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U.S. POLICY AND THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

JOHN E. NOYES*

Although the U.S. has not yet accepted the United Nations Convention on the Law of the Sea,¹ the Convention has attracted support from people in the U.S. with very different perspectives on U.S. foreign policy. Since adoption of the 1994 Part XI Implementation Agreement, which must be interpreted and applied together with the Law of the Sea Convention as a single instrument,² the Convention has garnered support across a broad range of the political spectrum, including from President George W. Bush.³ It has

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1. Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOS Convention]. As of August 2007, there were 155 parties to the Convention. See International Tribunal for the Law of the Sea, General Information—States Parties, http://www.itlos.org/start2_en.html (follow “General Information” hyperlink; then follow “States Parties” hyperlink) (last visited Dec. 22, 2007).

2. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 art. 2(1), July 28, 1994, 1836 U.N.T.S. 3 [hereinafter Part XI Implementation Agreement].

3. For the Bush administration’s November 2001 statement supporting U.S. accession to the Law of the Sea Convention and the 1994 Part XI Implementation Agreement, see Law of the Sea and Related Boundary Issues; United Nations Convention on the Law of the Sea; United States’ non-party status, 2001 DIGEST, ch. 12, § A(1)(a), at 675–76. The U.S. Commission on Ocean Policy, appointed by President Bush, has also supported U.S. accession to the Convention. See *id.* at 684; U.S. COMMISSION ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY: FINAL REPORT 521 (2004) (Recommendation 29-1). At 2003 hearings before the Senate Foreign Relations Committee, witnesses from the U.S. military, U.S. industry, and environmental groups strongly supported U.S. acceptance of the Convention and the 1994 Agreement. See *United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. (2003), S. EXEC. REP. NO. 108-10, at 23–187 (2004) (Annex II) [hereinafter *Foreign Relations Comm. Hearing*]; see also *Hearing Before the S. Select Comm. on Intelligence* (June 8, 2004) [hereinafter *Intelligence Comm. Hearing*]; *Military Implications of the United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Armed Services*, 108th Cong. (2004), S. HRC. NO. 108-796, at 26-122 (2005) [hereinafter *Armed Services Comm. Hearing*]; *The United Nations Convention on the Law of the Sea: Hearing Before the H. Comm. on International Relations*, 108th Cong. (2004), H.R. SERIAL NO. 108-136 (2004) [hereinafter *House International Relations Comm. Hearing*]; *United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Environment and Public Works*, 108th Cong. (2004), S. HRC. NO. 108-498 (2005) [hereinafter *Environment and Public Works Comm. Hearing*]. Although the Convention has not come to a vote before the full Senate, the administration has continued to support the Law of the Sea Convention. See

support from both Wilsonian “idealists” who favor cooperative international endeavors and those who favor reliance on a strong U.S. military. Why have people with such diverse perspectives supported the Convention?

A related question, the answer to which depends upon one's foreign policy perspective, is why should the U.S. accept the Convention now? Like any legal instrument, the Convention is a product of the historical and political forces of its time, and much has changed since the Convention was negotiated in the 1970s. The Cold War is over. Developing states now have a less socialist orientation than they did when the institutional framework governing seabed mining beyond the limits of national jurisdiction took shape in the 1970s. The current “war on terror” has led some U.S. policy makers to argue that America is justified in pursuing a wide range of unilateral international actions. The Convention either barely addresses or fails to deal with several critical oceans issues that have arisen in the past third of a century, concerning, for example, high seas fisheries conservation, the impact of global warming, underwater cultural heritage, and the exploitation of marine biotechnology resources. So why is there continuing support in the U.S. today for this complex multilateral treaty? Although the U.S. may find international law useful in addressing oceans issues, why should it now join the Convention when it could

Secretary of State Dr. Condoleezza Rice Endorses Law of the Sea, http://lugar.Senate.gov/sfrc/ric_e_endorsement.html (last visited Feb. 25, 2007). In May 2007, President George W. Bush again “urge[d] the Senate to act favorably on U.S. accession to the United Nations Convention on the Law of the Sea.” Press Release, White House, President's Statement on Advancing U.S. Interests in the World's Oceans (May 15, 2007), *available at* <http://www.whitehouse.gov/news/releases/2007/05/20070515-2.html> (last visited Oct. 4, 2007). The Joint Chiefs of Staff, in June 2007, endorsed U.S. acceptance of the Convention as important to U.S. national security interests. Letter from the Joint Chiefs of Staff to The Hon. Joseph Biden, Jr., Chairman, Senate Foreign Relations Comm. (June 26, 2007), *available at* <http://www.oceanlaw.org/downloads/JCsonLOS.pdf>. In September 2007, the Secretaries of Commerce and the Interior jointly “urge[d] favorable Senate action on U.S. accession during this session of Congress.” Letter from Dirk Kempthorne, Sec'y of the Interior, & Carlos M. Gutierrez, Sec'y of Commerce, to The Hon. Joseph Biden, Jr., Chairman, Senate Foreign Relations Comm. (Sept. 26, 2007), *available at* http://www.oceanlaw.org/downloads/DOC-DOI_Letter_to_Biden.pdf. Since the full Senate did not vote on the Convention during the 108th Congress, when the Senate Foreign Relations Committee held hearings, another vote by that Committee is now necessary to bring the Convention back to the Senate. *See* Standing Rules of the Senate, S. Doc. No. 106-15, at Rule 30(2) (2000). As this essay goes to press, the Senate Foreign Relations Committee has scheduled new hearings on the Convention for late September and October, 2007. Senate Foreign Relations Comm., Committee Hearings 110th Congress First Session—2007, <http://www.senate.gov/~foreign/hearing.html> (last visited Oct. 4, 2007).

instead simply pursue bilateral, or regional, or subject-matter-specific treaties?

This essay examines U.S. attitudes toward the Convention. Part I characterizes different U.S. perspectives toward foreign policy and international law, noting how these different viewpoints shape attitudes toward U.S. acceptance of the Convention. Part II then compares three concerns that U.S. Convention opponents have raised (relating to navigational freedom, U.S. participation in international institutions, and U.S. leadership in international affairs) to the perspectives associated with one of the several different foreign policy approaches. Many followers of historically-predominant U.S. foreign policy approaches do not share the concerns of Convention opponents. However, even if the U.S. *does* accept the Convention, views of Convention skeptics may well influence how the U.S. interprets the instrument and interacts with other States Parties.

I. THE CONVENTION AND U.S. ATTITUDES TOWARD FOREIGN POLICY AND INTERNATIONAL LAW

Those who take a consequentialist approach toward international law and international relations ask whether the benefits of U.S. accession to the Convention outweigh any costs.⁴ They typically conclude that the balance tips decidedly toward U.S. accession. The significant substantive benefits to the U.S.—found in the Convention's provisions concerning the 200-mile exclusive economic zone (EEZ), the broad continental shelf, environmental protections, and increased protections for navigation—are familiar. The concern that some of these benefits, especially those concerning navigation, are not firmly established customary international law helps explain the continuing support for the Convention in the U.S. .

Yet in reflecting on why the Convention continues to attract widespread support in the U.S. (and on why the U.S. has not yet accepted the Convention), the consequentialist approach is a blunt instrument. We need a more nuanced view of U.S. foreign policy perspectives. Exploring the values underlying different U.S. foreign policy perspectives can reveal sources of support for the Convention and explain lingering U.S. opposition to the Convention. Exploring these values can also help us understand the positions

4. For discussion of the interest-based approach to international law, see Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 476–80 (2005).

taken in the proposed understandings and declarations attached to the 2004 Senate Foreign Relations Committee recommendation that the U.S. Senate give its advice and consent to accession to the Convention.⁵

Recent scholarship illuminates how the U.S. historically has embraced several different, and distinctively U.S., approaches to questions of international law and foreign policy. Walter Russell Mead, for example, has analyzed four traditions of U.S. foreign policy, which he labels "Hamiltonian," "Jeffersonian," "Wilsonian," and "Jacksonian."⁶ The Hamiltonian tradition "sees the first task of the American government as promoting the health of American enterprise at home and abroad."⁷ The Jeffersonian school of thought regards "the preservation of American democracy in a dangerous world as the most pressing and vital interest of the American people," while the Wilsonian tradition, which has been receptive to international institutions, sees "a moral and a practical duty" on the part of the U.S. "to spread its values through the world."⁸ Finally, the Jacksonian tradition "represents a deeply embedded, widely spread populist and popular culture of honor, independence, courage, and military pride."⁹ Similarly, U.S. approaches to international law have also varied widely. Professor Mark W. Janis has analyzed nineteenth-century American views on international law by examining the roles of academics, lawyers, judges, Utopians, scientists, and diplomats.¹⁰ Among these groups, the reception to and interpretation of international law ranged from extreme skepticism and dismissal to an embrace of international law's potential for developing universal norms and furthering the peaceful resolution of disputes. The extensive debates in the U.S. over the complex, multifaceted Convention reveal the influence of some of these historical approaches.¹¹

5. Text of Resolution of Advice and Consent to Ratification, S. EXEC. REP. NO. 108-10, at 16 (2004).

6. See WALTER RUSSELL MEAD, SPECIAL PROVIDENCE: AMERICAN FOREIGN POLICY AND HOW IT CHANGED THE WORLD 89 (2001).

7. *Id.* at 87.

8. *Id.* at 88.

9. *Id.*

10. See MARK WESTON JANIS, THE AMERICAN TRADITION OF INTERNATIONAL LAW: GREAT EXPECTATIONS 1789-1914 (2004). For discussion of possible modern analogues to various U.S. international law traditions, see John E. Noyes, *Universalism and the American Tradition of International Law*, 21 CONN. J. INT'L L. 199, 201-04 (2006).

11. Other perspectives on U.S. attitudes about the Convention may also yield important insights. For example, the attitudes of various U.S. government agencies may differ. Approximately twenty U.S. agencies participated in the U.S. Interagency Task Force that developed U.S. negotiating positions for the Third United Nations Conference on the Law

Followers of these historically-influential perspectives on U.S. foreign policy have viewed the desirability of treaties through a distinctively American lens. None of these schools of thought has sought to promote some “international community” at the expense of U.S. “interests.” As several scholars have noted, Louis Sohn believed that building strong international legal norms and institutions would be advantageous to the United States.¹² According to Mead, “Wilsonian idealists” have supported international institutions in order to promote and spread American values, and have been less concerned with building some utopian “international society.”¹³ Woodrow Wilson himself came to support the League of Nations as a realist who discovered that certain threats to U.S. interests had to be addressed collectively.¹⁴ Hamiltonians have embraced international rules that promote U.S. commerce, including rules to ensure unimpeded ocean trade and commerce. The more unilateral Jacksonian tradition seeks a strong U.S. military capable of reacting to threats against the country. In a broad sense, the stable system of rules embodied in the Convention may appeal to people with different priorities: those who value international institutions and cooperative endeavors to address common space issues; those who favor open commercial relations; and those who support freedom of action for the U.S. military.¹⁵

of the Sea (UNCLOS). ANN L. HOLLICK, *U.S. FOREIGN POLICY AND THE LAW OF THE SEA* 351 (1981). Ann Hollick has commented that the U.S. delegation “was usually the scene of more intense negotiations than was UNCLOS itself” and has detailed the difficulties in formulating and executing U.S. policy. *Id.* A wide range of U.S. agencies continue to take an active interest in the international law of the sea.

12. See, e.g., José E. Alvarez, *A Tribute to Louis Sohn*, 39 GEO. WASH. INT’L L. REV. 643 (2007); Elliot L. Richardson, *Dispute Settlement Under the Convention on the Law of the Sea: A Flexible and Comprehensive Extension of the Rule of Law to Ocean Space*, in CONTEMPORARY ISSUES IN INTERNATIONAL LAW ESSAYS IN HONOR OF LOUIS B. SOHN 149, 150 (Thomas Buergenthal ed., 1984) (quoted in Thomas Buergenthal, *Louis B. Sohn (1914-2006)*, 100 AM. J. INT’L L. 623, 624–25 (2006)).

13. See MEAD, *supra* note 6, at 87–88, 317–18. In the nineteenth century, U.S. “Utopians” built on Western philosophical traditions and the Anglo-American peace movement to forge proposals for international courts and international legal mechanisms to resolve disputes peacefully. See JANIS, *supra* note 10, at 95–98.

14. See Mark Weston Janis, *How “Wilsonian” was Woodrow Wilson?*, 5 DARTMOUTH L.J. 1, 13–14 (2007).

15. For comprehensive overviews that discuss numerous advantages for the U.S. associated with U.S. acceptance of the Convention and the 1994 Part XI Implementation Agreement, see John Norton Moore & William L. Schachte, Jr., *The Senate Should Give Immediate Advice and Consent to the UN Convention on the Law of the Sea: Why the Critics Are Wrong*, 59 J. INT’L AFF. 1 (Fall/Winter 2005); *Environment and Public Works Comm. Hearing, supra* note 3, at 155–65 (statement of Prof. Bernard H. Oxman, University of Miami School of Law); *Foreign Relations Comm. Hearing, supra* note 3, at 53–59 (prepared statement of Prof.

But the question remains: Why support the Convention now? For those inclined toward a Wilsonian—or Sohnian—perspective, the case for U.S. participation in this universal legal framework for interrelated oceans issues is an easy one. The Convention creates minimum, harmonized, international environmental standards,¹⁶ provides human rights protections,¹⁷ and reinforces its substantive rules with dispute settlement norms and institutions.¹⁸ The Convention can both accommodate and facilitate new regional and global agreements on issues that the Convention itself does not adequately address. It stands both as a symbol of how much can be accomplished through peaceful cooperation and as the essential legal framework for developing, supporting, and integrating viable legal regimes for the oceans.

For those whose primary foreign policy concern is to promote communication and commerce, an enduring, treaty-based system of stable rules is also an “easy sell.” Hamiltonians perceive much ongoing value in the Convention, for it establishes or reinforces: freedoms of navigation and laying cables;¹⁹ security of tenure for mine sites beyond national jurisdiction;²⁰ stable boundaries for the outer continental shelf to facilitate oil production;²¹ and rules supporting uniform standards of ship construction, design, equipment and manning for vessels engaged in interstate oceans commerce.²² In general, the Convention promotes stable rules that facilitate business planning and the conduct of trade and commerce.

Many U.S. critics of the Convention express great skepticism about “legalism-moralism” in international relations²³ and espouse what Mead would characterize as a unilateral, Jacksonian view of U.S. foreign policy. Is it possible to convince a modern “Jacksonian” that U.S. acceptance of the Convention is prudent? The consuming foreign policy concern of such a Jacksonian is probably the

John Norton Moore, Director, Center for Oceans Law and Policy, University of Virginia School of Law).

16. See LOS Convention, *supra* note 1, arts. 192–237.

17. For an overview of the Convention’s provisions respecting human rights, see Bernard H. Oxman, *Human Rights and the United Nations Convention on the Law of the Sea*, 36 COLUM. J. TRANSNAT’L L. 399 (1997).

18. See LOS Convention, *supra* note 1, arts. 279–99 & Annexes V–VIII.

19. See *id.* arts. 58, 78–79, 87.

20. See *id.* art. 153(3) & Annex III, art. 16.

21. See *id.* arts. 76–77 & Annex II.

22. See *id.* arts. 21(2), 194(3)(b), 211(6)(c), 217(2).

23. The phrase is George Kennan’s. For Kennan’s criticism of “legalism-moralism” as a basis for the conduct of foreign affairs, see GEORGE F. KENNAN, *AMERICAN DIPLOMACY 1900–1950*, at 95–103 (1951).

“war on terror,” and he stresses the need for, and takes great pride in, a strong U.S. military to conduct that war. He is skeptical about the value of institutions designed to improve the human condition, viewing any effort to develop such institutions as a fool’s errand, and he is particularly skeptical about U.S. participation in international organizations that might pursue courses of action that the U.S. cannot control.²⁴ The Jacksonian’s world view incorporates the notion that the U.S. is honorable and will live up to its voluntarily undertaken commitments²⁵—hence the need for extreme caution before making such commitments. The next part of this essay more closely examines some of the concerns of those opposing U.S. ratification of the Convention and reacts to those concerns.

II. THE CONCERNS OF “JACKSONIAN” CRITICS: MILITARY FLEXIBILITY, INTERNATIONAL INSTITUTIONS, AND U.S. LEADERSHIP

Three issues that have concerned critics of U.S. participation in the Convention (as modified by the Part XI Implementation Agreement) relate to military flexibility, international organizations, and the characteristics of U.S. leadership. These issues also undoubtedly concern the Bush administration, which contains unilateralist, “Jacksonian” voices within it, although the administration has supported the Convention.²⁶ American attitudes with respect to these three issues may also have broader significance in indicating positions the U.S. will continue to stress should it become a State Party to the Convention.

The first issue reflects the notion that U.S. military vessels and aircraft should be able to conduct their missions with maximum flexibility. Critics have expressed the view that the Convention will limit U.S. freedom of action to inspect foreign vessels under the Proliferation Security Initiative²⁷ or to gather intelligence.²⁸ The

24. MEAD, *supra* note 6, at 246, 248.

25. *See id.* at 251.

26. Some reports indicated that the concerns of Convention critics may have tempered the enthusiasm with which the Bush administration lobbied for the Convention. *See* Jim Lobe, *Right-Wing Republicans Sinking Law of the Sea, Again*, INTER PRESS SERVICE, June 3, 2004, available at <http://www.commondreams.org/headlines04/0603-07.htm>. During 2007, however, the administration again signaled its support for U.S. acceptance of the Convention. *See supra* note 3.

27. Proliferation Security Initiative, Sept. 4, 2003, reprinted in S. EXEC. REP. 108-10, at 165–66 (2004). For background on this initiative, see Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT’L L. 526 (2004).

28. *Environment and Public Works Comm. Hearing, supra* note 3, at 79 (statement of Frank Gaffney Jr., President and CEO, The Center for Security Policy).

U.S. State Department and the military have repeatedly issued assurances about these specific concerns, and have more broadly asserted that U.S. military capabilities will be enhanced, rather than hampered, by its accession to the Convention.²⁹ Yet for unilateralists, the lesson that international legal standards can further the ability of the U.S. military to do its job rather than limit its flexibility has been conceptually difficult to accept.

Freedom of navigation is the main reason why the George W. Bush administration announced its support for U.S. accession shortly after the 9/11 attacks in 2001.³⁰ The administration likely finds that the Convention's navigational and national security benefits far outweigh any costs to the U.S. joining the Convention. Military security relates to self-defense, which the Convention preserves,³¹ and to port security, which the Convention facilitates by incorporating security requirements developed through the International Maritime Organization.³² The Convention also assures rights of navigation and overflight, including transit passage

29. *E.g.*, *Armed Services Comm. Hearing*, *supra* note 3, at 31–56 (statement of Hon. William H. Taft IV, Legal Adviser, Department of State); *id.* at 104–14 (statement of Rear Adm. William L. Schachte, Jr., U.S. Navy (Ret.), Judge Advocate General Corps); *Foreign Relations Comm. Hearing*, *supra* note 3, at 59–68 (statement of Rear Adm. William L. Schachte, Jr., U.S. Navy (Ret.), Judge Advocate General Corps); *id.* at 102–06 (statement of Admiral Michael G. Mullen, U.S. Navy, Vice Chief of Naval Operations, Joint Chiefs of Staff, Department of the Navy); Letter from the Joint Chiefs of Staff to The Hon. Joseph Biden, Jr., *supra* note 3.

30. See John E. Noyes, *The United States, the Law of the Sea Convention, and Freedom of Navigation*, 29 SUFFOLK TRANSNAT'L L. REV. 1, 5–6, 23 (2005).

31. Articles 88, 141, and 301 of the Convention, which refer to the use of the oceans for peaceful purposes, do not contravene the right of self-defense preserved in Article 51 of the United Nations Charter. See, e.g., *Environment and Public Works Comm. Hearing*, *supra* note 3, at 32 (statement of Prof. Bernard H. Oxman, University of Miami School of Law); *id.* at 77 (statement of William H. Taft IV, Legal Adviser, Department of State); *Foreign Relations Comm. Hearing*, *supra* note 3, at 84 (statement of John F. Turner, Assistant Secretary of State, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State); Text of Resolution of Advice and Consent to Ratification, *supra* note 5, § 3(1); see also U.N. Charter art. 103.

32. Every flag state “is required to conform to generally accepted international regulations, procedures and practices” with respect to ship safety, “and to take any steps which may be necessary to secure their observance.” LOS Convention, *supra* note 1, art. 94(5). One such “generally accepted international regulation” is the Safety of Life at Sea Convention, developed by the International Maritime Organization (IMO), which was amended after 9/11 to incorporate a new International Ship and Port Facility Code. ISPS CODE (IMO Sales No. I116E, 2003). The Convention also reaffirms the sovereignty of states over their ports, internal waters, and territorial sea, and the control of states over conditions of access to their ports. See LOS Convention, *supra* note 1, arts. 2, 25(2); Text of Resolution of Advice and Consent to Ratification, *supra* note 5, § 3(13).

through strategic straits and archipelagic sea lanes passage,³³ as well as the immunity of warships.³⁴ The U.S. insisted on strengthening rights of navigation and overflight during the Third United Nations Conference on the Law of the Sea Conference (UNCLOS III), and in making them more objective with what appears in the 1958 Territorial Sea Convention.³⁵

Why support the Convention now? Administration officials cite a “resurgence of creeping jurisdiction” by coastal states within their EEZs.³⁶ This resurgence threatens Convention-based navigational rights, which are at least as important today as they were during the Cold War. Alternative ways to respond to creeping coastal state jurisdiction are not satisfactory. If the U.S. continues to rely on assertions that customary international law establishes certain navigational rights, coastal states may increasingly counterclaim that emerging customary international law restricts such rights in coastal zones.³⁷ Some coastal states may altogether deny that Convention-based navigational rights exist under customary international law. As Admiral Michael G. Mullen, Vice Chief of Naval Operations, testified before the Senate Foreign Relations Committee, “some coastal states contend that the navigational and overflight rights contained in the Convention are available only to those states that also accept the responsibilities set forth in the Convention by becoming parties to it.”³⁸ If it joined the Convention, the U.S. would likely have less need to rely on either its Free-

33. LOS Convention, *supra* note 1, arts. 18–19, 21–23 (establishing a more objective definition of innocent passage than the one existing in prior law and setting out in detail coastal state rights to regulate such passage); *id.* arts. 37–44 (supporting free navigation through straits under a regime of transit passage for vessels and aircraft, subject to regulation on which the coastal state and the IMO must agree); *id.* arts. 52–54 (creating a regime of archipelagic sea lanes passage, which applies principles of the innocent passage and transit passage regimes); *id.* arts. 58, 86–87 (preserving high seas freedoms of navigation, overflight, and laying of cables and pipelines, “and other internationally lawful uses of the sea related to these freedoms” in the exclusive economic zone).

34. *Id.* arts. 29–32, 39, 54, 95–96, 236, 298.

35. See generally Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205. For discussion of U.S. views toward navigation rights at UNCLOS III, see, for example, BERNARD H. OXMAN, FROM COOPERATION TO CONFLICT: THE SOVIET UNION AND THE UNITED STATES AT THE THIRD U.N. CONFERENCE ON LAW OF THE SEA (1984); John Norton 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).

36. *Foreign Relations Comm. Hearing, supra* note 3, at 61 (statement of Rear Adm. William L. Schachte, Jr., U.S. Navy (Ret.), Judge Advocate General Corps).

37. See Jon M. Van Dyke, *The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone*, 29 MARINE POL’Y 107, 121 (2005).

38. *Foreign Relations Comm. Hearing, supra* note 3, at 106.

dom of Navigation Program³⁹ or negotiating new bilateral agreements.⁴⁰ The rules in the Convention clarify issues and narrow considerably the range of possible disagreements over navigational rights. Accepting the Convention will thus be less expensive—in terms of dollars, potential confrontations or loss of good will with coastal states, and U.S. concessions on other fronts—than continuing to stand outside it.

Convention supporters should also directly address U.S. skeptics' concern that the Convention represents a move toward multilateralism and greater roles for international institutions. The first and most basic response to this concern is that there really is no alternative to multilateralism with respect to rules for an international common space. A second response, and the tack adopted by the Bush administration and many other U.S. supporters of the Convention, has been to try to minimize the roles and significance of the three new, and now fully operational, institutions created by the Convention (the Commission on the Limits of the Continental Shelf (CLCS), the International Tribunal for the Law of the Sea (ITLOS), and the International Seabed Authority (ISA)).

The first of these institutions, the CLCS, has not been controversial in the United States. The CLCS is the technical body that reviews data in state submissions concerning the outer limits of the continental shelf beyond 200 miles from the baselines. Under the Convention, coastal states themselves still set those limits in accordance with the Convention, but only limits established "on the basis of" CLCS recommendations are "final and binding."⁴¹ A CLCS recommendation is thus a precondition for assuring that the outer limits of a state's continental shelf beyond 200 miles from its baselines will be generally recognized.⁴² Determining final conti-

39. For background on this Program, see William J. Aceves, *The Freedom of Navigation Program: A Study of the Relationship Between Law and Politics*, 19 HASTINGS INT'L & COMP. L. REV. 259, 301 (1996). For examples of U.S. Freedom of Navigation Program operations, see J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS 15–450 (2d ed. 1996).

40. See Panel on the Law of Ocean Uses, *United States Interests in the Law of the Sea Convention*, 88 AM. J. INT'L L. 167, 171 (1994).

41. LOS Convention, *supra* note 1, art. 76(8). According to one commentator, the Commission serves the function of the "canary in a mineshaft" to detect excessive coastal state claims. Ted L. McDorman, *The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World*, 17 INT'L J. MARINE & COASTAL L. 301, 324 (2002).

42. Relevant provisions of the Convention on the Law of the Sea refer to CLCS submissions by "coastal States" rather than "States Parties." LOS Convention, *supra* note 1, Annex II, art. 4. It is uncertain whether a non-party to the Convention, such as the United States, could make a submission to the CLCS, a matter on which the Commission will seek clarification from the UN Legal Counsel should the need arise. See L.D.M. Nelson, *The*

mental shelf boundaries is important for secure oil licenses, one reason why oil companies have supported U.S. acceptance of the Convention.⁴³ U.S. accession to the Convention would also allow a U.S. member to be elected to the CLCS,⁴⁴ a step that would give that member a role in determining the Commission's procedures, reviewing other states' submissions, and aiding the U.S. in formulating its own submissions to the CLCS.⁴⁵ Furthermore, the breadth of a coastal state's continental shelf affects the extent of the oceans in which all states enjoy high seas freedoms free from coastal state interference. Overly expansive continental shelf claims could interfere with high seas freedoms. A coastal state's rights over its continental shelf "must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in th[e] Convention,"⁴⁶ but coastal state installations on the continental shelf could affect navigation to a limited degree, and coastal state actions could restrict the high seas freedom of marine scientific research.⁴⁷ The work of the CLCS is thus important, but the Commission has not been controversial in the U.S. for several reasons: the CLCS is a technical rather than a policy-making body; U.S. acceptance of the Convention will allow it to obtain the benefit of determinate, gen-

Continental Shelf: Interplay of Law and Science, in LIBER AMICORUM JUDGE SHIGERU ODA 1235, 1249 (Nisuke Ando et al. eds., 2002). It is generally accepted that the Convention provisions on establishing the outer limits of the continental shelf beyond 200 miles from baselines affect the line marking those limits, rather than coastal state entitlement to that portion of the continental shelf. See *Report of the Committee on Legal Issues of the Outer Continental Shelf*, in INT'L L. ASS'N, REPORT OF THE SEVENTY-SECOND CONFERENCE HELD IN TORONTO 215, 216-17 (2006).

43. *Environment and Public Works Comm. Hearing*, *supra* note 3, at 4-9 (statement of Paul L. Kelly, Senior Vice President, Rowan Companies, Inc.); *Foreign Relations Comm. Hearing*, *supra* note 3, at 57 (statement of Prof. John Norton Moore, Director, Center for Oceans Law and Policy, University of Virginia School of Law); *id.* at 92 (statement of Hon. William H. Taft IV, Legal Adviser, Department of State).

44. States Parties elect members of the Commission, "who shall be experts in the field of geology, geophysics, or hydrography," from among their nationals. LOS Convention, *supra* note 1, Annex II, art. 2(1).

45. Although the U.S. has submitted views on the CLCS submissions of other states, *see, e.g.*, United States of America: Notification regarding the submission made by the Russian Federation to the Commission on the Limits of the Continental Shelf, ref. CLCS.01.2001.LOS/USA (2002), available at http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS_USAtext.pdf, only Commission members may participate in the deliberations of the CLCS and its subcommissions, *see* LOS Convention, *supra* note 1, Annex II, arts. 5-6. Because the CLCS's deliberations are secret, a U.S. member on the Commission could offer perspectives useful to the U.S. in formulating its own CLCS submission. See Ron Macnab & Lindsay Parson, *Continental Shelf Submissions: The Record to Date*, 21 INT'L J. MARINE & COASTAL L. 309, 320 (2006).

46. LOS Convention, *supra* note 1, art. 78(2).

47. See *id.* arts. 80, 246(6).

erally recognized outer limits to its continental shelf; and U.S. membership on the Commission will allow increased oversight of other coastal states' submissions.

Although Convention critics may regard the CLCS as benign, the Convention's obligatory third-party dispute settlement system⁴⁸ worries them. Any state's assessment of treaty provisions for formal third-party dispute settlement probably turns on four main factors: the independence of judges; which entities have access to the tribunal; whether the tribunal will have jurisdiction over sensitive disputes; and the dispute settlement forum's response mechanisms and enforcement capacity. The U.S. Convention critic raises questions on many of these fronts, and fears expensive, public litigation that could embarrass the U.S. or pressure it to modify its own policies or laws. The Bush administration and many other U.S. supporters of the Convention have not fully embraced its dispute settlement provisions. Instead, proponents of the Convention have made several defensive (or "reassuring") points about dispute settlement: only states, rather than individuals and non-governmental organizations, may invoke the Convention's Part XV dispute settlement mechanisms; the Convention emphasizes informal methods of dispute settlement;⁴⁹ military and intelligence-gathering activities and other sensitive matters are exempt from the third-party dispute settlement provisions;⁵⁰ compromissory clauses are not uncommon in other treaties to which the U.S. is a party.⁵¹ For matters that fall within the obligatory dispute settlement provisions of the Convention, the U.S. will choose arbitration or special arbitration, procedures that allow each party to a dispute to select a high percentage of the decision makers and that do not receive as much public attention as the ITLOS or the International Court of Jus-

48. *Id.* arts. 282, 286-99 & Annexes V-VIII.

49. *See Environment and Public Works Comm. Hearing, supra* note 3, at 69 (statement of John F. Turner, Assistant Secretary of State, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State); *Foreign Relations Comm. Hearing, supra* note 3, at 93 (statement of Hon. William H. Taft IV, Legal Adviser, Department of State).

50. *See Environment and Public Works Comm. Hearing, supra* note 3, at 69 (statement of John F. Turner, Assistant Secretary of State, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State); *Foreign Relations Comm. Hearing, supra* note 3, at 68 (statement of Rear Admiral William L. Schachte, U.S. Navy (Ret.)); *id.* at 93 (statement of Hon. William H. Taft, IV, Legal Adviser, Department of State); Text of Resolution of Advice and Consent to Ratification, *supra* note 5, § 2, Declaration 2; Moore & Schachte, Jr., *supra* note 15, at 16.

51. *See* John E. Noyes, *The Functions of Compromissory Clauses in U.S. Treaties*, 34 VA. J. INT'L L. 831, 833-34 & n.9 (1994).

tice.⁵² Decisions by Convention dispute settlement tribunals would not be enforceable in U.S. courts absent implementing U.S. legislation.⁵³ The Convention's third-party dispute settlement provisions, in short, are often presented as troublesome features whose scope should be minimized.

Several more forceful responses to the critics of the Convention's obligatory dispute settlement provisions are in order. First, the U.S. has already accepted the Convention's dispute settlement system with respect to certain significant categories of disputes (by ratifying the 1995 Fish Stocks Agreement, which incorporates the Convention's dispute settlement provisions).⁵⁴ Second, one can make a strong case that third-party dispute settlement has led to decisions that strengthen the Convention's rules and will lead to many more. For example, in its merits decision in the *Saiga* case, the ITLOS reinforced the concept of the EEZ as a zone of limited coastal state jurisdiction, which extends neither to customs matters nor generally to all matters affecting a coastal state's "public interest."⁵⁵ Third, the U.S. itself might find the Convention's dispute settlement system useful. For instance, arbitration could be threatened or pursued in order to oppose and publicly expose other states' illegal straight baseline claims.⁵⁶ The Convention's

52. Text of Resolution of Advice and Consent to Ratification, *supra* note 5, § 2, Declaration 1. For matters that are subject to binding obligatory third-party dispute settlement, Part XV, Section 2 of the Convention provides that States Parties may choose from among the following options: the International Court of Justice, the International Tribunal for the Law of the Sea, arbitration, or, with respect to certain subjects, special arbitration before panels of experts. LOS Convention, *supra* note 1, art. 287. Arbitration is the default forum in case States Parties choose different fora or make no choice. *Id.* art. 287(3), (5). Furthermore, if parties to a dispute concerning the interpretation or application of the Convention have agreed in a treaty "that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for" in Part XV of the Convention. *Id.* art. 282. For more discussion of the Convention's provisions on third-party dispute settlement, see John E. Noyes, *Compulsory Third-Party Adjudication and the 1982 United Nations Convention on the Law of the Sea*, 4 CONN. J. INT'L L. 675 (1989).

53. Text of Resolution of Advice and Consent to Ratification, *supra* note 5, § 3(22). This document also declares that most "provisions of the Convention," including "procedures thereunder," will not be self-executing, i.e., may not be relied on in U.S. courts absent implementing legislation. *Id.* § 3(24).

54. 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 arts. 7, 30-31, Dec. 4, 1995, S. TREATY DOC. NO. 104-24 (1996), 2167 U.N.T.S. 88.

55. *M/V Saiga* (No. 2) (St. Vincent v. Guinea), 120 I.L.R. 143, ¶¶ 127, 131 (Int'l Trib. L. of the Sea 1999).

56. See Bernard H. Oxman, *Drawing Lines in the Sea*, 18 YALE J. INT'L L. 663, 672-73 (1993); *Foreign Relations Comm. Hearing*, *supra* note 3, at 59 (prepared statement of Prof.

dispute settlement provisions can help prevent the compromises embodied in the Convention from unraveling.

The ISA, the institutional component that led the Reagan administration not to support the Convention in 1982, has remained a obstacle for a few vocal critics of the Convention in America. Although the ISA is the only new body created by the Convention that is explicitly authorized to make policy, its mandate is narrow, related to steps furthering security of tenure for those seeking to explore for minerals or mine on the seabed beyond the limits of national jurisdiction. The Part XI Implementation Agreement, which is now read together with the Convention to govern the ISA's operations, rectified all of the Reagan administration's objections to the original Part XI (the administration's only objections to the Convention).⁵⁷ The objectionable provisions related to an asserted lack of guaranteed access for qualified private miners, the possibility of payments to national liberation movements, mandatory technology transfers, production limitations, and a review conference that could amend Part XI over the objection of the U.S. or other states. The George W. Bush administration has emphasized the 1994 changes with respect to these provisions. It has also emphasized 1994 changes concerning the U.S. role in how the ISA makes its decisions, changes that give the U.S. an effective veto over ISA decisions. Since its inception, the ISA has operated on a low budget and has confined its activities to its specified mandate,⁵⁸ behavior that should reassure skeptics who fear an expensive, bloated international bureaucracy.

John Norton Moore, Director, Center for Oceans Law and Policy, University of Virginia School of Law). The U.S. championed extensive compulsory jurisdiction during the negotiation of the Convention, albeit with exemptions for certain sensitive issues. See Louis B. Sohn, *U.S. Policy Toward the Settlement of Law of the Sea Disputes*, 17 VA. J. INT'L L. 9, 10 (1976).

57. *Environment and Public Works Comm. Hearing*, *supra* note 3, at 66 (statement of John F. Turner, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, Department of State); *Foreign Relations Comm. Hearing*, *supra* note 3, at 39 (statement of Prof. Bernard Oxman, University of Miami School of Law); *id.* at 152 (statement of the Council on Ocean Law to the Committee on Foreign Relations of the U.S. Senate on the United Nations Convention on the Law of the Sea). Indeed, the 1994 Implementation Agreement went even further in the direction of free market principles than the Reagan administration had requested by incorporating GATT principles. See Part XI Implementation Agreement, *supra* note 2, Annex § 6(1)(b). For an overview of the Reagan administration's objections to the Convention's original Part XI and the remedies provided in the 1994 Agreement, see Bernard H. Oxman, *The 1994 Agreement and the Convention*, 88 AM. J. INT'L L. 687 (1994).

58. See *Environment and Public Works Comm. Hearing*, *supra* note 3, at 71 (statement of John F. Turner, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs); *id.* at 90 (statement of Paul Kelly, Senior Vice President, Rowan

Despite the ISA's limited mandate and its relative insignificance in relation to other matters the Convention addresses, however, the Authority remains a concern for Convention opponents in the U.S. Some of the opposition is simply bizarre. One critic testified at a congressional hearing that the U.S. should be greatly concerned about the development of an ISA military arm.⁵⁹ Although some opponents simply misconstrue the relevant treaty provisions,⁶⁰ it is doubtful that the opposition will disappear, even when misapprehensions about the scope of permitted ISA activities are corrected. The opposition is in line with the Jacksonian strand of foreign policy that has been extremely skeptical about U.S. participation in any international organization. Some critics abhor the idea of the U.S. joining any treaty that contains the words "common heritage," or that obligates the country to participate in an international regulatory body. It is also questionable whether someone who opposes any international regulatory body will be convinced that the significantly revised Part XI system is acceptable, for the ISA *does* have more extensive responsibilities than simply registering mine claims on a first-come, first-served basis. One practical response to this argument is that the 1994 system is, and will continue to be, the system used to govern eventual exploitation of mineral resources. All other major developed states have accepted the Convention and are operating under the 1994 seabed mining regime. Attempts to change any established, stable allocation rule face serious political obstacles. Under the now-entrenched revised ISA regime, these obstacles seem insurmountable.

Companies, Inc.); *id.* at 160 (statement of Prof. Bernard Oxman, University of Miami School of Law).

59. *House International Relations Comm. Hearing, supra* note 3, at 62 (statement of Peter M. Leitner).

60. For example, some critics broadly construe the ISA's authority under Article 153 to organize, carry out, and control activities in the "Area," i.e., in "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction." LOS Convention, *supra* note 1, art. 1(1). *E.g., Intelligence Comm. Hearing, supra* note 3, at 75 (statement of Hon. William J. Middenforf II). These critics overlook that the phrase "activities in the Area" is defined in Article 1(1)(3) as limited to "activities of exploration for, and exploitation of, the resources of the Area," and that "resources" are limited to mineral resources "in the Area at or beneath the seabed." LOS Convention, *supra* note 1, art. 133(a). Another baseless criticism is that the Convention creates a UN system of taxation, an argument apparently derived from Article 82 of the Convention. *See House International Relations Comm. Hearing, supra* note 3, at 60, 88 (statement of Peter M. Leitner). For arguments debunking the taxation myth, see, for example, Moore & Schachte, Jr., *supra* note 15, at 10-11; *Environment and Public Works Comm. Hearing, supra* note 3, at 71 (statement of John F. Turner, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs); *House International Relations Comm. Hearing, supra* note 3, at 28 (statement of William H. Taft IV, Legal Adviser, Department of State).

ble for the foreseeable future. If the U.S. does not accept this system, it is hard to envision an American company pursuing any alternative, inevitably less secure, route to deep seabed mining.⁶¹ The institutional features of the Convention (as revised by the 1994 Implementation Agreement) are not onerous, and they provide benefits to the U.S.

Convention critics may also be ambivalent about a third argument raised in support of U.S. acceptance of the Convention—that this step will facilitate U.S. leadership in oceans matters. For some Jacksonians, the U.S. would show true “leadership” by affirming its independent stance toward many oceans issues. Some Convention opponents find the notion of participating in an “international community” with respect to oceans issues objectionable because they doubt that values can truly be shared internationally and because they fear that non-U.S. political processes could affect U.S. positions.⁶²

For most U.S. observers, however, U.S. participation in Convention institutions and meetings of States Parties can help shape the future direction of the law of the sea in ways favorable to U.S. commercial, fishing, environmental, and military interests. The law of the sea will inevitably change through a wide variety of mechanisms. Some proposals for change could be made from “within” the Convention system—perhaps by formal amendments,⁶³ or even potentially at meetings of States Parties.⁶⁴ America’s taking its place as a State Party to the Convention can help promote U.S. views. For example, its participation in the work of the ISA can help assure that the Authority does not attempt to stretch its mandate to impinge on what many assert to be the freedom to harvest

61. See *Foreign Relations Comm. Hearing*, *supra* note 3, at 58 (statement of Prof. John Norton Moore, Director, Center for Oceans Law and Policy, University of Virginia School of Law).

62. Those whom Mead places in the “Jeffersonian” foreign policy camp may also be concerned with the influence of foreign or international processes on U.S. institutions. See MEAD, *supra* note 6, at 185–86; *supra* text accompanying note 8.

63. See LOS Convention, *supra* note 1, arts. 312–16 (describing the procedure for amendments).

64. See *id.* art. 319(2)(e). There is controversy over the scope of authority of States Parties at their meetings, and some commentators question whether the Convention’s amendment procedures will ever be used to bring about changes to the Convention. See David Freestone & Alex G. Oude Elferink, *Flexibility and Innovation in the Law of the Sea—Will the LOS Convention Amendment Procedures Ever Be Used?*, in *STABILITY AND CHANGE IN THE LAW OF THE SEA: THE ROLE OF THE LOS CONVENTION* 169, 218–21 (Alex G. Oude Elferink ed., 2005); Tullio Treves, *The General Assembly and the Meeting of States Parties in the Implementation of the LOS Convention*, in *STABILITY AND CHANGE IN THE LAW OF THE SEA*, *supra*, at 55, 73.

deep-sea-vent living organisms, which are important resources in biotechnology.⁶⁵ As a State Party, the U.S. would also have more leverage with respect to the Article 311 obligation that subsequent agreements between States Parties be compatible with the Convention.⁶⁶

Some Convention proponents also see spillover benefits from U.S. acceptance of the Convention. Such acceptance would signal to other states that the U.S. is willing to support sensible multilateral regimes. Accepting an important multilateral legal obligation might increase good will toward the U.S. and would be a visible example of America's declaring its willingness not to act unilaterally.⁶⁷ Yet, the notion of the U.S. exercising leadership by participating in multilateral conventions, especially those that involve obligatory dispute settlement and roles for international organizations, is a notion with which some "Jacksonian" skeptics remain uncomfortable.

CONCLUSION

Louis Sohn's view, which I share, was that "[f]or the United States and the world, widespread adoption of a codified rule of law for the oceans is of paramount importance."⁶⁸ Most fundamentally, "U.S. leadership" really means that America should lend its considerable weight to furthering values sometimes lumped together under the heading of the "rule of law." These values—

65. Compare Craig H. Allen, *Protecting the Oceanic Gardens of Eden: International Law Issues in Deep-Sea Vent Resource Conservation and Management*, 13 GEO. INT'L ENVTL. L. REV. 563, 659 (2001) (regarding harvesting of deep-sea-vent resources as a freedom of the high seas), with Alex G. Oude Elferink, *The Regime of the Area: Delineating the Scope of Application of the Common Heritage Principle and Freedom of the High Seas*, 22 INT'L J. MARINE & COASTAL L. 143, 174 (2007) (arguing that Convention references to Area "resources" could be read to authorize the Authority to regulate living resources). In 2000, marine biotechnology-related products reportedly generated \$100 billion in sales. See SALVATORE ARICO & CHARLOTTE SALPIN, UNU-IAS REPORT: BIOPROSPECTING THE GENETIC RESOURCES IN THE DEEP SEABED: SCIENTIFIC, LEGAL AND POLICY ASPECTS 27 (2005), available at <http://www.ias.unu.edu/binaries2/DeepSeabed.pdf>.

66. LOS Convention, *supra* note 1, art. 311(3).

67. See *Environment and Public Works Comm. Hearing*, *supra* note 3, at 74 (statement of John F. Turner, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs); *id.* at 89 (statement of Paul Kelly, Senior Vice President, Rowan Companies, Inc.); *id.* at 164 (statement of Prof. Bernard Oxman, University of Miami School of Law); *Foreign Relations Comm. Hearing*, *supra* note 3, at 82 (statement of Sen. Richard G. Lugar, Chairman, Senate Comm. on Foreign Relations).

68. Am. Bar Ass'n Section of Int'l Law & Practice, *Recommendation and Report on the United Nations Convention on the Law of the Sea*, 29 INT'L LAW. 252 (1995) (developed by Louis B. Sohn, John E. Noyes & Houston Putnam Lowry), reprinted in THE UNITED NATIONS AT 50: PROPOSALS FOR IMPROVING ITS EFFECTIVENESS 161, 161 (John E. Noyes ed., 1997).

stability of expectations, resolving differences peacefully and evenhandedly, building on a system of rules and procedures to resist unilateral assertions of jurisdiction—are values the U.S. should support by accepting the Convention. Improving the rule of law for the oceans, which still heavily depends upon the 1982 Convention that Professor Sohn helped craft, requires U.S. support. Fundamentally, the debate with Convention skeptics has been a battle over promoting the rule of law in international affairs, and that battle has not been as easy to win as many observers wish. The Convention remains the centerpiece of that rule of law.

Despite the importance of the rule of law, most arguments in the U.S. about the Convention have addressed its expected impact on specific U.S. foreign policy objectives. The arguments of some “Jacksonian” skeptics may well not prevail, as the U.S. appears poised to accept the Convention. Nevertheless, the concerns of Convention opponents explored in Part II are likely to continue to influence U.S. views about foreign policy and oceans issues. America has long construed the Convention to provide maximum navigational freedoms to military vessels and aircraft,⁶⁹ and will assuredly continue to promote this position. The Bush administration’s attempts to limit, as much as possible, the jurisdiction of tribunals operating under the Convention, along with its insistence on the limited nature of the ISA’s jurisdiction, suggest a reluctance to embrace new international institutional obligations. Finally, some of the emphasis in U.S. congressional hearings on the importance of “U.S. leadership” could be a shorthand way of signaling that this country may not fully endorse multilateral cooperative or consensus-building initiatives should it join the Convention. Nevertheless, U.S. acceptance of the Convention and the 1994 Part XI Implementation Agreement would be a welcome step toward furthering the rule of law in international affairs.

69. See George V. Galdorisi & Alan G. Kaufman, *Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict*, 32 CAL. W. INT'L L.J. 253, 274–75 (2002); Moore, *supra* note 35, at 109.