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THE UNITED STATES AND THE LAW OF THE SEA CONVENTION: SLIDING BACK FROM ACCESSION AND RATIFICATION*

*John A. Duff***

I. INTRODUCTION

As of August 26, 2005, there were 149 parties to the United Nations Convention on the Law of the Sea (“the Convention”). States of all sorts, with the most diverse interests in the oceans, from all parts of the globe, are parties to the Convention. For all the parties to the Convention virtually all legal questions concerning the law of the sea are now governed by the Convention. Such questions are, in effect, questions of interpretation and application of the Convention.¹ While interpretation and application of particular provisions may vary somewhat from one state to another, the scope of such differences is confined by the fact that each party is working from the same authoritative text.² Also, as parties to the Convention, these

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1. See generally Tullio Treves, THE LAW OF THE SEA: THE EUROPEAN UNION AND ITS MEMBER STATES (Tullio Treves, ed., 1997), at 1-5. Annex IX of the Convention permits certain “international organizations” to become parties to the Convention under certain stipulated conditions. See also Daniel Vignes, *La Communauté européenne dans le domaine du droit général de la mer*, in *id.* at 7-26.

2. For “a detailed survey of the attitudes and practice concerning the law of the sea of the [fifteen] member States of the European Union and of the European Community as such,” see Treves, *supra* note 1, at 2.

states, as well as the European Union, the one international organization that is a party,³ have rights to participate in the bodies established by the Convention and related agreements. The U.S., however, has not signed the Convention, nor has it acceded to it, so it is not a state party. It is, therefore, not bound by the terms of the Convention and it may not participate, absent some special arrangement, in the ongoing work of Convention-related bodies. In 1994, however, the U.S. signed a subsequent, related agreement, the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (“the Implementation Agreement”), which was intended to cure certain defects in the Convention to allow the U.S., as well as other industrialized nations, to become parties to it.⁴

In October 2003, during the 108th Congress (2003-2004), the U.S. Senate Foreign Relations Committee held hearings to examine the question of U.S. accession to the Convention and ratification of the accompanying Implementation Agreement. On February 25, 2004, the Committee voted unanimously (19-0) to support U.S. accession/ratification and reported the Convention and the Implementation Agreement to the full Senate for its consideration. On March 11, 2004, the Convention was placed on the Senate schedule and became eligible for the final phase that would bring the U.S. into state party membership. At the adjournment of the 108th Congress, the Convention had not been brought to a vote. As a result the Convention has slid back in the domestic “advice and consent” process and must once again be considered by the Foreign Relations Committee before it can be submitted to the full Senate. In light of the United States’ twenty-three year long desistance from ratification/accession, and particularly in light of the failure to have the Convention brought to a vote in the Senate in 2004, a number of questions merit examination. Why did the Senate refrain from voting on the Convention? Are there any credible signs that indicate U.S. ratification/accession is likely to occur soon? And, if the U.S. remains “outside the Convention” how might it protect its global ocean interests?

3. *But see* United Nations Convention on the Law of the Sea, Annex IX, art. 4, Dec. 10, 1982, 1833 U.N.T.S. 397, which limits somewhat the extent of participation and rights of the European Union under the Convention.

4. From the perspective of international law, the U.S. would become a party to the Convention by “accession,” since it is not a signatory to it; and it would become a party to the Implementation Agreement by “ratification,” as it is a signatory to that agreement. From the perspective of domestic U.S. law, however, the “advice and consent of the Senate” is required before the President can make a treaty, which would thus be required for both ratification and accession. U.S. Const. art. II, § 2, cl. 2.

For the first century of its existence, the U.S. used its waters and coasts in a fashion similar to other maritime states. The seas were employed as marine highways, carrying people and goods in domestic and international commerce. Fishery resources were exploited. Coastal areas were developed to facilitate water dependent industries and to spur economic expansion.

In the 1890s the U.S. embarked on an ambitious program to create a powerful “battleship navy,”⁵ capable of projecting military power not only in the Caribbean and Latin America, areas in which the U.S. had long claimed a special interest, but also throughout Asia and beyond.⁶ From that time to the present, as U.S. naval power and commercial and strategic interests abroad expanded, the U.S. has regarded those aspects of the international law of the sea that impact military uses as having overriding importance. Its principal interests in this regard were to maximize freedom of navigation for its naval vessels (and later freedom of overflight of ocean areas for its military aircraft), and, to that end, to resist encroachments on traditional freedom of the seas.

In the 1890s, also, offshore oil and gas development began off the west coast of the U.S. in the form of pier-based oil drilling. As technology rapidly developed in the 20th century it became apparent that vast sources of economic goods and uses lay off the coasts of the U.S. This realization prompted President Truman to proclaim exclusive jurisdiction over the resources on and below the continental shelf of the U.S. in 1945.⁷ This

5. HENRY KISSINGER, *DIPLOMACY* 38 (Simon & Schuster 1994).

6. See the enormously influential ALFRED THAYER MAHAN, *THE INFLUENCE OF SEA POWER UPON HISTORY, 1660-1783* (Sagamore Press Inc. 1957) (1890). See also WALTER LAFEVER, *THE AMERICAN AGE: UNITED STATES FOREIGN POLICY AT HOME AND ABROAD SINCE 1750* (W. W. Norton & Co. 1989) (describing Mahan as “perhaps the most influential military strategist in U.S. history.” *Id.* at 175).

7. Truman Proclamation on the Continental Shelf, Presidential Proclamation No. 2667, 10 Fed. Reg. 12,303 (Sept. 28, 1945). The Proclamation states:

Now, Therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and sea bed of the continental shelf. Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected. *Id.*

claim served as a watershed in law of the sea doctrine in that it was based more on contours and contiguity than on existing substantive legal principles or practices. The Proclamation did, however, fit into a recognized method of international law development, *i.e.*, the practice of claim and response. In this case, the U.S. claimed sovereignty over the continental shelf and the international community could respond in roughly one of two ways: rejection or acquiescence and adoption. The latter path was chosen and shortly after the U.S. claim was issued, maritime nations around the globe issued similar claims.⁸ While the process of claim-and-response often involves decades or centuries to fashion what becomes accepted as customary international law, the practice of so many states prompted one commentator to suggest that a customary international law principle regarding continental shelf claims may have crystallized in as few as four or five years.⁹

At about the same time, the end of the Second World War prompted the international community to seek to codify international law in a large number of areas under the auspices of the U.N. The law of the sea was selected as one of those areas. Four multilateral treaties emerged from the first United Nations Conference on the Law of the Sea (now known as UNCLOS I): the Convention on the High Seas,¹⁰ the Convention on the Territorial Sea and the Contiguous Zone,¹¹ the Convention on the Continental Shelf,¹² and the Convention on Fishing and Conservation of the Living Resources of the High Seas.¹³ These treaties effectively split up state interests in the oceans and codified certain rules, yet they remained ambiguous in some areas and completely deficient in others. Further, none of the four conventions contained compulsory dispute resolution processes, in spite of the fact that the use of ocean space and exploitation of ocean resources was expanding rapidly and concomitantly, increased the likelihood of conflict. Efforts to close some of the gaps and clarify some of the ambiguities via a second U.N. Conference on the Law of the Sea failed.

In November 1967, in a speech before the United Nations General Assembly, Malta's Ambassador, Arvid Pardo, called the delegates'

8. See ANN L. HOLLICK, U.S. FOREIGN POLICY AND THE LAW OF THE SEA, 117-20 (Princeton Univ. Press 1981).

9. H. Lauterpacht, *Sovereignty Over Submarine Areas*, 27 BR. Y.B. INT'L L. 376, 393-94 (1950).

10. Apr. 29, 1958, 450 U.N.T.S. 11.

11. Nov. 22, 1964, 516 U.N.T.S. 205.

12. Aug. 29, 1958, 499 U.N.T.S. 311.

13. Apr. 29, 1958, 559 U.N.T.S. 285.

attention to the potential wealth that lay on the ocean seabed.¹⁴ He proposed that the seabed area beyond the jurisdictional boundaries of states be declared the “common heritage of mankind” and that any resources retrieved from that area ought to be shared in a fair and distributive manner.¹⁵ Remarkably, similar statements had been uttered by U.S. administrations over the course of the nation’s history. In the early years of the republic, John Adams noted that “the oceans and [their] treasures are the common property of all men.”¹⁶ In 1966, President Lyndon Johnson declared that “[w]e must ensure that the deep seas and the ocean bottoms are, and remain, the legacy of all human beings.”¹⁷ In the U.S. Congress one year later, Senator Claiborne Pell was advocating the formation of a new framework governing the use of the seabed and its resources.¹⁸

By 1970, the U.N. General Assembly drafted a Conference Resolution, which called for the convening of a new law of the sea conference and established a Seabed Committee, which set the stage for what would become the Third United Nations Conference on the Law of the Sea (UNCLOS III).¹⁹ Negotiations for a comprehensive law of the sea treaty began in 1973.²⁰

In the U.S., there was bipartisan support for such a treaty. Prompted by the Stratton Commission Report in 1969,²¹ the Nixon administration undertook a thorough review of U.S. policy on the use of the oceans. In 1970, President Nixon proposed that all nations adopt as soon as possible a treaty under which they renounced all national claims to the natural resources of the seabed beyond the point where the high seas reach a depth

14. U.N. Doc. A/C1 PV.1515 (1967). See also Tullio Scovazzi, *The Evolution of International Law of the Sea: New Issues, New Challenges*, 286 R.C.A.D.I. 39, 118-19 (2000).

15. U.N. Doc. A/C1 PV.1515 (1967).

16. NATIONAL INTELLIGENCE COUNCIL, *LAW OF THE SEA: THE END GAME*, n.2 (Mar. 1996), http://www.cia.gov/nic/special_endgame.html (last visited Apr. 1, 2006).

17. Jon M. Van Dyke, *Sharing Ocean Resources—In a Time of Scarcity and Selfishness*, in *THE LAW OF THE SEA: THE COMMON HERITAGE AND EMERGING CHALLENGES* (Harry N. Scheiber, ed., 2000) (quoting Johnson).

18. 140 Cong. Rec. S10046 (daily ed. July 28, 1994). Statement by Senator Pell recounting the introduction of Senate Resolution 172 of 1967 calling for the negotiation of a treaty to extend the international legal order for the oceans beyond the then-existing international regime; and, Senate resolution 186 of 1967, advocating specific principles to govern the activities of States in the exploration and exploitation of ocean space.

19. See JOSEPH KALO ET AL., *COASTAL AND OCEAN LAW* 319 (2nd ed. 2002).

20. *Id.*

21. See generally REPORT OF THE COMMISSION ON MARINE SCIENCE, ENGINEERING AND RESOURCES, *OUR NATION AND THE SEA—A PLAN FOR NATIONAL ACTION* (1969).

of 200 meters and agreed to regard these resources as the common heritage of mankind.²²

II. THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: INITIAL U.S. REACTIONS

A. *U.S. Objections to the Convention on the Law of the Sea*

The Convention opened for signature in 1982.²³ For the twelve years following, Part XI—the deep seabed mining regime—proved to be the primary impediment to ratification and accession by industrialized nations.²⁴ During the final negotiations of the Convention in 1982, the U.S. raised a number of objections to Part XI concerning the institutional framework that would govern deep seabed mining activities as well as the commercial and economic principles that would reign.²⁵ President Reagan issued what amounted to an ultimatum regarding six specific issues, which required resolution if the U.S. were to become a party to the Convention.²⁶ Upon review of the final draft of the Convention, he determined that U.S. objectives had not been met and that the U.S. would, therefore, not join the Convention.²⁷

Acceding to the Convention subject to reservations was not an option open to the U.S. Readers of the voluminous Convention are well aware that it does not allow for reservations,²⁸ the means by which a state might ordinarily opt out of or modify certain treaty provisions with respect to their application to it. Nonetheless, a state acceding to the Convention may do so with a statement that includes a series of declarations and/or understandings, so long as those statements do not functionally amount to

22. Statement by President Nixon on United States Policy for the Seabed (May 23, 1970) *reprinted in* NEW DIRECTIONS IN THE LAW OF THE SEA: DOCUMENTS—VOLUME II 751-52 (S. Houston Lay, Robin Churchill & Myron Nordquist eds., 1973).

23. United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. DOC. A/CONF.62/122 (Oct. 7, 1982) *reprinted in* 21 INT'L LEGAL MATERIALS 1261 (1982) [hereinafter UNCLOS].

24. From its date of opening for signature in 1982, to the time of deposit of the sixtieth ratification, only one industrialized state, Iceland, had ratified the Convention.

25. March 2, 1981. Text from Weekly Compilation of Presidential Documents, *reprinted in* DEP'T ST. BULL. (Apr. 1981).

26. *Id.*

27. Press Release, White House, U.S. Votes Against Law of the Sea Treaty (July 9, 1982) (*reprinted in* 82 DEP'T ST. BULL. 71 (Aug. 1982)).

28. UNCLOS, *supra* note 23, art. 309 (“No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.”).

reservations.²⁹ When the Foreign Relations Committee submitted the Convention to the full Senate in 2004, it attached a set of suggested declarations and understandings.³⁰ Now that the Convention has been sent back to the Senate Foreign Relations Committee, however, it is questionable whether it will emerge with declarations and understandings identical to those suggested in 2004.

B. Modification and “Reflection”

Concerned that the Convention might garner the requisite participation to bring it into force, President Reagan appointed Donald Rumsfeld as Special Presidential Envoy on the Law of the Sea Treaty and assigned him the task of dissuading other industrialized nations from ratifying the Convention.³¹ As early as 1976, then Secretary of Defense Rumsfeld had voiced concerns over the implications of a Convention that might fail to protect U.S. interests.³² Commentators have noted that Mr. Rumsfeld’s

29. UNCLOS, *supra* note 23, art. 310. A reservation is defined in the Vienna Convention on the Law of Treaties, art. 2(1)(d), as “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.” Vienna Convention on the Law of Treaties, art. 2(1)(d), Jan. 27, 1980, 1155 U.N.T.S. 331.

30. For the text of the Committee’s suggested declarations and understandings, see the Appendix to John A. Duff, *A Note on the United States and the Law of the Sea: Looking Back and Moving Forward*, 35 OCEAN DEV. & INT’L L. 195 (2004). See also Yann-Huei Song, *Declarations and Statements with Respect to the 1982 UNCLOS: Potential Legal Disputes between the United States and China After U.S. Accession to the Convention*, 36 OCEAN DEV. & INT’L L. 261 (2005).

31. *Senate Advice and Consent to the Law of the Sea Convention: Hearing before the Senate Foreign Relations Committee*, 108th Cong. 5 (Oct. 14, 2003) (testimony of John Norton Moore, Professor of Law, University of Virginia School of Law) [hereinafter Moore testimony].

32. William J. Aceves, *The Freedom of Navigation Program: A Study of the Relationship Between Law and Politics*, 19 HASTINGS INT’L & COMP. L. REV. 259, 277-78 n.102 (1996). In 1976, Rumsfeld’s concerns were primarily related to excessive ocean claims that might impede U.S. navigation:

As we enter the last quarter of the 20th Century, the legal and political restrictions placed on freedom of mobility are changing the world and impacting on our strategic mobility capability. Our position in the Law of the Sea negotiations stresses, among other things, unimpeded transit through and over international straits. This principle applies to surface movements as well as to overflight. Without this freedom, our mobility and logistic resupply in future contingencies could be impeded.

Id. (quoting *Hearing Before the Senate Committee on Appropriations*, 94th Cong., 2d Sess. 363 (1976)).

efforts were effective in stalling a number of developed nations from ratifying the Convention.³³ The U.S. objections, along with the efforts of the special envoy, impeded effective movement toward quick and/or widespread acceptance of the Convention in the 1980s; yet the Convention was open for signature and gaining ratification from a substantial number of states, including a few industrialized nations. The U.S., recognizing that the Convention would eventually gain the sixty ratifications necessary to bring it into force, and eager to benefit from some of the Convention's provisions, began a two-pronged effort to: 1) modify those provisions it deemed objectionable, and 2) employ those provisions it deemed beneficial.

1. U.S. Efforts to Modify the Convention

*"There is no such thing as the policy of an organization, international or domestic, apart from the policy of its most influential member"*³⁴

In July 1990, U.N. Secretary-General Javier Perez de Cuellar acknowledged that there were problems with certain aspects of Part XI of the Convention and that these problems were inhibiting some states from accepting the Convention.³⁵ As a result, the U.N. prompted a review of Part XI to determine whether revision regarding the regime for the deep seabed area (the "Area") and its resources could bring about universal participation in the Convention. From 1990 to 1994 the U.N. coordinated efforts to revise Part XI of the Convention.³⁶

On July 28, 1994, those efforts came to fruition in the form of the Implementation Agreement.³⁷ The Implementation Agreement reflected

33. David A. Colson, *United States Accession to the United Nations Convention on the Law of the Sea*, 7 GEO. INT'L ENV. L. REV. 651, 657 (1995).

Some important allies such as the United Kingdom and Germany stood with the United States . . . and withheld signature. Other allies, such as France, Japan, Italy, Belgium, and the Netherlands signed, but made statements to the effect that ratification would not occur until an acceptable solution was found to the [provisions deemed deficient by the U.S.].

Id.

34. Hans J. Morgenthau, *Political Limitations of the United Nations*, in LAW AND POLITICS IN THE WORLD COMMUNITY 143, 150 (George A. Lipsky ed., 1953).

35. See The Secretary-General, *Consultation of the Secretary-General on Outstanding Issues Relating to the Deep Seabed Regime Provisions of the United Nations Convention on the Law of the Sea*, ¶¶ 1-2, delivered to the General Assembly, U.N. Doc. A/48/950 (June 9, 1994).

36. *Id.* at ¶¶ 4-28.

37. Agreement Relating to the Implementation of Part XI of the United Nations Convention Law of the Sea, G.A. Res. 48/263, U.N. Doc. A/RES/48/263 (Jul. 28, 1994),

“political and economic changes, including in particular a growing reliance on market principles”³⁸ Forty-one states, including the U.S. and twenty other industrialized nations, signed the Agreement on July 29, 1994.³⁹ This arrangement allowed the U.S. to participate in the organization and implementation of institutions within the International Seabed Authority for a limited period. That limited period has since expired and the U.S. has not acceded to the Convention. As a result, the U.S. now finds itself on the outside looking in. While the responsible officials in the executive and legislative branches of government ponder the merits and timeliness of ratification/accession, the courts are left to apply an odd and often inconsistent mix of principles in cases that require the application of ocean law doctrine.

On October 7, 1994, President Clinton forwarded the Implementation Agreement and the Convention to the U.S. Senate for advice and consent, a necessary step under U.S. law governing “domestic” ratification of international treaties.⁴⁰ In doing so, he noted that the Implementation Agreement modified the Convention sufficiently to merit U.S. Senate ratification.⁴¹ Senator Claiborne Pell, a staunch advocate of the Convention, chaired the Senate Foreign Relations Committee at the time and articulated his strong support of the Convention and the Implementation Agreement. Senator Pell stated that “[the] Convention and the Agreement . . . are the culmination of over two decades of efforts by Democratic and Republican Administrations. They are a triumph for

available at <http://daccessdds.un.org/doc/UNDOC/GEN/N94/332/98/PDF/N9433298.pdf?OpenElement> [hereinafter Implementation Agreement].

38. *Id.* at ¶ 6.

39. Signatories to the Implementation Agreement on July 29, 1994, were: Algeria, Argentina, Australia, Austria, Bahamas, Belgium, Brazil, Canada, Cape Verde, China, Denmark, Fiji, Finland, France, Germany, Iceland, Indonesia, Ireland, Italy, Jamaica, Japan, Kenya, Luxembourg, Malta, Namibia, Netherlands, New Zealand, Paraguay, Poland, Portugal, Seychelles, Spain, Sri Lanka, Sudan, Sweden, United Kingdom, United States, Uruguay, Vanuatu, and the European Community.

40. Message from the President of the United States transmitting United Nations Convention on the Law of the Sea, with Annexes. The Convention was opened for signature at Montego Bay, Dec. 10, 1982, and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of Dec. 10, 1982, with Annex, was adopted at New York, July 28, 1994, and signed by the United States, subject to ratification, on July 29, 1994. S. Treaty Doc. 39, 103d Cong., 2d Sess. IV (1994) [hereinafter S. Treaty Doc. 103-39].

41. The message from President Clinton, *supra* note 40, noted that the Implementation Agreement “fundamentally changes the deep seabed mining regime of the Convention . . . and the Agreement is important to maintain a stable legal regime for all uses of the sea [S]uch stability is vital to U.S. national security and economic strength.”

American foreign policy, and I will make their consideration one of my highest priorities for the Committee on Foreign Relations in the 104th Congress.⁴²

But Senator Pell, a Democrat, never got the chance to bring his influence to bear. One month after making the above statement, elections in the U.S. shifted control of the Senate to the Republicans, and with it the control of congressional committees. The new chair of the Foreign Relations Committee, Senator Jesse Helms, signaled his displeasure with the Convention and chose to refrain from holding hearings that might lead to Senate consent to ratification.⁴³

The limited period of participation that the U.S. enjoyed by signing the Implementation Agreement in 1994 has since expired and the U.S. has not yet ratified the Convention. While numerous treaty supporters provided the Senate with the national security, navigation, environmental, and commercial bases for Convention ratification and accession in the 1990s, Chairman Helms was unconvinced.⁴⁴ The U.S. now embarked on a policy of employing the Convention as a “mirror” to apply the beneficial terms of the Convention. Simply stated, the U.S. claims that certain law of the sea principles found in the Convention inure to its benefit and apply to other nations, not as treaty provisions per se, but rather as “reflections” of customary international law.

2. The Period of “Reflection” in the United States

The hesitancy to accede to the Convention has left the U.S. in a somewhat confused state in terms of which law of the sea principles ought to be employed in various lawmaking and policy-making efforts. While the Executive Branch of government regularly asserts that many, if not most, of the Convention’s provisions are codifications of customary international law, the Legislative Branch has (until very recently) been the impediment to accession. In cases where the U.S. courts have had to refer to law of the sea principles to adjudicate cases (domestic and international in nature), the

42. 140 CONG. REC. 144, S. 14468 (Oct. 6, 1994).

43. *Republican Ascendancy Dims Chances for Ratification of Law of Sea Treaty*, BNA Daily Report for Executives (Nov. 16, 1994) (citing statement by Senator Helms that he would oppose the Convention and Implementation Agreement if the resulting deep seabed mining regime restricts U.S. mining operations and free enterprise).

44. A summary of the defense, navigation, environmental, and commercial benefits that the Convention would provide to the United States as stated in the Treaty Document, S. Treaty Doc. 103-39, *supra* note 41, is provided in John Alton Duff, *UNCLOS and the Deep Seabed Mining Regime: The Risks of Refuting the Treaty*, 19 SUFFOLK TRANSNAT’L L. REV. 1 (1995).

choice of which law to employ is by no means certain. In the past ten years, U.S. courts have applied provisions found in the 1982 Convention (as “reflections of customary international law”), the various UNCLOS I Conventions, and century-old case law. As a result, the body of law developing in the U.S. has a patchwork quality to it and lacks coherence.

As the negotiations leading to the adoption of the text of the 1982 Convention proceeded, it became readily apparent that many of the principles in the 1958 Conventions would be replaced by new substantive law and legal processes. Faced with a new treaty to which it was not a party, the U.S. embarked on a period of “reflection” that would allow it to benefit from many of the Convention’s most important provisions without actually joining.

In 1988, President Reagan claimed a twelve nautical mile territorial sea for the U.S., not based upon the applicable 1958 Convention to which the U.S. was a party, but upon the principles set forth in the 1982 Convention on the Law of the Sea. Importantly, however, his claim was not based on the Convention *per se*, but rather was “[i]n accordance with international law, as *reflected in the applicable provisions of the 1982 [Convention]*.”⁴⁵

Eventually, President Clinton would rely upon the treaty-as-mirror metaphor when he claimed a U.S. Contiguous Zone in 1999, stating:

International law recognizes that coastal nations may establish zones contiguous to their territorial seas, known as contiguous zones In accordance with international law, *reflected in the applicable provisions of the 1982 Convention on the Law of the Sea*, within the contiguous zone of the United States the ships and aircraft of all countries enjoy the high seas freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to those freedoms, such as those associated with the operation of ships, aircraft, and submarine cables and pipelines, and compatible with the other provisions of international law *reflected in the 1982 Convention on the Law of the Sea*.⁴⁶

When called upon to resolve disputes that have ocean or maritime aspects, U.S. courts usually find it necessary to apply rules and principles of international law. Prior to the entry into force of the four UNCLOS I conventions, U.S. courts looked to customary international law for such

45. Territorial Sea of the United States of America, Presidential Proclamation No. 5928, 54 Fed. Reg. 777 (Jan. 9, 1989) (emphasis added).

46. Contiguous Zone of the United States, Presidential Proclamation No. 7219, 64 Fed. Reg. 173 (Aug. 8, 1999) (emphasis added).

rules and principles.⁴⁷ Later, after their entry into force, these conventions provided applicable law in many situations.⁴⁸ After the adoption of the 1982 Convention, even before it entered into force, courts in many states, including U.S. courts, relied on some of its provisions, not as applicable governing law itself, but rather as codifying patterns of state practice accepted as law.⁴⁹ From the U.S. perspective, many of the provisions of the Convention are mirrors that “reflect” customary international law.⁵⁰ The growing number of cases citing the 1982 Convention supports the notion that U.S. courts will increasingly rely upon certain legal principles “reflected” therein.⁵¹

47. *See, e.g.*, *The Scotia*, 81 U.S. 170 (1872); *The Paquete Habana*, 175 U.S. 677 (1900).

48. *See, e.g.*, *Commonwealth of Massachusetts v. Andrus*, 594 F.2d 872, 889 (1st Cir. 1979) (citing U.S. signing of the Convention on the Continental Shelf as confirming U.S. willingness to observe the traditional three-mile territorial sea limit notwithstanding its assertion of jurisdiction over mineral wealth farther offshore); *United States v. Warren*, 578 F.2d 1058, 1064 n.4 (5th Cir. 1978) (citing art. 10 of the Convention on the High Seas as authorizing parties to police their own vessels on the high seas); *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 338 n.14 (5th Cir. 1978) (citing the Convention on the Continental Shelf, the Convention on the High Seas, and the Convention on the Territorial Sea and the Contiguous Zone to define zones of maritime jurisdiction); *United States v. Mitchell*, 553 F.2d 996, 1002 (5th Cir. 1977) (referring to art. 14 of the Convention on the Territorial Sea and the Contiguous Zone to define innocent passage in applying the Marine Mammal Protection Act of 1972); *Warner v. Dunlap*, 532 F.2d 767, 768-69 (1st Cir. 1976) (referring to art. 7 of the Convention on the Territorial Sea and the Contiguous Zone to define the term “bay” in applying the Lighthouse Act of 1789).

49. *See, e.g.*, *Martha’s Vineyard Scuba Headquarters, Inc. v. Unidentified Wreck and Abandoned Steam Vessel*, 883 F.2d 1059 at 1066. (1st Cir. 1987) (citing the Convention for the exclusive jurisdiction of the flag state over a vessel on the high seas).

50. *See, e.g.*, *United States v. Alaska*, 503 U.S. 569, 588 n.10 (1992); *Barber v. Hawaii*, 42 F.3d 1185, 1195-96 (9th Cir. 1994); *United States v. Ramirez-Ferrer*, 82 F.3d 1131, 1136 n.4 (1st Cir. 1996); *Mayaguezanos por la Salud y el Ambiente v. United States*, 198 F.3d 297, 304-05 n.14 (1st Cir. 1999); *R.M.S. Titanic v. Haver*, 171 F.3d 943, 965 (4th Cir. 1999); *United States v. McPhee*, 336 F.3d 1269, 1273 (11th Cir. 2003), (citing United States Ocean Policy, statement by President Reagan, *reprinted in* 22 I.L.M. 464 (Mar. 10, 1983)).

51. *See also* *Sarei v. Rio Tinto PLC*, 221 F.Supp. 2d 1116 (C.D. Cal. 2002); *United States v. Royal Caribbean Cruises, Ltd.*, 24 F.Supp. 2d 155, 159 (D.P.R. 1997); *Mansel v. Baker Hughes, Inc.*, 203 F.Supp. 2d 745 (S.D. Tex. 2002); *United States v. Best*, 172 F.Supp. 2d 656 (D.V.I. 2001); *Jacobson v. Kalama Services*, 128 F.Supp. 2d 644 (D. Haw. 2000); *United States v. Royal Caribbean Cruises, Ltd.*, 11 F.Supp. 2d 1358 (S.D. Fla. 1998); *Alejandro v. Cuba*, 996 F.Supp. 1239 (S.D. Fla. 1997); *Greenpeace, Inc. (U.S.A.) v. France*, 946 F.Supp. 773 (C.D. Cal. 1996); *O’Barry v. United States*, 915 F.Supp. 345 (S.D. Fla. 1995).

As early as 1994, U.S. Courts of Appeal began citing the Convention as a document that reflected international law of the sea principles, even though the Convention itself did not apply to the U.S. Less than three weeks after the Convention entered into force (for ratifying and acceding nations – but not for the U.S.) the Ninth Circuit Court of Appeals relied, in part, upon the “continuous and expeditious” clause of the Convention’s innocent passage definition to resolve a dispute regarding mooring laws off the coast of Hawaii.⁵² Two years later, the First Circuit Court of Appeals cited several of the Convention’s exclusive economic zone (EEZ) principles as applicable insofar as those principles were alluded to in U.S. Presidential Proclamations.⁵³ In 1999, the First Circuit again referred to the applicability of certain provisions of the 1982 Convention, noting that while “[t]he Convention has been signed by the President . . . it has not yet been ratified by the Senate. Consequently, we refer to UNCLOS only to the extent that it *incorporates customary international law*”⁵⁴ That same year, the Fourth Circuit cited provisions of the 1982 Convention regarding salvage law and high seas freedoms as binding, not as treaty law, but as well-established customary law.⁵⁵

U.S. courts may also refer to Convention provisions when they need to ascertain applicable foreign law the interpretation of which depends on Convention principles. In a 1994 decision, for instance, the Third Circuit referred to the Convention to determine whether Mexico had jurisdiction to order the removal of a wreck located in its EEZ.⁵⁶ In addition, U.S. courts have referred to the Convention to determine whether a claim arises under the Alien Tort Claims Act which provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations”⁵⁷

The Eleventh Circuit Court of Appeals, recently ruling on a case in which the breadth of the territorial sea was an issue, noted that the “United States generally recognizes the territorial seas of foreign nations up to twelve miles,” citing a statement by President Reagan that “[t]he United

52. Barber v. Hawaii, 42 F.3d 1185, 1195-96 (9th Cir. 1994).

53. United States v. Ramirez-Ferrer, 82 F.3d at 1136 n.4.

54. Mayaguezanos por la Salud y el Ambiente v. United States, 198 F.3d at 304-05 n.14 (emphasis added), *aff’g* Mayaguezanos por la Salud y el Ambiente v. United States, 38 F.Supp. 2d 168 (D.P.R. 1999).

55. R.M.S. Titanic v. Haver, 171 F.3d at 965.

56. Grupo Protexa, S.A. v. All American Marine Slip, 20 F.3d 1224 (3d Cir. 1994), *aff’g* 954 F.2d 130 (3d Cir. 1992), *rev’g* 753 F.Supp. 1217 (D.N.J. 1990).

57. Sarei v. Rio Tinto PLC, 221 F.Supp. 2d 1116, 1133 (C.D. Cal. 2002) (“Because UNCLOS reflects customary international law, plaintiffs may base an ATCA claim on it.” *Id.* at 1162).

States will recognize the rights of other states in the waters off their coasts, as *reflected in* the [Convention].”⁵⁸ A 2003 federal district court opinion illustrates perhaps both the willingness of the U.S. courts to apply Convention principles and the proper understanding (or lack thereof) to do so appropriately.⁵⁹ The U.S. Supreme Court, as well, has indicated its willingness to look to the 1982 Convention as a mirror of generally accepted international legal principles. In *United States v. Alaska*, the Court noted that “[t]he United States has not ratified [the Convention], but has recognized that its baseline provisions reflect customary international law.”⁶⁰

Besides referring to certain provisions of the Convention as reflecting customary international law, some U.S. courts have referred to it believing that because the U.S. is actively considering accession to the Convention, it has, in their view, an obligation “to refrain from acts which would defeat the object and purpose of [the] treaty.”⁶¹ For example, in referring to Article 230(2) of the Convention to determine whether the U.S. is limited to imposing monetary damages on a foreign ship for dumping oil in the U.S. territorial sea, a federal district court said:

Matters of pollution by foreign vessels within the territorial sea of the United States are governed by UNCLOS. Although the treaty arising from the convention is currently pending ratification before

58. *United States v. McPhee*, 336 F.3d 1269, 1273 (11th Cir. 2003) (citing *United States Ocean Policy*, statement by President Reagan, 22 I.L.M. 464 (Mar. 10, 1983)).

59. *In re J.W. Westcott Co.*, 266 F.Supp. 2d 601, 605 (E.D. Mich. 2003). The court employed the 1982 Convention’s definition of “international strait” to conclude [inappropriately, in the view of the author] that the Detroit River is such a strait. *Id.* The court based its decision on an application of an 1893 U.S. Supreme Court case that characterized the Great Lakes as High Seas areas. Had the 2003 court employed the 1982 Convention’s international straits provisions as well as the Convention’s jurisdictional provisions (particularly regarding internal waters) it likely would have concluded that the Detroit River is not an international strait.

60. 503 U.S. 569, 588 n.10 (1992). See generally W. MICHAEL REISMAN & GAYL S. WESTERMAN, *STRAIGHT BASELINES IN MARITIME BOUNDARY DELIMITATION* 38-104 (1992) (describing the baseline provisions of UNCLOS III and their interpretation).

61. Vienna Convention on the Law of Treaties, art. 18. Although the United States is not a party to the Vienna Convention on the Law of Treaties, it regards itself as under the obligation not to defeat the object and purpose of a treaty which it has signed. 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 312(3) (1987). See generally Martin A. Rogoff, *The International Legal Obligations of Signatories to an Unratified Treaty*, 32 MAINE L. REV. 263 (1980). In 1983, the United Nations General Assembly adopted a resolution calling upon states to refrain from actions that would undermine the Law of the Sea Convention. G.A. Res. 59a, 38 U.N. GAOR Supp. No. 47 (1983), at 48. 1 RESTATEMENT, *supra* at 178 (Reporters’ Notes).

the Senate, it nevertheless carries the weight of law from the date of its submission by the President to the Senate. See Article 19 [sic] of the Vienna Convention on the Law of Treaties. The submission of the treaty to the Senate expresses to the international community the United States' ultimate intention to be bound by the pact. Pending a treaty's rejection or ratification by the Senate under Article 18 of the Vienna Convention, the United States is bound to uphold the purpose and principles of the agreement to which the executive has tentatively made the United States a party.⁶²

Courts have encountered difficulties, however, in referring to provisions of the 1982 Convention. Sometimes it is unclear whether the principles of the 1982 Convention should be referred to at all, even as "reflections" of customary international law. For instance, in 2002, a U.S. federal circuit court ruled that a defendant was not protected by law of the sea principles regarding foreign vessel seizure based on the fact that the defendant's flag state and the U.S., although both were parties to law of the sea treaties, were not both parties to the same treaties.⁶³ The court reasoned that while the U.S. was a party to the 1958 Conventions (Convention on the Territorial Sea and Contiguous Zone and the Convention on the High Seas) that might have afforded the defendant some protection, the flag state of the vessel (Brazil) and the national state of the defendant (Guyana) were not.⁶⁴ Alternatively, the court ruled that although the 1982 Convention on the Law of the Sea might have afforded the defendant similar protection, it did not apply since Brazil was a party to that treaty but the U.S. was not.⁶⁵

Courts have also acknowledged the problems associated with applying certain provisions of the Convention that are not self-executing and therefore would ordinarily require enabling legislation.⁶⁶ For instance, a federal district court in Louisiana refused to apply Articles 91 and 92 of the

62. *United States v. Royal Caribbean Cruise Lines, Ltd.*, 24 F. Supp. 2d 155, 159 (D. P.R. 1997). *See also* *Mansel v. Baker Hughes, Inc.* 203 F. Supp. 2d 745, 746 (S.D.Tex. 2002) (referring to the obligation of the United States not to defeat the object and purpose of a treaty to which it is has not yet ratified); *Mayaguezanos por la Salud y el Ambiente v. United States*, 198 F.3d 297, 304 n.14 (1st Cir. 1999) (citing art. 18 of the Vienna Convention on the Law of Treaties as "reflecting customary international law.").

63. *United States v. Best*, 304 F.3d 308 (3d Cir. 2002), *rev'g* *United States v. Best*, 172 F. Supp. 2d 656 (D. Virgin Islands 2001).

64. *Id.*

65. *Id.*

66. *See, e.g.*, *United States v. Roberts*, 1 F. Supp. 2d 601, 606 (E.D. La. 1998); *United States v. Royal Caribbean Cruises, Ltd.*, 11 F. Supp. 2d 1358, 1372 (S.D.Fla. 1998).

Convention (concerning the nationality of ships and the jurisdiction of states over ships on the high seas), even as reflections of customary international law, because “they are not self-executing . . . [t]hus requir[ing] implementing legislation before they may be enforced in the courts by individuals.”⁶⁷

Inconsistency in application of Convention principles is also a problem. A recent pair of Florida state court cases illustrates the discrepant manner in which law of the sea principles have been applied by U.S. courts. In November 2003, a Florida Appeals Court (Third District) ruled that Florida’s state ocean jurisdiction is coterminous with a twelve-mile U.S.-claimed territorial sea sufficient to bring a cruise ship doctor within state jurisdiction on a medical malpractice charge alleged to have taken place 11.7 nautical miles from Florida’s shore.⁶⁸ One month later, another Florida Appeals Court (Fourth District) ruled that a defendant crossed the U.S. border when he navigated more than three nautical miles (but less than twelve) beyond Florida’s coast, and in so doing engaged in activity exempted from the U.S. Constitution’s Fourth Amendment protection against unwarranted searches.⁶⁹

III. LAW OF THE SEA POLITICS IN THE UNITED STATES: FROM “REFLECTION” TO REALITY

The reason that the U.S. has maintained and endured its “period of reflection” lies in part in politics. As noted above, the U.S. Senate has significant power in determining whether the Convention will become U.S. law as treaty law (rather than a reflecting device). Within the Senate, no action can be taken until the Foreign Relations Committee holds hearings, reviews the implications of the Convention and Implementation Agreement, and forwards them to the full Senate for a vote. As most other industrialized states have moved forward in their efforts to join the ranks of the Convention, the U.S. Senate conspicuously ignored the Convention until 2003. The sentiment of the presiding Chair of the Foreign Relations

67. *United States v. Roberts*, 1 F. Supp. 2d at 606 (citing *United States v. Postal*, 589 F.2d 862, 875-76 (5th Cir. 1979) (holding that comparable provisions of the 1958 Convention on the High Seas were not self-executing)). *See also* *United States v. Delgado-Garcia*, 374 F.3d 1337, 1342 (D.C. Cir. 2004) (refusing to apply the 1958 Convention on the High Seas by narrowly interpreting the term “jurisdiction” in article 6(1)).

68. *Benson v. Norwegian Cruise Line Ltd.*, 859 So. 2d 1213 (Fla. 3 Dist. Ct. App. 2003).

69. *Backus v. State*, 864 So. 2d 1158 (Fla. 4 Dist. Ct. App. 2003) (*reh’g denied* Feb. 19, 2004).

Committee for most of the period from 1994-2003, Senator Helms, can fairly be described as “why bother?”. Many in the U.S., including Senator Helms, operated under an assumption that the U.S. could exercise many, if not most, of the rights outlined in the Convention by employing the treaty-as-mirror metaphor.

Two recent changes have prompted the shift in U.S. policy regarding treaty accession from “why bother?” to “whether?” to “when?”: September 11, 2001 and the retirement of Senator Helms. The terrorist attacks directed the attention and resources of the U.S. to issues of security. The transition in leadership on the Foreign Relations Committee from a vocal opponent of most things related to the U.N. to a chairman with a long history of “internationalist” work, created the opportunity to hold treaty ratification hearings.

A. The 2003 Senate Committee Hearings

The current Chairman of the Senate Foreign Relations Committee, Senator Richard Lugar, has highlighted the need for comprehensive multilateral efforts to address ocean-based environmental and national security threats.⁷⁰ In October 2003, Senator Lugar convened hearings to begin the Senate’s Convention ratification process.⁷¹ Lugar’s opening statement indicated his intention to “begin work on a resolution of advice

70. Press Release from Senator Lugar on Pew Oceans Commission Study (June 4, 2003) (on file with author).

We face a substantial threat to our standard of living from the growing environmental threat facing our oceans. Over-fishing, climate change, and pollution point to a global challenge reminiscent of the challenge we face in securing and destroying weapons of mass destruction. And there is one more nexus I want to touch on. Last year, I visited the Kola Peninsula in the Barents Sea, where I observed almost 200 former Soviets nuclear submarines scattered around miles of bays and inlets. Many of these subs are starting to sink. Experts predict that if any one of these subs does sink, a nuclear reactor in that submarine could trigger substantial leakage of radioactive material into the seas. This is serious business. I look forward to working with my House and Senate colleagues to continue to address these mutual environmental and global security threats with comprehensive measures.

71. The witnesses scheduled to speak at the hearing included: Senator Ted Stevens of Alaska (Chairman Committee on Appropriations); Senator John McCain (Chairman Committee on Commerce, Science and Transportation); Admiral James D. Watkins, USN (Ret.) (Chairman, U.S. Commission on Ocean Policy); Admiral Joseph Prueher, USN (Ret.); Professor John Norton Moore (Director, Center for Oceans Law and Policy, University of Virginia School of Law, Charlottesville, Va.); and Professor Bernard Oxman (University of Miami, School of Law, Coral Gables, Fla).

and consent” that is necessary for U.S. accession to the Convention.⁷² Senator Lugar emphasized the need for U.S. accession in the context of global security and leadership: “More than 140 nations are party to the Law of the Sea Convention, including all other permanent members of the U.N. Security Council and all but two other NATO members.”⁷³ Over the course of two separate hearings, the Foreign Relations Committee heard from a host of lawmakers, academics, senior level cabinet officials, business leaders, nongovernmental organizations, and security and military experts. To a person they advocated swift Senate consideration of the Convention and accession to the Convention. The statements made at the two hearings outline the wide-ranging interest in supporting accession to the Convention. Those interests are outlined below.

1. The National Security/Defense Perspective.

As already noted, Donald Rumsfeld played a key role in stopping the U.S.’s and other nations’ treaty ratification efforts in the 1980s. It is a compelling point, therefore, to note that Secretary Rumsfeld’s Defense Department now urges accession to the Convention. On October 21, 2003, a Deputy Assistant Secretary of Defense testified that the Convention is “critical to the United States Armed Forces.”⁷⁴ Defense Department support for accession was based in part on navigation rights deemed “critical to military operations” and “essential to the formulation and implementation of [U.S.] national security strategy.”⁷⁵ While some have contended that these and other law of the sea rights could be exercised employing the “reflection” approach, the Defense Department identified certain additional benefits that would come only with accession, including participation in international maritime fora and Convention-established entities.⁷⁶ Participation, noted the Defense Department representative, would allow the U.S. to “prevent the erosion of navigational rights and freedoms . . . [and work toward] international consensus proscribing the maritime trafficking of weapons of mass destruction.”⁷⁷ While

72. *U.N. Convention on the Law of the Sea: Hearing Before Senate Foreign Relations Committee*, 108th Cong. (Oct. 14, 2003) (opening statement by Senator Richard Lugar) [hereinafter Senator Lugar, Opening Statement].

73. *Id.* at 1.

74. *U.N. Convention on the Law of the Sea: Hearing, Before Senate Foreign Relations Committee*, 108th Cong. 5 (Oct. 21, 2003) (testimony of Mark T. Esper, Deputy Assistant Secretary of Defense for Negotiations Policy).

75. *Id.* at 1.

76. *Id.* at 2.

77. *Id.*

recommending Convention accession, the Defense Department did identify a number of issues that it deemed worthy of Senate attention. One of these will be noted here.

While the Convention explicitly allows a state party to declare that certain conflicts will not be subject to the Convention's dispute resolution processes, those exceptions are narrow. Article 198(b) allows a state party to effectively insulate "military activities" from Convention jurisdiction. Concerned that an adverse party might seek the Convention's application to a U.S. activity by characterizing it as non-military, the Department of Defense recommended that accession to the Convention be conditioned upon "the understanding that each Party [to the Convention] has the exclusive right to determine which of its activities are 'military activities' and that such determinations are not subject to review."⁷⁸ This condition would protect a state party from becoming subject to a Convention-based dispute resolution tribunal if the military activity claim/exemption to such a tribunal were called into question.⁷⁹

Speaking on behalf of the Joint Chiefs of Staff, Admiral Michael G. Mullen reiterated the concerns raised by others in the defense community and agreed that the "military activities" exemption condition was of paramount importance in a U.S. move toward accession. The Admiral also agreed that accession was warranted. "Military operations since September 11 . . . have dramatically increased [U.S.] global military requirements."⁸⁰ In particular, Mullen noted that U.S. military operations relied upon "[t]he right of transit passage through international straits and the related regime of archipelagic sea lanes passage."⁸¹ While maintaining that those rights were available to the U.S. under customary international law, he contended that "as a party to the Convention, the United States would . . . be in a stronger leadership position to assert its rights."⁸²

From the Department of Homeland Security perspective, Rear Admiral John E. Crowley, Jr. testified that "public order of the oceans is best established and maintained by a stable, universally accepted law of the sea treaty reflective of U.S. national interest."⁸³ This testimony also alluded to

78. *Id.* at 4.

79. *See* UNCLOS, *supra* note 23, Part XV, art. 298.

80. *U.N. Convention on the Law of the Sea: Hearing Before the Senate Foreign Relations Committee*, 108th Cong. 2 (Oct. 21, 2003) (testimony of Admiral Michael G. Mullen, U.S. Navy, Vice Chief of Naval Operations).

81. *Id.* at 6.

82. *Id.* at 7-8.

83. *U.N. Convention on the Law of the Sea: Hearing Before the Senate Foreign Relations Committee*, 108th Cong. 2 (Oct. 21, 2003) (testimony of Rear Admiral John E. Crowley, Jr.).

the importance of being part of a global law of the sea rulemaking process. The Convention's navigation freedoms and protections, noted Crowley, "allow the use of the world's oceans to meet changing national security requirements," suggesting that a non-state party would be at a disadvantage in fashioning what might be considered new ocean-borne security efforts.⁸⁴

Another significant benefit in becoming a state party to the Convention, noted Admiral Crowley, would be the enhanced "ability to conduct . . . interdiction operations and to refute excessive maritime claims."⁸⁵ Some U.S. efforts in the past had been questioned by states contending that certain treaty-based rights were not reflections of customary international law. Crowley also cited Convention Article 108 (requiring international cooperation in the suppression of illegal drugs) as a means by which the U.S. could hasten the implementation of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotic Substances.⁸⁶ Finally, the Department of Homeland Security support for accession highlighted the wide-ranging responsibilities charged to one of its core functional components, the U.S. Coast Guard. Accession, noted the statement, would augment the Coast Guard's ability to prevent, reduce, and control maritime pollution; purge U.S. waters of substandard ships; and preserve high seas fisheries.⁸⁷

2. The Diplomatic Perspective

Assistant Secretary of State John F. Turner cited the urgency for accession at the outset of his testimony: "there are important reasons for the United States to become a party to this Convention *and to do so now*."⁸⁸ Not surprisingly, the State Department highlighted accession as a means of maintaining U.S. leadership in global matters, contributing to the ongoing evolution of international lawmaking, and supporting peaceful methods of

84. *Id.*

85. *Id.*

86. *Id.* at 3. See United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, December 20, 1988, 28 I.L.M. 493 (1989). See also Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARV. INT'L L. J. 131, 167-211 (2005) (analyzing the lawfulness of ship interdiction under the 1982 Convention on the Law of the Sea).

87. *U.N. Convention on the Law of the Sea: Hearing Before the Senate Foreign Relations Committee*, 108th Cong. 3 (Oct. 21, 2003) (testimony of Rear Admiral John E. Crowley, Jr.).

88. *U.N. Convention on the Law of the Sea: Hearing Before Senate Foreign Relations Committee*, 108th Cong. 1 (Oct. 21, 2003) (testimony of John F. Turner, Assistant Secretary, Bureau of Oceans and International Environmental and Scientific Affairs) (emphasis added).

international dispute resolution. In an effort to perhaps illustrate the dwindling opportunity to portray the U.S. as being at the forefront, Turner explained, “[a]s of today, 143 parties, including most of our major allies, have joined the Convention. It is time for us to take the opportunity to demonstrate U.S. leadership on oceans issues by becoming a party to the Law of the Sea Convention.”⁸⁹

3. A Commercial Shipping Perspective

One commercial navigation voice raised during the committee hearings was that of the Chamber of Shipping of America (CSA), an association of U.S. vessel owners and operators of U.S. and foreign-flag ships. CSA president Joseph Cox made the case for accession based on environmental and freedom of navigation principles. Remaining outside the Convention, cautioned Cox, put U.S.-based shipping interests in jeopardy of being burdened by coastal state regulations that have been “stretching the interpretations of the law of the sea into unrecognizable forms.”⁹⁰ Cox referred specifically to recent actions taken off the coast of Western Europe. He lambasted the forcible removal of the *Prestige* in 2002 from the EEZ of Spain when it developed a hull fracture and sought entry into safe waters.⁹¹ Cox also criticized a recent designation of a large expanse of ocean stretching from the “upper reaches of the English Channel to the Straits of Gibraltar [as] a particularly sensitive sea area [(PSSA)].”⁹² While coastal states may designate PSSAs pursuant to International Maritime Organization principles, acknowledged Cox, he contended that the designation in this instance was unsubstantiated.⁹³

Identifying the important interplay between the Convention and other shipping and maritime organizations and agreements, Cox urged the Foreign Relations Committee to ratify the Convention and another treaty instrument awaiting Senate action, Annex VI of the Convention to Prevent Pollution from Ships.⁹⁴ Annex VI, which entered into force on May 19,

89. *Id.*

90. *U.N. Convention on the Law of the Sea: Hearing Before Senate Foreign Relations Committee*, 108th Cong. 4 (Oct. 21, 2003) (testimony of Joseph J. Cox, President and CEO of Chamber of Shipping of America) [hereinafter Cox testimony].

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 2. See also Christopher P. Mooradian, *Protecting “Sovereign Rights”: The Case for Increased Coastal State Jurisdiction over Vessel-Source Pollution in the Exclusive Economic Zone*, 82 B.U. L. REV. 767, 780-94 (2002) (analyzing the bases for coastal state jurisdiction over vessel-source pollution in the exclusive economic zone under the 1982

2005, regulates air pollution from ships.⁹⁵ In particular, it limits sulphur oxide (SOx) and nitrogen oxide (NOx) emissions from ship exhausts and prohibits deliberate emissions of ozone-depleting substances.⁹⁶ Annex VI merited prompt consideration, noted Cox, for familiar reasons—*i.e.*, that the U.S. had played a key role in fashioning the provisions of Annex VI; that the Annex was quickly approaching the requisite number of ratifications that will bring it into force; and that remaining on the outside of an operating international maritime treaty would place the U.S. and its shipping interests at a significant disadvantage in terms of the application and interpretation of important law of the sea principles.⁹⁷ In September 2005, the Senate Foreign Relations Committee held hearings on the merits of ratifying Annex VI.⁹⁸

4. The Academic Perspective

A number of academics gave testimony at the Foreign Relations Committee hearings, including Professors Bernard Oxman and John Norton Moore, both of whom had direct experience in the negotiations that culminated in the Convention. Oxman, who also has the distinction of having served as an appointed *ad hoc* judge on the International Tribunal for the Law of the Sea, recounted the historical leadership role played by the U.S. in fashioning law of the sea principles. With the insight of one who has worked from outside as well as inside the Convention, its creation, and its apparatus, he pointed out the weakness of claiming law of the sea rights as customary rights: “The fundamental truth is that the most difficult and potentially costly policy decisions made by the President and Congress regarding activities at sea turn not on what our own lawyers say our rights are under the law of the sea, but what foreign states perceive our rights to be.”⁹⁹

Convention on the Law of the Sea).

95. International Maritime Organization, Annex VI of MARPOL 73/78 Regulations for the Prevention of Air Pollution from Ships and NOx Technical Code (1998).

96. For a more detailed technical explanation of Annex VI, see A.A. Wright, *International Exhaust Emission Controls, MARPOL Annex VI*, paper presented at American Society of Mechanical Engineers Conference (Oct. 1999), at http://www.asme.org/divisions/ice/links/oct99conf_WRIGHT2.pdf.

97. Cox testimony, *supra* note 90, at 2-3.

98. *Hearing Before the Senate Foreign Relations Committee on Five Treaties*, 109th Cong. (2005) (opening statement by Senator Richard G. Lugar).

99. *U.N. Convention on the Law of the Sea: Hearing Before the Senate Foreign Relations Committee*, 108th Cong. 3 (Oct. 14, 2003) (testimony of Bernard Oxman, Professor of Law, University of Miami School of Law). See also Bernard H. Oxman, *The*

Professor Moore's testimony complemented that of his academic colleague and noted particular practical benefits that the U.S. could gain upon accession, including: a seat on the Council of the International Seabed Authority; a role in the next election of judges to serve on the International Tribunal for the Law of the Sea; the election of a U.S. expert to the Commission on the Limits of the Continental Shelf; direct participation in the annual meeting of the states parties to the Convention; and augmented authority and increased mechanisms for contesting illegal ocean claims.¹⁰⁰

5. The Senate's Perspective and an Eye Toward Continental Shelf Delimitation

While the Foreign Relations Committee has the responsibility of reviewing and recommending treaties to the full Senate, other Senate committees also play significant roles in the ultimate accession to the Convention and implementation of its provisions. In a deft nod to these committees, their roles and their leadership, Senator Lugar emphasized the fact that U.S. accession to the Convention was "supported by the chairmen of the Appropriations and Commerce Committees."¹⁰¹ The former exerts considerable influence in decisions related to the funding of U.S. policy efforts, while the latter would play a significant role in shepherding legislation through Congress that would be needed to allow implementation of the Convention's provisions.¹⁰²

The Chairman of the Senate Appropriations Committee, Senator Ted Stevens, signaled his support for accession and highlighted some of the proximate benefits to his own state of Alaska. Stevens pointed to the Convention's constraints on high seas fishing designed to protect coastal states from deleterious fishing practices.¹⁰³ He also highlighted the particular interest his constituents have in matters related to continental shelf claims, noting that two-thirds of the U.S. continental shelf is situated off Alaska.¹⁰⁴ Stevens pointed to recent continental shelf claims by Russia

Rule of Law and the United Nations Convention on the Law of the Sea, 7 EUR. J. INT'L L. 353, 356 (1996) (maintaining that "[t]he core idea of the Convention is a fundamental shift to multilateralism from unilateralism in the development of the law of the sea. Basic to the Convention's structure are numerous duties to report to, consult, obtain approval from, and respect rules promulgated by various international organizations . . .").

100. Moore testimony, *supra* note 31.

101. Senator Lugar, Opening Statement, *supra* note 72.

102. *Id.*

103. *U.N. Convention on the Law of the Sea: Hearing Before the Senate Foreign Relations Committee*, 108th Cong. 2 (Oct. 14, 2003) (testimony of Senator Ted Stevens).

104. *Id.*

that merited monitoring and suggested that the Convention's provisions on continental shelf delimitation would support a U.S. claim of approximately sixty-two thousand square kilometers north and east of the Bering Strait.¹⁰⁵ Article 76 of the Convention provides a basis upon which a coastal state may claim a juridical continental shelf, in excess of the geologic shelf, based on a complex determination of, *inter alia*, the extent of "the natural prolongation of [the coastal state's] land territory to the outer edge of the continental margin."¹⁰⁶

A U.S.-funded mapping and hydrographic study designed to identify regions where Convention-based extended continental shelf claims might be made, indicates that the U.S. is preparing for when it can make such claims as a state party to the Convention.¹⁰⁷ While the study does not purport to constitute an Article 76 claim, it focuses attention on the fact that, for some time, U.S. industries have been looking beyond the 200 nautical mile mark for opportunities to develop natural resources.

The U.S. refusal to accede to the Convention in 2004 has not hindered its activities regarding Article 76 continental shelf boundary delimitation research. Researchers at the Center for Coastal and Ocean Mapping/Joint Hydrographic Center at the University of New Hampshire continue to analyze data collected on numerous research cruises that might ultimately be used to substantiate continental shelf claims pursuant to Article 76 of the Convention on the Law of the Sea. That research suggests that there are expansive areas off the northeast coast of the U.S., in the Gulf of Alaska, in the Bering Sea, and in the Arctic region that might be claimed by the U.S. pursuant to Article 76 principles.¹⁰⁸

105. *Id.*

106. UNCLOS, *supra* note 23, at art. 76 [Definition of the Continental Shelf].

107. LARRY A. MAYER ET AL., THE COMPILATION AND ANALYSIS OF DATA RELEVANT TO A U.S. CLAIM UNDER UNITED NATIONS LAW OF THE SEA ARTICLE 76: A PRELIMINARY REPORT (Center for Coastal and Ocean Mapping/Joint Hydrographic Center, University of New Hampshire (2002)), available at http://www.ccom-jhc.unh.edu/unclos/reports_pdf/CCOM_JHC_REP.pdf (last visited Apr. 1, 2006).

108. See, e.g., JAMES V. GARDNER & LARRY A. MAYER, U.S. LAW OF THE SEA CRUISE TO MAP THE FOOT OF THE SLOPE AND 2500-M ISOBATH OF THE GULF OF ALASKA CONTINENTAL MARGIN (Center for Coastal and Ocean Mapping/Joint Hydrographic Center, University of N.H.) (2005); DOUG CARTWRIGHT & JAMES V. GARDNER, U.S. LAW OF THE SEA CRUISE TO MAP THE FOOT OF THE SLOPE AND 2500-M ISOBATH OF THE NORTHEAST U.S. ATLANTIC CONTINENTAL MARGIN: LEGS 4 AND 5 (Center for Coastal and Ocean Mapping/Joint Hydrographic Center, University of N.H.) (2005); JAMES V. GARDNER, ET AL., NEW VIEWS OF THE U.S. CONTINENTAL MARGINS, U.S. HYDRO CONFERENCE, SAN DIEGO, CALIF. (2005); L.A. MAYER, U.S. LAW OF THE SEA CRUISE TO MAP THE FOOT OF THE SLOPE AND 2500-M ISOBATH OF THE U.S. ARCTIC OCEAN MARGIN (Center for Coastal and Ocean Mapping/Joint Hydrographic Center, University of N.H.) (2004); JAMES V. GARDNER, U.S. LAW OF THE

6. The Industrial Perspective

The Foreign Relations Committee heard testimony from Paul Kelly, on behalf of petroleum and other industrial associations, advocating Convention accession as a means of facilitating energy development on the continental shelf beyond 200 nautical miles. While the Convention allows for continental shelf claims to 350 miles and in some cases even beyond this, as a non-state party, the U.S. has no treaty-based means of making such a claim. Kelly painted a picture of an energy industry ready, willing, and capable of moving oil and gas extraction production into deepwater areas beyond 200 nautical miles of the U.S.¹⁰⁹ Citing technology that now allows for oil and gas development in water depths approaching two kilometers, Kelly pointed out that “U.S. companies are interested in setting international precedents by being the first to operate in areas beyond 200 miles and to continue demonstrating environmentally sound drilling development and production technologies.”¹¹⁰ While Kelly touted the ambitious and environmentally-sound plans of industry, the environmental community had its own advocate citing the myriad reasons for acceding to the Convention.

7. The Environmental Perspective

Most of the testimony given before the Foreign Relations Committee referenced the environmental benefits that the U.S., and the oceans themselves, would obtain through near-universal accession to the Convention. One presenter, however, raised environmental implications as

SEA CRUISE TO MAP THE FOOT OF THE SLOPE AND 2500-M ISOBATH OF THE NORTHEAST U.S. ATLANTIC CONTINENTAL MARGIN: LEGS 1, 2, AND 3 (Center for Coastal and Ocean Mapping/Joint Hydrographic Center, University of N.H.) (2004); JAMES V. GARDNER, REPORT ON THE LOTS CRUISE TO MAP FOOT OF THE SLOPE AND 2500-M ISOBATH OF BOWERS RIDGE AND BERINGIAN MARGIN, BERING SEA (Center for Coastal and Ocean Mapping/Joint Hydrographic Center, University of N.H.) (2003); LARRY A. MAYER ET AL., REPORT ON RV HEALY CRUISE TO THE ARCTIC OCEAN (2003); LARRY A. MAYER, M. JAKOBSSON & A. ARMSTRONG, THE COMPILATION AND ANALYSIS OF DATA RELEVANT TO A U.S. CLAIM UNDER UNITED NATIONS LAW OF THE SEA ARTICLE 76: A PRELIMINARY REPORT (Center for Coastal and Ocean Mapping/Joint Hydrographic Center, University of N.H.) (2002), *all available at* <http://www.ccom.unh.edu/unclos/reports.htm> (last visited Apr. 1, 2006) [hereinafter “Center for Coastal and Ocean Mapping Compilation”].

109. *U.N. Convention on the Law of the Sea: Hearing Before Senate Foreign Relations Committee*, 108th Cong. 3 (Oct. 21, 2003) (testimony of Paul L. Kelly, Senior Vice President, Rowan Companies, Inc.).

110. *Id.*

a principal concern. Roger Rufe, a former U.S. Coast Guard Vice Admiral, spoke in his capacity as the president of a large nongovernmental organization dedicated to ocean conservation issues.¹¹¹

Rufe detailed not only the benefits, in the form of U.S. leadership in exporting sound marine environmental practices, but the pitfalls that merited consideration as well.¹¹² He cautioned that certain of the Convention's ambiguities might be employed as shields against the enforcement of U.S. domestic environmental laws.¹¹³ Rufe identified a series of Convention issues that warranted interpretive statements to ensure that environmental protections would not be subordinated or suborned.¹¹⁴ After detailing the environmental concerns and suggesting a means of mitigating or remedying them, Rufe went on to note that his organization was a strong supporter of accession to the Convention.¹¹⁵

8. The Committee Hearings: Aftermath

On February 25, 2004, the Committee voted unanimously (19-0) to support U.S. accession and reported the Convention and the Implementation Agreement to the full Senate for its consideration. On March 11, 2004, the Convention was placed on the Senate schedule and became eligible for the final step that would bring the U.S. into state party membership.

In a somewhat unusual turn of events, additional Senate and House committees requested hearings on the Convention before any Senate vote might be held. On March 23, 2004, public hearings were held before the Senate Committee on Environment and Public Works. On April 8, 2004, the Senate Armed Services Committee held hearings. On May 12, 2004, the House Committee on International Relations held hearings on the Convention, and on June 8, 2004, the Senate Select Intelligence Committee held closed hearings. Opponents of Convention accession continued to raise concerns about implications of the Convention for, among other things, U.S. sovereignty, and the specter of an international taxing authority.

111. *U.N. Convention on the Law of the Sea: Hearing Before Senate Foreign Relations Committee*, 108th Cong. 4 (Oct. 21, 2003) (testimony of Roger Rufe, President, The Ocean Conservancy).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* See also Howard S. Schiffman, *U.S. Membership in UNCLOS: What Effects for the Marine Environment*, 11 *ILSA J. INT'L & COMP. L.* 477 (2005) (arguing that U.S. ratification will have a positive effect on the environment).

In an effort to stop the Convention from being derailed, Senator Richard Lugar, Chair of the Senate Foreign Relations Committee, issued a series of twenty letters to his Senate colleagues between February and July 2004 pointing out the reasons for Convention accession and refuting the claims of opponents.¹¹⁶ Lugar also posted a series of Frequently Asked Questions on his Senate website highlighting, among other things, the reasons for prompt accession to the Convention.¹¹⁷

The road to accession seemed to gain another boost in the fall of 2004. In September 2004, the congressionally-created and presidentially-appointed U.S. Commission on Ocean Policy stated unambiguously that “[t]he United States should accede to the United Nations Convention on the Law of the Sea.”¹¹⁸ The Commission Report highlighted the reasons for that recommendation:

International bodies established under the LOS Convention are in the process of making decisions that directly affect important U.S. interests. For example, the Commission on the Limits of the Continental Shelf is considering jurisdictional claims over resources on the continental margin, an area of particular importance to the United States with its broad continental margin rich in energy resources. Measures to guide the future exploration and exploitation of deep seabed resources under the Convention are also being developed. The Convention will no doubt continue to evolve. In 2004, the Convention will be open for amendment by its parties for the first time. If the United States is to ensure that its interests as a maritime power and coastal state are protected, it must participate in this process. The best way to do that is to become a party to the Convention, and thereby gain the right to place U.S. representatives on its decision-making bodies.¹¹⁹

President Bush’s response to the Commission recommendation in December 2004 indicated that the administration agreed: “As a matter of national security, economic self-interest, and international leadership, the

116. See Richard G. Lugar, *Senator Lugar’s Letters to Senate and Colleagues About U.S. Leadership and the Law of the Sea, March 8, 2004 to July 7, 2004*, <http://lugar.senate.gov/sfrc/colleague.html> (last visited Apr. 17, 2006).

117. See Richard G. Lugar, *U.S. Leadership in the World and the Law of the Sea*, <http://lugar.senate.gov/sfrc/questions.html> (last visited Apr. 17, 2006).

118. U.S. COMMISSION ON OCEAN POLICY, FINAL REPORT: AN OCEAN BLUEPRINT FOR THE 21ST CENTURY 444 (2004).

119. *Id.* at 443-44.

Bush Administration is committed to U.S. accession to the U.N. Convention on the Law of the Sea.”¹²⁰

Despite the Foreign Relations Committee’s unanimous support for the Convention, Chairman Lugar’s efforts to shepherd it through the domestic ratification process, the U.S. Ocean Commission’s recommendation, and the President’s commitment, the full Senate refrained from holding a vote on Convention accession. When the term of the 108th Congress expired at the end of 2004, so too did the Convention’s place on the Senate schedule.

While the U.S. Constitution merely states that the Senate’s role in treaty ratification is to give its “advice and consent,” a detailed set of Senate rules governs the manner in which that process takes place. Treaties may linger in the “advice and consent” pipeline for years. Even if a treaty has made substantial progress through the Senate process, it may be subject to significant backsliding. Figure 1 illustrates the progress that the Convention and Implementation Agreement made through March 2004, when the Senate Foreign Relations Committee’s Resolution of Advice and Consent was placed on the Senate Schedule for consideration.¹²¹ But the Senate did not consider the Resolution during the remainder of the 108th Congress. As a result, at the adjournment of the 108th Congress, the Convention and Implementation Agreement were returned to the Foreign Relations Committee.

According to Senate Rule XXX, “[A]ll proceedings on treaties shall terminate with the Congress, and they shall be resumed at the commencement of the next Congress as if no proceedings had previously been had thereon.”¹²² Accordingly, the Convention and Implementation Agreement lost much of the progress they had made and slid back to an early stage of in the process.¹²³ The hearings in support of ratification have been effectively nullified and the unanimous Committee vote is now only of historical interest. The draft Declarations and Understandings that accompanied the treaty document on the Senate Schedule are likewise nullified. The Convention documents must again be considered by the Foreign Relations Committee, presumably meaning that new hearings must

120. BUSH ADMINISTRATION, U.S. OCEAN ACTION PLAN: THE BUSH ADMINISTRATION’S RESPONSE TO THE U.S. COMMISSION ON OCEAN POLICY (2004), *available at* <http://ocean.ceq.gov/actionplan.pdf>.

121. Figure 1 appears *infra* p. 35.

122. Standing Rules of the Senate, Rule XXX Executive Session – Proceedings on Treaties, *reprinted in* Treaties and Other International Agreements: the Role of the United States Senate, S. Prt 103-53, at 89 (Nov. 1993) *available at* <http://rules.senate.gov/senaterules/rule30.php>.

123. *See* Figure 2, *infra* p. 36.

be held, and again receive a favorable vote by the Committee before they may be placed on the Senate Schedule for consideration by the full Senate.

If the Committee does hold hearings, there is no guarantee that the Convention will secure the same level of support it received in 2004. The composition of the Committee has changed since 2004, and it is even possible that some remaining members may view the matter differently given the passage of time and the opposition voiced by those who consider accession contrary to U.S. interests.

Although the Convention suffered a setback with the adjournment of the 108th Congress, the Chair of the Senate Foreign Relations Committee has continued to solicit support for accession. In a series of questions to the nominee for the position of U.S. Secretary of State, Senator Richard Lugar suggested that the Bush administration ought to support the domestic ratification process in the Senate and that the Senate should again consider Convention accession.

During her confirmation hearings regarding her nomination to the post of U.S. Secretary of State in January, 2005, Dr. Condoleeza Rice recommended just such action. She indicated that the President would like to see the Convention “pass as soon as possible.”¹²⁴ Furthermore, in a written response to a question regarding Convention accession, Dr. Rice, on behalf of the Bush Administration, “urge[d] the Senate Foreign Relations Committee to again favorably report out the Convention and the Implementation Agreement,” adding that “the Administration [would] work with the Senate leadership to bring the Convention and the Implementation Agreement to a floor vote in the 109th Congress.”¹²⁵ Nonetheless, the Foreign Relations Committee has yet to convene any hearings or schedule any votes on the Convention during the current Congress.

9. The Remnants of Opposition.

While there have been few, if any, public statements of opposition voiced by members of the Senate, Convention opposition still exists in the hearts, minds, and statements of a number of long-time Convention adversaries.

Followers of the United States’ stance on the Convention over the years will recall that the strongest opposition to the Convention was raised by the

124. Richard G. Lugar, *Secretary of State Dr. Condoleeza Rice Endorses Law of the Sea*, Jan. 18, 2005, http://lugar.senate.gov/sfrc/rice_endorsement.html (last visited Mar. 28, 2006).

125. See Richard G. Lugar, *Questions for the Record*, Jan. 18-19, 2005, http://lugar.senate.gov/sfrc/rice_qfa.html (last visited Mar. 28, 2006).

Reagan administration in the 1980s. Less than six weeks after taking office, President Reagan ordered a comprehensive review of U.S. policy on the law of the sea and the then draft Convention.¹²⁶ One year later, as the Convention was being completed after a decade of negotiation (led in great part by the U.S. delegation), President Reagan deemed a significant portion of Part XI (the deep seabed mining regime) “unacceptable.”¹²⁷ A host of commentators joined Reagan in declaring the Convention to be, *in toto*, adverse to important U.S. interests.¹²⁸ While significant changes were made to Part XI via a virtual rewriting in the form of the Implementation Agreement, the Convention seemed eternally stigmatized by Part XI’s earlier characterization as “ocean resource socialism.”

While the Implementation Agreement modifications to Part XI addressed President Reagan’s objections, the changes did not seem to crystallize a pro-Convention constituency capable of moving the U.S. towards accession.¹²⁹ As noted above, changes in U.S. security priorities and a change in the Foreign Relations chairmanship seemed to be the two greatest factors prompting the Executive Branch to support accession and the Senate to entertain that support in the form of committee hearings.

A handful of opponents continue to voice their concerns about the impact of accession on U.S. sovereignty and security. Doug Bandow, a special assistant to President Reagan in the 1980s who served on the U.S. delegation to the Third U.N. Conference on the Law of the Sea, continues to call for the scuttling of the Convention.¹³⁰ Bandow continues to caution against what he refers to as a “redistributionist bent” embodied in Part XI in the form of a portion of deep seabed royalties being distributed to mining and non-mining nations alike. He also notes that the U.S. ought to stand against the creation of a “new oceans bureaucracy.”¹³¹ At the same time,

126. Text from *Weekly Compilation of Presidential Documents* (statement of President Ronald Reagan), in DEP’T ST. BULL., Apr. 1981.

127. President Ronald Reagan, *U.S. Policy and the Law of the Sea*, in DEP’T OF ST. BULL., Mar. 1982, at 54.

128. Leigh S. Ratiner, *The Law of the Sea: A Crossroads for American Foreign Policy*, 60 FOREIGN AFF. 1006, 1029 (1982); Malone, J., *Who Needs the Sea Treaty*, FOREIGN POL’Y 44-63 (Spring 1984). See also John A. Duff, *UNCLOS and the Deep Seabed Mining Regime: The Risks of Refuting the Treaty*, 19 SUFFOLK TRANSNAT’LL. REV. 1, 30-40 (1995) (for a discussion of certain opposing views).

129. Particularly in light of the unwillingness on the part of Senator Helms, in his capacity as Chair of the Senate Foreign Relations Committee, to hold hearings on treaty accession.

130. Doug Bandow, *Sink the Law of the Sea Treaty*, THE WKLY. STANDARD (Mar. 15, 2004). [hereinafter “Sink the Law of the Sea Treaty”]. Mr. Bandow called for a similar sinking in a newspaper opinion piece over a decade ago. *Deep Six the Law of the Sea Treaty*, WALL ST. J., July 28, 1994, at A12.

131. *Sink the Law of the Sea Treaty*, *supra* note 130.

he derides the advocates' call for Convention accession as a means of manifesting U.S. leadership. Leadership, suggests Bandow, can be illustrated just as easily by saying "no" as saying "yes."

Bandow's arguments, however, fail to carry the same weight today as they might have ten years ago. The "oceans bureaucracy," as he calls it, is not a development that might be stemmed. The Law of the Sea Tribunal is up and running. Judges have been appointed and are hearing and adjudicating cases. The Commission on the Limits of the Continental Shelf has been established and is employing Convention principles to delineate and reconcile continental shelf claims.¹³² The U.S. is currently engaged in mapping its own continental shelf employing Convention principles.¹³³

Another Convention opponent contends that the Convention still contains a number of "fatal flaws" that ought to stop the U.S. from acceding. Washington Times columnist Frank J. Gaffney, Jr. suggests that Convention accession will hinder U.S. intelligence-gathering activities that are vital to the country.¹³⁴ He also suggests that Convention-based adjudication of conflicts might emasculate U.S. military and defense initiatives.¹³⁵ These types of concerns were addressed comprehensively in the Committee hearings and continue to be effectively refuted by responsive commentaries penned by advocates of accession such as Admiral W. L. Schacte.¹³⁶

Still others suggest that the Convention was voted out of Committee in the dark of night, that Senator Lugar prevented other Senators from seeing the whole Convention,¹³⁷ and that the Convention would give the U.N. "absolute control" over any type of ocean research and exploration activity.¹³⁸ Many of these charges can be quickly dispelled by reviewing the process that has been employed in scheduling and holding the Committee hearings or by looking around for the thousands of dog-eared

132. See Commission on the Limits of the Continental Shelf, http://www.un.org/Depts/los/clcs_new/clcs_home.html (Follow "The Commission, Its Purpose and Functions" hyperlink) (last visited Mar. 22, 2006).

133. Center for Coastal and Ocean Mapping Compilation, *supra* note 108.

134. Frank J. Gaffney, Jr., Commentary, *Deep-six this Treaty*, WASHINGTON TIMES, Feb. 24, 2004.

135. *Id.*

136. W.L. Schachte, Jr., Op-Ed, *Don't Scuttle Sea-law Convention*, WASHINGTON TIMES, March 7, 2004 (Response to Gaffney Commentary).

137. See Paul Weyrich, *Law of the Sea by Dark of Night*, FREE CONGRESS FOUNDATION COMMENTARY (Mar. 2, 2004), available at <http://www.newsmax.com/archives/articles/2004/3/2/102729.shtml> (last visited Mar. 20, 2006).

138. See Jane Chastain, *Global Nightmare: Saving the LOST*, WORLDNETDAILY.COM, Mar. 4, 2004, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=37424.

copies of the full Convention that were printed by the U.S. Government Printing Office and distributed to the Senate in 1994. Nonetheless, some ocean policy devotees suggest that the specter of Senator Helms' opposition to the Convention still carries weight in Washington.¹³⁹

B. What Is Next?: The Gulf of Mexico and the Western Gap Example

The remaining question is “when?” Or given that the opportunity arose and then fell away in 2004, perhaps, “under what circumstances?” A set of circumstances that arose in the late 20th century may provide some insight. In 1978, the U.S. and Mexico entered into bilateral treaties that (1) delimit the EEZ between the two nations in the Gulf of Mexico; and (2) delimit the continental shelf in the area of the gulf known as the “western gap.” The U.S. had refrained from moving on these agreements for decades but finally ratified the agreements rapidly when the deep waters of the Gulf of Mexico and areas of the Continental shelf beyond the EEZ became ripe for development.

In 1997, the U.S. Minerals Management Service, the agency with authority to solicit, accept, and administer lease tract bids, announced that it would offer offshore leases for tracts in the western gap contingent upon a successful agreement between the two nations on that area. The Government of Mexico indicated that no agreement on the gap could be considered until the U.S. first ratified the boundary treaty. The increased interest in the deep waters of the Gulf of Mexico prompted the U.S. Senate Foreign Relations Committee to hold hearings in September of 1997 regarding the maritime boundary in the Gulf.

The Foreign Relations Committee favorably reported the 1978 Treaty to the Senate shortly after the hearings. The full Senate voted to ratify it on October 23, 1997. The two countries' leaders made specific reference to the final formalization during a visit by Mexico's President Ernesto Zedillo to Washington a month later. In a joint declaration issued from the White House, Presidents Clinton and Zedillo emphasized the “ratification of our Maritime Boundary Treaty as an important step to fully demarcate our common maritime border.”¹⁴⁰ With the entry into force of the maritime boundary treaty, the two nations moved forward with talks regarding the western gap.

On June 9, 2000, the U.S. and Mexico signed the “Treaty Between the Government of the United States of America and the Government of the

139. Personal communication from former U.S. Ocean Commissioner (Oct. 2005).

140. Text of Clinton-Zedillo Declaration, U.S. Newswire, November 14, 1997.

United Mexican States on the Delimitation of the Continental Shelf in the Western Gulf of Mexico Beyond 200 Nautical Miles.”¹⁴¹ The U.S. Senate gave its advice and consent to ratification on October 18, 2000, and the Mexican Senate followed suit on November 28, 2000. On January 17, 2001, the treaty entered into force upon exchange of the instruments of ratification. A boundary line was agreed upon to delimit the continental shelf within the western gap.

CONCLUSION

Are there any credible signs that indicate U.S. accession is likely to occur soon? While there seems to be no critical mass of existing commercial support similar to the support that prompted the agreements between the U.S. and Mexico, it is questionable whether such commercial readiness would serve as a sufficient impetus for Senate ratification of the Convention. Unlike the U.S.-Mexico agreements, the terms of the 1982 Convention are much more far-ranging and are part of a treaty with over 140 state parties as well as compulsory dispute resolution processes. Nonetheless, it seems as though the Article 76 continental shelf research that continues in the U.S. suggests that data is being gathered to inform a cost-benefit analysis as part of the Convention accession debate.

Additionally, statements in support of Convention accession continue to flow into Washington. Echoing Secretary of State Rice’s recommendation to ratify the Convention “as soon as possible,” a wide range of business, environmental and government figures urged U.S. accession in a letter to Senate majority Leader Bill Frist on August 31, 2005.¹⁴² The letter, in pertinent part, stated:

All major U.S. ocean industries, including offshore energy, maritime transportation and commerce, fishing, and shipbuilding support U.S. accession to the Convention because its provisions help protect vital U.S. economic interests and provide the certainty and stability crucial for investment in global maritime enterprises.

Environmental organizations also strongly support the Convention. As a party, the U.S. would be in the best position to lead future applications of this framework for regional and international

141. S. Treaty Doc. No. 106-39 (2000).

142. Letter from Leon E. Panetta, James D. Watkins, et al., to William Frist, Senate Majority Leader (Aug. 31, 2005), *available at* <http://www.clgd.org/downloads/unclos/frist-aug05.pdf> (last visited Apr. 1, 2006).

cooperation in protecting and preserving the marine environment.

The congressionally mandated and Presidentially appointed U.S. Commission on Ocean Policy and the privately funded Pew Oceans Commission both unanimously recommend accession to the Law of the Sea Convention as an important part of a comprehensive and coordinated U.S. ocean policy.¹⁴³

Yet support for the Convention in the Senate itself seems to be eroding. The Senate Foreign Relations Committee may be wary of scheduling new hearings and a vote on the Convention unless there are clear signs of support from the Senate leadership and a majority of senators. Barring that pro-Convention environment, individual senators may not wish to risk political capital in an endeavor that might tar them as U.N.-friendly actors too willing to relinquish U.S. sovereignty (real or perceived).

If the U.S. remains “on the outside looking in,” it will have to continue to rely upon its treaty-as-reflection contentions to claim the benefits that are available under the terms of the Convention and Implementation Agreement. It remains to be seen whether any state parties to the Convention on the Law of the Sea will challenge such claims.

143. *Id.*

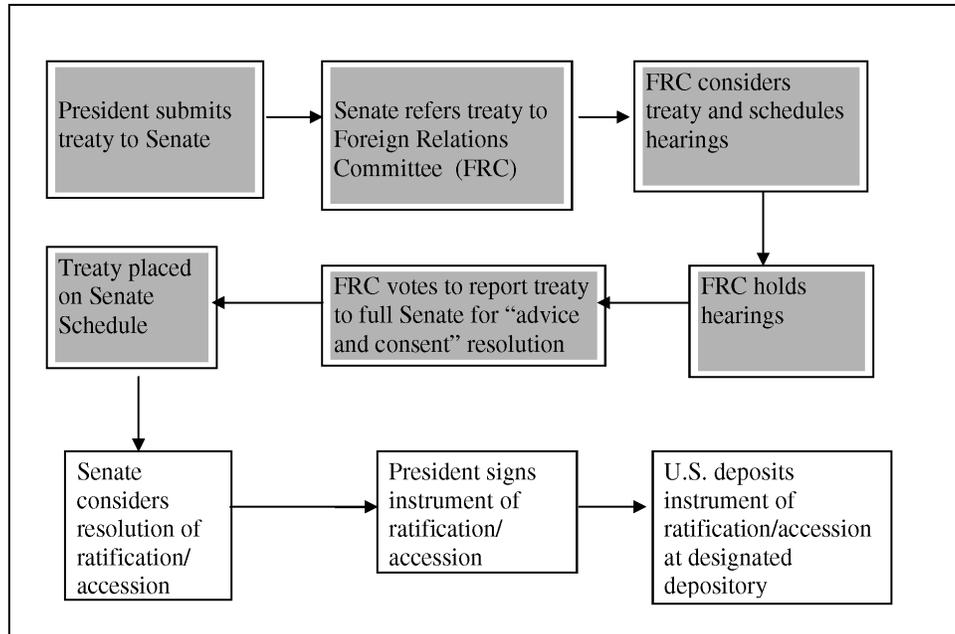


Figure 1. On March 11, 2004, the Treaty and Implementation Agreement were placed on the Senate schedule and became eligible for the final phase that would bring the U.S. into State Party membership of the Convention.

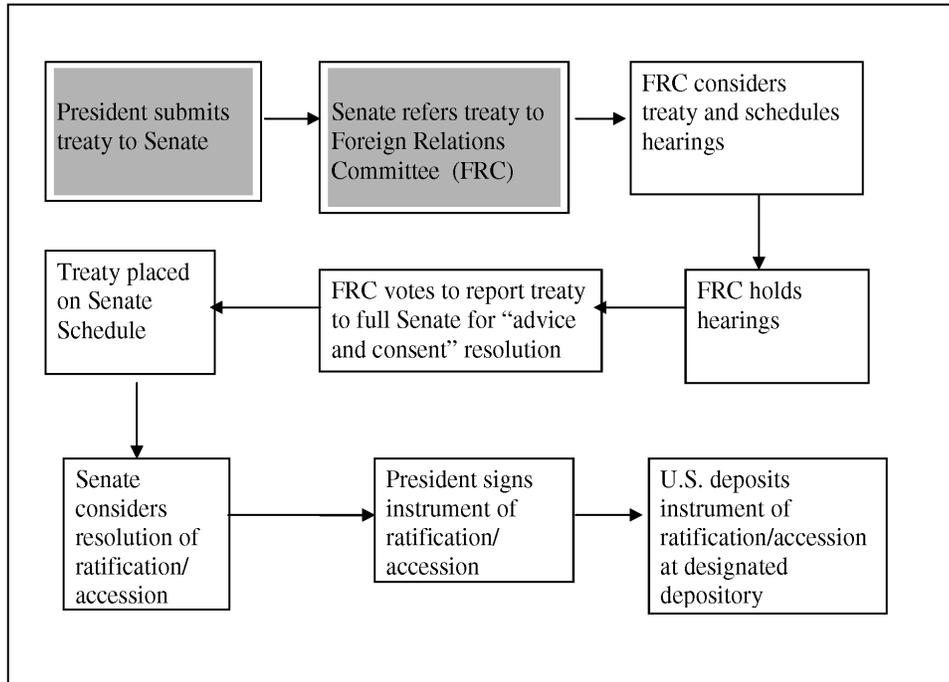


Figure 2. Pursuant to Senate rules, at the adjournment of the 108th Congress at the end of 2004, the Treaty reverted to the Senate Foreign Relations Committee.