

Chapter II

Identification of Excessive Maritime Claims

Claims by coastal States to sovereignty, sovereign rights or jurisdiction over ocean areas that are inconsistent with the terms of the LOS Convention are, in this study, called “excessive maritime claims”. They are illegal in international law. Since World War II, more than 80 coastal States have asserted various maritime claims that threaten the rights of other States to use the oceans. These excessive maritime claims include, but are not limited to, claims inconsistent with the legal divisions of the ocean and related airspace reflected in the LOS Convention, such as:

- unrecognized historic waters claims;
 - improperly drawn baselines for measuring the territorial sea and other maritime zones;
 - territorial sea claims greater than 12 miles;
 - other claims to jurisdiction over maritime areas in excess of 12 miles, such as security zones, that purport to restrict non-resource related high seas freedoms;
 - contiguous zone claims at variance with Article 33 of the LOS Convention;
 - exclusive economic zone (EEZ) claims inconsistent with Part V of the LOS Convention;
 - continental shelf claims inconsistent with Part VI of the LOS Convention;
- and
- archipelagic claims inconsistent with Part IV of the LOS Convention.

Other categories of excessive maritime claims include claims to restrict navigation and overflight rights reflected in the LOS Convention, such as:

- territorial sea claims that impose impermissible restrictions on the innocent passage of military and commercial vessels, of ships owned or operated by a State and used only on government noncommercial service, and of nuclear-powered warships (NPW) or warships and naval auxiliaries carrying nuclear weapons or specific cargoes;
- claims requiring advance notification or authorization for innocent passage of warships and naval auxiliaries through the territorial sea or EEZ or applying discriminatory requirements to such vessels;
- territorial sea claims not exceeding 12 miles in breadth that overlap straits used for international navigation and do not permit transit passage in conformance with the customary international law reflected in the LOS Convention, including submerged transit of submarines, overflight of military aircraft, and surface transit of warships and naval auxiliaries (including transit in a manner of deployment consistent with the security of the forces involved), without prior notification or authorization; and

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- archipelagic claims that do not permit archipelagic sea lanes passage in conformance with international law as reflected in the LOS Convention, including all normal routes used for international navigation, submerged passage of submarines, overflight of military aircraft, and surface transit of warships and naval auxiliaries (including transit in a manner of deployment consistent with the security of the forces involved), without prior notification or authorization.

Historic Bays

Bays meeting international legal standards contain internal waters,¹ navigation and overflight of which is subject to exclusive coastal State control. Some countries claim to exclude ships and aircraft from other bodies of water, containing territorial seas or high seas, that do not qualify as juridical bays, based on their historic claim to do so. To meet the international standard for establishing a claim to historic waters, a State must demonstrate its open, effective, long term, and continuous exercise of authority over the body of water, coupled with acquiescence by foreign States in the exercise of that authority. The United States takes the position that an actual showing of acquiescence by foreign States in such a claim is required, as opposed to a mere absence of opposition. The United States believes few such claims meet that standard.

Eighteen countries claim historic bays. The United States has diplomatically protested 13 such claims that do not meet the international legal standard. Operational assertions have been conducted against seven of them:

- Former-Soviet Union claims to Peter the Great Bay and three Arctic straits
- Libya's claim to the Gulf of Sidra
- Cambodia's claim to part of the Gulf of Thailand
- Vietnam's claim to part of the Gulf of Tonkin
- Kenya's claim to Ungwana Bay
- Panama's claim to the Gulf of Panama
- Dominican Republic's claim to Escocesa and Domingo Bays.²

Baselines

The normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.³ The low-water line is the standard location of baselines, and is the method used by the United States.

Straight baselines may only be used in exceptional circumstances, in the particular geographic situations provided for in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, to which the United States is a party,⁴ and repeated in the LOS Convention.⁵ As a narrow exception to normal baseline rules, the LOS Convention permits the establishment of straight baselines in two limited geographic circumstances, that is, (a) in localities where the coastline is deeply indented and cut into, or (b) if there is a fringe of islands

along the coast in the immediate vicinity of the coast.⁶ Straight baselines are permitted in those geographic circumstances where the application of normal baselines would produce a complex pattern, including enclaves of territorial seas and high seas. Properly drawn straight baselines do not push the limits of the territorial sea significantly seaward from the coast which would otherwise be measured from the low-water line.⁷

More than 60 countries have delimited straight baselines along portions of their coast and approximately ten other countries have enacted enabling legislation but have yet to publish the coordinates or charts of their straight baselines. Many of these baselines have been drawn inconsistent with international law. The effect of an illegal straight baseline is a claim that detracts from the international community's right to use the oceans and superjacent airspace. One result has been that these straight baseline systems have created large areas of internal waters which legally remain either territorial seas or areas in which the freedoms of navigation and overflight may be exercised. Burma, for example, by drawing a 222-mile straight baseline across the Gulf of Martaban has claimed about 14,300 sq. miles (an area the size of Denmark) as internal waters which, absent the closing line, would be territorial seas or high seas. The United States has, so far, diplomatically protested 26 of those systems. Operational assertions have been conducted against 14 of the claims: Burma, Cambodia, Colombia, Cuba, Dominican Republic, Ecuador, Ethiopia, Guinea, Guinea-Bissau, Haiti, Mauritania, Oman, Soviet Union, and Vietnam.⁸

Territorial Sea Breadth

Despite many diplomatic protests in the decades through the 1970s,⁹ the United States failed to prevent international acceptance of the 12-mile territorial sea and in 1988 the United States extended its territorial sea to 12 miles.¹⁰ The broad consensus in a 12 mile territorial sea reflected in the LOS Convention¹¹ has led more than half the countries claiming territorial seas broader than 12 miles to roll them back to the international standard reflected in the LOS Convention (*see* Table 5). The United States has either diplomatically protested or asserted its navigation rights against all 18 territorial sea claims that now exceed the 12-mile limit (*see* Table 6). Some claims have been protested more than once.

Contiguous Zones

The contiguous zone is an area seaward of the territorial sea in which the coastal State may exercise the control necessary to prevent or punish infringement of its customs, fiscal, immigration, and sanitary laws and regulations that occur within its territory or territorial sea (but not for security purposes).¹² The contiguous zone is comprised of international waters in and over which the ships

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and aircraft, including warships and military aircraft, of all nations enjoy the high seas freedoms of navigation and overflight.¹³

The maximum permissible breadth of the contiguous zone under international law is now 24 miles measured from the baseline from which the territorial sea is measured.¹⁴

Some sixteen countries claim the right to expand the competence of the contiguous zone to include protection of national security interests, and thus restrict or exclude warships and military aircraft, including: Bangladesh, Burma, Haiti, Iran, Sri Lanka, Sudan, Syria, Venezuela, Vietnam and Yemen. Syria claims a 35 mile contiguous zone; between 1990 and 1991 Namibia claimed a 200 mile contiguous zone. North Korea claims a 50 mile military boundary. The United States has diplomatically protested 14 of those claims, and conducted operational assertions against the claims by Burma, Cambodia, Haiti, North Korea, Nicaragua, Syria, Vietnam and Yemen.¹⁵

Exclusive Economic Zones

The 200 mile EEZ, which gained recognition in the LOS Convention, gives coastal States increased rights over the resources off their coasts, while curtailing the trend of national claims to broader territorial seas and preserving as many high seas freedoms as possible. Over 85 countries claim an EEZ. By virtue of its islands, territories and possessions, and long coastlines, the United States claims the largest EEZ.¹⁶

Most EEZ claims are generally consistent with the Convention's provisions relating to navigational freedoms. However, 20 States permit imprisonment for fisheries violations, contrary to the express provision of the LOS Convention.¹⁷ Further, Brazil and Uruguay do not permit foreign military exercises in their EEZs; and Colombia has claimed that foreign States do not have the right to conduct maritime counter-narcotics law enforcement operations in its EEZ, asserting exclusive jurisdiction in its EEZ to enforce its narcotics laws.¹⁸

Continental Shelves

The LOS Convention defines the continental shelf of a coastal State as comprising:

the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.¹⁹

Consequently, regardless of the seabed features, a State may claim, at a minimum, a 200-mile continental shelf. Under other LOS Convention provisions, a State has the right to claim a 200-mile EEZ which includes jurisdictional

rights over the living and nonliving resources of the seafloor and seabed. Thus, for those States whose physical continental margin does not extend farther than 200 miles from the territorial sea baseline, the concept of the continental shelf is of less importance than before.

Paragraphs 3-7 of Article 76, which provide a rather complex formula for defining the "continental shelf", apply only to States that have physical continental margins extending more than 200 miles from the coast. It seems widely accepted that the broad principles of the continental shelf regime reflected in the 1982 LOS Convention, Articles 76-81, were established as customary international law by the broad consensus achieved at the Third United Nations Conference on the Law of the Sea (UNCLOS III) and the practice of nations.

Since the mid-1970s, several countries have made general claims to the continental shelf that exceed the provisions of the LOS Convention. The Governments of Guyana, India, Mauritius, Pakistan and the Seychelles, for example, enacted statutes which purport to assert jurisdiction over any act on their continental shelves, contrary to international law. The United States has protested these claims, as well as those of Ecuador and Chile to continental shelves beyond 200 miles in the vicinity of the Galapagos, Easter and Sala Y Gomez Islands.²⁰

Archipelagos

The law of the sea first recognized a special regime for archipelagic States in the LOS Convention.²¹ By definition, an archipelagic State is a State "constituted wholly by one or more archipelagos and may include other islands". An archipelago is defined in the LOS Convention as:

a group of islands, including parts of islands, inter-connecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.²²

Until a State claims archipelagic status, the normal baseline is the low-water line around each island. Consequently, there may exist large areas of international waters between the islands of the archipelago. However, an archipelagic State is entitled to draw straight archipelagic baselines around the outermost islands of the archipelago, and to measure its territorial sea seaward of those baselines. Its sovereignty then extends to the archipelagic waters thereby enclosed.²³

Fourteen States have claimed archipelagic status: Antigua and Barbuda, Cape Verde, Comoros, Fiji, Indonesia, Kiribati, Marshall Islands, Papua New Guinea, Philippines, Saint Vincent and the Grenadines, Sao Tome and Principe, Solomon Islands, Trinidad and Tobago, and Vanuatu. In addition, The Bahamas has legislation pending to make such a claim. The United States worked closely with a number of island nations, including The Bahamas, Fiji and Indonesia, during

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UNCLOS III to develop a set of reasonable parameters for the archipelagic regime. On the other hand, despite its public commitment to conform its claim to the provisions of the LOS Convention which it has ratified, the Philippines continues to claim as archipelagic waters large areas of the Pacific to which it is not entitled under the LOS Convention.²⁴

While the Convention definition was drafted to exclude continental States with offshore groups of islands, Canada, Denmark, Ecuador, Portugal and Sudan have sought to enclose their islands (Arctic, Faroes, Galapagos, Azores and the Suakin Archipelago, respectively) with straight baselines in a manner simulating an archipelago. The United States has protested these efforts. No independent island nation has claimed archipelagic status to which it is not entitled under the LOS Convention.

Innocent Passage in the Territorial Sea

One of the fundamental tenets in the international law of the sea is the right enjoyed by all ships, including warships, regardless of cargo, armament or means of propulsion, to innocent passage through another State's territorial sea, in accordance with international law, for which neither prior notification nor authorization is required.

This right is not fully accepted by all coastal States. For example, over 30 States require either prior permission or prior notice. The United States has diplomatically protested all but four of them, and conducted operational assertions against 27 of those countries (see Table 10). A number of States have rolled back these claims as a result of the FON program. In 1979, Turkey instituted a requirement for foreign warships to give it notice before exercising innocent passage in its territorial sea. The United States diplomatically protested in 1979, and in 1983 Turkey lifted that requirement. Between 1931 and 1983 the Soviet Union required warships to obtain prior permission before entering the Soviet territorial sea. Between 1983 and 1989 the Soviet Union limited warships' right of innocent passage to five designated sea lanes. As a result of the LOS discussions following the Black Sea bumping incident in 1988, the Soviet Union conformed its claims to international law, and Russia has committed itself to continue that position.

Five States apply special requirements not recognized by international law for the innocent passage of nuclear powered warships and naval auxiliaries carrying nuclear weapons: Djibouti, Egypt, Oman, Pakistan and Yemen. The United States has diplomatically protested all of these claims and conducted operational assertions against the claims of Oman, Pakistan and Yemen.²⁵

International Straits

During the time that the maximum permissible breadth of the territorial sea was three miles, over 100 straits connecting one part of the high seas with another part of the high seas contained a high seas route. Consequently, the ships and

aircraft of all nations had the uncontested right to pass through such strategically important straits as Gibraltar, Hormuz, Bab el Mandeb, Lombok and Malacca, regardless of the political unpopularity of their mission. Consequently, there was no difficulty with the United States' use of the Strait of Gibraltar to airlift support to Israel when she was attacked in October 1973.²⁶

These critical straits are, however, less than 24 miles wide at their narrowest point. To maintain maritime mobility, a condition for U.S. acceptance of a broader 12 mile territorial sea was a guaranteed legal right for U.S. ships and aircraft to continue to be able to transit, without coastal State interference, those straits.²⁷ That right is codified in the LOS Convention as the right of transit passage.²⁸ It was because of this right that U.S. aircraft were able again to fly through the Strait of Gibraltar without protest, when USAF aircraft flew from British bases for the April 1986 attack on Libya.²⁹ In 1973 and in 1986 the littoral NATO nations refused to grant the U.S. permission to overfly their land for these missions.³⁰

Few States have explicitly accepted the transit passage regime of the LOS Convention as customary international law. Even the United Kingdom has been reluctant to do so before the Convention is universally accepted.³¹ Other States claim the right of transit passage is available only to the signatories of the LOS Convention, or otherwise seek to restrict the right by imposing conditions on its use not authorized by the terms of the LOS Convention. The United States has diplomatically protested all of these claims, and conducted assertions of right against Iran, Oman, Spain, the USSR and Yemen. In 1988, when Indonesia closed Sunda and Lombok Straits for a brief period of time, the United States, United Kingdom and Australia made very strong *demarches*, and, so far, it has not been repeated.³²

Overflight Restrictions

States with territorial sea claims greater than 12 miles, or with illegal straight baseline claims, frequently seek to prevent overflight by foreign aircraft of the international waters (i.e., waters beyond 12 miles from properly drawn baselines) that they claim as territorial sea. In 1985, two Cuban MiG-21s intercepted a U.S. Coast Guard HU-25A aircraft operating more than 12 miles offshore. In August 1986, Ecuador interfered with the flight of a U.S. Air Force aircraft flying more than 175 miles seaward from the Ecuadorian coast. In 1973, Libya established a restricted area of airspace within 100 miles of Tripoli. In August 1986, Peru claimed that a USAF C-141, 80 miles off shore, did not receive permission to fly into Peruvian-claimed airspace. Several similar incidents involving USAF aircraft occurred in 1987, 1988 and 1992. Greece restricts the use of international airspace four miles seaward of its six mile territorial sea. Nicaragua requires clearance for

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overflight of its 200 mile territorial sea. The United States has protested all of these claims, and conducted assertions of right against them all.³³

Archipelagic Sea Lanes Passage

A number of strategically important international navigation routes pass through Indonesian and Philippine archipelagic waters. A condition for U.S. acceptance of the archipelago concept was a legal guarantee that freedoms of navigation and overflight be maintained in and over the waters between the islands of the archipelago.³⁴ That right was documented in the LOS Convention as archipelagic sea lanes passage, which incorporates most of the essential elements of the transit passage regime of non-archipelagic international straits. All ships and aircraft, including warships and military aircraft, enjoy the right of archipelagic sea lanes passage while transiting through, under, or over the waters of archipelagos and adjacent territorial seas via archipelagic sea lanes.³⁵ Those sea lanes include all routes normally used for international navigation and overflight, whether or not designated by the archipelagic State.³⁶

Indonesia was the first State to suggest it might seek to exercise its right to designate sea lanes suitable for the continuous and expeditious passage of foreign ships through its archipelagic waters.³⁷ Although such sea lanes are required to include all normal passage routes and all normal navigational channels,³⁸ the Indonesian Navy is seeking to limit them to a mere three routes, all north-to-south.³⁹ The Philippines continues to refuse to recognize the Convention's archipelagic regime notwithstanding its ratification of the LOS Convention and public international commitment to reverse its view that the Philippine archipelagic waters are akin to internal waters wherein foreign ships may not navigate, and aircraft may not overfly, without Philippine permission. The Philippines refused to repeat that commitment in the 1992 military bases negotiations, while continuing the long-standing permission for U.S. forces to operate freely in Philippine waters.⁴⁰ The base agreement having expired, operational assertions of right are now necessary to maintain U.S. freedom of navigation and overflight there.

United States responses to these claims are described in greater detail in the following chapters, which are organized along the lines of the foregoing listing. Responses of other States are included where they are known.

Notes

1. LOS Convention, article 10.
2. See *infra* Chapter III.
3. LOS Convention, article 5.
4. Convention on the Territorial Sea and the Contiguous Zone, Geneva, Apr. 29, 1958, article 4, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 [hereinafter, 1958 Territorial Sea Convention].
5. LOS Convention, article 7.
6. LOS Convention, article 7; 1958 Territorial Sea Convention, article 4(1).

7. *See infra* Chapter IV.
8. *See infra* Chapter IV.
9. *See* 4 WHITEMAN, DIGEST OF INTERNATIONAL LAW 61, 91, 115-19 (1965) [hereinafter WHITEMAN].
10. *See infra* Chapter V and Appendix 3.
11. LOS Convention, article 3.
12. LOS Convention, article 33; 1958 Territorial Sea Convention, article 24.
13. LOS Convention, articles 33, 58 & 87.
14. LOS Convention, article 33(2).
15. *See infra* Chapter VI.
16. *See infra* Chapter VII.
17. *See infra* Chapter VII n. 26.
18. *See infra* Chapter XIV.
19. LOS Convention, article 76(1).
20. *See infra* Chapter VIII.
21. *See* LOS Convention, Part IV.
22. LOS Convention, article 46.
23. LOS Convention, articles 46-48.
24. *See generally infra* Chapter IX.
25. *See infra* Chapter X.
26. Gelb, *U.S. Jets for Israel Took Route Around Some Allies*, N.Y. Times, Oct. 25, 1973, sec. 1, at 1, col. 2; Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 Am. J. Int'l L. 77, 84 (1980); Robertson, *Passage Through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea*, 20 Va. J. Int'l L. 801, 841 n.198 (1980).
27. 1974 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 279 [hereinafter DIGEST]; Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 Am. J. Int'l L. 1, 14, 15 (1975).
28. LOS Convention, article 38.
29. Treves, *Codification de Droit International et Pratique des Etats dans le Droit de la Mer*, 223 Recueil des Cours 131-32 (1990-IV, 1991). *See further*, Chapter XI *infra*, text accompanying nn. 45-59.
30. DEP'T ST. BULL. June 1986 at 5, 10; Parks, *Crossing the Line*, U.S. Nav. Inst. Proc. 49-51 (Nov. 1986); MARTIN & WALCOTT, BEST LAID PLANS 292-93, 303 (1988); REAGAN, AN AMERICAN LIFE 519 (1990); WEINBERGER, FIGHTING FOR PEACE 193 (1990); CROWE, THE LINE OF FIRE 137 (1993).
31. *See, e.g.*, 59 Brit. Y.B. Int'l L. 525 (1989); 58 Brit. Y.B. Int'l L. 600-01 (1987). *See also infra* Chapter XI text accompanying nn. 19-21.
32. *See infra* Chapter XI, text accompanying nn. 99-100.
33. *See infra* Chapter XII.
34. 1974 DIGEST at 287-88; 1978 DIGEST at 943.
35. LOS Convention, article 53(2).
36. LOS Convention, article 53(12).
37. IMO Subcommittee on Safety of Navigation, Report to the Maritime Safety Committee, IMO document NAV/37/25, para. 3.2.9, Oct. 4, 1991.
38. LOS Convention, article 53(12).
39. RADM Abdul Hakim, A Proposal in the [Eighth] International Conference on SLOC [Sea Lanes of Communication], Bali, Indonesia, Jan. 26, 1993.
40. This was one issue, among others, contributing to the U.S. decision to withdraw its military forces from the Philippines and to permit the Military Bases Agreement to expire in late 1992. *See* 3 U.S. Department of State Dispatch 824, Nov. 16, 1992.