Conforming Maritime Claims to the Law of the Sea

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Introduction

For the last 20 years in its annual resolution on oceans and the law of the sea, which is annually adopted almost unanimously, the UN General Assembly has called upon States to

- harmonize their national legislation with the provisions of the UN Convention on the Law of the Sea and where, applicable, relevant agreements and instruments, to ensure consistent application of those provisions, and to
- ensure also that any declarations or statements they have made or make when signing, ratifying or acceding to the Convention do not purport to exclude or modify the legal effect of the Convention in their application to the State concerned (article 310) and to withdraw any such declarations or statements.

These resolutions, for the past 15 years, have also called upon States Party to the Convention that have not yet done so to deposit with the UN Secretary-General charts or lists of geographical coordinates, as provided for in the Convention (articles 16(2), 47(9), 75(2), 76(9) and 84(2)), preferably using generally accepted and the most recent geodetic datums (i.e., WGS 84).

These calls have direct application to most members of ASEAN and other States in Southeast Asia, including the People’s Republic of China, Japan and the Republic of Korea. This paper identifies those provisions of their national legislation and declarations that do not conform to the Convention and those States Parties that have not deposited charts or lists of coordinates, or given due publicity, as required by the Convention.

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Excessive Maritime Claims

For the purposes of this paper, the phrase “excessive maritime claims” is used to identify those unilateral coastal State claims that are inconsistent with the international law of the sea reflected in the Law of the Sea Convention. As noted above, excessive maritime claims manifest themselves in national legislation, declarations accompanying the instrument by which States consent to be bound by the Convention, and by unilateral actions.

Coastal States in Southeast Asia have collectively quite a large number of excessive maritime claims, including those claims to unrecognized historic waters, improperly drawn baselines for measuring the breadth of the territorial sea and other maritime zones, restraints on the exercise of innocent passage in the territorial sea, contiguous zone claims at variance with article 33 of the Convention, restraints on the exercise of navigation and overflight rights in and over the exclusive economic zone, and archipelagic claims inconsistent with Part IV of the LOS Convention. The UN General Assembly’s annual call for harmonization is thus entirely on point. The Preamble to the Convention recognizes

the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment[.]

Claims that are not consistent with the Convention undermine the legal order established in the Convention and are in violation of their international legal obligations undertaken when consenting to be bound by the Convention. Furthermore, claims by States not party to the Convention that are contrary to the customary international law of the sea reflected in the Convention are equally unlawful.4 Many excessive claims seek to expand the ocean areas of sovereignty (internal waters and territorial sea) to the detriment of the rights of users to those waters, or to restrict the traditional uses of the oceans open to all. Conforming those claims to the international law of the sea promotes the rule of law and peace, stability and economic prosperity for all.5

Expertise and assistance is available to States to bring national legislation into conformity with the LOS Convention. At the one hundred and first session of the IMO Legal Committee, April 2014, the Director of the Division for Ocean Affairs and the Law of the Sea, UN Office of Legal Affairs, described DOALOS’ technical cooperation activities related to maritime legislation, in part as follows:

Effective national legislation in the maritime field is critical not only for the implementation of IMO instruments but also for the implementation of the international legal regime for the oceans, as set out in the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and other related instruments. . . .

. . . I would like to take this opportunity to briefly inform delegations regarding the technical cooperation activities of DOALOS related to maritime legislation . . .

The Division, as the Secretariat of UNCLOS, has been mandated by the General Assembly to provide information and advice to States in the uniform and consistent application of the provisions of the Convention, which sets out the legal framework within which all activities in the oceans and seas must be carried out. In this content, the Division provides technical assistance to States, at their request. . . .

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. . . . I would like to take this opportunity to emphasize that the Division stands ready to provide the expertise on the uniform and consistent application of provisions of UNCLOS to technical assistance activities which touch upon the interpretation and application of such provisions.6

Excessive Legislative Maritime Claims

This paper turns first to an analysis of the recent legislation of the two States in the region that have recently amended their maritime legislation: Vietnam and the Philippines.

Vietnam

Vietnam signed the LOS Convention on 10 December 1982 and ratified it on 25 July 1994 with declarations (see below). Vietnam acceded to the Part XI Agreement on 27 April 2006. On 21 June 2012, effective 1 January 2013, Vietnam promulgated a legislatively-enacted law on its maritime zones, entitled “Law of the Sea of Viet Nam”.7 This is the first legislation, but not the first executive action by Vietnam, declaring its position on the law of the sea. It is remarkable for what it says and for what it does not address.

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7 National Assembly Law No. 18/2012/QH13. It should be noted that the text of this law in English has not be posted on the UN DOALOS website. The comments that follow are based on an informal translation on file with the author.
First, the Law is a clear attempt to harmonize its maritime law with the Law of the Sea Convention, one of only two such efforts in the region (the other, as noted above, is the Philippines, on which more next below).

Second, article 2(2) provides in effect that the Convention will prevail in the event of differences between the Law and treaties to which Vietnam is a Party. This is entirely consistent with article 27 of the Vienna Convention on the Law of Treaties (to which 114 States are party) and which reflects customary international law on this point.8

Third, the Law no longer
- requires prior permission for warships to conduct innocent passage through its territorial sea;
- requires prior notification for foreign warships to operate in the contiguous zone;
- claims security as an interest in the contiguous zone; and
- limits the number of foreign warships that may operate in the contiguous zone.9

The United States has welcomed these developments and congratulated Vietnam “on the general alignment of the structure of the Law with the structure of the [LOS] Convention.”10

Fourth, while the Law does not address maritime boundaries, it is notable that the DOALOS website listing Vietnam’s maritime delimitation agreements does not include the 1982 Agreement on Historic Waters of Vietnam and Kampuchea, that this agreement is not registered with the UN, and which has been criticized.11

Fifth, the Law makes no mention of historic waters or historic claims. Indeed, neither does the China-Vietnam Tonkin Gulf maritime boundary delimitation agreement of 2000.12

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8 Article 27 of the 1969 Vienna Convention on the Law of Treaties provides that “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” 1155 UNTS 331. Of the States in the Southeast Asia region the following are party: China, Japan, Malaysia, Myanmar, Philippines, Republic of Korea, Timor-Leste and Viet Nam. See https://treaties.un.org/pages/ViewDetailsIII.aspx?src=UNTONLINE&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&lang=en#4.


Sixth, the second sentence of Article 8 on the establishment of baselines provides: “The Government of Viet Nam shall determine and, upon approval by the National Assembly’s Standing Committee, publicise the baselines in areas where baselines have not been established.” This is an obvious reference to the Gulf of Tonkin where the normal baseline appears to be used.

However, four provisions in the Law are inconsistent with the LOS Convention:

- Article 8 first sentence of the Law provides for the continued use of existing straight baselines from which to measure maritime zones, which have been criticized as not being in conformity with article 7 of the Convention;¹³
- Article 12(2) of the Law conditions innocent passage of foreign military vessels in the territorial sea on the provision of prior notification, which is not authorized by the LOS Convention;¹⁴
- Articles 16(2)(2nd para.) and 18(4)(2nd para.) of the Law condition the laying of submarine cables in the exclusive economic zone and on the continental shelf on written consent of Vietnam, contrary to article 79 of the Convention which permits consent only for the laying of pipelines on the continental shelf; and
- Article 23(3)(b) of the Law provides that the threat or use of force against other countries renders passage in the territorial sea not innocent, while article 19(2)(a) of the Convention refers only to the coastal State.

One provision of the Law is questionable:

- Article 12 asserts sovereignty over archeological and historical objects in the territorial sea, the application of which to sunken foreign military ships and aircraft is uncertain. The United States views such ships and aircraft as remaining the property of the foreign flag State unless expressly abandoned or transferred and that disturbance or recovery of such ships and aircraft should not occur without the express permission of the foreign flag State.¹⁵

¹⁴ See Roach and Smith, supra n. 9, at 239-251.
¹⁵ Ibid. See Roach and Smith, supra n. 9, at 544-549.
The United States has requested the Government of Vietnam to review the provisions of the Law identified in its Note “and provide assurances that the Law will be implemented in a manner consistent with international law as reflected in the Convention.”

Philippines


In the 15th Congress, the “Philippine Maritime Zones Act” was introduced in the Philippines Senate, but has not been enacted. Substantively identical legislation has been introduced in the 16th Congress, First Regular Session. The texts contain no provisions inconsistent with the LOS Convention.

On the same day in 2011 legislation dealing with archipelagic sea lanes was introduced in the Philippines Senate and House, but were not been enacted. On 1 July 2013 substantively identical legislation was introduced in the Senate 16th Congress First Regular Session. On 18 August 2014 legislation was introduced in the House which, while identical to the other provisions in the Senate bill, did not prescribe the coordinates of the archipelagic sea lanes but refers to the role of the IMO. The Senate draft legislation in both the 15th and 16th Congresses did not recognize the role of the IMO set out in Article 53(9) of the LOS Convention and are not

16 U.S. Diplomatic Note supra n. 10.
consistent with Article 53(12) of the LOS Convention. Sections 3 and 11 of the Senate’s draft legislation would permit the exercise of archipelagic sea lanes passage through only three routes and preclude the exercise of archipelagic sea lanes passage through many other routes normally used for international navigation. The scheme contemplated in this Senate legislation would thus have established a partial, not a complete, system of archipelagic sea lanes within the meaning of Part H of the IMO publication, Ships’ Routeing. 24 As noted above, the 2014 draft House legislation avoids this difficulty.

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We turn next to the other members of ASEAN that have coastlines (Laos is landlocked) and excessive maritime claims (Singapore has no excessive legislative maritime claims).

**Brunei**

Brunei signed the LOS Convention on 12 May 1984. Twelve years later, on 11 May 1996, it ratified the Convention and consented to be bound by the Part XI Agreement. It has filed no declarations. 25 The Territorial Waters Act of Brunei, 1982, contains only four articles of little substance. 26 There is very little other information available on Brunei’s maritime legislation. 27

**Cambodia**

Cambodia is the last State in Southeast Asia not to have consented to be bound by the Convention. Cambodia signed the LOS Convention on 1 July 1983. It has been reported that Cambodia is preparing to ratify the Convention.

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24 Part H, entitled “Adoption, designation, and substitution of archipelagic sea lanes,” contains general provisions for the adoption, designation and substitution of archipelagic sea lanes, and specific provisions on archipelagic sea lanes adopted by the IMO, to date the only ones being the partial system of archipelagic sea lanes in Indonesian archipelagic waters. The general provisions of Part H were adopted, pursuant to SOLAS regulation V/10 and Assembly Resolution 572(14), as amended, by resolution MSC 71(69) at the 69th session of the Maritime Safety Committee (MSC), and the Indonesian partial system of archipelagic sea lanes was adopted at the same session by resolution MSC 72(69). When these two resolutions were adopted, the Philippines delegation at the IMO stated that the discussions and agreements on the designation of Indonesian archipelagic sea lanes should apply exclusively to the Indonesian archipelagic sea lanes and should not be interpreted as creating a precedent for future applications for the designation of archipelagic sea lanes. The MSC resolutions are available at http://www.imo.org/KnowledgeCentre/IndexofIMOResolutions/Pages/Maritime-Safety-Committee-%28MSC%29.aspx.


On 13 July 1982 the Council of State of Kampuchea issued a decree setting out the nation’s maritime claims.\textsuperscript{28} A number of its provisions are inconsistent with international law reflected in the Convention.

Article 2 provides for straight baselines, but not the normal baseline. Further, the baseline segments set out in the annex to the decree do not meet the criteria set out in article 7(1) of the Convention and have been criticized\textsuperscript{29} for using the “furthest islands” with lie well seaward of the coast which otherwise might meet the criteria. In addition the final segment ends at sea, connecting with the Vietnamese historic waters line.\textsuperscript{30}

The second paragraph of Article 4 claims security as one of its interests in the contiguous zone, which is not authorized by article 33 of the Convention.\textsuperscript{31}

The third paragraphs of articles 5 and 6 assert that Kampuchea has exclusive jurisdiction for “installations, devices and artificial islands” which exceeds the limited purposes set out in article 60(1)(b) of the Convention for installations and structures. In addition Part V of the Convention on the EEZ makes no mention of “devices”.

Article 6 on the continental shelf does not recognize its limited authority regarding submarine cables in asserting that “all activities” there must be authorized by the Government.

Finally, article 8 refers to the historic waters in the vicinity of the maritime boundary area with Vietnam. It is notable that the UN DOALOS website lists no boundary agreements for Cambodia.\textsuperscript{32}

\textit{Indonesia}

Indonesia signed the LOS Convention on 10 December 1982 and ratified the Convention on 3 February 1986. On 29 July 1994 it signed the Part XI Agreement and on 2 June 2000 it ratified the Part XI Agreement. It has filed no declarations.\textsuperscript{33}

\textsuperscript{30} On the Vietnamese historic waters agreement see supra n. 12 and accompanying text.
\textsuperscript{31} See Roach and Smith, supra n. 9, at 154-157.
\textsuperscript{33} “Table recapitulating the status of the Convention and of the related Agreements, as at 10 January 2014,” supra n. 25.
With regard to archipelagic sea lanes passage, in addition to designating three archipelagic sea lanes, Regulation No. 37 of 2002 prescribes in detail the rights and obligations of foreign ships and aircraft exercising the right of archipelagic sea lanes passage. For the most part the Regulation conforms to the provisions of Articles 52-54 of the LOS Convention. However, Article 3 of Regulation No. 37 appears to limit the exercise of archipelagic sea lanes passage to designated sea lanes:

1. The exercise of the right of archipelagic sea lane passage as described in article 2 [of the Regulation] is conducted through a sea lane or air route above the sea lane designated as an archipelagic sea lane for the purpose of transit in such sea lanes, as stipulated in article 11 [of the Regulation].

2. Pursuant to this regulation, to exercise the right of archipelagic sea lane passage in other parts of Indonesian waters can be conducted after such a sea lane has been designated in those waters for the purpose of this transit.

Considering that Indonesia has designated only three north-south routes, such a restriction is not permitted by Article 53 of the LOS Convention. Article 53(4) states that “[archipelagic] sea lanes and air routes . . . shall include all normal passage routes used as routes for international navigation or overflight through or over archipelagic waters . . . provided that duplication of routes of similar convenience between the same entry and exit points shall not be necessary.” In adopting three north-south routes, the IMO stipulated, and Indonesia confirmed at the time of adoption by the IMO, that this was a partial designation and that the provisions of Article 53(12) of the LOS Convention continued to apply pending adoption of designations for all normal passage routes. Accordingly, the right of archipelagic sea lanes passage may be exercised within the three designated routes, and also within other routes normally used for international navigation through and over Indonesian waters.

With regard to Indonesia’s archipelagic straight baseline system, two segments seem to cut off the rights of Timor-Leste in the Wetar Strait.

35 Article 15 similarly appears to limit the right of archipelagic sea lanes passage.
36 Report of the Maritime Safety Committee on its 69th Session, MSC 69/22, 29 May 1998, paras. 5.22-5.29; resolution MSC 72(69).
38 Timor-Leste protested segments 101E-101F and 101H-101I by note verbale NV/MIS/85/2012, 6 Feb. 2012 (“The first archipelagic straight baseline does not take in consideration the median line between the territorial sea of Timor-Leste’s island of Ataúro and the territorial seas of Indonesia’s island of Lirang and Alor. The second archipelagic straight baseline does not conform with Article 47(5) of the Convention as it encompasses the territorial sea of the Timor-Leste enclave of Oecussi, thus excluding the enclave of Oecussi from access to the high seas and to
Malaysia

Malaysia signed the LOS Convention on 10 December 1982, and ratified the Convention on 14 October 1996, with declarations (see below).\(^{39}\) Malaysia signed the Agreement in Implementation of Part XI on 2 August 1994, and consented to be bound by the Part XI Agreement on 14 October 1996.\(^{40}\)

Portions of two sections of Malaysia’s Exclusive Economic Zone Act 1984\(^{41}\) are not consistent with the LOS Convention.

Section 21(1) provides in part “No person shall construct, operate or use any artificial island, installation or structure in the exclusive economic zone or on the continental shelf except with the authorization of the Government.” Insofar as this relates to installations and structures not used for economic purposes, it goes beyond the limitations in article 60(1)(b) of the LOS Convention.

Section 22(1) provides in part “No person shall lay submarine cables or pipelines in the exclusive economic zone or on the continental shelf without the consent of the Government as to the delineation of the course for the laying of such cables and pipelines.” Article 79(3) of the LOS Convention limits the right of coastal States to delineating the course of pipelines – but not submarine cables – on the continental shelf.

Myanmar (Burma)

Myanmar signed the LOS Convention on 10 December 1982. Almost 14 years later, on 21 May 1996, it ratified the Convention and acceded to the Part XI Agreement. It has filed no declarations.\(^{42}\)

Myanmar has several excessive maritime claims.


\(^{40}\) “Table recapitulating the status of the Convention and of the related Agreements, as at 10 January 2014,” \textit{supra} n. 25.

\(^{41}\) Exclusive Economic Zone Act, 1984, Act No. 311, An Act pertaining to the exclusive economic zone and certain aspects of the continental shelf of Malaysia and to provide for the regulations of activities in the zone and on the continental shelf and for matters connected therewith, \textit{available at} http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MYS_1984_Act.pdf.

\(^{42}\) “Table recapitulating the status of the Convention and of the related Agreements, as at 10 January 2014,” \textit{supra} n. 25.
The Territorial Sea and Maritime Zones Law, 1977, Pyithu Hluttaw Law No. 3 of 9 April 1977, contains the following provisions that are inconsistent with the Law of the Sea Convention:

- Section 9(a) requires foreign warships to obtain prior express permission of the Council of Ministers to pass through the territorial sea, a requirement not recognized in articles 17-21 of the LOS Convention.
- Section 11(a) claims the right to exercise in the contiguous zone the control it may consider necessary to safeguard the security of Burma, a right not recognized in article 33 of the LOS Convention.
- The straight baselines set out in the Schedule along the Arakan coast, Gulf of Martaban and the Tenasserim coast do not meet the requirements of article 7 of the LOS Convention.

The Law amending the Territorial Sea and Maritime Zones Law (The State Peace and Development Council Law No. 8/2008), 5 December 2009, amends the Schedule by adding straight baselines around the Preparis Islands and the CoCo Islands. The straight baselines enclosing these two dependent archipelagos do not meet the criteria of articles 7 and 47 of the LOS Convention and have been protested by Bangladesh.

**Thailand**

Thailand signed the LOS Convention on 10 December 1982, and, on 15 May 2011, ratified the Convention, with declarations (see below) and acceded to the Part XI Agreement.

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44 Protested by the U.S. in 1982 and the UK in 1993. II *Cumulative Digest* 1850; Roach and Smith, supra n. 9, at 247 and note 79.
45 Protested by the U.S. in 1982 and the UK in 1993. II *Cumulative Digest* 1753, 1864; Roach and Smith, supra n. 9, at 154-155 n. 16.
49 “Table recapitulating the status of the Convention and of the related Agreements, as at 10 January 2014,” supra n. 25.
Several of the Thai straight baseline segments are inconsistent with the law of the sea requirements. In 1970 Thailand established straight baselines in three areas along its coast.\textsuperscript{50} In 1992 Thailand announced straight baselines in a fourth area of its coast.\textsuperscript{51} In 1994 the European Union protested the new baselines in Area 4 as being “excessively long”; in 2000 the United States protested the baselines in Area 2 as not having a fringe of islands along the coast, and in Area 4 as not being deeply indented or fringed with islands, as required by Article 4(1) of the 1958 Territorial Sea Convention to which both States are party.\textsuperscript{52}

Next we turn to other maritime countries in the region.

\textit{People’s Republic of China}

China signed the LOS Convention on 10 December 1982, and signed the Part XI Agreement on 29 July 1994. On 7 June 1996, it ratified the Convention and consented to be bound by the Part XI Agreement. It has filed several declarations (see below).\textsuperscript{53} China has the largest number of excessive maritime claims in the region.

China’s Law on the Territorial Sea and the Contiguous Zone of 25 February 1992 contains three provisions not authorized by the Law of the Sea Convention.\textsuperscript{54}

- Article 3 provides that the territorial sea baseline "is designated with the method of straight baselines." Article 3 makes no provision for use of the normal baseline as prescribed in article 5 of the LOS Convention. China’s straight baselines have been


\textsuperscript{53} “Table recapitulating the status of the Convention and of the related Agreements, as at 10 January 2014,” \textit{supra} n 25.

analyzed and protested by the United States as not meeting the geographic criteria of article 7 of the LOS Convention.55

- Article 6 second paragraph requires foreign military ships to obtain Chinese government permission to enter China’s territorial sea, a requirement not authorized by articles 17-21 of the LOS Convention. This requirement has been protested by the United States.56
- Article 13 claims security as an interest which it may protect in its contiguous zone, a right not authorized by article 33 of the Convention. The United States has protested this claim.57

In 2012 China proclaimed straight baselines around the dependent archipelago of the Senkakus/Diaoyu Dao. They have been protested and criticized.58

China’s 1998 Exclusive Economic Zone and Continental Shelf Act contains two provisions that are not consistent with the Law of the Sea Convention.59

- Articles 3 and 4 (2nd paragraph) and article 8 assert that China has exclusive jurisdiction for “artificial islands, installations and structures” which exceeds the limited purposes set out in article 60(1)(b) of the Convention for installations and structures.
- Article 11 second paragraph provides that China must authorize the laying of submarine cables and pipelines in its EEZ and on its continental shelf. Article 79(3) of the LOS Convention limits the right of coastal States to delineating the course of pipelines – but not submarine cables – on the continental shelf.

On the other hand, the first sentence of Article 11 provides that any State “shall enjoy in the exclusive economic zone ... of the People’s Republic of China freedom of navigation and overflight ...”. This tracks the language of article 57(1) of the LOS Convention. However, in practice China denies the right of overflight of its EEZ to surveillance aircraft operating over

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56 See Roach and Smith, supra n.9, at 247 n. 81.
57 Id. at 155 n. 16.
other countries’ EEZ. In the view of the United States and other States, aerial surveillance in the airspace over the EEZ is an exercise of the freedom of overflight.

The Surveying and Mapping Law of the People’s Republic of China (Order of the President No. 75), 29 August 2002, requires foreign organizations or individuals wishing to conduct surveying and mapping in “sea areas under the jurisdiction of” China must obtain China’s approval. The United States is of the view that the conduct of military surveys in the EEZ is a high seas freedom.

On 23 November 2013 China declared an Air Defense Identification Zone (AIDZ) over much of the East China Sea. Declaring an ADIZ per se is acknowledged in the practice of States and may be considered customary international law. However, contrary to the practice of other States China’s claim to enforce against aircraft not intending to enter China’s national airspace violates international law.

Japan


In 1996 Japan amended its law on the territorial sea and contiguous zone to provide for straight baselines to be “prescribed by Cabinet Order, in accordance with article 7” of the LOS Convention. A Cabinet Order was also issued in 1996 setting out the coordinates of the straight baselines which were protested by the United States. These baselines were amended in 2001.

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62 See Roach and Smith, supra n.9, at 379-387, esp. 384-385 with regard to China, and 435-437.
64 “Table recapitulating the status of the Convention and of the related Agreements, as at 10 January 2014,” supra n. 25.
So far as is known these revised baselines have not been examined for conformity with article 7 of the LOS Convention.

**Republic of Korea**

Korea signed the LOS Convention on 14 March 1983, and on 29 January 1994 it ratified the Convention and the Part XI Agreement. It has filed declarations pursuant to article 298.68

Provisions of two South Korean enactments are not consistent with the Law of the Sea Convention.

In 1996 Korea modified the straight baseline system along most of its coastline using isolated features well offshore.69 In 1998 the United States protested most of the segments in this system as not being in compliance with article 7 of the Convention.70

In 1977 Korea enacted a territorial sea law, article 5(1) of which asserted that foreign warships had to give prior notice if they intended to pass through Korea’s territorial sea.71 The United States protested this claim in 1977.72
Finally we turn to Taiwan.

While in general Taiwan’s maritime legislation, as of 2005, was consistent with the LOS Convention, there are a number of notable exceptions.\(^{73}\)

The Law on the Territorial Sea and Contiguous Zone of the Republic of China of 1998 contains nine notable exceptions: \(^{74}\)

- Article 4 provides that the baseline of the territorial sea “shall be determined by a combination of straight baseline in principle and normal baseline as exception.” This, of course, is the reverse of the rules in the LOC Convention for the normal baseline (article 5) and straight baselines as the exception (article 7).
- Article 7 provides that the right of innocent passage by foreign vessels is enjoyed on the basis of reciprocity, contrary to article 17 of the LOS Convention that the ships of all States enjoy the right of innocent passage.
- Article 7 also provides that foreign military or government vessels shall give prior notice before their passage through the territorial sea, a claim not supported by the Convention or its negotiating history.
- Article 8 includes acts making passage not innocent that are not listed in article 19(2) of the LOS Convention: taking on board any navigational equipment; violations of trade, inspection and environmental protection laws and regulations.
- Article 10 permits suspension of territorial sea for protecting national security and national interests, which is not authorized in article 25(3) of the LOS Convention.
- Article 12 permits requirements to use sea lanes and traffic separation schemes in its territorial sea for reasons not authorized by article 22 of the LOS Convention: protecting the destruction of on-the-sea and under-the-sea installations or marine resources and preventing marine environmental pollution.
- Article 14 expands the categories of interests in the contiguous zone to include trade, inspection, environmental protection and unauthorized broadcasting.
- Article 16 provides that all archeological and historical objects found in the territorial sea or contiguous zone belong to Taiwan, without recognizing the immunities of sunken warships and other government property.

\(^{73}\) These excessive maritime claims by Taiwan are detailed in Limits in the Seas No. 127, “Taiwan’s Maritime Claims” (2005), available at http://www.state.gov/documents/organization/57674.pdf; they are briefly summarized in the following paragraphs.

\(^{74}\) There are a number of minor differences in the provisions in Article 11 on laws regulating innocent passage identified in the footnotes to this article in Annex 1 to Limits in the Seas No. 127.
The straight baselines promulgated in 1999 do not meet the criteria of article 7 of the LOS Convention.

The Law on the Exclusive Economic Zone and Continental Shelf of 1998 contain more than five provisions that are not consistent with the LOS Convention:

- Article 5 paragraph 28 claims rights over “the resources” rather than the more limited category of “natural resources” set out in article 56(1)(a) of the LOS Convention.
- Article 5 paragraph 29 addresses all installations and structures rather than those used for economic purposes as set out in article 60(1) of the LOS Convention.
- Article 15 claims the right to delineate the course of submarine cables as well as pipelines on the continental shelf, contrary to article 79(3) of the LOS Convention.
- Article 11 asserts the right to indict a vessel for pollution in its EEZ broader than that authorized in article 220(6) of the LOS Convention.
- Article 12 permits the adoption of special mandatory measures for the prevention of pollution in its EEZ without the safeguards set out in article 211(6) of the LOS Convention.
- Article 9 seeks to regulate marine scientific research in the areas of supervision, suspension and cessation of MSR activities, interference with exercise of rights, information on results of research, and security that are inconsistent with Part XIII of the LOS Convention.

Excessive Maritime Declarations

Article 309 of the Convention provides that “[n]o reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.” Article 310 provides that

Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, inter alia, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.

States have and are free to modify or withdraw these declarations at any time.

A few of the States in the Southeast Asian region have made declarations pursuant to Article 310 which amount to impermissible reservations, as follows.76

75 No article permits reservations. Article 298 permits exceptions to compulsory dispute resolution for certain categories of disputes. Article 7, Provisional Application, of the Part XI Agreement permits certain exceptions to be taken to that article. Articles 309 and 310 apply to the Part XI Agreement. Part XI Agreement, Article 2(2).

76 All declarations to the LOS Convention, and objections thereto, may be found at https://treaties.un.org/pages/ViewDetailsIII.aspx?src=UNTSONLINE&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en#Participants.
China:

4. The People’s Republic of China reaffirms that the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice the right of a coastal state to request, in accordance with its laws and regulations, a foreign state to obtain advance approval from or give prior notification to the coastal state for the passage of its warships through the territorial sea of the coastal state.

The difficulty with this 1996 Chinese declaration is that the Convention does not authorize a coastal State to condition the exercise of innocent passage on the prior notification to or consent.77

Thailand:

I. The Government of the Kingdom of Thailand declares, in relation to Article 310 of the United Nations Convention on the Law of the Sea, as follows:

4. The Government of the Kingdom of Thailand understands that, in the exclusive economic zone, enjoyment of the freedom of navigation in accordance with relevant provisions of the Convention excludes any non-peaceful use without the consent of the coastal State, in particular, military exercises or other activities which may affect the rights or interests of the coastal State; and it also excludes the threat or use of force against the territorial integrity, political independence, peace or security of the coastal State.

This declaration contradicts a 1993 Thai circular note opposed to restrictions on the rights of passage and freedom of navigation in their maritime zones.78

The difficulty with this 2011 Thai declaration on military activities in the EEZ is that it is not authorized by the Convention and was expressly rejected by the Third Conference. The United States has protested the claim.79

Malaysia:

3. The Malaysian Government also understands that the provisions of the Convention do not authorize other States to carry out military exercises or manoeuvres, in particular those involving the use of weapon or explosives in the exclusive economic zone without the consent of the coastal state.

77 The United States has protested this Chinese claim on multiple occasions. See Roach and Smith, supra n. 9 at 239-251, esp. 247 n. 81 and Table 11.
79 See Roach and Smith, supra n. 9, at 390-391, and Digest 2011, at 410-411.
The difficulty with this 1996 Malaysian declaration on military activities in the EEZ, as with the similar Thai declaration immediately above, is that it is not authorized by the Convention and was expressly rejected by the Third Conference.\(^8\)

4. In view of the inherent danger entailed in the passage of nuclear-powered vessels or vessels carrying nuclear material or other material of a similar nature and in view of the provision of article 22, paragraph 2, of the Convention on the Law of the Sea concerning the right of the coastal State to confine the passage of such vessels to sea lanes designated by the State within its territorial sea, as well as that of article 23 of the Convention, which requires such vessels to carry documents and observe special precautionary measures as specified by international agreements, the Malaysian Government, with all of the above in mind, requires the aforesaid vessels to obtain prior authorization of passage before entering the territorial sea of Malaysia until such time as the international agreements referred to in article 23 are concluded and Malaysia becomes a party thereto. Under all circumstances, the flag State of such vessels shall assume all responsibility for any loss or damage resulting from the passage of such vessels within the territorial sea of Malaysia.

The difficulty with this 1996 Malaysian declaration on nuclear vessels is that the Convention does not authorize such unilateral action in the absence of international agreement.

8. The Malaysian Government declares, without prejudice to article 303 of the Convention of the Law of the Sea, that any objects of an archeological and historical nature found within the maritime areas over which it exerts sovereignty or jurisdiction shall not be removed, without its prior notification and consent.

The difficulty with this 1996 Malaysian declaration on underwater cultural heritage is that the LOS Convention does not provide for such authority over UCH in the EEZ or on the continental shelf, only in the territorial sea and contiguous zone (if claimed).

**Philippines:**

Understanding made upon signature and confirmed upon ratification:

7. The concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, and removes straits connecting these waters with the economic zone or high sea from the rights of foreign vessels to transit passage for international navigation.

This Philippine 1984 understanding prompted objections from Australia and protests from Bulgaria, the former Byelorussia, Czechoslovakia, the Ukraine, the former USSR and the United...
States. The Philippines responded to the Australian objection with an undertaking to revise its domestic legislation, which occurred in 2009.81

In July 2011, the Philippine Supreme Court considered the question of whether R.A. 9522 “unconstitutionally ‘converts’ internal waters into archipelagic waters, hence subjecting these waters to the right of innocent and sea lanes passage under [the LOS Convention].”82 In unanimously upholding the constitutionality of R.A. 9522, the Philippine Supreme Court stated that “[w]hether referred to as Philippine ‘internal waters’ under Article I of the Constitution or as ‘archipelagic waters’ under [Article 49 of the LOS Convention], the Philippines exercises sovereignty over the body of water lying landward of the baselines.” The Court recognized that Philippine sovereignty over the waters within the baselines is subject to the rights of innocent passage and archipelagic sea lanes passage, as provided for under international law.83

In 2011, the “Philippine Maritime Zones Act” was introduced in the Philippines Congress, Section 4 of which would clarify, consistent with the LOS Convention, that “[t]he Archipelagic Waters of the Philippines refer to the waters on the landward side of the archipelagic baselines …” and that “[w]ithin the archipelagic waters, closing lines for the delimitation of internal water shall be drawn pursuant to Article 50 of [the LOS Convention]….”84 This legislation has not been enacted into law. The 2013 draft legislation on Philippines maritime zones contains the same text.85

Deposit and Due Publicity

There are several different requirements in the LOS Convention for States Parties to deposit with the UN charts or lists of coordinates, national legislation and provide due publicity so that mariners will be advised of the nature and location of those claims.

Coastal States party to the Law of the Sea Convention are required to deposit with the UN Secretary-General charts showing straight baselines, closing lines and archipelagic baselines as

81 See Roach and Smith, supra n.9, at 214-215 and n. 47. See supra text accompanying nn. 20-23 for recent draft Philippines maritime legislation.
83 “The fact of sovereignty, however, does not preclude the operation of municipal and international law norms subjecting the territorial sea or archipelagic waters to necessary, if not marginal, burdens in the interest of maintaining unimpeded, expeditious international navigation, consistent with the international law principle of freedom of navigation. Thus, domestically, the political branches of the Philippine government, in the competent discharge of their constitutional powers, may pass legislation designating routes within the archipelagic waters to regulate innocent and sea lanes passage.” Id.
84 An Act to Define the Maritime Zones of the Republic of the Philippines, Senate bill No. 2737, 10 March 2011, available at http://www senate.gov.ph/lishdata/109329322!.pdf. Article 50 of the LOS Convention states: “Within its archipelagic waters, the archipelagic State may draw closing lines for the delimitation of internal waters, in accordance with articles 9, 10 and 11 [pertaining to mouths of rivers, bays, and ports].”
85 See n.21 supra and accompanying text.
well as the outer limits of the territorial sea, contiguous zone, the exclusive economic zone and the continental shelf. Alternatively they may deposit lists of geographical coordinates of points, specifying the geodetic datum. Coastal State parties are also required to give due publicity to all these charts and lists of geographical coordinates.\(^{86}\)

Coastal State parties are also required to deposit with the Secretary-General charts and relevant information permanently describing the outer limits of the continental shelf extending beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured when they are based on the recommendations of the Commission of the Limits of the Continental Shelf. In this case the Secretary-General is to give due publicity. These States are also required to provide appropriate information regarding the geodetic datum.\(^{87}\)

The UN Division of Oceans and Law of the Sea (DOALOS) has stated that “[t]he mere existence or adoption of legislation or the conclusion of a maritime boundary delimitation treaty registered with the UN Secretariat, even if they contain charts or lists of coordinates cannot be interpreted as an act of deposit with the Secretary-General under the Convention.”\(^{88}\)

State Parties are also required to give due publicity of all laws and regulations adopted by the coastal State relating to innocent passage through the territorial sea (article 21(3)) and all laws and regulations adopted by States bordering straits used for international navigation (article 42(3)). Further, concerning due publicity, article 25(3) stipulates that a coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily, in specified areas of its territorial sea, the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension takes effect, according to the same article, only after having been duly published.

DOALOS informs States of the deposit of charts and geographical coordinates through “maritime zone notifications” on its website.\(^{89}\)

As of 6 August 2014, of the States Parties in the region bordering on the South China Sea and East China Sea DOALOS lists only China, Indonesia, Japan, Myanmar, Papua New Guinea,

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\(^{86}\) LOS Convention, articles 16 (straight baselines, river closing lines, bay closing lines, roadsteads and territorial sea boundary delimitations), 47(8-9) (archipelagic baselines), 75 (EEZ), 84 (continental shelf).

\(^{87}\) Id., article 76(8-9).

\(^{88}\) UN DOALOS, “Deposit and Due Publicity – Background Information,” 13 March 2009, available at www.un.org/Depts/los/LEGISLATIONANDTREATIES/background_deposit.htm. DOALOS advises that this should be done by a note verbale or letter “addressed to the Secretary-General … by the Permanent Representative to the United Nations or other person duly authorized to do so, which should (i) be accompanied by the relevant information, (ii) clearly state the intention to deposit and (iii) specify the relevant article(s) of the Convention.” Id.

Philippines and Vietnam have complied with the deposit of charts requirements. Brunei, Malaysia, Republic of Korea, Singapore, Thailand and Timor-Leste have yet to satisfy these requirements. In this region as of 3 April 2012 only Myanmar has satisfied the due publicity requirement regarding laws and regulations regarding passage.

Malaysia

Malaysia employs straight baselines along its coast facing the South China Sea. They are illustrated on the maps appended to the Executive Summary of the 2009 Joint Malaysia-Vietnam Submission to the Commission on the Limits of the Continental Shelf and on the map appended to the U.S. State Department’s analysis of the 1969 Indonesia-Malaysia continental shelf agreement. It has been reported that Malaysia enacted the Baselines of Maritime Zones Act 2006 (Act 660) on 1 May 2007. However this act is not included in the DOALOS compilation of Malaysia’s legislation. The act reported provides for both normal and straight baselines. Malaysia has not given the due publicity to those straight baselines required by article 16(2); so far as is known, no chart or list of coordinates has been submitted to the UN.

Singapore

The situation with Singapore is ambiguous. The only relevant publicly available document from the Singapore government states in part:

As indicated in the Ministry of Foreign Affairs Press Statement dated 15 September 1980, Singapore has a territorial sea limit that extends up to a maximum of 12 nautical miles and an Exclusive Economic Zone. This is consistent with the United Nations Convention on the Law of the Sea of 10 December 1982, which Singapore is a State Party to.

The precise coordinates of Singapore’s territorial sea and Exclusive Economic Zone will be announced at an appropriate time. Should the limits of its territorial sea or Exclusive Economic Zone change, Singapore will notify the United Nations.

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90 Ibid. However, Indonesia (and Singapore) have not transmitted to DOALOS the text of their territorial sea boundary in the western part of the Strait of Singapore that entered into force in 2010 and is registered with the UN and published in 2713 UNTS. See note 99 infra for details.
95 The relevant provisions of the Act are quoted in id. at 28 n. 28.
Zone overlap with claims of neighbouring countries, Singapore will negotiate with those countries with a view to arriving at agreed delimitations in accordance with international law…97

As Singapore does not use straight baselines, it is not required to deposit charts or lists of coordinates of its territorial sea baseline. It does not appear that Singapore has yet claimed an EEZ (perhaps the only place it could do so is in the vicinity of Pedra Branca.98) However Singapore does not seem to have complied with the requirement in article 16(1) to deposit charts or lists of coordinates of the lines of territorial sea delimitation and give due publicity thereto as Singapore has, of course, negotiated territorial sea boundaries with Indonesia in the Strait of Singapore99 and with Malaysia in the Johor Strait.100

As of 21 July 2014, only three of the States in the region have received recommendations from the CLCS as to the outer limit of their extended continental shelves: Indonesia in the area North West of Sumatra Island (on 28 March 2011), the Philippines in the Benham Rise region (on 12 April 2012), and Japan in the Shikoku Basin Region (on 12 April 2012).101 Of these three only the Philippines has deposited the outer limits of its ECS (in the Benham Rise region) with the UN.102 However, on 9 September 2014 the Japanese Cabinet approved an ordinance apparently approving the CLCS recommendations.103

Due Publicity

100 Agreement between the Government of Malaysia and the Government of the Republic of Singapore to Delimit Precisely the Territorial Waters Boundary in Accordance with the Straits Settlements and Johore Territorial Waters Agreement 1927, Singapore 7 August 1995, entered into force 7 August 1995, III International Maritime Boundaries 2345-2356 (Rpt. 5-20, 1998), not registered with the UN.
States meet their obligations of due publicity regarding sea lanes, traffic separation lanes and archipelagic sea lanes through their adoption by the International Maritime Organization and publication in Safety of Navigation and COLREG Circulars.

**Conclusions and Recommendations**

No coastal State in Southeast Asia is in complete compliance with the UNGA’s calls to harmonize national legislation with the LOS Convention, withdraw declarations that are inconsistent with the Convention, deposit charts or lists of coordinates, and give due publicity. As Schofield has recently written,

> . . . lack of publicity undermines their claims and potentially leaves them open to challenge. . . . It is therefore to be hoped that that the South China Sea claimants move to address their baseline challenges. . . . One option available to them is to engage in joint hydrographic surveying activities with a view to co-operatively addressing the complexities and peculiarities of determining the location of normal baselines in the South China Sea context, as well as ‘rolling back’ excessive straight baseline claims while simultaneously fulfilling their obligations to give their baselines and maritime claims due publicity in the interests of providing clarity and certainty to marine users. . . . [S]uch enhanced clarity may offer an important step in efforts towards the resolution or at least better management of the South China Sea disputes.

Nevertheless, as recounted in this paper, there is a wide range of compliance as well as noncompliance.

It would behoove all States in the region to examine their situation and remedy the deficiencies, for that would benefit those States individually and collectively and all user States, thereby enhancing peace, stability and their economic development.

Or in the words of an old adage, “First, fix your own house”.

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104 Articles 22(4), 41(7) and 53(10).
105 IMO circulars are available through links at www.imo.org/Pages/home.aspx.
106 Schofield, supra n.5, at 54.