

HJR

19

<TARGET><BILL>HJR 19</BILL><SUBJECT>HJR
19</SUBJECT><COMM>HEDT27</COMM></TARGET>

Next we have HB 160, VISITOR INDUSTRY INVESTMENT FUND

Ask OLSON? to move amendment I.1

Object for discussion

Remove objection

I.1 would insert "at least" before the required industry match of \$2.7 million.

Available for Q's on HB 160:

- Johanna Bales – Revenue, Director of Tax Division (questions only)(offnet)
- DCCED (Comm. Bell – in-person)

Representative Bob Herron

Rep. Bob.Herron@legis.state.ak.us

State Capitol • Juneau, Alaska 99801-1182
Phone: (907) 465-4942 • Fax: (907) 465-4589



House District 38
Kuskokwim & Johnson Rivers
Kuskokwim Bay & Nelson Island

Akiachak
Akiak
Atmautluak
Bethel
Cheforanak
Eek
Goodnews Bay
Kasigluk
Kipnuk
Kongiganak
Kwethluk
Kwigillingok
Lower Kalskag
Mekoryuk
Mertarvik
Napakiak
Napaskiak
Newtok
Nightmute
Nunapitchuk
Oscarville
Platinum
Quinhagak
Toksook Bay
Tuluksak
Tununak
Tuntutuliak
Upper Kalskag

Sponsor Statement

HJR 19, "Urging the United States Senate to ratify the United Nations Convention on the Law of the Sea."

HJR 19 urges the United States Senate to ratify the United Nations Convention on the Law of the Sea (UNCLOS), also known as the Law of the Sea treaty (LOST). This resolution will help Alaska's Senate delegation bring the Law of the Sea treaty to the Senate floor for a vote on ratification. Ratification of this treaty is important to protect United States interests concerning the use and development of the high seas off Alaska.

The Law of the Sea treaty governs many aspects of oceans, such as mapping, state area control, environmental control, marine scientific research, economic and commercial activities, transfer of technology and the settlement of disputes relating to ocean matters.

161 countries are signatories to the treaty, including all of the Arctic nations with the exception of the United States.

In her annual address to the Alaska State Legislature February 24, 2011, United States Senator Lisa Murkowski called on the Legislature to once again pass a resolution urging United States Senate ratification of UNCLOS. United States participation in the Law of the Sea Treaty was approved in 1994 by President Clinton after work was done on portions of the treaty to address concerns raised by President Reagan. Entities and persons on record supporting ratification are all United States Presidents since Reagan, the United States Coast Guard, the Department of the Navy, the State Department, the Joint Chiefs of Staff, AT&T, The American Petroleum Institute, The International Association of Drilling Contractors, and the National Oceans Industries Association and many others.

Under the treaty, member nations can claim an exclusive economic zone (EEZ) to 200 miles, with sovereign rights to explore, develop, and manage the resources within that zone. A claim can extend beyond the 200 mile limit if the continental shelf can be proven to extend beyond 200 miles. It is estimated that the northern seabed off Alaska and beyond the 200-mile limit could be as large as the state of California.

Key features of the Law of the Sea treaty include the following:

- Coastal States exercise sovereignty over their territorial sea which may not exceed 12 nautical miles; foreign vessels are allowed "innocent passage" through those waters;
- Ships and aircraft of all countries are allowed "transit passage" through straits used for international navigation; States bordering the straits can regulate navigational and other aspects of passage;
- Coastal States have sovereign rights in the 200-nautical mile EEZ with respect to natural resources and certain economic activities, and exercise jurisdiction over marine science research and environmental protection;
- All other States have freedom of navigation and over flight in the EEZ, as well as freedom to lay submarine cables and pipelines;
- All States enjoy the traditional freedoms of navigation, over-flight, scientific research and fishing on the high seas; they are obliged to adopt, or cooperate with other States in adopting, measures to manage and conserve living resources;
- States are bound to prevent and control marine pollution and are liable for damage caused by violation of their international obligations to combat such pollution;
- All marine scientific research in the EEZ and on the continental shelf is subject to the consent of the coastal State, but in most cases they are obliged to grant consent to other States when the research is to be conducted for peaceful purposes and fulfils specified criteria;
- States Parties are obliged to settle by peaceful means their disputes concerning the interpretation or application of the Convention;
- Disputes can be submitted to the International Tribunal for the Law of the Sea established under the Convention, to the International Court of Justice, or to arbitration. Arbitration is also available and, in certain circumstances, submission to it would be compulsory. The Tribunal has exclusive jurisdiction over deep seabed mining disputes.

The State of Alaska has much to gain from international recognition of the United States' 200 mile EEZ and extended continental shelf and much to lose if we are the only Arctic nation not to extend our ocean boundaries.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number _____
 Bill Version HJR 19
 () Publish Date _____
 Dept. Affected Legislature
 Appropriation Legislative Council
 Allocation Session Expenses
 OMB Component Number 782

HJR19-LEG-COU-3-7-2011
 Title "Support for United Nations Convention on the Law of the Sea"
 Sponsor House Special Committee on Econ Dev, Trade & Tourism
 Requester House Special Committee on Econ Dev, Trade & Tourism

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation Required	Information						
		FY 2012	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
OPERATING EXPENDITURES								
Personal Services								
Travel								
Contractual								
Supplies								
Equipment								
Grants & Claims								
Miscellaneous								
TOTAL OPERATING		0.0	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES								
-----------------------------	--	--	--	--	--	--	--	--

CHANGE IN REVENUES								
---------------------------	--	--	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts								
1003 GF Match								
1004 GF								
1005 GF/Program Receipts								
1037 GF/Mental Health								
Other Interagency Receipts								
TOTAL		0.0	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time								
Part-time								
Temporary								

Why this fiscal note differs from previous version

Initial Version

Prepared by Shane Miller, Finance Manager
 Division Administrative Services Division
 Approved by Pamela Varni, Executive Director
 Legislative Affairs Agency

Phone 465-6626
 Date/Time 3/7/11 1:04 PM
 Date 3/7/2011

Analysis

This fiscal note has zero impact on the Legislative Affairs Agency.

Coast Guard commander urges treaty ratification

THE ASSOCIATED PRESS

JUNEAU — The departing commander of the Coast Guard's 17th District, which includes Alaska, said the U.S. must ratify the Law of the Sea treaty to ensure access to and control over a rich oil and mineral bed that is getting attention from China.

Rear Admiral Christopher Colvin said the U.S. would gain exclusive control of the ocean bottom up to 440 miles off the Alaska northern coast, according to KTOO-FM.

"That's important territory on the bottom," Colvin said. "It has oil, gas and minerals that will be very valuable."

The U.S. has exclusive control of 200 miles of ocean bed

off the coast, and Colvin said Chinese mineral exploration crews are working in the area that would turn over to U.S. control if it ratified the treaty.

"(The Chinese) have an icebreaker, they're building another icebreaker, the world's largest non-nuclear icebreaker to go along with the previous one," Colvin said. "They're doing scientific research probably for energy exploration because there's lots of energy on the Chuchki Plateau."

Colvin will be transferred in May to the Coast Guard's Pacific Area Command in Alameda, Calif., where he'll be second in command of Pacific operations.

The European Union and 160 nation states have ratified

the Law of the Sea treaty. The United States is one of 18 countries that have signed, but not ratified it.

The treaty, first put forward by the United Nations in 1982, would establish a governing system for the use of the ocean for military, transportation and mineral extraction purposes.

U.S. Sen. Lisa Murkowski, who is pushing for ratification of the treaty, said she has faced questions that first surfaced during the administration of President Ronald Reagan concerning the U.S. ceding its sovereignty by ratifying the treaty.

"They ask, what does this do to America's sovereignty?" Murkowski said. "By failing to ratify the treaty, by failing to be at the table, we give up that

sovereignty ourselves."

Last week, Murkowski told the state Legislature she'll push for ratification of the Law of the Sea treaty this spring or summer. She said Senate Foreign Relations Committee Chair John Kerry and President Barack Obama are behind the measure, but it faces opposition in Congress.

Murkowski also asked U.S. Department of Homeland Security Secretary Janet Napolitano for an update on the Coast Guard's icebreaker fleet.

Obama's budget proposal calls for decommissioning the icebreaker the Polar Sea, which would leave the U.S. with only one icebreaker for the next two years — the Healy, which can't break heavy ice.

I
t
Co
inc
me
to
giv
com
mo
es,
to
be
fic
dri
\$5
Mo
of
ne
be
Co
Bu
Co
to
he
is

**PREPARED STATEMENT OF REAR ADMIRAL CHRISTOPHER C. COLVIN,
COMMANDER, SEVENTEENTH COAST GUARD DISTRICT, U.S. COAST GUARD,
DEPARTMENT OF HOMELAND SECURITY**

Good morning, Mr. Chairman and distinguished members of the Committee. I am Rear Admiral Christopher C. Colvin, Commander of the Seventeenth Coast Guard District. It is an honor to appear before you today to provide you information about how accession to the United Nations Convention on the Law of the Sea would benefit the United States Coast Guard in the performance of its missions and in protecting the American people.

In my current position, I am responsible for directing Coast Guard operations, including search and rescue, maritime safety, environmental protection, fisheries law enforcement and military readiness, in Alaska and portions of the North Pacific Ocean, the Arctic Ocean, and the Bering Sea. Units under my command patrol over 3.8 million square miles of ocean and 33,000 miles of coastline. Coast Guard aircraft and vessels monitor more than 950,000 square miles off the Alaskan coast to enforce U.S. fisheries laws. The Coast Guard patrols an even larger area of the North Pacific to stop large scale, high seas drift netting and other illegal fishing practices. I also consider maritime safety and environmental protection to be priority missions. Over 15 percent of the oil that America produces each day transships through the Port of Valdez. Alaska is the world's second most popular cruise destination, bringing nearly one million passengers to its waters every year. The safety of these ships and passengers and protection of the waters in and around Alaska are critical missions.

Due to my time in Service, I have become one of the most experienced mariners in the Coast Guard. I have been assigned to six cutters and have commanded three; the last of which included conducting combat operations in the Middle East in support of Operation Iraqi Freedom. In general, I have spent about half of my afloat career conducting fisheries patrols in Alaska and the other half conducting drug patrols in the Caribbean. I once calculated that I've spent about three years of my life on patrol in the Bering Sea. I have also served as the Chief of Staff and Chief of Operations of the Coast Guard Atlantic Area. Just before my present assignment, I served as the Deputy Director for Operations at the U.S. Northern Command.

The breadth of these assignments—encompassing Coast Guard operations in the Caribbean Sea, the Gulf of Mexico, the Bering Sea, and the Atlantic, Pacific, and Arctic Oceans—provides me with the experience necessary to comment on the many beneficial effects that becoming party to the Law of the Sea Convention would have on U.S. Coast Guard missions.

The Law of the Sea Convention created a comprehensive legal regime that provides the Coast Guard with the legal certainty and stability to exercise its navigational rights and freedoms, to protect fisheries, to control marine pollution, and to maintain a legal order of the oceans against criminals and terrorists. From the Coast Guard perspective, public order of the oceans is best established and maintained by a stable, universally accepted law reflective of U.S. national interest. The navigation provisions of the Law of the Sea Treaty are reflective of customary international law.

One of the core foundations of the Convention was codification of rights and responsibilities of states as port States, flag States, and coastal States. It clarifies and delimits seaward territorial claims by coastal States to ensure navigational freedoms while at the same time recognizing the U.S.'s interest as a coastal State with sovereignty to protect its living and non-living marine resources. The result is an appropriate balance between the exclusive interests of coastal States and the interests of maritime States. It limits the maximum breadth of the territorial sea that a coastal State could claim to 12 nautical miles. Our fishery conservation management interests, as reflected in the Magnuson-Stevens Fishery Conservation Management Act of 1977, were instrumental in the international development of the concept of the 200-nautical mile Exclusive Economic Zone (EEZ). In the EEZ, all nations enjoy freedoms of navigation and overflight as on the high seas, while the coastal State possesses sovereign rights to protect and exploit the living and non-living marine resources. The United States, with the world's largest and richest EEZ, is perhaps the greatest beneficiary of this concept.

The Convention also calls for international cooperation among States in preserving the world's high-seas fisheries. An example of such cooperation is the UN ban on high seas drift net fishing and other illegal fishing practices. Each year, the Coast Guard patrols the North Pacific to conduct boardings and inspections under the Convention on the Conservation and Management

of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean. Over two dozen nations participate in this effort, which is a direct outcome of the Law of the Sea Convention.

The Convention also provides a comprehensive framework for the prevention, reduction, and control of maritime pollution. The Coast Guard conducts a wide-ranging port-state-control program to purge our waters of substandard ships and is assisting other nations in doing the same. The Convention carefully balances the rights of coastal States to adopt certain measures to protect the marine environment adjacent to their shores with the right of a flag State to set and enforce standards and requirements concerning the operation of its vessels. Moreover, it does all this without unduly burdening international maritime navigation and sea-borne trade.

The Coast Guard already relies heavily on the navigational freedoms and overflight rights codified in the Law of the Sea Convention. These protections allow the use of the world's oceans to meet changing national security requirements. In this regard, worldwide mobility requires undisputed access through international straits and archipelagic waters. The Convention ensures that our Coast Guard cutters will have their sovereign immunity protected wherever in the world they may be operating. In addition, the Convention limits a nation's territorial sea to no more than 12 nautical miles, beyond which all nations enjoy a high seas navigation regime that includes the freedom to engage in law enforcement activities. The Convention codifies the right to operate freely beyond a nation's territorial sea and protects this right by limiting excessive maritime claims that can have the effect of creating maritime safe havens for drug traffickers and other criminals. Each year, Coast Guard maritime interdiction operations occurring on international waters result in the seizure of tens of thousands of pounds of cocaine, dozens of vessels, and hundreds of arrests. Most of these seizures take place on distant maritime transit routes far from our shores. However, during bi-lateral negotiations, several nations have, in the past, questioned our authority to contest some of their excessive maritime claims simply because we have yet to become party to the Convention.

The Convention contains effective provisions for dealing with illegal activities at sea. Article 108 of the Convention requires international cooperation in the suppression of the transport of illegal drugs. The United Nations Convention against Illicit Traffic in Narcotic Drugs and

Psychotropic Substances, also known as the 1988 Vienna Convention, is a fine example of this. The United States has been at the forefront of international cooperation in the war against illegal drugs, and the use of ocean space to transport them. We have aggressively pursued bilateral agreements with many nations that border drug transit zones as well as States with large registries to facilitate the effective interdiction of vessels suspected of transporting illegal drugs and the eventual prosecution of the drug traffickers. During discussions with these nations, we emphasize the Convention's call for cooperation and premise each agreement on concepts codified within the Convention. Articles 100-107 detail the international legal principles dealing with acts of piracy at sea. Other provisions prohibit the transport of slaves, the operation of stateless vessels, and other activities in violation of international norms.

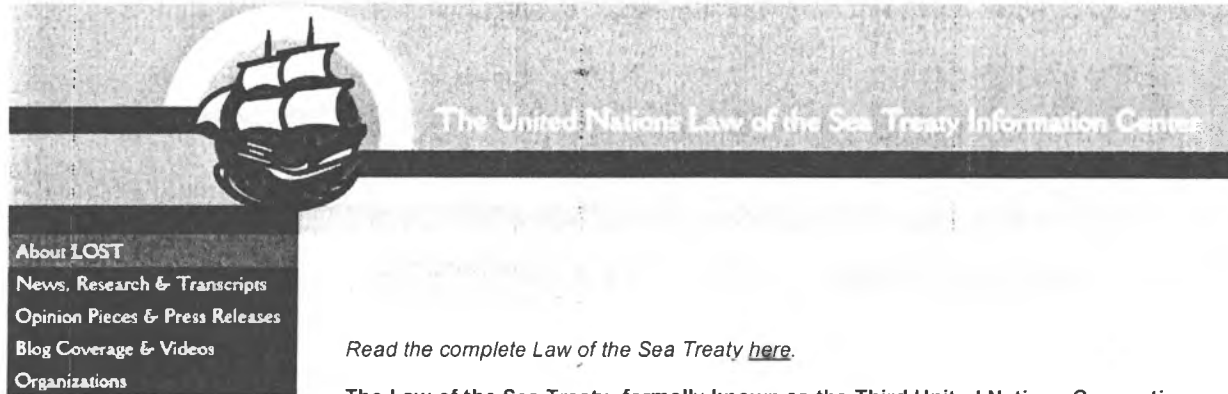
The Convention also contains provisions that enhance our ability to interdict foreign-flagged vessels off our own coasts. The Convention codifies a coastal nation's right to establish a 12-nautical mile contiguous zone just beyond the territorial sea, where it may exercise control to prevent and punish infringements of its customs, immigration, fiscal, and sanitary laws. Adoption by the U.S. of an expanded contiguous zone has doubled the area where we can exercise these increased authorities. The benefits of the contiguous zone against traffickers surreptitiously shipping their illicit products to U.S. shores are clear.

As the lead Federal agency for maritime safety and security, the Coast Guard believes that U.S. accession to the 1982 UN Convention on the Law of the Sea would benefit the Coast Guard in its efforts to improve maritime safety and ensure the security of our maritime borders, thus promoting homeland security. The Convention recognizes that various UN subsidiary bodies may serve as competent international organizations for the further development of certain aspects of the law of the sea. The International Maritime Organization has always been the recognized competent international organization for maritime safety and marine environmental protection. More recently, it has assumed a similar role in port facility and vessel security. The Coast Guard has worked at the IMO to amend the SOLAS Convention for vessel and port facility security, to enhance maritime domain awareness through Long Range Identification and Tracking (LRIT) of vessels bound for U.S. ports and waters, and to increase the operational effectiveness of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

(SUA Convention). The negotiations necessary to support efforts such as these take place in the context of the overwhelming number of nations at IMO being parties to the Law of the Sea Convention. Because of this fact, the Law of the Sea Convention provides the framework for the discussions and agreements. Although we have enjoyed success in the international security agreements so far, those negotiations have not always been easy. Frankly, the fact that the United States is not a party to the Law of the Sea Convention, when the overwhelming number of our international partners are parties, has repeatedly placed us in a difficult negotiating position at IMO and other forums.

In summation, while I am not in a position to express an Administration or Coast Guard position on the specific Resolution that this committee is considering, I am of the opinion that the provisions of the Law of the Sea Convention fairly balance the interests of coastal nations to control activities off their coasts with the freedom of navigation and overflight rights of all nations. The practical effect for the United States is to control economic activities within the world's largest Exclusive Economic Zone, while enabling our forces and merchant vessels to freely operate in every part of the globe. The Convention guarantees our military and transportation industries critical navigation and overflight rights. And U.S. fishermen enjoy exclusive fishing out to 200 nautical miles. In the view of the Coast Guard, the Convention for the Law of the Sea greatly improves our ability to protect the American public as well as our efforts to manage our ocean resources and to protect the marine environment. Becoming a party to the Convention would significantly enhance our global position in maritime affairs.

Thank you for the opportunity to make this informational appearance before you today.



Read the complete Law of the Sea Treaty [here](#).

The Law of the Sea Treaty, formally known as the Third United Nations Convention on the Law of the Sea, or UNCLOS III, was adopted in 1982. Its purpose is to establish a comprehensive set of rules governing the oceans and to replace previous U.N. Conventions on the Law of the Sea, one in 1958 (UNCLOS I) and another in 1960 (UNCLOS II), that were believed to be inadequate.

Negotiated in the 1970s, the treaty was heavily influenced by the "New International Economic Order," a set of economic principles first formally advanced at the United Nations Conference on Trade and Development (UNCTAD). That agenda called for "fairer" terms of trade and development financing for the so-called under-developed and developing nations.

Another way the New International Economic Order has been described is "redistributionist."

The Law of the Sea Treaty calls for technology transfers and wealth transfers from developed to undeveloped nations. It also requires parties to the treaty to adopt regulations and laws to control pollution of the marine environment. Such provisions were among the reasons President Ronald Reagan rejected the treaty in 1982. As Edwin Meese, U.S. Attorney General under President Reagan, explained recently, "...it was out of step with the concepts of economic liberty and free enterprise that Ronald Reagan was to inspire throughout the world."

In addition to the economic provisions, the treaty also establishes specific jurisdictional limits on the ocean area that countries may claim, including a 12-mile territorial sea limit and a 200-mile exclusive economic zone limit.

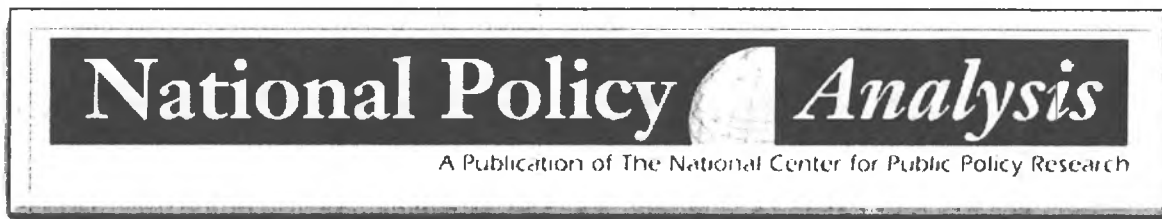
Some proponents of the treaty believe that the treaty will establish a system of property rights for mineral extraction in deep sea beds, making the investment in such ventures more attractive.

Notwithstanding concerns raised about the Law of the Sea Treaty - and there have been many - the U.S. Senate Foreign Relations Committee recommended U.S. accession to the treaty in a unanimous vote in March 2004.

Six years later, a vote of the entire U.S. Senate has yet to be scheduled.

This website has been established by the National Center for Public Policy Research to provide news, information and resources on the United Nations Law of the Sea Treaty. Links to external websites are provided for informational purposes only, and no endorsement of their opinions or content by The National Center for Public Policy Research is intended or should be implied.

Copyright 2010 [National Center for Public Policy Research](#)
 501 Capitol Court, NE Washington DC 20002
 (202) 543-4110 • www.nationalcenter.org • info@nationalcenter.org
[Contributions](#) are tax-deductible



542

August 2006

Ratification of the Law of the Sea Treaty: A Not-So-Innocent Passage

by David A. Ridenour

The "right of innocent passage" is the right of any nation's ships to traverse continuously and expeditiously through the territorial waters of a coastal nation, subject to certain conditions.¹ Under the Law of the Sea Treaty, such passage is conditioned on passing in a manner that isn't threatening to "sovereignty, territorial integrity or political independence" or the "good order and security" of that nation.

By this definition, if the Law of the Sea Treaty was a ship, it would fail to qualify.

That's because there are serious flaws in the treaty that - if U.S. ratified the treaty - could place U.S. sovereignty, security and political independence in doubt.

This analysis of the Law of the Sea Treaty will focus on the threats to political independence, particularly as they relate to environmental policy, and to threats to security.

Background

The Law of the Sea Treaty, formally known as the Third United Nations Convention on the Law of the Sea, or UNCLOS III, was adopted in 1982. Its purpose is to establish a comprehensive set of rules governing the oceans and to replace previous U.N. Conventions on the Law of the Sea, one in 1958 (UNCLOS I) and another in 1960 (UNCLOS II), that were believed to be inadequate.²

Negotiated in the 1970s, the treaty was heavily influenced by the "New International Economic Order," a set of economic principles first formally advanced at the United Nations Conference on Trade and Development (UNCTAD). That agenda called for "fairer" terms of trade and development

financing for the so-called under-developed and developing nations.³

Another way the New International Economic Order has been described is "redistributionist."

The Law of the Sea Treaty calls for technology transfers and wealth transfers from developed to undeveloped nations.⁴ It also requires parties to the treaty to adopt regulations and laws to control pollution of the marine environment. Such provisions were among the reasons President Ronald Reagan rejected the treaty in 1982. As Edwin Meese, U.S. Attorney General under President Reagan, explained recently, "...it was out of step with the concepts of economic liberty and free enterprise that Ronald Reagan was to inspire throughout the world."⁵

In addition to the economic provisions, the treaty also establishes specific jurisdictional limits on the ocean area that countries may claim, including a 12-mile territorial sea limit and a 200-mile exclusive economic zone limit.⁶

Some proponents of the treaty believe that the treaty will establish a system of property rights for mineral extraction in deep sea beds, making the investment in such ventures more attractive.⁷

Notwithstanding concerns raised about the Law of the Sea Treaty - and there have been many - the U.S. Senate Foreign Relations Committee recommended U.S. accession to the treaty in a unanimous vote in March 2004.

More than two years later, a vote of the entire U.S. Senate has yet to be scheduled.

Defense and Security Concerns

One of the concerns raised by critics of the Law of the Sea Treaty is that it could be used to sharply limit U.S. military operations. Among the examples they cite is Article 20, which stipulates: "In the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag."⁸

Proponents of the treaty counter that this provision merely establishes the conditions for invoking a "right of innocent passage" in the territorial waters of another nation.⁹ The "right of innocent passage" is the right of any nation's ships to traverse continuously and expeditiously through the territorial waters of a coastal nation, subject to certain conditions.¹⁰

Because Article 20 doesn't mention "innocent passage," this provision may provide opponents of U.S. military operations a pretext - albeit a fairly weak one - for claiming that the surfacing requirement applies to all U.S. submarines operating in territorial waters. Such claims would be unlikely to prevail, as it is fairly clear, based on the context, that this provision deals with innocent passage.

Advocates of the treaty also argue that Law of the Sea Treaty merely maintains the status quo for submarines passing through territorial waters because the United States is already a party to the 1958 Convention on the Territorial Sea and the Contiguous Zone which, they contend, contains similar language.¹¹ U.S. submarines have traversed territorial waters while submerged over the past 48 years, they say, largely unaffected by the Territorial Sea Convention's surfacing requirement.

Where submarines are concerned, they appear to be correct.

But Article 20 also adds something completely new: The requirement that "other underwater vehicles" navigate on the surface.¹² The surfacing requirement would thus presumably apply to Autonomous Underwater Vehicles (AUVs) and Remotely Operated Underwater Vehicles (ROVs), among others (including, presumably, the next generation of such vessels) for the first time.

AUVs, unmanned underwater drones, and ROVs, underwater vehicles controlled by operators at the surface, have numerous military applications, including mine detection and neutralization, surveillance and inspection of underwater installations and topography, among others.¹³

Some of these activities are otherwise consistent with the Law of the Sea Treaty's definition of "innocent passage." An AUV or ROV used to detect mines to protect a ship exercising its right of innocent passage, for example, appears to meet the requirement that it engage only in activities with "direct bearing on passage." But because these vehicles must be submerged to be used effectively they would be considered "prejudicial to the peace, good order and security of the state" by doing so, even though advancing the peace, good order and security is precisely the purpose for which they would be used.

If the U.S. ratifies the Law of the Sea Treaty, the use of AUVs and ROVs for these and other purposes could be reduced.

Opponents of the treaty also contend that it could inhibit the U.S.'s ability to pursue international terrorists and prevent the transportation of weapons of mass destruction on the sea.¹⁴ They appear to be correct.

Article 110 of the Law of the Sea Treaty specifies military ships are "not justified in boarding [a foreign ship] unless there is reasonable grounds for suspecting that: (a) the ship is engaged in piracy; (b) the ship is engaged in the slave trade; (c) the ship is engaged in unauthorized broadcasting...; (d) the ship is without nationality or (e) ...the ship is, in reality, of the same nationality as the warship." Boarding of ships involved in the illicit drug trade is also permitted.¹⁵

Note that boarding of ships engaged in "unauthorized broadcasts" is considered to be justified, but boarding ships carrying terrorists or weapons of mass destruction is not.

Unauthorized broadcasting, by the way, is not only a justification to board, but for certain countries, a requirement under the treaty.¹⁶ Policymakers

would be wise to remember that the U.S. has itself engaged in "unauthorized broadcasts," using such vessels as the Coastal Messenger, a mobile transmitting station for Voice of America broadcasts behind the Iron Curtain during the 1950s and 1960s.¹⁷

The treaty does permit states to pursue, apprehend and board ships for violation of other laws and regulations, too, but only if the state is in "hot pursuit" of the ship. To qualify as "hot pursuit," such pursuit must begin in the "internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone" if the pursuit has been uninterrupted.¹⁸

States that detain ships for reasons or by means other than those prescribed in the Law of the Sea Treaty could find their actions subject to review and judgment by the International Tribunal of the Law of the Sea (ITLOS) in Hamburg, Germany.

The Law of the Sea Treaty normally gives states the option, by mutual consent, of choosing between ITLOS, the International Court of Justice or "arbitral tribunals" to settle their disputes. When agreement between the states involved in the dispute can not be reached, an arbitral tribunal would be given jurisdiction in the case.

When provisional measures are sought, however - as they likely would be when ships are detained - the rules are different. Provisional measures are akin to temporary injunctions - orders requiring one to do something or cease doing something - in the interest of preventing irreparable harm. Article 290, paragraph 5 of the Law of the Sea Treaty specifies that ITLOS would automatically adjudicate such disputes when states can not reach agreement on the method of adjudication or arbitration "within two weeks from the date of the request for provisional measures."¹⁹

As Jeremy Rabkin, professor of government at Cornell University, has noted: "The only important category of dispute where one party can force another to answer before ITLOS is when a ship has been detained on the high seas and the complaining party seeks immediate release."²⁰

The prospects that disputes such as these taken to ITLOS would be ruled in the U.S.'s favor are poor. Many ITLOS judges, certainly a clear majority, are from countries that have either been openly hostile to the United States or are at best unreliable allies. Among the countries represented on ITLOS are South Africa, China, Russia, Tanzania, Lebanon, Brazil, Argentina and France.²¹

ITLOS certainly could complicate the U.S.'s efforts to interdict terrorists and weapons of mass destruction.

For example, if the U.S. chose to act on intelligence information that a foreign-flagged ship (perhaps flying the flag of Syria, Iran or North Korea) was carrying terrorists and boarded the ship, the U.S. could expect to have to answer to ITLOS.

Finally, opponents of the Law of the Sea Treaty contend that Article 88 of the treaty, which stipulates that "the high seas shall be reserved for peaceful purposes" together with Article 301's requirement to refrain from "any threat or use of force against the territorial integrity or political independence of any state" have the potential of unduly constraining U.S. defense operations on the high seas.²²

Proponents counter that warships of all major powers freely travel through the high seas even though the treaty is already in force for nations that have ratified it,²³ which, as of this writing, stood at 149 nations.²⁴ But the U.S.'s circumstances are very different than those of the 149 parties to the treaty. As the world's only remaining superpower, the U.S. is the only nation capable of extended, extensive long-range maritime operations.²⁵ What's more, the U.S. has military obligations that other nations simply do not. Many of the parties to the treaty²⁶ don't have organized navies. Others don't have significant ones.²⁷ Consequently, most parties to the treaty have less interest in the military implications of Article 88 than does the United States. The ratification of the treaty by these nations therefore should not be the yardstick by which the risks to U.S. military interests are measured.

Supporters of the treaty also argue that Article 301 would have little impact on U.S. military operations as the provision is the same as Article 2(4) of the U.N. Charter.²⁸ Although these two provisions are similar, there are some key differences.

For one thing, the bodies responsible for enforcement of the Law of the Sea Treaty's Article 301 and the U.N. Charter's Article 2(4) are different.

Under the U.N. Charter, the Security Council is the principal enforcement body. The United States has a permanent seat on the security council and, as such, has veto powers. Under the Law of the Sea Treaty, enforcement responsibilities fall to such bodies as ITLOS, which, as noted earlier, is unlikely to be favorable to U.S. positions, and the International Seabed Authority (ISA), with a similarly unfavorable composition. The ISA's executive body, the Council, is composed of representatives of 36 countries, the majority of which can not be counted on to support U.S. positions. Its membership includes representatives from the Sudan, Malaysia, China, Indonesia, South Africa, Namibia, Nigeria, Kenya, Guyana, Argentina, Russia and Myanmar (name given to Burma by its military junta), among others.²⁹

Article 301 of the Law of the Sea Treaty also has wording slightly different than the U.N. Charter's Article 2(4), replacing the more objective phrase "shall refrain from the threat" with a more subjective "shall refrain from any threat." This opens the possibility that U.S. military operations on the high seas could be inhibited when states merely "feel" threatened by them.

It is in this context that provisions such as Article 88 take on greater significance.

The Senate Foreign Relations Committee determined that the risks to U.S. military activity were sufficient enough to address them in its Committee Report. Among other things, it specified that the Senate's advice and consent for U.S. accession to the Law of the Sea Treaty be subject to the

understanding "that nothing in the Convention referring to 'peaceful purposes' impairs the inherent right of individual or collective self-defense or rights during armed conflict."³⁰

Unfortunately, the Committee did not also specify that the Senate's advice and consent to be subject to the understanding that the United States has the inherent right to defend itself during peacetime through pre-emptive action. Pre-emptive action may be required, for example, if the U.S. learns through reliable intelligence that a specific ship is carrying terrorists, weapons of mass destruction or both.

Even with such conditions, the U.S. would likely gain little advantage.

That's because Article 309 of the treaty specifies that no "reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention." While states are permitted to declare exceptions pertaining to military activities when ratifying the treaty under Article 298, such declarations would only free States from the dispute resolution process outlined in Articles 286-296. They would still be obligated to the dispute resolution requirements contained in Articles 279-285.³¹

Environmental Concerns

When the energy industry and environmentalists agree on an issue, one of the two likely doesn't fully comprehend the implications...

...and it's probably not the environmentalists.

Ratification of the Law of the Sea Treaty is supported by much of the energy industry, including "most of its major" trade associations³² and by leading environmental organizations, including Greenpeace, the Natural Resources Defense Council, Environmental Defense and World Wildlife Fund, among others.³³

The energy and mining sectors believe the treaty will help move deep sea mining and oil exploration forward by establishing internationally-recognized title to minerals.³⁴

So why would so many environmental groups with a history of opposing oil and gas exploration endorse this idea?

Answer: They wouldn't.

Opponents of the Law of the Treaty believe that environmentalists are using the treaty as a vehicle to achieve through international institutions that which they can't achieve through domestic ones - namely, more onerous environmental standards. This is consistent with the statements and actions of environmental groups to-date. Greenpeace, for example, has said, "The benefits of the U.N. Convention on the Law of the Sea are substantial, including its basic duties for states to protect and preserve the marine environment and to conserve marine living species."³⁵ The Natural

Resource Defense Council (NRDC), for its part, cited the Law of the Sea Treaty's environmental provisions as an argument in its challenge of the Navy's use of so-called "intense active sonar" several years ago. The NRDC said, in part, "The United Nations Law of the Sea Convention... requires States 'to assess the potential effects... on marine environment'... of systems such as high intensity active sonar, and to take all measures 'necessary to prevent, reduce and control pollution of the marine environment from any source'... The danger to marine life from... sonar... is clearly documented." The Navy ultimately agreed to scale back its use of this sonar technology.

Ratification of the Law of the Sea Treaty appears to carry with it the risk that the United States - and other parties to the treaty - may lose control of their environmental laws.

Nations have already attempted to use the Law of the Sea Treaty's environmental provisions to affect the environmental policies of others. In 1999, Australia and New Zealand appealed to the International Tribunal of the Law of the Sea (ITLOS) to shut down Japan's experimental southern blue fin tuna fishing program, citing Articles 64 and 116-119. Although the Tribunal ultimately decided that it lacked jurisdiction in the case, Australia and New Zealand did gain a temporary injunction on the program.³⁶ More recently, Ireland sought ITLOS's help in forcing the United Kingdom to abandon its planned opening of the Sellafield MOX plant, a nuclear fuel reprocessing plant in northern eastern England, arguing that it would contribute to pollution of the North Sea. Although ITLOS did not rule in Ireland's favor, it ordered both Ireland and the United Kingdom to enter into consultations.³⁷

In a great ironic twist, the Law of the Sea Treaty - supported by many in the energy sector - may give environmentalists a blunt instrument to use against the energy industry.

Article 212 of the treaty states, in part, "States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere... States, acting especially through competent international organizations... shall endeavor to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution."³⁸ This sounds like a directive to impose Kyoto Protocol-style regulations designed to reduce state emissions of greenhouse gases. These gases are emitted through the use of the very products the energy industry sells.

Backdoor implementation of the Kyoto Protocol might be advanced by arguing that U.S.'s anthropogenic greenhouse gas emissions (one-quarter of such emissions world-wide) are warming the planet, causing irreparable harm to coral reefs, home to the world's most biologically-diverse marine ecosystems.

Alternatively, they could argue that sea levels are rising due to U.S.-induced climate change, causing beach erosion in such countries as the Maldives, Comoros or the Seychelles. To bolster their case, they might cite Article 194 (2) of the treaty which states: "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as

not to cause damage by pollution to other States and their environment."

Some environmental advocates clearly believe the Law of the Sea Treaty can be used for such purposes.

Writing for *Our Planet*, a publication of the United Nations Environment Programme, Greenpeace International Executive Director Thilo Bode noted in 2000:

Global warming is likely to have a big impact at sea... Sea levels have risen by an estimated 10-25 centimetres over the last century, and as this continues the waters will cover land and coastal habitats in many countries... Solving the environmental problems facing the oceans... is one of the greatest challenges facing humankind... No single nation or region can do this alone: it will require comprehensive international cooperation as required by the United Nations Convention on the Law of the Sea."³⁹

Opponents of the Law of the Sea Treaty also fear that, should the U.S. ratify the treaty, environmentalists will have an additional avenue for pursuing environmental law suits in U.S. courts. As the U.S. Supreme Court has stated, "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for determination." This seems to leave the door wide open for the use of international law in U.S. courts.⁴⁰ Further, as Frederic L. Kirgis, writing for the American Society of International Law, notes, "Provisions in treaties and other international agreements are given effect as law in domestic courts of the United States... if they are 'self-executing'... the primary consideration is intent... that the provision become effective as judicially-enforceable domestic law without implementing legislation."⁴¹

Whether the Law of the Sea Treaty or specific provisions of the treaty meet this test will undoubtedly be subject of some debate.

Conclusion

Sufficient concerns about the implications for U.S. national security and U.S. environmental policy exist that the United States should be wary of acceding to the Law of the Sea Treaty.

These concerns, in summary, include:

- * Article 20 would extend the surfacing requirement to vessels not covered under previous conventions, including those that would otherwise qualify for innocent passage such as unmanned vessels used for mine detection and other purposes.
- * The Law of the Sea Treaty would impede the U.S.'s ability to capture international terrorists and confiscate weapons of mass

destruction through detention of ships on the high seas. The treaty specifies that the boarding of ship is not justified except when a ship is believed to be engaged in piracy, unauthorized broadcasting, drug trafficking, is obscuring its nationality or shows no nationality. Detention of ships in a manner other than those prescribed in the treaty would subject such actions to the judgment of the International Tribunal of the Law of the Sea in Hamburg, Germany.

* Article 88's stipulation that "the high seas shall be reserved for peaceful purposes" and Article 301's requirement that parties to the convention refrain from "any threat or use of force against the territorial integrity or political independence of any state" may be used to impede U.S. military operations at sea. The Treaty's opt-out provisions for military activities would only free the U.S. from the requirement to participate in a specific dispute resolution process, not dispute resolution itself.

* The marine conservation provisions of the treaty could be used by activists to achieve through international institutions that which they haven't been able to achieve through domestic legislation.

* The conservation provisions may give environmental organizations a new avenue to pursue environmental lawsuits in U.S. courts.

* The conservation provisions may provide the means for forcing the U.S. to adopt the Kyoto Protocol or similar emissions-control schemes - schemes the U.S. has rejected.

#

David Ridenour is vice president of the National Center for Public Policy Research. Comments may be sent to dridenour@nationalcenter.org.

Footnotes:

1 Kissi Agyeberg, "Theory in Search of Practice: The Right of Innocent Passage in the Territorial Sea," Cornell Law School, Ithaca, New York, 2005.

2 David B. Sandalow, "Law of the Sea Convention: Should the U.S. Join?" The Brookings Institution, Washington, D.C., August 2004.

3 Robert Looney, "New International Economic Order," Prepared for the Routledge Encyclopedia of

International Political Economy, 1999.

4 Doug Bandow, "Sink the Law of the Sea Treaty," Cato Institute, Washington, D.C., March 12, 2004.

5 Edwin Meese III, "Reagan Would Still Oppose Law of the Sea Treaty," Human Events, April 25, 2005.

6 Carrie E. Donovan, "The Law of the Sea Treaty," The Heritage Foundation, Washington, D.C., April 2, 2004.

7 David B. Sandalow, "Law of the Sea Convention: Should the U.S. Join?," The Brookings Institution, Washington, D.C., August 2004.

8 United Nations Convention on the Law of the Sea, 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea.

9 Sandalow.

10 Agyeberg.

11 Testimony of John F. Turner, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, U.S. Senate Environment and Public Works Committee, Washington, D.C., March 23, 2004.

12 Convention on the Territorial Sea and The Contiguous Zone, April 29, 1958.

13 "Design Report: Littoral Warfare Submarine, VT Total Ship Systems Engineering," Aerospace and Ocean Engineering College of Engineering, Virginia Polytechnic Institute, Blacksburg, Virginia.

14 Jeremy Rabkin, "Law of the Sea Treaty: A Bad Deal for America," Competitive Enterprise Institute, Washington, D.C., June 1, 2006.

15 United Nations Convention on the Law of the Sea, 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea.

16 Ibid.

17 "Courier, 1952," U.S. Coast Guard.

18 United Nations Convention on the Law of the Sea, 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea.

19 Ibid.

20 Rabkin.

21 International Tribunal of the Law of the Sea, October 1, 2005.

22 Frank Gaffney, "LOST at Sea," Jewish World Review, May 5, 2004.

23 John Norton Moore and William A. Schachtel, Jr., "The Senate Should Give Immediate Advice and Consent to the Law of the Sea Convention: Why the Critics Are Wrong," Columbia Journal of International Affairs, Vol. 59, Issue 1.

24 "Chronological Lists of Ratifications of, Accessions to and Successions to the Convention and the Related Agreements as of April 28, 2006," Division for Ocean and the Law of the Sea, United Nations.

25 Force Sustainment from the Sea," Policy Paper, U.S. Department of the Navy, Washington, D.C.

26 Chronological Lists of Ratifications of, Accessions to and Successions to the Convention and the Related Agreements as of April 28, 2006," Division for Ocean and the Law of the Sea, United Nations.

27 Andrew Toppan, Hazegray World Navies Today.

28 Transcript of panel discussion, "Should the U.S. Ratify the Law of the Sea Treaty?" Brookings Institution, Washington, D.C., May 4, 2004.

29 "Composition of the Council 2005-2008," International Seabed Authority, Kingston, Jamaica.

30 "U.N. Convention on the Law of the Sea Report," U.S. Senate Foreign Relations Committee, Washington, D.C., March 11, 2004.

- 31 United Nations Convention on the Law of the Sea, 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea.
- 32 Paul L. Kelly, "American Security Interest and the Law of the Sea: Energy Security."
- 33 "The United States and the U.N. Convention on the Law of the Sea (UNCLOS): Full Steam Ahead," Citizens for Global Solutions, Washington, D.C., March 9, 2005.
- 34 Moore and Schachte.
- 35 "Statement in Recognition of the International Year of the Ocean," Greenpeace, Amsterdam, The Netherlands, 1998.
- 36 "Phillipe Sands, Unilateralism, Values and International Law," 2000.
- 37 International Tribunal for the Law of the Sea (ITLOS): MOX Plant Case (Ireland v. United Kingdom) - Order Related to Request for Provisional Measures, No. 10 (December 3, 2001), American Society of International Law, Washington, D.C.
- 38 United Nations Convention on the Law of the Sea, 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea.
- 39 Thilo Bode, "Sea Changes," Our Planet (United Nations Environment Programme), November 2000.
- 40 Frederic L. Kirgis, "Is Foreign Law International Law," The American Society of International Law, Washington, D.C., October 31, 2005.
- 41 Frederic L. Kirgis, "International Agreements and U.S. Law," The American Society of International Law, Washington, D.C., May 1997.

[Donate](#) | [Subscribe](#) | [Search](#) | [About Us](#) | [What's New](#) | [Blog](#) | [Home](#)

The National Center for Public Policy Research
501 Capitol Court, N.E.
Washington, D.C. 20002
(202) 543-4110
Fax (202) 543-5975
E-Mail: info@nationalcenter.org
Web: www.nationalcenter.org

Paper Promises vs. Real Costs

by Doug Bandow



Doug Bandow is a senior fellow at the Cato Institute. He was a special assistant to President Reagan and a former deputy representative to the Third United Nations Conference on the Law of the Sea and is the author and editor of several books, including *Foreign Follies: America's New Global Empire* (Xulon Press).

Added to *cato.org* on April 22, 2009

This article appeared in the Washington Times on April 22, 2009.

The return of piracy to the high seas demonstrates the limits of international law. The international community might agree that it is wrong to seize ships for ransom, but a few thugs with guns in Somalia beg to differ. Paper guarantees cannot stop seajackings.

Yet Secretary of State Hillary Rodham Clinton wants Congress to ratify the Law of the Sea Treaty, the ultimate in paper guarantees. LOST, which essentially creates a second United Nations, is an artifact of the collectivist New International Economic Order popular in the 1970s, but it is being resold as a guarantor of freedom of the seas.

The convention obviously doesn't do anything to prevent piracy. Moreover, the recent contretemps between the U.S. and Chinese navies demonstrates that LOST's navigational guarantees are no more certain.

The USNS Impeccable, an unarmed spy ship, was operating 75 miles from China's Hainan Island. Chinese vessels harassed the U.S. vessel and ordered it to leave, causing the U.S. Navy to send in a supporting destroyer.

Territorial waters extend just 12 nautical miles, but LOST empowers nations to exercise control over resources in the 200-mile Exclusive Economic Zone. Washington contends that U.S. ships are allowed to conduct activities "in waters beyond the territorial sea of another state without prior notification or consent," according to Defense Department spokesman Stewart Upton. Beijing disagrees.

Washington would seem to have the better argument, though China's contention that peaceful uses of the ocean do not include spying is plausible. Alas, LOST fails to offer the clear, unambiguous protection of navigational freedom as claimed by its proponents.

LOST largely codifies customary international law, which favors free transit. However, the treaty only offers a paper guarantee. Even if LOST recognizes the Impeccable's right to spy, it offers no practical protection of that right.

If China - or Brazil, Malaysia or Pakistan, which also purport to forbid intelligence gathering within their exclusive zones - believes it to be in its interest and ability to prevent foreign passage, it won't spend a lot of time parsing ambiguous LOST provisions before acting. Geopolitical interest and military capability, not juridical technicalities, will triumph.

The problem is likely to grow as Beijing develops a blue-water navy. Last month, Director of National Intelligence Dennis C. Blair told the Senate Armed Services Committee: "In the past several years,

they have become more aggressive in asserting claims for the [exclusive zones] which are excessive under almost any international code." Despite China's adherence to LOST.

Although the treaty's navigational benefits are more theoretical than real, LOST has significant downsides. Most important, the so-called Part XI governing seabed mining was amended in 1994, but the result is only less bad.

LOST was crafted to redistribute wealth from First World democracies to Third World autocracies. The International Seabed Authority would regulate private ocean development, mine the seabed itself through an entity called the Enterprise, and pay off favored nations and groups. Those objectives remain unchanged.

Moreover, treaty proponents talk excitedly about new litigation opportunities created by LOST. Professor William C.G. Burns of the Monterey Institute of International Studies wrote that the convention "may prove to be one of the primary battlegrounds for climate change issues in the future." He dismissed the argument that the document does not authorize such litigation: "While very few of the drafters of [the United Nations Convention on the Law of the Sea] may have contemplated that it would one day become a mechanism to confront climate change, it clearly may play this role in the future."

Environmental activists also look forward to using LOST Article 207, which directs countries to "adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources." Treaty advocates publicly claim the provision is merely hortatory.

Yet the mandate already has sparked litigation between Ireland and Britain. Moreover, Citizens for Global Solutions and the World Wildlife Federation argue that the convention will stop Russia from polluting the Arctic. They have yet to explain how LOST would bind Russia but not America.

No wonder Bernard H. Oxman of the University of Miami warned LOST backers to shut up about their plans. He explained: "Experienced international lawyers know where many of the sensitive nerve endings of governments are. Where possible, they should try to avoid irritating them."

Finally, the United Nations proclaims that LOST is not "a static instrument, but rather a dynamic and evolving body of law that must be vigorously safeguarded and its implementation aggressively advanced." If you like activist judges at the national level, imagine what you will get at the international level.

Before the Senate approves the Law of the Sea Treaty, members should consider the tradeoff they would be making. The convention offers paper benefits but imposes real costs. It's a deal only a pirate could love.

- Accuracy In Media - <http://www.aim.org> -

Obama's Ambitious U.N. Treaty Agenda

Posted By [Cliff Kincaid](#) On July 8, 2009 @ 1:36 am In [AIM Column](#) | [Comments Disabled](#)

With Al Franken replacing Norm Coleman, Senate Democrats have another vote for the U.N.'s Law of the Sea Treaty, and there are strong indications that they intend to bring this controversial document up for a vote within days or weeks. Those who favor the U.N. Convention on the Law of the Sea (UNCLOS) believe that U.S. security lies in passing a treaty and hiring more lawyers to defend America before an international tribunal, rather than building more ships for the Navy and Coast Guard.

The anticipated vote on the treaty follows a strong recent push for ratification from the [Council on Foreign Relations](#) ^[1] and [newspaper ads](#) ^[2] in favor of the treaty from the Pew Charitable Trusts, a \$5 billion non-profit entity. Plus, the Obama State Department sent a document to the Senate Foreign Relations Committee on May 11 that declared UNCLOS to be a top priority for the administration.

In fact, Obama's submission to the Foreign Relations Committee names 17 treaties that he wants ratified. In addition to UNCLOS, they include the feminist Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the unverifiable Comprehensive Nuclear Test Ban Treaty, and the gun rights-destroying Inter-American Convention Against Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials.

President Reagan, who pursued development of a 600-ship Navy and believed in a policy of peace-through-strength, refused to sign UNCLOS. His Attorney General, [Edwin Meese](#), ^[3] now with the Heritage Foundation, says Reagan would continue to oppose it.

Senate Democrats may not listen to conservative objections to the pact, but they should pay some attention to the views of people like Newton B. Jones of the International Brotherhood of Boilermakers. "As recently as 1987," [he points out](#) ^[4], "the Navy had 594 ships. At that time, we were not at war. Since then, despite growing threats from around the globe-the Middle East, Korea, China-we have built an average of only six ships a year, while decommissioning 20. The Navy's fleet is now only 281 ships, less than half its size in 1987."

He goes on to note that "...numerous reports recommend a fleet of 55-75 submarines, but the Navy is building only one a year. Our submarine fleet has shrunk from 100 in 1990 to 53 today. The American Shipbuilding Association estimates that at current rates, China will have twice as many submarines as the United States in only five years."

In fact, the American Shipbuilding Association estimates that, if present trends continue, we will be down to a paltry 180 ships by 2024.

Rather than build more ships, which could produce jobs for the Boilermakers union (which endorsed Obama for president) and Americans in general, Obama and Senate liberals would prefer to facilitate the hiring of more international lawyers to handle competing claims for access and resources in the oceans of the world. The treaty comes with a financial price-a global fee or tax payable to a United Nations-sanctioned body.

Not coincidentally, Obama's Supreme Court nominee, Sonia Sotomayor, wrote the foreword for the book, *The International Judge*, a favorable treatment of foreign law and foreign judges. Chapter Two, titled, "International Judges: Who Are They and How Do They Get on the Courts?," examines such topics as "the job market."

Lawyers get on these courts by lobbying for the jobs through the U.N. and getting more treaties passed to create more jobs. This is why groups like the American Society of International Law are in business and draw many top lawyers to their annual conventions.

We may be losing jobs in our domestic economy, but opportunities are endless in the field of international law. Passage of UNCLOS would open up some well-paying jobs in the U.N.'s International Tribunal for the Law of the Sea ^[5].

However, the largely untold story is that of corruption in the international organizations that implement and monitor these treaties. For example, the International Seabed Authority in Jamaica, another of the Law of the Sea Treaty organizations, has been racked by corruption ^[6] charges. Yet, the Senate has never held a hearing into these charges.

Interestingly, *The International Judge* book includes a favorable profile of a judge on the International Criminal Court (ICC). Obama may eventually decide to sign and send the ICC treaty to the Senate for ratification. This is a court which can arrest, prosecute and imprison Americans in foreign jails, in violation of our constitutional rights.

Obama is pushing UNCLOS now, but the Law of the Sea is not a partisan issue. The Republican George W. Bush Administration also pushed hard for ratification. Susan Biniaz of the U.S. Department of State explained the rationale during a July 17, 2007, appearance at the American Enterprise Institute. She explained, "I think someone said how few ships there are compared to how many there used to be. We don't have the capacity to be challenging every maritime claim throughout the world solely through the use of naval power. And [we] certainly can't use the Navy to meet all the economic interests."

So rather than build more ships, we will depend on a piece of paper from the U.N. to safeguard U.S. national security. Then we will hire more lawyers to represent our interests. But there has been no coherent explanation as to how a piece of paper will deter America's enemies or the pirates who want to board our vessels or guarantee access to ocean resources.

Governor Sarah Palin of Alaska should have something to say about this. But she was persuaded to endorse the treaty two years ago. She has been asked repeatedly over the last several months to take a fresh look at the evidence against ratifying the treaty. However, she remains silent, oblivious to the concerns of conservatives in her own political party.

UNCLOS is a substitute for a strong Navy and was deliberately designed as such. The people who wrote the treaty were World Federalists such as Louis B. Sohn, ^[7] who co-authored *World Peace Through World Law*, a blueprint for world government. This international lawyer, who mentored Harold Koh, Obama's State Department Legal Adviser, sincerely believed that lawyers could help run the world as long as the international bureaucrats had sufficient power and resources through a strengthened United Nations. Sohn, who actually believed in a world army with nuclear weapons maintained by the U.N., saw UNCLOS as a stepping stone on the road to world government.

In what could be a preview of the UNCLOS battle, Koh was recently confirmed by a Senate vote ^[8] of 62-35. If Senate conservatives can line up 35 votes against UNCLOS, they will defeat the pact, because it requires two-thirds, or 67 votes, for approval. However, some of the senators who voted against Koh, such as Lisa Murkowski of Alaska, are solidly in favor of UNCLOS.

One of the major unknowns is Senator John McCain, the 2008 Republican presidential candidate, who was for the treaty before he ran for president. As a candidate, he was critical of the document, saying it was harmful to U.S. sovereignty.

The Navy destroyer, the USS John S. McCain ^[9], named after the grandfather and father of Senator McCain, stands as evidence of American power on the high seas. But the power is dwindling and passage of UNCLOS could be the final nail in the coffin of U.S. Naval superiority.

Article printed from Accuracy In Media: <http://www.aim.org>

URL to article: <http://www.aim.org/aim-column/obamas-ambitious-u-n-treaty-agenda/>

URLs in this post:

- [1] Council on Foreign Relations: <http://www.cfr.org/publication/19156>
- [2] newspaper ads: http://www.pewtrusts.org/news_room_detail.aspx?id=53718
- [3] Edwin Meese, :
<http://www.heritage.org/research/internationalorganizations/lost.cfm>
- [4] he points out: <http://www.boilermakers.org/resources/commentary/V45N1>
- [5] International Tribunal for the Law of the Sea: http://www.itlos.org/start2_en.html
- [6] racked by corruption: <http://www.aim.org/special-report/scandal-rocks-un-sea-treaty-organization/>
- [7] Louis B. Sohn, : <http://www.aim.org/aim-report/the-crackpot-mentor-of-state-department-nominee/>
- [8] a Senate vote:
http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm?congress=111&session=1&vote=00213
- [9] the USS John S. McCain: <http://www.mccain.navy.mil/default.aspx>

Copyright © 2010 Accuracy In Media. All rights reserved.

McCotter, Hoekstra push GOP's 'Sovereignty Caucus' to battle Obama on international treaties

By David Weigel | 07.01.09 | 1:02 pm

WASHINGTON — Shortly after leaving their offices on June 24, dozens of Hill staffers, foreign policy experts, and old Washington hands made their way to the lower floor of the Capitol Visitor Center, a sprawling complex below the halls of Congress. The occasion was the low-key launch of the new House Sovereignty Caucus, the project of three Republican members — U.S. Reps. Doug Lamborn of Colorado, Scott Garrett of New Jersey, and Michigan's own Thaddeus McCotter of Livonia — who had become more and more worried about Americans ceding their rights to foreign institutions. Retired Lt. Col. Oliver North and former Undersecretary of Defense Douglas J. Feith stopped by to make remarks and pose for photos. Patrick Henry College Chancellor Michael Farris made small talk near a table of fruits, vegetables and soft cheeses.

"I have said for years that we ought to get the U.S. out of the U.N. and the U.N. out of the U.S.," said U.S. Rep. Paul Broun (R-Ga.), addressing the crowd in an impromptu speech. "I'll do everything I can in the Congress to maintain the U.S. as a sovereign nation, subservient to no one but the almighty God."

A series of traffic delays meant that, Frank Gaffney, the president of the Center for Security Policy, was the last supporter of the new caucus to give a speech. He bemoaned the confirmation of Harold Koh as Legal Adviser to the State Department, an "enemy" of sovereignty, shortly after the Senate had agreed to move ahead to a vote on his nomination. But he was optimistic. "We may now have in the House a vehicle for keeping the so-called 'Upper House' more honest on these issues."

While Republicans and conservative activists were disappointed by the confirmation of Koh, the long delay leading up to the vote and its relative closeness — 65 to 31 to end debate on the nomination and 62-35 to confirm him — have boosted their hopes of successfully battling treaties that they characterize as threats to American rights and national interests. Treaties need the votes of 67 senators to be ratified, and can gum up the business of the Senate for weeks if they become flash points for controversy. The Convention on the Rights of the Child, for example, has convinced Michigan's Pete Hoekstra of Holland — a member of the House Sovereignty Caucus — to introduce a Constitutional amendment protecting the right of American parents to discipline their children and send them to religious schools.

Those hopes are likely to be tested at least twice this year. According to staffers for the Senate Foreign Relations Committee, the United Nations Convention on the Law of the Sea, or the Law of the Sea Treaty — a 1982 treaty that governs the right of countries to use the oceans — could be reintroduced next month. And President Obama is in Russia this week in part to move forward the Comprehensive Nuclear-Test-Ban Treaty, the 1996 agreement on weapons testing that was rejected by the Senate in 1999, when the upper chamber contained 55 Republicans and 45 Democrats. Of the 16 treaties that the State Department included on its priority list in a May 11 letter to the committee, both sides agree that these two will be the first to face full votes. And both sides agree that the Koh vote provided a good idea of the support these treaties might command from a very skeptical Senate Republican conference.

"The vote against Harold Koh is probably the minimum vote against both of those treaties," said John Bolton, who served as U.S. ambassador to the United Nations under George W. Bush, and who has been a forceful critic of both treaties. "I think that a lot of Republicans, whether they agreed or disagreed with Koh's views, basically agreed that president had the right to appoint his own team. Whether they would also support these treaties, given their concerns about national sovereignty, is another question."

The power to approve treaties rests entirely with the Senate; on the surface, that would seem to make the House Sovereignty Caucus and its supporters less relevant. But both supporters and opponents of the treaties said that skeptics of international law and international agreements will have an outsized influence in this debate. Senate staffers from both parties, experts from liberal groups, and experts from conservative groups all cited the same handful of people as the ones able to turn opinion on treaties: Bolton, Frank Gaffney of the Center for Security Policy, and fellows at the Heritage Foundation and Competitive Enterprise Institute (CEI). For an example of their influence, one supporter of the treaties pointed out what happens when someone does a basic Google search for "Law of the Sea." The first links include the [Heritage Foundation's page](#) on the treaty, [CEI's page](#), and the site [UNLawoftheSeaTreaty.org](#), owned by another think tank that opposes the treaty.

Myron Ebell, director of energy and global warming policy at CEI, said that there was some truth to this characterization. "At the one end, the American people are very suspicious of more United Nations involvement in their lives," said Ebell. "When you're saying that you'll put the UN in charge of the oceans, that's pretty strongly opposed by the American people. But at the other end, most Washington insiders, a lot of experts who work on this, a lot of admirals, say we ought to do that and say that the problems have been fixed since President Reagan opposed it. So we're not a very broad coalition."

Treaty supporters, who had hoped that a Democratic president and heavily Democratic Senate could get past this standoff, are frustrated by the conservatives' success. "The fight over the Law of the Sea has been a textbook example of the politics of intensity trumping the politics of common sense," said Don Kraus, the CEO of Citizens for Global Solutions, a group that supports both treaties. "The treaty's narrow group of opponents have whipped up conspiracy theories to feed political temper tantrums in swing states."

While negotiations that could lead to progress on the CTBT are taking center stage this week, treaty opponents are focusing on the Law of the Sea Treaty because it will come up first, and because its fate in the last Congress provided a roadmap for both sides. A tough campaign against the treaty, which included TV ads from the Competitive Enterprise Institute and pressure on conservative senators like U.S. Sen. Jim DeMint (R-S.C.), whittled down its support. U.S. Sen. John McCain (R-Ariz.), who had long supported the treaty, [backed down and said](#) that it needed "changes" shortly before the 2008 New Hampshire presidential primary.

According to Baker Spring, a fellow at the Heritage Foundation, opposition to international law and treaties like these has coalesced in the wake of the campaign against the Law of the Sea Treaty and because of worries about President Barack Obama. "We have a president in office who is potentially serious about this agenda. Nobody held the view that George W. Bush was going to scurry down a road that would undermine our national sovereignty."

Spring suggested that U.S. Sen. Richard Lugar (R-Ind.), the ranking member on the Foreign Relations Committee, slow-walked the treaty last year because he wanted to get a majority of Republicans on board. Lugar spokesman Mark would not confirm that, but he pointed out that so far the Obama administration's support for the treaty is comparable to the Bush administration's — just one of the items on the priority list. "The Obama campaign was fantastic at using social networking to organize

and build up grassroots support,” said Hayes. “The administration has chosen to use that skill on some campaigns, like the health care push, but not on other campaigns.”

Unless that happens, skeptics of international law suggested that high-visibility coalitions like the House Sovereignty Caucus can win the argument.

“I think it can have a real impact if it raises the volume of the debate,” said John Bolton. “The higher the salience of the issue, for conservatives in particular, the greater the likelihood that people will oppose these treaties.”

[blog comments powered by DISQUS](#)

Categories & Tags: [House Sovereignty Caucus](#) | [Law of the Sea Treaty](#) | [Pete Hoekstra](#) | [Thad McCotter](#) |

WebMemo



Published by The Heritage Foundation

No. 1638
September 25, 2007

The Top Five Reasons Why Conservatives Should Oppose the U.N. Convention on the Law of the Sea

Baker Spring, Steven Groves, and Brett D. Schaefer

The Senate Foreign Relations Committee will hold hearings this week on whether the United States should ratify the U.N. Convention on the Law of the Sea. Twenty-five years ago, President Ronald Reagan rejected the treaty—and rightly so. Today, the convention remains a threat to American interests.

Reason #1: The Treaty Will Undermine U.S. Sovereignty.

President Reagan rejected the Law of the Sea Convention in 1982 and cited several major deficiencies, none of which have been remedied. Reagan was concerned that the U.S., though a major naval power, would have little influence at the International Seabed Authority that the convention created. Although the Authority is supposed to make decisions by consensus, nothing prevents the rest of the “international community” from consistently voting against the United States, as regularly occurs in similar U.N. bodies, such as the General Assembly. In addition, President Reagan was troubled by the fact that the International Seabed Authority has the power to amend the convention without U.S. consent. That concern has also not been remedied in the intervening years.

Another issue is that the convention requires states to transfer information and perhaps technology to mandatory dispute resolution tribunals. Under the convention, parties to a dispute are required to provide a resolution tribunal with “all relevant documents, facilities and information.” This amounts to a blanket invitation for unscrupulous foreign competitors to bring the U.S. and American companies before a tribunal for the sole

purpose of obtaining sensitive data and technologies that would otherwise be unavailable to them. The safeguards against such practices that President Reagan demanded have never come to pass.

Reason #2: The Treaty Will Become a Back Door for Environmental Activists.

The Executive Director of Greenpeace International, Thilo Bode, has explained how the environmentalist movement plans to leverage the treaty to advance its agenda, which often runs counter to U.S. interests: “Global warming is likely to have a big impact at sea.... Solving the environmental problems facing the oceans... is one of the greatest challenges facing humankind.... No single action or region can do this alone: It will require comprehensive international cooperation as required by the United Nations Convention on the Law of the Sea.” President Clinton—a major supporter of the treaty—did not mince his words when he stated that the convention was “the greatest environmental treaty of all time.”

Indeed, the treaty states that convention participants must “take... all measures consistent with this Convention that are necessary to prevent, reduce, and control pollution of the marine environment from any source,” (Article 194). This provision goes

This paper, in its entirety, can be found at:
www.heritage.org/Research/InternationalOrganizations/wm1638.cfm

Produced by 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

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

on to require that such measures address “all sources of pollution of the marine environment...including those from land-based sources, from or through the atmosphere, or by dumping...” Signatories are also required to “adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere...” (Article 212).

The convention’s provisions and mandatory dispute resolution mechanisms will create new opportunities for environmental activists and like-minded governments to bring action against the U.S. for violating the Kyoto Protocol, even though America is not a party to that accord. American opponents of the Kyoto Protocol should be under no illusion: U.S. accession to this convention risks embroiling the U.S. in a plethora of legal actions, even if the Senate does not ratify Kyoto.

Reason #3: America Should Not Participate in Yet Another U.N. Bureaucracy.

International institutions created by multilateral treaties spawn unaccountable international bureaucracies, which in turn inevitably infringe upon U.S. sovereignty. The convention creates a bureaucracy known as the International Seabed Authority Secretariat. Like all international bureaucracies, the Secretariat has a strong incentive to enhance its own authority at the expense of state sovereignty. When international bureaucracies are unaccountable, they—like all unaccountable institutions—seek to insulate themselves from scrutiny and thus become prone to corruption. The International Seabed Authority is vulnerable to the same corrupt practices that have riddled the U.N. for years. 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, is a prime example. Despite ample evidence of the U.N.’s systemic weaknesses and vulnerability to corruption, the U.N. General Assembly has resisted efforts to adopt serious transparency and accountability reforms.

Reason #4: American Participation Will Undermine U.S. Military and Intelligence Operations.

Under the convention, the United States assumes a number of obligations at odds with its military practices and national security interests, including a commitment not to collect intelligence. The U.S. would sign away its ability to collect intelligence vital for American security within the “territorial waters” of any other country (Article 19). Furthermore, U.S. submarines would be required to travel on the surface and show their flags while sailing within territorial waters (Article 20). This would apply, for example, to U.S. submarines maneuvering in Iranian or North Korean territorial waters; they would be required to sail on the surface with their flags waving.

Reason #5: The U.S. Does Not Need the Convention to Guarantee Navigation Rights.

The U.S. enjoys navigation rights by customary international practice. The fact that the U.S. is not a convention member does not mean that other states will begin to demand notification by U.S. ships entering their waters or airspace. Indeed, the U.S. is not a signatory to the convention today and yet has freedom of the seas because current participants are required to grant the U.S. navigation rights afforded by customary international practice. In addition, these states have reciprocal interests in navigation rights that will discourage them from making such demands on American ships in the future.

Conclusion. For these reasons and many others,¹ conservatives who are concerned about U.S. sovereignty and national security should oppose ratification of the U.N. Convention on the Law of the Sea.

—Baker Spring is F. M. Kirby Research Fellow in National Security Policy in the Douglas and Sarah Allison Center for Foreign Policy Studies, a division of the Kathryn and Shelby Cullom Davis Institute for International Studies, at The Heritage Foundation. Steven Groves is Bernard and Barbara Lomas Fellow, and Brett D. Schaefer is Jay Kingham Fellow in International Regulatory Affairs, in the Margaret Thatcher Center for Freedom, a division of the Kathryn and Shelby Cullom Davis Institute for International Studies, at The Heritage Foundation.

¹ See, e.g., Edwin Meese, III, Baker Spring, and Brett D. Schaefer, “The United Nations Convention on the Law of the Sea: The Risks Outweigh the Benefits,” Heritage Foundation WebMemo No. 1459, May 16, 2007, at www.heritage.org/Research/InternationalOrganizations/awm1459.cfm

HJR 19 URGING U.S. SENATE TO RATIFY LAW OF SEA TREATY

HJR 19 urges the U.S. Senate to ratify the United Nations Convention on the Law of the Sea (“Law of the Sea treaty”). This resolution will help Alaska’s Senate delegation bring the Law of the Sea treaty to the Senate floor for a vote on ratification. Ratification of this treaty is important to protect U.S. interests concerning the use and development of the high seas and seabed off Alaska.

Economic Benefit of Treaty Ratification

Treaty allows countries to exercise sovereign rights over their extended continental shelf beyond the 200 mile limit of the Exclusive Economic Zone.

- Laying claim to the extended continental shelf beyond Alaska may result in the largest expansion of the United States since the Alaska Purchase.
- By one estimate, the value of energy and minerals resources in the extended continental shelf **exceeds 1 trillion dollars**.
- Ratification offers the single largest opportunity to expand U.S. oil, gas, and mineral development rights in areas that are not presently subject to any moratoria.
- The U.S. Geological Survey has estimated that the Arctic area may contain a significant portion of the world’s remaining undiscovered oil and gas deposits.
- Without the Convention, U.S. companies lack the legal certainty to justify the significant investments needed to explore and identify the resources of the extended continental shelf.

Defense

- According to current and former military service chiefs, secretaries of state, national security advisors and others, the treaty enhances rather than undermines our ability to wage the War on Terror. Maximum maritime naval and air mobility assured by the Convention is essential for our military forces to operate effectively. The Convention provides the necessary stability and framework for our forces, weapons, and material to get to the fight without hindrance. It is essential that key sea and air lanes remain open as a matter of international legal right and not be contingent upon approval from nations along those routes

Customary Law

- The Convention provides clear legal rules in a written treaty, as opposed to reliance on customary international law, which is too easily challenged by unilateral claims of other countries and changed by the practice of countries over time. Customary law is an inadequate basis upon which to protect navigational rights vital to our national security. The U.S. needs additional tools in its arsenal, including the firm legal footing that joining the Convention would provide.

President Reagan

- President Reagan pointed solely to certain deep seabed mining provisions of the Convention as flawed. His 1983 Ocean Policy Statement demonstrates that he accepted the non-deep-seabed

provisions. The 1994 Agreement fixed the flawed deep seabed mining provisions in ways that meet each one of President Reagan's objections.

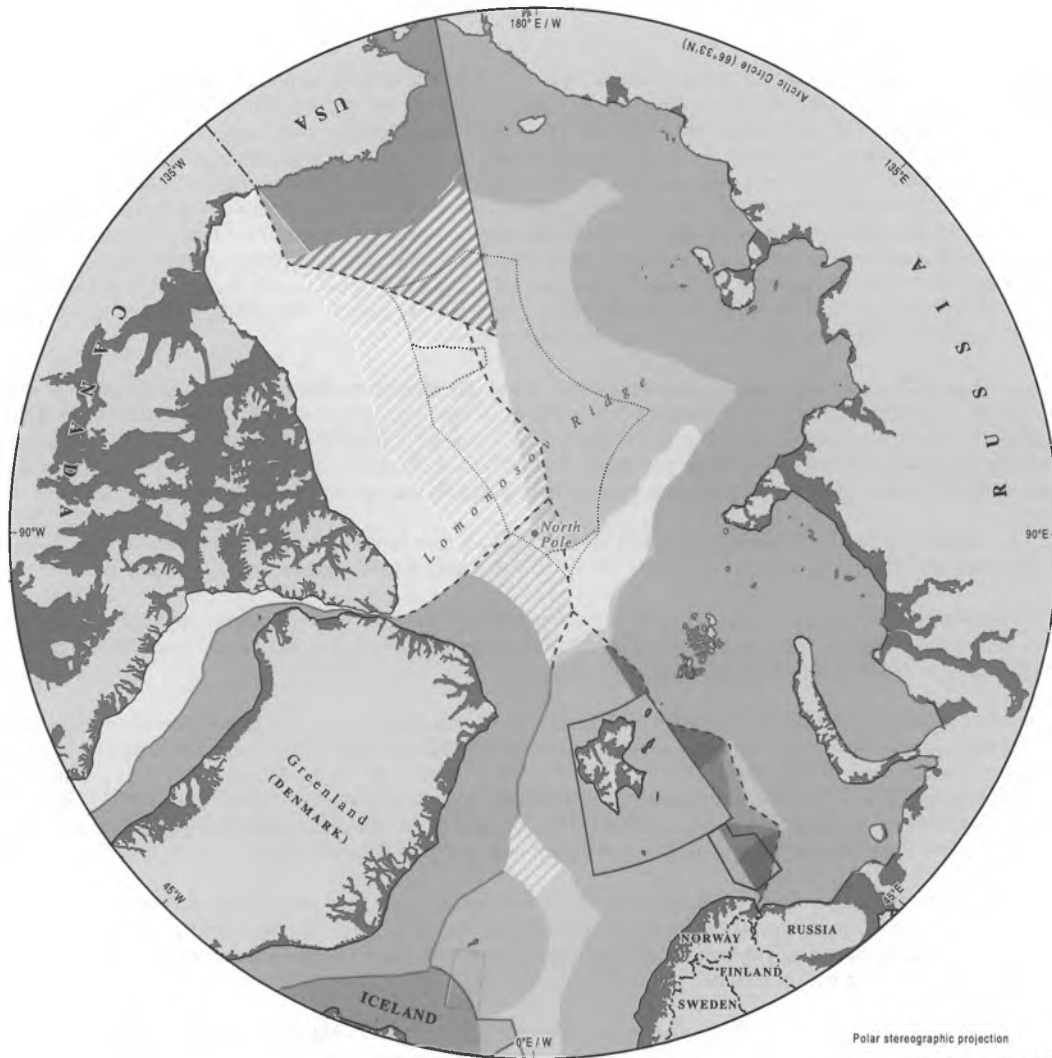
Sovereignty

- Ratification of the treaty could expand U.S. sovereignty and sovereign rights over extensive maritime territory and natural resources off its coast. It's rare that a treaty actually increases the sovereignty of a country, but this treaty does. The Convention does not harm U.S. sovereignty in any respect. As sought by the United States, the dispute resolution mechanisms provide appropriate flexibility in terms of both the forum and the exclusion of sensitive subject matter. The deep seabed mining provisions do not apply to any areas in which the United States has sovereignty or sovereign rights. Furthermore, these rules will facilitate mining activities by U.S. companies. Also, the navigational provisions ensure that U.S. military and commercial vessels have worldwide maritime mobility.

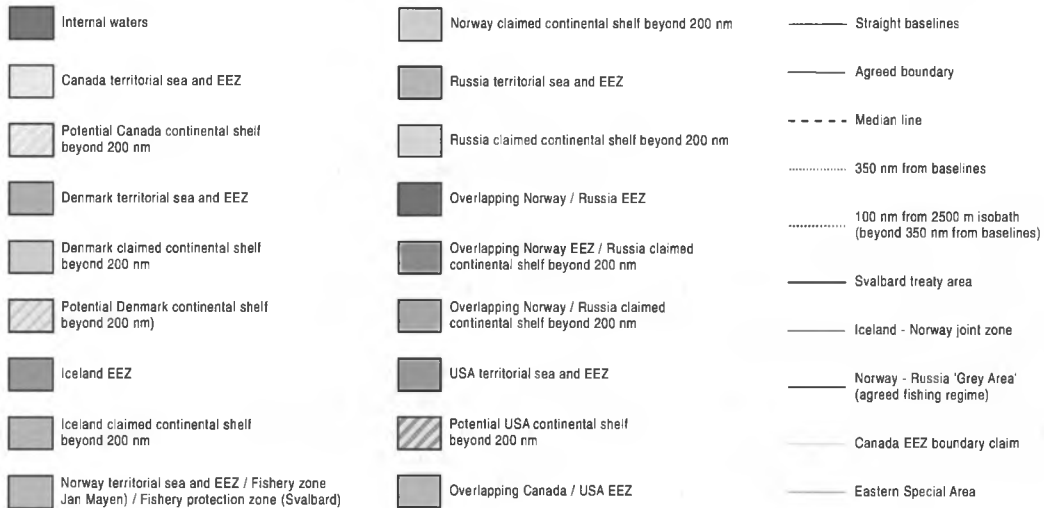
U.N. Treaty

- The Convention is not the United Nations, it was merely negotiated there. Just because a treaty is drawn up at the U.N. does not mean it doesn't serve the interests of the United States. For example, the US benefits from U.N. treaties such as the Anti-Corruption Convention and the Convention for the Suppression of Terrorist Bombings. The Law of the Sea Convention is another such treaty that serves our interests.

Maritime jurisdiction and boundaries in the Arctic region



Polar stereographic projection
0 400 nautical miles at 66°N
0 600 kilometres



Notes

1. The depicted potential areas of continental shelf beyond 200 nautical miles (nm) for Canada, Denmark and the USA are theoretical maximum claims assuming that none of the states claims continental shelf beyond median lines with neighbouring states where maritime boundaries have not been agreed. **In reality, the claimable areas may fall well short of the theoretical maximums** (see the summary of the definition of the outer limit of the continental shelf below). It is also possible that one or more states will claim areas beyond the median lines.

Where the continental margin of a coastal state extends beyond 200 nm from the state's territorial sea baseline, the outer limit of the continental shelf is defined with reference to two sets of points: (i) points 60 nm from the foot of the continental slope; (ii) points at which the thickness of sedimentary rocks is at least 1% of the shortest distance from the points in question to the foot of the continental slope. The outer limit of the continental shelf is defined by a series of straight lines (not exceeding 60 nm in length) connecting the seawardmost of the points in the two sets described above. This map does not attempt to depict such lines, which can only be identified with precision through bathymetric and seismic surveys. However, it is possible to depict the 'cut-off' limit beyond which states may not exercise continental shelf jurisdiction regardless of the location of the foot of the continental slope and the thickness of sediment seaward of that point. The cut-off limit is the seawardmost combination of two lines: (i) a line 350 nm from the state's territorial sea baseline; (ii) a line 100 nm seaward of the 2,500 metre isobath. Both the 350 nm line and (where it runs seaward of the 350 nm line) the 2,500 m + 100 nm lines are depicted on the map. The 2,500 m + 100 nm line is derived from the US National Geophysical Data Center's etopo2 bathymetry dataset.

2. The depicted claims of Denmark and Iceland to continental shelf beyond 200 nm in the northeast Atlantic Ocean are defined in the "Agreed Minutes on the Delimitation of the Continental Shelf beyond 200 Nautical Miles between the Faroe Islands, Iceland and Norway in the Southern Part of the Banana Hole of the Northeast Atlantic" of 20 September 2006. The agreed division of the continental shelf in this area is subject to confirmation by the Commission on the Limits of the Continental Shelf (CLCS) that there is a continuous continental shelf in the area covered by the agreement. Neither Denmark nor Iceland has yet made a submission to the CLCS.
3. An executive summary of Norway's submission to the CLCS of 27 November 2006 is available at http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/nor_exec_sum.pdf. The Commission has yet to respond to Norway's submission.
4. Maps and coordinates defining the area covered by Russia's submission to the CLCS of 20 December 2001 are available at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_rus.htm. The Commission asked Russia to revise its submission relating to its continental shelf in the Arctic Ocean.
5. Norway and the Soviet Union agreed a partial maritime boundary in Varangerfjord in 1957 but disagree on the alignment of their maritime boundary in the Barents Sea: Norway claims the boundary should follow the median line, while Russia seeks a 'sector' boundary extending due north (but deviating around the 1920 Svalbard Treaty area). As the Barents Sea is an important fishery for both states, in January 1978 the two governments agreed on a fishing regime in the so-called "Grey Zone", a 19,475 nm² area covering 12,070 nm² of overlapping EEZ claims, 6,588 nm² of undisputed Norwegian EEZ and 817 nm² of undisputed Russian EEZ. Within the Grey Zone Norway and Russia have jurisdiction over their own fishing vessels.
6. Canada argues that the maritime boundary in the Beaufort Sea was delimited in the 1825 treaty between Great Britain and Russia defining the boundary between Alaska and the Yukon as following the 141° W meridian "as far as the frozen ocean". The USA argues that no maritime boundary has yet been defined and that the boundary should follow the median line between the two coastlines. The area of overlap between the two claims is more than 7,000 nm².
7. Under a treaty signed in February 1920, Norway has sovereignty over the Svalbard archipelago and all islands between latitudes 74° and 81° north and longitudes 10° and 35° east. However, citizens and companies from all treaty nations enjoy the same right of access to and residence in Svalbard. Right to fish, hunt or undertake any kind of maritime, industrial, mining or trade activity are granted to them all on equal terms. All activity is subject to the legislation adopted by Norwegian authorities, but there may be no preferential treatment on the basis of nationality. Norway is required to protect Svalbard's natural environment and to ensure that no fortresses or naval bases are established. 39 countries are currently registered as parties to the Svalbard treaty.
8. The Eastern Special Area lies more than 200 nm from the baseline of the USA but less than 200 nm from the baseline of Russia. Under the June 1990 boundary agreement between the two states, the Soviet Union agreed that the USA should exercise EEZ jurisdiction within this area. A second Eastern Special Area and a Western Special Area (in which the opposite arrangement applies) were established adjacent to the boundary south of 60° north. The agreement has yet to be ratified by the Russian parliament but its provisions have been applied since 1990 through an exchange of diplomatic notes.

Agreed maritime boundaries

Canada-Denmark (Greenland): continental shelf boundary agreed 17 December 1973.

Denmark (Greenland)-Iceland: continental shelf and fisheries boundary agreed 11 November 1997.

Denmark (Greenland)-Norway (Jan Mayen): continental shelf and fisheries boundary agreed 18 December 1995 following adjudication by the International Court of Justice.

Denmark (Greenland)-Iceland-Norway (Jan Mayen) tripoint agreed 11 November 1997.

Denmark (Greenland)-Norway (Svalbard): continental shelf and fisheries boundary agreed 20 February 2006.

Iceland-Norway (Jan Mayen): fisheries boundary following the 200 nm limit of Iceland's EEZ agreed 28 May 1980; continental shelf joint zone agreed 22 October 1981 following the report of the Conciliation Commission.

Russia-USA: single maritime boundary agreed 1 June 1990 (see also note 8).

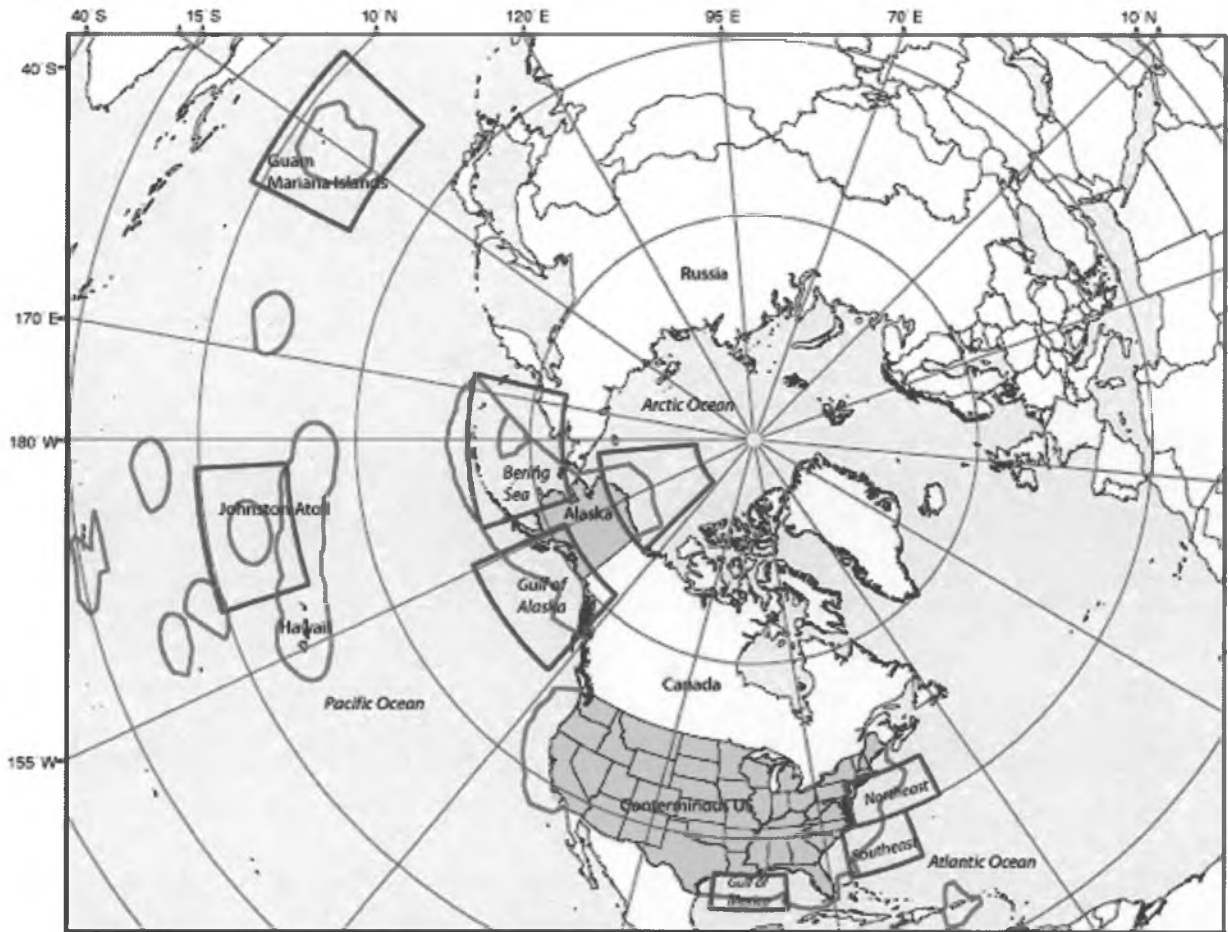


Figure 2: Eight regions (in red) adjacent to the United States and its dependences, where there likely exists extended continental shelf (ECS) beyond 200 nautical miles (in blue) identified by Mayer et al. (2002), [The compilation and analysis of data relevant to a U.S. Claim under the United Nations Law of the Sea Article 76: A Preliminary Report.](#) The regions presented in this figure are the result of an academic study, do not represent a formal position of the United States, and are without prejudice to any rights that the United States has with respect to its continental shelf.

3. Law of the Sea and Governance of Shipping in the Arctic and Antarctic

David L. VanderZwaag

3.1 Introduction

The 1982 UN Law of the Sea Convention (LOSC), which came into force in November 1994, might be described as setting the legal foundations for marine environmental protection and controlling marine resource exploitations in all the world's oceans, including the Polar seas. Having 320 articles and nine Annexes, the Convention sets out a basic requirement for all states to protect and preserve the marine environment (Art. 194) and to cooperate in developing global standards for shipping (Art. 211) and global and regional standards for land-based marine pollution (Art. 207), ocean dumping (Art. 210) and seabed activities (Art. 208). States also have an obligation to subject all activities under their jurisdiction or control which may cause substantial pollution or significant harmful changes to the marine environment to environmental impact assessment procedures (Art. 206).

While LOSC clearly applies to both the Arctic and Antarctic marine areas, two major differences in application stand out in light of the presence of recognised coastal states and port states in the Arctic but not in the Antarctic. Many of the Convention's provisions focus on clarifying the rights and responsibilities of coastal states in the five zones of national jurisdiction, internal waters, the territorial sea, a contiguous zone, the exclusive economic zone (EEZ) and a continental shelf. While five coastal states (Canada, Denmark/Greenland, Norway, the Russian Federation and the United States) surround the Arctic Ocean and thus those states are clearly bestowed powers to pass and enforce national laws in those zones, the Antarctic does not have generally recognised coastal states. Seven states (Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom) have historic territorial claims on the continent which have been "frozen" by the Antarctic Treaty (Art. IV). The LOSC also recognises the powers of port states over ships choosing to enter their ports, such as the right to inspect vessels for their seaworthiness and to prevent unseaworthy ships from sailing before being re-

paired. While all five Arctic coastal states are clearly port states with corresponding inspection and enforcement powers, the Antarctic continent does not have generally recognised port states in the actual region.

Shipping is a growing concern in both Polar Regions. Cruise ship visits have been on the increase with corresponding human safety and environmental concerns. The Arctic appears to be on the verge of a new era in commercial shipping with vast hydrocarbon and mineral resources and growing interest in transpolar shipping that may substantially cut transport distances between Europe and Asia. Navigation in the Arctic by military vessels and other ships on governmental service is also expected to rise. For example, the Government of Canada has announced a commitment to build new Arctic patrol vessels and to construct a vessel refuelling facility in Nanisivik, Nunavut. Both Polar Regions are remote, raising special challenges for emergency responses and search and rescue in case of accident. Navigating in ice and freezing temperatures are common challenges although the Arctic may be even more treacherous in light of a greater proportion of thicker multi-year ice.

A key social and political difference between the Polar Regions is the presence of indigenous communities and an overall human population of about 4 million in the Arctic, while the Antarctic hosts scientific stations with temporary teams of scientists. The potential human impacts of shipping which are a special concern in the Arctic include the interference caused to traditional hunting and harvesting activities and the overwhelming of small communities with tourists. Indigenous rights over marine areas and resources have yet to be fully resolved in the Arctic adding another layer of political and legal complexity not present in the Antarctic.

This chapter provides a broad overview of the law of the sea and shipping governance arrangements applicable to the Arctic and the Antarctic. The realities and challenges connected with the LOSC are first described for each region. The similarities and differences in regional approaches to addressing shipping safety and vessel-source pollution, including related environmental threats, are then surveyed. The maritime safety and pollution "main sails" are highlighted, namely, the (1974) International Convention on Safety of Life at Sea (SOLAS) and the (1973) International Convention for the Prevention of Pollution from Ships, as modified by the (1978) Protocol Relating Thereto (MARPOL 73/78) as well as further supportive conventions and guidelines ('jib sails') to the two central agreements governing international shipping. The chapter concludes by summarising the differences and commonalities in law of the sea and shipping governance approaches in the Polar Regions and highlights the many issues still needing to be resolved such as the adoption of a mandatory code for shipping in Polar waters.

This chapter, by attempting to provide a broad overview of Polar law relating to law of the sea and shipping governance, by necessity omits detailed discussion of some legal topics. A review of international agree-

ments relating to liability and compensation in case of marine accidents, such as an oil spill, is therefore beyond the scope of this paper. The effort to address seafarer working and living conditions, such as food, medical care and wages, through a consolidated 2006 Maritime Labour Convention, is not discussed nor are the international customs and contractual practices of ship owners and commercial interests surveyed. For example, marine insurance contracts may be critical for ensuring Polar shipping ventures actually occur and the cost of insurance may be a major constraint. The International Maritime Organization (IMO) has developed over 50 treaty instruments and hundreds of other measures, including codes and guidelines, over the years to control shipping and only some of the most important and relevant documents to Polar shipping can be summarised.

3.2 Law of the Sea Realities and Challenges

3.2.1 Arctic Law of the Sea Realities

The law of the sea reality for the Arctic is at the same time both simple and complex. The LOSC provides as easy to understand division of rights to living and non-living marine resources. Arctic coastal states are given exclusive rights to exploit fisheries, minerals, hydrocarbons and energy resources within their 200-nautical mile (n.m.) EEZs. Where the natural prolongation of continental shelves extends beyond 200-n.m., coastal states have the right to exploit sedentary species, such as shellfish, and mineral resources on the seabed. In the high seas water column beyond national 200-n.m. zones, various freedoms of the sea apply whereby all states may have access to living resources and shipping routes. For the deep seabed beyond national jurisdiction, the International Seabed Authority, a management organisation established pursuant to the LOSC and based in Jamaica, would be responsible for licensing and regulating any mineral exploration or exploitation activity should it arise. The Agreement to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, adopted in 1994, sets out further “rules of the game” in relation to deep seabed mineral policy including provisions on technology transfer and the financial terms of contracts.

The 1982 Convention also clearly bestows substantial coastal state jurisdiction to undertake and control marine scientific research in Arctic waters. Coastal states have the exclusive right to conduct marine scientific research in their territorial seas and such research can only be undertaken with the express consent and under conditions set by the coastal state (Art. 245). Marine scientific research in the EEZ and on the continental shelf is also subject to coastal state consent which should be normally given (Art. 246(2)). Exceptions where consent may be refused

include where a project is of direct significance for the exploration and exploitation of natural resources or where a project involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment (Art. 246(5)).

The LOSC is also straightforward in establishing various state responsibilities both within and beyond national zones of jurisdiction in the Arctic. For example, coastal states are obligated to ensure proper conservation and management measures so living resources in the EEZ are not endangered by over-exploitation and such measures must avoid seriously threatening the reproduction levels of associated or dependent species (Art. 61(2)(4)). States are required to cooperate directly or through sub-regional or regional organisations to ensure the conservation of fish stocks shared across national EEZs (Art. 63(1)) and stocks that straddle an EEZ and the high seas (Art. 63(2)). States must take all measures necessary to prevent, and control pollution of the marine environment from any source (Art. 194(1)) and seek to minimise to the fullest possible extent the release of toxic or noxious substances (Art. 194(3)(a)). States are required to protect and preserve rare or fragile ecosystems and the habitat of threatened or endangered species (Art. 194(5)). The intentional or accidental introduction of alien species to the marine environment which may cause significant harmful changes is to be avoided (Art. 196(1)). States are also required to cooperate in conserving and managing living resources in the high seas and to consider establishing sub-regional or regional fisheries organisations (Art. 118).

With broad acceptance that the Arctic Ocean is a semi-enclosed sea, Article 123 of LOSC urges states bordering such an area to cooperate in managing the conservation of living marine resources, in protecting and preserving the marine environment and in coordinating scientific research activities. Two key criteria must be met for the Arctic Ocean to be considered a semi-enclosed sea as defined in Article 122 of LOSC. First, the Arctic Ocean must be deemed a "sea," a term that is not defined in the Law of the Sea Convention. Second, the Arctic Ocean must consist entirely or primarily of the territorial seas and EEZs of two or more coastal states.

A further overlay of cooperative obligations emanates from the 1995 UN Agreement on Straddling and Highly Migratory Fish Stocks (Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks). The Agreement urges the application of precautionary and biodiversity protective approaches to fisheries management (Art. 5). The Agreement also calls for the strengthening of existing regional fisheries management organisations and arrangements with management mandates for straddling or highly migratory fish stocks (Art. 13). Coastal states and states fishing on the high seas are to consider es-

establishing a new regional fisheries management organisation or arrangement where no such organisation or arrangement exists (Art. 8(5)). This latter obligation might be described as a “prospective” for the Arctic as it remains to be seen whether viable commercial fish stocks exist in the high seas pocket in the central Arctic Ocean and whether states will wish to support the opening up of new fisheries areas.

The LOSC has cast a complex web of jurisdictional entitlements and limitations for the three categories of states concerned with Arctic shipping – coastal states, flag states, and port states. These categories are reviewed in turn.

3.2.1.1 Coastal State Jurisdiction and Control

Canada, Denmark (Greenland), Norway, the Russian Federation and the United States have coastal frontage on the Arctic Ocean and thus are considered as coastal states which can exert legislative and enforcement control over foreign ships in offshore waters. The amount of control varies with the zones of coastal state jurisdiction. The greatest powers exist in internal waters, the waters closest to the coastal state, and the powers become less according to the distance offshore with least control existing over foreign vessels navigating above an extended continental shelf beyond 200-n.m.

In internal waters, a coastal state has total sovereignty. Thus, if it wishes, the state may prohibit entry of certain ships, such as those carrying hazardous cargoes and may impose “zero discharge” limits on specific pollutants. The only limit on this maximum power is the customary duty to allow foreign ships in distress, such as those facing a major storm, to seek refuge in sheltered waters.

Internal water status can be claimed in various ways. LOSC recognises the right of coastal states to draw closing lines across mouths of geographical bays, ports and harbours and the marine areas on the landward side of the lines are considered internal. A coastal state is allowed to draw straight baselines around a deeply indented coastline or where there is a fringe of islands in the immediate vicinity of the coast, and the waters enclosed would be internal. Internal waters might also be claimed based upon their being recognised as such historically.

Within the territorial sea limit which may extend 12-n.m. from the low-water line along the coast or outside enclosed internal waters, the coastal state has full sovereignty but that sovereignty is subject to the right of foreign ships to enjoy innocent passage. Passage is considered innocent so long as it is continuous and expeditious and not prejudicial to the peace, good order, or security of the coastal state. The Convention lists various activities that are considered non-innocent including: carrying out of research or surveys, any fishing activities and any act of wilful or serious pollution in contravention of the Convention.

While the LOSC allows coastal states to adopt pollution control and navigational safety laws applicable to foreign ships transiting through the territorial sea, it places key limits on this authority. Coastal states cannot impose design, construction, crewing or equipment standards on foreign ships unless giving effect to generally accepted international rules or standards. Coastal states are also prohibited from imposing requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage. Coastal states can require foreign ships to use designated sea lanes or traffic separation schemes, but before doing so the state must consider the recommendations of the IMO and take into account any channels customarily used for international navigation.

Coastal states may also claim a 12 n.m. contiguous zone adjacent to the territorial sea to a seaward limit of 24 n.m. In a contiguous zone a coastal state may exercise necessary control over foreign ships to prevent infringement of its customs, fiscal, immigration or sanitary laws and to punish infringement of such laws committed within its territory or territorial sea. For example, a state might seek to enforce a law prohibiting any garbage disposal in its territorial sea against a foreign ship navigating within the contiguous zone that had previously disposed of garbage in the territorial sea.

In a coastal state's 200-n.m. EEZ, legislative and enforcement jurisdiction over foreign vessels is substantially curtailed. A coastal state cannot impose its own pollution standards on such vessels but is restricted to only imposing international pollution standards. Actual arrests and detention of a foreign ship is only allowed if there is a discharge causing or threatening major damage to the coastline, interests or resources of the coastal state. Monetary penalties may only be imposed for such EEZ pollution infringements.

Where the natural prolongation of a coastal state's continental shelf extends beyond 200-n.m. from the baselines from which the territorial sea is measured, the coastal state has very limited control over foreign shipping activities occurring in waters above the extended continental margin. A coastal state may establish safety zones around artificial islands or structures involved in seabed exploration or exploitation activities, and no such activities may be carried out without the coastal state's consent. A coastal state in exercising its rights over the continental shelf must not cause any unjustifiable interference with navigation or with other freedoms such as fishing.

A coastal state bordering a strait used for international navigation is severely restricted in controlling foreign shipping because of the right of all ships to transit passage. A coastal state may only impose international pollution control standards, not stricter national regulations. Sea lanes and traffic separation schemes may be established but only with IMO approval. A submarine exercising transit passage may remain submerged

whereas an innocent passage through the territorial sea a submarine is required to navigate on the surface and to show its flag.

While the various national zones of jurisdiction are applicable to all the world's oceans including the Arctic, the LOSC has recognised special hazards of navigation in ice-covered waters and has given extra powers for coastal states to pass and enforce laws for control of vessel source pollution for those waters. A coastal state may adopt stricter than international pollution standards normally applicable in the EEZ. Article 234 provides:

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment and be based on the best available scientific evidence.

Article 234 leaves open many questions of interpretation. For example, what is the significance of recognising special coastal state powers specific to the EEZ? One interpretation is that coastal states are given no greater powers than those granted for the territorial sea and thus no unilateral right exists to adopt special ship construction, crewing and equipment standards. What extent of ice coverage is required to invoke this article? The application of Article 234 to straits used for national navigation may also be questioned, although the LOSC does not explicitly exempt straits from application.

3.2.1.2 Flag State Jurisdiction and Control

A flag state, referring to the country granting its nationality to a ship and allowing a ship to fly its flag, has extensive jurisdictional control over its vessels. The flag state's national laws including criminal laws, apply to those aboard its ships. The flag state has exclusive jurisdiction over its vessels on the high seas with limited exceptions, for example, if the state consents to boarding and inspection by officials from other states pursuant to a regional fisheries enforcement agreement. A flag state has a duty to ensure that its ships conform to international standards in relation to safety at sea, pollution control and communications.

Two potential "weak links" in the flag state control approach stand out. First is the "flag of convenience" challenge where some states continue to register ships without having adequate capacity and political will to ensure their vessels live up to international standards and commitments. The International Transport Workers' Federation lists over 30 countries, including Antigua and Barbuda, Bahamas, Belize, the Cayman Islands, Liberia and Panama, that are considered flags of convenience

where vessels are registered for the purposes of reducing operating costs and avoiding strict regulations. Second is the sovereign immunity reality. Article 236 of the LOSC exempts warships and government owned or operated ships used for non-commercial service from the marine and environmental protection provisions of the Convention. States are merely required to ensure such vessels act consistent “as far as is reasonable and practicable” with the Convention’s provisions.

3.2.1.3 Port State Jurisdiction and Control

When a vessel is voluntarily within a port or off-shore terminal of a state, the state possesses broad powers of inspection and enforcement. Article 218 of the LOSC recognises the right of a port state to investigate and institute proceedings regarding illegal pollution discharges even if outside its own maritime zones, specifically on the high seas or within the jurisdictional zones of other states (if they request institution of proceedings). Article 219 of the LOSC requires port states to prevent unseaworthy ships from sailing and authorises port states to require a vessel to proceed to the nearest repair yard.

Most marine regions around the globe are covered by memorandums of understanding (MOU) on port state control, including the Paris MOU covering Europe and the North Atlantic and the Tokyo MOU applicable to Asia and the Pacific, whereby maritime administrations agree to cooperate in undertaking inspection of ships visiting their ports to ensure compliance with key international conventions relating to maritime safety and pollution. With the projected increase in Arctic commercial shipping the question arises as to whether the maritime authorities of the Arctic states should develop a new MOU specific to port state control in the Arctic.

3.2.2 Arctic Law of the Sea Challenges

At least four main “law of the sea” challenges can be seen to directly concern Arctic waters. First, two ocean boundary disputes continue to fester in the region. Canada and the United States disagree over the maritime boundary in the Beaufort Sea. Canada and Denmark (Greenland) contest a small area of jurisdiction in the Lincoln Sea. Until such disputes are resolved, ship operators may face uncertainty over which national shipping laws are applicable in a contested zone. While Norway and the Russian Federation had a long-standing ocean boundary dispute in the Barents Sea, they reached a preliminary agreement in April 2010 to finally delineate their maritime border.

Second, the five coastal states of the Arctic Ocean have yet to finally determine the outer limits of their continental shelves. The Russian Federation, made its initial submission for an extended continental shelf to the Commission on the Limits of the Continental Shelf in December 2001, but was requested to submit a revised submission as to a possible

Arctic extension and that submission is expected in 2010 or possibly later. Norway, filing its submission to the Commission in November 2006, received recommendations from the Commission in March 2009 and at the time of writing had yet to formally establish the outer limits. Canada, Denmark (Greenland) and the United States are still in the process of collecting scientific and technical data in order to establish their claims. The United States has not yet acceded to the LOSC and there is increasing pressure on it to become a Party in order to legitimise its potential extended continental shelf through the Commission on the Limits of the Continental Shelf.

Resolving disagreements over the jurisdictional status of some marine waters in the Arctic is a third challenge. For example, the United States and other states have objected to Canada's enclosure of its Arctic Archipelago with straight baselines and the status of those waters as internal. The United States considers the Northwest Passage and parts of the Northern Sea Route off the Russian Federation as straits used for international navigation where the right of transit passage would apply, while Canada and the Russian Federation vehemently contest such status.

The status of maritime zones off Svalbard is also open to contention. While the Treaty of Spitsbergen (Svalbard) adopted in 1920, recognises Norwegian sovereignty over the archipelago subject to equal rights of access, fishing and hunting for other parties, the application of the treaty beyond the territorial sea is disputed. Norway maintains the treaty's application ends at the territorial sea limit and, therefore, Norway is entitled to an EEZ and continental shelf off Svalbard. Tensions over the legal status of waters seaward of the territorial sea have been partly quelled by Norway's restraint in only establishing in 1977 a Fisheries Protection Zone out to 200 n.m., and granting fisheries access to contracting parties to the treaty founded on historical fishing patterns.

A fourth challenge is the need to consider possible future directions for strengthening international cooperation in protecting the marine environment in the large pocket of high seas beyond natural jurisdiction in the central Arctic Ocean. With various freedoms of the sea, including fishing and navigation, a looming challenge is to initiate international discussions on future development and conservation objectives and options for providing further protective measures. Various governance options have been proposed by various authors including the establishment of a regional ocean management organisation (ROMO), the creation of a regional fisheries management organisation (RFMO) and the negotiation of a high seas marine protected area.

Future directions for high seas governance for all the world's oceans, including the Arctic, has become an international cauldron of controversy. The UN General Assembly has established an Ad Hoc Open-ended Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdic-

tion (ABNJ Working Group). The ABNJ Working Group has met three times, most recently in February 2010, and has not been able to resolve deep divisions of opinion over such issues as whether an Implementation Agreement on High Seas Marine Biodiversity should be forged and whether bio-prospecting for genetic resources on the high seas should be subject to a special access and benefit sharing arrangements supportive of developing countries.

3.2.3 Antarctic Law of the Sea Realities and Challenges

With no generally recognised coastal states in the Antarctic region with national zones of jurisdiction and concomitant control over the activities of foreign vessels, the Antarctic law of the sea reality is the primacy of flag state jurisdiction. Each state authorising ships to fly its flag is responsible for ensuring its vessels operating in the Antarctic comply with international treaty and customary law obligations relating to such areas as shipping, fishing, ocean dumping and marine biodiversity conservation. For example, the Basel Convention on the Trans-boundary Management of Hazardous Wastes and Their Disposal requires parties to prohibit the export of hazardous wastes for disposal within the area south of the 60° South latitude, and it is the flag state that bears prime responsibility for ensuring its flagged vessels do not undertake such shipments. While ocean dumping in most regions would be strictly regulated by coastal states, in the Antarctic control measures for potential dumping from outside the region would fall on the shoulders of flag states.

Two main law of the sea challenges continue to hover over Antarctic waters. First is the potentially frayed regulatory nets opened by reliance on flag state jurisdiction as the prime means of controlling human uses. Flag states may not become party to key multilateral environmental or fisheries agreements aimed at protecting Antarctic waters. For example, the Madrid Protocol on Environmental Protection to the Antarctic Treaty, which sets out environmental impact assessment obligations for contracting parties authorising activities in the Antarctic, has only 34 parties. Thus, the danger exists that states not party might allow their flagged vessels to undertake tourism visits to the region without imposing any environmental impact assessment (EIA) requirements.

A second challenge is ensuring territorial claimant states in the Antarctic do not "rock the boat" in relation to contested offshore jurisdiction. For example, while Australia has passed national legislation prohibiting the taking of whales in its 200 EEZ declared off its claimed Antarctic Territory, it has thus far chosen not to enforce the legislation against foreign vessels. Political pressures continue within Australia for the government to take effective action against Japanese whaling allegedly undertaken for scientific research purposes. Potential extended continental shelf claims by territorial claimant states is a further jurisdictional issue.

For example, Australia in making its extended continental shelf claims to the Commission on the Limits of the Continental Shelf gave notice of its potential claim off Antarctica but requested the Commission not to consider the submission relating to the continental shelf appurtenant to Antarctica.

Numerous issues lurk in the background regarding maritime claims in the Antarctic. They include: how to determine baselines for measuring maritime zones where the normal “low-water line along the coast” may not be possible to determine due to ice-cover; whether ice shelves can be equated with land and be used as base points; and how to treat ice for maritime boundary delimitation purposes if claimant states in Antarctica choose to delimit boundaries between themselves.

The legal status of icebergs, which have potential for commercial exploitation, is a further looming issue. Whether coastal claimant states might eventually exert “ownership” rights over icebergs within 200 n.m. zones remains to be seen. A freedom of the high seas approach is also possible where “harvesting” would be open to anyone, but a common heritage of humankind approach whereby exploitation would be subject to equitable sharing of benefits through an international management scheme might also be considered.

3.3 Governance of Polar Shipping: Similarities and Polarities

3.3.1 Similarities

Shipping standards for the two Polar Regions are common on many fronts. Global conventions relating to maritime safety apply to both the Arctic and Antarctic as do some vessel-source pollution and marine environmental protection provisions. Various guidelines, some specifically tailored to address the special challenges of Polar shipping, have also been forged.

3.3.1.1 Maritime Safety Agreements

The “main sail” agreement setting out international safety standards for shipping in all oceans, including Polar seas, is the (1974) Safety of Life at Sea Convention, (SOLAS) as amended. The Convention casts a broad net of rules and standards in such areas as construction, steering gear requirements, fire detection and extinction, life-saving equipment including lifeboats and life jackets, radio communications, carriage of dangerous goods and maritime security. Chapter V of SOLAS addresses safety of navigation in various ways: by imposing navigational equipment requirements like radar and eco-sounding devices (to display available water depth); by requiring vessels to carry adequate and up-to-date nautical

charts; and by providing for the imposition of mandatory ships routing systems through application to the IMO.

Four other maritime safety “jib sails” are also particularly important. The (1966) International Convention on Load Lines, is aimed at ensuring ships are not overloaded by requiring adequate freeboard, that is, the distance between the ship’s deck and the waterline. The (1972) Convention on the International Regulations for Preventing Collisions at Sea, (COLREGS) sets out various speed, lookout and navigational rules to help avoid collisions and also requires various lighting arrays and sound signals. The (1979) International Convention on Maritime Search and Rescue provides the legal umbrella for countries to cooperate in ensuring that adequate search and rescue capabilities are in place in all marine regions. The (1978) International Convention on Standards of Training, Clarification and Watch-keeping for Seafarers, significantly amended in 1995 and again in June 2010, establishes training and competency requirements for ship officers and crew and covers hours of work and rest.

3.3.1.2 Vessel-source Pollution and Marine Environmental Protection Provisions

The International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), the “main sail” for addressing vessel-source pollution, is applicable to both Polar Regions and establishes detailed marine pollution and protection standards through six annexes. Annexes I (oil) and II (noxious liquid substances) are mandatory for all parties to the Convention while the others Annexes III (harmful substances in packaged form), IV (sewage), V (garbage) and VI (air emissions) are optional.

While substantial differences in vessel discharge standards for the Arctic and Antarctic exist in relation to oil, noxious liquid substances, and garbage as discussed below, two major commonalities stand out. First, Annex VI of the MARPOL 77/78 which seeks to control air emissions such as ozone-depleting substances, nitrogen oxides and sulphur oxides, applies uniformly to ships operating in both Polar Regions. One of the key control mechanisms is to generally limit the sulphur content of ship fuels at 4.5 percent, but special Emission Control Areas can be established where the sulphur content would be capped at 1.5 percent. Amendments to Annex VI in 2008 will gradually decrease the general cap from 4.5 percent to 0.5 percent (effective from 1 January 2020) and the Emission Control Areas standard from 1.5 percent to 0.1 percent (effective from 1 January 2015). The revised Annex VI allows an Emission Control Area to be designated not to just control sulphur oxides but also nitrogen oxides. Neither Polar Region has yet been proposed for special emissions status, thus the general sulphur content standards will apply.

While some differences do exist over how the Antarctic and Arctic regions address sewage discharges from ships, such as which ships are subject to controls, the two regions are also subject to quite similar sew-

age discharge standards. Annex IV to the Protocol on Environmental Protection to the Antarctic Treaty in Article 6 allows untreated sewage from a holding tank to be discharged beyond 12 n.m. from land or ice shelves at a moderate rate while the ship is *en route* at a speed of no less than 4 knots. This is consistent with Regulation 11 of MARPOL's Annex IV which sets a global standard from sewage discharges also applicable to the Arctic so long as coastal states do not adopt stricter standards.

Other global "jib sails" aimed at protecting the marine environment are also applicable to both Polar Regions. The (1972) Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, permits ocean dumping if authorised pursuant to a national ocean dumping permit but prohibits disposal of wastes listed on a global prohibited list, such as industrial and radioactive wastes. A 1996 Protocol to the Convention adopts a precautionary approach whereby only wastes listed on a global "safe list"; such as dredged materials and organic wastes of natural origin, may be disposed of subject to a waste assessment review and a national permit.

The International Convention on the Control of Harmful Anti-fouling Systems on Ships, which came into force on September 17, 2008, requires ships to either not use organotin compounds on their hulls by January 1, 2008 or to have a protective coating to prevent leaching of organotin compounds. Organotin compounds, such as tributyltin (TBT), act as biocides to prevent marine life such as algae and molluscs from attaching themselves to ship hulls and TBT has been shown to cause sex changes in whelks and deformities in oysters.

The International Convention for the Control and Management of Ships' Ballast Water and Sediments, adopted in 2004 but not yet in force, seeks to avoid transfer of invasive alien species across marine regions through ballast water exchange obligations (whenever possible conducting exchanges at least 200 n.m. from the nearest land in water at least 200 metres in depth) and ballast water management systems. Shifting from ballast water exchange to treatment systems to control the levels of viable organisms is to occur for all ships by 2016.

Two global agreements seek to ensure adequate preparations for preventing and responding to pollution incidents. The (1990) International Convention on Oil Pollution Preparedness, Response and Co-operation, requires contracting parties to require ships flying their flags to have on board a shipboard oil pollution emergency plan, to provide a minimum level of pre-positioned oil combating equipment, and to cooperate upon the request of any party in responding to an oil pollution incident. The (2000) Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, extends the obligations to cover carriage and spills of hazardous and noxious substances.

3.3.1.3 Shipping Guidelines

Three key sets of guidelines, adopted under the auspices of the IMO, seek to address the special conditions posed by shipping in Polar waters including remoteness and the dangers posed by ice. First, the Maritime Safety Committee in May 2006 adopted a Circular (MSC. 1/Circ. 1184) on Enhanced Contingency Planning Guidance for Passenger Ships Operating in Areas Remote from SAR Facilities. The guidance document urges companies operating passenger ships in areas remote from search and rescue facilities to develop contingency plans in case of emergencies which should consider, among other things, the possibility of voyage "pairing" where other passenger ships operating in the same area might be used as a search and rescue facility.

Guidelines on Voyage Planning for Passenger Ships Operating in Remote Areas, adopted by the IMO Assembly in November 2007, further urge passenger ships to develop detailed voyage and passage plans. Such plans for ships operating in the Arctic or Antarctic waters should address such factors as safe distance from icebergs, safe speeds in the presence of ice, no entry areas and special preparations necessary before entering waters where ice may be present, such as abandoning ship drills.

A third set of guidelines was adopted by the IMO Assembly in December 2009 which revised Guidelines for Ships Operating in Arctic Ice-Covered Waters (2002) and extended coverage to both the Arctic and Antarctic waters (See Figures 1 and 2). The Guidelines for Ships

Operating in Polar Waters provide a four-part overlay to existing international maritime agreements in order to address the special situation of ships operating in Polar waters. The Guidelines are applicable to ships subject to regulations under the SOLAS Convention which generally covers passenger ships and cargo ships of 500 gross tonnage or more when engaged on international voyages but not warships, pleasure yachts or fishing vessels. Part A of the Guidelines provides construction, stability and other technical requirements for new Polar Class Ships. The Guidelines, adopting the seven Polar classes recognised by the International Association of Classification Societies (IACS), seek to ensure ships can withstand flooding

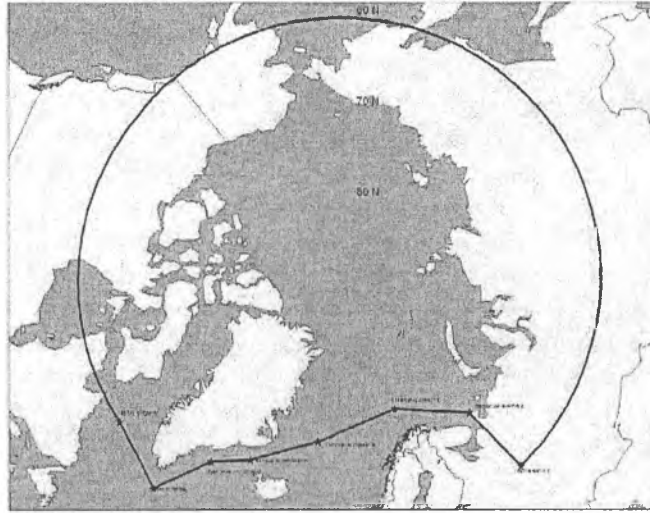


Figure 1: Maximum extent of Arctic waters application

Source: IMO, Guidelines for Ships Operating in Polar Waters, Assembly Res. A. 1024(26) (2009), p. 9

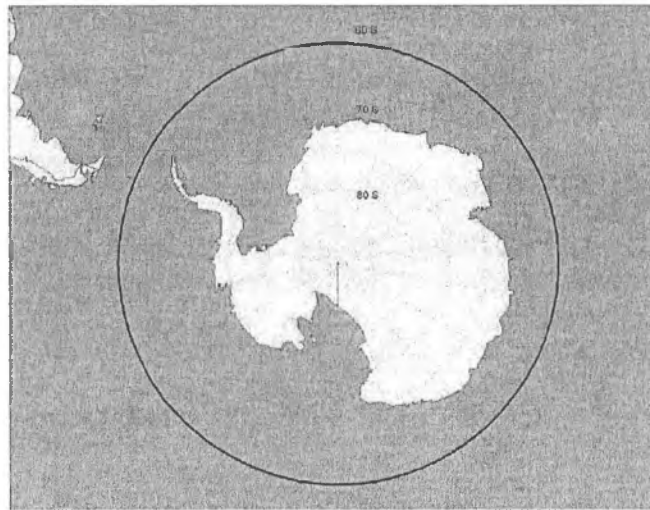


Figure 2: Maximum extent of Antarctic Waters application

Source: IMO, Guidelines for Ships Operating in Polar Waters, Assembly Res. A. 1024(26) (2009), p. 9

Resulting from hull penetration due to ice impacts, advocate against Polar Class ships carrying any pollutant against the outer shell, urge appropriate anchoring and towing arrangements, and call for all equipment on a ship to not be susceptible to brittle fracture.

Part B, applicable to Polar Class and other ships, sets out various equipment suggestions. These include, among others, the design and location of fire detection and extinguishment systems to avoid freezing temperatures, the provision of personal survival kits capable of protecting against severe weather conditions, the carrying of partially or totally en-

closed lifeboats, and redundancy in key navigational systems such as radar and depth sounding devices.

Part C, also applicable to Polar Class and other ships, sets out various operational suggestions. A checklist of what crew members should consider in an evacuation drill is provided. Carriage of at least one qualified Ice Navigator aboard all ships operating in Polar ice-covered waters is advocated, but with no detail on what would constitute adequate on-the-job training or simulation training. Reserve supplies of fuel and lubricants are urged in light of heavy fuel consumption in heavy ice.

Part D encourages the equipment and preparation for Polar Class and other ships navigating in Polar waters to control damage to the marine environment. Proper equipment and training to ensure minor hull repairs is urged along with the capability to contain and clean up minor deck or over side spills.

A process is currently underway within the IMO to make the voluntary Guidelines for Ships Operating in Polar waters mandatory with 2012 being a target completion date. Various issues are being discussed including the geographic scope of application, appropriate classroom and practical experiences that should be required for ice navigators, possible extension of coverage to barges, fishing vessels and pleasure craft, phase-in requirements for existing ships, and possible expansion to cover ballast water and hull-fouling.

A more general set of IMO guidelines also has potential to be applied to Polar waters. Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas (PSSAs), undergoing substantial revision in 2005, provide for the designation of PSSAs for areas particularly vulnerable from international ship traffic where special associated protective measures may be imposed such as areas to be avoided, traffic routeing, mandatory ship reporting, and discharge restriction. However, to date PSSA designations have not been applied to either Polar Region.

3.3.2 Polarities

With the Antarctic listed as a special area under Annexes I (oil), II (noxious liquid substances) and V (garbage) of MARPOL, stricter than global discharge standards have been established for the marine region south of the 60° South latitude. These stricter standards have been further solidified by inclusion in Annex IV to the Madrid Protocol on Environmental Protection. Article 3 of Annex IV prohibits the discharge into the sea of oil or oily mixtures from ships with limited exceptions such as a discharge relating to accidental damage to the ship or equipment. Article 4 prohibits the discharge of any noxious liquid substance and any other chemical substances in quantities or circumstances harmful to the marine environment. Article 5 prohibits disposal of all plastics into the sea from vessels and most other garbage with the exception of ground up food

wastes if disposed of 12 n.m. or more from the nearest land or ice shelf. The question of whether the Antarctic special area designations should be extended northward from the present area south of the 60° South latitude to the Antarctic convergence is under discussion by Antarctic Treaty Consultative Parties.

The MARPOL Convention provides special reception facility requirements to support Antarctic special area designations in relation to oil and garbage. Parties to MARPOL at whose ports ships depart *en route* to or arrive from the Antarctic area must ensure adequate facilities for the reception of oily residues and garbage from all ships. Each Party to MARPOL is also required to ensure that all ships entitled to fly its flag, before entering the Antarctic area, have sufficient capacity on board for the retention of oily residues and garbage and have concluded arrangements for the discharge of oily residues and garbage at a reception facility after leaving the area.

With no area of the Arctic Ocean having been designated as a special area under MARPOL, the pollutant discharge standards for some areas of the Arctic are less strict than for the Antarctic. Unless coastal states choose to impose stricter than global standards pursuant to the special legislative and enforcement powers granted by Article 234 of the LOSC, global standards will apply. Annex I of MARPOL allows oily ballast water discharges from tankers if they are over 50 n.m. offshore at a rate of 30 litres per nautical mile while *en route*, and the Annex also allows oily bilge waste discharges from oil tankers and other ships with a 15 parts per million (ppm) limitation. Annex II allows some discharge of noxious liquid substance residues based on the level of toxicity. Annex V allows considerable garbage deposits, other than plastics, including packing materials if more than 25 n.m. from the nearest land and glass, metal, paper products, rags and similar refuse if more than 12 n.m. from the nearest land.

Canada and the Russian Federation exemplify how coastal states may choose to impose stricter than global discharge standards. Canada prohibits all oil discharges from ships in Arctic waters with limited exceptions, as well as garbage and other waste deposits. The Russian Federation has prohibited the discharge of oily ballast water from tankers and the deposit of garbage for the Northern Sea Route.

Regional differences have also emerged in relation to the carriage of heavy grade oil and the control of ballast water in Polar Regions. A proposal to prohibit the use of carriage of heavy grade oil in the Antarctic was adopted by the IMO's Marine Environment Protection Committee in March 2010 and the ban on the use and carriage of heavy fuel oil by vessels operating in Antarctic waters will take effect from 1 August 2011 through a regulatory amendment to Annex I of MARPOL. In 2007, non-binding Guidelines for Ballast Water Exchange in the Antarctic Treaty Area were adopted by the IMO with various control measures suggested

including the exchange of ballast water before arrival in Antarctic waters. To date regional approaches to addressing heavy grade oil carriage and ballast water controls have not been developed for the Arctic region.

3.4 Conclusion

As this chapter has sought to highlight the Arctic and Antarctic are in many ways “poles apart” in relation to law of the sea contexts and shipping discharge standards. While the Arctic, being an ocean surrounded by continents, is largely subject to the jurisdiction of five coastal states, the Antarctic, constituting a continent surrounded by an ocean, remains in a law of the sea “twilight zone” with no generally recognised coastal state offshore jurisdiction and thus the primacy of flag state legislative and enforcement controls. While the Antarctic has been designated as a special area under three of MARPOL’s annexes where stricter than general international vessel-source discharge standards apply for oil, noxious liquid substances and garbage, the Arctic has not yet been globally designated for special pollution control measures.

However, shared commonalities in the areas of maritime safety, vessel discharge standards and marine environmental protection obligations have emerged. For example, The Guidelines for Ships Operating in Polar Waters (2009) establish a common framework for construction and operational requirements for ships in the Arctic and Antarctic. Consistent air emission and sewage discharge standards for ships have been adopted for the two regions. International agreements relating to ocean dumping, anti-fouling agents, ballast water management and emergency preparedness are also applicable to both regions.

The quest for effective governance in both Polar regions is thus far from over. The Guidelines for Ships Operating in Polar Waters have yet to be made mandatory and numerous issues remain to be resolved, such as the geographical scope of applications, the types of vessels covered and the strength of regulatory measures. Efforts continue within the IMO to further tighten controls on sewage and garbage from ships. The regulation of greenhouse gas emissions from ships has become a topic of important but unresolved debate. Pressures to better control vessel noise in order to protect marine mammals have also not abated.

Both Polar Regions are currently experiencing increased attention in respect of the inadequacies of existing shipping governance measures and the need to strengthen international and regional rules and standards. The Arctic Council’s comprehensive Arctic Marine Shipping Assessment (AMSA), published in April 2009, offered numerous recommendations under three themes. For example, to enhance Arctic marine safety, AMSA urged Arctic states: to work through the IMO to augment global ship safety and pollution prevention conventions with specific mandatory requirements for ship

construction, design, equipment, crewing, training and operations aimed at Arctic shipping safety; to explore harmonisation of national Arctic shipping regulatory regimes; and to develop a multi-national Arctic Search and Rescue (SAR) instrument including aeronautical and maritime SAR. To protect Arctic people and the environment, AMSA recommends that Arctic states: identify areas of heightened ecological and cultural significance and implement protective measures from marine shipping impacts; explore the need for specially designated Arctic marine areas as “special areas” or “particularly sensitive sea areas” through the IMO; enhance cooperation in oil spill prevention; and support reduction of air emissions of greenhouse gases, nitrogen oxides, sulphur oxides and particulate matter. To build Arctic marine infrastructure, the third theme, AMSA urges Arctic states: to improve infrastructure in the areas of ice navigation training, navigational charts, communication systems, port services, reception facilities for ship-generated waste, and icebreaker assistance; develop circumpolar pollution response capabilities; and increase investments in securing adequate hydrographic, meteorological and oceanographic data to support safe navigation. At the Sixth Ministerial Meeting of the Arctic Council in Tromsø, Norway, April 29, 2009, Ministers approved the actual establishment of a task force to negotiate an international SAR instrument for the Arctic by the next Ministerial meeting in 2011.

The Antarctic Treaty Meeting of Experts on Ship-borne Tourism in the Antarctic Treaty Area, hosted by New Zealand in December 2009, also produced a set of recommendations to be forwarded to the next Antarctic Treaty Consultative Meeting. For example, Antarctic Treaty Parties are urged to: consider the development of a specific checklist for inspections of tourist vessels in Antarctica; contribute to hydrographic and charting information in the Antarctic Treaty Area; proactively apply port state control regimes to tourist vessels bound for the Antarctic; exchange information on contingency planning preparedness; and consider mechanisms for enhancing coordination with respect to Antarctic-related matters within the IMO.

The time is ripe for the further strengthening of shipping governance and cooperative arrangements to protect the marine environment in both Polar Regions. However, it remains to be seen how far the vested social and economic interests of states and their constituents will constrain progress. The voyage towards safe and sustainable seas in both regions is thus likely to be a long and arduous.

Further reading:

- Arctic Council, *Arctic Marine Shipping Assessment 2009 Report* (April 2009, second printing).
- Erik Franckx, *Maritime Claims in the Arctic: Canadian and Russian Perspectives* Martinus Nijhoff Publishers, Dordrecht/Boston/Leiden, 1993.
- Christopher C. Joyner, *Antarctica and the Law of the Sea*, Martinus Nijhoff Publishers, Dordrecht/Boston/Leiden, 1992.
- Christopher C. Joyner, *Governing the Frozen Commons: The Antarctic Regime and Environmental Protection*, University of South Carolina Press, Columbia, South Carolina, 1998.
- Stuart B. Kaye and Donald R. Rothwell, "Southern Ocean Boundaries and Maritime Claims: Another Antarctic Challenge for the Law of the Sea?" (2002) 33 *Ocean Development & International Law*: 359–389.
- David Leary, "Bioprospecting in Antarctica and the Arctic: Common Challenges?" in (2009) 1 *The Yearbook of Polar Law*: 145–174.
- Alex G. Oude Elferink and Donald R. Rothwell (eds.), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction*, Kluwer Law International, The Hague and London, 2001.
- Rosemary Rayfuse, "Melting Moments: The Future of Polar Oceans Governance in a Warming World" (2007) 16(2) *RECIEL*: 196–216.
- Gillian Triggs and Anna Riddell (eds.), *Antarctica: Legal and Environmental Challenges for the Future*, British Institute of International and Comparative Law, London, 2007.
- David L. VanderZwaag, et. al., *Governance of Arctic Marine Shipping*, Marine & Environmental Law Institute, Dalhousie University, October 2008 Available online <<http://www.pame.is/amsa/amsa-background-research-documents>>.
- David L. VanderZwaag, "Climate Change and the Future of Arctic Governance: A Slushy Seascape and Hard Questions" in Timo Koivurova, E. Carina, H. Keskitalo and Nigel Bankes (eds.), *Climate Governance in the Arctic*, Springer, Berlin 2009, pp. 403–427.

Websites:

- Antarctic and Southern Ocean Coalition <<http://www.asoc.org>>.
- Division of Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations <<http://www.un.org/Depts/los/index.htm>>.
- International Maritime Organization <<http://www.imo.org>>.
- Protection of the Arctic Marine Environment Working Group (PAME) <<http://www.pame.is/>>.
- Secretariat of the Antarctic Treaty <http://www.ats.aq/index_e.htm>.

Questions:

1. What are the main differences in the Law of the Sea contexts for the Arctic and the Antarctic?
2. What is the main Law of the Sea challenge for each Polar region?
3. Are shipping activities in the Arctic and Antarctic adequately controlled?
4. What governance strengthening, if any, would you recommend for the Arctic? For the Antarctic?