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United States’ Ratification of the Law of the Sea Convention: Securing our Navigational Future While Managing China’s Blue Water Ambitions

Michael J. Kelly
UNITED STATES RATIFICATION OF THE LAW OF THE SEA CONVENTION: SECURING OUR NAVIGATIONAL FUTURE WHILE MANAGING CHINA’S BLUE WATER AMBITIONS

Michael J. Kelly*

“[W]e all came from the sea. . . . [W]e have salt in our blood, in our sweat, in our tears. We are tied to the ocean. And when we go back to the sea, whether it is to sail or to watch it we are going back from whence we came.”

―John F. Kennedy, September 14, 1962

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I. INTRODUCTION

The time has come for America to return to the sea. On her recent trip to China, ostensibly to develop better bilateral relations, U.S. Secretary of State Hillary Clinton had her diplomatic hat handed to her. Secretary Clinton endured repeated attacks in state-run Chinese media declaring the United States a “sneaky troublemaker” because it was pushing other states to challenge Chinese sea claims.2

* Professor of Law and Associate Dean for Faculty Research & International Programs, Creighton University School of Law. This essay is offered in the context of Case Western’s symposium “Presidential Power, Foreign Affairs, and the 2012 Election.” Regardless of which party controls the Presidency or the Senate in 2013, the author encourages ratification of the Law of the Sea Convention.


China’s renewed assertion of claims to wide swaths of ocean in the teeth of counter-claims by rival powers like Japan and smaller states like Vietnam and the Philippines have pushed the United States into the awkward position of reassuring regional states that it backs stability and security in the area, while at the same time not provoking one of its largest trading partners. As a non-party to UNCLOS, the United States has failed in both tasks.

For the past two decades, both Democratic and Republican presidents have urged the US Senate to approve the United Nations Convention on the Law of the Sea (UNCLOS) without success. Despite near universal agreement that the benefits of joining this multilateral treaty far exceed any drawbacks, US ratification has not been forthcoming. Latent, largely unfounded sovereignty concerns


4. See Convention on the Law of the Sea Report, S. Rep. No. 110–9, at 3 (2007), available at http://www.gc.noaa.gov/documents/UNCLOS-Sen-Exec-Rpt-110-9.pdf (noting there are 155 states party to the Convention, 131 party to the subsequent Agreement Relating to the Implementation of Part XI, and all NATO members are party, except Turkey and the United States). According to Congress’ legislative tracking service, UNCLOS was formally submitted to the Senate for advice and consent by President Clinton in 1994 and was reported out of the Senate Foreign Relations Committee favorably twice—once in 2004 under Chairman Richard Lugar (R) and once in 2007 under Chairman Joseph Biden (D). Chairman John Kerry (D) has begun moving the treaty through the committee process again. Once a treaty is favorably reported out of committee it goes to the full Senate, but if the Senate does not act on the recommendation to provide advice and consent before the legislative session expires, the treaty returns to the committee to be reconsidered in the next session. Below is the legislative history of Senate floor action on this treaty:

**Floor Action:** October 07, 1994—Received in the Senate and referred to the Committee on Foreign Relations by unanimous consent.

**Committee Action:** February 25, 2004—Committee on Foreign Relations. Ordered to be reported without amendment favorably.

**Committee Action:** October 14, 2003—Committee on Foreign Relations. Hearings held. Hearings printed: S.Hrg. in Ex. Rept. 108-10.

**Committee Action:** October 21, 2003—Committee on Foreign Relations. Hearings held. Hearings printed: S.Hrg. in Ex. Rept. 108-10.

**Floor Action:** March 11, 2004—Reported favorably by Senator Lugar, Committee on Foreign Relations with printed Ex. Rept.108-10 and a resolution of advice and consent to ratification with declarations and understandings. Executive Calendar No. 13.
appear to be holding back a sufficient minority of Senators from consenting. However, China’s recently assertive moves in oceanic affairs, coupled with its new and quickly developing naval capability, make US ratification all the more urgent.

II. BACKGROUND: CHINA’S RISE AS AN OCEANIC PRESENCE

History has shown that great powers operating within a multilateral legal framework agreement like UNCLOS or the World Trade Organization (WTO) balance one another to the benefit of all parties. By joining UNCLOS and operating within that system, the United States would be better able to more legitimately check China’s

Floor Action: December 20, 2004—No further action at sine die adjournment of the 108 Congress; automatically rereferred to the Committee on Foreign Relations under the provisions of Rule XXX, section 2, of the Standing Rules of the Senate.

Floor Action: December 20, 2004—Rereferred to Senate Committee on Foreign Relations.

Committee Action: September 27, 2007—Committee on Foreign Relations. Hearings held.


Committee Action: October 31, 2007—Committee on Foreign Relations. Ordered to be reported without amendment favorably.

Floor Action: December 19, 2007—Reported by Senator Biden, Committee on Foreign Relations with printed Ex. Rept.110-9 and a resolution of advice and consent to ratification with declarations, understandings, and conditions. Executive Calendar No. 9.

Floor Action: January 02, 2009—No further action at sine die adjournment of the 110th Congress; automatically rereferred to the Committee on Foreign Relations under the provisions of Rule XXX, section 2, of the Standing Rules of the Senate.

Committee Action: May 23, 2012—Committee on Foreign Relations. Hearings held.

Committee Action: June 14, 2012—Committee on Foreign Relations. Hearings held.

Committee Action: June 28, 2012—Committee on Foreign Relations. Hearings held.


behavior. Doing so from the position of an outsider, even though the United States recognizes the key provisions of UNCLOS as binding custom, weakens Washington’s position. Moreover, the United States has little or no say in the dispute resolution mechanisms available to UNCLOS member states.

There is much hand-wringing among great powers over the rise of China. Much of this worry concerns not so much arresting China’s rise, but rather managing it in a peaceful and beneficial way. But rising powers historically resist such foreign handling. After displacing Germany and Japan as the world’s second largest economy last year, a spot that alternated between both for decades, China is poised to claim the mantle of “great power.” With that title come natural ambitions. One of these, for China, is a dramatically increased oceanic presence.

To effectively deal with China’s surprisingly forceful oceanic diplomacy, the United States must understand Beijing’s perspective and appreciate the suspicion with which the Chinese government views the United States. As Professor Andrew Nathan and Dr. Andrew Scobell note:

The world as seen from Beijing is a terrain of hazards, beginning with the streets outside the policymaker’s window, to land borders and sea-lanes thousands of miles away, to the mines and oil fields of distant continents. These threats can be described in four concentric rings. In the first ring, the entire territory that China administers or claims, Beijing believes that China’s political stability and territorial integrity are threatened by foreign actors and forces. Compared with other large countries, China must deal with an unparalleled number of outside actors trying to influence its evolution, often in ways the regime considers detrimental to its survival. Foreign investors, development advisers, tourists, and students swarm the country, all with their own ideas about how China should change. Foreign foundations and governments give financial and technical support to Chinese groups promoting civil society. Dissidents in Tibet and Xinjiang receive moral and diplomatic support and sometimes material assistance from ethnic diasporas and sympathetic governments abroad. Along the coast, neighbors contest maritime territories that Beijing claims. Taiwan is ruled by its own government, which enjoys diplomatic


recognition from 23 states and a security guarantee from the United States.

At China’s borders, policymakers face a second ring of security concerns, involving China’s relations with 14 adjacent countries. No other country except Russia has as many contiguous neighbors. They include five countries with which China has fought wars in the past 70 years (India, Japan, Russia, South Korea, and Vietnam) and a number of states ruled by unstable regimes. None of China’s neighbors perceives its core national interests as congruent with Beijing’s.

But China seldom has the luxury of dealing with any of its neighbors in a purely bilateral context. The third ring of Chinese security concerns consists of the politics of the six distinct geopolitical regions that surround China: Northeast Asia, Oceania, continental Southeast Asia, maritime Southeast Asia, South Asia, and Central Asia. Each of these areas presents complex regional diplomatic and security problems.

Finally, there is the fourth ring: the world far beyond China’s immediate neighborhood. China has truly entered this farthest circle only since the late 1990s and so far for limited purposes: to secure sources of commodities, such as petroleum; to gain access to markets and investments; to get diplomatic support for isolating Taiwan and Tibet’s Dalai Lama; and to recruit allies for China’s positions on international norms and legal regimes.

In each of China’s four security rings, the United States is omnipresent. It is the most intrusive outside actor in China’s internal affairs, the guarantor of the status quo in Taiwan, the largest naval presence in the East China and South China seas, the formal or informal military ally of many of China’s neighbors, and the primary framer and defender of existing international legal regimes. This omnipresence means that China’s understanding of American motives determines how the Chinese deal with most of their security issues.

This anxiety plays out in contradictory ways. China is by far the largest investor in US debt, and the United States is one of China’s largest export markets. Yet the Chinese government remains insecure with the bilateral Sino-American relationship because of the

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8. Id. at 33–35.
very reasons Professor Nathan and Dr. Scobell articulate above. Consequently, Chinese sensitivity to what it perceives as American meddling with respect to its sovereignty concerns is unusually high.

III. CHINA’S OCEANIC CLAIMS

Three areas of renewed Chinese focus in this regard are assertions of sea claims in the East China Sea, much larger sea claims in the South China Sea, and meaningful participation in the Arctic Council now that significant polar ice melt has opened trans-Arctic sea lanes. To be sure, as the globe’s manufacturing hub, China’s vault into great power status rests on expansive foreign trade. This trade requires secure trade routes for large fleets of merchant vessels and, eventually, a deployable blue water navy (which they are quickly developing). But Chinese assertiveness of late has bordered on belligerency.

Beijing’s claim over the Senkaku Islands (or Diaoyu in Chinese), small uninhabited islets in the East China Sea south of Japan and north of Taiwan, overlaps with Tokyo’s own claim and actual possession. This has led to unfortunate incidents such as Chinese fishing trawlers colliding with Japanese patrol boats, prompting Japan to actually purchase the islands from the Japanese family that owned them—a move which China regarded in its official press as “the most blatant challenge to China’s sovereignty since the end of the second world war.”

But Japan’s purchase was actually motivated by a desire to keep a lid on the dispute. The right-wing nationalist governor of Tokyo Prefecture was set to purchase the islands and use them as a political wedge to rally Japanese nationalists against China’s claim. The central government’s preemptive purchase avoided this political problem but unwittingly handed China, which is undergoing its own once-per-decade power transition within the communist government, a propaganda bonanza to whip up anti-Japanese sentiment within a China (always a sure bet to distract the Chinese people from their real concerns regarding their own repressive government).


14. Id.
China decided to go further and actually pressed its legal case on possession of the Senkaku Islands publically. A bellicose, two-page, full color ad in the *New York Times* announced in large type, “Diaoyu Islands Belong to China.” In this politically-charged diatribe, China laid out its legal case for all to see. That one permanent member of the UN Security Council decided to take this action in the largest newspaper of another permanent member is remarkable:

China had already discovered and named Diaoyu Island by the 14th and 15th centuries. . . . In the early years of the Ming Dynasty, China placed Diaoyu Island under its coastal defense to guard against the invasion of Japanese pirates along its southeast coast. . . . Maps . . . published in Britain in 1811 and 1877 [and the United States in 1859] all marked Diaoyu Island as part of China’s territory. . . . On April 17, 1895, the Qing Court was defeated in the Sino-Japanese War and forced to sign the unequal Treaty of Shimonoseki and cede to Japan Taiwan along with Diaoyu Island. . . . The 1943 Cairo Declaration and the 1945 Potsdam Proclamation, which laid out the terms for the Japanese surrender at the end of World War II, obliged the country to return all the Chinese territories it had forcibly occupied. On September 2, 1945, the Japanese government accepted the Potsdam Proclamation in explicit terms with the Japanese Instrument of Surrender . . . . China has opposed the backroom deals between the United States and Japan concerning Diaoyu Island [citing the transfer to US control and subsequent “return” to Japanese control during the 1950s and 1970s]. . . . China’s will to defend national sovereignty and territorial integrity is firm and its resolve to uphold the outcomes of the World Anti-Fascist War [World War II] will not be shaken by any force.

While a successful Chinese claim would yield valuable new exclusive fishing and natural resource development zones of approximately a 200 nautical mile radius extending from each islet in the Senkaku chain, this pales in comparison to China’s most spectacular claim—the entire South China Sea. The extent and audacity of China’s claim extending south from Hainan Island all the way to Malaysia is breathtaking. Not only does it trample on the rival claims of several Southeast Asian states that enjoy greater proximity to the Sea itself, China’s claim also presents the United States with a geo-strategic quandary.

16. *Id*.
Since the collapse of the Soviet Union, the United States has enjoyed unchallenged primacy as possessing the world’s largest blue water navy. And Washington has not shied away from deploying this force to further its interests, including in the South China Sea. But such force projection requires freedom of navigation, a right guaranteed by the UNCLOS. Moreover, as half the world’s shipping, over $5 trillion annually, passes through the South China Sea, protecting this right is paramount.

Agreed to in 1982 and in force since 1994, UNCLOS establishes the legal framework for nautical sovereignty claims of coastal states. Such states may claim a twelve nautical mile (n.m.) band of water immediately offshore as their territorial sea and an additional 200 n.m. of water as their exclusive economic zone, within which they may assert dominance over natural resource exploration and exploitation. In the South China Sea, this amounts to vast fishing rights and control over oil reserves estimated at 213 billion barrels

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19. Spitzer, supra note 12.


(larger than Saudi Arabia’s). But within such waters, coastal states must also guarantee freedom of navigation rights for other states.

This basic framework of oceanic sovereignties is an extension of territorial sovereignty. As such, sea claims “run with the land.” In order for China’s claims to go forward, Beijing must successfully assert sovereignty over bits of land from which it can draw those lines. Figure 1 depicts the sovereignty claims of China, and the EEZ’s of Vietnam, Brunei, the Philippines, and Malaysia in the South China Sea.

To shore up its island claims, China has begun building on, populating and militarizing these specks of land, taking a play from Japan’s playbook when Tokyo built up the Okinotori reefs in the 1980’s to bolster its own claim. Japan, however, did not face competing claims. In this case, Beijing has moved 620 “residents” to Yongxing Island where they are provided with electricity, drinking water, an airstrip, and military protection, and who have subsequently elected a forty-five person legislature. This islet is less than a square mile and lies southeast of Hainan.

In response to alarmed and negative reaction to its assertion of sovereignty over the South China Sea, Beijing contends it does not in fact wish to claim the entire sea, “only 80 percent.” Smaller states with overlapping claims in the South China Sea have worked within the Association of Southeast Asian Nations (ASEAN) political apparatus to arrive at a multilateral solution. However, the draft ASEAN “code of conduct” in the South China Sea, which seeks to settle disputes peacefully and keep the waters mostly demilitarized, was scuttled by Cambodia, the regional host for the July 2012 ASEAN meeting, at the urging of Beijing. To reinforce its message, China’s Foreign Minister, Yang Jiechi, warned the Philippines to

22. Spitzer, supra note 12.
23. UNCLOS, supra note 3, art. 58.
26. Id.
27. Id.
29. Id.
“avoid making trouble” with respect to competing claims over reefs in the South China Sea.30

China understands it would lose in a multilateral environment with an array of states working against it. Thus, it prefers to deal with states (much smaller states) in bilateral settings where it can better leverage its power. That said, China realizes it cannot bully larger states to get its way in oceanic matters. The waters of the Arctic Ocean are largely controlled by the eight polar states, Canada, Russia, Norway, Sweden, Finland, Iceland, the United States (via Alaska), and Denmark (via Greenland).31 Collectively, they set policy for the region through the Arctic Council—a body created in 1996 to promote cooperation and coordination of activities.32 Since the opening of trans-Arctic waterways in the wake of global climate change-induced ice melt, this has suddenly become a very important body for states that engage in a lot of global shipping or are home to large petroleum exploration companies seeking to develop vast hydrocarbon reserves that are now becoming accessible.33

China possesses these twin interests. But it does not possess a seat on the Arctic Council or even permanent observer status. As an “ad-hoc observer,” China must request permission to attend each individual meeting of the Council.34 Beijing very much wants to advance its status to permanent observer (like Britain, France, and Germany)35 so it can attend all the meetings as of right and potentially participate in working groups and task forces, which are the forums that shape access policies with respect to navigation and natural resource development.

But Norway opposes China’s entry on human rights grounds. A diplomatic spat occurred in the wake of Oslo awarding Chinese dissident Liu Xiaobo the Nobel Peace Prize in 2010, and Beijing has not sufficiently made amends with the Norwegians, who could block

30. Id.
34. See id.
35. Id.
China’s advancement in the organization.\textsuperscript{36} Unable to intimidate European states as it is able to do elsewhere, China must resolve this issue diplomatically if it’s more pragmatic oceanic interests are to be pursued.

IV. Conclusion: Importance of U.S. Ratification of UNCLOS

All of the states in all of the above situations are parties to the Law of the Sea Convention except the United States.\textsuperscript{37} Even though Washington recognizes many of the UNCLOS provisions as binding custom, the United States is still the outsider. As such, it is difficult for the United States to force compliance with UNCLOS provisions and impossible to avail itself of dispute resolution features as a party—the threat of which could induce better Chinese cooperation, especially in the case of island claims.

The rest of the permanent members of the UN Security Council belong to UNCLOS, as do the rest of the Arctic Council members, all of the Antarctic claimants, all of the South China Sea claimants, and all of the other North Pacific regional powers except North Korea. Not only will Washington not be able to contain China through UNCLOS, as a non-party, the United States will not be able to stake its own nautical claims for fossil fuel development or even challenge the claims of others like Russia, which has staked out a region in the Arctic the size of France and Spain combined for exclusive Russian oil and natural gas development.\textsuperscript{38}

It is manifestly in the United States’ interest to ratify UNCLOS in the next session of Congress. Multiple presidents from both parties have supported ratification in addition to the Pentagon and the environmental lobby.\textsuperscript{39} The original hesitancy by private industry in the United States of handing deep seabed mining authority over to the United Nations in the recovery of manganese deposits has evaporated. The benefits of joining clearly outweigh any vague

\textsuperscript{36} Id. As of 2012, Norway appears ready to open discussion with China on this issue. Id.


\textsuperscript{39} Id.
sovereignty concerns. Perhaps the biggest immediate benefit would be the ability of the United States to throw the rulebook at China’s feet on its oceanic claims in the same way that it can with respect to China’s trading practices within the World Trade Organization—an analogously effective multilateral tool the United States uses to help manage China’s rise to great power.40


[T]he United States has requested dispute settlement consultations with the Government of China at the World Trade Organization (WTO) concerning China’s auto and auto parts “export base” subsidy program. Under the program, China provides extensive subsidies to auto and auto parts producers located in designated regions, known as “export bases,” that meet export performance requirements. China’s program appears to provide export subsidies that are prohibited under WTO rules because they severely distort trade. The subsidies provide an unfair advantage to auto and auto parts manufacturers located in China, which are in competition with producers located in the United States and other countries. Based on publicly available documents, “export bases” made at least $1 billion in subsidies available to auto and auto-parts exporters in China during the years 2009 through 2011.

Id.