# 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





#### **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

#### RNRF United States & Int'l Law



of War exifts between Auffria, Proffia, Sardinia, Great-Britain, and the United Netherlands, of the one part, and France on the

and the duty and interest of the United States require, that they should with fincerity and good faith adopt and purfue a conduct friendly and im-

partial towards the belligerent powers:

I have therefore thought fit by these presents to declare the disposition of the United States to obferve the conduct aforefaid towards those powers respectively; and to exhort and warn the citizens of the United States, carefully to avoid all acts and proceedings whatfoever, which may in any manner tend to contravene fuch disposition.

And I do hereby also make known, that whofoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding or abetting hostilities against any of the faid powers, or by carnotifies against any of the field powers, or y carrying to any of them those articles, which are deemed contraband by the modern usage of nations, will not receive the protection of the United States as gainst such punishment or forfeiture; and further, that I have given instructions to those officers, to whom it belongs, to cause prosecutions to be infli-tuted against all persons, who shall, within the cog-nizance of the Courts of the United States, violate the law of nations, with respect to the powers at War, or any of them.

In Testimony whereof, I have cansed the feal of the United States of America to be affixed to these Presents, and figued the fame (1.5.) with my hand. Done at the City of Phi-ladelphia the twenty feeond day of April one thousand seven hundred and mnery three, and of the Independence of the Uni-ted States of America the seventeenth.

Washington . TH: JEFFERSON.

**Neutrality Proclamation** April 22, 1793

#### **Neutrality Controversy of 1793**

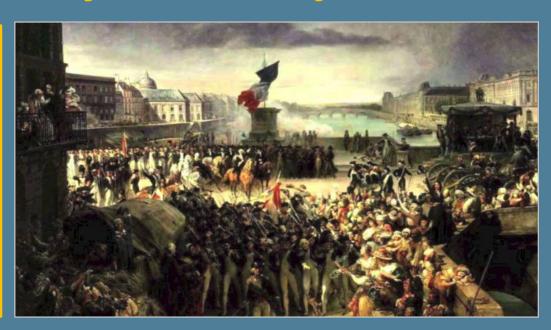
French Revolution

Global Conflict

**U.S.** Treaty

Law of **Nations** 

**Obligation?** 



**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

Source: 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 140 (Walter Lowrie & Matthew St. Clair Clarke eds., 1833)

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#### **HAMILTON**

#### **Pacificus-Helvidius Debate**

#### MADISON

#### Robust **Executive Power**

- **Concurrent Powers**
- **Broad Grant of Executive** Power under Art. II
- Executive responsible for treaty-negotiation and application
- "Exceptions" like Congressional Treaty and War Powers are limited
- Constitutional flexibility / **Political Reality**
- Customary int'l law supports neutrality even with treaty obligations



"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..."

#### Congressional Deference

- Separation of Powers
- **Enumerated Legislative** Functions under Arts. I-II
- Senate's Treaty Power is critical to foreign policy
- **Executive cannot obstruct** Legislative War Power
- Strict Constructionism / Limited Govt.
- Int'l law requires respecting treaty despite changed circumstance of revolution

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Source: Alexander Hamilton & James Madison, The Pacificus-Helvidius Debates of 1793-1794 (Ed. Morton J. Frisch 2007); see also Alexander Hamilton, The Federalist Papers: No. 75 (1788)



#### **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



#### Cannon Shot Rule

18th Century Technology Shapes Int'l Law (Custom -> Treaty)





#### 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

#### Sources of Int'l Law





**ICJ Statute: Article** 38(1)

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#### 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 Wicks

Source: RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 (AM. LAW INST. 1987)

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#### Formal Int'l Lawmaking Tools

TREATY	UN Law of the Sea Convention	
CONGEXEC. AGREEMENT (EX ANTE)	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."	
CONGEXEC. AGREEMENT (EX POST)	NAFTA followed by NAFTA Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993)	
EXEC. AGREEMENT PER TREATY	Security Arrangements (e.g., Status of Forces Agreements) per North Atlantic (NATO) Treaty (1949)  Paris Climate Accord (?)	
SOLE EXEC. AGREEMENT	2008 U.SIraq Strategic Framework Agreement / Status of Forces Agreement (per Commander-in-Chief Clause)	
POLITICAL COMMITMENT	1941 Atlantic Charter; 1975 Helsinki Accord; <b>2015 Iran Nuclear Deal</b>	



#### 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 OBLIGITIONS:** 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.

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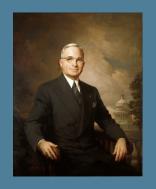
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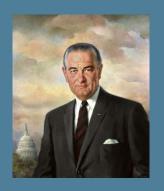
# Part 2: United Nations Law of the Sea Convention

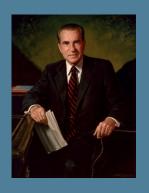
Background, Status, and U.S. Policy

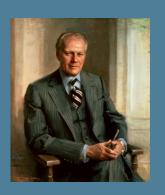


#### **Beltway Play: Presidents & Congress**















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#### **Act One: State Practice**

1945	<b>Truman Proclamations</b> establish (1) <b>Continental Shelf</b> claim to natural resources on seabed (Proclamation No. 2667) and (2) <b>fisheries conservation zones</b> (Proclamation No. 2668). Departure from traditional high seas freedoms.
1958	<ul> <li>Following Senate approval, the United States ratifies four (4) new Law of the Sea conventions (with Senate advice and consent):</li> <li>Convention on the Territorial Sea and the Contiguous Zone</li> <li>Convention on the High Seas</li> <li>Convention on Fishing and Conservation of the Living Resources of the High Seas</li> <li>Convention on the Continental Shelf</li> <li>Note: Optional Protocol – Compulsory Settlement of Disputes</li> </ul>
1966	<b>President Jonson</b> sign's into law <b>Twelve Mile Act</b> (Bartlett Act), 80 Stat. 908 (1966) creating <b>12-mile exclusive U.S. jurisdiction</b> pertaining to fisheries.



#### **Act Two: Codification & Adherence**

1970	<b>President Nixon</b> issues <i>Ocean Policy Statement</i> 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			
1976	President Ford signs Magnuson Fishery Conservation and Management Act (FCMA) for a 200-mile zone for fishing conservation.			
1973- 1982	Negotiation of the <b>UN Law of the Sea Convention</b> . Convention is finalized on Dec. 10, 1982. Combines subject matter of prior four (4) treaties.			
1982	<b>President Reagan</b> states that the United States will not sign the Convention due to its provisions relating to <b>deep seabed mining</b> .			
1983	<b>President Reagan</b> issues <i>Ocean Policy Statement</i> that UNCLOS reflects customary int'l law and fulfils U.S. interest in "a <b>comprehensive legal framework</b> relating to competing uses of the world's oceans."			



#### **Act Three: Negotiation & Transmittal**

1983- 1988	President Reagan unilaterally establishes 200 exclusive economic zone (Proclamation No. 5030, 1983) and 12-mile territorial sea (Proclamation No. 5928, 1988) consistent with UNCLOS terms.	
1990- 1994	Negotiation of an <b>Agreement (Part XI)</b> to modify the deep seabed mining provisions of the Convention. Finalized on July 28, 1994. UNCLOS entered into force in November 1994.	
1994	<b>President Clinton</b> signs on 1994 Agreement and transmits Convention with 1994 Agreement to Senate for its <b>advice and consent</b> (S. Treaty Doc. 103–39).	
1999	President Clinton unilaterally establishes 24-mile contiguous zone ( <i>Proclamation No. 7219</i> , 1999) consistent with UNCLOS terms.	
2004	Senate Foreign Relations Committee votes 19-0 in support of joining UNCLOS. Senate Report (Sen. Exec. Rpt. 108–10). No vote by full Senate.	



#### **Act Four: Absence**

2007	<b>President Bush</b> urges the Senate to approve U.S. accession. Senate Foreign Relations Committee <b>votes 17-4</b> in support of joining the Convention. Senate Report (Sen. Exec. Rpt. 110–09). SFRC Hearing Report (S. Hrg. 110–592). A vote of the full Senate does not take place.
2012	<b>President Obama</b> officially presents the convention to the Senate on May 17, 2012. Senate Foreign Relations Committee holds <b>four hearings</b> on the Convention; <b>no SFRC vote is taken</b> .
2014	On June 2, 2014, at Air Force Academy, <b>President Obama</b> urges ratification: "So, if we're truly concerned about China's actions in the <b>South China Sea</b> the Senate should help strengthen our case by approving the Law of the Sea Convention, as our military leaders have urged."
2017	During Senate confirmation hearings in January 2017, Sec. of State Tillerson and Sec. of Defense Mattis – <b>Trump administration</b> – offers tepid support for ratification, dangers of "subjecting any of our activities to <b>international courts</b> ."



#### 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
- 115<sup>th</sup> Congress concludes; no vote

115TH CONGRESS 1ST SESSION

H. RES. 339

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

IN THE HOUSE OF REPRESENTATIVES

May 18, 2017

Mr. COURTNEY (for himself, Mr. YOUNG of Alaska, Ms. BORDALLO, Mrs. DAVIS of California, Mr. LAISSEN of Washington, Mr. GALLEGO, Mr. SMITTH of Washington, Mr. GALKARENDI, and Mr. LANGEVIN) submitted the following resolution; which was referred to the Committee on Foreign Affairs

#### RESOLUTION

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. 15th CONGRES 2d Session S. RES. 598

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.

IN THE SENATE OF THE UNITED STATES

July 30, 2018

Ms. HIRONO (for herself and Ms. MURKOWSKI) submitted the following resolution; which was referred to the Committee on Foreign Relations

#### RESOLUTION

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.

"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."

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# Part 3: Barriers to Ratification

Institutions, Politics, Alternatives



#### RNRF Barriers to Ratification

#### Institutional Roadblock: Decline of Treaties

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

- 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

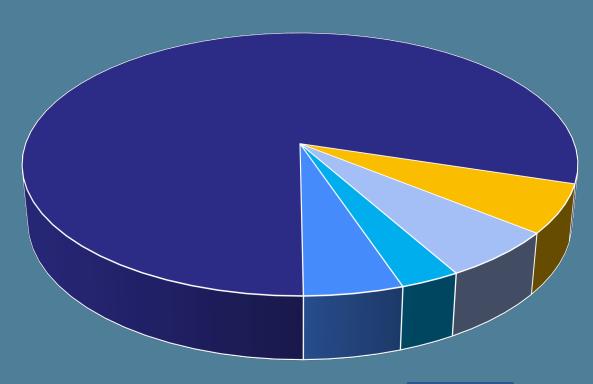
**TREATIES 6%** 

**SOLE EXEC. AGREEMENTS: 5%** 

**EXEC. AGREEMENTS - TREATY: 3%** 

**EX POST EXEC. AGREEMENTS: 6%** 

**EX ANTE EXEC. AGREEMENTS: 80%** 







#### What Explains This Trend?

#### Int'l Relations

(Density post-WWII)

#### **Institutional Capacity**

(Exec. vs. Cong.)

Rise of **Executive** Agreements

#### Efficiency

(Separation of Powers = Inefficient)

#### **Politics**

(Congressional Acquiescence & Obstruction)

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



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#### **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?
- Can the agreement be given effect without legislation?
- 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?
- 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)



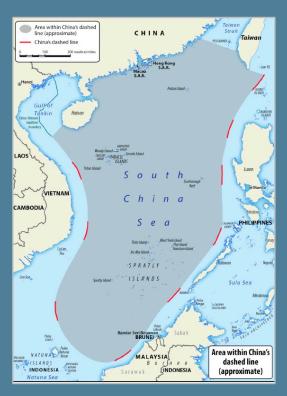
# Part 4: Costs to Non-Party Status

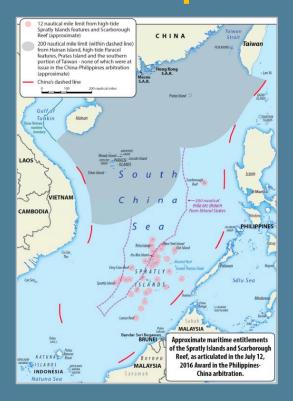
U.S. Interests and Leadership



#### 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)

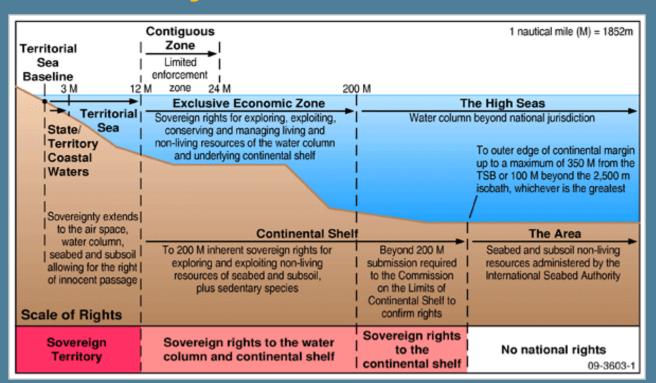


Source: The Republic of The Philippines v. The People's Republic of China, PCA's Judgment of 12 July 2016 Case No. 2013–19



#### Costs to Non-Party Status (Cont.)

#### **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

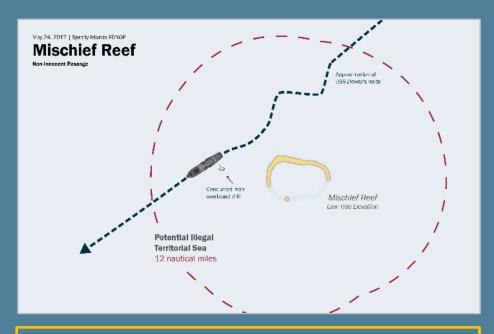
Sources: U.S. National Oceanic and Atmospheric Administration





## Costs to Non-Party Status

#### **Protect High Seas Freedoms**



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

UNCLOS Tribunal: China's Art. 298 declaration on military activities; jurisdiction based on Beijing's characterizations of "civilian" nature of island-building activities.





Source: CSIS Asia Maritime Transparency Initiative; U.S. Dept. of Defense, 2017 Annual Freedom of Navigation Report Fiscal Year 2017

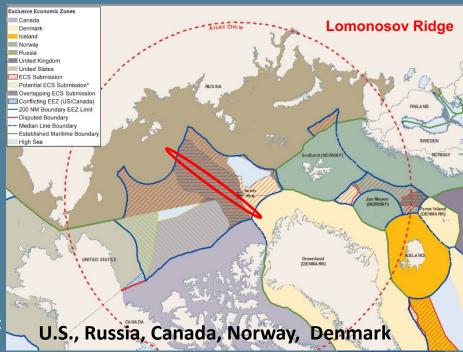


# Costs to Non-Party Status (Cont.)

#### **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 Artic 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.



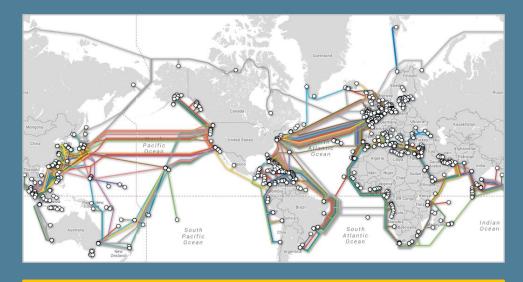
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# Costs to Non-Party Status (Cont.)

#### **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.

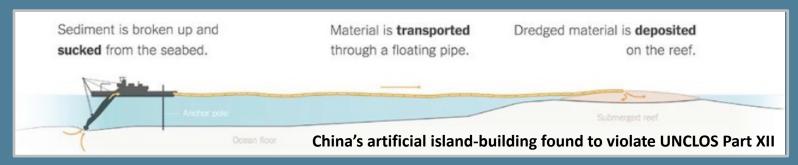


Source: TeleGeography, https://www.submarinecablemap.com/

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# Costs to Non-Party Status (Cont.)

#### Sustain Living Resources & Environment





Natural Ecosystems "Permanently Destroyed"

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."



Arts. 192, 194 (CITES, CBD)



Sources: Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 3 March 1973, 993 UNTS 243; Convention on Biological Diversity (CBD), 5 June 1992, 1760 UNTS 79



## Costs to Non-Party Status (Cont.)

#### 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"





# Costs to Non-Party Status (Cont.)

#### 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

#### RNRF Key Conclusions

- From its inception, America has a tradition of leadership in establishing and 1. developing int'l maritime law consistent with U.S. interests
- Broad bi-partisan consensus that UNCLOS reflects existing int'l law and is 2. consistent with U.S. policy
- Modern trends legal, political, institutional strongly suggest that treaties 3. are increasingly no longer a viable option for U.S. int'l lawmaking
- UNCLOS will only be ratified as an Art. II treaty; unilateral Presidential 4. action is not likely or legitimate
- Required to overcome barriers to UNCLOS ratification, Presidential 5. leadership and Congressional action
- Alternative is continued American absence cost to national interest and 6. erosion of U.S. global leadership (increase in anarchy) THE

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# Pangea Moment

