THE UNITED STATES AND THE LAW OF THE SEA AFTER UNCLOS III—THE IMPACT OF GENERAL INTERNATIONAL LAW

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I
INTRODUCTION

The success of the U.S. strategy of nonparticipation in the Law of the Sea Convention is dependent on the future course of the general international law of the sea. Mr. Malone expresses confidence that U.S. interests will be protected.[1] I am not that sanguine. My analysis of the situation leads me to believe that the U.S. refusal to participate in the Convention will have a mixed impact on U.S. interests. On balance, the United States is likely to be worse off as a result of its refusal to participate. Those adverse consequences, however, would be aggravated if the Convention were not to come into force at all.

At the present time some basic facts are known. The new Convention will be signed by a large number of states, many of which will not be from the Third World. They will include the U.S.S.R. and all other socialist states associated with it as well as China. Developed countries such as France and Japan will also sign. At present, however, the United States has firmly decided not to sign the Convention. Argentina and Venezuela also appear committed not to sign. The only other major powers which may not sign are the United Kingdom and the Federal Republic of Germany. Signature does not guarantee that the Convention will come into force or that all the signing states will become parties. It does, however, create a substantial possibility that the Convention will enter into force.

The United States recognizes that the new Convention text is not all bad. In fact, it appears to be satisfied with all aspects of the Convention except for the deep seabed portion of the text. It hopes that large segments of the Convention will ultimately merge into general international law. Thus, the United States could enjoy the benefit of many of the Convention's rules without being obligated to conform to its other unacceptable ones.[2]

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1. Malone, *The United States and the Law of the Sea After UNCLOS III,* LAW & CONTEMP. PROBS., Spring, 1983, at 29, 36.

2. *See id.* at 33, 34; President's Statement on the Convention of the Law of the Sea, 18 WEEKLY COMP. PRES. DOC. 887, 887 (July 9, 1982).

II

RULES FOR THE DEVELOPMENT OF GENERAL INTERNATIONAL LAW

To determine how U.S. interests in the oceans may fare if the United States is not a party to the Convention, the present state of the relevant general international law of the sea must be considered, as well as likely future changes in that law. The rules of public international law which provide for the development of general international law through international negotiations is critical in this regard. Rules found in an international agreement may contribute to general international law. Such new general law would not only be applicable to states that are parties to the relevant agreement but also to states that are not parties. Nevertheless, not all new rules created by international agreements find their way into general international law.

It is clear that provisions found within international agreements that require the creation of international machinery, such as international organizations or dispute settlement forums, are not suitable for incorporation as new norms of general international law. Other provisions, not requiring such machinery, might form or add to the development of general international law if the rules were found to rise above the quid pro quo of the international agreement.

The key court opinion on this subject is the *North Sea Continental Shelf Cases*[3] which arose in the International Court of Justice (ICJ) in the context of the law of the sea. One question presented to the court was whether the equidistance rule found in the 1958 Convention on the Continental Shelf[4] articulated a norm of international law applicable to states not party to that Convention.[5] In the course of deciding that the equidistance line was not mandated by general international law, the court discussed criteria for evaluating when such a rule may become a norm of international law.

There are three ways in which a rule found in an international agreement might be relevant to a search for general international law. First, the rule might be a codification of a preexisting norm of international law. In that circumstance, international practice outside of the agreement must be considered in order to determine whether the norm exists in general international law.[6] Second, the rule might serve the function of bringing into existence a norm that is in the formative stages of development in international practice.[7] Thus, the articulation of the norm in the agreement and the subscription to the norm by the parties to the agreement may provide the final elements needed to crystallize prior real world circumstances and to give birth to a new norm of international law. Third, the agreement might develop a new norm of international law which, once subscribed

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3. (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 3 (Judgment of Feb. 20).

4. 1958 Geneva Convention on the Continental Shelf, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

5. North Sea Continental Shelf (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 3, 19-24 (Judgment of Feb. 20).

6. *Id.* at 37-38; *see also* H. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 80-81 (1972).

7. 1969 I.C.J. at 37-38; *see also* H. THIRLWAY, *supra* note 6, at 80-81.

to by the states party to the agreement, might initiate a series of actions outside the agreement that would give rise to a general legal obligation.[8]

The court found that the equidistance rule met none of these requirements. It was neither a codification of a preexisting norm, nor was it the final crystallization of a new emerging rule of customary international law. It failed the first and second tests because a review of the negotiating history showed that the rule was put forward as a new development and not as an articulation of a rule that was generally accepted or was already in the process of being accepted by the international community.[9]

The court did not even find that the equidistance rule in the Convention initiated the development of a new norm. Primary consideration was given to the question of whether the rule stated in the Convention was fundamentally norm-creating in character, so that it could form the basis for a general rule of law. While the court found that the rule appeared to meet that test on its face, the context in which it was found and subsequent practice in the real world precluded such a conclusion.[10] In particular, the court found that the special circumstances exception to the equidistance rule established that the rule did not constitute a general obligation in all circumstances.[11] In further support of this conclusion, the court noted that agreements could supersede the rule and that reservations were permitted.[12]

In considering subsequent practice, the court found that most delimitations of continental shelf boundaries had been determined on the basis of equidistance.[13] Nevertheless, the court concluded that there was insufficient evidence that a legal obligation existed. It focused particularly on the practice of those states whose interests were specifically affected by the rule. The practice of using equidistance was not found to be sufficiently extensive or uniform to establish that the international community recognized that a rule of law or legal obligation existed.[14]

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8. 1969 I.C.J. at 37, 41; *see also* H. THIRLWAY, *supra* note 6, at 81.

D'Amato disagrees with the author and argues that treaties create international law at the moment of ratification, rather than upon subsequent developments after ratification. A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 107, 164 (1972) [hereinafter cited as A. D'AMATO, THE CONCEPT OF CUSTOM]; *see also* H. THIRLWAY, *supra* note 6, at 81-84; Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1 (1974-75); Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 31 (1970). In a more recent article, D'Amato appears to recognize that the passage of time may be necessary. D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1146 (1982) [hereinafter cited as D'Amato, *The Concept of Human Rights*].

9. 1969 I.C.J. at 41, 45.

10. *Id.* at 43-45; *see also* A. D'AMATO, THE CONCEPT OF CUSTOM, *supra* note 8, at 110-12, 120-21.

11. 1969 I.C.J. at 43-45.

12. *Id.* at 42; *see also* A. D'AMATO, THE CONCEPT OF CUSTOM, *supra* note 8, at 111.

13. 1969 I.C.J. at 43.

14. *Id.* at 44-45. D'Amato interprets the *North Sea Continental Shelf Cases* as creating a test of "manifest intent" for determining the effect of a treaty on international customary law. Under this test, the structure of a treaty must be examined to establish whether certain provisions of the treaty manifest an intent to be generalized into rules of international law. According to D'Amato, in the *North Sea Continental Shelf Cases* the equidistance rule was found not to have created international law because the obligation to use the method was secondary to an obligation to attempt delimitation by agreement, and because the method was subject to the "special circumstances" exception. In addition, the 1958 Geneva Convention on the Continental Shelf provided for possible reservations against any articles except articles 1 to 3. D'Amato argues that the Convention is thus internally divided between the first three articles and all the rest, so that only

Thus, those who seek to argue that new rules found in the new Convention on the Law of the Sea will find their way into public international law have a heavy burden. This burden, however, is not insurmountable. International agreements have established general international law in the past.[15] For example, before the Vienna Convention on the Law of Treaties[16] became effective, it was considered to state some generally applicable rules of public international law.[17] The human rights conventions have arguably created a customary law of human rights.[18] More recently, Judge Oda, in his highly relevant dissent to the judgment in the *Case Concerning the Continental Shelf,*[19] argued that parts of the Law of the Sea Convention had already merged into general international law.[20] Finally, the new tentative draft of the American Law Institute's *Restatement of the Foreign Relations Law of the United States* directly addresses this issue. In an introductory note to the section on the law of the sea the editors wrote:

> Except with respect to [the deep seabed part] of the Draft Convention, this Restatement, in general, accepts the Draft Convention as codifying the customary international law of the sea, and as law of the United States. In a few instances, however, provisions of the Draft Convention may be at variance with United States law or with the United States understanding of customary international law, and in such cases the Restatement reflects the domestic United States law or the United States view of international law.[21]

It should be pointed out, however, that this restatement is only in a tentative draft and has not been adopted by the American Law Institute (ALI). Furthermore, when the Reporter introduced this tentative draft to the ALI, its submission was qualified by the assumption that the Convention, then only in draft form, would be accepted by the United States.[22]

III

ANALYSIS OF THE UNITED STATES SUBSTANTIVE INTERESTS

Many U.S. interests are affected by the law of the sea. The following review of those interests and the likely future course of customary international law will be

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the first three articles express general norms of international law, while the remainder involve particular rules for the parties. A. D'AMATO, THE CONCEPT OF CUSTOM, *supra* note 8, at 109-11.

15. A. D'AMATO, THE CONCEPT OF CUSTOM, *supra* note 8, at 121-22. *See generally id.* at 104-05; D'Amato, *The Concept of Human Rights, supra* note 8, at 1129-39.

16. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/CONF. 39/27 [hereinafter cited as Vienna Convention], *reprinted in* 63 AM. J. INT'L L. 875 (1969).

17. *See* Fisheries Jurisdiction (U.K. v. Ice.), 1973 I.C.J. 3, 18 (Judgment of Feb. 2) (article 67 of the Vienna Convention was found to apply as a codification of prior law); Namibia, 1971 I.C.J. 16, 46-47 (Advisory Opinion of June 21) (article 60 of the Vienna Convention was held applicable as a codification of existing law); *see also* L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW CASES AND MATERIALS 580 (2d ed. 1980).

18. *See* L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 517-18, 522 (1973); D'Amato, *The Concept of Human Rights, supra* note 8; Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter,* 66 AM. J. INT'L L. 337 (1972).

19. (Tunisia v. Libyan Arab Jamahiriya), 1982 I.C.J. 18 (Judgment of Feb. 24).

20. *Id.* at 170-71, 228-31, 233 (Oda, J., dissenting); *see also id.* at 38 (judgment of court), *reprinted in* 21 I.L.M. 225, 235 (1982).

21. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES 55-56 (Tent. Draft No. 3, 1982).

22. *See* Statement of Professor Louis Henkin, 59 A.L.I. PROC. 190-91 (1982) (Professor Henkin stated that future developments might require that the tentative draft be reconsidered).

limited to five areas that are considered to be particularly significant: scientific research, marine environment, ocean boundaries, freedoms of the seas, and resource exploitation.

It is certainly very difficult to predict the way that international law will develop and how a specific state's interests will fare in the future. Despite these uncertainties, it is necessary that one make an attempt to predict the future course of events because those events will determine whether the U.S. decision not to participate in the Convention is correct. Such projections must form an essential basis for any state's decision to participate in the Convention.

A. Scientific Research

Presently, U.S. scientists find it difficult to conduct scientific research off the coasts of foreign countries. A large number of coastal states require that permission be obtained before research is conducted in or above any zone of national jurisdiction. The Convention on the Continental Shelf requires consent for research on the continental shelf.[23] This approach has generally been expanded to the 200-mile resource zones claimed by coastal states.[24] The new Convention, however, would establish technical rules which would maximize the chances for consent to be granted.[25] In fact, if the coastal state failed to respond to a request for consent, consent would be implied.[26] These provisions are a result of quid pro quo arrangements to effect a change in the public international law of the continental shelf. Thus, they are neither a codification of a norm nor a crystallization of an emerging rule of customary law. Absent an obligation in the Convention, it is likely that permission to conduct scientific research will be increasingly difficult to obtain under general international law.

Mr. Malone recognizes this problem of consent but argues that in the future, the United States will conduct marine scientific research under an expanding number of bilateral and regional agreements.[27] While this will occur, it does not appear likely that the ready access sought by the United States will be realized by this procedure. Access under regional and bilateral agreements has been available to marine scientists for many years. Such arrangements have not been sufficient in the past, and there is no tangible evidence supporting the view that they will be any more productive in the future. Sovereignty interests and the suspicion of foreign research will continue to be major factors for coastal states in their decisions to regulate foreign vessels conducting marine scientific research in their zones of national jurisdiction. Thus, it appears that U.S. scientific research interests will be worse off if the United States remains outside of the new Convention.

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23. 1958 Geneva Convention on the Continental Shelf, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

24. *See* FREEDOM OF OCEANIC RESEARCH (W. Wooster ed. 1973); Jacobson, *Marine Scientific Research Under Emerging Ocean Law,* 9 OCEAN DEV. & INT'L L.J. 187 (1981).

25. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), arts. 245-55 [hereinafter cited as Convention], *reprinted in* 21 I.L.M. 1261 (1982).

26. *Id.* art. 252.

27. Malone, *supra* note 1, at 32-33.

B. The Marine Environment

Most of the Convention provisions on the marine environment are hortatory,[28] although they do contain some very progressive language —for example, the definition of pollution[29] and the establishment of general goals and procedures for the protection of the marine environment.[30] At best, these provisions can serve as a source for progressive development of the law. Their norm-creating nature is in some doubt, however, because of provisions that allow exceptional treatment for various countries due to their economic and geographic circumstances.[31] More significantly, however, most of the marine environment portions of the text rely on other international forums for definition and implementation in the future.[32] The failure of the United States to sign the new Convention would not necessarily preclude the United States from participating in the more specialized agencies. In fact, some specialized agencies already exist and enjoy the participation of the United States.[33]

The United States may obtain the benefits of a cleaner ocean even if it is not a party to the new Convention. If there is widespread participation in the Convention, the environment provisions would be operative and the marine environment would therefore be benefited, regardless of U.S. participation. If the new Convention never comes into force, however, other states would not be obliged or encouraged to abide by its provisions. In that case, the marine environment might become more polluted.

Perhaps the most significant marine environment provisions in the Convention provide for limited coastal state jurisdiction over vessels in zones of national jurisdiction when such vessels threaten the marine environment.[34] The special jurisdiction provisions represent a delicate balance of interests between the environment, national sovereignty, and the freedom of navigation. The contractual nature of those articles would be difficult to translate into general norms of international law. In the absence of limitations set by the Convention, the coastal states would be likely to assert greater control over vessels found in these zones. Such coastal state assertions of jurisdiction might protect the marine environment better in some circumstances. That result, however, would be produced at a cost to other freedoms of the seas. Thus, if the Convention were to enter into force without U.S. participation, this country's interests in the marine environment may not suffer substantially. The adverse impact on other U.S. interests in the seas—navigation, for example—may be more significant.

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28. *See, e.g.,* Convention, *supra* note 25, arts. 194-96.
29. *Id.* art. 1(4).
30. *Id.* arts. 192, 206-07.
31. *Id.* art. 194(1).
32. *Id.* arts. 207-12.
33. *See, e.g., id.* arts. 197-273 (note the references to "competent international organizations" and "international rules and standards"). *See generally* Schneider, *Prevention of Pollution from Vessels or Don't Give Up the Ship,* in THE NEW NATIONALISM AND THE USE OF COMMON SPACES 7 (J. Charney ed. 1982); Thacher & Meith, *Approaches to Regional Marine Problems: A Progress Report on UNEP's Regional Seas Program,* 2 OCEAN Y.B. 153 (1980); Waldichuk, *Control of Marine Pollution: An Essay Review,* 4 OCEAN DEV. & INT'L L.J. 269 (1977).
34. Convention, *supra* note 25, arts. 218-20.

C. Boundaries in the Seas

The U.S. interest in the ocean boundary issues at the Conference was founded upon three objectives. First, it sought to limit the seaward extent of national jurisdiction in the oceans in order to limit encroachments on traditional high seas freedoms. Second, it sought to establish the legitimacy of U.S. claims of jurisdiction over valuable living and nonliving resources in the oceans adjacent to the U.S. coast. Third, it sought boundary rules and dispute settlement mechanisms that would avoid or resolve international boundary disputes, particularly those involving the United States.

The new Convention does serve the first U.S. interest in this area. It limits the further seaward extension of coastal state jurisdiction.[35] This goal eluded the community of nations at the first United Nations Conference on the Law of the Sea in the mid 1950's and prompted the second Conference in 1960.[36] Unfortunately, the second attempt to fix those limits also failed.[37] Seaward extension of coastal state jurisdiction has now been limited by the new Convention text, but, absent widespread participation, it is unlikely that those limits will find their way into general international law. If participation is widespread, then the Convention limitations would benefit the United States whether or not it joins in the Convention.

Customary law development has assured the protection of the second U.S. interest. The United States claims both a 200-mile fisheries zone and jurisdiction over the resources of the entire continental margin. Both of these claims are or will shortly be well protected by customary international law and by the terms of the new Convention.[38]

The new Convention presents a limited advance for the third U.S. interest in avoiding and resolving boundary disputes. Specific dispute settlement mechanisms established by the text would encourage the peaceful settlement of disputes which arise.[39] Agreement on the limits of the territorial sea, the economic zone, and the continental shelf provide the technical basis for boundary delimitations, although details may provide a fertile area for limited disputes.[40] By far the most contentious boundary issue concerns boundaries between opposite and adjacent states.[41] Unfortunately, the text does not provide a formula that would lessen the

35. *Id.* arts. 3, 33, 57, 76.

36. *See* A. HOLLICK, U.S. FOREIGN POLICY AND THE LAW OF THE SEA 135-59 (1981); Larsen, *Forward,* 11 OCEAN DEV. & INT'L L.J. 1, 1 (1982).

37. A. HOLLICK, *supra* note 36, at 135-59.

38. Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), 1982 I.C.J. 18, 228-31, 233 (Judgment of Feb. 24) (Oda, J., dissenting); Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-1882 (1976); Convention, *supra* note 25, arts. 55-57, 76-77.

39. Convention, *supra* note 25, pt. XV.

40. *See, e.g., id.* art. 76.

41. *See, e.g.,* Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), 1982 I.C.J. 18 (Judgment of Feb. 24); North Sea Continental Shelf (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 3 (Judgment of Feb. 20); Delimitation of the Continental Shelf (Gr. Brit. v. Fr.), 18 R. Int'l Arb. Awards 3 (1977) (under the Arbitration Agreement of July 10, 1975), *reprinted in* 18 I.L.M. 397 (1979). A dispute has recently arisen between the United States and Canada that promises to be equally contentious—delimitation of the Maritime Boundary in the Gulf of Maine Area (memorials were submitted to the International Court of Justice on Sept. 27, 1982; these memorials are currently unavailable).

potential for those disputes.[42] Accordingly, the text represents only a limited advancement of the U.S. interest in the resolution of boundary disputes.

Because the resource claims of the United States are assured whether or not it participates in the Convention, the Convention's primary benefit to the United States in this area would be the establishment of maximum limits on national jurisdiction. Although the participation of the United States is not necessary for it to reap the benefit of many of the new jurisdictional limits, such limits could only be established as general international law if the Convention receives widespread participation.

D. Freedoms of the Seas

For both military and commercial reasons,[43] the major and most pervasive U.S. interest in the law of the sea is the freedom to use and navigate the seas. The United States is a major trading nation and has maintained an interest in assuring its military mobility throughout the world. The freedom of the seas is critical to these interests.

Since World War II, the law of the sea has seen a massive expansion of coastal state jurisdiction over the waters adjacent to their shores.[44] While many of these new zones have been claimed for limited resource purposes, an inevitable result of the so-called doctrine of creeping jurisdiction is that there will be domestic pressure to expand the scope of coastal state jurisdiction in these zones. The new Convention provides a counterbalance to such domestic pressure by preserving many of the traditional uses of those waters. The text accomplishes this counterbalance through many subtle provisions that were hammered out in the course of the negotiations.[45] The subtlety and complexity of these provisions make it unlikely that their essence could be successfully translated into general international law. Certainly, in the absence of the Convention, the domestic pressure in many states for expanded coastal state jurisdiction would probably prejudice that balance.

The problem of creeping jurisdiction is particularly acute in territorial sea straits used for international navigation. The United States and the Soviet Union stimulated efforts which led to the Third U.N. Conference on the Law of the Sea (UNCLOS III) because they believed that the traditional regime of innocent passage[46] through straits did not give them sufficient freedom to use such straits for passage in the face of expanded territorial sea claims.[47] Questions have arisen concerning the right and conditions of passage for warships, nuclear powered vessels,

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42. *See* Convention, *supra* note 25, arts. 74, 83.

43. *See* Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea,* 74 AM. J. INT'L L. 77 (1980); Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking,* 74 AM. J. INT'L L. 48 (1980); Richardson, *Power, Mobility and the Law of the Sea,* 58 FOREIGN AFF. 902 (1980). *Contra* Darman, *The Law of the Sea: Rethinking U.S. Interests,* 56 FOREIGN AFF. 373 (1978).

44. *See* R. ECKERT, THE ENCLOSURE OF OCEAN RESOURCES: ECONOMICS AND LAW OF THE SEA (1979); Burke, *National Legislation on Ocean Authority Zones and Contemporary Law of the Sea,* 9 OCEAN DEV. & INT'L L.J. 289 (1981).

45. *See, e.g.,* Convention, *supra* note 25, arts. 55-56, 58-59.

46. *See* 1958 Geneva Convention on the Territorial Sea and the Contiguous Zones, arts. 14-23, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

47. *See supra* note 43.

submarines, and super tankers. Aircraft have no right of innocent passage.[48] The regime of transit passage through straits was created in the Convention to protect the transit interests of the United States and other countries.[49] That regime was a product of intense negotiations with the straits states and was reluctantly accepted by them. The Convention describes the rights and obligations of the states bordering such straits and of the transiting vessels in a detailed eight-article part of the Convention.[50]

The agreement on the regime of transit passage was viewed by the United States as a major accomplishment of the UNCLOS III negotiations, since the protection of its navigational interests in such straits is of substantial importance.[51] Even though the United States has decided not to participate in the Convention, it contends that its transit interests through such straits will nevertheless be protected as a matter of law. The United States presents four arguments in support of this conclusion, none of which is compelling.

The first argument appears to be that in the absence of a right of passage, no state has a right to claim a territorial sea in excess of three nautical miles from the coastline, particularly as opposed to the United States. This argument relies on the proposition that new international law cannot develop in the face of active opposition by a major state.[52] Along similar lines, the active opposition of the United States to an expansion of the breadth of the territorial sea would arguably prevent the application of the new rule to the United States. If the territorial sea were thereby limited to three nautical miles, a route of high seas would exist in the key straits, and U.S. interests in free transit through straits would be protected. Neither of these arguments is likely to prevail. It is simply inconceivable that the United States could establish that public international law restricts a nation's territorial seas claim to three nautical miles. The United States is virtually isolated in that view. The overwhelming preponderance of coastal states claim territorial seas of twelve nautical miles or more.[53] A rollback of those claims appears impossible.

The view that such claims would not be applicable to the United States due to its objections does have support, however, in the ICJ's decision in *Fisheries Jurisdiction (U.K. v. Ice.)*.[54] The court held that the United Kingdom's objection to the expanded Icelandic fifty-mile fishery zone made that claim not opposable to the United Kingdom.[55] Unfortunately, in subsequent actual practice, Iceland expanded its fisheries zone to 200 nautical miles from which the United Kingdom was excluded.[56] Since state practice is a stronger source of public international

48. *See id.*

49. *See id.*

50. Convention, *supra* note 25, arts. 34-45

51. *See* Moore, *supra* note 43; Richardson, *supra* note 43.

52. *See* RESTATEMENT OF FOREIGN RELATIONS LAW § 131 (Tent. Draft No. 1, 1980) (United States not considered bound by a rule of international law or by an international agreement if it disassociated itself during the process of formation).

53. *See* U.S. DEP'T OF STATE, LIMITS IN THE SEAS, NO. 36, NATIONAL CLAIMS TO MARITIME JURISDICTION (4th Revision May 1, 1981); Burke, *supra* note 44; Moore, *supra* note 43, at 86.

54. 1973 I.C.J. 3, 18 (Judgment of Feb. 2).

55. *Id.*

56. Anand, *A New Legal Order for Fisheries,* 11 OCEAN DEV. & INT'L L.J. 265, 280 (1982).

law than judicial opinion, the precedent of the ICJ opinion appears questionable. More importantly, theory aside, the practical lesson of the Iceland case is that expanded zones of national jurisdiction in the oceans will be enforced against objecting states.

The second argument put forward by the United States is that, historically, customary international law has recognized a special transit right through international straits regardless of the zone of national jurisdiction claimed by the straits states. Since vessels transited such straits traditionally, the practice has given rise to a special regime that cannot be prejudiced.

An analysis of this argument requires that one distinguish among different straits. There are those straits which narrow to a point where the distance between opposing shores is no more than six nautical miles. Such straits have been traditionally within the territorial sea of the coastal state even under the conservative view of the United States. As such, transit through such straits has been governed by the regime of nonsuspendable innocent passage. Such a regime is found in customary international law and is codified in the Convention on the Territorial Sea and the Contiguous Zone.[57] Heretofore, no arguments have been made that this regime has evolved in favor of greater transit rights. Such an expansion is envisioned in the new Convention through the application of the new regime of transit passage.

Another category of straits are those which are sufficiently wide so that the territorial sea claimed is not broad enough to close a navigation corridor of high seas through the strait. In those straits passage is predicated on the regime of the high seas. Such passage could not form the basis for a new rule of passage which limits the scope of territorial sea jurisdiction in straits. There is no evidence to suggest that coastal states have been reluctant to claim extensive territorial jurisdiction in straits due to claims of transit rights by foreign states.

The third category of straits presents the more interesting situation. Such straits would be those that never narrow to six nautical miles but have been subject to claims of territorial sea that eliminate a corridor of high seas for through navigation. The question arises whether such straits are burdened with the right of a transiting vessel similar to the right of transit passage found in the Convention. If such a right exists it must be derived from customary international law. Thus, there must be state practice over time consistent with such a norm, acquiescence in the normative rule, and a developed sense of obligation to abide by the rule as a matter of law.

To establish the practice supporting a right of transit passage, one may only look to the practice with respect to this last category of straits. The case for this rule has not been fully presented. While it is sometimes asserted that the United States has been acting on this claimed right,[58] these actions are not well known. It is not clear that there is a relative uniformity of practice by all interested nations

57. *See, e.g.,* Corfu Channel, 1949 I.C.J. 6 (Judgment of Apr. 9); 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, art. 16, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

58. *See* Moore, *supra* note 43, at 86-87.

pursuant to such a rule. It is not even clear that the rule has been actually articulated as such. Nor has the acquiescence of the international community, not to speak of the relevant straits states, been obtained. While this approach is certainly legitimate and a potentially productive vehicle for protecting U.S. straits interest, the limited information available on this claim suggests, prima facie, that the purported norm does not exist today.[59]

The third argument avoids the pitfalls of the second by contending that the Convention text on transit passage provides the vehicle for the emergence of a new rule of customary international law. Arguably, the practice of free transit passage exists, and the transit passage rule in the Convention plus its adoption at UNCLOS III have provided the basis for the norm. The text seemingly supports this proposition since it recognizes the right of transit passage for "all ships and aircraft"[60] and thus does not distinguish between parties and nonparties. The difficulty with this third argument arises from the intense negotiations which took place at the Conference on the right of transit passage. These negotiations resulted in a quid pro quo arrangement containing detailed obligations which are imposed on the coastal state and the transiting vessel. There does not appear to be a normative rule that would be susceptible of ready translation into general international law. Perhaps a more simplified general rule would have been more amenable to such an application.[61]

The emergence of the Convention might give rise to the development of a right of transit passage under future public international law. The norm would be articulated by the Convention, and state practice could create the necessary circumstances for new customary international law. The law of transit passage might develop rapidly, but there will be obstacles to that development. In light of the domestic sovereignty interests of the states bordering straits which may conflict with the interests of the transiting vessels, it would be difficult to find the virtual uniformity of practice by the states specifically affected by the rule (as called for by the ICJ) which is necessary to form the transit passage rule as general international law.

The fourth U.S. argument states that once the Convention enters into force, nonparties would be able to claim the rights of transit passage as third party beneficiaries of the transit passage provisions. Such a benefit might be established. It should be noted, however, that this theory specifically relies on the participation in the Convention of the states bordering the straits in question. The "all ships and aircraft" language may support this conclusion.[62] The Vienna Convention on the Law of Treaties requires, however, that the "parties to the treaty intend the provision to" establish third party rights or obligations.[63] Such an intention may be

59. The weakness of this approach and its inherent difficulties are briefly mentioned in Moore, *supra* note 43.

60. Convention, *supra* note 25, art. 38(1).

61. Reisman identifies this problem and suggests that the language of the Camp David Agreement of 1978 that addresses straits passage would have been amenable to this process. Reisman, *supra* note 43, at 76.

62. *See* Convention, *supra* note 25, art. 38(1)

63. Vienna Convention, *supra* note 16, art. 35.

difficult to prove.

In addition to the above arguments, U.S. interests in transit passage might benefit from the entry into force of the Convention in a nonlegal way. These benefits could result from performance under the Convention which does not discriminate between parties and nonparties. Thus, transit passage through straits under the Convention might create a situation in which most (but not virtually all) straits states do not actively check the nationality of ships and aircraft in passage. Such might be the case in normal circumstances, but in abnormal crisis situations the absence of treaty rights could produce critical differences in treatment. It is during such a crisis that the United States has the greatest need for the protections found in the Convention.[64]

A more direct method of protecting the U.S. interest would be to secure the key straits politically or militarily. Such a situation could put Indonesia (on the Strait of Malacca), and Spain and Morocco (on the Strait of Gibraltar), among other states, in key bargaining positions. The cost of maintaining friendly governments in those locations or creating new law by force may be far higher than the cost of participation in the new Convention. In fact, success in the efforts to directly guarantee access outside of the Convention could not even be assured.

The above analysis indicates that the United States is taking a substantial risk by proceeding outside of the Convention, especially in straits covered by the Convention transit passage regime. That risk may be somewhat ameliorated if the Convention comes into force, even if the United States is not a party.

E. Resource Exploitation

1. *Living Resources.* The Convention essentially codifies or crystallizes significant aspects of developing international law relevant to the exploitation of living marine resources.[65] That law now permits coastal states to claim resource zones of up to 200 nautical miles from their coastlines. While the new Convention does provide certain resource exploitation standards and procedures, they are largely hortatory. Interested nations are required to reach other more specific agreements in the future.[66] These provisions may encourage more rational and fair management of marine living resources. In all likelihood, however, coastal state jurisdiction to regulate the exploitation of living marine resources in zones of national jurisdiction will be virtually complete regardless of the fate of the Convention.[67] Much will depend, therefore, on the good will and particular interests of individual coastal states. Since the new Convention does seek to moderate coastal state control it may provide some limited benefits to the U.S. distant water fishing fleets which are not likely to be available outside of the Convention.[68]

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64. *See supra* note 43. The Falklands Islands incident has demonstrated that it is relatively easy for countries of all sizes to employ "smart" missiles to successfully attack or deter even the most advanced vessels.

65. Convention, *supra* note 25, arts. 55-63.

66. *See, e.g., id.* arts. 63(2), 64(1), 66(5), 67(3), 69, 70.

67. *See* Burke, *U.S. Fishery Management and the New Law of the Sea*, 76 AM. J. INT'L L. 24, 53-54 (1982).

68. *See, e.g.,* Convention, *supra* note 25, art. 64.

2. *Hydrocarbons.* The major U.S. interest in ocean mineral resources involves the exploitation of hydrocarbons. For the foreseeable future, the ocean source of those hydrocarbons will be the subsoil of the continental margin. The only significant question directly related to hydrocarbons which was addressed at UNCLOS III concerned the seaward extent of coastal state jurisdiction over the continental margin. The new Convention places that boundary at the seaward limit of the margin.[69] That limit appears to conform with developing international law. The Convention, however, provides a technical method which purports to fix the limit permanently. It is unlikely that this technical rule and the procedures for its implementation would form the basis for a general norm of international law.[70] Consequently, failure to participate in the Convention may lead to boundary disputes in the future. Similarly, by appearing to fix the limit permanently, the seaward movement of coastal state jurisdiction might be stopped at least for the foreseeable future. In the absence of a binding convention, it is likely that the seaward movement of national jurisdiction would not even be slowed. While a further expansion of resource jurisdiction would appeal to many coastal states, it would threaten other interests of the United States and other commercial and military users of the seas.

The Convention does provide for a limited sharing of revenues from the seabed beyond 200 nautical miles.[71] Such a provision is an unlikely candidate for incorporation into general international law. The avoidance of such a sharing arrangement may appear to be a direct advantage to the United States. In reality, even if all states participated in the Convention, it is unlikely that significant funds would be subject to this provision.

3. *Manganese Nodules.* Virtually all of the public's attention has been focused on the regime for the deep seabed because the negotiation of the deep seabed regime pitted the developed world against the Third World on a resource question. These negotiations produced an elaborate deep seabed mining regime with an international organization and an international entity. Both were created to exploit the resources of the deep seabed in parallel with other private and state business entities.[72]

Certainly, an obligation to create or join an international organization would not be likely to find its way into a rule of general international law.[73] On the other hand, an obligation not to exploit the deep seabed resources outside of a general international agreement might form the basis of international law on the subject. Arguments that this second obligation creates a basis for international law arise from normative statements found in the Convention as well as U.N. resolutions, resolutions of other international organizations, the negotiating history of

69. *Id.* art. 76.

70. Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), 1982 I.C.J. 18, 233 (Judgment of Feb. 24) (Oda, J., dissenting).

71. Convention, *supra* note 25, art. 82.

72. *Id.* pt. XI, arts. 156-70.

73. *See* A. D'AMATO, THE CONCEPT OF CUSTOM, *supra* note 8, at 106.

the Conference, and state practices up to this date[74] (no commercial exploitation has yet been conducted). The United States and others contend, however, that the freedom of the high seas applies and that the primarily interested nations have not subscribed to this change in the applicable law of the freedom of the high seas. The United States and others have rejected this rule by enacting deep seabed mining legislation and by permitting companies with their nationality to prospect for manganese nodules in the deep seabed.[75]

There is reason to believe that this issue might find its way to the ICJ in the not too distant future, perhaps as a request for an advisory opinion.[76] The result of such a case would be difficult to predict. Unlike the *North Sea Continental Shelf Cases,* strong international political interests are involved. Nevertheless, there is a chance that the United States and its supporters might win the argument on the law as long as they continue to maintain their position and take action to enforce their views. It is more likely, however, that a *clear* ruling in favor of the U.S. position will *not* be obtained from the court.

Even if the rule of law were found to generally support the United States, it would be a pyrrhic victory, at best. The United States would not be any closer to the exploitation of deep seabed manganese nodules by private enterprise without substantial financial and political support from the government.

This conclusion is based on three facts:

1. The economics of the technology do not justify private investment in the commercial exploitation of manganese nodules today regardless of the politico-legal situation. The economic viability of the industry apparently will be questionable for some time.[77]

2. The legal uncertainty and the strong political objections to exploitation

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74. *See infra* note 75.

75. For the arguments in favor of a customary law right to exploit deep seabed resources, see T. KRONMILLER, THE LAWFULNESS OF DEEP SEABED MINING (1980); Arrow, *The Customary Norm Process and the Deep Seabed,* 9 OCEAN DEV. & INT'L L.J. 1 (1981); Burton, *Freedom of the Seas: International Law Applicable to Deep Seabed Mining Claims,* 29 STAN. L. REV. 1135 (1977). For the opposing view, see Biggs, *Deep Seabed Mining and Unilateral Legislation,* 8 OCEAN DEV. & INT'L L.J. 223 (1980); Letter from the Group of Legal Experts on the Question of Unilateral Legislation to the Chairman of the Group of 77 (April 23, 1979), 2 OCEAN Y.B. 462 (1980) (Int'l Ocean Inst.) [hereinafter cited as Letter]. On June 28, 1980, President Carter signed into law the Deep Seabed Hard Mineral Resources Act, 30 U.S.C. §§ 1401-1473 (Supp. IV 1980). France (Fr.), West Germany (W. Ger), Japan, the United Kingdom (U.K.), and the Union of Soviet Socialist Republics (U.S.S.R.) have all recently adopted their own deep seabed mining laws: (W. Ger) Act of Interim Regulation of Deep Seabed Mining, *English translation appears in* 20 I.L.M. 393 (1981); (W. Ger) Act to Amend the Act of Interim Regulation of Deep Seabed Mining, *English translation appears in* 21 I.L.M. 832 (1982); (U.K.) Deep Sea Mining (Temporary Provisions) Act 1981, *reprinted in* 20 I.L.M. 1217 (1981); (U.S.S.R.) Edict on Provisional Measures to Regulate Soviet Enterprises for the Exploration and Exploitation of Mineral Resources, *English translation appears in* 21 I.L.M. 551 (1982); (Fr.) Law on the Exploration and Exploitation of the Mineral Resources of the Deep Seabed, *English translation appears in* 21 I.L.M. 808 (1982); (Japan) Law on Interim Measures for Deep Seabed Mining (July 16, 1982), *English translation appears in* 22 I.L.M. 102 (1983); (Japan) Enforcement of the Regulations for the Law on Interim Measures for Deep Seabed Mining, Official Register of the Ministry of International Trade and Industry, No. 9770 (July 26, 1982).

76. AM. BRANCH OF THE INT'L LAW ASS'N, REPORT OF THE COMMITTEE ON THE LAW OF THE SEA 98 (1982).

77. *See* President's Statement, *supra* note 2, at 888; Address by Marne Dubs, 15th Annual Conference of the Law of the Sea Institute (June 21, 1982) (Halifax, Nova Scotia, Canada), *forthcoming in* PROC. L. SEA INST. (1983) [hereinafter cited as Dubs].

outside of the Convention increase the economic risks to the potential exploiters. Direct and indirect retaliation against participants, including the participating financial institutions, would be possible.[78] The potential confiscation of the products of the exploitation would present a significant risk.[79] It is now likely that a number of nations would take these actions because recent events have produced an extreme politicization of the issue.

3. Assuming that deep seabed mining takes place, it would appear that the regime of the high seas would not provide the necessary security of tenure. There would be no guarantee that an exploiter would be able to work its mine site without the risk of claim jumpers and the presence of other impediments to its work. A mini-treaty with some developed country participation would be of little aid in the absence of the U.S.S.R., France, and Japan.[80] There is even the possibility that other exploiters might be sponsored by India, Brazil, the Enterprise (to be established by the Convention),[81] or some flag of the convenience states. Any one of those potential exploiters may assert rights in conflict with deep seabed mining activities conducted outside of the Convention. That conflict might be created for economic, political, or lawmaking purposes.

As a consequence, if the United States wants to encourage deep seabed mining outside of the Convention, it will be required to provide economic support to improve the financial prospects of the industry, and to insure against risks inherent in the high seas regime. It must also invest significant political effort to prevent retaliatory actions; it may even be required to provide military protection to the operations at the mine site. If the United States were to persevere over the long term, it might even be able to forge a new consensus on the law for the deep seabed.

Serious questions are raised about the deep seabed regime found in the Convention. It is argued that the regime will be inefficient and that it may not provide sufficient assurance of access to the resources or full security of tenure.[82] The text may also force participants to sell technology to other potential deep seabed miners, a procedure that is not desired by the industry but which does have prece-

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78. *See* Convention, *supra* note 25, art. 137(1); Letter, *supra* note 61, at 465.

79. Convention, *supra* note 25, art. 137(1); Letter, *supra* note 75, at 465; *see also* Convention, *supra* note 25, arts. 134(2), 137(3).

80. *See* Burton, *supra* note 75. On September 2, 1982, France, the Federal Republic of Germany, the United Kingdom, and the United States signed an agreement entitled Agreement Concerning Interim Arrangements Relating to Polymetallic Nodules of the Deep Sea Bed, Sept. 2, 1982, 21/I.L.M. *reprinted in* 21 I.L.M. 950 (1982). The United States has indicated that this agreement represents the first step towards a mini-treaty outside of the Convention. The Agreement merely provides for a method of settling disputes where there are overlapping deep seabed claims under domestic legislation. As such it is consistent with the Convention. In fact, resolution II, paragraph 5, of UNCLOS III specifically calls for such an arrangement. Furthermore, France voted for the adoption of the Convention and has indicated its intention to sign.

81. *See* Convention, *supra* note 25, art. 170, Annex IV.

82. *See Law of the Sea, Hearings on Status of the Law of the Sea Treaty Negotiations Before the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries*, 97th Cong., 2d Sess. 34-35, 39 (1982) (attachments to statement of Marne A. Dubs, Kennecott Corp.) [hereinafter cited as *Hearings*]; President's Statement, *supra* note 2, at 887-88; Malone's Statement, August 12, 1982, CURRENT POLICY NO. 416, LAW OF THE SEA AND OCEANS POLICY 3; Dubs, *supra* note 77.

dent.[83] Those arguments avoid the real question: would U.S. industry be able to participate in deep seabed mining under either regime in the foreseeable future absent substantial economic and political support from the United States government? Since the answer to that question is "no," one must determine the relative costs to the United States of sponsoring deep seabed mining. Such costs must be measured in the form of direct expenditures and hidden or indirect political and military efforts. That calculation must then be considered in the context of the entire law of the sea interests of the United States. Two countries seriously interested in deep seabed mining, France and Japan, have apparently made a preliminary calculation and have concluded that the Convention presents, on balance, the better route. It is hard to see why the United States calculation should be different.

In sum, the resource interest of the United States in fisheries would be slightly better served under the new Convention; the same is true for the hydrocarbon interest. In the case of deep seabed mining, the choice between proceeding under the Convention or outside of it presents a close question. The deep seabed mining interest is, at present, minor because of the limited prospects for deep seabed mining in the foreseeable future. Consequently, one would not have expected that the U.S. choice between participation and nonparticipation in the Convention would have been as significantly influenced as it was by the deep seabed mining regime set out in the Convention.

This short review of substantive U.S. interests in the law of the sea indicates that all would not be lost if the United States were not to participate. Nonparticipation, however, would impose costs on those substantive interests which do not appear to be counterbalanced by benefits for other substantive interests. Thus, there would be significant adverse impacts on the U.S. interests in marine scientific research, the maintenance of transit, and other freedoms of the seas. Some losses would be felt with respect to the interest in the marine environment, boundaries in the seas, and interests in the living resources. If the Convention were never to come into force and receive widespread participation, the adverse impact on the United States would be more substantial. The deep seabed mining interest may be a close call. Even if the deep seabed interest favored nonparticipation, however, on balance the real substantive interests of the United States would argue in favor of participation.

IV

ANALYSIS OF OTHER U.S. INTERESTS

The participation issue also hinges on some broader issues outside of the substance of the Convention. The interests of the United States in avoiding international conflict and maintaining stable rules of international behavior must be

83. *See* Convention, *supra* note 25, annex III, art. 5; President's Statement, *supra* note 2, at 888; *Hearings*, *supra* note 82, at 29-30, 41-64 (statement and attachments of Richard A. Legatski, National Ocean Industries Ass'n). *See generally Symposium: Transnational Technology Transfer: Current Problems and Solutions for the Corporate Practitioner*, 14 VAND. J. TRANSNAT'L L. 249 (1981).

considered. There are political and economic costs to the government and industry of the United States when international law is uncertain. International law provides stability and conflict avoidance mechanisms that serve to advance U.S. interests across the board. The new Convention provides the benefits of stability and conflict avoidance through the creation of binding rules of behavior and particular dispute settlement mechanisms.[84] Failure to participate in the new Convention is likely to prejudice U.S. interests in the law of the sea as well as harm the overall position of the United States in the international community.

It is argued that U.S. participation in this Convention would set a bad precedent. The precedent issue must be divided into three parts: the negotiating process, the substance of the negotiations, and the credibility of the United States. The precedential effect of UNCLOS III on the utility of major universal negotiations to resolve international issues is clear. Universal negotiations as seen at UNCLOS III were not successful regardless of the product or even the particular procedures used.[85] The negotiations simply took too long, were too costly, and produced too little to be used again in the near future. The international community will have to rethink its approach to major international legal and political issues that require universal settlement.

The substantive precedent is also limited, but it is not necessarily adverse to U.S. interests. If one focuses on the non-deep-seabed portions of the text, the precedent is positive. The parties directly addressed substantive issues and sought to resolve them primarily along pragmatic lines. The deep seabed negotiations were different. They involved highly charged issues of the New International Economic Order (NIEO) and questions of resource exploitation. In that arena, the product appears to be an agreement that places some of the political objectives of the NIEO into convention language.[86] It also creates what appears to be a cumbersome bureaucracy and state-like enterprise. The deep seabed regime was the product of hard fought negotiations conducted in the context of the entire UNCLOS III. As such, it was the unique result of the quid pro quo of those negotiations and stands as no generalizable precedent to be used in other settings. Furthermore, the facial appearance of the regime is deceiving. In reality, the regime may actually function in a way comparable to a private enterprise system subject to normal government regulations.[87] Consequently, it does not appear that this constitutes a substantial precedent that is adverse to U.S. interests.

The third aspect of the precedent issue concerns the U.S. refusal to participate in this Convention and its impact on future negotiations. It can be argued that refusal to participate will strengthen the U.S. hand at other forums. This result,

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84. Convention, *supra* note 25, arts. 186-91, 286-99, annexes V-VIII.

85. *See* Charney, *Technology and International Negotiations*, 76 AM. J. INT'L L. 78 (1982).

86. *See, e.g.*, Convention, *supra* note 25, Preamble, arts. 140, 143-44, 148, 150-52, 159-62, 164, 170, 202, 203, 266-77, annex III, arts. 5-13, 15, annex IV. *See generally* Charney, *Law of the Sea: Breaking the Deadlock*, 55 FOREIGN AFF. 598 (1977); Juda, *UNCLOS III and the New International Economic Order*, 7 OCEAN DEV. & INT'L L.J. 221 (1979).

87. *U.S. Foreign Policy and the Law of the Sea, Hearings Before the House Comm. on Foreign Affairs*, 97th Cong., 2d Sess. 89-94 (1982) (statement of Elliot L. Richardson); *Hearings*, *supra* note 82, at 224-28 (statement of Leigh R. Ratiner).

however, is dependent upon substantive issues. If it were clear that the U.S. refusal to participate is founded upon a realistic evaluation of U.S. interests, then other negotiation partners would realize that the United States will stand behind its interests. If the U.S. action is not based upon a fully reasoned and consistent analysis of its interests, the lesson to others is that the United States is an unreasonable and unpredictable negotiating partner. Such a conclusion would have an adverse impact on U.S. credibility at other international negotiations. It appears from the foregoing analysis that the precedent of U.S. nonparticipation in the instant case would be adverse to the United States.

V

CONCLUSION

Nonparticipation in the Convention would, on balance, have an adverse impact on the substantive interests of the United States, as well as on its interest in maintaining stable international law and avoiding international conflict. The United States ought to have pursued the goal of participation in the new Convention. Even if it is not a party, the United States would gain substantially from the Convention's entry into force. Current administration efforts appear to be aimed at preventing the Convention from coming into force. That is a mistake which should be corrected in short order.