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Emerging Issues under the UN Convention on the Law of the Sea for the Indian Ocean

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Abstract

The UN Convention on the Law of the Sea (UNCLOS) has provided the foundation of our rules-based order for the oceans for over 30 years. Its operation is challenged due to increasing demands from diverse users, and this phenomenon is particularly evident in the Indian Ocean. This Working Paper underlines the continued importance of UNCLOS for the Indian Ocean, and identifies a series of emerging issues and possible responses.

Keywords: Indian Ocean, UNCLOS, United Nations Convention on the Law of the Sea, Exclusive Economic Zone, Sri Lanka

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Abbreviations

| | |
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| UNCLOS | United Nations Convention on the Law of the Sea |
| EEZ | Exclusive Economic Zone |
| IMO | International Monetary Fund |
| ITLOS | International Tribunal for the Law of the Sea |
| IUU | Illegal, Unregulated and Unreported |
| UNODC | United Nations Office of Drugs and Crime |
| CLCS | Commission on the Limits of the Continental Shelf |
| ISPS | International Ship and Port Facility Security |

1. Introduction

The UN Convention on the Law of the Sea (UNCLOS or Convention) is often referred to as the ‘constitution of the oceans.’¹ UNCLOS seeks to delineate all ocean space into different maritime zones, and sets forth the rights and duties of States in relation to their activities within each of those maritime zones. Its importance is underscored by the fact that it has close to 170 States as parties, including 25 Indian Ocean States (see Annex A).² Many of its provisions are otherwise considered as reflecting customary international law. This *Working Paper* highlights the ongoing relevance of UNCLOS and a rules-based order for the Indian Ocean, even in the face of diverse emerging issues.

In Part 2, this Paper establishes UNCLOS and its relevance for Indian Ocean governance. Parts 3-5 address distinct issues that arise in different maritime zones: the high seas; the Exclusive Economic Zone (EEZ) and continental shelf; and the territorial sea. Part 6 considers issues pertaining to ports as addressed under UNCLOS and customary international law. Part 7 contemplates the avenues for dispute settlement should the rules-based order face challenges and States question the interpretation and application of UNCLOS by another State party in the Indian Ocean. While gaps and limitations to the operation of UNCLOS are identified, the Convention remains a critical element in the future of Indian Ocean governance.

As mentioned at the outset, 25 Indian Ocean States are parties to UNCLOS. Sri Lanka ratified UNCLOS on 19 July 1994, shortly before the Convention entered into force on 16 November 1994.³ The Convention was adopted in 1982 and Sri Lanka played an active role in the negotiation process, especially through the appointment of Shirley Amerasinghe, who served as the first President of the Third United Nations Conference on the Law of the Sea (1973 to 1980). Notably, in the Final Act of the Conference, Sri Lanka secured the adoption of a Statement of Understanding concerning the delimitation of its outer continental shelf in the Bay of Bengal.⁴

The negotiation of UNCLOS was a long, complex process that resulted in many compromises. Consequently, the text of the Convention reflects a careful balance between the demands of different States. One such balance is found between the exclusive rights of the coastal State, particularly for the exploitation of the ocean’s natural resources, and the inclusive or shared rights of other States that coexist with coastal States’ rights within some maritime zones, that are also protected on the high seas. For example, the freedom of navigation for other States exists in the EEZ of the coastal State but must be exercised with due regard for the rights of the coastal State. Freedom of navigation is also recognised as a right enjoyed by all States on the high seas, an area over which no State exercises

¹ Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press, 2010) page 12.

² United Nations Treaty Collection. (2019). Chapter XXI. Law of the Sea. [Online]. Available at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en [Accessed 3 May 2019].

³ *Ibid.*

⁴ Final Act of the Third United Nations Conference on the Law of the Sea, Annex II, Statement of Understanding Concerning a Specific Method to be Used in Establishing the Outer Edge of the Continental Margin.

sovereignty. Sri Lanka's Prime Minister has reaffirmed the fundamental importance of the freedom of navigation within the Indian Ocean.⁵

The Convention was intended 'to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea.'⁶ Yet questions arise as to whether UNCLOS is a perfectly worded and comprehensive instrument, given the compromises that had to be reached over nine years of negotiation. Moreover, in drafting and adopting UNCLOS, States had to acknowledge that there were existing international agreements—including treaties developed for the safety of shipping at the International Maritime Organization (IMO), as well as some treaties dealing with species protection or management⁷—that had a bearing on ocean matters and needed to sit within this new legal framework. UNCLOS accommodates these existing agreements within its terms, noting in the Preamble that 'matters not regulated by this Convention continue to be governed by the rules and principles of general international law.'

While UNCLOS remains the bedrock of ocean governance, new challenges require reflection on how a rules-based approach to international relations may be brought to bear — so as to strengthen the security, safety, and sustainability of activities in and around the Indian Ocean. In these circumstances, the ongoing interpretation and application of UNCLOS has raised issues in its operation, even though the Convention continues to serve as an indispensable instrument in ocean governance to ensure maritime safety and security into the future. Resolving outstanding issues through cooperation has the potential to advance prosperity, sustainability and stability in the Indian Ocean region within a rules-based approach.

2. Emerging Issues on the High Seas

The high seas comprise the maritime areas beyond national jurisdiction. The freedoms of the high seas recognised in Article 87 of UNCLOS include the freedoms of navigation, overflight, etc. These freedoms are essential in preserving sea lanes of communication between States to ensure the free movement of people and goods around the world. They are to be exercised with due regard for the interests of other States and with respect to activities on the deep seabed (the Area).

The Indian Ocean is one of the world's busiest East-West trade corridors and it is estimated that two-thirds of global oil shipments and a third of bulk cargo transits these waters.⁸ Sri Lanka has the potential to benefit from its geographic location and natural deep-water harbours as an important transit hub,

⁵ Lakshman Kadirgamar Institute. (2018). Navigating Challenges and Prospects in the Indian Ocean Towards a Shared Understanding, pp.15. [Online]. Available at:<http://www.indianoceanfuture.lk/wp-content/uploads/2019/04/Navigating-Challenges-and-Prospects-in-the-Indian-Ocean-Towards-a-shared-understanding.pdf#page=15> [Accessed 3 May 2019].

⁶ UNCLOS, Preamble page 25.

⁷ Gunasekera, D.M. (2018). Sri Lanka's Contribution to the Indian Ocean. [Online]. Daily News. Available at: <http://www.dailynews.lk/2018/10/12/features/165258/sri-lanka%E2%80%99s-contribution-indian-ocean> [Accessed 4 May 2019]

⁸ Panditaratne, D. and Wignaraja, G. (2019). Sri Lanka's Quest for a Rules-Based Indian Ocean.[Online]. East Asia Forum. Available at: <https://www.eastasiaforum.org/2019/01/31/sri-lankas-quest-for-a-rules-based-indian-ocean/> [Accessed 4 May 2019].

comparable to Dubai and Singapore.⁹ In addition to international commercial shipping benefitting from the freedom of navigation, the navies of the world also traverse the Indian Ocean. Sri Lanka has, for example, participated in maritime training programs with the US Navy.¹⁰ Navies from countries such as India, the United States, China, and Japan have all visited Sri Lankan ports in their voyages through the Indian Ocean.¹¹

The freedoms of the high seas have been modified by agreement between States, including within the Convention, as evident in obligations relating to the conservation and management of marine living resources under Articles 116-119, and in the right of visit under Article 110. Other international agreements have further delineated the obligations and rights of States in respect of specific activities on the high seas.¹² Yet at the core of these developments remains the concept that the high seas are a maritime domain of shared space over which no State exercises sovereignty;¹³ State powers are restricted to those vessels flying its flag and States must exercise effective jurisdiction and control over these vessels.

Flag State Responsibilities

Under UNCLOS, Article 94 sets out the duties of the flag State over its vessels. Article 94 requires every State to ‘effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.’ States do not always fully or rigorously implement these requirements so as to attract registration fees from vessel owners (sometimes referred to as open registries or flags of convenience).

Yet, there is an increasing trend to place more emphasis on flag State responsibilities. Article 94 has an inclusive list of measures ‘to ensure safety at sea’¹⁴ to deal with issues of seaworthiness, crew, collisions, and other related matters. The International Tribunal for the Law of the Sea (ITLOS) has considered that the ‘administrative’ matters over which flag States must exercise effective jurisdiction and control include those for the conservation and management of marine living resources.¹⁵ From Article 94(6), which requires a flag State to investigate and possibly remedy matters reflecting a failure to exercise effective jurisdiction and control, ITLOS considered this responsibility would also arise in relation to coastal State reports of illegal, unregulated, and unreported (IUU) fishing activities.¹⁶

⁹ De Zylva, A. and Wignaraja, G. (2018). Is Sri Lanka Sitting on the Bench of Asia’s Booming Digital Economy? [Online]. Lakshman Kadirgamar Institute. Available at: <https://www.lki.lk/publication/is-sri-lanka-sitting-on-the-bench-of-asias-booming-digital-economy/> [Accessed 3 May 2019].

¹⁰ Markar, M.M. (2018). China and US Play the Great Game in South Asia.[Online]. Nikkei Asian Review Available at: <https://asia.nikkei.com/Politics/International-relations/China-and-US-play-the-Great-Game-in-South-Asia> [Accessed 2 May 2019]

¹¹ Ibid.

¹² See e.g. United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 August 1995, 2275 UNTS 43 (entry into force 11 December 2001).

¹³ UNCLOS, Art 89.

¹⁴ UNCLOS, Art 94(2) and (3).

¹⁵ Request for an Advisory Opinion from the Sub-Regional Fisheries Commission, 2 April 2015, ITLOS Reports 2015, p. 4, para. 119.

¹⁶ Ibid, para. 139.

While Article 94 is seemingly only applicable to vessels when operating on the high seas pursuant to Article 86, flag State duties under Article 94 have also been held to apply within the territorial seas.¹⁷ Flag State responsibilities may also be augmented through other international instruments, including where the protection of human rights for those on board vessels has received greater scrutiny.¹⁸

Maritime Security

Steps taken by littoral States will only advance shared interests in the Indian Ocean to a limited extent, given that vessels flagged to many different States traverse these waters. Exclusive flag State authority over vessels has also had important implications in the fight against transnational crime at sea. While States have powers to investigate crimes committed within their territorial sea or in port, investigation and prosecution of crimes at sea may be important to interrupt trafficking routes and halt shipments of illicit substances (including drugs, weapons, or fish caught in violation of international obligations). If State authorities seek to take action against a vessel flagged to another State outside areas of national jurisdiction, they need the consent of the flag State. This consent may be pre-existing in an international agreement but must otherwise be obtained on an ad hoc basis. Policing activities may be hindered, or rendered ineffective, if timely consent is not obtained.

Sri Lanka hosts the Maritime Crime Program of the United Nations Office of Drugs and Crime, which focuses on improving State responses to illicit activity at sea through different capacity building exercises. Sri Lanka itself is actively engaged in policing efforts within the Indian Ocean with the support of States such as the United States, Japan, and China.¹⁹ Sri Lanka has also taken steps to implement international requirements to respond to maritime crime through its Piracy Act (No. 9 of 2001) and the Suppression of Unlawful Acts against the Safety of Maritime Navigation Act (No. 42 of 2000). Sri Lanka has not yet become party to the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, which would extend the range of offences over which Sri Lanka could exercise jurisdiction, and enhance its policing abilities against vessels flagged to other State parties.

Improving mechanisms to obtain consent from flag State officials will enhance efforts to combat transnational crime. Developing procedures or guidelines for contacting relevant State officials to obtain consent for boarding, and for subsequent action as needed, may facilitate law enforcement operations in fighting transnational crime. A coordinated approach for policing vessels without nationality (stateless vessels) could further be identified in terms of permissible steps to board, inspect, and potentially arrest individuals on board, particularly if the nationals on board these vessels are from Indian Ocean littoral States.

¹⁷ As evident in the application of the COLREGS to an incident occurring in the territorial sea as discussed in the South China Sea Arbitration.

¹⁸ Such as the 2006 Maritime Labour Convention, 23 February 2006, 2952 UNTS __; 45 ILM 792 (2006) (entry into force 20 August 2013).

¹⁹ The Japan Times. (2018). Japan Vows to Help Boost Sri Lanka Maritime Security as China Makes Inroads. [Online]. Available at <https://www.japantimes.co.jp/news/2018/08/22/national/politics-diplomacy/japan-vows-help-boost-sri-lanka-maritime-security-china-makes-inroads/#.XlIx7SIzaUk> [Accessed 2 May 2019]; Panda, Ankit. (2014). Japan and Sri Lanka Enhance Maritime Cooperation. [Online]. The Diplomat. Available at: <https://thediplomat.com/2014/06/japan-and-sri-lanka-enhance-maritime-cooperation/> [Accessed 3 May 2019].

3. Emerging Issues in relation to the Exclusive Economic Zone (EEZ) and Continental Shelf

In the EEZ, UNCLOS provides in Article 56 that the coastal State enjoys sovereign rights for the purpose of exploring, exploiting, conserving, and managing the natural resources in this maritime area, as well as exclusive jurisdiction over the protection and preservation of the marine environment, the establishment and use of artificial islands, installations and structures, and marine scientific research. These rights are to be exercised with due regard for the rights of other States. Article 58 provides that other States continue to enjoy the freedoms referred to in Article 87 and ‘other internationally lawful uses of the sea related to these freedoms.’ In the exercise of these rights, other States must demonstrate due regard for the rights of the coastal State and comply with the provisions of the Convention and other rules of international law that are compatible with the EEZ regime in UNCLOS.²⁰

Fisheries

To ensure the sustainable development and use of resources within the Indian Ocean, coastal States will need to incorporate ecosystem-based management approaches to the conservation and management of fish resources. While littoral States are seeking to regulate fisheries within their jurisdiction, enforcing those laws can be challenging, especially where maritime zones are large and pose surveillance challenges for proper monitoring and control. This issue has already emerged in the Pacific Ocean and is coming under increasing scrutiny within the Indian Ocean.

Sri Lanka has sought to improve its enforcement of its fisheries regulations, consistent with the rights and responsibilities accorded to coastal States in their EEZs under UNCLOS. Sri Lanka adopted a new law in 2017 to empower the Sri Lankan Navy to arrest foreign fishers and their trawlers, as well as destroy fishing nets left within Sri Lankan waters.²¹ Sri Lanka further adopted an amendment to its Fisheries and Aquatic Resources Act, banning bottom-trawling fishing in its waters. Each coastal State has exclusive rights within its EEZ to conserve and manage the marine living resources, and failures of other States to regulate their fishing industries consistent with these rights may constitute violations of UNCLOS.

Coastal State law enforcement, especially with regards to fishing, remains a critical concern. Coastal States may seek to coordinate efforts at monitoring, control, and surveillance, especially for the conservation and management of straddling stock and highly migratory species. For the latter species, States are to cooperate to ensure their conservation and management. There is scope to build on inspection regimes anticipated under the 1995 Fish Stocks Agreement and under regional fisheries agreements (the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region 1992 may be a model to consider for the Indian Ocean). In addition, management

²⁰ UNCLOS, Art 58(3).

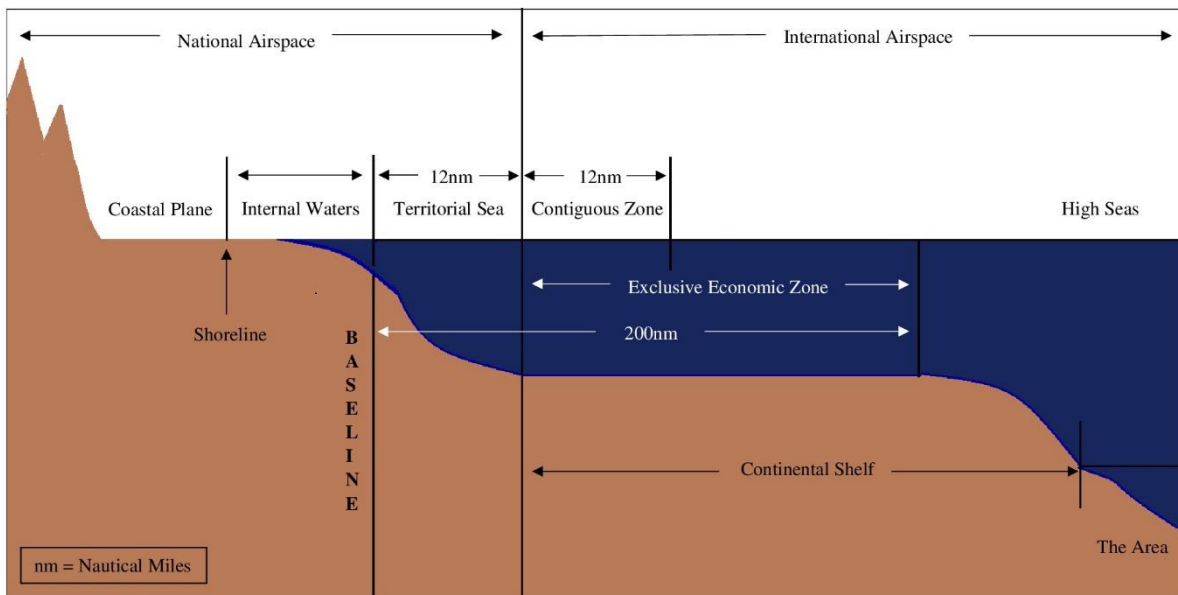
²¹ Scott, D.J. Walter. (2018). Why are Several TN Fishermen in Trouble with the Sri Lankan Navy? [Online]. The Hindu. Available at: <https://www.thehindu.com/news/national/tamil-nadu/why-are-several-tn-fishermen-in-trouble-with-the-sri-lankan-navy/article22716002.ece> Accessed 2 May 2019; Nath, Akshaya. (2018). Indian Fishermen being Charged under Sri Lanka’s New Fishing Law Want to be Pardoned, [Online]. India Today. Available at: <https://www.indiatoday.in/india/story/indian-fishermen-being-charged-under-sri-lanka-s-new-fishing-law-want-to-be-pardoned-1284351-2018-07-12> [Accessed 2 May 2019]

efforts will be enhanced through sharing scientific data and information about the status of fish stocks, the marine environment, or in relation to suspected unlawful fishing activity. Procedures or guidelines may be needed to facilitate communication between relevant State authorities and develop coordinated approaches to this issue.

Continental Shelf

Every coastal State under UNCLOS is entitled to claim sovereign rights over the continental shelf extending off its coast up to 200 nautical miles.²² Article 76 of UNCLOS further anticipates that coastal States may claim more extensive continental shelf rights where specific criteria about the continental shelf are demonstrated. These claims are assessed by the Commission on the Limits of the Continental Shelf (CLCS), which is established under Article 76(8) of UNCLOS and operates in accordance with Annex II of UNCLOS. The CLCS makes recommendations as to the possible limits of the outer continental shelf based on the coastal State demonstrating that the conditions for such recognition are met in accordance with Article 76 of UNCLOS. After the CLCS has made its recommendations, the coastal State may declare the outer limits of its continental shelf, and those limits become final and binding. Where there is any dispute between neighbouring States in relation to a maritime boundary, it is incumbent on the States concerned to negotiate an agreement, or potentially submit a joint application to the CLCS, as the CLCS will not make any recommendations in relation to disputed maritime areas.

Figure 1: Maritime Zones



Sri Lanka has claimed its maritime zones, including a continental shelf, under the Maritime Zones Law (No. 22 of 1976), and further regulates the exploration of oil and gas within Sri Lankan waters under the Petroleum Resources Act (No. 26 of 2003). In 2009, Sri Lanka submitted its claim to an extended

²² Article 76, UNCLOS

continental shelf to the CLCS.²³ This claim will need to be assessed against the Statement of Understanding adopted in the Final Act of the Third Conference on the Law of the Sea. Establishing these limits is important for Sri Lanka when it is recalled that 40% of the world's offshore oil production comes from the Indian Ocean.²⁴

The Statement of Understanding allows for the possibility that an outer edge of the continental margin may be established through the use of straight lines of 60 nautical miles in length where the thickness of sedimentary rock is not less than one kilometre. This exception deviates from the requirements as set out in Article 76(5), which would have otherwise resulted in Sri Lanka losing an entitlement to an outer continental shelf. In accommodating Sri Lanka in this regard, it was further agreed that a neighbouring State could use the same method 'on a common geological feature ... along which the mathematical average of the thickness of sedimentary rock is not less than 3.5 kilometres.' India's possible claims are thus accounted for in this way under the Statement of Understanding.

Ultimately, the precise parameters of Sri Lanka's outer continental shelf claim will be assessed through the CLCS. If Sri Lanka does not agree with the recommendations of the CLCS, the only recourse anticipated under the Convention is that Sri Lanka may make a revised or new submission.²⁵ It must do so 'within a reasonable time.'²⁶ Any maritime boundary delimitation agreements will then need to be negotiated based on the recognition of Sri Lanka's claim to this area. The Convention provides that the actions of the CLCS are not to prejudice matters relating to maritime boundary delimitations between States with opposite or adjacent coasts.²⁷

²³ United Nations Division for Ocean Affairs and the Law of the Sea. (2010) Commission on the Limits of the Continental Shelf (CLCS)

Outer limits of the continental shelf beyond 200 nautical miles from the baselines:

Submissions to the Commission: Submission by the Democratic Socialist Republic of Sri Lanka.[Online].Available at: https://www.un.org/Depts/los/clcs_new/submissions_files/submission_lka_43_2009.htm [Accessed 3 May 2019].

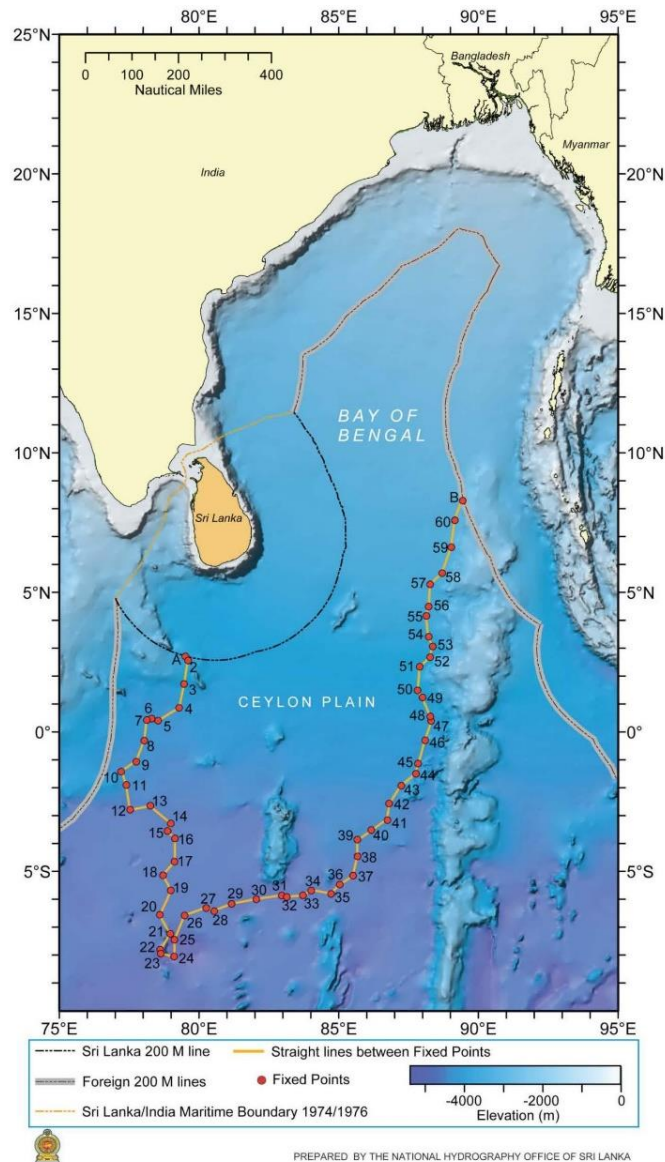
²⁴ Lakshman Kadirgamar Institute. (2018). *Navigating Challenges and Prospects in the Indian Ocean Towards a Shared Understanding*. [Online]. Available at: <http://www.indianoceanfuture.lk/wp-content/uploads/2019/04/Navigating-Challenges-and-Prospects-in-the-Indian-Ocean-Towards-a-shared-understanding.pdf> [Accessed 3May 2019].

²⁵ UNCLOS, Annex II, Art. 8.

²⁶ UNCLOS, Annex II, Art. 8.

²⁷ UNCLOS, Annex II, Art. 9.

Figure 2: Prepared by the National Hydrography of Sri Lanka



Military Activities in the EEZ

Maintaining the freedom of navigation within the EEZ as enshrined in UNCLOS remains of critical economic importance to support the movement of international cargo. Military vessels also enjoy the freedom of navigation within the EEZ. Conflicting views have emerged as to what military activities are permissible by military vessels flagged to a third State within the EEZ of a coastal State. As noted, Article 58 refers to the freedom of navigation and ‘other internationally lawful uses of the sea related to these freedoms.’ Some States interpret this provision to allow all military activities, including surveillance and training exercises. Others take the position that not all military activities by another State are permissible within its EEZ. No authority is granted to the coastal State to regulate military activities under Article 56 of UNCLOS.

What is important to recall in this debate is that States are prohibited from the threat or use of force against the territorial integrity or political independence of another State. This obligation, enshrined in article 2(4) of the UN Charter, is set out in UNCLOS in Article 301. Moreover, Article 88 preserves the high seas for peaceful purposes and this provision applies in the EEZ so far as it is not incompatible with the EEZ regime. Whether particular military activities arise to a threat or use of force in violation of Article 301 must then be assessed on a case-by-case basis depending on the particular activities and the relationship between the States concerned.

Given the ongoing debate as to whether foreign flagged vessels may undertake military activities within the EEZ, it is important to define and emphasise the limits on these activities in relation to the prohibition of the threat or use of force that applies and is recognised under UNCLOS.

4. Emerging Issues in Relation to the Territorial Sea

The territorial sea, which includes its bed, subsoil and the airspace above it, is subject to the sovereignty of the coastal State, with the exception of the right of innocent passage, other provisions of the Convention, as well as ‘other rules of international law.’²⁸ In the *Chagos Archipelago* arbitration, the Tribunal considered that ‘other rules of international law’ was intended to refer to general international law rather than specific bilateral commitments between States.²⁹ The *Chagos Archipelago* Tribunal determined that general international law required the UK to act in good faith in its relations with Mauritius with regard to the exercise of sovereignty over the territorial sea.

The right of innocent passage involves continuous and expeditious passage where the vessel does not enter the internal waters or ports of the coastal State.³⁰ To be innocent, the passage must not prejudice the peace, good order or security of the coastal State,³¹ and UNCLOS identifies a list of inclusive activities that may be considered prejudicial, including the loading or offloading of any commodity, fishing activities, or any research or survey activities.³² The coastal State, therefore, has a large measure of discretion in determining what violates the peace, good order or security of its territory.

In the event the coastal State determines that a vessel is in violation of the right of innocent passage, the responses of the coastal State are limited under Article 25 to taking steps to prevent any passage that is not innocent.³³ In addition, the coastal State may exercise criminal jurisdiction in accordance with Article 27 and limited civil jurisdiction under Article 28 over merchant vessels on commercial service. The coastal State must not otherwise hamper the innocent passage of foreign vessels through its territorial sea. Where the coastal State is not permitted to take action, the flag State instead has authority to respond to issues in relation to its vessels. Coastal State action against warships is limited to requiring the warship to leave the territorial sea immediately if the warship does not comply with

²⁸ UNCLOS, Art. 2.

²⁹ *Chagos Marine Protected Area Arbitration, Mauritius v United Kingdom, Final Award, ICGJ 486 (PCA 2015)*, 18th March 2015, para. 516. Judges Kateka and Wolfrum dissented on this limitation to Article 2(3). See *ibid*, Dissenting and Concurring Opinion, para. 94.

³⁰ UNCLOS, Art 18.

³¹ UNCLOS, Art 19(1).

³² UNCLOS, Art 19(2).

³³ UNCLOS, Art 25(1).

the coastal State's laws and regulations concerning passage through its territorial sea.³⁴ Therefore, while the coastal State has sovereignty over its territorial sea, it is constrained in what actions it might take that limit the rights of passage of foreign-flagged vessels through its waters.

Moreover, the coastal State is only entitled to limit the right of innocent passage through a temporary suspension in specified areas of the territorial sea if essential for the protection of the coastal State's security. This suspension must not discriminate in form or in fact among foreign ships.³⁵ The coastal State is allowed to introduce some regulations over the passage of vessels, including traffic separation schemes,³⁶ and must usually ensure that regulations relating to navigation align with international agreements or standards.³⁷ Any interference with passage must therefore be consistent with the requirements of UNCLOS, and the international agreements alluded to in its provisions.

The extent of protection afforded to navigational rights in the territorial sea is carefully defined within UNCLOS and must be respected to ensure that the balance between the rights of the coastal States and the rights of third States are maintained. Coastal States should ensure that their bases for exercising jurisdiction against foreign-flagged vessels are clearly defined in domestic legislation, and that the limitations on the exercise of jurisdiction as set out in UNCLOS continue to be respected to ensure unimpeded passage to facilitate international trade while still protecting the maritime safety and security of the coastal State.

5. Emerging Issues in Relation to Ports

Article 11 of UNCLOS does not specifically define ports, but to the extent they are to be utilised for delimiting the territorial sea, ports are considered as 'permanent harbour works' and are regarded as forming part of the coast. As part of the coast, States have sovereignty over ports located within their territory,³⁸ and may control what vessels enter their ports and under what conditions.

Ports are largely unregulated under UNCLOS, with the exception of indicating the relevance of ports for the purposes of delimiting the territorial sea,³⁹ and providing for the exercise of port state jurisdiction for the purposes of enforcing requirements relating to the protection and preservation of the marine environment.⁴⁰

Access to ports is predominantly a matter of customary international law or is otherwise regulated by separate agreements.⁴¹ In prescribing conditions for entry, States are entitled to regulate their ports consistent with their national interests. For example, the International Ship and Port Facility Security

³⁴ UNCLOS, Art. 30

³⁵ UNCLOS, Art. 25(3).

³⁶ See UNCLOS, Art 22.

³⁷ UNCLOS, Art 21.

³⁸ Robin R Churchill & A Vaughn Lowe, *The Law of the Sea* (3rd ed, 1999) 61.

³⁹ UNCLOS, Art 11.

⁴⁰ UNCLOS, Art 218 and 211(3). Article 98(1)(c) refers to ports in the context of the duty to render assistance and provision of information as to the journey of a ship involved in a collision.

⁴¹ Note in this regard that Article V of the GATT (1994, Freedom of Transit) provides for freedom of transit of goods, vessels and other means of transport across the territory of WTO members via the routes most convenient for international transit. Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press, 2010)

(ISPS) Code allows States to put in place notice requirements regarding the entry of a vessel into port as part of a suite of measures to reduce the likelihood of a terrorist attack against a port.⁴² The Port State Measures Agreement allows States to set requirements and restrictions on fishing vessels seeking entry into port so as to prevent, deter, and eliminate IUU fishing.⁴³

If access of a vessel to a port is restricted because of environmental risks associated with that vessel, different IMO treaties may be at issue but Article 211(3) of UNCLOS may also be invoked. This provision anticipates that States will ‘establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their offshore terminals.’ In doing so, a State is required to give due publicity to any such requirements and communicate them to the IMO, as the relevant competent intergovernmental organisation.⁴⁴ Article 218 of UNCLOS permits the exercise of port state jurisdiction over polluting vessels.

In relation to the rights and obligations that a State may exercise over any vessels that enter its ports, this legal authority is also governed by customary international law and treaties other than UNCLOS. To this end, McDougal and Burke have noted:

*It is universally acknowledged that once a ship voluntarily enters port it becomes fully subject to the laws and regulations prescribed by the officials of that territory for events relating to such use and that all types of vessels, military and other, are in common expectation obliged to comply with the coastal regulations about proper procedures to be employed and permissible activities within internal waters.*⁴⁵

Exceptions to this authority apply in relation to vessels that have entered the port in distress,⁴⁶ vessels subject to sovereign immunity,⁴⁷ and in relation to the inapplicability of local labour laws.⁴⁸

It is the right of the coastal State, as a corollary of the principle of state sovereignty,⁴⁹ to close a port to foreign shipping. Ports may be closed to safeguard good order on shore, to signal political displeasure, or to defend ‘vital interests.’⁵⁰ To the extent a foreign company is operating a port, the coastal State retains its sovereignty over the port. This is the case in relation to the Sri Lankan harbours of Trincomalee, Hambantota, and Colombo. It is incumbent on Sri Lanka to maintain or establish its regulatory powers over a port to ensure that it is able to adhere to its international obligations and

⁴² Ibid. 158-162 (discussing the ISPS Code).

⁴³ Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing, signed 22 November 2009, entered into force 5 June 2016, UNTS Registration No. I-54133. See discussion in Klein, Maritime Security, above n 24, 72.

⁴⁴ UNCLOS, Art 211(3).

⁴⁵ Myres S McDougal & William T Burke, *The Public Order of the Oceans* (1962) 156.

⁴⁶ Stuart Kaye, ‘The Proliferation Security Initiative in the Maritime Domain; (2005) 35 *Israel Yearbook of Human Rights* 205,

⁴⁷ See UNCLOS, Art 32 and Art 95.

⁴⁸ Kaye, above n 47, 210-211.

⁴⁹ Justin S.C. Mellor, ‘Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism’ (2002) 18 *American University International Law Review* 341, 393. See also A.V. Lowe, ‘The Right of Entry into Maritime Ports in International Law’ (1977) 14 *San Diego Law Review* 597, 607.

⁵⁰ Natalie Klein, above n 2, 67.

preserve its rights to control access to its ports consistent with those obligations or otherwise, in exercise of its sovereignty.

The sovereignty of the coastal State may be limited by international agreements promoting transit for the purposes of international trade, but the authority of the coastal State has been recognised for matters relating to maritime safety and security, specific law enforcement operations, and marine environmental protection.

6. Resolving Disputes under UNCLOS

When a State becomes party to UNCLOS, it agrees to settle all disputes relating to the interpretation and application of that Convention by peaceful means. In the event a dispute arises, States are to proceed expeditiously to an exchange of views on the possible means of dispute settlement and may consider a variety of peaceful mechanisms to resolve their differences. In the event the dispute cannot be settled by negotiations or these other means, a State party may initiate arbitration or adjudication. If a State party has not selected a preferred forum in advance for arbitration or adjudication, as is the case with Sri Lanka, or the States have selected different forums, the matter will be resolved through ad hoc arbitration.

A small number of disputes are excluded from these compulsory dispute settlement procedures, which primarily relate to the coastal State's exercise of jurisdiction over its fisheries and over marine scientific research in its EEZ. Under Article 298 of UNCLOS, State parties may also opt to exclude certain specific disputes, such as certain maritime boundary disputes, disputes relating to military activities, and disputes over historic bays and title. A declaration must be submitted to this effect. Sri Lanka has not opted to exclude any disputes under Article 298, but may elect to do so in the future.

Not every maritime dispute will fall within the dispute settlement procedures of the Convention. Rather, the dispute must be one that relates to the interpretation or application of UNCLOS. If another treaty is at issue, or the dispute relates to customary international law (such as in relation to the exercise of some rights over ports), the dispute would fall outside the subject matter jurisdiction of any court or tribunal constituted under UNCLOS. It falls to the court or tribunal constituted under UNCLOS to decide if it has jurisdiction or not. Any decision resolving an UNCLOS dispute is final and binding between the parties to that dispute.

7. Conclusion

The ongoing importance of UNCLOS for the Indian Ocean lies not only in its strong foundations for regulating conduct and setting parameters around demands about ocean use, but also in its future prospects to provide a vital framework for new uses, changing priorities, and reconciling differences. For Sri Lanka, lying in the heart of the Indian Ocean, there is significant potential to continue shaping the interpretation and application of the Convention so as to ensure adherence to the rules-based order by all States with an interest in the Indian Ocean.

Annex A - Indian Ocean State Parties to UNCLOS⁵¹

| <i>Country</i> | <i>Date of Signature</i> | <i>Date of Ratification</i> |
|----------------|--------------------------|-----------------------------|
| Australia | 10-Dec-82 | 5-Oct-1994 |
| Bangladesh | 10-Dec-82 | 27-Jul-01 |
| Brunei | 05-Dec-84 | 05-Nov-96 |
| Cambodia | 01-Jul-83 | - |
| Comoros | 06-Dec-84 | 21-Jun-94 |
| India | 10-Dec-82 | 29-Jun-95 |
| Indonesia | 10-Dec-82 | 03-Feb-86 |
| Iran | 10-Dec-82 | - |
| Kenya | 10-Dec-82 | 02-Mar-89 |
| Madagascar | 25-Feb-83 | 22-Aug-01 |
| Malaysia | 10-Dec-82 | 14-Oct-96 |
| Maldives | 10-Dec-82 | 07-Sep-00 |
| Mauritius | 10-Dec-82 | 04-Nov-94 |
| Mozambique | 10-Dec-82 | 13-Mar-97 |
| Myanmar | 10-Dec-82 | 21-May-96 |
| Oman | 01-Jul-83 | 17-Aug-89 |
| Pakistan | 10-Dec-82 | 26-Feb-97 |
| Seychelles | 10-Dec-82 | 16-Sep-91 |
| Singapore | 10-Dec-82 | 17-Nov-94 |
| Somalia | 10-Dec-82 | 24-Jul-89 |
| South Africa | 05-Dec-84 | 23-Dec-97 |
| Sri Lanka | 10-Dec-82 | 19-Jul-94 |
| Tanzania | 10-Dec-82 | 30-Sep-85 |
| Thailand | 10-Dec-82 | 15-May-11 |
| Timor-Leste | - | 8-Jan-13 (Accession) |
| UAE | 10-Dec-82 | - |
| Vietnam | 10-Dec-82 | 25-Jul-94 |
| Yemen | 10-Dec-82 | 21-Jul-87 |

⁵¹ United Nations Division for Ocean Affairs and the Law of the Sea. (2019). Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements. [Online]. Available at: <https://bit.ly/2QgKvSK> [Accessed 2 May 2019].

| <i>*Signature and Ratification of UNCLOS by major users of Indian Ocean</i> | | |
|---|-------------|-------------|
| China | 10-Dec-1982 | 7-Jun-1996 |
| Japan | 7-Feb-1983 | 20-Jun-1996 |
| United States | - | - |

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