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INTRODUCTORY NOTE ON THE PRESIDENT'S STATEMENT ON
ADVANCING U.S. INTERESTS IN THE WORLD'S OCEANS

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BY KEVIN D. FUTCH¹

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President George W. Bush announced his support for the United Nations Convention on the Law of the Sea² (LOSC) and proposed that the International Maritime Organization enhance the protection of the Papahānaumokuākea Marine National Monument in May 2007. While further protection of a marine national monument is important, it was President Bush's support for LOSC that had the most significance for international law.³ Over a decade after the Convention entered into force and as other countries such as Russia are testing its implications on territorial claims over natural resources,⁴ the United States is still debating whether to ratify the Convention.⁵ However, with the President's

¹ J.D. Candidate 2008, The George Washington University Law School.

² U.N. Convention on the Law of the Sea, Dec. 10, 1982, S. TREATY DOC. NO. 103-39 (1994), 1833 U.N.T.S. 3, 397 (hereinafter LOSC).

³ See David D. Caron & Harry N. Scheiber, *The United States and the 1982 Law of the Sea Treaty*, ASIL INSIGHT, June 11, 2007, <http://www.asil.org/insights/2007/06/insights070611.html> (describing the possible risks posed by delay of U.S. accession, e.g., "treaties without leadership can decay").

⁴ See Doug Struck, *Russia's Deep-Sea Flag-Planting at North Pole Strikes a Chill in Canada*, WASH. POST, Aug. 7, 2007, at A8 (discussing reactions of other countries to Russia's territorial claims); Alister Doyle, *Russia's Seabed Flag Heralds Global Ocean Carve-Up*, REUTERS, Aug. 15, 2007, <http://www.reuters.com/article/topNews/idUSL0880605120070815>.

⁵ For recent debate on whether LOSC poses positive or negative significance for U.S. interests, see Vern Clark & Thomas Pickering, Op-Ed, *A Treaty that lifts All Boats*, N.Y. TIMES, July 14, 2007, at A11; Jack Goldsmith & Jeremy Rabkin, *A Treaty the Senate Should Sink*, WASH. POST, July 2, 2007, at A19; John D. Negroponte & Gordon England, Op-Ed, *Reap the Bounty*, WASH. TIMES, June 13, 2007, at A17 (arguing U.S. accession to LOSC supports U.S. maritime security and economic rights); Edwin Meese, III, et al., *The United Nations Convention on the Law of the Sea: The Risks Outweigh the Benefits*, HERITAGE FOUND., May 16, 2007, <http://www.heritage.org/research/internationalorganizations/wm1459.cfm>; The Kojo Nnamdi Show: Who Owns The Ocean? (American University Radio broadcast Aug. 6, 2007), available at <http://wamu.org/programs/kn/07/08/06.php> (35-minute segment featuring Prof. John Norton Moore, Prof. Jeremy Rabkin, and Captain Patrick Neher, Director of International Law for the U.S. Navy).

personal support for LOSC⁶ and a change in the Senate leadership from one party to another,⁷ the Convention's stagnation in the Senate may finally come to an end.

The 1982 U.N. Convention on the Law of the Sea was the first attempt to codify a comprehensive legal framework to govern the oceans under a single treaty.⁸ The United States, under Presidents Nixon, Ford, and Carter, played an important role in the nine years of treaty negotiations.⁹ The resultant Convention addressed *inter alia* the delimitation of territorial waters, the rights of states inside and outside territorial waters (e.g., transit passage through archipelagic waters and when one ship may board another), the mining of the deep seabed, and the management of living marine resources.¹⁰

Although the United States had participated in negotiations, President Reagan refused to sign the Convention because of concerns that Part XI on the mining of the deep seabed did not adequately protect U.S. free-market interests.¹¹ Other countries, e.g., the United

⁶ The current Bush administration has expressed support for LOSC before, but this is the first time the President has publicly stated his position. See White House Press Briefing by Scott McClellan, June 22, 2004, <http://www.whitehouse.gov/news/releases/2004/06/20040622-3.html> (mentioning President Bush's "positive reaction" to LOSC); Caron, *supra* note 3, n. 6 (describing February 8, 2007 Letter from National Security Council Advisor, Stephen Hadley, to Senator Joseph Biden expressing "shared interest in moving forward" with LOSC).

⁷ See Charlie Savage, *Bush Allies Slam His Support of Maritime Treaty*, B. GLOBE, July 29, 2007, at A6 (stating Senator Helms prevented a hearing on LOSC in the Senate); Caron, *supra* note 3 (describing how Senate procedural customs have been used to prevent a vote on LOSC); Frank J. Gaffney, Jr., *Don't Get LOST*, NAT'L REV. ONLINE, Mar. 18, 2004, <http://www.nationalreview.com/gaffney/gaffney200403181156.asp> (describing Senate opposition to LOSC in 2004).

⁸ See SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 339 (2006) (discussing the three U.N. Conferences on the Law of the Sea that resulted in the current convention).

⁹ See BARRY E. CARTER ET AL., INTERNATIONAL LAW 835-36 (4th ed. 2003) (describing historical development of LOSC including its foundation on customary international law); Caron, *supra* note 3.

¹⁰ See LOSC, *supra* note 2. For more information on living resources provisions, see Eugene H. Buck, Congressional Research Service, *U.N. Convention on the Law of the Sea: Living Resources Provisions* (2003) (finding LOSC living resources provisions in line with U.S. policy).

¹¹ President Reagan said the Administration would support ratification of the Convention if six objectives with respect to seabed mining could be achieved. The six objectives were a seabed regime that would:

Not deter development of any deep seabed mineral resources to meet national and world demand;

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;

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;

Not allow for amendments to come into force without approval of the participating states, including, for the U.S., the advice and consent of the Senate;

Not set other undesirable precedents for international organizations; and

Kingdom and Germany, refused to sign the Convention as well.¹² To remedy the deep-sea mining concerns of the United States and the other countries that had refused to sign the 1982 text, the U.N. General Assembly adopted the 1994 implementing agreement.¹³

The Clinton Administration viewed the 1994 Agreement as legally binding, prevailing over the Convention in the event of a conflict, and meeting the objections of the United States.¹⁴ Thus, President Clinton submitted the Convention and the 1994 Agreement to the U.S. Senate for advice and consent in 1994.¹⁵ After submission to the Senate, the Convention lingered in the Foreign Relations Committee (SFRC) until the committee unanimously reported in favor of the Convention in 2004.¹⁶ However, the Senate had not voted to give its advice and consent to the treaty as of August 24, 2007.¹⁷ The SFRC's delay in reporting on the Convention and the further Senate delay in giving advice and consent on the Convention have in large part resulted from the ability of key LOSC opponents to use Senate procedures to stall the Convention's progress.¹⁸

By late summer 2007, 155 countries had ratified the Convention and 130 countries had ratified the 1994 Agreement.¹⁹ Among industrialized countries, only the United States has failed to join the Law of the Sea Convention.²⁰

Be likely to receive the advice and consent of the Senate, e.g. the convention should not contain provisions for the mandatory transfer of private technology and participation by and funding for national liberation movements[.]

James E. Mielke, Congressional Research Service, *Deep Seabed Mining: U.S. Interests and the U.N. Convention on the Law of the Sea* (2005) (citing Statement by the President, U.S. Policy and the Law of the Sea (Jan. 29, 1982), in DEP'T ST. BULL., Mar. 1982, at 54; White House Fact Sheet [accompanying Presidential Statement], Jan. 29, 1982, *id.* at 54-55) available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-230:1>; see also Carter, *supra* note 9, at 836; Murphy, *supra* note 8, at 339; Caron, *supra* note 3.

¹² Murphy, *supra* note 8, at 339.

¹³ See Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, S. TREATY DOC. NO. 103-39, at 263 (1994), 1836 U.N.T.S. 41; Murphy, *supra* note 8, at 339-40.

¹⁴ See Mielke, *supra* note 11 (describing the original objections to the Part XI and how the 1994 Agreement satisfied those objections). For further analysis of the 1994 Agreement, see Bernard H. Oxman, *The 1994 Agreement and the Convention*, 88 AM. J. INT'L L. 687 (1994) (concluding that the 1994 Agreement "substantially accommodates the objections of the United States and other industrial states to the deep seabed mining provisions" of LOSC).

¹⁵ S. TREATY DOC. NO. 103-39 (1994).

¹⁶ See S. EXEC. REP. 108-10 (2004).

¹⁷ See Status of the United Nations Convention on the Law of the Sea, www.un.org/Depts/los/reference_files/status2007.pdf (last visited Aug. 24, 2007).

¹⁸ Caron, *supra* note 3 (describing how after the SFRC's unanimous report in favor of LOSC, members of the Senate blocked placement of LOSC on the unanimous consent calendar); Gaffney, *supra* note 7 (describing Senate opposition to LOSC in 2004); Savage, *supra* note 7 (stating Senator Helms refused to give LOSC a hearing in the Senate).

¹⁹ See Status of the United Nations Convention on the Law of the Sea, *supra* note 17.

²⁰ See Carter, *supra* note 9, at 836; Murphy, *supra* note 8, at 365 (parties to the Convention include "virtually all North Atlantic Treaty Organization . . . states, China, and Russia").

Critics of the Convention tend to argue along two lines. First and most prominently, they argue that LOSC poses significant threats to American sovereignty.²¹ The Convention, they would say, puts the United States under the oversight of unaccountable U.N. institutions in areas of national importance, such as counterterrorism²² and environmental concerns.²³

For example, article 110 of the Convention provides five justifications for a warship to board a foreign ship on the high seas but does not include suspicions of terrorism or weapons of mass destruction among them.²⁴ Therefore, when a U.S. warship received reliable information that a certain foreign ship was transporting a nuclear weapon to a terrorist organization and the U.S. warship seized the foreign ship on the high seas, the International Tribunal for the Law of the Sea (“ITLOS”) could find the United States in violation of the treaty and order the release of the foreign ship.²⁵

A proposed way out for the United States from this scenario is the Convention’s exemption of “military activities” from the jurisdiction of ITLOS. However, the Tribunal has the final say whether an activity is “military” because the term is left undefined in the Convention’s text and because the ban on reservations to the Convention would prevent the United States from fully protecting itself from ITLOS supervision.²⁶ Regardless of whether the United States would ultimately be found to have violated the Convention, critics argue ITLOS supervision would hinder U.S. security interests.²⁷

²¹ Gaffney, *supra* note 7 (“[T]his accord would constitute the most egregious transfer of American sovereignty, wealth, and power to the U.N. since the founding of that “world body.”).

²² See Jeremy Rabkin, *The Law of the Sea Treaty: A Bad Deal for America*, COMPETITIVE ENTER. INST., June 1, 2006, at 4, available at <http://www.cei.org/pdf/5352.pdf>.

²³ David Ridenour describes LOSC Article 212 requiring states to adopt laws to “prevent, reduce and control pollution of the marine environment” as “Kyoto Protocol-style regulations.” David A. Ridenour, *Ratification of the Law of the Sea Treaty: A Not-So-Innocent Passage*, NAT’L POLICY ANALYSIS, <http://www.nationalcenter.org/MPA542LawoftheSeaTreaty.html>. Also, Jeremy Rabkin gives some examples of how the Convention could complicate U.S. environmental concerns. For instance, he describes how the Seabed Authority established by the Convention has already been urged to regulate “bioprospecting for commercial applications of new species,” a practice that scientists believe may offer keys to developing new cancer or antibiotic drugs. He also cites an Irish claim against the United Kingdom to prevent the building of a nuclear power plant that may indirectly affect marine life in Irish waters as evidence of how the convention could be used to infringe on U.S. interests. See Rabkin, *supra* note 22, at 9.

²⁴ See LOSC, *supra* note 2, art. 110.

²⁵ See Savage, *supra* note 7. For further discussion of this scenario, see Rabkin, *supra* note 22, at 4-5 (discussing possible U.S. justifications for seizure of foreign ship in this scenario, e.g., that foreign ship’s actions were akin to piracy; also discussing possible seizure of U.S. vessel engaged in intelligence gathering); Ridenour, *supra* note 23.

²⁶ Goldsmith, *supra* note 5.

²⁷ David Ridenour also noted that intelligence collection and other uses of Autonomous Underwater Vehicles and Remotely Operated Underwater Vehicles would be hindered by Article 20 of LOSC that requires “submarines and all other underwater vehicles” to surface within a foreign state’s territorial waters. Whereas submarines may not be affected by Article 20 due to 48 years of customarily passing through territorial waters submerged, unmanned vehicles have no such custom to shade interpretation of Article 20. See Ridenour, *supra* note 23.

Second, critics of the Convention believe that it is unnecessary to promote U.S. interests. Despite not having joined the Convention, the United States regards most of the provisions in the 1982 Convention as already being customary international law.²⁸ Because most Convention provisions, such as the five justifications for boarding foreign vessels discussed above, are already customary international law, these “superfluous” guarantees do not outweigh the corresponding cost to national sovereignty.²⁹ Moreover, they argue, most true benefits the Convention provides, *e.g.*, passage rights through a strait or environmental protections, could be obtained through bilateral negotiations or existing international organizations such as the United Nations Environment Programme.³⁰

On the other hand, supporters of the Convention argue that it offers direct national security and economic benefits while also providing the United States with a further leadership role in world affairs.³¹ The Convention strengthens the U.S. interest in national security, they argue, *inter alia*, by establishing legal certainty of U.S. sovereignty over territorial waters extending twelve miles from shore and the U.S. military’s right to naval mobility, notably passage through straights and archipelagic states such as Malaysia and Indonesia.³²

Along with these benefits, the criticism of the Convention on national security grounds may be overstated. The Convention does provide several means to intercept foreign ships suspected of carrying weapons of mass destruction, even though boarding on the high seas may be questionable.³³ Finally, many supporters believe the United States could avoid the controversial oversight by the International Tribunal on the Law of the Sea through a series of declarations and understandings made when the United States joins the Convention.³⁴

²⁸ See Murphy, *supra* note 8, at 340 (citing generally S. TREATY DOC. NO. 103-39).

²⁹ Rabkin, *supra* note 22, at 4.

³⁰ See Caron, *supra* note 3 (quoting Jeane Kirkpatrick’s testimony before the Senate Armed Forces Committee).

³¹ For counterpoints to most arguments against LOSC, see David B. Sandalow, *Law of the Sea Convention: Should the U.S. Join?*, BROOKINGS INST., Aug. 2004, available at <http://www.brook.edu/comm/policybriefs/pb137.pdf>. For general discussion about the influence of LOSC on the rule of law, see Bernard H. Oxman, *The Rule of Law and the United Nations Convention on the Law of the Sea*, 7 EUR. J. INT’L L. 353 (1996).

³² See Clark, *supra* note 5; Lawrence S. Eagleburger & John Norton Moore, *Opportunity on the Ocean*, WASH. POST, July 30, 2007, at A15; Negroponte, *supra* note 5. Also, John Moore has said that the price the U.S. has paid in national security for not having ratified LOSC can be seen in Malaysia and Indonesia having refused to join a U.S.-led agreement on interdicting ships suspected of smuggling nuclear weapons because the U.S. is not a member of LOSC. See Savage, *supra* note 7.

³³ See Marjorie Ann Browne, Congressional Research Service, *The U.N. Law of the Sea Convention and the United States: Developments Since October 2003*, at 6 (2004) (quoting Legal Advisor William H. Taft IV during hearings before the Senate Armed Services Committee saying, “The Convention will not affect our efforts . . . to interdict vessels suspected in the proliferation of weapons of mass destruction . . . The Convention recognizes numerous legal bases for taking enforcement action against vessels . . . for example, exclusive port and coastal State jurisdiction . . . exclusive flag State jurisdiction . . . and universal jurisdiction over stateless vessels.”)

³⁴ See Letter from Former Legal Advisors Herbert J. Hansell et al. to Senators William H. Frist et al. (April 17, 2004) in 98 AM. J. INT’L L. 307, 308 (2004) (stating that while reservations are prohibited under the

The Convention also provides direct economic benefits by granting the United States jurisdiction over territory greater than its current land area while allowing the United States to counter excessive territorial claims of other states.³⁵ Through this expansion, the Convention would provide the United States with certain economic opportunities to develop natural resources, *e.g.*, oil and natural gas.³⁶ The Convention also provides for exclusive economic control over an area reaching 200 miles from shore.³⁷ Joining the treaty would allow the United States to guarantee its control over this 200-mile zone, while also allowing the United States to dispute the over 100 excessive claims of other states around the world that currently infringe on U.S. interests.³⁸

Finally, many supporters of the Convention argue that the United States should take a leadership role in the development of internationally recognized rights under the Convention because this would allow the United States to shape those rights to its interest, reiterate the U.S. commitment to the international rule of law, and encourage other states to abide by the Convention.³⁹

Some have suggested that this last point, restoring the leadership role and image of the United States in world affairs, may hint at why the Bush administration has pushed the Law of the Sea Convention in recent years.⁴⁰ The implication is that President Bush is searching for a way to improve the image of the United States abroad in the wake of Iraq. However, the Bush Administration initially announced its support for LOSC in the immediate wake of September 11, 2001, a fact suggesting the administration identifies the treaty with national security and the related freedom of navigation concerns.⁴¹

Given the administration's six years of support for LOSC and the broad array of LOSC supporters,⁴² it is likely that the President has placed his personal support behind LOSC in order to achieve something more significant than image restoration. With the

Convention, the U.S. "will make it clear in an understanding" that the U.S. alone will judge what constitutes its military activities under LOSC).

³⁵ See Clark, *supra* note 5; Negroponce, *supra* note 5.

³⁶ See Paul L. Kelly, Senior Vice President, Rowan Companies, Inc., Presentation at the Global Offshore Drilling 2005 Conference: Evaluating the Impact of the Law of the Sea Treaty on Future Offshore Drilling (Apr. 19, 2005).

³⁷ See LOSC, *supra* note 2, arts. 56-57.

³⁸ See Testimony of John Norton Moore, *U.N. Convention on the Law of the Sea: Hearing on S. Treaty Doc. No. 103-39 Before the S. Comm. on Foreign Relations*, 108th Cong. 10 (2003) available at <http://www.senate.gov/~foreign/testimony/2003/MooreTestimony031014.pdf>; James C. Kraska, Commander, JAGC, U.S. Navy, Panel Presentation at the Symposium in Remembrance of Lous B. Sohn at The George Washington University School of Law: The Law of the Sea Convention: A National Security Success (October 24, 2006).

³⁹ See Moore, *supra* note 38; Murphy, *supra* note 8, at 365-67 (summarizing statements of William H. Taft, IV); Letter from Former Legal Advisors, *supra* note 34.

⁴⁰ See Gaffney, *supra* note 7; Savage, *supra* note 7.

⁴¹ John E. Noyes, *The United States, The Law of the Sea Convention, and Freedom of Navigation*, 29 SUFFOLK TRANSNAT'L L. REV. 1, 2 (2005) (citing 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))

⁴² Supporters of LOSC include the U.S. Navy, the American Petroleum Institute, the Center for Seafarers' Rights, and Greenpeace, among others. See Moore, *supra* note 38, at 2-3; Ridenour, *supra* note 22.

Democrats now in control of the Senate, President Bush may have renewed the push for ratification of the Convention to achieve national security and geopolitical objectives his own party had blocked.