

9-1-2008

## U.S. National Security Implications of the U.N. Convention on the Law of the Sea

Christopher Shiraldi

Follow this and additional works at: <http://elibrary.law.psu.edu/psilr>



Part of the [International Law Commons](#), and the [Law of the Sea Commons](#)

---

### Recommended Citation

Shiraldi, Christopher (2008) "U.S. National Security Implications of the U.N. Convention on the Law of the Sea," *Penn State International Law Review*: Vol. 27: No. 2, Article 12.

Available at: <http://elibrary.law.psu.edu/psilr/vol27/iss2/12>

# U.S. National Security Implications of the U.N. Convention on the Law of the Sea

Christopher Shiraldi\*

The use of the sea as a means of transport has not only provided coastal states with tremendous opportunities but also has created grave dangers to their security.<sup>1</sup>

## I. INTRODUCTION

In this era of increasing technology, the world is becoming a much smaller place. Coastal countries react to security threats by expanding their jurisdiction and authority.<sup>2</sup> Today, terrorists and other criminals have the potential to possess the same economic and technological resources as national governments do. Terrorists have access to an ever expanding pool of resources, including maritime vessels and the sea itself, with which to attack enemy countries.

Since the terrorist actions on September 11, 2001, increased security has become a priority in the United States, especially now that terrorists use all means of transportation to carry out their activities. As a country with an expansive coast, the United States has enacted several security programs in order to protect against terrorist threats, particularly from the oceans.<sup>3</sup> Container transportation along the sea poses a great security risk for the United States because of the difficulty in accounting for the

---

\* J.D. Candidate, The Dickinson School of Law of the Pennsylvania State University, May 2009. I thank my family and all my friends for their support and patience. Special thanks to everyone who helped me and kept me sane during the comment writing process.

1. Math Noortmann, *The US Container Security Initiative: A Maritime Transport Security Measure or an (inter)National Public Security Measure?*, 10 IUS GENTIUM 139, 142 (2004).

2. *Id.* at 143.

3. See The Proliferation Security Initiative, <http://usinfo.state.gov/products/pubs/proliferation> (last visited Nov. 8, 2008); The Container Security Initiative Strategic Plan, Sept. 29, 2006, available at [http://www.cbp.gov/linkhandler/cgov/trade/cargo\\_security/csi/csi\\_strategic\\_plan.ctt/csi\\_strategic\\_plan.pdf](http://www.cbp.gov/linkhandler/cgov/trade/cargo_security/csi/csi_strategic_plan.ctt/csi_strategic_plan.pdf).

massive amounts of shipments and containers held within those shipments.<sup>4</sup>

Entering into force in 1994, the United Nations Convention on the Law of the Sea (“the Convention”)<sup>5</sup> is the preeminent authority on the use of the sea. Most developed, coastal nations have joined the Convention on the Law of the Sea. However, the United States has not. The United States has signed it, but the Senate has not ratified it. The Convention sets jurisdictional, procedural, and operational laws that bind its members, which is why the United States has been cautious with regards to ratifying the Convention.

This Comment first examines current U.S. programs dealing with the issue of maritime terrorism. Next, it analyzes and explains the articles and provisions of the Convention. Finally, the consequences of ratifying the Convention on U.S. national security, both positive and negative, are explored.

## II. U.S. SECURITY PROGRAMS

The U.S. government has taken major initiatives on the maritime front in order to protect itself from terrorism and the proliferation of weapons of mass destruction. The first such governmental program is the Proliferation Security Initiative (“PSI”),<sup>6</sup> initiated in September of 2003.<sup>7</sup> The second program enacted by the United States is the Container Security Initiative (“CSI”).<sup>8</sup> The U.S. Customs and Border Protection Agency (“CBPA”) implemented the CSI in January of 2002.<sup>9</sup> Most recently, in September 2005, the United States adopted the third strategy for protecting itself, National Strategy for Maritime Security (“NSMS”).<sup>10</sup>

### A. *The Proliferation Security Initiative*

The PSI was initially created by the United States and ten other contributing countries.<sup>11</sup> Thereafter, five additional countries agreed

---

4. See Noortmann, *supra* note 1.

5. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261, 1833 U.N.T.S. 397 [hereinafter the Convention].

6. See The Proliferation Security Initiative, *supra* note 3.

7. See *id.*

8. See The Container Security Initiative Strategic Plan, *supra* note 3.

9. See *id.*

10. The National Strategy for Maritime Security, Sept. 2005, available at [http://www.dhs.gov/xlibrary/assets/HSPD13\\_MaritimeSecurityStrategy.pdf](http://www.dhs.gov/xlibrary/assets/HSPD13_MaritimeSecurityStrategy.pdf).

11. The original eleven countries included Australia, Britain, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain and the United States. Barbara Slavin, *11 Nations Join Plan to Stop N. Korea Ships*, USA TODAY, July 23, 2003, at 6A.

joined the PSI.<sup>12</sup> The initial meeting between the countries focused on North Korea and efforts to prevent North Korea's shipment of weapons of mass destruction ("WMDs").<sup>13</sup> However, the PSI is not focused on one particular state, but rather aims to stop the proliferation of WMDs on a global scale.<sup>14</sup>

The PSI is not based on a treaty, nor does it have enforceable authority.<sup>15</sup> It is however, a set of agreements between the participating nation-states.<sup>16</sup> All states participating in the PSI are devoted to stopping the shipment of WMDs.<sup>17</sup> National and global security concerns have risen proportionately to the increase in transportation and trade of WMDs.<sup>18</sup> WMDs can be transported between states themselves or between terrorist groups, thereby increasing security concerns.<sup>19</sup> The PSI attempts to use various methods besides force to stop the proliferation of WMDs around the world.<sup>20</sup>

The first goal of the PSI is to identify actors who are suspected of transporting WMDs, including both alleged countries and independent actors.<sup>21</sup> The next goal of the PSI is to increase communication among participating countries by the effective sharing of relevant information.<sup>22</sup> Sharing relevant information between these countries ensures that suspected actors are monitored and tracked with precision.<sup>23</sup> Finally, the PSI is also designed to encourage participants to review their own laws and international laws in order to stop the proliferation of WMDs.<sup>24</sup> Review of existing laws seeks to validate, promote, and give more credibility to the PSI.<sup>25</sup>

---

12. The five subsequent countries to join the PSI included Canada, Denmark, Norway, Singapore, and Turkey. ANDREAS PERSBO & IAN DAVIS, BRITISH AM. SEC. INFO. COUNCIL, *SAILING INTO UNCHARTED WATERS? THE PROLIFERATION SECURITY INITIATIVE AND THE LAW OF THE SEA* (June 2004) available at <http://www.basicint.org/pubs/Research/04PSI.htm>.

13. See Slavin, *supra* note 11.

14. John R. Bolton, Under Sec'y for Arms Control & Int'l Sec., Statement of Interdiction Principles Remarks at Proliferation Sec. Initiative Meeting (Sept. 4, 2003), available at <http://www.state.gov/t/us/rm/23801.htm>.

15. See The Proliferation Security Initiative, *supra* note 3.

16. See *id.*

17. See Fact Sheet: Proliferation Security Initiative Statement of Interdiction Principles, Sept. 4, 2003, available at <http://www.whitehouse.gov/news/releases/2003/09/2003/09/04-11.html> [hereinafter PSI Fact Sheet].

18. See The Proliferation Security Initiative, *supra* note 3.

19. See *id.*

20. See *id.*

21. See PERSBO & DAVIS, *supra* note 12.

22. See Bolton, *supra* note 14.

23. See *id.*

24. See PERSBO & DAVIS, *supra* note 12.

25. See The Proliferation Security Initiative, *supra* note 3.

Although the PSI is not based on a particular treaty, it is harmonious with current U.S. and United Nations (“U.N.”) law.<sup>26</sup> The PSI is rooted in political agreements, interdiction principles, and interdiction training exercises.<sup>27</sup> Training exercises are led by individual nation-states and are based on one specific aspect of interdiction: land, air, or sea.<sup>28</sup> The interdiction principles “identify practical steps necessary to interdict shipments of weapons of mass destruction, their delivery systems, and related materials flowing to and from states or non-state actors of proliferation concern at sea, in the air, or on land.”<sup>29</sup> The marine aspect of the interdiction principles established by the PSI aim to prevent shipments of WMDs while they are still at sea en route to their destination.<sup>30</sup> In an era of increasing technology, these shipments must be intercepted at sea because it may be too late once the shipments actually reach land.<sup>31</sup>

### 1. PSI Interdiction Principles

The Interdiction Principles are the heart of the PSI.<sup>32</sup> By adhering to these principles, all participating countries aspire to support each other in reducing the global proliferation of WMDs.<sup>33</sup>

The PSI’s Interdiction Principles are composed of four major components.<sup>34</sup> The first principle asserts that nation-states must take any effective measures to intercept and stop the transportation of WMDs.<sup>35</sup> States must also prevent WMDs delivery systems and the transfer of materials between states suspected of proliferation.<sup>36</sup> The second principle is to “adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity [and] protecting the confidential character of classified information provided by other states. . . .”<sup>37</sup> The third principle requires that participating nation-states work together to strengthen security, legal measures and international legal frameworks in order to support the other objectives of the PSI.<sup>38</sup>

---

26. See PSI Fact Sheet, *supra* note 17.

27. See Bolton, *supra* note 14.

28. See *id.*

29. The Proliferation Security Initiative, *supra* note 3.

30. See *id.*

31. See *id.*

32. See Bolton, *supra* note 14.

33. See PSI Fact Sheet, *supra* note 17.

34. See The Proliferation Security Initiative, *supra* note 3.

35. See *id.*

36. See *id.*

37. *Id.*

38. See *id.*

The fourth principle of the PSI interdiction principles is the most extensive and important.<sup>39</sup> States must prevent delivery of WMDs and any materials relating to WMDs.<sup>40</sup> Preventative and investigatory actions must conform to both the State's own legal framework and international law.<sup>41</sup> The fourth principle describes specific actions that participating nation-states may and may not take.<sup>42</sup> In support of the PSI and its interdiction efforts, participating nation-states must perform specific actions to prohibit shipments of WMDs.<sup>43</sup> For example, a country may not "transport or assist in the transport of any such cargoes to or from states or non-state actors of proliferation concern, and not to allow any persons subject to their jurisdiction to do so."<sup>44</sup> Further, nation-states may search their own ships that are reasonably suspected of transporting WMDs or provide consent to have their vessels searched by other nation-states.<sup>45</sup>

Furthermore, countries should "stop and/or search in their internal waters, territorial sea, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified."<sup>46</sup> Nation-states must place restrictions on ships in their jurisdiction that are reasonably suspected of transporting WMDs.<sup>47</sup> When a ship uses a state's ports, internal waters, or territorial sea, the ship may be subject to boarding, followed by search and seizure of any cargo found to be related to WMDs.<sup>48</sup> Moreover, nation-states must inspect vessels if their ports "are used as transshipment points for shipment of such cargoes to or from states or non-state actors of proliferation concern, to inspect vessels . . . reasonably suspected of carrying such cargoes, and to seize such cargoes that are identified."<sup>49</sup>

## 2. Bilateral Agreements

Bilateral agreements between countries are a key aspect of the PSI.<sup>50</sup> Two U.S. agreements arising from the PSI are the interdiction and

---

39. The Proliferation Security Initiative, *supra* note 3.

40. *See id.*

41. *See id.*

42. *See id.*

43. The Proliferation Security Initiative, *supra* note 3.

44. *Id.*

45. *See id.*

46. *Id.*

47. *See id.*

48. *See* The Proliferation Security Initiative, *supra* note 3.

49. *Id.*

50. *See* PSI Fact Sheet, *supra* note 17.

ship boarding agreements between the United States and Belize<sup>51</sup> and the United States and Panama, respectively.<sup>52</sup> The United States also entered into a ship boarding agreement with Liberia.<sup>53</sup> Each of these agreements focuses on searching and seizing vessels located in international waters not subject to either country's jurisdiction.<sup>54</sup> Using the agreement with Belize as an example, the term "international waters" is defined as all parts of the sea not included in the territorial sea, internal waters and archipelagic waters<sup>55</sup> of a state, consistent with the respective Constitutions of each Party and the United Nations Convention on the Law of the Sea.<sup>56</sup> According to the agreement with Belize, in other zones of the sea, such as the contiguous zone and the high seas, the vessel's own State has jurisdiction over the vessel, except when it is fleeing the territorial sea of another state.<sup>57</sup>

Under each of the agreements, ships that are reasonably suspected of transporting WMDs will be subject to seizure.<sup>58</sup> Because vessels in international waters are only subject to the jurisdiction of the state whose flag they fly,<sup>59</sup> a state wishing to board another state's ship must first seek the consent of that state.<sup>60</sup> Consent of the vessel's state must come in a timely manner<sup>61</sup> or the requesting state may proceed without consent.<sup>62</sup> The agreements also review the conduct of officials boarding the suspected ships and provide safeguards to the ships, crew, and cargo on board.<sup>63</sup> Article 14 of the boarding agreement with Belize discusses the settlement of disputes between the countries.<sup>64</sup> It provides that the countries must either come to mutual agreements or request a consultation from the other party to resolve any disputes that arise from

---

51. Agreement Between the Government of the United States of America and the Government of Belize Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea, U.S.-Belize, Aug. 4, 2005, available at <http://www.state.gov/t/isn/trty/50809.htm> [hereinafter Belize Agreement].

52. Judith Miller, *Panama Joins Accord to Stem Ships' Transport of Illicit Arms*, N.Y. TIMES, May 11, 2004, at A11.

53. See PERSBO & DAVIS, *supra* note 12.

54. See Miller, *supra* note 52.

55. Archipelagic waters are the waters surrounding a cluster of islands, no matter their distance from the coast of an island as defined in Article 49 of the Convention. See The Convention, *supra* note 5, art. 49.

56. Belize Agreement, *supra* note 51.

57. See *id.*

58. See *id.*

59. See The Convention, *supra* note 5, art. 94, ¶ 2b.

60. See Miller, *supra* note 52.

61. The term "timely manner" is not defined in the Belize Agreement.

62. See Belize Agreement, *supra* note 51.

63. See *id.*

64. See *id.*

the implementation of the agreement regarding the boarding of ships or otherwise.<sup>65</sup>

Previous altercations show how countries proceed with stopping, boarding, and searching of suspected vessels.<sup>66</sup> In 2002, Spanish ships seized and boarded a North Korean vessel suspected of transporting illegal materials.<sup>67</sup> Spanish officials deemed the vessel suspect because it flew no flag and avoided inspection.<sup>68</sup> During the search, Spanish authorities found missiles hidden onboard the ship.<sup>69</sup> However, there was nothing illegal about the missiles and the North Korean ship was allowed to proceed on its way.<sup>70</sup> A separate incident occurred in 2003, when the United States stopped a suspected vessel in the Persian Gulf.<sup>71</sup> In an example of a successful PSI interdiction, the U.S. Navy boarded and searched the ship and found illegal drugs and multiple terrorist suspects.<sup>72</sup>

### B. *The Container Security Initiative*

The next program designed to protect the United States against threats from the sea is the CSI.<sup>73</sup> The CSI is run by the CBPA.<sup>74</sup> The goal of the CBPA is to protect the United States from terrorism by securing its borders and ports.<sup>75</sup> Working with other countries, the CSI places U.S. officials in ports around the world in order to inspect suspicious containers.<sup>76</sup> Additionally, the United States allows foreign customs officials to be stationed at American ports for inspection of outgoing ships.<sup>77</sup> Because of the inherent difficulty of stopping ships on the high seas, the CSI aims to stop weapons or other illegal cargo at their

---

65. *See id.*

66. *See* Frederic L. Kirgis, *Boarding of North Korean Vessel on the High Seas*, ASIL INSIGHTS, Dec. 12, 2002, available at <http://www.asil.org/insights/insigh94.htm>.

67. *See* Ian Patrick Barry, Note, *The Right of Visit, Search, and Seizure of Foreign Flagged Vessels on the High Seas Pursuant to Customary International Law: A Defense of the Proliferation Security Initiative*, 33 HOFSTRA L. REV. 299, 299 (2004).

68. *See* Kirgis, *supra* note 66 (stating "according to a Pentagon official, the vessel took evasive measures in order to avoid inspection").

69. *See* Steven R. Weisman, *U.S. to Send Signal to North Koreans in Naval Exercise*, N.Y. TIMES, Aug. 18, 2003, at A1.

70. *See id.*

71. *See* Barry, *supra* note 67.

72. *See id.* at 300.

73. *See* The Container Security Initiative Strategic Plan, *supra* note 3, at i.

74. CSI in Brief, October 3, 2007, [http://www.cbp.gov/xp/cgov/trade/cargo\\_security/csi/csi\\_in\\_brief.xml](http://www.cbp.gov/xp/cgov/trade/cargo_security/csi/csi_in_brief.xml) (last visited Feb. 1, 2008).

75. *See* Fact Sheet: Securing U.S. Ports, July 12, 2006, available at [http://www.cbp.gov/xp/cgov/newsroom/fact\\_sheets/port\\_security/securing\\_us\\_ports.xml](http://www.cbp.gov/xp/cgov/newsroom/fact_sheets/port_security/securing_us_ports.xml) [hereinafter *Securing U.S. Ports*].

76. *See* CSI in Brief, *supra* note 74.

77. *See id.*



point of origin.<sup>78</sup> Therefore, the CSI requires that U.S. officials inspect suspected vessels and high risk containers before the cargo is shipped out of foreign ports.<sup>79</sup>

Since September 11, 2001, the U.S. government has increased port security in response to the use of mass transportation as a conduit for terrorist activities.<sup>80</sup> “Since an estimated 95 percent of U.S. imports move by sea, the security environment must place a premium on detecting, identifying, and tracking terrorist networks with interests in disrupting maritime commerce.”<sup>81</sup> The CSI helps identify and prescreen high risk containers prior to shipment.<sup>82</sup> The CSI employs new technology to screen the high risk containers and to develop new, secure containers.<sup>83</sup>

Initiated by the CBPA in 2002, the CSI is an international program that protects the world’s primary method of global trade.<sup>84</sup> Through the CSI program, U.S. CBPA officials work primarily with customs officials in other countries.<sup>85</sup> The two coordinating countries share intelligence in order to target and stop shipments of illegal material before they leave a particular port.<sup>86</sup> Targeting every suspected shipment would be impossible; therefore, officials use advanced technology to screen cargo.<sup>87</sup> Nevertheless, the CSI is expansive in scope, securing ports in various parts of the world<sup>88</sup> such as North, Central and South America, Europe, the Middle East, Asia, and Africa.<sup>89</sup> Each of these ports has an established CSI program aimed at eliminating the shipment of WMDs, especially to the United States.<sup>90</sup>

### 1. CSI Goals

The CSI sets out to accomplish three goals. The first strategic goal of the CSI is to secure the U.S. borders through evaluation of all containers bound for the United States with potential for a terroristic threat.<sup>91</sup> The United States uses three objectives to meet this first goal of

---

78. *See id.*

79. *See* The Container Security Initiative Strategic Plan, *supra* note 3, at i.

80. *See* Securing U.S. Ports, *supra* note 75.

81. The Container Security Initiative Strategic Plan, *supra* note 3, at i.

82. *See id.*

83. *See id.* at 11.

84. *See id.* at i.

85. *See* CSI in Brief, *supra* note 74.

86. *See id.*

87. *See id.*

88. *See id.*

89. *See* The Container Security Initiative Strategic Plan, *supra* note 3, at 6.

90. *See id.*

91. *See id.* at 15.

evaluation. The first objective focuses on identifying high risk cargo shipments using advanced information and trade data.<sup>92</sup> The CSI tries to hasten the shipment of low risk cargo throughout the world by using advanced technology and information transfer.<sup>93</sup> Once the cargo has been identified, the next objective is to screen and examine those containers using X-ray or gamma ray technology.<sup>94</sup> The last objective promotes inspections equally throughout all CSI ports before shipments enter the United States.<sup>95</sup>

The second goal of the CSI is to develop and maintain a strong cargo security system. This goal strives to create a “system that will withstand a terrorist incident and ensure a continuous flow of trade, or promptly resume trade through CSI ports, should a terrorist event occur.”<sup>96</sup> The first objective of this goal is to advance international security by promoting techniques the United States uses to standardize security operations at CSI ports.<sup>97</sup> If the proper ports are selected to participate in the CSI, it will strengthen security and trade.<sup>98</sup> Trade volume, terrorism connections, and geographical interests all impact the selection of ports for the CSI.<sup>99</sup> The other objective of this goal states that the CBPA must work with other governmental agencies to develop management and contingency plans.<sup>100</sup>

The final goal of the CSI is to protect and facilitate trade on a global scale.<sup>101</sup> The CSI seeks to accomplish this “by maintaining [and] effectively operating CSI ports, working with host nations to inspect all containers identified as posing a potential terrorist risk and providing benefits and incentives to international governments and organizations as well as to our trading partners.”<sup>102</sup> The CBPA negotiates with other CSI participating countries to use an Automated Targeting System to examine all high-risk shipments in the foreign nation’s ports.<sup>103</sup> Foreign ports are assessed in order to determine if they are meeting CSI requirements.<sup>104</sup> The assessment includes an evaluation of the terrorist threats to the particular port and the costs and benefits of including that

---

92. *See id.*

93. *See id.* at 16.

94. *See* The Container Security Initiative Strategic Plan, *supra* note 3, at 23.

95. *See id.* at 17.

96. *Id.* at 19.

97. *See id.* at 20.

98. *See id.* at 21-22.

99. *See* The Container Security Initiative Strategic Plan, *supra* note 3, at 22.

100. *See id.*

101. *See id.* at 24.

102. *Id.* at 25.

103. *See id.*

104. *See* The Container Security Initiative Strategic Plan, *supra* note 3, at 26.

port in the CSI.<sup>105</sup> The U.S. CBPA acquires interagency and international cooperation in order to promote the enhancement of global maritime security.<sup>106</sup> Throughout this process, the U.S. CBPA constantly evaluates and monitors its CSI teams in foreign countries with the ultimate goal of improving operations.<sup>107</sup>

## 2. Membership in the CSI

In order to be considered for membership in the CSI, each potential port must meet minimum standards set by the U.S. CBPA.<sup>108</sup> Each port must have regular and substantial shipments to the United States.<sup>109</sup> The foreign state must allow U.S. customs officials to inspect containers flowing through the particular port.<sup>110</sup> In addition, the port must allow the use of X-ray or gamma ray technology to examine containers being shipped.<sup>111</sup> Due to these requirements, developing countries find it difficult to participate in the program.<sup>112</sup> More developed countries are given priority treatment in this program because of their ability to comply with the mandatory standards.<sup>113</sup> Therefore, developing countries are at a disadvantage due to the negative impact on their ability to trade with the United States.<sup>114</sup> Nevertheless, developing countries often pose the greatest terror threat to the United States and other countries.<sup>115</sup>

### C. *The National Strategy for Maritime Security*

The NSMS seeks to prevent terrorism and the proliferation of weapons of mass destruction.<sup>116</sup> “In December 2004, the President [of the United States] directed the Secretaries of the Department of Defense and Homeland Security to lead the Federal effort to develop a comprehensive NSMS.”<sup>117</sup> The plan integrates all federal maritime

---

105. *See id.*

106. *See id.* at 27-29.

107. *See id.* at 30.

108. CSI: Container Security Initiative, *Minimum Standards for CSI Expansion*, [http://www.cbp.gov/linkhandler/cgov/trade/cargo\\_security/csi/minimum\\_standards.ctt/minimum\\_standards.doc](http://www.cbp.gov/linkhandler/cgov/trade/cargo_security/csi/minimum_standards.ctt/minimum_standards.doc) (last visited Nov. 6, 2008).

109. *See id.*

110. *See id.*

111. *See id.*

112. Marjorie Florestal, *Terror on the High Seas: The Trade and Development Implications of U.S. National Security Measures*, 72 BROOK. L. REV. 385, 394 (2007).

113. *See id.* at 395.

114. *See id.*

115. *See id.* at 394-95.

116. *See* The National Strategy for Maritime Security, *supra* note 10, at ii.

117. *Id.*

security programs in an effort to effectively address threats to maritime security.<sup>118</sup> In accordance with the NSMS plan, the Departments of Defense and Homeland Security have created eight supporting plans to address different aspects of maritime security.<sup>119</sup>

The NSMS acknowledges that the best method for protecting the United States is not through unilateral action.<sup>120</sup> The strategy combines public and private, as well as national and international action in order to combat maritime terrorism.<sup>121</sup> The first step the United States took in accordance with this strategy was to enhance international cooperation.<sup>122</sup> The United States seeks to accomplish a cooperative plan by adopting international frameworks, developing measures and techniques for information exchange and identification of terrorists and suspected vessels, and adopting procedures for inspecting vessels and enforcement.<sup>123</sup>

Next, the United States attempts to maximize its awareness in the maritime domain.<sup>124</sup> The United States is expanding technology, intelligence, and international agreements in an effort to achieve a better understanding of the sea.<sup>125</sup> The NSMS uses a layered security approach to defend against threats on the maritime front.<sup>126</sup> “Specifically, a layered approach to maritime security means applying some measure of security to each of the following points of vulnerability: transportation, staff, passengers, conveyances, access control, cargo and baggage, ports, and security en route.”<sup>127</sup> Also included in the layered security approach is physical cargo inspection, interdiction of personnel and materials, and military and law enforcement response.<sup>128</sup> The final aspect the United States must assess is ensuring conformity in the global maritime system in order to preserve global trade and national defense.<sup>129</sup>

---

118. *See id.*

119. *See id.* (including programs such as the National Plan to Achieve Domain Awareness, the Global Maritime Intelligence Integration Plan, the Interim Maritime Operational Threat Response Plan, the International Outreach and Coordination Strategy, the Maritime Infrastructure Recovery Plan, the Maritime Transportation System Security Plan, the Maritime Commerce Security Plan, and the Domestic Outreach Plan).

120. *See id.* at 13.

121. *See* The National Strategy for Maritime Security, *supra* note 10, at 13.

122. *See id.* at 14.

123. *See id.* at 14-15.

124. *See id.* at 16.

125. *See id.* at 17.

126. *See* The National Strategy for Maritime Security, *supra* note 10, at 20.

127. *Id.*

128. *See id.* at 21-22.

129. *See id.*

## III. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

A. *Background*

In 1970, the United Nations General Assembly organized the Third United Nations Law of the Sea Conference.<sup>130</sup> The Conference sought to establish an international framework for laws governing the sea.<sup>131</sup> Originally drafted in 1982, the United Nations Convention on the Law of the Sea (“the Convention”) was put into force in 1994.<sup>132</sup> As of 2007, 155 states, not including the United States, have agreed to the Convention.<sup>133</sup> The Convention deals with three primary issues. First, it defines different maritime zones and their boundaries.<sup>134</sup> Second, the Convention also establishes various measures for increasing security, protecting the environment, and conserving natural resources.<sup>135</sup> Additionally, the Convention sets up three authoritative bodies to deal with different maritime issues.<sup>136</sup>

The United States was involved in the initial discussions and drafting of the Convention, however, the U.S. did not sign the final draft.<sup>137</sup> The United States did not sign the Convention because it objected to the deep seabed provisions contained therein.<sup>138</sup> However, the 1994 agreement relating to the implementation of Part XI of the Convention<sup>139</sup> sought to address concerns regarding the deep seabed.<sup>140</sup> Because of the deep seabed amendment, the agreement was signed and Senate Foreign Relations Committee urged the Senate to give its advice and consent to ratify the Convention.<sup>141</sup> As of May 2007, the United

---

130. See David D. Caron & Harry N. Scheiber, *The United States and the 1982 Law of the Sea Treaty*, 11 ASIL INSIGHTS 16 (2007), available at [http://asil.org/insights/2007/06/insights070611.html#\\_edn1](http://asil.org/insights/2007/06/insights070611.html#_edn1).

131. See *id.*

132. See The Convention *supra* note 5.

133. See MARJORIE ANN BROWNE, CONG. RESEARCH SERV., THE U.N. LAW OF THE SEA CONVENTION AND THE UNITED STATES: DEVELOPMENTS SINCE OCTOBER 2003 (2007), available at <http://www.fas.org/sgp/crs/row/RS21890.pdf>.

134. See The Convention *supra* note 5.

135. See *id.*

136. See *id.* (stating that the authorities are the International Tribunal for the Law of the Sea, the Commission on the Limits of the Continental Shelf, and the International Seabed Authority).

137. See Caron & Scheiber, *supra* note 130 (explaining that in 1982, the Reagan office refused to sign the treaty although the three prior Presidents all were involved in negotiations).

138. See *id.*

139. See United Nations Convention on the Law of the Sea, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 Dec. 1982, 33 I.L.M. 1309 (1994).

140. See The Convention, *supra* note 5; see also Caron & Scheiber, *supra* note 130.

141. See S. EXEC. REP. NO. 108-10, at 6 (2004).

States has still not ratified the Convention because the Senate has not given the advice and consent needed to effectuate the agreement.<sup>142</sup>

### B. *The Convention's Maritime Zones*

The Convention divides the ocean into six different zones with different characteristics and rights.<sup>143</sup> Part II of the Convention discusses the Territorial Sea and Contiguous Zone.<sup>144</sup> The control of a nation-state extends past its land and internal waters and includes the water, air space, bed, and subsoil.<sup>145</sup> The Convention limits the extent of the Territorial Sea to twelve nautical miles from the state's baseline.<sup>146</sup> Within the Territorial Sea, all ships that fly the flag of a state have the right of innocent passage.<sup>147</sup> Article 24 of the Convention declares that in the Territorial Sea, a State must not impede the innocent passage of foreign ships.<sup>148</sup> However, Article 25 asserts that a "State may take the necessary steps in its territorial sea to prevent passage which is not innocent."<sup>149</sup> The state also has the right to temporarily suspend the innocent passage rights if doing so is compulsory for security reasons.<sup>150</sup> Except in certain circumstances, a state may not exercise criminal jurisdiction over a person or ship within its Territorial Sea.<sup>151</sup> In the case of a warship,<sup>152</sup> a state may demand the warship leave the state's jurisdiction if it does not comply with the State's laws and regulations.<sup>153</sup> However, the Convention does not interfere with a warship's immunity in the Territorial Sea.<sup>154</sup>

142. See source cited *infra* note 251.

143. Zones include the Territorial Sea, Contiguous Zone, Exclusive Economic Zone, the Continental Shelf, and the High Seas. Although not specifically enumerated in the Convention, the Internal Waters of a State are defined in Article 8 which states, "waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State." The Convention, *supra* note 5.

144. See *id.* arts. 2, 33.

145. See *id.* art. 2, ¶¶ 1-2.

146. Defined in Article 5, the normal baseline is the "low-water line along the coast as marked on large-scale charts officially recognized by the State." See *id.* art. 5.

147. See *id.* art. 17. (stating that "passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal State.")

148. See The Convention, *supra* note 5, art. 24.

149. *Id.* art. 25.

150. "Such suspension shall take effect only after having been duly published." See *id.*

151. See *id.* art. 27.

152. See *id.* art. 29 (defining warship as a "ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality").

153. See The Convention, *supra* note 5, art. 30.

154. See *id.* art. 32.

A coastal state may exercise sovereignty over the Contiguous Zone in order to accomplish limited goals.<sup>155</sup> A state may exercise control in this zone in order to prevent and punish violations of its customs, laws, or regulations that occur in the State's Territorial Sea.<sup>156</sup> The limit of the Contiguous Zone is twenty-four nautical miles from the same baseline as the Territorial Sea is measured.<sup>157</sup>

In addition, the Convention also defines the Exclusive Economic Zone ("EEZ").<sup>158</sup> A state has exclusive control of the natural resources contained within the EEZ.<sup>159</sup> The EEZ extends up to two hundred nautical miles from the baseline of a state.<sup>160</sup> The EEZ gives a coastal state "sovereign rights" to the natural resources and economic utilization of that zone, and also confers jurisdiction upon the state.<sup>161</sup> While a coastal state maintains certain rights within the EEZ, all other states hold a freedom of navigation within the zone.<sup>162</sup> Nevertheless, the other States must comply with the laws and regulations of the coastal state that are in accordance with international law.<sup>163</sup> Article 59 of the Convention outlines procedures for conflict resolution, but does not state how conflicts that arise in the EEZ should be resolved.<sup>164</sup> Article 73 of the Convention sets the standard for enforcement of laws in the EEZ.<sup>165</sup> A coastal state has the power to stop, inspect, and arrest in order to protect its natural resources in the EEZ.<sup>166</sup> However, "arrested vessels and their crews [should] be promptly released upon the posting of reasonable bond or other security."<sup>167</sup>

Moreover, a state's Continental Shelf extends two hundred miles from its baseline and contains the seabed and subsoil in the area.<sup>168</sup> The rights of a coastal state over its Continental Shelf only extend to its

---

155. *See id.* art. 33, ¶ 1.

156. *See id.* art. 33, ¶ 1a-b.

157. *See id.* art. 33, ¶ 2.

158. *See* The Convention, *supra* note 5, art. 55.

159. *See id.* art. 60.

160. *See* The Convention, *supra* note 5, art. 57.

161. *See id.* art. 56, ¶ 1a-b (explaining that jurisdiction in the EEZ includes the formation of artificial structures, scientific research, and preservation of the environment).

162. *See id.* art. 58, ¶ 1.

163. *See id.* art. 58, ¶ 3.

164. *See id.* art. 59.

165. *See* The Convention, *supra* note 5, art. 73.

166. *See id.* art. 73 (stating that a state may take these steps in order to "ensure compliance with the laws and regulations adopted by it in conformity with this Convention.")

167. *Id.*

168. *See id.* art. 76.

natural resources, and these rights must not interfere with the freedom of navigation or rights of other states in the same area.<sup>169</sup>

The High Seas lie outside the jurisdiction of any state, coastal or otherwise.<sup>170</sup> No state can exercise jurisdiction<sup>171</sup> over the area and every state has the right to sail ships on the High Seas.<sup>172</sup> Each state has complete autonomy on the High Seas.<sup>173</sup> In particular, warships<sup>174</sup> and ships owned by a state<sup>175</sup> have complete immunity on the High Seas.<sup>176</sup>

Contained within the High Seas section of the Convention is a definition of piracy.<sup>177</sup> Even though no state has jurisdiction or sovereignty on the High Seas, any State may capture and arrest a pirate ship in the area.<sup>178</sup> A warship is not allowed to seize and board another ship on the High Seas unless it has reasonable grounds<sup>179</sup> for doing so.<sup>180</sup> In chasing a fleeing ship, hot pursuit may only be employed when there is good cause to believe the ship has violated the laws of a state.<sup>181</sup> In addition, hot pursuit must begin when the fleeing ship is in the Internal Waters, Territorial Sea, or Contiguous Zone of the coastal State.<sup>182</sup> The pursuit must stop when the fleeing ship enters the Territorial Sea of any other State.<sup>183</sup> These pursuits can only be carried out by warships or military aircraft<sup>184</sup> that have already given to the fleeing ship verbal and visual warnings to stop.<sup>185</sup> Using these techniques and procedures, suspicious ships can be stopped and the transportation of WMDs can be prevented.

169. *See id.* art. 78, ¶¶ 1-2.

170. *See* The Convention, *supra* note 5, art. 86.

171. *See id.* art. 89.

172. *See id.* art. 90.

173. *See id.* art. 87, ¶ 1. (outlining the freedoms as navigation, overflight, laying submarine cables, constructing installations, fishing, and conducting scientific research).

174. *See id.* art. 95.

175. *See* The Convention, *supra* note 5, art. 96.

176. *See id.* arts. 95, 96.

177. *See id.* art. 101 (defining piracy as “any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; against a ship, aircraft, persons or property in a place outside the jurisdiction of any State”).

178. *See id.* art. 105 (stating in that this seizure and arrest may only be carried out by a warship or military aircraft).

179. *See id.* art. 110, ¶ 1 (explaining that a warship must have reasonable grounds that the suspected ship is engaged in piracy, slave trade, unauthorized broadcasting, or is without nationality).

180. *See* The Convention, *supra* note 5, art. 110, ¶ 1.

181. *See id.* art. 111, ¶ 1.

182. *See id.*

183. *See id.* art. 111, ¶ 3.

184. *See id.* art. 111, ¶ 5.

185. The Convention, *supra* note 5, art. 111, ¶ 4.



### C. *Transfer of Technology*

Articles 266 through 278 of the Convention regulate the development and transfer of marine technology between the member states of the Convention. States are required to work together with international organizations in order to develop and share marine technology.<sup>186</sup> However, the states must respect the rights of the other parties who are involved in the transfer of this technology.<sup>187</sup>

### D. *Settlement of Disputes*

Any conflicts that arise between parties to the Convention must be resolved peacefully<sup>188</sup> in accordance with the Charter of the United Nations.<sup>189</sup> If the states cannot reach a settlement, a party may request that the dispute be resolved by a court or tribunal.<sup>190</sup> After signing the Convention, a state must select one or more methods of dispute resolution.<sup>191</sup> The dispute resolution methods include the International Tribunal for the Law of the Sea<sup>192</sup> ("the Tribunal"), the International Court of Justice,<sup>193</sup> or binding arbitration.<sup>194</sup> If the parties to the dispute have not chosen the same tribunal or court, then arbitration must be used, unless the parties agree otherwise.<sup>195</sup> The arbitration process in the Convention is final and not appealable, unless agreed to in advance.<sup>196</sup> The parties to the dispute also have the option of agreeing to the conciliation procedures expounded in the Convention.<sup>197</sup> The Convention gives the Tribunal and the International Court of Justice jurisdiction to resolve any disagreement that arises from it.<sup>198</sup> When a state has not complied with Article 73 requirements to promptly release a ship, Article 292 states that the issue must be submitted to the Tribunal, or, if the parties agree within ten days, any other entity the parties

---

186. See *id.* art. 266, ¶ 1.

187. See *id.* art. 267.

188. See *id.* art. 279.

189. U.N. Charter art. 2, para. 3; see also *id.* art. 33, para. 1 (stating that the Charter of the United Nations mandates that all international disputes must be settled peacefully through normal channels of resolution in order to maintain international peace and security).

190. See The Convention, *supra* note 5, art. 286.

191. See *id.* art. 287, ¶ 1.

192. See *id.* art. 287, ¶ 1a.

193. See *id.* art. 287, ¶ 1b.

194. See *id.* art. 387, ¶ 1c-d.

195. See The Convention, *supra* note 5, art. 287, ¶ 5.

196. See *id.* annex VII, ¶ 11.

197. See *id.* art. 284.

198. See *id.* art. 288.

choose.<sup>199</sup> Once the Tribunal or selected body makes a decision, the parties must strictly adhere to the decision.<sup>200</sup> Nevertheless, a state, when signing the Convention, may choose not to accept the methods of dispute resolution that are provided.<sup>201</sup> If a state does not elect a method of dispute resolution, it forfeits its right to make any claims against another State and to submit disputes under the same category.<sup>202</sup>

### 1. The International Tribunal for the Law of the Sea

The Tribunal is an “an independent judicial body established by the Convention to adjudicate disputes arising out of the interpretation and application of the Convention.”<sup>203</sup> Headquartered in Hamburg, Germany,<sup>204</sup> the Tribunal is accessible to all parties to the Convention.<sup>205</sup> In addition, certain other parties, such as international organizations and independent legal persons, have access to the Tribunal.<sup>206</sup> The Tribunal has jurisdiction to hear all disagreements that arise under the provisions of the Convention.<sup>207</sup> Exclusive jurisdiction exists in cases involving the prompt release of ships.<sup>208</sup> The Tribunal is composed of twenty-one members<sup>209</sup> who must be from different countries.<sup>210</sup> The Tribunal has established a number of different chambers within itself to deal with specialized disputes.<sup>211</sup> In order to reach a decision, a simple majority of the Tribunal must occur.<sup>212</sup> All decisions by the Tribunal are final and must be followed by the parties who are in conflict with one another.<sup>213</sup>

The Tribunal has the power to provide advisory opinions in certain situations under the Convention in order to prevent future disputes.<sup>214</sup>

---

199. See *id.* art. 292.

200. See The Convention, *supra* note 5, art. 296.

201. See *id.* art. 298 (stating that a state may not accept the provisions regarding disputes of sea boundary limitations, conciliation, or military activities).

202. See *id.* art. 298, ¶ 3.

203. International Tribunal for the Law of the Sea, [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html) (last visited Feb. 1, 2008) [hereinafter Tribunal].

204. See The Convention, *supra* note 5, annex VI, art. 1, ¶ 2.

205. See *id.* annex VI, art. 20, ¶ 1.

206. See Tribunal, *supra* note 203.

207. See The Convention, *supra* note 5, annex VI, art. 21.

208. See Tribunal, *supra* note 203.

209. See The Convention, *supra* note 5, annex VI, art. 2, ¶ 1.

210. See *id.* annex VI, art. 3, ¶ 1.

211. See Tribunal, *supra* note 203 (outlining the chambers to include the Chamber of Summary Procedure, the Chamber for Fisheries Disputes, the Chamber for Marine Environment Disputes and the Chamber for Maritime Delimitation Disputes).

212. See The Convention, *supra* note 5, annex VI, art. 29.

213. See *id.* annex VI, art. 33, ¶ 1.

214. See Tribunal, *supra* note 203.

Either a special agreement or a written application must be submitted in order for the Tribunal to hear a case.<sup>215</sup>

a. The *Hoshinmaru* and *Tomimaru* Cases

The two most recent examples of how the International Tribunal for the Law of the Sea settles disputes between member countries of the Convention are set forth in the *Hoshinmaru*<sup>216</sup> and *Tomimaru* Cases.<sup>217</sup> Both of these cases involved disputes between the Russian Federation and Japan.<sup>218</sup> Each case arose pursuant to Article 292 of the United Nations Convention on the Law of the Sea.<sup>219</sup> Each involved alleged violations of Article 73(2) of the Convention.<sup>220</sup>

Article 73 of the Convention discusses the enforcement of laws and regulations of the coastal state.<sup>221</sup> The coastal state may take measures to ensure conformity to the laws of the Convention, including searching and seizing vessels.<sup>222</sup> The vessels however, must be located within the EEZ of the coastal state.<sup>223</sup>

Article 292 of the Convention provides for the prompt release of vessels and crews once detained.<sup>224</sup> When a state has detained a foreign vessel, but has not promptly released that vessel, the vessel's state may apply to any court or tribunal agreed upon to determine the question of detention and release.<sup>225</sup> Ten days after detention, if a reasonable bond has not been set, the states may go to the Tribunal, unless the two states agree otherwise.<sup>226</sup>

The *Hoshinmaru* Case involved a Japanese fishing vessel under the same name.<sup>227</sup> A Russian patrol boat stopped the *Hoshinmaru* when it was fishing in the EEZ of the Russian Federation.<sup>228</sup> Russian authorities boarded the ship, searched it, and found concealed fish for which the ship

215. *See id.*

216. The 88 *Hoshinmaru* (Japan v. Russ.), Int'l Tribunal for the Law of the Sea (Aug. 6, 2007), available at [http://www.itlos.org/case\\_documents/2007/document\\_en\\_295.pdf](http://www.itlos.org/case_documents/2007/document_en_295.pdf).

217. The 53 *Tomimaru* (Japan v. Russ.), Int'l Tribunal for the Law of the Sea (Aug. 6, 2007), available at [http://www.itlos.org/case\\_documents/2007/document\\_en\\_296.pdf](http://www.itlos.org/case_documents/2007/document_en_296.pdf).

218. *See The 88 Hoshinmaru; see also The 53 Tomimaru.*

219. *See The Convention, supra note 5.*

220. *See The 88 Hoshinmaru; see also The 53 Tomimaru.*

221. *See The Convention, supra note 5.*

222. *See id.* art. 73, ¶ 1.

223. *See id.* annex VI.

224. *See id.*

225. *See id.* art. 292, ¶ 1.

226. *See The Convention, supra note 5, art. 292, ¶ 1.*

227. *See The 88 Hoshinmaru* (Japan v. Russ.), Int'l Tribunal for the Law of the Sea (Aug. 6, 2007), available at [http://www.itlos.org/case\\_documents/2007/document\\_en\\_295.pdf](http://www.itlos.org/case_documents/2007/document_en_295.pdf).

228. *Id.*

did not account.<sup>229</sup> The ship was detained and the cargo was taken into custody.<sup>230</sup> Twelve days after the detention the Russian Federation set a bond of twenty-five million Russian Roubles for the release of the Hoshinmaru.<sup>231</sup>

Japan thought the amount of the bond was unreasonable under Article 73(2) of the Convention, and thus brought an action to the Tribunal under Article 292 of the Convention.<sup>232</sup> The Tribunal found that it had jurisdiction under Article 292 of the Convention because both states were parties to the Convention.<sup>233</sup> Japan alleged that the Russian Federation had not complied with Article 73(2) of the Convention, and the parties did not reach an agreement on the release of the vessel within ten days of its detention as required under the Convention.<sup>234</sup> The Tribunal found that the amount of the bond was unreasonable and that the Russian Federation had not complied with Article 73(2) of the Convention.<sup>235</sup> The Tribunal ordered the Russian Federation to promptly release the Hoshinmaru upon the payment of ten million roubles.<sup>236</sup>

The facts of the *Tomimaru* Case are essentially the same. A Japanese fishing vessel was located in the EEZ of the Russian Federation when it was boarded and inspected by Russian authorities.<sup>237</sup> The search of the ship revealed that there was an unaccounted for amount of a certain type of fish on board.<sup>238</sup> During the ship's detention, the Japanese government took multiple actions in order to secure the prompt release of the vessel.<sup>239</sup> The owner of the ship filed in Russian court for its release.<sup>240</sup> He then appealed to the District Court and the Supreme Court of the Russian Federation, who dismissed the complaint.<sup>241</sup> Afterwards, the vessel "seized by the State as a beneficiary" was entered in the Federal Property Register as property of the Russian Federation."<sup>242</sup>

Japan once again filed with the Tribunal under Article 292 and Article 73 of the Convention.<sup>243</sup> The Tribunal determined that "the confiscation of a vessel does not result *per se* in an automatic change of

---

229. *See id.*

230. *See id.*

231. *See id.*

232. *See The 88 Hoshinmaru.*

233. *See id.*

234. *See id.*

235. *See id.*

236. *See id.*

237. *See The 53 Tomimaru.*

238. *See id.*

239. *See id.*

240. *See id.*

241. *See id.*

242. *The 53 Tomimaru.*

243. *See id.*

the flag or in its loss. Confiscation changes the ownership of a vessel but ownership of a vessel and the nationality of a vessel are different [legal] issues.”<sup>244</sup> Therefore, the Tribunal concluded that it had jurisdiction to determine the application before it.<sup>245</sup> Article 292, paragraph 3, states that the Tribunal must deal “without prejudice [with] the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew.”<sup>246</sup> The decision by the Supreme Court of the Russian Federation ended the proceedings brought before its domestic courts.<sup>247</sup> Therefore, a decision by the Tribunal to “release the vessel would contradict the decision which concluded the proceedings before the appropriate domestic fora and encroach upon national competences, thus contravening article 292, paragraph 3 of the Convention.”<sup>248</sup>

#### IV. NATIONAL SECURITY IMPLICATIONS OF SIGNING THE U.N. CONVENTION ON THE LAW OF THE SEA

##### A. Overview

In the time since September 11, 2001, national security has taken the forefront in the U.S. governmental operations.<sup>249</sup> As concerns over national security have increased over the years, so has the importance of everything having an impact on national security. Since the Convention has potential to substantially affect national security, U.S. succession to it is highly controversial. Proponents and opponents of the Convention differ greatly in determining if the Convention will aid or hurt the national security of the United States. Opponents of the Convention have, thus far, been successful in preventing it from being ratified by the U.S. Senate.

Until recently, accession to the Convention has not been a priority for the Senate. For over twenty years since the original Convention, the United States has adhered to the principals of the Convention despite never ratifying it.<sup>250</sup> However, the Bush Administration has advocated accession to the Convention.<sup>251</sup> In a press release on May 15, 2007,

---

244. *See id.*

245. *See id.*

246. *See* The Convention, *supra* note 5.

247. *See* *The 53 Tomimaru*.

248. *See id.*

249. *See* The Proliferation Security Initiative, *supra* note 3; *see also* The Container Security Initiative Strategic Plan, *supra* note 3.

250. *See* Caron & Scheiber, *supra* note 130.

251. *See* Press Release, President George W. Bush, President’s Statement on Advancing U.S. Interests in the World’s Oceans (May 15, 2007), *available at* <http://www.whitehouse.gov/news/releases/2007/05/20070515-2.html>.

President Bush urged the Senate to ratify the Convention, stating that ratification will promote the U.S. interests in the world's oceans and national security.<sup>252</sup>

The fact that the United States has operated for over twenty years without ratifying the Convention has led opponents to argue ratification is unnecessary.<sup>253</sup> Opponents argue that signing the Convention would diminish U.S. sovereignty and weaken national security.<sup>254</sup> The problem of sovereignty, for example, arises in giving power to the International Seabed Authority ("ISA") established by the Convention. The ISA controls mining rights and resources in the areas outside of the EEZ.<sup>255</sup> Membership of the ISA is composed of numerous developing countries.<sup>256</sup> Therefore, this leads proponents of the Convention to suggest the United States will be underrepresented in the decision-making process of the ISA if they do not ratify it.<sup>257</sup>

### B. *Dispute Settlement Concerns*

Another problem that may result from signing the Convention is that any dispute that arises at sea, whether civil or military, will fall under the jurisdiction of international tribunals and judges.<sup>258</sup> If, under the PSI, the U.S. Navy seizes a ship or vessel that it suspects of transporting WMDs, the legality of the seizure may be decided by an international body.<sup>259</sup> According to the procedures of the Convention, nation-states must choose a form of dispute resolution after joining.<sup>260</sup> As stated earlier, the forms of dispute resolution include the International Tribunal for the Law of the Sea, the International Court of Justice, or arbitration.<sup>261</sup>

The Tribunal is composed of members who do not always support the United States as well as others who are not allied with the United States.<sup>262</sup> In addition, there is no guarantee that members of the Tribunal from countries allied with the United States will see the situation as the

---

252. *See id.*

253. *See, e.g.,* Jack Goldsmith & Jeremy Rabkin, Op-Ed. *A Treaty the Senate Should Sink*, WASH. POST, July 2, 2007, at A19.

254. *See* Maggie Goodlander, *Is the United States Ready to Approve the Law of the Sea Treaty?* COUNCIL ON FOREIGN REL., July 19, 2007, available at <http://www.cfr.org/publication/13851>.

255. *See id.*

256. *See id.*

257. *See id.*

258. *See* Goldsmith & Rabkin, *supra* note 253.

259. *See id.*

260. *See* The Convention, *supra* note 5, art. 287, ¶ 1.

261. *See id.*

262. *See* Goldsmith & Rabkin, *supra* note 253.

United States does, which is typically the case. The members of the Tribunal must enforce the provisions of the Convention and are not concerned with what is in the best national security interest of the United States. Unilateral action by the U.S. Navy, which may be necessary in times of crisis or to prevent terrorism, will be greatly disadvantaged. Through ratification, the United States would be able to nominate judges who might thereafter be appointed to the Tribunal. These judges would then be in a better position to understand the needs of U.S. security interests.<sup>263</sup>

According to the Convention, if both states involved in a dispute do not choose the same tribunal for handling disputes or do not choose a tribunal at all, arbitration must be used to settle the disagreement.<sup>264</sup> This option includes a five-judge international arbitration board.<sup>265</sup> The countries involved in the dispute have the ability to help choose the arbiters.<sup>266</sup> Frequently however, the countries cannot agree on the arbiters and the U.N. must step in and appoint the remaining judges to decide the dispute.<sup>267</sup>

The judges must be chosen from a list predetermined by the Convention which includes judges from each country of the Convention.<sup>268</sup> The list includes countries that do not have views similar as the United States and whose interests may be adverse to U.S. security concerns. Once again, international judges would determine the legality of U.S. Naval operations. Giving this power to the U.N. and the international community weakens the U.S. sovereignty and national security. Even though a certain naval operation may seem necessary to protect the United States and prevent terrorism, it will come under the scrutiny of, and must be approved by, the designated international forums under the Convention. "In every case, a majority of non-American judges would decide whether the [U.S.] Navy can seize a ship that it believes is carrying terrorist operatives or supplies for terrorists."<sup>269</sup>

A related concern for the United States is that the Convention exempts military activities from the jurisdiction of international tribunals.<sup>270</sup> However, the term "military activity" is ambiguous and is

---

263. See Candace L. Bates, *U.S. Ratification of the U.N. Convention on the Law of the Sea: Passive Acceptance Is Not Enough to Protect U.S. Property Interests*, 31 N.C. J. INT'L L. & COM. REG. 745, 746 (2006).

264. See The Convention, *supra* note 5, art. 188.

265. See *id.* annex VII, art. 3.

266. See Goldsmith & Rabkin, *supra* note 253.

267. See *id.*

268. See *id.*

269. *Id.*

270. See *id.*

not defined in the Convention. It could potentially be interpreted broadly, meaning that any activity by a military body would be excluded from the jurisdiction of the tribunals. On the other hand, it could be narrowly interpreted meaning that only officially sanctioned and declared military activities fall under the exemption.

According to proponents of the Convention, the United States should impose, as a condition to ratification, that the United States alone would determine what the phrase "military activities" means.<sup>271</sup> Proponents hope that the United States can define the phrase and decide what does and does not fall under the jurisdiction of the international tribunals for dispute resolution.<sup>272</sup> However, opponents argue that the tribunals for dispute resolution would still have authority over the supposed military operation to determine the legality of the imposed condition and capacity of the U.S. Navy.<sup>273</sup>

### C. *U.S. Security Program Concerns*

There is debate as to whether signing the Law of the Sea Convention will reinforce or diminish the U.S. security programs such as the PSI and the CSI because the Convention may preclude these programs.<sup>274</sup> By signing the Convention, it would take precedence over these programs and the United States would have to adhere to the provisions in the Convention. The PSI and CSI are major security programs in the United States and the Convention may limit their effectiveness. There are numerous examples of how the PSI and the CSI have worked and increased national security. By limiting these programs, the Convention may reduce the effectiveness of the United States to protect its citizens from terrorism.

On the other hand, signing the Convention may actually strengthen nonproliferation operations like the PSI and CSI.<sup>275</sup> As stated previously, the PSI is not based in treaty or binding authority.<sup>276</sup> If the United States ratifies the Convention, it may constitute a step toward giving the PSI binding, legal authority. By ratifying the Convention, the United States may encourage more countries to join and further legitimize the PSI.

---

271. See Press Release, Senator Richard G. Lugar, An Overdue Step to Greater Security (May 15, 2007), available at <http://lugar.senate.gov/press/record.cfm?id=274361&&year=2007&> [hereinafter Lugar].

272. See *id.*

273. See Goldsmith & Rabkin, *supra* note 253.

274. See Frank J. Gaffney Jr., Op-Ed., *Don't Get LOST: The White House Toys With Signing a Very Kerry Treaty*, NAT'L REV. ONLINE, Mar. 18, 2004, <http://www.nationalreview.com/gaffney/gaffney200403181156.asp>.

275. See Goodlander, *supra* note 254.

276. See The Proliferation Security Initiative, *supra* note 3.



The Convention appears to be consistent with the principles and goals of the PSI, and would reinforce them. Signing the Convention would certainly seem to boost national security and give the United States wider freedom in its military operations by supporting programs such as the PSI and CSI.

#### D. *Navigating the World's Oceans*

Agreeing to the Convention will mean that the United States will be subject to the same laws and regulations as all other nations who are part of the Convention. However, it will also provide the United States with the same advantages and freedoms as these member nations. The Convention would improve access and transportation for U.S. ships.<sup>277</sup> This would “facilitate timely movement of [U.S.] forces throughout the world.”<sup>278</sup> This can work to improve national security. The Convention would give U.S. ships freedom of passage to travel through international straits and other bodies of water that were previously off limits.<sup>279</sup> Senator Lugar, one of the chief proponents of acceding to the Convention, argues that there are guarantees that U.S. ships, whether military or civil, could travel freely throughout the world’s sea lanes.<sup>280</sup> Currently, as a non-party to the Convention, the United States must obtain permission from a country in order to travel in that country’s Territorial Sea.<sup>281</sup> If the United States does not receive this permission, its ships must limit navigation to the Contiguous Zone of the other country.<sup>282</sup> This places obvious burdens on United States’ ships, whether military or otherwise. By ratifying the Convention, the United States can ensure free passage in the zones they previously needed permission to enter. The provisions in the Convention would preserve and expand the rights of the United States to navigate the oceans in order to improve national security.<sup>283</sup>

However, along with the freedom of navigation throughout the seas, the United States must allow other nation-states to navigate freely close to U.S. waters. According to the Convention, a State may exercise strict

---

277. See David B. Sandalow, Op-Ed., *Ocean Treaty Good for U.S.*, WASH. TIMES, May 16, 2004, available at <http://www.brookings.edu/views/op-ed/fellows/sandalow20040516.htm>.

278. *Id.*

279. See Goodlander, *supra* note 254.

280. See Lugar, *supra* note 271.

281. See Bates, *supra* note 263.

282. See *id.*

283. See John R. Crook, *Contemporary Practice of the United States Relating to International Law: International Oceans, Environment, Health, and Aviation Law: Administration Urges Senate Action on Law of the Sea Convention*, 99 AM. J. INT’L L. 498 (2005).

jurisdiction in its Territorial Sea, but must allow more freedom of navigation in its Contiguous Zone.<sup>284</sup> These zones extend twelve and twenty-four nautical miles, respectively, from the state's baseline.<sup>285</sup> The limits on these zones may not be large enough to protect the U.S. national security interests. Improving technology may make these limits obsolete. Twelve nautical miles is not substantial considering the technology and the capacity of ships to launch missiles from much further away. The limits on the maritime zones imposed by the Convention will impede national security measures by allowing certain ships freedom of navigation closer to U.S. soil when the United States must wait to act.

More national security concerns arise if ratifying the Convention obstructs the U.S. Navy in its effort to stop terrorism.<sup>286</sup> The maritime zones created by the Convention limit where a ship can sail and what activities it can engage in.<sup>287</sup> Placing restrictions on all ships, including the Navy, will hamper the United State's ability to respond to and prevent terrorist activity.

#### *E. Advancement of U.S. Security Interests*

By ratifying the Convention, the United States would be able to participate in the Convention's decision-making processes. The United States would be given a permanent seat on the Convention's council.<sup>288</sup> In addition, the United States could propose additional members to sit on the Tribunal.<sup>289</sup> This way, the United States can take positive steps in the direction of having its interests advanced. With a permanent seat on the council for the Convention, the United States can ensure input in the decision making process and attempt to ensure new policies and laws coincide with U.S. interests.<sup>290</sup>

Also, in support of national security interests, the provision of the original Convention that ordered the mandatory transfer of technology has been removed.<sup>291</sup> In the version of the Convention that would be

---

284. See The Convention, *supra* note 5, art. 25.

285. See *id.* arts. 3, 33.

286. See Goldsmith & Rabkin, *supra* note 253.

287. See, e.g., The Convention, *supra* note 5, art. 3.

288. See *The U.N. Convention On the Law of the Sea: Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. (2007) (statement of John D. Negroponte, Deputy Sec'y of State), available at [www.jag.navy.mil/documents/testNegroponteTestimony070927.pdf](http://www.jag.navy.mil/documents/testNegroponteTestimony070927.pdf) [hereinafter Negroponte].

289. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: Senate Testimony Regarding U.S. Adherence to Law of the Sea Convention*, 98 AM. J. INT'L L. 173 (2004).

290. See Bates, *supra* note 263.

291. See *id.* at 746.

signed by the United States, the provisions regarding the transfer of technology are only general guidelines and there are no mandatory provisions.<sup>292</sup>

#### *F. Constraint on National Security Interests*

By ratifying the Convention, the United States may think twice about intercepting a ship or vessel suspected of terrorist or other criminal activity. The Convention provides compensation for any losses or damages to a ship that has been boarded and searched when nothing suspicious is found.<sup>293</sup> This part of the Convention implements sanctions against nation-states who conduct searches that prove to be unfounded.<sup>294</sup> In this age of uncertainty, with varying information coming from different sources, the United States must be relatively certain of a suspected vessel or face sanctions. Ensuring that countries wait until there is a solid foundation for searches creates a strain on national security. This delay in action could be costly to the United States in preventing terrorism in a timely fashion.

#### V. CONCLUSION

Many arguments have been made for and against the ratification of the Convention by the United States. However, one point of agreement is that if the United States ratifies the Convention, it will have a profound effect on national security. The Convention will put decisions regarding United States operations throughout the sea in the hands of foreign judges, but it will also reinforce current U.S. security programs. The arguments for and against the ratification of the Convention will only be validated if the United States actually ratifies it—a task that may be far off. The magnitude and gravity of ratifying the Convention has led the United States into a stalemate. However, a decision must be made in order for the United States to go forward. If the United States chooses to ratify the Convention, it will be a positive step in showing the international community that the United States is willing to cooperate and work with others toward a common goal. If however, the Convention is not ratified, the United States will show the rest of the world that it is set in continuing its unilateral traditions.

---

292. See Negroponte, *supra* note 288.

293. See The Convention, *supra* note 5, art. 110, ¶ 3.

294. See Justin S.C. Mellor, *Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism*, 18 AM. U. INT'L L. REV. 341, 381 (2002).