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US OCEAN POLICY: BETWEEN CONSISTENCY AND CONTRADICTIONS

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Abstract

The US has traditionally played a key role in the protection of rules of international law, including the use and exploitation of oceans space and resources. The US struggle with other states excessive maritime claims is carried out in the framework of the Freedom of Navigation Program (FON). Its implementation is crucial not only for ensuring the US commercial and economic interests, but strategic and war ones also. First, it guarantees the opportunity for American armed forces' rapid transfer by sea. However, in their fight against such kinds of threats like nuclear proliferation, piracy, maritime terrorism, which are a challenge to all countries of the world community, the United States directly violates the rules and provisions of the 1982 UN Convention on the Law of the Sea (UNCLOS). Moreover, the US's desire to ensure for itself a priority level of naval and intelligence activities leads Washington to a broad interpretation of conventional rules. As a result, the US non-participation in the 1982 UNCLOS combined with continuous enforcing of other states Convention rules defines the US ocean policy as globally contradictory and inconsistent. Presently, additional economical and political incentives have appeared, motivating Washington to revise its policy with respect to the fundamental international sea-law document. At the same time, the prospects of its accession to the 1982 UNCLOS, and in a broader sense, adjustment of approaches to the issues of the ocean's space control will depend on the balance of internal powers advocating different options of global strategy.

Key words

Customary spaces; 1982 UN Convention on the Law of the Sea (UNCLOS); Freedom of Navigation (FON); right of transit passage; international straits; Navy; Weapons of Mass Destruction (WMD); Proliferation Security Initiative (PSI); maritime terrorism; conventional and customary law; Arctic; Asia-Pacific region.

The US traditionally considers the ocean's space within the framework of a political-and-ideological posture of "global customary" concept. Their significance is determined by the fact that oceans cover about 70% of the Earth surface; nearly 80% of the Earth population lives in the coastal zone, over 80% of world trade is carried out by sea. At that 3/4 of this volume is carried through the largest international straits (Malacca, Singapore) and channels (Panama, Suez). The US, as one of the largest world economies, the key consumer of goods and resources, is thrilled with using at full the advantages of sea transport being the cheapest kind of transport and seaborne trade.

The US considers the smooth functioning of this system as a base for further expansion of the liberal economic world order, which, from the Washington standpoint, guarantees peace and stability on a global scale.

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To maintain its status quo the US continues to uphold the navigation freedom principle. It means not just an implementation of the right conferred in the 1982 UN Convention on the Law of the Sea, and applicable both to high seas and to 200-mile exclusive economic zone (EEZ) of coastal States, but a far more wide range of aspects to which the US relate the following:

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– Disputing establishment of incorrect straight baselines from which the breadth of the coastal State territorial sea is measured;

– Disputing the spread of the status of historic waters being under the full sovereignty of a state, in the waters, which the US recognizes as such;

– Non-recognition of the territorial sea boundaries exceeding the convention limit of 12 nautical miles;

– Opposing the enactment of notification or authorization-based procedure of innocent passage through the territorial sea of a coastal State both with respect to civil and war ships;

– Disputing claims of coastal states for extending their powers in safety administration within a 24-mile contiguous zone;

– Fighting against claims of coastal States in areas of seas which are beyond the limits of territorial waters, which lead to limitation of freedom of the high sea in the 200-mile exclusive economic zone;

– Dissent from the claims of archipelagic and States bordering the strait limitation of the rights of archipelagic and transit passages.

Thus, the US orderly realizes a policy of global enhancement of international legal status on a scale of the entire Ocean which the US considers as a compulsory element of ensuring global and regional stability. Protection of the US preferences is carried out in the framework of Freedom of Navigation Program initiated in 1979, administered by the US Department of Defense and Department of State. Thereat, protection of navigation freedom is crucial not only in the case of further US socio-economic development, but it remains a key element of the US defense policy as a whole. All basic elements of the US National Security Policy, namely, strategic deterrence, operational presence, crises response, forces recycle, directly depend on observance of the freedom of navigation principle, the rights of transit and archipelagic passages [Roach, Smith 2012: 642]. Provision of mobility and effectiveness of troops recycle to any region of the Earth by sea was and will in prospect remain one of the US policy priority trends. Washington will further strive by all means, both legally and by force, to get freedom of entry in any waters of the World Ocean.

The FON is implemented both by conducting diplomatic negotiations, submitting diplomatic notes, flag demonstrations, conducting naval exercises, and by a direct effect method with involvement of the US Navy combat ships for recourse of legal claims. During the "cold war" the US Navy, numbering about 600 waterborne platforms, conducted nearly 35 to 40 operations of the kind every year. Nowadays, after the US Navy has been halved, the number of exercises was reduced to 5–20 per year [Kraska, Pedrozo 2013: 203]. In the course of B. Obama's administration rule such operations were conducted against Argentina, Brazil, Venezuela, Vietnam, India, Indonesia, Iran, Cambodia, PRC, Libya, Liberia, Malaysia, the Republic of Maldives, Myanmar, Nicaragua, Oman, Peru, Republic of Korea, Taiwan, Thailand, Togo, Philippines, Sri-Lanka, Ecuador, Japan.

In prospect, the main objectives of such operations will remain both the States which either do not participate in the 1982 UN Convention on the Law of the Sea (Venezuela, Iran, Columbia, Libya, Peru), and those which substantially infringe the convention rules or else allow for their broad interpretation. It can be believed that in the course of the FON Program realization a special place will be devoted to PRC. This is due to the fact that, on the one hand, China is not only a full participant of the 1982 Convention, but it is a participant of both the additional Agreements of 1994 and 1995 to this Convention[1]. On the

[1]Agreement on Implementation of Part XI of the United Nations Convention on the Law of the Sea of December 10, 1982. Adopted by the General Assembly Resolution 48/263 on July 28, 1994 [Electronic resource] : UN Official web–site URL: http://www.un.org/ru/documents/decl_conv/conventions/agreement_impl_lawsea.shtml (accessed date: 2.03.2016); Agreement on Implementation of provisions of the 1982 UN Convention on the Law of the Sea, which relate to conservation of straddling fish stocks and the stocks of highly migratory species, and their management. A/CONF.164/37 8 September 1995 [Electronic resource] : URL: http://www.un.org/ru/documents/ods.asp?m=A/CONF.164/37 (accessed date: 2.03.2016).

other hand, it is hard to find an example of any other country that on such a scale would ignore directions contained in the 1982 Convention. For purposes of prime consideration of national security interests Beijing abridges the right of innocent passage through its territorial sea; it aspires to extending the rights in ensuring safety within the contiguous zone; it curtails freedom of navigation in EEZ; it does not recognize as international the airspace over EEZ[2]. The PRC claims on islands and areas of South-China and East-China Seas directly affect the interests of the US major allies in Asia-Pacific Region, namely, Indonesia, Taiwan, Philippines, Japan.

Conducting the FON Program in Asia-Pacific Area is a legitimate step towards Washington paying closer attention to this maritime region which is very important for

Table 1

The US Department of Defense Data on the FON Program Implementation in 2014

#	Country	Legal Claims
1	Argentina	Notification order of war ships passage through territorial sea
2	Brazil	Administrative procedure of conducting exercises and maneuvers on the side of war ships within the EEZ
3	Venezuela	Administrative nature of aircraft flight through the international airspace over the EEZ
4	Vietnam	Incorrect drawing of straight baselines
5	India	Administrative procedure of conducting exercises and maneuvers on the side of war ships within the EEZ
6	Indonesia	Incomplete designation of sea lanes for archipelagic passage; notification order of warships passage through territorial sea and archipelagic waters; restrictions to stop, anchorage, and unfounded passage of ships through areas of seas adjacent to territorial sea
7	Iran	Incorrect drawing of straight baselines; limitation of the right of transit passage through Strait of Ormuz; ban on conduct of the Navy operations within EEZ
8	PRC	Incorrect drawing of straight baselines; extension of jurisdiction to airspace over EEZ; restrictions on aircraft flight through Air Defense Identification Zone (ADIZ); national legislation providing criminal liability for conducting non-coordinated survey within EEZ
9	Libya	Extending the status of historic (internal) waters to aquatic area of Gulf of Sidra
10	Malaysia	Administrative nature of passage of nuclear powered vessels through territorial sea; Administrative nature of the Navy activities within EEZ
11	Maldives	Requirement of receiving a permission for warships entry into EEZ and combat aircraft flight over archipelagic waters
12	Nicaragua	Incorrect drawing of straight baselines; extending boundaries of territorial sea to 200 nautical miles; notification nature of warships passage through territorial sea; enlarging the power in providing safety in contiguous zone; notification nature of entry into contiguous zone
13	Oman	Recognition of only the right of innocent passage through Strait of Ormuz with requirement of receiving a permission for such a passage
14	Peru	200-mile limit of territorial sea
15	Republic of Korea	Incorrect drawing straight baselines; notification nature of warships and government ships passage through territorial sea
16	Taiwan	Incorrect drawing of straight baselines; notification nature of warships and government ships passage through territorial sea
17	Sri-Lanka	Accretion of power in provision of safety in contiguous zone
18	Philippines	Extending the status of internal waters to archipelagic waters
19	Ecuador	Incorrect drawing of straight baselines

[2]Maritime Claims Reference Manual. China [Electronic resource] : The Navy Judge Advocate General's Corps URL: http://www.jag.navy.mil/organization/documents/mcrm/China2016.pdf (accessed date: 2.03.2016).

the implementation of the US strategic interests. In the medium term, the Arctic Ocean may become a new objective for the Program employment. As long as the climate changes, the Arctic will become increasingly open for maritime economic operations of all interested states, the problem of protection of both economic and military strategic interests of Arctic states will become more drastic. We can expect an increase of both the US Northern Command's and US European Command's attention to this area [Kraska, Pedrozo 2013: 25]. Such attention will be focused not only on Russia, but also on China. Nowadays, the stepping-up of Chinese strategic missile-carrying submarines operation in the Arctic Ocean does not infringe upon enforceable international maritime law.

These changes in the Arctic region will lead to growth of the US Nave significance in ensuring nuclear deterrence. Washington and Ottawa can boost cooperation in the North American Air Defense (NORAD), and NATO intelligence activities (including anti-submarine intelligence) will be intensified. The conflict existing between the US and Canada in regard to legal status of the North-Western passage (NWP) at present remains confined to panel discussions[3], where existing differences are recorded, but both parties agree to maintain the status-quo [Byers 2009: 36-88]. In the future, this dispute may get to a qualitatively new level, including in the framework of the FON Program. The same situation may develop with respect to Russia and the Northern Sea Route (NSR), which the US is inclined to consider as a sea route consisting of a number of international straits with the right of transit passage[4].

2

The paradoxical feature of the US Policy on purposeful protection of the freedom of navigation principle is that irrespective of its crucial role in the development of trade and economy, a possibility of unimpeded armed forces recycle, it bears risks. Realization of navigation freedom can be employed with the same result to carry out illegal, unregulated, unreported fishing of aquatic biological resources; smuggling and piracy, drug and weapons (including WMD) trafficking, illicit movement of people, including irregular migration, conduct of maritime terrorist acts. The use for these purposes of vessels, which do not meet the international requirements on environmental safety, present a threat to the marine environment and its biological diversity, hence to environmental resource and food security of coastal states.

For the purpose of opposing these types of threats the US supports a variety of initiatives leading, if not to a direct violation of the rules and rules of the 1982 UN Convention on the Law of the Sea, then to their extremely wide interpretation.

It is recommended within the scope of the Proliferation Security Initiative (PSI) to take measures to search foreign ships present both in internal waters (including ports) of coastal State, and in its territorial sea[5]. In the first case the State really possesses full jurisdiction in regard to interception of suspected ships, but these powers cannot be applied to warships and other government ships employed for non-commercial purposes, and having immunity. In its territorial seas, each State has the right of innocent passage, and the 1982 Convention on trafficking of weapons of mass destruction is

[3]The US considers that NWP is an international strait connecting one part of open sea with another part of open sea to which there must be applied the transit passage right. On the contrary, Canada, by drawing in 1986 straight baselines all round the entire Canadian Arctic arch, considers that the NWP route pass through the internal historic waters of Canada which are under full state sovereignty.

[4]Russia also, as China tends to believe that the NWP route passes through the areas of seas having the status of internal historic waters (White, East–Siberian, Kara, Laptev, Chuckchee Seas; Pecherscaya and Cheshskaya Bays; Sannikov and Dmitri Laptev Straits (New Siberian Islands); Vilkitski and Shokalski Straits (Severnaya Zemlya archipelago)), and it insists on the priority right to control navigation herewith.

[5]Proliferation Security Initiative: Statement of Interdiction Principles [Electronic resource] : U.S. Department of State. Under Secretary for Arms Control and International Security. Bureau of International Security and Nonproliferation (ISN). Proliferation Security Initiative URL: http://www.state.gov/t/isn/c27726.htm (дата accessed date: 2.03.2016).

not considered a violation of this right. However, the US continues to insist that, within the struggle against WMD proliferation, the status of commercial and government ships shall be set equal, and the convention list of violations of the right of innocent passage will be expanded.

The US supports the idea of tolerating the search and detention of ships suspected of WMD trafficking in high seas[6]. Such a practice, which was executed a few years back, conflicts with one of the key provisions of the 1982 Convention, i.e., the principle of exclusive jurisdiction of the flag State on the high seas. A warship which encounters on the high seas a foreign ship, can search it provided that there are grounds to suspect that this ship is engaged in piracy, slave trade, unauthorized broadcasting, and when it does not fly the flag, or it is without nationality[7]. Within the framework of the existing legal system, actions on prevention of WMD proliferation are impossible without the UN Security Council's approval or without the agreement of the flag State.

Washington proceeds from the assumption that the UN Security Council is not the sole agency which can decide on the right of intervention which is necessary under the circumstances. The international law doctrine forms a view point according to which (in terms of struggle with WMD proliferation) the right of self-defense shall be recognized not only after committing an armed assault, but just at the moment of occurrence of direct threat thereof [Kolodkin, Guculyak, Bobrova 2007: 392-400]. According to this principle, any state can abridge freedom of maritime navigation for its own interests and not respect international obligations. The right of self-defense may become a basis upon which the states will be able to detent the vessels carrying WMD on the high seas.

The Convention list of exemptions from the principle of exclusive jurisdiction of a flag State (by exercising both the right of hot pursuit and the right of visit) can be extended not only in favor of countering WMD proliferation, but also with a purpose of countering maritime terrorism. This is related to the fact that international terrorism is more and more considered as a threat to international peace and security, as a challenge to all States and mankind at large, and it is qualified as a crime of international importance [Kolodkin, Guculyak, Bobrova 2007: 409]. It is probable that maritime terrorism will become an object of universal jurisdiction, and all courts, both civil and military, will be empowered the right to apply antiterrorist measures in the high seas.

In absence of respective provisions in multilateral legal documents the US aspires to use a regional approach based on signing bilateral agreements. For example, to counter WMD trafficking, the United States signed the agreements providing for boarding, examination and detention of the vessels on high seas, with Bahamas, Belize, Croatia, Cyprus, Liberia, Marshall Islands, Malta, Mongolia and Panama [Kraska, Pedrozo 2013: 785-795]. About 60% of the entire merchant (commercial) fleet has been put under control. Similar agreements were signed with the States of Caribbean Region and Latin America for the purpose of counteracting drug trafficking. In prospect, the scope of Article 110 "Right of Visit" of the 1982 UN Convention on the Law of the Sea may be substantially extended. In addition to piracy, slave trade, unauthorized broadcasting it can include the problem of combating maritime terrorism.

[6]Interdiction under the Proliferation Security Initiative: Counter–Proliferation or Counter–Productive? [Electronic resource]: British American Security Information Council URL: http://www.basicint.org/sites/default/files/PUB051003.pdf (accessed date 7.11.2015); Legitimacy in International Affairs: The American Perspective in Theory and Operation. John R. Bolton, Under Secretary for Arms Control and International Security Remarks to the Federalist Society. Washington, DC November 13, 2003 [Electronic resource]: U.S. State Department Archive, 2001–2009 URL: http://2001-2009.state.gov/t/us/rm/26143.htm (accessed date 7.11.2015).

[7]Art. 110 of the 1982 UN Convention on the Law of the Sea [Electronic resource] : UN Official Website. Section "Conventions and Agreements" URL: http://www.un.org/ru/documents/decl_conv/conventions/lawsea.shtml (accessed date 29.04.2015).

At the same time ensuring of the right of transit passage and assuring safety of navigation through the largest international straits (Bab-el-Mandeb, Gibraltar, Dover, Malacca, Ormuz, Singapore) will continue to attract the US's attention for two reasons: commercial navigation protection and passage of the US Navy ships.

The United States insists on that all marine and flying vessels, including warships and aircraft, irrespective of the nature of cargo, weapons, engine type, flag, departure and destination points, have the right of transit passage. By this is meant that submarines can pass in the submerged condition; combat aircraft can fly in a battle formation; it is allowed for aircraft and helicopters to take off and land using the flight deck; warships and civil vessels can replenish stocks in-motion; measures may be taken to provide for safety of surface ships[8].

Holding its ground the US is ready to consider the right of transit passage, as a step towards the codification of customary law. They assume that absence of an artificial rule pending adoption of the 1982 Convention was caused purely by a circumstance that States had no opportunity to legally expand limits of their territorial sea beyond the needed 3 nautical miles, and not by a circumstance that it was prohibited. Consequently, this interferes with the passage of American ships and vessels along designated see lanes on the high seas. The introduction of a 12-mile limit of territorial sea requires the development of "transit passage" conditions in order to reserve the right of the States for freedom of such motion. Thus, as viewed by Washington, the right of passage of warships and civil vessels through international straits existed before the adoption of the 1982 Convention [Roach, Smith 2012: 686-691].

The prevalent point of view is that the right to transit passage became an international compromise, and it exceeds the limits of both the 1958 Convention on the Territorial Sea and the Contiguous Zone[9], and also the rules of international customary law [Tanaka 2012: 106]. Not coincidentally in 1982 it was stated, 'This Convention is not a Convention which codifies the legal provisions. Statement that with exception of Part XI the Convention poses a codification of customary law or it covers the existing international practices, is wrong from the actual point of view, and it is legally unfounded. The regime of transit passage through the straits, used for international navigation, and the regime of archipelagic passage through sea lanes are just two examples among the plurality of new concepts embodied by the Convention'[10].

It was stated in the UN General Secretary's Report of November 5, 1992, "The regime of transit passage has been widely accepted in general terms by the international community and has become part of the practice of States, both of States bordering straits as well as of shipping States."[11] However, in practice only few States fully agree with the fact that transit passage is a rule of customary law, these are Australia, Great Britain, Papua New Guinea, the US and France. Some countries (Albania, Spain, PRC, UAE, and Peru) rejected to recognize it as a rule of the customary law. Iran, Morocco, UAT acknowledge only the right of innocent passage through straits, being part of territorial waters [Martin 2010: 197]. Moreover, Teheran insists on the fact that the United States, as non-member of the 1982 Convention, has no right to qualify for freedom of transit passage enjoyment, because it is not a working rule of customary law [Green 1992: 9-10].

[8]Senate Executive Report, 110th Congress, 1st Session, Exec. Rpt. 110–9 (December 19, 2007). P. 20 [Electronic resource]: The Office of General Counsel National Oceanic and Atmospheric Administration URL: http://www.gc.noaa.gov/documents/UNCLOS-Sen-Exec-Rpt-110-9.pdf (accessed date 15.06.2015).

[9]The 1958 Convention on the Territorial Sea and the Contiguous Zone [Electronic resource] : UN Official Site. Section 'Conventions and Agreements' URL: https://www.un.org/ru/documents/decl_conv/conventions/pdf/tsea.pdf (accessed date 15.06.2015).

[10]Constitution for oceans. Statements of Tommy T.B. Koh (Singapore), the President of the UN Third Conference on the Law of the Sea [Electronic resource]: UN Official Website URL: http://www.un.org/depts/los/convention_agreements/texts/koh_russian.pdf (accessed date 12.07.2015).

[11]UN Doc. A/47/512, Nov. 5, 1992, §. 23 [Electronic resource]: UN Official Website URL: http://www.un.org/Depts/los/general_assembly/general_assembly_reports.htm (accessed date 12.07.2015).

In this context, the US most deliberate attention within the FON Program scope will be focused on Ormuz and Bab-el-Mandeb Straits, because the States bordering these straits (Iran and Oman; Yemen and Djibouti) still have in their national legislation the provisions about authorization nature of passage of warships and some types of civil vessels [Grooves 2001: 18-20]. Countering such types of threats, such as piracy, drug trafficking, unauthorized fishery, will be used for the purpose of providing higher level of shipping control in Malacca and Singapore Straits. In 2004 the US launched the Regional Security Initiative aimed at countering all types of threats in Malacca Strait and adjacent areas of seas. Nevertheless, only Singapore supported that project of Washington. Malaysia and Indonesia continue to insist that insuring security in Malacca Strait is the concern of the States bordering the strait [Klein 2011: 84-87].

3

The US, on one hand, takes the lead in developing and approving quite a few international agreements, but, on the other hand, it continues to ignore such key international documents concerning inter alia management of spaces and resources of the World Ocean as, Agenda 21, the Convention on Biological Diversity, and all subsequent agreements and protocols therein; the Convention on the Protection and Use of Transboundary Watercourses and International Lakes; Stockholm Convention on Persistent Organic Pollutants; the Convention on the Protection of the Underwater Cultural Heritage. Practically in all cases the point at issue is that the assumption of certain obligations stipulated by these documents can negatively affect US national interests, lead to a restriction of its sovereignty. As a result, the United States policy of enhancement of international law order of use and exploitation of the World Ocean space and resources will be combined with simultaneous course to provide opportunities for naval and reconnaissance activities.

Even in the case of accession to the 1982 UN Convention on the Law of the Sea the US is ready to take advantage of the right provided in this document (Article 298) to declare that it does not accept one or more of the procedures (the International Court of Justice, International Tribunal for the Law of the Sea, Arbitral Tribunal, Ad Hoc Arbitral Tribunal) provided for settlement of disputes concerning the issues of military activity. The US has claimed its exclusive right to determine whether this or that activity is a 'military' one[12], but it is prone to count as military any kind of reconnaissance activity[13], which it regularly carries out in the coastal waters of other States.

The US assumes that since there are in the 1982 Convention no clarifications of such terms as "use for peaceful purposes" and "peaceful purposes" in relation to the spaces of the World Ocean, then, from its point of view, there are no restrictions on the right of States to carry out military activity not only in wartime, but in peacetime also[14]. The stand announced by Washington on this issue allows it to interpret police operations, reconnaissance activity, conduct of maritime search and rescue operations not as acts of aggression, but as the right of self-defense under the condition that it performs no hostile act or intents [Sviniyh 2011: 72]. From the standpoint of the US, the 1982 Convention, being a peacetime agreement, cannot impose restrictions on the conduct of military activity or else "deprive a State of the right of self-defense."[15]

Moreover, the United States considers the lack in the text of the 1982 Convention of a clear definition of the term "marine scientific research", as a basis not to relate to it any type

[12]Senate Executive Report, 108th Congress, 2nd Session, Exec. Rpt. 108–10 (March 11, 2004). P. 89, 93 [Electronic resource] : The Office of General Counsel National Oceanic and Atmospheric Administration URL: http://www.gc.noaa.gov/documents/SExecRept–108–10.pdf (accessed date 7.05.2015).

[13]Senate Executive Report, 110th Congress, 1st Session, Exec. Rpt. 110–9 (December 19, 2007). P. 11 [Electronic resource] : The Office of General Counsel National Oceanic and Atmospheric Administration URL: http://www.gc.noaa.gov/documents/UNCLOS–Sen–Exec–Rpt–110–9.pdf (accessed date 20.07.2015).

[14]Ibid. P. 19.

[15]Ibid. P. 11–12.

of "military research"[16]. And if to conduct "marine scientific research" in the zones under jurisdiction of a coastal state (for example, in 200-mile exclusive economic zone), a formal acquiescence of the latter[17] is required, then this right becomes inapplicable to "military research" [Kraska, Wilson 2010: 22-23]. Gathering oceanographic, geophysical, chemical, biological and acoustic information for military purposes, as well as hydrographic search, prospecting and survey of natural resources, the search for submerged objects, and underwater archeology, meteorological research from the US point of view do not require obtaining consent of a coastal State [Mandsager 1998: 124].

Further, the United States repeatedly emphasized that it is ready to act only in accordance with those provisions of the Convention, which do not contradict earlier established rules of international *conventional law*[18]. These are formed upon condition of combination of two components, i.e., existing widespread and sequential practices of States, and human element known as opinio juris[19]. Only when other States behave as if that they accept the practice of a particular State, which in this case shall be permanent and repetitive, then it is possible to speak about the appearance of a customary law rule [Vylegzhanin, Kalamkaryan 2012: 81-83]. Meanwhile, after its appearance, it takes on a universal character. While conventional rules of law involve only direct participants of the agreement, compulsory law rules are binding for absolutely all members of international community. Among other things they become obligatory for newly-formed States even though they did not take part in their development. In the case of the North Sea shelf the International Court of Justice holds that the compulsory law rules "by virtue of their nature shall be equally valid and binding for all members of the international community, and thus they do not grant to any such member any right to exclude himself from their scope using unilateral procedure and at its own convenience in its own interests"[20].

The 1982 Convention not only codified the rules of compulsory law, but it also introduced new rules [Rothwell, Stephens 2010: 22-23]. In particular, it supposes a special regime of development of mineral resources of the international seabed area[21]. Nevertheless, to become a fully-fledged rule of compulsory law, its execution by all States is required, including those participating in the Convention [Harrison 2011: 51-59]. Taking into account the fact that in the course of negotiations within the framework of the Third United Nations Conference on the Law of the Sea the consensus on application of the Common Heritage of Mankind

[16]Ibid. P. 13, 21, 38.

[17]Article 246 of the 1982 UN Convention on the Law of the Sea contains the following wording, "Coastal States, in the exercise of their jurisdiction, have the right to regulate, authorize and conduct marine scientific research in their exclusive economic zone and on their continental shelf... Marine scientific research in the exclusive economic zone and on the continental shelf shall be conducted with the consent of the coastal State." However, jurisdictional disputes exert further pointing that "Coastal States shall, *in normal circumstances, grant their consent* (italics mine – P.G.) for marine scientific research projects by other States or competent international organizations in their exclusive economic zone or on their continental shelf.

[18]Statement on United States Oceans Policy. March 10, 1983 [Electronic resource] : The Ronald Reagan Presidential Library and Museum URL: http://www.reagan.utexas.edu/archives/speeches/1983/31083c.htm (accessed date: 23.08.2015).

[19]Opinio Juris means that the State considers this or that customary rule as a rule of the international law, as a rule which is legally binding in the international terms. This expression of the State will. When other States also express their will along, there forms an tacit agreement on recognizing the customary rule as a rule of international law.

[20]ICJ Reports. 1969. §63 [Electronic resource] : International Court of Justice Reports of judgments, Advisory Opinions and Orders. North Sea Continental Shelf Cases (Federal Republic of Germany – Denmark; Federal Republic of Germany – Netherlands). Judgment of 20 February 1969 URL: http://www.icj-cij.org/docket/files/51/5535.pdf (accessed date 04.04.2015).

[21]Seabed and ocean floor and their natural resources beyond the national jurisdiction of coastal States. International Area of seabed and its resources are claimed in the scope of the 1982 Convention as common heritage of mankind; their exploration and exploitation are under control of specially organized for these purposes International Seabed Authority.

principle[22] failed to be reached and many States opposed the regime to be introduced, all attempts to consider it a rule of international law were merely simple speculation [Lodge 2013: 60]. The same goes for provisions of Article. 76 about continental shelf beyond the limit of 200 miles which has not become yet a rule of international law [International Law 2012: 140-141]. Correspondingly, the US still has a theoretical opportunity to ignore various provisions of the Convention 1982, which both at the present time, and in the longer term did not acquire or will not get the status of all around binding.

4

The US non-membership in the 1982 Convention entails reputational risks. These risks are conditioned by the fact that the United States comes out to be side by side with States, which within the framework of the American conception of foreign affairs are characterized as "rogue States", such as Afghanistan, Venezuela, Iran, Libya, Northern Korea, Syria, Somalia, and Eritrea. Amongst the Convention non-participants there are also a variety of states of Central and Latin America (Columbia, Peru, Salvador), Africa (those among the poorest countries in the world: Burundi and Ruanda, Central-African Republic, Ethiopia, South Sudan), Asia (Butane, Cambodia), former USSR (Azerbaijan, Kazakhstan, Kirgizia, Tajikistan, Turkmenistan, Uzbekistan)[23].

Refusal to ratify the 1982 Convention, on one hand, and status of leading maritime and naval power standing for enforcement of international law and order on the scale of the entire World Ocean, on the other hand, can discredit both the convention regime, and the US policy in the scope of the FON Program. For a number of States, Washington's refusal to participate appears as evidence of the US's policy of double standards. It becomes even more important for the Asia-Pacific Region where it will be more and more difficult for the United States to advocate the interests of its allies (Philippines, Taiwan, South Korea, and Japan) settlement of maritime conflicts and contradictions in South-China and East-China Seas. All attempts of the US to encompass this process within the framework of the international law, to mediate in the course of negotiations, to replace the regional approach to settlement with a wider international one, cannot be implemented without its full participation in the 1982 Convention[24]. A mere change of standpoint by Washington could reverse the situation and lead to conditions when the Chinese accusations against the US that it has no legal authority to interfere with the process of delimitation of maritime spaces of South-China Sea will become groundless[25].

A catalyst for the need to join the 1982 Convention could be the need to successfully develop scientific-and-technical activities. First, over recent years American oil and gas companies were provided with equipment for mining natural resources of continental shelf beyond 200-mile zone, that is deep sea and at great distance from the coastline. The US non-participation in the 1982 Convention, which means absence of international legitimation of its activities, hinders the development of investments in this field[26].

[22]International Law concept embedded in the 1982 Convention as the base for management of the State activity on development of seabed and subsoil of International Seabed area.

[23]Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 3 October 2014 [Electronic resource] : UN Official website URL: http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm (дата accessed date 04.09.2015).

[24]Bower E. Z., Poling G. Advancing the National Interests of the United States: Ratification of the Law of the Sea. May 25, 2012 [Electronic resource] CSIS URL: http://csis.org/publication/advancing-national-interests-united-states-ratification-law-sea (дата accessed date 04.06.2015).

[25]Speech by Secretary of Defense Leon E. Panetta at Law of the Sea Symposium. May 09, 2012, Washington, D.C. [Electronic resource] : U.S. Department of Defense URL: http://archive.defense.gov/speeches/speech.aspx?speechid=1669 (accessed date 04.06.2015).

[26]Clinton H. R. The Law of the Sea Convention (Treaty Doc. 103-39): The U.S. National Security and Strategic Imperatives for Ratification. Testimony before the Senate Committee on Foreign Relations. Washington, DC May 23, 2012. [Electronic resource] : URL: http://www.foreign.senate.gov/imo/media/doc/REVISED_Secretary_Clinton_Testimony.pdf (accessed date 14.06.2015).

Second, the development of technologies for exploration and exploitation of mineral resources in the deep sea areas of the World Ocean, which transferred from theory to practice. India, China and Russia are already actively involved in this process. The presence of precious and rare metals in these areas of seabed, which are used both in the power industry and for manufacturing high-tech products, opens for the US new perspectives, including strengthening its position in front of the Chinese thriving industry. However, exploration and exploitation of new sources of such resources calls for enormous investments, whereby American companies need warranties confirming their right to any area of the seabed and its resources[27].

The development of the situation in the Arctic Region also can push US leaders to ratificaty the 1982 Convention. This refers to impossibility of election of American experts as members of the Commission on the Limits of the Continental Shelf, and submission of a request thereto with the purpose of defining outer limits of the US continental shelf, the Arctic Ocean inclusive. At the same time, these restrictive circumstances should not be overestimated, because the US, not undertaking conventional obligations, can reckon on a rather greater shelf area, just being a participant of the 1958 Convention[28] and having worked out national legislation which does not limit the length of the latter [Groves 2011b]. It is believed that only a purposeful policy of other Arctic States, based on an unconditional appeal to the Commission on the Limits of the Continental Shelf, can push the United States to review anew its attitude towards the 1982 Convention. Nevertheless, it will be appreciated that the Arctic State application processing, except for Russia[29], will be long enough due to both heavy caseloads at the working body and existing order of priority. The US can reckon on a possibility of keeping until 2025 its status of outlooker in the Arctic, and not undertake additional liabilities provided in the 1982 Convention.

Regardless of the fact that the majority of representatives of the scientific-and-expert community, political and military leaders, business top-leaders tend to ratify the 1982 Convention, the probability of this step depends on political conjuncture inside the US. First of all, the question is, if the next President of the US after Barak Obama will enjoy Senate support. This is due to the fact that in accordance with the US legislation every time the composition of this body changes, international agreements to be ratified should be reviewed anew at a session of a dedicated Foreign Affairs Committee [Borgerson 2009: 3-4; 12-13]. In previous years, the attempts of the B. Clinton Administration to join the Convention fell victim to the traditional contest of Republican vs. Democrat, and in case of J. Bush-Junior, executive and legislative branches of power [Zhuravleva 2011: 96-127]. The likelihood of its ratification will also depend on which side, neoisolationism or new globalism, the ideological pendulum will swing in the US. Washington's attitude, either to the Convention in total or to its separate parts, will be directly correlated with American conception of foreign affairs.

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Summarizing the above said, it is necessary to note that the US policy in regard to the management and exploitation of spaces and resources of the world ocean is characterized by divergence.

Being the biggest maritime and naval power the US is inherently interested in the customary "gambling rules" (in this case the rules and standards of the international maritime law, first of all the 1982 UN Convention on the Law of the Sea) being observed by all the members of the international community. The policy of enforcement of a variety of States to observe them, which is implemented in the framework of the

[27]Ibid.

[28]Article 1 of the 1958 Convention refers the shelf to seabed and subsoil in the submarine areas adjacent to the coast of a continent or an island, but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.

[29]Taking in account that Presentation of 2015 represents the modified request submitted back in 2001, its examination, as agreed upon, will be prioritized.

Freedom of Navigation Program, will be carried out as before by Washington. Selectivity of this course will primarily depend on strategic relevance for the US of this or that maritime space. At large, the US considers, that safeguarding law enforcement in the World Ocean is a guarantee of stability of functioning of the entire international system and predictability of behavior of all States and participants of marine economy.

The US non-membership in the 1982 Convention, the broad interpretation of some of its provisions, attempts to restrict the rights of other States in order to protect its own national interests substantially compromise Washington's effort in this field and justifiably raise the question why the US has double standards. For quite a few States such a duality of the US's standpoint once again indicates that assurance of inherent security of contiguous areas of seas remains a bigger priority than the observance of the convention rules. As a result, the US provokes by its own actions the undermining of the international legal regime, all the while proclaiming it is are its defender.

The question about whether the United States policy, including participation in the Convention, will be revised, still remains open. Existing capacities of the US Navy enable it both to remain outside the conventional restrictions, and to pursue a policy of stimulating observance of the convention rules by other states. The US's focus on global hegemony under conditions of very limited degree of challenge on the part of other international players to an even greater degree promote a strong trend of not undertaking extra international obligations.

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