

Chapter I Maintaining Freedom of the Seas

The oceans encompass more than 70 per cent of the surface of the globe. Prior to World War II, most of the oceans were free for use by all nations. Coastal States had sovereignty over only a narrow three mile¹ territorial sea. However, since 1945 the trend has been clearly toward enclosing the oceans with ever broader coastal State claims of sovereignty or other competence to exclude other users of the oceans. This book chronicles the United States' continuing effort, principally in the years following the conclusion of the 1982 United Nations Convention on the Law of the Sea (LOS Convention),² to maintain the freedom of the seas which is essential to its maritime commerce and national security.³

As a maritime nation, the United States' national security depends on a stable legal regime assuring freedom of navigation on, and overflight of, international waters.⁴ That regime is set out in the LOS Convention, reflecting a careful balance of coastal and maritime State interests. The LOS Convention was designed in part to halt the creeping jurisdictional claims of coastal nations, or ocean enclosure movement. While that effort appears to have met with some success, it is clear that many States presently purport to restrict navigational freedoms by a wide variety of means that are neither consistent with the LOS Convention nor with customary international law.⁵ The stability of that regime is undermined by claims to exercise jurisdiction, or to interfere with navigational rights and freedoms, that are inconsistent with the terms of the LOS Convention.

The historic trend is for the commonly shared rights of all users of the seas to be diminished by coastal State claims to exercise rights further from shore. The expansion of the territorial sea breadth from 3 to 12 miles, and the acceptance of the 200 mile exclusive economic zone (EEZ), are prime examples. While the 12 mile territorial sea and 200 mile EEZ have gained international legal acceptance, as reflected in the LOS Convention, many States have asserted claims that exceed the provisions of the Convention. Unless these excessive claims are actively opposed, the challenged rights will be effectively lost.

This book seeks to explain the United States Government's responses to excessive maritime claims through a program to preserve and enhance navigational freedoms worldwide. This program, named the U.S. Freedom of Navigation (FON) Program, was formally instituted during the Carter Administration in 1979 to highlight the navigation provisions of the LOS Convention to further the recognition of the vital national need to protect maritime rights throughout the world.⁶ The FON Program was continued by the Reagan, Bush and Clinton Administrations. It is intended to be a peaceful exercise of the rights and freedoms

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recognized by international law and is not intended to be provocative.⁷ As President Reagan stated on March 10, 1983, it has been U.S. policy to:

accept and act in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight. In this respect, the United States will recognize the rights of other States in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal States.

In addition, United States policy has been to:

exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the [1982 Law of the Sea] convention. The United States will not, however, acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.⁸

The FON program operates on a triple track, involving not only diplomatic representations and operational assertions, but also bilateral and multilateral consultations with other governments in an effort to promote maritime stability and consistency with international law, stressing the need for and obligation of all States to adhere to the customary international law rules and practices reflected in the LOS Convention.⁹ This study identifies those countries that have brought their offshore claims in line with accepted international standards. The FON program helps to promote this process, by lowering coastal State expectations that other States will accept their claims and reversing the creeping jurisdictional expansion which proceeded almost unchecked in the 1960's and 1970's.¹⁰

When addressing other States' specific maritime claims that are inconsistent with international law,¹¹ the United States uses, as appropriate, the various forms of diplomatic correspondence. These include first and third person diplomatic notes, and may take the form of formal notes, *notes verbale* and *aides memoire*.¹² Since 1948, the United States has filed more than 140 such protests, including more than 110 since the FON Program began.¹³ Portions of these are excerpted or cited in this study.

The objective of the FON Program is not just to maintain the legal right to operate freely in and over international waters. The more important objectives are, first, to have other nations recognize and respect the legal right to operate freely, in conformity with the navigational provisions of the LOS Convention, in and over international waters, and second, to minimize efforts by other States to reduce those rights by making excessive maritime claims. Diplomatic communications alone do not always achieve those objectives.

The United States requires maritime mobility. To the extent that mobility can be exercised consistent with international law as reflected in the LOS

Convention and without political or military opposition, U.S. national security is enhanced. The United States believes it has a responsibility actively to promote compliance with the rules reflected in the navigational provisions of the LOS Convention. The United States has more to lose than any other nation if its maritime rights are undercut. Even though the United States may have the military power to operate where and in the manner it believes it has the right to, any exercise of that power is significantly less costly if it is generally accepted as being lawful. If the United States does not exercise its rights freely to navigate and overfly international waters, international straits and archipelagic sea lanes, it will lose those rights and others, at least as a practical matter.

The necessity for diplomatic communications and operational assertions to maintain the balance of interests reflected in the LOS Convention as law is often not well understood. It is accepted international law and practice that, to prevent changes in or derogations from rules of law, States must persistently object to actions by other States that seek to change those rules. Protest “must, at the very least, be repeated” and “must be supported by conduct which opposes the presentations of the claimant State.” Naturally, States are not required to adopt a course of conduct which virtually negates the rights reserved by protest. Consequently, States will not be permitted to acquiesce in emerging new rules of law and later claim exemption from them at will.¹⁴

Acquiescence is the tacit acceptance of a certain legal position as a result of a failure to make a reservation of rights at the appropriate juncture. For acquiescence to arise, a claim must have been made and accepted. The claim must be made in a manner, and in such circumstances, that the other State has been placed on notice of that claim. The conduct that allegedly constitutes acquiescence, or tacit acceptance of that claim, likewise must be clear and unequivocal. The failure to make a timely protest in circumstances when it reasonably could have been expected to do so may constitute tacit acceptance of the claim.¹⁵

Although one may question whether international law requires action by deed in order to preserve the legal position, “actions are an indication of national resolve and an affirmative effort to influence the formation of international law. . . . Action by deed . . . promotes the formation of law consistent with the action and deeds may be necessary in some circumstances to slow erosion in customary legal practice.”¹⁶ Where the claim protested against has the effect of taking away a nation’s right to use portions of the oceans, mere preservation of one’s legal right to operate there is of little practical value when one chooses not to operate there except in extraordinary circumstances. Avoiding areas where a country needs to operate, or could be expected to operate, in the absence of the illegal claim gives both practical and legal effect to the excessive claim.

Operations by U.S. naval and air forces designed to emphasize internationally recognized navigational rights and freedoms complement U.S. diplomatic efforts.¹⁷ FON operations are conducted in a low-key and non-threatening

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manner but without attempt at concealment. The FON Program impartially rejects excessive maritime claims of allied, friendly, neutral, and unfriendly States alike. These assertions of rights and freedoms tangibly exhibit U.S. determination not to acquiesce in excessive claims to maritime jurisdiction by other States. Although some operations receive public scrutiny (such as those that have occurred in the Black Sea¹⁸ and the Gulf of Sidra¹⁹), most do not. Since 1979, U.S. military ships and aircraft have exercised their rights and freedoms in all oceans against objectionable claims of more than 35 countries at the rate of some 30-40 per year.²⁰

This study summarizes relevant portions of the law of the sea, as understood by the United States, and describes, in as much detail as security and foreign policy considerations permit, the actions undertaken and results achieved by the FON Program. It should be noted that most of the illegal claims were made prior to the adoption of the LOS Convention in December 1982, and have not yet been revised to conform to the LOS Convention, even by some States which have ratified the instrument.²¹

Two caveats should be noted in regard to this study. First, it does not purport to discuss all coastal State maritime claims that may be inconsistent with the law of the sea, nor does it set out all actions taken by the United States (and other States) in response to these excessive claims. Thus, the failure to mention a particular claim should not be construed as acceptance of that claim by the United States.

Second, this analysis does not attempt to identify the practices of other States which conform to the provisions of the LOS Convention, although basic zonal jurisdictional claims are identified. In fact, the United States believes that the general practice of States reflects acceptance as international law of the non-seabed parts of the LOS Convention.²²

Notes

1. All miles in this study, unless otherwise noted, refer to nautical miles. One nautical mile equals 1,852 meters.

2. The LOS Convention, U.N. Doc. A/CONF.62/122 (1982), *reprinted in* 21 I.L.M. 1261-1354 (1982), was concluded December 10, 1982 and will enter into force on November 16, 1994 (one year following the deposit with the United Nations by Guyana of the 60th instrument of ratification) for those States that have ratified or acceded to it. See Appendix 5 for a list of States that have ratified the Convention as of July 1, 1994.

3. The National Security Strategy of the United States, Aug. 1991, at 19 [hereinafter National Security Strategy], states:

The United States has long supported international agreements designed to promote openness and freedom of navigation on the high seas. . . . As a maritime nation, with our dependence on the sea to preserve legitimate security and commercial ties, freedom of the seas is and will remain a vital interest. . . . Recent events in the Gulf, Liberia, Somalia and elsewhere show that American seapower, without arbitrary limits on its . . . operations, makes a strong contribution to global stability and mutual security.

4. Under the LOS Convention, articles 58 and 87, freedoms of navigation and overflight may be exercised in the high seas and in the exclusive economic zone.

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5. See Negroponte, *Who Will Protect the Oceans?*, DEP'T ST. BULL., Oct. 1986, at 41-43; Smith, *Global Maritime Claims*, 20 *Ocean Dev. & Int'l L.* 83 (1989).

6. 1979 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 997-98 [hereinafter DIGEST].

7. Negroponte, *supra* n. 5, at 42; U.S. Department of State, GIST: US Freedom of Navigation Program, December 1988 [hereinafter GIST]. See also National Security Strategy, at 15; and Rose, *Naval Activity in the Exclusive Economic Zone—Troubled Waters Ahead?*, 39 *Nav. L. Rev.* 67, 85-90 (1990).

8. Statement on United States Oceans Policy, Mar. 10, 1983, 1 *Pub. Papers of President Reagan* (1983), at 378-79; 22 *I.L.M.* 464; 77 *Am. J. Int'l L.* 619 (1983); DEP'T ST. BULL. at 70-71 (June 1983). See Appendix 1 for the full text of this statement. Upon signature of the LOS Convention, France expressed a similar view:

The provisions of the Convention relating to the status of the different maritime spaces and to the legal regime of the uses and protection of the marine environment confirm and consolidate the general rules of the law of the sea and thus entitle the French Republic not to recognize as enforceable against it any foreign laws or regulations that are not in conformity with those general rules.

U.N. Multilateral Treaties Deposited with the Secretary-General: Status as of Dec. 31, 1992, U.N. Doc. ST/LEG/SER.E/11, at 768 (1993). On depositing its instrument of ratification, Malta stated that it:

does not consider itself bound by any of the declarations which other States may have made, or will make upon signing or ratifying the Convention, reserving the right as necessary to determine its position with regard to each of them at the appropriate time. In particular, ratification of the Convention does not imply automatic recognition of maritime or territorial claims by any signatory or ratifying State.

U.N. LOS BULL., No. 23, June 1993, at 7.

9. On September 23, 1989, the United States and the Soviet Union issued a joint statement in which they recognized "the need to encourage all States to harmonize their internal laws, regulations and practices" with the navigational articles of the 1982 LOS Convention. See Appendix 4 for the full text of this statement.

10. See Aceves, *Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea*, *Nav. War Coll. Rev.* 59 (Spring 1993).

11. See 1 O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 38-44 (1982), for a discussion of the significance of protest in the law of the sea. Compare: Colson, *How Persistent Must the Persistent Objector Be?*, 61 *Wash. L. Rev.* 957, at 969 (1986):

First, States should not regard legal statements of position as provocative political acts. They are a necessary tool of the international lawyer's trade and they have a purpose beyond the political, since, occasionally, States do take their legal disputes to court.

Second, there is no requirement that a statement of position be made in a particular form or tone. A soft tone and moderate words may still effectively make the necessary legal statement.

Third, action by deed probably is not necessary to protect a State's legal position as a persistent objector when that State has otherwise clearly stated its legal position. Action by deed, however, promotes the formation of law consistent with the action and deeds may be necessary in some circumstances to slow erosion in customary legal practice.

Fourth, not every legal action needs an equal and opposite reaction to maintain one's place in the legal cosmos.

Fifth, the more isolated a State becomes in its legal perspective, the more active it must be in restating and making clear its position.

12. See 7 WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 502-04 (1970) [hereinafter WHITEMAN].

13. Negroponte, *Current Developments in U.S. Oceans Policy*, DEP'T ST. BULL., Sept. 1986, at 84, 85; *Navigation Rights and the Gulf of Sidra*, DEP'T ST. BULL., Feb. 1987, at 70; Roach, *Excessive Maritime Claims*, 1990 *Proc. Am. Soc. Int'l L.* 288, 290. Previous United States responses to excessive maritime claims are summarized in U.S. Department of State, *Limits in the Seas* No. 112 (1992).

14. CHURCHILL & LOWE, *THE LAW OF THE SEA* 6-7 (2d rev. ed. 1988); O'Connell, *Mid-Ocean Archipelagos in International Law*, 45 *Brit. Y.B. Int'l L.* 63-69 (1975). See also Colson, *supra* n. 11, at 957-70; Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 *Harv.*

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Int'l L.J. 457 (1985); and Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 Brit. Y.B. Int'l L. 1 (1986) and the sources cited therein.

15. *Gulf of Maine I.C.J. Case* [Canada v. United States], U.S. Counter Memorial, paras. 235-40 [1983].

16. Colson, *supra* n. 11, at 964 & 969. "Passage does not cease to be innocent merely because its purpose is to test or assert a right disputed or wrongfully denied by the coastal State." Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 27 Brit. Y.B. Int'l L. 28 (1950), commenting on the *Cofu Channel Case* in which the Court held that the United Kingdom was not bound to abstain from exercising its right of innocent passage which Albania had illegally denied. 1949 I.C.J. Rep. 4, 4 WHITEMAN 356.

The Special Working Committee on Maritime Claims of the American Society of International Law has advised that:

programs for the routine exercise of rights should be just that, "routine" rather than unnecessarily provocative. The sudden appearance of a warship for the first time in years in a disputed area at a time of high tension is unlikely to be regarded as a largely inoffensive exercise related solely to the preservation of an underlying legal position. Those responsible for relations with particular coastal states should recognize that, so long as a program of exercise of rights is deemed necessary to protect underlying legal positions, delay for the sake of immediate political concerns may invite a deeper dispute at a latter [sic] time.

Am. Soc. Int'l L. Newsletter 6 (Mar.-May 1988); *Nonviolent Responses to Violence-Prone Problems: The Cases of Disputed Maritime Claims and State-Sponsored Terrorism*, Am. Soc. Int'l L. Studies in Transnational Legal Policy No. 22, at 5 (1991).

17. In exercising its navigational rights and freedoms, the United States "will continue to act strictly in conformance with international law and we will expect nothing less from other countries." Schachte, *The Black Sea Challenge*, U.S. Nav. Inst. Proc. 62 (June 1988). See also 1979 DIGEST 1066-69.

18. See *infra* Chapter X.

19. See *infra* Chapter III.

20. Department of State Statement, Mar. 26, 1986, DEP'T ST. BULL., May 1986, at 79; *Navigation Rights and the Gulf of Sidra*, DEP'T OF ST. BULL., Feb. 1987, at 70. See Secretary of Defense, Annual Report to the President and the Congress 77-78 (1992) for a list of FON assertions conducted by DoD assets from October 1, 1990 to September 30, 1991, *id.* at 84-85 (1993) for a list of assertions by DoD assets between October 1, 1991 and September 30, 1992; and *id.* at G-1 for a list of assertions by DOD assets from October 1, 1992 to September 30, 1993 (1994).

21. Some States with illegal maritime claims have since ceased to exist. The Yemens merged on May 22, 1990. The German Democratic Republic ceased to exist on October 3, 1990. The Soviet Union broke apart in December 1991. On January 27, 1992, the Permanent Representative of Russia to the United Nations conveyed the text of the following note addressed to the heads of diplomatic missions in Moscow:

The Russian Federation continues to exercise its rights and honour its commitments deriving from international treaties concluded by the Union of Soviet Socialist Republics.

Accordingly, the Government of the Russian Federation will perform the functions formerly performed by the Government of the Soviet Union as depository for the corresponding multilateral treaties.

In this connection, the Ministry requests that the Russian Federation be considered a party to all international agreements in force, instead of the Soviet Union.

U.N. LOS BULL., No. 20, Mar. 1992, at 6 n.9; Russian MFA circular note no. 11/UGP dated Jan. 13, 1992, American Embassy Moscow telegram 001654, Jan. 17, 1992, Department of State File No. D92 0055-0637. The status of the maritime claims made by the Yemens, the GDR and the former Soviet Union is not certain in all cases. See generally, Walker, *Integration and Disintegration in Europe: Reordering the Treaty Map of the Continent*, 6 Transnat'l Law. 1 (1993).

22. In his report to the U.N. General Assembly occasioned by the tenth anniversary of the adoption of the LOS Convention, after reviewing the practice of States and international organizations, the Secretary-General concluded that:

. . . there has been a striking convergence of practice towards accepting the concepts, principles and basic provisions embodied in the Convention. Such acceptance is notable, particularly in respect of the territorial sea, the regime of straits used for international navigation, the archipelagic waters, the exclusive economic zone, and the protection and preservation of the marine environment.

He acknowledged the existence, however, of:

. . . some exceptional cases where state practice is not in conformity with, or clearly deviates from the relevant provisions of the Convention. These are particularly in the areas of the breadth of the territorial sea and the nature of the coastal State's jurisdiction in the contiguous zone and the exclusive economic zone with respect to security, fisheries, pollution control and marine scientific research.

He concluded his report by stressing that "the Convention has contributed significantly towards a general trend of harmonization of state practice in conformity with the new legal regime it has established." U.N. G.A. Doc. A/47/512, Nov. 5, 1992, paras. 81, 85-86, at 19-20. The Secretary-General is expected to publish in 1994 a worldwide survey of State practice pursuant to U.N. G.A. Res. A/Res 46/78.