From the outside looking in: America and the United Nations Convention on the Law of the Sea
INTRODUCTION


Although the United States called for the negotiation of a new sea treaty in 1970 under the Nixon administration, when the treaty was presented in 1982 the United States rejected it. President Reagan, who supported many provisions within the treaty, felt the restrictions outlined in Part XI were too confining. Part XI sets forth regulations on the pursuit of resources located outside of a state’s Exclusive Economic Zone, to include royalty payments and technology transfer provisions. The United States rejected these initial provisions within UNCLOS. However, between 1990-1994 the treaty underwent further negotiations to modify Part XI in an effort to obtain the United States’ approval.

Despite the revisions to Part XI, the United States has not moved forward in the ratification process. The treaty has received two supporting votes in the Senate Foreign Relations Committee; endorsement from the Clinton, Bush, and Obama administrations; and four Senate Foreign Relations Committee hearings. But a full vote was never taken in the Senate. As a result, UNCLOS remains unratified by the United States to this day.

While there are countless supporters of the treaty ranging from business groups to military leaders, UNCLOS also has many detractors who raise legitimate concerns. These entities argue that many U.S. interests are already safeguarded independent of accession to the treaty and ratification would only result in undue bureaucratic burdens on America’s actions. They also note that the United States’ freedom of maritime activities has been maintained for years due to our strong military, not from prior treaties. Additionally, accession to the treaty would expose the United States to increased risk of lawsuits from other convention members in relation to environmental practices. And, perhaps most concerning, ratification of the United Nations Convention on the Law of the Sea would force the United States to seek permission from an international body in order to conduct deep-sea mining operations to obtain vital minerals needed for modern technology (from which royalties would be demanded by the International Seabed Authority). These concerns, along with more ambiguous arguments against international treaties writ large, have hampered all attempts to ratify UNCLOS.

Advocates of the treaty have cited numerous advantages to ratification. Among these are new and stable protections for maritime industries, from mining to communications. These benefits would provide businesses with predictability and international assurances. Other benefits include military and commerce navigation rights, which ensure freedom of navigation for all vessels engaged in innocent passage. Other factors often cited include giving America a “seat at the table” to ensure that China and Russia do not rewrite the rules of international maritime law without us. This “seat at the table” would also give the United States greater legitimacy when criticizing China’s maritime actions, which violate the Law of the Sea. It is also argued that America’s exclusion from UNCLOS diminishes our international prestige and undermines our efforts to work with allies who are signatories to the agreement.

This white paper will provide both sides of the argument with great detail and balanced consideration. After all arguments are assessed, the Navy League leans in favor of ratifying UNCLOS, particularly given the strong and consistent support of military leaders. In the following pages you will find the arguments for and against ratification divided into major topics related to maritime disputes.

RUSSIA

As a member of UNCLOS, and a near-peer competitor, Russia has been testing the boundaries of its maritime claims particularly with regards to the Arctic. With bolder and bolder rhetoric increasingly matched by provocative actions, Russia has undermined UNCLOS both in spirit and in the letter of the law. This behavior has sparked tension with other UNCLOS members, namely Denmark and Canada, particularly in relation to the Lomonosov Ridge territory. In 2007, Russia attempted to solidify its claim to an extended continental shelf by planting its flag on the North Pole seabed. Since then, Russia has been expanding its military presence along the country’s Arctic coastline and has taken to conducting special weapons testing in...
the region. Despite Russia’s claims to peacefully negotiate Arctic territorial disputes, the uptick in military presence and displays have suggested hostility.

In signing onto UNCLOS, other signatory nations are hopeful the United States’ presence will work to de-escalate these high tensions. It would seem beneficial to the U.S. as it too has had run-ins with Russia regarding Arctic territorial claims stemming from the U.S. continental shelf extending from Alaska. The tension between the United States and Russia also applies to control over the Bering Strait and its role as a strategic passage. Furthermore, Arctic resource extraction has accelerated both nations’ efforts to expand presence in the area, with the U.S. working quickly to increase the number of polar icebreakers in its fleet.

Despite these concerns, detractors of the treaty note that the United States already has a strong bilateral agreement with Russia regarding the recognition of both nations’ territory in the Arctic and that UNCLOS is more useful to other Arctic nations. Also, as the U.S. seeks to explore mineral deposits in the Arctic, ratifying UNCLOS could result in unwanted bureaucratic red tape as well as royalty payments to the International Seabed Authority. These constraints could make UNCLOS more burdensome to America’s competition with Russia in the Arctic than helpful.

It should also be noted that Russia routinely ignores the provisions of UNCLOS despite being a signatory, thus diminishing the argument for ratification. Even with clear provisions in the treaty that define the rules of innocent passage, Russia has made a point of harassing foreign military vessels such as the British warship HMS Defender, which was assailed by Russian forces while making a peaceful passage through the Black Sea.

CHINA

Despite having signed onto UNCLOS, China remains the greatest concern regarding maritime activity. Notable acts of Chinese aggression have included support of paramilitary fishing vessel attacks on foreign fishermen and intense militarization of the Spratly Islands, a region within the Philippines’ EEZ. Although the Permanent Court of Arbitration at The Hague ruling was meant to eliminate territorial disputes between China and the Philippines in the South China Sea, China has refused to accept the ruling in favor of the Philippines. Continuing to act upon its claims to the nine-dash line, an illegitimate boundary signifying Chinese territory within the South China Sea, China neglects to follow the provisions of UNCLOS. The increasing severity and audacity of China’s actions in the South China Sea have caused great concern for America’s regional allies, many of whom would like to see America ratify UNCLOS in order to legitimately push back on China’s maritime misconduct.

One reason military leaders have historically supported U.S. accession to UNCLOS is they believe it will demonstrate a commitment to international rule of law, which will galvanize likeminded allies. It would also provide the United States with legal justification for sanctioning Chinese firms that engage in actions that undermine UNCLOS, such as militarizing islands or using paramilitary fishing vessels to raid the territorial fishing shoals of neighboring nations. Being outside of the treaty puts the U.S. at a disadvantage in terms of legal disputes or even legitimate criticism of China’s actions as we have not
adopted the very law that we claim China is violating.

Another argument in favor of ratification is that the United States needs a “seat at the table” in order to prevent China from rewriting the rules of international maritime transit. However, arguments against ratification note that those who have a “seat at the table” are unlikely to advance their causes there. China and Russia unilaterally violate UNCLOS as they see fit. Take for example China’s efforts to alter the definition of “innocent passage” so it only applies to commercial vessels and not military vessels. China changed this in its own domestic law, not through the governing body of UNCLOS. And America ignored China’s new law as our military might allows us to do so. This brings us to the topic of Freedom of Navigation Maneuvers.

A primary argument against ratification of UNCLOS is based on the premise that the United States already has freedom of navigation thanks to our military strength and, therefore, any additional obligations under UNCLOS would be superfluous. But this argument has been refuted by military leaders who make clear there must be other sources of legitimacy beyond raw military might. A world in which powerful militaries can do as they please just because they are powerful is exactly what China wants, particularly in its dealings with weaker nations. Rule of law is what China fears, and so the U.S. should be doing everything in its power to promote that. It should also be noted that while there already exists a bilateral body in which the U.S. and China are supposed to settle maritime differences (the Military Maritime Consultative Agreement), China refused to attend its December 2020 meeting, thus proving the limitations of a bilateral mechanism for arbitrating disputes between China and the United States.

LEGAL CONCERNS

While we have mentioned several legal benefits the United States could receive from ratifying UNCLOS, such as providing greater certainty for maritime businesses and gaining the ability to legitimately pursue legal action against China’s misdeeds, there is also a significant concern regarding ways in which ratification could lead to legal proceedings taken against the United States. Such proceedings would likely take the form of environmental lawsuits in which various nations sue the United States for its carbon emissions, contribution to climate change, environmental policies, etc. Nations with more stringent environmental policies might use such lawsuits to attempt to force the United States to meet the same level of regulation. Regardless of basis or even outcome, these lawsuits would make their way to the International Tribunal resulting in embarrassment to the United States as well as potential damages to be paid by the United States or by U.S. companies. Such rulings could then impact America’s environmental and energy policies even beyond the maritime domain.

SEABED MINING AND UNCLOS REVISIONS

Initial concerns over the provisions outlined in UNCLOS were first presented by the Reagan administration in 1982. The issues were centered around mandated technology transfer related to deep-sea mining technology, as well as the power of the International Seabed Authority. Efforts to alter UNCLOS in order to address America’s concerns began in 1990 under the administration of George H.W. Bush. In 1994, the core issues presented by the Reagan administration had been addressed, resulting in the “Agreement Relating to the Implementation of Part XI.” The agreement included the elimination of the technology transfer requirement and granted the United States the power to veto rules, regulations and financial decisions. The power of veto would encompass measures put forth by the International Seabed Authority, including fund redistribution. Likewise, the agreement would grant the United States the authority to conduct seabed mining under reasonable terms and conditions. Despite these amendments, the United States has yet to sign the treaty.

One outlet of resistance that has circulated among opposers of the treaty has been a belief that the agreement on Part XI would not be adopted over the original treaty’s Part XI. This has not been the case though as Article 2 of the revised agreement states that all provisions of the agreement should take precedent over provisions designated within the original Part XI. Since the implementation of the 1994 revision, no nation within the convention has objected to the terms. Furthermore, if the United States were to sign on to UNCLOS, we would have the legal right to leave the convention in the event the revised provisions were not executed. Therefore, in signing onto UNCLOS the United States would no longer face the economic and authoritative disadvantages that were acknowledged under the Reagan administration.
CONCLUSION

Despite areas of concern, the United Nations Convention on the Law of the Sea has had longstanding vocal support from military leaders and presidential administrations. Prominent supporters from the current U.S. Senate have included Sen. Mazie Hirono (D–Hawaii), Chair of the Senate Seapower Subcommittee, and Sen. Lisa Murkowski (R–Alaska). In declaring her support, Sen. Hirono stated, “Becoming party to UNCLOS protects our right of free passage through territorial seas and ensures we have a seat at the table on decisions impacting Hawaii and the ocean around us.” (Senate, 2019) Her statement was one of several given as part of a bipartisan resolution effort led by herself and Sen. Murkowski. Pushback from Congress has generally been limited. However, those in disagreement include Sen. Michael Lee (R–Utah), who argued that UNCLOS would “jeopardize American security, rule of law and prosperity” (Daily Signal, 2011). His concern however has not been backed by prominent military leaders. In fact, numerous military officials have called for Senate ratification of UNCLOS.

In a Senate hearing conducted on May 18, 2021, Sen. Tim Kaine (D–Va.) obtained the professional opinion of Navy Adm. Philip S. Davidson. In the bill’s language is the following quote from Davidson, dated March 9, 2021: “I’m on record saying that [ratification of the UNCLOS] would be good for us, I think we would be hard-pressed to find a Navy Admiral that’s said otherwise.” (Senate, 2021) In addition to Davidson, UNCLOS has garnered support from other military experts, namely Adm. Michael Gilday, Chief of Naval Operations; Adm. John Aquilino, commander of U.S. Indo-Pacific Command; Gen. Glen D. Van Herck, commander of U.S. Northern Command and the North American Aerospace Defense Command; and Gen. Charles Dunford, former chairman of the Joint Chiefs of Staff. While Aquilino noted the need to have “a seat at the table” and “an increased position of credibility,” Van Herck has voiced a need for focus on the Arctic and global competitors. In voicing his support for UNCLOS, Van Herck declared that “it’s never been more crucial for us with our like-minded nations and allies and partners that we come to agreement to not allow Russia and China to exploit any seams and gaps.” (Senate, 2021) These claims of support, in conjunction with congressional support, as well as support from business groups and labor organizations, outline the prevalent backing of UNCLOS from American leaders involved with maritime activities and policy. The Navy League joins them in supporting ratification of UNCLOS.

REFERENCES


The Navy League of the United States is a nonprofit organization dedicated to educating our citizens about the importance of sea power to U.S. national security and to supporting the men and women of the U.S. Navy, Marine Corps, Coast Guard, and U.S.-flag Merchant Marine and their families.