

Bilateral USCSCAP and CSCAP Philippines Workshop
UNCLOS and Maritime Security in East Asia
Manila, May 27, 2014
Conference Report

The US and Philippine Committees of the Council for Security Cooperation in the Asia Pacific (CSCAP) co-sponsored a workshop at the Manila Hotel in Manila, Philippines on May 27, 2014 to discuss the UN Convention on the Law of the Seas (UNCLOS) and Maritime Security in East Asia. It brought together 41 participants from throughout the Asia-Pacific region and beyond, including many who also attended an ASEAN Regional Forum (ARF) seminar on UNCLOS, which was held the following two days at the same venue. The workshop's off-the-record discussions focused on the role of UNCLOS in facilitating dispute settlement and promoting cooperation through regional organizations. Participants focused on dispute settlement mechanisms, principles related to freedom of navigation and rights and responsibilities of states, environmental preservation, and the management of living maritime resources. Throughout the discussion, participants were asked to focus on the role regional organizations like the ARF and CSCAP should play in promoting the principles outlined in UNLCOS and what could be done at the regional and state level to facilitate implementation of those principles.

Session 1: UNCLOS and Dispute Settlement

The first session focused on how Part XV of the UNCLOS and the general principles within it address the settlement of disputes as well as how effective they have been. Jay Batongbacal (*University of the Philippines Law Center, Institute for Maritime Affairs and Law of the Sea*) noted that over the last two years there has been heightened attention to dispute resolution issues, from the incidents related to the Scarborough Shoal to the challenges the Philippines has had resupplying marines stationed on Ayungin Shoal. He also saw the placement of the Chinese drilling platform, HS 981, in the Paracels and the rapid reclamation and build-up of Johnson South Reef by the Chinese as events that have increased concern about the adequacy of dispute settlement mechanisms.

Under UNCLOS Part XV, States Parties have an obligation to seek settlement by peaceful means as stated in article 279. Guidance contained in Part XV covers disputes arising from interpretation and application of UNCLOS more generally, which are classified and sequenced in convention. They include binding and nonbinding procedures. Under article 280 the initial guidance is to try to settle disputes "by peaceful means chosen by the parties" including other mechanisms such as existing arrangements. If they remain unsettled, guidance outlined in Part XV apply.

The Part VX dispute settlement process begins with an exchange of views, which does not require a formal starting point. One side can invite the other to engage in conciliation, but if the other does not accept it is deemed terminated. However, there are article 298 exceptions that make conciliation mandatory. Under compulsory procedures including four mechanisms available under article 287 – International Tribunal on Law of the Sea (ITLOS) Adjudication, International Court of Justice (ICJ), Annex VII

Arbitration, and Special Arbitration under Annex VIII dealing with fisheries, marine scientific research, marine environmental protection, and navigation.

The next step is for parties select to a procedure. If they both select the same one, it becomes compulsory. If no selection is made, the parties are deemed to have chosen Arbitration under Annex VII. Decisions are final and under Article 296 all parties must comply with such rulings. Within Southeast Asia, bilateral negotiations have led to the adjudication of border issues between Singapore-Malaysia, Malaysia-Indonesia, and Thailand-Cambodia. One measure that could be taken is to create a preventive mechanism that would allow parties to address them before become controversial.

Prior to the use of UNCLOS Part XV dispute settlement measures, key questions need to be addressed: the recognition of the dispute, the legitimacy of the dispute, the distinction between political disputes and legal disputes, as well as the framing of the legal dispute. In many of the current disputes in East Asia, there is a lack of recognition that a dispute exists and over the legitimacy of differing legal perspectives. For example, China has contested the Philippines framing of the legal dispute in its ITLOS submission.

Another important issue is preserving the status quo during the dispute settlement process to avoid changing the circumstances associated with the dispute. This problem is seen in the current dispute between China and the Philippines. Further, after the settlement process is complete, the recognition of the outcome by the respective constituencies is a concern, especially if one of the parties has refused to acknowledge the legitimacy of the procedure. Domestic politics create expectations and unfavorable rulings likely causing a political backlash. These expectations could also limit the ability of the government to comply with binding decisions.

Regional organizations could play several roles in this context: advocating mutual acceptance of dispute settlement mechanisms; moderating extremist behavior, and serving as a bridge between the two parties. The key issue is that support for parties seeking dispute settlement procedures should not be seen as taking sides.

Wu Shicun (*National Institute for South China Seas Studies*) stressed that the focus should be on managing the South China Sea (SCS) as this waterway is of tremendous significance to the Asia-Pacific region. It is central for energy, fisheries, and as a key sea lane. He stressed three points:

1. As an important sea lane, the SCS links the region with the world's economies. It is a busy waterway with more than 50 percent of oil tankers transiting it.
2. The SCS provides critical resources (both living and non-living) that are crucial to the economic development of littoral states.
3. In terms of UNCLOS there are different interpretations. While the convention has played a positive role in facilitating cooperation, there is much room for

improvement. One example is that the island regime in UNCLOS has enhanced the lure of island/coastal states to claim maritime jurisdiction.

The current trend towards the internationalization of the issue does not help crisis management of the SCS or the search for peaceful settlement. While there is a stated commitment to peaceful negotiations, some claimants have chosen international arbitration to embroil the global community in the dispute. This is taking place while countries are speeding to develop resources in the Spratly Islands, which undermines trust. Geopolitical competition has intensified, but cooperation on nontraditional security has also grown.

The role for UNCLOS to play is to effectively manage stability; it is the key mechanism essential for peace and stability with coastal states agreeing to settle disputes through it. However, the core of most disputes is territorial sovereignty and customary international law is the only mechanism that can determine questions of sovereignty.

Wu recommended shelving disputes and pursuing joint development as the best way to seek agreement while building trust. This can transform disputes into opportunities until delimitation is made, but it requires the support of neighboring countries. The Declaration on the Conduct of Parties (DOC) in the South China Sea is an important basis for building cooperation between China and ASEAN. The ARF Inter-Sessional Meeting on Maritime Security is not the right platform for SCS negotiations. It lacks an independent standing to facilitate dispute settlement combined with the fact that the dispute is not between China and ASEAN. It should limit its work to providing an opportunity for greater cooperation on non-traditional security issues.

Following the presentations, discussion began with a European participant sharing how the European Court of Justice has dealt with questions over fisheries disputes, addressing over 300 cases. Another suggestion was to consider the possibility of undertaking a study of attempts to resolve disputes (e.g., arbitration, courts, conciliation) in other parts of the world to determine their applicability to the disputes in East Asia. Another suggestion offered was to encourage more direct dialogue, based on the Indonesian experience. It was also suggested that the ARF should actively support initiatives in settling disputes as this would likely be more useful than submitting disputes to the ICJ. The court has shortcomings as some within ASEAN are not members, and while China is a member of the court, it has been unwilling to submit disputes to it. In the past, Indonesia tried to invoke the high council within ASEAN's Treaty of Amity and Cooperation, but Malaysia disagreed with using that mechanism. Another view was that the ARF should be a useful avenue to encourage an objective interpretation of UNCLOS and provides an opportunity to encourage disputants to address problems, even if it is not the venue where disputes are ultimately solved.

A Southeast Asian participant stressed that diplomatic discourse and appeals to outside dispute resolution mechanisms have serious implications for domestic politics, as these measures can become an issue for opposition parties. While it might be best to have discussions in private between disputants, this starts with an assumption that the status

quo is not being altered. In its dispute with China, the Philippines felt it could not wait and decided to pursue its case with ITLOS.

Reflecting on the impact of political pressures on decision-making, multiple participants highlighted the need to have national laws that are in alignment with UNCLOS. Having sound laws based on a proper interpretation of UNCLOS is needed to properly establish a state's claims. In this context, the ARF could establish the capacity to provide advice to parties on this matter. As the disputes in the SCS have been influenced by geopolitical competition, it is probably impossible to solve sovereignty/jurisdiction issues in the near future, but there is the potential to address sovereignty based on history and customary international law. If this could be done, then issues of delimitation of territory can be addressed.

In a discussion on the Declaration on Conduct in the South China Sea (DOC), it was noted that several parties see the others as being in violation of the declaration. The fact is all parties seem to have violated the spirit of the declaration in their actions. A broader point made regarding mutual accusations was that claims to the East China Sea and the South China Sea that are framed as being "indisputably mine," which is not factually correct. The Singapore-Malaysia and Malaysia-Indonesia cases adjudicated at the International Court of Justice (ICJ) offer examples among several that articulate in extraordinary detail the factors of law that is extraordinarily clear in dealing with sovereignty disputes. CSCAP could utilize these cases to show the outcomes, to apply the interpretations of the rules in those outcomes and assess current claims against them. Once the evidence is measured to see where things stand, there is actually a firm basis to make a decision from. In response to this observation, it was argued that the mechanism of conciliation has not really been used effectively, but it could potentially be more useful, even though it is not binding. It does provide a report that could be a basis for further negotiations, a way to break a current deadlock. The ASEAN High Council could also serve as a feasible dispute settlement mechanism in Southeast Asia if it had a solid example to build on. This would require that ASEAN members make a commitment on an issue such as migration or customs that would show the high council as an avenue to settle disputes.

The following key findings in the area of dispute settlement are focused on recommendations for action by the ARF, other regional organizations, or for member states within the ARF.

The ARF and other regional organizations could reduce tensions by acting as a bridging element between disputants. There were a range of views on how this could be achieved. One view offered was that specific actions could include:

- Advocating a specific dispute settlement procedure based on an independent assessment of the situation that would be mutually satisfactory to parties involved.
- Helping to moderate extreme behavior by disputants by sharing information to help neutralize and shape public perceptions on both sides of the dispute.

- Providing support to both parties in the dispute settlement process upon request.

Alternatively, the ARF could serve as a dialogue mechanism to promote better cooperation in the area of confidence building in nontraditional security issues. There are tools available to the ARF (including fact-finding and “good offices” missions) that could contribute to dispute resolution, assuming parties involved are open to third party assistance. For example, the ARF could also set up a sub-working group, comprised primarily of South China Sea claimants, to specifically address overlapping claims and concerns using its good offices.

Appeal to a third party appears necessary in the event of a stalemate and/or when bilateral approaches are no longer practical. The goal of the ARF in such cases would be to find common ground among disputants. One approach would be to examine outcomes from ICJ and ITLOS findings to determine how rules have been applied in order to evaluate current disputes in that light.

In addition, ARF member states could promote dispute settlement by:

- Bringing respective territorial claims into conformity with UNCLOS.
- Evaluating how ICJ and ITLOS have ruled on similar cases.
- Acknowledging a dispute exists before proceeding with joint development proposals.

Session 2 – UNCLOS and Freedom of Navigation

Ashley Roach (Global Affiliate, *National University of Singapore Center for International Law*) began by noting that descriptions of “unrestrained freedom of navigation” are not consistent with UNCLOS. It must be exercised with due regard for the interests of other states in their exercise of freedom of the seas. Those same freedoms in an Exclusive Economic Zone (EEZ) are to be exercised with due regard to the rights and duties of the coastal state and comply with its laws that must be consistent with UNCLOS. This applies to ships and aircraft (both government and commercial vessels). The right of innocent passage in territorial seas applies to surface ships and is to be exercised in a continuous and expeditious manner; submerged vessels and aircraft have no right of innocent passage. The high seas freedom of navigation and overflight applies to any declared contiguous zone.

Government ships are defined as warships and ships owned or operated by a state used only in government non-commercial service. On the high seas and in an EEZ, they have complete immunity from the jurisdiction of any state other than the flag state. In the territorial sea if a ship does not comply with coastal state’s rules and disregards the request for compliance, it can be required to leave the territorial sea immediately. A government ship operated for commercial purposes has no immunities and is treated like any other commercial ship.

Excessive maritime claims are those unilateral coastal state claims that are inconsistent with the UNCLOS. In Northeast Asia, China (including Taiwan), Japan, and the Koreas (ROK and DPRK) have such claims. Within Southeast Asia the only states without excessive maritime claims are Brunei, Singapore, Laos, and Timor-Leste.

UNCLOS defines a contiguous zone as the zone seaward of the territorial sea, not to exceed 24 nautical miles from the baseline from which breadth of the territorial sea is measured. The intent of declaring rights in a contiguous zone is to prevent or punish infringement of the customs, fiscal, immigration or sanitary laws of a state within its territorial sea. While the contiguous zone does not include the right to claims of security jurisdiction, Burma/Myanmar, Cambodia, Vietnam, and China claim a security interest in their declared contiguous zones. In addition Japan, the ROK, and Thailand measure their contiguous zones from straight baselines, which are not drawn in accordance with international law. In a 1980 decree, Vietnam incorrectly required prior permission for warships to navigate its contiguous zone, submarines were required to navigate on the surface, showing their flag, aircraft were prohibited from being launched from or taken aboard ships, and ships were to place weapons in non-operative positions before entering the contiguous zone. However, these restrictions were not mentioned in Vietnam's 2012 domestic law pertaining to the Law of the Sea.

Roach identified several areas where East Asian states have made excessive claims for activity in territorial seas. Those requiring prior permission for navigation in the territorial sea include Myanmar (1977 Territorial Sea Law), China (1992 Territorial Sea Law), Malaysia (1996 Article 310 declaration), and the Philippines (1968). Those requiring prior notice of intention of warships to transit the territorial sea include Indonesia (1978), the Republic of Korea (1978 Territorial Sea Act), Vietnam (2012 law covering Law of the Sea), and Taiwan (1998 Territorial Sea Law). These requirements are in excess of those provided in the UNCLOS.

Similarly, several countries make excessive claims in their EEZs. Both Malaysia and Thailand through Article 310 declarations claim freedom of navigation in EEZ does not include military exercises or other activities that may affect the rights or interests of the coastal State without its consent. Mapping and surveying in all Chinese sea areas requires prior consent under Mapping and Surveying Law of December 2002. None of these requirements are included under UNCLOS. China's 1996 EEZ and Shelf Law claims jurisdiction over artificial islands, installations, and structures in the EEZ and on the shelf. Vietnam's 2012 Law of the Sea claims jurisdiction over artificial islands, installations, and structures in the EEZ and on the shelf with regard to security laws and regulations. Neither is included under UNCLOS.

Roach concluded his presentation by noting that the ARF could contribute to improving compliance with UNCLOS by acknowledging the primary role of UNCLOS in establishing rule of law at sea. It should encourage strict adherence to the convention and to emphasize the United Nations annual call since 1994 to harmonize national legislation with UNCLOS, ensuring consistent application of its provisions.

Kazumine Akimoto's (*Japan Ocean Policy Research Foundation*) presentation was built around an OPRF project that developed a series of recommendations for building confidence among states in EEZs published in a document titled "Principles for Building Confidence and Security in the Exclusive Economic Zones of the Asia-Pacific." (Available here: http://oceans.oprf-info.org/analysis_en/c1406.html) The principles were built upon a previous project that led to a 2006 document entitled "Guidelines for Navigation and Overflight in the Exclusive Economic Zone."

The rationale for updating the project was that the changing maritime security environment in the region and an acknowledgement that the previous effort to develop guidelines was seen as too ambitious in scope in that the guidelines unduly restricted the freedoms of navigation and overflight available in EEZs. The new document takes a broader approach and focus on the central issue of misunderstanding and ambiguity over rights and duties in the EEZ. Central to this issue is the interpretation of "due regard" and the lack of a universal definition of "marine scientific research." The principles suggest that in exercising their rights to conduct maritime surveillance in an EEZ, states should observe internationally accepted rules and bilateral agreements. While states should be allowed to conduct maritime surveillance in areas claimed by other states as an EEZ, these activities should respect the sovereign rights and jurisdiction of the coastal State within its EEZ.

Military vessels and aircraft, as well as those from other agencies of government, enjoy the right to navigate in or fly over the EEZs of other states and to engage in other internationally lawful uses of the sea associated with the operations of ships and aircraft. Vessels undertaking military activities in the EEZ of another State have the obligation to refrain from the threat or use of force against the territorial integrity or political independence of both the coastal state and any others. States are encouraged to avoid military activities in areas rich in living and non-living resources, as well as those areas of active resource exploration and exploitation. They should avoid areas that have been identified as being particularly sensitive in accordance with internationally accepted standards or otherwise interfere with the coastal state's duties to protect the marine environment and to conserve the living resources of its EEZ.

Akimoto closed by emphasizing that the basic principle is due regard to the rights and duties of the coastal state. Military activities conducted lawfully by another state in the EEZ of a coastal state should not interfere with or endanger the rights and jurisdiction of the coastal state to protect as well as manage its resources.

During the discussion there was general agreement that much of the difficulty in Asian maritime disputes centers on activities in the EEZ. While UNCLOS Part V (Art. 55-75) addresses EEZs, new laws are being passed that are inconsistent with the provisions. UNCLOS does not address the issue of the establishment of an Air Defense Identification Zone (ADIZ), however, beyond 12 nm territorial waters, the most coastal states can do is request aircraft to identify themselves. If they fail to comply, the coastal state can intercept for the purpose of identification.

This led to a lengthy discussion regarding differences between the US and China regarding maritime rights. It was noted that there was not much difference on freedom of navigation between China and the US for commercial ships. In fact, both sides have worked to reduce confrontations in promoting freedom of navigation. Nevertheless, the two countries differ on how they see the seas: the US views them as being open to all activities while China views the EEZ as an area where it has a right to enforce its maritime laws. This leads to the US naval service utilizing this as a projection space, but China views these military activities as violating its EEZ rights.

Other participants reiterated the need for consideration beyond military vessels, including private vessels contracted to carry out government functions. Several argued that clarification is needed for UNCLOS in its application to the current dynamics of good order at sea. In this context, clarification on what was deemed maritime surveillance would be helpful, given the differences in the levels of technology that states employ in the region. Some UNCLOS provisions also contribute to excessive maritime claims as the definition of “straight baselines” and lengths of segments and the distance from coastlines are not explicitly clear from Article 7. More accurately, Article 7 does not have precise limitations on archipelagic straight baselines. Some of its words do have clear meaning, but domestic law application goes beyond its limitations.

While disagreement regarding the operation of naval ships long predates UNCLOS, the problem with confrontations between “white” or civilian ships is relatively recent as countries have ventured further into their EEZs. Accordingly, the suggestion was made that recent progress on a Code of Un-alerted Encounters at Sea (CUES) at the Western Pacific Naval Symposium should be extended to civilian law enforcement. Those ships are being more assertive in the context of current maritime tensions.

A US participant offered an explanation regarding US interpretation of several UNCLOS provisions. In 1983, the Reagan administration decided against signing UNCLOS based on the deep seabed-mining regime that it saw as prejudicial to US interests, but clearly communicated that the US would follow “traditional uses and provisions.” In the decades since, the ICJ and the ITLOS have made statements as to what provisions are considered customary international law and those provisions are binding to all states including those that are not party to UNCLOS. Finally he noted that most UNLCOS provisions regarding navigation and overflight are included in the 1958 Convention the High Seas, to which the US is a party.

The US view regarding military activities was derived from interaction between the US and the Soviet Union in the period when the UNCLOS was being negotiated. The Soviet Navy at the time viewed its principal function as defending against an invasion, seeking to keep ships and aircraft away from their coasts. As the Soviets developed a blue water Navy, it began to encourage a decision to support freedom of navigation beyond the high seas, leading to a shared Soviet and US view on this during the UNCLOS negotiations. China, with growing blue water ambitions, faces a similar dilemma. It can either have a blue water navy with no rights beyond the high seas or a non-blue water navy with heavy rights in its EEZ (no compromise).

Regarding freedom of navigation and activity in the various UNCLOS zones, the group suggested that the ARF should:

- Acknowledge the primary role of the UNCLOS in ordering rule of law at sea.
- Encourage strict adherence to rule of law including the terms of the UNCLOS.
- Emphasize the need for harmonization of national legislation with UNCLOS.
- Consider the adoption of principles for building confidence and establishing norms of behavior in EEZs that are consistent with principles of UNCLOS.

In addition, ARF member states should take the following actions to bring laws in compliance with UNCLOS:

- Eliminate excessive coastal maritime claims.
- Adjust requirements for navigation in territorial seas and EEZs.
- Build capacity to enhance law enforcement capabilities in conjunction with neighboring countries to reduce exploitation in border areas of EEZs.

Session 3: UNCLOS and the preservation of the Marine Environment

Robert Beckman (*National University of Singapore Center for International Law*) stressed that the key to successful implementation of the UNCLOS is its universal acceptance. If states are to accept the convention, they must accept Part 12 on the marine environment with its provisions being interpreted on an “updated” basis due to developments. The general obligation is to protect the environment by preventing, reducing, and controlling pollution. These actions must be taken to protect rare or fragile ecosystems and the habitat of threatened marine life.

Under the 2011 Advisory Opinion on Responsibility of Sponsoring States, the ITLOS Seabed Disputes Chamber affirmed the obligation to perform an environmental impact assessment as a general obligation under UNCLOS and customary international law when planned activities may cause substantial pollution. Consistent with the 1992 Rio Declaration on Environment and Development and ITLOS findings, states have a “duty to cooperate” by providing prior and timely notification to potentially affected states on activities that may have significant adverse trans-boundary environmental effects.

UNCLOS requires that states adopt laws and regulations on ship-source pollution that are consistent with the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78). This also applies to ocean dumping; states must be consistent with the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and other matter. While UNCLOS Article 208 covers seabed activities, this is a major gap as the international community has not established standards, with a major concern being ungoverned pollution from offshore oil platforms within national jurisdiction. There are similarly few internationally agreed upon rules for land-based activities outside of those for specialized chemicals or pollutants.

The conventions that regulate the design, construction, and equipment on ships include MARPOL 73/78 annexes that cover pollution from oil, noxious liquid substances,

sewage, harmful substances in packaged form, and garbage and the 1990 Convention on Oil Pollution Preparedness, Response, and Cooperation, which entered into force in 1995. The goal is to provide a global framework for international cooperation in combatting major incidents of marine pollution. Despite the framework, Beckman stressed that Southeast Asia is not prepared for a spill of hazardous and noxious substances.

He explained how the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea places liability for oil pollution damage on the owner of oil-carrying ships from which the oil escaped or was discharged from. It requires ships to maintain insurance in sums equivalent to the owner's total liability for one incident. This applies to all seagoing vessels carrying oil in bulk as cargo tankers. The convention includes a fund that is designed to support those who suffer pollution damages, but are unable to obtain compensation from the owner of the ship or if the compensation is insufficient to cover that damage incurred.

The International Maritime Organization (IMO) gives coastal states the opportunity to establish special rules in certain vulnerable coastal areas to reduce the pollution threat from ships. The "Special Areas" fall under MARPOL 73/78 as they are recognized for their oceanographic and ecological condition and to the particular character of its traffic. As such, special mandatory methods to prevent sea pollution can be established. Special Areas are provided a higher level of protection from "operational discharges" from ships than in other areas of the sea. The second type of protected zone is called a Particularly Sensitive Sea Area (PSSA), which are deemed to need special protection for their ecological, socio-economic or scientific reasons that may be vulnerable to damage from international maritime activities. Areas designated as such can enforce "associated protective measures" including discharge restrictions, routing measures, and prohibited activities. No PSSAs have been established in the Asia-Pacific region.

Martin Sebastian (*Maritime Institute of Malaysia*) stressed that the General Principles in Part XII of UNCLOS guide policies and that marine environmental protection goes beyond national jurisdiction. Under Article 218, when a vessel is voluntarily within a port or at an off-shore terminal of a state, that state may undertake investigations. When evidence warrants, it may institute proceedings in response to any discharge from that vessel outside the internal waters, territorial sea, or exclusive economic zone of that state in violation. Port state control becomes relevant when ship owners, recognized organizations, and flag states fail to comply with the requirements of the international maritime conventions. The Tokyo MOU consists of 18 member authorities and establishes an effective port state control regime in the Asia-Pacific region. It seeks to eliminate substandard shipping to promote maritime safety, to protect the marine environment, and to safeguard working and living conditions aboard ships.

A second important aspect of environmental protection is the land-sea nexus, which includes the response to illegal cross-border movements involving trafficking of people, wildlife, contraband, vehicles, timber, fuel (bunkering), weapons, and detonations for fish

bombing. The illegal exploitation of marine life including endangered species, corals, fish/crustaceans, and ornamental fish remains a persistent problem in this area.

The initial discussion following the presentations centered on the merits of having the South China Sea or some part of it declared a Particularly Sensitive Sea Area (PSSA) and the importance of trans-boundary cooperation to promote environmental preservation. While countries in other parts of the world have been able to develop cooperative frameworks for coordinating activities beyond national boundaries, maritime territorial disputes have made it difficult to make much progress in East Asia.

The idea of declaring a PSSA in several maritime regions certainly has merit. It would be relatively easy to define areas that are rich in resources that warrant special protection measures that would not prejudice the sovereignty issue. However, it was noted that to establish a PSSA would require significant research cooperation to demonstrate that it is an especially vulnerable ecosystem – something that would be very difficult to do in light of the current disputes.

On the issue of establishing a trans-boundary regime for assessing environmental impacts, the Coral Triangle Initiative (CTI) was presented as a successful example. However, it was also noted that a lack of harmonization between law enforcement agencies was an issue for how countries addressed environmental protection with the CTI. Another area where trans-boundary cooperation has seen some success is the Sulu/Sulawesi Sea with its rich biodiversity, but matters such as it being a key shipping lane for energy bound for the Chinese market must be taken into account.

Organizations such as the Partnerships in Environmental Management for the Seas of East Asia (PEMSEA) and Coordinating Body on Seas of East Asia (CBSEA) have a key role in promoting large-area marine environmental preservation, but a lack of common membership inhibits cooperation with other organizations who share their objectives. At this point, there seems to be a lack of critical mass to have a common grouping, resulting in these regional seas programs remaining very weak in East Asia. This large-area ecosystem approach is seen as taking the issue further to deal with destructive fishing, but it recognizes the need for alternative livelihoods in order to avoid creating conditions for militancy and transnational crime.

In the area of environmental preservation, the group recommends that the ARF and other regional organizations should:

- Encourage and assist member states in becoming party to the International Maritime Organization's Conventions to protect the marine environment.
- Educate member states on the benefits associated with becoming a party to IMO conventions on liability and compensation for environmental damage.
- Undertake studies to determine the value in creating Particularly Sensitive Sea Areas for the purpose of preserving these areas from environmental damage.

- Develop a real-time communication network for maritime law enforcement agencies (ASEAN could lead the way in this regard by establishing an intra-ASEAN network upon which the ARF could build).
- Encourage member states to consent to being bound by the new Port State Measures Agreement.
- Develop plans and engage in exercises to improve regional responses to Hazardous and Noxious Substance incidents

In addition, ARF member states should:

- Fully implement their UNLCOS obligations to preserve the environment.
- Implement IMO conventions into domestic law.
- Establish Special Areas or Particularly Sensitive Sea Areas

Session 4: UNCLOS and Living Resource Management

The final session focused on management of living resources, with specific focus on fisheries management. Xue Guifang (*Ko Guan Law School, Shanghai Jiao Tong University*) described the South China Sea (SCS) fisheries resources as a large and complex ecosystem, with diverse species (including intermixing that is difficult to manage) with tuna being the main commercial-value fishery. The region includes 30 percent of the world's coral reefs and valuable fisheries throughout contributing 5 million tons to the world's annual catch. However, the undetermined jurisdictional boundaries undermine national management efforts and frustrate regional cooperation initiatives.

In recent years, the region has become an increasingly important source of energy and food. Based on maritime feature and international law, the coastal SCS states are obliged to cooperate on the conservation of resources. As a result, there has seen a degradation of the marine environment with overfishing causing a breakdown of food chains.

UNCLOS Article 123 on enclosed and semi-enclosed seas calls for cooperation on living resources of the sea and Article 63 includes obligations regarding migratory stocks. It states that if these migratory species transit the EEZs of two or more states, they must coordinate to ensure the conservation and development of these stocks. The UNCLOS provisions are complemented by the FAO Compliance Agreement, UN Fish Stock Agreement (1995), and flag state jurisdiction. Complying with these agreements beyond UNCLOS is essential to effective management. While there are a number of fishery-related organizations in the region, there is no functioning regional fisheries management organization; the Asia-Pacific Fishery Commission is considered the most relevant body.

The need for sustainable fisheries is explicit. It is a distinct ecosystem with a remarkable amount of biological diversity. The challenge of sustainable fisheries goes beyond the capacity of individual states. Currently there is escalating pressure to create a regional cooperative mechanism to regularly discuss the resource issue and enforcement concerns. Working positively on this could lay the groundwork for cooperation on the much more volatile subject of territorial disputes.

Going forward there needs to be the ratification and accession to existing international conventions leading to effective implementation. Maritime law enforcement must be cooperative if we are to avoid conflicts at sea, including enhanced information sharing on living resources. This can be supported by harmonizing national laws and policies on fisheries management. The key remains the political will to establish a cooperative management mechanism. All SCS claimants are parties to UNCLOS except Taipei; all members of ASEAN are parties to UNCLOS except Cambodia. To play a functional role in fisheries, ASEAN must support the implementation of relevant parts of regional arrangements including the Declaration on the Conduct of Parties in the South China Sea.

Nguyen Thi Lan Anh (*Center for South China Seas Studies, Diplomatic Academy of Vietnam*) addressed the role of the UNCLOS in dealing with sovereign rights and jurisdiction of coastal States in resource management with the EEZ. This includes the traditional fishing rights in archipelagic waters and the conservation of living resources in both EEZs and high seas.

Nguyen noted that UNCLOS was supplemented by key mechanisms including the 1995 Agreement on Fish Stock, the FAO Code of Conduct for Responsible Fishing, the Plans of Action for Responsible Fishing, bilateral agreements, and regional organizations such as the Southeast Asian Fisheries Development Center. Cooperation is urgently needed to address Illegal, Unreported, and Unregulated (IUU) fishing, as well as on conservation for sustainable exploitation. Such cooperation is essential if states are to effectively carry out living resource management in contested waters. Implementing effective resource management starts with reconciling the differences in interpretation of international law. Within UNCLOS there are limits to the dispute settlement mechanism, with a lack of binding force (for those who opt out of Article 298), thus limiting participants.

All states have a responsibility to control their fisherman to prevent irresponsible fishing practices. Yet, the IUU practices in states with large populations living in coastal zones have damaged living resource conservation efforts. These illegal activities also increase the likelihood of unilateral activities in contested waters, with fishing in other state's EEZ a common feature. There is a need to increase enforcement capacity and expand awareness on conservation. Fishing has become deeply politicized as it is used to codify claims to disputed waters, making it very challenging to cooperate.

There are a number of good practices to build upon. The Sino-Vietnam Fisheries Agreement signed in 2000 was followed by protocol and preservation regulations in 2004. These established a joint fishing zone that is overseen by a Joint Fisheries Committee which is responsible for joint patrols. What has been learned is that coastal states should cooperate through the exchange of information and data on fisheries, aquaculture development, research activities, post-harvest cooperation, and food safety development. Collaboration is essential to prevent and combat IUU fishing, for the effective management of vessels and fishing control systems, and to address the seizure of fishing boats and their crews by coastal states.

Nguyen concluded by recommending that the ARF should encourage member states to comply with UNCLOS. The ARF should also promote preventive diplomacy to de-escalate potential conflicts between law enforcement agencies involved in living resource management – an opportunity to provide early warning on destabilizing unilateral actions. It should also facilitate the capacity building to combat IUU fishing and to develop common practices and rules on living resource management in contested waters.

In the discussion, it was noted that there was the need to focus on the matters from the recent ARF ISM on maritime security that focus on information-sharing and capacity-building of maritime law enforcement agencies. A greater use of port state controls should be emphasized to ensure ships are operating in accordance with regulations. A Southeast Asian participant underscored that the ASEAN working group on fisheries was chaired by Thailand, where they held a number of meetings on stock assessments for SCS fisheries. However, talking about resources in the SCS always entailed territorial sovereignty and jurisdiction. Ultimately Thailand could not move forward. Vietnam was also interested to study and promote cooperation on mineral resources in the SCS, but could not move forward beyond a few meetings. The reality is that countries have a difficult time controlling their own fisherman and overall it would be difficult to enforce.

It was acknowledged that despite several attempts to establish a cooperative mechanism to promote coordinated efforts in managing fisheries in the region, there has been little progress. At one point an effort was made to include the SCS in the Western and Central Pacific Fisheries Commission, but the Chinese objected to joining this cooperative mechanism. Meanwhile, Indonesia objected to having archipelagic waters in a cooperative mechanism. Nevertheless, Indonesia, Malaysia, and the Philippines have been able to cooperate on the Coral Triangle Initiative. Some believed this approach could be replicated in the SCS to promote conservation of resources and to protect corals. However, with more than one claimant in the SCS asserting exclusive EEZ rights to control all fishing in that area (keeping others out) will make it politically challenging. It must start with resolving the access issue.

The Japan-Taiwan fishing agreement in the East China Sea was held up as an example that might provide a workable solution. The key feature of the agreement is that it established a 12 nautical miles exclusionary zone Senkaku/Diayou – essentially treating the features as rocks – thereby avoiding any judgment on the territorial dispute over the land features. This has the potential to improve coordination in the larger maritime zones while avoiding the controversial areas. One concern raised was the presence of fisherman from Taiwan in regional waters creates some difficulty for broader cooperation, given its exclusion from most of the multilateral forums. With Taiwan being a claimant to maritime territory and a major fishing entity, it should be included in any cooperative mechanism.

Traditional fishing rights were also discussed as complicating issue. Indonesia has a Memorandum of Understanding with Australia covering Australian waters in the Timor Sea where Indonesian traditional fishers, using traditional fishing methods only, are permitted to operate. While this works fine in that region, it was acknowledged that such

an arrangement would be difficult to implement in the SCS. Problems include determining the area that is traditionally fished, traditional equipment to be used, who are the traditional fishermen, and what is the traditional catch.

A Southeast Asian participant noted that neither presentation mentioned the ASEAN Regional Center for Biodiversity, arguing that it could provide a platform to address cooperative resource management without focusing on sovereignty. Based on UNCLOS Article 61 and 62, coastal states should establish total allowable catch limits and to make harvesting limits known to those who are disadvantaged (landlocked). There is a continuing need to promote awareness among fisherman of requirements such as those on conservation and the utilization of living resources. Before states can address better enforcement, they need an understanding of the current state of government compliance.

With respect to managing maritime living resources, the group recommended that the ARF should:

- Develop a clearinghouse for good practices in fisheries management.
- Serve as a forum for confidence building by:
 - o Encouraging member states to interpret and comply with UNCLOS provisions.
 - o Defining the limits of contested waters.
- Engage in preventive diplomacy to reduce potential conflicts between agencies involved in managing access to living resources.
- Undertake a study to better understand traditional fishing rights.
- Build capacity for combating illegal, unreported, and unregulated fishing.
- Develop common practices and rules on living resources management in contested waters.
- Promote cooperation on search and rescue of fishermen in distress.

In addition, ARF member states should:

- Engage in bilateral fisheries management agreements with neighboring states.
- Build capacity to monitor and reduce IUU fishing.
- Improve cooperation between neighboring states to coordinate penalties for IUU.

In concluding comments, participants fully understood the sensitivities and difficulties associated with dealing in areas of overlapping or conflicting territorial claims. But these should not be used as an excuse for not complying with UNCLOS procedures or to not developing common approaches to managing the sea and its resources.

While this CSCAP dialogue was designed to be generic and to discuss UNCLOS in general, the overwhelming majority of discussion and examples of current challenges focused on the South China Sea (SCS). Cooperation in this area seems particularly urgent, given the upswing in confrontational behavior. While claimants argue over

sovereignty, fish stocks are dwindling, marine habitats are being destroyed, and good order at sea remains severely lacking. It was argued that a good starting point would be for ASEAN SCS claimants to set the example by addressing their own conflicting claims and by using available dispute settlement mechanism, such as the never-employed ASEAN Treaty of Amity and Cooperation (TAC) High Council.

Finally, ARF participants should also be aware of the *Principles for Building Confidence and Security in the Exclusive Economic Zones of the Asia-Pacific* produced in 2013 by the Ocean Policy Research Foundation. CSCAP may conduct a careful examination of the principles and guidelines contained in this document to further assess its relevancy to the ARF and Asia-Pacific maritime community, as part of its continuing effort to promote regional maritime security cooperation. CSCAP has a long record of working on issues related to maritime security. A list of CSCAP Memoranda pertaining to maritime cooperation is provided below. They can be downloaded from the CSCAP website at <http://www.cscap.org/index.php?page=publications>.

CSCAP Memoranda dealing with Maritime Security issues:

- No. 4: Guidelines for Regional Maritime Cooperation (Dec 1997)
- No. 5: Cooperation for Law and Order at Sea (Feb 2001)
- No. 6: The Practice of the Law of the Sea in the Asia Pacific (Dec 2002)
- No. 8: The Weakest Link? Seaborne Trade and the Maritime Regime in the Asia Pacific (Apr 2004)
- No. 12: Maritime Knowledge and Awareness: Basic Foundations of Maritime Security (Dec 2007)
- No. 13: Guidelines for Maritime Cooperation in Enclosed and Semi-Enclosed Seas and Similar Sea Areas of the Asia Pacific (July 2008)
- No. 16: Safety and Security of Offshore Oil and Gas Installations (Jan 2011)
- Forthcoming: Maritime CBMs, Trust & Managing Incidents at Sea\
- Forthcoming: Safety and Security of Vital Undersea Communications Infrastructure

The views expressed in this report represent the view of the workshop chairman and do not necessarily reflect the views of all seminar participants. They are offered as food for thought and further examination and reflection. For further information, please contact USCSCAP through PacificForum@pacforum.org or the primary authors, Ralph Cossa (Ralph@pacforum.org) and/or Carl Baker (Carl@pacforum.org).