

ASEAN REGIONAL FORUM

**3RD ASEAN Regional Forum (ARF) Workshop
on Implementing UNCLOS and other International Instruments
to address Emerging Maritime Issues
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Session 1. Emerging Challenges to the maritime domain

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***State Responsibility for the actions of private entities and
the role of non-state entities in maritime cooperation***

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Part 1

State Responsibility for Acts of Organs of the State

2001 ILC Articles on State Responsibility

- Adopted in 2001 by the International Law Commission
- Cited by International Courts and Tribunals as evidence of rules of customary international law
- General Principles:
 1. The conduct of any **organ of the State** shall be considered as an act of the State
 2. The conduct of **private persons or entities** are generally not considered as acts of the State

2001 ILC Articles on State Responsibility

Article 2. Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State
when conduct consisting of an action or omission:

- (a) is attributable to the State under international law; and
- (b) constitutes a breach of an international obligation of the State.

1982 UNCLOS: State Responsibility for conduct of Warships and Other Government Ships

Article 31. Responsibility of the Flag State for Damage Caused by a Warship or Other Government Ship Operated for Non-Commercial Purposes

- The **flag State** shall bear **international responsibility** for any loss or damage to the coastal State resulting from the non-compliance by a **warship** or **other government ship operated for non-commercial purposes** with the laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of this Convention or other rules of international law.

Immunity of Warships and Ships Used only on Non-Commercial Service

Article 95 Immunity of Warships on the High Seas

- Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.

Article 96 Immunity of Ships Used only on Government Non-Commercial Service

- Ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.

Definition of Warship

Article 29. Definition of Warships

- For the purposes of this Convention,
"warship" means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.

Government Ship operated for non-commercial purposes

- Not defined in UNCLOS
- Such Government Ships would include auxiliary vessels that are owned by or under the exclusive control of the armed forces
- Because they are State owned or operated and used for the time being only on government noncommercial service, they enjoy sovereign immunity.
- The State is internationally responsible for their conduct if they fail to comply with the laws and regulations of coastal States that are adopted in accordance with UNCLOS

“Maritime Militia”

- Vessels described in the media as “**maritime militia**” operate in the “**Grey Zone**”
- Fishing vessels with no markings indicating that they belong to or are under the control of any government agency
- Not Warships
- Not Government ships operated solely for non-commercial purposes (they also fish)
- They engage in activities other than fishing in support of policies of their government
- Their master and crew are reported to be former navy or coast guard personnel
- Some of their activities are reported to be under the direction or control of the either the coast guard or local law enforcement agencies of their State

“Maritime Militia”

- Reportedly manned by persons who are sometimes under the control of local or regional government agencies
 - Not owned by the armed forces
 - Not under the exclusive control of the armed forces
 - Not being used only on government noncommercial service
 - No external markings identifying them as government vessels
- Therefore, **my personal opinion** is that the stronger argument is that they are **not Government ships**:
 - their Government is not responsible for their conduct if they violate the laws and regulations of the coastal State
 - if they violate the laws of the coastal State, they do not have immunity, and they can be arrested by the law enforcement authorities of the coastal State

Part 2

State Responsibility for Acts of Private Persons or Entities and for Failing to Exercise Due Diligence to Control Illegal Acts of Private Persons or Entities

When Acts of Private Persons or Entities are State Acts

ILC Articles on State Responsibility

Article 5. Conduct of Persons or Entities Exercising Elements of Governmental Authority

- The conduct of a person or entity which is not an organ of the State under article 4 but which is **empowered by the law of that State to exercise elements of the governmental authority** shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Query: Could this provision apply to acts of Maritime Militia in some cases?

When Acts of Private Persons or Entities are State Acts

2001 ILC Articles on State Responsibility

Article 8. Conduct Directed or Controlled by a State

- The conduct of a person or group of persons shall be considered an act of a State under international law **if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State** in carrying out the conduct.

Query: Could this provision apply to acts of Maritime Militia in some cases?

State Responsibility for **failing to exercise due diligence** to control the acts of private persons

- States can be internationally responsible for failing to exercise due diligence to control the acts of private persons or entities subject to its jurisdiction and control
- ITLOS Advisory Opinion on Fisheries
 - the obligation of a flag State . . . to ensure that **vessels flying its flag** are not involved in IUU fishing is also an obligation “of conduct”
 - The flag State is under the “due diligence obligation” to take all necessary measures to ensure compliance and to prevent IUU fishing by **fishing vessels flying its flag**.

South China Sea Arbitral Award (2016)

- **Responsibility for acts of Chinese Coast Guard Vessels for assisting illegal acts of private entities:**
 - The obligation to have due regard to the rights of the Philippines is unequivocally breached when **vessels under Chinese Government control** act to escort and protect Chinese fishing vessels engaged in fishing unlawfully in the Philippines' exclusive economic zone. (para 756)
 - China was not responsible for the acts of the private fishing vessels, but was liable for escorting and protecting them

South China Sea Arbitral Award (2016)

- **Responsibility for failure to exercise due diligence:**
 - The Tribunal found that Chinese authorities were aware that Chinese fishermen have harvested endangered sea turtles, coral, and giant clams on a substantial scale in the South China Sea (using methods that inflict severe damage on the coral reef environment) and had not fulfilled their obligations to stop such activities.

Part 3

Role of Non-State Entities in Maritime Cooperation

Non-State Entities Involved in Maritime Cooperation

- Lack of Agreement on meaning of “non-State entities”
 - Does it include International Organizations / UN Specialized Agencies
 - Does it include bodies established by regional agreements like ReCAAP?
 - Does it include government-funded think tanks?
- Generally agreed that non-State entities include the following:
 1. Track 2 and Track 1.5 Organizations
 2. Private Companies
 3. Shipping Industry Trade Associations
 4. International Environmental NGOs
 5. Regional and National NGOs
 6. Independent Academic Institutions

Track 2 and Track 1.5 Mechanisms

- The **Council for Security Cooperation in the Asia Pacific (CSCAP)** provides an informal mechanism for scholars, officials and others in their private capacities to discuss political and security issues and challenges facing the region.
 - CSCAP have produced several Memoranda on issues of common concern
- **Workshops on Managing Potential Conflicts in the South China Sea** were co-chaired by Indonesia and Canada. They are an example of a Track 1.5 process that increased understanding among the States with claims in the South China Sea
- **Centre for Humanitarian Dialogue** Has been working with representatives of States in the region to establish **common operating principles** that could help provide guidance for maritime law enforcement and fishing vessel behavior during encounters at sea

Non-State Entities with Consultative Status at the IMO

1. Global Trade Associations representing commercial shipping interests

- **ICS** - International Chamber of Shipping – shipowners, ship operators, and national shipowner associations
- **BIMCO** – Baltic and International Maritime Council - ship owners, charterers, shipbrokers, etc
- **INTERTANKO** – International Association of Independent Tanker Owners
- **IACS** – International Association of Classification Societies

2. Global Associations representing the interests of Seafarers

- **ITF** - International Transport Workers Federation
- **IMEC** – International Maritime Employers' Council

3. International Environmental NGOs

- IUCN, WWF, Greenpeace, Clean Shipping Coalition, Pew Charitable Trusts, etc

Regional Cooperation in Asia on Piracy & ARAS

- **IMB Piracy Reporting Centre** in Malaysia – reporting centre established by the International Maritime Bureau (IMB) of the International Chamber of Commerce (ICC)
- **2004 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against ships in Asia (RECAAP)**
 - Includes ReCAAP Information Sharing Centre (IFC) in Singapore
 - Facilitates sharing of information on piracy and ARAS
 - ReCAAP issues warnings and alerts to shipping
 - ReCAAP produces guidance on particular issues:
 - Abduction of Crew in the Sulu-Celebes Seas and Waters off Eastern Sabah
 - Tug Boats and Barges Guide Against Piracy and Sea Robbery

Emerging Challenges in Maritime Domain

1. **Security of Fibre Optic Submarine Communications Cables** -- critical communications infrastructure (CSCAP Memo No. 24)
2. **Cyber Security Threats** to ships and maritime infrastructure
3. **Maritime Terrorism** –1988 SUA Convention amended in 2005 to address the threat of maritime terrorism, but very few States have ratified and implemented the 2005 Convention
4. **Health Pandemics and Regulation of shipping** – Regional and global cooperation to better prepare for impact of public health pandemics on commercial shipping
– lessons learned from COVID-19
5. **Unmanned Ships** – IMO is currently studying issue, but also has implications for UNCLOS

Note: All require States to cooperate with industry associations and with UN specialized agencies

Conclusions on Role of Non-State Entities in Maritime Cooperation

- Most of the evolving issues requiring maritime cooperation cannot be addressed solely through cooperation among States
- The emerging challenges in the maritime domain cannot be addressed unless States cooperate with each other as well as with private companies, industry associations and international and regional bodies, as well as NGOs
- The emerging challenges also require unprecedented inter-agency cooperation at the national level

Thanks for Your Attention

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