The United States and the UN Law of the Sea Convention: Adherence, Absence, Anarchy

Roncevert Almond

Congress on Ocean Policy

December 6, 2018
National Union Building
918 F St NW
Washington, DC
Overview

Discussion Outline

1. United States & Int’l Law
2. UN Law of the Sea Convention
3. Barriers to Ratification
4. Costs of Non-Party Status
5. Key Conclusions

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Part 1:
United States and Int’l Law

*Legal Context of UNCLOS Debate*
Neutrality Controversy of 1793

NEW PRECEDENT: President Washington, aided by Alexander Hamilton: (1) declares U.S. neutrality and (2) establishes maritime claim to protect U.S. interests – *without consulting Congress*
The issue on the table, France is on the verge of war with England, and do we provide aid and troops to our French allies. Or do we stay out of it…

Establishing the Territorial Sea

“The greatest distance to which any respectable assent among nations has been at any time given, has been the extent of the human sight, estimated at upward of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball, usually stated at one sea-league [three geographic miles]...This distance can admit of no opposition, as it is recognized by treaties between some of the powers with whom we are connected in commerce and navigation, and is as little, or less, than is claimed by any of them on their own coasts.”

Letter from Mr. Jefferson to British Minister George Hammond, Nov. 8, 1793

Source: H.R. Doc. No. 324, 42d Cong., 2d Sess. 553-54 (1872)
Themes: The President Versus Congress

- Constitutional Roles / Institutional Capacity
- Expansive Executive Role in Foreign Affairs
- Limitations on Congressional Treaty and War Powers
- Unilateral Executive Action on Maritime Claims
- Post-Legislative Endorsement of Presidential Int’l Lawmaking (1794 Neutrality Act)
- Tensions between Treaty and Custom (CIL)
- Dynamic of War, Technology, and Int’l Law
1. Treaties*
2. Custom*
3. General Principles of Law*
4. Judicial Decisions
5. Writing of Jurists

**TREATY:** International conventions, whether general or particular, establishing rules expressly recognized by the contesting states (see Vienna Convention, Art. 2)

**CUSTOM (CIL):** Evidence by a general state practice accepted as law (i.e., state practice + opinion juris);

**GENERAL PRINCIPLES OF LAW:** As recognized by “civilized nations” (e.g., pacta sunt servanda)

Sources: Statute of the Int’l Court of Justice, Chpt. II; United Nations Charter, Chpt. XIV

**ICJ Statute:** Article 38(1)
Int’l Law within U.S. Legal System

- **TREATY**: Pursuant to Art. II, Section 2, a treaty is made by the President with the advice and consent of two-thirds of the Senate present.

- **CONGRESSIONAL-EXECUTIVE AGREEMENT**:  
  - **EX ANTE**: Congress authorizes the President by statute to make and conclude an international agreement.
  - **EX POST**: Congress by statute approves an international agreement previously negotiated by the President.

- **EXECUTIVE AGREEMENT PER TREATY**: Agreement made by the President based on an authorization from an existing treaty.

- **SOLE EXECUTIVE AGREEMENT**: Agreement made by the President on his or her own constitutional authority per Art. II, Sections 1-3 (Commander-in-Chief, Executive Power, Receipt of Ambassadors, Faithful Execution of Laws).

- **“NON-BINDING” POLITICAL AGREEMENT**: Agreement between the President or one of the President’s subordinates and a foreign nation or foreign agency.

Source: RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 (AM. LAW INST. 1987)
**Formal Int’l Lawmaking Tools**

<table>
<thead>
<tr>
<th>Type</th>
<th>Example</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>TREATY</strong></td>
<td>UN Law of the Sea Convention</td>
</tr>
<tr>
<td><strong>CONG.-EXEC. AGREEMENT (EX ANTE)</strong></td>
<td>Agricultural Trade Development and Assistance Act of 1954, Pub. L. No. 83-840, § 101, 68 Stat. 454, 455, provides that the president may “negotiate and carry out agreements with friendly nations or organizations of friendly nations.”</td>
</tr>
<tr>
<td><strong>EXEC. AGREEMENT PER TREATY</strong></td>
<td>Security Arrangements (e.g., Status of Forces Agreements) per North Atlantic (NATO) Treaty (1949) <em>Paris Climate Accord (?)</em></td>
</tr>
<tr>
<td><strong>SOLE EXEC. AGREEMENT</strong></td>
<td>2008 U.S.-Iraq Strategic Framework Agreement / Status of Forces Agreement (per Commander-in-Chief Clause)</td>
</tr>
<tr>
<td><strong>POLITICAL COMMITMENT</strong></td>
<td>1941 Atlantic Charter; 1975 Helsinki Accord; <em>2015 Iran Nuclear Deal</em></td>
</tr>
</tbody>
</table>

**On the Int’l Plane**

- **DEFINITION OF “TREATY”:** Both Article II Treaties and Executive Agreements are intended to be legally binding and, therefore, are “treaties” for the purposes of int’l law and Vienna Convention (recognized by U.S. as authoritative) (22 C.F.R. § 181.2(a)(1))

- **SIGNATURE / INTERIM OBLIGTIONS:** A nation that signs a treaty is bound not to take actions that “would defeat the object and purpose of a treaty” until “it shall have made its intention clear” not to become a party to the treaty.

- **EXECUTIVE ACTION TO WITHDRAW:** Interim obligations are terminated if a nation – U.S. President – makes clear its intent not to become a party to the treaty.

- **TERMINATION:** In accordance with (1) terms of a withdrawal clause in the treaty (which might require a period of notice), (2) consent of all contracting states; or (3) the result of various circumstances such as a material breach.

*Background, Status, and U.S. Policy*
Beltway Play: Presidents & Congress
## UNCLOS (Cont.)

### Act One: State Practice

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>1945</td>
<td>Truman Proclamations</td>
<td>Establish (1) <strong>Continental Shelf</strong> claim to natural resources on seabed (Proclamation No. 2667) and (2) <strong>fisheries conservation zones</strong> (Proclamation No. 2668). Departure from traditional high seas freedoms.</td>
</tr>
</tbody>
</table>
| 1958 | Following Senate approval | The United States ratifies **four (4)** new Law of the Sea conventions (with Senate advice and consent):  
- **Convention on the Territorial Sea and the Contiguous Zone**  
- **Convention on the High Seas**  
- **Convention on Fishing and Conservation of the Living Resources of the High Seas**  
- **Convention on the Continental Shelf**  
  Note: Optional Protocol – Compulsory Settlement of Disputes |
**UNCLOS (Cont.)**

### Act Two: Codification & Adherence

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1970</td>
<td>President Nixon issues <em>Ocean Policy Statement</em> proposing the negotiation of a new “multilateral legal framework” for the oceans, including addressing resources of the deep seabed as the common heritage of mankind</td>
</tr>
<tr>
<td>1976</td>
<td>President Ford signs <em>Magnuson Fishery Conservation and Management Act</em> (FCMA) for a 200-mile zone for fishing conservation.</td>
</tr>
<tr>
<td>1982</td>
<td>President Reagan states that the United States will not sign the Convention due to its provisions relating to deep seabed mining.</td>
</tr>
<tr>
<td>1983</td>
<td>President Reagan issues <em>Ocean Policy Statement</em> that UNCLOS reflects customary int’l law and fulfils U.S. interest in “a comprehensive legal framework” relating to competing uses of the world’s oceans.</td>
</tr>
</tbody>
</table>
### Act Three: Negotiation & Transmittal

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
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</thead>
<tbody>
<tr>
<td>1994</td>
<td><strong>President Clinton</strong> signs on 1994 Agreement and transmits Convention with 1994 Agreement to Senate for its <strong>advice and consent</strong> <em>(S. Treaty Doc. 103–39).</em></td>
</tr>
<tr>
<td>1999</td>
<td><strong>President Clinton</strong> unilaterally establishes <strong>24-mile contiguous zone</strong> <em>(Proclamation No. 7219, 1999)</em> consistent with UNCLOS terms.</td>
</tr>
</tbody>
</table>
**Act Four: Absence**

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
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<tbody>
<tr>
<td>2012</td>
<td>President Obama officially presents the convention to the Senate on May 17, 2012. Senate Foreign Relations Committee holds four hearings on the Convention; no SFRC vote is taken.</td>
</tr>
<tr>
<td>2014</td>
<td>On June 2, 2014, at Air Force Academy, President Obama urges ratification: “So, if we’re truly concerned about China's actions in the South China Sea...the Senate should help strengthen our case by approving the Law of the Sea Convention, as our military leaders have urged.”</td>
</tr>
<tr>
<td>2017</td>
<td>During Senate confirmation hearings in January 2017, Sec. of State Tillerson and Sec. of Defense Mattis – Trump administration – offers tepid support for ratification, dangers of “subjecting any of our activities to international courts.”</td>
</tr>
</tbody>
</table>
Latest Action: 115th Congress (2017-2018)

- Identical bills introduced
- House – 05/18/2017
  Referred to Foreign Affairs Committee
- Senate – 07/30/2018
  Referred to Foreign Relations Committee
- 115th Congress concludes; no vote

“Calling upon the United States Senate to give its advice and consent to the ratification of the United Nations Convention on the Law of the Sea.”
Part 3: Barriers to Ratification

Institutions, Politics, Alternatives
Barriers to Ratification

Institutional Roadblock: Decline of Treaties

<table>
<thead>
<tr>
<th>PERIOD</th>
<th>TREATIES</th>
<th>EXEC. AGREEMENTS</th>
<th>PERCENT TREATIES</th>
</tr>
</thead>
<tbody>
<tr>
<td>1789-1839 (50 yrs.)</td>
<td>60</td>
<td>27</td>
<td>69.0%</td>
</tr>
<tr>
<td>1839-1889 (50 yrs.)</td>
<td>215</td>
<td>238</td>
<td>47.0%</td>
</tr>
<tr>
<td>1889-1939 (50 yrs.)</td>
<td>524</td>
<td>917</td>
<td>36.0%</td>
</tr>
<tr>
<td>1939-1989 (50 yrs.)</td>
<td>702</td>
<td>11,698</td>
<td>5.6%</td>
</tr>
<tr>
<td>1990-2012 (22 yrs.)</td>
<td>366</td>
<td>5491</td>
<td>6.2%</td>
</tr>
</tbody>
</table>

- In 8 years, **President Obama** submitted 38 treaties; only 15 received Senate consent
- Obama’s avg. **number of treaties** transmitted per year (**4.75**) and the percentage of treaties receiving Senate consent (**39%**) are smallest in modern period (since Truman)
- Far below **historical averages**: 15.3 treaties per year and **92%** consent

Breakdown of U.S. Int’l Agreements

- **TREATIES 6%**
- **SOLE EXEC. AGREEMENTS: 5%**
- **EXEC. AGREEMENTS - TREATY: 3%**
- **EX POST EXEC. AGREEMENTS: 6%**
- **EX ANTE EXEC. AGREEMENTS: 80%**

Barriers to Ratification (Cont.)

What Explains This Trend?

- **Int’l Relations**
  - (Density post-WWII)

- **Institutional Capacity**
  - (Exec. vs. Cong.)

- **Efficiency**
  - (Separation of Powers = Inefficient)

- **Politics**
  - (Congressional Acquiescence & Obstruction)

Rise of Executive Agreements

Pop Quiz:  $2,559,576 (41) ---- $569,915,000 (+11,000)
Hardened Political Ideology

- “Self-styled ‘global governance’ advocates...supranational tribunal that could supersede national sovereignties”

- Promotes muscular nationalism – no delegation of navigation and resource protection activities that ultimately affect U.S. interests.

- American Service-Members' Protection Act (a/k/a "The Hague Invasion Act")

- The South China Sea Arbitration constituted under UNCLOS Annex VII

- Int’l jurists representing Ghana (presiding), France, Poland, Netherlands, and Germany
Specific Concerns with UNCLOS

“The Law of the Sea Treaty’s provisions...were intentionally designed to promote a new world order – a form of collectivism...that seeks the redistribution of the world's wealth through a complex system of manipulative central economic planning and bureaucratic coercion.” – James Malone, Reagan Adm. Chief UNCLOS Negotiator

1. **TAXES**: Art. 13 imposes direct “fees” on U.S. corporations engaged in seabed mining. Art. 82 requires “payments” of up to 7% for drilling on outer continental shelf (OCS)

2. **LAND-BASED SOURCES OF POLLUTION**: Arts. 194, 207, 213 = “backdoor” UNFCCC Kyoto Protocol (not ratified by U.S.)

3. **INT’L INTERFERENCE / DISPUTE RESOLUTION**: Annex VIII, Art. 3, if Parties to a dispute cannot agree on arbitrators, UN Sec. General can choose; see also Int’l Seabed Authority

4. **INTELLIGENCE GATHERING**: Per Art. 19 (Innocent Passage), U.S. ships may be denied passage through a Coastal State’s Territorial Sea

5. **MILITARY ACTIVITIES**: Art. 298(1)(b) reservations – who decides?

Problematic Alternatives to Treaties

**Political Commitments**
(Iran Nuclear Deal)

**Executive Agreements** +
(Paris Accord)

**Customary Int’l Law**
(FONOPS)
Unilateral Presidential Action – UNCLOS?

1. To what extent does the agreement involve commitments or risks affecting the nation as a whole?
2. Is the agreement intended to affect state laws?
3. Can the agreement be given effect without legislation?
4. What is the past practice as to similar agreements?
5. Is there a Congressional preference as to a particular type of agreement?
6. What is the degree of formality desired for the agreement?
7. Is the agreement routine or short-term, require prompt action?
8. What is the general practice as to similar agreements?

State Dept. Circular No. 175: Considerations for Selecting Among Constitutionally Authorized Procedures

Unwinding the Paris Agreement

- **NON-BINDING (Art. 4.4):** Procedurally Binding (Int’l Reporting Requirements); But Emissions Reduction Non-Binding (see Kyoto vs. Copenhagen);
  - C.f., Signed but did not ratify Kyoto Protocol due to Senate opposition – 1992 SFRC Report (future treaty required) and 1997 Byrd-Hagel Resolution (no int’l mandatory emissions)

- **WITHDRAWAL (Art. 28):** Notice of Withdraw three (3) years after Entry Into Force (Nov. 4, 2016); Withdrawal takes place one (1) year after receipt of notification.

- **TRUMP ERA:** August 4, 2017, Trump Admin. submitted a formal notice of withdrawal “as soon as it is eligible to do so, consistent with the terms of the Agreement.”
  - Effective November 4, 2020 (Day After Election Day)

**EXEC. AGREEMENT +**

1. UN Framework Convention on Climate Change (Prior Treaty);
2. Article II (Exec. Power);
3. Prior Legislation (e.g., The National Environmental Policy Act of 1969, Global Climate Protection Act of 1987)

Part 4: Costs to Non-Party Status

*U.S. Interests and Leadership*
Costs to Non-Party Status

Maritime Claims & Dispute Resolution

UNCLOS Tribunal: Determined on July 12, 2016, that China’s “nine-dash line” claim is “contrary to the Convention” which “superseded any historic rights, or other sovereign rights or jurisdiction in excess of the limits imposed therein.”

“Only interested States parties to the United Nations Convention on the Law of the Sea will be admitted as observers”

ICJ: Principle of “la terre domine la mer” (land dominates sea)

Codify Limitations on Maritime Zones

UNCLOS Tribunal: Designed to prevent “unregulated propagation of claims to maritime rights and jurisdiction and with the prospect that technological developments would rapidly enable the greater exploitation of the resources of the seabed, which would fall to those States most capable of claiming them.”

International Tribunal for the Law of the Sea | Commission on the Limits of the Continental Shelf | International Seabed Authority

Sources: U.S. National Oceanic and Atmospheric Administration
Costs to Non-Party Status

Protect High Seas Freedoms

**UNCLOS Tribunal:** China’s Art. 298 declaration on military activities; jurisdiction based on Beijing’s characterizations of “civilian” nature of island-building activities.

**FONOPS:** United States conducts **military operations** (navigation / overflight rights) to challenge perceived excessive maritime claims in locations like the South China Sea.

Assert Arctic Claims

- **EXTENDED CONTINENTAL SHELF:** Beyond 200 nm – seabed and subsoil character.

- **COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF:** U.S. nationals may not serve. Can U.S. even make a legally recognized submission?

- **CONFLICTS:** Russia claims almost 1/2 of Arctic region’s area and coastline; Lomonosov Ridge, undersea feature spanning Arctic from Russia to Canada. Conflicts with U.S. claims.

- **ILUSSAT DECLARATION (2008):** U.S. / Arctic States affirm UNCLOS as “legal framework” for resolving “overlapping claims.”

**U.S. Geological Survey:** Arctic holds 22% world’s undiscovered oil and gas, amounting to more than 412 billion barrels of oil equivalent.
Oversight of Deep Seabed

- **INT’L SEABED AUTHORITY:** Administers mining rights and seabed resources in the areas outside exclusive economic zones ("Common Heritage of Mankind").

- **ASSEMBLY & COUNCIL:** The United States has permanent spot on the ISA Council, but is unable to take that spot as non-party to UNCLOS.

- **UNDERSEA CABLES:** U.S. telecom companies are forced to seek foreign state sponsors to voice concerns in UNCLOS disputes over “undue” interference by coastal states.

*Int’l Cable Protections Committee:* Estimated 98% of worldwide internet data is transmitted through the web of fiber optic cables lying on the ocean floor.

Source: TeleGeography, https://www.submarinecablemap.com/
Costs to Non-Party Status (Cont.)

Sustain Living Resources & Environment

UNCLOS Tribunal: The Convention’s obligations to preserve and protect the marine environment (Part XII) apply to “all States with respect to the marine environment in all maritime areas, both inside the national jurisdiction of States and beyond it.”

China’s artificial island-building found to violate UNCLOS Part XII

Fiery Cross Reef

Natural Ecosystems “Permanently Destroyed”

Impact on Other Shared Domains

How Will We Govern the Extension of Human Activity into Areas Beyond National Jurisdiction? Order or Anarchy?

Space Resource Exploration and Utilization Act of 2015

51 U.S.C. § 51303: Creates new property “rights” for U.S. citizens to space and asteroid resources

“Single Greatest Recognition of Property Rights in history”
Preserve America’s Global Leadership

U.S. initiated and negotiated treaty; UNCLOS ratified by 167 parties (incl. all of G-20). Non-parties – Iran, Venezuela, North Korea, and Syria.
Part 5: Key Conclusions
Anomie, Anarchy, or Alternative
Key Conclusions

1. From its inception, America has a tradition of leadership in establishing and developing int’l maritime law consistent with U.S. interests

2. Broad bi-partisan consensus that UNCLOS reflects existing int’l law and is consistent with U.S. policy

3. Modern trends – legal, political, institutional – strongly suggest that treaties are increasingly no longer a viable option for U.S. int’l lawmaking

4. UNCLOS will only be ratified as an Art. II treaty; unilateral Presidential action is not likely or legitimate

5. Required to overcome barriers to UNCLOS ratification, Presidential leadership and Congressional action

6. Alternative is continued American absence – cost to national interest and erosion of U.S. global leadership (increase in anarchy)
Pangea Moment

Maps showing the geological history of Earth, with labels for Permian, Triassic, Jurassic, and Cretaceous periods.