

POLICY BRIEF

Balancing U.S. Interests in the UN Law of the Sea Convention

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The Nicholas Institute for Environmental Policy Solutions has gathered leading experts on the UN Law of the Sea Convention to provide guidance in the ongoing debate over whether the U.S. should accede to the Convention. Rather than provide a complete summary of the Convention's provisions, we highlight in this short paper three important considerations:

First, emerging territorial disputes over expanding Arctic waters, most recently highlighted by efforts by Russia to establish claims to mineral resources under the North Pole, will be resolved within the Convention framework by Convention signatories.

Second, concerns about the role of international tribunals in making decisions that affect U.S. military, economic and environmental protection interests have been addressed through changes made at the request of the United States.

Third, the United States would benefit from Convention provisions which help member nations balance the need to navigate freely for security and commerce with its need to protect its vast coastal natural resources.

Overall we find:

- Arctic melting is adding urgency to the actions of several nations, including Russia, to claim navigation and resource rights around the North Pole. Claims and disputes over these resources will be resolved under the Convention framework. The best opportunity for the U.S. to achieve standing, to make and counter such claims, is through joining the Convention.
- Major points of contention raised by the Reagan administration, related to sea bed mining, technology transfers to developing nations and representation on key committees have been resolved in the United States' favor through negotiated changes to the Convention.
- The Convention provides dispute settlement tribunals and arbitration panels. The United States would have control over the type of dispute settlement body cases involving U.S. interests were brought before and would have significant input into the selection of the arbitrators on those bodies.
- The Convention recognizes the competing interests of navigational freedom (for military and commerce) and coastal resource protection (for fisheries, oil and minerals and environmental resources) and attempts to balance them. Perhaps no nation has more at stake in striking this balance than the United States which has both the largest claimed Exclusive Economic Zone (EEZ) and the largest blue water navy.
- Support for accession to the Convention is surprisingly broad, including the Navy and Coast Guard, maritime industries, the White House, and private public partnerships such as the Joint Ocean Commissions Initiative. At the same time, opposition to the Convention has narrowed to an ideological position based primarily on mistrust of UN-based treaties.

What is the Controversy over the Law of the Sea Convention?

The UN Convention on Law of the Sea (LOSC) is a treaty resulting from 40 years of international diplomacy that was set into motion by the 1945 Truman Proclamation,¹ where the continental shelf of the U.S. was claimed as a sovereign zone, spawning a subsequent claim-and-response period for seabed sovereignty. The United States had a particular interest in codifying this “constitution of the oceans,” to protect its marine living resources and maritime interests. In its current form, the treaty designates a 200 nautical mile exclusive economic zone (EEZ) where nations have sovereign rights “for the purpose of exploring and exploiting, conserving and managing natural resources.” The treaty provides parties with the ability to define those activities that are military while navigating in any part of the ocean, thus putting few restrictions on “peaceful” military navigation. Additionally it protects the living resources, facilitates military and maritime activities, and strengthens U.S. national security. Many of the benefits of LOSC are already utilized by the United States because most aspects of the treaty are already part of customary international law, to which all nations subscribe.

Despite the great lengths the treaty traveled in regards to maritime interests, living resource conservation, maritime dispute-settlement procedures and several other issues, by the early 1980s the United States still saw some key flaws highlighted by the Reagan administration. President Reagan supported most aspects of the treaty and stated officially that the U.S. would act in accordance with those provisions. However, his administration opposed perceived limits on free enterprise with regards to resources to be extracted from deep sea beds and the mandated technology transfers to poorer countries.² Over the next decade, culminating in 1994, the United States was successful in negotiating an Agreement that made key changes in the Convention, including a provision for a permanent seat for the U.S. on the governing Council of the International Seabed Authority and a seat on the powerful Finance Committee. Decisions by the Finance Committee are made by consensus, and by the Council through a chambered-voting procedure designed to protect all interest groups, thus ensuring U.S. ability to effectively “veto” unfavorable judgments. These changes also eliminated the mandatory technology transfers that riled some parties as “welfare” for poorer nations.

Though all of the problems cited by President Reagan were resolved in these negotiations, the United States has yet to ratify the treaty. Some continued opposition to accession to the Convention, typically focused on concerns with the jurisdiction of international tribunals, perceived threats to national security and commerce, or uncertainty about claims to wide continental shelf margins (as is currently being debated with regard to the Arctic, see below) may be based on incomplete knowledge of the treaty. Beyond these concerns, continued opposition to the Convention is largely ideological, stemming from a strong distrust of international treaties and international bodies having decision-making powers. The roots of these ideological objections are

¹Truman Proclamation On The Continental Shelf; Presidential Proclamation No. 2667; 28th September, 1945

²Adelman, Ken. “Scuttle Diplomacy.” The Wall Street Journal. June 2-3, 2007, A11

deeper than the Convention and thus beyond the scope of this paper. Here we deal specifically with how U.S. accession to the Convention would affect:

1. the current disputes over the resources and navigation rights to the Arctic;
2. the negotiating powers and standing of the United States and
3. the balance the U.S. needs to achieve between various uses of coastal seas.

Solving Disputes Over Sovereignty in The Arctic

In most parts of the world, debates over limitations on navigation vs. protection of natural resources are played out within well-defined Exclusive Economic Zones (EEZs). There are, nonetheless, several areas of active dispute over marine territory. The most dramatic example is the Arctic – a large, resource rich area where the territorial claims are almost completely unresolved. The confluence of three major forces - climatic, economic and political - have made the Arctic a focal point for a new round of territorial claims that will be debated under the Convention framework. Climatically, global warming has literally opened the Arctic³. 2007 saw the lowest level of recorded ice⁴ and the trend toward more open sea in the Arctic is likely to continue.

This melting is already having dramatic effects on arctic wildlife, but it will also open up new shipping routes and fishing grounds and make previously out of reach mineral and oil resources attainable. Economically, the demand for new oil and mineral supplies and associated high prices has made the Arctic an attractive target for resource extraction. Politically, nations such as Russia are eager to expand their territory and demonstrate their economic and technological might. Likewise, Canada has expressed claims of sovereignty over the Northwest Passage, which will become increasingly ice-free⁵. More prosaically, several Arctic nations are faced with upcoming deadlines under the Convention to make scientifically supported claims that their continental shelves are contiguous with the Arctic sea floor.

The renewed focus on the Arctic was highlighted in news coverage and response by other Arctic nations to a Russian expedition which placed a Russian flag on the sea floor under the North Pole^{6,7}. Several Arctic bordering nations, including the United States, have had expeditions of their own to establish the geological relationship between the Arctic and their own continental shelf⁸. It is likely that the territorial rights to the Arctic's riches will be settled within the Convention

³Belkin, Douglas. "As Arctic Ice Melts, Northwest Passage Beckons Sailors." Wall Street Journal, Sept 13, 2007

⁴Schmid, Randolph. "Arctic Sea Ice Shrinks to Record Low." August 17, 2007. Associated Press, Science Writer.

⁵Alexander, Bryan and Cherry. "Drawing lines in melting ice." The Economist.com. World International. August 16, 2007

⁶Zabarenko, Deborah. "U.N. must decide Russia Arctic claim: Russian experts" August 9, 2007. Reuters Online.

⁷Blomfield, Adrian. "Russia claims North Pole with Arctic flag stunt" August 1, 2007, London Telegraph.

⁸Esser, Doug. "U.S. Icebreaker to Map Arctic Sea Floor" August 11, 2007. Associated Press

framework. Accession to the Convention would provide the United States with a legitimate and internationally recognized pathway for making and disputing claims on Arctic resources.

The activity related to Arctic claims suggests an urgency for U.S. accession to the Convention. This urgency is driven both by what the United States can do and what it can undo as a party to the Convention. While we currently can comment on proposals by other Convention nations⁹, accession to the treaty would give the United States standing to substantially modify or block proposals that the U.S. found detrimental to its national interests. This could be done by preparing its own claim to the Continental Shelf Commission, or by working cooperatively with other Arctic nations to develop logical rules to govern exploitation of resources and other uses of the Arctic Sea. This latter strategy reflects one of the biggest benefits of U.S. accession to the Convention—namely that it would generate goodwill and a sense of cooperation over a shared mission to responsibly use the resources of the sea while protecting the oceanic environment for generations to come.

Jurisdiction and Participation in International Tribunals

The United States has considerable power to determine how accession to Convention would affect its national interests. This is primarily a function of the many years of negotiations getting the treaty to its 1994 form. More recent specific guidance provided by the U.S. Senate Foreign Relations Committee on conditions for U.S. accession to the treaty are laid out in a lengthy resolution identifying very specific declarations, understandings, and conditions that ensure protection of U.S. interests¹⁰. The conditions address a wide array of issues including representation on treaty decision-making bodies, ability to enforce U.S. environmental law, and rights to free navigation, as well as harmonization of the treaty with specific aspects of U.S. law. A particular concern to many in the United States is the specter of foreign courts making decisions about navigation and resource protection activities that ultimately affect U.S. interests. This concern could be said to be overstated for three reasons. First, accession to the Convention will allow the U.S. to have a say in the election of members of the Tribunal and to select members of arbitration panels making decisions. Second, and more important, is the fact that the U.S., as part of its accession (or any time thereafter), has the legal right to request the type of body it wants decisions concerning U.S. interests to be made by.

The choices the United States would have include:

1. A hearing before the International Tribunal for the Law of the Sea (ITLOS), a standing tribunal of 21 judges, each from a different nation, that serve nine year terms. The earliest the U.S. could get a seated judge would be in late 2008, when seven seats open.
2. A hearing before the International Court of Justice (ICJ), a UN court of 15 judges appointed by the General Assembly and Security Council. The U.S. currently has one sitting judge.

⁹E.g., The U.S. submitted an Official Statement from the Department of State to the Commission on the Continental Shelf, on 18 March 2002 contesting Russian claims to the Arctic

¹⁰U.S. Senate Committee on Foreign Relations. March 11, 2004. Report on the United Nations Convention on the Law of the Sea. Executive Report 108-10.

3. A special arbitral tribunal under “Annex VIII” made up of environmental, marine science, navigation and fisheries experts of which the U.S. would pick two of the five arbitrators.
4. A hearing before an “Annex VII” arbitration panel composed of five members of which the U.S. would be allowed to choose one and be involved in the appointment of at least three others.

The U.S. has already indicated its decision to adjudicate conflicts under the last two options, using the third option for fisheries, environmental and navigational disputes, and the fourth option for other disputes, meaning that all decisions concerning U.S. interests would go to a small arbitral body whose members are selected with U.S. input. Finally, nations may opt out of any of the above adjudication procedures when the issue debated concerns such issues as scientific research, boundary disputes, military activities and setting of limits in natural resource extraction within a nation’s EEZ ¹¹.

Balancing Economic, Military and Environmental Security

At the core of disputes in the exclusive economic zone (EEZ) as codified by the Convention and territorial seas is the tension between nations that are primarily maritime nations and those that are primarily coastal nations. Maritime nations are chiefly concerned with the ability to move cargo, fishing, and military vessels flying their flag freely through the high seas, EEZs and territorial seas as well as in the air above. Any attempt to limit transportation, such as movement of shipping lanes to protect species or speed limits within certain zones will cost these nations money and are thus met with resistance. Coastal nations, by contrast, are concerned with protecting their own resources in the EEZ, especially fisheries. These nations will propose any number of regulations to protect the environment, keep shipments of nuclear materials far off shore, or ensure that ships are not engaged in illegal fishing.

Of course, many nations have a vigorous interest on both sides of this dichotomy, but none more so than the United States. With the largest claimed EEZ of any nation (due in part to the long coast of Alaska, the Aleutian islands and Pacific territories) the U.S. is a coastal nation and as such demands protection for its coastal natural resources. From this perspective, the United States may wish to *limit* transport by other nations in its EEZ to protect habitats or to ensure that illegal fishing is not occurring. Indeed, the United States has imposed mandatory ship reporting requirements to protect right whales¹², and is seeking approval of the International Maritime Organization for limitations on transit in the northwest Hawaiian islands, which has recently been designated a National Monument. But with the largest and most wide ranging blue water Navy, the U.S. is a maritime nation that must maintain its existing rights to passage throughout the world’s oceans and seas. Moreover, the U.S. is reliant on international shipping imports and

¹¹These are addressed in sections 297 and 298 of the United Nations Convention on the Law of the Sea of 10 December 1982. The full text of which is available at: http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm

¹²Jon Van Dyke. 2005. The disappearing right to navigational freedom in the exclusive economic zone. Marine Policy. 29: 107-121.

restrictions on navigation will raise costs to U.S. consumers. These conflicts are concentrated in nations' territorial seas and straits, although conflicts in the wider boundaries of the EEZ are emerging.

A natural effect of this split interest is that any one sided argument about the perils of the U.S. joining the Convention is immediately contradicted. For example, alarmist arguments that Convention nations have or will impose limitations on transit are contradicted by the fact that the U.S. does impose some limits to transit in our own EEZ and has plans to continue to do so. Indeed, the very fact that the U.S. has perhaps the world's strongest interest in both protection of coastal resources and right of free transit on, under and above the ocean, is the most compelling reason to join the Convention. As four former U.S. Coast Guard Commandants stated in a letter urging the Chairman of the U.S. Senate Foreign Relations Committee to support accession to the treaty:

As a global maritime power and a nation with one of the longest coastlines, the United States has strong interests both in preserving freedom of the seas and in protecting our own coastal areas, including offshore marine resources. The Convention strikes the right balance between these sets of interests¹³.

Who Supports the Law of the Sea Convention?

Support for U.S. accession to the Convention is surprisingly broad¹⁴. Some of the architects of plans to scuttle the Convention treaty under the Reagan administration have now come around to support it because the more odious provisions were amended or eliminated since that time¹⁵. The Navy, Coast Guard, National Oceanic and Atmospheric Administration, the State Department and the White House, support accession. These groups support accession despite the fact that they occasionally squabble over its implementation, largely due to the dual interest of the U.S. (e.g., the environmental protection mandate of the Coast Guard vs. the security mandate of the Navy has put these two forces at odds in the past¹⁶). Likewise, major resource extracting industries and their trade groups, who are often at odds with environmental groups over regulations, share a common interest with many of these groups in ratifying the Convention. Finally, the most authoritative body on U.S. ocean science and policy ever assembled, the Joint Ocean Commissions Initiative, chaired by retired Navy Admiral James Watkins and former Congressman and White House Chief of Staff Leon Panetta, has indicated U.S. accession to the Convention as one of its highest priorities.

¹³Letter from Thomas H. Collins, James M. Loy, Robert E. Kramek, Paul A. Yost to Joseph Biden, Chairman, Senate Foreign Relations Committee. August 15, 2007

¹⁴For full list see lugar.senate.gov/sfrc/questions.html

¹⁵Ken Adelman. "Scuttle Diplomacy" Wall Street Journal, June 2-3 2007 weekend edition, A11.

¹⁶Jon Van Dyke. 2005. The disappearing right to navigational freedom in the exclusive economic zone. *Marine Policy*. 29: 107-121.

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the Nicholas Institute

The Nicholas Institute for Environmental Policy Solutions at Duke University is a nonpartisan institute founded in 2005 to engage with decision makers in government, the private sector and the nonprofit community to develop innovative proposals that address critical environmental challenges. The Institute seeks to act as an “honest broker” in policy debates by fostering open, ongoing dialogue between stakeholders on all sides of the issues and by providing decision makers with timely and trustworthy policy-relevant analysis based on academic research. The Institute’s staff leverages the broad expertise of Duke University as well as public and private partners nationwide.

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