

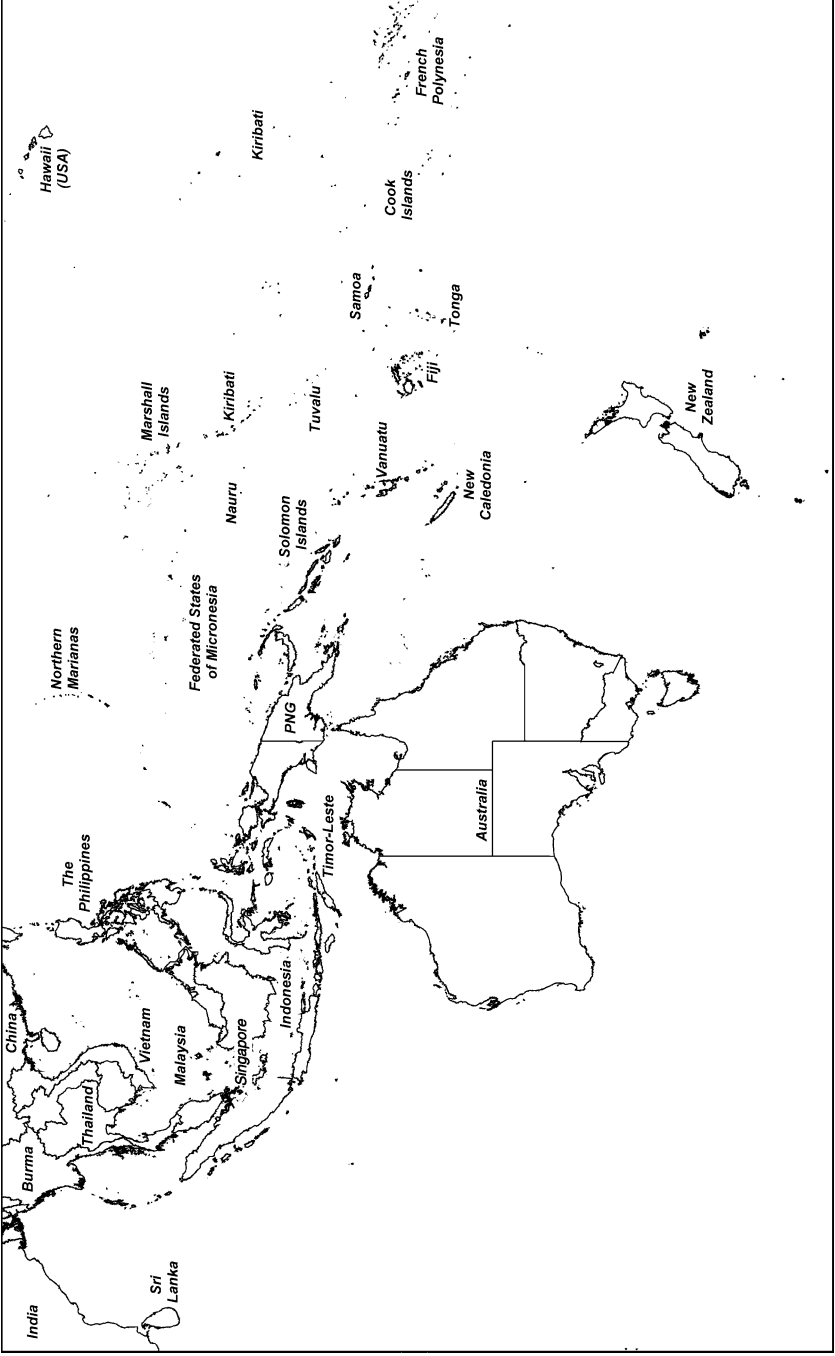
Maritime Security

International Law and Policy
Perspectives from Australia
and New Zealand

Edited by

**Natalie Klein, Joanna Mossop
and Donald R. Rothwell**





Australia and New Zealand in the Asia Pacific.

Maritime Security

Maritime security is of vital importance to Australia and New Zealand, as both countries depend on maritime transport for their economic survival. Since the events of 11 September 2001 serious questions have been raised as to whether Australia and New Zealand are adequately prepared for the consequences of a major disruption of global shipping following a terrorist attack on a leading regional port such as Hong Kong or Singapore. Considerable efforts have been undertaken to improve responses to an array of maritime security threats, such as transnational crime, environmental pollution and piracy and armed robbery.

This volume identifies the issues that particularly affect Australia and New Zealand's maritime security, evaluating the issues from legal and political perspectives, and proposes methods for improving the maritime security of the two countries. While the focus is primarily on Australia and New Zealand, the scope extends to regional considerations, addressing matters related to Pacific island states, South East Asia and the Antarctic and sub-Antarctic regions. The book also addresses strategic partnerships, examining the influence of the United States, and analyses issues within the broad framework of international law and politics.

Maritime Security: International Law and Policy Perspectives from Australia and New Zealand will be of great interest to scholars of international law, international relations and maritime affairs, maritime industry professionals, private and government lawyers, as well as diplomats, consuls and government officials.

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Preface

This volume reflects the work of the Trans-Tasman Maritime Security Project, which comprises a group of Australian and New Zealand scholars with backgrounds in international law, international relations and maritime security. Our aim has been to identify the issues that particularly affect Australia and New Zealand's maritime security and to undertake research that evaluates those issues from legal and political perspectives, and propose methods for improving maritime security in the two countries. While the focus of the work is Australia and New Zealand, the scope extends to regional considerations (addressing matters related to Pacific island states, South East Asia and the Antarctic and sub-Antarctic region), strategic partnerships (in examining the influence of the United States) and analyses issues within the broad framework of international law and politics (as opposed to a purely domestic focus).

In seeking to develop a better understanding of maritime security issues that face Australia and New Zealand, and make proposals for improving maritime security, two workshops were held involving the Project participants as well as government officials and security analysts to act as commentators and critics and to provide operational expertise. This interaction has enabled the Project participants to focus on topics of concern to those dealing with maritime security issues on a daily basis and to ensure that their analyses are informed by the practical and policy considerations of both Australian and New Zealand governments. In addition, the recommendations for improving maritime security set forth in the different chapters are intended to respond to the particular concerns highlighted at the workshops and in ensuing communications with relevant officials. The analyses provided by Project participants are therefore intended to combine rigorous scholarly examination with operational realities.

A key issue for this project was defining 'maritime security' and what that meant for Australia and New Zealand. Another key question was whether there was a distinctive Trans-Tasman or shared Australian and New Zealand perspective on these matters. Ultimately the Project participants were of the view that 'maritime security' extended beyond concerns related to terrorism and the proliferation of weapons of mass destruction to issues of environmental and economic security. A broad perspective is therefore taken throughout this work as to what constitutes maritime security. We also explore why legal and

policy perspectives in relation to maritime security are of particular importance. Justification is also provided as to why it is important to consider an Australian and New Zealand (or Trans-Tasman) dimension on maritime security, addressing the relevant concerns and actions of each state, and where and why similarities and differences in approaches to maritime security exist. The distinct geographic setting of Australia and New Zealand further permits an exploration of each state's regional and global interactions, allowing consideration of maritime security concerns stretching across an expansive maritime domain.

In the initial development of this project the editors wish to express their thanks to a number of colleagues who contributed to its conceptualization. In addition to the core members of the Project team, who all contributed ideas to the development of the project, Professor Campbell McLachlan (Victoria University of Wellington), Professor Martin Tsamenyi (University of Wollongong) and Professor Kim Rubenstein (Australian National University) at an early stage provided commitments of institutional support which ultimately made the project possible. We should also acknowledge an intellectual debt to the Australia and New Zealand Society of International Law (ANZSIL), which as an association dedicated to the promotion of international law scholarship in both Australia and New Zealand has provided the impetus for Trans-Tasman scholarship in the general field of international law over the past decade.

The editors would particularly like to thank the New Zealand Centre for Public Law, Victoria University of Wellington, the Centre for International and Public Law, Australian National University, and the Macquarie Law School, Macquarie University, for financial support of the Trans-Tasman Maritime Security Project. This Project entailed workshops held in Wellington in July 2007 and in Canberra in June 2008, as well as the production of this volume.

The editors gratefully acknowledge the financial support provided by the New Zealand Ministry of Foreign Affairs and Victoria University of Wellington for the Wellington workshop. We would also like to thank participants from Maritime New Zealand, the Royal New Zealand Navy, the New Zealand Ministry of Foreign Affairs and Trade, the National Maritime Coordination Centre, the New Zealand Ministry of Transport, New Zealand Customs Service and the Ministry of Fisheries who attended the workshop. Their comments and suggestions provided valuable guidance to the participants in the Project.

We also gratefully acknowledge the financial assistance provided by the John Fleming Centre for the Advancement of Legal Research, and the Centre for International and Public Law, ANU College of Law, for their support of the Canberra workshop. Our thanks to representatives from the Australian Department of Defence, the Australian Defence Force Academy, Border Protection Command, the Seapower Centre, the Australian Maritime Safety Authority, the Australian Attorney-General's Department and the National Maritime Coordination Centre in New Zealand for attending the workshop and providing valuable commentary on our work. We would also like to thank the following colleagues for their attendance and comments at the workshop: Rachel Baird, Mike Buky, Owen

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We also extend our thanks to all of our Australian and New Zealand colleagues who made up the core project team for the Trans-Tasman Maritime Security Project, who so enthusiastically contributed to and supported this project, as well as their respective institutions, which provided travel funding and assistance, enabling each participant to attend the workshops. We are particularly grateful to Professor Stuart Kaye for his time and attention in producing the maps for this book.

Finally, we would like to thank Sonali Seneviratne, a graduate of Macquarie Law School, for her excellent editorial assistance in the preparation of this volume.

Natalie Klein, Sydney
Joanna Mossop, Wellington
Donald R. Rothwell, Canberra
31 March 2009

1 Australia, New Zealand and Maritime Security

*Natalie Klein, Joanna Mossop and
Donald R. Rothwell*

Any consideration of the maritime security dimension of a single state raises multiple issues. A consideration of the maritime security dimensions of two states expands that consideration considerably. In the case of Australia and New Zealand there are, however, connecting threads which make that consideration not only possible but also sensible. Evans and Grant argued in 1995 that ‘Australia and New Zealand are as close as two countries that almost became one could be’,¹ and whilst there have been some emerging distinctions between the two countries over the past decade, principally as a result of Australia’s growing multiculturalism, the historic and contemporary political, economic and social ties remain as strong as they have ever been.² Australia and New Zealand have a long history of close economic integration, and in early 2009 these mutually shared interests were once again highlighted by the conclusion of the *ASEAN–Australia–New Zealand Free Trade Agreement (AANZFTA)*,³ reflecting the joint trading interests of both countries with South East Asia.⁴

In the South West Pacific, Australia and New Zealand are the two largest states in land size, population, economies, and their maritime domain. As countries with

- 1 G. Evans and B. Grant, *Australia’s Foreign Relations*, 2nd ed., Carlton: Melbourne University Press, 1995, p. 177.
- 2 For example, in February 2009 the Australian Foreign Minister, S. Smith, stated, ‘Australia’s relations with New Zealand are the closest and most comprehensive we have with any country, reflecting our shared history, geography, common values and institutions, and extensive economic and other ties’: Hon. S. Smith MP, Australian Minister for Foreign Affairs, ‘Diplomatic Appointment: High Commissioner to New Zealand’, Media Release, 25 February 2009, available online at www.foreignminister.gov.au/releases/2009/fa-s026_09.html.
- 3 *Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area*, 12 February 2009, available online at www.aseansec.org/22260.pdf.
- 4 Hon. S. Crean MP, Australian Minister for Trade, ‘Australia Signs Historic Regional Free Trade Agreement’, 27 February 2009, available online at www.trademinister.gov.au/releases/2009/sc_017.html. For a history of the negotiation of the *Australia–New Zealand Closer Economic Relations Trade Agreement*, 28 March 1983, [1983] ATS 2, and subsequent developments, see S. Hoadley, *New Zealand and Australia: Negotiating Closer Economic Relations*, Wellington: New Zealand Institute of International Affairs, 1995. ASEAN is the Association of South East Asian Nations, comprising Indonesia, Malaysia, the Philippines, Singapore, Thailand, Brunei Darussalam, Vietnam, Lao PDR, Myanmar and Cambodia.

economies that have traditionally relied upon extensive overseas trade of natural resources and agriculture, the maintenance of shipping routes not only within the immediate region but also beyond has been essential to the economic stability of both countries. When this factor is combined with the extensive coastlines possessed by both countries, and their capacity in the last half-century to assert increasingly extensive maritime claims, it is not surprising that Australia and New Zealand have such strong interests in maritime security. The extent of Australia and New Zealand's maritime zones are depicted, respectively, in Figures 1.1 and 1.2.

The two countries have a long history of cooperating in military contexts. Having been active participants in World Wars I and II, which in the case of the 1915 Gallipoli campaign became the basis for the shared ANZAC military tradition in both countries,⁵ Australia and New Zealand actively sought out post-war regional security alliances and arrangements to their mutual benefit.⁶ The 1951 *ANZUS Treaty*⁷ between Australia, New Zealand and the United States (US) remains the most self-evident expression of the mutual security cooperation framework which both countries sought to develop at that time. The *ANZUS* framework for defence and security cooperation continues, albeit with the New Zealand–US relationship suspended due to New Zealand's policy of prohibiting nuclear ship visits.⁸ There have been other expressions of this shared engagement in regional security frameworks including the 1954 *SEATO Treaty*,⁹ and the Five Power Defence Arrangements individually and mutually entered into with Malaysia and Singapore.¹⁰ In more recent times, Australia and New Zealand have undertaken

5 'ANZAC' refers to the Australian and New Zealand Army Corps, which was a joint force composed of Australian and New Zealand members that participated in multiple military engagements during the course of World War I, and particularly in Gallipoli, Turkey, where ANZAC forces landed on 25 April 1915, a date commemorated in both countries in view of the large loss of lives during that campaign.

6 This shared mutual interest was formalized in the 1944 ANZAC Pact, which outlined the shared common interests of both Australia and New Zealand with respect to security and defence, dependencies and territories, and the Pacific: *Australia–New Zealand Agreement*, 21 January 1944, [1944] ATS 2.

7 *Security Treaty between Australia, New Zealand and the United States of America*, 1 September 1951, [1952] ATS 2 [hereinafter *ANZUS Treaty*].

8 Evans and Grant, note 1, pp. 179–80. It is clear that the Australia–New Zealand relationship was damaged to some extent by the breakdown in the relationship between New Zealand and the United States; see D. McLean, *The Prickly Pair: Making Nationalism in Australia and New Zealand*, Dunedin: University of Otago Press, 2003, p. 258.

9 *South East Asia Collective Defense Treaty*, 8 September 1954, [1955] ATS 3 [hereinafter *SEATO Treaty*] which included as its members Australia, France, New Zealand, Pakistan, the Philippines, Thailand, the UK and the US. For a review of the obligations arising under the ANZUS and SEATO Treaties see N.C.H. Dunbar, 'Australia and Collective Security' in D.P. O'Connell (ed.), *International Law in Australia*, Sydney: Law Book Co., 1964, pp. 401–19.

10 See for example *Exchange of Notes constituting an Agreement between the Government of Australia and the Government of Malaysia regarding External Defence*, 1 December 1971, [1971] ATS 21. The Five Power Defence Arrangements include Australia, New Zealand, Malaysia, Singapore and the UK. See further Chapter 8 in this volume.

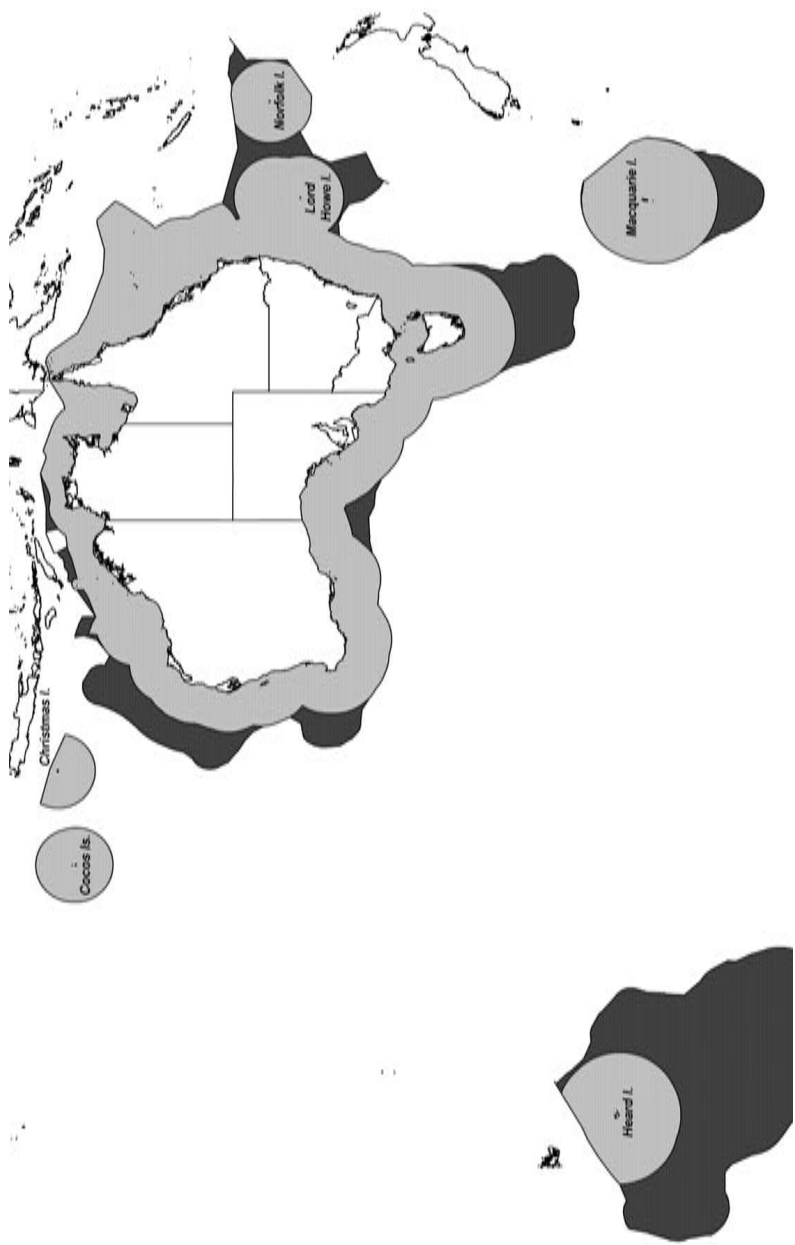


Figure 1.1 Australia's Maritime Zones.

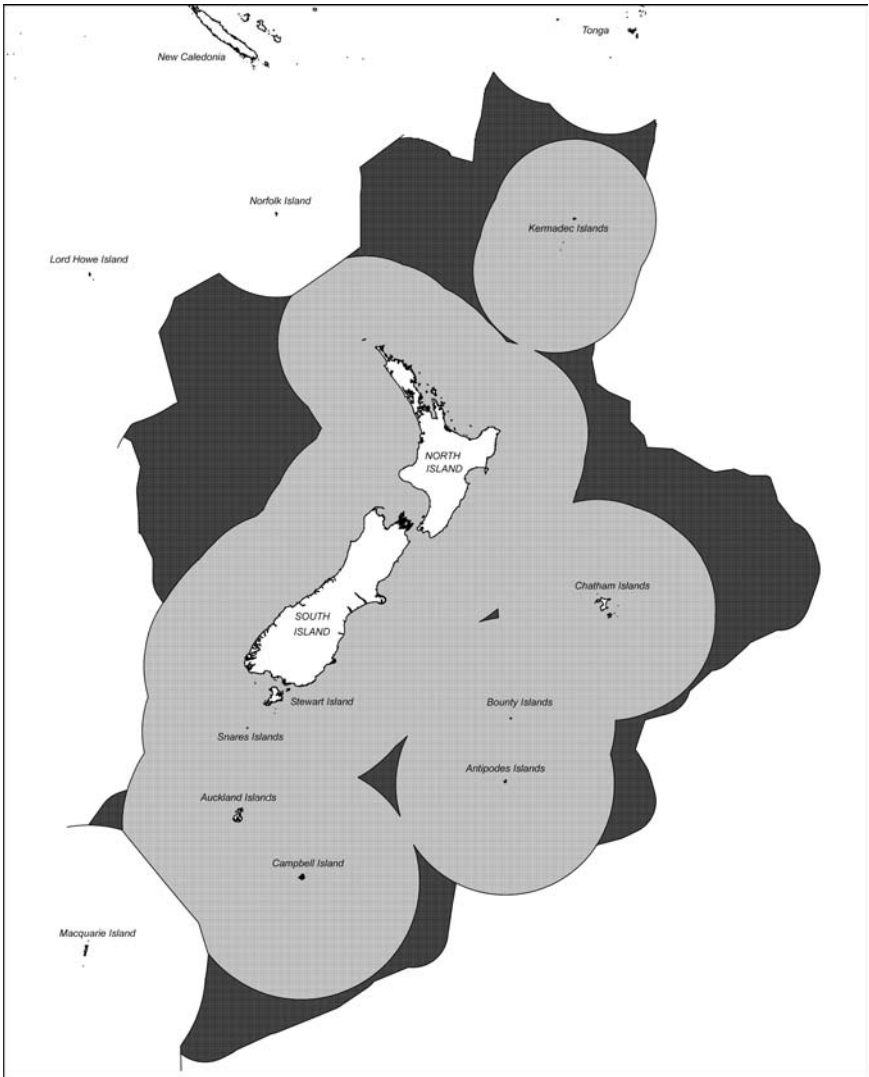


Figure 1.2 New Zealand's Maritime Zones.

shared military operations throughout the region, including in 1999 with the Australian-led INTERFET intervention into East Timor,¹¹ and in 2003 with the RAMSI stabilization mission in the Solomon Islands.¹²

11 INTERFET stands for the International Force for East Timor, an international force mandated by the UN Resolution on the Situation in East Timor, SC Res. 1264, UN Doc. SC/RES/1264 (1999) which was deployed to maintain peace in East Timor (later Timor Leste) following the successful referendum in favour of independence from Indonesia.

12 RAMSI stands for the Regional Assistance Mission to the Solomon Islands, involving fifteen

The relationship between the two countries in relation to military issues has not been without its problems. The *ANZUS* dispute and changes to the way New Zealand subsequently focused its defence policy on multilateral engagement has caused tension at times, with disagreements about the role that New Zealand can play in supporting Australia's armed forces.¹³ However, despite this debate that persists at a high level, the cooperation that has resulted from the various joint and multilateral South Pacific and East Timorese operations mentioned above, as well as a project in the late 1980s and 1990s to develop a joint ANZAC frigate construction programme, has helped to maintain the relationship.¹⁴

Australia and New Zealand on the basis therefore of their long-standing relationship and mutual interests in South East Asia and the South West Pacific also have shared interests with respect to maritime security. The purpose of this chapter is to explore what is maritime security, how it may be defined and articulated in both countries, and to consider some of the particular maritime security dimensions that exist for Australia and New Zealand individually and collectively.

1 What is 'maritime security'?

The term 'maritime security' has different meanings depending on who is using the term or in what context it is being used. From a military perspective, maritime security has traditionally been focused on national security concerns in terms of protecting the territorial integrity of any particular state from armed attack or other uses of force and projecting the state's interests elsewhere. Defence perspectives on maritime security have subsequently broadened to encompass a greater range of threats. For example, the US *Naval Operations Concept* refers to the goals of 'maritime security operations' as including ensuring the freedom of navigation, the flow of commerce and the protection of ocean resources, as well as securing 'the maritime domain from nation-state threats, terrorism, drug trafficking and other forms of transnational crime, piracy, environmental destruction and illegal seaborne immigration'.¹⁵

For operators in the shipping industry, maritime security is particularly focused on the maritime transport system and relates to the safe arrival of cargo at its destination without interference or being subjected to criminal activity.¹⁶

countries, deployed in July 2003 to assist the Solomon Islands government deal with a breakdown in law and order and security. See www.ramsi.org and E. Wainright, *How is RAMSI Faring? Progress, Challenges and Lessons Learned*, Canberra: Australian Strategic Policy Institute, 2005.

13 J. Rolfe, *Cutting their Cloth: New Zealand's Defence Strategy*, Canberra: Australian Strategic Policy Institute, 2007.

14 McLean, note 8, pp. 264–65.

15 Chief of Naval Operations–Commandant of the Marine Corps, 'Naval Operations Concept 2006', available online at www.quantico.usmc.mil/seabasing/docs/Naval_Operations_Concept_2006.pdf, p. 14.

16 See C.Z. Raymond and A. Morriën, 'Security in the Maritime Domain and its Evolution since 9/11' in R. Herbert-Burns, S. Bateman and P. Lehr (eds), *Lloyd's MIU Handbook of Maritime Security*, Boca Raton, LA: CRC Press, 2008, pp. 3, 4.

Consistent with this perspective, Hawkes has sought to define maritime security as ‘those measures employed by owners, operators, and administrators of vessels, port facilities, offshore installations, and other marine organizations or establishments to protect against seizure, sabotage, piracy, pilferage, annoyance, or surprise’.¹⁷

The International Maritime Organization (IMO) has addressed questions of maritime security under the auspices of its Maritime Safety Committee since the 1980s.¹⁸ In this context, a distinction is drawn between maritime safety and maritime security. Maritime safety refers to preventing or minimizing the occurrence of accidents at sea that may be caused by sub-standard ships, unqualified crew or operator error, whereas maritime security is related to protection against unlawful, and deliberate, acts.¹⁹

International lawyers referring to questions of maritime security may seek to have regard to the *United Nations Convention on the Law of the Sea (LOSC)*,²⁰ occasionally described as the ‘constitution of the oceans’, as a point of reference for defining or at least understanding a term related to the law of the sea. Despite the states parties to the *LOSC* desiring to settle ‘all issues relating to the law of the sea’, there are scant references to security in the convention,²¹ and certainly no clear-cut definition of what maritime security might mean within the law of the sea. At most, some indication of what is meant by security may be drawn from the *LOSC* in its treatment of the right of innocent passage and the identification of a series of activities that would be inconsistent with that right and hence prejudicial to the peace, good order and *security* of the coastal state.²² From this perspective, it is not only a range of military activities that may pose a threat to the security of the coastal state (such as weapons exercises, the threat or use of force, or the launching, landing or taking on board of any aircraft or military devices), but also includes fishing activities, wilful and serious pollution and research or survey activities.²³

International relations scholars have long studied questions of security, and it is generally acknowledged that in the post-Cold War and globalization era security

17 M.Q. Mejia Jr, ‘Maritime Gerrymandering: Dilemmas in Defining Piracy, Terrorism and other Acts of Maritime Violence’, *Journal of International Commercial Law* v2, 2003, p. 153, 155, citing K.G. Hawkes, *Maritime Security*, Centreville, MD: Cornell Maritime Press, 1989.

18 See *ibid.*, p. 153.

19 See P.K. Mukherjee and M.Q. Mejia Jr, ‘The ISPS Code: Legal and Ergonomic Considerations’ in M.Q. Mejia Jr (ed.), *Contemporary Issues in Maritime Security*, Malmö: World Maritime University, 2004, pp. 33, 34 (referring to the work of the IMO in this regard).

20 *United Nations Convention on the Law of the Sea*, 2 December 1982, 1833 UNTS 3 [hereinafter *LOSC*].

21 There are references to states parties suspending passage through straits for security purposes, as well as *LOSC*, Article 302, a safeguard clause so that states do not need to disclose information that would be ‘contrary to the essential interests’ of the state’s security.

22 See S. Kaye, ‘Freedom of Navigation in a post-9/11 World: Security and Creeping Jurisdiction’ in D. Freestone, R. Barnes and D. Ong (eds), *The Law of the Sea: Progress and Prospects*, Oxford: Oxford University Press, 2006, p. 347, pp. 348–9.

23 *Ibid.* (referring to Article 19 of *LOSC*).

concerns are no longer focused on military interests, in terms of a state being able to avoid war or otherwise prevail in any war. Threats to a state's security may not only be military but also political, economic, societal and ecological.²⁴ From a maritime perspective, the oceans have been viewed as 'particularly conducive to these types of threat contingencies because of [their] vast and largely unregulated nature'.²⁵ As a result, discussions about maritime security have similarly broadened for international relations scholars, with greater focus on acts of terrorism, transnational crime and environmental harm as influential on traditional concepts of 'sea power'.

The United Nations Secretary-General has acknowledged that there is no agreed definition of 'maritime security', and has instead identified what activities are commonly perceived as threats to maritime security.²⁶ In his 2008 'Report on Oceans and the Law of the Sea' the Secretary-General identified seven specific threats to maritime security. First, piracy and armed robbery against ships, which particularly endanger the welfare of seafarers and the security of navigation and commerce.²⁷ Second, terrorist acts involving shipping, offshore installations and other maritime interests, in view of the widespread effects, including significant economic impact, that may result from such an attack.²⁸ Third, illicit trafficking in arms and weapons of mass destruction.²⁹ Fourth, illicit trafficking in narcotic drugs and psychotropic substances, which takes into account that 'approximately 70 per cent of the total quantity of drugs seized is confiscated either during or after transportation by sea'.³⁰ Fifth, smuggling and trafficking of persons by sea, posing risks due to the common use of unseaworthy vessels, the inhumane conditions on board, the possibility of abandonment at sea by the smugglers, and the difficulties caused to those undertaking rescues at sea.³¹ Sixth, illegal, unreported and unregulated (IUU) fishing in light of the identification of food security as a major threat to international peace and security.³² Finally, intentional and unlawful damage to the marine environment as a particularly grave form of maritime pollution due to the potential to threaten the security of one or more states given the impact on social and economic interests of coastal states.³³ This listing

24 See B. Buzan, *People, States and Fear: An Agenda for International Security Studies in the post-Cold War Era*, 2nd ed., New York: Harvester Wheatsheaf, 1991, pp. 116–33.

25 P. Chalk, *The Maritime Dimension of International Security: Terrorism, Piracy and Challenges for the United States*, Santa Monica, CA: RAND Corporation, 2008, p. 2.

26 Secretary-General of the United Nations, 'Report of the Secretary-General on Oceans and the Law of the Sea', 10 March 2008, UN Doc. A/63/63, para. 39.

27 *Ibid.*, para. 54.

28 *Ibid.*, para. 63.

29 *Ibid.*, para. 72.

30 *Ibid.*, para. 82.

31 *Ibid.*, para. 89.

32 *Ibid.*, para. 98 (referring to United Nations Secretary-General, 'Report of the Secretary-General's High-level Panel on Threats, Challenges and Change. A More Secure World: Our Shared Responsibility', 2 December 2004, UN Doc. A/59/565, para. 52).

33 *Ibid.*, paras. 107–8.

encompasses the varied concerns of shipping operators, government defence forces and other maritime security analysts.

Even when a precise definition of 'maritime security' is eschewed, identifying what is a threat to maritime security has not been free from controversy. At the 2008 meeting of the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS), state representatives contested the inclusion of IUU fishing as a threat to maritime security.³⁴ Instead, it was proposed that the General Assembly recognize 'that illegal fishing poses a threat to the economic, social and environmental pillars of sustainable development' and that 'some countries' had found illegal fishing to be part of transnational criminal activity.³⁵

This brief survey indicates that while 'maritime security' is widely used and understood in the day-to-day workings of naval and law enforcement officials, other government officials, vessel owners and operators, as well as in the academic literature, it is rarely defined specifically. The most useful approach for addressing questions of maritime security has been to identify what are commonly perceived as existing or potential threats to maritime security and the steps that have been, or need to be, taken to address these threats. It therefore seems appropriate to examine the various threats identified in the 2008 report of the UN Secretary-General in relation to Australia and New Zealand's particular interests, both in their own right and in the region and beyond. In identifying this broad range of threats, it could be concluded that maritime security refers to the protection of a state's land and maritime territory, infrastructure, economy, environment and society from certain harmful acts occurring at, or from the, sea. This understanding of maritime security is reflected throughout the volume.

There is, however, another dimension with which to consider maritime security, especially for two countries that are relatively remote and located in a part of the world generally at some considerable distance from neighbouring states.³⁶ That dimension involves a consideration of the different political and geographical levels at which maritime security can be viewed. At one level, there are clearly certain matters that are common to global or international maritime security. The annual report of the UN Secretary-General report goes some considerable way to identifying what those matters may well be in any one year. However, there are also particular regional maritime security dimensions which will be distinctive. The maritime security dimensions of the Pacific Ocean, for example, will differ from those of the Indian Ocean. Likewise, it is not possible to compare the Mediterranean Sea with the Southern Ocean. The dynamic of these dimensional

34 'Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its Ninth Meeting: Letter dated 25 July 2008 from the Co-chairpersons of the Consultative Process addressed to the President of the General Assembly', 25 July 2008, UN Doc. A/63/174, Part B, para. 70-1.

35 *Ibid.*, Part A, para. 10(e).

36 This is best reflected by the fact that, other than in Antarctica, neither Australia nor New Zealand shares a land boundary with any neighbouring state.

levels has been highlighted recently by piracy off the coast of East Africa. While piracy has always been a matter of maritime security concern it is arguable that there are certain waters around the world where it is not currently a real threat. This is certainly the case for Australia and New Zealand, and while there are no piracy threats within their own national waters, the potential impact upon piracy for their flagged vessels cannot be ignored.³⁷ There are also distinctive sub-regional dimensions to maritime security, and accordingly it needs to be understood that when referring to maritime security in South East Asia the reality is that because of the multiple different bodies of water that make up that region there are distinctive sub-regional issues which need to be understood. Accordingly, understanding the maritime security issues which Australia faces in the Timor and Arafura Seas requires a very different appreciation from the issues which arise in the Tasman Sea. There are also, of course, differing national perspectives to maritime security, and while, as has been noted, Australia and New Zealand share many common interests in this area, there are also distinctions. There is also a need to appreciate internal regional differences. The cross-border regional issues which arise with respect to maritime security in the Torres Strait, for example, are radically different from maritime security issues which exist in the Bass Strait and yet both are strategically significant international straits within Australian waters. Finally, there are bound to be very particular local dimensions to maritime security whether as a result of history, geography, or climate. For New Zealand the local dimensions associated with maritime security in the port of Wellington, for example, which provides access to Cook Strait and is a gateway for inter-island maritime traffic, will differ from those that arise in New Plymouth harbour, used primarily for trade purposes and in support of the offshore energy industry.

2 Legal and policy dimensions to maritime security

This book examines maritime security from both legal and policy dimensions. As such, the main legal issues examined are the variety of global, regional and bilateral agreements addressing particular threats to maritime security, as well as, though to a lesser extent, the domestic law arrangements that have been put in place either to respond to or to pre-empt these international initiatives. The interpretation, application and enforcement of these legal rules are highlighted in the different chapters, with a particular view to highlighting some of the remaining lacunae and what steps may be taken to improve the legal framework for maritime security. The policy dimensions to maritime security encompass the informal arrangements and agreements existing or needed between states to

37 See Australian Government, Department of Infrastructure, Transport, Regional Development and Local Government, *Maritime Security Notice. Security Regulated Australian Ships: Protective Security Arrangements for Transiting through the Waters surrounding the Gulf of Aden and the Somali Coast* (2-08), 3 December 2008.

confront maritime security threats, as well as the motivations for putting in place particular structures and processes.

It is important to consider both facets of maritime security to reflect that maritime security is not merely a legal conundrum involving an assessment of applicable rules, reconciling ostensibly conflicting principles and identifying what legal lacunae might exist and how they should be rectified – all without considering in what context these rules operate. Nor is it possible to consider simply the policy dimensions required to enhance maritime security without taking into account the legal structures that are necessary to put the policy into practice, or that may otherwise constrain policy developments. There is instead a frequent intersection between these dimensions. These connections are seen in Chapters 12 by Rahman and 13 by Klein, in which Rahman discusses maritime domain awareness as the critical policy behind efforts to improve information collection and sharing and Klein examines the legal instruments and other arrangements that have been adopted pursuant to this policy.

It is of course important to note that the multifaceted nature of problems associated with maritime security draw in economic, social, cultural, strategic and communication concerns. Economic concerns feature in devising improvements to the security of shipping in light of the potential financial crisis that would be triggered by a terrorist attack in a mega-port or in a vital shipping route. The communication, and concomitant economic, threats posed to submarine cables and pipelines, as discussed by Kaye, were highlighted at the end of 2008 when four cables between Europe, the Middle East and Asia were severed, affecting telephone and internet services.³⁸ Social and cultural concerns arise when considering how different countries prioritize particular security matters. As pointed out in Chapter 6 by Bateman and Mossop, the Pacific Island states are more concerned about illegal fishing and transnational criminal activity affecting their maritime security and would prefer to divert resources for confronting these threats rather than meeting global standards that have been demanded for port and ship security. Strategic concerns for maritime security arise when states gauge their responsiveness to particular threats by reference to their relationships with other states, as highlighted by Shirley Scott with regard to Australia's relationship with the US, as well as Foster's observations on the influence of the '“we” feeling' in the Association of South East Asian Nations. These varied concerns are part of the warp and weft of maritime security and further inform legal and policy dimensions. The complex nature of the threats to maritime security is therefore taken into account in the different analyses in this volume.

38 See 'Severed Cable disrupts Net Access', *BBC News*, 19 December 2008, available online at <http://news.bbc.co.uk/2/hi/technology/7792688.stm>.

3 Maritime security concerns for Australia and New Zealand

Maritime security is of vital importance to New Zealand and Australia. Both countries have a maritime jurisdiction which, when combined,³⁹ extends from the Indian Ocean and the Timor and Arafura Seas as far south as the Southern Ocean adjacent to claimed Antarctic territories and sub-Antarctic islands, all of the Tasman Sea, and to eastern outer points in the South Pacific. Their respective search and rescue regions (SRRs) cover vast ocean space, extending beyond each state's maritime zones, and are depicted in Figure 1.3. Situated at one end of the world's supply chain, both countries depend on maritime transport for their economic survival. Nevertheless, while there are common perspectives, there are variations which can be noted. This analysis will therefore proceed by first assessing the common global and regional maritime security concerns of both countries, before turning to individual regional, sub-regional and national concerns.

3.1 Shared maritime security concerns: global

Australia and New Zealand share many common global maritime security concerns which stem from their similar dependence on foreign trade and international shipping as the lifeblood for the international supply chains which run to and from the major ports in both countries. These global concerns are perhaps best summed up by support for the freedom of navigation. Whether this be via respect for the *LOSC* regime and its guarantees of high seas freedom of navigation and transit passage through international straits, or ensuring that maritime traffic is safe and secure from disruption by pirates, terrorists or rogue states, Australia and New Zealand unequivocally support the freedom of navigation in all its forms. To that end, both countries should be viewed as much as maritime as coastal states in these matters, notwithstanding their significant coastlines and associated interests. Any maritime security threat that impacts upon the freedom of navigation throughout the world's major shipping routes is therefore of concern to both countries.⁴⁰ Consequently, the threats posed by international terrorism in the wake of the 2001 terrorist attacks upon the US and the consequences of these events

39 For example, the Australian Exclusive Economic Zone (EEZ), which encompasses the continental mainland and adjacent offshore islands and territories, is a total of 8,148,250 km², which should be compared with a total land area of 7,692,024 km²; see data located at www.ga.gov.au. The New Zealand EEZ, at 4,053,000 km², is approximately fifteen times the size of its land area (270,500 km²); New Zealand Government, Department of Prime Minister and Cabinet, *Maritime Patrol Review*, Wellington: Department of Prime Minister and Cabinet, February 2001, available online at <https://www.dPMC.govt.nz/dPMC/publications/maritimepatrolreview2001/index.html>.

40 See, for example, the Hon. S. Smith MP, Australian Minister for Foreign Affairs, 'Piracy in the Gulf of Aden', Joint Media Release, 5 December 2008, available online at www.foreignminister.gov.au/releases/2008/fa-s081205.html, in which it was noted, 'The Australian Government is deeply concerned at the recent significant increase in piracy-related incidents in the Gulf of Aden and off the coast of Somalia, and at the threat these incidents pose to innocent life and the maritime industry.'

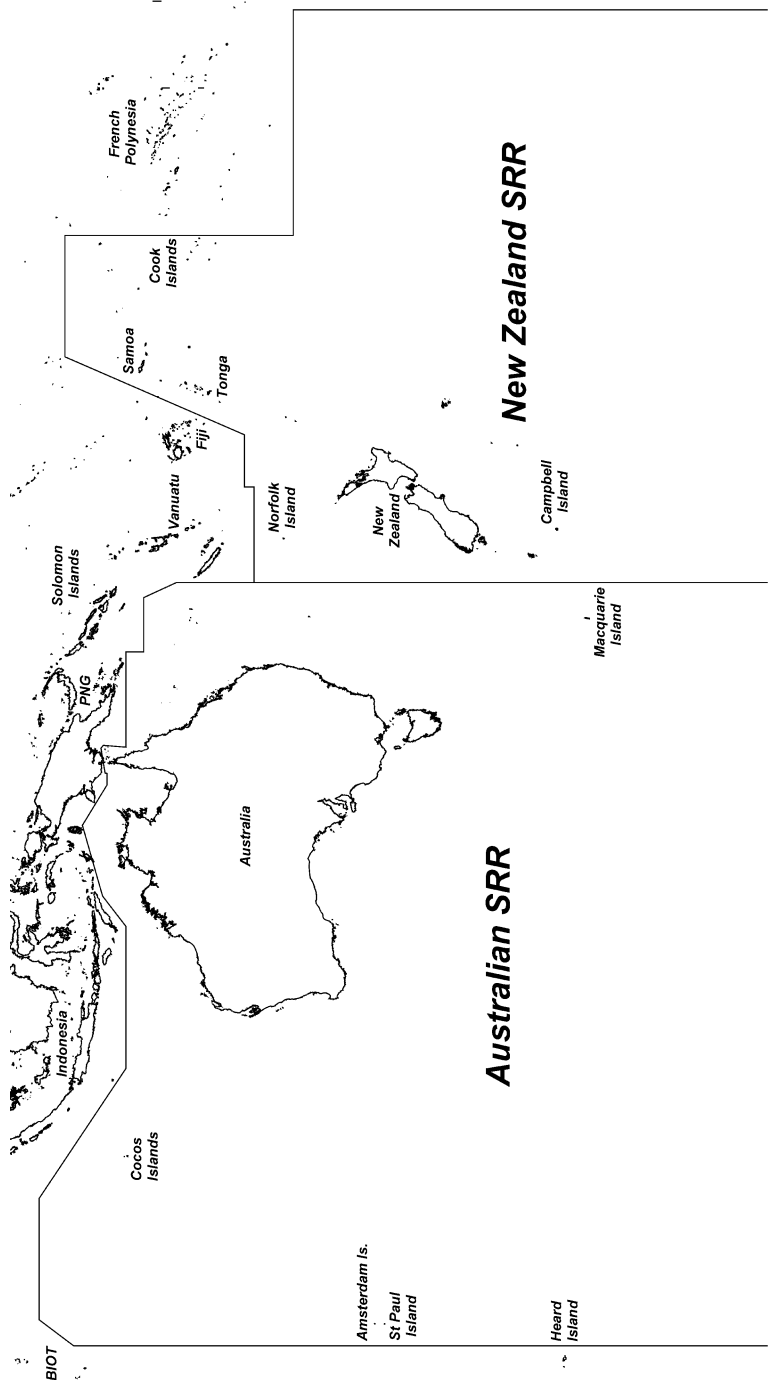


Figure 1.3 Australia and New Zealand Search and Rescue Regions.

for maritime security – both ship security and port security – were and remain matters of significant concern. Likewise, there is a shared concern as to the health of the world's oceans and the growing threat to marine biodiversity, which, subject to how this matter is addressed, could have significant regional and national maritime security implications.

3.2 Shared maritime security concerns: regional

Both countries also have shared regional maritime security concerns in three particular areas. The first is the South West Pacific, a region with which New Zealand has close historical and cultural ties. Much of the eastern coastline of Australia projects directly towards the South West Pacific and all of its eastern maritime zones abut waters claimed by New Zealand, France, the Solomon Islands and Papua New Guinea. The South West Pacific, because of its diversity and breadth, raises maritime security issues which are unique to the region and which because of their status as the two largest states create particular obligations and even expectations on the part of Australia and New Zealand. Australia and New Zealand are actively engaged in a wide range of institutions within the region, have extensive aid programmes for South West Pacific states, and from time to time have found themselves undertaking military operations to ensure the stability of the region. Post-11 September 2001, there were heightened concerns over the potential for terrorists to develop footholds in some of the island states within the region,⁴¹ and in 2003 this was one of the contributing factors when Australia and New Zealand joined together in the RAMSI mission in the Solomon Islands.⁴² Security throughout the South West Pacific remains a matter of ongoing concern to both countries;⁴³ however, security in this region very much needs to be seen in a broad context especially with respect to potential ramifications for Australia and New Zealand. This was highlighted in the 1973 *Nuclear Tests Cases* brought by Australia and New Zealand in the International Court of Justice in an attempt to halt France's atmospheric nuclear weapons testing programme on Mururoa Atoll in French Polynesia.⁴⁴ The two countries were concerned about the environmental impacts of the testing, and part of the motivation to act was to protect the interests of the Pacific states. Although since that time South West Pacific states have begun to take greater control of their regional

41 B.K. Greener-Barcham and M. Barcham, 'Terrorism in the South Pacific? Thinking Critically about Approaches to Security in the Region', *Australia Journal of International Affairs* v60, 2006, pp. 67–82.

42 See *Agreement between the Solomon Islands, Australia, New Zealand, Fiji, Papua New Guinea, Samoa and Tonga concerning the Operations and Status of the Police and Armed Forces and other Personnel deployed to the Solomon Islands to assist in the Restoration of Law and Order and Security*, 24 July 2003, [2003] ATS 17.

43 For a review of some of these issues see F. Hanson, 'Promoting a Pacific Pacific: A Functional Proposal for Regional Security in the Pacific Islands', *Melbourne Journal of International Law* v4, 2003, pp. 254–99.

44 *Nuclear Test Cases* (Australia and New Zealand v. France) [1973] ICJ Rep 320.

affairs and have developed institutional mechanisms to deal with some of distinctive maritime security issues the region faces,⁴⁵ New Zealand and Australia continue to play an active role.⁴⁶ While the issue of nuclear testing now appears to have ended, there remain a number of ongoing regional maritime security issues, including IUU fishing, port security and the presence of foreign navies.

In the Southern Ocean, Australia and New Zealand share the distinction of being two of the seven Antarctic claimants, though the status of their claims is contested, and they also have various island claims scattered throughout the sub-Antarctic. Accordingly, there is a strong interest in law and policy as they apply in the Southern Ocean in support of Australia and New Zealand's strategic interests.⁴⁷ While maritime security over the Southern Ocean may have been thought of as having been substantially settled as a result of the demilitarization of Antarctica under the 1959 *Antarctic Treaty*,⁴⁸ subsequent concerns over exploitation of krill and related fish stocks in 1980 resulted in the adoption of a distinctive marine living resource management regime,⁴⁹ while in 1991 mining activities on the continent and in parts of the Southern Ocean seabed were prohibited.⁵⁰ This has resulted in the creation of a dense legal regime for Antarctica and the Southern Ocean, which has strong political support from both countries. Nevertheless, the regime does not comprehensively address all maritime issues, and both Australia and New Zealand have over the last decade sought to address ongoing concerns arising from IUU fishing within their claimed sub-Antarctic waters,⁵¹ search and rescue capacity and response, and controversy arising from Japan's ongoing annual 'scientific whaling' and associated protest activities by environmental non-governmental organizations (NGOs).⁵²

The third area is Asian maritime security, especially within South East Asia, and in particular the Straits of Malacca and Singapore and the Indonesian Archipelago. Valencia has noted that:

45 See the discussion in J. Rolfe, 'Beyond Cooperation: Towards an Oceanic Community', *Australian Journal of International Affairs* v60, 2006, pp. 83–101, and instruments such as the *South Pacific Nuclear Free Zone Treaty*, 6 August 1985, 24 ILM 1442 (1985); *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region*, 9 July 1992, 32 ILM 136 (1993).

46 This was demonstrated in part when New Zealand sought, in 1995, to reopen its International Court challenge when France commenced underground nuclear weapons testing. See *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* (New Zealand v. France) Case [1995] ICJ Rep 288.

47 See for example H. Clarke, 'New Zealand Statement of Strategic Interest in Antarctica, Revised 2002', *New Zealand Yearbook of International Law* v1, 2004, pp. 219–22.

48 *Antarctic Treaty*, 1 December 1959, 402 UNTS 71.

49 *Convention on the Conservation of Antarctic Marine Living Resources*, 20 May 1980, 1329 UNTS 47.

50 *Protocol on Environmental Protection to the Antarctic Treaty*, 4 October 1991, 30 ILM 1455 (1991).

51 S. Bateman and D.R. Rothwell (eds), *Southern Ocean Fishing: Policy Challenges for Australia*, Wollongong: Centre for Maritime Policy, 1998.

52 See IWC Resolution on Safety at Sea and Protection of the Environment 2007–02 (2007), available online at www.iwcoffice.org/meetings/resolutions/resolution2007.htm, title co-sponsored by Japan and New Zealand. See also J. Mossop, 'Law of the Sea and Fisheries', *New Zealand Yearbook of International Law* v5, 2007–08, pp. 217, 219.

Specialists in Asian maritime security list the following maritime problem areas as requiring greater cooperation: piracy, smuggling, illegal immigration, transnational oil spills, incidents at sea, search and rescue, navigational safety, exchange of maritime information, illegal fishing, and management of resources in areas of overlapping claims. While these issues are all maritime safety problems of an essentially civil rather than military nature, addressing environmental and resource protection and illegal activities at sea necessitates that military forces in the region accept broader responsibilities and different priorities, in terms of their operations, training and force structure development.⁵³

Australia has a very particular maritime security interest in South East Asia, as Indonesia is Australia's largest maritime neighbour. This proximity not only raises issues with respect to the security of maritime zones and associated interests, but also there has been increased maritime interaction in recent decades between the two countries, ranging from fishing interests to asylum seekers.⁵⁴ Although New Zealand is geographically distant from South East Asia, it shares with Australia a common interest in ensuring the maintenance of sea lanes of communication between important regional ports and New Zealand, in particular those in Singapore and throughout China. The security of the waters between the South China Sea, the Straits of Malacca and Singapore, the Indonesian archipelago and Australia and New Zealand are therefore essential to both countries' trading interests.⁵⁵ Accordingly, any threat posed to the freedom of navigation through those waters, whether as a result of tension in the Taiwan Straits, terrorist threats to the Malacca Straits, internal conflicts within Indonesia, or aggressive interpretations of *LOSC* coastal state rights,⁵⁶ are matters for concern.

A particular example of Australia's interest in protecting the security of shipping occurred in the 1990s when Indonesia sought to commence a process leading to the designation of archipelagic sea lanes through the waters of the Indonesian archipelago. As a result of its fears as to the possible impact the sea lane designations would have upon the free flow of trade to and from the region, Australia took a very

53 M. Valencia, *The Proliferation Security Initiative: Making Waves in Asia*, New York: Routledge, 2006, pp. 11–12.

54 As to the linkages Australia sought to draw between asylum seekers and national and maritime security see A. Burke, 'Australia Paranoid: Security Politics and Identity Policy' in A. Burke and M. McDonald (eds), *Critical Security in the Asia-Pacific*, Manchester: Manchester University Press, 2007, pp. 121, 130.

55 R. Babbage, 'Maritime Security in the Asia Pacific in the Twenty-first Century' in D.R. Rothwell and S. Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea*, The Hague: Martinus Nijhoff, 2000, pp. 47–73.

56 An example of which was Indonesia's 1988 closure of the Sunda and Lombok Straits in order to undertake weapons exercises, an event which brought about a sharp rebuke from Australia and other interested maritime states: see 'Freedom of Navigation: International Straits – Closure by Indonesia of the Lombok and Sunda Straits: Australian Response', *Australian Year Book of International Law* v12, 1992, pp. 382–3.

particular interest in Indonesia's negotiations with the International Maritime Organization (IMO) as to the routing of the proposed sea lanes, and along with the US was part of a protracted negotiation process to ensure an outcome which reflected Australia's national interests.⁵⁷

3.3 Distinctive maritime security concerns: Australia

Notwithstanding the many common maritime security concerns shared by Australia and New Zealand, there are some distinctive elements for both countries. From a strategic and geographical perspective, Australia does tend to give greater weight to East Asian, South East Asian and South Asian maritime security issues than does New Zealand.⁵⁸ This is not only a function of geography but also reflects Australia's strategic interests and defence relationships within the region. As suggested above, the relationship with Indonesia, notwithstanding Australia's lead role in the INTERFET military intervention into East Timor in 1999, has in the past decade, and especially since 2002, grown significantly. This has been in response partly to the shared tragedy arising from the 2002 Bali bombings,⁵⁹ but also to increased cooperation in counter-terrorism and in dealing with human trafficking.⁶⁰ The latter particularly raised issues for Australia between 2000 and 2002 and was highlighted by the August 2001 'Tampa incident' off Christmas Island when the *Tampa* was refused access to Australian waters notwithstanding that it had undertaken a search and rescue operation to save the lives of 433 asylum seekers en route from Indonesia whose boat had sunk in the Indian Ocean.⁶¹ Australia's subsequent adoption of 'Operation Relex', featuring an aggressive campaign by the Royal Australian Navy designed to disrupt asylum seekers from reaching the mainland of Australia, raised numerous issues under the law of the sea, maritime law and also refugee law.⁶² Australia remains on

57 R. Warner, 'Implementing the Archipelagic Regime in the International Maritime Organization' in D.R. Rothwell and S. Bateman (eds) *Navigational Rights and Freedoms and the New Law of the Sea*, note 55, pp. 170–87.

58 See R. Ayson, 'The "arc of instability" and Australia's strategic policy', *Australian Journal of International Affairs* v61, 2007, pp. 215, 220, who upon reviewing Australia's concern over a perceived 'arc of instability' emerging in territories immediately to Australia's north comments that 'It is interesting to find few, if any, adherents to the arc of instability logic in New Zealand.'

59 On 12 October 2002 members of a terrorist organization, Jemaah Islamiah, detonated three bombs in the tourist area of Kuta, Bali. There were 202 people killed, including 88 Australians, 38 Indonesians, 3 New Zealanders and 73 other foreign nationals; 209 people were injured.

60 The culmination of which was the conclusion in 2006 of the Lombok Agreement: *Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation*, 13 November 2006, [2008] ATS 3.

61 See discussion in D.R. Rothwell, 'The Law of the Sea and the MV *Tampa* Incident: Reconciling Maritime Principles with Coastal State Sovereignty', *Public Law Review* v13, 2002, pp. 118–27; E. Willheim, 'MV *Tampa*: The Australian Response', *International Journal of Refugee Law* v15, 2003, pp. 159–91.

62 J. McAdam and K. Purcell, 'Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum', *Australian Year Book of International Law* v 27, 2008, p. 87, pp. 99–109.

active patrol for 'boat people' across the coast of northern Australia in the Timor and Arafura Seas, though the policy of 'offshore processing' of asylum seekers has been moderated.⁶³ Likewise, in the past decade Australia has engaged in ongoing surveillance and pursuit of illegal Indonesian fishermen operating in Australia's northern waters.⁶⁴

Australia also has a distinctive position with respect to Indian Ocean maritime security. While the west coast of Australia is relatively lightly populated and developed compared to the east coast, Australia has in recent times begun to appreciate the greater strategic significance of the Indian Ocean and has begun to take a more active role in that region.⁶⁵ This has particularly been the case because of the increased development of Australia's trade relationship with China, based predominantly on the export of natural resources, such as iron ore from Western Australia mines. Australia's growing economic relationship with India has also promoted greater interest in the Indian Ocean.

The Torres Strait is another distinctive area of maritime security interest for Australia. This is not only because of the shared boundary with Papua New Guinea, but also because of some of the unique features of the 1978 *Torres Strait Treaty*,⁶⁶ which gives recognition to some of the unique cultural and environmental issues which exist in that area. That the Torres Strait is also an international strait for the purposes of the *LOSC* adds another dimension to its significance. Since the 1990s, Australia has become increasingly concerned over the potential for a significant maritime disaster to occur in the strait and in response sought to introduce a voluntary pilotage regime for all shipping undertaking transit.⁶⁷ Following mixed success with this initiative, Australia in 2005 was successful in having the IMO declare the Torres Strait a Particularly Sensitive Sea Area,⁶⁸ and this became the basis for Australian implementation in 2006 of a compulsory pilotage

63 Senator C. Evans, Australian Minister for Citizenship and Immigration, 'New Directions in Detention: Restoring Integrity to Australia's Immigration System', speech delivered at Australian National University, Canberra, 29 July 2008, available online at www.minister.immi.gov.au/media/speeches/2008/ce080729.htm.

64 For an analysis of Australian policy in this area see R. Baird, 'Australia's Response to Illegal Foreign Fishing: A Case of Winning the Battle but Losing the Law?', *International Journal of Marine and Coastal Law* v23, 2008, pp. 95–124; R. Baird, 'Foreign Fisheries Enforcement: Do Not Pass Go, Proceed Slowly to Jail', *University of New South Wales Law Journal* v30, 2007, pp. 1–11.

65 See generally A. Bergin, 'The Proliferation Security Initiative: Implications for the Indian Ocean', *International Journal of Marine and Coastal Law* v20, 2005, pp. 85–95; D. Rumley and S. Chaturvedi (eds), *Geopolitical Orientations, Regionalism and Security in the Indian Ocean*, New Delhi: South Asian Publishers, 2004.

66 *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the Area between the two Countries, including the Area known as Torres Strait, and related Matters*, 18 December 1978, [1985] ATS 4.

67 S.B. Kaye, 'Regulation of Navigation in the Torres Strait: Law of the Sea Issues' in D.R. Rothwell and S. Bateman (eds) *Navigational Rights and Freedoms and the New Law of the Sea*, note 55, p. 119, pp. 125–8.

68 IMO Resolution MEPC.133(53), Designation of the Torres Strait as an Extension of the Great Barrier Reef Particularly Sensitive Area, 22 July 2005, IMO Doc. MSC MEPC 53/24/Add.2.

regime within the strait for ships, along similar lines to a regime that had previously been adopted for the internal waters of the Great Barrier Reef along the east coast of Queensland.⁶⁹

Australia also has some distinctive concerns with respect to maritime security associated with offshore platforms and oil rigs in Bass Strait, the Timor Sea and off the coast of Western Australia.⁷⁰ In the wake of 11 September 2001 and enhanced fears over the security of these structures, additional measures were taken under Australian law to provide for their protection, including the capacity for the Australian Defence Force to be 'called out' to provide direct protection.⁷¹

In this respect, the Australian government has in recent years given greater consideration to the articulation of particular maritime security concerns in conjunction with the interests of maritime industry participants. In 2008 the Australian government identified these concerns as follows:

- 1 Fulfilling Australia's obligations under the *SOLAS Convention*⁷² and the ISPS Code,⁷³ including the rights, freedoms and welfare of seafarers.
- 2 Reducing the vulnerability of Australian ships, port and offshore facilities to terrorist attack.
- 3 Reducing the risk of maritime transport or offshore facilities being used to facilitate terrorist activities.⁷⁴

Nevertheless, as a March 2009 pollution incident off the Queensland coast near Brisbane involving the cargo ship *Pacific Adventurer* highlighted,⁷⁵ notwithstanding the many initiatives which have been taken to address ship and port security in recent years, traditional maritime security issues such as responding to the environmental impacts caused by shipping incidents remain a governmental and public priority. Protection of marine biodiversity has had a high profile in Australia because of the accepted significance of the Great Barrier Reef, and

69 For a critique of the Australian initiative see R.C. Beckman, 'PSSAs and Transit Passage: Australia's Pilotage System in the Torres Strait Challenges the IMO and UNCLOS', *Ocean Development and International Law* v38, 2007, pp. 325–57; with respect to the Great Barrier Reef see M. White, 'Navigational Rights in Sensitive Marine Environments: The Great Barrier Reef' in D.R. Rothwell and S. Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea*, note 55, pp. 230–62.

70 See Statement by H.E. Ms Frances Lisson, Australia's Deputy Permanent Representative to the United Nations, 7 December 2006, *Australian Year Book of International Law* v27, 2008, p. 389.

71 See the provisions of the *Defence Act* 1903 (Cth), Part IIIAAA, 'Utilisation of Defence Force to Protect Commonwealth Interests and States and Self-governing Territories'.

72 *International Convention for the Safety of Life at Sea*, 1 November 1974, 1184 UNTS 278.

73 *Amendments to the Annex to the International Convention for the Safety of Life at Sea (SOLAS) contained in Resolutions 1, 2, 6 and 7 of the Conference of Contracting Governments and including the International Ship and Port Facility Security (ISPS) Code*, 12 December 2002, [2004] ATS 29.

74 Australian Government, Department of Infrastructure, Transport, Regional Development and Local Government, *Strengthening Maritime Security*, Canberra: Department of Infrastructure, Transport, Regional Development and Local Government, 2008.

75 A. Caldwell and B. Williams, 'Oil Spill Far Worse than First Realised: Efforts Doubled as Toxin Spreads', *Courier Mail*, 13 March 2009, p. 6.

from this has grown an appreciation of the potential maritime security dimensions of marine environmental issues. The introduction of alien species by way of ballast water exchange, for example, has been a high-profile public and governmental issue for the past decade because of its impact upon local marine biodiversity.⁷⁶

3.4 Distinctive maritime security concerns: New Zealand

It has been noted that New Zealand is among the very few countries in the world never to have been directly attacked.⁷⁷ New Zealand's nearest neighbours are New Caledonia (1,800 km away), Fiji and Australia (both more than 2,000 km away). The New Zealand view of maritime security is strongly coloured by this reality, and the issues are less influenced by traditional security concerns than in Australia. Instead, the primary risks to maritime security in New Zealand relate to potential disruptions to trade, of which 98 per cent by volume is carried by sea, protection of marine resources, environmental protection and the effects of transnational crime, including terrorism and the smuggling of people, goods and drugs.⁷⁸ It is in these areas that the government has focused its efforts in recent years. Changes to the focus of the armed forces have ensured that more military assets are now available to civilian enforcement agencies to ensure better detection and prosecution of offences at sea.

Possession of an extensive maritime zone is both a benefit and a challenge for New Zealand. The New Zealand Exclusive Economic Zone (EEZ) is approximately fifteen times the size of its land territory, and holds great potential for exploitation of living and non-living marine resources. However, with a small population and a comparatively small gross domestic product (GDP),⁷⁹ New Zealand struggles to find the resources necessary to assert control adequately over its maritime areas. Recent developments in New Zealand have improved this to some extent,⁸⁰ but New Zealand is never going to be in a position to equal Australia's investment in maritime and air surveillance and enforcement capabilities. Rather,

76 One outcome of which was strong Australian support for the negotiation of the *International Convention for the Control and Management of Ships' Ballast Water and Sediments*, 13 February 2004, [2005] ATNIF 18.

77 McLean, note 8, p. 257. As possible exceptions to this statement, McLean notes the mining of Auckland and Wellington harbours by Germany during World War II (no loss of life ensued) and the *Rainbow Warrior* bombing in Auckland Harbour in 1985 (loss of one life). It is notable that these two incidents are both maritime in nature. Hugh White has argued that this security is due, in large part, to Australia's defence policies: H. White, 'Refocusing the Debate on Strategic Cooperation', *New Zealand International Review* v28(1), 2003, p. 2.

78 New Zealand Government, Ministry of Foreign Affairs and Trade, *New Zealand's Foreign and Security Policy Challenges*, Wellington: Ministry of Foreign Affairs and Trade, 2000, pp. 15–16.

79 The CIA ranks New Zealand's GDP in purchasing power parity terms as equivalent to that of Slovakia or Belarus. See United States Government, Central Intelligence Agency, *World Fact Book*, 'Country Comparisons GDP (purchasing power)', available online at www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html.

80 See Chapter 4 in this volume.

considerable effort has been put into cooperation with other countries to ensure the security of trade routes, including through rapid implementation of port and container security initiatives, much of which involve improvements to land-based facilities and processes. Nevertheless, like Australia, New Zealand has also placed considerable emphasis on protecting its marine environment and views any significant environmental impact upon its maritime domain as having maritime security dimensions.⁸¹

New Zealand's regions of interest include Australia to the west across the Tasman Sea, the Southern Ocean to the south and the Pacific region to the north and east. While Australia has interests in these regions, the main point of distinction is arguably New Zealand's closer proximity to the Polynesian islands of the South Pacific, with whom the country shares cultural, social, economic and political ties that are different from those between Australia and Polynesia.⁸² The Pacific was seen as a strategically important area during World War II, but recent New Zealand interest in the Pacific has focused more on issues of governance and the possibility for the Pacific to be a transition or source for transnational criminal activities.⁸³

4 Concluding remarks

Robert Menzies, a former Australian Prime Minister, has noted that the 'world interests of Australia and New Zealand are, properly viewed, not identical but inseparable'.⁸⁴ Despite the fact that the two countries have not always seen eye to eye on security issues and the appropriate policy responses, the fact remains that the maritime security challenges facing them are similar in nature. Of course, there are significant differences in geographical terms between Australia and New Zealand, but each is a country with a Western democratic tradition located a considerable distance from its trade markets, with heavy reliance on the ocean for transport. Both have a vast maritime interest in terms of their EEZ and continental shelves, which creates both opportunities and challenges. Each has interests in the stability of the Asian, Pacific and Southern Ocean regions.

These characteristics influence the view of Australia and New Zealand as to the definition of maritime security. It is clear that a traditional view of security focused on military threats to territorial integrity is only a small part of the picture. Both countries have demonstrated commitment to global initiatives

81 'Biosecurity New Zealand', an agency of the Ministry of Agriculture and Forestry, gives a high profile to the issue, including the monitoring of not only ballast water but also clean hulls on all yachts that visit New Zealand. See New Zealand Government, Biosecurity New Zealand, 'Marine Biosecurity Programme', 23 March 2009, available online at www.biosecurity.govt.nz/biosec/camp-acts/marine-biosec-programme.

82 G. Urwin, 'Australia, New Zealand and the South Pacific', *New Zealand International Review* v28, January–February 2003, p. 11.

83 G. McGhie, 'New Zealand and the Pacific', *New Zealand International Review* v27(3), 2002, p. 19.

84 Quoted in McLean, note 8, p. 307.

designed to enhance maritime security, such as the Proliferation Security Initiative. At a regional level, more immediate concerns include issues that could broadly be described as maintaining law and order at sea and environmental protection. For Australia and New Zealand, maritime security can be seen as referring to the protection of a state's land and maritime territory, infrastructure, economy, environment and society from harmful acts occurring at sea. The contributions in this volume draw on this broad concept of maritime security to discuss issues relating to maritime security from the perspective of Australia and New Zealand. While these countries have a unique geographical position, and hence face unique challenges, many of the problems and their solutions are also applicable in other areas of the world.

2 Maritime Security and the Law of the Sea

Donald R. Rothwell and Natalie Klein

The 1982 *United Nations Convention on the Law of the Sea (LOSC)*¹ created a new framework for the conduct of maritime affairs. The influence of the *LOSC* extends from the recognition of a variety of maritime zones, and the rights and duties of states therein, to the conservation and management of living and non-living resources, and the protection and preservation of the marine environment. As coastal states with significant maritime domains in the Indian, Pacific and Southern Oceans, Australia and New Zealand rely upon the framework created by the *LOSC* for maritime security. Indeed, it could be argued that both countries have been significant beneficiaries of the modern law of the sea, not only in terms of their capacity to project extended maritime claims, but also because of the improvements the *LOSC* has afforded for the enhancement of maritime security for both countries. The freedom and security of the seas are of vital importance to Australia and New Zealand in a number of ways. One example of this is that the two countries have so significantly relied upon exports of natural resources and agricultural products into distant markets in Europe, the Americas and increasingly Asia. The *LOSC* continues to play an important contemporary role in ensuring maritime security.

The concept of maritime security has changed over time. Maritime security is a concept that initially had a strong 'national' focus in the law of the sea, which primarily concentrated upon the protection and integrity of the nation state and the repelling of hostile states, such that territorial integrity was maintained and that maritime threats were capable of being thwarted at sea. A distinct body of law related to naval warfare has developed in this regard. Over time, however, maritime security has developed different and wider dimensions. Ship security was perhaps one of the first additional dimensions, due to the increasing threat and occurrence of pirate attacks, and international law developed responses to address piracy both under customary international law and also increasingly under conventional law.² In an age of international terrorism, the international

1 *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 [hereinafter *LOSC*].

2 See, for example, B.H. Dubner, *The Law of International Sea Piracy*, The Hague: Martinus Nijhoff, 1980.

law response to ship security has now expanded even further through the adoption of instruments such as the 1988 *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (1988 SUA Convention) and its Protocols.³

However, in an increasingly globalized world, the diversity and complexity of the maritime environment mean that both countries are being confronted with a range of new threats and challenges extending beyond ship security to asylum seekers, illegal Southern Ocean fishing and vessels carrying ultra-hazardous goods and substances.⁴ Environmental security is now a legitimate sub-set of maritime security⁵ and, for Australia and New Zealand, two countries that have been at the forefront of national and international developments in environmental law and policy, a significant issue. This has been particularly highlighted by some of the issues both countries have faced in dealing with their Antarctic and Southern Ocean maritime domain whether as a result of illegal, unregulated and unreported (IUU) fishing activities, whaling, or maritime search and rescue.

In addition, national maritime security has increasingly become intertwined with regional and international maritime security. At a regional level, events which occur in the Southern Ocean, South West Pacific or South East Asia all have potential ramifications for Australian and New Zealand maritime security.⁶ It has therefore been important for both countries to seek to develop not only policy responses but also legal frameworks consistent with the law of the sea to address these challenges. Moreover, global events are also capable of impacting upon Australian and New Zealand maritime security, and this is no better illustrated than by the international responses to the 11 September 2001 terrorist attacks upon the United States (US), which had significant flow-on impacts for both countries.

This chapter will review how some of these issues are addressed within the contemporary law of the sea framework, focusing especially on the *LOSC* but also considering related international instruments that complement the modern law of the sea.

1 Background: the development of the law of the sea

The law of the sea, which has been in a state of development and evolution since at least the seventeenth century, has principally been centred around aspects of

3 *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 10 March 1988, 1678 UNTS 221; *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf*, 10 March 1988, 1678 UNTS 304; *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 14 October 2005 [2005] ATNIF 30.

4 For a more detailed overview of these threats and some of the issues see N. Klein, J. Mossop and D.R. Rothwell, 'International Law Perspectives on Trans-Tasman Maritime Security', presented at Royal Australian Navy *Sea Power Conference* 2008, Sydney, 30 January 2008, available via podcast online at www.seapower2008.com/media.asp.

5 See, for example, J. Stuhltrager, 'Global Climate Change and National Security', *Natural Resources and Environment* v22, 2008, p. 36; H.M. Babcock, 'National Security and Environmental Laws: A Clear and Present Danger?', *Virginia Environmental Law Journal* v25, 2007, pp. 105–56.

6 See, for example, Chapter 7 in this volume.

maritime security. Since the time of the earliest debates between Grotius and Selden with respect to the freedom of the seas, maritime security and national security have been fundamental to the development of the law. While the initial debates over the theoretical foundation of the law of the sea were resolved in favour of the Grotian vision of the freedom of the seas,⁷ limits on that freedom were acknowledged early on, with coastal states able to gain support for some form of control over a narrow offshore area of waters. It is apparent that over the centuries and especially during the past 100 years that the Grotian vision of the law of the sea has been under threat and a key factor has been a push for enhanced maritime security.

This has been the constant history of the law of the sea throughout the twentieth century, and as claims to a territorial sea solidified in state practice and then eventually customary international law until finally becoming part of conventional law, maritime security as it was intimately linked to national security became the dominant paradigm, certainly within the territorial sea. This push for coastal state control over time was further reflected in the recognition of an expanding number of maritime zones, beginning with the 1945 Truman Proclamation over a continental shelf followed by claims to fisheries zones and eventually an exclusive economic zone (EEZ), thereby enhancing the resource component of maritime security. The military aspect of maritime security featured in resistance to these coastal state claims in as much as naval mobility and flexibility were potentially impaired by the emphasis on resource security. The security of commercial shipping was also jeopardized by claims to resource security as concerns arose over coastal state interference in this important international trade. In response to some of these concerns, the *LOSC* has been regarded as seeking to strike a delicate balance between coastal state interests in resource control and protecting certain freedoms of the high seas, most notably navigation. As alarm has been raised over the phenomenon of ‘creeping jurisdiction’ in the law of the sea⁸ the law has sought to respond by seeking to ensure fundamental guarantees with respect to the freedom of navigation within areas such as international straits and the high seas.⁹

A common feature associated with coastal state claims over maritime zones since the nineteenth century has been an interest in regulating activities not only

7 Anand has noted that the freedom of the seas was the dominant approach of Asian states as well, prior to Grotius supporting the concept in his treatise. See R.P. Anand, ‘Changing Concepts of Freedom of the Seas: A Historical Perspective’ in J.M. Van Dyke, D. Zaelke and G. Hewison (eds), *Freedom for the Seas in the Twenty-first Century: Ocean Governance and Environmental Harmony*, Washington, DC: Island Press, 1993, p. 72.

8 See, for example, the discussion in B. Kwiatkowska, ‘Creeping Jurisdiction beyond 200 Miles in Light of the 1982 Law of the Sea Convention and State Practice’, *Ocean Development and International Law* v22, 1991, pp. 153–87; E. Franckx, ‘The 200-mile Limit: Between Creeping Jurisdiction and Creeping Common Heritage?’, *George Washington International Law Review* v39, 2007, pp. 467–98.

9 The freedom of navigation through international straits was recognized as a part of customary international law by the International Court of Justice in the *Corfu Channel Case* (United Kingdom v. Albania) [1949] ICJ Rep 3.

of their own nationals and flagged ships but also of foreign nationals and foreign-flagged ships that threatened national security and related interests of the coastal state.¹⁰ Coastal state jurisdiction has expanded through developments in the law of the sea, including: three UN Law of the Sea Conferences resulting in the adoption of five conventions;¹¹ additional multilateral instruments which are either attached to the *LOSC*,¹² or which have a distinctive operational role;¹³ relevant regional¹⁴ and bilateral conventions;¹⁵ and state practice.¹⁶ These developments have also matched an expansion in the concept of maritime security with not only a recognition of the international dimensions associated with the security of shipping lanes and the freedom of navigation, but also national dimensions for those states with significant coastal and maritime assets in addition to maritime fleets. As a result, there has been an expansion of the matters falling under the traditional regulation of criminal offences in offshore areas to include the illegal importation of drugs, illegal fishing, pollution of the marine environment and organized illegal immigration by ship. Consequently, coastal states have begun to have greater cause to seek to regulate a variety of criminal behaviour in offshore maritime zones consistent with international law and individual national policies.

Many of these developments in the law of the sea culminated in the conclusion and eventual entry into force of the *LOSC*.¹⁷ Some of the principles upon which

- 10 The most prominent example of this was the British Hovering Acts; see the discussion in D.P. O'Connell, *The International Law of the Sea* v1, Oxford: Clarendon Press, 1982–4, p. 90.
- 11 In addition to *LOSC*, note 1, there were four Conventions adopted at the First United Nations Conference on the Law of the Sea: *Convention on the Territorial Sea and Contiguous Zone*, 29 April 1958, 516 UNTS 205 (1958); *Convention on the Continental Shelf*, 29 April 1958, 499 UNTS 311 (1958); *Convention on the High Seas*, 29 April 1958, 450 UNTS 82 (1958); and *Convention on Fishing and Conservation of the Living Resources of the High Seas*, 29 April 1958, 559 UNTS 285 (1958).
- 12 An example of which would include the *United Nations Agreement for the Implementation of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling and Highly Migratory Fish Stocks*, 4 December 1995, 2167 UNTS 88.
- 13 See *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 10 March 1988, [1993] ATS 10 1988.
- 14 See *Convention on the Conservation of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean*, 5 September 2000, [2004] ATS 15.
- 15 An example being the so-called Torres Strait Treaty: *Treaty concerning Sovereignty and Maritime Boundaries in the Area between the two Countries, including the Area known as the Torres Strait, and related Matters*, 18 December 1978, [1985] ATS 4.
- 16 As recognized in the interpretation of relevant treaties and conventions relating to the law of the sea and which also contribute to the development of customary international law. See *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) [1969] ICJ Reports 3.
- 17 *LOSC*, note 1. As at 19 December 2008 there are 157 parties to the *LOSC*; see details at www.un.org/Depts/los. As to the status of the *LOSC*, see S. Nandan, 'An Introduction to the 1982 United Nations Convention on the Law of the Sea' in D. Vidas and W. Ostreng (eds), *Order for the Oceans at the Turn of the Century*, The Hague: Kluwer, 1999, pp. 9, 12, who argues: 'In light of the overwhelming support for the Convention as reflected in the number of state parties and the practice of states . . . the Convention embodies the prevailing international law of the sea.'

the *LOSC* was founded, principally as a result of the vision of the ambassador of Malta to the United Nations (UN), Arvid Pardo,¹⁸ include a legal order for the seas and oceans that will facilitate international communication, promote the peaceful uses of the seas and oceans, allow for the equitable utilization of resources of the seas and oceans, and conserve living resources while also permitting the study, protection and preservation of the marine environment.¹⁹ These views have since been endorsed by Ambassador Tommy T.B. Koh of Singapore, president of the final negotiating sessions of the Third United Nations Conference on the Law of the Sea, who has emphasized the capacity of the *LOSC* to promote international peace and security because it provides certainty to the relevant international law and sought to consolidate previously conflicting claims with respect to maritime space.²⁰

Among a multitude of law of the sea issues, the *LOSC* provides the basis for a number of maritime zones and the sovereignty and jurisdiction that coastal states may exercise over those zones. Accordingly, depending on whether particular maritime claims have been asserted, each coastal state has a mix of sovereignty, sovereign rights and jurisdiction over internal waters, territorial sea, international straits, a contiguous zone, EEZ, and a continental shelf. In addition, archipelagic states can also exercise jurisdiction over archipelagic waters.

Each of these maritime zones has a distinctive regime within which coastal states are entitled to exercise sovereignty or jurisdiction, in particular prescriptive and enforcement jurisdiction over criminal and civil matters. However, as some of the maritime zones overlap, this can lead to a blurring of the rights and responsibilities of coastal states and in determining the operative legal regime within those areas.²¹ Each of the maritime zones also differs as to the rights of navigation and related freedoms by foreign ships through those waters and this dimension adds a further complexity as there is a need to balance the rights and duties of both coastal states and foreign ships within these waters. Questions relating to military security (such as the passage of warships, the conduct of military exercises and intelligence gathering) have been particularly polemical in this regard and the *LOSC* has provided mixed results in solving these controversies.

18 Sec, for example, A. Pardo, 'The Convention on the Law of the Sea: A Preliminary Appraisal', *San Diego Law Review* v20, 1983, pp. 489–503; A. Pardo, 'The Law of the Sea: its Past and its Future', *Oregon Law Review* v63, 1984, pp. 7–17.

19 These principles are reflected in the Preamble of the *LOSC*, note 1.

20 See generally, T.T.B. Koh, 'Negotiating a New World Order for the Sea', *Virginia Journal of International Law* v24, 1983–84, pp. 761–84.

21 The complexity of these issues was highlighted by the first case before the International Tribunal for the Law of the Sea in 1997: *The MV Saiga* (St Vincent and the Grenadines v. Guinea) (1998) 37 ILM 362, in which the *Saiga* was arrested by Guinea for illegally bunkering within Guinean waters. The matter before the Tribunal raised issues ranging from the location of the arrest to whether various provisions of *LOSC* allowing for prompt release of arrested vessels had been followed. For commentary see E.D. Brown, 'The MV *Saiga* Case on Prompt Release of Detained Vessels: the First Judgment of the International Tribunal for the Law of the Sea', *Marine Policy* v22, 1998, p. 307.

It is clear therefore that the law of the sea has long had a concern with respect to maritime security, and this is reflected in the framework of the *LOSC*. However, it is also clear that the law of the sea has undergone significant evolution over the past century, none more so than with the conclusion of the *LOSC* and its entry into force having an impact upon virtually every aspect of the maritime domain. The *LOSC* has also been complemented and developed through the adoption of multilateral and regional treaties dealing with specific issues bearing on maritime security, and international and regional organizations have also influenced the legal framework of maritime security through both formal and less formal means.

2 The Law of the Sea Convention and maritime security

The contemporary law of the sea as reflected in the *LOSC* directly contributes to maritime security in a number of ways. First, as suggested by Koh, the resolution and finalization of the outer limits of a range of maritime zones have had a positive impact.²² This delineation has resulted in great certainty with respect to the limits of maritime zones that had previously proved to be contentious, especially the territorial sea and the developing EEZ. This is not to suggest that the extent of all maritime zones has been finalized or is uncontentious. Excessive baseline claims and unresolved outer continental shelf claims remain. While the *LOSC* goes some considerable way to defining the manner in which coastal states are able to determine straight baselines that would ultimately be the outer limits of internal waters,²³ as this is an area that substantially falls within coastal state sovereignty, there was a limited capacity for the *LOSC* to conclusively regulate this area.²⁴ Likewise, the limit of the outer continental shelf beyond 200 nautical miles is also subject to ultimate resolution following coastal state submissions before the Commission on the Limits on the Continental Shelf.²⁵ Although this is not a zone that has the same immediate maritime security implications as the territorial sea, as oil and gas resources become scarcer there is the potential for disputes to arise between coastal states and the international community with respect to the limit of this zone.

Second, balanced against the certainty that the *LOSC* seeks to provide with respect to maritime zones is the expanded regime for navigational rights and freedoms. Retaining the foundational base of the freedom of the seas on the high seas, which also extends to surface navigation over the EEZ, the *LOSC* also gave much greater substance to the regime of innocent passage through the territorial sea while

22 Koh, note 20, p. 783.

23 See in particular *LOSC*, note 1, Articles 5–10, 13.

24 See, for example, the discussion in G.S. Westerman, 'Straight Baselines in International Law: Call for Reconsideration', *American Society of International Law Proceedings* v82, 1988, pp. 260–77; J.B. McKinnon, 'Arctic Baselines: a *litore usque ad litus*', *Canadian Bar Review* v66, 1987, pp. 790–817.

25 See discussion in D.R. Rothwell, 'Issues and Strategies for Outer Continental Shelf Claims', *International Journal of Marine and Coastal Law* v23, 2008, pp. 185–211.

also creating for the first time the new regimes of transit passage through international straits and archipelagic sea lanes navigation through archipelagic waters.²⁶ The assurance that the *LOSC* provides to those maritime states relying upon the freedom of navigation for trade and commerce and their own national security that legitimate navigational rights will not be hindered by the expansion of maritime claims was one of the most fundamental trade-offs agreed to under the *LOSC*.²⁷

The third important area where the *LOSC* provides a maritime security dimension is in the conceptualization of specific economic interests as resource security. Historically, the law of the sea had little focus on resource security other than the guaranteed rights of access coastal states had to the resources of their territorial sea and the rights of the international community to access the resources of the high seas, especially fisheries. However, much of that has now been revolutionized with the *LOSC* and its confirmation of a range of maritime zones of which two in particular, the EEZ and the continental shelf, provide for coastal state resource sovereignty with respect to living and non-living resources. This recognition of coastal state rights ultimately provides for resource security, especially for those states that are very reliant on fisheries. Directly related to this are the equally important provisions of the *LOSC* dealing with environmental security, which, while predominantly found in Part XII, are also reflected in some of the navigational provisions dealing with shipping and also the EEZ.²⁸

Fourth, it has been noted that one of the features of the *LOSC* is the emphasis given to the promotion of the peaceful uses of the oceans. This is emphasized in Article 301, which reinforces Article 2(4) of the *United Nations Charter* (UN Charter),²⁹ by stating that when acting under the *LOSC* states 'shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law'. However, and most important, this provision was never seen as a basis for arguing that the oceans were to be demilitarized or that the oceans could not be the subject of use by naval forces provided that such activities were conducted for peaceful purposes. While from time to time this has raised for debate the legitimacy of maritime exclusion zones established for weapons testing or for the conduct

26 For general discussion of these various regimes see D.R. Rothwell and S. Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea*, The Hague: Martinus Nijhoff, 2000.

27 For some discussion see D.R. Rothwell, 'Navigational Rights and Freedoms in the Asia Pacific following Entry into Force of the Law of the Sea Convention', *Virginia Journal of International Law* v35, 1995, pp. 587–631; W.L. Schachte Jr, 'International Straits and Navigational Freedoms', *Ocean Development and International Law* v24, 1993, pp. 179–95.

28 Creating some difficult issues in balancing respective rights and interests. See J.M. Van Dyke, 'Balancing Navigational Freedom with Environmental Security Concerns', *Colorado Journal of International Environmental Law and Policy* (Yearbook), fall 2003, pp. 19–28.

29 *Charter of the United Nations*, 26 June 1945, 1 UNTS 16.

of military training exercises at sea,³⁰ there has never been any question that generally the *LOSC* does not directly address military uses of the oceans. Accordingly, provided states generally conform to their *UN Charter* and *LOSC* obligations when undertaking military activities at sea, such activities are consistent with international law and ultimately seek to reinforce maritime security.

Finally, in a benign sense, the compulsory dispute settlement provisions of the *LOSC* also assist in promoting security. At a base level, the range of dispute settlement options that exist under Part XV of the *LOSC*³¹ provide multiple options with which to settle disputes peacefully, thereby reinforcing the fundamental provisions of Article 33 of the *UN Charter*. The dispute settlement regime is not comprehensive, notably allowing states to exclude military activities from the purview of compulsory adjudication or arbitration, but the availability of mandatory and binding procedures in such a constituent instrument is remarkable.³² By its very existence the dispute settlement system in the *LOSC* provides states with reassurance and confidence that if disputes do arise over maritime affairs, as inevitably they will for all states from time to time, there are mechanisms available to them to settle their disputes peacefully, which should circumvent any temptation to resort to the use of force. Accordingly, it is interesting to reflect upon the jurisprudence to date of the International Tribunal for the Law of the Sea, which has had a strong focus upon dispute resolution in cases involving fisheries and/or environmental matters. The capacity of the Tribunal to respond swiftly to applications for prompt release in fisheries cases is a particular illustration as to how the dispute resolution provisions of the *LOSC* assist in the provision of resource security for states.³³

3 The law of the sea and criminal jurisdiction over activities at sea

A sovereign state has the ability to prescribe and enforce its laws and regulations within the territory over which it has sovereignty, including the air space above that territory and some adjacent maritime zones.³⁴ However, this right is not

30 See, for example, S. Rose, 'Naval Activity in the Exclusive Economic Zone: Troubled Waters Ahead', *Ocean Development and International Law* v21, 1990, pp. 123–45; 'Exclusion of Ships from Nonterritorial Weapons Testing Zones', *Harvard Law Review* v99, 1986, pp. 1040–58; C. Michaelsen, 'Maritime Exclusion Zones in Times of Armed Conflict at Sea: Legal Controversies Still Unresolved', *Journal of Conflict and Security Law* v8, 2003, pp. 363–90.

31 *LOSC*, note 1.

32 See generally N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge: Cambridge University Press, 2005.

33 T.A. Mensah, 'The Tribunal and the Prompt Release of Vessels', *International Journal of Marine and Coastal Law* v22, 2007, pp. 425–49; D.R. Rothwell and T. Stephens, 'Illegal Southern Ocean Fishing and Prompt Release: Balancing Coastal and Flag State Rights and Interests', *International and Comparative Law Quarterly* v53, 2004, pp. 171–87.

34 I. Brownlie, *Principles of Public International Law*, 4th ed., Oxford: Oxford University Press, 1998, pp. 105–6; M.N. Shaw, *International Law*, 4th ed., Cambridge: Cambridge University Press, 1997, pp. 333, 461; I. Shearer, *Starke's International Law*, 11th ed., London: Butterworth, 1994, p. 144.

absolute, and the sovereign rights of states have been constrained, even within sovereign territory, by developments in international law.³⁵

The maritime jurisdiction of a coastal state to prescribe and enforce criminal laws and regulations so as to give effect to its maritime security can be grounded in two principal sources. First, the exercise of such jurisdiction can invariably be justified on the basis of either the principle of nationality or that of territoriality in international law.³⁶ States have the capacity to enact criminal laws and regulations with respect to the acts of their nationals wherever they may be, and this provides a basis for the enactment of criminal laws and regulations over nationals both within and beyond the territory of a state.³⁷ States also clearly have the capacity to enact laws and regulations with respect to criminal matters that take place within their territorial limits, including adjacent air space and maritime areas.³⁸ However, under the law of the sea, territorial limits extend only to the edge of the territorial sea,³⁹ beyond which the remaining maritime areas are zones in which a mix of coastal state and third-state rights coexist. Rights of coastal states to prescribe and enforce laws related to fishing and the marine environment are set forth in the *LOSC* and have been supplemented by multilateral treaties. On the high seas, states' powers of prescription and enforcement are predominantly limited to vessels flying their flag. The main exception here is the universal jurisdiction recognized for the suppression of piracy.

Second, states also possess maritime jurisdiction in relation to criminal matters conferred by treaty. The best example of this power is the express maritime criminal jurisdiction conferred by the *LOSC* over the territorial sea,⁴⁰ but also in the case of hot pursuit for the exercise of enforcement jurisdiction beyond the

35 See D.P. O'Connell, *International Law*, London: Stevens, 1970, v1, p. 284.

36 Cf. F.A. Mann, 'The Doctrine of Jurisdiction in International Law', *Recueil de Cours* 1964-I, pp. 1, 83, who notes: 'a State may impose criminal liability if the act in question is committed within its territory or if the accused (or perhaps the victim) is its national. Yet while locality of the act or nationality are important points of contact, they are neither the only nor the invariably sufficient points of contact. It would go too far in the opposite direction if it were suggested that any connection with the legislating State should be sufficient. To see the limits of a State's criminal jurisdiction in the doctrine of the abuse of rights comes nearer the truth, but is, perhaps, a less attractive formulation.'

37 As an illustration of criminal law that is clearly intended to have an extraterritorial operation, see the *Crimes (Child Sex Tourism) Amendment Act 1994* (Cth), and the discussion by the High Court of Australia in *XYZ v. Commonwealth* [2006] HCA 25.

38 See Brownlie, note 34, pp. 303–5; Shaw, note 34, pp. 458–9 notes, 'That a country should be able to prosecute for offences committed upon its soil is a logical manifestation of a world order of independent states and is entirely reasonable since the authorities of a state are responsible for the conduct of law and the maintenance of good order within that state.'

39 It should be noted that some coastal states have also sought to exercise jurisdiction beyond the limit of a maritime zone on the basis of 'constructive presence', which has been relied upon when so-called 'mother ships' operating beyond a particular maritime zone are seized. See O'Connell, *The International Law of the Sea* v2, note 10, pp. 668–9. This concept has been incorporated in Article 111(4) of the *LOSC* in relation to hot pursuit.

40 See in particular *LOSC*, note 1, Articles 21, 27.

territorial limits of the coastal state to the EEZ and the high seas.⁴¹ Other treaties also confer very specific types of criminal jurisdiction to deal with international terrorism and hi-jacking at sea,⁴² and the illicit traffic of drugs at sea.⁴³

4 The United Nations Security Council and the law of the sea

The role of the Security Council supporting the legal framework for maritime security has evolved significantly since 11 September 2001. Prior to 2001 the Council's main contributions had been through the authorization of various enforcement actions, allowing vessels to be stopped and inspected to ensure adherence to mandatory Security Council resolutions setting out arms embargoes or seeking to prevent the passage of other goods and supplies to particular countries.⁴⁴ The Security Council has authorized such interdictions under Chapter VII of the *UN Charter* in relation to the 1991 Gulf War and the action in Afghanistan in 2001,⁴⁵ as well as in connection with the 1991–93 war in Yugoslavia, the 1993–94 conflict in Haiti and the 1997 civil war in Sierra Leone.⁴⁶

Although the Security Council is charged with the maintenance of international peace and security, and could authorize actions *prima facie* incompatible with the *LOSC*, it frequently operates with due regard for existing law of the sea principles. For example, the Security Council has called upon states to act within existing international law to enforce its sanctions, as happened in Resolution 1718 (2006) regarding the movement of certain cargo in response to North Korea's nuclear test.⁴⁷ Similarly, Resolution 1540 (2004) required states to prohibit and criminalize the transfer of weapons of mass destruction and their delivery systems to non-state actors, but does not specifically permit interdiction on the high seas for these purposes.⁴⁸

41 See *LOSC*, note 1, Article 111, and the discussion in O'Connell, *The International Law of the Sea* v2, note 10, pp. 1075–6.

42 See *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 10 March 1988 [1993] ATS 10.

43 See *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 20 December 1988, 28 ILM 497 (1989).

44 See N. Klein, *Maritime Security and the Law of the Sea*, Oxford: Oxford University Press, 2010, chapter 6.

45 M.J. Valencia, *The Proliferation Security Initiative: Making Waves in Asia*, Adelphi Papers, Oxford: Routledge for the International Institute for Strategic Studies, 2005, p. 34 (referring to Maritime Interdiction Operation under resolutions relating to Iraq, and the Leadership Interdiction Operation and NATO's Operation Active Endeavour targeting the Taliban and al Qaeda operatives).

46 Van Dyke, note 28, p. 25.

47 UN Resolution on Non-proliferation/Democratic People's Republic of Korea, SC Res. 1718, UN Doc. S/RES/1718 (2006) prohibited the import and export of weapons of mass destruction and ballistic weapon technology to North Korea and called upon all member states to take 'in accordance with their national authorities and legislation, and consistent with international law, cooperative action including through inspection of cargo to and from the DPRK, as necessary'.

48 UN Resolution on the Non-proliferation of Weapons of Mass Destruction, SC Res. 1540, UN Doc. S/RES/1540 (2004)

The Security Council has also taken action to respond to the severe problem of piracy off the coast of Somalia. Resolution 1816 (2008) was adopted under Chapter VII but also with the consent of the transitional government of Somalia. The resolution authorized states cooperating with the transitional government to enter the territorial waters of Somalia and use all necessary means for the purpose of repressing acts of piracy and armed robbery at sea, provided that advance notification was given to the transitional government and the action taken would be consistent with the suppression of piracy on the high seas.⁴⁹ A range of safeguards are included in the resolution to ensure that various rights under the law of the sea are preserved, including the right of innocent passage of third states through the territorial sea of Somalia,⁵⁰ that the resolution should not be construed as establishing customary international law and that it 'shall not affect the rights or obligations or responsibilities of member states under international law, including any rights or obligations under the [LOSC], with respect to any other situation'.⁵¹ While much emphasis was placed on how the resolution was not to disturb long-established law of the sea principles,⁵² Resolution 1816 nonetheless stands as an example of the ability of the Security Council to authorize action to deal with serious threats to maritime security.

5 The International Maritime Organization and the law of the sea

While the work of the International Maritime Organization (IMO) has predominantly been concerned with issues related to the safety of shipping and pollution of vessels,⁵³ it began consideration of maritime security issues, particularly related to terrorism, in the 1980s.⁵⁴ One of the main motivations for doing so was the hi-jacking of the Italian vessel *Achille Lauro*, and the on-board murder of a US national. To close gaps that existed in the authority of states to exercise jurisdiction over such incidents, states negotiated the *1988 SUA Convention* under the auspices of the IMO. Following the 11 September 2001 attacks on the US and the realization that the shipping industry may be vulnerable to terrorism, states moved the adoption of a protocol to augment the range of offences over which they could exercise jurisdiction, as well as creating a ship boarding procedure in order to enforce their criminal jurisdiction over these offences. The *2005 SUA Protocol* builds on state practice in the adoption of bilateral treaties allowing for ship boarding in response to terrorism and proliferation offences, and, when it

49 UN Resolution on the Situation in Somalia, SC Res. 1816, UN Doc. S/RES/1816 (2008), para. 7.

50 *Ibid.*, para. 8.

51 *Ibid.*, para. 9.

52 See 'The situation in Somalia', SC Mtg, UN Doc. S/PV.5902 (2008).

53 The relevance of this work for environmental security is discussed below.

54 See M.Q. Mejia Jr, 'Maritime Gerrymandering: Dilemmas in Defining Piracy, Terrorism and other Acts of Maritime Violence', *Journal of International Commercial Law* v2, 2003, p. 153.

enters into force, will provide an additional legal basis for action for the US-led Proliferation Security Initiative.⁵⁵

Another significant contribution of the IMO to the legal framework for maritime security has been through major amendments to the *International Convention for the Safety of Life at Sea Convention*⁵⁶ (SOLAS Convention). In 2004 the International Ship and Port Facility Code, adopted as Regulation XI-2/3, came into force and sets out security-related requirements for governments, port authorities and shipping companies with the intention to identify and allow for preventive measures against any suspicious act or circumstance threatening the security of the ship. A second key *SOLAS Convention* amendment was Regulation V/19-1 on Long Range Information and Tracking,⁵⁷ which creates a system whereby ships are required to automatically transmit information as to the identity of the ship, its position (longitude and latitude), and the date and time of the position provided.⁵⁸ This information may be received by the flag state of the vessel regardless of where the vessel is located.⁵⁹ A port state may also receive the information once a foreign-flagged vessel has indicated its intention to enter that port, except when the vessel is on the landward side of baselines of another state.⁶⁰ Finally, a coastal state may receive the information from a foreign-flagged vessel when it is 'navigating within a distance not exceeding 1,000 nautical miles of its coast', but again with the exception that no information will be provided if the vessel is on the landward side of baselines of another state.⁶¹ These new regulations have sought to improve the safety of shipping through enhanced mechanisms for assessing and responding to identified risks and providing greater information to authorities as to what ship is to be expected in a coastal state's maritime zones at any given time. The work of the IMO has been important in this regard for providing greater detail as to the operation of ships and transport of goods across the oceans.

6 Marine environmental security

An important dimension of the contemporary law of the sea has been the significant emphasis that is placed upon marine environmental protection. This is most prominently reflected in Part XII of the *LOSC*, but is also demonstrated by extensive references to the marine environment found elsewhere in the

55 See N. Klein, 'The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts against the Safety of Maritime Navigation', *Denver Journal of International Law and Policy* v35, 2007, p. 287.

56 *International Convention for the Safety of Life at Sea*, 1 November 1974, 1184 UNTS 278 [hereinafter *SOLAS Convention*].

57 IMO Resolution MSC.202(81), Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, as Amended, Ch. V, 'Regulation 19-1, Long-range Identification and Tracking of Ships', adopted 19 May 2006, IMO Doc. MSC 81/25/Add.1, Annex 2, p. 2.

58 *Ibid.*, para. 5.

59 *Ibid.*, para. 8.1.1.

60 *Ibid.*, para. 8.1.2.

61 *Ibid.*, para. 8.3. See further Chapter 13 in this volume.

Convention such as in the territorial sea regime (as it relates to constraints upon navigational rights and freedoms), the contiguous zone (with respect to the operation of sanitary laws and regulations) and the EEZ, which gives to the coastal state a wide ranging capacity to regulate marine environmental matters on both the surface of the oceans but also within the water column.

The increased focus found in the *LOSC* upon marine environmental matters reflected growing international awareness of environmental issues from the 1970s onwards, and has also been increasingly seen in national environmental laws and policies addressing matters related to the marine environment. As has been graphically demonstrated from time to time as a result of major maritime casualties resulting in large-scale oil spills and related environmental impact, damage to the marine environment has the potential to have significant economic impacts upon certain states. Not only is this an issue for individual states but there is also growing appreciation of the need for regional marine environmental management and regulation.

In addition to these initiatives, the oceans have also been the subject of new regimes seeking to guarantee nuclear security. Nuclear weapons testing at sea and nuclear-powered and armed ships have been regulated under a range of global and regional regimes. Australia and New Zealand challenged the legitimacy of France's South Pacific nuclear weapons testing programme in the International Court of Justice,⁶² and this provided the backdrop to the adoption of a South Pacific Nuclear Free Zone.⁶³ Similar nuclear-free zones have been declared in other parts of the world which extend to the adjacent EEZ,⁶⁴ though caution has been exercised to ensure there is no interference with the freedom of navigation.⁶⁵

One example of an area that has become subject to international and regional regulation under frameworks related to the law of the sea has been the transboundary movement of hazardous wastes and materials, which increasingly became a matter of global concern in the 1980s. The global response to this issue was the adoption of the 1989 *Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal* (Basel Convention).⁶⁶ The *Basel Convention*

62 *Nuclear Test Cases* (Australia and New Zealand v. France) [1973] ICJ Rep 320; *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case* [1995] ICJ Rep 288. See the discussion in C. Giraud, 'French Nuclear Testing in the Pacific and the 1995 International Court of Justice Decision', *Asia Pacific Journal of Environmental Law* v1, 1996, pp. 125–33.

63 *South Pacific Nuclear Free Zone Treaty*, 6 August 1985, 24 ILM 1442 (1985).

64 See *Treaty on the South East Asia Nuclear Weapon-free Zone*, 15 December 1995, available online at www.aseansec.org/3636.htm.

65 New Zealand has legislated to prohibit the entry into New Zealand ports (and all internal waters) of nuclear-powered vessels: see *New Zealand Nuclear Free Zone, Disarmament and Arms Control Act* 1987, s. 11. Section 4 establishes a nuclear-free zone in New Zealand, including in internal waters and the territorial sea, but s. 12 protects the right of innocent and transit passage and the rights of vessels in distress.

66 *Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal*, 22 March 1989, 1673 UNTS 126.

regulates the export of hazardous wastes and ensures that states of import have appropriate mechanisms in place to deal with the disposal of these hazardous wastes upon their arrival. To that end the *Basel Convention* places obligations on the state of export to ensure that certain standards are being met in the state of import, and also to put on notice those states through which the hazardous wastes are to transit.⁶⁷

In addition to the *Basel Convention*, there have been a number of regional initiatives designed to control and in some cases actually prohibit the export of such hazardous materials.⁶⁸ Within the Asia Pacific there has to date been guarded acceptance of the *Basel Convention*, especially in East Asia. However, the adoption in 1995 by South Pacific states of the *Waigani Convention*⁶⁹ represented a significant regional effort by South West Pacific states, including Australia and New Zealand, to create a separate legal regime to deal with the transboundary movement and management of hazardous and radioactive wastes.⁷⁰ The *Waigani Convention* has a wide area of application and is designed to complement already existing sub-regional environmental conventions in the South West Pacific, especially the *SPREP Convention*.⁷¹ The 'Convention Area' encompasses all the land territory, internal waters, territorial sea, continental shelf, archipelagic waters and EEZ established in accordance with international law of all the states parties (Article 1). In addition, high seas areas that are enclosed from all sides by the EEZs of the states parties are included. The central obligations of the *Waigani Convention* are found in Article 4, which provides for a number of initiatives, including:

- 1 A ban on the import of all hazardous and radioactive wastes from outside the Convention area.
- 2 A ban on the dumping of hazardous and radioactive wastes at sea.
- 3 A reduction in the generation of hazardous wastes within the region.
- 4 A commitment to ensure that all transboundary movements of hazardous wastes generated within the Convention Area are carried out in accordance with the provisions of the Convention.
- 5 A review of the controls over the transboundary movements of radioactive wastes.

67 K. Kummer, 'The International Regulation of Transboundary Traffic in Hazardous Wastes: The 1989 Basel Convention', *International and Comparative Law Quarterly* v41, 1992, p. 530.

68 See *Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa*, 29 January 1991, 30 ILM 773 (Bamako Convention).

69 *Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region*, 16 September 1995, [2001] ATS 17 (*Waigani Convention*).

70 For some background to the negotiation of this Convention see P. Lawrence, 'Regional Strategies for the Implementation of Environmental Conventions: Lessons from the South Pacific?' *Australian Year Book of International Law* v15, 1994, pp. 216–17.

71 *Convention for the Protection of the Natural Resources and Environment of the South Pacific Region*, 24 November 1986, 26 ILM 38 (1987).

- 6 A review of the controls over the international trade of domestically prohibited goods.

An additional concern over the transboundary movement of hazardous wastes and materials is the conditions for the transportation of such materials, and in the Asia Pacific this is an issue that primarily relates to transport at sea. Beyond a variety of IMO codes dealing with the transportation of 'dangerous goods',⁷² and some of the provisions of the 1973 *International Convention for the Prevention of Pollution from Ships* (MARPOL),⁷³ there has been little clear international law regulating the carriage of hazardous cargoes. Some specific provisions are found in the *LOSC*; however, these are not comprehensive and in any event refer back to existing international standards.⁷⁴

7 Concluding remarks

The law of the sea has been responsive to the changing environment for maritime security and the agreements and arrangements in place have sought to accommodate the increasing interests and demands of coastal states, as well as the interests of the international community as a whole. The cornerstone of the legal framework for maritime security is to be found in the *LOSC*, which addressed and reconciled the multifaceted security interests of states involved in the negotiations. Where gaps or ambiguities were left in the *LOSC*, states have, in many instances, reached more specific agreements to redress these matters. The examples mentioned in this chapter, including the recognition of additional coastal state criminal jurisdiction, new environmental agreements, and developments at the IMO, demonstrate how the law of the sea has continuing relevance for matters of maritime security. For Australia and New Zealand the law of the sea remains of fundamental importance in regulating their conduct within their own maritime zones as well as through their cooperative endeavours at regional and international levels that have been undertaken to enhance their maritime security.

72 See the review of the relevant instruments in S. Mankabady, *The International Maritime Organization*, v1, London: Croom Helm, 1986, pp. 97–163.

73 *International Convention for the Prevention of Pollution from Ships*, 2 November 1973, 1340 UNTS 184, Annex III.

74 See *LOSC*, note 1, Articles 19, 21, 23, 42.

3 Australia's Traditional Maritime Security Concerns and Post-9/11 Perspectives

Donald R. Rothwell and Cameron Moore

Australia is an island continent which even prior to becoming an independent state upon Federation in 1901 had a rich history in maritime affairs. Since that time Australia has maintained an increasing focus on maritime security, particularly expanding in recent years in response to contemporary events. Part of this interest has been driven by history and Australia's partial inheritance of British traditions and perspectives on maritime affairs, reinforced by the maritime threats Australia faced during World War II such as the battle of the Coral Sea.¹ It is also driven by geography, given Australia's unique position as the largest island which is also a continent remotely located from many other land masses and with no land bridge to other territories. Every journey undertaken to Australia and, perhaps more significantly for present purposes, all trade must be undertaken by sea or over the sea. This geographical element has been further reinforced through some of Australia's external possessions, such as the Australian Antarctic Territory (AAT) and island territories such as the Heard and McDonald Islands, Macquarie Island, Christmas Island and Norfolk Island, all being distant from the mainland and having a significant maritime component to their existence.² Australia's maritime security dimension has also been enhanced by the opportunities that have arisen as a result of the expansion of Australia's maritime domain through the declaration of a range of new maritime zones consistent with the contemporary law of the sea. These new maritime zones, especially the exclusive economic zone (EEZ) and the continental shelf, have created new resource rights for Australia but also carried with it new responsibilities such as environmental management.

1 The battle of the Coral Sea was a series of naval engagements between Japanese and Allied forces that took place off the north-east coast of Australia between 4 and 8 May 1942 in the Coral Sea between Australia, the Solomon Islands and New Guinea. It was the most significant maritime military operation conducted close to Australian shores during World War II and reinforced Australia's maritime vulnerability and reliance, at that time, upon US military power.

2 These offshore islands respectively generate an exclusive economic zone of 410,722 km², 471,837 km², 325,021 km² and 428,618 km²; see Australian Government, Geoscience Australia, 'Oceans and the Sea: Area of the Australian Exclusive Economic Zone', undated, available online at www.ga.gov.au/education/geoscience-basics/dimensions/oceans-seas.jsp.

This chapter will assess these issues by considering some of the drivers that impact upon Australian policy towards maritime security, before commencing with an analysis of the legal framework at both the international and national level within which Australia's maritime security framework operates. Consideration will also be given to some of the contemporary challenges that Australia has faced in dealing with post-9/11 maritime security challenges at both the global and the regional level, and the institutional frameworks and arrangements Australia has put in place during the past decade in response to these challenges.

1 Australian policy towards maritime security

Australian policy towards maritime security has been influenced by a number of drivers throughout history. Initially, defence of the Australian colonies from foreign powers was a key issue for a far-flung outpost of the British Empire, and this remained a theme during the early years of Federation post-1901. Closely related to this was the need to ensure the security and maintenance of trade routes, given Australia's reliance on the export of natural resources and agricultural products. World War II had a significant impact upon Australia's outlook towards these matters. The fall of Singapore and the threat of Japanese invasion forced Australia to reassess its alliances during the height of the Pacific conflict. The war highlighted not only Australia's maritime vulnerability but the need for a closer security relationship with the United States (US), and post-war this morphed into an alliance which has remained steadfast ever since.

The gradual assertion of ever-expanding offshore maritime zones consistent with the developing law of the sea also gave an additional dimension to Australia's maritime security.³ As an island continent with vast ocean spaces to the east, west and south, Australia had a nearly unfettered capacity to proclaim a continental shelf, a fisheries zone and then eventually an EEZ. These new maritime zones created both rights and responsibilities for Australia and raised issues with respect to their security. The growth in Australian trade into the Asia-Pacific, especially to markets in Japan and China, where there was considerable demand for Australian natural resources, meant that Australia had strong interests in regional maritime security. The recognition of new archipelagic states in developing democracies, such as Indonesia and the Philippines and the emergence of an independent Papua New Guinea, also meant that Australia was keen to ensure the freedom of international navigation through strategic straits immediately to its north. In more recent years, especially since 2001, Australia has taken a proactive role in addressing and responding to the potential threat of maritime terrorism not only within Australian waters but also within the region. To that end, Australia has taken a number of initiatives in the area. In the past decade issues concerning

3 See discussion in M. Landale and H. Burmester, 'Australia and the Law of the Sea: Offshore Jurisdiction' in K.W. Ryan (ed.), *International Law in Australia*, 2nd ed., Sydney: Law Book Co., 1984, pp. 390–416.

maritime terrorism have begun to dominate the Australian maritime security agenda and this has had an impact on law, policy and operational responses within the field.

2 The international and national legal framework

Australia's maritime security legal framework centres around the interaction of domestic law and the relevant international legal regime. At the level of the Commonwealth government, there remained some constitutional ambiguity as to the extent of Commonwealth power in the decades following Federation. While it was clear that the Commonwealth Parliament possessed legislative powers with respect to defence, fisheries and certain aspects associated with navigation,⁴ there was no clear treaty implementation power under the *Constitution*. This had the potential to create impediments to Commonwealth control and regulation of the Australian offshore under the developing law of the sea. The 1972 election of the Whitlam Labor government resulted in a more ambitious approach being taken to the potential operation of Commonwealth powers and the *Seas and Submerged Lands Act 1975* (Cth) was enacted in order to resolve conclusively the status of Commonwealth control and regulation of the offshore, especially with respect to the continental shelf. The constitutionality of this legislation was challenged before the High Court of Australia, which in its landmark decision of *NSW v. Commonwealth* accepted that Commonwealth legislative powers under the Section 51(xxix) 'external affairs' power of the *Constitution* could extend to events, matters, things and persons beyond the limits of Australia.⁵ With the subsequent confirmation of the extent of this power in a case concerning the Timor Sea,⁶ and a further expansion of the external affairs power to include all treaties to which Australia had become a party,⁷ the extent of federal power over the offshore was effectively complete.⁸ Nevertheless, for political purposes the decision was taken to effectively cede to the Australian states and territories control over the territorial sea up to the edge of the three nautical mile limit.⁹ Accordingly, there remains an ongoing role for the states and territories in the management and regulation of

4 See respectively *Commonwealth of Australia Constitution Act 1900* (Cth) s. 51 (vi), Defence power; s. 51(vii), Lighthouses power; s. 51(x), Fisheries power; ss. 51(i) and 98, Navigation and shipping power.

5 *New South Wales v. Commonwealth* (1975) 135 CLR 337.

6 *Horta v. Commonwealth* (1994) 181 CLR 183.

7 *Commonwealth v. Tasmania* (1983) 158 CLR 1. For assessment of these developments see D.R. Rothwell, 'The High Court and the External Affairs Power: A Consideration of its Outer and Inner Limits', *Adelaide Law Review* v15, 1993, pp. 209–40.

8 See discussion of these events as they impacted upon the offshore in R.D. Lumb, *The Law of the Sea and Australian Offshore Areas*, 2nd ed., St Lucia: University of Queensland Press, 1978.

9 These arrangements were put in place under the 'Offshore Constitutional Settlement', which was supported by legislation in the form of *Coastal Waters (State Powers) Act 1980* (Cth) and *Coastal Waters (State Title) Act 1980* (Cth).

Australia's maritime areas, especially with respect to policing within coastal waters.¹⁰

Under the international legal framework provided by the law of the sea Australia has been a strong supporter of the developments in the field that have taken place since the 1958 Geneva Conference resulted in the adoption of four conventions on the law of the sea.¹¹ While Australian ratification of the 1982 *United Nations Convention on the Law of the Sea (LOSC)*¹² was delayed until 1994, partly due to issues with respect to the Part XI regime for the deep seabed, Australia has been an enthusiastic supporter of the contemporary international law of the sea and has been actively engaged with a number of the international institutions created under that regime. Of particular relevance in terms of maritime security has been the gradual expansion of Australia's maritime zones so as to reflect the applicable outer limits available under the *LOSC*. To that end, the most significant recent development has been Australia's submission before the Commission on the Limits of the Continental Shelf and the recommendations made by the Commission in 2008 which will form the basis for the eventual assertion of an outer continental shelf claim under Article 76 of the *LOSC*.¹³ Consistent with the assertion of enlarged maritime zones, Australia has also been engaged in the delimitation and finalization of maritime boundaries with neighbouring states, of which the arrangements with Papua New Guinea and Timor Leste have particular maritime security dimensions.¹⁴

While the law of the sea provides a framework for an appreciation of Australia's international obligations in the maritime domain, there is a raft of additional instruments that have maritime security implications. Australia has been actively engaged through the International Maritime Organization (IMO) in the development since the 1950s of a range of instruments addressing shipping law, especially ship safety, and aspects of marine environmental protection particularly related to ship-sourced pollution. In more recent years this has been supplemented by Australian endorsement and adoption of the *1988 SUA Convention* and active engagement in the negotiations leading to the *2005 SUA Protocol*. At a regional level, Australia has given particular attention to maritime security in

10 For further discussion see D.R. Rothwell, 'The Legal Framework for Ocean and Coastal Management in Australia', *Ocean and Coastal Management* v33, 1996, pp. 41–61.

11 K. Bailey, 'Australia and the Geneva Conventions on the Law of the Sea' in D.P. O'Connell (ed.), *International Law in Australia*, Sydney: Law Book Co., 1964, pp. 228–45.

12 *United Nations Convention on the Law of the Sea*, 2 December 1982, 1833 UNTS 3 [hereinafter *LOSC*].

13 Hon. Martin Ferguson AM MP, Australian Minister for Resources and Energy; Minister for Tourism, 'UN confirms Australia's Rights over extra 2.5 million square kilometers of Seabed', 21 April 2008, available online at www.minister.ret.gov.au/TheHonMartinFergusonMP/Pages/UNCONFIRMSAUSTRALIA'SRIGHTSSOVEREXTRA.aspx; See also the discussion in A. Serdy, 'Toward Certainty of Seabed Jurisdiction beyond 200 Nautical Miles from the Territorial Sea Baseline: Australia's Submission to the Commission on the Limits of the Continental Shelf', *Ocean Development and International Law* v36, 2005, pp. 201–17.

14 See generally S. Kaye, *Australia's Maritime Boundaries*, 2nd ed., Wollongong: Centre for Maritime Policy, University of Wollongong, 2001.

the Southern Ocean via its engagement with the Antarctic Treaty System and in the past decade has been focused on addressing illegal, unregulated and unreported fishing within those waters. Bilaterally, the challenge raised by 'people smuggling' during the past decade has also seen Australian responses at a variety of legal and institutional levels, culminating in the adoption of the 2006 *Lombok Agreement between Australia and Indonesia on Security Cooperation*.¹⁵

Australia now has a vast suite of international legal frameworks at the global, regional and bilateral levels that provide for the enhancement of national maritime security. This has been supplemented at the national level by a domestic legal framework which, freed of any constitutional shackles, now has considerable capacity to not only give effect to Australia's international obligations but also to ensure the existence of a comprehensive legal regime at the national level. Where necessary, that legal regime is further supplemented by relevant state and territorial laws.

3 Contemporary developments

Any consideration of Australian maritime security concerns and responses must inevitably be selective given the manner in which perspectives have evolved over time and especially the particular dimensions that have arisen since 2001. To that end, any review of Australian perspectives and initiatives in the field must be assessed within a particular historical context. It is also important to appreciate the emerging significance of environmental and resource security issues for Australia and the particular maritime dimensions they possess. What follows is a brief consideration of some Australian maritime security law and policy issues in recent years.

3.1 Australian Maritime Identification System

In the wake of the September 2001 terrorist attacks upon New York and Washington, DC, Australia took a number of initiatives to respond to the threat posed by international terrorism.¹⁶ With respect to maritime security, the Howard government in 2001 had already given this issue some priority following the *MV Tampa* incident in August of that year,¹⁷ which paved the way for the

15 *Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation*, 13 November 2006, [2008] ATS 3.

16 The most politically significant was the invocation of the *Security Treaty between Australia, New Zealand and the United States of America (ANZUS Treaty)*, 1 September 1951, [1952] ATS 2, and the pledging of military support for the US-led 'Operation Enduring Freedom' in Afghanistan commencing in October 2001.

17 The *MV Tampa* was a Norwegian container ship which conducted a rescue at sea of 433 persons following the sinking of their boat off the north-west coast of Western Australia; the Australian government subsequently denied the *MV Tampa* entry into the Australian territorial sea on the basis that the rescued persons were illegal asylum seekers. For a description and legal analysis of

subsequent Royal Australian Navy (RAN)-led 'Operation Relex' interception of vessels carrying asylum seekers en route to Australia.¹⁸ Internationally, Australia was also supportive of the US-promoted Proliferation Security Initiative (PSI).¹⁹ Under the PSI, like-minded coastal states asserted a right to interdict in the territorial sea and contiguous zone vessels suspected of carrying weapons of mass destruction or other cargoes considered a potential threat to national or international security. Launched in 2003, the PSI received strong support from Australia, which also had support from key maritime states such as Italy, Japan and the United Kingdom. Notwithstanding questions raised over the conformity of the PSI with the *LOSC*,²⁰ then Foreign Minister Alexander Downer said in 2005 that 'Australia is proud to be a key driver of the PSI, a practical and informal arrangement among countries to cooperate with each other, as necessary, in intercepting and disrupting illicit and WMD trade, their delivery systems and related materials.'²¹

Clearly linked to its support for the PSI, in December 2004 Australia announced a series of initiatives that were further designed to strengthen maritime security. The focus of these initiatives was the protection of Australia's offshore assets, in particular offshore oil and gas facilities in the Timor Sea and North West Shelf; however, it was Prime Minister Howard's announcement of the creation of a new 'Maritime Identification Zone' that became the focus of much of the attention.²² In addition to announcing an enhanced role for the Australian Defence Force in offshore counter-terrorism, and the creation of a Joint Offshore Protection Command, Prime Minister Howard also indicated Australia would establish a Maritime Identification Zone:

this event see D.R. Rothwell, 'The Law of the Sea and the MV *Tampa* Incident: Reconciling Maritime Principles with Coastal State Sovereignty', *Public Law Review* v13, 2002, pp. 118–27; S. Kaye, 'Tampering with Border Protection: The Legal and Policy Implications of the Voyage of the MV *Tampa*' in M. Tsamenyi and C. Rahman (eds), *Protecting Australia's Maritime Borders: The MV Tampa and Beyond*, Wollongong: Centre for Maritime Policy, University of Wollongong, 2002, pp. 59–81.

18 See generally F. Brennan, *Tampering with Asylum: A Universal Humanitarian Problem*, St Lucia: University of Queensland Press, 2003; M. Crock, B. Saul and A. Dastyari, *Future Seekers v2, Refugees and Irregular Migration in Australia*, Sydney: Federation Press, 2006.

19 See M. Byers, 'Policing the High Seas: The Proliferation Security Initiative', *American Journal of International Law* v98, 2004, p. 526.

20 See discussion in M.R. Schulman, 'The Proliferation Security Initiative and the Evolution of the Law on the Use of Force', *Houston Journal of International Law* v28, 2006, p. 771; D. Guilfoyle, 'The Proliferation Security Initiative: Interdicting Vessels in International Waters to prevent the Spread of Weapons of Mass Destruction?', *Melbourne University Law Review* v29, 2005, p. 733.

21 Hon. A. Downer MP, Australian Minister for Foreign Affairs, 'Proliferation Security Initiative', Press Release, 31 May 2005, available online at www.foreignminister.gov.au/releases/2005/fa070_05.html.

22 See the announcement at the Hon J. Howard MP, Prime Minister of Australia, 'Strengthening Offshore Maritime Security', Media Release, 15 December 2004, available online at http://pandora.nla.gov.au/pan/10052/20050221-0000/www.pm.gov.au/news/media_releases/media_Release1173.html.

This will extend up to 1,000 nautical miles from Australia's coastline. On entering this Zone vessels proposing to enter Australian ports will be required to provide comprehensive information such as ship identity, crew, cargo, location, course, speed, and intended port of arrival. Within Australia's 200 nautical mile exclusive economic zone, the aim will be to identify all vessels, other than day recreational vessels.²³

Following the formal government announcement, Prime Minister Howard gave further details of the initiative via a media interview, at which time it was suggested the proposal would involve the creation of a 'surveillance or interception zone'.²⁴

This proposal raised a number of issues under the law of the sea and unsurprisingly was greeted with a torrent of criticism from some of Australia's neighbours²⁵ given that at face value the zone would have extended into the territorial seas and EEZs of not only Indonesia and New Zealand but also Timor Leste, Papua New Guinea and the Solomon Islands. By February 2005 the Howard government had begun to subtly adjust some of the terminology previously used with this initiative. Rather than a 'Maritime Identification Zone' it was indicated that a 'Maritime Identification System' was being proposed that would establish 'a framework for seeking, analysing and managing information on vessel identity, crews, cargoes and ship movements to support Australia's maritime security needs, particularly in relation to vessels seeking to enter Australian ports'.²⁶ Within this initiative, a graduated identification system would be implemented under which vessels up to 1,000 nautical miles or forty-eight hours' steaming would be subject to an Australian request for advanced arrival information, which would then increase when the vessel was 500 nautical miles or twenty-four hours' steaming from the coast, until such time as the vessel actually entered the Australian EEZ.²⁷ Aligned with these adjustments was the creation in 2005 of the 'Joint Offshore Protection Command', subsequently renamed 'Border Protection Command' (BPC), for the purpose of addressing terrorist threats to maritime

23 Ibid.

24 'Transcript of the Prime Minister of Australia, the Hon J. Howard MP, Interview with P. Murray', Radio 6PR, Perth, 15 December 2004, available online at <http://pandora.nla.gov.au/pan/10052/20050221-0000/www.pm.gov.au/news/interviews/Interview1174.html>

25 N. Klein, 'Legal Implications of Australia's Maritime Identification System', *International and Comparative Law Quarterly* v55, 2006, pp. 337-9; ABC News Online, 'Indonesia Rejects Maritime Security Zone', ABC News Online, 17 December 2004, available online at www.abc.net.au/news/newsitems/200412/s1267205.html. See also K. Marks, 'Australia to impose 1000-mile "Terror Exclusion Zone"', *The Independent* (London), 16 December 2004; 'NZ in Dark over vast Australian Security Cordon', *New Zealand Herald* (Wellington), 16 December 2004, available online at www.nzherald.co.nz.

26 Australian Government, Department of Transport and Regional Services, *Strengthening Australia's Offshore Maritime Security*, Industry Briefing Paper, February 2005, available online at www.dotars.gov.au/transport/security/maritime/pdf/Strengthening_offshore.pdf.

27 Ibid.

assets and the coastline, and also coordinating the implementation and operation of the new Maritime Identification System.²⁸ The modified system, dubbed the 'Australian Maritime Identification System' (AMIS), while not attracting the same fierce criticism from regional neighbours as the original proposal did, has nevertheless been questioned as to its consistency with international law.²⁹

3.2 *Torres Strait*

The emergence of an independent Papua New Guinea in 1975 necessitated for Australia the need to determine a maritime boundary through the Torres Strait and adjacent waters, and this was concluded in the 1978 *Torres Strait Treaty*.³⁰ The Treaty has provided a strong legal foundation not only for the determination of the maritime boundary through the strait, but also for ongoing cooperation between the two countries in the management of the strait. As an international strait for the purposes of the law of the sea, the right of transit passage is recognized through the Torres Strait.³¹ While Australia has never sought to contest this status, it has over recent decades begun to raise concerns over the environmental vulnerability of the area to the effects of marine pollution caused by shipping passing through the strait. To that end, Australia introduced a voluntary pilotage regime for international shipping passing through the strait in 1991. However, the level of compliance with this regime was such that initiatives were commenced to implement a compulsory pilotage regime under which all shipping passing through the strait would be required to take on board an accredited pilot for the purposes of ensuring safe transit.

In 2003 Australia and Papua New Guinea jointly began to work with the IMO towards the adoption of a compulsory pilotage regime within the Torres Strait.³² The proposal, essentially based on the grounds that the waters of the strait were a Particularly Sensitive Sea Area, was eventually adopted in 2005.³³ Based primarily on environmental security and the safety of shipping, the compulsory pilotage regime for the Torres Strait has raised some questions as to its consistency with the

28 Hon. R. Hill, Australian Minister for Defence, and the Hon. C. Ellison, Australian Minister for Justice and Customs, 'Boost for Maritime Counter-terrorism Protection', Media Release, 30 March 2005, available online at www.minister.defence.gov.au/Hilltpl.cfm?CurrentId=4745.

29 See Klein, note 25, p. 340. See also N. Klein, 'Legal Limitations on Ensuring Australia's Maritime Security', *Melbourne Journal of International Law* v7, 2006, p. 308.

30 *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the Area between the two Countries, including the Area known as the Torres Strait, and related Matters*, 18 December 1978, [1985] ATS 4.

31 For general background on this issue and the status of the strait see S.B. Kaye, *The Torres Strait*, The Hague: Martinus Nijhoff, 1997.

32 See discussion in J. Roberts, 'Compulsory Pilotage in International Straits: The Torres Strait PSSA Proposal', *Ocean Development and International Law* v37, 2006, p. 93.

33 IMO Resolution MPEC 133(53), Designation of the Torres Strait as an Extension of the Great Barrier Reef Particularly Sensitive Area, 22 July 2005, IMO Doc. MSC MEPC 53/24/Add.2 Annex 21.

provisions of the *LOSC*, especially with respect to whether Australia can enact laws enforcing such a regime without having the effect of 'hampering' transit passage contrary to the provisions of the Convention.³⁴ Australia's implementation of the new compulsory pilotage regime in the Torres Strait, which has necessitated amendments to the *Navigation Act 1912* (Cth), has raised some concerns by neighbouring and other maritime states as to the impacts upon their freedom of navigation and the consistency of Australia's actions with the law of the sea.³⁵

3.3 Japanese whaling within the Australian whale sanctuary

Australia has a long history as a whaling nation; however, through a combination of economics and more conservationist policies, the Australian whaling industry was gradually phased out in the 1970s. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*) reflects these developments, with the effect that any whaling activity within the declared Australian Whale Sanctuary is prohibited.³⁶ These provisions apply not only to Australian nationals and vessels but also to foreign nationals and vessels, and extend to waters offshore the Australian Antarctic Territory (AAT) in the Southern Ocean.³⁷

In 2004 a non-governmental organization, Humane Society International (HSI), commenced proceedings before the Federal Court of Australia asserting that Japanese whaling activity in the Australian Whale Sanctuary adjacent to the AAT was contrary to the *EPBC Act*.³⁸ In a series of proceedings between 2004 and 2008³⁹ declaratory and injunctive relief was sought concerning whaling alleged to have been carried out by Kyodo Senpaku Kaisha, a corporation holding a licence from the Japanese government to conduct 'special permit' whaling. Eventually the matter was determined at trial level in January 2008, where Allsop J was satisfied that a 'significant number of whales were taken inside the Australian Whale

34 See *LOSC*, note 12, Article 44.

35 See the discussion in R.C. Beckman, 'PSSAs and Transit Passage: Australia's Pilotage System in the Torres Strait challenges the IMO and UNCLOS', *Ocean Development and International Law* v38, 2007, pp. 325–57.

36 The Australian Whale Sanctuary is coterminous with the outer limits of the Australian EEZ, which in addition to extending offshore the continent of Australia also extends offshore islands and Australia's Antarctic claim to the AAT.

37 The application of Australian law in the waters offshore the AAT is contentious owing to Australia's claim to the AAT not being subject to recognition by the vast majority of states; see generally G. Triggs, *International Law and Australian Sovereignty in Antarctica*, Sydney: Legal Books, 1986.

38 Humane Society International was considered to have standing to bring proceedings seeking an injunction under *EPBC Act 1999* (Cth), s. 475(7): *Humane Society International Inc. v. Kyodo Senpaku Kaisha Ltd* [2008] FCA 3 [4].

39 Commencing with *Humane Society International Inc. v. Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510. See discussion in T. Stephens and D.R. Rothwell, 'Japanese Whaling in Antarctica: *Humane Society International Inc. v. Kyodo Senpaku Kaisha Ltd*', *Review of European Community and International Environmental Law* v16, 2007, pp. 243–6.

Sanctuary⁴⁰ and that Kyodo had contravened the *EPBC Act*. Orders were issued by the court that Kyodo be restrained from engaging in any such further acts.⁴¹ However, enforcement of these orders creates some significant legal challenges. As noted by Allsop J:

The respondent has, on the evidence, no presence or assets within the jurisdiction. Unless the respondent's vessels enter Australia, thus exposing themselves to possible arrest or seizure, the applicant acknowledges that there is no practical mechanism by which orders of this Court can be enforced.⁴²

Parallel to these proceedings the newly elected Rudd government announced in December 2007 a series of initiatives designed to promote Australia's opposition towards Japan's scientific whaling programme in the Southern Ocean.⁴³ One of these initiatives included the deployment of Australian assets to undertake monitoring and surveillance of the Japanese whaling fleet while it was within the Australian Whale Sanctuary. This resulted in the *Oceanic Viking*, an Australian Customs patrol vessel, being tasked with the responsibility of locating the Japanese whaling fleet and collecting evidence of its activities in January–February 2008. This mission was successful and the collected evidence is being assessed by the Australian government as to whether it may provide a basis for an international legal challenge to Japan's scientific whaling programme.⁴⁴ These incidents highlight the difficulties faced in enforcing Australian law and policy in the Southern Ocean due to the remoteness of the region, the uncertain status of Australia's claim over Antarctica and difficulties in Australia's enforcement capacity in the region. It illustrates one of the challenges Australia faces in ensuring its maritime security due to an underlying weakness in the legal regime.

4 The Commonwealth's structure for Australia's maritime security

As suggested above, there have been significant adjustments to the legal, policy and governmental framework associated with Australian maritime security since 2001, of which perhaps the most important was the creation in 2005 of Border

40 *Humane Society International Inc. v. Kyodo Senpaku Kaisha Ltd* [2008] FCA 3, para. 39.

41 *Ibid.*, para. 55. Orders were eventually served against the respondent in Japan: Peter Alford, 'Aussie judgment served on whalers', *The Australian* (Sydney), 24 January 2008, p. 7.

42 *Humane Society International Inc. v. Kyodo Senpaku Kaisha Ltd* [2008] FCA 3, para. 46.

43 Hon. S. Smith MP, Australian Minister for Foreign Affairs, and the Hon. P. Garrett MP, Australian Minister for Environment, 'Australia Acts to Stop Whaling', Joint Media Release, 19 December 2007, available online at www.foreignminister.gov.au/releases/fa-s002-07.html.

44 Hon. P. Garrett MP, Australian Minister for Environment, and Hon. B. Debus MP, Australian Minister for Home Affairs, 'Whaling Announcement: Release of Images from the *Oceanic Viking*', Transcript, 7 February 2008, available online at www.environment.gov.au/minister/garrett/2008/pubs/tr20080207a.pdf.

Protection Command. This reflected an increase in government concern for maritime security after the unauthorized boat arrival controversies of 2001, a sharp increase in illegal fishing activity in both northern and southern waters and, most significantly, the terrorist attacks in New York, Washington, DC, Bali, Madrid and elsewhere between 2001 and 2004.⁴⁵ Between 1968 and 2005 there had been various structures put in place at the Commonwealth level for civil surveillance and response and, to a lesser extent, maritime counter-terrorism. The most recent previous arrangement saw a RAN rear admiral put in charge of the Customs Coastwatch agency in 2000. This arrangement dealt primarily with coordinating surveillance and response.⁴⁶ Enforcement at sea was a matter for Customs and the Australian Defence Force (ADF) as separate agencies, although the relevant legislation was the responsibility of various other relevant agencies, such as the Australian Fisheries Management Authority, Immigration and Customs. Coastwatch did not deal with maritime counter-terrorism, for which the Attorney-General's Department, state police and the ADF shared responsibility, although not in a well-defined way.⁴⁷

4.1 The current structure

The current structure for Australia's maritime security divides responsibility for policy and enforcement. Policy responsibility, together with administration of the relevant legislation, resides with a number of Commonwealth agencies. It reflects general sectoral responsibility within government and there is no one particular lead agency with carriage of maritime affairs similar to the Canadian Department of Oceans and Fisheries, or the Indonesian Ministry of Maritime Affairs and Fisheries. For example, the Department of Immigration and Citizenship is responsible for immigration policy and administers the *Migration Act* 1958 (Cth). So too the Department of Agriculture, Fisheries and Forestry oversees fisheries policy through the Australian Fisheries Management Authority and administers the *Fisheries Management Act* 1991 (Cth).⁴⁸ Similarly, different agencies have responsibility for policy and legislation with respect to areas such as the environment and shipwrecks, shipping and the security of ships and offshore platforms, petroleum resources, quarantine and piracy.⁴⁹ None of these agencies has any significant capacity to enforce its legislation at sea.

45 Howard, 'Strengthening Offshore Maritime Security', note 22. Note that Border Protection Command was initially called Joint Offshore Protection Command. The authors are grateful for the comments of Commander Ian Campbell RAN, Command Legal Officer, Border Protection Command, on this section of the chapter.

46 See D. Woolner, *Policing our Ocean Domain: Establishing an Australian Coastguard*, Strategic Insights 41, Canberra: Australian Strategic Policy Institute, 2008, pp. 14–18.

47 *Ibid.*; Howard, 'Strengthening Offshore Maritime Security', note 22.

48 *Commonwealth of Australia Administrative Arrangements Order*, 25 January 2008, as amended by Order in Council 1 May 2008. All references to legislation are to Commonwealth legislation.

49 *Ibid.*; see Australian Government, Border Protection Command, *Concept of Operations*, Canberra, February 2008, p. 11.

BPC is largely responsible for all civil and military enforcement of Commonwealth law at sea, as well as responding to terrorist threats in or to Australia's offshore area. It is a standing multi-agency task force comprising Defence and Customs personnel along with other Commonwealth government agency representatives as required. BPC forms part of the Australian Customs Service as well as being an Australian Defence Force command. It has a Navy rear admiral as its commander and there are two deputy commanders, one from the Australian Customs Service and one from the Australian Defence Force. The Commander of BPC reports both to the Chief Executive Officer of Customs and the Chief of the Defence Force.⁵⁰ Despite extensive powers being available under legislation administered by its 'parent' agencies, the *Customs Act* 1901 (Cth) and the *Defence Act* 1903 (Cth), there are still significant enforcement powers within legislation administered by other agencies.⁵¹ Given the fragmented nature of Australian law relating to maritime security the creation of BPC has allowed a greater focus on coordinating this law, particularly between the regulatory and enforcement agencies.⁵² It remains a question as to whether it would be better to consolidate this law rather than coordinate it. This will be discussed in greater detail below.

4.2 *Benefits*

There are benefits of the current maritime security structure. Perhaps the most significant is the increased focus and coordination in enforcement and response at sea. Even if the policy responsibility for Australia's maritime affairs resides in disparate agencies, since 2005 responsibility for law enforcement and counter-terrorism at sea has solely resided in BPC. It is probably realistic that policy should reside in different agencies, as the various government policy interests often reflect disparate terrestrial policy interests, such as the environment, petroleum and immigration. Enforcement at sea is not, however, inherently disparate. There is a degree of unity in surveillance and interception of vessels at sea, whatever the regulatory purpose. Indeed, it is not necessarily possible to know the precise regulatory interest in a vessel, whether it be fishing or immigration, for example, until after a boarding. Having one agency in command of all enforcement action at sea appears to provide a much more coherent approach.

From the point of view of liaising with state and foreign governments, having one Commonwealth agency responsible for enforcement also appears to be beneficial, with BPC pursuing an active programme of engagement in this regard. This includes the PSI 'Exercise Maru' in New Zealand, ASEAN Regional Forum

50 Australian Government, Border Protection Command, 'Organisational Structure', September 2008, available online at www.customs.gov.au/site/page.cfm?u=5599.

51 For example, *Maritime Transport and Offshore Facilities Security Act* 2003 (Cth); *Torres Strait Fisheries Act* 1984 (Cth); *Offshore Petroleum and Greenhouse Gas Storage Act* 2006 (Cth).

52 Border Protection Command chairs a Maritime Legislation Working Group for this purpose. Australian Government, Border Protection Command, *Concept of Operations*, note 49, p. 9.

exercises, and acting as the Australian Security Forces Authority for IMO purposes.⁵³

There has also been a complete redevelopment of maritime counter-terrorism responsibilities. In 2005 the Commonwealth, states and Northern Territory, through a new National Counter Terrorism Plan, agreed that the Commonwealth would assume responsibility for counter-terrorism prevention and response seaward of the territorial sea baseline. The plan made the BPC the lead agency. This superseded previous arrangements where the ADF would support state responses, which was a concern given the limited capacity of the various state police services to operate far to sea.⁵⁴ Perhaps the most significant legislative development has been the 2006 amendments to Part IIIAAA of the *Defence Act 1903* (Cth),⁵⁵ which extended the provision for 'call out' of the ADF to apply to threats from the sea and air in Australia's offshore area.⁵⁶ These provisions provide a legislative framework to respond to non-military threats that are beyond the scope of normal law enforcement and yet, although possibly prompting measures in national self-defence, fall short of armed conflict. The powers available are about as forceful as any Australian parliament might have contemplated, including the power to destroy vessels at sea and aircraft in the air in certain circumstances.⁵⁷ While such measures are controversial,⁵⁸ they at least place actions that would previously have relied upon executive power onto a legislative basis. The creation of BPC with a clear emphasis on such threats appeared to give institutional momentum to the Part IIIAAA amendments, given that they came into force within a year of the creation of the then Joint Offshore Protection Command.

Another benefit of the current structure is that it preserves distinctions between military and civilian law enforcement. Traditionally the ADF has not enforced the law against Australian citizens or Australian-flagged vessels. This reflects a long-standing reluctance in the Westminster tradition to use military forces in

53 Australian Government, Border Protection Command, 'Share Information', September 2008, available online at www.customs.gov.au/site/page.cfm?u=5608. See also Australian Government, National Counter-terrorism Committee, *National Counter-terrorism Plan*, 2nd ed., Canberra: National Counter-terrorism Committee, September 2005, available online at www.nationalsecurity.gov.au/; Australian Government, Border Protection Command, *Concept of Operations*, note 49, p. 13.

54 Australian Government, National Counter-terrorism Committee, note 53, p. 3:5; Howard, 'Strengthening Offshore Maritime Security', note 22.

55 *Defence Legislation Amendment (Aid to Civil Authorities) Act 2006* (Cth).

56 This is a power on the part of the Executive Government of Australia to direct the Australian Defence Forces to conduct, consistent with the provisions of the *Defence Act 1903* (Cth), a temporary law-and-order operation primarily in response to a terrorist or related national security threat.

57 See *Defence Act 1903* (Cth), s. 51SE.

58 See M. Head, 'Australia's Expanded Military Call Out Powers: Causes for Concern', *University of New England Law Journal* v3(2), 2006, pp. 125–50; S. Bronitt and D.G. Stephens, '“Flying under the Radar”: The Use of Lethal Force against Hijacked Aircraft: Recent Australian Developments', *Oxford University Commonwealth Law Journal* v7, winter 2007, pp. 265–77; O. Lepsius, 'Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court strikes down a prominent Anti-terrorism Provision in the new Air Transport Security Act', *German Law Journal* v07(09), 2006, pp. 761–76.

internal policing. The ADF has never been a specialized law enforcement agency although it has enforced fisheries and immigration laws against foreign-flagged vessels for many years. It provides the most substantial capability to enforce the law at sea. While the Customs seagoing fleet is smaller and less capable, the Australian Customs Service is a civilian law enforcement agency that has always dealt with Australian citizens and Australian-flagged shipping. It has traditionally been much more concerned with tasks such as gathering evidence and assisting prosecutions. There is an obvious advantage in having the capability of the ADF available to BPC, but given the historical limitations of the ADF in domestic law enforcement it would be better if this is integrated with a civilian agency that specializes in law enforcement such as the Australian Customs Service.⁵⁹

There is also an advantage in BPC having only operational control of Customs and Defence vessels and aircraft. This allows it to focus on the operational issues while maintenance, logistics, personnel and related issues are the responsibility of Customs or Defence. This limits the degree of extra bureaucracy required and the potential for duplication. Although BPC has all of Customs' aircraft and seagoing vessels available to it, it is also able to request more Defence resources as may be required rather than being limited to having only a certain number of patrol boats.⁶⁰ For a medium-power nation it appears prudent to make use of its limited maritime enforcement capacity in this way.

4.3 Limitations

The essential purpose of BPC is to counter most of the range of non-military threats to Australia's security at sea.⁶¹ Military threats remain the responsibility of other commands within the Australian Defence Force. This still leaves some non-military threats that could require Australia to act in national self-defence at the higher end of the threat spectrum, such as a terrorist attack using a weapon of mass destruction. At the lower end of the spectrum, there are some matters that are not terrorism and should remain the responsibility of the state and territory police, such as riotous conduct on board a ferry. It may not be possible to know what end of the threat spectrum a situation might be in until it develops. This can create jurisdictional uncertainty. An advantage of the BPC structure is that it is able to command responses across most of the spectrum of possible threats. It is an inherent limitation though that there will be uncertainty at the higher and lower ends. Accordingly, as BPC is not a general policing service and it is not a war-fighting military command, it must be seen within these limitations. As Woolner points out, BPC is not a statutory agency but rather an agency created by

59 See C.A.T. Moore, 'Turning King Canute into Lord Neptune: Australia's new Offshore Protection Measures', *University of New England Law Journal* v3(1), 2006, pp. 57–82.

60 Australian Government, Border Protection Command, *Concept of Operations*, note 49, pp. 6–7.

61 *Ibid.*, pp. 17–71.

executive direction.⁶² As such, there is a danger that the gains it has made could be lost as bureaucratic priorities change or indeed that BPC could lack the institutional strength to change itself in response to developments. While this does not seem to have been a significant problem to date, the history of Commonwealth government arrangements for maritime security is one of periodic and *ad hoc* attention rather than sustained priority.⁶³ For the longer term, it may be better for BPC to be on a statutory basis so that at least only Parliament can decide to diminish its functions.

The lack of coherence in the relevant law enforcement legislation is still a limitation of the current structure for Australia's maritime security. A serious consideration of BPC's statutory basis could also be the opportunity to revisit the idea of a consolidated maritime law enforcement Act.⁶⁴ While the *Customs Act* provides many enforcement powers to both the ADF and Customs personnel, it still does not contain important powers found in the *Fisheries Management Act* 1991,⁶⁵ the *Maritime Transport and Offshore Facilities Security Act* 2003 and the piracy provisions of the *Crimes Act* 1914, for example. This creates a complicated patchwork of powers that require considerable effort to understand and apply, consequently increasing the potential for error. This will be complicated by legislation to implement the *2005 SUA Protocol*,⁶⁶ which will grant enforcement powers at sea with respect to terrorism and transporting weapons of mass destruction in international waters. Even though there are potential differences in boarding a vessel to enforce fisheries laws as opposed to boarding it to investigate for weapons of mass destruction, the central task is boarding a vessel for a law enforcement purpose. It would seem less complicated to provide the same legal powers where operational tasks are the same. This would not require all legislation with maritime application to be in one Act – this would be unwieldy – but rather to consolidate the enforcement powers. As things stand, the fragmented and complex nature of maritime law enforcement powers is a limitation of Australia's maritime security arrangements.

4.4 Alternative structures

Various alternative structures have been mooted to those currently in place. These include making BPC into a coastguard⁶⁷ and creating an independent homeland

62 Woolner, note 46, pp. 19–20.

63 *Ibid.*, pp. 19, 21.

64 This would be distinct from Part IIIAAA of the *Defence Act* 1903 (Cth), which is concerned primarily with preventing and defeating violent activity, rather than enforcing the law as such.

65 Such as s. 84(1)(a) for an investigative boarding of a fishing vessel where there is no belief there has been an offence.

66 *Protocol of 2005 to the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf*, 14 October 2005, [2005] ATNIF 31.

67 A. Bevis and R. McClelland, 'Border Protection still Fractured', Media Statement, 7 December 2006, available online at www.alp.org.au/media/1206/ms073.php. The development of a

security department that would include BPC's functions.⁶⁸ Simply renaming BPC as the 'Coastguard' may have some advantages. It would follow through in some way on the Rudd government's pre-election promise to establish a coastguard.⁶⁹ The prominence of the US Coast Guard and the use of the term in other Asia-Pacific countries, such as India and Japan, might assist in broader recognition of BPC's role. This could also create some confusion as well, though, as the role of BPC is probably more limited than that of the coastguards mentioned, it does not have its own oceangoing vessels or personnel in a coastguard uniform.⁷⁰

Creating a new department is much more significant than giving BPC a statutory basis. A new department could substantially change existing reporting and command and control arrangements. BPC could become an agency within a homeland security department. It might be like the Australian Federal Police or the Australian Customs Service itself. This could have the advantage of putting the organization on a more enduring footing, as discussed above. It could possibly allow BPC to administer legislation on behalf of a Minister instead of relying upon other agencies. Such an approach would run some risks, however. One of the key advantages of the current arrangement is that BPC can focus on operations, enforcement policy and relations with external agencies. An independent agency may lose the range of support it currently gains from Customs and Defence and have to manage maintenance, personnel, logistics and a range of other administrative functions itself. This could create a larger bureaucracy for no particular benefit and risk diluting the operational focus BPC can currently maintain.

Another factor is that BPC currently integrates Customs and Defence roles. It is not necessarily appropriate for an ADF officer to command a civilian law enforcement organization, for the reasons discussed above about keeping the military out of internal policing. The law also does not provide for anyone other than a member of the ADF to exercise command over members of the ADF.⁷¹ A possible alternative could be to place a civilian secretary or chief executive officer over the top of Commander BPC, whose job would be to report to the Minister. This would retain overall civilian control of the organization, although it may require some work to define such an official's role and relationship with the Commander. The ADF personnel would clearly report to the Commander but there would also be the question of whether the existing Customs personnel would become part of the new agency. If they did then BPC would acquire all of

coastguard has been debated within Australia for a number of years; see M. O'Connor, 'Future Organisational Directions for Australia's Border Protection: The Case for an Australian Coast Guard' in Tsamenyi and Rahman, note 17, pp. 93–116.

68 A. Yates, 'The Rudd Government's Evolving National Security Agenda', Australian Homeland Security Research Centre, National Security Practice Notes, 21 July 2008, available online at www.homelandsecurity.org.au/files/NSPN_Rudds_new_national_security_agenda08.pdf, p. 2.

69 Bevis and McClelland, note 67.

70 Australian Government, Border Protection Command, *Concept of Operations*, note 49, pp. 6–7, 13.

71 *Defence Act 1903* (Cth), s. 9.

the responsibilities of managing the civilian employees which Customs now has. If the employees remained with Customs but assigned to BPC then there would be a question of who they ultimately reported to.

Putting forward these reservations about change is not meant to suggest that change to the current structures should not occur. Any change that does occur though would not necessarily be straightforward and should be weighed carefully against the benefits of the current BPC structure.

5 Concluding remarks

Australian maritime security remains in a state of evolution as a result of modifications to the domestic and international legal regime governing the field and also significant adjustments to governmental structures and arrangements with respect to maritime security operations. A key tenet of these changes has been increasing centralization of control and power in the hands of the federal government, though there still remains some scope for collaboration with state and territorial authorities. The profile of enforcing Australian maritime security has also increased. Long gone are the days when Australia's only perceived maritime security threats were those posed by hostile foreign military forces on the horizon. There is now a widespread appreciation within the Australian community of the threats and challenges posed to Australian maritime security by illegal fishing, asylum seekers, pirates and terrorists, transnational criminal activities and environmental threats ranging from significant maritime accidents to vessels entering Australian waters with unauthorized and dangerous cargoes. This 'awareness raising' has also been accompanied by high-profile maritime incidents which in recent years have received significant media coverage and attention, of which Japanese Southern Ocean whaling in the Australian Whale Sanctuary is but one example. A good deal of these developments have also occurred against the backdrop of the global and national response to security threats generally, and international terrorism in particular, following the September 2001 terrorist attacks against the US.

However, it would not be accurate to depict Australia's maritime security responses and adjustments to its operational capacities during the past decade as being solely reflective of the events of 9/11. Rather, through a combination of the *Tampa* incident, Operation Relex, the New York and Washington, DC, terrorist attacks, and the looming independence of East Timor/Timor Leste, 2001 served as an important turning point in how Australia viewed national, regional and global maritime security issues. From this realization flowed many of the initiatives and actions that have been discussed in this chapter. It is unlikely, however, that these issues will fade. Given its vast maritime domain, Australia will always need to confront significant maritime challenges and accordingly must ensure that its legal, policy and governance arrangements are always capable of responding to those evolving challenges.

4 Maritime Security in New Zealand

Joanna Mossop

A commentator has stated that '[i]n a wired world of deepening interdependence, New Zealand's discrete geographical location provides the protection of a moat from globalizing scourges including terrorism and environmental degradation'.¹ This statement, recognizing New Zealand's location in the world, encapsulates the geopolitical reality facing New Zealand as well as the widespread perception among the New Zealand public that the threats facing the global community are somehow less heightened for that country. For New Zealanders the expanse of ocean that separates them from their nearest neighbours enhances a sense of security that is greater than that of Australia (or, indeed, most developed countries). However, there is also increasing awareness that the 'moat' that consists of New Zealand's maritime zones is not an empty watery barrier but a vital component of New Zealand's economic, strategic and environmental well-being. In addition, since the events of 11 September 2001, New Zealand has been forced to face the global nature of maritime threats, as well as participate in international efforts to improve security.

Arguably, New Zealand is still developing its capacity to ensure its maritime security, broadly conceived.² Clearly, while the ability to defend New Zealand's shores from conventional warlike challenges to sovereignty is an important part of its maritime security, other maritime security challenges are possibly of more relevance to contemporary New Zealand. Illegal fishing, pollution, smuggling of drugs and people and other transnational criminal activities have the potential

1 T. O'Brien, 'Looking out from Down Under: Diverging World Views' in R. Pettman (ed.), *New Zealand in a Globalising World*, Wellington: Victoria University Press, 2005, p. 141, 145.

2 Comprehensive security has been defined as '[t]he pursuit of sustainable security in all fields (personal, political, economic, social, military, environmental) in both the domestic and external spheres, essentially through cooperative means'. P. Cozens, 'Some Reflections on Maritime Developments in the Asia-Pacific Region affecting New Zealand during the past Sixty Years' in P. Dennerly and O. Morgan (eds), *The Maritime Dimension in the Asia-Pacific Region*, Auckland: Royal New Zealand Navy Museum, 2004, pp. 45, 60. Refer also to the discussion of maritime security in Chapter 1 of this volume.

to undermine the country's security.³ The security of shipping lanes that carry New Zealand trade goods is of vital importance to its economy. New Zealand also operates in a global environment, and takes seriously its responsibilities to implement anti-terrorism measures established in international instruments. Maritime security is, or should be, part of a broader national security strategy, but the maritime dimension poses particular challenges to New Zealand with its extensive ocean zones.

This chapter explores, first, the challenges to maritime security for New Zealand. Some of the main historical and contemporary developments are examined as well as the international and domestic legal framework for maritime security in New Zealand. Finally, the chapter discusses the governmental responses to maritime security concerns and considers whether New Zealand is adequately implementing measures to allow it to respond to global, regional and local maritime security threats.

1 New Zealand's maritime security interests

New Zealand has an extremely large maritime zone, giving the illusion of the 'moat' referred to above.⁴ The exclusive economic zone (EEZ) is more than 4 million km², approximately fifteen times that of the land mass. It is described variously as the world's fourth or fifth largest EEZ. In some places, when offshore islands are taken into account, the outer limit of the EEZ is further than 500 nautical miles from the mainland. In September 2008 the Commission for the Limits of the Continental Shelf issued recommendations endorsing New Zealand's claim to an outer continental shelf of approximately 1.7 million km² beyond the limits of the EEZ.⁵ The area of ocean for which New Zealand has search and rescue responsibilities is even greater: 30 million km² covering a large part of the Pacific Ocean from the equator to the Antarctic, and from half-way to Australia to half-way to Chile.⁶

3 P. Helm, 'Risk Management for National Security Issues' in *Science and Security: Informing New Zealand*, Proceedings of a Royal Society of New Zealand Conference, 17 November 2005, available online at www.royalsociety.org.nz/Site/news/redundant_stuff/sciensecurity/default.aspx, p. 9.

4 See generally New Zealand Government, Department of Prime Minister and Cabinet, *Maritime Patrol Review*, Wellington: Department of Prime Minister and Cabinet, 2001, pp. 6–7.

5 See 'Summary of the Recommendations of the Commission on the Limits of the Continental Shelf (CLCS) in regard to the Submission made by New Zealand 19 April 2006', 22 August 2008, available online at www.un.org/Depts/los/clcs_new/submissions_files/nzl06/nzl_summary_of_recommendations.pdf. Maritime boundaries between the outer continental shelf and EEZ of New Zealand and Australia were concluded in 2004: *Treaty between the Government of New Zealand and the Government of Australia establishing certain Exclusive Economic Zone Boundaries and Continental Shelf Boundaries*, exchange of notes 25 July 2004. The only remaining maritime boundaries to be agreed are in respect of the outer continental shelf boundaries with Tonga, Fiji and possibly France in connection with New Caledonia.

6 Refer to www.maritimenz.govt.nz.

In addition to a thriving fisheries export industry worth approximately NZ\$1.3 billion per year, New Zealand has an active hydrocarbon industry producing approximately NZ\$1.2 billion worth of oil and gas each year.⁷ The Maui field off the Taranaki coast (the west coast of the North Island) has supplied approximately 75 per cent of New Zealand's oil and gas requirements over the last thirty years.⁸ Further oil and gas reserves are expected to be discovered in the future. Additionally, gas hydrates and seabed minerals should play an important role in the future economic development of the ocean.⁹

1.1 Conventional maritime security

The New Zealand Defence Force (NZDF) specifically mentions the maritime domain in its mission statement, which is 'to secure New Zealand against external threat, to protect our sovereign interests, including in the Exclusive Economic Zone (EEZ), and to be able to take action to meet likely contingencies in our strategic area of interest'.¹⁰ More specifically, the NZDF states that it will 'secure New Zealand, including its people, and, territorial waters, exclusive economic zone, natural resources and critical infrastructure'.¹¹ Therefore, the protection of marine economic and environmental resources is seen as an important goal for the NZDF.¹²

From a conventional defence perspective, New Zealand is not seen as facing a direct military threat from other states: a prospect that has been described as 'more or less unthinkable'.¹³ Rather, immediate risks are perceived as coming from transnational security challenges, including the risk of terrorism and transnational crime.¹⁴

Close cooperation with Australia is seen as an important part of New Zealand's

7 Centre for Advanced Engineering, *Our Oceans: A Journey of Understanding*, Christchurch: Centre for Advanced Engineering, 2001, p. 13.

8 *Ibid.*, p. 8.

9 *Ibid.*, p. 13.

10 New Zealand Government, New Zealand Defence Force (NZDF), 'Strategic Plan 2007–2011', undated, available online at www.nzdf.mil.nz/downloads/pdf/public-docs/nzdf-strategic-plan-2007-2011.pdf, p. 2.

11 *Ibid.*

12 It is interesting to note that neither the mission statement nor the strategic plan more generally refers to protection of New Zealand's interests on the continental shelf beyond 200 nautical miles. Following the outcome of New Zealand's submission to the Commission on the Limits of the Continental Shelf, protection of sovereign interests in this area is likely to become an issue for New Zealand.

13 H. White, 'New Zealand and Australia: Foreign Policy and Armed Conflict', speech delivered at the New Zealand Institute of International Affairs Inaugural Foreign Policy Lecture, Victoria University of Wellington, 8 October 2002, available online at www.aspi.org.au/admin/eventFiles/publications.htm. See also New Zealand Government, NZDF, 'Annual Report 2006–2007', 2007, available online at www.nzdf.mil.nz/public-documents/annual-report/default.htm, p. 16; J. Rolfe, *Cutting their Cloth: New Zealand's Defence Strategy*, Canberra: Australian Strategic Policy Institute, 2007, pp. 7–8.

14 New Zealand Government, NZDF, 'Annual Report 2006–2007', note 13, p. 16.

maritime security. This relationship can be strained at times when differences in defence priorities and capabilities are emphasized.¹⁵ New Zealand also places a priority on relationships within the Pacific, which is seen as an important part of the security picture, due to governance issues in some states and the large maritime area involved.¹⁶

1.2 Fisheries

The fishing industry is an important contributor to the New Zealand economy. Seafood exports in 2007 were worth NZ\$1.3 billion and the commercial industry directly employs over 7,000 people.¹⁷ Additionally, approximately 30 per cent of the New Zealand population participate in some form of recreational fishing. With these economic and social values, there is a clear need to ensure that the fisheries stocks are managed sustainably. Challenges to this goal include overfishing of target stocks by New Zealanders as well as by foreign vessels and the impact of fishing on the ecosystem.

In addition to fisheries in New Zealand's maritime zones, there are a number of New Zealand fishers who operate in the maritime zones of other countries, or on the high seas. New Zealand-registered fishing vessels, or New Zealand operators of chartered foreign fishing vessels operating outside New Zealand, are required to hold a New Zealand high seas fishing permit. New Zealand nationals are forbidden from using a foreign vessel to fish on the high seas, unless they hold a permit from a state party to a regional fisheries management organization or relevant international agreement.¹⁸

The compliance strategies taken by the Ministry of Fisheries to respond to the possibility of non-compliance with New Zealand fishing regulations are broad and range from education of fishers through to inspections in port and at sea. Deterrence as well as enforcement are goals of compliance strategies implemented by the Ministry.¹⁹

15 See generally, Rolfe, note 13, pp. 32–6.

16 New Zealand Government, Ministry of Defence, 'Government's Defence Policy Framework', June 2000, available online at www.nzdf.mil.nz/downloads/pdf/public-docs/defencepolicyframeworkjune2000.pdf, para. 15, states that 'New Zealand has special obligations to Pacific neighbours to assist in maintaining peace, preserving the environment, promoting good governance and helping achieve economic well being.'

17 New Zealand Government, Ministry of Fisheries, 'New Zealand Fisheries at a Glance', undated, www.fish.govt.nz/en-nz/Fisheries+at+a+glance/default.htm. This is a comparatively large industry in New Zealand, given a population of only 4 million. More than 90 per cent of fish landed in New Zealand are exported.

18 *Fisheries Act* 1996 (NZ), s. 113E. See also New Zealand Government, Ministry of Fisheries, Draft Highly Migratory Species Fisheries Plan, Appendix A: Supporting information (Highly Migratory Species), p. 24, paras 97–8, available at <http://fpcs.fish.govt.nz/FishPlanComplex.aspx?ID=27>.

19 For further information refer to the New Zealand Government, Ministry of Fisheries, 'Statement of Intent 2007–2012', May 2007, available online at www.fish.govt.nz/mi-nz/Publications/Statements+of+Intent/SOI+2007-2012/default.htm.

1.3 Shipping, and security of sea lanes of communication

As approximately 98 per cent of New Zealand's imports and exports by volume are carried by sea, New Zealand has an interest in ensuring the security of sea lanes of communication, particularly in the Asia-Pacific region. Although a terrorist incident closing the Malacca Straits would have a lesser impact on New Zealand than other parts of the region, there would still be significant disruption to shipping and New Zealand's ability to ensure its trade was uninterrupted.

International attention has focused on the security of shipping containers in recent years. New Zealand Customs has worked closely with the United States (US) to develop robust procedures for screening of shipping to US ports through a Supply Chain Security arrangement. It was one of the first in the world to develop this procedure, which involves using risk assessment and intelligence to identify high-risk shipments to receive special attention. Also an innovation is a voluntary scheme called the Secure Export Partnership Scheme in which businesses undertake security measures in return for their shipments being classified as secure.²⁰

1.4 Maritime terrorism and proliferation of weapons of mass destruction

Although the risk of maritime terrorism in New Zealand might appear to be low compared to other areas of the world, New Zealand agencies have focused on fully implementing international regulations designed to improve security at ports and on shipping. The ISPS Code has been implemented in all major New Zealand ports and New Zealand is in the process of evaluating and building greater awareness of commercial shipping using long-range information and tracking, and automated information systems.²¹

Perhaps of greater concern to New Zealand agencies than commercial shipping are other forms of maritime traffic.²² Fishing vessels and small pleasure craft are less regulated and are able to bypass major ports if they wish. In New Zealand's only incident of terrorism, the *Rainbow Warrior* bombing in 1985, it is believed that the convicted French agents arrived in New Zealand in a yacht

20 By 2006–07 44 per cent of containers from New Zealand were covered by the Scheme. New Zealand Government, New Zealand Customs Service, 'Annual Report 2006–2007', 2007, available online at www.customs.govt.nz/library/Accountability+Documents/Annual+Report/Annual+Report+2006-2007.htm.

21 These issues are discussed below.

22 Numbers of visitors on cruise ships are increasing rapidly: from approximately 90,000 visitors in the 2003–04 year to more than 170,000 in 2007–08. New Zealand Government, New Zealand Customs Service, 'Annual Report 2007–2008', 2008, available online at www.customs.govt.nz/library/Accountability+Documents/Annual+Report+2007-2008/Annual+Report+2007-2008.htm.

from Noumea.²³ Gaps in information about the movement of pleasure craft through the Pacific are of concern to officials.²⁴

New Zealand has participated in the Proliferation Security Initiative since 2004. It has been an active participant in the Operational Experts Group (OEG), which discusses policy and legal issues, including hosting an OEG meeting in Auckland in March 2007. New Zealand has been involved in PSI exercises and in September 2008 hosted Exercise Maru, a live and tabletop exercise involving twenty-seven states.

1.5 *Transnational criminal activities*

The use of ships to transport drugs, people and illegal goods is naturally a significant concern for New Zealand, and a range of agencies, including Police, Customs and Immigration have responsibility for responding to these risks. Customs and Police are intercepting an increasing amount of illicit drugs entering New Zealand in shipping containers.²⁵ New Zealand is not considered a significant destination for human trafficking, although some evidence is that a small number of sex workers may be victims of trafficking.²⁶ New Zealand acknowledges the risk that illegal migrants may use vessels as a method of reaching New Zealand, and there have been occasional examples of ship jumping by crews.

1.6 *Pollution and environmental degradation*

The environmental integrity of New Zealand's oceans has importance for economic activities such as fishing as well as social values including ecological sustainability. New Zealand has not yet suffered a catastrophic oil spill in the nature of the *Exxon Valdez* or *Prestige*. However, there are a number of small spills annually. Approximately 160 oil spills are reported in New Zealand waters each year, and about thirty-five of these are detected through aerial monitoring.²⁷ The ability of New Zealand to detect and respond to these spills and other environment accidents is considered to be important from a security perspective.

23 The *Rainbow Warrior* bombing is discussed below.

24 For example, in 2006 New Zealand customs data indicated 65 small craft departed New Zealand for Australia; Australian customs data indicated that number was 115. These discrepancies, among other informational gaps about the activities of small pleasure craft, are cause for concern. See Secretariat of the Pacific Community, 'Pacific Border Security Risks posed by Ocean-going Pleasure Craft', 2008, p. 42.

25 New Zealand Government, New Zealand Customs Service, 'Annual Report 2006–2007', note 20.

26 www.humantrafficking.org/countries/new_zealand.

27 New Zealand Government, Department of Prime Minister and Cabinet, note 4, p. 16.

1.7 Biodiversity protection

The introduction of species, pests and diseases from maritime traffic is a serious risk for New Zealand. There is also the concern that species may be introduced via cargo or baggage. New Zealand generally imposes stringent controls on the introduction of potentially harmful species at the border, and the maritime environment is one aspect of this approach. New Zealand has been active, through the IMO, in initiatives to reduce the risk of introduced species through ballast water and on ships' hulls.

1.8 The South Pacific region

The South Pacific region is one which intimately impacts on the security of New Zealand. Commercial, fishing and yacht traffic through the Pacific has the potential to cause security concerns on a number of the fronts already mentioned. Low administrative capacity in Pacific country law enforcement and border agencies raises the possibility that the Pacific could be a source of illegal activity aimed at New Zealand.²⁸

1.9 The Southern Ocean

As a claimant to territory in Antarctica, New Zealand has an interest in maritime activities in the Ross Sea region of the Southern Ocean. New Zealand has a permanent scientific base, Scott Base, in the Ross Dependency for which supplies are occasionally sent by sea. New Zealand plays an active role in the Antarctic Treaty System, which has regulations that impact on some maritime activities. The commission established under the *Convention for the Conservation of Antarctic Marine Living Resources* (CCAMLR)²⁹ is responsible for the conservation and management of fishing resources in the Southern Ocean. New Zealand proactively seeks to improve management of Southern Ocean living resources through the CCAMLR Commission, and supports its enforcement activities with aerial surveillance patrols of the Southern Ocean.³⁰

Activities by Japanese whaling vessels and protest ships in the Southern Ocean in New Zealand's search and rescue zone have been a cause for concern in recent years. A fire on board a Japanese whaling vessel in February 2007 raised the possibility of a serious environmental accident if the integrity of the hull had been compromised. In the end there was no spillage of fuel from the vessel, but the potential impact on the maritime environment was significant. In addition, threats

28 Refer to Chapter 6 in this volume for more information about New Zealand's interests in maritime security in the Pacific and initiatives to improve this.

29 *Convention for the Conservation of Antarctic Marine Living Resources*, 20 May 1980, 1329 UNTS 48.

30 Refer to Chapter 7 in this volume for further discussion about environmental security in the Southern Ocean.

from protest vessels to ram Japanese vessels raised reasonable concerns about possible loss of life or an environmental accident.

2 Influences on New Zealand maritime security policy

It is fair to say that the modern concern about New Zealand's maritime security as involving a broad range of interests has developed only in the last few decades. Under the *United Nations Convention on the Law of the Sea (LOS)*,³¹ New Zealand obtained sovereign rights over a much broader expanse of ocean resources than could previously have been contemplated. However, the true extent of these interests and the corresponding risks took some time to realize, and until the end of the 1990s maritime security concerns focused on traditional defence interests. Even in this regard, New Zealand has not had a strong capability to defend against invasions from the sea. Instead, New Zealand's defence policy has centred around reliance on alliances with other nations (primarily the UK and later the US and Australia) to address any gaps in capacity on a defence front.

Until the end of World War II, New Zealand identified very strongly with the UK: politically New Zealand ended its Dominion status only in 1947;³² the vast majority of trade was with the UK; and New Zealand relied on the UK for assistance with defence.³³ However, following World War II, New Zealand turned to the US and Australia as its key defence partners, signing the *ANZUS Treaty* in 1951.³⁴ From 1951 until 1984 the *ANZUS* alliance formed the cornerstone of New Zealand defence policy and focus.

The defence relationship with the US suffered drastically with the adoption of the nuclear-free policy by the fourth Labour government on its election in 1984. This policy declared New Zealand nuclear-free, and led to the refusal in January 1985 of a port visit by the USS *Buchanan*, which the US refused to confirm or deny was nuclear-powered or carried nuclear weapons.³⁵ The *New Zealand Nuclear Free Zone, Disarmament and Arms Control Act 1987* prohibited the acquisition, construction, transport or storage of nuclear weapons in the nuclear-free zone, which is defined to include the territorial sea and internal waters of New Zealand.³⁶ Under the Act, the Prime Minister is directed to give permission for foreign warships to enter New Zealand's internal waters only 'if the Prime Minister is satisfied that the warships will not be carrying any nuclear explosive device upon their entry

31 *United Nations Convention on the Law of the Sea*, 2 December 1982, 1833 UNTS 3 [hereinafter *LOS*].

32 *Statute of Westminster Adoption Act 1947* (NZ), repealed and replaced by the *Constitution Act 1986* (NZ). As a Dominion, New Zealand was a self-governing territory of Great Britain.

33 R.G. Patman, 'Globalisation, Sovereignty and the Transformation of New Zealand Foreign Policy', Wellington: Centre for Strategic Studies Working Paper 21/05, 2005, available online at www.victoria.ac.nz/css/docs/Working_Papers/WP21.pdf, p.7.

34 *Security Treaty between Australia, New Zealand and the United States of America*, 1 September 1951, [1952] ATS 2.

35 Patman, note 33, p. 11.

36 *New Zealand Nuclear Free Zone, Disarmament and Arms Control Act 1987* (NZ) s. 4.

into the internal waters'.³⁷ Entry into New Zealand's internal waters is prohibited for vessels whose propulsion is wholly or partly dependent on nuclear power.³⁸ The Act is not intended to interfere with the international law rights of innocent passage through the territorial sea, transit passage through straits, or the right of refuge for vessels in distress.³⁹

Following the adoption of the nuclear-free policy, the US suspended its defence arrangements with New Zealand, leaving the two countries' security relationship to operate at a far less cordial and cooperative level than previously. Varying degrees of mutual cooperation have remained possible since 1985, depending on the situation and the political climate.⁴⁰ The involvement of New Zealand in the PSI as well as other initiatives is evidence that maritime security cooperation still exists between the countries. However, New Zealand no longer has the status of an 'ally' of the US.

New Zealanders' sense of security was shaken somewhat by New Zealand's only direct experience of maritime terrorism: the bombing of the Greenpeace vessel *Rainbow Warrior* by French agents in 1985.⁴¹ On 10 July 1985 the *Rainbow Warrior* was damaged by two explosive devices while in port in Auckland. The ship sank, killing one crew member. Subsequent police investigations resulted in the arrest and conviction of two members of the French armed forces for arson and manslaughter. Following an international dispute, the Secretary-General of the United Nations found that France was responsible under international law for the bombing and ordered an apology and compensation.⁴² This incident raised the New Zealand public's awareness of the vulnerability of port security and the risk of maritime terrorism, although it is fair to say that most viewed it as an isolated event in the context of the anti-nuclear debate.

From a defence perspective, another turning point came in 2001 when a major review of the defence forces determined to reconfigure the NZDF for 'depth' rather than 'breadth', abandoning an air strike capability and adjusting the focus of the navy.⁴³ Emphasis was on improving New Zealand's ability to participate in land-based peacekeeping operations and joint operations with other military forces as well as improving the inshore patrol capability of the navy.⁴⁴ This led to

37 Ibid., s. 9.

38 Ibid., s. 11.

39 Ibid., s. 12.

40 Patman, note 33, p. 11.

41 For information about the bombing of the *Rainbow Warrior* see M. King, *Death of the Rainbow Warrior*, Auckland: Penguin, 1986; C. Amery, *Ten Minutes to Midnight*, Auckland: Earl of Seacliff Art Workshop, 1989.

42 *Rainbow Warrior I* (1987) 74 ILR 241. According to the ruling, the two agents were transferred to a military base on Hao atoll for three years. Their early release from Hao atoll led to a second dispute. An arbitral tribunal ultimately found that France had breached international law by removing and not returning the agents from the atoll, but refused to order that they should be returned. *Rainbow Warrior II* (1990) 82 ILR 500.

43 Patman, note 33, p. 12.

44 The implications of the review for the navy are discussed below.

some tensions between New Zealand and Australia, with criticisms from Australia that New Zealand was a 'free rider' on the defence capabilities of Australia.⁴⁵

A final point worth noting is the attempt by the New Zealand government from 2000 to institute an Oceans Policy.⁴⁶ Although not directly related to maritime security issues, the push for an integrated Oceans Policy reflected a view that development of oceans legislation and policy had been *ad hoc*, resulting in gaps and inconsistent approaches. An early report identified a need for an overarching framework for sustainable marine management as well as building linkages and relationships between agencies and stakeholders in the area.⁴⁷ The Oceans Policy process was aimed at providing a vision and goals for the management of New Zealand's maritime zones and designing policies and tools to implement the goals.⁴⁸ Some progress was made: the government consulted widely with the public, identified weaknesses in the oceans management system, and identified some policy options.⁴⁹ However, the process was interrupted by a Court of Appeal decision that raised the prospect of Maori being able to claim customary rights over areas of the foreshore and seabed – a prospect that came as a surprise to the New Zealand government.⁵⁰ The government suspended the Oceans Policy process while it passed legislation to reverse the decision. However, even after the *Foreshore and Seabed Act* 1994 was passed, the Oceans Policy was not revived. It is suspected that there is little appetite among politicians for the resurrection of a process that had been perceived as cumbersome and potentially unwieldy. Instead the government has proceeded to fill some of the more obvious gaps, including drafting legislation to regulate the environmental impacts of uses of the EEZ other than fisheries.⁵¹ Another initiative has been the launch of Ocean Survey 20/20, a government programme to fund scientific research into New Zealand's ocean environment and resources.⁵²

45 Rolfe, note 13, p. 33; White, note 13.

46 See also Chapter 9 in this volume.

47 Parliamentary Commissioner for the Environment, 'Setting Course for a Sustainable Future: The Management of New Zealand's Marine Environment', 1999, available online at www.marinenz.org.nz/documents/Parliamentary_Commissioners_Report.PDF, pp. 96–8.

48 A summary of the Oceans Policy process in New Zealand is contained in R. Peart, *Looking out to Sea: New Zealand as a Model for Ocean Governance*, Auckland: Environmental Defence Society, 2005, pp. 183–91.

49 *Ibid.*, pp. 186–9.

50 For the background to the legal issues, a description of the *Ngati Apa v. Attorney-General* case ([2003] 3 NZLR 643 (CA)) and the subsequent legislative reforms see R. Boast, *Foreshore and Seabed*, Wellington: LexisNexis, 2005.

51 In 2008 Cabinet approved the creation of draft legislation that would fill gaps in the existing legislation to allow regulation of the environmental impact of activities such as mining, petroleum activities, energy generation, carbon capture and storage, and marine farming. The proposal is contained in Cabinet Paper 07-C-0751.

52 Hon. P. Hodgson, Minister for Land Information, 'Ocean Survey 20/20 Launch Speech', speech delivered at the launch of Ocean Survey 20/20, HMNZS *Resolution*, Queens Wharf, Wellington, 16 March 2005, available online at www.beehive.govt.nz/speech/ocean+survey+2020+launch+speech. See also www.linz.govt.nz.

3 The international and national legal framework for maritime security

In light of the importance of the maritime environment to New Zealand's security, New Zealand has actively pursued engagement on oceans matters at an international level. New Zealand was involved in discussions at both the Geneva Conferences as well as the Third United Nations Conference on the Law of the Sea, which ultimately resulted in the *LOSC*. At the first Geneva Conference, New Zealand took a position opposing the extension of the territorial sea beyond three nautical miles. This position was determined primarily by security concerns: New Zealand wished to ensure that 'no impediment was placed in the way of free movement by the navies of the allies on whom we depended for our security, or for that matter by the merchant fleets on which we depended for our trade'.⁵³ However, a growing awareness of the impact of foreign fishing fleets on fisheries resources led New Zealand to support the six-mile territorial sea plus six-mile fisheries zone that failed to gain approval at the Second Geneva Conference.⁵⁴ New Zealand played an important role in the Third United Nations Conference, supporting the creation of the EEZ⁵⁵ (including promoting its application to islands) and the extension of the continental shelf beyond 200 miles.⁵⁶ The *LOSC* was a satisfactory compromise (for New Zealand) between the relevant interests in protecting freedom of navigation and ensuring economic and environmental security in relation to New Zealand's marine resources. The finalizing of New Zealand's claim to an outer continental shelf upon the issuance of recommendations from the Commission on the Limits of the Continental Shelf in 2008 will complete the expansion of New Zealand's maritime zones, and its consequent security interests in the resources of those areas.

Many other treaties are relevant to maritime security in its broadest aspects, and New Zealand has tended to be highly supportive of these as well. New Zealand has ratified conventions such as the 1988 IMO *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988 SUA Convention)*⁵⁷ and the related *1988 Protocol*.⁵⁸ New Zealand has signed the *2005 Protocol to the 1988 SUA Convention*,⁵⁹ which expands the categories of offences covered by the original *1988 SUA Convention* and creates a voluntary ship boarding regime: legislation

53 M. Templeton, *The Law of the Sea and New Zealand*, Ministry of Foreign Affairs and Trade Information Bulletin No. 10, December 1984, p. 11.

54 New Zealand unilaterally declared a twelve-mile fisheries zone in the mid-1960s. *Ibid.*, p. 11.

55 New Zealand's 200-mile EEZ was unilaterally declared in 1977: see the *Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 (NZ)*.

56 Templeton, note 53, p. 12.

57 *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 10 March 1988, 1678 UNTS 221.

58 *Protocol for the Suppression of Unlawful Acts against the Safety of fixed Platforms located on the Continental Shelf*, 10 March 1988, 1678 UNTS 304.

59 *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 14 October 2005, [2005] ATNIF 30.

allowing ratification is expected in 2009. New Zealand participates in a range of fisheries management organizations and is supporting the creation of a new South Pacific Regional Fisheries Management Organization.⁶⁰ New Zealand was an original signatory to the *1959 Antarctic Treaty*⁶¹ and took a lead role in negotiating the (now defunct) 1988 Minerals Convention.⁶² It participates actively in the CCAMLR Commission.

New Zealand's constitutional arrangements are simultaneously more simple and more complex than Australia's. As a non-federal state with a unicameral legislature, New Zealand does not face the complexities that Australia does in establishing domestic authority over activities on the oceans. However, New Zealand's legal position is somewhat complicated by the fact that it does not have a comprehensive, written and superior constitution. Therefore, the constitutional arrangements for defence and exercising authority in the maritime areas are a mixture of prerogative powers and legislation.⁶³ The Governor-General is designated Commander-in-Chief of the New Zealand Armed Forces⁶⁴ and has the power to raise armed forces for, *inter alia*, the defence of New Zealand, the protection of New Zealand interests, to provide assistance to the civil power in the case of emergency, and for any public service.⁶⁵ Although civil agencies such as Customs and Fisheries do operate vessels for enforcement purposes, the capabilities of such assets are limited and generally restricted to inshore areas and certain geographical locations. Therefore, the Royal New Zealand Navy (RNZN) and the Royal New Zealand Air Force (RNZAF) are generally the agencies that undertake enforcement of domestic legislation in off-shore areas of New Zealand's EEZ. For this reason, NZDF officers may be authorized to exercise the powers of Customs officers,⁶⁶ and every officer in command of a vessel or aircraft of the NZDF is deemed to be a fishery officer for the purposes of the *Fisheries Act* 1996.⁶⁷ However, in practice NZDF vessels and aircraft often carry Customs or Fisheries officers on targeted patrols.⁶⁸

The powers available to enforce fisheries and customs legislation are contained in the respective Acts.⁶⁹ Generally the powers have been exercised without

60 Refer to www.southpacificrfmo.org.

61 *Antarctic Treaty*, 1 December 1959, 402 UNTS 71.

62 Convention on the Regulation of Antarctic Mineral Resource Activities, 2 June 1988 (not in force).

63 P. Joseph, *Constitutional Law*, Laws of New Zealand, Wellington: LexisNexis, para. 149.

64 *Letters Patent constituting the Office of Governor General of New Zealand*, given by Queen Elizabeth II, 28 October 1983, SR 1983/225, amendment SR 1987/8.

65 *Defence Act* 1990 (NZ), s. 5. The only restrictions on the power to perform a public service or provide assistance to the civil power are in respect of industrial disputes and the exercise of police powers in times of emergency. See *Defence Act* 1990 (NZ), s. 9; K. Riordan, *Defence: Warfare*, Laws of New Zealand, Wellington: LexisNexis, paras 146–8.

66 *Customs and Excise Act* 1996 (NZ), s. 6.

67 The powers of a fisheries officer may also be carried out by a person whom the commanding officer directs to carry out such duties. *Fisheries Act* 1996 (NZ), s. 196.

68 See C. Griggs, 'Legal Constraints on Maritime Operations affecting Merchant Shipping', *MLANZ Journal* v19, 2005, pp. 155, 157.

69 A brief description is in *ibid.*, pp. 154–8.

difficulty in the past. However, a particular difficulty can arise where government agencies exercise powers under domestic legislation that have international dimensions. In 2008 a Namibian-flagged fishing vessel was inspected in the port of Auckland for compliance with *CCAMLR* fisheries management measures. Suspected breaches of the *CCAMLR* regime were discovered, and the owner of the vessel sought a judicial review of the decision to report the information to the *CCAMLR* parties with a view to having the vessel included on a blacklist of illegal fishing vessels.⁷⁰ The High Court found that the *Fisheries Act* did permit such an inspection to take place, and put some reliance on the fact that the *Fisheries Act* expressly requires the Act to be interpreted according to New Zealand's international obligations.⁷¹

It is important to ensure that New Zealand law is consistent with international obligations so that New Zealand officials can achieve their objectives in New Zealand waters. One issue that could potentially be more important for New Zealand as a result of increased patrolling in New Zealand waters is hot pursuit. The Australians have engaged in several high-profile hot pursuits of illegal fishing vessels in recent years, and it is conceivable that New Zealand may be forced to do the same in the future.

Section 215 of the *Fisheries Act* 1996 creates general powers of Fisheries officers, which are stated to be exercisable within New Zealand, within New Zealand fisheries waters and beyond New Zealand fisheries waters. However, the fishery officer must not exercise the powers beyond New Zealand waters unless the officer:⁷²

- 1 believes on reasonable grounds that any person on board the vessel has committed an offence in New Zealand fisheries waters; and
- 2 is in fresh pursuit of, or has freshly pursued, the vessel; and
- 3 commenced that pursuit in New Zealand fisheries waters.

Sub-section 215(3) authorizes a Fisheries officer to exercise powers against foreign vessels on the high seas. Under the law of the sea, there are few situations in which this can occur, and it seems that section 215 was intended to give effect to the right of hot pursuit contained in Article 111 of the *LOSC*.⁷³ It is somewhat surprising that the words 'hot pursuit' are not found in the legislation: rather, 'fresh pursuit' is used.⁷⁴ This concept was probably considered to encapsulate the concept of hot

70 *Omunkete Fishing (Pty) Ltd v. Minister of Fisheries* (unreported judgment, High Court, Wellington, 1 July 2008, CIV 2008-485-1310, Mallon J).

71 *Ibid.*, para. 67. See *Fisheries Act* 1996 (NZ), s. 5.

72 *Fisheries Act* 1996 (NZ), s. 215(3).

73 A separate part of the Act, Part 6A, implements the high seas inspection regime under the *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, 2167 UNTS 88.

74 There are other legislative powers that give a right of 'fresh pursuit', for example section 119 of the *Land Transport Act* 1998 (NZ) authorizes a police officer to enter premises if 'freshly pursuing' a

pursuit, as it has been interpreted to mean a ‘continuing chain of action’, ruling out a break in the chain of events from the commission of an offence to the act authorized (such as entering property).⁷⁵ This bears some similarity to hot pursuit in the *LOSC*, in that Article 111(1) requires pursuit to be continuous, with no interruption. However, there are some requirements in the *LOSC* that are not included in Section 215. For example, pursuit must be preceded by an order to stop⁷⁶ and pursuit must end if the vessel enters another state’s territorial sea.⁷⁷ There is no reference in the New Zealand legislation to the doctrine of constructive presence, which allows a state to arrest a mother ship if the ship’s boats were engaged in illegal activities in the zone.

The inconsistencies between Section 215 and the international law of hot pursuit will be potentially significant if a power is exercised pursuant to Section 215 but without regard to the obligations in Article 111. First, the exercise of the power contrary to Article 111 may be considered illegal by New Zealand courts, which have been willing to view domestic law as constrained by international obligations even where there is no ambiguity in the legislation.⁷⁸ This is reinforced by Section 5 of the *Fisheries Act* 1996, which requires the Act to be interpreted consistently with New Zealand’s international obligations relating to fishing, arguably including Article 111 of the *LOSC*. Second, it may also expose New Zealand to international litigation through the compulsory dispute settlement mechanisms under the *LOSC*. It seems appropriate therefore, that Section 215 be updated to reflect more accurately the provisions of the *LOSC*. In addition, where there is a possibility that hot pursuit may be required in other contexts, it would be appropriate to ensure that the legislation reflects the ability to engage in hot pursuit. This might be relevant to such legislation as customs and immigration.⁷⁹

4 New Zealand’s maritime security arrangements

The following section outlines changes to the agency arrangements for maritime security that have occurred in the last decade. As a result of a review of New Zealand’s ability to monitor activity and enforce laws in maritime zones, considerable progress has been made in improving the coordination of agencies with maritime responsibility. However, due in part to limited financial resources, there is still more that could be done to improve the situation.

vehicle or person. Section 317 of the *Crimes Act* 1961 (NZ) allows an officer to enter premises to arrest an offender if freshly pursuing the offender. See also s. 52(3A) of the *Dog Control Act* 1996 (NZ).

75 See *Brookers Commentary to the Statutes of New Zealand*, para. LT119.04.

76 *LOSC*, note 31, Article 111(4).

77 *LOSC*, note 31, Article 111(3).

78 See, for example, *Sellers v. Maritime Safety Inspector* [1999] 2 NZLR 44 (CA).

79 The *Customs and Excise Act* 1996 (NZ), s. 139, allows a customs officer or other authorized person to board a ship within the territorial limits of New Zealand or the contiguous zone only. Section 142 allows a ship to be chased, within New Zealand waters only. See Griggs, note 68, p. 155.

4.1 Maritime surveillance and enforcement

New Zealand's ability to monitor and control activities in its maritime zones has undergone a significant review in the last ten years. During the latter part of the twentieth century the majority of surveillance of the EEZ was undertaken by RNZAF P3 Orion aircraft. In 1999 the NZDF sought additional funding to update the avionics of the Orion aircraft. In response the government decided to undertake a review of the maritime surveillance capability, and the result was the 2001 Maritime Patrol Review (MPR).⁸⁰ The MPR's purpose was to assess the civilian requirements for maritime patrols and surveillance and determine how they could best be met.

The MPR found that a very limited level of patrolling of New Zealand's EEZ was being undertaken by military or civilian agencies.⁸¹ Although information was available about fisheries vessels through vessel monitoring systems, other information about vessel activities was lacking. In addition there was a lack of cooperation between civilian and military agencies, and even within different branches of the NZDF.⁸² The MPR found that civilian agencies were frustrated by their inability to use the NZDF assets for civilian purposes, and concluded that the allocation of those assets for civilian tasks was inadequate.⁸³ Very little routine surveillance of New Zealand waters was undertaken by the RNZN, but using frigates for that purpose was not considered to be an appropriate use of the resource and no other vessels were appropriately configured for the work.⁸⁴ Future areas of need were identified for fisheries, customs and marine safety and environmental protection, as well as minor requirements for conservation.⁸⁵

The MPR made a number of recommendations to improve the efficacy of maritime patrolling in New Zealand waters.⁸⁶ First, it recommended the establishment of a Maritime Coordination Centre 'to collect information and manage tasking for all forms of military and civilian maritime surveillance to meet civilian needs' in New Zealand maritime zones, the South Pacific and the Southern Ocean. The Maritime Coordination Centre would develop means to enhance all elements of maritime patrol, including developing a ship reporting system for New Zealand waters to improve knowledge of activities in those waters. Second, the NZDF should be required to provide assets to be available for civilian

80 New Zealand Government, Department of Prime Minister and Cabinet, note 4.

81 *Ibid.*, p. 9. The review found that Orions undertook surveillance of local waters for just 2–3 per cent of each year, and some areas of the ocean were rarely overflown.

82 *Ibid.*

83 The Orion aircraft spent approximately 9 per cent of total annual hours flown on New Zealand maritime surveillance, mainly for fisheries and search and rescue tasks. This compared with 15–20 per cent of the time spent in surveillance of the South Pacific. The Ministry of Fisheries estimated that inshore areas were receiving 5 per cent of the required level of surveillance and offshore areas less than 20 per cent. *Ibid.*, p. 10.

84 *Ibid.*, p. 38.

85 *Ibid.*, pp. 10–11.

86 *Ibid.*, p. 41.

purposes to a specified level, under tasking from the Maritime Coordination Centre. Third, the MPR recommended that a capacity for sea surface maritime patrol be developed. The MPR envisaged a combination of inshore patrol vessels, vessels with mid-range offshore capabilities and a multi-role vessel with the ability to operate in the Pacific and in the Southern Oceans.

The MPR's recommendations were endorsed by Cabinet in March 2001.⁸⁷ Cabinet approved the call for an improved surface fleet with the capability of meeting civilian agency concerns and obligations in the South Pacific, the Southern Ocean and the Ross Dependency.⁸⁸ The Orion aircraft were to be retained with improved systems. Finally, Cabinet approved the creation of a Maritime Coordination Centre under the oversight of the Officials Domestic and External Security Committee.

4.1.1 National Maritime Coordination Centre (NMCC)

The National Maritime Coordination Centre (NMCC) was established as a pilot in 2002 and its existence confirmed in December 2006.⁸⁹ The NMCC is primarily responsible for coordinating the allocation of maritime patrol assets for civilian purposes.⁹⁰ It is also expected to coordinate information about maritime activities that pose risks to New Zealand and provide that to the relevant government agencies. Finally, it is expected to identify policy gaps and other issues regarding effective maritime patrol and surveillance. The NMCC is physically located at the NZDF Headquarters Joint Force, but administrative responsibility lies with Customs, and the operation is overseen by a network of chief executives of New Zealand government agencies. Currently, allocation of assets is achieved according to requests for time made by the agencies which are discussed among the agencies involved. Ultimately the NMCC may make the final determination on allocation of assets in the event of disagreement.

One of the purposes of the creation of the NMCC was to achieve greater coordination between the various civilian agencies with maritime patrol requirements and the NZDF, as well as a more open process for allocation of patrol assets. There is no doubt that significant progress has been achieved in this regard. There is a transparent process for determining the allocation of patrol assets, in contrast to the previous situation in which agencies depended on personal relations with the NZDF and NZDF willingness to assist. The NMCC is developing, in consultation with the contributing agencies, a risk management framework that will

87 Cabinet Paper CAB (01) 100.

88 The shape of the surface fleet was determined by the New Zealand Government, Ministry of Defence, Defence Policy and Planning Unit, 'Maritime Forces Review: Key Findings', January 2002, available online at www.defence.govt.nz/reports-publications/mfr/contents.html.

89 Cabinet Minute (06) 47/3.

90 National Maritime Coordination Centre (NMCC), *NMCC Governance Framework*, Wellington: NMCC, 2006, p. 10.

enhance the NMCC's ability to manage the sometimes competing requests for time and resources. This framework should be complete by July 2009.

However, limitations on the NMCC exist, largely as a result of resourcing. Currently the NMCC has a handful of full-time staff, most seconded from the contributing agencies such as Fisheries, Customs and NZDF. The first few years of operations have seen a focus on the coordination and information aspects of the NMCC role, but less work has been achieved on more strategic issues. The fact that a risk management framework is still under development is an indication that the NMCC is only now beginning to develop the proactive tools needed to manage its operational function. It is also not clear the extent to which the NMCC has so far been able to achieve the input to policy creation that the MPR expected it to have. The MPR expected the Coordination Centre would integrate maritime elements of strategies designed by agencies 'to ensure that New Zealand has in place comprehensive national management strategies for managing maritime risks'.⁹¹ The NMCC Governance Framework also envisages that the NMCC will 'identify policy gaps and related issues with respect to effective maritime patrol and surveillance'.⁹² At present there appears to be no capacity to do this.

4.1.2 Enhancement of New Zealand's maritime surveillance capability

A considerable change to New Zealand's maritime security architecture has involved the acquisition of new capabilities in recent times. Two significant developments in military capability emerged from the MPR: Project Protector, which involved a significant reconfiguration of naval capability; and the upgrade of the P3 Orion communication and surveillance equipment.

Project Protector is a NZ\$500 million project designed to significantly enhance New Zealand's ability to respond to maritime threats.⁹³ The project is managed by the RNZN, and vessels began to enter into active service from 2007. Project Protector is delivering seven new vessels.⁹⁴ HMNZS *Canterbury* is a multi-role vessel based on a roll-on/roll-off commercial model of ship. This vessel is expected to provide a sea lift capability for the transport and deployment of equipment, vehicles and personnel, and is capable of transferring cargo and personnel ashore in benign conditions when port facilities are not available. *Canterbury* can carry up to four NH90 helicopters and two 59-tonne Landing Craft Medium (LCM) capable of carrying 50 tonnes at 9 knots with a range of 250 nautical miles.⁹⁵

In addition to the multi-role vessel, Project Protector is also delivering two

91 New Zealand Government, Department of Prime Minister and Cabinet, note 4, p. 34.

92 NMCC, note 90.

93 The shape of Project Protector can be traced to the 'Maritime Forces Review', see www.defence.govt.nz.

94 New Zealand Government, Ministry of Defence, 'Defence Long-term Development Plan: October 2006 Update', October 2006, available online at www.defence.govt.nz/reports-publications/ltdp-2006/contents.html, pp. 17–20.

95 Refer to www.navy.mil.nz/visit-the-fleet/. HMNZS *Canterbury* was launched on 27 October 2007.

offshore patrol vessels with a range of 6,000 nautical miles, expected to be able to operate throughout New Zealand's EEZ as well as in the Pacific Islands. The offshore patrol vessels can carry a Seasprite helicopter.⁹⁶ Four inshore patrol vessels with a range of 3,000 nautical miles are also being delivered.⁹⁷ All the vessels in the Project Protector fleet are designed to support civilian agencies, and have dedicated space for civilian officials.

Teething problems with the new vessels have caused considerable difficulties for the RNZN. A number of safety issues have been raised about the new vessels. In the case of *Canterbury*, two serious incidents led to an independent inquiry ordered by the Minister of Defence. On 10 July 2007 a rigid-hull inflatable boat was lost at sea, and on 5 October 2007 a crew member was killed during the deployment of a rigid-hull inflatable boat. The inquiry was not limited to those incidents, however, and investigated concerns about the operation of the vessel, its performance or design, whether it is capable of performing the functions for which it was acquired, and whether any remedial action is required. The independent report was released on 12 September 2008, and found, among a range of issues, that although the *Canterbury* is intrinsically safe, insufficient attention was given to the potential drawbacks of the design of the vessel, and the management of the acquisition was inadequate.⁹⁸ It is understood that other concerns about the *Canterbury* include whether the ice strengthening of the hull is of a sufficient standard to allow the vessel to conduct operations in the Southern Ocean, such as resupplying Scott Base, one of the benefits of a multi-role vessel that was outlined by the MPR.⁹⁹ The *Canterbury*, *Otago* and *Rotoiti* reportedly originally failed to gain Lloyds certification on safety grounds. In June 2008 the Auditor-General issued a report on the Ministry of Defence's handling of a number of major contracts, including Project Protector, which found that insufficient information was kept to allow the Auditor-General to report appropriately on the acquisitions.¹⁰⁰ A further problem is that the RNZN is struggling to staff the new vessels, with the result that actual hours at sea in the early stages of active deployment are lower than originally intended. At present the RNZN plans to deliver 140 hours per vessel for civilian tasking.

The NZDF is also undertaking an upgrade of the P3 Orion mission management, communications and navigation systems.¹⁰¹ Included in the upgrade is new

96 HMNZS *Otago* was launched on 18 October 2006, and HMNZS *Wellington* was launched on 27 October 2007. See *ibid.*

97 HMNZS *Hawea* was launched on 11 December 2007 and HMNZS *Rotoiti* entered sea trials in November 2007. *Ibid.*

98 J. Cole, 'Report of the Review of the Safety and Functionality of HMNZS *Canterbury*', 12 September 2008, available online at www.defence.govt.nz/reports-publications/canterbury-independent-review/contents.html.

99 New Zealand Government, Department of Prime Minister and Cabinet, note 4, p. 39.

100 New Zealand Government, Controller and Auditor-General, 'Reporting the Progress of Defence Acquisition Projects', Interim Report, June 2008, available online at www.oag.govt.nz/2008/defence/docs/interim-report.pdf.

101 New Zealand Government, Ministry of Defence, 'Defence Long-term Development Plan: October 2006 Update', note 94, pp. 23–4.

technology to improve the range of surveillance as well as ensuring that the P3s can get imagery in all weather conditions and around the clock. It is expected that the upgrades will allow the P3 Orions to cover more area during their surveillance flights. New Zealand has six P3 Orions located at Whenuapai Air Base, near Auckland. Currently the P3 Orions fly 400 hours annually on dedicated civilian surveillance tasks.

It is expected that with the delivery of the new naval vessels, and the elimination of design and operational difficulties, New Zealand's ability for surface patrolling in its EEZ will dramatically increase, bringing improved enforcement and deterrence outcomes. At present there is little capacity for coordination between New Zealand naval patrols and air surveillance, but the increased capability of Project Protector should allow better use of those assets in combination.

4.2 Information sharing and data availability

In the last eight years significant improvements have been made to New Zealand agencies' ability to share and access information about the maritime domain. The MPR identified that information about maritime activity in New Zealand was disparate and characterized by a lack of integration.¹⁰² This lack of integrated information about the maritime picture was one of the key reasons for the recommendation of the creation of the NMCC. The MPR considered that a maritime coordination centre would collate maritime information from all streams available in New Zealand, develop a data coordination centre for all information concerning surveillance of the maritime area, disseminate the information to New Zealand agencies and undertake analysis of the information.¹⁰³

A number of enhancements have occurred since 2001 to New Zealand's arrangements for sharing maritime information among agencies. The NMCC has begun to play a role in disseminating certain information. In theory the NMCC should have access to all relevant information held by all relevant agencies and have the ability to share information where it is appropriate to do so. This has been achieved to a reasonable extent. The NMCC distributes information through the Multi-agency Network – Restricted (MAN-R), to which the NZDF, the NMCC, Customs, Maritime New Zealand and police currently have access. The Ministry of Fisheries is in the process of gaining access to that network. However, it is not possible to say with confidence that all sources of information are available to the NMCC, partly due to concerns about classification and partly due to reluctance to share all information with it. In addition, the NMCC may be under constraints about its ability to pass information onto other parties, again due to security processes but also due to legal constraints, such as contractual provisions or statutory limitations.

The most significant restraint on the NMCC again returns to resources.

102 New Zealand Government, Department of Prime Minister and Cabinet, note 4, p. 24.

103 *Ibid.*, pp. 33–4.

Currently the NMCC has no capacity to conduct independent analysis of the information it receives. Although the primary responsibility for analysis of information and strategic direction will lie with contributing agencies, there is a role for analysis of information to be completed by the NMCC itself with its unique perspective as a coordinating and central body. The NMCC is uniquely placed to integrate information into a useful maritime picture, but at present it simply lacks the capacity to do this.

In addition to the NMCC, a range of other initiatives are independently contributing to the sharing of information both within New Zealand and between New Zealand and other states.

The National Targeting Centre (NTC) was established as an agency within Customs in 2006. This facility provides twenty-four-hour coverage for risk management work related to customs operations. The purpose of the NTC is to integrate intelligence related to border security and cooperate with other agencies (such as in the US) to facilitate information flows across borders.

New Zealand is currently exploring the role that Long Range Information and Tracking (LRIT) and Automated Information Systems (AIS) can play in building maritime domain awareness.¹⁰⁴ As large commercial ships are required to carry equipment that is capable of transmitting the identification of the ship and its heading under the ISPS Code, there is the potential for New Zealand to access this information and integrate it into the maritime picture. Kordia, a state-owned enterprise which runs New Zealand's Maritime Operations Centre,¹⁰⁵ has developed a system which plots the information received from AIS transponders on to a platform based on Google Earth. This allows subscribers to have real-time information about the identification, location, heading, destination and cargo of vessels with AIS capability. Although it does not provide information about other forms of shipping, it would be a valuable tool for agencies with an interest in maritime shipping. Kordia is currently in discussion with some government agencies about a national service based on AIS monitoring.

What some consider necessary for complete maritime domain awareness, however, is a standard computerized information network that could display the position of all significant maritime traffic, including information known about each vessel based on an integrated database from all government agencies (taking into account classification of sensitive information). It appears that this is a long way from being achieved in New Zealand. At present, many computer systems are not compatible as between government agencies, and so the opportunity to directly share information is limited. The MPR clearly expected that this level of integration would be progressed by the creation of the

104 See further Chapter 12 in this volume.

105 The Maritime Operations Centre's role is primarily to continuously monitor international distress calls with coverage over approximately 50 million km² of Ocean. See Kordia Maritime Services, 'Maritime Operations Centre Information Booklet', Wellington: Kordia, undated.

NMCC. Although significant progress has been made – which should not be underestimated – there is still much work to be done. It will take time to build greater trust between the agencies, and a better understanding of the benefits of integrated information.

5 Concluding remarks

Two features of the development of maritime security initiatives in the last decade are striking. First, it is true to say that significant progress has been made since the MPR in breaking down barriers between agencies. Through whole-of-government approaches and the creation of the NMCC, agencies are now working together much more effectively than in the past. There appears to be greater knowledge of the roles of the agencies, and personal relations are a key factor in the close cooperation that has developed.

The second key feature is that much of the development appears to be *ad hoc* and reactive. As already mentioned, at around the time of the MPR, New Zealand also was conducting an Oceans Policy process that had the goal of an ocean ‘wisely managed for the greatest benefit of all New Zealanders, now and in the future’. The abandonment of the Oceans Policy process was a lost opportunity. At present, decisions about oceans management, including security, continue to be made in a fragmented, *ad hoc* fashion with little overarching strategic guidance. One example of this is that the government is considering introducing legislation to regulate activities in the EEZ, including a requirement to consider cumulative impacts. However, fisheries are excluded from the coverage of the potential legislation. Similarly, there is little in the way of guiding principles that can guide decision makers in how New Zealand should be managing its maritime domain or the priorities. Australia has made much more progress in achieving an integrated policy framework than New Zealand. Although it is hard to evaluate the extent to which this has impacted on maritime security arrangements, it is possible to argue that having a national Oceans Policy in place would better inform agencies about their priorities.

If New Zealand’s maritime areas continue to be perceived as a moat, protecting New Zealand from malign influences from abroad, this would be an inaccurate picture. There are a number of threats that New Zealand faces from the sea, and in general New Zealand government agencies are aware of them. However, New Zealand’s ability to be aware of the precise nature of those threats and respond to them is still under development. Significant advancements have been made in the last decade and continue to be made. However, the picture of activities at sea is incomplete at best, and the ability to coordinate responses, prioritize any response among competing uses and demands is also weak. One of the most notable achievements has been the gradual creation of a more cooperative approach to maritime security issues across government agencies, facilitated by the creation of the NMCC. However, this is not perfect, and in general lacks a high-level strategic direction. More resources for the NMCC would assist it in building its capability to be a coordinating agency. The question does remain whether a

purely coordination role is sufficient to fully integrate maritime security responses. It is possible that under the current *ad hoc* approach to Oceans Policy and strategy further progress will be limited. Without a comprehensive view of Oceans Policy, it is questionable whether maritime security responses in New Zealand can ever be more than fragmented.

5 Whose Security is it and how much of it do we want?

The US Influence on the International Law against Maritime Terrorism

*Shirley V. Scott**

The varieties of international security have expanded enormously over the last two decades. We now hear reference to many types of security, including economic, food, health, environmental, political, maritime and energy. It would seem that security can be preceded by virtually any subject on the political agenda. There are two characteristics of the term 'security' that impact considerably on the political use of the word as a key organizing concept. First, security is a state of being that would be difficult to attain fully. How could a person or society ever claim to be 100 per cent secure? This leads to a second characteristic of the term as it is used in contemporary Western political discourse: security is regarded as an unequivocally good thing, an ideal to which to aspire. This might sound too obvious to be worth mentioning until one realizes that it need not necessarily be the case. A sixteenth-century sermon referred to people as 'drowned in sin-fulle securitie',¹ while Shakespeare described security as 'Mortals cheefest Enemie'.² Security is, then, something to which many people and governments aspire but which, mercifully according to Shakespeare at any rate, none can ever fully attain.

These two qualities of the term make it a very valuable component of political rhetoric, simply because it is difficult to argue against a course of action designed to enhance security in some form. Governments are able to use the language of security to justify a shifting of budget priorities; electorates may well regard the new allocation of resources as warranted and more readily accept associated losses, whether they be from other parts of the budget or a reduction in civil liberties. Those critical of the 'war on terror' point to the way in which fear is manipulated to leave entire populations in a perceived state of open-ended

* The author would like to thank Sam Bateman, Andrew Tan and the editors for their valuable comments on a draft of this chapter.

1 Archbishop E. Sandys, *Sermons 1575–1585* (1585) cited in 'Security', Oxford English Dictionary Online, 2nd ed., 1989.

2 W. Shakespeare, ed. B. Lott, *Macbeth*, London: Longman, 1965, Act III, scene V, line 32, p. 135.

insecurity.³ Drawing on the language of security is not, however, a rhetorical device used only by governments. Advocates of a particular cause, whether scholars or non-government organizations, use the language of security to make a case for governments paying greater attention to an identified threat.

To recognize that the process through which members of a community come to accept a phenomenon as a threat to their security – a process referred to as ‘securitization’⁴ – is a political one is not, however, to say that it is necessarily bad. The objective of those arguing for environmental security, or water security or food security is to have basic human needs elevated to the same priority level as traditional military security concerns. In the case of maritime security, the agenda has shifted considerably in recent years, away from a traditional conception of maritime security as referring to the maritime component of international conflict, to a much broader conceptualization encompassing maritime terrorism and sometimes including the impact of climate change on the marine environment and illegal, unreported and unregulated fishing.

Along with recognition of the politics of securitization goes a questioning of the appropriate referent for questions of security. The state tends to be the default, but there is today recognition that safeguarding the state does not necessarily equate with ensuring the security of its citizens. Measures designed to protect ports may not coincide with the best interests of maritime workers, and the use of active sonar by naval vessels may be detrimental to the security of the marine environment.⁵ Recognizing that politicians find ‘security’ a valuable rhetorical tool because, although regarded as desirable, perfect security can only remain an ideal, raises the question as to how far policy should aim towards what is ultimately unattainable. This is not to glorify insecurity but simply to recognize that a set of regulations designed to enhance security need not necessarily constitute an unqualified good for every security referent.⁶

This chapter reflects on whose security is being increased by the recent expansion of international, Australian and New Zealand law on maritime security. In particular, to what extent has the development of international law to address the threat of maritime terrorism been steered by the United States (US) and with what implications for Australia and New Zealand? Second, how much maritime security should Australian and New Zealand policy-makers be aiming for? Could it be possible to aim too high?

3 See, for example, D.L. Altheide, *Terrorism and the Politics of Fear*, Lanham, MD: AltaMira, 2006, and G. Kassimeris (ed.), *Playing Politics with Terrorism: A User's Guide*, New York: Columbia University Press, 2008.

4 See, for example, O. Wæver, ‘Securitization and Desecuritization’ in R.D. Lipschutz (ed.), *On Security*, New York: Columbia University Press, 1995, pp. 46–86.

5 ‘Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its ninth meeting: Letter dated 25 July 2008 from the Co-chairpersons of the Consultative Process addressed to the President of the General Assembly’, 25 July 2008, UN Doc. A/63/174, para 42.

6 L. Zedner, ‘Too Much Security?’, *International Journal of the Sociology of Law* v31, 2003, pp. 155–84.

1 Assessing post-disaster regulation on maritime security

The impetus for the recent development of international, Australian and New Zealand law to counter the threat of maritime terrorism was the terrorist attacks on the US of 11 September 2001. The subsequent expansion of legal regimes addressing the issue can therefore be understood as an example of ‘post-disaster’ regulation, albeit that it has been a regulatory response not to an accident but to an act of intentional destruction. Disasters usually result in new rules and regulations, although, over time, the economic burden of those regulations may lead to demands for deregulation. There has in recent years been considerable interest in finding ways to improve methods of regulation within our system of regulatory capitalism and to move beyond the cycle of regulation and deregulation.⁷

Haines, Sutton and Platania-Phung argue that appropriate post-disaster regulation needs to respond to more than one form of risk and that the challenge for policy-makers is to address an appropriate mix of three forms of risk: actuarial, socio-cultural and political. ‘Actuarial risk’ is risk understood purely in terms of the impact and probability of a certain category of harm.⁸ By ‘socio-cultural risk’ the authors refer to risk as perceived by society itself; this may differ from a purely actuarial assessment of risk. Disasters, such as a gas explosion or the collapse of a major insurance company, can create a sense of social instability, and insecurity. The response to this may be new laws and regulations that signal that something is being done and that ‘this will never happen again’. The rationale for responsive measures may well be couched in actuarial terms although the significance of those measures is primarily socio-cultural.⁹ Political risk alludes to the fact that it is politicians who determine the extent and form that regulation will take. Ensuring security could be said to be the fundamental role of government, which means that any regulatory response to a security disaster incurs the danger that the government will place too great an emphasis on meeting political risk at the expense of either actuarial or socio-cultural risk. According to Haines *et al.* there is some ambiguity in the contemporary politician’s role in relation to risk, in so far as politicians need to promote an economic system that is based on risk-taking as well as to protect the public.¹⁰

The terrorist attacks that gave rise to the regulatory response under consideration did not take place in Australia or New Zealand but in the US, the most powerful country in the world. In terms of Australasian governments responding to actuarial risk, it would not have been inherently wrong for policy-makers in

7 See, for example, D. (FRW) Levi-Faur and J. Braithwaite, *Regulatory Capitalism: How it Works and Ideas for Making it Better*, Cheltenham: Edward Elgar, 2008 and N. Cunningham, *Smart Regulation: Designing Effective Environmental Policy*, Oxford: Clarendon Press, 1998.

8 F. Haines, A. Sutton and C. Platania-Phung, ‘“It’s all about risk, isn’t it?” Science, Politics, Public Opinion and Regulatory Reform’, *Flinders Journal of Law Reform* v10, 2007–08, p. 439.

9 *Ibid.*, p. 440.

10 *Ibid.*, pp. 441–2.

Australia and New Zealand to take action in response to the threat of a maritime attack not only in Australasia but on the US simply because international trade remains highly dependent on maritime commerce and any disruption to the flow of goods could have devastating effects on the world economy.¹¹ On the other hand, it is striking that a 2007 study by Martin Murphy published by the International Institute for Strategic Studies noted both that maritime terrorism has posed a threat to a very modest list of countries¹² – which does not include Australia, New Zealand or the US – and that ‘[t]hough it clearly has the potential to develop, terrorism at sea is currently a minor threat on the international scene’. Alexey Muraviev concluded in 2007 that the probability of a maritime terrorist attack in Australia is low.¹³ It is therefore appropriate to question whether the financial burden of maritime security regulations in Australasia, both for government and for business operating within a competitive economic environment, may be disproportionate to the local or regional risk.

Neither the Australian nor the New Zealand government has been under strong pressure to respond to socio-cultural risk. The only terrorist incident in New Zealand – the bombing of the *Rainbow Warrior* – took place over twenty years ago and in relation to issues seemingly unrelated to the contemporary situation. New Zealanders tend to feel removed from world events due to their isolation. In Australia there has not been any great alarm among the general public regarding questions of maritime security. Australia has never experienced a maritime terrorist incident and in recent years cruises have grown in popularity in both countries.¹⁴ Both governments were if anything going to find it difficult to gain public acceptance of far-reaching measures. Were there a terrorist attack on a vessel or port under Australian jurisdiction or were evidence to emerge that New Zealand was now to be targeted by radical Islamic terrorists the level of socio-cultural and hence political risk would no doubt increase.

Australian policy-makers faced the danger of over-responding to a particular perceived form of political risk: that of the need to pander to US security concerns at the expense of Australia’s own needs. John Howard, Prime Minister of Australia from 1996 to 2007, was in the US at the time of the 11 September attacks and had met the US President for the first time the previous day. Terrorism

11 S.J. Tangredi, ‘Security from the Oceans’ in R.L. Kugler and E.L. Frost (eds.), *Global Century: Globalization and National Security* v1, Washington, DC: National Defense University Press, 2001, pp. 471–92.

12 Murphy lists Israel, Sri Lanka, the Philippines, Yemen, Nicaragua and what was once the Spanish Sahara as those that have experienced the threat. M.N. Murphy, *Contemporary Piracy and Maritime Terrorism: The Threat to International Security*, Adelphi Paper 388, London: International Institute for Strategic Studies, 2007, p. 70.

13 A. Muraviev, ‘Maritime Terrorism and Risks to the Australian Maritime and Resource Industries’, presented at the RNSA Security Technology Conference, Melbourne, 28 September 2007, available online at www.safeguarding.australiasummit.org.au/files/sec_tec_07_PDFs/Alexey.pdf.

14 ‘Record Number of Australians take to the Water’, *The Age*, 6 May 2008, available online at www.theage.com.au/news/ and ‘Record Year for New Zealand Cruise Industry’, Scoop online, 13 March 2009, available online at www.scoop.co.nz/stories/BU0903/S00394.htm.

was to become a bonding agent in Howard's relationship with George W. Bush.¹⁵ Critics, particularly on the Labor side of politics, charged the Howard government with falling too readily in line with whatever would most please the US, on the assumption that the payoff would more than compensate for the fact that those actions might not otherwise appear to enhance Australia's security. In a 2007 speech the Director-General of the Australian Security Intelligence Organization, Paul O'Sullivan, said that since 2001 a terrorist attack in Australia was feasible and could well occur and that Australia had become a target because of 'who we are' – a Western country, aligned with the US, the UK and others that are seen as 'crusader' nations.¹⁶ Australians have been among those killed in terrorist bombings in Indonesia since 2001. Those arguing against the Howard approach to the US war on terror maintained that it was, in fact, possible to distinguish the interests of Australia from those of the US and that the Australia–US alliance does not require Australia to always acquiesce in whatever would keep the US most happy.

New Zealand policy-makers did not face as great a temptation as their Australian counterparts to follow blindly in the US's institutional, legal and even conceptual footsteps. US military ties had been severely reduced following the 1985 introduction by New Zealand of a ban on port visits by nuclear-armed or nuclear-powered warships. At an operational level US–NZ maritime defence cooperation has been considerably renewed during the war on terror but the two countries still do not regard themselves as military allies. New Zealand nevertheless shared with Australia the danger of unwittingly prioritizing US maritime security interests over its own simply because of the considerable influence the US has wielded on international law relating to maritime security. The immediate impetus for most national post-9/11 legislative initiatives has been the adoption of new measures by the International Maritime Organization (IMO) and the introduction of a range of initiatives by the US. As will be seen, in reality both can be regarded as US initiatives.

2 The influence of the US on the development of the international law of maritime security

Warnings had been expressed well ahead of 9/11 of the possibility of a catastrophic terrorist attack on the US,¹⁷ and of the possibility of terrorists bringing weapons of mass destruction (WMD) into the US via a container unloaded at a

15 See A. Summers, 'The Day that shook Howard's World', *Sydney Morning Herald*, 17 February 2007, available online at www.smh.com.au.

16 Cited in the Hon. M. Vaile MP, Minister for Transport and Regional Services, 'Government Priorities for Port and Maritime Security', speech delivered at the Port and Maritime Security and Counter-terrorism Conference, 30 April 2007, available online at www.ministers.dotars.gov.au/mv/speeches/2007/VS08_2007.htm.

17 See, for example, A.B. Carter, J. Deutch and P. Zelikow, 'Catastrophic Terrorism: Tackling the New Danger', *Foreign Affairs*, v77(6), 1998, pp. 80–94.

US port.¹⁸ Washington has taken concerns regarding the launching of attacks from vessels in ports, the transporting of weapons of mass destruction to terrorists by sea, terrorists entering a country by posing as crew on a merchant vessel, or even the use of a vessel as a missile such as in a narrow strait, much more seriously since 9/11. There was sudden recognition that, in comparison with the highly regulated aviation industry, the maritime industry had no comparable vetting of crew or tracking of vessels. The world has a relatively small number of supercontainer hubs and strategic straits. There were concerns that pirates might team up with terrorists and possibly hi-jack a chemical tanker and use it against a city much as the 9/11 terrorists had used aircraft against landmarks in US cities. The attacks on the USS *Cole* in Aden harbour in 2000 had even before 2001 shown that Al Qaeda had an interest in the maritime domain.

The *Maritime Transportation Security Act of 2002 (MTSA)*¹⁹ implemented a risk-based methodological approach to protect US ports and waterways from terrorist attack. The US Coast Guard released a *Maritime Strategy for Homeland Security* in December 2002,²⁰ but it was not until September 2005 that President George W. Bush approved the *National Strategy for Maritime Security (NSMS)*.²¹ The *NSMS* is part of a system of interlocking national, homeland and maritime security strategies including the *National Security Strategy of the United States*, the *National Strategy on Combating Weapons of Mass Destruction*, the *National Strategy for Homeland Security* and the *National Defense Strategy of the United States*. One of the underlying premises of these strategies is that the probability of a terrorist organization using a chemical, biological, radiological or nuclear weapon has increased significantly in the last decade, so it is vital to find ways of preventing terrorist attacks on the US, preventing terrorist groups from getting access to WMD-related technologies and denying terrorists the opportunity to exploit the maritime domain for their activities.

The *NSMS* places heavy emphasis on the US economy and its interconnectedness with the global economy; hence the need for international cooperation. An underlying theme of the *NSMS* is that security must be achieved without impeding free trade and markets because a strong world economy in itself enhances US national security. The *Maritime Security Strategy* points out that 80 per cent of world trade travels by water and that less than 3 per cent of the waterborne trade of the US is carried on vessels owned, operated and crewed by US citizens. The *Strategy* emphasizes the principle that maritime security is best achieved 'by blending

18 See, for example, S.E. Flynn, 'Beyond Border Control', *Foreign Affairs* v79(6), 2000, pp. 57–68.

19 *Maritime Transportation Security Act of 2002*, Public Law 107–295, 116 STAT 2064, 25 November 2002.

20 United States of America (US) Government, US Coast Guard, *Maritime Strategy for Homeland Security*, Washington, DC: US Coast Guard Headquarters, 23 December 2002, available online at www.uscg.mil/history/articles/uscgmaritimestrategy2002.pdf.

21 In the time between 2001 and 2005 actions were taken in accordance with departmental plans. US Government, Department of Homeland Security, 'The National Strategy for Maritime Security', September 2005, available online at www.dhs.gov/xlibrary/assets/HSPD13_MaritimeSecurityStrategy.pdf, p. 8.

public and private maritime security activities on a global scale into an integrated effort that addresses all maritime threats'.²² The *Strategy* was supplemented by eight supporting plans, including the *International Outreach and Coordination Strategy to Enhance Maritime Security*. This established two strategic goals. First is a coordinated policy for US maritime security activities with foreign governments, international and regional organizations, and the private sector. Second is enhanced outreach to foreign governments, international and regional organizations, and private-sector partners to solicit support for an improved global maritime security framework.²³

It is well recognized that the US was the chief architect of the network of international organizations and treaty regimes established following World War II. In many instances, the US provided the draft text of a treaty based on recent US legislation so that the treaty served in effect to extend that legislation beyond US borders. In the years since the immediate post-1945 experience, intergovernmental organizations have served to disseminate, legitimate and to some extent conceal US influence on policy in the international arena.²⁴ While the George W. Bush administration has been widely regarded as something of a maverick in terms of its relationship with international law and rejection of a number of products of multilateralism, it continued to use both treaty and non-treaty methods to disseminate its policy preferences on maritime security. It also used resolutions of the UN Security Council and its own legislation to shape the policies of other countries, the latter provoking charges of extraterritoriality. Let us review some of the instruments through which the US has sought to disseminate its post-9/11 policy preferences on maritime counter-terrorism before considering what this means for Australia and New Zealand.

2.1 *The ISPS Code and amendments to SOLAS*

Traditionally the International Maritime Organization has been concerned with maritime safety and marine environmental protection, not security. In November 2001 the Assembly of the IMO adopted Resolution A.924(22), requesting the Maritime Safety Committee to undertake 'on a high priority basis, a review to ascertain where there was a need to update various IMO instruments and to adopt other security measures and in the light of such a review to take prompt action'. An Intersessional Working Group on Maritime Security was established. On 15 January 2002 the US submitted a proposal on measures to improve

22 Ibid., p. 2.

23 'New US Maritime Security Strategy includes Legal and Institutional Initiatives', *American Journal of International Law* v100, 2006, p. 224.

24 S.V. Scott, 'Intergovernmental Organizations as Disseminators, Legitimizers, and Disguisers of Hegemonic Policy Preferences: The United States, the International Whaling Commission, and the Introduction of a Moratorium on Commercial Whaling', *Leiden Journal of International Law* v21, 2008, pp. 581–600.

maritime security.²⁵ The proposal covered a number of areas, including ship security officers, port vulnerability assessments, seafarer identity documents and ship security equipment. The Conference of Contracting Governments to the *International Convention for the Safety of Life at Sea 1974 (SOLAS Convention)*,²⁶ held in December 2002, adopted amendments including the addition of a new Chapter XI-2 on maritime security and the International Ship and Port Facility Security (ISPS) Code.²⁷ Chapter XI-2 required, *inter alia*, that a ship entering a port must comply with the security level of the flag state or the port state, whichever is higher. The ISPS Code established a framework to detect security threats to ports and vessels and to take preventive measures against them. The Code requires port facilities to maintain a Port Facility Security Plan and to designate a Port Facility Security Officer. The Code is the international equivalent of the *MTSA*,²⁸ and its provisions closely resemble the initial US proposal of January 2002.²⁹ The *MTSA* and ISPS Code both required total implementation by 1 July 2004.

2.2 *The Maritime Labour Convention*³⁰

There are more than 1.2 million seafarers. The US *MTSA* ‘encouraged’ the administration to negotiate:

an international agreement, or an amendment to an international agreement, that provides for a uniform, comprehensive, international system of identification for seafarers that will enable the US and another country to establish authoritatively the identity of any seafarer aboard a vessel within the jurisdiction, including the territorial waters, of the US or such other country.³¹

Other members of the IMO accepted the need for major revisions to the *1958 Seafarers’ Identity Documents Convention*. The resulting *ILO Convention No. 185, the Seafarers’ Identity Documents Convention (Revised) 2003*,³² required each Member to

25 R.C. Beckman, ‘International Responses to combat Maritime Terrorism’ in V.V. Ramraj, M. Hor and K. Roach (eds), *Global Anti-terrorism Law and Policy*, Cambridge: Cambridge University Press, 2005, p. 249.

26 *International Convention for the Safety of Life at Sea*, 1 November 1974, 1184 UNTS 278 [hereinafter *SOLAS Convention*].

27 IMO International Ship and Port Facility Security Code, adopted at the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974, 12 December 2002, IMO Doc. SOLAS/CONF.5/34, Annex 1, Conference Resolution 2, pp. 2–91.

28 C. Ward, ‘Maritime Security and Beyond’, *Mariners Weather Log* v49(1), 2005, available online at http://vos.noaa.gov/MWL/april_05/security.shtml.

29 Beckman, note 25, p. 252.

30 ILO Convention No. MLC *Maritime Labour Convention*, 7 February 2006, available online at www.ilo.org/ilolex/english/convdisp1.htm.

31 *Maritime Transportation Security Act of 2002*, note 19, s. 103.

32 ILO Convention No. C185, *Convention revising the Seafarers’ Identity Documents Convention 1958*, 19 June 2003, available online at www.ilo.org/ilolex/english/convdisp1.htm.

issue to each of its seafarer nationals an identity document designed to prevent tampering and falsification while at the same time being generally accessible to governments at the lowest possible cost. By Article 6 of the Convention the identity card was to suffice for obtaining shore leave; no visa would be necessary. This was unacceptable to the US and, although the Convention entered into force on 9 February 2005, it has received few ratifications.³³ In 2006 the International Labour Organization (ILO) completed the negotiation of the *Maritime Labour Convention*, often referred to as the consolidated *Maritime Labour Convention* or a 'Bill of Rights' for seafarers. This consolidates and updates more than sixty-five international labour standards related to seafarers, including the right to shore leave.

2.3 Amendments to the SUA Convention³⁴

The US has at all times been an important player in the development of an international legal regime to combat maritime terrorism. The *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (1988 *SUA Convention*)³⁵ and its Protocol to extend the provisions to unlawful acts committed against fixed platforms on the continental shelf originated in a US proposal subsequent to the 1985 *Achille Lauro* episode, in which a US citizen had been shot and thrown overboard an Italian-flagged cruise ship.³⁶ The *SUA Convention* lists a number of offences that endanger the safety of international maritime navigation, including the seizure of or exercise of control over a ship by any form of intimidation. States have an obligation *inter alia* to make these offences crimes under their law, to establish jurisdiction over the crime if it happens in their territory, and to extradite or prosecute an alleged offender who enters their territory.

IMO Resolution A.924(22)³⁷ requested the Legal Committee of the Organization to review the *SUA Convention* and to take prompt action to update it if necessary. The IMO began its consideration of possible amendments in April 2002. The US proposed *inter alia* that the Convention be amended so as to explicitly create an offence of 'intentionally and unlawfully releasing harmful substances (such as biological agents, chemicals, or radiological materials) that have the capacity to cause death or serious bodily injury to the ship's crew or passengers' and

33 International Labour Organization, 'Ratification Status of Convention No. C185 *Seafarers' Identity Documents Convention (Revised)* 2003', undated, available online at www.ilo.org/ilolex/cgi-lex/ratifice.pl?C185.

34 *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 10 March 1988, 1678 UNTS 221.

35 *Ibid.*

36 International Maritime Organization, 'Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation', undated, available online at www.imo.org/home.asp?topic_id=910. On US involvement in the incident itself see G.P. McGinley 'The *Achille Lauro* Affair: Implications for International Law', *Tennessee Law Review* v52, 1984–85, p. 691.

37 IMO Resolution A.924(22), Review of Measures and Procedures to Prevent Acts of Terrorism which Threaten the Security of Passengers and Crews and the Safety of Ships, 20 November 2001, IMO Doc. A 22/Res. 924.

that the Convention should address the issue of the transport of weapons of mass destruction and using the ship or its cargo as a weapon.³⁸ The US proposed that the committee establish an intersessional correspondence group to consider the scope of the necessary amendments and offered to lead the group.³⁹

On 14 October 2005 a diplomatic conference of States Parties to the *1988 SUA Convention* adopted amendments to the *1988 SUA Convention* and its *1988 Protocol relating to Fixed Platforms on the Continental Shelf*.⁴⁰ The range of offences included in Article 3 was broadened along the lines the US had proposed. Controversial was to include carriage by sea of explosive or radioactive material or any source of special fissionable material, as well as biological, chemical and nuclear (BCN) weapons. Especially controversial was the proposal to include the transport by sea of 'any equipment, materials, or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon' provided that the transportation takes place with the intention 'that it will be used for such purpose'. IMO members not party to the *Nuclear Non-proliferation Treaty*⁴¹ argued that the appropriate forum for the consideration of such matters was the International Atomic Energy Agency.⁴² Even more controversial was a new Article 8 *bis* to allow the boarding of vessels suspected of being involved in terrorist activities, and here the US did not achieve all that it wanted.⁴³ The amendments are not yet widely ratified and have not entered into force.

2.4 The Container Security Initiative

In January 2002 the US Customs Service launched the Container Security Initiative (CSI), aimed to provide greater security at the overseas point of loading for shipping containers destined for the US. The CSI consists of four core elements: (1) using automated information to identify and target high-risk containers; (2) pre-screening those containers identified as high-risk before they arrive at US ports; (3) using detection technology to pre-screen high-risk containers quickly; (4) using smarter, tamper-proof containers.⁴⁴ The first phase of the initiative involved twenty large ports in Europe and Asia. The programme was extended in 2003 to a

38 C. Young, 'Balancing Maritime Security and Freedom of Navigation on the High Seas: A Study of the Multilateral Negotiation Process in Action', *University of Queensland Law Journal* v24, 2005, p. 357.

39 *Ibid.*, p. 358.

40 *Protocol for the Suppression of Unlawful Acts against the Safety of fixed Platforms located on the Continental Shelf*, 10 March 1988, 1678 UNTS 304.

41 *Treaty on the Non-proliferation of Nuclear Weapons*, 1 July 1968, 729 UNTS 161.

42 R. Balkin, 'The International Maritime Organization and Maritime Security', *Tulane Maritime Law Journal* v30(1-2), 2006, pp. 27-8.

43 For an account of the negotiations on ship boarding see Young, note 38.

44 US Government, Department of Homeland Security, Customs and Border Protection, 'US Customs Container Security Initiative guards America, Global Commerce from Terrorist Threat', News Release, 1 November 2002, available online at www.cbp.gov/xp/cgov/newsroom/news_releases/archives/legacy/2002/112002/11012002_4.xml.

number of smaller but strategically important ports. Countries that do not implement the required CSI initiatives are at an effective disadvantage because their shipments will be cleared more slowly. The CSI thereby functions as a non-tariff barrier and there has been pressure to either join the system or risk losing export business to the US.⁴⁵ As of June 2008 there are fifty-eight ports within the CSI, accounting for 85 per cent of cargo traffic bound for the US.⁴⁶

A separate but related initiative was a US Customs requirement that detailed manifest information be transmitted electronically twenty-four hours in advance of a container's loading. The manifests are then analysed against the databases available at the National Targeting Center to establish whether the container poses a risk. If the answer is yes, it will likely be inspected before it is loaded on a ship bound for the US. Another related programme is the Customs–Trade Partnership against Terrorism (C–TPAT), a government–business initiative by which businesses improve the security of the international supply chain and thereby US border security. The US promoted the internationalization of its strategy in the form of an International Framework of Standards.⁴⁷ The World Customs Organization (WCO) passed a resolution on 28 June 2002 calling for the development of a worldwide strategy for its members similar to the CSI, and in 2005 the Council of the WCO adopted the SAFE Framework of Standards for Security and Facilitation in a Global Environment to enable all countries to develop their own programmes similar to CSI.

2.5 The Proliferation Security Initiative and bilateral ship boarding agreements

The Proliferation Security Initiative (PSI) was announced by President George W. Bush on 31 May 2003. It consists of a series of cooperative arrangements among a coalition of participating states regarding the interdiction of ships suspected of carrying weapons of mass destruction (WMD) and missile-related technologies. A 'Statement of Interdiction Principles' was agreed to at a meeting in Brisbane in September 2003.⁴⁸ At the 2003 London meeting of the PSI the US proposed operationalizing the PSI through negotiating bilateral agreements providing authority on a reciprocal basis to board sea vessels suspected of carrying illicit shipments of weapons of mass destruction or related materials. The US has

45 P. Walkenhorst and N. Dihel, 'Trade Impacts of Increased Border Security Concerns', *International Trade Journal* v20, 2006, p. 6.

46 US Government, Department of Homeland Security, 'Container Security Initiative Ports', undated, available online at www.dhs.gov/xprevprot/programs/gc_1165872287564.shtm.

47 See US Government, Department of Homeland Security, Customs and Border Protection, 'Remarks by R.C. Bonner, Customs World London Summit 2004 London, England', 21 September 2004, available online at www.cbp.gov/.

48 Australian Government, Department of Foreign Affairs and Trade, 'Proliferation Security Initiative: London, 9–10 October 2003', undated, available online at www.dfat.gov.au/globalissues/psi/psi_statement.html.

negotiated a number of such agreements with the group of countries that together account for the majority of the world's commercial vessel tonnage, including Cyprus, Liberia and Panama.⁴⁹ These agreements are premised on the principle of flag-state consent to the boarding of ships in international waters.⁵⁰ The PSI has nevertheless been controversial.

In pursuing international cooperation on counter-proliferation the US has also turned to the Security Council. Of particular relevance are Resolutions 1373⁵¹ and 1540,⁵² in which the Council, acting under Chapter VII of the *UN Charter*, decided that all states shall refrain from providing any form of support to non-state actors for obtaining WMD, and that states shall adopt and enforce national laws to that effect. A draft provision in Resolution 1540 authorizing the interdiction of foreign vessels suspected of carrying WMD on the high seas was reportedly dropped in order to obtain China's support for the resolution.⁵³

2.6 The significance of the US influence over the international law of maritime security

A characteristic of the US approach to security is said to be the hope for, or the quest to attain, 'absolute' security from the rest of the world. While at first glance this might seem to be a post-9/11 phenomenon, John Shy claims that a belief that nothing less than a complete solution is required to solve the problem of American security can be traced to the American experience as far back as the end of the seventeenth century. War between England and France, the latter usually joined by Spain, originated in Europe but was transplanted to the western hemisphere. By the end of the seventeenth century, articulate English colonists were claiming that anything less than the complete elimination of French and Spanish power from North America was useless.⁵⁴ The oceans have made possible what Joan Hoff describes as an exceptionalist belief in the country's invulnerability and ability to protect itself,⁵⁵ but have also been the conduit of threat. Observing the US preoccupation with security, Frank Harvey has argued that the more security you have, the more security you will need, not because enhancing

49 See US Government, Department of State, Under Secretary for Arms Control and International Security, Bureau of International Security and Nonproliferation, 'Treaties and Agreements', available online at www.state.gov/t/isn/trty/index.htm for the texts of the agreements.

50 Beckman, note 25, p. 261.

51 UN Resolution on Threats to International Peace and Security, SC Res. 1373, UN Doc. S/RES/1373 (2001).

52 UN Resolution on the Non-proliferation of Weapons of Mass Destruction, SC Res. 1540, UN Doc. S/RES/1540 (2004).

53 S.D. Murphy, *United States Practice in International Law* v2, 2002–2004, Cambridge: Cambridge University Press, 2006, p. 367.

54 J. Shy, 'The American Military Experience: History and Learning', *Journal of Interdisciplinary History* v1, 1971, pp. 214–15.

55 J. Hoff, *A Faustian Foreign Policy from Woodrow Wilson to George W. Bush: Dreams of Perfectibility*, Cambridge: Cambridge University Press, 2008, p. 8.

security makes terrorism more likely 'but because enormous investments in security inevitably raise public expectations and amplify public outrage after subsequent failures'.⁵⁶ It is striking that, notwithstanding the billions that the US has spent since 2001 on homeland security, and the record of success in preventing other attacks on US territory, public confidence in the ability of the government to prevent another terrorist attack has declined substantially during these years.⁵⁷

In the US quest for absolute security it is not surprising that the US remains the ultimate priority for US policy-makers. This is reflected in the US notion of a smart border, a virtual border to be created far from America's shores so that America's borders are not the last line of defence against terrorism.⁵⁸ As President George W. Bush commented, 'We are taking the fight to the enemy abroad so we do not have to face them here at home.'⁵⁹ The issue of just whose security is at stake has cropped up as regards the reciprocity of some of the measures the US has implemented. The bilateral ship boarding agreements entered into by the US are notionally reciprocal but are unlikely to be reciprocal in practice. The CSI is theoretically reciprocal but in practice the focus remains on US security. This concern is even more apparent in relation to the requirement of the 'Implementing Recommendations of the US 9/11 Commission Act of 2007' that by 1 July 2012 all containers destined for the US be scanned for content as well as radio-active materials prior to loading at the port of origin. According to WCO Director of Compliance and Facilitation, Michael Schmitz, it is unlikely that the US could cope if a number of its major trading partners were to demand reciprocity.⁶⁰ The WCO is currently focused on engaging its Members and other customs and trade stakeholders in order to explore various options that will enable the WCO to offer the US administration positive counter-proposals which will meet its needs and result in the 100 per cent scanning legislation being repealed.⁶¹

The ultimate focus of US policy is, perhaps naturally, on US security, but what is not necessarily so obvious is that US security is understood largely in terms of economic security. While the financial costs of the new measures may be high, the US private security sector has been boosted enormously by the measures,

56 F.P. Harvey, *The Homeland Security Dilemma: Fear, Failure and the Future of American Insecurity*, Abingdon: Routledge, 2008, pp. 1–2.

57 *Ibid.*, p. 7.

58 R. Bonner, Commissioner of the Bureau of Customs and Border Protection, Department of Homeland Security, quoted in 'Transcript' in 'The Bad Shipping News: Ports, Freight and Security', ABC Radio National, Background Briefing, 31 August 2003, available online at www.abc.net.au/rn/talks/bbing/stories/s937554.htm.

59 US Government, 'President discusses War on Terror at Naval Academy Commencement', Media Release, 27 May 2005, available online at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/05/20050527.html>.

60 'SAFE versus 100 per cent Scanning: Interview with M. Schmitz', WCO News, No. 55, 2008, available online at <http://publications.wcoomd.org>.

61 World Customs Organization, 'WCO releases University of Le Havre study on the Global Impact of the US 100 per cent Maritime Container Scanning Legislation', Press Release, 10 June 2008, available online at www.wcoomd.org/press/?v=1&lid=1&cid=5&id=160.

prompting some to refer to an emergent 'security-industrial complex'.⁶² The US focus on economic security also means that one of the features of the maritime environment that makes it particularly difficult to secure has not been seriously tackled by the US, and that is the relative lack of transparency of vessel ownership and operation.⁶³ The US was in fact a key player in the promotion of open registries post-World War II; this served the interests of US multinational corporations by making shipping less costly,⁶⁴ but it also contributes to the maritime environment being so opaque and difficult to secure. The US regards the preservation of the freedom of the seas as a top national priority; this was one of three broad principles that underpinned the 2005 *National Strategy for Maritime Security*. 'The free, continuing, unthreatened intercourse of nations is an essential global freedom and helps ensure the smooth operation of the world's economy.'⁶⁵ The US emphasis on the economy means that the ISPS Code, SUA revisions and the PSI have prioritized freedom of navigation over the effectiveness of the response.⁶⁶

According to a study for the US Congress, US legislators have focused on a small number of potentially catastrophic scenarios, including that of smuggling a nuclear weapon or 'dirty bomb' in a shipping container or that a ship could be used as a WMD. This US fear undoubtedly determined the design of the ISPS Code⁶⁷ and the revisions of the *SUA Convention*. There are, however, other forms of cargo that terrorists could exploit just as effectively.⁶⁸ Many developing countries do not accept the priority of measures in the ISPS Code, which are seen primarily as securing the interests of the major Western countries.⁶⁹ Robert Beckman has described the measures adopted by the IMO by way of the *SOLAS* and *SUA Conventions* as:

a major victory for the US in the field of multilateral diplomacy. . . . The US used its power and influence to get almost the entire international community

62 See, for example, M.P. Mills, 'The Security-Industrial Complex', *Forbes*, 29 November 2004, available online at www.forbes.com/forbes/2004/1129/044.html, and Harvey, p. 164.

63 P. Chalk, *The Maritime Dimension of International Security: Terrorism, Piracy and Challenges for the United States*, Santa Monica: RAND, 2008, p. 45.

64 E.R. DeSombre, *Flagging Standards: Globalization and Environmental Safety and Labor Regulations at Sea*, Cambridge, MA: MIT Press, 2006, p. 78. See also 'Brassed off: Flags of Convenience', *The Economist*, 18 May 2002.

65 US Government, Department of Homeland Security, note 21, p. 7.

66 N. Klein, 'Legal Limitations on Ensuring Australia's Maritime Security', *Melbourne Journal of International Law* v7, 2006, p. 307. This is arguably not true of the US emphasis on maritime domain awareness.

67 Captain P. Raes, quoted in 'Transcript' in 'The Bad Shipping News: Ports, Freight and Security', ABC Radio National, Background Briefing, 31 August 2003, available online at www.abc.net.au/rn/talks/bbing/stories/s938554.htm.

68 P.W. Parfomak and J. Frittelli, 'Maritime Security: Potential Terrorist Attacks and Protection Priorities', Report prepared for Members and Committees of Congress, Congressional Research Service, 9 January 2007, available online at www.usis.it/pdf/other/RL33787.pdf, p. 25.

69 A. Bergin and S. Bateman, *Future Unknown: The Terrorist Threat to Australian Maritime Security*, Canberra: Australian Strategic Policy Institute, 2005, p. 40.

to agree to adopt and implement comprehensive new measures on ship security and port security, notwithstanding the fact that many might not have had the same level of concern about maritime terrorism as the United States.⁷⁰

Pacific States, to take one example, are likely to regard illegal fishing as a greater threat to their maritime security than terrorism. Differing perceptions on the question mean that there is as yet no universally accepted definition of the term 'maritime security'.⁷¹

Not all commentators believe that the SOLAS amendments and ISPS code can deliver on the tasks assigned to them. William Langewiesche, author of *The Outlaw Sea*, has described the ISPS Code as 'a giant paperwork cathedral', claiming that it 'might cause a terrorist ten minutes of hesitation, that's about it'.⁷² Critics claim that, even if complied with fully, the ISPS Code does not make much difference in terms of security – that it is simply about the 'illusion of control'.⁷³ Among the amendments to SOLAS adopted in December 2002 was the requirement that merchant ships be equipped with Ship Security Alert Systems. A 2008 review of the systems concluded that they were all but useless to prevent or respond to terrorism, but crews have activated them when faced with piracy and armed robbery.⁷⁴ The fact that the ISPS Code undoubtedly reflects the maritime security concerns of the US and that some disagree with its effectiveness in preventing terrorism is significant given the enormous cost of implementation. One study has estimated that by late 2004 the cost to Malaysian ports of implementing the Code had already been approximately US\$25 million.⁷⁵ The US Coast Guard estimates that the cost to the US government of implementing the

70 Beckman, note 25, p. 252.

71 United Nations Secretary-General, 'Report of the Secretary-General on Oceans and the Law of the Sea', 10 March 2008, UN Doc. A/63/63, para. 39. See also 'Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its ninth meeting; Letter dated 25 July 2008 from the Co-chairpersons of the Consultative Process addressed to the President of the General Assembly', UN Doc. A/63/174, para. 40. Australia supported a wide definition of security.

72 He is cynical of all IMO regulations that require paperwork and logs on ships. According to Langewiesche, the paperwork is generally complied with but the paperwork bears little relation to physical reality – 'the paperwork sort of floats free of whatever that fact is'. W. Langewiesche, quoted in 'Transcript' in 'The Bad Shipping News: Ports, Freight and Security', ABC Radio National, Background Briefing, 31 August 2003, available online at www.abc.net.au/rn/talks/bbing/stories/s937554.htm.

73 S. Correy, presenter, quoted in 'Transcript', *ibid*.

74 T. Timlen, 'The use of SOLAS Ship Security Alert Systems', S. Rajaratnam School of International Studies Working Paper 154, available online at www.rsis.edu.sg/publications/Working-Papers/WP154.pdf.

75 N.A. Osnin, 'Financial Implications of the ISPS Code in Malaysia', *Maritime Studies* v141, March–April 2005, p. 22.

ISPS Code and the security provisions of the *MTSA* will be approximately US\$8.8 billion over the first eleven years.⁷⁶

The US influence on the international law of maritime security means not only that international law will emphasize issues that are of priority to the US but that gaps in the US framework will be mirrored more broadly. The SOLAS regulations do not apply to vessels less than 500 gross tonnes or to ships on domestic voyages unless specifically extended to such vessels by the government concerned. The US lack of adequate regulation of small craft⁷⁷ is mirrored in Australia.⁷⁸ One major way in which a number of commentators believe Australia's post-9/11 regulatory framework to be inadequate is in preventing an SS *Limburg* type of incident such as took place in Port Aden in Yemen, when a small craft rammed into a French oil tanker. The attack on the USS *Cole* in Yemen in 2000 was also by speedboat, and plans by Jemaah Islamiyah to attack US warships in Singapore have been foiled.⁷⁹ The danger of the international movement of small craft was highlighted in the *Rainbow Warrior* incident through the fact that the agents responsible for the attack were believed to have entered New Zealand by small craft.⁸⁰ The difficulty of preventing small-vessel attacks was demonstrated in Sydney through the boarding of HMAS *Sydney* by two protesters in inflatable dinghies during its departure for the Persian Gulf in 2003.⁸¹ The 2003 Maritime Risk Context Statement recognized the small-boat threat but, according to Mike Buky, the Australian government has taken inadequate steps to address the threat from domestic small vessels. A security officer obviously cannot do much about this; there would be jurisdictional difficulties in establishing a national regulatory scheme within the Federal system, and the necessary level of small-boat regulation would not likely be politically popular with the boating community in Australia or in New Zealand. Here we meet the intersection between socio-cultural and political risk. For, where there appears to be little socio-cultural risk to meet because of a lack of consciousness of the danger, it may well be politically unpopular for the government to introduce far-reaching or intrusive regulations. Apart from the huge cost to the government of policing small craft, doing so would incur substantial costs for owners of small boats.

Altogether, Australia, probably more so than New Zealand, has been in danger of following the US lead to an extent arguably incompatible with its own national

76 S.D. Murphy (ed.), 'Contemporary Practice of the United States relating to International Law', *American Journal of International Law* v98, 2004, p. 590.

77 J. Carafano, 'Small Boats, Big Worries: Thwarting Terrorist Attacks from the Sea', Heritage Foundation *Backgrounder* 2041, 11 June 2007, available online at www.heritage.org/Research/HomelandDefense/bg2041.cfm.

78 M.C. Buky, 'Quandaries in Maritime Terrorism Policy', refereed paper presented at the Australasian Political Studies Association conference, University of Queensland, July 2008, available online at www.polsis.uq.edu.au/index.html?page=51071.

79 M.C. Buky, 'Maritime Terrorism: The Threat from Small Vessels', *Maritime Studies* v157, 2007, p. 3.

80 See further Chapter 4 in this volume.

81 Buky, 'Maritime Terrorism: The Threat from Small Vessels', note 78, p. 3.

priorities. The New Zealand Customs Service worked closely with the US Customs and Border Protection National Targeting Center to introduce comprehensive supply chain security measures for shipments between the US and New Zealand,⁸² but New Zealand was less quick than Australia in deciding to participate in the PSI. Yet Australian officials have not blindly copied all US policy leads. Australia has, for example, adopted a more liberal approach to the movement of foreign seafarers in port than the US, where the restrictions on seafarers can be quite onerous.⁸³ While not dismissing the possibility of WMD being brought into an Australian harbour, officials have been less fixated on the risk than have their US counterparts. It has been recognized that enhanced screening of containers is valuable not only as a counter-terrorism measure but for the more traditional customs role of detecting drugs and other illegal imports. Australia was not in the list of top twenty ports that would be covered first by the CSI, but Australia was invited to sign up for Phase 2.⁸⁴ The Customs National Consultative Committee decided in September 2002 and February 2003 simply to monitor developments,⁸⁵ and Australia still has no ports participating in the scheme. The Australian Customs Service has implemented its own Customs Container Security Strategy, compatible with the CSI, just as New Zealand in mid-2007 entered into a Mutual Recognition Arrangement with the US Customs and Border Protection.

Early on, Australian officials did appear to struggle a little in setting a mid-course between simply falling in line with what the US was asking of other countries and adopting an overly assertive independent stance on questions of maritime security. On 15 December 2004 the Prime Minister of Australia, John Howard, announced the intention of the government to establish a Maritime Identification Zone, to extend up to 1,000 nautical miles from Australia's coastline. On entering the zone vessels proposing to enter Australian ports would be required to provide 'comprehensive' information such as ship identity and cargo.⁸⁶ The plan was abandoned after protests from New Zealand and Indonesia.⁸⁷

82 'US-NZ Customs Security Arrangement: Questions and Answers', available online at www.beehive.govt.nz/Documents/Files/US_NZ%20Customs%20security%20arrangement.pdf.

83 S. Bateman, 'ASEAN and the Poor Seafarers: The Price of Additional Maritime Security', RSIS Commentaries 37, 9 May 2007, available online at www.idss.edu.sg. In this commentary Bateman suggests that the mistreatment of crew stemming from tough new security measures, combined with reduced crew sizes, may be contributing to a shortage of seafarers that 'could in the long run pose a greater threat to the safety and security of shipping than any threat from terrorism'.

84 N. Brew, 'Ripples from 9/11: the US Container Security Initiative and its Implications for Australia', Information and Research Services Current Issues Brief No. 27, 2002-02, p. 1.

85 Australian Government, Australian Customs Service, 'Customs National Consultative Committee', undated, available online at www.customs.gov.au/site/page.cfm?u=4695.

86 J. Howard, Prime Minister of Australia, 'Strengthening Offshore Maritime Security', Media Release, 15 December 2004, available online at <http://pandora.nla.gov.au/pan/10052/20050221-0000/www.prm.gov.au/news/interviews/Interview1174.html>, cited in J. Cavenagh and J. Braithwaite, 'Australian Practice in International Law 2004', *Australian Year Book of International Law* v25, 2006, p. 498. The Zone was subsequently renamed the Maritime Identification Zone.

87 M.W. Bockmann, 'Maritime Zones Plan Scrapped', *The Australian Online*, 11 July 2005, available online at www.theaustralian.news.com.au.

3 Concluding remarks

International law texts generally present decisions by intergovernmental organizations as neutral acts of authoritative bodies. This disguises the extent to which the US has been able to use these bodies to disseminate its policy preferences. US policy preferences relating to maritime security have in some cases been achieved through US legislation but, where this was considered inadequate in impacting on the policies and actions of other states, the US has sought a decision by an intergovernmental organization, whether that be the IMO, ILO, or the UN Security Council. It is not that the US has always got all that it wanted from the relevant treaty developments – consider *ILO Convention No. 185 on Seafarers' Identity* documents or the ship boarding measures to be incorporated in the amendments to the *SUA Convention*, for example – but the US has nevertheless remained the dominant influence on international law in this area and thereby shaped the international policy agenda and responses.

This has in many ways been a good thing for Australia and New Zealand because, like the US, both have extensive coastlines. There is a close fit between the maritime security interests of the US and of Australasia; any attack on the US would have a huge impact on global and national economies. It has therefore been appropriate for Australian and New Zealand officials to contribute actively to international initiatives of the US to create a more secure maritime environment. Both have actively participated in the PSI and have cooperated with each other on a number of levels. It is at the same time valuable to be conscious of the international context in which Australia and New Zealand have rapidly developed their law and institutional capacity in the field of maritime security so as to facilitate the difficult task of identifying where Australian and New Zealand policy priorities may differ from those of the US. Australia and New Zealand have nowhere near such large economies as the US and cannot afford simply to mimic all US measures. Gaps in the US legislative response to make the maritime realm as secure as possible stem in part from the priority given to the US economy, and in other instances from the political difficulty of taking extensive measures whether there is little socio-cultural risk and the political risk is greater if action is taken than if not. Officials in Australia and New Zealand will need to continue to assess the national situation on its own terms, aiming not for perfect security in what is a particularly difficult environment to secure, but for 'the rational management of threats within acceptable boundaries'.⁸⁸

88 Chalk, note 62, p. 43.

6 New Zealand and Australia's Role in Improving Maritime Security in the Pacific Region

Sam Bateman and Joanna Mossop

Although much is written about maritime security in the Asia-Pacific, frequently the 'Pacific' aspect of this region is ignored or overlooked. However, for Australia and New Zealand, security or insecurity in states in the Pacific region plays an important role in ensuring security at home.¹ This chapter is focused on the role of Australia and New Zealand in building and maintaining maritime security in the Pacific Islands' Forum area of the Western and Central Pacific (see Figure 6.1), which is typically regarded by Australians and New Zealanders as 'the Pacific'. It is in this area that the two countries have the closest economic, political and social ties to Pacific nations. Maritime security is a significant aspect of the broader security picture in the Pacific.²

The maritime security concerns of Australia and New Zealand in the Pacific have changed over the years. After the independence of most Pacific island countries (PICs) in the 1970s, most concern was with the prevention of illegal fishing and the protection and conservation of the marine resources of the region. While this remains a high priority, following events of 9/11 and other international developments, Australia and New Zealand have become concerned with other issues: the prevention of transnational crime in the region, pollution, the uncontrolled movement of people and goods; and introduced threats to the environment.³

Flows of people and goods through the Pacific and the Australasian⁴ region mean that the Australian and New Zealand governments have put a priority on

1 G. Dobell, 'Pacific Power Plays' in Australian Strategic Policy Institute, *Australia and the South Pacific: Rising to the Challenge*, Special Report 12, Canberra: Australian Strategic Policy Institute, March 2008, pp. 75–7.

2 Bateman and Bergin, 'Maritime Security' in *ibid.*, pp. 55–73.

3 D. Ranmuthgala, 'Security in the South Pacific: The Law Enforcement Dimension' in I. Molloy (ed.), *The Eye of the Cyclone*, v1, *Issues in Pacific Security*, 2nd ed., Sippy Downs, Qld: PIPSA and the University of the Sunshine Coast, 2006, pp. 31–49.

4 The term 'Australasian' is often used to describe Australia and New Zealand's geographical location and includes the Tasman Sea. The two states are often referred to as the 'metropolitan' states in the context of the Pacific.

enhancing the security of the Pacific region, and considerable efforts have been dedicated to this end. The maritime environment is an attractive medium for transnational criminal activity because a larger quantity of goods (e.g. drugs or arms) and a greater number of people can be moved by sea and with generally a lower risk of detection by enforcement authorities. Another important consideration for Australia and New Zealand is that if resources are depleted in the Pacific, or the Pacific environment becomes so degraded that people are not able to continue living in the ways they wish, then security in Pacific states can become so unstable that Australia and New Zealand will be affected to a greater or lesser extent. This may be due to increased migration into the metropolitan states as well as increased crime that may impact on their interests.

The fact is that there is sometimes a disconnect between the priorities of Australia and New Zealand, the priorities of other external states and those of the Pacific states themselves.⁵ Pacific states may not perceive issues that are of high concern to outside countries as similarly important to themselves. New Zealand and Australia's priorities for assistance to the Pacific are primarily driven by their own security interests and their own perception of risk, which inevitably leads to some disagreement about priorities in the Pacific. This means that New Zealand and Australia must ensure that their initiatives in the Pacific are supported by political will among the PICs and that they meet the needs of those states if they are to be successful.⁶ In the security arena, PICs are having to respond to a range of externally imposed requirements including Security Council resolutions addressing terrorism and increased container and port security measures that they must meet in order to ensure ongoing market access. For states with limited bureaucratic capacity, increased demands on time and resources may be perceived as a burden rather than an opportunity, especially if the threats they are responding to are not seen as posing significant risks to the states concerned. The challenge for Australia and New Zealand, then, is to demonstrate that increased maritime security will benefit all states involved.

One point that is important to stress is the diversity of the Pacific. It is common for Australian and New Zealand experts to discuss the Pacific as if it were homogeneous and that problems and solutions are common to all PICs. This is an extremely problematic assumption, and may undermine the ultimate goal of Australia and New Zealand of working with PICs to improve their own security. Although this chapter by necessity refers to the Pacific as a whole, one observation is that the diversity of cultures, governments and capacity across the region should be considered in responding to maritime security risks and initiatives. In some cases, sub-regional approaches to particular problems may be required.

This chapter provides a brief overview of the maritime security issues facing the Pacific, evaluates some of the existing initiatives undertaken by Australia,

5 Dobell, note 1, p. 75.

6 For a critical comment on inappropriate aspects of Australia's assistance programmes in Papua New Guinea see L. Scheps, 'How Papua New Guinea works', *Quadrant* v49(4), April 2005, pp. 43–7.

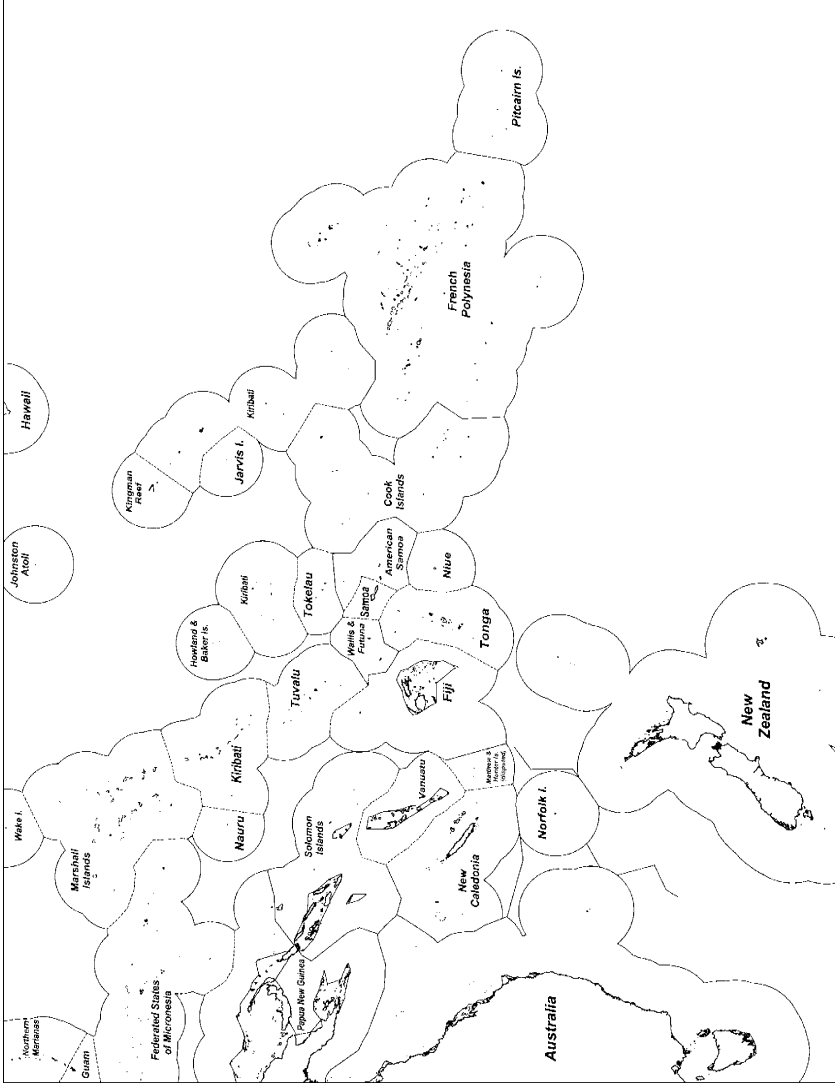


Figure 6.1 South Pacific Maritime Zones.

New Zealand and other countries to respond to the maritime security challenges and outlines some of the challenges the Pacific states face in dealing with those challenges. Finally, the chapter considers a variety of approaches that Australia and New Zealand could build on to improve maritime security in the Pacific. The scope of the topics addressed in this chapter is vast, and the chapter is, of necessity, limited to themes and broad responses rather than outlining in detail the threats and current projects in maritime security in the Pacific.⁷ Overall, extremely good progress has been made in some aspects of maritime security in the Pacific. However, obstacles to continued progress include an ongoing capacity problem at a state agency level, limited enforcement capability and sometimes a lack of political will to address a particular concern. The challenge is to overcome these obstacles and build a holistic maritime security regime for the region.

1 Maritime security issues in the Pacific

Pacific states face similar problems to Australia and New Zealand in that they typically have a large maritime area compared to their land mass. Fourteen Pacific states have a combined EEZ area of 20 million km².⁸ This creates unique and significant problems, particularly for states with small and dispersed populations, poor infrastructure and limited bureaucratic responsibility. One state, Kiribati, has three separate EEZs spread over a total area of 3.5 million km² to monitor and protect. The protection of sovereignty and sovereign rights is a major challenge for these small island countries with large areas of maritime jurisdiction and many remote islands and atolls.

For PICs, the ocean is perceived as a source of food and income rather than primarily as creating a threat. For many PICs the ocean is the main resource that has sustained them for generations. Pacific island peoples, particularly the Polynesians, have a strong cultural affinity with the sea, regarding the maritime and terrestrial environments as an integrated whole. Therefore, traditional maritime issues for PICs include: the health of their coral reefs that provide food and tourism dollars; the sustainability of fishing stocks for domestic consumption as well as foreign licence fees; the health of the marine environment; and the impact of climate change on rising sea levels and ecosystems. More recently, growing awareness of the impact of unregulated migration in the region is causing apprehension about the impact on Pacific societies. Concerns about maritime security in PICs reflect these matters rather than more defence-oriented concerns that occupy larger, more developed states. However, PICs are unable to avoid issues such as piracy and terrorism to the extent that they are required to respond to

7 Some of the threats facing the Pacific are outlined in more detail in Bateman and Bergin, note 2.

8 Bateman and Bergin, note 2, table 1, p. 56. For a discussion of EEZ management see I. Kawaley, 'Implications of Exclusive Economic Zone Management and Regional Cooperation between South Pacific small midocean Island Commonwealth Territories', *Ocean Development and International Law* v30, 1999, p. 333.

Security Council resolutions and increasing demands for security of supply chains from trading partners.

1.1 *Illegal fishing and sustainable fisheries management*

As the majority of PICs obtain significant income from licence fees paid by foreign fishing vessels,⁹ the sustainability of commercial fish species is of prime importance to PICs. One of the largest threats to that sustainability is the activities of illegal fishing vessels operating both in the EEZs of PICs and on the high seas. In the vast space of the Pacific Ocean, surveillance and monitoring of vessels is extremely difficult and intermittent. Vessels may not be detected if they make forays into national EEZs and operate there, depriving PICs of revenue and undermining fisheries management efforts. Even if the vessels are detected, PICs are not often in a position to respond to the sighting. The economic loss to the PICs as a consequence of IUU fishing is estimated by the Forum Fisheries Agency (FFA) to be about \$400 million per annum.¹⁰ At a domestic level, there is concern that corruption may undermine efforts to manage fisheries sustainably.¹¹

1.2 *Illegal movements of people and goods*

Another significant risk for the security of the PICs is the undetected, and often illegal, movement of people and goods within the Pacific. Although Pacific states have made significant improvements in the security of air access points in response to revenue and security priorities, a huge gap exists in relation to movements at sea. To an extent, this problem is inevitable due to immutable geographical factors: the sheer scale of the maritime zones and the dispersed nature of many of the islands making up the PICs mean that sea-based activity is difficult to monitor and control. Exacerbating this difficulty is that the majority of PIC customs, immigration and policing agencies are not adequately resourced to respond to the challenges. There is also a growing level of disquiet about some Chinese being involved in forms of crime, from passport scams to the smuggling of people and drugs.¹² New Zealand and Australia are concerned with the possibility that the Pacific may be used for the production and transshipment of drugs.¹³

9 In Kiribati, for example, access fees account for 40–50 per cent of government revenue. R. Hannesson, 'The Exclusive Economic Zone and Economic Development in the Pacific Island Countries', *Marine Policy* v32, 2008, pp. 886–97.

10 Bateman and Bergin, note 2, p. 57.

11 Q. Hanich and M. Tsamenyi, 'Managing Fisheries and Corruption in the Pacific Islands Region', *Marine Policy* v33, 2008, pp. 386–92.

12 Dobell, note 1, p. 80.

13 M. Moriarty, 'Border Management in the Pacific' in A. Bisley (ed.), *Pacific Interactions: Pasifika in New Zealand, New Zealand in Pasifika*, e-book, Wellington: Institute of Policy Studies, Victoria University of Wellington, 2008, available online at <http://ips.ac.nz/publications/publications/show/248>, p. 257.

Two areas of concern include fishing vessels and cruise ships. A 2005 study of the risks posed by fishing vessels in the Pacific found that such vessels posed risks associated with illegal fishing, people smuggling, smuggling of weapons and drugs, prostitution and money laundering, although the extent of these activities in reality has not been evaluated.¹⁴ The report further found that a lack of information sharing (about fishing vessels and their positions) between states and lack of coordination among border agencies were important factors inhibiting security.¹⁵ Another area for concern is the identity of fishing crew that may transfer between vessels at sea with no record being kept by states.

Apprehension has also been expressed about the rising number and size of cruise ships operating in the region.¹⁶ With ships reaching capacities for 2,500 or more people, it can be impossible for PIC authorities to adequately process visiting passengers and crew, leaving a serious information gap about the identity of visitors. The risk of smuggling of goods and drugs on cruise ships is a possibility, but little is known about the extent to which this occurs.

The number of cruising yachts and other recreational vessels in the region is also of concern. Approximately 4,500 of these are estimated to travel through the Pacific each year.¹⁷ Although they are required to report at a port of entry when entering a PIC, it is not clear how often this occurs. Some ports of entry are not manned, and, even in those that are, there are often very few customs officials.¹⁸ The high level of unmonitored traffic is a clear risk for trafficking of people, drugs and introduced species,¹⁹ and yet any attempt to quantify the risk is largely speculation, due to a lack of information.

1.3 Environmental insecurity

The protection and preservation of the marine and coastal environments is of vital importance to the PICs.²⁰ The management of these ecosystems and the sustainable use of their resources is accorded high priority in regional programmes, through the South Pacific Regional Environment Programme (SPREP) and other organizations, such as the Secretariat for the Pacific Community. Marine pollution from shipping and land-based activities, the introduction of

14 T. Martin, 'Report on Foreign Fishing Vessel Security Issues in the Pacific Islands Region', Regional Maritime Programme, Noumea: Secretariat of the Pacific Community, September 2005 [hereinafter the 'Martin Report'], pp. 36–7.

15 *Ibid.*, p. 54.

16 A. Bergin and S. Bateman, 'Future Unknown: The Terrorist Threat to Australian Maritime Security', *Strategy*, Canberra: Australian Strategic Policy Institute, April 2005, p. 30.

17 Secretariat of the Pacific Community, 'Pacific Border Security Risks posed by Ocean-going Pleasure Craft', Noumea: Secretariat of the Pacific Community, 2008, p. 21.

18 For example, the Cook Islands have 7 customs officials for 15 islands.

19 Refer generally to: Moriarty, note 13, pp. 255–60; Secretariat of the Pacific Community, note 17, pp. 10–20; Bateman and Bergin, 'Maritime Security', note 2, p. 12.

20 S. Bateman, 'Developing a Pacific Island Ocean Guard: The Need, the Possibility and the Concept' in Molloy, note 3, pp. 209–12.

marine invasive species and the impacts of climate change are all environmental risks which, if sufficiently serious, could destabilize PICs. PICs are also concerned about shipments of ultra-hazardous materials traversing their maritime zones, with significant environmental and economic implications in the event of an accident.

Climate change and sea level rise are issues for the PICs, particularly for those that are comprised wholly or partly of atolls. The Republic of Marshall Islands, Kiribati and Tuvalu are all atolls but other PICs, including Papua New Guinea and the Solomon Islands, have outlying atoll groups. A rise in sea level due to climate change could lead to destabilization of communities, some of whom may be forced to abandon their homes. These influences may exacerbate problems of transnational crime and economic dislocation.

1.4 Growing international pressures: terrorism and piracy

The focus of the international community, particularly since 11 September 2001, has been on counter-terrorism initiatives, including countering the possibility of maritime terrorism. Resolutions from the Security Council have required PICs to take certain responses, including reporting on legislation; the International Maritime Organization has implemented a number of sweeping changes, mainly imposed by the International Ship and Port Facility Security (ISPS) Code, which have required infrastructure and training upgrades for PICs;²¹ and countries like the United States (US) have initiated unilateral requirements that must be met for a country to continue trading directly with the US.²² All of these initiatives, while improving the overall security in the maritime transport network, have placed a high resource and administrative burden on PICs.²³ This is even higher for the states that provide seafarers to the international shipping industry, in view of increased security requirements imposed on those working in the maritime industry, and the need for new administrative processes to manage these requirements.²⁴

At present, the risk of maritime terrorism and piracy in the Pacific is low, and largely the risk may be that the PICs could be used as a transit point for terrorists and their materials.²⁵ Some concern exists that the Pacific could be the location

21 For a comprehensive discussion of these new maritime security requirements see S.M. Jones, 'Implications and Effects of Maritime Security on the Operation and Management of Merchant Vessels' in R. Herbert-Burns, S. Bateman and P. Lehr (eds), *Lloyd's MIU Handbook of Maritime Security*, Boca Raton, FL: CRC Press, 2008, pp. 87–116.

22 C. Rahman, 'Evolving US Framework for Global Maritime Security from 9/11 to the 1,000-ship Navy' in *ibid.*, pp. 39–54.

23 Moriarty, note 13, p. 267.

24 These relate particularly to new training requirements and seafarer identification documentation. M. Tsamenyi, M.A. Palma and C. Schofield, 'International Legal Regulatory Framework for Seafarers and Maritime Security post-9/11' in Herbert-Burns et al., note 21, pp. 233–52.

25 Bateman and Bergin, 'Maritime Security', note 2, p. 58; Moriarty, note 13, p. 260; Martin Report, note 14, p. 7.

for a terrorist attack against foreign tourists (in a similar way that the Bali attack appeared to focus on a tourist location).²⁶ This has led to a range of conflicting views about maritime security initiatives. Some believe there is an overemphasis on the counter-terrorism risk at the expense of more focused attention on the issues PICs themselves consider important.²⁷ For example, increased port security has had a social cost, as local people are now denied fishing or other recreational access to wharves and jetties used by international shipping.

1.5 Maritime safety and search and rescue

Maritime safety is a key concern for the region. For the PICs, maritime safety and security are closely related and require similar capabilities of command and control, air surveillance and surface response for the effective conduct of operations at sea. Small ships and traditional craft are the main means of movement between and within island groups and the region is also exposed to strong monsoonal weather conditions and occasional cyclones and tsunamis. As a result, the region experiences a significant number of search and rescue incidents each year, many of which involve loss of life.

2 Maritime security responses: bilateral and regional

2.1 Bilateral security initiatives

2.1.1 Maritime surveillance and patrolling

The most visible contribution to maritime security in the Pacific is made by Australia's Pacific Patrol Boat Programme (PPBP). Under the PPBP, Australia has provided twenty-two patrol boats to twelve Pacific states to assist in maritime law enforcement, training for crews, naval advisers posted to each country, a contribution to operating costs and other support infrastructure.²⁸ In the vast majority of PICs the PPBP is the only source of maritime capability available for offshore enforcement. Many PICs have not managed to fund the necessary maintenance programmes, and this has been a problem for Australia, which is frequently asked for financial assistance beyond what it has planned for. In addition, the vessels are not able to be at sea year-round – in Vanuatu, for example, the patrol boat *Tukoro*

26 J. Henderson, 'Security in Oceania in the post-9/11 and -Bali Era', in Pettman, note 1, pp. 73–82.

27 Political leaders and officials have tended to display a lack of political will and sense of urgency in dealing with terrorism. G. Fletcher, 'Terrorism and Security Issues in the Pacific' in Molloy, note 3, p. 15.

28 For more information see S. Bateman and A. Bergin, 'Law and Order at Sea in the South Pacific: The Contribution of the Pacific Patrol Boat Project', *Ocean and Coastal Management* v42, 1999, pp. 555–68. The first vessels were handed over in the late 1980s. Most are operated by the police, but in some states they are operated by the defence force or navy (e.g. Papua New Guinea, Tonga and Fiji).

spends about eighty days at sea. The limitations are frequently imposed by PICs themselves because they are unable or unwilling to provide increased budgets to cover fuel and operating expenses.

The life of the PPBP was extended from its original fifteen years by a further fifteen years,²⁹ but the future of the programme beyond the current life of the vessels is uncertain. The programme might be terminated when the vessels reach their end of life in about ten years' time. A recent Defence submission to a Senate inquiry in Australia noted that rising fuel costs and lack of assistance from partner states have made the PPBP too difficult to sustain.³⁰ At present the only contribution by New Zealand to the programme is one technical adviser to support the patrol boat in the Cook Islands. Rather than seeing any subsequent programme as a unilateral initiative, the two countries might consider cooperating in the provision of surveillance and patrolling capabilities in the future.

In addition to the limitations imposed by funding restraints on the patrol boats, other limitations also exist that inhibit their activities. Inter-agency coordination can be a problem with a breakdown of communications for example, between the police force that might operate the patrol boat and the national fisheries agency that issues licences and monitors the Vessel Monitoring Systems (VMS). In some cases, the patrol boats are deployed solely for fisheries duties, and do not inspect or keep information about other sorts of vessels encountered on their deployment. This limits the information that the state is able to collect about maritime traffic and misses an opportunity for inter-agency cooperation. Another problem is coordination with aerial surveillance and information received from other states or sources. Because of the limited seagoing capacity, it may not be possible for a patrol boat to intercept a suspicious vessel because it has no spare fuel capacity or it is not in the vicinity. A final problem is that, even if a vessel is intercepted, a successful prosecution is not always possible because evidence may not be collected in an appropriate way, offences may not be detected or the prosecution service is outmatched by lawyers employed by the shipping or fishing company.³¹

PICs and donor countries are aware of these weaknesses and are taking steps to address them. Training of police and prosecution staff is taking place on a bilateral basis by Australian and New Zealand agencies, although it is clear that this is often *ad hoc*. Efforts to train police, fisheries, customs and immigration officials in basic skills of evidence collection and processing should continue to be supported. All of these efforts will ultimately strengthen the effectiveness of the PPBP.

Problems with coordination of assets to respond to information received have

29 Australian Government, Department of Defence, *Protecting the Pacific: Future Directions for the Pacific Patrol Boat Program*, Canberra: Department of Defence, undated.

30 J. Pearlman, 'Defence calls to Scrap Pacific Patrol Vessels', *Sydney Morning Herald*, 30 September 2008, available online at www.smh.com.au/articles/2008/09/29/1222650989577.html.

31 Anecdotal evidence is that well-trained prosecution lawyers are in high demand in private practice and it is difficult for some states to pay lawyers sufficient to induce them to stay. Therefore there is a mismatch between the skill levels of lawyers in prosecutorial and defence roles.

been the focus of a series of exercises and operations facilitated by the Australian Defence Force.³² Operations Bigeye and Island Chief allowed cooperation between Australian personnel and PICs involving physical oceans surveillance and headquarters-based officials. The Kurukuru series (2004–07) gradually increased the number of PICs involved, in which information was pooled from a range of sources and analysed by representatives from all cooperating states to practise identifying vessels of interest. The data were then provided to the PICs, which decided what action to take. The series is considered a success in providing training for officials from PICs as well as building confidence in using information and making appropriate enforcement decisions. One recent development is that states have been encouraged to send representatives from a range of law enforcement agencies, not just fisheries, in order to highlight the utility of cooperation between agencies. It appears that the series has led to improved cooperation among neighbouring PICs due to participants being familiar with the people filling official roles in the other states and more standardized procedures.

The PPBP, although the largest arrangement of its type in the Pacific, is not the only model for donor–PIC cooperation in surveillance and enforcement in PIC maritime zones. The US has entered into a ship riding agreement with Palau to allow law enforcement officers from Palau to be carried on board US Coast Guard vessels.³³ In February 2008 two Japanese fishing vessels were arrested in the EEZ of the Federated States of Micronesia (FSM) for illegal fishing due to a temporary ship riding arrangement with the US Coast Guard.³⁴ An agreement to conduct joint patrols in the Cook Islands for law enforcement was concluded in 2007, and involves the sharing of information as well as allowing patrols in each others' maritime zones. New Zealand sends occasional naval patrols into the Pacific and does so with law enforcement officials on board from the host state to allow the inspection and apprehension of vessels acting illegally within the PIC EEZ. It is expected that these patrols will increase as new naval assets are acquired under New Zealand's 'Project Protector'.

The patrol and response effort provided by the Pacific patrol boats is maximized if there is also an effective maritime air surveillance programme in the region. At present this is not the case, partly because of a marked decrease in patrols by Royal Australian Air Force (RAAF) maritime surveillance aircraft. A

32 Operation Big Eye 2007 involved patrol boats from Palau, FSM, Marshall Islands, Kiribati, PNG and the United States Coast Guard base in Guam, as well as aircraft from Australia, New Zealand and the US. 'Palau to join Regional Surveillance Operation', *Pacific Islands Report*, Pacific Islands Development Program, East–West Center, Honolulu, available online at <http://pidp.eastwest-center.org/pirpoint/2007/August/08.03.07.htm>.

33 N. Rodriguez Jr, 'Palau signs "Shiprider" Agreement with US', *Marianas Variety*, 7 April 2008 reproduced in *Pacific Islands Report*, available online at <http://archives.pireport.org/archive/2008/april/04-07-11.htm>.

34 B. Jaynes, 'Three Fishing Vessels apprehended in FSM Waters', *Kaselehlie Press*, 17 February 2008, reproduced in *Pacific Islands Report*, available online at <http://archives.pireport.org/archive/2008/february/02-21-09.htm>.

comprehensive and effective air surveillance programme is the most pressing operational requirement for regional maritime enforcement.

New Zealand regularly sends Royal New Zealand Air Force (RNZAF) P3 Orion aircraft on surveillance flights of PIC EEZs to provide information about the presence of fishing and other vessels in maritime zones, but, as has been noted, the contribution by the RAAF has fallen markedly in recent years due to higher-priority requirements in other areas. These flights are a useful contribution to maritime awareness for PICs. Although the PIC's patrol boat may not always be in a position to intercept the vessel, in some cases it is possible to prosecute the owners of a fishing vessel *in absentia*, as has occurred in Tonga as a result of the P3 Orion information. Greater efforts are being made by New Zealand to better coordinate the timing of the surveillance flights to ensure that, for example, the flight is compatible with the schedule of the patrol boat.

The *Niue Treaty* 1992 is one model for cooperative surveillance and enforcement.³⁵ It provides a cooperative framework for dealing with illegal fishing in the region. The Treaty itself is a multilateral treaty that allows for a system of (generally) bilateral treaties between Pacific states facilitating cooperation for fisheries enforcement. Implementation of the Treaty, which would allow the patrol vessel of one PIC to conduct enforcement operations in the maritime zones of another, is relatively complicated.³⁶ Subsidiary Agreements are required to allow these enforcement activities to proceed, and, in turn, national legislation is required to support enforcement actions and prosecutions. The complexity of these legal requirements, along with some sensitivity about allowing enforcement operations by a foreign vessel in national areas of jurisdiction, may explain why the only Subsidiary Agreements that are operational at present are between the three former US Trust Territory PICs (Palau, FSM and the Marshall Islands). These countries have similar legal regimes and, due to their common history, may have fewer sovereignty sensitivities between each other.

The *Niue Treaty* is now being reviewed. Possible changes might include arrangements to make it easier to implement and to extend its scope to cover other types of illegal activity than just illegal fishing. Another area for development is the ability of subsidiary agreements to also encourage the sharing of information between PICs in relation to fishing activities and potentially other vessels.

35 *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region*, 9 July 1992, 32 ILM 136. See also J. Veitayaki, 'Staking their Claims: The Management of Marine Resources in the Exclusive Economic Zones of the Pacific Islands' in S.A. Ebben, A.H. Hoel and A.K. Sydnes (eds), *A Sea Change: The Exclusive Economic Zone and Governance Institutions for Living Marine Resources*, 2005, Dordrecht: Springer, pp. 159–60.

36 M. Herriman, M. Tsamenyi, J. Ramli and S. Bateman, 'Review of International Agreements, Conventions, Obligations and other Instruments influencing the Use and Management of Australia's Marine Environment', *Australia's Oceans Policy: International Agreements*, Background Paper 2, A Report Commissioned by Environment Australia, Wollongong: Centre for Maritime Policy, University of Wollongong, October 1997, available online at www.environment.gov.au/coasts/oceans-policy/publications/intl-agreements.html, p. 45.

2.1.2 Capacity-building in law enforcement and fisheries agencies

As indicated above, provision of infrastructure and surveillance capacity is not the only need in enhancing maritime security in the Pacific. Training of government officials is also necessary, and government departments in Australia and New Zealand often have budgetary provision to allow for some capacity-building in PICs in areas related to maritime security. Maritime security is supported by general capacity-building in law enforcement, military and fisheries agencies: basic skills in detection of offences, investigation and prosecution of offenders will build deterrence, as well as the ability of the agencies to respond to particular instances of offending. In addition, agencies dealing with maritime activities may require capacity-building in particular aspects of such activities, for example, as inspection procedures on yachts and fishing vessels.

Australia and New Zealand have a strong tradition of providing capacity-building assistance to PICs in terms of developing infrastructure as well as training. Examples include the Patrol Boat Programme already mentioned. The New Zealand government has committed \$3 million per year through a Pacific Security Fund, which allocates funding for projects based on bids received from PICs through New Zealand government agencies. Individual agencies also have significant capacity-building projects, such as the New Zealand Defence Forces' (NZDF) Mutual Assistance Programme, which conducts training for military forces in Asia Pacific, as well as encouraging exchanges and the placement of technical advisers.³⁷

2.2 Regional efforts to improve maritime security in the Pacific³⁸

2.2.1 Illegal fishing

Two significant regional organizations play a role in responding to illegal fishing. The Forum Fisheries Agency (FFA) was created in 1979 to improve fisheries management in the South West Pacific. It has been extremely successful in improving the capacity of PICs to manage fish stocks, and has also implemented measures at a regional level to combat illegal fishing such as the VMS. The Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC) is also now involved as a regional fisheries management organization. In the near future, it is likely that another fisheries commission, the South Pacific Regional Fisheries Management

37 New Zealand Government, New Zealand Defence Force, 'Annual Report 2006–2007', 2007, available online at www.nzdf.mil.nz/public-documents/annual-report/default.htm, p. 113.

38 The variety of regional initiatives for ocean governance, including resource management, in the Pacific are outlined in A. Wright, N. Stacey and P. Holland, 'The Cooperative Framework for Ocean and Coastal Management in the Pacific Islands: Effectiveness, Constraints and Future Direction', *Ocean and Coastal Management* v49, 2006, pp. 739–63.

Organization, will also be involved in monitoring fisheries activities in the region.³⁹ The latter organization is aimed at governing non-highly migratory fish species in the Pacific region, and so complements the work of the WCPFC Commission, which focuses on highly migratory species, such as tuna. The FFA is closely involved in representing the interests of PICs in the WCPFC and has worked to achieve progress within the Commission on illegal fishing. The Commission has undertaken a range of initiatives to reduce illegal, unregulated and unreported (IUU) fishing, which it is impossible to reproduce in detail here.⁴⁰

The VMS established by the FFA is an important capability for regional maritime security.⁴¹ Under this system, licensed fishing vessels are fitted with an Automatic Location Communicator, which sends a signal (via satellite) to FFA headquarters in Honiara, giving the vessel's location, speed and heading. Also, any foreign fishing vessel that wishes to apply for a licence to fish in waters of an FFA member country must first be registered on the VMS Register of Foreign Fishing Vessels maintained by the FFA.⁴²

The FFA makes the data available to PICs in respect of that PIC's maritime zone, but states are realizing the benefits of sharing data for law enforcement purposes. For example, if a state is able to see that a vessel switches off its VMS when entering its maritime zone from the zone of a neighbouring country, the vessel can readily be identified as suspect. If VMS data from the neighbouring state are not available, the relevant state will not be aware of the presence of the vessel from VMS information. Some sharing of VMS information does occur on a limited basis, and the FFA encourages this.⁴³ The US and France have also been seeking data access arrangements. So far the distant-water fishing nations have not expressed concern about VMS data being used for wider security purposes.⁴⁴

2.2.2 *Ship and port facility security*

The Regional Maritime Programme (RMP) of the Secretariat of the Pacific Community has leading responsibility for assisting the PICs with the implementation of IMO measures for the safety and security of shipping.⁴⁵ The RMP works with the maritime sector of countries and territories to review and update maritime legislation; ensure that ports meet IMO standards; and facilitate training to

39 The South Pacific RFMO is still under negotiation. Refer to www.southpacificrfmo.org/.

40 Information about the activities of the WCPFC is at www.wcpfc.int. There is still room for improvement in the WCPFC's management of tuna species in the Pacific. See A. Langley, A. Wright, G. Hurry, J. Hampton, T. Aqorau and L. Rodwell, 'Slow Steps Towards Management of the World's Largest Tuna Fishery', *Marine Policy* v33, 2008, pp. 271–9.

41 Bateman and Bergin, 'Maritime Security', note 2, p. 59.

42 Refer also to the Martin Report, note 14, p. 16.

43 *Ibid.*, p. 17

44 Bateman and Bergin, 'Maritime Security', note 2, p. 59.

45 *Ibid.*, p. 61.

ensure that all seafarers and port authorities meet required qualifications and standards.⁴⁶

Support for port and shipping security continues to be provided by Australia and New Zealand on a bilateral and regional basis. For example, under the transport security component of the Australian Government's Regional Counter Terrorism Strategy, \$4.7 million will be spent over the next four years to expand Australia's role in providing transport security assistance in the Asia Pacific. This includes the placement of officers in Manila, Jakarta and Port Moresby. In addition to providing guidance and technical assistance, they will contribute to governance and protective security activities.⁴⁷ The officers located overseas will contribute to regional security work carried out by the International Civil Aviation Organization, the IMO and the work of transport security agencies of the US and other countries.

2.2.3 Transnational crime at sea

A number of regional organizations and cooperative arrangements have interests in countering transnational crime at sea. The Pacific Islands Forum, the Oceania Customs Organization, the Pacific Immigration Directors Conference Secretariat, the Pacific Transnational Crime Coordination Centre, the Pacific Islands Chiefs of Police, and Transnational Crime Units are a part of building capacity in the PICs to address a variety of criminal activities, many of which occur at or from sea. One of the largest difficulties facing these organizations is the lack of information about identification and movements of vessels, as well as the threat that they pose for PICs. At times this lack of information has created a difficulty in getting support for regional programmes. Therefore, a number of the regional organizations are focusing on obtaining a better understanding of the extent of transnational criminal activities such as people smuggling, or simply having a clearer picture of the threats posed by fishing vessels,⁴⁸ small craft and cruise ships. More efforts could be made at improving the information available to regional organizations that can assist in identifying gaps or problem areas.

Many of the regional organizations are engaged in training officials from PICs. A lack of training in basic investigation skills as well as raising awareness of inter-agency operability is a key capacity issue. However, anecdotal evidence is that the range of training programmes can be *ad hoc* (dependent on funding), overlapping and occasionally ineffective (by not meeting the needs of the PICs). This criticism is more often directed at bilateral training programmes than at those coordinated by regional organizations, but it is probable that opportunities for coordination and synergies exist at a regional level as well.

⁴⁶ *Ibid.*, p. 61.

⁴⁷ *Ibid.*

⁴⁸ See, for example, the Martin Report, note 14.

2.3 *Involvement of other countries*

In addition to Australia and New Zealand, other non-Pacific island countries contribute to maritime security in the Pacific. France and the US regard themselves as ‘resident powers’ by virtue of their national territories in the region – New Caledonia, French Polynesia and Wallis and Futuna in the case of France; American Samoa, Guam and the Northern Marianas for the US.⁴⁹ The US also retains defence links with the FSM, Marshall Islands and Palau through the Compacts of Free Association with those countries. The US has announced major plans to develop its bases in Guam and the Northern Marianas to support its presence in the Western Pacific following the anticipated scaling down of US forces in South Korea and Okinawa.⁵⁰ There have also been reports that the US might seek to build military bases in Palau. Generally, the US has increased its level of maritime security assistance to the PICs in recent years.

Japan maintains a maritime ‘presence’ in the Pacific area through its extensive fishing interests but has also offered assistance with patrol craft to the Micronesian countries. However, it is unfortunate that ‘Japan’s traditional approach to Pacific fisheries has been to divide and conquer, by playing off island governments against each other’.⁵¹ Japan has also been accused of consistently understating its tuna catch in the region.⁵² However, despite these concerns, Japan might be looked upon to provide a contribution to regional maritime security.

The most significant development with the involvement of non-regional countries over the last decade or so has been the dramatic increase of China’s engagement in the region.⁵³ China’s aid to the PICs, with which it has diplomatic relations, has grown dramatically over the last few years, being estimated at US\$293 million in 2007 – significantly more than that of New Zealand, but still much less than Australia’s.⁵⁴ Recent authors have found little evidence that China has sought to exploit regional vulnerabilities or to become the dominant power in the region.⁵⁵ However, Japan and the US have been uncomfortable with this development, and might even try to make the Pacific an area of strategic competition.⁵⁶

China’s increased involvement in the region presents both opportunities and

49 US Defense Secretary Gates outlined the concept of the US as a ‘resident power’ in the western Pacific at the 2008 Shangri-la Dialogue. P. Walters, ‘Oceania’s new Airstrip One’, *Weekend Australian*, 14–15 June 2008, p. 20.

50 Ibid.

51 Dobell, note 1, p. 81.

52 Ibid., p. 82.

53 J. Henderson and B. Reilly, ‘Dragon in Paradise: Rising Star in Oceania’, *National Interest*, summer 2003, pp. 94–104.

54 F. Hanson, ‘The Dragon in the Pacific: More Opportunity than Threat’, *Policy Brief*, Sydney: Lowy Institute for International Policy, 2008, p. 3.

55 Hanson, note 54; T. Wesley-Smith, ‘China in Oceania: New Forces in Pacific Politics’, *Pacific Islands Policy* v2, Honolulu: East–West Center, 2007.

56 Wesley-Smith, note 55, p. 5.

costs. The costs include the competition with Taiwan for diplomatic recognition by PICs,⁵⁷ suspect fishing practices by Chinese fishing vessels and the furtherance of illegal Chinese immigration into the region. There is little doubt that the competition between China and Taiwan for diplomatic recognition has been disruptive for the region.⁵⁸ However, while China has not sought to engage in the Pacific militarily,⁵⁹ Taiwan has conducted a regular programme of naval ship visits to the region.⁶⁰ The opportunities provided by China's involvement include the experience and expertise of Chinese workers and officials, and the aid and resources being made available to the region.

Existing regional powers have little alternative but to accept that China is in the Pacific to stay.⁶¹ There is a need therefore to exploit the opportunities provided by China's presence in the region. In the maritime security context, this means engagement between Australia, New Zealand and China on maritime security and the encouragement of China playing a positive role in regional maritime security. China has already provided funding to build new maritime facilities in some PICs, and while Taiwan offered to provide funding for PPB operations on other PICs, Australia was able to persuade the countries concerned not to accept such assistance.⁶²

3 Obstacles to improving maritime security

Although PICs cannot change geographical factors that create maritime security issues, there are a range of factors that are mutable but currently are obstacles to improved maritime security in the Pacific. These are areas in which Australia and New Zealand may be able to perform a role in the future in improving security in PICs.

3.1 Infrastructure

It is clear that, even with the provision of patrol boats and assistance from other metropolitan states, most PICs have less than ideal infrastructural arrangements. Sustainability of infrastructure is an ongoing challenge even where donors are willing to provide vessels, buildings or computers in order to assist PICs. There may be insufficient resources allocated to maintenance or a lack of expertise in how to repair or maintain infrastructure. This problem is particularly acute where the PIC government is ambivalent about the importance of the infrastructure to

57 At present seven PICs (PNG, Samoa, Tonga, Cook Islands, Fiji, Vanuatu and FSM) have diplomatic relations with China while six PICs (Kiribati, Solomon Islands, Palau, Marshall Islands, Tuvalu and Nauru) recognize Taiwan.

58 Dobell, note 1, pp. 78–9.

59 Hanson, note 54, p. 5.

60 Bateman and Bergin, 'Maritime Security', note 2, p. 64.

61 Wesley-Smith, note 55, pp. 3, 28.

62 Bateman and Bergin, 'Maritime Security', note 2, p. 62.

key policy goals (counter-terrorism may rank lower in importance than poverty alleviation, for example). In many PICs basic infrastructure may be needed, such as computerization or communications equipment. International requirements are imposing demands for increasingly sophisticated screening equipment at the border.⁶³ However, the evidence is that donations of such equipment must be supported with training and resources for maintenance.

3.2 Agency capacity and coordination

Many PICs struggle to achieve the good inter-agency cooperation necessary to integrate the variety of maritime challenges and build a clear picture of maritime risks and respond effectively to them.⁶⁴ This may be due to a straightforward lack of capacity in various agencies that are overstretched by operational, resourcing and training demands. Where an agency has insufficient staff to cover all requirements, this will create gaps in the agency's ability to respond to maritime threats. A related problem is the ability for agencies to cooperate with each other even if they are willing to do so: for example, paper-based systems may limit agencies' capacity to share information.

A larger problem is where agencies do not see the need to cooperate, or, in some countries, jealousy, mistrust due to corruption concerns or lack of understanding can be impediments to agencies working together.⁶⁵ On the other hand, where agencies are small, building personal relations can sometimes be an effective way to encourage cooperation.

3.3 Information sharing

The sharing of information related to maritime activities between agencies within a PIC and between PICs is a significant element of improving the ability of PICs to respond to maritime threats. However, it appears that although states recognize the need for this to occur, it is still in its infancy, influenced by distrust and undermined by poor systems. In many PICs customs, immigration, police and fisheries information is recorded manually, which reduces the ease of sharing information with other agencies that could benefit from information exchange. The Forum Security Committee is in the process of identifying how this could work better among PICs, including developing models for information sharing. It is also possible that developments under the *Niue Treaty* could see improved information flows between states. However the difficulty in overcoming issues of suspicion and concerns about corruption will mean that moves in this direction are likely to be slow.

63 Moriarty, note 13, p. 267.

64 See also the Martin Report, note 14.

65 Moriarty, note 13, p. 269.

3.4 National legislation

There is little doubt that considerable effort is needed to ensure that legislation is in place in each PIC to allow effective measures against maritime threats. In some PICs this may involve ensuring that patrol boat crew have the authority to act with the powers of customs and immigration officers as well as fisheries officers so that they can deal with any situations they encounter at sea. The review of pleasure craft identified a range of areas in which PICs needed to improve legislation, including developing consistent entry and exit procedures and allowing the exchange of information between agencies and PICs.⁶⁶ There is an opportunity for an Australian or New Zealand aid project to help to develop model maritime crime legislation for the PICs.

3.5 Sovereignty concerns

In PICs that have only recently gained independence there is a natural concern to maintain their sovereignty. This may lead to reluctance to cooperate too closely with other PICs where cooperation might involve a perception that the state is giving up something seen as a sovereign right or natural sphere of influence.⁶⁷ Concerns about sovereignty often influence the relationship of PICs with Australia, New Zealand and other states involved in the region. There is sometimes the sense that metropolitan countries (to a greater or lesser extent) seek to impose their will on the Pacific, and to establish arrangements that suit them rather than the PICs. This suspicion is very familiar to those who work in the Pacific: Australia and New Zealand are sometimes, collectively or individually, seen as a double-edged sword, as they bring benefits to the region but also impose burdens. If managed well, this concern can remain peripheral to the relationships in the Pacific; if not managed well, this can impose an obstacle when Australia and New Zealand are pursuing objectives with PICs.

4 Time for a more integrated maritime regime?

There is cause to be optimistic about the future of maritime security in the Pacific. A number of excellent initiatives have been implemented by PICs in cooperation with Australia, New Zealand and other donor countries, as well as by regional organizations. The PICs are beginning to recognize the need for maritime security initiatives that protect their own sovereignty against illegal activities, many of which have environmental or social impacts. Although PICs are less concerned about the risk of terrorist activity than Australia or New Zealand, many counter-terrorism initiatives also strengthen the capacity of PICs to counter other forms of security threats.

66 *Pacific Border Security Risks posed by Ocean-going Pleasure Craft*, p. 41.

67 Bateman, 'Developing a Pacific Island Ocean Guard', p. 221.

4.1 Regional Maritime Coordination Centre

One proposal, to overcome the capacity issues in particular, is that a Regional Maritime Coordination Centre (RMCC) be established.⁶⁸ The RMCC would collect data from a range of sources, manage and schedule regional air and surface assets, receive bids for surveillance time from regional countries, coordinate responses from regional or national assets, coordinate funding from donors and liaise with national contacts. Under this proposal, some patrol vessels would remain under national control, while other air surveillance and offshore response capabilities would be provided regionally under management of the RMCC.

One advantage of this proposal is that a more efficient use of existing and future resources could be achieved. Coordination of air and vessel patrols to ensure that surveillance can be followed up by inspections at sea would be a valuable step forward – although this is being done on an *ad hoc* basis currently, the RMCC would ensure it is done across the region. A second advantage is that collection of data such as VMS receivers, police, immigration and customs intelligence, and shipping movements from port authorities, could be achieved in a secure environment, raising fewer concerns about information leakage. Such an organization might also reduce some of the sovereignty tensions by taking issues to a regional level. At the same time, all PICs would have an input into priority setting.

If this proposal is to be accepted, it must be because the PICs themselves acknowledge the need for such an arrangement. Many proposals driven by donor countries fail or do not achieve their potential because of a lack of buy-in by the countries in the region. In a case where the regional organization would replace or reinforce existing national law enforcement capabilities, the PICs will need to be confident that they will have a guiding voice in the structure of the RMCC and a key role in the RMCC and its decisions. If the RMCC is perceived as driven solely by Australia and New Zealand, there may be difficulties in gaining full cooperation with domestic agencies.

4.2 Short-term measures to improve maritime security

4.2.1 Better coordination between Australia, New Zealand, other donor countries and regional organizations regarding capacity-building projects

Some coordination of capacity-building projects exists at present. This is achieved partially through the Pacific Islands Forum, but also through other regional organizations such as the Oceania Customs Organization and RMP. However, it does appear that overlapping (or even inconsistent) projects are initiated by different donor countries in some cases. This is a significant risk arising from the fragmented nature of maritime security concerns, which involve a range of agencies

68 Bateman and Bergin, 'Maritime Security', note 2, pp. 68–9.

at government level and also a number of regional organizations. Both Australia and New Zealand now have inter-agency committees to examine maritime security issues. In addition, there is a role for regional organizations to provide better guidance to donor countries as to the areas of greatest need at a regional and bilateral level. Donor states should be encouraged to cooperate with regional organizations where such organizations have expertise in the area.⁶⁹ The Pacific Islands Forum can play a useful coordination role in this regard. However, regional and international institutions can also compete with each other, for example in creating model legislation, and this can lead to inconsistent approaches between PICs as well as a competition for funding assistance.

4.2.2 Improved quality of capacity-building projects

One frequent criticism is that donor countries often approach PICs with ‘pre-packaged’ initiatives that may not reflect the PIC’s capabilities and the long-term sustainability of the project. For example: provision of x-ray equipment without ongoing training or maintenance support; training in systems that assume a far greater level of personnel than exists on the ground; and at times sending staff with relatively little experience or knowledge of the Pacific to train more experienced officials from PICs. This is apparently exacerbated when agencies rotate staff after they have gained experience in the Pacific.

The quality of maritime security projects could be enhanced by: a greater level of communication between Australian and New Zealand agencies and PIC agencies about priorities and needs before creating projects; ensuring that trainers have the opportunity to gain experience in the Pacific, the capacity to build personal relationships, and do not come with preconceived ideas; exploring partnerships between Australian and New Zealand agencies and regional or national agencies in designing and delivering programmes; accepting that not all PICs have the same needs or capabilities; and designing programmes that reflect the very different infrastructure and personnel capabilities from Australia and New Zealand.

4.2.3 Improved operational coordination

Enforcement efforts should build on the success of activities such as the Big Eye and Island Chief series in improving operational coordination: between PICs; between PICs and metropolitan countries; and even within PICs. For example, encouraging contacts between police or fisheries agencies when a suspect vessel is in an area would improve the chances of the vessel being subject to inspection at some point. Another key is to ensure that aerial surveillance is matched with the capacity to take action at sea.

69 For example, a recent decision has led to capacity-building projects in customs agencies to be coordinated by the Oceania Customs Organization.

4.2.4 Encouragement of confidence-building measures such as data sharing, joint patrols and regional exercises

As more PICs enter into *Niue Treaty* Subsidiary Agreements for joint fisheries enforcement, and gain experience with these issues, it is likely that PICs will become more confident in undertaking shared surveillance and enforcement activities. Data sharing is also an area that PICs (as well as Australia and New Zealand) should be encouraged to explore. As long as states believe the data are adequately protected and shared on an equal basis, this will improve the long-term willingness to share information vital to enhancing maritime security. It is also important that cross-sectoral information sharing is trialled when confidence is high enough to achieve this.

4.2.5 Consider complementary maritime security measures

Australia and New Zealand could explore, with PICs, complementary measures to enhance security alongside the PPBP and aerial surveillance. In the area of fisheries, the FAO is negotiating an agreement on port state measures that would clarify and enhance the rights of states to inspect fisheries vessels entering port. If PICs are able to improve the level of data sharing sufficiently at a regional level, suspect vessels could be identified for inspection in port. This may be a more effective and less resource-intensive method of identifying illegal activity, with potential spin-offs for immigration, police and customs agencies. Improving the capacity of PICs to share this information and conduct port inspections could be a beneficial project for Australia and New Zealand.

Another option is to look to building local networks to assist national agencies with maritime awareness. Often, vessels acting illegally may avoid ports of entry and enter a PIC surreptitiously. Information about arrivals of vessels could be provided to national agencies by locals. This would require building awareness among locals about the need to monitor maritime traffic, establishing procedures for reporting, and providing communications infrastructure where necessary. Such information could be used by national or regional agencies to identify vessels of concern that could subsequently be intercepted or inspected at port. Such initiatives would need to be appropriate to local conditions and customs.

4.2.6 Possible joint initiatives by Australia and New Zealand

For historical and cultural reasons the PICs are likely to continue to rely on Australia and New Zealand for assistance and leadership. With the strong common interests of Australia and New Zealand in maritime security in the region, there is thus considerable scope for the two countries to develop a more integrated and joint approach to regional maritime security. Some of the joint initiatives that might be considered are:

- 1 Processes to ensure better coordination between donor countries, including

the extra-regional countries involved in the South Pacific. These should recognize the need for coordination with PICs and regional bodies, recognizing local priorities.

- 2 Workshops and 'table top' exercises aimed at achieving better coordination between agencies at a national level and building capacity in those agencies.
- 3 Possible measures to complement current enforcement and surveillance operations, e.g. through port state controls and building domestic reporting networks.
- 4 Support for information sharing between agencies and states. But this must be on an equal footing and address concerns about security of information.
- 5 A project to develop model maritime criminal legislation for the PICs.
- 6 Discussion of the surveillance and patrol assistance that might follow on from the PPBP, including a possible RMCC.

Some of these initiatives are already under consideration in one form or another.

5 Concluding remarks

Australia and New Zealand have taken the need for improved maritime security seriously and have devoted significant resources to assisting PICs increase their infrastructural and bureaucratic capacities to respond to threats from or to the ocean. It has not been possible given the space available in this chapter to detail the numerous bilateral and regional arrangements in which the countries are participating in an effort to enhance PIC maritime security, but they are many. This is, of course, driven by the interests that Australia and New Zealand have in a Pacific that is not afflicted by transnational crime, illegal immigration and resource depletion. The different perspectives Australia and New Zealand have about their national interest and the difference in resources available for aid of necessity lead to slightly different priorities when operating in the region.⁷⁰ One challenge is to ensure that ongoing programmes are well coordinated, focused on goals that are shared with the PICs, delivered in a format that is best suited for PIC conditions and ensure follow-up support where necessary.

The Pacific so far lacks an effective integrated regime for maritime security. The institutional arrangements are in place to deal with most dimensions of maritime security, particularly illegal fishing, ship and port security and transnational crimes, but cooperation and information sharing between these areas is underdeveloped. Some legal frameworks are in place but there are gaps with regard to both national legislation and regional treaties. However, the main deficiencies in current arrangements lie in the areas of resources (patrol vessels

⁷⁰ It is not suggested that New Zealand and Australia should work completely in tandem: indeed, this is possibly counter to the interests of each country. For a discussion of Australia and New Zealand's roles in the Pacific, see Henderson, note 26, pp. 73–82. See also D. Edwards, 'A Tale of Two Nation States' in Pettman, note 1, pp. 156–75.

and surveillance aircraft) and coordination both between sectors and between agencies. The Pacific is the largest oceanic area in the world and at present is very thinly patrolled and policed. Air surveillance of remote areas, EEZs and adjacent areas of high seas is limited, and if anything, the rate of effort has declined in recent years.⁷¹

The promotion of maritime 'good governance' should be a key objective for Australia and New Zealand and the PICs themselves. A key challenge for Australia and New Zealand is to develop a coordinated approach towards the involvement of the non-regional countries in maritime security. As well as Australia and New Zealand, the US and France already assist the PICs with maritime security but there is the opportunity for greater involvement of China and Japan. At present, the efforts of China and Japan (and others) are viewed with suspicion by the existing 'powers' in the Pacific, and this has the potential to create unhealthy duplication or competition of effort. The proposed RMCC offers a possible means through which this wider involvement might be effected; however, there are other initiatives that could also be usefully explored by cooperating with a wider range of states.

There is also a challenge for Australia and New Zealand in ensuring that the efforts of the two countries with regard to promoting maritime security in the Pacific are fully coordinated. At times, in the past, an element of competition may have crept into Australian and New Zealand aid to the Pacific. New Zealand has tended to identify the Polynesian countries as its domain of influence while Australia has adopted a similar proprietary approach to the Melanesian countries. While ostensibly the two countries meet in various forums and discuss the coordination of assistance, cooperation between Australia and New Zealand is not always obvious in the outcomes and current arrangements for maritime security in the region. It has to be recognized that there has been some tension in the relationship between Australia and New Zealand that has occasionally arisen due to the different countries' goals and methods in defence policy.⁷² However, this should not prevent greater cooperation in the Pacific in future. An initial focus of this greater coordination might be the future arrangements to provide air surveillance in the region and to replace the PPBP patrol and response capability.

71 Bateman and Bergin, 'Maritime Security', note 2, p. 61.

72 T. O'Brien, 'Looking out from Down Under: Diverging World Views', in Pettman, note 1, pp. 141–51.

7 Maritime Security and Shipping Safety in the Southern Ocean

Karen N. Scott

The ice was here, – the ice was there, –
The ice was all around;
It cracked and growled and roared and howled,
Like noises in a Swound!¹

For poets, painters and explorers alike, the Southern Ocean constitutes the stuff of legend. Characterized by the presence of sea ice and ‘lumbering lubbard loitering slow’² moving icebergs, as well as freezing water and air temperatures, tempestuous seas and its very isolation from civilization (and rescue), the Southern Ocean constitutes arguably the riskiest and most dangerous of maritime environments. Nevertheless, the number of fishing, support, research and, in particular, tourist vessels operating within the region has increased significantly over the last decade. In the 1980s fewer than 1,000 tourists visited Antarctica; by contrast, 49,000 ship-based passengers were anticipated for the 2008/09 season.³ Moreover, ever larger vessels are operating within the region; the *Golden Princess* made international headlines as the largest tourist vessel to visit the region, carrying 3,820 passengers and crew on a single voyage to the Antarctic peninsula during the 2006/07 season.⁴ This trend is likely to continue.⁵ Furthermore, the operational season within the Antarctic has been extended from three to almost six months for many vessels, and consequently a much larger number of vessels are forced to operate in icy waters at both ends of the season. Adding to the natural hazards

1 S.T. Coleridge, *The Rime of the Ancient Mariner*, 1797–98.

2 H. Melville, ‘The Berg (A Dream)’ in *John Marr and other Sailors*, New York: De Vinne Press, 1888.

3 ‘Chairman’s Report from the Miami Meeting (17–19 March 2008) on Antarctic Tourism’, submitted by International Association of Antarctic Tour Operators (IAATO) to the XXXI Antarctic Treaty Consultative Meeting (ATCM), Kiev, 2–13 June 2008, Doc. XXXI ATCM/IP19, p. 7

4 Princess Cruises, *ELA Princess Cruises MV Golden Princess 2006/7 Antarctic Cruise Expedition Initial Environmental Evaluation*, 2006, p. 9 (on file with author).

5 ‘Chairman’s Report from the Miami Meeting (17–19 March 2008) on Antarctic Tourism’, note 3. For a detailed overview of Antarctic tourism statistics and predicted trends see ‘IAATO Overview of Antarctic Tourism 2007–2008 Antarctic Season and Preliminary Estimates for 2008–2009 Antarctic Season’, submitted by IAATO to the XXXI ATCM, Kiev, 2–13 June, Doc. XXXI ATCM/IP85.

present within the region, the Southern Ocean in recent times has provided the setting for increasingly confrontational interactions between whaling vessels and protesters and illegal fishing vessels and naval and coastguard ships.

Both Australia and New Zealand have significant historical, political and economic interests within the Southern Ocean region. In addition to exercising sovereignty over a number of islands in the sub-Antarctic,⁶ both states maintain historical (and generally unrecognized) claims to the continent of Antarctica.⁷ The area south of 60° S latitude is governed by the *Antarctic Treaty*⁸ and is dedicated to peaceful purposes and scientific research.⁹ The sovereign rights of Australia, New Zealand and indeed the other five claimant states are cleverly held in abeyance by Article IV of the *Antarctic Treaty*, which preserves the seven sovereign claims made prior to 1959 without validating them. Moreover, paragraph 2 of Article IV of the *Antarctic Treaty* precludes the Parties from making new claims or extending existing claims within the Treaty area. This article has arguably had the greatest impact on the development of the various maritime zones associated with the Antarctic continent. The question as to whether states can claim an exclusive economic zone (EEZ) or continental shelf off Antarctica without compromising their obligations under Article IV(2) of the *Antarctic Treaty* has yet to be definitively determined.¹⁰ Thus, notwithstanding that all seven states have claimed a territorial sea in respect of their Antarctic territories and, furthermore, that Australia and France have claimed an EEZ,¹¹ no state actively enforces its rights against foreign nationals within the *Antarctic Treaty* area on the basis of territorial sovereignty. Although this restraint has undoubtedly contributed to successful cooperation within, and management of, the region, the absence of recognized coastal states within the area creates significant challenges in respect of the implementation and enforcement of both international and regional rules connected to the safety of shipping and maritime security more generally.

Connected to, and distinct from, Australia and New Zealand's territorial interests in the Antarctic and sub-Antarctic are their not inconsiderable economic interests in the region. Although fishing arguably comprises the most significant economic activity taking place within the Southern Ocean, both Australia and New Zealand support and benefit from tourist vessels and other ships that leave their ports for the Antarctic and sub-Antarctic. More speculatively, offshore oil

6 Australia exercises sovereignty over the Heard and McDonald Islands and Macquarie Island, and New Zealand controls the Auckland and Campbell Islands in the sub-Antarctic.

7 Seven states (Argentina, Chile, France, Norway and the UK in addition to Australia and New Zealand) maintain historical claims to the continent of Antarctica. The United States (US) and Russia reserve a right to make a claim to part of the continent of Antarctica.

8 *Antarctic Treaty*, 1 December 1959, 402 UNTS 71, Article VI.

9 *Ibid.*, Articles I and II.

10 For an excellent introduction to this area see P. Vigni, 'Antarctic Maritime Claims: "Frozen Sovereignty" and the Law of the Sea' in A. Elferink and D. Rothwell (eds), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction*, The Hague: Kluwer, 2001, pp. 85–104.

11 *Ibid.*, p. 104. It should be noted that Chile claims jurisdiction over the so-called Presential Sea, which extends into the Southern Ocean.

exploitation may constitute an important interest for both states in the sub-Antarctic or even the Antarctic in the medium to long-term future.

Moreover, Australia and New Zealand are subject to significant responsibilities within the region. For example, both states are responsible for maritime search and rescue (SAR) within large areas of the Southern Ocean surrounding Antarctica. More generally, Australia and New Zealand are both original and active participants within the system of regional governance which applies to the Antarctic. Institutional support for the *Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)*¹² Commission, which is based in Hobart, Tasmania, is provided by Australia, and the current Chair of the Committee on Environmental Protection (CEP) established under the *Protocol on Environmental Protection to the Antarctic Treaty (Environmental Protocol)*¹³ is employed by Antarctica New Zealand, in Christchurch, New Zealand. Both states take an active role in implementing and enforcing regulations within the region through their participation within inspection activities authorized by Article VII of the *Antarctic Treaty* and Article 14 of the 1991 *Environmental Protocol*, and through fishery patrols under the auspices of the CCAMLR Commission.

The concept of maritime security as applied to the Southern Ocean is focused on environmental security and shipping safety rather than the more traditional concerns of piracy, terrorism, drug and people trafficking. Issues that might be included within the Southern Ocean maritime security remit comprise illegal, unreported and unregulated (IUU) fishing, marine invasive species and bio-security and the safety of shipping. For the purposes of this chapter only one issue will be explored: the safety of shipping in the Southern Ocean. Maritime security and shipping safety in the region have been brought sharply into focus by an extraordinary series of accidents involving groundings,¹⁴ on-board fires,¹⁵ collisions with icebergs¹⁶ and loss of vessel power¹⁷ which occurred over 2007–08. Although, remarkably, only one of these incidents involved loss of life (the fire on

12 *Convention on the Conservation of Antarctic Marine Living Resources*, 20 May 1980, 1329 UNTS 47 [hereinafter CCAMLR].

13 *Protocol on Environmental Protection to the Antarctic Treaty*, 4 October 1991, 30 ILM 1455 (1991), [hereinafter *Environmental Protocol*].

14 Both the MV *Lyubov Orlova* and the MV *Nodkapp* grounded near Deception Island in November 2006 and January 2007 respectively. More recently, on 4 December 2008, the Panamanian registered MV *Ushuaia* grounded in Wilhelmina Bay near Cape Anna.

15 The explosion, fire and tragic loss of life on the *Nisshin Maru*, a Japanese factory whaling ship, in the Ross Sea area made headlines in February 2007.

16 The most serious incident to date comprises the sinking of the MS *Explorer*, a Liberian-registered passenger ship, south of King George's Island following a collision with an iceberg on 23 November 2007.

17 The *Argos Georgia*, a fishing vessel, lost power in the Ross Sea area on 24 December 2007 and drifted for fifteen days before receiving spare parts. At the end of December 2007 the MS *Fram* similarly lost power but, proving rather more unlucky, drifted into a glacier near King George's Island. Ten people were evacuated from a Royal Navy Antarctic patrol ship on 16 December 2008 after it too lost power in the Peninsula area of Antarctica.

board the *Nisshin Maru*), it is notable that all benefited from benign weather conditions and the presence of nearby vessels and assistance.

The remainder of this chapter will explore briefly some of the international controls on shipping which apply within the Southern Ocean before focusing on developments of particular relevance to maritime security and shipping safety under the auspices of the *Antarctic Treaty* System. Five specially selected security challenges will be identified and explored, namely: construction, equipment and manning of vessels operating within the Southern Ocean; navigational data within the Antarctic region; contingency plans and search and rescue; the use of heavy-grade fuel; and the designation of protected areas for shipping-related purposes. In focusing on these five areas particular attention will be paid to reform proposals that have been developed at both the international and regional levels. Finally, this chapter will conclude with a (necessarily) brief suggestion designed to better address maritime security and shipping safety in the Southern Ocean.

1 Safety of shipping and international law

While coastal states are able to enact regulations in connection with the safety of shipping and environmental protection within their territorial seas¹⁸ and EEZ,¹⁹ the extent of any regulation is limited by the right of all vessels to innocent passage and the freedom of navigation.²⁰ Moreover, although port states can set construction and equipment standards for all vessels entering ports,²¹ coastal states cannot stipulate that foreign vessels operating within their zones must meet higher standards than those required under international law.²² In practice, most safety-related regulation is developed at the international level under the auspices of the International Maritime Organization (IMO) and these rules generally constitute the minimum standards that must be met by flag states in connection with their registered vessels.²³ Ships operating in the Southern Ocean must generally comply with these international standards, including (but not limited to): *MARPOL*

18 *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 [hereinafter *LOSC*], Articles 21–3.

19 *Ibid.*, Article 56(1)(b)(iii).

20 *Ibid.*, Articles 17, 58.

21 *Ibid.*, Article 211(3).

22 *Ibid.*, Articles 21(2), 211(6)(c).

23 *Ibid.*, Articles 94, 211(2). Flag states can of course go beyond these minimum requirements (Article 211(2)). For example, Australia has issued additional guidelines in connection with ship safety and marine pollution in the Antarctic and sub-Antarctic Waters (Australian Government, Australian Maritime Safety Authority, Marine Notice 24/2007, ‘Ship Safety and Marine Pollution in the Antarctic and sub-Antarctic Waters’, 2007, available online at www.amsa.gov.au/shipping_safety/marine_notices/2007/24-2007.asp). Similarly, New Zealand requires that vessels take into consideration ice accretion and the additional weight related thereto with respect to Southern Ocean operations and demands that vessels carry specialized safety and communication equipment (New Zealand Government, Maritime New Zealand, ‘Maritime Rules’, available online at www.maritimenz.govt.nz/rules/maritime_rules.asp, Parts 40D, 43, 31C).

73/78;²⁴ *International Convention for the Safety of Life at Sea (SOLAS Convention)*;²⁵ the ISM Code;²⁶ *International Convention on Maritime Search and Rescue (SAR Convention)*;²⁷ and the *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention)*.²⁸ These instruments are of global application and have not been drafted with the particular conditions of the Southern Ocean in mind. Nevertheless, specialist and, on occasion, higher standards are provided for at the international level in connection with the Southern Ocean or at least parts thereof. For example, the *Antarctic Treaty* area is designated a special area for the purposes of Annex I (oil), Annex II (noxious liquid substances) and Annex V (garbage) of *MARPOL 73/78*. Moreover, passenger vessels operating in the Southern Ocean must also meet standards set by classification societies and for insurance purposes. Of particular importance within the Southern Ocean are the construction and equipment requirements developed for so-called Polar Class ships by the International Association of Classification Societies (IACS) in 2007.²⁹ Nevertheless, the accidents noted above indicate that these international standards are not sufficient for the purpose of ensuring shipping safety in the extreme conditions of the Southern Ocean.

2 Safety of shipping and the *Antarctic Treaty* system

The limitations discussed above associated with the adoption of local and regional shipping standards and the absence of recognized national maritime zones have constrained the development of extensive controls on vessels operating within the Southern Ocean by the Parties to the *Antarctic Treaty*. Vessels (other than fishing vessels) proceeding to the *Antarctic Treaty* area are subject to the prior notification requirements under Article VII(5). Moreover, Article 3 of the *Environmental Protocol* requires vessel operators to avoid adverse effects on water quality and detrimental changes in the distribution, abundance or productivity of fauna and flora. Furthermore, all activities, including tourist expeditions and logistical support associated with research and other governmental activities, are subject to the

24 *International Convention for the Prevention of Pollution from Ships*, 2 November 1973, 1340 UNTS 184, as amended by the *Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships*, 17 February 1978, 1340 UNTS 61.

25 *International Convention for the Safety of Life at Sea*, 1 November 1974, 1184 UNTS 278 [hereinafter *SOLAS Convention*]; *Protocol of 1988 relating to the International Convention for the Safety of Life at Sea of 1 November 1974*, 11 November 1988, [2000] ATS 3.

26 International Maritime Organization, *International Safety Management Code*, 2002, London: IMO Publishing Service, available online at www.imo.org/humanelement/mainframe.asp?topic_id=287 (mandatory by virtue of Chapter IX of SOLAS 1974).

27 *International Convention on Maritime Search and Rescue*, 27 April 1979, 1405 UNTS 97.

28 *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers*, 7 July 1978, 1361 UNTS 190, as amended 7 July 1995.

29 See International Association of Classification Societies (IACS), 'Requirements Concerning Polar Class', 2007, available online at www.iacs.org.uk/document/public/Publications/Unified_requirements/PDF/UR_L_pdf410.pdf.

Environmental Impact Assessment requirements under Article 8 and Annex 1 of the *Environmental Protocol*. In respect of vessels flagged to *Antarctic Treaty* Parties, operating permission arguably should be made subject to satisfaction of safety of shipping requirements appropriate to Southern Ocean conditions. Moreover, vessel operators licensed in States Parties to the *Environmental Protocol* must develop emergency response and contingency action plans³⁰ in order to cope with an environmental emergency at sea. Annex IV of this Protocol focuses on the prevention of marine pollution and, in essentials, implements *MARPOL 73/78* within the *Antarctic Treaty* area.³¹ Finally and most recently, the Parties to the 1991 *Environmental Protocol* adopted in 2005 a sixth annex, which establishes a partial liability regime in respect of environmental emergencies.³²

States Parties to the *CCAMLR* and, more particularly, to the *Environmental Protocol* have made some progress towards addressing safety of shipping issues beyond the basic provisions of these instruments. *CCAMLR* Conservation Measure 10-02 (2007) introduces a number of requirements in connection with the licensing of fishing vessels of relevance to vessel safety. For example, vessels may be licensed to fish within the *CCAMLR* area only if they operate a Vessel Monitoring System (VMS) on board, have adequate communication equipment, provide sufficient immersion survival suits for all on board and carry reserves of food, fresh water, fuel, spare parts and medical equipment. Moreover, the *CCAMLR* Commission recommends that Parties license only vessels with a minimum ice classification standard of ICE-1C for fishing in the *CCAMLR* area,³³ and that appropriate survival training is undertaken by crew operating within the region.³⁴

Parties to the *Environmental Protocol* have become increasingly focused on tourism within the *Antarctic Treaty* area, and, in particular, on the safety and environmental risks associated with passenger ships.³⁵ In 2007, at the XXX Antarctic Treaty Consultative Meeting (ATCM), held in New Delhi, an Intersessional Contact Group (ICG) on passenger ships operating within Antarctic waters was established. Its terms of reference specified that risk mitigation (including design, construction,

30 *Environmental Protocol*, note 13, Article 15, Annex VI, Articles 3–4. See also ATCM Measure 4 (2004), ‘Insurance and Contingency Planning for Tourism and Non-governmental activities in the Antarctic Treaty Area’, in Antarctic Treaty Secretariat (ATS), *Final Report of the Twenty-seventh ATCM*, Cape Town, 24 May–4 June 2004, pp. 167–8.

31 It should be noted that Article 8 of Annex IV requires Parties implementing the annex to give due consideration to the need to avoid detrimental effects on dependent and associated ecosystems outside the Antarctic Treaty area.

32 ATCM Measure 1 (2004) ‘Antarctic Specially Managed Areas: Designations and Management Plans’ (not yet in force) in ATS, *Final Report of the Twenty-seventh ATCM*, note 30, pp. 39–93.

33 *CCAMLR* Resolution 20/XXII, Ice-strengthening Standards in High-latitude Fisheries, adopted at the XXII *CCAMLR*, Hobart, 27 October–7 November 2003.

34 *CCAMLR* Resolution 23/XXIII, Safety on board Vessels fishing in the Convention Area, adopted at the XXIII *CCAMLR*, 25 October–4 November 2004.

35 See, for example, ATCM Measure 4 (2004), note 30, which requires tourist and non-governmental operators to develop appropriate contingency and search and rescue (SAR) plans which are not dependent upon support from national programmes.

operation, navigational standards, carriage, proper use of safety equipment and vessel communication) and search and rescue comprise the two topics for investigation.³⁶ Moreover, at the XXX ATCM, the *Antarctic Treaty* Parties adopted two tourism-related resolutions. Resolution 5 (2007) recommends that Parties discourage activities that may substantially contribute to the long-term degradation of the Antarctic environment and its dependent and associated ecosystems. Resolution 4 (2007) recommends that Parties discourage operators from using vessels designed to carry 500 or more passengers. More generally, in 2004, the *Antarctic Treaty* Parties endorsed a set of shipping guidelines for vessels operating in Antarctic waters.³⁷ These non-binding guidelines were developed (with minor amendments) from the 'Guidelines for Ships operating in Arctic Waters' (2002)³⁸ and are under consideration by the IMO with a view to their general adoption.³⁹

Finally, it should be noted that the International Association of Antarctic Tour Operators (IAATO) regulates passenger vessels belonging to its members in respect of various issues connected to shipping safety, including operational and contingency procedures, crew training and experience and assistance in the event of an emergency.⁴⁰

3 Challenges associated with shipping in the Southern Ocean

It is beyond the scope of this chapter to explore every issue connected to the safety of shipping and maritime security within the Southern Ocean. Consequently the remainder of the chapter will briefly introduce and discuss five selected issues: the construction, equipment and manning of vessels operating within the Southern

36 'Report of the Intersessional Contact Group on Issues concerning Passenger Ships operating in Antarctic Waters', submitted by Norway to the XXXI ATCM, Kiev, 2–13 June 2008, Doc. XXXI ATCM/WP36.

37 ATCM Decision 4 (2004) 'Guidelines for Ships operating in Arctic and Antarctic ice-covered Waters', in ATS, *Final Report of the Twenty-seventh ATCM*, note 30, p. 189.

38 IMO Guidelines for Ships operating in Arctic ice-covered Waters, 23 December 2002, IMO Doc. MSC/Circ.1056/MEPC/Circ.399 [hereinafter Arctic Guidelines]. See further L. Brigham, 'The Emerging International Polar Navigation Code: Bi-polar Relevance?' in D. Vidas, *Protecting the Polar Marine Environment: Law and Policy for Pollution Prevention*, Cambridge: Cambridge University Press, 2000, pp. 244–62; Ø. Jensen, 'Arctic Shipping Guidelines: Towards a Legal Regime for Navigation Safety and Environmental Protection?', *Polar Record* v44, 2008, pp. 107–14; Ø. Jensen, *The IMO Guidelines for Ships Operating in Arctic Ice-covered Waters: From Voluntary to Mandatory Tool for Navigation Safety and Environmental Protection?* Lyskaer: Fridtjof Nansen Institute/WWF Norway, 2007.

39 See further below.

40 IAATO Bylaws and Guidelines for Tour Operators are available online at www.iaato.org/bylaws.html. Unsurprisingly, the number of accidents involving tourist vessels in the Antarctic has prompted IAATO to reconsider marine safety guidelines and to explore new safety initiatives at a meeting held in February 2008. Some of these initiatives are discussed further below. See 'Summary Report and Outcomes of IAATO's Marine Committee Meeting on Vessel Operations, Safety and Related Issues', submitted by IAATO to the XXXI ATCM, Kiev, 2–13 June 2008, Doc. XXXI ATCM/IP81.

Ocean; navigational data within the Antarctic region; contingency plans and search and rescue; the use of heavy-grade fuel; and the designation of protected areas for shipping-related purposes.

3.1 Construction, equipment and manning issues associated with Southern Ocean shipping

As noted above, states acting individually and even collectively on a regional basis are constrained with respect to the extent to which they are able to regulate the construction, equipment and manning of foreign vessels beyond existing international requirements. Moreover, specialist guidelines of application to remote and/or polar waters are either largely recommendatory in nature⁴¹ or have been developed on behalf of private shipping organizations.⁴² The ‘Guidelines for Ships operating in Arctic and Antarctic ice-covered Waters’ were adapted with just minor amendments from the 2002 Arctic Guidelines⁴³ for Antarctic application by the Council of Managers of National Antarctic Programs (COMNAP).⁴⁴ Undoubtedly the most significant instrument with respect to Southern Ocean shipping, they were endorsed by the XXVII ATCM, held in Cape Town in 2004.⁴⁵ These guidelines are being considered by a sub-committee of the IMO Design and Equipment (DE) Committee. Rejecting the initial suggestion that the existing Arctic Guidelines be simply amended and applied to the Antarctic,⁴⁶ the sub-committee has decided to prepare a complete revision of the Arctic Guidelines for the purpose of applying them to the Antarctic.⁴⁷ This decision reflects the fact that, while superficially similar, the differences between the Arctic and Antarctic (in connection with the nature of the ice, as well as isolation from facilities, rescue and jurisdiction) are such that a simple extension of the Arctic

41 See, for example, IMO Resolution A.999(25), Guidelines on Voyage Planning for Passenger Ships Operating in Remote Areas, 29 November 2007, IMO Doc. A 25/Res.999; Arctic Guidelines, note 38.

42 See IACS, note 29.

43 Arctic Guidelines, note 38.

44 For background on the application of the Arctic Guidelines to the Antarctic see C. Joyner, ‘The Emerging Legal Regime for Navigation through Antarctic ice-covered Waters’ in G. Triggs and A. Riddell (eds), *Antarctica: Legal and Environmental Challenges for the Future*, London: BICL, 2007, pp. 61–83.

45 ATCM Decision 4 (2004), note 37.

46 ‘Ship Design and Equipment: Outcome of the XXVIIth ATCM, Note by the Secretariat’, 20 August 2004, IMO Doc. MSC/79/INF.2.

47 ‘Report to the Maritime Safety Committee’, submitted by the Sub-committee on Ship Design and Equipment, 12 March 2008, IMO Doc. DE/51/28, para. 11.6.1. See also ‘Amendments to the Guidelines for Ships operating in Arctic ice-covered Waters: Comments on Issues to be Considered’, submitted by Australia to the Sub-committee on Ship Design and Equipment, 14 December 2007, IMO Doc. DE/51/11, and ‘Amendments to the Guidelines for Ships operating in Arctic ice-covered Waters: Comments on the Proposals by the Antarctic Treaty Consultative Parties’, submitted by Canada, Germany, the UK and IACS to the Sub-committee on Ship Design and Equipment, 13 December 2007, IMO Doc. De/51/11/1.

Guidelines to the Antarctic is arguably inappropriate. A correspondence group (coordinated by Canada) has been established for the purpose of revising the Arctic Guidelines for Antarctic application⁴⁸ and it is envisaged that a resolution containing guidelines for Antarctic shipping will be adopted by the IMO in 2009.⁴⁹

The 'Guidelines for Ships operating in Arctic and Antarctic ice-covered Waters' in their current form set out standards and recommendations with respect to the construction, equipment, manning and operation of vessels located within both regions. The Guidelines also establish a number of requirements in connection with environmental protection and damage control. Part A of the Guidelines, which sets out construction requirements related to ice-strengthening, structure and stability, applies to Polar Class vessels only.⁵⁰ The equipment, operational and environmental standards apply more broadly to all vessels covered by the Guidelines, and generally require additional safety equipment to be carried which is particularly suited to the cold and harsh conditions of both the Arctic and the Antarctic. For example, fire-fighting equipment must be adequately protected against ice build-up,⁵¹ and lifeboat engines should be equipped with a means of ensuring that they will start readily at low temperatures.⁵² Ships' officers and crew should have cold-weather survival training, and as many as possible of the ship's deck and engine officers should be trained in ship operations in ice-covered waters.⁵³ Importantly, it should be noted that these guidelines set out recommendations which are *additional* and *supplementary* to the existing standards required by other IMO instruments, such as the *SOLAS Convention* and *MARPOL*.⁵⁴

Nevertheless, despite the level of detail contained in these guidelines, a number of criticisms may be made in connection with their application to the Antarctic. First, the scope of the amended Guidelines in respect of the Antarctic is inappropriately narrow. The definition of 'Antarctic ice-covered waters' is confined to waters south of 60°S latitude in which sea ice concentrations of one-tenth coverage or greater are present and which pose a structural risk to ships.⁵⁵ As noted above, in contrast to the Arctic, sea ice is not a constant feature of Antarctic waters, and during the summer, ships regularly navigate through ice-free seas. However, the risks posed to Antarctic shipping by icebergs, freezing temperatures, tempestuous seas and remoteness of location are not insignificant, and the revised

48 The website of the correspondence group can be found at: <http://de51.forumcircle.com/portal.php>.

49 'Report to the Maritime Safety Committee', submitted by the Sub-committee on Ship Design and Equipment, 12 March 2008, IMO Doc. DE/51/28, para. 11.6.2.

50 On the classification of Polar Class vessels see IACS, note 29.

51 ATCM Decision 4 (2004), note 37, Regulation 10.3.1.

52 *Ibid.*, Regulation 11.5.4.

53 *Ibid.*, Regulation 14.1.3.

54 Jensen, *The IMO Guidelines for Ships operating in Arctic ice-covered Waters*, note 38, pp. 10–11.

55 ATCM Decision 4 (2004), note 37, Regulation G-3.2.2. As noted by Jensen, the Guidelines as currently drafted omit to include a temporal criterion in relation to the presence of ice, in contrast to Article 234 of 1982 *LOSC*, which stipulates that ice must cover the area for most of the year. See Jensen, 'Arctic Shipping Guidelines', note 38, p. 109.

Guidelines must take account of these risks. Moreover, the Guidelines are under consideration by the IMO and not by the *Antarctic Treaty* Parties, and as such, there is no obvious reason why they should apply only to the *Antarctic Treaty* area, given that many if not all of the risks to Southern Ocean shipping apply to all vessels located anywhere south of the polar front.⁵⁶ Consequently, it is suggested that the scope of the revised Guidelines be extended to encompass the area south of the polar front, and that the reference to ice coverage be omitted from the definition of Antarctic waters. It may be appropriate to title the Guidelines as being of application to ships operating in polar ice-covered waters and *remote locations*. Furthermore, the narrow geographical scope of the Guidelines is compounded by its relatively restricted application to 'ships' as defined for the purpose of *SOLAS*.⁵⁷ Crucially, in the context of Southern Ocean shipping, this has the effect of excluding the application of the Guidelines to naval ships, fishing vessels and pleasure yachts not engaged in trade.⁵⁸ Thus it is recommended that the definition of 'ship' for the purpose of the revised Guidelines be detached from the scope of *SOLAS*, and broadly applied to all vessels operating south of the polar front.

Second, the construction requirements that relate to ice-strengthening, subdivision and stability, and so on, currently apply only to Polar Class ships so designated by the IACS Unified Requirements. It is nowhere mandated under international law that only Polar Class vessels can operate within the Southern Ocean (or even south of 60°S latitude). In fact, a large number of fishing vessels, mega-yachts and even some tourist vessels (such as those belonging to the Princess cruise line) operating within the region are not designated Polar Class vessels. Arguably, to maximize the safety of Southern Ocean shipping, *all* vessels located within the region ought to meet minimum ice-strengthening and stability requirements. Consequently, it is suggested that Part A of the Guidelines be revised so as to mandate that all vessels operating south of the polar front meet appropriate construction requirements, which may include (among other features) ice-strengthening, double bottoms and directional control systems of adequate strength.

Finally, a number of the enhanced equipment and even operational standards provided for in the Guidelines have not been drafted with the specific conditions of the Antarctic in mind. For example, vessels are required to carry specialist

56 The Polar Front (sometimes referred to as the Antarctic Convergence) lies at approximately 55°S latitude, although it does depart from this in places.

57 ATCM Decision 4 (2004), note 37, Regulation G-3.21.

58 *SOLAS Convention*, note 25, Annex, Ch. I, Regulation 3, Exceptions to the General Provisions. Other ships excluded from the ambit of *SOLAS* comprise cargo ships of less than 500 gross tonnage, ships not propelled by mechanical means and wooden ships of primitive build. It should be noted that for the purposes of Chapter V (Safety of Navigation) all ships and voyages are covered, with the exception of government ships and ships solely navigating the Great Lakes of North America. The safety of fishing vessels is regulated at the international level by the 1977 Torremolinos International Convention for the Safety of Fishing Vessels (not in force), now superseded by the 1993 Torremolinos Protocol (not in force).

polar personal survival kits only where the voyage is expected to encounter mean daily temperatures of below 0°C.⁵⁹ Similarly, group survival kits need be carried only in circumstances where a voyage is expected to encounter ice conditions that may prevent the lowering and operation of survival craft.⁶⁰ As noted above, during the Antarctic summer, temperatures might average above 0°C and ice conditions may be good. Nevertheless, it is arguably appropriate for vessels operating in the otherwise potentially harsh and remote conditions of the Southern Ocean to carry a full complement of both personal and group survival kits on board at all times irrespective of air temperature. Similarly, only Polar Class vessels are required to carry fully enclosed lifeboats⁶¹ and to be provided with automatic identification systems.⁶² The latter limitation has been addressed by a recent amendment to *SOLAS*, which requires all passenger ships and cargo ships over 300 gross tonnage to carry and operate an automatic identification system.⁶³ Nevertheless, in light of the risks associated with operating in the Southern Ocean, the equipment requirements identified by the Guidelines should be applied to all vessels located within the region.⁶⁴

There are three further issues that need to be considered in connection with the revision of the Arctic Guidelines and their application to the Antarctic. First, should the revised Guidelines be applied to government ships on non-commercial service and military vessels? The *Environmental Protocol* (in common with international maritime conventions) has traditionally, and controversially, permitted government vessels to claim immunity in respect of its marine pollution prevention obligations⁶⁵ and the Guidelines currently provide for a similar exemption.⁶⁶ Ideally, the revised Guidelines should apply to *all* vessels operating south of the polar front and, rather than being exempt, government vessels should in fact set the standard in connection with safety of shipping in the Southern Ocean.

59 ATCM Decision 4 (2004), note 37, Regulation 11.2.2.

60 *Ibid.*, Regulation 11.2.3.

61 *Ibid.*, note 37, Regulation 11.5.1. Other vessels equipped with open or partially enclosed lifeboats must carry tarpaulins to provide cover for the lifeboat. It should be noted that the *SOLAS Convention* requires passenger vessels to provide totally or partially enclosed lifeboats for at least 50 per cent of the total number of persons on board, although the flag state administration may permit the substitution of lifeboats with life-rafts, provided that there is sufficient lifeboat coverage for 37.5 per cent of the total number of persons on board the vessel. (IMO Resolution MSC.47(66), Adoption of Amendments to the *SOLAS Convention*, Ch. 3, 'Regulation 21, Survival craft and rescue boats', adopted on 4 June 1996, IMO Doc. MSC 66/24/Add.1, Annex 2, p. 29.

62 ATCM Decision 4, note 37, Regulation 12.7.

63 IMO Resolution MSC.202(81), Adoption of Amendments to the *SOLAS Convention*, as Amended, Ch. V, 'Regulation 19-1, Long-range Identification and Tracking of Ships Resolution', adopted 19 May 2006, IMO Doc. MSC 81/25/Add.1, Annex 2, p. 2.

64 Australia has indicated support for the more limited proposition that Chapter 11 of the Guidelines (life-saving equipment) be applied to all ships located within the Antarctic Treaty area. See 'Amendments to the Guidelines for Ships operating in Arctic ice-covered Waters, Comments on Issues to be Considered', submitted by Australia, note 47.

65 *Environmental Protocol*, note 13, Annex IV, Article 11.

66 ATCM Decision 4, note 37, Regulation 1.1.8.

Second, should the revised Guidelines be adopted in mandatory form? The Arctic Guidelines are currently non-binding, and Decision 4 (2004) expressly stipulates that the endorsed Guidelines for Ships operating in Arctic and Antarctic Waters constitute recommendations as opposed to mandatory directions. The ongoing negotiations at the IMO in connection with the revised Guidelines appear to be proceeding on the assumption that ultimately a non-binding resolution containing recommendations for ships operating within Antarctic waters will be adopted. Arguably greater merit lies in the eventual adoption of binding regulations relating to safety of shipping within the Southern Ocean. The revised Guidelines may of course be adopted by the Parties to the *Antarctic Treaty* in the form of a Measure, and consequently rendered mandatory in respect of vessels registered to, or operated by nationals of, *Antarctic Treaty* Parties. The extent to which a Measure can apply beyond the *Antarctic Treaty* area is of course debatable, but arguably the references in the *Environmental Protocol*, and in particular in Annex IV of the Protocol, to dependent and associated ecosystems provide a sufficient basis for its extension to the polar front. No such jurisdictional ambiguity exists in connection with *CCAMLR*, although the scope of any Conservation Measure adopting the revised Guidelines would be limited to fishing vessels operating within the region. However, a substantial number of vessels operating in the Antarctic are flagged to states not party to the *Antarctic Treaty*⁶⁷ and consequently not bound by obligations under that treaty, *CCAMLR* or the *Environmental Protocol*. A partial response to this problem in connection with tourist vessels would be for the Guidelines to be adopted by IAATO and made mandatory for all IAATO member operators.⁶⁸ Nevertheless, it would be sensible ultimately to adopt mandatory measures at the international level. The revised Guidelines might, for example, be adopted under the auspices of *SOLAS*.⁶⁹ Finally, as a binding (or indeed a non-binding) instrument the Guidelines would need to determine more

67 It is estimated that between 30 per cent and 40 per cent of vessels operated by IAATO members are flagged to non-*Antarctic Treaty* states. See 'Implication of Tourist Vessels flagged to Non-parties for the Effectiveness of the Antarctic Treaty System', submitted by New Zealand to the XXXI ATCM, Kiev, 2–13 June 2008, Doc. XXXI, ATCM/WP22. This issue was highlighted at the 2008 ATCM, during which, although Liberia submitted a short report on the sinking of the *MV Explorer* (SP 13 (2008), No. 15), as a non-Party it did not attend the ATCM in Kiev and consequently was not able to participate in the discussion which took place in connection with this incident. See the ATS, *Final Report of the Thirty-first Antarctic Treaty Consultative Meeting* (ATCM), Kiev, 2–13 June 2008, paras 142–3.

68 IAATO requires member operators not registered in *Antarctic Treaty* Parties to comply with all Treaty and Protocol requirements and for the necessary documentation (such as the initial environmental evaluation) to be submitted to the IAATO Secretariat. See Article III, Section B, of the IAATO Bylaws, available online at www.iaato.org/bylaws.html. Nevertheless, it may be challenging for IAATO to implement, and in particular to enforce detailed technical standards related to the safety of shipping.

69 A similar suggestion has been made in connection with the Arctic Guidelines. See Jensen, 'Arctic Shipping Guidelines', note 38. Of course, regulations adopted under the auspices of the *SOLAS Convention* would be confined to vessels covered by *SOLAS* as opposed to all vessels operating in the Antarctic.

precisely their scope of application. Currently the recommendations contained in the Guidelines make no distinction between new and existing vessels. At the very least, the revised Guidelines must apply to all new vessels, with a phase-in period for existing vessels operating in the Antarctic.

The third issue that must be addressed relates to implementation and enforcement. The Guidelines in their current form provide no mechanism for their implementation and enforcement. Given that they are at present recommendatory only, this is hardly surprising. However, to the extent that they ultimately become mandatory at either the regional or the international level they must also be enforceable. Typically a combined system of flag and port state enforcement is used to ensure compliance with shipping regulations. As noted in the introduction to this chapter, port state control is particularly challenging within the Antarctic region, and the burden of enforcement tends to fall on the very few states from which Antarctic-bound vessels depart. At the very least, affected port states (such as Chile, Argentina and, to a lesser extent, New Zealand, Australia and South Africa) should receive appropriate administrative and financial assistance towards the enforcement of the Guidelines in respect of vessels leaving for the Antarctic region.⁷⁰

3.1.1 Navigational data within the Southern Ocean

The *Antarctic Treaty* Parties have designated the absence, and inadequate nature of, navigational data about the Southern Ocean a priority issue in connection with maritime security and safety in the region.⁷¹ Vast areas of the Southern Ocean have never been charted, and the International Hydrographic Office (IHO) estimates that less than 1 per cent of the sea area within the 200 nautical mile contour has been adequately surveyed for the purpose of meeting the needs of contemporary shipping entering Antarctic waters.⁷² It is not apparent as to who bears responsibility for providing hydrographic services in the Antarctic under international law. Regulation 9, in Chapter V of *SOLAS*, which requires contracting governments to collect, compile and publish hydrographic data necessary for safe navigation, appears to be based on territorial jurisdiction. Rather than focus on individual state responsibility for gathering navigational data in the Southern Ocean, the Parties to the *Antarctic Treaty* have emphasized the need to cooperate in the collection of data and the pooling of their surveying and charting resources.⁷³ Resolution 5 (2008), adopted at the XXXI ATCM in Kiev,

⁷⁰ See further below.

⁷¹ See the ATS, *Final Report of the Thirty-first ATCM*, note 67, paras 114–17.

⁷² 'International Coordination of Hydrography in Antarctica: Significance of Safety of Antarctic Ship Operations', submitted by COMNAP to the XXX ATCM, New Delhi, 30 April–11 May 2007, Doc. XXX ATCM/IP50, para. 4.

⁷³ See 'Improving Hydrographic Surveying and Charting to support Safety of Navigation and Environmental Protection in the Antarctic Region', submitted by the UK and Australia to the XXXI ATCM, Kiev, 2–13 June 2008, Doc. XXXI ATCM/WP38.

recommends that Parties encourage their national programme vessels as well as other vessels to collect, where practicable, hydrographic and bathymetric data on all Antarctic voyages and to forward the information to the relevant international chart producer for charting action. This initiative should increase the amount of data available to all Parties (and indeed third states) while minimizing the costs of charting the region.

3.1.2 *Contingency plans and search and rescue in the Southern Ocean*

The frequently hostile conditions of the Southern Ocean and its remoteness from centres of population, response assets and facilities create significant challenges for search and rescue (SAR).⁷⁴ The Southern Ocean is divided into five maritime Search and Rescue Regions (SRRs) (managed by seven Rescue Coordination Centres) and five Navigational Areas (NavAreas). Argentina, Australia, Chile, New Zealand and South Africa are responsible for maritime search and rescue within the region under the auspices of the *SAR Convention*,⁷⁵ *SOLAS Convention* and Article 98 of *LOSC*.⁷⁶ Although the search and rescue regions of four of the five responsible states broadly coincide with at least part of the maritime zones associated with the claims of these states to the continent of Antarctica, responsibility for SAR regions is not based upon, or connected with, the exercise of sovereignty over Antarctica. Both Australia and New Zealand are responsible for SAR within vast areas of the Southern Ocean at significant distances from their mainland territories.⁷⁷ It is important to note that States Parties to the *SAR Convention* have responsibility for coordinating SAR within their areas but need not deploy their own assets in connection with every incident. In fact, only Argentina and Chile maintain dedicated SAR assets within the Antarctic portion of their SRR.⁷⁸ The pressure on SAR resources in the region was highlighted in a COMNAP report which noted that '[t]he current increase in activity and traffic in the Antarctic, in particular maritime traffic in the Antarctic peninsula region, is potentially pushing existing systems to the limit and is cause for concern'.⁷⁹

In light of the various accidents which have occurred within the Southern

74 See generally 'Search and Rescue in the Antarctic', submitted by COMNAP to the XXXI ATCM, Kiev, 2–13 June 2008, Doc. XXXI ATCM/IP99.

75 See also International Maritime Organization, 'IMO Enhanced Contingency Planning Guidance for Passenger Ships operating in Areas remote from SAR Facilities', 31 May 2006, IMO Doc. MSC.1/Circ.1184.

76 The principle of rendering assistance in an emergency was also affirmed by the Parties to the *Antarctic Treaty* at the first ATCM in 1961 in Recommendation I-X in ATS, *Final Report of the First Antarctic Treaty Consultative Meeting*, Canberra, 10–24 July 1961, pp. 9–10.

77 New Zealand's SAR region covers over 30 million km². Australia's SAR region covers over 52.8 million km².

78 Doc. XXXI ATCM/IP99, note 74, para. 24.

79 'COMNAP Report to ATCM XXXI', submitted by COMNAP to the XXXI ATCM, Kiev, 2–13 June 2008, Doc. XXXI ATCM/IP127, para. 11.

Ocean recently, as noted above,⁸⁰ discussion has taken place under the auspices of the ATCM and within the IMO as to how contingency planning and SAR facilities and procedures can be improved in the region. Three potential initiatives are under examination.

First, building on recently adopted IMO guidelines,⁸¹ it has been suggested that both tourist and fishing vessels pair up for the purposes of individual voyages. By travelling together, or at least in the same vicinity, vessels would be able to aid one another in the event of an emergency and provide spare parts or equipment if necessary. Vessel pairing is being strongly advocated by the UK, which already refers to pairing in its permitting requirements for the purposes of the *Environmental Protocol*.⁸² However, vessel pairing can prove logistically difficult, and New Zealand and Australia have both raised concerns as to its practicability in the less well-travelled eastern Antarctic region.⁸³

The second initiative relates to vessel position reporting. In response to papers presented by Chile⁸⁴ and New Zealand,⁸⁵ the ATCM in 2008 adopted Resolution 6 (2008), which recommends that governments encourage their tourist operators to report their vessel positions on a regular basis to the relevant regional Maritime Rescue Coordination Centre (MRCC) while operating in the *Antarctic Treaty* area. While this is clearly a positive initiative, it is a non-binding measure, the application of which is limited to tourist vessels located within the *Antarctic Treaty* area. Even as a recommendatory measure it therefore does not apply to non-tourist vessels or to any vessel operating within the Southern Ocean north of 60°S latitude. More generally, although COMNAP, IAATO and *CCAMLR* all operate limited ship positioning and reporting systems, there is as yet no one system designed to encompass all vessels operating within the Southern Ocean region.⁸⁶ The development of such a system would not only enable the location of a vessel encountering difficulties to be immediately identified, but should assist SAR coordinators in ascertaining the extent to which ships operating in the vicinity may be able to assist. It should be noted that traditionally fishing vessel operators tend to be reluctant to report their position for fear of divulging information on the location of commercially sensitive fishing grounds. The success of a general

80 See notes 14–17. These accidents do not comprise a complete list. Additional SAR incidents which occurred during the 2007/08 season include the rescue of two injured crew members on two fishing vessels in January 2008.

81 'IMO Enhanced Contingency Planning Guidance for Passenger Ships operating in Areas remote from SAR', 31 May 2006, IMO Doc. MSC.1/Circ.1184.

82 'Safety Issues relating to Passenger Vessels in Antarctic Waters', submitted by the UK to the XXX ATCM, New Delhi, 30 April–11 May 2007, Doc. XXX ATCM/WP23, para. 15.

83 Doc. XXXI ATCM/WP36, note 36, para. 29.

84 'Rules Governing Ships operating in the Antarctic', submitted by Chile to the XXXI ATCM, Kiev, 2–13 June 2008, Doc. XXXI ATCM/IP8, para. 6(b).

85 'Maritime Search and Rescue Incidents in the Antarctic Treaty Area: The Role of Rescue Coordination Centres', submitted by New Zealand to the XXXI ATCM, Kiev, 2–13 June 2008, Doc. XXXI ATCM/WP20.

86 Doc. XXXI ATCM/IP81, note 40, p. 4.

positioning and reporting system is consequently dependent upon how the data will be used and distributed.

The final initiative is similarly concerned with tracking the position of vessels within the Southern Ocean. Rather than relying on ship operators manually communicating with reporting systems and/or MRCCs, however, it has been proposed that a network of VHF receiving stations be established for the purpose of collecting Automatic Identification System information (AIS). In the alternative, it has been suggested that the ATCM and IMO agree to make Long Range Identification and Tracking (LRIT) information originating from the entire Antarctic region available to RCCs.⁸⁷ To the extent that a large proportion of both passenger ships and fishing vessels are not registered to States Parties to the *Antarctic Treaty* it is clear that these initiatives will have to be developed simultaneously under the auspices of the ATCM and within the IMO.

3.1.3 *Heavy-grade fuel and the Southern Ocean*

The fourth issue of maritime and environmental security in the Southern Ocean focuses on concerns over the carriage of heavy-grade fuel oil (HGO) as both fuel and cargo in the region.⁸⁸ Notwithstanding amendments to Annex I of *MARPOL* 73/78, which requires new ships carrying large amounts of oil as fuel to invest in oil fuel tank protection,⁸⁹ there is broad agreement among states supporting a prohibition on the use and carriage of HGO in Antarctic waters.⁹⁰ In 2005 the *Antarctic Treaty* Parties requested that the IMO consider a proposed HGO ban,⁹¹ and a proposed amendment to Regulation 15, Annex I, of *MARPOL* 73/78 is being discussed within both the sub-committee on Bulk Liquids and Gases (BLG) and the Marine Environmental Protection Committee (MEPC). Nevertheless, a number of technical issues such as the breadth of any prohibition require resolution before a ban can be implemented.⁹² Moreover, a number of states have questioned the placing of the proposed amendment under Regulation 15 of Annex I of *MARPOL*, which regulates the deliberate discharge of oil from

87 IMO Doc. MSC 81/25/Add.1, note 63.

88 Doc. XXXI ATCM/WP36, note 36.

89 Regulation 12A entered into force on 1 August 2007 and applies to ships delivered on or after 1 August 2010 with an aggregate oil fuel capacity of 600 m³. See IMO Resolution MEPC.141(54), Amendments to the Annex of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, 24 March 2006, IMO Doc. MEPC 54/21, Annex 2.

90 'Report to the Maritime Safety Committee and the Marine Environmental Protection Committee (Twelfth Session)' by the Sub-committee on Bulk Liquids and Gases, 20 February 2008, IMO Doc. BLG 12/17, para. 16.2.

91 ATCM Decision 8 (2005), Use of Heavy Fuel Oil (HFO) in Antarctica, in the ATCS, *Final Report of the Twenty-eighth ATCM*, Stockholm, 6–17 June 2005, pp. 367–8.

92 Issues include the applicability of the ban to search and rescue vessels and to government vessels. See IMO Doc. BLG/12/17, note 90, para. 16.8.

vessels.⁹³ A prohibition on the carriage of HGO goes beyond discharge regulation and it may be more appropriate to place the ban in Regulation 21 of Annex I of *MARPOL*, which focuses specifically on the carriage of HGO by tankers.⁹⁴ Finally, given that the *MARPOL* 73/78 Annex I special area comprises the *Antarctic Treaty* area, it is likely but lamentable that any HGO ban will be similarly so confined. Although ultimately a ban on HGO must be adopted at the international level, it is suggested that the Parties to the *Antarctic Treaty* introduce, as an interim measure, an HGO ban in respect of their registered vessels operating within the *Antarctic Treaty* area.

3.1.4 Designating protected areas for shipping-related purposes in the Southern Ocean

The final issue connected to maritime and environmental security within the Southern Ocean concerns the extent to which marine protected areas can be designated for shipping-related purposes. The designation of protected areas on the high seas for any purpose is controversial and is currently subject to discussion under the auspices of both *LOSC*,⁹⁵ and the *Convention on Biological Diversity*.⁹⁶ Any area south of 60°S latitude may be designated as specially protected or specially managed under Annex V of the *Environmental Protocol* in order to protect outstanding environmental, scientific, historic, aesthetic or wilderness values or planned scientific research.⁹⁷ However, while activities can be regulated or even prohibited within Antarctic Specially Protected Areas (ASPAs) or Antarctic Specially Managed Areas (ASMAs),⁹⁸ it is not clear that passage through these areas can be prohibited altogether. Moreover, Treaty Parties have not yet used Annex V of the *Environmental Protocol* as a basis for regulating the construction, equipment, manning and operation of vessels located within these areas. In fact, only five of the seventy ASPAs can be categorized as marine

93 'Use and Carriage of Heavy Grade Oil (HGO) on Ships in the Antarctic Area', submitted by Norway to the twelfth session of the Sub-committee on Bulk Liquids and Gases, 29 November 2007, IMO Doc. BLG 12/16, para. 5.4.

94 Regulation 21 would need to be amended to address the carriage of HGO as fuel as well as cargo and to apply to vessels other than oil tankers.

95 For a helpful summary of, and links to, recent work in this area undertaken by the Parties to *LOSC*, refer to United Nations Division for Ocean Affairs and the Law of the Sea, Ad-hoc Open-ended Informal Working Group, 'Marine Biological Diversity beyond Areas of National Jurisdiction', undated, available online at www.un.org/Depts/los/biodiversityworkinggroup/marine_biodiversity.htm.

96 See 'Protected Areas: Consideration of the Recommendations of the ad hoc Open-ended Working Group on Protected Areas', submitted to the eighth Conference of the Parties to the 1992 Convention on Biological Diversity, 6 February 2006, Doc. UNEP/CBD/COP8/1/INF/16, available online at: www.cbd.int/doc/meetings/mar/ewsebm-01/information/ewsebm-01-cop-08-inf-16-en.pdf.

97 *Environmental Protocol*, note 13, Annex V, Article 3(1). Annex V was adopted under ATCM Recommendation XVI-10, Antarctic Protected Area System: Review of the System, in *Final Report of Sixteenth ATCM*, Bonn, 7–18 October 1991, p. 115–25.

98 *Environmental Protocol*, note 13, Annex V, Articles 3, 4.

protected areas⁹⁹ with a further six comprising areas including a significant marine component.¹⁰⁰ Only one ASMA includes a significant marine component.¹⁰¹ None of the management plans for marine protected areas or areas with a substantial marine component to date addresses vessel construction, equipment and manning, and only eight of the eleven areas identified above provide very basic recommendations in connection with vessel operation.¹⁰² In light of the fact that protected areas designated under Annex V of the *Environmental Protocol* tend to encompass a very small geographical area close to the coast, and that controls can be applied only to vessels registered to Parties or operated by persons based within States Parties to *Environmental Protocol*, Annex V does not appear to provide a particularly appropriate means by which to address maritime safety and security issues.

Arguably, a much more appropriate platform from which to address safety of shipping issues is through the designation of a Particularly Sensitive Sea Area (PSSA). Designation of PSSAs takes place under the auspices of the IMO in respect of areas that are particularly vulnerable to shipping and meet specified ecological, socio-economic or scientific criteria.¹⁰³ Protective measures within a PSSA may include the creation of special areas under *MARPOL*, the implementation of routing and reporting systems and the development of other measures aimed at protecting specific sea areas from environmental damage from ships, provided that they have an identified legal basis.¹⁰⁴ In the context of the Antarctic, appropriate measures might include routing recommendations, reporting requirements, a prohibition on the discharge of sewage from vessels and the application of the Antarctic Shipping Guidelines to vessels operating within the Area.

Although the prospect of designating an Antarctic PSSA was discussed (briefly)

99 ASPA No. 144 (Chile Bay, Greenwich Island, South Shetland Islands); ASPA No. 146 (South Bay, Doumer Island, Palmer Archipelago); ASPA No. 152 (Western Bransfield Strait); ASPA No. 153 (Eastern Dallmann Bay); ASPA No. 161 (Terra Nova Bay, Ross Sea).

100 ASPA No. 107 (Emperor Island, Dion Islands, Marguerite Bay, Antarctic Peninsula); ASPA No. 113 (Litchfield Island, Harbour Avners Island, Palmer Archipelago); ASPA No. 114 (Northern Coronation Island, South Orkney Islands); ASPA No. 121 (Cape Royds, Ross Island); ASPA No. 145 (Port Foster, Deception Island, South Shetland Islands); ASPA No. 169 (Amanda Bay, Ingrid Christensen coast, Princess Elizabeth Land, East Antarctica). It should be noted that a number of other ASPAs include a small marine component.

101 ASMA No. 7 (South-west Anvers Island and Palmer Basin).

102 For example, the most common requirement is a prohibition on anchoring within the protected area. Additionally, within ASPA 107 boats must travel no closer than 200 m to any breeding colony of emperor penguins. Within ASPA 113 only small boats (undefined) may access the area. No such restriction applies within ASPA 121, but vessels should avoid the main seaward routes used by penguins. Finally, within ASPA 144 and ASPA 146 the dumping of waste from vessels and bottom trawling must be avoided.

103 IMO Resolution A.982(24), Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, 1 December 2005, IMO Doc. A 24/Res.982. Twelve PSSAs have been so designated to date.

104 *Ibid.*, paras 6.1.1–1.3.

at the fifty-eighth session of the Marine Environmental Committee of the IMO,¹⁰⁵ a number of potentially problematic issues are associated with the designation of an Antarctic PSSA. First, while the Southern Ocean extending to the polar front constitutes a relatively contained ecosystem, states have, in the past, been reluctant to permit the designation of extensive areas of the marine environment as a PSSA.¹⁰⁶ Nevertheless, the designation of the Great Barrier Reef PSSA¹⁰⁷ and of the Western European Waters PSSA¹⁰⁸ establishes precedents for the creation of large-scale marine protected areas.

More significantly, it is unclear as to whether areas of the high seas may be designated PSSAs and subject to associated protective measures. IMO Resolution A.982(24) (1 December 2005) stipulates that a PSSA may be designated within and *beyond* the territorial sea.¹⁰⁹ However, while Article 211(6) of *LOSC* provides a clear jurisdictional basis for the designation of PSSAs within a coastal state's EEZ, an equivalent provision in respect of the high seas is not provided for in *LOSC*.¹¹⁰ Moreover, to date PSSA proposals have been developed and submitted by the relevant coastal state. In respect of an area of the high seas it is not clear as to whether any state could submit a PSSA proposal or whether that state would have to demonstrate a particular interest in the area under consideration. In the Antarctic there are no generally recognized coastal states associated with the continent itself and, politically, it would be unwise for any of the seven claimant states to submit a Southern Ocean PSSA proposal to the IMO. One option would be for the *Antarctic Treaty* Parties collectively, through the organ of the ATCM, to make such a submission in respect of either the *Antarctic Treaty* area or a particularly vulnerable location within the region such as the Antarctic Peninsula or the Ross Sea.¹¹¹ The designation of high seas PSSAs is by no means precluded by

105 'Report of the Marine Environmental Protection Committee on its Fifty-eighth Session', 16 October 2008, IMO Doc. MEPC 58/23, paras 8.1–8. See also 'Identification and Protection of Special Areas and Particularly Sensitive Sea Areas: Antarctic Shipping', submitted by FOEI, 31 July 2008, IMO Doc. MEPC/58/8.

106 During the negotiations in connection with the designation of the Western European Waters PSSA (IMO Resolution MEPC 121(52), Designation of the Western European Waters as a Particularly Sensitive Sea Area, 15 October 2004, IMO Doc. MEPC 52/24/Add.1) a number of IMO delegations expressed concern over the large size of the PSSA and the precedent that such a designation might set. See the 'Report of the Marine Environmental Committee on its Forty-ninth Session', 8 August 2003, IMO Doc. MEPC 49/22, para. 8.14.1.

107 IMO Resolution MEPC 45(30), Protection of the Great Barrier Reef, 16 November 1990, IMO Doc. MEPC 30/24; IMO Resolution MEPC 133(53), Designation of the Torres Strait as an Extension of the Great Barrier Reef Particularly Sensitive Sea Area, 22 July 2005, IMO Doc. MEPC 53/24/Add.2, Annex 21.

108 IMO Resolution MEPC 121(52), note 106.

109 IMO Doc. A 24/Res.982, note 103, para. 4.3.

110 A potential jurisdictional basis might be found in Article 194(3)(b) of *LOSC*, which requires Parties individually or jointly to take all measures to prevent pollution from vessels in all areas of the marine environment, including the high seas.

111 It should be noted that several existing PSSAs, including the Western European Waters PSSA and the Baltic Sea Area PSSA, were proposed by a number of interested coastal states collectively.

IMO Resolution A.982(24) (1 December 2005) in terms of either substance or procedure.¹¹² Moreover, the protection of particularly vulnerable areas of the high seas from pollution associated with vessels is entirely consistent with the text and purpose of Article 194 and, more generally, Part XII of the *LOSC*. Therefore, the designation of the *Antarctic Treaty* area as a PSSA by the IMO in conjunction with the *Antarctic Treaty* Parties is an eminently appropriate and sensible measure that should be adopted in order to improve the safety and security of shipping in the Southern Ocean.¹¹³

4 Concluding remarks and a proposal for regional reform

Many challenges associated with maritime security and, in particular, the safety of shipping in the Southern Ocean identified above, are in the process of being addressed at both the international level (through the IMO) and at the regional level, under the auspices of the *Antarctic Treaty* and, to a lesser extent, *CCAMLR*. For the reasons discussed above, safety of Southern Ocean shipping is most appropriately regulated at the international level through the IMO. Nevertheless, this should not preclude the Parties to both the *Antarctic Treaty* and *CCAMLR* from developing a regional response designed to improve shipping safety and to maximize environmental protection within the Southern Ocean. Measures developed by the *Antarctic Treaty* Parties would not only bind over 50 per cent of vessels operating within the region, but would send a clear message to the international community and, more specifically, to the IMO about the importance of maritime security and shipping safety in the Southern Ocean.

It is consequently proposed that Annex IV of the *Environmental Protocol* be radically revised and developed into a coherent and comprehensive 'Southern Ocean Maritime Security and Safety of Shipping Code'. Although it is beyond the scope of the concluding section of this chapter to develop a detailed proposal for such a code, four foundational pillars can be identified. First, the proposed Code should be based on principles fundamental to the instruments of the Antarctic Treaty System. Selected principles might include (but are not limited to) precaution, ecosystem management, 'polluter pays' and rigorous standards of environmental protection. Second, the Code must be comprehensive and must address all safety and environmental issues connected with Southern Ocean shipping, including, but not limited to, construction, equipment and manning requirements (incorporating the revised Arctic Shipping Guidelines), navigational data, contingency planning and SAR, operating aspects of shipping (such as vessel discharges,

112 T. Scovazzi in 'Marine Protected Areas on the High Seas: Some Legal and Policy Considerations', *International Journal of Marine and Coastal Law* v19, 2004, pp. 1–17, maintains that PSSAs may be designated in any marine spaces, including the high seas (p. 9).

113 Arguably, coastal states in the sub-Antarctic such as Australia and New Zealand should also consider the option of PSSA designation within their EEZs.

ballast water management and hull fouling), carriage of heavy-grade fuel and the creation of protected areas for shipping-related purposes. Third, the Code should be rendered mandatory for *Antarctic Treaty* Parties by virtue of its incorporation in Annex IV of the *Environmental Protocol*. Appropriate parts of the Code should similarly be rendered mandatory in respect of fishing vessels by virtue of its adoption as a binding conservation measure under *CCAMLR*. Ideally – in the medium term – the Code should be adopted by the IMO on a mandatory basis through amendments to appropriate shipping instruments such as the *SOLAS Convention*, *MARPOL* and the *SAR Convention*. Adoption at the international level would permit the Code to be applied beyond the *Antarctic Treaty* area to the whole of the Southern Ocean, and to vessels registered in states not party to the *Antarctic Treaty*. Finally, sufficient regulatory and institutional mechanisms must be developed for the effective implementation and enforcement of the Code. Flag states must require their registered vessels to comply with the Code and vessel operators based within Parties to the *Antarctic Treaty* must be required to demonstrate compliance with the Code as part of the environmental assessment/permitting processes. Importantly, the Code should provide for a system of port state inspection and control in respect of vessels leaving for the Antarctic, which should be financially supported by all states and non-governmental organizations operating in the Antarctic.

Although at first sight the development of such a code is a potentially complex and formidable task, it should be noted that all of the issues identified above are already being addressed in one forum or another. The purpose of an all-encompassing Code, developed under the auspices of both the *Environmental Protocol* and, as appropriate, the *CCAMLR*, is to facilitate the development of a coherent, holistic and integrated response to maritime security and safety of shipping challenges in the unique environment of the Southern Ocean. By setting a much needed example at the regional level the Parties to the *Antarctic Treaty* will establish the foundation from which international regulation of Antarctic shipping may be developed and implemented.

8 Counter-Terrorism and the Security of Shipping in South East Asia

*Caroline E. Foster**

Since the events of 11 September 2001 the terrorist maritime security threat in South East Asia has been taken very seriously. A proliferation in regional institutional maritime security arrangements has resulted. Whether the response is in proportion to the threat has been questioned. The scenarios envisaged are low probability.¹ At the same time, a successful attack involving a chemical tanker or other volatile or toxic cargo could result in an ecological and human disaster, with serious economic implications at the global level. Analyses of the types of vessels that might be attacked for terrorist purposes point towards liquefied gas tankers² and shipments of fertilizer. Special security arrangements have been recommended for chemical and gas tankers, gas carriers and other at-risk smaller vessels.³ In addition, the possibility of a successful attack using nuclear or biological weapons hidden inside shipping containers must be taken into account.⁴

* My thanks to Anna Zhou for her valuable research assistance in the early stages of the research for this chapter. I am also grateful to fellow workshop participants, particularly Andrew Forbes and Sam Bateman, and to Chris Griggs, Alex Rogers, Pete Kempster, Richard Davies, Andrew Bedford, Paul Sands, Bruce Hedder, Nick Quinn, Gabrielle Rush and Paul Ash.

1 Bateman underlines the need for balanced decision making. S. Bateman, 'Outlook: The New Threat of Maritime Terrorism' in P. Lehr (ed.), *Violence at Sea: Piracy in the Age of Global Terrorism*, New York: Routledge, 2007, p. 243. See also J.H. Ho, 'The Security of Sea Lanes in South East Asia', *Asian Survey* v46, 2006, p. 562.

2 W.S.G. Bateman, J. Ho and M. Mathai, 'Shipping Patterns in the Malacca and Singapore Straits: An Assessment of the Risks to Different Types of Vessel', *Contemporary South East Asia: A Journal of International and Strategic Affairs* v29, 2007, pp. 309–32. The authors do note that terrorists might face major problems hi-jacking this type of vessel and navigating it into the required position. Forbes observes also that 'LNG carriers . . . are difficult to set on fire, as the conditions necessary to ignite a vapour spill are very limited' (A. Forbes, 'Managing International Shipping', paper presented at the Indian Ocean Naval Symposium Seminar on Contemporary Transnational Challenges: International Maritime Connectivities, New Delhi, 14–16 February 2008, p. 5).

3 Bateman, Ho and Mathai, note 2, pp. 11–15, 20.

4 Australian Government, Department of Defence, 'Australia's National Security: A Defence Update 2007', 1 January 2007, available online at www.defence.gov.au/ans/2007/pdf/Defence_update.pdf, pp. 14, 25 [hereinafter 'Defence Update']. See also A. Forbes, 'Australia's Contribution to the Fight against Terrorism in South East Asia', paper presented at the Mississippi

The political dynamic of the response to the terrorist threat is heavily influenced by the United States (US), with the Singaporean media also playing a part. It was the US that drew attention in 2004 to the possibility of an attack on shipping or on Singapore, which at the time was still the world's leading container port. The potential for such a major attack was discussed in the US Pacific Command's Strategy for Regional Maritime Security, leading to the US-initiated Regional Security Initiative (RMSI).⁵ An attack on the scale envisaged by the US would have the potential to disrupt shipping through any major route selected as a target, including the Suez Canal, the Panama Canal, the Straits of Gibraltar, the Strait of Hormuz, or the Malacca and Singapore Straits. The direct effect on regional and global commerce would be considerable. Notably, an attack resulting in interruption in supply of seaborne energy to China and Japan would have potent economic ramifications in Australia and New Zealand, as well as more widely.⁶ The physical and human effects must also be underlined. A significant proportion of the population of Malaysia, Indonesia and Singapore live close to the Malacca and Singapore Straits and many are dependent on the straits for their livelihood.

1 Diplomatic and legal responses

Diplomatic and legal responses to concern about shipping security in South East Asia involve a burgeoning number of multilateral and bilateral initiatives and institutions. Australia and New Zealand, together with regional states and with the wider global community, have an economic interest in successfully countering threats to maritime security in the region and have closely pursued an agenda of engagement in controlling the terrorist threat, in particular. It is widely understood that an international response is essential from a practical point of view to ensure the best possible security for shipping, both in South East Asia and more widely around the world. Regional initiatives are key, and the work of the International Maritime Organization (IMO) has also been of fundamental

State University Center for International Security and Strategic Studies Conference on International Cooperation in the War against Terror in the Asia Pacific Region with a Special Emphasis on the Malacca Strait', Mississippi, 8–9 March 2006, available online at www.vanderbilt.edu/VIPPS/VIPPSUSJ/library/workshop/2006/index.htm.

- 5 Commander, United States Pacific Command, *Strategy for Regional Maritime Security*, 20 November 2004, available online at www.pacom.mil.rmsi/RMSI%20strategy%20Nov%2004.pdf. See also US Department of Defense, Pentagon, 'Quadrennial Defense Review Report', 6 February 2006, available online at www.defenselink.mil/qdr/report/Report20060203.pdf, portraying the increasing need for global security as resulting from a process of gradual evolution over the last decade.
- 6 For an outline of three scenarios modelled by Australia for APEC see A. Forbes, 'The Economic Impact of Disruptions to Seaborne Energy Flows', paper presented at the Asian Energy Security Conference on Regional Cooperation in the Malacca Strait, Mississippi, 1–2 October 2007, 10 ff., available online at www.msstate.edu/dept/ISSS/AESC/Papers%20and%20Presentations-pdf/Forbes,%20Andrew.pdf. Studies conducted have included an assessment of the effects of a three-month blockage of the Malacca Strait following a hypothetical collision between a Very Large Crude Carrier and a container ship.

importance. Conventional diplomacy within the region may be considered first. Effort has been expended in particular through the Asia-Pacific Economic Cooperation forum (APEC)⁷ and under the auspices of the Association of South East Asian Nations (ASEAN).⁸ The two fora within ASEAN through which concrete maritime security developments are taking place are the ASEAN Regional Forum (ARF) and the grouping known as ASEAN Plus Three. The concept of an ASEAN Security Community (ASC) is also growing.

1.1 Asia-Pacific Economic Cooperation

APEC was founded in 1989 to address economic issues in the Asia-Pacific. APEC's Counter-terrorism Task Force (CTTF) was established in 2003 as a result of the 2002 APEC Leaders' Statement on Fighting Terrorism and Promoting Growth.⁹ The role of the CTTF has been to assist members to assess terrorist threats and facilitate cooperation to counter terrorist activity, including through national Counter-terrorism Action Plans. One of the key priorities within the CTTF has been an initiative known as Secure Trade in the APEC Region (STAR), to foster coordination between the public and private sectors. Annual STAR conferences¹⁰ have addressed practical maritime security issues where such coordination is vital, including the sealing and satellite tracking of security-sealed containers, implementation of the IMO's International Ship and Port Facility Security (ISPS) Code,¹¹ and the adoption of vessel-monitoring systems (VMS). Supply Chain Security has become a central focus of ongoing work, aiming at improving overall security within the supply chain through taking practical steps to counter potential interference with containers and their contents at every step in their journey by rail, road and sea, via terminals, rail yards and road stops.¹²

7 APEC's twenty-one members are the US, Canada, China, Chinese Taipei, Hong Kong, Japan, Australia, New Zealand, the Philippines, Thailand, Singapore, Indonesia, Malaysia, Brunei, South Korea, Papua New Guinea, Mexico, Chile, Peru, Russia and Vietnam.

8 ASEAN's ten members are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.

9 APEC Secretariat, 'APEC Leaders' Statement on Fighting Terrorism and Promoting Growth', 26 October 2002, available online at www.apec.org/apec/leaders_declarations/2002/statement_on_fighting.html. For an overview of the CTTF's field of activity see the Office of the Ambassador-at-Large for Counterterrorism and Chairman of the APEC Counter-Terrorism Task Force, 'APEC Counter-terrorism Review 2001–2006', Philippines, 2006, available online at www.apec.org/apec/apec_groups/som_committee_on_economic/som_special_task_groups/counter_terrorism.html.

10 STAR conferences have been held in Thailand (2003), Chile (2004), Korea (2005), Vietnam (2006), Australia (2007) and Peru (2008).

11 IMO International Ship and Port Facility Security Code, adopted at the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974, 12 December 2002, IMO Doc. SOLAS/CONF.5/34, Annex 1, Conference Resolution 2, pp. 2–91.

12 See the APEC Private Sector Supply Chain Security Guidelines, APEC Counter-terrorism Task Force, September 2003, available online at www.apec.org. For discussion see Bateman, note 1, pp. 249, 252; C. Trelawny, 'Containerised Cargo Security – a Case for "Joined-up Government"',

Work carried out under the auspices of the CTTF has also included the development of guidelines to facilitate rapid restoration of trade within APEC following any terrorist attack.¹³

Sea-lane security has additionally been addressed through an Energy Security Initiative (ESI) first proposed in 2000. The initiative has incorporated a simulation exercise, held in Tokyo in 2002, to examine response mechanisms and contingency plans for dealing with disruption in South East Asian sea lanes. Practical recommendations emerging from this exercise have included establishment of a real-time emergency information sharing system. The ESI is a child of the APEC Energy Working Group (EWG), one of APEC's two working groups dealing with maritime security. The second is the Transportation Working Group (TWG). Both working groups are supported by Australia and New Zealand and have met in these states.¹⁴ Under the auspices of the TWG two expert groups have been established. The first is a Maritime Security Experts Group (MSEG) and the second is an Intelligent Transportations Systems Expert Group (ITSEG). The MSEG has, *inter alia*, been sponsoring capacity-building measures to assist with implementation of the IMO's ISPS Code, while the ITSEG has been promoting new technologies to enhance security of the maritime transportation supply chain as a whole.

1.2 Association of South East Asian Nations

Since the inception of ASEAN in 1967 the focus has been on mutual respect and cooperation. The *Treaty of Amity and Cooperation in South East Asia (Treaty of Amity)*,¹⁵ adopted at the first ASEAN Summit in Bali in 1976, set down the principles that would guide Members in their relations with one another: mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations; the right of every state to lead its national existence free from external interference, subversion or coercion; non-interference in the internal affairs of one another; settlement of differences or disputes by peaceful means; renunciation of the threat or use of force; and effective cooperation among themselves. Today the gradualist approach characterizing ASEAN regional diplomacy is described as 'the ASEAN way'.¹⁶ ASEAN's own literature refers to ASEAN's

IMO News No. 2, 2006, available online at www.imo.org/includes/blastData.asp/doc_id=7875/containerisedcargosecurityarticle.pdf, p. 10. Note the important role played by the US's Container Security Initiative (CSI).

13 Singaporean Government, Ministry of Transport, APEC Secretariat, 'APEC Trade Recovery Programme Study Report', paper presented at the Counter-terrorism Task Force meeting, Cairns, 30 June–1 July 2007, Doc. 2007/SOM3/CTTF/003, available online at www.apec.org/apec/apec_groups/som_committee_on_economic/som_special_task_groups/counter_terrorism.html.

14 The 2007 APEC Transportation Ministerial Meeting was held in Adelaide, and the EWG met in Auckland in 2007.

15 *Treaty of Amity and Cooperation in South East Asia*, 24 February 1976, [2005] ATS 30.

16 Reference has been made in the past to 'the Asiatic approach', an approach based on functionalism and gradualism. For criticism of 'the ASEAN way' see J. Saravanamuttu, 'Whither the

‘solidarity, cohesiveness and harmony’, also described as ‘the “we” feeling’.¹⁷ At its core, the ASEAN security culture still revolves tightly around the principles in the *Treaty of Amity*. Australia and New Zealand acceded to the *Treaty of Amity* in 2005, as a condition for founding membership of the East Asia Summit (EAS).¹⁸ The EAS is a new and promising regional forum for dialogue, with a wider membership than ASEAN, including also China, Japan and South Korea, building on the ASEAN Plus Three grouping discussed below.¹⁹

The ASEAN Regional Forum (ARF), founded in 1994, continues to serve as a forum for multilateral dialogue on regional security, including maritime security.²⁰ Membership of the ARF includes the ten ASEAN Members and seventeen dialogue partners, including the US and the EU.²¹ A tightening of the ARF’s focus on maritime security led to adoption of a Statement on Cooperation against Piracy and other Threats to Security in June 2003 and a Statement on Strengthening Transport Security against International Terrorism in July 2004.²² A workshop was held in Kuala Lumpur the same year,²³ co-hosted by Malaysia, Indonesia and

ASEAN Security Community? Some Reflections’, *International Journal of Asia-Pacific Studies* v1, 2005, p. 44. See also M. Murphy, ‘Piracy and the United Nations Law of the Sea Convention’ in Lehr, note 1, p. 168.

17 ‘ASEAN Security Community’ in ASEAN Secretariat, ‘ASEAN Annual Report 2004–2005’, 2005, available online at www.aseansec.org/AR05/PR-Peace.pdf, pp. 13–21.

18 For a review of the pre-accession discussions held by Australia with ASEAN members see M. Bliss, ‘Amity, Cooperation and Understanding(s): Negotiating Australia’s Entry into the East Asia Summit’, *Australian Yearbook of International Law* v26, 2007, p. 63.

19 On New Zealand’s accession see *ibid.*, p. 83, note 84.

20 For further information see www.aseanregionalforum.org.

21 An increasing level of trust has gradually developed within the ARF, facilitating discussions on such sensitive issues as the Korean Peninsula and disputes in the South China Sea. This has led to criticism that the ARF’s security agenda has tended to be dominated by North East Asian security concerns; see D.K. Emmerson, ‘Comments on the Ninth ASEAN Summit in Bali’, 20 September 2003, *Radio Singapore International*, available online at http://aparc.stanford.edu/news/donald_emmerson_comments_on_the_9th_asean_summit_in_bali_20030920/.

22 *Ibid.*; the 2003 statement recognized that maritime security is regarded as ‘an indispensable and fundamental condition for the welfare and economic security of the ARF region’. ASEAN Secretariat, Regional Forum Unit, ‘ASEAN Regional Forum Statement on Cooperation against Piracy and other Threats to Security’, Tenth ASEAN Regional Forum, Phnom Penh, 18 June 2003. For discussion see Ho, note 1, p. 569; C. Rahman, ‘Multilateral Approaches to Combating Piracy at Sea’ in Lehr, note 1, p. 186; N.M. Morada, ‘Regional Maritime Security Initiatives in the Asia Pacific: Problems and Prospects for Maritime Security Cooperation’, paper presented at the first Berlin Conference on Asian Security (BCAS) on Security Regionalism in the Asia-Pacific, Berlin, 14–15 September 2006, available online at http://swp.preview.exozet.com/en/common/get_document.php?asset_id=3562, p. 9. Intersessional meetings on counter-terrorism and transnational crime also began to be held from 2004, with participants expressing the importance of giving serious attention to combating piracy.

23 At the workshop participants agreed on the need to respond to maritime threats with collective efforts, and on the need to develop surveillance systems and an accurate and timely information system with the aim of ensuring safe movement of people and goods through regional waters. ASEAN Secretariat, ‘ASEAN Security Community’, note 17, pp. 15–16. There was also a seminar on enhancing cooperation on non-traditional security issues in Hainan, China, in March 2005. At

the US. In 2005 Singapore and the US then co-hosted a meeting focusing on identifying concrete, implementable strategies for regional cooperation in maritime security.²⁴ At the 2006 ARF Ministerial Meeting, Ministers reaffirmed their commitment to addressing maritime security 'within a cooperative framework' that recognizes both the sovereign rights of littoral states and the legitimate concerns of user states.²⁵ In 2007 ARF Members held their first operational exercise, involving military, law enforcement, port and policy agencies from twenty-one Member States.²⁶ Also in 2007 the ARF held a Round Table Discussion on Stocktaking of Maritime Security issues, and in 2008 ran a training programme on maritime security. The ARF involves also an unofficial layer of cooperative activity, through the Council for Security Cooperation in the Asia-Pacific (CSCAP). The New Zealand government has stated that it values the ARF and actively supports greater defence participation under the auspices of the ARF.²⁷ Australia shares a very similar perspective.²⁸ In 2009/10 New Zealand will co-host with Indonesia and Japan a further ARF intersessional meeting to develop common understandings and practical cooperative efforts on maritime security issues.

The ASEAN Plus Three grouping, comprised the ASEAN Member States together with China, Japan and South Korea, and came together initially in 1997.²⁹ Political and security cooperation within ASEAN Plus Three has incorporated a particular focus on transnational crime, including drug trafficking,

the Hainan seminar, participants agreed on developing plans of action to implement the relevant ARF statements on non-traditional security issues. *Ibid.*

24 At this meeting, attended by Chiefs of Defence Forces, discussions went a step further. There was a focus on identifying concrete, implementable strategies that included: 'fostering information sharing; establishing maritime domain awareness; initiating joint maritime security exercises; cooperating on consequence management; and sustaining capacity building initiatives'. ASEAN Secretariat, 'ASEAN Security Community', note 17, pp. 15–16. Singapore's Minister of Defence encouraged members to move beyond dialogue and work towards conducting an ARF Maritime Security Exercise in the near future; Kyodo News International, 'IMO Chief urges Framework for Coordinated Patrols of Malacca Strait', 7 March 2005, available online at www.findarticles.com/p/articles/mi_m0WDQ/is_2005_March_7/ai_n11854645.

25 Morada, note 22, p. 11. At the ARF Ministerial Meeting in 2005, in Vientiane, Ministers included shipping and port security among the key areas they identified for future cooperation on maritime safety and security.

26 Singaporean Government, Ministry of Defence, 'Singapore Hosts First Ever ASEAN Regional Forum Maritime Security Shore Exercise', 23 January 2007, available online at www.mindef.gov.sg/imindef/news_and_events/nr/2007/jan/23jan07_nr.html.

27 See New Zealand Government, Ministry of Defence, 'Annual Report for the Year ended 30 June 2006', 2006, paper presented to the House of Representatives, 2006, available online at www.defence.govt.nz/pdfs/reports-publications/annual-report-2006.pdf, p. 8. Within the ARF, defence officials continue to meet in what has become a formal dialogue at Ministerial Meetings, Intersessional Group Meetings and Senior Officials' Meetings: Singaporean Government, Ministry of Defence, note 26.

28 Australian Government, Department of Defence, *Defence 2000: Our Future Defence Force*, Canberra: Defence Publishing Service, December 2000, p. 41 [hereinafter *Defence 2000*]; Australian Government, Department of Defence, 'Defence Update', note 4, p. 36.

29 ASEAN Secretariat, 'ASEAN Plus Three Cooperation', undated, www.aseansec.org/16580.htm.

traffic in persons, money laundering, arms smuggling, cyber-crime and international economic crime, as well as terrorism and piracy. ASEAN Plus Three provided the initiative, at the proposal of Japanese Prime Minister Koizumi, that led to the development of the *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia*. The Agreement was finalized in 2004, opened for signature in early 2005 and entered into force in 2006. There are now fourteen parties to the Agreement.³⁰ The UN General Assembly welcomed this 'progress in regional cooperation' in its 2005 Resolution on Oceans and the Law of the Sea.³¹ Under the Agreement an Information Sharing Centre (ISC) has been established in Singapore, which is a permanent body with full-time staff, funded by parties to the agreement. The work of the ISC will complement that carried out by the IMB Piracy Reporting Centre, set up with the support of the IMO and the International Maritime Satellite Organisation, INMARSAT, in 1992 in Kuala Lumpur.³²

In 2003 the establishment of an ASEAN Security Community (ASC) was proposed as one of the three pillars of an overarching ASEAN Community in the Declaration of ASEAN Concord II adopted at the ASEAN Summit in Bali (Bali Concord II).³³ The ASEAN Community was to comprise an ASEAN Security Community, an ASEAN Economic Community and an ASEAN Socio-cultural Community. The concept of a security community now serves as an umbrella for ASEAN activity in relation to security issues ranging from immigration, environmental security and nuclear disarmament to transnational crime and counter-terrorism. ASEAN has concluded 'Joint Declarations on Cooperation to Counter International Terrorism' with a number of states, including in 2004 with Australia.³⁴ Indonesia has spoken about establishing an ASEAN Centre for Combating Terrorism, an ASEAN Peacekeeping Training Centre and an ASEAN Maritime Surveillance Centre.³⁵

30 The parties to the Agreement are Bangladesh, Brunei, Cambodia, China, India, Japan, the Republic of Korea, Laos, Myanmar, the Philippines, Singapore, Sri Lanka, Thailand and Vietnam.

31 UN Resolution on Oceans and the Law of the Sea, GA Res. 60/30, UN Doc. A/60/30 (2005).

32 A specialist division of the International Chamber of Commerce, the IMB's primary interest is in commercial shipping and the welfare of commercial seamen. Financed by voluntary contributions from shipping and insurance companies, the Centre produces regular statistics on the incidence of attacks on vessels. Figures on attacks, are, of course, also compiled by other agencies, including in the form of the monthly reports of the Royal Navy and the US Navy. The British Ministry of Defence also issues a 'Worldwide Threat to Shipping' report on a monthly basis through the Defence Intelligence Staff in London.

33 ASEAN Secretariat, 'ASEAN Security Community', note 17, pp. 15–16. See also ASEAN Secretariat, ASEAN Security Community Plan of Action, November 2004, available online at www.aseansec.org/16827.htm.

34 ASEAN–Australia Joint Declaration for Cooperation to Combat International Terrorism, ASEAN Secretariat, available online at www.aseansec.org/16205.htm.

35 Emmerson, note 21.

1.3 The International Maritime Organization

The IMO has also taken a particular interest in the security of shipping in South East Asia, and has sought to reinforce and complement regional endeavours and initiatives. Most constructively, the IMO organized a series of biennial meetings on 'The Straits of Malacca and Singapore: Enhancing Safety, Security and Environmental Protection' in Jakarta in 2005, Kuala Lumpur in 2006 and Singapore in 2007 under the auspices of its Protection of Vital Shipping Lanes Initiative. Among the more far-reaching of the global legal maritime security initiatives pursued through the IMO have been the adoption of the ISPS Code³⁶ and of a 2005 *Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988 SUA Convention)*,³⁷ as discussed elsewhere in this volume. In addition, the IMO's Maritime Safety Committee has established a joint working group with the Organization's Facilitation Committee to work on ensuring a sound balance between enhanced security and facilitation of maritime traffic in the overall context of container and supply chain security. This work responds at a global level to the same concerns expressed at Ministerial level within APEC and taken up through the STAR initiative.³⁸

Further, in order to increase the level of international technical development relating to maritime security, the IMO has established an International Maritime Security Trust Fund, and runs an Integrated Technical Cooperation Programme. Again, this appreciation of the importance of technical assistance parallels a similar awareness within APEC. Technical assistance within APEC has included a series of workshops held under the ISPS Code Implementation Assistance Programme. Further steps to increase capacity-building have included the publication of Guidelines, a Procedures Manual and a Catalogue of Maritime Security Training, Capacity Building and Technical Outreach initiatives, as well as the establishment of a Maritime Security Point of Contact Network to handle enquiries. Technical assistance directed towards improving South East Asian regional security more broadly is targeted to a wide variety of concerns, including terrorist financing and anti-corruption and transparency.³⁹

36 The ISPS Code was adopted through an amendment to the *International Convention for the Safety of Life at Sea*, 1 November 1974, 1184 UNTS 278 (1974). Implementation of the code is discussed elsewhere in this volume.

37 *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 14 October 2005, [2005] ATNIF 30.

38 See 'Joint Ministerial Statement', Fifth APEC Transportation Ministerial Meeting, Adelaide, 28–30 March 2007, available online at www.apec.org/content/apec/ministerial_statements/sectoral_ministerial/transportation/2007transport.html, para. 9. Note also the theme of the Fifth Secure Trade in APEC Region Conference 'Mitigating Risks: Containing Costs', Sydney, 27–28 June 2007.

39 Ha Noi Declaration, Fourteenth APEC Economic Leaders' Meeting, Ha Noi, 18–19 November 2006, available online at www.apec.org/apec/leaders_declarations/2006.html.

2 Military and strategic responses

Military responses to maritime security threats are in many respects inseparable from the wider task of working to ensure regional peace and security. The trans-Tasman defence relationship, formalized through an arrangement known as 'Closer Defence Relations', incorporates recognition of the broad link between peace and stability in the Asia-Pacific and security in Australia and New Zealand.⁴⁰ Despite various differences in outlook and capability, the military and strategic bond between Australia and New Zealand is exceptionally strong.⁴¹ The ANZAC spirit is recorded in the 'Joint Statement on Closer Defence Relations' of 2003:⁴²

There is no strategic partnership in our region closer than that between Australia and New Zealand. Bound together by geography and history, by shared values, beliefs and interests, and by the close relationships between our peoples, we have a tradition of mutual commitment to each other's security.

For New Zealand, a strategy of increasing engagement in the region more widely is compelled by the region's commercial importance and the significance of peace and stability among its South East Asian neighbours.⁴³ An active decision 'to play an appropriate role in the maintenance of security in the Asia Pacific Region' was therefore reaffirmed as one of the five key objectives for New Zealand's defence policy in the government's 'Defence Policy Framework' of 2000.⁴⁴ New Zealand's defence forces thus play an increasingly important part in what has come to be called 'regional confidence building' through networks of military links and active participation in regional fora dealing with security issues.⁴⁵ The need to 'provide a physical demonstration of New Zealand's commitment to regional and global security through ship visits, training, and exercises with other countries' was recognized in the New Zealand 'Maritime Forces Review' in 2002.⁴⁶ New Zealand's key defence objective of meeting 'alliance commitments to Australia by

40 New Zealand Government, Ministry of Defence, 'Defence Portfolio: Briefing to the Incoming Government 2005', available online at www.defence.govt.nz/pdfs/reports-publications/elecbrief-def-portfolio-2005.pdf, p. 9 [hereinafter *Defence Portfolio*].

41 For the Australian perspective see Australian Government, Department of Defence, *Defence 2000*, note 28, p. 42.

42 M. Burton, 'New Closer Defence Statement Released', 26 June 2003, available online at www.beehive.govt.nz/ViewDocument.aspx?DocumentID=17174.

43 New Zealand Government, New Zealand Defence Force, *Statement of Intent for the period 1 July 2006–30 June 2009*, presented to the House of Representatives, G.55 SOI, 2006, p. 14.

44 New Zealand Government, Ministry of Defence, 'Government's Defence Policy Framework', June 2000, available online at www.nzdf.mil.nz/downloads/pdf/public-docs/defencepolicyframeworkjune2000.pdf, p. 4.

45 New Zealand Government, Ministry of Defence, 'Defence Portfolio', note 40, pp. 12–14.

46 New Zealand Government, Ministry of Defence, Defence Policy and Planning Unit, 'Maritime Forces Review: Key Findings', January 2002, available online at www.defence.govt.nz/pdfs/reports-publications/mfr1.pdf, pp. 10, 29, 32. See also the requirements for interoperability with the Australian Defence Force and for meeting FPDA obligations.

maintaining a close defence partnership in pursuit of common security interests' was also recognized in the 'Defence Policy Framework' of 2000.⁴⁷

Following that with Australia, New Zealand's defence relationships with Singapore and Malaysia are New Zealand's two major bilateral relationships in the region. New Zealand has extensive and long-standing defence links with Singapore,⁴⁸ and a similarly long history of a strong defence association with Malaysia.⁴⁹ New Zealand also has growing defence ties with Brunei, the Philippines, Thailand, the Republic of Korea, Russia and Japan,⁵⁰ and increasingly maintains a defence relationship with China as part of an expanding engagement with North Asia.⁵¹ In 2007 Australia, China and New Zealand held their first tri-national naval exercise, off the Australian coast.⁵²

Australia's size and wealth, combined with a significantly greater geographical strategic exposure, have allowed and prompted a defence policy incorporating a more assertive and proactive projection of power than New Zealand. Australia's most important long-term strategic objective remains the defence of Australia from direct military attack, with priority then accorded to fostering stability in the immediate neighbourhood, in South East Asia and in the wider Asia-Pacific region.⁵³ The Royal Australian Navy plays a central and essential role.⁵⁴ Australia's number one defence relationship has remained the relationship with the US under the alliance formally embodied in the *ANZUS Treaty* of 1951.⁵⁵ This relationship remained unaffected by suspension of the US–New Zealand dimension of the alliance following an adverse US response to New Zealand's nuclear-free policy in the 1980s.⁵⁶

Australia's *Defence White Paper* of 2000 expressed the view that the US's global preponderance of military capability and influence supports international stability

47 New Zealand Government, Ministry of Defence, 'Government's Defence Policy Framework', note 44, p. 4.

48 See New Zealand Government, Ministry of Defence, 'Annual Report', note 27.

49 *Ibid.*, pp. 8–9; New Zealand Government, Ministry of Defence, 'Defence Portfolio', note 40, pp. 12–14.

50 See New Zealand Government, Ministry of Defence, 'Annual Report', note 27, pp. 8–9; New Zealand Government, Ministry of Defence, 'Defence Portfolio', note 39, pp. 12–14.

51 New Zealand Government, Ministry of Defence, 'Defence Portfolio', note 40, pp. 12–14; New Zealand Government, Ministry of Defence, 'Annual Report', note 27, p. 9.

52 M. Richardson, 'Five Power Naval Exercise gives China the Jitters', *New Zealand Herald*, 5 September 2007, available online at www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=10461642.

53 Australian Government, Department of Defence, *Defence 2000*, note 28, pp. 30–1; Australian Government, Department of Defence, 'Defence Update', note 4.

54 Australian Government, Royal Australian Navy, *Australian Maritime Doctrine (RAN Doctrine 1 2000)*, Canberra: Defence Publishing Service, 2000, available online at www.navy.gov.au/w/images/Amd_prelim.pdf.

55 *Security Treaty between Australia, New Zealand and the United States*, 1 September 1951, [1952] ATS 2.

56 Australian Government, Department of Defence, *Defence 2000*, note 28, pp. 34–5; Australian Government, Department of Defence, 'Defence Update', note 4, p. 34.

and the interests of the Asia-Pacific region.⁵⁷ Australia shares its view with Japan, with which a well-developed strategic dialogue has evolved over the last fifty years,⁵⁸ to the point where an 'Australia–Japan Joint Declaration on Security Cooperation' was signed in 2007.⁵⁹ Australia places a high priority on deepening dialogue with China,⁶⁰ welcomes the establishment of dialogue with Russia⁶¹ and seeks to strengthen its relationships with India and Korea.⁶² Australia's common interests with India focus specifically on maritime security and counter-terrorism and have led to the 2006 *Australia–India Memorandum of Understanding on Defence Cooperation*.⁶³ As in the case of New Zealand, there are long-standing cooperative relationships between Australia and Singapore and Malaysia.⁶⁴ The defence relationship with Thailand is growing.⁶⁵ Efforts to revitalize the important relationship with Indonesia have resulted in the 2006 *Australia–Indonesia Agreement on the Framework for Security Cooperation*, reinforcing joint efforts to address concerns including terrorism and people smuggling.⁶⁶ In the context of counter-terrorism the Australian Defence Force works closely with Indonesia towards greater border security and intelligence exchange.⁶⁷

Both Australia and New Zealand are members of the Five Power Defence Arrangements (FPDA), together with Malaysia, Singapore and the UK. Founded in 1971, the FPDA was initially a response to the security concerns faced by Malaysia and Singapore in relation to the potential revival of the politically radical Indonesian leadership seen in 1963 and 1966.⁶⁸ Although the original *raison d'être* now lacks currency, the FPDA relationship is deeper than it ever previously has been. With the increasing naval capacity of Malaysia and Singapore, the alliance is starting to come of age – although Indonesia's non-membership detracts from its overall effectiveness. Strengthening of the FPDA has taken place in the context of a broadened focus that now incorporates security threats, including maritime terrorism. For the first time in 2004 the annual joint FPDA exercise conducted in the South China Sea included a maritime interdiction component.⁶⁹ The scenarios addressed through the FPDA now extend to threats from piracy

57 Australian Government, Department of Defence, *Defence 2000*, note 28, p. 16; Australian Government, Department of Defence, 'Defence Update', note 4, p. 34.

58 Australian Government, Department of Defence, *Defence 2000*, note 28, p. 37.

59 Australian Government, Department of Defence, 'Defence Update', note 4, p. 35.

60 Australian Government, Department of Defence, *Defence 2000*, note 28, p. 37; Australian Government, Department of Defence, 'Defence Update', note 4, p. 35.

61 Australian Government, Department of Defence, *Defence 2000*, note 28, p. 38.

62 Ibid.

63 Australian Government, Department of Defence, 'Defence Update', note 4, p. 35.

64 Australian Government, Department of Defence, *Defence 2000*, note 28, p. 40.

65 Ibid.

66 *Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation*, 13 November 2006, [2006] ATNIF 25; Australian Government, Department of Defence, 'Defence Update', note 4, p. 35.

67 Australian Government, Department of Defence, 'Defence Update', note 4, p. 37.

68 Ho, note 1, p. 573.

69 Rahman, note 22, p. 190; Ho, note 1, p. 573.

and people smuggling, as well as maritime terrorism.⁷⁰ In addition, the Western Pacific Naval Symposium (WPNS), initiated in 1988, provides a forum for association among navies in the Asia-Pacific region outside the context of any formal alliance.⁷¹ Designed originally to promote mutual understanding, the symposium has now developed to the point where it includes regular military exercises.⁷² Australia expressly considers its membership of the FPDA to serve enduring interests in the region.⁷³

The speed at which significant changes in the maritime political dynamics of the Asia-Pacific region are taking place is easy to underestimate. China's economic rise is drawing an unprecedented level of sea traffic through its ports, particularly in the south, with volumes almost tripling between 2001 and 2005. The security of regional shipping is vital for China. More than 80 per cent of China's imported energy travels through the Malacca Strait.⁷⁴ China's expected reliance on oil imports is projected to reach 50 per cent of consumption by 2015.⁷⁵ China has estimated that 90 per cent of its trade passes through regional waters,⁷⁶ and it is clear that China's demand for energy increasingly bolsters the volume of regional shipping.⁷⁷

Although China has not actively involved itself in the policing of the Malacca Strait, the significance of the strait for oil flow to China, and also to Japan and Korea, could prompt closer engagement if traffic through the strait came under greater threat. This would also be likely if the US were to provide policing assistance to the littoral states.⁷⁸ China's relationships with the US, Japan and India, along with the US-Indian relationship, have been described as the moving tectonic plates that shape the region's geopolitics, with the Sino-US relationship as

70 As discussed by the New Zealand Minister of Defence when meeting with his counterparts in Singapore and Malaysia in June 2006. New Zealand Government, Ministry of Defence, 'Annual Report', note 27.

71 Rahman, note 22, p. 188.

72 Ho, note 1, p. 573; Rahman, note 22, p. 188.

73 Australian Government, Department of Defence, *Defence 2000*, note 28, p. 40.

74 J. Zhao, 'The Straits of Malacca and Challenges Ahead: China's Perspective,' paper presented at Maritime Institute of Malaysia Conference 'The Straits of Malacca: Building a Comprehensive Security Environment,' Kuala Lumpur, 11-13 October 2004, cited in S. Jayakumar 'UNCLOS: Two Decades On' in M.H. Nordquist, J.N. Moore and K-C. Fu (eds), *Recent Developments in the Law of the Sea and China*, Leiden: Martinus Nijhoff, 2006, p. 21.

75 Statistics from the State Financial Ministry of China cited in S. Wu and N. Hong, 'The Energy Security of China and Oil and Gas Exploitation in the South China Sea' in Nordquist, Moore and Fu, note 74, p. 148.

76 Zhao, note 74.

77 Wu and Hong, note 75, p. 147. By 2010, 12 per cent of total world oil imports will be going to China. Institute of Shipping Economics and Logistics, *Shipping Statistics and Market Review 2006: Tanker Market Developments*, March 2006; Institute of Shipping Economics and Logistics, *Shipping Statistics and Market Review 2006: World Port Development*, November-December 2006, pp. 5-6.

78 R. Snoddon, 'Piracy and Maritime Terrorism: Naval Responses to Existing and Emerging Threats to the Global Seaborne Economy' in Lehr, note 1, p. 238.

the most significant.⁷⁹ China has rejected US involvement in South East Asia maritime security,⁸⁰ while, for its part, the US has reviewed its policies for security engagement in the region in reflection of China's growing significance in South East Asia.⁸¹ So far as broader regional security is concerned, planning for the peaceful joint development of disputed oil resources in the South China Sea is clearly essential.⁸² Resolution of the related territorial disputes is not likely in the near future, and this continues to inhibit cooperation within the region.⁸³

Japan's concerted dedication to improving sea lane security in South East Asia may be seen, in part, as a response to the rise of China as a maritime power.⁸⁴ Japan is also highly dependent on the sea from an economic perspective, including for the importation of oil.⁸⁵ Japan has most notably declared that it will protect its sea lines of communication out to a distance of 1,000 nautical miles.⁸⁶ The Japan Coast Guard has proved an acceptable face for the Japanese security presence in the region and has been engaged on a regular basis in activities in South East Asian countries since 2000. As early as 1999 Japan proposed combined coastguard patrols of the Malacca Strait and several Indonesian sea lanes, involving Indonesia, Malaysia, Singapore, China and South Korea.⁸⁷ These activities include carrying out patrols, engaging in combined exercises, capacity-building endeavours, training for officers from regional agencies and assistance in the establishment of coastguard organizations in Indonesia and Malaysia.⁸⁸ In its

79 T.C. Hean, Singaporean Minister of Defence, 'Working Together to Enhance Security', speech delivered at the Asia-Pacific Programme for Senior Military Officers, 4 August 2005, available online at www.mindef.gov.sg/imindef/news_and_events/nr/2005/qug/04aug05_hr.html.

80 Murphy, note 15, p. 175; see also Snoddon, note 78, p. 234.

81 Rahman, note 22, p. 192.

82 The South China Sea has been described as the 'second Persian Gulf' for its abundance of oil and gas resources. Wu and Hong, note 74, p. 148. In 2002 China and the ASEAN Member States pledged their cooperation with one another in a Declaration on the Conduct of Parties in the South China Sea and established a joint working group to recommend confidence-building activities, including specific cooperative activities in the South China Sea. ASEAN Secretariat, 'ASEAN Security Community', note 17, p. 17; K. Zou, 'A New Model of Joint Development for the South China Sea' in Nordquist, Moore and Fu, note 74, pp. 155–71. Construction of new gas and oil pipelines across Myanmar only partly eases China's 'Malacca dilemma', as it has been called by President Hu Jintao. 'China seals Ties with brutal Junta through 1450 km Oil, Gas Pipeline', Telegraph Group, *New Zealand Herald*, 16 January 2008.

83 K. Zou, 'Piracy at Sea and China's Response', *Lloyd's Maritime and Commercial Law Quarterly*, August 2000, pp. 364, 378. See also H. Kaneda, 'Japan's Role on Regional Security and Order Maintenance as Public Property Initiative for the Regional Security and Order Coalition' in Nordquist, Moore and Fu, note 74, pp. 279–92. One idea has been to freeze claims in the region, taking the Antarctic Treaty as a model. H.K. Park, *The Law of the Sea and Northeast Asia: A Challenge for Cooperation*, The Hague: Kluwer, 2000, p. 122.

84 Rahman, note 22, p. 189.

85 Ibid.; Murphy, note 15, p. 170.

86 Forbes, 'Managing International Shipping', note 2, pp. 8–9.

87 Rahman, note 22, pp. 189–90; New Zealand Government, Ministry of Defence, 'Defence Policy Framework', note 44.

88 Rahman, note 22, p. 190.

'National Defence Program Guidelines' 2006, Japan stated also its intention to promote multilateral cooperation in relation to common regional concerns such as terrorism and piracy.⁸⁹ These efforts have included the dispatch of Japanese Self-defence Force units after the attacks of 11 September 2001 to assist in preventing terrorist activity at sea, and continue through ongoing work in the northern Indian Ocean. Japan has been encouraging a quadrilateral dialogue with Australia, the US and India for some time, and in 2007 signed the 'Australia–Japan Joint Declaration on Security Cooperation'.⁹⁰ Informed observers have urged a greater counter-terrorism role for Japan in the Malacca Strait.⁹¹

For India, also, the security of sea traffic through the Malacca Strait is vital from an economic point of view.⁹² Although India's oil comes directly from the Middle East, Africa and nearby parts of Asia, a high proportion of India's commerce relies on South East Asian sea lanes.⁹³ India too is turning to multilateral naval cooperation, which is laid down in the Indian Maritime Doctrine as one of the guiding principles for addressing common security concerns such as protection of sea lanes, terrorism, piracy, drug trafficking and transportation of weapons by sea.⁹⁴ Problems of piracy and armed robbery at sea are discussed at such gatherings as the Milan (Hindi for 'Meeting'), a biannual gathering of warships from South Asia and South East Asia hosted by India since 1995.⁹⁵

India's concerns for regional cooperation in relation to security at sea must, as with Japan, be seen within the overall context of regional dynamics, including tensions with China. Under a Southern Forwarding Strategy the Indian navy has for some time been expanding its operations eastwards into the South China Sea.⁹⁶

89 Institute of Shipping Economics and Logistics, *World Port Development*, note 77, p. 8.

90 Richardson, 'Five Power Naval Exercise', note 52.

91 D. Dillon, Suggestions Committee, 'Recommendations' from the Mississippi State University Center for International Security and Strategic Studies Conference on International Cooperation in the War against Terror in the Asia Pacific Region with a Special Emphasis on the Malacca Strait, Mississippi, 8–9 March 2006, available online at www.msstate.edu/chair/radvanyi/ICWAT/.

92 Snoddon, note 77, p. 238. For Australia's perspective on Australia and Japan's shared commitment to the US role in regional security see Australian Government, Department of Defence, *Defence 2000*, note 28, p. 37.

93 M. Richardson, 'Maritime Security in South East Asia with Special Emphasis on the Straits of Malacca and Singapore', paper presented at the Mississippi State University Center for International Security and Strategic Studies Conference on International Cooperation in the War against Terror in the Asia Pacific Region with a Special Emphasis on the Malacca Strait, Mississippi, 8–9 March 2006, available online at www.vanderbilt.edu/VIPPS/VIPPSUSJ/library/workshop/2006/index.htm, p. 2.

94 *Ibid.*

95 At the 2002 'International Fleet Review', attended by naval ships from twenty-three countries, and hosted by India, the Indian Prime Minister stated that 'active co-operation between navies is a must in [these] times of sea piracy, gun running and drugs, which are all part of international terrorism . . .'. V. Sakhuja, 'Piracy in the Indian Ocean: The Arabian Sea and Bay of Bengal' in Lehr, note 1, p. 31.

96 Y-H. Song, 'The Overall Situation in the South China Sea in the New Millennium: Before and After the September 11 Terrorist Attacks', *Ocean Development and International Law* v34, 2003, pp. 229, 232.

At the same time, India has been strengthening ties and concluding bilateral agreements on military cooperation with Vietnam, Malaysia and Indonesia.⁹⁷ This cooperation has included joint military and anti-piracy exercises with these countries, as well as with South Korea and Japan in the South China Sea and the Indian Ocean.⁹⁸ In 2005 India and the US signed a *Framework Agreement on Defence Relations*, and in 2006 a bilateral *Framework for Maritime Security Cooperation* was announced.⁹⁹ In 2007 India hosted a joint exercise with Australia, Japan, Singapore and the US in an operational zone stretching across to the Andaman and Nicobar Islands near the western entrance to the Malacca Strait.¹⁰⁰ In February 2008 the Indian Ocean Naval Symposium was launched, a new regional maritime security initiative aimed at providing a consultative forum for 'Chiefs of Navy' from states bordering the Indian Ocean region.¹⁰¹ Some commentators consider that there would be considerable regional tolerance were India to join with Indonesia, Singapore, Malaysia and Thailand in patrolling the Malacca Strait.¹⁰²

The US continues to maintain a major interest in maritime security around the globe, including in South East Asia – and the US is conscious that its allies, Japan and Korea, rely on passage through the strait for their oil supplies.¹⁰³ In addition, US warships depend on passage as a route to the Arabian Sea and Persian Gulf, source of much of the US's imported oil.¹⁰⁴ Annual bilateral exercises are carried out with the navies and other maritime forces of Singapore, Malaysia, Indonesia, the Philippines, Thailand and Brunei.¹⁰⁵ The US notion of a 1,000-ship navy – a cooperative network among many contributing navies – provides a powerful image of the potential for cooperation on maritime security, not only in the Asia-Pacific but globally.¹⁰⁶ The concept has been adopted by the Royal Australian Navy and since renamed the Global Maritime Partnership initiative.¹⁰⁷ The Indian navy and the Japan Maritime Self-defence Force have responded positively. China has been non-committal, although there is already a level of cooperation on the ground between China's non-PLA maritime forces and the US Coast

97 Ibid.

98 Ibid. Additionally, under a bilateral cooperative arrangement, the Indian Navy from time to time assumes responsibility for escorting US commercial ships carrying high-value goods through the straits.

99 Richardson, 'Maritime Security in South East Asia', note 93, p. 3.

100 Richardson, 'Five Power Naval Exercise', note 52.

101 Indian Government, Indian Navy, 'Indian Ocean Naval Symposium', undated, available online at www.indiannavy.gov.in/ion.htm.

102 Richardson, 'Maritime Security in South East Asia', note 93, p. 6.

103 Ibid., p. 3.

104 Ibid.

105 Rahman, note 22, p. 193.

106 Proposed by US Chief of Naval Operations, Admiral Mike Mullen, in 2005. C. Rahman, *The Global Maritime Partnership Initiative: Implications for the Royal Australian Navy*, Papers in Australian Maritime Affairs 24, Canberra: Sea Power Centre Australia, 2008.

107 Ibid.

Guard.¹⁰⁸ The US-led Proliferation Security Initiative (PSI) aimed at the maritime interdiction of shipments of weapons of mass destruction, their delivery systems and related material, has been regarded by the US as a central aspect of international security cooperation, and is supported by both Australia¹⁰⁹ and New Zealand. Both are active participants in the PSI's twenty-member steering group, the Operational Experts Group.

3 Concluding remarks

The bulk of Australian¹¹⁰ and New Zealand¹¹¹ imports and exports travel by sea. Yet it is not a direct threat to Australian and New Zealand trade that has the highest profile in the context of regional security. The greatest concern in relation to maritime security in South East Asia remains the possibility of a major terrorist attack in the Singapore or Malacca Straits.¹¹² One observer writes:

[s]ecurity experts believe that should terrorists wish to make a significant impact on the global economy, then it is here that they are most likely to attack.¹¹³

The sinking of a large vessel in the straits themselves would force almost half of the world's shipping fleet to travel further,¹¹⁴ moving south in a detour of around

108 Ibid., p. 53.

109 Australian Government, Department of Defence, 'Defence Update', note 4, p. 37.

110 In the case of Australia, for the period 2004–05 the total proportion of trade carried by sea was 75.38 per cent by value and 99.89 per cent by weight. Australian Government, Department of Infrastructure, Transport, Regional Development and Local Government, Bureau of Transport and Regional Economics, 'Australian Transport Statistics 2006', August 2006, available online at www.bitre.gov.au/publications/03/Files/ATS2006.pdf, p. 10. For figures and discussion on Australian shipping routes, see A. Forbes, *The Strategic Importance of Seaborne Trade and Shipping*, Papers in Australian Maritime Affairs 10, Canberra: Sea Power Centre Australia, 2003.

111 In the year ended June 2006 the proportion of New Zealand's exports loaded for shipment by sea was 84.3 per cent by value and 99.5 per cent by volume. The proportion of New Zealand's imports unloaded at seaports was 78.5 per cent by value and 99.4 per cent by volume. New Zealand Government, Statistics New Zealand, 'Overseas Cargo Statistics: Year ended June 2006', September 2006, available online at www.stats.govt.nz/NR/rdonlyres/C991BB53-8820-425B-9E24-A7CD6A691D6D/0/overseascargostatisticsyejun06hotp.pdf.

112 Only a low proportion of Australian trade goes through the Straits, while most goes via the Lombok and Makassar Straits. Forbes, 'Australia's Contribution to the Fight against Terrorism in South East Asia', note 4, p. 10. Australia's more particular direct interest lies in sea lanes north through Indonesia. Australian Government, Royal Australian Navy, note 54, p. 42. Figures for New Zealand trade are difficult to estimate. Examining the *New Zealand Shipping Gazette* for the period between 5 December 2006 and 5 December 2007, Zhou concluded that on seventy-seven of the 157 voyages involving a call at a New Zealand port there was a transit via the Malacca Straits on the way to or from New Zealand. Anna Zhou, research assistance, see acknowledgement above, at the opening of this chapter.

113 Snoddon, note 77, p. 233.

114 Forbes, 'The Economic Impact of Disruptions to Seaborne Energy Flows', note 6.

600 miles, increasing shipping and insurance costs significantly, particularly in the short term.¹¹⁵ An interruption in the maritime supply of energy to North Asia would have further severe consequences. Connected economies would be expected to suffer most, but the economic impact would be felt globally.¹¹⁶ Depending on its form, a successful attack on the port of Singapore, or an attack with biological, chemical or nuclear weapons, could constitute a disaster of considerably greater magnitude.

Even as the more widely known problem of piracy in the Malacca Strait recedes for the meantime,¹¹⁷ Australia and New Zealand continue resolutely in their contributions to countering vulnerability to a major maritime terrorist attack in the vicinity. Ultimately it may be that the best way forward is to persevere with regional cooperation and capacity-building between police, customs, immigration and transport agencies, the financial sector, intelligence agencies and defence forces, combined with long-term development programmes to assist regional poverty alleviation. These basic law enforcement efforts may be the most important steps that can be taken to reduce the likelihood of a major maritime terrorist disruption. Both Australia and New Zealand regard this as their primary toolkit for dealing with maritime security in the region.¹¹⁸ Yet, at the most foundational level, there naturally remains an underlying reliance on Australia and New Zealand's ongoing shared interest with China, India, Japan and the US in secure peacetime navigation through the most significant regional straits.¹¹⁹

115 *Ibid.*; see also www.imo.org.

116 *Ibid.*

117 The 2006 figures were the lowest since 1998, and the decrease was attributed by the International Maritime Bureau (IMB) to the proactive measures taken by the authorities in certain countries. International Chamber of Commerce, International Maritime Bureau, 'Piracy and Armed Robbery against Ships: Annual Report 1 January–31 December 2006', January 2007. However, attacks rose again in the first quarter of 2008. Lloyds' listing of the Malacca and Singapore Straits as a 'war risk zone' was lifted in 2007. United Nations Secretary-General, 'Addendum to the Report of the Secretary-General on Oceans and the Law of the Sea (Advance and Unedited)', 12 March 2007, UN Doc. A/62/66/Add.1, p. 23, para. 79.

118 For more detail on the Australian approach see Forbes, 'Australia's Contribution to the Fight against Terrorism in South East Asia', note 4.

119 Richardson, 'Maritime Security in South East Asia', note 93, p. 1.

9 Maritime Security and Oceans Policy

Peter Cozens

The negotiators and decision makers at the third United Nations Conference on the Law of the Sea (UNCLOS III) between 1973 and 1982 may not have considered the implications for how coastal states would manage their respective extended maritime zones and what security considerations would arise. They were understandably more concerned with the immediacy of the international strategic problems ahead. The three principal committees of UNCLOS III from 1973 to 1982 were focused on:

- 1 *Committee One.* The problem of the legal regime of the seabed.
- 2 *Committee Two.* The regimes of the territorial sea and contiguous zone, continental shelf, exclusive economic zone, the high seas, and fishing and conservation of the living resources of the high seas, and questions relating to straits and archipelagic states.
- 3 *Committee Three.* Questions of the preservation of the marine environment and scientific research.¹

The issues of local stewardship and security of exclusive fishing and economic zones began to emerge only after claims to extended maritime jurisdictions were declared. In this respect the matter of controlling access and removal of valuable resources, particularly fish, becomes on the one hand, a question of how to manage these new responsibilities to best advantage and on the other, to controlling the actions of poachers and other undesirable activities. In this respect and when applied across massive spaces of open sea, it indicates the necessity for a policy, nowadays more formally known as Oceans Policy, to manage a nation's ocean estate and secondly, to impose appropriate methods of control to uphold the security of those national assets.

During the mid to late 1970s, as a direct consequence of the ongoing deliberations by Committee Two, countries around the world declared 200-mile zones

1 R.R. Churchill and A.V. Lowe, *The Law of the Sea*, 3rd ed., Melland Schill Studies in International Law, Manchester: Manchester University Press, 1999, p. 16.

with astonishing frequency.² India declared a zone on 28 May 1976 and Mexico in June 1976.³ The French Cabinet issued an official communiqué on 16 June 1976 announcing a draft law to establish a 200 nautical mile economic zone.⁴ Canada intended its 200-mile EEZ to come into force on 1 January 1977, as did Norway and the US on 1 March 1977. The UK also intended something similar for 1 January 1977 but faced delimitation talks with France, Denmark and Iceland.⁵

The New Zealand government appears to have been more cautious in its approach than those of other countries, partly perhaps because of lessons learned a few years earlier in its dispute with Japan over the twelve-mile fishing zone.⁶ Although the government was clear in its ambitions to declare a 200-mile Exclusive Economic Zone (EEZ), it consulted other South Pacific Forum nations to form a consensus for the smaller nations to likewise declare 200-mile zones on an agreed date in the South Pacific Region.⁷ In September 1977 the Port Moresby Declaration led many Pacific nations, including Australia, to declare 200 mile nautical mile exclusive fishing zones.⁸ Happily for New Zealand and other South Pacific countries, the Japanese also moved to establish a 200-mile zone. The New Zealand embassy in Tokyo reported, 'The Japanese Government will soon announce its intention to establish a 200 mile offshore fishery zone. This should simplify our negotiations with the Japanese over the question of access to the surplus in the New Zealand zone. There can now be no question of the willingness of the Japanese to accept a New Zealand 200 mile zone.'⁹

The New Zealand government's intentions for the 200 mile zone were introduced to Parliament in May 1977. The four main purposes of the Bill were:

- 1 To extend the territorial waters from three to twelve miles.
- 2 To establish a 200-mile economic zone.
- 3 To leave untouched, essentially, the concept laid down in the Continental Shelf Act 1964, except that where the continental shelf was less than 200 miles, the zone would extend to that distance. Where the continental shelf was more than 200 miles, the Continental Shelf Act would still apply.
- 4 To apply automatically to the Ross Dependency the twelve-mile territorial

2 Ibid., p. 60.

3 Gazette of India, New Delhi, Friday, 28 May 1976, Bill No. XXVIII of 1976, The Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act 1976.

4 New Zealand Archives, PM 106/22/16, 24 June 1976.

5 Ibid.

6 New Zealand Archives, Briefing from the Secretary for External Relations to the Minister of External Relations (also the Prime Minister) on CP(66) 664, 5 August 1966, in Cabinet Office 21/34/1 – Law and Justice – Japanese Fishing: Future Action in the Dispute with Japan.

7 Cabinet Economic Committee E(77) M8 Part III, 15 March 1977.

8 P.J. Ward (ed.), *Japanese Long-lining in Eastern Australian Waters, 1962–1990*, Canberra: Bureau of Resource Sciences, 1996, p. 13.

9 New Zealand Archives, PM 106/22/16/1, c. March 1977, Japan: 200 Mile Fishery Zone, Minute to the Minister of Foreign Affairs from the Secretary, Ministry of Foreign Affairs.

sea concept and to give the power to make by order-in-council a 200-mile economic zone off the Ross Dependency.¹⁰

For obvious reasons the declarations of these fishery and exclusive economic zones added another dimension to the subject of maritime security.¹¹

Upholding and maintaining rights that are cognizant with the precepts under which Exclusive Economic Zones and similar areas are held is a problematic exercise. There is a need to be satisfied that human activity in these zones is indeed acting in strict accordance with the law and this requires some form of surveillance and oversight. Traditional notions of maritime security now have to be modified to consider not only legitimate and illegal resource extraction but also issues of a pernicious nature that affect the maritime environment itself. These considerations add another dimension to the endeavours of the Ministries for the Environment in Australia and New Zealand, which are nominally responsible for Oceans Policy. Their previous focus has naturally been more concerned with *terra firma* and matters ashore than with security in its various forms in a three-dimensional nautical domain.

The intention of this chapter is to discuss the merits, efficacy and performance of Oceans Policy as a means of enhancing maritime security in the maritime estates claimed, under the provisions of the *United Nations Convention on the Law of the Sea (LOSC)*,¹² by Australia, New Zealand and briefly the South Pacific countries of the Pacific Islands Forum (PIF).

1 Maritime security

Maritime security is not an easily defined concept because there are so many facets involved.¹³ They range from issues of freedom of navigation, safety at sea, naturally occurring hazardous phenomena, including tsunamis and under-sea volcanoes, piracy and armed robbery,¹⁴ smuggling in its various forms, including humans,¹⁵ to matters of pollution and the irresponsible extraction of valuable resources. However, the obvious factor in maritime security is an economic dimension in respect of trade. Freedom to trade and the unfettered movement of shipping are a vital part of the growth and economic efficiency

10 New Zealand Archives, PM 106/22/16/1, Exclusive Economic Zone Bill, 18 April 1977.

11 New Zealand Archives, PM 106/22/16/1, Minutes of Cabinet Committee on Legislation and Parliamentary Questions, 12 May 1977, L(77) M9 Part 1.

12 *United Nations Convention on the Law of the Sea*, 2 December 1982, 1833 UNTS 3.

13 See Council for Security Cooperation in the Asia Pacific (CSCAP), Study Group on Facilitating Maritime Security Cooperation in the Asia Pacific, Memorandum No. 13, 'Maritime Knowledge and Awareness: Basic Foundations of Maritime Security', December 2007.

14 D. Johnson and M. Valencia (eds), *Piracy in Southeast Asia: Status, Issues, and Responses*, Singapore: Institute of Southeast Asian Studies, 2005.

15 See CSCAP, Study Group on Human Trafficking, Memorandum No. 11, 'Human Trafficking', June 2007.

and effectiveness of the international trading system.¹⁶ A huge amount of cargo is constantly on the sea, conveyed in all manner of ships to a wide variety of destinations. Impediments to the safe transfer of that freight will have damaging economic and social effects throughout the Asia-Pacific region and elsewhere. In recent years, as a consequence of 9/11 and to tighten the security of sea-borne trade, several international measures have been applied, including the International Ship and Port Facility Security (ISPS) Code.¹⁷ It is not surprising that traditional notions of maritime security, which include ‘command of the sea’ and ‘sea denial’, colour the nautical security thinking in the region.¹⁸ However, other factors such as severe environmental impacts that include pollution and destruction of fishing grounds, and tourist attractions such as coral reefs, also merit consideration from the perspective of security. Coastal states are therefore adding another dimension to maritime security in the form of environmental management and resource protection measures.¹⁹ In some instances these instruments are increasingly being referred to as Oceans Policy.

2 Oceans Policy and Australia

In 1998 the Australian government released two documents entitled *Australia’s Oceans Policy*, setting in place ‘the framework for integrated and ecosystem-based planning and management for all of Australia’s marine jurisdictions. The two documents comprehensively include a vision, a series of goals and principles and policy guidance for a national Oceans Policy.’²⁰ The Prime Minister, then John Howard, declared that the policy ‘requires partnerships between all spheres of government, the private sector, and the scientific and wider communities’.²¹ Australia was the first country to demonstrate its intent of how to manage its newly declared ocean estate and ‘the policy was recognized internationally as a milestone in marine resource management’.²²

16 See CSCAP, Working Group on Maritime Cooperation, ‘Memorandum No. 8, ‘The Weakest Link? Seaborne Trade and the Maritime Regime in the Asia Pacific’, April 2004.

17 The International Ship and Port Facility Security Code is an amendment to the *International Convention for the Safety of Life at Sea*, 1 November 1974, 1184 UNTS 278. See IMO International Ship and Port Facility Security Code, adopted at the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974, 12 December 2002, IMO Doc. SOLAS/CONF.5/34, Annex 1, Conference Resolution 2, pp. 2–91.

18 G. Till, *Maritime Strategy in the Nuclear Age*, London: Macmillan, 1982, chapter 4.

19 See CSCAP, Working Group on Maritime Cooperation, Memorandum No. 6, ‘The Practice of the Law of the Sea in the Asia Pacific’, December 2002.

20 Commonwealth of Australia, *Australia’s Oceans Policy*, Canberra: Environment Australia, 1998, available online at www.environment.gov.au/coasts/oceans-policy/index.html.

21 J. Howard, ‘A Message from the Prime Minister’ in Commonwealth of Australia, *Australia’s Oceans Policy: Caring, Understanding, Using Wisely* v1, *ibid.*, p. 1.

22 J. Vince, ‘Ten Years of Implementing Australia’s Oceans Policy: From an Integrated Approach to an Environmental Policy Focus’, *Maritime Studies* v159, March–April 2008, pp. 1–10.

After wide public consultation, the essential intent of the Oceans Policy defined by the Australian government was:²³

To provide a strategic framework for the planning, management and ecologically sustainable development of Australia's fisheries, shipping, tourism, petroleum, gas and sea bed resources while ensuring the conservation of the marine environment.²⁴

The articulation of an Oceans Policy was indeed a bold and imaginative public policy initiative by the Australian government – it had never been formulated previously. The two documents are now a point of reference, giving guidance and principles of direction to policy-makers around the vast coast as well as all sectors and members of society on how their magnificent oceans will be strategically managed and governed.²⁵

In these documents a wide range of factors are considered and integrated into a coherent, orchestrated plan and strategy. The management of fishing activities, marine tourism, extraction of hydrocarbons and other minerals, shipbuilding and maritime transport are all considered, as well as guidelines for new investments in new industries. Likewise the effects on the ecology of the ocean from malevolent use and pollution are also comprehensively addressed. For example, it is acknowledged that pollution from land-based activities is a particularly difficult issue to manage, with international consequences. Underpinning these considerations is the recognized necessity for scientific research, including oceanography, hydrography and meteorology, thus leading to greater awareness and understanding of the natural environment. Of particular importance is the understanding that:

managing oceans on a purely sectoral basis (i.e. each industry sector and ocean user doing basically 'its own thing') is dysfunctional, with a 'tyranny of small decisions'. It does not recognize the 'interconnectedness' of ocean uses and submerges the conflicts of interest that can emerge, particularly the basic tension that invariably arises between wealth creation interests (or economic uses) on the one hand and marine environmental protection on the other.²⁶

Taking this observation to its logical conclusion indicates that 'ocean management' is indeed an international and trans-border activity. Giving the policy greater scope and potency is an express provision for intergenerational equity. This is to prevent deleterious use of the oceans today, which could thereby jeopardize the interests of future generations. Binding the original policy together were the yet to be developed reporting and assessing mechanisms, but the intent

23 Commonwealth of Australia, note 20.

24 S. Bateman, 'Australia's Oceans Policy and the Maritime Community', *Journal of the Australian Naval Institute* v26, January–March 2000, p. 7.

25 Commonwealth of Australia, note 20.

26 Bateman, note 24, p. 6.

to do so was clearly evident. The matter of policing and surveillance, including that of an ecological nature, would necessarily extend beyond Australia's EEZ to be effective. To coordinate the implementation of regional maritime plans under the new policy the government established the National Office of Oceans (NOO), located in Hobart, which reported as a separate agency to the Minister of the Environment.²⁷

A review in August 2002 examined three broad sectors of the Oceans Policy, '(1) progress in implementation, (2) progress in the development of regional maritime plans and (3) most importantly, the effectiveness of institutional and governance arrangements in supporting and implementing the policy'.²⁸ The study identified a number of issues of coordination that had to be resolved but its most important recommendations emphasized a national approach to directing Oceans Policy, with a permanent office located in Canberra where staff could easily interact with departments and Ministers to improve stakeholder engagement. Subsequent developments in the ensuing years included the establishment of the Oceans Board of Management and the Science Advisory Group.²⁹ Unfortunately the NOO lost its stand-alone status and was subsumed into the Environment Ministry – this meant, in effect, that Oceans Policy coordination and development became another task of that Ministry. Although Oceans Policy is recognized as being of significant importance, it seems to have been absorbed into a bureaucratic maze and, as a result, its potency has diminished.

However, other stakeholders, including the National Environmental Law Association (NELA), began to advocate the merits of an Oceans Act as legislative grounding for Oceans Policy. In 2006 the NELA in conjunction with the Australian Conservation Federation (ACF) released a report entitled *Out of the Blue: An Act for Australia's Oceans*.³⁰ The ACF and NELA 'hoped that this document would "kick-start" a discussion on Australian oceans governance'.³¹ The report put forward a number of recommendations, including the development of an Australian Oceans Authority.³² Although it is not specifically clear, it is likely that the impetus for the *Out of the Blue* report came from consideration of the *Oceans Act 1996* (Canada).³³ Sections 29–34 of that instrument provide specific instructions to:

lead and facilitate the development and implementation of a national strategy for the management of estuarine, coastal and marine ecosystems in waters that form part of Canada or in which Canada has sovereign rights under international law.

27 Vince, note 22, p. 1.

28 Ibid., p. 3.

29 Ibid., p. 4.

30 Australian Conservation Foundation (ACF) and National Environmental Law Association (NELA), *Out of the Blue: An Act for Australian Oceans*, March 2006, Carlton: ACF and NELA.

31 Vince, note 22, p. 7.

32 Ibid.

33 *Oceans Act* SC 1996 c. 3.1 (Canada).

This innovation gives a legislative basis to policy. The concluding perceptive sentence in Dr Joanna Vince's excellent overview of 'Ten Years of *Australia's Oceans Policy*' states, 'Pushing the debate for an Oceans Act may be the key to putting "oceans" back on the government's agenda.'³⁴

Practical responses to the need for knowledge about what is happening at sea include, in the case of Australia, 'the Border Protection Command (BPC), staffed from the Australian Defence Force, Fisheries, Customs and Quarantine and is responsible for managing maritime domain awareness, surveillance, response planning and response operations to control the security of Australian maritime zones'.³⁵

3 Oceans Policy and New Zealand

In New Zealand in a parliamentary debate in 1976 the Prime Minister, Robert Muldoon, offered the opinion that:

There is not the slightest doubt that, if the Law of the Sea Conference takes the course that is apparent at the moment but not firmly certain, it will be the most important economic event in this country's recent history, and will require from New Zealand a vast effort to exploit and administer the fourth largest area of sea in the world.³⁶

Since he made his remarks New Zealand has yet to compose and articulate a comprehensive Oceans Policy for the well-being of the nation's maritime estate.

Successive governments since Prime Minister Muldoon made his exhortation have wrestled with the articulation of an Oceans Policy. The fact that such an instrument has not yet been formulated may indicate to those who are 'resource-hungry' that perhaps New Zealanders do not care about the resources with which they have been entrusted and endowed under the rules of the *LOSC*. Included in a cable from the New Zealand Ambassador in Tokyo about the proposal to declare an Exclusive Economic Zone was this little gem about Japanese perceptions of New Zealand and its people.

There are natural resources of great variety (including fish) which, it is assumed, are left largely unexploited by a scattered, easygoing and probably backward population.³⁷

Although the promise of maritime resources excited the fishing industry of

34 Vince, note 22, p .9.

35 D. Woolner, *Policing our Ocean Domain: Establishing an Australian Coast Guard*, Strategic Insights 41, Canberra: Australian Strategic Policy Institute, June 2008, p. 6.

36 New Zealand Government, Parliament, House of Representatives, *New Zealand Parliamentary Debates* v405, 12 August 1976, p. 1581.

37 NZA PM 106/22/17/2, Cable from Tokyo to Wellington, 16 March 1977, p. 2.

New Zealand – and probably others too – the proposal to claim a 200-mile Exclusive Economic Zone did not curry universal enthusiasm. The Secretary of Defence, (later Sir) John Robertson, reportedly said that New Zealand was woefully unprepared to administer the proposed zone because it lacked a basic knowledge of the minerals lying offshore and the basic research into fishing and other relevant industries.³⁸ With disdain he is reported to have said, ‘Some critics have described this as the biggest land grab in history – ten countries stand to get 30 per cent of the area appropriated.’³⁹ There is some truth in his remarks – Churchill and Lowe suggest that over 90 per cent of all commercially exploitable fish stocks lie within 200-mile zones. Furthermore, 87 per cent of the world’s known submarine oil deposits also fall within the 200-mile limits.⁴⁰

The Secretary for Foreign Affairs wrote to his Minister suggesting that on the initiative of the Prime Minister a Cabinet Policy Committee would be created, ‘for the development of New Zealand’s offshore resources’. He had the foresight to consider this subject under what is now referred to as Oceans Policy.⁴¹ The important feature in all of this is that a ‘strategy’, to develop, to manage, to benefit or to protect the Ocean Estate of New Zealand has proved to be elusive. It is an extraordinary fact that since that time, a generation ago, an Oceans Policy, let alone a strategy on which that policy is based, has yet to be articulated for New Zealand, even though several knowledgeable authorities in New Zealand have suggested that the nation’s ocean estate could be worth billions in earnings.⁴²

A submission to the Foreign Affairs, Defence and Trade select committee outlined the strategic benefits and national responsibilities in 1997, a year after New Zealand ratified the provisions of UNCLOS III. The submission contended that the protection and policing of New Zealand’s oceanic resources was a task additional to that of traditional and other security concerns and that ‘a modest investment in appropriately equipped Ocean Patrol Vessels would benefit the national interest’.⁴³

Other groups in New Zealand sought to bring to the attention of the public the nation’s newly acquired maritime estate. The Centre for Advanced Engineering at the University of Canterbury organized a major conference in 1999 to address the potential of the New Zealand maritime estate and published a report in 2001

38 New Zealand Archives, W4627, Series 950, Box 2516 106/22/12 42B, Proposals to Modify Existing Law of the Sea, 03/76-05/76. Article from the *Evening Post*, Wellington, 31 May 1976.

39 *Ibid.*

40 Churchill and Lowe, note 1, p. 162.

41 NZA PM 106/22/16, undated, c. June 1976.

42 M. Quirke, ‘Oceans “worth billions” to New Zealand’, *The Dominion*, Wellington, 11 October 2001.

43 P. Cozens, ‘Maritime Security Implications of New Zealand’s Maritime Boundaries and Continental Shelf’, Submission to the Foreign Affairs, Defence and Trade Select Committee, Wellington, 18 September 1997, p. 4.

entitled *Our Oceans: A Journey of Understanding*.⁴⁴ The report contains seven brief sections addressing topics associated with taking responsibility and the acquisition of knowledge. Only one part of the report addressed the subject of the protection of the resource – but in a limited way this could be construed as referring to the matter of security. Nonetheless it is clear that this priceless asset and its security have, as yet, to capture the imagination of many New Zealanders. At the conference, Emeritus Professor of Economics at Victoria University Sir Frank Holmes observed that:

Given how close all of us living here are to the sea, and given the size of our marine estate, it is perhaps surprising that the oceans and our maritime interests do not feature more prominently in our national life and in the policies of our governments. If we do want the sustainable development of our marine industries and services to play a leading role in the next phase of our progress, then much more systematic thought will have to be given to the opportunities and potential problems which would be involved.⁴⁵

In 2001 the Department of the Prime Minister and Cabinet published the Maritime Patrol Review, which examined the nation's civil and military requirements for patrolling its ocean areas.⁴⁶ Recommendations included the establishment of a Maritime Coordination Centre to 'develop all elements of maritime patrol and surveillance'.⁴⁷ A scheme to acquire seven new ships for the Royal New Zealand Navy – Project Protector – was the result of a further review that identified the newly identified tasks.⁴⁸

In 2002 the Ministry for the Environment, the government's lead agency for Oceans Policy, commissioned an 'Oceans Policy Stocktake' – and this makes disturbing reading.⁴⁹ Included in the overview of the report were many criticisms, the essence of which was that 'There is no explicit overarching goal for managing the marine environment. . . .'⁵⁰ The section 'Compliance and Enforcement' mentions that extensive compliance and enforcement provisions are incorporated into statutes. However, the authors of the review raised questions around the ability to enforce those provisions.⁵¹ This reveals, from one perspective, a lack of governmental coordination, especially in respect of the provisions of Project Protector and the intention to enhance the physical security of the maritime estate by the

44 Centre for Advanced Engineering, *Our Oceans: A Journey of Understanding*, CAE Comments Series 1, Christchurch: Centre for Advanced Engineering, 2001.

45 Ibid.

46 New Zealand Government, Department of the Prime Minister and Cabinet, *Maritime Patrol Review*, Wellington, February 2001.

47 Ibid.

48 Refer to www.navy.mil.nz/visit-the-fleet/project-protector/.

49 G. Willis, J. Gunn and D. Hill, *Oceans Policy Stocktake, Part 1: Legislation and Policy Review*, paper prepared for the Oceans Policy Secretariat, November 2002, p. 3.

50 Ibid.

51 Ibid., p. 6.

Ministry for the Environment. Alternatively, the idea that the protection of the maritime environment can be upheld by the publication of some smooth arrangement of words is preposterous. Some of the statements about an Oceans Policy for New Zealand include the following:

New Zealanders having confidence in, supporting and participating in the wise management, stewardship and sustainability of New Zealand's oceans . . .

New Zealand's oceans providing the best possible value for New Zealand society now and in the future . . .⁵²

Although that report was compiled in 2002 one wonders how much progress has in fact been made in respect of hard-nosed security. According to the Ministry for the Environment, the New Zealand Defence Force is listed as a Secondary Agency in respect of having key responsibilities and functions for marine management. It is interesting to note that neither the Ministry of Defence nor the Treasury is included in either the key or secondary lists of government agencies relating to the management, which presumably would include issues of security of the oceans.⁵³

An idea of how the government approached the subject is revealed in the following statement from the Ministry for the Environment's Web page (in which the Cabinet approved a vision statement for the new policy work in 2005) as 'Healthy Oceans: wisely managed for the greatest benefit of all New Zealanders, now and in the future'.⁵⁴ Another study from the Department of Land Information New Zealand, published in March 2005, entitled 'Emerging Trends in the Ocean Environment', took a long-term strategic approach to the management and security of the maritime estate.⁵⁵ Contained within its pages is a reference to a strategic approach and the recognition of shortcomings: 'the current management regime of ocean resources is both fragmented and cumbersome. Our ocean territory would benefit from a strategic approach to the future of the oceans and a better understanding of the ocean environment (the ocean estate)'.⁵⁶ The report identified likely 'potential activities with the ocean estate including mineral extraction (gold, phosphates, salt, etc.); marine farming; marine protection; further tourism; bio-prospecting (sea mounts, active submarine volcanic vents and canyons); and energy generation (waves/offshore wind farms, tidal currents, ocean thermal exchange)'.⁵⁷ The study concluded with an exhortation that 'it is essential an economic, ecological and strategic position is adopted for this "new frontier"'.⁵⁷

52 Refer to www.mfe.govt.nz/issues/oceans/previous-work/stage-one.html.

53 Ibid.

54 Ibid.

55 New Zealand Government, Land Information New Zealand (LINZ), *Emerging Trends in the Ocean Environment*, Wellington, March 2005, pp. 1–77.

56 Ibid., p. 8.

57 Ibid.

New Zealand must be “strategically” ready to protect its national interest and sovereign rights.⁵⁸

The report also rightly observed that ‘Increasingly the northern hemisphere is looking “down under” for new resources such as fish and minerals to exploit.’⁵⁹ This factor is reported in other highly regarded international journals, including *Foreign Affairs*, where Emeritus Professor John Temple Swing of the Foreign Policy Association discusses the critically pertinent question ‘What Future for the Oceans?’⁶⁰ His article argues that, although there is bound to be exploitation of mineral and organic assets within ocean estates, an even more deadly threat is that of pollution and the unintended transfer of pernicious organisms from one part of the world to another, with catastrophic consequences for the local environment. The subject of protection of resources therefore takes on another characteristic altogether. Issues of quarantine come readily to mind.

The ‘Emerging Trends’ report was perhaps the signal for the next stage of progress towards managing the ocean estate. Official thinking was revealed on 16 March 2005 when the government embarked on its Oceans 20/20 project,⁶¹ the vision of which is to complete by the year 2020 an ocean survey that will provide New Zealand with the knowledge of its ocean territory. The geographical area covered by the programme is primarily New Zealand’s EEZ, the continental shelf and the Ross Sea region. The programme is intended to:

- 1 Demonstrate stewardship and exercise sovereign rights.
- 2 Conserve, protect, manage and sustainably utilize ocean resources.
- 3 Facilitate safe navigation and enjoyment of the oceans around New Zealand.⁶²

These points illustrate that at least one government department other than those associated with security, broadly defined, accepted the need for a whole-of-government approach. In New Zealand the National Maritime Coordination Centre (NMCC)⁶³ provides a similar and analogous role to its Australian counterpart, the Border Protection Command.

There are some real problems that the New Zealand government has to wrestle with, not least the ‘foreshore and seabed’ controversy that involves complex issues of indigenous people’s rights and the robust political debate associated with it.⁶⁴ However, a nervous approach to this question risks the opportunity for positive

58 Ibid.

59 Ibid.

60 Swing, note 58.

61 New Zealand Government, LINZ, Launching the next Era of New Zealand Discovery, 16 March 2005, available online at www.linz.govt.nz/about-linz/news-publications-and-consultations/news-and-notices/archive/2005/20050322-next-era/index.aspx.

62 New Zealand Government, LINZ, ‘Ocean Survey 20/20’, 23 October 2007, available online at www.linz.govt.nz/hydro/projects-programmes/ocean-survey-2020/index.aspx.

63 New Zealand Government, Department of the Prime Minister and Cabinet, note 45, p. 33.

64 *Foreshore and Seabed Act 2004* (NZ); *Resource Management (Foreshore and Seabed) Amendment Act 2004* (NZ).

action and is thus a loss for all. Unfortunately the controversy over indigenous rights has stymied further progress on the matter of Oceans Policy – a detailed and exhaustive account of this legal *mêlée* by Joanna Vince describes the complexities future administrations have to face.⁶⁵ Nonetheless it is evident that this logjam has to be cleared, and the government, led by Prime Minister John Key, in which he has wisely included the Maori Party, needs to tackle this thorny issue.

4 Oceans policy and the South Pacific

The Pacific Islands Forum has developed an Oceans Policy.⁶⁶ Notwithstanding the obvious lack of substance with which to enforce it or indeed how to patrol and survey the vast Exclusive Economic Zones of its member states, a statement that captures the essence of the Pacific Islands Regional Oceans Policy (PIROPS) merits mention. Here are some selected quotes from that document:

You may have your eyes turned towards exploration of the galaxies;
 But here, on the home planet, there are many secrets and wonders waiting to be revealed;
 Mother Ocean has already given much;
 What further gifts has she to offer the family of the Pacific and the world?
 Join with us in discovering and protecting them.⁶⁷

It is perhaps quite surprising that the now deposed Prime Minister of Fiji should have chosen the statement ‘Join with us in discovering and *protecting* them’,⁶⁸ meaning the resources of the people of the Pacific. It is a powerful message. The meaning from the then Prime Minister Qarase is even more pertinent when one considers New Zealand’s constitutional responsibilities to the states of Tokelau, Niue, the Cook Islands and the Ross Dependency in Antarctica.⁶⁹ New Zealand and Australia’s association with other Pacific neighbours is obvious. Clearly here are opportunities for further engagement to assist in protecting and developing their resources.

Perhaps it is timely to reconsider the language used by Laisenia Qarase to stimulate our collective imagination about the oceans once again. A new story,

65 J. Vince, *New Zealand Oceans Governance: A Safe Harbour or a Lee Shore?* Australasian Political Studies Association Conference, Brisbane, Queensland, 6–9 July 2008, pp. 9–10.

66 Pacific Islands Forum, ‘Pacific Island Regional Oceans Policy’, Secretariat of the Pacific Community, 25 February 2004, available online at www.spc.int/piocean/forum/New/policy2.htm.

67 Hon. L. Qarase, Prime Minister of Fiji, Opening Address of the Pacific Islands Regional Ocean Forum (PIROF), 2–6 February 2004, University of the South Pacific, Suva, p. 3.

68 Ibid.

69 New Zealand Government, Ministry of Foreign Affairs and Trade, 18 October 2007, available online at (1) Cook Islands, www.mfat.govt.nz/Countries/Pacific/Cook-Islands.php; (2) Niue www.mfat.govt.nz/Countries/Pacific/Niue.php; (3) Tokelau www.mfat.govt.nz/Countries/Pacific/Tokelau.php; (4) Antarctica www.mfat.govt.nz/Foreign-Relation/1-Global-Issues/Antarctica/1-New-Zealand.

similar to that by Jules Verne in his book *Twenty Thousand Leagues under the Sea*, in which Captain Nemo and his crew of the *Nautilus* take Professor Arronax and his two colleagues on an epic underwater voyage of discovery, could well be a vehicle to excite public interest in the well-being and security of the oceanic domain. Myth-making associated with legend and cultural influences are powerful tools for formulating policy. Australia and New Zealand's early European history is riddled with nautical song, myth and legend, including the arrival of the early settlers complete with deeds of derring-do and remarkable voyages of discovery, as in the case of James Cook and Matthew Flinders – it is interesting to note that these remarkable men have universities named after them in Australia and are powerful reminders of a maritime connection. The Maori people of New Zealand and the differing ethnicities of Polynesia draw on their respective legendary ancestries to guide them through the vicissitudes of contemporary globalized existence. The Maori often refer, as did their forebears, to their *waka* (canoe) as a vehicle in which to navigate turbulent seas. It is not uncommon for politicians of all hues in New Zealand to refer to *waka* to convey ideas of a ship of state in which to carry and safely deliver something of value into the future. The heritage of many in Australia and Aotearoa/New Zealand is intimately associated with the sea and if sensitively linked with that of the Polynesians would provide a veritable fleet of *waka* with which to carry broad public dialogue and support for the benefits that accrue from prudent stewardship of the maritime estate to enhance regional maritime security.

5 Oceans policy and maritime security

Both the Border Protection Command in Australia and the National Maritime Coordination Centre (NMCC) in New Zealand appear to have grasped the importance of the concept of Maritime Domain Awareness (MDA).⁷⁰ This premise was derived from an inter-agency exercise in the US in response to the so-called 'war on terror' but in a maritime context. It is beginning to be recognized as a basis on which to develop a whole-of-government approach in New Zealand to matters of Oceans Policy in which maritime security is an integral part. Work in progress to facilitate a medium-term strategy for the NMCC is likely to define MDA as:

The effective understanding of anything associated with the maritime environment that could impact the sovereignty, security, safety, economy, environment or foreign policy interests of New Zealand.⁷¹

70 See 'Key Definitions: Maritime Domain Awareness' in United States Government, Department of Homeland Security, 'National Plan to Achieve Maritime Domain Awareness for the National Strategy for Maritime Security', October 2005, available online at www.dhs.gov/xlibrary/assets/HSPD_MDAPlan.pdf, p. 1.

71 Work in progress, *c.* December 2008.

There is something of a bureaucratic awkwardness in these pragmatic responses by Canberra and Wellington in as much as the Ministries for the Environment do not appear to be involved on an operational basis with the direct protection of maritime zones. This exclusion appears to dilute the potency of Oceans Policy in Australia and indeed the gestation of a robust whole-of-government approach to the subject in New Zealand. In her authoritative review of the Australian Oceans Policy, Joanna Vince bemoans the view ‘that “oceans” as a singular policy issue was no longer a priority for either major party as it was during the 1996 federal election. On 24 November 2007, a new Federal Labor Government was elected and nine years of Oceans Policy implementation under the coalition ended.’⁷² An initial response to this matter would be to raise a question of whether a legislative or a policy approach to management of the maritime estate is the optimum methodology. An audit report by the Commissioner of the Environment in Canada for that country’s oceans management strategy concluded that the ‘promise of the Oceans Act has not been fulfilled. Indeed, implementing the Act and the oceans strategy has not been a government priority.’⁷³ One could conclude that although the governments of Australia, New Zealand and Canada were keen to claim their ocean estates under the provisions of the *LOSC* and to benefit financially accordingly, they have been rather tardy in producing the substance to manage them adequately and comprehensively. Is this sorry state of affairs a matter of complacency and therefore a lack of political will? Are there any other approaches that could stimulate the performance of government in Australia and New Zealand?

6 Maritime heritage and knowledge

Since the formation of the British Ministry of Defence in 1964, out of the War Office, the Air Ministry and the Admiralty, many responsibilities of these powerful agencies have been devolved to other public service agencies. The Admiralty was responsible for an extraordinarily worldwide spectrum of maritime affairs, including maritime security. A similar dilution of responsibility has happened in Australia and New Zealand. In New Zealand, for example, the Hydrographic Office of the Royal New Zealand Navy has been passed to Land Information New Zealand.⁷⁴ The dissipation of this heritage, knowledge and influence complicates a comprehensive and coherent approach either of a legislative or policy nature to the management and security of the ocean estates. Within Australia, New Zealand and South Pacific maritime circles there is a significant reservoir of

72 Vince, ‘Ten years of implementing *Australia’s Oceans Policy*’, note 22, p. 8.

73 J. Gélinas, Canadian Commissioner of the Environment and Sustainable Development, ‘Fisheries and Oceans Canada: Canada’s Oceans Management Strategy’, Opening Statement to the Standing Committee on Fisheries and Oceans, Ottawa, 22 November 2005, available online at www.oag-bvg.gc.ca/internet/English/osh_20051122_e_23422.html, p. 1.

74 New Zealand Government, LINZ, ‘Charts and Hydrographic Services’, available online at www.linz.govt.nz/hydro/index.aspx.

wisdom and knowledge beyond purely day-to-day operational issues that is not necessarily appreciated by senior decision makers, whether in government service, the broader community or indeed within the major political parties.

Perhaps one should not be too negative about the lack of maritime awareness in the corridors of power. There are some signs that in New Zealand the government is beginning to once again realize the merits of maritime transport. It appears, however, that this new appreciation is driven more by concerns about the environment and greenhouse gas emissions than the efficient conveyance of goods.⁷⁵ On 20 May 2008 the government announced its approach to coastal shipping under the title 'Sea Change – the Final Strategy', in which the Minister of Transport articulated a plan to encourage coastal shipping.⁷⁶ Although this initiative is welcome it also reveals that there is a paucity of understanding in official circles about maritime matters in general and by extension to the broader issues of comprehensive maritime security.

It is axiomatic that harnessing this knowledge and experience would be of significant benefit to legislators and policy-makers. Much of this maritime knowledge has direct and indirect implications and associations with all corners of Australasian society. It was the exercise of sea power, formed from its sources and elements, that allowed the UK to exercise command of the sea in what were then distant waters.⁷⁷ This so-called sea power enabled many significant scientific discoveries, and these, in turn, affected maritime security.

Two important but unrelated historical events support this contention. The first was the voyages of James Cook to the Asia-Pacific and the flowering of knowledge in several disciplines, including, navigation, botany and anthropology.⁷⁸ The second was HMS *Challenger's* epic four-year voyage of scientific exploration that started in 1872 to explore the seabed of planet Oceanus.⁷⁹ There were many beneficial outcomes resulting from *Challenger's* intrepid voyage: 'it set the scene for the plate tectonic revolution of the 1960s and 1970s . . . and the cataloguing of sea floor sediments . . . led the way, in the middle of the twentieth century, to the unravelling of the history of climate change, so vital for our own future on a warming earth'.⁸⁰ Research from the scientists, or 'scientific', as they were more popularly referred to on board HMS *Challenger*, opened many new avenues for enquiry and the acquisition of knowledge about the oceans of the world.

A new appreciation of the local and regional maritime domain by Canberra, Wellington and the Pacific Island Forum that draws on this maritime heritage is

75 New Zealand Government, Ministry of Transport, 'Transport Overview Cabinet Minute', 23 June 2008, available online at www.transport.govt.nz/transport-overview-cabinet-minute/.

76 Hon. A. King MP, New Zealand Minister for Transport, 'Sea Change: The Final Strategy', speech delivered at the launch of the Sea Change Strategy, Museum of Wellington, 23 June 2008, available online at www.beehive.govt.nz/speech/sea+change+---+final+strategy.

77 Till, note 18, p. 76.

78 J.C. Beaglehole, *The Life of Captain James Cook*, London: Adam & Charles Black, 1974.

79 R. Corfield, *The Silent Landscape*, London: John Murray, 2004.

80 *Ibid.*, pp. 249–52.

needed. Consideration of this circumstance prompts the question of how all the facets of maritime enterprise in Australia, New Zealand and the PIF will be coordinated into a rational whole. Although primary production and the excavation of mineral wealth and subsequent conveyance to industrial destinations is the essential basis of Australasia's contemporary economic prosperity, the huge maritime estate of both nations offers, as yet, an unquantified rich source of economic opportunity. Political awareness in Wellington and Canberra of this potential appears to be limited but it is likely that other less naturally well endowed but powerful countries recognize the prospects for the development of these assets.

An initial response to this matter would be to significantly elevate the functions and responsibilities of the two Oceans Policy agencies in Australia and New Zealand to take a far more proactive and high-level role in disseminating information as well as providing a forum for discussion about each nation's ocean estate. In Canberra the NOO has been subsumed by the Department for the Environment,⁸¹ and in New Zealand the Oceans Policy Secretariat has likewise disappeared into the Ministry for the Environment. An effect of these changes has been to reduce the perception of a whole-of-government approach to the management of ocean territories. A bold and imaginative approach to reconstitute these offices on the one hand to service the various coordinating committees in Canberra and Wellington such as the Oceans Board of Management⁸² but also to act as information centres to publish regular bulletins for the public is overdue. Stimulating public awareness of all aspects of oceans management, including maritime security, will enhance understanding. It would also inspire support, particularly from those members of society who have so much experience and maritime knowledge to share and pass on. An example of what ought to happen locally is provided by a relatively recent meeting of concerned individuals acting in an international context.

In December 2004 a group of well-qualified individuals met for the third time in as many years to consider the numerous questions associated with the 'Changing Relationship between Man and the Ocean and Changes in Security Concepts'. A précis of their deliberations is the so-called 'Geo-agenda for the Future: Securing the Oceans – Adoption of the Tokyo Declaration on Securing the Oceans'.⁸³ The declaration discusses broad questions of how to harmonize the principle of ocean governance with the sovereignty of coastal states and the need to strengthen cooperative relationships for the comprehensive security of the oceans. These high ideas, however, depend on that critical balance between national interest and international obligations. Although many governments have declared EEZs and have taken measures to benefit from the adjacent

81 Vince, 'Ten years of implementing *Australia's Oceans Policy*', note 22, p. 7.

82 Ibid.

83 Tokyo Declaration on Securing the Oceans, Tokyo, Institute for Ocean Policy, Ship and Ocean Foundation, 3 December 2004.

maritime resources, the development of Oceans Policies to govern and provide security for them adequately is yet to be fully realized. However, the so-called Tokyo Declaration provides a goal for policy-makers in Australia, New Zealand and Oceania to see beyond their own parochial interests to provide much improved arrangements that enhance security for all.

Although the Oceans Policy of New Zealand has yet to be articulated, there are signs that it is at an advanced stage of preparation, notwithstanding the requirement for some statesmanlike political accommodation over indigenous customary rights. In Australia it is clear that the subject of Oceans Policy has significant vigour and intensity to rise to prominent national consciousness again. Although it is axiomatic that safe maritime trading depends in large measure on maritime security, there is increasing evidence that the ocean requires protective security. Although the ocean has been a benevolent highway for the carriage of goods in the past, there is now a need to protect the sea itself and indeed the oceans from the effects of unsustainable and destructive fishing practices, pollution, acidification of coral reefs and the dumping of sewage and other untreated materials, particularly in coastal waters. This will require the vigorous implementation of Oceans Policy underpinned by significant and ongoing political will on both sides of the Tasman.

10 Act of State Doctrine in the Antipodes

The Intersection of National and International Law in Naval Constabulary Operations

*Cameron Moore**

The Royal New Zealand Navy (RNZN) and the Royal Australian Navy (RAN) have been stopping and boarding vessels in the Arabian Gulf intermittently since 1990 to enforce United Nations (UN) Security Council resolutions.¹ Such operations are a type of naval constabulary operation. Naval constabulary operations are coercive operations for a national or international law enforcement purpose and are a significant part of each navy's contribution to New Zealand and Australian maritime security.² They are quite distinct from the conduct of naval warfare. In the international law of the sea, the right of a state to enforce UN Security Council resolutions, or national laws, balances against the rights afforded to states by the 1982 *United Nations Convention on the Law of the Sea (LOSC)*³ to have their vessels exercise innocent passage⁴ in territorial seas and freedom of

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1 UN Resolution on the Situation concerning Iraq, SC Res. 1790, UN Doc. S/RES/1790 (2007); UN Resolution on Iraq–Kuwait, SC Res. 665, UN Doc. S/RES/665 (1990).

2 See Australian Government, Royal Australian Navy, *Australia's Maritime Doctrine (RAN Doctrine 1 2000)*, Canberra: Defence Publishing Service, 2000, available online at www.navy.gov.au/w/images/Amd_prelim.pdf, pp. 65–9. New Zealand does not appear to define naval constabulary operations in doctrine as such but nonetheless carries out operations that would meet this description, such as in the Arabian Gulf and to enforce New Zealand fisheries laws; see further below.

3 For the majority of States which are party to it. *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 [hereinafter *LOSC*].

4 Innocent passage is a limited right of surface navigation for foreign ships in the territorial sea, which extends up to twelve nautical miles from the coast. *Ibid.*, Articles 3, 17.

navigation⁵ in international waters.⁶ As international law essentially involves obligations between states, neither New Zealand nor Australia's international treaty obligations are a direct part of the national law of either country unless incorporated by way of legislation.⁷ Therefore, unless provided for in New Zealand or Australian law, an RNZN or RAN commander is not legally bound or empowered under that law to fulfil his or her own country's international treaty rights or obligations.⁸

While New Zealand and Australia have extensive national legislation for enforcing their coastal state rights, it is virtually silent on enforcement of UN Security Council resolutions and other international enforcement agreements at sea. Both countries rely upon prerogative power to authorize such operations. Such power relies for the most part upon common law authorities. These at times ancient sources of law do not seem to have countenanced fully the modern international law of the *UN Charter*⁹ and international enforcement operations that are not war. This raises the question, what authority really is there in New Zealand and Australian national law to enforce international law instruments like UN Security Council resolutions at sea? Any interference, loss or damage not authorized by national law could give rise to a civil claim. Given that Australia and New Zealand's international naval constabulary operations seek to enforce international law, a successful claim which found a lack of national legal authority could undermine the legitimacy of these international law enforcement efforts. A lack of lawful authority in one aspect could make it difficult to portray the operations as supporting the rule of law overall. This could in turn compromise the maritime security aims of the operations more generally.

This chapter will consider the way in which international law might be, in Australian jurisprudence, a 'source'¹⁰ or 'a legitimate and important influence

5 Freedom of navigation is the freedom to navigate in, under and over international waters mainly subject only to the requirement to give due regard to other users. In the international law of the sea there is a limited list of grounds upon which a state may interfere with freedom of navigation upon the high seas, such as for piracy, slavery and being without nationality. *Ibid.*, Articles 87, 90, 110.

6 See, for example, *ibid.*, Articles 19, 110.

7 *Chow Hung Ching v. R* (1948) 77 CLR 449, para. 471; *Bradley v. Commonwealth* (1973) 128 CLR 557, para. 583; *Ashby v. Minister of Immigration* [1981] 1 NZLR 222, para. 229 (CA).

8 In New Zealand and Australian law, Parliament can also legislate contrary to international law provided that it does so with words which clearly express that intention. Therefore, if there is legislation which clearly affects the right of innocent passage or freedom of navigation, as can occur with customs, immigration or fisheries legislation, then that legislation prevails over international law. *Ashby v. Minister of Immigration* [1981] 1 NZLR 222, para. 229 (CA); *Horta v. Commonwealth* (1994) 181 CLR 183, paras 195-6.

9 *Charter of the United Nations*, 26 June 1945, 1 UNTS 16.

10 *Chow Hung Ching v. R* (1948) 77 CLR 449, para. 477 per Dixon J, citing J.L. Brierley in *Law Quarterly Review* v51, 1935, p. 31, cited by I.A. Shearer, 'The Relationship between International Law and Domestic Law' in B. Opeskin and D. Rothwell (eds), *International Law and Australian Federalism*, Melbourne: Melbourne University Press, 1997, p. 49.

on the common law¹¹ or, in New Zealand jurisprudence, ‘a vital source of relevant guidance’.¹² It will argue that international law in the form of UN Security Council resolutions should inform the content of Act of State doctrine. This is the key common law doctrine which can protect the Crown (a legal representation of the executive arm of the state in New Zealand and Australia) from liability for coercive actions in exercising its prerogative with regard to foreign affairs.

1 International enforcement instruments in New Zealand and Australian legislation

The RAN and RNZN have conducted operations in the Arabian Gulf to enforce UN Security Council Resolution 665 of 1990, for the RAN, in support of UN Security Council Resolution 1546 of 2004, and for both navies, in support of coalition counter-terrorism operations.¹³ In 2008 HMNZS *Tē Mana* returned from a Gulf deployment while in the same year HMAS *Stuart* was on station there.¹⁴ Both navies also arguably had some limited maritime enforcement power in East Timor under UN Security Council Resolution 1264 of 1999 which does not appear to have been exercised.¹⁵ New Zealand has given legislative effect to various UN Security Council resolutions through the regulation-making power under Section 2 of the *UN Act 1946* (NZ). None of the regulations has granted enforcement powers at sea. Where Australian legislation has incorporated UN Security Council resolutions there has been no provision for enforcing them at sea.¹⁶ Section 6 of the *Charter of the UN Act 1945* (Cth) grants a power to the Governor-General to make regulations to give effect to UN Security Council resolutions. This section specifically states, however, that it is only ‘in so far as those decisions require Australia to apply measures *not* involving the use of armed force’ (author’s emphasis).

11 *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1, para. 55 per Brennan J (Mason CJ and McHugh J concurring).

12 *Hosking & Hosking v. Simon Runtig & Anor* [2004] 1 NZLR 1, para. 6.

13 UN Resolution on Iraq–Kuwait, SC Res. 665, note 1; UN Resolution on the Situation between Iraq and Kuwait, SC Res. 1546, UN Doc. S/RES/1546 (2004), as extended by the UN Resolution on the Situation concerning Iraq, SC Res. 1790, note 1. See also New Zealand Government, New Zealand Defence Force, ‘Arabian Gulf’, 25 August 2008, available online at www.nzdf.mil.nz/operations/deployments/arabian-gulf/default.htm and Australian Government, Royal Australian Navy, note 2, p. 67.

14 See New Zealand Government, Royal New Zealand Navy, ‘HMNZS *Tē Mana* in the Gulf’, July 2008, available online at www.navy.mil.nz/visit-the-fleet/te-mana/rec-ent-activities-te-mana/220708.htm; Australian Government, Department of Defence, ‘Operation Catalyst’, 23 June 2008, available online at www.defence.gov.au/opEx/global/opcatalyst/index.htm.

15 UN Resolution on the Situation in East Timor, SC Res. 1264, UN Doc. S/RES/1264 (1999). This is on the basis that operative paragraph 3 gave authority to ‘restore peace and security in East Timor’, which presumably extended to its immediate maritime environment.

16 *Charter of the United Nations Act 1945* (Cth), s. 5, approved the *Charter of the United Nations*, 26 June 1945, 1 UNTS 16.

Beyond UN Charter obligations, the *Regional Assistance Mission to Solomon Islands Agreement* grants enforcement powers to New Zealand and Australia within the Solomon Islands, which also includes Solomon Islands maritime jurisdiction.¹⁷ Australia and France also have separate mutual obligations to assist each other in enforcement at sea under the *France–Australia Maritime Cooperation Agreement*¹⁸ within the Southern Ocean. However, there is no provision in either New Zealand or Australian legislation for either agreement. They presumably rely on the law of France and the Solomon Islands in those jurisdictions as well as upon the prerogative power with respect to New Zealand and Australia. Notably, the *LOSC* also permits enforcement action by all states in international waters for piracy and to a lesser extent slavery.¹⁹ Australia has provided enforcement powers at sea only for piracy,²⁰ although there are criminal offences in Australian legislation for slavery as well.²¹ In New Zealand the *Crimes Act 1961* (NZ) has offences for piracy and slavery²² but no related provision for enforcement at sea.

Overall, New Zealand and Australian practice appears to have been to legislate for enforcement powers at sea where such powers serve a domestic law enforcement purpose, rather than being primarily the conduct of foreign affairs. This has included legislating for a range of international maritime law enforcement instruments such as the *UN Fish Stocks Agreement*,²³ certain aspects of *LOSC* itself²⁴ and, for Australia only, the *Torres Strait Treaty*²⁵ and the *Pacific Fisheries Treaty*.²⁶ Where

17 *Agreement between Solomon Islands, Australia, New Zealand, Fiji, Papua New Guinea, Samoa and Tonga concerning the Operations and Status of the Police and Armed Forces and other Personnel deployed to Solomon Islands to assist in the Restoration of Law and Order and Security*, 24 July 2003, [2003] ATS 17, Article 1(a).

18 *Treaty between the Government of Australia and the Government of the French Republic on Cooperation in the Maritime Areas adjacent to the French Southern and Antarctic Territories (TAAF), Heard Island and the McDonald Islands*, 24 November 2003, [2005] ATS 6, Articles 3–4.

19 *LOSC*, note 3, Article 110. Slavery is important with respect to the discussion of *Buron v. Denman* (1848), 154 All ER 450, below. The Convention also has enforcement provisions for illegal broadcasting but only for ships of states which are particularly connected to the broadcasts, Articles 109–10.

20 *Crimes Act 1914* (Cth), ss. 51–6.

21 *Criminal Code Act 1995* (Cth), Division 270.

22 *Crimes Act 1961* (NZ), ss. 92–98AA.

23 *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 December 1995, 2167 UNTS 88. Schedule 2 of and partially implemented by the *Fisheries Management Act 1991* (Cth), for example in ss. 87A–G. Schedule 1A and Part 6A of the *Fisheries Act 1996* (NZ).

24 For example, *Fisheries Act 1996* (NZ) and *Fisheries Management Act 1991* (Cth).

25 *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the Area known as Torres Strait, and related Matters*, 18 December 1978, ATS 1985, No. 4 being a schedule to and partially implemented by the *Torres Strait Fisheries Act 1984* (Cth).

26 *Agreement among Pacific Island States concerning the Implementation and Administration of the Treaty on Fisheries between the Governments of certain Pacific Island States and the Government of the United States of America of 2 April 1987*, 2 April 1987, [1988] ATS 43, being Schedule 1 to the *Fisheries Management Act 1991* (Cth) and partially implemented for example in ss. 4, 37 and 84(1)(p)and(r).

there is really no domestic law enforcement purpose, as with the enforcement of UN Security Council resolutions or the agreements with France and the Solomon Islands, the legal authority for international naval constabulary operations rests upon the prerogative power.²⁷

2 Prerogative power

Prerogative power is an aspect of executive power. This chapter will use the term 'prerogative power' as the relevant cases use it rather than referring to the broader concept of executive power. Prerogative power is governmental power left in the hands of the executive, which arguably only the Crown can exercise, and which does not require the authority of Parliament through legislation.²⁸ Prerogative power includes such things as the prerogatives with respect to foreign affairs and war.²⁹ Prerogative power in New Zealand derives from the *Letters Patent Constituting the Office of Governor-General of New Zealand* of 1983, which authorizes and empowers the Governor-General to exercise the executive authority of the Queen.³⁰ In Australia, Section 61 of the *Commonwealth Constitution*³¹ provides for the exercise of executive power, which now clearly includes all the prerogative powers of the Crown relevant to the Commonwealth of Australia and capable of exercise in Australia.³² In Australia, particularly, there is a view which prefers reference to executive power.³³ Given that this chapter deals primarily with the existing prerogative with regard to foreign affairs, rather than the potentially broader powers contained in Section 61 of the *Constitution*, it will not enter into this debate. Importantly for current purposes, there is no explicit general requirement in New Zealand or Australian law for operations authorized under the prerogative power to conform to international law.³⁴

While there is ancient common law authority on the Crown prerogative to

27 Some national counter-terrorist operations might also occur under authority of prerogative power. Act of State Doctrine would not generally be expected to apply to matters that occur within the realm; see below.

28 *Council of the Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, para. 379. There is debate as to whether prerogative power is distinct from the powers which the Crown may exercise simply by virtue of having a legal personality, such as contracting or suing debtors, which it has in common with any other legal person. These are not necessarily prerogative powers but are perhaps just ordinary executive powers. See discussion by Fiona Wheeler in 'Judicial Review of Prerogative Power in Australia: Issues and Prospects', *Sydney Law Review* v14, 1992, p. 432, pp. 447–8.

29 *Attorney-General v. De Keyser's Royal Hotel Ltd* [1920] AC 508; *Burmah Oil Co. Ltd v. Lord Advocate* [1965] AC 75; *Re: Tracey, ex parte Ryan* 166 CLR 518; *Curtis v. Minister of Defence* [2002] 2 NZLR 744.

30 *Letters Patent constituting the Office of Governor General of New Zealand*, given by Queen Elizabeth II, 28 October 1983, SR 1983/225, amendment SR 1987/8, para. III.

31 *Commonwealth of Australia Constitution Act* 1900 (Cth).

32 *Barton v. Commonwealth* (1974) 131 CLR 477.

33 See French J in *Ruddock v. Vadarlis* (the 'Tampa case') (2001) 110 FCR 491.

34 See discussion by G. Lindell in 'Judicial Review of International Affairs' in Opeskin and Rothwell, note 10.

wage war and to defend the realm,³⁵ international naval constabulary actions, that is, those actions which enforce only international law, fit into neither of these categories. They have not been the conduct of war for the most part, nor have they really concerned the defence of New Zealand or Australia in any direct way sufficient to be described as defending the realm. International naval constabulary operations might be best described as coming under the prerogative to conduct foreign relations.³⁶ The legal authority of the executive to engage in international naval constabulary operations which use force, yet are not war, has not been questioned in a New Zealand or Australian court, however.³⁷ In Australia, *Thorpe v. Commonwealth* is authority for the conduct of foreign affairs being non-justiciable as an Act of State, but this case did not concern coercive action.³⁸ Similarly, in *Attorney-General of Fiji v. Robert Jones House Ltd*³⁹ a New Zealand government executive certificate concerning the status of an interim military government in Fiji was conclusive, but this case also did not concern coercive action.

Is a UN Security Council resolution enough to authorize coercive action outside New Zealand or Australia, such as interference with freedom of navigation, and, if so, how? There is actually no authority on the point. It is certainly clear since *Bradley v. Commonwealth*⁴⁰ that UN Security Council resolutions have no force of their own in Australian law within Australian territory. The 2005 Cole Inquiry in Australia heard the argument that UN Security Council resolutions are not part of Australian law.⁴¹ Likewise, there is nothing in New Zealand law to support UN Security Council resolutions having force of their own within New Zealand. For international naval constabulary action which does not rely on New Zealand or Australian legislation it is necessary to refer to Act of State doctrine, discussed below. This falls back upon the 1848 slaving case of *Buron v. Denman*⁴² and

35 *Attorney-General v. De Keyser's Royal Hotel Ltd* [1920] AC 508; *Burmah Oil Co. Ltd v. Lord Advocate* [1965] AC 75; *Re: Tracey, ex parte Ryan* 166 CLR 518; *Curtis v. Minister of Defence* [2002] 2 NZLR 744 and A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed., London: Macmillan, 1959, p. 288.

36 As to the prerogative to conduct foreign relations, *Thorpe v. Commonwealth* (1997) 144 ALR 677, 681 and *Re Hourigan* [1946] NZLR 1.

37 The *Tampa* case essentially concerned a national naval constabulary operation which relied more on the prerogative to exclude aliens than on the prerogative to conduct foreign affairs. *Ruddock v. Vadarlis* (the 'Tampa case') (2001) 110 FCR 491, para. 542.

38 *Thorpe v. Commonwealth* (1997) 144 ALR 677, para. 681.

39 *Attorney-General of Fiji v. Robert Jones House Ltd* [1989] 2 NZLR 69.

40 In *Bradley v. Commonwealth* (1973) 128 CLR 557, para. 583, Barwick CJ and Gibbs J rejected Security Council resolutions which had not been given legislative recognition in Australia as justification for executive action within Australia that would otherwise have been unlawful.

41 Commonwealth of Australia, Inquiry into Certain Australian Companies in relation to the UN Oil for Food Programme, *Report of the Inquiry into certain Australian Companies in relation to the UN Oil for Food Programme*, Commissioner Hon. T. Cole, 2006, Sydney: Commonwealth of Australia, Appendix 1, 'Joint Opinion of Dr Renwick and Dr Ward on the Status of United Nations Resolutions and Sanctions in Australian Domestic Law of 9 December 2005', available online at www.oilforfoodinquiry.gov.au/, pp. 1–12.

42 *Buron v. Denman* (1848) 154 All ER 450.

possibly to the very old, unsettled and almost certainly obsolete concept of pacific blockade.⁴³

3 Liability

A ship or cargo owner or a crew member could sue the Australian or New Zealand government for loss or damage arising from a boarding operation by the RNZN or RAN to enforce a UN Security Council resolution.⁴⁴ There are possible remedies available in tort for negligence claims arising from incidents at sea. In *Blunden v. Commonwealth* for example, which concerned a claim from a civilian arising from the collision between HMA ships *Voyager* and *Melbourne*, the High Court made it clear that actions in tort for negligence are transitory. That is, they are not attached to a particular place, and may be sued upon where the court has jurisdiction over the defendant.⁴⁵ While this has not yet happened with respect to an operation in the Arabian Gulf, there is nothing to say it could not happen in the future. It is also possible that a different type of naval constabulary operation, such as one conducted under the *France–Australia Maritime Cooperation Agreement* in the Southern Ocean, might see a claim pursued in an Australian or New Zealand court. Southern Ocean fishing enforcement operations have previously given rise to proceedings against Australia. *Olbers v. Commonwealth*, for example, commenced on the basis of RAN enforcement actions at sea being beyond power.⁴⁶ Although unsuccessful, the case demonstrates that enforcement actions at sea may be challenged. Further, the matter turned on the *Fisheries Management Act 1991* (Cth), and in the absence of legislative authority the question of appropriate national legal authority would have been more problematic.

A separate but related issue is that of criminal responsibility for coercive actions in an international naval constabulary operation. This chapter will not pursue the question, as its focus is upon Act of State doctrine, which arises primarily in the context of civil claims. Nevertheless, it can be noted that while the *Crimes Act 1961* (NZ) provides for criminal jurisdiction beyond New Zealand over acts done on board any Commonwealth (as in British Commonwealth) ship (including RNZN ships), it requires the consent of the Attorney-General before an information can be laid in respect of such an act.⁴⁷ The consent of the

43 See discussion of ‘Forcible Measures Short of War’ in C.J. Colombos, *International Law of the Sea*, 6th ed., New York: McKay, 1967, pp. 464–74. Smith viewed pacific blockade as obsolete in 1959, H.A. Smith, *The Law and Custom of the Sea*, London: Stevens, 1959, p. 144.

44 Possible claims under admiralty jurisdiction may be limited, as most actions for loss or damage arise under contracts, the main exception being for collisions – an occurrence unlikely to be within the authority of an enforcement agreement or UN Security Council resolution; see M. Davies and A. Dickey, *Shipping Law*, 3rd ed., Sydney: Law Book Co., 2004, pp. 409–42.

45 *Blunden v. Commonwealth* (2003) 218 CLR 330, paras 335–6.

46 *Olbers v. Commonwealth* (No. 4) (2004) 136 FCR 67.

47 *Crimes Act 1961* (NZ), ss. 8, 400. Note that disciplinary jurisdiction would also apply under the *Armed Forces Discipline Act 1971* (NZ), s. 74.

Australian Attorney-General is also required under the *Crimes at Sea Act* 2000 (Cth), which applies criminal law to actions occurring on or from Australian (including RAN) ships, before commencing any prosecution of an offence alleged to have taken place outside the area adjacent to Australia in which state law applies.⁴⁸ This would include the Gulf, the Solomon Islands and the area of the Southern Ocean relevant to the *France–Australia Maritime Cooperation Agreement*. Presumably neither the New Zealand nor the Australian Attorney-General would authorize prosecution of a member of the navy conducting coercive operations authorized by the government of which the Attorney-General was a member. It might be a different question should the member perform a criminal act beyond what his or her duty required. Even so, the question remains as to what national authority would actually authorize actions in an international naval constabulary operation, such as stopping and detaining a ship and possibly its crew as well, which would be otherwise criminal.

4 International enforcement instruments in New Zealand and Australian common law

In the absence of legislative authority to interfere with navigation in international naval constabulary operations, it may be that the common law should recognize international law authority to do so. International law can have an effect through the common law as a ‘source’,⁴⁹ as ‘a legitimate and important influence on the common law’⁵⁰ or as ‘a vital source of relevant guidance’.⁵¹

48 *Crimes at Sea Act* 2000 (Cth), s. 6. Note that there is no requirement for the Attorney-General to consent to a prosecution of an offence alleged to have occurred within the ‘coastal sea’ of the Heard and Macdonald Islands Territory, as s. 6 does not apply there, s. 6(10). Note also that disciplinary jurisdiction would also apply under the *Defence Force Discipline Act* 1982 (Cth), s. 61.

49 *Chow Hung Ching v. R.* (1948) 77 CLR 449, para. 477.

50 *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1, para. 55 per Brennan J (Mason CJ and McHugh J concurring).

51 *Hosking & Hosking v. Simon Runtig & Anor* [2004] 1 NZLR 1, para. 6. For a discussion of the relationship between New Zealand common law and international law see T. Dunworth, ‘Hidden Anxieties: Customary International Law in New Zealand’, *New Zealand Journal of Public International Law* v2, 2004, pp. 67–84. This chapter will not address statutory interpretation, as it is dealing with actions authorized under prerogative power. The principles of statutory interpretation are relatively well settled. Generally, courts should favour a construction which gives effect to the purpose of the legislation, *Interpretation Act* 1999 (NZ), s. 5(1), and *Acts Interpretation Act* 1901 (Cth), s. 15AA. Secondary to this, the courts should presume that legislation will not take away common law rights without express words, *Mitchell v. Licensing Control Commission* [1963] NZLR 553 at 558, *Hawkins v. Sturt* [1992] 3 NZLR 602 at 610 and *Plaintiff S157/2000 v. Commonwealth of Australia* (2003) 211 CLR 476, para. 492 (see discussion in D.C. Pearce and R.S. Geddes, *Statutory Interpretation in Australia*, 6th ed., Sydney: LexisNexis Butterworth, 2006, pp. 188–90), and, where there is an ambiguity, should also favour a construction which is consistent with international law, *Tavita v. Minister of Immigration* [1994] 2 NZLR 257 (CA), para. 266, and *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273, para. 287. All of these things together would suggest a strict reading of coastal state legislation on matters such as customs, immigration or fisheries to favour a

5 Act of State doctrine

Where it may be possible for UN Security Council resolutions and other international enforcement instruments to have an effect through the common law is if they informed the content of Act of State doctrine. This doctrine is uncertain, yet it would be the principal plea in response to claims against the Crown in right of New Zealand or the Commonwealth of Australia ('the Crown') arising from naval constabulary operations.⁵² The common law could refer to the relevant international law instruments to limit the immunity which Act of State doctrine provides or to define the authority protected by that immunity.

Traditionally, Act of State doctrine has given the Crown immunity from liability for tortious acts committed outside the realm in the exercise of its prerogative with respect to foreign affairs.⁵³ It is interesting because it is where international law meets prerogative power. The most cited case, *Buron v. Denman*,⁵⁴ is on point because it concerned a Royal Navy torching of a Spanish-owned slaving business in West Africa and the liberation of its slaves. This was not an act of war. The government adopted the action as an Act of State and so no liability could follow from the ensuing action against the Royal Navy captain.⁵⁵ Act of State doctrine would most likely be the principal plea in response to claims against the Crown arising from naval constabulary operations which interfered with freedom of navigation, such as to enforce UN Security Council resolutions.⁵⁶ In the High Court of Australia decision *Thorpe v. Commonwealth*, which is authority for the conduct of foreign relations being non-justiciable, the court did not distinguish between claims in tort and other claims.⁵⁷

5.1 Uncertainty over Act of State doctrine

The difficulty with relying on Act of State doctrine is its uncertainty. In the 2004 Victorian Supreme Court case of *Ali v. Commonwealth* some doubt was cast upon Act of State doctrine. It concerned an interlocutory step in a claim for false

right of innocent passage, public right of navigation or freedom of navigation unless it is contrary to the purpose of the statute or the statute expressly provides to the contrary. See also Dixon J in *Polites v. Commonwealth* (1945) 70 CLR 60, para. 77, on general words in a statute to be taken not to apply to 'persons or subjects which . . . a national law of the kind in question ought not to include'.

52 See below.

53 Lindell, note 34, pp. 90–1. This is distinct from sovereign acts of foreign governments being non-justiciable before English or Australian courts.

54 *Buron v. Denman* (1848) 154 All ER 450.

55 See discussion in Lindell, note 34, as well as G. Lindell, *The Coalition Wars against Iraq and Afghanistan in the Courts of the UK, Ireland and the US: Significance for Australia*, Centre for International and Public Law and Policy Papers 26, Sydney and Canberra: Federation Press, 2005, pp. 33–7.

56 Or even interference with innocent passage in foreign territorial seas, such as in Iraq.

57 *Thorpe v. Commonwealth* (1997) 144 ALR 677. For a discussion of the distinction see P. Cane, 'Prerogative Acts, Acts of State and Justiciability', *International and Comparative Law Quarterly* v29, 1980, pp. 680–700.

imprisonment in Nauru by agents of the Commonwealth of Australia. It is the only case known to the author which concerns coercive action by the Commonwealth pursuant to its prerogative to conduct foreign relations. The Victorian Supreme Court declined to accept immediately that it provided immunity from suit, or even that it was necessarily part of Australian law. Justice Bongiorno noted:

Buron v. Denman has been accepted as correct by English courts . . . although not for the proposition contended for in this case. There is, therefore, no authority directly binding upon this Court which would compel its being applied in this case with respect to the Act of State doctrine with which it is concerned. Mr Burnside QC's submissions on behalf of the plaintiffs have focused on a number of matters which he contends lead to the conclusion that it does not represent the common law of this country at this time. He submitted that at the time it was decided notions of Crown immunity from suit were, as yet, unaffected by later statutory reforms so that redress in respect of actions which would have constituted torts if committed by a private citizen went unredressed when committed by the Crown. More importantly he referred to the different constitutional position of the Crown in Australia in 2004 compared to that of the Crown in England almost 160 years earlier by reference to the joint judgment of Gummow and Kirby JJ in *The Commonwealth v. Mevett* . . .⁵⁸

If Act of State doctrine did apply, it could render a matter non-justiciable, but the court would need to hear evidence and argument to determine if that was the case. Ultimately the Victorian Supreme Court denied the application sought in this instance;⁵⁹ however, for reasons unknown the matter did not proceed further.

There is no equivalent recent case in New Zealand law. Given the constitutional issues raised, *Ali v. Commonwealth* could hint at a possible divergence between Australian and New Zealand law on this point. New Zealand does not have a written or federal constitution, nor does it have an equivalent of Chapter III concerning judicial power. Nonetheless, it is significant that even without these constitutional elements the United Kingdom (UK) Attorney-General was unsuccessful in a plea of Act of State in *Attorney-General v. Nissan* before the House of Lords in 1970 in relation to army acquisition of a hotel in Cyprus.⁶⁰ Lord Morris of Borth-y-Guest stated the conceptual difficulty with Act of State doctrine:

I do not view with favour a rule which can give immunity if wrongful acts are done abroad but no immunity if such acts are done in this country and even if done to a resident foreigner. The general principle has been that if a wrong

58 *Ali & Ors v. Commonwealth of Australia* [2004] VSC 6 (unreported, Bongiorno J, 23 January 2004).

59 *Ibid.*, para. 22.

60 *Attorney-General v. Nissan* [1970] AC 179 [hereinafter *Nissan* case]. See Lindell, note 34, p. 191.

is of such a character that it would have been actionable if committed in England and if the act is not justifiable by the law of the place where it was committed then an action may be founded in this country.⁶¹

Lindell argues that the ‘immunity does not sit easily with the modern adherence to the rule of law’.⁶² He also refers to a 2004 case in which the UK did not rely on the doctrine in relation to negligent shooting of Kosova civilians by British forces operating under a UN Security Council resolution.⁶³ The 2000 UK Court of Appeal case of *R. v. Secretary of State ex parte Thring*, concerning Royal Air Force air attacks on Iraq in the 1990s, did give support to Act of State doctrine in English law.⁶⁴ It should be treated with some caution, however, as the plaintiff was a British taxpayer who objected to taxes being spent on an operation that he argued violated the law of armed conflict. The lack of a clear cause of action meant that the case was likely to have been decided differently than if it was brought by a person who had directly suffered loss or damage as a result of the bombing.

5.2 International law to inform Act of State doctrine

From a policy perspective it is inconceivable that any coercive action in a UN or other enforcement operation by the RAN or RNZN of itself should ground a claim against the Crown. The promotion of maritime security through enforcement of international law could become impossibly contentious. Act of state doctrine could be placed on a firmer footing if informed by international law. In illustrating the problem in *Attorney-General v. Nissan*, Lord Wilberforce pointed to a possible solution:

Between these acts and the pleaded agreement with the government of Cyprus the link is altogether too tenuous, indeed it is not even sketched out; if accepted as sufficient to attract the description of Act of State it would cover with immunity an endless and indefinite series of acts, judged by the officers in command of the troops to be necessary, or desirable, in their interest. That I find entirely unacceptable.⁶⁵

Where actions within a naval constabulary operation do have a clear link to the authorizing treaty or Security Council resolution, they should be protected

61 *Nissan* case, note 60, para. 195.

62 McMillan notes the difficulty of arguing Act of State in the *Tampa case* (2001) 110 FCR 491, even though it concerned actions not based on legislative authority to board and stop a ship from offloading people seeking to enter Australia unlawfully. J. McMillan, ‘The Justiciability of the Government’s *Tampa* Actions’, *Public Law Review* v13, 2002, p. 90, note 7.

63 *Bici v. Ministry of Defence* [2004] EWHC 786 in Lindell, ‘The Coalition Wars’, note 55, p. 37.

64 *R. v. Secretary of State ex parte Thring*, Court of Appeal (Civil Division) (unreported, Pill, Clarke, Bennett IJJ, 20 July 2000) per Pill LJ.

65 *Nissan* case, note 60, para. 210.

by Act of State doctrine. The common law could recognize such international authority as being the lawful limits of an Act of State and so give greater certainty to the doctrine. This would be a legitimate exercise of the executive government's prerogative with regard to foreign affairs. It could be a form of international law being a source of guidance or a legitimate influence on the common law.

Where action exceeded international authority, as with an excessive use of force, it may be outside the immunity provided by Act of State doctrine. This could also perhaps be the case if a boarded vessel is detained for longer than is necessary to determine what should be done with it⁶⁶ or if a detained vessel is clearly not engaged in 'inward and outward maritime shipping'⁶⁷ from the country in question. The remedy is likely to be a diplomatic one but it is conceivable that the ship owner could commence proceedings against the Crown over the delay caused to the vessel. The Crown could then choose to adopt the action as an Act of State, as occurred after the event in *Buron v. Denman*,⁶⁸ and plead immunity. If the Crown did adopt the action as an Act of State it certainly would be an Act of State in the ordinary sense of the term and it would be interesting to see if the court accepted this plea and determined the matter to be non-justiciable. The other alternative open to a court would be to limit the immunity to actions reasonably necessary for the purpose of enforcing the treaty or UN Security Council resolution, and not for the purpose of any other interference with freedom of navigation not otherwise authorized by international law. In this way international law may actually be a check on the prerogative power of the executive. It would also be a development which complemented the regulated nature of the law of naval warfare, in which the courts have a role in the law of prize.⁶⁹ It would support the rule of law at both international and national level. It would be consistent with the view in *Sellers v. Maritime Safety Inspector*, even though dealing with statutory interpretation, that:

For centuries national law in this area has been essentially governed by and derived from international law, with the consequence that national law is to be read, if at all possible, consistently with the related international law. That will sometimes mean that the day-to-day (or at least year-to-year) meaning of national law may vary without formal change.⁷⁰

As matters stand in New Zealand and Australian law, UN Security Council resolutions and other international maritime enforcement agreements have no status

66 For examples of treaty provisions for liability for unjustifiable delay see *LOSC*, note 3, Article 106 (regarding piracy, liability owed to the flag state) and Article 111(8) (regarding hot pursuit, liability owed to the ship), as well as the *International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties*, 29 November 1969, 970 UNTS 211, Article VI (compensation for damage for measures exceeding those reasonably necessary).

67 For example, UN Resolution on Iraq-Kuwait, SC Res. 665, note 1.

68 *Buron v. Denman* (1848) 154 All ER 450.

69 See below.

70 *Sellers v. Maritime Safety Inspector* [1999] 2 NZLR 44, 60.

of their own unless incorporated by statute. Given the reliance on prerogative power for international constabulary operations and the uncertain status of Act of State doctrine, there is arguably a case for the common law to recognize UN Security Council resolutions and other international enforcement agreements.⁷¹ Legislation may be another possible solution but it is not a likely alternative given governments' traditional reliance on prerogative power as the basis for overseas military operations generally.

6 The contrast between the law of naval constabulary operations and the law of naval warfare

It is worth noting at this point the significant contrast between the regulation of naval constabulary operations and the law of naval warfare. Also relying on prerogative power, naval operations in war, or armed conflict, are in fact relatively well regulated by the law of naval warfare, in particular with regard to the law of prize, which provides some judicial scrutiny. Prize law regulates the capture of merchant ships and cargoes during naval warfare and serves as a means of protecting trade to some extent in spite of the disruption of war.⁷² Notably, it actually directly incorporates international law into national law, as prize courts are national courts applying international law.⁷³ Much of the law of armed conflict is also actually regulated in Australia and New Zealand by statute through the *Geneva Conventions Act 1958* (NZ), the *International Crimes and International Criminal Court Act 2000* (NZ), the *Criminal Code Act 1995* (Cth)⁷⁴ and the *Geneva Conventions Act 1957* (Cth). There is also common law immunity from liability for combat operations to be found in *Shaw Savill Albion Co. Ltd v. Commonwealth*.⁷⁵ This illustrates the relative paucity of the law relating particularly to international naval constabulary operations and raises the question of why war should be more regulated and 'peace' operations less. It may be that the law with respect to international naval constabulary operations actually needs to catch up to the law of naval warfare and follow the example it sets.

7 Concluding remarks

New Zealand and Australia's maritime security depend in great part upon their navies conducting constabulary operations to enforce national law off their coasts and international law as far away as the Arabian Gulf. Given the

71 For a note of caution on courts having too much regard to policy see J. Evans, 'Questioning the Dogmas of Legal Realism', *New Zealand Law Review*, 2001, pp. 145–70.

72 See Colombos, note 43, pp. 795–825.

73 *The Tojo Maru* [1972] AC 242, paras 290–1.

74 *Criminal Code Act 1995* (Cth), Division 268.

75 *Shaw Savill & Albion Co. Ltd v. Commonwealth* (1940) 66 CLR 344, para. 347. There does not appear to be an equivalent New Zealand case, so it would be expected that *Burmah Oil Co. Ltd v. Lord Advocate* [1965] AC 75 would be relevant.

extensive regulation of both naval warfare and coastal law enforcement, it is remarkable that such a significant aspect of maritime security as international naval constabulary operations rests upon such an uncertain legal basis. It could undermine the legitimacy of such operations in supporting the international rule of law if they gave rise to a civil claim which found their legal basis wanting in national law.

Despite the absence of international enforcement instruments like UN Security Council resolutions from New Zealand and Australian legislation they are not mere policy considerations. There are ways for ship and cargo owners and other interested parties to seek to enforce their right to navigate in the territorial sea and in international waters. Loss or damage arising from interference with navigation could ground a claim. This points to problems with the enforcement of UN Security Council resolutions at sea, or other maritime enforcement agreements, which could in future possibly include interdiction of weapons of mass destruction⁷⁶ or anti-piracy operations in Somalia's territorial sea.⁷⁷ These international naval constabulary operations rely in New Zealand and Australian law upon the prerogative power to conduct foreign affairs. Act of State doctrine should operate to render claims arising from these operations non-justiciable, but there is no authority for this with respect to coercive operations outside New Zealand or Australia. This doctrine is also now uncertain in both Australia and the UK. The common law could, however, recognize the authority of UN Security Council resolutions or other maritime enforcement agreements as the appropriate limits of Act of State doctrine. This would both strengthen and constrain the legal basis for the conduct of naval constabulary operations. In the intersection of international and New Zealand and Australian law in naval constabulary operations, the common law should follow the example of the law of naval warfare and accord significant weight to enforcement agreements and UN Security Council resolutions. If the common law did develop to recognize such international legal authority for naval constabulary operations, it could do much to support New Zealand and Australia's efforts to support international law and maritime security generally.

76 Perhaps under the Proliferation Security Initiative or a UN Security Council resolution.

77 UN Resolution on the Situation in Somalia, SC Res. 1816, UN Doc. S/RES/1816 (2008), and 'Australia May join Anti-piracy Force', *Sydney Morning Herald*, 8 January 2009, available online at <http://news.smh.com.au/world/australia-may-join-antipiracy-force-20090108-7c4t.html>. Note that Australian anti-piracy operations on the high seas would derive legal authority from the *Crimes Act 1914* (Cth).

11 The Protection of Platforms, Pipelines and Submarine Cables under Australian and New Zealand Law

Stuart Kaye

Offshore facilities by and large did not exist before the middle of the nineteenth century, when the first submarine cables were snaked across the world's oceans. Likewise, platforms exploiting undersea resources, most notably oil and gas, did not exist until the middle of the twentieth century, with World War II providing the spur for states to overcome the technological challenges in exploiting the sea bed, and piping oil and gas across the ocean floor.¹

For Australia and New Zealand these developments have been of tremendous impact. Since the nineteenth century, submarine cables connected the two states to the rest of the world, allowing communication times to be reduced from weeks and months to days, hours and ultimately virtually instantaneously. Today the bulk of telecommunications traffic, including telephone and internet, travels via submarine cable, and for Australia it is worth \$5 billion to the national economy.² Oil and gas platforms have allowed exploitation of substantial petroleum deposits to the extent that well over 80 per cent of such production in Australia, and virtually all of it in New Zealand, is produced in offshore fields.³

As such, the loss or disruption for an extended period of oil and gas supplies from offshore, or the severing of submarine communication links, would have a catastrophic effect on the economies of Australia and New Zealand. This underlies the importance of the protective regimes that exist internationally and

1 An early, albeit temporary, undersea oil pipeline was PLUTO, used by the Allies to provide the armies with gasoline in the months following the D-Day landings in France: see W.B. Taylor, 'PLUTO: Pipeline under the Ocean', *Archive: The Quarterly Journal for British Industrial and Transport History* v42, 2004, pp. 48–64.

2 See Australian Government, Australian Communications and Media Authority, 'Submarine Telecommunications Cables', June 2008, available online at www.acma.gov.au/WEB/STANDARD/pc=PC_100223#background.

3 See Australian Government, Geoscience Australia, 'Crude Oil and Gas Production by Basin, pre-1996 and 1996–2005', March 2008, undated, available online at www.ga.gov.au/image_cache/GA11367.pdf; R. Gregg and C. Walrond, 'Oil and Gas', *Tē Ara: The Encyclopedia of New Zealand*, September 2007, available online at www.teara.govt.nz/EarthSeaAndSky/MineralResources/OilAndGas/6/en.

domestically to protect these facilities from interference. This chapter considers the regime for the *in situ* protection of offshore facilities from terrorist attack, including platforms, pipelines and submarine cables under international, Australian and New Zealand law. While relevant to an overall strategy to combat terrorism, broader regulatory mechanisms such as the International Ship and Port Facility Security (ISPS) Code⁴ will not be considered.

1 International law protecting platforms, pipelines and cables

While platforms, pipelines and submarine cables all rest on the ocean floor, the international law applicable to their protection is different and distinct. Surprisingly, the international law with respect to platforms is very different from that with respect to pipelines and submarine cables, even though pipelines and platforms are often used in combination in the exploitation of natural gas or oil. In fact, the regime for pipelines is much more closely related to that used for submarine cables, even though they have very different uses. The differences between platforms, pipelines and submarine cables do make it necessary to consider each in turn.

1.1 Platforms

The relevant international law pertaining to the protection of platforms constructed on the seabed is found in the *United Nations Convention on the Law of the Sea (LOSC)*.⁵ The *LOSC* provides that where a state has authority over the seabed that is within its sovereignty over the territorial sea or internal waters or sovereign rights over its continental shelf, the coastal state has an exclusive right to control platforms on the seabed.⁶ The state can assert its jurisdiction over activities taking place aboard such platforms,⁷ and authorize the construction of them.

The nature of the protection available to states pertaining to platforms in the coastal state's Exclusive Economic Zone (EEZ) is found in Article 60 of the *LOSC*, and applies *mutatis mutandis* to the continental shelf by virtue of Article 80. Article 60 in part provides:

- 4 The coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.
- 5 The breadth of the safety zones shall be determined by the coastal State,

4 IMO International Ship and Port Facility Security Code, adopted at the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974, 12 December 2002, IMO Doc. SOLAS/CONF.5/34, Annex 1, Conference Resolution 2, pp. 2–91.

5 *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 [hereinafter *LOSC*].

6 *Ibid.*, Articles 60, 80.

7 *Ibid.*, Articles 56, 60, 80.

taking into account applicable international standards. Such zones shall be designed to ensure that they are reasonably related to the nature and function of the artificial islands, installations or structures, and shall not exceed a distance of 500 metres around them, measured from each point of their outer edge, except as authorized by generally accepted international standards or as recommended by the competent international organization. Due notice shall be given of the extent of safety zones.

- 6 All ships must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones.
- 7 Artificial islands, installations and structures and the safety zones around them may not be established where interference may be caused to the use of recognized sea-lanes essential to international navigation.
- 8 Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.

The above provisions indicate a coastal state is limited to a 500 metre safety zone around a platform, as no other distance has been agreed by the international community. While no purpose is explicitly indicated, the reference to navigation in Article 60(4) makes it apparent that the perceived purpose at the time the *LOSC* was adopted was navigational safety and avoiding accidents rather than a buffer zone to fend off attacks.⁸

On the seabed beyond national jurisdiction, all states have the right to construct platforms,⁹ although exploitation of the seabed in these areas is pursuant to the approval of the International Seabed Authority.¹⁰ The *LOSC* does not deal with the nature of safety zones around such features directly, although it is reasonable to assume a 500 metre safety zone may be declared.¹¹ In practical terms, such waters are relatively remote in ocean, being a minimum of 200 nautical miles from the nearest land, and the seabed in such areas is typically oceanic crust, thousands of metres below the surface of the ocean. This means there are no platforms anywhere in the world beyond national jurisdiction at the present point in time.

8 Such a conclusion is consistent with the deliberations of the International Law Commission in the precursor provision to Article 60 within the Convention on the Continental Shelf: see articles concerning the Law of the Sea, draft Article 71: *Yearbook of the International Law Commission* v2, 1956, p. 264, UN Doc. A/CN.4/97. See also M. Nordquist, *United Nations Convention on the Law of the Sea 1982: A Commentary* v2, Dordrecht: Martinus Nijhoff, 1993, p. 577.

9 *LOSC*, note 5, Article 87(d).

10 See *ibid.*, Part XI; *Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea*, 28 July 1994, 1836 UNTS 3 (1994).

11 *LOSC*, note 5, Article 147.

More specific protection for platforms is provided in the *1988 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*¹² (*1988 SUA Protocol*) and its *2005 Protocol to the Protocol (2005 SUA Fixed Platforms Protocol)*.¹³ The *1988 SUA Protocol* provides for cooperation and enforcement of a range of offences against fixed platforms, including seizure of a platform, acts of violence against a person on a platform, destruction or threatening the safety of a platform and the placement of a device to achieve such a result.¹⁴ Jurisdiction to board a platform in the event of an offence taking place is, as might be expected, vested in the coastal state, although states also retain a prescriptive jurisdiction over their nationals.¹⁵ The *2005 SUA Fixed Platforms Protocol* added to the range of offences to include the use of radioactive material or biological or chemical weapons against a platform or persons thereon, and releasing oil or gas calculated to cause serious injury or damage.¹⁶ While there is greater scope for cooperation in dealing with such offences, the power to board a platform to respond to an attack is still vested in the coastal state implicitly under the *LOSC*. This can be contrasted to provisions permitting, albeit in limited circumstances, third-party boardings under the *2005 SUA Fixed Platforms Protocol*,¹⁷ and seems to be based on the assumption that a coastal state would always have the capacity to take action with respect to platforms under its jurisdiction. Whether this is always the case is debatable. At the time of writing, the *1988 SUA Protocol* was in force, but not its *2005 Protocol*.

1.2 Submarine cables and pipelines

International law has considered issues surrounding the protection of submarine cables for well over 100 years. Since the adoption of the *1884 Convention on the Protection of Submarine Telegraph Cables* (Submarine Cables Convention),¹⁸ for which special provision was made for the participation of the Australian colonies in their own right,¹⁹ international law has emphasized the right of states to lay cables on the seabed outside territorial waters.²⁰ Regulatory efforts have focused on the attribution of responsibility for damage to cables, with that centring on the flag state of an offending vessel, rather than vesting jurisdiction in a coastal state or cable user.²¹

The current international law position has seen the *LOSC* effectively replace the

12 *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf*, 10 March 1988, 1678 UNTS 304 [hereinafter *1988 SUA Protocol*].

13 *Protocol of 2005 to the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf*, 14 October 2005, [2005] ATNIF 31 [hereinafter *2005 SUA Fixed Platforms Protocol*].

14 *1988 SUA Protocol*, note 12, Article 2.

15 *Ibid.*, Article 3.

16 *2005 SUA Protocol*, note 13, Articles 2 *bis* and 2 *ter*.

17 *Ibid.*, Article 8 *bis*.

18 *Convention on the Protection of Submarine Telegraph Cables*, 14 March 1884, [1901] ATS 1.

19 *Ibid.*, Additional Article.

20 *LOSC*, note 5, Article 87(c).

21 *Convention on the Protection of Submarine Telegraph Cables*, 14 March 1884, [1901] ATS 1, Article X.

Submarine Cables Convention, and provides that the principal duty of protection rests on the flag state of the vessel responsible for damage to the cable. Article 113 of the *LOSC* provides in part:

Every State shall adopt the laws and regulations necessary to provide that the breaking or injury by a ship flying its flag or by a person subject to its jurisdiction of a submarine cable beneath the high seas done wilfully or through culpable negligence, in such a manner as to be liable to interrupt or obstruct telegraphic or telephonic communications, and similarly the breaking or injury of a submarine pipeline or high-voltage power cable, shall be a punishable offence. This provision shall apply also to conduct calculated or likely to result in such breaking or injury.

It should be noted from the above that the principle of flag-state regulation of the breaking of a cable also applies to submarine pipelines. In practical terms this is of less importance for two reasons. First, where an undersea pipeline is used to assist in the exploitation of the seabed by a coastal state, the coastal state retains jurisdiction over the pipeline, and can make laws to protect the pipeline from accidental breakage or attack.²² Second, a likely consequence of the breakage of a pipeline would be to cause environmental harm, and this could provide a basis for the exercise of coastal state jurisdiction within its territorial sea or EEZ.²³

While the breaking of a pipeline may give a coastal state jurisdiction to take action in respect of an incident, *prima facie* there is no authorization for the coastal state, or for any other state using a cable, to have jurisdiction to punish any breaking of a cable beyond the territorial sea outside of the circumstances indicated in Article 113 of the *LOSC*. Australia's obligation under Article 113 is fulfilled by Section 7 of the *Submarine Cables and Pipelines Protection Act 1969* (Cth), while under New Zealand law the *Submarine Cables and Pipelines Protection Act 1996* (NZ) fulfils the same function.

That a coastal state does not have rights over a submarine cable beyond its territorial sea is confirmed elsewhere in the *LOSC*. Article 79 provides:

- 1 All States are entitled to lay submarine cables and pipelines on the continental shelf, in accordance with the provisions of this article.
- 2 Subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines, the coastal State may not impede the laying or maintenance of such cables or pipelines.
- 3 The delineation of the course for the laying of such pipelines on the continental shelf is subject to the consent of the coastal State.
- 4 Nothing in this Part affects the right of the coastal State to establish

²² See *LOSC*, note 5, Article 79.

²³ See *ibid.*, Article 56.

conditions for cables or pipelines entering its territory or territorial sea, or its jurisdiction over cables and pipelines constructed or used in connection with the exploration of its continental shelf or exploitation of its resources or the operations of artificial islands, installations and structures under its jurisdiction.

- 5 When laying submarine cables or pipelines, States shall have due regard to cables or pipelines already in position. In particular, possibilities of repairing existing cables or pipelines shall not be prejudiced.

The text of the article is clear, in so far as a coastal state cannot impede another state laying a cable through its EEZ, and possesses a jurisdiction over cables in its territorial sea, but no further.

The possibility of having a protective zone around submarine cables and pipelines, where activities were restricted, or anchoring was prohibited, was explicitly considered by the International Law Commission (ILC) in 1956, in its preparation of the draft texts for the four *Geneva Conventions on the Law of the Sea*.²⁴ The ILC rejected the notion as inconsistent with freedom of navigation, with even a limited proposal against anchoring near a cable failing to gain support. It was indicated that such a protective zone might prove an unacceptable impediment to freedom of navigation.²⁵ Nothing in the *LOSC*, or its predecessor conventions, provides for such a zone outside the territorial sea.

It is clear that a coastal state does have jurisdiction over the protection of a submarine cable within the territorial sea. This is explicitly confirmed in Article 21(1)(c) of the *LOSC*, which provides that a coastal state's laws can be applied to a vessel exercising a right of innocent passage in respect of the protection of submarine cables and pipelines. Since a state can assert its jurisdiction over protecting cables, the proclamation of a protective zone in the territorial sea would be perfectly legitimate. This would permit a protection zone over the cables to a distance of twelve nautical miles.

Outside of the territorial sea, there is no explicit basis to assert jurisdiction over a submarine cable by a coastal state. However, states using the waters of the EEZ are subject to the laws of the coastal state provided that can be applied under the regime of the EEZ, as indicated by Article 58(3) of the *LOSC*:

- 3 In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the

24 *Convention on the Territorial Sea and the Contiguous Zone*, 29 April 1958, 516 UNTS 205; *Convention on the High Seas*, 29 April 1958, 450 UNTS 11; *Convention on Fishing and Conservation of the Living Resources of the High Seas*, 29 April 1958, 559 UNTS 285; *Convention on the Continental Shelf*, 29 April 1958, 499 UNTS 311; *Optional Protocol of Signature concerning the Compulsory Settlement of Disputes*, 29 April 1958, 450 UNTS 169.

25 See *Yearbook of the International Law Commission* v2, 1956, p. 12, UN Doc. A/CN.4/97.

provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

A protection zone for a submarine cable outside the territorial sea could be validly asserted by a state, provided the basis of jurisdiction was tied to one that could be claimed under the regime for the EEZ or continental shelf. That is to say, protection over a cable could be achieved by restricting activities that could be validly regulated in the EEZ or continental shelf. For example, the protective measures directed towards the restriction of various types of fishing activity could be permissible in the EEZ, as coastal states have jurisdiction in these waters based on Articles 56 and 62 of the *LOSC*. The jurisdiction to deal with environmental protection in the EEZ would also provide a basis for jurisdiction for some types of activities, particularly those that might damage a pipeline, thus causing significant environmental harm.

2 Protection of platforms, pipelines and cables in Australian and New Zealand law

2.1 Platforms

The application of Australian law to protect platforms at sea operates within the territorial sea and beyond to all areas of seabed under Australian jurisdiction. As domestic law may operate on a platform under national jurisdiction, for Australia the principal legislation dealing with this circumstance is the *Crimes at Sea Act 2000* (Cth). The *Crimes at Sea Act 2000* (Cth) provides that the criminal law of the various states and territories can be applied in the oceans around Australia. It divides these oceans into separate areas of jurisdiction, and allocates criminal legislation to acts taking place in those waters.²⁶ This is accomplished through the use of ‘adjacent areas’, which were themselves first used in the offshore petroleum settlement in 1967.²⁷ Each state, the Northern Territory and Ashmore and Cartier Islands Territory have a large area designated as adjacent to them. Outside the adjacent area, for acts taking place on Australian ships, or by Australian nationals, or on a ship whose next port of call is Australia, the applicable criminal law is that of the Jervis Bay Territory by virtue of Section 6 of the Act.

Within the adjacent areas, the substantive criminal law of the relevant state will apply, under clause 2 of the Cooperative Scheme implemented under Section 5 of the Act. The cooperative scheme indicates that, within the territorial sea, state criminal law applies of its own force, and that, outside the territorial sea, state criminal law applies by virtue of the force of Commonwealth law. These provisions are to avoid the necessity of the state demonstrating a nexus between the

²⁶ *Crimes at Sea Act 2000* (Cth), preamble.

²⁷ See R. Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes*, Sydney: Federation Press, 1990, pp. 65–70.

criminal act and the state, which would otherwise be required to justify the extra-territorial operation of state law.²⁸ As such, terrorist acts on board ships in the adjacent area against an Australian platform would fall within the criminal law of the respective Australian state adjacent to the incident's location.

In terms of the interaction of the *Crimes at Sea Act* 2000 (Cth) with other criminal legislation, it is worth stressing that the *Crimes at Sea Act* 2000 (Cth) was not intended to be the sole source of applicable criminal law at sea for Australia. The Act certainly does not explicitly displace other legislation. The purpose of the Act is to apply state criminal law offshore in certain circumstances. It does not prevent other, more specific legislation applying to platforms at sea.

Protection of platforms internationally through the *1988 SUA Protocol* provided an impetus to strengthen the regime for the protection of platforms in domestic law. The *Crimes (Ships and Fixed Platforms) Act* 1992 (Cth) was enacted to implement the *SUA Convention* with respect to crimes against ships and the *1988 SUA Protocol* with respect to crimes against fixed platforms. The portion of the Act that specifically applies to fixed platforms is Part III. It creates a series of offences against fixed platforms, including seizing control of a fixed platform,²⁹ acts of violence against a person on board a fixed platform knowing the act may endanger the platform's safety,³⁰ destroying or damaging a platform in such a way as to endanger its safety,³¹ and placing a destructive device on a platform so as to endanger its safety.³² Additional offences are created for causing death,³³ grievous bodily harm³⁴ or injury³⁵ in the course of committing the offences against a platform, as well as threatening to endanger a platform.³⁶ Most of these offences have substantial penalties attaching to them.

The offences are designed to operate outside the territorial sea, but are not limited to offences taking place in Australian waters or upon Australian installations. Provided there is an Australian element,³⁷ or the offence takes place on the installation of another state party to the *1988 SUA Protocol*, if the victim or offender were a national of such a state, or otherwise affected such a state, the location of the incident is not significant.³⁸

28 The High Court in *Union Steamship v. King* (1988) 166 CLR 1 indicated that the pre-Australia Act requirement of a nexus was still required to found the operation of state law extraterritorially.

29 *Crimes (Ships and Fixed Platforms) Act* 1992 (Cth), s. 21.

30 *Ibid.*, s. 22.

31 *Ibid.*, s. 23.

32 *Ibid.*, s. 24.

33 *Ibid.*, s. 25.

34 *Ibid.*, s. 26.

35 *Ibid.*, s. 27.

36 *Ibid.*, s. 28.

37 This requirement is satisfied where the platform is on the Australian continental shelf, or the alleged offender is an Australian national: *ibid.*, s. 29(3).

38 *Ibid.*, s. 29(4), provides: 'For the purposes of this section, an offence against this Part had a Protocol State element if one of the following circumstances applied: (a) the fixed platform concerned was on the continental shelf of a Protocol State; (b) the fixed platform concerned was in the territorial

Some protections for platforms are also provided for in the *Sea Installations Act* 1987 (Cth), although these are separate from the measures discussed above. The *Sea Installations Act* deals with a very limited category of platforms, which form a very small fraction of those platforms that might be found off the Australian coast. The definition of a sea installation under the Act does not include resource installations, mobile offshore drilling units, installations used with submarine cable and pipelines, defence or navigational facilities.³⁹

At present, there is limited authority directed at the enforcement in Australian law of the 500 metre safety zone, the bulk of which is contained in the *Offshore Petroleum and Greenhouse Gas Storage Act* 2006 (Cth), which itself has replaced the *Petroleum (Submerged Lands) Act* 1967 (Cth). Section 616 of the *Offshore Petroleum and Greenhouse Gas Storage Act* 2006 (Cth) provides that 500 metre safety zones can be proclaimed around structures, wells or equipment by the Designated Authority and published in the *Gazette*. All vessels, or all vessels of a particular type, can be excluded from the safety zone, and it is an offence of strict liability for a vessel to enter or remain in the safety zone. The penalty can be applied to the owner and/or the master of the vessel, and since the adoption of the newer legislation the penalties are substantial.⁴⁰

Division 4 of Part 6.6 of the *Offshore Petroleum and Greenhouse Gas Storage Act* 2006 (Cth), reflecting the equivalent provisions in Division 3A of the *Petroleum (Submerged Lands) Act* 1967 (Cth), provides for more specific powers in respect of safety zones and areas to be avoided. At present, the only area to be avoided is designated in Schedule 2 of the *Offshore Petroleum and Greenhouse Gas Storage Act* 2006 (Cth), or formerly Schedule 6 of the *Petroleum (Submerged Lands) Act* 1967 (Cth), and is a defined area surrounding the Bass Strait oilfields. Section 327 of the former *Offshore Petroleum Act* 2006 (Cth)⁴¹ provided that where the Minister was satisfied that a terrorist attack was likely to occur that would cause damage or injury to any equipment or person in the area to be avoided or safety zone, then a state of emergency could be proclaimed by a *Gazette* notice.⁴² Terrorism was broadly defined, explicitly to include activities involving extortion.⁴³ Section 327 has not

sea or internal waters of a Protocol State; (c) the alleged offender was a national of a Protocol State; (d) the alleged offender was stateless and was habitually resident in a Protocol State that had extended its jurisdiction under Article 3(2)(a) of the Protocol; (e) during the commission of the alleged offence, a national of a Protocol State was seized, threatened, injured or killed and the Protocol State had extended its jurisdiction under Article 3(2)(b) of the Protocol; (f) the alleged offence was committed in an attempt to compel a Protocol State to do or abstain from doing any act and the Protocol State had extended its jurisdiction under Article 3(2)(c) of the Protocol.⁷

39 *Sea Installations Act* 1987 (Cth), s. 4.

40 *Offshore Petroleum and Greenhouse Gas Storage Act* 2006 (Cth), s. 616.

41 *Offshore Petroleum Act* 2006 (Cth) as amended by the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill* 2008 (Cth).

42 *Offshore Petroleum Act* 2006 (Cth), s. 327.

43 *Offshore Petroleum Act* 2006 (Cth), s. 326.

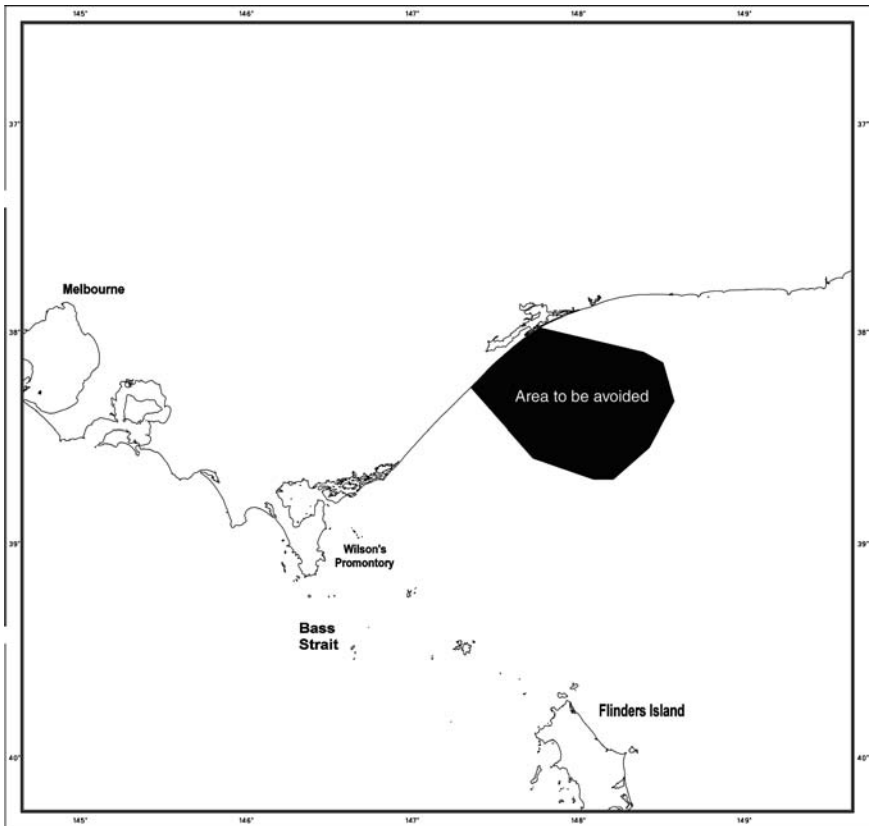


Figure 11.1 Area to be avoided, Schedule 2 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*.

been retained in the new *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), although the definition of terrorism, now with no application, remains.⁴⁴

The area to be avoided (Figure 11.1 above) is closed to vessels in excess of 200 tonnes or a tonnage length of at least 24 metres which are Australian flagged-vessels (or capable of being registered as such) and vessels engaged in petroleum-related activities.⁴⁵ Except for this last category, foreign-flagged vessels are exempt.⁴⁶ This is because, at international law, freedom of navigation would not permit Australia to close off an area of its EEZ to shipping, but it can restrict its own vessels, or vessels seeking to exploit its EEZ. Consultation with the International Maritime Organization to set up a traffic separation scheme for the area

44 Ibid., s. 614.

45 *Crimes (Ships and Fixed Platforms) Act 1992* (Cth), s. 331.

46 Ibid., s. 614.

in the vicinity of the Bass Strait oil fields was the manner in which this limitation was minimized.⁴⁷ Unauthorized entry by applicable vessels into the area to be avoided attracts a maximum A\$50,000 fine and/or five years' imprisonment for the owner and master. The offence is one of strict liability.⁴⁸

If an unauthorized vessel enters the safety zone or area to be avoided, then a range of powers are available to authorized persons. These powers include boarding the vessel to ask questions relating to the vessel and its movements, searching the vessel's documents relating to it or its movements, requiring the registration documents of Australian-flagged vessels, requiring the master of an unauthorized vessel to remove it from the zone, requiring the master to permit the vessel to be measured, towing a disabled vessel from the zone, and detaining a vessel that has contravened the entry restrictions. Refusal to cooperate with or obstructing an authorized person is an offence punishable by a fine of up to fifty penalty units.⁴⁹

The power to board, question, search, measure and detain can be exercised only under warrant issued by a magistrate, defined to include a Justice of the Peace. The warrant can be dispensed with if the authorized person has reasonable grounds to believe the vessel is, was or will soon be in contravention and the exercise of powers is necessary to prevent damage to structures, pipelines or equipment, and the circumstances are of a serious nature.⁵⁰

Section 184A of the *Customs Act* 1901 (Cth) gives the right to board a vessel that is within 500 metres of an offshore resource installation to establish the identity of the vessel, or if there is a reasonable suspicion that the vessel is, was or is preparing to breach the *Customs Act* or prescribed legislation. This is part of the general boarding power in the *Customs Act*, and contains robust provisions with respect to mother-ship apprehension.⁵¹ However, the *Petroleum (Submerged Lands) Act* 1967 was not, and the *Offshore Petroleum and Greenhouse Gas Storage Act* 2006 (Cth) is not, a prescribed Act in the *Customs Regulations* 1926 (Cth). Surprisingly, the *Crimes (Ships and Fixed Platforms) Act* 1992 (Cth) is prescribed under Regulation 31AAA of the *Customs Regulation* 1926 (Cth). This means the latter Act is enforceable by officers authorized under the *Customs Act*, but the former Act is not.

There is also implementation of the ISPS Code for Australia in the *Maritime Transport and Offshore Facilities Security Act* 2003 (Cth). This Act provides for a regulatory regime to ensure that persons working in maritime industries, including aboard offshore oil and gas platforms, are appropriately screened and subject to security controls. As the function of the Act is regulatory rather than punitive, its

47 For the current coordinates of the scheme see "Traffic Separation Schemes, Temporary Adjustment of the Traffic Scheme "In the Bass Strait", note by the Government of Australia, 29 November 2001, IMO Doc. COLREG.2/Circ.50.

48 *Offshore Petroleum and Greenhouse Gas Storage Act* 2006 (Cth), s. 619.

49 *Ibid.*, ss. 620, 621. At the time of writing, a penalty unit was \$110, meaning the maximum fine was \$66,000: *Crimes Act* 1914 (Cth), s. 4AA.

50 *Offshore Petroleum and Greenhouse Gas Storage Act* 2006 (Cth), s. 622.

51 *Customs Act* 1901 (Cth), s. 184A.

focus is on establishing Offshore Facility Security plans rather than creating a series of offences designed to be enforced by police or the Australian Defence Force. This is reflected in administrative responsibility for the Act resting with the Office of Transport Security within the Department of Infrastructure, Transport, Regional Development and Local Government. While this chapter principally considers the potential responses to maritime terrorism at sea, this should not be taken as diminishing the significance of the regulatory environment through the *Maritime Transport and Offshore Facilities Security Act 2003* (Cth) in helping to increase security offshore.

It should also be noted that Australia has responsibility with Timor-Leste for the management of petroleum activities in the Joint Petroleum Development Area (JPDA) in the Timor Sea. Article 19 of the *Timor Sea Treaty*⁵² provides that Australia and Timor-Leste will 'exchange information on likely threats to, or security incidents relating to, exploration for and exploitation of petroleum resources in the JPDA' and 'make arrangements for responding to security incidents in the JPDA'. In furtherance of this provision the two states concluded a security memorandum of understanding in 2006.⁵³

As with Australia, New Zealand has a number of measures designed to facilitate legislative protection for offshore platforms. First, the criminal law of New Zealand is deemed to operate aboard all oil, gas or other platforms operating upon New Zealand's continental shelf. This is provided for under Section 7 of the *Continental Shelf Act 1964* (NZ), which imports civil and criminal jurisdiction to these offshore facilities. In application it treats the installations as if they were part of New Zealand landward of the ordinary spring high tide.⁵⁴ The lack of additional subsidiary jurisdictions like the Australian states means the provision is far less complicated than the *Crimes at Sea Act 2000* (Cth) in Australia.

There is also provision for the declaration of a 500 metre safety zone around a New Zealand offshore installation. Section 8 of the *Continental Shelf Act 1964* (NZ) provides that the Governor-General may make regulations in respect of safety zones around such facilities, and to exclude shipping from these zones. The Governor-General has promulgated a number of regulations in respect of safety zones around facilities off the New Zealand coast.⁵⁵

New Zealand also has legislation to implement the *1988 SUA Protocol* with respect to fixed platforms. The *Maritime Crimes Act 1999* (NZ) closely reflects the

52 *Timor Sea Treaty*, 20 May 2002, [2003] ATS 13.

53 See the Hon. A. Downer MP, Australian Minister for Foreign Affairs, 'Australia and East Timor sign Security Arrangement on Joint Petroleum Area', Media Release, October 2006, available online at www.foreignminister.gov.au/releases/2006/fa112_06.html.

54 *Continental Shelf Act 1964* (NZ), s. 7.

55 *Continental Shelf (Pohokura Platform B Safety Zone) Regulations 2006* (NZ); *Continental Shelf (Umuroa Installation Safety Zone) Regulations 2008* (NZ); *Continental Shelf (Maui A Safety Zone) Regulations 1975* (NZ); *Continental Shelf (Maui B Safety Zone) Regulations 1991* (NZ); *Continental Shelf (Floating Production, Storage and Off-loading Installation Safety Zone) Regulations 1996* (NZ); *Continental Shelf (Kupe Wellhead Platform Safety Zone) Regulations 2006* (NZ).

SUA Protocol's provisions for offshore installations, although there is no specific reference to the *SUA Convention* or the *1988 SUA Protocol* within the text. At the time of writing, the legislation did not reflect the content of the *2005 SUA Fixed Platforms Protocol*.

2.2 *Submarine pipelines and cables*

The protection of pipelines in Australia is principally dealt with under the *Submarine Cables and Pipelines Act 1963* (Cth). The Act establishes a basic protection scheme derived from the obligations under the *Submarine Cables Convention* and adopted in the *Submarine Telegraph Act 1885* (Imp). It applies to cables and pipelines beneath the high seas or within the EEZ.⁵⁶ The Act makes it an offence for an individual to break or injure a submarine cable or pipeline, whether negligently or deliberately, although the penalties vary depending upon the motivation of the offender.⁵⁷

The application of these offences is only to persons operating on board Australian registered vessels, and not individuals operating off vessels registered in other states, regardless of the location of the pipeline. This closely reflects the requirements for states under Article 113 of the *LOSC* which treats the protection of pipelines and cables as a flag state rather than a coastal state matter.

A regulatory regime for pipelines does exist under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), but it is intended not to deal with protection of pipelines from interference, but rather to address occupational health and safety measures. Similarly, the *Maritime Transport and Offshore Facilities Security Act 2003* (Cth) deals with regulatory matters pertaining to the security of ships, platforms and shore facilities under the ISPS Code; since the ISPS Code does not purport to deal with undersea pipelines, neither does the Act.⁵⁸

More generally, an attack on a pipeline might fall under more general offences, related to terrorist offences or causing environmental harm.⁵⁹ Such offences may apply to a pipeline by virtue of the operation of the *Crimes at Sea Act 2000* (Cth) or in respect of offences relating to the environmental harm that might be caused by damaging a pipeline. However, there are no other specific provisions.

The protection of submarine cables in Australia is covered in two pieces of

56 *Submarine Cables and Pipelines Protection Act 1963* (Cth), s. 5 provides: '(1) This Act applies only to a submarine cable or pipeline, or that part of a submarine cable or pipeline: (a) that is beneath the high seas or in the exclusive economic zone; and (b) that is not a submarine cable (within the meaning of Schedule 3A to the *Telecommunications Act 1997* (Cth) in a protection zone (within the meaning of that Schedule).'

57 Negligent conduct attracts a maximum penalty of \$2,000 or imprisonment for twelve months, whereas negligent conduct attracts a maximum penalty of \$1,000 or imprisonment for three months: *Submarine Cables and Pipelines Protection Act 1963* (Cth), s. 7.

58 For the purposes of the Act, pipelines are not part of an offshore facility: *Maritime Transport and Offshore Facilities Security Act 2003* (Cth), s. 17A(5).

59 *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), s. 24AA.

legislation. The *Submarine Cables and Pipelines Protection Act 1963* (Cth) discussed above applies to submarine cables in the same fashion as its operation for pipelines. It is important to note that since 2005 the operation of the *Submarine Cables and Pipelines Protection Act 1963* (Cth) in respect of submarine cables was substantially altered, with the removal of cables used for telecommunications under a different regulatory scheme.

The second regime for the protection of submarine cables is within Schedule 3A of the *Telecommunications Act 1997* (Cth) and was introduced in 2005. It provides for an extensive scheme of protected areas to be established around submarine cables by the Australian Communications Management Authority (ACMA). A protected area may prohibit a range of activities, including certain types of fishing, anchoring, laying other cables or seabed mining.⁶⁰ Other activities may be substantially restricted.⁶¹ Before implementation, a protection zone around the cable must be the subject of public consultation with potentially affected groups. The Act provides a great deal of detail in relation to the incorporation of the consultation process into the administrative decision making that creates the protected area.

Schedule 3A of the *Telecommunications Act 1997* (Cth) also provides for a number of offences in the event a cable is damaged or disrupted in some fashion. The deliberate damaging of a cable within a protected zone attracts a maximum penalty of 600 penalty units and up to ten years' imprisonment.⁶² Negligently damaging a cable attracts a fine of up to 180 penalty units and up to three years' imprisonment and is an offence of strict liability.⁶³ There are also offences directed at the master and owner of a ship that has been used in the damaging of a cable, again attracting significant penalties, including imprisonment.⁶⁴ Even if the cable itself is undamaged, similar offences are directed at individuals, the master and the owner of an offending ship, simply by breaching the restrictions imposed within a protected zone, again with substantial penalties.⁶⁵ Provision is also made for civil claims in respect of damage.⁶⁶

Since Schedule 3A of the *Telecommunications Act 1997* (Cth) entered into force, ACMA has sponsored the creation of three protected areas, through two consultation processes.⁶⁷ The principal communications cables on the east coast, the Southern Cross and the Australia–Japan cables, are both within extensive protected zones up to 15.7 km wide and extending up to 75 km out to sea. Shortly after the creation of the eastern protected zones, a zone was implemented around the principal western cable, the SEA-ME-WE3 cable, extending some 94.5 km

60 *Telecommunications Act 1997* (Cth), Schedule 3A, cl. 10.

61 *Ibid.*, cl. 11.

62 *Ibid.*, cl. 36.

63 *Ibid.*, cl. 37.

64 *Ibid.*, cl. 39.

65 *Ibid.*, cls 40, 44.

66 *Ibid.*, cl. 45.

67 *Submarine Cable (Northern Sydney Protection Zone) Declaration 2007* (Cth); *Submarine Cable (Southern Sydney Protection Zone) Declaration 2007* (Cth); *Submarine Cable (Perth Protection Zone) Declaration 2007* (Cth).

out to sea. The consistency with international law of measures beyond the territorial sea discussed above is questionable.⁶⁸

The protection of pipelines and cables in New Zealand is dealt with under the *Submarine Cables and Pipelines Protection Act 1996* (NZ). Section 7 of the Act reflects New Zealand's obligations under the *LOSC* with respect to establishing a regime for liability for damage to cables and pipelines under Article 113. The Act also provides for an extensive regime of protection of cables and pipelines,⁶⁹ including the creation of protected zones around cables and pipelines where fishing or anchoring is prohibited.⁷⁰

The application of the *Submarine Cables and Pipelines Protection Act 1996* (NZ) does not run into the same international law jurisdictional concerns that the provisions applicable to submarine cables in Australia face under the *Telecommunications Act 1997* (Cth). The New Zealand legislation explicitly limits its jurisdictional application to New Zealand's territorial sea and internal waters, or actions undertaken from New Zealand ships, or by New Zealand nationals aboard foreign-registered vessels.⁷¹ This is entirely consistent with the accepted types of jurisdiction under international law. Further, to ensure that the application of New Zealand law does not create difficulties with other states, where the Act might apply to activities taking place beyond the territorial sea, there is a requirement that the Attorney-General issues a certificate in order that a prosecution may go ahead.⁷²

The *Submarine Cables and Pipelines Protection Act 1996* (NZ) and its associated regulations have been extensively used since their enactment, and a large number of protection zones around cables and pipelines have been designated. These include protection areas in the Hauraki Gulf, Cook Strait, Great Barrier Island, Kawau Island, Whangaparoa peninsula, Muriwai Beach and Taharoa Beach, as well as a submarine pipeline restriction area applying to all New Zealand ships associated with the Maui pipelines. Further, there has been integration of these protection areas as part of an overall scheme of protection pertaining to other matters offshore. This allows mariners to be aware of protection arrangements in relation to fisheries and resource management, the discharge of harmful substances as well as the protection of cables and pipelines. A single publication provides information on all of these areas, together with detailed maps to indicate visually the extent of all protected areas.⁷³

68 S.B. Kaye, 'International Measures to Protect Oil Platforms, Pipelines and Submarine Cables from Attack', *Tulane Maritime Law Journal* v31, 2007, pp. 418–21.

69 The Act also provides for the seizure of equipment and documents, as well as orders for a ship's identification or removal from the protected area: see *Submarine Cables and Pipelines Protection Act 1996* (NZ), ss. 20, 21.

70 *Submarine Cables and Pipelines Protection Act 1996* (NZ), ss. 12, 13.

71 *Ibid.*, s. 4.

72 *Submarine Cables and Pipelines Protection Act 1996* (NZ), s. 27.

73 V.A. Froude, *Area-based Restrictions in the New Zealand Marine Environment*, Wellington: New Zealand Department of Conservation, 2004, available online at www.doc.govt.nz/templates/MultiPageDocumentTOC.aspx?id=43055

3 Concluding remarks

Both Australia and New Zealand have made some progress in recent years to provide greater legislative protection for offshore installations, pipelines and cables. This is not surprising, as both states are keenly aware of their reliance on these offshore facilities, and both are conscious of the raft of international measures designed to facilitate maritime security.

In some respects, Australian protection of oil and gas installations appears more advanced, but this probably reflects the larger number of Australian oil and gas platforms, and the much greater threat faced by these facilities, rather than any fault on New Zealand's part. Both states have indicated support for further protective measures and are working towards eventual implementation of the *2005 SUA Fixed Platforms Protocol*. Both states too have worked in recent times to provide greater protection of undersea structures like pipelines and cables, and in this respect New Zealand seems further advanced, particularly in the provision of integrated information for seafarers in respect of the range of offshore protected areas and the scope of activities permitted in and around such zones. Australian progress in respect of the protection of pipelines and other forms of submarine cable not used for data traffic, like for example the Basslink power cable linking Tasmania to the national electricity grid, has been much slower.

One issue raised by the protection available to submarine cables under Schedule 3A of the *Telecommunications Act 1997* (Cth) has been whether the measures are consistent with international law. The *LOSC* guarantees freedom of navigation in the EEZ and beyond, and places responsibility for harm to submarine cables with flag states. The Australian scheme potentially restricts some aspects of freedom of navigation well beyond the twelve nautical miles of the territorial sea, and does so without reference to the flag state of an offending vessel. This raises questions as to whether the Australian measures are consistent with international law.

It is clear that ACMA has acted under the Schedule 3A of the *Telecommunications Act 1997* (Cth), and that, from a domestic legal position, the lack of compliance with international law, does not affect the validity of the Act. The High Court of Australia in *Horta v. Commonwealth*⁷⁴ held that an Australian court would not invalidate legislation validly framed under a head of power in the *Constitution*⁷⁵ even if it was clear the legislation might be contrary to international law. However, given the measures could be made compliant with international law with some modification which would not unduly undermine their effectiveness, they may draw international protest. Limiting restrictions in the EEZ to fishing-related activities, drilling and exploitation of the seabed and environmental matters such as scuttling or the use of a spoiling ground would ensure that Australia complies with its international obligations. In addition, it may be appropriate for states as reliant upon submarine cable traffic as Australia and New Zealand to promote states revisiting the relevant international law and to call for its updating.

⁷⁴ *Horta v. Commonwealth* (1994) 181 CLR 183.

⁷⁵ *Commonwealth of Australia Constitution Act 1900* (Cth).

12 Maritime Domain Awareness in Australia and New Zealand

Chris Rahman

Maritime domain awareness (MDA) has become a familiar catchword of the post-9/11 security environment. MDA – or comprehensive knowledge of the situation at, or related to, the sea – increasingly is deemed by coastal states to be an essential requirement for the protection of their national security and maritime interests. Further, to the extent that the international system itself is a maritime one, linked by seaborne trade and the maritime lines of communication of United States (US) alliance systems, states have a tangible stake in building and sharing knowledge and understanding of the maritime domain. The physically connected, transnational nature of the sea and the openness of the international trading system make that task both complex and daunting. The MDA task for both Australia and New Zealand is made especially difficult due to long coastlines and the great physical extent of their maritime zones of jurisdiction, as well as their wider regional maritime responsibilities and interests.

This chapter assesses maritime domain awareness in Australia and New Zealand first by examining the concept as conceived by the US and developed rapidly since the attacks of 9/11. Second, it describes the many MDA technologies and information sources being employed or under development, with a particular focus on the ship automatic identification system (AIS) and satellite-based long-range identification and tracking (LRIT) of vessels. It then addresses in turn the national MDA arrangements of Australia and New Zealand.

1 Maritime domain awareness as a concept

As a concept, MDA was developed by the US Coast Guard in the late 1990s.¹ In many ways it was simply a new name to describe an old idea: situational awareness, or what can be observed at sea, an important operational prerequisite for navies and other maritime security forces. However, in the altered strategic circumstances

1 M. Murphy, 'Lifeline or Pipedream? The Origins, Purposes, and Benefits of Automatic Identification System, Long-range Identification and Tracking, and Maritime Domain Awareness' in R. Herbert-Burns, S. Bateman and P. Lehr (eds), *Lloyd's MIU Handbook of Maritime Security*, Boca Raton, FL: CRC Press, 2008, p. 22.

of our times MDA has taken on more expansive connotations, at least in the US context, and this has influenced in turn the MDA requirements of other states. In the post-9/11 security environment, the urgency of preventing potentially catastrophic terrorist attacks at sea, or from the sea, forced states to take individual and collective action to enhance their knowledge of the maritime domain, especially with respect to information on vessels, their crews and cargoes. Reliable and timely information was thus now viewed as essential for the prevention of attacks. The US, in particular, became understandably preoccupied with preventing the exploitation of the maritime domain as the vector via which terrorist groups such as al Qaeda might conceivably launch an attack using a nuclear weapon, or other highly destructive or disruptive method, against the US homeland.

However, while the spectre of catastrophic terrorist attacks has been the primary MDA driver, that need has also dovetailed with broader concerns over ongoing challenges to 'good order at sea'.² Among other things, there has been a perception that the world's oceans have become, in the words of the US *National Strategy for Maritime Security* (NSMS) of September 2005, a 'largely unsecured medium for an array of threats by nations, terrorists and criminals'.³ The US has demonstrated especial concern with certain regions in which good order at sea is perceived to be under threat from piracy and armed robbery against ships, from illegal exploitation of marine resources, drug or weapons smuggling or other criminal or disruptive activity.⁴ MDA is a centrepiece of the NSMS:

Awareness and threat knowledge are critical for securing the maritime domain and the key to preventing adverse events. . . . Domain awareness enables the early identification of potential threats and enhances appropriate responses, including interdiction at an optimal distance with capable prevention forces.⁵

Further, as one of the eight plans designed to support and implement the NSMS, the *National Plan to Achieve Maritime Domain Awareness*, explains, the current 'maritime threat environment . . . requires broader scope and a more comprehensive vision . . . beyond traditional surveillance of ports, waterways, and oceans'.⁶

2 The concept of 'good order at sea' has been extensively explained and analysed in G. Till, *Seapower: A Guide for the Twenty-first Century*, London: Frank Cass, 2004, chapter 10.

3 United States of America (US) Government, The White House, 'The National Strategy for Maritime Security', September 2005, www.dhs.gov/xlibrary/assets/HSPD13_MaritimeSecurityStrategy.pdf, p. 2 [hereinafter 'National Strategy'].

4 For discussion of the regions in question see C. Rahman, *The Global Maritime Partnership Initiative: Implications for the Royal Australian Navy*, Papers in Australian Maritime Affairs 24, Canberra: Sea Power Centre Australia, 2008, pp. 23–5.

5 'National Strategy', note 3, p. 16.

6 US Department of Homeland Security, 'National Plan to achieve Maritime Domain Awareness for the National Strategy for Maritime Security', October 2005, www.dhs.gov/xlibrary/assets/HSPD_MDAPlan.pdf, p. 2 [hereinafter 'National Plan'].

The US Navy's own MDA Concept states that maritime domain awareness consists of situational awareness ('what is observable and known') plus threat awareness ('what is anticipated or suspected') and 'occurs when these two components are brought together to provide a decision-maker with an amalgamation of operational, intelligence and environmental information'.⁷ The comprehensiveness of US MDA ambitions is fully exposed in its official definition: 'the effective understanding of anything associated with the maritime domain that could impact the security, safety, economy, or environment of the United States'.⁸ The extent of the ambition is further exemplified by Washington's definition of the maritime domain itself, which comprises 'all areas and things of, on, under, relating to, adjacent to, or bordering on a sea, ocean, or other navigable waterway, including all maritime related activities, infrastructure, people, cargo, and vessels and other conveyances'.⁹

In transitioning from concept to operational reality the *National Plan to Achieve Maritime Domain Awareness* established a set of MDA objectives: the ability to 'persistently monitor' vessels and craft, cargo, crews and passengers and 'all identified areas of interest' anywhere in the maritime realm, albeit not simultaneously, on a global basis; access and archive vessel, maritime facility and infrastructure data; 'collect, fuse, analyze, and disseminate' relevant information; and develop data on the performance of the 'MDA-related mission'.¹⁰ In effect, the plan aims to be able to access data on, or monitor, any aspect of the global maritime domain, as expansively defined above, in a temporal context that is meaningful for the effective conduct of maritime security operations or other enforcement action, when required.

This challenging vision for greatly improved knowledge and awareness of the maritime sphere has significant organizational, political and legal implications.¹¹ It emphasizes cooperation and coordination not only among domestic government agencies, but also between national authorities and both private maritime and maritime-related industry and international partners.¹² Ensuring that information can flow freely and avoid potential political, legal, commercial or organizational 'firewalls' is a necessary prerequisite for effective MDA. Domestic coordination and information sharing demands a high level of interagency

7 US Department of the Navy, 'Navy Maritime Domain Awareness Concept', Washington, DC: Department of the Navy, May 2007, available online www.navy.mil/navydata/cno/Navy_Maritime_Domain_Awareness_Concept_FINAL_2007.pdf, p. 8.

8 'National Plan', note 6, p. 1 (emphasis added).

9 Ibid.

10 Ibid., p. 3; US Office of Global Maritime Situational Awareness, 'National Concept of Operations for Maritime Domain Awareness', December 2007, available online at www.defenselink.mil/policy/sections/policy_offices/hd/assets/downloads/UNCLAS%20MDA%20CONOPS%20Final%2020071213.pdf.

11 On the legal implications of information sharing see Chapter 13 in this volume.

12 'National Plan', note 6, p. 4.

cooperation, which can be difficult even within a single national jurisdiction due both to the natural interplay of bureaucratic politics and to differing attitudes to, and protocols for, the handling and sharing of often quite sensitive information. These tensions can be particularly acute when civilian and military organizations must work closely together, reflecting largely divergent organizational cultures. Such issues are not new for many states, including Australia and New Zealand, where the coordination of maritime surveillance inputs and outputs has involved interagency cooperation for some time. However, even in those jurisdictions the greater integrative demands of MDA in post-9/11 circumstances has heightened the need to enhance the robustness and effectiveness of coordination across all relevant government agencies.

Effective MDA requires partnerships to be constructed at a number of levels. Because the actual act of international trade is performed mostly by private companies, enlisting the cooperation of industry has been considered an important function of improving security practices and furnishing information for MDA systems.¹³ International cooperation is even more important, as a single state is unlikely to be able to generate sufficient data for a comprehensive MDA system using only its own domestic means: the more ambitious the MDA requirement, the greater the level of international cooperation that will be needed. The US imperative to build the most complete MDA system possible thus depends to a significant extent upon the participation of other states, in both bilateral and multilateral relationships. The promotion of maritime security cooperation therefore features as a leading element not only of the NSMS and its supporting plans,¹⁴ but also of the US Navy's Global Maritime Partnership initiative (formerly the '1,000 ship Navy'),¹⁵ and the more recent joint US maritime strategy.¹⁶

The Global Maritime Partnership initiative is particularly pertinent to this discussion. In a manner akin to the Proliferation Security Initiative, it is intended to be an informal security partnership, whereby interested states choose to participate only to the extent of their political or operational comfort, free of treaty or other legal obligations or constraints. Its two main components are the development of expanded MDA capabilities globally, and enhancement of regional enforcement capacities through cooperation and capacity-building.¹⁷ The MDA focus perhaps is the initiative's most tangible and significant aspect, and also

13 Ibid., p. 6.

14 'National Strategy', note 3, pp. 14–15; 'National Plan', note 6, p. 6; US Government, Department of State, *International Outreach and Coordination Strategy for the National Strategy for Maritime Security*, Washington, DC: United States Department of State, November 2005, available online at www.dhs.gov/xlibrary/assets/HSPD_IOCPlan.pdf.

15 Rahman, *The Global Maritime Partnership Initiative*, note 4.

16 US Navy, US Marine Corps and US Coast Guard, 'A Cooperative Strategy for Twenty-first Century Seapower', October 2007, available online at www.navy.mil/maritime/MaritimeStrategy.pdf.

17 Rahman, *The Global Maritime Partnership Initiative*, note 4, pp. 11, 27–9.

is likely to be its most enduring legacy. The Global Maritime Partnership idea in many respects represents the practical embodiment and implementation strategy of the principles of building cooperation for comprehensive MDA: promoting the construction of regional networks for maritime information exchange.¹⁸

The generation of MDA information has also been a goal of US engagement with international organizations such as the International Maritime Organization (IMO) and World Customs Organization. The US has taken a multifaceted approach to establishing a new system for global maritime security for the post-9/11 world, combining domestic measures, unilateral regulations with wide international implications, leadership in international organizations to create new multilateral regulations, and development or promotion of new informal security partnerships and regional maritime networks for security cooperation.¹⁹

US authorities often characterize their MDA conception as being analogous to the International Civil Aviation Organization (ICAO) system for monitoring aircraft.²⁰ It is about more than just vessel tracking, however. An important analytical goal is to identify ‘anomalous or suspicious’ vessel behaviour,²¹ which might involve, for example, detecting when a tracked ship ventures away from a course consistent with its stated destination. Yet a ship track alone may not be a sufficient signpost to supposedly errant behaviour. For example, when British authorities tracked and later boarded and searched the MV *Nisha* on the basis of a suspicious voyage pattern – looking, ultimately unsuccessfully, for weapons of mass destruction in the heightened threat environment of December 2001 – subsequent analysis demonstrated that the voyage pattern was in fact normal for that particular ship.²² The *Nisha* incident illustrates the importance, therefore, of being able to integrate and match historical information and detailed knowledge of individual ships and intelligence information with raw surveillance data. That need, in turn, is driving the development of database tools and information sharing architectures to integrate and analyse data: advanced algorithms are required for processes such as data mining and anomaly detection.²³

There is a danger, however, that the US predilection for advanced technology for its own sake may in fact allow technology itself – or the science of what is technologically possible – to drive the evolving MDA system, potentially making it

18 *Ibid.*, pp. 36–43.

19 That argument is fully developed in C. Rahman, ‘The Evolving US Framework for Global Maritime Security from 9/11 to the 1,000-ship Navy’ in Herbert-Burns, Bateman and Lehr, note 1, pp. 39–53.

20 See, for example, US Department of the Navy, ‘Navy Maritime Domain Awareness Concept’, note 7, p. 4.

21 *Ibid.*

22 Related in Murphy, ‘Lifeline or Pipedream?’, note 1, p. 23.

23 For discussion of the data fusion and analysis processes see Naval Studies Board, National Research Council of the National Academies, *The ‘1,000 Ship Navy’: Maritime Security Partnerships*, Washington, DC: National Academies Press, 2008, pp. 3–38–45.

unworkable, possibly unaffordable and a deterrent to the participation of some states. Nevertheless, the development and integration of relevant technologies and data inputs to serve MDA objectives is an important element of constructing MDA systems for all coastal states.

2 MDA information sources

The following is intended not as an exhaustive survey of all MDA information sources and technologies²⁴ but as an indicative guide to the types of sources being utilized or under development, with a focus on AIS and LRIT:

- 1 *Vessel track data*: AIS, LRIT, radar and other reporting systems used for safety, search and rescue (SAR) and vessel traffic services (VTS); and fisheries vessel monitoring systems (VMS).²⁵
- 2 *Sensors*: coastal and over-the-horizon radars; maritime patrol aircraft and unmanned aerial vehicles (UAVs); unmanned underwater vehicles and seabed sound detection arrays; imagery (electro-optical and radar) satellites; and electronic container seals.
- 3 *Customs and immigration information*: advance notice of arrival and arrival/destination information; pre-loading manifests such as the US Twenty-four-hour Rule; cargo, cargo and ship owner, carrier, and ship information; Customs–industry partnerships across the supply chain such as the US Customs–Trade Partnership against Terrorism and the World Customs Organization’s Authorized Economic Operator equivalent;²⁶ crew and passenger information, including biometrics.
- 4 Intelligence and law enforcement information.
- 5 *International and regional databases and architectures*: such as the Equasis database of port state information,²⁷ and the Virtual Regional Maritime Traffic Centre run by the Italian Navy for information exchange on vessels in the Mediterranean and Black Seas.²⁸
- 6 *Environmental information*: oceanographic, geographic, hydrographic and meteorological data.

2.1 Automatic identification system

AIS is probably the most important MDA information source: it was adopted by the IMO in 2000 as an addition (Regulation V/19) to Chapter V of the

24 For more detail see Rahman, *The Global Maritime Partnership Initiative*, note 4, pp. 30–3.

25 E.J. Molenaar and M. Tsamenyi, *Satellite-based Vessel Monitoring Systems: International Legal Aspects and Developments in State Practice*, FAO Legal Papers Online 7, April 2000.

26 For details of US initiatives see US Department of Homeland Security, *Strategy to Enhance International Supply Chain Security*, Washington DC, July 2007, pp. 64–78.

27 On Equasis and other international databases see Naval Studies Board, note 23, pp. F-1–3.

28 See Rahman, *The Global Maritime Partnership Initiative*, note 4, pp. 42–3.

International Convention for the Safety of Life at Sea (SOLAS Convention).²⁹ The regulation requires all SOLAS vessels of 300 gross registered tonnes (GRT) and above engaged on international voyages, all cargo ships 500 GRT and above not engaged on international voyages, and all passenger vessels capable of carrying more than twelve passengers, to carry a Class A AIS device. In the wake of 9/11 a 2002 SOLAS Conference brought forward the implementation timeline for AIS, requiring that all AIS-mandated ships be fitted with the device no later than 31 December 2004. AIS is a very high frequency (VHF) radio broadcast system that allows the voiceless exchange of navigation and other ship information between AIS-equipped vessels and other nearby AIS-equipped vessels, aircraft and shore stations. It is connected to a ship's navigational devices, such as global positioning systems and shipboard sensors, to send information in 'packets' over a VHF data link (VDL). Each Class A AIS unit automatically broadcasts information every sixty seconds into self-organized VDL transmission time slots.³⁰ Class A AIS units transmit four types of information:³¹

- 1 *Static information* (entered at the time of installation of the AIS unit; reported every six minutes and on request):
 - a Vessel call sign.
 - b Name.
 - c IMO number.
 - d Maritime Mobile Service Identity (MMSI), a nine-digit number used to transmit on the VDL.
 - e Dimensions (length and beam).
 - f Type of vessel.
 - g Location of the ship's position fixing antenna.
- 2 *Dynamic information* (from the ship's electronic navigational systems; reported from every two seconds to three minutes, depending on speed and course changes):
 - a Time, in universal time.
 - b Position (latitude/longitude).
 - c Course over ground.

29 *International Convention for the Safety of Life at Sea*, 1 November 1974, 1184 UNTS 278 [hereinafter *SOLAS Convention*].

30 Australian Maritime Safety Authority (AMSA), 'Automatic Identification System (AIS)', AMSA brochure, May 2008. Other types of AIS also exist: Class B, Base Station, aids to navigation, SAR transmitters and SAR aircraft.

31 Information derived from the US Coast Guard, Navigation Center, 'Automatic ID System (AIS)', undated, available online at www.navcen.uscg.gov/enav/AIS/default.htm; N.J. Bailey and Lloyd's Register Research Unit, 'Training, Technology and AIS: Looking beyond the Box', unpublished paper presented at the Seafarers International Research Centre Symposium, Cardiff University, n.d., p. 3; Australian Government, AMSA, 'Shipborne Automatic Identification System (AIS)', AMSA Fact Sheet, December 2003, p. 2; and Australian Government, AMSA, 'Automatic Identification System (AIS)', note 29.

- d Speed over ground.
 - e Heading.
 - f Rate of turn.
 - g Navigational status.
- 3 *Voyage-related information* (entered at the beginning of each voyage; reported every six minutes, whenever data are amended or on request):
- a Draught.
 - b Hazardous cargo (type).
 - c Destination.
 - d Estimated time of arrival.
 - e Route plan.
- 4 *Short safety-related messages* (sent as required):
- a Free format text message.

Although AIS was conceived initially as a tool to enhance navigational safety, especially for collision avoidance, its utility for MDA purposes is obvious. One of the system's limitations, however, is its range: typically, AIS transmissions at sea can be detected at ranges of around twenty nautical miles, although this extent of coverage can depend upon antenna heights and can be extended using repeater stations.³² The US, for example, plans to extend AIS coverage to allow coastal reception of up to fifty nautical miles and eventually out to 2,000 nautical miles, through the use of AIS-equipped offshore platforms and buoys linked to commercial communications satellites, AIS-equipped aircraft and AIS-equipped satellites.³³

A second limitation is that non-SOLAS vessels are not required to install the equipment, meaning that there are literally millions of small vessels and craft around the world, such as fishing boats, work and pleasure craft, that for the most part cannot be monitored and tracked under present circumstances. Class B AIS is a cheaper version of the system, with less functionality, designed for use on such craft.³⁴ Because the IMO has no jurisdiction to set standards for such craft, its use remains voluntary: individual national authorities have the option of specifying the system, however, for craft licensed within their jurisdiction.

A third potential problem with AIS is security: because it is an open broadcast system, anyone with an AIS transponder within range or with access to live AIS feeds or near-real-time online AIS databases can access the information. Hypothetically, this could become a potentially useful tool for the well organized pirate or terrorist. This has led some ships' masters to switch off their AIS unit in

32 US Coast Guard Navigation Center, note 31.

33 Naval Studies Board, note 23, pp. 3–11.

34 AMSA, 'Automatic Identification System (AIS)', note 29.

potentially dangerous regions.³⁵ Further problematic issues with AIS include incorrect information being transmitted as a result either of operator error or even deception.³⁶ Nevertheless, despite these limitations, AIS remains among the most powerful MDA tools available to states.

2.2 Long-range identification and tracking

Satellite-based long-range identification and tracking of ships is another IMO amendment to Chapter V (Regulation V/19-1) of the *SOLAS Convention*, adopted in May 2006, for security and SAR purposes. Its adoption was driven primarily by post-9/11 concerns due to the coverage limitations of AIS. LRIT applies to all vessels of the following classes engaged on international voyages: passenger ships; cargo ships of 300 GRT and above, including high-speed craft; and mobile offshore drilling units. The system is able to utilize the satellite terminals already mandated for most SOLAS vessels, which use an Inmarsat C device for the global maritime distress safety system.³⁷ Relevant ships that do not carry this system are required to install a dedicated LRIT terminal. The LRIT system requires SOLAS vessels to automatically transmit their identity, position, and date and time of position every six hours, although ships can be polled remotely at a minimum of fifteen-minute intervals,³⁸ if requested. LRIT is completely unconnected to the AIS system and, unlike AIS, it is secure and confidential, with ship operators or crews unable to input data or tamper with the terminal, and the information is restricted to only those who are entitled to access it. The amendment entered into force on 1 January 2008, with compliance required by 31 December 2008,³⁹ although delays in fully establishing the system have led to the agreement of transitional arrangements until 30 June 2009.⁴⁰

Under the plan for LRIT system architecture, Contracting Governments must elect either to create a National LRIT Data Centre, or participate in a Regional or Cooperative Data Centre.⁴¹ Existing national VMS centres may double as the data centre, and data centres may be operated on a commercial basis by a nominated Application Service Provider. This Provider, where used, or the data centre must add the following data to LRIT transmissions: name of the ship, IMO ship

35 Murphy, note 1, p. 16.

36 *Ibid.*, pp. 16–17; Bailey and Lloyd's Register Research Unit, note 31, pp. 18–19.

37 Murphy, note 1, p. 18.

38 Remote polling allows on-demand polling of specific ships by relevant authorities.

39 For further description and analysis of LRIT see AMSA, 'Long Range Identification and Tracking', AMSA Fact Sheet, February 2009; M. Tsamenyi and M.A. Palma, 'Long-range Identification and Tracking Systems for Vessels: Legal and Technical Issues' in Herbert-Burns, Bateman and Lehr, note 1, pp. 215–32. The LRIT section of this chapter is based on these sources.

40 'Transitional Arrangements and Measures for Accelerating the Completion of the Establishment of the LRIT System', 8 December 2008, IMO Doc. MSC.1/Circ.1299.

41 In theory states can also opt to join an International Data Centre, although in practice it has yet to be established.

identification number and Maritime Mobile Service Identity, as well as appropriate time stamps. Every mandated ship must transmit its LRIT information to the data centre nominated by its flag state. Data centres collect the data for their respective flag state. When a data centre is requested by another LRIT data user through its own nominated data centre for LRIT information, both the request and the LRIT information are transmitted via the International LRIT Data Exchange. All requests for polling must be transmitted through the Exchange – to be provided on an interim basis by the US – with system standards and operating procedures set by the IMO's LRIT Data Distribution Plan. Data-using states are required to pay for each ship position requested, including archived data.

As there are approximately 50,000 SOLAS-regulated ships in operation, at a minimum rate of four transmissions per ship every twenty-four hours, over any twenty-four-hour period the system must be able to process at least 200,000 transmissions. That number could be considerably higher if large numbers of on-demand requests are made for polling at lesser intervals than every six hours.

The LRIT regulations allow flag states to receive LRIT information from ships flying their flag anywhere in the global maritime domain. Port states are entitled to receive information from ships that have communicated an intent to enter any of their port facilities: the information can be received from ships anywhere in the world except when they are located in the internal or archipelagic waters of another state. Coastal states may receive information from ships navigating up to 1,000 nautical miles from their coast, except when the ship is located within the internal waters of another state or the territorial sea of its flag state. These regulations do not alter in any way the extant law of the sea, including existing powers of maritime enforcement: it has been persuasively argued that the collection and provision of LRIT information is a 'passive activity' and thus does not affect a ship's navigational rights or breach any other provisions of the *United Nations Convention on the Law of the Sea (LOSC)*.^{42, 43} In addition, national SAR authorities may receive LRIT information in emergencies free of charge. However, the rather pedantic limitations, and the fact that some technical and financial issues have yet to be settled, make the ultimate effectiveness of LRIT unclear.

2.3 Satellite-based automatic identification system

Satellite-based AIS may be one way to overcome the limitations of LRIT. Canada and the US have already commenced programmes with commercial satellite operators to equip low earth orbit communications satellites with an AIS receiving capability. Further, a feasibility study by the Norwegian Defence Research Establishment has concluded that adapting AIS in this way would be a low-cost

42 *United Nations Convention on the Law of the Sea*, 2 December 1982, 1833 UNTS 3.

43 M. Tsamenyi and M.A. Palma, 'Legal Considerations in the Implementation of Long-range Identification and Tracking Systems for Vessels', *Journal of International Maritime Law* v13(1), 2007, pp. 50–5.

alternative for open ocean vessel tracking. It suggests that AIS signals could be received by AIS-equipped satellites up to an altitude of 1,000 km, and that AIS satellites would have a range to the horizon of 1,000 nautical miles. The study also concluded that a 99 per cent probability of detection is possible, depending on the satellite swath width, which could be optimized from region to region to take into account the normal density of shipping. Apart from the AIS-equipped satellites, the system would require a control station and one or more downlink stations appropriately placed to receive the data.⁴⁴

The IMO has also begun to consider the issue in collaboration with the International Telecommunications Union. The two bodies have pinpointed a need for further studies to address the problem that too many simultaneous AIS transmissions from high-density shipping areas might potentially hinder satellite reception. Potential solutions proffered include eliminating Class B AIS from satellite reception and setting an 'appropriate reporting rate' for Class A equipment, which might need modification and a separate frequency for satellite detection of AIS, although the latter might require the replacement of all existing AIS equipment.⁴⁵

In 2004 the US Coast Guard awarded the US company ORBCOMM a contract for an AIS concept demonstration satellite, which was launched in June 2008 along with five other AIS satellites. ORBCOMM is planning further AIS-equipped satellites, which are being marketed to the US, other governments and commercial customers.⁴⁶ The Canadian space system company COM DEV also launched a dedicated AIS nano-satellite prototype test in April 2008, which has since validated the concept for wide area coverage. COM DEV subsequently signed a contract with the Canadian government to build a Maritime Monitoring and Messaging Micro-satellite to be launched in 2010, expected to be the first in a class of AIS-equipped micro-satellites. COM DEV also has developed as part of its AIS package a proprietary 'decollision' process to separate the large number of incoming AIS signals from high traffic density areas into usable data. The company predicts that by 2015 the market for space-based AIS could equate to more than forty payloads.⁴⁷ It seems clear, therefore, that space-based reception of AIS

44 See T. Eriksen, G. Høye, B. Narheim and B.J. Meland, 'Maritime Traffic Monitoring using a Space-based AIS Receiver', *Acta Astronautica* v58, May 2006, pp. 537–49.

45 'Safety of Navigation: Improved Satellite Detection of AIS', Note by the Secretariat, Maritime Safety Committee, 26 August 2008, IMO Doc. MSC 85/11/1.

46 'Coast Guard explores Space-based System for Maritime Awareness', ORBCOMM, 24 January 2007, available online at www.orbcomm.com/media/releases/01-24-07.htm, and 'ORBCOMM and the US Coast Guard amend Agreement to select High Data Usage and add Software Upgrades', ORBCOMM, 3 October 2008, available online at www.businesswire.com/portal/site/orbcomm//20081003005312/en.

47 'COM DEV Awarded AIS Micro-satellite Contract with Canadian Government', Canada Newswire Ltd, 23 June 2008, available online at <http://micro.newswire.ca/release.cgi?rkey=1606236806&view=28380-0&Start=0>. 'COM DEV Validates Advanced Space-based AIS Performance', Canada Newswire Ltd, 5 June 2008, available online at <http://micro.newswire.ca/release.cgi?rkey=1606058998&view=28380-0&Start=0>. 'COM DEV to Demonstrate Advanced Space-based AIS Capability', 19 October 2007, SpaceRef Interactive Inc., available online at www.spaceref.com/news/viewpr.html?pid=23840.

signals is going to provide an important new capability for essentially unrestricted worldwide tracking of SOLAS ships. As long as the downlinks are secure, the system could, over the medium term at least, enhance, and possibly even effectively replace, the need for LRIT from a purely technical perspective, although it could pose political or operational problems if certain flag states were to perceive unrestricted access to shipping data as a security risk.

3 Maritime domain awareness in Australia

Although Australia may lack the global pretensions of the US plan for comprehensive MDA, the definition adopted by the Australian Maritime Identification System (AMIS) Programme Charter and Mandate is a simple derivation from the US original: 'The effective understanding of any activity associated with the maritime environment that could impact on the security, safety, economy or environment.'⁴⁸ Australia's maritime domain has been defined as 'all things relevant to the national interest on, under, associated with, or adjacent to Australia's maritime zones'.⁴⁹ The extent of those zones places the enormous scale of the MDA task into context. Australia's exclusive economic zone (EEZ) is the world's third largest: in total, the EEZ is over 8.1 million km², excluding the Antarctic EEZ.⁵⁰ In April 2008 Australia's jurisdiction over an extra 2.5 million km² of continental shelf was confirmed.⁵¹ Australia's MDA requirement must also take into account its responsibility for both aviation and maritime SAR in the East Indian, South West Pacific and Southern Oceans, a region of almost 53 million km², which equates to more than 10 per cent of the earth's surface.⁵²

Moreover, in the greater South West Pacific, Australia has Defence Cooperation Programme obligations to assist with maritime surveillance for Pacific Island states, as well as other maritime security interests and responsibilities.⁵³ Further still, the unbreakable maritime links that tie Australian national security to the security environment in the East Asian and Indian Ocean regions ensure an

48 Cited in AMSA, 'AMSA Vessel Tracking Program: Program Charter and Mandate', Version 2.0, July 2008, available online at www.amsa.gov.au/shipping_safety/vessel_tracking/program_charter_v1.pdf, p. 3 [hereinafter 'Vessel Tracking Program'].

49 Border Protection Command, *Concept of Operations*, Canberra, February 2008, p. 3.

50 Geoscience Australia, 'Australia's Oceans and Seas: Area of the Australian Exclusive Economic Zone', available online at www.ga.gov.au/education/facts/dimensions/oceans.jsp.

51 Hon. M. Ferguson AM MP, Australian Minister for Resources and Energy, Minister for Tourism, 'UN Confirms Australia's Rights over extra 2.5 Million Square Kilometres of Seabed', Media Release, 21 April 2008, available online at <http://minister.ret.gov.au/TheHonMartinFergusonMP/Pages/UNCONFIRMSAUSTRALIA'SRIGHTSOVEREXTRA.aspx>.

52 AMSA, 'Search and Rescue Arrangements in Australia', undated, available online at www.amsa.gov.au/search_and_rescue/Search_and_Rescue_in_Australia/Arrangements.

53 Rahman, *The Global Maritime Partnership Initiative: Implications for the Royal Australian Navy*, note 4, pp. 51–2.

abiding interest in maritime knowledge of those areas: this is particularly the case with respect to archipelagic South East Asia, where Australia is deeply engaged in capacity-building programmes for MDA, among other things.⁵⁴ However, this section will focus on the maritime space of primary concern to AMIS: the mechanism through which Australia integrates its MDA interests. Australia's MDA arrangements are the responsibility of two agencies: Border Protection Command (BPC)⁵⁵ and the Australian Maritime Safety Authority (AMSA).

3.1 Border Protection Command and the Australian Maritime Identification System

Border Protection Command is a multi-agency body staffed by personnel from the Australian Customs and Border Protection Service, the Department of Defence, the Australian Fisheries Management Authority (AFMA) and the Australian Quarantine and Inspection Service. It is charged with primary responsibility for the coordination of surveillance, response and security throughout Australia's maritime domain, including acting as Australia's Security Forces Authority in response to violent acts against shipping anywhere in the vast Australian SAR region.⁵⁶ Employing a whole-of-government approach, it is BPC's task to identify security threats and assess their likelihood and the possible consequences.⁵⁷ Within the organization, the BPC Intelligence Centre fuses MDA intelligence and conducts threat analysis and risk assessments, and the Australian Maritime Information Fusion Centre employs AMIS as the primary system with which to manage MDA information.

As described by the Director of AMIS, it 'is a system that collects data, establishes context, fuses and plots positional data to persistently track targets via a picture, the Recognised Maritime Picture' (RMP).⁵⁸ AMIS employs a graduated information system that seeks to detect maritime traffic and access 'basic entry information' at a distance of 2,000–1,000 nautical miles (or approximately ninety-six to forty-eight hours' steaming time) from the coast; identify traffic

54 See, for example, C. Rahman, 'Australia and Maritime Security in the Northeast Indian Ocean' in W. Tow and C. K. Wah (eds), *ASEAN-India-Australia: Towards Closer Engagement in a New Asia*, Singapore: Institute of Southeast Asian Studies, 2009, pp. 181–198.

55 On the recent evolution of Australia's arrangements for maritime border protection see C. Schofield, M. Tsamenyi and M.A. Palma, 'Securing Maritime Australia: Developments in Maritime Surveillance and Security', *Ocean Development and International Law* v39, 2008, pp. 94–112; M. Bannon, 'The Evolution of the Role of Australian Customs in Maritime Surveillance and Border Protection', Master of Maritime Studies-Research, dissertation, University of Wollongong, 2007, pp. 43–63.

56 Border Protection Command, note 46, p. 5.

57 *Ibid.*, p. 6.

58 T. Roulston, Director, Australian Maritime Information System, 'The Australian Maritime Information System: Next Generation MDA Systems and Operations', PowerPoint presentation, 12 December 2007.

500 nautical miles away (twenty-four hours' steaming), using 'advanced voluntary information', and identify and conduct threat assessments of all traffic within the EEZ except day recreational craft.⁵⁹ Data mining and visualization tools are employed to detect patterns and anomalies in vessel behaviour. The initial AMIS operational MDA capability was to be in place by the end of 2008; an enhanced analytical capability, including an unclassified database, is expected by December 2009; and greater whole-of-government access to AMIS outputs is intended for mid-2011.⁶⁰ Currently all AMIS data are classified across a spectrum of security ratings.⁶¹

The actual data originate from other government agencies: AMSA is the leading source of vessel tracking data; the Department of Immigration and Citizenship provides crew and passenger information; and intelligence data are sourced from different intelligence agencies, the Australian Federal Police and open sources. Customs provides important information on cargoes, vessel movements, ports, shippers and other trade-related information.

In addition to AMIS, there are a range of other assets and capabilities that contribute to the overall MDA picture. The Australian Customs and Border Protection Service contracts civil aerial surveillance under the Coastwatch Sentinel programme, which uses three helicopters, as well as ten Dash-8 fixed-wing aircraft equipped with advanced sensor suites and capable of surveillance of a northern Australia area of over 110,000 km² – the location of vulnerable offshore gas platforms and large numbers of often illegal foreign fishing activity and seaborne people movements.⁶² AMSA also contracts five Dornier SAR aircraft, which Customs funds to conduct extra maritime surveillance when not in use for SAR purposes.⁶³ In mid-2008 BPC conducted trials of a mid-range maritime surveillance UAV capability using the Israeli Heron aircraft. The Heron has a range of over 1,800 km, with the trial focusing on particular areas of interest such as the Torres Strait and Great Barrier Reef.⁶⁴ Commercial satellite imagery is also procured when required. Under a legislative amendment, AFMA is able to give information sourced from fisheries VMS to Customs for the purpose of offshore civil surveillance,⁶⁵ which allows BPC to distinguish between known and

59 *Ibid.*

60 *Ibid.*

61 AMSA, 'Vessel Tracking Program', note 48, p. 8, note 3.

62 Australian Customs Service (ACS), 'Aircraft', undated, available online at www.customs.gov.au/site/page.cfm?u=5789. 'Strengthening Aerial Surveillance to Protect our Borders', Media Release, 1 February 2007, available online at www.customs.gov.au/site/page.cfm?c=8472.

63 ACS, 'Annual Report 2006–07', 2007, available online at www.customs.gov.au/site/page.cfm?u=4283, pp. 124–5.

64 ACS, 'Unmanned Aircraft Trial boosts Border Protection', Media Release, 23 May 2008, available online at www.customs.gov.au/site/page.cfm?c=10417.

65 *Fisheries Management Act* 1991 (Cth), s. 167B; see also Australian Fisheries Management Authority, 'Principles and Policy Guidelines for the Application of the Vessel Monitoring System in Commonwealth Waters', January 2008, pp. 2–3.

potentially illegal vessels.⁶⁶ Private industry is also a source of information, and the Office of Transport Security, which is responsible for the security regulation of ports, ships and offshore platforms, generates risk assessment information about those assets. This office, Customs, the Australian Federal Police and intelligence officers posted in regional states also add to the human intelligence and risk assessment product.

Improved surveillance capabilities to detect threats as far from Australian territory as possible has been a long-standing goal of Australia's defence policy: the 2000 Defence White Paper listed as one of its capability goals, for example, the development of 'a comprehensive surveillance system providing continuous coverage of [Australia's] extended air and sea approaches'.⁶⁷ The Australian Department of Defence is a major contributor to BPC's overall MDA effort. For example, surveillance is generated by a Royal Australian Air Force (RAAF) AP-3C maritime patrol aircraft dedicated to BPC duties, although others can be tasked when needed: RAAF 41 Wing Air Space Surveillance support; and Army Regional Force Surveillance Unit patrols.⁶⁸ In addition, surveillance is sourced from the Jindalee over-the-horizon radar network, which provides constant all-weather detection of maritime and air 'targets' to the north and north-west of Australia out to a distance of 2,000 km;⁶⁹ satellite imagery sourced by the Defence Imagery and Geospatial Organisation from both allied military satellites and commercial satellite providers; and electronic intelligence and signals intelligence gathered by the Defence Signals Directorate. In the near future, the RAAF's airborne early warning and control aircraft will add to surveillance capabilities and, more important, there exists the prospect of an Australian purchase of long-range, high-endurance broad-area maritime surveillance UAVs, which will have a mission radius of around 3,000 nautical miles.⁷⁰ This capability has already been proven during the North West Shelf Unmanned Aerial System Trial in 2006.⁷¹

3.2 AMSA vessel tracking programme

AMSA's remit is maritime safety, SAR and marine environmental protection rather than security. It is thus a primary collator of vessel track data as it has

66 ACS, 'Submission to the Security Legislation Review Committee', January 2006, p. 15.

67 Australian Department of Defence, *Defence 2000: Our Future Defence Force*, Canberra: Defence Publishing Service, December 2000, available online at www.defence.gov.au/publications/wpaper2000.PDF, p. 95.

68 Border Protection Command, note 46, p. 6.

69 Hon. B. Nelson, Australian Minister for Defence, 'Maintaining Australia's Over the Horizon Radar Capability', Media Release, 28 June 2007, available online at www.minister.defence.gov.au/NelsonMintpl.cfm?CurrentId=6815.

70 P. La Franchi, 'BAMS (Broad Area Maritime Surveillance) Announcement Imminent', *Asia Pacific Defence Reporter* v34(1), February 2008, pp. 28–9.

71 P. Lindsay, Parliamentary Secretary to the Minister for Defence, 'Joint Maritime Surveillance Do-able with Unmanned Aerial System', Media Release, 22 March 2007, available online at www.minister.defence.gov.au/2007/070322.doc.

responsibility for AIS, LRIT, SAR and other safety-related monitoring systems. AMSA established its Vessel Tracking (AMSA-VT) Program in 2006 'to manage and integrate all aspects of vessel track information' in order to satisfy the safety and environmental demands for MDA and support whole-of-government MDA efforts, including AMIS and the National AIS Strategy.⁷² It also is working to develop a 'common approach' to the 'collection, storage and dissemination' of vessel track information across the whole of government.⁷³ The *Australian Maritime Safety Authority Act* 1990 (Cth) has been amended to allow AMSA to share data, including for the purposes of MDA and maritime security.⁷⁴ A multi-agency integrated project team is developing the National AIS Strategy, which will provide AIS data via secure channels to 'federal, state and relevant authorities'.⁷⁵

The AMSA-VT Program does not intend to provide '24/7 real-time monitoring of vessel track data, nor will it include a fused, collated and managed image',⁷⁶ which is the role of AMIS. Instead, it aims to provide 'real-time access' to data (including vessel, crew, cargo and route information) on ships throughout the Australian SAR region using a Google Earth display system: Earth VTS. AMSA-VT data is fed in real time to AMIS.⁷⁷

The AMSA-VT Program uses the following information sources:⁷⁸

- 1 AMSA AIS Base Station network.
- 2 *Australian Ship Reporting System* (AUSREP), operated by AMSA through the Australian Rescue Coordination Centre for safety and SAR purposes. It is mandatory only for certain ships but all ships transiting the Australian SAR region are encouraged to participate: because it is in their own self-interest, the vast majority do so. Participating ships must transmit various reports at regular intervals using Inmarsat C polling in a 'positive reporting' system, whereby the Rescue Coordination Centre will undertake checks if scheduled reports are not received.⁷⁹
- 3 *Great Barrier Reef and Torres Strait Vessel Traffic Service* (REEFVTS), operated jointly by AMSA and Maritime Safety Queensland to assist navigational safety and avoid environmental damage from shipping in those areas, which are complex for navigation and environmentally sensitive. It comprises a mandatory ship reporting system (REEFREP), and monitoring and

72 AMSA, 'Vessel Tracking Program', note 48, p. 3. For the complete list of vessel track data usage by AMSA business units see Annex A, pp. 15–16.

73 *Ibid.*, p. 8.

74 *Maritime Legislation Amendment Act* 2007 (Cth), Schedule 2.

75 AMSA, 'AMSA Comments for ACMA Spectrum Discussion Papers', 18 July 2008, p. 5.

76 AMSA, 'Vessel Tracking Program', note 48, p. 10.

77 *Ibid.*, pp. 10–11.

78 Unless otherwise noted, based on *ibid.*, p. 8.

79 AMSA, *AUSREP: Ship Reporting Instructions for the Australian Area*, Canberra: AMSA, January 2007, pp. 3–6, 14.

surveillance systems, including radar, AIS and automated position reporting via Inmarsat C, as well as VHF reporting.⁸⁰

- 4 *LRIT*, the Australian National Data Centre, to be expanded into a Cooperative Data Centre in 2009⁸¹, became operational in February 2008, and is provided on a commercial basis by the British Application Service Provider, Pole Star.⁸² Inmarsat C has been confirmed as the primary communications system, and Pole Star will receive the six-hourly reports from Australian-registered vessels and forward them to the International LRIT Data Exchange.⁸³ The Australian aspects of the LRIT system were fully functioning by mid-2008, with all Australian registered ships reporting.⁸⁴ Australia intends to receive reports on foreign flagged ships within 1,000 nm of the coast only at twelve, rather than six-hourly intervals, with a higher polling rate remaining an option, when required: based on an average of 2,500 ships transiting within 1,000 nm of the coast in any 24-hour period, that equates to approximately 1,780,000 reports per year.⁸⁵
- 5 AIS-equipped SAR aircraft.
- 6 *VMS*: data on fishing boats within the REEFVTS area only, provided by the Queensland Fisheries Service.
- 7 Defence/Customs (only on request, as required).
- 8 Coastal Volunteer Marine Rescue reporting (via Police).
- 9 Maritime Safety and Security Information System (MSSIS).⁸⁶
- 10 Foreign SAR authorities and Amver.⁸⁷

In addition, the program will supplement such information sources from 2008/

80 AMSA, *REEFVTS User Manual*, 2nd ed., Canberra: AMSA, March 2005, p. 3.

81 Australia issued a letter of intent to the IMO in late 2008 indicating that it would form a Cooperative Data Centre, which will initially also include New Zealand, the Cook Islands and Papua New Guinea as participants. Correspondence from AMSA Vessel Tracking Manager, 16 January 2009.

82 On Pole Star's LRIT ASP services see Pole Star, Long Range Identification and Tracking: Overview, 'Data Centre Solutions', undated, available online at www.lrit.com/datacentre.html.

83 AMSA, 'Long Range Identification and Tracking', note 39, pp. 2–3.

84 Personal conversation with senior AMSA manager, Canberra, 3 September 2008.

85 See International Maritime Organization, Intersessional MSC Working Group on Long Range Identification and Tracking, 'Considerations of Issues for the Timely Establishment of the LRIT System: Comments on the outcome of COMSAR 11', submitted by Australia, 6 July 2007, IMO Doc. MSC/ISWG/LRIT 2/3/1.

86 MSSIS is a system created by the US Department of Transportation for the sharing of raw AIS data between states. Any state which contributes data can access data in return. As of August 2008 there were fifty-three participating states, including Australia. See Commander D.G. Wirth, US Navy, 'Spotlight on the Caribbean Initiative', PowerPoint presentation to the second Western Hemisphere Maritime Domain Awareness Workshop, EXPONAVAL 2008, Port of Valparaiso, Chile, 4 December 2008.

87 Amver is a US Coast Guard-sponsored global ship reporting system for SAR purposes using IMO reporting standards. Participation is open, voluntary and free of charge: 12,000 ships currently participate, with an average of 2,800 ships on the plot each day. Amver exchanges data with AUSREP. Refer to www.amver.com/default.asp.

2009 with non-AMSA AIS and radar data from the states, port authorities and maritime and offshore industries; AMIS, when security release details are resolved; and potentially, satellite-based AIS from commercial providers.⁸⁸ In addition to the mandatory carriage of AIS by SOLAS ships, AMSA notes that many other vessels and offshore oil and gas installations choose to carry the equipment, while the National Marine Safety Committee is likely to mandate AIS for all passenger vessels under the jurisdiction of the states and the Northern Territory.⁸⁹ The greater use of AIS, including the voluntary carriage of Class B units by small boats and leisure craft, may ultimately further improve the overall MDA picture generated by AMSA and AMIS, although the voluntary nature of applicability to such craft and the very large numbers involved (in the hundreds of thousands) do raise questions of clutter and practicality.

4 Maritime domain awareness in New Zealand

The New Zealand MDA conception also is derived from that of the US: 'The effective understanding of anything associated with the maritime environment that could impact the sovereignty, security, safety, economy, environment or foreign policy interests of New Zealand'.⁹⁰ Like Australia, New Zealand also has a vast EEZ – the world's fifth largest at approximately 4 million km². In addition, jurisdiction over an extra 1.7 million km² of continental shelf was confirmed in September 2008.⁹¹ New Zealand's SAR region stretches from the Equator – encompassing the maritime zones of several island states of the South Pacific – to Antarctica, and from the Tasman Sea a long way eastward into the Pacific Ocean: amounting to 30 million km².⁹² New Zealand's MDA burden is significant given the small size of the country and national budget relative to its maritime interests and responsibilities, which include constitutional obligations for the defence and security of Niue, Tokelau and the Cook Islands, and aerial EEZ surveillance responsibilities on behalf of South Pacific Forum island states.⁹³ New Zealand's maritime areas of interest thus encompass the Tasman Sea, the South West Pacific, the Southern Ocean and, farther afield – as a heavily trade-dependent state – important choke points along vital trade routes such as the Torres Strait,

88 AMSA, 'Vessel Tracking Program', note 48, p. 8.

89 AMSA, 'AMSA Comments', note 75, pp. 4–5.

90 R. Davies, Operations Manager, National Maritime Coordination Centre New Zealand, 'Strengthening your Domain Awareness through Effective Decision Making', PowerPoint presentation to IPQC Coastal Surveillance 2007, 1 August 2007 (emphasis added).

91 New Zealand Ministry of Foreign Affairs and Trade, 'UN Confirms NZ's Extended Seabed Claim', undated, available online at www.mfat.govt.nz/Media-and-publications/Features/990-NZ-extended-seabed-claim.php.

92 Maritime New Zealand, 'The NZ Search and Rescue Region', undated, available online at www.maritimenz.govt.nz/SAR/SARregion.asp.

93 New Zealand Ministry of Defence, 'Government's Defence Policy Framework', June 2000, available online at www.nzdf.mil.nz/downloads/pdf/public-docs/defencepolicyframeworkjune2000.pdf, p. 5.

the Singapore and Malacca Straits, the Strait of Hormuz, and the Panama Canal.⁹⁴

The National Maritime Coordination Centre (NMCC) is an operationally independent part of New Zealand Customs Service and coordinates New Zealand's maritime surveillance and patrol activity. It operates using a whole-of-government approach, coordinating MDA information from several government agencies, and is staffed on a multi-agency basis, with liaison personnel from Customs, the New Zealand Defence Force (NZDF) and the Ministry of Fisheries. Among its three 'key purposes' are to contribute to MDA 'in relation to risks in the marine environment' and to 'support and facilitate the effective use and accessibility of maritime-related information from multiple sources'.⁹⁵ The main agency sources of information are Customs, the NZDF, the Ministry of Fisheries and Maritime New Zealand. The latter agency holds responsibility for maritime safety, SAR and environmental protection, and thus is the organization responsible for AIS and, in principle, LRIT. The same four agencies are also the primary users of coordinated MDA information from the NMCC, with the addition of the New Zealand Police.⁹⁶

The main MDA information source inputs to the NMCC are as follows:⁹⁷

- 1 *AIS*: the New Zealand government has been unwilling to establish a coordinated national AIS network to meet whole-of-government needs. Instead, AIS coverage is provided by a state-owned enterprise, Kordia, on a commercial basis to government departments and other users.⁹⁸ Kordia's seventeen AIS sites provide almost complete coverage of the New Zealand coast, with the current exceptions of East Cape and Fiordland, both of which will be covered in 2009. Kordia uses high elevation, strategically located sites for its high-sensitivity AIS receivers, which provide significantly better reception coverage than many other land-based AIS systems around the world, with a reception range in some instances as great as 150 km from ship to shore. The Kordia network has inbuilt redundancy, is monitored by two 24/7 Operations Centres, provides information storage and offers an Earth VTS display option to clients.⁹⁹

94 Davies, note 86.

95 New Zealand Customs Service, 'National Maritime Coordination Centre', undated, available online at www.customs.govt.nz/about/Who+We+Are/Operations/NMCC/.

96 Davies, note 86.

97 Unless otherwise noted, based on *ibid*.

98 E-mail from the General Manager, Maritime Operations, Maritime New Zealand, to author, 30 September 2008. (Australia had intended to establish a Regional Data Centre but, owing to difficulties in complying with all IMO requirements, has decided instead to establish a Cooperative Data Centre.)

99 Kordia Maritime Services, 'What is AIS?', undated, available online at www.kordiamaritime.com/automatic_identification_system.aspx.

- 2 *LRIT*: New Zealand has chosen Pole Star as its LRIT Application Service Provider for the very few New Zealand-registered ships, and will use the Australian Cooperative Data Centre at no extra cost.¹⁰⁰ Maritime New Zealand views LRIT primarily in SAR terms,¹⁰¹ although clearly it will offer a wider MDA function for the NMCC and other security-focused agencies. LRIT capability is viewed in whole-of-government terms, and no lead agency responsible for its implementation had been determined by mid-2008,¹⁰² although Maritime New Zealand logically enough seems to be fulfilling that role in its role as the New Zealand Maritime Administration, even if the NMCC will likely be the primary collator and disseminator of LRIT information.
- 3 *VMS*: the NMCC accesses information from fisheries VMS from the Ministry of Fisheries. Trawlers and long-liners over 28 meters are required to carry VMS in New Zealand's EEZ, and are polled at two-hourly intervals, although the polling frequency can be increased to 5–10 minutes.¹⁰³ In principle, the NMCC can receive VMS data from the South Pacific Forum Fisheries Agency, an area in which New Zealand has obligations and responsibilities, mentioned above. However, in practice, that does not yet seem to be occurring.¹⁰⁴
- 4 *NZDF*: protecting New Zealand's sovereign rights at sea is a primary task for the NZDF. The Royal New Zealand Air Force flies six P-3K Orion maritime patrol aircraft that surveil New Zealand's maritime zones, the Ross Dependency and Southern Ocean, and South Pacific island EEZs, provide emergency SAR capability for the Nadi SAR region, and operate closely with the RAAF to protect common interests.¹⁰⁵ The NZDF also can supply electronic intelligence and signals intelligence to the NMCC.
- 5 Customs data on ships, cargoes and crews.
- 6 Maritime Safety and Security Information System.¹⁰⁶
- 7 Vessel movement data from Maritime New Zealand, ports and shipping agents, and Amver.
- 8 Environmental data such as sea surface temperature and meteorological reports.

100 Email from the General Manager, Maritime Operations, Maritime New Zealand, to author, 30 September 2008.

101 Ibid.

102 Maritime New Zealand, 'MSC 84 Report: Agenda Item 6, Long Range Identification and Tracking (LRIT) Related Matters', June 2008, para. 6.10.2.

103 Personal conversation with a Ministry of Fisheries officer, Wollongong, 9 July 2008.

104 Ibid.

105 'Government's Defence Policy Framework', note 93.

106 Wirth, note 86.

5 Maritime domain awareness as a common concern

It seems clear that the need for MDA will continue to be regarded as an important aspect of national security for both Australia and New Zealand. While neither state possesses the global interests and responsibilities of the US, each may benefit over time from US-led or supported regional and global networks for MDA and information sharing, potentially building upon their existing MDA pictures. There are limits, however, to the amount of information that is useful for national purposes: an ever greater quantity of data is not necessarily of use for its own sake. There are also significant differences between developments on either side of the Tasman. Australia has been willing to commit, proportionately, far greater resources for MDA than New Zealand, and its structure for MDA information collection, integration, analysis and dissemination is concomitantly more highly developed. In part this is due to the politicization of border protection policy in Australia over a number of years.¹⁰⁷

Australia's more advanced MDA arrangements are also a logical result of its geographical location closer to potential sources of threat; especially extensive, mostly Indonesian, illegal fishing and people-smuggling activity in Australia's northern waters, bio-security threats via the Torres Strait and, potentially, even terrorist threats to offshore oil and gas installations in the Timor Sea and on the Northwest Shelf. New Zealand's threat perceptions are thus rather more circumscribed than those of Australia. To some extent that is understandable. However, New Zealand's politically limited national security horizons fail to appreciate the fluid nature of the sea itself: the ocean represents, perhaps above all else, a medium for movement. New Zealand thus can never be immune to seaborne threats and external challenges to the integrity of its extensive maritime jurisdiction. New Zealand also has suffered, historically, from an unwillingness to commit serious budgetary resources to national security, especially during peacetime, and it seems most unlikely that that record of neglect will be overcome.

Both nations, however, will continue to be stretched to generate truly comprehensive MDA given the vast extent of their maritime zones, interests and responsibilities. Although significant MDA improvements are under way throughout their respective mainland EEZs, in the future the existing levels of trans-Tasman cooperation, and cooperation with third parties – such as that with France in the South Pacific and the Southern Ocean – may need to be transformed into regional MDA networks in those more distant areas of interest if MDA is to be truly effective and regional security obligations fulfilled. Such regional obligations and the very real national interests that Australia and New Zealand each possess in maintaining security and good order at sea in those areas nevertheless are likely to remain lesser priorities than maritime security, including

107 See, for example, M. Tsamenyi and C. Rahman (eds), *Protecting Australia's Maritime Borders: The MV Tampa and Beyond*, Wollongong Papers on Maritime Policy 13, Wollongong: Centre for Maritime Policy, University of Wollongong, 2002.

MDA capabilities, within areas of national sovereignty or jurisdiction. The potential effectiveness multipliers of the combined capabilities inherent in regional networks thus seem to be a relatively low priority.

Furthermore, there is considerable frustration in Australia already over the lack of partner contributions to the costs of the Australian Department of Defence-led Pacific Patrol Boat program, which includes EEZ monitoring and surveillance assistance for the island states of the South West Pacific, including states for which New Zealand (and the US) in theory have significant responsibilities. The unwillingness of potential partners to share the financial burden has contributed to the view within Defence that its own commitment should be discontinued in its current form once the existing program concludes in 2027.¹⁰⁸

New Zealand's reticence to make major financial commitments even to its own MDA needs, let alone to regional requirements, thus dims the prospects for enhanced regional MDA networking. Trans-Tasman MDA cooperation, then, is most likely to be geographically more limited and target specific. Nevertheless, necessity may ultimately determine that the recent tidal wave of interest and commitment to MDA may mark only the beginning of the long road ahead to greatly improve our knowledge and understanding of what is happening throughout the maritime domain.

108 Australian Department of Defence, Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade 'Inquiry into the Main Economic and Security Challenges facing Papua New Guinea and the Island States of the Southwest Pacific', August 2008, pp. 3–4.

13 Intelligence Gathering and Information Sharing for Maritime Security Purposes under International Law

Natalie Klein

Essential to all efforts by states to protect against threats to their maritime security is knowledge about what is happening in their waters and who is undertaking those activities. It is readily apparent that intelligence provides a vital tool in maritime interception operations and other naval activities during times of war.¹ In protecting maritime security following 11 September 2001 there is also a great need for accurate and reliable information to undertake counter-terrorism and counter-proliferation activities as well as respond to other threats to maritime security. The policy of maritime domain awareness underscores the recognition of information as a vital element of efforts addressing maritime security.²

Given the extensive areas of ocean space over which Australia and New Zealand exercise rights, it is vital for those states to have an awareness of what is occurring within that space. Australia has responded to this need through the creation of the National Surveillance Centre as part of its Border Protection Command, which ‘conducts twenty-four-hour monitoring, coordination and communications support for all offshore protection activities’.³ It has also gradually increased the number of security patrols and embraced the use of emergent technologies to improve surveillance and detection methods.⁴ A 2002 ‘Maritime Forces Review’ recognized the need of the New Zealand Navy to conduct maritime surveillance in support of civilian agencies in the New Zealand EEZ, to assist South Pacific island states to patrol their EEZs, and in the Southern Ocean.⁵ New Zealand has since established a Maritime Coordination Centre, which has among

1 See United States of America (US) Government, Department of the Navy, *Naval Intelligence*, NDP-2, Chapter 2, cited in C.H. Allen, ‘The Limits of Intelligence in Maritime Counterproliferation Operations’, *US Naval War College Review*, forthcoming, available online at <http://ssrn.com/abstract=935328>, at note 2.

2 See further Chapter 12 in this volume.

3 Australian Government, Border Protection Command, ‘National Surveillance Centre’, undated, available online at www.customs.gov.au/site/page.cfm?u=5786.

4 See C. Schofield, M. Tsamenyi and M. Palma, ‘Securing Maritime Australia: Developments in Maritime Surveillance and Security’, *Ocean Development and International Law* v39, 2008, pp. 104–5.

5 New Zealand (NZ) Government, Ministry of Defence, Defence Policy and Planning Unit, ‘2002 Maritime Forces Review’, January 2002, available at www.defence.govt.nz/pdfs/reports-publications/mfr1.pdf.

its purposes 'To support and facilitate the effective use and accessibility of maritime-related information from multiple sources that supports the core business of government agencies.'⁶ While states have typically engaged in intelligence gathering on an individual basis for the promotion of their national security, concerns about global maritime security have prompted a range of multilateral initiatives, each of which entails obligations about information sharing.

This chapter will consider some of the main legal and political arrangements established by states to improve intelligence gathering and information sharing for the promotion of maritime security.⁷ These aspects of the *Proliferation Security Initiative*, the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988 SUA Convention)* and its *2005 Protocol (2005 SUA Protocol)*,⁸ and the new Long Range Identification and Tracking Regulation⁹ to the *International Convention for the Safety of Life at Sea (SOLAS Convention)*¹⁰ will be examined. The latter is of particular relevance for Australia in light of its creation of the Australian Maritime Identification System, which is intended to identify all vessel traffic entering Australian ports or transiting within 200 miles of Australia's coast. Information sharing arrangements established for criminal law enforcement purposes will also be considered in view of the contribution made by navies and law enforcement officials to counter transnational crime as well as illegal fishing activities. The chapter highlights the avenues of information available to government officials, the legal obstacles faced in securing this information and how weaknesses in the existing legal framework of intelligence gathering and information sharing might be overcome.

At the outset, it is important to note the limited regulation of intelligence gathering and information sharing under the *United Nations Law of the Sea Convention (LOSC)*.¹¹ Even in areas under the sovereignty of coastal states (such as the territorial sea and in straits), intelligence gathering activities are not specifically

6 NZ Government, NZ Customs Service, 'National Maritime Coordination Centre', available online at www.customs.govt.nz/about/Who+We+Are/Operations/NMCC/National+Maritime+Coordination+Centre.htm.

7 While information sharing obligations arise in relation to marine scientific research and as part of obligations to cooperate in the conservation and management of living marine resources, only those obligations most related to maritime security are examined here.

8 *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 10 March 1988, 1678 UNTS 221 [hereinafter *1988 SUA Convention*]; *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 1 November, 14 October 2005, [2005] ATNIF 30 [hereinafter *2005 SUA Protocol*].

9 IMO Resolution MSC.202(81), Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, as Amended, Chapter V, 'Regulation 19-1, Long-range Identification and Tracking of Ships Resolution', 19 May 2006, IMO Doc. MSC 81/25/Add.1, Annex 2, p. 2.

10 *International Convention for the Safety of Life at Sea*, 1 November 1974, 1184 UNTS 278 [hereinafter *SOLAS Convention*].

11 *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 397 [hereinafter *LOSC*]. Coastal states have 'the exclusive right to regulate, authorize and conduct marine scientific research in their territorial sea'. *Ibid.*, Article 245.

outlawed, but affect the characterization of the passage of foreign vessels. Among the activities that will be construed as prejudicial to the right of innocent passage in this context are research and survey activities,¹² as well as ‘any act aimed at collecting information to the prejudice of the defence or security of the coastal State’.¹³ In practice the collection of data required for a ship’s safe navigation during passage may produce data capable of other uses and the coastal state would not even be aware that this information was gathered.¹⁴ In straits subject to the regime of transit passage,¹⁵ the *LOSC* requires that ships must proceed without delay through the strait and ‘refrain from any activities other than those incidental to their normal modes of continuous and expeditious transit’.¹⁶ What constitutes the ‘normal mode’ for a vessel leaves considerable room for debate, and it may be argued that a vessel could not only collect data that were incidental to safe navigation, but also operate equipment and sensors that would normally be used in the operation of the vessel or aircraft.¹⁷

The legal situation is even less clear when examining the rights of states in the Exclusive Economic Zone (EEZ). The *LOSC* deliberately obfuscated this issue, complicating the contours of the rights of coastal states and the freedom of navigation.¹⁸ The lack of legal clarity has become especially problematic as technological advances have not only improved the range and accuracy of both weaponry and intelligence collection, but also changed the very art of warfare and intelligence gathering.¹⁹ Of regional concern for Australia and New Zealand have been military and diplomatic confrontations in Asia as a result of intelligence gathering activities by foreign states in the EEZ.²⁰ It is this ongoing

12 *Ibid.*, Article 19(2)(j). Coastal states have ‘the exclusive right to regulate, authorize and conduct marine scientific research in their territorial sea’. *Ibid.*, Article 245.

13 *Ibid.*, Article 19(2)(c). Intelligence activities that ‘interfer[e] with any systems of communication or any other facilities or installations of the coastal State’ would also be prejudicial to the coastal state. *Ibid.*, Article 19(2)(k).

14 S. Bateman, ‘Hydrographic Surveying in the EEZ: Differences and Overlaps with Marine Scientific Research’, *Marine Policy* v29, 2005, p. 165 (referring to depth sounding and the observation of wind speed and direction in this regard).

15 *LOSC*, note 11, Article 37, and Part III generally.

16 *Ibid.*, Article 39(1)(c).

17 S. Kaye, ‘Freedom of Navigation, Surveillance and Security: Legal Issues surrounding the Collection of Intelligence from beyond the Littoral’, *Australian Year Book of International Law* v24, 2003, pp. 95–9.

18 See J.M. Van Dyke, ‘Military Ships and Planes operating in the Exclusive Economic Zone of another Country’, *Marine Policy* v28, 2004, p. 31.

19 See M.J. Valencia, ‘Introduction: Military and Intelligence Gathering Activities in the Exclusive Economic Zone: Consensus and Disagreement’ II, *Marine Policy* v29, 2005, p. 98 (suggesting in this context that extending restrictions in the EEZ to constrain military and intelligence gathering activities will be largely ineffective). See also M. Hayashi, ‘Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms’, *Marine Policy* v29, 2005, p. 130 (commenting that the *LOSC* is not adequate to regulate the use of new intelligence technologies).

20 See, for example, Kaye, note 17, pp. 102–4 (discussing the collision of a US EP-3E Aries with a Chinese F-8 II ‘finback’ fighter, killing the Chinese pilot and forcing the US aircraft to make an emergency landing on Hainan Island in China). Further incidents include the December 2001

ambiguity, coupled with recognition of coastal state rights over the territorial sea, that form the background to a range of legal and policy developments that have been undertaken post-11 September 2001 to improve intelligence capability for the purposes of promoting maritime security.

1 Multilateral arrangements and agreements for counter-proliferation and counter-terrorism

In addressing concerns about the spread of weapons of mass destruction and the potential actions of terrorists, states generally lack the capacity and resources to act entirely independently. Globalization and the nature of international trade mean that a number of states are involved in a myriad of ways in international shipping. For example, different nationalities may be ascribed to the crew of the vessel, the beneficial owner of the vessel, its legal owner and the vessel itself; that vessel may then dock in several different states before reaching its final destination; and it may pass through the territorial seas or the EEZs of a range of states during the course of its journey. Coordination between states becomes imperative in determining what is being shipped, by whom and to where, as well as knowing who is on board and what those persons intend to do when reaching any particular destination. The activities, rights and responsibilities of port states, coastal states and flag states are all implicated. As a result, efforts at both legal and political levels have sought to improve cooperation in the flow of information. These initiatives include revising the *1988 SUA Convention*, adopting new regulations to the *SOLAS Convention* (including the adoption of the International Ship and Port Facility Security (ISPS) Code²¹), and instituting the Proliferation Security Initiative.

1.1 The 1988 SUA Convention and 2005 SUA Protocol

The need to establish information sharing mechanisms for counter-terrorism efforts received limited recognition with the adoption of the *SUA Convention* in 1988. Article 13 of that treaty sets forth a general obligation on States Parties to cooperate in the prevention of offences through the exchange of information in accordance with national law. In addition, Article 14 then requires that any states believing that an offence under the 1988 *SUA Convention* will be committed must

Japanese coastguard attack on and the sinking of a North Korean spy vessel in Japan and China's EEZ with the loss of all on board and Chinese intelligence ships in Japanese waters, sometimes posing as research vessels. See M.J. Valencia, *The Proliferation Security Initiative: Making Waves in Asia*, Adelphi Papers, Oxford: Routledge for the International Institute for Strategic Studies, 2005, pp. 20–2.

21 IMO International Ship and Port Facility Security Code, adopted at the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974, 12 December 2002, IMO Doc. SOLAS/CONF.5/34, Annex 1, Conference Resolution 2, pp. 2–91.

furnish information to states that would have jurisdiction over the offence. Mellor has criticized these provisions as 'vague and highly permissive'.²²

When states revisited the *1988 SUA Convention* post-11 September the main points of focus in amending the treaty were to expand the range of offences over which states could establish jurisdiction and to create a procedure for States Parties to visit foreign-flagged vessels outside the territorial sea.²³ As a result, the provisions in the *1988 SUA Convention* on information exchange were not altered beyond expanding their coverage in relation to the new offences identified in the *2005 SUA Protocol*.

The ship boarding procedure in Article 8 *bis* of the *2005 SUA Protocol* does anticipate some additional cooperation regarding intelligence gathering and information sharing, even though the latter is not the central focus of the procedure. As a State Party must have 'reasonable grounds to suspect' that an offence set forth in the *1988 SUA Convention* or *2005 SUA Protocol* is being or is about to be committed as a predicate to a boarding,²⁴ it must be assumed that some amount of intelligence gathering is required to establish this (somewhat vague) standard.²⁵ The information exchange aspect of the ship boarding procedure is seen through the requirement that a request for boarding 'should, if possible, contain the name of the suspect ship, the IMO ship identification number, the port of registry, the ports of origin and destination, and any other relevant information'.²⁶ There is no specific obligation on the state wishing to conduct the boarding to provide the intelligence that led to reasonable grounds for suspicion, but a flag state may make the receipt of additional information a condition for it consenting to the boarding.²⁷ Following a boarding, the state conducting that boarding must report on the results of its actions to the flag state of the vessel.²⁸ This information exchange facilitates any decisions as to possible prosecution, or whether any liability has otherwise arisen due to any damage, harm or loss attributable to the boarding state because of the measures taken.

While an advance in enhancing opportunities to arrest and prosecute maritime terrorists, in terms of improving rights to acquire information and duties to share information, the *2005 SUA Protocol* represents only a modest gain. For a more legally effective regime, more specificity was required as to what information should be shared and when, as opposed to a general obligation to cooperate. The

22 J.S.C. Mellor, 'Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism', *American University International Law Review* v18, 2002, p. 384.

23 See N. Klein, 'The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts against the Safety of Maritime Navigation', *Denver Journal of International Law and Policy* v35, 2007, p. 287.

24 *2005 SUA Protocol*, note 8, Article 8 *bis*, para. 4.

25 See Allen, note 1, p. 9.

26 *2005 SUA Protocol*, note 8, Article 8 *bis*, para. 2.

27 *Ibid.*, Article 8 *bis*, para. 5(c) and para. 7. See also Klein, note 23.

28 *2005 SUA Protocol*, note 8, Article 8 *bis*, para. 6. That report must also include information as to the discovery of evidence of illegal conduct that is not subject to the *SUA Convention*.

retention of the broad language in Article 13 of the *1988 SUA Convention* allows states flexibility as to the operational aspects of information exchange and may be viewed as suitable for national security concerns or national restrictions on sharing intelligence. It is arguable, though, that this level of ambiguity is no longer appropriate, because of the increased scope of both prescriptive and enforcement jurisdiction in the *2005 SUA Protocol* and the recognized need for multilateral effort in counter-terrorism and counter-proliferation efforts. In these circumstances it is to be regretted that no further advances in the legal framework could be achieved.

1.2 International Ship and Port Facility Security Code

The importance of protecting ports from the threat of terrorist attack is of considerable concern for the Asia-Pacific, especially since most of the world's mega-ports are in APEC economies.²⁹ 'As a result, the risk of major disruption to world trade from a terrorist attack on seaborne trade in the APEC region is high.'³⁰ One global legal response to this concern has been the adoption of the ISPS Code, which came into force mid-2004 as an amendment to the *SOLAS Convention*.

The ISPS Code provides a standardized framework to evaluate risks and permit governments to respond to changing threat levels to ships and port facilities.³¹ Australia has enacted the ISPS Code into the *Maritime Transport and Offshore Facilities Security Act 2003* (Cth) and New Zealand has done so in the *Maritime Security Act 2004* (NZ) and its associated regulations. One aspect of the ISPS Code is the provision of information to port states prior to the entry of a vessel into port. Through the Secure Trade in the APEC Region initiative, which was launched in 2002, the need to share information and develop cooperation among APEC members was recognized as a means of ensuring the requirements involved in implementing the ISPS Code.³²

The information to be provided by ships prior to entry into port under the ISPS Code includes information on the security level at which the ship is currently operating and had been operating during the previous ten port visits, as well as any special or additional security measures that were undertaken in any previous

29 The member economies of the Asia-Pacific Economic Cooperation organization are: Australia, Brunei, Canada, Chile, China, Hong Kong, China Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Russia, Singapore, Chinese Taipei, Thailand, the United States and Viet Nam.

30 I.W. Porter, 'Proceedings of the Symposium of Maritime Experts to Assist in Implementation of the Secure Trade in the APEC Region (STAR) Initiative', Melbourne, 18–20 June 2003, p. 5 [hereinafter STAR Report].

31 H.G. Hesse, 'Maritime Security in a Multilateral Context: IMO Activities to Enhance Maritime Security', *International Journal of Marine and Coastal Law* v18, 2003, p. 331.

32 STAR Report, note 30, p. 7 (identifying major areas of concern). The STAR initiative is discussed further in Chapter 8 of this volume.

port.³³ Information may also be requested in relation to ship-to-ship activity, though a vessel is not required to provide its security plan to a port state.³⁴ The IMO Maritime Safety Committee has identified what sort of security information should be provided prior to entry into port with the intention of harmonizing the data set that may be required from each port.³⁵ However, Contracting Governments to the *SOLAS Convention* are clearly left with the option to seek additional or supplementary information as a condition for entry into a port located within its territory.³⁶ If this information is not provided, then the port state may opt to deny entry of that ship.

In view of the resources accorded to the implementation of the ISPS Code,³⁷ it is clear that it has improved the capability of ports to assess security risks and potentially avert the realization of such risks. The main weakness of the ISPS Code lies in its enforcement options for states when they receive information that a vessel is considered a risk. The control measures that may be imposed against a non-compliant vessel are limited to inspecting, delaying or detaining the ship; imposing restrictions on its operations in port; or lesser administrative or corrective measures.³⁸ Depending on the circumstances, it may be more preferable to address the risk of the vessel well before it is in the vicinity of a port or other harbor infrastructure.

1.3 Long Range Information and Tracking Regulation

One of the most recent legal tools created to enable governments to learn more about vessels in their surrounding waters is a new regulation to the *SOLAS Convention*: Regulation V/19-1 on Long Range Information and Tracking (LRIT), which became operative on December 31, 2008.³⁹ Under this Regulation, ships are required to automatically transmit information as to the identity of the ship, its position (longitude and latitude), and the date and time of the position provided.⁴⁰

For the functioning of the LRIT system, National, Regional or Cooperative

33 See 'Guidance relating to the Implementation of SOLAS Chapter XI-2 and the ISPS Code', MSC/Circ.1111, 7 June 2004, Ref. T2-NAVSEC/2.11, Annex 2, Ch. 3, p. 7, para. 3.1.

34 *Ibid.*, p. 8, para. 3.1.

35 Annex, Guidance to Masters, Companies and Duly Authorized Officers on the Requirements relating to the Submission of Security-related Information prior to the Entry of a Ship into Port, MSC/Circ. 1130, 14 December 2004.

36 *Ibid.*

37 Australia, along with six other APEC members, launched an ISPS Code Implementation Assistance Programme to assist APEC members with compliance and has provided technical assistance and grants to that end. See R. Asariotis, 'Implementation of the ISPS Code: An Overview of Recent Developments', *Journal of International Maritime Law* v11, 2005, p. 279.

38 See N. Klein, 'Legal Limitations on Ensuring Australia's Maritime Security', *Melbourne Journal of International Law* v7, 2006, p. 321.

39 See further Chapter 12 in this volume.

40 IMO Doc. MSC 81/25/Add.1, note 9, para. 5.

Data Centres had to be created (as well as an International LRIT Data Centre, which is to be used by vessels of a flag state that is not participating in a National, Regional or Cooperative Data Centre), along with an International LRIT Data Exchange⁴¹ to allow for the flow of information from vessels to various recipients.⁴² It is up to the flag state to determine to which LRIT Data Centre its vessels must report. The Data Centre selected by a flag state collects the information and ensures that the LRIT information is only sent to those entitled to receive it. Australia initially planned to establish a National Data Centre to be expanded to a Cooperative Data Centre.⁴³ New Zealand will use this Cooperative Data Centre at no extra cost.⁴⁴

As a formal mechanism for information sharing, Regulation V/19-1 takes into account commercial and governmental sensitivities involved in the transmission of LRIT information. Contracting governments are to 'recognize and respect the commercial confidentiality and sensitivity' of the information, as well as 'protect the information they . . . receive from unauthorized access or disclosure'.⁴⁵ Moreover, the information received is to be used 'in a manner consistent with international law',⁴⁶ which may suggest that the LRIT information should not be used for military purposes that may amount to an unlawful use of force under Article 2(4) of the *United Nations Charter*.⁴⁷

The LRIT information may be received by the flag state of the vessel regardless of where the vessel is located.⁴⁸ A port state may also receive the information once a foreign-flagged vessel has indicated its intention to enter that port, except when the vessel is on the landward side of baselines of another state.⁴⁹ Finally, a coastal state may receive the information from a foreign-flagged vessel when it is 'navigating within a distance not exceeding 1,000 nautical miles off its coast', but again with the exception that no information will be provided if the vessel is on the

41 The International LRIT Data Exchange is to be established on an interim basis in the United States. See IMO Resolution MSC.243(83), Establishment of International LRIT Data Exchange on an Interim Basis, 12 October 2007, IMO Doc. MSC 83/28/Add.2.

42 Regional and Cooperative Data Centres may internally transmit data among users without going through the International Data Exchange. 'LRIT Matters: Outcome of the MSC/ISWG/LRIT 2', Note by the Secretariat, Maritime Safety Committee, 18 July 2007, IMO Doc. MSC 83/6/2, para. 49 (though a journal for these transactions is to be kept for an initial assessment of the functioning of the entire LRIT system).

43 *Ibid.*, para. 11. See further 'Consideration of Issues for the Timely Establishment of the LRIT System: Comments on the Outcome of COMSAR 11', submitted by Australia, 6 July 2007, IMO Doc. MSC/ISWG/LRIT 2/3/1, para. 6.

44 See further Chapter 12 in this volume, note 100.

45 IMO Doc. MSC 81/25/Add.1, note 9, paras 10.2–3.

46 *Ibid.*, para. 10.4.

47 *Charter of the United Nations*, 26 June 1945, 1 UNTS 16.

48 IMO Doc. MSC 81/25/Add.1, note 9, para. 8.1.1

49 *Ibid.*, para. 8.1.2. Reference is to a 'port facility . . . or a place under the jurisdiction of that Contracting Government'.

landward side of baselines of another state.⁵⁰ Each state must bear the costs of any information requested and received.⁵¹

The entitlement of coastal states to receive LRIT information from vessels that are not coming into the ports of those states was a point of controversy during the formulation of the Regulation. During negotiations, Australia had advocated for a 2000 nautical mile range within which coastal states could request and receive LRIT information.⁵² Australia supported this distance as a maximum, and allowed for the possibility that flag states could inform the IMO as to what coastal states were not permitted to receive LRIT information from their vessels.⁵³ Other states sought to align the distance with the breadth of the EEZ (200 miles),⁵⁴ but the shorter distance was impractical given that this distance is usually covered by a vessel in approximately twelve hours.⁵⁵

In view of the controversy surrounding coastal state receipt of LRIT information, the Regulation permits that a state may decide that vessels flying its flag will not provide information to coastal states 'in order to meet security or other concerns'.⁵⁶ This decision may be taken at any time, and may be subsequently amended, suspended or annulled at any time.⁵⁷ If a state makes this decision then the 'right, duties and obligations, under international law' of the ships involved 'shall not be prejudiced'.⁵⁸ The implication here would seem to be that if a vessel was not providing information to a coastal state by virtue of a decision of the flag state of that vessel, no action should be taken by the coastal state to treat that vessel suspiciously and interfere with its passage. In addition, the Regulation

50 *Ibid.*, para. 8.3.

51 *Ibid.*, para. 11.1.

52 'Development of the Draft SOLAS Amendments on Long Range Identification and Tracking', submitted by Australia and Canada, 19 September 2005, IMO Doc. MSC/ISWG/LRIT 1/3/3, Annex 2, para. 1.

53 *Ibid.*, Annex 2, para. 2.

54 See, for example, 'Consideration and Adoption of Amendments to Mandatory Instruments: Long-range Identification and Tracking of ships', submitted by Brazil, 7 March 2006, IMO Doc. MSC81/3/8, para. 5 (proposing that coastal states would be entitled to tracking information up to 200 miles from the coast unless the flag state notified the IMO that coastal states might extend their tracking range beyond that); 'Development of the Draft SOLAS Amendment on Long Range Identification and Tracking: Draft SOLAS regulation on LRIT', submitted by the Russian Federation, 20 September 2005, IMO Doc. MSC/ISWG/LRIT 1/3/4, Annex 2, para. 4.3 (proposing that coastal states could receive information from vessels navigating up to 200 nautical miles from their coast in order to be consistent with the EEZ).

55 One proposal set the distance at 400 nautical miles on the basis that it would be the average distance a ship might be expected to travel in twenty-four hours and that twenty-four hours' advance notice before arrival in port was the practice of a number of states. 'Development of the Draft SOLAS Amendments on Long Range Identification and Tracking', submitted by [EU Member States] and the European Commission, 19 September 2005, IMO Doc. MSC/ISWG/LRIT 1/3/2, para. 5.

56 IMO Doc. MSC 81/25/Add.1, note 9, para. 9.1.

57 *Ibid.*

58 *Ibid.*, para. 9.3.

anticipates that there will be certain times when the systems and equipment providing identification information may be switched off, or otherwise cease providing information.⁵⁹

The enforcement provisions of the Regulation are extremely limited. The only recourse for a state in the event that the requirements of the Regulation are not being observed or adhered to is to report the case to the IMO.⁶⁰ States are not given any new enforcement powers at sea or at port under the Regulation. As with other maritime security agreements, although the substantive rights are an important improvement, the ability of states to respond to failures or breaches in the operation of these rules is quite restricted.

1.4 Proliferation Security Initiative

In addition to legal agreements to formalize the gathering and sharing of information about shipping as a means to enhance maritime security, states globally and regionally have decided to cooperate in various ways as a political matter. The information sharing aspects of these different initiatives in the law of the sea are highlighted in relation to the PSI, but may also be seen in the adoption of various Security Council resolutions.⁶¹

The PSI is intended to prevent the movement of weapons of mass destruction, their delivery systems and related materials between states and non-state actors of proliferation concern. Australia was a core member of the PSI when it was first announced by President George W. Bush in 2003. New Zealand endorsed the PSI in April 2004, and has since participated in the meetings of the Operational Experts Group, as well as participating in relevant PSI operational and tabletop exercises.⁶²

Through the PSI, states that have committed themselves politically to this endeavor are to 'establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the United Nations Security Council'.⁶³ Essential to the achievement of PSI aims is the ability to obtain the necessary intelligence about what is being shipped. From a policy perspective, the PSI has been described as 'a multilateral

59 Ibid., para. 7.

60 Ibid., para. 13.

61 See UN Resolution on the Non-proliferation of Weapons of Mass Destruction, SC Res. 1540, UN Doc. S/RES/1540 (2004); UN Resolution on Threats to International Peace and Security, SC Res. 1373, UN Doc. S/RES/1373 (2001).

62 New Zealand Ministry of Foreign Affairs and Trade, 'Proliferation Security Initiative', undated, available online at www.mfat.govt.nz/Foreign-Relations/1-Global-Issues/Security/3-Proliferation-Security-Initiative.php.

63 United States Government, White House, Office of the Press Secretary, 'Proliferation Security Initiative: Statement of Interdiction Principles, Fact Sheet', 4 September 2003.

intelligence-sharing project incorporating cooperative actions and coordinated training exercises to improve the odds of interdicting the transfer of weapons of mass destruction'.⁶⁴

The importance of intelligence as a legal matter is implied in the requirement that Participant States will take appropriate action in respect of vessels that are reasonably suspected of carrying cargos of proliferation concern.⁶⁵ The use of a flexible standard, such as 'reasonable suspicion', is intended to enhance the deterrent value of the PSI.⁶⁶ It is not completely novel, but is comparable to the standard imposed in relation to permissible interdictions where there are reasonable grounds for suspecting, for example, a ship is engaged in the slave trade.⁶⁷ Difficulties may arise, however, in terms of the quantity and quality of intelligence that a participant is willing to share and on which a participant may be willing to act.

While the PSI has undoubtedly proved useful on an operational level, no new powers have been granted to states to conduct intelligence gathering activities under the law of the sea, nor has any clarity been brought to bear on the legal rights and duties of states in conducting intelligence gathering in the EEZs of coastal states. The nature of the PSI as a political arrangement essentially prevents any development in the legal framework on information sharing. It does, however, highlight that legal obligations on information exchange are only one aspect of broader policies to improve awareness of activities at sea.

2 Criminal law enforcement

There are a number of ways that law enforcement officials in different countries work together in exchanging information to deal with transnational crime or other illegal activity at sea. Formal legal commitments have been undertaken in addition to focusing on operational agreements that tend to involve inter-agency (as opposed to inter-state) arrangements. This part highlights three areas where information exchange has been a focus of law enforcement efforts in the Asia-Pacific: first, the creation of an Information Sharing Centre to address piracy and armed robbery in Asia; second, practical programmes to address people smuggling through the Bali Process; and, finally, surveillance of fisheries to reduce the incidence of illegal fishing.

64 J. Joseph, 'The Proliferation Security Initiative: Can Interdiction stop Proliferation?' *Arms Control Today*, June 2004, available online at www.armscontrol.org/act/2004_06/Joseph.asp, p. 6.

65 United States Government, Department of State, 'Proliferation Security Initiative: Statement of Interdiction Principles', 4 September 2003, available online at www.state.gov/t/isn/rls/fs/23764.htm.

66 T.D. Lerhman, 'Enhancing the Proliferation Security Initiative: The Case for a Decentralized Nonproliferation Architecture', *Virginia Journal of International Law* v45, 2004, p. 232.

67 See *ibid.*, p. 236.

2.1 Piracy and armed robbery

The problem of piracy and armed robbery⁶⁸ in the Asia-Pacific, particularly in the Malacca Straits and the Singapore Straits, has prompted regional action as a means of promoting cooperation in the suppression and prosecution of such acts. In 2005, the ten states of ASEAN,⁶⁹ plus Bangladesh, China, India, Japan, South Korea and Sri Lanka, adopted a *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia* (ReCAAP).⁷⁰ Now that the agreement has entered into force,⁷¹ it is open to Australia and New Zealand (or any other state) to become party to the agreement.⁷² A key feature of ReCAAP is the creation of an Information Sharing Centre, which is based in Singapore and undertakes the collection, collation and analysis of information received from the Contracting Parties and ensures a flow of information between all Contracting Parties.⁷³ In order to facilitate this process, each Contracting Party designates a 'focal point' responsible for communication to the Centre, and provides notification of this designation. Information concerning incidents of piracy or armed robbery is then notified to the Centre through this focal point.⁷⁴ The Contracting Party still has to ensure that there is coordination between relevant national authorities and the focal point.⁷⁵ This need is underlined by the fact that Contracting Parties may have reports from ships, ship owners or ship operators going to national authorities who are not necessarily the same as the focal points.⁷⁶

Maintaining the confidentiality of information remains an important aspect of the work of the Information Sharing Centre. To this end, Article 8 states: 'In carrying out its functions, the Centre shall respect the confidentiality of information provided by any Contracting Party, and shall not release or disseminate such information unless the consent of that Contracting Party is given in advance.'⁷⁷ In addition, Contracting Parties are to respect the confidentiality of information transmitted from the Centre.⁷⁸ During negotiations, there was some concern about how information may be used. In this regard, Bradford has noted, 'Indonesian

68 As 'piracy' refers only to acts on the high seas, 'armed robbery' has been the term adopted to refer to similar criminal acts occurring within waters subject to the jurisdiction or sovereignty of a coastal state. See R.C. Beckman, 'Combating Piracy and Armed Robbery against Ships in South-east Asia: The Way Forward', *Ocean Development and International Law* v33, 2002, p. 317.

69 The members of the Association of South East Asian Nations are Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Viet Nam.

70 *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia*, 11 November 2004, 44 ILM 829 (2005).

71 The agreement entered into force on 4 September 2006.

72 *ReCAAP*, note 70, Article 18. A Contracting Party may object to the accession, however. See *ibid.*, Article 18(5).

73 *Ibid.*, Article 7 (setting out the functions of the ISC).

74 *Ibid.*, Article 9(5).

75 *Ibid.*, Article 9(3).

76 *Ibid.*, Article 9(4).

77 *Ibid.*, Article 8(2).

78 *Ibid.*, Article 9(2).

policymakers associate the transmission of data which may portray the state badly as costly, and they are therefore reluctant to agree to measures which share information or improve transparency.⁷⁹ It seems, however, that provisions protecting the confidentiality of the information provided, coupled with the overall goal of improving national response and ability to prevent and suppress piracy and armed robbery, have prevailed over such concerns in devising this legal framework for enhancement of information sharing.

2.2 *People smuggling*

People smuggling has become one of the most profitable aspects of transnational crime. One legal response is a 2000 *Protocol to the UN Convention against Transnational Organized Crime* specifically addressing the smuggling of migrants by land, sea and air.⁸⁰ One of its purposes is to promote cooperation among states parties to prevent and combat the smuggling of migrants.⁸¹ To this end, Article 10 requires states to exchange information on a range of matters, including:

- 1 Embarkation and destination points, as well as routes, carriers and means of transportation.
- 2 Identity and methods of organizations known to be engaged in people smuggling.
- 3 Authenticity and use of travel or identity documents.
- 4 Means and methods of concealment and transportation.
- 5 Legislative experiences and practices and measures to prevent and combat the smuggling of migrants.
- 6 Scientific and technological information useful to law enforcement.

This provision is notable for the level of detail provided as to the types of information that should be exchanged. However, the information may be subject to any restrictions on its use as imposed by the state transmitting the information, and may also be limited because it is to be provided consistently with domestic legal and administrative systems.⁸²

79 J.F. Bradford, 'Japanese Anti-piracy Initiatives in Southeast Asia: Policy Formulation and the Coastal State Responses', *Contemporary Southeast Asia* v26, 2004, p. 499.

80 *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, 40 ILM 335 (2001). Article 3 defines 'smuggling of migrants' as 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident'. The Protocol entered into force in 2004, and Australia and New Zealand are both parties.

81 *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, 40 ILM 335 (2001), Article 2.

82 *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, 40 ILM 335 (2001), Article 10.

As a regional response to people smuggling, the Bali Process was inaugurated in 2002 through a Regional Ministerial Conference on People Smuggling, Trafficking in Persons and related Transnational Crime. Over fifty states are involved in the Bali Process; Australia and Indonesia serve as co-chairs, while New Zealand acts as a country coordinator on regional and international cooperation on policy issues and legal frameworks. The Bali Process is a voluntary, non-binding grouping, intended to develop programmes of practical cooperation, including 'the development of more effective information and intelligence sharing'.⁸³ In addition, the Australian Federal Police have been engaged in a number of international initiatives to address people smuggling, including Interpol Operation Bridge and the Law Enforcement Cooperation Programme, which are both intended to facilitate information exchange.⁸⁴

Cooperation between the relevant agencies, both within Australia and New Zealand and dealing with agencies or defence forces overseas, becomes paramount to enabling information regarding people smuggling to be gathered and shared for a timely and conveniently located response. Thus it is clear that, while legal frameworks are in place, much depends on the operational response and reliability of networks for obtaining and sharing relevant information to address this problem.

2.3 Fisheries management

Information sharing is an important aspect of conserving and managing fish stocks, especially in relation to monitoring compliance and enforcing obligations. For Australia and New Zealand a number of rights and obligations pertaining to information sharing accrue to them in light of their position as coastal states and through their involvement in regional fisheries organizations, such as those established under the *Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR)*,⁸⁵ the *Convention for the Conservation of Southern Bluefin Tuna (CCSBT)*⁸⁶ and the South Pacific Forum Fisheries Agency (FFA).

Coastal states and states fishing on the high seas are required under the *Fish Stocks Agreement (FSA)* to implement and enforce conservation and management measures through effective monitoring, control and surveillance.⁸⁷ For fishing on

83 See further Bali Process, 'About the Bali Process', undated, available online at www.baliprocess.net/index.asp?pageID=2145831401.

84 Australian Federal Police, 'People Smuggling', available online at www.afp.gov.au/national/people_smuggling.

85 *Convention for the Conservation of Antarctic Marine Living Resources*, 20 May 1980, 1329 UNTS 47 [hereinafter *CCAMLR*].

86 *Convention for the Conservation of Southern Bluefin Tuna*, 10 May 1993, 1819 UNTS 359 [hereinafter *CCSBT*].

87 *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, 2167 UNTS 88, Article 5(1).

the high seas, flag states are further required to establish national schemes and programmes for monitoring, control and surveillance of their vessels.⁸⁸ The FSA requires regional fisheries organizations to establish mechanisms for surveillance and enforcement,⁸⁹ and they are expected to play a central role in this regard.⁹⁰ To this end, the FFA has facilitated the negotiation of agreements with distant-water fishing states on matters such as surveillance and enforcement within the EEZs of member states.⁹¹ In addition, the *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region*, which was adopted under the auspices of the FFA, sets out requirements to cooperate to develop regionally agreed procedures for the conduct of surveillance,⁹² including by one party into the territorial sea and archipelagic waters of another party.⁹³

To further their conservation and management commitments under *CCAMLR*, Australia and France have entered into bilateral treaties in order to improve cooperation on law enforcement efforts in their sub-Antarctic waters. A 2003 treaty provides for:

the exchange of information about the location, movements and other details of vessels suspected of fishing illegally in order to facilitate operational responses, logistical support in the conduct of hot pursuits, and the undertaking of cooperative research on marine living resources. There is also provision for surveillance of the parties' maritime zones by the other state with the consent of the coastal state.⁹⁴

Further agreements on cooperative surveillance were anticipated in the 2003 Treaty and hence provided the basis for the conclusion of a second treaty between the states in January 2007. Among the enforcement measures in the 2007 Treaty is the requirement that 'both state-parties . . . provide to each other reports on enforcement activities and information that may assist in prosecutions associated with illegal fishing operations'.⁹⁵ Article 10 further requires that the parties

88 *Ibid.*, Article 18(2)(g).

89 *Ibid.*, Article 10.

90 T. Henriksen, G. Hønneland and A. Sydnes, *Law and Politics in Ocean Governance: The UN Fish Stocks Agreement and Regional Fisheries Management Regimes*, Leiden: Martinus Nijhoff, 2006, p. 36.

91 R.G. Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries*, Leiden: Martinus Nijhoff, 2004, p. 297. Australia, France and New Zealand adopted a Joint Declaration on Maritime Surveillance in 2006, which is designed to fulfil this role. See Joint Declaration on Cooperation on Maritime Surveillance and Combating Illegal, Unreported and Unregulated (IUU) Fishing in the Pacific Islands Region.

92 *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region*, 9 July 1992, 32 ILM 136 (1993), Article III(2).

93 *Ibid.*, Article VI(1).

94 W. Gullett and C. Schofield, 'Pushing the Limits of the Law of the Sea Convention: Australian and French Cooperative Surveillance and Enforcement in the Southern Ocean', *International Journal of Marine and Coastal Law* v22, 2007, p. 560 (annexing the 2007 Treaty between Australia and France).

95 *Ibid.*, p. 561 (referring to Article 7 of the Treaty).

exchange information about cooperative enforcement actions 'to the extent permitted by their national law and policies'.⁹⁶ This information may not be disclosed to third parties without the written consent of the party providing the information.⁹⁷

Efforts at enforcement of fisheries laws have also prompted a variety of mechanisms to ensure sustainable fishing practices, including the use of observation and inspection regimes to deter illegal fishing. Within its EEZ, the coastal state is entitled to adopt laws and regulations relating to the placement of observers on board fishing vessels.⁹⁸ The FSA, then, accords a central role to regional fisheries organizations in implementing conservation measures, particularly in adopting joint schemes of control and inspection.⁹⁹

In this regard, *CCAMLR* anticipates its Commission implementing a system of observation and inspection,¹⁰⁰ and sets out the principles to form the basis of the system.¹⁰¹ In particular, observation and inspection shall be carried out on board vessels engaged in either scientific research or harvesting activities by inspectors and observers designated by members of the Commission and operating under terms and conditions established by the Commission.¹⁰² A Scheme of International Scientific Observation was established in 1992 whereby scientific observers were to report on factual information regarding fishing activities, without making judgements or interpretations relating to compliance.¹⁰³

As part of its Scientific Research Programme, States Parties to the *CCSBT* established standards for a Scientific Observer Programme for which each flag state is responsible in respect of its own vessels and is intended to reach coverage of 10 per cent for catch and effort as a target level for each fishery.¹⁰⁴ While information gathered is to be exchanged through the Secretariat of the organization, all data and information obtained through the programme belong to the flag state of the observed vessel, and an observer should not disclose any information without the permission of the flag state.¹⁰⁵ The standards adopted are further intended to be aligned with the observer regimes put in place in other regional organizations. States parties to the *CCSBT* began implementing these standards in their respective observer programmes in 2003–04. While, in principle, the

96 *Ibid.*, Article 10(1).

97 *Ibid.*, Article 10(2).

98 *LOSC*, note 11, Article 62(4)(g).

99 Henriksen, Hønneland and Sydnæs, note 90, p. 36.

100 *CCAMLR*, note 85, Article IX(1)(g).

101 See *ibid.*, Article XXIV.

102 *Ibid.*, Article XXIV(2)(b).

103 See Rayfuse, note 91, p. 266. The *CCAMLR* Commission has established a separate System of Inspection; see Commission for the Conservation of Antarctic Living Resources, *Basic Documents*, Part 9, 'Text of the *CCAMLR* System of Inspection', December 2008, available online at www.ccamlr.org/pu/e/e_pubs/bd/pt9.pdf, pp. 104–12.

104 *CCSBT* Scientific Observer Program Standards, undated, available online at www.ccsbt.org/docs/pdf/about_the_commission/observer_program_standards.pdf, p. 5.

105 *Ibid.*, p. 8.

programme should enhance enforcement efforts, the protection afforded for the information gathered may undermine the overall goals. As such, it might have been preferable to accord the observer more of a neutral role and allow the reporting of information without requiring the permission of the relevant flag state.

The success of surveillance and law enforcement efforts, together with observation and inspection regimes, for fisheries subject to the management of regional organizations has been necessarily limited by the presence of fishing vessels on the high seas flagged to non-states parties. The original parties to the *CCSBT* have been successful in encouraging some states and fishing entities (namely Taiwan) harvesting this species to join the organization. In addition, the states parties to the *CCSBT* then 'cooperate in the exchange of information regarding any fishing for southern bluefin tuna by nationals, residents and vessels of any State or entity not party' to the treaty.¹⁰⁶ Under *CCAMLR*, a Scheme to Promote Compliance by Non-contracting Party Vessels with *CCAMLR* Conservation Measures was adopted in 1997 and provided a basis for vessels sighted in contravention of *CCAMLR* efforts to be informed of that conduct and that information to be circulated to the flag state, along with member states and the *CCAMLR* Secretariat.¹⁰⁷ *CCAMLR* now follows a Policy to Enhance Cooperation between *CCAMLR* and Non-contracting Parties.¹⁰⁸ This approach seeks to involve non-states parties in the work of the Commission in a range of ways, including attendance at meetings, investigations and inspection of fishing vessels suspected of non-compliance and reporting information on that activity to the Commission.¹⁰⁹

3 Concluding remarks

Legal principles regarding information sharing and intelligence gathering range in the level of details provided. Some require no more than that states are to cooperate in this regard, leaving states to decide on what precise information should be shared, how it is to be transmitted and when it is to be shared. When more detail on information exchange obligations is provided, there are often restrictions due to national security, sovereignty or commercial confidentiality concerns. In the absence of a fully effective legal framework, the less formal interaction of agencies and government officials becomes essential, both within the state itself and then with points of contact outside the state, especially when dealing with neighbouring countries. The operational perspective then becomes more important than the legal perspective if the goals related to securing greater knowledge of activities at sea are to be achieved.

106 *CCSBT*, 10 May 1993, 1819 UNTS 359, Article 5(4).

107 Rayfuse, note 91, pp. 271–2.

108 See *CCAMLR*, 'Policy to Enhance Cooperation between *CCAMLR* and Non-contracting Parties', undated, available at www.ccamlr.org/pu/E/cds/policy%20to%20enhance.pdf.

109 *Ibid.*, p. 2.

‘The goal therefore cannot be perfect security but rather optimal security, and optimal security decisions will inevitably be based not on perfect knowledge but rather on optimal intelligence assessments.’¹¹⁰ These ‘optimal intelligence assessments’ have been enhanced through a number of legal initiatives to improve maritime security. However, for every advance made there have been limitations incorporated into information sharing and intelligence gathering rights and obligations, and consideration should be given to overcoming such restrictions.

One limitation, as mentioned above, is that most obligations regarding information sharing allow for the possibility that such intelligence cannot be distributed to other sources due to limitations within national laws or policies. This approach allows national security interests to trump international security interests. To do so is no longer entirely viable, given the global and regional threats presently faced.

Another limitation of the legal framework has been that if information is to be shared with another state, then there has to be a formal legal requirement to do so. Moreover, the possibility will exist that the information is not to go any further than the designated recipient unless express permission is given. These limitations may prevent a state from being able to respond to a security threat in a timely manner. For example, the delay in seeking additional information on an *ad hoc* basis to confirm suspicions may result in a lost opportunity to prevent a terrorist or other unlawful act from occurring, or may otherwise complicate a law enforcement operation because of the gaps in legal authority.¹¹¹ More collaborative approaches to information exchange, as well as a more permissive view on intelligence sharing, need to be formally endorsed in recognition of the global goals to be achieved.

Finally, there are also instances where there is no recourse against a state if it is failing to provide information that would be relevant for law enforcement purposes. So, for example, a warship on the high seas or a port state has limited legal responses available if a vessel is failing to abide with reporting requirements under the *SOLAS Convention*. The long-standing approach of the IMO has been to leave matters of enforcement to member states, and primarily the flag states concerned. If the greater goal is achieving maritime security for all states, given the global interests at stake, then these sorts of limitations are not appropriate and states should work to overcome them.

110 Allen, note 1, pp. 12–13.

111 For example, port inspection may no longer be a possibility and so the more complicated interdiction on the high seas would need to be pursued instead, provided a legal basis to do so was still available.

14 Maritime Security in the Twenty-First Century

Contemporary and Anticipated Challenges for Australia and New Zealand

Donald R. Rothwell

One of the characteristics of maritime security is that there are two distinct dimensions in terms of responding to external threats faced by a coastal state. The first is that there exists a core set of threats, values and responses which any state will bring to bear in seeking to secure its maritime security. These reflect the national and international outlook of a state, its geographical location and maritime domain, and its bilateral and regional relationships. While some of these factors may vary over time, they will remain fairly stable. This is certainly the case for Australia and New Zealand, though there has from time to time been some disruption in bilateral and regional relationships so as to impact upon maritime security outlooks, as was the case with New Zealand's suspension of the *ANZUS Treaty*¹ with the United States (US) and the breakdown of relations between Australia and Indonesia over East Timor. While both of these issues and relationships have now been 'mended' – or at least worked around – they created for a time a particular maritime security dimension which needed to be addressed by both countries. The second dimension is the evolving and emerging threats to maritime security, some of which may be only periodic or temporary, others of which may be looming or may suddenly arise with little warning.² The attacks on 11 September 2001 have highlighted the potential that one single event may have, not only for national security, but also for global and regional security. The ripple effect felt by Australia and New Zealand of the terrorist attacks upon New York and Washington demonstrated that maritime security concerns can be not only simultaneously both global and national, but also sudden and in the context of a nuclear world have very far-reaching consequences.

Planning and addressing maritime security therefore require not only ongoing attention to 'core values' of the state but also a capacity to respond to emerging

1 *Security Treaty between Australia, New Zealand and the United States*, 1 September 1951, [1952] ATS 2.

2 A dramatic example of such an event occurred in March 2009 with the eruption of an undersea volcano off the coast of Tonga, causing a danger to navigation in the area: 'Tonga on Edge as Ocean Volcano puts on a Show', *The Australian*, 20 March 2009, available online at www.theaustralian.news.com.au/story/0,25197,25212007-2703,00.html, p. 8.

or unanticipated threats. Much of this responsiveness will of course involve the deployment of primarily defence assets, but there are multiple other scenarios which would involve the deployment of other government assets and agencies, as would be the case with a major marine environmental disaster following an oil spill. This dynamic nature of maritime security highlights the need for responsiveness and ensuring that national law and policy are sufficiently flexible to respond to these challenges. In light of these dynamics, this chapter will address some of the outstanding contemporary challenges to maritime security, and also some anticipated or 'horizon' issues that need to be considered and ultimately addressed. The impact of these issues for Australia and New Zealand will be assessed, before moving to some conclusions with respect to the issues that confront maritime security in the twenty-first century.

1 Contemporary maritime security challenges

1.1 Piracy³

During 2008 a gradual upsurge in pirate attacks occurring off the East African coast was observed, principally in the Gulf of Aden but also in the Indian Ocean off the coasts of Kenya and Somalia. In the first six months of 2008 the IMO reported a total of 121 pirate attacks worldwide, 34 of which occurred off the coast of East Africa and 17 in the Indian Ocean.⁴ Global attention was focused on these events in November 2008 with the seizure of the crude oil carrier *Sirius Star* some 450 nautical miles south-east of Mombasa, Kenya.⁵ An estimated US\$3 million cash ransom was delivered on board the *Sirius Star* on 16 January 2009 to the Somali pirates, many of whom were lost at sea after abandoning the ship.⁶

While these events centred the spotlight on Indian Ocean piracy, it is not a recent phenomenon. In response to an upsurge in pirate activity the International Maritime Bureau in 1992 established a Piracy Reporting Centre which since that time has been steadily tracking pirate activity around the world.⁷ Until recently much of the focus has been upon South East Asian waters, especially in the Straits

3 Part of the commentary in this section is drawn from D.R. Rothwell, 'Maritime Piracy and International Law', *Crimes of War Project*, 24 February 2009, available online at crimesofwar.org/onnews/news-piracy.html.

4 United Nations Secretary-General, 'Addendum to the Report of the Secretary-General on Oceans and the Law of the Sea', 29 August 2008, UN Doc. A/63/63/Add.1, para. 95.

5 'Somali Pirates Seize Supertanker', *The Australian*, 19 November 2008, available online at www.theaustralian.news.com.au/story/0,25197,24674070-2703,00.html, p. 11.

6 A.M. Abdi, 'Sirius Star Freed after \$4m Ransom Dropped to Pirates', *Sun Herald*, 11 January 2009, p. 44.

7 See details at International Chamber of Commerce, Commercial Crime Services, 'IMB Piracy Reporting' Centre, available online at www.icc-ccs.org/index.php?option=com_content&view=article&id=30&Itemid=12.

of Malacca and within the Indonesian archipelago.⁸ One particular regional response to this issue was the development of the *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP)*,⁹ which seeks to enhance information sharing and capacity-building among principally ASEAN nations, and related North East Asian and South Asia states.¹⁰

Piracy has long been a subject addressed by international law. As contemporary international trade routes developed throughout the seventeenth century, slow-moving undefended ships were an easy target for pirates set on looting and plunder. Throughout the nineteenth century a legal regime developed in response to the threat of piracy, and customary international law evolved which made piracy in effect the first universal crime over which all states had the capacity to arrest and prosecute. Pirates were considered *hostis humani generis*: an enemy of all mankind. These developments in custom found their way into the modern law of the sea as it developed throughout the twentieth century. The 1958 *Geneva Convention on the High Seas*,¹¹ and then the *Law of the Sea Convention (LOSC)*¹² both outlined an international regime for the repression of piracy and effectively recognized universal jurisdiction on the part of all states to suppress pirate acts. However, by limiting the definition to acts committed for 'private ends' any actions taken for political motives are excluded.¹³

A crucial element of the *LOSC* is that piracy is an act that occurs on the high seas, which will also include the adjoining Exclusive Economic Zone (EEZ).¹⁴ When piracy was first subject to regulation, nearly all of the world's oceans were considered high seas. As such, a century ago nearly all violent acts at sea committed for private ends would have been characterized as piracy. However, under the *LOSC* vast expanses of the world's oceans have now fallen under the sovereignty and jurisdiction of coastal states and accordingly an act of 'convention piracy' can occur only beyond the limits of the territorial sea. One consequence of these developments is that the modern law on piracy has been significantly constrained so as to fall effectively into two categories: piracy on the high seas beyond the twelve nautical mile limit of coastal state jurisdiction and sovereignty; and pirate-type acts which occur within territorial waters, including the waters of archipelagic states such as Indonesia. To that end, the international law on piracy does not apply to incidents occurring within a coastal state's adjacent waters. The

8 J.N. Mak, 'Pirates, Renegades and Fishermen: Reassessing the Dynamics of Maritime Piracy in the Malacca Strait' in A. Forbes (ed.), *Australia and its Maritime Interests: At Home and in the Region*, Canberra: Sea Power Centre, 2008, pp. 161–80.

9 *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia*, 11 November 2004, 44 ILM 829 (2005).

10 See J. Ho, 'Combating Piracy and Armed Robbery in Asia: The ReCAAP Information Sharing Centre', *Marine Policy* v33, 2009, pp. 432–4.

11 *Convention on the High Seas*, 29 April 1958, 450 UNTS 11.

12 *United Nations Convention on the Law of the Sea*, 2 December 1982, 1833 UNTS 3 [hereinafter *LOSC*].

13 See *ibid.*, Article 101.

14 See *ibid.*, Article 58(2).

effect of this is that it has predominantly been left to those countries that have been faced with offshore pirate-type attacks and incidents of sea robbery within their jurisdiction to utilize their own criminal justice systems to police and patrol their waters and ultimately enforce their criminal laws through prosecutions. As a result, a somewhat uneven legal regime has developed that is dependent upon capability and consistency in the fulfilment of these functions by states directly affected.

Mindful of the growing incidence of pirate attacks in waters off the coast of Somalia since 2005, in June 2008 the Security Council adopted Resolution 1816, which directly sought to address the threat posed by Somali piracy.¹⁵ Recognizing the incapacity of the Transitional Federal Government¹⁶ of Somalia to interdict pirates and secure offshore shipping lanes, and that pirate attacks were a threat to international peace and security in the region, the Security Council authorized states acting in cooperation with the Transitional Federal Government to enter the territorial waters of Somalia to undertake enforcement actions against piracy and armed robbery. In taking this unprecedented action the Security Council was recognizing the reality of Somalia's inability to provide maritime security within its own waters and the need for the international community to effectively undertake 'national-type' policing and enforcement operations within Somali waters. Resolution 1816 was effectively renewed on 2 December 2008 with the adoption of Resolution 1846, which extended the international community's mandate for a further twelve months. In response to these developments, the European Union (EU) launched 'Operation Atlanta' in December 2008 to combat piracy off the coast of Somalia, with NATO handing over its UN-requested counter-piracy operation named 'Allied Provider' to the EU later that month.¹⁷ Other states offering support included Russia, Malaysia, India, Iran, China, Turkey, South Korea, and Singapore.¹⁸ Another significant step was taken by the UN Security Council with the adoption of Resolution 1851 on 16 December 2008, authorizing 'ship rider' agreements to facilitate more effective law enforcement capability. The resolution also permits the international community to operate not only within Somali waters but also within the land territory of Somalia which is used to plan, facilitate or undertake acts of piracy and armed robbery at sea.

For Australia and New Zealand the upsurge of pirate attacks in 2008 and 2009 raised several issues. One was whether either country would make a contribution

15 See the discussion in D. Guilfoyle, 'Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-piracy Efforts', *International and Comparative Law Quarterly* v57, 2008, pp. 690–9.

16 Somalia has been a matter of ongoing concern for the Security Council since the early 1990s. The United Nations has been working with the Transitional Federal Government in the failed state in order to bring about a restoration of law and order not only within Somalia itself but also in relation to its territorial waters.

17 H. LaFranchi, 'Pursuit of Somali Pirates to get Hotter', *Christian Science Monitor*, 18 December 2008, p. 3.

18 A. Aneja, 'Iran, China will begin Counter-piracy Patrols', *The Hindu*, 22 December 2008, p. 15; S'pore Vigilant to Piracy Threat', *Business Times Singapore*, 22 December 2008.

to the anti-piracy operations being conducted off the east coast of Africa.¹⁹ Another was a further confirmation that pirate attacks well beyond the immediate region had the potential to impact upon shipping and trade into Australia and New Zealand. While this maritime security dimension of piracy had been accepted to some degree when pirate attacks throughout South East Asian waters were at their height, piracy in the Indian Ocean raised other dimensions. That some Australian tourists were on board a cruise ship attacked off the coast of Kenya further highlighted the potential local impact of these maritime events occurring in distant waters.²⁰

Despite significant, unprecedented moves by the international community to address the threat posed by maritime piracy, considerable legal challenges remain. It is clear that the current legal regime is not comprehensive with respect to the enforcement of either international law or domestic criminal law against those responsible for pirate attacks. The jurisdiction of a state over acts of piracy is based predominantly upon nationality or territoriality. An issue arising in the case of Somali piracy was that, unless local courts were both willing and capable of conducting prosecutions against alleged pirates, the responsibility for enforcement would predominantly fall upon those members of the international community whose ships patrolled the Somali coast. This in turn would depend upon the ability of a state with a ship in Somali waters to apply and enforce its own piracy and sea robbery laws based upon the pirate ship or the pirates having the nationality of that state, or the degree to which the national law of the enforcing state makes piracy a universal crime which can be subject to arrest and prosecution anywhere throughout the world.

While the intervention of the Security Council through its various resolutions has gone some way to resolve these jurisdictional loopholes, there remain gaps which are compounded by lack of political will on the part of some members of the international community to engage in law enforcement. What then are the possible legal solutions? A more comprehensive legal regime dealing with threats to maritime security is essential. The regime would need to balance the recognition of universal jurisdiction on the part of all states to deal with persons responsible for such acts against the inherent right of state sovereignty. All states need to have the capacity under international law to prosecute persons who perpetrate acts of violence against foreign ships in all settings, except within the internal waters of other states.²¹ Counterbalanced against this, however, is that while states

19 S. Smiles, 'Navy Plans Pirate Fight', *The Age*, 9 January 2009, available online at www.theage.com.au/national/navy-plans-pirate-fight-20090108-7cw7.html, p. 1; 'Australia should help in Pirate Battle', *West Australian*, editorial, 12 January 2009, p. 20. In November 2008 it was reported that Australian maritime unions supported the deployment of the Australian Navy to provide protection for Australian-flagged vessels off the coast of Somalia: T. Skotnicki, 'Send in the navy: anti-piracy call', *Canberra Times*, 23 November 2008, p. 10.

20 S. Elks, 'Cruise vessel outruns pirates', *The Australian*, 3 December 2008, p. 3.

21 In addition to the provisions of the *LOSC*, the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 10 March 1988, 1678 UNTS 221, also provides a basis for states to commence prosecutions for a range of unlawful acts against ships.

may be prepared to offer their military support to ensure the safety and security of shipping lanes, the reality is that – as has occurred in Somalia – some states will be reluctant to seek to prosecute the offenders either because their legal regimes are inadequate or for political considerations.²² To that end, innovative legal responses are required. In January 2009 the US and the UK signed agreements with Kenya allowing the transfer of suspected pirates to Kenya for trial, while the EU reached a similar agreement in March 2009. These arrangements were designed to facilitate prompt detention and transfer of suspected pirates to the Kenyan criminal justice system.²³ However, while these initiatives may be helpful in dealing with the particular situation in Somalia, they do not address more fundamental issues regarding the international crime of piracy. Through a combination of circumstances, especially arising as a result of the collapse of effective governance and policing mechanisms within some coastal states, piracy has been allowed to thrive in certain situations. To date, the response of the international community to this threat has been rather haphazard. A more coordinated approach is warranted, with a view to the resolution of the legal issues identified herein. To this end, the International Law Commission may see fit to revisit the definition of piracy in the next decade.

1.2 Transnational crime

Closely related to piracy is the prevention and suppression of transnational crime, which can have a maritime element. This is most particularly the case in the trafficking of narcotic drugs and psychotropic substances, and the trafficking of people between continents and countries. In 2008 the United Nations Secretary-General noted the links that existed between drug trafficking and related organized criminal activities, such as trafficking in illegal firearms and terrorism.²⁴ In this respect, transnational organized crime has sought to take advantage of weaknesses and vulnerabilities that exist within certain states due to the length of their coastlines, inadequate monitoring and surveillance of maritime activities, lack of maritime enforcement capability, and poor governance and legal frameworks.²⁵

For Australia and New Zealand the threat posed by transnational organized crime has long been understood first with respect to drug trafficking, and throughout the past decade in relation to human trafficking. Australia is concerned about issues arising due to its geographical proximity to neighbouring

22 'Germany mulls Action over captured Somali Pirates', *Agence France Presse*, 6 March 2009.

23 S. Childress, 'Pact with Kenya on Piracy Trials gets first Test', *Wall Street Journal*, 17 February 2009, p. A8; 'EU and Kenya Sign Deal on Transfer of Somali Pirates', *Agence France Presse*, 7 March 2009.

24 United Nations Secretary-General, note 4, para. 102.

25 'Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its ninth meeting: letter dated 25 July 2008 from the Co-chairpersons of the Consultative Process addressed to the President of the General Assembly', 25 July 2008, UN Doc. A/63/174, Part B, para. 62.

states.²⁶ New Zealand has its eye on the Pacific region, where weak institutional structures and vast ocean areas make it an attractive transit point for drugs and other forms of smuggling.²⁷ Another important aspect of these responses has been enhanced bilateral arrangements to deal with shared security and transnational criminal matters,²⁸ and arrangements to permit more effective maritime regulation and enforcement.²⁹ However, there may be greater capacity to develop more effective regional, sub-regional and bilateral cooperation in combating transnational crime, especially within the South West Pacific. Enhanced joint patrols and ship rider agreements, some of which are already in place to address illegal fishing, may be productively expanded to address these threats, and this is an area where Australia and New Zealand could play a productive role.³⁰ In this regard, the ongoing concerns expressed with respect to the 'arc of instability' and the fear of transnational organized crime finding a foothold in collapsing or collapsed states within the region create a further incentive for Australia and New Zealand to be proactive in this field.³¹

1.3 *Creeping jurisdiction*

A common thread throughout world affairs over the past 100 years has been a gradual encroachment by coastal states over their adjacent maritime domain. First with the territorial sea, then the continental shelf, and then during the 1960s and 1970s a raft of new claims to zones asserting sovereignty and jurisdiction over fisheries and economic activities, the law of the sea has witnessed throughout the twentieth century an ever expanding assertion of the right of the coastal state over adjacent waters. While the legitimacy of all of these maritime zones has now been confirmed by the *LOSC*, there remains an ongoing capacity for coastal states to

26 R. Cornall, 'Australia's Response to Transnational Crime in the Region', *Public Administration Today* v4, July–October 2005, pp. 61–5.

27 M. Moriarty, 'Border Management in the Pacific' in A. Bisley (ed.), *Pacific Interactions: Pasifika in New Zealand, New Zealand in Pasifika*, Wellington: Institute of Policy Studies, Victoria University of Wellington, 2008, available online at <http://ips.ac.nz/publications/publications/show/248>, pp. 245, 257.

28 See, for example, *Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation*, 13 November 2006, [2008] ATS 3. Article 3 provides: 'The scope of this Agreement shall include: . . . (7) Cooperation between relevant institutions and agencies, including prosecuting authorities, in preventing and combating transnational crimes, in particular crimes related to: (a) People smuggling and trafficking in persons . . . (g) Illicit trafficking in narcotics drugs and psychotropic substances and its precursors . . .'

29 See the *Treaty between the Government of Australia and the Government of the French Republic on Cooperation in the Maritime Areas adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Islands*, 24 November 2003, [2005] ATS 6.

30 See 'Report on the Work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its Ninth Meeting', note 25, Part B, para. 67, highlighting this issue for small island developing states.

31 See discussion in R. McCusker, 'Transnational Crime in the Pacific Islands: Real or Apparent Danger?', *Trends and Issues in Crime and Criminal Justice*, March 2006, No. 308, pp. 1–6.

assert unilateral claims over some of these zones which have considerable capacity to impact upon maritime security. The effect of this creeping jurisdiction or 'territorialization' of the oceans can be profound, especially with respect to its potential impacts upon the freedoms of navigation, fishing and marine scientific research.

There are two particular dynamics at play in this regard. The first is the ability of a coastal state to unilaterally interpret the provisions of the *LOSC* so as to gain as extensive a maritime claim as is possible. This can apply with respect to the drawing of baselines (both straight and archipelagic), the assertion of maritime zones off islands and rocks, and the proclamation of outer continental shelves. The second is the capacity of some coastal states to adopt a unilateral interpretation of the *LOSC* so as to assert more extensive claims to sovereign rights or jurisdiction than was originally envisaged by the Convention's framers.³² Though some caution must be exercised when considering unilateral claims in the context of the oceans, given the role that such actions played in the progressive development of the modern law of the sea, the active assertion of new sovereign rights and jurisdiction within existing maritime zones remains very contentious. Both of these phenomena have a capacity to impact upon maritime security and are matters against which Australia and New Zealand must guard.

Given the importance attached by both countries to the freedom of navigation and its consequences for trade flows, the redrawing of baselines is a matter of particular sensitivity. This is especially the case given the presence within South East Asia of two large archipelagic states in Indonesia and the Philippines,³³ and the tensions that have arisen over the South China Sea between various claimants as a result of excessive baseline claims and island disputes.³⁴ The precedential value that may be created by some of these claims also has ramifications within the South West Pacific because of the potential for some island states within the region to similarly assert excessive claims over their maritime domain. Australia and New Zealand have remained vigilant in monitoring maritime claims made by their northern neighbours both in Asia and in the Pacific,³⁵ and these matters also

32 An example is Chile's claim to a 'Presencial' Sea; see J. Gilliland Dalton, 'The Chilean Mar Presencial: A Harmless Concept or a Dangerous Precedent?', *International Journal of Marine and Coastal Law* v8, 1993, pp. 397–418.

33 This was highlighted by the Australian objection to the Declaration lodged by the Philippines when it signed and subsequently ratified the *LOSC*. Australia's concern related to how the Philippines sought to interpret the archipelagic waters provisions of the *LOSC*: 'United Nations Convention on the Law of the Sea: ratification, with understanding by the Philippines – Objection by Australia' *Australian Year Book of International Law* v12, 1992, pp. 383–5.

34 These disputes exist over the Spratly and Paracel island groups; see as an example of the tension in this region A. McIndoe, 'Tensions growing in South China Sea', *Straits Times*, 18 March 2009, and more generally D. Whiting, 'The Spratly Islands Dispute and the Law of the Sea', *Denver Journal of International Law and Policy* v26, 1998, pp. 897–916.

35 There are examples where Australia has sought to express its concern over excessive maritime claims, such as its response to a declaration by Papua New Guinea of a fifty nautical mile exclusion zone around the island of Bougainville, see G. Evans, 'Freedom of Navigation: Declaration by Papua New Guinea of a Fifty-nautical-mile Exclusion Zone around Bougainville – Australian Response', *Australian Year Book of International Law*, v13, 1992, pp. 297–8.

remain the concern of the international community. To that end, the vigilance of the US in contesting excessive maritime claims provides additional support for any diplomatic protests or assertion of sovereign rights which Australia or New Zealand may make.

The unilateral assertion of new sovereign rights or jurisdiction within existing maritime zones is also a matter for concern. As coastal states seek to assert ever increasing controls over the waters beyond the territorial sea, the EEZ is fast becoming a contentious area with respect to the regulation not only of fishing rights but also freedom of navigation for both merchant and naval vessels, and overflight by all aircraft.³⁶ Likewise, the freedom of marine scientific research has the potential to become increasingly more contentious because of the security dimensions associated with such research. The Article 246 regime created by the *LOSC* which acknowledges the right of all states to conduct marine scientific research within the EEZ and continental shelf, subject to coastal state regulation,³⁷ can become the centre of disputes, especially if disagreement arises as to whether the research is being conducted 'exclusively for peaceful purposes' or whether there is a military dimension to the research activity. The maritime security dimension of this issue was highlighted in March 2009 by the encounter between the USNS *Impeccable*, which was undertaking ocean surveillance activities within China's EEZ seventy-five nautical miles to the south of Hainan Island and five Chinese vessels which surrounded the *Impeccable* and sought to block its path.³⁸ The event highlights how China's active interpretation of its EEZ rights such as to limit navigation, marine scientific research and the conduct of surveillance could flare into a major international incident.³⁹

In this respect, Australia and New Zealand need to exercise some caution in their own active assertion of sovereign rights and jurisdiction within their maritime zones. During the past decade Australia has had its actions called into account with respect to enforcement action undertaken against vessels carrying asylum seekers,⁴⁰ penalties imposed upon foreign fishing vessels in the Southern

36 This matter was particularly highlighted by the 2001 EP-3 incident involving aerial surveillance by a US Navy aircraft off the coast of Hainan Island, China, in which a mid-air collision occurred between the US aircraft and a People's Liberation Army navy fighter jet some fifty nautical miles south-east of Hainan Island, raising issues as to the freedom of overflight within the Chinese-claimed EEZ; see I. Shearer, 'Military Activities in the Exclusive Economic Zone: The Case of Aerial Surveillance', *Ocean Yearbook* v17, 2003, pp. 548–62.

37 However, this regime is also supported by a presumption of 'implied consent' on the part of the coastal state if after a period of six months a project request to undertake marine scientific research has effectively been met with silence: see *LOSC*, note 12, Article 252.

38 D. Sevastopulo, 'White House protests to Beijing over Naval Incident', *Financial Times*, 10 March 2009, p. 3.

39 F. Ching, 'China will avoid Military Showdown with the US', *Business Times Singapore*, 18 March 2009.

40 G. Thom, 'Human Rights, Refugees and the MV *Tampa* Crisis', *Public Law Review* v13, 2002, pp. 110–17.

Ocean⁴¹ and the implementation of a compulsory pilotage regime in the Torres Strait.⁴² The latter case is one which particularly may have ramifications in that neighbouring states, especially Indonesia, may seek to rely upon aspects of the Australian approach to compulsory pilotage based on environmental protection grounds to adopt similar measures throughout the Indonesian archipelago.

1.4 Maritime safety, search and rescue

The enhancement of safety of navigation, responding to maritime casualties, and maritime search and rescue remain ongoing global issues related to maritime security. Ensuring the safety of navigation within Australian and New Zealand waters, and safety of their flagged vessels around the world, is a self-evident ongoing priority for both countries. To that end, responses to increases in acts of piracy and sea robbery are another dimension of this concern. Likewise, enhancing navigational services to ensure the safety of shipping through Australian and New Zealand waters remains ongoing. However, Australia's experience with its compulsory pilotage regime in the Torres Strait has demonstrated some potential to raise other sensitivities under the law of the sea due to the significance attached to non-interference with transit passage through an international strait.⁴³ While maritime casualties have declined in recent years the number of abandoned wrecks has reportedly increased,⁴⁴ which globally create ongoing navigational hazards. In this context, the eventual entry into force of the 2007 *Nairobi International Convention on the Removal of Wrecks*⁴⁵ will be an important development. Additionally, there are ongoing global efforts to ensure both flag and port states take greater responsibility for effective implementation and enforcement of maritime safety standards, including survey, crewing and marine pollution standards. Greater capacity-building to assist certain states to meet their international obligations has been called for,⁴⁶ and there is some potential role for Australia and New Zealand to that end, especially in the South West Pacific. These are matters of particular concern for both countries, given the high volume of foreign-flagged ships that enter

41 W. Gullett, 'Prompt Release Procedures and the Challenge for Fisheries Law Enforcement: The Judgment of the International Tribunal for the Law of the Sea in the *Volga* Case (Russian Federation v. Australia)', *Federal Law Review* v31, 2003, pp. 395–407.

42 R. Beckman, 'PSSAs and Transit Passage: Australia's Pilotage System in the Torres Strait Challenges the IMO and UNCLOS', *Ocean Development and International Law* v38, 2007, pp. 325–57.

43 It should be noted that Australia's initiatives during the 1990s to secure compulsory pilotage through the waters of the Great Barrier Reef did not raise the same sensitivities as have arisen in the Torres Strait; see M. White, 'Navigational Rights in Sensitive Marine Environments: The Great Barrier Reef' in D.R. Rothwell and S. Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea*, The Hague: Martinus Nijhoff, 2000, pp. 230–62.

44 United Nations Secretary-General, note 4, para. 78.

45 *Nairobi International Convention on the Removal of Wrecks*, 18 May 2007, London: International Maritime Organization, 2008.

46 'Report on the Work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its Ninth Meeting', note 24, Part B, para. 77.

Australian and New Zealand waters after departing from distant foreign ports. Accordingly, ensuring stronger flag and port state monitoring and enforcement within South East Asia and the South West Pacific has positive maritime security consequences for both countries.⁴⁷

Maritime search and rescue is a field in which during the past decade there have been enhanced responsibilities for both countries, either with respect to the coordination of search and rescue operations or the actual undertaking of some operations. Issues have particularly arisen in the context of asylum seekers making their way to the Australian coastline,⁴⁸ adventurers and yachts being lost in remote parts of the Indian and Southern Oceans,⁴⁹ or maritime incidents in the Southern Ocean, including sinking or crippled tourist vessels and the Japanese whaling fleet and protestors.⁵⁰ At one level, ensuring that Australia and New Zealand meet their international obligations under the *International Convention on Maritime Search and Rescue*⁵¹ is a matter of securing not only capacity but also appropriate governmental procedures and mechanisms to respond to maritime incidents. However, there is also a significant maritime security dimension to this issue because of the vast ocean spaces for which both countries have search and rescue (SAR) responsibility, and the possible consequences in terms of loss of life and international repercussions if a SAR operation fails. Both a human security and an environmental security dimension exists with respect to SAR. The intersection of these issues has been highlighted in Australia in recent years. First, as a result of the response to the *Tampa* rescue at sea north of Christmas Island and, second, the subsequent loss in 2001 of the *Siev X*, a suspected illegal-entry vessel carrying asylum seekers from Indonesia which sank in the Indian Ocean with an estimated loss of 353 lives.⁵² As shipping activity within Australian and New Zealand waters increases, whether by merchant ships, cruise ships, pleasure yachts or adventurers, it must be anticipated that the accompanying demand on SAR capabilities

47 These matters were highlighted for Australia when the Greek-registered tanker *Kirki*, which had only recently completed its survey requirements, lost its bow in the Indian Ocean off the coast of Western Australia, resulting in the spill of 17,280 tonnes of oil into waters off the coast; see M. White, 'The *Kirki* Oil Spill: Pollution in Western Australia', *University of Western Australia Law Review* v22, 1992, pp. 168–77.

48 In addition to the August 2001 *Tampa* incident, during September–December 2001 the Royal Australian Navy while in the conduct of 'Operation Relex' assisted in a number of search and rescue operations off the northern and north-western Australian coast; see the discussion in D. Marr and M. Wilkinson, *Dark Victory*, Crows Nest: Allen & Unwin, 2003, pp. 181–210.

49 New Zealand Government, Maritime New Zealand, 'French Yacht Crew Rescue', Media Release, 18 February 2008, available online at www.maritimenz.govt.nz/news_and_media/media_releases_2008/20080218a.asp.

50 In February 2007, following a fire aboard the Japanese whaling vessel *Nisshin Maru*, the then New Zealand Prime Minister expressed concern over the safety of life at sea, potential marine environmental risk arising from the incident and New Zealand's search and rescue obligations in that part of the Ross Sea: 'Japan Implored to Move Damaged Whaler before Fuel Spills', Environmental News Service, 19 February 2007, at www.ens-newswire.com/ens/feb2007/2007-02-19-05.asp.

51 *International Convention on Maritime Search and Rescue*, 27 April 1979, 1405 UNTS 97.

52 See discussion in Marr and Wilkinson, note 48, pp. 230–51.

of both countries will continue to grow. When the added dynamic of the consequences of climate change and the potential for more violent storms at sea, including cyclones, is taken into account,⁵³ it becomes clear that SAR will remain an ongoing high-profile maritime security issue for Australia and New Zealand.

2 Anticipated maritime security challenges

In addition to ongoing and contemporary challenges being posed for maritime security globally, and for Australia and New Zealand in particular, it is possible to identify a number of 'horizon' issues that have maritime security consequences. These are matters that Australia and New Zealand will inevitably need to give greater attention to in the coming decade.

2.1 Climate change

The effect of climate change on the world's oceans, and its consequences for maritime security, should not be underestimated. In 2008 the United Nations Secretary-General noted:

Climate change continues to have a significant impact on the oceans and the lives of people that depend on the sea. Observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level conclusively indicate that the world is already warming in response to past greenhouse gas emissions, and are evidence of a warmer world in the future.⁵⁴

The anticipated impacts of climate change for the world's oceans include sea level rise, changes in sea surface temperature, erosion, ocean acidification and increased frequency of extreme weather events. The impact upon the marine environment could be significant, extending from the melting of the polar ice caps, resulting in the appearance of open water across the Arctic Ocean and significant icebergs throughout the Southern Ocean, to the redistribution of some fish stocks as their habitats change.⁵⁵

While all of the consequences of climate change for the world's oceans remain unknown, several can be anticipated for countries such as Australia and New Zealand that have maritime security ramifications. Rising sea levels will create challenges with respect to the status of previously declared baselines. Issues will therefore arise as to the status of certain baselines, including the use of low-tide elevations and reefs, for the purposes of declaring baselines and determining the

53 United Nations Secretary-General, note 4, para. 261.

54 *Ibid.*, para. 259.

55 *Ibid.*, para. 260.

limits of internal waters and all related maritime zones.⁵⁶ This is potentially a global issue which all coastal states will face and which may result in some compromise position being reached by the states parties to the *LOSC*. It must be anticipated that Australia and New Zealand's position with respect to baselines could be subject to challenge during this period,⁵⁷ and that Australia, at least, may seek to contest the baseline assertions of neighbouring states.⁵⁸ The consequences for potential baseline modification arising from climate change are considerable with respect to navigation, as it may result in greater access by foreign vessels exercising a right of innocent passage. On the other hand, it may result in navigation through waters which are currently hazardous, such as the Torres Strait or the Great Barrier Reef, becoming less so and accordingly reducing some maritime security threats. That baselines may need to be recalibrated as a result of sea level rise will also result in general uncertainty as to the outer limits of already claimed maritime zones. Such uncertainty would not be helpful for maritime confidence in general, as it could lead to increased tensions over already disputed areas such as the South China Sea. Navigational hazards may also be increased, particularly as a result of the melting of the polar ice cap, and this would have repercussions for both countries, especially with respect to their SAR obligations in the Southern Ocean, where it would have to be anticipated that icebergs would become more prevalent.

Adjustments in the habitats of marine living resources will also have maritime security implications. The first is that the jurisdictional regimes which have been devised to regulate certain fish stocks may need to be revisited. For Australia and New Zealand this has implications for marine living resource management in the Southern Ocean,⁵⁹ and for southern bluefin tuna,⁶⁰ which are effectively regulated under regional fisheries arrangements. There may also be a need to devise arrangements to reflect the new habitats of straddling stocks and highly migratory species.⁶¹ Not only would this be an important bilateral issue, it would also have

56 See the discussion in A.H.A. Soons, 'The Effects of a Rising Sea Level on Maritime Limits and Boundaries', *Netherlands International Law Review* v37, 1990, pp. 207–32.

57 This could particularly be an issue for Australia and New Zealand's positions with respect to baselines around their Antarctic territorial claims, the Australian Antarctic Territory and the Ross Sea; see generally D.R. Rothwell, 'Antarctic Baselines: Flexing the Law for Ice-covered Coastlines' in A.G. Oude Elferink and D.R. Rothwell (eds), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction*, Martinus Nijhoff: The Hague, 2001, pp. 49–68.

58 This could become a contentious issue for low-lying small island states throughout the south-west Pacific, which rely upon reefs, islets and rocks in partial support of their claims to archipelagic status under the *LOSC*.

59 *Convention on the Conservation of Antarctic Marine Living Resources*, 20 May 1980, 1329 UNTS 47.

60 *Convention for the Conservation of Southern Bluefin Tuna*, 10 May 1993, 1819 UNTS 359.

61 W.W.L. Cheung, K. Kearney, V. Lam, J. Sarmiento, R. Watson and D. Pauly, 'Projecting Global Marine Biodiversity Impacts under Climate Change Scenarios', *Fish and Fisheries* v10, 2009 (in press), argue that there is the potential for more than 1,000 species of commercial fish and shellfish to migrate from tropical waters towards polar oceans, including the Southern Ocean; they note at p. 1, 'climate change may lead to numerous local extinctions in the sub-polar regions, the tropics and semi-enclosed seas. Simultaneously, species invasion is projected to be most intense in the Arctic and the Southern Ocean.'

ramifications within the South West Pacific and Southern Ocean, given the already existing dense regional fisheries regimes in place there. These matters directly have maritime security implications because they raise the potential for new challenges with respect to maritime regulation and enforcement of fisheries laws within the Australian and New Zealand EEZs. In addition, there is the potential that, as fish stocks relocate into the region, fleets that have traditionally fished those stocks will follow. Northern hemisphere fleets that may no longer have plentiful stocks in their traditional fishing grounds may also be tempted to move farther south. All of these factors suggest the potential for greater IUU fishing to occur within or adjacent to the eastern Indian, Southern and South West Pacific Oceans which will inevitably have significant maritime security implications for Australia and New Zealand.

2.2 Marine environmental security

It seems inevitable that if climate change is expected to have an impact upon maritime security, then marine environmental security will become an even more pressing issue. Australia and New Zealand have a track record of being well aware of the importance of this issue. It needs to be recalled that it was Australia and New Zealand that sought to challenge France's nuclear weapons testing programme in the Pacific and that the *French Nuclear Test Cases* in the International Court were among the first in which the ICJ considered international environmental issues.⁶² New Zealand's 1995 attempt to reopen that case had an even stronger focus on the damage being done to the marine environment and highlighted the development of the law in the field and the role played by the *Treaty of Rarotonga*.⁶³ Likewise, New Zealand's anti-nuclear ships policy towards the US, which effectively scuttled their ANZUS relationship, not only reflected New Zealand's general anti-nuclear stance but also a strong desire to protect New Zealand's marine environment.⁶⁴ Australia's attitude to protecting the Great Barrier Reef and more recently the Torres Strait also demonstrates a similar concern about diminishing environmental risk as a result of the hazards posed by shipping activities.

In the coming decade it must be anticipated that, as the effects of climate change become more prevalent, and concern for the environment becomes even stronger, the political and public demand for protection of the marine environment will continue to grow. What are the issues, then, that may have a maritime security dimension to them? One response to the impact of climate change has particular consequences for the oceans. The growing interest in ocean fertilization

62 *Nuclear Test Cases* (Australia and New Zealand v. France) [1973] ICJ Rep 320.

63 *South Pacific Nuclear Free Zone Treaty*, 6 August 1985, 24 ILM 1442 (1985); and see some of the arguments raised in this matter in D. Anton, 'International and Environmental Lawyers Worldwide Join to Challenge the Lawfulness of the Resumption of Nuclear Testing by France', *Environmental and Planning Law Journal* v12, 1995, pp. 299–300.

64 T.F. Daughton, 'The Incompatibility of ANZUS and a Nuclear-free New Zealand', *Virginia Journal of International Law* v26, 1986, pp. 455–84.

and how it may be employed as a means to combat climate change raise multiple issues under the law of the sea, international climate law and international law more generally.⁶⁵ How the international community will respond to the issues raised by ocean fertilization remains uncertain.⁶⁶ However, the maritime security implications should not be overlooked and that some of the experimentation in the field has taken place in the Southern Ocean raises particular issues for Australia and New Zealand. The effects of ocean acidification arising from climate change, and the unknown impacts that may arise from ocean fertilization, highlight ongoing issues regarding threats to marine biodiversity. Access to and utilization of genetic resources in the oceans has been a matter under consideration since 2007,⁶⁷ as have the legal issues arising from bioprospecting,⁶⁸ especially as they may arise in Antarctica and the Southern Ocean.⁶⁹ One maritime security dimension arising from this is the potential for disputes to arise over access to resources, and whether certain bioprospecting activities are properly characterized as marine scientific research or exploitation of the oceans. Linked to this is the introduction of invasive alien species into the world's oceans,⁷⁰ a matter which the IMO has sought to actively control through its measures dealing with ballast water, but which will require further attention to protect fisheries and aquaculture. If appropriate initiatives are not taken to address this issue, there remains the ongoing potential that some states may take unilateral action of their own. Another area where coastal states may become more proactive is in their efforts to protect the coastal and marine environment from the effects of marine pollution, whether as a result of oil spill or maritime disaster. The reaction in Australia to the March 2009 oil spill by the *Pacific Adventurer* off the south-east coast of Queensland highlights the political issues associated with marine environmental impact and the pressures that may arise for more protective responses to be taken.⁷¹

65 R. Rayfuse, M.G. Lawrence and K.M. Gjerde, 'Ocean Fertilisation and Climate Change: The Need to Regulate Emerging High Seas Uses', *International Journal of Marine and Coastal Law* v23, 2008, pp. 297–326.

66 See A. Jha, 'Ocean Iron Plan approved as Researchers show Algae absorb CO₂', *Guardian Unlimited*, 28 January 2009, available online at www.guardian.co.uk/environment/2009/jan/28/iron-carbon-oceans.

67 United Nations Secretary-General, note 4, paras 149–52.

68 See T. Scovazzi, 'Bioprospecting on the Deep Seabed: A Legal Gap requiring to be Filled' in F. Francioni and T. Scovazzi (eds), *Biotechnology and International Law*, Oxford: Hart Publishing, 2006, pp. 81–97; S.A. Bonney, 'Bioprospecting, Scientific Research and Deep Sea Resources in Areas beyond National Jurisdiction: A Critical Legal Analysis', *New Zealand Journal of Environmental Law* v10, 2006, pp. 41–91.

69 A.D. Hemmings and M. Rogan-Finnemore (eds), *Antarctic Bioprospecting*, Christchurch: Gateway Antarctica, 2005.

70 United Nations Secretary-General, note 4, para. 182.

71 L. Dayton, 'Slick Recovery', *The Australian*, 18 March 2009, available online at www.theaustralian.news.com.au/story/0,25197,25202358-5006786,00.html, p. 13; A. Morton and C. Marriner, 'Oil Spill to require lengthy Eco-monitoring', *The Age*, 17 March 2009, available online at www.theage.com.au/environment/oil-spill-to-require-lengthy-ecomonitoring-20090316-8zwn.html, p. 4.

Marine environmental security will also inevitably become an issue in the context of overfishing of marine living resources, and this has multiple dimensions. First, there already exist disputes over the management of certain stocks, ranging from whales in the Southern Ocean to southern bluefin tuna. Both the Australian and New Zealand governments have been proactive in the debates regarding management of these and other stocks, including litigation or considering litigation of environmental management disputes before international courts and tribunals.⁷² It has to be anticipated that as the effects of climate change and modifications to the marine environment take hold these disputes could flare up again. In addition, there is the potential that the sustainability of other fish stocks and marine living resources could become contentious, especially if Australia and New Zealand face the prospect of increased IUU fishing. Given the track record of past disputes in the Timor Sea, Southern Ocean and parts of the South West Pacific, it must be anticipated that as fish stocks become more scarce and Australia and New Zealand continue to express their concerns over the sustainability of fisheries that disputes in this area may erupt.

2.3 Responsiveness and adaptability

Any ability to respond adequately to these and other related maritime security issues will require a high level of capacity, capability and also adaptability. Some of the reforms and adjustments that have been made to maritime security arrangements in Australia and New Zealand since 2003 are important steps in that process. However, that is not where the matter should end. It would be helpful if there was a more comprehensive review of the legislative framework dealing with offshore matters to ensure that if there is a need to undertake unexpected maritime regulation and enforcement operations, whether that be by the navy, Customs, Fisheries or maritime police, that the legal regime is adequate and appropriate to support such operations. The capacity to enact quickly 'emergency legislation' is very limited and so having an adequate legislative framework already in place is essential. In that regard, not only must operations within claimed maritime zones be considered, but also operations on the high seas and even within the waters of other coastal states. This raises important issues regarding the constitutionality of the extraterritorial application of laws consistent with an international law framework. Connected with this is the need to ensure that there is an appropriate policy framework in place to also support these operations. While there is always the capacity to develop policy quickly to respond to unanticipated events, a specific policy response needs to sit within a broad policy framework reflecting particular values and goals. Here the failure of the Oceans Policy process in New Zealand is a concern, as a robust Oceans Policy would assist decision makers in responding to unforeseen developments. Finally, and perhaps

72 N. Klein, 'Where were the Tuna Watchers? Lessons for Australia in Litigation against Japan', *Alternative Law Journal* v33, 2008, pp. 137–41.

most important, there needs to be an operational capability to respond to maritime security challenges. Once again this can extend all the way from the core central agencies of government, such as the defence forces, to local agencies on the ground capable of quickly responding to SAR or marine pollution incidents. However, because of the size of their respective maritime domains, both countries need not only a coastal operational capacity but also a 'blue water' capacity capable of responding to events at the outer limits of their claimed maritime zones including distant parts of the Southern Ocean, the South West Pacific and the Indian Ocean and, subject to an international mandate, in other parts of the world's oceans and seas. In recent years, primarily as a result of operational deployments under UN mandate in various parts of the world, capacity in this respect has been significantly stretched.

3 Concluding remarks

Determining the limits of maritime security remains an ongoing challenge. The 'definitional issue' and divergent views as to what precisely constitutes maritime security result in fractured approaches to dealing with common problems when harmonized approaches would be more productive.⁷³ This is an issue which remains at the global, regional and national level. Fortunately, within Australia and New Zealand there have been ongoing debates on this topic which have assisted in allowing a range of views to be developed. What is becoming clear, however, is that a broader perspective on maritime security is increasingly being realized and this is impacting upon the ways in which existing and potential security threats are being addressed.⁷⁴ Nevertheless, challenges do remain. Determining the extent of maritime security interests remains an important foundational issue. At a minimum, Australia and New Zealand would assert that the maritime domain that falls within an area bounded by coastal fronts to the outer limits of their maritime zones are at the core of their maritime security concerns. However, there are additional sub-regional, regional and global concerns and interests which are directly or indirectly related to some of those core interests.

One of the challenges in maintaining maritime security is getting the right balance between local, regional and global responses, and likewise balancing legal, policy and institutional responses. Whether Australia and New Zealand

73 See generally 'Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its Ninth Meeting', note 24, Part B, paras 70–1, on the question as to whether illegal fishing was a maritime security issue; United Nations Secretary-General, 'Report of the Secretary-General on Oceans and the Law of the Sea (Advance and Unedited text)', 17 March 2009, available online at www.un.org/depts/los/general_assembly/general_assembly_reports.htm, para. 138.

74 S. Bateman and A. Bergin, *Sea Change: Advancing Australia's Ocean Interests*, Canberra: Australian Strategic Policy Institute, 2009, p. 51, have argued that 'for Australia, almost everything to do with the oceans has a strategic dimension'.

have tended to place too much emphasis on 'hard' responses to maritime security is debatable. Attention has been directed to 'soft' responses through the provision of foreign aid and diplomatic initiatives with regional neighbours, but more could no doubt be done and other opportunities could be pursued. Harmonization of capacity-building and enforcement techniques⁷⁵ at a global, regional and national level has in recent years been given attention by both countries, but there remains scope for more regional and global initiatives. Likewise, efforts have been made at developing maritime domain awareness, especially as to the extent and scope of the data that need to be collected, how they should be collected and, ultimately, how they should be assessed. These are especially challenging issues for Australia and New Zealand, given the extent of their maritime domain. Effective maritime security responses also require harmonization of law at different levels – especially the national and the international. Because of the delays that exist in the entry into force of relevant international conventions there may from time to time be a disconnect between international law and national law. This is undesirable, but given the extent of the already existing sovereignty and jurisdiction which exists over the maritime domain, such lack of harmonization may not always prove to be a major weakness.

Maritime security will remain a challenge for Australia and New Zealand, not only in the short term but also the medium to long term. The capacity of both countries to cope with the issues that arise will ultimately depend upon their preparedness, capacity and capability. It will also require an appreciation of 'lessons learned' and current and looming challenges, and, where appropriate, bilateral cooperation in their mutual interest.

75 United Nations Secretary-General, 'Report of the Secretary-General on Oceans and the Law of the Sea (Advance and Unedited text)', note 73.

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