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I. INTRODUCTION

On September 28, 1945, President Harry S. Truman issued two presidential proclamations that would forever change the landscape of the world's oceans. First, the United States claimed exclusive jurisdiction over the "the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States."[1] The character of the waters above the continental shelf as high seas and the right of all nations to "free and unimpeded navigation" in and over those waters, however, were not affected by the proclamation.[2] Second, the United States claimed the authority to unilaterally establish fisheries conservation zones in areas of the high seas contiguous to the U.S. coast, under the exclusive regulation and control of the United States, where "fishing activities have been or in the future may be developed and maintained on a substantial scale."[3]

This unilateral assault on freedom of the high seas soon resulted in a proliferation of excessive maritime claims that not only claimed exclusive jurisdiction over offshore living and non-living resources, but also sovereignty over the water column beyond the traditional three nautical mile territorial sea limit. To address this growing uneasiness at sea, the United Nations General Assembly (UNGA) adopted a resolution on February 21, 1957, with the view of creating a more stable legal order for the oceans and promoting better use and management of its resources. Based on a recommendation of the International Law Commission, the General Assembly decided to convene the First United Nations Conference on the Law of the Sea to examine the state of the law, considering the legal, technical, biological, economic, and political aspects of the problem, and to codify the results of the Conference in one or more international instruments as appropriate.[4] Eighty-six States participated in the Conference and adopted four separate conventions on October 31, 1958: (1) the Convention on the Territorial Sea

1. Proclamation No. 2667, Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 10 Fed. Reg. 12,305 (Sept. 28, 1945).

2. *Id.*

3. Proclamation No. 2668, Policy of the United States with Respect to the Coastal Fisheries in Certain Areas of the High Seas, 10 Fed. Reg. 12,304 (Sept. 28, 1945).

4. G.A. Res. 1105 (XI) (Feb. 21, 1957).

and the Contiguous Zone;[5] (2) the Convention on the High Seas;[6] (3) the Convention on Fishing and Conservation of the Living Resources of the High Seas;[7] and (4) the Convention on the Continental Shelf.[8] The Conference also adopted an Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes.[9]

Although the 1958 Conventions were a significant achievement, making a historic contribution to the codification and progressive development of the law of the sea, they did not resolve all outstanding issues. As a result, on December 10, 1958, the UNGA requested that the Secretary-General convene a Second United Nations Conference on the Law of the Sea to consider "questions on the breadth of the territorial sea and fishery limits," which had not been settled in the 1958 Conventions.[10] The Conference convened on March 17, 1960, but concluded on April 26, 1960, without resolving the outstanding issues.

On December 18, 1967, the UNGA established an ad hoc committee of thirty-six member States to study the peaceful uses of the sea-bed and the ocean floor beyond the limits of national jurisdiction.[11] The Ad Hoc Committee completed its work in 1968 and submitted its study to the UNGA. Based on the Committee's report, the UNGA established the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, comprised of forty-two member States, on December 21, 1968.[12] Two years later, the UNGA decided to convene the Third United Nations Conference on the Law of the Sea (UNCLOS III) in 1973, and instructed the Committee to act as the preparatory body for the conference.[13] Based on the work of the Committee between 1971 and 1973, the UNGA

5. Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

6. Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 11.

7. Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285.

8. Convention of the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

9. Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes, Apr. 29, 1958, 450 U.N.T.S. 169.

10. G.A. Res. 1307 (XIII) (Dec. 10, 1958).

11. G.A. Res. 2340 (XXII) (Dec. 18, 1967).

12. G.A. Res. 2467A (XXIII) (Dec. 21, 1968).

13. G.A. Res. 2750C (XXV) (Dec. 17, 1970).

requested the Secretary-General to convene the first two sessions of UNCLOS III in 1973 and 1974.[14] Following the first session, the UNGA decided that the mandate of the Conference would be "to adopt a convention dealing with all matters relating to the law of the sea."[15]

The Conference held eleven sessions between 1973 and 1982 and was attended by 160 States. After nine years of painstaking debate, the Conference completed its work and adopted the United Nations Convention on the Law of the Sea (UNCLOS) on December 10, 1982.[16] Hailed as "A Constitution for the Oceans," the Convention was immediately signed by 119 States, a remarkable number given the contentious and complex nature of the negotiations.[17] But support for the Convention soon began to unravel. By 1993, the Convention had still not entered into force, primarily over concerns by the industrialized nations over Part XI on deep seabed mining.

Realizing that the Convention would not achieve universal acceptance without modifications to Part XI, the Secretary-General convened fifteen informal meetings beginning in July 1990 and culminating on July 28, 1994, with the adoption of the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (Part XI Implementation Agreement).[18] Article 2 of the Part XI Implementation Agreement provides that it will be interpreted and applied together with UNCLOS as a single instrument.[19] Four months later, on November 16, 1994, UNCLOS entered into force, followed by entry into force of the Part XI Implementation Agreement on July 28, 1996. As of June 2022, UNCLOS and the Implementation Agreement have 168 and 151 parties, respectively.

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14. G.A. Res. 3029A (XXVII) (Dec. 18, 1972).

15. G.A. Res. 3067 (XXVIII), ¶ 3 (Nov. 16, 1973).

16. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

17. Tommy T.B. Koh, *A Constitution for the Oceans* (Dec. 11, 1982) (remarks by the President of the Third United Nations Conference on the Law of the Sea), https://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf [hereinafter Koh, *A Constitution for the Oceans*].

18. U.N. Secretary-General, *Consultations of the Secretary-General on Outstanding Issues Relating to the Deep Seabed Mining Provisions of the United Nations Convention on the Law of the Sea*, U.N. Doc. A/48/950 (June 9, 1994).

19. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, 1836 U.N.T.S. 3.

The intent of the Conference had been to produce a comprehensive and universally accepted convention, covering every aspect of the uses and resources of the oceans, that would stand the test of time. Was it successful? At the final session, Ambassador Tommy Koh of Singapore, President of the Third Conference, answered that question in the affirmative for the following reasons:

- UNCLOS promotes international peace and security by replacing the plethora of conflicting claims with universally agreed limits on the various maritime zones;
- UNCLOS enables freedom of navigation by its compromises on the status of the exclusive economic zone (EEZ) and by the regimes of innocent passage, transit passage, and archipelagic sea lanes passage;
- UNCLOS creates the EEZ, which enhances conservation and the optimum utilization of the living resources of the oceans;
- UNCLOS contains new rules for the protection and preservation of the marine environment from pollution;
- UNCLOS contains new rules on marine scientific research (MSR) that strike an equitable balance between the interests of research States and coastal States;
- UNCLOS' mandatory dispute settlement system advances the peaceful settlement of disputes and prevents the use of force in the settlement of disputes;
- UNCLOS confirms that the resources of the deep seabed are the common heritage of mankind by creating fair and workable institutions and arrangements; and
- UNCLOS provisions reflect international equity—for example, revenue sharing from the resources of the extended continental shelf, granting land-locked and geographically disadvantaged States access to the living resources in the EEZ of their neighbors, balancing the interests of coastal and distant-water fishermen, and sharing the benefits derived from deep seabed mining.[20]

Was Ambassador Koh correct in his assessment of the Convention? Has UNCLOS stood the test of time as a comprehensive treaty that is respected by all nations? This article analyzes the various provisions of UNCLOS, based on forty years of State practice, to determine whether the rules-based

20. Koh, *A Constitution for the Oceans*, *supra* note 17.

legal order codified in the Convention has stood the test of time. While many of the provisions of the Convention have had their desired effect of preserving navigational rights and freedoms for the international community by curtailing the plethora of conflicting coastal State claims that existed prior to 1982, an equal number of provisions have failed miserably in achieving their intended effect. This failure has given rise to a new era of excessive maritime claims by coastal States that purport to restrict freedom of the seas, thereby increasing tensions and diminishing international peace and security. The article concludes by examining how the international community should respond to this new wave of excessive claims.

II. BENEFITS OF THE CONVENTION

There are clearly provisions of the Convention that have had a positive impact on maintaining a rules-based legal order for the oceans that balances coastal State rights and user State rights in the littorals. UNCLOS clarifies the maximum breadth of the territorial sea. It assures unimpeded transit rights through international straits and archipelagic waters. It reaffirms the sovereign immunity of warships and other government-owned or operated noncommercial vessels. It grants coastal States exclusive resource rights in their EEZ and continental shelf. It provides clear guidance on the conduct of MSR in foreign EEZs and on the high seas. It enhances the protection and preservation of the marine environment. It establishes a mechanism for the adjudication of extended continental shelf claims by the Commission on the Limits of the Continental Shelf. It creates an independent judicial body, the International Tribunal for the Law of the Sea (ITLOS), which has jurisdiction over any dispute concerning the interpretation or application of the Convention.

A. Breadth of the Territorial Sea

UNCLOS conclusively settled the long-standing dispute concerning the maximum breadth of the territorial sea. Traditionally, the breadth of the territorial sea was limited to three nautical miles.[21] By 1974, however, only twenty-eight States claimed a three-nautical-mile territorial sea, while eighty-

21. Tullio Treves, *Historical Development of the Law of the Sea*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 1, 5 (Donald Rothwell et al. eds., 2015).

eight States claimed territorial seas ranging from four to two hundred nautical miles.[22] UNCLOS resolved the issue by establishing the maximum breadth of the territorial sea at twelve nautical miles, thereby stabilizing State practice and discouraging excessive claims.[23] Of the twenty States that claimed territorial seas in excess of twelve nautical miles in 1983, thirteen reduced their claims to twelve nautical miles by 2011.[24] Only Benin, Peru, Somalia, and Togo continue to claim territorial seas exceeding twelve nautical miles, compared to 144 States that claim a twelve-nautical-mile territorial sea, two that claim a six-nautical-mile territorial sea, and one that claims a three-nautical-mile territorial sea.[25]

B. Transit Passage

Prior to UNCLOS, most strategic chokepoints, like the Straits of Gibraltar, Hormuz, and Malacca, contained a high seas corridor that allowed for free and unimpeded transit for all surface ships, submarines, and aircraft. With the expansion of the maximum breadth of the territorial sea from three to twelve nautical miles, more than one hundred of these straits used for international navigation are today overlapped by territorial seas. Under the prevailing law of the time, these straits would be governed by the regime of innocent passage, which does not include a right of overflight for aircraft or submerged transit for submarines.[26] As a compromise, UNCLOS balances coastal States' interest in expanding their territorial seas with the international community's interest in unimpeded navigation and overflight on, over, and under these strategic waterways.

In straits used for international navigation between one part of the high seas or EEZ and another part of the high seas or EEZ, that are completely overlapped by territorial seas of the bordering States, all ships and aircraft enjoy the non-suspendable right of transit passage.[27] Moreover, bordering

22. J. ASHLEY ROACH & ROBERT W. SMITH, EXCESSIVE MARITIME CLAIMS 136 (3d ed. 2012).

23. UNCLOS, *supra* note 16, art. 3.

24. ROACH & SMITH, *supra* note 22, at 136; *see generally* U.S. Department of Defense, Maritime Claims Reference Manual, https://www.jag.navy.mil/organization/code_10_mcrm.htm (last updated Feb. 8, 2022) [hereinafter MCRM].

25. *See* MCRM, *supra* note 24.

26. Convention on the Territorial Sea and the Contiguous Zone arts. 2, 14, Apr. 29, 1958, 15 U.S.T. No. 1606, T.I.A.S No. 5639, 516 U.N.T.S. 205 [hereinafter 1958 Territorial Sea Convention].

27. UNCLOS, *supra* note 16, arts. 37, 38, 44.

States may not adopt laws or regulations that have the practical effect of denying, hampering, or impairing the right of transit passage.[28] That means surface ships, submarines, and aircraft have an unimpeded right of transit through the strait for the purpose of continuous and expeditious transit in their normal mode of operation as a matter of right, without bordering State notice or consent.[29] "Normal mode of operation" means that submarines may transit submerged, military aircraft may overfly in combat formation and with normal equipment operation, and surface ships may transit in a manner consistent with vessel security, to include formation steaming and launch and recovery of aircraft, if consistent with sound navigational practices.

The right of transit passage is therefore fundamental to naval and air forces of all nations for both routine and contingency operations. For example, Operation El Dorado Canyon, the U.S. response to the April 5, 1986, terrorist bombing of the La Belle Discotheque in West Berlin that killed an American soldier and wounded two hundred other people, was facilitated by the right of transit passage. France and Spain denied the United States overflight rights over their territory to conduct the operation. U.S. F-111s and EF-111s based in Great Britain (RAF Lakenheath and RAF Heyford) were therefore forced to enter the Mediterranean Sea through the Strait of Gibraltar, a 3,500-mile flight each way with aerial refueling, to conduct strikes against terrorist targets in Libya, in coordination with U.S. Navy aircraft off the USS *Coral Sea* (CV 43) and USS *America* (CV 66) operating off the coast of Libya.[30]

The regime of transit passage enjoys near universal recognition. Only Iran and Malaysia have contrary positions. Iran signed but has not ratified UNCLOS.[31] At the time the Islamic Republic signed UNCLOS in 1982, it declared that many of the provisions of the Convention, including Article 38, which describes the right of transit passage, do not reflect customary

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28. *Id.* art. 42.

29. *Id.* arts. 38, 39, 44.

30. Gregory Ball, *1986—Operation El Dorado Canyon*, AIR FORCE HISTORICAL SUPPORT DIVISION (Sept. 8, 2012), https://www.afhistory.af.mil/FAQs/Fact-Sheets/Article/458950/operation-el-dorado-canyon/; Fred Heyford, *U.S. Attack on Libya: A Raid That Went Right*, WASHINGTON POST (Apr. 20, 1986), https://www.washingtonpost.com/archive/politics/1986/04/20/us-attack-on-libya-a-raid-that-went-right/23336af6-dfde-4ce7-928c-c170d42b6654/.

31. U.N. Division for Ocean Affairs and the Law of the Sea, Status of the United Nations Convention on the Law of the Sea, https://www.un.org/Depts/los/reference_files/UNCLOS%20Status%20table_ENG.pdf (last visited Nov. 18, 2022).

international law. Specifically, Iran claims that the right of transit passage through straits used for international navigation, like the Strait of Hormuz, is a contractual right limited to State parties to the Convention.[32] As the sole entrance to the Persian Gulf, the Strait of Hormuz is one of the most critical chokepoints in the world. The United States rejects Iran's position and considers that the regime of transit passage is "clearly based on customary practice of long standing and reflects the balance of rights and interests among all States, regardless of whether they have signed or ratified the Convention."[33] Accordingly, commercial and military ships and aircraft of all nations routinely exercise the right of transit passage through the Strait of Hormuz.[34]

Malaysia also impedes transit passage through the Straits of Malacca and Singapore, but only for certain ships. Beginning in the 1990s, large cargoes of high-level nuclear waste were transported between Japan and France on board ships owned by British Nuclear Fuels Limited. Concerned that these shipments could endanger coastal communities and cause long-term damage to the marine environment in the event of a casualty, some coastal and island States along the routes used by British Nuclear Fuels Limited objected to the transport of nuclear material through their territorial seas and EEZs without prior notification and consent.[35] Malaysian officials further stated that such vessels would not have access to the Straits of Malacca and Singapore without prior authorization, claiming that there were "gaps in the legal regimes governing these activities" and that there were no agreements in place "regarding salvage responsibilities, liability for damages, obligations to consult, advance notification and contingency planning to handle emergencies."[36] Despite this purported restriction, all other ships, including nuclear-powered

32. U.N. Treaty Collection, Status of the United Nations Convention on the Law of the Sea, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec (last updated June 27, 2022).

33. U.S. DEP'T OF STATE, BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, LIMITS IN THE SEAS NO. 112, UNITED STATES RESPONSES TO EXCESSIVE NATIONAL MARITIME CLAIMS 68 (Mar. 9, 1992).

34. U.S. DEP'T OF STATE, BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, LIMITS IN THE SEAS NO. 114, IRAN'S MARITIME CLAIMS 24 (Mar. 16, 1994).

35. Jon M. Van Dyke, *The Legal Regime Governing Sea Transport of Ultrahazardous Radioactive Materials*, 33 OCEAN DEVELOPMENT & INTERNATIONAL LAW 77, 78–80 (2002).

36. *Id.* at 86; *see also* Statement by Datuk Law Hieng Ding, Malaysian Minister of Science, Technology and Environment, Carriage of Ultra Hazardous Radioactive Cargo by Sea: Implications and Responses, delivered by Deputy Minister Dato' Abu Bakar Bin Daud at the Meeting of the Maritime Institute of Malaysia (Oct. 18, 1999), *in* 8 MIMA BULLETIN 1, 3 (2000).

warships, continue to enjoy an unimpeded right of transit passage through the Straits of Malacca and Singapore.

Other nations, like Canada, Russia, and China, do not recognize transit passage rights in certain straits, not because they question the legality of the regime but because they do not consider the strait to be a strait used for international navigation under Part III, Section 2, of the Convention. The failure of UNCLOS to rollback these illegal claims will be discussed in Part III, below.

C. Archipelagic Sea Lanes Passage

Prior to 1982, international law did not recognize the right of mid-oceanic island States to claim archipelagic status. During the Third UN Conference, maritime States worked closely with island States to craft an agreement that allowed mid-oceanic island States, like Indonesia and the Philippines, to claim archipelagic status and guaranteed the right of all States to freely navigate through the archipelago. For the most part, State practice by archipelagic States has complied with Part IV of the Convention.

An archipelagic State is a nation comprised wholly of one or more archipelagoes and may include other islands.[37] UNCLOS defines an "archipelago" as a group of islands, interconnecting waters, and other natural features that are closely interrelated and form an intrinsic geographical, economic, and political entity.[38] Thus, continental nations (e.g., the United States) may not assert archipelagic status for their claimed mid-ocean island (e.g., Hawaiian Islands). Nonetheless, China, Denmark, Ecuador, France, the Netherlands, Norway, and the United Kingdom purport to draw straight baselines around their claimed mid-ocean island territories and dependencies that are akin to a claim of archipelagic status. The illegality of these assertions and inability of UNCLOS to influence States to modify these excessive claims is discussed in Part III, below.

A nation that qualifies as an archipelagic State may draw straight baselines joining the outermost points of its outermost islands if the ratio of water to land within the baselines is between 1:1 and 9:1.[39] Thus, even if a State is an island nation it must still meet the water-to-land ratio. So, Australia, Japan, and the United Kingdom, for example, cannot claim archipelagic status because they have too much land territory. The waters enclosed within

37. UNCLOS, *supra* note 16, art. 46.
38. *Id.*
39. *Id.* art. 47.

an archipelago's straight baselines are archipelagic waters, which are subject to archipelagic State sovereignty.[40] Archipelagic baselines are also used to measure the archipelagic State's maritime zones.[41]

Archipelagic States may, but are not required to, designate archipelagic sea lanes (ASL) through their archipelagic waters suitable for continuous and expeditious passage of ships and aircraft. All normal routes used for international navigation and overflight are to be included in the designation and must be adopted by the International Maritime Organization (IMO).[42] If the archipelagic State does not designate, or makes only a partial designation of ASLs, vessels and aircraft of all States may continue to exercise the right of archipelagic sea lanes passage (ASLP) in all normal passage routes used for international navigation and overflight through the archipelago.[43]

ASLP applies within archipelagic waters and the adjacent territorial sea whether the archipelagic State has designated ASLs or not and is virtually identical to the transit passage regime. It includes the rights of navigation and overflight in the normal mode of operation solely for the purpose of continuous, expeditious, and unobstructed transit through archipelagic waters. As in the case of transit passage, normal mode includes submerged transit by submarines; launching and recovery of aircraft and military devices for force protection; formation flying and steaming for force protection; and replenishment at sea and air-to-air refueling. All military and commercial ships and aircraft enjoy the right of ASLP while transiting through, under, or over archipelagic waters and adjacent territorial seas via all normal passage routes used as routes for international navigation or overflight.[44] The right of innocent passage applies in archipelagic waters not covered by the ASLP regime.[45]

Archipelagic States may not impede or suspend the right of ASLP for any reason.[46] Additionally, there is no requirement for ships or aircraft to request diplomatic clearance or provide prior notice or receive consent from the archipelagic State to engage in ASLP. Archipelagic States may adopt laws

40. *Id.* art. 49.

41. *Id.* art. 48.

42. *Id.* art. 49.

43. *Id.* art. 53(12); IMO, Guidance for Ships Transiting Archipelagic Waters, IMO Doc. SN/Circ.206/Corr.1 (Mar. 1, 1999); IMO Res. MSC.71(69) (May 19, 1998); IMO Res. MSC.72(69) (May 19, 1998); IMO, Guidance for Ships Transiting Archipelagic Waters, IMO Doc. SN/Circ. 206, ¶ 2.1.1 (Mar. 1, 1999).

44. UNCLOS, *supra* note 16, art. 53.

45. *Id.* art. 52.

46. *Id.* arts. 44, 54.

and regulations relating to ASLP, but these laws and regulations shall not discriminate in form or in fact among foreign ships and shall not have the practical effect of denying, hampering, or impairing the right of ASLP.[47] Only two of the twenty-two States that claim archipelagic status restrict the right of ASLP. The Dominican Republic does not recognize the right of ASLP,[48] while the Maldives limits ASLP to designated sea lanes, which have not yet been specified, and prohibits all overflight in ASLs.[49]

Twenty-two States currently claim archipelagic status: Antigua & Barbuda, the Bahamas, Cabo Verde, Comoros, the Dominican Republic, Fiji, Grenada, Indonesia, Jamaica, Kiribati, the Maldives, the Marshall Islands, Mauritius, Papua New Guinea, the Philippines, Saint Vincent & the Grenadines, Sao Tome & Principe, the Seychelles, the Solomon Islands, Trinidad & Tobago, Tuvalu, and Vanuatu.[50] The U.S. State and Defense Departments have examined seventeen of these claims and have only found five to be inconsistent with the provisions of UNCLOS, Part IV—Comoros, the Dominican Republic, the Maldives, the Marshall Islands, and Mauritius.[51]

To date, the only archipelagic State that has designated ASLs is Indonesia. When it introduced its proposal before the Maritime Safety Committee, Indonesia confirmed that the proposed designation was a "partial" ASL proposal and that the right of ASLP would continue to apply in "all other normal passage routes used for international navigation and overflight . . . including an east-west route and other associated spurs and connectors, through and over Indonesia's territorial sea and its archipelagic waters."[52] The IMO therefore adopted Indonesia's ASL proposal as a "partial system" because it did not include all normal routes used for international navigation

47. *Id.* arts. 42, 44, 54.

48. Dominican Republic, Act 66-07, art. 12 (May 22, 2007), https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DOM_ 2007_Act_frombulletin65.pdf.

49. Maldives, Maritime Zones of Maldives Act No. 6/96, arts. 12, 15 (1996), https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MDV_1996_Act.pdf.

50. ROACH & SMITH, *supra* note 22, at 24.

51. *See generally* U.S. Dep't of State, Office of Ocean and Polar Affairs, Limits in the Seas, https://www.state.gov/limits-in-the-seas/; MCRM, *supra* note 24.

52. IMO Maritime Safety Committee, Report of the Maritime Safety Committee, IMO Doc. MSC 69/22, ¶ 5.23.2 (May 29, 1998); *see also* IMO Maritime Safety Committee, Report of the Maritime Safety Committee, IMO Doc. MSC 77/26, ¶ 25.40 (June 10, 2003).

as required by UNCLOS Article 53.[53] Relevant IMO documents reflect that where a partial ASL proposal has come into effect, the right of ASLP "may continue to be exercised through all normal passage routes used for international navigation or overflight in other parts of archipelagic waters" in accordance with UNCLOS.[54]

D. Sovereign Immunity

Under customary international law, warships, naval auxiliaries, and military aircraft, as well as all State owned or operated vessels and aircraft in non-commercial service, are entitled to sovereign immunity. Such vessels and aircraft, wherever located, are immune from arrest, seizure, search, and inspection by the authorities of another State. Therefore, while in port or at sea, local authorities may not board a sovereign immune ship or aircraft without the permission of the commanding officer. Such vessels and aircraft are also immune from foreign taxation and have exclusive control over passengers and crew onboard with respect to acts performed on board. Sovereign immunity additionally allows the commander or master of a ship or aircraft to protect the identity of personnel, stores, weapons, or other property on board. Warships may be required to comply with some coastal State laws and regulations promulgated in conformity with UNCLOS, but failure to comply is subject only to a diplomatic protest by the aggrieved State and an order to leave its territorial sea immediately.

UNCLOS meticulously codifies this long-standing principle of international law. Article 32 provides that nothing in the Convention "affects the

53. IMO Res. MSC.72(69), Adoption, Designation, and Substitution of Archipelagic Sea Lanes (May 19, 1998); IMO, Report of the Maritime Safety Committee on its Sixty-Ninth Session, IMO Doc. MSC 69/22/Add.1, Annex 8 (June 1, 1998) (Annex 8 is IMO Res. MSC.71(69), Adoption of Amendments to the General Provisions on Ships' Routeing, adopted on May 19, 1998); *See also* IMO, Adoption, Designation, and Substitution of Archipelagic Sea Lanes, IMO Doc. SN/Circ.200 (May 26, 1998); IMO, Adoption, Designation, and Substitution of Archipelagic Sea Lanes, IMO Doc. SN/Circ.200/Add.1 (July 3, 2008); IMO, Adoption, Designation, and Substitution of Archipelagic Sea Lanes, IMO Doc. SN/Circ.202 (July 31, 2008).

54. IMO Res. MSC.71(69), Adoption of Amendments to the General Provisions on Ships' Routeing, ¶ 6.7 (May 19, 1998); IMO, Guidance for Ships Transiting Archipelagic Waters, IMO Doc. SN/Circ.206 ¶ 2.1.1 (Mar. 1, 1999).

immunities of warships and other government ships operated for non-commercial purposes."[55] Articles 95 and 96 reflect the generally accepted principle that warships and ships owned or operated by a State and used only on government non-commercial service on the high seas have complete immunity from the jurisdiction of any State other than the flag State.[56] The rule reflected in these articles applies in all waters seaward of the territorial sea.[57]

If a sovereign immune vessel fails to comply with coastal State laws and regulations concerning passage through the territorial sea and disregards a request by the coastal State to comply therewith, the coastal State may only require the sovereign immune vessel to leave the territorial sea immediately.[58] Use of force by a coastal State to require a sovereign immune vessel to leave its territorial sea is not permitted unless required in self-defense. Of course, the flag State bears "international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of this Convention or other rules of international law."[59]

Consistent with Articles 95 and 96, sovereign immune vessels may not be boarded by a foreign warship pursuant to the right of visit.[60] Additionally, sovereign immune vessels and aircraft are exempt from compliance with the environmental provisions of the Convention. The only requirement is that States shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities, that their sovereign immune vessels and aircraft act in a manner that is consistent with the Convention so far as is reasonable and practicable.[61] Finally, a State is permitted to file a declaration in writing that it does not accept the compulsory dispute settlement

55. UNCLOS, *supra* note 16, art. 32.

56. *Id.* arts. 95, 96.

57. Article 58(2) provides that "Articles 88 to 115 . . . apply to the exclusive economic zone in so far as they are not incompatible with this Part." *Id.* art. 58(2). The second sentence of Article 86 provides that Part VII on the high seas does not abridge the "freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58." *Id.* art. 86.

58. *Id.* art. 30.

59. *Id.* art. 31.

60. *Id.* art. 110.

61. *Id.* art. 236.

provisions of the Convention to apply to, inter alia, disputes concerning military activities and law enforcement activities regarding marine scientific research or fisheries matters.[62]

The issue of sovereign immunity and the military exception in Article 298 have been addressed by both ITLOS and arbitration tribunals established pursuant to UNCLOS. In the *ARA Libertad* case, ITLOS applied the time-honored principle of sovereign immunity in deciding the case. On October 1, 2012, the Argentine warship *ARA Libertad* entered the port of Tema, Ghana. The frigate was due to depart Tema on October 4 but could not due to an injunction issued by a Ghanaian court seeking to enforce a civil judgment against Argentina won by a Cayman Islands company in a U.S. federal court. Subsequently, on October 30, 2012, Argentina instituted arbitration proceedings against Ghana. Two weeks later, on November 14, 2012, Argentina requested that ITLOS prescribe provisional measures under Article 290(5) of the Convention.

In deciding the case, ITLOS acknowledged that warships express the sovereignty of the flag State and enjoy complete immunity, even in internal waters. The tribunal also noted that the actions taken by Ghana to prevent the Argentine warship from discharging its missions and duties affect the warship's immunity under general international law. Additionally, the attempts by Ghanaian authorities to board the *Libertad* and forcibly move it to another berth without the consent of the commanding officer demonstrated the seriousness of the situation and the urgent need for provisional measures. Accordingly, the tribunal unanimously granted the provisional measures and ordered that Ghana unconditionally release the *Libertad* and ensure that the frigate, its commanding officer, and crew be allowed to leave the port of Tema, as well as other Ghanaian maritime areas, and that the frigate be resupplied to that end.[63]

Sovereign immunity was also raised in the *Kerch Strait (Ukraine v. Russia)* case. On November 25, 2018, the Ukrainian naval vessels *Berdyansk*, *Nikopol*, and *Yani Kapu*, and their crews, were arrested and detained by Russian authorities as they attempted to transit through the Kerch Strait enroute to the Ukrainian port of Berdyansk in the Sea of Azov. As the two artillery boats and the naval tugboat approached the strait, they were informed by the Russian Coast Guard that the strait was closed. The Ukrainians ignored the notice and informed Russian authorities that they intended to proceed through

62. *Id.* art. 298.

63. "ARA Libertad" (Arg. v. Ghana), Case No. 20, Order of Dec. 15, 2012, ITLOS Rep. 2012, at 332, ¶¶ 94–99, 108.

the strait, but they were blocked by Russian Coast Guard vessels and forced to turn around. As they navigated away from the strait, Russian Coast Guard vessels pursued the Ukrainian ships. During the pursuit, a Coast Guard vessel opened fire on the *Berdyansk*, wounding three crew members and damaging the vessel. The three Ukrainian vessels and their crews were then seized and detained by the Russian Coast Guard and taken to the port of Kerch. The twenty-four crew members were apprehended, detained, and charged with a violation of Article 322, Section 2, of the Criminal Code of the Russian Federation as persons suspected of having committed a crime of aggravated illegal crossing of the State border of the Russian Federation.[64]

On April 16, 2019, Ukraine filed a request for the prescription of provisional measures with ITLOS requesting that the tribunal: (1) indicate provisional measures requiring the Russian Federation to promptly release the three Ukrainian naval vessels and return them to the Ukraine; (2) suspend criminal proceedings against the twenty-four Ukrainian servicemen and refrain from initiating new proceedings; and (3) release the twenty-four servicemen and allow them to return to Ukraine. The Russian Federation refused to participate in the hearing.[65] When Russia ratified UNCLOS, it declared, in accordance with Article 298, that it did not accept compulsory dispute settlement for disputes concerning military activities and law-enforcement activities regarding the exercise of sovereign rights and jurisdiction.[66]

Regarding the military activities' exception, ITLOS determined that the case involved the use of force in the context of a law enforcement operation rather than a military operation and that Article 298(1)(b) did not apply.[67] In the tribunal's opinion, the "distinction between military and law enforcement activities cannot be based solely on whether naval vessels or law enforcement vessels are employed in the activities in question."[68] Furthermore, the distinction between military and law enforcement activities cannot "be based solely on the characterization of the activities in question by the parties to a dispute."[69] Rather, the distinction "must be based primarily on an objective evaluation of the nature of the activities in question, taking into account the

64. Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Provisional Measures, Order of May 25, 2019, ITLOS Rep. 2019, at 283, ¶¶ 30–32.

65. *Id.* ¶¶ 1, 24–25.

66. *Id.* ¶ 49.

67. *Id.* ¶¶ 74, 77.

68. *Id.* ¶ 64.

69. *Id.* ¶ 65.

relevant circumstances in each case."[70] The tribunal concluded that the arrest and detention of the Ukrainian vessels suggest that the Russian actions took place in the context of a law enforcement operation.[71] This conclusion was further supported by the subsequent proceedings and charges against the crew that they had unlawfully crossed the Russian boarder and that Russia had detained the Ukrainian vessels for failure to comply with Russian laws and regulations.[72]

Concerning the status of the Ukrainian vessels, ITLOS determined that the *Berdyansk* and *Nikopol* were warships within the meaning of Article 29 of UNCLOS and that the *Yani Kapu* was a government-owned or operated ship used only on non-commercial service as referred to in Article 96 of UNCLOS. Thus, the Ukrainian vessels enjoyed immunity under the Convention and general international law and any action affecting the immunity of warships can cause "serious harm to the dignity and sovereignty of a State and has the potential to undermine its national security."[73] Consequently, the "actions taken by the Russian Federation could irreparably prejudice the rights claimed by Ukraine to the immunity of its naval vessels and their servicemen."[74] According, the tribunal granted the following provisional measures: (1) immediate release of the Ukrainian naval vessels and return to Ukraine; (2) immediate release of the twenty-four detained Ukrainian servicemen and return to Ukraine; and (3) no action from the Russian Federation that might aggravate or extend the dispute.[75]

Thus, the terms of the Convention and its implementation have honored the long-standing customary international law principle of sovereign immunity of warships, State aircraft, and other government-owned or operated noncommercial vessels and aircraft, as well as the exclusive jurisdiction of the flag State.

E. Exclusive Economic Zone

Unlike the other maritime zones, the exclusive economic zone (EEZ) is a creation of the Convention. Articles 55 and 86 make clear that the zone is not part of the territorial sea nor the high seas, but rather is a sui generis

70. *Id.* ¶ 66.
71. *Id.* ¶ 75.
72. *Id.* ¶ 76.
73. *Id.* ¶¶ 96–102, 110.
74. *Id.* ¶ 111.
75. *Id.* ¶ 124.

regime established by the Convention.[76] The EEZ has its origins in several post-WWII proclamations by the United States,[77] Latin American States,[78] and several Arab States.[79] All of these edicts asserted jurisdiction over resources but maintained freedom of navigation in the superjacent waters of the claimed seabed areas.

The first international instrument to proclaim a two hundred nautical mile zone was the Santiago Declaration, signed by Chile, Ecuador, and Peru on August 18, 1952.[80] The driving force behind the declaration was resource exploitation, vesting sole sovereignty and jurisdiction over the waters and the seabed and subsoil (at a minimum) within two hundred nautical miles off their coasts. Unlike the previous proclamations that maintained freedom of navigation, the Santiago Declaration only allowed for the right of innocent passage through the zone.[81]

In 1970, nine Latin American States—Argentina, Brazil, Chile, Ecuador, El Salvador, Nicaragua, Panama, Peru, and Uruguay—signed the Montevideo Declaration establishing exclusive resource jurisdiction in the waters and the seabed and subsoil off their coasts out to an undefined limit.[82] The declaration did, however, maintain freedom of navigation and overflight for all ships and aircraft in "areas under their maritime sovereignty and jurisdiction."[83] Three months later, five other States—Colombia, the Dominican Republic, Guatemala, Honduras, and Mexico—joined the signatories of the

76. UNCLOS, *supra* note 16, art. 55 ("The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention"); art. 86 ("The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State").

77. Proclamation No. 2667, *supra* note 1; Proclamation No. 2668, *supra* note 3.

78. *See Presidential Declaration Concerning Continental Shelf of June 23, 1947*, EL MERCURIO, June 29, 1947 (Chile); *Presidential Decree No. 781 of August 1, 1947*, 107 EL PERUANO: DIARIO OFICIAL, No. 1983, Aug. 11, 1947 (Peru).

79. Saudi Arabia, May 28, 1949; Bahrain, June 5, 1949; Qatar, June 8, 1949; Abu Dhabi, June 10, 1949; Kuwait, June 12, 1949; Dubai, June 14, 1949; Sharjah, June 16, 1949; Ras al Khaimah, June 17, 1949; Umm al Qaiwain, June 20, 1949; Ajman, June 20, 1949; *See* Idrīs Ḍaḥḥāk, 1 LES ETATS ARABES ET LE DROIT DE LA MER 123–30 (1986) (in French).

80. Declaration on the Maritime Zone, Aug. 18, 1952, 1006 U.N.T.S. 323.

81. S. N. Nandan, *The Exclusive Economic Zone: A Historical Perspective*, www.fao.org/3/s5280T/s5280t0p.htm (last visited Nov. 18, 2022).

82. The Declaration of Montevideo on the Law of the Sea, May 8, 1970, 9 INTERNATIONAL LEGAL MATERIALS 1081 (1970).

83. Nandan, *supra* note 81.

Montevideo Declaration in approving the Lima Declaration.[84] The declaration repeated the principles of the Montevideo Declaration but added additional points, including coastal State authority to prevent contamination and other harmful effects to the marine environment that may result from resource use, exploration, and exploitation in the area.[85]

Two years later, fourteen Caribbean States—Barbados, Colombia, Costa Rica, the Dominican Republic, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Trinidad and Tobago, and Venezuela—introduced the concept of the patrimonial sea in the Declaration of Santo Domingo.[86] While repeating some of the features of the Montevideo and Lima Declarations, the Santo Domingo Declaration drew a clear distinction between State sovereignty in the territorial sea and economic jurisdiction in the patrimonial sea. This distinction included, inter alia, (1) granting coastal States sovereign rights, not sovereignty, over the resources of the patrimonial sea; (2) indicating that the patrimonial sea was adjacent to the territorial sea; (3) limiting the maximum breadth of the patrimonial sea to two hundred nautical miles; and (4) preserving freedom of navigation and overflight for all ships and aircraft, and the laying of submarine cables and pipelines, in the patrimonial sea subject to the coastal State's resource rights in the area.[87]

That same year, in June, sixteen African nations adopted the Yaoundé Conclusions, which mirrored many of the provisions of the Lima Declaration.[88] Recommendation I authorized States to establish an economic zone (of an unspecified breadth but at least including the continental shelf) beyond the territorial sea over which the State would have "exclusive jurisdiction for the purpose of control regulation and national exploitation of the living resources of the Sea and their reservation for the primary benefit of their peoples and their respective economies, and for the purpose of the prevention and control of pollution."[89]

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84. Declaration of the Latin American States on the Law of the Sea, Aug. 8, 1970, 10 INTERNATIONAL LEGAL MATERIALS 207 (1971).

85. A second point addressed in the declaration was coastal State authority over marine scientific research (MSR) in the Area. *See id.*; Nandan, *supra* note 81.

86. Declaration of Santo Domingo, June 9, 1972, 11 INTERNATIONAL LEGAL MATERIALS 892 (1972).

87. Other features addressed coastal State authority to protect the marine environment, authority over MSR, and delimitation of overlapping areas. *See id.*; Nandan, *supra* note 81.

88. Conclusions in the General Report of the African States Regional Seminar on the Law of the Sea, June 30, 1972, 12 INTERNATIONAL LEGAL MATERIALS 210 (1973) [hereinafter Yaoundé Conclusions]; Nandan, *supra* note 81.

89. Yaoundé Conclusions, *supra* note 88, ¶ I(a)(3); Nandan, *supra* note 81.

In February 1973, the Inter-American Juridical Committee adopted the Organization of American States Resolution on the Law of the Sea.[90] Unfortunately, the resolution once again blurred the distinction between sovereignty and jurisdiction, indicating that coastal State "sovereignty and jurisdiction" extended beyond the territory, internal waters, and sea area "adjacent to its coasts to a maximum distance of 200 nautical miles, as well as to the airspace above and the bed and subsoil of that sea."[91] The Organization of American States resolution was followed soon thereafter by the adoption of the Addis Ababa Declaration by the Organization of African Unity.[92] The declaration likewise provided, inter alia, for the establishment of an EEZ beyond the territorial sea to a maximum breadth of two hundred nautical miles, sovereignty over the living and non-living resources in the zone, and management of the zone without undue interference from other legitimate uses of the sea, such as freedom of navigation, overflight, and the laying of cables and pipelines.[93]

Nonetheless, despite these initiatives to define coastal authority beyond the territorial sea as economic/resource-related in nature, between 1965 and 1975 the number of States claiming a two-hundred-nautical-mile territorial sea subject to coastal State sovereignty grew from three to twenty-five nations.[94] This extension of sovereignty was driven by a desire of the less-developed States to offset their lack of capacity and capability to adequately regulate, monitor, and exploit their two-hundred-nautical-mile zones. The major maritime powers were, of course, concerned that these excessive claims could adversely affect traditional high seas freedoms of navigation and overflight beyond the territorial sea. Recognition of the EEZ as a new maritime zone by the UNCLOS III participants resulted in an acceptable solution to reconcile these competing interests and became an integral part of the "package deal" of compromises reflected in the Convention.[95]

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90. O.A.S. Inter-American Juridical Committee Resolution on the Law of the Sea of February 9, 1973, O.A.S. Doc. OAS/SER.G, CP/doc.262/73 rev. 1 (Mar. 21, 1973), 12 INTERNATIONAL LEGAL MATERIALS 711 (1973).

91. The resolution also contained provisions regarding protection of the marine environment, coastal authority over MSR, and access to resources in the Area to land-locked States. *See id.*; Nandan, *supra* note 81.

92. Declaration of the Organization of African Unity on the "Issues of the Law of the Sea" of 2 July 1973, Doc. A/CONF.62/33, at 63 (July 19, 1974) (original French).

93. *Id.*; Nandan, *supra* note 81.

94. ROACH & SMITH, *supra* note 22.

95. Nandan, *supra* note 81.

The result was Part V of the Convention, which establishes an elaborate legal regime for the EEZ that carefully balances coastal State economic interests and maritime State navigational interests. Article 56 grants coastal States "sovereign rights" for the purpose of exploring, exploiting, conserving, and managing the living and non-living natural resources of the waters superjacent to the seabed and of the seabed and its subsoil of the two-hundred-nautical-mile EEZ, as well as other activities related to the economic exploitation and exploration of the zone, such as the production of energy from the water, currents, and winds.[96] States are also granted jurisdiction over (1) the establishment and use of resource-related offshore artificial islands, installations, and structures; (2) marine scientific research (MSR); and (3) protection and preservation of the marine environment, all of which have a direct relationship with coastal States' resource rights and economic interests.[97] Nonetheless, as a counterbalance, in exercising its rights and performing its duties in the EEZ, the coastal State shall have "due regard" to the rights and duties of other States in the zone.[98]

The Convention makes clear that coastal States do not exercise sovereignty over the EEZ. The terms "sovereign rights" and "jurisdiction" were deliberately chosen to clearly distinguish between coastal State resource rights and limited jurisdiction in the EEZ on the one hand, and coastal State authority in the territorial sea on the other. Coastal States enjoy a much broader and more comprehensive right of "sovereignty" in the territorial sea.[99]

Article 58 provides clarity to the rights and duties of other States in the EEZ, providing that all States retain the high seas freedoms of "navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms."[100] However, in exercising their rights and performing their duties in the EEZ, States have a similar "due regard" obligation to respect the rights and duties of the

96. UNCLOS, *supra* note 16, arts. 56, 57.

97. *Id.* arts. 56, 60, 220, & Part XIII.

98. *Id.*

99. 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 531–44 (Satya N. Nandan & Shabtai Rosenne eds., 1993) [hereinafter VIRGINIA COMMENTARY II].

100. UNCLOS, *supra* note 16, art. 58.

coastal State.[101] The United States takes the position that enforcement of the "due regard" requirement rests with the flag State, not the coastal State.[102]

Article 58 further clarifies that the high seas provisions found in Section 1 of Part VII of the Convention—Articles 88 to 115—and other pertinent rules of international law apply equally to the EEZ to the extent they are compatible with the EEZ regime.[103] Thus, no State may claim "sovereignty" over the EEZ.[104] Flag States retain exclusive jurisdiction over their flag vessels operating in foreign EEZs, subject to coastal State jurisdiction over violations of its fisheries laws and regulations.[105] Warships and other government-owned or operated non-commercial ships retain complete immunity from the jurisdiction of any State other than the flag State.[106] The flag State or the State of nationality retain penal jurisdiction over the master and crew in the event of a collision or other navigational incident in the EEZ, and only the flag State can order the arrest and detention of the vessel.[107] All States have a duty to render assistance to persons and ships in distress at sea in the EEZ.[108] All States have a duty to prevent and punish the universal crimes of slavery,[109] piracy,[110] and unauthorized broadcasting[111] in the EEZ, to include the right of visit[112] and the right of hot pursuit.[113] Similarly, all States have a duty to cooperate to suppress the illicit traffic in narcotic drugs and psychotropic substances in the EEZ.[114] Finally, all States are entitled to lay submarine cables and pipelines on the continental shelf, subject to the coastal State's resource rights and environmental jurisdiction. States shall also have

101. *Id.*

102. U.S. President's Transmittal of the United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI to the U.S. Senate with Commentary (Oct. 7, 1994), *reprinted in* 34 INTERNATIONAL LEGAL MATERIALS 1393, 1411 (1995) ("It is the duty of the flag State, not the right of the coastal State, to enforce this 'due regard' obligation") [hereinafter U.S. Commentary on UNCLOS].

103. UNCLOS, *supra* note 16, art. 58.

104. *Id.* art. 89.

105. *Id.* arts. 73, 92.

106. *Id.* arts. 95, 96.

107. *Id.* art. 97.

108. *Id.* art. 98.

109. *Id.* art. 99.

110. *Id.* arts. 100–7.

111. *Id.* art. 109.

112. *Id.* art. 110.

113. *Id.* art. 111.

114. *Id.* art. 108.

due regard to cables or pipelines already in position and the delineation of the course for laying pipelines is subject to coastal State consent.[115]

The concept of the EEZ has proven to be one of the Convention's most important pillars. By granting coastal States sovereign rights over the resources in the zone, the EEZ put an end to two hundred nautical mile territorial sea claims, thus preserving high seas navigational rights and freedoms for all States seaward of the territorial sea. The institution of the EEZ has achieved widespread acceptance, with over 125 States claiming economic or fishing zones consistent with the Convention. Once a novelty, today it is considered by the International Court of Justice to have become part of customary law.[116]

The United States established a two hundred nautical mile EEZ consistent with UNCLOS in 1983 to "advance the development of ocean resources and promote the protection of the marine environment."[117] The U.S. proclamation specifically preserves "high seas freedoms of navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea" for all States in the U.S. EEZ.[118]

From a U.S. perspective, the EEZ regime established in Part V properly balances long-term coastal State and maritime State interests. As both a coastal and maritime State, the United States benefits immensely in both respects. The United States enjoys one of the world's largest and richest EEZs, encompassing about 4.4 million square miles of ocean with abundant living and non-living resources.[119] As a maritime nation, the United States depends on free and open access to the world's oceans for its national security and economic interests. Part V of the Convention guarantees that U.S. military and commercial ships and aircraft have critical navigational and related free-

115. *Id.* arts. 79, 112.

116. Continental Shelf (Libya v. Malta), Judgment, 1985 I.C.J. 13 (June 3).

117. Proclamation No. 5030, Exclusive Economic Zone of the United States of America, 48 Fed. Reg. 10605 (Mar. 10, 1983); *see also* Department of State, Public Notice 2237, Exclusive Economic Zone and Maritime Boundaries, Notice of Limits, 60 Fed. Reg. 43825 (Aug. 23, 1995).

118. Proclamation 5030, *supra* note 117.

119. The U.S. EEZ is second only to that of France (4.5 million square miles) if you include the EEZs of its overseas departments and territories. *See* Geoffrey Migiro, *Countries with the Largest Exclusive Economic Zones*, THE WORLD ATLAS (June 29, 2018), https://www.worldatlas.com/articles/countries-with-the-largest-exclusive-economic-zone s.html.

doms in foreign EEZs, to include the right to engage in military-related activities without coastal State notice or consent, subject to the due regard obligation.[120]

As discussed below in Section III(D), while a handful of States purport to regulate foreign military activities in their EEZ, most States agree with the U.S. position articulated at the conclusion of the UNCLOS III that:

> All States continue to enjoy in the [EEZ] traditional high seas freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to those freedoms, which remain qualitatively and quantitatively the same as those freedoms when exercised seaward of the zone. Military operations, exercises and activities have always been regarded as internationally lawful uses of the sea. The right to conduct such activities will continue to be enjoyed by all States in the exclusive economic zone. This is the import of Article 58 of the Convention.[121]

Thus, military activities, such as launching and landing aircraft, operating military devices, intelligence collection, exercises, operations, emplacement of listening or other security-related devices on the seabed, and military marine data collection (military surveys) are recognized historic high seas uses that are preserved by Article 58 for all States, subject to the obligation to have due regard to coastal State resource rights.[122]

F. Marine Scientific Research

More than 80 percent of the world's oceans remain unexplored and unmapped.[123] Nonetheless, each year scientists discover new species, like the Apolemia (a large siphonophore), and new features, like the massive coral reef pinnacle in the Great Barrier Reef.[124] The Convention promotes and

120. *See generally* U.S. Commentary on UNCLOS, *supra* note 102, at 1410–11.

121. 17 OFFICIAL RECORDS OF THE THIRD UN CONFERENCE ON THE LAW OF THE SEA 244, U.N. Doc. A/CONF.62/WS/37 and ADD.1–2 (1984) (hereinafter Statement of the United States, Third UN Conference).

122. U.S. Commentary on UNCLOS, *supra* note 102, at 1411.

123. Kattie Hogge, *4 Recently Discovered Ocean Species*, OCEAN CONSERVANCY BLOG (Jan. 22, 2021), https://oceanconservancy.org/blog/2021/01/22/5-recently-discovered-ocean-species/.

124. Danielle Hall, *The Top Ten Ocean Stories of 2020*, SMITHSONIAN MAGAZINE (Dec. 17, 2020), https://www.smithsonianmag.com/science-nature/top-ten-ocean-stories-2020-180976558/.

facilitates MSR throughout the various maritime zones, requiring States and competent international organizations to cooperate in the development and conduct of MSR.[125] Thus, the Convention has played a critical role in understanding and managing the marine environment and its resources.

The term "marine scientific research" is not defined in the Convention. However, it generally refers to "those activities undertaken in the ocean and coastal waters to expand knowledge of the marine environment and its processes."[126] It includes "physical oceanography, marine chemistry, marine biology, fisheries research, scientific ocean drilling and coring, geological and geophysical research, and other activities with a scientific purpose."[127]

States exercise sovereignty over their internal waters, territorial sea, and archipelagic waters and therefore have the exclusive right to conduct MSR in those waters.[128] Foreign-flag vessels transiting the territorial sea or archipelagic waters in innocent passage are prohibited from carrying out research or survey activities without the consent of the coastal/archipelagic State.[129] Similarly, foreign ships engaged in transit passage or archipelagic sea lanes passage may not carry out any research or survey activities in international straits or archipelagic sea lanes without prior authorization of the bordering States or the archipelagic State.[130]

Given the interrelationship between MSR and marine environment protection and resource exploitation, research activities in the EEZ and on the continental shelf require coastal State consent.[131] The researching State may presume consent has been granted and may proceed with its research project six months after the date it has provided the required information to the coastal State unless, within four months of receiving the information, the coastal State informs the researching State that consent is being withheld for any of the reasons stated below.[132] This provision should encourage coastal

125. UNCLOS, *supra* note 16, art. 239.

126. U.S. Commentary on UNCLOS, *supra* note 102, at 1439; *see generally* U.S. Department of State, Office of Ocean and Polar Affairs, *Marine Scientific Research Consent Overview*, https://www.state.gov/marine-scientific-research-consent-overview/ (last visited Nov. 18, 2022).

127. National Oceanic and Atmospheric Administration, Office of General Counsel, *Marine Scientific Research*, https://www.gc.noaa.gov/gcil_marine_research.html (updated Dec. 9, 2020) [hereinafter NOAA, *Marine Scientific Research*].

128. UNCLOS, *supra* note 16, arts. 2, 49.

129. *Id.* arts. 19(2)(j), 52, 245.

130. *Id.* arts. 40, 54.

131. *Id.* arts. 56, 77, 246.

132. *Id.* art. 252.

States to respond promptly to a request from the researching State. Beyond the EEZ and continental shelf—the high seas and the deep seabed (the "Area")—all States and competent international organizations have a right to conduct MSR.[133]

In most cases, coastal States shall grant permission for MSR projects by other States and competent international organizations to "increase scientific knowledge of the marine environment for the benefit of all mankind."[134] Consent may only be withheld if the MSR project:

> a) is of direct significance for the exploration and exploitation of natural resources . . . ;
> b) involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment;
> c) involves the construction, operation or use of artificial islands, installations and structures . . . ; [or]
> d) contains information communicated [by the researching State] . . . regarding the nature and objectives of the project which is inaccurate or if the researching State . . . has outstanding obligations to the coastal State from a prior research project.[135]

Thus, coastal State consent may not be arbitrarily withheld, thereby maximizing access for research activities while recognizing coastal State resource interests.

If a coastal State lacks sufficient grounds to withhold consent, it can still protect its interests against potential surreptitious activities—for instance, a proposed MSR project that is a subterfuge to collect military intelligence against the coastal State—by imposing conditions on the researching State. For example, the coastal State may exercise its right to participate or be represented in the MSR project, especially on board the research vessel or scientific research installation without obligation to contribute to the cost of the project.[136] The coastal State may also require the researching State to provide it with preliminary reports, as well as with the final results and conclusions after the project is completed.[137] The coastal State may additionally request the researching State to provide all data, which may be copied, and portions of samples derived from the project, as well as an assessment of

133. *Id.* arts. 87, 256, 257.
134. *Id.* art. 246
135. *Id.*
136. *Id.* art. 249.
137. *Id.*

such data, samples, and research results.[138] In this regard, the United States requires submission of a copy of all data collected during a foreign research project, as well as the project's final report, to NOAA's National Center for Environmental Information.[139]

States and competent international organizations shall publicize and disseminate knowledge resulting from their MSR activities.[140] This is consistent with U.S. policy, which advocates the free and full disclosure of the results of MSR.[141] Coastal States may, however, require their consent to release results of a project of direct significance for the exploration and exploitation of natural resources in its EEZ or on its continental shelf.[142]

The United States is a recognized leader in the conduct of MSR and has consistently promoted maximum freedom for such research. Despite the Convention's provisions on coastal State jurisdiction over MSR in the EEZ, the United States did not avail itself of that right in its 1983 Ocean Policy Statement because of the U.S. interest in encouraging MSR and avoiding unnecessary burdens.[143] However, in 2020, the United States amended its MSR policy to increase maritime domain awareness and reduce potential exposure to security, economic, and environmental risks. The new policy requires advance consent for all cases of foreign MSR in the U.S. EEZ or on its continental shelf.[144]

The Convention's MSR provisions are consistent with and advance U.S. policy, which seeks to "develop, encourage, and maintain a coordinated, comprehensive, and long-range national program" in MSR for the benefit of mankind to assist in protecting health and property; enhancing commerce, transportation, and national security; rehabilitating U.S. commercial fisheries; and increasing utilization of ocean resources.[145] U.S. MSR activities will contribute to the following objectives: (1) accelerate development of ocean resources; (2) expand human knowledge of the marine environment; (3) encourage private investment in exploration, technological development, marine commerce, and economic utilization of marine resources; (4) preserve

138. *Id.*

139. NOAA, *Marine Scientific Research*, *supra* note 127.

140. UNCLOS, *supra* note 16, art. 244.

141. U.S. Commentary on UNCLOS, *supra* note 102, at 1438–39.

142. UNCLOS, *supra* note 16, art. 249(2).

143. Ronald Reagan, President of the United States, Statement on United States Ocean Policy, 19 Weekly Comp. Pres. Doc. 383 (Mar. 10, 1983).

144. Proclamation No. 10071, Revision to United States Marine Scientific Research Policy, 85 Fed. Reg. 59165 (Sept. 18, 2020).

145. 33 U.S.C. § 1101.

the role of the United States as a leader in MSR and resource development; (5) advance education and training in marine science; (6) develop and improve the capabilities, performance, use, and efficiency of technology used to explore, research, survey, recover resources, and transmit energy in the marine environment; (7) effectively use scientific and engineering resources in close cooperation between the public and private sectors to avoid unnecessary duplication of effort and waste; and (8) cooperate with other nations and international organizations in MSR activities.[146]

Although the Convention does not define MSR, it distinguishes MSR from other forms of non-resource-related data collection, such as hydrographic surveys (to enhance safety of navigation) and military marine data collection (military surveys). For example, Article 19(2)(j) prohibits "research and survey activities" for ships engaged in innocent passage.[147] Article 40 applies a similar restriction to ships engaged in transit passage, prohibiting "marine scientific research and hydrographic survey ships" from carrying out any "research or survey activities" without prior authorization of the States bordering the strait.[148] The same prohibition applies to ships engaged in archipelagic sea lanes passage (Article 54) and ships transiting archipelagic waters in innocent passage (Article 52).[149] Finally, Article 56, Article 123, and Part XIII only refer to MSR, and not to "survey" activities.[150] Thus, while coastal/archipelagic States may prohibit ships engaged in innocent passage, transit passage, and archipelagic sea lanes passage from conducting "research and survey" activities, they may only regulate foreign MSR in the EEZ. Hydrographic surveys and military marine data collection remain high seas freedoms seaward of the territorial sea.

G. Extended Continental Shelf

In 1958, the continental shelf was defined as "the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the

146. *Id.*
147. UNCLOS, *supra* note 16, art. 19.
148. *Id.* art. 40.
149. *Id.* arts. 52, 54.
150. *Id.* arts. 56, 123, & Part XIII.

said areas."[151] The description of the continental shelf beyond the depth of two hundred meters—"to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas"—was imprecise, at best. Concerned that this ambiguity over the demarcation of the shelf's outer limits and the exploitation of its resources could lead to a new wave of excessive maritime claims, the issue was thoroughly discussed and resolved at UNCLOS III.

The result of the negotiations was Article 76, which clarifies the definition by (1) extending coastal State control over the shelf's resources out to two hundred nautical miles, to coincide with the outer limit of the EEZ and satisfy the interests of the geologically disadvantaged States; and (2) providing a detailed formula based on geological criteria to determine the extent of the shelf where its continental margin extends beyond two hundred nautical miles from the coast, to satisfy the interests of the broad-margin States.[152]

Thus, all States may claim a continental shelf of two hundred nautical miles even if the outer edge of the continental margin does not extend up to that distance.[153] Allowing all States to claim a two hundred nautical mile continental shelf places "virtually all sea-bed hydrocarbon resources under coastal state jurisdiction."[154] In situations where the continental margin extends beyond two hundred nautical miles, coastal States may claim an extended continental shelf (ECS) up to 350 nautical miles from the baseline or 100 nautical miles from the 2,500-meter depth, depending on geological criteria such as the thickness of sedimentary deposits.[155] The continental margin includes "the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise."[156] It does not, however, "include the deep ocean floor with its oceanic ridges or the subsoil thereof."[157]

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151. Convention on the Continental Shelf art.1, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

152. UNCLOS, *supra* note 16, art. 76; U.N. Division for Ocean Affairs and the Law of the Sea, *The United Nations Convention on the Law of the Sea (A Historical Perspective)*, https://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm (last visited Nov. 18, 2022).

153. UNCLOS, *supra* note 16, art. 76(1).

154. U.S. Commentary on UNCLOS, *supra* note 102, at 1426.

155. UNCLOS, *supra* note 16, art. 76(4)–(6).

156. *Id.* art. 76(3).

157. *Id.*

Notwithstanding the alternative maximum limits stated above, the outer limit of the ECS shall not exceed 350 nautical miles from the coast on submarine ridges, except that the 350-nautical-mile cap does not apply to "submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs."[158] The United States believes this exception applies to the hydrocarbon-rich Chukchi plateau and its component elevations off north Alaska. During UNCLOS III, the U.S. delegation expressed support for Article 76(6) on the understanding that the Chukchi plateau and its component elevations cannot be considered a ridge and are covered by the exception to the 350-nautical-mile cap. No State objected to the U.S. statement.[159] In addition to the Arctic Ocean, the United States can also potentially claim an ECS off its Atlantic coast, the Gulf of Mexico, and the Bering Sea.[160]

To ensure that ECS claims are consistent with the formula established in Article 76, before establishing the outer limits of its ECS the coastal State must first submit the particulars of its claim to the Commission on the Limits of the Continental Shelf along with "supporting scientific and technical data."[161] Based on the information provided, the Commission "shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf."[162] The coastal State is not bound by the Commission's recommendations, but if it establishes the outer limits of its continental shelf based on these recommendations, the delimitation shall be final and binding on all State parties and the International Seabed Authority, thus providing stability to the claim.[163] If the coastal State disagrees with the Commission's recommendations, it must make a revised or new submission to the Commission within a reasonable amount of time.[164] As of October 2022, the Commission has received 93 submissions and 9 revised submissions for review.[165]

158. *Id.* art. 76(6).

159. U.S. Commentary on UNCLOS, *supra* note 102, at 1427.

160. *Id.*

161. UNCLOS, *supra* note 16, Annex II, art. 4.

162. *Id.* art. 76(8) & Annex II, art. 6.

163. *Id.*

164. *Id.* Annex II, art. 8.

165. U.N. Division for Ocean Affairs and Law of the Sea, Submissions, Through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, https://www.un.org/Depts/los/clcs_new/commission_submissions.htm (last updated Oct. 25, 2022).

To offset the potential economic effects of the ECS, coastal States shall make annual payments or contributions in kind with respect to all exploitation of non-living resources at a site after the first five years of production of the site.[166] Beginning in the sixth year, "the rate of payment or contribution shall be 1 per cent of the value or volume of production at the site."[167] Thereafter, "the rate shall increase by 1 per cent for each subsequent year until the twelfth year and shall remain at 7 per cent thereafter."[168] Payments or contributions are made to the International Seabed Authority, which is responsible for distributing the funds to States parties to the Convention based on equitable sharing criteria, taking into account the interests and needs of developing States, in particular the least developed and land-locked States.[169] Developing States that are a net importer of a mineral resource produced from its ECS are exempt from making such payments or contributions with respect of that mineral resource.[170] U.S. government experts believe that the required payments under Article 82 are a small percentage of the total economic benefits derived by the coastal State from the resources extracted at the site and clearly serve U.S. interests.[171] The U.S. oil and gas industry likewise agrees that the revenue sharing requirement in Article 82 should not result in any additional cost to industry.[172]

III. FAILURES OF THE CONVENTION

A. Straight Baselines

Both the 1958 Convention on the Territorial Sea and Contiguous Zone and the 1982 UNCLOS allow a coastal State, in limited circumstances, to draw straight baselines along its coast from which its maritime zones are measured. The straight baseline provisions of the conventions are derived from

166. UNCLOS, *supra* note 16, art. 82(1)–(2).
167. *Id.* art. 82(2).
168. *Id.*
169. *Id.* art. 83(4).
170. *Id.* art. 83(3).
171. U.S. Commentary on UNCLOS, *supra* note 102, at 1428.
172. *Hearing on the United Nations Convention on the Law of the Sea Before the S. Comm. on Environment and Public Works*, 108th Cong. 4 (Mar. 23, 2004) (statement of Paul L. Kelly, Senior Vice President, Rowan Companies, Inc., on Behalf of the American Petroleum Institute, the International Association of Drilling Contractors, and the National Ocean Industries Association).

the 1951 *Fisheries Case (United Kingdom v. Norway)*, which concerned a straight baseline claim by Norway in the northern part of its mainland coast.[173]

The International Court of Justice was asked to ascertain whether the outer line of the "skjærgaard" that borders the western sector of the Norwegian mainland should be considered in delimiting Norway's territorial sea. The Court determined that the general rule of using the low-water mark to delimit the territorial sea "may be applied without difficulty to an ordinary coast, which is not too broken."[174] However, where the coast is

> deeply indented and cut into, as is that of Eastern Finnmark, or where it is bordered by an archipelago such as the "skjærgaard" along the western sector of the [Norwegian] coast . . . , the base-line becomes independent of the low-water mark, and can only be determined by means of a geometrical construction. . . . Such a coast . . . calls for the application of a . . . method of base-lines which, within reasonable limits, may depart from the physical line of the coast.[175]

The Court, however, determined that the use of straight baselines was not unlimited, indicating that "the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast" and that the sea areas lying within the baselines are "sufficiently closely linked to the land domain to be subject to the regime of internal waters."[176]

Consistent with the *Fisheries* case, UNCLOS restates the general rule that "the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast."[177] However, straight baselines may be used instead of the low-water line "where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity."[178] Nonetheless, the drawing of straight baselines "must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters."[179]

In determining whether the conditions in Article 7(1) apply to a given coastline, thus allowing for the use of straight baselines, UN experts agree

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173. Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. 116 (Dec. 18).
174. *Id.* at 128.
175. *Id.* at 128–29.
176. *Id.* at 133.
177. UNCLOS, *supra* note 16, art. 5.
178. *Id.* art. 7(1).
179. *Id.* art. 7(3).

that "it is necessary to focus on the spirit as well as the letter of the first paragraph of Article 7."[180] Although no objective test has been developed to identify what constitutes a "deeply indented coast," it is generally agreed "that there must be several indentations which individually would satisfy the conditions establishing a juridical bay . . . , though there may be other less marked indentations associated with them."[181] By judiciously establishing a system of straight baselines, a coastal State may be able to "eliminate potentially troublesome enclaves and deep pockets of non-territorial seas without significantly pushing seaward" territorial sea limits away from the coast.[182] In short, "it is not the purpose of straight baselines to increase the territorial sea unduly."[183]

Similarly, there is no uniform objective test that identifies what constitutes a fringe of islands along the coast—"states should be guided by the general spirit of Article 7."[184] Nevertheless, experts agree that "there must be more than one island in the fringe" and islands "arranged like a stepping-stone perpendicular to the coast" would not qualify.[185] A fringe of islands is likely to exist in two situations: (1) islands that appear to form a unity with the mainland, and (2) islands that mask a large portion of the coast.[186] The fringe of islands must also be in the immediate vicinity of the coast. Experts agree that a fringe twenty-four nautical miles from the coast would satisfy the requirement—a fringe one hundred nautical miles from the coast would not.[187]

As a general rule, the United States believes that, to comply with these requirements, SBL segments must (1) not "depart to any appreciable extent from the general direction of the coastline," by reference to general direction lines that in each locality do not exceed sixty nautical miles in length; (2) not exceed twenty-four nautical miles in length; and (3) result in sea areas situated landward of the straight baseline segments that are "sufficiently closely linked to the land domain to be subject to the regime of internal waters."[188]

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180. U.N. OFFICE FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, BASELINES: AN EXAMINATION OF THE RELEVANT PROVISIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA ¶ 35, U.N. Sales No. E.88.V.5 (1989).

181. *Id.* ¶ 36.

182. *Id.* ¶ 38.

183. *Id.* ¶ 39.

184. *Id.* ¶ 42.

185. *Id.* ¶ 43.

186. *Id.* ¶¶ 44–45.

187. *Id.* ¶ 46.

188. U.S. Commentary on UNCLOS, *supra* note 102, at 1403.

UNCLOS further limits drawing straight baselines to and from low-tide elevations, "unless lighthouses or similar installations which are permanently above sea level have been built on them or" in cases where the drawing of straight baselines to and from low-tide elevations "has received general international recognition."[189] Straight baselines may also not be applied "in such a manner as to cut off the territorial sea of another State from the high seas or an [EEZ]."[190] Finally, when drawing straight baselines, consideration must be given to "economic interests peculiar to the region . . . , which are clearly evidenced by long usage."[191]

Straight baselines may also be used "where because of the presence of a delta and other natural conditions the coastline is highly unstable" and "across the mouth of a river between points on the low-water line of its banks" if the "river flows directly into the sea."[192] Finally, a straight baseline that does not exceed twenty-four nautical miles, drawn between the low-water marks of the natural entrance points of a juridical bay, can be used to close off the bay. If the "distance between the low-water marks of the natural entrance points . . . exceeds 24 [nautical miles]," a straight baseline of twenty-four nautical miles can "be drawn within the bay . . . to enclose the maximum area of water . . . possible with a line of that length."[193]

Thus, one reason for allowing the use of straight baselines is to permit coastal States to enclose waters that, because of their close relationship with the land, have the character of internal waters. Coastal States may also use straight baselines to "eliminate complex patterns, including enclaves, in its territorial sea, that would otherwise result from the use" of the low-water line.[194] Therefore, straight baselines are the exception, not the rule, and should be used sparingly.

Objective and precise application of the Convention's baseline rules would prevent excessive claims. Nonetheless, despite mirroring the International Court of Justice decision in the *Fisheries* case, the straight baseline provisions are the most abused articles of the Convention by States seeking to illegally expand their jurisdiction over waters adjacent to their coasts. Because maritime zones are measured from the baseline, excessive straight baselines significantly extend coastal State jurisdiction seaward in a manner

189. UNCLOS, *supra* note 16, art. 7(4).
190. *Id.* art. 7(6).
191. *Id.* art. 7(5).
192. *Id.* arts. 7(2), 9.
193. *Id.* art. 10.
194. U.S. Commentary on UNCLOS, *supra* note 102, at 1403.

that is detrimental to freedom of navigation and overflight and other lawful uses of the sea.[195] Areas that were once territorial seas or high seas are now considered by coastal States as internal waters where navigational rights do not apply.

To meet the criteria of being "deeply indented and cut into," the United States considers that the coastline must meet all of the following characteristics: (1) there exists at least three deep indentations; (2) the indentations are near one another; and (3) the depth of penetration of each indentation from the proposed closing line at its entrance to the sea is greater than half the length of the straight baseline segment.[196]

The United States additionally considers that a "fringe of islands along the coast in its immediate vicinity" must meet all the following requirements before straight baselines can be drawn: (1) the most landward point of each island lies no more than twenty-four nautical miles from the mainland; (2) each island to which a straight baseline is to be drawn is not more than twenty-four nautical miles apart from the island from which the straight baseline is drawn; and (3) the islands, as a whole, mask at least 50 percent of the mainland in any given locality.[197]

Applying these international rules, the United States has rejected over fifty straight baseline claims made by coastal States as inconsistent with UNCLOS and customary international law.[198] These illegal claims either (1) do not meet the two geographic conditions in UNCLOS required for drawing straight baselines; (2) enclose waters that do not have a close relationship with the land but rather reflect the characteristics of territorial seas or high seas; or (3) are inordinately long, well in excess of twenty-four nautical miles.

B. Mid-Ocean Islands Archipelagoes

As discussed above, only island nations that meet the water-to-land ratio of Article 47 can claim archipelagic status. Continental States may not assert archipelagic status for their claimed mid-ocean islands. Nonetheless, despite the clear language in UNCLOS, several continental States illegally purport to draw straight baselines around their claimed mid-ocean island territories and dependencies. These claims are akin to an assertion of archipelagic status for

195. *Id.* at 7.
196. *Id.* at 9.
197. *Id.*
198. *See* MCRM, *supra* note 24.

these features and are therefore inconsistent with contemporary international law.

China established straight baselines around the Paracel Islands in 1996.[199] In 2012, Beijing declared straight baselines connecting several features in the Senkaku Islands (Diaoyu Dao).[200] In both cases, the standards for drawing what is, in effect, archipelagic baselines around these mid-ocean island groups are not met.[201] The proper baseline is the low-water line of the various features. In addition to the United States, Japan has also protested China's straight baseline claim in the Senkakus, indicating that it is not grounded in international law, including UNCLOS.[202]

Denmark initially declared straight baselines that are, in effect, archipelagic baselines around the Faroe Islands in December 1976.[203] The United States protested this illegal claim in 1991 and has conducted operational assertions challenging its validity under the U.S. Freedom of Navigation Program.[204] Denmark slightly amended one of the straight baseline segments in 2002, but the claim remains inconsistent with UNCLOS.[205] Like Denmark,

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199. Declaration of the Gov't of the People's Republic of China on the Baselines of the Territorial Sea (May 15, 1996), https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1996_Declaration.pdf.

200. Statement of the Gov't of the People's Republic of China on the Baselines of the Territorial Sea of Diaoyu Dao and Its Affiliated Islands (Sept. 10, 2012), https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/chn_mzn89_2012_e.pdf.

201. U.S. DEPT' OF STATE, BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, LIMITS IN THE SEAS NO. 117, STRAIGHT BASELINES CLAIM: CHINA 8 (July 9, 1996).

202. Permanent Mission of Japan to the Secretary-General of the United Nations, Note Verbale PM/12/303, Sept. 24, 2012, *reprinted in* UNITED NATIONS, LAW OF THE SEA BULLETIN NO. 80, at 39 (2013), http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin80e.pdf.

203. Denmark, Ordinance No. 599 of 21 December 1976 on the Delimitation of the Territorial Sea around the Faroe Islands, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DNK_1976_Ordinance599.pdf.

204. *See* MCRM, *supra* note 24.

205. *See* Gov't of Denmark, Decree on the Coming into Force of the Act on the Delimitation of the Territorial Sea for the Faroe Islands, Decree No. 240 (Apr. 30, 2002), *reprinted in* UNITED NATIONS, DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, LAW OF THE SEA BULLETIN NO. 68, at 13 (2008); Decree to Amend the Decree on the Fishing Territory of the Faroe Islands, Decree No. 241 (Apr. 30, 2002), *in* LAW OF THE SEA BULLETIN NO. 68, *supra,* at 14; Exec. Ord. on the Delimitation of the Territorial Sea of the Faroe Islands, Exec. Ord. No. 306 (May 16, 2002), *in* LAW OF THE SEA BULLETIN NO. 68, *supra*, at 15.

France also established straight baselines that are equivalent to archipelagic baselines around New Caledonia.[206] These baselines do not meet the criteria established in UNCLOS for the use of straight baselines and as a continental State France may not establish archipelagic baselines around its mid-ocean dependencies.

Ecuador designated straight baselines along part of its mainland coast and around all the Galápagos Islands (Archipélago de Colón) in 1971.[207] The straight baseline system consists of five points on or near the mainland and eight points around the Galápagos Islands. Based on accepted State practice and criteria established in international law for the drawing of straight baselines, U.S. experts concluded that the entire straight baseline system was questionable and that archipelagic baselines could not be constructed around the Galápagos.[208] The United States protested the archipelagic baselines claim in 1986.[209] When Ecuador ratified UNLCOS in 2012, it filed a declaration reiterating, inter alia, the validity of Supreme Decree No. 959-A, which established archipelagic baselines around the Galápagos.[210] The declaration additionally confirmed that Ecuador "exercises full jurisdiction and sovereignty over the Galapagos Marine Reserve, . . . as well as over the Particularly Sensitive Sea Area and the 'area to be avoided', both established by the International Maritime Organization."[211] The United States has operationally challenged these claims under the Freedom of Navigation Program, most recently in 2014.[212]

The 1920 Spitsbergen (Svalbard) Treaty grants Norway full and absolute sovereignty over the Archipelago of Spitsbergen but provides free access and

206. *See* Gov't of France, Decree Defining the Straight Baselines and Closing Lines of Bays Used to Determine the Baselines from which the Breadth of the French Territorial Waters Adjacent to New Caledonia is Measured, Decree No. 2002-827 (May 3, 2002), *reprinted in* UNITED NATIONS, DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, LAW OF THE SEA BULLETIN NO. 53, at 58 (2004).

207. *See* Gov't of Ecuador, Supreme Decree No. 959-A (June 28, 1971), https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ECU_1971_Decree.pdf (prescribing straight baselines for the measurement of the territorial sea).

208. U.S. DEPT' OF STATE, BUREAU OF INTELLIGENCE AND RESEARCH, LIMITS IN THE SEAS NO. 42, STRAIGHT BASELINES: ECUADOR 6, 8, 10 (May 23, 1972).

209. MCRM, *supra* note 24.

210. Declaration by Ecuador upon Ratification of the 1982 United Nations Convention on the Law of the Sea ¶ VI (Sept. 24, 2012), U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en (scroll down the list to Ecuador).

211. *Id.* ¶ VIII.

212. MCRM, *supra* note 24.

the right to engage in economic activities to the nationals of all parties to the treaty.[213] On June 7, 2001, Norway deposited a list of geographical coordinates with the United Nations depicting the points for drawing straight baselines around Svalbard for measuring the width of the territorial sea.[214] These illegal straight baselines have the practical effect of creating internal waters that should be considered territorial seas and extending the territorial sea around Svalbard into areas where high seas freedoms of navigation and overflight would apply. As a continental State, Norway may not draw archipelagic baselines around Svalbard.

In 1985, Portugal established straight baselines for the coasts of the islands of the Autonomous Region of the Azores.[215] When Portugal ratified UNCLOS in 1997, it reaffirmed its rights under domestic law with respect of the mainland and the archipelagos and islands incorporated therein, "for the purposes of delimitation of the territorial sea, the continental shelf and the exclusive economic zone."[216] These straight baselines in effect establish archipelagic baselines and are therefore inconsistent with international law. The United States does not recognize these claims and protested them in 1986.[217]

The United Kingdom has similarly drawn illegal baselines around the Falkland Islands. The Falkland Territorial Sea Order establishes straight

213. Treaty Relating to Spitsbergen (Svalbard) arts. 1–3, Feb. 9, 1920, 43 Stat. 1892, T.S. 686, 2 Bevans 269, 2 L.N.T.S. 7.

214. Gov't of Norway, M.Z.N. 38, 2001, LOS (Maritime Zone Notification) June 8, 2001), Deposit by Norway of the List of Geographical Coordinates of Points Pursuant to Art. 16, Para. 2, of the Convention, *reprinted in* UNITED NATIONS, DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, LAW OF THE SEA INFORMATION CIRCULAR (LOSIC) NO. 14, at 34 (Oct. 2001); Gov't of Norway, Regulations Relating to the Limits of the Norwegian Territorial Sea Around Svalbard, Laid Down by Royal Decree of 1 June 2001, *reprinted in* UNITED NATIONS, DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, LAW OF THE SEA BULLETIN NO. 46, at 72 (2001).

215. Gov't of Portugal, Decree-Law No. 495/85, art. 1 (Nov. 29, 1985), https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PRT_1985_Decree.pdf.

216. Declaration by Portugal upon Ratification of the 1982 United Nations Convention on the Law of the Sea ¶ 1 (Nov. 3, 1997), U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec (scroll down the list to Portugal).

217. MCRM, *supra* note 24.

baselines from which the breadth of the territorial sea adjacent to the Falkland Islands is measured.[218] The straight baseline system is comparable to an archipelagic baseline system. It employs twenty-two turning points to join the outermost points of the outermost islands and reefs. Additionally, it complies with the water-to-land ratio prescribed in Article 47 of UNCLOS.[219] As a continental State, the United Kingdom may not claim archipelagic status for its overseas mid-ocean dependencies.

UNCLOS is crystal clear—only island nations that meet the water-to-land ratio stipulated in Article 47 can claim archipelagic status and draw archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago. Thus, continental nations and island States that do not meet the requirements of Article 47 may not assert archipelagic status for their claimed mid-ocean islands. Despite the unambiguous UNCLOS language and the status of the above nations as parties to the Convention, UNCLOS has failed to deter these States from illegally drawing, what are in effect, archipelagic baselines around their claimed mid-ocean possessions. These claims have the potential of affecting adversely freedom of navigation and overflight and other lawful uses of the seas.

C. Historic Bays

The emergence of the concept of "historic waters" originated in the unsettled status of international rules related to the maximum breadth of the territorial sea and the opening of bays. Given this uncertainty, States asserted jurisdiction over areas adjacent to their coasts that were considered vital for their national security and economic well-being. With the extension of the territorial sea to twelve nautical miles, the creation of the two-hundred-nautical-mile EEZ, and a clear rule on closing lines for juridical bays, the rationale for claiming historic waters—security and economic concerns—no longer exists.[220]

Nonetheless, Article 10 of the Convention exempts historic bays from the straight baseline requirement for juridical bays, which limits the closing

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218. Gov't of U.K., Falkland Islands (Territorial Sea) Order 1989 No. 1993, art. 3 (Nov. 1, 1989), https://www.legislation.gov.uk/uksi/1989/1993/introduction/made.

219. Patrick H. Armstrong & Vivian L. Forbes, *The Maritime Limits of the Falkland Islands*, 1 BOUNDARY AND SECURITY BULLETIN 73 (1993).

220. U.N. Secretariat, *Juridical Regime of Historic Waters, Including Historic Bays*, U.N. Doc. A/CN.4/143, ¶¶ 36, 81 (Mar. 9, 1962), *reprinted in* 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1962, at 1 (1964) [hereinafter U.N. Doc. A/CN.4/143].

line to twenty-four nautical miles.[221] The Convention also recognizes in Article 15 that historic title can affect the delimitation of the territorial sea between two States with opposite or adjacent coasts.[222] Disputes involving historic bays or titles are also exempt from compulsory dispute settlement under Part XV.[223] The Convention fails, however, to provide guidance on the criteria required to establish historic claims. As a result, several States continue to claim historic title over vast areas of the seas that adversely affect freedom of navigation and overflight.

There is no uniform international standard for establishing a valid claim to historic waters and bays. However, a 1962 study by the UN Secretariat concluded that, based on State practice, there are three factors that should be considered in determining whether a title to historic waters exists: (1) the effective exercise of sovereignty over the area by the claiming State; (2) the exercise of sovereignty by the claiming State must have continued over a considerable time to have developed into a usage; (3) the attitude of foreign States to the activities of the claiming State in the area must have been such that it can be characterized as an attitude of general toleration.[224] The burden of proof to establish these factors rests with the claiming State.[225] Repeating these standards in the Convention could have influenced States to roll-back their excessive historic waters claims.

First, to be effective, a claim of sovereignty must be "expressed by deeds and not merely by proclamations."[226] That does not mean that the claiming State must take "concrete actions to enforce its laws and regulations" within the claimed area.[227] However, it is essential that, to the extent action by the claiming State is "necessary to maintain authority over the area, such action was undertaken."[228]

Second, the activity from which the required usage emerges must be a repeated or continued activity by the claiming State. In other words, the claiming State "must have kept up its exercise of sovereignty over the area for a considerable time."[229] There is not consensus, however, on the exact

221. UNCLOS, *supra* note 16, art. 10.

222. *Id.* art. 15.

223. *Id.* art. 298.

224. U.N. Doc. A/CN.4/143, *supra* note 220, ¶¶ 185–86.

225. *Id.* ¶ 188.

226. *Id.* ¶ 98 (quoting Maurice Bourquin, *Les baies historiques*, *in* MÉLANGES GEORGES SAUSER-HALL 43 (1952)).

227. *Id.* ¶ 99.

228. *Id.*

229. *Id.* ¶ 103.

amount of time "necessary to build the usage on which the historic title" is based.[230]

Finally, the claiming State must show acquiescence by other States in the claiming State's exercise of sovereignty over the area in question. Nonetheless, acquiescence does not require that other States affirmatively consent to the claim—to do so would render reliance on a historic title superfluous.[231] The study concluded that inaction by foreign States over a considerable period is sufficient to permit the emergence of a historic title.[232] This conclusion is consistent with the decision of the International Court of Justice in the *Fisheries* case, which held that the consistent and prolonged application of the Norwegian system of delimiting its fisheries zone, combined with the general toleration of foreign States, gave rise to a historic right to apply the system.

> The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it. . . .
>
> . . .
>
> The Court notes that in respect of a situation which could only be strengthened with the passage of time, the United Kingdom Government refrained from formulating reservations. The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.[233]

The United States takes the contrary view, requiring an "actual showing of acquiescence" by foreign States to a historic claim, "as opposed to a mere absence of opposition."[234] In other words, an actual showing of acquiescence requires a failure to protest what is clearly known to a foreign State as a historical claim. Of the nineteen claims to historic bays, the United States has protested and/or operationally challenged seventeen on the grounds that they do not qualify as historic waters under international law.[235]

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230. *Id.* ¶ 104.

231. *Id.* ¶ 107.

232. *Id.* ¶¶ 110, 112.

233. Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. 116, 138–39 (Dec. 18).

234. U.S. Commentary on UNCLOS, *supra* note 102, at 1404; ROACH & SMITH, *supra* note 22, at 19.

235. *See* MCRM, *supra* note 24.

The Rio de la Plata Estuary was identified as a historic bay in a 1957 UN study.[236] Four years later, Argentina and Uruguay issued a Joint Declaration drawing a 120-nautical-mile straight baseline joining Punta del Este in Uruguay to Punta Rasa del Cabo San Antonio in Argentina, thereby enclosing the Rio de la Plata Estuary as internal waters.[237] The closing line was reaffirmed in the 1973 Argentina-Uruguay maritime boundary agreement,[238] as well as in Argentine domestic legislation in 1991.[239] Although none of the aforementioned documents make specific reference to historic waters, both Argentina and Uruguay consider the Rio de la Plata Estuary to be a historic bay. Accordingly, the United States protested the claim in 1963.[240] The United Kingdom (December 1961) and the Netherlands (June 1962) have likewise protested the claim.[241]

Australia asserted historic water claims for Anxious, Encounter, Lacepede, and Rivoli Bays in two 1987 proclamations.[242] These claims were reasserted in 2006[243] and 2016.[244] The United States protested these claims in 1991, indicating that it was unaware that Australia had previously claimed

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236. U.N. Secretariat, *Historic Bays*, ¶ 43, U.N. Doc. A/CONF.13/1 (Sept. 30, 1957) [hereinafter A/CONF.13/1].

237. U.S. DEP'T OF STATE, BUREAU OF INTELLIGENCE AND RESEARCH, LIMITS IN THE SEAS NO. 44, STRAIGHT BASELINES: ARGENTINA 2 (Aug. 10, 1972).

238. Treaty Concerning the Rio de la Plata and the Corresponding Maritime Boundary, Uru.-Arg., art. 1, Nov. 19, 1973, 1295 U.N.T.S. 293, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/URY-ARG1973MB.PDF.

239. Gov't of Argentina, Act No. 23.968, arts. 1, 2 (Aug. 14, 1991), https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ARG_1991_23968.pdf.

240. MCRM, *supra* note 24.

241. LIMITS IN THE SEAS NO. 112, *supra* note 33, at 13.

242. Gov't of Australia, Proclamation of 19 March 1987, Pursuant to Section 8 of the Seas and Submerged Lands Act 1973, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/aus_1987_proclamation_sec8.pdf; Gov't of Australia, Proclamation of 19 March 1987, Pursuant to Section 7 of the Seas and Submerged Lands Act 1973, Table 1A, https://www.un.org/Depts/los/LEGISLATIONAND TREATIES/PDFFILES/aus_1987_proclamation_sec7.pdf.

243. Gov't of Australia, Seas and Submerged Lands (Territorial Sea Baseline) Proclamation 2006, Schedule 2, Part 2 (Feb. 15, 2006), https://www.legislation.gov.au/Details/F2006L00525; Seas and Submerged Lands (Historic Bays) Proclamation 2006, §§ 5–9 (Feb. 15, 2006), https://www.legislation.gov.au/Details/F2006L00526.

244. Gov't of Australia, Seas and Submerged Lands (Territorial Sea Baseline) Proclamation 2016, Schedule 2, Part 2 (Mar. 10, 2016), https://www.legislation.gov.au/Details/F2016L00302; Seas and Submerged Lands (Historic Bays) Proclamation 2016, §§ 6–10 (Mar. 10, 2016), https://www.legislation.gov.au/Details/F2016L00301.

these bays as historic and that the claim therefore did not rise to the level of being open and notorious.[245] The U.S. protest also noted that none of these bays were referenced in the 1957 UN study on historic bays, even though the study mentioned other bays Australia had claimed as historic.[246]

Cambodia and Vietnam signed an agreement in July 1982 that, inter alia, claimed part of the Gulf of Thailand as historic waters located between the coast of Kien Giang Province, Phu Quoc Island, and the Tho Chu islands on the Vietnamese side and the coast of Kampot Province and the Poulo Wai islands on the Cambodian side.[247] Pending further negotiations, the parties agreed that the 1939 Brévié Line would be used as the dividing line for the islands within the historic waters.[248] The United States protested the claim in 1987 indicating that the claim was first made internationally on July 7, 1982, notwithstanding the assertion that the waters had belonged to Vietnam and Cambodia for a "very long time."[249] The brief period of time that elapsed since the claim's promulgation was "insufficient to meet the second criterion for establishing a claim to historic waters" and did not permit sufficient time for acquiescence by the community of nations to mature.[250] Moreover, there is no evidence that Vietnam or Cambodia exercised effective authority over the claimed historic waters either before or after the date of the agreement. Finally, the United States pointed out that it had not ac-

245. MCRM, *supra* note 24; ROACH & SMITH, *supra* note 22, at 39–41; Maritime Rights and Freedoms of International Community, 1991–1999 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, vol. II, ch. 12, §A(4), at 1578–1580 (Sally J. Cummins & David P. Stewart eds., 2005), https://2009-2017.state.gov/documents/organization/139394.pdf (quoting from a telegram from the U.S. Dep't of State to the U.S. Embassy in Canberra, dated Apr. 6, 1991, relating to the U.S. diplomatic protest of Australia's historic bay claims in South Australia).

246. ROACH & SMITH, *supra* note 22, at 40; 1991–1999 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, *supra* note 245, at 1579; A/CONF.13/1, *supra* note 236, ¶ 43.

247. Ramses Amer & Nguyen Hong Thao, *Regional Conflict Management: Challenges of the Border Disputes of Cambodia, Laos, and Vietnam*, 2 AUSTRIAN JOURNAL OF SOUTH-EAST ASIAN STUDIES, no. 2, 2009, at 53, 55.

248. *Id.*

249. LIMITS IN THE SEAS 112, *supra* note 33, at 13; United States Mission to the United Nations at New York Note Dated June 17, 1987, *reprinted in* UNITED NATIONS, DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, LAW OF THE SEA BULLETIN NO. 10, at 23 (1987).

250. *Id.*

quiesced in the claim and viewed the claim to be without foundation in international law.[251] Thailand, Singapore, and Germany have also protested the claim.[252]

The Dominican Republic claimed Escocesa Bay (between Cabo Francés Viejo and Cabo Cabrón) and Santo Domingo Bay (between Punto Palenque and Cabo Caucedo) as historic waters in 1952.[253] Neither bay, however, appears in the 1957 UN study on historic bays—only the Bays of Samaná, Ocoa, and Neyba are listed in the Dominican entry.[254] So it is questionable whether the claim was asserted in 1952.[255] The claim was, nonetheless, reaffirmed by the Dominican Republic in 1967[256] and 2007.[257] In 2007, the United States and the United Kingdom filed a joint demarche objecting to the claim pending further examination.[258] It is unclear why the United States and United Kingdom waited forty years to object to the claim. Applying the rationale of the *Fisheries* case, a tribunal could find that, given the notoriety

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251. *Id.*

252. LIMITS IN THE SEAS NO. 112, *supra* note 33, at 14; Letter Dated 9 December 1985 from the Permanent Representative of Thailand to the United Nations addressed to the Secretary-General, Annex, U.N. Doc. A/40/1033 (Dec. 12, 1985).

253. *See* U.S. DEPT' OF STATE, BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, OFFICE OF OCEAN AFFAIRS, LIMITS IN THE SEA NO. 36, NATIONAL CLAIMS TO MARITIME JURISDICTION 44 (8th rev. May 25, 2000) (description of Dominican Republic Law No. 3342 of July 13, 1952).

254. A/CONF.13/1, *supra* note 236, ¶ 43.

255. U.S. DEP'T OF STATE, BUREAU OF INTELLIGENCE AND RESEARCH, LIMITS IN THE SEAS NO. 5, STRAIGHT BASELINES: DOMINICAN REPUBLIC 5 (Jan. 25, 1970).

256. Dominican Republic, Act No. 186 of 13 September 1967 on the Territorial Sea, Contiguous Zone, Exclusive Economic Zone and Continental Shelf art. 2(1), https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DOM_1967_Act.pdf.

257. Dominican Republic, Act 66-07, art. 7 (May 22, 2007), https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DOM_2007_Act_frombulletin65.pdf.

258. Text of a Joint Demarche Undertaken by the United Kingdom of Great Britain and Northern Ireland and the United States of America in Relation to the Law of the Dominican Republic Number 66-07 of 22 May 2007, Done on 18 October 2007, *reprinted in* U.N., DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, LAW OF THE SEA BULLETIN NO. 66, at 98 (2007); U.S. DEPT' OF STATE, BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, LIMITS IN THE SEAS NO. 130, DOMINICAN REPUBLIC: ARCHIPELAGIC AND OTHER MARITIME CLAIMS AND BOUNDARIES 16 (Jan. 31, 2014).

of the claim and the prolonged abstention in contesting the claim, the Dominican Republic is entitled to enforce the claim against the United States and the United Kingdom.

In June 1974, India and Sri Lanka entered into a bilateral agreement establishing a boundary line in the "historic waters" from Palk Strait to Adam's Bridge.[259] Two years later, India and Sri Lanka signed a second agreement determining the maritime boundary between the two countries in the Gulf of Mannar and the Bay of Bengal.[260] The parties agreed that each would excise sovereignty over the "historic waters" and territorial sea on its side of the boundary.[261] The boundary in the Gulf of Mannar was adjusted in 1976.[262] Earlier that year, India enacted enabling legislation to specify the limits of its historic waters.[263] In 2009, India provided notification to the international community of the limits of its historic waters reflected in the bilateral agreements with Sri Lanka in the Palk Strait, Palk Bay, and Gulf of Mannar.[264] The United States first protested the claim in 1983[265] and conducted numerous operational challenges under the Freedom of Navigation Program throughout the 1990s.[266]

In 1977, Italy drew a closing line from Santa Maria di Leuca to Punta Alice, claiming the Gulf of Taranto as historic waters.[267] The United States

259. Boundary in Historic Waters and Related Matters, India-Sri Lanka, art. 1, June 26, 1974, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/LKA-IND1974BW.PDF.

260. Maritime Boundary in the Gulf of Mannar and the Bay of Bengal and Related Matters, India-Sri Lanka, art. 1, Mar. 23, 1976, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/LKA-IND1976MB.PDF.

261. *Id.* art. 5.

262. Supplementary Agreement on the Extension of the Maritime Boundary in the Gulf of Mannar from Position 13 M to the Trijunction Point Between Sri Lanka, India, and Maldives (Point T), India-Sri Lanka, (Nov. 22, 1976), https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/LKA-IND1976TP.PDF.

263. India, The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, Act No. 80 of 28 May 1976, art. 8(1), https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/IND_1976_Act.pdf.

264. India, Notification of the Ministry of External Affairs of 11 May 2009 Concerning the Baseline System, *reprinted in* UNITED NATIONS, DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, LAW OF THE SEA BULLETIN NO. 71, at 26 (2010).

265. ROACH & SMITH, *supra* note 22, at 43.

266. MCRM, *supra* note 24.

267. Italy, Decree of the President of the Republic No. 816 of 26 April 1977 Containing Regulations Concerning the Application of Law No. 1658 of 8 December 1961 Authorizing Accession to the Convention on the Territorial Sea and the Contiguous Zone, Adopted at

protested the claim in 1984, 1986, and 1987, indicating that Italy's claim did not meet the criteria for establishing a historic bay.[268] The United Kingdom objected to the claim in 1981.[269]

One of the most notorious historic bay claims is the Gulf of Sidra (Surt). In 1973, Libya established a three hundred nautical mile closing line across the gulf, along 32 degrees and 30 minutes parallel of north latitude, claiming the entire gulf as internal waters based on historic title.[270] The United States protested the action the following year, indicating that the claim did not meet the requirements in international law for historic waters. The U.S. protest also denounced the claim as a unilateral attempt by Libya to appropriate a large portion of the high seas that would encroach on the long-standing principle of freedom of the seas.[271] In 1985, the United States reiterated its objection that the Gulf of Sidra constituted internal waters, rejecting the unlawful interference with freedom of navigation and overflight and other related high seas freedoms.[272] U.S. naval and air forces have additionally conducted numerous operational challenges to Libya's illegal claim (1981–1984, 1986, 1997–1998, 2000, and 2013).[273] Libya's claim has additionally been rejected by Australia (1981), France (1986), Germany (1986), Italy (1976), Norway (1986), Spain (1986), and the United Kingdom (1986).[274]

Panama claimed sovereignty over the Gulf of Panama as a historic bay in Law No. 9 of January 30, 1956.[275] Panama reiterated its claim when it

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Geneva on 29 April 1958, and Giving Effect to that Convention, art. 1, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ITA_1977_Decree.pdf.

268. MCRM, *supra* note 24; *see also* ROACH & SMITH, *supra* note 22, at 44–45.

269. ROACH & SMITH, *supra* note 22, at 45 n.22.

270. Libyan Arab Republic, Information Concerning the Jurisdiction of the Gulf of Surt, Oct. 19, 1973, *reprinted in* United Nations, National Legislation and Treaties Relating to the Law of the Sea, ST/LEG/SER.B/18, at 26 (1976).

271. *See* U.S. Dep't of State File No. P74 0020-2088, 1974 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, at 293 (Arthur W. Rovine ed., 1975); LIMITS IN THE SEAS NO.112, *supra* note 33, at 17–18.

272. Communication Transmitted to the Permanent Missions of the States Members of the United Nations at the Request of the Permanent Representative of the United States to the United Nations (Ref. NV/85/11), July 10,1985, *reprinted in* United Nations, Division for Ocean Affairs and the Law of the Sea, Law of the Sea Bulletin No. 6, at 40 (1985).

273. MCRM, *supra* note 24.

274. LIMITS IN THE SEAS NO. 112, *supra* note 33, at 18; ROACH & SMITH, *supra* note 22, at 45 n.25.

275. LIMITS IN THE SEAS NO. 112, *supra* note 33, at 18; ROACH & SMITH, *supra* note 22, at 49.

ratified UNCLOS in 1996, declaring that the waters were a historic Panamanian bay with a two hundred kilometer imaginary closing line joining Punta Mala and Punta de Jaqué.[276] A similar declaration was made in 2003 when Panama ratified the Convention on the Protection of the Underwater Cultural Heritage, asserting sovereignty over the gulf that was by nature and history a Panamanian bay, with an area of about thirty thousand square kilometers.[277] Both Colombia[278] and Costa Rica[279] acknowledge the existence of the claim and have not objected. The United States protested the validity of the claim in 1956 and again in 1988, indicating that the Gulf of Panama does not qualify as a historic bay under international law because it was not based on a long-standing claim and had not received the requisite treatment by the international community.[280] Moreover, there was no evidence that the gulf had been recognized as a historic bay when Panama separated from Colombia in 1903, nor had anything occurred since 1903 that would confer the gulf the character of a historic bay.[281]

In 1957, the Soviet Union (U.S.S.R.) first claimed Peter the Great Bay as a historic bay.[282] In 1984, the U.S.S.R. declared straight baselines along much of its coast, including a 106-nautical-mile closing line across Peter the Great

276. Declaration by Panama upon Ratification of the 1982 United Nations Convention on the Law of the Sea, July 1, 1996, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en (scroll down to entry for Panama); Panama, Law No. 38 of 4 June 1996 Ratifying the United Nations Convention on the Law of the Sea, https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/PAN_1996_Law.pdf.

277. Declaration by Panama upon Ratification of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage (with Annex), May 20, 2003, 2562 U.N.T.S. 9 (2012).

278. Treaty on the Delimitation of Marine and Submarine Areas and Related Matters, Colom.-Pan., art. 3, Nov. 20, 1976, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/PAN-COL1976DM.PDF.

279. Treaty Concerning Delimitation of Marine Areas and Maritime Cooperation, Costa Rica-Pan., art. 3, Feb. 2, 1980, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/CRI-PAN1980MC.PDF.

280. LIMITS IN THE SEAS NO. 112, *supra* note 33, at 19; MCRM, *supra* note 24.

281. LIMITS IN THE SEAS NO. 112, *supra* note 33, at 19.

282. U.S. DEP'T OF STATE, BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, LIMITS IN THE SEAS NO. 107, STRAIGHT BASELINES: U.S.S.R. 4 (Sept. 30, 1987).

Bay, thus renewing the claim that these waters were a historic bay.[283] The United States protested the Soviet claim in 1957 and 1958. Canada (1957), France (1957), Germany (1958), Japan (1958), the Netherlands (1957), Sweden (1957), and the United Kingdom (1957) also protested the claim at that time.[284] In May 1982, the USS *Lockwood* (FF 1064) was navigating in the bay and was ordered to leave the area by Soviet naval units. The Soviet unlawful interference with freedom of navigation prompted the United States to renew its objection that Peter the Great Bay did not qualify as a historic bay under international law.[285] The U.S. Navy has operationally challenged this illegal claim on multiple occasions, the most recent in November 2020 by the USS *John S. McCain* (DDG 56).[286]

In addition to the Gulf of Thailand discussed above, Vietnam also claims sovereignty over the portion of the Gulf of Tonkin that appertains to Vietnam as historic waters.[287] In analyzing the claim, the Geographer of the U.S. Department of State noted that the occurrence of claims to historic bays that are shared by more than one State is not common and, at a minimum, all States bordering the bay must agree that the bay is a historic bay.[288] There is no evidence, however, that China, which also borders the gulf, claims it as historic waters.[289] The United States protested the claim in December 1982, stating that the international standards for establishing a claim to historic

283. *Id.* at 5; U.S.S.R., Declaration Concerning Baselines for Measuring the Breadth of the Territorial Sea, the Economic Zone, and the Continental Shelf of the USSR of the Continental Coastline and Islands of the Pacific Ocean, the Sea of Japan, the Sea of Okhotsk, and the Bering Sea, Feb. 7, 1984, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1984_Declaration.pdf.

284. LIMITS IN THE SEAS NO. 107, *supra* note 282, at 4–5; LIMITS IN THE SEAS NO. 112, *supra* note 33, at 19.

285. LIMITS IN THE SEAS NO. 112, *supra* note 33, at 19–20.

286. *USS John S. McCain Conducts Freedom of Navigation Operation*, COMMANDER, U.S. SEVENTH FLEET PUBLIC AFFAIRS (Nov. 24, 2020), https://www.navy.mil/Press-Office/News-Stories/Article/2425878/uss-john-s-mccain-conducts-freedom-of-navigation-operation/; MCRM, *supra* note 24.

287. Statement of 12 November 1982 by the Government of the Socialist Republic of Viet Nam on the Territorial Sea Baseline of Viet Nam, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/VNM_1982_Statement.pdf.

288. U.S. DEP'T OF STATE, BUREAU OF INTELLIGENCE AND RESEARCH, LIMITS IN THE SEAS NO. 99, STRAIGHT BASELINES: VIETNAM 11–12 (Dec. 12, 1983).

289. *Id.* at 12.

waters have not been met and that, therefore, there is no basis in international law for Vietnam's claim.[290] France (1983) and Thailand (1985) have also protested the claim.[291]

By acknowledging the existence of historic bays and historic waters but failing to provide adequate guidance on the criteria necessary to establish such claims under international law, the Convention encourages States to make excessive claims that significantly restrict freedom of navigation and overflight over broad expanses of the oceans. Moreover, exempting such claims from compulsory dispute settlement reassures States that their excessive claims cannot be challenged, thereby upending the careful balance between coastal State and user State rights that is the hallmark of the Convention.

D. Residual Rights in the EEZ (Article 59)

Although it is ambiguous, Article 59 purportedly provides a basis to resolve disputes regarding the rights and duties not specifically allocated to coastal or other States by Articles 55, 56, and 58, and other provisions of the Convention.

> In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.[292]

Given the functional nature of the EEZ, where economic interests are concerned, equity would normally favor the coastal States; on non-resource uses, the interests of other States would presumably predominate.[293] Nonetheless, this ambiguity allows coastal States to abuse their rights and duties by claiming residual rights in the EEZ that are clearly inconsistent with the balance

290. ROACH & SMITH, *supra* note 22, at 53.

291. *Id.*; Letter Dated 9 December 1985 from the Permanent Representative of Thailand to the United Nations Addressed to the Secretary-General, Annex, U.N. Doc. A/40/1033 (Dec. 12, 1985).

292. UNCLOS, *supra* note 16, art. 59.

293. Nandan, *supra* note 81.

of interests that led to the establishment of this new maritime zone. Particularly, it has paved the way for coastal States to illegally assert jurisdiction over non-resource-related activities in the EEZ, to include a right to restrict foreign military activities.

Post-UNCLOS, restrictions on military activities in the EEZ have replaced the two-hundred-nautical-mile territorial sea as the new antithesis to freedom of navigation and overflight. Eighteen States purport to regulate foreign military activities in their EEZs. These States include Bangladesh, Brazil, Burma (Myanmar), Cape Verde, China, India, Indonesia, Iran, Kenya, Malaysia, the Maldives, Mauritius, North Korea, Pakistan, the Philippines, Portugal, Thailand, and Uruguay.[294] Illegal constraints imposed by these States on foreign military activities vary from State-to-State and include:

- restrictions on "non-peaceful uses" of the EEZ without consent, such as weapons exercises;
- limitations on military marine data collection (military surveys) and hydrographic surveys without prior notice or consent;
- requirements for prior notice or consent for transits by nuclear-powered vessels or ships carrying hazardous and dangerous goods, such as oil, chemicals, noxious liquids, and radioactive material;
- limitations on warship transits to innocent passage;
- prohibitions on intelligence, surveillance, and reconnaissance operations;
- restrictions on navigation and overflight through the EEZ;
- requirements for prior permission for warships to enter the EEZ;
- application of domestic environmental laws and regulations to sovereign immune vessels; and
- requirements that military aircraft file flight plans prior to transiting the EEZ.[295]

These excessive claims have no basis in customary international law or State practice and are clearly at odds with the reassurances in Article 56(2) and

294. MCRM, *supra* note 24. Indonesia and the Philippines have not enacted domestic legislation restricting foreign military activities but have on occasion objected to such activities in their EEZ. Raul (Pete) Pedrozo, *Military Activities In and Over the Exclusive Economic Zone*, *in* FREEDOM OF THE SEAS, PASSAGE RIGHTS, AND THE 1982 LAW OF THE SEA CONVENTION 235, 237 (Myron H. Nordquist et al. eds., 2009).

295. Raul (Pete) Pedrozo, *Military Activities in the Exclusive Economic Zone: East Asia Focus*, 90 INTERNATIONAL LAW STUDIES 514, 524 (2014).

Article 86 that the freedoms enjoyed by all States in respect of non-resource-related activities in the EEZ are not abridged. Accordingly, the United States has diplomatically protested and routinely conducts operational assertions challenging the validity of these claims.

UNCLOS reaffirms that all nations have an absolute right under international law to conduct military activities beyond the territorial sea of another State. The EEZ, which comprises nearly 38 percent of the world's oceans that were previously considered high seas, was created for the sole purpose of granting coastal States greater control over the resources adjacent to their coasts.[296] Efforts by a few nations to expand coastal State authority in the EEZ to include residual competencies were rejected by most of the delegations present at UNCLOS III.[297] Most nations agreed that military activities "have always been regarded as internationally lawful uses of the sea" and the "right to conduct such activities will continue to be enjoyed by all States in the exclusive economic zone."[298]

Thus, the negotiations focused on "ensuring that the regime of the high seas would apply in the EEZ to the extent it was not incompatible with Part V."[299] It was agreed that "the rights as to resources belong to the coastal State and, in so far as such rights are not infringed, all other States enjoy the freedoms of navigation and communication."[300] During the negotiations, Ambassador Koh, President of UNCLOS III, instructed the delegates to draw a clear distinction "between the rights of the coastal state and the rights of the international community" in the EEZ and to ensure that coastal State sovereign rights and jurisdiction in the EEZ were "compatible with well-established and long-recognized rights of communication and navigation."[301] The final text of Article 86 recognizes the EEZ as a sui generis regime but retains the distinction that had previously existed between the territorial sea and the high seas by confirming that nothing in the article abridges the high seas "freedoms enjoyed by all States in the EEZ in accordance with Article

296. VIRGINIA COMMENTARY II, *supra* note 99, at 491–821.

297. *Id.* at 529–30.

298. Statement of the United States, Third UN Conference, *supra* note 121, at 244.

299. 3 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 63–64 (Satya N. Nandan & Shabtai Rosenne eds., 1995).

300. *Id.* at 64.

301. *Id.* at 64–65.

58."[302] Restrictions on military activities only apply in the territorial sea (Articles 2, 19, 20), archipelagic waters (Articles 49, 52), international straits (Articles 39, 40), and archipelagic sea lanes (Article 54).

Also, nothing in UNCLOS grants coastal States authority over the airspace above the EEZ, which is considered international airspace and is therefore not subject to coastal State sovereignty.[303] Article 3 of the Chicago Convention exempts State aircraft from the rules of the convention, including compliance with Flight Information Region procedures beyond national airspace. State aircraft operating in the airspace over the EEZ and the high seas are only required to operate with due regard for the safety of navigation of civil aircraft.[304] Efforts by Brazil to designate the airspace above the EEZ as national airspace were rejected by the International Civil Aviation Organization Legal Committee, indicating that the proposal flagrantly contradicted UNCLOS, which equates "the EEZ . . . with the high seas as regards freedom of overflight."[305]

For the foreseeable future, some coastal States will continue to assert authority to regulate military activities in and over the EEZ. By raising the political and military costs of such activities, these States seek to pressure nations to remain outside the EEZ. If the position of these nations becomes the international standard, 38 percent of the world's oceans that were once considered high seas and open to unfettered military use will come under coastal State control. Such an outcome was not part of the package deal negotiated during UNCLOS III that allowed for the establishment of the EEZ.

To paraphrase a speech by Ambassador Koh in 2008—a few States want to equate the legal status of the territorial sea and EEZ, while many other States believe that coastal State rights in the EEZ are limited to exploitation of the resource and that the water column should be treated similar to the high seas. He then went on to say, "I find a tendency on the part of some coastal States . . . to assert their sovereignty in the EEZ . . . is not consistent with the intention of those of us who negotiated this text and is not consistent with the correct interpretation of [Part V] of the Convention."[306] Yet

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302. *Id.* at 60–71.

303. Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

304. *Id.* art. 3.

305. BARBARA KWIATKOWSKA, THE 200 MILE EXCLUSIVE ECONOMIC ZONE IN THE NEW LAW OF THE SEA 203 (1989).

306. Tommy T.B. Koh, *Remarks on the Legal Status of the Exclusive Economic Zone*, *in* FREEDOM OF THE SEAS, PASSAGE RIGHTS AND THE 1982 LAW OF SEA CONVENTION 53, 54-55 (Myron H. Nordquist et al. eds., 2009).

there is no indication that any of the aforementioned States intend to roll-back their excessive EEZ claims.

E. Prior Notice/Consent and Innocent Passage

In preparation for the negotiations of the 1958 Conventions, the International Law Commission drafted provisional articles concerning, inter alia, the regime of the territorial sea. Draft Article 25, adopted in 1955, provided that coastal States could "make the passage of warships through the territorial sea subject to previous authorization or notification" except in "straits normally used for international navigation between two parts of the high seas."[307] The Commission expressed the view, however, that warships should normally not be required to "request special authorization for each passage" and that coastal State authorization should be provided "in general terms giving vessels the right of passage" provided warships comply with coastal State laws and regulations.[308]

The International Law Commission reconsidered the issue in 1956 and approved a new Article 24, which also allowed coastal States to condition innocent passage of warships through the territorial sea "to previous authorization or notification" but required coastal States to normally grant passage subject to compliance with Articles 17 (Rights of Protection of the Coastal State) and 18 (Duties of Foreign Ships During Their Passage).[309] The Commission noted that, even though "a large number of States do not require previous authorization or notification," that did not mean that a "state would not be entitled to require such notification or authorization if it deemed it necessary to take this precautionary measure."[310] The International Law Commission reasoned that the "passage of warships through the territorial sea of another state can be considered by that state as a threat to its security."[311] Therefore, the Commission was "not in a position to dispute the

307. *See* Int'l Law Comm'n, Rep. on the Work of Its Seventh Session, U.N. Doc. A/2934 (1955), *reprinted in* [1960] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 19, 41.

308. *Id.*

309. Int'l Law Comm'n Rep. on the Work of Its Eighth Session, U.N. Doc. A/3159 (1956), *reprinted in* [1957] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 253, 276.

310. *Id.* at 277.

311. *Id.*

right of states to take such a measure."[312] However, prior notification or consent could only be required if the coastal State had enacted and duly published a restriction to that effect.

Notwithstanding the International Law Commission's preparatory work, the diplomatic conference did not adopt the language of draft Article 24. Instead, Article 14 of the 1958 Territorial Sea Convention simply provides that "ships of all States . . . shall enjoy the right of innocent passage through the territorial sea" and passage is considered innocent "so long as it is not prejudicial to the peace, good order, or security of the coastal state."[313] Article 23 allows the coastal State to require a foreign warship to leave its territorial sea if the warship "does not comply with the regulations of the coastal state concerning passage through the territorial sea and disregards any request for compliance which is made to it" by the coastal State.[314] Thus, it appears that a prior notice or consent requirement was rejected by a majority of the delegations present at UNCLOS II.

The issue was revisited during UNCLOS III. An attempt by a few States to include a prior notification or authorization requirement failed to receive sufficient support during the negotiations, so the proponents agreed not to press the proposed amendment to Article 21.[315] At the conclusion of UNCLOS III, Ambassador Koh confirmed on the record that "the Convention is quite clear on this point. Warships do, like other ships, have a right of innocent passage through the territorial sea, and there is no need for warships to acquire the prior consent or even notification of the coastal State."[316] As a result, UNCLOS Articles 17, 19, and 30 contain virtually identical language found in the 1958 Territorial Sea Convention.

Despite the unambiguous rejection of the prior notification or consent requirement in the 1958 and 1982 conventions, the number of States that condition the passage of warships on prior notice or consent has proliferated. In 1958, there were only seven States that conditioned innocent passage of warships on prior notice or consent.[317] By 1991, the number had grown to 47, with only four States rolling back their excessive claims after 1982.[318]

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312. *Id.*

313. 1958 Territorial Sea Convention, *supra* note 26, art. 14.

314. *Id.* art. 23.

315. VIRGINIA COMMENTARY II, *supra* note 99, at 195–99.

316. Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VIRGINIA JOURNAL OF INTERNATIONAL LAW 809, 854 n.159 (1984).

317. LIMITS IN THE SEAS NO. 112, *supra* note 33, at 61.

318. *Id.*; ROACH & SMITH, *supra* note 22, at 250–51 tbl.11.

Thus, nearly one-quarter of the parties to UNCLOS purport to condition the right of innocent passage of foreign warships in the territorial sea on prior notification or consent.[319]

This trend is clearly inconsistent with UNCLOS, Article 17, which on its face applies to all ships, including military and other sovereign immune vessels. The right of innocent passage of warships is further confirmed by Article 19, which contains a list of military activities that are prohibited when ships are engaged in innocent passage, such as weapons exercises, intelligence collection, and launching or recovering aircraft or military devices. Lack of notification or consent is not one of the listed proscribed activities. This creates a presumption that warships not engaged in one of the prohibited activities automatically enjoy the right of innocent passage. Article 19 would be unnecessary if warships were not entitled to exercise the right. By failing to specifically address the issue in Article 17, UNCLOS has contributed to this disturbing trend.

F. Dispute Settlement

Part XV of the Convention establishes an elaborate dispute settlement mechanism, which includes both voluntary and compulsory procedures. Parties are required to settle their disputes concerning the interpretation or application of the Convention by peaceful means, whether that is through voluntary mechanisms of their own choice or through compulsory mechanisms provided in UNCLOS.[320] When a dispute arises, State parties shall expeditiously exchange views regarding its settlement.[321] The parties to the dispute can also agree to submit the matter to conciliation.[322]

If the parties cannot settle the dispute, the matter shall be referred to ITLOS, the International Court of Justice, an Annex VII arbitral tribunal, or an Annex VIII special arbitral tribunal for certain categories of disputes, for compulsory resolution.[323] Non-voting experts may be employed by the court or tribunal to assist in the deliberations.[324] A court or tribunal can also prescribe provisional measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending

319. MCRM, *supra* note 24; LIMITS IN THE SEAS NO. 112, *supra* note 33, at 62.
320. UNCLOS, *supra* note 16, arts. 279–82.
321. *Id.* art. 283.
322. *Id.* art. 284.
323. *Id.* arts. 286–88.
324. *Id.* art. 289.

a final decision.[325] In cases involving the detention of a foreign flag vessel by another State, the court or tribunal may order the prompt release of the vessel and its crew upon the posting of a reasonable bond or other financial security.[326] Any decision rendered by a court or tribunal shall be final and binding on the parties to the dispute.[327]

Certain disputes, however, are exempt from these compulsory procedures. A State is not obligated to accept compulsory dispute settlement for any disagreement concerning the coastal State's right or discretion to withhold consent for an MSR project in its EEZ in accordance with Article 246(5) or to order suspension or cessation of a project in accordance with Article 253.[328] Additionally, a coastal State is not required to accept compulsory procedures for any dispute related to its sovereign rights with respect to the living resources in the EEZ, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States, and the terms and conditions established in its conservation and management laws and regulations.[329]

When signing, ratifying, or acceding to the Convention, or at any time thereafter, a State may declare in writing that it does not accept compulsory procedures regarding: (a) disputes concerning maritime boundary delimitations or those involving historic bays or titles; (b) disputes concerning military activities, including military activities by sovereign immune vessels and aircraft, and disputes concerning law enforcement activities regarding the exercise of sovereign rights or jurisdiction excluded from compulsory dispute settlement under Article 297(2) or (3); or (c) disputes where the UN Security Council is exercising its functions under the UN Charter, unless otherwise authorized by the Council.[330]

These elaborate procedures are designed and intended to resolve disputes peacefully and expeditiously, as well as enhance compliance with the Convention's provisions. They also recognize the importance of certain national interests by allowing States to exempt matters, such as military and law enforcement activities, from compulsory dispute settlement. Nonetheless, even though decisions of a court or tribunal are intended to be final and

325. *Id.* art. 290.
326. *Id.* art. 292.
327. *Id.* art. 296.
328. *Id.* art. 297(2).
329. *Id.* art. 297(3).
330. *Id.* art. 296.

binding on the parties to the dispute, the procedures lack one important feature—an enforcement mechanism.

Take, for example, the South China Sea arbitration case between China and the Philippines. On January 22, 2013, the Philippines initiated arbitration proceedings against China pursuant to UNCLOS, Articles 286 and 287, and Article 1 of Annex VI. The Philippines requested the tribunal to determine the validity of China's claimed historic rights and maritime entitlements in the South China Sea, the status of the maritime features and the maritime entitlements these features can generate, and the lawfulness of certain Chinese actions that allegedly violated UNCLOS.

Both States are parties to UNCLOS and are therefore subject to the compulsory dispute settlement provisions of the Convention. Nonetheless, China rejected the arbitration and refused to participate in the proceedings, claiming that the tribunal lacked jurisdiction over the dispute.[331] The tribunal convened a hearing in July 2015 and rendered an Award on Jurisdiction and Admissibility on October 29, 2015, finding that it had jurisdiction over the dispute.[332]

The tribunal convened the hearing on the merits from November 24–30, 2015, rejecting China's arguments that the dispute was about territorial sovereignty and maritime boundary delimitation.[333] The tribunal found that a dispute concerning whether a State is entitled to a maritime zone is a distinct matter from the delimitation of maritime zones in an area in which they overlap. The tribunal issued a unanimous award in favor of the Philippines

331. Embassy of the People's Republic of China to the Republic of the Philippines, Note Verbale No. (13) PG-039 (Feb. 19, 2013) (available at Annex 3 in volume 2 of the Memorial of the Philippines (Mar. 30, 2014), submitted in the South China Sea Arbitration (Phil. v. China), Case No. 2013-19 (Perm. Ct. Arb.)); Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (Dec. 7, 2014), *reprinted in* 15 CHINESE JOURNAL OF INTERNATIONAL LAW 431 (June 2016).

332. South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Award on Jurisdiction and Admissibility (Perm. Ct. Arb. 2015).

333. "The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention [compulsory dispute settlement] with respect to all the categories of disputes referred to in paragraph 1 (a) [maritime delimitation] (b) [military and law enforcement activities] and (c) [functions of the UN Security Council] of Article 298 of the Convention." Declaration of China upon Ratification of the 1982 United Nations Convention on the Law of the Sea (Aug. 25, 2006), U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec (scroll down to entry for China).

on July 12, 2016.[334] Consistent with the Convention's compulsory procedures, the tribunal did not consider or rule on any question of sovereignty over land territory and did not delimit any maritime boundary between the parties.

The tribunal noted that the award was binding and that both parties had an obligation to comply with its decision.[335] Nevertheless, China issued a statement following the hearing stating that the award was "null and void" and had "no legal binding force."[336] Thus, what could have been a seminal case in helping resolve the long-standing South China Sea dispute has further aggravated the situation and has weakened the rule of law.

G. Ice-Covered Areas

Article 234 provides special rules for protecting and preserving the marine environment in ice-covered areas like the Arctic. It authorizes coastal States 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.[337]

These laws and regulations must have "due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence."[338] In addition, they must be "consistent with other

334. UNCLOS, *supra* note 16, art. 296, Annex VII art. 11.

335. South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Award, ¶¶ 1195–1201 (Perm. Ct. Arb. 2016), https://pcacases.com/web/sendAttach/2086.

336. Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines (July 12, 2016), http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1379492.shtml.

337. UNCLOS, *supra* note 16, art. 234.

338. *Id.*

relevant provisions of the Convention and international law, including the exemption for vessels entitled to sovereign immunity in Article 236."[339]

Article 234 was purportedly negotiated directly between Canada, the Soviet Union, and the United States to provide a legal basis for implementing the provisions of the 1970 Canadian Arctic Waters Pollution Prevention Act to commercial and private vessels, while at the same time protecting U.S. national security interests in preserving navigational rights and freedoms throughout the Arctic.[340] Unfortunately, Article 234 has allowed Russia and Canada to turn the Arctic Ocean into a Russian-Canadian lake.

The Northern Sea Route (NSR) is defined in Article 14 of the 1998 Federal Act of the Russian Federation, as amended by Article 2 of Federal Law No. 132-FZ:

> Navigation in the waters of the Northern Sea Route, a historically established national transport communication route of the Russian Federation, shall be carried out in accordance with the generally recognized principles and norms of international law, the international treaties of the Russian Federation, this Federal Law, and other federal laws, as well as regulations issued in accordance with them.[341]

Article 3(3) of the 2012 law also amended the Code of Commercial Navigation of the Russian Federation adding, inter alia, a new Article 5, which defines the waters of the NSR as the water that adjoins the northern littoral of the Russian Federation, comprising the internal maritime waters, territorial sea, contiguous zone, and EEZ of the Russian Federation.[342]

Guidelines for navigating through the NSR ensure safety of navigation and protection of the marine environment, and include:

1) procedures for navigation of vessels;
2) rules for icebreaker pilotage of vessels;

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339. 4 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 396 (Shabtai Rosenne & Alexander Yankov eds., 1993) [hereinafter VIRGINIA COMMENTARY IV]; U.S. Commentary on UNCLOS, *supra* note 102, at 1419.

340. U.S. Commentary on UNCLOS, *supra* note 102, at 1419; VIRGINIA COMMENTARY IV, *supra* note 339, at 393, 398.

341. Russia, Federal Law No. 132-FZ of July 28, 2012, On Amendments to Certain Legislative Enactments of the Russian Federation concerning State Regulation of Commercial Navigation in the Waters of the Northern Sea Route (U.S. State Department translation *reprinted in* MCRM, *supra* note 24, entry for Russian Federation 2021).

342. *Id.* art. 3(3).

3) rules for pilotage of vessels by an ice-qualified pilot;
4) rules for pilotage of vessels along routes in the NSR;
5) guidelines on navigational-hydrographic and hydrometeorological support;
6) rules for radio communication; and
7) other guidelines pertaining to organization of navigation of vessels.[343]

Applications to obtain a permit to navigate through the NSR shall be submitted to the NSR Administration. Permits are issued on the "condition that the vessel fulfills the requirements pertaining to safe navigation and protection of the marine environment" that are established by the international treaties and laws of the Russian Federation and the aforementioned rules.[344] Vessels will also submit documents certifying that they possess "insurance or other financial guarantee of civil liability . . . for harm resulting from pollution or for other harm caused by the vessels."[345]

The United States protested the NSR regulatory scheme on May 29, 2015. The U.S. diplomatic note objected to several provisions, including: (1) a requirement to obtain permission to enter and transit the Russian EEZ and territorial sea and provide certification of adequate insurance; (2) characterization of international straits that form part of the NSR as internal waters; (3) characterization of the NSR as a "historically established national transport communication route"; and (4) the "lack of any express exemption for sovereign immune vessels."[346]

The United States also encouraged the Russian Federation to "submit relevant aspects of the scheme to the International Maritime Organization . . . for consideration and adoption."[347] In particular, "the provisions . . . to use routes prescribed by the . . . [NSR] Administration, [to] use icebreakers and ice pilots, and [to] abide by other related measures . . . in straits used for international navigation, are measures that must be approved and adopted by the IMO."[348]

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343. *Id.*
344. *Id.*
345. *Id.*
346. Russia–Northern Sea Route, 2015 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 12, §A(5)(c), at 526 (CarrieLyn D. Guymon ed., undated).
347. *Id.*
348. *Id.* at 537–38.

The U.S. note additionally questioned the scope of the NSR area and whether the entire area, particularly the western portion, is ice-covered for most of the year, as required by Article 234. Moreover, as the Arctic continues to warm, the note observed that "the use of Article 234 as the basis for the scheme" becomes more untenable.[349] The United States also sought confirmation that the NSR scheme does not apply to sovereign immune vessels (Article 236), and clarification on whether the provisions for the use of Russian icebreakers and ice pilots were mandatory. The United States believes that Article 234 does not support the imposition of mandatory icebreaker or pilotage requirements, that the exclusion of the use of foreign-flagged icebreakers is inconsistent with the non-discrimination aspects of Article 234, and that the charges levied for these services are of concern.[350]

The Russian Federation announced new rules for the NSR in March 2019 that are more problematic. The new rules require foreign warships and naval auxiliaries to provide forty-five days advance notice and obtain permission to transit the NSR.[351] The advance notice must include the ship's "name, purpose, route, timetable, and technical specifications, as well as the military rank and identity of its captain."[352] Foreign ships are also required to take a Russian pilot on board before transiting through the Arctic and transit can be denied without explanation. Unauthorized transits can result in the arrest or destruction of the non-compliant vessel. Russian authorities cite Article 234 and national security concerns as their legal authority for the new measures, which are clearly inconsistent with international law, including UNCLOS.[353]

Canada's Arctic mandatory ship reporting system is equally problematic and has been challenged by the United States and several other nations.[354] The Northern Canada Vessel Traffic Services Zone Regulations (NOR-

349. *Id.* at 527.

350. *Id.*

351. Alexey Kozachenko et al., *Cold Wave: Foreigners Created the Rules of Passage of the Northern Sea Route*, IZVESTIA (Mar. 9, 2019), https://iz.ru/852943/aleksei-kozachenko-bogdan-stepovoi-elnar-bainazarov/kholodnaia-volna-inostrantcam-sozdali-pravila-prokhoda-sevmorputi.

352. *Id.*

353. *Id.*

354. *See* Northern Canada Vessel Traffic Services Zone, 2010 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW , ch. 12, §A(4)(a), at 514-19 (Elizabeth R. Wilcox ed., 2011) [hereinafter 2010 U.S. DIGEST]; ROACH & SMITH, *supra* note 22, at 492–95.

DREGs) took effect on July 1, 2010, in Canadian-claimed waters of the Arctic.[355] The regulations have two main elements. First, they establish the NORDREGs Zone that covers Canada's claimed northern waters, extending up to two hundred nautical miles. A vessel may not enter, leave, or proceed within the zone unless it has previously obtained a clearance from Canadian authorities. Noncompliant persons and vessels are liable to a monetary fine and/or imprisonment. Second, the regulations establish a mandatory ship reporting system within the zone. Canada cites Article 234 as the legal basis for the regulations.

The United States protested the regulations in August 2010, indicating that the NORDREGs are "inconsistent with important law of the sea principles related to navigational rights and freedoms" and recommending that Canada submit the system to the IMO for adoption.[356] The United States noted that the prior permission requirement to enter and transit the EEZ and territorial sea, as well as the enforcement provisions for noncompliance, were inconsistent with navigational rights and freedoms in the EEZ, the right of innocent passage in the territorial sea, and the right of transit passage through straits, such as the Northwest Passage, used for international navigation. Moreover, conditioning transit on prior permission is inconsistent with Article 234, which requires coastal State laws and regulations to have due regard to navigation. The United States also expressed concern that the NORDREGs did not contain an express exemption for sovereign immune vessels and that any enforcement action would be inconsistent with international law, including Article 236 of UNCLOS.[357]

The United States also expressed concerns that Canada's unilateral imposition of mandatory ship reporting and mandatory ship routing should be submitted to the IMO for adoption consistent with Chapter V, Regulations 10 and 11 of the International Convention for the Safety of Life at Sea (SOLAS).[358] In September 2010, the United States and International Association

355. *See* Northern Canada Vessel Traffic Services Zone Regulations, SOR/2010-127 (June 10, 2010), https://laws-lois.justice.gc.ca/eng/Regulations/SOR-2010-127/.

356. Diplomatic Note from the U.S. to Canada Commenting on Canada's Proposed NORDREGS (Mar. 19, 2010), *reprinted in* 2010 U.S. DIGEST, *supra* note 354, at 515, 516–18.

357. *Id.*

358. *Id.* at 517.

of Independent Tanker Owners made a joint submission to the IMO's Maritime Safety Committee expressing concern over the NORDREGs.[359] In particular, the joint submission highlights that the mandatory ship reporting system applies to ships seeking to enter and transit Canada's EEZ and it is therefore inconsistent with SOLAS V/11 and V/12. Beyond the territorial sea, SOLAS does not permit coastal States to unilaterally adopt mandatory ship reporting systems. The IMO is the only international body competent to develop guidelines and criteria for regulations of ship reporting systems on an international level. Similarly, vessel traffic services may only be made mandatory in a State's territorial sea.

H. Fisheries Jurisdiction

Given that nearly 90 percent of living marine resources are harvested within two hundred nautical miles of the coast, UNCLOS placed most living marine resources under the jurisdiction of coastal States. This grant of management authority was heralded by the coastal States as a boon to their economic growth and food security. Article 56 grants coastal States sovereign rights for the purpose of exploring and exploiting, conserving, and managing living resources within the EEZ.[360] This authority includes the right to determine the allowable catch of all living resources in the EEZ, based on the best scientific evidence available, to ensure that these resources are not endangered by over-exploitation.[361] A coastal State is required to promote the objective of optimum utilization of the living resources in the EEZ. If the coastal State does not have the capacity to harvest the entire allowable catch, it shall give other States access to the surplus.[362] Special rules apply to the conservation and management of straddling fish stocks (Article 63), highly migratory species (Article 64), marine mammals (Article 65), anadromous stocks (Article 66), and catadromous species (Article 67).

To ensure compliance with its fishery laws, a coastal State is authorized to take a broad range of enforcement measures, to include boardings, inspections, vessel position reporting, embarked observers, and arrests and

359. *See* Submission of the United States & International Association of Independent Tanker Owners to the IMO, Safety of Navigation: Northern Canada Vessel Traffic Services Zone Regulations, IMO Doc. MSC 88/11/2 (Sept. 22, 2010); ROACH & SMITH, *supra* note 22, at 493 n.139.

360. UNCLOS, *supra* note 16, art. 56.

361. *Id.* art. 61.

362. *Id.* art. 61.

fines.[363] Despite these broad authorities, coastal States have failed to adequately conserve and manage living resources within their EEZs because they lack the necessary maritime domain awareness and maritime law enforcement capacity and capabilities.

The U.N. Food and Agriculture Organization assesses that marine fish stocks have steadily declined since the mid-1970s. According to the Organization's 2020 State of the World Fisheries report, "the proportion of fish stocks that are within biologically sustainable levels decreased from 90 percent in 1974 to 65.8 percent in 2017 . . . , with 59.6 percent classified as being maximally sustainably fished stocks."[364] The "percentage of stocks fished at biologically unsustainable levels increased from 20 percent in 1974 to 34.2 percent in 2017."[365] Illegal, unreported, and unregulated (IUU) fishing exacerbates the depletion of fish stocks and further threatens the sustainability of coastal State fisheries and fragile ecosystems.[366] The value of global fish production in 2018 was estimated at $401 billion,[367] but 20 percent of global fish catch results from IUU fishing resulting in billions of dollars in lost revenue every year.[368] Rather than create the controversial International Seabed Authority to regulate futuristic mining of deep seabed minerals, UNCLOS III would have been better off creating an organization similar to the International Seabed Authority to regulate world fisheries beyond the territorial sea.

I. Environmental Protection

UNCLOS has been touted as "the strongest comprehensive environmental treaty now in existence or likely to emerge for quite some time."[369] Part XII establishes an unprecedented legal framework and basic obligation to protect the marine environment from all sources of pollution, including vessel-

363. *Id.* arts. 62, 73.

364. U.N. FOOD AND AGRICULTURE ORGANIZATION, THE STATE OF WORLD FISHERIES AND AQUACULTURE 2020: SUSTAINABILITY IN ACTION 7 (2020) [hereinafter STATE OF WORLD FISHERIES AND AQUACULTURE 2020].

365. *Id.*

366. U.S. COAST GUARD, ILLEGAL, UNREPORTED AND UNREGULATED FISHING STRATEGIC OUTLOOK (Sept. 2020), https://www.uscg.mil/Portals/0/Images/iuu/IUU_Strategic_Outlook_20 20_FINAL.pdf.

367. STATE OF WORLD FISHERIES AND AQUACULTURE 2020, *supra* note 364.

368. U.S. National Oceanic and Atmospheric Administration, *Fishwatch: U.S. Seafood Facts (2020)*, https://www.fishwatch.gov/ (last visited Nov. 18, 2022).

369. U.S. Commentary on UNCLOS, *supra* note 102, at 1414.

source pollution, ocean dumping, seabed activities, and land-based sources.[370] By addressing all sources of marine pollution, the Convention "compels parties to come together to address issues of common and pressing concern" that will promote continued improvement in the health of the world's oceans.[371]

All States have a general duty to protect and preserve the marine environment.[372] More specifically, States shall take measures necessary to ensure that activities under their jurisdiction or control do not cause marine pollution using the best practicable means at their disposal.[373] Part XII additionally provides an elaborate framework for global and regional cooperation (Articles 197–201), promoting scientific and technical assistance (Articles 202–203), monitoring the risks and effects of pollution through environmental assessments (Articles 204–206), and adopting domestic laws and regulations to implement international rules and standards (Articles 207–212).

States also have the right and obligation to enforce compliance with measures adopted to preserve and protect the marine environment. The Convention provides express enforcement provisions for pollution from land-based sources (Article 213), seabed activities (Article 214), activities in the Area (Article 215), ocean dumping (Article 216), vessels (Articles 217–220), maritime casualties (Article 221), and from or through the atmosphere (Article 222).[374]

States are required to fulfil their international obligations concerning the protection and preservation of the marine environment and will be held liable in accordance with international law.[375] In this regard, States shall ensure that recourse is available under their domestic laws for "prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction."[376] Part XII is without prejudice to specific obligations States may have under other conventions or agreements related to protection and preservation of the marine environment (e.g., the International Convention for the Prevention of Pollution from Ships).[377]

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370. *Id.* at vi, ix.
371. *Id.*
372. UNCLOS, *supra* note 16, art. 192.
373. *Id.* arts. 194, 196.
374. U.S. Commentary on UNCLOS, *supra* note 102, at 1417.
375. UNCLOS, *supra* note 16, art. 235.
376. *Id.*
377. *Id.* art. 237.

Nonetheless, of critical importance to the United States and other seagoing nations, the provisions of UNCLOS "regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service."[378] The only requirement is that States shall ensure, "by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable," with UNCLOS.[379]

Despite this elaborate framework, UNCLOS has failed in its objective to protect and preserve the marine environment. The world's oceans are more polluted today than ever before. According to the U.S. National Oceanic and Atmospheric Administration, "billions of pounds of trash and other pollutants enter the ocean" each year because of littering, poor waste management practices, storm water discharge, or natural events such as tsunamis and hurricanes.[380] Some of the debris ends up on the beach, some sinks to the ocean floor, some is eaten by fish and marine animals mistaking it for food, and some collects in ocean gyres formed by rotating ocean currents. Ingestion of plastics or entanglement in derelict fishing gear can result in the death of marine species. Contaminants, such as heavy metals and microplastics, can also accumulate in seafood, making it harmful for human consumption. In this regard, over one-third of shellfish-growing waters in the United States are negatively affected by coastal pollution.[381]

Oil and chemical spills also continue to impact the wellbeing of the oceans. Over 80 percent of pollutants, however, come from land-based activities that result in runoff. Nonpoint sources of pollution can include septic tanks, storm water discharge, vehicles, farms, livestock ranchers, fertilizer from yards, and timber harvest areas. Excessive amounts of nitrogen and phosphorus in a body of water, for example, can trigger algal blooms—an overgrowth of algae. These harmful algal blooms, known as red tides, can produce toxic effects that harm marine life. Excess nutrients in the water can

378. *Id.* art. 236.

379. *Id.*

380. U.S. National Oceanic and Atmospheric Administration, *Ocean Pollution and Marine Debris*, https://www.noaa.gov/education/resource-collections/ocean-coasts/ocean-pollution (last updated April 1, 2020).

381. *Id.*

also cause dead zones (hypoxia). As algae sinks and decomposes, the decomposition process reduces the level of oxygen in the water causing marine species to die or leave the area.[382]

In short, while the Convention may have raised awareness of the adverse effects of marine pollution, human activities continue to threaten the health of the world's oceans and UNCLOS has done little to curb that threat. Despite the obligation imposed on States parties to protect and preserve the marine environment, more than 50 percent of land-based plastic-waste leakage originates from just five parties to the Convention—China, Indonesia, the Philippines, Thailand, and Vietnam.[383] Concerted action by these five States alone, imposed through compulsory dispute settlement, could reduce global leakage of plastic waste into the ocean by 45 percent by 2025.[384]

J. Declarations and Statements

When signing, ratifying, or acceding to UNCLOS, Article 310 allows States to make declarations or statements regarding application of the Convention that do not purport to exclude or modify the legal effect of the provisions of the Convention.[385] In other words, reservations to the treaty's provisions are not permitted. Notwithstanding the clear language of Article 310, several States have made declarations or statements that effectively constitute reservations limiting the scope of the Convention. The two most prevalent areas include innocent passage of warships and military activities in the EEZ.

Despite the negotiating history of the Convention and the precise language of Article 17 that guarantees the right of innocent passage to all ships, eighteen States made declarations or statements reserving the right to condition innocent passage of foreign warships on prior notice or consent. These States include Algeria, Argentina, Bangladesh, Cabo Verde, Chile, China, Croatia, Ecuador, Egypt, Finland, Iran, Malta, Montenegro, Oman, Romania, Serbia, Sweden, and Yemen. Similarly, the *travaux préparatoires* of the Convention, long-standing State practice, and UNCLOS Article 56 support the conclusion that military activities that are consistent with Article 2(4) of the UN Charter may be conducted in foreign EEZs without notice

382. *Id.*

383. *Stemming the Tide: Land-Based Strategies for a Plastic-Free Ocean*, OCEAN CONSERVANCY 7 (Sept. 2015), https://oceanconservancy.org/wp-content/uploads/2017/04/full-report-stemming-the.pdf.

384. *Id.* at 3.

385. UNCLOS, *supra* note 16, art. 310.

or consent. Yet, Bangladesh, Brazil, Cabo Verde, Ecuador, India, Malaysia, Pakistan, Thailand, and Uruguay made declarations or statements purporting to have the authority to regulate all military activities in the EEZ.

The Convention was negotiated and accepted as a "package deal." These declarations and statements are contrary to the plain language of Article 310, undermine the legitimacy of the Convention, and weaken the rule of law for the oceans.

IV. CONCLUDING THOUGHTS

UNCLOS has profoundly influenced the development of the law of the sea. Some of that influence has been good, some has been bad. But overall, the Convention carefully balances the interests of coastal States in controlling activities off their coasts with those of all States in preserving freedom of navigation and overflight and other internationally lawful uses of the seas without undue interference.

That explains why all U.S. administrations since the modification of Part XI in 1994 have supported U.S. accession to UNCLOS. As both a coastal State with one of the largest and richest EEZs in the world and the world's preeminent naval power, the United States will benefit by becoming a party to UNCLOS. The three primary benefits inherent in the Convention include:

- UNCLOS advances U.S. interests as a global maritime power by preserving the right of U.S. naval and air forces and commercial vessels engaged in maritime trade to access the world's oceans to advance U.S. national security and economic interests.
- UNCLOS advances U.S. coastal State interests by providing exclusive sovereign rights to the living and non-living resources in the EEZ and on the continental shelf.
- The deep seabed mining regime in Part XI was fundamentally changed to appease the United States and other industrialized nations, satisfactorily addresses all of President Reagan's 1982 objections, and now provides an acceptable, stable regime for mining deep seabed minerals if such activities occur in the future.[386]

Since the end of the Second World War, the United States has led efforts to develop a "widely accepted international framework governing uses of the

386. U.S. Commentary on UNCLOS, *supra* note 102, at 1398.

seas."[387] UNCLOS achieves that objective. Granted, U.S. accession to the Convention will not make excessive claims fade away overnight. There will always be States that will purport to assert competencies and authorities at sea that are inconsistent with long-standing international norms.

China, for example, is a serial violator of the Convention despite being a party since 1996.[388] Virtually all its domestic maritime laws and regulations are inconsistent with UNCLOS and customary international law. China's recent refusal to observe the 2016 decision of the arbitral tribunal in the South China Sea arbitration case reconfirms Beijing's disdain for the international rules-based legal order codified in the Convention and its propensity to disregard its international legal obligations.

China claims illegal straight baselines along its mainland coast, around the Paracel Islands, and portions of the Senkaku (Diaoyu) Islands. Most of China's mainland coast does not meet the geographic criteria in Article 7 for establishing straight baselines. Moreover, as a continental State, China's use of archipelagic straight baselines to enclose the Paracels and Senkakus is clearly inconsistent with Articles 46 and 47. China also claims the Gulf of Bohai (Pohai) and the Hainan (Qiongzhou) Strait as internal historic waters. Yet, neither claim meets the criteria for establishing a valid claim to historic waters.

Contrary to Article 17, China illegally conditions the right of innocent passage of foreign warships on prior consent. Beijing also unlawfully claims security jurisdiction in its contiguous zone, contrary to the precise language of Article 33, which limits coastal State competencies in the zone to customs, fiscal, immigration, and sanitary matters. China additionally purports to regulate foreign military activities in the EEZ, which is inconsistent with Article 58, long-standing State practice, and the negotiating history of the Convention. Similarly, China's 2002 Surveying and Mapping Law illegally asserts jurisdiction over all marine data collection in its EEZ even though Article 56 only grants coastal States exclusive jurisdiction over MSR. Finally, China's attempt to regulate overflight of its EEZ by establishing an Air Defense Identification Zone in international airspace in the East China Sea has no basis in UNCLOS, the Chicago Convention, or customary international law.

China's flagrant disregard of the international legal order and unsettling pattern of coercive behavior undermines the rule of law and the liberal order of the world's oceans. As the world's preeminent maritime power, the United

387. *Id.* at 1400.

388. Raul "Pete" Pedrozo, *China's Legacy Maritime Claims,* LAWFARE (July 15, 2016), https://www.lawfareblog.com/chinas-legacy-maritime-claims.

States can best help counterbalance China's egregious maritime claims and disdain for international norms and standards by becoming a party to UNCLOS. By joining the Convention, the United States will be in a better position to ensure that the law of the sea is interpreted and evolves in a way that preserves the rules-based legal order that has brought peace and stability to the world's oceans.