



National Security, Economic Well-Being, and the Law of the Sea

Hosted by the Environmental Law Institute in conjunction
with the National Marine Sanctuaries Foundation

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SEMINAR SUMMARY

Over 15 years after its entry into force, the United Nations Convention on the Law of the Sea (UNCLOS) is commonly considered an umbrella treaty for the management of the world's oceans—one that provides a framework for determining jurisdictional boundaries, defining freedom of navigation, and conserving the ocean's natural resources. While the United States views many aspects of the treaty as customary international law, and therefore abides by those aspects in practice, it has not ratified the Convention.

The numerous national and international discussions regarding U.S. ratification of UNCLOS have included a wide range of perspectives on a spectrum of issues. In this seminar, international ocean management experts explored the rationale for acceding, focusing specifically on the relevance of UNCLOS to national security and economic well-being.

Speakers

- **Ambassador David A. Balton**, Deputy Assistant Secretary, Oceans and Fisheries, Bureau of Oceans, Environment, and Science, U.S. Department of State
- **Professor David D. Caron**, President, American Society of International Law; Berkeley Law, University of California
- **Rear Admiral Frederick J. Kenney, Jr.**, Judge Advocate General and Chief Counsel, U.S. Coast Guard
- **Commander James Kraska**, Howard S. Levie Chair of Operational Law, U.S. Naval War College

Moderator

- **Ms. Jordan Diamond**, Deputy Director, Ocean Program, Environmental Law Institute

Professor David D. Caron opened the panel with a discussion of the historical context of UNCLOS. The law of the sea has evolved according to the different balances that have been struck between two competing interests: a shared interest in freedom of navigation and coastal states' interests in controlling marine resources. Until the 20th century, the law of the sea was relatively stable. The primary extraction activity was near-shore fishing, and consequently coastal states' interests in controlling offshore resources were generally satisfied by a relatively small territorial sea. Essentially, the ocean was divided into two zones – *territorial seas* that typically stretched 3 (sometimes up to 12) miles from shore, abutted directly by *high seas* that could be used freely by all nations. Around 1900, however, improved fishing technologies – most importantly, refrigeration and steam-powered navigation – and the discovery of offshore oil gave coastal states an incentive to expand the boundaries of their territorial seas. As the balance between interests in free navigation and resource control shifted, an “enclosure” movement ensued.

Professor Caron described how after World War II the tension between these interests intensified and the international community struggled to strike a new balance in the law of the sea. In 1945, President Truman issued two relevant proclamations. One stated the U.S. intent to establish fisheries conservation and regulation zones in high seas areas contiguous to U.S. waters. The other asserted the U.S. authority over the submerged lands and natural resources of the continental shelf, although the United States ultimately reversed this position when it became embroiled in a series of international incidents after many Latin American countries issued similar proclamations.

Professor Caron explained that, after two failed attempts, the Convention that is in force today attempts to strike a lasting balance between the competing forces driving the development of the law of the sea. Much of UNCLOS' success may be attributed to the fact that, in addition to the two traditional zones of territorial and high seas, it creates a hybrid zone known as the Exclusive Economic Zone (EEZ). Within the EEZ, which extends from 12–200 miles from shore, all marine resources are the property of the coastal state; however, all nations continue to enjoy freedom of navigation within such waters. Dispute resolution mechanisms were also integral to preventing the territorial sea from continuing to expand outward. Although the United States was a key actor in the creation of this hybrid zone, after UNCLOS opened for signature in 1982 it declined to ratify the treaty because of an objection to a deep sea mining provision. The mining provisions of Part II were amended in 1984, to directly address U.S. concerns, after which many nations signed the treaty. It entered into force in 1994. The United States, however, has still yet to accede. Currently, the Senate is considering advice and consent to the treaty.

Next, Rear Admiral Frederick J. Kenney presented the importance of UNCLOS to the U.S. Coast Guard. He emphasized that on a daily basis the Coast Guard's operational officers rely on the freedom of navigation that UNCLOS attempts to preserve. The Coast Guard is the only U.S. surface presence in many parts of the world, and this widespread presence allows the Coast Guard to respond quickly to international incidents. For example, a Coast Guard cutter was the first U.S. presence in Georgia after Russian troops entered the country in 2008.

Because the United States is not a party to the Convention, however, Rear Admiral Kenney explained that the United States cannot use its dispute resolution mechanisms for resolving conflicting claims to ocean territory. In one important dispute, the United States and Canada disagree about whether Passamaquoddy Bay is part of Canada's internal waters and thus whether Canada can block passage of commercial shipping through the bay to East Port, Maine. If plans for a liquid natural gas (LNG) terminal in East Port move forward, Rear Admiral Kenney predicts this dispute will intensify without any clear means of resolution.

Rear Admiral Kenney drew on his personal experience as a negotiator to discuss the difficulties the United States faces in negotiating other treaties because it is not a party to UNCLOS. As the primary regulator of U.S. shipping, the Coast Guard participates in treaty negotiations with the International Maritime Organization (IMO). However, the IMO's primary treaties are inextricably linked to UNCLOS, and Rear Admiral Kenney opined that the United States loses credibility in IMO negotiations because it is not a party to UNCLOS. Further, Rear Admiral Kenney suggested that bilateral agreements regarding drug enforcement would be easier to negotiate if the United States were a member of UNCLOS because they would be able to incorporate UNCLOS' enforcement mechanisms.

Finally, Rear Admiral Kenney highlighted how the U.S. failure to ratify UNCLOS precludes it from participating in amendment processes. For instance, the United States does not have a voice while parties to the Convention debate an article on collisions on the high seas. For those reasons and more, Rear Admiral Kenney urged supporters of UNCLOS accession to educate others on this important issue.

Commander James Kraska discussed why maneuverability and mobility on the seas are essential for the maintenance of both U.S. national security and the global order. He emphasized that in an era of globalization, prosperity relies on stability of the regimes that ensure free movement on the seas. Marine Corps Vision 2025 projects that most of the conflict and instability in the coming decades will occur in the world's littoral zones, making mobility on the seas essential for U.S. military operations and engagement.

Next, Commander Kraska confronted the idea that UNCLOS merely adopts customary international law without adding anything new. Of foremost importance, the EEZ is a unique creation of UNCLOS, and respect for freedom of navigation in the EEZ is essential to the U.S. Department of Defense's strategic surface, subsurface and aviation deployments. For instance, to deploy a carrier strike group from Norfolk, Virginia, to the Arabian Gulf, the ships must travel through the Strait of Gibraltar (international strait) and the Mediterranean (almost entirely comprised of EEZs), the Suez Canal, the Red Sea, the Strait of Bab el Mandeb, the Gulf of Aden and the Strait of Hormuz. Navigational freedom along the length of the route is entirely dependent on the stability of the regimes set forth in UNCLOS. In addition, UNCLOS created new archipelagic states, while ensuring free passage through archipelagic waters.

Commander Kraska also emphasized that UNCLOS affects deployments for all U.S. armed forces. The treaty's provisions support freedom of navigation in straits, EEZs, and archipelagic waters, and the regimes in the Convention apply to submarines, surface vessels, and aircraft. The Department of Defense projects power using a "sea basing" concept, which positions submarines, surface vessels, aircraft, and amphibious and expeditionary forces at sea to affect events on land. From these operating areas, the United States has a unique capability to project decisive power along the world's shorelines and coastal zones.

Commander Kraska illustrated the fragility of the law of the sea by discussing China's excessive maritime claims. China asserts two types of excessive claims in the East and South China Seas. First, China claims excessive straight baselines that extend all of the nation's maritime zones out into the ocean. Straight baselines are permitted in some circumstances, but China's claims do not meet the rules set forth in Parts I and II of UNCLOS. Second, China's asserts greater coastal state competence over the EEZ in an attempt to make the EEZ more like the territorial seas. China's view of the EEZ was specifically rejected during the negotiations for UNCLOS, but as Chinese military and economic power has grown, the country has resurrected its maritime claims. Commander Kraska asserted that by not ratifying UNCLOS,

the United States misses an opportunity to strengthen the fragile nature of the law of the sea. But ensuring freedom of navigation for U.S. military forces and commercial shipping will require constant attention from the U.S. government. Consequently, Commander Kraska concluded that U.S. ratification and accession of UNCLOS is a necessary – but insufficient – step for maintaining the global order of the oceans.

In the final presentation, Ambassador David A. Balton discussed how ratifying UNCLOS would advance numerous U.S. interests. First, he noted that the United States is the world's leading maritime power. Only as a party to UNCLOS can the United States best invoke and ensure respect for its provisions on freedom of navigation. Second, the United States has the largest EEZ on the planet, as well as a continental shelf that is likely to be the envy of most other nations. Only as a part can the United States best secure our rights as a coastal state under UNCLOS. Third, only as a party to UNCLOS can the United States make best use of the treaty's provisions on the marine environment and fisheries, or shape the rules for mining the seabed beyond the jurisdiction of any nation. Ambassador Balton agreed with Rear Admiral Kenney that the United States would benefit from being able to use UNCLOS procedures for resolving disputes, adding that becoming a party would allow the United States to nominate members of the International Tribunal for the Law of the Sea. He also agreed that accession would allow the United States to maximize leadership on maritime issues. Further, Ambassador Balton emphasized that accession would better allow the United States to maintain the balance of interests in the law of the sea described by Professor Caron. Accession is preferable to reliance on customary international law because customary law is subject to erosion. Overall, Ambassador Balton explained that the United States secured everything it wanted in the convention, given that the related 1994 agreement on deep seabed mining satisfied our concerns with respect to those issues.

Next, Ambassador Balton discussed emerging issues that will best be handled under the UNCLOS framework. First, as the oceans warm the Arctic will become more accessible for shipping and oil and gas extraction, among other uses. All other Arctic nations are parties to UNCLOS, and the United States' failure to join complicates negotiations and weakens our credibility in international talks. Second, Ambassador Balton emphasized the disadvantage we face as a non-party in respect of our extended continental shelf, the area of seafloor beyond 200 miles from our coasts that meet certain criteria set forth in the Convention. The United States estimates that it has an extended continental shelf approximately the size of California. Only as a party to UNCLOS can the United States best secure international recognition of the outer limits of our continental shelf.

Finally, Ambassador Balton explained that the Convention is actually part of a large suite of treaties relating to the oceans, most of which have already secured Senate approval. He noted that nothing about ratifying UNCLOS is anathema to U.S. interests or traditions. The United States is already bound to the IMO's key conventions, which are built on the framework of UNCLOS, as well as the 1995 UN Fish Stocks Agreement, which is legally related to UNCLOS.

Question and Answer

What are the prospects for U.S. engagement in deep sea mining without being a party to UNCLOS? This is an especially important issue now because there is significant interest in extracting rare earth minerals from manganese nodules.

Ambassador Balton responded that as a practical matter U.S. companies are currently foreclosed from mining the deep seabed in the area beyond national jurisdiction. Because the United States is not a

party to UNCLOS, it cannot sponsor those activities. Consequently, if they wish to engage in such mining, U.S. companies must reincorporate abroad or use a foreign subsidiary. Professor Caron agreed, adding that the United States will lose jobs and tax revenue if the companies restructure. As side note, Professor Caron also mentioned that there are outstanding questions about the environmental consequences of processing minerals on the high seas.

How will the Panama Canal expansion affect shipping to the Eastern Seaboard?

Rear Admiral Kenney answered that the completion of the third set of locks and the ability for bigger ships to pass through the canal will increase shipping to both the east and west coasts. At the same time, shipping patterns are in flux because there have been major improvements at Canadian ports, which now pose greater competition to U.S. ports. Further, the opening of the Arctic could have a major impact on shipping.

Do the Long Range Identification and Tracking (LRIT) requirements in the International Convention for the Safety of Life at Sea (SOLAS) and the International Ship and Port Facility Security (ISPS) Code affect freedom of navigation?

Commander Kraska explained that the IMO and the Isthmus Bureau of Shipping, respectively, developed these mechanisms to respond to post-9-11 security concerns. The ISPS Code creates a public-private partnership between the shipping industry, flag states, and port states for increased oversight. Neither the ISPS Code nor the 2006 amendment to SOLAS gives the coastal state any additional authority to restrict freedom of navigation. The unchanged rule is that a coastal state may only restrict activities with actual impacts on the coastal state.

Does UNCLOS deal with marine protected areas (MPAs) outside of the territorial sea? In particular, would UNCLOS affect the way the United States manages its non-fisheries MPAs in the Pacific?

Ambassador Balton replied that UNCLOS permits, but does not require, the establishment of MPAs. He noted that the United States' MPAs are consistent with UNCLOS. Professor Caron and Rear Admiral Kenney pointed out that not all MPAs worldwide are consistent with UNCLOS. Rear Admiral Kenney added that it is difficult to advance U.S. interests in freedom of navigation when the IMO considers designating a Particularly Sensitive Sea Area (PSSA) when the United States is not a party to UNCLOS.

What would happen if the President issued a proclamation on the limits of our Extended Continental Shelf without going through the formal process at the UN Commission?

Ambassador Balton acknowledged that nobody knows exactly what would happen in that case. Unilateral action could prompt other unilateral actions by other nations that the United States disagrees with, or which are inconsistent with UNCLOS, so joining the Convention and following its process is preferable. Regardless, the United States is not yet prepared to announce where it believes the boundaries of its Extended Continental Shelf lie, as it will take another 3–4 years to properly gather and analyze the relevant data.

Will there ever reach a point where the United States will have missed so many opportunities to participate in dispute resolutions, or negotiations pursuant to the Convention, that it will no longer will have an interest in joining?

Ambassador Balton responded that delay does not mean it is somehow too late to join UNCLOS, but that it has real negative consequences. Even if the United States joined UNCLOS today, it would be some time before the Commission on the Limits of the Continental Shelf would make recommendations about the U.S. continental shelf.

There is currently a divide between the expectations of fishing interests and the rest of the maritime sector about the appropriate level of regulation. As security issues intensify, will fishing vessels see increased regulation?

Rear Admiral Kenney recognized that fishing vessels are the least regulated type of vessel and that the fishing industry is reluctant to submit to additional regulation. U.S. fishing vessels are required to use a tracking system that is analogous to the Automatic Identification System (AIS) that the IMO requires large shipping vessels to use. However, the information gathered on fishing vessels is only available for limited purposes. Internationally, there are no instruments in force that will place stricter tracking requirements on fishing vessels. In addition, Professor Caron remarked that marine domain awareness should be connected to fishing regulations and that law enforcement should be strengthened.

Are there specific provisions in UNCLOS about alternative energy production?

Ambassador Balton answered that alternative energy production typically occurs within states' EEZs, and thus the framework established by UNCLOS. However, he does not believe that it specifically addresses alternative energy, in part because the treaty was written before many forms of alternative offshore energy were economically viable.

How do the panelists respond to the objection that UNCLOS would infringe on U.S. sovereignty?

Professor Caron answered that, if anything, UNCLOS represents a tremendous effort to preserve sovereignty in oceans, and expressed that he does not understand the argument that UNCLOS somehow diminishes sovereignty. Ambassador Balton agreed, adding that it is important to try and understand the objections to UNCLOS. He countered the notion the United States can depend on the Navy to assert sovereignty over the ocean, explaining that the Navy is a major advocate of UNCLOS because it is more effective and efficient to use the rule of law rather than military force. Commander Kraska also noted that most materiel moves by non-naval vessels, so it is important to have a regime that prevents other countries from blocking those materiel shipments.

Non-state interests should be sure to join the broader debate about UNCLOS accession, especially on the Hill. The telecommunications, oil, and fishing industries and environmentalists should be more vocal about the need to become a party to UNCLOS.

The panelists were invited to deliver summation points and address any additional needs that UNCLOS does not meet.

- Professor Caron noted that there need to be new international efforts to address environmental concerns.
- Rear Admiral Kenney explained that UNCLOS does not cover all scenarios, but it does set up the foundation for any discussion about positive change in ocean governance.

- Commander Kraska suggested that flag state implementation of vessel standards should be a major focus at the IMO and that a strong regime could reduce the temptation to restrict freedom of navigation in the name of the environment.
- Ambassador Balton concluded the panel by stating that any sober assessment of US interests leads to the conclusion that we should become a party to UNCLOS.

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