

U.S. MEMBERSHIP IN UNCLOS: WHAT EFFECTS FOR THE MARINE ENVIRONMENT?

*Howard S. Schiffman**

I. INTRODUCTION	477
II. THE HISTORICAL CONTEXT OF UNCLOS: THE NEED FOR A BETTER TREATY	478
III. THE BASIC STRUCTURE OF UNCLOS AND ITS OBJECTIVES	478
IV. THE U.S. PERSPECTIVE AND PRESENT RATIFICATION STATUS	479
V. PROPOSED DECLARATIONS AND UNDERSTANDINGS AFFECTING THE ENVIRONMENT	481
VI. CONCLUSIONS	482

I. INTRODUCTION

The issue of whether or not the U.S. should ratify the United Nations Convention on the Law of the Sea (UNCLOS or the Convention)¹ has been debated since the treaty was concluded in 1982. UNCLOS itself is one of the most significant achievements in international law in the Twentieth Century. The Convention consists of 320 articles and eight annexes. It is comprehensive, if not definitive, in its treatment of ocean usage. A hallmark of UNCLOS is the balancing of interests between coastal states and other maritime users. From the perspective of living marine resources such as fisheries, for example, UNCLOS offers a balance between the conservation and utilization of those resources. Without a doubt, UNCLOS contains numerous provisions addressing matters of the marine environment.

This article attempts to highlight in very broad strokes some of the key issues surrounding U.S. accession to UNCLOS, particularly with respect to the marine environment. It is neither a comprehensive review of the treaty provisions pertaining to the marine environment nor an exhaustive discussion of the law and politics of the advice and consent process as it presently stands in the U.S. Senate. With this parameter in mind, it is instructive to begin by

* Howard S. Schiffman, J.D., LL.M., is Clinical Assistant Professor and Director of the M.S. Program in Global Studies at New York University, Center for Global Affairs. This article is a revised reproduction of oral remarks presented at the American Branch of the International Law Association International Law Weekend, October 2004, New York, NY, United States.

1. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

understanding the context of this most recent attempt at the codification of the modern law of the sea.

II. THE HISTORICAL CONTEXT OF UNCLOS: THE NEED FOR A BETTER TREATY

The need for a more comprehensive treatment of ocean space became apparent after the four 1958 conventions (produced by UNCLOS I) did not establish a sufficient legal order of the oceans. Although these treaties added considerably to the ocean governance of the time, they were not entirely successful because they were unable to fix the breadth of the territorial sea.

Following the inability of the 1960 conference (UNCLOS II) to improve on the 1958 agreements, specifically the lack of agreement about the limit to the territorial sea, in 1970 the UN General Assembly adopted Resolution 2570 calling for a new conference (UNCLOS III) to produce a comprehensive treaty.² From 1973 to 1982, multiple rounds of negotiation produced the bundle of compromises that is UNCLOS. The growing concern for the marine environment of the 1970s was reflected in various parts of UNCLOS. The most significant of which is Part XII entitled, "Protection and Preservation of the Marine Environment." Numerous other provisions express concern for conservation and sustainable use of resources. Of course, the marine environment was just one of several aspects of ocean governance addressed by the Convention. Other key aspects include allocation of maritime zones, delimitation of maritime boundaries, navigation and overflight, mineral exploitation, marine scientific research, recognition of authority to exercise prescriptive and enforcement jurisdiction, the settlement of disputes and many others.

III. THE BASIC STRUCTURE OF UNCLOS AND ITS OBJECTIVES

The most basic goal of UNCLOS is to divide the ocean into maritime zones that more or less allocate the rights and responsibilities of coastal states and other maritime users in those zones. Unlike its predecessors, UNCLOS adopted a limit to the territorial sea. The territorial sea, out to a maximum of 12 nautical miles, is adjacent to a state's coastline. It is that part of the ocean where the coastal state enjoys its greatest rights for applying its prescriptive and enforcement jurisdiction, providing for its defense, exploiting its marine resources and protecting its marine environment. In addition to the territorial sea, UNCLOS provides for coastal states to have an Exclusive Economic Zone (EEZ) out to a maximum of 200 nautical miles. In the EEZ, the coastal state has considerable authority to provide for the exploration, conservation, and utilization of resources. In the EEZ the coastal state specifically has jurisdiction to protect

2. See R. R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 16 (3d. ed. 1999).

and preserve the marine environment.³ From the standpoint of fisheries, the regime of the EEZ is significant not only because it allows the coastal state to determine the allowable catch limits in these waters,⁴ but also because many living marine resources are found within 200 miles of a coastline. Perhaps most importantly, the regime of the EEZ allows coastal states to use their prescriptive and enforcement jurisdiction to address a variety of environmental concerns in what amount to wide sections of the ocean.

Apart from the allocation of maritime zones, some of the provisions generally directed to the environment include Article 194, which requires states to take action to prevent, reduce and control pollution. Article 195 requires states to act so as not to transfer "damage or hazards" from one area to another. UNCLOS addresses marine pollution originating from land-based sources,⁵ seabed activities,⁶ dumping,⁷ the ordinary operation of vessels,⁸ and the atmosphere.⁹ In addition, Articles 65 and 120 favor the conservation of marine mammals, cetaceans in particular, over their exploitation.

A particular innovation of UNCLOS is its dispute settlement mechanism. The dispute settlement provisions found in Part XV are flexible and can lead to binding decisions. Part XV creates a tribunal, the International Tribunal for the Law of the Sea (ITLOS), which is dedicated to the interpretation and application of UNCLOS. Under Part XV, UNCLOS members are permitted to designate certain enumerated dispute settlement options should disputes arise with other UNCLOS parties.

IV. THE U.S. PERSPECTIVE AND PRESENT RATIFICATION STATUS

Understanding the U.S. history with the Convention is a useful starting point to address the potential impact of the treaty on any number of maritime uses. Although the U.S. participated in UNCLOS negotiations and achieved many of its goals in those negotiations (most particularly with regard to navigation and overflight rights for military vessels and aircraft), the U.S. ultimately resisted ratification because of the perceived effect of Part XI governing the deep sea-bed. Article 136 declares the resources of the deep sea-bed to be "the common heritage of mankind."¹⁰ This provision implied an obligation to share

3. UNCLOS, *supra* note 1, art. 56(b)(iii).

4. *Id.* art. 61(1).

5. *Id.* art. 207.

6. *Id.* art. 208 & 209.

7. *Id.* art. 210.

8. UNCLOS, *supra* note 1, art. 211.

9. *Id.* art. 212.

10. *Id.* art. 137.

deep sea-bed resources in a manner that was objectionable to the U.S. and other developed states. Despite this, President Ronald Reagan proclaimed that the bulk of the substantive provisions of UNCLOS would be applied by the U.S. on a provisional basis.

In 1994, in a separate agreement addressing the concerns of developed states, a compromise was reached on access to deep sea-bed resources. President Bill Clinton signed this additional agreement and transferred it, along with the main text of UNCLOS, to the Senate for Advice and Consent. The Senate did not act on UNCLOS until 2003.

In October 2003, the Senate Foreign Relations Committee held hearings on U.S. ratification. All of the testimony taken by the Foreign Relations Committee favored U.S. membership. Among the witnesses were John F. Turner, Assistant Secretary of the Bureau of Oceans and International Environmental and Scientific Affairs of the State Department, and Roger Rufe, President of the Ocean Conservancy. These witnesses highlighted some of the ways in which UNCLOS contributes to the stewardship of the marine environment.¹¹ In March 2004, the Foreign Relations Committee ordered UNCLOS reported to the full Senate. This included the attachment of 24 declarations and understandings to accompany U.S. ratification.

At about the same time, the Environment and Public Works Committee held additional hearings on UNCLOS. The stated purpose of these hearings was to include some voices opposing U.S. ratification of the Convention.¹² The opponents emphasize the surrender of decision-making ability to the Sea-Bed Authority provided for in Part XI and its accompanying agreement as well as the potential impact of decisions by the ITLOS on U.S. activities.¹³ In support of the latter concern, it should be noted that even though the U.S. does not intend to designate the ITLOS as a method of dispute settlement there are certain circumstances under which it might still be subject to its jurisdiction.

As of November 2004, the full Senate had not yet voted on the question of ratification, however, the proposed declarations and understandings of the Senate Foreign Relations Committee,¹⁴ many of which address environmental concerns, are worthy of review. At the outset, it is useful to recall that because of the highly coordinated and integrated nature of its provisions, UNCLOS

11. The statements of these witnesses can be found at the following website: <http://foreign.senate.gov/hearings/2003/hrg031021a.html> (visited Nov. 13, 2004).

12. See Senator James M. Inhofe, Opening Statement, United States Senate Oversight Hearing to Examine the "United Nations Convention on the Law of the Sea" (March 24, 2004), http://epw.senate.gov/hearing_statements.cfm?id=219593.

13. See Frank Gaffney, Jr., President and CEO, The Center for Security Policy, Statement at the United States Senate Oversight Hearing to examine the "United Nations Convention on the Law of the Sea" (March 24, 2004), http://epw.senate.gov/hearing_statements.cfm?id=219549.

14. S. EXEC. DOC. NO. 108-10, United Nations Convention on the Law of the Sea (2004).

specifically prohibits reservations.¹⁵ On the other hand, UNCLOS does permit a state, when signing, ratifying or acceding, to make “declarations or statements” with a view to the harmonization of its domestic laws with the Convention.¹⁶

V. PROPOSED DECLARATIONS AND UNDERSTANDINGS AFFECTING THE ENVIRONMENT

The most substantive declaration proposed by the Senate addresses the U.S. option for dispute settlement under Part XV. In this declaration, the U.S. designates a “special arbitral tribunal” to hear disputes arising from the Convention related to:

- 1) Fisheries;
- 2) Protection and preservation of the marine environment;
- 3) Marine scientific research; and
- 4) Navigation,

including pollution from vessels and by dumping. This type of declaration is perfectly permissible under Article 287(1) of UNCLOS. For all remaining disputes, the U.S. opts for arbitration. Arbitration is not only an option under Article 287(1) but is also the default method of dispute settlement under the treaty.¹⁷

Another declaration proposed by the Senate that affects the environment emphasizes the right to impose and enforce conditions for the entry of foreign vessels into U.S. ports and internal waters. This declaration is specifically directed at the introduction of alien species from ballast water discharge as well as oil spills. In a similar declaration, the U.S. expresses the understanding that UNCLOS supports the authority of a coastal state to regulate the introduction of alien species into the marine environment. Another declaration emphasizes the right of the coastal state to determine allowable catch limits of living resources in its EEZ and to establish terms and conditions for access by other states to those resources. This same declaration expresses the understanding that these determinations are not subject to binding dispute resolution.

Still, another declaration asserts that Article 65, the UNCLOS provision pertaining to conservation and management of marine mammals, lends direct support to the present moratorium on commercial whaling and the establishment of sanctuaries and other conservation measures. The same declaration also asserts that states must cooperate with respect to all cetaceans not just large ones. This declaration is a clear reference to the work of the International

15. UNCLOS, *supra* note 1, at art. 309.

16. *Id.* art. 310.

17. *Id.* art. 287, paras. 3 & 5.

Whaling Commission (IWC) although it does not identify the IWC by name. To understand the context of this declaration, the moratorium on commercial whaling, which has been in effect since the mid-1980s, has come under assault in recent years by pro-whaling states that find no basis in law for the continuation of the moratorium. Furthermore, the reference to "all cetaceans" not just large whales speaks to an ongoing debate in the IWC: that is, whether or not the IWC is competent to regulate small cetaceans (i.e., dolphins and porpoises) as well as the great whales. The effect of this declaration will likely be to lend greater U.S. support to the efforts of the IWC which today has a solidly conservationist agenda.

VI. CONCLUSIONS

By most accounts, U.S. ratification of UNCLOS will have a positive effect on the environment. This is not because the U.S. will be binding itself to any new substantive norms. On the contrary, most substantive provisions of UNCLOS are already part of U.S. policy and have been for many years. Despite this, the conservation of ocean wildlife, the protection of delicate marine ecosystems, and the control of marine pollution are by their very nature multilateral issues. U.S. ratification will demonstrate U.S. commitment to address these problems in a cooperative manner at a time when some view U.S. policy as generally antithetical to multilateral arrangements. The environmental community strongly favors UNCLOS and U.S. ratification would send a message of support.

Among the benefits the U.S. will receive from UNCLOS membership is the ability to have a judge of U.S. nationality serve on the ITLOS and the right to participate in the amendment process of the treaty as provided for in Article 312. The power to amend the treaty is vested in the parties 10 years after the treaty has entered into force.¹⁸ The 10-year anniversary was November 16, 2004. The U.S. would be entering the game just as amendments become possible. Admittedly, the question of amendment to such a comprehensive legal instrument is fraught with difficulties, but U.S. membership ensures that any future amendments will only be adopted when the U.S. is a full participant in the process.

The U.S. has a golden opportunity to take a more respected leadership role in ocean governance by embracing a treaty that offers a meaningful, if imperfect, framework for ocean governance. Even though the U.S. has already proven its commitment to the marine environment and willingness to work both independently and with responsible partners to achieve environmental goals, U.S. ratification will highlight those objectives in international affairs. U.S.

18. *Id.* art. 312.

ratification will energize and elevate the status of UNCLOS in international law. Undoubtedly, the marine environment would be an immediate beneficiary of U.S. participation.