

## American Security and Law of the Sea

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*With the election of President Barack Obama and renewed interest in the Law of the Sea Convention inside the United States, this article pulls from obscurity the key U.S. declarations, understandings, and conditions of ratification to the Treaty, considers their context and meaning for U.S. security interests, and helps to place them into the lexicon of oceans law and policy that informs the greater dialogue of international security and strategy.*

**Keywords** law of the sea, maritime security, freedom of navigation, oceans policy, oceans law, exclusive economic zone, EEZ

### Introduction

The analysis in this article provides a commentary on the significance of U.S. interpretations of the law of the sea affecting American security interests. Upon becoming a party to the United Nations Convention on the Law of the Sea (LOS Convention),<sup>1</sup> states may issue interpretative declarations, understandings, and conditions (hereinafter, statements) concerning their interpretation or understanding of the provisions of the Treaty. Consequently, the United States has developed a number of such statements.<sup>2</sup> This article will explore the scope and context of the statements concerning national security that accompany the instrument of accession to the LOS Convention and to the ratification of the Agreement Relating to the Implementation of Part XI of the Convention.<sup>3</sup> Along with President Ronald Reagan's Oceans Policy Statement in 1983,<sup>4</sup> the statements represent landmark assertions on the intersection of U.S. oceans policy and international security and world order, and will acquire authoritative weight with U.S. membership in the LOS Convention.

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The U.S. statements were developed with broad support among career experts and military officers within the Pentagon, and throughout the executive branch and a bipartisan cross-section of the Senate. The provisions contained in the statements reflect the input of critical ocean industries, such as telecommunications and energy, and oceanographic scientists and scholars. Although the statements were prepared during a Republican administration, they reflect long-standing U.S. government positions and have significant acceptance across the political aisle, enjoying broad and bipartisan support. The statements are the best point of departure for further examination by researchers and practitioners worldwide who seek to better understand the U.S. perspective on the Treaty and the implications of the LOS Convention for American national security as Washington turns toward the belated business of becoming a state party to the Convention. It is with some curiosity, then, that the U.S. statements have received a near total lack of attention by the media, academicians, or diplomats. With the election of President Barack Obama and renewed interest in the Convention inside the United States, the goal of this article is to pull the statements from obscurity, consider their context and meaning for U.S. security interests, and to help to place them into the lexicon of oceans law and policy that informs the broader dialogue of international security and strategy.

### **Developing the American Perspective**

As the 111th Congress confronts a variety of pressing domestic and international issues, the Senate will once again turn toward considering rendering advice and consent for U.S. accession to the LOS Convention and ratification of the 1994 Agreement. The Convention and the Agreement represent the seminal authority for the world's oceans, codifying essential frameworks for governing the seas, which comprise 70% of the earth's surface and serve as the highways for more than 80% of transnational commerce. Accession to the Convention by the United States is the most prominent and pressing maritime issue for the new Congress because the Treaty promotes every essential U.S. oceans interest in a broadly accepted global framework. During the negotiations, the United States repeatedly maintained that it was critically important that the Convention should promote global mobility and maneuverability for vessels and aircraft of the armed forces, and facilitate civil merchant shipping and transnational trade. Finally, becoming a party to the Convention now helps the United States fortify, and in some cases recover, its role as a leader in the development of oceans law and policy.

Both within Democratic and Republican presidential administrations, U.S. government officials, industry group representatives, and senior officers of the armed forces have forcefully and persuasively testified as to the merits of the LOS Convention for the United States.<sup>5</sup> The Treaty is strongly in the American national interest: promoting the requirements of a global security presence, providing a framework for preservation of maritime mobility and maneuverability, creating a system for facilitating transnational trade and promoting economic prosperity, and creating a regime of binding dispute resolution and conflict avoidance that is a cornerstone for building a stable legal order for the oceans. Indeed, a comprehensive case for U.S. accession already has been made most eloquently by Ambassador John Norton Moore and retired Rear Admiral William L. Schachte in a paper that has been widely distributed on Capitol Hill.<sup>6</sup>

The Navy and the most senior U.S. military leadership among all of the armed forces also strongly support the Treaty, including the Chairman and Vice Chairman of the Joint Chiefs of Staff, the Chief of Naval Operations, the Commandant of the Marine Corps,

the Chief of Staff of the Army, the Chief of Staff of the Air Force, and the Commandant of the U.S. Coast Guard.<sup>7</sup> The focus of this article is to complement the work of the many American proponents of the Convention, supplementing the public testimony by taking a different approach from their well-supported and concisely advanced case for U.S. acceptance of the Treaty, and instead turn toward unpacking the statements associated with American national security equities that will accompany the U.S. instrument of accession and ratification. Beyond the domain of customary international law, the statements will serve as original evidence of U.S. state practice under the Convention and offer a glimpse into the future of how the United States will conduct its affairs as a state party.

The Convention was adopted in 1982. After resistance by the United States and other countries comprising 60% of world gross domestic product to the deep seabed regime in the Convention (Part XI)—and following more than a decade of renegotiation and the demise of the Soviet Union—key parts of the Convention were amended with the adoption of the 1994 Implementing Agreement. The Implementing Agreement pertaining to Part XI transformed the rules on seabed mining from a socialist model to a market-oriented model, thereby opening the way for U.S. accession to the Convention. The Treaty now has 156 state parties; the European Community is also a party.<sup>8</sup> The most comprehensive treaty in existence after the UN Charter, the Convention is an epochal agreement on the order of the Treaty of Westphalia. As a constitution for the world's oceans,<sup>9</sup> the Convention's 300-plus articles, "... provides a framework for the allocation of jurisdiction, rights and duties among states that carefully balance the interests of States in controlling activities off their own coasts and the interests of all states in protecting the freedom to use the ocean spaces without undue interference."<sup>10</sup>

Support for U.S. participation in negotiations to achieve agreement on a multilateral treaty on the international law of the sea dates to the Ford administration. In its current form, the LOS Convention and Implementing Agreement attracted extensive support throughout the Reagan, Clinton, and Bush administrations, and in particular from the Department of State, the U.S. Navy, and the U.S. Coast Guard. The Treaty also was widely supported by a diverse range of environmental, shipping, fishing, energy, and telecommunications lobbies—interests that rarely align. Treaty opponents have appeared numerous times to express the view that the Convention is flawed, raising concerns about the interpretation of specific provisions and voicing opposition to large multilateral institutions, and especially to agreements produced by the United Nations. Over the past 15 years, consideration of the Convention within the United States has sparked passionate interest and spirited political debate, and sometimes no small amount of acrimony.<sup>11</sup> Despite widespread support, U.S. accession has remained a contentious issue since 1982. After the amendments fixed the seabed mining provisions in 1994, a long line of senior government and industry supporters have rejected criticism of the Treaty, contending that the Convention is the best means of serving the entire spectrum of U.S. interests in the oceans.

Like all multilateral accords, the LOS Convention reflects compromises inherent in obtaining broad agreement; there is a certain quality of constructive ambiguity in some of the terms. As a human undertaking, the results of 9 years of negotiations produced an imperfect document. The balance of U.S. interests, however, decisively falls in favor of U.S. participation. The Convention, for example, reflects the fundamental U.S. interest in global mobility and maneuverability. On June 29, 2000, Admiral Jay L. Johnson, at the time serving as Chief of Naval Operations, wrote a letter to the Chairman of the Senate Foreign Relations Committee (SFRC), in which he stated:

I would like to bring to your attention two alarming trends that adversely affect our navigational freedoms that are directly related to our failure to accede to

the Convention. First, is the erosion of U.S. influence internationally in the development of the law of the sea. Secondly, and perhaps more alarming, is the emboldening of those who seek to fundamentally change the balance between our interests as a coastal nation and the role of the United States as the world's leading maritime nation and guarantor of freedom of the seas, to one of a coastal nation that places domestic and regional regulatory control first. These trends, which are closely interconnected, can be effectively curtailed if the United States accedes to the Convention.

During my tenure, I have witnessed the jurisdictional creep of coastal states, often with the direct support of non-governmental organizations (NGOs) contrary to the law of the sea as codified in the Convention. These claims of regional and coastal state jurisdiction and authority are invoked to the detriment of navigational freedoms to further a wide range of special interests, including enhanced environmental protection, total nuclear disarmament, world health, limitations on measures to combat transnational crime and illegal migration, and management and allocation of the radio frequency spectrum.

During the past decade, coastal states and regional groups of coastal states have continued their efforts to extend jurisdiction beyond that which is recognized and permitted under the Convention. Although the United States Navy does its best to counter those illegal extensions of jurisdiction by operationally challenging such claims and arguing that they are contrary to the principles of customary international law, we are increasingly being marginalized, both internationally and domestically, by the fact that the United States has not acceded to the Convention. In short, our failure to accede to the Convention permits domestic and international policymakers, foreign nations, and NGOs to increasingly pursue modifications to bedrock principles of customary international law, that affect our navigational freedoms over our most strenuous objection.<sup>12</sup>

At the end of the letter, Admiral Johnson appended a handwritten note that declared the Treaty to be his most important piece of "unfinished business." The strong Navy position in favor of U.S. accession has been supported by the Department of State.

Regarding the diplomatic benefits of U.S. participation in the LOS Convention, the Department of State Legal Adviser has testified that "U.S. accession would substantially enhance the authoritative force of the Convention, likely inspiring other States to join, and promote its provisions as the governing rules of international law relating to the oceans."<sup>13</sup>

Under the leadership of Senator Claiborne Pell (D-RI), the SFRC conducted hearings on the LOS Convention and the Implementing Agreement on August 11, 1994, in anticipation that the instruments would be sent to the full Senate for advice and consent.<sup>14</sup> Thereafter, on October 7, 1994, President Clinton transmitted the Convention and the Implementing Agreement to the SFRC for consideration.<sup>15</sup> With the promotion of the conservative Senator Jesse Helms (R-NC) to the Chairmanship of the SFRC in 1995, however, the Convention languished until his retirement at the end of the 107th Congress in 2001. Supported by the administration of George W. Bush, the Convention was placed on the Treaty Priority List in 2002 and remained a top treaty priority through to the end of the administration.<sup>16</sup> The Bush administration also included the goal of U.S. accession to the Convention in the President's "Ocean Action Plan," which outlined the administration's objectives for domestic oceans policy.<sup>17</sup>

Hearings on the Treaty again were conducted by the SFRC on October 14, 2003,<sup>18</sup> and October 21, 2003,<sup>19</sup> under the chairmanship of Senator Richard Lugar (R-IN). The

2003 hearings were valuable in that they teased out issues and posed questions about the mechanics of the LOS Convention and how it would interface with historic strategic oceans goals and promotion of U.S. sea power. Dozens of meetings, hundreds of telephone conferences, and thousands of e-mails were exchanged within the Pentagon and among the departments and agencies of the U.S. government in the development of the statements deemed necessary to create this interface. The stakeholders in the executive branch met for numerous meetings at the National Security Council and on Capitol Hill to fashion the U.S. approach. The Department of State acknowledged the importance of this collaboration, which ensured that the declarations and understandings satisfied the concerns and issues identified to support all aspects of U.S. maritime power.<sup>20</sup> The result of the collaboration was that the interagency community within the executive branch and the SFRC concurred on the scope and specific language of the statements on January 28, 2004. Less than 1 month later, on February 25, 2004, the SFRC considered the Convention and the Implementing Agreement and with a vote of 19–0 recommended that the full Senate deliver its advice and consent to U.S. accession to Convention and Agreement, subject to the statements contained in the Senate resolution of advice and consent to ratification.<sup>21</sup> No action was taken by the full Senate, however, due to the opposition of a handful of Republican Senators. But, just as a Republican-chaired SFRC led by Senator Lugar favorably endorsed the Treaty in February 2004, a Democratic-chaired committee led by Senator, and now Vice President, Joseph Biden in October 2007 also voted in favor of the Treaty by a vote of 17–4. In accordance with Senate rules, the Convention was returned to the SFRC at the conclusion of the 110th Congress because the full Senate was never presented with the opportunity to offer its advice and consent. Thus, two times in the past 5 years, the SFRC has endorsed the LOS Convention, recommending that the United States become a party. On neither occasion, though, did the full Senate have the opportunity to vote on whether the President should accede to the Convention and ratify the Implementing Agreement, foregoing the opportunity for a more globally engaged maritime America.<sup>22</sup>

Statements made by states to the LOS Convention have a high degree of importance because Article 309 of the Treaty bars state parties from making reservations. State parties may not except out undesirable language or provisions, as that would undermine the nature of the Convention as a package deal.<sup>23</sup> Although states may not make reservations or exceptions when signing, ratifying, or acceding to the Treaty, they may provide statements with a view toward harmonizing their domestic laws and regulations with the Convention.<sup>24</sup> Article 310 of the Convention provides authority for a state party, at the time of signature, ratification, or accession, or at any time thereafter, to make declarations and statements, provided such statements do not purport to exclude or to modify the legal effect of the provisions of the Convention. One hundred nineteen states have made such statements, including 33 that have done so upon signature, 60 states that have done so at the time of ratification or accession, and 16 more states that have done so at a later date.<sup>25</sup>

In several exceptional instances expressly permitted by specific Articles of the LOS Convention, states may make certain elections to carry out pertinent parts of the Treaty, including those relating to procedures for dispute resolution. Thus, statements that are provided by a state party on occasion of accession to the Treaty are an initial opportunity for a state party to formally comment on the Convention and to set forth authoritative interpretations and understandings regarding the text. The U.S. Text of Resolution of Advice and Consent to Ratification contains two elective declarations, submitted in accordance with Articles 287 and 298, 24 additional declarations and understandings, as well as five conditions.<sup>26</sup> Emerging from a decade of deliberative and democratic process spanning

Republican and Democratic administrations, the statements offer a quintessentially American view of the Convention.

The perspective captured in the declarations and understandings reveals the motivations of the United States for participating in the negotiations of the LOS Convention from 1973 to 1982, and then engaging in diplomacy during the Clinton presidency to influence and shape the positive changes to Part XI as reflected in the 1994 Implementing Agreement and in acceding to the Convention. The statements provide interpretative approaches that add greater fidelity to some of the Treaty's more malleable terms. By informing the U.S. public and the international community of elections and policy choices to be made within the terms of the Convention, the statements also portend future American state practice. The U.S. government policy positions that have emerged on the national security aspects of the Treaty, and refinements on some of the more detailed provisions, were developed by oceans policy advisers within the Office of the Under Secretary of Defense for Policy, Strategic Plans & Policy Directorate in the Joint Chiefs of Staff, the Deputy Chief of Naval Operations for Plans, Policy & Operations, and the Department of Defense Representative for Oceans Policy Affairs in the Office of the Judge Advocate General, U.S. Navy, working in conjunction with staff members of the Oceans and Fisheries Directorate of the Bureau of Oceans, Environment and Science in the Department of State, and the U.S. Coast Guard, formerly in the Department of Transportation but now residing in the Department of Homeland Security. The executive departments, with the participation of the National Security Council, also coordinated closely with the staff of the SFRC. The result is a mosaic of national security issues developed by policymakers and senior leaders inside the "beltway" that represent the core U.S. positions in the international law of the sea on areas of election or that hold the potential for international misunderstanding in the conduct of military affairs or foreign relations.

### **Interpretative State Practice**

The proposed U.S. statements represent a set of terms applicable to U.S. conduct as a party to the Convention and are evidence of state practice. Furthermore, the provisions serve as a comprehensive compilation of U.S. positions on the most critical areas of oceans policy reflected over the years in diplomatic communications and associated policy pronouncements concerning operations by the armed forces of the Coast Guard and the Department of Defense. The statements also outline some of the more important conditions under which the United States will operate within the LOS Convention. In particular, the statements affect the conduct of air and sea exercises, operations, and intelligence activities of the armed forces, and reflect the continuing importance of global freedom of navigation and overflight of military, intelligence, and other public vessels and aircraft. Collectively, the statements affirm activities historically undertaken by the U.S. armed forces throughout the world's oceans, and recognize that those operations are consistent with the rights and freedoms set forth in the Convention.<sup>27</sup> The seven critical American understandings related to national security and the Law of the Sea Convention are identified below and discussed in detail throughout the remainder of this article.

1. *Military activities.* The U.S. maintains the exclusive right, as a state party to determine whether activities it conducts at sea constitute "military activities," and therefore are, at the election of the United States, exempt from the provisions concerning mandatory dispute resolution under the terms of the Treaty.<sup>28</sup>

2. *Peaceful purposes*. The U.S. maintains that the Treaty wording “the seas shall be reserved for peaceful purposes” does not create new rights for coastal states or third countries, or generate any new obligations on behalf of naval powers.<sup>29</sup>
3. *Innocent passage*. In accordance with Article 19 of the LOS Convention, coastal states may not restrict innocent passage based on cargo, means of propulsion, destination, purpose, or flag.<sup>30</sup>
4. *Transit and archipelagic sea-lanes passage*. Military vessels and aircraft in their normal mode have the right of transit passage through straits used for international navigation and archipelagic sea-lanes passage through archipelagic sea-lanes and other normal routes normally used for international navigation, and coastal states may not restrict such passage.<sup>31</sup>
5. *Exclusive economic zone*. Restrictions or requirements for prior consent or notification to operate military vessels or aircraft in the exclusive economic zone (EEZ) are inconsistent with the Convention.<sup>32</sup>
6. *Hydrographic and military surveys*. Coastal states are not authorized to regulate hydrographic or military surveys in the EEZ, as these activities are separate and distinct from marine scientific research (MSR), which requires coastal state consent.<sup>33</sup>
7. *Excessive claims*. The United States will continue to oppose excessive coastal state maritime claims, continuing to challenge or protest such claims through bilateral and multilateral and diplomatic forums and demarches, military-to-military engagement, and operational assertions by the air and sea forces of the Navy and Air Force.<sup>34</sup>

### **Military Activities Exemption**

The LOS Convention establishes protocols for mandatory dispute settlement, which include the International Tribunal for the Law of the Sea (ITLOS) located in Hamburg, Germany, and in accordance with Annex VI of the Convention, the International Court of Justice (ICJ) located in The Hague, the Netherlands, arbitral tribunals constituted under Annex VII of the Convention, and special arbitral tribunals constituted in accordance with Annex VIII of the Convention. The provisions of the Treaty contain one particularly important caveat pertinent to the role of dispute settlement in the area of national security. State parties may exclude certain categories of disputes from dispute resolution procedures, and military activities are among those that states may elect to remove from jurisdiction.

Article 298 of the Convention regarding optional exceptions to categories of disputes subject to compulsory dispute resolution permits nations to except out certain activities from dispute settlement procedures. Paragraph 1 states:

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:

[inter alia]

(b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal . . . ;

(c) disputes in respect of which the Security Council of the United Nations in exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.

Although the United States was a proponent during the negotiations of dispute resolution generally, it viewed the “military activities” exception as a key element of the dispute settlement package.<sup>35</sup> In testimony before the Senate in 2003, the State Department noted that U.S. sensitivity on the issue dates back to the negotiation of the Convention when the U.S. delegation, working in conjunction with other delegations, sought and achieved language reflecting a very broad exception to compulsory dispute resolution for military activities.<sup>36</sup>

The United States, as authorized by Article 298, would exempt “military activities” from compulsory dispute resolution. Under the Convention, a state party has the exclusive right to determine what constitutes a “military activity.” The U.S. declaration states:

The Government of the United States of America declares, in accordance with article 298(1), that it does not accept any of the procedures provided for in section 2 of Part XV (including, *inter alia*, the Seabed Disputes Chamber procedure referred to in article 287(2)) with respect to the categories of disputes set forth in sub-paragraphs (a), (b), and (c) of article 298(1). The United States further declares that its consent to accession to the Convention is conditioned upon the understanding that, under article 298(1)(b), each State Party has the exclusive right to determine whether its activities are or were “military activities” and that such determinations are not subject to review.<sup>37</sup>

The legal effect of the declaration is to exclude from the jurisdiction of any court, arbitral panel, or the ITLOS any dispute involving the United States arising from military and intelligence activities, as well as matters under consideration at the UN Security Council. The declaration also recognizes that the United States reserves an exclusive right to determine whether a questioned activity constitutes a “military” activity.<sup>38</sup> Once removed from review or jurisdiction, U.S. military activities are exempt from exposure to arbitration or outside court ruling, or review by a compulsory international panel or other state. The declaration represents a cornerstone U.S. interpretation and is virtually identical to the one recommended in the 1994 SFRC transmittal package.<sup>39</sup> Testifying in 2003, the Department of State Legal Adviser stated that the declaration was essential in order to protect U.S. military activities, such as military surveys and reconnaissance flights, that are conducted over foreign coastal state EEZs, ensuring that those activities are not inappropriately subjected to international dispute resolution procedures.<sup>40</sup>

Some senators questioned whether certain U.S. intelligence activities would be exempted from the dispute settlement provisions. The SFRC concurred in the administration’s view that intelligence activities were considered “military activities” within the meaning of the LOS Convention, noting that prior testimony from officials of the Department of Defense and the Central Intelligence Agency before the Senate Select Committee on Intelligence (SSCI) reasoned that intelligence activities at sea are “military activities” for purposes of the U.S. dispute settlement exclusion under the Convention.<sup>41</sup> Thus, the binding dispute settlement procedures would not apply to U.S. intelligence activities conducted at sea. Questioning this interpretation during hearings in the 110th Congress, Senators Jim DeMint (R-SC) and David Vitter (R-LA) expressed concern that a tribunal could sit in

judgment of U.S. military activities despite the express U.S. declaration to the contrary.<sup>42</sup> Because the test for determining what constitutes a “military activity” is not expressly defined in the Treaty, these senators suggest that a tribunal may attempt to make its own decision as to what constitutes such activity within the meaning of the LOS Convention, notwithstanding the understanding included in the U.S. resolution. It is not too much, Senator Vitter suggested, that the country should consider the possibility that a court or arbitral panel reviewing a case in binding, compulsory dispute resolution might assert greater jurisdiction than anticipated. Senator Vitter asserted that international courts are not reluctant to issue decisions that confound U.S. understandings of the law, and that the LOS Convention would not be immune from the practice. Article 288(4) of the LOS Convention provides that: “In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.” Thus, if a future tribunal or court determined it could assert jurisdiction over a matter considered to be a “military activity” by the United States, the body would be disregarding the U.S. declaration. Senator Vitter maintained that the United States should expect and prepare for a dispute resolution decision in which a court or tribunal rejects the U.S. position on the definition of a “military activity.”

Regardless of the U.S. exempting “military activities” from compulsory dispute settlement under the LOS Convention, certain state parties may purport to seek dispute resolution over U.S. military activities in the oceans, and in the EEZ in particular. Numerous coastal states, for example, are conducting a broad legal, political, and military campaign to limit freedom of navigation by the international community in the EEZ in order to reduce or entirely stop foreign military and intelligence activities in their littoral regions. Indeed, Admiral Johnson’s letter to Senator Helms in 2000 recognized the issue as a damaging trend that threatens to weaken the LOS Convention. The goal of these coastal states is to impede the deployment of foreign air and naval forces into the combat theater, limit the locations from which these forces may effectively operate, or force foreign naval and air forces to operate from locations farther from the locus of potential conflict than they normally would prefer. Often, these policies are aimed specifically at reducing the military advantage of the United States, which has the unique and powerful capability to marshal distributed force packages, delivered from the sea, subjecting potentially virtually every area of the globe to American military power.

In 2003, Mark Esper, the Deputy Assistant Secretary of Defense for Negotiations Policy, testified that the Bush administration closely examined the LOS Convention, pored through the negotiating history of the Treaty, and reviewed the practices of international tribunals constituted under the Convention.<sup>43</sup> Based on the thorough examination, the administration took the position that the scope of the military activity exemption is solely within the ambit of the authority of each state party to determine for itself. Retired U.S. Navy Admiral William Schachte concurred, stating: “. . . No country would subordinate its international security activities to an international tribunal. . . . Certain disputes about military activities are considered . . . to be so sensitive that they are best resolved by diplomatic means.”<sup>44</sup>

Responding to a question posed by Senator Lugar at a 2003 SFRC hearing regarding whether a tribunal could trump a state’s decision regarding whether an activity was “military” in nature, John Norton Moore emphatically stated: “I believe the chances of this article being interpreted the way some are arguing and posing a risk to the United States is about like your deciding not to hold this hearing today because of the risk of the hearing room being hit by a meteorite. To be frank, Mr. Chairman, this is a silly objection. . . .”<sup>45</sup> The objection by critics of the LOS Convention and the purported risk of

an overreaching tribunal misses one of the most basic rules of jurisprudence. If a court or tribunal acts beyond its jurisdiction, competence, or authority, such an action would be *ultra vires* and any decision or judgment issued by that court or tribunal would not be legally binding. Finally, of note is that many other countries have asserted an exemption under Article 298 to include either military activities or matters before the UN Security Council, including, Argentina, Australia, Belarus, Canada, Cape Verde, Chile, China, Germany, Mexico, the Republic of Korea, the Russian Federation, Tunisia, Ukraine, and the United Kingdom.<sup>46</sup> Consequently, there is broad international support for the military activities exemption.

### “Peaceful Uses” and “Peaceful Purposes”

Article 88 of the LOS Convention reserves the high seas for “peaceful purposes” and the provision applies by extension throughout the EEZ in accordance with Article 58. The term also is referenced in Articles 141, 143(1), 147(2)(d), 155(2), 240(a), 242(1), 246(3), and 301 of the Convention. The United States declaration concerning the meaning of the terms “peaceful uses” or “peaceful purposes” is made in order to clarify the application of these terms to naval operations and exercises. The statement provides that: “The United States understands that nothing in the Convention, including any provisions referring to ‘peaceful uses’<sup>47</sup> or ‘peaceful purposes,’<sup>48</sup> impairs the inherent right of individual or collective self-defense or rights during armed conflict.”<sup>49</sup> The understanding comports with Washington’s position taken in 1976 during the Convention, at which a U.S. delegate declared:

The term “peaceful purposes” did not, of course, preclude military activities generally. The United States has consistently held that the conduct of military activities for peaceful purposes was in full accord with the Charter of the United Nations and with the principles of international law. Any specific limitation on military activities would require the negotiation of a detailed arms control agreement. The Conference was not charged with such a purpose and was not prepared for such a negotiation. Any attempt to turn the Conference’s attention to such a complex task would quickly bring to an end current efforts to negotiate a law of the sea convention.<sup>50</sup>

The declaration articulates the recognized right under international law, as reflected in Article 51 of the UN Charter, for all nations to exercise individual or collective self-defense.<sup>51</sup> Because the Convention is a peacetime agreement, it does not displace the body of the law of naval warfare and neutrality that applies during time of armed conflict at sea.<sup>52</sup> This understanding emphasizes that the Convention does not prohibit or restrain military exercises or the conduct of operations in response to a hostile act or a demonstration of hostile intent by another power. Moreover, “peaceful uses” and “peaceful purposes” are terms used within the framework of *jus ad bellum*, or the use of force, and peacetime military activities, including maritime constabulary and security operations and freedom of navigation operations and military surveys and intelligence, surveillance and reconnaissance are not acts of aggression without some additional indicia of hostile intent or commitment of a hostile act. Thus, the terms that appear throughout the Convention are not to be read in isolation, but must be considered in conjunction with the UN Charter and customary international law and their meaning does not invite colloquial or elastic application. The treaty does not impose new restraints on military operations or impair the

inherent right of self-defense. More generally, military activities that are consistent with the principles of international law are not prohibited by custom and state practice, and this long-standing norm is incorporated into the LOS Convention and the UN Charter.<sup>53</sup> Furthermore, this understanding underscores the importance the United States attaches to the inherent right of individual and collective self-defense and the use of force in conditions of armed conflict.<sup>54</sup>

### **Innocent Passage**

Several U.S. understandings relate to freedom of navigation—specifically addressing the U.S. view of innocent passage, transit passage, and archipelagic sea-lanes passage and the right of all nations to exercise a panoply of high seas freedoms throughout the EEZ. These navigational understandings are contained in the original Commentary that accompanied the Letter of Submittal in 1995.<sup>55</sup>

One of the principal navigational rights is innocent passage in a foreign coastal state's territorial sea. Coastal states are entitled to claim sovereignty over a territorial sea extending 12 nautical miles seaward from the shore. Even though the coastal state may exercise sovereignty in the ocean and airspace in this zone, ships of all nations have a right to passage through territorial waters under the concept of innocent passage, which means that passage by foreign vessels must not prejudice the "peace, good order, or security of the coastal state."<sup>56</sup>

Numerous coastal states have improperly and unlawfully sought to restrict or impair the right of innocent passage in the territorial sea. China, India, Pakistan, and Brazil, for example, purport to ban military ships in their territorial seas or, alternatively, to condition innocent passage by requiring notification or prior coastal state consent before the ships of a foreign state may exercise the right of innocent passage. Italy, Egypt, Malaysia, and others purport to require preapproval for the passage of ships through their territorial sea based on either the character of the cargo (e.g., nuclear, crude oil, noxious substances) or the class of the vessel (e.g., military vessel, tanker) conducting the passage. But, innocent passage, by definition, may not be impaired merely on the basis of the type of ship or cargo or vessel classification. Instead, only a specific and recognized action that is noninnocent under the explicit terms of the Treaty are inconsistent with innocent passage. In such cases, the coastal state may require the foreign vessel to depart the territorial sea and, if that request is refused, the coastal state may take steps to impair passage. This understanding, which is reproduced below, confirms what the United States stated during the negotiations of the LOS Convention:

The United States understands, with respect to the right of innocent passage under the Convention, that—

- (A) all ships, including warships, regardless of, for example, cargo, armament, means of propulsion, flag, origin, destination, or purpose, enjoy the right of innocent passage;
- (B) article 19(2) contains an exhaustive list of activities that render passage non-innocent;
- (C) any determination of non-innocence of passage by a ship must be made on the basis of acts it commits while in the territorial sea, and not on the basis of, for example, cargo, armament, means of propulsion, flag, origin, destination, or purpose; and

- (D) the Convention does not authorize a coastal State to condition the exercise of the right of innocent passage by any ships, including warships, on the giving of prior notification to or the receipt of prior permission from the coastal State.<sup>57</sup>

The Convention recognizes a “right” of innocent passage in a coastal state’s territorial sea. The right is conferred on the international community and is not a function of the goodwill of the coastal state. Coastal states exercise sovereignty in the territorial sea subject to the rights of the international community.

The Senate Executive Report makes several points in connection with this principle:<sup>58</sup>

- The “purpose” of a ship is not relevant to the right of enjoyment of innocent passage, and a determination of noninnocence cannot be made, among other things, on the basis of a ship’s “purpose.” The reference to “purpose” is intended to make clear, for example, that a ship navigating for the sole purpose of exercising its right of innocent passage is still fully entitled to the right of innocent passage, but that would not preclude a ship’s purpose from being taken into account in assessing whether that ship posed a threat to use force within the meaning of Article 19(2)(a).
- Article 19(2) of the Convention contains an exhaustive list of activities that render passage noninnocent. The provision complements the mutual understanding obtained by the United States and the Soviet Union in Articles 2 and 3 of the Jackson Hole Agreement, in which the cold war superpowers agreed that Article 19 contains an “exhaustive list” of activities that may be considered noninnocent, and that innocent passage may not be conditioned by notification or consent by the coastal state.<sup>59</sup>
- The Convention does not authorize a coastal state to condition the exercise of the right of innocent passage by any ships, including warships or nuclear-powered vessels, on the provision by the distant state of prior notification to or the receipt of prior permission from the coastal state.
- Article 19 contains an exhaustive list of activities that render passage not innocent. Passage is not innocent if it is “prejudicial to the peace, good order or security of the coastal state.” Article 19 specifies which activities are considered to be prejudicial. These activities include any act aimed at collecting information to the prejudice of the defense or security of the coastal state.

Based on the above understanding, a determination of whether a ship’s passage (defined in Article 18) in a coastal state’s territorial sea is entitled to innocent passage must be based solely on the list of activities in Article 19. The list in no way narrows the right of innocent passage the United States currently enjoys as a party to the 1958 Convention on the Territorial Sea and Contiguous Zone<sup>60</sup> and customary international law. On the contrary, the 1982 Convention improves on the 1958 Convention’s innocent passage regime from the perspective of U.S. navigational mobility by establishing a more objective standard for the meaning of the term “innocent” based on specifically enumerated activities, and by identifying an exhaustive list of those activities that will render passage noninnocent.<sup>61</sup> A warship cannot be banned by a coastal state, or alternatively be required to provide advance notice in a coastal state’s territorial sea, merely because of the source of power (e.g., nuclear power), cargo (e.g., armaments), or the status of the vessel (e.g., a naval combatant).

As in the case of the analogous provisions of Articles 18, 19, and 20 in the 1958 Territorial Sea Convention, the provisions regarding innocent passage in the 1982 Convention

set forth conditions for the enjoyment of the right of innocent passage in the territorial sea, but the 1982 rules do not prohibit or otherwise affect activities or conduct that is inconsistent with that right and therefore not entitled to that right. In 2007, Senators DeMint and Vitter suggested that: "Article 20 . . . limits the ability of the United States to collect intelligence."<sup>62</sup> The SFRC examined whether Articles 19 and 20 of the LOS Convention could adversely affect or prohibit intelligence-gathering activities. Article 20 provides that submarines are required to navigate on the surface in order to enjoy the right of innocent passage. The Committee findings, however, maintain that, failure to comply with the provisions of innocent passage may not necessarily be "characterized as inherently not 'innocent.'"<sup>63</sup> The Director of Naval Intelligence and the Assistant Director of Central Intelligence for Collection met in a closed hearing held in 2004 before the SSCI, and thereafter Senators Rockefeller and Bond of the SSCI sent a letter dated September 14, 2007, to Senator Biden at the SFRC, concluding that: "the Convention does not affect the conduct of intelligence activities."<sup>64</sup> The Rockefeller-Bond letter also stated:

Based on our consideration of these matters, we concur in the assessment of the Intelligence Community, the Department of Defense, and the Department of State that the Law of the Sea Convention neither regulates intelligence activities nor subjects disputes over intelligence activities to settlement procedures under the Convention. It is therefore our judgment that accession to the Convention will not adversely affect U.S. intelligence collection or other intelligence activities.<sup>65</sup>

Reflecting the views of the combatant commanders and the Joint Chiefs, the Chairman of the Joint Chiefs of Staff, General Richard B. Meyers concurred with this approach in 2004, stating: "The rules under which the U.S. forces operated for over 40 years to board and search ships or to conduct intelligence activities will not be affected."<sup>66</sup>

### **Transit Passage and Archipelagic Sea-Lanes Passage**

The LOS Convention ushered in recognition of the juridical archipelagic state, a country composed of islands and meeting a criteria of water to land of between 1:1 to 9:1.<sup>67</sup> Within the archipelagic baselines, the state may exercise sovereignty and the oceans within that area are considered to be internal waters. The vessels and aircraft of the international community, however, retain the right of archipelagic sea-lanes passage inside the archipelago throughout the length of all routes normally used for international navigation.

An archipelago is a "group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such."<sup>68</sup> The archipelagic regime provides a framework for states to designate sea-lanes and air transit routes for ships, submarines, and aircraft that ensure foreign passage in a manner that is "continuous and expeditious."<sup>69</sup> Moreover, vessels and aircraft are entitled to transit in the "normal mode," meaning submarines may stay submerged and air-capable ships may launch, recover, and operate aircraft and other military devices. Surface ships may conduct formation steaming and take other measures necessary for force protection or expeditious transit.<sup>70</sup>

Approximately 20 states, encompassing millions of square miles of ocean, could seek status as an archipelagic nation, and therefore be in a position to designate archipelagic sea-lanes. Improper designations or restrictions would greatly impact freedom of

navigation and operational maneuverability for U.S. armed forces, as well as adversely affect global maritime trade.<sup>71</sup> Because of this potential, the United States asserts the following understanding:

The United States also understands, concerning Parts III and IV of the Convention, that:

- (A) all ships and aircraft, including warships and military aircraft, regardless of, for example, cargo, armament, means of propulsion, flag, origin, destination, or purpose, are entitled to transit passage and archipelagic sea lanes passage in their “normal mode”;
- (B) “normal mode” includes, *inter alia*—
  - (i) submerged transit of submarines;
  - (ii) overflight by military aircraft, including in military formation;
  - (iii) activities necessary for the security of surface warships, such as formation steaming and other force protection measures;
  - (iv) underway replenishment; and
  - (v) the launching and recovery of aircraft;
- (C) the words “strait” and “straits” are not limited by geographic names or categories and include all waters not subject to Part IV that separate one part of the high seas or exclusive economic zone from another part of the high seas or exclusive economic zone or other areas referred to in article 45;
- (D) the term “used for international navigation” includes all straits capable of being used for international navigation; and
- (E) the right of archipelagic sea lanes passage is not dependent upon the designation by archipelagic States of specific sea lanes and/or air routes and, in the absence of such designation or if there has been only a partial designation, may be exercised through all routes normally used for international navigation.<sup>72</sup>

One of the key objectives for the United States in the negotiation of the LOS Convention was to obtain widespread agreement on a nonsuspendable right of transit passage through key choke points around the world. As the discussions during the negotiations of the Convention developed a consensus around a 12-nautical-mile territorial sea, it became evident that the high seas corridor through many international straits around the world would become overlapped by the extended territorial seas. Today, there are more than 150 international straits overlapped by 12-nautical-mile territorial seas. Among the most critical straits in the world are the Straits of Malacca and Singapore, the Strait of Gibraltar, the Strait of Hormuz, the Bab el Mandeb Strait, and the Dover Strait.<sup>73</sup> Collectively, these narrow seas represent key straits and choke points critical to military and commercial global mobility and maneuverability. Ensuring the right of transit passage through international straits was a primary U.S. interest expressed by Admiral Michael G. Mullen in his 2003 testimony to the SFRC.<sup>74</sup> Similar to the right of archipelagic sea-lanes passage, the transit passage regime protects the right of vessels and aircraft to transit straits used for international navigation.<sup>75</sup> Furthermore, states are entitled to exercise innocent passage throughout the areas of the archipelago that do not constitute an archipelagic sea-lane. This additional provision—a departure from the normal regime of coastal state consent to transit through internal waters—permits warships and other vessels to enjoy innocent passage inside archipelagic baselines.

## The Exclusive Economic Zone

Approximately 36% of the world's oceans are potentially captured within coastal states' 200-nautical-mile EEZs, comprising an enormous swath of operating area and maneuver space. The history of the international law of the sea has exhibited a tension between freedom of the seas and coastal state sovereignty over the seas.<sup>76</sup> The LOS Convention reconciled those interests, restricting a coastal state's interest to resource-related concerns beyond 12 nautical miles while preserving the right of high seas freedom of navigation and overflight for all other states. The EEZ regime was created as a *sui generis* regime to balance the rights of coastal states to the living and nonliving resources, including fisheries and offshore oil and gas development, with the interests of all states in preserving other high seas rights and freedoms.<sup>77</sup> Consequently, coastal states may exercise sovereign rights and jurisdiction in their EEZ, as limited by the Convention, but states may not assert sovereignty over those areas. All states enjoy the high seas freedoms of navigation and unrestricted aircraft overflight in a foreign EEZ.<sup>78</sup>

The U.S. understanding with respect to the regime of the EEZ recognizes two important points. First, the EEZ does not "belong" to a coastal state; rather, it is an area adjacent to the territorial sea in which the coastal state exercises sovereign rights and jurisdiction for economic purposes. Second, all other states enjoy high seas freedoms and other internationally lawful uses of the sea related to those freedoms in a coastal state's EEZ. The United States articulated these understandings as follows:

The United States understands, with respect to the exclusive economic zone, that—

- (A) all States enjoy high seas freedoms of navigation and overflight and all other internationally lawful uses of the sea related to these freedoms, including, inter alia, military activities, such as anchoring, launching and landing of aircraft and other military devices, launching and recovering water-borne craft, operating military devices, intelligence collection, surveillance and reconnaissance activities, exercises, operations, and conducting military surveys; and
- (B) coastal State actions pertaining to these freedoms and uses must be in accordance with the Convention.<sup>79</sup>

The understanding has particular relevance to the United States because coastal states are increasingly purporting to assert greater control over waters off their coasts. Several coastal states have openly challenged U.S. military activities in their EEZ, including China and Argentina.<sup>80</sup> Bangladesh, Brazil, Cape Verde, China, India, Malaysia, the Maldives, Mauritius, Pakistan, and Uruguay, among others, have published regulations purporting to prohibit foreign military activities in their EEZ more generally.<sup>81</sup> The United States has responded that these actions are inconsistent with the law of the sea and have a corrosive effect on navigational freedoms, destabilizing the LOS Convention. Moreover, Washington has stated that EEZ restrictions are contrary to customary international law and inconsistent with the plain meaning of the LOS Convention.

Article 58 preserves the right of all states to enjoy high seas uses of the EEZ, including the full range of military activities. Anchoring, launching, and recovery of aircraft, as well as the conduct of military operations, exercises, and intelligence activities are permissible by vessels and aircraft of any state within the EEZ of a coastal state consistent with the

obligation of due regard.<sup>82</sup> The concept of “due regard,” however, does not manufacture additional coastal state rights; rather, the coastal state is entitled to have distant states operating in its EEZ to observe due regard only for its lawful resource-related rights in the zone.<sup>83</sup> Importantly, it is the duty of the flag state, not the right of the coastal states, to enforce the obligation of due regard against vessels and aircraft of the flag state.<sup>84</sup> The understanding also reflects the position that there is no conflict or inconsistency within the Convention respecting the rights of coastal states and maritime states. Coastal state laws must not be incompatible with high seas freedoms.<sup>85</sup>

In order to demonstrate nonacquiescence to excessive coastal state claims, the United States has diplomatically and operationally protested the claims of at least 30 states, including China, North Korea, Iran, and India, that purported to exercise rights within the EEZ beyond resource-related rights.<sup>86</sup>

### **Marine Scientific Research and Military Surveys**

The LOS Convention confirms that coastal states have the right to require consent for “marine scientific research” undertaken in marine areas under their national jurisdiction.<sup>87</sup> The term “marine scientific research” is not defined in the Convention, leading to conflicting understandings among some states.<sup>88</sup> The U.S. position is that MSR does not include activities for prospecting and exploration of natural resources or military activities, such as military surveys.<sup>89</sup> Furthermore, MSR does not include hydrographic surveys or other survey activities unrelated to economic development, which are separate and distinct activities addressed in Articles 19(2)(j), 21(1)(j), and 40. Additionally, activities related to objects of an archaeological and historical nature are addressed in Articles 303 and 33. Operational oceanography,<sup>90</sup> such as the use of expendable marine instruments, and surveys of submerged wrecks or for the purposes of meteorology, are not specifically addressed by the Convention. Hydrographic surveys are conducted for the production of nautical charts and similar products for the safety of navigation to determine the depth of water, determine the configuration and nature of the natural bottom, obtain heights and times of tides, and identify hazards to navigation. Military surveys refer to activities undertaken in the ocean and coastal waters involving marine data collection for military purposes and may include oceanographic, marine geological, geophysical, chemical, biological, acoustic, and related data.

The United States does not include within the scope of MSR those activities undertaken in the ocean and littoral regions “to expand knowledge of the marine environment for peaceful purposes,” including oceanography, marine biology, geological and geophysical scientific surveying, and other activities with a scientific purpose.<sup>91</sup> When conducted beyond the territorial sea, operational oceanography, hydrographic surveys, and military surveys are part of high seas freedoms enjoyed by all nations and the rights cannot be restricted by the coastal state or made subject to a condition of prior notice or preapproval by the coastal state.<sup>92</sup> Consequently, the U.S. understanding concerning MSR and surveys provides that:

The United States understands that “marine scientific research” does not include, *inter alia*—

- (A) prospecting and exploration of natural resources;
- (B) hydrographic surveys;
- (C) military activities, including military surveys;

- (D) environmental monitoring and assessment pursuant to section 4 of Part XII;
- or
- (E) activities related to submerged wrecks or objects of an archaeological and historical nature.<sup>93</sup>

By suggesting that the Convention's provisions on MSR are ambiguous, some coastal states have erected a veiled threat against distant flag state operations in their EEZ.<sup>94</sup> The U.S. understanding conveys the intention not to acquiesce in such claims.

### **Maintaining the Rule of Law**

Although reservations are not permitted to the LOS Convention, some coastal states have made robust "declarations and understandings" that, in the scope and content, are suggestive of reservations. These statements go beyond the typical clarifications made by state parties and purport to claim more coastal state sovereignty, authority, or control at the expense of the rights and freedoms currently enjoyed by the international community. Numerous states, including Brazil, Bangladesh, China, Greece, India, Malaysia, Oman, Pakistan, the Philippines, Portugal, Saudi Arabia, Sweden, Spain, and Yemen, have made declarations or statements accompanying their instruments of ratification or acceptance that are inconsistent with the terms of the LOS Convention. The UN General Assembly has called on state parties to withdraw such "stealth reservations."<sup>95</sup> The United States has asserted that any declaration or statement purporting to limit navigation, overflight, or other rights and freedoms of all states in a manner inconsistent with the LOS Convention is unlawful because the Convention either legally binds state parties or reflects customary norms. Furthermore, the lack of a response by the United States to any particular coastal state declaration or statement made pursuant to the Convention is not to be interpreted as tacit acceptance. Canada, France, Russia, and the United Kingdom have offered similar declarations, indicating that those states will not observe the declarations or understandings of other states that are inconsistent with international law.

The SFRC indicated that, although it was not legally necessary for the United States to comment on all of the declarations and statements that were inconsistent with the LOS Convention, it was nonetheless desirable to make clear the U.S. position on such declarations and statements.<sup>96</sup> The U.S. statements reject all declarations and understandings made by other state parties in cases in which those statements serve, in effect, as impermissible reservations. This understanding emphasizes U.S. opposition to egregious and excessive maritime claims and statements by coastal states that are tantamount to a treaty reservation.

The understanding states:

The United States understands that any declaration or statement purporting to limit navigation, overflight, or other rights and freedoms of all States in ways not permitted by the Convention contravenes the Convention. Lack of a response by the United States to a particular declaration or statement shall not be interpreted as tacit acceptance by the United States of that declaration or statement.<sup>97</sup>

This statement is an appropriate and efficient general reply to claims in this context, rather than attempting to resort to producing an exhaustive and specific listing of excessive claims.<sup>98</sup> In light of the U.S. policy on freedom of navigation that is interwoven into the history of the country, if the statement were not made, its absence might be misconstrued

as a departure from past promotion of freedom of the seas. The understanding underscores and complements the U.S. Freedom of Navigation program, which challenges the excessive coastal state maritime claims of both allies and potential adversaries.<sup>99</sup>

## Conclusion

In the coming years, the United States' participation in the LOS Convention will become a key enabler for achieving U.S. national security and meeting global security commitments. As the foundation of modern oceans law, accession to the Convention is essential for the United States to restore its leadership in the oceans, rehabilitate its image in the international community, and attract friends and allies in a global maritime partnership and figurative "Thousand Ship Navy," and to purposefully engage with other nations in a variety of maritime security operations, such as the Proliferation Security Initiative. The declarations and understandings that comprise the U.S. statements concerning national security were developed by the 108th Congress, endorsed by the 110th Congress, and represent a clear, authoritative perspective on U.S. national security interests in the Convention.

The statements serve a confidence-building function in that they telegraph to other nations that the United States has maintained consistent positions in interpreting the LOS Convention based on the plain reading of the text. In helping other states to better understand U.S. interpretative approaches, the statements serve to avoid conflict and promote the stability of the regimes in the Convention and to strengthen the rule of law in the oceans. Absent from the Convention for 15 years, the United States has missed repeated opportunities to develop closer maritime security partnerships with many of the world's nations that are state parties to the Treaty. For example, Indonesia and China have expressed deep skepticism over the legality of U.S. maritime counterproliferation initiatives because the United States is not a party to the Convention. As the United States begins to rebuild frayed maritime security relationships that have atrophied since the end of the cold war, the LOS statements will serve as an influential expression to clarify Washington's most critical security interests in the Convention.

## Notes

1. United Nations Convention on the Law of the Sea, done at Montego Bay, December 10, 1982, 1833 *U.N.T.S.* 3 (entered into force Nov. 16, 1994).

2. Senate Executive Report 110-9, December 19, 2007 (to accompany Treaty Doc. 103-39), Part VIII, at 19–24.

3. Agreement Relating to Implementation of Part XI of the Convention, done at New York, July 28, 1994, 33 *I.L.M.* 1309 (1994) (entered into force July 28, 1996).

4. President Ronald Reagan, STATEMENT ON U.S. OCEANS POLICY, Mar. 10, 1983, available at: [www.reagan.utexas.edu/archives/speeches/1983/31083c.htm](http://www.reagan.utexas.edu/archives/speeches/1983/31083c.htm).

5. Representative Joe Sestak (D-PA) letter to U.S. House of Representative Colleagues, June 23, 2008:

... Again as a former Vice-Admiral in the U.S. Navy, I can attest to the great benefits that accession would offer to our men and women in uniform—the necessary peril to them and U.S. interests that our absence from the Convention is creating. As the only nation that is truly deployed, the U.S. has a unique stake in the stability and reliability of international ocean law. We cannot rely on customary international law, which over time and whose application can be unpredictable, to guarantee our rights at sea.

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6. John Norton Moore and William L. Schachte, Jr., *THE SENATE SHOULD GIVE IMMEDIATE ADVICE AND CONSENT TO THE LAW OF THE SEA CONVENTION: WHY THE CRITICS ARE WRONG*, available at [www.virginia.edu/colp/pdf/Moore.Schachte.final.pdf](http://www.virginia.edu/colp/pdf/Moore.Schachte.final.pdf). See also William L. Schachte, *The Unvarnished Truth: The Debate on the Law of the Sea Convention*, 61 NAVAL WAR COLL. REV. 119–127 (Spring 2008).

7. Chairman of the Joint Chiefs of Staff “24-star” letter to Hon. Joseph Biden, Jr., Chairman, Committee on Foreign Relations, U.S. Senate, Jun. 26, 2007, undersigned by General Peter Pace, Chairman of the Joint Chiefs of Staff, Admiral E. P. Giambastiani, Vice Chairman, Joint Chiefs of Staff, Admiral M. G. Mullen, Chief of Naval Operations (and current Chairman of the Joint Chiefs of Staff), T. Michael Mosely, Chief of Staff, U.S. Air Force, J. T. Conway, Commandant of the U.S. Marine Corps and George W. Casey, Chief of Staff, U.S. Army, available at [www.virginia.edu/colp/pdf/Biden-Letter-JointChiefs.pdf](http://www.virginia.edu/colp/pdf/Biden-Letter-JointChiefs.pdf).

8. Division for Oceans Affairs and the Law of the Sea (DOALOS), United Nations, CHRONOLOGICAL LIST OF RATIFICATIONS OF, ACCESSIONS AND SUCCESSIONS TO THE CONVENTION AND TO RELATED AGREEMENTS, Dec. 31, 2008, available at [www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea).

9. T. B. Koh, A CONSTITUTION FOR THE OCEANS, available at [www.un.org/Depts/los/convention\\_agreements/texts/koh\\_english.pdf](http://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf).

10. COMMENTARY — THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA AND THE AGREEMENT ON IMPLEMENTATION OF PART XI, accompanying the Secretary of State Letter of Submittal in Senate Treaty Document 103-39, at 1, 6 U.S. STATE DEPARTMENT DISPATCH, Supp. No. 1, Feb. 1995, at 5–52; 34 *I.L.M.* 1400–1447 (1995) and available at [dosfan.lib.uic.edu/ERC/briefing/dispatch/1995/html/Dispatchv6Sup1.html](http://dosfan.lib.uic.edu/ERC/briefing/dispatch/1995/html/Dispatchv6Sup1.html).

11. See, for example, Cliff Kincaid, *Build More Ships or Hire More Lawyers?*, HUMAN EVENTS, Sept. 27, 2007.

12. Chief of Naval Operations Admiral Jay L. Johnson letter to the Hon. Sen. Jesse Helms (R-NC), Chairman, Senate Foreign Relations Committee SFRC), Jun. 29, 2000, available at the Web site of the Center for Oceans Law and Policy, University of Virginia School of Law, at [www.virginia.edu/colp/pdf/ADMJohnsonLtr-Chariman-Helms.pdf](http://www.virginia.edu/colp/pdf/ADMJohnsonLtr-Chariman-Helms.pdf).

13. State Department Legal Adviser Will Taft, Senate Committee on Foreign Relations, Hearing on the U.N. Convention on the Law of the Sea (Treaty Doc. 103-39), Oct. 21, 2003, in Senate Executive Report 108-10, Mar. 11, 2004, at 90.

14. Committee on Foreign Relations, Senate, U.S. Congress, CURRENT STATUS OF THE CONVENTION ON THE LAW OF THE SEA Hearing, 103rd Congress, 2nd Sess., Aug. 11, 1994, S. Hrg. 103–737.

15. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, July 29, 1994 (Senate Treaty Doc. 103-39), submitted to the Senate, Oct. 7, 1994.

16. See Assistant Secretary of State for Legislative Affairs Paul V. Kelly letter to Senate Foreign Relations Committee Chairman Biden, Feb. 7, 2002, and Assistant Secretary of State for Legislative Affairs Jeffrey T. Bergner letter to Senate Foreign Relations Committee Chairman Biden, Feb. 7, 2007 (enclosure: Treaty Priority List for the 110th Congress).

17. U.S. OCEAN ACTION PLAN: THE BUSH ADMINISTRATION’S RESPONSE TO THE U.S. OCEAN COMMISSION ON POLICY at 5, 35 (Dec. 17, 2004), available at [ocean.ceq.gov/actionplan.pdf](http://ocean.ceq.gov/actionplan.pdf).

18. On October 14, 2003, testimony was delivered to the SFRC by Senator Ted Stevens (R-AK); Ambassador John Norton Moore, former Deputy Special Representative of the President and U.S. Ambassador to the Third UN Conference on the Law of the Sea and Director, Center for Oceans Law and Policy, University of Virginia School of Law; Admiral James D. Watkins, U.S. Navy (Ret.), former Chief of Naval Operations and Chairman, U.S. Commission on Ocean Policy (COP); Professor Bernard H. Oxman, former Vice Chairman of the U.S. Delegation to the Third UN Conference on the Law of the Sea and professor of law, University of Miami School of Law; and Rear Admiral William L. Schachte, Jr., JAGC, USN (Ret.), former Department of Defense Representative for Ocean Policy Affairs (REPOPA). See Senate Executive Report 108-10, *supra* note 13, at 26–80.

19. On October 21, 2003, testimony was delivered to the SFRC by Rear Admiral John E. Crowley, U.S. Coast Guard Chief Counsel and Judge Advocate General of the Coast Guard; Admiral Michel G. Mullen, U.S. Navy, Vice Chief of Naval Operations and current Chairman of the Joint Chiefs of Staff; William H. Taft IV, the Legal Adviser to the U.S. Department of State; John F. Turner, Assistant Secretary for Oceans, International Environmental and Scientific Affairs, U.S. Department of State Department; and Mark T. Esper, the Deputy Assistant Secretary for Negotiations Policy, Office of the Under Secretary of Defense for Policy, Department of Defense. Also testifying on October 21 were Randi Thomas, the National Representative, U.S. Tuna Foundation; Joseph Cox, then President and CEO of the Chamber of Shipping of America and current; and Paul L. Kelly, Senior Vice President, Rowan Companies, Inc., and representing the American Petroleum Institute (API) and the International Association of Drilling Contractors; and Vice Admiral Rodger T. Ruff, Jr., U.S. Coast Guard (Ret.), President of the Ocean Conservancy. See *ibid.*, at 81–148.

20. Written statement of Will Taft, Department of State Legal Adviser, to the Senate Select Committee on Intelligence on June 8, 2004, contained in Senate Executive Report 110-9, *supra* note 2, at 34.

21. Senate Executive Report, 108-10, *supra* note 13, at 6.

22. John Bellinger, the U.S. Department of State Legal Adviser, remarked at the Law of the Sea Institute, Berkeley, California, on Nov. 3, 2008, about the lack of a full Senate vote, when he stated:

Opponents were ultimately successful in keeping it from reaching the senate floor by making it clear that a debate on U.S. accession would trigger every possible procedural maneuver and thereby take up maximum floor time. The Senate Majority Leader decided not to send the treaty forward under those circumstances, and the treaty has languished on the Senate calendar for the last year.

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23. C. A. Stavropoulos, *Procedural Problems of the Third Conference on the Law of the Sea*, in UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Vol. I, Myron H. Nordquist, ed., 1985), at lxv.

24. LOS Convention, *supra* note 1, arts. 309–310.

25. See Division for Ocean Affairs and the Law of the Sea (DOALOS), available at [www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm).

26. Senate Executive Report 110-9, *supra* note 2, at 19–24.

27. *Ibid.*, at 12.

28. *Ibid.*, Declaration 2, at 19; and see below sec. III.

29. *Ibid.*, Understanding 1, at 19; and see below sec. IV.

30. *Ibid.*, Understanding 2, at 20; and see below sec. V.

31. *Ibid.*, Understanding 3, at 20; and see below sec. VI.

32. *Ibid.*, Understanding 4, at 20–21; and see below sec. VII.

33. *Ibid.*, Understanding 5, at 21; and see below sec. VIII.

34. *Ibid.*, Understanding 6, at 21; and see below sec. IX.

35. Statement of Taft, *supra* note 13, at 89.

36. *Ibid.*

37. Senate Executive Report 110-9, *supra* note 2, Declaration 2, at 19.

38. *Ibid.*, at 11.

39. See Commentary, *supra* note 10, at X.

40. Statement of Taft, *supra* note 13, at 93.

41. Senate Executive Report 110-9, *supra* note 2, at 11.

42. *Ibid.*, at 26.

43. Statement of Mark T. Esper, Deputy Assistant Secretary for Negotiations Policy, Department of Defense, Senate Foreign Relations Committee, Oct. 21, 2003, in Senate Executive Report 108-10, *supra* note 13, at 99. In response to a Senate question following this hearing, Esper stated:

The determination of whether an activity is of a military nature inherently involves subjective as well as objective elements and the evaluation of potentially sensitive and important national security activities and information. Whether a State's particular activity constitutes a "military" activity is thus a determination that the State Party undertaking the activity is uniquely situated to make.

*Ibid.*

44. Statement of Rear Admiral William L. Schachte, Jr., JAGC, USN (Ret.), in *ibid.*, at 61.

45. John Norton Moor, *ibid.*, at 71–72.

46. See Division for Ocean Affairs and Law of the Sea (DOALOS), available at [www.un.org/Depts/los/settlement\\_of\\_disputes/choice\\_procedure.htm](http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm).

47. LOS Convention, *supra* note 1, art. 301.

48. *Ibid.*, art. 88 (reservation of high seas); 143(1), 147(2)(d), 240(a), and 246(3) (marine scientific research); and 141 and 155(2) (application to the Area).

49. Senate Executive Report 110-9, *supra* note 2, Understanding 1, at 19.

50. OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, (Vol. V) para. 81, at 62. See also Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VA. J. INT'L L. 809, 829–832 (1984) and UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 89 (Vol. II, Satya Nandan and Shabtai Roseanne, eds., 1993).

51. Senate Executive Report 110-9, *supra* note 2, at 11–12.

52. See, for example, the 1994 SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (1995).

53. Commentary, *supra* note 10, at 94.

54. Senate Executive Report 110-9, *supra* note 2, at 11–12.

55. See: Commentary, *supra* note 10.

56. LOS Convention, *supra* note 1, art. 19(1).

57. Senate Executive Report 110-9, *supra* note 2, Understanding 2, at 20.

58. *Ibid.*, at 12–13.

59. Union of Soviet Socialist Republics, United States: Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, done at Jackson Hole, Wyoming, Sept. 23, 1989, 28 I.L.M. 1444 (1989).

60. Territorial Sea and Contiguous Zone Convention, done at Geneva, April 29, 1958, 516 U.N.T.S. 205 (entered into force Sept. 22, 1964).

61. Senate Executive Report 110-9, *supra* note 2, at 12.

62. *Ibid.*, at 26–27.

63. *Ibid.*, at 12.

64. Referred to in Senator John D. Rockefeller IV and Senator Christopher S. Bond, Chairman and Vice Chairman, Senate Select Committee on Intelligence letter to Hon. Joseph R. Biden, Jr., Sept. 14, 2007, in *ibid.*, at 30.

65. *Ibid.*, at 31.

66. Chairman of the Joint Chiefs of Staff General Richard B. Myers letters to the Hon. Sen. John W. Warner (R-VA) and the Hon. Sen. Richard G. Lugar (R-IN), April 7, 2004 (Convention leaves "unaffected" U.S. Navy intelligence collection activities). The full text of the letter is available at the Web site of the Rule of Law Committee for the Oceans at [www.oceanlaw.org/downloads/references/military/CJCS\\_ltrs.pdf](http://www.oceanlaw.org/downloads/references/military/CJCS_ltrs.pdf). "Oceanlaw.org" is maintained by Caitlyn Antrim, Executive Director of The Rule of Law Committee for the Oceans and former member of the U.S. delegation to the Third UN Conference on the Law of the Sea. Oceanlaw.org contains a comprehensive electronic archive of official testimony, articles, and research concerning the Law of the Sea Convention.

67. LOS Convention, *supra* note 1, art. 47(1).

68. *Ibid.*, art. 46.

69. *Ibid.*, art. 53. If a state has not properly made such a designation, then “the route of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation.”

70. Statement of Navy Admiral Michael Mullen, Senate Committee on Foreign Relations, Oct. 21, 2003 in Senate Executive Report 108-10, *supra* note 13, at 105. Admiral Mullen continued that the right to transit in normal mode is “frequently challenged, [and] is particularly important to our naval units because it ensures their ability to maintain appropriate readiness and defensive postures through many of the most important choke points in the world.”

71. George V. Galdorisi and Kevin R. Vienna, *BEYOND THE LAW OF THE SEA, NEW DIRECTIONS FOR U.S. OCEANS POLICY* 149 (1997).

72. Senate Executive Report 110-9, *supra* note 2, Understanding 3, at 20.

73. Statement of Admiral Mullen, *supra* note 70, at 105.

74. *Ibid.*

75. LOS Convention, *supra* note 1, arts. 37 and 38. Transit passage applies to straits that are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive zone.

76. Prepared statement of Bernie Oxman, University of Miami School of Law, Senate Committee on Foreign Relations, Oct. 14, 2003, in Senate Executive Report 108-10, *supra* note 13, at 35.

77. Commentary, *supra* note 10, at 6.

78. *Ibid.*

79. Senate Executive Report 110-9, *supra* note 2, Understanding 4, at 20–21.

80. Statement of Rear Admiral Schachte, Jr., *supra* note 44, at 61. See also James Kraska and Brian Wilson, “Beijing’s Political and Legal ‘Warfare’ to Deny Littoral Access: Foreign Military Activities in China’s EEZ,” *ASIAN DEFENCE JOURNAL*, at 27 (May 2009).

81. Statement of Taft, Department of State Legal Adviser, to the Senate Select Committee on Intelligence on June 8, 2004, in Senate Executive Report 110-9, *supra* note 2, at 38.

82. LOS Convention, *supra* note 1, art. 58, states that activities in an EEZ shall have “due regard” for the “rights and duties of the Coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention . . . in so far as they are not incompatible with this Part.”

83. U.S. Navy Admiral Mullen, Vice Chief of Naval Operations, responding to a question posed by the Senate Foreign Relations Committee, at the Oct. 21, 2003, Senate Executive Report 108-10, *supra* note 13, at 173.

84. Commentary, *supra* note 10, at 24.

85. Exclusive Economic Zone, Presidential Proclamation 5030, Mar. 10, 1983, 48 *FED. REG.* 10605, stated in part that, within the EEZ, freedoms of navigation and overflight are to be enjoyed without prejudice to the sovereign rights and jurisdiction of the United States.

86. Operational challenges are conducted through the Freedom of Navigation (FON) program. For a list of U.S. operational assertions from 2000 to 2007, see [www.defenselink.mil/policy/sections/policy\\_offices/](http://www.defenselink.mil/policy/sections/policy_offices/).

87. Commentary, *supra* note 10, at 79.

88. See, generally, J. A. Roach and R. W. Smith, *UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS* 425–449 (2nd ed. 1996).

89. Commentary, *supra* note 10, at 80.

90. Senate Executive Report 110-9, *supra* note 2, at 13.

91. *ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS* 130 (Thomas and Duncan, eds., U.S. Naval War College, 1997).

92. Captain J. Ashley Roach, JAGC, USN (Ret.), “Defining Scientific Research: Marine Data Collection,” 541–565 at 564–565, in *LAW, SCIENCE AND OCEAN MANAGEMENT* (Myron Nordquist, Ronan Long, Tomas H. Heidar, and John Norton Moore, eds., 2007).

93. Senate Executive Report 110-9, *supra* note 2, Understanding 5, at 20–21.

94. Galdorisi and Vienna, *supra* note 71, at 164.

95. United Nation's General Assembly, Resolution 58/240, U.N. Doc. A/58/RES/240, Dec. 23, 2003, at 4.

96. Senate Executive Report 110-9, *supra* note 2, at 13.

97. *Ibid.*, Understanding 6, at 21.

98. Examples of excessive claims include: those relating to baselines not drawn in conformity with the LOS Convention; those purporting to require notification or permission before warships or other ships exercise the right of innocent passage or freedom of navigation or which otherwise purport to limit navigation and overflight in ways not permitted by the Convention; those that are not in conformity with the provisions of the Convention relating to straits used for international navigation, including the right of transit passage; those that are not in conformity with the provisions of the Convention relating to archipelagic states or waters, including archipelagic baselines and archipelagic sea-lanes passage; and those that are not in conformity with the provisions of the Convention relating to the exclusive economic zone or the continental shelf.

99. Since 1979, the U.S. Freedom of Navigation program has included diplomatic and operational challenges to over 80 states with excessive maritime claims. See *supra* note 86.

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