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Freedom of overflight: a study of coastal State jurisdiction in international airspace

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6.1 CONCLUSIONS

The central research question of this study was: *What jurisdiction does a coastal State have over the operation of the aircraft registered in other States in international airspace adjacent to its coast?* In attempting to answer this question, this study addressed three principal matters, as those that were identified as involving ambiguity in terms of where the balance sits between the rights of the coastal State and the rights of the users of the airspace in the exercise of their freedom of overflight. This chapter will briefly address the main conclusions in the research on each of these matters before presenting, as the focus of the chapter, the overarching conclusions of the study. It will also provide some observations and recommendations based on these overarching conclusions.

6.1.1 Safety zones

Article 60 UNCLOS provides the coastal State with the exclusive right to construct, regulate and use artificial islands, and installations and structures related to the exercise of its EEZ rights or that interfere with those rights, in its EEZ. This exclusive right exists *mutatis mutandis* on the continental shelf. This Article also permits the coastal State to impose safety zones around their maritime constructions, to up to 500 metres from the perimeter of the construction, a distance which may be greater with the approval of the IMO, and which is required to reflect the nature and function of the construction. Within these safety zones the jurisdiction of the State extends beyond that which the coastal State has in the EEZ or continental shelf more broadly, that is, outside the safety zones.

There were three broad matters that were discussed in Chapter 3 relevant to determining jurisdiction of the coastal State over the operation of aircraft in international airspace adjacent to its territorial sea. The *first* is the circumstances in which construction changes the legal status of a feature at sea in terms of shifting the delimitation of national and international airspace. The *second* is whether Article 60 can be interpreted as providing the right to extend safety zones to the airspace over maritime constructions or whether this has developed as a customary international law independently from the regime under UNCLOS. The *third* is, in the case that no such right exists to extend safety zones to the airspace, what rights does the coastal State have, if any, to prohibit, restrict or otherwise manage the overflight of the aircraft of other States in order to facilitate air traffic movement in and out of a maritime construction? This is particularly relevant in the

case a State were to establish an artificial island in its EEZ for the purpose of a civil international airport, which would involve a consistent flow of traffic and therefore a need to impose measures to manage overflight on a sustained basis.

The potentially changing legal status of the sea was addressed in two ways: human modification to natural features beyond the territorial sea and human modification to the coastline of a landmass under the sovereignty of a State in the case that there are resulting changes to the delimitation of the airspace. The first of these discussed a series of cases culminating, most recently, in the *South China Sea Arbitration*, in which it was confirmed that a maritime feature retains its original legal status despite human modification. As a result of this, for example, a low-tide elevation in the EEZ or on high seas, cannot become a natural island through construction and it instead continues to exist in law as a low-tide elevation whilst also becoming an artificial island. This position is significant because it means that a State cannot use a low-tide elevation, or a permanently submerged reef, in order to claim national airspace over a maritime feature that, prior to the construction, did not generate claims to sovereignty. Furthermore, for the purposes of this study, it means that these features are relevant to the discussion on safety zones. The chapter also drew attention to the implication for the delimitation of national, and therefore international, airspace, as a result of human modification within a State's territorial sea. This discussion was raised in the context of its expected increasing relevance in light of rising sea levels as a result of climate change, where coastal construction and even island creation has been undertaken to protect affected communities.

The main body of Chapter 3 considered whether a coastal State may have jurisdiction in the airspace above its maritime construction through there being a right to extend safety zones around those constructions in its EEZ or on its continental shelf to the airspace above them. This chapter first considered the wording of Article 60, particularly Articles 60(4), (5) and (6), which suggest that the safety zones are restricted to the sea itself. This conclusion was reached on the basis of the reference to 'navigation', as opposed to also 'overflight', the reference to 'ships' and not 'aircraft', and to the stipulation regarding the extent of the zones, that is, that it refers to a breadth around them but not to an altitude above them. Despite this, there are instances¹²¹⁰ in which these laws have been interpreted as allowing for the extension of safety zones to the airspace above maritime constructions pursuant to these provisions. This is supported by a teleological interpretation of the laws: they are designed to protect the safety of both the construction and of users of the maritime space operating in the vicinity. On the other hand, the subsequent practice of States in implementing the law into their domestic jurisdiction overwhelmingly supports the literal interpretation of the text of the treaty, in applying only to vessels on the

1210 France, for example, as to which see Section 3.3.2.1, as well as in academic opinion, as to which see Rothwell, discussed in the same section.

surface of the sea. This is furthermore supported by the drafting material to the 1958 provisions on safety zones, which form the basis for the UNCLOS provisions, and the fact that no amendments were made in respect to airspace in the provisions as they were included in UNCLOS. Based on the actions of the US in repeatedly overflying the 'prohibited airspace' above the artificial islands constructed by China in the South China Sea, this study also considered the possibility of the right to establish safety zones in the airspace above maritime constructions becoming customary international law and, in particular, it considered the role of the persistent objector and the development of regional custom, where only a small number of related States engage in the practice. In any case, this analysis was hypothetical as the present set of circumstances does not suggest that the right is forming as customary law.

A State has jurisdiction over the aviation operations themselves that are conducted to and from its maritime construction as a result of Articles 60(1) and (2) UNCLOS. The management of air traffic is governed as it is with any other users of the airspace. In the case that a State constructs an artificial island in its EEZ or on its continental shelf for the purpose of establishing a civil international airport on it, a State would also undoubtedly have jurisdiction over that airport as a result of Articles 60(1) and (2) UNCLOS. The State would not have jurisdiction over the airspace as a result of the construction of the artificial island though. It remains to be seen how States would respond to a proposal by a State to manage the airspace above an airport outside its territory, which would involve sustained use of the international airspace above it. At the least, it would involve amendments to the applicable RANP.

6.1.2 Flight information regions

This matter was examined in the scope of this study slightly differently to the other aspects. Instead of determining whether a coastal State has jurisdiction in international airspace, it considered the scope of the coastal State's jurisdiction in the provision of its ATS, specifically in the context of whether the coastal State is prohibited under international civil aviation law from discriminating against aircraft operating in international airspace within the FIR for which it is responsible. In the absence of an explicit principle of non-discrimination applying to the provision of ATS under Annex 11 to the Chicago Convention, the chapter set out to examine whether there was an implied principle that applied, considering the context of Annex 11 within the broader international civil aviation law framework and the significance of non-discrimination to air navigation aspects in national airspace. The non-discrimination principle appears in the Chicago Convention several times. It is not an overarching principle though, as air transport matters are outside of its scope and, relying on a framework of, mostly, bilateral agreements, they are necessarily discriminatory. On this basis, access to national airspace from the outset is granted on a discriminatory basis.

Furthermore, the principle of non-discrimination, where it applies to air navigation, still leaves States with the discretion to discriminate against aircraft based on their State of registry in some instances. For example, the non-discrimination principle in Article 9(a) applies only to aircraft engaged in scheduled services, while the access to air navigation facilities under Article 15 is subject to the exception in Article 68, that States have the right to designate the routes that any scheduled service may followed. The same right is included in the Transit Agreement in respect to the right of overflight. On this basis, it is difficult to argue that there is an overarching principle of non-discrimination in international civil aviation law which may implicitly apply to navigation in international airspace. In addition, whilst there are safety and economic arguments to be made for non-discrimination in international airspace, as are the purposes of non-discrimination in national airspace, the application of the principle is, in contrast to national airspace, not necessary to avoid discrimination in international airspace. Unlike in national airspace, jurisdiction in respect to air navigation in international airspace is narrowly defined: it is restricted to the provision of ATS, which involves decisions relating to technical and operational matters only for the purpose of safety and efficiency. This involves regulating the operation of air traffic and even, under certain circumstances, imposing temporary measures that restrict the operation of aircraft in certain parts of international airspace. These measures are consistent with the scope of jurisdiction of the coastal States provided that they are imposed for safety or efficiency purposes. Finally, Annex 11, as the legal foundation for the FIR responsibility in international airspace, is adopted by ICAO whose objectives in developing principles of international air navigation include the avoidance of discrimination between contracting States. For a State to carry out its responsibility in international airspace in a discriminatory manner would subsequently also be a breach of the principle of good faith.

6.1.3 Air defence identification zones

Jurisdiction of the coastal State in respect to ADIZs was addressed in terms of prescriptive jurisdiction, or the right to establish ADIZs and thereby impose domestic regulations in the international airspace to which the zone applies, and enforcement jurisdiction, or the right to enforce the regulations in international airspace. As was made clear, even if a State has the right to establish an ADIZ, the zone does not provide the coastal State with enforcement jurisdiction in international airspace. On this basis, the coastal State has no right to act in international airspace in response to an aircraft that does not comply with its ADIZ requirements beyond the rights it has under international law in the absence of the ADIZ. These include, for example, limited circumstances under which a State is permitted to intercept a civil aircraft and, in the case of the use of force, the right to self-defence. This is so also for State aircraft, although there are no codified rules governing the interception of State aircraft and States frequently intercept the State

aircraft of other States. As a consequence, the coastal State has no right in international airspace to act against an aircraft in the case it fails to comply with ADIZ procedures.

ADIZs are presented by coastal States as national security measures. They involve the exercise of prescriptive jurisdiction of the coastal State in international airspace in the case that the zone extends beyond national airspace. The specific procedures that apply to the zone differ between States but in any case, by definition, they involve 'special identification and/or reporting procedures additional to those related to the provision of air traffic services'.¹²¹¹ In determining whether a coastal State has the right to exercise prescriptive jurisdiction in international airspace by way of the establishment of an ADIZ, this study, on the one hand, considered whether there is a permissive rule under international law to serve as a legal basis for the right to establish ADIZs or, in the case that a permissive rule is not necessary, whether the establishment of such a zone is prohibited by international law. It found that there was no permissive rule and that ADIZs are not consistent with freedom of overflight.

In consideration of a permissive rule, four justifications for ADIZs were examined: the right of a State to establish conditions of admission to or departure from its territory based on the interpretation of Articles 11 and 3(c) of the Chicago Convention; the right of self-defence under customary international law, as recognised in Article 51 of the UN Charter; the right of a coastal State to restrict military activities in its EEZ based on the EEZ regime under UNCLOS, or in light of the right under customary international law; and, consideration of whether the right to establish an ADIZ is customary international law.

Regarding a State's right to establish the rules relating to entry and exit of its territory, it necessarily includes obligations that must be fulfilled outside the territory of the State but the identification purpose of ADIZs can be achieved through ATS and the creation of a zone is not a reasonable measure to achieve this purpose. Furthermore, most States apply their ADIZ procedures not just to aircraft entering or exiting their national airspace, but also to aircraft with the intention of remaining in international airspace within the ADIZ. In terms of self-defence, the analysis clearly concluded that both the threat that the right to self-defence is designed to address and the act of self-defence are not those that apply in the case of the establishment of ADIZs.

The right of a State to regulate military activities in its EEZ was discussed in relation to ADIZs as far as the zones are limited to the EEZ boundary and only in terms of its application to military aircraft. In this respect, even if this basis was valid, it would not justify the establishment of ADIZs beyond the boundary of the EEZ or its application to civil aircraft or non-military State aircraft. Many coastal States regulate the military activi-

1211 Chicago Convention, Annex 4 (11th edn, July 2009) 1-1 and Annex 15 (16th edn, July 2018) 1-2. See Section 4.3.2.

ties of other States in their EEZ in some way, including the overflight of military aircraft, although this is controversial and there is no express ground for doing so under UNCLOS. This chapter examined whether the obligation to have due regard for the coastal State's EEZ rights in the zone could be interpreted as encompassing the right to regulate military activities in the EEZ more generally. If the activities associated with the overflight impacted on the coastal State's rights and jurisdiction in the EEZ, this would be justified, as it would be for civil aircraft, but regulating overflight on the basis of national security interests would not fall within the scope of this right. Unlike vessels, aircraft are less likely to interfere with the coastal State's EEZ rights, even when undertaking military exercises. It is difficult to see how ADIZs, which apply to aircraft merely passing through the airspace, could be justified on this basis. On the other hand, the right of a coastal State to regulate the military activities of other States could develop as a customary international law to allow for regulation beyond instances interfering with the EEZ rights of the coastal State. At this stage, this is not the case however.

If a permissible law exists to support the right of the coastal State to establish ADIZs, the crystallisation of it as a customary international law is the most convincing argument, a matter that is reflected in the attention it has garnered in academic discussion. At the same time, there is great variation in State practice and finding that there is sufficiently uniform practice for the purpose of customary international law will depend on where the emphasis is placed on the elements of the establishment of the zones. The variation in practice is reflected in the very general definition of ADIZ provided by ICAO. Furthermore, there seems to be insufficient evidence of *opinio juris* for the purpose of customary international law. State aircraft rarely comply and, whilst civil aircraft tend to do so, discord between States' verbal objections to certain ADIZ and their expectation that their civil aircraft comply, suggests that the intention behind the compliance may have more to do with ensuring the safety of international civil aviation than reflecting a belief that they are bound under international law to meet the requirements.

If the *Lotus* principle stands and coastal States are not required to rely on a permissive rule to exercise prescriptive jurisdiction in establishing ADIZs, they are still not legitimate as they are a violation of freedom of overflight. ADIZs cannot be validly construed as a balance of rights under UNCLOS, either in terms of freedoms of the high seas or in terms of coastal State rights in relation to other airspace users under the EEZ regime. Well-accepted instances of 'restrictions' that are consistent with freedom of overflight are all for one purpose: they facilitate freedom of overflight or the other accepted uses of the maritime space beyond territorial borders. This study also considered the consistency of the zones with international civil aviation law, considering the possible negative safety implications that ADIZs can bring about as a result of adding complexity to the procedures in the airspace. It ultimately found, despite this, that there was no inconsistency with the SARPs that govern the aspects of safety that ADIZs pose a risk to.

6.1.4 Transit and archipelagic sea lanes passage

UNCLOS provides a regime for overflight through international straits and archipelagic waters as a response to, respectively, the extension of the breadth of the territorial sea and the recognition of the concept of the archipelagic State that it codified. The correlating transit passage and archipelagic sea lanes passage ensured that States were still able to freely navigate from one body of the high seas, or the EEZ as was codified at the same time, to another. As explained in the chapter, whilst the right of passage applies to both State aircraft and civil aircraft, it is the former that generally exercises the right and who the passage is primarily designed to facilitate. Like in international airspace, aircraft do not require prior permission to fly through the airspace and the coastal States may not impose their national regulations to the operation of the aircraft; Article 12 of the Chicago Convention applies without exception, as in international airspace. Like in international airspace, the coastal States attempt to exercise greater control over the airspace that is subject to these passage regimes and, as with ADIZs, national security was a concern of States in the drafting process of the transit passage regime. This is demonstrated, for example, in the declarations and reservations that coastal States bordering international straits have with respect to the regime, as well as by the so-called partial designation by Indonesia of its archipelagic sea lanes.

6.1.5 General conclusions and recommendations

6.1.5.1 *Fragmentation of the law governing the use of international airspace*

The law of the sea and international air law are specialised areas of public international law. The contours of both areas are well recorded in treaty law, most notably UNCLOS and the Chicago Convention. They each contribute to the governance of overflight in international airspace. However, there are some areas that are not addressed by either, leaving States to interpret the silence or ambiguity through national legislation to complement the codified law. This was seen throughout this study in terms of the absence of an explicit statement on the application of safety zones to the airspace above maritime constructions and in relation to consideration regarding the legality of ADIZs, neither of which fit squarely within the competence of either authority. ICAO's lack of contribution to the drafting process of UNCLOS at the Third UN Conference on the Law of the Sea, from 1973 to 1982, was recognised in Chapter 1.¹²¹² On the other side, as was addressed in Chapter 3, the UK delegate during the drafting of the Second UN Conference on the Law of the Sea, in 1960, was against explicitly providing the coastal State with the right to extend safety zones to the airspace over

1212 See Section 1.4.

maritime constructions on the basis of it not falling within the scope of the subject matter of the conference. It is difficult to know, as a result of this situation, whether subsequent silence by the IMO in its guidance material on safety zones¹²¹³ in terms of their possible application to airspace, is recognition that they are restricted to the sea or whether it is because it considers this aspect outside its competence relating to the seas and the oceans. Furthermore, like with the regulation of passage through international straits and archipelagic sea lanes, ADIZs are focused on military aircraft, which generally pose a greater risk to national security than civil aircraft. As State aircraft fall outside the scope of the Chicago Convention, they are also outside the competence of ICAO.

These positions present a problem for the development of the law in that States are left to interpret the law without further guidance. Ambiguity in the law will always exist, and States are left to interpret the provisions of treaties in order to apply them in any case. The inclusion of subsequent practice in the application of a treaty as an element of the general rule of interpretation of that treaty in establishing agreement of the parties in its interpretation reflects this fact.¹²¹⁴ At the same time, this is where an authority such as the IMO or the ICAO could play a constructive role in providing guidance on the text of the treaty. This is particularly so in the context of the topic of this study where the interests of coastal States collectively, in extending their jurisdiction into international airspace, are in direct opposition to users of the airspace, that is, State and civil aircraft exercising their freedom of overflight. The risk to freedom of overflight is even greater when justifications for the extension of jurisdiction are based on such broad concepts as 'national security'. A reduction in the fragmentation in the law between the law of the sea and international civil aviation law when it comes to governance of international airspace would help to alleviate this 'gap' in the law. On matters where this is possible, joint guidance material issued by the IMO and ICAO would help States to interpret the provisions of UNCLOS and the Chicago Convention.

6.1.5.2 *ATS providers as the authority over international airspace*

Freedom of overflight is not defined in international law and what it entails is determined by the rights of other users of the maritime space. In the maritime areas adjacent to a State's territorial sea, the rights of the coastal State are relevant in determining what freedom of overflight involves. ICAO stated, upon the adoption of UNCLOS, that the EEZ regime has no impact on the rights of airspace users but coastal States have, nevertheless, sought to extend their jurisdiction over the operation of aircraft in international airspace, at times justifying it based on their rights under UNCLOS, and

1213 Considering, specifically, IMO Resolution A.671(16) 'Safety Zones and Safety of Navigation Around Offshore Installations and Structures' (19 October 1989) (see Section 3.2.1.2).

1214 Vienna Convention on the Law of Treaties, Article 31(3)(b), as discussed in 3.3.2.2.

at times relying on legal bases under international civil aviation law and public international law more broadly. There is no doubt that freedom of overflight, as a broad principle, is designed to evolve to fit the interests of States as their use of the maritime space develops. This study set out to determine where the balance sits at present in relation to areas that were identified as being ambiguous. It concluded, based on the areas it examined, that freedom of overflight is still narrowly defined, that is, the international community is reluctant to acknowledge the exercise of jurisdiction by States in international airspace. The exercise of jurisdiction by coastal States is presently restricted to the facilitation of the exercise of the freedom of overflight and achieving a balance between the freedom of overflight and other maritime freedoms.

Coastal States have prescriptive jurisdiction in international airspace within their FIRs in order to fulfil their responsibility for carrying out the provision of ATS in the area. Their responsibilities have their legal foundation in Annex 11 of the Chicago Convention and the RANP, which is established pursuant to the Annex. States that accept to provide ATS in international airspace may do so in a manner consistent with this Annex over its national airspace but again, this is restricted to circumstances in which the State deems it essential to enable it to fulfil its responsibility.¹²¹⁵ In any case, the provision of ATS is for the purpose of the safety and efficiency of international civil aviation, thereby contributing to the facilitation of freedom of overflight.

A State may establish a danger area in international airspace for the purpose of notifying aircraft of potential safety risks resulting from use of the maritime area. These danger areas are generally established in coordination with the ATS authority responsible for the FIR, but this is not an obligation when it is deemed by the State performing the activity that civil aircraft will not be at risk as a result of the absence of coordination.¹²¹⁶ In addition to the requirements that the dimensions of a danger area are defined and that it is for a specified period of time, a State is not permitted to restrict or prohibit aircraft from international airspace by way of establishing a danger area. In practice though, a danger area will likely result in aircraft avoiding the affected airspace, on account of the risk to safety. Despite this, danger areas are accepted as being consistent with freedom of overflight and even more so, they are in some cases part of the corresponding obligation in exercising the freedom. Aerial military activities are part of freedom of overflight and in exercising this freedom, as with all freedoms, States have a due regard obligation under Article 87(2) to the interests of other States in carrying out their freedoms, whether freedom of overflight or otherwise. Danger areas may of course be established to protect international civil aviation from non-aviation related maritime activities, but once again, the danger area is required as a result of the due regard obligation and further-

1215 See Section 2.7.2.2.1.3.

1216 See Section 2.6.5.

more, its establishment facilitates international civil aviation by ensuring all aircraft are aware of safety risks.

Having said this, this study sees the possible development of customary international law in two areas as providing a significant shift in the concept of freedom of overflight if they were to crystallise. The first is the right of a coastal State to regulate military activities in its EEZ and the second is the right of a State to establish an ADIZ. Clear opposition to the former by the US provides a strong voice against the development of the law, positioning it as being in conflict with the freedom of overflight and navigation in the EEZ, but many States impose the practice, restricting the freedom of both navigation and overflight for national security purposes. These matters require assessment as they evolve.

Finally, a shift in the mentality of governments away from the idea of FIRs being linked to sovereignty, and towards prioritizing them for the sole purpose of the provision of ATS – the purpose for which they exist – would assist in achieving the highest level of safety and efficiency for international civil aviation. This is particularly important over international airspace considering, as has been examined throughout this study, coastal States at times demonstrate a willingness to assert jurisdiction without a clear legal basis in international law.

6.1.5.3 Environmental implications protecting freedom of overflight

Environmental law may serve indirectly to protect freedom of overflight by restricting the establishment of larger and more permanent maritime constructions. Whilst safety zones do not extend to the airspace above maritime constructions, the construction of airports or launch pads beyond the territorial sea, as expected in future, will require the establishment of danger areas in the airspace, at the very least. As has been identified, freedom of overflight at present is understood to be consistent with temporary danger areas that are restricted in their dimensions in relation to what is reasonable for the activity being undertaken. Furthermore, aircraft cannot be prohibited from the airspace: the danger area serves merely as a safety warning to other airspace users. At the same time, recognising that freedom of overflight is an evolving concept and that coastal States tend to attempt to expand their jurisdiction in the maritime areas adjacent to their national airspace, this position may undergo a shift. If, as identified in Chapter 3,¹²¹⁷ a State wishes to construct a civil international airport beyond its territorial sea, a danger area would not be appropriate to ensure the safety of aircraft operating in the area and the State would need to negotiate with other States to establish jurisdiction for exclusive use of the airspace up to a certain altitude over the airport and in the airspace in its vicinity. This also applies to the launch of rockets if the platform was to be used on a regular basis.

¹²¹⁷ See Section 3.4.2.

Closer examination on how this could be facilitated considering a balance of rights between the coastal State and users of international airspace in the case of such maritime constructions requires further attention.

States are required under Article 192 UNCLOS, among other environmental obligations, 'to protect and preserve the marine environment'. The Tribunal in the *South China Sea Arbitration* noted that China had, through its island building activities, acted in violation of this provision, along with several other environmental protection provisions under UNCLOS. ITLOS similarly ordered Singapore not to engage in land reclamation that would result in significant harm to the marine environment.¹²¹⁸ These regulations restrict the ability of a State to establish maritime constructions, certainly on a large and permanent scale, and may therefore serve, inadvertently, to minimise the subsequent jurisdiction over international airspace.

6.1.5.4 *Political considerations and the limitations of international law*

The circumstances discussed in this study are highly political, as was established in Section 1.2.2, and reiterated throughout. National security unambiguously plays a key role for States in the imposition of ADIZs and in the desire to restrict traffic through international straits and archipelagic sea lanes. It is also a motive for a State to restrict overflight of maritime constructions where these constructions are part of a State's critical infrastructure, from oil rigs to airports. With reference to the notion of 'creeping jurisdiction' as raised in Chapter 1, States are also driven by a desire to achieve greater control over the maritime domains adjacent to their coasts. State aircraft are often the targets of coastal State jurisdiction in international airspace both because they pose a greater risk to national security and because it is with State – military – aircraft that other States challenge the overflight restrictions and requirements imposed by coastal States. In the case of transit passage and archipelagic sea lanes passage the regimes are designed to facilitate, primarily, the movement of State aircraft. Each of these considerations contributes to the politicised context in which the legal questions that have been addressed throughout this study are placed.

At a fundamental level, the involvement of State aircraft means that, insofar as international civil aviation is unimpeded, the matter falls outside of ICAO's normative powers. Even where international civil aviation is concerned, however, such as in the case of ADIZs, ICAO has not taken a position on their legality under international law. At the same time, ICAO appears to have contributed to the timely reversal of the prohibition of Qatari-registered aircraft from international airspace within the FIRs of its neighbouring States, with the change occurring soon after consultations took place. The law does not exist in a vacuum though and so violations

1218 *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of October 2003, ITLOS Reports 2003, p. 10, p. 28 (see Section 3.2.2 (n 542)).

of the law with strong political undercurrents tend not to be followed by unequivocal statements from ICAO clarifying the law.

On the other hand, freedom of overflight for both State aircraft and civil aircraft forms part of the law of the sea, being codified in UNCLOS. Section 6.1.5.1 addressed the issue of fragmentation and the fact that many of the legal questions addressed in this research sit on the boundaries of international civil aviation law and the law of the sea. In some respects though, the circumstances impact international civil aviation but the legal questions are more squarely positioned within the law of the sea. For answers to these questions under UNCLOS, adjudication of a dispute before ITLOS would be the ultimate procedure. The reach of this mechanism is restricted though, considering that key States such as the US and Turkey are not State parties to UNCLOS.¹²¹⁹ Until, or if, clear statements are issued on these legal questions by the competent international organs, and even perhaps in spite of this, the interests of coastal States will continue to govern practical, and even legal, developments in this area.

Freedom of overflight is a fundamental principle in international airspace. At the same time, the interests of coastal States in extending their jurisdiction at sea, as considered in this study, are in direct opposition to the enjoyment of this freedom by other States. The practices of coastal States must, as a result, be closely scrutinised by the international community as to their legitimacy under relevant international law, including international civil aviation law and the law of the sea.

¹²¹⁹ Statute of the International Law of the Sea Tribunal (UNCLOS, Annex VI), Article 20.