



A program of the
Global Security Institute

Bipartisan Security Group Policy Brief

Bipartisan Security Group · 110 Maryland Ave, Suite 508 · Washington, DC 20002 · Tel: 202-543-9017 · Fax: 202-543-0799

How the Law of the Sea Convention Benefits the United States

Written by Benjamin Friedman and Daniel Friedman
for the Bipartisan Security Group

November 2004

How the Law of the Sea Convention Benefits the United States

Benjamin Friedman and Daniel Friedman

Prepared for the
Bipartisan Security Group
A Program of the Global Security Institute

November 20, 2004

Beyond media scrutiny, a small group of extremists is blocking ratification of a treaty the United States spent 40 years perfecting. The Law of the Sea Convention, the product of negotiations begun under President Richard Nixon, governs the conduct of states on the world's oceans. The Convention enjoys the enthusiastic endorsement of interest groups across the American political spectrum, the backing of every agency of the federal government relevant to oceans, and even the nominal support of the White House. But by invoking the specter of right-wing dissent, a few zealots are cowing the White House and Senate Majority Leader Bill Frist (R-Tenn) into blocking a vote on the Convention. As George Bush's second term takes shape, the Convention's future remains cloudy.¹ Today, almost three years since the State Department listed the Convention as one of five "treaties for which there is an urgent need for Senate approval," and seven months since the Chairman of the Joint Chiefs of Staff, Gen. Richard Myers, called passage of the Convention "a top national security priority," the Law of the Sea languishes in the Senate.²

Opponents argue that the Convention should be rejected because Ronald Reagan refused to sign it in 1982. They argue that it poses risks to national security. They argue that acceding to the Convention would cede U.S. sovereignty to international organizations. These claims are baseless. By signing the Convention, the United States would enhance its ability to project military power and fight nuclear proliferation. It would protect shipping lanes and fishing rights, win offshore mining rights, claim exclusive access to all marine resources up to 200 miles off its coast, and protect its environment. By failing to ratify the Convention, the United States forgoes these benefits. It loses its place at the table on several international committees that will determine the policies that govern the seas. And by eschewing a treaty that almost all nations follow, the United States undermines its leadership in oceans policy and beyond.

Background

Senator Dick Lugar (R-Ind), the chairman of the Senate Foreign Relations committee, a man known for bipartisanship and foresight in foreign policy matters, held hearings on the Convention in October 2003.³ A stunning array of interests endorsed the Convention. The oil and gas, mining, fishing and shipping industries supported ratification. The National Resource Defense Council, the National Environmental Trust, the Humane Society and every other environmental group agreed. The American Bar Association and business groups expressed support. The U.S. Commission on Ocean Policy, a bipartisan panel created to steer U.S. oceans policy, agreed unanimously on the need to pass the Convention. Representatives of the Coast Guard, the Navy, the Defense Department and the State Department called for passage.⁴ No interest group affected by oceans policy opposed the treaty. On

¹ The U.S. Constitution gives the President the power to make treaties, but requires that treaties receive the approval of a two thirds majority of the Senate to be ratified.

² David Sanadalow, "Ocean Treaty Good for the U.S.," *The Washington Times*, May 16, 2004. Also see, "Letter from Richard Myers to Senator Richard Lugar," April 7, 2004, lugar.senate.gov/sfrc/letter9.pdf.

³ The full record of testimony on the Convention (officially the United Nations Convention on the Law of the Sea) can be found at the Senate Foreign Relations Committee website: foreign.senate.gov/hearing2003.html.

⁴ For a fuller list of groups supporting ratification of the Law of the Sea Convention, see lugar.senate.gov/sfrc/questions.html.

February 25, 2004, the Senate Foreign Relations Committee voted unanimously to send the Law of the Sea Convention to the full Senate for ratification.

This widespread support comes from decades of negotiation. These negotiations were themselves the culmination of centuries spent pressing for maritime rights. As a state that projects its power and moves its goods by sea, the United States has always had a special interest in enshrining freedom of the seas. Molestation of American shipping helped cause a naval war with France in 1797, the War of 1812, and America's entrance into World War I. In the 1950s, as the Navy expanded its reach and American industry moved goods to new overseas markets, the United States began negotiating treaties to protect maritime rights. A 1958 conference brought four Geneva Conventions on the Law of the Sea, which established rules such as freedom of the seas in international waters, the right of innocent passage in territorial zones, and the rights of coastal states to regulate certain activities off their shores.⁵ The United States quickly signed and ratified the Conventions.⁶

Negotiations on the Law of the Sea Convention itself began in the early 1970s, under U.S. leadership. The Convention reaffirmed many of the protections of maritime and coastal rights in the Geneva treaties. The Convention also became a vehicle to protect the environment, define coastal rights, protect fishing stocks, and allow the development of mining rights in the deep seas.⁷

The negotiations on the Convention closed in 1982, but Part XI of the treaty, which created the International Seabed Authority (ISA), aroused controversy. The ISA administers seabed resources in areas outside the 200 nautical mile exclusive economic zones (EEZ) of coastal states, distributing property rights to corporations wishing to mine the sea floor. Part XI reflected developing states' argument that those resources should be shared by all states, regardless of technological capability.⁸ Part XI thus mandated technology transfers to poor nations unable to engage in deep sea mining. This prospect upset U.S. companies, who were not eager to give away technologies developed to extract materials from the seabed. Even as most nations signed on, Reagan, concluding that Part XI hurt U.S. interests, refused. He put in place an alternative policy that would last a decade. The United States conditioned its signature on renegotiation of Part XI but agreed to adhere to all the other parts of the treaty, calling them customary international law.

Twelve years of further negotiation got the United States what it wanted. A 1994 agreement repealed the treaty's mandatory technology transfer provisions, requiring developing states to seek deep sea mining technology on the open market.⁹ The 1994 agreement also included renegotiated voting rules that would allow the United States to veto any proposed rules relating to the distribution of ISA revenues, were it to join the Convention.¹⁰ These changes allowed President Clinton to sign the treaty and submit it to the Senate, where it stalled until Lugar's hearings last fall. When opponents of the

⁵ Innocent passage does not only apply to ships. Telecommunications cables passing under the territorial waters and planes flying above them rely on innocent passage to avoid molestation by coastal states.

⁶ Baker Spring, "Testimony before the House Committee on International Relations," May 12, 2004, www.heritage.org/Research/InternationalOrganizations/tst081104c.cfm.

⁷ Professor John Norton Moore, University of Virginia School of Law, "Testimony before the Senate Foreign Relations Committee Hearing on the U.N. Convention on the Law of the Sea," October 14, 2003, 55.

⁸ Industrialized nations generally argued that seabed resources should be treated as *res nullis*, belonging to no one and hence available to anyone able to recover them. Developing states advanced a *res communis* perspective, claiming that the seabed's resources were "the common heritage of mankind" and therefore should be shared. By awarding deep sea property rights but mandating technology transfers to developing states, Part XI attempted to reconcile these claims. See C. Joyner and E. Martell, "Looking Back to See Ahead: UNCLOS III and Lessons for Global Commons Law," *Ocean Development & International Law*, 1996, Vol. 27, 73-95, cited by Thomas Brauningner and Thomas Konig, "Making Rules for Governing Global Commons: the Case of Deep-Sea Mining," *Journal of Conflict Resolution* Vol. 44(5), 2000, 610.

⁹ "Agreement Relating to the Implementation of Part XI of the United Nations Law of the Sea," Annex, Section 5, www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.

¹⁰ *Ibid*, Annex, Section 3.

treaty use Reagan's opposition to justify current opposition to the Convention, they demonstrate either dishonesty or ignorance of his motives. The United States resolved the problems that prevented Reagan's signature.

National Security

The Navy is a primary supporter of the Convention because it ensures the right of free passage. Naval leaders have repeatedly argued that American power depends on the ability to move without inhibition across the world's oceans – the ability to project power.¹¹ Much of America's military might is naval. American nuclear submarines, aircraft carriers, and every other naval vessel must pass along coastlines and through narrow straits and archipelagos. American planes also rely on free passage to pass above coastal waters of foreign states.

Each year the United States challenges dozens of states for asserting legal rights that impede freedom of the seas. Iran, North Korea, and China have all challenged the U.S. navy's free passage through their EEZ. By codifying the right to pass freely through the exclusive economic zone of foreign states without restrictions on cargo or formation, the Law of the Sea strengthens America's ability to project power.

But these rights are already recognized as customary international law. What does the Convention add? For one, it makes these rights stronger. Written treaties are perceived as more powerful than customary laws. By signing the Convention, the United States gives added weight and stability to customary rights, and pushes recalcitrant states to respect navigational freedoms.

More importantly, the Convention creates a forum to change navigational rights. It is possible, though unlikely, that future deliberations under the Convention might create rules that undermine freedom of navigation. If the United States fails to ratify the Convention, it will lose the opportunity to defend these rights. The problem is not that other states can stop the U.S. Navy from sailing where they want to sail. The problem is that they can raise the costs of doing so. If a nation decides to forbid U.S. ships their legal right to pass, America could use force to assert our right. But, realistically, it will be more likely to seek legal remedy. Signing the Convention lowers the cost of projecting power.

The most absurd argument made against the Convention is the notion that it would hinder U.S. efforts to interdict shipments of materials used for nuclear, chemical and biological weapons and the missiles used to deliver them. The opposite is true. Signing the Convention helps stop proliferation.

Opponents contend that because the Convention protects freedom of the seas and freedom of passage in territorial waters, signing would prohibit the U.S. Navy from stopping suspect shipments.¹² This argument is based on a misunderstanding of both international law and America's current nonproliferation efforts. The Convention offers states limited reasons for violating a ship's freedom of the seas or right of innocent passage, and these reasons do not include carrying weapons. But these constraints on U.S. conduct already exist. Freedom of the seas and the right of innocent passage are codified in the treaties the United States passed in 1958 and subsequently recognized as customary international law. If the United States ever had a right to stop shipments without regard for freedom of the seas and the right of innocent passage, that right is long gone. The Convention imposes no new restrictions on the United States' ability to interdict weapons shipments.

¹¹ Admiral Michael Mullen, Vice Chief of Naval Operations, Joint Chiefs of Staff, Department of the Navy, "Testimony before the Senate Foreign Relations Committee Hearing on the U.N. Convention on the Law of the Sea," October 21, 2003, 102- 106; Rear Admiral William Schachte, JAGC, U.S. Navy (Ret.), "Testimony before the Senate Foreign Relations Committee Hearing on the U.N. Convention on the Law of the Sea," October 14, 2003, 60-69.

¹² See Peter Leitner, "Statement before the U.S. Senate Committee on Environment and Public Works: Oversight Hearing to Examine the United Nations Convention on the Law of the Sea," March 24, 2004.

Moreover, current U.S. nonproliferation policy relies on the Convention. The Proliferation Security Initiative, an effort among more than 20 states, led by the United States, to share intelligence and stop weapons shipments, must conform to the Law of the Sea Convention. The other states in the PSI are party to the Convention.¹³ In their Statement of Interdiction Principles, the PSI parties agree to adhere to international law.¹⁴ In effect, this agreement means that when the United States works with allies as part of the PSI, it agrees to observe the rights of innocent passage and freedom of the seas. This agreement costs America nothing, because it already recognizes those rights.

The United States could, of course, forcibly violate established rights of free passage in order to interdict weapons shipments. But this policy would be disastrous for two reasons. First, it would undermine the right of free passage, which is essential to U.S. trade and force projection. Second, it would destroy the Proliferation Security Initiative. The PSI cannot work without the cooperation of our allies, and their cooperation depends on the Initiative's adherence to the Law of the Sea.

Instead of fighting proliferation outside of international law, America can use international law to fight proliferation. One way to allow interdiction of weapons shipments is to alter the Convention to make proliferation grounds for interdiction on the high seas or in coastal waters. It would take a long negotiating effort, but the United States might succeed. By staying outside the Convention, the United States forgoes this opportunity but remains bound by the legal restrictions on interdiction.

Environmental Protections

The overwhelming support of environmental groups demonstrates that the Convention aids U.S. environmental interests. The Convention is partially an effort to prevent depletion of the global commons and avoid classic collective action problems that lead to the destruction of goods that have both inherent value and value to businesses. For instance, the Convention contains provisions to control overfishing and protect fishing rights. Existing vessel safety and pollution accords depend on the Convention, and the Convention's rules will be the basis for future agreements. The Convention establishes the principle that states have both the right to use the oceans and obligations to do so without sully it. As a party to the Convention, the United States will be in a stronger negotiating position on future environmental accords and will have more success in aiding enforcement of existing environmental obligations.¹⁵ The energy and shipping industries support the agreement as vociferously as the environmentalists, demonstrating that the Convention will not impose costly regulations on U.S. industry.

International Bodies Established by the Convention

The Law of the Sea Convention opened for amendment in November, 2004. The need for ratification is urgent. While the United States stays outside the Convention, other states can start negotiating issues affecting U.S. interests in a forum where the United States is not represented. By not signing, the United States bars itself from the ISA, the Law of the Sea Tribunal, and the Continental Shelf Commission. With 146 states adhering to the Convention, these bodies make policy that governs all states' relations at sea, affecting American interests whether or not the United States ratifies the treaty.

The ISA, as discussed above, administers deep seabed mining. Without ratifying the treaty, the United States cannot capitalize on the changes it won in the ISA. Opponents of the Convention argue the ISA's power to administer the sea floor "supersedes the power of participating states."¹⁶ But the ISA

¹³ William Taft, IV, Legal Adviser, Department of State, "Testimony before the Senate Foreign Relations Committee Hearing on the U.N. Convention on the Law of the Sea," October 21, 2003, 111.

¹⁴ "Proliferation Security Initiative: Statement of Interdiction Principles," September 4, 2003, www.state.gov/t/np/rls/fs/23764.htm.

¹⁵ Admiral James Watkins, USN (Retired), Chairman, U.S. Commission on Ocean Policy, "Testimony before the Senate Foreign Relations Committee Hearing on the U.N. Convention on the Law of the Sea," October 14, 2003, 42.

¹⁶ Spring, 2.

was created because no state has sovereignty over the seabed. No one can own the sea floor. It remains a commons. As Senator Lugar puts it, “The only way to establish legal norms in an area where no sovereignty exists is through international agreement.”¹⁷ By clarifying the extent of national jurisdiction over coastal waters, The Law of the Sea Convention in fact strengthens state sovereignty.

The role of the Law of the Sea Tribunal is to resolve disputes over the Convention. The Convention mandates that the Tribunal resolve all disputes, except those involving military activities. Opponents of the Convention argue that the tribunal could dispute U.S. designations of certain activities as military, forcing the U.S. to limit military operations. Some even claim American “citizens could be dragged before politically motivated foreign jurists.”¹⁸

Professor John Norton Moore, the leading U.S. expert on the law of the sea, told the Senate Foreign Relations Committee that the chances of the Tribunal undermining U.S. military operations was comparable to that of a meteorite striking the capitol building.¹⁹ Still, administration officials have taken precautions. Upon joining the Convention, the United States would submit a declaration stipulating that it is acceding on the condition that states themselves have the authority to decide whether activities are military.²⁰ Opponents think that even this precaution leaves a chance of the Tribunal harassing the U.S. military. As a party to the Convention, however, the United States can nominate the judges to sit on the tribunal, rendering this wildly remote possibility even more unlikely.

If the United States does not ratify the Convention, it has no control over the decisions the Tribunal reaches. The Tribunal will never have power over the U.S. military, but its decisions will form precedents that will help resolve future maritime disputes. Those precedents would affect U.S. interests.

The Continental Shelf Commission is crucial to the U.S. energy industry and supply. The Commission is a forum for states to register claims to extract materials from areas of their continental shelf. Today the United States obtains 28% of its natural gas and nearly as much oil from the Outer Continental Shelf. This amount will increase as technologies allow petroleum production in deeper waters – areas outside the 200 mile American exclusive economic zone that the Convention protects. To gain certainly to its rights to mine in these areas, the United States needs submit claims to the Continental Shelf Commission, which will allow American companies to extract materials. These claims could expand U.S. areas for resource exploitation by 290,000 square miles. Without a legal claim, U.S. companies will face legal uncertainties, creating risks that undermine investment.²¹

Moreover, there is competition for resources. Russia has already submitted a claim for areas in the Arctic that the United States might profitably mine. By staying out the Convention, the United States loses its ability to submit claims to areas ripe for energy extraction and to help weigh claims others submit. The result is a massive lost opportunity to make money and increase domestic energy supply.

¹⁷ Senator Richard Lugar, “U.S. Leadership in the World and the Law of the Sea,” p. 8, lugar.senate.gov/sfrc/questions.html.

¹⁸ Leitner, 1.

¹⁹ Moore, 71-72.

²⁰ Mark Esper, Deputy Assistant Secretary for Negotiations Policy, Department of Defense, “Testimony before the Senate Foreign Relations Committee Hearing on the U.N. Convention on the Law of the Sea,” October 21, 2003, 99.

²¹ Paul Kelly, Senior Vice President, Rowan Companies, Inc., “Testimony before the Senate Foreign Relations Committee Hearing on the U.N. Convention on the Law of the Sea,” October 21, 2003, 113-121. Kelly notes that the United States might eventually vastly increase its domestic energy supply by extracting gas hydrates, crystalline structures that trap methane, which are located largely on continental slopes beyond the EEZ. Whether or not United States ratifies the Law of the Sea Convention, the Continental Shelf Commission will have a say on rules governing how states extract methane hydrates. Not signing could harm this future industry.

The United States cannot avoid the ISA, the Law of the Sea Tribunal, and the Continental Shelf Commission, but it can lead them. By joining Convention, the U.S. can regain its role, relinquished in 1982, as the leader of international efforts to establish the rule of law in the oceans. This would be a step toward the broader goal of repairing America's international standing. The Bush Administration's foreign policy decisions have created the perception that the United States opposes the advancement of international law and cooperation. By joining the treaty, the United States could weaken this perception and begin reestablishing American leadership of international institutions.

Conclusion

The Law of the Sea is not a U.N. plan imposed on Americans by foreign bureaucrats. It is an international regime that the United States built to protect and assert its maritime interests. American power is not great enough to protect these interests without international cooperation. The treaty serves America. How then have a few radicals managed to impede it? In part by advancing claims, either through ignorance or deception, that are flat-out false. These claims will not fool anyone who spends any time studying the treaty. They are red herrings. They reflect not a rational analysis of the costs and benefits of joining the Convention, but a deep-seated, ideological opposition to any form of international cooperation. Cowed by this sentiment, Frist and the White House may have sidelined the treaty to avoid alienating right-wing supporters in an election year.²² But now, with the Convention open for amendment and its benefits waiting to be realized, action is necessary. America's national interest demands the speedy ratification of the Law of the Sea Convention. With the power to move the treaty, the President and Frist must decide how much longer they can allow the ideology of a few Americans to trump the interests of the rest.

²² See Andrew Grotto, "Senate Should Clip the Far Right's Wings and Ratify the Ocean's Treaty," Center for American Progress, August 10, 2004, www.americanprogress.org/site/pp.asp. Grotto asserts the Treaty was held up in exchange for the far right's non-opposition to nation building in Iraq.



THE BIPARTISAN SECURITY GROUP

A program of the Global Security Institute

The Bipartisan Security Group consists of Republican and Democratic experts with experience in diplomacy, law, intelligence and military affairs. BSG supports Members of Congress by providing reliable information and critiques of global security issues. An emphasis is placed on multilateralism and strengthening the rule of law. BSG is directed and chaired on Capitol Hill by veteran diplomats Ambassador Robert T. Grey, Jr., and Ambassador Thomas Graham, Jr. www.gsainstitute.org