GLOBAL COMMONS, INTERNATIONAL TREATIES, AND ORDER AT SEA[1]

Commander Sarabjeet Singh Parmar

"The 'Global Commons' refers to resource domains or areas that lie outside of the political reach of any one nation State. Thus international law identifies four global commons namely: the High Seas; the Atmosphere; Antarctica; and, Outer Space".[2] As far as the maritime domain is concerned "the oceans reflect the classic model of a 'global commons', and the term is a useful metaphor for thinking about shared space".[3] Although the application of the term pertains to the high seas, the spreading tentacles of nationalistic jurisdiction over ocean spaces are increasing. These stem mainly due to territorial disputes over land, which also impacts on maritime space, and also for the search for natural resources, as is unfolding in South China Sea and could also occur in the Arctic.

Antarctica, although the only land mass amongst the four commons, is connected to the oceans as the Antarctic Treaty includes oceans spaces south of 60 degree south latitude.[4] Therefore any discussion on order at sea would also have to per force include this land mass. The legalese of the oceans was documented in the United Convention on the Law of the Sea (UNCLOS), negotiated from 1973 to 1982 and brought into force in 1994, further connecting the oceans and Antarctica. Although UNCLOS does not mention Antarctica or global commons, it amplifies in the preamble that "the area of the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as its resources, are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States".

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[1] *A version of this paper was presented while the author was a research fellow at IDSA, at the fourth workshop on International order at Sea held at RSIS, Singapore on 19 Nov 2013.*

[2] *Definition as per Division of Environmental Law and Conventions, United Nations Environmental Programme, available at http://www.unep.org/delc/GlobalCommons/tabid/54404/Default.aspx, accessed on July 24, 2015*

[3] *Kraska, James 'Indian Ocean Security and the Law of the Sea, Georgetown Journal of International Law, Vol. 43, No. 2 (Winter 2012), p. 445.*

[4] *Article VI of the Antarctic Treaty of 1959 (brought into force in 1961) states that "The provisions of the present treaty shall apply to the area south of 60 deg South Latitude, including all ice shelves, but nothing in the present treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any state under international law with regard to the high seas within that area".*

Therein is the connection that places the maritime global commons as a common heritage of mankind. The opening up of the Arctic sea routes is also gaining global traction with more non arctic nations joining the Arctic Council as observers.

This paper examines the aspects of security and environmental issues related to the areas of Antarctica, South China Sea, and the Arctic with respect to the Antarctic Treaty System (ATS) and UNCLOS.

Antarctic Treaty System

Although Antarctica is a land mass with some sea area around it, the rationale for its comparative success in terms of non-recognition of competing existent claims and the upholding of the ATS in both letter and spirit has some lessons that could be imbibed for a more resolute application towards ensuring order at sea. This comparative success of the ATS could be attributable to four reasons:-

- A clearly defined geographic extent of area south of 60 degree south latitude.
- Lesser number of signatory nations that simplifies decision making.[5]
- Clarity in the Antarctic Treaty of 1959 especially with respect to non-recognition of existing claims resulting in little space for ambiguity.
- Apart from the original Antarctic treaty of 1959, the ATS also includes the following international agreements covering environmental and conservation aspects: -

o Convention for conservation of Antarctic Seals of 1972 (CCAS).

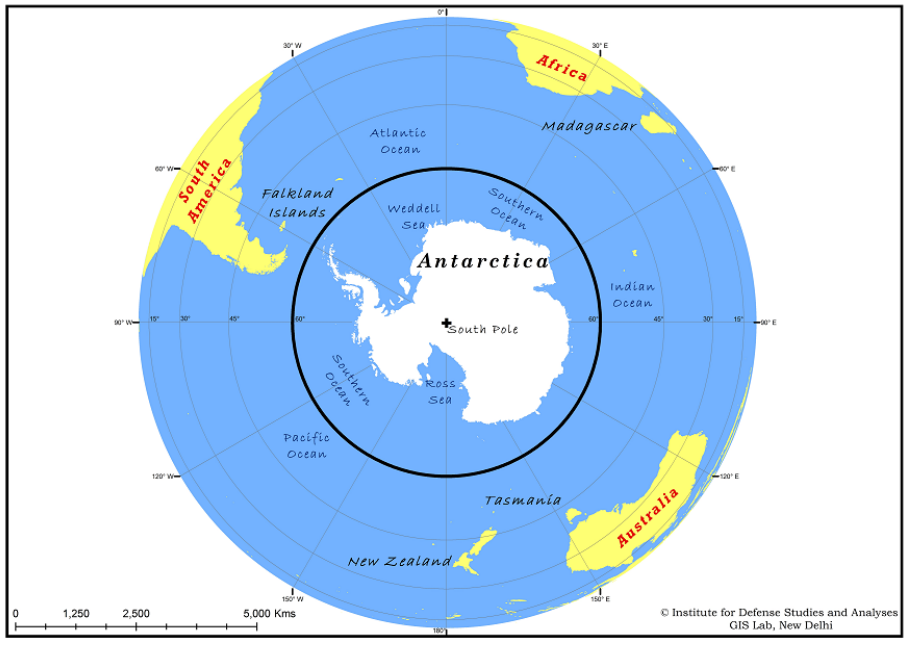
o Convention on the conservation of Antarctic Marine Living Resources of 1980 (CCAMLR).

o Protocol on Environmental Protection to the Antarctic Treaty of 1991 (Environment or Madrid Protocol).

The Antarctic Treaty was brought into force in 1961 and predates UNCLOS by three decades. The relation between both the treaties with regards to the high seas is forged on the aspect of 'freedom of navigation', an aspect that

[5] *52 nations have acceded to the Antarctic Treaty. See www.ats.aq/devaS/ats_parties.aspx?lang=e, accessed on July 23, 2015.*

has been the focus of attention as far as the global commons are concerned. The sea area covered by the ATS (see map 1) borders the three major oceans of the world – the Pacific, Atlantic and Indian Oceans. This clear cut demarcation has in a way protected the sanctity of the ATS and the spirit behind its conception.



Map 1 – Area covered by the ATS

The objectives of the Antarctic Treaty were:-[6]

- To demilitarise Antarctica, to establish it as a zone free of nuclear tests and the disposal of radioactive waste, and to ensure that it is used for peaceful purposes only;
- To promote international scientific cooperation in Antarctica;
- To set aside disputes over territorial sovereignty.

These points are also pertinent when related to developments in the South

[6] *See http://www.antarctica.ac.uk/about_antarctica/geopolitical/treaty/index.php, accessed on July 23, 2015*

China Sea and Arctic. The first point could also be viewed as a successful arms control regulation that was negotiated during the cold war. The second point was the main issue that brought nations together to formulate a common perception and approach that formed the bedrock on how nations would avoid exploitation of Antarctic and its surrounding areas. The third point merits attention as any recognition of claims would inherently lead to maritime jurisdiction over the adjoining sea areas and lead to a closure of what has been called a "gentleman's agreement".[7]

From the 12 original signatories the number of nations has increased to 52.[8] Out of these 52, 29 are consultative parties and 23 are non-consultative parties.[9] The consultative party status is based on the interest demonstrated in 'conducting substantial research there' which includes 'establishment of a scientific station or the dispatch of a scientific expedition' as per Article IX, paragraph 2. This consultative status enables nations to take part in the decision making in the Antarctic Treaty Consultative Meetings (ATCM). The non-consultative parties due to their accession to the treaty can attend the ATCMs but are not part of the decision-making. This restricted decision making body, though enabling decision making due to the lesser number of nations, has also been criticised. Malaysia while recognising the efforts to ignore territorial claims and promote peace questioned the restrictive decision making system with the view that "the treaty and its system has become mired in its obsession to maintain a status quo regime advantageous to a privileged few."[10]

This issue although dormant can be analysed by a study of the claims and groupings of nations as per their interests. Out of the 12 original signatories, seven nations claim parts of Antarctica: United Kingdom – 1908, New Zealand – 1923, France – 1924, Australia – 1933, Norway – 1939, Chile – 1940, and Argentina - 1942. Of these, the claims of Argentina, Chile and the United Kingdom overlap. Only

[7] *Haward Marcus, "Introduction: The Antarctic Treaty 1961–2011", The Polar Journal, Vol 1, No 1, June 2011, p 1*
[8] *Note 5.*
[9] *See http://www.ats.aq/devAS/ats_parties.aspx?lang=e, accessed on July 23, 2015.*
[10] *Sulong ZA, "Question of Antarctica: Address by Permanent Representative to the United Nations Tan Sri Zainal Abidin Sulong on the 'Question of Antarctica' on November 28th, 1983," Foreign Affairs Malaysia, Vol 16, No 4, 1983, p 446*

the areas called Ellsworth Land and Byrd Land are unclaimed.

"Four groups of state interests can be identified which adopt significantly different legal perspectives on the question of Antarctic sovereignty:"[11]

• Antarctic Treaty states which claim territorial sovereignty in Antarctica.

• Antarctic Treaty Parties which deny, or do not recognise, claims to territorial sovereignty and which make no claim of their own.

• Antarctic Treaty Parties which do not recognise any claim to Antarctic sovereignty but which reserve their own rights to make a claim in the future.

• States which are not party to the Antarctic Treaty regime but which deny claims to sovereignty on the ground that Antarctica is, or should become, part of the common heritage of mankind.

All the claims are historical in nature and therefore, would, require a tremendous amount of 'international arbitration to be recognised and accepted. Any case would face opposition from other members, especially since the global commons and resources contained within are considered Res Communis (Common Heritage of Mankind). Any argument to seek recognition of these claims would set precedence for historical claims in other parts of the world's global commons. Interestingly 'only Australia, New Zealand, Norway, France, and the United Kingdom reciprocally recognise their respective claims.'[12] The interest of the claimant nations vary from proximity in respect of Argentina, Australia, Chile, and New Zealand to Norway's concern for protecting whale and seal resources to France and United Kingdom concerns over their scientific and exploration activities. Although article IV[13] of the treaty in a way stalls all sovereignty claims it is viewed as "ingenious and innocuous"[14] and "as an act imperialism

[11] *Introduction of Part II, "The Antarctic Treaty Regime: Legal Issues" in Gillain D Triggs (Ed), "The Antarctic Treaty Regime: Law Environment and Resources", Cambridge University Press, 1987, p 51*
[12] *Note 11, p 52*
[13] *Article IV prevents any nation from asserting, supporting, or even denying a claim to territorial sovereignty, and also the creation of any rights of sovereignty.*
[14] *Scott Shirley V, "Ingenious and innocuous? Article IV of the Antarctic Treaty as imperialism", The Polar Journal, Vol 1, No 1, June 2011, p 52*

on the part of the US."[15] This could be considered a natural fall out of the US being the driving force behind the Antarctic Treaty.

This type of grouping is interesting as the groupings especially the first, second and third and some of the aspects discussed are relevant to both the South China Sea dispute and the Arctic. The issue becomes more relevant as the areas under dispute or consideration in all the three regions are either uninhabited or have very less indigenous population. Therefore, the issue of resources comes into question.

Although the protection of living creatures was covered by the CCAS and CCAMLR, the protection of natural resources was not so smooth. The theory of Antarctica abounding with natural resources is based on the fact that "Antarctica has a geological affinity with the mineral-rich Southern Hemisphere landmass".[16] Exploration has been minimal mainly due to the inhospitable environment, commercial viability and restrictions on commercial based activities by the Antarctic Treaty. Studies conducted by many nations since the 1970s including France, Germany, Japan and the US indicate the presence of hydrocarbons in the Ross Sea, Amundsen Sea, Bellingshausen Sea, Weddell Sea, perhaps near the Amery Ice Shelf and in inland basins covered by continental ice, particularly in West Antarctica.[17] It was obvious that in time technology would be developed, which would accord access to the resources both on sea and land.

In order to streamline exploitation an agreement called the Convention on the Regulation of Antarctic Mineral Resources Activities (CRAMRA)[18] was drafted in 1988, after 10 years of negotiations. The convention was initiated based on the issue that exploitation of natural resources would happen in time, and therefore, required regulations in place that would protect the Antarctic environment. The convention required the then

[15] *Note 14, p 58*
[16] *Zumberge James Herbert, "Possible Environmental Effects of Mineral Exploration and Exploitation in Antarctica", Scientific Committee on Antarctic Research, Cambridge, 1979, p. 5.*
[17] *Encyclopaedia Britannica, available at http://www.britannica.com/EBchecked/topic/27068/Antarctica/24722/Mineral-resources, accessed on November 11, 2013*
[18] *Text available at http://sedac.ciesin.org/entri/texts/acrc/cramra.txt.html, accessed on July 23, 2015*

16 consultative nations to sign and ratify. However France and Australia did not sign[19] and therefore the convention never came into force. The failure to put CRAMRA into force left an opening for "oil companies to begin prospecting for and exploiting Antarctic hydrocarbon resources."[20] This aspect led to formulation of the Environmental Protocol, which came into force in 1998. This convention bans all mining and oil exploration for a period of 50 years, ie upto 2048 after which it would be open for review. The protocols application over the high seas has however, come under scrutiny for the following aspects:-[21]

• Differing opinions over the inclusion of high seas south of 60 degrees south latitude under ATS.

• Jurisdiction over high seas under the ATS due to the caveat in article VI that refers to the respect for international law in the high seas under the ATS.

• Relation and overlap with International Convention for the Prevention of Pollution from Ships (MARPOL).

• Weakened national implementation due to vertical disintegration at every level by domestic bureaucracy.

Therefore, nations could choose an option that suits their interests and yet be within the ambit of an acceptable international law. This could degrade the efficacy of the ATS as a whole. However, despite the differences and perception the ATS has been a success mainly due to the inability of nations to overcome the natural hurdles of weather and terrain that Antarctica presents, and also mainly due to the lack of available technology to overcome them. This status quo will apparently continue for some more time and nations will cooperate till these hurdles are overcome. Therefore order at sea in the waters off Antarctica would be maintained in consonance with international law. This sort of 'bonhomie' was commented upon by Brian Roberts in the late 1970s when he stated:

"During the forty years or more during

[19] *This was attributed to difference in perceptions. For details see IM Martin, "Antarctica—environmental idealism versus national self interest?", The RUSI Journal, June 1997, pp 67,68*
[20] *Note 19, p 68*
[21] *See Wood Kevin R, "The Uncertain Fate of the Madrid Protocol to the Antarctic Treaty in the Maritime Area", Ocean Development and International Law, Vol 34, No 2, 2003*

which I have been associated with Antarctic affairs, I have seen some degree of international order evolved out of chaos; harmony has replaced discord; many apparently insolvable problems have been resolved one after another. I have seen that good co-operation and compromise can be and have been achieved repeatedly without any significant sacrifice of national autonomy and to the common advantage of all concerned."[22]

It is this sort of understanding, cooperation, and intervention of nature, which has resulted in the comparative success of the ATS.

UNCLOS

UNCLOS in a way could be called the 'Constitution for the Oceans'[23] and rightfully so as it built on the concept of 'freedom of the seas', and is therefore, a legal document. The present UNCLOS III is the result of two earlier conventions and intense negotiations. UNCLOS I was convened in 1956 and concluded in 1958. Though it did not address the important aspect of extent of territorial seas, four treaties were signed: -

• Convention on the Territorial Sea and Contiguous Zone. This came into force in 1964.

• Convention on the Continental Shelf. This came into force in 1964.

• Convention on the High Seas. This came into force in 1962.

• Convention on Fishing and Conservation of Living Resources of the High Seas. This came into force in 1966.

UNCLOS II was held in 1960. However no conclusive agreements could be reached mainly due to the division created by the cold war. Discussions on UNCLOS III commenced in 1973, the convention was opened for signature in 1984 and came into force in 1994. UNCLOS III along with the 1994 Agreement relating to the implementation of part XI of UNCLOS (brought into force in

[22] *Roberts Brian, "International Co-operation for Antarctic Development: the test for the Antarctic Treaty," Polar Record, Vol 19, Issue 119, May 1978, p 107*
[23] *"A Constitution for the Oceans," remarks by Tommy T B Koh of Singapore, President of the Third United Nations Conference on the Law of the Sea, available at http://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf, accessed on July 23, 2015.*

1996) and the 1995 United Nations Fish Stocks Agreement (brought into force in 2001) 'provide a comprehensive legal regime for all activities in the oceans and seas.'[24] 167 nations have ratified UNCLOS III, 145 have ratified Part XI and 81 have ratified the fish stocks agreement.[25] UNCLOS III caters for the following:[26]

- Limits of maritime zones.
- Rights of passage and navigation.
- Peace and security on the seas.
- Conservation of marine and living resources.
- Protection and preservation of the marine environment.
- Marine scientific work.
- Dispute settlement procedure.

Therefore, UNCLOS III covers the maritime environment, and its sanctity is based on a clear demarcation of maritime zones. These are in turn dependent on the baseline[27] that forms the basis for measuring the limits of maritime zones within which the convention is applicable. Therefore, success of UNCLOS lies on land and its implementation is subject to the following issues that are unilateral, bilateral or multilateral in nature, which in turn affect order at sea: -

- Recognition of another nation's claims or sovereignty over land that would accrue maritime zones for the claimant nation.
- Acceptability of baselines promulgated by nations.
- Perceptions and interpretation of UNCLOS III.
- Recognition of other nation's laws established in either consonance with UNCLOS or based on their perceptions and interpretation of UNCLOS.

An important issue addressed was access to the high seas through own or another nation's maritime zone. Therefore, non recognition of maritime

[24] *UNCLOS at 30, p 3, available at http://www.un.org/depts/los/convention_agreements/pamphlet_unclos_at_30.pdf, accessed on July 23, 2015*
[25] *See http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm, accessed on July 23, 2015*
[26] *Note 24, pp 3 - 7*
[27] *Baseline is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State*

zones claimed by another nation would affect passage to and out of the high seas. In this regard the South China Sea dispute and Arctic are two examples that merit attention.

South China Sea

The root issue of the South China Sea dispute revolves around the ownership of around 250 islands. Most of these islands have no indigenous people, and some of these islands are submerged at high tide. The recognition of these islands as per UNCLOS article 121,[28] would accrue an island maritime zones from a territorial sea upto a continental shelf. Yongxing island (also called Woody Island) in the Paracel Chain, that is claimed by China, Taiwan and Vietnam, with a land area of around 13 square kilometres would give a maritime jurisdiction of around two million square kilometres.[29] Given that the South China Sea is around 3,500,000 square kilometres, this maritime jurisdiction would cover almost 57 percent of South China Sea. Considering that the area contains approximately 11 billion barrels of oil and 190 trillion cubic feet of natural gas in proved and probable reserves with additional hydrocarbons in under-explored areas[30] no nation would be willing to forego such a vast amount of sea space. In addition, depletion of fishing stock near the coasts has resulted in the fishing fleets moving more seawards and this aspect adds rationale for nations staking their claims.

Another serious issue is the effect on the high seas due to the competing claims. The dashed line (map 2)[31] encloses the high seas area after drawing 200 nautical miles EEZ from the claimed baseline of nations including Paracels. It is evident that according status of island regime as per article 121 would render the South China Sea devoid of any high seas.

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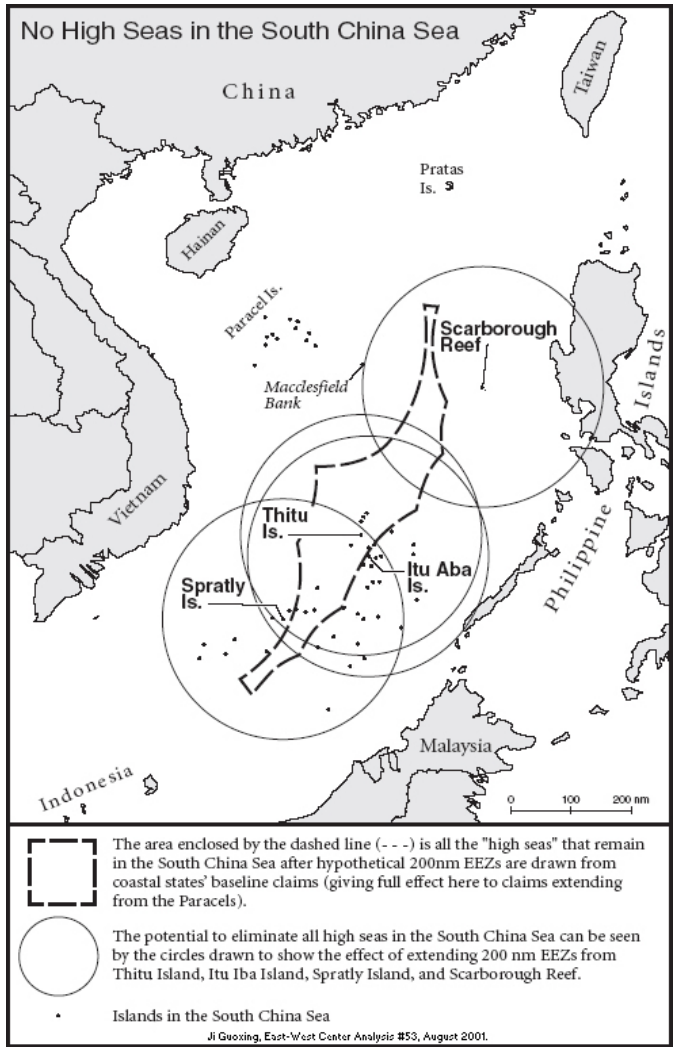
[28] *Article 121 – Regime of Islands states: - 1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide. 2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory. 3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.*

[29] *Parmar Sarabjeet Singh, "Yongxing Island: China's Diego Garcia in the South China Sea?", IDSA Comment, August 07, 2012, available at www.idsa.in/idsacomments/YongxingIsland ChinasDiegoGarciaintheSouthChinaSea_ssparmar_070812.html, accessed on July 24, 2015*

[30] *As per EIA estimates. See http://www.eia.gov/todayinenergy/detail.cfm?id=10651, accessed on July 24, 2015*

[31] *See http://community.middlebury.edu/~scs/images/guoxing_map.jpg*



Map 2 – No High Seas

The US presence, strategic alliances with various nations, and China's view of US involvement has increased the friction between the claimant nations

involved in the South China Sea dispute. Also, perceptions regarding some articles of the UNCLOS III between China and the US have resulted in friction in the past. Some of these issues are: -

• Difference in opinion over which parts of the region are part of the global commons.

• Difference in opinion over accepted activities such as military and surveillance in maritime zones, specifically in the EEZ.

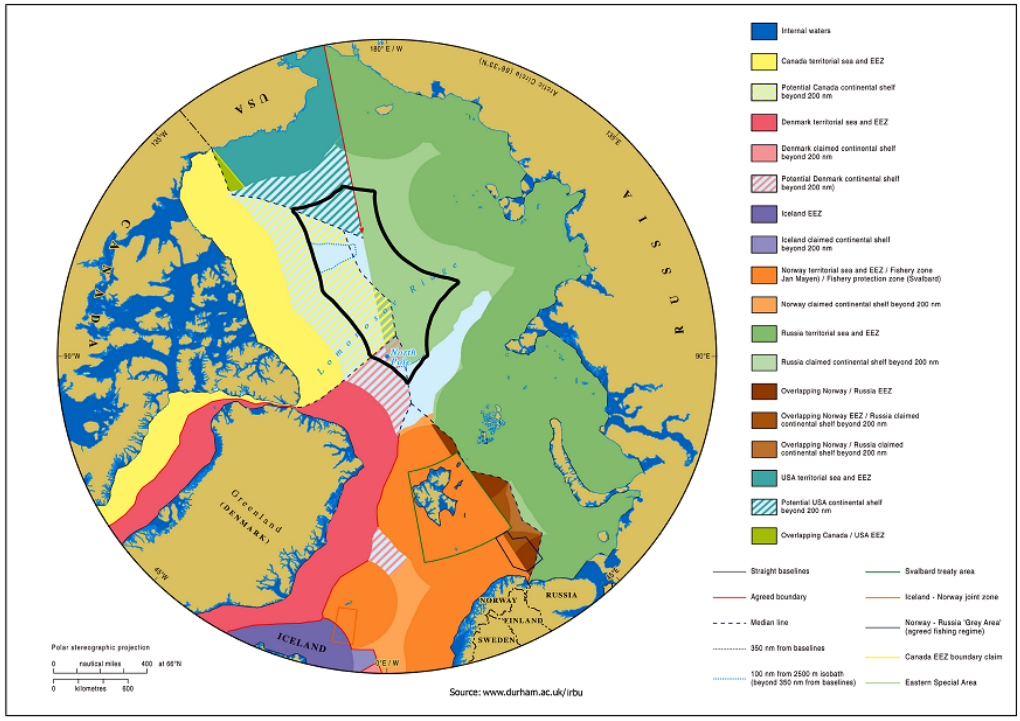
• US pivot to Asia.

As access to the islands, resources and the high seas is via the maritime zones, nations are modernising their maritime capabilities. The intentions are to firstly, protect their sovereignty; secondly to ensure access and protection of natural resources within their claimed maritime zones; thirdly, to protect their maritime trade and to ensure access to the high seas. An issue that is further exacerbating the dispute is reclamation of land resulting in an increase in the available land mass. Despite article 121, nations could claim maritime zones beyond territorial waters. This would add onto the way nations interpret UNCLOS and dilute its status. These aspects have a degrading effect on good order at sea, especially in a disputed area like the South China Sea.

It is apparent that successful application of UNCLOS in the South China Sea is limited due to sovereignty factors that are emanating from land. In this regard it must be remembered that UNCLOS is like a guideline that lays down methods by which the oceans are to be regulated, and in its preamble lays down that state sovereignty would be respected. Therefore, to ensure successful application of UNLCOS in the South China Sea, nations would need to work together to ensure that the aspect of mutual understanding and cooperation relating to the law of the sea as covered in the preamble is adhered to. Although the issue of sovereignty would need a bilateral or multilateral approach, the issue of access to global commons, sharing of resources on a pro-rata basis could be worked out separately and could be included as a part of the Code of Conduct, which has been under deliberation for some time now.

Arctic

Melting of the ice and opening up of maritime routes, the northern and northwest passages, have heralded a new frontier that is literally 'up for grabs'. The inhospitable environment and cost of extracting the available natural resources places the Arctic at par with the Antarctic, while the differences in opinion over the maritime jurisdictional claims, control of the sea areas through which the northern and northwest routes pass, and growing militarisation could create a 'South China Sea' like scenario, with the possibility of conflict amongst cooperation.[32] These aspects become clearer when one looks at the various claims (see map 3).



Map 3 – Division of the Arctic

[32] *See Parmar Sarabjeet Singh, "The Arctic: Potential for Conflict amidst Cooperation" , Strategic Analysis, Vol 37, Issue 4, July 2013*

The area contained in the black solid line is the area of high seas, based on the 200 nautical mile extent of EEZs of the five arctic nations. Interestingly, there are a few overlaps, for example the continental shelf claims beyond 200 nautical miles of Russia overlaps with that of Canada and Norway. The area in the black lines is ice and very less water, and therefore presently, would not be considered important. UNCLOS has only one article with respect to ice covered area – article 234, that states:-

"*Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.*"

During the formulation of UNLOS, opening of Arctic routes may have been considered a possibility, but not a reality, hence the limited focus. As article 234 looks only at the EEZ, the issue of a regulation extending beyond the EEZ remains a grey area, and would be viewed under the articles pertaining to the high seas. Fundamentally ice is another form of water and therefore any argument to the contrary, that the area is ice and not water could be easily countered.

• The passages themselves generate a debate as to the type of control nations could exert on them. This aspect could hamper the so far existing peace, and ongoing dialogues mainly due to firstly, a major part of the northern passage passes through Russian maritime zones; secondly, Russia has identified the Arctic as a strategic priority and a resource base for the 21st century with a focus on strengthening national sovereignty in the region;[33]

[33] *For details see Klimenko Ekaterina, "Russia's Evolving Arctic Strategy: Drivers, Challenges and New Opportunities", SIPRI Policy Paper, September 2014*

and thirdly, the growing antagonism between Russia, US, and NATO.

Although the area is not as volatile as the South China Sea and some differences have been settled peacefully, like the agreement on Svalbard between Norway and Russia, there are still issues that will impact on the global commons. In addition, as the number of non arctic nations being granted observer status increases, the issues would be debated under a host of differing views. As the region is still opening, nations do have the time to look at this region in a cogent manner, avoid the 'pitfalls' of the South China Sea, and therefore could lay down a 'code of conduct' modeled on the ATS. This could ensure that; firstly, sovereignty issues do not adversely affect this region; secondly, sanctity of freedom of navigation is ensured and thirdly, exploitation of natural resources is controlled with due respect for the environment. Successful adoption of these issues could lay down a template that could form the basis of maritime management and conflict resolution. The third aspect merits attention as any methodology adopted could have an impact on the discussions on the future of the Environment Protocol of the ATS, prior its expiry in 2048.

Conclusion

The complexities involved due to the magnitude of shared space and conflicting views on jurisdictional aspects is causing a creeping insecurity with respect to the 'safety of' and 'access to' the global commons. Although the high seas as global commons are supposed to lie outside the political reach of any nation, they are definitely affected by the mechanics of political thoughts of nations. This intrinsic link is a result of the international laws laid down by the polity of nations to ensure the protection of global commons either directly or indirectly. It does seem to be a 'catch 22' situation. Two facts stand out very clearly:

- The high seas and the aspect of 'freedom of navigation' are both affected, directly and indirectly, by sovereignty issues that emanate from land.

- Laws, treaties and conventions were discussed and implemented based on the existing environment at that time.

The hurried or inordinately long gestation period prior to their coming of age saw a change in the environment that rendered some parts of them either ineffective or inadequate to deal with future scenarios.

Therefore, it is imperative that a deeper introspection be carried out to examine and view the possible ramifications of actions and understandings between nations that would impinge on the high seas.

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About the Author

Commander Sarabjeet Singh Parmar, an alumnus of National Defence Academy (NDA) Kharakwasla and Defence Services Staff College (DSSC) Wellington, was commissioned into the Indian Navy in 1987. The officer is a Naval Aviator who flies helicopters. He has commanded IN Ships Bedi and Sharda, and Naval Air Squadron 330. He has served in Directorate of Naval Planning at the Integrated HQ of MoD (Navy) and also been Directing Staff at Defence Services Staff College (DSSC), Wellington. He was member of the XI Indian Antarctic Summer Expedition in 1991 and has attended the South Asia Regional Governance and Management Defence Course Conducted by the British Government at Colombo in 2005. He was a Research Fellow at the Institute for Defence Studies and Analyses (IDSA), New Delhi from Sep 2010 to July 2014 and wrote on maritime security issues. He is presently Joint Director (Strategy) in the Directorate of Strategy Concepts and Transformation at Integrated HQ of MoD (Navy).