

# Lost at Sea: America and the Law of the Sea Treaty



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**T**he United Nations Law of the Sea Convention (UNCLOS), or Law of the Sea Treaty (LOST) as opponents in the United States call it, provides an overarching comprehensive ocean governance framework for the world's oceans which cover 80 percent of the planet. At the time of its development and negotiation (1973-1982) in which Canada played a key leadership role, this was a groundbreaking agreement among nations. The final text of the 320-article convention with nine annexes was signed in Montego Bay, Jamaica on December 10, 1982, when 115 nations signed the instrument. The Third United Nations Convention on the Law of the Sea (UNCLOSIII) was a groundbreaking rules-based international agreement that has provided a clear foundation for ocean activities for the past 30 years. It is partly a codification of then-existing customary international law and a new rules-based regime that is global in nature and application, that addresses a variety of ocean issues including maritime zones, freedom of navigation, fishing, environmental protection and hydrocarbon development.

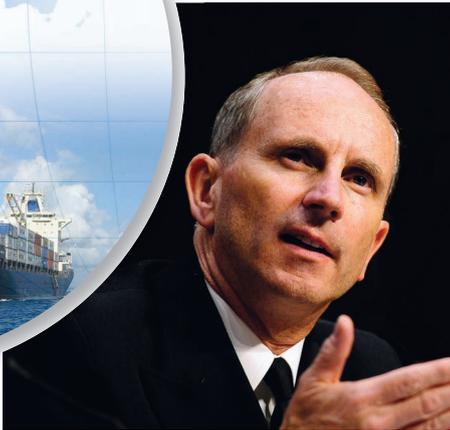
It is a complete international agreement on 24 elements of ocean matters and has been called "an overarching constitution of the seas". A nation has to accept all of the terms of UNCLOS as a complete package. Countries cannot pick and choose what elements of UNCLOS they were prepared to accept.

UNCLOS balances rights in the shipping context between coastal and flag states and freedom of navigation and environment protection. This has influenced Canada's marine and ocean activities since inception on all three of Canada's oceans: the Atlantic, Pacific and Arctic, whose maritime boundaries it shares with the United States, its

largest trading partner. This has strengthened Canada's ocean governance.

Many believed that agreement on the text of UNCLOS could not be achieved with so many issues and nations involved. Since that time, 163 nations have signed and ratified UNCLOS. Canada ratified UNCLOS in 2003. The United States signed UNCLOS in 1994 but, to ratify a convention under U.S. law, it must receive a two-thirds majority vote in the U.S. Senate. Earlier this year, an attempt to ratify UNCLOS was unsuccessful in the U.S. Senate. This led to a variety of testimony from a wide range of current and past senior officials in the U.S. government and military. This article will examine what American non-ratification of UNCLOS means to Canada from an Arctic Ocean, trade, and defence and security perspective and provide some insight into the stability that UNCLOS provides to Canada's economic prosperity and trade in the 21st Century.

The Senate Committee on Foreign Relations chaired by Senator John Kerry, the senior-ranking Democrat from Massachusetts, sought to bring forward UNCLOS for ratification. A small minority of Republican senators opposed ratification on July 16, 2012 on ideological grounds and obtained 34 votes to block it. As a Treaty, it requires a two-thirds majority for approval in the 100-member U.S. Senate. The ideological opposition to UNCLOS is based on the fear that the United States would give up its sovereignty to a United Nations body and place restrictions on U.S. activities on the high seas and the deepsea bed. In addition, on a number of issues under UNCLOS, the Treaty gives jurisdiction to an international body to resolve disputes under UNCLOS governed activities. For example,



Photos: Peter D. Lawlor, Patrick Kelley

Adm. Jonathan Greenert (left) and Commandant Adm. Robert J. Papp Jr. testify before the Senate Committee on Foreign Relations.

one is the outer extension of the continental shelf beyond the 200 nautical miles of the Exclusive Economic Zone (EEZ), as set out in article 76 of UNCLOS. Under UNCLOS, a Commission on the Limits of the Continental Shelf was set up under Annex 2 to define on a geological basis the outer extend of the continental shelf. The fact that these submerged sediments off a coastal nation may be a rich source of offshore hydrocarbon resources has not entered the discussion and debate in the Senate. For example, the U.S. Geological Survey estimates that the Arctic Ocean Basin contains 25 per cent of the world's undiscovered hydrocarbons. The U.S. has an extensive continental margin outside it EEZ. UNCLOS has been seen by American conservatives as a Trojan Horse for foreign organizations to potentially control U.S. activities.

The support for ratification of UNCLOS has a great deal of support in the United States from a diverse coalition of U.S. interest groups that represent national security, industry and the environment. The ratification of UNCLOS has been supported by U.S. Presidents Obama, Bush and Clinton. In Senate confirmation hearings for the position of Secretary of State, Senator Hillary Clinton was asked whether the Treaty should be a priority for the Secretary of State. Clinton stated "Yes it will be, and it will be because it is long overdue." She went on to say "If people start drilling in areas that are now ice-free most of the year, and we don't know where they can and cannot drill, we are going to be disadvantaged."

At the time of signing of the wording of UNCLOS in 1982, President Ronald Reagan refused to sign based upon then deepsea mining provisions, which were since modified. The U.S. Navy also felt at the time that, while it supported UNCLOS, the Treaty could hinder freedom of navigation and effect the projection of power by sea and overflight, thereby restricting naval mobility because of the new navigation rights created by UNCLOS. Fast forward 30 years and times have changed. In recent testimony before the Senate Committee on Foreign Relations, senior

members of the U.S. military have all given unanimous support to the ratification of UNCLOS. The support is broad and includes every living Chief of Naval Operations, the senior ranking Naval Officer in the U.S. Navy, the Chairman of Joint Chiefs of Staff and the Commandant of the U.S. Coast Guard, Admiral Robert Papp. Admiral Papp stated with respect to UNCLOS in testimony before the Senate Committee on Foreign Relations:

*"American prosperity has always depended upon having safe, reliable and secure maritime trade ... we rely on the Convention's framework every day to aid mariners in distress, protect our fish stocks, intercept illicit traffickers attempting to deliver drugs, persons and other illegal cargos to our shores, and to preserve our maritime sovereignty, navigational rights, and freedoms."*

Discussing the importance of the Convention in the emerging Arctic, Papp stated:

*"Our ability to effectively plan and allocate Arctic resources depends, in part, on the delineation of maritime boundaries, sovereign rights, privileges, and navigational freedoms. Yet, as we work alongside our partner Arctic Nations on issues of governance such as cooperative search and rescue agreements, oil spill prevention and response protocols, and delineation of maritime claims, we remain the only Arctic nation that is not a party to the Convention. Being a non-party detracts from our ability to best provide for the safety, security and stewardship of our vast and resource-rich maritime and emerging Arctic domain."*

The present Chief of Naval Operations, Admiral Jonathan W Greenert stated:

*"As the world's preeminent power, the U.S. Navy will benefit from the support the Law of the Sea Convention provides for our operations, especially the broad navigational rights guaranteed on the high seas and inside the Exclusive Economic Zones of other nations."*



The U.S. recognizes that it is imperative, and in its national security interests to ratify this agreement. This is especially so with the rise of China in the Indo-Pacific. We will address the geopolitical implications of doing so below.

The Senators from Alaska believe that after the U.S. elections in this fall, there will be an opportunity to have this Treaty ratified. Senator Mursowski (R-Alaska) has stated publicly that she is hopeful that the Law of the Sea Treaty will pass Congress in the lame-duck session after the election. She stated: "I don't want us, as an Arctic nation, to abandon those opportunities, and we would be doing that if we fail to ratify the Law of the Sea Treaty".

Both Canada and the United States are Arctic and Ocean nations. Having a uniform ocean governance regime is very important for economic stability and all aspects of ocean management. It is worth noting that over 90 per cent of world trade is carried by sea in over 60,000 deepsea vessels. Navigation rights are critically important. The importance of a uniformly defined ocean regime set out under UNCLOS is especially so in the Arctic with emerging marine and resource activities as Admiral Papp testified. Melting sea-ice will impact potential shipping trade routes through the Arctic Ocean Basin. UNCLOS provides the underlying foundation and framework on which many specialized international agreements often developed under the auspices of the International Maritime Organization (IMO) are based.

The U.S. has the world's largest Exclusive Economic Zone. Ninety-five per cent of U.S. foreign trade arrives or is shipped by sea. The maritime transportation system accounts for nearly \$700 billion of Gross Domestic Product and 51 million U.S. jobs. The American economy and security depend upon maritime commerce. Canada is also a maritime nation with over 244,000 kilometres of coastline and 7.1 million square kilometres of ocean territory under its jurisdiction. Only two provinces, Alberta and Saskatchewan, do not have tidewater access within their provincial boundaries.

Foreign trade carried by sea is important to Canada. This strategic reality, new to many Canadians, was recognized by Prime Minister Stephen Harper in his May 2012 speech at the Royal Canadian Navy Memorial in Ottawa when he said "Canada and its economy float on salt water." The Prime Minister could easily have added "governed by UNCLOS, which will promote stability in an unstable ocean commons."

As we move into the 21st century, Canada's natural resources will be in demand as the world economy grows and Canada's export markets become more globalized and increasingly carried by sea. As we move away from Canada's traditional continental trade focus, global ocean issues as they impact international shipping and marine security and maritime boundaries will grow in importance.

For example, piracy off the Horn of Africa – a very real threat – affects all aspects of the maritime supply chain and increases costs including hard-to-measure invisible costs such as marine cargo insurance, which increases shipping costs. The increasing potential of the export of Alberta oil sands bitumen by marine tanker is just one example of the growing importance of marine trade to Canada's current and future well-being. The international shipping trade pillar is one reason Canada needs to ensure the U.S. ratifies UNCLOS.

UNCLOS creates ocean stability for international shipping. The United States needs to be part of the internationally accepted regime. The benefits of U.S. participation in UNCLOS have been summarized by the Pew Foundation, which has led U.S. thinking on ocean issues, and which is a member of The American Sovereignty Campaign (further information can be found at [www.RatifyTheTreatyNow.org](http://www.RatifyTheTreatyNow.org)):

- **Stronger economy:** UNCLOS grants U.S. worldwide commercial access to undersea communications cable to keep America connected across the globe. It allows for clearly defined rights of navigation throughout the world's oceans including the Exclusive Economic Zones.

- **Enhance National Security:** The U.S. military would be in the strongest possible position to protect legal rights to move through and over the world's oceans by ships and aircraft and ensure unimpeded access to critically important maritime transit routes. This includes traveling through geopolitically important chokepoints such as the Strait of Hormuz.

- **Extension of U.S. Sovereignty:** The Treaty would strengthen America's claim to the full outer continental shelf. In Alaska, this would extend U.S. sovereignty 600 miles offshore. UNCLOS ensures international stability and peaceful use of the world's oceans by covering all activities on the international waters of the high seas, based on a globally accepted regime of overlapping rights and interests. The Treaty clearly defines signatory rights in offshore fishing, deep seabed mining, and navigation while sustaining ocean resources for future generations. UNCLOS also guarantees the ability of United States military to operate under defined procedures for countries to follow in order to prevent national marine incidents during military exercises. Given the fact that Canada is a member of NATO and a long-standing partner with NORAD, having both countries operate under the same international legal regime and undertaking military operations globally is clearly in Canada's interests. Canada's Royal Canadian Navy is the only Navy that integrates completely with U.S. carrier task groups.

In the South China Sea, China is increasingly using a



legal interpretation, commonly known as “lawfare” to take an adverse interpretation of UNCLOS to prohibit freedom of navigation within its Exclusive Economic Zone and the restriction of permissible military activities in the EEZ. These restrictions are prohibited under UNCLOS. There is a right of innocent passage between 12 and 200 miles, and EEZ is not a barrier to naval forces or commercial traffic navigating in this zone if it in compliance with environmental standards of the coastal state. In addition, there are competing boundary claims to further complicate the status of these waters. When China is a signatory to the specific provisions contained in UNCLOS – and the U.S. not – the U.S. cannot argue based on customary international law, putting it at a disadvantage. These disputes can be dealt with in an international forum and by the rule of law thus creating stability. These situations don’t need to be determined by close quarters situations between naval vessels of the U.S. and China. This is seen as a major concern and could be destabilizing influence in the region. (Other non-signatories to UNCLOS are North Korea and Iran). This is one of the main reasons why United States military leaders are pushing for ratification of UNCLOS at this time. It allows for a rules-based approach to freedom of navigation without military force being required for freedom of navigation. It has been said members of the U.S. Armed Forces “deserve the legal certainty that accrues from Treaty based rights.” This is to be preferred and will create stability especially as maritime trade increases in the Indo-Pacific region. This has important implications for Canada’s increasing export of energy and natural resources to the region.

It is clearly preferred that UNCLOS be used to develop a consistent global regime for increasing marine activities in the Arctic which will become more international in nature. Last year (2011), along the Northern sea route across the top of Russia, vessels from 72 flag states were operating in Russian arctic waters. UNCLOS will provide uniformity for a rules-based regime on which the IMO’s Polar Code for arctic shipping is solidly grounded. Without the U.S. at the table, there is a large gap in the international foundation for Arctic governance. This is especially so as China is gaining traction in the region and has been conducting research in these waters for the past number of summers.

There has been a push for a separate Arctic Treaty by a variety of groups but is generally recognized by members of the Arctic Council that it is best to utilize UNCLOS, which was designed in response to new ocean challenges. It is in the interests of both Canada and the United States to have

UNCLOS apply to the Arctic Ocean. Using UNCLOS as the overarching framework building on the longstanding ice-covered-water provisions under article 234, there is no need to have a separate regime for the Arctic. UNCLOS also recognizes the concept of transit passage in international straits which, given the importance to Canada of the Northwest Passage, is clearly in our interests and also provides a dispute resolution mechanism as Canada’s claims these as internal waters should disputes arise.

With the melting sea ice, we may well see trans-polar shipping across the top of the world become important as a shipping route. Much of this transpolar route is in high seas waters commonly referred to as the “doughnut hole”. UNCLOS also creates a strong basis for coastal state governance of in transit shipping under the environmental protection provisions of the coastal state contained in UNCLOS Part 5, Protection and Preservation of the Marine Environment. Given that Canada shares much of the Arctic Ocean Basin with the United States, it makes good sense to operate under UNCLOS, especially as it relates to potential hydrocarbon developments on the Arctic continental shelf. We are seeing offshore drilling this summer with Shell in the Chukchi Sea and Beaufort Sea off Alaska. These concerns on UNCLOS are clearly set out by USCG Commandant Admiral Papp in his recent Senate Committee on Foreign Relations testimony and Secretary of State Clinton at the Senate confirmation hearings noted above.

Canada needs to support the United States in ratifying UNCLOS for a variety reasons, which this article has touched upon. If agreement cannot be reached on ratification on UNCLOS, commentators have argued other efforts involving multiparty international climate change may be potentially at risk without U.S. participation and ratification of international instruments. What is very clear is that Canada, as both an Ocean and Arctic nation, needs the United States, as the world’s major maritime nation, to come into the UNCLOS tent. Canada as a nation – including both the public and private sector – must do everything it can to support and ensure sure that UNCLOS is ratified by America to ensure stable trade, environmental protection, Arctic development and marine security. Both the Canadian and the United States economies float on salt water (including increasingly colder and more salty Arctic waters). This is not the time – in an increasing unstable and multipolar world – for the United States, our neighbour, best friend and ally, to be LOST at sea. Canada can provide ocean leadership and a solid example of the benefits of being part of UNCLOS. It is in the best long-term interests of both of our nations.

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