

## IMPLEMENTING THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA IN EAST ASIA: ISSUES AND TRENDS

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The marine legal order established in East Asia is based on the United Nations Convention on the Law of the Sea. Most countries in East Asia have acceded to the Convention; they therefore cooperate with and interact between themselves on East Asian ocean matters and ocean uses within the framework provided by the Convention. This paper deals with some new legal developments within this framework, touching upon several key issues such as the safety of navigation, territorial and maritime disputes, maritime boundary delimitation, marine resource management, and marine environmental protection.

### I. EAST ASIAN SEAS

The East Asian seas, from north to south geographically, include the Sea of Japan, the Yellow Sea, the East China Sea and the South China Sea. All these seas bear the same characteristic of being semi-enclosed as defined by the 1982 *United Nations Convention on the Law of the Sea* (“LOS Convention”).<sup>1</sup> The bordering countries include Brunei, Cambodia, China (including Taiwan), Indonesia, Japan, the two Koreas, Malaysia, the Philippines, Russia, Singapore, Thailand and Vietnam. Natural resources are abundant in these seas and serve the peoples around them.

The current international marine legal order was established by and has since been maintained under the LOS Convention, which is commonly regarded as a constitution of oceans incorporating almost all previously existing conventional and customary rules and norms concerning the oceans. Pursuant to the provisions of the LOS Convention, a coastal State has the right to establish maritime zones under its jurisdiction. These zones include internal waters inside the baselines which are used to measure the extent of the territorial sea and other jurisdictional waters, the territorial sea of 12 nautical miles (n.m.), the exclusive economic zone (E.E.Z.) of 200 n.m., and the continental shelf of 200 n.m. (or up to 350 n.m. in some cases) outward from the baselines. Within these maritime zones, a coastal State is entitled to enjoy either sovereignty or sovereign rights and to exercise its jurisdiction and enforce its laws and regulations in accordance with international law. All fourteen East Asian countries except Cambodia, North Korea and Thailand have acceded to the LOS Convention (see Table 1). In order to implement the LOS Convention, these countries have

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<sup>1</sup> *United Nations Convention on the Law of the Sea*, 10 December 1982, 21 I.L.M. 1261. According to Article 122 of the LOS Convention, “enclosed or semi-enclosed sea” means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States. The Convention was open for signature on 10 December 1982 and came into effect on 16 November 1994. As of February 2005, there were 148 Contracting Parties, including one international organisation.

Table 1.  
Contracting Parties to the LOS Convention in East Asia and Their Maritime Claims.

States	Date of Ratification) (d/m/y)	Territorial Sea	Contiguous Zone	E.E.Z.	Continental Shelf
Brunei	05/11/1996	12		200	
Cambodia		12	24	200	200(58)
China	07/06/1996	12	24	200	200/CM
Japan	20/06/1996	3/12	24	200	200/CM
S. Korea	29/01/1996	3/12	24	200	
N. Korea		12		200	
Laos	05/06/1998				
Malaysia	14/10/1996	12		200	200 m/Exp(58)
Mongolia	13/08/1996				
Myanmar	21/05/1996	12	24	200	200/CM
Philippines	08/05/1985			200	Exp
Russia	12/03/1997	12		200	200/CM(58)
Singapore	17/11/1994	3			
Thailand		12	24	200	200 m/EXP(58)
Vietnam	25/07/1994	12	24	200	200/CM
(Taiwan)		12	24	200	200/CM(58)

Source: Prepared by the author.

N.B.:

- The Date of Ratification refers to the date on which the depository, the United Nations, received the instrument of ratification.
- Taiwan is not a member of the United Nations and is, therefore, not qualified to be a signatory of the LOS Convention.
- (58): Contracting Party to the 1958 Convention on Continental Shelf.
- CM: continental margin; Exp.: exploitability; 200: 200 n.m.; 200m: 200 metres.
- The Philippine territorial sea is rectangular according to the so-called "Treaty Limits".
- The 3-mile limit, for South Korea, applies to the Korean Strait area, and for Japan, applies to the Soya Strait, the Tsugaru Strait, the eastern and western channels of the Tsushima Strait and the Osumi Straits only.

adopted relevant domestic laws and regulations for the management of their own maritime zones and maritime activities within their jurisdictions.<sup>2</sup>

The extension of jurisdictional maritime zones of coastal States may cause conflicts and disputes amongst neighbouring countries that share a same sea such that bilateral arrangements are needed to facilitate the maintenance of the marine legal order. These arrangements are concerned with various maritime matters such as fisheries management, maritime boundary delimitation, joint development of marine non-living resources, marine environmental protection, and maritime safety. So far, some twenty such bilateral agreements have been concluded in East Asia (see Table 2). Ironically, however, some bilateral agreements are a source of disruption when they involve and/or encroach on the rights and interests of a third State. A good example is the *Agreement concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries between Japan and South Korea* signed in January 1974.<sup>3</sup> China issued a strong protest by stating that the agreement

<sup>2</sup> For details on these laws, see UN Division for Marine Affairs and the Law of the Sea, <<http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/asia.htm>>.

<sup>3</sup> Text is reprinted in Park Hee Kwon, *The Law of the Sea and Northeast Asia: A Challenge for Cooperation* (The Hague: Kluwer Law International, 2000) at 181.

Table 2.  
Bilateral Maritime Agreements in East Asia.

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Agreement between the Government of Malaysia and the Government of Indonesia on the Delimitation of the Continental Shelves between the Two Countries, 27 October 1969
Treaty between the Republic of Indonesia and Malaysia Relating to the Delimitation of the Territorial Seas of the Two Countries in the Strait of Malacca, 17 March 1970
Agreement between the Government of the Kingdom of Thailand and the Government of the Republic of Indonesia Relating to the Delimitation of a Continental Shelf Boundary between the Two Countries in the Northern part of the Straits of Malacca and in the Andaman Sea, 17 December 1971
Agreement between the Government of the Republic of Indonesia, the Government of Malaysia and the Government of the Kingdom of Thailand Relating to the Delimitation of the Continental Shelf Boundaries in the Northern Part of the Strait of Malacca, 21 December 1971
Agreement Stipulating the Territorial Sea Boundary Lines between Indonesia and the Republic of Singapore in the Strait of Singapore, 25 May 1973
Agreement between the Republic of Korea and Japan concerning the Establishment of Boundary in the Northern Part of the Continental Shelf Adjacent to the Two Countries, 30 January 1974
Agreement between the Republic of Korea and Japan concerning Joint Development of the Southern Part of Continental Shelf Adjacent to the Two Countries, 30 January 1974
Agreement between the Government of the Kingdom of Thailand and the Government of the Republic of Indonesia Relating to the Delimitation of the Sea-bed Boundary between the Two Countries in the Andaman Sea, 11 December 1975
Treaty between the Kingdom of Thailand and Malaysia Relating to the Delimitation of the Territorial Seas of the Two Countries, 24 October 1979
Memorandum of Understanding between the Kingdom of Thailand and Malaysia on the Delimitation of the Continental Shelf Boundary between the Two Countries in the Gulf of Thailand, 24 October 1979
Agreement between the Government of the Kingdom of Thailand and the Government of the Socialist Republic of the Union of Burma on the Delimitation of the Maritime Boundary between the two countries in the Andaman Sea, 25 July 1980
Agreement between the Union of the Soviet Socialist Republics and the Democratic People's Republic of Korea on the Delimitation of the Soviet-Korean National Border, 17 April 1985
Agreement between the Union of Soviet Socialist Republics and the Democratic People's Republic of Korea on the Delimitation of the Economic Zone and the Continental Shelf, 22 January 1986
Agreement on Fishery Cooperation between the People's Republic of China and the Union of the Soviet Socialist Republics, 4 October 1988
Agreement between the Government of the Union of Soviet Socialist Republics and the Government of the Democratic People's Republic of Korea concerning The Regime of the Soviet-Korean State Frontier, 3 September 1990
Agreement on Fisheries between the People's Republic of China and Japan, 11 November 1997
Agreement on Fisheries between the Republic of Korea and Japan, 28 November 1998
Agreement on Fisheries between the People's Republic of China and the Republic of Korea, 3 August 2000
Agreement on Fishery Cooperation in the Gulf of Tonkin between the People's Republic of China and the People's Republic of Socialist Vietnam, 25 December 2000
Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin between the People's Republic of China and the People's Republic of Socialist Vietnam, 25 December 2000

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*Source:* Compiled by the author.

had violated China's sovereignty and sovereign rights in the East China Sea.<sup>4</sup> This paper is designed to assess the legal situation during the post-LOS era in East Asia by focusing on regional responses at the bilateral and multilateral levels to the implementation of the LOS Convention in some critical maritime areas as addressed below.

## II. MARINE RESOURCES MANAGEMENT

With the depletion of resources and population increase in the world, marine resources become ever more important. Struggles for marine resources may cause conflict between the countries concerned. The military clashes between North and South Korea respectively in 1999 and 2002 were directly caused by the crabbing of blue crabs in the Yellow Sea around the Northern Limit Line (NLL).<sup>5</sup> Thus, a legal order governing marine fisheries is necessary. While there is no regional institution or organisation relating to fisheries management in East Asia, there are a number of bilateral fishery agreements. For example, China has concluded fishery agreements with Japan (1997), South Korea (2000) and Vietnam (2000) with an aim towards sustainable fishery management in the East China Sea, the Yellow Sea and the Gulf of Tonkin respectively. All the three agreements established joint fisheries zones in the relevant sea areas and fishing in these areas is to be conducted in accordance with the terms and conditions provided for under these agreements. Some fishery agreements such as the *Sino-Japanese Fishery Agreement* assume a dual function: to continue the governance of the joint fishery management and to serve as a provisional arrangement for the future delimitation of the E.E.Zs and continental shelves between China and Japan.

However, it is important to note that the fishery agreements between China and Japan, or China and South Korea, or Japan and South Korea are bilateral ones. They are of limited scope and also do not completely cover the areas of the East China Sea and the Yellow Sea. Secondly, because of their bilateral nature, they may affect the interests of a third party. For example, South Korea expressed its dissatisfaction with the *Sino-Japanese Fishery Agreement* by seeking an explanation from China and Japan as to how the northern-limit line of their joint fishing area was determined. It is arguable that China and Japan ought to have consulted South Korea before reaching their agreement.<sup>6</sup> Thirdly, since bilateral agreements only regulate bilateral relations, they do not regulate the fishing activities of third parties. This is particularly true where Taiwan is concerned. Finally, many fishery resources in the East China Sea and the Yellow Sea are migratory species which travel across waters with no regard for politically established boundaries. Effective conservation and management of fishery resources in the East Asian seas would therefore require a regional and multilateral fishery arrangement. The newly concluded bilateral fishery agreements could serve as the basis for such regional cooperation.

With regards to the management of marine non-living resources, the legal concept of "joint development" has been applied to the East Asian seas. "Joint development" refers to "an agreement between two States to develop so as to share jointly in agreed proportions by inter-State cooperation and national measures the offshore oil and gas in a designated zone of the seabed and subsoil of the continental shelf to which both or either of the participating States are entitled in international law".<sup>7</sup> It contains several characteristics: (a) it is an

<sup>4</sup> For details, see Zhao Lihai, *Studies on the Law of the Sea Issues* (Beijing: Peking University Press, 1998) at 41-57.

<sup>5</sup> For details, see Jon M. Van Dyke, Mark J. Valencia & Jenny Miller Garmendia, "The North/South Korea Boundary Dispute in the Yellow (West) Sea" (2003) 27(2) *Marine Policy* 143.

<sup>6</sup> See Chi Young Pak, "Resettlement of the Fisheries Order in Northeast Asia resulting from the New Fisheries Agreements among Korea, Japan and China" (1999) 30(4) *Korea Observer* 614-615.

<sup>7</sup> British Institute of International and Comparative Law, *Joint Development of Offshore Oil and Gas: A Model Agreement for States for Joint Development with Explanatory Commentary* (London: British Institute of International and Comparative Law, 1989) 45.

arrangement between two countries; (b) it concerns an overlapping boundary maritime area; (c) it is a provisional arrangement pending the settlement of the boundary delimitation disputes between the countries concerned; (d) it is designed to jointly develop the mineral resources in the disputed area. In East Asia, joint development agreements include, *inter alia*, the Japan-South Korea arrangement in the Sea of Japan and the East China Sea in the 1970s, the Malaysia-Thailand joint development area in the Gulf of Thailand and the Australian-Indonesia joint development zone in the Timor Gap.

The Japanese-South Korean joint development arrangement was the first such arrangement in East Asia. It was based on several agreements signed between the two countries. The arrangement is significant in state practice as it represents the first application of the idea of joint development of offshore oil where the parties have failed to agree on boundary delimitation.<sup>8</sup> Under the agreement, concessionaires who are authorised by the two respective governments have an undivided interest with respect to each of the nine defined sub-zones, and one operator is chosen from among the concessionaires so authorised for a particular sub-zone.<sup>9</sup> The agreement establishes a Joint Commission as a consultative body to implement the agreement.

What is of greater significance is the joint arrangement concluded by three countries—Malaysia, Thailand and Vietnam—in the Gulf of Thailand for their overlapping claimed sea areas, consisting of two separate but associated bilateral agreements between Malaysia and Thailand, and between Malaysia and Vietnam. In 1979, Malaysia and Thailand signed a Memorandum of Understanding (M.O.U.) to establish, on an interim basis of fifty years, a Malaysia-Thailand Joint Authority “for the purpose of the exploration and exploitation of the non-living natural resources of the seabed and subsoil in the overlapping area”.<sup>10</sup> More than ten years later, the two countries worked out the legal personality and other matters relating to the establishment of such an authority, which provides details of the operation of the joint zone.<sup>11</sup> There are two striking characteristics of this joint development scheme: (a) a powerful joint authority which decides on the plan of operation and the work programme, and is responsible for granting operation permits, concluding transactions, approving and extending the period of exploration and exploitation, approving the work programme and budgets of the contractor, inspecting and auditing the operator’s books and accounts;<sup>12</sup> and (b) the introduction of a production-sharing system which includes such terms and conditions as the duration of the contract not exceeding thirty-five years, the payment of 10% of gross production of petroleum by the contractor to the Joint Authority as royalty, 50% of gross production to be applied by the contractor for the recovery of costs, the remainder of gross production to be considered as profit and divided equally between the Joint Authority and the contractor, all costs of operations are to be borne by the contractor, and any dispute arising from the contract is to be referred to arbitration unless settled amicably.<sup>13</sup>

In the same vein, Malaysia and Vietnam also signed an M.O.U. in 1992 for joint development in the Gulf of Thailand. Accordingly, Petronas and Petrovietnam are assigned to undertake petroleum exploration and exploitation respectively in the “defined area”. The arrangement between the two state-owned oil companies, concluded in August 1993, establishes an eight-member Coordination Committee to issue policy guidelines for the management of petroleum operations. This differs from the Thai-Malaysia model in which

<sup>8</sup> Masahiro Miyoshi, “The Joint Development of Offshore Oil and Gas in Relation to Maritime Boundary Delimitation”, (1999) 2(5) *Maritime Briefing* 1.

<sup>9</sup> *Ibid.* at 12.

<sup>10</sup> Text is reprinted in Jonathan I. Charney & Lewis M. Alexander, eds., *International Maritime Boundaries: Volume 1* (Dordrecht: Martinus Nijhoff Publishers, 1993) at 1099-1123.

<sup>11</sup> *Ibid.*

<sup>12</sup> Article 7 of the 1990 Agreement.

<sup>13</sup> Article 8 of the 1990 Agreement.

the Joint Authority is appointed directly by the governments. After the conclusion of the commercial arrangement in July 1997, oil has been extracted from the Bunga Kekwa field.<sup>14</sup> Based on the bilateral arrangements, a tripartite mechanism has gradually been evolving for an overlapping maritime area.

Encouraged or triggered by these developments in East Asia, China began to put forward the idea of joint development in the disputed sea areas. As early as the 1980s, Mr. Deng Xiaoping, the former paramount Chinese leader, applied the concept of joint development in his famous statement regarding China's policy towards disputed areas in its adjacent seas. Deng regarded "joint development" as one of the two most important peaceful means for international dispute resolution.<sup>15</sup> Since then, China has actively pursued the joint development agenda and reiterated its proposal on many occasions. When Mr. Wu Bangguo, Chairman of the National People's Congress, visited the Philippines in August 2003, he proposed to his Filipino counterpart the joint development of petroleum resources in the South China Sea.<sup>16</sup> On 11 November 2003, the China National Offshore Oil Corporation (CNOOC) and the Philippine National Oil Company signed a Letter of Intent by which they agreed to jointly explore oil and gas in the South China Sea. A joint committee will be established to help select areas of exploration in the South China Sea. They also agreed to establish a programme to "review, assess and evaluate relevant geographical, geophysical and other technical data available to determine the oil and gas potential in the area".<sup>17</sup> In addition, China has proposed joint development with Malaysia and Vietnam in disputed areas in the South China Sea. It is arguable that given the complicated situation in the South China Sea, joint development may be the only feasible means for regional cooperation for offshore oil and gas development.

### III. MARINE ENVIRONMENTAL PROTECTION

Regional cooperation and institutions for marine environmental protection are not new in State practice. Under the auspices of the United Nations Environment Programme's (UNEP) Regional Seas Programme, several regional arrangements have been established for different marine areas throughout the world. They are the Wider Caribbean region, the Southeast Pacific region, the Mediterranean region, the West and Central African region, the Red Sea and Gulf of Aden region, the Kuwait Action Plan region, the Eastern African region, the South Asian Seas region, the South Pacific region, and the Black Sea region.<sup>18</sup> All these arrangements bear some common characteristics: They all involve an action plan which is usually underpinned by a regional Convention and associated Protocols on specific problems; and the UNEP works closely with governments, regional experts and interested international organisations in formulating and implementing the action plans. In 1989, the UNEP Governing Council designated the Northwest Pacific as a new area where a regional action plan and a subsequent regional treaty should be developed. The geographical coverage includes the marine environment and coastal zones of China, North and South Korea,

<sup>14</sup> See Nguyen Hong Thao, "Vietnam and Joint Development in the Gulf of Thailand" (2003) 8 *Asian Yearbook of International Law* 145.

<sup>15</sup> The other is "one country, two systems". See *Selected Works of Deng Xiaoping* (Beijing: Foreign Languages Press, 1984), Vol. 3, at 87.

<sup>16</sup> "Wu Bangguo proposes a multiple cooperation for oil in the Spratly Islands" *Lianhe Zaobao [of Singapore]* (1 September 2003).

<sup>17</sup> "Chinese, Philippine firms join forces to look for oil in South China Sea" *Agence France Presse* (13 November 2003).

<sup>18</sup> See Patricia W. Birnie & Alan E. Boyle, *International Law and the Environment* (Oxford: Clarendon Press, 1992) at 260-263.

Japan and Russia. Interested countries around the Northwest Pacific sent their representatives to attend the inaugural contact meeting held in Nairobi shortly thereafter.<sup>19</sup> Subsequent developments showed that the establishment of a regional programme in East Asia would not be as easy as in other regions, particularly in light of the abnormal political relations amongst the coastal States in the East Asian region.<sup>20</sup> Tensions in the Korean Peninsula and the Taiwan issue are obstacles preventing regional co-operation for marine environmental protection. For example, when the first meeting of the National Focal Points and experts convened in Vladivostok in October 1991, North Korea did not send its representative.<sup>21</sup>

In 1994, the Northwest Pacific Action Plan (NOWPAP) was finally adopted and contained five objectives: the monitoring and assessment of environmental conditions; the creation of an efficient and effective information base; integrated coastal area planning; integrated coastal area management; and the establishment of a collaborative and cooperative framework.<sup>22</sup> To implement the Action Plan, a number of projects are designed and carried out in parallel by national institutions with support from relevant regional and international organisations. For multiple projects, given their geographically dispersed nature as well as the wide scope of possible inputs from both within and without the region, a network of participating institutions coordinated by regional activity centres will be established. In any case, a Regional Coordination Unit (R.C.U.) should be established to ensure that projects under the Action Plan are coordinated and well-managed. Until such time as an R.C.U. is established and functioning, the member governments have designated UNEP as the organisation responsible for the implementation of the Action Plan.<sup>23</sup> As of 2004, the programme is still managed and supervised by UNEP and there is still no formal treaty negotiated amongst the States concerned.

Apart from the NOWPAP, the other regional marine environmental programme is the East Asian Sea Programme jointly sponsored by the International Maritime Organization (IMO), the United Nations Development Programme (UNDP), the Global Environmental Facility (GEF) and the World Bank. This regional programme, implemented in 1994, enjoys the participation of countries including Brunei, Cambodia, China, Indonesia, Japan, Malaysia, North Korea, the Philippines, Singapore, South Korea, Thailand and Vietnam. Therefore, its geographical coverage is broader than the NOWPAP. Its overall objective is to support the efforts of the participating countries in the prevention and management of marine pollution at both the national and sub-regional levels on a long-term and self-reliant basis.<sup>24</sup> In order to institutionalise Integrated Coastal Management (ICM), the Regional Programme established two demonstration sites to demonstrate the application of ICM in Xiamen, China and Batangas Bay, the Philippines. Subsequently, similar sites have been established in Cambodia, Indonesia, Malaysia, North Korea, Thailand and Vietnam. Demonstration sites for sub-regional sea areas and pollution hot spots were also established in China (Bohai Sea), the Philippines (Manila Bay), Malaysia/Singapore (Malacca

<sup>19</sup> "BSAP and NOWPAP—Now We Are 12" (1991) 43 *The Siren* (United Nations Environment Programme's Oceans and Coastal Area Programme) 1, cited in Jon M. van Dyke, "Promoting Maritime Co-operation in the Asia-Pacific Era", in Dalchoog Kim *et al.*, eds., *Exploring Maritime Co-operation in Northeast Asia* (Seoul: Institute of East and West Studies, Yonsei University, 1993) at 204.

<sup>20</sup> See Jin-Hyun Paik, "East Asia and the Law of the Sea", in James Crawford & Donald R. Rothwell, eds., *The Law of the Sea in the Asia-Pacific Region: Developments and Prospects* (Dordrecht: Martinus Nijhoff, 1995) 7.

<sup>21</sup> See Sang-Don Lee, "A Framework for Co-operation for the Protection of the Marine Environment in the Yellow Sea: A Korean View", in Kim *et al.*, *supra* note 19 at 73.

<sup>22</sup> See "Action Plan for the protection, management and development of the marine and coastal environment of the Northwest Pacific region", online: <<http://www.nowpap1.org/2-NOWPAP.htm>>.

<sup>23</sup> *Supra* note 22.

<sup>24</sup> "Fighting pollution in the East Asian Seas", IMO News 4/97.

Straits), and Thailand (Gulf of Thailand).<sup>25</sup> The programme launched the Marine Pollution Monitoring and Information Management Network to help build linkages amongst the participating countries on the status of the marine environment in the East Asian seas.

It should be noted that the implementation of the above two regional programmes depends solely on the willingness and good faith of the participating States since the States have not concluded any legally binding agreement and no dispute settlement mechanism has been established. In the case of a dispute, the States concerned may resort to the dispute settlement mechanisms under the LOS Convention provided that the parties concerned are signatory to the convention. However, it is arguable that the very existence of these programmes can help States avoid environmental disputes resulting from marine pollution and conflicting uses of marine resources. Finally, unlike the regional programmes of the Association of Southeast Asian Nations (ASEAN) which tend to rely heavily on intra-ASEAN cooperation, the marine programmes involve the cooperation and coordination of international organisations in addition to that of the East Asian states.

#### IV. SAFETY OF NAVIGATION

In terms of safety of navigation, piracy is the most threatening problem in the East Asian seas. Piracy is regarded as *hostis humani generis*, an enemy of the human race, punishable wherever encountered. Piracy existed in the East Asian region as early as the fourteenth century. During Zheng He's seven voyages to the Indian Ocean during the Ming Dynasty (1405-1433 A.D.), he undertook action to suppress pirates in the South China Sea and Southeast Asia to bring order and maintain a degree of peace in the region.<sup>26</sup> Piracy has once again revived in the region and on a serious scale such as to endanger the safety of navigation, persons and property. More than two-thirds of piratical attacks worldwide are in Asian waters. In 2000, the region accounted for 65% of piracy worldwide. In 2002, Indonesia remained the world's most pirate-infested country, with 22 of 87 attacks reported worldwide (32 in the Southeast Asian seas) from January to March taking place in its waters.<sup>27</sup> Incidents in the South China Sea increased from 120 in 2001 to 140 in 2002.<sup>28</sup>

The term "piracy" usually refers to a broad range of violent acts at sea. The LOS Convention defines it as follows:

Piracy consists of any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed to: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).<sup>29</sup>

However, the above definition has its limitations. First, it defines "piracy" as only for "private ends" and terrorist acts at sea for political ends are generally excluded. That is why the world community needed the *Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation* ("SUA Convention") following the *Achille Lauro* Incident

<sup>25</sup> For details, see online: Partnerships in Environmental Management for the Seas of East Asia (PEMSEA) <<http://www.pemsea.org/>>.

<sup>26</sup> See Wang Li, "Zheng He's Voyage and Solution of Pirates Issue", in Nanjing Zheng He Study Association, ed., *Chinese Heading for the Sea* (Beijing: Sea Tide Publishing House, 1996) 311-319.

<sup>27</sup> "Pirate attacks jumped 28% in first quarter", *The Shipping Times [of Singapore]* (10 May 2002).

<sup>28</sup> "Reports on Acts of Piracy and Armed Robbery against Ships", IMO Doc. MSC.4/Circ.32 (17 April 2003).

<sup>29</sup> Article 101 of the LOS Convention.

in 1985.<sup>30</sup> Second, according to the above definition, piracy *juris gentium* presupposes that a criminal act is one exercised by the passengers or the crew of a ship against another ship or persons or property on its board. The two-vessel requirement is an ingredient of the crime of piracy, unless a criminal act occurs in *terra nullius*.<sup>31</sup> Thus “internal seizure” within the ship is hardly regarded as an “act of piracy” under the definition of the LOS Convention. Finally, piracy must occur on the high seas and piratical acts within territorial waters are not subject to the above definition.

To remedy these limitations, the IMO has attempted to divide acts of piracy into two categories by geographical and legal division of maritime zones: piracy on the high seas is regarded as “piracy” as defined by the LOS Convention, while acts of piracy in ports or national waters (internal waters and territorial sea) are defined as “armed robbery against ships”.<sup>32</sup> However, we may note that the shortcoming of such a division is obvious: piracy is not equivalent to armed robbery and it may also include other violent acts such as murder, assault and rape.

For most of the countries in East Asia, piracy may be subject to punishment in the name of robbery, murder, larceny or kidnapping according to their criminal laws. In this context, the international definition does not carry a significant meaning when piratical activities are found in the waters within national jurisdiction and subject to punishment under the domestic criminal laws of a coastal State. However, at the regional level, particularly with a view to regional cooperation, the international legal definition is meaningful and provides a fundamental legal lynchpin for any regional effort to crackdown on piracy. It should be pointed out that legal developments in the international arena have rendered the definition provided by the IMO gradually acceptable worldwide as manifested by numerous international documents including the United Nations (“UN”) documents relating to the LOS Convention.<sup>33</sup>

The geographic features of the East China Sea and the South China Sea are very complex. The complicated topography and the vast size of the seas are arguably factors that contribute to the higher piracy levels in the region than in other parts of the world. It is noted that effective law enforcement is extremely difficult in the South China Sea because of its vastness (more than 200 n.m. wide) and the presence of numerous uninhabited islands to which pirates can retreat.<sup>34</sup>

International law has established an obligation for States to cooperate in the suppression of piracy and grants States certain rights to seize pirate ships and criminals. Article 100 of the LOS Convention provides that “All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State”. Article 105 further provides that “on the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize

<sup>30</sup> On 3 October 1985, a group of Palestinian guerrillas hijacked the Italian cruise ship, *Achille Lauro*, while it was in Egyptian territorial waters. The hijackers demanded the release of fifty Palestinians held in Israel in return for the release of the passengers. They ordered the ship to sail to Syria, which refused them port entry. The hijackers then killed an American passenger on 8 October. Several days later, the four hijackers surrendered to the Egyptian authorities. On 11 October, an Egyptian civilian aircraft was intercepted by United States military aircraft over the Mediterranean Sea and instructed to land at an air base in Sicily. Four Palestinians on board were detained by the Italian authorities and subsequently indicted and convicted in Genoa for offences related to the hijacking of the ship and the death of the American passenger.

<sup>31</sup> Natalino Ronzitti, “The Law of the Sea and the Use of Force against Terrorist Activities”, in N. Ronzitti, ed., *Maritime Terrorism and International Law* (Dordrecht: Martinus Nijhoff, 1990) 1.

<sup>32</sup> See Birgit S. Olsen, “Piracy and the Law” (Paper presented to the IMO Seminar and Workshop on Piracy and Armed Robbery against Ships, Singapore, 3-5 February 1999) at 2 (on file with the author).

<sup>33</sup> See, for example, “Oceans and Law of the Sea”, Report of the Secretary-General, UN Doc. A/57/57 (7 March 2002) at 27-29.

<sup>34</sup> See “IMO to organize missions, regional seminars on piracy”, IMOFAX 05/98, 8 April 1998, online: IMO <<http://www.imo.org/imo/briefing/1998/fax05.htm>>.

the property on board. The courts of the State which carried out the seizure may decide upon penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith". However, only warships or military aircraft or similar governmentally authorised ships or aircraft have the power to seize a pirate ship or aircraft in the high seas. It should be noted that the above piracy provisions are also applicable to the E.E.Z. even though it is within the national jurisdiction.<sup>35</sup>

The SUA Convention applies to all maritime terrorist acts, whether private or political. It is significant that even if terrorist acts cannot be punished and suppressed under the LOS Convention, they may still be punished under the Rome Convention. This means that any maritime terrorist and piratical act cannot escape justice. The other twin instrument is the *1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf* ("SUA Protocol"),<sup>36</sup> which was adopted at the same time as the Rome Convention and contains similar provisions. It is relevant in the context of the East Asian seas that the seas are rich in oil and gas and the coastal States have already launched exploitation projects either by themselves or jointly with foreign oil companies. It has been suggested that offshore oil and gas installations are potential targets of piracy.<sup>37</sup> In the event that a terrorist or piratical attack should aim at the oil platform(s) or artificial islands located in the East Asian seas, it could be suppressed under this protocol. As of January 2005, eight countries in East Asia have ratified the SUA Convention.

Regional cooperation is necessary to effectively combat piracy in the region. In November 2002, the *Joint Declaration of ASEAN and China on Cooperation in the Field of Non-Traditional Security Issues* ("Joint Declaration") was adopted. The Declaration initiated full cooperation between ASEAN and China in the field of non-traditional security issues and listed the priority and form of cooperation. Current priorities include "combating trafficking in illegal drugs, people-smuggling including trafficking in women and children, sea piracy, terrorism, arms-smuggling, money-laundering, international economic crime and cyber crime". Multilateral and bilateral cooperation aims to "(a) strengthen information exchange, (b) strengthen personnel exchange and training and enhance capacity building, (c) strengthen practical cooperation on non-traditional security issues, (d) strengthen joint research on non-traditional security issues, and (e) explore other areas and modalities of cooperation".<sup>38</sup> In addition, the *2002 Declaration on the Conduct of the Parties in the South China Sea*<sup>39</sup> also mentions the suppression of piracy and armed robbery at sea.

Multilateral interaction amongst the countries in East Asia has produced some positive results with regards to regional cooperation. For example, the heads of coast guard agencies from sixteen countries (the ten ASEAN countries, India, Sri Lanka, Bangladesh, South Korea, China, Hong Kong and Japan) attended the first regional conference held in April 2000, during which three documents were adopted. In the statement, *Asia Anti-Piracy Challenge 2000*, the coast guard authorities expressed their intention to reinforce mutual cooperation in combating piracy and armed robbery against ships. The "Tokyo Appeal" calls, on the other hand, for the establishment of contact points for information exchange among relevant authorities as well as for the drafting of a national anti-piracy action plan. Finally, a Model

<sup>35</sup> Provisions on the high seas of the LOS Convention are applicable to the E.E.Z. as long as there are no contradictions with the E.E.Z. provisions.

<sup>36</sup> *1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf* 27 I.L.M. (1988) 685.

<sup>37</sup> See Sam Bateman & Doug MacKinnon, "The Role of Port States to Suppress Acts of Piracy in Their Waters", (Paper presented to the 3<sup>rd</sup> ICC-IMB International Meeting on Piracy and Phantom Ships, Kuala Lumpur, 1-2 June 1998) at 5 (on file with the author).

<sup>38</sup> See Joint Declaration of ASEAN and China on Cooperation in the Field of Non-Traditional Security Issues, 6th ASEAN-China Summit, Phnom Penh, Cambodia, 4 November 2002, online: ASEAN Secretariat <<http://www.aseansec.org/13185.htm>>.

<sup>39</sup> Online: ASEAN Secretariat <<http://www.aseansec.org/13163.htm>>.

Action Plan promulgates specific countermeasures based on the Tokyo Appeal.<sup>40</sup> At the bilateral level, China and the Philippines discussed the possibility of future cooperation in combating piracy and drug-trafficking in the South China Sea, including the possible establishment of special joint patrol teams.<sup>41</sup> In October 2004, China's Maritime Safety Administration and the Philippine Coast Guard held a joint-table search and rescue (SAR) exercise to strengthen capabilities in the region and to make the sea safer for the public and for ships.<sup>42</sup>

A most significant recent development is the *ASEAN Regional Forum Statement on Cooperation against Piracy and Other Threats to Maritime Security* which was issued on 19 June 2003 in Phnom Penh, Cambodia during the Tenth ASEAN Regional Forum (ARF).<sup>43</sup> It is acknowledged that piracy and armed robbery against ships has been a significant problem in the Asia-Pacific region and effective responses require "regional maritime security strategies and multilateral cooperation in their implementation".<sup>44</sup> It is noted that the ARF countries have expressed their commitment to become parties to the SUA Convention if they have yet to do so. In addition to undertaking necessary actions such as the exchange of information, consideration and discussion of new International Maritime Bureau proposals on prescribed traffic lanes for large supertankers with coastguard or naval escort, provision of technical assistance and capacity-building infrastructure for countries that need help, they also commit to "endorse the ongoing efforts to establish a legal framework for regional cooperation to combat piracy and armed-robberies against ships".<sup>45</sup> On this basis, a regional treaty on anti-piracy is currently being negotiated amongst the Asian countries and the parties have recently decided to establish a Center for Information Exchange in Singapore.<sup>46</sup>

Closely related to the suppression of piracy and maritime terrorism is the Regional Maritime Security Initiative (RMSI). It was formally proposed in March 2004 by Admiral Thomas B. Fargo, Navy Commander of the U.S. Pacific Command in his testimony regarding the U.S. Pacific Command posture before the House Armed Services Committee of the U.S. House of Representatives.<sup>47</sup> According to Fargo, the RMSI is designed to implement the "President's Proliferation Security Initiative (PSI)"<sup>48</sup> and State Department's Malacca Strait Initiative" with the approach that detailed plans are provided "to build and synchronize interagency and international capacity to fight threats that use the maritime space to facilitate their illicit activity". From Fargo's remarks, it is obvious that this Initiative is designed for the East Asian region, with a particular focus on navigational safety in the Strait of Malacca. On the other hand, Fargo emphasised that in order to

<sup>40</sup> See Japanese Ministry of Foreign Affairs, "Diplomatic Bluebook 2001", online: Ministry of Foreign Affairs of Japan <<http://www.mofa.go.jp/policy/other/bluebook/2001/chap2-4-d.html>>.

<sup>41</sup> See *Lianhe Zaobao [of Singapore]* (15 July 1999).

<sup>42</sup> "Country runs exercise with the Philippines", *China Daily* (22 October 2004).

<sup>43</sup> This statement is available on the ASEAN Secretariat website <<http://www.aseansec.org/14838.htm>>.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> See "Asian countries decide to establish anti-piracy information center in our country", *Lianhe Zaobao* (13 November 2004). The countries involved in the negotiations include Bangladesh, Brunei, Cambodia, China, India, Indonesia, Japan, Laos, Malaysia, Myanmar, the Philippines, Sri Lanka, Singapore, South Korea, Thailand and Vietnam.

<sup>47</sup> The text of the Testimony is available on the US Pacific Command website <<http://www.pacom.mil/speeches/sst2004/040331housearmedsvscomm.shtml>>.

<sup>48</sup> PSI is an effort to consider possible collective measures among the participating countries, in accordance with national legal authorities and relevant international law and frameworks, in order to prevent the proliferation of weapons of mass destruction, missiles and their related materials that pose threats to the peace and stability of the international community. The PSI is administered by the "core group" countries, which, at present, consist of fifteen countries (Japan, US, UK, Italy, the Netherlands, Australia, France, Germany, Spain, Poland, Portugal, Singapore, Canada, Norway and Russia). See "The Proliferation Security Initiative (PSI) Maritime Interdiction Exercise hosted by Japan" (18 October 2004), online: Ministry of Foreign Affairs of Japan <<http://www.mofa.go.jp/policy/un/disarmament/arms/psi/exercise-2.html>>.

conduct effective interdiction in the sea it is necessary to use high-speed vessels equipped with Special Operations Forces or Marines. To implement the PSI, the United States has signed non-proliferation shipboarding agreements with Liberia (11 February 2004), Panama (12 May 2004) and the Marshall Islands (13 August 2004). According to these agreements, if a ship with either party's flag is suspected of carrying proliferation-related cargo, either party can request the other to confirm the nationality of the ship and if needed, to authorise the boarding, search and possible detention of the ship and its cargo. These agreements, together with PSI partners, cover more than fifty percent of commercial shipping fleet dead-weight tonnage, which is subject to rapid action consent procedures for boarding, search and seizure by the United States.<sup>49</sup>

Responses from Asian countries to this Initiative are varied: some countries such as Japan, Singapore and South Korea immediately rendered their support. For example, Japan hosted the PSI Maritime Interdiction Exercise off the coast of Sagami Bay and off the Port of Yokosuka from 25 to 27 October 2004.<sup>50</sup> Yet, some other countries such as Malaysia and Indonesia are doubtful about whether the RMSI can really play a positive role in curbing piracy and maritime terrorism. They are also suspicious of the American intentions; namely, whether it would infringe upon their national sovereignty and territorial integrity. In order to prevent potential American military intervention in Straits affairs, Malaysia and Indonesia decided to formulate a joint patrol to protect this international waterway, an initiative which Singapore subsequently joined. The tripartite patrol consists of fifteen to twenty military vessels and patrol in the Strait all year round.<sup>51</sup>

## V. MARITIME BOUNDARY DELIMITATION

There are a number of bilateral agreements concerning maritime boundary delimitation in East Asia. A recent one is the agreement between China and Vietnam regarding the Gulf of Tonkin. The size of the gulf, as agreed by the two countries, is more than 126,000 square kilometres,<sup>52</sup> with abundant marine living and non-living resources. With the pace of developments pertaining to the law of the sea, China and Vietnam realised the importance and necessity of establishing a maritime boundary in the Gulf of Tonkin. The entire negotiation process comprised of three stages: brief negotiations in 1974 as initiated by Vietnam; negotiations during the period between October 1977 and June 1978; and the negotiations from 1992 to 2000.<sup>53</sup> On 25 December 2000, both parties concluded the negotiation process and signed the *Agreement on the Delimitation of the Territorial Seas, Exclusive Economic Zones and Continental Shelves in the Beibu Gulf* ("Sino-Vietnamese Boundary Agreement")<sup>54</sup> and the *Agreement on Fishery Cooperation in the Beibu Gulf* ("Sino-Vietnamese Fishery Agreement").<sup>55</sup> Both agreements came into effect as of 1 July 2004 after ratification by the two

<sup>49</sup> See "US—RMI Agreement: Maritime Security Initiative Signed" (15 August 2004), online: Yokwe Online <<http://www.yokwe.net>>.

<sup>50</sup> See "The Proliferation Security Initiative (PSI) Maritime Interdiction Exercise hosted by Japan", *supra* note 48.

<sup>51</sup> See "Indonesia and Malaysia jointly oppose American army to patrol in the Strait of Malacca", *Lianhe Zaobao [of Singapore]* (8 May 2004) and "Piratical attacks are more fierce in the Strait of Malacca, Indonesia, Malaysia and Singapore will prevent this jointly" (9 October 2004), online: People Daily <<http://www.people.com.cn/GB/guojij/1029/2905373.html>>.

<sup>52</sup> The figure that Vietnam refers to is 126, 250 square kilometres while the Chinese figure is 128,000 square kilometres. See respectively "Interview by Foreign Minister Nguyen Dy Nien about Tonkin Gulf Delimitation Agreement" (1 July 2004), online: Vietnam News Agency <[http://www.vnagency.com.vn/news.asp?LANGUAGE\\_ID=2&CATEGORY\\_ID=29&NEWS\\_ID=106778](http://www.vnagency.com.vn/news.asp?LANGUAGE_ID=2&CATEGORY_ID=29&NEWS_ID=106778)> and "Introduction to the Sino-Vietnamese Beibu Gulf Delimitation Agreement" (30 July 2004), online: Ministry of Foreign Affairs of the People's Republic of China <<http://www.fmprc.gov.cn/chn/zxxx/t145558.htm>>.

<sup>53</sup> See "Interview by Foreign Minister Nguyen Dy Nien about Tonkin Gulf Delimitation Agreement", *ibid*.

<sup>54</sup> An unofficial English text of the Boundary Agreement is found in Zou Keyuan, "Sino-Vietnamese Agreement on the Maritime Boundary Delimitation in the Gulf of Tonkin" (2005) 36 *Ocean Devel. & Int'l L.* 22-24.

<sup>55</sup> *Supra* note 54 at 127-148.

countries concerned. A new marine legal order based on the LOS Convention has, therefore, been established in the Gulf of Tonkin.

The Sino-Vietnamese Boundary Agreement contains eleven clauses. Article 1 defines the area of the Gulf of Tonkin for the purpose of delimiting the territorial seas, E.E.Zs and continental shelves of the two countries. Article 2 uses twenty-one geographical points to draw the maritime boundary in the Gulf of Tonkin. In the use of coordinates, the line connecting Point 1 to Point 9 is the line to divide the territorial seas of the two countries, whereas the line connecting Point 9 to Point 21 is the line to delimit the E.E.Zs and continental shelves of the two countries in the Gulf of Tonkin.

Both China and Vietnam have adopted the straight baseline approach in measuring the breadth of their territorial seas and other maritime zones. China publicised some information regarding its straight lines along its mainland coast as well as Hainan Island in 1996 when it ratified the LOS Convention. The straight baselines connected by four geographic coordinates from Yingge Zui (Oanh Ca in Vietnamese) to Junbi Jiao along the coast of Hainan Island facing the Gulf have probably affected the delimitation in the Gulf between the two countries. It is recalled that China deliberately left the baselines for the Gulf of Tonkin undefined because of the maritime delimitation with Vietnam. However, part of its baselines along Hainan Island still produce some impact on the delimitation since this sector of the baselines is within the area of the Gulf of Tonkin as defined by the Sino-Vietnamese Boundary Agreement.

For Vietnam, it has also adopted the straight baseline approach as proclaimed in its *1982 Statement on the Territorial Sea Baseline of Vietnam*.<sup>56</sup> However, as the above Statement provides, the Vietnamese part of the Gulf of Tonkin, as delineated by the 1887 Border Treaty signed between France and China, “constitutes the historic waters and is subject to the juridical regime of internal waters” of Vietnam.<sup>57</sup> Under such circumstances, there is no need to use baselines which are applicable to the territorial sea and beyond. However, the Vietnamese historic waters claim was not recognised by China and the Vietnamese agreement to negotiate maritime delimitation was perceived as an acquiescent abandonment of its former claim. Yet, in September 1964, Vietnam declared a 12 n.m. territorial sea and published a map that included the marking of the territorial sea in the Gulf of Tonkin.<sup>58</sup> Therefore, it is likely that Vietnam went back to its 1964 position during the negotiations, though it is unknown whether the delimitation line between China and Vietnam is based on straight baselines or simply on low-water mark baselines. The delimitation itself is evidence that the 1887 French-China red line,<sup>59</sup> which Vietnam had insisted as a demarcation line between the two countries, particularly as the basis for its historic waters, has been discarded.

One important issue which is not mentioned in the Sino-Vietnamese Boundary Agreement but critical to the delimitation, is the effect of islands on the delimitation line. The two parties finally agreed to give the Bach Long Vi Island twenty-five percent effect, thus this mid-ocean island enjoys 12 n.m. of territorial sea and 3 n.m. of the E.E.Z. and continental shelf. The other small island, Con Co Island, about 13 n.m. off the coast of Vietnam has been given fifty percent effect in the delimitation of the E.E.Z. and continental shelves of the two countries at the closing line at the mouth of the Gulf.<sup>60</sup> Since these two islands belong to Vietnam, China would have wished to minimise their effect on the delimitation. The final arrangement is obviously a result of compromise.

<sup>56</sup> The text is available on <[http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/VNM\\_1982\\_Statement.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/VNM_1982_Statement.pdf)>.

<sup>57</sup> See UN Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Baselines: National Legislation with Illustrative Maps* (New York: UN, 1989) at 384.

<sup>58</sup> See Zou Keyuan, “Maritime Boundary Delimitation in the Gulf of Tonkin” (1999) 30(3) *Ocean Devel. & Int’l L.* 245.

<sup>59</sup> For the illustrative map of this line, see Zou, *ibid.* at 237.

<sup>60</sup> See “Interview by Foreign Minister Nguyen Dy Nien about Tonkin Gulf Delimitation Agreement”, *supra* note 52.

The Sino-Vietnamese Boundary Agreement has produced the first maritime boundary that China has ever agreed to share with its neighbouring countries. As China still has maritime delimitation problems with eight other countries (*i.e.*, Brunei, Indonesia, Japan, Malaysia, North Korea, the Philippines, South Korea and Vietnam), the success of the delimitation in the Gulf of Tonkin is an invaluable experience to China in its future negotiations with other countries. The practice of using one single maritime boundary line to delimit three different maritime zones (territorial sea, E.E.Z. and continental shelf) indicates that China may follow this practice in future negotiations with other neighbouring countries, bearing in mind that China has used the doctrine of natural prolongation in its claim to the continental shelf in the East China Sea,<sup>61</sup> which would create two different maritime boundary lines in the event that China's claim is accepted by Japan. For Vietnam, though the Boundary Agreement is the second of the three agreements Vietnam has signed with its neighbouring countries (with Thailand in 1997 and Indonesia in 2003), Vietnam has admitted that this agreement is "the first most comprehensive of its kind".<sup>62</sup>

In East Asia, maritime boundary demarcation often becomes an issue which causes tension between the States concerned. The recent incident in the Yellow Sea between North and South Korea resulted directly from the unclear and controversial demarcation of their maritime boundary. In June 1999 and June 2002 respectively, the two Koreas had armed skirmishes in the disputed sea areas around the so-called Northern Limit Line (NLL) which was unilaterally drawn by the United Nations Command after the conclusion of the Armistice Agreement relating to the Korean War in 1953, but whose validity has been rejected by North Korea.<sup>63</sup> In response, the North Korean military authorities declared after the 1999 incident (on 2 September 1999) that they had set up a "North Korean Military Demarcation Line in the West Sea (Yellow Sea)" which overlaps with the existing NLL. The different lines existing in the same area have caused and will continue to cause maritime conflicts unless a clear boundary line is negotiated between the two sides. It is, however, not easy to reach agreements on maritime boundary delimitation, though relevant negotiations are now under way, for example, between China and Japan, China and South Korea, and Japan and South Korea.

## VI. ISLANDS DISPUTES AND THEIR SETTLEMENT

There are several disputes over islands in East Asia, including the Kuril Islands (between Russia and Japan), the Dokdo (between Japan and Korea) the Diaoyu Islands (between China and Japan), and the South China Sea islands (various claimants).

The islands in the South China Sea, particularly the Spratlys, are claimed by five countries including China (including Taiwan), Brunei, Malaysia, the Philippines and Vietnam. There were two armed skirmishes in the South China Sea in 1973 and 1988 between China and Vietnam over the disputes of the South China Sea islands. The 1995 tension between China and the Philippines over Mischief Reef also invited high profile exposure in the mass media. Arrests of fishing boats and fishermen are frequent. The claimant States blame one another for incursions in the disputed areas.<sup>64</sup> In June 2002, Vietnam lodged a protest against

<sup>61</sup> The doctrine of natural prolongation is embodied in the LOS Convention which provides that "the continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf, the slope and the rise" (Art. 76).

<sup>62</sup> "Interview by Foreign Minister Nguyen Dy Nien about Tonkin Gulf Delimitation Agreement", *supra* note 52.

<sup>63</sup> A Korean scholar, following the South Korean governmental position, argues that the NLL has become a bilateral customary law. See Park, *supra* note 3 at 108.

<sup>64</sup> For example, the Philippines expressed its alarm over increasing Vietnamese military and fishing vessel incursions into the waters off the disputed Spratly Islands in the South China Sea and there were 205 Vietnamese vessels in areas claimed by the Philippines in the first 10 months in 2001. See "Philippine alarmed over increasing Vietnamese incursions in Spratlys" *Agence France-Presse* (16 November 2001).

China's live ammunition exercises in the South China Sea, but China dismissed Vietnam's protest and stated that the drill fully complied with international law.<sup>65</sup>

There is, however, a positive sign: all the claimants to the Spratly Islands have pledged to resolve their disputes in a peaceful manner and in accordance with international law including the LOS Convention. ASEAN countries, together with China, have held several rounds of discussion to formulate a Code of Conduct for the South China Sea.<sup>66</sup> On 4 November 2002, China and all the ASEAN member States signed the *Declaration on the Conduct of the Parties in the South China Sea* in Phnom Penh, Cambodia. It is the most remarkable document ever signed between China and the ASEAN countries. The 2002 Declaration is designed to consolidate and develop the friendship and cooperation existing between China and ASEAN, to promote a peaceful, friendly and harmonious environment in the South China Sea, and to enhance the principles and objectives of the *1997 Joint Statement of the Meeting of the Heads of State/Government of the Member States of ASEAN and President of the People's Republic of China*.<sup>67</sup>

Originally, China was very reluctant to negotiate such a document. It is recalled that during the Ninth South China Sea Informal Workshop in December 1998, China opposed the proposal to negotiate a code of conduct for the parties concerned. The reasons behind that opposition included, *inter alia*, (1) the fact that China did not want to receive additional burden or pressure resulting from a code of conduct if formulated. Though a code of conduct has no legal force, it is after all a "gentlemen's agreement" and should be complied with *bona fides*. Any violation would be condemned by other parties. (2) China did not consider the Workshop an appropriate forum to negotiate such a code of conduct. The workshop was informal and the participants were there in their personal capacity. The process of formulating a code of conduct would imply that such informal workshops would become formalised and the personal capacity may become attendance in an official capacity. China did not want to see such a scenario transpire. (3) China preferred bilateral negotiations to multilateral negotiations in resolving the South China Sea issue. If a code of conduct became necessary, China considered that it should be reached through bilateral diplomatic channels, just as with the code of conduct between China and the Philippines in 1995. What annoyed China more was that the Taiwanese participants at the Workshop attempted to expand Taiwan's diplomatic space by pushing forward the proposal to negotiate a code of conduct with their involvement.

Nevertheless, China gradually changed its attitude and began to consider the possibility and benefits of negotiating such a code of conduct. The change arguably resulted from both internal and external forces. Internally, China decided on a pragmatic foreign policy of "stabilising the neighbouring regions" (*wending zhoubian*) as one of its top priorities. Based on this, China had to maintain a stable environment in the South China Sea. Externally, the pressures and efforts made by ASEAN countries convinced the Chinese that cooperation with ASEAN was inevitable if China desired a stable environment in the South China Sea. As a result, China put forward its own proposal on the code of conduct in 1999 as a response to the ASEAN proposal. There were differences between the two proposals such that the two sides undertook negotiations to reach an agreed document. The 2002 Declaration is the fruit of many rounds of negotiations.

The Declaration reaffirms the Parties' commitment to the use of international law, in particular the LOS Convention, to conduct confidence-building and cooperation. The Parties ensure the freedom of navigation in and overflight above the South China Sea. They

<sup>65</sup> See "Vietnam protests China's exercises in 'off-limits zone'" *Voice of Vietnam [of Hanoi]* (11 June 2002); and "China Dismisses Vietnam's Protest over Naval Exercise" *Xinhua News Agency [of Beijing]* (11 June 2002).

<sup>66</sup> The drafts of the Code of Conduct by both ASEAN and China are reprinted in Hainan Research Institute for the South China Sea, ed., *Collection of Selected Foreign and Chinese Papers on the South China Sea* (Hainan: Haikou, 2002) 180-183.

<sup>67</sup> Online: ASEAN Secretariat <<http://www.aseansec.org/5476.htm>>.

promise to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force. They intend to cooperate in the following matters: (a) marine environmental protection; (b) marine scientific research; (c) safety of navigation and communication at sea; (d) search and rescue operations; and (e) combating transnational crime, including but not limited to trafficking in illicit drugs, piracy and armed robbery at sea, and illegal traffic in arms. The Parties will continue their dialogues on the South China Sea and restraint themselves from taking any provocative actions in the area. In comparison, the Declaration absorbed many elements from the Chinese proposal, including, but not limited to, cooperative matters. China's signature can be regarded as a demonstration of its willingness to resolve the South China Sea issue by peaceful means. It can be said that there will be no major conflicts in the South China Sea in the near future. However, the Parties still face a series of tasks to be accomplished in accordance with the 2002 Declaration. The Declaration itself, though a first step, is not the code of conduct, and the Parties concerned will have to work on its adoption in the years to come.

While the dispute over the Spratly Islands is still pending, countries in Southeast Asia have recently decided to use international judicial organs in solving their disputes over the islands, as illustrated by two cases before the International Court of Justice (ICJ): the case of *Sovereignty over Pulau Litigan and Pulau Sipadan (Malaysia/Indonesia)* (1998-2002) and the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (2003- ). In the judgment on *Sovereignty over Pulau Litigan and Pulau Sipadan*, the ICJ granted the disputed islands to Malaysia. The Court, when addressing the issue of *effectivités*, confirmed the validity of Malaysia's regulations concerning the control of collecting turtle eggs and the establishment of a bird reserve and regarded them as "regulatory and administrative assertions of authority over territory which is specified by name".<sup>68</sup> In July 2003, Malaysia and Singapore also submitted their territorial dispute over certain tiny islets including the Pedra Blanca/Pulau Batu Puteh, Middle Rocks and South Ledge to the ICJ for settlement based on the special agreement they signed in February 2003 and which entered into force in May the same year.<sup>69</sup> This case is still lodged with the Court and is currently awaiting its decision.

## VII. CONCLUSION

Following the ascension of East Asian states to the LOC Convention, the maritime situation in the region has assumed a greater degree of complexity. Some countries have laid claim to islands and/or maritime zones in the South China Sea by using the provisions of the LOS Convention on the 200 n.m. E.E.Z. regime to argue that since these islands, islets or reefs are located within their claimed E.E.Z., these features should belong to them. According to the principle of "land dominating the sea", maritime jurisdiction derives from the sovereignty over land territory, not the other way round. That is to say, only with the ownership of a piece of land, may a State have the right to extend its jurisdictional waters, including the E.E.Z., outwards from that land. To claim a piece of land (no matter how small it is) from the sea is simply a misuse or abuse of the LOS Convention which no doubt disrupts the marine legal order in East Asia.

Lack of political confidence and trust amongst the East Asian countries has hindered the effective implementation of the LOS Convention. Two countries, China and Korea, are still

<sup>68</sup> *Case Concerning Sovereignty Over Pulau Litigan and Pulau Sipadan (Indonesia/Malaysia)*, [2002] I.C.J. General List No. 102, online: ICJ <[http://www.icj-cij.org/icjwww/idocket/iinma/iinmajudgment/iinma\\_ijudgment\\_20021217.PDF](http://www.icj-cij.org/icjwww/idocket/iinma/iinmajudgment/iinma_ijudgment_20021217.PDF)>.

<sup>69</sup> International Court of Justice, Press Release 2003/22, "Malaysia and Singapore jointly submit a dispute concerning sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge to the International Court of Justice" (24 July 2003), online: ICJ <[http://www.icj-cij.org/icjwww/ipresscom/ipress2003/ipresscom2003-22\\_ms\\_20030724.htm](http://www.icj-cij.org/icjwww/ipresscom/ipress2003/ipresscom2003-22_ms_20030724.htm)>.

divided internally. The divided authorities distrust and are hostile towards each other. That is why the Korean Peninsula and the Taiwan Straits are the other two political flashpoints, in addition to the South China Sea, in East Asia. The Cold War is over in Europe and other places in the world but still continues in East Asia to the extent that there has been no reconciliation between hitherto Cold War contesting parties. In contrast, these parties have been strengthening their military build-up. East Asia remains the second-largest regional arms market after the Middle East and North Africa.<sup>70</sup> China continues to strengthen its naval and air capabilities to prevent Taiwan from attaining *de jure* independence while Taiwan has bought and continues to buy advanced weapons from the United States to deter Mainland China's threat. In the event of armed conflict in the Taiwan Straits, the marine legal order in East Asia will be threatened. On the other hand, Japan, which possesses the most advanced fleet in the region, has taken a more active approach in its defense affairs<sup>71</sup> and has begun to send troops overseas under its recently amended domestic laws. Its military presence in the South China Sea in the name of anti-piracy patrols worries neighbouring countries that are reminded of Japanese aggressions during the Second World War.

Nevertheless, three main characteristics in the trends concerning the marine legal order in East Asia are promising: First, from divergence to convergence. Prior to the LOS Convention, State practice in East Asia varied greatly. The Convention, however, provided a basis for the establishment of a marine legal order and States have enacted relevant domestic laws in accordance with the convention as well.

Second, from the rule of power to rule of law. This is indicated not only by the fact that most of the East Asian countries have acceded to the LOS Convention, but also by the fact that most of the countries have enacted basic marine laws such as those concerning the territorial sea and E.E.Z. and have also established their jurisdictional maritime zones. Some countries have even started to use international judicial organs to settle their maritime disputes. Although there are various definitions of rule of law, one thing is clear: the rule of law principle at the international level requires States to use international law rather than power, the will of individuals, or even force to govern State-to-State relations. It is remarkable that in 2004, China, for the first time, expressed clearly that the rule of law should be implemented in international relations. In the Four Opinions of China regarding the work of the United Nations, one of the opinions is the rule of law in international relations. According to China, the rule of law is fundamentally important in maintaining international peace and security, enhancing development and protecting human rights. The pick-and-choose mentality towards international legal norms does not help to promote and realise the rule of law and justice in the world community.<sup>72</sup>

Third, from bilateralism to multilateralism (regionalism). The best example is the *Declaration on the Conduct of Parties in the South China Sea* as explained above. China, a key player in East Asia, has realised, though with some reluctance, that regionalisation of maritime issues such as the South China Sea dispute is an inevitable trend, which China is unable to prevent and faces little choice but to adapt so that it can continue to play a significant role in resolving regional maritime issues. In short, international law and the LOS Convention requires vibrant regional cooperation and a regional mechanism for maintaining and improving the marine legal order in East Asian seas and coastal States are obliged to cooperate between and amongst themselves.

<sup>70</sup> Anthony Bergin, "East Asian Naval Developments—Sailing into Rough Seas" (2002) 26 *Marine Policy* 121.

<sup>71</sup> *Ibid.* at 126.

<sup>72</sup> See "Zhang Yishang put forward four opinions on the work of the United Nations in the General Assembly" (8 October 2004), online: People Daily <<http://www.people.com.cn/GB/guojiji/14549/2904212.html>>.

