WebMemo
Published by The Heritage Foundation
No. 1459
May 16, 2007

The United Nations Convention on the Law of the Sea: The Risks Outweigh the Benefits

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The Bush Administration has renewed its 2004 request that the Senate ratify the United Nations Convention on the Law of the Sea (UNCLOS). While UNCLOS contains provisions that would be marginally beneficial to the U.S. Navy, other provisions of the treaty, such as those regarding the settlement of disputes, royalties on the exploitation of resources on the deep seabed, and the empowering of an additional U.N.-affiliated international bureaucracy, pose far greater risks to U.S. interests. The United Nations Convention on the Law of the Sea is likely to have unintended negative consequences for U.S. interests. Nothing has occurred since 2004 that should lead the Senate to reverse its earlier decision to decline to take up the treaty.

UNCLOS has been a contentious issue in the U.S. for a quarter of a century. International negotiators completed drafting UNCLOS in 1982. It was designed to establish a comprehensive legal regime for international management of the sea and the resources it contains. Among its sweeping provisions were several that pertained to the rights of passage by both commercial and naval vessels. These built on a series of 1950s-era conventions and were supported by the Navy. President Ronald Reagan, however, refused to sign UNCLOS in 1982 because he did not believe, on balance, that the treaty served U.S. interests.

In 1994, however, the Clinton Administration sought and received a package of changes in UNCLOS that it touted as correcting the problems that led President Reagan to withhold his signature. President Clinton signed the revised treaty and forwarded it to the Senate. The record shows that the Senate was not convinced that the 1994 changes corrected the problems, and it has deferred action on the treaty ever since.

Much to Lose, Little to Gain. As a multilateral treaty negotiated under the auspices of the U.N, UNCLOS poses the usual risks to U.S. interests of such multilateral treaties. In the international organizations created by such treaties, the U.S. often faces regional, economic, or political blocs that coordinate their votes to support outcomes counter to U.S. interests. The bloc voting process is frequently driven by the same overtly anti-American agenda that is often apparent in the U.N. General Assembly. While the U.S. can achieve positive outcomes in these forums, its successes are usually limited, having been watered down or coupled with demands from other participating states that it would otherwise not accept.

One example of U.S. interests being thwarted by bloc voting is the new U.N. Human Rights Council. The U.S. was a strong proponent of creating a new body to replace the discredited U.N. Commission on Human Rights, which had became a haven for human rights abusers to protect one another from

This paper, in its entirety, can be found at:
www.heritage.org/research/internationalorganizations/wm1459.cfm

Produced by the Center for Legal and Judicial Studies and the Douglas and Sarah Allison Center for Foreign Policy Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002–4999
(202) 546-4400 • heritage.org

scrutiny and censure. Once locked into negotiations over the specifics of the new council, however, the U.S. was repeatedly outnumbered and isolated. As a result, the council has minimal requirements for membership, and China, Cuba, Pakistan, Saudi Arabia, and other repressive states have won council seats. Unsurprisingly, the council has performed just as badly, if not worse, as its predecessor, and the U.S. has declined even to seek a seat on it.

Further, U.N.-related multilateral treaties often create unaccountable international bureaucracies. The UNCLOS bureaucracy is called the International Seabed Authority Secretariat, which is headed by a secretary-general. The Secretariat has a strong incentive to enhance its own authority at the expense of state sovereignty. Thus University of Virginia School of Law Professor John Norton Moore describes this sort of treaty as a "law-defining international convention." The law that is being defined and applied by international bureaucrats is one designed to govern the actions of the participating states, not to serve their joint interests. For example, a provision of UNCLOS that would impose direct levies on the revenues of U.S. companies generated through the extraction of resources from the deep seabed reveals this bias against state sovereignty.

When international bureaucracies are unaccountable they, like all unaccountable institutions, seek to insulate themselves from scrutiny and become prone to corruption. The International Seabed Authority Secretariat is vulnerable to the same corrupt practices that have been present at the U.N. for years. The most pertinent example of this potential for corruption is the United Nations Oil-for-Food scandal, in which the Iraqi government benefited from a system of bribes and kickbacks involving billions of dollars and 2,000 companies in nearly 70 countries. Despite ample evidence of the U.N.'s systemic weaknesses and vulnerability to corruption, the U.N. General Assembly has yet to adopt the reforms to increase transparency and accountability proposed by former Secretary-General Kofi Annan and others. This example is particularly pertinent considering that the Authority could oversee significant resources through fees and charges on commercial activities within its authority and potentially create a system of royalties and profit sharing.

Many U.N. bodies suffer vulnerability to corruption, mismanagement, and abuse, and the U.S. should be concerned about the protections in place to prevent the occurrence of these ills in the International Seabed Authority. The entire U.N. system should adopt strong, consistent practices to increase transparency and accountability. Until that happens, the U.S. should resist ratifying or acceding to any treaty that relies on U.N. institutions, funds, or programs to interpret, implement, or enforce its provisions.

The Bush Administration's Unconvincing Arguments. The Bush Administration is likely to counter the arguments regarding the clear risks to U.S. interests posed by ratification of UNCLOS by asserting that there are greater risks if the U.S. fails to ratify the treaty. These arguments are unconvincing and easily rebutted.

Assertion #1: The U.S. needs to join UNCLOS to "lock in" the navigation rights it currently enjoys under customary international practice. Implied in this argument is the presumption that other nations, the vast majority of which are UNCLOS participants, will ignore their obligations under the treaty and forgo the concurrent privileges regarding navigation rights afforded by customary international practice just because the U.S. is not a party to the treaty. This, according to the Bush Administration, will manifest itself in the form of some coastal states demanding notification by U.S. ships entering their waters or airspace.

Fact: These states have reciprocal interests in navigation rights that will discourage them from making such demands. Second, the few irresponsible states that may decide to make such challenges are not going to be dissuaded by the "locking in" argument or U.S. appeals to the navigation provisions of UNCLOS.

Assertion #2: U.S. companies will not take advantage of the economic opportunities afforded by extracting natural resources from the deep seabed unless the U.S. joins UNCLOS. UNCLOS supporters have noted, in support of this assertion, that U.S. mining companies have not undertaken extraction activities on the deep seabed.

Fact: The marginal legal protections afforded mining companies by U.S. participation in UNCLOS

are unlikely to change their calculations. First, the efficient use of resources by private enterprise depends on a legal regime that establishes strong property rights. The relevant sections of UNCLOS are anything but clear regarding the extension of such property rights. The treaty, even after the 1994 changes, describes deep seabed resources as the "common heritage of mankind." This provision, at a minimum, leaves mining companies to question the full extent of their property rights in the deep seabed areas. Further, UNCLOS directs the International Seabed Authority to take into account the interests and needs of developing states regarding the exploitation of deep seabed resources. This is a barrier to companies from the U.S. and other states designated as developed. Finally, UNCLOS encourages technology transfers from advanced mining companies to support mining activities by developing states. This provision will discourage companies from participating in mining activity under the jurisdiction of the International Seabed Authority.

Assertion #3: U.S. participation in UNCLOS will not undermine intelligence operations.

Fact: It is impossible to confirm this assertion because the relevant intelligence activities are classified. It is clear, however, that U.S. participation in UNCLOS is unlikely to facilitate U.S. intelligence activities. For example, a coastal state may demand that all submarines entering its exclusive economic zone surface and identify themselves. Even if the U.S. were a party to the treaty, the Navy would not invoke UNCLOS to justify its presence in these waters when it engages in intelligence operations. Instead, it would simply ignore the demand and avoid being caught. On this basis, it is unclear how the U.S. intelligence community would suffer by not joining the treaty.

Assertion #4: The U.S can prevent decisions that are not in its interests. UNCLOS created several governing bodies, of which the two most important are the Council and the Authority. Supporters claim that the 1994 Agreement on Part XI of UNCLOS puts the U.S. in a strong position to block questionable propositions because of the preference for consensus in many areas and the advantageous position the U.S. would have if it joined the organization.

Fact: While the 1994 Agreement on Part XI of UNCLOS does state that, "As a general rule, decision-making in the organs of the Authority should be by consensus," in nearly all cases, decisions may be adopted by a majority or two-thirds vote of members present and voting "if all efforts to reach a decision by consensus have been exhausted." All decisions in the Assembly are subject to this provision, and only two types of decisions by the Council must be adopted by consensus: decisions on the "protection of developing countries from adverse effects on their economies or on their export earnings" resulting from deep sea bed mining and decisions to adopt rules, regulations, and procedures concerning "the equitable sharing of financial and other economic benefits derived from activities [within the jurisdiction of the Authority] and the payments and contributions…taking into particular consideration the interests and needs of the developing States and peoples" and the prospecting, exploration, and exploitation of minerals and other resources in the deep sea.[1] As a member of the Council, the U.S. could, in theory, block decisions in these two areas, provided it is willing to accept the political and diplomatic consequences. By itself, however, the U.S. could not stop other Council actions subject to a majority or two-thirds vote.

Council decisions could also be blocked by a majority of any of the five "chambers," or membership groups, of the 36-member Council. If it chose to ratify the treaty, the U.S. would claim one of the four slots in the chamber for industrialized coun-

1. The amended treaty also stipulates that the 15-member Finance Committee, which is elected by the Assembly but must include the five largest financial contributors to the administrative budget "until the Authority has sufficient funds other than assessed contributions to meet its administrative expenses," must adopt decisions on "questions of substance" by consensus. Because the budget is assessed based on the U.N. scale of assessments for its regular budget, the U.S. would, at the present, hold a seat on the Finance Committee and could block decisions. However, the U.S. would not always be assured of a seat on the Finance Committee, because the Authority hopes to raise revenues from other sources in the future, which would overcome the guaranteed-seats provision. Moreover, although the treaty instructs the Assembly and the Council to "take into account recommendations of the Finance Committee," it does not require them to adhere to those recommendations.

tries and Russia, which is guaranteed a spot as the Eastern European region country with the largest economy. Considering the difficulties faced by the U.S. in rallying support from Russia and Europe in the Security Council, this mechanism may prove difficult to use to protect U.S. interests. And while the U.S. could, in certain circumstances, block Council actions by deviating from consensus, other countries on the Council could just as easily prevent U.S.-supported actions from being adopted. In sum, the U.S. could stop some detrimental decisions if it chose to ratify UNCLOS, but that ability would be sharply limited and would often bear diplomatic consequences that many U.S. administrations would prefer to avoid.

Conclusion. The United States should be wary of joining sweeping multilateral treaties negotiated under the auspices of the United Nations. Indeed, the bar should be set very high for U.S. participation in multilateral treaties negotiated under the auspices of the United Nations. The United Nations Convention on the Law of the Sea is no exception. International bodies created by such treaties often lack proper protections to prevent unaccountable behavior and corruption and result in the U.S. being isolated by bloc voting led by countries with an interest in limiting U.S. freedom of action and sovereignty. The U.S. can rely upon customary international practice to obtain many of the benefits of these treaties without subjecting itself to the risks of joining them. For these reasons, the Senate has been wise to defer consideration of the United Nations Convention on the Law of Sea since it was submitted in 1994.

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