



# THE BROOKINGS INSTITUTION

1775 Massachusetts Avenue, NW Washington, DC 20036-2188  
Tel: 202-797-6000 Fax: 202-797-6004  
www.brookings.edu

June 22, 2004

## LAW OF THE SEA CONVENTION: SHOULD THE U.S. RATIFY?

by David B. Sandalow

The United States has vital national interests in the oceans. Our national security depends on naval mobility. Our prosperity depends on underwater energy resources. Ocean fisheries help feed the United States and much of the world.

On February 25, 2004, the Senate Foreign Relations Committee unanimously recommended that the United States accede to the Law of the Sea Convention, which sets forth a comprehensive framework of rules governing use of the world's oceans. The recommendation followed two hearings in which the Committee heard testimony supporting the Convention from the Bush administration, uniformed military, ocean industries and environmental groups, among others. Several additional Congressional committees have since held hearings on the treaty.

The United States should promptly join the Law of the Sea Convention. Doing so would help protect our national security, advance our economic interests and protect the marine environment. Prompt action is needed to ensure that the United States is a party by November 2004, when the Convention is open to amendment for the first time.

### BACKGROUND ON LAW OF THE SEA CONVENTION

The Convention on the Law of the Sea has been called a "constitution" for the world's oceans. Among its many provisions, the Convention limits coastal nations to a 12-mile territorial sea, establishes 200-mile exclusive economic zones, requires nations to work together to conserve high seas fisheries, and establishes a legal regime for the creation of property rights in minerals found beneath the deep ocean floor.

Historically, rules concerning use of the oceans were established by customary international law -- a term used to describe practices considered legally required by most nations from time to time. The uncertainties inherent in such an approach led, in 1958, to the adoption of four conventions setting forth rules for oceans governance. The conventions were promptly ratified by the United States and many other countries, but soon came to be seen as insufficient. In particular, during the 1960's the U.S. became increasingly concerned about the growing number of coastal states asserting control over vast reaches of the oceans. New issues -- including marine pollution -- gained greater prominence. In 1973, negotiations were launched for a new Convention on the Law of the Sea.

The Convention was adopted in 1982. Its provisions reflected longstanding U.S. negotiating objectives, including recognition of navigational and overflight freedoms, limits on coastal state jurisdiction to a 12-mile territorial sea, the establishment of 200-mile exclusive economic zones and rights to the ocean floor to the edge of the continental shelf. However, the agreement also contained provisions on deep seabed mining at odds with U.S. interests (including requirements for the mandatory transfer of private technologies).

President Reagan praised the Convention's "many positive and very significant accomplishments," but declined to sign because of the deep seabed mining provisions. In March 1983, President Reagan issued an Ocean Policy Statement announcing the United States' intention to act generally in accordance with the terms of the Convention.

New negotiations over the Convention's deep seabed mining provisions were launched in 1990. These talks were concluded in 1994, with a new agreement on deep seabed mining that addressed all concerns identified by the Reagan administration a decade earlier. In October 1994, the Convention was transmitted to the Senate for approval.

The Convention entered into force in November 1994, after the sixtieth nation joined. Today, more than 140 nations are parties to the Law of the Sea Convention.

#### NATIONAL SECURITY CONSIDERATIONS

U.S. military operations depend on naval mobility. By codifying navigational and overflight freedoms long asserted by the United States, the Convention improves access rights in the oceans for our armed forces, reducing operational burdens and helping avert conflict.

Historically, the U.S. Navy was required to contend with widely varying and excessive claims by coastal nations concerning access to the oceans. In the 1940's, for example, Chile asserted the right to control access by all vessels within 200 miles of its coast. Later, Indonesia asserted a similar right with regards to all waters between its many islands.

These claims and many others are effectively resolved by the Convention, which recognizes navigational and overflight freedoms within 200-mile exclusive economic zones and through key international straits and archipelagoes. The Convention also recognizes rights of passage through territorial seas, without notice and regardless of means of propulsion, as well as navigational and overflight freedoms on the high seas.

The results include less need for military assets to maintain maritime access rights and reduced risk of conflict.

However, the failure of the United States to join the Law of the Sea Convention puts these gains at risk.

First, there is a risk that important provisions could be weakened by amendment, beginning in November 2004 when the treaty is open for amendment for the first time. Currently, for example, the Convention prohibits coastal states from denying transit rights to a vessel based

upon its means of propulsion. Some states, however, may propose to amend this provision to allow exclusion of nuclear-powered vessels. Under the Convention, no amendment may be adopted unless the parties agree by consensus or, if every effort to reach consensus failed, more than 2/3rds of the parties present agree both on certain procedural matters and on the proposed amendment. As a party, the United States would have a much greater ability to defeat amendments not in the U.S. interest, by blocking consensus and by joining with other parties to vote against such amendments.

Second, by staying outside the Convention, the United States increases the risk of backsliding by nations that have put aside excessive maritime claims from years past. Pressures from coastal states to expand their maritime jurisdiction will not disappear in the years ahead – indeed such pressures will likely grow. Incremental unraveling of many gains under the Convention is more likely if the world’s leading maritime power remains a non-party.

For these reasons and others, General Richard B. Meyers, Chairman of the Joint Chiefs of Staff, recently called ratification of the treaty by the United States “a top national security priority.” Admiral Vern Clark, Chief of Naval Operations, reiterated the Navy’s longstanding support for U.S. ratification, explaining that “by joining the Convention, we further ensure the freedom to get to the fight, 24 hours a day and seven days a week, without a permission slip.”

Some have argued that U.S. accession to the Convention is unnecessary since excessive maritime claims can be addressed by invoking customary international law and with “operational assertions” by the U.S. military. But such an approach is less certain, more risky and more costly than taking advantage of the Convention. Customary law is by nature subject to varying interpretations and change over time. “Operational assertions” – sending military ship and aircraft into contested areas -- involve risk to naval personnel as well as political costs. Such assertions should be conducted aggressively where needed, but avoided where possible.

Others have argued that U.S. accession to the Convention would interfere with the Proliferation Security Initiative (PSI), under which the United States and more than a dozen allies have agreed to interdict some ships that may present a nonproliferation risk. In fact, the Convention *expands* the list of justifications for ship interdiction set forth in the 1958 Convention on the High Seas, to which the United States has been a party for more than 40 years. Among the many legal bases that may be applicable to interdictions under the PSI are the jurisdiction of coastal states in their territorial seas, the right to board stateless vessels, agreements with flag States concerning high seas boarding and the inherent right of self-defense. Indeed several PSI allies have recently expressed concern about the U.S. failure to ratify the Convention, asserting that this failure could weaken the Initiative.

Finally, some have argued joining the Convention would hamper U.S. intelligence activities, citing a supposed restriction on intelligence-gathering and submerged transit of submarines in coastal waters. This argument is based on a simple misreading of Article 19 and 20 of the Convention, which impose no restrictions on any activity but simply establishes conditions for invoking the "right of innocent passage." As Admiral Clark has written, the Convention "supports U.S. efforts in the war on terrorism by providing important stability and codifying navigational and overflight freedoms, while leaving unaffected intelligence collection activities."

## COMMERCIAL CONSIDERATIONS

The U.S. economy depends on the oceans. Goods worth more than \$800 billion dollars are shipped through U.S. ports each year. More than a third of oil and gas produced around the world each year comes from offshore wells. (For U.S. oil and gas production, the figure is roughly 25%.) U.S. fisheries had landings in excess of \$3 billion in 2002. Submarine cables are essential to global communications and therefore much of global commerce.

The Law of the Sea Convention helps promote U.S. commercial interests in several important respects.

First, the navigational freedoms recognized under the Convention provide a stable environment for global commerce. Clear rules with widespread acceptance facilitate international trade and reduce risks to the many industries that depend upon marine transport.

Second, the U.S. oil and gas industry benefits from the Convention's rules concerning offshore resources. Under the Convention, coastal nations have exclusive authority over all resources within 200 miles of shore. In addition, coastal nations have authority over the ocean floor beyond this 200-mile zone, to edge of the continental shelf.

This latter provision is especially beneficial for the United States, which has the largest continental shelf in the world. Vast areas of the ocean floor off Alaska, Maine and other states are brought under U.S. jurisdiction as a result of this provision. With expected advances in deep water drilling technologies, these areas hold vast potential for oil and gas production.

In addition, the Convention offers a ready set of procedures for delineating the outer limit of each country's continental shelf. These procedures help provide the certainty needed for major capital investment in new oil fields or mines.

However, these procedures are only available to nations that join the Convention. In addition, only nations that join the Convention can nominate commissioners to the Convention's Commission on the Limits of the Continental Shelf.

Currently pending before this Commission is a submission by Russia concerning the Arctic Ocean. Based on preliminary analyses, the U.S. is concerned that Russia is claiming territory that fails to meet the Convention's criteria for the continental shelf. Unless the U.S. promptly ratifies the Convention, decisions concerning Russia's submission will be made without full U.S. influence or input. Claims are also being submitted by Australia and Brazil.

For these reasons and others, the American Petroleum Institute, the International Association of Drilling Contractors and the National Ocean Industries Association all support U.S. ratification of the Convention.

Some opponents of ratification have objected to the Convention's provisions concerning revenue sharing from proceeds of the outer continental shelf. Under the Convention, no payments are owed for the first five years of production (which are typically the most productive). Beginning

in year six, payments equal to 1% of the value of production at the site, increasing 1% each year to a maximum of 7%, are owed to the International Seabed Authority.

Significantly, the U.S. oil and gas industry, which would likely make these payments, does not oppose these revenue sharing provisions. After noting “the significant resource potential of the outer continental shelf,” Paul Kelly of Rowan Industries, representing the American Petroleum Institute and other major industry groups, told the Senate Foreign Relations Committee in October 2003 that “on balance the package contained in the Convention, including the modest revenue sharing provisions, clearly serves U.S. interests.”

Finally, the Convention promotes the United States’ substantial commercial interests in ocean fisheries. The recognition of our 200-mile exclusive economic zone by other nations is fundamental to gaining full value from our rich fisheries. (Under the Convention, the United States has the exclusive right to determine the allowable catch of living resources within this 200-mile zone.) The requirement that nations work together in managing migratory species is equally fundamental to maintaining the health of many fish stocks.

The U.S. fishing industry, including the U.S. Tuna Foundation, strongly supports U.S. ratification of the Convention.

#### ENVIRONMENTAL CONSIDERATIONS

The ocean environment is under enormous stress. Many fisheries are depleted or collapsing. Pollution plagues highly populated coastal regions. Non-native species threaten ocean ecosystems around the globe.

The Convention provides a comprehensive framework for international cooperation to protect the marine environment. It imposes minimum requirements – all of which are already being met by the United States – to protect and preserve the marine environment. Under the Convention, states are required to take measures to address pollution from vessels and land-based sources, to prevent the introduction of alien or invasive species, and to conserve and manage coastal fisheries.

The Convention also requires states to work together to protect the oceans. States are required to cooperate in the management of high sea fish stocks, as well as stocks that migrate between the high seas and exclusive economic zones, setting the stage for regional agreements essential to managing ocean fisheries. States are also required to work together to protect marine mammals, which are given special protections under the Convention.

The standards for environmental protection set forth in the Convention work strongly to the advantage of the United States, which has already met and in most cases significantly exceeded these standards but necessarily depends on actions by other nations to protect the marine environment.

The Convention has strong support from environmental groups, including the World Wildlife Fund, the Oceans Conservancy and the National Environmental Trust.

Some observers have expressed concern that the Convention gives undue preference to navigational rights over the rights of coastal states to protect their shores from marine pollution. However, the Convention affirms the sovereign right of all nations to impose conditions for port entry designed to protect the marine environment and recognizes numerous coastal state authorities to address polluting activities of foreign vessels. These and other provisions strike a reasonable balance between the United States' interests as a coastal state and seagoing nation.

### DEEP SEABED MINING

For decades, engineers have explored ways to extract metals from the deep seabed. Deposits of manganese, cobalt and methane hydrates have attracted particular interest. At present, however, there are no commercial deep seabed mining projects, largely because costs are much higher than for land-based mining. Cost is expected to remain a significant barrier to mining in the deep ocean for years to come.

Historically, the lack of clear property rights was also a barrier to development. The high seas and ocean floor beneath them have long been considered part of the global commons, beyond the reach of national jurisdiction. As such, it was unclear how nations or companies might establish legal title to minerals retrieved from the ocean floor. Investors were not expected to commit the substantial funds needed for commercial development absent assurance that property rights would be widely recognized.

In 1994, nations adopted a set of rules governing deep seabed mining. The 1994 agreement applies free market principles to deep seabed mining, establishing a mechanism for vesting title in minerals in the entity that recovers them from the ocean floor. The agreement establishes an International Seabed Authority (ISA) with responsibility for supervising this process. The ISA is an independent international organization – not a part of the United Nations. It is governed by a Council (with principal executive authority) and an Assembly (which gives final approval to regulations and budgets). As a party to the Convention, the United States would be a permanent member of the Council and have the ability, under relevant voting rules, to block most substantive decisions of the Authority, including any decisions with financial or budgetary implications and any decisions to adopt rules, regulations or procedures relating to the deep seabed mining regime.

The agreement also recognized the longstanding view that the deep ocean floor is part of the global commons and beyond the reach of national jurisdiction.

The 1994 agreement is a legally binding modification of Part XI the Law of the Sea Convention. The agreement addresses in full all concerns identified by President Reagan a decade earlier. Technology transfer requirements – a principal objection in 1982 – were deleted from the agreement.

Some opponents of U.S. ratification have expressed concern that American companies would be the victim of discrimination in mining approvals and that companies would owe substantial fees to the International Seabed Authority. However, U.S. voting rights on the Council and Assembly

would prevent such results. Furthermore, the United States' failure to ratify operates as the most effective discrimination against U.S. companies. Few if any companies would invest the enormous sums needed for deep seabed mining without ISA approval, forcing U.S. companies to work through foreign governments in order to secure widely recognized property rights in minerals from the deep seabed.

## CONCLUSION

Diverse voices – including the Joint Chiefs of Staff, the Navy, the oil and gas industry, the fishing industry and major environmental groups – have expressed strong support for U.S. ratification of the Law of the Sea Convention. The U.S. Commission on Oceans Policy, appointed by President Bush pursuant to the Oceans Act of 2000, unanimously recommended U.S. ratification, as did the privately appointed Pew Oceans Commission. This breadth of support reflects the many benefits the United States would enjoy from ratifying the Convention.

By its terms, the Convention is open to amendment for the first time in November 2004 -- the tenth anniversary of its entry into force. At that time, many U.S. gains under the Convention may be at risk.

In February 2002, the Bush administration declared that U.S. accession to the Convention was “urgent.” The Senate should promptly approve the Law of the Sea Convention, to protect and promote wide-ranging U.S. interests.

*David B. Sandalow is a scholar in the Foreign Policy Studies Program at The Brookings Institution.*