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On the United States, the UN Convention on the Law of the Sea and US Freedom of Navigation Operations

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This photograph taken on 16 October 2019 shows US Navy F/A-18 Super Hornets multirole fighters on board USS Ronald Reagan (CVN-76) aircraft carrier as it sails in the South China Sea. Photo: Catherine LAI/AFP.

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EXECUTIVE SUMMARY

- The US has not become a party to the 1982 United Nations Convention on the Law of the Sea (UNCLOS) despite the overwhelming support for US accession by all American government agencies, major interest groups, business sector, marine scientists and environmental organisations, and is not likely to do so in the foreseeable future.

- Right-wing conservative Senators have persistently prevented UNCLOS from being sent to the Senate for a full vote, their main argument being that accession to UNCLOS would surrender part of America's sovereignty to international organisations.

- Since the US is not a party to UNCLOS, American nationals cannot serve on UNCLOS institutions, the US cannot bid for deep sea mining sites from the International Seabed Authority, and does not have access to the UNCLOS dispute settlement system.

- While not being a party to UNCLOS, the US State Department undertakes studies examining the maritime claims and practices of other States, including China's maritime claims in the South China Sea, and whether such claims are consistent with UNCLOS.

- US Freedom of Navigation Operations (FONOPs) are focused on excessive maritime claims that restrict the rights and freedoms of US naval vessels, but they do not challenge China's excessive maritime claims to the natural resources in the South China Sea – a more critical concern of Southeast Asian countries.

- Accession to UNCLOS would serve American security and economic interests, enhance US reputation as a promoter of the rules-based maritime order, and enable Washington to challenge excessive maritime claims through UNCLOS' compulsory binding dispute settlement system.

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THE US AND UNCLOS NEGOTIATIONS, 1973-1982

The Third United Nations Conference on the Law of the Sea (the Conference) began in 1973 and ended with the adoption of the United Nations Convention on the Law of the Sea (UNCLOS) on 12 December 1982. The US administration of Republican President Richard Nixon was a principal initiator of the Third Conference. The US maintained a bipartisan approach and actively participated in the Conference negotiations throughout the presidencies of Richard Nixon (Republican, 1969-74), Gerald Ford (Republican, 1974-1977) and Jimmy Carter (Democratic, 1977-81). However, the situation changed with the election of Republican President Ronald Reagan in 1980. Reagan replaced the US negotiating team and called for a review of the provisions in Part IX on Deep Sea Mining.[1]

The US and Part IX on Deep Sea Mining

The Reagan administration called for fundamental changes to Part IX on deep sea mining because it believed that the provisions were not consistent with its view on the appropriate role of private enterprise in deep sea mining. However, the Conference was not willing to accede to what many countries regarded as America's "last-minute" demands for major changes to one part of the draft convention given that from the outset it was agreed upon that the entire convention would be negotiated as a "package deal". The Conference decided to proceed to formally adopt the text of UNCLOS on 10 December 1982.

UNCLOS was opened for signature on the same day the text was adopted. President Reagan announced that the US would not sign UNCLOS because of its provisions on deep sea mining. However, in 1983, President Reagan issued a Policy Statement declaring that the US would accept and act in accordance with the provisions of UNCLOS relating to traditional uses of the oceans, but not to its provisions in Part IX on the deep seabed. Reagan stated that the US would exercise and assert its navigational and overflight rights and freedoms on a worldwide basis in a manner consistent with the balance of interests reflected in UNCLOS. He also announced the US' Exclusive Economic Zone (EEZ) within 200 nautical miles of its coast in consistence with UNCLOS.[2]

1994 Implementation Agreement on Deep Sea Mining

UNCLOS provided that it would enter into force 12 months after the deposit of the sixtieth instrument of ratification or accession with the UN Secretary-General. A potential problem arose because almost all of the countries that ratified or acceded to UNCLOS from 1982 to 1990 were developing countries. Most leading Western industrialised countries supported the US objections on Part XI on the deep seabed and refused to become parties to UNCLOS. This raised the prospect that the goal of establishing a universally accepted legal regime for all uses of the oceans might not be realised.

Consequently, UN Secretary-General Pérez de Cuéllar established an informal group of experts in the early 1990s to review the provisions in Part XI to determine if they could address the concerns of the US and other Western industrialised countries. Everyone saw

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the need for a universally accepted set of rules for the oceans. The administration of President George H.W. Bush (1989-93) participated in the discussions, which were continued under the administration of President Bill Clinton (1993-2001).

The result of the negotiations was the 1994 Implementation Agreement on Part XI which in effect amended the provisions in Part XI of UNCLOS on deep sea mining to address the concerns that had been articulated by the Reagan administration. Other Western industrialised countries then began to ratify UNCLOS. It entered into force on 17 November 1994 and is now universally accepted with 168 Parties including the European Union. The only major power that is not a party to UNCLOS is the United States.

As America has not acceded to UNCLOS, its nationals cannot serve on the institutions established under UNCLOS, including the International Tribunal for the Law of the Sea, the International Seabed Authority and the Commission on the Limits of the Continental Shelf. In addition, the US cannot bid for deep sea mining sites from the International Seabed Authority. Furthermore, as a non-party to UNCLOS, the US does not have access to the dispute settlement system in UNCLOS.[3]

WHY THE US FAILED TO BECOME A PARTY TO UNCLOS

Given that the US concerns on deep sea mining were addressed by the 1994 Implementation Agreement, many observers are baffled as to why America has not become a party to UNCLOS, despite the US position that UNCLOS "for the most" part reflects customary international law.[4]

According to the US Constitution, Article II, Section 2, the President has the power to enter into treaties "with the advice and consent of the US Senate, provided that two-thirds of the Senators present agree". Simply stated, this provision of the US Constitution and the rules of the US Senate have enabled a small group of right-wing Senators to block US accession to UNCLOS.

In November 1994, following the 1994 Implementation Agreement amending Part XI of the deep seabed to address the concerns of the Reagan administration, President Bill Clinton sent UNCLOS to the US Senate for approval. However, conservative Senator Jesse Helms, the Chairman of the Foreign Relations Committee, refused to even hold a hearing on the Convention.[5]

Support for the Convention and Subsequent Attempts to Obtain Senate Approval

The position of the US on UNCLOS is even more baffling when one considers the fact that there is overwhelming support for US accession to UNCLOS by all government agencies and all major interest groups in America. This includes the Department of Defense and the State Department, as well as almost all industries with commercial interests in the oceans, including the shipping industry, deep sea mining industry, fishing industry, oil and gas

industry and the submarine cable industry. Marine scientists and leading environmental organisations in the US also favour it becoming a party.

Two further attempts to obtain the consent of the US Senate were made during the administration of Republican President George W. Bush. In 2004, the Senate Foreign Relations Committee held hearings on the issue and unanimously recommended that the Senate give its advice and consent to accession. However, procedural moves made by conservative Senators prevented the matter from being sent to the Senate for a full vote.[6] In 2007, President Bush again urged the Senate to give its consent to the US becoming a party to UNCLOS.[7] The Senate Foreign Relations Committee held hearings and voted 17-4 in support of the US becoming a party. However, opponents of UNCLOS prevented a full vote of the Senate from taking place.

The major argument put forward by opponents to UNCLOS has been that if the US becomes a party, it would be surrendering part of its sovereignty to international organisations. Their arguments are set out by the Heritage Foundation, a conservative think tank that has led the drive to prevent the US from becoming a party.[8] Leading US experts on the law of the sea have countered the Heritage Foundation's arguments and articulated in detail the reasons why it is in the US' national interests to become a party, but to no avail.[9] For summaries of the arguments and statements of leading experts on both sides of the debate, see *UNCLOS debate,* a website devoted to the issue.[10]

The latest attempt to obtain approval of the US Senate was in 2012, under the administration of Democratic President Barack Obama. A series of hearings were held on UNCLOS to obtain the perspectives of the US business community and the US military, with a particular focus on UNCLOS and US national security interests. All sectors supported UNCLOS. However, once again, UNCLOS was not referred to the full Senate for a vote.[11]

The increased polarisation of politics in the US makes it increasingly unlikely that it will become a party to UNCLOS in the foreseeable future. Despite the fact that President Joe Biden was a member of the Senate Foreign Relations Committee for many years and fully understands the importance of UNCLOS to the US, he is enough of a realist to know that the chances of obtaining approval by a two-thirds vote in the US Senate are practically nil.

THE PRACTICES OF THE US ON LAW OF THE SEA ISSUES

Although it is not a party to UNCLOS, the US State Department carefully studies the extent to which the practice of countries that are parties to UNCLOS is consistent with their obligations under UNCLOS.

Limits in the Seas

Since 1970, the US State Department has undertaken studies and published reports examining the maritime claims and boundaries of other countries, including an assessment

of whether in the opinion of the US, those claims and boundaries are consistent with international law. Prior to the adoption of UNCLOS, most of the studies were on maritime boundaries and the use of straight baselines. Since the rules on straight baselines are the same in UNCLOS as in the 1958 Geneva Convention of the Territorial Sea and Contiguous Zone, the early studies on straight baselines remain relevant. After UNCLOS entered into force, the US studies expanded to include maritime claims based on archipelagic baselines.

The US State Department has undertaken studies under the *Limits in the Seas* series on whether China's maritime claims in the South China Sea are consistent with UNCLOS. In December 2014, while the Philippines' case against China was in progress, the US issued *Limits in the Seas No. 143* on *China's Maritime Claims in the South China Sea*.[12] After the decision of the Arbitral Tribunal on the South China Sea case in 2016, China's statements seemed to suggest that it was basing its maritime claims from straight baselines around the four "island groups" over which it claims sovereignty in the South China Sea. In response, in January 2022, the US issued *Limits in Seas No. 150* on *China's Maritime Claims in the South China Sea*.[13]

The US can justify its studies on China's maritime claims in the South China Sea because there is a strong argument that China's claims restrict passage rights and high seas freedoms in a manner that is not consistent with UNCLOS. However, some would argue that the US studies are a form of "lawfare" that is part of the rising competition between the existing superpower and the rising superpower.

On a more general level, critics might also ask whether a country that is not a party to UNCLOS should appoint itself as a judge to determine whether the practice of countries that are parties is consistent with UNCLOS. The US justification for its actions lies with its Freedom of Navigation Program.

US Freedom of Navigation Program and US Responses to Excessive Maritime Claims

The US Freedom of Navigation (FON) Program was instituted in 1979 by the Carter administration to highlight the navigation provisions in the draft convention to provide further recognition of the US national interest in protecting maritime rights and freedoms of the seas. The programme's underlying policy was to ensure that the US Navy's normal activities did not operate in a manner that might be construed as an acquiescence to a claim that was not consistent with international law and was thus not recognised by the US.[14]

On 9 March 1992, the US issued *Limits in the Seas* No. 112 entitled *United States Responses to Excessive National Maritime Claims*.[15] This study focused on the US Freedom of Navigation Program. The US position on excessive maritime claims was later published in a book authored by two State Department officials, Captain J. Ashley Roach and Robert Smith under the title *Excessive Maritime Claims*. The first edition was published in 1994. The fourth is by J. Ashley Roach and was published in 2021.[16]

Under the FON programme, the US first undertakes diplomatic action with respect to what it believes are excessive maritime claims.[17] This could involve bilateral consultations or

formal diplomatic protests. If diplomatic efforts are not successful, the US may conduct operational challenges to assert the rights and freedoms which it believes it has under international law as set out in UNCLOS. These operations are known as Freedom of Navigation Operations (FONOPs).

One problem with FONOPs is that the US government often fails to clearly articulate to the international and local media what it is doing and why it is doing it. Consequently, it sometimes appears to observers that the US is merely asserting its naval strength in a manner that increases tensions and poses a risk of military conflict.

The US policy with respect to freedom of navigation and overflight was codified in 2018 under the Trump administration as follows:

> (a) Declaration of Policy: It is the policy of the United States to fly, sail, and operate throughout the oceans, seas, and airspace of the world wherever international law allows.
> (b) Implementation of Policy: In furtherance of the policy set forth above, the Secretary of Defense should:
>
> > (i) plan and execute a robust series of routine and regular air and naval presence missions throughout the world and throughout the year, including for critical transportation corridors and key routes for global commerce;
> > (ii) execute routine and regular air and maritime freedom of navigation operations throughout the year, in accordance with international law, including, but not limited to, maneuvers beyond innocent passage, and;
> > (iii) to the maximum extent practicable, execute these missions with regional partner countries and allies of the United States.[18]

Since 2018, the US has more actively pursued a robust programme of FONOPs to challenge what the US believes are excessive maritime claims by China from the disputed islands it occupies in the South China Sea. This includes China's use of straight baselines around the Paracel Islands, its claim of a territorial sea from low-tide elevations and submerged features, and its requirement that ships exercising the right of innocent passage in the territorial sea seek authorisation for such passage. The US position is that if it does not conduct operational challenges to China's excessive maritime claims, it will be seen to have acquiesced to the legality of those claims. The intensification of these FONOPs has increased tensions between the US and China and has been a cause for concern among some regional countries – that an incident may trigger a response that could get out of control.

FONOPS are focused on excessive maritime claims that unlawfully restrict the rights and freedoms of US naval vessels. These operations, however, do not challenge China's excessive maritime claims to the natural resources in the South China Sea – a far more important concern of many countries. The ASEAN member states bordering the South China Sea assert that under UNCLOS they have sovereign rights and jurisdiction to explore and exploit the natural resources, both fisheries and hydrocarbons, in the 200 nautical mile EEZ measured from the baselines along their mainland coast or from their archipelagic

baselines. They assert that China's claim to "historic rights" within the nine-dash line, and China's claim to an EEZ from the four "island groups" in the South China Sea, are inconsistent with UNCLOS and prejudice their sovereign rights and jurisdiction to explore and exploit the natural resources in their exclusive economic zone.

The US is also seeking to execute the freedom of navigation operations with its regional partner countries and allies. However, because FONOPS are limited to challenging excessive maritime claims that restrict the rights and freedoms of navies, and do not challenge unlawful claims to natural resources, ASEAN member states are reluctant to participate in or even publicly support US FONOPs in the South China Sea. Some may even regard the "robust" series of FONOPs as actions that could exacerbate tensions in the region and increase the risk of conflict between the US and China. As such, these operations are not likely to enhance America's prestige.

Hopefully, the day will come when the US Senate realises that it is the country's national interests to accede to UNCLOS. This would enhance the reputation of the US as a promoter of the rules-based legal order for the oceans and give it an additional tool to challenge what it believes are excessive maritime claims: the compulsory binding dispute settlement system in UNCLOS.

ENDNOTES

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