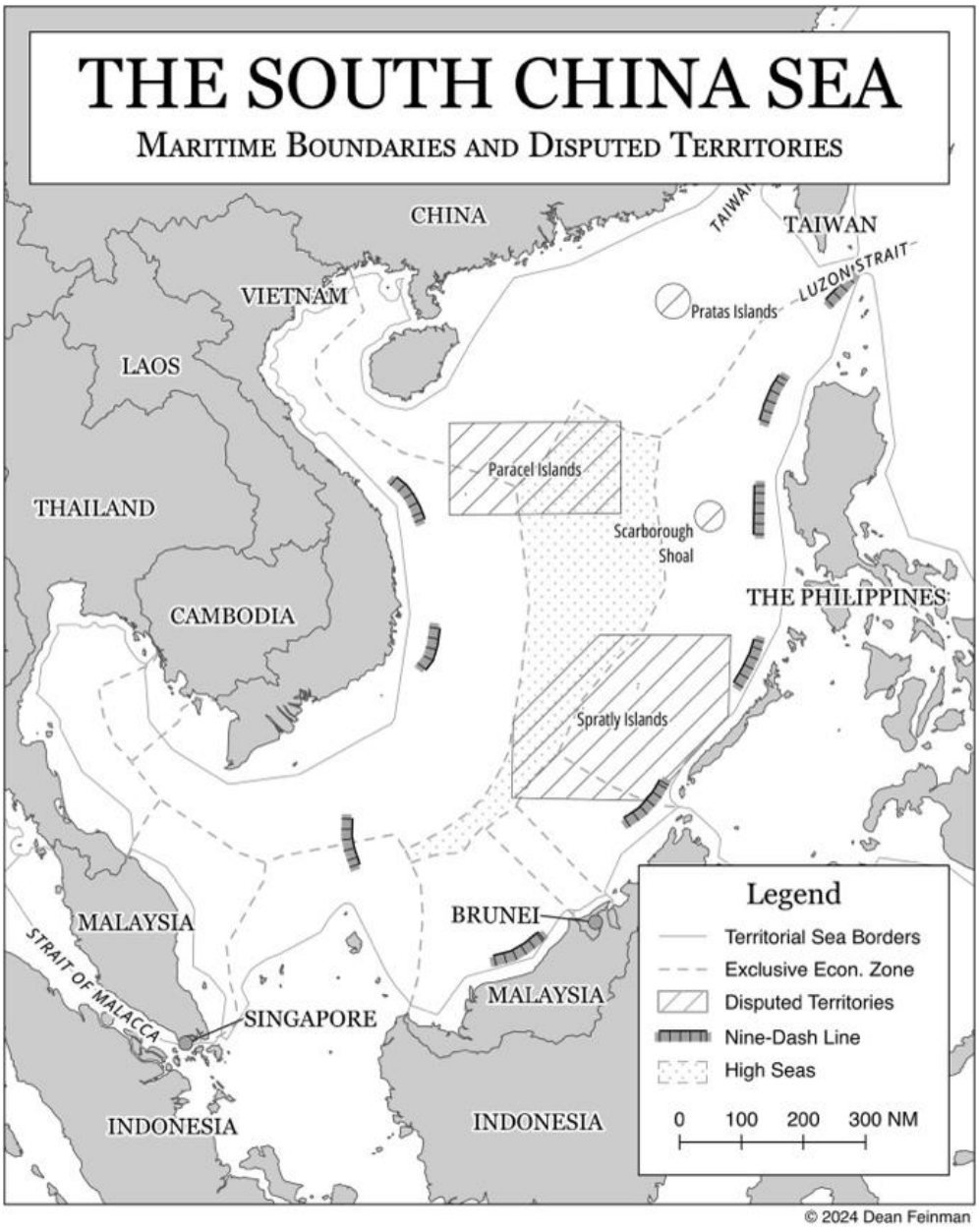
LOST AT THE SOUTH CHINA SEA: A LEGAL RATIONALE FOR JOINING UNCLOS

*Dean Feinman**

Rising tensions in the South China Sea are a tired front of great power competition. Since President Barack Obama's "pivot to Asia," there has been renewed attention on growing Chinese naval power and influence, which stands to challenge the U.S. status as the world's preeminent naval force. Despite a clear and obvious interest in maintaining a favorable global oceans regime, the United States has not ratified the United Nations Convention on the Law of the Sea (UNCLOS), the principal international instrument governing the use of the oceans. Instead, the United States argues that ratification is unnecessary because UNCLOS "embodies" customary international law. This Note explores the legal context of U.S. nonmembership and analyzes its implications along three axes: U.S. rights and obligations, access to effective dispute settlement mechanisms, and the ability to shape future developments of the law of the sea. It concludes that relying on customary international law without being party to UNCLOS is not sufficient to guarantee the foundation of the U.S. Freedom of Navigation policy. On the contrary, ratification is in the U.S. best interest: it would lock in a favorable status quo, lend the United States credibility to meaningfully challenge divergent behavior, and offer a venue to shape the future of the law of the sea.

* LL.M. Candidate, 2025, Université Paris-Panthéon-Assas; J.D. Candidate, 2025, Fordham University School of Law; B.S., 2016, United States Military Academy. Thank you Professor Karen Greenberg for your guidance. Thank you Matthew Donovan and Luke Schumacher for your intrepid editing. And thank you to the *Fordham Law Review* for maintaining a formidable journal.



INTRODUCTION

On August 8, 2023, a joint flotilla of eleven Chinese and Russian ships neared territorial waters off the cost of Alaska's Aleutian Islands.[1] In a coordinated press release, Alaskan Senators Lisa Murkowski and Dan Sullivan decried "authoritarian aggression."[2] The Pentagon released a limited press statement, noting "the patrol remained in international waters and was not considered a threat,"[3] though it did not confirm the convoy's location. The Russian ministry of defense claimed the flotilla passed through the Kamchatka Strait,[4] which would place the ships over 260 nautical miles outside the territorial waters of the United States.[5]

For all the Senators' bluster, the White House did not publicly comment; it had different considerations. The United States aggressively pursues its own Freedom of Navigation (FON) policy,[6] often sojourning into other State's territorial waters "without a permission slip"[7] under the right of innocent passage guaranteed by international law.[8] Too strong a protest would belie hypocrisy.

Chinese media, however, was eager to weigh in. The *Global Times*, a Chinese Communist Party newspaper, accused the United States of a double standard: "[o]ver the past years, the US has repeatedly trespassed into the territorial waters or adjacent waters of Chinese islands and reefs in the South China Sea," quipping provocatively, "who is really the authoritarian aggressor?"[9] Indeed, the United States does pass through Chinese territorial waters.[10]

---

1. *See* Craig Hooper, *U.S. Mum After Confronting 11 Chinese and Russian Ships off Alaska*, FORBES (Aug. 9, 2023, 9:18 PM), https://www.forbes.com/sites/craighooper/2023/08/09/us-gives-no-details-after-confronting-11-chineserussian-ships-off-alaska/ [https://perma.cc/25NB-QMKR].

2. Press Release, Lisa Murkowski, U.S. Sen., Murkowski, Sullivan Statements on Chinese and Russian Vessels in U.S. Waters off Coast of Aleutians (Aug. 5, 2023), https://www.murkowski.senate.gov/press/release/murkowski-sullivan-statements-on-chinese-and-russian-vessels-in-us-waters-off-coast-of-aleutians [https://perma.cc/E8TS-E7V5].

3. Matt Seyler & Tal Axelrod, *Russian and Chinese Ships Patrolled "Near Alaska" but Were Not "a Threat," US Officials Say*, ABC NEWS (Aug. 6, 2023, 6:38 PM), https://abcnews.go.com/Politics/story?id=102058344 [https://perma.cc/724Y-S2D9].

4. *See* Dzirhan Mahadzir, *Russian, Chinese Warships Operated near Alaska, Say Senators*, U.S. NAVAL INST. NEWS (Aug. 6, 2023, 2:06 PM), https://news.usni.org/2023/08/06/russian-chinese-warships-operated-near-alaska-say-senators [https://perma.cc/V9EX-DGQB].

5. I calculated this figure using standard, publicly available maps.

6. *See* THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 45 (2022); *infra* Part I.C.2.

7. *Military Implications of United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Armed Services*, 108th Cong. 26 (2004) (statement of Admiral Vernon E. Clark, Chief of Naval Operations, U.S. Navy).

8. *See infra* Part I.B.1.a.

9. *Redline Breaker US Not Qualified to Accuse Legal China-Russia Patrol*, GLOB. TIMES (Aug. 7, 2023, 9:01 PM), https://www.globaltimes.cn/page/202308/1295822.shtml [https://perma.cc/JU2L-QLDT].

10. The United States conducted twenty-nine Freedom of Navigation Operations (FONOPS) in 2023 challenging "excessive maritime claims," including seven such incursions in the SCS. *See* DEP'T OF DEF., ANNUAL FREEDOM OF NAVIGATION REPORT, FISCAL YEAR 2023, at 3 (2024) [hereinafter 2023 FON REPORT]. This number has increased from

The dispute highlights an important paradox in the current U.S. oceans policy. The United States bills itself as "the world's preeminent maritime power" with the ability and intention of operating throughout the world's oceans.[11] It aggressively seeks to uphold FON to protect its and its allies' interests.[12] And it seeks to enforce the law of the sea to establish a predictable, safe, and conducive maritime environment.[13] Yet, despite its mantle as a defender of the international maritime order, the United States has not ratified the United Nations Convention on the Law of the Sea (UNCLOS),[14] the principal law of the sea instrument.[15]

Despite its leading role during negotiations,[16] despite calls from national security and military experts for ratification,[17] and despite encouragement from U.S. industry,[18] the Senate has refused to give its advice and consent.[19] As a nonmember, the United States cannot argue its rights under the treaty.[20] Instead it is left to argue its rights and obligations are unaffected because pertinent FON provisions of the treaty are binding under customary law.[21]

---

twenty-two FONOPS in 2022. *See* DEP'T OF DEF., ANNUAL FREEDOM OF NAVIGATION REPORT, FISCAL YEAR 2022, at 4 (2022) [hereinafter 2022 FON REPORT]. For more coverage see U.S. 7th Fleet Public Affairs, *7th Fleet Conducts Freedom of Navigation Operation*, U.S. INDO-PACIFIC COMMAND (Sept. 8, 2021), https://www.pacom.mil/Media/News/News-Article-View/Article/2768060/ [https://perma.cc/L25M-SYKF] (reporting the USS Benfold passed within twelve nautical miles of Mischief Reef, a Chinese claim in the Spratly Islands); Sam LaGrone, *U.S. Destroyer Performs South China Sea FONOP, China Says It Expelled Warship*, U.S. NAVAL INST. NEWS (July 13, 2022, 7:35 AM), https://news.usni.org/2022/07/13/u-s-destroyer-performs-south-china-sea-fonop-china-says-it-expelled-warship [https://perma.cc/QZ9K-W2N5] (reporting the USS Benfold passed the Paracel Islands claimed by China).

11. RICHARD LUGAR, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: REPORT TO ACCOMPANY TREATY DOC. 103-39, S. REP. NO. 108-10, at 3 (2004).

12. *See id.*

13. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, 112th Cong. 94 (2012) (statement of Sen. John Kerry, Chairman, Senate Foreign Relations Committee).

14. U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

15. *See Status of the United Nations Convention on the Law of the Sea*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg [https://perma.cc/9BBZ-4DWE] (Nov. 14, 2024, 6:50 AM).

16. *See* James Kraska, *The Law of the Sea Convention: A National Security Success—Global Strategic Mobility Through the Rule of Law*, 39 GEO. WASH. INT'L L. REV. 543, 546 (2007).

17. *See Military Implications of United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Armed Service*, *supra* note 7, at 18–23.

18. *The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 8 (statement of Sec'y Hillary Clinton, Sec'y of State) ("It has the support of every affected industry, including shipping, fisheries, telecommunications, energy, and environmental groups as well."); *id.* at 269 (statement of Thomas J. Donohue, President, U.S. Chamber of Commerce) ("The shipping industry—and industry in general—will benefit from a strong, treaty-based rule of law guided by the United States."); *Military Implications of United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Armed Service*, *supra* note 7, at 93–94 (statements of the International Association of Drilling Contractors and the American Petroleum Institute).

19. *See infra* Part I.C.1.

20. *See infra* Part I.C.1.b.

21. *See infra* Part I.C.1.b.

All the while, mounting tensions in the South China Sea (SCS)[22] present complicated and frequent dilemmas. China has redoubled its territorial claim to the so-called "nine-dash line," covering most of the SCS, and has built man-made islands as military pieds-à-terre throughout the contested region.[23]

Meanwhile, SCS States have sought to balance interests between the United States and China. The Association of Southeast Asian Nations (ASEAN) and China are engaged in ongoing negotiations to create a binding code of conduct (COC) in the region that would supplement, if not supplant, UNCLOS.[24] The United States welcomes such efforts to de-escalate regional tensions,[25] although they carry the potential of reshaping customary law to China's benefit.

Using geopolitical tensions in the SCS as the backdrop for discussion, this Note explores the legal implications of U.S. reliance on customary international law and its impact on U.S. FON policy. It proceeds in three parts. Part I introduces the background necessary to discuss U.S. FON policy: international law and the process of identifying customary law,[26] the UNCLOS framework,[27] and the U.S. position regarding each.[28] Part II assesses the legal implications of the U.S. position[29] and the consequences of not having access to viable dispute settlement mechanisms.[30] Part III discusses the benefits of ratifying UNCLOS in light of the foregoing analysis, namely that ratification would lock in a favorable status quo, provide better options to challenge divergent practices, and offer a venue for U.S. leadership to shape the future of the law of the sea.[31]

22. Nomenclature in disputed territories can unintentionally legitimize certain claims at the expense of others. The nomenclature used in this Note comports with International Hydrographic Organization and the U.S. Board of Geographic Names. *See Geographic Name Server*, NAT'L GEOSPATIAL-INTEL. AGENCY, https://geonames.nga.mil/geonames/GNSHome/ [https://perma.cc/3VBF-PZWS] (Sept. 18, 2024).

23. *See* Jerome A. Cohen & Jon M. Van Dyke, *China and the Law of the Sea*, *in* REGIONS, INSTITUTIONS, AND LAW OF THE SEA 245, 250–51 (Harry Scheiber & Jin-Hyun Paik eds., 2013).

24. *See generally* Ramses Amer & Li Jianwei, *From DOC to COC: A Regional Rules-Based Order*, *in* ROUTLEDGE HANDBOOK OF THE SOUTH CHINA SEA 357 (Keyuan Zou ed., 2021).

25. *See* Hillary Clinton, U.S. Sec'y of State, Dep't of State, Remarks at Press Availability in Hanoi, Vietnam (July 23, 2010), https://2009-2017.state.gov/secretary/20092013clinton/rm/2010/07/145095.htm [https://perma.cc/3DFA-L23V]; White House, *Joint Statement—Association of Southeast Asian Nations-United States Special Summit 2022, Joint Vision Statement*, ¶ 12 (May 13, 2022), https://www.govinfo.gov/content/pkg/DCPD-202200397/pdf/DCPD-202200397.pdf [https://perma.cc/2RTC-6Y5H].

26. *See infra* Part I.A.

27. *See infra* Part I.B.

28. *See infra* Part I.C.

29. *See infra* Part II.A.

30. *See infra* Part II.B.

31. *See infra* Part III.

I. INTERNATIONAL LAW AND FREEDOM OF NAVIGATION IN THE SOUTH CHINA SEA

The decision to ratify UNCLOS implicates broad geopolitical, commercial, and legal interests. To make sense of the legal framework surrounding UNCLOS, Part I.A introduces international law, particularly customary international law, which lies at the heart of U.S. oceans policy; Part I.B introduces UNCLOS and explores its importance to U.S. FON; and Part I.C synthesizes this context through a U.S. lens and attempts to summarize the current U.S. positions.

A. International Law

Covering over 70 percent of the earth's surface, the global ocean is one of the largest cooperative commons challenges that humanity faces.[32] Cooperation is necessary to ensure safety and prosperity. Therefore, a meaningful discussion begins with the rudiments of international law.

International law recognizes two principal sources: treaty law and customary law.[33] To make sense of these, international courts consult the subsidiary sources of the "general principles of law" and "judicial decisions and the teachings of the most highly qualified publicists."[34] Although, in theory, international decisions do not have "binding force except between the parties,"[35] in practice, international courts seek to harmonize the law with prior decisions.[36]

Treaty law, also known as conventional law, consists of contractual obligations States assume when entering a treaty.[37] Strictly speaking, treaties are binding only on party States, and thus, the rights and obligations they create cannot and do not extend to nonmembers.[38] Therefore, any discussion of rights and obligations established in UNCLOS comes with a caveat that, those provisions qua conventional provisions do not apply to the United States so long as it remains outside the treaty.[39] However, the relationship is not always so simple. There exist mechanisms whereby treaty provisions can ascend to customary law and thereby bind even nonmembers.[40]

---

32. *See* Kraska, *supra* note 16, at 543.

33. *See* Statute of the International Court of Justice art. 38(1).

34. *Id.* art. 38(1)(c)–(d).

35. *Id.* art. 59.

36. *See* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 202 (1995).

37. *See International Law*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/international_law [https://perma.cc/SKA7-RQZ8] (July 2023).

38. *See* Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 332 ("A treaty does not create either obligations or rights for a third State without its consent.").

39. *See id.*

40. *See id.* art. 38 ("Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law."); North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶¶ 71–72 (Feb. 20) (discussing the possibility a treaty provision may "pass[] into the general *corpus* of

1. Customary International Law

Customary international law is an uncodified body of binding norms derived from State practice accepted as law.[41] For a norm to be binding, it must satisfy both an objective and subjective component: (1) it must meet an objective threshold of general State practice and (2) those States must subjectively perceive that such practice is required by customary law.[42] In other words, customary law reflects what States do out of a sense of legal obligation.[43]

a. State Practice

For State practice to meet the objective element, it must be "sufficiently widespread and representative, as well as consistent."[44] However, there is no concrete formula to determine sufficiency. Jurists consider the totality of the circumstances, looking at the kind of practice in question, the degree to which it is practiced, and the nature of the practice and participants.

In terms of the kind or quality, jurists have broad latitude to consider all forms of State action and inaction.[45] In addition to actual conduct, courts consult disparate sources: official government documents and policies, diplomatic conduct, opinions of government legal advisors, decisions of national courts, press releases, military manuals, etc.[46]

Similarly, there is no definitive formula or quantitative measure to determine the degree, or quantity, of practice required. The threshold for reaching a "general practice" depends on the nature of the rule.[47] Courts have articulated the objective standard as everything from a requirement of "extensive and virtually uniform" practice[48] to one in which it may be "sufficient that the conduct of States should, in general, be consistent."[49] Much of this analysis is complicated by competing attitudes toward the process of custom formation, which I explore in the next section.

---

international law" and become "binding even for countries which have never, and do not, become parties to the Convention.").

41. *See Identification of Customary International Law*, [2018] 2 Y.B. Int'l L. Comm'n 92, U.N. Doc. A/CN.4/SER.A/2018/Add.1.

42. *See id.* at 90.

43. *See id.* at 93.

44. *Id.* at 91; *see* YOSHIFUMI TANAKA, THE INTERNATIONAL LAW OF THE SEA 12 (3d ed. 2019).

45. *See Identification of Customary International Law*, *supra* note 41, at 98–99.

46. *See id.* at 90, 99; TANAKA, *supra* note 44, at 13.

47. *Identification of Customary International Law*, *supra* note 41, at 100.

48. North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 74 (Feb. 20).

49. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 186 (June 27). *See generally* Alberto Alvarez-Jiménez, *Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence: 2000-2009*, 60 INT'L & COMP. L.Q. 681, 687–89 (2011).

In terms of the nature of participation, courts pay particular attention to the conduct of States that have a special interest in the rule.[50] In practice, this suggests that States with more economic and political capital at risk are necessary, though not on their own sufficient, for a custom to emerge.[51] This phenomenon is known as the "specially affected" doctrine.[52]

Together, one can think of the objective element as requiring a "critical mass" of consensus. This can be established even unilaterally if an actor is sufficiently influential, as was the case when the United States unilaterally declared exclusive control over its continental shelf.[53] Typically, however, critical mass is achieved as a function of the number of States converged on the norm, weighted according to the degree they are specially affected and the length of time the norm has existed.[54]

b. Opinio Juris

The subjective element requires that States exhibit the perception they are "legally compelled or entitled to [a given practice] by reason of a rule of customary international law"—a concept known as *opinio juris*.[55] The obligation must be (or at least perceived to be) legal in nature.[56] Motivations such as a desire for reciprocity, comity, pragmatism, convenience, or protocol are extralegal and cannot be used to identify the existence of a custom.[57] Further, the source of the obligation must be customary, and not another form of legal obligation such as a treaty provision or domestic law.[58] Mere treaty compliance does not evidence *opinio juris* because States comply with treaty provisions out of legal obligation to their commitments.[59]

One final point regarding the development of customary international law is the persistent objector doctrine. Stated simply, a State that persists in objecting to an emerging rule of customary law may not be subject to the

---

50. *See Identification of Customary International Law*, *supra* note 41, at 101. *See generally* Shelly Aviv Yeini, *The Specially-Affecting States Doctrine*, 112 AM. J. INT'L L. 244 (2018).

51. *See North Sea Continental Shelf*, 1969 I.C.J. 3, ¶ 74.

52. *See Identification of Customary International Law*, *supra* note 41, at 101.

53. *See* Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 1 PUB. PAPERS 352 (Sept. 28, 1945); James W. Houck, *Alone on a Wide Wide Sea: A National Security Rationale for Joining the Law of the Sea Convention*, 1 PENN. ST. J. L. & INT'L AFF. 1, 17 (2012).

54. *See Identification of Customary International Law*, *supra* note 41, at 98–102. Note, there is no strict duration requirement; it is simply one factor among many. *See id.* at 100.

55. *Cf. Identification of Customary International Law*, *supra* note 41, at 102.

56. *See id.*

57. *See id.*; North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20).

58. *See Identification of Customary International Law*, *supra* note 41, at 102.

59. *See* COMM. ON FORMATION OF CUSTOMARY (GEN.) INT'L L., INT'L L. ASS'N, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 46–47 (2000) ("What States do in pursuance of their treaty obligations is *prima facie* referable only to the treaty, and therefore does not count towards the formation of a customary rule.").

rule, but only if the State had objected throughout the rule formation process and only for so long as it consistently maintains its objection.[60]

2. Identifying Custom: Strict and Flexible Approaches

The test for identifying custom introduces a paradox: for a custom to exist there must be preexisting *opinio juris*, but for *opinio juris* to exist States must already believe there is a custom. Courts have approached this conundrum in two distinct ways.[61] One approach is the traditional strict jurisprudence, laid out in the *North Sea Continental Shelf* (Ger./Den.; Ger./Neth.).[62] The other is a flexible jurisprudence, developed in *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.).[63]

The strict approach sets a high threshold before either State practice or *opinio juris* is met. This approach requires that State practice is "extensive and virtually uniform."[64] It also scrupulously applies the requirement that the practice stem from a strictly legal obligation for the court to find *opinio juris*.[65]

The strict approach, therefore, creates an inherently conservative legal regime with a cautious attitude to identifying new customary norms.[66] Generally speaking, developed nations, which have outsized influence on (and interest in) the status quo, favor the strict approach.[67]

The flexible approach, on the other hand, is less demanding in determining whether a norm is general practice. It considers State conduct contextually, blurring the lines between the objective and subjective prongs.[68] In *Nicaragua*, for example, the International Court of Justice (ICJ) distanced itself from its prior jurisprudence, holding that it may be "sufficient that the conduct of States should, in general, be consistent."[69] This language is in stark relief from the "virtually uniform" requirement of the strict approach.[70]

Regarding the threshold for identifying *opinio juris*, the flexible approach endorses the view that the mere convergence of State practice around a given rule can be, if not a per se indication, significant evidence of *opinio juris*.[71]

---

60. *See Identification of Customary International Law*, *supra* note 41, at 111.

61. *See* Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757 (2001); Alvarez-Jiménez, *supra* note 49.

62. Judgment, 1969 I.C.J. 3 (Feb. 20).

63. Judgment, 1986 I.C.J. 14 (June 27).

64. *North Sea Continental Shelf*, 1969 I.C.J. 3, ¶¶ 74, 77.

65. *See id.*; *supra* note 57 and accompanying text.

66. *See* Alvarez-Jiménez, *supra* note 49, at 689.

67. *See* Roberts, *supra* note 61, at 767–68.

68. *See* Alvarez-Jiménez, *supra* note 49, at 687–88.

69. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 186 (June 27) ("The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule.").

70. *See supra* note 64 and accompanying text.

71. *See* Alvarez-Jiménez, *supra* note 49, at 688.

Controversially, some theorists even posit that at a certain threshold of State practice, the subjective element is wholly unnecessary.[72]

In contrast to the strict approach, developing countries favor the flexible approach because it offers more progressive inroads to shape the international legal order to more accurately reflect State practice.[73]

3. The Characteristics of Customary Law

Customary law is characterized by three elements: independence, interdependence, and indeterminacy. First, customary and treaty law are distinct bodies of law: "customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content."[74] This allows customary law to evolve quickly to keep pace with changing circumstances and technologies without being bogged down in ossified treaty law.[75] But such adaptability comes at the cost of legal stability and predictability.[76]

Second, despite its independence, customary law shares an inescapable interdependence with treaty law. The content of customary law may shape the interpretation of a treaty, and vice versa.[77] In fact, a treaty provision may indeed become universally binding, even on nonmembers, if it sufficiently ascends to the status of custom.[78] This process can take three forms. The simplest mode of ascension is the declaratory effect.[79] Where a treaty invokes established customary content, the declaratory statement is considered alongside the nature of the rule, number of signatories, and character of international objection as prima facie evidence of State practice and *opinio juris*.[80] The second mode is the crystallizing effect. The codification of an emerging norm in a treaty provision may provide the "final push" into maturity by formally reflecting existing State practice and *opinio juris*.[81] The third mode, the generating effect, operates similarly but occurs when State practice converges around a novel treaty norm with enough force to generate a new custom.[82]

---

72. *See* COMM. ON FORMATION OF CUSTOMARY (GEN.) INT'L L., *supra* note 59, at 41.
73. *See* Alvarez-Jiménez, *supra* note 49, at 689; Roberts, *supra* note 61, at 768–69.
74. *Nicaragua*, 1986 I.C.J. 14, ¶ 179; *see id.* ¶¶ 174–79; *Identification of Customary International Law*, *supra* note 41, at 92 n.637.
75. Houck, *supra* note 53, at 16–17.
76. *Id.*
77. *See Identification of Customary International Law*, *supra* note 41, at 92 n.637, 104.
78. *See id.* at 105; TANAKA, *supra* note 44, at 17.
79. *See, e.g.*, Convention on the High Seas pmbl., Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11 (declaring its stated purpose "to codify the rules of international law relating to the high seas.").
80. *Identification of Customary International Law*, *supra* note 41, at 105–06.
81. *See id.* at 106.
82. *See id.* at 107.

Lastly, the indeterminant nature of customary law suggests that its substantive content cannot be reliably known or universally accepted[83] until and unless a jurist weighs the merits of a particular dispute and so determines.[84] Unlike treaty law, which provides legal certainty through memorialized provisions in written form,[85] customary law must be "identified" through juridical process.[86]

For the United States, these dynamics have implications on its rights and obligations under the law of the sea. The indeterminate nature of custom creates something of a Schrodinger's law: rights and obligations under customary law simultaneously exist and do not exist until an international jurist declares what the law is.[87] This dynamic allows States to exploit perceived differences between custom and treaty, quickening the creation of divergent customs.[88]

B. The United Nations Convention on the Law of the Sea

Heralded as the constitution of the world's oceans,[89] the significance of UNCLOS cannot be overstated. UNCLOS provides the basis for the rule of law in the face of the most contentious issues that arise at sea—defining boundaries, jurisdiction, and rights of States over coastal waters and the seabed below and airspace above them.[90] It covers everything from the seabed floor,[91] to conservation and environmental management,[92] to marine research.[93] In addition to its substantive content, the treaty framework incorporates compulsory dispute settlement procedures,[94] which are a welcomed development in an arena where accidents are dangerous and escalation costly.[95] Despite its ambitious scope as a "package deal,"[96]

83. *See* Calling upon the United States Senate to Give Its Advice and Consent to the Ratification of the United Nations Convention on the Law of the Sea, S. Res. 220, 117th Cong. pmbl. at 3 (2021).

84. *See Identification of Customary International Law*, *supra* note 41, at 93.

85. *See* Kraska, *supra* note 16, at 568–69.

86. *See generally Identification of Customary International Law*, *supra* note 41, at 93.

87. *See supra* notes 83–86 and accompanying text.

88. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 17 (statement of Hon. Leon Panetta, Sec'y of Def.).

89. *See* John Norton Moore, *The United Nations Convention on the Law of the Sea: One of the Greatest Achievements in the International Rule of Law*, *in* LEGAL ORDER IN THE WORLD'S OCEANS: UN CONVENTION ON THE LAW OF THE SEA 5, 8 (Myron Nordquist, John Norton Moore & Ronán Long eds., 2018).

90. *See id.* at 8–9.

91. *See* U.N. Convention on the Law of the Sea, *supra* note 14, pt. XI.

92. *See id.* pt. VII, § 2.

93. *See id.* pt. XIII.

94. *See id.* pt. XV.

95. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 131 (statement of Sen. Christopher A. Coons); *id.* at 178 (statement of Ambassador John D. Negroponte, Former Deputy Sec'y of State).

96. *See* Moore, *supra* note 89, at 9.

UNCLOS remains one of the most widely accepted and ratified international instruments with 170 parties.[97]

In 1958, the international community, recognizing the need to renovate the law of the sea,[98] concluded four fundamental treaties, all of which the United States ratified.[99] However, rapid changes during the Cold War mooted this progress, leading Professor Louis Henkin to note, "[f]or three hundred years [the law of the sea] was probably the most stable and least controversial branch of international law . . . . By 1970 it was in disarray."[100]

In 1973 a third conference convened at the urging of world leaders, including President Richard M. Nixon.[101] Negotiations progressed slowly.[102] The United States, led by Ambassador John Norton Moore, sought to establish robust FON protections as a first principle.[103] However, establishing a regime that prioritized robust maritime freedoms over the sovereign rights of coastal States required careful negotiations and concessions. In defining the territorial sea, the United States accepted a larger breadth (increasing the distance from the coast that States could claim as territorial waters) in return for concrete innocent passage rights,[104] the cornerstone of U.S. FON policy.[105] Additionally, Ambassador Moore urged for a compulsory dispute settlement mechanism in the face of Soviet opposition.[106] Ultimately, Ambassador Moore prevailed.[107]

---

97. *Status of the United Nations Convention on the Law of the Sea*, *supra* note 15; Kraska, *supra* note 16, at 544.

98. *See* LORI FISLER DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW: CASES AND MATERIALS 1353 (6th ed. 2014).

99. *See id.* at 1354. The four treaties are: Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205; Convention on the High Seas, *supra* note 79; Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311; Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, 559 U.N.T.S. 285.

100. DAMROSCH & MURPHY, *supra* note 98, at 1354 (quoting LOUIS HENKIN, HOW NATIONS BEHAVE 212 (2d ed. 1979)); *see* Third United Nations Conference on the Law of the Sea, U.N. GAOR, 11th Sess., 160th plen. mtg. ¶ 5, U.N. Doc. A/CONF.62/SR.160 (Mar. 30, 1982) (statement of Mr. Robleh, the representative from Somalia) (noting the G77's "sincere desire for a treaty which would establish a universal legal order in place of the current chaos.").

101. *See* DAMROSCH & MURPHY, *supra* note 98, at 1354; Statement About United States Oceans Policy, 1 PUB. PAPERS 454 (May 23, 1970).

102. *See* Memorandum from Ambassador John Norton Moore, Deputy Special Rep. of the President for the Law of the Sea Convention, to Deputy Sec'y, Dep't of State, at 1 (Sept. 25, 1975) (on file at the Gerald R. Ford Presidential Library, John Marsh files, box 19, "Law of the Sea Negotiations—General" file), https://catalog.archives.gov/id/1563044 [https://perma.cc/2Z5R-CDVF].

103. *See infra* Part I.C.2.

104. *See* Memorandum from Ambassador John Norton Moore, Deputy Special Rep. of the President for the Law of the Sea Convention 2 (June 12, 1975) (on file at the Gerald R. Ford Presidential Library, John Marsh files, box 19, "Law of the Sea Negotiations—General" file), https://catalog.archives.gov/id/1563044 [https://perma.cc/2Z5R-CDVF].

105. *See* Kraska, *supra* note 16, at 547–48.

106. Memorandum from John Norton Moore, *supra* note 104, at 4.

107. *See infra* Part I.B.2.

On December 10, 1982, in Montego Bay, Jamaica, the convention adopted the final text.[108] The instrument bore striking similarity to Ambassador Moore's initial proposal,[109] with one consequential addition: Part XI relating to deep seabed mining, which was a domestic nonstarter.[110]

President Ronald Reagan never transmitted the treaty to the Senate, but because the remaining treaty terms advantaged U.S. interests, neither could he dismiss the treaty whole cloth.[111] Instead, he declared "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."[112]

Thus, the struggle to modernize the law of the sea faced a setback as the United States and other industrialized States supported key navigation principles but objected on economic grounds to its mining provisions.[113] The treaty languished without the requisite ratifications until, in 1994, the U.N. General Assembly adopted an implementing agreement,[114] which renovated Part XV, largely in an aim to address and correct the Reagan administration's concerns.[115] Most holdouts ratified UNCLOS as amended,[116] and the treaty entered into force in November 1994.[117] The United States did not and has not since ratified the treaty.

108. *Status of the United Nations Convention on the Law of the Sea*, *supra* note 15.

109. *See* Kraska, *supra* note 16, at 546. Israel, Turkey, the United States, and Venezuela all voted against adoption. *See* DAMROSCH & MURPHY, *supra* note 98, at 1355.

110. The irony of this outcome is that the idea for an "international regime for the exploitation of seabed resources" came from President Nixon's 1970 oceans policy. *See* Statement About U.S. Oceans Policy, *supra* note 101, at 455. President Nixon's policy advocated for the proceeds of such mining to "be used for international community purposes, particularly economic assistance to developing countries." *Id.* In a September 1976 letter to President Gerald R. Ford, Senator Lee Metcalf declared "that the United States will not sign a treaty which would . . . unreasonably limit our existing access to these resources," warning ominously the draft resolution "would have very great difficulty in obtaining the Senate's advice and consent." Letter from Sen. Lee Metcalf and Nineteen Sens. to the President (Sept. 9, 1976) (on file at the Gerald R. Ford Presidential Library, John Marsh files, box 19, "Law of the Sea Negotiations—General" file), https://catalog.archives.gov/id/1563044 [https://perma.cc/2Z5R-CDVF].

111. *See* Bernard H. Oxman, *Law of the Sea Forum: The 1994 Agreement on Implementation of the Seabed Provisions of the Convention on the Law of the Sea*, 88 AM. J. INT'L L. 687, 688–89 (1994).

112. Statement on United States Oceans Policy, 1 PUB. PAPERS 378, 379 (Mar. 10, 1983).

113. *See* Raul Pedrozo, *The U.S. Position on the U.N. Convention on the Law of the Sea (UNCLOS)*, 97 INT'L L. STUD. 81, 82 (2021).

114. *See* DAMROSCH & MURPHY, *supra* note 98, at 1356–57.

115. *See Military Implications of United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Armed Service*, *supra* note 7, at 84 (statement of Ambassador John Norton Moore). *See generally* Oxman, *supra* note 111.

116. *See* DAMROSCH & MURPHY, *supra* note 98, at 1357–59.

117. *Status of the United Nations Convention on the Law of the Sea*, *supra* note 15.

1. The Freedom of Navigation Provisions

UNCLOS's great achievement is in providing a single and settled authority preserving traditional maritime rights.[118] By codifying clear and universally accepted definitions of maritime concepts, UNCLOS standardizes maritime practices and enables basic FON.[119] This section addresses two sets of provisions. The first are enabling provisions, which are those whose standardization is foundational to operating in the maritime space, such as the demarcation of maritime boundaries and zones, and, subsequently, the rights and obligations States enjoy in those zones. The second is innocent passage, which is the cornerstone of FON.

However, it is necessary to first note that UNCLOS does not settle, nor does it purport to settle, claims of sovereignty.[120] Nevertheless, because sovereignty over habitable land entitles the State to claim maritime rights,[121] States have an incentive to exaggerate maritime claims,[122] blurring the boundary between the law of the sea and the law of sovereignty. UNCLOS recognizes this distinction. Article 298 allows States to exempt themselves from compulsory arbitration regarding border disputes and historic claims.[123] The treaty provides rules for both calculating the territorial coastline (known as the "baseline")[124] and defining the type of land features that beget maritime rights.[125] In this sense, UNCLOS can settle whether a given features is "land," but it cannot settle who owns that land.

a. Enabling Provisions

UNCLOS defines four principal maritime zones: territorial sea, exclusive economic zone (EEZ), international straits, and the high seas.[126] The territorial sea[127] extends twelve nautical miles from the State's coastal baseline.[128] States are free to regulate their territorial sea for safety, security, economic, or environmental reasons, but they may not otherwise interfere with innocent passage.[129]

---

118. *See generally* THE WHITE HOUSE, LETTER OF TRANSMITTAL, S. TREATY DOC. NO. 103-39, at III–IV (1994).

119. *See* Kraska, *supra* note 16, at 544.

120. *See* Ryan Mitchell, *An International Commission of Inquiry for the South China Sea?: Defining the Law of Sovereignty to Determine the Chance for Peace*, 49 VAND. J. TRANSNAT'L L. 749, 770 (2016).

121. *See, e.g.*, U.N. Convention on the Law of the Sea, *supra* note 14, arts. 13(2), 121(3).

122. *See* James W. Houck & Nicole M. Anderson, *The United States, China, and Freedom of Navigation in the South China Sea*, 13 WASH. U. GLOB. STUD. L. REV. 441, 441 (2014); Mitchell, *supra* note 120, at 775.

123. *See* U.N. Convention on the Law of the Sea, *supra* note 14, art. 298(1)(a)(i).

124. *See id.* arts. 5, 7.

125. *See id.* pt. VIII.

126. UNCLOS also defines other maritime zones, such as internal waters, the contiguous zone, and archipelagic waters. *See id.* arts. 8–12, 33; *id.* pt. IV.

127. *See id.* pt. II.

128. *See id.* art. 3.

129. *See id.* art. 21.

The EEZ, which States's must affirmatively claim, may extend 200 nautical miles off the State's baseline.[130] Coastal States may claim "sovereign rights to explore, exploit, conserve and manage the living resources" within their EEZ with certain limitations.[131] They may also regulate certain activities such as scientific research and surveying.[132] Other States have the same freedoms as on the high seas, provided they "comply with the laws and regulations adopted by the coastal State."[133]

International straits connect two parts of the high seas used for international navigation.[134] As such, they are particularly vital sea lanes for both national security and global FON.[135] UNCLOS addresses the security concerns of coastal States of such straits by ensuring their sovereign territorial sea and defining their rights to regulate safe passage[136] while ensuring the straits remain open to global passage.[137]

Lastly, the high seas refer to all international waters outside the EEZ of any State.[138] UNCLOS outlines six basic freedoms, subject to reasonable limitations, that all States enjoy on the high seas: navigation, overflight, laying submarine cables and pipelines, constructing artificial structures, fishing, and scientific research.[139]

b. Innocent Passage

Innocent passage prescribes clearly where vessels are authorized to go and what they are authorized to do.[140] Generally, innocent passage guarantees the right to navigate in a "continuous and expeditious" manner through territorial seas[141] "so long as it is not prejudicial to the peace, good order or security of the coastal State."[142] The treaty provides an exhaustive list defining conduct that violates the rule of innocent passage, such as "any exercise or practice with weapons of any kind," "the launching, landing or taking on board of any aircraft [or] . . . military device," and "the carrying out of research or survey activities."[143] Put simply, a foreign State is free to navigate through another State's territorial waters so long as its purpose is peaceful and its conduct has "a direct bearing on passage."[144]

130. *See id.* pt. V.
131. *See id.* art. 73.
132. *See* Cohen & Van Dyke, *supra* note 23, at 253.
133. *See* U.N. Convention on the Law of the Sea, *supra* note 14, art. 58.
134. Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 28 (Apr. 9).
135. *See* Moore, *supra* note 89, at 10; DEP'T OF HOMELAND SEC., THE NATIONAL STRATEGY FOR MARITIME SECURITY 2, 15 (2005).
136. *See* U.N. Convention on the Law of the Sea, *supra* note 14, art. 35.
137. *See id.* art. 38.
138. *See id.* art. 86.
139. *See id.* art. 87; THE WHITE HOUSE, *supra* note 118, at III.
140. *See* THE WHITE HOUSE, *supra* note 118, at III.
141. *See* U.N. Convention on the Law of the Sea, *supra* note 14, pt. II, § 3; *id.* art. 52.
142. *Id.* arts. 18–19.
143. *Id.* art. 19.
144. *Id.* art. 19(2)(l).

Innocent passage is contrasted with the general, unbridled right of navigation States enjoy on the high seas. Within the EEZ, States have a full right of navigation, meaning their passage need not meet the criteria of innocent passage, although the coastal State may impose limited regulations that are otherwise compatible with the treaty.[145]

The central dispute arising from innocent passage is whether a coastal State may require foreign warships to give notice and receive permission prior to entering the State's territorial sea or EEZ.[146] Beijing has insisted that the controversy lies not in whether foreign warships have a right to innocent passage, but whether requiring pre-authorization prejudices the passing ship's right.[147] In China's view, it does not. China memorialized its position in its declaration filed upon ratification, in which it defended a coastal State's right to require advance approval or notification from foreign warships.[148]

In 2023 alone, fourteen of the twenty-nine FON Operations (FONOPS)[149] the United States conducted were aimed at challenging pre-authorization policies—in China, Colombia, Croatia, the Dominican Republic, Latvia, the Maldives, Malta, Oman, Russia, Taiwan, Vietnam, and Yemen.[150]

2. Dispute Settlement Mechanism: The Part XV Regime

An element that distinguishes UNCLOS from other multilateral treaties—one that makes its widespread acceptance particularly noteworthy—is the inclusion of the Part XV compulsory dispute settlement mechanism in the treaty itself and not merely as an optional protocol.[151] Part XV obliges States to exchange views[152] and to exhaust bilateral and regional mechanisms before bringing a claim before an arbitral body.[153] However, once a dispute is submitted to an appropriate body, the mechanism is compulsory and the tribunal is authorized to proceed in absentia, if necessary.[154]

---

145. *Id.* arts. 56, 58.

146. Kraska, *supra* note 16, at 556. For a fantastic summary of the history and development of the right of innocent passage of warships, including the shifting view of the United States through its rise as a naval superpower, see Lawrence Wayne Keye, *The Innocent Passage of Warships in Foreign Territorial Seas: A Threatened Freedom*, 15 SAN DIEGO L. REV. 573 (1978).

147. Yu Jia, *Rethink About the Right of Innocent Passage of Warships*, 2021 MARINE L. & POL'Y 106, 109–10; *e.g.*, *infra* note 212 and accompanying text.

148. *Status of the United Nations Convention on the Law of the Sea*, *supra* note 15 (s.v. China).

149. *See infra* notes 194–200 and accompanying text.

150. *See* discussion and sources cited *supra* note 10.

151. *See* David H. Anderson, *Peaceful Settlements of Disputes Under UNCLOS*, *in* LAW OF THE SEA: UNCLOS AS A LIVING TREATY 385, 386 (Jill Barrett & Barnes Richard eds., 2016); Vaughan Lowe, *The "Complementary Role" of ITLOS in the Development of Ocean Law*, *in* REGIONS, INSTITUTIONS, AND LAW OF THE SEA, *supra* note 23, at 29.

152. U.N. Convention on the Law of the Sea, *supra* note 14, art. 283.

153. *See generally* J. Ashley Roach, *Dispute Settlement Mechanisms for South China Sea Issues*, *in* ROUTLEDGE HANDBOOK OF THE SOUTH CHINA SEA, *supra* note 24, at 413–25.

154. U.N. Convention on the Law of the Sea, *supra* note 14, pt. XV, § 2.

Another important element of the UNCLOS dispute settlement mechanism is Article 298, which allows States to formally opt out of certain categories of disputes.[155] These include disputes over maritime boundaries, military and law enforcement activities, and situations being considered and acted on by the U.N. Security Council.[156]

Lastly, Article 290 grants the authority for the arbitral body or tribunal to issue provisional measures necessary to prevent irreparable harm.[157] This authority is sweeping, as decisions in particular disputes may have an impact on non-disputants.[158]

A pivotal test of the UNCLOS dispute regime occurred in the 2016 *South China Sea Arbitration* (Phil. v. China)[159] over Chinese activities within its so-called "nine-dash line."[160] The Philippines deliberately avoided raising the question of sovereignty before the tribunal.[161] Instead it insisted, even if arguendo China did own the disputed features, China nevertheless had no right to exercise sovereignty over the adjacent waters.[162]

China rejected the tribunal's jurisdiction.[163] The Permanent Court of Arbitration (PCA) proceeded in absentia.[164] Through diplomatic papers, China argued the court lacked jurisdiction because (1) the dispute was fundamentally about sovereignty, (2) the disputants had not exhausted bilateral instruments, and (3) China had exercised its Article 298 right to opt out from maritime border disputes.[165] Despite these objections, the court issued a judgment against China.[166] In response, China "solemnly declare[d] that the award is null and void and has no binding force."[167] China continues

155. *See id.* art. 298(1)(a).

156. *See id.*

157. *Id.* art. 290.

158. *See* HIGGINS, *supra* note 36, at 202–03; *see, e.g.*, Southern Bluefin Tuna (N.Z. v. Japan; Austl. v. Japan), Cases Nos. 3 & 4, Provisional Measures, Order of Aug. 27, 1999, ITLOS Rep. 280.

159. Award, 33 R.I.A.A. 153 (Perm. Ct. Arb. 2016).

160. *See id.* ¶ 99. *See generally* Raul Pedrozo, *The South China Sea Arbitration Award*, 97 INT'L L. STUD. SER. 62 (2021). For discussion of the nine-dash line, see *infra* notes 223–27.

161. *See* Mitchell, *supra* note 120, at 770.

162. *See* South China Sea Arbitration (Phil. v. China), Award on Jurisdiction, 33 R.I.A.A. 1, ¶ 101 (Perm. Ct. Arb. 2015).

163. *See Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines*, MINISTRY OF FOREIGN AFFS. OF CHINA (Dec. 7, 2014, 8:39 AM), https://www.fmprc.gov.cn/eng/wjb/zzjg_663340/tyfls_665260/tfsxw_665262/202406/t20240606_11405446.html [https://perma.cc/9R6N-U8XF].

164. *See* U.N. Convention on the Law of the Sea, *supra* note 14, annex VII, art. 9.

165. *See* Mitchell, *supra* note 120, at 769–70; *South China Sea Arbitration*, 33 R.I.A.A. 1, ¶ 14; *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines*, *supra* note 163, pt. 2.

166. South China Sea Arbitration (Phil. v. China), Award, 33 R.I.A.A. 153, ¶¶ 1202–03 (Perm. Ct. Arb. 2016).

167. *Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines*, MINISTRY OF FOREIGN AFFS. OF CHINA (July

to reject the tribunal's jurisdiction.[168] Although the United States supports the ruling,[169] one can imagine it does so cautiously as the nature of China's objections illustrate U.S. misgivings regarding ratification.[170]

C. The U.S. Position

With the groundwork of customary international law and UNCLOS set, this Note now turns to the U.S. perspective on UNCLOS, FON, and the SCS.

1. On the U.N. Convention on the Law of the Sea

Even before negotiations began, it had been "axiomatic within the Executive Branch that U.S. oceans and political interests are best served by a treaty."[171] The treaty itself, as one defense official put it, "was, and still is, a resounding success for U.S. diplomacy."[172] In fact, it is generally accepted by defense, security, and legal experts that the law of the sea, according to UNCLOS, is overwhelmingly favorable to the United States.[173]

a. Opposition to Ratification

Despite the negotiating victory, the Senate has yet to provide its advice and consent.[174] Attempts by Presidents William ("Bill") J. Clinton (1994), George W. Bush (2004 and 2007), and Barack Obama (2012) all failed to achieve ratification.[175] Notably, after a "24-Star" hearing convened by the U.S. Senate Committee on Foreign Relations extoled the military and

12, 2016, 5:12 PM), https://www.fmprc.gov.cn/eng/zy/gb/202405/t20240531_11367334.html [https://perma.cc/8PDN-Q27C].

168. *See Foreign Ministry Spokesperson's Remarks on the Statement of the Philippine Department of Foreign Affairs Concerning Ren'ai Jiao*, MINISTRY OF FOREIGN AFFS. OF CHINA (Aug. 8, 2023, 12:12 PM), https://www.fmprc.gov.cn/eng/xw/fyrbt/fyrbt/202405/t20240530_11349794.html [https://perma.cc/9PDK-Y5WX].

169. *See* Press Statement, Dep't of State, Decision in the Philippines-China Arbitration (July 12, 2016) (on file with author).

170. *See infra* Part I.C.1.a.

171. Memorandum from John Norton Moore to Deputy Sec'y, *supra* note 102, at 3.

172. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 106 (statement of Admiral Robert J. Papp, Jr., Commandant, U.S. Coast Guard).

173. *See id.* at 103–06; THE WHITE HOUSE, *supra* note 118, at IV; *Military Implications of United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Armed Service*, *supra* note 7, at 83 (statement of Ambassador John Norton Moore); Houck, *supra* note 53, at 19.

174. *See* José E. Alvarez, *Biden's International Law Restoration*, 53 N.Y.U. J. INT'L L. & POL. 523, 530 (2021).

175. *See* Pedrozo, *supra* note 113, at 84–86. President Clinton transmitted the treaty to the Senate as required by Article II, Section 2 of the Constitution. THE WHITE HOUSE, *supra* note 118. However, the treaty has not received the Senate's advice and consent as subsequent attempts to support the treaty failed. *The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 5–6 (statement of Sen. Richard G. Lugar).

security benefits of ratification,[176] a coalition of thirty-four Senate Republicans issued a letter indicating their intention to veto ratification, effectively quashing the necessary two-thirds vote.[177] The treaty's fate remains largely unchanged.[178]

Opponents broadly argue that because the United States has successfully protected its interests from outside the treaty, ratification is unnecessary.[179] A significant element of opposition stems from economic concerns,[180] despite strong support from industry,[181] though this Note will not address economic implications.

The thrust of the security concern is that the treaty is an unacceptable abdication of sovereignty. Opponents make two general arguments: (1) UNCLOS will compromise U.S. military and surveillance activities, and (2) it will subject the United States to hostile international courts.[182] This Note will address these arguments in Part III.

b. Official Position: The Embodiment Argument

The U.S. position is that UNCLOS "embodies customary international law,"[183] a position this Note refers to as the embodiment argument. This position expresses overt support for UNCLOS provisions relating to the

176. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 91–167 (subhearing on *Perspectives from the U.S. Military* took place on the morning of June 14, 2012). The name of the hearing comes from the six four-star officers who testified. *Id.* at 210 (statement of Sen. Christopher A. Coons).

177. *See* Letter from Sens. Rob Portman and Kelly Ayotte to Sen. Majority Leader, Harry Reid (July 16, 2012), https://web.archive.org/web/20121024194127/http://portman.senate.gov/public/index.cfm/files/serve?File_id=317ccc22-1649-4982-944f-ca1d97e14075 [https://perma.cc/T5LX-H94R].

178. *See* Alvarez, *supra* note 174, at 531; *The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 244–45 (letter from the Heritage Foundation submitted for the record by Sen. James E. Risch) (containing the views of twenty-six former government officials, including Donald H. Rumsfeld, John R. Bolton, John Yoo, naval officers, and others).

179. *Military Implications of United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Armed Service*, *supra* note 7, at 112 (statement of Admiral William L. Schachte, Jr., Judge Advocate General Corp, U.S. Navy); *The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 95 (statement of Sen. Richard G. Lugar); Steven Groves, *Should the U.S. Ratify the U.N. Convention on the Law of the Sea?*, HERITAGE FOUND. (June 13, 2022), https://www.heritage.org/global-politics/commentary/should-the-us-ratify-the-un-convention-the-law-the-sea [https://perma.cc/X5CZ-Z98G]. *See generally* 153 CONG. REC. S14243 (daily ed. Nov. 13, 2007) (statement of Sen. David Vitter).

180. *See* Letter from Sens. Rob Portman and Kelly Ayotte, *supra* note 177; discussion *supra* note 110.

181. *See* sources cited *supra* note 13.

182. *See infra* notes 359–66 and accompanying text.

183. *The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 154 (statement of Admiral Samuel J. Locklear III, Commander, U.S. Pacific Command, U.S. Navy).

"traditional uses of the oceans,"[184] which it argues reflect "longstanding and customary international law."[185] Legal, defense, and security experts have consistently reiterated as much.[186]

At the heart of the U.S. security paradigm, and its interest in the SCS, is the U.S. FON policy.[187] The foundation of this policy rests on the FON provisions perfected and codified within UNCLOS.[188] But to fully enjoy the benefits of this single and universally accepted rule set, these terms must be universally binding.[189] Therefore, the embodiment argument attempts to secure the static terms of UNCLOS for the United States even though it is not a member.

Thus, the U.S. position is an amalgamation of competing interests: because key UNCLOS provisions are favorable to the United States, it supports them; because it does not have the political consensus to ratify the treaty, it has not; but because U.S. FON policy requires these provisions be universally binding and because customary law is universally binding, it argues they are custom.

2. On Freedom of Navigation

FON ensures the U.S. Navy has the reach to project force anywhere in the world[190]—a long recognized component of global power.[191] It also provides stability, which in turn facilitates a safer and more predictable maritime environment.[192] It is no surprise then, that military officials have universally voiced support for UNCLOS.[193]

---

184. *See* THE WHITE HOUSE, *supra* note 118, at III ("[I]t has been the policy of the United States to act in a manner consistent with its provisions relating to traditional uses of the oceans and to encourage other countries to do likewise."); Statement on United States Oceans Policy, *supra* note 112, at 379.

185. *See* S. Res. 220, 117th Cong. (2021).

186. *See Military Implications of United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Armed Service*, *supra* note 7, at 20 (joint statement of all Department of State legal advisors from 1983 to 2004).

187. *See* DEP'T OF HOMELAND SEC., *supra* note 135, at 1 ("The safety and economic security of the United States depend in substantial part upon the secure use of the world's oceans.").

188. *See supra* Part I.B.1.

189. *See supra* Part I.A.

190. *See Military Implications of United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Armed Service*, *supra* note 7, at 26 (statement of Admiral Vernon E. Clark, Chief of Naval Operations, U.S. Navy).

191. *See* Kraska, *supra* note 16, at 546; Jia, *supra* note 147, at 107.

192. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 153 (statement of Admiral Samuel J. Locklear III, Commander, U.S. Pacific Command) ("The Convention provides a stable legal framework of rights, freedoms, and uses of the sea.").

193. *See Military Implications of United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Armed Service*, *supra* note 7, at 36 (statement of Hon. William H. Taft IV, Legal Advisor, Department of State) ("[F]ormal U.S. adherence to the Convention would have further national security advantages."); S. Res. 220, 117th Cong. (2021) ("[B]ecoming a party to the Convention would reinforce freedom of the seas and the navigational rights vital to our global force posture in the world's largest maneuver space." (quoting Admiral Michael Gilday, Chief of Naval Operations, U.S. Navy)).

To demonstrate that the United States will not acquiesce to unilateral restrictions of FON, it conducts FONOPS designed to challenge (what it considers) excessive maritime claims.[194] FONOPS are "operational assertions" designed to bring foreign States "into conformity with UNCLOS" by flying or sailing in a manner that directly challenges over-restrictive policies.[195] In response to a 1988 incident in which a Soviet frigate "bumped" a U.S. destroyer during a routine FONOP,[196] Secretary of State George P. Shultz remarked that the FONOPS program "is completely consistent with international law. If we are to retain our rights of navigation, we must periodically exercise those rights in areas subject to illegal and excessive territorial claims."[197]

FONOPS can be dangerous, provocative, and, given the stakes, even reckless.[198] And without recourse to other effective mechanisms to challenge divergent practices,[199] FONOPS are little more than gunboat diplomacy.[200]

3. On the South China Sea

In China, the United States fears a "competitor with both the intent to reshape the international order and, increasingly, the economic, diplomatic, military, and technological power to do it."[201] Since President Obama's "Pivot to Asia" in 2011,[202] China has risen as a pacing target for the U.S. security apparatus.[203]

---

194. *See* William J. Aceves, *Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea*, *in* 68 READINGS ON INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW (1978-1994), at 243, 246 (John Norton Moore & Robert F. Turner eds., 1995).

195. DEP'T OF DEF., *Commander's Handbook on the Law of Naval Operations* 2-18 (2022); *see Military Implications of United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Armed Service*, *supra* note 7, at 26 (statement of Admiral Vernon E. Clark, Chief of Naval Operations, U.S. Navy).

196. *See* Aceves, *supra* note 194, at 251.

197. *Id.* at 253 (quoting Letter from Secretary of State George P. Shultz to Senator Alan Cranston (Mar. 21, 1988)).

198. *See supra* note 95.

199. *Cf. The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 111 (statement of Admiral Samuel J. Locklear III, Commander, U.S. Pacific Command, U.S. Navy) (mentioning in addition to FONOPS, "military-to-military communications, and diplomatic protests issued through the State Department."). Divergent practices are not necessarily illegal in a strict sense, they just indicate behavior that may differ from other State practice and, thus, may frustrate the creation of a customary norm. *See supra* Part I.A.1. Whether a divergent practice violates treaty law, and is thus illegal, is a separate question.

200. *See generally The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 25 (statements of Hon. Leon Panetta, Sec'y of Def., and General Martin E. Dempsey, Chairman, Joint Chiefs of Staff).

201. THE WHITE HOUSE, *supra* note 6, at 23; *see Combatting the Generational Challenge of CCP Aggression: Hearing Before the H. Comm. on Foreign Affs.*, 118th Cong. 6 (2023) (statement of Daniel J. Kritenbrink, Assistant Sec'y, Dep't of State).

202. *See* Remarks to the Parliament in Canberra, 2 PUB. PAPERS 1440 (Nov. 17, 2011).

203. *See* THE WHITE HOUSE, *supra* note 6, at 20, 23.

The South China Sea[204] is fertile grounds for great power competition. Geographically, it is a well contained and vulnerable nexus of international sea lanes, with over one million square nautical miles.[205] Eighty percent of the sea is enclosed by land.[206] Demographically, it sits in the center of the Indo-Pacific, which is home to more than 60 percent of the world's population.[207] Economically, it is one of the busiest international waters, transiting roughly one-third of all global shipping annually,[208] with estimated oil and natural gas reserves that rival the quantity of the Persian Gulf.[209]

Given its strategic value and resources, States vie for influence.[210] As part of the geopolitical dynamics, States, particularly China, have adopted positions adverse to innocent passage.[211] Upon ratifying the treaty, China submitted a declaration that UNCLOS provisions "shall not prejudice the right of a coastal state to request, in accordance with its laws and regulations, a foreign state to obtain advance approval . . . for the passage of its warships."[212]

In 2001 a Chinese sortie intercepted a U.S. Navy EP-3 reconnaissance plane operating over China's EEZ, causing both planes to crash and the death of the Chinese pilot.[213] Beijing accused the United States of violating Chinese airspace in contravention of UNCLOS Article 301.[214] Washington defended its FONOP as overflight, which is fully permitted within the EEZ under Article 58.[215]

---

204. For a thorough geographic survey of the SCS, see Vivian L. Forbes, *The South China Sea: Geographic Overview*, *in* ROUTLEDGE HANDBOOK OF THE SOUTH CHINA SEA, *supra* note 24, at 9.

205. *See id.* at 16–17.

206. *See id.*

207. *See Fact Sheet: In Asia, President Biden and a Dozen Indo-Pacific Partners Launch the Indo-Pacific Economic Framework for Prosperity*, THE WHITE HOUSE BRIEFING ROOM (May 23, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/23/fact-sheet-in-asia-president-biden-and-a-dozen-indo-pacific-partners-launch-the-indo-pacific-economic-framework-for-prosperity/ [https://perma.cc/3KUA-MSW6].

208. *See* China Power Project, *How Much Trade Transits the South China Sea?*, CTR. FOR STRATEGIC & INT'L STUD., https://chinapower.csis.org/much-trade-transits-south-china-sea/ [https://perma.cc/ND6W-5NEL] (Jan. 25, 2021). Estimating the value of trade transiting the SCS is notoriously difficult. A common figure is $5.3 trillion; however, $3.4 trillion is likelier. *Id.*

209. *See* Mu Ramkumar, M. Santosh, Manoj J. Mathew, David Menier, R. Nagarajan & Benjamin Sautter, *Hydrocarbon Reserves of the South China Sea: Implications for Regional Energy Security*, HAL (Apr. 28, 2020), https://hal.science/hal-02557393 [https://perma.cc/4RK7-UUCR].

210. *See* Wu Shicun, *South China Sea: How We Got Here and Where We Should Go*, CHINESE PEOPLE'S INST. OF FOREIGN AFFS., http://www.cpifa.org/en/cms/book/189 [https://perma.cc/7HQL-YTEC] (last visited Nov. 14, 2024).

211. *See* KIMBERLY HSU & CRAIG MURRAY, CHINA'S EXPANDING MILITARY OPERATIONS IN FOREIGN EXCLUSIVE ECONOMIC ZONES 1–3 (2013).

212. *Status of the United Nations Convention on the Law of the Sea*, *supra* note 15 (s.v. China).

213. *See* Cohen & Van Dyke, *supra* note 23, at 254.

214. U.N. Convention on the Law of the Sea, *supra* note 14, art. 301 (regarding peaceful uses of the seas).

215. *See id.* art. 58(1).

Similarly, in October 2023, China intentionally bumped a Filipino coast guard vessel en route to resupply the Second Thomas Shoal,[216] a low-laying island both claim.[217] In a press release, the Chinese foreign minister accused the Philippines of intruding on its territorial waters, insinuating there was no territorial dispute to speak of.[218] The Philippines not only have a naval vessel grounded on the island, but have continuously manned it since 1999.[219]

Additionally, to improve their strategic position, SCS coastal States have raced to systematically claim, dredge, and build islands on uninhabitable reefs and low lying insular features.[220] Although all SCS States have been complicit, China's efforts have been categorically different, consisting of larger, more environmentally degrading, and more enduring infrastructure.[221] Moreover, satellite imagery reveals military

---

216. China refers to this disputed island as Ren'ai Jiao. Asia Maritime Transparency Initiative, *Second Thomas Shoal*, CTR. FOR STRATEGIC & INT'L STUD., https://amti.csis.org/second-thomas-shoal/ [https://perma.cc/26Z9-XFY4] (last visited Nov. 14, 2024).

217. *See Foreign Ministry Spokesperson's Remarks on CCG Lawfully Blocking Philippine Attempt to Send Construction Materials to Its Illegally "Grounded" Warship at Ren'ai Jiao*, MINISTRY OF FOREIGN AFFS. OF CHINA (Oct. 22, 2023, 9:40 PM), https://www.fmprc.gov.cn/eng/xw/fyrbt/fyrbt/202405/t20240530_11349825.html [https://perma.cc/564Y-75UT].

218. *See id.*

219. *See* Michael Green, Kathleen Hicks, Zack Cooper, John Schaus & Jake Douglas, Asia Maritime Transparency Initiative, *Counter-Coercion Series: Second Thomas Shoal Incident*, CTR. FOR STRATEGIC & INT'L STUD. (June 19, 2019), https://amti.csis.org/counter-co-2nd-thomas-shoal/ [https://perma.cc/9LDX-GCYC]. Recent tensions have begun to mount between the two countries. In August 2023, the Chinese Coast Guard established a blockade to prevent resupplies from reaching the Filipino marines on the island. *See* Jim Gomez, *Philippine Boats Breach a Chinese Coast Guard Blockade in a Faceoff near a Disputed Shoal*, ASSOCIATED PRESS, https://apnews.com/article/south-china-sea-second-thomas-shoal-philippines-b2296168586e148e9f93bca3a8bc0787 [https://perma.cc/YQ6J-N82X] (Oct. 4, 2023, 10:53 PM); Jim Gomez, *Philippines Says Its Coast Guard Ship and Supply Boat Are Hit by Chinese Vessels near South China Sea*, ASSOCIATED PRESS, https://apnews.com/article/south-china-sea-philippines-second-thomas-shoal-64d4fad7bb42b44f991df183fb39fe1d [https://perma.cc/7SMY-PXKG] (Oct. 22, 2023, 10:15 PM). Later it fired water cannons at Filipino merchant vessels attempting to reach the island. *Id.* On October 4, Filipino ships successfully ran the blockade. *Id.* The incident on October 22 was likely an escalation to avoid another embarrassing blockade run.

220. Together, the SCS States have built over ninety outposts. Vietnam is numerically the most aggressive with approximately fifty. *See* Asia Maritime Transparency Initiative, *Vietnam Island Tracker*, CTR. FOR STRATEGIC & INT'L STUD., https://amti.csis.org/island-tracker/vietnam/ [https://perma.cc/98MR-PGL3] (last visited Nov. 14, 2024).

221. China has developed twenty-seven such outposts, dredging to create over 3,000 acres of new land. *See* Asia Maritime Transparency Initiative, *China Island Tracker*, CTR. FOR STRATEGIC & INT'L STUD., https://amti.csis.org/island-tracker/china/ [https://perma.cc/886R-RAPL] (Sept. 18, 2024). Of these efforts, three in the Spratly Islands known as the "Big 3" are of note. *See* DEP'T OF DEF., MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 18–19 (2023); Asia Maritime Transparency Initiative, *Updated: China's Big Three Near Completion*, CTR. FOR STRATEGIC & INT'L STUD. [hereinafter *AMTI Big 3 Report*], https://amti.csis.org/chinas-big-three-near-completion/ [https://perma.cc/X22G-TH3D] (June 29, 2017). Mischief Reef is approximately 600 nautical miles from the closest point in China, on Hainan, while it is only 130 nautical miles from the Philippine's Palawan island. Subi Reef is similarly situated, but only approximately 100 nautical miles closer to China than the Philippines. Fiery Cross Reef sits equipoise, at roughly 250 nautical miles from Vietnam, Malaysia, and the Philippines but 540 nautical miles from Hainan, China. These distances were calculated by the author using publicly available maps.

infrastructure—airstrips, missile shelters, radar, berthing facilities, and resupply capabilities—consistent with a flexible and permanent military strategy.[222]

Exacerbating territorial claims, China argues it holds historic title to, what it calls, the "nine-dash line."[223] The nine-dash line is a broad claim, covering the vast majority of the SCS.[224] And although China has never fully outlined the extent or basis of its claim,[225] it projects force, enlists civilian maritime forces as paramilitary patrols, exercises fishing and mineral extraction rights, and establishes naval blockades within its claimed territory in expressions of de facto control.[226] Washington has publicly rebuked the claim, drawing the ire of Beijing.[227]

The United States assesses that the Chinese Navy intends to increase its modern expeditionary capabilities and expand its influence beyond the Indo-Pacific.[228] Indeed, China has begun conducting its own FONOPS and marine research in other States' waters.[229] The combination of militarized outposts, restrictive policies, and expeditionary capabilities concerns the United States, who sees the growing Chinese Navy as a direct threat to global FON.[230]

The region also poses complicated diplomatic challenges. The United States is watchful of the ongoing ASEAN-China effort to conclude a binding regional code of conduct governing the SCS.[231] The COC would have the potential to displace UNCLOS provisions by crystalizing divergent interpretations of the treaty.[232] Because UNCLOS requires parties to settle under the peaceful terms of bilateral and regional agreements,[233] if China can successfully negotiate a regional instrument amenable to its interpretation of the law, it could then use the COC to promote the same interpretation of UNCLOS.[234] For its part, the United States has largely encouraged the

222. *See AMTI Big 3 Report*, *supra* note 221.

223. Cohen & Van Dyke, *supra* note 23, at 251.

224. *See id.* at 250.

225. Although China has made vague reference to historic exploration of the region, it has never attempted to articulate its claim or defend its basis. *See id.* at 250–51.

226. *See* DEP'T OF DEF., *supra* note 221, at 18–19, 80–82; Green, et al., *supra* note 219.

227. *See* Hillary Clinton, *supra* note 25.

228. *See* DEP'T OF DEF., *supra* note 221, at 53.

229. *See* HSU & MURRAY, *supra* note 211, at 1; Houck & Anderson, *supra* note 122, at 445–46.

230. *See* DEP'T OF DEF., *supra* note 221, at 19; *see also* Cohen & Van Dyke, *supra* note 23, at 254.

231. *See* Amer & Jianwei, *supra* note 24, at 362.

232. *See* supra Part I.A.3; *Identification of Customary International Law*, *supra* note 41, at 112; *see also The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 55 (statement of General Martin E. Dempsey, Chairman, Joint Chief of Staff).

233. *See* U.N. Convention on the Law of the Sea, *supra* note 14, art. 280.

234. China has indeed asserted bi- and multilateral agreements, including a precursor to the COC, govern its disputes in the SCS. *See Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines*, *supra* note 163, pt. 3.

development of the COC,[235] though undoubtedly it is not indifferent to its terms.[236]

II. ASSESSING THE U.S. "EMBODIMENT ARGUMENT"

Much is at stake in the law of the sea. This part grapples with how UNCLOS nonmembership impacts U.S. interests from a legal perspective. Part II.A considers the reliability of customary law in safeguarding U.S. FON. Part II.B considers the implications of not having access to viable dispute resolution mechanisms.

A. The Customary Standing of the Law of the Sea

The United States recognizes customary law is unstable.[237] Indeed, Washington advocated for a comprehensive treaty in the first instance because the existing patchwork of customary law of the sea lacked predictability and stability.[238] This section considers whether the embodiment argument remedies these deficits.

Because customary law is an independent body of law, even if the United States prevailed in defining the content of a given customary provision, its arguments would not have direct implication on the conventional interpretation of UNCLOS.[239] Therefore, the United States tries to tether customary law of the sea to the favorable rule set embodied in UNCLOS, with the expectation that if it prevails in defining the interpretation of custom it would indirectly influence the interpretation of the treaty.[240] It can do this by arguing one of three forms of the embodiment argument: (1) customary law of the sea is functionally fixed to UNCLOS (the maximalist form), (2) UNCLOS defines the content of custom (the moderate form), or (3) key UNCLOS FON provisions have ascended as custom (the weak form).

235. *See* White House, *supra* note 25, ¶ 12; Cohen & Van Dyke, *supra* note 23, at 247.

236. *See, e.g.*, White House, *supra* note 25, ¶¶ 11–12. *See generally The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 121.

237. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 10 (statement of Hillary Clinton, Sec'y of State) ("[I]n no other situation in which our security interests are so much at stake do we consider customary international law good enough to protect rights that are vital to the operation of the United States military."); *id.* at 144 (statement of Admiral Robert J. Papp, Jr, Commandant, U.S. Coast Guard) ("[C]ustomary international law is in the eyes of the beholder. Everybody has slightly different variations of customary international law.").

238. *See* Memorandum from John Norton Moore to Deputy Sec'y, *supra* note 102, at 4.

239. *See id.*

240. *See supra* Part I.C.1.b.

1. The Maximalist Form: UNCLOS Is Customary Law

The United States may argue, analogous to the finding in *Nicaragua*,[241] that UNCLOS is a proxy for customary law, or, put another way, that UNCLOS and customary law are so hermetically aligned their content is identical. In *Nicaragua*, the court found that that the use of force provisions in the U.N. Charter "correspond, in essentials, to those found in customary international law."[242] Indeed, it is well settled that UNCLOS codified, at least in part, existing customary law.[243] However, UNCLOS also innovated in important ways.[244] It modernized particularly contentious rules: defining the breadth of the territorial sea and innocent passage, formalizing new maritime zones, and protecting navigation through international straits.[245] UNCLOS is not merely an ossified codification of customary law.

A similar argument is that UNCLOS is custom because, with 170 parties, its provisions are generally accepted State practice by the overwhelming majority of States. There are three reasons this argument is less persuasive than it seems.

First, although there are only a few nonparty States, they represent an important bloc of interests. Given the size and operational scope of the U.S. Navy and the size of its economic interests, it is an unavoidable, specially affected State.[246] Similarly, others such as Eritrea, with important sovereign interests in the Red Sea, and Turkey, who controls the Bosporus strait, are notable nonmembers.[247] Second, many of those who have joined the treaty maintain persistent objections to key provisions.[248] For example, China, Russia, Malaysia, Taiwan, Vietnam, and numerous other States continue to require pre-authorization of warships.[249] Third, even if a court were to find UNCLOS had a generating effect resulting in "extensive and virtually uniform" practice,[250] the court would nonetheless need to satisfy the subjective element. In particular, the court would need to find that States abide by UNCLOS provisions not merely as treaty provisions, but because

241. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 188 (June 27).

242. *Id.*

243. *See* Kraska, *supra* note 16, at 543 ("In many respects, the Convention codifies customary international law."); *id.* at 568.

244. *See* Moore, *supra* note 89, at 13–15.

245. *See id.*; *Military Implications of United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Armed Service*, *supra* note 7, at 112 (statement of Admiral William L. Schachte, Jr., U.S. Navy).

246. *See supra* Part I.A.1.a.

247. *See Status of the United Nations Convention on the Law of the Sea*, *supra* note 15.

248. *See id.*

249. *See* 2022 FON REPORT, *supra* note 10, at 5–6; 2023 FON REPORT, *supra* note 10, at 4–6.

250. North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 74 (Feb. 20).

they believe them to be customary law.[251] This outcome would depend largely on the jurisprudence the court adopts.[252]

Together, the complexity of the treaty, the prevalence of divergent practices, and the difficulty of identifying *opinio juris* all militate against a universal finding of customary status and instead counsel a provision-by-provision analysis.[253] The maximalist argument must be tempered.

2. The Moderate Form: UNCLOS Defines Custom

Since it cannot be said that UNCLOS, in its entirety, captures the content of customary law of the sea, the next argument is that customary law is nevertheless interpreted through the lens of UNCLOS. One may argue that, as a specially affected State, where U.S. practice and *opinio juris* converge with UNCLOS, these provisions should have sufficient standing to be binding custom. The underlying test remains unchanged: for a provision to be customary international law a court must find sufficient State practice and *opinio juris*.[254]

a. State Practice

President Reagan's Solomonic compromise was in declaring that the country would abide by the "fair and balanced results" of UNCLOS,[255] thereby profiting from the treaty's favorable provisions while avoiding the unfavorable Part XI.[256]

As early as 1989, in a bilateral treaty with the Soviet Union, both States acknowledged that the UNCLOS FON provisions "generally constitute international law and practice and balance fairly the interests of all States."[257] The treaty evidences the convergence of U.S. and Soviet State practice along the treaty terms. Since then, U.S. officials have repeated the same position.[258] Similarly, the government has argued in domestic courts that,

---

251. *See supra* text accompanying notes 58–59.

252. *See supra* Part I.A.2.

253. *See generally* Kraska, *supra* note 16, at 556.

254. *See supra* Part I.A.1.

255. Statement on United States Oceans Policy, *supra* note 112, at 379.

256. *See Military Implications of United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Armed Service*, *supra* note 7, at 36 (statement of Hon. William H. Taft IV, Legal Advisor, Department of State).

257. Uniform Interpretation of Rules of International Law Governing Innocent Passage, U.S.-U.S.S.R., pmbl., Sept. 23, 1989, 28 I.L.M. 1444.

258. *See supra* Part I.C.1.b; S. Res. 220, 117th Cong. (2021) ("[B]ecoming a party to the treaty would codify the United States current position of recognizing the provisions within the UNCLOS as customary international law."); *Military Implications of United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Armed Service*, *supra* note 7, at 36 (statement of Hon. William H. Taft IV, Legal Advisor, Department of State).

although it has not ratified UNCLOS, "[w]e nevertheless cite to it as evidence of the customs and usages of international law."[259]

So too have military leaders and manuals promoted the view of UNCLOS as a codification of custom.[260] The 2022 Commander's Handbook on the Law of Naval Operations "considers the [UNCLOS] provisions concerning traditional uses of the ocean, such as freedoms of navigation and overflight, as generally reflective of customary international law binding on all States."[261] This language can be used to adduce State practice.[262] It strongly suggests that U.S. practice, or at least its intended practice, hews toward the terms set in the treaty. Even under a strict approach, official U.S. conduct and statements can be used to indicate a "general practice."[263] A court is likely to find that where U.S. practice converges with international practice along a UNCLOS provision, the objective element for this provision is satisfied.

b. Opinio Juris

A court must next turn to the subjective element. Here, the patchwork of the law of the sea complicates the customary norms that exist outside and separate from the treaty law, because States' obeyance of treaty provisions does not, in and of itself, evidence a sense of legal obligation to a customary norm.[264]

Under the strict approach, a court would need to establish the motivation of legal obligation to follow a given practice that existed ex ante.[265] This is complicated by the host of other-than-legal causes that motivate State behavior—especially when two intransigent powers compete—such as a pragmatic consideration for reciprocity, a desire for de-escalation, or mere convenience.[266] Similarly, SCS States, who often refer to their rights under UNCLOS, have equally complicated motivations as they attempt to balance U.S. and Chinese influence.[267]

The strict approach inspires little confidence in the U.S. claim to rights and obligations under customary law because the standard for norm creation is so stringent.[268] The flexible approach, however, provides more opportunity.

---

259. United States v. Aybar-Ulloa, 987 F.3d 1, 5 n.2 (1st Cir. 2021); *see* United States v. Alaska, 503 U.S. 569, 588 n.10 (1992) (citing a footnote in the Government's brief which reads "[t]he United States has not ratified [UNCLOS], but has recognized that its baseline provisions reflect customary international law").

260. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 113 (statement of Admiral Samuel J. Locklear III, Commander, U.S. Pacific Command, U.S. Navy).

261. DEP'T OF DEF., *supra* note 195, at 1-1; *see* THE WHITE HOUSE, *supra* note 6, at 45.

262. *See supra* Part I.A.1.a.

263. *See supra* Part I.A.1.a.

264. *See supra* notes 55–59 and accompanying text.

265. *See supra* notes 55–59 and accompanying text.

266. *See supra* notes 55–59 and accompanying text; Alvarez-Jiménez, *supra* note 49, at 686–87.

267. *See* Alvarez-Jiménez, *supra* note 49, at 686–87.

268. *See id.* at 698.

Because the flexible approach envisions a more fluid relationship between custom and treaty law, it posits that State motivation cannot be neatly ascribed to one or the other.[269] In this sense, it is more likely to consider the convergence of overwhelming State practice, buttressed by the normative character of the provisions, as evidence of *opinio juris*.[270]

The success of the flexible approach depends on the court's willingness to accept UNCLOS (or at least a block of its provisions, such as was the case for the use of force provisions cited in *Nicaragua*[271]) as a single, coherent entity. But courts are unlikely to do so because of the reasons pointed out above, namely that UNCLOS innovated the law of the sea in important ways.[272] Thus, its provisions must be analyzed individually to determine their customary standing.

3. The Weak Form: Key FON Provisions Are Custom

So far, this part has assessed the customary standing of UNCLOS provisions by nature of their inclusion in the treaty. This section assesses the customary standing of the fundamental FON provisions as they exist as independent provisions of customary law.

a. Enabling Provisions

FON enabling provisions operate as a minimum starting point for negotiating the content of the law of the sea.[273] To this end, many of these provisions have become settled practice, if not custom.[274] However, identifying points of contention is illuminating.

One such norm of contention addresses the right of States to claim maritime zones on low-lying insular features. To assert its claim over the nine-dash line, China alleges title through historic discovery.[275] However, the ICJ has noted that although the law of the sea expressly contemplates the recognition of low-tide elevations for the sake demarcating maritime boundaries, "the Court [is not] aware of a uniform and widespread State practice which might have given rise to a customary rule [pertaining to the law of sovereignty] which unequivocally permits or excludes appropriation

269. *See supra* Part I.A.2.

270. *See* Alvarez-Jiménez, *supra* note 49, at 687–88.

271. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 188 (June 27).

272. *See supra* notes 244–45 and accompanying text.

273. *See supra* Part I.B.1.a.

274. *See* Kraska, *supra* note 16, at 543; *The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 200 (statement of Steven Groves).

275. *See* Shicun, *supra* note 210 ("China, as the first country to have discovered, named, explored and exploited the South China Sea, has indisputable sovereignty over the South China Sea Islands and is entitled to the corresponding sovereign rights.").

of low-tide elevations."[276] Thus, the court declined to sanction the practice.[277]

The practice of claiming an EEZ is widely accepted as an "incontestable . . . part of customary law"; however, the rights States enjoy in their own and other States' EEZ is more controversial.[278] Part of the divergence of opinion is an artifact of the sheer novelty of the EEZ, which only emerged in earnest during UNCLOS negotiations, and of the compromise it embodies between sovereignty over territorial waters and the freedom of the high seas.[279]

Regarding the rights States enjoy on the high seas, customary norms are buttressed by both the declaratory and crystalizing effect of the Convention on the High Seas (CHS).[280] The CHS declared its intention "to codify the rules of international law relating to the high seas."[281] This language is mirrored in UNCLOS.[282]

In all, the customary law related to maritime sovereignty, borders, zones, and the freedom of the high seas illustrates the messiness of customary law. Although there are areas of agreement in general practice, the law is nevertheless indeterminant.[283]

b. Innocent Passage

The right of innocent passage, particularly of warships, is a topic of controversy in the law of the sea.[284] The United States grounds its right to innocent passage in the Convention on the Territorial Sea and the Contiguous Zone (CTS).[285] As a party to that treaty,[286] the United States is obliged to respect other signatories' transit through its territorial sea and is granted a reciprocal right.[287] However, this arrangement is limited to signatories and does not protect the global innocent passage rights that U.S. FON policy requires.[288]

276. Maritime Delimitation and Territorial Questions (Qatar v. Bahr.), Judgment, 2001 I.C.J. 40, ¶ 205 (Mar. 16).

277. *See id.*

278. Continental Shelf (Libya/Malta), Judgment, 1985 I.C.J. 13, ¶ 34 (June 3).

279. *See* Moore, *supra* note 89, at 14, 16–18.

280. *See* Convention on the High Seas, *supra* note 79, art. 2.

281. *See id.* pmbl.

282. *Compare id.* art. 2, *with* U.N. Convention on the Law of the Sea, *supra* note 14, art. 87.

283. *See supra* Part I.A.3.

284. *See* TANAKA, *supra* note 44, at 108–09.

285. *See* Convention on the Territorial Sea and the Contiguous Zone, *supra* note 99, § III.

286. *See* DAMROSCH & MURPHY, *supra* note 98, at 1354.

287. It is likely for this reason that the Pentagon and White House were silent as to China and Russia's joint flotilla off the Alaskan coast. *See supra* Introduction.

288. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 153 (statement of Admiral James A.Winnefeld, Jr., Vice Chairman, Joint Chief of Staff).

Unlike the CHS, the CTS does not contain a declaratory statement.[289] Considering the long-standing debate as to the full extent of innocent passage rights, this omission is significant. Although the right is nearly universally acknowledged for commercial vessels,[290] there is controversy regarding warships.[291] The heart of the controversy stems from uncertain interpretations of treaty provisions.[292] Both the CTS and UNCLOS, as a general rule, provide "ships of all States . . . the right of innocent passage."[293] They then clarify that "[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State."[294]

The treaties diverge, however, while outlining the required behavior of States exercising innocent passage. The CTS requires broadly that ships "comply with the laws and regulations enacted by the coastal State,"[295] ostensibly permitting coastal States latitude in regulating passage. UNCLOS, on the other hand, provides an exhaustive list of conduct that violates innocent passage.[296] Nonetheless, the list is not immune from creative lawyering. The first prescription, for example, prohibits passage that exhibits "any threat . . . against the sovereignty . . . of the coastal State, or in any other manner in violation of the principles of international law."[297] The broadness of the exception swallows the rule.

UNCLOS does not directly address the question of warships.[298] States alleging a right to require pre-authorization argue that under Article 30, warships are required to comply with "the laws and regulations of the coastal state,"[299] and since no other UNCLOS provision explicitly prohibits such requirements, they must be permissible.[300]

In analyzing the customary norm, the continued prevalence of the controversy contraindicates a convergence of State practice and casts doubt even as to the potential content of a rule. As early as 1928, the *Institut de droit international* in Stockholm and the Research in International Law Project of Harvard Law School expressed a prioritization of coastal States' right of sovereignty, with the latter concluding there is "no reason for freedom of innocent passage of vessels of war."[301]

---

289. *Compare* Convention on the Territorial Sea and the Contiguous Zone, *supra* note 99, pmbl., *with* Convention on the High Seas, *supra* note 79, pmbl.

290. *See* Houck & Anderson, *supra* note 122, at 441.

291. *See* TANAKA, *supra* note 44, at 108–11.

292. *See id.* at 110–11.

293. *Compare* Convention on the Territorial Sea and the Contiguous Zone, *supra* note 99, art. 14(1), *with* U.N. Convention on the Law of the Sea, *supra* note 14, art. 17.

294. *Compare* Convention on the Territorial Sea and the Contiguous Zone, *supra* note 99, art. 14(4), *with* U.N. Convention on the Law of the Sea, *supra* note 14, art. 19(1).

295. *Compare* Convention on the Territorial Sea and the Contiguous Zone, *supra* note 99, art. 17, *with* U.N. Convention on the Law of the Sea, *supra* note 14, art. 19(1).

296. *See* U.N. Convention on the Law of the Sea, *supra* note 14, art. 19(2)(a)-(l).

297. *Id.* art. 19(2)(a).

298. *See* TANAKA, *supra* note 44, at 109; Jia, *supra* note 147, at 109.

299. U.N. Convention on the Law of the Sea, *supra* note 14, art. 30.

300. *See* Jia, *supra* note 147, at 112.

301. *See* TANAKA, *supra* note 44, at 108.

The same position was articulated during the United Nations Conference on the Law of the Sea by the G77.[302] Somalia objected, claiming that "[i]nternational customary law, as evidenced by the practice of States, granted implicit powers to coastal States to distinguish between merchant ships and warships in regard to the regulations applicable to each."[303] Congo similarly reiterated its interpretation "that international customary law established, and the draft convention implied, a legal régime for the passage of warships through the territorial sea which conferred upon all coastal States the right to require prior notification or authorization."[304] One can imagine, China relies on such language in the *travaux préparatoires* to substantiate its interpretation of the law.[305] Accordingly, these States constitute a sizable bloc of persistent objectors, reaching back to before the CTS.[306]

On the other hand, significant specially affected States endorse the right.[307] A strong piece of evidence is the 1989 bilateral agreement between the United States and the Soviet Union, the world's two most specially affected parties of the day, that declared a shared understanding that "[a]ll ships, including warships . . . enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required."[308]

A similar uneasiness stems from the right of innocent passage through international straits. The United States relies on the CTS, which states, "[t]here shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation."[309] This right is supported in the 1949 *Corfu Channel* (U.K. v. Alb.)[310] case, in which the ICJ considered Albania's right to demand pre-authorization of ships passing through the Corfu Strait.[311]

In May 1946, Albanian ground forces fired upon two British cruisers exiting the channel.[312] The United Kingdom protested, but six months later, at the behest of "His Majesty's Government who wish[ed] to know whether the Albanian Government have learnt to behave themselves," the United Kingdom dispatched four additional warships through the channel.[313] Two vessels struck an Albanian minefield resulting in forty-four casualties.[314]

The ICJ held that it is "generally recognized and in accordance with international custom that States in time of peace have a right to send their

302. *See* Third United Nations Conference on the Law of the Sea, *supra* note 100, ¶¶ 5–6.
303. *Id.*
304. *Id.* ¶¶ 31–32.
305. *See* Jia, *supra* note 147, at 110.
306. *See id.* at 110–12.
307. *See generally* Uniform Interpretation of Rules of International Law Governing Innocent Passage, *supra* note 257.
308. *Id.* ¶ 2; *see supra* note 257 and accompanying text.
309. Convention on the Territorial Sea and the Contiguous Zone, *supra* note 99, art 16(4).
310. Judgment, 1949 I.C.J. 4 (Apr. 9).
311. *See id.* at 27.
312. *See id.*
313. *Id.* at 28.
314. *See id.* at 10.

warships through straits used in international navigation."[315] The ruling is admittedly narrow: the court declined to rule on "the more general question . . . whether States under international law have a right to send warships in time of peace through territorial waters not included in a strait."[316]

The narrowness of the *Corfu Chanel* decision raises concern. As is the case with all customary law, such a right is subject to both evolution and atrophy. Indeed, the tendency of customary law to atrophy and change is precisely its fatal liability.[317]

B. Access to Dispute Settlement Fora

In addition to its implications on the substantive content of the law as discussed in the previous section, nonmembership equally affects the legal processes and venues that are available to the United States. In this section we assess the role of international courts as dispute settlement mechanisms and how a lack of access to these venues impacts U.S. interests.

UNCLOS negotiators understood that it was not possible to have a comprehensive and universally accepted body of law without a comprehensive enforcement mechanism.[318] Thus, Part XV delivers the promise of the "package deal"[319]—a comprehensive legal framework held together by an ever-present specter of compulsory enforcement.[320] Part XV contributes to the hygiene and maintenance of the law by ensuring State practice hews closely to the treaty.[321] It does so by simultaneously encouraging convergence and discouraging divergence.[322]

As it stands, the primary method for the United States to enforce customary law is to contest adverse claims through FONOPS.[323] Such gunboat diplomacy is provocative; it is intended to demonstrate that the U.S. Navy can flout a coastal State's wishes without reprisal.[324] The United States could, in theory, coordinate with foreign partners to espouse its claim but, as Senate proponents have highlighted, "relying on other countries to assert [U.S.] claims . . . is woefully insufficient to defend and uphold United States

315. *Id.* at 28.
316. *Id.* at 30.
317. *See supra* note 76 and accompanying text.
318. *See supra* note 106 and accompanying text; Third United Nations Conference on the Law of the Sea, U.N. GAOR, 11th Sess. at 258, U.N. Doc. A/CONF.62/WS/18 (Apr. 1, 1982) (statement by the delegation of Colombia).
319. *See* Moore, *supra* note 89, at 9.
320. *See supra* Part I.B.2.
321. *See* Alan Boyle, *UNCLOS Dispute Settlement and the Uses and Abuses of Part XV*, 47 REVUE BELGE DE DROIT INT'L 182, 185 (2014) (Belgium); MARK E. ROSEN, CTR. NAVAL ANALYSIS, USING INTERNATIONAL LAW TO DEFUSE CURRENT CONTROVERSIES IN THE SOUTH AND EAST CHINA SEAS 19 (2015).
322. *See* Boyle, *supra* note 321, at 185–87.
323. *See supra* Part I.B.1.
324. *See Military Implications of United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Armed Service*, *supra* note 7, at 26 (statement of Admiral Vernon E. Clark, Chief of Naval Operations, U.S. Navy); *id.* at 84 (statement of Ambassador John Norton Moore).

sovereign rights and interests."[325] Nor does the United States have easy access to international courts of general jurisdiction, such as the ICJ or PCA. Although both the United States and China are de facto parties to the ICJ,[326] neither State has signed the optional protocol granting the court compulsory jurisdiction.[327] Therefore, both States would have to consent to jurisdiction for the claim to proceed, which is unlikely, to say the least.[328]

1. Encouraging Convergence

It is trivial that international courts censure specific instances of divergent behavior. However, a more significant impact of the power to punish, whether used or not, is its ex ante influence on State practice. This stems in part from a recognition that an international tribunal's rulings are—as Justice Rosalyn Higgins noted—"treated as authoritative pronouncements upon the current state of international law."[329] And although international law generally eschews the common law obsession with precedent,[330] nevertheless an international court will strive "to act consistently and build on its own jurisprudence."[331] It may be a rose by another name, but its impact is the same: international courts and tribunals borrow from one another, which produces consistency and predictability, which in turn helps converge State practice.[332]

The most obvious instance of Part XV's convergent effect comes when court pronouncements formally recognize the existence of a customary norm. In these instances, the court's holding may suspend—at least for some duration—a given custom's indeterminacy. For example, immediately following the *Corfu Channel* decision, there remained no doubt as to the existence of a right of innocent passage of warships through international straits.[333]

Dispute settlement mechanisms also sustain convergence around novel issues raised by fringe cases as new circumstances and technologies push the boundaries of interpretation. For example, as uncrewed maritime vessels (UMVs) and underwater vehicles (UUVs) become commonplace, coastal States may seek to impose restrictions consistent with their right to regulate

325. S. Res. 220, 117th Cong. (2021).
326. *See* U.N. Charter art. 93(1).
327. *See Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L CT. JUST., https://www.icj-cij.org/declarations [https://perma.cc/ZP9L-UXCG] (last visited Nov. 14, 2024); *see also* Statute of the International Court of Justice art. 36(2).
328. *See* Statute of the International Court of Justice art. 36(1).
329. HIGGINS, *supra* note 36, at 202.
330. *See* Statute of the International Court of Justice art. 59.
331. *See* HIGGINS, supra note 36, at 202–03.
332. *See generally* Robert Beckman & Christine Sim, *Maritime Boundary Disputes and Compulsory Dispute Settlement: Recent Developments and Unresolved Issues*, *in* LEGAL ORDER IN THE WORLD'S OCEANS: UN CONVENTION ON THE LAW OF THE SEA 228 (Myron Nordquist, John Norton Moore & Ronán Long eds., 2018).
333. *See* Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 28 (Apr. 9).

"the safety of navigation and the regulation of maritime traffic."[334] Access to courts, which allow States to intervene early as divergent practices emerge, helps coalesce behavior around a single, "authoritative pronouncement" of the law.[335]

2. Discouraging Divergence

International courts operate as a carrot and a stick. The carrot is the convergent effect that court pronouncements have on harmonizing international practice. The stick is the specter of international censure which discourages divergent practice. For example, despite the *South China Sea Arbitration* ruling that the disputed islands between China and the Philippines do not entitle either party to claim a territorial sea,[336] China maintains a military blockade around the islands, preventing the Philippines from resupplying marines there and denying foreign ships from transiting.[337] Setting aside the unsettled claim to the islands themselves, China's contravention of the ruling and its interpretation of UNCLOS threatens to establish a divergent norm, one seeming to suggest that a State may inhibit innocent passage around insular features deemed important to the security of the sovereign State.[338] This erosion of the rule of law directly threatens FON.

One reading of the contest is that the Part XV regime has failed to adequately sanction Chinese divergence since Beijing continues to flout the court's holding; however, this interpretation may be short sighted. Diplomatic maneuvering in the region may explain, at least in part, the SCS States ingratiation of Chinese interests.[339] Filipino President Rodrigo Duterte had been elected only the month prior to the ruling's publication; the same year he attended an economic summit in Beijing and voiced his intention to set aside the decision to foster better ties with China.[340] Indeed, the ASEAN States are invested in the success of the ongoing COC negotiations, which have proved successful in reducing regional tensions.[341]

Another reading is that the dispute settlement regime was as effective as it could be, but without U.S. support the verdict could not be meaningfully

334. U.N. Convention on the Law of the Sea, *supra* note 14, art. 21(1)(a); *e.g.*, Mark Valencia, *US-China Underwater Drone Incident: Legal Grey Areas*, DIPLOMAT (Jan. 11, 2017), https://thediplomat.com/2017/01/us-china-underwater-drone-incident-legal-grey-areas/ [https://perma.cc/NM3Z-2ZUE].

335. *See supra* note 329 and accompanying text.

336. *See supra* note 166 and accompanying text.

337. *See supra* notes 216–19 and accompanying text.

338. *See, e.g.*, ROSEN, *supra* note 321, at 19–20; Cohen & Van Dyke, *supra* note 23, at 252.

339. *See generally The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 121.

340. *See* Benjamin Kang Lim, *Philippines' Duterte Says South China Sea Arbitration Case to Take "Back Seat,"* REUTERS, https://www.reuters.com/article/us-china-philippines/philippines-duterte-says-south-china-sea-arbitration-case-to-take-back-seat-idUSKCN12J10S [https://perma.cc/QXT3-E3AN] (Oct. 19, 2016, 5:15 AM); Timothy R. Heath, *Strategic Consequences of U.S. Withdrawal from TPP*, THE RAND BLOG (Mar. 27, 2017), https://www.rand.org/blog/2017/03/strategic-consequences-of-us-withdrawal-from-tpp.html [https://perma.cc/6M7U-MF3A].

341. *See* Amer & Jianwei, *supra* note 24, at 359.

enforced. On this reading, the Philippines and its ASEAN partners are unwilling to challenge Chinese conduct lest doing so frustrate economic and diplomatic progress.[342] Since few States can economically and militarily afford to confront China, the United States is a natural ally. However, these States are hesitant to rely on the United States so long as it remains outside the treaty.[343]

C. Summary Assessment of the U.S. Position

The foregoing analysis leaves a messy picture of the U.S. standing vis-à-vis customary law. It may be useful to synthesize a few observations.

First, the outcome of the U.S. embodiment argument depends largely on whether the relevant court adopts a strict or flexible jurisprudence.[344] Combined with the independent and indeterminant nature of customary law,[345] one can see that customary law does not provide a stable foundation for the U.S. oceans policy.[346]

Second, it is imprudent for the United States to encourage a flexible approach, but given the rigidity of the strict approach, the United States would need to.[347] Relying on flexibility has paradoxical consequences.[348] Since the flexible approach reduces the threshold for state practice and *opinio juris*,[349] it thereby increases the opportunity for divergent States to establish inimical interpretations of the law.[350]

Third, so long as the United States is outside the treaty, the treaty law is free to develop without U.S. input. The United States can only challenge customary practice, but because of the independent nature of custom, such challenges have no bearing on the treaty law.[351] This deficit is felt most

342. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 127 (statement of Sen. John Kerry, Chairman, Senate Foreign Relations Committee); *see also id.* at 121; Amer & Jianwei, *supra* note 24, at 364–68.

343. *See Military Implications of United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Armed Service*, *supra* note 7, at 37 (statement of Hon. William H. Taft IV, Legal Advisor, Dep't of State).

344. *See supra* notes 252, 268–72 and accompanying text.

345. *See supra* Part I.A.3.

346. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 93 (statement of Sen. John Kerry, Chairman, Senate Foreign Relations Committee) ("[C]ustomary law is vague and doesn't provide a strong foundation for critical national security rights . . . . Joining the Convention would put our vital rights on a firmer legal basis . . . ." (quoting Former Secretaries of State, Henry A. Kissinger, George P. Shultz, James A. Baker III, Colin L. Powell, and Condoleezza Rice)).

347. *See supra* notes 268–72 and accompanying text.

348. *See infra* Part III.A.3.

349. *See supra* notes 68–73.

350. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 112 (statement of Admiral Samuel J. Locklear III, Commander, U.S. Pacific Command, U.S. Navy) ("[O]ther nations feel they can ignore the Convention's provisions when dealing with the United States, in favor of what they may view as less clear and more subjective obligations that may exist in customary international law.").

351. *See supra* notes 74–76 and accompanying text.

keenly with the emerging norm of States requiring pre-authorization of warships.[352]

Lastly, even if the United States prevailed in establishing its interpretation as the customary norm, its inability to access international courts would frustrate enforcement.[353] This outcome may satisfy the U.S. desire for universally binding provisions, but it would not ensure other States actually comply. As a nonmember, the United States does not have access to the dispute settlement mechanisms necessary to efficiently enforce the law against non-compliant States.[354]

III. BENEFITS AND IMPLICATIONS OF RATIFICATION

"We have negotiated ourselves in a position where this is most favorable to us. It is almost like having a lottery ticket—a winning lottery ticket—that you do not cash in."[355]

The decision to ratify UNCLOS implicates broad State interests. Admittedly, this Note focuses on merely one instrument of national power[356]—the legal dimension—but it reaches a similar conclusion as security and defense officials: ratification is in the best interest of U.S. FON.[357] Moreover, as the security environment becomes increasingly complex, the need for stability and predictability becomes more urgent.[358]

This part presents three principal benefits of ratification. Ratification would: (1) lock in a favorable status quo by providing legal substance and stability, (2) allow the United States to proactively and responsibly challenge divergent practices by facilitating better options and relationships with allies, and (3) provide a venue for the United States to shape the future of the law.

However, before moving to the benefits of ratification, it is important to address the main security concerns opposing ratification. First, opponents argue nebulous treaty language does not give concrete protections to what the United States considers important military and intelligence gathering rights.[359] The fear is genuine; however, it is not clear what capabilities and to what extent they may be threatened. Many defense and state officials contend ratification would strengthen U.S. capabilities by clarifying the

352. *See supra* notes 291–308 and accompanying text.

353. *See supra* notes 326–28 and accompanying text.

354. *See supra* notes 323–28 and accompanying text.

355. *The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 125 (statement of Admiral Robert J. Papp, Jr, Commandant, U.S. Coast Guard).

356. *See* DEP'T OF DEF., JOINT DOCTRINE NOTE (JDN) 1-18: STRATEGY, at vii–viii (2018); DEP'T OF DEF., JOINT PUBLICATION (JP) 1: DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES, at I-1 (2013).

357. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 153 (statement of Admiral James Winnefeld, Jr., Vice Chairman, Joint Chief of Staff).

358. *See id.*

359. *See generally* 153 CONG. REC. S14243 (daily ed. Nov. 13, 2007).

extent of its FON rights.[360] They also indicate that opting out from disputes concerning military and intelligence activity is sufficient to protect these interests.[361]

Second, opponents contend the treaty would subject the United States to unfriendly international courts in binding proceedings with hostile jurists.[362] They argue that international overreach, married with tribunals' authority to define their own jurisdiction, will leave important U.S. interests vulnerable to international courts' interdiction.[363] Particularly in light of the *South China Sea Arbitration* award—in which the tribunal granted itself jurisdiction despite China's declaration opting out of all available categories[364]—the argument is not merely hypothetical. Although these arguments raise important concerns, this Note argues that the benefits gained from participating with the international community in the maritime domain outweigh these concerns. The rest of this Note explores these benefits.

A. Perpetuate the Favorable Status Quo

As scholars and security experts have repeated, "the United States could not have obtained a better deal than that contained in the Convention."[365] So long as FON remains the bedrock of U.S. maritime power and economic prosperity,[366] stability in the law of the sea will remain a top concern. UNCLOS, which is favorable in both the substance and stability of its content, is the best tool to achieve U.S. oceans policy.

1. A Remarkably Good Deal

UNCLOS provisions are, practically speaking, the most favorable set of rules for the United States.[367] Although undoubtedly UNCLOS contains compromise, the value in stability and predictability of a comprehensive treaty outweighs the inherent indeterminacy of customary law.[368] The aggregate instrument, its widespread acceptance, and the constancy it

360. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 113 (statement of Admiral Samuel J. Locklear III, Commander, U.S. Pacific Command) ("Accession would strengthen our ability to conduct such operations by eliminating any question of our right.").

361. *See Military Implications of United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Armed Service*, *supra* note 7, at 32 (statement of Hon. William H. Taft IV, Legal Advisor, Dep't of State); WARREN CHRISTOPHER, LETTER OF SUBMITTAL, S. TREATY DOC. 103-39, at IX–X (1994).

362. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 160 (statement of the Coalition to Preserve American Sovereignty); 153 CONG. REC. S14241–42 (daily ed. Nov. 13, 2007).

363. *See* 153 CONG. REC. S14242–43 (daily ed. Nov. 13, 2007).

364. *See supra* notes 159–70 and accompanying text.

365. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 72 (statement of General Martin E. Dempsey, Chairman, Joint Chief of Staff) ("The rules of the Convention that guarantee the freedom of navigation are favorable to our interests."); *supra* note 173 and accompanying text.

366. *See* Kraska, *supra* note 16, at 547–48.

367. *See supra* note 173 and accompanying text.

368. *See supra* notes 103–06 and accompanying text.

provides are more significant than the marginal compromises required to achieve the treaty. This is especially true after the implementing agreement revoked contentious deep seabed mining provisions, a colossal concession from the international community.[369]

The codification of a twelve nautical mile territorial sea, the right to a 200 nautical mile EEZ, innocent passage, transit passage through international straights, and freedom of navigation on the high seas are all fundamental to the U.S. policy of modern global FON. And all are central components of UNCLOS.[370]

2. A Firmer Foundation Than Customary Law

UNCLOS provides a firmer foundation of law, which is to say it is less susceptible to erosion and evolution than customary law.[371] UNCLOS establishes a single, static, and authoritative instrument with a baseline of States' rights and obligations.[372] Ratification would allow the United States to profit from this rule set while avoiding the constant evolution of custom and the perennial attention that is required to upkeep the customary status quo.[373]

Opponents of ratification argue that the United States has prevailed in protecting its oceans policy without joining the treaty.[374] Therefore, they conclude, ratification is unnecessary.[375] The argument is logically attractive but misleading. First, the geopolitical status quo is changing. What worked in the past may no longer work as threats evolve.[376] The White House recognizes China's unique potential and desire to shape the global order.[377] Given the SCS's importance to China's vision, it would be remiss to overlook its intent to reshape the law of the sea.

---

369. *See* Third United Nations Conference on the Law of the Sea, U.N. GAOR, 11th Sess. at 264, U.N. Doc. A/CONF.62/WS/23 (Apr. 16, 1982) (statement by the delegation of Canada) ("It is ironic in the light of recent developments to recall that many of those who argued that the trade-off should be freedom of navigation in return for resources, are now insisting, having obtained the guarantees of freedom of navigation that they demanded, that they are entitled to the lion's share of the resources.").

370. *See supra* Part I.B.1; *supra* note 245 and accompanying text.

371. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 14 (statement of Hillary Clinton, Sec'y of State) ("Joining the Convention would secure our navigational rights and our ability to challenge other countries' behavior on the firmest and most persuasive legal footing, including in critical areas such as the South China Sea."); *id.* at 149 (statement of Admiral James Winnefeld, Jr., Vice Chairman, Joint Chief of Staff) ("Treaty law remains the firmest legal foundation upon which to base our operational posture.").

372. *See* Kraska, *supra* note 16, at 568–69.

373. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 144 (statement of Admiral Robert J. Papp, Jr, Commandant, U.S. Coast Guard) ("[C]ustomary international law is in the eyes of the beholder.").

374. *See supra* note 179 and accompanying text.

375. *See supra* note 179 and accompanying text.

376. *See* THE WHITE HOUSE, *supra* note 6, at 23.

377. *See id.*

Second, even if the U.S. policy has secured oceans interests in the past, this does not imply its policy has been optimal. Every FONOP the United States is forced to conduct is inherently a failure of less-than-military means of achieving the desired outcome.[378] FONOPS are demonstrations of U.S. power, but without other tools to reinforce the outcome, they run the risk of becoming banal. As Thomas Jefferson wrote, "I hope our wisdom will grow with our power, and teach us that the less we use our power the greater it will be."[379]

Third, FON is not an end in itself. It is a means to open oceans conducive to security and trade. To this point, it is relevant that both security and industry experts endorse ratification.[380]

3. A Consistent and Coherent Legal Strategy

Ratification would allow the United States to maintain the beneficial status quo while avoiding the paradox introduced by an overreliance on customary law.[381] In most circumstances, the United States favors the strict approach to identifying customary law[382] because it tends to insulate the status quo and benefit developed States.[383] Indeed, the United States has traditionally argued for a strict jurisprudence over the objections of developing States, which accuse the international legal order of perpetuating Western imperialism.[384]

However, in the context of the law of the sea, the strict approach is less likely to protect U.S. interests.[385] Therefore, the United States must tacitly endorse a flexible jurisprudence.[386] Of course the irony is that the flexible approach enables more rapid development of customary law, including developments inimical to U.S. interests,[387] which in the end may be self-defeating.

To illustrate this dilemma, consider the ASEAN-China COC. Given China's rising influence, especially its position to shape the COC, it can marshal State practice and *opinio juris* to present plausible customary norms and interpretations of the law to challenge those of the United States.[388] This is particularly true in novel areas of the law of the sea where a convergence of practice has yet to materialize. The flexible approach that the United

---

378. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 25–26 (statement of Hon. Leon Panetta, Sec'y of Def.).
379. Letter from Thomas Jefferson to Thomas Leiper (June 12, 1815) (on file with author).
380. *See supra* notes 17–18 and accompanying text.
381. *See supra* note 350 and accompanying text.
382. *See supra* Part I.A.2.
383. *See* Alvarez-Jiménez, *supra* note 49, at 689.
384. *See id.*; Roberts, *supra* note 61, at 768.
385. *See supra* Part II.A.
386. *See supra* Part II.C.
387. *See supra* note 350 and accompanying text.
388. *See supra* notes 231–36 and accompanying text.

States would argue to assert that UNCLOS provisions have ascended as custom would similarly open the door for China and like-minded States to assert that their divergent practices have customary standing.[389] This reliance on customary law creates instability to the U.S. FON policy, but also jeopardizes other areas of international law which the United States relies on. Prevailing in asserting its rights under customary law may in the end prove to be a Pyrrhic victory.

B. Position the United States to Challenge Divergent Practices

Defense officials acknowledge that U.S. credibility is compromised since it is shut out of important multilateral venues.[390] This includes, of course, the ongoing COC negotiations. If concluded, the COC would offer a competing interpretation of the law of the sea.[391] Further, as a regional instrument, the COC would hasten the creation of customary norms because of the SCS's significance to global transit and UNCLOS parties' obligation to settle disputes through bilateral and regional means.[392]

For example, it is possible the COC will codify a coastal State's right to require pre-authorization of warships to transit the territorial sea.[393] This provision will be binding on the SCS parties. Most other States will likely acquiesce to the new norm so as to maintain friendly relations with China, a significant regional power and trading partner.[394] The United States, however, is uniquely positioned, not merely because it can better afford the economic costs of challenging China, but because it offers an economic alternative for allies to rally behind. However, such allies will remain hesitant if the United States' only means of mounting a challenge is through gunboat diplomacy.[395] Without the legitimacy and stability UNCLOS provides, the United States is at a marked disadvantage for building a coalition to challenge divergent interpretations of the law.[396]

Ratification would not single-handedly interrupt the COC's disruptive potential. But it would empower the United States and its allies with the tools needed to confront Chinese overreach.[397] In particular, it would offer diplomatic avenues to avoid conflicts as well as peaceful dispute settlement

389. *See supra* notes 347–50 and accompanying text.

390. Yann-huei Song, *Possibility of U.S. Accession to the LOS Convention and Its Potential Impact on State Practices and Maritime Claims in the South China Sea*, *in* MAJOR LAW AND POLICY ISSUES IN THE SOUTH CHINA SEA: EUROPEAN AND AMERICAN PERSPECTIVES 75, 86 (Yann-huei Song & Zou Keyaun eds., 2014).

391. *See supra* notes 231–36 and accompanying text.

392. *See supra* notes 152–53 and accompanying text.

393. *C.f.* Houck & Anderson, *supra* note 122, at 449.

394. *See id.* at 451.

395. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 26.

396. *See also id*. at 136 (statement of Admiral Robert J. Papp, Jr, Commandant, U.S. Coast Guard).

397. *See id.* at 93 (statement of Sen. John Kerry, Chairman, Senate Foreign Relations Committee).

mechanisms to resolve them.[398] But more important, it would allow the United States to present a unified front along with its allies, backed by the authority of the law, with the real potential of prosecuting its interpretation of the law of the sea on the international stage.

1. Stronger Relations with Regional Allies

Nonmembership impedes U.S. credibility.[399] As Admiral John M. Richardson noted, "[W]e undermine our leverage by not signing up to the same rule book by which we are asking other countries to accept."[400] But ratification would do more than simply avoid diplomatic sanctimony;[401] it would overcome concrete challenges that stand in the way of building meaningful relationships with international partners.[402] At the same time, China continually cites U.S. nonmembership to dismiss U.S. criticism off hand.[403]

Strategic and diplomatic experts note that U.S. nonmembership inhibits its ability to cooperate, even with allies, in areas related to the law of the sea.[404] Because the United States cannot operate within the framework to challenge divergent behavior, its only practical recourse is FONOPS.[405] This leaves allies uneasy that they, not the United States, will bear the brunt of Chinese reprisals. The United States can assume the risk and attendant costs of such disruptive measures, but many of its allies cannot.[406] Thus, U.S. allies see U.S. nonmembership as a liability and as a condition more likely to disrupt

398. *See* Houck & Anderson, *supra* note 122, at 451–52.

399. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 181 (statement of Ambassador John D. Negroponte, Former Deputy Sec'y of State) ("Remaining outside the Convention undermines U.S. credibility and limits our ability to achieve critical national security objectives.").

400. S. Res. 220, 117th Cong. pmbl. at 10 (2021).

401. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 179 (statement of Ambassador John D. Negroponte, Former Deputy Sec'y of State) ("[F]or us again to reject this Convention [after our Part XI] concerns have been met, I would say would be tantamount to a diplomatic slap in the face."); *id.* at 181 ("More difficult to measure than the tangible benefits gained from U.S. accession is the diplomatic blight on America's reputation for rejecting a carefully negotiated accord that enjoys overwhelming international consensus and a treaty that was adjusted in unprecedented fashion to specifically meet the demands put forth by President Reagan.").

402. *See id.* at 10 (statement of Sen. John Kerry, Chairman, Senate Foreign Relations Committee) ("[A]s a party to the Convention, we would have greater credibility in invoking the Convention's rules and a greater ability to enforce them.").

403. *Id.* at 127 (statement of Sen. John Kerry, Chairman, Senate Foreign Relations Committee) ("China . . . does not listen to us either because we are not party to [UNCLOS].").

404. *See id.* at 22 (statement of General Martin E. Dempsey, Chairman, Joint Chief of Staff).

405. *See supra* Part I.C.2.

406. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 127 (statement of Sen. John Kerry, Chairman, Senate Foreign Relations Committee) ("The Philippines and Vietnam have both specifically asked us to join the Law of the Sea in order to be able to help them leverage a peaceful outcome to the disputes of the South China Sea because they cannot do it on their own because of China's power.").

and frustrate regional stability than achieve strategic goals.[407] Ratification would help accelerate the convergence of State practice by assuaging these concerns and enabling more meaningful coalitions.

2. Access to International Courts

Ratification also provides useful tools to challenge divergent practices, most notably access to dispute settlement mechanisms. The Part XV regime provides an efficient mechanism to enforce the law in its current form.[408] The lack of access to dispute fora frustrates the United States' ability to weigh in when adversaries challenge its or its allies' interpretation of the law. For example, when the United States asked to participate in the *South China Sea Arbitration* in support of the Philippines, the tribunal denied Washington observer status.[409] Similarly, throughout the 2018 Kirk Strait incident,[410] the United States was unable to mount a direct legal challenge in defense of Kyiv after Russia seized three Ukrainian ships and their crew in violation of international law, even after the International Tribunal for the Law of the Sea (ITLOS) voted 19–1 in a provisional order that Russia must return the ships and crews to Ukrainian custody.[411] Without access to international tribunals, the United States cannot obtain a conclusive answer on the interpretation of the law, which is functionally the most decisive means of both encouraging convergence of State practice and discouraging divergent practice.[412]

3. Reduce Tensions in the South China Sea

Ratification would lend the United States legitimacy and credibility in the maritime domain. Ratification would signal U.S. seriousness in maintaining a robust FON policy while at the same time demonstrating its commitment to peaceful, nonescalatory, and nonprovocative means of managing great power competition, especially in the SCS where rising tensions have the potential of global implications.[413] The U.S. Navy boasts impressive size, capability, and competence. But this does not make it the only, or even the

---

407. *See Combatting the Generational Challenge of CCP Aggression*, *supra* note 201, at 88 (statement of Daniel J. Kritenbrink, Assistant Sec'y, Dep't of State); Houck, *supra* note 53, at 20.

408. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 20 (statement of Leon Panetta, Sec'y of Def.) ("[Ratification] would give us the power and credibility to support and promote the peaceful resolution of disputes within a rules-based order.").

409. *See* S. Res. 220, 117th Cong. pmbl. at 3 (2021).

410. *See Russia-Ukraine Tensions Rise After Kerch Strait Ship Capture*, BBC (Nov. 26, 2018, 1:03 AM), https://www.bbc.com/news/world-europe-46340283 [https://perma.cc/TZ8J-E8A6].

411. *See* S. Res. 220 pmbl. at 3–4.

412. *See supra* Part II.B.

413. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 131 (statement of Sen. Christopher A. Coons) ("[T]he entire dangerous, risky, and provocative process [of conducting FONOPS] could be avoided in some circumstances by ratifying this treaty and being able to contest excessive claims in the ways it allows us to do.").

best, tool for effecting U.S. policy. As President Obama remarked, "Just because we have the best hammer does not mean that every problem is a nail."[414] Defense experts continue to warn that "the force of arms does not have to be and should not be our only national security instrument."[415] Further, FONOPS are deleterious to other avenues of resolution. They send confusing signals to allies and adversaries alike. Most obviously, FONOPS place disputing vessels in close proximity, increasing the potential for accidents, which are dangerous at sea but when coupled with the risk of escalation can quickly become catastrophic.[416] Ratifying the treaty would ensure that when the United States does resort to FONOPS, the message is credible and clear.[417]

C. Shape the Future of the Law of the Sea

UNCLOS provides a single framework for shaping development of the law of the sea through both settlement and amendment mechanisms.[418] As new issues arise, the UNCLOS framework, and the formal and informal channels between member States, will be the first place discussions take place. By choosing not to participate in these discussions, the United States is closing the door on the opportunity to shape the future of the law of the sea.[419]

The law of the sea, as well as the global oceans themselves, is under constant stress. Climate change, for example, is opening new areas of the law, both physically and conceptually.[420] UNCLOS is the only legal framework to govern emerging disputes in the Arctic as melting icecaps expose navigable sea lanes; however, the United States is the only Arctic State that has not ratified the treaty.[421]

Similarly, advancements in passive intelligence, surveillance, and reconnaissance (ISR) capabilities;[422] the emergence of uncrewed maritime

414. Barack Obama, Remarks by the President at the United States Military Academy Commencement Ceremony (May 28, 2014, 10:22 AM).

415. *The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 22 (statement of General Martin E. Dempsey, Chairman, Joint Chief of Staff).

416. *See id.* at 95 (statement of Sen. Richard G. Lugar); *id.* at 131 (statement of Sen. Christopher A. Coons); *id.* at 180 (statement of Ambassador John D. Negroponte).

417. *See id.* at 70 (statement of Hon. Leon Panetta, Sec'y of Def.) ("[Ratification] would certainly afford us increased authority in the conduct of our operational assertions.").

418. U.N. Convention on the Law of the Sea, *supra* note 14, arts. 312–16.

419. *See The Law of the Sea Convention (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Rels.*, *supra* note 13, at 73 (statement of General Martin E. Dempsey, Chairman, Joint Chief of Staff).

420. *See* Houck, *supra* note 53, at 11–13. *See generally* Olivia Wooley, *Renewable Energy and the Law of the Sea*, *in* EMERGING TECHNOLOGY AND THE LAW OF THE SEA 35 (James Kraska & Young-Kil Park eds., 2022).

421. *See* S. Res. 220, 117th Cong. pmbl. at 10 (2021).

422. *See generally* James Kraska, *Seabed Technology and Naval Operations on the Continental Shelf*, *in* EMERGING TECHNOLOGY AND THE LAW OF THE SEA, *supra* note 420, at 301.

vehicles;[423] shifting attitudes toward nuclear powered vessels;[424] and even high orbit satellites[425] are all law of the sea challenges that have direct effect on U.S. FON.[426] By not being a member, the United States has abdicated its seat at the table where these debates are taking place.

UNCLOS establishes a conceptual starting point for balancing the principles of freedom and sovereignty to guide future development.[427] This balance, however, is susceptible to erosion.[428] U.S. ratification would signal its commitment to the balance struck in UNCLOS and provide like-minded States the diplomatic support to advocate for the same.

CONCLUSION

The reach of the modern law of the sea can be dizzying. It exists on a foundation of both customary international law and conventional treaty law. It implicates everything from national security to trade, fishing, energy, the environment, and individual enjoyment of the oceans. And it occupies a rare status in international relations as practically all States recognize the clear benefit and need of legal standardization.

If past is prologue, there is little doubt that the global oceans will continue to be a central arena of great power competition—and the SCS will be its main stage. As powers vie for influence in the SCS, as emerging technologies and geopolitical winds shift, and as the law develops to keep pace, tensions will remain. In particular, as competing superpowers, the United States and China, maneuver to entrench their visions of the rules governing the global oceans, their navies, diplomats, and proxies will be placed in uncomfortably close quarters. To repurpose the proverbial sentiment, when great ships play chicken the wake disrupts the sea. A single strategic miscalculation or tactical misstep when navigating these tensions could lead to disastrous consequences. Getting it right is important.

The U.S. position on the law of the sea stands on shaky legs. The United States cannot rely on customary law to protect key U.S. FON provisions. Customary law is inherently indeterminate, volatile, and subject to reinterpretation. Ratification bypasses these shortcomings by providing a firm legal foundation with embedded dispute settlement mechanisms, which together offer stability, predictability, and a rule set that is remarkably favorable to U.S. interests.

Of course, opponents raise valid concerns. Ratification would subject the United States to international courts, but the benefits of having recourse to a

423. *See generally* Raul (Pete) Pedrozo, *Unmanned and Autonomous Warships and Military Aircraft*, *in* EMERGING TECHNOLOGY AND THE LAW OF THE SEA, *supra* note 420, at 272.

424. *See generally* Elena Bernini, *Small Modular Reactors and Transportable Nuclear Power Plants*, *in* EMERGING TECHNOLOGY AND THE LAW OF THE SEA, *supra* note 420, at 108.

425. *See generally* Brian Wilson, *Maritime Cyber Security*, *in* EMERGING TECHNOLOGY AND THE LAW OF THE SEA, *supra* note 420, at 158.

426. *See* DEP'T OF DEF., *supra* note 221, at 53.

427. *See supra* Part I.B.

428. *See supra* Part II.B.2.

court with the jurisdiction to peacefully settle disputes has been undervalued. Far from being an abdication of congressional responsibility or a degradation of U.S. sovereignty, ratification would amplify the voice of U.S. policymakers to shape the law and to express and protect U.S. interests. Ratification would open the doors to important venues for U.S. leadership, thereby augmenting, not undermining, sovereignty.

After all, given that the United States already abides by the treaty provisions, formal accession to the treaty would signal to the world that U.S.-styled FON is and will continue to be the global norm.

In sum, global oceans challenges will continue to complicate U.S. interests and security. The law, the world, and the sea are all rapidly changing. The question is, will the United States be positioned to effectively cope? Although at one point ratifying UNCLOS may have threatened U.S. interests, the strategic environment has shifted. Today, it is not ratifying that carries the greater risk.