



32nd OCEANS CONFERENCE
FREEDOM OF THE SEAS,
PASSAGE RIGHTS AND THE 1982
LAW OF THE SEA CONVENTION

9–10 January 2008 ||
SINGAPORE ||



32nd OCEANS CONFERENCE: FREEDOM OF THE SEAS, PASSAGE RIGHTS AND THE 1982 LAW OF THE SEA CONVENTION

REPORT ON A CONFERENCE ORGANIZED BY
THE S. RAJARATNAM SCHOOL OF INTERNATIONAL STUDIES,
NANYANG TECHNOLOGICAL UNIVERSITY
AND
THE CENTER FOR OCEANS LAW AND POLICY,
UNIVERSITY OF VIRGINIA SCHOOL OF LAW

9-10 January 2008
SINGAPORE

MARITIME SECURITY PROGRAMME
S. RAJARATNAM SCHOOL OF INTERNATIONAL STUDIES,
NANYANG TECHNOLOGICAL UNIVERSITY

OPENING CEREMONY

Ambassador Barry Desker
Dean, S. Rajaratnam School of
International Studies, Singapore



Ambassador Barry Desker making his welcome remarks

During the opening session of the conference Ambassador Barry Desker, Dean of RSIS described the change that seafarers have experienced, from liberty to go anywhere with few concerns about pollution and conducting naval operations indiscriminately, exercising the freedom of the high seas, to a time with more regulations emanating from multilateral agreements, restricting them to ensure the security of navigation and protection of the environment. Ambassador Desker said that the implementation of changes has been difficult and remarked that during this conference the obligations and regulations placed by the UNCLOS will be highlighted in the coming sessions. Ambassador Desker said that the conference will also examine the role of the rights and jurisdictions of states to protect the marine environment and the measures to be implemented with international cooperation. He concluded by saying that the importance of this region is vital for the safe and secure passage of shipping and that he was confident that this conference will contribute to the literature of the law of the sea and the evolution of maritime security policy.

Professor John Norton Moore
Director, Center for Oceans Law and
Policy, University of Virginia School
of Law



Professor John Norton Moore delivering his welcome remarks

Professor John Norton Moore, Director of the Center for Oceans Law and Policy of the University of Virginia School of Law, mentioned that this conference was a tribute to the UNCLOS and he stated the importance of the international cooperation to the success of the convention. He also mentioned the importance of the UNCLOS in establishing the rule of law in the oceans for more security and less conflicts. Professor Moore finally added that the conference will also provide guidelines for the stable management of the seas and concluded by congratulating Singapore for its efforts and leadership to bring about more safety to the oceans.

Ambassador Patricia L. Herbold U.S. Ambassador to Singapore



Ambassador Patricia Herbold making her opening remarks

The U.S. Ambassador to Singapore, Ambassador Patricia Herbold, talked about the issues concerning the United States in the context of the convention and mentioned that oceans are best protected with a global framework of the law of the seas. The Ambassador also mentioned the reason why the U.S. did not participate in the convention and how the U.S. Senate has been favourably advised about the content of the UNCLOS in a recent report. The Ambassador also talked about U.S. leadership in the protection of the seas and recognized that all nations share a common interest in securing the oceans.

Professor S. Jayakumar Deputy Prime Minister, Coordinating Minister for National Security and Minister for Law, Singapore



Professor S. Jayakumar delivering the keynote address

Professor S. Jayakumar, Deputy Prime Minister, Coordinating Minister for National Security and Minister for Law, Singapore, mentioned that the convention, adopted 25 years ago, established a legal order for international communications and has served

as an important instrument for dispute settlements. He also talked about how the UNCLOS has brought about innovative regimes, like the transit passage regime, and the crucial role of establishing order in exploration activities. Professor Jayakumar also mentioned that he would like to see an increase in the membership of the convention. He talked about the elements of globalization that have allowed a fragmentation of production and therefore an increase of maritime trade that transports about 90 per cent of total world trade. Thus, the navigation rights are indispensable to secure the flows of trade. He also addressed his concern of traffic through the Straits of Malacca because it is likely to keep growing. He added that it was critical to preserve the security of passage against terrorism. Professor Jayakumar added that nations should not forget the serious threat of climate change. He mentioned that changes caused by climate change such as the opening of transit through the arctic would require the UNCLOS to play a main role.

In conclusion, Professor Jayakumar mentioned that the UNCLOS has served the international community and will continue to do so with a comprehensive package to balance the competing interests of many states, and these different interests should not be viewed in zero sum terms, as they are not necessarily at odds. He finally said that together scholars and practitioners present at the conference will continue to preserve the integrity of the UNCLOS as an instrument for international cooperation in safety and environmental protection of the oceans.

PANEL ONE

BACKGROUND ON FREEDOM OF NAVIGATION

Professor Tommy T. B. Koh
Ambassador-at-Large,
Ministry of Foreign Affairs, Singapore



Ambassador Tommy Koh making his presentation

Ambassador Tommy Koh began his presentation by highlighting that the United Nations Convention on the Law of the Seas (UNCLOS) started missing two of the super powers at the time of signing because those countries held very radical views that could not be reconciled. Ambassador Koh also mentioned that many strait states were not invited as they also held radical positions towards the issues of navigation, activities and passage in the Economic Exclusive Zones (EEZ). He mentioned the countries that were pioneers from very small ones like Fiji to important maritime players such as the United Kingdom.

He continued his presentation explaining that after a long negotiation process, the countries finally reached a consensus on the articles to be included in the convention and released a first draft. Those incorporated articles were widely accepted as a part of the convention. Ambassador Koh also talked about the reasons why some of these proposals were accepted in the convention. He proceeded by answering that the reason was the need to find a balance and to match the legitimate interests between the major maritime players and the strait states.

Ambassador Koh went on to explain Article 3 of the convention, which consists of the balance packages that compromise various contentious issues in the international navigation. He expressed his concern on the lack of respect of the legacy and consistency of the states in following the rules of the 1982 Convention (UNCLOS). As an example of the lack of consistency, he talked about Australia and its controversial requirement for compulsory pilotage in certain areas that restricted the liberty of the traffic and added more costs to transportation.

Ambassador Koh went further to request that countries respect the full integrity of the compromise and not interpret the UNCLOS according to their private interests. He also stated a strong view on the Economic Exclusive Zones (EEZ) and its legal status towards exploitation activities that needed an agreement that has not been achieved. Ambassador Koh said that we need to break the impasse to find a solution.

Ambassador Koh also talked about the efforts of the Mexican Foreign Minister Jorge Castañeda that gathered several countries to work on a compromise that was widely accepted during the negotiations of the UNCLOS, although the contentious issues, such as extension of the economic zone and the activities allowed, among others, prevailed.

Ambassador Koh concluded by mentioning that the Castañeda Group's most important agreements were that the EEZ is not a territorial sea, neither an international sea, but sui generis and that no state can claim full sovereignty in the Exclusive Economic Zone. He mentioned that in Article 59, the conclusion was that each case was to be considered individually. Finally, Ambassador Koh talked about the importance of consistency within the convention for the future of the seas.

Professor Dr. Hasjim Djalal
Member of the Indonesian Maritime Council, Senior Advisor to the Indonesian Minister for Maritime Affairs and Fisheries, and Indonesian Naval Chief of Staff



Professor Hasjim Djalal delivering his presentation

Hasjim Djalal began his presentation by talking about the background and history of the freedom of the seas, that goes back to the 15th century with the Treaty of Torquesillas between Spain and Portugal that divided the world; the east to Portugal and the west to Spain. The division of the earth affected Indonesia, as the Spanish came through the Philippines and the Portuguese took the western islands. The relevant issue was that Portugal prevented the Dutch from trading for many years. He said that history shows us how the freedom of navigation has been an issue for centuries.

Djalal went further into the issue of the freedom of navigation and how it contributed to bringing colonialism to Indonesia, and subsequently the profiting of fisheries and many other resources extracted for hundred of years by the colonizers. He mentioned his concern that at the beginning of the 21st century many states are claiming for more sovereignty in the oceans. The implementation of these extensive claims on the exercise of sovereignty in the sea lines of communication would affect considerably the freedom of transport.

Djalal talked about the attempts during the 1950s to obtain more territorial sovereignty. He mentioned an example of one Canadian proposal, which consisted of the right of countries to obtain sovereignty over (6 x 6 miles) the Exclusive Economic Zone. However, the proposal fortunately was defeated by just one vote.

He mentioned that with the independence from the colonial powers during the 1960s more new states came into play. Those new countries did not at first pay attention to the EEZ but later those same countries started to change their minds, claiming that territorial waters belonging to them sea must bring benefits to their country and not to others.

Djalal went on to the historical evolution of sea transport with the arrival of the supertanker's era that brought benefits to the international trade but also endangered the marine environment with pollution. This concern was an important issue vis-à-vis the Straits of Malacca and the passage of hazardous containers.

In another important topic, Djalal spoke on the impact of technology and the ownership of the seabed for mining and other extraction activities. The conventional view of the developed countries was that the resources extracted from the sea were supposed to be awarded to the one that extracted it on a first-come, first-served basis, creating an imbalance against the developing countries that did not possess the technology required for the exploration and exploitation of the seabed. Therefore the consequent solution to avoid his problem was a common use of the sea.

Djalal brought up the contentious topic of where the territorial seabed ends and thus the creation of a set of maritime categories was a good idea. Finally he talked about the regulations, rights and duties of coastal states, which were placed in accordance to the convention. He talked about cooperation between Indonesia, Malaysia and Singapore on the Malacca Straits to promote protection safety of navigation and protection of the marine environment.

Djalal's conclusions were on the importance of setting guidelines to address the important issues such as the integrity of the freedom of navigation, the risk of the lack of agreements, the challenges to maritime security after 9/11, as well as the uses of the seabed and its extension. Finally he said that the Law has given us guidance but there is still a lot work to do to achieve success on the freedom of the seas.

Rear Admiral Nora Tyson Commander, Logistics Group Western Pacific, United States Pacific Command



Rear Admiral Nora Tyson making her presentation

Nora Tyson began her presentation by mentioning some facts: the global economy depended on the ocean highways, as the world's commercial fleets carry around 90 per cent of global exports with more than 33 million containers, 90 per cent of oil exported from the Persian Gulf transits by tanker through the Strait of Hormuz and half of the world's annual merchant fleet tonnage passes through the Straits of Malacca, Sunda and Lombok.

Tyson talked about the importance of global mobility such as Innocent Passage, Transit Passage, Archipelagic Sea Lane Passage and High Seas Freedoms in the EEZ. She explained the characteristics of coastal state sovereignty in territorial seas, that is the exercise of customs, fiscal, immigration and sanitation enforcement.

Tyson explained the U.S. Cooperative Strategy for 21st Century as a worldview and that the oceans are to the benefit of all, not just maritime nations and maritime forces will play a unique role in enforcing the rule of law for the oceans. She went further in explaining that U.S. interests are best served by forwarding deployed maritime forces capable of preventing, deterring, limiting, localizing and mitigating disruptions in the global system interrelated and interdependent subsystems of trade, finance, law, information and immigration.

She also emphasized that preventing war was as important as winning wars and the importance of cooperative maritime relationships as the basis for global security, and mentioned the core capabilities of the U.S. Navy such as Deterrence, Sea Control, Power Projection, Maritime Security and Humanitarian Assistance. She also pointed out that there is a necessity for challenging excessive claims and that practice remains consistent with international law.

Tyson concluded her presentation by showing the importance of maritime forces to prevent, deter, limit and localize conflict, as the forces can be surged when necessary but trust and cooperation cannot be surged. Finally, Tyson said that maritime forces around the globe present opportunities for cooperative relationships that inspire trust and confidence in the evolving global system. She said that the Freedom of Navigation Program established in 1979 has a public record of operational assertions and that the programme does not discriminate as allies, neutrals and unfriendly nations alike are challenged alike.

Professor Rudiger Wolfrum President, International Tribunal for the Law of the Sea



Professor Rudiger Wolfrum delivering his presentation

Rudiger Wolfrum commenced his presentation by mentioning that the freedom of navigation was one of the oldest and most recognized principles in the legal regime. It constitutes one of the pillars of the law of the sea and international law. He mentioned that according to Hugo Grotius, the sea was the avenue of communications among nations and therefore a sole state must not monopolize it.

Wolfrum explained extensively the articles that constitute the 1982 Convention, such as Article 36, where the freedom of navigation in straits used for international navigations is stated, and went on to explain other important articles like Articles 38, 58, 78 and 87 among others, that talk about the transit passage, the freedom in EEZ, and the regulations for the high seas. He pointed out the importance of the definitions of terminology to indicate different concepts on the law of the seas.

Wolfrum emphasized the jurisdictional powers concerning the movement of ships under the UNCLOS and the issues and controversies that arise in cases of vessels' pollution in the EEZ. In other issues, he talked about the privileges that vessels with Innocent Passage status enjoy, causing broad concern among the coastal countries. He talked about the special regimes where navigation is not governed by the regime concerning innocent passage but by a particular one. Wolfrum mentions that while coastal states' jurisdiction is limited, they may still impose controls on navigation.

Wolfrum also talked about the measures taken to enhance the safety of navigation and protection of the marine environment by coastal states and IMO and other measures that may be taken in the future as well. Among the important measures, he mentioned Article 21 that establishes a balance between the interest of the international navigation and the right of the coastal states; however, the problem was the ambiguity of the legislative competences. Among many regulations, the UNCLOS shall not affect the design, construction and equipment of foreign ships until there is a generally accepted standard.

Wolfrum explained the measures that may be taken on the basis of internationally-specific instruments,

which consist of further and comprehensive management and control of international navigation in conjunction with IMO. However, he said that the system was still in development.

Wolfrum went on with his presentation talking about the measures initiated by IMO, which include sensitive sea areas that need special protection through the IMO. He said that these areas could have ecological, socio-economic or scientific significance and mentioned the concern that whatever decision taken by IMO is considered to conform to the UNCLOS.

Wolfrum also mentioned the controversial measure of the mandatory pilotage and its implications on the reduction of freedom of navigation. On the topic of the transport of Weapons of Mass Destruction and the security measures taken on the basis of bilateral arrangements, the interception of a suspect vessel raises the question on the compatibility of such measures with the UNCLOS.

Wolfrum talked about the involvement of the Security Council and the narrowness of the definition of Innocent Passage. He explained that the Security Council may exercise a legislative power but it does not mean that the transit of such material could be automatically considered non-innocent. The legal situation raises particular problems in international straits.

Wolfrum finished his presentation by stating that the concerns over nuclear weapons and its proliferation are in principle valid but they carry the effect of limiting the freedom of navigation. He raised the question on whether the Security Council has the legal basis to use de facto legislation on these issues. If the trend to limit the transport of navigation continues, a reassessment may be called.

QUESTION AND ANSWER SESSION

The moderator remarked that during the 400 years of dispute between coastal states and major maritime powers on territorial issues, the core political compromise has been the expansion of economical incentives in exchange for freedom of navigation. He said that Ambassador Koh is correct in saying that the EEZ are not under control of any one state but *sui generis*. However, it is important to mention that coastal states emphatically have sovereign rights on the EEZ's natural resources, albeit not in the transit. The radical positions that the Freedom of Navigation is dead, is wrong and it is clear that the issue is more vital than ever.

A member of the audience queried on the extent the application of the convention is carried out and what should the correct interpretation of the convention be.

Ambassador Koh responded that he does not claim to have the monopoly of wisdom just by being one of the first negotiators. He mentioned that the UNCLOS belonged to all the international community and there could be different interpretations of the law as the states do not agree on an authoritative

interpretation; Wolfrum agreed on that point, but went further, stating that the dispute settlement mechanism is effective and that the interpretation should rely on the dispute resolution mechanism, to achieve more clarity.

In the second question, a member from the audience wondered if they have reached the same results if the UNCLOS were negotiated today.

Djalal answered that not many changes would have been made from the first convention as the maximum compromise possible was achieved; Tyson agreed by saying that we would be in the same place as we are now and agreements and disagreements would persist. However, Wolfrum responded that there are new facts in the present that were not considered before and thus some conditions may be changed if we were to negotiate the convention today.

On a final comment, Ambassador Koh mentioned that it was a delicate balance achieved by the group of negotiators, such as the panellists today, that made the convention possible.

PANEL TWO

SCIENTIFIC RESEARCH AND HYDROGRAPHIC SURVEYS IN EEZ

Dr Sam Bateman
Senior Fellow, S. Rajaratnam
School of International Studies



Dr Sam Bateman making his presentation

In this second session Sam Bateman started by posing two questions: (i) Should hydrographic surveying in the EEZ be within the jurisdiction of the coastal state? (ii) Do hydrographic surveys in the EEZ require the prior authorization of the coastal state? Bateman started to answer this by giving a definition of the term Marine Scientific Research (MSR) and how it is used loosely to cover all forms of marine data collection to expand scientific knowledge and that this may be either “pure” or “applied”. He mentioned that MSR is not defined in the UNCLOS and it is subject to a special regime.

He also talked about the definition of hydrographic surveying, as well as the safety of navigation, he mentioned that hydrographical data has a wide range of uses such as boundary delimitation and resource exploitation. Bateman also explained that military surveys or data gathering are important activities for submarine operations and can include hydrographic, oceanographic, geological data among other activities. He said that these data are intended to be used by the military and not by the scientific community.

Bateman summarized the situation of MSR and surveying in international law and which requires prior

authorization of the coastal state in its internal waters and the territorial sea. He also mentioned that coastal states have the exclusive right to regulate, authorize and conduct MSR in their EEZ; however he said that the situation with hydrographic surveying in the EEZ is less clear.

Bateman mentioned the arguments against hydrographic surveying under coastal-state jurisdiction such as the distinction in the UNCLOS between “MSR” and “hydrographic surveys” and the different treatment of these activities in the convention. He further explained the operational considerations that might be conducted by a ship or an aircraft.

He also talked about some trends in hydrography and its closer relationship with MSR. Most states classify hydrography under MSR technological developments as the utility of hydrographic data now has commercial value. He also mentioned that it is now more difficult to argue that hydrographic surveying in the EEZ should be outside the jurisdiction of the coastal state and that the purpose or intent of collecting data and the utility of the data must be considered. It is no longer sufficient to say that military surveys are outside coastal state jurisdiction because data collected is for military purposes.

Bateman mentioned a series of guidelines of the EEZ Group 21 which described the kind of maritime surveillance that may be conducted by states for peaceful purposes in areas claimed by other states as EEZ. He said that the state should grant consent for marine scientific research exclusively for peaceful purposes and that hydrographic surveying should only be conducted in the EEZ with the permission of the coastal state. He explained that the consent for hydrographic surveying in the EEZ should normally be granted unless the surveys fall within one of the categories in UNCLOS Article 246.

Bateman concluded by pointing out that the difference between hydrographic surveys and military surveys is substantial but paradoxically the arguments for “military surveys” in the EEZ being outside the jurisdiction of the coastal state appear stronger than those for hydrographic surveying. On another point, he concluded that hydrographic surveys in the EEZ can be considered within the MSR regime in the UNCLOS and require a prior authorization of the coastal state concerned and should only be conducted with the involvement of that state. He finally stated that state practice appears to support this position.

Professor Guifang (Julia) Xue Director, Institute for the Law of the Sea, Oceans University, China



Professor Julia Xue delivering her presentation

Julia Xue started her presentation by saying that the definition of Marine Scientific Research (MSR) is not found in the “Ocean Constitution”. However, in her own words, MSR refers to any activities undertaken in the ocean and coastal waters to expand scientific knowledge of the marine environment. She said that the activities included in MSR are oceanography, marine biology, chemistry, geophysical surveying among other scientific activities.

Xue explained the significance of MSR to provide a knowledge base for supporting ocean development and environmentally sustainable use of marine jurisdiction, as well as to provide the knowledge base to understand the nature and the world oceans better, such as climatic and meteorological variations and patterns.

She also explained that the principles that have been agreed in the LOSC (MSR) regime, albeit vague, are

acceptable and functional according to the Articles 238, 239 and 240. That gave all states the right to conduct, promote and develop MSR for peaceful purposes without unjustifiable interference. However Xue also mentioned that in Articles 246–253, the convention grants coastal states the right to regulate and authorize MSR under their jurisdictional waters.

Xue explained that some activities associated with MSR such as hydrographic surveys, military surveys and operational oceanography were not mentioned on the LOSC. In particular, Xue mentioned the importance of hydrographic surveys, for the research of the depth of water, the configuration and nature of the natural bottom, force of currents, height and times of tides, which are vital for the safety of navigation.

She also explained that the marine data collected by military vessels are usually for military purposes and the data are not available to the public, so the question arises on how to distinguish it from other activities. She responded that the means of data collection are often the same and may appear indistinguishable from MSR.

Xue talked on the practical problems of distinguishing a “scientific purpose” and “military purpose” and how countries can trust each other under the general climate of suspicion.

She said that a disagreement on these issues is best seen in the incident between China and the U.S. when the latter was performing lawful military activities in international waters and not engaged in MSR, while China claimed that they were performing MSR in their EEZ and were subject to their laws. She said that the vagueness of definitions and the practical problems on how to distinguish one activity over another is controversial.

Xue also mentioned the legal implications of the development of technology and the capabilities to collect large amounts of marine data at great distances using remote technologies located outside the jurisdictional waters of coastal states. She mentioned that due to these controversies, more restrictions could be imposed on the freedom of the seas by the international community and in the LOSC. She said that it is important to regulate MSR due to the impact on the marine environment.

Xue concluded her presentation raising questions on the importance to find a common ground and to bridge the regulatory gap, on implementation and the ways to capture diversified MSR activities including surveying and its motives, and finally, if a code of conduct for MSR may diminish existing disagreement and potential conflicts.

In her concluding remarks she said that, despite minor imperfections, the LOSC and its (MSR) regime are functional and can continue to serve the international community, and pointed out that changes in knowledge and skill would make it necessary to update the MSR legal regime to close the legal loophole.

Captain J. Ashley Roach Office of the Legal Adviser, U.S. Department of State



Captain Ashley Roach making his presentation

Ashley Roach started his presentation by explaining the categories of marine data collection, dividing them into marine scientific research (MSR), hydrographic military surveys, operational oceanography, and exploration and exploitation of marine activities. He also went ahead to explain the maritime zones and how they are divided into the territorial sea, contiguous zone, EEZ, continental shelf, deep seabed and straits among other areas.

Roach continued defining and explaining each of the maritime zones. He said that MSR was not defined in the LOS Convention, and that the MSR term was

broadly used to describe those activities undertaken in the ocean and coastal waters to expand scientific knowledge of the marine environment and its processes.

He also talked about the surveys and the division into hydrographic and military. The first one, he said, was to obtain information for the safety of navigation and the military one for data collection for military purposes only and not usually disseminated to public.

He also briefly explained that operational oceanography was not mentioned in the LOS Convention and was basically the collection of temperature, pressure, currents, salinity and wind for monitoring and forecasting of the weather.

He also spoke about the exploration and exploitation activities and the legislation defined in the LOS. Roach mentioned the terms commonly used such as EEZ, shelf, and seabed among others including the underwater cultural heritage, which is part of marine archaeology.

Roach talked about the controversial exploitation and its legal implications with the elements of sovereignty, right to regulate, the balance between the researching and coastal state. He went further by explaining the Articles 248–250 that regulate certain activities of specific projects.

He also talked about the discussions carried out in the ABE-LOS concerning how to define the marine activities within the broad term of MSR and the different position that were taken. He gave us an example on the collection of oceanographic data that could be considered as marine scientific research (MSR). He said that the position of some countries was favourable such as Argentina and Japan and in others it was negative such as the U.S. and the U.K.

Roach concluded his presentation by saying that not all methods of data collection about the oceans are MSR and the lack of agreed definitions results in differences of views on the legal regimes and the data collected by MSR and Surveys. He emphasized the importance to understand and clarify all the terms and definitions.

Finally, he mentioned that if the proposals that all forms of marine data collection to be under coastal state control succeed, they would deprive the people of all nations of the benefits of free and open access to data that enhance safety and environmental protection. In the last remark he said that the nations must facilitate access and data sharing.

Dr. Ronan Long
Director, Marine Law and Ocean Policy
Centre and Jean Monnet Chair
European Commercial Law, National
University of Ireland



Dr Ronan Long delivering his presentation

Ronan Long started his presentation by raising some questions such as, “What is marine bio-discovery and what is its difference between MSR?” He defined bio-diversity as the collection of small amounts of biological resources and the screening to identify bioactive compounds that may be used for commercial purposes. He mentioned the history of marine bio-discovery from the 1950s to the present and how technology has evolved and changed the research activities in the oceans.

He said that it is not always possible to maintain a clear distinction between fundamental and applied

research. He mentioned that the difference between MSR and bio-discovery appears to lie in the use of knowledge and results of such activities, rather than in the practical nature of the activities themselves.

Long explained the characteristic of his country and the importance of the marine sector for Ireland which accounts for €3 billion, and the future objectives of the country like sustainable development, improvement of the sector management and future investment of €600 million in the context of the National Development Plan (2007–2011). He also talked about the quantities of MSR vessels available in several EU countries, concluding that the United Kingdom is the major player in this area.

In another point, he talked about the normative framework of the 1982 LOS Convention, characterized by the duty to promote & facilitate MSR, the general principles for conduct of MSR, the role of international cooperation and the importance of publication and dissemination of knowledge. The key challenge was that MSR shall not constitute a legal basis for any claim to marine environment or its resources mentioned in Article 241.

He raised the question of whether there was an overlap or convergence of regimes such as the 1982 LOSC, the protection of marine bio-diversity (CBD), the protection of endangered species regime (CITES), as well as the TRIPS regime on intellectual property of MSR data.

Long described the core elements in the framework, such as the agreements regarding ownership, the promotion and facilitation of MSR, the balance between researching states and international organizations interests. He emphasized the issue of collaboration and monitoring and the provision of the same regime for nationals and non-nationals.

In conclusion, he mentioned that MSR provisions are working well, and the amendments of governance regime would be flexible in conformity with the international and European law and would focus on the benefit of science. Long said that the focus would be on the conservation and utilization of bio-diversity with a clear benefit of sharing for all.

QUESTION AND ANSWER SESSION

During the discussion there was an observation from a member of the audience that military MSR, just by being called differently did not mean it was not, after all, Marine Scientific Research. The issue goes into the abuse of military immunity in order to not reveal what kind of research was performed in the area.

To this observation, Xue responded that there is flexibility in definitions and that caused controversy. She also mentioned that there was no answer yet on the case of the U.S. Navy's controversy with China.

In the second intervention, a member from the audience asked if there were known exploration activities (MSR) of China in a neighbouring country's EEZ. Professor Xue responded that there was no evidence of that and to the contrary the Chinese EEZ seems to be very attractive to foreign countries to do MSR.

Roach mentioned that it is important to follow the convention and not paraphrase it, and if the problem relied on the use of different terminologies, that should be solved soon. He also said that the convention does not talk about surveys on MSR, nor gives terms to provide guidance. In a controversial statement, he said that surveys are not MSR as they are different, and the MSR term should not be used to describe all kinds of activities. He also mentioned in the discussion that concern should be put into the protection of sovereign rights of the coastal states.

In response, Bateman disagreed with Roach because in order to recognize MSR activities, a common sense was needed to differentiate the activities. He also said that consent and cooperation are needed for more clarity in the future due to the importance of safety of navigation and the management of the marine resources.

PANEL THREE

MILITARY ACTIVITIES IN THE EEZ

Captain Pete Pedrozo
Staff Judge Advocate, U.S.
Pacific Command



Captain Pete Pedrozo making his presentation

Pete Pedrozo started his presentation by talking about the restrictions of the coastal states in the Exclusive Economic Zone and the different forms they

may take such as the prohibition of military data collection or surveys and the requirement to ask for consent to conduct military activities in EEZ among other environmental restrictions without basis of the UNCLOS.

Pedrozo also mentioned the excessive EEZ claims and the recent challenges in the Asia-Pacific region with some countries such as India, Malaysia, Burma, Indonesia and China, among others, and their controversies over military activities in the EEZ, which have been regulated under Article 56 in the UNCLOS.

He also explained the coastal state's rights and its jurisdiction in the EEZ and the fact that they are limited to the waters adjacent to the seabed and to the seabed and its subsoil, with the exception of the rights with regard to production of energy from the winds. Pedrozo said that in exercising its rights in the EEZ, the coastal state should give due regard to the rights of other

states and shall act in a manner compatible with the provisions of UNCLOS Article 58.

He also talked about a less discussed but equally important topic of the freedom of over-flight. In the EEZ, all states enjoy the freedom of navigation and other internationally lawful uses of the sea. He mentioned that in exercising their rights in the EEZ, the states must comply with the laws and regulations adopted by the coastal states.

However, he said that the legal issues raised by the aircraft accident in Hainan, China aroused a controversy over the legality of surveillance flights over the EEZ, and the possibility that coastal states could assert security interests in their EEZ.

In this regard, the U.S. position was that according to Articles 19, 56 and 58, other states have the right to conduct military activities in the EEZ, as it is a long-standing practice as there was no threat to the territorial integrity or independence of the coastal state.

Pedrozo mentioned that the Chinese position was very different as there is only freedom of over-flight in the high seas and thus there is a need for consent from the coastal state and the collection of data poses a threat to PRC security interests. Stated in Article 301 of the UNCLOS, where the states must refrain from threatening the integrity and independence of a coastal state.

Pedrozo defended the U.S. arguments by explaining that the U.S. operations were in accordance to customary law and state practice, the UNCLOS, IMO/IHO World-wide Navigational Warning Service, and the ICAO Rules and Recommendations. He went on with evidence of the Articles 58 and 236 on the rights of coastal states and the environmental jurisdiction in the EEZ.

He continued by explaining the limitations of the UNCLOS over military activities in Articles 19, 20, 39 and 40 on straits and territorial sea limitations and in Articles 52 and 54 on Archipelagic Waters limitations. He also talked about the peaceful purpose provisions in Articles 88, 141 and 301, where it was stated that the high seas should be reserved for peaceful purposes and thus refrain from the use of threat or force against the integrity of the coastal state.

Pedrozo mentioned that the collection of data does not go against the peaceful activities as the UNCLOS clearly distinguishes between “threat and use of force” and other military activities at sea that are consistent with Article 2(4) of the Charter, such as military exercises, weapons testing, use of ordnance, surveillance and intelligence collection, flight operations, military marine data collection and hydrographic surveys

He raised the question of whether guidelines to regulate military activities in the EEZ were needed. He spoke of the Nippon Foundation Guidelines that were developed by a group of individuals acting in their personal capacities between 2002 and 2005 with non-binding voluntary principles. He said that the navies are expanding and technology is advancing while coastal states are exercising increasing control over their EEZ. These were opposing trends that will result in a higher frequency and intensity of incidents.

Pedrozo said that military activities should not stimulate or excite the defensive systems or collect information to support the use of force against the coastal state. He mentioned that there should not be deployment of systems that prejudice the defence or security of a coastal state, nor interfere or endanger the right of the coastal state to protect its resources and environment.

He said that then it is important to notify the coastal state of major military exercises in the EEZ and invite observers from the coastal state, it was also important, he added, to limit military exercises to the adjacent high seas and not cause pollution or negatively affect the marine environment. In his opinion there was no need for further regulation in military activities, and added that environmental protected areas should not be placed with the intention of preventing transit in the ocean.

Pedrozo concluded with concerns on the increasing restrictions on military activities in the EEZ. He said that these restrictions are inconsistent with the UNCLOS and customary international law. He finally said that the military needed to remain engaged to preserve its operational flexibility, and in order to prevent erosion of the UNCLOS, a proper balance of interests between coastal states and between navigant states was needed.

Captain Alexander S. Skaridof Admiral Makarov State Maritime Academy, Russia



Captain Alexander Skaridof delivering his presentation

Alexander Skaridof started his presentation by explaining Russia's stance on the freedom of navigation and the rights of the maritime states for exploration and exploitation of the seabed resources. He continued by saying that major restriction on the passage in the EEZ would make it impossible for Russia to trade anywhere as they would not have any freedom to move their vessels.

Skaridof explained that warships are not passenger vessels as they carry very delicate materials and sensible tasks. He also mentioned the difficulty to distinguish between legal and illegal activities in the ocean, as there was no way to find out what task is been carried out without an inspection, and this kind of uncertainty make some parts of the UNCLOS very controversial.

He raised the question of what could be considered a military operation from innocent passage and if the submarines' collection of data could be treated as a normal activity. Skaridof underlined the fact that it was hard to predict and prevent misunderstanding in military operations and that the disagreements would be as constant as in the past.

He continued his intervention, mentioning that Russia has signed bilateral agreements with 12 states on concern of the military level and how to deal with related incidents. He said that these kind of agreements started with the prevention of dangerous military operations between U.S. and the Soviet Union in the

decade of the 1960s. Skaridof also mentioned among other mechanisms, the bilateral instrument of consultation, which was very important.

Skaridof also explained the key provisions in order to have a clear definition of the use of force. He mentioned an example on how countries can provide advance notice to the coastal country if the operations represented a danger to navigation. He discussed of the mechanism of consultation to be mutually informed of opinions in the case of incidents.

Skaridof concluded that the rights of the coastal states to protect their Exclusive Economic Zones have to be acknowledged. However, we have to match the interests and balance them in order to continue with the freedom of navigation. Finally, he mentioned that due to the climate change, the arctic may become an area of deep concern for Russia and the world, and that the sovereignty rights would be claimed by Russia under the framework of the United Nations Convention on the Law of the Sea.

Professor Gao Zhiguo Executive Director, China Institute for Marine Affairs, State Oceanic Administration



Professor Gao Zhiguo making his presentation

Gao Zhiguo presented the importance of China and its maritime characteristics. Among other facts, he mentioned that China has the tenth longest coastline and seventh largest continental shelf as well as the second largest oil importer, with the third largest defensive Navy. Gao mentioned that security has always been given the first consideration in the formulation of ocean policy and law as they have

direct impact on China. He narrated the historical review of China and the six major foreign invasions from the sea.

With respect to China's history in the UNCLOS, he pointed out that his country began to play a more active role in international affairs, participating in the convention and has maintained an unchanged position on most issues. He explained that China signed the 1982 Convention as it was acceptable to the majority of the states and because much progress was made compared with the old law of the sea. However, Gao explained that China was not entirely satisfied and it took some years to ratify the UNCLOS in 1996.

Gao mentioned the practice of the national legislation and some agreements. Among the legislation, he mentioned the Government's Declaration on Territorial Sea of 1958 and the Sino-Japanese Fishery agreements in 1955, 1975 and 2000.

Gao explained the characteristics of the agreements such as the Joint Management Zones and the Joint Fishery Commission, as well as other international laws such as the 1992 Law on the Territorial Sea and the Contiguous Zone, plus the 1998 Law on EEZ & Continental Shelf.

He talked about the regime of the LOS and its characteristics such as 12 nautical miles of territorial sea and 12 nautical miles of contiguous zone, the 200 nautical miles of EEZ and continental shelf as well as the Innocent Passage for foreign merchant ships. He emphasized that warships require prior authorization and that marine scientific research requires official approval in the EEZ and the continental shelf.

Gao mentioned the controversial issue of the military hydrographic surveys that have plagued military activities in the Chinese EEZ. He also mentioned the Bowditch case in 2002 where China monitored some activities without its approval in its EEZ, 60 miles off the Chinese coast. There was a scientific research vessel escorted by several naval destroyers, and Gao talked about the Chinese reactions in that case. There were different positions and the arguments were that the foreign state was conducting surveys in the EEZ

as an exercise of the freedom of navigation and other internationally lawful uses of the sea and thus were not subject to coastal state regulation. On the other hand the Chinese position was that military hydrographic surveys in the EEZ is military in nature and a battlefield preparation, thus representing a threat and violating the principle of peaceful use of the sea.

In another point, he related the case of the aircraft incident in Hainan, where the intelligence gathering aircraft from the United States in 2001 caused a collision with a Chinese aircraft, causing the death of a Chinese pilot. Again he mentioned the different positions and arguments; in the case of the U.S. position, the aircraft had the right to fly in international airspace about 70 miles off the Chinese coast but the Chinese argument was that the performance of reconnaissance activities constitutes an abuse of the right of over-flight over its EEZ.

Gao talked about some analysis and findings in the LOS Convention and that the theory and practice established a new legal order. there also arises new uncertainties and different interpretations. The EEZ and continental shelf represents both opportunities to some countries and challenges to others.

Gao said that the military and intelligence activities certainly represent a major source of tension and instability in Asia and underline that it was likely to become even more intensive, intrusive, controversial and dangerous in the future.

He talked about the general opinion that the exercise of the freedom of navigation and over-flight in the EEZ should not interfere with or endanger the rights of the coastal state to protect and manage its own resources and its environment, and should not be for the purpose of marine scientific research (MSR).

Gao explained that the Chinese perspective on the freedom of navigation and over-flight in and over EEZs is not tantamount to freedom of military and reconnaissance activities. He mentioned that hydrographic and military surveys should be considered into the broad category of marine scientific research

and that military and intelligence gathering activities in and over the EEZ by foreign military vessels and aircraft constitutes a threat of force, violating the principle of peaceful use of the sea as required under the Convention.

Gao concluded his presentation by mentioning that a legal framework on the law of sea in China has been

brought into place and now the task is to bring these laws and regulations into faithful implementation and enforcement. He finally said that China seems to be the testing ground of some of the emerging challenges and is working hard in the search for approaches to resolution.

QUESTION AND ANSWER SESSION

After Gao's presentation, one member of the audience inquired if it is the U.S. that sets guidelines on what activities should be condoned in the EEZ. Pedrozo answered that the Department of Defense does not provide specific guidelines of conduct in the EEZ but the Law of the Sea is to be followed. He explained that captains should refrain from activities that may cause any accident in the EEZ.

On the second question, a member of the audience asked about the widely reported intrusions by China in the Japanese Exclusive Economic Zone. Gao responded that there is an overlapping of claimed areas and the research vessels are considered to be in Chinese territory, not in the Japanese EEZ and that China would continue to submit its military activities to the International Court of Justice.

On the third question, a member of the quorum inquired if the opposing positions are heading towards confrontation and what should be done to avoid such confrontation. Pedrozo responded that in order to avoid a confrontation it will depend on how countries would behave when the other side is not consistent with the guidelines of the UNCLOS, and that would be a difficult issue.

In a sensitive question from the audience directed to Gao, he was asked about the traditional role of China in the South China Sea region and if the country would claim more rights and influence in the Zone. Gao responded that China would never claim more than its legitimate Economic Exclusive Zone's rights.

Skaridof said that the eventual participation of China in the Arctic would be very important for them and

thus the UNCLOS would be the best guideline to achieve this.

There was another question on Chinese implementation of national legislation and its engagement in state practice. To this question, Gao answered that China has been struggling in the transition from a planned economy to a market one and is still trying to define its national interest.

In another question, a member of the audience inquired about the issue of the design of LOS for peaceful activities and whether China would engage in military activities in another EEZ in the future. Gao responded that China and many other coastal states have no problem with normal operations but the issue is on the military activities and the collection of military data with submarines. Such activities were not normal and that the over-flights cause accidents.

Sakridof intervened mentioning that China also undertakes activities in other locations and it is likely that those activities may be military. He also said that with the rise of China's Navy it would be important for the country to engage in data collection in EEZ of other coastal states in the future.

Skaridof made a clarification that it does not mean that just because military vessels were employed in the EEZ, they would be used for military data collection. He concluded that once China has a fleet of submarines, the country would have to collect data as well and would not want to be constrained by others.

PANEL FOUR

TRANSIT PASSAGE THROUGH STRAITS USED FOR INTERNATIONAL NAVIGATION

Dr Robert Beckman
Adjunct Senior Fellow, S. Rajaratnam
School of International Studies,
Singapore



Dr Robert Beckman delivering his presentation

In his presentation, Robert Beckman examined how the marine environment in straits that are used for international navigation can be protected under the UNCLOS and of the very limited prescriptive and enforcement jurisdiction given to the littoral states under Articles 42 and 233. He defined littoral states as states bordering a straits used for international navigation.

He noted that Part III of the UNCLOS created a new legal regime for straits used for international navigation. However, sovereignty and jurisdiction of the straits must be exercised subject to provisions of Part III. He added that the main constraint on the sovereignty of littoral states is that all ships and aircraft enjoy the right of transit passage. He felt that Part III of the UNCLOS was an attempt to strike a balance between the interests of the international community in maritime navigation on international shipping routes and the interests of littoral states in their security and in protection of their marine and coastal environment. He then proceeded to draw on the differences between the Part III of the UNCLOS with the Innocent Passage regime. Part III of the UNCLOS include over-flight,

states that submarines may navigate in their normal mode and cannot be suspended, ships exercising passage must comply with generally accepted IMO rules on navigational safety and environmental protection, special measures on ships exercising passage must be adopted by the IMO and that the power of littoral states to regulate ships exercising transit passage is severely restricted.

Beckman explained that Article 39 (2) of the UNCLOS states that ships in transit passage must comply with all generally-accepted international regulations, procedures and practices on safety of life at sea and ship source pollution as well as comply with IMO conventions such as MARPOL 73/78, SOLAS, COLREGS, and other important legal rulings. The article also stipulates that the obligation to comply with IMO conventions and practices applies whether or not the flag state is a party to the UNCLOS, whether or not the littoral states have ratified the conventions or adopted laws and regulations and that the obligation to ensure that ships exercising transit passage comply with IMO conventions under Article 39 rests with the flag states, not the littoral states. The practical effect of this ruling is that the power to adopt laws and regulations on pollution from ships exercising transit passage has been delegated to the IMO and that IMO convention on safety and ship-source pollution, including new amendments, automatically apply once they are generally accepted.

Beckman postulated the view that there are additional measures that are currently being taken to ensure navigational safety. These measures include littoral states being able to designate sea lanes and prescribe traffic separation schemes (TSS) for navigation in straits when it is necessary to promote safe passage of ships stipulated under Article 41 of the UNCLOS and that sea lanes and TSS must conform to generally-accepted international regulations. Proposals by the littoral states must also be referred to and adopted by the IMO.

Another important measure adopted is the IMO Conventions and Guidelines that enable littoral states to apply to the IMO for adoption of other measures to promote safety and environmental protection, including routing measures, such as areas to be avoided or deep-water channels, mandatory ship reporting systems, vessel traffic systems and “special areas” under MARPOL 73/78 relating to the discharge of oil from the operation of ships. He suggested that littoral states could cooperate through port state control under the UNCLOS. He proposed several contingency plans that could be implemented.

Firstly, he said that littoral states can cooperate by ratifying and implementing the IMO conventions on contingency planning for spills of oil or hazardous and noxious substances such as in the 1990 convention on Oil Spill Preparedness Response and Cooperation (OPRC) and the 2000 OPRC-HNS Protocol. Secondly, he added that littoral states can cooperate to ratify and implement the relevant conventions on liability for pollution damage caused by oil spills through the 1992 International Convention on Civil Liability for Oil Pollution Damage (CLC), the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund) and the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers).

Beckman proceeded to explain the concept of the Particularly Sensitive Sea Areas (PSSAs) which he defined, and management tools proposed by coastal states and adopted by the IMO. He added that the PSSAs can apply in particular areas of the EEZ (and/or territorial sea) that are vulnerable to ship-source pollution and that the IMO can adopt “associated protective measures” (APMs) to reduce the risk of ship-source pollution in the PSSAs. He explained that the PSSAs do include areas that are within straits used for international navigation. However, the APMs cannot impede the right of transit passage and must be consistent with provisions in Part III. He mentioned that littoral states can propose a PSSA in the Malacca Strait but this would be of little or no use in the lower half of the Malacca Strait as special measures have already been proposed by the littoral states and adopted by the IMO.

Captain Patrick J. Neher Director, International and Operational Law Division, Office of the Judge Advocate General, U.S. Navy



Captain Patrick Neher making his presentation

Patrick Neher began his presentation by explaining the legal term of Transit Passage. A transit passage is an area where there is freedom of navigation and overflight, and there is a straits used for international navigation for purpose of continuous and expeditious transit. He postulated the view that ships in the transit passage must be in accordance with Article 39 of the UNCLOS, comply with generally-accepted international regulations, procedures, and practices for safety at sea, including the international regulations for Preventing Collisions at Sea and comply with generally-accepted international regulations, procedures, and practices for the prevention, reduction, and control of pollution from ships.

He continued to explain that coastal states may, under Article 42.1 of the UNCLOS, adopt laws and regulations relating to transit passage, in respect to safety of navigation and regulation of maritime traffic as provided in Article 41, to prevention, reduction, and control of pollution, by giving effect to applicable international regulations regarding discharge of oil, oily wastes, and other noxious substances, to prevention of fishing (with respect to fishing vessels) and loading or unloading of any commodity, currency, or person in contravention of customs, fiscal, immigration or sanitary laws. At the same time, coastal states are bounded by Article 42.2 of the UNCLOS not to discriminate in form or in fact among foreign ships or have the practical effect of denying, hampering or impairing the right of transit passage. He added a caveat to this by explaining that

the coastal enforcement can only be applied if the ship is not entitled to sovereign immunity and if it has caused or is threatening to cause major damage to the marine environment of the strait.

He then started addressing the important question of whether coastal states are allowed to impose compulsory pilotage in a strait used for international navigation. He said that coastal states are not allowed to do so. He then cited the case of the Torres Straits in Australia. He observed that Resolution MEPC.133(53), adopted on 22 July 2005 recommends that governments recognize the need for effective protection of the Great Barrier Reef and Torres Strait region and inform ships flying their flag that they should act in accordance with Australia's system of pilotage. He elucidated the fact that the Australian proposal was opposed by other countries. He noted that the Australian plan does not fit into any of the four categories of permissible regulatory authority and would be a violation of international law.

He ended by quoting a European Community report that stated that there is a need for the legal system relating to oceans and seas based on the UNCLOS, to be developed to face new challenges.

Mr Hiroshi Terashima Executive Director, Ocean Policy Research Foundation, Japan



Mr Hiroshi Terashima delivering his presentation

Hiroshi Terashima began his presentation by explaining the legal issues related to the UNCLOS and transit passage. He cited Article 43 of the UNCLOS which stated explicitly that user states and states bordering a strait, should by agreement, cooperate in the

establishment and maintenance of necessary navigational and safety aids or other improvements in aid of international navigation and in the prevention, reduction and control of pollution from ships.

He noted that the phrase “should by agreement cooperate” in Article 43 is generally interpreted as recommending cooperation by agreement. He cited the example of the cooperation between Japan as the principal user state of the Straits of Malacca and Singapore and the three littoral states for navigational safety and environmental conservation as an embodiment of Article 43. He said that Japan, as non-littoral but user state of the straits, has consistently provided financial and technical cooperation. He noted that changes in the straits, such as an increase in the number of ships using the straits, increased accidents and piracy attacks are signs that more cooperation needed to be undertaken to ensure that there will be less problems in the Straits. He said that this realization for more cooperation was expressed at the Malacca-Singapore Straits Conference held in Singapore in September 2007. A “cooperative mechanism” consisting of a cooperative forum, a project coordination committee, and an aids to navigation fund was called. It was agreed that user states, maritime shipping industries and other stakeholders would try to make financial contributions on a voluntary basis. However little has been done since then due to the lack of interest among user states for such a project.

He highlighted that several projects have been proposed, aimed at encouraging cooperation in the Straits of Malacca. Among these projects are the removal of wrecks in the Traffic Separation Scheme in the Straits of Malacca and Singapore; cooperation and capacity building on Hazardous and Noxious Substance (HNS) preparedness and response in the Straits of Malacca and Singapore; demonstration Project of Class B automatic identification system (AIS) transponder on small ships; setting up a tide, current and wind measurement system for the Straits of Malacca and Singapore to enhance navigation safety and marine environment protection; replacement and maintenance of aids to navigation in the Straits of Malacca and Singapore; and replacement of aids to navigation damaged by the tsunami incident in December 2004. He drew attention to the fact that

several countries including the United Arab Emirates, Korea, Japan, China, Australia as well as the Nippon Foundation have expressed support for some of these projects.

Terashima believed that the strength of the cooperative mechanism is in fact that the participation is not limited to the littoral and user states but also includes the shipping industries and a variety of other stakeholders. He felt that there will be a focus on contributions by the direct beneficiaries of the straits passage, that is, the shipping industry, especially as it paves the way for businesses to make voluntary contributions as part

of their social responsibilities. He envisioned that the establishment of the Aids to Navigation Fund will secure the extensive financial support necessary to maintain and replace navigational aids. The role of this fund will be to serve as a pool for voluntary contributions by a variety of stakeholders, including oil producing countries and the shipping industries.

Terashima concluded by expressing confidence that the cooperative mechanism established by the different stakeholders and supported by Nippon Foundation will yield significant benefits to all parties.

QUESTION AND ANSWER SESSION

One of the participants asked a question about the Torres Straits. He noted that the main fear of the international community with Australia's action to impose compulsory pilotage in the Straits. He noted that all straits are different and the Australian decision could be motivated by the growing concerns about environment, economic imperative and navigational safety.

Beckman said that the Australian position is not a legal argument. He postulated the view that the Australia did not exhaust all means and could have acted within the framework of international law. There would have been room for states to ensure compliance with the system. As far as he is concerned, Australia acted unlawfully.

Another participant expressed the view that the current jurisdiction is a failure if states do not comply. He felt that the failure of this jurisdiction led Australia to act unilaterally. He added that diplomatic process could take ten years or more. Meanwhile an environmental disaster could occur during this time.

Another participant expressed the opinion that a country can protect the marine environment without acting in a manner not consistent with international law. He added that Australia has a good track record for

compliance with international law and should have acted within the framework of international law. The participant then proceeded to ask whether the shipping industry would be worried about the Australian actions. He asked whether the Americans could do something to persuade the Australians. He also asked whether the Japanese could persuade the Europeans to come onboard and assist with various projects to protect marine environment.

A participant expressed the opinion that the Australian government, on the record, does not think their actions were illegal or will have an impact on hampering transit.

Beckman said that there is a clear irreconcilable issue. While the Australians may think that they were in compliance with international law, the fact is that they were not. He added the IMO will never approve of Australia's action. This is simply because if the IMO does not stop the Australians, other states may follow suit.

Neher said that the U.S. will continue with dialogue and will hold bilateral consultation with Australia. However, it is unlikely that the U.S. will compel Australia. He said that environmental concerns are valid. At the end of the day, all states are interested in their own interest and security.

Terashima stated that Japan will always strive to encourage other states to be involve in the processes and projects.

A participant asked whether there will be a proliferation of the Proliferation Security Initiative (PSI). He wanted to know whether other states may be swayed to do something if the U.S. itself ratifies the UNCLOS. He also asked at what point would the PSI reach a critical mass such that one could roll back into the UN framework to give it greater legitimacy.

Neher said that he cannot predict the number of countries that is needed. At this point, he noted that the U.S. does not have the credibility to persuade other countries to be involved in the process. He said that there is a need to expand the number of countries to become more involved as non-endorsing states. Maritime security in the future is such that nobody can control what happens in the offshore and within its territories.

PANEL FIVE

ARCHIPELAGIC SEA LANES PASSAGE

Professor Martin Tsamenyi
Director, Australian National Centre for
Ocean Resources & Security (ANCORS)



Professor Martin Tsamenyi making his presentation

Martin Tsamenyi began his talk by explaining that he will be providing an analysis of the navigational rights through the waters of states claiming archipelagic state status in the context of the 1982 Law of the Sea Convention. He noted that Part IV of the United Nations Convention of the Law of the Sea of 1982 (the LOSC) introduces the concept of archipelagic sea lanes passage as part of a special regime applicable to archipelagic states.

The Part IV regime establishes two preconditions of archipelagic sea lanes passage. First, such passage may only be undertaken through “archipelagic waters”. Second, archipelagic waters may only exist in respect of archipelagic states that have defined archipelagic baselines in accordance with several requirements set out in Article 47 of the LOSC. The five requirements under Article 47 include: that the claimant state’s “main islands” must be included within the archipelagic baseline system; the ratio of water to land within the baselines must be between 1:1 and 9:1; the length of any single baseline segment must not exceed 125 nm; no more than three per cent of the total number of baseline segments enclosing an archipelago may exceed 100 nm; and such baselines “shall not depart to any appreciable extent from the general configuration of the archipelago”. According to records of the United Nations, 20 states have claimed archipelagic state status as at 24 October 2007. A minority of these states have implemented the preconditions of archipelagic sea lanes passage by defining archipelagic baselines in accordance with Article 47.

He then proceeded to define what the term “archipelagic state” meant. To him, an archipelagic state is a state that constituted wholly of one or more archipelagos and may include other islands. He defined

an archipelago as a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such. He added that an archipelagic state status may simply be for symbolic political reasons without any navigational consequences and that an archipelagic state may have archipelagic waters through which the right of archipelagic sea-lanes passage is exercised. Tsamenyi postulated the view that archipelagic sea-lanes passage refers to the exercise in accordance to this convention of the rights of navigation and over-flight in the normal mode for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

The presentation then examined the navigational rights through the waters of states claiming archipelagic state status in the context of international law. He divided states claiming archipelagic status into four categories. The first category was those states which have claimed archipelagic status and which have defined both archipelagic sea lanes (ASLs) and archipelagic baselines in accordance with Article 47 of the LOSC. Indonesia falls within this category. The second category relates to states that have defined archipelagic baselines in accordance with Article 47 of the LOSC but which have not designated ASLs. Jamaica and Papua New Guinea fall within this category. The third category were states which have claimed archipelagic state status but have determined their archipelagic baselines in a manner contrary to the requirements of Article 47. Philippines and Maldives were in this category. The fourth category of states are states without archipelagic sea lanes and baselines. Countries such as Bahrain and the Comoros belong to this category.

He ended his presentation by arguing that the implementation of Part IV of LOSC can be challenging in terms of designation and maintenance of sea lanes. There has been only one partial compliance since LOSC came into force. He mentioned that the analysis of state practice shows a lack of complete understanding of the archipelagic state regime under the LOSC.

Captain Pete Pedrozo Staff Judge Advocate, U.S. Pacific Command



Captain Peter Pedrozo delivering his presentation

Pete Pedrozo began his talk by defining archipelagic sea lanes. He explained that these sea lanes refer to sea lanes or air route traversing archipelagic waters and adjacent territorial sea. It must also be suitable for continuous and expeditious transit, must be IMO-approved, must have a designated archipelagic state and must include all normal passage routes used for international navigation or over-flight.

He proceeded to explain that the rights of Archipelagic Sea Lanes Passage (ASLP) include continuous, expeditious and unobstructed transit. He added that the archipelagic state could not hamper or obstruct sea routes. Diplomatic clearance or prior notice is not required. All ships and aircraft can also enjoy this passage. Ships using the ASLP must refrain from any threat or use of force, but may operate in the “normal mode”. Pedrozo mentioned that normal mode refers to a series of activities, which involve continuous and expeditious transit, such as launching and recovering aircraft/military devices (force protection), and air-to-air refuelling. He then postulated the complications involving warships and military aircraft and ASLP. He noted that the current Innocent Passage Regime is inadequate. He said currently submarines must transit on the surface. There is also no right of innocent passage for aircraft, no launching, landing or taking on board of any aircraft or military device, or innocent passage may be suspended temporarily. All these create problems for the military, drive up the cost and take up a lot of time. Pedrozo also attempted to explain

the designation of sea lanes. He said that an archipelagic state may, but need not, designate sea lanes. If it chooses to designate sea lanes, it must first get IMO approval and must include all normal passage routes used for international navigation, except for duplicate routes of similar convenience. Where an archipelagic state has not yet designated sea lanes or only made a partial designation, the right of ASLP continues to apply within all normal passage routes used as routes for international navigation.

Subsequently, he began assessing the case study of Indonesia and its ASL proposal. In 1998, the U.S. and Australia worked closely with Indonesia to obtain IMO approval for its ASL proposal. As Indonesia was not then in a position to seek approval for all normal routes, in particular the east-west route, the lanes adopted by the IMO is explicitly a “partial system”. The consequence of a partial system is that the right of ASLP continues to apply through all routes normally used for international navigation through the Indonesian archipelago until Indonesia designates all normal routes.

He explained that during this period, it was agreed by all concerned, including the Government of Indonesia, that the three north-south sea lanes adopted by the IMO in 1998 and designated by Indonesia was a partial designation and that the right of ASLP continues to apply in all other normal passage routes used for international navigation until the Indonesian government make a full and complete designation of all normal passage routes through the archipelago. While the final agreement adopted by Indonesia is in line with the IMO, several articles in the agreement could be in contention with the IMO. These include Article 13 which does not make clear that innocent passage applies in all Indonesian archipelagic waters (except internal waters) and adjacent territorial sea as prescribed by UNCLOS Article 52(1) and the GPSR part H, paragraph. 6.5; and the regulation does not make clear that the right of ASLP exists through all routes normally used for international navigation through other parts of the Indonesian archipelago as set out in UNCLOS Article 53(12) and the GPSR part H, paragraph 6.7.

Pedrozo concluded by emphasizing that the ASLP is an essential right for military ships and aircraft. As confirmed by the IMO, ASLP applies in all routes used for international navigation regardless of whether the archipelagic state has designated sea lanes or has only designated a partial system.

Mr. Alberto A. Encomienda Secretary-General, Maritime and Ocean Affairs Center, Ministry of Foreign Affairs, Philippines



Mr Alberto Encomienda making his presentation

Alberto Encomienda began his address by stating that the Philippines has not designated archipelagic sea lanes (ASLs) under the UNCLOS. He added that the prevalent thinking has been that designation of archipelagic sea lanes is necessary for the orderly transit management of foreign vessels through archipelagic waters. However, he explained a new policy thrust that takes the view that peace, good order, and security in its archipelagic waters, and in the state itself, may be better served through the application of, and focus on, internationally established protection measures for the marine environment while guaranteeing and facilitating freedom of navigation, in lieu of designation of archipelagic sea lanes. Under this new policy reorientation, the Philippines believes that the designation of the entire country as a Particularly Sensitive Sea Area (PSSA), and the consequent institution of associated protective measures (APMs) would address better the circumstances of the Philippines as an archipelago and archipelagic state.

It is stated that under UNCLOS Part IV, archipelagic states may or may not designate archipelagic sea lanes. In the latter case, foreign vessels may exercise the right of archipelagic sea lanes passage through routes normally used for international navigation. He noted that transit passage through archipelagic waters cannot be confined to archipelagic sea lanes since foreign vessels can enter and exit archipelagic waters or navigate anywhere in archipelagic waters in the exercise of innocent passage. Encomienda believes that declaring the Philippines as PSSA and instituting APMs to govern vessel transit in exercise of the right of archipelagic sea lanes passage and innocent passage would be a more practical arrangement in the Philippines. He explained that there are two main reasons for this. Firstly, the entire archipelago is an eco-system or eco-region by itself with delicate and rich marine biodiversity. Secondly, the Philippines archipelago is composed of very closely-grouped islands. As such it is impossible in regard to technical parameters under the UNCLOS for designation of archipelagic sea lanes.

Mr A Havas Oegroseno
Director, Directorate for Political
Security and Territorial Affairs, Indonesia



Mr Havas Oegroseno delivering his presentation

Havas Oegroseno began his address by arguing that the 1982 United Convention on the Law of the Sea (UNCLOS) has given birth to a new legal regime at sea which can be regarded as a constitution of the sea that strikes the balance between the interests of coastal states and the international community. He remarked that one of the issues that must be dealt with is the recognition that the waters among the islands of archipelagic states that previously were international

waters now fall within the sovereignty of the archipelagic state. The relevant archipelagic state are expected to guarantee freedom of navigation through its archipelagic waters and must ensure that ships navigating through archipelagic waters are guaranteed the right of transit passage. At the same time, the relevant archipelagic states have the obligation to designate archipelagic sea lane (ASL) passage. Xue also mentioned the legal implications of the development of technology and the capabilities to collect large amounts of marine data at great distances using remote technologies located outside the jurisdictional waters of coastal states. She mentioned that due to these controversies, more restrictions could be imposed on the freedom of the seas by the international community and in the LOSC. She said that it is important to regulate MSR due to the impact on the marine environment.

Oegroseno noted that Indonesia, being the largest archipelagic state in the world, has designated major archipelagic sea lanes passages which were all encapsulated in the Government Regulation No. 37/2002. He explained that the sea-lane passages that were designated as ASL I is for the navigation between the South China Sea and Indian Ocean, ASL II is for the navigation between the Sulawesi Sea and the Indian Ocean and ASL III is for the navigation between the Timor Sea to the Pacific Ocean. He said that the process of designating such lanes was done in several different stages in a certain time frame involving surveys, national coordinating meetings, consultation with relevant neighbouring and other interested states. This culminated in the acknowledgement of Indonesia's designation in the International Maritime Organization (IMO) processes.

He articulated the view that several developments has necessitated Indonesia to review the existing ASL passages. He said that these ASLs were regulated under the Government Regulation No. 37/2002. He mentioned that changes have resulted in Indonesia changing some of its regulations related to the ASL. In part, East Timor today is no more part of Indonesia. This change affected Indonesia's designation of ASL III. He said that the Indonesian government is still grappling with several issues such as new measurements of baselines. The current archipelagic strait baselines are measured from basepoints on East Timor territory.

QUESTION AND ANSWER SESSION

A participant asked Tsamenyi whether a normal continental country which is not an archipelagic country may apply archipelagic principles to their coastlines. The participant noted that a lot of countries apply this in Southeast Asia.

The coral reefs initiative was not designed to have legal significance in archipelagic waters. It is a conservation initiative, not a legal status. Timor Leste is not an archipelagic state.

Tsamenyi said that base on his reading of the convention, it is designed for an archipelagic state but a normal continental country can use Article 5 or 7 but not apply Article 47.

A participant asked whether aircraft should be allowed to operate in some areas like Indonesia.

Pedrozo noted that airspace must be within sea lanes. The Sulu sea lanes is 50 miles in width. As such, aircraft can operate in the areas.

A participant asked whether the Philippines' claim to be an archipelagic state is consistent with the UNCLOS.

Encomienda claims that the whole of the Philippines should be a Particularly Sensitive Sea Area (PSSA).

Tsamenyi said that the Philippines has straight baselines and as such does not comply with Article 47. In the political sense, Philippines is an archipelagic state but not under the UNCLOS. It is also not compliant with the baselines

Encomienda said that the baselines were drawn in 1958 long before the UNCLOS came into force. He explained that before the UNCLOS came into effect, laws were passed in the Filipino Congress to declare Philippines as an archipelagic state and that the waters around it are domestic not international waters. In terms of compliance to the UNCLOS and domestic laws, constitutions declared that waters are considered part of domestic waters. The current problem Philippines faced is that domestic laws are not in line with the UNCLOS. He added that no one who is not a Filipino will accept the current state of affairs.

PANEL SIX

VESSEL-SOURCE POLLUTION AND PROTECTION OF MARINE ENVIRONMENT

Captain Charles D. Michel
Chief, Office of Maritime and
International Law, U.S. Coast Guard
Headquarters, Washington, D.C.



Captain Charles Michel making his presentation

Charles Michel began his presentation by highlighting some common examples of waste that can lead to sea pollution. He remarked that protecting the environment and acting within the law costs money and illegal discharge is not an acceptable cost of doing business. He argued that environmental crimes should be seen as economic crime. He went on to highlight some common causes of sea pollution. These include Oily Water Separator (OWS) Bypassing, Oil Content Meter Tricking, Marine Sanitation Device (MSD) Bypassing or Other Sewage Discharges, Cargo Slop Discharges, Garbage/Plastics Discharges, Outer Continental Shelf (OCS) Facility Discharges and Falsification of Environmental Protection Records.

He said that these offences can be detected using several means including routine Coast Guard Port State Control Exam, through information from an informant such as a crew member or a company, and through intelligence methods such as aerial surveillance and information from other countries. Michel explained that when an offender is caught, he is dealt with using

several ways including informal corrective actions, port state control action, notice of violation, civil penalties and criminal enforcement. Historically, he noted, the U.S. has pursued prosecution for: criminal violation, criminal false statements and other deliberate concealment and failure to report known pollution. He articulated the U.S. interpretation of the UNCLOS by noting that Article 228/230 does not apply to violations of non-pollution crimes. Article 228 does not apply to pollution in the territorial sea or crimes committed in port and Article 230 only applies to natural persons on the ship at the time and not to corporations or shore-side personnel. Since 1998, the U.S. have imposed more than \$200 million in criminal penalties and the largest fine ever was imposed in 2007 worth \$37 million. There have also been probation of hundreds of vessels operating under court-supervised environmental compliance programs (ECP). Michel noted that one of the most interesting ways of tackling the problem is through the U.S. Voluntary Disclosure Policy. In this programme, crews of ships are rewarded for reporting any environmental offences.

He then cited the case of the *Selendang Ayu*. Due to cooperation, the owner pleaded guilty to three strict liability offences including two refuse act counts. Oil and soybeans were thrown illegally. They were also prosecuted under one Migratory Bird Treaty Act (MBTA) count for killing seabirds. They were fined \$10 million (including \$4 million in community service), given three years' probation, and was put under audit of owner's maintenance program. The United States maintains it could prove, beyond a reasonable doubt, violations of the Clean Water Act for the negligent discharge of a pollutant (engine maintenance). Criminal prosecution of vessel owners and operators will generally only be recommended by the Coast Guard when the alleged violation involved intentional or culpably negligent conduct on the part of the responsible party.

Mr. Peter Hinchliffe Marine Director, International Chamber of Shipping



Mr Peter Hinchliffe delivering his presentation

Peter Hinchliffe began his presentation by introducing the role of the International Chamber of Shipping and the International Maritime Organization with respect to the protection of the Marine Environment. He explained the relevance of globally-applicable regulation to a unique international industry that cannot operate efficiently when faced with regional or national regulations whose requirements differ from the international baseline.

He said that the ICS has 37 countries represented in it and about 75 per cent of shipping around the world are controlled by ICS members. Its key purposes are to develop an international consensus on issues affecting shipping industry and to represent the consensus in international debate. He remarked that the ICS is working towards zero environmental impact and ensuring stakeholder engagement

He then explained the role of the International Maritime Organization (IMO). IMO is run under the United Nations. It has 167 member governments and 300 staff in its Secretariat. Among its functions is to assist in meetings between member countries. Half of the IMO's working year is spent speaking to member countries. IMO also attempts to ensure environmental compliance knowledge. To ensure that the IMO is effective, a working regulatory framework is needed. In the IMO Regulatory Framework are the SOLAS Convention, MARPOL Convention and other single subject conventions. This framework is meant to protect the environment.

He pointed out that several clauses within the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) ensured the safety of the environment. These include Annex I which is the Prevention of Pollution by Oil, Annex II which is the Control of Pollution by Noxious Liquid Substances, Annex III which is the Prevention of Pollution by Harmful Substances in Packaged Form, Annex IV which is the Prevention of Pollution by Sewage from Ships, Annex V which is the Prevention of Pollution by Garbage from Ships, and Annex VI which is the Prevention of Air Pollution from Ships. While most countries have ratified the first five clauses, there has been some complications with Annex VI. As for now only 47 states have ratified this.

Hinchliffe then spoke about the International Convention on the Control of Fouling Systems on Ships (2001). This convention was ratified in September 2007 and will be enforced on 17 September 2008. Another important convention is the International Convention for the Control and Management of Ship's Ballast Water and Sediments 2004 which has been ratified by only 10 of the 30 member states.

Hinchliffe then moved on to speak about the problems related to various conventions. He said that one of the key problems facing these conventions is the delay of entry into force. There are also impediments to ratification for some states and as such these states must have the right to delay some of these ratifications. There are also some state obligations under the IMO conventions. To overcome some of these problems, several solutions could be suggested. These include accompanying guidelines to conventions. Dates must be relative to entry into force. They must remove adopted text if not ratified within specified period and that there must be a selection of ratification criteria. He ended his address by saying that the international community must aim for the implementation of a mechanism to ensure expedient entry into force, enforceability and stability.

Professor Kuen Chen Fu
Director, Center for Oceans Policy and
Law, Xiamen University



Professor Kuen Chen Fu making his presentation

Kuen Chen Fu began his presentation by highlighting the four legally meaningful parts of the Taiwan Straits. These parts include the territorial sea waters along the mainland coast of China and around Taiwan Island and Penghu Islands (or the Pescadores), the internal waters around Kinmen, Wuchiu and Matsu islands, the Penghu Channel as internal waters between Penghu Islands and the coastal shoals of JiaYi County on Taiwan Island, and the EEZ area between the territorial sea waters measured from both Taiwan Island and from Mainland China. He explained that

there are two systems of territorial sea baselines promulgated by both the Taiwan authorities and China. Both China and Taiwan accept the UNCLOS.

He proceeded to examine the legal status of the Taiwan Strait and the feasibility of enforcing Generally Accepted International Rules and Standards (GAIRS) in the area. The recent universal move in expelling single-hulled tankers has been used as an example to indicate the ways for such enforcing efforts. Since Taiwan is not recognized by most of the members of the international community as a sovereign state, there is a real demand for cooperation between Mainland China and Chinese Taipei in this area for a more effective scheme of law enforcement against vessel-source pollution. He felt this will be good for Taiwan. He proposed that a Joint Law Enforcement Zone be established between the two countries. While there are two systems of territorial sea baselines promulgated by both the Taiwan authorities and the PRC but there are no overlapping or conflicting sections. Laws between the two countries are uniform as both subscribe to the MARPOL 73/78.

He concluded by stating that it is of great importance for China and Taiwan to cooperate to ensure that the Straits will be protected.

QUESTION AND ANSWER SESSION

One of the participants noted that for new conventions, the entry into force take more time. He felt that the current process of amendment is too long and could in fact be done without delays. At the same time, he argued that states should comply with Annex IV of the UNCLOS as they had been party to the earlier discussions on it.

Hinchliffe answered by saying that the issue about fixed state is not likely to pass until ratification. Fixed state will not be achieved as the equipment was not going to be there. Underlying the state control, coastal states need to take action because the continental state does not take responsibility. It is difficult to monitor effectively that countries are following the convention.

Another participant queried about how the U.S. was applying the UNCLOS.

Michel noted that the many in the U.S. feel that the UNCLOS should be ratified. The issue is now being debated and they are confident that they will be able to ratify the treaty soon.

A participant noted that there is a need for uniform standards to be applied. One of the crucial issues faced is the importance of not having coastal states defining position. Coastal states will not want that. He felt that it is difficult to assume that the majority of coastal states, would secede control of their waters to other nations.

PANEL SEVEN

NON-FLAG STATE ENFORCEMENT AND PROTECTION OF MARINE ENVIRONMENT

Commander James Kraska Chief, International Negotiations Division and Oceans Policy Advisor, Joint Staff, United States



Commander James Kraska delivering his presentation

James Kraska began his address by providing a background to the origins of the Particularly Sensitive Sea Areas (PSSA). He noted that the PSSA has its origin from the Stockholm Conference in 1977. Article 7 called on all states to “take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea”. The specific inception for the PSSA concept arose from Resolution 9 of the “Protection of Particularly Sensitive Sea Areas”, of the 1978 International Conference on Tanker Safety and Pollution Prevention in London. He said that the PSSA is a management tool to alleviate the most damaging impact of merchant shipping activities on certain areas requiring heightened environmental protection.

Kraska noted that PSSA was an area that needs special protection through IMO action because of its significance for ecological, socio-economic or scientific attributes that may be vulnerable to damage from international shipping. This was to ensure that interests

of the coastal state, flag states and environmental and shipping communities were thoroughly considered. He said that the principal mechanism for compliance of PSSAs is flag state enforcement (Paragraph 9.3 of the Guidelines).

Kraska explained that member governments which have received information of an alleged violation of an associated protective measure (APM) by a ship flying their flag should provide the Government which has reported the offence with details of appropriate action taken. The convention also recognizes extraordinary circumstances or threats in which it may be appropriate for a coastal state to enforce against major environmental damage. However, the principal mechanism for compliance of PSSAs is flag state enforcement. For Non-Flag State Enforcement, the convention also recognizes extraordinary circumstances or threats in which it may be appropriate for a coastal state to enforce against major environmental damage.

Kraska went on to cite examples of PSSA. He stated that the first PSSA is the Great Barrier Reef in 1990. Governments recognize the need to ensure that there is protection of the environment. Since then, the trend toward demarcating PSSAs that extend into the exclusive economic zone has accelerated. The list of PSSAs now includes the archipelago of Sabana-Camaguey (Cuba), Malpelo Island (Colombia), the Florida Keys (United States), the Wadden Sea (Netherlands, Denmark and Germany), Paracas National Reserve (Peru), Western European Waters (Belgium, France, Ireland, Portugal, Spain, United Kingdom), Canary Islands (Spain), the Baltic Sea (Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland, Sweden), Galapagos Islands (Ecuador), the Torres Strait extension of the Great Barrier Reef (Australia and Papua New Guinea), and the northwestern Hawaiian Islands (United States).

Kraska concluded by noting that the growth in the number of PSSAs since 1990 and the trend toward increasing regulation give rise to concern over the potential for PSSAs to impair freedom of navigation and over-flight over foreign-flagged vessels and aircraft. If not developed through consensus and carefully and responsibly managed by coastal states, APMs that arise from the PSSA process could lead to restrictions on the exercise of high seas freedoms in the exclusive economic zone (EEZ), impair the right of transit passage through straits used for international navigation and weaken the right of innocent passage.

Associate Professor Rosemary Rayfuse Faculty of Law, University of New South Wales, Australia



Dr Rosemary Rayfuse making her presentation

Rosemary Rayfuse began her presentation by highlighting the problems of Illegal, Unregulated and Unreported (IUU) fishing. She noted that IUU fishing remains one of the main obstacles to the achievements of sustainable world fisheries. IUU fishing also causes severe economic, social, biological and environmental impacts. Efforts to eliminate IUU fishing have been ineffective. As such, there is a need for criteria for assessing the performance of flag states and the need for non-flag (coastal) state enforcement.

She propounded the view that flag states have a duty to cooperate in conservation and management of MLR. This cooperation could occur through regional organizations and arrangements and it is a duty for these states to comply. Flag states have the duty to ensure effective control of vessels flying your flag. This could be done through maintaining vessel registers, and restricting authorization unless they are unable to control the events. There is also a requirement to authorize/license MSC, vessel- and catch-reporting and verification, regulation or trans-shipment. She also elucidated the view that several measures must be taken by non-flag states. She then addressed the question of what needs to be established before a non-flag state can take action and what that action might then be. She noted that non-flag measures can be invoked if several criteria are met. This could be done through the determination of irresponsible flag states on the basis of pattern of breaches, right to be informed and to respond to allegations, and that there is burden of proof on those alleging breach.

QUESTION AND ANSWER SESSION

A participant asked the panellists several questions. The first question posed was about differences between PSSA and marine-protected areas like marine parks and the implication to navigation. Secondly, a question was posed about the jurisdiction of FAO and IMO. The third question was about how international navigation was affected by the designation of North West Hawaii, which covers large areas of the Pacific Ocean as a PSSA.

Answering the first question, Kraska noted that the problem with terms is the fact that there are no precise definition or criteria to differentiate these terms. He observed that there are guidelines but no legal distinction. However, regardless of definition, all these areas are governed by the UNCLOS.

He also answered the third question by explaining that North West Hawaii is the largest PSSA. However, when states have opportunity to pose the question, only India did so. As IMO works on collective consensus, they decided to move on with the process and are still designating the area as a PSSA. There was no disagreement in the proposal worked out by the U.S.

Rayfuse stated that there was coordination work between IMO and FAO. There are also joint secretariat efforts between FAO and IMO. She also said that while the area of the Northwest Hawaii PSSA may seem big, there is little international shipping in the area. Most international traffic goes through South Hawaii. As such, there is little impact even if the area is designated as a PSSA.

Rapporteurs:
Mohamed Nawab Mohamed Osman
Cruz Armendariz Jorge Humberto

Edited by:
Joshua Ho

PROGRAMME

Freedom of Seas,
Passage Rights and 1982 Law of the Sea Convention

Day One - Wednesday, 9 January 2008

(Conference Sessions Venue:
Orchard Ballroom 3, Level 3)

0800 Continental Breakfast, Registration and
Distribution of Conference Materials

1230

0900 Welcome:
Ambassador Barry Desker
Dean
S. Rajaratnam School of International Studies

1330

Professor John Norton Moore
Director
Center for Oceans Law and Policy
University of Virginia School of Law

0920 Keynote Address:
Professor S. Jayakumar
Deputy Prime Minister,
Coordinating Minister for National Security
and Minister for Law
Singapore

0940 Opening Remarks:
HE Patricia L. Herbold
US Ambassador to Singapore

1000 Break

1030 Panel I: Background on Freedom
of Navigation

Moderator:
Professor John Norton Moore

Panelists:
Professor Tommy T.B. Koh
Ambassador-at-Large
Ministry of Foreign Affairs, Singapore

Professor Dr. Hasjim Djalal
Member of Indonesian Maritime Council
Senior Advisor to the Indonesian Minister for
Maritime Affairs and
Fisheries and Indonesian Naval Chief of Staff

Rear Admiral Nora Tyson, USN
Commander, Logistics Group Western Pacific
United States Pacific Command

Professor Dr. Rudiger Wolfrum
President
International Tribunal for the Law of the Sea

Lunch
Venue: Orchard Ballroom 2, Level 3

Panel II: Scientific Research and
Hydrographic Surveys in EEZ

Moderator:
Mrs Barbara S. Moore
National Oceanographic and
Atmospheric Administration
U. S. Department of Commerce

Panelists:
Dr Sam Bateman
Senior Fellow
S. Rajaratnam School of International Studies

Dr Ronan Long
Director, Marine Law and Ocean Policy Centre
& Jean Monnet Chair European
Commercial Law
National University of Ireland, Galway

Captain J. Ashley Roach
Captain, JAGC, USN (Ret.)
Office of the Legal Adviser
US Department of State

Professor Guifang "Julia" Xue
Director, Institute for the Law of the Sea
Oceans University, China

Break

1530

1600

Panel III: Military Activities in EEZ

Moderator:
Professor Myron H. Nordquist
Associate Director
Center for Oceans Law and Policy

PROGRAMME

	<p>Panelists: Captain Raul “Pete” Pedrozo, JAGC, USN Staff Judge Advocate US Pacific Command</p> <p>Captain Alexander S. Skaridov, R.F. Navy (ret.) Admiral Makarov State Maritime Academy Russia</p> <p>Professor Gao Zhiguo Executive Director China Institute for Marine Affairs, State Oceanic Administration</p>		<p>Captain Patrick J. Neher, JAGC, USN Director, International and Operational Law Division Office of the Judge Advocate General US Navy</p> <p>Mr Hiroshi Terashima Executive Director Ocean Policy Research Foundation Japan</p>
		1045	Break
		1100	Panel V: Archipelagic Sea Lanes Passage
1730	Adjourn		<p>Moderator: Cmdr. James Kraska, JAGC, USN Chief, International Negotiations Division and Oceans Policy Adviser Joint Staff United States</p>
1930	<p>Gala Dinner (Cocktail commences at 1900 hrs) Venue: Asian Civilisations Museum, Empress Place Dress code: Business suit & tie and equivalent attire for women (Note: Coaches to the dinner venue will be provided for all speakers and overseas participants).</p>		<p>Panelists: Mr A Havas Oegroseno Director Directorate for Political Security and Territorial Affairs Indonesia</p>
Thursday, 10 January 2008			
0900	<p>Panel IV: Transit Passage Through Straits Used for International Navigation</p> <p>Moderator: Mrs Mary Seet-Cheng Senior Specialist Advisor & Ambassador (Non-Resident to Panama and Cuba), Ministry of Foreign Affairs, Singapore</p> <p>Panelists: Associate Professor Robert Beckman Adjunct Senior Fellow S. Rajaratnam School of International Studies</p>		<p>Mr Alberto A. Encomienda Secretary General Maritime and Ocean Affairs Center Ministry of Foreign Affairs – Philippines</p> <p>Captain Stacy A. Pedrozo, JAGC, USN Fleet Judge Advocate US Pacific Fleet International Chamber of Shipping</p> <p>Professor Martin Tsamenyi Director, National Centre for Ocean Resources and Security Australia</p>

PROGRAMME

1300	Lunch Venue: Orchard Ballroom 2, Level 3	1600	Panel VII: Non-Flag State Enforcement and Protection of Marine Environment
1400	Panel VI: Vessel Source Pollution and Protection of Marine Environment Moderator: Mr Chao Hick Tin Attorney-General, Singapore Panelists: Captain Charles D. Michel, U.S. Coast Guard Chief, Office of Maritime and International Law U.S. Coast Guard Headquarters, Washington, DC Professor Kuen Chen Fu Director, Center for Oceans Policy and Law Xiamen University Mr Peter Hinchliffe Marine Director		Moderator: Ambassador Gudmundur Eiriksson Former Judge International Tribunal for the Law of the Sea, Member of the Board of the Law of the Sea Institute of Iceland Panelists: Cmdr. James Kraska, JAGC, USN Chief, International Negotiations Division and Oceans Policy Adviser Joint Staff United States Professor Rosemary Rayfuse Law Faculty University of New South Wales, Australia
1530	Break	1715	Closing Remarks by Hosts
		1730	Adjourn

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Deputy Prime Minister
Coordinating Minister for National Security and
Minister for Law
Singapore
2. Ambassador Barry Desker
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United States of America
4. HE Patricia L. Herbold
US Ambassador to Singapore
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5. Professor Tommy T.B. Koh
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6. Prof. Dr. Hasjim Djalal
Member of Indonesian Maritime Council
Senior Advisor to the Indonesian Minister for Maritime
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7. Rear Admiral Nora Tyson, USN
Commander, Logistics Group Western Pacific
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8. Professor Dr. Rudiger Wolfrum
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9. Mrs Barbara S. Moore
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22. Mr Alberto A. Encomienda
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ABOUT RSIS

The S. Rajaratnam School of International Studies (RSIS) was established in January 2007 as an autonomous School within the Nanyang Technological University. RSIS's mission is to be a leading research and graduate teaching institution in strategic and international affairs in the Asia Pacific. To accomplish this mission, it will:

- Provide a rigorous professional graduate education in international affairs with a strong practical and area emphasis
- Conduct policy-relevant research in national security, defence and strategic studies, diplomacy and international relations
- Collaborate with like-minded schools of international affairs to form a global network of excellence

Graduate Training in International Affairs

RSIS offers an exacting graduate education in international affairs, taught by an international faculty of leading thinkers and practitioners. The teaching programme consists of the Master of Science (MSc) degrees in Strategic Studies, International Relations, International Political Economy, and Asian Studies as well as an MBA in International Studies taught jointly with the Nanyang Business School. The graduate teaching is distinguished by their focus on the Asia Pacific, the professional practice of international affairs, and the cultivation of academic depth. Over 150 students, the majority from abroad, are enrolled with the School. A small and select Ph.D. programme caters to advanced students whose interests match those of specific faculty members.

Research

RSIS research is conducted by five constituent Institutes and Centres: the Institute of Defence and Strategic Studies (IDSS, founded 1996), the International Centre for Political Violence and Terrorism Research (ICPVTR, 2002), the Centre of Excellence for National Security (CENS, 2006), the Consortium of Non-Traditional Security Studies in ASIA (NTS-Asia, 2007); and the Temasek Foundation Centre for Negotiations (2008). The focus of research is on issues relating to the security and stability of the Asia-Pacific region and their implications for Singapore and other countries in the region. The School has three professorships that bring distinguished scholars and practitioners to teach and to do research at the School. They are the S. Rajaratnam Professorship in Strategic Studies, the Ngee Ann Kongsi Professorship in International Relations, and the NTUC Professorship in International Economic Relations.

International Collaboration

Collaboration with other professional Schools of international affairs to form a global network of excellence is a RSIS priority. RSIS will initiate links with other like-minded schools so as to enrich its research and teaching activities as well as adopt the best practices of successful schools.



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