

## Chapter III Historic Waters

### *Criteria*

To meet the international standard for establishing a claim to historic waters, a State must demonstrate its open, effective, long term, and continuous exercise of authority over the body of water, coupled with acquiescence by foreign States in the exercise of that authority. The United States has taken the position that an actual showing of acquiescence by foreign States in such a claim is required, as opposed to a mere absence of opposition.<sup>1</sup>

### *United States Waters*

The United States Supreme Court has found the waters of **Mississippi Sound**<sup>2</sup> and **Long Island Sound**<sup>3</sup> to be historic for purpose of disputes between the United States federal government and the coastal states regarding ownership of the seabed of the Sounds. The U.S. Supreme Court has held that certain other bodies of U.S. waters do not meet the criteria for historic waters. These include **Cook Inlet, Alaska**;<sup>4</sup> **Santa Monica and San Pedro Bays, California**;<sup>5</sup> **Florida Bay**;<sup>6</sup> numerous bays along the coast of **Louisiana**;<sup>7</sup> **Block Island Sound**;<sup>8</sup> and **Nantucket Sound, Massachusetts**.<sup>9</sup>

### *Foreign Waters Considered Not to Be Historic*

Table 1 lists known claims to historic waters and actions taken by the United States. Following Table 1 is a description of several claims to historic waters that have been protested by the United States.

Table 1  
Claims Made to Historic Bays

<u>State</u>	<u>Body of Water</u>	<u>Law and Date of Claim</u>	<u>U.S. Protest</u>	<u>U.S. Assertion<sup>a</sup></u>
Argentina	Rio de la Plata	Joint Declaration with Uruguay, Jan. 30, 1961	1963	
Australia	Anxious, Rivoli, Encounter, Lacedepe Bays	Proclamation March 31, 1987	1991	
Cambodia	Part of Gulf of Thailand	Agreement with Vietnam July 7, 1982	1987	
Canada	Hudson Bay	Amendment to Fisheries Act July 13, 1906	1906	
Dominican Republic	Samana, <sup>b</sup> Ocoa, <sup>b</sup> Neiba <sup>b</sup> Bays	Law No. 3342, July 13, 1952		

The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.

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Table 1 (Cont.)

<u>State</u>	<u>Body of Water</u>	<u>Law and Date of Claim</u>	<u>U.S. Protest</u>	<u>U.S. Assertion<sup>a</sup></u>
Dominican Republic	Escocesa & Santo Domingo Bays	Act No. 186, Sep. 13, 1967		1991
Egypt	Bay of el Arab <sup>c</sup>	Embassy Note June 4, 1951	1951	
El Salvador	Gulf of Fonseca <sup>d</sup>	Const. Amend. 1946, art. 3; Const. art. 84, Dec. 13, 1983		
Honduras	Gulf of Fonseca <sup>d</sup>	Constitution of 1982, art. 10		
India	Gulf of Mannar Palk Bay	Law No. 41, June 1, 1979 Agreement with Sri Lanka, June 28, 1974	1983 1983	1993
Italy	Gulf of Taranto	Presidential Decree No. 816, April 26, 1977	1984 <sup>e</sup>	
Kenya	Ungwana Bay	Territorial Waters Act, May 16, 1972		1990
Libya	Gulf of Sidra	Foreign Ministry Note Ver- bale MQ/40/5/1/3325, Oct. 11, 1973	1974 <sup>e</sup>	1981 <sup>e</sup>
Panama	Gulf of Panama	Law No. 9, Jan. 30, 1956	1956 <sup>e</sup>	
Soviet Union	Peter the Great Bay Laptey, Demitri, Sannikov Straits	Decree July 20, 1957 Aide Memoire July 21, 1964	1957 <sup>e</sup> 1965	1982 <sup>e</sup> 1984 <sup>e</sup>
Sri Lanka	Palk Bay  Palk Bay, Palk Strait, Gulf of Mannar	Agreement with India June 28, 1974 Proclamation Jan. 15, 1977		
Thailand	Part of Gulf of Thailand	Decree, Sept., 22, 1959		
Uruguay	Rio de la Plata	Joint Declaration with Argentina, Jan. 30, 1961	1963 <sup>e</sup>	
Vietnam	Part of Gulf of Thailand  Gulf of Tonkin	Agreement with Cambodia, July 7, 1982 Statement, Nov. 12, 1982	1987 1982	

<sup>a</sup>Operational assertion of right by U.S. naval and/or air forces of internationally recognized navigational rights and freedoms against excessive maritime claim.

<sup>b</sup>Now qualifies as a juridical bay.

<sup>c</sup>Not maintained.

<sup>d</sup>Historic status confirmed by ICJ in *El Salvador v. Honduras*, 1992 ICJ Rep. 351, para. 432 at 616-17.

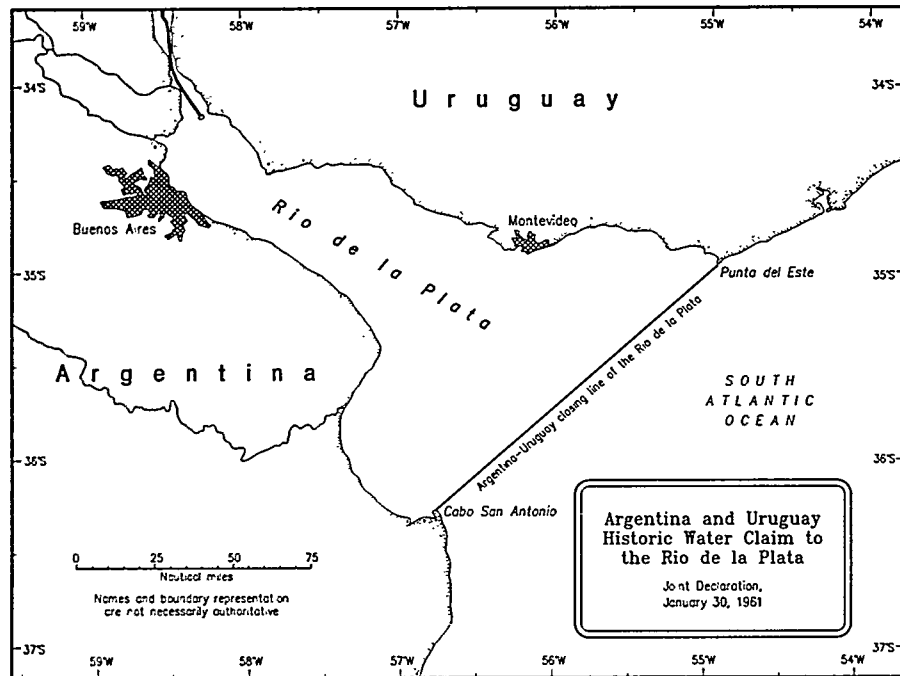
<sup>e</sup>More than one protest or assertion against this claim.

Source: U.S. Department of State, Office of Ocean Affairs.

***Argentina and Uruguay - Rio de la Plata:***

Some authorities have stated that the Rio de la Plata estuary is a historic bay (see Map 1).<sup>10</sup> However, in drawing a straight line across the mouth of the estuary, the joint Declaration of the Governments of Argentina and Uruguay of January 30, 1961 did not assert an historic claim to the Rio de la Plata. Rather, the Declaration took into account the provisions of Article 13 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone<sup>11</sup> regarding river closing lines.

Map 1



On January 23, 1963 the United States protested on the grounds that the Declaration ran counter to international law and that Article 13 “relates to rivers which flow directly into the sea which is not the situation of the River Plate which flows into an estuary or bay”.<sup>12</sup>

***Australia - Anxious, Encounter, Lacedpede and Rivoli Bays***

In 1987, Australia declared that Anxious, Encounter, Lacedpede and Rivoli Bays, in South Australia, were historic bays, and drew straight baselines across the mouths of those bays which did not meet the criteria for juridical bays. In

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1991, the United States protested this claim, in a note, which after reciting the internationally accepted criteria for establishing claims to historic bays, stated:

Prior to the issuance of the 19 March 1987 Proclamation, the United States was not aware of any claim by the Government of Australia that these bays were historic, nor was such a claim mentioned in the United Nations Secretariat study on historic bays, published in 1957 as UN Document A/CONF.13/1 and in 1958 in volume I: Preparatory Documents of the first United Nations Conference on the Law of the Sea, UN Doc. A/CONF.13/37, at pages 1-38, or in any other compilation of historic bay claims of which the United States is aware.

Having reviewed the evidence submitted by the Government of Australia to support these claims, the United States regrets that it is unable to agree that Anxious, Encounter, Lacedpede and Rivoli Bays meet the requirements of international law for historic bays and reserves its rights and those of its nationals in that regard.

The United States notes that effective 20 November 1990 the Government of Australia extended its territorial sea from three to twelve nautical miles. The United States is of the view that, with the increased coastal State maritime jurisdiction now permitted under customary international law reflected in the 1982 United Nations Convention on the Law of the Sea and other rules of international law reflected therein, no new claim to historic bays or historic waters is needed to meet resource and security interests of the coastal State.<sup>13</sup>

### *Cambodia and Vietnam - Gulf of Thailand*

On July 7, 1982, Cambodia and Vietnam signed an agreement which, in part, made claim to a part of the Gulf of Thailand as historic waters.<sup>14</sup> The United States protested this claim in a note to the UN Secretary-General, as follows:

Under the terms of this agreement the parties purportedly claim as historic certain waters in the Gulf of Thailand extending from the mainland to Tho Chu and Poulo Wai Islands.

As is well known under longstanding standards of customary international law and State practice, historic waters are recognized as valid only if the following prerequisites are satisfied: (a) the State asserting claims thereto has done so openly and notoriously; (b) the State has effectively exercised its authority over a long and continuous period; and (c) other States have acquiesced therein.

In the case of the historic waters claim made by the parties to the above agreement, the claim was first made internationally no earlier than July 7, 1982, less than five years ago, notwithstanding the assertion in the agreement that the waters "have for a very long time belonged to Vietnam and Kampuchea [Cambodia] due to their special geographical conditions and their important significance towards each country's national defense and economy."

The brief period of time since the claim's promulgation is insufficient to meet the second criterion for establishing a claim to historic waters, and there is no evidence of effective exercise of authority over the claimed waters by either country before or after the date of the agreement. Moreover, without commenting on the substantive merits or lack thereof attaching to the "special geographical conditions" of the waters in question and their "important significance towards each country's defense and economy," such considerations do not fulfill any of the stated customary international legal prerequisites of a valid claim to historic waters.

Finally, the United States has not acquiesced in this claim, nor can the community of States be said to have done so. Given the nature of the claim first promulgated in 1982, such a brief period of time would not permit sufficient acquiescence to mature.

Therefore, the United States views the historic claim to the waters in question as without foundation and reserves its rights and those of its nationals in this regard.<sup>15</sup>

#### *India and Sri Lanka - Gulf of Mannar and Palk Bay*

On June 1, 1979, India claimed as historic the waters of the Gulf of Mannar (see Map 2) between the coast and its maritime boundary with Sri Lanka.<sup>16</sup> The United States protested this claim, among other Indian maritime claims, in a note to the Indian Ministry of External Affairs on May 13, 1983.<sup>17</sup>

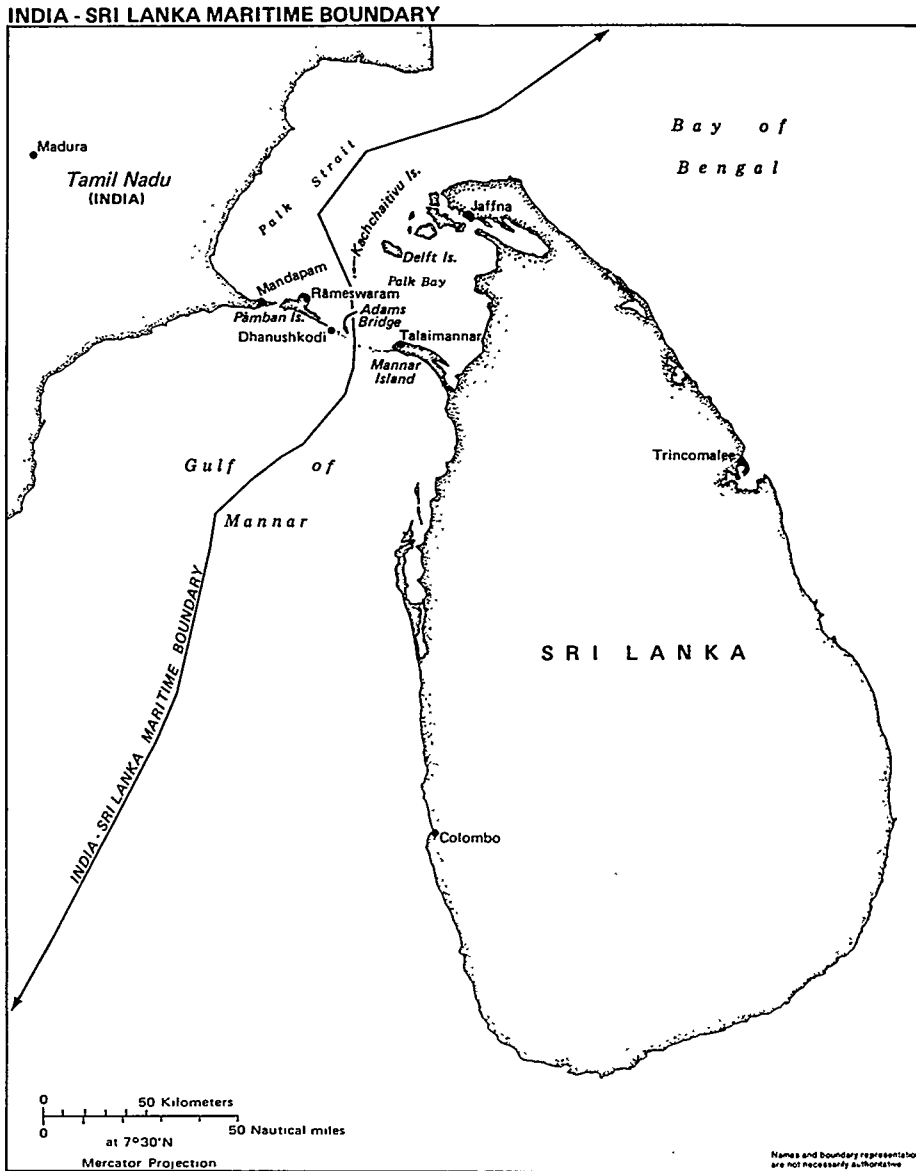
#### *Italy - Gulf of Taranto*

As part of its 1977 decree establishing straight baselines for portions of the Italian coast, Italy for the first time claimed the Gulf of Taranto as an historic bay (see Map 3).<sup>18</sup> During bilateral discussions with the Italian government in 1984, the United States stated its view that the Gulf of Taranto could not be considered an historic bay since the requirements for such status were not met. The United States noted that "a coastal State claiming such status for a body of water must over a long period of time have openly and continually claimed to exercise sovereignty over the body of water, and its claims must have resulted in an absence of protest of foreign States, amounting to acquiescence on their part."<sup>19</sup>

#### *Libya - Gulf of Sidra*

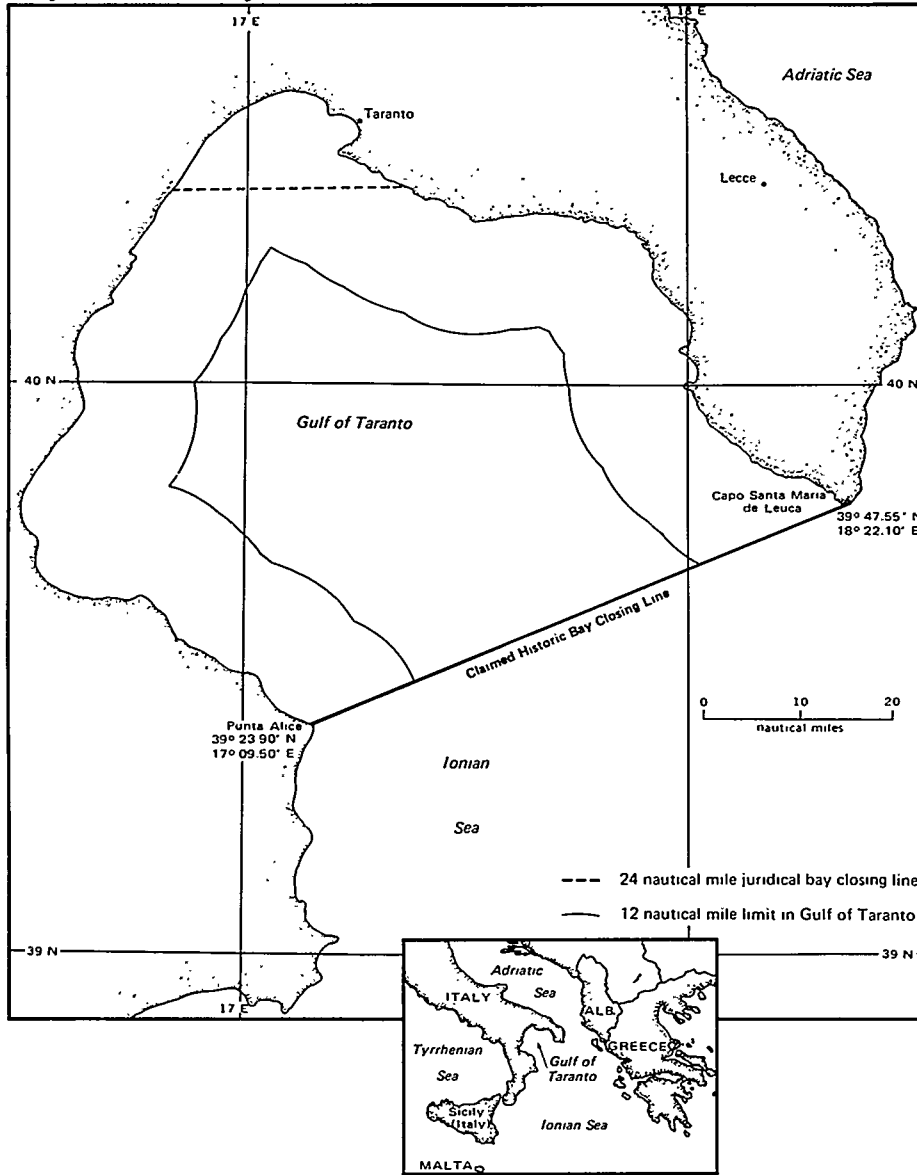
In 1973 Libya's Foreign Ministry circulated a note claiming the Gulf of Sidra as Libyan internal waters. The Gulf was defined by a closing line, approximately 300 miles long, along the 32° 30' parallel of north latitude (see Map 4).<sup>20</sup> The United States first protested this claim in 1974.<sup>21</sup> In a 1985 note to the Secretary-General of the United Nations, the United States reiterated "its rejection of the Libyan claim that the Gulf of Sidra constitutes internal waters

Map 2



Map 3

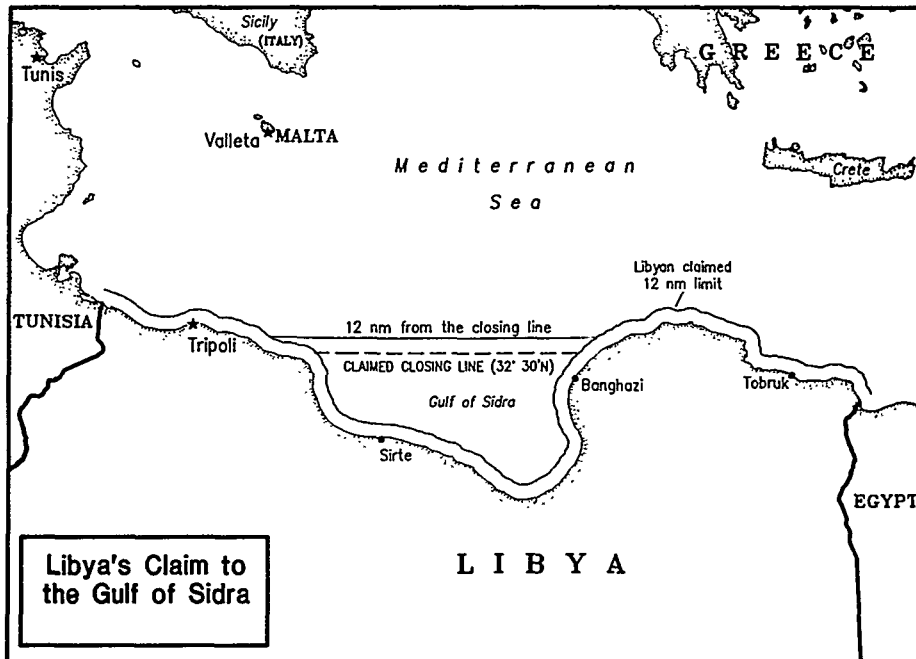
Italy's Historic Bay Claim: Gulf of Taranto



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to the latitude of 32 degrees 30 minutes North,” and rejected “as an unlawful interference with the freedoms of navigation and overflight and related high seas freedoms, the Libyan claim to prohibit navigation” in the Gulf.<sup>22</sup>

Map 4



In December 1986, the U.S. Department of State, Bureau of Public Affairs, published “Navigation Rights and the Gulf of Sidra,” in *GIST*, a reference aid on U.S. foreign relations. The study discussed the history of U.S. responses, dating to the 18th century, to attempts by North African States to restrict navigation in these waters. The *GIST* stated, in part, that:

*Current law and customs:* By custom, nations may lay historic claim to those bays and gulfs over which they have exhibited such a degree of open, notorious, continuous, and unchallenged control for an extended period of time as to preclude traditional high seas freedoms within such waters. Those waters (closed off by straight baselines) are treated as if they were part of the nation’s land mass, and the navigation of foreign vessels is generally subject to complete control by the nation. Beyond lawfully closed-off bays and other areas along their coasts, nations may claim a “territorial sea” of no more than 12 nautical miles in breadth (measured 12 miles out from the coast’s low water line — or legal straight baseline) within which foreign vessels enjoy the limited navigational “right of innocent



passage." Beyond the territorial sea, vessels and aircraft of all nations enjoy freedom of navigation and overflight.

Since Libya cannot make a valid historic waters claim and meets no other international law criteria for enclosing the Gulf of Sidra, it may validly claim a 12-nautical mile territorial sea as measured from the normal low-water line along its coast. Libya also may claim up to a 200-nautical mile exclusive economic zone in which it may exercise resource jurisdiction, but such a claim would not affect freedom of navigation and overflight. (The U.S. has confined its exercises to areas beyond 12 miles from Libya's coast.)<sup>23</sup>

#### *Panama - Gulf of Panama*

In 1956, the United States protested the unilateral declaration contained in Panamanian Law No. 9 of January 30, 1956, purporting to confirm and implement Panama's claim that it exercises sovereignty over the Gulf of Panama as an historic bay.<sup>24</sup> The note reads in part as follows:

Particular note has been taken by my Government of the statements that "the Republic of Panama and its predecessors . . . have been exercising sovereignty over the waters of the Gulf of Panama in the Pacific Ocean from time immemorial" and that "the territorial character of the Gulf under reference and the exercise of Panamanian sovereignty over it always has had the tacit acquiescence of all states."

The Government of the United States avails itself of this opportunity to take exception both to the operative provisions of Law No. 9 and the thesis on which they are based insofar as this measure purports to claim or confirm any general jurisdiction by Panama over waters of the Gulf of Panama . . .

My Government submits that the Gulf of Panama does not qualify as a historic bay under international law. This body of water has never enjoyed the character of a historic bay, whether by immemorial claim or by treatment as such by the community of nations. The Gulf of Panama was not recognized as a historic bay at the time of the separation of Panama from Colombia, and nothing that has occurred subsequently has been of a character to give the Gulf of Panama the character of a historic bay.

Accordingly, my Government cannot accept the unilateral declaration contained in Law No. 9 as resulting in giving the Gulf of Panama the character of a historic bay.<sup>25</sup>

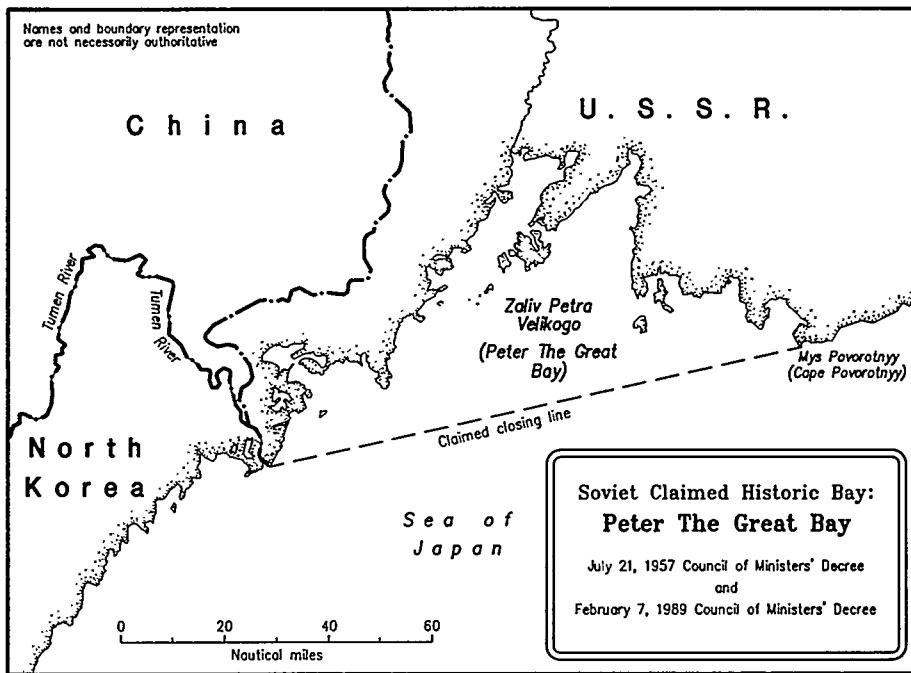
#### *USSR - Peter the Great Bay*

The former Soviet Union first claimed Peter the Great Bay as historic in a 1957 Decree.<sup>26</sup> The United States, and other countries, immediately protested.<sup>27</sup> The 106-mile closing line is, at one point, more than 20 miles from any land

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territory, and 47 miles seaward from Vladivostok, an important Soviet naval base (see Map 5).

Map 5



Following an incident involving USS *Lockwood* (FF-1064) on May 3, 1982, the United States renewed its protest of the Soviet claim that Peter the Great Bay was an historic bay. The U.S. note read in part as follows:

... refers to an incident of May 3, 1982, when a warship of the United States of America was approached by naval units of the Union of Soviet Socialist Republics while navigating on the high seas in the vicinity of Peter the Great Bay, and was ordered to leave what the Soviet naval units referred to as waters of the Soviet Union.

In light of this incident, the Government of the United States of America wishes to state again its objection to the claim by the Government of the Union of Soviet

Socialist Republics that the waters of Peter the Great Bay landward of a line drawn between the mouth of the river Tyumen-Ula and the Povorotny promontory are internal waters of the Soviet Union. As the Government of the United States of America informed the Government of the Union of Soviet Socialist Republics in its Diplomatic Note of August 12, 1957, and reiterated in its note of March 6, 1958, there is no basis in international law for the unilateral claim to all the waters of Peter the Great Bay landward of the aforementioned line as internal waters of the Soviet Union. It continues to be the view of the Government of the United States of America that the claim that this large body of water is comprised of internal waters cannot be geographically or historically justified in international law.<sup>28</sup>

#### *USSR - Northeast Passage*

The United States conducted oceanographic surveys of the Arctic north of the former Soviet Union in the summers of 1963 and 1964. During 1964, USS *Burton Island* (AGB-1) collected data in the East Siberian Sea. On July 21, 1964, the Soviet Union presented an *aide memoire* to the United States regarding this survey in which it was claimed that “the Dmitry, Laptev and Sannikov Straits, which unite the Laptev and Eastern-Siberian Seas ... belong historically to the Soviet Union.”<sup>29</sup>

In response, the United States stated:

So far as the Dmitry, Laptev and Sannikov Straits are concerned, the United States is not aware of any basis for a claim to these waters on historic grounds even assuming that the doctrine of historic waters in international law can be applied to international straits.<sup>30</sup>

#### *Vietnam - Gulf of Tonkin*

In addition to claiming part of the Gulf of Thailand as historic waters (*see* Cambodia and Vietnam above), in 1982 Vietnam also claimed a part of the Gulf of Tonkin as its historic waters<sup>31</sup> (*see* Map 10). In December 1982, the United States protested the claim as follows:

The Government of the Socialist Republic of Vietnam also claimed that a part of the Gulf of Tonkin, not clearly defined, constitutes historic waters of the Socialist Republic of Vietnam in which the legal regime of internal waters applies. The Government of the United States wishes to state that international law requires certain standards to be met before a claim to historic waters can be established. These standards are not met in this case and, therefore, it is the view of the Government of the United States of America that there is no basis for the aforementioned claim by the Government of the Socialist Republic of Vietnam to a part of the Gulf of Tonkin.<sup>32</sup>

In analyzing Vietnam’s claim, the Office of the Geographer of the Department of State wrote:

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The occurrence of claims to historic bays that are shared by more than one state is even less common than the relatively small number of single states claiming historic bays.

The general norms for the concept of an historic bay ... and the few case studies of bays bordered by more than one state suggest that, at a minimum, the states bordering the bay must all agree that the bay is an "historic bay." The Vietnamese claim to historic waters is questionable because China, which also borders the Gulf of Tonkin, does not claim the gulf as historic waters and disputes the Vietnamese claim to the meridional boundary within the Gulf.<sup>33</sup>

### *Historic Bay Claims Rolled Back*

#### *Bays now qualifying as juridical bays*

Historic bay claims were frequently advanced in previous years because their mouths were too wide to qualify as juridical bays. Prior to 1958, while there was general agreement on the three-mile territorial sea, there was no agreement as to the maximum length of a closing line of a juridical bay. However, the 24-mile closing line rule was fixed for juridical bays in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and has remained unchanged since then. The U.S. Supreme Court has found that **Long Island Sound**<sup>34</sup> constitutes a juridical bay on that basis. Both **Chesapeake Bay** (with a 12 mile wide mouth) and **Delaware Bay** (with a 10 mile wide mouth) now qualify as juridical bays, notwithstanding earlier assertions they were internal waters of the United States.<sup>35</sup> Similarly, the **Gulf of Amatique**, which Guatemala claimed as historic in 1940,<sup>36</sup> now qualifies as a juridical bay, as do **Samana, Ocoa and Neiba Bays** claimed by the Dominican Republic as historic in 1952.<sup>37</sup>

#### *Egypt - Bay of El-Arab*

This body of water, on Egypt's Mediterranean coast, is 75 miles wide at its opening to the sea and penetrates 18 miles into the mainland. It does not qualify as a juridical bay and may be better classified as a bight. In a letter to the League of Nations of 28 July 1928, Egypt noted it claimed a three mile territorial sea "except as regards the Bay of El Arab, the whole of which is, owing to its geographical configuration regarded as territorial waters." In 1951 an Egyptian decree stated that the inland waters of Egypt includes "all the waters of the bays along the coasts of the Kingdom of Egypt," without mentioning the Bay of El-Arab. This claim was protested by the United States and the United Kingdom in 1951. The British protest stated that no historic bays are "situated in Egypt". In 1990 Egypt promulgated the coordinates of straight baseline along its coast. No mention was made of this historic claim in the decree. The straight baseline in the Bay of El Arab is well within the "mouth" of the bay, being no more than 6 miles off shore at its furthest.<sup>38</sup>

## Notes

1. 1973 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 244-45 (1974) [hereinafter DIGEST]; Goldie, *Historic Bays in International Law—An Impressionistic Overview*, 11 *Syracuse J. Int'l L. & Com.* 205, 221-23, 248 & 259 (1984). See also 4 WHITEMAN, DIGEST OF INTERNATIONAL LAW 233-58 (1965) [hereinafter WHITEMAN]. So-called historic bays are not determined by the semicircle and 24-nautical mile closure line rules applicable to juridical bays (which are discussed in Chapter IV). Territorial Sea Convention, article 7(6); LOS Convention, article 10(6). The I.C.J. takes the view that general international law:

does not provide for a single "regime" for "historic waters" or "historic bays", but only for a particular regime for each of the concrete, recognized cases of "historic waters" or "historic bays".

Continental Shelf (Tunisia/Libya), 1982 I.C.J. Rep. 74, quoted with approval in *Dispute (El Salvador/Honduras)* (Judgment), 1992 I.C.J. Rep., at 589.

2. *United States v. Louisiana et al. (Alabama and Mississippi Boundary Case)*, 470 U.S. 93 (1985).

3. *United States v. Maine et al. (Rhode Island & New York Boundary Case)*, 469 U.S. 504, 509 (1985).

4. *United States v. Alaska*, 422 U.S. 184 (1975).

5. *United States v. California*, 381 U.S. 139, at 173-75 (1965).

6. *United States v. Florida*, 420 U.S. 531, 533 (1975).

7. *Louisiana Boundary Case*, 420 U.S. 529 (1975).

8. *United States v. Maine et al.*, *supra* n. 3, at 509 n.5.

9. *Massachusetts Boundary Case*, 475 U.S. 89 (1986). In the Florida, Massachusetts and Louisiana cases, the Supreme Court adopted the recommendations of its Special Masters. Their Reports, containing the primary analysis of these waters, can be found in KOESTOR AND BRISCOE, THE REPORTS OF THE SPECIAL MASTERS OF THE UNITED STATES SUPREME COURT IN THE SUBMERGED LANDS CASES, 1949-1987 (1992).

10. See, e.g., the 1910 dissenting opinion of Luis M. Drago in the *North Atlantic Coast Fisheries Case* (U.K. v. U.S.), reprinted in SCOTT, THE HAGUE COURT REPORTS 199-200 (1916); III GIDEL, LE DROIT INTERNATIONAL PUBLIC DE LA MER 653-54 (1934); Historic Bays, U.N. Doc. A/CONF.13/1, para. 43, reprinted in 1 U.N. Conference on the Law of the Sea, Official Records 8, U.N. Doc. A/CONF.13/37.

11. 15 U.S.T. 1606, 1610; T.I.A.S. No. 5639. Article 13 provides that "if a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-tide line of its banks."

12. 57 Am. J. Int'l L. 403-04 (1963); 4 WHITEMAN 342-43. The United Kingdom (on Dec. 26, 1961) and the Netherlands (on June 26, 1962) also protested the Declaration for the same reasons. 4 WHITEMAN 343. Previously, on March 16, 1908, the United Kingdom had protested Uruguay's claim to treat the River Plata as territorial waters. PRESCOTT, MARITIME AND POLITICAL BOUNDARIES OF THE WORLD 51 & 313 (1985) [hereinafter PRESCOTT] also criticizes this line as an "extreme claim".

13. American Embassy Canberra delivered the note on April 10, 1991 to the Department of Foreign Affairs and Trade. American Embassy Canberra telegram 02400, April 10, 1991. Australia's claim to these bays was made in a March 19, 1987 proclamation by the Governor-General published in the Commonwealth Gazette No. S 57, Mar. 31, 1987, at 2-4, 11 Aust. Y.B. Int'l L. 266 (1991). The Government of Australia, in response to a request from the United States for information as to the basis of these claims, provided the Department a copy of a February 1986 Report of the Commonwealth/South Australia Committee on the "South Australia Historic Bays Issue". This report was analyzed in talking points provided the Embassy, as follows:

We note that while the Joint Committee was charged with considering the claim by South Australia that ten of its bays be considered historic bays or historic waters of Australia, only three were so ultimately considered. Two were judged to be mere curvatures, three were juridical bays, and two of the bays were not historically part of South Australia. Lacedpede Bay, although not stated to be within the terms of reference, was also found to be a historic bay of Australia.

We note that the report itself acknowledges that the international legal validity of these four claims is only "probable" and identifies some contrary evidence.

The report bases the origin of the claims in 1836 Letters Patent by the Crown establishing the Province of South Australia, which included "all and every the Bays and Gulfs thereof."

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The Report further suggests that this claim “would have been known or should have been known, to all the nations then represented at the Palace of St James” and that no protests were made then or later.

A generalized claim to “all” bays and gulfs as forming part of the new Province of South Australia, coupled with persistent failure of the Government of Australia to identify the particular bays claimed as historic when the opportunity arose several times in the 20th Century, does not, we believe, rise to the level of an “open and notorious” claim.

We note that the Report provides no evidence that, until the early 1980s, any of these bays were ever specifically mentioned in any listing of the historic bays of Australia.

With regard to the attitude of foreign states to the claim, the Commission relied on the views expressed in the 1962 UN Secretariat study on the juridical regime of historic waters, that the mere absence of protest is sufficient circumstances to establish acquiescence.

On the other hand, the United States has been of the view that acquiescence in a historic claim cannot be found in the mere absence of opposition to the claim. Rather the United States considers that there must be an actual showing of acquiescence, i.e., a failure to protest what is clearly known to a foreign State as a historical claim. This burden has not been met in the case of these four bays where the historic nature of the claim to those four bays was, I must note, never made public before the early 1980s.

Concern is expressed in the Report [paragraph 24] that if the historic status of these bays was not accepted internationally, there would be areas of high seas within what are, for domestic Australian purposes, internal waters.

We note that the United States had a similar situation in the Gulf of Mexico, where the waters of the States of Texas and Florida extend nine nautical miles seaward. As you know, until 1988 the United States [like Australia] claimed only a 3 nautical mile territorial sea. Hence the waters between 3 and 9 miles offshore of Texas and the West Coast of Florida were high seas internationally yet belonged to those States.

The extension of our territorial sea to 12 nautical miles has removed that long standing anomaly for international purposes. We assume the same result has occurred since 20 November 1989 when Australia extended its territorial sea to 12 nautical miles.

In support of the claim to these four bays, the report adduces evidence of economic activity having occurred.

We note, however, that Australia claims a 200 mile exclusive fishery zone, and that in our view Australia would be entitled to claim a 200 nautical mile exclusive economic zone. In our view, the EEZ provides an adequate avenue for protecting economic interests.

Hence, my Government is of the view that, with the increased coastal State maritime jurisdiction now permitted under customary international law reflected in the 1982 United Nations Convention on the Law of the Sea and other rules of international law reflected therein, no new claim to historic bay or historic waters is needed to meet resource and security interests of the coastal State.

State Department telegram 111637, Apr. 6, 1991. See also BOUCHEZ, *THE REGIME OF BAYS IN INTERNATIONAL LAW* 228-29 (1964) [hereinafter BOUCHER]; PRESCOTT, *AUSTRALIA'S MARITIME BOUNDARIES* 58, 70-73 (1985); and PRESCOTT, at 61.

14. The text of this agreement may be found in IV FBIS Asia & Pacific, July 9, 1982, no. 132, at K3-K4.

15. United States Mission to the United Nations in New York Note dated June 17, 1987, reprinted in U.N. LOS BULL. No. 10, Nov. 1987, at 23 and U.N. Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Current Developments in State Practice No. II*, at 86 (U.N. Sales No. E.89.V.7, 1989) [hereinafter U.N. Current Developments No. II]. Thailand and Singapore protested this claim (and a claim to the airspace over these waters made by Vietnam in a statement dated June 5, 1984, U.N. Doc. A/39/309, annex) in notes to the Secretary-General of the United Nations reprinted in U.N. Office of the Special Representative of the Secretary-General for the Law of the Sea, *The Law of the Sea: Current Developments*

in State Practice 147 (U.N. Sales No. E.87.V.3, 1987) [hereinafter U.N. Current Developments No. I] (Thailand, U.N. Doc. A/40/1033), and in U.N. Current Developments No. II, at 84-85 (Singapore, U.N. Doc. A/41/967 of Dec. 15, 1986). Singapore and Thailand also stated the agreement is devoid of any legal effect since "the so-called Government of the Peoples' Republic of Kampuchea does not represent" Kampuchea. *Id.* The Federal Republic of Germany protested Vietnam's claim in June 1984. See PRESCOTT, at 212-30.

16. Article 8 of the Indian Maritime Zones Act No. 80, 1976, which may be found in United Nations Legislative Series, National Legislation and Treaties Relating to the Law of the Sea, U.N. Doc. ST/LEG/SER.B/19, at 52 (1980) [hereinafter U.N. Legislative Series B/19]. The Notice of January 15, 1977 related to Act No. 80 and Law No. 41 of June 1, 1979, may be found at 16 Indian J. Int' L. 557-62 (1976), and SMITH, EXCLUSIVE ECONOMIC ZONE CLAIMS 222-25 (1986) [hereinafter SMITH EEZ CLAIMS]. In June 1974, India and Sri Lanka signed an agreement on the boundary in historic waters between their two countries. It has been said that the question of historicity of Palk Bay was resolved in *Anna kumar Pillai v. Muthupayal*, Appellate Criminal Division, Indian High Court, Madras (H.C.) 1903-04, when both Sri Lanka (Ceylon) and India were under U.K. administration. The suit involved rights to chank beds and pearl grounds in Palk Bay and the adjacent Gulf of Mannar (Manaar). According to the decision, Palk Bay was "landlocked by His Majesty's dominions for eight-ninths of its circumference ... [and] effectively occupied for centuries by the inhabitants of the adjacent districts of India and Ceylon respectively." See JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 14-16 (1927); Limits in the Seas No. 66, Historic Water Boundary: India-Sri Lanka (Dec. 12, 1975), at 3; and PRESCOTT, at 61.

17. State Department telegram 128220, May 9, 1983; American Embassy New Delhi telegram 09947, May 16, 1983.

18. Presidential Decree No. 816 of April 26, 1977, reprinted in 2 WESTERN EUROPE AND THE DEVELOPMENT OF THE LAW OF THE SEA, ITALY 1912-1977, Doc. L.26.4.1977, at 147-51 (F. Durante & W. Rodino eds. 1979).

19. State Department telegram 249145, Aug. 23, 1984. The United Kingdom has stated that the Italian claim to the Gulf of Taranto as internal waters "is not consistent with our interpretation of the 1958 Geneva Convention on the Territorial Sea." 424 H.L. (5th Ser.) 367, Oct. 13, 1981 (written answer by Lord Carrington), reprinted in 52 Brit. Y.B. Int'l L. 465 (1982). See Ronzitti, *Is the Gulf of Taranto an Historic Bay?*, 11 Syracuse J. Int'l L. & Com. 275 (1984) (Taranto not a historic bay); Ronzitti, *New Criticism on the Gulf of Taranto Closing Line: A Restatement of a Different View*, 12 *id.* 465 (1986); Caffio, *Baia storiche a confronto*, Rivista Marittima, Nov. 1991, at 79-92 (foreign submarine transited Gulf of Taranto submerged on Feb. 24, 1985), State Department translation LS No. 138696; Caffio, *Il Golfo di Taranto come baia storica*, Rivista Marittima, 1986, II, at 73.

20. U.N. Legislative Series B/18, at 26-27; Libyan Embassy, Washington, D.C. Note dated Oct. 11, 1973, State Department File POL 33 Gulf of Sirte 019435. The Libyan claim is carefully examined in Spinatto, *Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra*, 13 Ocean Dev. & Int'l L.J. 65 (1983); Francioni, *The Status of The Gulf of Sirte in International Law*, 11 Syracuse J. Int'l L. & Com. 311 (1984); Blum, *The Gulf of Sidra Incident*, 80 Am. J. Int'l L. 668 (1986); Neutze, *The Gulf of Sidra Incident: A Legal Perspective*, U.S. Nav. Inst. Proc. at 26-31 (Jan. 1982); and Parks, *Crossing the Line*, U.S. Nav. Inst. Proc. at 41-43 (Nov. 1986).

21. 1974 DIGEST 293.

22. United States Mission to the United Nations in New York Note to the Secretary-General of the United Nations, dated July 10, 1985. The United Nations transmitted this note to the permanent missions in New York on July 10, 1985, as document NV/85/11, and subsequently published it in U.N. LOS BULL., No. 6, Oct. 1985, at 40.

Many other nations also reject Libya's claim to the Gulf of Sidra, including Australia (11 Aust. Y.B. Int'l L. 264-66, June 9, 1982; 10 Aust. Y.B. Int'l L. 405-06, Aug. 25, 1981; Hayden press conference in Brisbane, March 26, 1986), France (FBIS Western Europe, Mar. 26, 1986, at K1), Federal Republic of Germany (FBIS Western Europe Mar. 26, 1986, at J1), Italy (1976 Italian Y.B. Int'l L. 422, 1985; *id.* 246-47, 1986-87; *id.* 392-93), Norway (FBIS Western Europe, Apr. 7, 1986, at P3-P4); Spain (FBIS Western Europe, Mar. 26, 1986, at n. 1); and the United Kingdom and other EC nations (57 Brit. Y.B. Int'l L. 579, 580, 582, 1987). PRESCOTT, at 298 strongly rejects this claim.

Only Syria, Sudan, Burkina Faso (formerly Upper Volta), and Romania have publicly recognized the claim. U.N. Doc. S/PV.2670, at 12 (1986) (Syria); Foreign Broadcast Information Service (FBIS) Daily Report, Middle East & Africa, March 27, 1986, at Q5 (Sudan); *id.*, Dec. 13, 1985, at T1 (Burkina Faso); FBIS Daily Report, Eastern Europe, Mar. 27, 1986, at H1 (Romania).

23. DEP'T STATE BULL., Feb. 1987, at 69-70. The GIST also noted the prior history of United States responses to attempts by North African States to restrict navigation:

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Barbary Coast history: This is not the first time that the U.S. has contended with navigational hindrances imposed by North African states. After the American Revolution, the U.S. adhered to the then common practice of paying tribute to the Barbary Coast states to ensure safe passage of U.S. merchant vessels. In 1796 the U.S. paid a one-time sum (equal to one-third of its defense budget) to Algiers, with guarantees of further annual payments. In 1801, the U.S. refused to conclude a similar agreement with Tripoli, and the Pasha of Tripoli declared war on the U.S. After negotiations failed, the U.S. blockaded Tripoli; in the autumn of 1803 Commodore Edward Preble led a squadron, including U.S.S. *Constitution* ("Old Ironsides") to the Mediterranean to continue the blockade. Shortly after the squadron arrived off Tripoli, a U.S. frigate, the *Philadelphia*, ran aground and was captured. Lt. Stephen Decatur led a team into Tripoli harbor and successfully burned the *Philadelphia*. In June 1805, the Pasha agreed to terms following a ground assault led by U.S. Marines that captured a port near Tripoli. In 1810, Algiers and Tripoli renewed raids against U.S. shipping and in 1815 Commodore Decatur's squadron caught the Algerian fleet at sea and forced the Dey of Algiers to agree to terms favorable to the U.S. Decatur then proceeded to Tunis and Tripoli and obtained their consent to similar treaties. A U.S. squadron remained in the Mediterranean for several years to ensure compliance with the treaties.

24. Panama Law No. 9 of Jan. 30, 1957, published in the *Gaceta Oficial* of April 24, 1956, may also be found in *ATLAS OF THE STRAIGHT BASELINES* 44 (Scovazzi ed., 2d ed. 1989) [hereinafter Scovazzi, ed.]. Colombia and Costa Rica, in their agreements with Panama delimiting their maritime boundaries, did not "object" to Panama's historic bay claim. See Article III of these 1976 (Colombia) and 1980 (Costa Rica) agreements, translations and analyses of which appear in *Limits in the Seas* Nos. 79 (1978) and 97 (1982) respectively.

25. American Embassy Panama dispatch 141, Oct. 3, 1956, forwarding a copy of Note 199 of Sept. 28, 1956 to the Panama Foreign Office, State Department File No. 397.022-IA/10-356 XR719.022. The U.S. objection was repeated in *demarches* made February 3 and 4, 1988 by the Embassy to Foreign Ministry and other officials in Panama City. American Embassy Panama telegram 1438, Feb. 5, 1988; State Department telegram 397809, Dec. 24, 1987.

26. 4 WHITEMAN 250-51.

27. See 4 WHITEMAN 251-57 for an exchange of notes on the status of Peter the Great Bay, including the U.S. Notes of Aug. 12, 1957 and Mar. 6, 1958, as well as protests by Japan (1958), Great Britain (1957), France (Oct. 11, 1957), Canada and Sweden (Dec. 9, 1957), as well as the Federal Republic of Germany (Feb. 5, 1958) and the Netherlands (Oct. 31, 1957); see also 2 *Japanese Ann. Int'l L.* 213-18 (1958), 62 *RGDIP* 63, 159-62 (text of U.S., Japanese and French protests), 7 *Int'l & Comp. L.Q.* 112-13, 1957-1958 Y.B. Dutch Ministry of Foreign Affairs 298-300, and BUTLER, *THE SOVIET UNION AND THE LAW OF THE SEA* 110 (1971).

28. American Embassy Moscow Note No. 86/82 dated Aug. 2, 1982. State Department telegram 212128, July 30, 1982; American Embassy Moscow telegram 09344, Aug. 3, 1982. The Soviet Note read as follows:

On May 3 of this year, at 01 hours 15 minutes Moscow time, the American naval vessel "Lockwood," bow number FF-1064, violated the state maritime boundary of the USSR in the Far East at a point with the coordinates 42 degrees 21 minutes 6 seconds and 132 degrees 21 minutes 6 seconds E., and remained inside the territorial waters of the USSR until 10 hours 30 minutes. The above-mentioned vessel not only failed to react to the demands of Soviet coast guard and naval vessels to leave the territorial waters of the USSR at once, but also took a number of provocative actions, such as signalling its intentions to fire missiles, and sent up a helicopter, which made flights in Soviet airspace.

All this constitutes a flagrantly illegal action, and must be regarded as a dangerous, deliberate provocation.

In expressing its vigorous protest over the violation of the state maritime boundary of the USSR by an American warship, the Ministry of Foreign Affairs demands that the U.S. authorities take appropriate measures to prevent such occurrences in the future. The U.S. side should be aware that it will bear all responsibility for the possible consequences of further incidents of this nature.

Soviet Ministry of Foreign Affairs Note No. 30/dusa of May 4, 1982, to American Embassy Moscow. State Department Language Services translation no. 118568, File No. P86 0014-0060.

29. *Aide memoire* from the Soviet Ministry of Foreign Affairs to American Embassy Moscow, dated July 21, 1964, American Embassy Moscow telegram 222, July 21, 1964.



30. American Embassy, Moscow *aide memoire* to the Soviet Ministry of Foreign Affairs dated June 22, 1965, State Department File No. USSR POL 33 R. See *infra*, Chapter XI, for the diplomatic correspondence regarding transit rights in the Northeast Passage.

31. The November 12, 1982 declaration of Vietnam may be found in U.N. Doc. A/37/682-S/15505, Nov. 30, 1982 and U.N. Current Developments No. 1, at 143-44.

32. U.S. Mission to the United Nations Note to the Mission of the Socialist Republic of Vietnam to the United Nations in New York dated Dec. 6, 1982, State Department telegram 334675, Dec. 1, 1982. France and Thailand also protested this claim in notes to the Secretary-General of the United Nations which are reprinted in U.N. Current Developments No. 1, at 146 (France, Dec. 5, 1983) and 147 (Thailand, Nov. 22, 1985, originally circulated as U.N. Doc. A/40/1033 of Dec. 12, 1985). On November 28, 1985 China issued a statement denying any prior maritime delimitation in the Beibu Gulf (Gulf of Tonkin) and restated its claim to the Xisha (Paracels) and Nansha (Spratly) Islands. *Id.* at 145 (originally circulated as U.N. Doc. A/37/682-S/15505 of Nov. 30, 1982). China reasserted these claims in its 1992 Territorial Sea Law, U.N. LOS BULL., No. 21, Aug. 1992, at 24.

33. Limits in the Seas No. 99, Straight Baselines: Vietnam 9-10 (1983).

34. *United States v. Maine et al. (Rhode Island & New York Boundary Case)* 469 U.S. 504, 526 (the portion of Long Island Sound west of the line between Montauk Point on Long Island and Watch Hill Point in Rhode Island). See n. 3 *supra*.

35. See 4 *WHITEMAN* 235. In 1965 the Supreme Court declined to consider the claim that Monterey Bay, California, is historic, noting that it met the 24-nautical mile closing line test. *United States v. California*, 381 U.S. 139, at 173. See further 4 *WHITEMAN* 238-39, 241 & 247-48.

36. Presidential Decree No. 2393, June 17, 1940, reprinted in U.N. Laws and Regulations on the Regime of the High Seas, U.N. Doc. ST/LEG/SER.B/1, at 80 (U.N. Sales No. 1951.V.2 (1951)).

37. Art. 2, Act No. 3342, July 13, 1952, Concerning the extent of the Territorial Waters of the Dominican Republic, as transl. in U.N. Laws and Regulations on the Regime of the Territorial Sea, U.N. Doc. ST/LEG/SER.B/6, at 11 (U.N. Sales No. 1957.V.2 (1956)).

38. Diplomatic Note from the American Embassy Cairo of June 4, 1951, may be found in 7 Rev. Egypt. de Droit Int'l 94 (1951). The British Embassy at Cairo protest of May 23, 1951 may be found in *id.* at 91-94. The Egyptian Royal Decree concerning the territorial waters of the Kingdom of Egypt of January 15, 1951, may be found in 6 *id.* 175-77 (1950). See also U.N. Secretariat Memorandum, Historic Bays, U.N. Doc.A/CONF.13/1 (1957), reprinted in 1 U.N. Conference on the Law of the Sea, Official Records 6, paras. 24-26 (1958); BOUCHEZ, at 220-221; and Scovazzi ed. at 26. Presidential Decree No. 27/90, Jan. 9, 1990, concerning Egypt's baselines, and the *note verbale* of Egypt to the United Nations, May 2, 1990, may be found in translation in the U.N. LOS BULL., No. 16, Dec. 1990, at 3-9.