

Law of the Sea

A POLICY PRIMER



U.S. Coast Guard



U.S. Navy

LL.M. Program in International Law + Fletcher Maritime Studies Program

 THE FLETCHER SCHOOL
OF LAW AND DIPLOMACY
TUFTS UNIVERSITY

Law of the Sea

A POLICY PRIMER

Editors

John Burgess, Lucia Foulkes, Philip Jones, Matt Merighi, Stephen Murray, Jack Whitacre

Contributors

Philip Jones, Max McGrath-Horn, Matt Merighi, Stephen Murray, Cullan Riley, Bogdan Rotar, Krittika Singh, Meaghan Tobin, Timothy Urban, Jack Whitacre, Steven Young

Map Designer

Mehar Kaur

Thanks to the following for their comments and guidance

CDR Brendan Burke, JAGC, USN; LCDR Jonathan Flynn, JAGC, USN;
CAPT Todd Huntley, JAGC, USN; LCDR Edward Pierce, JAGC, USN;
LCDR Matthew Rector, JAGC, USN

Special thanks to Captain Todd Huntley, JAGC, USN;
Dean James Stavridis, and Professor Rocky Weitz for their
encouragement of this project.





The Law of the Sea Primer Project
LL.M. in International Law Program
The Fletcher School of Law and Diplomacy
160 Packard Avenue
Medford, Massachusetts 02155
Email: Internationallaw@tufts.edu

Copyright 2017 by the Trustees of Tufts College

Design: Petronella Gianocostas

We invite the liberal use of this information
with appropriate acknowledgement of the source.

Table of Contents

Foreword	1
Introduction	2
CHAPTER ONE: Customary International Law and the Adoption of the Law of the Sea Convention	4
CHAPTER TWO: Maritime Zones	11
CHAPTER THREE: Freedom of Navigation	19
CHAPTER FOUR: Military Activities in an Exclusive Economic Zone (EEZ)	30
CHAPTER FIVE: Sovereign Immunity	36
CHAPTER SIX: Maritime Security and the LOSC	40
CHAPTER SEVEN: The LOSC and the Environment	49
CHAPTER EIGHT: The Arctic and the LOSC	59
CHAPTER NINE: The LOSC Dispute Resolution Provisions	67
CHAPTER TEN: The South China Sea Tribunal	73
CHAPTER ELEVEN: State Sovereignty and the LOSC	80

Foreword

It gives me great pleasure as the Dean of the Fletcher School of Law and Diplomacy at Tufts University and as a retired career officer in the U.S. Navy to introduce this primer on the law of the sea, prepared by faculty and students at the Fletcher School's LL.M. and Maritime Studies programs.



The law of the sea has played a central role in my professional life. It was the topic of my PhD dissertation at the Fletcher School. A sound understanding of its key principles and implications was important throughout my time serving our country, whether as a junior officer or as NATO's Supreme Allied Commander Europe. Today, I regularly draw on its principles as I evaluate issues as disparate as the ongoing disputes in the South China Sea, the opening up of new maritime routes through the Arctic, or the preservation of transit passage through the Strait of Hormuz.

As policy makers within the U.S. government and elsewhere, you too will regularly face issues that demand an understanding of the law of the sea, as embodied in the Law of the Sea Convention and customary international law. The law of the sea forms the basis for the conduct of maritime commerce that is critical to international trade; codifies the rules of freedom of navigation that are essential to national security and commerce; and provides an international framework for the conservation, regulation, and exploitation of the resources of the oceans and continental shelves for the benefit of the environment and economic development.

We here at the Fletcher School know that you will find this primer to be a valuable resource as you address these issues in a complex and changing global environment. We are honored to have had the opportunity to prepare this primer and draw on the advice of experts acknowledged on the title page to make it available for your use.

Let's get underway...

A handwritten signature in black ink, appearing to read 'J. Stavridis'. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Admiral James Stavridis, U.S. Navy (Ret.)
Dean, The Fletcher School of Law and Diplomacy

Introduction

This primer is intended to provide policy makers, the military, and other interested persons with an introduction to the basic principles of the law of the sea as they affect U.S. security, commercial, and scientific interests. To do so, it focuses on key elements of the law of the sea that touch on those interests, including provisions of the United Nations Convention of the Law of the Sea (LOSC), a highly detailed and comprehensive treaty that has been signed by 168 parties. While the U.S. is not a party to the LOSC, it takes the view that with limited exceptions the Convention reflects the rules of customary international law. The U.S. actively seeks the observance of those rules by all States.

The law of the sea forms the basis for the conduct of maritime commerce critical to our economy; codifies the rules of freedom of navigation that are essential to national security; and enables the U.S. to conserve, regulate, and exploit the resources of our neighboring waters and continental shelf for the benefit of the environment and economy. America's commercial and military position in the world is preserved by the rule of law at sea.

This primer outlines the key maritime zones agreed to in the LOSC, ranging from internal waters controlled by individual sovereign States to the high seas where all States enjoy unhindered freedom of navigation. That discussion underscores a central tenet of the law of the sea, which is the fair balancing of the desire by coastal States to protect their sovereign rights and to conserve and exploit natural resources of neighboring waters with the desire of maritime States to freely navigate the world's oceans in pursuit of their own economic and security interests. As a country with significant coastal resources and as the world's leading naval power, the U.S. has an abiding interest in both aspects of that balance.

The primer also discusses how the law of the sea works to protect the oceans from abuse, whether as a space for illegal activities which threaten peace and security such as piracy, human trafficking, or smuggling components of weapons of mass destruction; degradation through environmental abuse and pollution as a result of avoidable disasters like the Exxon Valdez spill; or deliberate and destructive State conduct like the construction of artificial islands by China in the South China Sea (SCS).

The law of the sea also embodies certain key underlying legal concepts, including:

- Sovereign immunity, protecting warships and other government vessels and aircraft from search and seizure by foreign States without permission.
- Environmental and safety regimes that allocate responsibility among the flag States with which vessels are registered, the coastal States that they transit, and the port States that they visit.

- A systematic and flexible regime of dispute resolution intended to facilitate the peaceful settlement of disputes while providing compulsory dispute resolution when parties are unable to reach agreement on their own.

The primer summarizes each of these concepts in the maritime context.

The primer specifically looks at the application of the law of the sea in certain contexts that raise current and pressing policy questions. For example:

- It discusses the 2016 arbitration regarding the SCS, which denied Chinese claims of broad rights in the sea, found China responsible for violations of applicable environmental and safety regulations, and made important determinations regarding maritime features and zones in the region.
- It reviews the law relating to critical waterways like the Strait of Hormuz, where the free conduct of international commerce and normal naval operations are subject to the threat of illegal interference by coastal States.
- It discusses important issues governed by the law of the sea in the Arctic, as reduction in the size of the polar icecap increases the level of commerce in the region and opens up the opportunity to exploit energy and mineral resources which until now have been inaccessible.

Finally, the primer addresses key questions concerning the U.S. and law of the sea, including the considerations surrounding why the U.S. has declined to ratify the LOSC, the position currently taken by the U.S. on the applicability of the LOSC as the embodiment of customary international law regarding most issues relating to law of the sea, and the policy arguments, pro and con, concerning ratification.

The legal principles described in this primer raise issues that must be addressed on an ongoing basis by policy makers, sometimes in familiar contexts and at other times arising out of new and unanticipated developments. The law of the sea is not static, and its core principles remain under recurring risk of erosion by contrary State practices. From the challenges to freedom of navigation through vital chokepoints like the Straits of Malacca and Hormuz, to the preservation of critical fishing stocks, to China's ongoing efforts to limit freedom of navigation in the SCS, the application of the law of the sea to preserve U.S. interests will remain a pressing national priority. This primer is intended to aid those who are charged with that critical responsibility.

A few background notes regarding this primer follow:

The United Nations Convention on the Law of the Sea is referred to throughout as either the LOSC or the Convention. The full text is available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

Countries are referred to as States within the text of the LOSC and this primer.

A nautical mile is defined as 1852 meters (6,076 feet), or about 15% greater than a regular mile. (A nautical mile historically represented one minute (1/60 of a degree) of latitude at the Equator.)

Customary International Law and the Adoption of the Law of the Sea Convention

Introduction to Customary International Law

International law is comprised of treaties and customary international law. Customary international law is established through the actions that States take out of a sense of legal obligation. International law changes through changing treaty regimes, as well as through new and different legal norms that States assume based on what they deem to be the law governing emerging issues. Customary international law, and in recent years, treaty law, have played a central and continuing role in the evolution of the law of the sea.

In contrast to treaties, which are written and more easily researched and cited to, the reasoning behind customary international law can be harder to discern. The prevailing U.S. view of determining and interpreting international law is very similar to other widely accepted methods of international jurisprudence. A comparison of the international view and the U.S. view illustrates the similarities.

Article 38 of the International Court of Justice

- “1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
- a. international conventions, whether general or in particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.”¹

Section 102 of The Restatement Third on Foreign Relations (U.S.)

- “1. A rule of international law is one that has been accepted as such by the international community of states
 - a. in the form of customary law;
 - b. by international agreement; or
 - c. by derivation from general principles common to the major legal systems of the world.
2. Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.
3. International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.
4. General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.”²

The U.S. Constitution includes treaties as part of “the supreme law of the land” and refers to the “Law of Nations” (as customary international law was called at the time of its drafting).³

Though international custom changes over time, it is still binding and recognized as law around the world. Not everything will be overtly agreed to by a State, however, “a customary rule is observed, not because it has been consented to, but because it is believed to be binding...its binding force does not depend...on the approval of the individual or the State to which it is addressed.”⁴ Customary international law is determined by looking at two things: state practice and *opinio juris*. The International Court of Justice has stated that “[n]ot only must the acts concerned amount to settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”⁵

State Practice

Traditionally, a particular practice of States does not need to be universally followed by States to qualify as custom. It needs merely to be generally and consistently practiced by a representative group of States capable of participating in the practice. State practice is shown by the actions taken by States. The reasoning behind a State’s actions is also considered so as to eliminate any accidental State practice, and only focus on what States mean to do. Much of the Law of the Sea Convention (LOSC) reflects the practices of States before the treaty was made.

Opinio juris sive necessitas (“an opinion of law or necessity”)

Opinio juris occurs when States act out of a belief that they are either forbidden from doing something or compelled to do it by international law. It differentiates what a State does out of a legal obligation and what a State does out of regular courtesy or comity. *Opinio juris* is demonstrated through various means. Most of the Convention was written to reflect the sense of obligation that States already felt towards each other regarding law of the sea.

Problems with Customary International Law

Customary international law can be difficult to define with precision. It is difficult to determine when an international custom has changed, and at what point, if ever, a state’s non-compliance with international custom becomes a new custom or is merely a violation of existing law. Customary international law is easiest to show when codified in treaty frameworks. The Third Restatement on Foreign Relations Law states that “[i]nternational agreements constitute practice of States and as such can contribute to the growth of customary international law.”⁶ Generally, if a treaty represents international custom, even States that are not parties to the treaty are held to the custom’s standard.

History of the Law of the Sea

The law of the sea is simultaneously one of the oldest and one of the newest bodies of international law. From the time the seas began to be used for the conduct of commerce and war, politicians, merchants, and scholars have debated who could use the sea and who could control it. Freedom of the seas has taken many forms over the centuries. From the 17th century, a State’s rights and jurisdiction on the ocean were limited to a specific belt of water extending from the coastlines. For many years, a country’s territorial waters extended as far as a shore battery could fire, and all waters beyond this were considered international waters (free seas, or *mare liberum*). As described by Hugo Grotius, the father of modern international law, the seas “were free to all nations but belonged to none of them.”

The tension between “the free sea” and “the closed sea” waxed and waned for centuries, generally with the powerful arguing that the sea was free to all, and the smaller States arguing for transnational limitations on what maritime powers could do to navigate the oceans and exploit their resources. Political, strategic, and economic issues are reflected in the historical tension between the exercise of state sovereignty over the sea and the idea of “the free sea.” By the 19th century the concept of the free seas, open to all, was the prevalent view, reflecting the dominance of large maritime powers, and Great Britain in particular, thus fostering a body of law that favored free navigation and the conduct of both commerce and naval operations across the world’s oceans.

Background of the Law of the Sea Convention

The Law of the Sea Convention (the “Convention” or “LOSC”), is binding on the States that are party to it, as well as other States (including the U.S.), to the extent that it represents customary international law. The Convention is the cumulative result of decades of diplomacy and is based on centuries of relevant practice and jurisprudence. At the time of the creation of the Convention, there was much talk about:

“marine resources being exhaustible and in need of conservation; and that is the case again today, when the maritime powers coexist in equilibrium upon the pivot of mutual deterrence and cannot prevail over the host of small States that have tended to usurp their authority.”⁷

No agreement came from efforts by the League of Nations in the early 1930s to decide on extending State claims of sovereignty over adjacent waters. In 1945, President Harry S. Truman extended the U.S.’s control to all the natural resources on its continental shelf, under the customary international law principle that a nation has a right to protect its natural resources. Chile, Peru, and Ecuador followed that example, extending their claim to 200 nautical miles to include their fishing grounds. Most States extended their territorial waters to 12 nautical miles. In subsequent years, various attempts were made to create a broad-spectrum law of the sea regime that ultimately culminated in the creation of the present Convention.

First and Second Conferences on the Law of the Sea

The first off-shore oil rig out of the sight of land started producing in 1947, and there was slow growth of off-shore operations through the 1950s. In the 1960s there was a boom in activity and technology; platforms began drilling thousands of feet below the surface and could be located further and further from shore. During the same period, advances were made in fishing. Vessels increased in size and could travel further from port and stay out longer. Nations began to exploit distant fishing waters without restraint.

Issues of geopolitics and nationalism, in addition to interest in oceanic resources, amplified the desire of States to assert sovereign rights over increasingly larger areas of the ocean. All of these trends increased the pressure to adapt the principles of customary law of the sea to a changing world environment.

In 1956 the U.N. convened its first Conference on the Law of the Sea. Ending in 1958, the result of the first Conference was four treaties: The Convention on the Territorial Sea and Contiguous Zone, the Convention on the Continental Shelf, the Convention on the High Seas, and the Convention on Fishing and Conservation of Living Resources of the High Seas. These treaties entered into force between 1962 and 1966. Though the Conference was heralded as a success, it failed to address some key issues, including the issue of the breadth of territorial waters over which coastal States could assert broad sovereign rights. The U.N. held a second Conference in 1960, but it only lasted six weeks, and no new agreements came of it.

Third Conference on the Law of the Sea

The unanswered issue of territorial waters needed to be resolved. In 1966, President Lyndon B. Johnson referred to the deep sea and the seabed as the legacy of all humans. The following year, the Ambassador to the UN from Malta, Arvid Pardo, presented a proposal to the UN General Assembly declaring that the seabed should be part of the common heritage of mankind. In 1973 the third Conference on the Law of the Sea convened in New York. For nine years States negotiated over the parameters of the law of the sea until the Convention was completed in 1982.

The U.S strongly supported the initiative of the third Conference and played a leading role in its negotiation over the course of the Nixon, Ford and Carter administrations. U.S. negotiators focused on preserving principles of freedom of navigation and other vital security concerns, as well as protecting the right of the U.S. to conserve and exploit the resources of the continental shelf and the 200-nautical mile exclusive economic zone. The U.S. negotiators were successful in these efforts.

Objections to U.S. ratification of the LOSC as originally negotiated largely focused on Part XI of the LOSC, which governs management of the deep seabed and provides for compulsory dispute resolution through the Seabed Disputes Chamber.⁸ The U.S. objections initially resulted in some degree of uncertainty over the future of the treaty. Following the lead of the U.S., many other developed States declined to ratify the Convention.

To address the concerns preventing the U.S. and other States from joining the LOSC, in 1994 the UN General Assembly (UNGA) negotiated what became known as the Agreement Relating to the Implementation of Part XI of the United Nations Law of the Sea (hereafter referred to as the Agreement). The Agreement is intended to be interpreted along with Part XI of the Convention, and addresses concerns developed nations had regarding the exploitation of the deep seabed and its administration. In the case of any conflict or contradiction between the texts or their interpretations, the text of the Agreement is to prevail. Any States ratifying the Convention following implementation of the Agreement are also bound by the Agreement. States which ratified the Convention before the Agreement may consent to the Agreement separately.

Heralded as a “Constitution of the Sea” the Convention came into force in 1994, and as of June 2016 168 parties have joined the Convention. The U.S. is a signatory, but the Senate has not ratified the Convention. The LOSC defines the rights and responsibilities of nations and their use of the planet’s oceans. It establishes guidelines for businesses, environment, and the management of marine natural resources.

Various developed nations with significant naval and maritime assets, the U.S. and U.K. for example, strongly support the Convention. Since entering into force in 1994, the LOSC has increasingly become an important part of the international legal order. Followed by the vast majority of the States of the world, the LOSC provides the only

framework within international law for resolving contentious issues such as freedom of navigation, fishing rights, and the appropriate scope and boundaries of maritime zones.

A Constitution of the Sea

Constitutions, like that of the U.S. or other States of the world, are documents outlining rights and protections of a group as well as a particular mode of governance. The Convention was consciously written as a comprehensive articulation of the rights and responsibilities of States with respect to, among other things, navigation, exploitation of resources, and exploration of the world's oceans.⁹ Additionally, the Convention covers governance over the sea and related disputes.¹⁰ From the beginning, States worked to achieve a "package" of mutually supporting agreements, rather than just a single treaty of limited scope. They sought to create a "comprehensive regime" dealing with all matters relating to the law of the sea.¹¹ LOSC was the embodiment of this desire and was to "establish true universality in the effort to achieve a 'just and equitable international economic order' governing ocean space."¹²

It has been noted that "[a]n examination of the character of the individual provisions reveals that [LOSC] represents not only the codification of customary norms, but also, and more significantly, the progressive development of international law..." This progression has a significant amount of weight, as the agreement was made by consensus of UN member States.¹³ That consensus led to a "grand compromise" that expanded the sovereign rights of coastal States over their territorial waters and exclusive economic zones, treated the deep seabed as a common heritage (and resource) of mankind, and codified the key principles of freedom of the seas.¹⁴

LOSC operates as a "Constitution of the Sea" by offering protections and regulating action. It governs, among other things, limits of national jurisdiction over ocean space, access to the seas, navigation, protection and preservation of the marine environment, exploitation of living resources and conservation, scientific research, sea-bed mining and other exploitation of non-living resources. It also covers dispute settlement, created international bodies to realize specific objectives, and fosters international cooperation to address maritime issues such as safety and environment. LOSC attempts to achieve an overall equitable order by balancing concomitant rights and benefits against duties and obligations.¹⁵

Many U.S. officials, including military leaders, have pushed for the U.S. to sign LOSC for reasons described in more detail in Chapter Eleven: State Sovereignty and the LOSC. Many U.S. Admirals and Generals have urged Congress to sign the LOSC so that the U.S. can take advantage of "the Treaty's 'navigational bill of rights' for worldwide access to get our troops to the fight, to sustain them during the fight, and to get them back home...."¹⁶

The Law of the Sea Convention as Customary International Law

The geopolitical challenges facing the law of the sea have not changed in their nature since the LOSC took effect in 1994. China is expanding its naval forces and creating man-made islands. Russia's last aircraft carrier recently operated in the Mediterranean, launching flights in support of the Assad regime in Syria. Somali pirates on tiny fishing boats still threaten shipping by the Horn of Africa. Japan claims a cultural right to whaling. Yemen uses missiles from Iran to attack U.S. vessels. Within this "equilibrium" the world continues to look to the law of the sea to keep the oceans safe and accessible.

Although the U.S. is not officially a party to the Convention, it is still obliged to follow the elements of the treaty that represent a codification of customary international law. The Convention represents customary international law because of the state practice and *opinio juris* on which LOSC was based. Most States are parties to LOSC and actively follow its precepts. Even before the Convention existed, many of the norms included in it were already practiced by States. States have done so out of a legal obligation, whether it be from recognizing Grotius's idea of the "free sea" or from the previous iterations of the LOSC. It should be noted, however, that a comprehensively articulated and written agreement on the law of the sea is necessary to hold a small number of influential States accountable for practices that they employ in limiting access or navigation that are incompatible with the U.S.'s global interests. See Chapter Four, Military Activities in an Exclusive Economic Zone, for more information on this topic.

The fact that LOSC is a multi-lateral treaty, accepted by most of the world, is evidence of the fact that the Convention is custom, backed by *opinio juris*. Not only do other States follow the Convention, but the U.S. does as well. The U.S. generally supported the terms of LOSC and only disagreed with Part XI, regarding the seabed. At the very least, under customary international law the U.S. will be required to comply with the terms of the Convention that it did not actively protest.

1 ICJ Article 38(1).

2 Third, Restatement. "The Foreign Relations Law of the United States." (1987): 102 (1-2). (italics added).

3 U.S. Const. art. III, § 2.

4 Brierly, James Leslie. *The Law of Nations: An Introduction to the International Law of Peace*. Clarendon Press, 1955, p. 52.

5 North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, pp. 3, 45, para. 77.

6 Third, Restatement. "The Foreign Relations Law of the United States." (1987): 102 (3).

7 D.P. O'Connell, *The International Law of the Sea*, edited by I.A. Shearer, Vol. 1, New York: Oxford University Press, 1982, p.1.

8 United Nations Convention on the Law of the Sea, Part XI, Section 5, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOSC]. (available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/part2.htm).

9 See Koh, Tommy, *A Constitution for the Oceans*, Remarks of the President of the Third United Nations Conference on the Law of the Sea at the Conference at Montego Bay (December 1982).

10 See LOSC, Parts XI and XV.

11 See Koh, Tommy, *A Constitution for the Oceans*, Remarks of the President of the Third United Nations Conference on the Law of the Sea at the Conference at Montego Bay (December 1982).

12 Bernardo Zuleta, "Introduction," in *The Law of the Sea*, New York: The United Nations, 1983, pp. xix-xxvii.

13 Bernardo Zuleta, "Introduction," in *The Law of the Sea*, New York: The United Nations, 1983, pp. xix-xxvii.

14 See LOSC, Part XI.

15 See Koh, Tommy, *A Constitution for the Oceans*, Remarks of the President of the Third United Nations Conference on the Law of the Sea at the Conference at Montego Bay (December 1982).

16 United States Senate Committee on Foreign Relations (2017). "24 Star" Military Witnesses Voice Strong Support for Law of the Sea Treaty. [online] Available at: <https://www.foreign.senate.gov/press/chair/release/24-star-military-witnesses-voice-strong-support-for-law-of-the-sea-treaty> [Accessed 5 Jul. 2017].

Maritime Zones

Introduction

The rights of coastal States to regulate and exploit areas of the ocean under their jurisdiction are one of the foundations of the LOSC. These rights need to be balanced with the freedom of navigation and access to resources outside State control – the freedom of the seas. To demarcate the proverbial rules of the road, the LOSC permits coastal States to establish several different maritime zones. These zones give coastal States different jurisdictional rights. In general, a State has more rights in zones near to its coastline than it does further into the ocean. The main challenges associated with these zones are how variations in geography affect where zones end and where new zones begin.

Maritime Zones and How They Are Determined

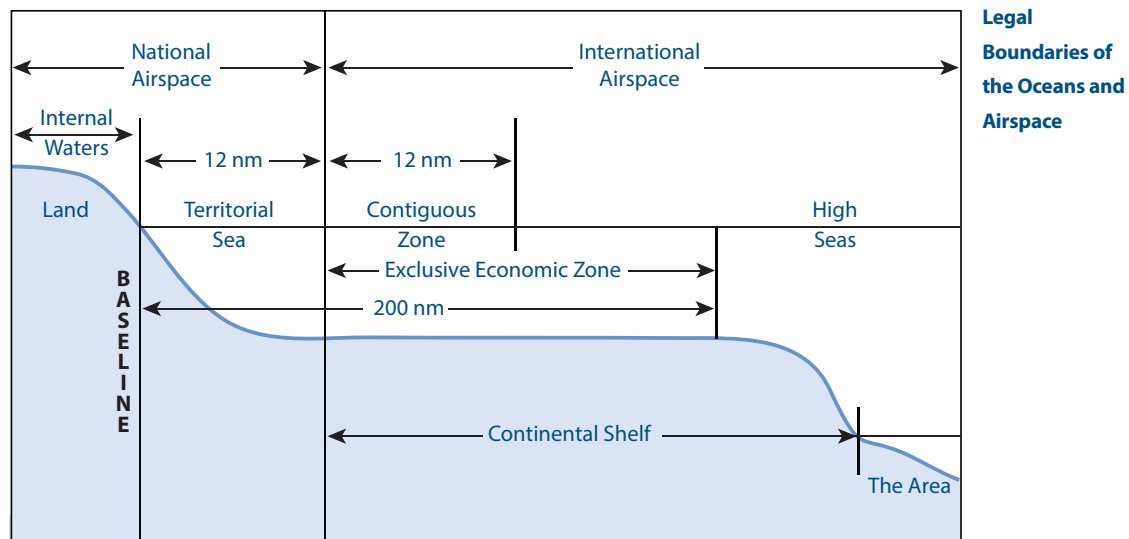
Maritime zones are drawn using what the LOSC calls “baselines.” Unlike inland waters, coastal waters rise and fall in tides. Rather than having moving maritime boundaries, the baseline is fixed to begin at the low-water line along the coast. The low-water line is derived from the coastal State’s own charts.¹

These zones are measured using nautical miles, a measurement based on the circumference of the Earth.² One nautical mile equals roughly 1.15 miles on land.

As seen in the graphic below, the LOSC divides the ocean into six different zones:

- | | | |
|--------------------|----------------------------|---------------------------------|
| 1. Internal Waters | 3. Contiguous Zone | 5. Continental Shelf |
| 2. Territorial Sea | 4. Exclusive Economic Zone | 6. High Seas & Deep Ocean Floor |

Maritime Zones Schematic



nm – nautical mile

Internal Waters

Internal waters are all the waters that fall landward of the baseline, such as lakes, rivers, and tidewaters. States have the same sovereign jurisdiction over internal waters as they do over other territory. There is no right of innocent passage through internal waters.

Territorial Sea

Everything from the baseline to a limit not exceeding twelve miles is considered the State's territorial sea. Territorial seas are the most straightforward zone. Much like internal waters, coastal States have sovereignty and jurisdiction over the territorial sea. These rights extend not only on the surface but also to the seabed and subsoil, as well as vertically to airspace. The vast majority of States have established territorial seas at the 12 nautical mile limit, but a handful have established shorter thresholds.

While territorial seas are subject to the exclusive jurisdiction of the coastal States, the coastal States' rights are limited by the passage rights of other States, including innocent passage through the territorial sea and transit passage through international straits. This is the primary distinction between internal waters and territorial seas. These rights are described in detail in Chapter Three: Freedom of Navigation.

There is no right of innocent passage for aircraft flying through the airspace above the coastal state's territorial sea.

Contiguous Zone

States may also establish a contiguous zone from the outer edge of the territorial seas to a maximum of 24 nautical miles from the baseline. This zone exists to bolster a State's law enforcement capacity and prevent criminals from fleeing the territorial sea. Within the contiguous zone, a State has the right to both prevent and punish infringement of fiscal, immigration, sanitary, and customs laws within its territory and territorial sea. Unlike the territorial sea, the contiguous zone only gives jurisdiction to a State on the ocean's surface and floor.³ It does not provide air and space rights.

Exclusive Economic Zone (EEZ)

Unlike other zones whose existence derived from earlier international law, the EEZ was a creation of the LOSC. States may claim an EEZ that extends 200 nautical miles from the baseline. In this zone, a coastal State has the exclusive right to exploit or conserve any resources found within the water, on the sea floor, or under the sea floor's subsoil. These resources encompass both living resources, such as fish, and non-living resources, such as oil and natural gas.⁴ States also have exclusive rights to engage in offshore energy generation from the waves, currents, and wind within their EEZ. Article 56 also allows States to establish and use artificial islands, installations and structures, conduct marine scientific research, and protect and preserve the marine environment through Marine Protected Areas.⁵ Article 58 declares that Articles

88 to 115 of the Convention relating to high seas rights apply to the EEZ “in so far as they are not incompatible with this Part [V].”⁶

Due to the maritime features discussed later in this chapter, the U.S. has the largest EEZ in the world, totaling 3.4 million square nautical miles. The EEZ’s size derives from the large coastlines on the Atlantic Ocean, the Gulf of Mexico, the western continental U.S., Alaska, Hawaii and many small outlying Pacific islands. Although not a signatory of LOSC, The U.S. established an EEZ by Presidential Proclamation in 1983. EEZs of States worldwide constitute 38% of the oceans of earth that were considered part of the high seas prior to adoption of the LOSC.

The EEZ is the most misunderstood of all the maritime zones by policymakers in States around the world. Unlike the territorial sea and the contiguous zone, the EEZ only allows for the previously mentioned resource rights and the law enforcement capacity to protect those rights. It does not give a coastal State the right to prohibit or limit freedom of navigation or overflight, subject to very limited exceptions.

Continental Shelf

The continental shelf is a natural seaward extension of a land boundary. This seaward extension is geologically formed as the seabed slopes away from the coast, typically consisting of a gradual slope (the continental shelf proper), followed by a steep slope (the continental slope), and then a more gradual slope leading to the deep seabed floor. These three areas, collectively known as the continental margin, are rich in natural resources, including oil, natural gas and certain minerals.

The LOSC allows a State to conduct economic activities for a distance of 200 nautical miles from the baseline, or the continental margin where it extends beyond 200 nautical miles. There are two methods to determine the extent of a continental margin under the LOSC. The first method is by measuring geological features using what is called the Gardiner formula. By measuring the thickness of sedimentary rocks, the edge of the shelf is drawn where sedimentary rocks become less than 1 percent of the thickness of the soil.⁷ The second method is to use fixed distances in what is called the Hedberg formula. This method allows States to draw its boundary 60 miles from the foot of the shelf’s slope.⁸ This expanded continental shelf cannot, however, exceed (i) 350 miles from the baseline or (ii) 100 miles from the 2,500-meter isobath.⁹

To prevent abuse of the continental shelf provisions, the LOSC established the Commission on the Limits of the Continental Shelf (CLCS). The CLCS uses scientists to evaluate States’ claims about the extent of their continental shelves and whether they conform to the Convention’s standards. The CLCS is discussed in more detail in Chapter Eight: The Arctic and the LOSC.

The economic rights within the continental shelf extend only to non-living resources and sedentary living resources, such as shellfish. It also allows the coastal State to build artificial islands, installations, and structures. Other States can harvest non-sedentary living resources, such as finfish; lay submarine cables and pipelines; and

conduct marine research as if it were international waters (see below).¹⁰ As with the EEZ, continental shelf rights do not grant a State the right to restrict navigation.¹¹

High Seas and Deep Ocean Floor

The ocean surface and the water column beyond the EEZ are referred to as the high seas in the LOSC. Seabed beyond a coastal State's EEZs and Continental Shelf claims is known under the LOSC as the Area. The LOSC states that the Area is considered "the common heritage of all mankind"¹² and is beyond any national jurisdiction. States can conduct activities in the Area so long as they are for peaceful purposes, such as transit, marine science, and undersea exploration.

Resources are a more complicated matter. Living resources, such as fish, are available for exploitation by any vessel from any State. Although the LOSC does not impose any limitations on fishing in the high seas, it encourages regional cooperation to conserve those resources and ensure their sustainability for future generations. The U.S. is party to separate conventions and regional fisheries management organizations that govern international fishing activity.

Non-living resources from the Area, which the LOSC refers to as minerals, are handled differently from fish, since mineral extraction projects are capital intensive to build and administer. To maintain such projects without national control, LOSC created the International Seabed Authority, referred to as the Authority in the LOSC document. This international body, headquartered in Jamaica, is responsible for administering these resource projects through a business unit called the Enterprise. The Enterprise was organized to be governed much like a public-traded corporation with a Council (functioning as an Executive Committee) and a Secretariat (which handles day-to-day administration). As an international body, the Authority also includes an Assembly of representatives from each nation which functions like a large Board of Directors. Unlike a publicly traded corporation, the Assembly is the supreme body for setting policy in the Authority. Since the ratification of the LOSC, there has been limited activity in relation to these provisions.¹³

Maritime Features

Although it is easy to determine how baselines can be drawn from large areas of continental coastline, such as in Florida or California, there are other maritime features that can affect how zones are drawn. These include:

- Straight baselines (which are not a feature, but change the baseline when used)
- River Mouths
- Bays
- Islands
- Rocks
- Reefs and Atolls
- Low-Tide Elevations
- Artificial Islands, Installations, and Structures

Straight Baselines

To accommodate deeply indented coastline and fringes of islands along the coast, the LOSC allows for use of straight baselines.¹⁴ These baselines, drawn between features and coastline to create straight lines, allow States to create fixed points to deal with the wild distance variances caused by such features. Any sea between the coast and the straight baseline is considered internal waters rather than territorial waters. The practical effect of straight baselines is that they push a State's maritime borders outward. As a consequence, States ranging from Canada to China have aggressively used straight baselines in ways that are not accepted by the U.S.

States are not able to arbitrarily draw straight baselines in order to extend their maritime claims. The LOSC provides that straight baselines must conform to the general direction of the coast and the sea area lying with the lines must be closely linked to the coast.¹⁵ Straight baselines cannot be drawn across low-tide elevations (see definition below). Finally, they cannot be used to cut off another State's access to their territorial sea or EEZ. Straight baselines can be considered in the case of "economic interest peculiar to the region concerned" if there is demonstrated "long usage" by the State drawing the baseline.¹⁶

River Mouths

River mouths are where rivers empty into the ocean. States with river mouths are permitted to draw a straight baseline between the low-water lines on each bank.¹⁷

Bays

Bays are one of the more complex maritime features. In general, a bay is a large indentation in a shoreline. This can become an issue with straight baselines as States may try to classify large bays as internal waters to project maritime boundaries out further and control overflight access. To prevent this, the LOSC defines a bay as a "well-marked indentation... [where] its area is as large as, or larger than, that of a semi-circle whose diameter is a line drawn across the mouth of that indentation."¹⁸ The amount of control a State has over a bay is based on the distance between the low-water line on either side of the bay's entrance. If the entrance is equal to or less than 24 miles wide at low-tide, then a State may draw a straight baseline across the entrance, effectively making the entire bay internal waters. If the entrance is more than 24 miles wide, a State can only draw a straight baseline 24 miles across the bay in a way that maximizes the area of internal waters. So-called "historic" bays, such as the Chesapeake Bay, are exempt from this provision.

Islands

Islands are naturally formed land areas surrounded by water on all sides. Islands must be above the water at high tide and able to sustain human habitation or economic life of their own.¹⁹ Islands possess the same maritime zones as other

landmasses, including a territorial sea, contiguous zone, EEZ, and continental shelf. Islands do not need to be inhabited to create those maritime zones; they only need to be *capable* of sustaining human habitation or economic life. See below for information on artificial islands, which are treated differently than naturally occurring islands.

Rocks

A rock in the LOSC is defined as an island that is unable to support human habitation or economic life. Rocks provide their owners with less control than islands, providing only a territorial sea and a contiguous zone. They do not create or further the extent of an EEZ. Rock is a legal term and does not refer to any particular type of geological formation. For example, a sandbar can be considered a rock.

Reefs and Atolls

Reefs are formations of coral, roughly shaped like mountains, which run just below the surface of the water. Atolls are small, U-shaped islands or reefs which are made from coral. In the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef....²⁰

Low-Tide Elevations

A low-tide elevation is a landmass that is completely submerged during high tide but above water at low tide. These elevations do not create any zones of maritime control on their own.²¹ If a low-tide elevation falls within the boundary of a State's territorial sea as measured from the mainland or an island, that State may draw a baseline from the low-water line of the low-tide elevation rather than from the shore.

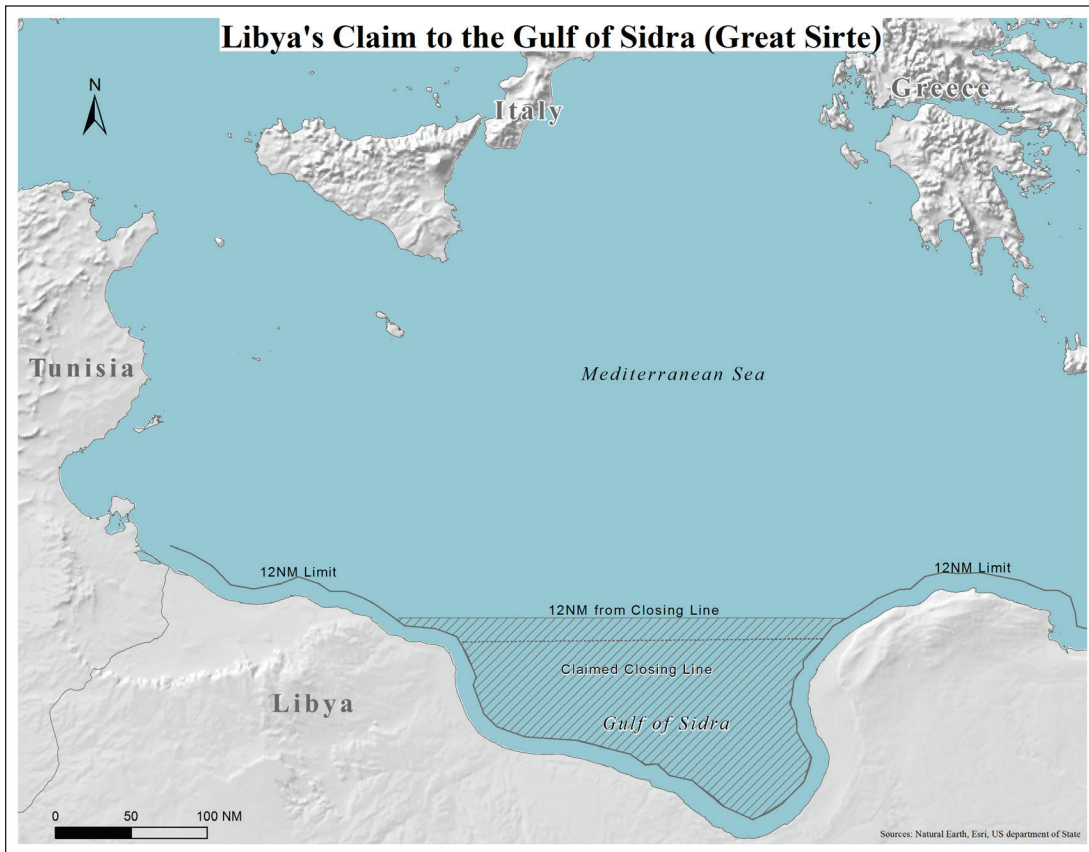
Artificial Islands, Installations, and Structures

States have the right to construct artificial islands, installations and structures within their EEZ.²² Owners of such artificial features are permitted to establish reasonable safety zones, usually not to exceed 500 meters (1649 feet) or acceptable standards from international safety organizations such as the International Maritime Organization. Since they are not naturally occurring, artificial features do not create a territorial sea, contiguous zone, EEZ, or continental shelf.

Effects and Controversies of Maritime Zones and Features

The LOSC specifically defines the various maritime zones and features. However, there are ongoing controversies around the world over the definition of those features and the zones they should produce. It is easy to see why, depending on the type of feature.

The dispute over the Gulf of Sidra illustrates the challenges posed by bays and straight baselines. Located between the eastern and western halves of Libya, the Libyan government under Muammar Gadhafi in the 1970s attempted to draw a



straight baseline across the Gulf of Sidra and declare it as internal waters. This would have allowed Libya a much larger area to restrict navigation and overflight. Most nations did not recognize the claim because, under the LOSC, the baseline did not conform to the shape of the coast. These nations also opposed Libya’s claim to historical use due to a lack of demonstrated usage and its large size.

Another challenge centers on the definition of islands. There is an incentive for States to obtain island status for their deep ocean features. Unlike rocks or low-water elevations, islands project a full territorial sea with overflight control and a full EEZ. This issue is most prevalent in the South China Sea, which is rich in resources and contains many maritime features that may or may not be islands entitled to large EEZs. Even small islands, such as the Spratly Islands, which total 1.5 square miles in size, can project hundreds of square nautical miles of exclusive economic control over the South China Sea. This issue is discussed in more detail in Chapter Ten: The South China Sea Tribunal.

Finally, rising sea levels threaten to alter the current demarcation of maritime zones. As already discussed, rocks and low-tide elevations create much smaller zones of control than islands. Rising sea levels could effectively downgrade the status of some islands to that of rocks or low-tide elevations that would deny their owners an EEZ. The LOSC provides no clear guidance on this emerging issue.

-
- 1 United Nations Convention on the Law of the Sea, Article 5, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOSC]. (available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/part2.htm).
 - 2 US Department of Commerce, National Oceanic and Atmospheric Administration. "What is the difference between a nautical mile and a knot?" NOAA's National Ocean Service. June 01, 2013. Accessed July 06, 2017. http://oceanservice.noaa.gov/facts/nauticalmile_knot.html.
 - 3 U.S. Department of the Navy, *Annotated Supplement for the Commander's Handbook on the Law of Naval Operations*, NWP 9 (Rev. A)/FMFM 1-10), paras. 1.5.1 & 2.4.1 (1989).
 - 4 LOSC, Article 56
 - 5 LOSC, Article. 56.
 - 6 LOSC, Art. 58. (*Articles 58-115 include the duty to render assistance (Article 98), actions taken to counter the slave trade (Article 99) and repress piracy (Articles 100-107), suppression of narcotics trafficking (Article 108), suppression of unauthorized broadcasting (Article 109), the exercise of the peacetime right of approach and visit (Article 110), and the right to hot pursuit (Article 111).*)
 - 7 LOSC, Article 76(4)(a)(i).
 - 8 LOSC, Article 76 (4)(a)(ii).
 - 9 A 2,500-meter isobath means a line connecting the 2,500-meter depth of the seabed
 - 10 LOSC, Article 79(1).
 - 11 LOSC, Article 78.
 - 12 LOSC, Article 136.
 - 13 LOSC, Article 151(b).
 - 14 LOSC, Article 7.
 - 15 LOSC, Article 7.
 - 16 LOSC, Article 7.
 - 17 LOSC, Article 9.
 - 18 LOSC, Article 10.
 - 19 LOSC, Article 121.
 - 20 LOSC, Article 6.
 - 21 LOSC, Article 13.
 - 22 LOSC, Article 60.

Freedom of Navigation

“Upon our naval and air patrol . . . falls the duty of maintaining the American policy of freedom of the seas, now.”¹

– President Franklin D. Roosevelt, Fireside Chat, September 11, 1941



Diana Quinlan/U.S. Navy/Handout via Reuters/October 2016

**Guided-missile destroyer
USS Decatur (DDG 73)
operates as part of the
Bonhomme Richard
Expeditionary Strike
Group (ESG) in the
South China Sea.**

“As we go forward, the United States will continue to fly, sail, and operate wherever international law allows, and we will support the right of all countries to do the same.”²

– President Barack H. Obama, Address to the People of Vietnam, May 24, 2016

Introduction

This chapter focuses on the application of the broad principles of freedom of the high seas and navigation rights, as outlined in the LOSC, within specific situations that permit coastal States to impose some limitations on freedom of navigation including “innocent passage” and “transit passage.”³ These rights are critical to U.S. commerce and military operations central to U.S. national security interests. The U.S. is not a party to the LOSC, but it considers the provisions of the Convention relating to the high seas and navigation rights to be a reflection of the customary international law that is binding on all States.

This chapter analyzes the legal definition of innocent passage by vessels through territorial waters and discusses the relevant articles of the LOSC regarding innocent passage. It then outlines the legal definition of transit passage through international straits and discusses the relevant articles of the LOSC regarding transit passage. The right of archipelagic sea lanes passage for ships and aircraft is also part of the freedom of navigation framework within the LOSC, but it will not be addressed in depth here.⁴ The final section highlights the U.S. Freedom of Navigation Program, which is designed to challenge unlawful limitations imposed by coastal States in some of the most hotly contested waters around the globe.

Right of Innocent Passage

The right of innocent passage for foreign vessels within the territorial sea of a coastal State is defined as “navigation through the territorial sea for the purpose of (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility.” Passage must be “continuous and expeditious,” but it may include stopping and anchoring when incidental to ordinary navigation or rendered necessary by unusual circumstances.⁵

Article 19 of the LOSC declares that passage is “innocent” so long as it is not prejudicial to the peace, good order, or security of the coastal State and further outlines a list of 12 activities that are considered “prejudicial.” This list effectively precludes a range of military operations, including practicing or exercising weapons; collecting information to the prejudice of the coastal State; launching, landing or taking on board any aircraft or military device; and jamming coastal State communications. Submarines and underwater vehicles conducting innocent passage must navigate on the surface and show their flag.⁶ It is important to note that the right of innocent passage only applies to foreign vessels. Aircraft in flight are not entitled to innocent passage and thus aircraft must remain onboard vessels during innocent passage.⁷

An exception to the authority to deny innocent passage to aircraft exists within the limited context of the “right of assistance entry”⁸ based on the long-recognized duty of mariners to render immediate rescue assistance to those in danger or distress at sea. The right of assistance entry permits entry into the territorial sea by ships or, under certain circumstances, aircraft without permission of the coastal State for the limited purposes of rescue or assistance. This principle of customary international law is also reflected in the “duty to render assistance” described in Article 98 of the LOSC.⁹

The right of innocent passage applies to straits used for international navigation in accordance with the LOSC and cannot be suspended even when a situation of armed conflict exists.¹⁰ The right of innocent passage also applies to archipelagic waters, but it can be subject to temporary published suspensions for the protection of coastal State security.¹¹

Lawful Limitations on Innocent Passage

Laws and Regulations of the Coastal State Relating to Innocent Passage

Article 24 prohibits coastal States from hampering the innocent passage of foreign ships through the territorial sea unless specifically authorized by other Articles of the LOSC. Coastal States are also prohibited from discriminating among States or cargoes from different nations.¹² However, the LOSC permit coastal States to adopt laws and regulations related to passage through the territorial sea in the following list of circumstances:

- the safety of navigation and the regulation of maritime traffic;
 - the protection of navigational aids and facilities and other facilities or installations;
 - the protection of cables and pipelines;
 - the conservation of the living resources of the sea;
 - the prevention of infringement of the fisheries laws and regulations of the coastal State;
 - the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;
 - marine scientific research and hydrographic surveys;
 - the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
- ***
- prevention of collisions at sea including the use of designated sea lanes and traffic separation schemes; and
- ***
- require foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances to carry documents and observe special precautionary measures established for such ships by international agreements.¹³

Despite the broad regulatory authority outlined above, Article 26 of the LOSC prohibits the imposition of charges levied upon foreign ships for innocent passage unless a ship receives services rendered by the coastal State for which payment is due, such as refueling or maintenance.

Rights of Protection of the Coastal State

A coastal State may take necessary steps in its territorial sea to prevent passage which is not innocent and may announce temporary suspensions of innocent passage through a required public notice if the suspension is essential for security reasons, which include weapons exercises.¹⁴ While the text of the relevant articles of the LOSC does not explicitly grant the right of innocent passage to warships, the overall language of the LOSC in the context of its negotiation history and customary international law all make it clear that warships enjoy the right of innocent passage on an unimpeded and unannounced basis.¹⁵ However, if a warship does not comply

with coastal State regulations that conform to established principles of international law and disregards a request for compliance that is made to it, the coastal State may require the warship to leave the territorial sea immediately.¹⁶ Due to the sovereign immunity of warships (discussed further in Chapter Six: Sovereign Immunity) the degree to which a coastal State can force a warship to exit its territorial waters in this situation is not clear. Additionally, coastal States may not prohibit transit or otherwise impair the rights of innocent passage of nuclear-powered sovereign vessels.¹⁷

Differing Interpretations Regarding Innocent Passage

Several articles of the LOSC addressing innocent passage have led to differing interpretations by States. For example, some coastal States interpret Article 19(1), which allows for innocent passage, to prohibit several activities not explicitly listed under Article 19(2). Another issue of interpretation is whether the coastal State may require foreign ships conducting innocent passage to carry equipment that enables the coastal State to monitor the ship's movement. Some commentators have argued that no LOSC provision prevents the coastal State from imposing such a measure.¹⁸ However, the LOSC does not expressly characterize a foreign ship's passage in the territorial sea as non-innocent if it fails to enable monitoring by the coastal State.

These disputed issues originate from the negotiations that preceded the adoption of the LOSC, which placed the interests of maritime powers in conflict with those of coastal States. Maritime powers pushed for more freedom of navigation, but coastal States argued for the ability to constrain mobility in certain circumstances to protect coastal State interests.¹⁹

Unlawful Restrictions Claimed by Outlier States

A number of States unlawfully require prior notification before a foreign warship may conduct innocent passage through their territorial waters, but most of these States do not specify when the foreign warship must provide the notification. A larger number of States, notably including China, not only unlawfully require notification, but also require that prior permission be granted.

Saudi Arabia unlawfully asserts that innocent passage does not apply to its territorial sea where there is an alternate route through the high seas or an exclusive economic zone (EEZ) which is equally suitable.

Romania²⁰ and Lithuania²¹ prohibit the passage of ships carrying nuclear and other weapons of mass destruction through their territorial seas.

A complete list of the unlawful restrictions imposed by coastal States upon the right of innocent passage can be found in the Maritime Claims Reference Manual (MCRM) issued by the Department of Defense (DoD) Representative for Ocean Policy Affairs (REPOPA) published on the following website: www.jag.navy.mil/organization/code_10_mcrm.htm.

Right of Transit Passage

The right of transit passage is defined as the exercise of the freedoms of navigation and overflight, solely for the purpose of continuous and expeditious transit through an international strait between one part of the high seas or an EEZ and another part of the high seas or an EEZ, in the normal modes of operation utilized by ships and aircraft for such passage. An exception to the right of transit passage declares that the right “shall not apply if the strait is formed by an island of a State bordering the strait and its mainland” and “there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.”²² Transit passage cannot be hampered or suspended by the coastal State for any purpose during peacetime. This also applies to transiting ships, including warships, of States at peace with the bordering coastal State but involved in armed conflict with another State.²³ The right of transit passage applicable in peacetime, along with the laws and regulations of States bordering straits adopted in accordance with international law, continue to apply during armed conflict. However, during transit belligerents must not conduct offensive operations against enemy forces, nor use such neutral waters as a place of sanctuary or as a base of operations.²⁴

It is important to note a few key differences between innocent passage and transit passage that are particularly relevant to military operations and to highlight the fact that fewer restrictions may be imposed on transit passage when compared to innocent passage. While there is no right to innocent passage for aircraft, and coastal States may deny entry to aircraft attempting to traverse airspace over their territorial waters, they may not deny transit passage to aircraft over an international strait.

In addition, while coastal States may require submarines to conduct innocent passage on the surface and showing their flag, they may not prohibit submarines from conducting transit passage submerged.²⁵ Another difference is that transit passage may not be suspended by the coastal State, whereas innocent passage may be temporarily suspended.²⁶

Duties of ships and aircraft during transit passage

Ships and aircraft exercising the right of transit passage shall (a) proceed without delay through or over the strait; (b) refrain from any threat or use of force against the sovereignty, territorial integrity, or political independence of States bordering the strait; and (c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress.²⁷ Surface warships may transit in a manner consistent with sound navigational practices and the security of the force, including the use of their electronic detection and navigational devices such as radar, sonar, and depth sounding devices, formation steaming, and the launching and recovery of aircraft.²⁸

Laws, Regulations, & Duties of States Bordering Straits Relating to Transit Passage

Foreign ships are required to obtain the authorization of the coastal States that border straits prior to carrying out any research or survey activities while exercising the right of transit passage.²⁹ States bordering straits have the authority to establish sea lanes and traffic separation schemes where necessary to promote the safe passage of ships in straits used for international navigation.³⁰ Warships, auxiliaries, and government ships operated on exclusive government service, i.e., sovereign-immune vessels, are not legally required to comply with such sea lanes and traffic separation schemes while in transit passage, but they must exercise due regard for the safety of navigation. Coastal States may not prohibit transit or otherwise impair the right of transit passage of nuclear-powered sovereign vessels.³¹

Coastal States have the authority to adopt laws and regulations relating to transit passage through straits, with respect to all or any of the following:

- “(a) the safety of navigation and the regulation of maritime traffic, as provided in Article 41;
- (b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait;
- (c) with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear;
- (d) the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits.”³²

States bordering straits have the duty not to hamper transit passage and to give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge.³³

U.S. Freedom of Navigation (FON) Program

To preserve the freedom of the seas, the U.S. Department of Defense (DoD) regularly conducts operational challenges to many of the unlawful restrictions on freedom of navigation that have been outlined above through the U.S. Freedom of Navigation (FON) program. In accordance with U.S. Oceans Policy (1983), the U.S. “will exercise and assert its rights, freedoms, and uses of the sea on a worldwide basis in a manner that is consistent with the balance of interests” reflected in the LOSC. The FON Program includes: (1) consultations, representations, and protests by U.S. diplomats with foreign governments and (2) operational activities by U.S. military forces in and above international waters. The FON Program is implemented against excessive maritime claims by coastal States in every region of the world, based upon the DoD’s global interest in freedom of navigation and access.³⁴

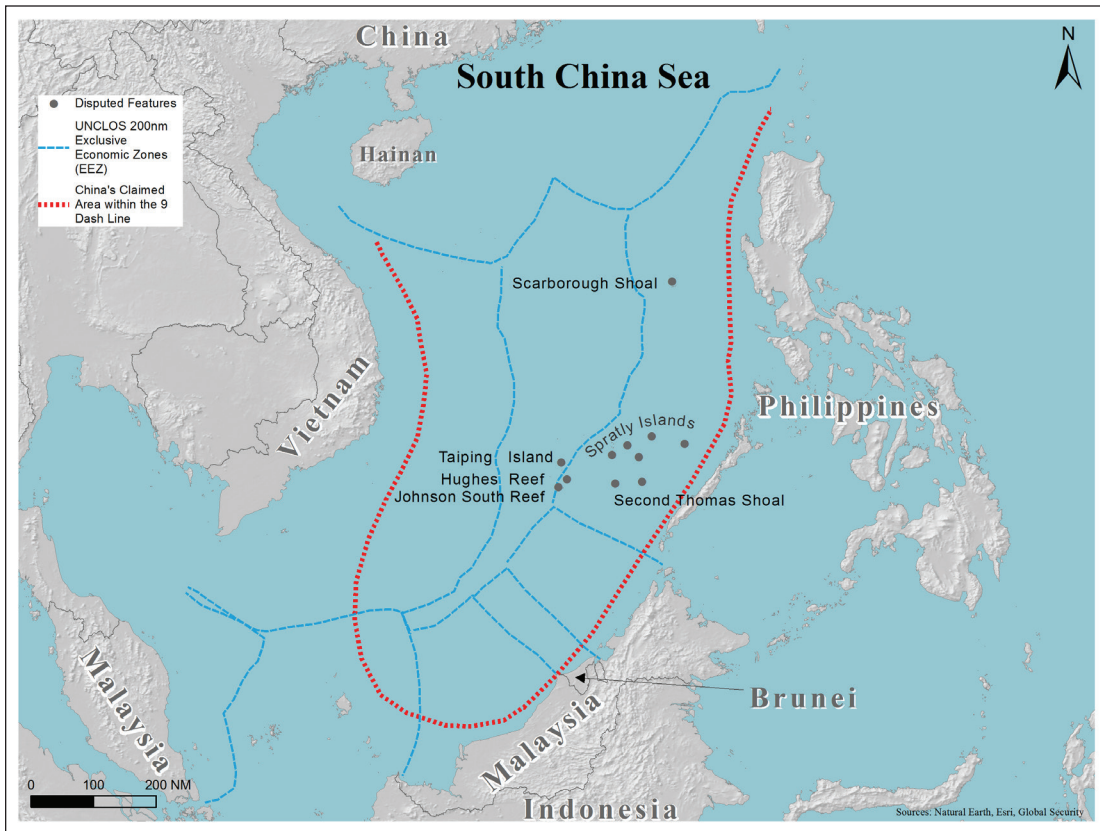
Given the high level of publicity that some FON Program operations currently receive with respect to interactions with China, it is important to highlight that the FON Program is “principle-based.” FON operations are conducted with a focus on the excessive nature of maritime claims, rather than the identity of the coastal States asserting those claims. U.S. forces challenge excessive claims asserted not only by potential adversaries and competitors, but also by allies, partners, and other States. The Program includes “both FON operations (i.e., operations that have the primary purpose of challenging excessive maritime claims) and other FON-related activities (i.e., operations that have some other primary purpose, but have a secondary effect of challenging excessive claims), in order to gain efficiencies in a fiscally constrained environment.” Each year DoD publishes an annual FON Report that summarizes FON operations and other FON related activities conducted by U.S. forces, and identifies the specific coastal nations and excessive claims challenged.³⁵

When the FON program began in 1979, U.S. military ships and aircraft were exercising their rights against excessive claims of about 35 countries at the rate of about 30 to 40 challenges annually, but by 1999 the decline in operational challenges led the Department of the Navy and the Department of Commerce (within which the National Oceanic and Atmospheric Administration resides) to recommend an expansion of the program to “exercise openly the traditional freedoms of navigation and overflight in areas of unacceptable claims.”³⁶ In fiscal year 2016, the DoD conducted FON operations against 22 different States, and 13 of those States were subject to multiple challenges.³⁷

The remainder of this chapter will highlight some recent and well publicized FON operations in some of the most hotly contested waters around the globe where freedom of navigation is vital to U.S. foreign policy, commerce, and national security interests.

South China Sea (SCS)

The South China Sea (SCS) is the most contentious region for FON operations. China has been building artificial features and installing military equipment on them in addition to making a variety of other excessive maritime claims including broad assertions of sovereignty as exemplified by the so-called “nine dash line.” See Chapter Ten: The South China Sea Tribunal for additional information on this topic. In 2016 the U.S. challenged the following Chinese restrictions on freedom of navigation: (1) excessive straight baselines; (2) jurisdiction over airspace above the EEZ; (3) restriction on foreign aircraft flying through an Air Defense Identification Zone (ADIZ) without the intent to enter national airspace; (4) domestic law criminalizing survey activity by foreign entities in the EEZ; and (5) prior permission required for innocent passage of foreign military ships through the territorial sea.³⁸ On December 22, 2015, the Secretary of Defense outlined the U.S. views regarding FON operations in the SCS in response to an inquiry from Senator John McCain regarding a widely discussed FON operation conducted by the USS Lassen in the South China on October 27, 2015.³⁹ Senator McCain and other members of Congress have suggested that the DoD

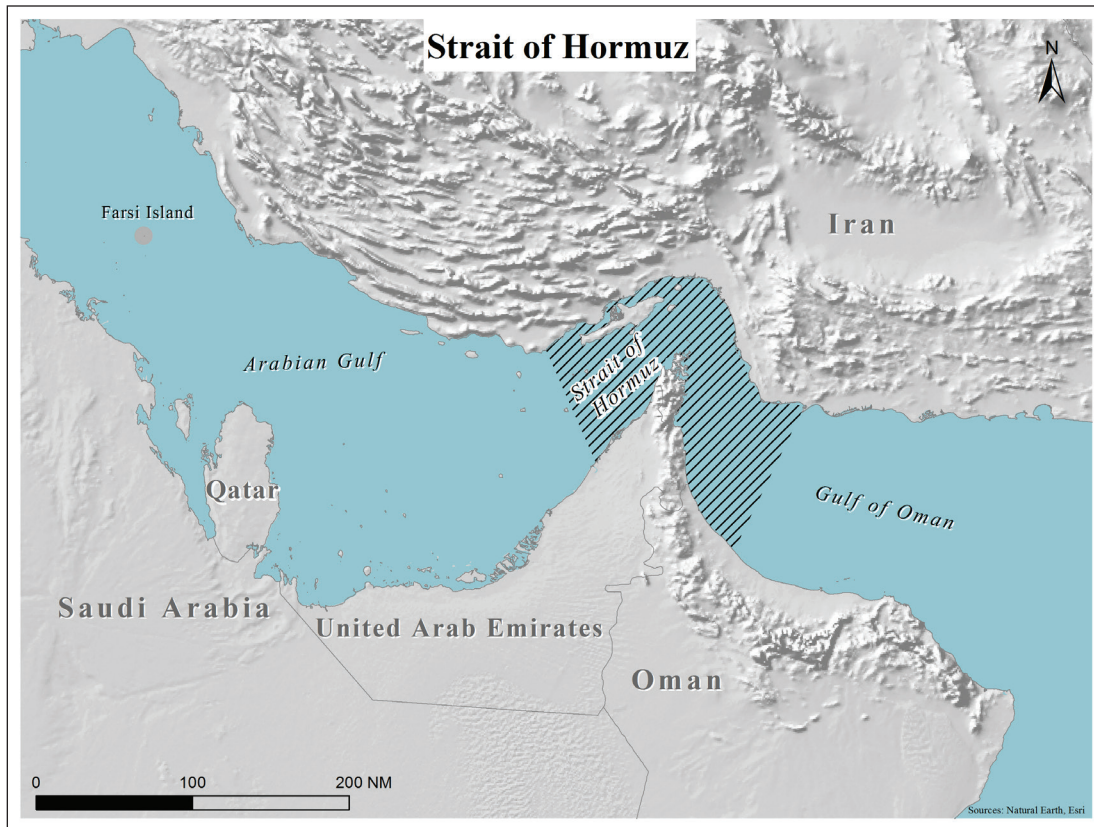


should more clearly articulate the particular excessive claim(s) being challenged by these types of FON operations.⁴⁰ In October 2016, a U.S. Navy destroyer sailed close to Woody Island, which is also claimed by Taiwan and Vietnam, in the fourth such operation by the U.S. Navy in the year. China called the act “provocative” and has responded to U.S. FON operations in the SCS with a wide variety of claims that lack support under the LOSC.⁴¹

Arabian Gulf & Strait of Hormuz

On January 12, 2016, Iran detained nine U.S. sailors and a naval officer near Farsi Island in the Arabian Gulf and ransacked two U.S. vessels. The sailors were carrying out innocent passage when one of their boats suffered an engine problem, and thus the detention and search of the vessels was in violation of international law.⁴² Iran was also subject to FON operations in both 2015 and 2016 because it imposed restrictions on the right of transit passage through the Strait of Hormuz and attempted to prohibit foreign military activities and practices in the EEZ.⁴³

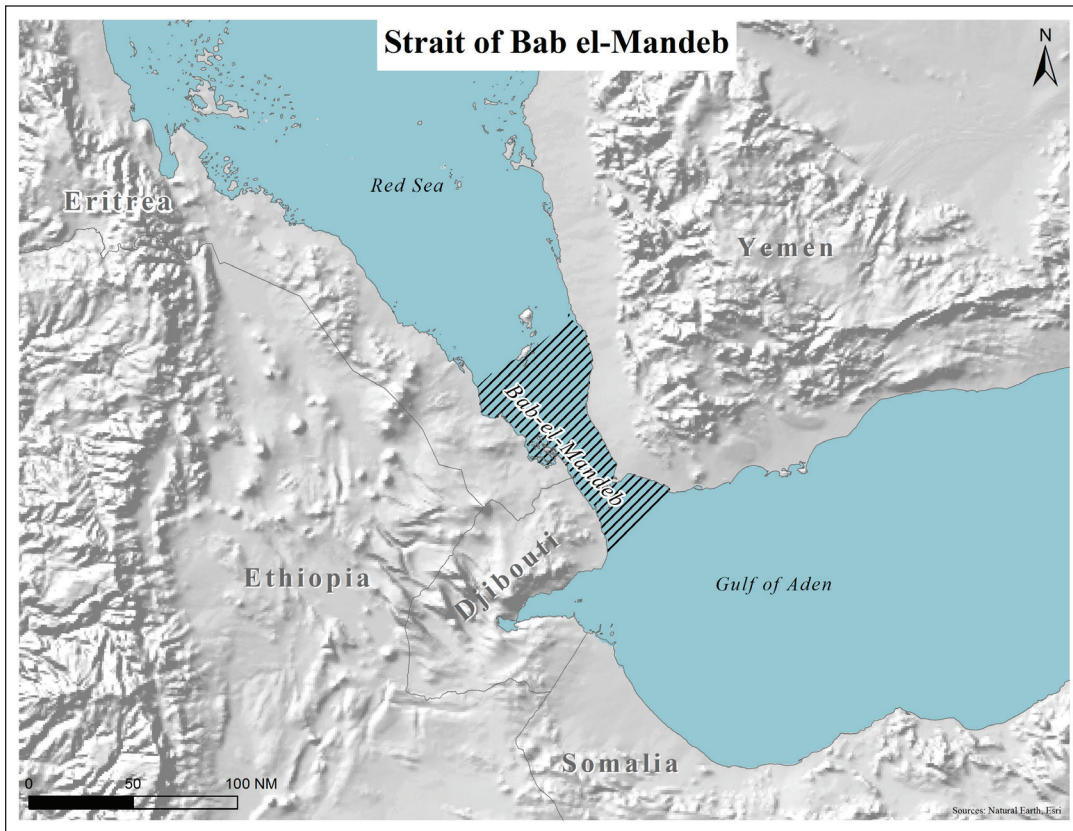
Tensions have continued in the Strait of Hormuz in 2016. On January 8, the USS Mahan (DDG-72) was escorting a Navy oiler and the USS Makin Island (LHD-8) when four Iranian Revolutionary Guard Corps Navy fast inshore attack craft, with crew-served weapons manned, approached within 900 yards of the guided missile destroyer. After the Iranian boats failed to respond to a radio call and flares signaling



them to stop, sailors on board the U.S.S. Mahan fired warning shots with a .50-caliber machine gun and a Navy helicopter also deployed a smoke screen generator. These actions caused the Iranian boats to halt their high-speed approach and observe the U.S. vessels complete the transit passage. There were 35 close encounters between U.S. and Iranian vessels in 2016, most of which occurred during the first half of the year, and 23 encounters in 2015.⁴⁴

Bab el Mandeb

On October 12, 2016, the sixteenth anniversary of the bombing of the USS Cole (DDG-67) in Aden, Yemen, Houthi rebels in Yemen launched missiles at U.S. Navy ships operating near the Bab el Mandeb international strait for the second time in that week. The U.S. responded with Tomahawk cruise missile strikes to destroy three coastal radar sites in Houthi-controlled territory on Yemen's Red Sea Coast. Pentagon press secretary Peter Cook stated that the U.S. will "respond to any further threat to our ships and commercial traffic, as appropriate, and will continue to maintain our freedom of navigation in the Red Sea, the Bab al-Mandeb and elsewhere around the world."⁴⁵



Conclusion

The FON Program presents a balancing of diplomatic costs and benefits with the risks inherent in physical challenges. In some cases, the costs, disadvantages, or risks that come with physically challenging excessive claims might be greater than the benefits. Of course, coastal States understand this calculus and may try to use it to their advantage since they have an incentive to compel the international community to acquiesce to their excessive maritime claims.⁴⁶ Continued investments in the FON Program, including diplomatic protests against unlawful claims and continued FON operations to challenge those claims, are essential to preserve key navigational rights embodied in the LOSC and customary international law. The U.S. has encouraged allies like Japan, South Korea, and Australia to join the FON Program, but they have been reluctant to conduct operations so far. The U.S. should continue to pursue this goal because the message delivered by FON operations will be stronger when more States send it.

- 1 Franklin D. Roosevelt, "Fireside Chat," September 11, 1941, The American Presidency Project. (available at: <http://www.presidency.ucsb.edu/ws/?pid=16012>).
- 2 Barack H. Obama, "Address to the People of Vietnam," May 24, 2016, Office of the Press Secretary, The White House. (available at: <https://www.whitehouse.gov/the-press-office/2016/05/24/remarks-president-obama-address-people-vietnam>)
- 3 United Nations Convention on the Law of the Sea, Articles 87, 90, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOSC]. (available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/part2.htm).
- 4 LOSC, Articles 53-54.
- 5 LOSC, Articles 17-18.

- 6 LOSC, Articles 19-20.
- 7 Naval Warfare Publication 1-14M, The Commander's Handbook of the Law of Naval Operations, "General Maritime Regimes Under Customary International Law as Reflected in the 1982 LOS Convention," 2-4. [hereinafter Naval Warfare Publication 1-14M] (available at: http://www.jag.navy.mil/documents/NWP_1-14M_Commanders_Handbook.pdf).
- 8 Chairman of the Joint Chiefs of Staff Instruction 2410.01D, "Guidance for the Exercise of Right-of-Assistance Entry", August 31, 2010. (available at: http://www.dtic.mil/cjcs_directives/cdata/unlimit/2410_01.pdf); See also San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Articles 31-33, June, 12 1994. [hereinafter San Remo Manual] (available at: <https://ihl-databases.icrc.org/ihl/INTRO/560>).
- 9 LOSC, Article 98.
- 10 LOSC, Article 45; *see also* San Remo Manual, Articles 31-33.
- 11 LOSC, Articles 52-53.
- 12 LOSC, Article 24.
- 13 LOSC, Articles 21-23.
- 14 LOSC, Article 25.
- 15 Naval Warfare Publication 1-14M, 2-5.
- 16 LOSC, Article 30.
- 17 Naval Warfare Publication 1-14M, 2-5.
- 18 *See* John A. Knauss & Lewis M. Alexander, "The Ability and Right of Coastal States to Monitor Ship Movement: A Note", 31 Ocean Dev. & Int'l L. 377, 379 (2000).
- 19 *See generally* William Agyebeng, "Theory in Search of Practice: The Right of Innocent Passage in the Territorial Sea", Cornell International Law Journal, Volume 39, Issue 2, 389-390, (2006). (available at: <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1672&context=cilj>)
- 20 "Romania: Act Concerning the Legal Regime of Internal Waters, the Territorial Sea and the Contiguous Zone of Romania" (Aug. 7, 1990), 19 L. Seas Bull. 9, 11 (1991).
- 21 Lithuania: Legislation on the Territorial Sea, 25 L. Seas Bull. 75 (1994).
- 22 LOSC, Article 38.
- 23 Naval Warfare Publication 1-14M, 2-6; *See also* San Remo Manual, Articles 31-33, June, 12 1994.
- 24 San Remo Manual, Articles 27-30.
- 25 Naval Warfare Publication 1-14M, 2-6.
- 26 LOSC, Article 25.
- 27 LOSC, Article 39.
- 28 Naval Warfare Publication 1-14M, 2-6.
- 29 LOSC, Article 40.
- 30 LOSC, Article 41.
- 31 Naval Warfare Publication 1-14M, 2-5, 2-6.
- 32 LOSC, Article 42.
- 33 LOSC, Article 44.
- 34 *See generally* DoD Freedom of Navigation Fact Sheet, March 2015 [hereinafter DoD Freedom of Navigation Fact Sheet] (available at: <http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program%20-%20Fact%20Sheet%20%28March%202015%29.pdf>)
- 35 *See generally* DoD Freedom of Navigation Fact Sheet.
- 36 James Kraska, "The Law Of The Sea Convention: A National Security Success - Global Strategic Mobility Through The Rule Of Law", 544 The Geo. Wash. Int'l L. Rev. 39, 569, (2008). (available at: <http://www.virginia.edu/colp/pdf/kraska-los-national-security-success.pdf>)
- 37 U.S. Department of Defense (DoD) Freedom of Navigation (FON) Report for Fiscal Year (FY) 2016. [hereinafter DoD FON Report for FY 2016] (available at: <http://policy.defense.gov/Portals/11/FY16%20DOD%20FON%20Report.pdf>)
- 38 DoD FON Report for FY 2016.
- 39 "Letter from Secretary of Defense Ash Carter to Sen. John McCain (R-Ariz.) regarding U.S. military operations in the South China Sea", Dec. 22, 2015. (available at: <https://news.usni.org/2016/01/05/document-secdef-carter-letter-to-mccain-on-south-china-sea-freedom-of-navigation-operation>).
- 40 Lynn Kuok, "The U.S. FON Program in the South China Sea: A lawful and necessary response to China's strategic ambiguity", Brookings, June 2016 (available at: <https://www.brookings.edu/wp-content/uploads/2016/07/The-US-FON-Program-in-the-South-China-Sea.pdf>).
- 41 Lucas Tomlinson, "China flies nuclear-capable bomber in South China Sea after Trump Taiwan call, US officials say", Fox News (Dec. 9, 2016). (available at: <http://www.foxnews.com/world/2016/12/09/china-flies-nuclear-capable-bomber-in-south-china-sea-after-trump-taiwan-call-us-officials-say.html?refresh=true>)
- 42 Dan Lamothe, Navy: "Poorly led and unprepared" sailors were detained by Iran after multiple errors", Washington Post, June 30, 2016. (available at: <https://www.washingtonpost.com/news/checkpoint/wp/2016/06/30/navy-poorly-led-and-unprepared-sailors-were-detained-by-iran-after-multiple-errors>).
- 43 DoD FON Report for FY 2016.
- 44 *See generally* Michael Gordon, "American Destroyer Fires Warning Shots at Iranian Boats", N.Y. Times, Jan. 9, 2017. (available at: https://www.nytimes.com/2017/01/09/world/middleeast/iran-uss-mahan-shots.html?_r=0)
- 45 *See generally* Lolita C. Baldor, "US strikes in Yemen risk wider entanglement in civil war", Associated Press, Oct. 13, 2016, (available at: http://www.apnewsarchive.com/2016/Officials_say_US_missiles_destroy_radar_sites_on_Yemen_coast/id-f03b50ff873a471c88ebb1538c1e3dc9)
- 46 James Kraska, "The Law Of The Sea Convention: A National Security Success - Global Strategic Mobility Through The Rule Of Law", 544 The Geo. Wash. Int'l L. Rev. 39, 571, (2008).

Military Activities in an Exclusive Economic Zone (EEZ)

In May 2016, following a “dangerous” intercept by two Chinese J-11 fighter jets that approached within 50 feet of an U.S. EP-3 Aries reconnaissance aircraft, China’s Foreign Ministry demanded that the U.S. immediately cease surveillance flights over international waters along China’s coast, saying they were “seriously endangering Chinese maritime security.”¹ After a similar incident in June 2016, Secretary of State John Kerry said the U.S. would consider any Chinese establishment of an air defense identification zone (ADIZ) over the South China Sea to be a “provocative and destabilizing act.”² This dispute is but one example of a coastal State unlawfully trying to limit military activities within its Exclusive Economic Zone (EEZ).

Introduction

The legal definition of the EEZ and a discussion of the relevant articles of the LOSC that delineate the rights, jurisdiction, and duties of coastal States are included in Chapter Two: Maritime Zones. This chapter outlines the relevant articles of the LOSC that delineate the rights and duties of other States within the EEZ of a coastal State. It then addresses the legality of military activities within an EEZ and differing interpretations of the law promoted by certain States. Finally, it highlights sensitive reconnaissance operations in the EEZs of other States conducted by U.S. Armed Forces with a focus on publicized incidents relevant to U.S. national security interests and foreign policy.

Rights and Duties of States Other Than the Coastal State Within an EEZ

Article 87 of the LOSC provides that the high seas are open to all States, including freedom of navigation and overflight, and that the freedoms of the high seas “shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.”³ Article 58 recognizes that all States enjoy within the EEZ “the freedoms referred to in Article 87 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, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.” Article 86 of the Convention confirms this broad interpretation of Article 58. Hence, both the EEZ (including the contiguous zone) and the high seas beyond the EEZ are often referred to

as “international water” or “high seas” for purposes of such navigation and overflight rights. Article 301 requires States to “refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations” and also applies to EEZs.

Legality of Military Activities in an EEZ

Most of the States that participated in the LOSC negotiations supported the view that military operations, exercises, and activities have always been regarded as internationally lawful uses of the sea and that the right to conduct such activities would continue for all States within the EEZs of other States.⁴

Air Defense Identification Zones (ADIZ)

However, international law does not prohibit coastal States from establishing ADIZs for security reasons in the international airspace within their EEZ. For example, an aircraft approaching national airspace may be required to identify itself while in international airspace as a condition of entry approval. ADIZs are justified in international law on the basis that a State has the right to impose reasonable conditions for entry into its national airspace. States that have standing ADIZs include Indonesia (over the island of Java), U.S., Japan, Canada, and France.⁵ U.S. ADIZs are set forth in 14 CFR 99.42, 99.43, 99.45, and 99.47 for the continental U.S, Alaska, Guam, and Hawaii respectively.⁶

Certain States, however, purport to require all aircraft penetrating an ADIZ to comply with ADIZ identification procedures, whether or not the aircraft intends to enter their national airspace. The U.S. does not recognize the right of a coastal State to impose ADIZ procedures upon foreign aircraft that do not intend to enter national airspace. Accordingly, U.S. military aircraft not intending to enter national airspace do not identify themselves or otherwise comply with ADIZ procedures established by other States, unless the U.S. has specifically agreed to do so.⁷

Surveillance and Intelligence Activities Within EEZs Are Legal

China’s Ministry of Foreign Affairs has argued that U.S. surveillance flights for the purpose of overt intelligence collection within China’s EEZ “undermine the international peace and security” of the EEZ and are therefore a violation of international law.⁸ China has referenced articles 87, 88, and 301 of the LOSC in its argument and stated that the “right to maintain peace, security, and good order” within the EEZ, shall be respected and that a State shall conform to the LOSC and “other rules of international law when exercising its freedom of the high seas.”⁹ The U.S. view is that any activity that occurs in international airspace should be treated as legal, unless it involves hostilities against another State, and therefore the use of passive systems to collect information from an area not subject to national jurisdiction is entirely peaceful and lawful.¹⁰ Examples from the tense and sometimes dangerous

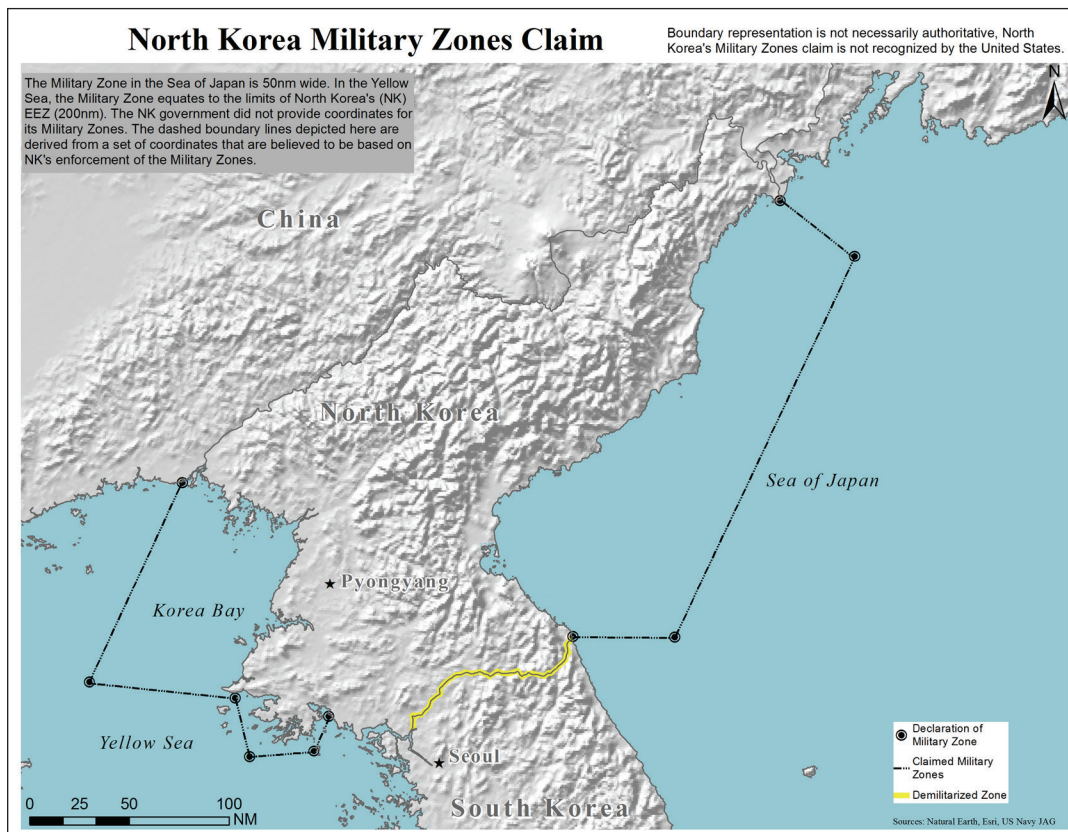
international relations between China and the U.S. related to this dispute about military activities within China's EEZ will be discussed further in the final section of this chapter.

Military Marine Data Collection (Oceanographic Surveys) Within an EEZ Are Legal

Coastal States may regulate marine scientific research (MSR) within their EEZ in accordance with Article 56 of the LOSC. States that attempt to limit military marine data collection (surveillance operations and oceanographic surveys) in EEZs have argued that such operations are akin to MSR and thereby subject to coastal State control.¹¹ These attempts by coastal States to regulate military marine data collection are inconsistent with centuries of state practice, customary international law, and the text of the LOSC Articles 58, 86, and 87.¹² Restrictions on MSR were adopted in connection with the adoption of the EEZ. Based on the language and legislative history of the Convention, these restrictions were intended to limit research activities by foreign States regarding maritime resources and were not intended to limit military marine data collection.

North Korea's Unlawful Approach

North Korea also does not respect freedom of navigation within its EEZ and it aggressively opposes military activities such as intelligence collection flights within its



EEZ. On August 1, 1977, North Korea declared a “military zone” extending 50 miles from the starting line of the territorial waters in the East Sea to the boundary line of the economic sea zone in the West Sea for the purpose of safeguarding its EEZ and to defend the “nation’s interests and sovereignty.”¹³ Foreign military ships and aircraft are prohibited from entering the zone and civilian ships and aircraft are allowed to navigate inside it only with prior agreement or approval. It is also strictly prohibited to take photographs or collect marine data.¹⁴ North Korea is effectively treating this area as internal waters and national airspace.

Other Unlawful Coastal State Restrictions on Military Activities Within an EEZ

Eighteen States purport to regulate or prohibit foreign military activities in their EEZs, but of these only China, North Korea, and Peru have demonstrated a willingness to use force to impose their excessive EEZ claims. A list of the most common of these unlawful constraints is provided below:

- 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 and/or consent;
- Requirements for prior notice and/or consent for transits by nuclear-powered vessels or ships carrying hazardous and dangerous goods, such as oil, chemicals, noxious liquids, and radioactive material;
- Limiting warship transits of the EEZ to innocent passage;
- Prohibitions on surveillance operations (intelligence collection) and photography;
- Requiring warships to place weapons in an inoperative position prior to entering the contiguous zone;
- Restrictions on navigation and overflight through the EEZ;
- Prohibitions on conducting flight operations (launching and recovery of aircraft) in the contiguous zone;
- Requiring submarines to navigate on the surface and show their flag in the contiguous zone;
- Requirements for prior permission for warships to enter the contiguous zone or EEZ;
- Asserting security jurisdiction in the contiguous zone or EEZ;
- Application of domestic environmental laws and regulations; and
- Requirements that military and other State aircraft file flight plans prior to transiting the EEZ.

A complete list of the unlawful restrictions imposed by coastal States upon military activities in an EEZ can be found in the Maritime Claims Reference Manual (MCRM) issued by the Department of Defense (DoD) Representative for Ocean Policy Affairs (REPOPA) published at the following website: www.jag.navy.mil/organization/code_10_mcrm.htm.

These claims have no basis in customary international law, State practice, the LOSC, or the Chicago Convention on international civil aviation. These claims have been

protested against and operationally challenged by the U.S. through its Freedom of Navigation (FON) Program.¹⁵ Additional information about the FON Program can be found in Chapter Three: Freedom of Navigation.

U.S. Sensitive Reconnaissance Operations in the EEZ of China

The U.S. military conducts intelligence collection flights, often referred to as “sensitive reconnaissance operations (SRO),” within the EEZs of foreign States that are sometimes challenged and intercepted by foreign military aircraft. Perhaps the most infamous of these incidents occurred on April 1, 2001 off the southern coast of China near Hainan Island when a Chinese F-8-II “Finback” fighter made contact with a U.S. EP-3E Aries aircraft. The Chinese pilot died after his fighter crashed into the sea and the American EP-3E was severely damaged and had to make an emergency landing on Hainan Island.¹⁶

These dangerous intercept incidents have continued over the years as Chinese aircraft have attempted to deter the U.S. aircraft from approaching China’s coast to utilize sophisticated intelligence-collection capabilities. More recently, on August 22, 2014, the Obama administration accused a Chinese fighter jet of conducting a “dangerous intercept” of a U.S. P-8 Poseidon surveillance aircraft near Hainan Island, and U.S. officials said it was at least the second formal complaint U.S. diplomats have filed with China in recent months.¹⁷ A similar series of events occurred in May and June of 2016 when two Chinese fighter jets that flew within 50 feet of a U.S. EP-3 aircraft over the South China Sea, and a Chinese J-10 fighter jet conducted a dangerous intercept of a U.S. reconnaissance plane over the East China Sea. The U.S. determined that China’s dangerous intercepts were in violation of an agreement designed to reduce or avoid such incidents that was signed by the two governments in 2015.¹⁸ On February 8, 2017 near Scarborough Shoal in the South China Sea, a Chinese KJ-200 aircraft approached within 1,000 feet of a U.S. P-3 Orion, and the P-3 had to alter its course to avoid a collision.¹⁹ The status of the Scarborough Shoal and the area around it within the context of the LOSC were an important part of the dispute between China and the Philippines, which is discussed in Chapter Ten: The South China Sea Tribunal.

Conclusion

The preservation of military activities in EEZs will continue to be of paramount importance to the U.S. and is a source of continuing friction with coastal States that seek to expand their authority in their EEZs. The U.S. should continue FON Operations, diplomatic protests, military exercises, and SROs to challenge the unlawful limitations that coastal States seek to impose on military activities.

1 Idrees Ali and Megha Rajagopalan, “China demands end to U.S. surveillance after aircraft intercept”, Reuters (May 19, 2016) (available at: <http://www.reuters.com/article/us-southchinasea-china-usa-idUSKCN0YA0QX>).

2 Reuters, “Pentagon U.S. Accuses China of Dangerous, High-speed Intercept of Spy Plane in South China Sea”, Newsweek (June 7, 2016) (available at: <http://www.newsweek.com/china-spy-plane-intercept-unsafe-south-china-sea-united-states-high-speed-asia-467714>).

3 United Nations Convention on the Law of the Sea, Article 87, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOSC]. (available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/part2.htm) (A definition of the Area can be found in Chapter Two: Maritime Zones).

- 4 17 Third UN Conference on the Law of the Sea, Plenary Meetings, Official Records, U.N. Doc. A/CONF.62/WS/37 and ADD. 1-2, 244 (1973-1982).
- 5 Richard Jaques, *Maritime Operational Zones*, U.S. Naval War College, D-4 (2013). [hereinafter Richard Jaques, *Maritime Operational Zones*] (available at: [https://www.usnwc.edu/getattachment/Departments---Colleges/International-Law/Maritime-Operational-Zones/2013-Zones-Manual-\(1\).pdf.aspx](https://www.usnwc.edu/getattachment/Departments---Colleges/International-Law/Maritime-Operational-Zones/2013-Zones-Manual-(1).pdf.aspx))
- 6 Richard Jaques, *Maritime Operational Zones*, Note 9 at 3-3.
- 7 "Air Force Operations and the Law", The Judge Advocate General's School, 78 (2014). (available at: <http://www.afjag.af.mil/Portals/77/documents/AFD-100510-059.pdf>).
- 8 Stuart Kaye, "Freedom of Navigation, Surveillance and Security: Legal Issues Surrounding the Collection of Intelligence from Beyond the Littoral", 24 *Australian Year Book of International Law* 93 (2005). [hereinafter Stuart Kaye, "Freedom of Navigation, Surveillance and Security"] (available at: http://www.austlii.edu.au/au/journals/AUyrBkIntLaw/2005/7.html#_Ref79163184)
- 9 Stuart Kaye, "Freedom of Navigation, Surveillance and Security".
- 10 Stuart Kaye, "Freedom of Navigation, Surveillance and Security"; See also Naval Warfare Publication 1-14M, *The Commander's Handbook of the Law of Naval Operations, "General Maritime Regimes Under Customary International Law as Reflected in the 1982 LOS Convention,"* 2-12. (available at: http://www.jag.navy.mil/documents/NWP_1-14M_Commanders_Handbook.pdf)
- 11 Raul Pedrozo, "Military Activities in the Exclusive Economic Zone: East Asia Focus", 90 *Int'l L. Stud.* 514, 525 at note 29, (2014). [hereinafter Raul Pedrozo, *Military Activities in the Exclusive Economic Zone*] (available at: <https://www.usnwc.edu/getattachment/973bec67-9225-4dde-9550-26279c600e2f/Military-Activities-in-the-Exclusive-Economic-Zone.aspx>)
- 12 Raul Pedrozo, "Military Activities in the Exclusive Economic Zone", 525-526.
- 13 Raul Pedrozo, "Military Activities in the Exclusive Economic Zone", 539.
- 14 Raul Pedrozo, "Military Activities in the Exclusive Economic Zone", 539.
- 15 Raul Pedrozo, "Military Activities in the Exclusive Economic Zone", 524.
- 16 Stuart Kaye, "Freedom of Navigation, Surveillance and Security".
- 17 Robert Burns and Lolita C. Baldor, *Pentagon Cites "Dangerous" Chinese Jet Intercept*, The Associated Press (Aug. 22, 2014) (available at: <http://bigstory.ap.org/article/pentagon-cites-dangerous-chinese-jet-intercept>).
- 18 See generally Reuters, "U.S. Accuses China of Dangerous, High-speed Intercept Of Spy Plane In South China Sea", Reuters (Jun. 7, 2016). (available at: <http://www.newsweek.com/china-spy-plane-intercept-unsafe-south-china-sea-united-states-high-speed-asia-467714>)
- 19 Ryan Browne, "U.S. Chinese and U.S. aircraft in 'unsafe' encounter", CNN (Feb. 10, 2017) (available at: <http://edition.cnn.com/2017/02/09/politics/us-china-aircraft-unsafe-encounter/index.html>).

Sovereign Immunity

Background

It is a long-standing rule of international law that one sovereign State does not have authority over another sovereign State and that all States are equals. This underlies the concept of sovereign immunity. Sovereign immunity in international law makes one State's property immune from interference by another State in two ways: jurisdictional immunity, which limits the adjudicatory power of national courts against a foreign State, and enforcement immunity, which limits the taking of or interference with State property by executive authorities of foreign States.

The LOSC Articles on Sovereign Immunity

Sovereign immunity for vessels owned or operated by a State and used in governmental, non-commercial service has been recognized in U.S. law, customary international law, and international agreements. In *The Schooner Exchange v. McFaddon*,¹ the U.S. Supreme Court recognized in 1812 that U.S. courts have no jurisdiction over military vessels in the service of another sovereign State, as warships are regarded as political and military instruments of the State. Customary norms of international law concerning State-owned vessel and warship immunity are reflected in the United Nations Convention on the Jurisdictional Immunities of States and Their Property, the International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels, and the LOSC.

Article 29 of the LOSC defines a warship as, “[A] ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew who are under regular naval discipline.”² Under this definition, a ship does not need to be armed in order to be considered a warship. Articles 95 and 96 of the LOSC recognize the complete immunity of warships and other government ships operated for non-commercial purposes on the high seas.³ Regarding the territorial waters of a coastal State, Article 32 reaffirms “the immunities of warships and other government ships operated for non-commercial purposes”, but a coastal State may require a warship to leave its territorial sea if the warship does not comply with the laws and regulations of the coastal State (when consistent with international law) concerning innocent passage and disregards any request for compliance made to it.⁴ The right of innocent passage is addressed in more detail in Chapter Three: Freedom of Navigation. Additionally, the LOSC provisions on protection and preservation of the marine environment do not apply to warships.⁵

Iran's Detention of 10 U.S. Sailors

On January 12, 2016, Iran's Revolutionary Guard Corps detained 10 U.S. Navy sailors after their riverine patrol boat entered Iranian waters due to a navigational error. At the time, not only was the U.S. Navy vessel entitled to sovereign immunity, their passage was in compliance with "innocent passage" under Article 19 of the LOSC. Iran had the right to query the vessel and escort them from their waters, but not to arrest the sailors or search the vessel.

Defining Immunity

In accordance with U.S. policy and the U.S. interpretation of international law regarding sovereign immunity, full sovereign immunity means immunity from arrest and search in national or international waters, foreign taxation, foreign state regulation requiring flying the flag of foreign State, and exclusive control over persons and acts performed on onboard.⁶ Sovereign immune vessels cannot be required to consent to onboard search or inspection, and police and port authorities may only board with permission of the commanding officer or master. Sovereign immune vessels shall not be required to fly a host nation's flag in port or when transiting a territorial sea. Regarding taxes and fees, if port authorities or husbanding agents attempt to assess fees such as a port tax, port tariff, port marine pass, or tolls on vessels with sovereign immunity, the vessel's captain should request an itemized list of all charges and explain that sovereign immune vessels cannot be charged port fees. However, they may pay for all goods and services provided by port authorities. It is the policy of the U.S. to never provide individual health records and to never allow health or sanitary inspections. However, captains must comply with quarantine regulations and restrictions for the port where the sovereign immune vessel is located. The U.S. does not provide crew lists to host nation authorities under any circumstances with no distinction made between military and non-military personnel. In response to a request for a crew list, captains should inform the host nation that the U.S. policy prohibits them from complying with this request.

U.S. Policy on Sovereign Immunity for Warships and Naval Auxiliaries

It is the policy of the U.S. to assert the privilege of sovereign immunity for all United States Ship (USS) vessels and small craft. USS vessels include, but are not limited to: U.S. Naval Ships (USNS), U.S. Coast Guard Cutter vessels (USCGC), other vessels owned by the U.S., U.S. flagged bareboat and time-charter vessels, and voyage charter vessels for the duration of government service. Small craft include, but are not limited to: motor whale boats, landing craft air cushioned and all other small boats, and craft and vehicles deployed from larger sovereign immune craft. In addition to USS vessels and small craft, the U.S. asserts sovereign immunity for underwater unmanned systems (UUS) and underwater unmanned vehicles (UUV) engaged exclusively in governmental, non-commercial service. How a small craft is launched has no

bearing on its status. Sovereign immunity for both UUS and UUV systems may be considered an extension of the sovereign immune vessel or aircraft from which they were launched, or they may be considered entitled to sovereign immunity as naval auxiliaries.

China's Seizure of U.S. Underwater Drone in the South China Sea

On December 16, 2016, a Chinese Navy submarine rescue vessel seized a U.S. Unmanned Underwater Vehicle (UUV) about 50 miles northwest of Subic Bay in the Philippines. In doing so, China indicated a willingness to openly capture U.S. property with sovereign immune status. This was an unlawful assertion of legal jurisdiction and interfered with freedom of navigation in the South China Sea in violation of the LOSC.

The Military Sealift Command Policy

The Military Sealift Command (MSC) is the provider of ocean transportation for the U.S. Navy and the Department of Defense (DoD). It is a critical element of U.S. maritime security and supports many naval operations. MSC vessels include:

- U.S. naval vessels assigned to MSC;
- U.S. Maritime Administration's National Defense Reserve Fleet (NDRF) and its Ready Reserve Force (RRF) when activated and assigned to MSC;
- privately-owned vessels under time charter to MSC with the Afloat Prepositioned Force (APF); and
- vessels chartered by MSC for a period of time or under MSC charter for a specific voyage or voyages.

The APF consists of ships loaded with combat equipment and support items located near potential trouble spots for quick deployment. It is U.S. policy to not only assert the full privileges of sovereign immunity for all MSC vessels owned by the U.S., but also for MSC time and voyage chartered ships in the APF. For MSC time and voyage chartered ships not in the APF, the U.S. only asserts freedom from arrest or taxation, but reserves the right to assert full sovereign immunity on a case-by-case basis. As a matter of policy, the U.S. does not claim sovereign immunity for MSC foreign-flagged voyage or MSC foreign-flagged time chartered vessels.

Although MSC vessels owned by the U.S., and U.S. flagged vessels bareboat or time chartered by the MSC are not to provide crew lists to foreign authorities, the Master may provide a shore party list for crew members going ashore to the host nation if requested. The list may contain only the names and passport numbers of those personnel and must not include health records, job descriptions, or employers. Masters must also comply with applicable agreements between the U.S. and the host nations, such as Status of Forces Agreements (SOFA), that specify procedures for port visits to the host nation.

Limited privileges of sovereign immunity for MSC U.S.-flagged voyage-charter vessels look quite different from full sovereign immunity. In the absence of an order

to assert full sovereign immunity, vessels may provide crew lists to foreign authorities as a condition of port entry or to satisfy local immigration requirements similar to commercial vessels. Foreign authorities may search MSC U.S.-flagged chartered vessels, but masters must deny requests to search U.S. military cargo.⁷

U.S. Position on Sovereign Immunity for Military and Auxiliary Aircraft

In accordance with Article 3 of the Convention on International Civil Aviation, military aircraft are considered State aircraft, and therefore also enjoy sovereign immunity from search and inspection.⁸ Foreign officials are only allowed to board the aircraft with the consent of the aircraft commander. Although military aircraft are generally not allowed to enter the national airspace or land of the sovereign territory of another nation without authorization, this is subject to the rights of transit passage, archipelagic sea-lane passage, and assistance entry. Additional information about these rights can be found in Chapter Three: Freedom of Navigation. Aircraft commanders must certify compliance with local customs, immigration, or quarantine requirements, or the aircraft may be directed to leave the territory and the national airspace of a State.

Auxiliary aircraft owned and under the exclusive control of the armed forces are considered State aircraft. The designation of State aircraft can be applied to civilian owned and operated aircraft if contracted by the DoD and used in military service. If designated as State aircraft, auxiliary aircraft enjoy sovereign immunity from search and inspection. As matters of policy, Air Mobility Command-charter aircraft are not designated as State aircraft. However, unmanned aerial vehicles (UAV) and remotely piloted vehicles are generally considered to be military aircraft. As such, they enjoy the same navigational rights and protections of applicable domestic and international law as manned aircraft.

1 *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) (under international custom jurisdiction was presumed to be waived in a number of situations).

2 United Nations Convention on the Law of the Sea, Article 29, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOSC]. (available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/part2.htm).

3 LOSC, Articles 95-96.

4 LOSC, Articles 30-32.

5 LOSC, Article 236

6 U.S. Navy, U.S. Marine Corps & U.S. Coast Guard, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A, *The Commander's Handbook on the Law of Naval Operations* (2007); OFFICE OF THE CHIEF OF NAVAL OPERATIONS, NAVADMIN 158/16, SOVEREIGN IMMUNITY POLICY (available at <http://www.public.navy.mil/bupers-npc/reference/messages/Documents/NAVADMINS/NAV2016/NAV16158.txt>) (This is a valuable resource on US policy regarding sovereign immunity questions generally).

7 LOSC, Article 236

8 Convention on International Civil Aviation, art. 3, Dec. 7, 1944, 15 U.N.T.S. 295.

Maritime Security and the Convention on the Law of the Sea¹

Background

The LOSC is the foremost international legal instrument for realizing collaborative approaches to maritime security.² Maritime security supports an international order that is maintained through rule of law, and relies upon clear regulation of, and adherence to, the principles of both customary and formal international law, judicial decisions, other protocols, customs, and legal scholarship. Balancing issues of state sovereignty and collective interest, the Convention supports broad issues of security explicitly and implicitly, prescribing specific enforcement and jurisdiction requirements for states. The Convention provides a legal framework through which states organize their military and law enforcement assets to spread safety and security through international networks and coalitions.³

This chapter addresses those portions of the LOSC related to the treatment of illicit activity in the maritime domain, primarily in international waters. Maritime security law involves both the multilateral and bilateral legal regimes directed at eliminating crime in the global commons. Coupled with the Convention, other legal instruments, such as the Suppression of Unlawful Acts at Sea (SUA Convention) and the Proliferation Security Initiative (PSI), and organizations like the International Maritime Organization (IMO), govern activity from the high seas to coastal ports. It is difficult to address the full scope of illicit activity as it often follows legal trade and co-opts technology, modalities, and methods employed by the maritime industry to achieve efficiency and reduce risk; hence the range of legal regimes and institutions required to disrupt and degrade the capacity of criminal organizations to operate with impunity.

Maritime Security and the Convention

At the confluence of maritime security and international law, the law of the sea is a complex architecture of interactive rules and processes that regulate the use of the world's seas and oceans, and international cooperation and collaboration are necessary to its success. In form, maritime security is crucial to national and international security. In function, maritime security is jurisdictionally complicated, but generally well observed by maritime states and those with a vested interest in maintaining access to the high seas and protection of their coastal waters, including the U.S. As Natalie Klein has noted, "Modern interests are shared interests in terms of maritime security, even if a state has specific needs or interests that coexist with

the interests of other states.”⁴ A common interest in maritime security forms the basis of comprehensive approaches to international security with regard to the seas. This may require rethinking of the shared and exclusive interests because “no single nation has the sovereignty, capacity, or control over the assets, resources, or venues from which transnational threats endanger global security.”⁵ Operationally, States striving to enforce their national laws and the Convention are challenged not by large navies, but by the threat of non-state actors seeking to exploit the oceans- either for financial gain, under illegal pretext, induction of fear for political gain, or to support criminal enterprises. These threats challenge existing interpretation and application of international law, but also present an opportunity for an improved understanding of maritime security.

The U.S. Navy defines maritime security as “tasks and operations conducted to protect U.S. sovereignty and maritime resources, support free and open seaborne commerce, and to counter maritime- related terrorism, weapons proliferation, transnational crime, piracy, environmental destruction, and illegal seaborne immigration.”⁶ The United Nations acknowledges no settled definition of maritime security, but instead defines the concept in terms of threats and illicit activities that pose a risk to peace and order.⁷ The *Oceans and the Law of the Sea* report, distributed annually by the UN Secretary-General, identifies, *inter alia*, illicit trafficking of arms and weapons of mass destruction, illicit traffic of narcotics and psychotropic substances, and smuggling and trafficking of persons by sea as threats to shipping companies, militaries, and law enforcement.⁸

These threats to maritime security are catalysts for action and change, informing the development of the Convention with regard to jurisdiction and operations. “The law of the sea,” states Klein, “has a vital role to play in improving maritime security...the law is one of many factors taken into account in devising new policies.”⁹ Provisions in the LOSC, enumerated in the following paragraphs, address issues of maritime security.¹⁰ These provisions are not exclusive in nature, and are intended not just to frame the rules of interdiction in the various maritime zones, but also to add descriptive and normative elements to the law.

Maritime Security Roles of the Navy and Coast Guard Under the Convention

Military forces operating in international waters fall under multiple legal regimes. Because there is no single unit responsible for guaranteeing maritime security, the Navy, operating in conjunction with the U.S. Coast Guard, enforces both international and U.S. law. U.S. Navy Regulations state, “At all times, commanders shall observe, and require their commands to observe, the principles of international law. Where necessary to fulfill this responsibility, a departure from other provisions of Navy Regulations is authorized.”¹¹ Despite this hierarchy, domestic and international law commonly complement each other. For example, Article 98 of the Convention and U.S. Navy Regulation 0925 emphasize safety of life at sea, and direct the commander

of a naval vessel to render assistance and give the commander the right of assistance. These provisions are an important aspect of maritime security, if for no other reason than to afford naval ships the right of approach.

The laws regarding maritime security operations are premised on the notion of universality of crime, that illicit activity conducted on the high seas is contrary to good order and the innate freedom of the seas under international law. Notably, if reasonable suspicion of specific illicit activity, as enumerated in Article 110 of the Convention, is acted upon through a boarding, but the suspicions are unfounded and no illegal activity is discovered, the ship visited is entitled to compensation for any loss or damage.¹² Therefore, decisions made by the commander may result in substantial repercussions if proper judgment is not exercised in boarding operations. The criteria articulated in the LOSC are relatively broad in scope; therefore, the particular rights of any vessel depend on the specific circumstances and activity at issue. Articles 95 and 96 provide immunity to warships from jurisdiction of any State other than the flagged State, and to civilian ships used in government non-commercial service; therefore, adjudications of claims are held by international courts or tribunals.

Related to the right of visit are the rules for the use of force. Naval commanders always retain the inherent right and obligation of self-defense. Hostile acts against U.S. ships, U.S. forces, or in certain circumstances, U.S. citizens and property, can be responded to in a manner that removes or eliminates the threat. Article 25 of the Convention is the primary reference to the degree of force that can be used in enforcement measures, but its language refers only to the coastal state's rights, not rights on the high seas. For further reference on military functions in maritime security, reference Chapter Four: Military activities in the EEZ.

Varieties of Transnational Crime in the Maritime Domain

Maritime trafficking routes closely follow commercial shipping lanes, and the modalities and technologies employed by criminals are often more advanced than those used in legal trade. The vast expanses of ocean, the complexity of the maritime transportation system, the immense volume of cargo transferred at each port, and the limited capacity for inspections of cargo creates opportunity for criminals. Commercial trade in the maritime domain follows a reasonably defined set of "oceanic roads" based on currents and weather. Because of the reliability of shipping and mass amounts of cargo moved, traffickers utilize the commercial shipping industry with great effect. Shipping and sea lanes offer anonymity for criminals; criminal activity can be hidden behind legitimate industry, appearing to be licit. Criminal activity, especially illicit trade in narcotics, humans, and weapons, has become so extensive that States and corporations may be implicated in the criminal enterprise. Individuals involved may be of different nationalities, vessels may be flagged to different States, multiple vessels may be used in the network, the vessels may transit the waters of various States and call at different ports before reaching a final destination.¹³ Despite the abundance of laws designed to combat illicit

trafficking and an apparent impetus to stop specific types of crime, governments remain only marginally successful in preventing the global flow of illegal goods due to the overwhelming volume and complexity of the markets for illicit trade. Working in tandem, the Navy and Coast Guard disrupt the illicit supply chain and criminal enterprises when engaged in maritime security operations; cooperation and collaboration between military forces and law enforcement organizations that possess the capacity and power to support the rule of law are the best solution to countering transnational crime at sea.

Furthermore, as the high seas fall outside the jurisdiction of a single State, and are collectively policed by all States through international law, a collaborative approach must be taken to address crime occurring at sea or crime carried out through use of the maritime domain.¹⁴ Piracy and the illicit trafficking of narcotics, humans, and weapons comprise the main varieties of transnational crime addressed in the Convention. Article 110 discusses the customary rule that warships may exercise “approach and visit” on the high seas of any ship that is suspected of piracy, human trafficking, unauthorized broadcasting; is without nationality; or, “though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.” Article 111 addresses the right of hot pursuit, allowing warships of one State to follow a ship through the different maritime zones if that ship is suspected of illegal activity. Articles related to specific types of crime are included in the following paragraphs.

Narcotics Trafficking

Article 108 requires member States to cooperate and empowers them to offer assistance in the suppression of drug trafficking, specifically addressing other-state flagged vessels. Traditionally, drug traffickers used overland routes, but in the last twenty years, they have shifted transportation west into the Pacific Ocean and east into the Atlantic Ocean. The majority of this trafficking has traditionally been in the littoral regions, and often within territorial waters, but advanced technologies, complex methodologies, and larger ships have allowed traffickers to move further to sea into “blue water” areas, outside the 12-nautical mile mark and often further than the 200-mile EEZ of any country. This shifting between domains and geographic areas has been described colloquially as “squeezing a balloon,” reflecting shifts in supply and demand for different illicit goods.

Reflecting the fact that the U.S. is the world’s largest consumer of illegal drugs, the source and transit zones between Latin America and the U.S. border are highly patrolled. Navy ships, operating with a Coast Guard law enforcement detachment (LEDET) on board, operate under a strict regimen of control that corresponds with domestic law, complies with the Convention, and reflects bilateral agreements the U.S. has with most Latin American states.

Operation Martillo

For example, in July 2015, U.S. maritime law enforcement, working in conjunction with other nations during Operation Martillo, interdicted a semi-submersible more than 200 miles off the coast of El Salvador. With 274 bales of cocaine weighing over eight tons on board, the estimated street value of the drugs was in the hundreds of millions.¹⁵ From April to July of the same year, three U.S. Coast Guard vessels seized 32 metric tons of cocaine and two metric tons of heroin with an estimated combined value of \$1 billion. In the first case, the vessel's origin was unknown, making it a stateless vessel and, thus, subject to prosecution in U.S. courts. This is an important distinction in international law, informing jurisdiction and prosecution on the high seas.



Piracy and Armed Robbery at Sea

One of the most ancient and persistent forms of maritime crime, piracy is subject to rigorous treatment under maritime security law, and the provisions in the LOSC derive directly from customary international law. Article 101 defines piracy as “any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or passengers of a private ship or private aircraft...on the high seas against another ship or aircraft...outside the jurisdiction of any State.” The latter portion of the definition is important: piracy is a variety of transnational crime conducted by non-state actors in international waters. Article 105 of the LOSC grants *every* State the authority to seize any vessel or aircraft and associated property and arrest any persons engaged in piracy. Domestic courts of the State conducting the seizure may prosecute the pirates under domestic law and determine what to do with the vessels; however, to date the courts remain inadequate or unsupported in many places.

Piracy became a security issue of international concern in the last fifteen years, primarily in the Horn of Africa, Gulf of Aden, and the Red Sea; however, since the establishment of Combined Task Force-151(CTF-151), focused on counter-piracy, and Combined Task Force-150 (CTF-150), focused on maritime security, piracy in that region has waned. Supported by several U.N. Security Council Resolutions, these task forces “engage with regional and other partners to build capacity and improve relevant capabilities to protect global maritime commerce and secure freedom of navigation.”¹⁶ Recently, attacks emanating from Yemen on commercial and government vessels may evidence a new paradigm in piracy, one that draws on sophisticated tactics and new technology. The attacks on commercial and military vessels employed underwater autonomous vehicles, advanced surface-to-surface missiles, and small boat swarming tactics. Refined methods by pirates may present a

greater challenge to maritime security that will require changes to current anti-piracy measures in the region.

Views on piracy are shaded by incomplete data. First, in the Pacific-Asia region, actual acts of piracy are most likely underreported and, of those that are reported, many are of such small scale that they cloud the true volume of major piracy events. Second, like the analogy of the “squeezed balloon” in narcotics trafficking, as piracy has been relatively contained in eastern Africa, it has increased in western Africa, specifically in the Gulf of Guinea. This may be linked to increased trafficking in narcotics from Latin America, illegal fishing, or human trafficking, but is in any event a reminder that piracy remains a persistent and widespread challenge to maritime security. However, recent activity in Somalia and Yemen may foreshadow a resurgence of piracy in the region, bolstered by advanced small arms and light weapons, access to ship monitoring and tracking devices, and use of unmanned systems and long range communications.

The LOSC alone cannot sufficiently address the prosecution of pirates once captured. The IMO has urged all coastal states to take all necessary and appropriate measures to prevent and combat piracy...through regional co-operation, and to investigate incidents of piracy in order to prosecute perpetrators in accordance with international law.¹⁷ A 2010 report by the UN Secretary General outlines two significant actions to bring pirates to justice under international law. First, domestic or state courts should be empowered to prosecute pirates. Second, international or regional courts should supplement domestic courts with investigation and prosecution through specialized piracy courts.¹⁸ However, so long as many coastal states in Africa and elsewhere lack the resources, experience, and political will to sustain effective prosecution and punishment of captured pirates, these goals will not be met and the best efforts of increased maritime security measures will be undermined.

Slavery, Human Trafficking, and Illegal Migration

Slavery and human trafficking are two other long-standing challenges to maritime security. Under the law, people being trafficked at sea fall into one of two types of human cargo depending on the intent and type of activity they are engaged in: migrants (asylum seekers or those attempting to bypass immigration laws) and victims of trafficking (kidnapped individuals or those coerced or exploited). The U.N. Office on Drugs and Crime (UNODC) provides the following clarifications¹⁹:

- **Consent:** Migrant smuggling, while often undertaken in dangerous or degrading conditions, involves consent. Trafficking victims, on the other hand, have either never consented or if they initially consented, that consent has been rendered meaningless by the coercive, deceptive or abusive action of the traffickers.
- **Exploitation:** Migrant smuggling ends with the migrants’ arrival at their destination, whereas trafficking involves the ongoing exploitation of the victim.

- **Transnationality:** Smuggling is always transnational, whereas trafficking may not be. Trafficking can occur regardless of whether victims are taken to another state or moved within a state's borders.
- **Source of profits:** In smuggling cases profits are derived from the transportation of facilitation of the illegal entry or stay of a person into another county, while in trafficking cases profits are derived from exploitation.

Article 99 of the Convention addresses the slave trade and grants freedom to all slaves on the high seas, but makes no distinction between those being trafficked and those being smuggled; therefore, in the maritime domain a legal reference to slavery connotes both trafficking and smuggling. Furthermore, the language makes it clear that a visiting vessel on the high seas only has the responsibility to report slavery to authorities of the trafficking vessel's flag state. While these distinctions are important, the issues of territoriality and jurisdiction that they present hamper response and risk human life.

Human trafficking is widespread, and "interlinked transnational gangs traffic by land and by sea an estimated four million people every year as 'human cargo.' It has been estimated that the annual earnings from this trafficking have reached between \$5 billion and \$7 billion."²⁰ This multi-billion-dollar industry has a collective effect on almost every state. The Syrian civil war has resulted in the movement of four million externally displaced people, with approximately one million of those seeking asylum in Europe.²¹ Due to strict border controls in surrounding states, many of the refugees have fled by boat, using trafficking routes to Greece, Italy, and North Africa. The U.N. High Commissioner for Refugees (UNHCR) found that a total of 65.3 million people were forcibly displaced from their homes by the end of 2015, compared to 59.5 million just a year earlier, many of these traveling by sea.²² Realistic extrapolations may assume that these numbers will increase with conflicts involving coastal or maritime states, such as those in Syria and parts of Africa.

The Institute for Foreign Policy Analysis notes that the challenge of human trafficking lies both in the volume of displaced people and the incapacity of authorities to deal with the problem. This issue is particularly challenging for "law enforcement authorities to manage as it requires an additional set of capabilities and initiatives that go beyond those found in the standard toolkits of local police and border guards."²³ The UNHCR has established offices worldwide, and serves as a bridge between local and regional law enforcement and the international organizations that provide guidance on handling human trafficking at sea.

Small Arms and Weapons of Mass Destruction (WMD)

The 2015 *Small Arms Survey* estimates that the global trade in illicit small weapons is close to \$2 billion per year, adding to the global market upwards of eight million small arms designed for use by individuals or small groups.²⁴ Like the illicit drug trade, the market for illegal small arms and light weapons manipulates security weaknesses

within the commercial shipping industry, especially container ships. Unlike the drug trade, weapons trafficking is more consolidated and varied. It also brings in significantly less revenue for traffickers than a shipment of cocaine.

Following 9/11, the proliferation of WMD became a major concern for governments around the world. The abundance of high-capacity freighters, containerization, and a black market for fissile material gave rise to a new regime of international law that addressed gaps in maritime security. The Proliferation Security Initiative (and attendant Container Security Initiative) parallels the Convention with the main purpose of interdicting precursor materials, weapons, and delivery systems at any given point in the transportation system. The PSI has been adopted by most signatories of the Convention and has been successful in preventing the proliferation of WMD.²⁵

The maritime industry has invested heavily in maritime security measures. The international community has focused heavily on combatting trafficking in drugs, weapons, and humans, but the simple calculus of cost/benefit ratios spurs private sector innovation. The U.S. led the world in post-9/11 maritime security measures that became the worldwide standard. Most of this technology focused on detecting WMD and precursor materials. The advent of new technologies employable in the maritime domain, including those focused on detecting WMD and precursor materials, has already created capacity for persistent, reliable intelligence and information. Coupled with existing information sharing systems, like the Automatic Identification System (AIS), the Maritime Safety and Security Information System, and Shipboard AIS and Radar Contact Reporting (SARC-R), use of underwater autonomous vehicles, seabed sensors, and swarming micro-drones may give maritime law enforcement more capacity to gather, interpret, and share information relating to illicit activity in the maritime domain.

Conclusion

The Convention specifically identifies only certain types of transnational crime that affect maritime security, but there are many varieties and combinations of criminal activity that affect security and safety from the high seas to internal waters. Domestic laws must be symbiotic with international law, and cooperative partnerships between States, law enforcement, and militaries to combat illicit activity must transcend the morass of politics that often plague more restrictive legal regimes. Information and intelligence sharing, novel TTPs (tactics, techniques, and procedures), and unconventional employment of existing technologies may assist navies and coast guards in ensuring freedom of the seas. In closing, the Convention provides a strong framework and multilateral efforts to deter and defeat criminal activity in all maritime zones will result in a more secure, safer operating environment for all. However, the recurrent difficulty in successfully prosecuting and punishing wrongdoers, whether engaged in piracy or human trafficking, is a reminder that much remains to be done.

-
- 1 Portions of this chapter were adapted in part from Timothy Urban, "Blue Water Asymmetry: Transnational Crime, Networks, and the International Rule of Law in the Maritime Domain," 2017.
 - 2 James Kraska, "Grasping 'The Influence of Law on Sea Power,'" SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, June 20, 2009), <https://papers.ssrn.com/abstract=1423107>.
 - 3 James Kraska, "Grasping 'The Influence of Law on Sea Power,'" SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, June 20, 2009), <https://papers.ssrn.com/abstract=1423107>.
 - 4 Natalie Klein, *Maritime Security and the Law of the Sea*, 1st pbk. edition, Oxford Monographs in International Law (Oxford: Oxford University Press, 2012), 18.
 - 5 John G. Morgan VADM and Martoglio, Charles W., RADM, "The 1,000 Ship Navy: Global Maritime Network," *USNI Proceedings*, November 2005, 18, <http://www.usni.org/magazines/proceedings/2005-11/1000-ship-navy-global-maritime-network>, cited in Klein, *Maritime Security and the Law of the Sea*.
 - 6 James T Conway GEN, Gary Roughead ADM, and Thad W Allen ADM, "Naval Operations Concept 2010" (U.S. Government, 2010), <https://www.uscg.mil/history/docs/2010NOC.pdf>.
 - 7 Klein, *Maritime Security and the Law of the Sea*, 10.
 - 8 Secretary-General of the United Nations, "Oceans and the Law of the Sea," Report of the Secretary-General (New York, N.Y.: United Nations General Assembly, September 1, 2015), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/269/73/PDF/N1526973.pdf?OpenElement>.
 - 9 Klein, *Maritime Security and the Law of the Sea*, 326.
 - 10 United Nations Convention on the Law of the Sea, Article 29, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOSC]. (available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/part2.htm).
 - 11 "U.S. Navy Regulations 1990" (U.S. Government, 1990), <https://doni.documentservices.dla.mil/navyregs.aspx>.
 - 12 LOSC, Article 110; Klein, *Maritime Security and the Law of the Sea*, 116.
 - 13 Klein, *Maritime Security and the Law of the Sea*, 17.
 - 14 UNODC, "UNODC Global Maritime Crime Programme," *United National Office on Drugs and Crime*, 2016, <https://www.unodc.org/unodc/en/piracy/index.html?ref=menuside>.
 - 15 U.S. Customs and Border Protection, "CBP OAM, Interagency Partners Interdict Semi-Submersible Vessel with 8 Tons of Cocaine," *U.S. Customs and Border Protection*, July 22, 2015, <https://www.cbp.gov/newsroom/local-media-release/cbp-oam-interagency-partners-interdict-semi-submersible-vessel-8-tons>.
 - 16 "CTF 151: Counter-Piracy," *Combined Maritime Forces*, September 17, 2010, <https://combinedmaritimeforces.com/ctf-151-counter-piracy/>.
 - 17 Kenneth Scott, "Prosecuting Pirates: Lessons Learned and Continuing Challenges" (One Earth Future), 6, accessed April 27, 2017, <http://oceansbeyondpiracy.org/sites/default/files/attachments/ProsecutingPiratesReportDigital.pdf>.
 - 18 "Report of the Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia" (United Nations, July 26, 2010), 8, <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Somalia%20S2010%20394.pdf>.
 - 19 "United Nations Office on Drugs and Crime," UNODC, January 12, 2016, <http://www.unodc.org/unodc/en/human-trafficking/faqs.html>.
 - 20 J. Ashley Roach, "Initiatives to Enhance Maritime Security at Sea," *Marine Policy* 28, no. 1 (January 2004): 41–66, doi:10.1016/j.marpol.2003.10.010, quoted in Klein, *Maritime Security and the Law of the Sea*, 123.
 - 21 United Nations High Commissioner for Refugees, "Syria Emergency," UNHCR, accessed January 22, 2017, <http://www.unhcr.org/syria-emergency.html>.
 - 22 United Nations High Commissioner for Refugees, "Global Forced Displacement Hits Record High," UNHCR, accessed June 22, 2017, <http://www.unhcr.org/news/latest/2016/6/5763b65a4/global-forced-displacement-hits-record-high.html>.
 - 23 Institute for Foreign Policy Analysis and Geneva Center for Security Policy, "A Comprehensive Approach to Combating Illicit Trafficking," June 2010, <http://www.ifpa.org/pdf/IFPA-GCSPTraffickingReport.pdf>, 26.
 - 24 *Small Arms Survey*, 2015, Geneva, Switzerland: Graduate Institute of International and Development Studies, 2015, (available at <http://www.smallarmssurvey.org/publications/by-type/yearbook/small-arms-survey-2015.html>).
 - 25 "Statement of Interdiction Principles Fact Sheet" U.S. Department of State. September 4, 2003. Accessed July 06, 2017. <https://www.state.gov/t/isn/c27726.htm>.

The LOSC and the Environment

Background

Origins

Through the leadership of States around the world, including the U.S., the LOSC made history as the first general global convention to protect the marine environment. The LOSC promotes an evidence-based approach to management and policy that facilitates coordination between economic, environmental, and military uses. For example, the Convention upholds every State's right to exploit their natural resources as long as these actions are in accord with environmental preservation. Connecting the shores of every State, oceans today have greater economic, diplomatic, and scientific value than ever before. Through duties rather than obligations, the Convention encourages States to protect marine environments with its framework, enforcement mechanisms, and anti-pollution measures. Article 236 of the LOSC exempts warships and other sovereign immune vessels from the provisions described in this chapter. For more information about this topic see Chapter Five: Sovereign Immunity.

VALUE IN AN INTERCONNECTED WORLD

Economists have quantified the worth of the oceans in ways that reveal their value to everyone. In 2015, the Worldwide Wildlife Fund (WWF) valued the oceans at \$24 trillion.¹ By protecting and preserving the marine environment, marine and deep sea industries, rare and threatened species, and healthy public waters, all States benefit. Events like the *Exxon Valdez* tanker spill, which spread an oil slick over 1,300 square miles off the coast of Alaska in 1989, reveal how modern environmental disasters, and the threats to marine assets, often take on a larger scope. While the oceans were once thought to be able to accommodate human waste indefinitely, they are now seen as finite and sensitive through events like the Fukushima radiation disaster, red tides, oil spills, and plastic gyres. Ahead of its time, the LOSC protects the environmental and economic assets of the oceans from large-scale disasters through the use of regional cooperation and pollution controls.

LIFE SYSTEMS

Beyond the economics, the LOSC matters because the marine environment sustains life on this planet. According to the State Department, "marine biodiversity and ecosystems are essential to the functioning of earth's surface and atmosphere inhabited by living things and thus to the well-being of humans."² To ensure our own livelihoods, we have a duty to protect and not degrade the environment. Nature cannot necessarily replenish itself. As an example of irreversibility, human activity

in the Pacific Ocean has caused damage to coral reefs, which are the essential home of many underwater ecosystems. By digging up coral reefs while building artificial islands, China, for example, has caused half of these reefs to decline.³ As world populations grow, strains on the environment will build. Global environmental cooperation and governance can lessen the impact on the marine environment through renewed responsibility and enforcement.

Environmental Framework

International Cooperation

The authors of Part VII the LOSC created basic rules for environmental preservation within an international framework based on global and regional cooperation, while respecting principles of State sovereignty. For more information about how the LOSC respects State sovereignty see Chapter Five: Sovereign Immunity. Leaving room for various kinds of implementation, the LOSC does not explicitly carve out the laws or duties of States and enforcement agencies.

Under the LOSC, States can cooperate either directly or through competent international organizations. Examples of Part VII's architecture include general obligations to 1) protect and preserve the marine environment;⁴ 2) control pollution of the marine environment from any source;⁵ 3) prevent the introduction of alien species to marine environments;⁶ and 4) ensure that pollution from one State does not spread beyond the areas where they exercise sovereign rights.⁷

COMMUNICATION BETWEEN STATES

The LOSC encourages communication between States to protect against spreading environment damage and mitigate pollution risks. As a scientific and diplomatic opportunity, States can share and receive information and data about the marine environment. This is an opportunity to strengthen international relations because joint contingency plans may reduce costs and increase shared responsibility. The LOSC gives financial and technical preference to developing States. This inclusive practice ensures that all States can complete and share periodic scientific reports on their marine environments and contribute to the development of pollution remedies. Under the LOSC, any additional rules, standards, or recommended practices, shall be science-based and developed between States directly or through competent international organizations.⁸

RESPONSIBILITIES

The LOSC maintains a spirit of non-interference with State sovereignty. It is the State's responsibility to measure its own impact on its environment and the environment of others. Rather than initiating a universal regime, the LOSC accepts that specific pollution laws will vary by region. The LOSC recommends that States take into account internationally agreed rules, standards, and recommended practices and

procedures. By considering the unique economic and environmental capacity of each area, States can harmonize and create regional frameworks to serve the larger goal of reducing marine pollution. Whether the pollution originates from the shore or from seabed activities, national laws must be no less effective than international rules, standards, and recommended practices and procedures. The LOSC divides enforcement of the law between States. These differences can cause disagreements when States dispute environmental or territorial claims. For example, without clear remedies and enforcement mechanisms applicable to States and private fishermen, courts do their best to make fair rulings. These general provisions offer a holistic way of looking at the marine environment, State relationships to various parts of it, and relationships between States.

CASE STUDY:

ENVIRONMENTAL PROVISIONS OF LOSC IN THE SOUTH CHINA SEA

The South China Sea (SCS) Tribunal ruled that certain environmental provisions of the LOSC had been violated by China.⁹ Fishery practices and island-building activities, violated several articles of the LOSC relating to protection of the marine environment. However, experts say it's not clear what remedies (and enforcement mechanisms) are available to other coastal States, or to fishermen from other States, for this environmental damage, under the LOSC or under customary international law. See Chapter Ten: The South China Sea Tribunal for additional information on this topic.

Pollution

The LOSC outlines six types of pollution: (1) land-based and coastal activities; (2) continental-shelf drilling; (3) potential seabed mining; (4) ocean dumping; (5) vessel-source pollution; and (6) pollution from or through the atmosphere.¹⁰ According to the National Oceanographic and Atmospheric Administration (NOAA), 80% of marine pollution begins on land.¹¹ Dumping was a type of ocean based pollution that was popular in the 1950s and 1960s to dispose of waste produced by activities on land. The 1996 Protocol to the London Convention defined it as any pollution done by a vessel, aircraft, platform, or man-made structure at sea. Rules regulating land-based pollution remain weak at the global level. While the LOSC is relatively toothless with regard to international enforcement to prevent land based pollution, it does call for the prevention of land based pollution to be enforced by States themselves. Pollution maintains its classification as pollution whether its form is changed or if it is relocated. Without this provision, certain areas would likely become disproportionate dumping grounds. Looking ahead, the marine environment would benefit from new research on pollution management techniques, collaborations focused on institutionalizing compliance mechanisms, and a framework for land based pollution.

Vessel Source Pollution

Vessel source pollution, also known as ship-based pollution, involves the discharge of oil, oily residues, or other noxious substances into the sea by vessels. Although operational discharges from routine shipping activities release more oil than tanker spills, highly publicized accidents such as the *Exxon Valdez* spill pushed the international community in the direction of a treaty to deal with emergencies at sea. The LOSC and the International Convention for the Prevention of Pollution from Ships (MARPOL) provide the principal legal framework for the regulation of vessel source pollution.

International Convention for the Prevention of Pollution from Ships (MARPOL)

In 1973, the international community adopted MARPOL to cover pollution by oil, chemicals, harmful substances in packaged form, sewage, and garbage. Following a series of pollution incidents between 1973 and 1977, the International Maritime Organization (IMO), which regulates safety procedures for vessels traversing the oceans, adopted a Protocol in 1978 with measures related to tanker design and operation. The 1973 MARPOL and its 1978 Protocol are treated as a single instrument, generally referred to as MARPOL 73/78. Apart from accidental and operational pollution, MARPOL 73/78 aimed to deal with other forms of pollution from ships and therefore has annexes covering chemicals, harmful substances carried in packaged form, sewage, garbage, as well as a new Annex adopted in 1997 on the prevention of air pollution from ships. MARPOL 73/78 also had two Protocols dealing with reports on incidents involving harmful substances and arbitration. Annexes I and II are mandatory, while the other annexes are optional and States may opt out of these annexes.

MARPOL Convention Annexes

Title	Subject matter
Annex I	Regulations for the Prevention of Pollution by Oil
Annex II	Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk
Annex III	Regulations for the Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form
Annex IV	Regulations for the Prevention of Pollution by Sewage from Ships
Annex V	Regulations for the Prevention of Pollution by Garbage from Ships
Annex VI	Regulations for the Prevention of Air Pollution from Ships

As of January 2017, 155 States representing 99.14 per cent of the world's shipping tonnage are parties to Annexes I and II of MARPOL 73/78.¹²

Vessel Source Pollution Under The LOSC

Under the LOSC, vessel source pollution is regulated by flag States, coastal States, and port States. States have two kinds of jurisdiction: legislative (making national laws and regulations) and enforcement jurisdiction (ensuring compliance with national and international rules). While the rules for coordination between States have been laid out in detail in the LOSC, it is implementation that presents a complex challenge. An excerpt from a European marine pollution case is illuminating:

“Major incidents of pollution off the European coast have shown its vulnerability to the heavy maritime traffic along one of the world’s more important maritime routes. Among the frequent causes of pollution are violations of applicable laws and regulations or of international rules and standards relating to the prevention, reduction, and control of acts of pollution. Most of the illicit acts take place outside territorial waters, in the exclusive economic zones (EEZs) of the coastal States concerned. Coastal State navies attempt, in difficult conditions, to detect violations, gather the evidence, and bring the perpetrators to domestic courts to impose adequate penalties. Flag States often consent to coastal State proceedings or, alternatively, impose such adequate penalties through proceedings in their own courts. In some cases, however, flag States impose such nominal penalties that violations are not deterred, in which case the coastal State involved may attempt to retain jurisdiction.”¹³

Enforcement

Flag State Jurisdiction

The flag symbolizes the nationality of a vessel. By placing a ship on its register, a State undertakes the national and international responsibilities of a flag State in relation to that ship.¹⁴ Flag States have the primary duty to ensure that their ships comply with the standards accepted by the flag State under international law. The first two annexes to MARPOL are an example of such “international standards,” reflecting their widespread adoption by States. The LOSC declares that penalties provided for by the laws and regulations of flag States shall be “adequate” in severity to discourage violations wherever they occur.¹⁵

WHAT CAN FLAG STATES DO?

Flag States make laws based upon international standards. One example would be CDEM standards, which are standards for construction, design, equipment and manning, and operation of vessels. Another example would be measures for preventing accidents, dealing with emergencies, ensuring the safety of operations at sea, preventing both intentional and unintentional discharges.¹⁶

Flag States can also enforce laws and ensure compliance. This can include ensuring that vessels or ships do not sail unless they are “seaworthy” or in a good condition to sail. States can also ensure that vessels carry necessary certificates and conduct periodic inspections. If a vessel violates rules and standards, there is

a duty to immediately investigate and initiate action where necessary. There is also a duty to inform the IMO and requesting States of the actions taken.¹⁷

The enforcement jurisdiction of a flag State is borderless and extends to wherever the vessel sails. Unfortunately, flag States are often not major maritime States, but rather States with liberal tax rules and a relatively light regulatory touch structured to make them attractive to ship owners. This combination of insufficient resources and expertise along with a lack of political will often limits their willingness to initiate legislation and capacity to enforce applicable environmental rules (see the case study of the *Liberian Registry* below).¹⁸ Less scrupulous operators register their ships under the flags of such lenient States, leading to the “flags of convenience” problem in marine environmental pollution enforcement. To fill the gap, coastal and port States have been given additional legislative and enforcement powers.

THE U.S. AS A FLAG STATE

Stringent CDEM standards [46 U.S.C Sec 3701]

1980 Act to Prevent Pollution from Ships

33 U.S.C Sec 1901 to implement the MARPOL

The U.S. is a party to the 1972 Convention on the Prevention of Collisions at Sea

CASE STUDY: THE LIBERIAN REGISTRY

The Liberian Registry is an example of how the maritime world has many faces. Ships register with a registry as proof of ownership and for the ability to travel in international waters. By registering in Liberia, ship owners may accrue certain benefits like less stringent inspections and regulations. This so-called practice of “flags of convenience” can reduce costs and allow ship owners to retain anonymity. At this time, the Liberian Registry purports to be the second largest in the world including “approximately 4,000 vessels of more than 133 million gross tons, which represents 11 percent of the world’s ocean going fleets.”¹⁹

Coastal State Jurisdiction

Coastal States exercise jurisdiction complementing flag State jurisdiction to prevent marine pollution from foreign vessels entering their territorial seas and EEZs. This is different from flag State jurisdiction because the authority is derived from territorial sovereignty and control over maritime boundaries. Coastal State jurisdiction extends to the 200 nm EEZ and States may adopt additional environmental standards for special areas within the EEZ.²⁰ The exercise of enforcement measures depends on the seriousness of damage inflicted on the coastal State’s interests.

WHAT CAN COASTAL STATES DO?

Coastal States can make laws that only permit such design, construction, equipment, and manning standards that give effect to international standards.²¹

Coastal States can also enforce laws by instituting legal proceedings in case of violation of laws and regulations by a vessel voluntarily entering its ports or offshore terminals.²² In the territorial sea, they can conduct physical inspections, initiate court proceedings, and detain vessels if necessary. In the EEZ, they can ask for relevant information with respect to violations, physically inspect vessels when a violation leads to substantial discharge causing or threatening significant pollution of the marine environment and when a vessel has refused to give information, proceedings can be initiated in the case of clear objective evidence. There are safeguards against the exercising of enforcement powers by coastal States. For example, powers of enforcement against foreign vessels may only be exercised by government ships and aircraft²³ and penalties are limited to monetary penalties.²⁴ Proceedings to impose penalties are to be suspended when a flag State imposes such penalties.

THE U.S. AS A COASTAL STATE

The U.S. prohibits the discharge by vessels, including foreign vessels, of oil and hazardous substances within its navigable waters or contiguous zone [33 U.S.C Section 1321(b)(3)]

1972 Clean Water Act regulates the discharge of sewage by vessels operating in U.S. navigable waters (within three nautical miles of U.S. baselines)

CASE STUDY: THE FAST INDEPENDENCE

The *Fast Independence* was a roll-on/roll-off ship flying the flag of Malta, which was arrested by French authorities in May 2005 for marine pollution in France's EEZ. The captain admitted that the crew had erred in the conduct of discharges into the oceans. The flag State Malta notified the French authorities of the Malta Maritime Authority decision to impose upon the captain and shipowner a fine of 9,500 Maltese pounds (approximately 23,750 euros) and a sum of 9,000 Maltese pounds (approximately 22,500 euros) in payment of costs incurred due to the proceedings. The French tribunal rejected Malta's request for suspension of proceedings in France. The court of appeal proceeded to compare the fines decided by the French tribunal and the Maltese Maritime Authority and imposed a fine of 450,000 euros upon the captain and shipowner, as well as awarding 10,000 euros in damages to local authorities. It concluded "by deciding a fine of a small amount in comparison with provisions of French law for a violation committed in the French EEZ, Malta did not impose a penalty that would deter ships flying the Maltese flag from violating the provisions of the MARPOL Convention." On appeal, the highest court in France gave a ruling in favor of Maltese jurisdiction over the vessel even though it agreed on the inadequate penalty imposed. This case illustrates the primacy of flag State jurisdiction.^A

Port State Jurisdiction

Port States have the right to enforce compliance with national rules and standards as a condition for the entry of foreign vessels into their ports, internal waters, and offshore terminals.²⁵ Under MARPOL,

these States have been entrusted with the additional right to “enforce applicable international rules and standards” in other States’ maritime zones and on the high seas in the case of an illegal operational discharge. Port States can thus prevent severe pollution damage to the marine environment that could be caused by substandard ships. Port States indirectly act in the interest of the international community as well because marine pollution does not stop at man-made maritime boundaries.²⁶ In practice, Port States can refrain from exercising their enforcement powers effectively since these are voluntary. Some factors such as cost-benefit analysis, the fear of a competitive disadvantage, and the lack of political will in the absence of national interest come into play. Port States in different parts of the world have set up regional control regimes.²⁷

THE U.S. AS A PORT STATE

1978 Port and Tanker Safety Act conditions entrance of tankers and other vessels carrying bulk cargoes to U.S. ports on the fulfillment of specified requirements [33 USC Section 1228]

Enforcement Jurisdiction Matrix

Flag State Jurisdiction	Coastal State Jurisdiction	Port State Jurisdiction
<p>LOSC Articles 211 (2), 217</p> <p>Principal responsibility</p> <ul style="list-style-type: none"> Design, construction, manning, equipment, operation (MARPOL Standards). <p>Issues</p> <ul style="list-style-type: none"> Complex because of flag States of convenience Defining flag States (nominal jurisdiction) While being primary enforcers, often the weakest ones because these are often States without the resources, expertise or political will. Thus the burden of responsibility shifted onto the coastal/port State 	<p>LOSC Articles 211(4), 220</p> <p>Complements the flag State responsibility</p> <ul style="list-style-type: none"> Greater responsibility, especially when closer to the land boundary or territorial sea 200 nm EEZ enlarged the spatial scope of coastal State jurisdiction (Art 211(5),(6)) 	<p>LOSC Articles 211, 218</p> <p>When a vessel is within a port or offshore terminal of a State</p> <ul style="list-style-type: none"> Enforcement action even with respect to violations committed in the high seas Under Article 218, port State would assume the role of an organ of the international community in the protection of the marine environment and safety at sea

Enforcement Conclusion

There are competing principles which States must weigh concerning issues of enforcement of the LOSC. A balance needs to be struck between controlling pollution and ensuring freedom of navigation in the high seas and between the jurisdictions of flag States versus that of coastal States.

Environmental Laws and Maritime Security

In some cases, competing security and environmental priorities can create potential tensions, and reveal areas of compromise and cooperation. Natural resource protection and national security concerns both have a place in the oceans because both contribute to the welfare of the U.S. and other States.

Many States, including the U.S., have adopted marine environmental regulations including marine protected areas and similar laws. Recognizing the importance of marine resource protection, some believe these laws may have the potential to be used to curtail freedom of navigation in affected waters. By the same token, the U.S. has successfully used marine protections to exclude foreign fishing vessels in areas like the New England coast. This has prevented overfishing by foreign States. Environmental laws may alter the respective rights and responsibilities of flag, coastal, and port States under the LOSC. However, as demonstrated above, the LOSC incorporated accommodations for regional actors to fit within a larger system of cooperation.

The Marine Mammals Protection Act (MMPA) serves as a good example of balancing environmental and security interests. Congress created MMPA to protect marine mammals from “extinction or depletion.”²⁸ A recent case from the 9th Circuit Court of Appeals, *NRDC v. Pritzker*, illustrates tensions that surface with different uses of the sea. The case was brought by the National Resources Defense Council (NRDC) in response to the National Marine Fisheries Service’s (NMFS) oversight of low frequency sonar use by the military. Sonar might affect marine mammal migration, reproduction, surfacing, nursing, feeding, and sheltering. The NRDC claimed the current use of sonar harmed marine mammals in ways that were illegal under the MMPA. The U.S. Navy argued that stringent regulations on the part of the NMFS could jeopardize sonar use important to national defense.⁸

The Ninth Circuit Court of Appeals ruled in favor of the NRDC, finding that the NMFS had not met its statutory duty to demonstrate that its regulations regarding low frequency sonar provided for the “least practicable adverse impact” on marine mammals. The Court noted that the MMPA concerns peacetime use of sonar and that its ruling does not “constrict the Navy’s operations during a war or active military engagement.” This case shows the challenges in balancing the interests of multiple stakeholders in the use of the ocean, including, in this instance, the tension between national security interests and natural resource protection.

Conclusion

The oceans can be exploited for financial gain, are centers of scientific inquiry, and provide inspiration for many people. The LOSC provides the first low-stakes protection for the marine environment in a global convention. Written in language that largely calls States to duties, rather than obligations, the LOSC asks States to reflect on their own environmental impact, their influence on others, and how partnerships can be formed to study and respond to pollution. A keystone of global environmental governance, the LOSC protects the equilibrium of the world's oceans, and preserves access to the primary sources of food for over one billion people.²⁹

-
- 1 WWF, "Oceans Valued at 24 Trillion", April 22, 2015, (available at <http://www.worldwildlife.org/stories/ocean-assets-valued-at-24-trillion-but-dwindling-fast>).
 - 2 U.S. Department of State, "Marine Biodiversity", (available at <http://www.state.gov/e/oes/ocns/opa/biodiversity/index.htm>).
 - 3 National Geographic, "One of the World's Largest Fisheries is on the Verge of Collapse, August 29, 2016, (available at <http://news.nationalgeographic.com/2016/08/wildlife-south-china-sea-overfishing-threatens-collapse/>).
 - 4 United Nations Convention on the Law of the Sea, Article 192, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOSC]. (available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/part2.htm).
 - 5 LOSC, Article 194(1).
 - 6 LOSC, Article 196(1).
 - 7 LOSC, Article 194(2).
 - 8 See, e.g., LOSC, Articles 200-202.
 - 9 The New York Times, "Tribunal Rejects Beijing's Claims in the South China Sea", July 12, 2016, (available at <http://www.nytimes.com/2016/07/13/world/asia/south-china-sea-hague-ruling-philippines.html>).
 - 10 United Nations, "Convention on the Law of the Sea: Protection of the Marine Environment", 2012 (available at: http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm).
 - 11 NOAA, "What is the Biggest Source of Pollution in the Ocean?", May 25, 2015, (available at <http://oceanservice.noaa.gov/facts/pollution.html>).
 - 12 IMO, Status of Conventions (printed on 11.01.2017)
 - 13 Decision Nos. 07-87362 & 07-87931, Cour de Cassation (chamber criminelle), May 5, 2009
 - 14 Z.O.Ozcayir, *Liability for Oil Pollution and Collisions* (Lloyds of London Press, 1998), pp 16-19
 - 15 LOSC, Article 217(8).
 - 16 LOSC, Article 211(1).
 - 17 LOSC, Article 217(2-7).
 - 18 OGSR, "Liberia", (available at <https://www.guidetoshipregistries.com/sample/liberia>);
See also United Nations, "Convention on the Law of the Sea", 2012, (available at [http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm#Protection of the Marine Environment](http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm#Protection%20of%20the%20Marine%20Environment)).
 - 19 Liberian Registry, "About the Liberian Registry", 2016, (available at <http://www.liscr.com/liscr/AbouttheLiberianRegistry/tabid/197/Default.aspx>).
 - 20 LOSC, Article 211(6).
 - 21 LOSC, Article 21(2).
 - 22 LOSC, Article 220(1).
 - 23 LOSC, Article 224.
 - 24 LOSC, Article 230.
 - 25 LOSC, Article 211(3).
 - 26 Doris Konig, "The Enforcement of the International Law of the Sea by Coastal and Port States", Max Planck Institute, p.5. (available at http://www.zaoerv.de/62_2002/62_2002_1_a_1_16.pdf).
 - 27 Doris Konig, "The Enforcement of the International Law of the Sea by Coastal and Port States", Max Planck Institute, p.7. (available at http://www.zaoerv.de/62_2002/62_2002_1_a_1_16.pdf).
 - 28 U.S. Fish and Wildlife Service, "Marine Mammal Protection Act", April, 3-, 2004, (available at <https://www.fws.gov/International/pdf/legislation-marine-mammal-protection-act.pdf>).
 - 29 CIERP, "Charting a New Course for the Oceans", April 2014, (available at http://fletcher.tufts.edu/~media/Fletcher/Microsites/CIERP/Publications/2014/Fisheries_14_Doc.pdf).
 - A *'Fast Independence' and 'Trans Artic' Cases*, Cour de cassation [French Court of Cassation] 07-87363, 07-97931, 5 May 2009, reported in (2009) Bull Crim No 85.
 - B *Nat. Res. Def. Council, Inc. v. Pritzker*, 828 F.3d 1125 (9th Cir. 2016).

The Arctic and the LOSC

Introduction

Due to the effects of climate change on melting ice, the Arctic has captured new levels of international attention. In the past, this remote and inhospitable region was almost entirely inaccessible due to year-round sea ice. As warming melts the sea ice, parts of the Arctic Ocean will increasingly open. While the thawing of the Arctic sea ice and glaciers raises serious environmental issues, the opening of the region will likely lead to new economic opportunities. By the middle of the present century, the retreat of ice will potentially open new shipping lanes and the possibility of new resource extractions.

Potential access to new resources has led to increased interest among States and observers regarding exactly who owns what in the Far North. Unlike Antarctica, which is a largely uninhabited continent with unsettled sovereignty questions, coastal States ring the Arctic with established boundaries. In the Arctic Ocean, the LOSC provides a clear framework for determining boundaries and legal rights and responsibilities.

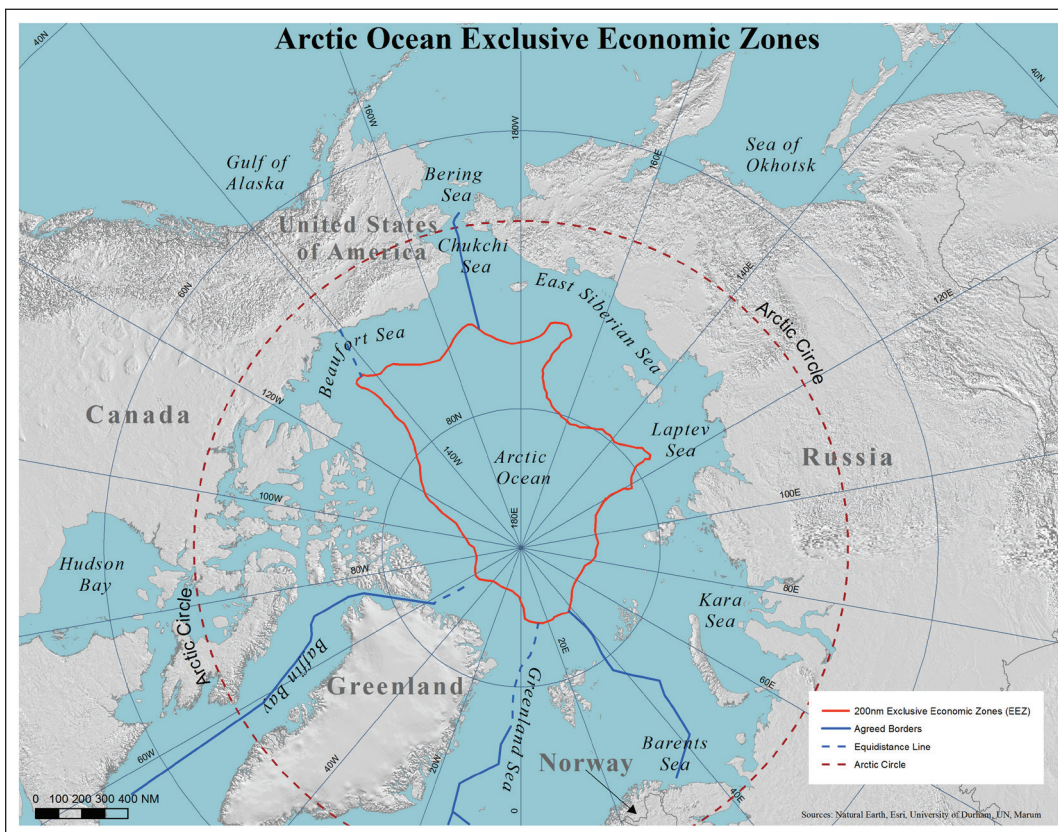


No Race for the North

At times, media reports on the Arctic have depicted an unclaimed wilderness with States scrambling for resources.¹ In 2007, some people's fears were stoked when Russian scientists symbolically planted a titanium Russian flag at the North Pole.² In reality, the Arctic is not likely to be a source of conflict over territorial claims. This is because, with the exception of a small island between Canada and Greenland, there are no unresolved land border disputes in the Arctic. Furthermore, the Arctic coastal States – the U.S., Canada, Russia, Denmark, and Norway – jointly declared in 2008 that the LOSC was the appropriate framework for Arctic governance.³ Thus, as with the rest of the oceans, the LOSC provides a clear legal regime for the Arctic.

Coastal State Rights

Much of the Arctic Ocean falls under the jurisdiction of the coastal States. As outlined in Chapter Two: Maritime Zones, coastal States enjoy a 12 nautical mile territorial sea and a 24 nautical mile contiguous zone. In addition, coastal States may declare an exclusive economic zone (EEZ) of 200 nautical miles from the baseline, in which they have the right regulate the use of natural resources and establish environmental protection. While some overlapping claims exist, the Arctic coastal States have mostly resolved maritime boundary disputes through bilateral negotiations. The most significant unresolved maritime boundary dispute is between the U.S. and Canada in the Beaufort Sea. However, both parties seek to minimize tension as they work toward resolving the dispute. In reality, issues of sovereignty in the Arctic are relatively clear and not contentious.



LOSC Article 234 - Special Rights for Arctic Coastal States

The LOSC, in Article 234, grants coastal States authority to specially regulate ice covered areas within their national jurisdiction.⁴ They may adopt nondiscriminatory regulations focused on the prevention, reduction, and control of marine pollution in areas of the EEZ covered by ice most of the year where the ice presents an obstruction or exceptional hazard to navigation. The rules must be based on the best available science and must have “due regard for navigation.”⁵ Notably, Canada and Russia have exercised this regulatory privilege.

The application of Article 234 is a subject of dispute between the U.S. and the other Arctic coastal States. Canada and Russia assert they have the right to exclude ships from their territorial sea or EEZ if States fail to comply with local regulations enacted pursuant to Article 234. The U.S. agrees that coastal States may enact regulations, but asserts that because of the freedom of the high seas, innocent (or transit) passage may not be impeded by excluding vessels pursuant to Article 234.⁶

In response, Canada and Russia cite Article 34, which clarifies that that transit passage “does not affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil.”⁷ Additionally, the innocent passage regime of Article 24 is subject to exception “in accordance with this Convention.” This exception would seem to permit restriction of innocent passage based on Article 234 or other provisions in the treaty.⁸ Reading these limitations of the passage rights within Article 234’s grant of authority to regulate ice covered waters, Canada and Russia assert a right to deny passage in response to violation of their national regulations based on Article 234. The U.S. position is that these exceptions do not justify restriction of passage on the basis of national regulation.

Arctic Continental Shelf

Unresolved overlapping claims on the deep seabed are the only significant territorial disputes between nations in the Arctic. Under the LOSC, coastal States have the right to request a recommendation from the Committee on the Limits of the Continental Shelf (CLCS) regarding an extension of their continental shelf beyond the 200 nautical mile EEZ. An extension would legally entitle that State to exclusive subsoil resource access on the extended continental shelf. For additional information on this topic see Chapter Two: Maritime Zones. If scientific data collection and analysis corroborates the current projections of the extended continental shelves in the Arctic, nearly all subsoil rights in the Arctic will ultimately fall under the exclusive jurisdictions of States. Successful extension claims in no way affect the legal status of the water column, the ocean surface, or the airspace above the extended continental shelf.

The CLCS has no legal mandate to resolve disputes. The CLCS recommendations are meant to provide an independent assessment of bathometric and geological data submitted by claimants for the extended continental shelf, upon which bilateral

decisions can be reached between States. Arctic States are committed to abiding by the LOSC, the recommendations of the CLCS, and “the orderly settlement of any possible overlapping claims.”⁹ Extended continental shelf claims are disputed in many regions of the world, but the Arctic has the most natural resources under contention by volume.

The Arctic States have followed the procedures of the Convention relating to extended continental shelf claims, and to date no formal determinations by the CLCS have been made. Russia’s claims, and to a lesser extent those of Denmark, would, however, embrace a significant portion of the Arctic seabed. Russia’s claims and interpretations in particular are based on characterizations of geologic and geomorphic features of the Arctic seabed with which the U.S. disagrees.

Arctic Straits

One of the more contentious legal debates among Arctic States is the applicability of the right of transit passage in international straits to the Northwest Passage and the Northern Sea Route. The Northwest Passage is the long-sought sea route from the Atlantic Ocean to the Pacific Ocean that passes between Canadian islands in the Far North. The Northern Sea Route is a transit route along the northern coast of Russia. Both routes can shorten voyages between Europe and Asia, but they remain hazardous due to sea ice and weather. Canada and Russia claim these as internal waters where foreign ships do not have the right to go without permission. The U.S. argues that the Northwest Passage and the Northern Sea Route are international straits and consequently the coastal States do not have the right to restrict transit passage. Despite the disagreement, it is important to emphasize that the parties agree that the LOSC is the appropriate framework to utilize to resolve the disputes. They simply disagree regarding the correct interpretation of the LOSC.

In order to be considered an international strait, the International Court of Justice ruled in the *Corfu Channel* case that a body of water must have a “geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation.”¹⁰ International straits are also defined by Articles 37 and 38 of the LOSC. The Corfu channel was traversed by 2,884 ships within a twenty one month period. While the Northwest Passage has seen only a small handful of ships until very recently, the *Corfu Channel* court stated the “greater or lesser importance for international navigation” was not important so long as the strait is a “useful route” for international maritime traffic. As the ice in the Northwest Passage melts it will certainly be “useful” to international navigation and “used” more frequently. Indeed, ship traffic has already begun in the Northwest Passage.¹¹

Canada asserts that the Northwest Passage is part of Canadian internal waters and is therefore sovereign Canadian territory and not subject to either the transit passage or innocent passage rights of other nations. Canada justifies this assertion with straight baselines drawn in 1985 based on the claim that “historic usage” by the Inuit people of the ice covered waterways for hundreds of years establishes the area as Canadian



sovereign territory.¹² However, there is arguably no clear legal authority for “historic usage” to establish sovereignty over water. The U.S. has consistently protested Canada’s use of straight baselines for this purpose and its assertion that the enclosed waters are internal.

Russia also asserts that portions of the Northern Sea Route are internal waters. The U.S. argues, as in the Northwest Passage, that the usefulness of the strait for international navigation is the deciding factor, regardless of the actual volume of traffic. Like Canada, the Russian position is also based on historical usage and lack of transits without prior authorization. The U.S. made several attempts to navigate the straits without permission, but turned back in the face of Russian threats. Nonetheless, the U.S. has consistently disputed Russia’s claims.

These disputes have not recently been a source of tension. In the Northwest Passage, the U.S. and Canada have “agreed to disagree” over the status of the strait. The U.S. has not attempted a transit in the Northern Sea Route without Russian permission. Nonetheless, as the straits are increasingly open to shipping, other States with an interest in shipping may join the U.S. in contesting the Russian and Canadian claims. Eventually, the claims may be resolved through negotiation or some other dispute resolution method.¹³

Arctic High Seas

Even if all or most of the Arctic seabed belonged to one State or another's continental shelf, there will still be a portion of the central Arctic Ocean water column that is beyond the jurisdiction of any coastal States. This area is the Arctic high seas. Other States would have the right to freely navigate and exploit the resources in the water column in this part of the high seas. Many are concerned that living marine resources in the central Arctic Ocean will be subjected to dangerous and unregulated fishing.

In the future, the Arctic States in coordination with other fishing States may decide to establish a regional fisheries management organization. This association would function as a treaty organization designed to coordinate and manage fishing stocks in a sustainable way to advance mutual interests. For now, the five Arctic Coastal States released a joint declaration at Oslo, Norway in the summer of 2016 directed towards fishing in the central Arctic Ocean. The declaration noted that commercial fishing in the central Arctic Ocean was not currently feasible and so a regional fishery management organization was not yet necessary. Regardless, the coastal States undertook as an interim measure to restrain any fishing in the central Arctic Ocean until a fishing regulatory scheme like a regional fisheries management organization could be established. This decision ensures that future fishing will be carried out sustainably and in accordance with scientific inputs. The coastal States also declared their intent to respect the rights of other States and to pursue their cooperation in achieving a mutually beneficial preservation of Arctic fish stocks.¹⁴ It is likely that Arctic fishing will continue to be a topic of interest and further regulation as central Arctic fishing grounds open in the years ahead.

The Arctic Council

While the LOSC sets the framework of governance in the Arctic, there are areas where additional rule-making among the Arctic States is necessary. Because of the inhospitable nature of the region, the general lack of State assets and capabilities in the area, and the sensitivity of the environment, cooperation among the Arctic States is essential. To that end, the Arctic States – the five Arctic coastal States plus Sweden, Finland, and Iceland – established the Arctic Council. The Arctic Council acts as a forum for cooperation and coordination among the Arctic States, but it is not a true international organization with rule-making power. All decision-making is done on a consensus basis, and treaties negotiated in the Council are enacted between the Arctic States without reference to the Council as a legal entity. Other nations with interests in the opening Arctic, like China, have observer status on the Council, but they don't have full membership.

So far, the Council has been the forum for negotiating two significant treaties between the Arctic States. First, in 2011, the Arctic States signed a treaty on search and rescue, apportioning responsibility for response and structuring cooperation. Then, in 2013, the Arctic States signed a treaty on Arctic pollution preparedness and response.¹⁵ A

third treaty focused on scientific research and cooperation was signed on May 2017.¹⁶ These agreements demonstrate the utility of a standing forum for the interested parties to discuss and cooperate in areas of mutual interest.

International Maritime Organization (IMO) Polar Code

One of the more recent developments in Arctic maritime law is the promulgation of a polar shipping code by the International Maritime Organization (IMO). This Polar Code sets additional standards for construction, manning, training, equipment, voyage planning, pollution, and communications for commercial ships in polar waters. The IMO is the specialized agency of the UN charged with “responsibility for the safety and security of shipping and the prevention of marine pollution by ships.”¹⁷ The Marine Safety Committee and the Marine Environmental Protection Committee of the IMO released resolutions amending the International Convention for the Safety of Life at Sea (SOLAS) and the International Convention for the Prevention of Pollution from Ships (MARPOL). Both of these resolutions include additional requirements in order to “reduce the probability of an accident” in the sensitive and remote polar regions.¹⁸ While there are IMO codes setting minimum standards that are applicable globally, the Polar Code is needed because ships operating in the polar regions can expect to encounter environmental and navigational challenges beyond those experienced in other regions.

The mandatory provisions of the Polar Code went into effect on January 1, 2017 for new ships. The provisions go into effect for existing ships in 2018. In addition to the mandatory provisions, the Polar Code also includes additional non-binding recommendations for both safety and environmental protection. The Polar Code likely qualifies as “generally accepted international rules and standards” for environmental protection under Article 211 of LOSC. If so, flag States would be responsible for enforcement of the Code and coastal States may demand compliance with its terms.¹⁹ In the face of likely increased ship traffic in the future, due to receding ice, the Polar Code will protect the safety of mariners in an inhospitable region and the fragile Arctic environment itself.

Conclusion

The LOSC provides the necessary legal framework for Arctic governance. It establishes a clear set of rights and responsibilities for coastal States and others. Where the general provisions of the LOSC may not be enough to protect mariners and the environment in this inhospitable region, the LOSC provides the pathways for coastal States to regulate ships further. The IMO has begun to increase safety in the region even further as was discussed above.

-
- 1 See for example, Paul Reynolds, "Russia Ahead in Arctic 'gold rush,'" BBC News (Aug. 1, 2007), (available at http://news.bbc.co.uk/2/hi/in_depth/6925853.stm).
 - 2 See for example, Paul Reynolds, "Russia Ahead in Arctic 'gold rush,'" BBC News (Aug. 1, 2007), (available at http://news.bbc.co.uk/2/hi/in_depth/6925853.stm).
 - 3 The Ilulissat Declaration, May, 29, 2008, (available at http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf).
 - 4 LOSC, Article 234.
 - 5 LOSC, Article 234.
 - 6 Stanley P. Fields, *Article 234 of the United Nations Law of the Sea: The Overlooked Linchpin for Achieving Safety and Security in the U.S. Arctic?*, 7 Harv. Nat'l Sec. J. 55, 59-77 (2016).
 - 7 LOSC, Article 34.
 - 8 LOSC, Article 24.
 - 9 Ilulissat Declaration, Arctic Ocean Conference, Ilulissat, Greenland, May 2008, (available at http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf).
 - 10 Corfu Channel Case (UK v. Albania) 1949 I.C.J. 4, 28-29 (Apr. 9).
 - 11 Corfu Channel Case (UK v. Albania) 1949 I.C.J. 4, 28 (Apr. 9).
 - 12 Michael Byers, *International Law and the Arctic* at 131-32 (2013).
 - 13 These disputes between Canada and Russia are summarized in Michael Byers, *International Law and the Arctic* (2013).
 - 14 "Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean", (Jul. 16, 2015), (available at <https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/folkerett/declaration-on-arctic-fisheries-16-july-2015.pdf>).
 - 15 *Agreements*, Arctic Council (Sep. 16, 2015), (available at <http://www.arctic-council.org/index.php/en/our-work/agreements>).
 - 16 "Task Force on Scientific Cooperation meets in Ottawa, Arctic Council" (Jul 27, 2016), (available at <http://www.arctic-council.org/index.php/en/our-work/2/8-news-and-events/408-sctf-ottawa-july-2016>); "Agreement on Enhancing International Arctic Scientific Cooperation", U.S. Department of State (May 11, 2017), (available at <https://www.state.gov/e/oes/rls/other/2017/270809.htm>).
 - 17 "Introduction to IMO", IMO, (available at <http://www.imo.org/en/About/Pages/Default.aspx>).
 - 18 Øystein Jensen, "The International Code for Ships Operating in Polar Waters: Finalization, Adoption, and Law of the Sea Implications", 7 Arctic Rev. on Law and Politics, no. 1, at 68-69.
 - 19 Øystein Jensen, "The International Code for Ships Operating in Polar Waters: Finalization, Adoption, and Law of the Sea Implications", 7 Arctic Rev. on Law and Politics, no. 1, at 64-74.

LOSC Dispute Resolution Provisions

Background

The LOSC states that the parties entered into the Convention “prompted by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea and aware of the historic significance of this Convention as an important contribution to the maintenance of peace, justice, and progress for all peoples of the world.”¹ Consistent with those goals, Part XV of the Convention sets forth a comprehensive and complex set of dispute resolution provisions centered around three basic principles: (1) the peaceful resolution of disputes, (2) a high degree of flexibility in choice of dispute resolution mechanisms and (3) compulsory dispute resolution where States are unable to settle a dispute on their own.

Scope of Part XV provisions

A party to the LOSC may invoke the dispute resolution system if three conditions are met. First, the conflict must fall within the bounds of the Convention. For example, the dispute must not relate to sovereignty or other issues outside the scope of the LOSC dispute resolution provisions.² Second, the States involved in the dispute must not be parties to a general, regional, or bilateral agreement that provides an alternative path for dispute resolution. Third, if required by international law, all local remedies must have been exhausted.³ In accordance with Article 282, if the LOSC members are parties to an applicable general, regional, or bilateral agreement, then the method provided for in the separate agreement shall prevail “in lieu of the procedures provided for” in the LOSC.⁴

For example, in the highly-publicized case between the Philippines and China relating to a range of disputes in the South China Sea, decided in 2016, the arbitral tribunal noted that it did not have the power to consider any claims of sovereignty over specific islands and that the two countries had not (contrary to Chinese assertions) agreed to settle their dispute bilaterally outside of the Convention. See Chapter Ten: The South China Sea Tribunal for additional information about this tribunal.

Absent any of the circumstances described above, disputes under the Convention are governed by the following provisions.

Peaceful settlement

At any point in time, the parties may resolve the issue by independently agreeing on a peaceful resolution of the dispute.⁵ They should follow a series of efforts to reach a resolution.

First, they should have an exchange of views. If a resolution of the dispute, independent of the LOSC procedures, is not pursued or achieved, then the parties have an obligation to “exchange views” as to whether a “settlement by negotiation or other peaceful means” is possible in their view.⁶

Second, in accordance with Article 284, a party to a dispute may “invite the other party or parties to submit the dispute to conciliation.” If the parties agree to submit the dispute to conciliation, they are bound to comply with the rules set out by the conciliatory process of the LOSC and cannot prematurely terminate the conciliation. If the invitation is declined or the parties fail to agree on the conciliation procedure, then the conciliation is considered to have ended.⁷ Conciliation is a process by which the dispute is submitted for consideration by an independent party, but the parties are not obligated to accept the independent party’s conclusions.

If the parties agree to conciliation, then a conciliation commission is formed, composed of five members. The two parties each propose two members, forming a group of four, which selects the fifth member of the commission. Once the commission is established, it determines its own procedures (unless the parties agree to an alternative procedures), and decisions are made by majority votes. The commission “shall hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement.” Within 12 months, the commission will issue a non-binding report on the proposals regarding the “questions of fact or law relevant to the matter in dispute” and will make recommendations “as appropriate” for an “amicable settlement.”⁸ The first conciliation case under the LOSC began in 2016, relating to a dispute between Timor-Leste and Australia regarding the maritime boundary between the two States.⁹

Compulsory Procedures

If the procedures discussed above do not lead to the settlement of the dispute, then Part XV of the Convention provides for compulsory dispute settlement. Either party may submit the dispute to the court or tribunal having jurisdiction, as described in the next paragraph. Through their accession to the Convention, parties are obligated to comply with these procedures.¹⁰

CHOOSING THE PROCEDURE

When a member State formally agrees to be bound by the Convention, the State has the right to freely choose “by means of written declaration” any one of the following means of dispute settlement:

- “(a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
- “(b) the International Court of Justice;
- “(c) an arbitral tribunal constituted in accordance with Annex VII;
- “(d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.”¹¹

If a party has not previously declared a preference for one of the procedures listed above, it “shall be deemed to have accepted arbitration” as a default procedure. If parties to a dispute have declared a preference for the same procedure (from (a) to (d) listed above), the dispute must be heard under that procedure. If they have declared a preference for different procedures, or no procedure at all, the dispute will be heard in arbitration, unless an alternative is agreed to.¹² In essence, arbitration is the default method for compulsory dispute resolution under the LOSC.

The court or tribunal in question will apply the LOSC and international law to resolve the dispute. In the case of a conflict between the text of the Convention and international law, the LOSC shall prevail.¹³

Reservations

Reservations are statements made by a State, in this case before becoming a party to the Convention or “at any time thereafter,” through which the State rejects the application of certain treaty provisions to itself or modifies their content.¹⁴ The LOSC prohibits States from asserting reservations. However, Article 298 of the Convention explicitly allows them to reject any or all of the compulsory settlement mechanisms listed above for disputes regarding the following issues:

- Disputes concerning the interpretation or application of provisions relating to delimitation of territorial sea, exclusive economic zone or continental shelf as well as those involving historic bays or titles. However, if no agreement is reached through negotiations, conciliation can be invoked under the LOSC;
- Disputes concerning military activities and law enforcement activities regarding sovereign rights, marine scientific research or fishing; and
- Disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, except the case in which the Security Council decides otherwise.¹⁵

China made all three reservations in 2006, after it ratified the LOSC. Under the LOSC, parties may agree to alternative forms of dispute resolution. If a party made a reservation regarding one of the categories above, it is permitted to waive the reservation if a second party wishes to engage in a dispute resolution procedure about the topic covered by the reservation. Parties are also permitted to agree on dispute settlement procedures that differ from those provided by the LOSC. This is consistent with the LOSC goal of giving parties flexibility in how they choose to settle a dispute.

The LOSC also provides that disputes about fishing and marine scientific research in the EEZ are exempt from compulsory dispute resolution, given the special concerns and rights of coastal States regarding those issues. Such disputes may, however, be subject to compulsory conciliation in certain circumstances.¹⁶

Jurisdiction

As outlined above, States can choose from the four procedures for relief made available by the LOSC. The courts and tribunals available are described briefly below.

The International Tribunal for the Law of the Sea (ITLOS)

The LOSC established The International Tribunal for the Law of the Sea (ITLOS). This tribunal, located in Hamburg, Germany, specializes in disputes regarding the interpretation and application of LOSC. ITLOS has 21 members whose selection is based upon two criteria.¹⁷ First, they should enjoy “the highest reputation for fairness and integrity and [be] of recognized competence in the field of the law of the sea.” Second, their election should assure that there is “a representation of the principal legal systems of the world” and an “equitable geographical distribution.” No country can have two nationals as members and “each geographical group” should have a minimum of three members.¹⁸ It is interesting to note that “permanent members of the Security Council have no guarantee of a seat on the Tribunal.”¹⁹ ITLOS makes decisions by majority vote and if the votes are evenly split, the President breaks the tie.



The International Tribunal for the Law of the Sea

CC Image courtesy of WMeinhart via Wikimedia

The International Court of Justice (hereinafter “ICJ”)

The International Court of Justice (ICJ) is located in The Hague, Netherlands.²⁰ It is composed of 15 members, and no State can have more than one member. The Court makes decisions by majority vote, and if votes are evenly split, the President breaks

the tie. In contrast with ITLOS, members of the ICJ are “elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration.”²¹ This distinction is important, as Security Council members can appoint judges from their countries, while with ITLOS this is not assured.



The International Court of Justice

CC Image courtesy of Lybil BEF via Wikimedia

The Arbitral Tribunal constituted in accordance with Annex VII of the LOSC

A key aspect of the arbitral tribunal contemplated by LOSC is that a State's failure to appear before the tribunal does *not* prevent the continuation of the arbitration process.²² If a party to the LOSC fails to agree to an alternative peaceful means to settle the dispute in question, arbitration can be instituted without any consent other than that found in accession to the LOSC. Most notably, this occurred in the South China Sea (SCS) case, where China refused to appear and the tribunal nevertheless proceeded to a ruling after implementing certain procedural and evidentiary steps to address China's absence.²³ For additional details on the South China Sea arbitration, see Chapter Ten: The South China Sea Tribunal.

The arbitral tribunal is made up of five members, with each party appointing one member and the initial two members agreeing on three additional members, one of whom shall be appointed president of the tribunal. A separate tribunal membership is appointed for each dispute. The decisions of the tribunal are made by majority vote, with at least half of the members present, and, in case of a tie, the president's vote shall be decisive.²⁴ The President of the Permanent Court of Arbitration in The Hague appoints members where a party fails to appear, as occurred in the SCS case.

The Special Arbitral Tribunal

In addition to the general arbitral tribunal, the Convention provides for a "Special Arbitral Tribunal" for issues involving "fisheries, protection and preservation of the marine environment, marine scientific research or navigation, including pollution from vessels and by dumping" due to the expertise necessary to consider these subjects. A special tribunal will have five members, two appointed by each party and a president appointed by both parties according to their agreement. The members should be "chosen preferably from the appropriate list" of experts on the specific topics which necessitate the Special Arbitral Tribunal. The lists of experts are maintained by appropriate UN agencies, and each State party can nominate experts to the lists.²⁵

The Rulings and Their Enforcement

Decisions issued by a court or tribunal with jurisdiction are binding between the parties in accordance with the provisions of Article 296 of the LOSC. In contrast with the U.S. legal system, decisions made under the LOSC dispute resolution procedures cases do not have the legal value of a precedent and therefore are not binding on any third party.

History has taught that despite having a "binding" effect between the parties, enforcing these rulings can be difficult. China has refused to comply with rulings against it in the SCS case, and there are no easy ways to enforce compliance. When a great power loses in an international dispute, such as the case between the U.S. and Nicaragua in the ICJ or the Chagos Island case between Mauritius and the United Kingdom (which was heard by the Permanent Court of Arbitration) there is no effective enforcement mechanism. Other powerful countries are usually reluctant to intervene.²⁶

Nevertheless, the dispute resolution provisions of the LOSC have often proven effective and will continue to be a critical component of the Convention framework. Proponents of the LOSC highlight the Convention as unique in its flexibility regarding how parties can resolve their disputes in conjunction with the compulsory provisions essential to resolve disputes. For example, disputes between Eritrea and Yemen regarding the Hamish Islands in the Red Sea, and between India and Bangladesh relating to maritime zone boundaries in the Bay of Bengal were successfully resolved in 1998 and 2014 through arbitration, ending years of conflict without resort to the use of force.^A However, critics perceive those same provisions as a threat to national sovereignty. This tension continues to influence the U.S. attitude towards the LOSC, but is mitigated by the careful balance struck in the treaty, including its basic jurisdictional boundaries (i.e., it does not cover territorial sovereignty), its encouragement of bilateral agreements, and the reservations States are permitted under Article 298.

-
- 1 United Nations Convention on the Law of the Sea, Preamble, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOSC] (available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/preamble.htm).
 - 2 Beckman, Robert. 2013. "The UN convention on the law of the sea and the maritime disputes in the south china sea." *American Journal of International Law* 107 (1): p142.
 - 3 LOSC, Article 295.
 - 4 LOSC, Article 282.
 - 5 LOSC, Articles 279-280.
 - 6 LOSC, Article 283.
 - 7 LOSC, Article 284.
 - 8 LOSC, Annex V.
 - 9 "The Permanent Court of Arbitration. Conciliation between The Democratic Republic of Timor-Leste and The Commonwealth of Australia. Second Press Release." Accessed January 21, 2017. (available at <https://pcacases.com/web/sendAttach/1869>).
 - 10 LOSC, Article 286.
 - 11 LOSC, Article 287.
 - 12 LOSC, Article 287.
 - 13 LOSC, Article 293.
 - 14 As defined in art.2.1.d by the Vienna Convention on the Law of Treaties.
 - 15 LOSC, Article 298.1.
 - 16 LOSC, Article 297
 - 17 LOSC, Article 2.1 Annex VI.
 - 18 LOSC, Annex VI Articles 2-3 (*containing the articles that govern ITLOS*).
 - 19 Merrills, J. G. 1998. *International dispute settlement*. 3rd ed. New York; Cambridge, U.K: Cambridge University Press, p185.
 - 20 Article 22.1, ICJ Statute.
 - 21 Article 3.1, 4.1, ICJ Statute.
 - 22 LOSC, Annex VII Article 9.
 - 23 "Permanent Court of Arbitration. The South China Sea Arbitration (The Republic of The Philippines v. The People's Republic of China. Third Press Release." Accessed January 21, 2017. (available at <https://pcacases.com/web/sendAttach/1295>).
 - 24 LOSC, Annex VII contains the articles that govern the Arbitral Tribunal (Article 8 Annex VII).
 - 25 LOSC Annex VIII governs Special Arbitral Tribunals.
 - 26 The Diplomat, Graham Allison, "Of Course China, Like All Great Powers, Will Ignore an International Legal Verdict." *The Diplomat*. Accessed January 21, 2017. (available at <http://thediplomat.com/2016/07/of-course-china-like-all-great-powers-will-ignore-an-international-legal-verdict/>).
 - A "Eritrea/Yemen - Sovereignty and Maritime Delimitation in the Red Sea." *Cour Permanente D'Arbitrage | Permanent of Court Arbitration*. Accessed July 06, 2017. (available at <https://pca-cpa.org/fr/cases/81/>); "Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India." *PCA :: Case view*. Accessed July 06, 2017. (available at <https://www.pcacases.com/web/view/18>).

The South China Sea Tribunal

Background

The increasing risk of conflict in the South China Sea (SCS) poses a significant threat to stability in the region and to U.S. interests. Not only do Taiwan, Vietnam, Malaysia, Brunei, and the Philippines have competing territorial and jurisdictional claims over the physical features of the SCS, but U.S. Freedom of Navigation (FON) operations have also elicited an increasingly hostile tone from Beijing. See Chapter Three: Freedom of Navigation, for additional information about this topic. Additionally, Beijing's insistence that it has "indisputable sovereignty over the South China Sea Islands and the adjacent waters" within the so-called "nine-dash line" as well as its accelerated industrial scale "island building" for military purposes have increased the overall international tension in this region. China's militarization of the SCS is of great concern to the U.S. and its regional allies because China's aggressive assertions serve to destabilize the region and weaken important international agreements such as the LOSC. Additional concerns include China's refusal to arbitrate legitimate disputes concerning the law of the sea, an aversion to multilateral negotiations, and the refusal to enter into bilateral negotiations on the basis of equality.

The South China Sea (SCS) Tribunal

The South China Sea (SCS) Tribunal (the Tribunal) established through the Permanent Court of Arbitration (PCA) under the terms of Part XV of the LOSC resulted from the efforts of the Philippines to hold China accountable for their activities near the Scarborough Shoal, the claims and conduct of China in the Spratly Islands, and Chinese assertion of sovereignty over wide areas of the SCS, including parts of the EEZ of the Philippines. The Philippines alleged that China violated its rights and privileges enshrined within the LOSC, and on July 12, 2016 the Philippines received a favorable decision from the Tribunal. The Tribunal ruled overwhelmingly in favor of the Philippines' claims, although it declined to hold that China had behaved in bad faith or to impose special enforcement remedies.

History of SCS Disputes

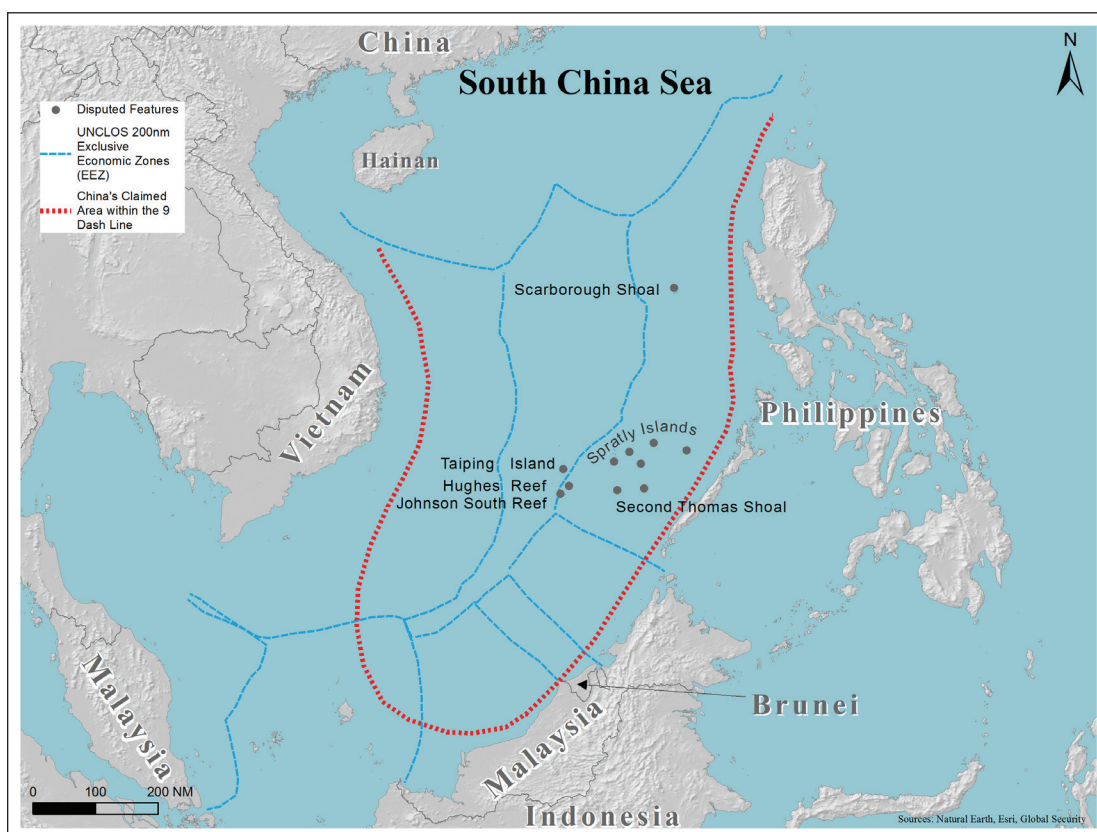
The SCS has not always been a tense geopolitical area. At the end of World War II, none of the neighboring states occupied a single island in the entire SCS. However, over the next fifty years, there would be periodic escalations and de-escalations in the SCS such that no country can claim consistent possession of the islands there. Between 1946 and 1947, China began the process of establishing itself in the Spratly Islands, Woody Island, and the Paracel Islands, while the French and Vietnamese established themselves on

Pattle Island. During China's civil war, the islands then occupied by China were again vacated. After this period, neighboring countries again began making claims on islands. In 1974, China engaged South Vietnam in the Battle of the Paracel Islands to wrest control of the islands. Then in 1988, China moved into the Spratly Islands and defeated Vietnam's opposition to occupy the Johnson Reef. Tensions again escalated in 1995 when China built bunkers above Mischief Reef following the grant of a Philippine oil concession.

2002 was a year which offered great hope for a breakthrough in the SCS. China deviated from its long tradition of bilateral negotiations and instead worked with the Association of Southeast Asian Nations (ASEAN) to create the Declaration on the Conduct of Parties in the SCS.

In this declaration, the parties promised "to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner."^A

A period of reduced tensions followed in the SCS, although tensions in the East China Sea between Japan and China continued during this time. The latest round of tensions commenced in May 2009 when Malaysia and Vietnam sent a joint submission to the Commission on the Limits of the Continental Shelf to state their claims. China was among those countries that responded and submitted a controversial map to the UN Secretary General containing the "nine-dash" line.



In submitting the “nine-dash” line in 2009, China asserted that it has “indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof.”¹ This statement could either be construed as: 1) China claims all of the territory in the SCS with adjacent waters allowed under international law, or 2) China claims all land and water features enclosed by the line beyond what is accepted under international law. The line runs along the coast of Vietnam all the way down to the coast of Malaysia and Brunei and back up to the Philippines.

Following publication of the map, China and the Philippines engaged in a standoff at the Scarborough Shoal in 2012. A Philippine Navy surveillance aircraft detected eight Chinese fishing vessels near the Scarborough Shoal on April 8, 2012. After finding endangered clams, coral, and live sharks on the vessels, in violation of Philippine law, the Philippines deployed the military vessel *BRP Gregorio del Pilar* to arrest the fishermen. In response, China dispatched maritime vessels to prevent the Philippines from detaining the fishermen and had People’s Liberation Army Navy (PLAN) vessels in the area on standby. Concurrent with this incident, both countries engaged in non-military retaliations. China imposed restrictions on banana imports from the Philippines, and the Philippines imposed restrictions on Chinese tourism in the Philippines. By July 2012, China effectively blocked access to the Scarborough Shoal by Filipino fisherman.

Matters Adjudicated by the Tribunal

On January 22, 2013, the Philippines initiated arbitral proceedings against China under Articles 286 and 287 of LOSC.² Article 286 allows for the referral of disputes, where no settlement has been reached, to binding resolution in a court or tribunal specified in Article 287. Through Article 287, the Philippines elected to use an arbitral tribunal in accordance with Annex VII of the LOSC. See Chapter Nine: LOSC Dispute Resolution Provisions, for additional information about that section of the LOSC. In July 2013, the Tribunal appointed the PCA to serve as Registry for the proceedings. The PCA is an intergovernmental organization established by the 1899 Hague Convention on the Pacific Settlement of International Disputes.

Relief Sought By The Philippines

In its request to initiate the proceedings, the Philippines sought an award that:

- declares that the LOSC governs the rights and obligations of the parties with regard to the waters, seabeds, and maritime features of the SCS such that China’s “nine-dash line” is invalid;
- determines under Article 121 of the LOSC whether certain maritime features claimed by both China and the Philippines are islands, low tide elevations, or submerged banks, and whether they are capable of generating entitlement to maritime zones greater than 12 nautical miles; and
- declares that China has unlawfully exploited the living and non-living resources in the Philippines’ exclusive economic zone and continental shelf, and has unlawfully prevented

the Philippines from exploiting the living and non-living resources therein, and enables the Philippines to enjoy and exercise the rights within and beyond its exclusive economic zone and continental shelf.

In subsequent submissions to the Tribunal, the Philippines asserted two additional claims of LOSC violations against China. The first additional claim alleged China's breach of obligations to protect and preserve the marine environment under Article 192, through its harvesting of endangered species and coral as well as through the construction of artificial features. The second claim was that Chinese government vessels were operating to impair the navigation of Philippine vessels in a manner inconsistent with safe navigation under the LOSC.

China's Response

On February 19, 2013, China rejected the arbitration through a diplomatic note to the Philippines. China noted "the two countries have overlapping jurisdictional claims over parts of the maritime area in the SCS and that both sides had agreed to settle the dispute through bilateral negotiations and friendly consultation."³ Throughout the proceedings China did not appear nor participate, but the Philippines was able to successfully invoke Article 9 of Annex VII of the LOSC to request that the proceeding continue despite China's non-participation. On October 29, 2015, the Tribunal determined unanimously that it had jurisdiction over the SCS matters and that China's refusal to participate in the proceedings did not deprive the Tribunal of jurisdiction.^B China reacted with a statement from its Ministry of Foreign Affairs claiming that there would be no binding effect on China. China asserted that the claims presented to the Tribunal were a political provocation under the cloak of law and that China has indisputable sovereignty over the SCS Islands and the adjacent waters. China also claimed that its sovereignty and relevant rights in the SCS were formed through the course of history and asserted by successive Chinese governments, through China's domestic laws, and protected under international law including the LOSC. With regard to the issues of territorial sovereignty and maritime rights and interests, China asserted that it would not accept any outcome imposed on it or any unilateral resort to a third-party dispute settlement.⁴ The Tribunal issued its decisions on July 12, 2016.

The Decisions of the Tribunal

MATTER 1: HISTORIC RIGHTS AND THE NINE-DASH LINE

Although the Tribunal did not rule on any question of sovereignty over land territory and did not delimit any boundary between the parties, the Tribunal concluded that: (a) there was no evidence that China had historically exercised exclusive control over the islands and waters of the SCS; and, regardless, (b) any pre-existing, historic Chinese rights were extinguished to the extent they were incompatible with the LOSC. Therefore, the Tribunal concluded that there was no legal basis for China to claim historic rights to resources within the nine-dash line.⁵

MATTER 2: STATUS OF FEATURES

The Tribunal also evaluated whether certain reefs being claimed by China were above high tide, as features above water at high tide generate at least a 12 nautical mile territorial sea. Features below water at high tide do not generate such an entitlement, even if such features have been modified by land reclamation and construction. As for the features which the Tribunal found to be high-tide elevations, the Tribunal considered whether any of these could generate maritime zones of 200 nautical miles and a continental shelf, or whether these features were just rocks which could not sustain human habitation or economic life and thus only generated rights to a territorial sea. The Tribunal noted that to qualify as islands that generate an EEZ, maritime features must be able to either sustain a stable human community or economic life that does not depend on outside resources and is not purely extractive in nature. Evaluation of features must be made in their natural state, without taking into account artificial enlargements or enhancements like those undertaken by the Chinese. The Tribunal found that only small groups of transient fisherman historically used the Spratly Islands and that their economic activities had only been extractive. Thus, the Tribunal determined that none of the Spratly Islands could generate extended maritime zones. In short, China could not claim an exclusive economic zone (EEZ) based on its claims upon the Spratly Islands.⁶

The Tribunal's statement as to the status of features in the SCS has limited the scope of maritime entitlements that China could claim and applies also to other States and their claims in the SCS. The Tribunal's designation of the Johnson South Reef, Hughes Reef, and the Scarborough Shoal as "rocks" instead of "islands," not only limits Chinese claims and maritime entitlements, but also provides guidance on how similar cases involving other States could be adjudicated in the future. Such a characterization could be applied to other locations of geopolitical interest where the status of features might be contested. An example of this could be the status of certain U.S. possessions in the Pacific Ocean, such as Howland Island.

MATTER 3: LAWFULNESS OF CHINESE ACTIONS

The Tribunal found that certain areas were within the EEZ of the Philippines, and, moreover, that China had violated certain sovereign rights of the Philippines in its EEZ. Such violations included: (1) interfering with Philippine fishing and petroleum exploration, (2) failing to prevent Chinese fisherman from fishing in the EEZ, and (3) constructing artificial islands. The Tribunal also determined that China unlawfully restricted the traditional fishing rights of Philippine fishermen at Scarborough Shoal and that China's law enforcement vessels unlawfully created a serious risk of collision when they physically obstructed Philippine vessels.^c

MATTER 4: HARM TO MARINE ENVIRONMENT

The Tribunal concluded that China violated its obligation to preserve and protect fragile ecosystems and habitat of depleted, threatened, or endangered species through both its harmful fishing practices and its large-scale land-reclamation activities and

construction of artificial features. The Tribunal further noted that China's failure to make available any meaningful evaluation of the environmental impact created by its land-reclamation activities violated the LOSC. The Tribunal also held that China failed to prevent its fishermen from harvesting endangered sea turtles, coral, and giant clams on a substantial scale.⁷

MATTER 5: AGGRAVATION OF DISPUTE

The Tribunal also considered whether China's actions aggravated the dispute between the parties after the arbitration had commenced. Although the Tribunal concluded that China's continuation of the large-scale land reclamation and construction of artificial islands was incompatible with the obligations on a State during dispute resolution proceedings, the Tribunal found that it lacked jurisdiction to consider implications of a stand-off between Philippine marines and the Chinese naval and law enforcement vessels at Second Thomas Shoal. Disputes involving military activities are excluded from compulsory settlement under the LOSC.⁸

Impact of the Tribunal Decisions

Although the decisions of the Tribunal could be perceived as a huge win for the Philippines, as well as a victory for the notion of peaceful dispute resolution, its enforceability remains an open question. The decision is final and binding pursuant to Articles 11 and 296 of the LOSC, to which China is a party. Despite this, as recently as late October 2016, China's Ministry of Foreign Affairs has stated that the situation at the disputed Scarborough Shoal in the SCS "has not changed and will not change."⁹ It currently remains unclear whether China will comply and whether the Philippine President Rodrigo Duterte will use the Tribunal's decisions as leverage to influence relations between the two countries.¹⁰ So far, President Duterte has threatened to challenge Beijing if they begin extracting gas within the EEZ of the Philippines in the SCS. However, he has also indicated a willingness to set the Tribunal decision aside to facilitate better relations with China. China has taken limited steps to ease tensions by permitting some access to the Scarborough Shoal for Filipino fishermen, while retaining overall control of access.

Beyond China, the Philippines, and the U.S., other claimants in the SCS have welcomed the refutation of China's "nine-dash line." Vietnamese authorities have refused to recognize Chinese passports that feature the nine-dash line to symbolically deny recognition of China's claim.¹¹ Separately, Taiwan actually supports the legitimacy of China's "nine-dash line" claim because it also supports Taiwan's claim to Taiping Island, the largest of the Spratly Islands. By characterizing Taiping Island as a "rock" instead of an "island," the Tribunal denied Taiwan a 200 nautical mile EEZ.¹² The principles applied by the Tribunal, if adopted by others, could, as noted above, call into question maritime zones claimed by other nations (including the U.S. and France) by virtue of small and uninhabited islands.

What the Tribunal decision could not do, however, is resolve tensions in the SCS. The Tribunal could only interpret the LOSC and determine the kinds of maritime zones that could be lawfully claimed. It lacked jurisdiction to adjudicate claims between China and other States concerning sovereignty. Given China's current approach, it does not seem that tensions in the SCS will subside at any time in the near future.

-
- 1 People's Republic of China, Note Verbale CML/18/2009 (May 7, 2009).
 - 2 Press Release, Permanent Court of Arbitration, The Hague, Arbitration Between the Republic of the Philippines and the People's Republic of China (July 13, 2015), (available at http://archive.pca-cpa.org/shownews454.html?nws_id=518&pag_id=1261&ac=view).
 - 3 Hong Lei, "Statement of Ministry of Foreign Affairs of the People's Republic of China Spokesperson", February 19, 2013, (available at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1015317.shtml).
 - 4 Phil. v. China, PCA Case No. 2013-19, Award of July 12, 2016.
 - 5 Phil. v. China, PCA Case No. 2013-19 at ¶ 230-278, Award of July 12, 2016.
 - 6 Phil. v. China, PCA Case No. 2013-19 at ¶ 539-551, 615-626, Award of July 12, 2016.
 - 7 Phil. v. China, PCA Case No. 2013-19 at ¶ 950-966, Award of July 12, 2016.
 - 8 Phil. v. China, PCA Case No. 2013-19 at ¶ 1161-1162, 1163-1181, Award of July 12, 2016, (regarding military activities and reclamation and construction activities).
 - 9 Paul Carsten & Manuel Mogato, "China Says 'Situation' at Disputed Scarborough Shoal has not Changed", Reuters, Oct. 31, 2016, (available at <http://www.reuters.com/article/us-southchinasea-china-philippines-idUSKBN12V0YT>).
 - 10 Nandini Krishnamoorthy, "Duterte Says He Will Insist on International Tribunal Ruling if China Drills in South China Sea", International Business Times, Dec. 29, 2016, (available at <http://www.ibtimes.co.uk/duterte-says-he-will-insist-international-tribunal-ruling-if-china-drills-south-china-sea-1598539>).
 - 11 "South China Sea: Vietnam Airport Screens Hacked", BBC News, July 29, 2016, (available at <http://www.bbc.com/news/world-asia-36927674>).
 - 12 Austin Ramzy, Taiwan, "After Rejecting South China Sea Decision, Sends Patrol Ship", N.Y. Times, July 13, 2016, (available at <https://www.nytimes.com/2016/07/14/world/asia/south-china-sea-taiwan.html>).
- A "DECLARATION ON THE CONDUCT OF PARTIES IN THE SOUTH CHINA SEA." Association of Southeast Asian Nations. Accessed July 06, 2017, (available at http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2).
- B Phil. V. China, PCA No. 2013-19 at ¶ 413, Award of October 29, 2015.
- C Phil. V. China, PCA No. 2013-19 at ¶ 716, 757, 814, and 993, Award of October 29, 2015.

State Sovereignty and the LOSC

Background & Development of the LOSC

The first UN Conference on the Law of the Sea was held in 1958. The Conference resulted in four conventions, all of which have been signed and ratified by the U.S. These conventions addressed: the territorial sea and contiguous zone, the high seas, the continental shelf, and fishing and conservation of living resources of the high seas.

The U.S. government has consistently expressed the view that with a few exceptions, most of the articles of the LOSC represent a codification of customary international law and existing State practice. During their development and ratification, the 1958 conventions were also interpreted to reflect customary international law.

The second Conference on the Law of the Sea convened only two years later, but concluded without a treaty agreement. During the 1960s, the international community developed a growing consensus toward recognizing the rights of coastal States to exclusive control over fishing zones and the continental shelf. In 1966, President Lyndon B. Johnson referred to the deep sea and the seabed as the legacy of all humans. The following year, the Ambassador to the UN from Malta, Arvid Pardo, presented a proposal to the UN General Assembly declaring that the seabed should be part of the common heritage of mankind. These remarks ignited international discussion about the management of and jurisdiction over deep sea resources. For more about the provisions of the LOSC regarding the deep seabed and the conservation and management of the living resources of the high seas, see Chapter Two: Maritime Zones and Chapter Seven: The LOSC and the Environment.

In 1970, the Montevideo Declaration on the Law of the Sea was concluded, which recognized the right of coastal States to avail themselves of the natural resources of the sea adjacent to their coasts.¹ The international debate regarding the right to manage, exploit, and explore the resources of the deep sea was also manifest in a third Conference on the Law of the Sea, and formed the foundation for the definitions of the EEZ as well as subsequent negotiations regarding the exploration and exploitation of the deep seabed. The third Conference was held between 1973 and 1982, by which time more than 150 States had participated in the negotiations. For further background on the historical development of the LOSC, see Chapter One: Customary International Law and the Adoption of the Law of the Sea Convention.

The U.S. played a central role in the development and substance of the negotiations at the third Conference, only to ultimately voice strong objections to certain aspects of the agreement and vote against its adoption, principally due to concerns regarding Part XI of the Convention described in more detail below.

The U.S. has not ratified the Convention. Since the LOSC was adopted, 168 parties have ratified it. The absence of the U.S. from the list of participating States affects not only U.S. national military and commercial interests, but also limits the ability of the U.S. to influence decisions reached by the Convention's dispute resolution mechanisms that can serve as guidance for future interpretation of important issues regarding the law of the sea.

The dispute resolution mechanisms of the LOSC provide important legal guidance regarding the oceans, the delimitation of territorial waters, the governance of shared resources, and the conduct of military and commercial activity at sea. These decisions will influence future cases regarding common space, resources, and freedom of navigation. As described in Chapter Nine: LOSC Dispute Resolution Provisions, the dispute resolution mechanisms also provide States with great flexibility in how to resolve disputes regarding the Convention, while providing for compulsory dispute resolution over many issues where States are unable to settle a dispute.

Objections to U.S. ratification of the LOSC have largely focused on its infringement of the sovereignty of participating States, particularly due to Part XI. Part XI concerns management of the deep seabed, referred to as the Area, and provides for dispute resolution through the Seabed Disputes Chamber.² Part XI declares the deep seabed as belonging to the common heritage of mankind, invoking principles of common heritage which include non-appropriation, common management, and sharing of benefits derived from the Area. Part XI also establishes the International Seabed Authority (ISA) to oversee a body referred to as the Enterprise in exploration and exploitation of the deep seabed in compliance with the principles of common heritage agreed upon in the LOSC.³

The U.S. Position Regarding the LOSC

Despite being a central participant in the negotiation of the 1958 Conventions and the 1982 Law of the Sea Conventions, the U.S. expressed significant reservations regarding the LOSC as negotiations were drawing to a close. These concerns focused primarily on Part XI, regarding the exploitation of deep sea resources, the principle of common heritage, requirements for technology transfer to developing nations, and acceptance of the jurisdiction of an international decision-making body for disputes concerning the resources, territory, and activities of the U.S.

President Ronald Reagan declared multiple objections to the LOSC. The President was primarily concerned with a potential lack of influence by the U.S. on the decisions and activities of the ISA. He also concluded that the LOSC assigned too much authority to the ISA, allowing the ISA to make regulatory decisions about the exploitation and exploration of the Area which could constrain U.S. activities and impose financial losses on U.S. businesses involved in exploitation and exploration. Of additional concern was the possibility that U.S. companies or government entities could be required to share proprietary technology with competitors. Finally, the President did not want to agree to surrender U.S. sovereignty by submitting to the jurisdiction of

an international decision-making body through the compulsory dispute resolution mechanism.

The U.S. objections to the LOSC initially resulted in some degree of uncertainty over the future of the treaty. Following the lead of the U.S., many other States also declined to ratify the Convention. In order to address the concerns preventing the U.S. and other States from joining the LOSC, in 1994, the UN General Assembly (UNGA) negotiated what became known as the Agreement Relating to the Implementation of Part XI of the United Nations Law of the Sea (hereafter referred to as the Agreement). The Agreement is intended to be interpreted along with Part XI of the Convention. In the case of any conflict or contradiction between the texts or their interpretations, the text of the Agreement is to prevail. Any States ratifying the Convention following implementation of the Agreement are also bound by the Agreement. States which ratified the Convention prior to the Agreement may consent to the Agreement separately.

Following the UNGA's vote, most developed States which had objected to the LOSC ratified it. Shortly after the 1994 Agreement, the U.S. became a signatory to the Agreement⁴, but this did not lead to subsequent ratification. The LOSC was submitted to the U.S. Senate for ratification in October of 1994 and the Senate has declined to ratify it. The LOSC entered into force in November 1994. The official position of the U.S. has been that the LOSC generally reflects an embodiment of existing customary international law with the exception of the U.S. objections noted above.

Arguments in Favor of U.S. Ratification of the LOSC

Since entering into force in 1994, the LOSC has become an increasingly important part of the international legal order. Adhered to by the majority of States, the LOSC provides the only framework within international law for resolving contentious issues such as freedom of navigation and fishing rights in the South China Sea.

The LOSC Reflects and Codifies Critical U.S. Security Interests

The LOSC documents the navigational rights of customary international law that are essential to the movement of global commerce and the U.S. armed forces. In addition to freedom of navigation on the high seas, the Convention also affirms the right of innocent passage through the territorial seas of foreign States and the right of transit passage through international straits. See Chapter Three: Freedom of Navigation for additional information on this topic. These rights are critical to U.S. military and intelligence operations as well as the operations of U.S. commercial interests. In addition to recognizing the sovereignty of a State over its territorial sea, the Convention also recognizes the sovereignty of that State over the seabed and subsoil below and airspace above the territorial sea, crucial aspects of U.S. commercial and environmental interests. During negotiations of the LOSC, the U.S. delegation fought hard for recognition of these rights, and succeeded along other States in formally codifying them in the Convention. The administrations of Presidents Clinton and

George W. Bush both strongly advocated for the Senate to ratify the LOSC, noting that the 1994 Agreement thoroughly addresses the objections of the U.S. to the 1982 Convention and citing the importance of U.S. leadership in shaping international law. In 2007, Gordon England, U.S. Deputy Secretary of Defense, advocated ratification to the U.S. Senate.

By joining the Convention, we provide the firmest possible legal foundation for the rights and freedoms needed to project power, reassure friends and deter adversaries, respond to crises, sustain combat forces in the field, and secure sea and air lines of communication that underpin international trade and our own economic prosperity.⁵

The LOSC enhances U.S. interests by recognizing and clearly delineating freedom of navigation rights and U.S. rights to manage and exploit its resources. The Convention also codifies the sovereign right of the U.S. to conduct military operations on the high seas and within EEZs, the right of sovereign immunity, and right of visit for warships and government and military noncommercial vessels.

Article 298 of the LOSC proclaims that States can declare in writing the intention to remove disputes regarding military activities and law enforcement activities regarding the exercise of sovereign rights or jurisdiction from the compulsory jurisdiction described in Section 2 of Part XV of the LOSC.⁶ The U.S. has also asserted its understanding that under article 298(1)(b), each State Party has the exclusive right to determine whether its activities are “military activities” and that such determinations are not subject to review.⁷ The U.S. has outlined a Cooperative Strategy for 21st Century Seapower, setting goals for U.S. Navy, Marine Corps, and Coast Guard operations.⁸ The core aims of this strategy are defending the homeland, deterring conflict, responding to crises, defeating aggression, protecting the maritime commons, strengthening partnerships, and providing humanitarian assistance and disaster response. The strategy also recognizes the importance of joint cooperation with allies and partners, almost all of whom have ratified the LOSC. U.S. ratification of the LOSC would help align the underlying framework for that cooperation.

The LOSC Protects U.S. Economic and Commercial Interests

U.S. commercial interests would also benefit from the legal clarity provided by the Convention regarding the EEZ. Major U.S. companies in significant industries like oil, shipping, and fishing are advocates for U.S. ratification of the LOSC. It would benefit these commercial interests and those of the U.S. to have an EEZ that is recognized within the legal framework of the Convention. The LOSC recognizes the exclusive sovereign right of a State to all of the resources under and on the seabed as well as in the ocean within 200 nautical miles of its coastlines, which is a tremendous commercial asset.⁹ With the largest EEZ in the world, the U.S. stands to benefit more than any other State by establishing recognition of its right to manage, exploit, and explore its own resources within the LOSC framework.

The Convention also offers coastal States the potential to extend legal recognition for their continental shelves beyond 200 nautical miles through the Commission on the Limits of the Continental Shelf.¹⁰ Without being a party to the Convention, the U.S. will forfeit the opportunity to obtain international recognition of this extension of its sovereign right to access and manage its own resources.

The LOSC Strengthens Protection of the Oceanic Environment

Another aim of the Cooperative Strategy for 21st Century Seapower is protection of environmental resources. The U.S. recognizes the importance of safeguarding the world's rich environmental resources for sustainable use by future generations. For more information about the environmental protection provided for in the Convention, including the legal framework set up to protect the oceans and their resources, see Chapter Seven: The LOSC and the Environment.

U.S. Concerns Regarding Part XI of the LOSC Have Been Fully Addressed

The 1994 Agreement was intended to address objections from the U.S. and other States to Part XI of the Convention. Presidents from both the Republican and Democratic parties, including President Bill Clinton and President George W. Bush, have advocated for the ratification of the Convention in light of the resolutions made in the Agreement. For example, the 1994 Agreement stipulates that the U.S. is guaranteed a permanent seat on the Council and Finance Committee of the ISA. This seat gives the U.S. the ability to veto any decisions which contradict U.S. national interests.

Failure to Ratify the LOSC Significantly Weakens U.S. Influence

The longer the U.S. waits to ratify the LOSC, the more other States can shape the functioning of the ISA and the scope of its jurisdiction in ways that may or may not be aligned with the interests of the U.S. The ISA has been in existence for two decades, and will continue to exist with or without U.S. participation. Through ratification of the LOSC and participation in the ISA, the U.S. would gain the ability to directly influence ISA decisions about deep sea resources of vast territorial scope.

Failure to ratify the LOSC also precludes the U.S. from participating formally on key bodies interpreting and enforcing the Convention, including the Commission on the Limits of the Continental Shelf and the International Tribunal for the Law of the Sea, the only international venues for disputes relating to the sea. The U.S. can currently only be present at meetings of State parties to the LOSC as an observer without the powers of intervention or participation.

The LOSC is now a critical part of the framework of the international legal order. It is both the substance and the procedure of the international law of the sea. The Convention framework will be used to develop the law in response to situations arising in the future regarding navigational routes, resource management, natural disasters, and the maintenance of State sovereignty. The LOSC is effectively shaping State practice. Despite China's unlawful maritime claims in the South China Sea,

China seeks an interpretation of the Convention that will support and justify its activities, rather than disregarding the LOSC as irrelevant. The highly publicized jockeying for power in these contested waters therefore only augments the relevance of the LOSC and its ability to influence State practice. If the U.S. continues to decline to ratify the Convention, especially as it is referenced more and more in maritime disputes and as a benchmark for State behavior, U.S. influence on the way the Convention is applied and interpreted will also continue to decline. As a consequence, both the application of the LOSC and customary international law more generally may evolve in ways adverse to U.S. interests.

Arguments Against U.S. Ratification of the LOSC

Ratification is Unnecessary to Preserve Core U.S. Interests

A primary argument against U.S. ratification of the LOSC is that the U.S. is effectively already bound by most provisions of the Convention that it would consent to because the U.S. considers those provisions to be a codification of customary international law. Through its signature to the 1994 Agreement and its ratification of the 1958 Conventions, the Executive branch of the U.S. government has expressed agreement with all but one section of the LOSC, Part XI. The Convention can be considered unnecessary as the U.S. is already bound by many of its rules, and already abides by its own definition of the EEZ. For more about the U.S. EEZ, see Chapter Two: Maritime Zones and Chapter Four: Military Activities in an EEZ. The U.S. also gains the benefit of the observance of these same rules by States that are parties to the LOSC without the need for the U.S. to become a party itself.

History Suggests No Compelling Need for the U.S. to Ratify the LOSC

The U.S. is the world's dominant naval power and has been for decades. This success has been achieved without U.S. participation in a Convention that would constrain its practice and ability to act. The U.S. has protected its own commercial, military, and environmental interests successfully without formal participation in the LOSC framework. Additionally, relevant commercial maritime activity is protected and regulated through the U.S. participation in multilateral treaties under the International Maritime Organization, rendering the LOSC unnecessary in combination with these treaties and customary international law.

Ratifying the LOSC Would Erode U.S. Sovereignty

While the Convention would provide formal recognition for U.S. claims over its territory and resources, it also subjects parties to the jurisdiction of the ISA. If the U.S. ratifies the LOSC, the ISA would have the power of decision on a variety of issues relating to the Area vital to U.S. national interests. By creating the ISA, the Convention established institutions with executive and judicial powers that should arguably belong only to national sovereignty. The power granted to the ISA to make decisions

that impact sovereign States undermines the independent decision-making authority of national governments.

More generally, the Convention also subjects parties to the jurisdiction of a compulsory dispute settlement mechanism. The requirement to participate in this process would open the possibility for other States to pursue legal action against the U.S. in an effort to constrain or undermine U.S. interests. There is, for example, a risk that the U.S. could be exposed to litigation regarding environmental claims as a party to the Convention. The U.S. should not surrender its sovereignty regarding decisions affecting its own interests to institutions that are not accountable to national sovereignty.

Declining to ratify the LOSC gives the U.S. the ability to affect international law relating to the sea through its own practices and those of other States. As the dominant naval power in the world, the actions of the U.S. have significant influence with respect to the practices of other States and the overall development of customary international law even if the U.S. is not a party to the LOSC. This diminishes the perceived need for the U.S. to participate in and be constrained by the LOSC. Failure to ratify the LOSC has not significantly impacted the U.S. naval dominance of the world's oceans.

The Current Framework for the U.S.

If the U.S. does not ratify the LOSC, it has claim only to customary international law, the UN Charter, and the agreements regarding the law of the sea that it ratified prior to the development of the LOSC. It does not have recourse to resolve disputes with other State parties through the International Tribunal for the Law of the Sea (ITLOS).

As the framework of the LOSC remains the most significant influence on the development of the law of the sea, the continued absence of the U.S. communicates a lack of dedication to upholding the international legal order. As more decisions are made regarding the law of the sea, the refusal of the U.S. to take its guaranteed seat on the Council of the ISA is a cession of power to States that are party to the LOSC. By not joining, the U.S. takes a backseat in determining international legal practice and allows State parties to the Convention to set the precedent. It is also open to accusation of "hypocrisy," however groundless, when it seeks to compel compliance by others with the provision of the LOSC.

By some interpretations, the common heritage principle is not part of customary international law, but only part of the LOSC. This means that non-parties are not bound by the common heritage principle. However, the common heritage principle is only effective if all States adhere to it, and the continued objection to this principle by the U.S. undermines the best-functioning legal agreement pertaining to common resources. The U.S. could take advantage of its position as the world's dominant naval power and as a longtime advocate for the importance of the international legal order and set an example that adherence to common legal principles matters for all countries while also retaining veto power regarding ISA decisions.

Looking Toward the Future

If the U.S. does not become a party to the LOSC, it will be disadvantaged in the international arena. It will not have legal recourse to the LOSC dispute resolution mechanisms regarding international disagreements concerning maritime boundary delimitation, management of its own sovereign maritime resources, or infringement of its rights of navigation if it does not ratify the LOSC. Customary international law is an inadequate substitute for the LOSC framework, especially if the vast majority of the world's nations operate within that framework.

As the U.S. has already been compelled to undertake freedom of navigation operations in the South China Sea, it is unlikely that this will be the last time the U.S. faces the possibility of other States attempting to restrict its freedom of navigation, a legal right defined in the LOSC. Area denial is one of the primary ambitions of China's increasingly powerful navy and island building campaign. Without recourse to the dispute resolution mechanisms of the LOSC, the rights of the U.S. may not be adequately protected through means short of the use of force. The LOSC framework protects rights that are critical for the achievement of the U.S. vision for cooperative 21st century seapower.

-
- 1 "Montevideo Declaration on the Law of the Sea." *The American Journal of International Law*, vol. 64, no. 5, 1970, pp. 1021–1023, (available at www.jstor.org/stable/2198967).
 - 2 United Nations Convention on the Law of the Sea, Part XI, Section 5, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOSC]. (available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/part2.htm).
 - 3 LOSC, Part XI, Section 4.
 - 4 *Maritime Space: Maritime Zones and Maritime Delineation*, United Nations, January 8, 2010 (available at <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/status.htm>) (stating that "no State or entity can establish its consent to be bound by the Agreement unless it has previously established its consent to be bound by the Convention or unless it establishes such consent to be bound by the Agreement and the Convention at the same time.").
 - 5 Gordon England, "Written Testimony of Deputy Secretary of Defense Gordon England, Senate Foreign Relations Committee", September 27, 2007, (available at <http://www.virginia.edu/colp/pdf/EnglandTestimony070927.pdf>).
 - 6 LOSC, Article 298.
 - 7 Senate Executive Report 110-9, December 19, 2007 (to accompany Treaty Doc. 103-39), Part VIII, at 19. (available at Note 37 on page 275 at: <http://www.webpages.uidaho.edu/fish510/PDF/Wilson%20and%20Kraska%202009%20Law%20of%20Sea.pdf>).
 - 8 "A Cooperative Strategy for 21st Century Seapower", March 2015, (available at https://www.uscg.mil/seniorleadership/DOCS/CS21R_Final.pdf).
 - 9 LOSC, Part V.
 - 10 LOSC, Annex II.

