

**THE LAW OF THE SEA CONVENTION:
A NATIONAL SECURITY SUCCESS—*GLOBAL STRATEGIC
MOBILITY THROUGH THE RULE OF LAW***

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I. INTRODUCTION

The United Nations Convention on the Law of the Sea (Convention) has been called a constitution for the world's oceans because it provides a legal and policy architecture for conduct on, over, and under more than seventy percent of the globe.¹ So far, the treaty has served as an enduring framework for ensuring a stability of expectations. In many respects, the Convention codifies customary international law and the state practice comprised of the cumulative actions of governments in areas such as transit through international straits and establishment of the exclusive economic zone (EEZ).² The Convention has gone far toward fulfilling Professor

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1. See Tommy T. B. Koh, A Constitution for the Oceans xxxiii–xxxiv, available at http://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf.

2. See EDWARD L. MILES, GLOBAL OCEAN POLITICS: THE DECISION PROCESS AT THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, 1973–1982, at 50 (1998).

Myres S. McDougal's vision for a minimum world "public order of the oceans." Professor McDougal and his collaborator, William T. Burke, suggested that developing a stable regime for the oceans required a "comprehensive . . . process of authoritative decision."³ This process flowed from three distinct elements—interaction among the maritime states and ocean users, the rights of access of the international community to ocean space and the rights of coastal state to claim jurisdiction over ocean space, and determinations of decision makers responding to these competing claims. This process gave definition and certainty to the navigational regimes of the treaty. The unfolding process of authoritative decision for a public order of the oceans is displayed through maritime operational and diplomatic theater. In the contemporary era, this drama unfolds within the boundaries set by the Convention, and the United States and other countries have a great interest in ensuring the stability of those boundaries.

The Convention has been an enormously positive influence on the development of authoritative decision, shaping the process in a direction that protects the international community's right to freedom of the seas. Freedom of navigation is a community right, but the right is under constant pressure of encroachment by coastal state interests. Whether the Convention is able to continue to serve the critical function on the development of authoritative decision will depend on the outcome of the ongoing "struggle for law" in the oceans.

As a human endeavor, the Convention is imperfect and sometimes contains language obsequious to opposing interests. At the same time, the grand bargain struck in the treaty carefully achieved a balance of interests that has attracted more than 150 state parties.⁴ The Convention is a framework treaty, perhaps the most comprehensive multilateral agreement in existence after the United Nations (UN) Charter, and it is one of the most widely accepted global treaties.⁵ The treaty sets forth the architecture for

3. MYRES S. McDOUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* vii (1962).

4. Division for Ocean Affairs and Law of the Sea (DOALOS), United Nations, Chronological lists of ratification of, accessions and successions to the Convention and the related agreements as of 04 April 2007, http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea (last visited Sept. 2, 2007).

5. See Division for Ocean Affairs and the Law of the Sea, United Nations, *Oceans: The Source of Life—United Nations Convention on the Law of the Sea: 20th Anniversary (1982–2002)* 15 (2002), available at http://www.un.org/Depts/los/convention_agreements/convention_20years/oceansourceoflife.pdf.

developing policy and law for virtually every major oceans interest, including protection of the international community's essential interest in freedom of the seas, which is the foundation of oceans policy. Other important oceans interests include, but are not limited to, marine environmental protection, natural resource management, oil, natural gas and mineral extraction within and beyond areas of national jurisdiction, marine scientific research, and establishment of a menu of mechanisms for the peaceful resolution of disputes. In the United States, experts representing each of these national interests have strongly supported the Convention and, combined, make a powerful case.

II. THE LAW OF THE SEA CONVENTION AND NATIONAL SECURITY

This issue of the Journal focuses on the life and achievements of Professor Louis B. Sohn, distinguished member of the U.S. delegation to the Third United Nations Conference on the Law of the Sea. In evaluating whether the Convention has been a *national security* success, it is useful to turn toward another important leader and scholar in the early development of the Convention. Doing so requires us to think back three decades. In September 1975 John Norton Moore wrote that U.S. oceans interests are best served by reaching a comprehensive multilateral treaty on the law of the sea.⁶ At the time, a few scholars urged that such a treaty was unattainable and, moreover, that the United States had little interest in negotiating such an agreement in any event. Calling that view "profoundly mistaken," Professor Moore's assessment appeared in a declassified memorandum sent to the Deputy Secretary of Defense and was written while Ambassador Moore was serving as the Chairman of the Interagency Task Force on the Law of the Sea.⁷ The memorandum provides a succinct record of the enduring spectrum of U.S. national security interests in establishing a widely-accepted and stable global regime for the oceans.

At that time, as the text of the Convention began to take shape, Ambassador Moore suggested that the treaty should capture and promote the range of U.S. oceans interests, broadly promoting national military and economic security. "This does not mean a treaty at any price," he wrote at the time.⁸ The final text signed at

6. Briefing Memorandum from Amb. John Norton Moore, Deputy Special Rep. of the President for the Law of the Sea Convention, to the Deputy Sec'y of State, and the Under Secretary for Security Assistance I (Sept. 25, 1975) (declassified Mar. 9, 2004, and available at the Declassified Documents Reference System).

7. *Id.*

8. *Id.* at 4.

Montego Bay seven years later, however, would remarkably parallel Ambassador Moore's model, especially in protection of maritime freedom of navigation and overflight through international straits and areas of limited coastal state resource jurisdiction, such as the EEZ. The basic U.S. strategy in the negotiations was to achieve a widely accepted multilateral treaty which would preserve the international community's right to exercise freedom of the seas while still appealing to the coastal interests of developing states.⁹ The Convention also promotes bedrock U.S. political and national security interests in conflict avoidance, the peaceful resolution of disputes and the stability of juridical boundaries.

The vision shared by Professors Sohn and Moore, and others, reflects a long-range perspective for oceans policy. Taking the long view on maritime policy is something that Yale Professor of History Paul Kennedy argues is an essential prerequisite for a maritime state to maintain the status of a global maritime power.¹⁰ The particular value of naval forces in maintaining regional security and global stability is often identified with the naval theorist Alfred Thayer Mahan, who lived one hundred years ago. Mahan suggested the Navy, which could freely transit the seas, was an especially flexible instrument of national power, able to assert influence "where the national armies cannot go."¹¹ Political science theory bears out the relationship between a strong navy and the maintenance of global power. Over the last five hundred years, all of the world's leading states achieved their position of leadership through reliance on preeminent sea power and naval capabilities.¹² When tested empirically, the theory holds true for helping to explain the rise as leading world powers of Portugal, the Netherlands, Great Britain and the United States.¹³ *Pax Britannica*,¹⁴ and the present

9. Memorandum, U.S. Dept. of State, Background Information in Preparation for the Third Sess. of the United Nations Conference on the Law of the Sea, Geneva, Switzerland, Mar. 17–May 10, 1975, at 2 (undated), available at Declassified Documents Reference System.

10. Takayuki Tanaka, *Sea Change Needed on Ocean Policies*, DAILY YOMIURI (TOKYO), Sept. 24, 2006, at 3.

11. Philip A. Crowl, *Alfred Thayer Mahan: The Naval Historian*, in MAKERS OF MODERN STRATEGY: FROM MACHIAVELLI TO THE NUCLEAR AGE, 444, 462 (Peter Paret ed., 1986).

12. See generally GEORGE MODELSKI & WILLIAM R. THOMPSON, SEAPOWERS IN GLOBAL POLITICS 1493–1993 (1988) (discussing the relationship between naval capabilities and world leadership).

13. See generally *id.*

14. Pax Britannica, or the "British Peace," refers to the period after the Battle of Trafalgar to World War I, when British naval mastery by the Royal Navy enforced relative condition of peace on the continent of Europe. Cf. Robert K. Massie, DREADNOUGHT: BRITAIN, GERMANY AND THE COMING OF THE GREAT WAR xiii, 463 (1991).

global security architecture which relies on American power for stability, are a product of naval power.

National security interests were paramount in crafting the final text of the Convention, so it is unsurprising the treaty framework promotes regional stability, optimizes maritime strategic mobility, and yields other national security benefits. At home, the Convention supports strong flag and port state security measures and ensures the exercise of sovereignty in the territorial sea. The Convention also provides the most effective means to exercise U.S. leadership to shape the management and development of law of the sea. Abroad, the Convention facilitates combined operations with coalition partners through subscription to a common rule set, such as the Proliferation Security Initiative (PSI). The suggestion by some critics that the Convention represents a progressive confrontation of U.S. national security interests has turned historical analysis on its head, as the Convention in fact secured the essential oceans interests of the maritime powers. Senator Richard Lugar called the criticism of these “amateur admirals”¹⁵ factually and historically incorrect, and focusing on spurious concerns over vague losses of U.S. sovereignty.¹⁶ During the negotiations, the United States closely coordinated with the other major maritime powers—the Soviet Union, Japan, the United Kingdom and France—to accommodate high seas freedoms.¹⁷ These states, and particularly the superpowers, demonstrated a repeated willingness to go against their usual clients and allies in favor of positions supported by the maritime powers. The politics of the negotiations reflected national interest as a function of geography, rather than superpower politics or North-South differences. The cornerstone of this coordination was achievement of the provisions protecting freedom of navigation. In the end, essentially all of the maritime security benefits of the Convention are rooted in preserving maximum freedom of the seas.

III. GLOBAL STRATEGIC MOBILITY—FOUNDATION OF MARITIME POWER

Global freedom of navigation is the cornerstone of maritime power, essential for the exercise of U.S. national military power. Maritime operations are completely dependent upon strategic

15. Press Release, Sen. Richard G. Lugar, Lugar Calls for Action on the Law of the Sea Treaty (May 15, 2007), *available at* <http://lugar.senate.gov/press/record.cfm?id=274361>.

16. *See id.*

17. Memorandum, U.S. Dept. of State, *supra* note 9, at 2.

mobility throughout the global commons, as well as tactical maneuver antecedent to conducting operations.¹⁸ Indeed, unimpaired transit through the ocean is more important to naval combat than even the concept of firepower.¹⁹

Freedom of navigation also underpins global economic prosperity. The oceans, wrote Professors McDougal and Burke, were a "spatial extension resource, principally useful as a domain for movement."²⁰ With the increasing trend in global trade, exercising the freedom to navigate on the seas is becoming even more important. This trend is accelerating in an era of globalization. "Shipping lanes are getting busier," reports the Wall Street Journal, "not just from Asia to North America and Europe, but within Asia."²¹ The initial rise of the globalized economy, which began in mercantilist Europe, can be attributed in large part to unimpeded ocean transit. Four hundred years ago, the legal scholar Hugo Grotius cogently set forth the commercial doctrine that fueled international trade. "For do not the ocean," Grotius wrote, "navigable in every direction with which God has encompassed all the earth, and the regular and occasional winds which blow now from one quarter and now from another, offer sufficient proof that Nature has given to all peoples a right of access to all other peoples?"²² The model of freedom of the seas also is regarded as the logical analogue for developing the legal regime for outer space.²³

Ensuring freedom of the seas is a historic mission of the U.S. Navy and a modern necessity for securing regional and global peace and stability.²⁴ In 1983 President Ronald Reagan declared that the United States would accept the navigation and overflight

18. CAPT. WAYNE P. HUGHES, JR., USN (RET.), *FLEET TACTICS AND COASTAL COMBAT* 203 (2d. ed. 2000).

19. See Commander Bradley A. Fiske, USN, Prize Essay, XXXI PROCEEDINGS OF THE UNITED STATES NAVAL INSTITUTE 1, 14-17 (Mar. 1905).

20. MCDUGAL & BURKE, *supra* note 3, at vii.

21. Evan Ramstad, *Korean Shipbuilders Take Novel Construction Tack: Booming Business Inspires New Methods to Make Boats; Thinking Outside the Dock*, WALL ST. J., June 12, 2007, at A8.

22. HUGO GROTIUS, *FREEDOM OF THE SEAS OR THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIA TRADE* 8 (Ralph Van Deman Magoffin trans., James Brown Scott ed., Oxford Univ. Press 1916) (1609).

23. Some suggest that naval power is the logical analogue for developing the regime for the use of outer space. See, e.g., BENJAMIN S. LAMBETH, *MASTERING THE ULTIMATE HIGH GROUND: NEXT STEPS IN THE MILITARY USES OF SPACE* 105 (2003).

24. *The Department of the Navy's Fiscal Year 2007 Budget Request: Hearing Before the H. Armed Services Comm.*, 109th Cong. 4 (2006) (statement of Adm. Michael G. Mullen, USN, Chief of Naval Operations), available at <http://www.navy.mil/navydata/cno/mullen/testimony/mullen060301-posture.pdf>.

provisions of the Convention.²⁵ Since then, U.S. Naval forces have conducted their operations and intelligence activities in accordance with the rules reflected in the treaty.

The National Strategy for Maritime Security (NSMS) identifies freedom of the seas as a “top national priority.”²⁶ Naval forces depend upon global strategic mobility and tactical maneuverability to conduct the spectrum of sea-air-land operations in pursuit of the national interest, and these operations include:

- operating the most survivable component of nuclear deterrence, ballistic missile submarines (SSBNs);²⁷
- conventional global strike;²⁸
- air and missile defense;²⁹
- information operations;³⁰
- sea and land direct attack with missiles, naval gunfire and aircraft;
- crisis and disaster response, such as tsunami relief;³¹
- maritime homeland security;³²
- amphibious and expeditionary operations in littoral areas;³³
- insertion of special operations forces (SOF) for missions such as counterinsurgency and counterterrorism;³⁴

25. Statement by the President, U.S. Ocean Policy Statement (Mar. 10, 1983), in PUBLIC PAPERS OF THE PRESIDENTS: RONALD REAGAN, 1983, at 383. This policy was reiterated in Presidential Decision Directive/NSC-32 on Freedom of Navigation. Presidential Decision Directive/NSC-32, Freedom of Navigation (Jan. 23, 1995).

26. White House, National Strategy for Maritime Security 7 (Sept. 2005).

27. See Adm. Michael G. Mullen & Gen. Michael W. Hagee, Naval Operations Concept (NOC) 15 (Sept. 1, 2006), available at www.mcw.usmc.mil/file_download.cfm?filesource=c:%5CMCWL_Files%5CC_P%5CNOC%20FINAL%2014%20Sep.pdf. See also 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, 80 (1980).

28. See Michael R. Gordon, *Pentagon Seeks Nonnuclear Tip for Sub Missiles*, N.Y. TIMES, May 29, 2006 at A1. For a chronology of global strike events prepared by the Federation of American Scientists, see Hans M. Kristensen, *Global Strike: A Chronology of the Pentagon's New Offensive Strike Plan* (Mar. 15, 2006), available at <http://www.fas.org/ssp/docs/GlobalStrikeReport.pdf>.

29. Mullen & Hagee, *supra* note 27, at 22.

30. *Id.*

31. *Id.* at 12–13.

32. See David Longshore, *American Naval Power and the Prevention of Terror*, 1 HOMELAND SECURITY AFF. 1, 1 (Summer 2005), available at www.hsaj.org/pages/volume1/issue1/pdfs/1.1.6.pdf (discussing steps to reform naval strategies in order to effectively deter terrorist threats).

33. Mullen & Hagee, *supra* note 27, at 13. “Littoral” areas are those areas both seaward of the open ocean to the shore that must be controlled to effectively conduct operations ashore, as well as those areas inland and adjacent to the shore that can be supported from the sea. *Id.* at 9. For comment on the NOC, see Andrew Scutro, *Navy, Marine Plan Together for Future*, NAVY TIMES, Sep. 18, 2006, at 18.

34. Mullen & Hagee, *supra* note 27, at 20–21.

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- constabulary functions and maritime security operations (MSOs) such as counterdrug operations³⁵ and piracy repression;³⁶
- counter proliferation operations such as the Proliferation Security Initiative (PSI) and the Protocols to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA);³⁷
- exercise of the right of approach, approach and visit, maritime interception operations (MIO) and visit, board, search and seizure (VBSS);
- naval control and protection of shipping (NCAPS);³⁸
- exercise of sea lines of communication (SLOCs) through the global supply chain and strategic supply;
- sea control;³⁹
- anti-access and sea denial strategies such as mining;
- civil-military affairs;⁴⁰
- security cooperation and peacekeeping;⁴¹ and
- forward presence.⁴²

In addition to securing the homeland, the exercise of these military activities ensures and relies on U.S. command of the global commons, which means the United States is readily able to insert power anywhere throughout the globe.⁴³ The Chief of Naval Operations has said assuring access to the oceans and preserving the freedom to conduct naval operations is directly related to deterring war, or, if necessary, winning it.⁴⁴

The greatest success of the Convention in support of maritime strategic mobility was to achieve global acceptance for the regime of straits used for international navigation.⁴⁵ Prior to 1982, the status of international straits was embroiled in controversy. In one

35. See James C. Kraska, *Counterdrug Operations in U.S. Pacific Command*, JOINT FORCE Q. 81, 82 (Winter 1997–1998) (detailing defense counter-drug efforts and achievements in Asia and the Pacific).

36. Mullen & Hagee, *supra* note 27, at 14.

37. *Id.* at 21–22.

38. See Lt. Michael C. Grubb, Protection of Shipping: A Forgotten Mission with Many New Challenges (Oct. 10, 2006) (unpublished paper, on file with the Naval War College Joint Military Operations Department.), available at <http://stinet.dtic.mil/oai/oai?&verb=getRecord&metadataPrefix=html&identifier=ADA463612>.

39. Mullen & Hagee, *supra* note 27 at 14–15.

40. *Id.* at 19.

41. *Id.* at 18.

42. *Id.* at 11–12; see also HUGHES, JR., *supra* note 18, at 35.

43. Barry R. Posen, *Command of the Commons: The Military Foundations of U.S. Hegemony*, 28 INT'L SECURITY 5, 8 (Summer 2003).

44. See Interview with Admiral Mike Mullen, Chief of Naval Operations, Surface Sitrep (Winter 2007), available at http://www.navy.mil/navydata/cno/mullen/Surface_Sitrep_Winter_2007.pdf (“Our job is, as it has always been, to help deter such war and failing that, to fight and win it. The freedom to conduct naval operations . . . must be preserved . . .”).

45. Cf. Moore, *supra* note 27, at 78–79.

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example, Malaysia and Indonesia claimed the Strait of Malacca as territorial waters.⁴⁶ At the time, the maritime powers were deeply concerned that littoral straits states might try to limit tonnage through the straits, stop traffic or impose tolls for passage, or even close straits in extreme cases. Some straits states favored adoption of a regime of innocent passage through international straits, a regime which may be suspended by the coastal state and does not include the right of overflight or submerged transit.⁴⁷

If straits states could regulate passage through international straits in the same manner as they could through their other territorial waters, submarines could be required to travel on the surface and civil and military aircraft could be denied overflight passage through straits. To “enable [straits states] unilaterally to control or impose conditions on such an important community freedom,” wrote Professor Moore in 1980, “would be inequitable, inefficient, and conducive to conflict.”⁴⁸ The recognition of transit passage through international straits favorably resolved the debate. Unlike innocent passage, transit passage may not be suspended by a state bordering the strait.⁴⁹ At the same time, the regime of transit passage does not, in other respects, affect the legal status of the waters forming the straits or the exercise by border states of their sovereignty or jurisdiction over such waters and their airspace, bed, and subsoil.⁵⁰

IV. NATIONAL SECURITY BENEFITS OF THE CONVENTION

Prior to adoption of the Convention, there were a few who suggested that the navigational regimes contained in the treaty were not essential for U.S. national security. Some sought to “rethink” U.S. interests, believing the cost of the original (and objectionable) seabed mining provisions were greater than the value of codifying the freedom of navigation provisions.⁵¹ Others suggested the United States essentially was a continental power and global air and sea strategic mobility were altogether unnecessary for national

46. William D. Hartley, *When is a Strait International, When Territorial? No One is Quite Sure, and Therein Lies a Dispute*, WALL ST. J., Nov. 30, 1972, at 40.

47. See Memorandum, U.S. Dept. of State, *supra* note 9, at 3.

48. Moore, *supra* note 27, at 79.

49. United Nations Convention on the Law of the Sea, art. 44, December 10, 1982, 1833 U.N.T.S. 397, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf [hereinafter LOS Convention].

50. *Id.* art. 34(1).

51. See, e.g., Richard G. Darman, *The Law of the Sea: Rethinking U.S. Interests*, FOREIGN AFF., Jan. 1978, at 373, 375–76.

security and prosperity.⁵² These erroneous views gained little traction in the 1970s and 1980s, as it was apparent that U.S. dependence on maritime strategic mobility was essential for achieving the goals of U.S. diplomacy and the exercise of military deterrence.

The refocus from bipolar concerns to global concerns after the Cold War further validated the importance of worldwide freedom of the seas. As the forces of economic and social globalization grew in the 1990s, it became even more apparent that freedom of navigation was the basis for national and global economic growth and stability. In little more than a decade after publication, Richard G. Darman's mistaken view that a "territorialist" regime of the oceans would be more favorable to the United States had become a grossly outdated artifact.⁵³

In a 1996 report, the Department of Defense and the Joint Chiefs of Staff set forth the major national security benefits of the Law of the Sea Convention.⁵⁴ The foremost benefit is global access to the oceans throughout the world, including areas adjacent to coastal states, which include the contiguous zone and the EEZ.⁵⁵ These interests extend to U.S. security and economic interests in global high seas freedoms, including freedom of navigation, overflight, and telecommunications.⁵⁶ Benefits also include a stable, comprehensive, and nearly universally-accepted Convention, modified by the 1994 Agreement, to promote public order and free access to the oceans and the airspace above it.⁵⁷

The attacks of 9/11 and the strategic threat of terrorism confirmed the importance of freedom of the seas to national security. To address the maritime dimension of emerging national security concerns, the Navy developed the Naval Operation Concept (NOC). The NOC serves as the "commander's intent" of the Chief of Naval Operations and the Commandant of the Marine Corps to provide principles for modern naval operations. The document sets forth the goal for the Department of the Navy to "secure strategic access," in order to "retain global freedom of action by ensuring that key regions, lines of communication and the global

52. See, e.g., Charles E. Pirtle, *Transit Rights and U.S. Security Interests in International Straits: the "Straits Debate" Revisited*, 5 OCEAN DEV. & INT'L L. 477, 479, 489, 493 (1980).

53. Darman, *supra* note 51, at 376-78.

54. DEP'T OF DEFENSE, NATIONAL SECURITY AND THE CONVENTION ON THE LAW OF THE SEA i (2d. ed. 1996).

55. *Id.* at i-ii.

56. *Id.* at i.

57. *Id.* at ii.

commons remain accessible to all.”⁵⁸ In reiterating the importance of the Convention as an essential element to maintaining freedom of the seas, Chief of Naval Operations Admiral Clark wrote in a 2004 letter to the Senate that the treaty “[c]odifies the right to transit through . . . international straits.”⁵⁹ Protection of these global freedoms is not just important to the sea services. For example, the U.S. Army is dependent upon sealift and operational maneuver from the sea. The treaty “reinforces our military’s ability to move—without hindrance and under authority of law—forces, weapons and materiel to the fight.”⁶⁰

In recent years, many of the most senior U.S. military officers have further articulated the national security benefits of the Convention. The Navy has been one of the strongest supporters of the Convention, with every serving and former Chief of Naval Operations lining up to publicly support U.S. accession.⁶¹ In 2004 when the U.S. Senate was actively considering the treaty, the Joint Chiefs of Staff, the worldwide four-star unified combatant commanders, and the Chief and Vice Chief of Naval Operations strongly supported U.S. accession to the Convention.⁶² These uniformed senior flag and general level officers provided ample testimony to the Senate concerning the broad range of national security interests the Convention directly promoted. The treaty “helps [to] assure access to the largest maneuver space on the planet—the sea—under authority of widely recognized and accepted law and not the threat of force.”⁶³ The United States benefits from the

58. Mullen & Hagee, *supra* note 27, at 7–8, 33. The “global commons” includes “international waters, airspace, space, and cyberspace.” *Id.* at 36.

59. Letter from Adm. Vern Clark, Chief of Naval Operation, to Sen. Trent Lott (Aug. 6, 2004) (on file with author).

60. Letter from William H. Taft, IV, to The Hon. John Warner, Chairman, Comm. on the Armed Services, U.S. Senate (Apr. 6, 2004) (on file with author).

61. *See, e.g.*, Letter from Adm. F. B. Kelso, Adm. C. A. H. Trost, Adm. J. D. Watkins, Adm. T. B. Hayward, Adm. J. L. Holloway, Adm. E. R. Zumwalt, and Adm. T. H. Moorer to The Hon. Strom Thurmond, Chairman, Comm. on Armed Services, Hon. Trent Lott, Senate Majority Leader, and Hon. Jesse Helms, Chairman, Foreign Relations (undated; on file with author); Letter from Adm. Vern Clark to The Hon. James M. Inhofe, Chairman, Comm. on Env’t and Pub. Works (Mar. 18, 2004) (on file with author) (former Chief of Naval Operations expressing his strong support for United States’ accession to the Law of the Sea Convention).

62. Following the 1994 Agreement relating to the implementation of Part XI, all former living Chiefs of Naval Operations have endorsed the Convention and urged the Senate leadership to take positive action on U.S. accession. *See United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. 102–03 (2004) (statement of Adm. Michael G. Mullen, Vice Chief of Naval Operations, Joint Chiefs of Staff, Dept. of the Navy) [hereinafter Senate Foreign Relations Hearing].

63. Letter from Adm. Vern Clark to The Hon. James M. Inhofe, *supra* note 61.

navigational regimes of innocent passage and transit passage through straits and archipelagos, the exercise of high seas freedoms in the EEZ and high seas, as well as the concept of sovereign immunity for warships and other public vessels and public aircraft.⁶⁴ Also in 2004, the Chairman of the Joint Chiefs of Staff said the Convention helps U.S. forces to “operate freely across the vast expanse of the world’s oceans under the authority of widely recognized and accepted international law.”⁶⁵ Additional testimony in support of the national security benefits of the treaty is included in the 2004 Report of the Senate Foreign Relations Committee, which voted the treaty out of committee in a bipartisan 19-0 vote.⁶⁶

From the negotiating history to the present, freedom of the seas has been the principle U.S. national interest in the treaty. In early 2007, Assistant to the President for National Security Affairs Stephen B. Hadley wrote to the Chairman of the Senate Foreign Relations Committee, “the Convention supports navigational rights critical to military operations and essential to the formulation and implementation of the President’s National Security Strategy, as well as the National Strategy for Maritime Security.”⁶⁷ On May 15, 2007, President Bush declared, “Joining [the Law of the Sea Convention] will serve the national security interests of the United States, including the maritime mobility of our armed forces worldwide.”⁶⁸ Shortly thereafter, on June 26, 2007, the Joint Chiefs of Staff, which includes the Chairman and the Service Chiefs, all signed a letter to the Senate in support of the Convention.⁶⁹

The Convention’s critical architecture for preserving freedom of the seas for use by the entire international community is under pressure primarily from a coordinated effort by certain U.S. gov-

64. See DEP’T OF DEFENSE, *supra* note 54, at 5–11.

65. Letter from Gen. Richard B. Myers, Chairman, Joint Chiefs of Staff, to The Hon. John W. Warner, Chairman, Comm. on Armed Services, U.S. Senate (Apr. 7, 2004) (on file with author).

66. *E.g.*, Senate Foreign Relations Hearing, *supra* note 62, at 40, 49, 60, 107 (statements in support of the Convention by admirals Watkins, Prueher, Schachte, and Crowley).

67. Letter from Stephen J. Hadley, Asst. to the President for National Security Affairs, to The Hon. Joseph R. Biden, Jr., Chairman, Comm. on Foreign Relations (Feb. 8, 2007), available at <http://www.clgd.org/modules.php?op=modload&name=News&file=index&catid=&topic=1&allstories=1>.

68. Press Release, White House, 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>.

69. Letter from the Joint Chiefs of Staff to The Hon. Joseph Biden, Jr., Chairman, Comm. on Foreign Relations, U.S. Senate (June 26, 2007), available at <http://www.virginia.edu/colp/pdf/Biden-Letter-JointChiefs.pdf>.

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ernment agencies, coastal states, and international and nongovernmental organizations to promote greater coastal state jurisdiction over the international water beyond the territorial sea and even into the high seas. These efforts are driven by a number of motivations, including flagrant coastal state nativism or jingoism; good faith and deep concern over maritime environmental degradation; deliberate fortress mentality or “homeland security” focus that is oriented toward easing the challenge of protecting a nation from threats emanating from the sea; national theater military strategy to restrain the freedom of action of maritime powers (e.g., by China against Japan and the United States in the East China Sea); thinly veiled anti-capitalist and anti-globalist sentiment; development and “build out” of international environmental law as a means of achieving a unified, regional or global approach to the environment; and, aggressive assertion of national claims to marine natural resources. The confluence of these approaches has the greatest momentum against freedom of navigation in thirty years.

Two more points—related to one another—should be said about the navigational regimes in the Convention. Both of these points were apparent to sophisticated observers more than a quarter of a century ago, and are even more valid today. The first is that the United States could not have obtained a better deal than that contained in the Convention, and the second is that any effort now to reshape the Convention likely would lead to very serious and harmful changes that undermine global mobility.⁷⁰ Over the coming years, if the navigational regimes in the Convention do not remain stable, the Convention’s attraction as a “package deal” could diminish for the United States, other maritime powers, states operating large or open commercial vessel registries, and national economies dependent on global trade. If that occurred, the grand bargain struck between the coastal states and the maritime states would be placed at risk, something that does not serve either set of interests. The maritime states should ensure the threats to freedom of navigation and the public order of the oceans do not gain currency. Two of the most prominent threats to the structure of high seas freedoms reflected in the Convention are naval strategy and environmental protection. The best means of resisting these threats trends is to ensure that maritime powers are not divided

70. John Norton Moore, *The Law of the Sea Negotiations and the Struggle for Law*, in PROCEEDINGS OF CONFERENCE ON DEEP SEABED MINING AND FREEDOM OF THE SEAS 21, 24 (Frederick Tse-shyang Chen ed., Remar Printing 1981).

internally within their governments between a global maritime focus and a parochial coastal state focus. The maritime states also should improve their coordination to protect freedom of navigation in international venues, such as the United Nations, the Major Maritime Powers meetings, and the International Maritime Organization.

The greatest value of the Convention for maritime powers is in containing the sentiments that would impede high seas freedoms. There is no guarantee that the Convention can continue to serve this function, however, and success depends on the outcome of the ongoing struggle to shape interpretations of the Law of the Sea.

V. EXCESSIVE MARITIME CLAIMS AS A SEA DENIAL STRATEGY

Some critics have suggested that the treaty lacks value because some nations, even some state parties, still fail to completely conform their state practice, their national legislation, and their maritime claims to the framework provided within the Convention. China, for example, became party to the Convention a decade ago and still persists in a series of excessive maritime claims, both in geographic reach and regulatory jurisdiction.

In a declaration filed in conjunction with accession, China reaffirmed its claim that warships must receive China's permission to conduct innocent passage in the territorial sea, a provision inconsistent with the plain reading of the Convention.⁷¹ China subsequently passed legislation in June 1998 that fails to recognize the airspace above its EEZ as international airspace. Beijing has interfered with U.S. reconnaissance flights over the EEZ, even though those flights are entirely unrelated to China's legitimate interest in the exercise of resource jurisdiction in the water column and seabed. This assertion of coastal state authority is inconsistent with the plain meaning of Articles 58 and 87, as well as the broad understanding reached during the negotiations that there would be freedom of navigation in the EEZ.⁷²

In one deadly instance in 2001, a particularly aggressive Chinese interception of a U.S. EP-3 aircraft caused a mid-air collision, the loss of the Chinese fighter jet and pilot, and required an emergency distress landing of the U.S. aircraft on China's Hainan Island. After the incident, the Chinese government appeared divided on the legality of China's claims. The military did not fully

71. See LOS Convention, *supra* note 49, art. 17.

72. Memorandum, U.S. Dept. of State, *supra* note 9, at 4.

disclose what it knew about the incident to Chinese officials outside of the military.⁷³ Military officials on Hainan Island “did not provide full or accurate details of the incident to Beijing—especially not to the Ministry of Foreign Affairs—frustrating efforts by U.S. and Chinese diplomats to resolve the crisis.”⁷⁴

Such activity impairing the right of overflight of the EEZ is an element of China’s campaign to reshape its EEZ away from an area of limited jurisdiction focused on resource management and exploitation and toward an area of quasi-sovereign ocean and airspace. The goal of this “legal warfare” (or “lawfare”)⁷⁵ is to renegotiate the essential bargain of the Convention through a patient, persistent effort at reinterpretation.⁷⁶

China views its excessive regulatory claims over the EEZ as an important component of its ability to conduct asymmetric maritime warfare. In 2006, the U.S. Department of Defense reported to Congress that, through an orchestrated program of scholarly articles and symposia, China sought to shift scholarly opinion and the view of national governments away from interpretations of the Law of the Sea that favor freedom of the seas.⁷⁷

Likewise, the 2007 Department of Defense report to Congress on China’s military power explains:

Recently, PRC military strategists have taken an increasing interest in international law as an instrument to deter adversaries prior to combat China . . . is shap[ing] international opinion in favor of a distorted interpretation of the UN Convention on the Law of the Sea by moving scholarly opinion and national perspectives away from long-accepted norms of freedom of navigation and toward interpretations of increased sovereign authority over the 200 nautical mile Exclusive Economic Zone, the airspace above it, and possibly outer space.⁷⁸

73. Bates Gill & Martin Kleiber, *China’s Space Odyssey: What the Antisatellite Test Reveals about Decision-Making in Beijing*, FOREIGN AFF., May–June 2007, at 2, 3.

74. *Id.*

75. The concept of “lawfare” was explored in a 2003 Roundtable at the Council on Foreign Relations, a transcript of which is available at Council on Foreign Relations, Transcript: Lawfare, the Latest in Asymmetries (Mar. 18, 2003), <http://www.cfr.org/publication.html?id=5772>.

76. See DEP’T OF DEFENSE, ANNUAL REPORT TO CONGRESS: MILITARY POWER OF THE PEOPLE’S REPUBLIC OF CHINA 13 (2007), available at <http://www.defenselink.mil/pubs/pdfs/070523-China-Military-Power-final.pdf> [hereinafter 2007 ANNUAL REPORT].

77. DEP’T OF DEFENSE, ANNUAL REPORT TO CONGRESS: MILITARY POWER OF THE PEOPLE’S REPUBLIC OF CHINA 38 (2006), available at <http://www.defenselink.mil/pubs/pdfs/China%20Report%202006.pdf> [hereinafter 2006 ANNUAL REPORT].

78. 2007 ANNUAL REPORT, *supra* note 76, at 13.

Political and legal activity publicized by international civil society and transnational organizations may be used to bring pressure against a potential adversary. China seeks to leverage international organizations and willing national governments in its lawfare campaign. The Department of Defense reports, for example, that the assertion of claims and rights in the maritime domain could enhance the perceived legitimacy of coercive Chinese operations at sea.⁷⁹ From the Chinese perspective, the global nature of international politics and the proliferation of international laws and regulations serve to make this form of legal warfare more effective than in the past.⁸⁰

In terms of maritime strategy, China's legal warfare is a resourceful anti-access or sea denial strategy. Sea denial is employed by inferior continental navies to deny maritime powers the ability to exercise command of the sea and thereby limit their influence over events on land.⁸¹ Employment of submarine mines is an example of a traditional sea denial strategy. China seeks to create "strategic depth" to the Chinese mainland by denying access of its EEZ to warships and aircraft of the United States, Japan and other countries in the region. The strategy of the People's Liberation Army (Navy) (PLA(N)) set forth in a recent Chinese defense white paper is directed at the "gradual extension of strategic depth for offshore defensive operations" and for "enhancing its capabilities in integrated maritime operations and nuclear counterattacks."⁸²

"At the centre of this approach is the establishment of a sea denial capability to prevent the U.S. Navy from being able to deploy into waters that cover what Chinese naval strategists call the Second Island Chain, which stretches from the Japanese archipelago to Guam and the Marshall Islands."⁸³ This is the heart of the operating area for the U.S. Navy in the Western Pacific. The United States views greater access and engagement in the region as the most essential element of the U.S. security architecture in the Asia-Pacific.⁸⁴ At the same time that China seeks to push its jurisdiction seaward to create strategic depth in the East China Sea, China seeks to limit the exercise and operating areas of U.S. air

79. 2006 ANNUAL REPORT, *supra* note 77, at 38.

80. Cf. QIAO LIANG & WANG XIANGSUI, UNRESTRICTED WARFARE 55, 131 (Beijing, PLA Literature and Arts Publishing House 1999), available at <http://www.terrorism.com/documents/TRC-Analysis/unrestricted.pdf>

81. HUGHES, JR., *supra* note 18, at 256.

82. Timothy Hu, *Marching Forward*, JANE'S DEFENCE WKLY., Apr. 25, 2007, at 24, 29.

83. *Id.*

84. Robert Karniol, *Pacific Partners*, JANE'S DEFENCE WKLY., Apr. 25, 2007, at 19.

and naval forces—thereby weakening the bonds between the United States and its regional friends and allies. This is especially true with regard to fending off Japanese and U.S. forces from waters disputed by China and Japan in the East China Sea, and even from Japanese waters. These activities also are designed to dissuade outside intervention in a cross-strait scenario.⁸⁵

Similarly, Iran has adopted a combination of overt threats and lawfare to pursue its anti-access or sea denial strategy throughout the Persian Gulf and the approaches to the Straits of Hormuz.⁸⁶ Tehran's strategy also focuses on attempting to market to the world community erroneous territorial and jurisdictional claims that are inconsistent with the rules of the Convention. These claims include a series of excessive straight baselines which purport to convert international water into Iranian territorial seas,⁸⁷ the assertion of Iranian state security powers in the contiguous zone,⁸⁸ a requirement for foreign warships and nuclear-powered vessels to obtain advance consent for conducting innocent passage,⁸⁹ and a prohibition on "foreign military activities and practices" in the Iranian EEZ.⁹⁰ One Iranian analyst has gone even further, suggesting the entire Persian Gulf constitutes a closed political region that permits "innocent passage" of vessels throughout the Gulf, but only so long as they are not conducting "coercive measures" against Iran aimed at undermining Tehran's sovereignty.⁹¹

VII. EXCESSIVE ENVIRONMENTAL REGULATION AS A RISK TO FREEDOM OF THE SEAS

The assertion of excessive coastal state or international environmental regulation also poses a separate legal and policy threat to the stability of the navigational regimes in the Convention. During

85. See Peter A. Dutton, *International Law and the November 2004 "Han Incident,"* 2 ASIAN SECURITY 87, 97–98 (2006).

86. Bill Samii, *Iran: Naval Doctrine Stresses "Area Denial,"* RADIO FREE EUROPE/RADIO LIBERTY, Apr. 6, 2006, available at <http://www.rferl.org/featuresarticle/2006/04/ecc7cc43-5786-4faf-a4ef-5d093184a90a.html>.

87. Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea of 2 May 1993, art. 3 (Text Transmitted by the Permanent Mission of the Islamic Republic of Iran to the United Nations) (Iran), available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/IRN.htm> [hereinafter Marine Areas Act].

88. Marine Areas Act, *supra* note 87, art. 13.

89. *Id.* art. 9; see also *id.* art. 16.

90. *Id.* art. 16.

91. *U.S. Warships in Strait of Hormuz Violating Law of the Sea*, BBC WORLDWIDE MONITORING, May 28, 2007.

the 1960s and 1970s, as the number of oil tanker accidents increased, a coalition of port, coastal and straits states pushed for greater authority to prescribe and enforce environmental regulation over foreign-flagged tankers in waters adjacent to their coasts, particularly in the EEZ and international straits. Over the last few decades, this trend has developed into a generalized effort by some coastal states to impose unilateral environmental standards on transiting vessels.

During the negotiations of the Convention, the international community opposed efforts to destabilize the existing navigational regimes in order to protect the shipping industry and broader national economic and security interests in freedom of navigation.⁹² Moreover, the assault on high seas freedoms from a multiplicity of excessive coastal state environmental regulations undermines the integrity of the flag state system of jurisdiction. These actions risk creating a global “crazy quilt” of inconsistent and contradictory coastal state regulations that would drive up the costs of operating the global supply chain. For example, a vessel in transit from the Strait of Gibraltar to the Suez Canal might pass through multiple coastal state regimes and chaos would ensue if coastal state rules were not consistent.⁹³ The flag states, representing both major maritime powers and a number of open registries from the developing world, prevailed on the issue of ensuring consistent coastal state rules during the conference negotiating the Convention. The United States led efforts to universalize regulation of ship attributes associated with construction, design, equipping and manning (CDEM), and this approach was codified in the Convention.⁹⁴ The most effective way to increase environmental protection in the oceans is to continue to develop and enforce flag state measures, not zoning off the oceans.

The temptation of coastal states to pursue “environmental nationalism” that impairs freedom of navigation is particularly acute in the EEZ. The United States is not immune to the lure of excessive coastal state regulation. The U.S. EEZ is the world’s larg-

92. MILES, *supra* note 2, at 92–93.

93. Sandra Speares, *In Search of a System that Ensures the Law is Applied Consistently: The Conflict Between Unilateral Legislation and International Rules Needs to Be Addressed*, LLOYD’S LIST, May 2, 2007, at 6, available at 2007 WLNR 8219448.

94. LOS Convention, *supra* note 49, arts. 21(2), 211(6). For special areas designated under art. 211(6), only international construction, design, equipping and manning (CDEM) standards may be prescribed by the coastal state. *Cf.* ALAN KHEE-JIN TAN, VESSEL-SOURCE MARINE POLLUTION: THE LAW AND POLITICS OF INTERNATIONAL REGULATION 212 (2006).

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est, encompassing 3.4 million square miles, an area greater than the landmass of the entire country.⁹⁵ Dr. Bernard H. Oxman, one of the original negotiators for the Convention, has written that some U.S. departments and agencies, particularly those concerned with marine resources and environmental protection, continue to push for a greater expansion of coastal state authority in the EEZ.⁹⁶ These efforts are incongruent with the 230-year history of the United States as a global maritime power and they weaken the country's economic and national security interests in unencumbered mobility at sea. Because the United States has considerable influence in interpreting and developing oceans law and policy internationally, these efforts tend to erode high seas freedoms globally. In order to avoid these problems, the National Security Council should strengthen its review and control of individual agency proposals that have the potential to affect international freedom of navigation in U.S. territorial seas, straits used for international navigation, and the EEZ.

The European Commission (EC) also has sought to reshape some of the navigational regimes to accommodate its notion of progressive environmental regulation. In a major policy paper released in 2006, the EC wrote, "The legal system relating to oceans and seas based on [the Convention] needs to be developed to face new challenges."⁹⁷ "The [Convention] regime for EEZ and international straits makes it harder for coastal states to exercise jurisdiction over transiting ships," even though "any pollution incident in these zones presents an imminent risk for [those states]."⁹⁸ The EC is confident this view reflects a "growing consensus" for expanding coastal state jurisdiction associated with the territorial seas into the EEZ, an area in which ships are ensured the right to exercise high seas freedoms.⁹⁹ If the EC is correct that an expansive view of coastal state authority over the EEZ is gaining traction, maritime powers should seek opportunities to express a unified response in opposition. Already the civil shipping industry has taken notice of the progression of thought at the EC.

95. U.S. COMM'N ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY, FINAL REPORT 30-31 (2004).

96. Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 AM. J. INT'L L. 830, 830, 850 (2006).

97. European Comm'n, *Green Paper: Towards a Future of Maritime Policy for the Union: A European Vision for the Oceans and Seas*, at 42, COM 2006 (275) final (June 7, 2006), available at http://ec.europa.eu/maritimeaffairs/policy_en.html.

98. *Id.*

99. *EU Seeks to Increase Jurisdiction Offshore by 200 Nautical Miles*, LLOYD'S LIST, Oct. 20, 2006, at 3.

These developments have those who operate the global supply chain—represented by shipping industry groups such as INTERTANKO and INTERCARGO—deeply concerned. The International Chamber of Shipping (ICS), for example, called the EC's ambitious approach “radical.”¹⁰⁰ At a meeting in the spring of 2007, there was broad agreement among industry lawyers and representatives that the International Maritime Organization should become more active in opposing unilateral and regional measures by coastal states that are at odds with international law.¹⁰¹

Beyond the problem of environmental nationalism that impairs the right of the international community to exercise high seas freedoms in the EEZ, there is sentiment among some governments, international organizations, and non-governmental organizations (NGOs) to restrict navigation even in areas beyond national jurisdiction. Some propose creation of vast, high seas marine protected areas that could impede freedom of the seas. A different view is that regional marine protected areas would bind only states parties, so they preserve the rights, including the rights of high seas freedoms, of non-party states whose vessels enter the area.¹⁰² If a protected area receives recognition by the International Maritime Organization (IMO),¹⁰³ however, as is the case of MARPOL special areas or “particularly sensitive sea areas” (PSSAs), the special status of the area, and associated protective measures that affect navigation, apply to all member states of the IMO.

The focus on high seas environmental protection is directed at fishing as well as traditional uses of the seas, such as shipping and military activities, that are “assaulting marine species, habitats and ecosystems with increasing noise, pollution and litter.”¹⁰⁴ More radical proposals include taxes for transit on the high seas.¹⁰⁵ There is the suggestion that revenue could be generated from ves-

100. INT'L CHAMBER OF SHIPPING AND INT'L SHIPPING FED'N, ANNUAL REVIEW 2007, at 24 (2007), available at <http://www.marisec.org/annualreview.pdf>.

101. See Speares, *supra* note 93, at 6.

102. Kristina M. Gjerde & Graeme Kelleher, *High Seas Marine Protected Areas on the Horizon: Legal Framework and Recent Progress*, 15(3) PARKS: HIGH SEAS MARINE PROTECTED AREAS 11, 12 (2005).

103. The IMO is the UN specialized technical agency for maritime matters and has more than 160 member states. Int'l Maritime Org., *About IMO*, http://www.imo.org/About/mainframe.asp?tpoic_id=3 (last visited Oct. 17, 2007).

104. Dan Laffoley, *Protecting Earth's Last Frontier: Why We Need a Global System of High Seas Marine Protected Area Networks*, 15(3) PARKS: HIGH SEAS MARINE PROTECTED AREAS 5, 6 (2005).

105. See Paul Morling, *The Economic Rationale for Marine Protected Areas in the High Seas*, 15(3) PARKS: HIGH SEAS MARINE PROTECTED AREAS 24, 30 (2005).

sel transit and aircraft overflight of the high seas in order to pay for high seas marine protected areas—a supranational tax for transiting the global commons.¹⁰⁶ This would yield, in the view of its proponents, two beneficial outcomes—the revenue raised can be dedicated toward conservation and the tax would deter environmentally-harmful activities, such as merely transiting the ocean.¹⁰⁷

On issues of maritime environmental protection there is a close link between some corners of government and civil society, with the two mutually supporting one another. In a phenomenon recognized by Professor Anne-Marie Slaughter, policymakers inside some national agencies work in conjunction with nongovernmental agencies and bureaucracies in other states on a “second track” or side channel of coordination to develop international policy.¹⁰⁸ The policy goals and positions may be entirely uncoordinated within a government, and different departments or agencies may pursue their own international policy agenda without other parts of government having visibility on their activities. These officials participate in an informal global network whose members share the same epistemological assumptions about the subordination of other national interests to protection of the environment.

The cozy relationship between some government officials and NGOs was recognized by a former Chief of Naval Operations. In a letter to Senator Jesse Helms in 2000, then Chief of Naval Operations Admiral Jay L. Johnson sought U.S. action on the Convention to help to resist some of the “alarming trends” that he viewed as “directly related to our failure to accede to the Convention.”¹⁰⁹ First, the admiral expressed concern that failure to accede to the Convention relinquished U.S. influence internationally in development of the law of the sea.¹¹⁰ “Secondly, and perhaps more disturbing,” the admiral said, “is the emboldening of those who seek to fundamentally change our role as the world’s leading maritime nation and guarantor of freedom of the seas to one of a coastal nation that places domestic and regional regulatory control

106. *Id.*

107. *Id.*

108. Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 183–97 (1997).

109. Letter from Adm. Jay L. Johnson, Chief of Naval Operations, to The Hon. Jesse Helms, Chairman, Comm. on Foreign Relations, U.S. Senate (June 29, 2000) (on file with author). “I consider [accession to the Law of the Sea Convention] my most significant piece of ‘unfinished business,’” the admiral wrote in hand-written script at the bottom of the letter. *Id.*

110. *Id.*

first.”¹¹¹ The admiral recounted an “expansive growth in the number and nature of claims of regulatory and jurisdictional authority by coastal states, often with the direct support of [NGOs], contrary to the law of the sea as codified in the Convention.”¹¹² “These claims of regional and coastal state jurisdiction and authority are invoked to the detriment of navigational freedoms to further a wide range of special interests,” wrote the admiral, “including enhanced environmental protection, total nuclear disarmament, world health, limitations on measures to combat transnational crime and illegal migration, and management and allocation of the radio frequency spectrum.”¹¹³

The dichotomy between a coastal state view of the oceans and a maritime power perspective is rooted in competing world views. Generally, efforts to regulate conduct on the oceans flow from two complementary strands of Western political philosophy. The two traditions—English and French—are represented in the common law approach of the English system and the continental system of code law of the continent—developed initially by the French and adopted by the Russians and Germans.¹¹⁴ The French revolutionary thinkers were optimistic about human nature, believing in the power of intellectuals to rearrange society by edict.¹¹⁵ This approach is informed by the French Enlightenment and Cartesian rationalism.¹¹⁶ Its most well-known proponent is Rousseau.¹¹⁷ Rationalism serves as a beacon for political elites everywhere who are confident in their ability to manage society closely.

The English were more pessimistic, seeking to design institutions that would temper human nature while maximizing individual liberty. The English view, derived from Scottish moral philosophers such as David Hume, Adam Smith and Edmund Burke, is essentially empiricist.¹¹⁸ The English found the essence of freedom in spontaneity, organic growth in society and the absence of coercion; the soul of the French approach lies in the pursuit and enforcement of an absolute and collective purpose defined by doctrine

111. *Id.*

112. *Id.*

113. *Id.*

114. Cf. F. A. Hayek, *Freedom, Reason, and Tradition*, LXVIII ETHICS: INT'L J. OF SOC., POL. & LEG. PHIL. 229, 229–30 (1958).

115. *See id.* at 229.

116. *See id.* at 230.

117. *Id.*

118. *Id.*

deliberateness.¹¹⁹ The liberalism and freedom of the English tradition is not always in concert with the socialism and rationalism of the French tradition. The two schools demarcate separate philosophical space, and they have been carried over into the development of international law and policy—including oceans law and policy. The dichotomy between these two schools is evident in contrasting approaches to environmental protection and preservation of high seas freedoms.

Within the context of oceans policy, marine environmental protection can be best achieved through the exercise of flag state authority over vessels registered in the state. States may freely elect to become party to marine environmental laws and regulations and then prescribe and enforce those rules on their flagged vessels. The continental view, in comparison, is that the best method of control is to develop top-down international rules and then compel global compliance. This phenomenon is displayed by coastal states and regional organizations that act unilaterally to purport to apply their regulation to foreign flagged vessels in waters well beyond the territorial seas. Multilateral international organizations also exhibit this behavior by forcing consensus on dissenting states over strict environmental measures. This was evident at the IMO in 2004-05, when eight Baltic countries sought to impose a PSSA in the Baltic Sea over the objection of the Russian Federation.¹²⁰ Eventually, Russia did not object after the proposal exempted water under Russian jurisdiction, but adoption of the PSSA affected vessels transiting the Baltic making entry into Russian ports, potentially “zone-locking” Russian oil tankers in Russian waters. The trend also is reflected in the movement toward exploring ways of “alleviating” or finding exceptions to the principle of flag state jurisdiction in other contexts as a way of compelling compliance of foreign flagged vessels.¹²¹ The contest over these two philosophies informs much of the debates in oceans law and policy and is a key to understanding the unfolding “struggle for law” in the oceans.

119. *Id.*

120. Hugh O'Mahony, *Battle Looms Over Proposal for Whole of Baltic Sea to be Declared a PSSA: Russia Seeks Fundamental Review of Guidelines*, LLOYD'S LIST, Feb. 26, 2004, at 7, available at 2004 WLNR 7099533.

121. See European Comm'n, *Green Paper*, *supra* note 97, at 43.

VIII. FROM A "STRUGGLE FOR POWER" TO A "STRUGGLE FOR LAW"
IN THE WORLD'S OCEANS

There are more than one hundred illegal, excessive coastal state claims worldwide that purport to impair vital navigation and overflight rights and freedoms.¹²² Rejecting the Convention because it is violated by some states and applied imperfectly by others falls into the familiar trap made by the novice of international law—which is to reject international law because all nations do not adhere to all of its standards all of the time. Moreover, rejecting the Convention forgoes the opportunity to use international treaty law as a mechanism to influence change in the domestic laws—and the behavior—of noncompliant states. On the other hand, there is pressure to reshape interpretations of the Convention from the European Commission, vocal NGOs and some member states in ways that undermine freedom of the seas, undercutting national economic and security interests. The contest of ideas to shape future interpretations of the Convention is not unlike international political competition.

Hans Morgenthau, an astute observer of international politics and founder of the modern school of political realism, dedicated his life to the study of the "struggle for power." "All history shows," he wrote in his classic treatise, "that nations active in international politics are continuously preparing for, actively involved in, or recovering from organized violence in the form of war."¹²³ The Convention serves as a powerful tool to shift maritime political disputes from being a cause for violence and naval warfare to a legal based order, approaching the vision of Myres S. McDougal and William T. Burke of a "public order of the oceans."¹²⁴ As the negotiations for the Convention were drawing to a close, Ambassador John Norton Moore understood that the United States was reaching its objective of replacing the "struggle for power" at sea with the "struggle for law" in the world's oceans, reducing, and perhaps

122. See generally J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS (2d ed. 1996). Excessive maritime claims are identified in the DoD Maritime Claims Reference Manual. See, e.g., Under Secretary of Defense for Policy, Maritime Claims Reference Manual, DOD 2005.1-M, June 23, 2005, available at <http://www.dtic.mil/whs/directives/corres/html/20051m.htm>. The Office of Oceans Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State, has produced an outstanding series of reference papers containing information on excessive maritime claims, Limits in the Seas. The series is available at <http://www.state.gov/g/oes/ocns/c16065.htm>.

123. HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 52 (revised by Kenneth W. Thompson, 6th ed. 1985).

124. See generally MCDUGAL & BURKE, *supra* note 3, at x.

one day eliminating, an entire class of maritime conflicts as a cause of war.¹²⁵ Toward that end, the Convention successfully has influenced numerous countries to conform their conduct and maritime claims to the Convention, typically in a manner that inures great benefit to global stability and security. These positive adjustments and reductions in excessive maritime claims constitute the “dogs that didn’t bark” in law of the sea. Over time, the individual and cumulative effect on U.S. national security and global interests has been positive.

At a recent meeting of the Non-Aligned States in Cuba, for example, member states reaffirmed their support for applying the principles set forth in the Convention to the maritime territorial disputes in the East China Seas. In a more specific example, in December 2003, Syria adopted a new maritime law that rescinded its previous 35-nautical mile (nm) territorial sea, establishing a 12-nm territorial sea in conformity with the Convention.¹²⁶ At the same time, Syria rolled back a 41-nm contiguous zone claim to a 24-nm contiguous zone¹²⁷ and adopted a 200-nm EEZ,¹²⁸ with these changes placing Syria in compliance with Convention in most respects. These provisions mark an improvement over previous Syrian government positions in relation to maritime claims, although Syria still has some work to do to modify other excessive coastal state claims and enter into complete compliance with international law.

In yet another example, Vietnam has agreed to use the treaty as a framework for crafting its oceans laws and as a template for resolving ocean disputes with neighboring countries.¹²⁹ Hanoi has made recent advances to recognize it should revise its laws to be in conformity with the Convention.¹³⁰ Vietnam, however, still maintains a requirement for foreign warships to seek permission to enter its territorial sea or contiguous zone at least thirty days in advance of conducting a transit,¹³¹ which is inconsistent with the Convention. On the other hand, Hanoi has reached maritime

125. Cf. Moore, *supra* note 70, at 29.

126. Law No. 28, Definition Act of Internal Waters and Territorial Sea Limits of the Syrian Arab Republic of 8 Nov. 2003, art. 4 (Syria), *available at* <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/SYR.htm>.

127. *Id.* art. 19.

128. *Id.* art. 21.

129. *Politics & Law: Vietnam Reaffirms Sovereignty Over Two Disputed Archipelagos*, VIETNAM NEWS BRIEFS, Dec. 29, 2006.

130. *Vietnam National Assembly Committee Reviews Sovereignty Issue*, THAI PRESS REP., Oct. 2, 2006.

131. Under Secretary of Defense for Policy, *supra* note 122, at 689.

boundary agreements with its neighbors by applying the concept of “equitable principles” set forth in the Convention, thereby adding a measure of stability and confidence in the region.¹³² First, Hanoi applied the concept of “equitable principles” in a maritime boundary agreement with Indonesia concerning the continental shelf.¹³³ More recently, Vietnam and China have employed the concept of “equitable principles” to resolve long-standing maritime boundary disputes in the Gulf of Tonkin.¹³⁴

Other states have also recognized the Convention’s positive legal force—most recently Japan, India, and Mexico at the UN General Assembly’s Sixth Committee (Legal).¹³⁵ Those nations credited the Convention with operating as a fundamental document for advancing the “rule of law” throughout the world. Most coastal states, in fact, have adjusted their maritime claims to be in conformity with the Convention. For example, 144 States claim a territorial sea of 12 nm or less, in accordance with Article 3 of the Convention.¹³⁶ Throughout the globe, many countries have areas within their law or state practice that are noncompliant, but “state practice complies largely” with the Law of the Sea as reflected in the Convention.¹³⁷ Even in these instances, however, diplomacy operates within the context of the rules reflected in the Convention.

If the Convention did not exist, the international community would have incentives to create it, because it serves as a Restatement on the Law of the Sea. Competing visions of customary international law exist because custom and state practice is not explicitly codified. When states disagree about excessive maritime

132. The concept of “equitable principles” is expressed as a fundamental norm that states should reach “equitable solutions” in delimiting the exclusive economic zone (EEZ) and continental shelf between States of opposite or adjacent coastlines. See LOS Convention, *supra* note 49, arts. 74(1), 83(1). The concept of “equitable principles” was promoted by the International Court of Justice in its judgment in the North Sea Continental Shelf cases. See, e.g., North Sea Continental Shelf (F.R.G. v. Den.), 1969 I.C.J. 3, at para. 85 (“[D]elimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles.”). The United States has accepted the principle as a guide in EEZ delimitation. See Statement by the President, *supra* note 25, at 378–79.

133. See DOUGLAS M. JOHNSTON & MARK J. VALENCIA, PACIFIC OCEAN BOUNDARY PROBLEMS: STATUS AND SOLUTIONS 128 (1991).

134. See Nguyen Hong Thao, *Maritime Delimitation and Fishery Cooperation in the Tonkin Gulf*, 36 OCEAN DEV. & INT’L L. 25, 41 (2005).

135. See *Countries Describe Relevance for Them of “Rule of Law,” as Legal Committee Begins Debate on National, International Implications*, U.S. FED. NEWS, Oct. 17, 2006.

136. UN Division for Ocean Affairs and the Law of the Sea, *supra* note 5, at 15.

137. *Id.*

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claims—particularly between a maritime nation and a coastal state—the Convention reduces the terms of the debate to a common framework and lexicon, thereby promoting the peaceful resolution of the dispute. For the United States, the Convention would place the country in a much stronger position to assert lawful navigational rights and freedoms, as well as affording specific conflict resolution mechanisms.¹³⁸ In a recent opinion editorial, the Deputy Secretary of State and the Deputy Secretary of Defense explained that the Convention strengthens the widely-accepted state practice of freedom of the seas with “welcome legal certainty.”¹³⁹

One effective component of the struggle for law at sea and the preservation of freedom of the seas is the U.S. Freedom of Navigation (FON) program. The FON program began, more than twenty-five years ago to tangibly exhibit the U.S. determination not to acquiesce to coastal states’ excessive maritime claims. When the program began in 1979, U.S. military ships and aircraft were exercising their rights against excessive claims of about thirty-five countries at the rate of about thirty to forty challenges annually.¹⁴⁰ As late as 1998, the United States was conducting more than twenty-five operational assertions each year.¹⁴¹ But by 1999 the decline in operational challenges led the Department of the Navy and the Department of Commerce (within which the National Oceanic and Atmospheric Administration resides) to recommend an expansion of the program to “exercise openly the traditional freedoms of navigation and overflight in areas of unacceptable claims.”¹⁴²

In 2000, the United States conducted challenges against just fifteen states.¹⁴³ The cumulative report for the years 2000 to 2003

138. *United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Env’t and Pub. Works*, S. Hrg. 108-498, at 69–70 (2004) (statement of John F. Turner, Asst. Sec’y of State, Oceans and Int’l Env’tl. and Scientific Affairs).

139. John D. Negroponte & Gordon England, *Reap the Bounty: U.S. Should Join the Law of the Sea Convention*, WASH. TIMES, June 13, 2007, at 17.

140. Bureau of Oceans and Int’l Env’tl. and Scientific Affairs, U.S. Dept. of State, Limits in the Seas No. 112: United States Responses to Excessive National Maritime Claims, Mar. 9, 1992 at 6, available at <http://www.state.gov/documents/organization/58381.pdf> (Principal analysts: Robert W. Smith and J. Ashley Roach, Office of Ocean Affairs).

141. WILLIAM S. COHEN, DoD ANNUAL DEFENSE REPORT TO THE PRESIDENT AND CONGRESS, at app. I (1999) (entitled “Freedom of Navigation”), available at http://www.dod.mil/execsec/adr1999/apdx_i.html.

142. WILLIAM M. DALEY (SEC’Y OF COMMERCE) & RICHARD DANZIG (SEC’Y OF THE NAVY), TURNING TO THE SEA: AMERICA’S OCEAN FUTURE, at 31 (1999), available at <http://www.publicaffairs.noaa.gov/oceanreport/>.

143. WILLIAM S. COHEN, DoD ANNUAL DEFENSE REPORT TO THE PRESIDENT AND CONGRESS, at app. H, H-1 (2001) (entitled “Freedom of Navigation”), available at http://www.dod.mil/execsec/adr2001/apdx_h.html.

and the 2004 report show further decline.¹⁴⁴ By 2005, the Department of Defense reported conducting operational challenges against only six nations: Cambodia, Ecuador, Philippines, Indonesia, Iran, and Oman.¹⁴⁵ That level of operational assertions remained steady in 2006, with challenges reported against the excessive maritime claims of the Philippines, Indonesia, Iran, Oman, and Taiwan.¹⁴⁶ The steady decline in freedom of navigation challenges over the last ten years is attributable to two factors: (1) a reduction in the number of excessive claims due to the constructive influence of the Convention and (2) Department of Defense resource constraints imposed by a declining naval force structure coupled with competing tasking in support of the War on Terror.¹⁴⁷

If appropriately resourced by the combatant commanders, the Freedom of Navigation program is effective, but it is not a panacea. The United States can assert its navigational rights at any point on the globe, but it cannot be assured of a local superiority of forces simultaneously at every location of potential maritime dispute. Moreover, obvious practicality compels restraint—against both allies and potential adversaries—over maritime disputes. Even the peaceful and non-confrontational FON program may present dip-

dod.mil/execsec/adr2001/. The United States conducted operational challenges against the following fifteen nations: Bangladesh, Burma, Cambodia, China, Ecuador, Egypt, El Salvador, Iran, Libya, Malaysia, Philippines, Romania, Syria, Venezuela, and Vietnam. *Id.* at H-2.

144. Compare DoD Freedom of Navigation FY 2000–2003 Operational Assertions, *available at* http://www.dod.mil/policy/sections/policy_offices/isp/fon_fy00-03.html#_ftn1 (asserting challenges against 22 states in three years) (last visited Oct. 17, 2007), with DoD Freedom of Navigation FY 04 Operational Assertions, http://www.dod.mil/policy/sections/policy_offices/gsa/fon_fy2004.html (last visited Oct. 17, 2007) (asserting challenges against seven states).

145. DoD, Freedom of Navigation FY 2005 Operational Assertions, *available at* http://www.dod.mil/policy/sections/policy_offices/isp/FON.pdf (last visited Oct. 17, 2007). Although only six nations were recorded, multiple challenges were conducted against all of the countries except Cambodia. *Id.*

146. See DoD, Freedom of Navigation FY 06 Operational Assertions, http://www.dod.mil/policy/sections/policy_offices/gsa/FON_Annual_Report_2006.pdf (last visited Oct. 17, 2007).

147. On the Joint Staff, the Director, Strategic Plans and Policy (J-5) maintains the policy lead for the Freedom of Navigation program; the Director, Operations (J-3) maintains operational lead for the program. Operational challenges are developed and executed by the worldwide geographic combatant commanders (GCCs), and since 2001, all of the GCCs have had fewer resources to accomplish an expanding mission set. In particular, Commander, U.S. Central Command has acquired forces from other GCCs such as Commander, U.S. Pacific Command and Commander, U.S. European Command, in order to prosecute the wars in Iraq and Afghanistan.

lomatic costs and pose risks inherent in physical challenges,¹⁴⁸ as was displayed by the Black Sea bumping incident in February 1988. In 1996, the National Intelligence Council concluded that in some cases the costs, disadvantages, or risks of physically challenging excessive claims might be greater than the benefits.¹⁴⁹ Of course, coastal states understand this calculus and will try to manipulate it to their advantage since they have an incentive to compel the international community to acquiesce in their excessive maritime claims.

IX. KEEPING THE REGIME STABLE

It is useful to examine the value of the Convention to national security within a macro context. The U.S. has an interest in the wide acceptance of a favorable, stable oceans regime. By providing concrete rules for determining the legality of maritime claims, the Convention serves broader U.S. interests in conflict avoidance and a stable and enduring public order of the oceans.¹⁵⁰ These interests promote the policy goal of an expansive and liberal view of respect for the rule of law. Peaceful promotion of the rule of law is an essential element of the U.S. National Security Strategy and is mentioned sixteen times in the document, principally as a key to defeating terrorism.¹⁵¹

The Convention offers a comprehensive and widely-accepted package of favorable rules that serve as the basis for diplomatic engagement on the entire range of competing and sometimes conflicting regional and global oceans policies. By providing the point of departure for such discussions, particularly those related to freedom of the seas and maritime security, the Convention brings parties together within a common nomenclature, state practice, and legal and policy reference point.

Just as importantly, the Convention supports the most fundamental national security interest of the United States—the peaceful resolution of disputes within a favorable framework that promotes the rule of law at sea. During the negotiations, establishing a system of dispute resolution was central to the U.S. negotiat-

148. Nat'l Intelligence Council, *Law of the Sea: The Endgame: National Intelligence Community Assessment*, Mar. 1996, available at http://www.dni.gov/nic/special_endgame.html.

149. *Id.*

150. See DEP'T OF DEFENSE, *supra* note 54, at 14–20.

151. White House, *National Security Strategy of the United States of America* (March 2006) at 2, 4–7, 10, 13, 16, 25–29, 36, 39 (“rule of law”).

ing position. The U.S. considered it an essential mechanism to “protect the treaty from erosion through strained interpretations” and to “avoid conflicts that could . . . lead to international incidents such as the Iceland–U.K. Cod War.”¹⁵² The Cod Wars was a series of confrontations in the 1950s and 1970s between Iceland and the United Kingdom over British access to fisheries near the coast of Iceland. In the 1970s, the disputes crystallized around British rejection of Iceland’s enforcement of a 200 nm EEZ. At the time, most nations supported recognition of an EEZ extending seaward 200 nm, but the legal basis for Iceland’s claim in the 1970s was uncertain because it predated the 1982 Law of the Sea Convention. The “wars” culminated in numerous incidents of ramming and shouldering of British fishing vessels by Icelandic coastal patrols vessels in 1975 and 1976. The disagreement began to affect the NATO alliance, as Iceland threatened to revoke NATO access to the antisubmarine forces stationed at Keflavik. Finally, in the fall of 1976, NATO Secretary-General Dr. Joseph Luns successfully mediated an agreement between the two countries in which British fishing vessels were afforded limited access to Iceland’s EEZ for a period of six months.

This dispute among NATO allies illustrates the importance of strengthening effective dispute resolution. The core U.S. national interest in the peaceful resolution of disputes is driven by a focus on maintaining and broadening stability and security in the world. The United States is a primary beneficiary of the Westphalian state system and interstate and sub-national conflict tends to weaken that system.

The Law of the Sea Convention is a national security success. The freedom of the seas were captured in the grand bargain between the rights of the international community to freedom of navigation and the rights of coastal states to a discrete territorial sea and limited jurisdiction beyond the territorial sea. Whether the Convention continues to serve as a national security success is dependent upon the stability of that bargain. The efforts to reshape the navigational regimes in the Convention, and particularly those efforts that have the effect of a diminution of transit passage through international straits and high seas freedoms in the EEZ and high seas, serve to destabilize and weaken the treaty structure.

152. Memorandum, U.S. Dept. of State, *supra* note 9, at 6.