification for the blanket permission required by Malaysia.

Papua New Guinea

Papua New Guinea is an archipelagic State, in spite of its mainland territory sharing a land boundary with Indonesia. There is no indication of any assertion of jurisdiction

by Papua New Guinea that would be contrary to the LOSC. Its archipelagic baselines are largely in accordance with international law, although the formal baselines were only declared in 2002. No ASL have been proclaimed.

Pakistan

Pakistan does require notification of foreign warships entering its territorial sea, even if such vessels are exercising a right of innocent passage. There is no requirement in international law for such notification to be given where a warship is exercising a right of innocent passage, and Pakistan's legislation on this point has been the subject of protest by the United States. Pakistan has a contiguous zone which extends to 24 nautical miles. The extent of the zone is consistent with international law. Pakistan also purports to possess jurisdiction over fiscal, immigration, sanitary, customs and security matters. Only the first four of these are consistent with the LOSC, while there is no justification for security.

Philippines

The Philippines largely complies with the requirements of the LOSC with respect to the transit of vessels, although it has expressed concern over military activities in its EEZ. However, there are no specific provisions limiting military vessels transiting through the archipelago. Contrary to the LOSC, the Philippines has proclaimed its territorial waters to be all those waters contained in what is usually described as the Treaty Limits Box. This large Box extends to as much as 350 kilometres away from the coast of the Philippines, and is therefore not permissible at international law. Australia and other States have protested the maintenance of the Box, even though the Philippines has indicated it will not enforce rights in the Box in a manner inconsistent with the LOSC.

Solomon Islands

The Solomon Islands is yet to seek the promulgation of archipelagic sea lanes. Section 10 of the *Delimitation of Marine Waters Act 1978* does provide that the relevant Solomons minister can proclaim ASL in accordance with international law, but until this takes place, routes normally used by international navigation may be used for ASL passage. Rights of navigation in accordance with international law are explicitly guaranteed in the *Delimitation of Marine Waters Act 1978*.

Sri Lanka

Sri Lanka claims the full range of maritime zones in accordance with international law; however, its practice with respect to foreign vessels and military exercises is restrictive and in breach of international law. Sri Lanka has a requirement of notice to be given by foreign warships prior to entering its territorial sea.

In addition, Sri Lanka also asserts a security jurisdiction over the contiguous zone. Since the contiguous zone under the LOSC limits jurisdiction to fiscal, immigration, sanitary and customs jurisdiction, as assertion over matters pertaining to security is also contrary to international law.

Sri Lanka also seeks to restrict military activities in its EEZ. It requires prior permission to be given of any military exercises or manoeuvres taking place in its EEZ. There is no basis in international law for these measures.

Taiwan

In the international community, most States do not recognise the government of Taiwan, but rather recognises the sovereignty over the island being vested in the People's Republic of China. Some aspects of the law of the sea practice of the government in Taipei are not consistent with international law. Taiwan provides that foreign civilian ships are entitled to exercise a right of innocent passage if such a right is available to Taiwanese vessels under the reciprocity principle. Foreign military and government vessels are required to give notice of passage through the Taiwanese territorial sea. Such a requirement is not consistent with international law.

Outside the territorial sea, Taiwan is mostly compliant with international law, with the exception of the waters of the Taiwan Strait outside its territorial sea. It provides the Taiwanese government can regulate foreign transiting vessels in the Taiwan Strait used for international navigation on the following subjects:

1. the maintenance of navigation safety and the regulation of maritime traffic
2. the prevention, reduction and control of pollution of the environment
3. the prohibition of fishing
4. the prevention and punishment of loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of the Republic of China.

While the second and third are permissible, and the fourth permissible in the contiguous zone, the first goes beyond what is allowable under international law.

Thailand

Thailand has also acted entirely with the LOSC in relation to issues of passage. Thailand has explicitly stated that it supports the existing passage regimes with respect to innocent passage through the territorial sea, and transit passage through international straits. Further, it has rejected the notion that warships exercising such passage rights ought to give prior notification of their transits. The Thai position was incorporated into a statement by the Thai Ministry of Foreign Affairs, made in August 1995.

Vanuatu

Vanuatu's claims of jurisdiction over the territorial sea reflect international law quite closely, even to the extent of guaranteeing in legislation the right of all vessels to exercise a right of innocent passage through the territorial sea. Its archipelagic baselines are in accordance with international law, but no ASL have been proclaimed.

Vietnam

Vietnam claims a 12 nautical mile territorial sea, in accordance with the LOSC. However, *Decree No. 30-CP*, issued in 1980, requires a 30 day authorisation period by foreign warships and 'military ships' to receive permission to exercise a right of innocent passage through Vietnamese waters. Once granted, there is a 48 hour pre-entry notification required. Non-military vessels must seek permission with a minimum of 24 hours notice, after seeking permission seven days in advance, unless they are not commercial vessels, in which case the notification increases to 48 hours and the permission to 15 days. Vietnam also claims that no more than three warships of the same nationality may be present in its territorial sea, nor may they stay on visits for more than one week.

Vietnam also has specified routes which foreign vessels must follow, and designated 'forbidden areas' which these vessels may not enter. Since the designated routes are not navigational measures set up in consultation with the IMO, such as a traffic separation scheme, they are also unlawful, in the territorial sea. While navigation in the territorial sea is, at international law, subject to the regime of innocent passage, there is no restriction as to route other than being continuous and expedition, unless there are navigational measures such as a traffic separation scheme. Permanently forbidden areas are only legitimate if they are in internal waters.

Vietnam claims similar security rights for the contiguous zone, as it does in the territorial sea. For warships, notice requirements are again asserted, as well as a requirement for weapons to be in a 'non-operative position' and ammunition locked away and gun barrels covered. Submarines are obliged to navigate on the surface and show their flag.

All of these measures are contrary to international law. Ships have freedom of navigation outside the territorial sea, and as long as they pose no direct threat to shipping or the coastal State, can exercise with their weapons. Submarines are only obliged to navigate on the surface when exercising a right of innocent passage in the territorial sea, and therefore there is no requirement for such navigation in the contiguous zone. The notification requirements are, as with the territorial sea, without foundation at international law.

Impact of the Law of the Sea on Australian National Interests

Freedom of Navigation

Restrictions on international navigation by coastal States present a serious threat to Australia's international maritime interests. Any limitations upon the movement of vessels engaged in international trade around the region would have a profoundly negative effect upon the Australian economy. Ensuring the existing freedom of navigation regime is retained and supported worldwide should be viewed as an essential foreign policy objective for Australia.

There are a number of ways in which an increasingly restrictive navigation regime internationally might affect Australian interests. First, ADF ships, submarines and aircraft might find their access to certain areas of the ocean and super-adjacent airspace becoming restricted or subject to unacceptable limitations. Prior entry notification, navigation on the surface for submarines, and the restriction of international straits and ASL are not currently permissible at international law, and would limit the ADF's operational effectiveness throughout the region. It could also impede the transit of allied navies in times of heightened tension or armed conflict, also hampering the efforts of coalitions of which Australia is a part.

Second, Australian commercial shipping, and other flag carriers of Australian exports and imports use many important sea routes that pass through international straits, archipelagic waters or areas subject to claims of security jurisdiction by the littoral State. The interruption of these commercial vessels, even for a short time, would have a very detrimental impact upon the Australian economy. Consequently, it is vital for the right of freedom of navigation to be upheld and maintained for commercial traffic as well as military.

Given the assertion of jurisdiction by coastal States beyond the ambit of the LOSC, it appears to be motivated most commonly by a desire to improve maritime security, as most of the restrictions relate to the activities of warships, and, to a lesser extent, military aircraft. Most coastal States, like Australia, also draw substantial benefit from the freedom of navigation, so have not, to date, been over zealous in asserting their security regimes. An exception to this would be North Korea, but fortunately, its waters are far from maritime trade routes which are of significance to Australia. While there has been some tension with China with respect to transits through the Taiwan Straits, there is no indication this has prevented a strengthening of the relationships, diplomatic and defence-based, that have grown over the last decade, and will likely continue to grow under the new Rudd Government in Australia.

A number of responses to assertions of security jurisdiction by coastal States, or other restrictions on freedom of navigation, are possible. First, Australia could engage in a systematic program of diplomatic protest in respect of regional maritime claims, which cannot be justified under international law. To date, there has been little diplomatic activity directed at maritime claims by other States, and to allow claims to go unchallenged over a long period of time weakens Australia's position. While protests have been made in respect of particular areas which were relevant because of an ongoing operation, such as Australia's protest to Iran over the legality of its territorial sea baselines in the Persian Gulf, other areas of greater strategic importance, but not the site of extant conflict or activity, have not been the subject of protest.

Second, Australia might seek to take a leaf out of the United States' book and initiate a Freedom of Navigation program. The Freedom of Navigation program requires the USN to be cognisant of maritime claims disputed by the United States, and to, where possible, operationally assert rights of freedom of navigation or military exercise, as appropriate. As such USN vessels will regularly detour into waters subject to claim or restriction by coastal States, to ensure there is a practical demonstration of the United States' failure to accept these claims and restrictions. The Freedom of Navigation program is applied to allies' claims as well as other States, and is the subject of annual reporting to Congress by the USN and the State Department.

Freedom of navigation efforts become more complex when asserted on behalf of Australian commercial interests. First, innocent passage permits vessels to pass continuously and expeditiously through the territorial sea of a coastal State, and prohibits activities that are not incidental to passage. Transit and ASL passage have similar restrictions. RAN ships accompanying Australian flagged vessels through the territorial sea of another State would not be in a position to stop or request to board other transiting vessels, including Australian vessels, unless they were assisting such vessels when in danger or distress.⁶⁵

Outside of the territorial sea of third States and of Australian waters, there are issues with respect to commercial vessels being boarded by the ADF. International law does not permit a State to board another State's vessels without its consent on the high seas, save in extremely limited circumstances. The provision of operational support to assert any freedom of navigation, would therefore have to be done with the express consent and cooperation of a flag State, to ensure that Australian personnel could get aboard supported vessels if necessary.

On balance, while some States assert jurisdiction over maritime areas, there is nothing to suggest that to date this has impacted negatively on Australian warships' and other vessels' access to important ocean passages. Developments in the law of the sea to date, while requiring monitoring, also do not suggest that the navigational regimes are being fatally undermined. The positive assertion through diplomatic means and

regular ship transits would not impact negatively on the present situation, and would demonstrate an Australian commitment to uphold the existing law.

Maritime Enforcement

States through their warships or other government vessels, including coastguard vessels, may be able at international law to assert a right to board a vessel at sea. This may be through an assertion of jurisdiction over the vessel, the permission of the flag State, or through a mere right to visit the vessel. If the vessel in question refuses to comply to permit a boarding to take place, the question is raised as to what degree of force may be imposed in order to compel compliance.

The LOSC says very little as to what level of force may be imposed by a State in order to uphold its rights and jurisdiction at sea. The LOSC notes that the exercise of jurisdiction should be by a warship or other marked government vessel, which may imply some degree of force might be used, as most vessels fitting these descriptions are armed, but it is submitted that this is too much to read into the LOSC. As the LOSC does not deal with the issue, it is necessary to apply older principles of international law.

There have been a number of cases dealing with offshore maritime enforcement and the use of force. In the case of *I'm Alone*, a joint commission dealt with matters surrounding the pursuit and destruction of a Canadian vessel suspected of smuggling alcohol during Prohibition by the United States Coast Guard. The Commission, after dealing with issues of hot pursuit, held that the sinking of the *I'm Alone*, which had offered no threat to the pursuing coast guard vessels, was contrary to international law. The Commission was satisfied that a pursuing vessel might use necessary and reasonable force for the purpose of boarding, searching, seizing and bringing to port a vessel, and if in such circumstances the vessel was to sink, then that might be acceptable, providing the sinking was incidental to necessary and reasonable action. However, where an unarmed vessel had been deliberately sunk, such action would be contrary to international law.⁶⁶

In the case of the *Red Crusader*, an international inquiry between the United Kingdom and Denmark had to consider an incident between a Scottish trawler and a Danish fisheries patrol vessel in the waters around the Faroe Islands. After having been stopped by the Danish patrol vessel *Neils Ebbesen* on suspicion of fishing, the *Red Crusader* fled, taking two Danish crew members with her. The *Neils Ebbesen* gave chase, and ultimately fired upon the *Red Crusader*, initially with 40mm gun fire into mast, radar scanner and lights, and then into the ship's stern. When this proved ineffective, *Neils Ebbesen* fired 127mm solid shot into the *Red Crusader*, with the incident brought to a close with the intervention of a Royal Navy vessel interposing itself between the two vessels. The Court of Inquiry held that the force used against the *Red Crusader* was

contrary to international law. It considered the firing of solid shot into the *Red Crusader* without warning, and firing in such a way as to endanger human life exceeded the legitimate use of force.⁶⁷

The most recent significant international case dealing with the use of force in enforcement actions at sea was that of the MV *Saiga* (No.2) before the International Tribunal for the Law of the Sea. The *Saiga* was a tanker, registered in St Vincent and the Grenadines, that was engaged in bunkering fishing vessels off the coast of Guinea in 1997. A Guinean patrol vessel pursued the *Saiga* and fired into it, although it was disputed before the Tribunal what calibre of weapon was used. The Tribunal held that the level of force used by Guinea was excessive and stated:

155. In considering the force used by Guinea in the arrest of the *Saiga*, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.

156. These principles have been followed over the years in law enforcement operations at sea. The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force.⁶⁸

This places a substantial restriction on the use of force in maritime enforcement. Aside from an exception in relation to self defence, which was touched upon in MV *Saiga* (No.2), but deemed inapplicable by the Tribunal in the circumstances, it certainly makes it explicit that the use of force is only permissible after a variety of other measures have been implemented, including warning shots across the bow. Together with *Red Crusader* and *I'm Alone*, it makes it most unlikely that the application of force that could potentially cause physical harm to humans in the arrest of a vessel at sea can be lawfully used.

Such an approach is largely duplicated in the 2005 Protocol to the SUA Convention. Article 8*bis*(9) provides:

9. When carrying out the authorized actions under this article, the use of force shall be avoided except when necessary to ensure the safety of

its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions. Any use of force pursuant to this article shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances.

It is significant that the language used in the last sentence of this paragraph is identical to the phrase used by the International Tribunal for the Law of the Sea in paragraph 155 of its joint judgment in the *MV Saiga*.

Notably, where a boarding is undertaken under article 8*bis*(10) of the 2005 SUA Protocol, the scope of the duty is more fully described, perhaps reflecting the heightened concern of States in regard the exercise of a power to board and arrest against their flagged vessels:

10. Safeguards:

(a) Where a State Party takes measures against a ship in accordance with this article, it shall:

(i) take due account of the need not to endanger the safety of life at sea;

(ii) ensure that all persons on board are treated in a manner which preserves their basic human dignity, and in compliance with the applicable provisions of international law, including international human rights law;

(iii) ensure that a boarding and search pursuant to this article shall be conducted in accordance with applicable international law;

(iv) take due account of the safety and security of the ship and its cargo;

(v) take due account of the need not to prejudice the commercial or legal interests of the flag State;

(vi) ensure, within available means, that any measure taken with regard to the ship or its cargo is environmentally sound under the circumstances;

(vii) ensure that persons on board against whom proceedings may be commenced in connection with any of the offences set forth in article 3, 3*bis*, 3*ter* or 3*quater* are afforded the protections of paragraph 2 of article 10, regardless of location;

(viii) ensure that the master of a ship is advised of its intention to board, and is, or has been, afforded the opportunity to contact

the ship's owner and the flag State at the earliest opportunity;
and
(ix) take reasonable efforts to avoid a ship being unduly
detained or delayed.

These provisions reinforce the basic position in respect of the use of force, but also flesh out detail on how a vessel and its crew must be dealt with. The level of detail would seem to go well beyond the previously discussed cases.

When ADF and other Australian Government personnel undertake maritime enforcement operations, including boardings, the above international law establishes the minimum standard for the use of force. This is both at international and domestic law, as Australian law adopts the relevant international law to determine the appropriate minimum standard for the use of force at sea.⁶⁹

The lack of detail in the relevant international law presents a substantial challenge to those charged with ensuring the legality of Australian maritime enforcement actions, and a challenge which they may have to defend not only in Australian courts, but in international tribunals. The LOSC provides a mechanism for flag States of vessels that have been subject to arrest and seizure by a coastal State to have their vessel released through action before the International Tribunal for the Law of the Sea.⁷⁰ The *Saiga* discussed previously is an example of such an action, and it would present an opportunity for an international tribunal to comment on the legality of the use of force in boarding operations. Obviously this is an area of international law where further developments could have a substantial impact upon the manner in which Australia conducts the enforcement of its laws offshore.

Notes

- 1 See S. Kaye, *Australia's Maritime Boundaries*, (2nd edn), Wollongong Papers on Maritime Policy No. 12, Centre for Maritime Policy, University of Wollongong, 2001. This figure reflects the additional 2.5m km² agreed by the UN Commission on the Limits of the Continental Shelf in April 2008.
- 2 Australian Maritime Safety Authority, *Fact Sheet: Australian Search and Rescue*, <www.amsa.gov.au/search_and_rescue/Australian_Search_and_Rescue_fact_sheet.asp>.
- 3 Royal Australian Navy, *Australian Maritime Doctrine*, Sea Power Centre - Australia, Canberra, 2000, Chapter 2.
- 4 Australian Communications and Media Authority, *Annual Report 2006-07*, Melbourne, 2007, p. 31.
- 5 The Commonwealth Scientific and Industrial Research Organisation (CSIRO) estimates the value of marine activities to the national economy at approximately \$52 billion. CSIRO Marine Research, *Facts on Australia's Oceans*, 25 November 1988, <www.marine.csiro.au/LeafletsFolder/pdfsheets/25facts.pdf>.
- 6 *United Nations Convention on the Law of the Sea*, done at Montego Bay on 10 December 1982, entered into force 16 November 1994, United Nations Treaty Series, Vol. 1833, p. 396.
- 7 Craig H. Allen, (A Stronger and More Prosperous World through Secure and Accessible Seas), Final Report on the Legal Experts' Workshop on the Future Global Legal Order, Naval War College, 2007, p. 3.
- 8 See M.O. Hudson, 'The First Conference on the Codification of International Law' (1930) *American Journal of International Law*, Vol. 24, p. 447; D.P. O'Connell and I.A. Shearer (ed), *The International Law of the Sea*, Oxford University Press, Oxford, 1982, Vol. 1, pp. 158-159; C.J. Colombos, *The International Law of the Sea*, Longman, London, 1967, pp. 103-106.
- 9 A.H. Dean, 'The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas' (1960) *American Journal of International Law*, Vol. 54, p. 751; D. Bowett, 'The Second United Nations Conference on the Law of the Sea' (1960) *International and Comparative Law Quarterly*, Vol. 9, p. 414.
- 10 Article 3 of the LOSC provides:

Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12nm, measured from baselines determined in accordance with this Convention.
- 11 Derived principally from a number of tables contained in Germany, Commander's Handbook: Legal Bases for the Operations of Naval Forces ; additional material added by the author.
- 12 Benin: Decree No. 76-92 extending the territorial waters of the People's Republic of Benin to 200nm, 1976, <www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/BEN_1976_Decree.pdf>;
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Treaty of Tordesillas, done at Tordesillas on 7 June 1494, ratified by Spain 2 July 1494, ratified by Portugal 5 September 1494: reproduced at <www.yale.edu/lawweb/avalon/moder/mod001.htm>.
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- 20 Article 25(3) of the Law of the Sea Convention.
- 21 *Corfu Channel Case, ICJ Reports 1949*, p. 3.
- 22 See article 30 of the Law of the Sea Convention.
- 23 Article 54 of the Law of the Sea Convention provides:
 Articles 39, 40, 42 and 44 apply mutatis mutandis to archipelagic sea lanes passage.
- 24 Article 58(1) of the Law of the Sea Convention provides:
 In the exclusive economic zone all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.
- 25 See article 87(2) of the Law of the Sea Convention.
- 26 See B. Oxman, 'The Regime of Warships under the United Nations Convention on the Law of the Sea', *Virginia Journal of International Law*, Vol. 24, 1984, p. 809.
- 27 See article 21 of the Law of the Sea Convention.
- 28 Article 33 of the Law of the Sea Convention provides:
 In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:
 (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;

- (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.
- 29 The table was derived from S.B. Kaye, 'Freedom of Navigation in a Post 9/11 World: Security and Creeping Jurisdiction' in R. Barnes, D. Freestone and D. Ong (eds), *The Law of the Sea: Prospects and Problems*, Oxford University Press, Oxford, 2006, p. 347.
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- 34 See F. Francioni, 'Peacetime Use of Force, Military Activities, and the New Law of the Sea', *Cornell International Law Journal*, Vol. 18, 1985, p. 215; see also M. Nordquist, *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Martinus Nijhoff, Dordrecht, 1985, pp. 553-565.
- 35 The Preamble states in part:
 'Prompted by the desire to settle, in a spirit of mutual understanding and co-operation, all issues relating to the law of the sea and aware of the historic significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world', and 'Believing that the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, co-operation and friendly relations among all nations in conformity with the principles of justice and equal rights and will promote the economic and social advancement of all peoples of the world, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter'.
- 36 Galdorisi and Kaufman, 'Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict', pp. 275-278.
- 37 Article 240 of the Law of the Sea Convention provides:
 In the conduct of marine scientific research the following principles shall apply:
 (a) marine scientific research shall be conducted exclusively for peaceful purposes.
- 38 On this point see D.J. Attard, *The Exclusive Economic Zone in International Law*, 1987, p. 75; F. Orrego Vicuna, *The Exclusive Economic Zone: Regime and Nature under International Law*, 1989, pp. 110-113; Galdorisi and Kaufmann, 'Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict', pp. 274-276.

- 39 L. Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 1995, paragraph 10.
- 40 See Part II(3)(c), Law of the Sea Convention. Other provisions also support sovereign immunity for warships and government vessels on non-commercial service beyond the territorial sea. Articles 42(5) and 236 explicitly refer to the doctrine with approval. In terms of intervention beyond the territorial sea, there is nothing to suggest the immunity of a warship is diluted in any way.
- 41 The incident is described in S.D. Murphy (ed), 'Contemporary practice of the United States relating to International Law', *American Yearbook of International Law*, Vol. 95, 2001, p. 626; Galdorisi and Kaufmann, 'Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict', pp. 292-294.
- 42 China has proclaimed territorial sea baselines, which the United States has protested. The incident occurred more than 12nm from the Chinese baselines, so that its occurrence in international airspace was not in dispute. The baselines were proclaimed in 1996: Declaration of the Government of the People's Republic of China on the baselines of the territorial sea, 15 May 1996, reproduced at <www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1996_Declaration.pdf>. The American protest is cited in Naval War College, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, Naval War College, Newport, 1997, pp. 1-77.
- 43 Article 13 of the *Law of the Territorial Sea and the Contiguous Zone* of 25 February 1992 provides that the Chinese exercise jurisdiction over security within the contiguous zone. This is rejected by the United States as inconsistent with article 33 of the Law of the Sea Convention, which has no reference to a security jurisdiction in respect of the contiguous zone. The 1992 US protest is cited in Naval War College, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, Naval War College, Newport, 1997, pp. 1-90.
- 44 A statement from the Chinese Embassy in Washington, DC noted: 'The surveillance flight conducted by the US aircraft overran the scope of 'free overflight' according to international law. The move also violated the LOSC, which stipulates that any flight in airspace above another nation's exclusive economic zone should respect the rights of the country concerned. Thus, the US plane's actions posed a threat to the national security of China.' Reproduced at <<http://id.china-embassy.org/eng/xwdt/t87158.htm>>.
- 45 Chinese Ministry of Affairs Press Release, 3 April 2001, reproduced at <<http://query.nytimes.com/gst/fullpage.html?res=9800E3DA163EF937A357C0A9679C8B63>>.
- 46 Ivan Shearer recognised this as the logical outcome of the Chinese argument in an unpublished paper presented to a conference organised by the Asia-Pacific Centre for Military Law at the University of Melbourne in February 2002: I.A. Shearer, 'Military Activities in the Exclusive Economic Zone: The Case of Aerial Surveillance', Melbourne, February 2002, cited in Galdorisi and Kaufman, 'Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict', p. 293.
- 47 International Maritime Organization, *International Ship and Port Facility Security Code*, London, 2003.
- 48 *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, done at Rome on 10 March 1988, entered into force 1 March 1992: United Nations Treaty Series, Vol. 1678, p. 221.

- 49 *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, International Maritime Organization Doc. LEG/CONF. 15/21, done at London on 14 February 2006.
- 50 Article 3*bis*, 2005 SUA Protocol.
- 51 Article 3*ter*, 2005 SUA Protocol.
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- 53 Article 8*bis*(12), 2005 SUA Protocol.
- 54 See <<http://fpc.state.gov/documents/organization/48624.pdf>>.
- 55 Reprinted at <www.dfat.gov.au/globalissues/psi/psi_statement.html>.
- 56 Article 42, United Nations Charter.
- 57 Operative paragraph 10 provides:
Further to counter that threat, calls upon all States, in accordance with their national legal authorities and legislation and consistent with international law, to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials.
- 58 See <www.state.gov/t/isn/c12386.htm>.
- 59 Australia has excellent cooperation in naval affairs with a number of States in the region, as well as having formal defence ties with a number of States including Malaysia, Singapore, Papua New Guinea, Japan and New Zealand.
- 60 See 'N Korea agrees Disarmament Steps', *BBC News*, 13 February 2007 <<http://news.bbc.co.uk/2/hi/asia-pacific/6356481.stm>>.
- 61 For a discussion of the 2007 non-proliferation plan see N. Michishita, The 13 February Action Plan and the Prospects for the North Korean Nuclear Issue, *IFRI Proliferation papers, 2007*, <http://ifri.org/files/Securite_defense/Proliferation_Paper_Michishita.pdf>.
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- 63 Section 36 of the *Migration Act 1958*.
- 64 United Nations Treaty Series, Vol. 189, p. 150.
- 65 Article 18(2) of the Law of the Sea Convention.
- 66 'Claim of the British Ship *I'm Alone* v United States' Joint Interim and Final Reports of the Commissioners, 1933 and 1935. See (1935) *American Journal of International Law*, Vol. 29, p. 330.
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