Legal Assessment of the United States' "Freedom of Navigation"

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Executive Summary

The project "Legal Assessment of the United States' 'Freedom of Navigation'" was initiated by the China Institute for Marine Affairs under the Ministry of Natural Resources of the People's Republic of China (CIMA). Researchers from CIMA, China Institute of International Studies (CIIS), Tsinghua University, Shanghai Jiao Tong University, Tianjin Foreign Studies University and Huayang Center for Maritime Cooperation and Ocean Governance jointly completed the Legal Assessment of the United States' "Freedom of Navigation." From a legal perspective, the Assessment discusses whether the U.S. practices relating to freedom of navigation are consistent with codified and general international law, and evaluates the legal foundation of U.S. "freedom of navigation."

The Assessment examines the United States' legal positions and actions on freedom of navigation, particularly those in relation to its "Freedom of Navigation Program" and summarizes the claims, characteristics, and implications of U.S. "freedom of navigation." The Assessment points out that the U.S. "Freedom of Navigation" contains numerous so-called customary international law based on U.S.-created concepts and self-imposed standards, which are inconsistent with international law and many state practices. The U.S. uses these claims to curtail the legitimate rights and interests of other countries and expand its rights and freedoms in order to achieve unfettered "freedom."

The Assessment concludes that U.S. "Freedom of Navigation" lacks a basis in international law and seriously distorts the interpretation and development of international law. It perpetuates the logic of "gunboat diplomacy" and reflects the usual practice of the U.S. using military force to pressure other countries. U.S. "Freedom of Navigation" serves the national interests and geopolitical strategy of the United States,

and risks threatening regional peace and stability with military force and disrupting the international maritime order. It embodies distinct illegality, unreasonableness and double standards.

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Introduction

Since the Carter administration launched the "Freedom of Navigation Program" (FON Program) in 1979, the United States has been conducting "Freedom of Navigation Operations" (FONOPs) and frequently dispatching warships and military aircraft into waters under the jurisdiction of other coastal States to challenge the so-called "excessive maritime claims."[1] According to official statistics from the United States Department of Defense, during fiscal year 2023 alone, the U.S. FONOPs challenged 29 "excessive maritime claims" by 17 coastal States, an increase from the 22 "excessive maritime claims" by 15 coastal States challenged in FY 2022.[2] The U.S. "freedom of navigation" frequently causes unnecessary frictions. In several severe cases, it leads to maritime and aerial accidents.[3]

The U.S. FONOPs are based on the distorted interpretation of "freedom of navigation" by the U.S. The essence of freedom of navigation in international law is to maintain the peaceful use of the ocean by all States and to promote trade and economic cooperation among them.[4] However, according to the U.S. Department of Defense's report, "freedom of navigation," as part of "freedom of the seas,"[5] includes not only the traditional passage of ships and overflight of aircraft, but also "task force maneuvering, flight operations, military exercises, surveillance, intelligence gathering activities, and

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[1] According to the U.S. Department of Defense, "excessive maritime claims" are defined as "unlawful attempts by coastal states to restrict the rights and freedoms of navigation and overflight as well as other lawful uses of the sea." *See* United States Department of Defense, "Annual Freedom of Navigation Report (Fiscal Year 2023)," p.2, https://policy.defense.gov/Portals/11/Documents/FON/DoD%20FON%20Report%20for%20FY23%20(Corrected).pdf.

[2] "DoD Annual Freedom of Navigation (FON) Reports," https://policy.defense.gov/OUSDP-Offices/FON/.

[3] Examples include the 1988 Black Sea bumping incident between the U.S. and the Soviet Union, and the 2001 South China Sea mid-air collision incident between the U.S. and China. *See* James Kraska and Raul Pedrozo, *The Free Sea: The American Fight for Freedom of Navigation*, Naval Institute Press, 2018, pp.234-235 & 249; Sally J. Cummins and David P. Stewart, eds., *Digest of US Practice in International Law 2001*, International Law Institute, 2002, pp.703-704, https://2009-2017.state.gov/s/l/c8184.htm.

[4] S. Jayakumar, "Navigational Freedom and Other Contemporary Oceans Issues," in Myron H. Nordquist, Tommy Koh and John Norton Moore, eds., *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention*, Martinus Nijhoff, 2009, pp.18-19.

[5] "Freedom of the seas" are defined by the U.S. Department of Defense as "all of the rights, freedoms, and lawful uses of the sea and airspace, including for military ships and aircraft, guaranteed to all nations under international law." *See* United States Department of Defense, "Annual Freedom of Navigation Report (Fiscal Year 2017)," p.2, https://policy.defense.gov/Portals/11/FY17%20DOD%20FON%20Report.pdf?ver=2018-01-19-163418-053.

ordnance testing and firing"[6] by warships and military aircraft. The freedom of military operations unilaterally emphasized by the U.S. "freedom of navigation", disregards the rights and interests of coastal States and is not the freedom of navigation recognized by the 1982 United Nations Convention on the Law of the Sea (hereinafter referred to as the Convention or UNCLOS) and general international law. In essence, it is a "freedom of willful trespassing."[7]

From a legal perspective, the U.S. "freedom of navigation" is based on the abuse of customary international law. While the 1958 Convention on the High Seas, the Convention on the Territorial Sea and the Contiguous Zone, and the Convention on the Continental Shelf are still in force, UNCLOS created a series of new regimes, including transit passage, regime of islands, archipelagic state and right of archipelagic sea lanes passage, exclusive economic zone and the continental shelf beyond 200 nautical miles. Many of these new regimes still belong to treaty law and have not yet evolved into customary international law.

As a participant in the negotiations and consultations in the Third United Nations Conference on the Law of the Sea, the United States does not accede to the Convention out of self-interests.[8] This leaves much of the U.S. "freedom of navigation" to be based on the "rules of customary international law" that it advocates. However, the United States has always viewed itself as a stakeholder in the Convention and has tried to justify its "freedom of navigation" claims under the Convention through customary international law. As early as March 10, 1983, the U.S. government publicly stated that "the Convention contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of

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[6] "Naval Vessels in Baltic Economic Zones," US Secretary of State's Message to the US Embassy in Vilnius, November 1, 1996. As cited in James Kraska and Raul Pedrozo, *International Maritime Security Law*, Martinus Nijhoff, 2013, pp.237-238.

[7] "Willful trespassing" is a description of U.S. FONOPs in the South China Sea by Chinese officials. *See* "Foreign Ministry Spokesperson Geng Shuang's Regular Press Conference on November 19, 2019," Ministry of Foreign Affairs of the People's Republic of China, https://www.fmprc.gov.cn/web/wjdt_674879/fyrbt_674889/201911/t20191119_7815454.shtml.

[8] James L. Malone, "The United States and the Law of the Sea after UNCLOS III," *Law and Contemporary Problems*, Vol.46, No.2, p.29.

all states."[9]

Such statements may appear to suggest the United States recognizes that parts of the Convention reflect rules of customary international law and are indirectly applicable to itself, but in fact it only selectively applies the provisions of the Convention in its favor. There is also considerable room to interpret the specific meaning of "traditional uses of the oceans." The general practice of selectively applying the Convention by the U.S. government has remained unchanged to this day, despite some clarification on the customary international law attributes of particular provisions in the Convention. The flexible arrangement has also provided space for the formation and development of U.S. "freedom of navigation."

The Assessment provides a comprehensive review of the consistency, or inconsistency, of U.S. legal positions and actions related to freedom of navigation with international law, with reference to international legal rules including the Convention, state practice and jurisprudence embodied in judicial decisions as well as scholarly research. Part 1 identifies the overall U.S. position on freedom of navigation and its actions, and summarizes its major legal arguments. Part 2 analyzes the gaps between U.S. perceptions of navigational rights and related practices and the rules of international law. Part 3 analyzes the legality of U.S. restrictions on the rights of coastal States and whether they have a sufficient basis in international law. Part 4 further assesses the U.S. "freedom of navigation" in terms of legality and reasonableness.

[9] "Statement on United States Oceans Policy," March 10, 1983, https://www.reaganlibrary.gov/archives/speech/statement-united-states-oceans-policy.

1 Overview of U.S. "Freedom of Navigation"

The Assessment focuses on U.S. "freedom of navigation," mainly the United States' FON Program and the corresponding FONOPs. This part briefly describes the development of the U.S. FON Program and summarizes the main legal arguments of U.S. "freedom of navigation," which provide the basis for the analysis that follows.

1.1 The U.S. FON Program

The "absolute freedom of navigation upon the seas" has always been recognized by the United States as a "vital national interest" of a long-term and global nature.[10] According to the United States, whenever a coastal State makes "excessive maritime claims" that are "inconsistent with the international law of the sea," they may constitute an unlawful restriction on freedom of navigation. In the view of the United States, "excessive maritime claims" pose "a threat to the legal foundation of the rules-based international order."[11] The United States therefore refuses to acquiesce in such "unilateral acts of other states designed to restrict the rights and freedom of the international community" and considers it necessary to direct its military forces to "continue to fly, sail, and operate wherever international law allows."[12]

The United States' FON Program was formally launched in 1979 and continues to this day.[13] The Program seeks to negate and challenge "excessive maritime claims" by others through "complementary diplomatic and operational efforts" to preserve "the legal balance of interests established in customary international law as reflected in the 1982 Law of the Sea Convention." The FON Program includes protests against "excessive maritime claims" by the U.S. State Department, and challenges against those

[10] "U.S. Department of Defense Freedom of Navigation Program," February 28, 2017, https://policy.defense.gov/Portals/11/DoD%20FON%20Program%20Summary%2016.pdf?ver=2017-03-03-141350-380.
[11] "Annual Freedom of Navigation Report (Fiscal Year 2023)."
[12] "U.S. Department of Defense Freedom of Navigation Program," February 28, 2017.
[13] "U.S. Department of Defense Freedom of Navigation Program," March 2015, https://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program%20--%20Fact%20Sheet%20(March%202015).pdf.

claims with naval and air forces by the U.S. Department of Defense, known as the "Freedom of Navigation Operations," to exercise the maritime rights and freedoms of the United States.[14]

Indeed, the U.S. "freedom of navigation" is unique in its practice of using military force to routinely challenge "excessive maritime claims" of coastal States. The United States carries out FONOPs globally, mainly relying on the global projection capabilities of its naval and air forces, with distinct characteristic of military display.

From the inception of the FON Program to FY 1992, the United States conducted military challenges to the "excessive maritime claims" of 35 countries, in addition to more than 110 diplomatic protests.[15] Since then, the U.S. Department of Defense has tabulated the U.S. Navy's FONOPs in each annual report. Since FY 1993, the United States has challenged an average of more than 15 countries per year in its operations, and the number has remained high over the past decade.

The United States seems to be convinced that all FONOPs are "planned with deliberation, subjected to legal review, and professionally conducted" and are carried out in a "principled, unbiased manner" against its allies, partners and competitors, without targeting any particular excessive claimant. The United States asserted that many nations "continue to comment favorably" on its "peaceful vigilance in responding to excessive maritime claims."[16]

1.2 The Content of U.S. "Freedom of Navigation"

According to the United States, freedom of navigation is an all-encompassing and non-derogable right.[17] In its statements and actions, the United States has spared no

[14] "Annual Freedom of Navigation Report (Fiscal Year 2023)."
[15] United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs, "Limits in the Seas No.112: United States Responses to Excessive National Maritime Claims," https://www.state.gov/wp-content/uploads/2019/12/LIS-112.pdf.
[16] "Annual Freedom of Navigation Report (Fiscal Year 2023)."
[17] Zhang Xinjun and Chen Xidi, "The 2022 ICJ Judgment in Nicaragua v. Colombia: Towards a Theory of Exclusivity in Allocating Rights and Jurisdiction between the Coastal and Other States?" *Chinese Journal of International Law*, Vol.23, No.2, 2024, pp.223-262.

effort to defend and expand its rights and freedoms, while rejecting, as far as possible, those rules of international law that are conducive to the rights and jurisdictions of coastal States or that restrict the "freedom" of oceans.

Based on the collection and analysis of existing U.S. practices, this Assessment mainly examines its following arguments or practices:

(1) International law permits warships to exercise the right of innocent passage in a foreign territorial sea.
(2) Entry into a foreign territorial sea by vessels and aircraft, including military vessels or aircraft, for the purpose of rescuing persons in danger or distress at sea is a right of a State under customary international law.
(3) Transit passage is a right under customary international law.
(4) Passage through archipelagic sea lanes is a right under customary international law.
(5) There are "international waters" under international law in which States are permitted to exercise freedom of navigation.
(6) There are multiple standards for identifying the legal status of islands.
(7) The application of straight baselines is subject to stringent criteria.
(8) The Convention does not allow the application of straight baselines by continental States to their outlying archipelagos as a whole.
(9) Freedom of navigation and military activities in the exclusive economic zone (EEZ) is equivalent to that of the high seas.
(10) It should not be allowed to impose Air Defense Information Zone (ADIZ) procedures upon foreign aircraft that are merely transiting international airspace within a State's ADIZ.
(11) The identification of historic waters is subject to stringent criteria.

2 Excessive Expansion of Navigational Interests by U.S. "Freedom of Navigation"

When identifying and interpreting the maritime regimes, the United States spares no effort to expand its rights and freedoms by means of "customary international law reflected in the Convention."

2.1 Innocent Passage of Warships

As early as 1982, the United States explicitly classified "contain[ing] requirements for advance notification or authorization for warships/naval auxiliaries or apply[ing] discriminatory requirements to such vessels" as one of the "excessive maritime claims."[18] To this end, the U.S. Navy has repeatedly and continuously entered into the territorial seas of other States worldwide for many years, aiming to challenge the requirement that foreign warships must give prior notification or receive authorization before entering territorial seas.

In the U.S. Department of Defense's "Annual Freedom of Navigation Report" for FY 2023, 13 claims from 11 States or regions directly involved restrictions on passage through territorial seas by foreign military vessels.[19] Among them, China's regulation requiring prior authorization for foreign military vessels to enter its territorial seas has been the U.S. Navy's primary target for many years. Since FY 2007, challenges against this Chinese regulation have been uninterrupted.[20]

It should be noted that the "existing rules" of no need prior notification or authorization .reflected in UNCLOS claimed by U.S have not been well-established. During the negotiations of the 1958 Convention on the Territorial Sea and the

[18] "U.S. Program for the Exercise of Navigation and Overflight Rights at Sea (NSC-NSDD-72)," https://fas.org/irp/offdocs/nsdd/nsdd-072.htm.
[19] This does not include claims related to transit passage rights through straits used for international navigation.
[20] "DoD Annual Freedom of Navigation (FON) Reports."

Contiguous Zone, clear divergences in views had already emerged regarding the innocent passage of foreign warships through territorial waters.[21] The Soviet Union, Bulgaria, and Romania raised in their reservations to the 1958 Convention that coastal States have the right to establish procedures for the authorization of the passage of foreign warships through their territorial waters.[22]

The drafting history of UNCLOS further highlighted the significant differences in standpoints among States on this issue. A proposal initiated by 28 States in 1982 called for allowing coastal States to enact domestic legislation regarding innocent passage through their territorial seas, recognizing the right of coastal States to adopt measures to safeguard their security, including the requirement of prior authorization or notification for the innocent passage of warships through territorial waters.[23] Subsequently, Albania, Benin, China, Iran, Malta, Republic of Korea (ROK), and Pakistan continued to insist on the right to restrict the innocent passage of foreign warships through territorial seas.[24] Despite being fully aware of these facts,[25] the United States, on March 8, 1983, misrepresented the statement read from the Conference President Tommy Koh, claiming that it "clearly placed coastal State security interests within the context of articles 19 and 25. Neither of those articles permits the imposition of notification or authorization requirements on foreign ships exercising the right of innocent passage."[26]

In fact, the United States is more aware than any other State that its so-called "existing

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[21] *Official Records of the United Nations Conference on the Law of the Sea*, Volume III: First Committee (Territorial Sea and Contiguous Zone), United Nations, 1958, pp.127-131. Some American scholars have stated that the debate over the innocent passage of foreign warships through territorial seas has been a central focus throughout the development of the law of the sea in the 20th century. *See* Christine Bianco, Zenel Garcia and Bibek Chand, "What Is Innocent? Freedom of Navigation versus Coastal States' Rights in the Law of the Sea," *Ocean Development & International Law*, Vol.54, No.3, 2023, pp.4-7.

[22] "Convention on the Territorial Sea and the Contiguous Zone—Declarations and Reservations," https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-1&chapter=21#EndDec.

[23] UN Doc. A/CONF.62/L.117 (1982). The sponsoring States agreed to withdraw it ultimately, in favor of a statement by the President of the Conference on the record, that its withdrawal was "without prejudice to the rights of coastal States to adopt measures to safeguard their security interests, in accordance with articles 19 and 25 of this Convention." *See* UN Doc. A/CONF.62/SR.176 (1982).

[24] J. Ashley Roach, *Excessive Maritime Claims*, 4th edition, Brill Nijhoff, 2021, pp.261-262.

[25] Thomas A. Clingan Jr., "Freedom of Navigation in a Post-UNCLOS III Environment," *Law and Contemporary Problems*, Vol.46, No.2, 1983, pp.107-123.

[26] "Note by the Secretariat," UN Doc. A/CONF.62/WS/37, in *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume XVII, pp.243-244.

rules" are entirely unfounded. In the 1910 *North Atlantic Coast Fisheries* arbitration, then-U.S. Secretary of State Elihu Root explicitly stated before the arbitral tribunal that "War-ships may not pass without consent into this zone, because they threaten. Merchant-ships may pass and repass because they do not threaten."[27] In the 1988 Black Sea bumping incident, it was precise during the U.S. Navy's FONOP within the Soviet territorial sea that U.S. warships were intercepted and collided with Soviet vessels. If, as the United States claims, there existed clear and well-established rules prohibiting coastal States from restricting the entry of foreign warships into their territorial seas, then the Soviet Union's actions would have undoubtedly constituted a violation of these rules, making it liable under international law. However, this was not the case.[28]

There have consistently been obvious divergences in state practice regarding the innocent passage of foreign warships through territorial seas, indicating that relevant rules have not been firmly established in international law. According to data collected by the U.S. Navy Judge Advocate General's Corps (JAG), as of 2024, at least 29 out of 158 States or regions worldwide still require prior authorization for foreign warships to enter their territorial seas, while another 15 States mandate prior notification.[29]

Despite the number of States adhering to such practices, the United States has never

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[27] Elihu Root, *North Atlantic Coast Fisheries Arbitration at the Hague: Argument on Behalf of the United States*, Robert Bacon and James Brown Scott, eds., F. B. Rothman, 1917, pp.3 & 116.

[28] "Uniform Interpretation of the Rules of International Law Governing Innocent Passage through the Territorial Sea," *Law of the Sea Bulletin*, No.14, 1989, p.13, http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulE14.pdf.

[29] States that require prior authorization include Albania, Algeria, Antigua and Barbuda, Barbados, Bangladesh, Myanmar, China, Colombia, Ecuador, Grenada, Iran, Latvia, Maldives, Malta, DPRK, Oman, Pakistan, Romania, Saint Vincent and the Grenadines, Seychelles, Sierra Leone, Somalia, Sri Lanka, Sudan, Sweden, Syria, the United Arab Emirates, Vanuatu, and Yemen. States or regions that require prior notification include Argentina, Croatia, Denmark, Djibouti, Egypt, Estonia, Finland, Guyana, India, Libya, Montenegro, Russia, Slovenia, ROK, and Vietnam. Among them, Croatia, Denmark, and Montenegro not only require prior notification but also impose restrictions on the number of warships that may enter their territorial seas simultaneously. Brazil has a similar restriction on the number of warships allowed. In addition to the above States, Cape Verde, Poland, and Ukraine have declared their right to restrict the innocent passage of foreign warships through their territorial seas but have not yet implemented such measures. Meanwhile, Chile and Lithuania adhere to a principle of reciprocity, meaning that if a country requires prior authorization for their warships to enter its territorial sea, they will impose the same restriction on that country's warships. *See* https://www.jag.navy.mil/national-security/mcrm/.

seriously considered their legal significance.[30] Instead, it has hastily deemed them all as "excessive claims" in violation of so-called "existing rules". Ironically, after years of U.S. efforts to uphold "freedom of navigation," even adopting the late J. Ashley Roach's analysis, only a handful of States, such as Finland and Sweden, have altered their positions.[31] It remains questionable whether such alterations can be attributed to U.S. protests and challenges.

2.2 Assistance Entry

The United States claims assistance entry, i.e. the right to enter the foreign territorial sea to rescue others without the permission of coastal States, as a right under customary international law. In 1986, the US Department of State, Department of Defense, and Coast Guard jointly issued a policy statement concerning exercise of the right of assistance entry.[32] The United States argues that "mariners have recognized a humanitarian duty to rescue persons in distress due to perils of the sea, regardless of their nationality or location." Accordingly, the right to enter a foreign territorial sea to engage in *bona fide* efforts to render emergency assistance is a right under customary international law, independent of the rights of innocent passage, transit passage, and archipelagic sea lanes passage. According to this policy statement, the right of assistance can be exercised by both military vessels and military aircraft. Moreover, the exercise of the right of assistance entry "is not dependent upon seeking or receiving the permission of the coastal State," merely "notification of the entry should be given to the coastal State both as a matter of comity and for the purpose of alerting the rescue forces of that State." Subsequently, the United States further expanded the scope of the right of

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[30] In a memorandum submitted to Sweden in 1984, the United States went so far as to distort the facts, claiming that the practice of restricting the innocent passage of foreign warships was not sufficiently widespread to reflect a new development in international law—therefore, these practices were merely violations of what the U.S. called "existing rules." *See* aide mémoire dated December 4, 1984, from American Embassy Stockholm, reported in American Embassy Stockholm telegram 08539, December 10, 1984, pursuant to instructions contained in State Department telegram 355149, December 1, 1984, in *Cumulative Digest of United States Practice in International Law*, Book II, pp.1846–1848 & 2023–2025.

[31] J. Ashley Roach, *Excessive Maritime Claims*, 4th edition, pp.276-277, Table 11 "Restrictions on Warship Innocent Passage."

[32] "Statement of Policy by the Department of State, the Department of Defense, and the United States Coast Guard concerning Exercise of the Right of Assistance Entry," in A. R. Thomas and James C. Duncan, eds., *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, 1999, p.163.

assistance entry to archipelagic waters.[33]

The above claim by the United States that the right of assistance entry is customary international law is not supported by other States. In January 1991, the United States submitted a note to the International Maritime Organization (IMO)'s Sub-Committee on Lifesaving, Search and Rescue, intending to set forth the legal basis for the right of assistance entry.[34] The US believes that customary international law and state practice have shown that such humanitarian activities are not subject to the rights of coastal States.[35] However, in subsequent discussions at the sixty-fifth session of the IMO's Legal Committee, the United States' proposition did not receive positive responses. On the contrary, one delegation explicitly questioned the United States' position viewing the right of assistance entry as customary international law. It stated that previous relevant treaties and international practices do not create international custom, and that UNCLOS "did not give any State the right to enter the territorial sea of another State before obtaining the latter's permission to conduct salvage and assistance operations."[36] The 1979 International Convention on Maritime Search and Rescue (SAR Convention) also clearly states that transmitting a request to the coastal State is required before entering into the territorial sea for rescue purposes.[37]

Regional treaties generally follow the permission pattern of the SAR Convention, such as the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic and the Agreement on Cooperation regarding Maritime Search and Rescue Services among Black Sea Coastal States. Many States hold such a position and emphasize that it is important not to upset the delicate balance between the duty to render assistance and the sovereign right of coastal States to control entry into or operation in their waters.[38] As a conclusion, the IMO's Legal Committee found that

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[33] "Guidance for the Exercise of the Right of Assistance Entry," Chairman of the Joint Chiefs of Staff Instruction CJCSI 2410.01A, April 23, 1997, para.4.a.
[34] "SAR on or over Foreign Territorial Seas," LSR 22/8/4, January 19, 1991, para.1.
[35] *Ibid*., para.13.
[36] "Report of the Legal Committee on the Work of Its Sixty-Fifth Session," LEG 65/8, October 11, 1991, para.117.
[37] *International Convention on Maritime Search and Rescue*, Article. 3.1.3.
[38] "Report of the Legal Committee on the Work of Its Sixty-Fifth Session," para.118.

there existed no right of assistance entry in public international law. This principle "is neither embodied in any convention nor established by customary law."[39] Nevertheless, the United States still clings to this legal claim that has no market.[40]

2.3 Transit Passage

The United States argues that the regime of transit passage has become a part of customary international law and that Non-Parties to the Convention are therefore entitled to the right of transit passage in straits used for international navigation. This argument mainly rests on two points: first, the regime of transit passage established by the UNCLOS is a codification of customary international law that has developed over time and in practice;[41] and second, the regime of transit passage has evolved into customary international law since the entry into force of the Convention. In fact, the question of whether the regime of transit passage, applied among Parties of the Convention, is customary international law has not yet been settled.

On one hand, the drafting history of UNCLOS reveals the negative attitude of certain States towards the creation of transit passage. During the second session of the Third United Nations Conference on the Law of the Sea, States submitted various draft provisions regarding straits used for international navigation. The United Kingdom proposed the transit passage regime for straits used for international navigation in Article 2 of the draft, sparking heated debate. States including Malaysia, Morocco, Yemen, Oman, Iran, Denmark, Ghana, Spain, and Albania emphasized the sovereignty, security, and environmental interests of coastal States, only advocating for the regime of innocent passage.[42] Oman argued that straits used for international navigation remain

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[39] *Ibid*.

[40] "Guidance for the Exercise of Right-of-Assistance Entry," Chairman of the Joint Chiefs of Staff Instruction 2410.01D, August 31, 2010.

[41] "Presidential Proclamation 5928 of December 27, 1988," *Federal Register*, Vol.54, No.5, January 9, 1989, p.777; William L. Schachte, Jr., "International Straits and Navigational Freedoms," 1992, pp.5-6, https://2009-2017.state.gov/documents/organization/65946.pdf.

[42] The draft submitted by Malaysia, Morocco, Yemen, and Oman stipulates that straits used for international navigation are subject to the regime of innocent passage; Iran emphasizes the sovereignty, security, and good order of coastal States, stating that it cannot accept the transit passage regime and believes that passage through international straits should be based on existing rules contained in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone; Denmark considers it reasonable for international straits to be subject to the rule of innocent passage, with no need for revision; Ghana believes that if a strait falls within the territorial sea, all ships and aircraft

part of territorial seas and thus should be subject to innocent passage, though it suggested a "presumption of innocence for the passage of foreign merchant ships" in light of global trade needs. Yemen elaborated on its position, asserting that the innocent passage regime applies to merchant vessels, while non-commercial vessels, such as submarines and warships, must obtain prior approval and comply with regulations of the coastal State.[43]

After nearly ten rounds of negotiations, at the eleventh session of the conference, States such as Spain, Iran, and Oman still considered the regime of transit passage unsatisfactory. Spain indicated that while it reluctantly accepted transit passage for ships to facilitate consensus, it persistently opposed provisions relating to the free overflight of military aircraft and insisted that the regime of innocent passage applies in such cases. Somalia was of the view that the regime of transit passage fails to provide even the minimum level of security guarantees for coastal States. Spain made it clear at the final session that "after many years of effort, his delegation had been forced to submit a series of amendments. ... the texts approved by the Conference did not constitute a codification or expression of customary law."[44] It is clear that the right of transit passage is essentially a contractual right that is conceded by each of the different interests, rather than a codification of an established rule of customary international law.

On the other hand, an examination of state practice on whether a rule of customary international law is formed does not support the United States' position. In practice, the position of States on whether the passage of warships and aircraft requires prior notification or authorization is different. Some States have made it clear that the passage of warships or some types of ships or aircraft requires prior notification or authorization.

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passing through it should be subject to the regime of innocent passage, and warships must give advance notification to the coastal State in advance of their passage; Albania believes that the sovereignty and security interests of coastal States take priority, and that the passage of warships and military aircraft requires prior notification and consent; Spain states that maritime space situated in a strait forming part of the territorial sea is itself territorial sea and subject to the sovereignty of the coastal State. *See* UN Office of Legal Affairs Division for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Legislative History of Part III of the United Nations Convention on the Law of the Sea*, Volume II, 1992, p.22, 33-34 & 55.

[43] *Ibid*., pp.56 & 68.

[44] *Ibid*., pp.132-133, 136-138 & 143.

Yemen made a declaration upon signing the Convention in December 1982, reaffirming its domestic law, stating that "it adheres to the rules of general international law concerning rights to national sovereignty over coastal territorial waters, even in the case of the waters of a strait linking two seas," and "adheres to the concept of general international law concerning free passage as applying exclusively to merchant ships and aircraft; nuclear-powered craft, as well as warships and warplanes in general, must obtain the prior agreement of the Yemen Arab Republic before passing through its territorial waters, in accordance with the established norm of general international law relating to national sovereignty."[45] Oman takes a similar position, stipulating in its domestic law that it exercises full sovereignty over the territorial sea of the Sultanate and over the airspace in harmony with the principle of innocent passage of ships and planes of other States through international straits.[46] In addition, Greece and the Philippines have excluded the right of transit passage through some kinds of straits in their declarations.[47]

It should also be noted that the generality of state practice is not the same as uniformity, and that the position of specially affected States is of particular significance in judging the uniformity of state practice.[48] Some coastal States have set additional restrictions on the passage of ships and aircraft. For example, the domestic law of Morocco, a State bordering the Strait of Gibraltar,[49] and Yemen, a State bordering the Bab-el-Mandeb Strait, imposes additional requirements on nuclear-powered ships and ships carrying

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[45] "The Yemen Arab Republic Declarations," December 10, 1982, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#13.

[46] "Royal Decree concerning the Territorial Sea, Continental Shelf and EEZ," February 10, 1981, Article 1, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/OMN_1981_Decree.pdf.

[47] Greece declared that the coastal State concerned has the responsibility to designate the route or routes, in the said alternative straits, through which ships and aircraft of third parties could pass under transit passage regime; Philippines stated that the concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, and removes straits connecting these waters with the economic zone or high sea from the rights of foreign vessels to transit passage for international navigation. *See* "United Nations Convention on the Law of the Sea—Declarations and Reservations," https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec.

[48] A. G. López Martín, *International Straits: Concept, Classification and Rules of Passage*, Springer, 2010, p.194.

[49] "Act No. 1.73.211 Establishing the Limits of the Territorial Waters and the Exclusive Fishing Zone of Morocco," March 2, 1973, Article 3, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MAR_1973_Act.pdf.

hazardous substances.[50] Meanwhile, Turkey, a State bordering the Turkish Straits, has not yet signed the Convention and does not recognize the general application of the regime of transit passage, while Iran, a State bordering the Strait of Hormuz, has declared that the regime of transit passage is limited to the Parties to the Convention and does not constitute an existing custom or established practice of an obligatory character.[51]

Moreover, most scholars in the field of international law tend to recognize that the regime of transit passage has not developed into customary international law. Japanese scholar Yoshifumi Tanaka holds that there is insufficient evidence to demonstrate that the regime of transit passage has developed into customary international law.[52] Tullio Scovazzi, an Italian scholar, pointed out that the attitude demonstrated by many States toward the regime of transit passage indicates that it is still far from becoming customary international law.[53] Hugo Caminos and Vincent P. Cogliati-Bantz also argued that the regime of transit passage has not attained the status of customary international law.[54] Bingbing Jia noted that the majority opinion is that the regime of transit passage is yet to become a part of customary law.[55]

2.4 Right of Archipelagic Sea Lanes Passage

An American scholar stated that the provisions of Article 54 of the Convention relating to passage, research and surveying activities through archipelagic waters reflect customary international law. In other words, the rules of Articles 39, 40, 42 and 44 also apply to archipelagic sea lanes passage and are binding on Non-Parties to the

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[50] "Republican Decree No.15 (Sanaa)," https://www.jag.navy.mil/national-security/mcrm/; "Act No.45 of 1977 concerning the Territorial Sea, EEZ, Continental Shelf and other Marine Areas," Articles 7-8, https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/YEM_1977_Act.pdf.

[51] "Iran Interpretative Declaration on the Subject of Straits," https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec.

[52] Yoshifumi Tanaka, *The International Law of the Sea* (Fourth Edition), Cambridge University Press, 2023, pp.271-272.

[53] Tullio Scovazzi, *The Evolution of International Law of the Sea: New Issues, New Challenges*, Martinus Nijhoff, 2001, pp.174-175 & 186.

[54] Hugo Caminos and Vincent P. Cogliati-Bantz, *The Legal Regime of Straits: Contemporary Challenges and Solutions*, Cambridge University Press, 2014, p.469.

[55] B. B. Jia, *The Regime of Straits in International Law*, Oxford University Press, 1998, pp.207-208.

Convention.[56] At the core of this statement is the right of the United States to exercise archipelagic sea lanes passage under customary international law.

In this regard, archipelagic States, such as Indonesia, do not recognize this position and have rejected it through their domestic legislation and actions. This refusal is thus considered by the United States as "a violation of customary international law" and falls within the range of FONOPs targets.[57] Challenging the archipelagic sea lanes passage arrangements of archipelagic States, which are "not in conformity with the rules of the law of the sea," has become an important element of U.S. FONOPs over the years.

In fact, the archipelagic sea lanes passage regime is an entirely new navigation regime created by the Convention, which is applicable among State Parties. There is no practice to suggest that the right of archipelagic sea lanes passage under the archipelagic State regime has transformed from a treaty right to a rule of international law applicable between State Parties and Non-Parties. In fact, only Indonesia and the Philippines have so far attempted to engage in the practice of designating archipelagic sea lanes by invoking the provisions relating to the right of passage through archipelagic sea lanes under the Convention. Moreover, the designation of sea lanes in both States has not been completed due to problems such as "partial designation."[58] Under the circumstances, it is virtually impossible to find sufficiently extensive and representative state practice and *opinio juris* to substantiate the status of the regime as customary international law.

2.5 "International Waters"

The United States created several "legal concepts." One is "international waters." It does not exist in the contemporary law of the sea, although the United States claims the

[56] J. Ashley Roach, "Today's Customary International Law of the Sea," *Ocean Development & International Law*, Vol.45, No.3, 2014, pp.239-259.
[57] United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs, "Limits in the Seas No.141 Indonesia: Archipelagic and other Maritime Claims and Boundaries," https://www.state.gov/wp-content/uploads/2020/02/LIS-141.pdf.
[58] IMO Doc. MSC 69/22/Add.1; "Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Enactment by the Republic of the Philippines of Its 'Maritime Zones Act' and 'Archipelagic Sea Lanes Act'," November 8, 2024, https://www.fmprc.gov.cn/eng/zy/gb/202412/t20241218_11498201.html.

freedom of navigation and overflight in the "international waters." The United States insists that the oceans be divided into two parts for military purposes. The first part consists of internal, territorial and archipelagic waters that are subject to the territorial sovereignty of the coastal State, and the second part is the so-called "international waters" consisting of the contiguous zone, the EEZ and the high seas, where all States enjoy freedom of navigation and overflight on the high seas.[59]

From the current diplomatic practice of States and international judicial cases, it appears that this reclassification of maritime areas under the jurisdiction of the coastal State, which insists on the expansion of the navigational rights of third States and alters the nature of these maritime areas, has not been accepted by more States or international judicial bodies, apart from the fact that it is sometimes used out of its convenience for describing non-sovereign maritime areas.[60] It is even sometimes perceived by coastal States as a threat to their territorial sovereignty and rights under the Convention.[61]

Another concept is "high seas corridor" created by the United States. In October 2024, the US Navy stated that it conducted a routine Taiwan Strait transit through waters where "high-seas freedom of navigation and overflight apply under international law," and specifically noted that the vessel transited through a "high seas corridor in the Strait that is beyond the territorial sea of any coastal State."[62] As a matter of fact, only internal waters, the territorial sea, the contiguous zone and the EEZ exist in the Taiwan Strait, and there is clearly no "high seas corridor" or "high seas." It is argued that the entry into force of the Convention and the establishment of the EEZ regime have

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[59] Department of the Navy and Department of Homeland Security, *The Commander's Handbook on the Law of Naval Operations*, 2022, p.1-7.

[60] Permanent Court of Arbitration, "The 'Enrica Lexie' Incident (Italy v. India) Award of 21 May 2020," paras.69-70, https://pcacases.com/web/sendAttach/16500; International Tribunal for the Law of the Sea, "The M/V 'Norstar' Case (Panama v. Italy) Judgment of 10 April 2019," para.289, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/case_no_25_merits/C25_Judgment_20190410.pdf.

[61] "Foreign Ministry Spokesperson Wang Wenbin's Regular Press Conference on June 13, 2022," Ministry of Foreign Affairs of the People's Republic of China, https://www.mfa.gov.cn/eng/zy/jj/diaodao_665718/mn/202206/t20220613_10702460.html.

[62] "U.S. 7th Fleet Destroyer and the Royal Canadian Navy Conduct Bilateral Transit in the Taiwan Strait," United States Indo-Pacific Command, October 20, 2024, https://www.pacom.mil/Media/News/News-Article-View/Article/3940364/us-7th-fleet-destroyer-and-the-royal-canadian-navy-conduct-bilateral-transit-in/.

already led to the replacement of the high seas corridor by the EEZ.[63] The United States created the concept of "high seas corridor" to deflate its obligations under international law with regard to the sea areas under the jurisdiction of the coastal State in the Taiwan Strait.

[63] Alexander Lott, "Maritime Security in the Baltic and Japanese Straits from the Perspective of EEZ Corridors," *Ocean Development & International Law*, Vol.54, No.3, 2023, pp.327-348.

3 Excessive Restrictions of U.S. "Freedom of Navigation" on Rights of Coastal States

The United States has spared no effort to expand its rights and to compress and restrict the rights and freedoms of other coastal States, when identifying and interpreting the rules under the various regimes of maritime zones.

3.1 The Legal Status of Islands

Article 121 of the Convention defines the regime of islands, which distinguishes between islands with EEZs or continental shelves and rocks that cannot sustain human habitation or their own economic life. The United States, based on double standards, selectively challenges the legal status of other States' islands.

The United States has claimed EEZs and continental shelves based on its numerous uninhabited islands and reefs located in the Pacific Ocean, such as Baker Island, Howland Island, and Jarvis Island.[64] Similarly, the United States seems to be quite tolerant towards its partners on this issue. For example, Australia claims EEZs and continental shelves based on two uninhabited reefs in the Pacific, Mellish Reef and Middleton Reef, but the United States has not opposed the claim. When the Japanese government made a submission on the limits of its outer continental shelf in seven sea areas to the Commission on the Limits of the Continental Shelf, which involved illegal claims of EEZ and continental shelf based on the rock of Oki-no-Tori, the United States turned a blind eye and has never protested.[65] However, the US frequently challenges or protests the legal status of specific States' islands. The double-standards approach of the United States not only restricts and violates the legitimate rights of coastal States, but also paves the way for its illegal claims.

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[64] "Treaty Doc.114-13: The Treaties with the Republic of Kiribati and the Government of the Federated States of Micronesia on the Delimitation of Maritime Boundaries," https://www.govinfo.gov/app/details/CDOC-114tdoc13/CDOC-114tdoc13.

[65] "Diplomatic Note of United States Mission to the United Nations," December 22, 2008, https://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/usa_22dec08.pdf.

3.2 Straight Baselines

Concerning the application of straight baselines, the United States also regards its understanding as the "authoritative" interpretation for matters not explicitly stipulated in the Convention. Article 7, Paragraph 1 of the Convention provides, "where the coastline is deeply indented and cut into" is one condition under which straight baselines may be applied, but it has not further elaborated. According to the official U.S. position,[66] the geographic configuration of the coastline must meet all of the following characteristics to be considered "deeply indented and cut into": first, in a locality where the coastline is deeply indented and cut into, there exist at least three deep indentations; second, the deep indentations are in close proximity to one another; and third, the depth of penetration of each deep indentation from the proposed straight baseline enclosing the indentation at its entrance to the sea is, as a rule, greater than half the length of that baseline segment.[67]

Article 7, Paragraph 1 of the Convention also provides another criterion for drawing straight baselines: "if there is a fringe of islands along the coast in its immediate vicinity." It still does not provide stricter provisions. The official U.S. position holds that this condition must also meet all of the following characteristics: first, the most landward point of each island lies no more than 24 nautical miles from the mainland coastline; second, each island to which a straight baseline is to be drawn is not more than 24 nautical miles apart from the island from which the straight baseline is drawn; and third, the islands, as a whole, mask at least 50% of the mainland coastline in any given locality.[68]

The International Law Association's Report on Baseline under the International Law of

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[66] The official U.S. position can be found in "Commentary—The 1982 United Nations Convention on the Law of the Sea and the Agreement on Implementation of Part XI," p.9, https://www.foreign.senate.gov/imo/media/doc/treaty_103-39.pdf.

[67] According to J. Ashley Roach, "the US believes logical interpretation suggests that 'deeply indented' sets a stricter geographical standard than that for a juridical bay. This standard is designed to prevent shallow bays which do not meet the penetration criterion for juridical bays from being the basis for establishing a series of straight baseline segments in a particular locality." *See* J. Ashley Roach, *Excessive Maritime Claims*, 4th edition, p.82.

[68] "Commentary — The 1982 United Nations Convention on the Law of the Sea and the Agreement on Implementation of Part XI," p.9.

the Sea pointed out, "the Article 7(1) reference to 'a fringe of islands' can be applied flexibly so as to take into account multiple different island configurations that may be located offshore a mainland. ... There is no provision in UNCLOS, consistency in state practice, or assessment by international courts and tribunals as to the distance between a fringe of islands and the mainland; rather the proximity of the islands to the coast is controlled by the general criteria within Article 7."[69]

The U.S. also believes that to satisfy the requirement of Article 7, Paragraph 3 of the Convention, which stipulates that "the drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain," no single straight baseline segment should exceed 24 nautical miles in length.[70] The aforementioned report of the International Law Association, however, pointed out that "U.S. state practice does not represent the international community and the U.S. position on the interpretation of UNCLOS and state practice is only one amongst those of many other States."[71]

In fact, the United States itself is well aware that the Convention does not set precise parametric conditions for the drawing of straight baselines as it does for archipelagic baselines.[72] However, the U.S. has put forward a series of self-determined "criteria" to assess whether the straight baselines drawn by other coastal States are "up to standard," essentially attempting to replace the rules of positive international law with self-created standards.

3.3 Baselines of Outlying Archipelagos

The United States states that due to the lack of clear provisions in the Convention on the

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[69] International Law Association Sydney Conference 2018, "Final Report on Baselines under the International Law of the Sea," para.105, https://www.ila-hq.org/en_GB/documents/conference-report-sydney-2018-5.
[70] "Commentary — The 1982 United Nations Convention on the Law of the Sea and the Agreement on Implementation of Part XI," p.9.
[71] "Final Report on Baselines under the International Law of the Sea," para.19.
[72] J. Ashley Roach, *Excessive Maritime Claims*, 4th edition, p.74.

application of straight baselines to the establishment of territorial sea baselines of continental States' outlying archipelagos, and the absence of corresponding rules in customary international law, the current application of straight baselines to outlying archipelagos is mainly based on Article 7 of the Convention.[73] Therefore, there is no rule in customary international law that allows continental States to establish straight baselines for their outlying archipelagos as a whole. The viewpoint of the United States above runs counter to the practice of many States. In fact, although the United States continues to challenge the practice of establishing straight baselines for the entire outlying archipelago, not a few continental States have applied straight baselines for their outlying archipelagos in practice for a long time.

Prior to the First United Nations Conference on the Law of the Sea, States such as Norway, Iceland, and Ecuador had adopted the straight baseline method to establish the territorial sea baselines of their outlying archipelagos.[74] At the Third United Nations Conference on the Law of the Sea, due to the exclusion of continental States from the informal consultation on archipelago issues, the issue of baselines for the outlying archipelagos of continental States was not extensively discussed,[75] and some maritime powers did not want to extend the scope of the archipelagic system to outlying archipelagos, which they asserted would expand the maritime jurisdiction of continental States and pose obstacles to freedom of navigation, international trade, and national security.[76] Therefore, the Convention has no provision on the baseline rules for continental States' outlying archipelagos, and affirms that matters not regulated continue to be governed by the rules and principles of general international law.

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[73] United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs, "Limits in the Seas No.150 People's Republic of China: Maritime Claims in the South China Sea, State Practice Supplement," https://www.state.gov/wp-content/uploads/2022/01/LIS150-SCS-Supplement.pdf.

[74] Jens Evensen, "Certain Legal Aspects concerning the Delimitation of the Territorial Waters of Archipelagos," UN Doc. A/CONF.13/18, in *Official Records of the United Nations Conference on the Law of the Sea*, Volume I (Preparatory Documents), 1958, pp.295-297.

[75] "Revised Single Negotiating Text (Part II)," UN Doc. A/CONF.62/WP.8/Rev.1/Part II, in *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume V, pp.170-172; Myron H. Nordquist, Satya N. Nandan and Shabtai Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary*, Volume II, Martinus Nijhoff, 2002, p.412.

[76] C. F. Amerasinghe, "The Problem of Archipelagoes in the International Law of the Sea," *International & Comparative Law Quarterly*, Vol.23, No.3, 1974, pp.543-544.

The Convention does not prohibit continental States from using straight baselines to establish the territorial sea baselines of outlying archipelagos as a whole. In fact, many continental States use straight baselines or mixed baselines to establish the territorial sea baselines of their outlying archipelagos. The United States' *Limits in the Seas* report issued in 2022 examined the practice of 24 States in establishing baselines for the territorial sea of outlying archipelagos, of which 30 outlaying archipelagos as a whole applied straight baselines or mixed baselines. For example, Brazil applies a straight baseline to enclose all the islands in the São Pedro and São Paulo Archipelagos, and Denmark also applies a straight baseline to enclose the Faroe Islands as a whole.[77] These practices demonstrate that the United States' proposition and position that customary international law prohibits continental States from establishing straight baselines for outlying archipelagos as a whole are completely untenable.

3.4 Military Activities in the Exclusive Economic Zone

The United States insists on absolute freedom of navigation and military activities in the other States' EEZ and adheres to the notion that areas beyond the territorial sea are "international waters." The U.S. has long held a unilateral and extreme interpretation of the EEZ regime, attempting to fully apply the concept of high-seas freedoms within the EEZ in order to maintain its hegemonic interests in the world's oceans.[78] The U.S. disregards the fact that the EEZ framework is designed to balance the interests of coastal States and user States.[79] This not only contradicts the purposes and provisions of UNCLOS, but also severely undermines the legitimate rights of developing countries to peacefully exploit marine resources and achieve sustainable development, which has provoked protests and opposition from many States.

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[77] "Limits in the Seas No.150 People's Republic of China: Maritime Claims in the South China Sea, State Practice Supplement."

[78] "Recommendation of the President of the United States to the United States Senate regarding the Convention on the Law of the Sea, 7 October 1994," *Ocean Yearbook Online*, Vol.12, No.1, pp.537-538.

[79] Umberto Leanza and Maria Cristina Caracciolo. "The Exclusive Economic Zone," *The IMLI Manual on International Maritime Law*, Volume I, 2014, p.177; Ioannis Prezas, "Foreign Military Activities in the EEZ: Remarks on the Applicability and Scope of the Reciprocal 'Due Regard' Duties of Coastal and Third States," *The International Journal of Marine and Coastal Law*, Vol.34, No.1, 2019, pp.97-116.

On the one hand, the United States' position and actions deviate significantly from the text of UNCLOS. First, the U.S. exaggerates the scope of "other internationally lawful uses of the sea" under Article 58 of UNCLOS,[80] claiming that UNCLOS grants other States the right to conduct a wide range of military activities in the EEZ, including military exercises, weapons testing, and intelligence gathering.[81] However, according to UNCLOS, such activities must be "related to these freedoms"[82] and cannot be independent or completely unrelated. Moreover, the rights and freedoms of all States must be exercised "subject to the relevant provisions of this Convention" meaning that even activities related to navigation must comply with other UNCLOS provisions, particularly those concerning the sovereign rights and jurisdiction of coastal States in the EEZ, such as Article 56.

Second, the United States distorts the meaning of the obligations of due regard. While advocating freedom of military activities in the EEZ, the US often downplays or ignores the obligations of due regard.[83] The U.S. argues that military activities such as anchoring, intelligence gathering, surveillance, military exercises or maneuvers, in particular those involving the use of weapons or explosives, are traditional uses of the high seas protected by Article 58.[84] The U.S. also contends that Articles 56, 58, 86 and 89, together with the negotiating history of UNCLOS, indicate that the high seas freedoms, including military activities, continue to apply in the EEZ; the fulfillment of due regard is the responsibility of the flag State, not a right of the coastal State.[85]

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[80] Peter Dutton, ed., *Military Activities in the EEZ: A U.S.-China Dialogue on Security and International Law in the Maritime Commons*, US Naval War College China Maritime Studies Institute, 2010.

[81] "Commentary — The 1982 United Nations Convention on the Law of the Sea and the Agreement on Implementation of Part XI," p.24.

[82] Article 58, Paragraph 1 of UNCLOS provides that, "In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention."

[83] Ioannis Prezas, "Foreign Military Activities in the Exclusive Economic Zone: Remarks on the Applicability and Scope of the Reciprocal 'Due Regard' Duties of Coastal and Third States," *The International Journal of Marine and Coastal Law*, Vol.34, No.1, 2019, pp.97-116.

[84] Amitai Etzioni, "Freedom of Navigation Assertions: The United States as the World's Policeman," *Armed Forces & Society*, Vol.42, No.3, 2016, pp.501-517; Elmar Rauch, "Military Uses of the Oceans," *German Yearbook of International Law*, Vol.28, 1985, p.229.

[85] Robert Beckman, "Military Exercises Involving Live Firing in the EEZ and the 'Due Regard' Obligation in 1982 Unclos," in *Asia and UNCLOS 30 Years' Implementation: An Assessment*, Springer Nature Singapore, 2024, pp.199-210; Brian Wilson, "An Avoidable Maritime Conflict: Disputes Regarding Military Activities in the

The obligations of due regard do, however, require user States to avoid important fishing grounds, shipping lanes and environmentally sensitive zones of coastal States during military activities, to minimize interference with the economic, environmental and security interests of coastal States, and to ensure that there is no negative impact on their resource management, environmental safety and maritime order.[86] The U.S. unilaterally conducts large-scale, frequent, and high-intensity activities such as close reconnaissance, military surveys, and exercises in the EEZs of coastal States, potentially violating their sovereign rights and undermining regional maritime security and stability. This approach, which emphasizes freedom of navigation while neglecting the obligations of due regard, is essentially an abuse and misinterpretation of international law.[87]

Third, the United States mischaracterizes military and hydrographic surveys. The U.S. has long argued that military and hydrographic surveys are not marine scientific research regulated by Part XIII of UNCLOS.[88] However, the technical methods and content of military and hydrographic surveys are highly consistent with those of marine scientific research. Moreover, excluding military and hydrographic surveys from marine scientific research risks hollowing out and weakening the whole marine scientific research regime.[89]

Exclusive Economic Zone," *Journal of Maritime Law and Commerce*, Vol.41, No.3, 2010, p.421.

[86] Julia Gaunce, "On the Interpretation of the General Duty of 'Due Regard'," *Ocean Yearbook*, Vol.32, 2018, pp.27-59.

[87] Lowell Bautista, "The Role of Coastal States," in *Routledge Handbook of Maritime Regulation and Enforcement*, Routledge, 2015, pp.59-70; Albert J. Hoffmann, "Freedom of Navigation," in *Max Planck Encyclopedia of Public International Law*, 2011, para.15.

[88] J. Ashley Roach and Robert W. Smith, *Excessive Maritime Claims*, 3rd edition, Martinus Nijhoff, 2012, p.508; Raul (Pete) Pedrozo, "Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone," *Chinese Journal of International Law*, Vol.9, No.1, 2010, p.21; James Kraska, "Marine Data Collection Outside the MSR Regime," in *Viability of UNCLOS amid Emerging Global Maritime Challenges*, Springer Nature Singapore, 2024, pp.41-57.

[89] UN Office of Legal Affairs Division for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Marine Scientific Research—A Revised Guide to the Implementation of the Relevant Provisions of the United Nations Convention on the Law of the Sea*, 2010.

Fourth, the U.S. policies and actions exploit the ambiguity of terms such as "other internationally lawful uses" and "due regard" in UNCLOS to maintain its military hegemony in global oceans.[90]

Finally, the U.S. ignores the principle of "peaceful uses of the seas and oceans." The principle of peaceful use is one of the fundamental principles of freedom of high seas and other maritime activities established by UNCLOS to ensure global maritime peace and stability. However, the U.S. is simplifying this principle into a blanket authorization for military activities,[91] even conducting hostile and threatening activities, thus escalating regional tensions and potentially constituting a threat of force, which is clearly contrary to the spirit of the UN Charter and UNCLOS.[92]

On the other hand, state practice does not support the U.S. position. Many States explicitly oppose unrestricted foreign military activities in the EEZ, emphasizing coastal State jurisdiction over resource conservation, the marine environment, and even security interests in the EEZ.[93]

For example, upon ratifying UNCLOS, Bangladesh, Brazil, Cape Verde, Ecuador, India, Malaysia, Pakistan, Thailand, and Uruguay issued declarations stating that UNCLOS does not permit military exercises or operations involving weapons or explosives in the EEZ without the consent of the coastal State.[94] Iran, a Non-Party to UNCLOS, has enacted national legislation prohibiting foreign military activities, reconnaissance and other activities in its EEZ and continental shelf that are inconsistent with its interests.[95]

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[90] Zhang Haiwen, "Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ," *Chinese Journal of International Law*, Vol.9, No.1, 2010, pp.31-47.

[91] Mark J. Valencia and Kazumine Akimoto, "Guidelines for Navigation and Overflight in the Exclusive Economic Zone," *Marine Policy*, Vol.30, No.6, 2006, pp.704-711.

[92] Wu Jilu and Zhang Haiwen, "Freedom of the Seas and the Law of the Sea: A Chinese Perspective," in *Twenty-First Century Seapower*, 2013, pp.281-297; Zou Keyuan, "Peaceful Use of the Sea and Military Intelligence Gathering in the EEZ," *Asian Yearbook of International Law*, Vol.22, 2016, pp.161-176.

[93] Examples of such States include India, Bangladesh, Pakistan, Maldives, Mauritius, Myanmar, China, Thailand, Malaysia, Philippines, Indonesia, Iran, DPRK, Kenya, Brazil, Cape Verde, Ecuador, and Uruguay. The geographical area covers the Indian, Pacific and Atlantic Oceans. *See* Sam Bateman, "Building Good Order at Sea in Southeast Asia: The Promise of International Regimes," in *Maritime Security in Southeast Asia*, Routledge, 2007, pp.111-130.

[94] "United Nations Convention on the Law of the Sea—Declarations and Reservations."

[95] "Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea, 1993,"

India requires foreign military surveys, reconnaissance or oceanographic surveys in the EEZ to obtain prior consent of the coastal State. It has repeatedly protested the United States' military surveys in its EEZ without notification, accusing the U.S. of violating its sovereignty.[96] The Democratic People's Republic of Korea (DPRK) prohibits foreign persons, vessels, and aircraft from photographing or surveying in its EEZ without prior permission.[97]

Similarly, China requires that any surveying and mapping work carried out by foreign organizations or individuals in its EEZ must seek its consent.[98] China considers the U.S. military surveys in its EEZ without notification a violation of its rights under UNCLOS.[99]

In conclusion, the U.S. position on military activities in the EEZ is a unilateral interpretation and misapplication of UNCLOS, which seriously undermines the legitimate rights of coastal States and destabilizes the international maritime order.[100]

3.5 Air Defense Identification Zone

For quite some time, the content in U.S. official statements regarding the Air Defense Identification Zone (ADIZ) has been out of step with international practice, which even

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https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/IRN_1993_Act.pdf.

[96] Sam Bateman, "Hydrographic Surveying in the EEZ: Differences and Overlaps with Marine Scientific Research," *Marine Policy*, Vol.29, No.2, 2005, pp.163-174; J. Ashley Roach, "Marine Data Collection： Methods and the Law," in *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention*, pp.171-208; Moritaka Hayashi, "Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms," *Marine Policy*, Vol.29, No.2, 2005, pp.123-137.

[97] "DPRK Decree Establishing the Economic Zone, August 1977," in *Maritime Claims Reference Manual 2023*, https://www.jag.navy.mil/national-security/mcrm/.

[98] *See* Articles 2, 8 and 61 of the Surveying and Mapping Law of the People's Republic of China. The Surveying and Mapping Law of China was adopted by the Standing Committee of the National People's Congress on December 28, 1992, and subsequently amended on August 29, 2002, and April 27, 2017. Previous U.S. annual freedom of navigation reports have repeatedly misquoted the effective version of the law. For example, the U.S. reports for fiscal years 2018, 2019, and 2022 all cited the 2002 Chinese legislation.

[99] "Foreign Ministry Spokesperson Ma Zhaoxu's Remarks on the US Surveillance Ship's Activities in Chinese Exclusive Economic Zone in the Yellow Sea," Ministry of Foreign Affairs of the People's Republic of China, May 6, 2009, https://www.fmprc.gov.cn/eng/xw/fyrbt/fyrbt/202405/t20240530_11348858.html.

[100] Sophia Kopela, "The 'Territorialisation' of the Exclusive Economic Zone: Implications for Maritime Jurisdiction," paper presented at the 20th Anniversary Conference of the International Boundaries Research Unit on "The State of Sovereignty," Durham University, United Kingdom, 2009; Wolf Plesman and Volker Roeben, "Marine Scientific Research: State Practice versus Law of the Sea?" in Ruediger Wolfrum, ed., *Law of the Sea at the Crossroads: The Continuing Search for a Universally Accepted Regime*, Berlin: Duncker und Humblot, 1991, p.375.

leads to an inconsistency of U.S. ADIZ rules with its own official statements.

Firstly, the U.S. often stresses that it "does not recognize the right of a coastal State to apply its ADIZ procedures to foreign aircraft not intending to enter national airspace or does the United States apply its ADIZ procedures to foreign aircraft not intending to enter U.S. airspace."[101] However, this does not conform to the "applicability" clause[102] of current U.S. ADIZ rules, which apply to aircraft flying out of U.S. territorial airspace through its ADIZ. Therefore, the U.S. practice of "establishing reasonable conditions of entry" into national airspace as the legal basis for ADIZ regulations is not rigorous.[103] And this legal theory for establishing an ADIZ is also inconsistent with current U.S. ADIZ rules. Furthermore, the U.S. has so far never explained why its ADIZ covers undisputed territorial airspace of another State, like the Dog Rocks of the Bahamas.[104]

Secondly, the U.S. has an argument that a coastal State may not impose its ADIZ procedures upon foreign aircraft that are "merely transiting" international airspace within the State's ADIZ and not intending to enter national airspace. This is not consistent with the practice of the vast majority of States that have declared ADIZs, not even compatible with the original U.S. ADIZ rules.[105] Looking at the relevant practice of States whose ADIZs cover international airspace[106], only some provisions of the

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[101] *The Commander's Handbook on the Law of Naval Operations*, March 2022, p.2-17.

[102] The "applicability" clause of U.S. ADIZ rules provides, "This subpart prescribes rules for operating all aircraft (except for Department of Defense and law enforcement aircraft) in a defense area, or into, within, or out of the United States through an Air Defense Identification Zone (ADIZ) designated in subpart B." *See* the Code of Federal Regulations accordingly: 14 C.F.R. §99.1 (2024).

[103] *The Commander's Handbook on the Law of Naval Operations*, p.2-17.

[104] The U.S. ADIZs used to cover the Guadalupe Island of Mexico from 1950 to 1988, and still partially cover the territorial airspace of the Bahamas (including the Muertos Cays and Dog Rocks, as well as the archipelagic waters and associated territorial waters claimed by the Bahamas based on its archipelagic baselines) to date. *See* Cao Qun, *The U.S. Air Defense Identification Zones: A Historical and Legal Study*, Beijing: China Ocean Press, 2020, pp.126 & 154-157; Cao Qun and Bao Yinan, "No Need to Worry about a Potential South China Sea ADIZ," SCSPI, July 6, 2020, http://www.scspi.org/en/dtfx/1594038414.

[105] The U.S. ADIZ rules in the 1950s broadly applied to aircraft operating "into or within" an ADIZ. Only following the revision of the "applicability" clause in 1961 did the ADIZ rules cease to apply to "merely transiting" aircraft. *See* the Federal Register respectively: Security Control of Air Traffic, 15 Fed. Reg. 9319 (December 27, 1950); Security Control of Air Traffic, 25 Fed. Reg. 340 (January 15, 1960); Security Control of Air Traffic, 26 Fed. Reg. 9710 (October 14, 1961).

[106] According to the author's statistics, fewer than 20 States' ADIZs cover international airspace, and most cover their own territorial airspace as well. There are many ADIZs established completely within the declaring States' territorial airspace, including those of Finland, Poland, Turkey, Libya, Sri Lanka, Peru, Argentina, Brazil, and Uruguay. It is worth noting that certain Latin American ADIZs have been established exclusively to address non-traditional security threats, for example the ADIZs established by Peru and Argentina are aimed at combating

ADIZ rules of Japan and India are similar to those of the U.S. in this regard.[107] Obviously, the practice of excluding the application of ADIZ rules for "merely transiting" aircraft is still a minority practice and has not constituted an international practice.

Thirdly, the U.S. has adopted double standards in insisting on "freedom of overflight" for its military aircraft in other States' ADIZs while propagandizing non-allied States' similar operations as a "threat." On the one hand, the U.S. underlines "freedom of overflight" for military aircraft, and has been challenging China's East China Sea ADIZ for successive years and repeatedly sending military aircraft to transit the Taiwan Strait;[108] on the other hand, the U.S. has sensationalized PLA military aircraft operations in international airspace within the ADIZs of the U.S., Japan and South Korea, as "intrusions" or "provocative."[109] The U.S. double-standards approach on the ADIZ is obviously contrary to its rhetoric purporting to defend "freedom of navigation."

In addition, the U.S. also holds double standards on the issue in relation to Flight Information Regions (FIRs) and the "high seas freedoms" enjoyed by military aircraft, selectively challenging certain States' "excessive maritime claims." The U.S. does not recognize the right of a coastal State to apply its FIR procedures to foreign military aircraft merely transiting international airspace within its FIR.[110] However, the U.S. has

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drug trafficking and organized crime.

[107] Regarding Japan's requirement of filing a flight plan, it is only applicable to aircraft flying into Japanese territory from abroad through the ADIZ. *See* AIP Japan, 1 Mar 2018, ENR 5.2-21. There was no similar stipulation in India's earlier ADIZ rules, but the 2018 revision of its Air Defense Clearance (ADC) requirements clearly indicated that the applicability was limited to "departing aircraft as well as aircraft entering Indian airspace." For example, Article 5.2.2.2.3 of its rules states: "ADC number for departing aircraft as well as aircraft entering Indian airspace shall be strictly enforced by ATC and no flight would be cleared without a valid ADC number." *See* AIP India, 19 Jul 2018, ENR 5.2-18, 5.2.2.2.3.

[108] In recent years, the U.S. military aircraft operations in the Taiwan Strait have become increasingly provocative. For instance, a US Navy P-8A anti-submarine patrol aircraft flew across the Taiwan Strait from north to south in December 2022. It flew less than 13 nautical miles away from the territorial sea baseline of Chinese mainland, marking a new record for the recent close-in reconnaissance of China by U.S. military aircraft. *See* "An Incomplete Report on US Military Activities in the South China Sea in 2022," SCSPI, March 2023, http://www.scspi.org/en/yjbg/incomplete-report-us-military-activities-south-china-sea-2022.

[109] See Mercedes Trent, *Over the Line; Implications of China's ADIZ Intrusions in Northeast Asia*, Federation of American Scientists, 2020, p.6; Laura Gozzi, "China and Russia stage first joint bomber patrol near Alaska," *BBC*, July 25, 2024, https://www.bbc.com/news/articles/cz9x22k5qv2o.

[110] *The Commander's Handbook on the Law of Naval Operations*, p.2-17.

never conducted FONOPs against the FIR claim of Greece, its NATO ally.[111] The related challenging targets of U.S. FONOPs in recent three decades include Cuba, Myanmar and Venezuela. Specifically, the U.S. has launched the largest number of challenges against the FIR claim of Venezuela, which has strained relations with the U.S.[112]

3.6 Historic Waters

The United States claims that historic waters are recognized as valid only if the following prerequisites are satisfied: first, the State asserting claims thereto has done so openly and notoriously; second, the State has effectively exercised its authority over a long and continuous period; and third, other States have acquiesced therein.[113] Among the criteria, the U.S. especially emphasizes the importance of the attitudes of other States in determining whether the waters constitute historic waters. It claims that the determination of historic waters not only requires that other States do not object or protest, but also that they must acquiesce to the claim of the historic waters. This proposition, in addition to the first two criteria, elevates the threshold for determining historic waters. Compared to other States' inaction or non-opposition, the acquiescence standard is stricter.

However, the U.S.' claim deviates from judicial and state practice and does not conform to the consensus of scholars. For example, in the case concerning the Land, Island and Maritime Frontier Dispute between El Salvador and Honduras in 1992, one reason for

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[111] Allegedly for air traffic safety purposes, Greece "requests" that all civil and military aircraft should submit flight plans prior to their entry into the Athinai FIR. Ministry of Foreign Affairs, Hellenic Republic, "Athens FIR," https://www.mfa.gr/en/foreign-policy/foreign-policy-issues/issues-of-greek-turkish-relations/athens-fir/ There were communications between the U.S. and Greece on this issue: Greece protested the U.S. refusal to submit flight plans when U.S. military aircraft operate in the Athinai FIR, but the U.S. responded that it's not under any obligation to comply with ICAO regulations when its military aircraft operate in foreign States' FIRs. *See* George Assonitis, "The Greek Airspace: The Legality of a Paradox," *United States Air Force Academy Journal of Legal Studies*, Vol.8, 1997-1998, pp.172 & 181.

[112] With regards to the related FIR claims, the U.S. FONOPs have challenged Cuba in FY 1998, Myanmar in FY 2000, and Venezuela in FY 2014 and 2016-2020. *See* U.S. Navy Judge Advocate General's Corps, *Maritime Claims Reference Manual*, December 2021, p.3; "DoD Annual Freedom of Navigation (FON) Reports."

[113] *See* note of United States Mission to the United Nations in New York dated June 17, 1987, in *Cumulative Digest of United States Practice in International Law*, Book II, pp.1807–1809; UN Office for Ocean Affairs and the Law of the Sea, *Law of the Sea Bulletin*, No.10, November 1987, p.23; UN Office of Legal Affairs Division for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Current Developments in State Practice*, No. II, p.86.

the International Court of Justice's recognition of the waters in the Gulf of Fonseca as historic waters was the absence of opposition from other States.[114] As pointed out by researchers, Canada claims Hudson Bay as a "historic bay" and one of the reasons is that "for more than a century, no country has publicly opposed the claim." Acquiescence of other States to the Canadian claim is not a necessary condition in this case.[115]

The conditions unilaterally proposed by the U.S. unreasonably raise the criteria for determining historic waters on the one hand, and exaggerate the role and significance of other States' attitudes in the formation of historic waters on the other hand,[116] causing unnecessary and unreasonable restrictions and reductions to the maritime rights and interests of coastal States.

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[114] "Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) Judgment," in *I.C.J. Reports 1992*, p.601, para.405.

[115] Michael Byers and Suzanne Lalonde, "Who Controls the Northwest Passage?" *Vanderbilt Journal of Transnational Law*, Vol.42, 2006, p.1154.

[116] For example, the study prepared by the UN Secretariat, "Juridical Regime of Historic Waters, Including Historic Bays," points out that in determining whether or not a title to "historic waters" exists, there are three factors which have to be taken into consideration: (1) authority exercised over the area by the State claiming it as "historic waters"; (2) the continuity of such exercise of authority; and (3) the attitude of foreign States. First, effective exercise of sovereignty over the area by the claiming State is a necessary requirement for title to the area as "historic waters" of that State. Second, such exercise of sovereignty must have continued during a considerable time so as to have developed into a usage. Third, the attitude of foreign States to the activities of the claiming State in the area must have been such that it can be characterized as an attitude of "general toleration." The opinion is obviously different from the "acquiescence" claimed by the United States. *See* UN Secretariat, "Juridical Regime of Historic Waters, Including Historic Bays," *Yearbook of the International Law Commission*, Vol.2, 1962, UN Doc. A/CN.4/143, pp.13 & 25.

4 Legal Evaluation on U.S. "Freedom of Navigation"

In essence, the U.S. "freedom of navigation" tries its best to suppress the legitimate rights and interests of other States in order to gain unfettered freedom. The U.S. "freedom of navigation" seriously distorts the interpretation and development of international law, perpetuates the logic of gunboat diplomacy. It serves the interests and geopolitical strategy of the United States and risks threatening regional peace and stability with military force and disrupting the international maritime order. It embodies distinct illegality, unreasonableness and double standards.

4.1 Unlawfulness

The U.S. "freedom of navigation" contains a large number of navigational claims that the United States regards as customary international law, but they in fact run counter to the practice of most States. In the process of constructing its understandings of freedom of navigation, the United States has violated the basic requirements of international law for the *bona fide* interpretation of treaties and customary international law. The U.S. has abused its status as a Non-Party and "customary international law" by selectively applying treaty rules in the establishment and implementation of U.S. "freedom of navigation," which cause destruction to the systemic nature of the Convention as a "package deal." Specifically, the unlawfulness of U.S. "freedom of navigation" is mainly reflected in the following three aspects.

First, it tries to obscure the development trend of rules related to navigation. Without acceding to the Convention, the United States has taken it upon itself to determine the customary international law attributes of some rules related to navigation, forcibly asserting its rights and obligations *vis-à-vis* other States under international law. In addition, the U.S. tends to proclaim its own judgment as a "global guideline" without considering the legitimacy and rationality of other States' views to the contrary, and implement its non-existent "rights" through diplomatic means and military actions.

To a large extent, the U.S. "freedom of navigation" has suppressed the positions of more States with its own opinion and practice, making it difficult for truly mainstream state practice to be adequately reflected in the international community. For example, the United States carries out high-frequency and wide-ranging FONOPs and creates the "practice" of safeguarding the freedom of user States on a global scale. Meanwhile, most other States are not capable of adequately counteracting this and can only suffer from the infringement of the United States.

Second, it distorts the interpretation of rules related to navigation. The United States habitually interprets the rules of customary international law and the provisions of the Convention unilaterally. Under the auspices of its strong maritime power and international discourse, the United States, as a Non-Party, has used its unilateral interpretation of the Convention to deny and challenge the Parties' understanding of provisions. It attempts to usurp the right to interpret the Convention and arbitrarily defines its own standards as rules of customary international law.

The U.S. "freedom of navigation" contains a considerable amount of understanding of the rules of international law that are not widely accepted and are even fundamentally wrong. In practice, the United States' own "interpretations" supported by its diplomatic and military activities, often overshadow the voices of correct interpretations, making it difficult to draw wider attention to the views and positions that are truly in line with the essence of rules in the law of the sea.[117]

Third, the integral nature of the rules of the Convention is being torn apart. The rules of the various regimes under the Convention are not isolated, but are interrelated and interact with each other. In the nearly decade-long process of treaty-making, the determination of specific provisions is often the result of full consultation and compromise among States, and the creation of rights is usually accompanied by the constraints of obligations. The United States differentiates between related rules that are

[117] See previous analysis in this Assessment on issues such as innocent passage and straight baselines.

holistic in nature, selectively recognizing as customary international law those rules of a particular Convention regime that are advantageous to it, and excluding those rules that are not in line with its interests. It even coerces other States into accepting the U.S. rules and standards by power-based initiatives such as FONOPs.

No matter what kind of "theory" the United States uses to cover it up, the selectivity of the U.S. "freedom of navigation" has substantially undermined the integral nature of the Convention as a "package deal." The practice of the United States, as a Non-Party to the Convention, of enjoying only its rights but evading its obligations in the system of rules of the international law of the sea, unduly puts it in a position of superiority over the Parties. This is neither reasonable nor legitimate, and it not only infringes the rights of State Parties to the Convention, but also runs counter to the international rule of law, which requires *bona fide* compliance with the rules of international law and the equal status of States.

It should be recognized that the freedom of navigation guaranteed by customary international law is limited and conditional. The U.S. "freedom of navigation" seriously jeopardizes the sovereignty, sovereign rights and jurisdiction of coastal States under international law and has a significant impact on the international legal order of the oceans, exposing its divergence with the common interests of the international community.

4.2 Unreasonableness

The core value of freedom of navigation is to ensure that sea lanes remain open for global commerce. The use of warships must adhere to the principles of peaceful coexistence, international cooperation and mutual benefit. The concept of U.S. "freedom of navigation" is rooted in its historically extensive commercial interests and global trade routes. After World War II, the U.S. played a pivotal role in the international trading system with its dominant merchant fleet.[118] At the time, the U.S.

[118] John Frittelli, "Shipping Under the Jones Act: Legislative and Regulatory Background," Congressional Research

interpretation of “freedom of navigation” was distinctly commercial and focused on securing trade passage rights for U.S. vessels in global waters.[119]

However, concurrent with the overseas relocation of U.S. manufacturing operations and the advance of globalization, there has been a marked decline in the size of the U.S. merchant fleet and its share of global trade.[120] At present, the U.S. merchant fleet has fallen out of the top 20 in terms of number and tonnage, and its share of the world’s seaborne trade has undergone a substantial decrease.[121] This structural change has diminished the traditional commercial value of freedom of navigation for the U.S., meaning that from a purely commercial perspective, the U.S. no longer relies on freedom of navigation to protect its economic lifeline as it once did. Consequently, the U.S. interpretation of freedom of navigation has evolved, no longer being merely a tool to protect commercial interests, but increasingly taking on military and strategic significance.

Looking further, the reason why the United States’ emphasis on “freedom of navigation” has shifted toward a military dimension and morphed into blatant “freedom of willful trespassing” lies mainly in the following factors:

First, the necessity to uphold global hegemony and maintain a substantial military presence. Ensuring unimpeded access to global waters including among hundreds of military bases for military deployment, power projection, and intelligence gathering is of paramount importance to the United States. In this regard, “freedom of navigation” has emerged as a pivotal instrument in sustaining its global military dominance.

Service, November 21, 2019, p.14, https://crsreports.congress.gov/product/details?prodcode=R45725.

[119] Emma Salisbury, “Don’t Protect the U.S. Merchant Marine—Promote It,” War on the Rocks, January 27, 2025, https://warontherocks.com/2025/01/dont-protect-the-u-s-merchant-marine-promote-it/.

[120] Brent D. Sadler and Peter St Onge, “Rebuilding America’s Maritime Strength: A Shipping Proof-of-Concept Demonstration,” Heritage Foundation Backgrounder 3782, August 16, 2023, pp.6-7, https://www.heritage.org/sites/default/files/2023-08/BG3782_0.pdf.

[121] “United States-Flag Privately-Owned Merchant Fleet Report,” United States Department of Transportation Maritime Administration, 2023, https://www.maritime.dot.gov/sites/marad.dot.gov/files/2024-02/DS_USFlag-Fleet_2023_05_18Bundle.pdf.

Second, strategic considerations to counter competitors have led to an intensification of military activities in certain maritime areas under the guise of maintaining "freedom of navigation," which is in essence using military displays and deployments to deter and pressure other States.

Third, the influence of domestic military-industrial interests has resulted in a more aggressive military posture, driven by lobbying and political contributions.

Fourth, selective interpretation and application of UNCLOS have shaped the U.S. approach. Notably, the United States, refusing to accede to the Convention, has strategically chosen to embrace provisions that align with its interests while rejecting those that might impose limitations on its actions. This selective approach has led to a U.S. interpretation of "freedom of navigation" that is at odds with the fundamental principles of UNCLOS and infringes rights and interests of other states .

In conclusion, the United States' application of the principle of freedom of navigation, which it allegedly champions, is often selective and self-serving, raising significant questions regarding its commitment to this principle.

4.3 Double Standards

The U.S. "freedom of navigation" also reflects its hypocrisy of adopting double standards. As a Non-Party to the Convention, the U.S. attempts, through the typical use of force in its FONOPs, to impose its domestic laws and unilateral interpretation of freedom of navigation on the Parties to the Convention, and use dispute settlement mechanisms not recognized by the Convention to "resolve" disputes concerning the interpretation and application of the Convention.

Facts have proven that the U.S. unilateral interpretation of freedom of navigation and its FONOPs based on the theory not only fail to uphold the authority and integrity of the Convention but also weaken and even undermine the international maritime legal order.

The U.S. “freedom of navigation” essentially amounts to an unlimited expansion of U.S. military presence in global oceans, selective use of geopolitical pressure and naval power projection based on its interests, and application of differential treatment and judgment standards to different States.

Although the U.S. repeatedly emphasizes that its FONOPs in the South China Sea are “not targeted at any specific country,” China has been, statistically, the primary target of these operations over the past decade.[122] As explicitly pointed out in a report by the U.S. Congressional Research Service, “although disputes in the SCS and ECS involving China and its neighbors may appear at first glance to be disputes between faraway States over a few rocks and reefs in the ocean that are of seemingly little importance to the United States, the SCS and ECS can engage U.S. interests for a variety of strategic, political, and economic reasons.”[123] In addition, as previously analyzed, the U.S. has adopted questionable double standards on issues including the status of islands and the ADIZ, applying different standards to itself and other States.

When “freedom of navigation” is entirely subordinate to military and strategic purposes and used to deter and pressure other States, it has completely morphed into a “freedom of military threat.”

To preserve the integrity of freedom of navigation, States must return to its original purpose: promoting peace and mutual benefit through free trade. Multilateral cooperation, rather than unilateral dominance, is the only way forward. Warships should protect merchant vessels and safeguard maritime security. We shall not forget the true meaning of freedom of navigation: prosperity, connectivity, and cooperation. If we lose sight of this, the risks we face are not just the loss of open sea lanes, but also the loss of the stability of global oceans.

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[122] Hyun-Binn Cho and Brian C Chao, “Muddied Waters: Freedom-of-Navigation Operations as Signals in the South China Sea,” *The British Journal of Politics and International Relations*, Vol.27, No.1, 2024, pp.7-10.

[123] “U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress,” Congressional Research Service, updated August 26, 2024, p.1, https://crsreports.congress.gov/product/details?prodcode=R42784.