

U.S. Accession to the Law of the Sea Convention

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INTRODUCTION

As this volume of *Ocean Yearbook* is going to press, the United States Senate is once again considering whether to provide its advice and consent to the U.S. ratification of the 1982 United Nations Law of the Sea Convention.¹ The United States played a central role in the 1974–1982 negotiations that produced this treaty, and, in the 1994 Part XI Agreement,² achieved the modifications of the parts of the treaty that the Reagan Administration had opposed in the early 1980s. On May 15, 2007, President George W. Bush “urge[d] 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.”³ But some Republican senators have continued to oppose the treaty, based apparently on a fear of international organizations in general,⁴

*Some sections in this article overlap somewhat with J.M. Van Dyke, “The 1982 United Nations Convention on the Law of the Sea,” in *Ocean and Coastal Law and Policy* (American Bar Association, D. Baur, T. Eichenberg and M. Sutton eds., publication forthcoming).

1. United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122, reprinted in 21 *International Legal Materials* 1261 (1982) and *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index*, UN Sales No. E.83.V.5 (1983).

2. Agreement relating to the Implementation of Part XI of the United States Convention on the Law of the Sea of 10 December 1982, U.N.G.A. Res. 48/263 (July 28, 1994) [hereafter cited as Part XI Agreement].

3. President Bush’s statement is available at <<http://www.whitehouse.gov/news/releases/2007/05/20070515-2.html>>.

4. Two distinguished commentators have characterized the opposition as based on a concern about the “loss of sovereignty to international government.” D.D. Caron and H.N. Scheiber, “The United States and the 1982 Law of the Sea Treaty,” 11:16 *ASIL Insight* (July 11, 2007), available at <<http://www.asil.org/insights/2007/06/insights070611.html>> (last visited Sept. 4, 2007).

Ocean Yearbook 22: 47–59.

and their opposition has been previously sufficient to block ratification.⁵

The advantages of U.S. ratification are clear. The United States would be able to invoke clear rules to support its claims to navigational freedoms.⁶ It would be able to rely on the text of the Convention to support its claims to an extended continental shelf in the Western Gap area of the Gulf of Mexico⁷ and in the Arctic.⁸ It would be able to utilize the principles and institutions of the Convention to work with other nations to protect the marine environment.⁹ It would be able to utilize the sophisticated and flexible dispute-resolution procedures established by the Convention. It would be able to put a U.S. ocean law expert on the International Tribunal for the Law of the Sea and a U.S. scientist on the Commission on the Limits of the Continental Shelf. It would be able to participate actively in the interpretation and implementation of all aspects of this comprehensive treaty, and thus could better protect all of its ocean interests.¹⁰

5. “Republican Sen. James Inhofe of Oklahoma, one of at least a dozen conservatives who oppose the treaty, calls it ‘a disaster’ and vows to work to block it from a full Senate vote.” Neil King Jr., *U.S. Resistance to Sea Treaty Thaws*, *Wall Street Journal*, Aug. 22, 2007, at A6, col. 1.

6. In his May 2007 Statement, n. 3 above, President Bush said the Convention would protect “the maritime mobility of our armed forces worldwide.” The Navy’s Judge Advocate General Rear Admiral Bruce MacDonald has said: “This for us is global mobility. That’s what it’s all about.” King, n. 5 above. Professors Caron and Scheiber have explained that “the Exclusive Economic Zone is a complex zone and is, by its nature, unstable, easily tending to gravitate to more and more ownership claims by the nearby coastal state,” and have noted that the institutions created by the Law of the Sea Convention may be crucial to “prevent a collapse of zones from recurring.” Caron and Scheiber, n. 4 above. See also V. Clark and T.R. Pickering, “A Treaty that Lifts All Boats,” *New York Times*, July 14, 2007, at A25, col. 1. (“Our nation will be in a much stronger position to advance its military and economic interests if we ratify the treaty.”)

7. See, e.g., R. McLaughlin, *The Western Gap and Transboundary Resources in the Ultra-Deepwaters of the Gulf of Mexico* (publication forthcoming in *Ocean Development and International Law*).

8. President Bush noted that the Convention would “secure U.S. sovereign rights” over extensive marine areas and their resources. Bush May 2007 Statement, n. 3 above.

9. President Bush explained that accession would “promote U.S. interest in the environmental health of the oceans.” *Id.*

10. President Bush noted that accession would give the United States “a seat at the table when the rights that are vital to our interests are debated and interpreted.” *Id.* See also Clark and Pickering, n. 6 above. (“The agreement is being interpreted, applied and developed right now and we need to be part of it to protect our vital interests in the area of security and beyond.”)

THE LAW OF THE SEA CONVENTION

The Law of the Sea Convention is a comprehensive document that provides rules to govern most ocean activities and procedures for resolving competing and overlapping uses. It was drafted after more than a decade of preparatory meetings and formal negotiations that involved countries from all parts of the globe. The Convention is a monumental achievement, which entered into force November 16, 1994, without U.S. accession, after the 60th nation submitted its ratification. As of August/September 2007, it had been ratified by 155 of the 192 members of the United Nations,¹¹ but has not yet reached universal adherence, with key nations such as Turkey, Iran, and Thailand, as well as the United States, still withholding ratification.

The 1982 Convention was produced by the Third United Nations Conference on the Law of the Sea, which began with much fanfare and high expectations in Caracas in 1974, and then continued with meetings every six months thereafter, alternating between New York and Geneva. The need for a comprehensive treaty became clear after countries began making wildly conflicting claims to their coastal waters and the resources in them. The first formal claim to an extended maritime zone had been made by the United States in the 1945 Truman Proclamation, which claimed sovereign rights and jurisdiction over the non-living resources on the U.S. continental shelf.¹² This claim was designed primarily to allow the United States to drill for oil and natural gas in the gently sloping continental shelf extending off the U.S. coast in the Gulf of Mexico. In making this claim, the United States sought to protect its navigational freedoms by distinguishing between the ability to claim resources on the one hand, and the ability to regulate navigation on the other, but other countries ignored this distinction and responded to the U.S. action by making a bewildering array of claims to the resources near their coasts.

Four treaties were drafted in Geneva in 1958,¹³ but countries ratified some of them and not others, producing a patchwork of legal principles, and, most notably, the Territorial Sea Convention failed to define the

11. Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as at 7 August 2007, <http://www.un.org/Depts/los/convention_agreements/convention_agreements.htm> (last visited Sept. 22, 2007).

12. Presidential Proclamation No. 2667, 10 Fed. Reg. 12303 (1945), 4 *Digest of International Law* 756–58 (M. Whiteman ed. 1965); see 2 *Foreign Relations of the United States*, 1945, at 1502.

13. Convention on the Territorial Sea and Contiguous Zone, 516 U.N.T.S. 205, 15 U.S.T. 1606; Convention on the High Seas, 450 U.N.T.S. 82, 13 U.S.T. 2312; Convention on Fishing and Conservation of Living Resources of the High Seas, 17 U.S.T. 138, 599 U.N.T.S. 285; Convention on the Continental Shelf, 499 U.N.T.S. 311, 15 U.S.T. 471.

breadth of the territorial sea. An attempt to reach consensus on that matter in 1960 also failed. During the mid-1960s, attention began to focus on the polymetallic nodules found on the sea floor.¹⁴ The debates over this potential resource brought countries back to the table, leading to the eight years of formal negotiations.

When the Conference began, the central disputes concerned the width of the territorial sea, coastal State control of adjacent offshore resources, and the navigational rights of commercial and military vessels to pass through straits and island archipelagoes. The United States initially resisted the concept of extended fisheries zones, because it was concerned that such zones would limit navigational freedoms. The United States was particularly concerned about its continuing ability to navigate its warships, including submerged submarines, through key international straits such as the Strait of Gibraltar (into the Mediterranean Sea), the Strait of Hormuz (into the Persian/Arabian Gulf), the Strait of Bab el Mandeb (into the Red Sea), the Strait of Malacca (connecting the Indian Ocean with the Pacific), the Dover Strait (through the English Channel), the Bering Strait (in the Arctic), and the Strait of Lombok (through the Indonesian archipelago). The United States worried that if countries were allowed to extend their territorial seas from three to 12 nautical miles, no high-seas corridors would remain in these narrow straits, and control over passage might fall under the control of the countries bordering these key waterways. The United States maintained that free movement through these straits was essential to its national security, and protested claims of expanding territorial seas.¹⁵

The compromise that emerged consisted of (a) allowing coastal States to extend their territorial seas to 12 nautical miles, (b) recognizing the right

14. In 1967, Ambassador Arvid Pardo of Malta told the U.N. General Assembly that vast riches lay scattered across the floor of the deep seabed in the form of exploitable, softball-sized rocks and offered the "Pardo proposal" urging that they be viewed as the "common heritage" of humankind. (This idea was also developed in J. Mero, *The Mineral Resources of the Sea* (1965).) Within three years of Ambassador Pardo's speech, an international consensus developed that these nodules should be viewed as a "common heritage" resource, that national claims of exclusive rights to seabed resources must be prohibited, that exploitation should take place pursuant to an international legal regime, and that developing nations should share genuine benefits from seabed exploitation. The key international document recognizing this consensus was the U.N. General Assembly's 1970 Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction. U.N. General Assembly's 1970 Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, G.A. Res. 2749 (15V), 25 U.N. GAOR, Supp. No. 28, at 24, U.N. Doc. A/8028 (1970).

15. G. Galdorisi, "The United States and the Law of the Sea: Decade of Decision," in *The United States and the 1982 Law of the Sea Convention: The Cases Pro and Con* 7, 16-17 (G. Galdorisi, D. Bandow and M.C. Jarman eds., Law of the Sea Institute Occasional Paper No. 38, 1994).

to transit passage through international straits, and (c) allowing countries to establish an “exclusive economic zone” (EEZ) out to a distance of 200 nautical miles from its coast. The right of “transit passage through international straits” is non-suspendable and applies to all vessels and also to airplanes. Submarines are allowed to remain submerged when they exercise this right of transit passage. In the newly created EEZ, the adjacent or coastal State has sovereign rights over the living and non-living resources and can exercise certain forms of jurisdiction to protect the marine environment, regulate scientific research, and govern artificial structures. Coastal States must also exercise “due regard to the rights and duties of other States” under Article 56(2) and must permit navigational passage, but debates continue regarding the types of restrictions that can be imposed upon the movement of ships.

The EEZ was designed to balance carefully the interests of both the coastal and the maritime States. Maritime countries contend that they have the same navigational freedoms in the EEZs of other countries as they have on the high seas, but a number of coastal countries, including some of the maritime powers, have imposed restrictions on navigation in their EEZs in order to protect coastal resources and coastal populations. Disputes continue regarding the nature of military activities one country can engage in while its vessels are in the EEZ of another country, and disputes also exist regarding whether hydrographic surveying by one country is permitted in the EEZ of another country.¹⁶ Countries cannot engage in marine scientific research in the EEZs of other countries without permission, but coastal countries are encouraged to grant permission when it is requested.¹⁷

The Convention also addresses a wide variety of other issues, and, inevitably, left some issues unresolved. Should ships be free to move freely in all parts of the oceans? Even if they are warships carrying nuclear weapons? Even if they are carrying ultrahazardous radioactive cargoes that impose risks on coastal populations? What law applies when vessels collide? Or when a crime takes place on a vessel sailing on the high seas or other waters off the coast of a foreign State? Should fishing vessels be free to harvest fish wherever they can be found, or should the people living near the sea have priority over, or even ownership of, the fish that live near their coasts? Should a different approach be taken regarding fish that “straddle” adjacent fishing nations or a fishing nation and the high seas? Who should own the petroleum and mineral resources found under the sea? Can scientific research be done freely in all parts of the ocean, or in certain

16. See, e.g., J.M. Van Dyke, “The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone,” *Marine Policy* 29 (2005): 107–21.

17. Law of the Sea Convention, n. 1 above, art. 246.

parts only with permission of an adjacent country? How should ocean boundaries be drawn?¹⁸

THE U.S. REFUSAL TO SUPPORT THE CONVENTION

On December 10, 1982, after years of tough negotiations, 119 nations signed the Law of the Sea Convention in Montego Bay, Jamaica. The Convention came into force in November 1994 after a sufficient number of countries had formally ratified the treaty.

Although the United States had the largest delegation by far in Caracas and played a leading role in negotiating the Convention, President Ronald Reagan refused to allow the U.S. delegation to sign the treaty in 1982. When Reagan became President in January 1981, he reassigned or fired most of the U.S. officials involved in the negotiations, and ordered his aides to undertake a year-long review of the Draft Convention. Two negotiating sessions were held that year, but no serious talks took place because the United States refused to participate in substantive discussions.

In early 1982, President Reagan said the United States would return to the Conference, but would insist on specific changes before it would sign the treaty. His statement of January 29, 1982, explained that the United States would seek to change the provisions governing deep seabed mining:

to correct those unacceptable elements and to achieve the goal of a treaty that:

- Will not deter development of any deep seabed mineral resources to meet national and world demand;
- Will assure national access to these resources by current and future qualified entities to enhance U.S. security of supply, to avoid monopolization of the resources by the operating arm of the international Authority, and to promote the economic development of the resources;
- Will provide a decision-making role in the deep seabed regime that fairly reflects and effectively protects the political and economic interests and financial contributions of participating states;
- Will not allow for amendments to come into force without approval of the participating states, including in our case the advice and consent of the Senate;

18. See generally *Freedom for the Seas for the 21st Century* 72 (J.M. Van Dyke, D. Zaelke and G. Hewison eds., Washington, D.C.: Island Press, 1993).

- Will not set other undesirable precedents for international organizations; and
- Will be likely to receive the advice and consent of the Senate. In this regard, the Convention should not contain provisions for the mandatory transfer of private technology and participation by and funding for national liberation movements.¹⁹

During the spring 1982 session, intense negotiations were held in an effort to bridge the gap between the United States and the nations of the developing world. The United States was given a virtually guaranteed seat on the governing body of the International Seabed Authority (Article 161(1)(a)), and a resolution was passed protecting the investments already made by the mining consortia interested in deep seabed mining and guaranteeing to them access to the polymetallic nodules of the deep seabed. These actions did not satisfy the Reagan Administration, however, and on April 30, 1982, the U.S. Ambassador to the Conference insisted that a vote be taken on the Convention as a whole. One hundred and thirty nations voted for the Convention, 4 voted against (Israel, Turkey, the United States, and Venezuela), and 17 abstained. The abstaining nations included the Eastern European nations, who thought the United States had been given too much in the spring 1982 negotiating session, plus several Western European nations. On July 9, 1982, President Reagan announced that the United States would not sign the Convention, restating the same concerns listed above in his January 1982 statement.²⁰

On March 10, 1983, President Reagan issued a Proclamation establishing an exclusive economic zone for the United States and an Oceans Policy Statement announcing U.S. policy on related oceans issues.²¹ Then on December 27, 1988, President Reagan issued another proclamation extending the U.S. territorial sea from 3 to 12 nautical miles.²²

19. Statement of President Ronald Reagan, January 29, 1982, reprinted in U.S. Department of State Bureau of Public Affairs, Current Policy No. 371.

20. Statement of President Ronald Reagan, July 9, 1982, reprinted in U.S. State Department Bureau of Public Affairs Current Policy No. 416. Articles that explain the dynamics of how the decision not to sign was reached include: Leigh Ratiner, *The Law of the Sea: A Crossroads for American Foreign Policy*, *Foreign Affairs* 60, 5 (1982): 1006; Nossiter, "Underwater Treaty: The Fascinating Story of How the Law of the Sea was Sunk," *Barron's* 10 (July 26, 1982).

21. Presidential Proclamation 5030 of March 10, 1983. "The Exclusive Economic Zone of the United States of America." 48 Fed. Reg. 10,605 (Mar. 14, 1983). See J.M. Van Dyke, "Going It Alone Is Bad for America," *Washington Post*, May 12, 1985, Outlook section, at 1, col. 1.

22. Presidential Proclamation No. 5928 of December 27, 1988. "The Territorial Sea of the United States of America." 54 Fed. Reg. 777 (Jan. 9, 1989).

THE 1994 “PART XI AGREEMENT”

Part XI of the Law of the Sea Convention regulates mining on the seabed in areas beyond the exclusive economic zones of coastal countries. As explained above, the primary resource thought to be of potential value is the softball-sized polymetallic nodules on the sea floor, particularly in the Pacific and Indian Oceans, which contain nickel, manganese, cobalt, copper and trace amounts of other metals.

The Convention declared this resource to be “the common heritage” of humankind and established an International Seabed Authority, based in Jamaica, to regulate it.²³ The structure of this Authority was one of the major reasons the Reagan Administration refused to sign the Convention in 1982 and refused to participate in the Preparatory Commission to establish the details of the international regime to govern exploitation of the polymetallic nodules. The dispute over these resources was based in part on a disagreement regarding whether the concept of the “freedom of the seas,” which protects navigational freedoms and fishing activities on the high seas, also includes the ability to harvest mineral resources.²⁴ Because the nodules are on the floor of the abyssal plains in the deep seabed, they had never been exploited historically, and the question was not addressed in earlier agreements.

The Clinton Administration worked with the international community to modify the provisions of Part XI of the Law of the Sea Convention to address the concerns that had been identified during the Reagan Administration. The detailed provisions of Part XI of the 1982 Law of the Sea Convention have been simplified through an agreement signed on July 29, 1994, generally referred to as the “Part XI Agreement.”²⁵ Some of the provisions of Part XI are put on hold for the time being, and others are scaled down or altered to meet new perceptions of the economic potential of the seabed minerals and the greater acceptance of free market principles by the world community.²⁶ The Agreement is effectively an amendment to

23. Law of the Sea Convention, n. 1 above, Part XI.

24. See generally J. Van Dyke and C. Yuen, “‘Common Heritage’ v. ‘Freedom of the High Seas’: Which Governs the Seabed?,” *San Diego Law Review* 19 (1982): 493–551; also published in *The Law of the Sea and Ocean Development Issues in the Pacific Basin*, 206–76 (Honolulu: Law of the Sea Institute, E. Miles and S. Allen eds., 1983).

25. Part XI Agreement, n. 2 above.

26. Section 1 of the Annex to the Part XI Agreement says, for instance, that “all organs and subsidiary bodies to be established under the Convention and this Agreement shall be cost-effective” and that the creation of such organs “shall be based on an evolutionary approach.” Section 2(3) states that “[t]he obligation of States Parties to fund one mine site of the Enterprise . . . shall not apply.” Other provisions in the Annex state that the provisions of Articles 151(1–7) and (9), 155(1) and (3–4), 161(1), 161(8)(b) and (c), 162(2)(j) and (q), 165(2)(n), and Annex III, Articles 5, 6(5), and 7 of the Law of the Sea Convention “shall not apply.”

the Law of the Sea Convention, although its creation was not in compliance with the Convention's provisions on amendments, reservations, or modifying agreements.

Perhaps the most significant change for the United States concerned decision-making within the International Seabed Authority. Article 161 of the Convention established a sophisticated decision-making procedure calling for different levels of enhanced majorities depending on the type of decision being made. Section 3 of the Part XI Agreement restructured this procedure by establishing a system of "chambered voting" within the Seabed Authority's governing Council, to protect minority interests while at the same time allowing majority rule under a one-nation one-vote system. This approach was originally advocated by the Nixon Administration in 1970 when it outlined a system of decision-making for the body that eventually became the International Seabed Authority.

As modified in 1994, the Council, which is the main decision-making body of the International Seabed Authority, now consists of 35 members and has four distinct "chambers" of nations representing different interest groups. One chamber consists of four of the nations with the world's largest economies, with a specific seat allocated to the United States (if it ratifies the Convention) and one reserved for an Eastern European nation. The second chamber consists of four of the nations that have made the largest investments in deep seabed mining. The third chamber includes four of the nations that are net exporters of the minerals to be mined from the sea floor, including at least two developing countries that rely heavily on the income from these minerals. And the fourth chamber consists of all the other developing nations that are elected to the Council. All questions of substance must be adopted by a two-thirds majority of the entire Council and cannot be opposed by a majority in any of the chambers. In other words, each chamber can veto any decision and block action. Certain key decisions can be made only if there is "consensus" of the entire Council.

Another change affecting decision-making was the establishment of a Finance Committee, made up of representatives of 15 countries, which has the power to control the budget of the International Seabed Authority. The United States, if it ratifies the Convention, would have a guaranteed seat on the Finance Committee, as one of the five largest financial contributors to the Authority which are automatically elected to the Committee. Because decisions of the Committee on substance must be made by consensus, the United States (along with the other members of the Committee) will effectively have a veto on the budget of the International Seabed Authority. This change was important in the Clinton Administration's decision to support ratification of the 1982 Convention.

Other changes of importance concerned the articles on transfer of technology, the Review Conference, production policies, and the financial terms of contracts. With regard to the mandatory provisions on these topics

in the 1982 Law of the Sea Convention, the 1994 Agreement says simply that the text of the Convention “shall not apply.”²⁷

Pioneer investors who registered their claims were protected under the Part XI Agreement, and they had 36 months from the entry into force of the Convention to submit their plan of work of exploration.²⁸ Mining consortia licensed under U.S. law would also have been eligible to attain pioneer investor status on the basis of terms and conditions “similar to and no less favorable than” those granted to companies registered with the Preparatory Commission. Fees owed by pioneer investors may also be waived for a period of time under this new scheme.²⁹ It should also be emphasized that the fundamental principle that the resources of the seabed are the common heritage of humankind, first established in 1970, remains unchanged, and that the obligation to share these resources, particularly with the least developed nations, remains firm.

After the Part XI Agreement was completed, President William Clinton signed the Agreement, and submitted the Convention to the Senate for advice and consent to ratification on October 7, 1994.³⁰ But the Senate failed to act then, and no floor vote was taken in 2004 even though the Senate’s Foreign Relations Committee strongly endorsed ratification.³¹

27. *Id.*

28. Part XI Agreement, n. 2 above, Annex, Section 1(6)(ii).

29. Ken Adelman, an active member of the Reagan Administration’s efforts to persuade allies that they should not support the Convention in 1982, now supports ratification, explaining that the changes made through the Part XI Agreement have responded properly to the concerns they had raised in the early 1980s:

Scraped away are virtually all the barnacles we denounced during our 1982 “scuttle diplomacy.” There’s no bar to private firms mining the minerals. No mandatory technology transfer. No decision-making without U.S. participation. Indeed, the U.S. gets a permanent seat on the decision-making body, and thus has veto power. There’s no bar to future qualified mining firms, and no gigantic LOS institution for wannabe bureaucrats.

The seabed mining regime reflects free-market principles. It offers companies the legal certainty needed for large-scale, long-term investments; protects existing claims of U.S. firms; and reinforces international law on territorial waterways. It locks in U.S. offshore economic rights as it expands our rights over resources in a 200-mile exclusive economic zone, 200-mile continental shelf, and in a shelf beyond 200 miles off Alaska.

K. Adelman, “Scuttle Diplomacy,” *Wall Street Journal*, June 2–3, 2007, at All, col. 1.

30. Letter by President William J. Clinton, Transmittal Letter to the U.S. Senate, Washington, D.C., Oct. 7, 1994, in United Nations Convention on the Law of the Sea, with Annexes, and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, with Annex, Message from the President of the United States, Senate Treaty Doc. 103-39, 103d Cong., 2d Sess. at IX (1994) [hereafter cited as 1994 Clinton Message].

31. King, n. 5 above.

Other countries have taken steps to perfect their claims to seabed resources, but “[w]ithout joining the treaty, the U.S. has no forum in which to stake a claim.”³²

Under Article 18 of the Vienna Convention of the Law of Treaties, the United States—having indicated support of the treaty while formal accession is pending—“is obligated to refrain from acts which would defeat the object and purpose” of the Law of the Sea Convention.³³ The United States has looked to the Law of the Sea Convention for guidance regarding its customary international law obligations,³⁴ and U.S. courts have also ruled that most of its provisions reflect customary international law.³⁵

THE DISPUTE RESOLUTION PROCEDURES ESTABLISHED BY THE CONVENTION

The Convention contains a number of innovative concepts, including the exclusive economic zone (EEZ), archipelagic waters, transit passage through international straits, protections for the marine environment, and detailed provisions governing fisheries.³⁶ But perhaps the most innovative sections of

32. *Id.* (quoting University of Virginia Professor John Norton Moore as saying that “[o]ur sitting on the sidelines all these years has already cost us.”).

33. Vienna Convention on the Law of Treaties, Art. 18, 1155 U.N.T.S. 331 (1969).

34. See, e.g., *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 965 n.3 (4th Cir. 1999).

35. See, e.g., *U.S. v. Royal Caribbean Cruises*, 24 F. Supp. 2d 155, 159 (D.P.R. 1997) (“Although the . . . convention is currently pending ratification before the Senate, it nevertheless carries the weight of law from the date of its submission by the President to the Senate,” because such submission “expresses to the international community the United States’ ultimate intention to be bound by the pact.”); *United States v. Alaska*, 503 U.S. 569, 588 n.10 (1992) (“The United States has not ratified [the Law of the Sea Convention], but has recognized that its baseline provisions reflect customary international law.”); *Mayaguezanos por la Salud y el Ambiente v. United States*, 198 F.3d 297, 305 n. 14 (1st Cir. 1999) (noting that because it had signed the Convention, even though it had not yet ratified it, the United States “is obliged to refrain from acts that would defeat the object and purpose of the agreement”); *Mansel v. Baker Hughes, Inc.*, 203 F. Supp. 2d 745, 746 n. 1 (S.D. Texas 2002) (same); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1161, 1162 (C.D. Cal. 2002) (explaining that because the Convention has been ratified by so many nations and signed by the United States, it “thus appears to represent the law of nations,” and because it “reflects customary international law, plaintiffs may base an ATCA [Alien Tort Claims Act, 28 U.S.C. sec. 1350] claim upon it”).

36. The Convention’s fishery provisions have been fleshed out in the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, UN Doc. A/CONF.164/37, 34 *International Legal Materials* 1542 (1995); the United States is among the 67 countries that have ratified this Agreement (as of Aug. 2007). Chronological List, n. 11 above.

the Convention are those found in Part XV, which concern the settlement of disputes.

Article 287 instructs each contracting party to pick from among four options for settling disputes over the interpretation of the Convention: (1) the International Tribunal for the Law of the Sea (ITLOS) (a 21-judge court located in Hamburg, Germany, established according to Annex VI); (2) the International Court of Justice (in The Hague, Netherlands); (3) an arbitral tribunal established pursuant to Annex VII; or (4) a special arbitral tribunal established pursuant to Annex VIII to deal with specialized scientific issues. If the disputing countries have picked different procedures and cannot agree on a procedure, their dispute will be resolved through an Annex VII arbitration. President Clinton proposed in 1994 that the United States choose the Annex VIII special arbitral tribunal for disputes related to fisheries, protection of the marine environment, marine scientific research, and navigation, and "Annex VII arbitration for disputes not covered by the above."³⁷

According to Article 297, controversies subject to mandatory dispute-resolution procedures include those involving coastal State environmental regulations that limit navigation (Article 297(1)(a) and (b)), allegations that a coastal State is violating internationally established environmental regulations (Article 297(1)(c)), and allegations that a coastal State has improperly seized a vessel flying the flag of another country (Article 292). Coastal States are not required to submit to these dispute resolution procedures their decisions regarding marine scientific research on their continental shelf and exclusive economic zone (Article 297(2)) or their decisions regarding management of their EEZ fisheries and the allocation of their surplus catch (Article 297(3)). Ratifying countries have the option of withdrawing from mandatory dispute resolution disagreements over maritime boundaries (Article 298(1)(a)), disputes concerning military activities (Article 298(1)(b)), and disputes that are pending before the U.N. Security Council (Article 298(1)(c)). Disputes relating to deep seabed mining are subject to a special regime, and the Seabed Disputes Chamber of ITLOS will deal with most of these controversies. The International Tribunal for the Law of the Sea came into force in 1994, and has issued several important decisions clarifying the EEZ regime,³⁸ addressing fishing issues,³⁹ and protecting the marine environment.⁴⁰

37. 1994 Clinton Message, n. 30 above, at IX.

38. *The M/V Saiga Case (Saint Vincent and the Grenadines v. Guinea)* (ITLOS 1 July 1999), <http://www.un.org/Depts/los/ITLOS/Saiga_cases.htm> (22 Mar. 2000).

39. See A. Yankov, "Irregularities in Fishing Activities and the Role of the International Tribunal for the Law of the Sea," in N. Ando, E. McWhinney, and R. Wolfrum (eds.), *Liber Amicorum Judge Shigeru Oda* (The Hague: Kluwer Law International, 2002).

40. *The MOX Plant Case (Ireland v. U.K.)*, (ITLOS 2001), 41 I.L.M. 405 (2002). See J.M. Van Dyke, "Giving Teeth to the Environmental Obligations in the LOS

CLAIMS TO AN EXTENDED CONTINENTAL SHELF

The Law of the Sea Convention allows countries to claim a continental shelf beyond their 200-nautical-mile EEZ, to a line 350 nautical miles from their coastal baselines, if they can establish that their continental shelf meets the complicated formula found in Article 76. This provision may be of substantial importance in the Arctic, now that the ice in that region is breaking up, as exemplified by Russia's planting of a flag on the sea floor of the North Pole on August 2, 2007. Russia was not claiming the North Pole, but was exploring the seabed to see whether it could justify a claim to an extended continental shelf under Article 76. The United States may also be able to make an extended continental shelf claim in the Arctic region, perhaps claiming "more than 200,000 square miles of additional undersea territories,"⁴¹ but its ability to make such a claim credibly will be substantially weakened if it remains outside the Law of the Sea Convention.⁴²

CONCLUSION

The 1982 Law of the Sea Convention has served to regulate ocean activities for a quarter of a century and will continue to be the main document utilized to guide, conduct and resolve disputes. This carefully crafted treaty includes many compromises and leaves some issues unresolved or ambiguous, but it will be the starting point that officials and scholars turn to when conflicts arise. It has brought substantial stability, has allowed countries to utilize ocean resources cooperatively, and will be viewed in coming generations as one of the international community's crowning achievements. The United States participated actively in the creation of this document, and will, through accession to the Convention, have the opportunity to become directly involved in the interpretation and implementation of it.

Convention," in *Oceans Management in the 21st Century: Institutional Frameworks and Responses* 167–86 (A.G. Oude Elferink and D.R. Rothwell eds., 2004).

41. King, n. 5 above.

42. *Id.* ("Without being a party to the treaty, the U.S. has no clear way—short of threatening force—to assert its claims.").