

**BALANCING THE RIGHTS OF THE COASTAL STATE IN ITS EXCLUSIVE ECONOMIC ZONE  
AND FREEDOM OF NAVIGATION OF OTHER STATES:  
AN ANALYSIS OF THE PRACTICE OF ASIAN COUNTRIES**

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*Abstract*

*The UN Convention on the Law of the Sea creates a delicate balance between the rights of the coastal State and those of other States in the EEZ. The present paper argues that although the balance created by the Convention is impressive, its application is not easy. As national interests are involved, state practice is not exactly in conformity with the Convention. The paper analyses national laws of selected Asian countries and finds that although most of them follow the Convention formula of balancing, some are clearly at variance with it and some are controversial. The paper concludes that states parties to UNCLOS are obliged to fulfil in good faith the obligations under the Convention and that the delicate balance between coastal and user states rights can be achieved in practice only by means of mutual understanding and sincere negotiations.*

1. Introduction
2. Coastal State's rights in the EEZ versus freedom of navigation of other states
3. The practice of Asian countries
4. States parties' obligation to comply in good faith with the Convention
5. Conclusion

## 1. Introduction

The United Nations Convention on the Law of the Sea (UNCLOS) 1982 provides a detailed structure of the Exclusive Economic Zone (EEZ): it is an area beyond and adjacent to the territorial sea<sup>1</sup> and it shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.<sup>2</sup> The EEZ does not follow either the concept of sovereignty, prevailing in the territorial sea, or the concept of freedom, which characterizes the high seas.<sup>3</sup> The Convention intentionally refrains from describing the EEZ as a part of the high seas. The zone is treated as an intermediate area of sea between the high seas and the territorial sea with a distinct regime of its own (*sui generis*)<sup>4</sup>. The *sui generis* nature of the EEZ reflects three main elements: (1) the rights and duties which the Convention accords to the coastal states; (2) the rights and duties which the Convention accords to other states; and (3) the formula provided by the Convention for the reconciliation of the sovereign rights and jurisdiction of the coastal state and communications freedoms of other states

The present paper begins with the evaluation of the general mechanism of balances and counterbalances of rights and responsibilities of the coastal and user states under the Convention. The paper argues that although the balance created by the Convention is impressive, its application is not easy. As national interests are involved, state practice is not exactly in conformity with the Convention. The paper analyses national laws of selected Asian countries and finds that although most of them follow the Convention formula of balancing, some are clearly at variance with it and some are controversial. The paper concludes that states parties to UNCLOS are obliged to fulfil in good faith the obligations under the Convention and that the delicate balance between coastal and user states rights can be achieved in practice only by means of mutual understanding and sincere negotiations.

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<sup>1</sup> Article 55, the United Nations Convention on the Law of the Sea 1982, opened for signature Dec. 10, 1982, UN Doc. A/CONF. 62/122 (1982) (entered into force Nov. 16, 1994). [Hereinafter UNCLOS 1982].

<sup>2</sup> Article 57, *Ibid.*

<sup>3</sup> Anne Bardin, "Coastal State's Jurisdiction over Foreign Vessels", (2002) 14 *Pace Int'l L. Rev.* 27, at 40.

<sup>4</sup> For *sui generis* nature of the EEZ, see E.D. Brown *International Law of the Sea*, vol. 1, (1994) 218.

## 2. Coastal State's Rights in the EEZ Versus Freedom of Navigation of Other States

The balance between a coastal state's rights and third states freedoms in the EEZ has always been a central issue of the law of the sea since the adoption of UNCLOS.

### 2.1 Coastal State's Rights

The coastal state's rights and duties are set out in broad terms in Article 56 of UNCLOS and amplified in later articles. Article 56 reads:

1. In the exclusive economic zone, the coastal state has:
  - (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources whether living or non-living, of the waters superjacent to the sea-bed and sub-soil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, current and winds;
  - (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
    - i. the establishment and use of artificial islands, installations and structures;
    - ii. marine scientific research;
    - iii. (iii) the protection and preservation of the marine environment.
2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

First, the coastal state has 'sovereign rights for the purpose of exploring, exploiting, conserving and managing the natural resources whether living or non-living....' It is significant that unlike in the territorial sea, the coastal state cannot exercise 'sovereignty' in its EEZ;<sup>5</sup> it has only 'sovereign rights' in respect of the natural resources of the EEZ. As far as living resources are concerned, these rights, together with certain duties imposed on the coastal state, are spelt out in Articles 61 to 73.

Secondly, the coastal state has 'jurisdiction' with regard to artificial islands and installations, marine scientific research and protection of the marine environment. In respect of this, the Convention confers on the coastal state, not sovereign rights, but the more limited 'jurisdiction'.

The coastal state has exclusive jurisdiction over the establishment and use of artificial islands and installations in the EEZ and has the right to establish safety zones, which are normally not to exceed 500 metres in breadth, around them.<sup>6</sup> The jurisdiction in respect of such artificial islands and installations are subject to certain duties. Thus the coastal state must give due notice of the construction of artificial islands and installations, and must not construct them where interference may be caused to the use of recognized sea lanes essential to international navigation.<sup>7</sup>

Although the coastal state's jurisdiction over marine scientific research has not much to do with navigational rights of foreign states, its 'jurisdiction provided for in the relevant provisions of this Convention with regard to ... the protection and preservation of the marine environment' may have some bearing on these navigational rights. The 'relevant provisions' of the Convention are to be found in Part XII. This Part gives the coastal state legislative and enforcement competence in its EEZ to deal among others with the dumping of waste<sup>8</sup>, and other forms of pollution from vessels<sup>9</sup>.

The above rights are set out in Article 56 (1) (a) and (b). Article 56 goes on in sub-paragraph (c) to state that in addition to these rights the coastal state also has in its EEZ 'other rights and duties provided for in this Convention'. The rights which appeared to be referred to here are those which the coastal state has in its contiguous zone<sup>10</sup>, and the right of hot pursuit<sup>11</sup>.

In relation to each of the principal rights conferred under Article 56, the Convention imposes a number of duties on the coastal state. In addition, Article 56 (2) lays down a general duty on a coastal state 'to have due regard to the rights and duties of other states and to act in a manner compatible with the provisions of

<sup>5</sup> For an excellent discussion on the clear limit of UNCLOS of the exercise of a state sovereignty to internal waters, archipelagic waters and the territorial sea and the temptation of states to extend its sovereign power to the EEZ, see Bernard H. Oxman, "The Territorial Temptation: A Siren Song at Sea", (2006) 100 *AJIL* 830.

<sup>6</sup> Article 60 (2), (4), (5), UNCLOS 1982.

<sup>7</sup> Article 60 (7), *Ibid.*

<sup>8</sup> Articles 210 (5), 216, *Ibid.*

<sup>9</sup> Articles 211 (5)-(6), 220, 234, *Ibid.*

<sup>10</sup> See Article 33, *Ibid.* This is because the contiguous zone is overlapping with the inner twelve nautical miles of the EEZ.

<sup>11</sup> See Article 111, *Ibid.*

this Convention’.

## 2. 2 Communications Freedoms of Third States: Freedom of Navigation

The rights and duties of other states are set out in Article 58 of the Convention. They are all essentially concerned with international communications and are those high seas freedoms that have survived the demands of coastal states. Of the six freedoms specifically referred to in Article 87 of the Convention, fishing, marine scientific research and construction of artificial islands and installations, have come within the jurisdiction of the coastal state. The other three freedoms, namely - freedom of navigation, freedom of overflight and freedom to lay sub-marine cables and pipelines – remain open to all states, although subject to greater limitations than on the high seas.

The present paper is primarily concerned with navigational freedom of other states in the EEZ of a coastal state. According to Article 58 (1), in the EEZ all states enjoy ‘the freedom[s] referred to in Article 87 of navigation...’ and ‘other internationally lawful uses of the sea related to [this] freedom.’

This freedom is subject to a number of limitations. First, the freedom may possibly be subject to the general limitation governing all freedoms of the high seas set out in Article 87 (2) – namely, that these freedoms must be exercised ‘with due regard for the interests of other states in their exercise of the freedoms of the high seas’. Secondly, under Article 58 (2), freedom of navigation in the EEZ is subject to the provisions of Articles 88 to 115 of the Convention and the other relevant rules of international law which deal with navigation on the high seas, in so far as they are not incompatible with the Convention’s provisions on the EEZ.<sup>12</sup>

There are two further limitations on freedom of navigation in the EEZ not explicitly mentioned in the Convention but which are implicit in its provisions. First, foreign shipping is subject to the coastal state’s powers of pollution control. Secondly, foreign ships may be affected by the presence of artificial islands and installations, although such structures may not be placed in ‘recognized sea lanes essential to international navigation’. It must also not be forgotten that shipping in the inner twelve miles of the EEZ will be in the coastal state’s contiguous zone and therefore subject to the jurisdiction which the coastal state enjoys in that zone (control necessary to prevent and punish infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea<sup>13</sup>).

## 2. 3 Balancing the Conflicting Rights

Articles 55 and 86 of UNCLOS establish that the EEZ is unique, neither part of the territorial sea nor part of the high seas. Articles 56 and 58, however, create a balance between the rights of coastal states and those of foreign maritime states.<sup>14</sup> Some authorities maintain that the provisions of the convention tilt the balance in the direction of the coastal state.<sup>15</sup> However, that does not seem to be the case, because Article 58(3) explicitly obliges third states to comply only with those laws and regulations of the coastal state which are adopted ‘in accordance with’ the relevant provisions of the Convention. Moreover, even if such regulations reflect rules of international law other than those embodied in the Convention, the third states are obliged to comply only in so far as those rules are not incompatible with Part V (the Part relating to EEZ).

The scope of the communications freedoms, including freedom of navigation, enjoyed by third states in the EEZ depends on the maintenance of a proper balance between those freedoms and coastal state’s rights. The general principle established in the UNCLOS to serve such balance is that of equivalence and reasonableness of coastal state’s and third states’ uses within the EEZ. This principle is reflected by reciprocal basic obligations of the coastal and third state to have ‘due regard’ to their respective rights and duties<sup>16</sup>, and the parallel obligation of the third state to have ‘due regard’ to the interests of other states exercising communications freedoms.<sup>17</sup>

In one case, the convention establishes a general priority of navigation over other interests, namely, that artificial islands, installations and structures must not be established ‘where interference may be caused to

<sup>12</sup> For a detailed analysis, see Orrego Vicuna, *The Exclusive Economic Zone*, (Cambridge University Press, 1989), 99-102.

<sup>13</sup> See Article 33, UNCLOS 1982.

<sup>14</sup> George V. Galdorisi and Alan G. Kaufman, “Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict”, (2002) 32 *Cal. W. Int’l L.J.* 253.

<sup>15</sup> W.T. Burke, R. Legatski, and W.W. Woodhead, *National and International Law Enforcement in the Ocean* (Seattle and London: University of Washington Press, 1975), 107; T. Treves, Military Installations, structures and devices on the Seabed, 74 *AJIL* (1980) 808-857, at 843; Cf W.T. Burke, “Exclusive Fisheries Zones and Freedom of Navigation”, 20 *SDLR* (1983) 595-623, at 616-18.

<sup>16</sup> Article 56 (2) and Article 58(3), UNCLOS 1982.

<sup>17</sup> Article 87(2), *Ibid.*

the use of recognized sea lanes essential to international navigation'. Apart from that exception, the principle of equivalence of different uses within the EEZ does not imply any *a priori* hierarchy between the competing uses and necessitates the 'assessment of the relative importance of the interests involved' in each particular case.

### 3. The Practice of Asian Countries

The evaluation will be made on the national legislation of selected Asian countries. National legislation of most of the Asian countries are in compliance with UNCLOS and a number of countries expressly acknowledge in their national laws the communications freedoms of third states in their EEZ. Many other countries, although do not expressly provide in their national laws for the navigational freedom of third states, do have provisions that are not contrary to the Convention. However, a careful analysis of national laws demonstrates the fact that some of them are clearly not in conformity with the Convention and some are difficult to reconcile with the delicate balance established by the Convention.

#### Philippines, Thailand, Indonesia, and China

There are countries that expressly acknowledge in their national laws the communications freedoms of third states in their EEZ. Good examples are the national laws of Philippines<sup>18</sup>, Thailand<sup>19</sup>, Indonesia<sup>20</sup>, and China<sup>21</sup>. Section 4 of the national law of Philippines, for example, provides that "other states shall enjoy in the exclusive economic zone freedoms with respect to navigation and overflight, and laying of submarine cables and pipelines, and other internationally lawful uses of the seas relating to navigation and communications."

#### India and Pakistan

India's legislation provides that the Government "may: (a) declare any area of the EEZ to be a 'designated area'; and (b) make such provisions as it may deem necessary with respect to, - .... customs and other fiscal matters", and "may provide for the regulation of entry into and passage through the designated area of foreign ships by the establishment of sea lanes, traffic separation schemes or any other mode of ensuring freedom of navigation which is not prejudicial to the interest of India". Furthermore, the legislation provides that "The Government may extend...any enactment for the time being in force in India...to the EEZ or any part thereof; and make such provisions... for facilitating the enforcement of such enactment, and any enactment so extended shall have effect as if the EEZ or the part thereof to which it has been extended is a part of the territory of India".<sup>22</sup>

Pakistan also has a national law<sup>23</sup> whose provisions in this respect are almost identical with that of India. Such type of legislation is objectionable on two grounds, namely: (1) the idea of creating 'designated areas' not contemplated in the Convention and the extension of the coastal state's customs and fiscal jurisdiction (which is only applicable within the contiguous zone - that is, within 24 nautical miles from the base lines) to these designated areas; and (2) the extension of any national enactment and its enforcement to the EEZ or any part thereof, as if such EEZ or any part of it is a part of the territory of the coastal state. Such a national law appears to unjustifiably extend the prescriptive and enforcement jurisdiction of a state to the EEZ and might have serious clashes with communications freedoms in the EEZ of other countries in accordance with UNCLOS.

#### Japan

Japan adopted the "Law on the Exclusive Economic Zone and the Continental Shelf" in 1996. The Japanese law seems to have two controversial provisions. First, Article 3 (1) of the law provides that "the laws and regulations of Japan (including penal provisions) shall apply with respect to the following matters" and it goes on with the enumeration of the matters such as exploring and exploiting the natural resources of the EEZ and the continental shelf, the establishment of artificial islands, installations and structures, conservation of the marine environment, marine scientific research, and the execution of official duties by public officials of Japan

<sup>18</sup> Section 4, Presidential Decree No. 1599 of 11 June 1978 establishing an Exclusive Economic Zone and for other purposes.

<sup>19</sup> Section 3, Royal Proclamation Establishing the Exclusive Economic Zone of the Kingdom of Thailand, 23 February 1981

<sup>20</sup> Section 4, Declaration by the Government of Indonesia concerning the Exclusive Economic Zone of Indonesia, 21 March 1980.

<sup>21</sup> Article 11, Exclusive Economic Zone and Continental Shelf Act, adopted at the Third session of the Standing Committee of the Ninth National People's Congress, 26 June 1998.

<sup>22</sup> Section 7 (6) and (7), The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, Act No. 80 of 28 May 1976.

<sup>23</sup> Section 6 (4) and (5), Territorial Waters and Maritime Zones Act, 1976 (of 22 December 1976).

in the EEZ or on the continental shelf.

Secondly, Article 3 (2) of the law provides that artificial islands, installations and structures referred to in the preceding paragraph shall be considered to be located in the territory of Japan, with respect to which the laws and regulations of Japan shall apply in addition to the provision of the said paragraph.

If we examine Article 3 out of the context, it is clear that the Japanese law does not take account of UNCLOS and other relevant rules of international law and that nowhere in the law can we see any reference to the communications freedoms of other states in the EEZ in accordance with the Convention. However, Article 3 has to be read together with Article 4 which provides that "Where a treaty provides for matters provided for in this law, the provisions of the treaty shall apply." What does Article 4 mean? Does the word 'treaty' in Article 4 refer to 'UNCLOS'? From the phrase 'the treaty shall apply', can we assume that 'the treaty shall prevail' over any contrary Japanese law? Although the English translation of the law may not be entirely accurate and the law uses the word "apply" instead of a clearer word "prevail", if Article 4 is interpreted to mean the application of 'the treaty' (that is UNCLOS) as far as the rights and duties of the coastal state and those of the other states are concerned, the Japanese law can be said as in conformity with the Convention.

### Maldives

The national law of Maldives provides that:

*Ships of all states shall enjoy the right of innocent passage through the territorial waters and other Exclusive Economic Zone of the Republic of Maldives...*

*However, no foreign warships shall enter the Territorial sea of the Republic of Maldives, nor a foreign fishing vessel shall enter its Exclusive Economic Zone without prior consent of the Government of the Republic of Maldives....*<sup>24</sup>

The crucial deviation of Maldives law from the Convention is that it allows foreign fishing vessels only the 'right of innocent passage' through the EEZ where according to the Convention ships (including fishing vessels) of all states have freedom of navigation subject to the provisions of UNCLOS and due regard to the relevant laws and regulations of the coastal state in accordance with the convention. Another provision that would affect freedom of navigation is that warships cannot enter the territorial sea or fishing vessels cannot enter EEZ without prior consent of the government.

### Myanmar

Pyithu Hluttaw of Myanmar (Burma) passed the Territorial Sea and Maritime Zones Law on 9 April 1977 to establish among others the EEZ of Myanmar that extends to a distance of 200 nautical miles from the baselines. Although the law acknowledges the right of freedom of navigation within the EEZ of ships of all states<sup>25</sup>, there is a controversial claim to the effect that the government of Myanmar can exercise control to safeguard the security of Myanmar in the contiguous zone that extends to a distance of 24 nautical miles from the baselines<sup>26</sup>. This is the same thing as saying that Myanmar can control the inner 12 nautical miles of its EEZ for security purposes, which is clearly incompatible with UNCLOS and is objectionable.

### Malaysia

The EEZ of Malaysia is governed by two statutes: the Exclusive Economic Zone Act, 1984<sup>27</sup> and the Fisheries Act, 1985<sup>28</sup>. If compared with its counterparts in other Asian countries, the EEZ Act of Malaysia is in more detail and much more comprehensive. However, freedom of navigation is not even touched upon by the Malaysian law. Communications freedoms are not mentioned apart from a provision that "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."<sup>29</sup>

By virtue of section 8 of the EEZ Act, the law governing the EEZ regime of Malaysia is not complete

<sup>24</sup> Section 1, Law No. 32/76 of 5 December 1976 relating to the navigation and passage by foreign ships and aircraft through the airspace, Territorial Waters and the Exclusive Economic Zone of the Republic of Maldives.

<sup>25</sup> Section 19 (a), Territorial Sea and Maritime Zones Law, 1977, Pyithu Hluttaw Law No. 3 of 9 April 1977.

<sup>26</sup> Section 11 (a), *Ibid.*

<sup>27</sup> Laws of Malaysia, Act 311, date of publication in the Gazette: 31 December 1984, date of coming into operation: 1 May 1985.

<sup>28</sup> Laws of Malaysia, Act 317, date of publication in the Gazette: 30 May 1985, date of coming into operation: 1 January 1986.

<sup>29</sup> Section 22, *Ibid.*

without taking into account the Fisheries Act 1985. The two statutes need to be read together to have a complete picture of the law. It is interesting to note that although the EEZ Act does not talk about navigational freedom of foreign vessels, the Fisheries Act 1985 imposes substantial limitations on passage of foreign fishing vessels. The original section 16 of the EEZ Act 1984, entitled 'Innocent passage of foreign fishing vessels in Malaysian fisheries waters', provides in subsection (1) that: "...a foreign fishing vessel may enter Malaysian fisheries waters for the purpose of exercising its right of innocent passage through such waters...". The Act also requires, in subsection (3), the master of the foreign fishing vessel to "notify by radio an authorized officer of the name, the flag state, location, route and destination of the vessel, the types and amount of fish it is carrying and the circumstances under which it is entering Malaysian fisheries waters."

After the enactment of the Fisheries Act 1985, there were protests especially by Thai fishermen who used to fish in the area of the sea which has become the EEZ of Malaysia.<sup>30</sup> Arguments were also made on the ground the Malaysian statute was not conformity with UNCLOS because under it (1) only the right of innocent passage was allowed to the fishing vessels which had in fact freedom of navigation under Article 58 of the Convention and (2) fishing vessels were required to make notification to the authorized officer of Malaysia when entering the Malaysian EEZ.

In 1993, section 16, among others, of the Fisheries Act 1985 was amended.<sup>31</sup> The following three amendments are noteworthy:

- (1) The word "passage" was substituted for the words "innocent passage" appearing in the marginal note.
- (2) In subsection (1) of section 16, the words "exercising its right of innocent passage" were substituted by the single word "passage".
- (3) In subsection (3) of section 16, the words "telex or facsimile in the English or Malay language" were inserted immediately after the word "radio".<sup>32</sup>

Amendments to the Fisheries Act 1985 appeared to be made to counter the arguments that the Malaysia statute was not in conformity with UNCLOS because it allowed only the right of innocent passage to foreign fishing vessels. However, what is ironic is that although the word "innocent" was deleted in the marginal note and in the subsections, that particular word was not deleted in the title of section 16 and thus the title remains the same as it was in the original section and reads "Innocent passage of foreign fishing vessels..."

The amendment to subsection (3) was obviously made to ease the rigidity of the law for foreign fishing boats that do not have radio facility to use telex or facsimile and to use English if they cannot use Malay language in notifying the authorized officer. Nevertheless, the requirement of notification remains.

## Concluding Remarks

Although the above analysis is limited only to selected Asian countries, it appears to reflect the overall picture of the international practice. There may be reasons for countries that claim wider rights in their EEZ, such as situating in a geographically strategic location and vulnerability of their natural resources. In any case, unjustifiable extensions of coastal states' rights may undermine the main purpose of UNCLOS, namely: a clear demarcation of coastal states' rights and an end to 'creeping jurisdiction'.<sup>33</sup>

The above analysis indicates that while national laws of most of the countries in Asia are in conformity with UNCLOS and some even expressly acknowledge the communications freedoms of other countries in their EEZ, some countries have legislation that are at variance with the Convention and some legislation are controversial. What is important, however, is how to resolve this problem of national laws that are clearly incompatible with UNCLOS or those that are of doubtful compatibility.

## 4. States Parties' Obligation to Comply in Good Faith with the Convention

UNCLOS is a package deal: take it all or leave it all. Article 309 of the Convention prohibits reservations or exceptions to the Convention. Article 310 of the Convention provides that "the prohibition on reservations or exceptions does not preclude a State, when signing, ratifying or acceding to the 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

<sup>30</sup> See Abdul Ghafur Hamid @ Khin Maung Sein, *Public International Law: A Practical Approach*, (Pearson- Prentice Hall, Kuala Lumpur, 2006), 355.

<sup>31</sup> Fisheries (Amendment) Act 1993, Laws of Malaysia, Act A854, date of publication in the Gazette – 15 July 1993, date of coming into operation – 1 September 1993.

<sup>32</sup> See section 9, Fisheries (Amendment) Act, 1993.

<sup>33</sup> See R.R. Churchill and A.V. Lowe, *The Law of the Sea*, (3<sup>rd</sup> ed., Manchester University Press, 1999), 173.

exclude or to modify the legal effects of the provisions of this Convention in their application to that State." It is therefore clear that these declarations or statements are not regarded as reservations and they have no binding legal effect. Their main purpose is to facilitate smooth harmonization of the respective domestic laws and regulations with the provisions of the Convention.<sup>34</sup>

Then what is the basic obligation of states parties towards the Convention? Is it justified for a state party to have a domestic law which is contrary to the Convention?

Article 300 provides that "States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right." This provision is a reaffirmation of Articles 26 and 27 of the Vienna Convention on the Law of Treaties.<sup>35</sup> While Article 26 endorses the norm *pacta sunt servanda*, Article 27 codifies a fundamental rule of international law, that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Treaty obligations are obligations of the State, "and the failure of an organ of the state, such as a Parliament or a court, to give effect to the international obligations of the state cannot be invoked by it as a justification for failure to meet its international obligations."<sup>36</sup>

The Permanent Court of International Justice, in its Advisory Opinion in *Exchange of Greek and Turkish Populations*, regarded as 'self evident' the principle that "a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken."<sup>37</sup>

UNCLOS, which has been properly described as "a Constitution for the Oceans," is one of those legal instruments requiring harmonization of the national laws of States Parties to its provisions. This is particularly true with regard to the regime of the exclusive economic zone, a new legal concept that emerged from the negotiations at the Third United Nations Conference on the Law of the Sea.

Then what is the position of a state whose national law is at variance with the Convention? Why is it that national laws of some countries, adopted in 1970s, are incompatible with UNCLOS up until today even though these countries have become parties to UNCLOS long time ago? One possibility is that there has not been much pressure or serious protestation by other countries. In practice, states will not be very much interested in a national law of a country which is quite far away and which do not have any relationship with their country. Say, for example, a country from South America might not make serious protest against a national law, restricting foreign fishing vessels within its EEZ, of an East Asian country because the fishermen or fishing vessels of the former would not by any chance use the EEZ of the latter.

Normally, only neighbouring countries or user countries would have adequate interest to make strong protestations against non-complying national law. Even in such a situation, if the coastal state is adamant, the protestations of user states might fade away because states naturally do not want to have problems with friendly or neighbouring countries on not so important matters. Now the important question that arises is: will the absence of protestations from neighbouring or user countries amount to acquiescence? Or can a rule of customary international law emerge between two neighbouring countries due to the absence of protest by one country of the application of a non-complying national law of its neighbour?

One way of dealing with the issue of national laws that are incompatible with UNCLOS is to initiate legal proceedings against the state which is enforcing the non-complying national law. The advantage of such a legal action is that the appropriate tribunal could have the opportunity to determine whether the national law is compatible with UNCLOS.

**Settlement of disputes:** An important procedural guarantee for maintaining a proper balance between the rights of the coastal state and communications freedoms of third states within the EEZ consists in the compulsory dispute settlement scheme provided for in Part XV of UNCLOS which applies if states reach no settlement by any peaceful means of their own choice as indicated in Article 33 of the UN Charter.<sup>38</sup> Disputes concerning interpretation or application of UNCLOS with regard to communications freedoms and pollution are subject to the compulsory procedures provided for by Part XV. This, according to Article 297 (1), relates in particular to the three following categories of disputes which are not fundamental importance for balancing the coastal and third state's rights and freedoms:

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<sup>34</sup> Far a detailed study of the General Assembly Resolutions appealing to states to harmonize their national laws with the provisions of the Convention, see Hugo Caminos, "Harmonization of the Pre-Existing 200-mile Claims in the Latin American Region with the UN Convention on the Law of the Sea and Its Exclusive Economic Zone", (1998) 30 *U. Miami Inter-Am L. Rev.* 9, at 15-16.

<sup>35</sup> Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 UNTS 331 (1980) [hereinafter Vienna Convention].

<sup>36</sup> *Oppenheim's International Law*, Vol. I Peace, (9<sup>th</sup> ed. 1992), 85.

<sup>37</sup> *Exchange of Greek and Turkish Populations*, Advisory Opinion, 1925 PCIJ Ser. B, No. 10, at 20.

<sup>38</sup> See Articles 279-281, UNCLOS 1982.

- (a) when it is alleged that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in Article 58;
- (b) when it is alleged that a State in exercising the aforementioned freedoms, rights or uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal State in conformity with this Convention and other rules of international not incompatible with the Convention; and
- (c) when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with the Convention.<sup>39</sup>

*M/V Saiga*: This is a rare case that illustrates the role of international tribunals in determining whether a national law of a coastal state is in conformity with UNCLOS. It is the first case of the new International Tribunal for the Law of the Sea. On October 27, 1997, the *MV Saiga*, flying the flag of Saint Vincent and the Grenadines, refuelled fishing vessels at sea off the coast actually in the EEZ, of Guinea. The next day, Guinean customs patrol boats arrested the *Saiga* off the coast of Sierra Leone, during which two arrested crew members were injured. The vessel and its crew were then brought to Guinea, detained, and the cargo of oil was ordered to be discharged.<sup>40</sup>

As a result, Saint Vincent and Grenadines moved for provisional measures for the prompt release of the *Saiga* before the Tribunal. In *Saiga No. 2*, the Tribunal had to decide whether "the laws applied or the measures taken by Guinea against the *Saiga* were compatible with the Convention and whether, under the Convention there was justification for Guinea to apply its customs laws in the EEZ within a customs radius extending to a distance of 250 kilometres from the coast."<sup>41</sup>

After noting that while the coastal state can apply its customs laws and regulations in its territorial sea (UNCLOS Arts, 2 and 21), and that it may exercise control necessary to prevent infringement of its customs laws in its contiguous zone (Article 33 (1)), the Tribunal concluded that the coastal state had jurisdiction to apply its customs laws in its EEZ only in respect to artificial islands, installations and structures (Article 60(2)), and not "in respect of any other parts of the exclusive economic zone not mentioned above".<sup>42</sup>

The Tribunal further rejected the Guinean argument of "public interest" as it found that it would be incompatible with UNCLOS Article 56 and 58 regarding the rights of the coastal state in the EEZ because it would "entitle it to prohibit any activities in the said zone which it decides to characterize as activities which affect its economic 'public interest' or entail 'fiscal losses' for it."<sup>43</sup> The Tribunal therefore finds that, by applying its customs laws to a customs radius which includes parts of the EEZ, Guinea acted in a manner contrary to the Convention. Accordingly, the arrest and detention of the *Saiga*, the prosecution and conviction of its Master, the confiscation of the cargo and the seizure of the ship were contrary to the Convention.<sup>44</sup>

## 5. Conclusion

While national laws of most of the countries in Asia are in conformity with UNCLOS, some national laws are at variance with the Convention and some are controversial. It is true that the EEZ is one of the most valuable assets of a state and to extend the coastal state's sovereign powers to the EEZ is its national interest. However, as UNCLOS is the result of about ten years of difficult and complicated negotiations by the participating states and is a delicate compromise formula in the form of a multilateral framework, it is too valuable to be frustrated or destroyed by the unilateral action of a state that wants to take its national interest to the forefront.

States parties to UNCLOS have a good faith obligation "to harmonize their national legislation with the provisions of the UNCLOS and to ensure consistent application of those provisions".<sup>45</sup> Only by maintaining the balance in a reasonable and equitable manner can states avoid conflicts. Differences can be resolved by mutual understanding and sincere negotiation. Nevertheless, if an international tribunal decides that a national law is in conformity with

<sup>39</sup> Article 297(1), *ibid.*

<sup>40</sup> See Bernard Oxman, International Decision: The *M/V "Saiga"*, (1998) 92 *AJIL* 278, 279. For a factual background on both cases see *M/V Saiga* case, ITLOS, case No. 1, December 4, 1997, 25-33; *M/V Saiga* case, ITLOS, case No. 2, 31-39.

<sup>41</sup> *M/V Saiga* case, ITLOS, Case No. 2, 126.

<sup>42</sup> *Ibid.*, 127.

<sup>43</sup> *Ibid.*, 131.

<sup>44</sup> *Ibid.*, 136.

<sup>45</sup> See for example, General Assembly Resolution 28/49, UN GAOR UN Doc. A/RES/ 49/28 (1994).

UNCLOS, the state that enforced the non-conforming national law within its EEZ is responsible under international law for the breach of an international obligation and is obligated to make necessary reparation for the victim of the breach.