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The U.N. Law of the Sea Convention and the United States: Developments Since October 2003

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Summary

In October 2003, the Senate Foreign Relations Committee held hearings on the 1982 U.N. Convention on the Law of the Sea and the 1994 Agreement Relating to Implementation of Part XI of that Convention. These were the first hearings since the Convention package was transmitted to the Senate in October 1994. In February 2004, the Committee unanimously recommended Senate advice and consent to U.S. adherence to the Convention. CRS Issue Brief IB95010, *The Law of the Sea Convention and U.S. Policy*, serves as a basic CRS source for discussion of issues related to the United States and the Convention and Agreement, while this short report focuses on events and issues that have emerged since October 2003. It summarizes the Committee's resolution of advice and consent and presents some of the issues raised in recent months in support of and in opposition to U.S. adherence. This report will be updated periodically.

Introduction

On February 25, 2004, the Senate Committee on Foreign Relations, by a vote of 19 to 0, recommended that the Senate give its advice and consent to U.S. accession to the 1982 United Nations Convention on the Law of the Sea and ratification of the 1994 Agreement Relating to the Implementation of Part XI of the U.N. Convention (S. Ex. Rpt. 108-10, March 11, 2004). The resolution of advice and consent included declarations to be made under Articles 287 and 298 of the Convention, declarations and understandings to be made under Article 310 of the Convention, and conditions. The Committee on October 14 and 21, 2003, held hearings on the Convention package (Treaty Document 103-39) which was transmitted to the Senate on October 7, 1994.[1] The Senate Majority Leader has not yet scheduled the treaty for floor consideration and vote.

[1] A link to the text of Treaty Document 103-39 may be found at [http://lugar.senate.gov/sfrc/sea.html]

Background

The Convention which resulted from the third U.N. Conference on the Law of the Sea, established a legal regime governing activities on, over, and under the world's oceans. In December 1982, when the Convention was opened for signature, the United States and some other industrialized countries did not sign the Convention, maintaining that important changes were needed to the parts that dealt with deep seabed resources beyond national jurisdiction. As a consequence of consultations on these issues, an agreement relating to Part XI of the Convention was adopted on July 28, 1994 and opened for signature. The Convention entered into force on November 16, 1994, and the Agreement entered into force on July 28, 1996. As of August 19, 2004, 145 entities were parties to the Convention and 117 entities were parties to the Agreement.

Issues Since October 2003 — and the Senate Response

The issues raised in the 1982-1994 period dealt primarily with the regime and international organization associated with the deep seabed area beyond national jurisdiction. Many of the issues raised during and since the October 2003 hearings related to more traditional law of the sea topics.[2] They included use of the military activities exemption in application of the mandatory dispute settlement machinery; protection of U.S. security interests in the face of current terrorist threats; delimitation of the continental shelf beyond 200 nautical miles; and a concern that continued absence by the United States in the bodies[3] set up by the Convention and Agreement will act negatively against the interests of the United States.

The response of the Senate Foreign Relations Committee was to fashion a resolution of advice and consent that included in section 2, declarations under Articles 287 and 298 of the Convention regarding settlement of disputes; in section 3, 24 declarations or understandings under Article 310 of the Convention; and in section 4, five paragraphs that deal with amendment of the Convention, only two of which would be included in the U.S. instrument of accession to the Convention.

Article 287 (1) of the Convention allows for a declaration on the dispute settlement machinery a State Party chooses to use in disputes concerning the interpretation or application of articles of the Convention. Under the Committee-recommended resolution of advice and consent, the United States would choose a special arbitral tribunal under Annex VIII in disputes relating to "fisheries, protection and preservation of the marine environment, marine scientific research, and navigation, including pollution from vessels and by dumping." The United States would choose an arbitral tribunal under Annex VII for the settlement of disputes not covered in the above list.

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[2] In addition to the Senate Foreign Relations Committee, hearings were held by the Senate Environment and Public Works Committee on March 23, 2004, the Senate Armed Services Committee on April 8, 2004, the Senate Select Committee on Intelligence on June 8, 2004, and the House International Relations Committee on May 12, 2004. Statements may be found on the website of each Committee.

[3] The International Seabed Authority and its Councils, the Commission on the Limits of the Continental Shelf, and the International Tribunal for the Law of the Sea.

Article 298 (1) of the Convention provides that a State may declare it does not accept any of the procedures for dispute settlement in any of three types of disputes. Under section 2 of the recommended resolution of advice and consent, the United States would submit a declaration exempting itself from all three categories of disputes — those concerning the interpretation or application of Article 15 on the territorial sea, Article 74 on the exclusive economic zone and Article 83 on the continental shelf relating to boundary delimitations or those involving historic bays or titles; disputes concerning military activities and disputes concerning certain law enforcement activities; and disputes in which the United Nations Security Council is exercising its U.N. Charter functions. The U.S. declaration would also state the U.S. understanding that under Article 298 (1)(b), "each State Party has the exclusive right to determine whether its activities are or were 'military activities' and that such determinations are not subject to review."

Article 310 provides that a State may make declarations or statements aimed at harmonizing its laws and regulations with the Convention, provided that these declarations or statements do not "purport" to exclude or to modify the legal effect of the Convention's provisions in their application to that State. Section 3 of the recommended resolution sets out declarations or statements of understanding in 24 separate paragraphs. Some of these reiterate Convention language to emphasize this country's understanding and interpretation of that language. These include such topics as:

- right of innocent passage,
- transit passage defined,
- high seas freedoms in the exclusive economic zone,
- marine scientific research,
- sovereign right of a State to impose and enforce conditions for entry of foreign vessels into its ports, rivers, harbors...,
- coastal State exclusive right to determine the allowable catch of living resources in its exclusive economic zone, and
- "Sanitary laws and regulations" in Article 33 to include laws and regulations to protect human health from pathogens being introduced to the territorial sea.

Section 4 lists five paragraphs of conditions, all related to the amendment process for the Convention, requiring the President to provide copies of proposed amendments to the Senate Committee on Foreign Relations and to consult with the Committee in certain circumstances. Two conditions would also be included in the U.S. instrument of accession, to the effect that all amendments shall be submitted by the President to the Senate for its advice and consent and that the United States shall take all necessary steps to ensure that certain amendments are adopted in conformity with the treaty clause of the U.S. Constitution.

Other Issues of Concern to the Congress

Since the February 25, 2004, Committee vote, numerous expressions of opposition to as well as support for U.S. adherence to the Convention and Agreement have been published. During his March 23, 2004, statement to the Senate Environment and Public Works Committee, Assistant Secretary of State for Oceans and International

Environmental and Scientific Affairs John F. Turner set forth Administration responses to at least a dozen opposing arguments.[4]

Proponents have raised at least two sets of arguments as supporting "prompt" Senate approval of the convention/agreement package. They maintain that quick U.S. adherence to and participation in the Convention would

— protect U.S. interests during considerations of the Commission on the Limits of the Continental Shelf, and enable the United States to submit its own limits, with extensive supporting data; and
— provide an effective U.S. role, as November 2004 approaches for the submission and consideration of proposed amendments to the Convention.

Commission on the Limits of the Continental Shelf

The mandate of the Commission is to examine and make recommendations on coastal State extensions of their continental shelf beyond 200 nautical miles. The Convention gives the coastal State sovereign jurisdiction over the resources, including oil and gas, of its continental shelf. Under Article 76 of the Convention, a coastal State with a broad continental margin may establish a shelf limit beyond 200 miles, subject to its submission of the particulars of the limit and supporting scientific and technical data to the Commission for review and recommendations. The Commission reviews the intended limits and supporting documentation, referring to the criteria set forth in Article 76 and to other guidelines it has set up and makes recommendations to the submitting State. While, according to information in Treaty Document 103-39, the "coastal State is not bound to accept these recommendations," Article 76, para. 8, stipulates that the "limits established by a coastal State on the basis of these recommendations shall be final and binding."[5] In this way, the Convention process contributes to the goal of preventing and reducing the possibility of "dispute and uncertainty."

The Russian Federation made the first submission received by the Commission in December 2001, with proposed outer limits in the Central Arctic Ocean, the Barents and Bering Seas, and in the Sea of Okhotsk. As of May 21, 2004, seven States had expressed their intentions to make submissions to the Commission within three years. They included Australia (by November 16, 2004), Ireland, Norway, Namibia, Pakistan, Sri Lanka, and Brazil, which made its submission on May 17, 2004. [6]

The Amendment Process

The Convention's provisions delayed the possibility of amendment until ten years after its entry into force, that is until November 2004. Articles 312 through 316 deal with amendment, with a special process set forth in Article 314 and Article 316, para. 5, for any Convention provisions relating exclusively to activities in the Area, defined as the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction.

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[4] See [http://www.state.gov/g/oes/rls/rm/2004/30723pf.htm] See also statements before the Senate Armed Services Committee on April 8, 2004, by William H. Taft IV, Admiral William L. Schachte, and John Norton Moore, all of which contain responses to opposition comments.

[5] See Treaty Document 103-39, pages 56-57.

[6] U.N. Press Release SEA/1793, p. 3 and Commission document CLCS/39, p. 5.

For amendments to provisions not relating to activities in the Area, the Convention sets forth two procedural options leading to adoption after a proposed amendment is sent by a State Party to the U.N. Secretary-General:

- proposal of amendment (s), with a request that a conference be held to consider and adopt the proposed amendment. The convening of such a conference would require favorable responses from at least half of the States Parties within 12 months of the request. (Article 312)
- proposal of amendment (s), with a request for adoption by a "simplified procedure" without convening a conference. If, within 12 months of this request, "a State Party objects to the proposed amendment or to ... its adoption by the simplified procedure, the amendment shall be considered rejected." If, however, within the same time period, there has been no objection, the proposed amendment "shall be considered adopted." (Article 313)

In either case, entry into force of an amendment after adoption requires ratification or accession by two-thirds or by 60 States Parties, whichever is the greater number.

Amendments to provisions relating to activities in the Area require a different procedure. Proposed amendments are to be sent to the Secretary-General of the International Seabed Authority (ISA). The proposed amendment must be approved by the ISA Assembly after prior approval (by consensus) by the ISA Council. Once approved, the proposed amendment "shall be considered adopted." Entry into force of any adopted amendment requires ratification or accession by three fourths of States Parties, after which it "shall enter into force for **all** [emphasis added] States Parties."

The United States would need to be a Party to the Convention in order to block what it might consider objectionable amendments in two of the three approaches discussed. Under the conference option, it might, as an observer, muster sufficient influence on some States Parties to affect a proposed amendment.

U.S. National Security Interests

Some opponents to U.S. adherence to the treaty package have suggested that such adherence is contrary to U.S. national security interests, especially in a post-September 11 world. They maintain that under the treaty the United States would not be able to carry out counter-terrorism programs such as the Proliferation Security Initiative (PSI) under which shipments of weapons of mass destruction (WMD), etc., would be interdicted. Referring to Articles 92 and 110 of the Convention, they state that the treaty does not explicitly guarantee a right to board or interdict when evidence of terrorist intentions through WMD is involved.[7]

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[7] The Proliferation Security Initiative was started by President Bush May 31, 2003, and framed in a Statement of Interdiction Principles, September 4, 2003. PSI participating states "undertake effective measures...for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council." See CRS Report RS21881 on the PSI by Sharon Squassoni.

Legal Adviser William H. Taft IV during April 8, 2004, hearings before the Senate Armed Services Committee addressed "the relationship between the Convention and the President's Proliferation Security Initiative. The Convention will not affect our efforts under the PSI to interdict vessels suspected of engaging in the proliferation of weapons of mass destruction." He added,

> The Convention recognizes numerous legal bases for taking enforcement action against vessels and aircraft suspected of engaging in proliferation of weapons of mass destruction, for example, exclusive port and coastal State jurisdiction in internal waters and national air space; coastal State jurisdiction in the territorial sea and contiguous zone; exclusive flag State jurisdiction over vessels on the high seas (which the flag State may, either by general agreement in advance or approval in response to a specific request, waive in favor of other States); and universal jurisdiction over stateless vessels. Further, nothing in the Convention impairs the inherent right of individual or collective self-defense (a point which is reaffirmed in the proposed Resolution of Advice and Consent).

In 2004, the United States concluded PSI boarding agreements with both Liberia and Panama, two of the largest ship registry nations in the world.

Among other statements made by Convention opponents are the following: "The treaty effectively prohibits two functions vital to American security: collecting intelligence in, and submerged transit of, territorial waters." AND "The treaty's Articles 19 and 20 attempt explicitly to regulate intelligence and submarine activities in what are defined as 'territorial' seas. These are activities vital to U.S. security that we should ensure remain unrestricted at all costs." [8]

Taft stated that Articles 19 and 20 do not prohibit intelligence activities or "submerged transit" in the territorial sea of other States. He continued,

> The Convention's provisions on innocent passage are very similar to article 14 in the 1958 Convention on the Territorial Sea and the Contiguous Zone, to which the United States is a party. (The 1982 Convention is in fact more favorable than the 1958 Convention....) A ship does not...enjoy the right of innocent passage if, in the case of a submarine, it navigates submerged or if, in the case of any ship, it engages in an act in the territorial sea aimed at collecting information to the prejudice of the defense or security of the coastal State, but such activities are not prohibited by the Convention. In this respect, the Convention makes no change in the situation that has existed for many years and under which we operate today.

In summary, the question of when and if the Senate will consider the Law of the Sea Convention in 2004 before the end of the 108th Congress remains a matter before the Senate Majority Leader. If the treaty is not considered, it will be returned to the Committee and would have to be voted out of Committee again before being placed on the Senate Executive calendar.

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[8] See Gaffney, Frank J., Jr. "John Kerry's Treaty." *National Review Online*, February 26, 2004, at [http://www.nationalreview.com] for the first quote and "Deep-six this treaty." *The Washington Times*, February 24, 2004 for the second quote.