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**FACULTY OF SOCIAL SCIENCES**

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**UNCLOS and the role of the United States in the South  
China Sea**

Master's thesis

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## **Declaration**

1. I hereby declare that I have compiled this thesis using the listed literature and resources only.
2. I hereby declare that my thesis has not been used to gain any other academic title.
3. I fully agree to my work being used for study and scientific purposes.

In Prague on July 28, 2019

Bc. Michaela Kaňková

## References

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## **Abstract**

This Master's thesis is focusing on why the United States of America never ratified the United Nations Convention on the Law of the Sea. It is analysing the prevailing arguments which were used in 1982, which led to President Ronald Reagan never ratifying the Convention. As well as why the same thing happened in 1994 when the United Nations agreed on an Update to the Convention.

Then the thesis is focusing on crucial parts of the Convention, which are part of the arguments for or against the ratification of the Convention, as well as those which have a great influence on the American approach to the high seas. Furthermore, this thesis is trying to offer a current insight into the problematic of why the United States still did not ratify the Convention, despite the fact that they used the Convention as an explanation why they patron the high seas as well as the right of innocent passage.

At the same time, the findings are then looked at from the perspective of the South China Sea, which is a region the United States monitor. This last part is attempting to do several things. First, it is explaining the issue of the South China Sea and the interest of the United States in it. Then it is looking at the way by which the United States try to promote their interests in the region on how the fact them they are not member states of the Convention influences that.

## **Abstrakt**

Tato diplomová práce se věnuje otázce toho, proč Spojené státy americké nikdy neratifikovaly Úmluvu Organizace spojených národů o mořském právu, zkoumá, jaké jsou převládající argumenty, které v roce 1982 vedly k tomu, že prezident Reagan odmítl tuto úmluvu ratifikovat a proč se tomu tak stalo i po tom, co byla Úmluva v roce 1994 upravena. Dále pak vyzdvihuje důležité body Úmluvy, jak ty, které jsou součástí argumentů pro a proti přistoupení k Úmluvě, tak těch, které mají vliv na postupování Spojených států v mezinárodních vodách. Zároveň se tato práce snaží nabídnout současný náhled do problematiky toho, proč Spojené státy stále zůstávají mimo tuto Úmluvu, přestože její obsah využívají k tomu, aby mohly dohlížet na dění v mezinárodních vodách, ale i kontrolovat, že není porušováno právo pokojného proplutí.

Zároveň jsou tato zjištění následně zasazena do problematiky Jihočínského moře, které Spojené státy dlouhodobě monitorují. Tato poslední část se tedy snaží o několik věcí, za prvé vysvětluje problematičnost Jihočínského moře a zájem Spojených států o něj. Dále pak se dívá na to, jakým způsobem se Spojené státy v regionu prosazují a jaký na to má vliv fakt, že nejsou členy Úmluvy Organizace spojených národů o mořském právu.

## **Keywords**

The United States, The United Nations Convention on the Law of the Sea, People's Republic of China, the South China Sea, FONOP, ratification

## **Klíčová slova**

Spojené státy, Úmluva Organizace spojených národů o mořském právu, Čínská lidová republika, Jihočínské more, FONOP, ratifikace

## **Title**

UNCLOS and the role of the United States in the South China Sea

## **Název práce**

UNCLOS a role Spojených států amerických v Jihočínské moři

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## 1. Introduction

Today we have an unprecedented number of international organisations and treaties which try to unite the world and ensure prosperity and peace. Between those is the United Nations Convention on the Law of the Sea. With oceans and seas being a majority of the Earth's surface, it is logical that it would be space which needs to be somehow regulated. Without an agreement, the strongest states may simply try to control the oceans and forbid others from accessing it and its resources. The United Nations Convention on the Law of the Sea was created in such a way not to benefit the strongest but to be fair as much as possible. Moreover, since it was created within the United Nations, it means that no country had the major voice in creating the Convention since, in the United Nations, all states possess a single vote.

However, that also means that the full text of the Convention was almost impossible to be acceptable for everyone. Probably every member involved had to see something within the Convention they disagreed with. Since the Convention was created in all or nothing manner, the states had to decide whether they prefer to ratify the Convention even if they disagree with something for the sake of the international order or if they did not wish to do so and decided to remain outside it.

Moreover, it was the United States, one of the key actors in creating the Convention, which decided to refrain from ratifying. Their list of arguments of why the Convention was not acceptable for them was large. However, it may be simplified to the fact that the Convention would be interfering with their autonomy way too much.

In the 1980s, the United States was the Western power, the Convention needed their support, especially since the Soviet Union and Communist China both ratified it. Therefore, the concerns of the United States were soon heard, and the United Nations started to work on an update with the participation of the United States.

Despite all that, the United States did not ratify neither the Convention nor its update. Since then the United Nations Convention on the Law of the Sea was in the focus of the American administrations. Several presidents, democratic and republican, called for the Senate to give its accord with the ratification. There were numerous hearings in different committees within the Senate, experts, politicians and businesses came to give their advice on whether to ratify or not. However, despite that, the Convention did not reach the Senate floor for a vote.

It is important to note that the case of the United Nations Convention on the Law of the Sea is not particularly unique, in May 2017 the Diplomat informed that forty-five treaties got stuck in Senate and are still awaiting their ratification.<sup>1</sup> However, the U.S. Department of State website publishes a list of treaties pending in the Senate, and as of January 2, 2019, there are currently forty-one treaties in Senate waiting for the senators to express their advice and consent to ratify.<sup>2</sup> Surprisingly, one of those treaties, International Labour Organization Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organise, dates back to 1948 which was submitted to the Senate in 1949.<sup>3</sup> Therefore, the fact that the United Nations Convention on the Law of the Sea which the United States refused to sign in 1982 is still not ratified, is not unprecedented.

The United States declared that it is going to treat the provisions of the United Nations Convention on the Law of the Sea as customary law and parts of the Convention were quickly turned into Proclamations.<sup>4</sup> This means that Washington claims to follow the rules set by the Convention without officially ratifying it. However, as with any other customary law, the problem remains that it is harder to hold countries accountable than under treaty law. The fact that 162 countries ratified the Convention means that the pressure to abide at least by the customary law is way higher than if it was a smaller treaty.

Important to note that despite the UNCLOS being more detailed than the previous systems, it still is not a country. There may be rules and even sanction system. However, it is still very hard to demand complete compliance of all member states. As with the case of the UNCLOS, if a member state were to disregard the rules, there would be not much to do to force compliance, especially in cases which would involve more powerful countries. A state has more tools by which they can enforce the people to compliance with the rules. However,

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<sup>1</sup> Almond Roncevert Ganon, "U.S. Ratification of the Law of the Sea Convention", *The Diplomat*, May 24, 2017, <https://thediplomat.com/2017/05/u-s-ratification-of-the-law-of-the-sea-convention/> (Accessed on June 19<sup>th</sup>, 2019).

<sup>2</sup> "Treaties Pending in the Senate, OFFICE OF TREATY AFFAIRS", Official Site of the U.S. Department of State, <https://www.state.gov/treaties-pending-in-the-senate/> (Accessed on May 1<sup>st</sup>, 2019).

<sup>3</sup> Ibid.

<sup>4</sup> "U.S. President, Proclamation. „Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 1945, Proclamation 2667\"", The American Presidency Project, September 28, 1945, <http://www.presidency.ucsb.edu/ws/index.php?pid=12332#axzz1MWetYSLm> (accessed January 27<sup>th</sup>, 2019). and "U.S. President, Proclamation. „Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 1945, Proclamation 2667\"", The American Presidency Project, September 28, 1945, <http://www.presidency.ucsb.edu/ws/index.php?pid=12332#axzz1MWetYSLm> (accessed January 27<sup>th</sup>, 2019).

international organisations do not have that. They usually have the right to suspend the membership of any country which does not follow the rules, or they may give them a fine. But there is no way that even if after all this the country does not comply, the organisation can come and force compliance.

This paper is divided into five parts; the introduction; Creation of the United Nations Convention on the Law of the Sea; The United States and the United Nations Convention on the Law of the Sea; The United States stance on the South China Sea amidst its non-member status in the United Nations Convention on the Law of the Sea and the Conclusion. The first chapter focuses on the creation of the United Nations Convention on the Law of the Sea; it brings a historical explanation as well as an overview of the important parts of the Convention. The second chapter closely looks at the role of the United States in the formation process of the Convention and the arguments which are most often used in the United States to support the ratification or non-ratification of the Convention. The fourth chapter is focusing on the South China Sea, one of the vital world's regions, which the United States closely monitors. Therefore it is the best place where to have a look at how the fact that the United States is not a member state of the Convention influences them. The last part of this paper is the conclusion.

This paper is looking at several questions, what were the reasons why the United States still did not ratify the Convention, what are the arguments against it and in support of it. Furthermore, the paper is trying to look at the current situation how the fact that the United States is not a member state of the United Nations Convention on the Law of the Sea influences them and the Convention. Then this paper is focusing on how the stance of the United States toward the United Nations Convention on the Law of the Sea influences its position in the South China Sea. The Convention is one of the essential set of rules which should be referred to in the case of the South China Sea, and Washington is closely monitoring whether the Convention is being upheld. Then that issue is closely related to the Convention since it is caused by overlapping claims by several nations. However, at the same time when the American forces are protecting the rules of the Convention at one part of the world, the Senate is still undecided on whether the United States should or should not ratify it. Therefore, this paper is trying to look closer at this dichotomy on how on one side the United States carefully guard whether the member states of the Convention do follow it, but at the same time they are not a member state, and so far the arguments against the ratification seem to be prevailing, which makes it unlikely that the Convention would be ratified in the near

future. This has been a well-known moot point where ones claim that it makes the United States hypocritical and others argue that it is a way for the United States to supervise the situation. Is it necessary for the United States to accede to UNCLOS in order to have credibility and real influence over the overlapping territorial claims in the South China Sea?

Sources used in this paper are mainly primary. The first chapter, which focuses on the United Nations Convention on the Law of the Sea, is mainly written on the basis of the text of the treaty. The text of the Convention is available through the official website of the United Nations. As well as other official documents, from official hearings to proclamations which are published on the official websites from the White House, the Senate or the Chinese Embassy in the United States.

Furthermore, there were several titles used which solely focus on the topic of the maritime law; the most important is the book from Booth Ken the Law, force and diplomacy at sea which offers an overlook of the maritime law before the United Nations Convention on the Law of the Sea was created. It also studies the implications of the Convention.

Another important source was written by Browne Marjorie Ann, for the Congressional Research Service, it is called CRS Issue Brief for Congress - The Law of the Sea Convention and U.S. Policy. Browne summarises the reasons why the United States refrained from ratifying the Convention, and further looks at what are the American interests within the Convention and what are the issues the Senate has with it.

Then books which focus on the South China Sea where the South China Sea: The Struggle for Power in Asia from Bill Hayton is probably the most used in this paper. This book is focusing on the different claims over the South China Sea from past to potential future.

Fundamental information for this paper regarding the impact which the accession of the United States to the Convention would have on are from the article for The Heritage Foundation from Steven Groves. The article is titled The Law of the Sea: Costs of U.S. Accession to UNCLOS and the author in great detail explains the impact this move would have on the United States.

Lastly, since parts of this paper are rather current, some sources consist of the online media, such as The Diplomat which informs on the current international events — mostly used in reports on the South China Sea. However, The Diplomat has numerous reporters; therefore, even news written on the same topic may have different authors.

## 2. Creation of the United Nations Convention on the Law of the Sea

### 2.1. Leading up to the negotiations

The United Nations Convention on the Law of the Sea was the result of a decades-long effort to regulate the law of the free seas in such a manner that not only the powerful maritime countries could benefit from it but others as well. Previously the maritime law was mostly non-existent, but different concepts started to emerge long before the twentieth century. Between the said concepts we can mention *Mare Liberum* (Open Sea) by Hugo Grotius<sup>5</sup> or *Mare Clausum* (Closed Sea) by John Selden,<sup>6</sup> both were defined during the seventeenth century. *Mare Liberum* was based on the idea that seas and oceans were an international territory and all nations had a right to use it.<sup>7</sup> On the other hand, *Mare Clausum* deemed the seas and oceans to be under the jurisdiction of a country which controlled it as a part of their territory and therefore no other nation was allowed to enter.<sup>8</sup>

However, there were no real provisions which would regulate the law of the sea or an institution which would be tasked with oversight over the rules in the international waters or which would be able to sanction nations which broke the rules. Therefore, the situation could be described as the right of the strongest and survival of the fittest. If any nation had the power to keep a part of the world's oceans to itself, there was nothing that would make such an action illegal. The most powerful countries with strong naval forces were those who had control over international waters, and they set the rules as they saw fit – at the time when Grotius and Selden wrote their works it was the Spanish and partly the Portuguese, then the Dutch and then the British Empire. Undoubtedly those practices were installed to benefit the stronger maritime nations over others.

However, it would be the twentieth century, which would finally see a shift in international waters. After the First World War, a new course was notably mentioned even in the Fourteen Points of the President of the United States, Woodrow Wilson. The Fourteenth Points stated:

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<sup>5</sup> Hayton Bill, *The South China Sea: The Struggle for Power in Asia* (New Haven: Yale University Press, 2014), 61.

<sup>6</sup> Booth Ken, *Law, force, and diplomacy at sea* (Boston: Allen & Unwin, 1985), 12.

<sup>7</sup> Hayton Bill, *The South China Sea: The Struggle for Power in Asia* (New Haven: Yale University Press, 2014), 61.

<sup>8</sup> Booth Ken, *Law, force, and diplomacy at sea* (Boston: Allen & Unwin, 1985), 12

“Absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war, except as the seas may be closed in whole or in part by international action for the enforcement of international covenants.”<sup>9</sup>

Unsurprisingly, this idea was not very well accepted not only back in Europe, where the majority of the old-time maritime powers were but within the United States as well. Notably, the United Kingdom with the British Empire spanning over the globe was the most prominent maritime power prior to the First World War, however, that started to change with the end of the war and the rise of the United States not only as a maritime power. Yet, after the Treaty of Versailles, the United States decided to isolate itself from the rest of the world and the issue of the law of the sea was not resolved. The Washington Naval Treaty between the victorious countries was only limited to naval construction.

Nevertheless, it was the Second World War that finally pushed for negotiations in the realm of maritime law. These, however, became more complicated as a wave of decolonisation followed the War. Suddenly there were many more coastal states that wanted to take control over their waters and certainly, after centuries under the rule of European empires, did not wish for the western powers to dictate the rules over what they now considered their territory.

In 1945, the United States, under President Harry Truman published two Presidential proclamations in relation to the Law of the Sea. The first one, Proclamation 2667, concerned on the matter of Natural Resources of the Subsoil, and Sea Bed of the Continental Shelf.<sup>10</sup> The second one, Proclamation 2668, focused on the question of Coastal Fisheries in Certain Areas of the High Seas.<sup>11</sup> Therefore, the United States was focused on protecting the Natural resources, which could be found underwater and ways to ensure that no other state would extract the resources before them. Shortly after that, many other countries took inspiration from the two Proclamations and wrote similar ones to protect their coastlines and resources, to

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<sup>9</sup> “FOURTEEN POINTS, UNITED STATES DECLARATION”, Encyclopaedia Britannica, <https://www.britannica.com/event/Fourteen-Points> (Accessed on January 27<sup>th</sup>, 2019).

<sup>10</sup> “U.S. President, Proclamation. „Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 1945, Proclamation 2667””, The American Presidency Project, September 28, 1945, <http://www.presidency.ucsb.edu/ws/index.php?pid=12332#axzz1MWetYSLm> (accessed January 27<sup>th</sup>, 2019).

<sup>11</sup> “U.S. President, Proclamation. „Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 1945, Proclamation 2667””, The American Presidency Project, September 28, 1945, <http://www.presidency.ucsb.edu/ws/index.php?pid=12332#axzz1MWetYSLm> (accessed January 27<sup>th</sup>, 2019).

ensure they were reserved for them.<sup>12</sup> Understandably such a wave of territorialisation over the seas could not create a stable environment and could not ensure safe waters. The biggest problem for everyone was the threat to the crucial intersections, the so-called Sea Lines of Communication (SLOC).<sup>13</sup> The biggest worry came from the fact that it would be relatively easy for someone to close the SLOC in a chokepoint such as the Malacca Strait or the Hormuz Strait which would cause a great upset to global trade and the growing energy trade. This worry became even more grave when the world started to face a new threat in the Cold War between the Western World and the Soviet Union and its satellite.

Moreover, the West feared the rising influence of the Soviet Union in Asia where the new post-colonial countries controlled the coastline with access not only to several SLOCs but to the chokepoints as well. Chokepoints in this sense mean narrow passages on major SLOCs which are key for maritime navigation. As such, they tend to be somewhat vulnerable with risks of being easily blocked by ships or wreckages if someone were to sink several boats in the narrowest point. Common chokepoints are straits between islands or continents where the sea bottom is not the deepest, and therefore only a small part of the strait is actually accessible to larger ships.<sup>14</sup>

Therefore, it was necessary to form a global order which would regulate the international waters. The first initiative was agreed on in Genève, Switzerland, at the end of the 1950s.<sup>15</sup> The present states approved four separate conventions which were not dependent on each other, and each nation could choose which they wanted to ratify. The Convention on the Continental Shelf (CCS); The Convention on the High Seas (CHS); The Convention on Fishing and Conservation of the Living Resources of the High Seas (CFCLR); The Optional Protocol of Signature concerning the Compulsory Settlement of Disputes (OPSD); and The Convention on the Territorial Sea and the Contiguous Zone (CTS).<sup>16</sup> This set of conventions is usually referred to as the first United Nations Convention on the Law of the Sea. It was then followed by other negotiations, which were again held in Genève, Switzerland in 1960.<sup>17</sup> This round of negotiations is referred to as The United Nations Convention on the Law of the

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<sup>12</sup> Booth Ken, *Law, force, and diplomacy at sea* (Boston: Allen & Unwin, 1985), 16.

<sup>13</sup> Klein John J, "Maritime Strategy Should Heed U.S. and UK Classics" *U.S. Naval Institute Proceedings* Vol 133, No. 4, (2007), 67–69.

<sup>14</sup> Booth Ken, *Law, force, and diplomacy at sea* (Boston: Allen & Unwin, 1985), 97–99.

<sup>15</sup> Booth Ken, *Law, force, and diplomacy at sea* (Boston: Allen & Unwin, 1985), 16.

<sup>16</sup> Tullio Treves, „1958 Geneva Conventions on the Law of the Sea“, *Audiovisual Library of International Law*, (2017), <http://legal.un.org/avl/ha/gclos/gclos.html> (Accessed January 27th, 2019).

<sup>17</sup> *Ibid.*

Sea II.<sup>18</sup> However, neither of these two conventions, UNCLOS I nor UNCLOS II brought any real solution for the situation. The main problem was that states could not agree on the definition of the territorial waters which blocked any negotiations which could genuinely bring the much-needed regulations. Furthermore, since the Conventions were not in one package countries were actually only choosing the parts which suited them and opted-out of those which could be potentially unfavourable to them.

## **2.2. Negotiations and creation of the current order**

Despite the failure of the previous attempts to create an order, there was another attempt which worked on a much larger scale and actually brought feasible results. It was the United Nations Convention on the Law of the Sea III which took place from 1973 to 1982 with a number of conferences, debates and series of summits that finally changed the system of the international waters.<sup>19</sup> This convention is usually referred to simply as the UNCLOS since it is the one that is presently in place and actually had tangible results. One hundred and sixty states became part of the negotiations, but not all of them ratified the convention. The decade protracted negotiations welcomed countries which for the first time had power over their own seas and oceans after the colonial empires perished.<sup>20</sup> The fact that the convention was negotiated under the United Nations meant that all countries were equal with each one of them possessing a single vote. Therefore, the former colonies had the same power as the European powers which previously controlled them. Another change in the negotiations was the fact that the final document was conceived as “all or nothing”. In other words, if a country was to ratify the Convention, it had to accept all of its provisions.<sup>21</sup> This was done in order to ensure that the agreement could present a united order for all countries involved. Furthermore, it was most likely the easiest way how to ensure that the most countries would participate despite the separation of the world amidst the Cold War which during the negotiations went from détente to so-called Second Cold War.

During the negotiations, the countries agreed on a long list of rules and definitions which were supposed to guide the maritime law. The United Nations Convention on the Law of the Sea coined some of the key terms which are used in the maritime law. Several of those, which

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<sup>18</sup> Ibid.

<sup>19</sup> Kraska James, *Maritime power and the law of the sea: expeditionary operations in world politics*. (New York, N.Y.: Oxford University Press, 2011), 98.

<sup>20</sup> Booth Ken, *Law, force, and diplomacy at sea* (Boston: Allen & Unwin, 1985), 17.

<sup>21</sup> Browne Marjorie Ann, “CRS Issue Brief for Congress - The Law of the Sea Convention and U.S. Policy” Congressional Research Service (June 16, 2006), 1, [https://www.gc.noaa.gov/documents/gcil\\_crs\\_2006\\_report.pdf](https://www.gc.noaa.gov/documents/gcil_crs_2006_report.pdf) (Accessed on June 7<sup>th</sup>, 2019).

will be used in this work, are Artificial Islands, Contiguous Zone, Exclusive Economic Zone, Extended Continental Shelf, High Seas, the right of Innocent Passage, and Territorial waters and more which will be explained in the next chapter.

### **2.3. Rules set by the United Nations Convention on the Law of the Sea**

The United Nations Convention on the Law of the Sea set many rules – the treaty when it was first created consisted of seventeen parts which are further separated into three hundred and twenty Articles, and the Annex Section is divided into nine sub-sections.<sup>22</sup> It contains a broad range of issues, rules which focused on many areas and coined important terms which shape the rightful claims over the world’s oceans. Terms and articles included in the Convention that are important for this paper are the following.

Territorial waters, defined in Part II, Section 1 and Section 2, are twelve nautical mile zones (approximately twenty-two kilometres) which extend from the coastline of a littoral state.<sup>23</sup> These waters fall under the jurisdiction of each state where they can set the rules. Furthermore, the sovereignty of the littoral states extends over the air space above the territorial waters as well. In Section 2, the Convention carefully examines how the limits of the territorial waters are measured since the coastlines are rarely without obstructions. For this reason, the Convention created the tool of *Straight baselines* which may be applied in cases of highly irregular (i.e. indentured) coastlines. However, it is strictly prohibited to use the Straight baseline in a such a manner that the claimant country would interfere with the territorial waters of another country, it also cannot separate them from their Exclusive Economic Zone.<sup>24</sup>

However, the Convention also set an exception for the sovereignty the states may claim over their territorial waters with the right to Innocent Passage which ensures that any vessel can pass through these waters if it is done in a continuous manner unless they were to pose a threat to the country through whose waters the vessel is passing. However, the definition of

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<sup>22</sup> “United Nations Convention on the Law of the Sea”, Official Site of the United Nations, [https://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf), (Accessed on June 15<sup>th</sup>, 2019).

<sup>23</sup> “United Nations Convention on the Law of the Sea”, Official Site of the United Nations, [https://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf), 23, (Accessed on June 15<sup>th</sup>, 2019).

<sup>24</sup> “United Nations Convention on the Law of the Sea”, Official Site of the United Nations, [https://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf), 23-31, (Accessed on June 15<sup>th</sup>, 2019).

innocent passage is fundamental because it rules out several activities from this right, such as fishing and submarines, which do not have a right of the innocent passage if they are submerged.<sup>25</sup> The Innocent Passage is explained in Part II, Section 3.<sup>26</sup> Since under the UNCLOS any boat has a right of innocent passage through the territorial waters without limitations, the littoral states cannot try to block, prevent or attempt to dissuade any boat from entering their territorial waters unless it was to pose a danger to them.

The contiguous zone is defined in Part II, Section 4. It extends beyond the territorial waters with an additional twelve nautical miles. The countries have a right to regulate laws in this zone in four different cases; customs, immigration, sanitary laws (pollution) and taxation.<sup>27</sup>

Beyond the territorial waters extends the Exclusive Economic Zone to which the coastal states have a right. Exclusive Economic Zone is coined in Part V; it extends to two hundred nautical miles (approximately three hundred seventy kilometres) from the coastline where littoral states cannot regulate boats which enter this zone. However, the state which owns the Exclusive Economic Zone has special rights when it comes to the resources found there; they have the exclusive right to explore and exploit them.<sup>28</sup>

Important definition from the Convention is the Continental Shelf, in Part IV. It is defined as a natural prolongation of the land of the state. The countries have a right to the continental shelf and its resources to the point where the prolongation ends. However, this also comes with other limitations; the continental shelf can be claimed up to three hundred and fifty nautical miles (approximately six-hundred fifty kilometres) from the coastline.<sup>29</sup> If the countries prove that they do have a right to claim the Continental Shelf, they have the right to extract the natural resources as well as any non-living material from the subsoil.

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<sup>25</sup> “United Nations Convention on the Law of the Sea”, Official Site of the United Nations, [https://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf), 26-29, (Accessed on June 15<sup>th</sup>, 2019).

<sup>26</sup> Ibid.

<sup>27</sup> “United Nations Convention on the Law of the Sea”, Official Site of the United Nations, [https://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf), 31, (Accessed on June 15<sup>th</sup>, 2019).

<sup>28</sup> “United Nations Convention on the Law of the Sea”, Official Site of the United Nations, [https://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf), 40-49, (Accessed on June 15<sup>th</sup>, 2019).

<sup>29</sup> “United Nations Convention on the Law of the Sea”, Official Site of the United Nations, [https://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf), 36-39, (Accessed on June 15<sup>th</sup>, 2019).

Furthermore, UNCLOS in Part V, Article 60 defines the Artificial Islands and the fact that constructing one does not generate nor prolong the territorial waters of the state.<sup>30</sup> However, their construction is in accordance with the rules.

High Seas start after the end of the Exclusive Economic Zone, and no state has a right to control or regulate it as it is stated in Part VII.<sup>31</sup>

Additionally, an important part of the Convention is the Part XI, which is split into five Sections, focused among other issues on minerals in the seabed outside the territorial waters or Exclusive Economic Zones.<sup>32</sup> Part XI also includes further information about the International Seabed Authority which would be tasked with authorising the exploration of the seabed outside the territorial water and the Exclusive Economic Zone and then with collecting the royalties which they would also redistribute.<sup>33</sup> The creation of the International Seabed Authority was established in Part XI, Section 4 and further determined in Annex I, Resolution 1 and Annex VI.<sup>34</sup> The International Seabed Authority is supposed to be in charge of the regulation of the minerals related activity in the seabed, which is outside the jurisdiction of the individual countries.

Moreover, the Part XI in Section 2, the Convention stated that member states would be subjected to *technology transfer* relating to seabed mining.<sup>35</sup> The Convention also created the International Tribunal for the Law of the Sea. Both bodies were created to ensure that the rules set in the Convention were carried out and at the same time, it created a settlement

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<sup>30</sup> "United Nations Convention on the Law of the Sea", Official Site of the United Nations, [https://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf), 41, (Accessed on June 15<sup>th</sup>, 2019).

<sup>31</sup> "United Nations Convention on the Law of the Sea", Official Site of the United Nations, [https://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf), 53-61, (Accessed on June 15<sup>th</sup>, 2019).

<sup>32</sup> "United Nations Convention on the Law of the Sea", Official Site of the United Nations, [https://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf), 66-97, (Accessed on June 15<sup>th</sup>, 2019).

<sup>33</sup> "United Nations Convention on the Law of the Sea", Official Site of the United Nations, [https://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf), 78, (Accessed on June 15<sup>th</sup>, 2019).

<sup>34</sup> "United Nations Convention on the Law of the Sea", Official Site of the United Nations, [https://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf), 78 and 143, (Accessed on June 15<sup>th</sup>, 2019).

<sup>35</sup>"United Nations Convention on the Law of the Sea", Official Site of the United Nations, [https://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf), 67-71, (Accessed on June 15<sup>th</sup>, 2019).

mechanism for conflicts between countries.<sup>36</sup> The Tribunal is a place where member states may turn to if they believe another country is violating their rights.

The United Nations Convention on the Law of the Sea finally unified the rules for the world's oceans. The Convention tried to cover every important issue from limits to what littoral states may claim and govern to the creation of bodies which were tasked with ruling in disputes. However, despite the lengthy negotiations on the content of the Convention where the United States participated, in 1982 when it came to signing and then ratifying the Convention, the American President Ronald Reagan refused to do so. Moreover, the Convention very soon faced the need to change several parts.

### **3. The United States and the United Nations Convention on the Law of the Sea**

The United States is the most powerful maritime nation in the world, and it was one when the United Nations Convention on the Law of the Sea was created. Therefore, the United States was not in need for the Convention since it was powerful enough to ensure that its claims were not endangered and that its waters were safe. Before the Convention was created, the Americans claimed smaller area as their territorial waters than what the Convention appointed to each country; and after the Convention through a Proclamation, the United States extended their territorial waters to those determined by the Convention.<sup>37</sup> Furthermore, very few would risk attacking the American vessels at the high seas since they could not measure up not only with the quantity of their maritime power; the technological difference was enormous as well. Despite that the United States was one of the key countries in negotiating the Convention, even though, in the end, they did not ratify it.

Therefore, it is essential to address the reasons why the United States was in favour of the Convention and supported the negotiations for years. As well as why they never ratified the Convention despite the fact that the support for the Convention never really disappeared from the debate in the United States and several presidents since the 1994 Agreement tried to urge the American Senate in proceeding with the ratification of the Convention and the Agreement,

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<sup>36</sup> "United Nations Convention on the Law of the Sea", Official Site of the United Nations, [https://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf), 95, (Accessed on June 15<sup>th</sup>, 2019).

<sup>37</sup> "Proclamation 5928--Territorial sea of the United States of America", The Official Site of National Archives, <https://www.archives.gov/federal-register/codification/proclamations/05928.html> (Accessed on July 6<sup>th</sup>, 2019).

however, both still remain in the Senate which usually seems to side with the arguments against the ratification rather than for.

### **3.1. Role of the United States in the negotiations, refusal to sign**

The United States took part in all the negotiations regarding maritime law since the end of the Second World War. With the start of the Cold War and the American involvement in the wars in Asia (the war in Vietnam and the Korean War), it meant that the American administrations needed to ensure their unlimited access to this part of the world. Interrupted SLOCs with blocked chokepoints or with tolls imposed on the passage of ships was unacceptable for them since it could potentially hinder their chance to send enforcement in time. However, when after years of negotiations, the United Nations Convention on the Law of the Sea was supposed to be ratified in 1982, the United States never did so. The Senate did not take a vote on the Convention, and President Ronald Reagan opposed it as well.

The Reagan administration had its reservation toward Part Eleven of The United Nations Convention on the Law of the Sea, which was revolving around the issue of the seabed drilling of natural resources (minerals).<sup>38</sup> The President argued that ratifying the Convention would put at risk their interests, not only national but business as well. The parts of the United Nations Convention on the Law of the Sea which the United States found mainly problematic were the sections which were dealing with the deep seabed mining in the high seas, access to it, the decision making within the bodies of the Convention as well as the transfer of technology to all member states of the Convention.<sup>39</sup> Therefore, that includes Part XI, which focuses on the area and then the two Annexes three and four. Annex III is focusing on *Basic Conditions of Prospecting, Exploration and Exploitation*, and Annex IV details the *Statute of the Enterprise*.<sup>40</sup> These parts regulate that the international waters beyond the Exclusive Economic Zones and the continental shelf are the *common heritage of mankind* and that no country has a right to try to claim sovereignty or even exclusive access to those parts or try to

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<sup>38</sup> "United Nations Convention on the Law of the Sea", Official Site of the United Nations, [https://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf), 23-31, (Accessed on June 15<sup>th</sup>, 2019).

<sup>39</sup> Clark William P., "Reagan and the Law of the Sea", The Heritage Foundation, (October 9, 2007) <https://www.heritage.org/global-politics/commentary/reagan-and-the-law-the-sea> (Accessed on June 23<sup>rd</sup>, 2019).

<sup>40</sup> "United Nations Convention on the Law of the Sea", Official Site of the United Nations, [https://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf), 145-163, (Accessed on June 15<sup>th</sup>, 2019).

use force to claim the resources found within that region.<sup>41</sup> The United States was unhappy with the International Seabed Assembly since it would diminish their access to natural resources, which are key for American businesses. In 1984, James Malone, who worked within the Reagan Administration, explained further the opposition to the Convention.

“The Treaty's provisions were intentionally designed to promote a new world order – [...] -- that seeks ultimately the redistribution of the world's wealth through a complex system of manipulative central economic planning and bureaucratic coercion.”<sup>42</sup>

Furthermore, there was the notion where the United States felt like the Convention was actually deterring a further development of the deep seabed resources since the principles set by the Convention went against the free market rules.<sup>43</sup> Therefore, it was creating an environment which was at odds with Western philosophy of the free market. The Part XI is most often cited as the main reason why the United States did not ratify the Convention, and it definitely was one of the most notable ones.

However, there were other concerns as well; the Transfer of technology was as well unacceptable. Despite the fact that the Convention did not make it mandatory. The Convention stated that nothing has the power to force any member state to reveal anything which would be “contrary to the essential interests of its security”.<sup>44</sup> Nevertheless, the technology transfer was something the United States could not accept since it posed a danger to them, revealing their technological advances which may be used in other fields. Furthermore, they would not have the control over who has access to their technology which in the eighties was a significant concern for the United States since the Cold War was entering a new phase when rollback politics replaced the period of détente.

Moreover, at the time, the Soviet Union was a member state of the Convention as well as other communist countries. Therefore, such a notion was unacceptable to the United States since it could potentially lead to their adversaries managing to get access to the technological

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<sup>41</sup> “United Nations Convention on the Law of the Sea”, Official Site of the United Nations, [https://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf), 67, (Accessed on June 15<sup>th</sup>, 2019).

<sup>42</sup> Clark William P., “Reagan and the Law of the Sea”, The Heritage Foundation, (October 9, 2007) <https://www.heritage.org/global-politics/commentary/reagan-and-the-law-the-sea> (Accessed on June 23<sup>rd</sup>, 2019).

<sup>43</sup> Ibid.

<sup>44</sup> “United Nations Convention on the Law of the Sea”, Official Site of the United Nations, [https://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf), 138, (Accessed on June 15<sup>th</sup>, 2019).

advances of the United States. It was clear that the Convention would have to change before the United States would be able to join it.

Since it would be the Authority created by the UNCLOS which would grant the concessions to drill undersea outside the territorial waters and the Exclusive Economic Zone, it would mean that American companies would need to go through the same process as all other companies from other countries. This became problematic for them, and it was one of the reasons why many of these companies went on to support Ronald Raegan during his presidential campaign.<sup>45</sup> His criticism of the UNCLOS resonated with them, and they saw him as a way how to keep the United States out of the binding agreement. Later on, the UNCLOS was often talked about as a remnant of the politics of the previous American President Jimmy Carter.<sup>46</sup> Unsurprisingly after being elected, Ronald Raegan refused to ratify the UNCLOS due to the objections mainly toward Part Eleven.<sup>47</sup> This, despite the objections of the Americans towards the Convention, was somewhat shocking since the United States was one of the first countries which tried to change the system of the international waters and in the end, it did not become a member of what they wished for.

However, as a sign of their interest in the Convention, the United States immediately accepted the rules set by the treaty as a part of its customary law, except for Part XI.<sup>48</sup> American President Ronald Raegan accepted the rules set by the Convention through two Proclamations. In 1983, Proclamation No. 5030 set the Exclusive Economic Zone in accordance with the Convention to two hundred nautical miles.<sup>49</sup> Moreover, in 1988, in Proclamation No. 5928, the American territorial waters were extended from three nautical miles to twelve, the same as the territorial waters' limits set by the Convention.<sup>50</sup>

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<sup>45</sup> Ibid.

<sup>46</sup> Ibid., 27.

<sup>47</sup> Ibid.

<sup>48</sup> Borgerson G. Scott, The National Interest and the Law of the Sea, *Council on Foreign Relations*, No. 46 (May 2009), 11, [https://cfrd8-files.cfr.org/sites/default/files/pdf/2009/04/LawoftheSea\\_CSR46.pdf](https://cfrd8-files.cfr.org/sites/default/files/pdf/2009/04/LawoftheSea_CSR46.pdf). (Accessed on June 7<sup>th</sup>, 2019).

<sup>49</sup> "Proclamation 5030--Exclusive Economic Zone of the United States of America", The Official Site of National Archives, <https://www.archives.gov/federal-register/codification/proclamations/05030.html> (Accessed on July 6<sup>th</sup>, 2019).

<sup>50</sup> "Proclamation 5928--Territorial sea of the United States of America", The Official Site of National Archives, <https://www.archives.gov/federal-register/codification/proclamations/05928.html> (Accessed on July 6<sup>th</sup>, 2019).

### 3.2. The 1994 Agreement

When in 1982 the United Nations Convention on the Law of the Sea was finalised the United States, Administration ruled that the Part XI, Annexe III and Annexe IV did not align with the American interests and therefore they could not ratify it.

The United Nations Convention on the Law of the Sea shortly after being ratified for the first time had to be redesigned. The main push for the change came from the United States and the fact that they refused to ratify the Convention.

The problems the Americans had with the Treaty were taken into account, and the member states tried to modify it. The United States participated in these negotiations, trying to ensure their objections would be reflected in the new version of the Convention.

The results of this round of negotiations are known as the Agreement on Implementation. The Agreement made a significant change in the Convention and especially in favour of the United States. The rules on the mandatory technology transfer and limitation on seabed exploitation were dismissed. Importantly for the United States, it was promised to them that in case Washington would decide to ratify the Convention, they would be guaranteed a seat on the Council of the International Seabed Authority. The Authority was also subjected to another change, by the creation of a Finance Committee which would be tasked with the financial issues and the largest contributors would have a place in the Committee, therefore, if the United States were to join the Convention they would also join not only the Authority but the Committee as well.<sup>51</sup>

The Agreement is relatively short in comparison with the Convention, it consists only of ten Articles, and the Annexe part of the Agreement has only nine sections.<sup>52</sup> On July 29, 1994, the United States signed the amendment of the Convention, and by October both the Agreement and the Convention were transmitted to the Senate for them to vote on both.<sup>53</sup>

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<sup>51</sup> "Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 – Overview", Oceans & Law Of The Sea – UNITED NATIONS, [http://www.un.org/depts/los/convention\\_agreements/convention\\_overview\\_part\\_xi.htm](http://www.un.org/depts/los/convention_agreements/convention_overview_part_xi.htm) (accessed January 27th, 2019).

<sup>52</sup> Ibid.

<sup>53</sup> Browne Marjorie Ann, "CRS Issue Brief for Congress - The Law of the Sea Convention and U.S. Policy" Congressional Research Service (June 16, 2006), 1, [https://www.gc.noaa.gov/documents/gcil\\_crs\\_2006\\_report.pdf](https://www.gc.noaa.gov/documents/gcil_crs_2006_report.pdf) (Accessed on June 7<sup>th</sup>, 2019).

However, the Senate still faced an important matter, to decide whether the 1994 Agreement managed to remove and solve all the issues the United States had with the Convention or if their concerns with it remain.

Subsequently, the objections of the United States toward the UNCLOS which were presented by the President Ronald Raegan were accepted in the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of December 1982, which was signed in 1994.<sup>54</sup> The United States signed this Agreement, but even afterwards they did not do so for the original UNCLOS even though the problematic parts of the Convention were now mainly void. Despite signing the Agreement, it was never officially ratified by the Senate.<sup>55</sup>

### **3.3. The debate in the United States after the 1994 Agreement**

Ever since then, the debate whether the United States should still remain a non-participant of the United Nations Convention on the Law of the Sea or if they should ratify has been ongoing. This question never really left American politics. During the presidency of Barack Obama, the issue was supposed to be introduced in the American Senate. However, it never came to it; the Convention never made it to the Senate floor for a vote. For several reasons, from the start of the financial crisis which started in 2008 to a lack of sufficient votes in support of the Convention. This leads to the question of whether it is necessary for the United States to join the Convention or not. Since they already follow the rules set by it as they promised back in the eighties. However, since the United States are not bound by the Convention, other countries may not find their promise credible enough. Especially since Part Eleven was updated, and the problematic parts were removed, the critics do not see any reason why the United States should keep refusing to ratify the Convention. The fact remains that they are not a signing member of UNCLOS; therefore, they are not obliged to follow the rules set by the convention. Despite their claim that they will do so.

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<sup>54</sup> "Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 – Overview", Oceans & Law Of The Sea – UNITED NATIONS, [http://www.un.org/depts/los/convention\\_agreements/convention\\_overview\\_part\\_xi.htm](http://www.un.org/depts/los/convention_agreements/convention_overview_part_xi.htm) (accessed on January 27th, 2019).

<sup>55</sup> "Treaties Pending in the Senate, OFFICE OF TREATY AFFAIRS", Official Site of the U.S. Department of State, <https://www.state.gov/treaties-pending-in-the-senate/> (Accessed on May 1<sup>st</sup>, 2019).

The United States is one of the leading nations who proclaim the importance of free international waters. Furthermore, the United States pays close attention to ensure that no coastal state abuses its position by closing its waters to others. In reaction, the United States created the Freedom of Navigation Program (FON Program), which works all around the globe.<sup>56</sup> The FON Program's primary goal is to monitor and ensure that no coastal state attempts to violate the current system of international waters defined by the UNCLOS. The most notable activity of the FON Program is the so-called Freedom of Navigation Operations (FONOPs).<sup>57</sup>

The FONOPs were created as a part of the FON Program in 1982 under President Raegan's Ocean Policy.<sup>58</sup> In the following years, the United States became well-known for their operations when American Navy boats would pass through the territorial waters of states who signed the UNCLOS to see if they follow the freedom of navigation and most importantly the right of innocent passage.

The South China Sea is one of the current hotspots in the world with increasing tensions between several states which lay overlapping claims over the cramped region. When, in 2009, the People's Republic of China submitted the so-called Nine-Dash Line map to the United Nations, the situation in the South China Sea became rather volatile.<sup>59</sup> The Nine-Dash Line shows the Chinese claims in the South China Sea, which go past what would belong to the People's Republic of China based on the UNCLOS. Furthermore, the packed region is witnessing an increasing number of artificial islands being built all over it.<sup>60</sup> Therefore, it is only understandable that the United States turned its attention to the region as well. By carrying out the FONOPs in the region, the United States tried to monitor the situation and ensure that no involved state breaches UNCLOS they all ratified. However, some point out that the presence of the American navy in the cramped region does not help to stabilise the situation. Most notably, the People's Republic of China uses this rhetoric since it is

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<sup>56</sup> "Maritime Security and Navigation", Archived Official Site for the U.S. Department of State for Years 2009 to 2017, <https://2009-2017.state.gov/e/oes/ocns/opa/maritimesecurity/> (Accessed on July 8<sup>th</sup>, 2019).

<sup>57</sup> Ibid.

<sup>58</sup> "Statement on United States Oceans Policy", The American Presidential Project, (March 10, 1983), <http://www.presidency.ucsb.edu/ws/index.php?pid=41036&st=&st1> (Accessed on January 27<sup>th</sup>, 2019).

<sup>59</sup> Hayton Bill, *The South China Sea: The Struggle for Power in Asia* (New Haven: Yale University Press, 2014), 250.

<sup>60</sup> Ibid, 110.

understandable that they do not wish to have the Americans in the South China Sea around their territories.<sup>61</sup>

Therefore, since the UNCLOS does not tie the United States, it gives them more power to do as they wish and to supervise others whether they follow what they agreed on or not. In effect, the United States may act as a policeman. However, they are not obligated to follow the same rules they want to make sure everybody else does.

The debate whether the United States should become part of the United Nations Convention on the Law of the Sea really never left American politics. Since their refusal to ratify the Convention, various entities launched their support for the Convention or started to lobby to ensure that the United States would remain outside of the treaty. Between those who currently support the ratification of the Conventions are the American Petroleum Institute, The International Association of Drilling Contractors.<sup>62</sup> Several presidents tried to push for the Convention to be ratified and the Senate held numerous hearings where both sides presented their arguments. Throughout the years, the arguments for ratification and non-ratification remained relatively consistent.

In 2003, the Senate Foreign Relations Committee held two hearings to determine their position on whether the United States should proceed with ratifying the United Nations Convention on the Law of the Sea.<sup>63</sup> In February 2004, summarising the hearings the Senate Foreign Relations Committee recommended to the Senate to proceed with the ratification of the Convention.<sup>64</sup> The support of the Committee was unanimous. However, the Senate was not favourable to such a conclusion, and it never even went for a vote instead the Convention ratification was returned back to the Committee for another set of hearings and for them to create a new report. The Committee was tasked with providing answers to the following questions:

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<sup>61</sup> Panda Ankit, "China Condemns US FONOP Near Mischief Reef in the South China Sea", The Diplomat, (March 25, 2018) <https://thediplomat.com/2018/03/china-condemns-us-fonop-near-mischief-reef-in-the-south-china-sea/> (Accessed on June 15<sup>th</sup>, 2019).

<sup>62</sup> "STATEMENT BY PAUL L. KELLY SENIOR VICE PRESIDENT ROWAN COMPANIES, INC. BEFORE THE UNITED STATES SENATE COMMITTEE ON FOREIGN RELATIONS," The Official Website of the United States Senate Committee on Foreign Relations, (October 21, 2003), 1, <https://www.foreign.senate.gov/imo/media/doc/KellyTestimony031021.pdf> (Accessed on June 3<sup>rd</sup>, 2019).

<sup>63</sup> Browne Marjorie Ann, "CRS Issue Brief for Congress - The Law of the Sea Convention and U.S. Policy" Congressional Research Service (June 16, 2006), 2, [https://www.gc.noaa.gov/documents/gcil\\_crs\\_2006\\_report.pdf](https://www.gc.noaa.gov/documents/gcil_crs_2006_report.pdf) (Accessed on June 7<sup>th</sup>, 2019).

<sup>64</sup> Ibid.

“will the amendments offered in the Agreement sufficiently alter the direction of the Convention’s deep seabed mining provisions to make it acceptable to those who oppose U.S. ratification? What will be the Senate’s response to the Administration’s statements of support for U.S. accession because it meets “U.S. national security, economic, and environmental interests?””<sup>65</sup>

### **3.3.1. Arguments against the ratification**

Arguments which support the current situation where the United States remains outside of the Convention usually focus on several issues – limitation of power and money.

The concept of sovereignty was always important to the United States; however, in recent years, it only grew, especially under President Trump. Moreover, while some argued that accession to the Convention would diminish American sovereignty, it is also possible to argue that it would rather reinforce it. Mainly because the ratification of the Convention would provide the United States with a permanent seat on the International Seabed Authority, and the United States would finally be able to take part in the amending process.

Furthermore, the Convention gave to the countries the generous rights with the rather large Exclusive Economic Zone. The countries received a lot by forming the Convention. However, those who oppose the Convention point out that the United States would be able to do so without it, and therefore, it is not useful.

A different side of this argument was presented in an article published in the Journal of International Affairs where William Schachte and John Norton Moore argued that the Convention is an international organisation which heavily promotes nationalism and the sovereignty of the signatory states rather than internationalism or even global government.<sup>66</sup>

One of the prominent arguments is the fact that if the United States joined the Convention, they would be vulnerable to international lawsuits due to the pollution of the environment. And not only the Oceans but also for pollution of the atmosphere as well.<sup>67</sup>

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<sup>65</sup> Ibid., 3.

<sup>66</sup> John Norton Moore and William L. Schachte Jr. Journal of International Affairs Vol. 59, No. 1, The Politics of the Sea: Regulating Stateless Space (FALL/WINTER 2005), 1-23 [https://www.jstor.org/stable/24358230?read-now=1&seq=1#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/24358230?read-now=1&seq=1#page_scan_tab_contents) (Accessed on May 3<sup>rd</sup>, 2019).

<sup>67</sup> Groves Steven, “The Law of the Sea: Costs of U.S. Accession to UNCLOS”, The Heritage Foundation, (June 14, 2019), <https://www.heritage.org/testimony/the-law-the-sea-costs-us-accession-unclos> (Accessed on June 4<sup>th</sup>, 2019).

Several experts pointed out that under the Convention there is the possibility of a lawsuit from island states or coastal states which are threatened by the rising levels of the oceans.<sup>68</sup> Since the United States are one of the greatest polluters in the world, they might be one of the first to face a lawsuit regarding the rising levels of the oceans if they decide to ratify the Convention. This is not currently happening as other large polluters are member states of the Convention and they are not being sued. Of course, this argument is mostly used as a threat of what may happen in the future and why the United States should remain outside the Convention.

Other risks come from oil spillage from boats as well as from drilling, which has an impact on the environment. The fact that any country could file a lawsuit against the United States, not only the ones directly hit by the catastrophe, is one of the critical arguments against ratifying the Convention.<sup>69</sup>

The main problem with these lawsuits is the fact that the United States would be forced to defend against all of them which in the end would be very expensive even if the United States did win those cases.<sup>70</sup> Furthermore, there would be fines which would come from lost lawsuits. Another issue is the fact that the United States would lose some of their autonomy since they would be forced to face and be held accountable to international jurisdiction which ties it back to the argument of loss of sovereignty.<sup>71</sup>

The United States is the world's most significant naval power; they remained the most powerful naval power since the end of the First World War when they replaced the British Empire. Therefore, they were the country which had the most power to decide the rules of the international waters. Since the United States was rising as a naval power prior to the First World War, it is understandable that the hostility and tension which spilled to the Oceans during the First World War was troubling for them. Also, it was one of the main reasons why the United States decided to enter the First World War.

The threat of technology transfer is not exactly liable anymore. However, it is another point which was previously contested by the United States. But another part, which was aligned with the technology transfer and which still remains an issue for the United States is

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<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Browne Marjorie Ann, "CRS Issue Brief for Congress - The Law of the Sea Convention and U.S. Policy" Congressional Research Service (June 16, 2006), 10, [https://www.gc.noaa.gov/documents/gcil\\_crs\\_2006\\_report.pdf](https://www.gc.noaa.gov/documents/gcil_crs_2006_report.pdf) (Accessed on June 7th, 2019).

<sup>71</sup> Ibid., 11.

the payment of royalties for seabed drilling.<sup>72</sup> If a country would rent their shelf for deep-sea mining a substantial part of the money which they would receive from the company would have to be forwarded to the Authority created by the Convention which would then redistribute the money between other member states. Depending on the size of the American shelf and the money they receive from companies which mine in the area the sum of the money which the United States would have to pay would most likely reach several trillion U.S. dollars.

Furthermore, it is not a single pay commitment; the royalties are paid by the member states continuously. The payments start after the sixth year of drilling, they will be expected to pay one per cent from the productions total value. And every following year the amount rises by one per cent until it reaches seven per cent total in year twelve of the drilling and those seven per cent will be paid until the end of the drilling.<sup>73</sup> Therefore, the United States would have to face a dent in their budget as well as the impact this would have on the American companies which drill off the U.S. continental shelf. Currently, the United States gets twelve and a half per cent from the drilling companies; therefore in year twelve and every year after that, the United States would be able to keep less than half of those royalties unless it would change the amount requested which would be strenuous for the drilling companies.<sup>74</sup>

Furthermore, the size of the American shelf is not absolutely determined as well as the reserves of natural resources which can be found in it. Therefore, the United States cannot precisely determine how much money would be forwarded to the Authority. Here, the fact that the Convention has to be ratified as a whole and certain parts cannot be changed plays a considerable role. Since the United States would be definitely more forthcoming if they could renegotiate the amount of the royalties paid or at least set a specific limit. The royalties also make it highly unlikely for the Convention to be ratified under the current administration, since, President Donald Trump argued that the United States in several other organisations is paying more than their share should be and are subsidising for other countries which pay less and slack behind on their commitment. Also, the United States would be expected to contribute money toward the Convention's institution and based on the 2003 testimonies; it

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<sup>72</sup> Groves Steven, "The Law of the Sea: Costs of U.S. Accession to UNCLOS", The Heritage Foundation, (June 14, 2019), <https://www.heritage.org/testimony/the-law-the-sea-costs-us-accession-unclos> (Accessed on June 4th, 2019).

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

would be somewhere around three million dollars.<sup>75</sup> Therefore, it is understandable to say that President Trump would not consider joining another organisation or agreement, which would mean that the United States would be expected to pay a rather large sum of money.

One of the arguments which are often used not only for not ratifying but for ratifying as well is the fact that the United States mostly already follows the rules set by the Convention. Those who argue not to ratify the Convention point out that there is no need to ratify it since the United States already promised to follow the rules and they already do so.<sup>76</sup> Furthermore, the United States does not abuse the fact that majority of other countries ratified the Convention and therefore are expected to abide by the rules when there is nothing which forces the Americans to do the same. The United States accepts the right of free passage and does not block boats merely passing through their territorial water even though they are not bound by their signature to do so. However, those who support the accession of the United States to the Convention point out that the whole world cannot merely trust the Americans to keep their promise. Since they can change their opinion and block their waters without anyone being able to successfully reprimand them, furthermore, the United States would very unlikely just accept a promise of another state to follow an agreement based on their goodwill without any guarantees. Also, some may argue that this is one of the main reasons why other countries criticise the United States. To better illustrate, the People's Republic of China several times pointed out that the behaviour of the United States is somewhat hypocritical in the questions regarding the United Nations Convention on the Law of the Sea where the United States is not a member state but still wish to exercise their power and guard whether other states follow the rules set by the Convention.<sup>77</sup>

The United States is one of the largest coastal countries in the entire world. In fact, the coastlines of the United States are almost twenty thousand kilometres long which includes their Pacific coastline as well as their Atlantic coastline plus the coastline of Alaska which has

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<sup>75</sup> Browne Marjorie Ann, "CRS Issue Brief for Congress - The Law of the Sea Convention and U.S. Policy" Congressional Research Service (June 16, 2006), 13, [https://www.gc.noaa.gov/documents/gcil\\_crs\\_2006\\_report.pdf](https://www.gc.noaa.gov/documents/gcil_crs_2006_report.pdf) (Accessed on June 7th, 2019).

<sup>76</sup> Bromund Theodore R., Carafano James Jay and Schaefer Brett D., "7 Reasons U.S. Should Not Ratify UN Convention on the Law of the Sea" The Heritage Foundation, (June 5<sup>th</sup>, 2018), <https://www.heritage.org/global-politics/commentary/7-reasons-us-should-not-ratify-un-convention-the-law-the-sea> (Accessed on June 3<sup>rd</sup>, 2019).

<sup>77</sup> Slavin Erik, "China accuses US of hypocrisy for not ratifying international sea law" Stars and Stripes, (July 15, 2016) <https://www.stripes.com/news/china-accuses-us-of-hypocrisy-for-not-ratifying-international-sea-law-1.419184> (Accessed on June 18<sup>th</sup>, 2019).

the longest coastline of all states of the United States.<sup>78</sup> Furthermore, Alaska also extends the American reach towards the Arctic Ocean.

What is important to note, the United States may find it easier to negotiate bilaterally in regard to their continental shelf than to join the Convention to follow its rules. As Senator Rob Portman stated in 2012,

“We simply are not persuaded that decisions by the International Seabed Authority and international tribunals empowered by this treaty will be more favorable to U.S. interests than bilateral negotiations, voluntary arbitration, and other traditional means of resolving maritime issues.”<sup>79</sup>

Majority of the American continental shelf can be easily divided. With the Southern neighbour, Mexico, the United States needed to negotiate the distribution of the continental shelf in the Gulf of Mexico and a part on the Pacific side. The United States and Mexico had several negotiations which shaped their divide of the continental shelf between the two. They agreed on the lines between their claims in both the Pacific Ocean and in the Gulf of Mexico. However, between those two lines on both sides of the continent remained patches of unclaimed waters; therefore, in 2000, they split the *western gap* and *eastern gap* between themselves.<sup>80</sup> Moreover, since the gaps are in the Extended Continental Shelf, it is implausible that anyone would or even could oppose such an agreement between the two.<sup>81</sup> Therefore, the United States did not need the Convention to determine the waters around its border with Mexico.

On the northern part of its territory, the United States needs to only negotiate with Canada. Therefore, for the United States, it may be just more comfortable to negotiate with their neighbours than to join the Convention. However, Alaska’s continental shelf extends to the Arctic Ocean where more countries contest for the right to claim the territory since it has vast reservoirs of natural resources. Notably, Canada, Denmark through Greenland, Norway,

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<sup>78</sup> Thompson Andrea, “Alaska’s Coast Is Vanishing, 1 Storm at a Time “, The Scientific American, (November 30, 2017) <https://www.scientificamerican.com/article/alaskas-coast-is-vanishing-1-storm-at-a-time/> (Accessed on June 20<sup>th</sup>, 2019).

<sup>79</sup> Bromund Theodore R., Carafano James Jay and Schaefer Brett D., “7 Reasons U.S. Should Not Ratify UN Convention on the Law of the Sea” The Heritage Foundation, (June 5<sup>th</sup>, 2018), <https://www.heritage.org/global-politics/commentary/7-reasons-us-should-not-ratify-un-convention-the-law-the-sea> (Accessed on June 3<sup>rd</sup>, 2019).

<sup>80</sup> Groves Steven, “The Law of the Sea: Costs of U.S. Accession to UNCLOS”, The Heritage Foundation, (June 14, 2019), <https://www.heritage.org/testimony/the-law-the-sea-costs-us-accession-unclos> (Accessed on June 4<sup>th</sup>, 2019).

<sup>81</sup> Ibid.

Russia and the United States.<sup>82</sup> Alaska's coastline is not very distanced from the coastline of Russia. Therefore, the situation with Alaska's continental shelf may become rather challenging for the United States. Furthermore, given the number of countries involved the negotiations would most likely be harder to achieve.

The arguments for not ratifying the UNCLOS did not change very much since the creation of the Convention. Several were at least diminished when the Convention was updated in 1994; however, the majority of the arguments still remains the same.

### **3.3.2. Arguments supporting the ratification**

The arguments which are used in support of the Convention usually try to stress the fact that the United States by remaining outside of the treaty is actually mostly hurting itself rather than strengthening their sovereignty.

One of the dangers that arise with the United States outside of the Convention is the weakening of the treaty. Despite the fact that the United States abide by the Convention as a part of their customary law, their objections to a signatory country breaking the Convention rules, may not work very well since some countries see it as hypocrisy on the part of the United States.<sup>83</sup> Because they try to govern others in following a treaty, in which the United States does not take part and therefore is not bound by the same rules. This leads to diminishing credibility of the United Nations Convention on the Law of the Sea as well as of the United States.

If the United States ratified the United Nations Convention on the Law of the Sea, it would most likely strengthen the treaty since the largest and the most influential world's maritime power would finally become a member. The decisions carried out under the Convention would have more credibility, and member states would feel more pressured to abide by it.

This comes after the infamous ruling in the case between the Philippines and the People's Republic of China,<sup>84</sup> where the Philippines argued that the Chinese claims and activities in the

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<sup>82</sup> King Hobart M., "Who Owns the Arctic Ocean?", The Geology.com, <https://geology.com/articles/who-owns-the-arctic.shtml> (Accessed on June 21<sup>st</sup>, 2019).

<sup>83</sup> Wyne Ali, "U.S. Hypocrisy in the South China Sea - Washington's Mistake With Beijing", The Foreign Affairs, (July 14, 2016), <https://www.foreignaffairs.com/articles/china/2016-07-14/us-hypocrisy-south-china-sea> (Accessed on June 18<sup>th</sup>, 2019).

<sup>84</sup> Burgess John, Foulkes Lucia and col. (ed.) "Law of the Sea A Policy Primer", LL.M. Program in International Law + Fletcher Maritime Studies Program, The Fletcher School of Law and Diplomacy,

South China Sea went against the provisions of the Convention and they decided to reach out to the Convention to support their stance.<sup>85</sup> Moreover, the Tribunal, established through the Permanent Court of Arbitration, ruled in favour of the Philippines.<sup>86</sup> However, the People's Republic of China refused to acknowledge the findings of the tribunal.<sup>87</sup> Additionally, since there are no means how the United Nations could force the People's Republic of China to change its behaviour, the treaty suffered a considerable blow towards its credibility.

Therefore, it may be necessary for the United States to join the UNCLOS if only to ensure the viability of the Convention. Otherwise, it may happen that more and more countries will act in disregard to the Convention. From extending their claims, closure of important chokepoints to interference with the right of innocent passage.

Secondly, the United States has a large continental shelf, especially the part extending from Alaska. Many countries are trying to determine their claims over the Arctic with larger parts of the Arctic Ocean suitable for maritime traffic as well as because of the enormous natural resources which can be found in the region. Therefore, the United States has to act to protect its interests in the region.

Especially in regard to the continental shelves under the Arctic, many are concerned with the fact that the United States does not have a say in the evaluation of the claims of other states for their continental shelves. Just recently Russia submitted their claim for their continental shelf under the Arctic Ocean.<sup>88</sup> The United States argued that the claims go beyond what is allowed by the Convention; however, they do not have an official vote. Therefore, one day, the United States may face a loss due to a lack of their own vote or an official voice within the Convention's Commission on the Limits of the Continental Shelf.<sup>89</sup>

Surprisingly in recent years the support of the United States to join the Convention comes even from American businesses. Such as the American Petroleum Institute, The National

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Tufts University, (2017), 73-79,

<https://sites.tufts.edu/lawofthesea/files/2017/07/LawoftheSeaPrimer.pdf> (Accessed on May 2<sup>nd</sup>, 2019).

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> Phillips Tom, Holmes Oliver and Bowcott Owen, "Beijing rejects tribunal's ruling in South China Sea case", The Guardian, (July 12, 2016), <https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china> (Accessed on June 23<sup>rd</sup>, 2019).

<sup>88</sup> Sevunts Levon, "Russia scores scientific point in quest for extended Arctic continental shelf", The Barents Observer, (April 5, 2019), <https://thebarentsobserver.com/en/arctic/2019/04/russia-scores-scientific-point-quest-extended-arctic-continental-shelf> (Accessed on July 17<sup>th</sup>, 2019).

<sup>89</sup> Browne Marjorie Ann, "CRS Issue Brief for Congress - The Law of the Sea Convention and U.S. Policy" Congressional Research Service (June 16, 2006), 6-7, [https://www.gc.noaa.gov/documents/gcil\\_crs\\_2006\\_report.pdf](https://www.gc.noaa.gov/documents/gcil_crs_2006_report.pdf) (Accessed on June 7<sup>th</sup>, 2019).

Ocean Industries Association and the International Association of Drilling Contractors.<sup>90</sup> They all advocate for the ascent of the United States to the Convention despite the fact that they would be required to pay more. However, the protections coming from the Convention are worth it for them. The American industries believe that the resources found in the continental shelf would offset any amount of royalties that the United States would have to pay.<sup>91</sup> In October 2003, Paul Kelly, representing Rowan Industries and the American Petroleum Institute in front of the Senate Foreign Relations Committee, he noted that:

“on balance, the package contained in the Convention, including the modest revenue-sharing provision, clearly serves U.S. interests.”<sup>92</sup>

Clearly, some American industries shifted their support toward the ratification of the Convention. Therefore, the main obstacle to the ratification is the Senate. However, it is impossible to pin it on one party. Since 1994, the Senate was controlled both by the Democratic and the Republican party and neither managed to push the Convention through, despite the support from presidents and the American oil and gas industries. Mostly because the debate went on for so long and both sides present strong arguments, it is tough to collect the two-thirds of senators which would be willing to support the Convention.

Despite the overwhelming amount of fundamental arguments against the United States ever ratifying the Convention, many administrations demanded a statement from Congress and urged the Senate to debate whether they should or should not ratify the Convention. In 1993, President Clinton even went so far that he made a promise that the United States will become an active participant in consulting the 1994 revision of the United Nations Convention, which at the time may have seemed like a fundamental step toward the United States ratifying the Convention as a whole. The revisions were widely accepted with hundred

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<sup>90</sup> “STATEMENT BY PAUL L. KELLY SENIOR VICE PRESIDENT ROWAN COMPANIES, INC. BEFORE THE UNITED STATES SENATE COMMITTEE ON FOREIGN RELATIONS,” The Official Website of the United States Senate Committee on Foreign Relations, (October 21, 2003), 1, <https://www.foreign.senate.gov/imo/media/doc/KellyTestimony031021.pdf> (Accessed on June 3<sup>rd</sup>, 2019).

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*, 3.

and twenty-one countries voting for, no country voting against, seven decided to absent from the vote, and thirty-six were not present.<sup>93</sup>

On October 1994 the Agreement was submitted to the Senate together with the Convention, both treaties were forwarded to the Senate Committee on Foreign Relations.<sup>94</sup> However, the Senate did proceed with the ratification neither of the Convention nor the Agreement.

The United States was provided with a provisional seat at the International Seabed Authority. However, this privilege was only extended to November 1998, unless Washington would agree to ratify the Convention. Therefore, ever since the United States had only an observer position within the International Seabed Authority. Therefore, Washington now has no influence over the decisions made by the Authority.<sup>95</sup>

Then when President Clinton was replaced by a Republican president Bush the efforts to resolve the status of the United States within the Convention did not come to a halt. Right from the beginning President Bush turned to the Senate and pressed them for the urgency to provide him with the advice about how he should proceed since it was Senate where the ratification process failed. Moreover, this urgency translated into the foreign policy of the United States when the United States ambassador to the United Nations Economic and Social Council stated that “the Administration of President George W. Bush supports the accession of the United States to the Convention.”<sup>96</sup> Therefore, the administration was sending a strong signal that it was invested in ratifying the Convention and putting the pressure on the Senate to proceed with the hearings and ratifying process.

In September 2004, the U.S. Committee on Ocean Policy decided to recommend to the Senate that it should ratify the Convention. The report stated that “There are many compelling reasons for the United States to accede to the Convention expeditiously.”<sup>97</sup> At the time the report seemed like a breakthrough the moment when in response to this recommendation, President Bush called the ratification of the Convention a matter of national security for the

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<sup>93</sup> Browne Marjorie Ann, “CRS Issue Brief for Congress - The Law of the Sea Convention and U.S. Policy” Congressional Research Service (June 16, 2006), 1, [https://www.gc.noaa.gov/documents/gcil\\_crs\\_2006\\_report.pdf](https://www.gc.noaa.gov/documents/gcil_crs_2006_report.pdf) (Accessed on June 7<sup>th</sup>, 2019).

<sup>94</sup> Ibid., 1-2.

<sup>95</sup> Browne Marjorie Ann, “CRS Issue Brief for Congress - The Law of the Sea Convention and U.S. Policy” Congressional Research Service (June 16, 2006), 1, [https://www.gc.noaa.gov/documents/gcil\\_crs\\_2006\\_report.pdf](https://www.gc.noaa.gov/documents/gcil_crs_2006_report.pdf) (Accessed on June 7<sup>th</sup>, 2019).

<sup>96</sup> Ibid., 2.

<sup>97</sup> Ibid.

United States.<sup>98</sup> However, the Senate did not share the sentiment with the President or the Committee and decided to return the issue back to them for re-evaluation. Therefore, once again the Convention remained trapped in the Senate's confirmation process despite the urgency from the White House.

In 2006, several Senators tried to lock a request with the Joint Ocean Commission Initiative for an update on the stance toward the Convention. The Commission Initiative published in June 2006 a report, titled "From Sea to Shining Sea: Priorities for Ocean Policy Reform".<sup>99</sup> In this report, they presented the top ten actions the Congress should do as well as a brief overview of the current situation the United States was facing as a non-member state to the Convention. The conclusion of the report was very straightforward, with the main recommendation being that:

"The Joint Initiative agrees with the President that accession supports vital U.S. national security, economic, and international leadership interests and that rapid Senate approval is needed."<sup>100</sup>

The additional important point mentioned in the report was that the United States already lost its seats within the International Seabed Authority.<sup>101</sup> Therefore, the international power of the United States within the bodies of the Convention was diminishing. Unfortunately, even after this report, the Senate did not vote whether to ratify the Convention or not.

Another prospect of ratifying the Convention came when Barack Obama became the next President of the United States in 2008. Since President Obama was also very forthcoming to the idea of the United States working closely with international organisations, it was therefore expected that the Obama administration might be the one to manage to push the Convention through Senate and finally ratify it.

Moreover, the Obama Administration may have been keen on ratifying the Convention; the Senate was opposed to it, which became apparent in 2012. Since there is the need for two-thirds of all Senators to be in favour of ratifying an international treaty, it would need support

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<sup>98</sup> Ibid.

<sup>99</sup> "FROM SEA TO SHINING SEA REPORT TO THE UNITED STATES SENATE - PRIORITIES FOR OCEAN POLICY REFORM", Joint Ocean Commission Initiative, (June 2006), [http://www.jointoceancommission.org/~media/JOCI/PDFs/2006-06-13\\_Sea\\_to\\_Shining\\_Sea\\_Report\\_to\\_Senate.pdf](http://www.jointoceancommission.org/~media/JOCI/PDFs/2006-06-13_Sea_to_Shining_Sea_Report_to_Senate.pdf), (Accessed on May 2<sup>nd</sup>, 2019).

<sup>100</sup> Ibid., 30.

<sup>101</sup> Groves Steven, "The Law of the Sea: Costs of U.S. Accession to UNCLOS", The Heritage Foundation, (June 14, 2019), <https://www.heritage.org/testimony/the-law-the-sea-costs-us-accession-unclos> (Accessed on June 4<sup>th</sup>, 2019).

from senators from both parties. At the time the Democratic party had fifty-one senators. Therefore, a large part of the Republican senators would have to support the Convention as well.<sup>102</sup> The 2012 attempt to ratify the Convention started in the Senate Committee on Foreign Relations whose Chairman was the Democratic Senator John Kerry.<sup>103</sup> The Committee held a series of hearings in order to push the Senate toward ratifying the Convention. However, several Republican senators signalled that they were not in favour of ratifying the Convention no matter what and they do not support this initiative.<sup>104</sup>

Since the Democrats did not gain the significant majority in the Senate, they were not able to push for a vote on ratifying the Convention for the remaining years of the Obama Administration. Moreover, despite the refusal of the Senate, President Obama did not stop campaigning in support of the Convention. In 2014 at West Point during his speech, President Obama said that:

“It’s a lot harder to call on China to resolve its maritime disputes under the Law of the Sea Convention when the United States Senate has refused to ratify it –“<sup>105</sup>

He was referring to the fact that the United States in their quest for the other countries to abide by the rules set by the Convention seems somewhat hypocritical since it tries to control something, they are not officially a part of. Therefore, the fact that they remain outside of the Convention is actually hurting their position in the global order.

Furthermore, in the 2015 National Security Strategy, the fact that the Senate still did not proceed with ratifying the Convention was labelled as “the ongoing failure to ratify this Treaty undermines our national interest.”<sup>106</sup>

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<sup>102</sup> “SENATORS OF THE UNITED STATES - 1789-present“, The Official Site of the Senate, <https://www.senate.gov/artandhistory/history/resources/pdf/chronlist.pdf> (Accessed on May 1<sup>st</sup>, 2019).

<sup>103</sup> “THE LAW OF THE SEA CONVENTION (TREATY DOC. 103–39) – HEARINGS BEFORE THE COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE ONE HUNDRED TWELFTH CONGRESS SECOND SESSION“, The Government Publishing Office, (May 23, June and June 28, 2012), <https://www.govinfo.gov/content/pkg/CHRG-112shrg77375/pdf/CHRG-112shrg77375.pdf> (Accessed on May 2<sup>nd</sup>, 2019).

<sup>104</sup> Wright Austin, “Law of the Sea treaty sinks in Senate“, Politico, (July 16, 2012), <https://www.politico.com/story/2012/07/law-of-the-sea-treaty-sinks-in-senate-078568> (Accessed on June 5<sup>th</sup>, 2019).

<sup>105</sup> Panda Ankit, “How the US Senate Can Help Stabilize the South China Sea“, The Diplomat, (May 23, 2015), <https://thediplomat.com/2015/05/how-the-us-senate-can-help-stabilize-the-south-china-sea/> (Accessed on June 17<sup>th</sup>, 2019).

<sup>106</sup> “NATIONAL SECURITY STRATEGY“, The Official Website of The White House under Obama, 13, [https://obamawhitehouse.archives.gov/sites/default/files/docs/2015\\_national\\_security\\_strategy\\_2.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/2015_national_security_strategy_2.pdf) (Accessed on May 4<sup>th</sup>, 2019).

The support for the Convention comes even from personnel in the Navy when in 2016 Admiral Harry Harrison stated in his testimony that, “I think that in the 21st century our moral standing is affected by the fact that we are not a signatory to UNCLOS.”<sup>107</sup> Pointing out that it is not only the credibility of the United States outside the country but that it is their obligation to who they are.

Continuous support for the Convention not only from the White House, however, could not change the fact that the Senate remained convinced by the arguments regarding the fear for their sovereignty rather by those in support of ratifying the Convention.

### **3.4. Critique of the United States**

The United States may follow the rules set by the United Nations Convention on the Law of the Sea as a part of their customary law; however, there is nothing that legally ensures that the Americans really follow it. Since they also patrol whether the signatory states really do abide by the rules set by the Convention, it brought more than one critique.

The most common criticism in regard to the Convention and the American position is the fact that the United States is somewhat hypocritical. They want the others to follow the rules set by the Convention with all implication. However, they do not do the same. Especially the People’s Republic of China was known to address the American behaviour in regard to the Convention. To illustrate, it is possible to mention the statement given by the China Foreign Ministry spokesman Lu Kang on July 2016.

“The US is always selective when it comes to the application of international law: citing international law when it sees fit and discarding international law when it sees otherwise. It keeps urging others to abide by the United Nations Convention on the Law of the Sea while refusing to ratify the convention to this day.”<sup>108</sup>

For this reason, some see the American behaviour as utilitarian, since the United States are the most powerful maritime nation, it would be tough for anyone to force them to do anything. However, in the same way, it would be difficult for the United States to make sure that dozens of coastal countries obey the maritime law in the same way as they do. Moreover,

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<sup>107</sup> Beech Hannah, “China Will Never Respect the U.S. Over the South China Sea. Here's Why”, Time, (July 8, 2016), <https://time.com/4397808/south-china-sea-us-unclos/> (Accessed on June 17<sup>th</sup>, 2019).

<sup>108</sup> “Foreign Ministry Spokesperson Lu Kang's Remarks on Statement by Spokesperson of US State Department on South China Sea Arbitration Ruling”, The Official Site of the Chinese Embassy in The United States, (July 13, 2016), <http://www.china-embassy.org/eng/fyrth/t1380409.htm> (Accessed on June 21<sup>st</sup>, 2019).

since those countries now follow the rules set by a Convention the United States helped very much to shape to its present form, it managed to ensure that majority of the maritime nations follows the rules the Americans wish to enforce without them being legally bound by them as well.

The main problem with this criticism is the fact that mainly adversary countries would promote such a narrative, on the other hand, especially since those countries are a part of the Convention, they may actually try to push for an amendment which would shift the Convention from being a tool of the United States to working for the signatory members and possibly in a way that the Americans would oppose.

#### **4. The United States stance on the South China Sea amidst its non-member status in the United Nations Convention on the Law of the Sea**

The Convention was not ratified in 2012, the last time it was heavily supported by the Administration and talked about by the Senators. However, the United States became more involved in the issue of the South China Sea where People's Republic of China, Vietnam, Philippines, Brunei and Malaysia all raised claims which overlap with claims from another country or more. Notably, the Nine-Dash Line claim from the People's Republic of China goes beyond what was agree upon to in the United Nations Convention on the Law of the Sea.<sup>109</sup> Furthermore, the People's Republic of China continuously constructs artificial islands in the middle of the South China Sea.<sup>110</sup> On many of these artificial islands, the Chinese install their equipment and create bases with transport infrastructure, which causes more conflicts with other nations in the South China Sea region.<sup>111</sup> However, the biggest worry is the fear that the People's Republic of China or another country may start with the militarisation of the disputed islands, so far nothing has been officially confirmed, but for some time now there have been unofficial reports that the militarisation may be already underway.<sup>112</sup> The United States found this somewhat troubling and potentially dangerous. Therefore, it was possible to observe the United States carry out several of the FONOPs in the

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<sup>109</sup> Hayton Bill, *The South China Sea: The Struggle for Power in Asia* (New Haven: Yale University Press, 2014), 250.

<sup>110</sup> Colin Sébastien, "China, the US, and the Law of the Sea", *China perspective*, No. 2016/2, 57, <https://journals.openedition.org/chinaperspectives/6994?file=1> (Accessed on June 26th, 2019).

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

region. During Obama's presidency, the United States reportedly carried out six different FONOPs in the South China Sea.

American investment in the region can be explained by several factors. First, it is their wish for the member states of the Convention to follow the rules they promised to obey when they ratified it. If countries were allowed to violate the Convention, sooner rather than later, the Convention would become ineffective, and soon other countries may follow suit by violating the provisions set by the Convention, which would render the Convention to the point where it would mean nothing, and most likely it would soon cease to exist. Other treaties which became pointless after repeated violations by member states were the League of the Nations, and more recently the United States decided to withdraw from the Intermediate-Range Nuclear Forces Treaty after the continuous violation of the provisions on the Russian part.<sup>113</sup> Therefore, it could be expected that if the United States and other countries fail to make sure that the member states do follow the rules of the Convention, it may very soon become pointless with more and more countries violating the rules or even leaving the Convention. Second, the United States fears the construction of the artificial islands for a good reason. The artificial islands may not emit territorial waters. However, the fact that the People's Republic of China may construct military bases is worrisome. In the South China Sea, it does not present a significant danger to the United States; however, if a country were to construct artificial islands in the Pacific Ocean with a military structure on top of the island, it may soon become a threat to the United States, especially since it could mean that the distance between the United States and potential warheads would diminish. Therefore, it is essential for the United States to do their best to mitigate the construction of artificial islands for military purposes. Third, the South China Sea is an important global maritime intersection which leads to the Strait of Malacca. If the tension in the South China Sea sparked into an open conflict, it would pose a danger for ships passing through the region which would cause troubles for international trade when the ships would risk harm or would be forced to take longer routes. Both would bring unnecessary expenses.

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<sup>113</sup> Borger Julian, "US to begin nuclear treaty pullout next month after Russia missile talks fail", The Guardian, (January 16, 2019) <https://www.theguardian.com/world/2019/jan/16/us-russia-inf-treaty-nuclear-missile> (Accessed on June 16<sup>th</sup>, 2019).

## 4.1. Explaining the South China Sea

The South China Sea is one of the most volatile regions in the world. The three and a half million square kilometres contain numerous possible sparks for a conflict.<sup>114</sup> The South China Sea is an incredibly important region for its strategic position – it connects through the Malacca Strait to the Indian Ocean, furthermore through the South China Sea leads one of the busiest world's shipping lines. Annually the trade carried through the South China Sea amounts to three trillion United States Dollars, which is also caused by the fact that around half of the world's maritime trade goes through the Strait of Malacca.<sup>115</sup> Moreover, the region is also rich in resources from fish to hydrocarbons, which lay beneath the water. Furthermore, there may be vast reserves of natural resources which are still undiscovered.

However, the region is surrounded by several nations which all lay claims on parts of it. Most notably countries raising claims for the waters and islands in the South China Sea are Brunei, Malaysia, the People's Republic of China, the Philippines, Taiwan, and Vietnam.<sup>116</sup>

Important to note is the fact that the claims of the People's Republic of China and Taiwan overlap, which is caused by the united politics of One-China.<sup>117</sup> Meaning that both the People's Republic of China and Taiwan agree that there is only one China even though they disagree on what the one China is and who the official representative of it is. This was agreed on during the semi-official meeting often referred to as the 1992 Consensus.<sup>118</sup> Their claims may be the same, but the islands or archipelagos they actually control vary.

The claims of the People's Republic of China were introduced in the so-called Nine-Dash Line. (Sometimes called Ten-Dash Line which includes the claim over the island of Taiwan).<sup>119</sup> This map was submitted to the United Nations in 2009, and it immediately sparked international dissatisfaction ever since.<sup>120</sup> The Philippines immediately contested the claim and filed an official diplomatic protest which stated that such an enormous claim over

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<sup>114</sup> Tweed David, "Why the South China Sea Fuels U.S.-China Tensions", The Washington Post (February 13, 2019), [https://www.washingtonpost.com/business/why-the-south-china-sea-fuels-us-china-tensions/2019/02/13/6b283fb8-2fd2-11e9-8781-763619f12cb4\\_story.html?utm\\_term=.b8f22031cc2c](https://www.washingtonpost.com/business/why-the-south-china-sea-fuels-us-china-tensions/2019/02/13/6b283fb8-2fd2-11e9-8781-763619f12cb4_story.html?utm_term=.b8f22031cc2c) (Accessed on June 26<sup>th</sup>, 2019).

<sup>115</sup> Hayton Bill, *The South China Sea: The Struggle for Power in Asia* (New Haven: Yale University Press, 2014), 3.

<sup>116</sup> *Ibid.*, 2-4.

<sup>117</sup> Shirley A. Kan, „China/Taiwan: Evolution of the “One China” Policy—Key Statements from Washington, Beijing, and Taipei,“ Congressional Research Service, (November 10, 2014), 49-51, <https://fas.org/sgp/crs/row/RL30341.pdf> (Accessed on May 2<sup>nd</sup>, 2019).

<sup>118</sup> *Ibid.*

<sup>119</sup> Hayton Bill, *The South China Sea: The Struggle for Power in Asia* (New Haven: Yale University Press, 2014), 117.

<sup>120</sup> *Ibid.*

the South China Sea is illegal under the United Nations Convention on the Law of the Sea.<sup>121</sup> Vietnam and Malaysia filed another protest together.<sup>122</sup> Primarily since the Nine-Dash Line claim covers the majority of the South China Sea, it is sure to anger all other countries around the region. Not only does this claim go beyond what was agreed upon in the United Nations Convention on the Law of the Sea, it even clashes with territories held by other countries for years. Important to note is the fact that the Nine-Dash Line clashes even with exclusive economic zones of several countries in the region. It is not only a dispute over islands, part of the territorial water and the Exclusive Economic Zones, but the Chinese claim would also severely diminish parts of the sea which the rest of the countries around the South China Sea have a right to.<sup>123</sup> The claimed portion of the South China Sea by the People's Republic of China can be dated back to a map created in 1936 which was created by then representatives of China, the Republic of China led by the Kuomintang party.<sup>124</sup> The first map consisted of eleven dashes, including the Gulf of Tonkin, later it was reduced to nine dashes which coined the name for the Chinese claims in the South China Sea.<sup>125</sup>

The latest evolution came when the People's Republic of China marked their claims in the South China Sea as their *core interest*, which is a category of "interests" which until that point was only used in the case of Taiwan and Tibet.<sup>126</sup> Both regions where the People's Republic of China is very unhappy about any interference from outside countries, especially the United States.

The problems are caused by the fact that the South China Sea contains more than two hundred islands or reefs. However, most of them are claimed by two or more different countries which usually present historical testaments to support their claims. The most important archipelagos whose ownership is contested are the Spratly Islands, the Parcel

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<sup>121</sup> Beech Hannah, "China Will Never Respect the U.S. Over the South China Sea. Here's Why", Time, (July 8, 2016), <https://time.com/4397808/south-china-sea-us-unclos/> (Accessed on June 17<sup>th</sup>, 2019).

<sup>122</sup> Valencia Faye, "PH protests China's '9-dash line' claim over Spratlys", Yahoo! Philippines (April 13, 2011) <https://ph.news.yahoo.com/blogs/the-inbox/ph-protests-china-9-dash-line-claim-over-20110413-064347-870.html> (Accessed on July 15<sup>th</sup>, 2019).

<sup>123</sup> Hayton Bill, *The South China Sea: The Struggle for Power in Asia* (New Haven: Yale University Press, 2014), 1.

<sup>124</sup> *Ibid.*, 56.

<sup>125</sup> *Ibid.*, 59.

<sup>126</sup> Woody Christopher, "The South China Sea is now a 'core interest' of Beijing — and that's a problem for its neighbors", The Business Insider (July 2, 2015), <https://www.businessinsider.com/the-south-china-sea-is-chinas-core-interest-2015-7> (Accessed on July 17<sup>th</sup>, 2019).

Islands and The Pratas Islands.<sup>127</sup> Other significant groups of formation which are claimed by several countries are The Macclesfield Bank and The Scarborough Shoal.<sup>128</sup>

The Spratly Islands are located almost in the centre of the South China Sea and are spreading over almost a half a million square kilometres. Therefore, almost every country surrounding the South China Sea raised claims over these islands. The Spratly Islands are formed by dozens of small islands, islets and even reefs and submerged atolls. Despite expanding over a large area, the total surface of all islands is, in fact, less than two square kilometres.<sup>129</sup> Most islands in the Spratly Islands are occupied by the Philippines, then by Vietnam, People's Republic of China, Malaysia and even by Taiwan.<sup>130</sup> Furthermore, Brunei claims an Exclusive Economic Zone over a part of the Spratly Islands in the southeast.<sup>131</sup> Like most of the South China Sea, the Spratly Islands are rich in natural resources from fish to natural gas and oil. The natural resources are one of the main reasons for the tensions between the countries. In the Spratly Islands, the Chinese constructed their most well-known artificial island, the Fiery Cross Reef.<sup>132</sup> Reportedly in 2014, the People's Republic of China commenced with their construction on the reef located there, and shortly they managed to construct an artificial island on which the area equals to two hundred and seventy-four hectares.<sup>133</sup> Since then, the equipment of the Fiery Cross Reef was updated; currently, the artificial island has a runway which is suitable for landing of Chinese H-6G bombers.<sup>134</sup> It is important to note that while the runway on the Fiery Cross Reef is the largest in the South China Sea, the Chinese are not the only one who are constructing runways in contested territories.<sup>135</sup> The Philippines, Malaysia, Vietnam and even Taiwan have constructed runways on islands they control within the Spratly Islands.<sup>136</sup>

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<sup>127</sup> Hayton Bill, *The South China Sea: The Struggle for Power in Asia* (New Haven: Yale University Press, 2014), 1.

<sup>128</sup> *Ibid.*, 117.

<sup>129</sup> "The World Factbook: Spratly Islands", Central Intelligence Agency, (July 14, 2019), <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/pg.html> (Accessed on July 19<sup>th</sup>, 2019).

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*

<sup>132</sup> Hayton Bill, *The South China Sea: The Struggle for Power in Asia* (New Haven: Yale University Press, 2014), 81-82.

<sup>133</sup> "Before and after satellite images: What has been built on the reefs that China occupies in the Spratlys", *The Strait Times*, (February 29, 2016), <https://www.straitstimes.com/asia/se-asia/before-and-after-satellite-images-what-has-been-built-on-disputed-islands-in-the-south> (Accessed on July 17<sup>th</sup>, 2019).

<sup>134</sup> "Airpower in the South China Sea", Asia Maritime Transparency Initiative, (July 29, 2015), <https://amti.csis.org/airstrips-scs/> (Accessed on May 2<sup>nd</sup>, 2019).

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

The Paracel Islands are located further to North than The Spratly Islands, East of Vietnam and South of Hainan Island.<sup>137</sup> This archipelago is also known as the Xisha Islands, which is the Chinese appellation.<sup>138</sup> Similarly, Vietnamese have their own name, Hoang Sa.<sup>139</sup> However, usage of these names alludes certain notion to who has the right to claim these islands. Essential issues in the Paracel Islands is the fact that the People's Republic of China raised a straight baseline around them. Straight baselines may, according to the Convention, be used by archipelagos countries to determine its territorial waters and other zones. However, since the People's Republic of China is a continental country, it is not in accordance with the Convention for them to draw straight baselines around their islands.<sup>140</sup>

The Pratas Islands may be found in the North-eastern part of the South China Sea between the People's Republic of China and the Philippines.<sup>141</sup> The Pratas Islands are as well known as the Dongsha Islands or Tungsha Islands.<sup>142</sup> The islands of Pratas Islands are claimed by the People's Republic of China; however, it is Taiwan who currently controls them.

The Macclesfield Bank is claimed by the People's Republic of China which actually controls it. For a period of time, it was suggested that the Philippines are claiming a part of the underwater reefs.<sup>143</sup> However, this was refused by the Philippine authorities.

The last formation is the Scarborough Shoal, which is known under several different names, notably Panatag Shoal in Filipino, and Huangyan Islets and Democracy Reefs in Chinese.<sup>144</sup> The Scarborough Shoal is located in the East part of the South China Sea, closest to the Philippines coast. Therefore, it is the People's Republic of China and the Philippines who claim the Scarborough Shoal.

Furthermore, the Malacca Strait is located at the South of the South China Sea. The Malacca Strait is one of the vital world's chokepoints. Majority of the trade passing through

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<sup>137</sup> Hayton Bill, *The South China Sea: The Struggle for Power in Asia* (New Haven: Yale University Press, 2014), 2.

<sup>138</sup> *Ibid.*, 58.

<sup>139</sup> *Ibid.*, 1.

<sup>140</sup> "United Nations Convention on the Law of the Sea", Official Site of the United Nations, [https://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf), 23-31, (Accessed on June 15th, 2019).

<sup>141</sup> Hayton Bill, *The South China Sea: The Struggle for Power in Asia* (New Haven: Yale University Press, 2014), 2.

<sup>142</sup> *Ibid.*, 58.

<sup>143</sup> "Limits in the Seas, No. 127, Taiwan's Maritime Claims", United States Department of State, (November 15, 2005), 17, <https://2009-2017.state.gov/documents/organization/57674.pdf> (Accessed on July 17th, 2019).

<sup>144</sup> "Scarborough Shoal", Asia Maritime Transparency Initiative, <https://amti.csis.org/scarborough-shoal/> (Accessed on June 26th, 2019).

the South China Sea must go through the Malacca Strait, to enter or to exit. Therefore, the rather narrow strait is a critical point for the whole world. Half of the world's maritime trade passes through the Malacca Strait.<sup>145</sup> Therefore, if the Strait were to be closed, blocked or taxed it would be a direct hit at the world's trades and economy and not only the People's Republic of China would be severely affected.

For this reason, the Malacca Strait only adds to the tension in the South China Sea. For the People's Republic of China, which is a very fast-growing economy, stable and free Malacca Strait is critical. However, the Malacca Strait is at the other side of the South China Sea, therefore, out of the reach of the People's Republic of China and it is not even included in the Nine-Dash line claim.<sup>146</sup> Therefore, the People's Republic of China must adopt other means to ensure their access to the Malacca Strait and through it to the Indian Ocean and then to Africa and Europe. The Strait of Malacca is also a key passage to access the Chinese String of Pearls.<sup>147</sup> The String of Pearls is a strip of ports which the People's Republic of China helped to build and has a certain control over. These ports are scattered on the way from the Malacca Strait to Africa.<sup>148</sup>

To understand why the People's Republic of China is so focused on the South China Sea, it is necessary to look at its geography and borders. Majority of its borders are with different countries, on North with Mongolia; however, it is also the place where the Gobi Desert is.<sup>149</sup> Then there is the Russian Federation, more specifically the Siberian part where only a small part of the Russian population lives. On the North-West, there are the -stan countries, Kazakhstan, Kyrgyzstan, Tajikistan, Afghanistan and Pakistan which connect the People's Republic of China to central Asia.<sup>150</sup> However, the majority of the Chinese population and industries are found in the Eastern part of the country. Therefore, the borders with the -stans countries are too far away for efficient trade — however, the relation between the People's Republic of China and Pakistan is growing on its importance. In 2015 the two countries started a project China–Pakistan Economic Corridor through which the People's Republic of

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<sup>145</sup> Hayton Bill, *The South China Sea: The Struggle for Power in Asia* (New Haven: Yale University Press, 2014), 3.

<sup>146</sup> Hayton Bill, *The South China Sea: The Struggle for Power in Asia* (New Haven: Yale University Press, 2014), 250.

<sup>147</sup> Klein Natalie, "A String of Fake Pearls? The Question of Chinese Port Access in the Indian Ocean", *The Diplomat*, (October 25, 2018), <https://thediplomat.com/2018/10/a-string-of-fake-pearls-the-question-of-chinese-port-access-in-the-indian-ocean/>, (Accessed on July 17<sup>th</sup>, 2019).

<sup>148</sup> *Ibid.*

<sup>149</sup> Marshall Tim, "Prisoners of Geography: Ten Maps That Tell You Everything You Need to Know About Global Politics", (Elliott & Thompson Limited: London, 2015) 29-35.

<sup>150</sup> *Ibid.*

China invests in the Pakistani infrastructure.<sup>151</sup> One example is the port Gwadar, which is supposed to be a part of the Chinese One Belt, One Road and is also included within the String of Pearls.<sup>152</sup> Then there is the Southern border with India and Nepal, which is mainly consisting of a high range of mountains. This is also the place where Tibet lies on the Chinese part. The People's Republic of China has several disputes with India over the border territory.<sup>153</sup> Therefore, the tensions between the two countries are rather high. Also, the good relations between the People's Republic of China and Pakistan are another troubling thing to the Indian representatives. Then, the borders with Laos and Burma are not very favourable with the one with Laos being covered with jungle and the one with Burma being formed of the very high mountain range.<sup>154</sup>

Then, the Eastern part of their borders is the only one through which the Chinese have direct access to seas. However, in the north, there is South Korea and Japan both allies of the United States and both countries have American military bases on their territory.<sup>155</sup> Therefore, Chinese movement in the Yellow Sea and in the East China Sea is limited and under surveillance. Consequently, the People's Republic of China is turning the majority of their attention to the South China Sea.

In 2016, there was a resolution in the Philippines dispute of the Chinese Nine-Dash claim which they deemed to be a direct violation of the United Nations Convention on the Law of the Sea.<sup>156</sup> This case is known as the South China Sea Arbitration.<sup>157</sup> Straight away from the beginning of the arbitration in 2013, the Chinese side indicated that they do not accept the arbitration initiated by the Philippines.<sup>158</sup> However, in reaction to the ruling of the Arbitration the Chinese president Xi Jinping said that the Chinese part does not accept the ill-founded

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<sup>151</sup> "China Pakistan Economic Corridor, Introduction," The Official Site of the China Pakistan Economic Corridor, <http://cpec.gov.pk/introduction/1> (Accessed on July 17<sup>th</sup>, 2019)

<sup>152</sup> Holmes James R., "Gwadar and the "String of Pearls", The Diplomat (February 9, 2013), <https://thediplomat.com/2013/02/gwadar-and-the-string-of-pearls/> (Accessed on July 17<sup>th</sup>, 1029).

<sup>153</sup> Marshall Tim, "Prisoners of Geography: Ten Maps That Tell You Everything You Need to Know About Global Politics ", (Elliott & Thompson Limited: London, 2015), 31.

<sup>154</sup> Ibid., 37.

<sup>155</sup> Ibid., 67-68.

<sup>156</sup> - Burgess John, Foulkes Lucia and col. (ed.) "Law of the Sea A Policy Primer", LL.M. Program in International Law + Fletcher Maritime Studies Program, The Fletcher School of Law and Diplomacy, Tufts University, (2017), <https://sites.tufts.edu/lawofthesea/files/2017/07/LawoftheSeaPrimer.pdf> (Accessed on May 2nd, 2019).

<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

decision over their rightful claims in the South China Sea but that they will still work to resolve the disputes with the other countries.<sup>159</sup>

The contested and overlapping claims over the majority of the South China Sea are the main reason for rising tensions in the region.

## **4.2. U.S. position on the South China Sea**

The importance of the South China Sea is a well-known fact, and the United States is aware of it. Several U.S. administrations were closely monitoring the situation in the region. Ever since the tensions started to rise in the South China Sea, they presented their firm belief that the issue should be resolved in accordance with the United Nations Convention.

What most likely sparked higher interest and worry was the start of construction of artificial islands by the People's Republic of China and the fact that there are claims that they even install military equipment on them.<sup>160</sup> The most visual evidence of the American interest in the South China Sea is the rise of the number of FONOPs carried out in the region.

FONOPs are the tool which is used the most often aside from political statements in regard to the events in the South China Sea. Since the problem in the region are overlapping and excessive claims, the right to the innocent passage may be interfered with. Therefore, the American presence in the region is ensuring that the message that the United States do care about the right of innocent passage not to be interfered with. Therefore, it is important to have a look at the FONOPs which were carried out by the two last Administrations. First, to see where exactly these operations were carried out and second what were the messages the United States were sending out to what their stance on the South China Sea is.

The People's Republic of China is one of the fastest developing countries not only in regard to the economy, but their military advances are formidable as well. In recent years the Chinese seem to be heavily focusing on their maritime powers.<sup>161</sup> With their coast somewhat limited and their reach to open waters complicated, there are not many ways they can go. Since the Yulin Naval Base on Hainan Island, which is located in the South China Sea, is the

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<sup>159</sup> Phillips Tom, Holmes Oliver and Bowcott Owen, "Beijing rejects tribunal's ruling in South China Sea case", *The Guardian*, (July 12, 2016), <https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china> (Accessed on June 23rd, 2019).

<sup>160</sup> Colin Sébastien, "China, the US, and the Law of the Sea", *China perspective*, No. 2016/2, <https://journals.openedition.org/chinaperspectives/6994?file=1> (Accessed on June 26th, 2019).

<sup>161</sup> China Power Team. "How is China modernizing its navy?" *China Power*, (December 17, 2018. Updated January 9, 2019.), <https://chinapower.csis.org/china-naval-modernization/> (Accessed July 17th, 2019).

centre of the Chinese maritime power, Beijing focus on the region is unwavering. The Yulin Base is mainly intended for nuclear submarines; however, in recent years, it was reported that the base was supposed to be extended.<sup>162</sup>

The Chinese interest to become the leading power and hegemony in South-East Asia is rather evident with their policies to ensure good relationships with critical countries for them as well as the military advances which are supposed to set them above the others. However, the United States is present in the region as well, and it would be tough for the Chinese to quickly obtain naval forces which could measure up with the American ones. However, despite several bases which the Americans have in or close to the region, the Chinese have definitely the advantage of the proximity.

The emerging of the People's Republic of China in the region became an issue which is closely monitored by the United States. The former President Barack Obama on January 19, 2011, at a press conference in the White House with than the Chinese President and the General Secretary of the Communist Party Hu Jintao, stated that:

“We [the United States] welcome China's rise. We just want to make sure that that rise is done -- that that rise occurs in a way that reinforces international norms and international rules, and enhances security and peace, as opposed to it being a source of conflict either in the region or around the world.”<sup>163</sup>

They were aware that it would be tough to oppose to the emerging Chinese power. However, President Obama expressed the hope of the administration that the Chinese would become a power within the current world order rather than contesting it.

The South China Sea is most likely one of the first regions which will in full reveal how exactly the People's Republic of China sees its position in the world and its order. So far, it seems as if they would prefer to contest the current rules and change them. Their claims and actions in the South China Sea support this statement, from demanding the majority of the South China Sea which falls under the Nine-Dash Line claim to their refusal to accept the

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<sup>162</sup> Cook Damen, “A Closer Look at China's Critical South China Sea Submarine Base”, The Diplomat, (March 18, 2017), <https://thediplomat.com/2017/03/a-closer-look-at-chinas-critical-south-china-sea-submarine-base/> (Accessed on June 21<sup>st</sup>, 2019).

<sup>163</sup> “Press Conference with President Obama and President Hu of the People's Republic of China”, The White House, Office of the Press Secretary (January 19, 2011) <https://obamawhitehouse.archives.gov/the-press-office/2011/01/19/press-conference-president-obama-and-president-hu-peoples-republic-china> (Accessed on June 15<sup>th</sup>, 2019).

findings in the arbitration regarding the case with the Philippines. Therefore, the South China Sea is already a region where the People's Republic of China is contesting the world's order.

On the other hand, the Chinese may argue that the overlapping claims in the South China Sea should not be perceived as a global issue but rather as a regional one; therefore, there is no need for international interference. After the United States expressed their potential desire to cooperate with the Association of Southeast Asian Nations (ASEAN), the People's Republic of China even issued a warning that if the United States tries to make the matter of the South China Sea a global issue would only deteriorate it and therefore the Americans should not involve in it.<sup>164</sup> The area was already too small for all the countries claiming a part of it; they stressed that adding another country to the situation would only make it worse.

However, the case of the South China Sea is slightly different, because if the region would become too volatile for ships to pass through, it would seriously harm most of the world's economy. Therefore, the United States takes a particular interest in it, and steadily, other countries join in monitoring the situation very closely.

The position of the United States during the Obama administration became clear rather fast. The Secretary of State Hillary Clinton marked the region as key for them, stating that ensuring that the international maritime law is respected is their crucial interest as well as the maintaining of the freedom of navigation.<sup>165</sup> These proclamations were a part of the Hanoi Declaration from July 2010, meaning that they were published before the official announcement of the strategic rebalance in the Asia-Pacific policy which was announced in November 2011.<sup>166</sup> The message was simple, the United States was not leaving the region, and they did care about what was happening there. Hillary Clinton even during the 2012

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<sup>164</sup> Zheng Sarah, "Chinese foreign minister Wang Yi warns US against 'interference' in South China Sea", *South China Morning Post*, (October 29, 2018), <https://www.scmp.com/news/china/diplomacy/article/2170686/chinese-foreign-minister-warns-us-against-interference-south>, (Accessed on July 29<sup>th</sup>, 2019).

<sup>165</sup> "Hillary Rodham Clinton Secretary of State - National Convention Center, Hanoi, Vietnam", Archived Official Site for the U.S. Department of State for Years 2009 to 2017, (July 23, 2010), <https://2009-2017.state.gov/secretary/20092013clinton/rm/2010/07/145095.htm> (Accessed on July 17<sup>th</sup>, 2019).

<sup>166</sup> "THE LAW OF THE SEA CONVENTION (TREATY DOC. 103-39) – HEARINGS BEFORE THE COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE ONE HUNDRED TWELFTH CONGRESS SECOND SESSION", The Government Publishing Office, (May 23, June and June 28, 2012), 7, <https://www.govinfo.gov/content/pkg/CHRG-112shrg77375/pdf/CHRG-112shrg77375.pdf> (Accessed on May 2<sup>nd</sup>, 2019).

hearings of the Senate's Committee on Foreign Relations, was one of the critical testimonies in support for the Convention.<sup>167</sup>

Furthermore, the effort to help to settle the disputes in the South China Sea was visible from the beginning as well. Notably the Secretary of State Hillary Clinton hoped that ASEAN might be a key in helping to resolve the tensions.<sup>168</sup>

During the administration of Barack Obama, the United States carried out six FONOPs in the South China Sea.<sup>169</sup> This illustrates not only the commitment to do region but the fact that the South China Sea is currently one of the most volatile regions in the world. Six FONOPs in two presidency terms, however, mean that it was less than one operation per year. Therefore, it is not possible to claim that the pressure of the United States in the South China Sea to make sure the rules set by the Convention are followed was overwhelming.

The first FONOP under president Obama took place in 2013.<sup>170</sup> In 2015 two FONOPs were reported, one of those was carried out by a military aircraft which flew over the Fiery Cross Reef which holds the Chinese longest runway in the South China Sea.<sup>171</sup> The other three FONOPs were carried out in 2016 and one of the vessels passed around the Fiery Cross Reef as well which goes to show that the United States consider the artificial island worrisome, especially since it is a runway which is suitable for bombers landing and take-off.<sup>172</sup> Surprisingly, the last FONOP which was carried out during the presidency of Barack Obama did not breach the twelve nautical miles limit of the territorial waters of the islands controlled by the People's Republic of China in the Paracel islands. However, the American vessels still entered the part of the Sea, which the Chinese claims as theirs.<sup>173</sup>

Comparably to President Barack Obama, President Donald Trump was more in favour of the FONOPs since he entered the office in January 2017. However, most of the FONOPs

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<sup>167</sup> Ibid., 7-60.

<sup>168</sup> "Clinton urges Asean unity over South China Sea rows" BBC, (September 3<sup>rd</sup> 2012), <https://www.bbc.com/news/world-asia-19435346> (Accessed on July 17<sup>th</sup>, 2019).

<sup>169</sup> Leaf Paul J., Taiwan and the South China Sea Must Be Taken Off the Back Burner", The National Interest, (June 18, 2018), <https://nationalinterest.org/feature/taiwan-the-south-china-sea-must-be-taken-the-back-burner-26324> (Accessed on June 20<sup>th</sup>, 2019).

<sup>170</sup> Zhenhua Lu, "US coastguard cutter takes part in 'freedom of navigation' in Taiwan Strait for the first time", South China Morning Post, (March 25, 2019) <https://www.scmp.com/news/china/diplomacy/article/3003105/us-freedom-navigation-operation-through-taiwan-strait-involves> (Accessed on July 17<sup>th</sup>, 2019).

<sup>171</sup> "Airpower in the South China Sea", Asia Maritime Transparency Initiative, (July 29, 2015), <https://amti.csis.org/airstrips-scs/> (Accessed on May 2<sup>nd</sup>, 2019).

<sup>172</sup> Ibid.

<sup>173</sup> Panda Ankit, "South China Sea: Fourth US FONOP in Five Months Suggests a New Operational Rhythm", The Diplomat, (October 12, 2017), <https://thediplomat.com/2017/10/south-china-sea-fourth-us-fonop-in-five-months-suggests-a-new-operational-rhythm/> (Accessed on May 3<sup>rd</sup>, 2019).

under President Trump seemed to be underreported. The first FONOP target became the Mischief Reef which is located in the Spratly islands, and it is another artificial island built by the People's Republic of China which holds a runway.<sup>174</sup>

The Mischief Reef was an interesting choice for the first FONOP. The Mischief Reef is also claimed by the Philippines which pushed the case to the tribunal of the Permanent Court of Arbitration in The Hague which ruled that since the Mischief Reef before the constructions on top of it did not stay above the waters during the high-tide did not generate any rights such as the territorial waters or Exclusive Economic Zone.<sup>175</sup>

Furthermore, the tribunal closed up the issue with the ruling that the Mischief Reef, in reality, belongs to the Philippines since it is a part of their Exclusive Economic Zone and the Continental Shelf. These decisions were carried out by the tribunal in July 2016.<sup>176</sup> Therefore, choosing the Mischief Reef as the first target of the FONOPs under the new president sends a clear message to the American stance on the issue.

By October 2017, based on the reports by the Diplomat the United States managed to carry out four different FONOPS in the South China Sea region, quickly passing the busiest year in terms of FONOPS of the previous administration.<sup>177</sup> However, the U.S. Department of Defense (DoD) Freedom of Navigation (FON) Report for Fiscal Year (FY) 2017 included six FONOPs which were carried out against the People's Republic of China and included one which solely focused on the East China Sea.<sup>178</sup> For the first time, the U.S. Department of Defense (DoD) Freedom of Navigation (FON) Report became more detailed, providing more information in general about the Freedom of Navigation Program to a specific geographic location where the FONOPs were carried out, instead of the usual statement which country was targeted by them. Therefore, it is for the first time possible to know which islands were

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<sup>174</sup> Panda Ankit, "The US Navy's First Trump-Era South China Sea FONOP Just Happened: First Takeaways and Analysis", The Diplomat, (May 25, 2017), <https://thediplomat.com/2017/05/the-trump-administrations-first-south-china-sea-fonop-is-here-first-takeaways-and-analysis/> (Accessed on May 4<sup>th</sup>, 2019).

<sup>175</sup> Burgess John, Foulkes Lucia and col. (ed.) "Law of the Sea A Policy Primer", LL.M. Program in International Law + Fletcher Maritime Studies Program, The Fletcher School of Law and Diplomacy, Tufts University, (2017), 73-79, <https://sites.tufts.edu/lawofthesea/files/2017/07/LawoftheSeaPrimer.pdf> (Accessed on May 2<sup>nd</sup>, 2019).

<sup>176</sup> Ibid.

<sup>177</sup> Panda Ankit, "South China Sea: Fourth US FONOP in Five Months Suggests a New Operational Rhythm", The Diplomat, (October 12, 2017), <https://thediplomat.com/2017/10/south-china-sea-fourth-us-fonop-in-five-months-suggests-a-new-operational-rhythm/> (Accessed on May 3<sup>rd</sup>, 2019).

<sup>178</sup> "Annual Freedom of Navigation Report - Fiscal Year 2017", Department of Defense Report to Congress, <https://policy.defense.gov/Portals/11/FY17%20DOD%20FON%20Report.pdf?ver=2018-01-19-163418-053> (Accessed on May 5<sup>th</sup>, 2019).

targeted and why it happened. The justification was a part of the Report in the previous years; however, without a specific location. Regarding the importance of the Strait of Malacca, which was mentioned several times, the Strait is included in the Report for the Fiscal Year 2017, though, under closer investigation, the reasoning was stated as: “Prior authorization required for nuclear-powered ships to enter the territorial sea.”<sup>179</sup> Therefore, it may not have been the usual FONOP rather than the fact that the United States simply needed the authorisation of Malaysia for passage of a nuclear-power vessel.

In 2018 the relationships between the United States and the People’s Republic of China reached a long-time low with the American’s imposing tariffs on imported goods.<sup>180</sup> Moreover, only shortly before officially announcing these tariffs, the United States carried out yet another FONOP near the Mischief Reef.<sup>181</sup>

Based on the U.S. Department of Defense (DoD) Freedom of Navigation (FON) Report for Fiscal Year (FY) 2018 the United States carried out another six FONOPs which targeted the People’s Republic of China’s claims in the South China Sea (furthermore, the United States also carried out one FONOP in the East China Sea).<sup>182</sup> In 2018, the FONOPs were carried out against twenty-six different subjects around the world (even including Taiwan, which is not recognised as a sovereign country by the United States). However, no other country was subjected to as many FONOPs as the People’s Republic of China, a few faced two FONOPs, but no other country was subjected to more except for the People’s Republic of China.

The U.S. Department of Defense (DoD) Freedom of Navigation (FON) Report for Fiscal Year (FY) 2019 is not currently available (last two reports were published on December 31), and currently, there are only the FONOPs which were reported by the media. The first FONOP of 2019 was supposedly carried out on January 7, 2019, when the American vessel

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<sup>179</sup> Ibid.

<sup>180</sup> Landler Mike and Tankersley Jim, “Trump hits China With Stiff Trade Measures”, The New York Times, (March 22, 2018) <https://www.nytimes.com/2018/03/22/us/politics/trump-will-hit-china-with-trade-measures-as-white-house-exempts-allies-from-tariffs.html> (Accessed on July 18<sup>th</sup>, 2019).

<sup>181</sup> Panda Ankit, “China Condemns US FONOP Near Mischief Reef in the South China Sea”, The Diplomat, (March 25, 2018) <https://thediplomat.com/2018/03/china-condemns-us-fonop-near-mischief-reef-in-the-south-china-sea/> (Accessed on June 15<sup>th</sup>, 2019).

<sup>182</sup> “Annual Freedom of Navigation Report - Fiscal Year 2018”, Department of Defense, [https://policy.defense.gov/Portals/11/Documents/FY18%20DoD%20Annual%20FON%20Report%20\(final\).pdf?ver=2019-03-19-103517-010](https://policy.defense.gov/Portals/11/Documents/FY18%20DoD%20Annual%20FON%20Report%20(final).pdf?ver=2019-03-19-103517-010) (Accessed on June 16<sup>th</sup>, 2019).

passed around the Paracel Islands.<sup>183</sup> The Chinese Ministry of Foreign Affairs reacted with a statement that they “urge the United States to immediately cease this kind of provocation.”<sup>184</sup>

The second reported FONOP of 2019 took place in February when the U.S. Seventh Fleet passed through the Spratly Islands, once again, passing around the Mischief Reef.<sup>185</sup> This FONOP happened during the time both naval forces of the People’s Republic of China and the United States took place in the naval exercise hosted by Pakistan.<sup>186</sup>

It is safe to say that under the Administration of Donald Trump, the FONOPs are getting more support and are more often used than under the previous President. The current administration already carried out more FONOPs than Obama’s administration did during two terms. However, some raised questions whether the FONOPs actually have any impact on the situation since, despite the frequent operations around the world and especially in the South China Sea, the situation does not seem to be changing.<sup>187</sup> The United States carried out these operations in accordance with the United Nations Convention on the Law of the Sea. And despite (or even because of) the fact that the situation with the overlapping claims in the South China Sea does violate the rules set by the Convention, the United States feels the need to be present in the region and to ensure that the Convention is not further violated, for example by interfering with the right of innocent passage which is tested by the operations. However, this at the same time is one of the causes for the criticism of the United States by the others, especially the People’s Republic of China since they are supervising something, they are not signatory members.

## 5. Conclusion

The United States believes that it is important to engage the People’s Republic of China through international organisations to help maintain the world’s order. If the Chinese are a part of many organisations, there would be a strong prerogative to follow the rules since it would be more lucrative. However, it is hard for the United States to push the People’s

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<sup>183</sup> Panda Ankit, “US Navy Conducts First Freedom of Navigation Operation of 2019 in South China Sea”, (January 8, 2019), <https://thediplomat.com/2019/01/us-navy-conducts-first-freedom-of-navigation-operation-of-2019-in-south-china-sea/> (Accessed on May 2<sup>nd</sup>, 2019).

<sup>184</sup> Ibid.

<sup>185</sup> Werner Ben, “Two U.S. Guided-Missile Destroyers Conduct FONOP Past Mischief Reef in South China Sea”, USNI News, (February 11, 2019), <https://news.usni.org/2019/02/11/41017> (Access on May 3<sup>rd</sup>, 2019).

<sup>186</sup> Ibid.

<sup>187</sup> “THE USEFULNESS OF “REDUNDANT” FREEDOM OF NAVIGATION OPERATIONS”, The Asia Maritime Transparency Initiative, (January 26, 2018) <https://amti.csis.org/usefulness-redundant-fonops/> (Accessed on July 18<sup>th</sup>, 2019).

Republic of China into cooperation since the United States often opted out of international treaties. Therefore, ratifying the United Nations Convention on the Law of the Sea may be an essential step toward debunking the claim that the United States is hypocritical, which undermines their global power.

Furthermore, as it was noted before, there is now the possibility to amend the Convention. Moreover, since the People's Republic of China is a member state, as well as other states who may want to look into contesting the American maritime power in certain areas, these states now have the possibility to change the maritime law in such a way which go against the Americans interests and the United States would have no chance to fight against such an amendment. Moreover, despite the fact that the United States is still the strongest maritime nation if a potential amendment limited passage of military ships through the territorial waters or important chokepoints the United States would be able unable to disregard such a decision. Even now, the People's Republic of China is already claiming that military ships or plane do not have the right to cross or fly over the East China Sea. Therefore, the People's Republic of China is already set on modifying the rules of maritime law. Moreover, it might be crucial for other states to act as soon as possible to ensure that the Convention is not transformed in such a way that the world's oceans become more hostile.

Many warn against the danger of other states turning the rules of the Convention to adverse the United States. To maintain the favourability of the world's oceans the United States needs to ensure that the Convention is not used against their interests, however, the only way to do so is from the inside as a member state.

An essential part of the amendment process is the fact that members states need to ratify the said amendment before it is binding for them. However, if the United States remain outside of the Convention, they do not have the power to do so. Moreover, then it would be too late for them to change it.

It would be unwise to believe that the United Nations Convention on the Law of the Sea would remain unchanged and the laws it set would be the same in the next couple of decades. Majority of the international laws evolves with time. In reaction to a new danger or a new technology previously unknown, which suddenly changes the reality, the world is facing. Therefore, it is logical to expect that the maritime law would evolve as well, if to reflect on new technologies, on the change of environment or the political change within the member states. Change is inevitable.

The United States needs to realise that the Convention will change with or without them. However, the United States may not like the new version of the treaty. The United States may have helped with the creation of the United Nations Convention on the Law of the Sea, and in many ways, it has shaped its current form. However, it is very likely they will have no say in the next evolution of the treaty.

The chances that the United Nations Convention on the Law of the Sea will be ratified in the upcoming years are rather small. The latest action taken toward the ratification of the treaty was taken on July 2018. Democratic Senator Mazie Hirono presented a resolution which called upon the ratification of the Convention. However, upon introduction to the Senate, the resolution was referred to the Committee on Foreign Relations where it still remains without any proceedings.<sup>188</sup> Therefore, the United States ratifying the Convention is very unlikely despite the overwhelming support for it. Despite the fact that the arguments against the ratification, mainly the liability to lawsuits and the share of royalties which the United States would face if they did join, the arguments for the ratification of the Convention seem to be more pressing. With every international organisation, most countries are losing something in order to support the organisation.

Especially with the rise of the People's Republic of China, the United States is facing the challenge of how to contain the development of it and the contestation of the world's order without entering into a conflict. Moreover, while the idea that the best way to do so is to engage the People's Republic of China through various international organisation, these organisations need to have some validity behind them.

In the case of the United Nations Convention on the Law of the Sea one of the main problems is the fact that Beijing is disregarding the rules of it and despite the adamant support of Washington toward the treaty, it is tough for them to demand another country to follow rules of an organisation they are not part of. Moreover, the People's Republic of China was swift to point out the American hypocrisy as Beijing often calls it.

The findings of this thesis were that the arguments against the accession of the United States to the UNCLOS are mainly based on the fear of loss of the sovereignty and another financial commitment which will help others but not the United States. The arguments in support of the United States ratifying the Convention are mentioning the fact that the United

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<sup>188</sup> "S.Res.598 - A resolution calling upon the United States Senate to give its advice and consent to the ratification of the United Nations Convention on the Law of the Sea", CONGRESS.GOV <https://www.congress.gov/bill/115th-congress/senate-resolution/598> (Accessed on July 15<sup>th</sup>, 2019).

States already abides by the rules and remaining outside of the Convention hurts it as well as the American wishes for the face of the international waters. Therefore yes, if the United States became a member state of the United Nations Convention on the Law of the Sea, their critics would lose their strongest argument, that the behaviour of the United States is hypocritical when they enforce something it did not ratify. Despite that, it is unlikely that under the current administration that will happen.

## Summary

Spojené státy americké jsou dlouhodobě světovou námořní velmocí. Během vyjednávání Úmluvy Organizace spojených národů o mořském právu se Spojené státy ve velkém angažovaly, jelikož považovaly za naprosto nezbytné zavést světový řád v mezinárodních vodách.

Ovšem když byla tato Úmluva dokončena, tak ji Spojené státy nikdy neratifikovaly, za prvé došlo k výměně prezidenta, kdy se jím stal Ronald Reagan, který byl zásadně proti. Úmluvě bylo vytýkáno, že naprosto neakceptovatelně zasahuje do práv jednotlivých států. Co Spojeným státům nejvíce vadilo byla jedenáctá část. Tato část se soustředila na několik bodů, mezi ty nejvíce kritizované patřilo sdílení technologie a míra moci, kterou by získaly orgány Úmluvy.

Tyto výtky Spojených států byly rychle vyslyšeny, když v roce 1994 byla Úmluva revidována. Ovšem ani potom Washington Úmluvu neratifikoval, od té doby se otázka Úmluvy pravidelně vrací do americké politiky, kdy se několik administrativ snažilo donutit Senát, aby se vyjádřil ohledně ratifikace. Senát pravidelně svolává slyšení, kde experti a politici prezentují své názory proč Úmluvu podepsat nebo nepodepsat.

Argumenty proti Úmluvě se většinou týkají ztráty suverenity a velkých finančních nákladů. Zároveň poukazují na fakt, že ratifikace je stejně zbytečná, jelikož Spojené státy již většinu pravidel Úmluvy akceptuje, tak proč ji ratifikovat.

Naopak argumenty pro ratifikaci zmiňují, že díky tomu Spojené státy získají hlas uvnitř orgánů Úmluvy a mohou tedy takto hájit své zájmy. Zároveň pak poukazují na to, že když nadále zůstávají mimo Úmluvu a zároveň dohlížejí na ostatní státy jestli ji dodržují, působí pokrytecky a oslabují tím nejen sebe ale i Úmluvu.

Na případě Jihočínského moře, kde se nároky několika států kříží, je možné vidět, jak tato dichotomie Spojených států funguje. Washington tu zároveň přes svůj program FONOP dohlíží na dodržování Úmluvy, ale také je možné vidět, jak je to poškozující. Zvláště pak Peking využije každé příležitosti, aby mohl poukázat na pokrytectví Spojených států, což potvrzuje argument lidí, kteří zastávají názor, že by Spojené státy měly ratifikovat Úmluvu. Ovšem, za současné administrativy je velmi nepravděpodobné, že by k ratifikaci došlo.

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