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## The 1982 United Nations Convention on the Law of the Sea: An Historical Perspective on Prospects for US Accession

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### *Early Background*

Contrary to popular belief, the initiative for the Third United Nations Conference on the Law of the Sea did not originate with Ambassador Pardo's famous speech before the General Assembly in 1967. Although this speech dramatized ocean seabed issues to the international community and gave us the now-famous phrase of "common heritage of mankind," the idea for a third conference germinated from several different sources, one of the principal of which was the US government.

More than a year prior to Ambassador Pardo's speech, the US House of Representatives touched off the process in a letter to the Department of State suggesting a study of the international implications of developing resources of the seabed. The reply from the Assistant Secretary for Congressional Relations indicated that the State Department "was unaware of any need for a study of international law or foreign policy relating to the development of the natural resources of the oceans."<sup>1</sup> The attention of the State Department was pricked again in 1966 when the Soviet Union sent a letter to some sixty States about the possibility of convening a third

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law of the sea conference.<sup>2</sup> The letter dealt explicitly only with the issue of the breadth of the territorial sea, which was left unresolved by the 1958 Convention on the Territorial Sea and Contiguous Zone and the failed 1960 Second United Nations Conference on the Law of the Sea.<sup>3</sup> This letter was basically an appeal to affirm the Soviet position on the 12 mile territorial sea.<sup>4</sup> When the Soviet proposal was received, it touched off a six-month study by the Departments of State and Defense and the Bureau of Commercial Fisheries.<sup>5</sup> This study group concluded that the Department of Defense could live with a 12 mile territorial sea, provided it was accompanied by a right of free passage through international straits, but it also recognized that this solution was not attainable without some accommodation between coastal and maritime States with respect to fisheries. There was also apprehension by the Department of Defense that the process might get out of control and urged that any international negotiation should be conducted in “manageable packages.”<sup>6</sup>

Concurrently with this effort, the Office of International Organizations of the Department of State, apparently without extensive vetting by other departments, launched its own initiative in the United Nations. James Roosevelt, the US delegate to the United Nations, sent a letter to Secretary-General U Thant suggesting that the Secretariat conduct a study “of the state of knowledge concerning undersea resources and exploitation technology.”<sup>7</sup> As an immediate consequence, the UN Economic and Social Council adopted a resolution requesting the Secretary-General “make a survey of the present state of knowledge of [the non-fish resources of the sea beyond the continental shelf], and of the techniques for exploiting these resources,” particularly those capable of exploitation for the benefit of developing countries.<sup>8</sup>

Echoing this theme, President Johnson, in his remarks at the commissioning of the ocean research ship *Oceanographer* in 1966, stated:

[U]nder no circumstances, we believe, must we ever allow the prospects of rich harvests and mineral wealth [of the oceans] to create a new form of colonial competition among the maritime nations. We must be careful to avoid a race to grab and to hold the lands under the high seas. We must ensure that the deep seas and the ocean bottoms are the legacy of all human beings.<sup>9</sup>

With this as background, it was not really a giant step for Ambassador Pardo, representing the State of Malta, to propose in 1967 that the mineral resources of the seabed beyond national jurisdiction be declared the “common heritage of mankind” to be developed for the benefit of all nations.<sup>10</sup> He went on to predict that the volume of these resources was so vast and so easily mined that in a few years the



ores would yield at least \$5 billion profit annually to be distributed for the benefit of the poorer countries of the Third World.<sup>11</sup> The US Ambassador to the United Nations, Arthur Goldberg, heartily endorsed including the item on the agenda of the First Committee.<sup>12</sup>

Enticed by the “mirage” of the wealth of the deep seabed predicted by Ambassador Pardo, the UN General Assembly rapidly formed an ad hoc committee to study seabed issues—the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction.<sup>13</sup> This committee, in turn, was made a permanent committee and morphed into the Preparatory Committee for a Third United Nations Conference on the Law of the Sea.

Congress quickly took notice of the Malta proposal, and almost immediately several bills were introduced in the House and Senate, mostly unfavorable to the idea of an international regime for the seabed. In testimony before several committees that held hearings on the issue, Johnson administration witnesses displayed some uncertainty and confusion about the US position but generally stated that given the present state of knowledge, it was premature to consider international control over the resources of the seabed.<sup>14</sup> The UN resolution and the uncertainty indicated by the congressional hearings did, however, stimulate action within the Executive Branch to take action to coordinate the formation of a unified US policy on the law of the sea, responsibility for which previously had been divided among many departments. The result was the creation of the Committee on International Policy in the Marine Environment (CIPME), under the chairmanship of the Deputy Under Secretary of State. Day-to-day leadership was under the International Organizations Office of the State Department, but eventually was assumed by the Legal Adviser.<sup>15</sup> By the time of the second session of the Ad Hoc Seabed Committee in June 1968, as a result of the work of the CIPME, the United States was able to submit to the Seabed Committee a draft declaration of seven principles, two of which were

(1) that no state might claim or exercise sovereignty or sovereign rights over any part of the deep ocean floor; and (2) that international arrangements to govern exploitation of deep-sea resources should be established as soon as practicable, with provisions for the orderly development of resources and for the dedication of a part of the value of the resources to “international community purposes.”<sup>16</sup>

By 1970 the principle of the deep seabed as the common heritage of mankind was apparently so firmly established within the US government’s policy on the law of the sea that it was included in President Nixon’s ocean policy statement of May 23, 1970, in which he stated, in part:

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I am today proposing that all nations adopt as soon as possible a treaty under which they would renounce all national claims over the natural resources of the seabed beyond the point where the high seas reach a depth of 200 meters . . . and would agree to regard these resources as the common heritage of mankind.<sup>17</sup>

The President's statement went on to say that the treaty should establish an international regime for the exploitation of seabed resources beyond this limit and provide for agreed international machinery to authorize and regulate exploration and use of seabed resources beyond the continental margin.<sup>18</sup> On August 3 of the same year, the United States submitted to the UN Seabed Committee a draft UN Convention on the International Seabed as "a working paper for discussion purposes" that spelled out the details of machinery for the exploration and exploitation of the seabed beyond national jurisdiction, and provided that developing countries would share in the revenues.<sup>19</sup> It also included a provision for the establishment of a law of the sea tribunal for settlement of disputes.<sup>20</sup>

#### *The Opposition Emerges*

It can be seen then that, from the outset, the principle of the "common heritage of mankind" and the creation of an international body to orchestrate the exploration and exploitation of its mineral resources was not something invented by Third World States to use against the United States, but was a principle accepted and advanced from the outset by the US government at all levels. What, then, changed between 1970 and 1982 to make that principle, as now codified in Part XI of the Law of the Sea Convention<sup>21</sup> unacceptable to the United States at that time? The stated cause, as expressed by President Reagan in his January and July 1982 announcements that the United States would not adhere to the Convention, was the specific terms of the machinery adopted to implement the common-heritage principle in the deep seabed. In his statements, the President identified six provisions in Part XI of the Convention that could not be accepted by the United States. He added, however, that if these objectionable provisions were corrected, he would support ratification.<sup>22</sup>

The President's statement was reinforced and amplified a month later by the statement of the President's then-Special Representative for the Law of the Sea, Ambassador James L. Malone, in his statement to the House Merchant Marine and Fisheries Committee in which he testified that the United States has "a strong interest in an effective Law of the Sea Treaty"<sup>23</sup> and six months later when he testified before the House Foreign Affairs Committee that the United States was "not seeking to change the basic structure of the treaty" or "to destroy the system" but rather to "make it work."<sup>24</sup>



With the defects in the machinery identified by President Reagan having been fixed by the 1994 Agreement superseding the objectionable elements of Part XI;<sup>25</sup> with President Clinton having forwarded the Convention and the 1994 Agreement to the Senate strongly recommending adherence;<sup>26</sup> with his successor, George W. Bush, having strongly renewed that recommendation;<sup>27</sup> and with the Senate Republican-chaired Foreign Relations Committee having unanimously recommended that the Senate give its advice and consent to the Convention in 2004,<sup>28</sup> why is there still controversy even in getting it to a vote by the full Senate?

The result may be partly the result of higher-priority items displacing it on the Senate agenda—after all, the argument goes, the American stakeholders appear to be functioning without difficulty in a non-treaty environment. But the major bugaboo, in my view and that of others as well, in 1982, as well as today, is ideological. The most vocal opposition advocates view with suspicion any action by the United States that accepts any arrangement for decision making by an international institution. In their view this is a “surrender of sovereignty.”<sup>29</sup>

This ideology was stated early on in a surprising statement by Ambassador Malone at the Sixth Annual Conference of the University of Virginia Center for Oceans Law and Policy held in Montego Bay in January 1983—only one month after the opening of the Convention for signature at the identical location and only six months after the President’s announcement of his decision not to sign the Convention. The statement was “surprising” in that it directly contradicted the President’s statement and Ambassador Malone’s contemporaneous testimony before the two House committees that the US objective was not to scuttle the Convention but to make it work. At the University of Virginia Conference, Mr. Malone stated:

The Treaty . . . is a document which, hiding behind the mask of superficially appealing slogans like the “new international economic order” and the “common heritage of mankind,” promotes a thinly disguised world collectivism. It is intended as an instrument for the redistribution of the world’s wealth from those who have acquired their prosperity by risk, sacrifice, and hard work to those who seek to promote their prosperity through organizational means.<sup>30</sup>

Replying to those who suggested that the flaws could be corrected through “PREPCOM, and other means,” he added, “The plain fact is that there exists no possibility nor instrument for making the important changes that would satisfy President Reagan’s objections.”<sup>31</sup>

Ambassador Malone continued:

The potential impact on the U.S., its friends and allies is without parallel. Think of the latent danger. We are discussing an institution that would exert supreme control over

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the deep oceans and their mineral wealth representing over 60% of the resource potential of planet Earth.

I sometimes wonder how many informed and well-meaning Americans can be willing to compromise principals [sic] and values which support America's national greatness and mortgage our future economic health and security interests for a treaty that is little better than an international entitlement program—a *give away*.<sup>32</sup>

#### *Opposition Arguments against the Convention*

The arguments put forth by Ambassador Malone's remarks at the University of Virginia conference form the core of current arguments against adherence to the Convention—that is, the Convention is a surrender of sovereignty and amounts to a giveaway.<sup>33</sup> Opponents bolster their arguments by pointing out what they perceive as specific flaws in the substantive provisions of the Convention. They are phrased somewhat differently in the many statements originating with the opposition, but in essence they boil down to the following:

1. The seabed provisions (Part XI) give the International Seabed Authority (ISA) jurisdiction over all activities occurring in over 70 percent of the earth's surface (ocean, seabed and airspace above);
2. The 1994 Agreement did not really correct the flaws in Part XI of the Convention;
3. Adherence to the Convention would impede the conduct of US maritime intelligence operations and the Proliferation Security Initiative (PSI);
4. Since most of the provisions of the Convention reflect customary international law, we don't need the Convention to protect our maritime interests;
5. The Convention's provisions for compulsory dispute settlement could result in bringing the United States within the jurisdiction of an international tribunal against our will;
6. The Convention gives the International Seabed Authority power to "levy taxes" (some critics conflate the Convention's seabed-governing body (the ISA) into the United Nations); and
7. Pressure to accede to the Convention is a "rush to judgment."

#### *Counterarguments*

All of the foregoing criticisms have been effectively answered in detail by government officials and independent experts numerous times and in detail in many fora, including congressional hearings, official reports and other public discussions. I will not attempt to answer them in detail in this article but will briefly summarize



the gist of the responses and, where appropriate, provide in the endnotes some reference to where the interested reader may find amplification.<sup>34</sup>

#### **Jurisdiction of the International Seabed Authority**

The jurisdiction of the ISA is limited to the “solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the sea-bed.”<sup>35</sup> The Area, in turn, is defined as “the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.”<sup>36</sup> Article 135 explicitly provides, “Neither this Part [Part XI] nor any rights granted or exercised pursuant thereto shall affect the legal status of the waters superjacent to the Area or that of the air space above those waters.”

#### **The 1994 Agreement**

The changes adopted in this “Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982” supersede any conflicting terms in the 1982 LOS Convention and meet all of the objections raised by President Reagan in his 1982 statement. The Agreement substantially overhauls the Authority’s decision-making procedure, including provisions guaranteeing the United States a permanent seat on the powerful Council and Finance Committee. It requires that in these bodies important decisions and financial decisions be made by consensus, thus, in essence, giving the United States veto power. The development principles incorporated in the Agreement are market-based and require the operating arm (the Enterprise), when activated, to compete on the same basis as other commercial enterprises. It eliminates all subsidies inconsistent with the General Agreement on Tariffs and Trade. The site claims of mining companies already licensed under US laws are grandfathered, and the requirement for mandatory transfer of technology is eliminated.<sup>37</sup> In a letter to the Chairman of the Senate Armed Services Committee, all living former Legal Advisers of the Department of State, who constitute a continuum of service from 1977 to 2000, authoritatively refuted the argument that the 1994 Agreement had not cured the provisions of the 1982 Convention to which President Reagan objected.<sup>38</sup>

#### **Proliferation Security Initiative and US Maritime Intelligence Surveillance**

The US-developed PSI is directed toward preventing the illicit transportation by ships of weapons of mass destruction, their delivery systems and related materials. Under the Law of the Sea Convention and customary international law, a number of jurisdictional bases exist for stopping and searching ships suspected of being engaged in some sort of illicit activity. These include jurisdiction exercised by a State with respect to ships flying its flag or within its territorial sea, ports or contiguous

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zone, and stateless vessels. It is also permissible to stop and search a foreign-flag vessel with the permission of the flag State. The PSI builds on this latter basis of jurisdiction with a series of bilateral agreements by which the United States and its treaty partners agree in advance on a set of orderly procedures for the reciprocal granting of permission for visits and search of suspected ships and cargoes. There is nothing in the Convention that would change the law in any respect with respect to the US practices under the Proliferation Security Initiative.<sup>39</sup>

Likewise, with respect to intelligence operations, the Law of the Sea Convention contains no restrictions on US naval surveillance and intelligence operations not already included in the 1958 Convention on the Territorial Sea and Contiguous Zone to which the United States is already a party.<sup>40</sup>

#### **Customary Law of the Sea as an Acceptable Alternative to the Convention**

There is at least a germ of truth in this argument. The United States and its maritime activities are functioning reasonably well under the customary regime of the law of the sea. Most of the Convention is indeed a codification of customary international law. President Reagan's 1982 statements acknowledged this and pledged that the United States would abide by its rules.<sup>41</sup> But customary law does not provide the precision and detail of a written document. It may establish a principle, but its content may remain imprecise, subject to a range of interpretations. With respect to the exclusive economic zone (EEZ), for example, it is generally conceded today that the principle of the zone has become a part of customary international law. But what about its content? The details are contained in a set of articles codifying a series of compromises worked out in meticulous detail in the negotiations leading up to the signing of the Convention. The rules for determining the allowable catch of the living resources of the EEZ, the determination of the coastal State's capacity to harvest them, the determination of the allowable catch by other States and the rules governing the coastal State's establishing of terms and conditions for foreign fishermen in their EEZs are laid out in detail.<sup>42</sup>

Customary rules are fuzzy around the edges and may not be recognized as binding by an opposing State. The "jurisdiction creep," which continued after the 1958 and 1960 First and Second UN Conferences on the Law of the Sea, illustrated the futility of relying on customary law to protect our vital security interests. Only a written document can provide the certainty and stability required by our governmental agencies and private maritime enterprises. And in any dispute with a foreign State to secure its compliance with the rules set forth in the Convention, arguments based on a written agreement rather than an asserted principle of customary international law would be much more effective.



Also, international institutions cannot be created by custom. Only through agreements can this occur. The institutions incorporated in the Convention are essential to its proper functioning—the Seabed Authority, the Commission on the Limits of the Continental Shelf, the Law of the Sea Tribunal and the other dispute settlement mechanisms provided for in Part XV and Annexes V to VIII of the Convention. The marine scientific research articles (Part XIII) of the Convention also provide for implied consent to research requests in foreign waters if there is no reply within fixed time limits, a right not accorded to the United States as a non-party.<sup>43</sup>

Some States also argue that some of the rights of navigation set forth in the Convention are the contractual products of the negotiations and are available only to parties to the Convention. These rights include the right of transit passage through international straits and archipelagic sea lanes passage, both of the utmost importance to the United States.<sup>44</sup>

#### **Compulsory Dispute Settlement**

From the outset the United States has insisted that a system of compulsory dispute settlement be a part of any comprehensive convention on the law of the sea.<sup>45</sup> The US delegation, in the person of the late Louis Sohn, took the lead in the negotiating group that developed the final package, which became Part XV of the Convention and its related Annexes. It is incongruous that the flexible provisions of Part XV, worked out under the leadership of the United States, should now be the basis of objection to the Convention. The objectors suggest, without basis in fact, that the United States might be dragged against its will into the jurisdiction of the Law of the Sea Tribunal, particularly with respect to our military activities.<sup>46</sup> They ignore the terms of the Convention that provide, with respect to compulsory procedures entailing binding decisions, an opportunity for States, upon signing, ratifying or acceding to the Convention, “or at any time thereafter,” to choose the binding procedure it will accept from a menu of settlement mechanisms.<sup>47</sup> The United States has indicated that it will choose arbitration under Annexes VII and VIII upon accession.<sup>48</sup> Further, the criticism ignores the provisions of Article 298 that provide that State parties may exclude from the applicability of “any” of the compulsory procedures providing for binding decisions, *inter alia*, “disputes concerning military activities.” One of the declarations that will accompany any US accession to the Convention will state that its accession “is conditioned upon the understanding that, under article 298(1)(b), each State Party has the exclusive right to determine whether its activities are or were ‘military activities’ and that such determinations are not subject to review.”<sup>49</sup>

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### **The Power to Levy Taxes**

This argument is a distortion of the requirements of the Convention for funding the International Seabed Authority. Under these provisions, during the period until the ISA can become self-supporting, funding its operations depends on assessments against States party to the Convention. In 2004 the Legal Adviser of the Department of State estimated that had the United States been a party to the Convention, its assessments for 2004 would have been a little over \$1 million for the Authority and less than \$2 million for the Seabed Tribunal.<sup>50</sup>

The taxation objection made by opponents is often coupled with an argument that US companies that had invested millions of dollars in exploration costs would lose their existing claims under US law. This argument ignores the fact that the 1994 Agreement grandfathers these holders into the treaty regime based on arrangements no less favorable than those granted to holders of claims already registered with the Authority upon certification by the US government and the payment of a \$250,000 application fee (a fee that is half of the fee established in the 1982 Convention).<sup>51</sup> As Ambassador Colson pointed out in the 1994 hearings, “If the U.S. does not become Party to the Convention, international recognition of the rights of the U.S. licensed consortia could be jeopardized.”<sup>52</sup>

### **A “Rush to Judgment”**

Rather than a “rush to judgment,” it is hard to find any aspect of the Convention that has not been discussed and debated *ad infinitum*—in the public media, in academic conferences and symposia, in legal and ocean policy literature, and in congressional hearings. It has been studied and restudied by each successive administration, and every government department and agency with a concern in the oceans supports accession. In March 2007, in testimony before the Subcommittee on Fisheries, Wildlife, and Oceans of the Natural Resources Committee of the House of Representatives, Admiral James D. Watkins and Leon E. Panetta, Co-chairmen of the Joint Ocean Commission Initiative, renewed their strong endorsement of the Convention, saying, among other things, that the failure of the United States to become a party to the Convention is “one of the most serious international ocean policy issues that remain unresolved for our nation.”<sup>53</sup>

On May 15, 2007, President George W. Bush issued a formal statement urging the Senate

to act favorably on U.S. accession to the United Nations Convention on the Law of the Sea during this session of Congress. Joining will serve the national security interests of the United States, including the maritime mobility of our armed forces worldwide. It will secure U.S. sovereign rights over extensive marine areas, including the valuable



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natural resources they contain. Accession will promote U.S. interests in the environmental health of the oceans. And it will give the United States a seat at the table when the rights that are vital to our interests are debated and interpreted.<sup>54</sup>

With this overwhelming support from all segments of the US economic and governmental structure, one would think that Senate advice and consent to accession would be a “slam dunk.” The immediate effect, however, was a flurry of media articles in opposition to the Convention, most of them from familiar names previously identified with the opposition.<sup>55</sup> Their arguments were the same as have been endlessly repeated since the Convention was adopted in 1982, with but one new argument I had not heard before. That is that the United States is giving up sovereignty under the terms of Article 2, which provides, “The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.”<sup>56</sup> This argument conveniently ignores the fact that the United States is already bound by identical text in the 1958 Convention on the Territorial Sea and Contiguous Sea.<sup>57</sup>

*The Costs of Non-adherence*

There are tangible costs for the United States in not being a party to the Law of the Sea Convention. Until 1998, the United States was entitled to provisional membership in the meetings of the States party to the Convention, but since then it can be present only as an observer. Its non-accession has had and continues to have real costs. It is ineligible to nominate members to the Law of the Sea Tribunal; it has forfeited (as of March 2007) the opportunity to nominate members to the Commission on the Limits of the Continental Shelf until the next election in 2012,<sup>58</sup> and it cannot occupy its guaranteed seat on the Council of the Seabed Authority and the powerful Finance Committee. The marine scientific research institutions continue to suffer from long delays in gaining approval for research in foreign EEZs, which would be alleviated by the Convention’s implied consent provisions were the United States a party.<sup>59</sup>

Perhaps as damaging as the concrete benefits of the Convention previously discussed is the harm to the credibility of the United States in international relations by failing to accede to the Convention. After all, we laid out before the world in President Reagan’s 1982 statements our objections to the Convention and what would be required for the United States to become a party. By adopting the 1994 Agreement, the international community gave us what we demanded as conditions for our accession, and now, thirteen years later, the United States has still not become a party.

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### *Current Prospects for Accession*

As of the date of preparation of this paper for publication (early September 2007), there are indications that the Senate is prepared to take action toward granting its advice and consent to accession to the Law of the Sea Convention. Both Senator Biden, Chairman of the Senate Foreign Relations Committee, and Senator Lugar, the senior minority member, are strong supporters of the Convention. It is anticipated that the Senate Foreign Relations Committee will hold further hearings toward the end of September. Both the Department of State and the Department of Defense appear to have mounted a “full-court press” to obtain Senate approval.<sup>60</sup> The Commandant of the Coast Guard has weighed in with a strong endorsement.<sup>61</sup> Four former Commandants of the Coast Guard have written Senator Biden urging the Senate to approve the Convention this session of Congress.<sup>62</sup> But the opposition’s efforts to scuttle the Convention remain active, flooding the press and the Internet with arguments built on destroying the straw men they have created by misrepresentations and distortions of the terms of the Convention. As one of their spokesmen has said, “The Senate won’t ratify the Convention if it is controversial, and I’m doing everything I can to make a controversy.”<sup>63</sup>

The window of opportunity for the Senate to grant its consent to accession to the Convention in the current 110th session of Congress is small, and the Senate Foreign Relations Committee and the Senate at large both have full plates—Iraq, Iran, North Korea, Afghanistan and immigration issues. Complicating the landscape is the fact that the Committee Chairman, Senator Biden, is a presidential candidate with the first state primaries only a few months away. If the Convention cannot be brought up for a vote in this session, it is unlikely that the Senate would be inclined to address the issue in the second session of this Congress with a presidential election looming ahead in November 2008. Those who favor US accession may have to keep their hopes alive until a new Congress convenes in January 2009.

### *Notes*

1. ANN L. HOLLICK, U.S. FOREIGN POLICY AND THE LAW OF THE SEA 194 (1981).
2. BERNARD H. OXMAN, FROM COOPERATION TO CONFLICT: THE SOVIET UNION AND THE UNITED STATES AT THE THIRD U.N. CONFERENCE ON THE LAW OF THE SEA 4 (1984).
3. *Id.* at 5.
4. *Id.*
5. *Id.* at 6.
6. E-mail from Bernard H. Oxman, Richard A. Hausler Professor of Law, University of Miami School of Law (July 1, 2007) (on file with author).
7. HOLLICK, *supra* note 1, at 194.
8. Econ. and Social Council Res. 1112 (XL) (Mar. 7, 1966).



9. Remarks at the Commissioning of the Research Ship *Oceanographer*, 1 PUBLIC PAPERS OF THE PRESIDENTS 722 (July 13, 1966).

10. The Pardo initiative was a two-step process. On August 17, 1967, he proposed that the General Assembly include on its agenda an item, "Declaration and Treaty Concerning the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and of the Ocean Floor, Underlying the Seas Beyond the Limits of Present National Jurisdiction, and the Use of their Resources in the Interests of Mankind." U.N. GAOR, 22nd Sess., Annex Vol. 3, Agenda item 92, at 1, U.N. Doc. A/6695 (1967). On September 21, he explained his reasons for proposing the agenda item. U.N. GAOR, 22nd Sess., Summary Records, U.N. Doc. A/BUR/SR.166, at 3 (Sept. 21, 1967) [hereinafter Summary Records].

11. U.N. GAOR, 22nd Sess., Fifth Comm., 1515th and 1516th mtgs. (Nov. 1, 1967), *reprinted in* H.R. 999, 90th Cong., 1st Sess., at 285 (1967). *See also* Louis B. Sohn, *Managing the Law of the Sea: Ambassador Pardo's Forgotten Second Idea*, 36 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 285, 287 (1998).

12. Summary Records, *supra* note 10.

13. G.A. Res. A/2340 (XXII) (Dec. 18, 1967), *available at* <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/236/75/IMG/NR023675.pdf?OpenElement>.

14. HOLLICK, *supra*, note 1, at 198–201, and the citations therein.

15. *Id.* at 201.

16. *Id.* at 204–205. For a detailed discussion of the development of the US position of the law of the sea during this period, see *id.* at 190–208. *See also* Horace B. Robertson Jr., *A Legal Regime for the Resources of the Seabed and Subsoil of the Deep Sea: A Brewing Problem for International Lawmakers*, NAVAL WAR COLLEGE REVIEW, Oct. 1968, at 61, *reprinted in* READINGS IN INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW 1974–1977, at 457 (Richard B. Lillich & John Norton Moore eds., 1980) (Vol. 61, US Naval War College International Law Studies). (That article was initially prepared as a paper to fulfill the author's thesis requirement for the degree of Master of International Relations, George Washington University, 1968. The paper (on file with author) contains a fuller account of initiatives within the US government, especially those of Senator Claiborne Pell of Rhode Island, an early advocate of US action to take the lead in developing an international regime for the deep seabed.) *See* S. Res. 263, 90th Cong. (1968).

17. Statement about United States Oceans Policy, PUBLIC PAPERS OF THE PRESIDENTS 454, 455 (May 23, 1970).

18. *Id.*

19. U.N. Doc. A/AC.138/25 (Aug. 3, 1970). *See* Statement by John R. Stevenson, Legal Adviser, US Department of State, *Draft U.N. Convention on the International Seabed Area: U.S. Working Paper Submitted to U.N. Seabeds Committee* [hereinafter Stevenson Statement] and appended Statement by U.S. Ambassador Christopher H. Phillips, 63 DEPARTMENT OF STATE BULLETIN 209 (1970) (outlining and explaining the US working paper).

20. *Id.*

21. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter 1982 LOS Convention].

22. Statement on United States Participation in the Third United Nations Conference on the Law of the Sea, 1 PUBLIC PAPERS OF THE PRESIDENTS 92 (Jan. 29, 1982), *available at* <http://www.reagan.utexas.edu/archives/speeches/1982/12982b.htm>; Statement of United States Actions Concerning the Conference on the Law of the Sea, 2 PUBLIC PAPERS OF THE PRESIDENTS 911 (July 9, 1982), *available at* <http://www.reagan.utexas.edu/archives/speeches/1982/70982b.htm>.

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23. *Law of the Sea: Hearing Before the H. Comm. on the Merchant Marine and Fisheries*, 97th Cong. 165 (Feb. 23, 1982) (statement of Ambassador James L. Malone, Special Representative of the President), *quoted in* Bernard H. Oxman, *The 1994 Agreement and the Convention*, 88 AMERICAN JOURNAL OF INTERNATIONAL LAW 687, 688 (1994).

24. *U.S. Policy and the Law of the Sea: Hearing Before the H. Comm. on Foreign Affairs*, 97th Cong. 84 (Aug. 12, 1982) (statement of Ambassador James L. Malone, Special Representative of the President), *quoted in* Oxman, *supra* note 23, at 689.

25. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, 1836 U.N.T.S. 41.

26. Message from the President of the United States Transmitting the United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI on the United Nations Convention on the Law of the Sea, with Annex, S. TREATY DOC. NO. 103-39 (1994), *available at* <http://lugar.senate.gov/sfrc/pdf/presidentialmessage.pdf>.

27. Press Release, The White House, President's Statement on Advancing U.S. Interests in the World's Oceans (May 15, 2007), <http://www.whitehouse.gov/news/releases/2007/05/20070515-2.html> [hereinafter President's Statement].

28. S. Exec. Rpt. 108-10 (2004), *available at* <http://lugar.senate.gov/sfrc/pdf/seareport.pdf>.

29. The opposition has never clearly identified what elements of sovereignty are given up by adherence to the Convention. Presumably it is suggesting that we could establish claims to some form of exclusive jurisdiction over certain areas of the seabed and reserve them exclusively for American exploitation, ignoring the fact no responsible government or private entity would invest the enormous amounts of capital required for a profitable seabed-mining venture unless the security of the claimed site was safe from competing claims or claim jumpers. It also ignores the fact that by terms of the Convention, the US unilateral claims to a 200 mile exclusive economic zone and the US continental shelf extension to the edge of the continental margin would be reinforced by treaty language.

30. Ambassador James L. Malone, Keynote Address Before the Center for Oceans Law and Policy Conference: Law of the Sea Policy (Jan. 6, 1983), *in* 9 OCEAN POLICY STUDY SERIES 11 (1985).

31. *Id.* at 13.

32. *Id.* at 16. Emphasis in original text.

33. *See, e.g., Military Implications of the United Nations Convention on the Law of the Sea: Hearings Before the S. Comm. on Armed Services*, 108th Cong. 56 (Apr. 8, 2004) (statement of Jeane J. Kirkpatrick); statement of J. William Middendorf, *id.* at 69; *United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Environment and Public Works*, 108th Cong. 19 (Mar. 23, 2004) (statement of Frank Gaffney Jr.); statement of Peter Leitner, *id.* at 24, 92, 129-45.

34. Perhaps the most detailed, articulate and scholarly defense of the Convention and refutation of the opponents' arguments is contained in the Prepared Statements of Professor John Norton Moore. *Military Implications of the United Nations Convention on the Law of the Sea*, *supra* note 33, at 81 [hereinafter Moore Prepared Statement]; *U.N. Convention on the Law of the Sea: Hearing Before the H. Comm. on International Relations*, 108th Cong. 70 (May 12, 2004).

35. 1982 LOS Convention, *supra* note 21, art. 133.

36. *Id.*, art. 1(1).

37. For a fuller discussion of the 1994 Agreement, see Oxman, *supra* note 23; Louis B. Sohn, *International Implications of the 1994 Agreement*, 88 AMERICAN JOURNAL OF INTERNATIONAL LAW 696 (1994). *See also* statement of William H. Taft IV, Legal Adviser, Department of State, S. Exec. Rpt. 108-10, *supra* note 28, at 88, 94 [hereinafter Taft statement].



38. Letter from Herbert J. Hansell, Roberts B. Owen, Davis R. Robinson, Abraham D. Sofaer, Edwin D. Williamson, Conrad K. Harper, David R. Andrews & Michael J. Matheson to John W. Warner, Chairman, Committee on Armed Services, United States Senate (Apr. 7, 2004), reprinted in 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 307 (2004), available at <http://www.oceanlaw.org/downloads/references/endorsements/LegalAdvisorsLetter.pdf>.

39. See Moore Prepared Statement, *supra* note 34, at 81, 89; statement of Rear Admiral William L. Schachte, US Navy (Ret.), *Military Implications of the United Nations Convention on the Law of the Sea*, *supra* note 33, at 104, 108, 110 [hereinafter Schachte Statement].

40. See Moore Prepared Statement, *supra* note 34; Schachte Statement, *supra* note 39.

41. Statements of the President, *supra* note 22.

42. 1982 LOS Convention, *supra* note 21, Part V.

43. *Id.*, art. 252.

44. See statement of Rear Admiral William L. Schachte, S. Exec. Rpt. 108-10, *supra* note 28, at 60; statement of Professor John Norton Moore, *id.* at 50.

45. See Stevenson Statement, *supra* note 19, at 210.

46. See Statement of Baker Spring, Research Fellow, National Security Policy, Heritage Foundation, *Military Implications of the United Nations Convention on the Law of the Sea*, *supra* note 33, at 44; see also Jack Goldsmith & Jeremy Rabkin, *A Treaty the Senate Should Sink*, WASHINGTON POST, July 2, 2007, at A19.

47. 1982 LOS Convention, *supra* note 21, art. 287.

48. See Message from the President, *supra* note 26, at 84–85; see also Taft statement, *supra* note 37, at 93; “Declarations under Articles 287 and 298” in the Draft Resolution of Advice and Consent Subject to Declarations and Understandings, S. Exec. Rpt. 108-10, *supra* note 28, at 17 [hereinafter Draft Resolution].

49. Message from the President, *supra* note 26, at 87; Taft statement, *supra* note 37; Draft Resolution, *supra* note 48, at 17.

50. Taft statement, *supra* note 37, at 94.

51. *Id.* See also *Current Status of the Convention on the Law of the Sea: Hearing Before the S. Comm. on Foreign Relations*, 103rd Cong. 51–52 (Aug. 11, 1994) (statement of Ambassador David A. Colson).

52. *Id.* at 51.

53. *Ocean Policy Priorities in the U.S.: Hearing Before the H. Subcomm. on Fisheries, Wildlife, and Oceans*, 100th Cong. 7 (Mar. 29, 2007) (statement of Admiral James. D. Watkins, US Navy (Ret.) and the Honorable Leon A. Panetta, Co-chairmen, Joint Ocean Commission Initiative), available at <http://www.jointoceancommission.org/> (follow “Testimony” hyperlink; then “3-29-2007” hyperlink).

54. President’s Statement, *supra* note 27.

55. See, e.g., Frank Gaffney Jr., *LOST at the Helm*, WASHINGTON TIMES, May 15, 2007, at A15; Henry Lamb, *The Law of the Sea Treaty, LOST: The Damn Thing Won’t Die*, CANADA FREE PRESS, May 17, 2007, <http://canadafreepress.com/2007/lamb051607.htm>; Cliff Kincaid, *Bush-backed Law of the Sea Treaty is a Trojan Horse for International Slip and Fall Lawyers*, USASURVIVAL.ORG, Mar. 29, 2007, <http://www.usasurvival.org/docs/los.pdf>; Phyllis Schlafly, *Deep-six the Law of the Sea*, BEND WEEKLY (Oregon), May 18, 2007, available at <http://www.bendweekly.com/print/6036/html>; Cliff Kincaid, *Last Stand for American Sovereignty*, NEWSWITHVIEWS.COM, May 21, 2007, <http://www.newswithviews.com/Kincaid/cliff152.htm>; Paul M. Weyrich, “UNCLOS” or “LOST” – A Bad Idea Resurfaces, THE CONSERVATIVE VOICE, May 29, 2007, <http://www.theconservativevoice.com/article/25486.html>.

**Historical Perspective on Prospects for US Accession to the LOS Convention**

56. Henry Lamb, *Warning: LOST Again*, WORLDNETDAILY, Jan. 29, 2005, [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=42606](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=42606).
57. Convention on the Territorial Sea and Contiguous Zone art. 1(2), Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.
58. The United States has a strong current interest in the work of the Commission on the Limits of the Continental Shelf. It has a large continental shelf, approximately 14 percent of which is beyond the outer boundary of the 200 mile EEZ. Much of this lies in the Alaskan Arctic, and with the shrinking of the Arctic icecap this sector becomes increasingly important. Russia is expected soon to file a claim for a huge area extending from its northern shores to the North Pole. Statement of Professor John Norton Moore, S. Exec. Rpt. 108-10, *supra* note 28, at 50, 52.
59. 1982 LOS Convention, *supra* note 21, art. 252.
60. Informal statement of a Department of Defense representative at the Naval War College, June 10, 2007. See John D. Negroponte & Gordon England, *Reap the Bounty: U.S. should join Law of the Sea Convention*, WASHINGTON TIMES, June 13, 2007, at A17.
61. Press Release, United States Coast Guard, Statement by ADM Thad Allen, Commandant of the Coast Guard, on the Convention on the Law of the Sea (May 17, 2007), <https://www.piersystem.com/go/doc/786/156912/>.
62. Letter from Admirals Thomas H. Collins, James M. Loy, Robert E. Kramek & Paul A. Yost to Joseph Biden, Chairman, Foreign Relations Committee, United States Senate (Aug. 15, 2007), available at <http://www.oceanlaw.org/downloads/CGComm-LOS-Biden.pdf>.
63. Jeremy Rabkin, Statement at the American Enterprise Institute forum on the Law of the Sea Convention (July 17, 2007), *quoted in* Paul Scott, *Law of the Sea Digest*, CITIZENS FOR GLOBAL SOLUTIONS, July 23, 2007, [http://globalsolutions.org/blog/index.php/home/2007/07/23/law\\_of\\_the\\_sea\\_digest](http://globalsolutions.org/blog/index.php/home/2007/07/23/law_of_the_sea_digest).