

**AMERICAN BAR ASSOCIATION**  
**TORT TRIAL AND INSURANCE PRACTICE SECTION**  
**THE MARITIME LAW ASSOCIATION OF THE UNITED STATES**  
**REPORT TO THE HOUSE OF DELEGATES**  
**RESOLUTION**

1           RESOLVED, That the American Bar Association reaffirms its support that the  
2 United States accede to the United Nations Convention on the Law of the Sea  
3 (UNCLOS).



## REPORT

### I. Introduction

Ratification of the United Nations Convention on the Law of the Sea (UNCLOS)<sup>1</sup> is long overdue. Accession to the Convention is important for the United States to fully protect its national interests. By joining the treaty, the United States can participate in international bodies established by UNCLOS, and more importantly, can continue to exert global leadership to protect the rights established by the Law of the Sea Convention.

The American Bar Association (ABA) has long supported joining UNCLOS. In 1994, the ABA adopted a resolution at its Annual Meeting to “Recommend that the United States become a party to the 1982 United Nations Convention on the Law of the Sea and to the Agreement Relating to the Implementation of Part XI of the Convention.”<sup>2</sup> The ABA’s first known statement of support was made to the U.S. Senate Foreign Relations Committee in 1994, shortly after the international “Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of December 10, 1982, dated July 29, 1994.”<sup>3</sup>

In 2001, the President of the ABA stated to the U.S. Commission on Ocean Policy that, “[a]s a first and vital step in creating a comprehensive oceans policy, the American Bar Association therefore recommends that this Commission support early action in the Senate to approve the Convention.”<sup>4</sup>

In 2004, the President of the ABA made written remarks in support of accession to UNCLOS.<sup>5</sup> The statement characterized UNCLOS as the “foundation of public order with respect to the oceans” and an “extraordinary achievement in the annals of global rulemaking.”<sup>6</sup>

In 2005, the ABA House of Delegate resolved to urge “the United States Government to continue and enhance efforts to play a leadership role in the development and implementation of international initiatives to protect the world’s marine ecosystems” by “Ratifying the United Nations (UN) Convention on the Law of the Sea.”<sup>7</sup>

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<sup>1</sup> Montego Bay, 10 December 1982, United Nations, *Treaty Series*, vol. 1833, pg. 3, 146; 21 I.L.M. 1245 (1982); 1982 WL 186633.

<sup>2</sup> See ABA Report to the House of Delegates A302 (1994).

<sup>3</sup> Reprinted in *Current Status of the Law of the Convention on the Law of the Sea*, S. Hrg 103-737 (Aug 11, 1994).

<sup>4</sup> Statement by Robert E. Hirshon, President, The American Bar Association, To The Commission On Ocean Policy (Nov. 13, 2001), available at [https://govinfo.library.unt.edu/oceancommission/meetings/nov13\\_14\\_01/Hirshon\\_testimony.pdf](https://govinfo.library.unt.edu/oceancommission/meetings/nov13_14_01/Hirshon_testimony.pdf).

<sup>5</sup> Reprinted in *United Nations Convention on the Law of the Sea*, S. Exec. Rpt. 108-10 (Mar. 11, 2004), available at [https://www.foreign.senate.gov/imo/media/doc/executive\\_report\\_108-10.pdf](https://www.foreign.senate.gov/imo/media/doc/executive_report_108-10.pdf).

<sup>6</sup> *Id.*

<sup>7</sup> The ABA Resolution and Recommendation 101C (2005), available at [https://www.americanbar.org/content/dam/aba/directories/policy/2005\\_am\\_101c.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/2005_am_101c.authcheckdam.pdf);

In 2008, the ABA drafted letters to President Bush and Senate Leadership urging accession to UNCLOS.<sup>8</sup> “It is difficult to conceive of any reason why the United States should not be a party to, and take a leading role in, advancing the rule of law as it applies to the seas,” said ABA President William H. Neukom.<sup>9</sup>

In 2012, the ABA again urged the Senate to move forward with the Law of the Sea Convention. ABA President Wm. T. (Bill) Robinson III stated the Convention “is unquestionably in the economic, national security and foreign policy interests of the United States, as is reasserting the leadership role of the United States in advancing and shaping the rule of law in the oceans as it evolves over time.”<sup>10</sup>

The Board of the Maritime Law Association of the United States, an affiliated national organization represented in the ABA House of Delegates, passed a similar resolution on February 26, 2021.<sup>11</sup> In the resolution, it “urges United States ratification of and accession to the United Nations Convention on the Law of the Sea in furtherance of national security, our economic/commercial interests, and the preservation of world ocean resources.”<sup>12</sup> Among the key benefits for ratification, the Association highlighted:

maintaining freedom of navigation and the use of international waters; promoting our interests as a global maritime power, as fully supported by the U.S. Navy; enhancing our homeland security, as fully supported by the U.S. Coast Guard; supporting our claim to a 200 mile exclusive economic zone off of all our coasts, including the Arctic; improving the environmental health of the world’s oceans; fostering their many uses and benefits as highways of trade and resources for food, energy, and minerals; and overall furthering world order with 161 nations and the European Union having already ratified UNCLOS.<sup>13</sup>

The President of The Maritime Law Association, David Farrell, is charged with making its Resolution known to the United States Department of State, the United States Senate and encouraged the submission of this renewed ABA resolution.<sup>14</sup>

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See also Rhonda McMillion, “Saving the Seas,” ABA Journal, November 29, 2005, posted at [https://www.abajournal.com/magazine/article/saving\\_the\\_seas](https://www.abajournal.com/magazine/article/saving_the_seas).

<sup>8</sup> See

[https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/promoting\\_international\\_rule\\_law/lawoftheseatreaty/](https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/promoting_international_rule_law/lawoftheseatreaty/).

<sup>9</sup> James Podgers, “Stuck in Port,” ABA Journal, Feb. 2, 2008, available at [https://www.abajournal.com/magazine/article/stuck\\_in\\_port](https://www.abajournal.com/magazine/article/stuck_in_port).

<sup>10</sup> “ABA president says U.S. should ratify Law of the Sea Convention,” ABA Washington Letter, June 2012, available at

[https://www.americanbar.org/content/dam/aba/publications/GAO/2012/2012june\\_wl.pdf](https://www.americanbar.org/content/dam/aba/publications/GAO/2012/2012june_wl.pdf).

<sup>11</sup> <https://mlaus.org/mla-resolution-urges-u-s-ratification-of-u-n-convention-on-law-of-the-sea/>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

Today, the ABA continues to list accession to the United Nations Convention on the Law of the Sea among its legislative priorities,<sup>15</sup> yet there do not appear to be any recent letters of support for the treaty. This Resolution would reaffirm the ABA's commitment to the rule of law and this convention that has been called a constitution for the oceans.

## II. Evolution of the Law of the Sea<sup>16</sup>

In the days of Christopher Columbus, as state powers rose, there were efforts by maritime nations to claim exclusive rights over entire oceans. But starting in the 1600s, Western maritime powers increasingly looked at the oceans as global highways open to all users. By the 1700s, most states subscribed to the idea of *mare liberum*—the freedom of the seas. Proponents of *mare liberum* argued the sea's resources were vast and all nations had an equal right to navigation, commerce, and fishing on the high seas. The physical nature of the ocean was unlike the land. It was impossible to occupy the ocean, guard it, or secure it from others. *Mare liberum* promoted communication, transportation, and trade across the ocean. Freedom of navigation also permitted global powers to move their navies and armies to coastal areas of military or economic importance.

Even strong advocates of *mare liberum* recognized a limited exception whereby countries could claim "territorial seas." The "territorial sea" was (and is) a narrow band of water along the coast of a nation that is treated much like the land territory of a country. The stated purposes and rights within territorial sea varied between nations, but the idea that the territorial sea should not exceed three miles was broadly accepted by the community of nations. Within this band of water, the coastal state could assert its laws and exclude foreigners who threatened the peace or security of the state. Resigning such a small sliver of the littoral zone to the coastal states left the vast majority of the world's oceans open to all users.

The close of World War II opened a new chapter in the law of the sea. States began to assert more jurisdiction and claim greater sovereign rights farther offshore. In 1945, the United States recognized the opportunity to harvest offshore oil and gas resources in the Gulf of Mexico. President Harry Truman proclaimed American jurisdiction over the "subsoil and sea bed of the continental shelf" contiguous to the United States. Truman also proclaimed the right of coastal states to establish fisheries conservation zones in the high seas contiguous to the United States. (The high seas existed in the waters just beyond the territorial seas.) Truman's proclamations were careful to reserve freedom of navigation for all other ocean users. Even in those areas where the United States claimed exclusive rights to conserve, manage, or exploit natural resources in or beneath the water column, other nations would still enjoy unimpeded navigation and all other traditional high seas freedoms.

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<sup>15</sup> See

[https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/promoting\\_international\\_rule\\_law/lawoftheseatreaty/#:~:text=The%20Convention%20contains%20provisions%20regarding,are%20party%20to%20the%20Convention.](https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/promoting_international_rule_law/lawoftheseatreaty/#:~:text=The%20Convention%20contains%20provisions%20regarding,are%20party%20to%20the%20Convention.)

<sup>16</sup> This section of the Report draws heavily on Glen Sulmasy and Chris Tribolet, "The United Nations Convention on the Law of the Sea," printed in Timothy McNulty *National Security Law in the News* (ABA, 2012).

Shortly following the Truman proclamations, South American countries broadened their territorial seas. In 1947, Chile claimed a 200-mile territorial sea. Ecuador and Peru did the same in 1951. Under the Santiago Declaration, these countries claimed not only limited jurisdiction over resources in and under the sea, but exclusive sovereignty and jurisdiction extending out to 200 miles. The Santiago Declaration claimed much stronger powers for the South American countries than the Truman proclamations had for the United States. The United States protested the Santiago Declaration.

The U.S. government sought to codify the law of the sea in an international agreement. The country entered into four treaties on the law of the sea in 1958,<sup>17</sup> but those quickly proved inadequate to deal with contemporary ocean uses and political developments. For instance, the 1958 treaties left unresolved the maximum breadth of the territorial sea. By 1970, President Richard Nixon supported a new U.N. initiative for a more robust convention on the law of the sea.<sup>18</sup> The United States had two overriding objectives for the new convention: First, find a legal method to secure fundamental navigation rights in the face of rapidly expanding coastal state claims purporting to enclose large swaths of the littoral ocean. Second, provide ordered access and management to natural resources of the ocean beyond the current jurisdiction of coastal states—and do it in a way that would not undermine the U.S. desire for enhanced protections for the freedom of navigation.<sup>19</sup>

As explained below, UNCLOS achieved both objectives. The treaty significantly expanded, by several orders of magnitude, the right of nations to claim both sovereignty and sovereign rights further to sea. The treaty also codified a right to “transit passage” through straits used for international navigation that was not well defined in customary international law. With very minor exceptions, UNCLOS committed to treaty all the rights the United States had previously claimed as a matter of customary international law. In addition, UNCLOS permitted the United States to claim sovereign rights over the natural resources in more than 3.4 million square miles of the oceans.<sup>20</sup> No other country gained such a massive area of the earth for exclusive economic purposes.<sup>21</sup> Yet UNCLOS also came with some provisions that made the treaty less palatable. Part XI of the treaty, in particular, had language that echoed socialist values as the Reagan administration fought a pitched battle between free-market ideals and communism during the Cold War. Provisions of Part XI that required transfer of technology and the redistribution of wealth—

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<sup>17</sup> Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (entered into force September 10, 1964); the Convention on the High Seas, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (entered into force September 30, 1962); Convention on the Continental Shelf, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (entered into force June 10, 1964); and the Convention on Fishing and Conservation of Living Resources of the High Seas, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285 (entered into force March 20, 1966).

<sup>18</sup> See Richard Nixon, “Statement about United States Oceans Policy,” May 23, 1970, available at <https://www.presidency.ucsb.edu/documents/statement-about-united-states-oceans-policy>.

<sup>19</sup> See George V. Galdorisi and Kevin R. Vienna, Beyond the Law of the Sea, New Directions for U.S. Oceans Policy (1997), 27.

<sup>20</sup> See [https://www.gc.noaa.gov/documents/2011/012711\\_gcil\\_maritime\\_eez\\_map.pdf](https://www.gc.noaa.gov/documents/2011/012711_gcil_maritime_eez_map.pdf).

<sup>21</sup> *Id.*; See also S. Treaty Doc. No. 103-39 (1994). (noting, “the United States gains more from the provisions on the EEZ in the Convention than perhaps any other State.”).

presumably from Western powers to third world and possibly communist countries—were unacceptable to a number of influential political leaders. President Ronald Reagan declined to sign the treaty, but he did not completely abandon it.<sup>22</sup> On balance, the treaty did much to enhance the sovereign rights and the national security imperatives of the United States. Therefore, Reagan proclaimed that, with the exception of Part XI of the treaty, the United States viewed UNCLOS as generally confirming existing maritime law and practice and fairly balancing the interests of all states. The United States promised to honor the rights of other nations off their coasts in accordance with the treaty and also to enforce its own rights to freedom of navigation in accordance with the Convention.<sup>23</sup> In 1994, the United Nations facilitated changes to Part XI of the treaty that answered the objections of the United States. Provisions requiring the transfer of technology involved in deep sea mining were stricken, and the United States was offered a permanent right to veto distributions of royalties. President Bill Clinton transmitted the treaty to the Senate but the Senate has yet to give its advice and consent to ratification. Senate hearings on the Convention have been held as recently as May 2012.

### III. Specific Benefits of Acceding

First, acceding to the Convention will assure a direct input on rulemaking by the International Seabed Authority (“ISA”) in Kingston, Jamaica, particularly for the division of exploitation fees gathered by it. The U.S. negotiated for a permanent seat on the ISA, giving the U.S. a uniquely influential role in that body if the U.S. accedes to UNCLOS.

Second, freedom of the seas is being eroded by intentional actions of other states, particularly in the South China Sea. This point is bolstered by the fact that, while not the “sole fix” for these issues, maritime security issues can benefit from accession. Every ally in NATO has ratified except for Turkey and the U.S., as have each of the members of the UN Security Council except for the U.S., which additionally has veto power on the Security Council. The threat to freedom of the seas is certainly a priority for our Armed Forces, especially the Navy and USCG which have both long-supported accession. One would be overstating the benefits of accession if they alleged that China, among others, would magically comply with all requirements if the U.S. acceded, but it certainly has more power if it does accede and can bring cases against other states when necessary.<sup>24</sup>

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<sup>22</sup> See Ronald Reagan, “Statement on United States Actions Concerning the Conference on the Law of the Sea,” July 9, 1982, available at <https://www.reaganlibrary.gov/archives/speech/statement-united-states-actions-concerning-conference-law-sea>.

<sup>23</sup> See Ronald Reagan, “Statement on United States Oceans Policy,” Mar. 3, 1983, available at <https://www.reaganlibrary.gov/archives/speech/statement-united-states-oceans-policy>.; See also 54 Fed. Reg. 777 (Dec. 27, 1988) (Proclamation 5928, entitled “Territorial Sea of the United States of America”).

<sup>24</sup> See “Proclamation on Revision to United States Marine Scientific Research Policy,” September 15, 2020, available at <https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-revision-united-states-marine-scientific-research-policy/> (reaffirming UNCLOS “generally reflects customary international law.”)

Another recent issue with the South China Sea involves the Spratly Islands, where the Philippines has reported that illegal structures have appeared after at least a month of increased Chinese military vessel presence.<sup>25</sup> China's new Coast Guard Law – allowing its Coast Guard vessels to fire upon other vessels, board and inspect them, and demolish other nations' structures in waters claimed by China – will only add to the complications in the region.<sup>26</sup>

Third, exploitation and navigation (which likely will be accompanied by an increased need for search and rescue) in the Arctic, as well as other Arctic issues including environmental will be addressed by the Convention. The U.S. can greatly influence regulations, etc., in this field, and this influence is only enhanced by acceding to UNCLOS. Currently, U.S. persons cannot serve on the Commission on the Limits of the Continental Shelf, and it is unclear if the U.S. may submit its continental shelf limits and protect its rights and interests in the Arctic, for example. While the U.S. is a member of the Arctic Council, its UNCLOS status as a non-member may hinder its goals on the Council: other nation states may question the U.S. commitment to international agreements as some have already.

Fourth, and on the previous point to an extent, the signal to the international community sent by acceding to UNCLOS (that the U.S. will commit to playing by the same rules, so to speak) bolsters relations with other nations (particularly Member States), commits the U.S. only to the rules it expects other nations to follow, shows a commitment to following through on its word, and makes whole the negotiations and signing of the Part XI Agreement which largely resolved the issues the U.S. previously had with the regard to the deep seabed.

Fifth, it is consistent with the U.S. position that UNCLOS generally reflects customary international law.<sup>27</sup> But customary international law only goes so far and may not cover emerging trends. In an age where MASS (maritime autonomous surface ships) are becoming more and more important, for example, will unmanned surface and underwater vehicles/vessels be treated the same as manned vehicles? What will become of deep seabed mining, and how much of a role will the U.S. play in developing this area if it is not a Member State? In addition, customary international law is more fluid than the provisions of written instruments.

Finally, in practice, the U.S. largely complies with and has been informed by the provisions of UNCLOS. Courts have noted that much of UNCLOS is now recognized as customary international law.<sup>28</sup> Courts have also noted that as a signatory to the 1994 Agreement,

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<sup>25</sup> The Maritime Executive, "Illegal Structures' Spotted at Contested S. China Sea Reefs[.]" THE MARITIME EXECUTIVE (April 2, 2021), available at <https://www.maritime-executive.com/article/illegal-structures-spotted-at-contested-s-china-sea-reefs>.

<sup>26</sup> See Yew Lun Tian, "China authorizes coast guard to fire on foreign vessels if needed[.]" Reuters (January 22, 2021), available at <https://www.reuters.com/article/us-china-coastguard-law/china-authorises-coast-guard-to-fire-on-foreign-vessels-if-needed-idUSKBN29R1ER>.

<sup>27</sup> See "Proclamation on Revision to United States Marine Scientific Research Policy," September 15, 2020, available at <https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-revision-united-states-marine-scientific-research-policy/>.

<sup>28</sup> *U.S. v. McPhee*, 336 F.3d 1269, 1274 n.6 (11th Cir. 2003).



the United States “is obliged to refrain from acts that would defeat the object and purpose of the agreement”<sup>29</sup> and is “is bound to uphold the purpose and principles of the agreement to which the executive has tentatively made the United States a party.”<sup>30</sup>

#### IV. Support and Opposition to the Treaty

Accession to UNCLOS has been consistently supported by the executive agencies of the U.S. government and most presidents since Ronald Reagan. A resolution introduced by Senator Mazie Hirono in 2019 lists some of the more prominent supporters.<sup>31</sup> The Department of State has listed accession to UNCLOS as a “top priority”<sup>32</sup> and compiled an index of prominent supporters on its website.<sup>33</sup> NOAA,<sup>34</sup> the Coast Guard,<sup>35</sup> and the Navy<sup>36</sup> all have used their websites to promote accession to UNCLOS. Numerous industry and environmental groups support accession. Of note, former Secretary of State Rex Tillerson, while he was chairman and CEO of ExxonMobil, urged the Senate Committee on Foreign Relations to accede to UNCLOS:

“Perhaps the best example of the need for certainty in an area with great unexplored potential involves the Arctic Ocean...Several countries, including the United States, are provided with a claim to extended exploitation rights under the application of UNCLOS in the Arctic. The legal basis of claims is an important element to the stability of property rights.’ In the absence of treaty ratification, Tillerson noted that the United States suffers from the dual disadvantage of having both a cloud over the international status of U.S. claims and a weakened ability to challenge other states’ conflicting claims.”<sup>37</sup>

There remain criticisms of UNCLOS. The International Seabed Authority (ISA) itself is still used by opponents as a major problem for accession. However, with a permanent seat on the ISA and other revisions to the deep seabed part, the U.S. has effectively negotiated away much of the concern with the ISA, save the issue of fees being distributed amongst the developing nations (but the U.S. only has the requisite level of sway regarding the

<sup>29</sup> *Mayaguezanos por la Salud y el Ambiente v. U.S.*, 198 F.3d 297, 305 n.14 (1st Cir. 1999), citing Restatement (Third) of Foreign Relations Law § 312(3) and the Vienna Convention on the Law of Treaties, art. 18 (1969).

<sup>30</sup> *U.S. v. Royal Caribbean Cruise Lines, Ltd.*, 24 F. Supp. 2d 155, 159 (D. P.R. 1997).

<sup>31</sup> S. Res. 284, 116<sup>th</sup> Cong. (2019) (as Introduced, July 25, 2019), available at <https://www.congress.gov/bill/116th-congress/senate-resolution/284/text>.

<sup>32</sup> <https://2009-2017.state.gov/e/oes/lawofthesea/index.htm>.

<sup>33</sup> <https://www.state.gov/law-of-the-sea-convention/>.

<sup>34</sup> [https://www.gc.noaa.gov/gcil\\_los.html](https://www.gc.noaa.gov/gcil_los.html).

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[https://www.dco.uscg.mil/Portals/9/DCO%20Documents/Proceedings%20Magazine/Archive/2013/Vol70\\_No2\\_Sum2013.pdf?ver=2017-05-31-120805-633](https://www.dco.uscg.mil/Portals/9/DCO%20Documents/Proceedings%20Magazine/Archive/2013/Vol70_No2_Sum2013.pdf?ver=2017-05-31-120805-633).

<sup>36</sup> [https://www.jag.navy.mil/organization/code\\_10\\_law\\_of\\_the\\_sea.htm](https://www.jag.navy.mil/organization/code_10_law_of_the_sea.htm).

<sup>37</sup> Roncevert Ganan Almond, “U.S. Ratification of the Law of the Sea Convention Measuring the *raison d’État* in the Trump era[.]” *THE DIPLOMAT* (May 24, 2017), available at <https://thediplomat.com/2017/05/u-s-ratification-of-the-law-of-the-sea-convention/>.

rulemaking for this if it accedes). Article 161 of UNCLOS requires consensus of the ISA Council to distribute such moneys, and the U.S. permanent seat on this Council is established under the Part XI Agreement at Section 3, paragraph 15(a) of the Annex. The U.S. is the only nation with what essentially amounts to a veto power, and it currently cannot even use it. It is unfortunate that the U.S. thus abides by the substantive provisions of UNCLOS while simultaneously receiving none of the benefits of accession (such as having sway regarding rulemaking).

Likewise, the Part XV mandatory/compulsory claims resolution requirements have raised concerns. Some argue this will open the U.S. to frivolous suits by other nations, particularly for issues involving environmental considerations (pollution, etc.). However, nations may choose through declaration whether to utilize the ICJ, the ITLOS, an arbitral tribunal, or a special arbitral tribunal. If the U.S. chose to utilize arbitration, as had been suggested previously, it would be entitled to selection of some of the arbitrators on the panel (note: only if there is an unresolvable dispute over an arbitrator(s) between the parties does a third party step in to select an arbitrator). Thus, it can and likely will be a neutral process. The parties can settle disputes using any method of their choosing and shall seek a mandatory solution under Part XV only if there is no agreement between the parties. The parties may also, by agreement, create an appellate process for appealing such arbitral decisions if arbitration is necessary. In addition, there are exceptions to the compulsory dispute resolution requirements, including where a nation's concerns regarding national security are claimed. One important positive of acceding to UNCLOS here is that the U.S. becomes eligible to nominate judges from the U.S. to the ITLOS (of note, the most recent judge appointed to the Tribunal was from China, despite the U.S. voicing its concerns as a non-Member State<sup>38</sup>). The U.S. has previously agreed to similar provisions, recently in the Agreement for the Implementation of the Provisions of the Convention relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks which came into force in 2001.

As the 1994 UNCLOS treaty transmittal to the Senate noted, "the Convention permits a State to opt out of binding dispute settlement procedures' with respect to one or more enumerated categories of disputes, namely disputes regarding maritime boundaries between neighboring States, disputes concerning military activities and certain law enforcement activities, and disputes in respect of which the United Nations Security Council is exercising the functions assigned to it by the Charter of the United Nations."<sup>39</sup> The President recommended excluding all three categories of disputes from binding dispute settlement.<sup>40</sup>

There are also some who are more agnostic about the need to accede to the Treaty. They question – now that UNCLOS has been adopted by 166 countries and is accepted as generally reflecting customary international law – whether there is a need to formally

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<sup>38</sup> <https://www.rfa.org/english/news/china/tribunal-08252020174828.html>

<sup>39</sup> S. Treaty Doc. No. 103-39 (1994).

<sup>40</sup> *Id.*

join the Treaty. This argument was best answered by ABA President Dennis W. Archer in his 2004 comments to the Senate Foreign Relations Committee.<sup>41</sup> He said:

In the case of the Law of the Sea Convention, the answer to the question of whether formal acceptance matters is both specific, as to activities and institutions created by the Convention, and general, with respect to the nature of American leadership in promoting the rule of law in an increasingly lawless world.

As to specifics, the Convention codifies rules with respect to freedom of navigation and overflight that were not necessarily universally recognized as customary international law. While the United States continues where necessary to assert rights of freedom of navigation, protests of violations or encroachments based upon universally understood and accepted provisions in the Convention are obviously more precise--and effective. The Convention also defines limits of, and the resource specific nature of, coastal state jurisdiction in an exclusive economic zone beyond the 12 mile territorial sea. The Convention created a Law of the Sea Tribunal but, absent ratification, the United States cannot offer a judicial candidate, nor staff the specialized arbitral panels available under the Convention regime. Similarly, the United States is ineligible to put forth a candidate for membership on the Outer Continental Shelf Commission that is reviewing proposals and making recommendations on how states should define the boundaries of the outer continental shelf in places where the shelf extends beyond 200 miles. As oil exploitation had become possible in these distant areas, certainty of jurisdiction is essential to stability, and perhaps also to the energy security of this nation. Likewise, the United States may not currently officially participate in the work of the International Sea-Bed Authority, and thus directly influence and control the course of rule-making for deep ocean resource exploitation. Lastly, it is by no means clear that the United States may take full advantage of the Convention's provisions on protection of the marine environment without being a party to the treaty. In short, the Convention is living up to its original intended function as a framework within which rules governing new and peaceful uses of the oceans might be developed, and the United States should be an active participant in its implementation.

More important than specifics, however, is the Convention's role as the foundation of public order with respect to the oceans. In that sense the treaty is an extraordinary achievement in the annals of global rulemaking. However universally accepted the Convention's

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<sup>41</sup> His statement is reprinted in "United Nations Convention on the Law of the Sea," S. Exec. Rpt. 108-10 (Mar. 11, 2004), available at [https://www.foreign.senate.gov/imo/media/doc/executive\\_report\\_108-10.pdf](https://www.foreign.senate.gov/imo/media/doc/executive_report_108-10.pdf). Id.

provisions may now appear they will surely erode over time if the United States fails to exercise the kind of continuing leadership and participation which led to this extraordinary achievement in the first place. There does not now appear to be any rationale which would support our continuing nonparticipation in an agreement that so effectively stemmed the rising tide of claims of national jurisdiction in the oceans, and that will continue to serve our interests as long as the United States is flanked by two great oceans.

The Senate should grant its advice and consent to join UNCLOS.

Respectfully submitted,

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Tort Trial And Insurance Practice Section

August 2021