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### **PARTING THE WAVES: CLAIMS TO MARITIME JURISDICTION AND THE DIVISION OF OCEAN SPACE**

*Dr. Clive Schofield\**

*This article casts aside traditional obsessions and examines the development and present state of coastal State claims to maritime jurisdiction, the overlapping claims to maritime space that have inevitably resulted from the significant extension of maritime claims in recent decades, and thus the delimitation of maritime boundaries.*

#### INTRODUCTION

Open the pages of an atlas and one is faced with the familiar network of lines, often depicted with bold, red symbols, indicating the network of international boundaries that serve to define the territorial limits of States. This is far from the case offshore, however. Indeed, cartographic illustrations of the political map of the world rarely show boundary lines at sea. This is something of an oddity as not only do the oceans comprise the majority (around 72%) of the surface of the planet, but coastal State rights over maritime space have evolved and extended over time such that they now encompass an area comparable to the world's land territory.

This article examines the development and present state of coastal State claims to maritime jurisdiction, the overlapping claims to maritime space that have inevitably resulted from the significant extension of maritime claims in recent decades, and thus the delimitation of maritime boundaries. It is suggested that while considerable progress has been made in relation to the definition of maritime

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boundaries and a clearer approach to maritime delimitation has emerged from recent cases considered by international courts and tribunals, significant sources of uncertainty remain. Consequentially, it will be some considerable time before the kind of comprehensive network of international boundary lines that we are used to on land, will be evident offshore.

## I. EXPANDING MARITIME JURISDICTIONAL CLAIMS

An enduring theme in the development of the international regime relating to the oceans has been the tension between the pressure from coastal States towards advancing national claims over the maritime spaces off their coasts and the concept of the freedom of the seas, and in particular freedom of navigation, for all States. These competing views are often associated with the classic works of Hugo Grotius who published *Mare Liberum* (Freedom of the Seas)<sup>1</sup> in 1609,<sup>2</sup> and John Selden's opposing view, *Mare Clausum* (Closed Seas), published in 1635.<sup>3</sup> On the one hand Grotius argued that "no ocean can be the property of a nation because it is impossible for any nation to take it into possession by occupation" and that for a State to attempt to do so would be contrary to the laws of nature. Selden, in contrast, provided an early articulation of the concept of State sovereignty over the oceans.<sup>4</sup>

For a long period, the demand for freedom of the seas in the interests of ensuring global trade prevailed, with the broad consensus being that coastal State rights should be restricted to a narrow coastal belt of territorial waters whose maximum breadth was not specifically defined through international agreement but was generally thought not to extend more than three nautical miles (nm)<sup>5</sup> offshore in

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<sup>1</sup> HUGO GROTIUS, THE FREEDOM OF THE SEAS OR THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE (The Lawbook Exchange 2001) (translated with a revision of the Latin text of 1633 by R. Van Deman Magoffin, Division of International Law, Carnegie Endowment for International Peace). First published as Chapter 12 of *De Indis* [The Indies], available at [http://oll.libertyfund.org/index.php?option=com\\_staticxt&staticfile=show.php%3Fperson=3775&Itemid=28](http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Fperson=3775&Itemid=28).

<sup>2</sup> "Hugo Grotius" is the commonly used anglicised version of the Dutch "Huig de Groot." With apologies to de Groot, the anglicised version is used here.

<sup>3</sup> First published in Latin as JOHN SELDEN, "MARE CLAUSUM SEU DE DOMINO MARIS," republished as "OF THE DOMINION, OR, OWNERSHIP OF THE SEA," translated into English and set forth with some [sic] additional evidences and discourses by Marchmont Nedham (London: William Du-Gard, by appointment of the Council of State, 1652) (reprinted Lawbook Exchange 2004).

<sup>4</sup> It is notable that both authors' views reflected national interests – Grotius in support of the position of his client, the Dutch East India Company, while Selden had been charged with defending the interests of the British Crown over the seas surrounding the British Isles. See ROBIN CHURCHILL AND VAUGHAN LOWE, THE LAW OF THE SEA 4 (Manchester University Press, 3<sup>rd</sup> ed. 1999).

<sup>5</sup> It is acknowledged that technically "nm" denotes nanometres rather than nautical miles, for which the correct abbreviation is "M." However, "M" is often taken to mean metres and "nm" is widely used as an abbreviation for nautical miles in this article. It is also worth pointing out that "nm" is used for nautical miles by authorities such as the United Nations Office of Ocean Affairs and the Law of the Sea.

accordance with the so-called “cannon shot rule.”<sup>6</sup> While efforts were made towards the codification of the international law of the sea, for example the Hague Conference on the Codification of International Law of 1930, little progress had been achieved by the mid-Twentieth Century. Substantial changes, however, were afoot with more and more States advancing expansive maritime jurisdictional claims – a phenomenon generally termed “creeping coastal State jurisdiction.”

#### A. *Creeping Coastal State Jurisdiction*

A 1945 United States Presidential Proclamation, *Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf*, often termed the *Truman Proclamation*,<sup>7</sup> is generally regarded as a key catalyst for the expansion of coastal State claims to maritime jurisdiction further offshore. The *Truman Proclamation* was not, however, the first move to advance claims to maritime areas beyond the territorial sea. Notable developments in this regard include the division and subsequent annexation of the seabed of the Gulf of Paria between the United Kingdom (on behalf of Trinidad and Tobago) and Venezuela in 1942,<sup>8</sup> and Argentina’s continental shelf Decree of 1944.<sup>9</sup> Nonetheless, the *Truman Proclamation* was especially influential given that it was the United States taking this bold step. In September 1945, U.S. President Truman issued a pair of Presidential Proclamations relating to maritime areas seaward of the United States’ territorial sea limits (at that time set at three nautical miles). The Proclamation relating to the continental shelf, stated that “the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.”<sup>10</sup>

The *Truman Proclamation* was explicitly resource-oriented, highlighting the “long range world-wide need for new sources of petroleum and other minerals” and their probable presence beneath “many parts” of the continental shelf off the coasts of the United States, together with the technological developments to make their recovery practicable, either at the time or in the near future.<sup>11</sup> Jurisdiction over the continental shelf was claimed in order to ensure the “conservation and prudent

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<sup>6</sup> The cannon shot rule purportedly equated to the distance a cannon could throw a ball, as proposed by the Dutch in negotiations with the English as early as 1610. See CLYDE SANGER, ORDERING THE OCEANS: THE MAKING OF THE LAW OF THE SEA 12 (1986).

<sup>7</sup> See Proclamation No. 2667, 3 C.F.R. 1943-1948 Comp., p. 67 (Sept. 28, 1945), 3 EDWARD DUNCAN BROWN, THE INTERNATIONAL LAW OF THE SEA 113 (1994).

<sup>8</sup> See 1 INTERNATIONAL MARITIME BOUNDARIES, 639-654 (Jonathan Charney & Lewis Alexander eds., 1993). It is, however, worth noting in the present context that Article 5 of the treaty provides that the agreement refers “solely to the submarine areas of the Gulf of Paria, and nothing herein shall be held to affect in any way the status of the islands, islets or rocks above the surface of the sea together with the territorial waters thereof.” *Id.* at 653.

<sup>9</sup> The first explicit claim to coastal State jurisdiction over the continental shelf, termed the “epicontinental sea” of Argentina. See Decree No.1, 385 Concerning Mineral Reserves, Jan. 24, 1944, Boletín Oficial de la República Argentina, Vol.52, no.14, 853 in *Laws and Regulations on the Regime of the High Seas*, U.N.Doc ST/LEG/SER.B/1, (Mar. 17 1944).

<sup>10</sup> Proclamation 2667, Sep. 28, 1945, 3 C.F.R. 67 (1943-1948).

<sup>11</sup> *Id.*

utilization” of such resources, as development took place, and on security grounds, with “self-preservation” compelling the coastal nation to “keep close watch over activities off its shores.”<sup>12</sup> The exercise of jurisdiction over continental shelf resources by the “contiguous nation” was presented as “reasonable and just” on the basis that efforts to utilise or conserve such resources would rely upon “cooperation and protection from shore” and because “the continental shelf may be regarded as the extension of the land mass of the coastal nation and thus naturally appurtenant to it,” which seems to represent an alternative way of saying ‘natural prolongation,’ with the resources in question frequently forming “a seaward extension of a pool or deposit lying within its territory.”<sup>13</sup> The *Truman Proclamation* did, however, include a clear statement that “[t]he character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.”<sup>14</sup> The United States similarly claimed the right to designate fishery conservation zones in the high seas beyond American-claimed territorial sea.<sup>15</sup>

Once sown, the seeds of extended maritime jurisdiction, covering the living and non-living resources of both the seabed and water column swiftly came to germination. These developments led an increasing number of States to advance claims to maritime jurisdiction over areas significantly further offshore than had previously been the case. Of particular note, a number of Latin American countries proceeded to claim sovereignty over both seabed and water column up to 200nm offshore – prompting diplomatic protests from the United States, United Kingdom, and others.<sup>16</sup> The profusion of extended claims to maritime jurisdiction, largely sparked by the *Truman Proclamation*, led to a clear need to clarify and codify the international law of the sea respecting maritime jurisdictional rights and obligations.

### B. Order for the Oceans?

As noted above, early efforts to codify the international law of the sea proved unsuccessful. Therefore, a renewed effort was mounted in the post-World War II period. In particular, the First United Nations Conference on the Law of the Sea (UNCLOS I), which took place in Geneva in 1958, yielded four Conventions<sup>17</sup> – the Convention on the Territorial Sea and Contiguous Zone,<sup>18</sup> the Convention on the

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> It is notable, however, that the fisheries proclamation refers to the regulation and control of fishing and offers to enter into agreements with other States as opposed to the continental shelf proclamation, which claims “jurisdiction and control.” Reproduced in (1946) 40 *American Journal of International Law Supplement* 45.

<sup>16</sup> For example, in a joint declaration dating from 1952, Chile, Ecuador, and Peru asserted their “sole sovereignty and jurisdiction over the area of sea adjacent to the coast . . . and extending not less than 200 nautical miles from the said coast.” Peru and Chile, *Maritime Boundary: Chile-Peru*, OFFICE OF THE GEOGRAPHER, US DEP’T OF STATE, LIMITS IN THE SEA (July 2, 1979).

<sup>17</sup> Collectively these Conventions are often termed the “Geneva Conventions” or the “1958 Conventions” [hereinafter the *1958 Conventions*].

<sup>18</sup> Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205 [hereinafter CTSCZ].

Continental Shelf,<sup>19</sup> the Convention on the High Seas,<sup>20</sup> and the Convention on Fishing and Conservation of the Living Resources of the High Sea.<sup>21</sup>

Despite the significant progress that the 1958 Conventions represented, uncertainty still prevailed concerning the limits of maritime claims. For example, consensus on the breadth of the territorial sea was lacking at UNCLOS I. Agreement on the contentious issue of territorial sea limits proved to be just out of reach at the conclusion of the Second United Nations Conference on the Law of the Sea (UNCLOS II) of 1960 with agreement on a formula of a 6nm territorial sea with a 6nm fishing zone seaward failing to secure the necessary two-thirds majority for adoption by a single vote. Moreover, the breadth of the continental shelf under the 1958 Convention on the Continental Shelf was less than specific. Article 1 of the Convention provides for continental shelf limits coinciding with either a depth of 200m or, beyond that limit, to a depth where exploitation of resources was possible.<sup>22</sup> This suggested, rather unsatisfactorily, that the outer limits of the continental shelf were potentially subject to change over time as improvements in offshore resource exploitation technology allowed for the extraction of seabed resources in deeper waters, further offshore.

These shortcomings led to the convening of the Third United Nations Conference on the Law of the Sea (UNCLOS III) commencing in 1973, which resulted in the drafting of the United Nations Convention on the Law of the Sea (LOSC) in 1982. A key achievement of LOSC was the definition of clear spatial limits for national claims to maritime jurisdiction, something that had, as noted above, eluded earlier codification efforts.

Under LOSC an agreement was reached on 12nm as the maximum breadth of the territorial sea.<sup>23</sup> LOSC also provides for a contiguous zone out to 24nm from relevant baselines.<sup>24</sup> Additionally, and significantly, the concept of the exclusive economic zone (EEZ) gained general international acceptance at the Third United Nations Conference on the Law of the Sea (UNCLOS III) and an agreement was reached on the breadth of the EEZ at 200nm. Concerning the continental shelf, complex criteria were laid down in Article 76 of LOSC whereby the outer limits of the continental shelf may be determined in partnership with a scientific and technical

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<sup>19</sup> Convention on the Continental Shelf, Apr. 29, 1958, 499 U.N.T.S. 311.

<sup>20</sup> Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 11.

<sup>21</sup> Convention on Fishing and Conservation of the Living Resources of the High Sea, Apr. 29, 1958, 559 U.N.T.S. 285.

<sup>22</sup> Convention on the Continental Shelf, Apr. 29, 1958, 499 U.N.T.S. 311, at art. 1.

<sup>23</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOSC]. Article 3 provides that every State has the right to establish the breadth of the territorial sea “up to a limit not exceeding 12 nautical miles,” measured from baselines determined in accordance with the Convention. *See id.* at art. 3. Article 4 further states that the outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.” *See id.* at art. 4.

<sup>24</sup> *Id.* at art. 33.

body established through the Convention – the United Nations Commission on the Limits of the Continental Shelf (CLCS).<sup>25</sup>

LOSC has gained widespread international recognition and at the time of writing there were 162 parties to it.<sup>26</sup> A notable absentee from the list of States parties to LOSC is the United States. Nonetheless, the United States accepts that much of LOSC, including the maritime jurisdictional and boundary delimitation provisions, is declaratory of customary international law and conducts its policy accordingly.<sup>27</sup> For parties to the Convention, it provides the binding legal framework governing maritime jurisdictional claims and the delimitation of maritime boundaries between national maritime zones. Indeed, those parts of the Convention dealing with maritime claims and maritime boundary delimitation can be considered declaratory of customary international law.

In this context it can be observed that States codified the international law of the sea and, therefore unsurprisingly, the law accords States the primary role. Thus, only States can advance maritime claims<sup>28</sup> and such a State requires land territory and a coastline in order to make such claims.<sup>29</sup>

### C. *The Increasing Scope of Maritime Claims*

The vast majority of coastal States have proved to be enthusiastic claimants in terms of maritime jurisdictional zones.<sup>30</sup> These claims have largely proven to be in conformity with international norms with most coastal States claiming 12nm breadth territorial seas and 200nm EEZs. Therefore, the maritime political map of the world is relatively stable, at least in terms of the geographic scope of maritime claims, with

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<sup>25</sup> See U.N. Comm'n on the Limits of the Continental Shelf website, *available at* [http://www.un.org/Depts/los/clcs\\_new/clcs\\_home.htm](http://www.un.org/Depts/los/clcs_new/clcs_home.htm) [hereinafter CLCS].

<sup>26</sup> Comprising 161 states plus the European Community.

<sup>27</sup> J. ASHLEY ROACH & ROBERT SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS 4-6 (1996).

<sup>28</sup> This is implicit from the terms and language of the Convention. For example, among the few definitions of terms provided in Article 1 of LOSC, “States Parties” is defined as “States which have consented to be bound by this Convention and for which this Convention is in force.” LOSC, *supra* note 23, at art. 1. Moreover, regarding claims to maritime zones of jurisdiction, States are given an exclusive role with Article 2 of LOSC dealing with the territorial sea providing that “[t]he sovereignty of a coastal State extends ....” Similar language prevails in respect of the other types of maritime zones covered by LOSC. LOSC, *supra* note 23, at art. 2.

<sup>29</sup> Possession of land territory and a coastline are prerequisites for claims to maritime jurisdiction. As Prosper Weil has observed: “. . . the land dominates the sea and it dominates it by the intermediary of the coastal front.” See PROSPER WEIL, THE LAW OF MARITIME DELIMITATION - REFLECTIONS 50 (1989).

<sup>30</sup> See U.N. DIV. FOR OCEAN AFFAIRS & THE LAW OF THE SEA OFFICE OF LEGAL AFFAIRS, *Table of Claims to Maritime Jurisdiction* (2008) *available at* [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table\\_summary\\_of\\_claims.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf).

few “excessive” claims in terms of their breadth remaining because many past claims that were not in accordance with the terms of LOSC have been “rolled back.”<sup>31</sup>

The introduction of 200nm breadth EEZs, in particular, has had a dramatic impact on the scope of ocean spaces becoming subject to the maritime claims of coastal States. It has been estimated that, should every coastal State make national maritime jurisdictional claims out to 200nm (as is predominantly the case), these claims would encompass 43 million square nautical miles (147 million square kilometres) of maritime space. This amounts to approximately 41% of the area of the oceans or 29% of the Earth’s surface. The extent of the area subject to jurisdictional claims out to 200nm is thus approximately equivalent to the area of land territory on the surface of the Earth.<sup>32</sup> This vast extension of maritime areas subject to coastal State sovereign rights inevitably offers both great opportunities, especially in terms of access to marine resources, but also significant management and oceans governance challenges. For example, in 1984 the United Nations (UN) Food and Agriculture Organisation (FAO) estimated that 90% of marine fish and shellfish were caught within 200nm of the coast.<sup>33</sup> Similarly, it was estimated that 87% of the world’s known submarine oil deposits would fall within the 200nm breadth zones of jurisdiction.<sup>34</sup> Consequently, the drafting of LOSC and widespread claiming of 200nm EEZs represents a profound reallocation of resource rights from international to national jurisdiction. Realising the opportunities raised by these extended maritime jurisdictional claims, notably protecting and managing marine resources and activities, is, however, undoubtedly a challenging task. This task is made all the harder given the jurisdictional uncertainty caused by undefined maritime boundaries and competing claims to maritime jurisdiction.

#### D. *The Last Great Scramble?*

The enormous extension of coastal State rights offshore is not yet complete. In particular, the outer limits of continental shelf areas extending seawards of the 200nm limit of the EEZ have yet to be finalised. In contrast to the open-ended situation under the 1958 Convention on the Continental Shelf, Article 76(1) of LOSC establishes that a coastal state’s continental shelf right can extend to 200nm from baselines or “throughout the natural prolongation of its land territory to the outer edge of the continental margin.” Thus, where continental margins are broader than 200nm, coastal States may assert their sovereign rights over those parts of the continental shelf forming part of their natural prolongation but are located beyond their 200nm EEZ limit. Article 76 goes on to provide a complex series of formulae through which the coastal State can establish the outer limit of its continental shelf,

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<sup>31</sup> See ROACH & SMITH, *supra* note 27. Whilst most “excessive” territorial sea claims have been “rolled back” to the international norm of 12nm, a number of coastal States retain claims to 200nm territorial seas (Benin, Congo (Brazzaville), Ecuador, Peru, and Somalia). See *id.*

<sup>32</sup> Personal Communication with Philip A. Symonds, Senior Adviser – Law of the Sea at Geoscience Australia (July 2011); J.R.VICTOR PRESCOTT & CLIVE SCHOFIELD, *THE MARITIME POLITICAL BOUNDARIES OF THE WORLD* 9 (2005).

<sup>33</sup> R. Schurman, *Tuna Dreams: Resource Nationalism and the Pacific Island’s Tuna Industry*, 29 *DEVELOPMENT AND CHANGE*, 107 (1998).

<sup>34</sup> CHURCHILL & LOWE, *supra* note 4, at 162.



seaward of the 200nm limit. Essentially, Article 76 provides two formulae according to which coastal States can establish the existence of a continental margin beyond the 200nm limit which forms part of the State's natural prolongation<sup>35</sup> and two maximum constraints, or 'cut-off' lines.<sup>36</sup>

While it is recognised that coastal State rights to the continental shelf are inherent,<sup>37</sup> the outer limits of such areas, which are generally termed the 'outer' or 'extended' continental shelf, can only be determined following a submission of information to the relevant United Nations technical and scientific body, the United Nations Commission on the Limits of the Continental Shelf (CLCS).<sup>38</sup> It is abundantly clear that the CLCS has an enormous task facing it to assist States in finalising their outer continental shelf limits. A surge in submissions occurred because of a deadline applicable to many coastal States in May 2009.<sup>39</sup> As a result the number of submissions lodged with the Commission rapidly increased from 11 a year prior to the deadline to over 50 immediately after it (59 at the time of writing), together with over 40 (currently 45) submissions of preliminary information on outer continental shelf limits.<sup>40</sup> Given the Commission's present consideration rate of around two years per submission it is clear that, even allowing for up to three sub-commissions operating in parallel, finalisation of the outer limits of the continental shelf and thus definition of the exact extent of extended continental shelf areas is a process that will be measured in decades. Although the assertions being made by coastal States located on broad continental margins to outer continental shelf rights beyond 200nm from their coasts appear to represent further 'creeping coastal State jurisdiction,' it can be argued that in reality this is not the case as coastal States are working within and abiding by the mechanism established under LOSC, as evidenced by the submissions made to the CLCS. These submissions collectively encompass an

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<sup>35</sup> These are either the "Gardiner Line", based on reference to depth or thickness of sedimentary rocks overlying the continental crust, or the "Hedberg Line" which uses a distance formula of 60nm. Both entitlement formulae are measured from the foot of the continental slope, which is defined as the point of maximum change in gradient at the base of the continental slope (unless there is "evidence to the contrary"). See LOSC *supra* note 23, at art. 76(4)(b) Whichever of the formulae is most advantageous to the coastal State may be used.

<sup>36</sup> Either a distance of 350nm from relevant baselines or 100 nautical miles from the 2,500 metre isobaths (depth contour). Again, whichever of the formulae is most advantageous to the coastal State may be used. See LOSC *supra* note 23, at art. 76(5).

<sup>37</sup> Continental shelf rights "do not depend on occupation, effective or notional, or on any express proclamation." LOSC *supra* note 23, at art. 77(3).

<sup>38</sup> See CLCS, *supra* note 25.

<sup>39</sup> The original deadline for submissions to the CLCS was set at "10 years of the entry into force of this Convention for that State." LOSC *supra* note 23, at art. 4 annex II, (LOSC, Annex II, Article 4). However it became clear that many interested States would be unable to fulfill this deadline so it was pushed back to 13 May 2009 – ten years after the Commission adopted its scientific and technical guidelines.

<sup>40</sup> In a further move to address the concerns of those States struggling to meet the (revised) deadline for submissions, in June 2008 a meeting of the states' parties to the Law of the Sea agreed to allow submissions of preliminary information to be made in order to stop the 10 year clock for submissions. See *Decision of the Eighteenth Meeting of State Parties*, SPLOS/183, available at [http://www.un.org/Depts/los/meeting\\_states\\_parties/SPLOS\\_documents.htm](http://www.un.org/Depts/los/meeting_states_parties/SPLOS_documents.htm).

enormous area, in excess of 30 million square kilometres, of continental shelf located seawards of the 200 nautical mile limit from coastal baselines.<sup>41</sup>

## II. DIVIDING THE WORLD'S OCEANS

The inevitable consequence of the enormous expansion in national claims to maritime space seawards has been a major proliferation in overlapping claims to maritime jurisdiction and thus potential international maritime boundaries. Whereas the limited scope of the maritime claims of coastal States in the past meant that the need for maritime boundaries was similarly restricted, this is clearly no longer the case. Instead, the expanded spatial scope of maritime claims means that States far separated from one another now potentially may have overlapping maritime claims and therefore the need to delimit a maritime boundary between them.

As EEZ claims are now commonplace, States with coasts up to 400nm distant from one another may share a potential maritime boundary. Moreover, as continental shelf rights may extend beyond 200nm from baselines, States even further removed from one another may require a seabed boundary to be delimited. Indeed, of the estimated 30 million square kilometres of potential extended continental shelf areas subject to submissions to the CLCS mentioned above, over 2.7 million square kilometres of continental shelf areas beyond 200nm from the coast are subject to overlapping submissions.<sup>42</sup> Just as overlapping maritime claims, and thus potential maritime boundaries, have multiplied, so too have maritime jurisdictional and boundary disputes. Again, this is perhaps inevitable given the tendency for States to try to maximise their own maritime entitlements. Although significant progress has been made in terms of the delimitation of maritime boundaries worldwide,<sup>43</sup> there remains a long way to go before a comprehensive network of agreed maritime boundaries and limits is achieved. Indeed, less than half of the potential maritime boundaries around the world have been delimited.<sup>44</sup> Moreover, many of the maritime boundary agreements that have been concluded are partial or incomplete in character – for instance, only covering part of the length of the potential maritime boundary or dealing with only continental shelf rights rather than the EEZ.

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<sup>41</sup> Robert Van de Poll & Clive Schofield, “A Seabed Scramble: A Global Overview of Extended Continental Shelf Submissions”, paper presented at the Advisory Board on the Law of the Sea (ABLOS) conference on *Contentious Issues in UNCLOS – Surely Not?*, International Hydrographic Bureau Monaco, 25-27 October 2010.

<sup>42</sup> *Id.*

<sup>43</sup> See 1-2 INTERNATIONAL MARITIME BOUNDARIES (Jonathan Charney & Lewis Alexander eds., 1993); 3 INTERNATIONAL MARITIME BOUNDARIES (Jonathan Charney & Lewis Alexander, eds., 1998); 4 INTERNATIONAL MARITIME BOUNDARIES (Jonathan Charney, & Robert Smith eds., 2002); 5 INTERNATIONAL MARITIME BOUNDARIES (Robert Smith and David Colson eds., 2005); 6 INTERNATIONAL MARITIME BOUNDARIES (Robert Smith and David Colson eds., 2011).

<sup>44</sup> Clive Schofield, *The Delimitation of Maritime Boundaries: An Incomplete Mosaic*, in THE ASHGATE RESEARCH COMPANION TO BORDER STUDIES 665-681 (Doris Wastl-Walter ed., 2011).

### A. *The Delimitation of Maritime Boundaries*

In accordance with LOSC, where overlapping claims to territorial seas out to 12nm exist, Article 15 applies.<sup>45</sup> This article provides that, failing agreement between the States, delimitation should be the equidistance or median line,<sup>46</sup> defined as a line “every point of which is equidistant from the nearest points on the [territorial sea] baselines.”<sup>47</sup> A median or equidistance line is, therefore, a geometrically exact expression of the mid-line concept.<sup>48</sup> Article 15 of LOSC offers a clear preference for the use of equidistance as a method of delimitation for the territorial sea. Departure from the median line may, however, be justified on the basis of the existence of an “historic title or other special circumstances” in the area to be delimited.<sup>49</sup> This approach has been termed the “equidistance/special circumstances” method of delimitation by international courts and tribunals.<sup>50</sup> The International Court of Justice (ICJ) has also stated that Article 15 “is part of customary [international] law.”<sup>51</sup>

Under the 1958 Convention on the Continental Shelf, delimitation of the continental shelf was also to be effected by the use of median lines, unless agreement to the contrary or “special circumstances” existed that justified an alternative approach.<sup>52</sup> UNCLOS III witnessed a lack of consensus on the inclusion of equidistance as a preferred method of delimitation for the continental shelf and EEZ. This lack of consensus translated into the ambiguous wording contained in LOSC. Articles 74 and 83 of the LOSC deal, respectively, with delimitation of the continental shelf and EEZ. Both articles call for agreement to be reached on the basis of international law in order to achieve “an equitable solution.”<sup>53</sup> No preferred method of delimitation is indicated. Instead, all potentially relevant circumstances are to be weighed within the delimitation equation with the objective of achieving an equitable result.

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<sup>45</sup> LOSC, *supra* note 23, at art. 3 (provides that states have the right to establish a territorial sea “not exceeding 12 nautical miles” measured from its baselines. Article 15 of LOSC represents a near verbatim repetition of Article 12 of the 1958 Convention on the Territorial Sea and Contiguous Zone). *See id.* at art. 12, 15.

<sup>46</sup> The terms “equidistance line” and “median line” are used interchangeably in the present context although it is recognised that the latter terms is more commonly applied to equidistance lines between opposite coastlines.

<sup>47</sup> LOSC, *supra* note 23, at art. 15.

<sup>48</sup> Chris Carleton and Clive Schofield, *Developments in the Technical Determination of Maritime Space: Delimitation, Dispute Resolution, Geographical Information Systems and the Role of the Technical Expert*, in MARITIME BRIEFING, 3, 4 and 7 (2002). *See also* S.W. Boggs, *Problems of Water-Boundary Definition: Median Lines and International Boundaries through Territorial Waters*, 17 THE GEOGRAPHICAL REVIEW 3, 445-456 (July 1937); R.D. Hodgson and E.J. Cooper, *The Technical Delimitation of a Modern Equidistant Boundary*, 3 OCEAN DEV. AND INT’L L. 361-388 (1976).

<sup>49</sup> LOSC, *supra* note 23, at art. 15.

<sup>50</sup> *See also* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening), 2002 I.C.J. 303, para. 288 [hereinafter *Cameroon/Nigeria Case*].

<sup>51</sup> Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr (Merits) 2001 I.C.J. 40, para. 175, *available at* <http://www.icj-cij.org/docket/files/87/7027.pdf>.

<sup>52</sup> *See* CTSCZ, *supra* note 18, at art. 6.

<sup>53</sup> LOSC, *supra* note 23, at arts. 74, 83.

The marked shift away from equidistance as a preferred method of delimitation, at least in the first instance, can be largely attributable to the ICJ's ruling in the North Sea Continental Shelf Cases of 1969.<sup>54</sup> In this instance, although the ICJ noted that a median line between opposite States usually resulted in an equal division of the maritime space involved,<sup>55</sup> and that the majority of maritime boundary agreements at the time were based on the equidistance principle,<sup>56</sup> the Court concluded that the provisions relating to equidistance in the 1958 Conventions had not become part of customary international law and therefore were not obligatory.<sup>57</sup>

International courts and tribunals have termed the method of delimitation applicable to EEZ and continental shelf delimitation, as contained in Articles 74 and 83 (and in customary international law), as the equitable principles/relevant circumstances method. For example, in the *Cameroon/Nigeria Case* the ICJ stated explicitly that, “[t]he Court has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdictions is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method.”<sup>58</sup>

The vague nature of these articles, which were among the last to be agreed upon at UNCLOS III, resulted from disagreement between the negotiating States. The difference of view was essentially between two camps – whilst some States preferred an “equidistance/special circumstances” rule, others favoured delimitation on the basis of “principles of equity.” The end result was compromise text that places particular emphasis on the objective of the delimitation, utilising an alternative form of words not reflective of either side's view and thus acceptable to both.<sup>59</sup> As the Arbitral Tribunal in the Eritrea-Yemen Arbitration observed in reference to Article 83, this was “a last minute endeavour...to get agreement on a very controversial matter,” and therefore, “consciously designed to decide as little as possible.”<sup>60</sup>

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<sup>54</sup> North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), 1969, I.C.J. 3, para. 101, [hereinafter *North Sea Continental Shelf Cases*].

<sup>55</sup> *Id.* at para. 57.

<sup>56</sup> *Id.* at para. 75. In particular, the examples drawn from State practice cited by the parties to the dispute and concluded following the signature of the 1958 Convention on the Continental Shelf.

<sup>57</sup> *Id.* at paras. 70-82 and 101(a). Indeed, the Court asserted that there was “not a shred of evidence” that the States that had agreed to equidistance-based maritime boundary agreements had done so because they “believed themselves to be applying a mandatory rule of customary international law.” *Id.* at para. 76.

<sup>58</sup> *Cameroon/Nigeria Case*, *supra* note 50, at para. 288.

<sup>59</sup> Robert Beckman & Clive Schofield, *Moving Beyond Disputes over Island Sovereignty: ICJ Decision Sets Stage for Maritime Boundary Delimitation in the Singapore Strait*, 40 OCEAN DEV. & INT'L L. 11-12 (2009).

<sup>60</sup> *Arbitration between Eritrea and Yemen, Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation)*, Award of 17 December 1999, para. 116, available at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1160](http://www.pca-cpa.org/showpage.asp?pag_id=1160).

### B. Increasing Clarity?

Although the provisions of Articles 74 and 83 of LOSC are less than specific, some guidance on maritime boundary delimitation can be gleaned from an examination of how, over time, international courts and tribunals have approached this challenge. Increasingly, international jurisprudence has tended to favour the construction of an equidistance line as a preliminary stage and then consider ways in which this line should be amended or shifted in order to achieve an equitable result.

From a relatively early date the Court has not been averse to using the equidistance method as a basis or starting point for maritime delimitation. For example, in the case between Malta and Libya in 1985, the ICJ referred back to its 1969 North Sea decision elaborating that as the Court was faced with a delimitation exclusively between opposite States:

It is clear that, in these circumstances, the tracing of a median line between those coasts, by way of a provisional step in a process to be continued by other operations, is the most judicious manner of proceeding with a view to the eventual achievement of an equitable result. But that this...should not be understood as implying that an equidistance line will be an appropriate beginning in all cases, or even in all cases of delimitation between opposite States.<sup>61</sup>

Similarly, in the *Gulf of Maine Case*, a median line was selected as a starting point for delimitation in the central portion of the Gulf between opposite coasts and later altered in light of other factors.

The two-stage approach to maritime boundary delimitation, that is, drawing a provisional line based on equidistance and then considering factors that might lead to an adjustment of that line, was applied in the *Jan Mayen Case* (concerning maritime delimitation between Greenland and Jan Mayen Island),<sup>62</sup> in the *Qatar/Bahrain Case*,<sup>63</sup> in the *Cameroon/Nigeria Case*,<sup>64</sup> and in the *Guyana/Suriname Arbitration*.<sup>65</sup> For example,

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<sup>61</sup> Case Concerning the Continental Shelf (Libya Arab Jamahiriya/Malta), Judgment of 3 June 1985, [1985] ICJ Reports, 13, [hereinafter *Libya/Malta Case*], para. 107, available at [www.icj-cij.org](http://www.icj-cij.org), para. 62.

<sup>62</sup> Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), [1993] ICJ Reports, 38 [hereinafter *Jan Mayen Case*]. See also <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=e0&case=78&code=gjm&p3=4> at para. 51.

<sup>63</sup> See Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain, (Bahrain Case) at para. 230, available at <http://www.icj-cij.org/docket/files/87/11055.pdf>.

<sup>64</sup> *Cameroon/Nigeria Case*, *supra* note 50, at para. 288. See also *In the Matter of the Arbitration between Barbados and Trinidad and Tobago* (Apr. 11, 2006), in 45 INTERNATIONAL LEGAL MATERIALS 800 at para. 242. [hereinafter, *Barbados/Trinidad and Tobago Arbitration*]; MARITIME POLITICAL BOUNDARIES, *supra* note 32, at 240-41.

<sup>65</sup> Arbitral Tribunal Constituted Pursuant to Article 287, and in accordance with Annex VII, of the United Nations Convention on the Law of the Sea in the Matter of an Arbitration between

in the *Cameroon/Nigeria Case* the Court found that the equitable principles/relevant circumstances method was applicable to the delimitation of “coincident jurisdictions” of EEZ and continental shelf between the parties. The Court noted that this approach was “very similar” to the equidistance/special circumstances method for the delimitation of the territorial sea and consisted of<sup>66</sup> “first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an “equitable result.”<sup>67</sup>

This approach was developed further in the ICJ’s ruling in the *Black Sea Case* of February 2009.<sup>68</sup> In the *Black Sea Case* the Court articulated a three-stage approach to the delimitation of a maritime boundary. First, and “[i]n keeping with its settled jurisprudence on maritime delimitation,”<sup>69</sup> a provisional delimitation line should be established using geometrically objective methods.<sup>70</sup> In this context, it was stated that “an equidistance line will be drawn *unless there are compelling reasons that make this unfeasible* in the particular case.”<sup>71</sup> This explicit preference for an equidistance line as the starting point for maritime delimitation marks a significant development as it contrasts with previous, rather more circumspect, statements on the part of the Court on this issue. For example, in the Court’s judgment in the *Nicaragua/Honduras Case* of 2007, the Court referred to the wide use of equidistance lines in the delimitation of maritime boundaries and the merits, or “certain intrinsic value,” of this method of delimitation on account of its “scientific character and the relative ease with which it can be applied.”<sup>72</sup> However, the Court reached the conclusion that “the equidistance method does *not* automatically have priority over other methods of delimitation” as “there may be factors which make the application of the equidistance method inappropriate.”<sup>73</sup>

Once a provisional, equidistance-based, delimitation line has been established, at the second stage the Court is to assess “whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result.”<sup>74</sup> The third stage outlined by the Court in the *Black Sea*

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Guyana and Suriname, Award of the Tribunal of the Permanent Court of Arbitration (Sept. 17, 2007), available at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1147](http://www.pca-cpa.org/showpage.asp?pag_id=1147).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Case Concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine) (Feb. 3, 2009), available at <http://www.icj-cij.org/docket/files/132/14987.pdf> [hereinafter *Black Sea Case*].

<sup>69</sup> *Id.* at para. 118.

<sup>70</sup> *Id.* at para. 116.

<sup>71</sup> *Black Sea Case*, *supra* note 68 at para. 116 (emphasis added). It can, however, be observed that the provisional equidistance line drawn by the Court in the *Black Sea Case* is not, in fact, a strict equidistance line as Serpents’ Island was discounted as a basepoint on the basis that to count Serpents’ Island as a relevant part of the coast would be judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes.” *Id.* at para. 149.

<sup>72</sup> Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Oct. 8, 2007, at para. 272, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=14&case=120&code=nh&p3=4>.

<sup>73</sup> *Id.* (emphasis added).

<sup>74</sup> *Black Sea Case*, *supra* note 68, at para. 120. At this point, the Court cited its earlier Judgment in the *Cameroon/Nigeria Case* in support of its ruling. See *Cameroon/Nigeria Case*, *supra* note 50, at para. 288.

*Case*, involved the verification of the resulting potential delimitation line, which may or may not have been adjusted, through what the Court termed a “disproportionality test”<sup>75</sup> in order to ascertain that it,

...does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line. A final check for an equitable outcome entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths.<sup>76</sup>

The Court did, however, take care to assert that this (dis)proportionality test “is not to suggest that these respective areas should be proportionate to coastal lengths.”<sup>77</sup> When it came to applying the “disproportionality test” in the context of the *Black Sea Case* the Court noted that such a check “can only be approximate” in light of the “[d]iverse techniques” that can be used to assess coastal lengths and the lack of clear requirements in international law as to whether the “real” coastline or baselines are to be followed or whether coasts relating to internal waters should be excluded.<sup>78</sup> The Court found that the ratio of relevant coastal lengths for Romania and Ukraine was approximately 1:2.8, that the ratio of relevant maritime areas of the order of 1:2.1.<sup>79</sup> The Court concluded that this difference between the ratio of relevant coastal lengths and maritime areas did not constitute a disproportion and that consequently no further adjustment to the delimitation line was required at the third stage.<sup>80</sup>

The three-stage process through which maritime boundary delimitation can be achieved, as established by the ICJ in the *Black Sea Case*, marks the Court’s clearest expression yet of its approach to the delimitation of maritime boundaries. This approach represents a development from previous judgments, both in terms of its emphasis on equidistance as the method of constructing the provisional delimitation line and in its outlining of a three-stage process, as opposed to the two-stage approach that had previously been adopted by the Court. It is also worth noting, though, that the unanimity of the Court in the *Black Sea Case* invests the decision with considerable weight.<sup>81</sup> This trend was reinforced by the ruling of the International Tribunal on the Law of the Sea (ITLOS) in its delimitation of an EEZ and continental shelf boundary between Bangladesh and Myanmar in the Bay of

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<sup>75</sup> *Black Sea Case*, *supra* note 68, at paras. 122, 210-16.

<sup>76</sup> *Id.* at paras. 122, 214-15.

<sup>77</sup> *Id.* The Court reinforced this statement by quoting from its Judgment in the *Jan Mayen Case*. “[T]he sharing out of the areas should be proportionate to coastal lengths – not vice versa.” *Jan Mayen Case*, *supra* note 62, at para. 64.

<sup>78</sup> *Black Sea Case*, *supra* note 68, at para. 212.

<sup>79</sup> *Id.* at para. 215.

<sup>80</sup> *Id.* at para. 216.

<sup>81</sup> *Id.* at para. 219.

Bengal on 14 March 2012 where the three-stage equidistance/special circumstances approach developed by the ICJ in the context of the *Black Sea Case* was adopted.<sup>82</sup>

Ultimately, in light of the inherent advantages of equidistance as a method of delimitation (though by no means in all cases), as outlined above, the ICJ's essential return to equidistance as the preferred method of, or at least starting point for, delimitation of the continental shelf and EEZ, as evidenced through the ICJ's ruling in the *Black Sea Case*, should come as no surprise. Further, this reliance on equidistance lines is consistent with State practice as the equidistance method has proved more popular than any alternative method by far and most agreed maritime boundaries are based on some form of equidistance.<sup>83</sup>

### III. ENDURING ISSUES

The *Black Sea Case* and preceding decisions in the same vein offer a welcome degree of clarity in the maritime delimitation process. This also promises greater consistency and predictability in future international judicial rulings – something arguably lacking in the past.<sup>84</sup> Nevertheless, a number of problematic issues remain which are likely to forestall the rapid completion of the network of boundary lines on the maritime political map of the world. Key impediments to maritime boundary delimitation include: the unclear and legally dubious character of some claims to maritime jurisdiction, excessive claims to straight baselines, and disputes involving islands.

#### A. *Ambit, Ambiguous and Problematic Claims*

One notable obstacle to maritime boundary delimitation is that many maritime claims remain ill-defined. Only rarely do coastal States provide unilateral definitions as to the precise extent of their maritime jurisdictional claims. Instead, many States simply advance maritime claims according to the maximum breadth of the particular maritime claims, for instance to a 200nm breadth EEZ. This general lack of precision regarding the exact dimensions of maritime claims and therefore the scope of overlapping maritime zones necessarily leads to maritime jurisdictional uncertainty.

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<sup>82</sup> Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar) (Mar. 14, 2012), International Tribunal on the Law of the Sea, Case no.16, at para. 240, available at <http://www.itlos.org/index.php?id=108>.

<sup>83</sup> For example, with respect to delimitations between opposite coastal States it has been estimated that 89% of agreements concluded were based on some form of equidistance. The figure does, however, drop to 38% when adjacent State delimitation is considered. See Leonard Legault, & Blair Hankey, *Method, Oppositeness and Adjacency, and Proportionality in Maritime Boundary Delimitation*, in 1 INTERNATIONAL MARITIME BOUNDARIES 203, 214 (Jonathan Charney & Lewis Alexander eds., 1993).

<sup>84</sup> For example, past ICJ boundary decisions have been sharply criticised for advancing “numerous approaches, rules and concepts” but failing to articulate clear principles, instead producing “a bewildering array of quasi-principles”, leading to considerable uncertainty. See Ian Townsend-Gault, *Maritime Boundaries in the Arabian Gulf*, in THE RAZOR'S EDGE: INTERNATIONAL BOUNDARIES AND POLITICAL GEOGRAPHY 223, 224-27 (Clive Schofield et al. eds., 2002).



A further type of problematic maritime claims are those based on alleged historic rights. The validity of such claims to "historic waters" is often highly uncertain. Indeed, the only mention of this type of claim in LOSC is a reference to "so-called" historic bays – language which hardly constitutes a resounding endorsement of the concept.<sup>85</sup> In this context, the United States has taken the restrictive view that: "[t]o meet the international standard for establishing a claim to historic waters, a State must demonstrate its open, effective, long-term, and continuous exercise of authority over the body of water, coupled with acquiescence by foreign States to the exercise of that authority."<sup>86</sup> A prominent example in this regard, though by no means the only one, is provided by China's apparent claims to large parts of the South China Sea, allegedly on historic grounds.<sup>87</sup>

### B. *Excessive Baselines*

LOSC was successful in providing a clear spatial framework for coastal State maritime claims, and coastal States predominantly make claims in line with the terms of the Convention, at least as far as the breadth of maritime zones is concerned. However, where maritime claims are to be measured, baselines along the coast then become a key concern. Indeed, such baselines are also frequently crucial to the delimitation of maritime boundaries. This is the case because baselines have a direct bearing on the construction of an accurate equidistance or median line and, as noted, the majority of maritime boundaries concluded to date have been based on equidistance.

Although the predominant types of baselines in international practice are "normal" baselines coincident with "the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State,"<sup>88</sup> LOSC allows for a number of other types of straight-line type baselines to be constructed along the coast. These include straight baselines (LOSC, Article 7), river closing lines (Article 9), bay closing lines (Article 10), lines related to ports and roadsteads (Articles 11 and 12), and in respect of archipelagic states (Article 47). Among these, the provisions related to straight baselines have proved to be the most open to flexible

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<sup>85</sup> This has led one leading law of the sea scholar to term historic waters "an orphaned offshore international legal regime" on account of the fact that they were left out of both the *1958 Conventions* and LOSC. See Ted McDorman, *Notes on the Historic Waters Regime and the Bay of Fundy*, in *THE FUTURE OF OCEAN REGIME BUILDING: ESSAYS IN TRIBUTE TO DOUGLAS M. JOHNSTON* 701, 701-22 (Aldo Chircop, et al. eds., 2009).

<sup>86</sup> ROACH & SMITH, *supra* note 27, at 31.

<sup>87</sup> It should be noted that considerable uncertainty surrounds the meaning of China's nine-dashed claim line in the South China Sea. See Li Jinming & Li Dexia, *The Dotted Line on the Chinese Map of the South China Sea: A Note*, 34 *OCEAN DEV. & INT'L L.* 287 (2003); Zou Keyuan, *The Chinese Traditional Maritime Boundary Line in the South China Sea and Its Legal Consequences for the Resolution of the Dispute over the Spratly Islands*, 14 *INT'L J. OF MARINE AND COASTAL L.* 52 (1997); and Kuan-Hsiung Wang, *The ROC's Maritime Claims and Practices with Special Reference to the South China Sea*, 41 *OCEAN DEV. & INT'L L.* 237-252 (2010).

<sup>88</sup> LOSC, *supra* note 23, at art. 5.

interpretation and thus suffer the most abuse.<sup>89</sup> Excessive baselines claims tend to capture or enclose overly large marine spaces as internal waters and simultaneously advance the claimant State's starting point for measuring its maritime claims and also have the potential to inequitably influence the course of a potential maritime boundary based on equidistance. Disagreements over baselines are therefore frequently a notable dimension of maritime boundary disputes.

### C. Islands

A further frequent source of maritime jurisdictional disputes relates to islands. Such disputes broadly fall into two intrinsically interlinked categories – sovereignty disputes over islands and disputes related to their associated maritime spaces. Within the latter category of disputes a critical issue that frequently arises relates to the capacity of particular insular features to generate extensive claims to maritime jurisdiction. In keeping with the Regime of Islands, as provided by Article 121 of LOSC, an island consists of “a naturally formed area of land, surrounded by water, which is above water at high tide.”<sup>90</sup> In principle such features are to be treated just as any other land territory and therefore generate the full suite of maritime claims.<sup>91</sup> However, LOSC Article 121(3) states that “[r]ocks which cannot sustain human habitation or an economic life of their own shall have no exclusive economic zone or continental shelf.” This distinction between islands capable of generating extended claims to maritime jurisdiction and a disadvantaged sub-category of island, the “rock,” has enormous implications in terms of potential maritime claims. If an island had no maritime neighbours within 400nm, it could generate 125,664 square nm (431,014km<sup>2</sup>) of territorial sea, EEZ and continental shelf rights. In stark contrast, if deemed a mere “rock” incapable of generating EEZ and continental shelf rights, a territorial sea of 452 sq. nautical miles (1,550km<sup>2</sup>) could be claimed.<sup>92</sup> To date no conclusive means by which to distinguish between islands capable of generating extended maritime claims (that is, to EEZ and continental shelf rights), and mere “rocks” which cannot, has emerged. In the context of maritime boundary delimitation and disputes, small insular features and their capacity to generate extensive maritime claims, and therefore act as a valid base-point in the construction of an EEZ or continental shelf boundary, is often a key consideration and point of contention. That said, there is arguably an increasingly clear trend for small islands, often sparsely inhabited or uninhabited and located far offshore, to be awarded a much reduced capacity to generate maritime claims and to influence the course of maritime boundaries.

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<sup>89</sup> See generally ROACH & SMITH, *supra* note 27. See also J. Ashley Roach & Robert Smith, *Straight Baselines: The Need for a Universally Applied Norm*, 31 INT'L J. MARINE AND COASTAL L. 47-80 (2000).

<sup>90</sup> LOSC, *supra* note 23, at art. 121(1).

<sup>91</sup> *Id.* at art. 121(2).

<sup>92</sup> For the sake of this theoretical calculation the features in question are assumed to have no land area.

#### D. Continuing Jurisdictional Creep

As noted above, the maritime political map of the world is relatively stable with regard to the spatial extent of maritime jurisdictional claims and LOSC can be regarded as a triumph in this regard. Nonetheless, the issue of “creeping coastal jurisdiction” remains.

While the breadth of coastal State claims has to a large extent been constrained and contained by the framework established under LOSC, States have nonetheless sought to secure additional rights within their national zones and, increasingly, in areas beyond national jurisdiction. Such additional national jurisdictional rights over maritime spaces are often claimed on maritime security and environmental grounds. With regard to the former concern, it has been noted that there exists a temptation for States to use the 200nm EEZ limit as the basis for boarding rights, justified on the basis of contemporary security threats such as maritime terrorism, leading to “further territorialisation of the EEZ.”<sup>93</sup> In a similar vein, some coastal States have sought to restrict certain activities in “their” waters, asserting, for example, rights over the passage of foreign military vessels through their waters and claiming the right to prohibit activities such as exercises or survey activities, including hydrographic surveying, within their EEZs without permission. Such claims have been resisted and protested by other States and this has, on occasion, resulted in incidents such as that involving the USS *Impeccable*, an unarmed United States Navy surveillance vessel, which in March 2009 was harassed by multiple Chinese civilian and naval vessels with the objective of forcing the U.S. ship to withdraw from China’s EEZ.<sup>94</sup>

It has further been observed that coastal States have also been keen to assert additional controls offshore on environmental grounds, for instance in respect of the transport of hazardous materials<sup>95</sup> and in the wake of the loss of the *Prestige* oil tanker off the north-western coast of Spain and the resulting oil pollution along those shores, in November 2002.<sup>96</sup> This represents a significant challenge to the delicate balance of rights, responsibilities, and freedoms contained in LOSC and thus a threat to the stable oceans regime vital to ensuring the freedom of navigation necessary for global trade.

#### IV. BEYOND BOUNDARIES

Claims to maritime jurisdiction have advanced offshore to encompass great swaths of the world ocean – indeed, an area approximately equivalent to the world’s land territory. This vast extension in coastal State rights has generated a large

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<sup>93</sup> See Bernard Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 THE AM. J. INT’L L. 842 (2006); see also ROACH & SMITH, *supra* note 27, at 409-421.

<sup>94</sup> The incident took place approximately 75 miles south of Hainan Island, well beyond China’s territorial waters, but within its 200nm EEZ. See Ian Townsend-Gault & Clive Schofield, *Hardly Impeccable Behaviour: Confrontations Between Foreign Ships and Coastal States in the EEZ*, 5 INT’L ZEITSCHRIFT 1 (Apr. 2009), <http://www.zeitschrift.co.uk/indexv5n1.html>.

<sup>95</sup> *Id.* at 421-423.

<sup>96</sup> Oxman, *supra* note 93, at 847-848.

number of overlapping maritime claims, potential boundaries and, inevitably, disputes. Despite the substantial progress that has undoubtedly been made in terms of the delimitation of maritime boundaries, to date less than half have been settled. The increasing clarity that is emerging in international ocean boundary law, as evidenced by the ICJ's ruling in the *Black Sea Case*, offers the prospect that maritime boundary disputes will be more readily settled in the future than has been the case heretofore. That said, it is also clear that key impediments to the rapid delimitation of maritime boundaries remain. It can further be observed that the process of 'maritime jurisdictional creep' is far from over, both in the spatial extent of claims as extended continental shelf areas are finalised and with respect to the rights claimed and asserted by States within their maritime zones.

It is also worth emphasising that while maritime boundary delimitation is clearly the preferred option of coastal States to define the limits of their maritime entitlements where they have the potential to overlap with the claims of other States, it is neither the only way to address this situation, nor is it the end of the process. Increasingly, maritime joint development zones have been applied to areas of overlapping maritime claims, often in lieu of delimiting a maritime boundary. Further, the delimitation of a maritime boundary, or, indeed, the creation of a maritime joint development zone, only represents an initial, albeit useful, step towards enhanced oceans management. Such delimitations may well deliver clarity and certainty to all maritime states and users and thereby help to minimise the risk of friction and conflict by eliminating a source of bi-lateral and multilateral disputes. However, they only provide the framework for the effective management of the inevitably fluid marine environment and its resources. Ultimately, therefore, while it can be argued that the delimitation of international maritime boundaries is an essential component of a stable maritime regime and good oceans governance, transboundary cooperation is also required to realise comprehensive maritime resource and environmental stewardship.