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ALONE ON A WIDE WIDE SEA: A NATIONAL SECURITY RATIONALE FOR JOINING THE LAW OF THE SEA CONVENTION

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In the face of twenty-first century challenges to military maritime mobility, the question persists as to whether customary international law will remain a reliable foundation for U.S. maritime security interests in the future. To date, the U.S. has successfully conducted military operations sanctioned by the customary high seas freedoms of free navigation and overflight. However, with technological advances and heightened environmental and defense concerns, countries with coastal state interests may demand greater control over their near-shore waters, requiring the U.S. to reconsider its position outside the United Nations Convention on the Law of the Sea (UNCLOS).

This article addresses pertinent issues relating to the subject, including whether the U.S. should continue to rely on the legitimate, but unstructured, processes of customary law to guarantee military access; and whether U.S. national security interests would be better served by a commitment to UNCLOS.

INTRODUCTION

After playing a leading role in negotiating the 1982 United Nations Convention on the Law of the Sea (UNCLOS or the Convention) and the subsequent 1994 Agreement on deep seabed mining, the U.S. has failed to join the Convention.¹

* Vice Admiral, Judge Advocate General's Corps, U.S. Navy. The views expressed herein are the author's and do not reflect the official policy of the Department of Defense. The author wishes to thank John Bellinger, Ash Roach, and Stu Belt for their helpful comments, as well as Ed O'Brien, Aundrea Taplin, and Eric Osterhues for their invaluable research assistance and insights. Finally, special thanks to Joe Baggett for his unerring counsel and abiding knowledge of both the law and the sea. The title is inspired by Coleridge's *Rime of the Ancient Mariner* (part fourth): "Alone, alone, all, all alone, / Alone on a wide wide sea! / And never a saint took pity on / My soul in agony."

¹ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]; Division for Ocean Affairs and the Law of the Sea, *United Nations Convention on the Law of the Sea of 10 December 1982 Overview and Full Text*, Table 8,

The U.S. remains outside UNCLOS despite consistent presidential support. The last three administrations have supported accession,² and President Reagan, while rejecting UNCLOS' deep seabed mining provisions, recognized the treaty's national security value and directed the U.S. to operate in accord with UNCLOS.³ President Reagan's objections to the deep seabed mining provisions were later addressed, leading President Clinton to transmit the treaty to the Senate for advice and consent on October 7, 1994.⁴

The Department of Defense has consistently supported U.S. accession as well.⁵ Department of Defense representatives played an active role in negotiating the treaty and actively supported the treaty's codification of critical navigational rights such as the right of "innocent passage" through coastal state territorial seas;⁶ the right of unimpeded "transit passage" through critical international choke points;⁷ and the continued right to exercise free navigation, overflight,⁸ and other traditional high seas freedoms in the Exclusive Economic Zone (EEZ).⁹

However, despite support from consecutive presidents, a wide spectrum of U.S. industry, and the national security establishment, UNCLOS has not enjoyed a full measure of support on Capitol Hill. Although the Senate Foreign Relations Committee has twice voted UNCLOS favorably out of committee, the treaty has never received a full Senate vote.¹⁰

Through the years, UNCLOS has foundered because opponents have raised concerns about its association with the United Nations as well as its provisions for sharing revenues derived from outer continental shelf exploration and deep seabed

http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm (last visited Sept. 15, 2011).

² See *Nomination of the Honorable Hillary R. Clinton to be Secretary of State: Hearing Before the Committee on Foreign Relations of the United States Senate*, 111th Cong. 1 (Jan. 13, 2009), available at <http://foreign.senate.gov/hearings/2009/hr090113a.html>; see also MARJORIE ANN BROWNE, CONG. RESEARCH SERV., IB95010, THE LAW OF THE SEA CONVENTION AND U.S. POLICY (2006), available at <http://www.climateactionproject.com/docs/crs/IB95010.pdf>; Cong. Rec. S14475-76 (daily ed. Oct. 7, 1994) (President William J. Clinton, Letter of Transmittal to the Senate, October 7, 1994), available at http://www.jag.navy.mil/organization/documents/Senate_Transmittal.pdf.

³ United States Oceans Policy 1983, 19 WEEKLY COMP. PRES. DOC. 383, 866 (Mar. 10, 1983) [hereinafter United States Oceans Policy].

⁴ S. Treaty Doc. No. 103-39, at III-IV (1994).

⁵ See, e.g., DEP'T OF DEF., *The Quadrennial Defense Review Report* 86 (Feb. 2010), available at http://www.defense.gov/qdr/images/QDR_as_of_12Feb10_1000.pdf.

⁶ UNCLOS, *supra* note 1, art. 17, at 30.

⁷ UNCLOS, *supra* note 1, arts. 37-44, at 36-39.

⁸ UNCLOS, *supra* note 1, art. 87, at 57.

⁹ See generally John Norton Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AM. J. INT'L L. 77 (1980) (giving a detailed account of the negotiations over navigation rights).

¹⁰ Scott G. Borgerson, *The National Interest and the Law of the Sea*, COUNCIL ON FOREIGN RELATIONS SPECIAL REPORT NO. 46 at 12-13 (May 2009), available at <http://www.cfr.org/global-governance/national-interest-law-sea/p19156>.

mining. While important, the debate over revenue sharing and deep seabed mining is beyond the scope of this paper.¹¹

UNCLOS opponents also have argued that UNCLOS would endanger U.S. national security.¹² Recently, however, some UNCLOS opponents have adopted a different tack, conceding the national security benefits of UNCLOS, but arguing that the benefits provide insufficient justification to join an otherwise flawed treaty.¹³

Critical to the opponents' new approach is their assertion that UNCLOS' favorable national security provisions are already well established as customary international law.¹⁴ Therefore, opponents argue, there is no national security imperative to join the treaty. The U.S. can enjoy UNCLOS' benefits without incurring obligations opponents find objectionable in other provisions of the treaty.

UNCLOS opponents are correct on at least one point. The customary international law of the sea – at least as generally understood today – is consistent with U.S. national security interests. The U.S. government has said as much.¹⁵ However, in relying on the apparent harmony between UNCLOS and customary law as rationale for the U.S. to remain outside the treaty, opponents have failed to address a critical question: What if UNCLOS or customary law changes? Is it possible that today's favorable legal environment could evolve adversely to U.S. interests?

The question is more than speculative. Through the years, a variety of nations have advanced legal theories inconsistent with critical U.S. ocean policy interests.¹⁶

¹¹ See THE HERITAGE FOUNDATION, U.N. CONVENTION ON THE LAW OF THE SEA: IT'S STILL A BAD IDEA, FACTSHEET #87 (July 7, 2011), available at <http://www.heritage.org/Research/Factsheets/2011/07/UN-Convention-on-The-Law-of-The-Sea-Its-Still-a-Bad-Idea>. For a pro-UNCLOS treatment of these issues, see Bernard H. Oxman, *The 1994 Agreement on Implementation of the Seabed Provisions of the Convention on the Law of the Sea*, 88 AM. J. INT'L L. 687 (1994).

¹² See e.g., *The United Nations Convention on the Law of the Sea: Hearing Before the H. Comm. on Int'l Relations*, 108th Cong. 96-103 (2004) (statement of Baker Spring, F.M. Kirby Research Fellow in National Security Policy, The Heritage Foundation); see also John Bolton & Dan Blumenthal, *Time to Kill the Law of the Sea Treaty – Again*, WALL ST. J., Sept. 29, 2011, available at <http://online.wsj.com/article/SB10001424053111904836104576560934029786322.html>.

¹³ Steven Groves, *Accession to the U.N. Convention on the Law of the Sea Is Unnecessary to Secure U.S. Navigational Rights and Freedoms*, THE HERITAGE FOUNDATION BACKGROUNDER NO. 2599 (Aug. 24, 2011), available at <http://www.heritage.org/Research/Reports/2011/08/Accession-to-UN-Convention-Law-of-the-Sea-Is-Unnecessary-to-Secure-US-Navigational-Rights-Freedoms>; ROA Opposes Push to Ratify Law of the Sea Treaty, THE RESERVE OFFICER ASSOCIATION BLOG (July 26, 2011, 3:35 PM), <http://reserveofficer.blogspot.com>.

¹⁴ See RESTATEMENT (THIRD) OF THE LAW: THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102, reporter's note 2 at 30 (1987) (customary international law is most frequently defined as the general and consistent practice of states arising from a sense of legal obligation).

¹⁵ See *Military Implications of the United Nations Convention on the Law of the Sea: Hearing Before the Senate Armed Services Comm.*, 108th Cong. 31 (2004) (statement of Hon. William H. Taft, IV, Legal Adviser, Department of State) [hereinafter Statement of Hon. William H. Taft (2004)]; see also Leon E. Panetta, Sec'y of Def., Statement to ASEAN Defense Ministers (Oct. 23, 2011), available at <http://www.defense.gov/Speeches/Speech.aspx?SpeechID=1624>.

¹⁶ J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS 4 (2d. ed., 1996).

Historically, these nations have lacked the will or ability to affect meaningful change in the international law of the sea. Today, however, this dynamic is changing.

Consider, for example, U.S. military operations in the off-shore area known as the EEZ, as codified by UNCLOS, comprising the waters beyond a nation's territorial sea extending a maximum of 200 nautical miles from the coast.¹⁷ For years, the U.S. has consistently maintained the right under customary international law to conduct military activities in coastal state EEZs.¹⁸ Over the past decade, however, the People's Republic of China has initiated confrontations with U.S. ships and aircraft operating in the Chinese-claimed EEZ and its associated airspace. The Chinese have boldly rejected long-standing U.S. positions on customary international law and also challenged conventional interpretations of critical UNCLOS provisions.

In the face of these and similar challenges to military maritime mobility, the question is whether customary international law will remain a reliable foundation for U.S. maritime security interests in the future. Should the U.S. continue to rely on the legitimate, but unstructured, processes of customary law to guarantee military access? Or, would U.S. national security interests be better served by a commitment to UNCLOS?

The stakes are high. Coastal states' EEZs cover nearly forty percent of the world's oceans, including all the globe's critical littoral areas. The Chinese arguments, if successful, would dramatically limit the U.S. military's ability to operate not only in the Chinese EEZ, but in EEZs around the world.

Clearly, access to coastal state EEZs and associated airspace will continue to play a critical role in the U.S.' ability to execute its national security strategy. Policy makers must understand UNCLOS' potential risks and rewards as they develop options for shaping and responding to the wide range of potential national security scenarios facing the U.S.

I. MILITARY ACTIVITIES IN THE EXCLUSIVE ECONOMIC ZONE

UNCLOS' codification of the EEZ concept represented the fulfillment of extended efforts to reconcile coastal state interests in protecting resources in their off-shore waters with the desires of maritime states to exercise traditional high seas freedoms in the waters of the EEZ. UNCLOS defines the EEZ as "an area beyond and adjacent to the territorial sea" in which "the rights and jurisdiction" of the coastal state and "the rights and freedoms" of other states interrelate.¹⁹ Within these geographic limits, a series of functional rights and duties apply.

Within the EEZ, a coastal state possesses "sovereign rights" with respect to living and non-living natural resources (conservation, management, exploration, and exploitation) as well as economic exploitation and exploration (such as using water,

¹⁷ UNCLOS, *supra* note 1, art. 57, at 44 (limiting the EEZ to 200 nm from the same baseline used to measure the territorial sea).

¹⁸ Statement of Hon. William H. Taft (2004), *supra* note 15.

¹⁹ UNCLOS, *supra* note 1, art. 55, at 43.

winds and currents for energy production). A coastal state also has “jurisdiction” in the EEZ (as opposed to sovereign rights) with respect to scientific research, man-made structures, and protection of the marine environment. UNCLOS Article 56 does not, however, give the coastal state the right to limit the high seas freedoms of other user states.

In contrast to the scope of the coastal state’s specific EEZ prerogatives, Article 58 of the Convention addresses the broader “rights and duties” enjoyed by “all states” in a coastal state’s EEZ.²⁰ The “rights” are cast, by explicit reference, in the context of the “freedoms referred to in Article 87” – which are, as set out in that article, the “freedom of the high seas.” Both Articles 87 and 58 specifically mention the freedoms of navigation and overflight. Article 58 further speaks of “other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft . . .” All states must exercise these rights with “due regard” for the rights and duties of the coastal state.

The U.S. has long taken the view that Article 56, which sets forth the restricted authority of coastal states over their EEZ, must be read together with the more expansive Article 58, setting forth the rights of all states within the EEZ. “There is a mutuality of relationship of the coastal state and other states, and articles 56 and 58 taken together constitute the essence of the regime of the [EEZ].”²¹ The U.S. has long asserted that, taken together, these articles give a state the robust right to exercise high seas freedoms in a foreign state’s EEZ.

A. *The Military Mobility Perspective*

From the inception of UNCLOS, the U.S. has consistently asserted that the high seas freedoms of navigation and overflight are available to military vessels and aircraft and that state aircraft and vessels are legally protected from coastal state jurisdictional assertions.²²

The U.S. declared its EEZ on March 10, 1983,²³ stating that “[t]he right to conduct [military operations, exercises, and] activities will continue to be enjoyed by all states in the exclusive economic zone.”²⁴ The point was reiterated in Secretary of State Warren Christopher’s 1994 Submittal Letter to the President recommending that the U.S. become a party to the Convention, where he noted that the Convention “specifically preserves and elaborates the rights of military and commercial navigation and overflight in areas under coastal state jurisdiction and on the high seas beyond.”²⁵

²⁰ UNCLOS, *supra* note 1, art. 58, at 44.

²¹ MYRON H. NORDQUIST ET AL., UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY §58.2, at 556 (1993) [hereinafter NORDQUIST].

²² See Third U. N. Conference on the Law of the Sea, 11th Sess., Note by the Secretariat, at 243, U.N. Doc. A/CONF.62/WS/37 (Dec. 10, 1982), *available at* http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1982/docs/vol_XVII/a_conf-62_ws_37%20and%20add-1%20and%202.pdf.

²³ United States Ocean Policy, *supra* note 3, at 383.

²⁴ Third U. N. Conference on the Law of the Sea, *supra* note 22.

²⁵ United States Dep’t of State, *Law of the Sea Convention Letters of Transmittal and Submittal and Commentary*, 6 DISPATCH MAGAZINE 2 (Supp. 1 1995).

Numerous states have filed declarations supporting the U.S. view. The Netherlands declaration was representative:

The Convention does not authorize the coastal state to prohibit military exercises in its exclusive economic zone. The rights of the coastal state in its exclusive economic zone are listed in article 56 of the Convention, and no such authority is given to the coastal state. In the exclusive economic zone all states enjoy the freedoms of navigation and overflight, subject to the relevant provisions of the Convention.²⁶

Germany, Italy, the United Kingdom, Egypt, and Oman all filed declarations asserting the rights of maritime nations in the coastal state's EEZ.²⁷

B. *The Coastal State Perspective*

During UNCLOS' development and in the immediate years following its entry into force, a cadre of states rejected the military mobility perspective.²⁸ These states, however, had little success in advancing their view and in intervening years have done little to challenge maritime operations in their EEZs.

In 2001, however, the latter condition began to change. In March 2001, the USNS *Bowditch* was confronted by Chinese warships while conducting routine military survey operations within the Chinese EEZ and was forced out of the area.²⁹ Less than a month later, in April 2001, a U.S. Navy EP-3 aircraft conducting a routine reconnaissance flight was intercepted by Chinese aircraft and subsequently forced to make an emergency landing while operating within the Chinese EEZ.³⁰ On March 9, 2009, while conducting lawful military activities, the USNS *Impeccable* was surrounded by Chinese vessels and forced to undertake emergency maneuvers to avoid colliding with the Chinese vessels.³¹ This event was soon followed by China's repeated interference with the USNS *Victorious*.³²

²⁶ Division for Ocean Affairs and the Law of the Sea, *Declarations and Statements* (July 12, 2011), http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm.

²⁷ *Id.*

²⁸ It is a matter of historical record that at the final Convention negotiation conference, "unsuccessful proposals were made to restrict the holding of foreign military exercises in the EEZ despite the widely held view that such exercises fell under the freedom of navigation concept. The Convention includes no such limitation." See Third United Nations Conference on the Law of the Sea, 4th Sess., 67th plen. mtg. at 62, U.N. Doc. A/CONF.62/SR.67 (Dec. 10, 1982).

²⁹ See Chris Plante, *U.S. Quietly Resumes Surveillance Flights off China*, CNN (May 15, 2001), available at http://articles.cnn.com/2001-05-15/us/us.china.plane_1_transport-plane-navy-ep-3-chinese-coast?_s=PM:US ("Chinese frigate Jianheu encountered the Bowditch near the Chinese coast in international waters on March 23 [2001] and aggressively confronted the unarmed ship. . . . The U.S. ship left the area rather than continue the confrontation.").

³⁰ See Henry Chu & Paul Richter, *U.S. Spy Plane, Chinese Fighter Collide Over Sea*, L.A. TIMES, Apr. 2, 2001, available at <http://articles.latimes.com/2001/apr/02/news/mn-45841>.

³¹ See Ann Scott Tyson, *U.S. Protests Chinese Shadowing in International Waters*, WASH. POST, Mar. 10, 2009, available at <http://www.washingtonpost.com/wp->

In each of these incidents, China asserted that U.S. aircraft and vessels were violating Chinese domestic law as well as international law. China argues that the EEZ is within China's sovereign domain, and insists that foreign vessels must have Chinese permission for military operations within its EEZ.³³ This general assertion is amplified in various forms.

1. *Prior permission requirements*

During the negotiations preceding the adoption of the Convention, a few states attempted to restrict military activities and other high seas freedoms in the EEZ.³⁴ Although this effort was unsuccessful, other states joined Brazil at the time, and through the years, additional states have enacted express restrictions on military activities in the EEZ or have claimed territorial seas to 200 nautical miles and beyond.³⁵ Upon its ratification of UNCLOS in May 2011, Thailand became the latest state to adopt this view.³⁶

Many of the prior permission declarations require the consent of the coastal state concerned prior to any military exercises or maneuvers in the EEZ. Although the declarations purport to require permission for any military activity, they emphasize

dyn/content/article/2009/03/09/AR2009030900956.html?hpid=moreheadlines; *see also*, Raul Pedrozo, *Close Encounters at Sea*, 62 NAVAL WAR C. REV. 101 (2009).

³² Jane McCartney, *Chinese and American ships clash again in Yellow Sea*, TIMES ONLINE, May 6, 2009, available at <http://www.timesonline.co.uk/tol/news/world/asia/article6233796.ece>.

³³ *See* David Lague, *Dangerous Waters: Playing Cat and Mouse in the South China Sea*, 4 GLOBAL ASIA 56, (2009), available at http://www.globalasia.org/Current_Issues/V4N2_2009/David_Lague.html ("China argues that under UNCLOS and related domestic law, foreign vessels operating in the exclusive economic zone that extends 200 nautical miles from its coast must have permission to conduct military operations, intelligence collection or hydrographic surveys. As a number of maritime security experts including Sam Bateman from Singapore's Nanyang Technological University have pointed out in recent years, Beijing is expending considerable diplomatic energy to win wider international support for its restrictive views on maritime boundaries under UNCLOS. 'China has lodged a solemn representation to the United States as the USNS Impeccable conducted activities in China's special economic zone in the South China Sea without China's permission,' Chinese Foreign Ministry spokesman Ma Zhaoxu told a news briefing in Beijing on March 10. 'We demand that the United States put an immediate stop to related activities and take effective measures to prevent similar acts from happening.' After Beijing was called on to explain why two Chinese fishing vessels had obstructed the Victorious in the Yellow Sea on May 1, Ma again responded that the US had 'violated' international law. 'The fact is that the USNS Victorious conducted activities in China's exclusive economic zone in the Yellow Sea without China's permission,' he said in a statement.").

³⁴ *See* NORDQUIST *supra* note 21, at § 58.10(b), at 564.

³⁵ The following States impose some form of restriction on military activities in the EEZ: Bangladesh; Benin; Brazil; Burma; Cape Verde; China; Ecuador; India; Iran; Kenya; Malaysia; Maldives; Mauritius; North Korea; Pakistan; Peru; Philippines; Portugal; Thailand; and Uruguay. In addition, six states claim a 200 nautical mile territorial sea that also purports to restrict military activities: Benin; Congo; Ecuador; Liberia; Peru; and Somalia. *See* United States Department of Defense. *Maritime Claims Reference Manual DOD 2005.1-m*, available at http://www.jag.navy.mil/organization/code_10_mcrm.htm.

³⁶ UNCLOS, Thailand: Ratification, C.N.291.2011.TREATIES-4 (Depositary Notification), available at <http://treaties.un.org/doc/Publication/CN/2011/CN.291.2011-Eng.pdf>.

the need for permission, in particular where the use of weapons or explosives is involved.

Although China did not make a declaration regarding military activities in its EEZ upon signing or ratifying the Convention,³⁷ the Chinese have nonetheless been consistent proponents of the prior permission requirement.³⁸

Most recently, in the aftermath of the *Impeccable* and *Victorious* incidents, China's Ministry of Foreign Affairs asserted that military ships "entering Chinese EEZs without China's permission . . . is a violation of relevant international law as well as Chinese laws and regulations."³⁹ Later, in November 2010, after the shelling of Yeonpyeong by North Korea, a Chinese Foreign Ministry Spokesman, commenting on U.S. Navy activity in the Yellow Sea, stated that "we hold a consistent and clear-cut stance . . . we oppose any party to take any military acts in our exclusive economic zone without permission."⁴⁰

The U.S. has consistently refused to comply with prior permission requirements and there is no widely accepted practice by maritime states that would indicate the existence of an international rule or custom curtailing the general freedom to conduct military activities in the EEZ.⁴¹

³⁷ China provided the following statement, in part, with their ratification on June 7, 1996: In accordance with the provisions of the United Nations Convention on the Law of the Sea, the People's Republic of China shall enjoy sovereign rights and jurisdiction over an exclusive economic zone of 200 nautical miles and the continental shelf . . . The People's Republic of China reaffirms that the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice the right of a coastal State to request, in accordance with its laws and regulations, a foreign State to obtain advance approval from or give prior notification to the coastal State for the passage of its warships through the territorial sea of the coastal State.

Division for Ocean Affairs and the Law of the Sea, *Declarations and Statements* (July 12, 2011), http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China%20Upon%20ratification.

³⁸ During UNCLOS negotiations, PRC representative Ling Ching stated that a territorial sea established together with an exclusive economic zone up to 200 nautical miles was "entirely proper and reasonable" and added that a coastal state should exercise full sovereignty within the exclusive economic zone. *See* Third United Nations Conference on the Law of the Sea, 24th Meeting, at 187, U.N. Doc A/CONF.62/C.2/SR.24 (Aug. 1, 1974), *available at* <http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1982/Vol2.html>.

³⁹ Huang Zuoping, *Troubled Waters*, BEIJING REVIEW (PRC), June 11, 2009, *available at* http://www.bjreview.com.cn/world/txt/2009-06/07/content_199369.htm.

⁴⁰ Ian Johnson & Martin Fackler, *China Addresses Rising Korean Tensions*, N.Y. TIMES, Nov. 26, 2010, *available at* <http://www.nytimes.com/2010/11/27/world/asia/27korea.html?pagewanted=all>.

⁴¹ Territorial Regimes and Related Issues, INTERNATIONAL LAW INSTITUTE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, 648-50 (Sally J. Cummins ed., 2007) *available at* <http://thehague.usembassy.gov/uploads/jM/vC/jMvC0kGHnuAnY5weJVHk8g/US-practice-in-International-Law.pdf> [hereinafter DIGEST]. In 2007, India provided a diplomatic note to the United States protesting the conduct of marine scientific research (MSR) by USNS *MARY SEARS* in India's EEZ without permission as required by its domestic law. The United States responded that the vessel was not conducting MSR and was lawfully conducting activities under Article 58 of UNCLOS for traditional high seas freedoms of navigation and other uses of the sea which have always included military operations and exercises. *See id.*

2. *Peaceful purposes*

In addition to arguing for coastal state sovereignty in the EEZ, Chinese commentators have also argued that military activities in the EEZ, conducted without coastal state permission, violate UNCLOS Article 88, which states that “the high seas shall be reserved for peaceful purposes,”⁴² as well as Article 301 (entitled “Peaceful uses of the seas”), which states that “State Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State.”⁴³

The most compelling response to the Chinese argument is a 1985 report by the United Nations Secretary-General concluding that “military activities consistent with the principles of international law embodied in the Charter of the United Nations, in particular with Article 2, paragraph 4, and Article 51, are not prohibited by the Convention on the Law of the Sea.”⁴⁴ In addition, several maritime nations have explicitly recognized military activities as a lawful and normal at-sea activity.⁴⁵

3. *Intelligence collection*

The Chinese argue specifically that intelligence-gathering operations within the EEZ violate UNCLOS’ peaceful purpose language and also constitutes a threat or use of force in violation of Article 2(4) of the U.N. Charter.⁴⁶ Two Chinese scholars have gone so far as to argue that intelligence collection in the EEZ is a form of battlefield preparation and “an electronic invasion and threat to the coastal state.”⁴⁷

The Convention does not address intelligence collection in the EEZ.⁴⁸ Intelligence collection has been routinely conducted beyond territorial seas by many nations for decades.⁴⁹

4. *Marine scientific research*

The Chinese argue that U.S. operations such as those conducted by *Bowditch*, *Impeccable*, and *Impervious* are a form of intelligence-gathering,⁵⁰ or, alternatively, a form of marine scientific research legitimately regulated by the coastal state.⁵¹

⁴² See e.g., Ji Guoxing, *The Legality of the “Impeccable Incident,”* 5 CHINA SECURITY 16, 18 (2009).

⁴³ *Id.*

⁴⁴ See NORDQUIST, *supra* note 21 at 91 (quoting The Secretary-General, *General and Complete Disarmament – Study of the Naval Arms Race*, ¶188, U.N. Doc. A/40/535 (1985)).

⁴⁵ See e.g., Netherlands and Germany Declarations, *supra* notes 25 and 26.

⁴⁶ See Ji Guoxing, *supra* note 42, at 18-19; see also Mark Valencia, *The Impeccable Incident: Truth and Consequences*, 5 CHINA SECURITY 22, 23-24 (2009).

⁴⁷ Cheng Xizhong, *A Chinese Perspective on “Operational Modalities”*, 28 MARINE POL’Y 25, 26 (Jan. 2004); see generally Ren Xiaofeng & Cheng Xizhong, *Military and Intelligence Gathering Activities in the Exclusive Economic Zone: Consensus and Disagreement II; A Chinese View*, 29 MARINE POL’Y 139 (Mar. 2005).

⁴⁸ *Convention on the Law of the Sea: Report of the Senate Committee on Foreign Relations*, 110th Cong. 36-37 (2007) (statement of Hon. William H. Taft, IV, Legal Adviser, Department of State) (stating that the Convention does not regulate or prohibit intelligence activities).

⁴⁹ See, e.g., Melissa Healy, *Soviet Spy Ship Activity Grows off West Coast*, L.A. TIMES, May 27, 1989, at 1.

⁵⁰ Sienho Yee, *Agora: Military Activities in the EEZ: Sketching the Debate on Military Activities in the EEZ: An Editorial Comment*, 9 CHINESE J. OF INT’L LAW 1, 4 (2010) (“The factual and operational

The U.S. asserts that the Convention recognizes the difference between military survey activities and marine scientific research.⁵² Military surveys can include the collection of oceanographic, bathymetric, marine geological, geophysical, chemical, biological, and acoustic data. Hydrographic surveys obtain information for creation of navigational charts critical for safe navigation and gather information such as water depth, configuration and nature of the natural bottom, directions and force of currents, heights and times of tides and water stages.

The means of data collection for both hydrographic and military surveys may sometimes be the same as those used in marine scientific research; however, according to the U.S., the key difference is that information, regardless of security classification, is intended not for use by the general scientific community, as with marine scientific research, but by the military for military purposes.

II. POTENTIAL FOR CHANGE

For more than a half-century, the U.S. has been overwhelmingly successful in conducting military operations consistent with the principles of free navigation and overflight. Coastal states with objections to U.S. operations and the supporting legal rationale have failed to curtail these operations. In addition to a strong military, the U.S. has credible responses, grounded in the Convention's text, negotiating history, and customary international law, to the restrictive arguments made by China and like-minded coastal states.

Given this record of U.S. success, any serious modification to the international oceans law regime may seem unlikely. Even so, in an era of persistent and dynamic change, prudence dictates that alternative futures be considered. In fact, several dynamics suggest that past may not be prologue when it comes to the international community's attitude toward military activities in the near-coastal regions.

A. A Changing Political, Economic, and Military Context

The U.S.'s post-World War II record of success in shaping a favorable law of the sea agenda was achieved without a serious rival. For decades, developing nations looked to the Soviet Union for leadership in opposing perceived imperialistic trends in U.S. foreign policy. However, within the law of the sea, the Soviet antagonist was notably absent. As the nation most capable of challenging U.S. operations and

nature or characteristics of the military activities in question are of great importance to the debate . . . To some, such activities are oceanographic survey; to others, they are spying activities. In our high-tech age, one man's survey may be another's war preparation.”)

⁵¹ Bill Gertz, *China Enacts Law Extending Its Control, 200-Mile Economic Zone Concerns U.S.*, WASH. TIMES, Jan. 27, 2003, at A1.

⁵² DIGEST, *supra* note 41, at 647-648 (“The United States recognizes that a coastal state may require anyone seeking to conduct MSR in the coastal state's EEZ to obtain approval in advance. However, international law, as reflected in the LOS Convention, distinguishes between MSR and survey activities, and is reflected in articles 19(2)(j), 21(1)(g), 40, 54 and in article 246(1) of the LOS Convention.”).

underlying legal doctrines, the Soviets had no interest in doing so. The U.S. and Soviet Union were, in effect, law of the sea allies.⁵³

Today, China shows far less inclination toward cooperation. Although Chinese legal arguments are not entirely original, what separates China from the traditionally ineffectual opponents of military maritime mobility is China's ambitious naval modernization.⁵⁴ The Chinese have served notice they intend to be at least a regional maritime power and perhaps more. Moreover, the Chinese intend to protect their maritime interests by redefining key aspects of the maritime legal regime.⁵⁵

If indeed the Chinese are inclined to lead a law of the sea insurgency from a position of maritime strength, the international political climate for doing so is more favorable today than 1982, when UNCLOS opened for signature, or even than 1994, when UNCLOS entered into force. Today, states with coastal concerns and interests of their own may find China's arguments useful in their own contexts. Two especially fertile justifications for increased regulation are protecting the coastal marine environment and ensuring off-shore security.

1. *Environmental protection*

UNCLOS addresses protection of the ocean environment. Article 56 of the Convention provides that a coastal state has jurisdiction "as provided for in the relevant provisions of this Convention with regard to . . . the protection and preservation of the marine environment."⁵⁶ Part XII of the Convention (Preservation and Protection of the Marine Environment) provides provisions for protection of the environment, but places limits on coastal state enforcement. Under Article 211, those who take enforcement action against pollution by vessels in their EEZs must apply "generally accepted international rules and standards established through the competent international organization or general diplomatic conference."⁵⁷ The International Maritime Organization (IMO) has a mandate as the competent international organization to adopt rules and standards relating to pollution from vessels and pollution by dumping.⁵⁸ From the U.S. perspective, national laws

⁵³ See, e.g., Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, U.S.-U.S.S.R., 28 I.L.M. 1444 at 1445-1446 (Sept. 23, 1989).

⁵⁴ See U.S. DEP'T OF DEFENSE, ANNUAL REPORT TO CONGRESS MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA (2011) available at http://www.defense.gov/pubs/pdfs/2011_cmpr_final.pdf; see also, BERNARD D. COLE, THE GREAT WALL AT SEA: CHINA'S NAVY IN THE TWENTY-FIRST CENTURY (2d ed. 2010); see also Robert Karniol, *China's Fourth Fleet*, THE STRAITS TIMES, Sept. 5, 2011, available at <http://vietstudies.info/kinhte/ChinaFourthFleet.htm>.

⁵⁵ Gertz, *supra* note 51; see also U.S. DEP'T OF DEFENSE, ANNUAL REPORT TO CONGRESS, MILITARY POWER OF THE PEOPLE'S REPUBLIC OF CHINA 13 (2007), available at <http://www.defense.gov/pubs/pdfs/070523-china-military-power-final.pdf> (describing China's views on law as an element of warfare).

⁵⁶ UNCLOS, *supra* note 1, art. 56, at 43-44.

⁵⁷ UNCLOS, *supra* note 1, art. 211, at 106.

⁵⁸ International Maritime Organization [IMO], *Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization*, LEG/MISC.6, 7 (Sept. 10, 2008), available at <http://www.imo.org/ourwork/legal/documents/6.pdf>.

promulgated unilaterally without regard to such procedures or that exceed generally accepted international rules and standards are inconsistent with UNCLOS and are not enforceable against other states' vessels.

The U.S. perspective notwithstanding, the environmental sensitivities that shaped UNCLOS Part XII have become even more prominent today than thirty years ago. Coastal states are increasingly able to harvest and exploit off-shore natural resources and the domestic political pressure to do so, and protect the surrounding marine environment, are unlikely to diminish.

Consider, for example, the U.S.'s recent defeat in the traditionally hospitable IMO on an environmental initiative that places restrictions on activities conducted on the high seas. In 2004, Spain and Mexico proposed that states consider amending the international agreement regarding pollution from ships⁵⁹ in respect of the potential risk to the marine environment posed by transfers of oil cargoes between ships on the high seas. Over the course of the next several years, states party to the Convention evaluated the need for restrictions on such activities and fashioned various requirements that were eventually approved by the Marine Environment Protection Committee at its fifty-eighth session in October 2008.⁶⁰ These amendments included a requirement that parties to the agreement provide forty-eight-hours advance notification to the coastal state for any ship-to-ship transfers of oil occurring in the EEZ. Despite strong U.S. objection in extending an advance notification scheme into the EEZ, the U.S. was unable to defeat the proposal, which entered into force January 1, 2011.

Coastal states have shown a willingness to act independently from the IMO as well. In 2006, Australia implemented domestic legislation⁶¹ requiring the compulsory use of a pilot by certain foreign vessels transiting through the Torres Strait, a strait used for international navigation. Compulsory pilotage was proposed as an associated protective measure arising from the strait's designation through the IMO as a particularly sensitive sea area. Australia argued that the use of pilots familiar with the specific hazards of the strait was necessary to protect the environmentally sensitive area. However, the IMO rejected Australia's proposal.

Similarly, Canada's Northern Canada Vessel Traffic Services Zone Regulations (NORDREG)⁶² require certain foreign and Canadian vessels to register with and report to the Canadian Coast Guard if entering and travelling through Canadian-claimed Arctic waters. Although not vetted through the IMO, the

⁵⁹ International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 94 Stat. 2297, 1340 U.N.T.S. 184, reprinted in 12 I.L.M. 1319, amended by Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, *adopted* February 17, 1978, 1340 U.N.T.S. 61, *reprinted* in 17 I.L.M. 546.

⁶⁰ Int'l Maritime Org. [IMO], *Report of the Marine Environment Protection Committee on its Fifty-Eighth Session*, MEPC 58/23 (October 16, 2008), *available at* <http://www.imo.org/ourwork/environment/pollutionprevention/airpollution/documents/23-add-1.pdf>.

⁶¹ Navigation Act, 2006, § 186A *et. seq.* (Austl.).

⁶² Northern Canada Vessel Traffic Services Zone Regulations (NORDREGS), SOR/2010-127 (Can.).

regulations require a vessel to gain permission to enter Canada's claimed EEZ and territorial sea and were justified as necessary protection for the marine environment.

Indeed, the European Commission has challenged UNCLOS itself, expressing dissatisfaction with UNCLOS Article 211. The Commission's position has significant implications for navigational freedoms:

The legal system relating to oceans and seas based on UNCLOS needs to be developed to face new challenges. The UNCLOS regime for EEZ and international straits makes it harder for coastal states to exercise jurisdiction over transiting ships, despite the fact that any pollution incident in these zones presents an imminent risk for them. This makes it difficult to comply with the general obligations (themselves set up by UNCLOS) of coastal states, to protect their marine environment against pollution.⁶³

The examples above do not currently apply to sovereign immune vessels, such as warships, because the controlling international agreements and most domestic regulations exempt such vessels from compliance. UNCLOS itself provides for sovereign immunity of warships and other vessels operating in government non-commercial service.⁶⁴ Sovereign immunity notwithstanding, the trend within the international community is toward greater coastal state regulation.

Chinese commentators have asserted that freedom of navigation in the EEZ is subject to Chinese domestic environmental protection laws and regulations.⁶⁵ The Chinese have drawn inspiration from litigation within the U.S. Although the Supreme Court declined to restrict Navy sonar operations in a lawsuit brought by the Natural Resources Defense Council, the suit served as a striking example of interest groups' increased willingness to associate military activities with environmental harms and to seek legislative and judicial remedies.⁶⁶ Whether other foreign governments adopt the Chinese argument remains to be seen.

⁶³ Commission of the European Communities, Green Paper: *Towards a Future Maritime Policy for the Union: A European Vision for the Oceans and Seas*, COM (2006) 275 final, at 42 (June 7, 2006), available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SPLIT_COM:2006:0275\(02\):FIN:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SPLIT_COM:2006:0275(02):FIN:EN:PDF).

⁶⁴ UNCLOS, *supra* note 1, arts. 32, 95, 96, at 35, 59.

⁶⁵ See Yu Zhirong, *Jurisprudential Analysis of the U.S. Navy's Military Surveys in the Exclusive Economic Zones of Coastal Countries*, in *MILITARY ACTIVITIES IN THE EEZ* 38, 42-43 (Peter Dutton ed., 2010.)

⁶⁶ *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008).

2. *Coastal security*

Coastal states can also be expected to want more control of their off-shore waters and airspace for domestic security reasons.⁶⁷ As technology advances, coastal states can reasonably be expected to seek a legal regime that makes it more difficult for foreign militaries to exploit advancements in the range and accuracy of weapons and intelligence-gathering inherent in manned and unmanned aerial, surface, and underwater vehicles, as well as over-the-horizon weaponry and specialized littoral platforms.

Moreover, the nature of threats such as terrorism; weapons of mass destruction; and arms, drugs, and human-trafficking encourage coastal states to extend surveillance and control beyond their territorial seas and in some cases even into others' EEZs.⁶⁸ In the aftermath of September 11, many nations, including the U.S., have increased surveillance of their coastal areas.⁶⁹

To varying degrees and through various methods, coastal states have objected to military activities in their respective EEZs through the years. Whatever their historical weaknesses and current political rivalries, coastal states continue to share important interests and continue to face what Professor Bernard Oxman calls the "territorial temptation" to expand control over their off-shore waters.⁷⁰

Although it may be premature to forecast a sea change in the law of the sea, the conditions for such change continue to ripen. Moreover, for the first time in modern history, a state with the wherewithal to enforce its coastal interests and articulate accompanying legal justifications seems more inclined than ever to do so.

B. *The International Legal System's Response to Change*

Having deemphasized arguments that UNCLOS is *dangerous* to U.S. national security, some UNCLOS opponents have recently changed course by arguing that UNCLOS is *unnecessary* for national security. Opponents contend that all necessary navigational rights and associated coastal state duties are found in customary international law and as a result, the U.S. military can – and does – operate wherever necessary without the burdens of treaty membership.⁷¹

⁶⁷ See generally George V. Galdorisi & Alan G. Kaufman, *Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict*, 32 CAL. W. INT'L L.J. 253 (2002) (providing examples of coastal states asserting increased control within the EEZ).

⁶⁸ See generally Juan Carlos Del Alamo Carrillo et al., *Changing Asymmetrical Threats Require New Responses*, in NAVAL WAR COLLEGE NEWPORT PAPERS 11, at 11-17, (Paul D. Taylor ed., 31st ed. 2008), available at <http://www.usnwc.edu/Publications/Naval-War-College-Press/Newport-Papers/Documents/31-pdf.aspx>.

⁶⁹ Joseph R. Inge & Eric A. Findley, *North American Defense and Security after 9/11*, JOINT FORCE Q., Issue 40, 1st Quarter 2006, available at http://www.dtic.mil/doctrine/jel/jfq_pubs/4004.pdf.

⁷⁰ Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 AM. J. INT'L L. 830 (2006).

⁷¹ Groves, *supra* note 13, at 28-29.

The argument is politically well-conceived, allowing proponents to oppose UNCLOS while claiming common ground with national security interests. Indeed, some UNCLOS opponents augment the legal argument with explicit appeals for a larger Navy, in effect presenting a choice between a robust U.S. Navy, free to operate without encumbrance, or, a weaker Navy forced to rely on a complicated, unnecessary, United Nations treaty. Although the choice is specious – a strong military and UNCLOS membership are not mutually exclusive – the argument has superficial appeal.

To serve as a credible rationale for future policy, the anti-UNCLOS argument is based on the fundamental and largely unexamined assumption that the U.S. will ensure that the customary law of the sea, as enjoyed today, will never change. Important as this assumption is to the anti-UNCLOS case, it deserves especially careful scrutiny.

1. *The effect of UNCLOS amendments on customary law*

Traditionally, treaty law was considered distinct from customary law in that treaty provisions were only binding on the parties. Today, however, it is widely recognized that a treaty can form the basis of custom and bind all states, including non-parties.⁷²

The International Court of Justice explicitly endorsed this view in the North Sea Continental Shelf Cases stating “a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention.”⁷³

The International Court of Justice has likewise recognized three instances in which international conventions may form the basis of customary international law: when the convention “(1) codifies existing customary international law; (2) causes customary international law to crystallize; and (3) initiates the progressive development of new customary international law.”⁷⁴ In each of these cases, the negotiation and adoption of an agreement is considered evidence of customary international law.⁷⁵ Others argue that three additional conditions must also be satisfied.

⁷² See generally Kathryn Surace-Smith, *United States Activity Outside of the Law of the Sea Convention: Deep Seabed Mining and Transit Passage*, 84 COLUM. L. REV. 1032, 1034-35 n. 10-13 (1984) (citing North Sea Continental Shelf Cases (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3 (Feb. 20) for the proposition that treaty provisions can become customary international law when they are of a “fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law” in conjunction with sufficient state practice and *opinio juris*).

⁷³ North Sea Continental Shelf Cases (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, 42 (Feb. 20).

⁷⁴ Martin Lishexian Lee, *The Interrelation Between the Law of the Sea Convention and Customary International Law*, 7 SAN DIEGO INT'L L.J. 405, 407-408 (2006); see also North Sea Continental Shelf Cases (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, 37-39 (Feb. 20).

⁷⁵ Jonathon I. Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. 971, 971 (1986); see also North Sea Continental Shelf Cases (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, 37-39 (Feb. 20).

First, a treaty must be accepted by a sufficient number of states in the international system; second, there must be a significant number of state parties to the treaty whose interests are significantly affected by the treaty; and third, the treaty provisions may not be subject to reservations by the signatories.⁷⁶

By any measure, UNCLOS satisfies the criteria for creating new custom. As such, to the extent UNCLOS reflects customary law, the most obvious way to change customary law would be to amend UNCLOS itself. Although amending the treaty could be challenging, UNCLOS provides two processes for amending its general provisions, as well as a separate process for amending the deep seabed mining provisions of the 1994 Agreement.⁷⁷

UNCLOS' general provisions can be amended by two separate procedures. A simplified procedure provides that the Secretary General may circulate a request for an amendment and if within 12 months there is no objection, the amendment is adopted. If a party objects, the amendment is rejected.⁷⁸ Under the conference procedure, a party may propose an amendment and request an amendment conference. Convening the conference requires concurrence by half the state parties within twelve months of the request. After its adoption, an amendment's entry into force by either procedure requires ratification by two thirds of the state parties.⁷⁹

Significantly, if the U.S. were a party to UNCLOS, any post-accession amendment would require signature by the President and ratification by the Senate.⁸⁰ According to the express terms of the treaty, the U.S. could not be involuntarily bound by post-accession changes to the Convention.⁸¹

2. *The effect of state practice on customary law*

Even if UNCLOS' express provisions are not formally amended, the treaty's ambiguities can be resolved and its lacunae filled by the practices of parties. As parties take actions and adopt complimentary legal positions to develop "the law of UNCLOS," they will also develop customary law. Given that customary law evolves to reflect the emerging needs of the international community,⁸² to the extent these needs are addressed through interpretations of a broad multilateral treaty, the implications will be felt beyond the parties to the treaty.

⁷⁶ Lee, *supra* note 74, at 408 (citing Gary L. Scott & Craig L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT'L L. & POL'Y 71, 72 (1996)).

⁷⁷ Although not the focus of this article, a more complete discussion of deep seabed regulations can be found at Jason C. Nelson, *A Critical Analysis of the Mining Regulations Promulgated by the International Seabed Authority*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 27 (2005).

⁷⁸ UNCLOS, *supra* note 1, art. 313, at 141.

⁷⁹ *Id.*

⁸⁰ U.S. CONST. art. II, §2.

⁸¹ UNCLOS, *supra* note 1, art. 316, at 142-143.

⁸² Hugo Caminos & Michael R. Molitor, *Perspectives on the New Law of the Sea: Progressive Development of International Law and the Package Deal*, 79 AM. J. INT'L L. 871, 882 (1985).

Although the traditional view has been that such changes in custom take place slowly over time, this is no longer necessarily true.⁸³ In its North Sea Continental Shelf Cases judgment, the International Court of Justice found that customary law can develop quickly since “the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law.”⁸⁴ The Court found that the Truman Proclamation issued by the U.S. in 1945 had a special status in establishing a new rule for state rights to the continental shelves off their shores.⁸⁵ The Court’s ruling is frequently cited as an example of “instant customary law.”⁸⁶

Custom can also develop rapidly based upon interpretations of treaties, as well as the rulings and declarations of international bodies and courts that can declare an existing customary rule.⁸⁷ In the past 50 years, customary rules have developed quickly in response to technological innovation or in times of fundamental change.⁸⁸ Moreover, rapid changes to custom do not require multiple instances of state practice,⁸⁹ particularly when a state with special influence in the field seeks change.⁹⁰ Most recently, the terrorist attacks on the World Trade Center and Pentagon resulted in changed custom concerning the use of force in self-defense against non-state actors⁹¹ and those who support or harbor terrorists.⁹² Such changes to the well-settled field of international humanitarian law would have been unthinkable in an earlier era.

⁸³ See generally RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 reporter’s note 2, at 30 (1987) [hereinafter RESTATEMENT].

⁸⁴ North Sea Continental Shelf Cases (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, 43 (Feb. 20).

⁸⁵ *Id.* at 33-34.

⁸⁶ RESTATEMENT, *supra* note 83, at 30.

⁸⁷ See generally Michael Reisman, *The Cult of Custom in the Late 20th Century*, 17 CAL. W. INT’L L.J. 133 (1987); Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT’L L. 1 (1988).

⁸⁸ See Michael P. Scharf, *Seizing the “Grotian Moment”: Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INT’L L.J. 439, 450-51 (2010) (citing the Soviet Union and United States placing satellites in orbit and the 1999 NATO intervention in Serbia to prevent genocide as “Grotian Moments” where customary international law evolved rapidly).

⁸⁹ See John Alan Cohn, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law*, 15 PACE INT’L L. REV. 283, 297 (2003) (citing ANTHONY D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 34-39 (1971).

⁹⁰ *Id.* at 303.

⁹¹ See Scharf, *supra* note 88, at 451 (noting that the international community’s acceptance of the use of force against al Qaeda stood in stark contrast to the 1986 ICJ opinion in the *Nicaragua Case* which held that states could not use force in response to attacks by non-state actors).

⁹² See Benjamin Langille, *It’s “Instant Custom”: How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001*, 26 B.C. INT’L & COMP. L. REV. 145, 154-155 (2003) (arguing that the Bush Doctrine of pursuing those who harbored or supported al Qaeda was instant customary law as evidenced by the number of states who acted in accordance with the doctrine and subsequent U.N. Security Council resolutions).

3. *International influence and legal change*

Regardless of the pace of change, the critical factor in creating and changing international custom will continue to be the relative power of relevant actors.⁹³ The creation of international law is a political process and those with the political, economic, and military power to bend the international legal environment to their own objectives are generally successful in doing so. As relative power changes among international actors, changes to established legal paradigms should be expected.

The implications for the law of the sea are obvious. China's willingness to challenge traditional legal constructs and ability to influence states with similar interests cannot be dismissed, especially if a dramatic event accelerates the change. One need not agree with China's arguments or be certain of their ultimate success to acknowledge China's potential as an advocate for coastal state interests. Whether these interests will reshape the law of the sea remains to be seen. However, to assume that customary law will remain static and that the traditional maritime powers will continue to dictate its future seems retrospective.⁹⁴

In a dynamic international environment, policy makers must continually reexamine assumptions. The essence of foreign policy planning is preserving response options for plausible alternative futures; exclusive reliance on the status quo, no matter how comforting or apparently secure, limits options and increases risk. If change and surprise are among the most predictable elements of foreign policy planning, the question for U.S. oceans policy is how best to preserve a favorable legal regime across a range of potential future scenarios.

III. MANAGING THE FUTURE: IS THE U.S. BETTER OFF INSIDE OR OUTSIDE UNCLOS?

The greatest maritime legal risk to the U.S. today is that the law of the sea will change.⁹⁵ As China articulates and enforces coastal state interests giving rise to the possibility that others may likewise demand greater control over their near-shore waters, the rationale for U.S. membership in UNCLOS membership has never been stronger.

⁹³ See generally JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); Reisman, *supra* note 87, at 144; Weisburd, *supra* note 87, at 45.

⁹⁴ For an instructive discussion of custom's flexibility in a territorial sea context, see GOLDSMITH & POSNER, *supra* note 93, at 59-66.

⁹⁵ See Alan M. Wachman, *Playing by or Playing with the Rules of UNCLOS? in MILITARY ACTIVITIES IN THE EEZ* 107, 113-14 (Peter Dutton, ed. 2010.) ("By challenging the understanding of what is permissible in the EEZ, the Chinese analysts may be hoping that other states will follow suit, adjusting what would then be seen as customary international law and hoping that the legal justifications they offer will likewise become the new norm."). See also Mark J. Valencia, *Foreign Military Activities in Asian EEZs: Conflict Ahead?*, National Bureau of Asian Research Special Report 27, at 4 (May 2011) ("[C]ertain UNCLOS provisions, formulated 30 years ago in a very different political and technological context, may be inappropriate and consequently should be reinterpreted in light of these new circumstances. What is needed is an assessment of how the maritime security paradigm is changing, a delineation of the resultant emerging international issues, and an analysis of possible responses.").

Most importantly, from a national security perspective, UNCLOS' terms are overwhelmingly favorable to the U.S. Were this not the case, additional arguments for accession would be irrelevant. To the contrary, the Convention codifies principals the U.S. national security community helped negotiate and continues to support. The Convention's express terms give the U.S. military a comprehensive and eminently favorable basis for conducting maritime operations around the world.⁹⁶

UNCLOS, as a treaty with favorable terms, is superior to customary law (and the 1958 Geneva Conventions on the Law of the Sea to which the U.S. has long been a party) as means for preserving U.S. interests in global mobility. Treaty membership would help the U.S. better preserve the favorable terms it helped negotiate, both through formal access to the amendment processes described above, as well as through UNCLOS constituent bodies such as the International Tribunal of the Law of the Sea, the International Seabed Authority, and the Commission on the Limits of the Continental Shelf.

Formal membership prerogatives aside, given the conflation of UNCLOS and current customary law, U.S. membership in UNCLOS will reinforce customary law and give the U.S. a stronger basis to affect its development in the future. Ironically, U.S. isolationism from UNCLOS serves as the leading example for others who would selectively choose among UNCLOS provisions or even abandon it altogether, thereby eroding customary law. The U.S.' current posture undermines the very legal principles the U.S. professes to support.

Today, not surprisingly, some find inconsistency and even hypocrisy in the U.S. practice of referring others to the Convention's obligations without incurring reciprocal treaty obligations.⁹⁷ U.S. arguments on substantive issues are burdened with the stigma of unilateralism,⁹⁸ making it more difficult for states committed to the

⁹⁶ UNCLOS opponents have argued that ratification would subject the U.S. to mandatory dispute resolution procedures when its military activities are challenged. See Groves, *supra* note 13, at 1. The argument is specious. Article 298 of the Convention provides that for certain categories of disputes, including military activities, a state may, when signing, ratifying or acceding to the Convention or at any time thereafter, declare that it does not accept any one or more of the dispute procedures. Thus, the U.S. would preemptively reject all dispute resolution procedures affecting military activities, as others have done, including all permanent members of the Security Council. See Division for Ocean Affairs and the Law of the Sea, *Declarations and Statements* (July 12, 2011), available at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm.

⁹⁷ "[T]here is a strong political force which is scornful of the Convention in the United States. They like to take advantage of the Convention but do not respect it. 'Skeptics of the convention believe it is not needed, given the hegemonic strength of the U.S. Navy. . . . Opponents of the convention argue that there is no need to join the treaty because, with the world's hegemonic navy, the United States can treat the parts of the convention it likes as customary international law, following the convention's guidelines when it suits American interests and pursuing a unilateral course of action when it does not.'" Zhang Haiwen, *Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States?—Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ*, 9 CHINESE J. OF INT'L L. 31, 38 (2010), quoting SCOTT G. BORGERSON, COUNCIL ON FOREIGN RELATIONS, THE NATIONAL INTEREST AND THE LAW OF THE SEA 4 (2009), available at <http://www.cfr.org/global-governance/national-interest-law-sea/p19156>.

⁹⁸ Wachman, *supra* note 95, at 111-112. ("The PRC position is rife with implications of American hegemony By choosing this tack the PRC locates its dispute with the United States less

Convention's processes and multilateral framework to support underlying U.S. arguments even where there may be basis for substantive agreement.⁹⁹

As an UNCLOS party, the U.S. would assume a natural leadership role, facilitating coalitions and eliciting support from nations inclined to support the legal prerequisites for military maritime mobility. The U.S. relies on this support in a variety of contexts, ranging from the International Maritime Organization and regular bilateral interactions with partners and allies, such as the Proliferation Security Initiative,¹⁰⁰ where there is direct evidence that non-party status has inhibited U.S. counter-proliferation efforts.¹⁰¹ UNCLOS membership would also enhance the U.S.' influence with other states as they continue to evaluate their own practices and legal positions.¹⁰²

Although there may have been a time when the U.S. could simply declare its will and rely on the persuasive power of its global presence and naval gross tonnage to ensure cooperation, the guarantors of success in the modern maritime domain are more likely successfully coordinated coalitions and bilateral relationships.¹⁰³ UNCLOS membership would provide a strong foundation for both.

in law than in the international equivalence of populism. That plays not only to the sympathies of its own population . . . but also to the global bleachers. In this way China seeks to arouse the sympathies of less powerful 'developing' nations, which feel themselves at some disadvantage in confrontation with the United States or other large states that act in self-interest, disregarding the preferences of the weaker state. In this sense, the controversy concerning UNCLOS may be seen as one battle in the Sino-U.S. war for moral primacy and influence over global institutions.”)

⁹⁹ See, e.g., *Law of the Sea Convention: Hearing on the Law of the Sea Convention: Before the Committee on Foreign Relations of the United States Senate*, 110th Cong. 21 (Sept. 27, 2007) (statement of Admiral Patrick M. Walsh, Vice Chief of Naval Operations) [hereinafter Statement of Admiral Patrick M. Walsh]; *Law of the Sea Convention: Hearing on the Law of the Sea Convention: Before the Committee on Foreign Relations of the United States Senate*, 110th Cong. 17 (Sept. 27, 2007) (statement of Deputy Secretary of Defense, Gordon England), available at http://www.fas.org/irp/congress/2007_hr/lots.pdf.

¹⁰⁰ See *Proliferation Security Initiative, Statement of Interdiction Principles*, U.S. STATE DEP'T, PROLIFERATION SECURITY INITIATIVE, STATEMENT OF INTERDICTION PRINCIPLES, (Sept. 4, 2003) available at <http://www.state.gov/t/isn/c27726.htm> (explaining the response of the international community to “the growing challenge posed by the proliferation of weapons of mass destruction (WMD), their delivery systems, and related materials worldwide.”).

¹⁰¹ Statement of Admiral Patrick M. Walsh, *supra* note 99 (“our failure to be a party to the Law of the Sea Convention is limiting further expansion of PSI”), available at http://www.fas.org/irp/congress/2007_hr/lots.pdf.

¹⁰² See, e.g., S. Jayakumer, former Deputy Prime Minister of Singapore, Keynote Address at the Centre for International Law Conference on Joint Development and the South China Sea (June 16, 2011), at 3, available at <http://cil.nus.edu.sg/programmes-and-activities/past-events/international-conference-international-conference-on-joint-development-and-the-south-china-sea/> (“[T]he U.S. is a major maritime power whose engagement with, and presence in, the region is crucial for maintaining stability in the South China Sea. Unfortunately, it has yet to become a party to UNCLOS. This despite the U.S. having stressed many times its interests in the South China Sea, especially freedom of navigation. . . . [A]ccession will greatly enhance the role and credibility of the U.S.”). *Id.*

¹⁰³ See, e.g., DEP'T OF THE U.S. NAVY, A COOPERATIVE STRATEGY FOR 21ST CENTURY SEAPOWERS 16-17 (Oct. 2007), available at <http://www.navy.mil/maritime/MaritimeStrategy.pdf>; Admiral Jonathan W. Greenert, U.S. Chief of Naval Operations, remarks delivered to the 20th Annual International Seapower Symposium, Oct. 19, 2011, available at <http://www.navy.mil/navydata/people/cno/Greenert/Speech/111019-Seapower%20Symposium.pdf> (“We desire to see a cooperative approach to maritime security and the rules of law on the sea. . . . We are in a time of unprecedented global interdependence and we have abundant maritime activity and a

That UNCLOS membership would promote international maritime collaboration should be obvious. Less obvious, however, is how UNCLOS membership might also facilitate unilateral action. Consider the U.S. Freedom of Navigation (FON) Program.¹⁰⁴ Consistent with the need to shape the law through state practice, the U.S. has historically conducted operations designed to challenge excessive maritime claims. The FON program provides a framework for conducting such operations. Although states with excessive claims will never publicly welcome U.S. challenges, the U.S. – as an UNCLOS party – would have greater credibility and standing to conduct challenges, reaffirming as a fellow-member the crucial tenants of an internationally accepted legal regime. In this context, challenges might be made more frequently and in more meaningful areas, rendering them a more potent component of U.S. strategic communication on freedom of the seas and airspace. Moreover, as an UNCLOS party, the U.S. could augment the diplomatic and operational means to challenge excessive maritime claims with the Convention’s mandatory dispute procedures. The U.S. thus would have those procedures to use offensively against excessive maritime claims that are not in compliance with the Convention, including those that limit military mobility and high seas freedoms.

Ultimately, navigational freedom will be preserved in international law only to the extent states with power and influence allow it. The U.S. has both, but increasingly, so do other countries who do not always share U.S. maritime interests. The question going forward is whether the U.S. will conceive a maritime policy and conduct operations in a way that enhances, or diminishes, the influence so important for maintaining the favorable legal regime it now enjoys.

To paraphrase Clausewitz, military operations at sea, as well as international law, are both extensions of policy by other means.¹⁰⁵ In addition to its legal consequences, U.S. accession to UNCLOS would be a political act with international strategic communication consequences. By joining UNCLOS, the U.S. would not only reinforce the express terms of a favorable legal regime, but also demonstrate commitment to the underlying processes that maintain and uphold the regime.

This commitment to the UNCLOS process could prove critical in maintaining support not only for the legal regime itself, but also for the critical operations that rely on the legal regime for legitimacy.¹⁰⁶ Military activities of any consequence are

lot of disruptions out there. It’s a time of budget constraints, so we’ve got to innovate, we’ve got to share capabilities, share technologies, and be willing to work together. Maritime security is impossible for one nation. No one can do it alone.”)

¹⁰⁴ U.S. Dep’t of State, *Maritime Security and Navigation*, <http://www.state.gov/e/oes/ocns/opa/maritimesecurity/> (last visited Apr. 12, 2012).

¹⁰⁵ See CARL VON CLAUSEWITZ, ON WAR 87 (Michael Howard & Peter Paret eds. & trans., 1976) (1832) (renowned nineteenth century military philosopher Carl von Clausewitz noted “war is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means”).

¹⁰⁶ *Law of the Sea Convention: Hearing on the Law of the Sea Convention: Before the Armed Services Committee of the United States Senate*, 110th Cong. 75 (Oct. 4, 2007) (statement of Admiral Vern Clark, former Chief of Naval Operations) (“[w]e need more than just freedom of operations to maintain freedom of the seas. . . . [Our sailors need to know] that they have the backing and that they have the

controversial and inevitably require international political, operational, and intelligence support. Conducting such operations within an internationally agreed upon legal framework rather than unilaterally, as an outsider indifferent to the framework, would provide a stronger basis for sustaining future operations.

IV. CONCLUSION

After playing a leading role in creating the Law of the Sea Convention, the U.S. has failed to join the treaty. Treaty opponents point to the fact that U.S. military forces have operated successfully under customary international law for decades, rendering UNCLOS unnecessary, if not dangerous.

As superficially appealing as the argument may be, reliance on customary international law as the guarantor of U.S. military mobility is misplaced. Customary law is dynamic. International legal norms evolve with the economic, military, and political preferences of the most influential actors.

Today, China has begun to challenge assumptions fundamental to U.S. naval and air operations in the maritime domain. China's arguments are cast in the language of coastal state security, economic sovereignty, and environmental protection, all of which are increasingly likely to resonate with coastal states, including traditional U.S. allies.

From a national security standpoint, UNCLOS accession would yield a range of legal and political benefits. In a changing world, UNCLOS codifies global military maritime mobility at its apex and provides a predictable and fair foundation for future cooperation on the oceans. As the broader U.S. domestic debate over UNCLOS' many provisions continues, let there be no misunderstanding: from a national security perspective, UNCLOS is overwhelmingly in the United States' best interest.

authority of widely recognized and accepted law to look to, rather than depending only upon the threat or use of force or customary international law that can be too easily changed.”), *available at* http://www.fas.org/irp/congress/2007_hr/lots.pdf.