

**THE LAW OF THE SEA CONVENTION:
A NATIONAL SECURITY SUCCESS**

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**Panel I: A Decade of the Law of the Sea Convention:
Is it a Success?**

**The Law of the Sea in the Twenty-First Century:
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**The views presented here are those of the author and do not reflect the
official policy or position of the Department of Defense, the Joint Staff,
or the U.S. Government.**

I would like to thank Associate Dean Susan Karamanian for organizing the symposium and for extending an invitation to me to participate with such distinguished judges, scholars and colleagues.

Thank you also to Professor Thomas Franck for serving as the Chair of this panel, which seeks to make some assessment of the success of the Law of the Sea Convention. I am delighted to be a part of this special remembrance of the life and work of Professor Sohn, who shaped the treaty as a delegate to the Convention from 1974-1982. In evaluating whether the Convention has been a *national security* success, I would like to turn toward another important leader and scholar in the early development of the Convention. Before I do, however, I would like to preface these remarks with a Department of Defense disclaimer, which is, the views presented here are those of the presenter and do not reflect the official policy or position of the Department of Defense, the Joint Staff, or the U.S. Government

With that out of the way, I'd like to take us back three decades. It was in September of 1975 that John Norton Moore wrote that U.S. oceans interests are best served by achieving a comprehensive treaty on the law of the sea.¹ At the time, a few scholars urged that such a treaty was unattainable and, moreover, that the United States had little interest in negotiating such an agreement in any event. In calling that view, "profoundly mistaken," Professor Moore's written evaluation was not part of an academic exercise, but rather an assessment sent to the Deputy Secretary of Defense, written while Ambassador John Norton Moore was serving as the as the Chairman of the Interagency Task Force on the Law of the Sea. The letter provides a succinct record of the enduring spectrum of U.S. national security interests in a widely accepted and stable global regime for the oceans.

¹ Ambassador John Norton Moore, Briefing Memorandum to The Deputy Secretary of State, Sep. 25, 1975, declassified on Mar. 9, 2004, and available electronically at Declassified Documents Reference System, INFOTRAC.

At that time, right as the text of the Law of the Sea Convention began to take shape, Ambassador Moore suggested that the treaty could capture and promote a range of U.S. oceans and political interests, broadly promoting national military and economic security and environmental protection. “[T]his does not mean a treaty at any price,” he wrote at the time, but the final text to be signed at Montego Bay seven years later would remarkably parallel Ambassador Moore’s analysis, including protection of maritime freedom of navigation and overflight through international straits and areas of resource jurisdiction. The Convention would also promote bedrock U.S. political interests in conflict avoidance, dispute resolution and the stability of juridical boundaries.

The vision shared by Professors Sohn and Moore and others reflects a long-range perspective for oceans policy, something that Yale Professor of History Paul Kennedy argues is an essential condition for a maritime state to maintain the status of a global maritime power.

National security interests were preeminent in crafting the final text of the Law of the Sea Convention, so it is unsurprising that implementation of the treaty framework promotes regional stability and yields other national security benefits. The claim by some that the Convention represents a progressive assault against U.S. national security interests is unfounded, as the Convention in fact secured essential oceans interests of maritime powers while providing a favorable framework for the peaceful resolution of competing maritime disputes. Moreover, the navigational provisions in the text are an effective bulwark protecting global maritime maneuverability and mobility of naval vessels and aircraft, freedoms that underpin our national security and serve to protect international economic prosperity. Perhaps the greatest maritime security success of the Convention was to achieve global acceptance for the regime of straits used for international navigation in Part III of the Convention.

Prior to 1982, the status of international straits was embroiled in controversy. In just one example, Malaysia and Indonesia claimed the Strait of Malacca as territorial waters.² At the time, the United States and other maritime states including our Cold War adversary, the Soviet Union, as well as Japan and the United Kingdom, were deeply concerned that straits states may begin to try to limit tonnage through the straits, stop traffic or impose tolls for passage, or even close the straits in some extreme cases. If the waters of the strait were determined to be territorial waters, submarines could be required to surface and civil and military aircraft could be denied passage.

Only in the last few years has there arisen a fairly effective campaign to challenge the value of the Convention to U.S. national security; I do not challenge the legitimacy of expression of those views, but I believe they are incorrect on the merits. One of the lead critics has said treaty proponents include, “the wealth redistributors, the one-worlders, environmentalists, international lawyers and the usual suspects on the Left,” as well as, “the U.S. Navy, the American oil industry and Vice President Cheney.” While I can tell you with a fair amount of certainty that the U.S. Navy is not in collusion with the “wealth redistributors” and the “one-worlders,” I am not prepared to comment on whether the Vice President and the American oil industry indeed are instruments of the far Left.

The recent critic continues, saying, “Such support appears to be motivated by narrow, parochial, and short-sighted reasons” Because criticism of the treaty has arisen from outside the oceans community, the external perspective can help us to develop a more complete understanding of the value of the treaty.

My purpose today is not to provide a catalog accounting of the national security benefits of the Convention, something that already has been done by the most senior military officers. In 2004, for example, when the treaty was under active consideration in the U.S. Senate, the Joint Chiefs of Staff, the worldwide 4-star combatant commanders and the Chief and Vice Chief of Naval Operations strongly supported U.S. accession to the

² William D. Hartley, “When is a Strait International, When Territorial? No One is Quite Sure, and Therein Lies a Dispute,” *The Wall St. J.* Nov. 30, 1972 p.40.

Convention.³ These uniformed flag-level officers provided ample testimony to the Senate concerning a broad range of national security interests directly promoted by the Convention. The testimony is a matter of public record, included in the Report of the Senate Foreign Relations Committee, which voted the treaty out of committee in a bipartisan 19-0 vote.

My focus today is to take a few moments and step back to review the Convention from the 50,000-foot perspective—discussing our national security interests in the Convention within a broader, perhaps more macro context, which is our interest in wide acceptance of a favorable, stable regime of the seas. This interest also promotes our policy objective in seeking acceptance throughout the world for respect for the rule of law. The Convention offers a comprehensive, nearly universally-accepted package of favorable rules for the conduct of military operations at sea and in the air, and that serve as the basis for diplomatic engagement on the entire range of competing and sometimes conflicting regional and global oceans policies. By providing a point of departure for such discussions, particularly those related to maritime security, the Convention has brought parties together within a common nomenclature, an accepted state practice, and within legal and policy reference points to peacefully resolve their differences.

Some critics have suggested that the treaty lacks value because some nations, even some signatory nations still fail to conform completely their state practice, their national legislation and their maritime claims to the framework reflected within the Convention. China, for example, became party to the Convention a decade ago and yet still persists in a series of excessive maritime claims in the East China Sea. In fact, in a declaration filed in conjunction with accession, China reaffirmed its claim to require permission for warships to conduct innocent passage in the territorial sea, a provision inconsistent with the plain reading of the Convention.

³ Following the 1994 Agreement relating to the implementation of Part XI, all living former Chiefs of Naval Operations endorsed the Convention in a 1998 letter urging the Senate leadership to take positive action on U.S. accession. Statement of Admiral Michael G. Mullen, Vice Chief of Naval Operations, Joint Chiefs of Staff, Department of the Navy, 102, at 103.

China subsequently passed legislation in June, 1998, that fails to recognize the airspace above its EEZ as international airspace, and has interfered with U.S. reconnaissance flights over its EEZ. In one deadly instance in 2001, a particularly aggressive Chinese interception of an American EP-3 aircraft caused a mid-air collision, the loss of the Chinese fighter jet and pilot and required emergency distress landing of the U.S. aircraft.

In fact, there are more than 100 illegal, excessive claims worldwide that purport to limit vital navigational and overflight rights and freedoms. Rejecting the Convention because it is applied by states imperfectly falls into the familiar trap made by the novice of international law—which is to reject international law because all nations do not adhere to all of its standards all of the time. The Convention successfully has influenced countries to conform their conduct and maritime claims to the Convention, nearly always in a manner that benefits U.S. national security interests. These positive adjustments in maritime claims can be said to constitute the “dogs that didn’t bark” in the law of the sea.

For example, at a recent meeting of the Non-Aligned States in Cuba, member states reaffirmed their support for applying the principles contained in the Convention to the maritime territorial disputes in the East China Sea. In a more specific example, in November 2003, Syria adopted a new maritime law that rescinded its previous 35-nm territorial sea, establishing instead a 12-nm territorial sea in conformity with the Law of the Sea Convention. At the same time, Syria rolled back a 41 nm contiguous zone claim and instead proclaimed a 24-nm contiguous zone and a 200-nm exclusive economic zone, adhering to the Convention in each of these zones in most respects. These provisions mark an improvement over previous Syrian government positions in relation to maritime claims, although Syria still has some work to do before it is in complete compliance with international law.

In yet another example, Vietnam also has made recent advances to conform its laws to the Convention. Hanoi still maintains a requirement for foreign warships to seek permission to enter its territorial sea or contiguous zone at least 30 days in advance of conducting a transit. On the other hand, Vietnam has reached maritime boundary

agreements with China in the East China Sea and Thailand in the Gulf of Thailand using the concept of “equitable principles” contained in the Convention, thereby helping to bring stability to the relationship between two powerful nations in the East China Sea.

Even in these instances, however, diplomacy operates within the context of the rules reflected in the Convention. If we didn’t have the Convention, there would be value in creating it, as it serves in many respects the function of a Restatement on the Law of the Sea, and its provisions relevant to national security are nearly universally accepted. Even though we might rely on customary international law to support our position, that source of law, while equally valid, is sometimes more difficult to ascertain than a treaty and some would argue it is a more tenuous basis for policy than an international agreement. There more easily can be competing visions of customary international law because it is not explicitly codified. When there is disagreement between countries over excessive maritime claims—particularly between a maritime nation and a coastal state—the Convention reduces the terms of the debate to a common framework, promoting peaceful resolution. These benefits of the Convention have been recognized by other countries as well—most recently, by Japan, India and Mexico at the UN General Assembly’s Sixth Committee (Legal) last week. Those nations credited the Convention with operating as a fundamental document for the development of the “rule of law” throughout the world.

The freedom of navigation program began more than twenty-five years ago to exhibit tangibly U.S. determination not to acquiesce in excessive maritime claims by other states. When the program began in 1979, U.S. military ships and aircraft were exercising their rights to challenge excessive maritime claims against about 35 countries at the rate of about 30-40 challenges annually. As late as 1998, the United States was conducting more than 25 operational assertions each year. In 2000, the United States conducted challenges against fifteen states. By 2005, DoD had reported conducting operational challenges against just six nations: Cambodia, Ecuador, the Philippines, Indonesia, Iran and Oman. The steady decline in freedom of navigation challenges over the last ten years, in my view, can be attributable to two factors—a reduction in the number of excessive claims due to the constructive influence of the Law of the Sea Convention and resource

constraints imposed by a declining naval force and competing tasking in support of the Global War on Terror. So while critics of the Convention might suggest that the United States Navy can kick down the door in any corner of the globe it chooses to operate, there is an opportunity cost in conducting freedom of navigation missions. Moreover, conducting freedom of navigation operations represents some diplomatic cost and poses risks inherent in physical challenges, as was displayed by the Black Sea bumping incident. The National Intelligence Council concluded in 1996 that in some cases, the costs, disadvantages or risks of physically challenging excessive claims might be deemed higher than the benefits would warrant.

In conclusion, we can see that any overall assessment of the national security benefits of the Convention would have to move beyond a provision-by-provision accounting of the terms of the treaty. Such analysis can benefit from an historical perspective and an understanding of the national security context of the Convention. Beyond specific terms of the treaty, the Convention has promoted national security interests in at least two key respects: First, it has influenced positively states to adjust and retract excessive maritime claims. Second, it has provided a black letter standard for States to resolve maritime disputes, promoting the U.S. foreign policy goal of regional stability and conflict avoidance. In terms of these two broader issues, the Law of the Sea Convention has been a national security success.