Backgrounder

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Accession to the U.N. Convention on the Law of the Sea Is Unnecessary to Secure U.S. Navigational Rights and Freedoms

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Abstract: *For more than 200 years, the United States has successfully preserved and protected its navigational rights and freedoms by relying on naval operations, diplomatic protests, and customary international law. U.S. membership in the United Nations Convention on the Law of the Sea (UNCLOS) would not confer any maritime right or freedom that the U.S. does not already enjoy. The U.S. can best protect its rights by maintaining a strong U.S. Navy, not by acceding to a deeply flawed multilateral treaty.*

The United Nations Convention on the Law of the Sea (UNCLOS) is a controversial and fatally flawed treaty. Accession to the convention would result in a dangerous and irreversible loss of American sovereignty. It would require the U.S. Treasury to transfer tens, if not hundreds, of billions of dollars to an unaccountable international organization in Jamaica, which in turn is empowered to redistribute those American dollars to countries with interests that are inimical to the U.S. The convention's mandatory dispute mechanisms will result ultimately in troublesome and costly legal judgments if the United States is deemed to have "violated" the convention—most likely when the United States has acted in its own best interests.

On the surface, UNCLOS sounds like a treaty that it would be worthwhile to join, as it relates to navigational rights and freedoms, development of the natural resources of the deep seabed, protection of the marine environment, and many other matters regarding the world's oceans.[1] However, in July 1982, President Ronald Reagan announced that he would not sign the

Talking Points

- The United States has enjoyed freedom of the seas since its independence and will continue to do so even if it does not accede to UNCLOS.
- For more than 200 years before UNCLOS was adopted in 1982 and for 30 years since then, the U.S. Navy has successfully protected its maritime interests regardless of the fact that the U.S. has not joined the convention.
- By forgoing membership in UNCLOS, the United States has not hindered its ability to secure and protect its navigational rights and freedoms. Those rights and freedoms are best guaranteed by a strong Navy, not by acceding to the convention.
- Instead of reconsidering a deeply flawed multilateral convention that was first rejected by President Ronald Reagan almost 30 years ago, the Senate should endeavor to provide the Navy with the resources it requires to preserve its preeminent position on the world's oceans.

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convention because of "several major problems in the Convention's deep seabed mining provisions."[2] Those provisions underwent revision during the 1990s, and the Clinton Administration signed an agreement regarding those revisions in July 1994 and subsequently transmitted the convention to the U.S. Senate for its advice and consent. Although the Senate has held several hearings since 1994 regarding UNCLOS, it has never given its consent, and the United States remains a non-party to the convention.

There are many reasons why accession to UNCLOS would not advance U.S. national interests and would in fact harm those interests. The convention creates the International Seabed Authority (ISA) and an attendant international bureaucracy that serve as unaccountable gatekeepers to exploration of the deep seabed. If the United States joined the convention, it would be required to transfer royalties generated from oil and gas development on the U.S. continental shelf to the ISA for redistribution to the "developing world."[3] The United States would also be compelled under Part XV of the convention to submit to international dispute resolution mechanisms, potentially exposing it to specious environmental claims.

The United States Navy is the finest navy the world has ever seen. It is, to quote the Navy's recruiting pitch, a "global force for good." Its mission is "to maintain, train and equip combat-ready Naval forces capable of winning wars, deterring aggression and maintaining freedom of the sea."[4] Respect for the military, including the Navy, is at record levels, and it is therefore no surprise that national leaders listen when the Navy talks.

The Navy is strongly in favor of U.S. accession to UNCLOS. It asserts that U.S. membership in the convention is essential to guaranteeing the Navy's navigational rights and freedoms. However, the Navy's vocal and consistent support for UNCLOS is extremely narrow, based largely on the navigational rights and freedoms contained within the convention—its least controversial provisions. That said, for more than 200 years before UNCLOS came into existence in 1982 and during the almost 30 years since then, the United States has successfully preserved and protected its maritime interests regardless of the fact that it has not acceded to the convention.

The navigational rights and freedoms enjoyed by the United States and the Navy are guaranteed not by membership in a treaty, but rather through a combination of long-standing legal principles and persistent naval operations. Specifically, the United States relies on the customary international law of the sea and the U.S. Freedom of Navigation Program to protect those rights and freedoms.

Customary international law existed long before UNCLOS and includes the principles of freedom of navigation and overflight on the high seas, "innocent passage" through territorial waters, and passage rights through international straits and archipelagoes. The convention merely codified and elaborated upon widely accepted principles of the customary international law of the sea. Under the Freedom of Navigation Program, the United States disputes excessive maritime claims made by other countries in contravention of customary international law, as reflected in UNCLOS. U.S. efforts combine diplomatic protests and military operations to affirmatively establish and protect U.S. navigational interests.

UNCLOS proponents claim that U.S. accession to the convention is critical for the protection of navigational freedoms. The convention is often promoted as a panacea, and they argue that U.S. membership in UNCLOS would be the determin-

1. United Nations Convention on the Law of the Sea (UNCLOS), December 10, 1982, at *http://www.un.org/Depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm* (July 28, 2011).
2. Ronald Reagan, "Statement on United States Oceans Policy," March 10, 1983, at *http://www.reagan.utexas.edu/archives/speeches/1983/31083c.htm* (July 28, 2011).
3. Steven Groves, "U.N. Convention on the Law of the Sea Erodes U.S. Sovereignty over U.S. Extended Continental Shelf," Heritage Foundation *Backgrounder* No. 2561, June 7, 2011, at *http://www.heritage.org/Research/Reports/2011/06/UN-Convention-on-the-Law-of-the-Sea-Erodes-US-Sovereignty-over-US-Extended-Continental-Shelf*.
4. U.S. Navy, "Mission & History," at *http://www.navy.com/about/mission.html* (August 16, 2011).

ing factor in any number of maritime controversies, such as Russian mineral claims in the Arctic Ocean, Chinese aggression in the South China Sea, and virtually any other maritime matter.

The United States has enjoyed freedom of the seas since its independence and will continue to do so even if it does not accede to UNCLOS. This paper demonstrates how the United States has successfully protected its navigational rights and freedoms for centuries without joining the convention.

- Part I establishes that the United States has successfully relied on the customary international law of the sea as the basis for its maritime rights and discusses how it protects those rights through the Freedom of Navigation Program.
- Part II addresses the traditional freedoms of navigation and overflight on the high seas and "innocent passage" through territorial waters.
- Part III addresses the navigational regimes of "transit passage" through international straits and "archipelagic sea-lanes passage," including brief case studies of the Strait of Hormuz, the Strait of Bab el-Mandeb, and the archipelagic waters of Indonesia and the Philippines.
- Part IV concludes that U.S. membership in UNCLOS is not essential to the U.S. Navy's global mission. Nor is membership necessary to maintain the U.S.'s position as the dominant naval power in the world and the preeminent leader on international law of the sea and maritime matters. Rather than spending its time debating a convention that the United States has rejected for almost 30 years, Congress should focus on providing the Navy with the resources that it requires to face the current and future challenges on the world's oceans.

Part I: Protecting U.S. Navigational Rights and Freedoms

The Continental Congress established the U.S. Navy on October 13, 1775, by enacting legislation to outfit two warships. Over the ensuing 236 years, the U.S. Navy has become the greatest maritime force in history. Yet proponents accept as an article of faith that U.S. accession to UNCLOS is essential to "guarantee" navigational rights and freedoms.[5]

However, in 1993, the Department of Defense issued an Ocean Policy Review Paper on "the currency and adequacy of U.S. oceans policy, from the strategic standpoint, to support the national defense strategy,"[6] which concluded that U.S. national security interests in the oceans have been protected even though the U.S. is not party to UNCLOS:

> U.S. security interests in the oceans have been adequately protected to date by current U.S. ocean policy and implementing strategy. U.S. reliance on arguments that customary international law, as articulated in the non-deep seabed mining provisions of the 1982 Law of the Sea Convention, and as supplemented by diplomatic protests and assertion of rights under the Freedom of Navigation Program, have served so far to preserve fundamental freedoms of navigation and overflight with acceptable risk, cost and effort.[7]

That is not to say that the Department of Defense does not currently support U.S. accession to UNCLOS—it certainly does. However, the Department of Defense does not, and cannot, say either that U.S. membership in UNCLOS is absolutely essential to the preservation of navigational rights and freedoms or that the United States is incapable of protecting those rights unless it accedes to the convention.

5. "Specifically, the [Law of the Sea] Convention…[g]uarantees unimpeded overflight and passage rights through international straits and archipelagic sea lanes." Rear Admiral William D. Center, prepared statement, in hearing, *Current Status of the Convention on the Law of the Sea*, Committee on Foreign Relations, U.S. Senate, 103rd Cong., 2nd Sess., August 11, 1994, pp. 26–27. The convention "guarantee[s] the rights of our naval and air forces to transit through the seas of other countries and key straits." Tom Lantos, in hearing, *The United Nations Convention on the Law of the Sea*, Committee on International Relations, U.S. House of Representatives, 108th Cong, 2nd Sess., May 12, 2004, p. 4.
6. U.S. Department of Defense, "DOD Ocean Policy Review Paper," 1993, in hearing, *Current Status of the Convention on the Law of the Sea*, pp. 76–94.
7. *Ibid.*, p. 86.

The 1993 report's conclusion that the United States is successfully protecting its national security interests on the world's oceans is correct, and the U.S. has done so without being party to UNCLOS. The practices of the United States and other maritime powers over the course of centuries have created the very customary law of the sea that is the foundation of UNCLOS's navigational provisions. It is therefore erroneous to claim that the United States may benefit from the convention's navigational provisions only if it joins the convention.

Proponents accept as an article of faith that U.S. accession to UNCLOS is essential to "guarantee" navigational rights and freedoms.

Moreover, a review of the development of the law of the sea since the 1993 Ocean Policy Review Paper—and an assessment of the status quo—demonstrates that the United States need not accede to UNCLOS to protect its navigational freedoms.

UNCLOS and Customary International Law. Throughout its history, the United States has successfully protected its maritime interests despite not being an UNCLOS member. Enjoyment of the convention's navigational provisions is not restricted to UNCLOS members. Those provisions represent widely accepted customary international law, some of which has been recognized as such for centuries. UNCLOS members and nonmembers alike are bound by the convention's navigational provisions.

The body of international law known as the "law of the sea" was not invented in 1982 when UNCLOS was adopted, but rather "has its origins in the customary practice of nations spanning several centuries."[8] It developed as "customary international law," which is "that body of rules that nations consider binding in their relations with one another. It derives from the practice of nations in the international arena and from their international agreements."[9] Although not a party to UNCLOS, the United States is bound by and acts in accordance with the customary international law of the sea and considers the UNCLOS navigational provisions as reflecting international law.

Most of the UNCLOS navigational provisions have long been recognized as customary international law. The convention's articles on navigation on the high seas (Articles 86–115, generally) and passage through territorial waters (Articles 2–32, generally) were copied almost verbatim from the Convention on the High Seas and the Convention on the Territorial Sea and the Contiguous Zone, both of which were adopted in 1958. The United States is party to both conventions, which are considered to be codifications of widely accepted customary international law.

Similar to other multilateral conventions, such as the Vienna Convention on Diplomatic Relations, UNCLOS is said to "have codified settled customary international law or to have 'crystallized' emerging customary international law."[10] As explained in more detail below, UNCLOS codified customary law relating to navigation on the high seas and through territorial waters and "crystallized" emerging customary law, such as the concepts of "transit passage" through international straits and "archipelagic sea-lanes passage." As summarized by Defense Department official John McNeill in 1994, UNCLOS "contains a comprehensive codification of long-recognized tenets of customary international law which reflect a fair balance of traditional ocean uses."[11] In short, the convention's navigational provisions have attained such a status that all nations—UNCLOS members and nonmembers alike—are expected to adhere to them.

One way to determine the extent to which UNCLOS's navigational provisions have achieved the status of binding international law is to study the behavior of nations. Behavior in conformity with the convention—known as "state practice"—is

8. *Ibid.*, p. 81.
9. *Ibid.*, p. 80.
10. Barry E. Carter, Phillip R. Trimble, and Allen S. Weiner, *International Law*, 5th ed. (New York: Aspen Publishers, 2007), p. 123.
11. For example, see John H. McNeill, prepared statement, in hearing, *Current Status of the Convention on the Law of the Sea*, p. 20.

additional evidence that its navigational provisions reflect international law. Indications that a state is acting in conformity with international law may be found in states' "legislation, the decisions of their courts, and the statements of their official government and diplomatic representatives."[12] A nation's inaction regarding a particular navigational provision may also be viewed as state practice because it can be deemed to be acquiescence.

The body of international law known as the "law of the sea" was not invented in 1982 when UNCLOS was adopted, but rather "has its origins in the customary practice of nations spanning several centuries."

As demonstrated throughout this paper, the consistent practice of states—maritime states, coastal states, UNCLOS members, and nonmembers—indicates that the UNCLOS navigational provisions are almost universally accepted law. The *Restatement of the Law, Third, of the Foreign Relations Law of the United States* notes:

> [B]y express or tacit agreement accompanied by consistent practice, the United States, and states generally, have accepted the substantive provisions of the Convention, other than those addressing deep sea-bed mining, as statements of customary law binding upon them apart from the Convention.[13]

This has long been the U.S. position. Since the Reagan Administration, the official U.S. policy has been that the UNCLOS provisions on the traditional uses of the oceans, including the provisions on navigation and overflight, confirm international law and practice.[14] Specifically, in March 1983, President Ronald Reagan announced the U.S. oceans policy in light of his decision not to sign UNCLOS.[15] Reagan announced that "the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight" and "will recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states."[16]

Reagan's 1983 oceans policy statement confirmed what was already widely recognized: that the navigational provisions of UNCLOS generally reflect customary international law and as such must be respected by all nations.[17]

Yet proponents of U.S. accession to UNCLOS imply that the United States cannot fully benefit from these navigational rights unless it is a party to the convention, which "provides" and "preserves" these rights.[18] This is simply incorrect. The United States enjoys the same navigational rights as UNCLOS parties enjoy.

At the December 1982 final plenary meeting of the Third United Nations Conference on the Law of the Sea (UNCLOS III), some nations took the opposite position, contending that a nation that chose not to join the convention would forgo all of these rights. On March 8, 1983, the United States,

12. R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3d ed. (Manchester: Manchester University Press, 1999), p. 11.
13. American Law Institute, *Restatement of the Law, Third, of the Foreign Relations Law of the United States*, Vol. 2 (St. Paul, Minn.: American Law Institute Publishers, 1987), p. 5.
14. For example, see McNeill, prepared statement, p. 19.
15. Reagan, "Statement on United States Oceans Policy." On the same day, Reagan released a separate proclamation asserting jurisdiction over a 200-nautical-mile exclusive economic zone, consistent with Part V of UNCLOS.
16. *Ibid.*
17. The United States may also recognize as customary international law the UNCLOS provisions "relating to the conservation and management of living marine resources." D. James Baker, prepared statement, in hearing, *Current Status of the Convention on the Law of the Sea*, p. 35.
18. "In particular, the Convention provides core navigational rights through foreign territorial seas, international straits and archipelagic waters, and preserves critical high seas freedoms of navigation and overflight seaward of the territorial sea, including in the EEZ." Admiral James D. Watkins, prepared statement, in hearing, *The U.N. Convention on the Law of the Sea*, p. 44.

exercising its right to reply, expressly rejected that position:

> Some speakers discussed the legal question of the rights and duties of States which do not become party to the Convention adopted by the Conference. Some of these speakers alleged that such States must either accept the provisions of the Convention as a "package deal" or forgo all of the rights referred to in the Convention. This supposed election is without foundation or precedent in international law. It is a basic principle of law that parties may not, by agreement among themselves, impair the rights of third parties or their obligations to third parties. Neither the Conference nor the States indicating an intention to become parties to the Convention have been granted global legislative power….
>
> The United States will continue to exercise its rights and fulfil its duties in a manner consistent with international law, including those aspects of the Convention which either codify customary international law or refine and elaborate concepts which represent an accommodation of the interests of all States and form part of international law.[19]

It is not essential or even necessary for the United States to accede to UNCLOS to benefit from the certainty and stability provided by its navigational provisions. Those provisions either codify customary international law that existed well before the convention was adopted in 1982 or "refine and elaborate" navigational rights that are now almost universally accepted as binding international law.

The navigational provisions of UNCLOS generally reflect customary international law and as such must be respected by all nations.

The Freedom of Navigation Program. In addition to relying on customary international law as reflected in UNCLOS, the United States protects its navigational rights by diplomatically protesting excessive maritime claims made by other nations and by conducting operational assertions with U.S. naval forces to physically dispute such claims. Well before the adoption of UNCLOS in 1982, the United States had issued protests and conducted naval operations to dispute excessive maritime claims by other nations.[20]

These diplomatic and military activities were formally operationalized as the Freedom of Navigation (FON) Program in March 1979 during the Carter Administration.[21] The FON Program was instituted to challenge attempts by other nations to "extend their domain of the sea beyond that afforded them by international law."[22] The program also serves a broader purpose:

> The objective of the FON Program is not just to maintain the legal right to operate freely in and over international waters. The more important objectives are, first, to have other nations recognize and respect the legal right of all nations to operate, in conformity with the navigational provisions of the LOS Convention, in and over the territorial sea and international waters, and second, to minimize

19. Statement by the United States of America, March 8, 1983, in "Note by the Secretariat," extract from *Official Records of the Third United Nations Conference on the Law of the Sea*, Vol. 17, A/CONF.62/WS/37, p. 243, at *http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1982/docs/vol_XVII/a_conf-62_ws_37%20and%20add-1%20and%202.pdf* (July 28, 2011).
20. For example, in 1956, the U.S. protested a Panamanian claim that the Gulf of Panama was a "historic bay"; in 1961, it protested a Philippine claim of straight archipelagic baselines; and in 1979, the Navy conducted an operational assertion against Sudan to protest, *inter alia*, a requirement that foreign warships obtain prior permission before transiting its territorial sea. U.S. Department of Defense, Under Secretary of Defense for Policy, *Maritime Claims Reference Manual*, June 23, 2005, pp. 452, 463, and 575, at *http://www.jag.navy.mil/organization/documents/mcrm/MCRM.pdf* (July 28, 2011). The United States issued 30 diplomatic notes between 1948 and March 1979 and 110 more between March 1979 and 1996. J. Ashley Roach and Robert W. Smith, *United States Responses to Excessive Maritime Claims*, 2nd ed. (The Hague: Martinus Nijhoff Publishers, 1996), pp. 7–8.
21. Roach and Smith, *United States Responses to Excessive Maritime Claims*, p. 5.
22. Lieutenant Commander James K. Greene, "Freedom of Navigation: New Strategy for the Navy's FON Program," U.S. Naval War College, February 13, 1992, p. 2.

efforts by other States to reduce those rights by making excessive maritime claims.[23]

Every U.S. Administration since President Jimmy Carter has prosecuted the FON Program.[24] When President Reagan decided not to sign UNCLOS in 1983, he confirmed that the United States would nevertheless continue to protect its navigational rights:

> [T]he United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the convention. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.[25]

The vast majority of FON assertions have been conducted in relative obscurity, with a few notable exceptions, such as the operations in the Gulf of Sidra in 1981 and 1989 (challenging Libya's claim of "historic waters" in the Gulf) and the "Black Sea Bumping" incident in February 1988 (challenging an excessive claim made by the Soviet Union regarding its territorial sea).

Starting in the early 1990s, the Defense Department began to publish its operational assertions on a regular basis.[26] From fiscal year (FY) 1993 to FY 2010, the Navy conducted hundreds of FON operations to dispute various types of excessive maritime claims made by 47 nations.

In addition to operational assertions, the Navy routinely transits international straits and archipelagic waters to demonstrate that it enjoys the rights of transit passage and archipelagic sea-lanes passage, regardless of whether the U.S. is party to UNCLOS. For instance, in FY 1997, Navy warships and warplanes "frequently conducted routine transits through international straits," including the Straits of Gibraltar, Hormuz, and Malacca, and transited through the archipelagic waters of Indonesia and the Philippines on 73 and 47 occasions, respectively.[27]

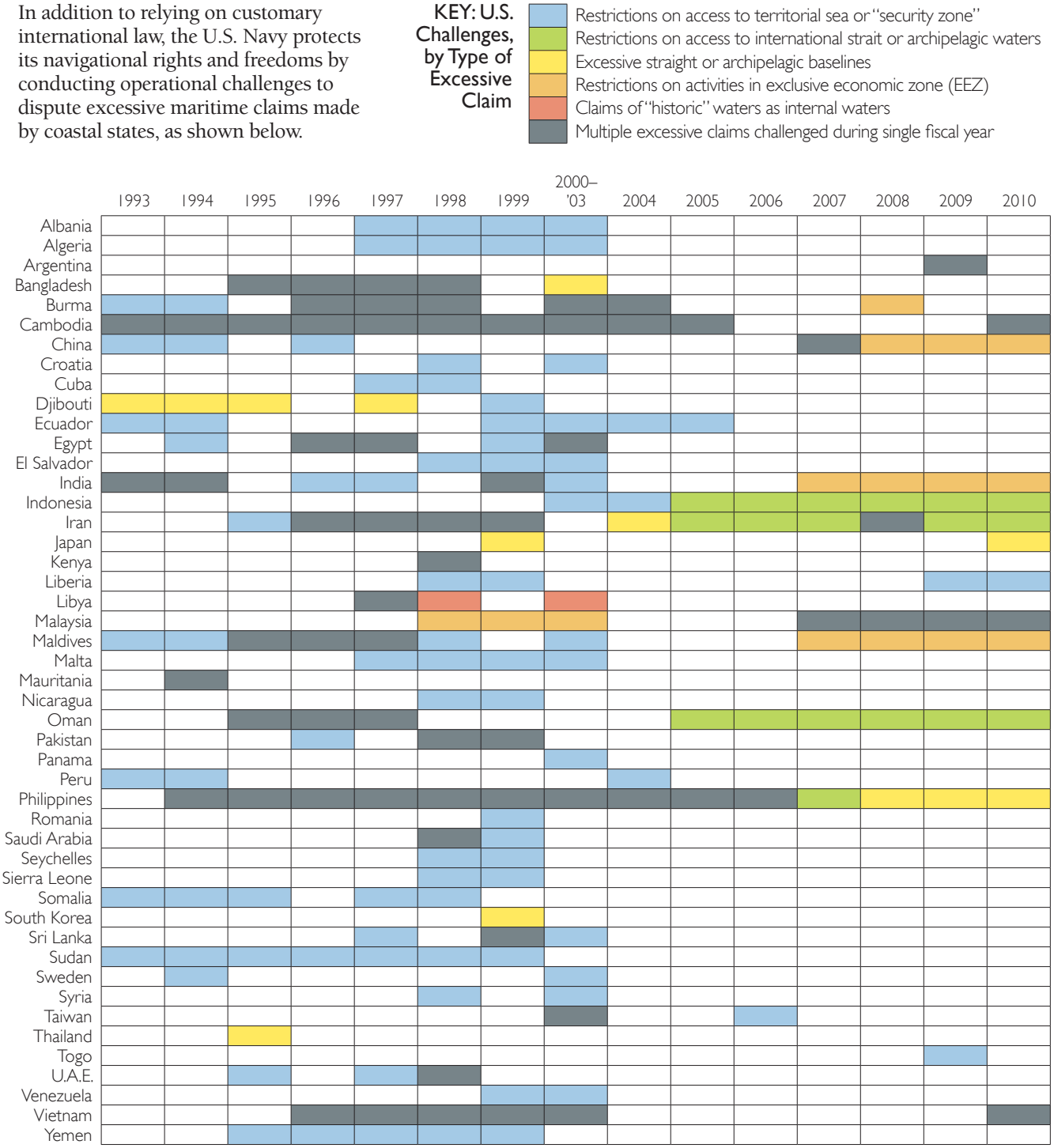
The FON Program has been very successful in demonstrating U.S. conformity to UNCLOS, securing U.S. navigational rights and freedoms, and protesting excessive maritime claims by foreign countries that do not conform with the convention. According to the 1993 Department of Defense Ocean Policy Review Paper:

> The effectiveness of the FON program as a means to gain full coastal state compliance with the navigation and overflight provisions of the Convention has been positive. It has clearly and convincingly demonstrated to the international community that the U.S. will not acquiesce in excessive maritime claims. It has played a positive role in curbing nonconforming territorial sea, contiguous zone and exclusive economic zone (EEZ) claims and, arguably, has helped persuade states to bring some of their domestic laws into conformity with the Convention.[28]

23. Roach and Smith, *United States Responses to Excessive Maritime Claims*, p. 8.
24. For example, see Ronald Reagan, "United States Program for the Exercise of Navigation and Overflight Rights at Sea," National Security Decision Directive No. 72, December 13, 1982, and George H. W. Bush, "Freedom of Navigation Program," National Security Directive No. 49, October 12, 1990.
25. Reagan, "Statement on United States Oceans Policy."
26. The U.S. Navy's operational assertions for FY 1994–FY 1999 were appended to the Department of Defense's *Annual Report to the President and the Congress*. The assertions for FY 2000–2010 were posted on the Web site of the Office of the Deputy Assistant Secretary of Defense for Countering Weapons of Mass Destruction. U.S. Department of Defense, Office of the Deputy Assistant Secretary of Defense for Countering Weapons of Mass Destruction, "Freedom of Navigation Operational Assertions," at *http://policy.defense.gov/gsa/cwmd/fon.aspx* (July 28, 2011). For a complete list of the Navy's operational assertions during FY 1994–FY 2010, see the Appendix. For a listing of the Navy's assertions on a country-by-country basis, see U.S. Department of Defense, *Maritime Claims Reference Manual*.
27. U.S. Department of Defense, *Annual Report to the President and the Congress*, 1998, Appendix I, at *http://www.dod.gov/execsec/adr98/index.html* (July 28, 2011).
28. U.S. Department of Defense, "DOD Ocean Policy Review Paper," p. 83.

U.S. Navy Challenges to Excessive Maritime Claims, FY 1993–FY 2010

In addition to relying on customary international law, the U.S. Navy protects its navigational rights and freedoms by conducting operational challenges to dispute excessive maritime claims made by coastal states, as shown below.



Sources: U.S. Department of Defense, Office of the Deputy Assistant Secretary of Defense for Countering Weapons of Mass Destruction, "Freedom of Navigation Operational Assertions," at *http://policy.defense.gov/gsa/cwmd/fon.aspx* (July 28, 2011).

Table 1 • B 2599 heritage.org

In sum, the United States has been aggressive in protecting its maritime interests. Since the Reagan Administration, the U.S. has made clear that it will act in accordance with the navigational provisions of UNCLOS and will recognize the maritime rights of other nations. When other nations assert claims contrary to customary international law as reflected in the convention, the United States actively contests such claims through the FON Program. In this manner, the United States has preserved its navigational rights and continued to shape the international law of the sea.

Proponents of U.S. accession to UNCLOS claim that reliance on customary international law and the FON Program is insufficient to protect U.S. navigational freedoms,[29] but such arguments are not supported by the facts. Indeed, proponents are obliged to admit that U.S. reliance on customary international law and the FON Program has adequately protected its navigational rights to date while simultaneously contending that continued reliance would not adequately protect these same rights. Testimony at a 1994 congressional hearing offers a typical example of this incongruous argument:

> While the United States has repeatedly taken the position that the provisions of the Convention with respect to traditional uses of the oceans, such as navigation and overflight, generally confirm existing maritime law and practice and fairly balance off all states, and asserted they should be considered to reflect customary international law, not all other States have accepted this view. More importantly, customary international law can change as the practice of States changes. Should the United States and other maritime powers fail to become party to the Convention, the degree to which its provisions reflect customary international law is likely to erode.[30]

Claims that the navigational provisions of UNCLOS will somehow erode in the absence of U.S. membership is a consistent meme of the convention's proponents.[31] Proponents have similarly argued that if the U.S. does not join the convention, "it will not be in a position to affect the evolution of this ocean regulatory regime."[32]

Still others insist that time is running out for the United States to realize the benefits of the convention's navigational provisions. For instance, in 1995, Admiral William Schachte warned, "This may be our last opportunity to 'lock in' those critical navigational and overflight rights so essential to our economic and military security."[33] A dozen years later, in 2007, the Vice Chief of Naval Operations repeated the same warning to the Senate Foreign Relations Committee: "We need to lock in the navigation and overflight rights and high seas freedoms contained in the Convention while we can."[34]

However, the evidence indicates that the navigational provisions of UNCLOS are already locked in to the extent that any aspect of international law can be. Indeed, the passage of time has demonstrated that nations—UNCLOS members and nonmembers alike—have generally adhered to the convention's navigational provisions in good faith and that those provisions have endured, not eroded. The United States is no pariah in regard to development of the law of the sea. To the contrary, the United

29. For example, see William L. Schachte, Jr., "National Security: Customary International Law and the Convention on the Law of the Sea," *Georgetown International Environmental Law Review*, Vol. 7 (1995), p. 709.
30. David A. Colson, testimony, in hearing, *Current Status of the Convention on the Law of the Sea*, p. 52.
31. "However universally accepted the Convention's provisions may now appear they will surely erode over time if the United States fails to exercise the kind of continuing leadership and participation which led to this extraordinary achievement in the first place." Dennis W. Archer, prepared statement in report, "United Nations Convention on the Law of the Sea," Committee on Foreign Relations, U.S. Senate, 108th Cong., 2nd Sess., March 11, 2004, p. 151.
32. McNeill, prepared statement, p. 24. "For the United States to remain outside of the convention would…limit our ability to shape the future of the convention as it evolves over time." Rear Admiral John E. Shkor, prepared statement, in hearing, *Current Status of the Convention on the Law of the Sea*, p. 33.
33. Schachte, "National Security," p. 715.
34. Admiral Patrick M. Walsh, prepared statement, in hearing, *The United Nation's [sic] Convention on the Law of the Sea (Treaty Doc. 103-39)*, Committee on Foreign Relations, U.S. Senate, 110th Cong., 1st Sess., September 27, 2007, p. 24.

States played a central role in the creation of the customary international law upon which the navigational provisions of UNCLOS are based, as well as the evolution and interpretation of those provisions since the convention was adopted in 1982.

The endurance of the navigational provisions of UNCLOS and the central role that the United States has played in preserving them are best demonstrated by examining the origins and development of the navigational rights and freedoms codified in the convention; high seas freedoms and "innocent passage" through territorial waters (Part II); and "transit passage" through international straits and "archipelagic sea lanes passage" (Part III).

Part II: Navigation on the High Seas and Through Territorial Waters

> *The law of the sea has its origins in the customary practice of nations spanning several centuries. A basic tenet of customary international law is that the high seas are free and open for navigation and commerce, and that coastal states may subject only a narrow margin [the territorial sea] to their own jurisdiction and control.*
>
> —U.S. Department of Defense (1993)[35]

> *One of the fundamental tenets in the international law of the sea is the right enjoyed by all ships of every state to innocent passage through another state's territorial sea.*
>
> —U.S. Department of State (1992)[36]

Proponents of accession to UNCLOS maintain that membership is the *sine qua non* of U.S. enjoyment of navigational freedoms on the high seas. One proponent has gone as far as to imply that failure to join the convention will cost the lives of American servicemen:

> The UNCLOS is a key weapon in this struggle for our oceans' freedom. The United States won through the [UNCLOS III] negotiations the core elements of that freedom. To abandon that win is the legal equivalent of unilateral disarmament for the United States in the struggle for freedom of the seas. The price we will pay through time for any such error in judgment will be high. In essence the critics who would have us abandon a rule of law in the world's oceans may effectively be asking American service men and women someday to pay with their lives for the absence of such a rule of law. This is not mere hyperbole; already disputes about the oceans regime have cost American lives. Thus, an American aircraft in lawful overflight of the high seas was forced down by Peru in asserting an illegal claim over an extended area of the seas. More recently, harassment by Chinese fighters brought down a United States aircraft engaged in lawful activities under the 1982 Convention.[37]

Other UNCLOS proponents are less hyperbolic, claiming only that the convention "preserves" high seas freedoms such as navigation and overflight.[38]

Nevertheless, U.S. membership in UNCLOS would not preserve its high seas freedoms, and it certainly would not guarantee that U.S. servicemen will not be killed while serving their country. The convention's provisions regarding the high seas and territorial waters reflect customary international law of the sea that existed long before UNCLOS was proposed and would have persisted even if the convention had never been adopted.

Freedom of the High Seas. The concept of the freedom of the seas dates back at least to 1609, when Hugo Grotius's *Mare Liberum* (The Free Sea) was published. Responding to claims that a nation may legitimately assert sovereignty over the world's oceans, Grotius argued that the oceans should be considered international territory that all nations are free to use.

35. U.S. Department of Defense, "DOD Ocean Policy Review Paper," p. 81.
36. U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, "United States Responses to Excessive National Maritime Claims," *Limits in the Seas*, No. 112, March 9, 1992, p. 51, at *http://www.state.gov/documents/organization/58381.pdf* (July 28, 2011).
37. John Norton Moore, prepared statement, in hearing, *Military Implications of the United Nations Convention on the Law of the Sea*, Committee on Armed Services, U.S. Senate, 108th Cong., 2nd Sess., April 8, 2004, p. 86.
38. Center, prepared statement, p. 27.

For centuries, the law of the sea developed organically in conjunction with the vast expansion of maritime travel. Common maritime practices became widely accepted and were adopted as law by maritime and coastal states alike:

> International law of the high seas has evolved over the years based on accepted and agreeable practices of nations. It has generally been held that usage becomes an international legal norm when it has been repeated over a period of time by several states, when they have generally acquiesced in such behavior by one another, and when governments begin to act in certain ways out of a sense of legal obligation. Customary acceptance of the practice of nations, over time, results in international law and is binding on all nations.[39]

Only in the 20th century did nations seek to codify the law of the sea, beginning in 1930 at a conference convened by the League of Nations. However, the nations in attendance were unable to reach agreement on key provisions, such as the proper breadth of the territorial sea, and no codification conventions were adopted at the conference.[40]

There was a renewed effort to codify the law of the sea after World War II. These efforts culminated in the first United Nations Conference on the Law of the Sea (UNCLOS I), convened in Geneva in February 1958 "to examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate."[41] UNCLOS I was attended by 86 nations and resulted in the adoption of four separate conventions[42] that "codified the law as it had grown up over two centuries" and "constituted the core of the generally accepted rules of the law of the sea concerning maritime zones."[43]

The freedoms of navigation on and overflight over the high seas simply do not hinge on UNCLOS membership. They have existed for hundreds of years as part of the customary international law of the sea.

The Convention on the High Seas (CHS), one of the 1958 conventions, explicitly set out "to codify the rules of international law relating to the high seas" and adopted a series of provisions as "generally declaratory on established principles of international law."[44] The CHS codified key principles regarding freedom of the high seas, including that the high seas are open to all nations, whether coastal or landlocked, and that no nation may claim sovereignty over any part of the high seas.[45]

Other basic tenets of high seas freedom codified in the CHS include freedom of navigation, freedom of overflight, freedom of fishing, and freedom to lay submarine cables and pipelines.[46] The CHS also addressed issues relating to access to the seas for landlocked nations, flying maritime flags, safety, respond-

39. Greene, "Freedom of Navigation," p. 5, quoting Walter S. Jones, *The Logic of International Relations* (Boston: Little, Brown & Company, 1985), p. 493 (internal quotations omitted).
40. Carter *et al.*, *International Law*, pp. 848–849.
41. U.N. General Assembly, Resolution 1105 (XI), February 21, 1957.
42. Convention on the High Seas, Convention on the Territorial Sea and the Contiguous Zone, Convention on the Continental Shelf, and Convention on Fishing and Conservation of the Living Resources of the High Seas. An optional protocol regarding the compulsory settlement of disputes was also adopted at UNCLOS I. See, generally, Tullio Treves, "1958 Geneva Conventions on the Law of the Sea," Audiovisual Library of International Law, at *http://untreaty.un.org/cod/avl/ha/gclos/gclos.html* (July 28, 2011).
43. American Law Institute, *Restatement of the Law, Third, of the Foreign Relations Law of the United States*, Introductory Note, and Churchill and Lowe, *The Law of the Sea*, p. 15.
44. Convention on the High Seas, April 29, 1958, at *http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf* (July 28, 2011).
45. Convention on the High Seas, art. 2.
46. *Ibid.*, art. 2(1)–(4).

ing to collisions, rendering assistance, and dealing with piracy.[47] The United States ratified the CHS in April 1961, and the convention remains in force.[48]

The United Nations convened a third Conference on the Law of the Sea (UNCLOS III) in 1973. Negotiations for the adoption of a comprehensive convention on the law of the sea spanned nine years and overlapped four U.S. Administrations. In the end, the CHS provisions relating to the high seas were adopted wholesale into UNCLOS. For example, the freedom of navigation and overflight codified in Article 2(1) and 2(4) of the CHS are repeated verbatim in UNCLOS as Article 87(1)(a) and (1)(b). The definition of piracy in Article 15 is mirrored in Article 101 of UNCLOS, and the right of "hot pursuit" of a foreign ship in Article 23 is repeated almost verbatim in Article 111 of UNCLOS. Indeed, every substantive provision of the CHS (Articles 1–29) has an equivalent in UNCLOS (Articles 86–115).

In sum, freedom of navigation on the high seas has long been recognized as customary international law and was codified as such in 1958 in the Convention on the High Seas. Those same provisions were restated in UNCLOS in 1982.

It is therefore erroneous to claim that U.S. membership in UNCLOS is essential to guaranteeing the U.S. Navy's high seas freedoms. The freedoms of navigation on and overflight over the high seas simply do not hinge on UNCLOS membership. They have existed for hundreds of years as part of the customary international law of the sea. The United States has been party to the Convention on the High Seas since 1961, and in 1983, President Reagan clearly stated that, while he would not sign UNCLOS, "the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight."[49]

Moreover, the United States actively protects its freedoms of the high seas from erosion and direct threats. Many coastal states, including UNCLOS members, regularly assert excessive maritime claims in an attempt to restrict military activities within their 200 nautical mile (nm) exclusive economic zone (EEZ). Excessive claims by coastal states commonly include a requirement that foreign warships obtain permission before entering their EEZ or a prohibition on military maneuvers in their EEZ without authorization.[50] Under the FON Program, the U.S. Navy regularly protests such claims by entering foreign EEZs without prior permission and engaging in any number of "prohibited" activities, including military maneuvers, "oceanographic surveys, underwater surveillance, hydrographic surveys, missile tracking and acoustic surveys."[51]

Since FY 1993, the Navy has conducted FON operational assertions against at least seven nations, primarily in Asia, that have attempted to restrict military activities in their EEZs.[52] With some notable exceptions, such as China's interference with the surveillance activities of the USNS *Impeccable* and USNS *Victorious* in the South China Sea in 2009, the vast majority of the Navy's FON assertions in foreign EEZs were conducted without fanfare and without any objection from the coastal state making the excessive claim.

Innocent Passage Through Territorial Waters. The Convention on the Territorial Sea and the Con-

47. Convention on the High Seas, arts. 3, 4–7, 10–12, and 14–21.

48. U.S. Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2010*, p. 400, at *http://www.state.gov/documents/organization/143863.pdf* (July 28, 2011).

49. Reagan, "Statement on United States Oceans Policy."

50. For examples of excessive claims made by Brazil, Cape Verde, India, Iran, and Uruguay concerning military activities in their EEZs, see, generally, Roach and Smith, *United States Responses to Excessive Maritime Claims*, pp. 409–414.

51. Captain Raul (Pete) Pedrozo, USN (Ret.), "Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone," *Chinese Journal of International Law*, Vol. 9, No. 1 (2010), p. 14. Many of the Navy's operational assertions are conducted by special-mission ships assigned to the U.S. Navy Special Mission Program. *Ibid.*

52. By state and fiscal years of operational assertion, those seven nations are Burma (2008); China (2007–2010); Egypt (2000–2003); India (1999 and 2007–2010); Malaysia (1998–2003 and 2007–2010); Maldives (2007–2010); and Pakistan (1998). For more details, see the Appendix.

tiguous Zone (CTS), another of the 1958 conventions, confirmed the long-standing view that a coastal nation may claim sovereignty over a narrow strip of water adjacent to its coast, called the "territorial sea."[53] The CTS memorialized the widely accepted principle that a coastal nation may exert nearly complete control of maritime activity within its territorial sea, including the requirement that foreign warships and warplanes may pass through and over the territorial sea only via "innocent passage."

That is to say that warships may transit through the territorial waters of a coastal state "so long as it is not prejudicial to the peace, good order or security of the coastal State."[54] Submarines are required to navigate on the surface while passing through territorial waters and must show their flag.[55] Any warship that does not transit in such a manner is considered to be abusing its right to innocent passage and may be required by the coastal state to leave the territorial sea.[56]

The nations attending UNCLOS I were unable to agree on the maximum breadth of the territorial sea, so the CTS gives no specific limit. A second U.N. Conference on the Law of the Sea (UNCLOS II) was convened in 1960 to address the issue, but it also failed to reach agreement, and no convention was adopted.[57] At UNCLOS III, the negotiators finally agreed that the maximum breadth of the territorial sea would be 12 nm.[58]

In addition to agreeing on the 12 nm limit, the negotiators developed a more detailed definition of the scope of innocent passage, including a comprehensive and inclusive list of activities that would not be considered "innocent." These activities include "any act aimed at collecting information to the prejudice of the defence or security of the coastal State," "any act of propaganda aimed at affecting the defence or security of the coastal State," and "the carrying out of research or survey activities."[59]

During the final stages of the UNCLOS III negotiations, some nations at the conference claimed that only those nations that joined the convention could benefit from its provisions, including the provisions on navigational rights and freedoms. The United States flatly rejected that position, stating in March 1983 that, *inter alia*, the "Convention includes provisions, such as those related to the regime of innocent passage in the territorial sea, which codify existing rules of international law which all States enjoy and are bound by."[60] In other words, the right of innocent passage exists on its own accord, independent of UNCLOS or any other international treaty.

The United States goes to great lengths to secure its right to innocent passage. The most common excessive maritime claim by coastal states is a requirement that foreign warships either notify or seek prior permission from the coastal state before entering its territorial sea.[61] To protect its navigational right to innocent passage, since 1979, the U.S. Navy has issued dozens of diplomatic protests to states that make excessive maritime claims. Between 1979 and 1992, the State Department issued diplomatic protest notes to 37 coastal states that maintained that warships must receive permission or provide notification before transiting their territorial waters.[62]

Operational assertions regarding territorial waters is the most common FON mission conducted by the Navy, which regularly transits territorial waters in Asia, Africa, Europe, and South America to

53. Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, arts. 1–2, at *http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_territorial_sea.pdf* (July 28, 2011).
54. *Ibid.*, art. 14(4).
55. *Ibid.*, art. 14(6).
56. *Ibid.*, art. 23.
57. Churchill and Lowe, *The Law of the Sea*, p. 15.
58. UNCLOS, art. 3.
59. *Ibid.*, art. 19(2)(c), (d), and (j).
60. Statement by the United States of America, p. 243.
61. See, generally, Roach and Smith, *United States Responses to Excessive Maritime Claims*, pp. 251–278.
62. *Ibid.*, pp. 266–267.

challenge excessive maritime claims. Between 1979 and 1995, the Navy has asserted its navigational rights against 28 coastal states to protest excessive claims involving their territorial waters, conducting multiple challenges to 21 such states.[63] Since FY 1993, the Navy has conducted multiple operational assertions against at least 29 nations that have made excessive claims attempting to restrict access to their territorial waters.[64]

The United States does not need UNCLOS membership either to enjoy the freedom of the high seas or to exercise the right of innocent passage through the territorial waters of foreign nations.

In sum, the United States does not need UNCLOS membership either to enjoy the freedom of the high seas or to exercise the right of innocent passage through the territorial waters of foreign nations. These rights and freedoms are among the oldest and most widely accepted principles of the law of the sea. They have been codified twice, first in the Convention on the Territorial Sea and Contiguous Zone in 1958 and then in UNCLOS in 1982. Moreover, in situations in which the United States believes that a coastal state is violating the customary international law of the sea as reflected in UNCLOS, the U.S. Navy regularly challenges such excessive claims to demonstrate its commitment to protecting its navigational rights and freedoms.

Finally, U.S. accession to UNCLOS will not end excessive maritime claims in foreign territorial waters or EEZs. Nor will it do anything to assist the Navy in executing its mission under the FON Program. So long as coastal states persist in making excessive claims, the Navy will continue to conduct operational assertions to protest those claims, regardless of whether the U.S. is a member of UNCLOS.

Part III: Passage Through International Straits and Archipelagic Waters

> *Recent practice of states, supported by the broad consensus achieved at the Third United Nations Conference on the Law of the Sea, has effectively established as customary international law the concept and the basic rules of transit passage through international straits and sea-lanes passage through archipelagic waters.*
>
> —*Restatement of the Law, Third, of the Foreign Relations Law of the United States* (1987)[65]

In contrast to high seas freedoms and the regime of innocent passage through territorial waters, the regimes of transit passage through international straits and archipelagic sea-lanes passage are examples of customary law that were "refined and elaborated" and "crystallized" in UNCLOS.

Some UNCLOS proponents infer that these navigational rights may be "guaranteed" only if the United States accedes to the convention.[66] However, the United States has long maintained that passage rights through straits and archipelagoes were recognized under international law well before UNCLOS was adopted. For example, during the closing session of UNCLOS III in December 1982, some nations asserted that these were new rights to be

63. *Ibid.*

64. By state and fiscal years of operational assertion, the 29 nations are Albania (1997–2003); Algeria (1997–2003); Argentina (2009); Burma (1993–1994); Cambodia (1993–1995, 1999, and 2010); China (1993–1994 and 1996); Croatia (1998 and 2000–2003); Djibouti (1999); Egypt (1994, 1996–1997, and 1999–2003); India (1993–1994, 1996–1997, and 1999–2003); Indonesia (2000–2004); Iran (1995–1999); Libya (1997); Malaysia (2007–2010); Maldives (1993–1998 and 2000–2003); Malta (1997–2003); Oman (1995–1997); Pakistan (1996); Romania (1999); Seychelles (1998–1999); Somalia (1995 and 1997–1998); Sri Lanka (1997 and 1999–2003); Sudan (1993–1998); Sweden (1994); Syria (1998 and 2000–2003); Taiwan (2006); United Arab Emirates (1995 and 1997–1998); Vietnam (1998–2003 and 2010); and Yemen (1995–1999). See the Appendix. The information in the *Maritime Claims Reference Manual* varies, sometimes significantly, from the information gleaned from the *Annual Report to the President and the Congress*. For example, the manual notes that in 1982, the United States protested a 1977 Burmese law restricting access to the territorial sea and that it conducted operational assertions to dispute that law in 1985, 1989, 1991, 1992, 1998, 2000, and 2001.

65. *Restatement of the Law, Third, of the Foreign Relations Law of the United States*, § 513 cmt. j.

enjoyed only by members of the convention. The United States rejected that notion:

> To the contrary, long-standing international practice bears out the right of all States to transit straits used for international navigation and waters which may be eligible for archipelagic status. Moreover, these rights are well established in international law. Continued exercise of these freedoms of navigation and overflight cannot be denied a State without its consent.[67]

By the time the *Restatement of the Law, Third, of the Foreign Relations Law of the United States* was published five years later, a pattern of state practice had emerged to confirm that both transit passage and archipelagic sea-lanes passage had become widely accepted:

> Recent practice of states, supported by the broad consensus achieved at the Third United Nations Conference on the Law of the Sea, has effectively established as customary international law the concept and the basic rules of transit passage through international straits and sea-lanes passage through archipelagic waters.[68]

The United States has consistently asserted that the UNCLOS provisions on transit passage and archipelagic sea-lanes passage reflect customary international law. For example, in 1989, the Legal Adviser's Office in the State Department wrote a letter that addressed Indonesia's temporary closure of two of its international straits for naval exercises:

> Prior to the Third United Nations Conference on the Law of the Sea, international law did not permit archipelagic claims. Although the 1982 Law of the Sea Convention is not yet in force, the archipelagic provisions reflect customary international law and codify the only rules by which a nation can now rightfully assert an archipelagic claim.…
>
> The United States is of the view that interference with the right of straits passage or archipelagic sea lanes passage would violate international law as reflected in the 1982 Law of the Sea Convention.…
>
> No nation may, consistent with international law, prohibit passage of foreign vessels or aircraft in a manner that interferes with straits transit or archipelagic sea lanes passage.[69]

Like its operations to dispute excessive maritime claims relating to the high seas and territorial waters, the United States also issues diplomatic protests and conducts naval assertions under the FON Program to protect U.S. access to key international straits and archipelagic waters. Even proponents of U.S. accession to UNCLOS have confirmed that the U.S. Navy's operational assertions have helped to preserve U.S. rights to transit passage and archipelagic sea-lanes passage. For example, in 1994, Defense Department official John McNeill testified before the Senate Committee on Foreign Relations:

> Combined with diplomatic initiatives, U.S. military forces have exercised navigational rights throughout the world to maintain and preserve these rights through State practice. As a result of frequent and routine transits, concepts such as transit passage and archipelagic sealanes passage have become well established in international practice.[70]

Transit Passage Through International Straits. The right of warships to enjoy navigational freedoms while transiting through an international

66. "The LOS Convention guarantees our armed forces a non-suspendable right of transit passage in, over and under these straits in the 'normal mode' of operation. The same guaranteed, non-suspendable rights apply to warships, military aircraft and submarines transiting through archipelagoes, such as Indonesia and the Philippines." Rear Admiral William L. Schachte (ret.), prepared statement, in hearing, *The United Nations Convention on the Law of the Sea*, Committee on International Relations, U.S. House of Representatives, 108th Cong, 2nd Sess., May 12, 2004, p. 15.
67. Statement by the United States of America, p. 244.
68. *Restatement of the Law, Third, of the Foreign Relations Law of the United States*, § 513 cmt. j.
69. Marian Nash Leich, "Contemporary Practice of the United States Relating to International Law," *American Journal of International Law*, Vol. 83, No. 1 (January 1989), pp. 559–560.
70. McNeill, prepared statement, pp. 18–19.

strait has been largely unchallenged for centuries. This is primarily because the coastal states that border on international straits have historically claimed only a 3 nm territorial sea.[71] Since almost all strategic international straits are wider than 6 nm, warships could transit using the corridor of high seas in the middle of the strait without entering the territorial waters of the coastal states. Thus, "the ships and aircraft of all nations had the uncontested right to pass through such strategically important straits as Gibraltar, Hormuz, Bab el Mandeb, Lombok and Malacca, regardless of the political unpopularity of their mission."[72]

However, shortly after World War II, many coastal states bordering on international straits (straits states) began to claim territorial seas of greater and greater breadth.[73] By 1979, only 23 states, including the United States, still claimed a territorial sea of only 3 nm, while 76 states claimed a territorial sea of 12 nm. (The U.S. did not extend its territorial sea to 12 nm until December 1988.)[74] These expanded claims could have "closed" several key international straits, because the high seas corridors through the centers of these straits were reclassified as territorial waters of the straits states and were therefore subject to the restrictive regime of innocent passage.[75]

For example, the Strait of Bab el-Mandeb is about 14.5 nm wide at its narrowest point between the Republic of Yemen and Djibouti. When these nations expanded their territorial seas out to 12 nm in 1967 and 1979, respectively, the entire breadth of the Bab el-Mandeb was converted to territorial waters.[76] Several other key straits—Gibraltar, Hormuz, and Malacca—are also less than 24 nm wide at their narrowest points and would similarly be "covered" by territorial waters if the bordering straits states claimed territorial seas of 12 nm.

The trend of expanding territorial waters to 12 nm during the years leading up to UNCLOS III was troubling to world maritime powers, such as the United States and the Soviet Union, whose warships and submarines regularly transited key straits. This would limit warships' ability to maneuver and transit in a protective formation and preclude submarines from transiting undetected if a straits state strictly adhered to a regime of innocent passage.

Hence, during the UNCLOS III negotiations, the United States and the Soviet Union insisted that their acceptance of a uniform 12 nm territorial sea be part of an "indivisible package" that guaranteed freedom of navigation through international straits. Indeed, "on no other issue in the negotiation did the major participants express themselves so unmistakably on and off the record and make their views so well known."[77]

71. While there is some debate regarding the origins of the 3 nm territorial sea, that breadth was "almost universally accepted" by the end of the Napoleonic Wars in the early 19th century. Tommy T. B. Koh, "Negotiating a New World Order for the Sea," *Virginia Journal of International Law*, Vol. 24, No. 4 (1984), pp. 762–763.
72. Roach and Smith, *United States Responses to Excessive Maritime Claims*, p. 24.
73. The trend in expansion of territorial sea breadth may have begun as early as 1930 as a result of the Hague Convention of 1930. Koh, "Negotiating a New World Order for the Sea," pp. 762–764.
74. John Norton Moore, "The Regime of Straits and the Third United Nations Conference on the Law of the Sea," *American Journal of International Law*, Vol. 74, No. 1 (January 1980), p. 86. At that time, seven states claimed a territorial sea between 3 nm and 12 nm, while 25 states made claims between 15 nm and 200 nm. The United States extended its territorial sea from 3 nm to 12 nm on December 27, 1988. Ronald Reagan, "Territorial Sea of the United States," Presidential Proclamation 5928, December 27, 1988, at *http://www.presidency.ucsb.edu/ws/index.php?pid=35297#axzz1TQdtXNj9* (July 28, 2011).
75. The right of innocent passage through an international strait covered entirely by the territorial waters of a single coastal state has been considered customary international law since at least 1949. For example, see *Corfu Channel Case (United Kingdom v. Albania); Merits*, International Court of Justice, April 9, 1949, and Convention on the Territorial Sea and the Contiguous Zone, 1958, art. 16(4).
76. U.S. Department of Defense, *Maritime Claims Reference Manual*, pp. 185 and 693.
77. Moore, "The Regime of Straits and the Third United Nations Conference on the Law of the Sea," p. 100, and Horace B. Robertson, Jr., "Passage Through International Straits: A Right Preserved in the United Nations Conference on the Law of the Sea," *Virginia Journal of International Law*, Vol. 20, No. 4 (1980), p. 808.

The United Kingdom proposed a solution: a navigational regime of "transit passage." UNCLOS III adopted the concept of transit passage as "the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."[78]

U.S. membership in UNCLOS would not grant the United States any rights or freedoms that it does not already enjoy.

While transiting, warships may conduct activities that are "incident to their normal modes" of transit.[79] Although "normal mode" is not defined in the convention, the official U.S. position is that it "means that our submarines can transit submerged, military aircraft can overfly in combat formation with normal equipment operation, and warships can transit in a manner necessary for their security, including launching and recovering aircraft, formation steaming and other force protection measures."[80] This understanding is key to the concept of transit passage because the alternative regime of innocent passage would not permit warships and warplanes to conduct any of those activities.

Since the adoption of UNCLOS, some proponents of U.S. accession have argued that the convention itself, not customary international law, guarantees navigational freedoms, inferring that the United States cannot secure its right to transit passage if it is not a party. For example, former Chief of Naval Operations Admiral Vernon Clark testified to the Senate Armed Services Committee in April 2004:

> What I am saying is that the convention gives us new protections that did not exist before, and they are transit passage and rights in archipelagic waters…. What I was saying about passing through straits, under the old rules before we had this convention, innocent passage was the only thing prescribed in international law.[81]

Yet this is not the case. U.S. membership in UNCLOS would not grant the United States any rights or freedoms that it does not already enjoy. The specific legal regime of transit passage had not been articulated before the adoption of UNCLOS, but that was due only to the fact that straits states historically claimed territorial seas only 3 nm in breadth. Traditionally, U.S. ships did not navigate international straits under the regime of innocent passage, but rather on a corridor of high seas that ran through the center of such straits. When straits states began to claim 12 nm territorial seas, a compromise was negotiated during UNCLOS III that recognized those claims while not impeding the customary rights of maritime states to navigate through international straits.

In short, a right of warships to pass freely through international straits existed prior to 1982, and it exists today, regardless of whether a state is or is not a party to UNCLOS.

U.S. officials have made it clear that "long-standing international practice bears out the right of all States to transit straits used for international navigation" and that no nation may "prohibit passage of foreign

78. UNCLOS, art. 38(2).

79. *Ibid.*, art. 39(1)(c).

80. Schachte, prepared statement, p. 15, and U.S. Department of the Navy, *The Commander's Handbook on the Law of Naval Operations*, NWP 9, July 2007, para. 2.5.3.1, at *http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)* (July 28, 2011). Some commentators contend that the convention's reference to "normal mode" is too vague and therefore may not be relied upon to secure navigational rights, such as submerged submarine transit. For example, see W. Michael Reisman, "The Regime of Straits and National Security," *American Journal of International Law*, Vol. 74 (1980), pp. 71–75, at *http://digitalcommons.law.yale.edu/fss_papers/718/* (July 28, 2011).

81. Admiral Vernon E. Clark, testimony, in hearing, *Military Implications of the United Nations Convention on the Law of the Sea*, p. 41. Admiral Clark was likely referring to Article 16(4) of the 1958 Convention on the Territorial Sea and the Contiguous Zone, which forbids the suspension of innocent passage through international straits.

vessels or aircraft in a manner that interferes with straits transit."[82] Even Professor John Norton Moore, an eminent scholar of the law of the sea and a proponent of U.S. accession to UNCLOS, has observed that "the United States is on sound legal ground in insisting on freedom of navigation through straits used for international navigation with or without a comprehensive law of the sea treaty."[83]

States have long enjoyed the right to navigate through international straits under the customary international law of the sea. That customary right became threatened after World War II when several straits states claimed territorial seas of 12 nm or greater. To address these competing rights, a compromise was reached during UNCLOS III that recognized claims to a 12 nm territorial sea but preserved the long-standing customary right of passage through international straits. That compromise—the transit passage regime—represents a customary navigational right that was "refined and elaborated" or "crystallized" in UNCLOS. Since 1982, the regime of transit passage has itself attained the status of customary international law, both through widespread adoption of UNCLOS and by state practice.[84]

In sum, the United States need not accede to UNCLOS to guarantee its right to transit international straits. The international community accepted the concept of transit passage during the negotiations for UNCLOS, and more than 160 nations are party to the convention. The practice of straits states since the adoption of the convention indicates compliance with the regime of transit passage. Maritime states, including the United States and its naval forces, regularly navigate through and fly over international straits around the world, including Hormuz, Malacca, Bab el-Mandeb, and Gibraltar.

Key International Straits: Case Studies. While more than 150 international straits are covered entirely by territorial waters, the U.S. Navy considers only around a dozen to be strategic for commercial and military purposes. These straits include Bab el-Mandeb, Bonafacio, Dover, Gibraltar, Hormuz, and Malacca and the straits that permit ingress and egress to the archipelagic waters of Indonesia and the Philippines.[85]

Some of the straits states that border on these key international straits, including UNCLOS members, have sought at various times to restrict passage in violation of customary international law as reflected in UNCLOS. The United States has successfully kept such key straits "open" to its Navy and the navies of other nations through diplomatic protests and operational assertions under the FON Program.

Strait of Hormuz. As the sole entrance and exit for the Persian Gulf, the Strait of Hormuz is one of the world's most important maritime chokepoints for both commercial and military traffic. The strait is bordered by Oman on the south and Iran on the north and measures only 21 nm at its narrowest point.[86] Oman is a party to UNCLOS, but Iran is not.[87]

For centuries, a high seas corridor ran through the center of the Strait of Hormuz, permitting foreign warships to transit without entering either Iranian or Omani territorial waters. This changed in April 1959 when Iran attempted to alter the legal status of the strait by expanding its territorial sea to 12 nm and declaring that it would recognize only transit by innocent passage through the newly

82. Statement by the United States of America, p. 244, and Leich, "Contemporary Practice of the United States Relating to International Law," p. 560.

83. Moore, "The Regime of Straits and the Third United Nations Conference on the Law of the Sea," p. 87.

84. Chris Forward, "Archipelagic Sea-Lanes in Indonesia—Their Legality in International Law," *Australian and New Zealand Maritime Law Journal*, Vol. 23, No. 2 (2009), p. 148, at *https://maritimejournal.murdoch.edu.au/index.php/maritimejournal/article/download/113/152* (July 28, 2011).

85. Center, prepared statement, p. 27.

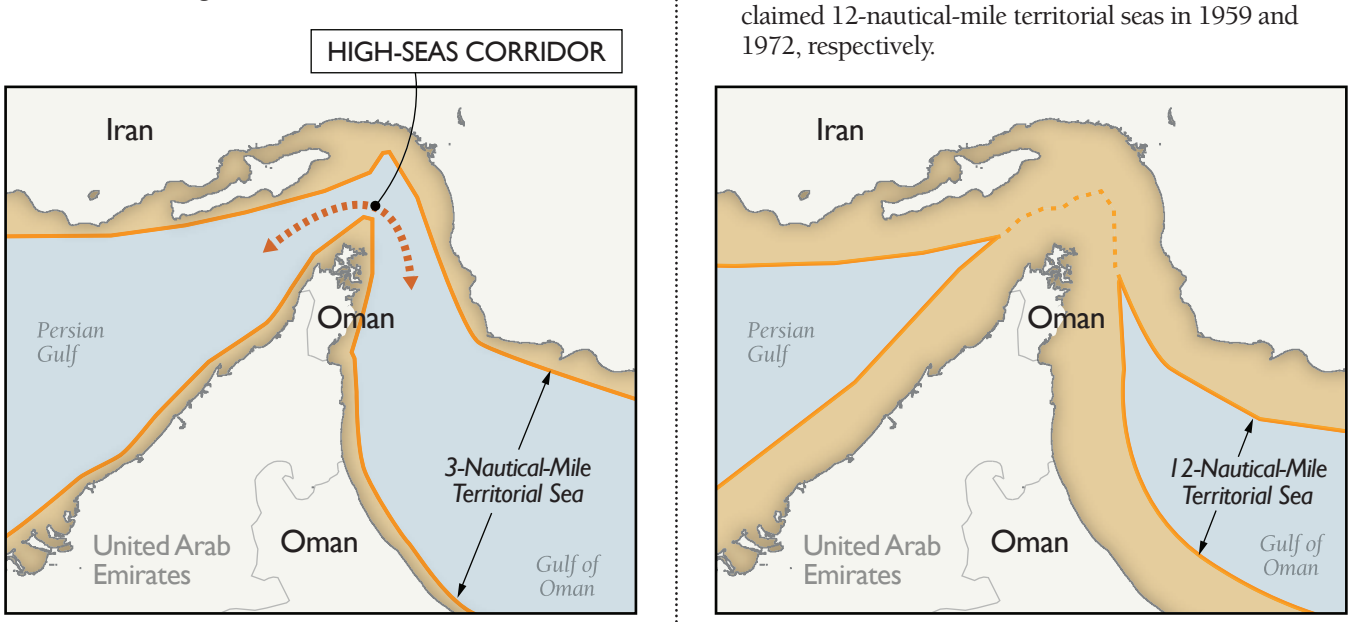
86. Commander R. H. Kennedy, "A Brief Geographical and Hydro Graphical Study of Straits Which Constitute Routes for International Traffic," A/CONF.13/6 and Add.1, extract from *Official Records of the United Nations Conference on the Law of the Sea*, Vol. 1, 1958, at *http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1958/docs/english/vol_I/9_A-CONF-13-6_PrepDocs_vol_I_e.pdf* (July 28, 2011).

87. Iran signed UNCLOS on December 10, 1982, but has never ratified it.

Expansion of Territorial Waters in the Strait of Hormuz

Before UNCLOS. Traditionally, coastal states claimed only a 3-nautical-mile territorial sea. Straits states, such as Iran and Oman, had narrow territorial seas that left a corridor of high seas passing through the center of the Strait of Hormuz. As such, foreign warships could easily transit through the strait without entering the territorial waters of either nation.

After UNCLOS. Under UNCLOS, states may claim territorial seas up to 12 nautical miles, essentially closing the high seas corridors that once passed through the center of narrow straits. Today, the Strait of Hormuz—which is only 21 nautical miles wide at its narrowest point—is "covered" by the combined territorial waters of Iran and Oman. Iran and Oman claimed 12-nautical-mile territorial seas in 1959 and 1972, respectively.



Note: Map locations and boundaries are approximate.

Source: U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, "Iran's Maritime Claims," *Limits in the Seas*, No. 114, March 16, 1994, at *http://www.state.gov/documents/organization/58228.pdf* (July 28, 2011).

Map 1 • B 2599 heritage.org

expanded area. In July 1972, Oman expanded its territorial sea to 12 nm by decree.[88] Thus, by mid-1972, the Strait of Hormuz was completely "closed" by the combined territorial waters of Iran and Oman.

During the 1970s, neither Iran or Oman attempted to impede the passage of warships through the strait, but in the 1980s, both countries asserted claims that were inconsistent with customary international law. In February 1981, Oman issued a royal decree declaring its "full sovereignty over the territorial sea of the Sultanate…in harmony with the principle of innocent passage of ships and planes of other States through international straits."[89]

Upon ratifying UNCLOS in August 1989, Oman submitted declarations confirming its 1981 royal decree that only innocent passage is permitted through its territorial sea. The declarations further asserted that prior permission was required before foreign warships could pass through Omani territorial waters.[90]

88. S. H. Amin, "The Regime of International Straits: Legal Implications for the Strait of Hormus," *Journal of Maritime Law and Commerce*, Vol. 12, No. 3 (April 1981), pp. 389 and 398.
89. Sultanate of Oman, "Royal Decree Concerning the Territorial Sea, Continental Shelf and Exclusive Economic Zone," February 10, 1981, at *http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/OMN_1981_Decree.pdf* (July 28, 2011).
90. U.S. Department of Defense, *Maritime Claims Reference Manual*, p. 441.

Upon signing the convention in December 1982, Iran entered a declaration stating "that only states parties to the Law of the Sea Convention shall be entitled to benefit from the contractual rights created therein," including "the right of transit passage through straits used for international navigation."[91] Although Iran never ratified UNCLOS, in May 1993, it enacted a comprehensive law on maritime areas, several provisions of which conflict with UNCLOS provisions, including a requirement that warships, submarines, and nuclear-powered ships obtain permission before exercising innocent passage through Iran's territorial waters.[92]

The United States does not recognize any of the excessive claims by Oman and Iran and has contested each of them. In response to Oman's 1981 decree, the U.S. Navy conducted regular transits through Omani territorial waters, including the Strait of Hormuz, between 1983 and 1996. The U.S. also contested Oman's declarations submitted upon its ratification of UNCLOS, both by diplomatic protest in 1991 and by conducting operational assertions in 1991, 1992, 1995–1997, and 2005–2010. During FY 1995–FY 1997, the Navy entered Omani territorial waters without first obtaining permission. In addition, on multiple occasions during FY 2005–FY 2010, the Navy navigated through the Strait of Hormuz under the regime of transit passage in contravention of Oman's claim that only innocent passage was permitted.[93]

In April 1987, Iran protested the fact that U.S. warships were transiting regularly through the Strait of Hormuz, claiming that this violated its territorial waters restrictions. The U.S. diplomatic response to Iran's complaint stated:

> [T]he United States…particularly rejects the assertions that the…right of transit passage through straits used for international navigation, as articulated in the Convention, are contractual rights and not codification of existing customs or established usage. The regimes of…transit passage, as reflected in the Convention, are clearly based on customary practice of long standing and reflects the balance of rights and interests among all States, regardless of whether they have signed or ratified the Convention.[94]

The United States protested Iran's 1993 Marine Areas Act by diplomatic note in January 1994.[95] In addition to its diplomatic protest, the Navy conducted regular operational assertions against Iran's excessive claims by transiting the Strait of Hormuz through Iranian territorial waters. On multiple occasions during FY 2005–FY 2010, the Navy navigated through the strait under the regime of transit passage rather than innocent passage. In addition, the Navy entered Iranian territorial waters without permission during FY 1995–FY 1999.[96]

Strait of Bab el-Mandeb. The Strait of Bab el-Mandeb provides the strategic link between the Indian Ocean, the Red Sea, and the Suez Canal and is bordered at its narrowest point by Djibouti to the west and the Republic of Yemen to the east. Both nations are party to UNCLOS.

Yemen has historically made excessive claims regarding passage through the strait.[97] In April 1967 and January 1978, Yemen decreed that foreign warships must obtain prior permission before transiting

91. United Nations Convention on the Law of the Sea, Declarations and Reservations: Iran (Islamic Republic of), in United Nations Treaty Collection, at *http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en#EndDec* (July 28, 2011).
92. Islamic Republic of Iran, "Act on the Marine Areas of the Islamic Republic of Iran," art. 9, May 2, 1993, at *http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/IRN_1993_Act.pdf* (July 28, 2011).
93. Appendix, *infra*, and U.S. Department of Defense, *Maritime Claims Reference Manual*, p. 441.
94. U.S. Department of State, "United States Responses to Excessive National Maritime Claims," p. 68.
95. U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, "Iran's Maritime Claims," *Limits in the Seas*, No. 114, March 16, 1994, pp. 37–39, at *http://www.state.gov/documents/organization/58228.pdf* (July 28, 2011).
96. Appendix, *infra*, and U.S. Department of Defense, *Maritime Claims Reference Manual*, p. 302.

its territorial waters, including the Bab el-Mandeb.[98] Yemen reiterated that position in December 1982, when it submitted a declaration upon signing UNCLOS.[99] The United States officially protested the Yemeni claim with a diplomatic note:

> [T]he Government of the Yemen Arab Republic may not legally condition the exercise of the right of transit passage through or over an international strait, such as Bab-el-Mandeb, upon obtaining prior permission. Transit passage is a right that may be exercised by ships of all nations, regardless of type or means of propulsion, as well as by aircraft, both state and civil. While warplanes and other state aircraft normally require prior authorization before overflying another State's territory, authorization is not required for the exercise of the right of straits transit passage under customary law as reflected in article 32 of the Convention.
>
> For the above reasons, the United States cannot accept the claim of authority by the Government of the Yemen Arab Republic…to condition the exercise of the right of transit passage by any ships or warplanes upon prior authorization. Accordingly, the United States reserves its rights and those of its nationals in this regard.[100]

In addition to protesting through diplomatic channels, the U.S. Navy has conducted operational assertions to dispute Yemen's excessive claims regarding its territorial waters and the Bab el-Mandeb. Specifically, from 1979 to 1990, the Navy regularly transited through Yemeni territorial waters and the Bab el-Mandeb without first seeking permission from the government of Yemen. Additional operational assertions were conducted during FY 1995–FY 1999.[101]

Securing Transit Rights. The case studies of the Strait of Hormuz and the Strait of Bab el-Mandeb demonstrate that U.S. membership in UNCLOS has not been necessary to secure America's right to transit through key international straits. Through diplomatic protests by the State Department and operational assertions by the U.S. Navy, the United States has secured the right of its ships to transit international straits, including strategic chokepoints, such as Hormuz and Bab el-Mandeb.

Even though it is not party to UNCLOS, the United States has regularly and successfully challenged the excessive claims of straits states, such those by Iran, Oman, and Yemen. Likewise, through adherence to the customary international law of the sea as reflected in UNCLOS and through operational assertions, the U.S. Navy regularly transits other key international straits such as Dover, Gibraltar, and Malacca as part of its global mission.[102]

Archipelagic Sea-Lanes Passage. Nations that are archipelagoes (an island chain or a cluster of islands), present special challenges to navigational freedom. For many years before the adoption of UNCLOS, Indonesia and the Philippines led an effort to establish a special regime that would recognize the concept of an "archipelagic state" and

97. Djibouti passed a law in January 1979 requiring nuclear-powered vessels and vessels carrying nuclear or radioactive material to give prior notification before entering its territorial waters, but the law did not modify "international rules of navigation" in the Strait of Bab el-Mandeb. U.S. Department of Defense, *Maritime Claims Reference Manual*, p. 185, and Djibouti Law No. 52/AN/78, January 9, 1979. The U.S. protested the territorial seas claim in 1989 and conducted operational assertions in 1998–2000.
98. U.S. Department of Defense, *Maritime Claims Reference Manual*, p. 693.
99. United Nations Convention on the Law of the Sea, Declarations and Reservations: Yemen Arab Republic, in United Nations Treaty Collection, at *http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en#12* (July 28, 2011).
100. Embassy of the United States in Sana'a, Yemen, Diplomatic Note No. 449, October 6, 1986, reproduced in Roach and Smith, *United States Responses to Excessive Maritime Claims*, pp. 298–299.
101. Appendix, *infra*, and U.S. Department of Defense, *Maritime Claims Reference Manual*, p. 693.
102. Other major international straits—such as the Danish Straits, Magellan, and the Turkish Straits—are subject to conventions that were in place prior to UNCLOS, and passage through them is governed by special regimes. See UNCLOS, art. 35(c). However, the Navy conducted an operational assertion against Argentina during FY 2009 to challenge its claim that foreign warships must give notification before transiting the Strait of Magellan.

regulate the passage of foreign ships through the "archipelagic waters" of such a state.[103]

The position of several archipelagic states was that the waters located within the state's "baseline"—an imaginary line enclosing the islands of an archipelago—should be considered "internal waters" and therefore subject to transit only under restrictive conditions pertaining to jurisdiction over and control of their land. Major maritime states, on the other hand, have sailed through archipelagos such as Indonesia and the Philippines for centuries, firmly establishing a custom that the waters within an archipelago are subject to freedom of navigation and overflight for the purpose of continuous and expeditious transit. These states, including the United States, conditioned their acceptance of the archipelago concept on "a legal guarantee that freedoms of navigation and overflight be maintained in and over the waters between the islands of the archipelago."[104]

Through diplomatic protests by the State Department and operational assertions by the U.S. Navy, the United States has secured the right of its ships to transit international straits, including key strategic chokepoints.

A compromise was reached during UNCLOS III that balanced the sovereign rights of an archipelagic state and the rights of other nations to transit through archipelagic waters. Archipelagic states were officially recognized and permitted to "convert" the high seas waters within their baselines to "archipelagic waters," which would be governed by a new navigational regime.[105] Under the new archipelagic sea-lanes passage (ASLP) regime, foreign vessels and aircraft, including warships and warplanes, may transit through a state's archipelagic waters via specifically designated sea-lanes.

The ASLP regime is substantially similar to the rules of transit passage through international straits, meaning that submarines may transit submerged, military aircraft may overfly in combat formation, and warships may steam in formation and launch and recover aircraft.[106] Outside of the designated sea-lanes, vessels are permitted to transit all other areas of a state's archipelagic waters under the regime of innocent passage.[107]

An archipelagic state may elect to seek official recognition of its archipelagic sea-lanes (ASL) by submitting the proposed ASL to the International Maritime Organization (IMO).[108] The state works in consultation with the IMO for the formal adoption of the ASL. The United States, as an IMO member and a major maritime power, wields substantial influence in that body.

If a state elects to undergo the process at the IMO, it is required to designate all of the "normal passage routes used as routes for international navigation or overflight" through its waters.[109] The ships and aircraft of all nations, whether party to UNCLOS or not, "enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes."[110] An archipelagic state may also elect not to formally designate ASL through the IMO process. In such cases, the right of ASLP may be exercised by any state through any route "normally used for international navigation."[111]

103. For a historical description of the efforts made by archipelagic states for recognition of their special status, see Vivien Jane Evangelio Cay, "Archipelagic Sea Lanes Passage and Maritime Security in Archipelagic Southeast Asia," World Maritime University, August 30, 2010.
104. Roach and Smith, *United States Responses to Excessive Maritime Claims*, pp. 26–27.
105. UNCLOS, arts. 46–49. See also U.S. Department of State, "State Department Telegram to the U.S. Embassy in Jakarta Concerning Archipelagic Claims," August 8, 2003, at *http://www.state.gov/s/l/2003/44347.htm* (July 28, 2011).
106. UNCLOS, art. 53.
107. *Ibid.*, art. 52.
108. *Ibid.*, art. 53(9). While Article 53(9) refers only to "the competent international organization" as the proper venue, the IMO has been designated as such in practice.
109. *Ibid.*, art. 53(4).
110. *Ibid.*, art. 53(2).

Therefore, even though it is not an UNCLOS member, the United States enjoys the right of navigation through and overflight of the sea-lanes of every archipelago in the world, whether or not the archipelagic state has formally designated ASL. U.S. policy regarding the universality of the right of ASLP is reflected in the *Commander's Handbook on the Law of Naval Operations*, the navigational guide used by the U.S. Navy, Marine Corps, and Coast Guard:

> Archipelagic nations may designate archipelagic sea lanes through their archipelagic waters suitable for continuous and expeditious passage of ships and aircraft. All normal routes used for international navigation and overflight are to be included. If the archipelagic nation does not designate such sea lanes, the right of archipelagic sea lanes passage may nonetheless be exercised by all nations through routes normally used for international navigation and overflight. If the archipelagic nation makes only a partial designation of archipelagic sea lanes, a vessel or aircraft must adhere to the regime of archipelagic sea lanes passage while transiting in the established archipelagic sea lanes but retains the right to exercise archipelagic sea lanes passage through all normal routes used for international navigation and overflight through other parts of the archipelago.[112]

At present, only Indonesia has submitted a proposal to the IMO seeking formal recognition of its ASL. All other archipelagic states have apparently been satisfied with the customary practice of permitting foreign vessels, including warships, to transit their waters via normal routes.

Contrary to the fears of some UNCLOS proponents, no evidence suggests that the ASLP regime is deteriorating or eroding. As one maritime analyst put it, if the ASLP regime was "under threat of destabilization, it would be logical to expect some countervailing State practice."[113] To the contrary, since the adoption of the convention in 1982, the status quo "has not proven unacceptable to most archipelagic states."[114]

Moreover, since the adoption of UNCLOS, the concept of ASLP has become widely accepted by archipelagic states and maritime states alike, and there is "a good deal of evidence to suggest that the Convention's provisions [regarding archipelagos] have passed into custom."[115]

Key Archipelagic Waters: Case Studies. The United States has demonstrated its ability to secure passage rights through key archipelagic waters by its interactions with Indonesia and the Philippines, two major archipelagic states. Indonesia and the Philippines are at the crossroads between the Pacific and Indian Oceans and the South China Sea, making their waters a key strategic geographical area for U.S. national security interests and for international commercial shipping.[116]

Historically, both nations have sought to regulate their respective waters in a manner that is inconsistent with customary international law and contrary to UNCLOS, even after both nations ratified the convention. The United States has successfully contested their excessive claims and has secured its maritime rights through a combination of bilateral diplomacy, diplomatic protests, operational assertions under the FON Program, and its influence at the IMO.

The Philippines. The Philippines has a history of attempting to restrict passage through its archipelago by declaring that the waters connecting its islands are "internal waters." In a March 1955 communica-

111. *Ibid.*, art. 53(12).

112. U.S. Department of the Navy, *The Commander's Handbook on the Law of Naval Operations*, paras. 1.5.4 and 2.5.4.

113. Stuart Kaye, "Freedom of Navigation in the Indo-Pacific Region," Sea Power Centre *Papers in Australian Maritime Affairs* No. 22, 2008, p. 16, at *http://www.navy.gov.au/w/images/PIAMA22.pdf* (July 28, 2011).

114. *Ibid.*

115. Churchill and Lowe, *The Law of the Sea*, pp. 129–130.

116. Captain Jonathan P. Edwards, "The Development and Operational Impact of Indonesia's Approved Partial System of Archipelagic Sea Lanes," Naval War College, May 17, 1999, and Mary Ann Palma, "The Philippines as an Archipelagic and Maritime Nation: Interests, Challenges, and Perspectives," S. Rajaratnam School of International Studies *Working Paper* No. 182, July 21, 2009, at *http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1088&context=lawpapers* (July 28, 2011).

tion to the U.N. Secretary-General and in legislation passed by the Philippine Congress in June 1961, the Philippines claimed that the waters "around, between and connecting" its islands were internal waters subject to its exclusive sovereignty.[117] The 1973 Philippine Constitution stated similarly that the "waters around, between, and connecting the islands of the archipelago…form part of the internal waters of the Philippines."[118]

As noted previously, UNCLOS recognized the right of archipelagic states to assert sovereignty over their waters but required them to respect passage rights through sea-lanes within those waters. When the Philippines signed and ratified UNCLOS, it persisted in classifying the waters within its baselines as internal. Specifically, in May 1984, when the Philippines deposited its instrument of ratification for UNCLOS, it submitted eight understandings that qualified its acceptance of the convention. Among the Philippine understandings was the following statement:

> The concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, and removes straits connecting these waters with the economic zone or high sea from the rights of foreign vessels to transit passage for international navigation.[119]

The implication of this understanding is that the Philippines would treat its archipelagic waters as internal waters, therefore subjecting foreign warships to a regime of passage by permission instead of the ASLP regime with its greater transit rights.

The United States well understood that such a designation could not go unchallenged due to the strategic significance of Philippine waters and officially protested the excessive claim by diplomatic note in January 1986:

> [The United States] wishes to observe that, as generally understood in international law, including that reflected in the 1982 Law of the Sea Convention, the concept of internal waters differs significantly from the concept of archipelagic waters. Archipelagic waters are only those enclosed by properly drawn archipelagic baselines and are subject to the regimes of innocent passage and archipelagic sea lanes passage. The Government of the United States further wishes to point out that straits linking the high seas or exclusive economic zone with archipelagic waters, as well as straits within archipelagic waters, are, if part of normal passage routes used for international navigation or overflight through or over archipelagic waters, subject to the regime of archipelagic sea lanes passage.[120]

Through this note, the United States made it clear to the Philippines that the U.S. does not consent to the Philippines' claim regarding its archipelagic waters and that the claim contravenes international law as reflected in UNCLOS. Australia, Bulgaria, Czechoslovakia, Ukraine, and the Soviet Union also objected to the understandings submitted by the Philippines.

In October 1988, in an apparent response to the protests raised by the United States and others, the Philippines submitted a declaration to the U.N. Secretary-General stating that it "intends to harmonize its domestic legislation with the provisions of the Convention." The declaration gave assurances that the "necessary steps are being taken to enact legislation dealing with archipelagic sea lanes passage" and that the Philippines "will abide by the provi-

117. Mohamed Munawar, *Ocean States, Archipelagic Regimes in the Law of the Sea* (AD Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1995), p. 63; Cay, "Archipelagic Sea Lanes Passage and Maritime Security in Archipelagic Southeast Asia," p. 20; and Republic of the Philippines, An Act to Define the Baselines of the Territorial Sea of the Philippines, Republic Act No. 3046, June 17, 1961.

118. Constitution of the Republic of the Philippines, art. I (1973), at *http://www.chanrobles.com/1973constitutionofthephilippines.htm* (July 28, 2011). The current Philippine constitution, enacted in 1987 (after the Philippines ratified UNCLOS), persists in claiming that its archipelagic waters are "internal."

119. U.N. Office of the Special Representative of the Secretary-General for the Law of the Sea, *Law of the Sea Bulletin*, No. 1, September 1983, p. 14, at *http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulE1.pdf* (July 28, 2011).

120. U.S. Department of State, "United States Responses to Excessive National Maritime Claims," p. 51.

sions" of UNCLOS.[121] In a further effort to conform to its international commitments, the Philippines enacted legislation in March 2009 to adopt a baseline system consistent with UNCLOS.[122]

In practice, the Philippines has complied with UNCLOS by permitting foreign vessels, including military warships and warplanes, to transit through its archipelagic waters via routes that existed prior to the adoption of the convention. The Philippine archipelago is traditionally transited via one north–south route and several east–west routes.[123] The Philippines has not submitted a proposal to the IMO seeking official recognition of those sea-lanes.[124]

Since no formal sea-lanes are recognized as yet, the United States and other maritime states continue to exercise their right of passage "through the routes normally used for international navigation" pursuant to UNCLOS.[125] The Philippines' state practice complies with the UNCLOS provisions by allowing foreign vessels, including warships and submerged submarines, to transit through Philippine archipelagic waters without notification or authorization.[126] There is no evidence that the United States has been hindered while transiting through Philippine archipelagic waters.

Regardless of the Philippines' stated intention to conform its laws to UNCLOS and its actual practice of permitting the transit of foreign vessels, the U.S. Navy regularly conducts operational assertions in Philippine archipelagic waters to challenge any residual excessive claims. For example, Navy vessels and aircraft transited Philippine archipelagic waters on 47 occasions in FY 1997, 32 occasions in FY 1998, and 34 occasions in FY 1999.[127]

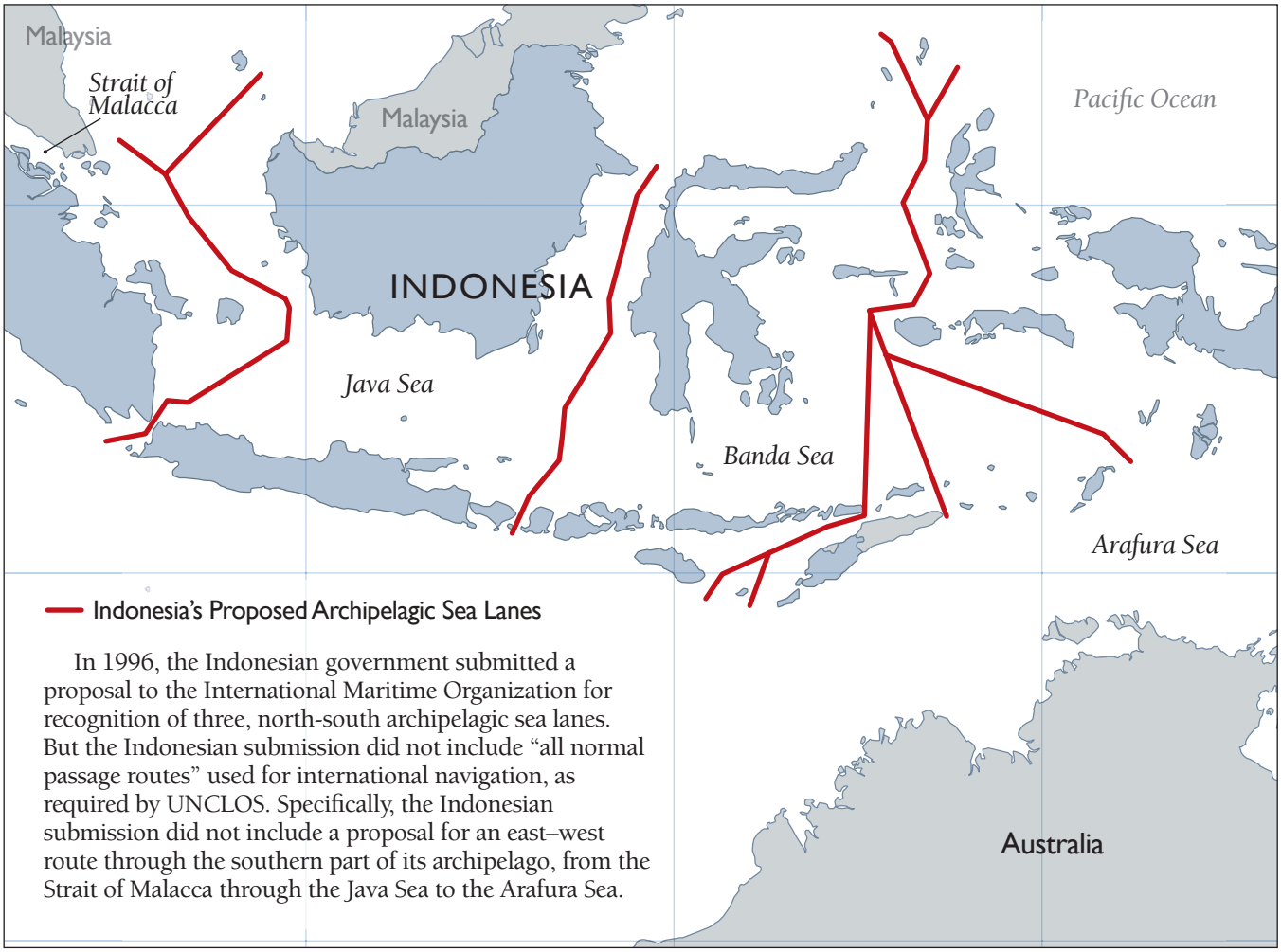
Indonesia. Indonesia, the world's largest archipelagic state, has also long sought special recognition of its waters with the intention of placing restrictions on the passage of foreign vessels. In February 1960, Indonesia enacted legislation proclaiming that all of the waters enclosed within its baselines were "internal waters." The law required any ship passing through its internal waters to travel under the restrictive regime of innocent passage.[128] The Indonesian law was met with "almost universal international condemnation."[129]

Although Indonesia ratified UNCLOS in February 1986, it continued to adhere to its 1960 law declaring its waters to be internal. The United States and Indonesia took steps to resolve that inconsistency. Specifically, the U.S. and Indonesia entered into a tax treaty in 1988 that included an exchange of diplomatic notes that included the following understanding:

> The United States recognizes the archipelagic States principles as applied by Indonesia on the understanding that they are applied in

121. Roach and Smith, *United States Responses to Excessive Maritime Claims*, p. 403.
122. Republic of the Philippines, An Act to Amend Certain Provisions of Republic Act No. 3046, as Amended by Republic Act No. 5446, to Define the Archipelagic Baselines of the Philippines, and for Other Purposes, Republic Act No. 9522, March 10, 2009. The act was deposited with the U.N. Secretary-General on April 1, 2009.
123. Barbara Kwiatkowska, "The Archipelagic Regime in Practice in the Philippines and Indonesia—Making or Breaking International Law?" *International Journal of Estuarine and Coastal Law*, Vol. 6, No. 1 (1991), p. 6, and Palma, "The Philippines as an Archipelagic and Maritime Nation: Interests, Challenges, and Perspectives," p. 7. Palma describes five routes as "important" to international navigation.
124. Cay, "Archipelagic Sea Lanes Passage and Maritime Security in Archipelagic Southeast Asia," p. 56.
125. UNCLOS, art. 53(12).
126. Palma, "The Philippines as an Archipelagic and Maritime Nation," p. 7, and Kwiatkowska, "The Archipelagic Regime in Practice in the Philippines and Indonesia," p. 12.
127. U.S. Department of Defense, *Annual Report to the President and the Congress*, 1997, Appendix I; *Annual Report to the President and the Congress*, 1998, Appendix I; and *Annual Report to the President and the Congress*, 1999, Appendix H, at *http://www.dod.gov/execsec/adr_intro.html* (July 28, 2011).
128. Government of Indonesia, Act Concerning Indonesian Waters, arts. 1(3) and 3(1), February 18, 1960, in U.S. Department of State, Bureau of Intelligence and Research, "International Boundary Study, Straight Baselines, Indonesia," *Limits in the Seas*, No. 35, July 20, 1971, pp. 2–4, at *http://www.state.gov/documents/organization/61544.pdf* (July 28, 2011).
129. Forward, "Archipelagic Sea-Lanes in Indonesia," p. 149.

Indonesia's "Partial" Archipelagic Sea Lane Designation



Source: Royal Australian Navy, *Australian Maritime Issues 2005*, *Papers in Australian Maritime Affairs* No. 16, p. 117, at *http://www.navy.gov.au/Publication:Papers_in_Australian_Maritime_Affairs_No._16* (August 1, 2011).

Map 2 • B 2599 heritage.org

accordance with the provisions of Part IV of the 1982 United Nations Convention on the Law of the Sea and that Indonesia respects international rights and obligations pertaining to transit of the Indonesian archipelagic waters in accordance with international law as reflected in that Part.[130]

Indonesia is the only archipelagic state that has sought formal recognition of its ASL at the IMO. Even though the U.S. is not a party to UNCLOS, it has been successful in shaping Indonesia's ASL claim in a way that protects U.S. navigational interests. In August 1996, the Indonesian government submitted a proposal to the IMO for rec-

130. Convention Between the Government of the United States of America and the Government of the Republic of Indonesia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, July 11, 1988. The convention entered into force on December 30, 1990. Rear Admiral Center acknowledged the 1988 tax treaty in his 1994 written testimony but asserted that it was a "haphazard approach" to securing transit rights. Center, prepared statement, p. 28.

ognition of three north–south ASL, which did not include "all normal passage routes" used for international navigation, as required by UNCLOS. Specifically, the Indonesian submission did not include a proposal for a key east–west ASL route through the southern part of its archipelago, from the Strait of Malacca through the Java Sea to the Arafura Sea.[131]

The United States and several other nations objected to the Indonesian proposal and blocked its consideration at the IMO.[132] Thereafter, Indonesia consulted closely with the United States and Australia regarding the three north–south ASL.

Indonesia subsequently submitted a revised proposal for the adoption of the three ASL, which was approved by the IMO in May 1998.[133] Since Indonesia had not proposed any east–west ASL, the IMO, with the express agreement of Indonesia, designated the Indonesian submission as a "partial system."[134] The United States and other maritime nations could continue to transit Indonesia's archipelagic waters through every other route "normally used for international navigation" including the east–west route.[135]

For several years, this arrangement was seemingly acceptable to all concerned parties, but in June 2002, Indonesia promulgated Regulation No. 37, which proclaimed that its three north–south ASL were a "full designation" and that all maritime traffic outside of those ASL was subject to the regime of innocent passage.[136]

In August 2003, the United States officially protested Regulation No. 37 in a diplomatic note, which reminded the Indonesian government of its commitment in the 1988 tax treaty to comply with UNCLOS.[137] The note further stated that the Indonesian submission to the IMO was only a "partial designation" and that "the right of the ships and aircraft of all states to exercise archipelagic sea lanes passage continues on all normal routes used for international navigation through other parts of the Indonesian archipelago, as provided in article 53(12) of the law of the sea convention."

The U.S. bolstered its diplomatic protest with naval operational assertions. In July 2003, the USS *Carl Vinson* and five F-18s conducted maneuvers near Bawean island in the Java Sea, well outside of Indonesia's three designated north–south ASL.[138] The Navy also conducted regular operations through Indonesian archipelagic waters to assert U.S. maritime rights. Navy vessels and aircraft transited Indonesian archipelagic waters on 73 occasions in FY 1997, 20 occasions in FY 1998, and 22 occasions in FY 1999.[139] Additionally, during FY 2005–2010, the Navy conducted multiple operational challenges within Indonesia's archipelagic waters, including protests against Indonesia's claim that its partial designation of ASL was a "full designation."[140]

131. UNCLOS, art. 53(4), and Forward, "Archipelagic Sea-Lanes in Indonesia," p. 152.
132. Commander David K. Wright, "Archipelagic Sea Lanes Designation: Considerations for Operational Level Planners," Naval War College, May 18, 1998. Other states that objected to Indonesia's ASL submission included France, Russia, China, Germany, South Korea, Vietnam, Malaysia, South Africa, Thailand, Ghana, Greece, Jamaica, Japan, Mexico, and New Zealand.
133. Edwards, "The Development and Operational Impact of Indonesia's Approved Partial System of Archipelagic Sea Lanes," pp. 16–20.
134. International Maritime Organization, "Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization," September 10, 2008, p. 32, at *http://www.imo.org/ourwork/legal/documents/6.pdf* (July 28, 2011).
135. UNCLOS, art. 53(12).
136. Indonesian Government Regulation No. 37, quoted in Forward, "Archipelagic Sea-Lanes in Indonesia," p. 153.
137. U.S. Department of State, "State Department Telegram to the U.S. Embassy in Jakarta Concerning Archipelagic Claims."
138. Cay, "Archipelagic Sea Lanes Passage and Maritime Security in Archipelagic Southeast Asia," p. 48. The July 2003 operational assertion also challenged Indonesia's claim that warships are required to give notification before entering its territorial sea.
139. U.S. Department of Defense, *Annual Report to the President and the Congress*, 1997, Appendix I; *Annual Report to the President and the Congress*, 1998, Appendix I; and *Annual Report to the President and the Congress*, 1999, Appendix H.

Protecting U.S. Maritime Rights. The case studies of Indonesia and the Philippines demonstrate that U.S. membership in UNCLOS is not critical to securing America's passage rights through key archipelagic waters. Even though it is not party to UNCLOS, the United States, joined by other nations, successfully challenged excessive claims made by both nations that their archipelagic seas constituted "internal waters." The United States, joined by Australia, used its prominent position at the IMO to ensure that Indonesia did not restrict its official ASL to three north–south lanes. To further demonstrate its maritime rights, the United States has conducted FON operations over, through, and under the archipelagic sea-lanes of both Indonesia and the Philippines over the span of many years.

Finally, the United States maintains comprehensive, mutually beneficial bilateral relationships with both Indonesia and the Philippines, which has a mutual defense treaty with the United States.[141] These bilateral relationships further ensure that any disputes arising over ASLP will be resolved amicably.[142]

Part IV: Ensuring Continued U.S. Global Leadership on the Oceans

For more than 180 years and through two world wars, the U.S. Navy thrived, developing into a global maritime power, without the benefit of a written convention on the law of the sea. In 1958, the principles of high seas freedom and innocent passage through territorial waters were codified in the first round of law of the sea conventions. Between 1958 and 1982, the Navy continued to fulfill its mission on a global scale. UNCLOS was adopted in 1982, duplicating the navigational provisions of the 1958 conventions and "crystallizing" the concepts of transit passage and archipelagic sea-lanes passage. Since 1982, through the end of the Cold War and to the present day, the Navy continues to prosecute its mission as the world's preeminent naval power.

By forgoing UNCLOS membership, the United States is in no way hindering its ability to secure, preserve, or otherwise protect its navigational rights and freedoms. Nor, as contended by several UNCLOS proponents, is it failing to demonstrate leadership on maritime issues by remaining outside the convention.[143] To the contrary, the United States remains the greatest maritime power in the world and is deeply involved in ongoing issues relating to the law of the sea.

The United States plays an essential, if not indispensable, role in the development of the law of the sea. The U.S. Navy's *Commander's Handbook on the Law of Naval Operations* is the preeminent operational manual on the convention's navigational provisions and is considered the gold standard by maritime nations worldwide, many of which have adopted it for use by their own navies.[144]

The United States is an active participant in many multilateral organizations and forums that deal with law of the sea issues, such as the annual meetings of the Major Maritime Powers, IMO proceedings, and meetings of the states parties to UNCLOS, which the U.S. attends as an observer nation. Despite repeated claims to the contrary, the United States effectively protects its Arctic interests, navigational and otherwise, regardless of its nonmembership in UNCLOS. It was a founding member of the Arctic Council, an eight-member intergovernmental body established to foster coordination among Arctic nations that

140. See Appendix, *infra*.

141. Renato De Castro and Walter Lohman, "U.S.–Philippines Partnership in the Cause of Maritime Defense," Heritage Foundation *Backgrounder* No. 2593, August 8, 2011, at *http://www.heritage.org/research/reports/2011/08/us-philippines-partnership-in-the-cause-of-maritime-defense*, and Mutual Defense Treaty Between the Republic of the Philippines and the United States of America, August 30, 1951.

142. For example, see Bruce Vaughn, "Indonesia: Domestic Politics, Strategic Dynamics, and U.S. Interests," Congressional Research Service *Report for Congress*, January 31, 2011, at *http://www.fas.org/sgp/crs/row/RL32394.pdf* (July 28, 2011), and Thomas Lum, "The Republic of the Philippines and U.S. Interests," Congressional Research Service *Report for Congress*, January 3, 2011, at *http://www.fas.org/sgp/crs/row/RL33233.pdf* (July 28, 2011).

143. For example, see McNeill, prepared statement, pp. 23–24.

144. U.S. Department of the Navy, *The Commander's Handbook on the Law of Naval Operations*.

recently adopted an agreement on search and rescue cooperation in the Arctic Ocean.[145]

The United States is party to a number of multilateral treaties regarding the law of the sea and maritime navigation, including the International Convention for the Safety of Life at Sea, the Convention on the Facilitation of International Maritime Traffic, and the Convention on International Regulations for Preventing Collisions at Sea.[146] The U.S. is also a global leader in maritime enterprises that are not treaty-based, such as the Proliferation Security Initiative (a multilateral effort to prevent trafficking of weapons of mass destruction) and Combined Task Force 151 (a multinational counterpiracy effort operating off the coast of Somalia).[147]

In short, the United States has played and continues to play a dominant worldwide role in matters concerning the law of the sea. However, the United States needs to take the necessary steps to ensure that U.S. dominance persists well past 2011 and through the 21st century. To that end:

- Congress should work with the Department of Defense to provide the U.S. Navy with the assets it needs to maintain its preeminent position on the high seas.[148] Freedom of navigation and overflight, innocent passage through territorial waters, transit passage through international straits, and archipelagic sea-lanes passage are best guaranteed by a strong Navy, not by a signature on a treaty.
- The United States should continue to advance its interests, including freedom of navigation, in the Arctic.[149] To the extent that the U.S. requires a "seat at the table" on Arctic issues, its prominent position on the Arctic Council serves that role. Nothing indicates that accession to UNCLOS would be a factor, much less a determinative one, in securing U.S. interests in the Arctic.[150]
- The United States should address Chinese maritime ambitions and confront China's aggression in the South China Sea by maintaining its strong forward posture in East Asia and supporting its allies in the region.[151] To that end, the U.S. may rely on the customary international law of the sea, as reflected in the UNCLOS navigational provisions, while continuing to challenge China's excessive maritime claims through the Freedom of Navigation Program.

145. Arctic Council, Web site, at *http://www.arctic-council.org* (July 28, 2011), and Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic, May 12, 2011, at *http://arctic-council.org/filearchive/Arctic%20SAR%20Agreement%20EN%20FINAL%20for%20signature%2021-Apr-2011.pdf* (July 28, 2011).
146. International Convention for the Safety of Life at Sea, June 17, 1960; Convention on the Facilitation of International Maritime Traffic, April 9, 1965; and Convention on International Regulations for Preventing Collisions at Sea, October 20, 1972.
147. U.S. Department of State, "Proliferation Security Initiative," at *http://www.state.gov/t/isn/c10390.htm* (July 28, 2011), and U.S. Navy, "Combined Task Force (CTF) 151," at *http://www.cusnc.navy.mil/cmf/151/index.html* (July 28, 2011).
148. "A Strong National Defense: The Armed Forces America Needs and What They Will Cost," Heritage Foundation *Special Report* No. 90, April 5, 2011, at *http://www.heritage.org/Research/Reports/2011/04/A-Strong-National-Defense-The-Armed-Forces-America-Needs-and-What-They-Will-Cost*, and Mackenzie Eaglen and Bryan McGrath, "Thinking About a Day Without Sea Power: Implications for U.S. Defense Policy," Heritage Foundation *Backgrounder* No. 2555, May 16, 2011, at *http://www.heritage.org/Research/Reports/2011/05/Thinking-About-a-Day-Without-Sea-Power-Implications-for-US-Defense-Policy*.
149. Ariel Cohen, Lajos F. Szaszdi, and Jim Dolbow, "The New Cold War: Reviving the U.S. Presence in the Arctic," Heritage Foundation *Backgrounder* No. 2202, October 30, 2008, at *http://www.heritage.org/Research/Reports/2008/10/The-New-Cold-War-Reviving-the-US-Presence-in-the-Arctic*.
150. Steven Groves, "LOST in the Arctic: The U.S. Need Not Ratify the Law of the Sea Treaty to Get a Seat at the Table," Heritage Foundation *WebMemo* No. 1957, June 16, 2008, at *http://www.heritage.org/Research/Reports/2008/06/LOST-in-the-Arctic-The-US-Need-Not-Ratify-the-Law-of-the-Sea-Treaty-to-Get-a-Seat-at-the-Table*.
151. Dean Cheng, "Sea Power and the Chinese State: China's Maritime Ambitions," Heritage Foundation *Backgrounder* No. 2576, July 11, 2011, at *http://www.heritage.org/Research/Reports/2011/07/Sea-Power-and-the-Chinese-State-Chinas-Maritime-Ambitions*.

While the future is unknowable, the U.S. Navy will continue to face new and difficult challenges in the years ahead. It is crucial that Congress provide the Navy the resources that it requires to meet those challenges and to prosecute its mission of protecting navigational rights and freedoms on a global basis. UNCLOS membership is not necessary, much less essential, to accomplish that mission.

Moreover, most of the reasons why the United States should continue to forgo membership in UNCLOS are unrelated to navigational rights and freedoms. The convention's royalty-sharing provisions, compulsory dispute resolution requirements, and creation of an international bureaucracy to regulate deep seabed mining are just a few of its major flaws.[152] The navigational benefits claimed by proponents of U.S. accession to UNCLOS must necessarily be balanced against the irrefutably negative aspects of the convention that stem from its non-navigational provisions.

The practices of the U.S. Navy and the navies of other major maritime powers created the very customary international law upon which the navigational provisions of UNCLOS are based. The Navy enjoys those same navigational rights and freedoms despite non-accession to the treaty. The Navy's insistence that a failure to join UNCLOS will hinder its ability to conduct its global mission successfully is belied by the facts and demonstrably disproved by history. Moreover, the Navy's support for the navigational rights enshrined in UNCLOS is far outweighed by the convention's dangerous non-navigational provisions.

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152. See, generally, Groves, "U.N. Convention on the Law of the Sea Erodes U.S. Sovereignty over U.S. Extended Continental Shelf," and Edwin Meese III, Baker Spring, and Brett D. Schaefer, "The United Nations Convention on the Law of the Sea: The Risks Outweigh the Benefits," Heritage Foundation *WebMemo* No. 1459, May 16, 2007, at *http://www.heritage.org/Research/Reports/2007/05/The-United-Nations-Convention-on-the-Law-of-the-Sea-The-Risks-Outweigh-the-Benefits.*

APPENDIX

U.S. Navy Challenges to Excessive Maritime Claims, FY 1993–2010

In FY 1994–1999, a list of the U.S. Navy's operational assertions under the Freedom of Navigation Program was appended to the Department of Defense's *Annual Report to the President and the Congress.* The list of annual assertions for FY 2000–FY 2010 was posted on the Web site of the Office of the Deputy Assistant Secretary of Defense for Countering Weapons of Mass Destruction. In FY 2000–FY 2003, the Department of Defense did not specifically indicate the fiscal year in which each assertion was conducted.

Note: An asterisk (*) indicates that multiple operational challenges to the same excessive claim were conducted during a single fiscal year.

Albania

1997: Prior permission for warships to enter territorial sea

1998: Prior permission for warships to enter territorial sea

1999: Prior permission for warships to enter territorial sea

2000–2003: Prior permission for warships to enter territorial sea

Algeria

1997: Prior permission for warships to enter territorial sea

1998: Prior permission for warships to enter territorial sea

1999: Prior permission for warships to enter territorial sea

2000–2003: Prior permission for warships to enter territorial sea

Argentina

2009: Notification required before foreign warships transit the Strait of Magellan or in proximity to the territorial sea

Bangladesh

1995: Claimed security zone • Claimed territorial airspace beyond 12 nm

1996: Excessive straight baselines • Claimed security zone • Claimed territorial airspace beyond 12 nm

1997: Excessive straight baselines • Claimed security zone • Claimed territorial airspace beyond 12 nm

1998: Excessive straight baselines • Claimed security zone

2000–2003: Excessive straight baselines*

Burma

1993: Prior permission for warships to enter territorial sea

1994: Prior permission for warships to enter territorial sea

1996: Excessive straight baselines • Claimed security zone • Claimed territorial airspace beyond 12 nm

1997: Excessive straight baselines • Claimed security zone • Claimed territorial airspace beyond 12 nm

1998: Excessive straight baselines • Claimed security zone

2000–2003: Claimed 24 nm security zone • Excessive straight baselines • Authority to regulate overflight in international space*

2004: Claimed 24 nm security zone • Excessive straight baselines

2008: Broad restrictions in EEZ*

Cambodia

1993: Prior permission for warships to enter territorial sea • Excessive straight baselines

1994: Prior permission for warships to enter territorial sea • Excessive straight baselines

1995: Claimed security zone • Claimed territorial airspace beyond 12 nm • Prior permission for warships to enter territorial sea

1996: Excessive straight baselines • Claimed security zone • Claimed territorial airspace beyond 12 nm

1997: Excessive straight baselines • Claimed security zone • Claimed territorial airspace beyond 12 nm

1998: Excessive straight baselines • Claimed security zone

1999: Excessive straight baselines • Claimed security zone • Prior permission for warships to enter territorial sea and security zone

2000–2003: Excessive straight baselines • Claimed 24 nm security zone*

2004: Excessive straight baselines • Claimed 24 nm security zone*

2005: Excessive straight baselines • Claimed 24 nm security zone

2010: Excessive straight baselines • Prior permission for warships to enter territorial sea or contiguous zone • Security jurisdiction in contiguous zone*

China

1993: Prior permission for warships to enter territorial sea

1994: Prior permission for warships to enter territorial sea

1996: Prior permission for warships to enter territorial sea

2007: Claimed jurisdiction of superadjacent airspace over the EEZ • Domestic law criminalizes survey activity by foreign entities in any waters under the jurisdiction of the coastal state*

2008: Jurisdiction over airspace above EEZ • Domestic law criminalizing survey activity by foreign entities in the EEZ*

2009: Jurisdiction over airspace above EEZ • Domestic law criminalizing survey activity by foreign entities in the EEZ*

2010: Jurisdiction over airspace above EEZ • Domestic law criminalizing survey activity by foreign entities in the EEZ*

Croatia

1998: Prior permission for warships to enter territorial sea

2000–2003: Prior authorization for warships to enter territorial sea

Cuba

1997: Require state aircraft to comply with directions from air traffic control within flight information region

1998: Require state aircraft to comply with directions from air traffic control within flight information region

Djibouti

1993: Excessive straight baselines

1994: Excessive straight baselines

1995: Excessive straight baselines

1997: Excessive straight baselines

1999: Prior notification for nuclear-powered vessels to enter territorial sea

Ecuador

1993: Claimed 200 nm territorial sea

1994: Claimed 200 nm territorial sea

1999: Claimed 200 nm territorial sea

2000–2003: Claimed 200 nm territorial sea

2004: Claimed 200 nm territorial sea

2005: Claimed 200 nm territorial sea*

Egypt

1994: Prior notification for warships to enter territorial sea

1996: Excessive straight baselines • Prior permission for warships to enter territorial sea

1997: Excessive straight baselines • Prior permission for warships to enter territorial sea

1999: Prior permission for warships to enter territorial sea

2000–2003: Prior notice for warships or nuclear-powered vessels to enter territorial sea or EEZ*

El Salvador

1998: Claimed 200 nm territorial sea

1999: Claimed 200 nm territorial sea

2000–2003: Claimed 200 nm territorial sea

India

1993: Prior notification for warships to enter territorial sea • Historic waters claim (Gulf of Mannar)

1994: Prior notification for warships to enter territorial sea • Historic waters claim (Gulf of Mannar)

1996: Prior permission for warships to enter territorial sea

1997: Prior permission for warships to enter territorial sea

1999: Prior notification for warships to enter territorial sea • Prior permission required for military exercises and maneuvers in EEZ • Historic waters claim (Gulf of Mannar)

2000–2003: Claimed 24 nm security zone • Prior authorization for warships to enter territorial sea

2007: Requirement for prior consent for military maneuvers in the EEZ*

2008: Authorization required for military maneuvers in the EEZ*

2009: Authorization required for military maneuvers in the EEZ*

2010: Authorization required for military maneuvers in the EEZ*

Indonesia

2000–2003: Prior notification for warships to enter territorial sea*

2004: Prior notification for warships to enter territorial sea*

2005: Archipelagic sea lanes passage*

2006: Archipelagic sea lanes passage*

2007: Conduct of ASLP through normal passage routes used as routes for international navigation through or overflight over archipelagic waters*

2008: Partial designation of archipelagic sea lanes*

2009: Partial designation of archipelagic sea lanes*

2010: Partial designation of archipelagic sea lanes*

Iran

1995: Prior permission for warships to enter territorial sea

1996: Excessive straight baselines • Prior permission for warships to enter territorial sea

1997: Excessive straight baselines • Prior permission for warships to enter territorial sea

1998: Excessive straight baselines • Prior permission for warships to enter territorial sea

1999: Excessive straight baselines • Prior permission for warships to enter territorial sea

2004: Excessive straight baselines*

2005: Restriction on right of transit passage through Strait of Hormuz to UNCLOS signatories*

2006: Restriction on right of transit passage through Strait of Hormuz to UNCLOS signatories*

2007: Restriction on right of transit passage through Strait of Hormuz to UNCLOS signatories*

2008: Restriction on right of transit passage through Strait of Hormuz to UNCLOS signatories • Excessive straight baselines*

2009: Restriction on right of transit passage through Strait of Hormuz to UNCLOS signatories*

2010: Restriction on right of transit passage through Strait of Hormuz to UNCLOS signatories*

Japan

1999: Excessive straight baselines

2010: Excessive straight baselines

Kenya

1998: Excessive straight baselines • Historic bay claim (Ungwana Bay)

Liberia

1998: Claimed 200 nm territorial sea

1999: Claimed 200 nm territorial sea

2009: Excessive territorial sea claim*

2010: Excessive territorial sea claim*

Libya

1997: Excessive straight baselines • Prior notification for warships to enter territorial sea

1998: Historic waters claim (Gulf of Sidra)

2000–2003: Historic waters claim (Gulf of Sidra)

Malaysia

1998: Excessive restrictions on military activities in EEZ

1999: Prior permission for military exercises in EEZ

2000–2003: Prior permission to conduct military activities in EEZ*

2007: Prior authorization for nuclear-powered ships to enter territorial sea and for military maneuvers in EEZ*

2008: Prior authorization for nuclear-powered ships to enter territorial sea and for military maneuvers in EEZ*

2009: Prior authorization for nuclear-powered ships to enter territorial sea and for military maneuvers in EEZ*

2010: Prior authorization for nuclear-powered ships to enter territorial sea and for military maneuvers in EEZ*

Maldives

1993: Prior permission for warships to enter territorial sea

1994: Prior permission for warships to enter territorial sea

1995: Prior permission for warships to enter territorial sea • Claimed territorial airspace beyond 12 nm

1996: Excessive straight baselines • Prior permission for warships to enter territorial sea

1997: Excessive straight baselines • Prior permission for warships to enter territorial sea

1998: Prior permission for warships to enter territorial sea

2000–2003: Prior notification for warships to enter territorial sea*

2007: Permission required for foreign vessels to enter EEZ*

2008: Permission required for foreign vessels to enter EEZ*

2009: Permission required for foreign vessels to enter EEZ*

2010: Permission required for foreign vessels to enter EEZ*

Malta

1997: Prior permission for warships to enter territorial sea

1998: Prior permission for warships to enter territorial sea

1999: Prior permission for warships to enter territorial sea

2000–2003: Prior permission for warships to enter territorial sea

Mauritania

1994: Excessive straight baselines • Recognizes only innocent passage, not transit passage, through international straits

Nicaragua

1998: Claimed 200 nm territorial sea

1999: Claimed 200 nm territorial sea

Oman

1995: Excessive straight baselines • Prior permission for warships to enter territorial sea

1996: Excessive straight baselines • Prior permission for warships to enter territorial sea

1997: Excessive straight baselines • Prior permission for warships to enter territorial sea

2005: Claimed to recognize only the regime of innocent passage through Strait of Hormuz*

2006: Claimed to recognize only the regime of innocent passage through Strait of Hormuz*

2007: Claimed to recognize only the regime of innocent passage through Strait of Hormuz*

2008: Claimed to recognize only the regime of innocent passage through Strait of Hormuz*

2009: Claimed to recognize only the regime of innocent passage through Strait of Hormuz*

2010: Claimed to recognize only the regime of innocent passage through Strait of Hormuz*

Pakistan

1996: Prior permission for warships to enter territorial sea

1998: Claimed security zone • Excessive restrictions on military activities in EEZ

1999: Excessive straight baselines • Claimed security zone

Panama

2000–2003: Claimed 200 nm territorial sea

Peru

1993: Claimed 200 nm territorial sea

1994: Claimed 200 nm territorial sea

2004: Claimed 200 nm territorial sea

Philippines

1994: Excessive straight baselines • Claimed archipelagic waters as internal waters

1995: Excessive straight baselines • Claimed archipelagic waters as internal waters

1996: Excessive straight baselines • Claimed archipelagic waters as internal waters

1997: Excessive straight baselines • Claimed archipelagic waters as internal waters

1998: Excessive straight baselines • Claimed archipelagic waters as internal waters

1999: Excessive straight baselines • Claimed archipelagic waters as internal waters

2000–2003: Excessive straight baselines • Claimed archipelagic waters as internal waters*

2004: Excessive straight baselines • Claimed archipelagic waters as internal waters*

2005: Excessive straight baselines • Claimed archipelagic waters as internal waters*

2006: Excessive straight baselines • Claimed archipelagic waters as internal waters*

2007: Claimed archipelagic waters as internal waters*

2008: Excessive archipelagic baselines*

2009: Excessive archipelagic baselines*

2010: Excessive archipelagic baselines*

Romania

1999: Prior permission for warships to enter territorial sea

Saudi Arabia

1998: Excessive straight baselines • Claimed security zone

1999: Claimed security zone

Seychelles

1998: Prior permission for warships to enter territorial sea

1999: Prior notification for warships to enter territorial sea

Sierra Leone

1998: Claimed 200 nm territorial sea

1999: Claimed 200 nm territorial sea

Somalia

1993: Claimed 200 nm territorial sea

1994: Claimed 200 nm territorial sea

1995: Claimed 200 nm territorial sea • Prior permission for warships to enter territorial sea

1997: Claimed 200 nm territorial sea • Prior permission for warships to enter territorial sea

1998: Claimed 200 nm territorial sea • Prior permission for warships to enter territorial sea

South Korea

1999: Excessive straight baselines

Sri Lanka

1997: Prior permission for warships to enter territorial sea

1999: Prior permission for warships to enter territorial sea • Historic waters claim (Gulf of Mannar)

2000–2003: Claimed security zone • Prior permission for warships to enter territorial sea

Sudan

1993: Prior permission for warships to enter territorial sea

1994: Prior permission for warships to enter territorial sea

1995: Prior permission for warships to enter territorial sea

1996: Prior permission for warships to enter territorial sea

1997: Prior permission for warships to enter territorial sea

1998: Prior permission for warships to enter territorial sea • Claimed security zone

1999: Claimed security zone

Sweden

1994: Prior permission for warships to enter territorial sea

Syria

1998: Claimed 35 nm territorial sea • Prior permission for warships to enter the territorial sea

2000–2003: Claimed 35 nm territorial sea • Prior permission for warships to enter the territorial sea*

Taiwan

2000–2003: Excessive straight baselines • Claimed 24 nm security zone

2006: Restriction on right of innocent passage through territorial sea • Requirement of prior notice of warships transiting territorial sea

Thailand

1995: Excessive straight baselines

Togo

2009: Excessive territorial sea claim

United Arab Emirates

1995: Prior permission for warships to enter territorial sea

1997: Prior permission for warships to enter territorial sea

1998: Prior permission for warships to enter territorial sea • Claimed security zone

Venezuela

1999: Claimed security zone

2000–2003: Claimed security zone*

Vietnam

1996: Excessive straight baselines • Claimed security zone

1997: Excessive straight baselines • Claimed security zone

1998: Excessive straight baselines • Claimed security zone • Prior permission for warships to enter territorial sea

1999: Excessive straight baselines • Claimed security zone • Prior permission for warships to enter territorial sea and contiguous zone • Requirement that warships place weapons in non-operative positions prior to entering contiguous zone • Historic waters claim (Gulf of Tonkin)

2000–2003: Excessive straight baselines • Prior permission for warships to enter territorial sea*

2010: Excessive straight baselines • Prior permission for warships to enter territorial sea and contiguous zone

Yemen

1995: Prior permission for warships to enter territorial sea

1996: Prior permission for warships to enter territorial sea

1997: Prior permission for warships to enter territorial sea

1998: Prior permission for warships to enter territorial sea • Claimed security zone

1999: Prior permission for nuclear-powered warships to enter territorial sea • Claimed security zone