

Chapter XII Overflight Restrictions

The United States has protested the claims of several countries claiming jurisdiction to control overflight of ocean areas not subject to such jurisdiction. In most cases, these claims correspond with illegal territorial sea claims that exceed the 12 mile limit.

In 1986, Cuba complained to the United States that U.S. military aircraft were operating within the Cuban Flight Information Region (FIR) without Cuban permission. The United States responded on August 20, 1986, as follows:

The Department of State refers to the note of the Ministry of Foreign Affairs of Cuba dated May 15, 1986, concerning the interception of an unarmed United States Coast Guard HU-25A Falcon by two Cuban MIG-21 aircraft on December 23, 1985, which was the subject of its note dated December 27, 1985.

While the Government of the United States welcomes the statement in the Ministry's note that Cuba seeks to avoid any incident in air navigation, the Government of the United States does not accept the description of the interception contained in that note and stands by the description of the interception and the protest contained in its note of December 27, 1985.

Furthermore, the Government of the United States rejects the implicit assertion in the note of 16 May, 1986, that state aircraft of the United States are required to notify and obtain authorization from Cuban authorities before entering Flight Information Regions (FIR) administered by Cuba. There is no authority for the imposition of such a requirement. It is therefore meaningless for the note to speak of this incident as a "violation" of the Cuban FIR. There can be no justification for the Cuban attempt to interfere with the flight of the U.S. Coast Guard aircraft in international airspace, thereby endangering the lives of the Coast Guard crew.

The Government of the United States accordingly reiterates its strong protest of the actions of the Government of the Republic of Cuba.¹

In August 1986, Ecuador interfered with the flight of a U.S. Air Force aircraft flying over the high seas more than 175 miles from the Ecuadorian coast. The United States had protested Ecuador's claim to a 200-mile territorial sea in 1967.² The State Department instructed American Embassy Quito to protest, drawing on the following points:

1. Airway Upper Lima 308 comes no closer than 175 nautical miles (nm) to the Ecuador coast, and customary law as reflected in the 1982 Law of the Sea Convention (which neither the U.S. nor Ecuador has signed, but for different reasons) permits a territorial sea claim over the sea and adjacent airspace (i.e.

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sovereignty) of no more than 12 nm from the coast. Ecuador claims a 200 nm territorial sea, which the U.S. does not recognize and which we protested in 1967. Except as might be required under the Convention on International Civil Aviation (Chicago Convention), the U.S. would oppose any attempt by Ecuador to require aircraft to give prior notice or seek prior permission in order to overfly areas beyond 12 nm from the coast.

2. Under Annex 2 to the Chicago Convention civil aircraft which expect to transit a Flight Information Region (FIR) must file a flight plan, either at least 30 minutes prior to take off or at least 10 minutes prior to entering a particular FIR, so to that extent civil aircraft are subject to a prior notification requirement. Civil aircraft must also abide by local flight regulations and instructions while in that FIR. While Annex 2 envisions variations from the 30/10 minute filing rule, the U.S. is generally opposed to efforts by any country to impose more burdensome requirements in the absence of compelling circumstances.

3. The Embassy can approach appropriate GOE officials to reiterate our concern that such an incident not happen again, that the U.S. does not recognize Ecuadorian territorial sea/airspace claims beyond 12 nautical miles from the coast, and our hope that any new Ecuadorian regulations will be in full conformity with international aviation standards. Should the Ecuadorans seek advice or consultations on drafting their regulations, we would, of course, be happy to assist.³

The United States protested **Libya's** establishment in 1973 of a "restricted area" of airspace within a 100 mile radius of Tripoli.⁴

In 1986, **Peru** complained that a USAF C-141 aircraft did not receive permission to fly into Peruvian claimed airspace. The United States responded as follows:

The USG makes reference to an incident which occurred on August 8, 1986, in which Peruvian authorities claimed the right to require a flight clearance request/approval for a US Air Force C-141 aircraft, tail number 50250, flying no closer than 80 miles off the Peruvian coast enroute from Santiago to Panama. Customary international law permits a state to claim a territorial sea and a corresponding territorial airspace up to twelve miles in breadth. Beyond this limit, military or other state aircraft operate in international airspace and are not subject to the jurisdiction and control of air traffic control authorities of other countries. Accordingly, no clearance or approval is required for flights of U.S. military aircraft in international airspace. The USG wishes to call the attention of the GOP to this incident and reiterates that there was no justification under international law for such interference with the freedom of overflight by US Air Force aircraft.⁵

Information provided to the Embassy by the Department of State for use in connection with delivery of this note included the following:

International law does not support the Peruvian claim to a 200nm territorial sea. USG respects Peruvian claim only out to a distance of 12nm, beyond which the high seas freedoms of navigation and overflight exist.

Although under the Chicago Convention, civil aircraft operating in international airspace are subject to certain International Civil Aviation Organization (ICAO) procedures when passing through a Flight Information Region (FIR) of another country, the military aircraft operating in international airspace are not subject to these procedures. State aircraft are not bound to comply with instructions of another nation's Air Traffic Control authorities while operating in international airspace.

As a matter of policy, US military aircraft operating in international airspace normally comply with ICAO procedures except when compliance would not be in the best interests of the US because of military contingencies, classification of missions, political necessity or mission accomplishment. Aircraft then fly under "due regard" for safety of other aircraft.⁶

Following several similar incidents with Peru in 1987 and 1988, the United States protested as follows:

. . . to refer to an incident occurring on 10 January 1988. On that date, a C-135 aircraft of the United States Air Force was flying over the Pacific Ocean off the coast of Peru, its closest point of approach to the Peruvian coast having been approximately 80 nautical miles. While the aircraft was thus operating in international airspace, it was challenged by Peruvian authorities on the grounds that it was operating in claimed Peruvian airspace without authorization.

This is the fourth such incident to have occurred since August 1986. During one such incident, which occurred on 5 August 1987, not only did Peruvian authorities unjustifiably challenge the right of the U.S. Air Force aircraft to transit off the Peruvian coast, but an intercepting aircraft of the Peruvian air force operated in a manner that unnecessarily and intentionally endangered the safety of the transiting U.S. Air Force aircraft and its crew. The Government of the United States vigorously protests all of these incidents.

Customary and conventional international law, including that reflected in the 1982 United Nations Convention on the Law of the Sea, permits a state to claim a territorial sea and corresponding territorial airspace up to twelve nautical miles in breadth. Beyond this limit military or other state aircraft operate in international airspace exercising the internationally recognized freedoms of navigation and overflight and are not subject to the jurisdiction or control of the coastal state. No coastal state clearance or approval is required to exercise such freedoms of navigation and overflight.

The United States, therefore, vigorously protests the actions of the Government of Peru and reaffirms the right to continue to exercise the internationally recognized freedom of overflight in the international airspace more than twelve nautical miles from the baselines from which Peru may measure its territorial sea.

The United States shall continue to exercise such overflight freedoms without prior notification to, or permission from, Peru or any other coastal State.⁷

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Talking points provided the Embassy included the following:

I understand that the Peruvian military is primarily concerned with identifying the nationality of aircraft off its coast. While the United States Government can accept no Government of Peru right to restrict our freedom in international airspace, there are two simple and unobjectionable ways for the Government of Peru to identify such aircraft.

The first and simplest method is to instruct military controllers to consult the ICAO flight plans routinely filed by [these] U.S. aircraft. This would enable the Government of Peru to reliably identify [these] aircraft off its coast.

The second method would involve visual identification of transiting aircraft by Government of Peru aircraft. So long as such identifications are made in conformance with internationally recognized safe procedures, the United States Government would offer no objection.

While I recognize that our Governments will not agree on this issue, I trust that we understand one another, and that the Government of Peru will consider one of these potential solutions.⁸

Notes

1. Department of State Diplomatic Note dated Aug. 20, 1986, to the Cuban Interests Section of the Czechoslovakian Embassy, File No. P92 0100-0954. The Department's Note of Dec. 27, 1985 may be found in State Department telegram 392892 of Dec. 28, 1985 and File No. P93-0002-1166; the Cuban Note of May 15, 1986 is reported in U.N. Interests Section Havana telegram 2068 of May 19, 1986.

2. See *supra* Chapter V, n. 5.

3. State Department telegram 262333, Aug. 20, 1986.

4. 1973 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 302-03 and U.N. Security Council Doc. S/10956, June 20, 1973, 1975 *id.* 451-52 and 1977 *id.* 636.

5. American Embassy Lima Note delivered August 15, 1986, American Embassy Lima telegram 9602 August 19, 1986.

6. State Department telegram 255297, Aug. 14, 1986.

7. Embassy Note delivered March 16, 1988 by American Embassy Lima, American Embassy Lima telegram 03574, Mar. 17, 1988, pursuant to instructions contained in State Department telegram 061624, Feb. 27 1988.

8. State Department telegram 061624, Feb. 27, 1988, para. 4. A similar protest was delivered by American Embassy Lima on July 7, 1992 (American Embassy Lima telegram 09328, July 4, 1992, pursuant to instruction contained in State Department telegram 204139, June 22, 1992), following Peruvian diversion of a USAI KC-135 on a routine flight June 8, 1992 from Panama to Argentina 100 miles west off the Peruvian coast Wash Post., June 23, 1992, p.A-14.