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The failure of the United States to ratify the UN Convention on the Law of the Sea (UNCLOS) after facing many decades of political obstructions should be brought forth for reconsideration by the Senate under the context of the current geopolitical climate and as an instrument supportive of U.S. national security strategy. Current U.S. National Security Strategy has emphasized the need for renewed American leadership across the military and political spectrum in an era of “great power competition.” UNCLOS provides the U.S. a necessary means to reinforce the rules-based order that it helped build. Ratification would also serve to enhance U.S. credibility with partners and allies, and reassert American leadership of the global commons within the UNCLOS framework.

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U.S. Accession to the United Nations Convention on the Law of the Sea:
Opportunity for renewed American leadership in the era of Great Power Competition

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Executive Summary

Title: U.S. Accession to the United Nations Convention on the Law of the Sea: Opportunity for renewed American leadership in the era of Great Power Competition

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Thesis: The failure of the United States to ratify the UN Convention on the Law of the Sea (UNCLOS) after facing many decades of political obstructions should be brought forth for reconsideration by the Senate under the context of the current geopolitical climate and as an instrument supportive of U.S. national security strategy.

Discussion: Current U.S. National Security Strategy (NSS) has emphasized the need for renewed American leadership across the military and political spectrum in an era of "great power competition." The military lever of national power has been overly utilized in many respects, and U.S. policymakers should be reexamining other instruments previously disregarded or underestimated to best meet the latest challenges outlined in the NSS. UNCLOS provides the U.S. a necessary means to reinforce the rules-based order that it helped build.

Opponents to UNCLOS ratification have primarily expressed their concerns regarding the Convention's provisions governing the use of the extended continental shelf in relation to the Commission on the Limits of the Continental Shelf and the International Seabed Authority. This paper will provide an in-depth study of these provisions to show that they do not pose a danger to U.S. sovereignty and that the benefits of the treaty far outweighs the costs.

The Convention has also been disregarded in the past as unnecessary to ensure the security and freedom of the world's oceans. Opponents view UNCLOS as a redundant treaty given that the U.S. Navy has been able to wield its power relatively unopposed, and they propose that organizations like the International Maritime Organization is enough to secure American interests at sea. This paper will challenge these arguments opposing accession and present the merits of the treaty within current strategic context with the possibility that American preeminence at sea will become severely challenged in the future without U.S. leadership under the Convention.

Conclusion: The longstanding support for UNCLOS by American business leaders, senior military officers, and Presidential administrations from both political parties has been undermined by the misinterpretation and exaggeration of the treaty provisions. Misleading statements made by political groups have overstated the negative ramifications of accession, and outright dismisses the valuable application of the treaty to current diplomatic, economic, and national security objectives. Policymakers should review their decades old perspective on the treaty and examine it under the lens of the current National Security Strategy now that America has found itself challenged by revisionist nations that aim to bend the law of the sea to their will. Ratification would also serve to enhance U.S. credibility with partners and allies, and reassert American leadership of the global commons within the UNCLOS framework.

DISCLAIMER

THE OPINIONS AND CONCLUSIONS EXPRESSED HEREIN ARE THOSE OF THE INDIVIDUAL STUDENT AUTHOR AND DO NOT NECESSARILY REPRESENT THE VIEWS OF EITHER THE MARINE CORPS COMMAND AND STAFF COLLEGE OR ANY OTHER GOVERNMENTAL AGENCY. REFERENCES TO THIS STUDY SHOULD INCLUDE THE FOREGOING STATEMENT.

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"To deal with gray zone operations, first, you have to be present. How do you influence or know what's going on if you aren't there? You need to be there to shape and react quickly."
Former Chief of Naval Operations Admiral Jonathan Greenert[1]

Introduction

The 2017 U.S. National Security Strategy (NSS) has made it clear that American preeminence on the international stage has become seriously challenged by the "revisionist powers of China and Russia" who are "actively competing against the United States and our allies and partners…in order to shift regional balances of power in their favor."[2] The White House recognizes that these powers better comprehend the broad range of competition that exists between peace and war, and have been able to execute their strategies more effectively within this spectrum than the United States.[3] The NSS emphasizes a joint force that can dominate across the air, maritime, land, space, and cyberspace domains in both the conventional sense and in "irregular warfare," below the threshold of armed conflict.[4] It also calls for an "upgrade [of] our political and economic instruments to operate across these environments,"[5] and to "exercise leadership in political and security bodies"[6] that would enable the U.S. to "shape and govern [the] common domains…within the framework of international law."[7]

The NSS has provided an updated vision for the United States, one that requires a fundamental shift in focus to great power competition in the 21st century. This demands a serious reevaluation of U.S. strategy that can not only addresses the current geopolitical climate, but also better anticipates future changes in the environment to ensure the security of U.S. national interests and values. It is the endeavor of this paper to argue the case for U.S. accession to the United Nations Convention on the Law of the Sea (UNCLOS), and that ratification of the Convention would be a constructive step in fulfilling the objectives of the NSS in advancing U.S. interests.

The development of UNCLOS demanded decades of time and effort by the international community, including the United States, to finally form a universal legal framework around centuries old customs regarding the law of the sea. This paper will be prefaced with a few key assumptions to establish the scope of the arguments. Context will then be provided as to how UNCLOS came into force and why the United States, a significant player in its development, ultimately did not come to ratify the Convention despite having strong bipartisan support. Although President Clinton signed the treaty in 1994, it has since continued to face hurdles preventing its ratification, largely due to politically motivated efforts to block it from a Senate vote.

The obstacles that UNCLOS has faced in domestic politics have been categorized into two primary points of contention. The first point of contention raises concerns that the Convention would require the U.S. to compromise its sovereignty, and would place U.S. economic interests at risk as it relates to the pursuit of resources in the deep seabed along the extended continental shelf. This is the leading issue presented by the opposition, and one that this paper will examine in detail. This will involve a study of the three major organizations that manage claims on the extended continental shelf and establish baseline behaviors for interactions at sea. These include the UN Commission on the Limits of the Continental Shelf (CLCS), the International Seabed Authority (ISA) and the International Maritime Organization (IMO). The results will show that the U.S. is not endangering its sovereignty or its coffers, but is rather sidelining itself by remaining out of the treaty.

The second issue concerns maritime security and the navigational provisions in the Convention, which the opposition views as redundant and unnecessary given that the U.S. Navy can already wield its power at sea relatively unopposed. The counterarguments to the second

issue will be examined under the supporting lens of current U.S. national security strategy and the missed opportunity that UNCLOS presents in enhancing America's international credibility as a global leader. Finally, this paper will aim to offer policymakers a strategy for accession using a conditions-based approach that would most effectively communicate the significance of ratification. This method would best promote America's renewed position of leadership under the framework of UNCLOS as a means to challenge China and other revisionist powers that seek to upend the law of the sea to fit their agenda.

It is important to note that this paper is not intended to be a comprehensive examination of every possible argument opposing U.S. accession to UNCLOS. The scope of this paper is limited to only the chief concerns surrounding the ramifications to U.S. sovereignty, specifically in regards to the continental shelf, and the claims that accession would provide no benefit to U.S. interests not already protected under customary international law. These are the issues that have been the persistent focus by those in Congress and other interest groups that have so far been able to block the Convention from a vote in the Senate. The recommendation that the U.S. ratify UNCLOS should also not be misconstrued as being the only means necessary to secure the maritime space. UNCLOS is not the cure to every territorial dispute, nor will it put an immediate end to China's militarization of the South China Sea. However, it will be argued that these challenges are best undertaken with the U.S. assuming a strong leadership role within UNCLOS. U.S. accession to the treaty would mark a new beginning in bolstering its maritime security posture, but will still require the use of other well-designed diplomatic, economic, and military solutions to reinforce national strategy.

Obstacles to Ratification

There has been a long history of attempts to "codify the rules of international law relating to the high seas."[8] The Four Law of the Sea Conventions adopted in 1958, ratified by the United States in 1961, would be the first of several of iterations concerning the regulation of the sea as the global commons.[9] President Nixon's Ocean Policy Statement in 1970 called for a new treaty of conventions that would include articles for deep seabed exploration and set a 12-mile territorial sea limit for coastal nations.[10] The Law of the Sea Convention followed in 1973 with this mind. It would take nine years until its adoption in 1982, but it would fail to see ratification by the United States. President Reagan's reasons for rejecting the treaty were due to limitations placed on deep seabed mining and exploration, which was outlined in his 1983 Ocean Policy Statement.[11] Another four years of negotiations took place between 1990 and 1994 which sought to rectify the issues regarding deep seabed mining. This was finalized in the 1994 Agreement, amending Part XI of UNCLOS regarding the provisions concerning the extended continental shelf of coastal nations.[12] Although the 1994 Agreement was negotiated with the sole purpose of resolving the issues raised by the U.S. to "facilitate universal participation in the Convention," the U.S. again failed to ratify the treaty.

As of January 2020, UNCLOS and 37 other outstanding treaties are pending a Senate decision for ratification.[13] UNCLOS and the associated 1994 Agreement remain in limbo and await further advice and consent to ratification by the Senate. The first attempt to gain a Senate vote was made in 2004 by the Senate Committee on Foreign Relations, which unanimously agreed to recommend the advice and consent of the treaty and put it to a vote on the Senate floor.[14] The Senate never voted on the treaty due to "other priorities" that competed for attention and was sent back to the Committee before the end of the 108th Congress.[15]

The Committee made a second formal recommendation for ratification in 2007 with the support of the George W. Bush administration and gained a favorable 17-4 majority vote in the Committee.[16] However, the treaty was blocked by Senator Harry Reid as the acting Senate Majority Leader because it was not found to be politically "convenient" to raise the issue at the time.[17] The treaty received no special priority for several years after this and only became a priority for President Obama halfway through his first term.[18] The last formal deliberation to push for ratification was during the 2012 Senate Committee on Foreign Relations hearing, which reiterated similar arguments from the testimonies heard in 2004 and 2007. Despite having the support of the previous three Presidential administrations, senior ranking military service chiefs, and U.S. industry leaders, the treaty was again prevented from coming to a formal vote. Senator John Kerry, Chairman of the Committee on Foreign Relations, foresaw that the push for ratification in 2012 was undercut by the "hurly-burly Presidential politics" of that year.[19]

Senator Jim Inhofe, the major dissenting voice in the 2012 hearing, gathered the support of 34 other senators against UNCLOS should it be brought to a vote in the Senate.[20] This was the exact number required to prevent a two-thirds majority vote needed to ratify the treaty. Senators Kelly Ayotte and Rob Portman also led the opposition in expressing to Senate Majority Leader Harry Reid that the treaty's "impositions on U.S. sovereignty outweigh its potential benefits," and pledged to oppose any ratification efforts.[21] Their arguments against the treaty made exaggerated claims that UNCLOS would "cede authority to the United Nations over 70 percent of the surface of the Earth, along with the air above it." Senators Ayotte and Portman also happened to be on a "short list" of Mitt Romney's potential running mates in the election that year, which Senator Kerry recognized as having significant influence on the decision by other Senators to block the treaty from a vote.[22]

The Heritage Foundation, a conservative lobbying organization in Washington D.C., was another key player that testified before the 2012 Senate Committee hearing against UNCLOS. The group spends about $80 million annually in lobbying efforts, and has made a concerted effort to prevent any attempt by the Senate to ratify the treaty.[23] Mr. Steven Groves, a former Senior Research Fellow at the Heritage Foundation, testified before the Committee in 2012 to voice concerns over the sovereignty issue and payment of royalties to the ISA.[24] He refers to UNCLOS as "Orwellian," and mischaracterizes the supporting arguments of the treaty as being the "panacea or cure-all of all things maritime."[25] No testimony given at any of the Senate hearings has suggested that the treaty was a "cure-all" of any sort. Admiral Greenert's testimony in 2012, as acting Chief of Naval Operations, stated quite the opposite. "It is not going to solve everybody's problems…we need to roll-up our sleeves and go use it as the instrument to sit down with nations because we have a consistent instrument that we can use."[26]

Lobbyists from the Heritage Foundation cite America's existing leadership in the Arctic Council and International Maritime Organization as proof that the U.S. has sufficient influence in the world to secure the maritime space, suggesting that UNCLOS is superfluous baggage that presents too great a risk to national sovereignty. Mr. Groves dismisses the Navy's appeals that the country must "reassert American leadership in maritime affairs" as only a "campaign by slogan," one that is not based on any fact.[27] He equates the ISA as being able to "run roughshod over our eleven carrier groups" and as having the authority to decide "whether or not they are going to continue to allow freedom on the high seas."[28] These are heavily exaggerated and misleading claims, representing a fundamental misunderstanding of the function of the ISA, IMO, CLCS and associated UNCLOS provisions.

The testimony provided in the 2012 hearing was the most comprehensive in detailing the arguments on both sides of the issue, and serves to highlight that those opposed to ratification are heavily anchored to the economic and sovereignty issues surrounding the provisions of the extended continental shelf.[29] Proponents of U.S. ratification of UNCLOS argue that remaining a non-party to the treaty is sidelining the U.S. from formally claiming an extension to the continental shelf and taking on a leadership role within the ISA.[30] Further examination into the function of the CLCS and ISA is needed to show that they do not pose a danger to U.S. sovereignty, and that the IMO is not an equitable substitute for these bodies or within its function to act as such. This is evident in the efforts made by other countries like China and Russia, who are taking full advantage of these UNCLOS mechanisms while the U.S. remains absent and unable to take advantage of the added legitimacy the treaty offers.

Commission on the Limits of the Continental Shelf

Article 76 of UNCLOS permits coastal nations to pursue claims beyond the normal 200 nautical mile boundary of their EEZ to retain exclusive rights to seabed resources if it falls within the underlying continental shelf.[31] This becomes a particularly important issue in the Arctic regions that are becoming more accessible as the ice fields recede due to global warming. Canada and Russia have already pursued claims of an extended continental shelf within their adjacent Arctic boundaries.[32] These claims are reviewed by the CLCS as established under UNCLOS. The U.S. also has legitimate claims regarding the continental shelf in the Arctic regions. However, there has been some contention among scholars as to whether UNCLOS ratification is necessary for the U.S. to establish a claim that could be further legitimized under the auspices of the CLCS.[33]

China's release of their Arctic strategy in 2018, the Polar Silk Road, identified itself as a "near-Arctic state" and made their intentions known that they seek to expand their "Belt and Road Initiative" in the region.[34] Secretary of State, Mike Pompeo, recognizes that the U.S. is "entering a new age of strategic engagement in the Arctic" and questions China's intentions in a region that is over 900 miles from their borders.[35] There is a fear that the "Arctic Ocean [will] transform into a new South China Sea, fraught with militarization and competing territorial claims."[36] Chinese pursuit of resources in the Arctic also presents a risk to the environment through "unregulated industrial activity," the effects of which could bleed over into the territories of the U.S. and other nearby Arctic nations.[37]

The recent CLCS submissions by other Arctic nations for an extended Arctic shelf and increased Chinese presence in the region is an indication that the United States may face significant hurdles in the future to secure its own Arctic interests. The U.S. has taken some action to face these challenges, most recently with the introduction of the Strategic Arctic Naval Focus Act of 2019 in the Senate, which seeks to increase U.S. military and Coast Guard presence in the region.[38] This Senate bill reinforces similar objectives outlined in the latest National Defense Authorization Act,[39] but these efforts are heavily reliant on the usual method of leveraging the military to confront gray zone competition without a comprehensive political framework to support this strategy. The building of more polar-class icebreakers, increased Arctic military training, Coast Guard cutter patrols, and Freedom of Navigation Operations (FONOP) are all practical and tangible strategies to counter China and Russia in the Arctic.[40] However, simply enhancing military posture in the region is a similar approach to how the U.S. responded to the years of Chinese land reclamation and militarization of the South China Sea, which has done little to deter China's escalatory actions in the region.

The situation in the Arctic is arguably more complex than the South China Sea given Russia's presence as a second great power also competing for control in the region. Relying on the U.S. interpretation of customary international law is also not a viable strategy for the Arctic. As Admiral Jonathan Greenert, former Chief of Naval Operations, admitted in his 2012 testimony to the Senate Committee on Foreign Relations, the Arctic is a "new area…I do not know what is customary up there."[41] The situation warrants the use of other levers of national power beyond the heavy-handed use of the military. Ratification of UNCLOS with U.S. influence in the CLCS offers a mutually supportive diplomatic and military strategy to current efforts.

Mr. Raul Pedrozo, a professor at the U.S Naval War College Stockton Center for International Law, argues that even though only States party to UNCLOS may join the CLCS, any coastal State regardless of treaty party status can submit a continental shelf claim to the Commission for review.[42] Annex II of the Convention governing the CLCS is explicit on the rules establishing Commission membership and voting, however Articles 3 and 4 of Annex II do not specifically require the coastal State to be party to UNCLOS.[43] Pedrozo overlooks a key clause in Article 4 of Annex II, and corresponding Rule 45 in the CLCS Rules of Procedure, in which a coastal State shall submit a claim with supporting data to the Commission "within 10 years of the entry into force of this Convention for that State."[44] This would suggest that the CLCS is either not permitted nor obligated to take submissions from non-party States.

The submission deadline was originally set to be ten years after UNCLOS was entered into force on November 16, 1994 by party nations at the time.[45] The CLCS later ruled in 2001 that it would not hold party States to the original deadline due to the lack of submission guidelines.[46] The commencement of the new ten-year deadline began with the adoption of the

Scientific and Technical Guidelines for continental shelf submissions in May 1999, or the date a nation becomes party to UNCLOS if ratified after this date. [47] This deadline was retroactively applied to any State that became party to the Convention prior to 1999. Rule 45 of the CLCS procedures also stipulates that the Commission would review late submissions on a case-by-case basis, particularly concerning less developed States that lack the resources required to carry out an in-depth scientific study of their continental shelf.[48]

The CLCS has also shown leniency to States that miss their deadline for other reasons. Countries that provide official notice to the Commission that their continental shelf study is underway, or have submitted partial reports by the deadline, would be considered in compliance with the requirement.[49] This has been the case with Russia's submissions, which have been updated twice since 2001 in regards to the Okhotsk Sea in 2013 and the Arctic Ocean in 2015.[50] Canada also made a partial submission regarding their Atlantic Ocean shelf by their deadline in December 2003, but have yet to submit a full report.[51] Canada missed their deadline when they made a second partial submission for the Arctic Ocean in May 2019.[52] Their reason for late submission was due to difficulties in collecting data in the harsh Arctic environment that presented limited seasonal access to certain areas. Canada made the appeal that their efforts first began in the mid-1990s, and data collection that did not conclude until 2016.[53]

Pedrozo's arguments that the U.S. would be free to make a submission to the CLCS at any time, regardless of ratifying UNCLOS, has yet to be tested by other non-party nations. [54] As of January 2020, there are a total of 85 submissions to the CLCS, the most recent of which was Malaysia's South China Sea continental shelf claim in December 2019.[55] Submissions have only been made by nations party to UNCLOS, and so far the Commission has made recommendations on only 33 of them. There are no indications that the U.S. or other non-party coastal State has the

intention to make an official submission in the near future. Based on these facts, and the governing articles in UNCLOS, there are no specified requirements that the CLCS must recommend a non-party State claim for an extended continental shelf unless they are party to the Convention.

Although a recommendation by the CLCS can grant greater legitimacy to a nation's claims, the lack of a recommendation does not outright preclude a coastal State from exercising their rights over their continental shelf. Article 77 of UNCLOS protects the exclusive rights of the continental shelf to the respective coastal State regardless of "occupation, effective or notional, or on any express proclamation." These rights exist even if the coastal State has not previously explored or extracted resources from their continental shelf. There is also no requirement in Article 77 that a coastal State must be party to UNCLOS for these rights to be recognized.[56] However, formal research and data collection would still be required to determine exactly what constitutes a nation's own extended continental shelf. Russia, Norway, and Canada have all submitted to the CLCS for recommendation of an extended Arctic shelf.[57] The U.S. has an inherent right to their adjacent continental shelf, but does not enjoy the added legitimacy of a CLCS recommendation to an Arctic shelf that may have overlapping claims with Russia and Canada. Although these disputes could be resolved through bilateral negotiations without any CLCS input or recommendation, there remains a missed opportunity for the U.S to influence the decisions made by the Commission regarding the claims of other nations.

There are twenty-one members on the CLCS at any given time as representatives of "experts in the field of geology, geophysics or hydrography, elected by States Parties to the Convention from among their nationals."[58] The current members on the Commission are serving a five-year term that will end in 2022, and includes representatives from Russia, China, Japan,

Republic of Korea, Malaysia, and Canada.[59] This is noteworthy given the overlapping claims that Russia and Canada have in the Arctic, and the competing claims in the South China Sea by China and Malaysia. Procedural voting rules dictate that CLCS members cannot vote for recommendations of any submission made by their country.[60]

In the case of Malaysia, their most recent submission to CLCS in December 2019 is a partial revision of a joint submission made with Vietnam in 2009, which seeks to extend the outer limits of Malaysia's northern continental shelf.[61] This area envelopes the majority of seabed under the Spratly Islands and is strategically aimed at challenging China's nine-dash line.[62] China's only submission to the CLCS was in 2012 for an extended East China Sea continental shelf,[63] which indicates that Malaysia's recent submission may have caught China off-guard. It would not be surprising for China to submit their own CLCS claim in response, or at the very least have their CLCS representative vote against Malaysia and potentially sway a two-thirds majority to reject it entirely.

China has predictably reasserted their claims in the South China in response to the submission.[64] Malaysian Foreign Minister, Saifuddin Abdullah, fired back that it is Malaysia's "sovereign right to claim whatever is there within our waters" and "for China [to believe] that the whole of the South China Sea belongs to them, I think that is ridiculous."[65] Despite these charged statements, Malaysia remains committed to seeking a peaceful resolution regarding the territorial disputes, having reached a bilateral agreement with China to "establish a consultative mechanism" during a September 2019 meeting.[66] This suggests a favorable trend in the region, that despite China's significant BRI investment in the country, Malaysia is still willing to challenge China's excessive maritime claims.[67] However, this bilateral arrangement does give

China the advantage in controlling the narrative that could undermine multilateral efforts by other ASEAN countries.

Japan's own CLCS submission in 2008 did not include the region surrounding the Senkaku Islands or the East China Sea, but focused rather in the Southern Kyushu Ridge Region and Shikoku Basin.[68] China's 2012 CLCS submission specifically claims an extended continental shelf in the East China Sea that encompasses the entire Okinawan Trough and does not make "refence to the islands of Diaoyu Dao and its affiliated islands."[69] The CLCS has yet to form a sub-committee addressing China's submission,[70] but the Commission has recognized Japan's invocation of Annex I of UNCLOS regarding the "rules of procedure relating to a dispute in the area of the submission."[71] Japan could potentially seize an opportunity to update their 2008 submission to maintain pressure on China in the East China Sea.

The argument that there is no practical utility for the U.S. becoming party to UNCLOS overlooks the usefulness that a U.S. presence could have in bodies like the CLCS to support allies and partners overseas. Proponents advocating for U.S. membership point out that "without a seat the U.S. has neither eyes nor ears" in the sense that a seat on the Commission "provides the government valuable strategic intelligence for little cost."[72] Although there are no guarantees of when a party nation of UNCLOS is represented as a voting member in the CLCS, the complete absence of U.S. involvement in UNCLOS proceedings limits the reach of U.S. influence to more effectively weigh-in on these matters. Even if UNCLOS ratification does not present an immediate opportunity for CLCS representation, the act of ratification itself would lend greater credibility to U.S. strategic messaging and inspire greater confidence within allies to push back against Chinese gray zone strategies.

The International Seabed Authority

Those not convinced of the usefulness of the UNLCOS and the CLCS body are also quick to point out that Article 82 of UNCLOS requires party States to "make payments or contributions to the ISA from any extraction operations of non-living resources within the continental shelf."[73] These payments would be made to the International Seabed Authority (ISA), also referred to as the Authority, and constitute annual royalties in the amount of one percent of the "value or volume of production at the site" after six years of production.[74] This rate rises by one percent each year after that until capping at seven percent annually beginning at the twelfth year of production. The collected funds would then be distributed by the ISA to other party States of UNCLOS "on the basis of equitable sharing criteria," including developing land-locked countries.[75] Only Article 82 allows for royalty exemptions, but is intended only for developing nations that are net importers of the material being extracted from the continental shelf.

These requirements do appear to place the U.S. at a slight economic disadvantage. It would yield control over how royalties are disbursed to other countries, which in theory could include "corrupt and despotic regimes and state sponsors of terrorism."[76] There is a potential wealth of resources along the U.S. extended continental shelf, so there is an understandable concern that an international assembly of foreign nations would have authority to siphon away this wealth from the American economy. Recent estimates by the U.S. Department of the Interior show as much as "8.5 billion barrels of oil and 29.3 trillion cubic feet of natural gas in proved and unproved reserves and another 86 billion barrels of oil and 420 trillion cubic feet of natural gas in undiscovered resources" within the continental shelves of Alaska and Gulf Coast regions.[77] Private companies that would seek these resources are already required to pay the U.S. Treasury as much as 12.5% in royalties on leased tracts of seabed by the Department of the

Interior.[78] This would mean that as much as half of the royalties currently being paid to the U.S. government would by drawn away by the ISA to be paid to other countries. These concerns are valid, the costs of which should be weighed appropriately against the benefits of ratifying UNCLOS and becoming subject to ISA control. However, the operating structure of the ISA provides the U.S. an enormous position of advantage to mitigate many of these risks if it were to become party to the Convention.

The 1994 Agreement on Part XI of the Convention provides the opportunity for the U.S. to assume a permanent seat on the ISA Council. Paragraph 15 of Section 3 of the Agreement specifies five criteria for a party State to become a member of the ISA Council, which are elected in a priority order.[79] The first priority order reserves four member seats on the Council by nations that have "consumed more than two percent in value terms of total world consumption" and the State, "on date of entry into force of the Convention, having the largest economy in terms of gross domestic product." The U.S. had the highest GDP when the Convention went into force in 1994,[80] and could choose to become a permanent seat on the Council "if such States wish to be represented in this group."[81]

The rest of Section 3 of the Agreement delineates the decision-making authorities between the ISA Assembly at large and the Council. Decisions made by the ISA "should be by consensus," with any "questions of substance shall be taken by a two-thirds majority of members" of the Assembly. However, it is the Council that must make "recommendations" on any "administrative, budgetary or financial matter." In the event that the Assembly disagrees with the Council's recommendations then the decision "shall return the matter to the Council for further consideration." If the matter reaches a deadlock then the Council "may defer taking of a decision in order to facilitate further negotiation."

The ISA framework established in the 1994 Agreement allows U.S. to take advantage of a permanent Council seat that was designed specifically with the U.S. in mind. The U.S. could block any decision that was not in its best interest while also making strides in furthering its own strategic objectives. Those concerned about how funds are distributed from the ISA have also failed to acknowledge that U.S. allies party to UNCLOS do not have the same influence that the U.S. could have in controlling the ISA Council's agenda. The hesitation to ratify UNCLOS and take on a leadership position within ISA is largely due to the misleading interpretations about these facts by those in Congress and lobby groups that seek to promote their own agendas rather than support the endeavors of American businesses or national defense strategy.

It is important to note that despite the royalties having to be paid the ISA, American business leaders from critical industrial sectors like oil, natural gas, mining, shipping, and telecommunications strongly support ratification of UNCLOS. Lockheed Martin, AT&T, ExxonMobile, Verizon, and Shell Oil have testified to Congress that accession would remove the uncertainty surrounding claims on the continental shelf beyond 200 nautical miles.[82] Other organizations like the Maritime Trades Department, Seafarers International Union of North America, American Petroleum Institute, National Association of Manufacturers, the Chamber of Shipping, and the U.S. Chamber of Commerce have also expressed support for the treaty as a valuable instrument to spur investment and job creation. The Convention allows these companies to more confidently stake claims on the shelf without risk of entangling disputes with other foreign entities that they would have to face on their own. Lockheed Martin CEO, Mr. Robert Stevens, implored the Senate Committee to consider that mineral resource access on the extended continental shelf is "vital to national economic security interests," but that "investment

is only going to be secured for rights clearly recognized and protected within the established treaty-based framework."[83]

Opponents of UNCLOS have continued to insist that the royalties that companies would be required to pay the ISA amounts to a tax or is a devious scheme to redistribute wealth to foreign dictators.[84] Former Secretary of Defense Donald Rumsfeld and Ambassador John Bolton represented the concerns of the opposition that the ISA amounts to a "nationalization of the world's oceans." These concerns were drafted as part of a joint letter on behalf of the Heritage Action for America, part of the Heritage Foundation lobbying group.[85] The framework of UNCLOS with the protections afforded in the 1994 Agreement as outlined in this paper serve to show that these concerns are unfounded. The ISA does not dictate freedom of navigation, control 70 percent of the world's surface, nor have the power to grant a country sovereignty in any capacity. It is an instrument by which to legitimize and protect a country's own claims to their extended continental shelf against unfair claims by other nations through a dispute mechanism in which the United States would be afforded a dominating position of influence.

Assuming that the concerns about the ISA are valid, that the ambiguity in UNCLOS presents too great a risk to U.S. interests, then one must question how much risk the U.S. is taking by being the only nation that still clutches to the even vaguer notion of an unwritten "customary international law?" Political opposition views this treaty as a zero-sum game, one in which there are only winners and losers, and does not acknowledge the value of the assurances provided by international law that American industry and military leaders strongly desire. American businesses and labor organizations have deemed UNCLOS a prerequisite for full-scale operations on the extended continental shelf, and would much rather have 93 to 99 percent of the resources under the seabed than have zero percent of nothing.

Admiral Locklear, Commander of U.S. Indo-Pacific Command, testified before the Senate that those in the Pacific theater "live this issue every day" and are constantly "confronted with the aspects of ambiguities of not being party of this treaty."[86] Rather than rely on customary international law, UNCLOS would grant his military commanders the "ability to make decisions that will be in the best interest of this Nation." The ambiguities due to U.S. absence from UNCLOS that Admiral Locklear mentions do not necessarily impact military operations directly, but have ancillary effects on the way operations are messaged and relationships to other military allies or partners. For instance, the U.S. led maritime security coalition of 26 nations in the Middle East regularly conducts operations under the provisions of the Convention ranging from counter piracy, boarding of vessels, and rendering assistance to vessels in danger. However, military commanders have admitted that the role of the U.S. as leader of the coalition is often questioned by the partner nations, worried that U.S. absence from the Convention may undermine coalition efforts.[87]

The International Maritime Organization

The availability of other means for the U.S. to affect change outside of UNCLOS is another common argument against ratification. The International Maritime Organization (IMO) is a closely associated body to the United Nations that manages the regulations governing use of the maritime space. There are currently 174 IMO member nations, including the U.S. that joined in 1950 when it was known as the Inter-Governmental Maritime Consultative Organization (IMCO).[88] Mr. Raul Pedrozo points out that long-standing U.S. membership to the IMO is enough to ensure U.S. national security interests are protected at sea, and that ratifying UNCLOS would be redundant to efforts that the U.S. can make within the IMO.[89] However, this argument overlooks the distinct roles that IMO and UNCLOS have in relation to one another.

The development of IMO regulations were intentionally aligned with the efforts of the Third United Nations Conference on the Law of the Sea beginning in 1972 and concluding with ratification in 1982.[90] This was to ensure no conflicts arose between the two conventions and that the IMO "conformed with the basic principles guiding the elaboration of UNCLOS."[91] UNCLOS "defines flag, coastal and port State jurisdiction," whereas IMO only specifies "how State jurisdiction should be exercised so as to ensure compliance with safety and shipping anti-pollution regulations."[92] Because IMO does not dictate the "extent of a coastal State's jurisdiction," it relies on UNCLOS to define jurisdictional limits within territorial, contiguous, and exclusive economic zones.[93]

IMO regulatory instruments include the International Convention for Safety of Life at Sea (SOLAS), preventing collisions at sea (COLREG), standards of training, certification, and watchkeeping (STCW), prevention of pollution from ships (MARPOL), and maritime search and rescue (SAR).[94] SOLAS, MARPOL, and STCW provide the primary standards of safety for 99% of the world's merchant tonnage, however these standards can vary in the quality of enforcement depending on the way a nation implements these policies within their maritime zones.[95] It is regulations like COLREGS and others established by the IMO under the UNCLOS framework, that serve to iron out the differences in what each country interprets as "customary international law of the sea."[96] Although these regulations establish a common understanding of how modern navies are to safely conduct themselves, the IMO acknowledges that differences in the manner of enforcement exist due to IMO's reliance on the interpretations of the provisions outlined in UNCLOS.

Mr. Pedrozo's arguments acknowledge that "UNCLOS operates as a framework" and that IMO is one of many organizations tasked with "implementing those principles."[97] However, he

also argues that since "the early 1990s, the IMO has shown a propensity to place environmental considerations above traditional navigational rights and freedoms in UNCLOS" and that it is up to the U.S. to "ensure IMO remains focused on freedom of navigation."[98] This argument appears to misunderstand the fact that the IMO is intended to be a regulatory arm of UNCLOS, specifically meant to handle maritime environmental and navigational safety concerns, not to interpret or enforce nor define jurisdictional authority over sovereign States.

Opponents of UNCLOS make the point that the U.S. only needs to leverage a strong Navy and existing leadership roles to further its interests at sea. Mr. Pedrozo asserts that "as long as we retain our leadership role at IMO, maintain a strong, capable, and well-trained Navy…[that] U.S. ocean and national security interests will be preserved."[99] While the U.S. should still pursue a greater leadership role in the IMO, the assertion that the IMO alone will affect change to better challenge excessive maritime claims or to preserve freedom of navigation is a not a feasible strategy given the limits of the IMO's function. The IMO and UNCLOS are mutually supporting legal instruments; both need to be leveraged to maximize their application. The call for a stronger U.S. Navy is also well intentioned, but this too is only a partial strategy. Military spending is subject to the whims of policymakers, which may or may not be properly oriented with the latest national security strategy to meet long-term strategic objectives.[100] Pedrozo concludes that "any changes or reinterpretation of UNCLOS will more likely occur at the IMO, not the United Nations."[101] It seems unlikely that the changes needed will come from an environmental and safety regulatory body like the IMO, especially given that the IMO seeks to maintain alignment within the UNCLOS framework.

It should be noted that Pedrozo does not totally reject the idea of the U.S. becoming party to UNCLOS. In a commentary aimed at his challengers who claim he is against ratification, he

declares that "if the United States were to join UNCLOS tomorrow that would be a good thing."[102] He recognizes that "it would demonstrate U.S. leadership, enhance U.S. credibility internationally, and eliminate spurious arguments from countries like China and Iran that the United States, as a non-party, is not entitled to the benefits of the Convention."[103] Despite his apparent willingness to support ratification, he insists that proponents are not making the right arguments to "convince their opponents that U.S. accession to UNCLOS is truly in our national interest."[104] While he may not believe that ratification would have any enduring negative side-effects for U.S. national security, he also sees no added benefit to ratification that is not already guaranteed by customary international law.[105]

This argument maintains a narrow view of the issue that underestimates the impact that U.S. ratification could have on its international credibility and expanded sphere of influence. His ultimate position maintains that if the U.S. ratified UNCLOS today it would "not be a bad outcome, [but] nothing would change," and until there is a tangible advantage for ratification the U.S. should maintain the status quo.[106] Pedrozo's arguments have merit, but only if viewed within the immediate time horizon in which he focuses. If U.S. national strategy truly seeks long-term objectives that aim to challenge excessive maritime claims by China and others, then policymakers should consider arguments that anticipate changes to U.S. national security in the future, rather than remain reactive to countries that have a more coherent long-term strategy.

America's Opportunity for Leadership

UNCLOS ratification by itself is not going to solve the maritime disputes between China and other Asian countries. U.S. FONOPs, while appropriately intended at countering a Chinese *fait accompli*, have not ultimately deterred China's militarization of the South China or their continued incursions in the East China Sea. One could argue that the U.S. Navy has become an

unstoppable force that continues to get thrown against an immovable object. The U.S. cannot afford to lose the strategic messaging afforded by conducting FONOPs, just as China would be unwilling to forfeit the massive sunk cost in materials, infrastructure, equipment, and military assets currently fortified across several island bases.[107] The arguments for U.S. ratification of UNCLOS should not be so easily dismissed simply because it will not solve every problem over disputed territorial claims. The Convention should be viewed as a strategic diplomatic tool that offers opportunities for the U.S. to legitimize both U.S. territorial claims and those of allies abroad.

This does not mean immediate ratification is a strategically desirable move to make at this moment in time. A strategically opportune time to ratify might have been immediately following the Permanent Court of Arbitration's (PCA) ruling in 2016 in which an international tribunal found that "China had violated the Philippines' sovereign rights in its exclusive economic zone by interfering with Philippine fishing and petroleum operations, and constructing artificial islands" in the zone.[108] It further ruled that the China's historic nine-dash line claiming territorial sovereignty over the South China Sea had "no legal basis" and is "incompatible with the detailed allocation of rights and maritime zones in the Convention."[109] The Tribunal noted that the underlying cause of the dispute was due to a "fundamentally different understanding" in their interpretations of UNCLOS.[110] The PCA ruling represented a missed opportunity for the United States to take a firmer position on the issue.

The U.S. continues to maintain its position that the South China Sea dispute should be resolved "peacefully without the threat or use of force,"[111] and rightfully so, however the overall tepid response post-PCA ruling by the U.S. did little to encourage the Philippines to take a harder stance against China.[112] Although the U.S. has taken no official legal position on the disputes

themselves, Secretary of State Mike Pompeo recently "reaffirmed our commitment to the Mutual Defense Treaty" in March 2019, which specifically assured the Philippines that "any armed attack" against them in the South China Sea "will trigger mutual defense obligations under Article IV."[113] An invocation of Article IV that acknowledges an attack as "common danger" to either party is further clarified in Article V which recognizes that any such attack also includes "island territories under its jurisdiction in the Pacific."[114] Accession to UNCLOS would offer a supporting instrument in the U.S. reaffirmation of the Mutual Defense Treaty and instill greater confidence in other ASEAN partners.

The U.S. did seek to send an observer to the PCA during the period of arbitration, however the Tribunal decided that "only interested States parties to the United Nations Convention on the law of the Sea will be admitted as observers."[115] The presence of a U.S. observer at the PCA may have ultimately been seen as only a small gesture of support, but it does not diminish the significance of the fact that the U.S. was refused a seat at the table as a non-party member of UNCLOS. This could set a precedent of continued refusal of American involvement in UN proceedings regarding the law of the sea. This may also result in an increase in the perception that the United States is no longer a credible participant in the security of the maritime space.

China has taken this opportunity to seize the initiative in the information domain by highlighting the hypocrisy in America's challenge to their South China Sea claims as being invalid under international law, given that China is party to UNCLOS and the U.S. is not. China's Foreign Ministry Spokesperson, Lu Kang, remarked in a press briefing following the PCA ruling that the "U.S. is always selective when it comes to the application of international law…and keeps urging others to abide by UNCLOS while refusing to ratify the Convention."[116]

China is able to point to the U.S. as being the unreliable partner that only seeks to escalate regional tensions, which undermines the ability for the U.S. to enhance its credibility with other Asian partners. It is not difficult to find some truth in China's criticisms that the U.S. will "cite international law when it sees fit and discard it when it sees otherwise."[117] Declaring an adherence to customary international law as a substitute for UNCLOS is becoming more irrelevant within an international community that recognizes a separate and distinct legal framework. Simply conducting more FONOPs in the South China Sea is merely a monotonous repeat of a strategy that needs a renewed approach, especially if the U.S. continues to be uninvited to venues like the PCA or continues to refuse its unique position of advantage on the ISA Council. This is not to suggest that the U.S. FONOP program should be abandoned, but rather messaged more effectively under the auspices of the Convention.

Opponents argue that an increase in the number of FONOPs is all that is needed to protect freedom of navigation, but they do not address what the strategy should be if the U.S. Navy is no longer able to maintain its dominant presence across the world's oceans. Budgetary constraints, operational limitations, or the emergence of new threats could easily redistribute forces away from FONOP priority areas for extended periods of time. If FONOPs are propped up as being the cornerstone of American resolve on the high seas, then what message does it send if the U.S. Navy is unable to support an increased FONOP tempo or becomes restricted in its ability to conduct them altogether? Equating FONOP as the sole measure of American resolve to protect freedom of navigation is a precarious strategy that offers no recourse if this resolve becomes seriously contested in the future.

Former commander of U.S. Pacific Fleet, Admiral Scott Swift, admits that "FONOPs tend to give a false sense of meaningful action and do not represent the whole-of-government

approach necessary to blunt the progress China has achieved."[118] Admiral Jonathan Greenert, former Chief of Naval Operations, emphasizes the need for persistent U.S. engagement to counter China's gray zone operations.[119] He summarizes this advice into three points: maintain presence to best know how to shape the environment, engage with allies and "potential adversaries" alike, and form enduring alliances. While Admiral Greenert's remarks spoke more specifically to the use of military power, the same can be said in the wielding of political or diplomatic power. FONOPs provide a tangible solution that is overt in nature, but would UNCLOS not provide a similarly tangible, albeit more subtle, diplomatic presence? This would align with Admiral Greenert's second and third points of advice, that the U.S. must always be willing to engage with both China and allies.

UNCLOS could provide a venue for the U.S. to engage with China, partners like ASEAN, and form stronger coalitions with other nations. Greenert does discuss the point that "we made a conscious decision not to ratify the UNCLOS treaty…that's all I'm saying."[120] In his earlier 2012 testimony to Congress, then acting as the Chief of Naval Operations, Admiral Greenert states that "remaining outside the Convention is just inconsistent with our principles, our national security strategy, and our leading position in maritime affairs."[121] He highlights the lack of credibility the U.S. holds with allies by remaining a non-party to UNCLOS, and that membership to the Convention would enable the U.S. "to press the rule of law and to peacefully deter conflict."[122]

Although ratification now would not be near as impactful as it would have been in 2016 or early 2017, there remains a significant strategic value to ratification given that the PCA ruling has established a firmer precedent in challenging China's claims. Despite ambiguities that may still exist in maritime law, the PCA ruling is in alignment with U.S. national interest and has

given the U.S. an opportunity to take a stronger position on the issue. If the U.S. can bolster ties with the Philippines and other ASEAN countries through continued use of diplomatic, economic, and security cooperation then ratification of UNCLOS would better reinforce U.S. strategy. It would also send a signal to other allies in the region that the U.S. remains committed to upholding international maritime law as a participatory member of UNCLOS. Stronger multilateral partnerships between the U.S. and ASEAN nations under the treaty will undermine China's strategy of engaging with nations bilaterally to more easily bend them to its agenda.

Establishing desired pre-conditions for ratification and fine-tuning the strategic timing would only be the first part of a larger strategy. It is important to determine how U.S. national power must be leveraged post-ratification to ensure a proper follow-through of policy. UNCLOS ratification with a combined use of economic, diplomatic, or military response would more effectively reinforce U.S. strategy and complicate China's ability to respond. If the pre-conditions are not effectively established in U.S. favor, then reasons for ratification are likely to be called into question due to a perceived lack of forethought or understanding by policymakers. The pitfalls are similar if there is a feeble or uncoordinated response following ratification. The decision to ratify must be made with an understanding of the larger strategic context given the current climate of the U.S. relationship to China and other Asian nations. China would undoubtedly respond to U.S. ratification with a strong information campaign to devalue its significance and reassert their claims in the region. Ratification must be accompanied by an equally strong information campaign that has the support of U.S. allies and partners. Strategic messaging should reemphasize the U.S. position that the territorial disputes should be resolved peacefully, and not include overly aggressive language that would cause unease among U.S. allies, dissuading them from engaging on the issue.

Conclusion

The primary concerns over UNCLOS ratification have been shown to be overly exaggerated, misleading, or born from a misinterpretation of the treaty's functions and its true value. While there are certainly flaws that can be found in any document of substantial length and content, the Convention clearly offers a greater overall advantage rather than disadvantage for the United States. These kinds of advantages are desperately needed, particularly in a time where the U.S. has come to realize it is not well-equipped to engage in gray zone competition with revisionist powers.

While perils of ratification are largely overstated, opponents have also underestimated the significance of continued U.S. absence from the Convention. This has called into question the ability of the U.S. to maintain its leadership role in the international order. The importance of alliances and partnerships have received enormous emphasis across the range of current U.S. national security and defense strategies. If the U.S. truly desires a renewed leadership role and stronger alliances, then it should not dismiss or sideline the decision to ratify UNCLOS. The consistent leveraging of the U.S. military to engage in gray zone competition will not be enough to out-maneuver revisionist powers like China within this space.

Opponents to UNCLOS have made a habit of pivoting back to their point that the U.S. has and always will enjoy freedom of navigation by virtue of a customary international law. However, this point is never expounded upon further to clarify what is or is not customary law in a constantly evolving international system. These arguments make the bold assumption that what is supposedly widely accepted customary maritime law today will be equally accepted customary law tomorrow, and that the U.S. will always be able to maintain its influence in the international system to dictate the terms of these unwritten customs. Admiral Locklear admitted that a reliance

on customary international law could present serious security risks in the future because it "is going to morph in a way that we cannot predict."[123]

The concerns about UNCLOS and the ISA "nationalizing the world's oceans" and other "Orwellian" comparisons are overlooking the fact that UNCLOS is like any other treaty. If the U.S. were to ratify the Convention and the ISA revealed itself to be the harbinger of an Orwellian future seeking to erode American sovereignty to claim the oceans for itself, then why does the Convention offer specific provisions for nations to withdraw from the agreement? If UNCLOS leads the U.S. into an unfavorable strategic position, or it is decided later that it no longer meets American interests, the U.S. can withdraw from the Convention at any time under Article 317. UNCLOS does not require party States to provide a reason for withdrawing from the Convention, only written notification. There is nothing unique about UNCLOS that makes it more difficult to withdraw from than any other treaty, therefore the concerns about the accession binding the U.S. to the whims of an international body are unfounded.

The case for UNCLOS ratification should be renewed in the Senate and not be shelved for another eight years. The significant changes to the geopolitical landscape and U.S. national security strategy that have occurred since 2012 warrant, at a minimum, another formal hearing before the Senate that properly frames UNCLOS within the latest strategic context. As Admiral (USN) James Winnefeld, former Vice Chairman of the Joint Chiefs of Staff, testified to the Senate 2012, "the real question to me is whether our country will choose to lead in the maritime environment form the inside or will follow from the outside."[124] Serious deliberation on the issue must take into account not just U.S. interests at home that benefit American industries, but also the positive impacts that ratification would have on our interests abroad and those of our allies. Even if current domestic or international climates are not strategically ideal for U.S. accession to

UNCLOS, policymakers should be cautious of delaying for the perfect conditions to arise. Opponents of ratification maintain that customary international law has always been enough to enable foreign policy on U.S. terms, negating the need for UNCLOS. However, the longer the U.S. maintains a distinction between UNCLOS and what it refers to as customary international law, the greater the chance that it makes itself the exception, and not the rule, in the international system governing the law of the sea.

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