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The U.S. Position on the U.N. Convention on the Law of the Sea (UNCLOS)

*Office of the Staff Judge Advocate, U.S. Indo-Pacific Command**

* Prepared by Captain Raul (Pete) Pedrozo, JAGC, U.S. Navy (Ret.); edited by Commander Matthew Wooten, JAGC, U.S. Navy and Lieutenant Commander Miles Young, U.S. Coast Guard; and approved by Colonel Thomas McCann, U.S. Marine Corps.

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The U.S. position on the 1982 U.N. Convention on the Law of the Sea (UNCLOS) is set forth below.

The Convention. UNCLOS, together with its Part XI Implementing Agreement (IA),[1] establishes a comprehensive set of rules governing the uses of the world's oceans, including the airspace above and the seabed and subsoil below. After decades of dispute and negotiation, the Convention reflects consensus on the extent of jurisdiction that States may exercise off their coasts and allocates rights and duties among all States. It carefully balances the interests of coastal States in controlling resource activities off their coasts and the interests of all States in protecting the freedom to use the oceans without undue interference. UNCLOS and the Part XI IA have both entered into force and currently have 168 and 150 Parties, respectively.[2] Despite being a major participant in the negotiation process, the United States did not sign the Convention when it was opened for signature in 1982 and is currently not a Party to UNCLOS or Part XI IA.

President Reagan's Objections. Upon the adoption of the Convention in 1982, the United States and other industrialized nations declined to sign or ratify UNCLOS, though they supported most of its provisions, because they could not accept the Part XI regime established to govern deep seabed mining in areas beyond the continental shelf. Specifically, the United States identified the following problems with Part XI: (1) provisions that would actually deter future development of deep seabed mineral resources, when such development should serve the interest of all countries; (2) a decision-making process that would not give the United States or other industrialized nations a role that fairly reflects and protects their interests; (3) provisions that would allow amendments to enter into force for the United States and other nations without their approval; (4) stipulations relating to mandatory transfer of private technology and the possibility of national liberation movements sharing in monetary benefits from deep seabed mining; and (5) the absence of assured access for future qualified deep seabed miners to promote the development of these resources.[3]

1983 U.S. Ocean Policy Statement.[4] Following adoption of the Convention in 1982, it has been the policy of the United States to act in a manner consistent with its provisions relating to traditional uses of the oceans and

to encourage other countries to do likewise. Since the end of World War II, the United States has supported efforts to develop a widely recognized legal order that will, *inter alia*, facilitate peaceful, international uses of the oceans and provide for equitable and effective management and conservation of marine resources. Therefore, although the United States did not sign UNCLOS, it recognized that the Convention contains provisions with respect to traditional uses of the oceans that generally confirm existing maritime law and practice and fairly balance the interests of all States. Accordingly, in March 1983, President Reagan announced three decisions to promote and protect U.S. oceans interests in a manner consistent with the fair and balanced results in UNCLOS and customary international law.

First, the President declared that the United States would "accept and act in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight." In return, the United States would recognize the rights of other States in their coastal waters, as reflected in UNCLOS, so long as coastal States recognized the U.S. and other nations' rights and freedoms under international law. Second, the President indicated that the United States would "exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests" reflected in UNCLOS. However, the President warned that the United States would not "acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses." Third, the President proclaimed U.S. sovereign rights and jurisdiction over a 200-nautical mile (nm) Exclusive Economic Zone (EEZ) consistent with the provisions of UNCLOS.[5] Of note, the Proclamation specifically provides that "all States enjoy the high seas freedoms of navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea," within the EEZ.[6]

Part XI Implementing Agreement. Recognizing that UNCLOS would not receive universal acceptance without modifications to Part XI, the UN Secretary-General convened a series of informal consultations between July 1990 and July 1994, which resulted in the adoption of the Part XI IA. Article 2 provides that UNCLOS and the IA shall be interpreted and applied together as a single instrument.[7] The legally binding changes set forth in the IA met all U.S. objections to Part XI, and as a result, the United States and all other major industrialized nations signed the IA.

The Part XI Implementing Agreement

(1) Overhauls the Part XI decision-making procedures to accord the United States, and other nations with major economic interests at stake, adequate influence over future decisions on possible deep seabed mining;
(2) Guarantees the United States a seat on the critical executive body and requires a consensus of major contributors for financial decisions;
(3) Restructures the deep seabed mining regime along free market principles and meets the U.S. goal of guaranteed access by U.S. firms to deep seabed minerals on the basis of reasonable terms and conditions; (4) Eliminates mandatory transfer of technology and production controls;
(5) Scales back the structure of the International Seabed Authority (ISBA), which administers the mining regime, and links the activation and operation of institutions to the actual development of concrete commercial interest in seabed mining;
(6) Together with its allies, the United States could block the Enterprise, the ISBA's operating arm, from being activated, and any mining activities conducted by the Enterprise are subject to the same requirements that apply to private mining companies;
(7) Does not require States to finance the Enterprise, and subsidies inconsistent with the General Agreement on Tariffs and Trade are prohibited; grandfathers the seabed mine site claims established on the basis of the exploration work already conducted by companies holding U.S. licenses; and
(8) Strengthens the provisions requiring consideration of the potential environmental impacts of deep seabed mining.

Transmittal to the Senate for Advice and Consent. The President has the power, by and with the advice and consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.[8] The United States has basic and enduring national interests in the oceans and has consistently taken the view that the best way to protect these interests is through a widely accepted international framework governing uses of the sea. Accordingly, with the successful modifications to Part XI, President William Clinton

transmitted UNCLOS and the Part XI IA to the Senate for advice and consent on October 7, 1994.[9]

Some of the benefits of the Convention identified by the President include: (1) UNCLOS advances U.S. interests as a global maritime power by preserving the right of the U.S. military to use the world's oceans to meet national security requirements and of commercial vessels to carry sea-going cargoes; (2) UNCLOS advances U.S. interests as a coastal State by providing for a 200-nm EEZ; (3) UNCLOS promotes continuing improvement in the health of the world's oceans; (4) UNCLOS establishes clear criteria and procedures to promote access to marine areas, including coastal waters, for marine scientific research activities; (5) UNCLOS fairly balances the respective interests of coastal and maritime States; and (6) UNCLOS's dispute settlement provisions provide mechanisms to enhance compliance by Parties with its provisions.

The President's transmittal letter also highlights the reforms to Part XI achieved by the IA, which fundamentally changes the Convention's deep seabed mining regime. Accordingly, the President recommended that the Senate give early and favorable consideration to the Convention and to the IA and give its advice and consent to accession to the Convention and to ratification of the IA. Despite widespread bipartisan support for UNCLOS, the Senate Foreign Relations Committee (SFRC) did not hold hearings on the Convention in 1994.

Senate Hearings. President George W. Bush reinvigorated efforts to join the Conventions in 2004. In March, the SFRC, under new leadership, held hearings and recommended unanimously that the full Senate give its advice and consent to accession to the Convention and ratification of the Agreement.[10] The full Senate did not vote, however, on the Committee's recommendation. Since the full Senate took no action, Senate rules required the return of the Convention and the IA to the SFRC at the end of the 108th Congress.

On May 19, 2007, President Bush urged the Senate to approve UNCLOS during the first session of the 110th Congress, stating that: "joining [the Convention] will serve the national security interests of the United States, including the maritime mobility of our armed forces worldwide. It will secure U.S. sovereign rights over extensive marine areas, including the valuable natural resources they contain. Accession [to the Convention] will promote U.S. interests in the environmental health of the oceans. And it will give the United States a seat at the table when the rights that are vital to our interests are

debated and interpreted."[11] Once again, the SFRC held additionally hearings and recommended that the full Senate give its advice and consent.[12] Notwithstanding the President's strong support, the full Senate did not take up the matter during the 110th Congress.

UNCLOS was debated again during the 112th Congress. On May 23, 2012, Secretary of State Hilary Clinton, Secretary of Defense Leon Panetta, and Joint Chiefs of Staff Chairman General Martin Dempsey testified before the SFRA and urged swift ratification of UNCLOS. On June 14, 2012, the SFRC hosted a "24 Star" hearing where six four-star generals and admirals testified in support of UNCLOS accession. Finally, on June 28, 2012, the U.S. Chamber of Commerce, the American Petroleum Institute, the National Association of Manufacturers, and Verizon Communications testified before the SFRC arguing that joining the treaty would advance U.S. economic interests.[13] Despite this overwhelming support, Republican opposition doomed U.S. accession and ratification, as thirty-four Republican Senators signed a letter to the Chairman of the SFRC indicating that they would vote against U.S. accession, effectively killing Senate action on the Convention in the 112th Congress.[14]

Opposition to UNCLOS. Opponents to UNCLOS argue that the costs associated with joining the Convention outweigh the benefits, and Article 309[15] forbids States to submit reservations or exceptions exempting itself from the Convention's controversial provisions. For example, the conservative Heritage Foundation argued that: (1) if it joins the Convention, the United States "will be required . . . to transfer royalties generated from hydrocarbon production of the U.S. 'extended continental shelf' (ECS) to the International Seabed Authority for redistribution to developing and landlocked countries;" (2) the United States does not have to be a Party to UNCLOS in order to exploit its ECS; (3) the United States does not have to join the Convention to mine the deep seabed; (4) "U.S. accession . . . would expose the . . . [United States] to lawsuits regarding virtually any maritime activity . . ." which would be expensive to defend, and "any adverse judgment rendered by an UNCLOS tribunal would be final, could not be appealed, and would be enforceable in U.S. territory;" and (5) the United States does not have to be a Party to UNCLOS to "protect and preserve its navigational rights and freedoms" because the navigational provisions of UNCLOS codify customary international law that is binding on all nations.[16]

Department of Defense Support. UNCLOS supports implementation of the National Security Strategy, provides legal certainty in the world's oceans, and preserves essential navigation and overflight rights. Becoming a Party to UNCLOS would help preserve the Department of Defense's ability to move forces on, over, and under the world's oceans, whenever and wherever needed. UNCLOS establishes stable maritime zones; codifies innocent passage, transit passage, and archipelagic sea lanes passage rights; recognizes unrestricted military activities on the high sea; works against "jurisdictional creep" by preventing coastal States from expanding their own maritime zones; and reaffirms sovereign immunity of warships, auxiliaries and government aircraft.[17]

1. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, *entered into force* July 28, 1996, 1836 U.N.T.S. 3, 33 I.L.M. 1309 (1982) [hereinafter Part XI IA].

2. Status of the Convention and of the Related Agreements, https://www.un.org/Depts/los/.

3. Statement on United States Participation in the Third United Nations Conference on the Law of the Sea, Jan**.** 29, 1982, https://www.reaganlibrary.gov/research/speeches/12982b; Statement on United States Actions Concerning the Conference on the Law of the Sea**,** Jul**.** 9, 1982, https://www.reaganlibrary.gov/research/speeches/70982b.

4. Statement on United States Oceans Policy, Mar. 10, 1983, https://www.reaganlibrary.gov/archives/speech/statement-united-states-oceans-policy.

5. Proclamation 5030—Exclusive Economic Zone of the United States of America, Mar. 10, 1983, https://www.reaganlibrary.gov/research/speeches/31083d.

6. *Id.*

7. Part XI IA, *supra* note 1, art. 2.

8. U.S. Constitution, art. II, sec. 2.

9. S. Treaty Doc. 103-39, United Nations Convention on the Law of the Sea, with Annexes, and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, with Annex, 103rd Cong., 2nd Sess., Oct. 7, 1994.

10. S. Exec. Rpt. 108–10, United Nations Convention on the Law of the Sea, Report to accompany Treaty Doc. 103–39, 108th Cong, 2nd Sess., Mar. 11, 2004.

11. S. Exec. Rpt. 110–9, Convention on the Law of the Sea, Report together with Minority Views to accompany Treaty Doc. 103–39, 110th Cong., 1st Sess., Dec. 19, 2007.

12. *Id.*

13. S. Hearing 112–654, The Law of the Sea Convention (Treaty Doc. 103–39), Hearing Before the Committee on Foreign Relations, United States Senate, 112th Cong., 2nd Sess., May 23, June 14, and June 28, 2012.

14. Julian Ku*, US Will Not Join the Law of the Sea Treaty (At Least Not This Year)*, OPINIO JURIS, (July 16, 2012), http://opiniojuris.org/2012/07/16/us-will-not-join-the-law-of-the-sea-treaty-at-least-not-this-year/.

15. United Nations Convention on the Law of the Sea art. 309, Dec. 10, 1982, 1833 U.N.T.S. 397, provides "no reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention."

16. Steven Groves, *The Law of the Sea: Costs of U.S. Accession to UNCLOS*, THE HERITAGE FOUNDATION (June 14, 2012), https://www.heritage.org/testimony/the-law-the-sea-costs-us-accession-unclos.

17. The Convention on the Law of the Sea, NAVY JAG, https://www.jag.navy.mil/organization/code_10_law_of_the_sea.htm.