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George Galdorisi
U.S. Navy

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Captain George Galdorisi, U.S. Navy

THE LONG-AWAITED ADOPTION OF THE 1982 United Nations Convention on the Law of the Sea represents a watershed for the maritime interests of the international community. The Convention, the final result of the largest single international negotiating process ever undertaken, has enormous implications for the conduct of maritime affairs among nations. As the world's leading maritime state, the United States has a huge stake in the Convention.

In the pre-Convention environment, much of the interaction between nations on the oceans was governed by customary international law. While not inherently bad, customary international law does not represent the desired end-state for the United States. There are significant dangers in relying heavily on customary international law to support U.S. uses of the oceans, and especially to guarantee the unhampered movement of its naval forces. Customary law is inherently "fuzzy around the edges" and vague on details. It is constantly evolving, through a process of claim and counter-claim, and accordingly it represents a very unstable

Captain Galdorisi is the Chief of Staff for Commander, Cruiser Destroyer Group Three, currently embarked in USS *Carl Vinson* (CVN 70). He is a helicopter aviator and amphibious warfare officer who has commanded helicopter squadrons HSL 41 and HSL 43, the amphibious assault ship USS *Cleveland* (LPD 7), and Amphibious Squadron Seven. A 1970 graduate of the U.S. Naval Academy, he holds master's degrees in oceanography from the Naval Postgraduate School and in international relations from the University of San Diego. He graduated from the colleges of Command and Staff and of Naval Warfare at the Naval War College with highest distinction and is a graduate of the MIT Sloan School's Program for Senior Executives. He received the Navy League's Alfred Thayer Mahan Award for Literary Achievement in 1993 and the Naval War College's Admiral John Hayward Award for Academic Achievement in 1994. He has published one monograph, *The United States and the 1982 Law of the Sea Convention: The Cases Pro and Con*, as well as numerous professional journal articles on the law of the sea. This article is adapted from segments of Captain Galdorisi's forthcoming *Beyond the Law of the Sea: New Directions for U.S. Oceans Policy* (Greenwood).

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landscape. Some states, especially newly independent ones, do not even recognize customary international law; they view it as having been formed, frequently, without their participation or consent and as promoting the interests of developed nations—often former colonial powers—without considering and reflecting those of the developing world.[1] Finally, as legal scholars have noted, governments are more inclined to respect obligations to which formal consent has been given by the highest political authorities.[2]

In an effort to rectify the weaknesses of customary international law, as well as the weaknesses of the few already existing maritime treaties, the community of nations began four decades ago a series of conferences on the law of the sea. The first was held in 1958 and resulted in four conventions. A second conference was held in 1960 but produced no new conventions. A third conference—the Third United Nations Conference on the Law of the Sea, or UNCLOS III—was convened in 1972, and frequent negotiations continued over the course of a decade. Throughout all these years of detailed law of the sea discussions, the United States was deeply involved, one of the prime movers.

The final Law of the Sea Convention, presented for signature in 1982, codified existing practice and established new norms of international law in many areas of oceans policy. Dozens of issues were addressed in the 320 articles and nine annexes of the final document; they included coastal jurisdiction and management in territorial seas, contiguous zones, and a two-hundred-mile exclusive economic zone; marine passage and overflight through straits and archipelagoes used for international navigation; a special status for archipelagic states; management of fisheries under the high seas and under exclusive economic zones; coastal and flag-state jurisdiction over vessels for the purpose of preventing environmental disasters; the general ocean environmental obligations of states, and their right to conduct ocean science research; the creation of a system for managing the exploitation of deep-seabed minerals; and dozens of others.[3] The table at the end of this article lists the key features of the Convention, as reflected in United Nations publications.[4]

The 1982 treaty is, in many ways, a model for international accords in the post–Cold War world. It contains several fundamental compromises between the major powers and the developing world, notably the "transit passage" regime through international straits, negotiated to offset extension of the maximum territorial sea to twelve nautical miles.[5] It also applies the principles of the "common heritage of mankind" as a guiding philosophy in regard to the exploitation of the deep seabed's mineral resources.[6] At the end of the negotiating process the Convention had become much more than a piece of paper—it was an international state of mind. It created new international law, codified much of what had been merely customary in the law of the sea, and established new norms for the negotiation of multistate agreements.[7]

The United States Position on the Convention

When the Convention was finally voted on and subsequently opened for signature in 1982, the United States opted to vote against it and then not to sign it because of dissatisfaction with the deep-seabed mining provisions in Part XI, especially the provisions for the sharing of profits and of technology, as well as the lack of guarantees that the United States and other mining nations would have a sufficient voice in decisions. This decision was a great disappointment to large segments of the international community; to much of the world it appeared that the United States wanted to select among the benefits of the treaty without accepting its negotiated compromise positions. However, Great Britain, France, Japan, Canada, and the USSR also did not sign the Convention.

The American position was rearticulated in a 1984 article by Ambassador James Malone, who had been President Ronald Reagan's chief negotiator at the final sessions of the Law of the Sea Conference. Ambassador Malone made a particularly pointed attack on the Convention: "Let me state very emphatically that the United States cannot and will not sign the United Nations Convention on the Law of the Sea. The treaty is fatally flawed and cannot be cured. In its present form it presents a serious threat to U.S. vital national interests and, in fact, to global security. Once more, it is inimical to the fundamental principles of political liberty, private property, and free enterprise. The administration firmly believes that those very principles are the key to economic well-being for all countries—developing as well as developed."[8]

Nevertheless, a decade later, in October 1994, President William Clinton submitted the United Nations Convention on the Law of the Sea, and with it a 1994 Agreement Relating to the Implementation of Part XI of the Convention, to the Senate for its advice and consent. The president said, in part, that "the United States has basic and enduring national interests in the oceans and has consistently taken the view that the full range of those interests is best protected through a widely accepted international framework governing the uses of the seas. Since the 1960s, the basic U.S. strategy has been to conclude a comprehensive treaty on the law of the sea which will be respected by all countries. Each succeeding Administration has recognized this as the cornerstone of U.S. oceans policy. Following adoption of the Convention in 1982, it has been the policy of the United States to act in a manner consistent with the provisions relating to traditional uses of the oceans and to encourage other countries to do likewise. . . . Early adherence by the United States to the Convention and the Agreement is important to maintain a stable legal regime for all uses of the sea, which covers more than 70 percent of the surface of the globe. Maintenance of such stability is vital to U.S. national security and economic strength."[9]

Why the Administration Accepted the Convention

The 1984 statement by Ambassador Malone and the 1994 statement by President Clinton represent radically different viewpoints on the Law of the Sea Convention. Substantial political, economic, security, and ideological changes all coalesced to impel the executive branch to come "on board" with the Convention. The recent Agreement rectified the objectionable deep-seabed mining provisions of the Convention, and it was a necessary condition for the change; however, it was not in itself sufficient. Ten other primary factors account for why the Clinton administration became a strong advocate of the Convention, submitting to the Senate the Convention and the Agreement for accession and ratification, respectively. These reasons illuminate the new security imperatives that the United States faces at the end of the century.

A New, More Reasoned Environment. The first reason for the change in the administration's position on the Convention was simply the passage of time. The early 1980s debate on the Convention within the United States was impassioned and strident. Many individuals both inside and outside government staked their careers on their opposition to, or advocacy of, the treaty. The principled decision by the Reagan administration to not sign the Convention further polarized the treaty's supporters and detractors. Subsequently, most of the individuals involved moved on to other pursuits, and emotions on the subject became less sharp; in time, as a result, personalities had less effect than a decade ago on decisions regarding the Convention.[10] In this more reasoned environment, agencies within the executive branch, principally the departments of State and Defense, had an opportunity to revisit the instrument. This objective review led Secretary of State Warren Christopher and Secretary of Defense William Perry in July 1994 to send a joint letter to the chairman of the Senate Foreign Relations Committee, Claiborne Pell: "Becoming a Party to the Law of the Sea Convention," they urged, "is in our national interest in all respects."[11]

An Outsider Looking In. The second reason was the sense of urgency engendered by the sixtieth ratification (by Guyana) of the Convention, on 16 November 1993; by the terms of the treaty, it would come into force a year later. For the United States, this ratification changed the treaty from a future "might be" to a concrete international protocol that demanded a place on the agenda. The Clinton administration had to weigh the very real prospect of being an outsider looking in at a completed treaty process, a prospect that was particularly unattractive in terms of leverage as the Convention began its implementation phase.

The penalties for "jumping in late" became apparent to the United States once the treaty in fact came into force, on schedule, for states that had ratified or

acceded to it. Many Americans had recognized by this time that, comprehensive as it is, the Convention provides a framework for future negotiation in the international arena. One of the fora for these negotiations will be the International Maritime Organization, where supplemental international regulations, particularly regarding navigation and overflight, will be decided.[12] Another is the International Tribunal for the Law of the Sea, to be established in Hamburg, Germany, as the international agency adjudicating law of the sea issues; only states that are parties to the Convention can provide, or vote on, the twenty-one members of the Tribunal.[13] Thus there was within the executive branch renewed impetus to secure the advice and consent of the Senate; the result was a series of vigorous congressional briefings by an interagency task force chaired by the National Security Advisor.

The Deep-Seabed Mining Regime. The third reason for the change in position on the Law of the Sea Convention was the changing situation in the deep-seabed mining industry and in the structure of the Convention with respect to that subject. In the course of the 1980s and early nineties it became clear that a broadly acceptable regime could be achieved only by altering the Convention to remove, or at least minimize, the fundamental objections—philosophical, commercial, and operational—of the United States and other developed nations. But it was also vital that any modifications to the Convention safeguard the primary concerns of the developing countries, in particular the basic principle that the resources of the deep seabed beyond the limits of national jurisdiction are the "common heritage of mankind."

In an effort to gain consensus among both developing and developed states regarding deep-seabed mining, the Secretary-General of the United Nations, Javier Perez de Cuellar, initiated informal negotiations in July 1990 between representatives of some of the major participants in the UNCLOS negotiations. The Secretary-General acknowledged that certain aspects of the deep-seabed mining provisions had prevented some states from ratifying or acceding to the Convention and that therefore it was necessary to make it a more useful and workable regime for both developing and developed nations.[14] Fifteen meetings were convened, from 1990 to 1994. The first phase of consultations was to identify issues, select an approach for examining them, and search for solutions; the second phase gave more precision and definition to the results of the first phase and raised additional points for consideration. There was general agreement that any modifications had to be put into place before the 1982 Convention entered into force, in order to avoid the constitutional and treaty law complexities of amending the Convention through its own procedures.[15]

As the Secretary-General's consultations progressed, with the United States playing an increasingly proactive role, a consensus gradually emerged, captured

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in the so-called "Boat Paper," cobbled together by a caucus of developing and developed nations and first distributed in August 1993. Its successive versions offered substantive changes that were intended to make Part XI of the Convention acceptable to the nations that had reservations to it, while simultaneously satisfying the intricate procedural requirements of international treaty law and national constitutions. The consensus was finally embodied in the Agreement adopted by the General Assembly at a Special Resumed Session on 28 July 1994.[16]

This "Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982" is a treaty instrument that introduces significant changes to the seabed mining regime of the Convention. Although it does not use the term "amendment," its clear intent and unmistakable effect is to amend substantially Part XI of the Convention. The Agreement (Article 2) states that it and Part XI are to be interpreted and applied as a single instrument but that in case of inconsistency the provisions of the Agreement shall prevail.[17]

Through this innovative treaty law device, an unbreakable link was established between the Agreement and the 1982 Convention such that there would be no possibility of competing regimes on seabed mining. In essence, it was now impossible for a state to be a party to the Agreement without also becoming a party to the Convention. As well, the states that had ratified the Convention before the adoption of the Agreement could express their consent to be bound by the Agreement through a simplified procedure avoiding possible domestic constitutional constraints.[18]

This well crafted solution to what had seemed an intractable impasse led to rapid and positive response on the part of developed nations in general and the United States in particular. The Agreement was opened for signature on 29 July 1994 and was quickly signed by over sixty-nine states, including all of the world's major industrial powers—the United States, Germany, Japan, France, Italy, the United Kingdom, and others—as well as the European Union. U.S. State and Commerce department law of the sea experts judged that the Agreement "more than" met the original American requirements for the deep-seabed mining regime.[19] For example, the National Oceanographic and Atmosphere Administration (NOAA) argued that "the Agreement modifying Part XI addresses the specific objections to Part XI raised by the United States in 1982. It also goes further than those specific concerns. The Agreement does eliminate the most onerous and economically unworkable provisions of Part XI. It also significantly changes the basic orientation of that Part. The Agreement incorporates free market principles, including considerations of cost-effectiveness and efficiency, and provides for the functioning of institutions of the regime—and development of regime requirements—on an incremental, as-needed basis, taking into account the existing economic circumstances."[20]

American acceptance of the Agreement Relating to the Implementation of Part XI of the Convention was a vital step, in that this instrument removed the objectionable deep-seabed mining provisions of the original Convention. In turn, the Agreement itself had been facilitated by substantial changes in market conditions over the previous decade and a half.

Deep-seabed mining had emerged as an issue during the late 1960s and the early 1970s, as speculation increased regarding the potential to mine mineral deposits on the deep ocean floor. The potential economic advantages of seabed vis-à-vis land mining were perceived to include low labor costs, the absence of drilling or excavation expenses, and relatively low transportation costs.[21] In a 1967 address to the UN General Assembly, Ambassador Arvid Pardo of Malta estimated (based on what he later acknowledged had been "hasty calculations") that by 1975 a new international agency responsible for seabed mining would have at least five billion dollars available, after expenses, for further development purposes.[22]

By the early 1980s, many were predicting a major boom in the mining of deep-seabed nodules of cobalt, manganese, nickel, copper, and other minerals. The enthusiasm for deep-seabed extraction was not restricted to mining companies and consortia. Mathematical models constructed by scientists and engineers at the Massachusetts Institute of Technology, for example, predicted a basic return on investment of 18 percent.[23] Two respected academics, R.R. Churchill and A.V. Lowe, opined in 1983 that "there are sufficient recoverable deposits [on the deep seabed] to offer a high level of self-sufficiency in the main minerals derived from them to States capable of exploiting them, with the consequent benefits to the balance of payments of those States, and the strategic advantage of lessening dependence upon foreign land-based deposits."[24]

Later research, however, indicated that such optimistic predictions were premature—by several decades. By the early nineties, the prospect for economically feasible deep-seabed mining of nodules any time soon had become remote, due primarily to the discovery of substitutes for many materials and the ample availability of land-based supplies.[25] Writing for the independent Panel on the Law of Ocean Uses in 1994, Professor Jonathan Charney of Vanderbilt University commented, "The likelihood of early deep sea-bed mining for minerals is bleak. Recent economic conditions and the use of substitutes have depressed minerals demand, while alternative cheaper land-based sources of some nodule minerals have been identified. There is little doubt that the market will not make deep sea-bed mining economically viable before 2025 and probably much later than that."[26] In any case, it appeared that should seabed mining of nodules ever become of genuine strategic importance to the United States, or market prices improve, plentiful quantities were available in the shallow waters of national two-hundred-mile exclusive economic zones.[27] (Deep-seabed mining has, in fact, yet to occur.)

By 1993 and 1994 it was evident in the White House that while promising sites had been identified by various companies, which understandably wished to protect their investments, the demand for the metals (especially nickel and copper) principally responsible for interest in manganese nodules both was depressed and could be satisfied for some time to come by sources on land. These metals can be stockpiled, and concern had abated about investment in, and stable supply from, mines.[28] Writing in the authoritative *American Journal of International Law*, Bernard Oxman summed up the consensus view of the Panel on the Law of Ocean Uses: "Deep seabed mining did not exist when Part XI was negotiated. Many of the objectionable provisions of Part XI were negotiated on the assumption that such mining would become a commercial reality before the end of this century. Altered market conditions, exploitation of additional land-based sources, and improved efficiency of land-based mining now indicate that deep seabed mining, in the absence of artificial government subsidies, will not be economically feasible until well into the next century, if then. New sources of seabed minerals also have been discovered, some of which are located in exclusive economic zones."[29]

The view that seabed mining was no longer a sticking-point and that the Agreement more than adequately addressed previous concerns by U.S. and other Western nations was echoed in a wide range of presentations to conferences and congressional fora; it reflected a true interagency, executive branch consensus on this issue. Thus, the sea-changes in deep-seabed mining possibilities had done much to defuse this once-contentious issue for the United States; even those skeptical that the Agreement would remedy the deep-seabed mining regime of the Convention had little to be worried about. Even though editorials arguing against U.S. accession to the Convention continued, most of them seemed locked in the paradigm of the pre-Agreement regime and old ideologies.[30]

Leadership in Environmental Concerns. A fourth reason for the change in the American attitude toward the Convention was a new global attitude toward management of the environment. Part XII of the Convention deals extensively with the protection and preservation of the marine environment, covering a wide array of issues, from general principles to global and regional cooperation, technical assistance, monitoring and environmental assessment, and responsibility and liability.[31] The inclusion of strong environmental protection measures in the Convention was an early and enduring goal of the United States. In the decade following its completion, the U.S., along with many other nations, became even more interested in preserving the environment, to the point that such concerns in many cases supplanted economic considerations.[32] Given that Part XII creates an effective, if diffuse, international mechanism for controlling marine pollution and establishes a symbiotic relationship between the Convention and other

issue-specific agreements, the Clinton administration decided that agreeing to the Convention would ensure a stable regime for environmental protection.[33]

In the early nineties, Rear Admiral William Schachte, former Judge Advocate General of the Navy and an active participant in the United States UNCLOS III delegation, argued that the Convention provided a uniquely useful framework for addressing and resolving the environmental concerns of the United States. He asserted that the Convention was far superior to any of the numerous conventions and protocols addressing marine pollution that had been attempted over the past four decades, and that it struck a delicate balance between the naturally conflicting interests of maritime and littoral states on environmental issues.[34] This theme was reinforced in August 1994 congressional testimony by Rear Admiral John Shkor, Chief Counsel of the U.S. Coast Guard, who called the Convention "the glue that binds diverse maritime interests in the environmental field."[35]

As early as 1990, the Convention was being described as a framework for addressing environmental challenges. The Secretary-General of the United Nations, in a report that year on the status of the law of the sea, noted growing interest in improving the role and effectiveness of international environmental accords and in devising strategies to take better account of both resource depletion and the benefits of conservation. "Since the Convention on the Law of the Sea provides the necessary framework of rights and obligations for all ocean uses, its importance has been stressed in all discussions regarding the future development of international law and policy. . . . The time required to negotiate conventions and bring them into effect is of mounting concern for dealing with a number of environmental issues where rapid acceptance and implementation will be a distinct goal. Thus, there is a growing interest in such supplementary actions as provisional application of some or all treaty provisions; simultaneous adoption of recommendations that deal with selected convention subjects; and declarations of voluntary compliance."[36]

Environmental concerns were, accordingly, prominent in the decision by the Clinton administration to sign the Convention. In an address at the National Forum on Ocean Conservation, UNCLOS III negotiator Ambassador Elliot Richardson recalled that the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro (better known as the 1992 Earth Summit, attended by 170 states) had taken up the protection of the oceanic environment as one of its principal concerns. It had set forth, in "Agenda 21," a forty-chapter plan with several hundred action items for the protection of the oceans, seas, and coastal areas, as well as for the protection, development, and rational use of their living resources. The 1982 Law of the Sea Convention, Ambassador Richardson remarked, embodies principles that would support consensus on such issues.[37] Clearly, he argued, the United States needed to be a

party to the Convention if the nation was to retain a leadership role in environmental concerns and deliberations.

A New Pragmatism—and UN Sensitivity. A fifth reason was the changing U.S. relationship with the developing world. With the end of the Cold War, the United States and most of the Third World came to view their mutual interests as important and durable. American interactions with the developing world now tended to be not the polarized standoffs of the 1950s through the late 1970s but, quite commonly, humanitarian and relief undertakings. The strident anti-American rhetoric that had marked the years when the original treaty was being negotiated, and that had caused a substantial portion of the developing world to align itself against American desires, had been replaced by a more pragmatic approach. By the early 1990s, this rapprochement with the developing world had opened a window of opportunity for the United States.

Closely tied to the fifth cause for the change in the United States position was a sixth: strong signals by the United Nations of a willingness to be sensitive to the concerns of the developed nations, and of a specific desire that the United States be a full party to the Convention. This new attitude was a substantial change from that of previous decades, when the United Nations had often seemed a forum for "U.S.-bashing." The behind-the-scenes efforts, both extensive and intensive, between 1990 and 1994 that ultimately led to the Agreement were but one indicator of the willingness of the United Nations to address long-standing concerns on the part of the United States.

Naval Mobility. A seventh factor that underlay the new United States position on the Convention was the global security environment, specifically the increased importance of the oceans connecting the nation, its allies, and its major interests. Diminishing access to overseas bases, the many parts of the world that require naval presence because of continuing instability, and the growing maritime power of many developing nations with apparent regional ambitions pointed to the increasing importance for the United States of naval mobility. An essential element of such mobility is assurance that sea and air lanes of communication will remain open as a matter of international legal right—not at the sufferance of coastal and island nations along the route or in the area of operations.[38]

In the last two decades there had been a remarkable number of naval confrontations and boundary demarcation or fishing disputes: from 1974 to 1990, at least thirty-seven major demarcation disputes, fifteen noteworthy fishing disagreements, and thirty-one naval conflicts. Eighty-three percent of all U.S. military responses from 1946 to 1991 had involved naval forces, about half of them solely naval ones. Since the 1986 Goldwater-Nichols Act, with its emphasis on joint operations, fewer operations have been exclusively naval in character, but an even

higher proportion—95 percent—have involved naval units. Additionally, the focus of these efforts has overwhelmingly been in littoral waters. In all 270 instances of the employment of naval forces in crisis response from 1946 to 1991, they were used not to counter other naval forces but rather to oppose threats on land. The naval forces therefore had to operate in coastal waters, not the high seas, to project power from the sea onto the land.[39]

The years immediately preceding the entry into force of the Convention saw an increase in these disputes, ranging from the conflict among Southeast Asian nations over the Spratly and Paracel islands to Canadian and European embroilments over fishing rights. This trend made clear the value to the United States of a compact wherein each nation honored universally agreed-to rules and procedures that would ensure maritime and naval mobility.[40] The executive branch recognized that its ability to achieve maximum flexibility and mobility within the new global security environment would be greatly enhanced by accession to the 1982 Convention—for the legal stabilizing of the world's oceans and for its strong potential for minimizing and controlling disputes that might directly or indirectly prejudice U.S. political, economic, or defense interests.[41] While the lack of an established global regime had not by the early 1990s resulted in any specific, overt denial of U.S. transit rights through straits or archipelagic waters, the possibility was becoming more and more worrisome.[42]

Without international respect, it became apparent, for the freedom of navigation and overflight set forth in the Convention, the freedom of U.S. forces to project power could be jeopardized. Protracted disputes with littoral states could delay action; the time required for U.S. and allied or coalition forces to reach distant areas of conflict could lengthen; forces might arrive on the scene too late to make a difference; and deterrence would be weakened. For example, if prevented from transiting through the Indonesian archipelago and the Strait of Malacca, a carrier battle group enroute from Yokosuka, Japan, to Bahrain would have to steam around Australia. Assuming a steady fifteen-knot pace, a six-ship, conventionally powered battle group would require an extra fifteen days and over ninety-four thousand gallons of fuel to transit the additional 5,800 nautical miles. The added fuel cost alone would amount to over $3 million.[43]

An Austere U.S. Navy. An eighth reason that led the president to urge United States accession to the Convention was the dramatic decrease in the size of the U.S. Navy. It was apparent that as challenges to unhampered use of the oceans continued or increased, the Navy was becoming increasingly prominent in U.S. defense and foreign policy plans. In the former administration, President George Bush and the Chairman of the Joint Chiefs of Staff, General Colin Powell, had placed a strong premium on the use of the United States Navy to support the four

pillars of the National Security Strategy and the National Military Strategy—strategic deterrence, forward presence, crisis response, and force reconstitution—across the full spectrum from peace to war. That policy was reinforced by President Clinton and the present Chairman, General John Shalikashvili, in their respective updated strategies of 1994 and 1995.[44]

Further, it was argued, challenges to U.S. naval mobility would be most likely to arise from states occupying archipelagoes or straits, or from other maritime-oriented coastal nations.[45] Indeed, some analysts noted that the extension of sovereignty by coastal states over significantly larger ocean areas had led to dramatic growth in the number, size, and capabilities of navies.[46] Others predicted that over the next several decades the generic "small navy" would be defined as one designed specifically to realize the rights conveyed by the Law of the Sea Convention.[47]

These challenges came as the United States Navy was going through one of the most substantial downsizings in its history. Less than a decade before, the "600-ship navy" had been an organizing impulse; then, a 25 percent draw-down had envisioned a "Base Force" of about 450 ships; thereafter the U.S. Navy decommissioned ships at an even more accelerated pace and was to have by the end of 1995 only 367 ships. The Clinton administration's Future Years Defense Plan projected a navy of just over three hundred ships at the end of the century, with some influential analysts calling for even greater cuts.[48] Regardless of its precise final size, the U.S. Navy would clearly be a much more austere force to deal with the growing challenges. Maritime affairs, difficult enough even with the Convention, would be nearly chaotic without it; whereas, were the Convention strengthened by the adherence and formal support of the United States, disputes would probably be reduced in frequency and intensity. In practical terms, it seemed probable, the stresses upon a much-reduced U.S. Navy would be lessened by American accession to the 1982 Convention on the Law of the Sea.

"***Egregious Excessive Claims.***" A ninth reason that led the United States toward accession to the Convention was the growing political and military cost of the Freedom of Navigation (FON) Program. This effort, initiated by the Carter administration in 1979 and continued under presidents Reagan, Bush, and Clinton, combined diplomatic and operational (not solely naval) means to discourage claims violating the navigational freedoms asserted by the 1982 Convention—freedoms that the U.S. supported even though, for other reasons, it had not signed the treaty.[49] The FON program involved (and at this writing still does) naval exercises and consultations, bilateral and multilateral, with other governments to promote maritime stability, conformance with international law, and adherence by all nations to the customary rules and international law reflected in the Convention.

On the diplomatic front, since 1979 the Department of State had filed well over a hundred protests against maritime claims inconsistent with international law.[50] Over the same period, U.S. warships and aircraft had exercised rights and freedoms in all oceans, against objectionable claims by more than fifty countries, at the rate of some thirty or forty per year.[51] These attempts, by coastal and island states, included, but were not limited to, unrecognized historical-waters claims, improperly drawn baselines, territorial sea claims greater than twelve miles, security zones not provided for in the Convention, contiguous zones at variance with Convention provisions, exclusive economic zones that purported to negate or restrict navigation and overflight rights, archipelagic claims not conforming to the rules of the Convention, restrictions on innocent passage through territorial seas, requirements for advance notice of innocent passage, and restrictions on transit passage.[52]

Throughout the 1980s, with a large navy, the FON program worked reasonably well; by the early 1990s, however, the environment had changed significantly. With reduced naval and air resources, such a level of FON assertions was becoming difficult to sustain without limiting the operational flexibility of military forces. Additionally, other nations were reluctant to join in multilateral FON operations.

Even before the forces available to conduct FON missions began to dwindle, however, these excessive and illegal claims were causing the United States particular concern, because these U.S. responses to sovereignty claims were in turn eliciting strong and potentially dangerous reactions. For example, in August 1979 Soviet aircraft staged mock missile attacks against the destroyers USS *Caron* and USS *Farragut* as they conducted FON operations in the Black Sea. In August 1981, two Libyan Su-22 fighters attacked two U.S. Navy F-14s while the latter were conducting announced maneuvers sixty miles from the Libyan coast. In 1982 and again in 1987, Soviet forces interfered with the operations of U.S. naval frigates off Peter the Great Bay near Vladivostok. In February 1984, the destroyer USS *David R. Ray* was conducting FON operations in the Black Sea when Soviet aircraft fired cannon rounds into the ship's wake and a helicopter swooped within thirty feet of the ship's deck. In 1986, Ecuador interfered with a U.S. Air Force flight over the high seas 175 miles from the Ecuadorian coast. In 1986, two Cuban MiG-21 fighters intercepted a U.S. Coast Guard HU-25A Guardian flying outside Cuba's twelve–nautical-mile territorial sea, claiming it had entered the Cuban flight information region without permission. In March 1986, during FON operations in the Gulf of Sidra, Libyan missile installations fired on U.S. aircraft performing combat air patrol. In January 1988, two Soviet border guard vessels "bumped" the USS *Caron* and the cruiser USS *Yorktown*, which were demonstrating their right of innocent passage through the territorial sea off the Crimean Peninsula.[53] Finally, in April 1992 a Peruvian fighter aircraft intercepted and shot at a U.S. Air Force C-130 aircraft, killing one crewmember and wounding two

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others. Peru attempted to justify its action by asserting that the U.S. aircraft had been within its two-hundred-nautical-mile territorial sea and air space.[54]

This is just a sampling of excessive maritime claims and their sequels, but it represents the financial and diplomatic costs, as well of the risks, associated with the FON program. The case became compelling that such costs and risks would be substantially less under a specific, binding treaty.[55] Two noted experts on the law of the sea, J. Ashley Roach and Robert W. Smith, presented the position of the State Department in 1994: "Unilateral U.S. demonstrations of resolve—especially operational assertions—are sometimes viewed as antagonistic. They risk the possibility of military confrontation and of political costs that may be deemed unacceptable, with prejudice to other U.S. interests, including worldwide leadership in ocean affairs and support for use of cooperative, international solutions to mutual problems."[56]

In fact, many of the nations making claims that the U.S. considered excessive were asserting that the Convention was a legal contract, the rights and benefits of which were not necessarily available to non-parties—such as the United States. The continual counter-assertion that these rights and benefits were already embodied in customary international law was appearing more and more difficult to sustain. In testimony before the Senate Foreign Relations Committee in the summer of 1994, the chairman of the Department of Defense Task Force on the Law of the Sea Convention, John McNeill, pointed to the likelihood of "increasingly egregious excessive claims" by many coastal states as a critically important reason to seek U.S. accession to the Convention.[57] The danger of continuing to rely on the FON program was summed up by Rear Admiral William Schachte: "The political costs and military risks of the Freedom of Navigation Program may well increase in the changing world order."[58] Conversely, accession to the Convention, by the United States would, it was hoped, convince states making excessive claims to retract them and, perhaps more importantly, keep in check their natural desire to extend sovereignty to offshore areas, when it would be inimical to navigation and overflight rights.[59]

The "Preeminent Global Power." The tenth, and final, factor bearing upon the Clinton administration's decision to sign the Agreement and recommend accession to the Convention was its desire for the nation to retain leadership in maritime affairs generally. Rear Admiral Schachte went so far as to say that "as the preeminent global power in the 1990s and beyond, the United States is uniquely positioned to assume a more visible leadership role in achieving a widely accepted international order to regulate and safeguard the many and diverse activities and interests regarding the world's oceans."[60]

The Clinton administration realized that U.S. refusal to accede to a Convention widely regarded as one of the most important international agreements ever

negotiated would raise fundamental questions regarding not only the future legal regime applicable to the world's oceans but also the overall role of the United States. By actively promoting "leadership for peace" in the politically and economically important matter of rationalizing maritime laws and regulations, the United States hoped to be able to ensure itself a major role in shaping a post-hegemonic global order.[61] Conversely, the White House recognized that if the United States remained outside the Convention, it would not be in a position to influence the treaty's further development and interpretation, transition, and refinement.[62] More broadly, continued mute opposition seemed likely not only to jeopardize important national interests in the law of the sea but also to be seen as an implicit rejection of the very goal of world order through international law. In even less charitable eyes, it might be construed as a belief that unilateralism is a viable policy when backed by military force.[63] It appeared that full participation in the Convention offered an opportunity to exercise world leadership in a context far broader than had been possible during the Cold War.

Clearly, the totality of these ten factors support the decision that accession to the 1982 United Nations Convention on the Law of the Sea was in the best interests of the nation politically, economically, and strategically. The nation crossed a tremendous policy chasm in the decade between Ambassador Malone's attack on the Convention and its submission by President Clinton to the Senate for advice and consent. This action was taken only after exhaustive interagency review, and it represented a true consensus of the executive branch, particularly the departments of State and Defense. Now it is up to the "world's greatest deliberative body" to weave the Convention into the national security tapestry.

Key Features of the 1982 Law of the Sea Convention

- *Coastal states exercise sovereignty over their territorial sea, of up to twelve nautical miles in breadth, but foreign vessels are allowed peaceful "innocent passage" through those waters.*
- *Ships and aircraft of all countries are allowed "transit passage" through straits used for international navigation; states alongside the straits are able to regulate navigational and other aspects of passage, but passage cannot be suspended; passage includes aircraft overflight and submerged transit of submarines.*
- *Archipelagic states (made up of a group or groups of closely related islands and interconnecting waters) have sovereignty over a sea area enclosed by straight lines drawn between the outermost points of the islands; all other states enjoy the right of archipelagic passage (similar to transit passage) through designated sea lanes.*

- *Coastal States have exclusive resource exploitation rights in a two-hundred-nautical-mile exclusive economic zone (EEZ) with respect to natural resources and certain economic activities, and they may also exercise jurisdiction over marine science research and environmental protection.*
- *All other states have high seas freedoms of navigation and overflight in the EEZ, as well as freedom to lay submarine cables and pipelines.*
- *Landlocked and geographically disadvantaged states have the opportunity to participate in exploiting part of the EEZ's fisheries on an equitable basis when the coastal nation cannot harvest them all itself; highly migratory species of fish and marine mammals are accorded special protection.*
- *Coastal states have exclusive rights over the continental shelf out to at least two hundred nautical miles from the shore (and possibly more under specified conditions) to explore and exploit its resources.*
- *Coastal states must share with the international community part of the revenue they derive from exploiting resources from any part of their continental shelf beyond two hundred miles; a Commission on the Limits of the Continental Shelf makes recommendations to states on the shelf's outer boundaries beyond two hundred miles.*
- *All nations enjoy the traditional freedoms of navigation, overflight, scientific research, and fishing on the high seas; they are obliged to adopt, or cooperate with other states in adopting, measures to manage and conserve living resources.*
- *The territorial sea, EEZ, and continental shelf of islands are determined in accordance with rules applicable to other land territory, but features that could not sustain human habitation or economic life on their own have no economic zone or continental shelf.*
- *States bordering enclosed or semi-enclosed seas are expected to cooperate in managing living resources and environmental research policies and activities.*
- *Landlocked states have the right of access to and from the sea and enjoy freedom of transit through the territory of applicable coastal states.*
- *States are bound to prevent and control marine pollution and are liable for damage caused by violation of their international obligations to combat such pollution.*
- *All marine scientific research in the EEZ and on the continental shelf is subject to the consent of the coastal states, but they are obliged in most cases to grant consent to other nations when research is to be conducted for peaceful purposes and fulfills specified criteria.*
- *States are bound to promote the development and transfer of marine technology "on fair and reasonable terms and conditions," with proper regard for all legitimate interests.*
- *States are obliged to settle by peaceful means their disputes concerning the interpretation or application of the Convention.*
- *Disputes can be submitted to an International Tribunal for the Law of the Sea (to be established under the Convention), to the International Court of Justice, or to arbitration as selected by states party to the Convention. Conciliation is also available, and, in certain circumstances, submission to it is compulsory. The Tribunal has exclusive jurisdiction over deep-seabed mining disputes.*

Notes

1. U.S. Navy Dept., Office of the Judge Advocate General, "National Security Interests in the 1982 Law of the Sea Convention: A Reappraisal," briefing (delivered on various occasions), p. 32.

2. John Stevenson and Bernard Oxman, "The Future of the United Nations Convention on the Law of the Sea," *American Journal of International Law*, July 1994, p. 492.

3. *1982 United Nations Convention on the Law of the Sea*, United Nations Publication 1261 (1982), reproduced from UN Document/CONF.62/122 of 7 October 1982. The text also incorporates the two English corrections contained in UN Documents A/CONF.62/122/CORR.3 of 23 November 1982 and A/CONF.62/122/CORR.8 of 26 November 1982. See also Robert Friedheim, *Negotiating the New Ocean Regime* (Columbia, S.C.: Univ. of South Carolina Press, 1993), pp. 1–418, passim.

4. Biliana Cicin-Sain, ed., *Implications of Entry into Force of the Law of the Sea Convention for U.S. Ocean Governance* (Newark, Del.: Ocean Governance Study Group, 1995). This publication contains an excerpt from a United Nations press release detailing the benefits of the Convention.

5. R.R. Churchill and A.V. Lowe, *The Law of the Sea* (Manchester, U.K.: Manchester Univ. Press, 1983), p. 14. The width of the territorial sea has always been a contentious issue. The 1982 Convention set the limit of territorial waters at twelve miles in accordance with the trend clearly dominant in practice.

6. Martin Harry, "The Deep Seabed: The Common Heritage of Mankind or Arena for Unilateral Exploitation?" *Naval Law Review*, vol. 40, 1992, p. 210.

7. Churchill and Lowe, p. 16. Between 1973 and 1980, numerous negotiating drafts evolved, which allowed UNCLOS III committee members to voice their opinions. See also United Nations, *The Law of the Sea: Annual Review of Ocean Affairs, Law and Policy, Main Documents* (New York: 1993), pp. 3–28.

8. James Malone, "Who Needs the Sea Treaty?" *Foreign Policy*, Spring 1984, p. 83. Ambassador Malone served in a number of capacities as a Reagan administration expert on the law of the sea, first as Special Representative for the Third United Nations Conference on the Law of the Sea, later as Assistant Secretary of State for Oceans, International Environmental and Scientific Affairs, and finally as Chairman of the United States Delegation to the Law of the Sea Conference.

9. *Congressional Record*, 103rd Congress, 2d. Sess., 1994, S14475, Statement of the President, 6 October 1994, p. 1. Elsewhere in his transmittal letter the president outlined six key reasons arguing for the Senate's advice and consent:

> The Convention advances the interests of the United States as a global maritime power. It preserves the right of the U.S. military to use the world's oceans to meet national security requirements and of commercial vessels to carry sea-going cargoes. It achieves this, inter alia, by stabilizing the breadth of the territorial sea at 12 nautical miles, by setting forth navigation regimes of innocent passage in the territorial sea, transit passage in straits used for international navigation and archipelagic sea lanes passage; and by reaffirming the traditional freedoms of navigation and overflight in the exclusive economic zone and the high seas beyond. . . .
>
> The Convention advances the interests of the United States as a coastal State. It achieves this, inter alia, by providing for an exclusive economic zone out to 200 nautical miles from shore and by securing our rights regarding resources and artificial islands, installations and structures for economic purposes over the full extent of the continental shelf. These revisions fully comport with U.S. oil and gas leasing practices, domestic management of coastal fishery resources, and international fisheries agreements. . . .
>
> As a far-reaching environmental accord addressing vessel pollution, pollution from seabed activities, ocean dumping, and land-based sources of marine pollution, the Convention promotes continuing improvement in the health of the world's oceans. . . .
>
> In light of the essential role of marine scientific research in understanding and managing the oceans, the Convention sets forth criteria and procedures to promote access to marine areas, including coastal waters for research activities. . . .
>
> The Convention facilitates solutions to the increasingly complex problems of the uses of the ocean—solutions that respect the essential balance between our interests as both a coastal and a maritime nation. . . .
>
> Through its dispute settlement provisions, the Convention provides for mechanisms to enhance compliance by Parties with the Convention's provisions.

10. George Galdorisi and James Stavridis, "Time to Revisit the Law of the Sea?" *Ocean Development and International Law*, Fall 1993, p. 306.

11. U.S. Congress, Senate, Committee on Foreign Relations, *Current Status of the Convention on the Law of the Sea*, Hearings (Washington: U.S. Govt. Print. Off. [hereafter GPO], 11 August 1994).

12. Jan M. Lodel, "The Law of the Sea and National Security," address at the Georgetown University Law Center Symposium, "Implementing the United Nations Convention on the Law of the Sea: An International Symposium," Washington, D.C., 27 January 1995. Mr. Lodel, the senior representative from the Department of Defense at this well attended conference, concluded that "we risk losing our ability to speak with authority in the international arena if we fail to join the Convention. . . . The bottom line from the Department of Defense is this: The Law of the Sea Convention is a good deal. It is the result of long-standing bipartisan consensus. Now is the time for action. Let's join the Convention and move, smartly and confidently, into the future."

13. *Congressional Record*, 103rd Congress, 2d Sess., 1994, "Message from the President of the United States Transmitting the United Nations Convention on the Law of the Sea, with Annexes, Done at Montego Bay, December 10, 1982 ('The Convention'), and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, with Annex, Adopted at New York, July 28, 1994 ('The Agreement'), and signed by the United States, Subject to Ratification, on July 29, 1994," Treaty Document 103-39. Annex VI of the Convention contains comprehensive provisions for the composition and operation of the International Tribunal.

14. Tadao Kuribayashi and Edward Miles, eds., *The Law of the Sea in the 1990s: A Framework for Further International Cooperation* (Honolulu: Law of the Sea Institute Press, 1992), p. 15. The authors point out that although the United States was most closely associated with a revised seabed mining regime, other industrialized nations, most notably Japan, also presented strong arguments for amending Part XI of the Convention.

15. Doug Bandow, George Galdorisi, and M. Casey Jarman, *The United Nations Convention on the Law of the Sea: The Cases Pro and Con*, Law of the Sea Institute, Occasional Paper no. 38 (Honolulu: Law of the Sea Institute Press, 1995), p. 2.

16. United Nations, *The Law of the Sea*, p. 64.

17. Bandow et al., p. 4.

18. United Nations, *The Law of the Sea*, p. 68.

19. U.S. Congress, Senate, Committee on Foreign Relations, *Current Status of the Convention on the Law of the Sea*, Hearings (Washington: GPO, 11 August 1994), p. 17.

20. Karen Davidson, "Law of the Sea and Deep Seabed Mining: The Agreement Modifying Part XI of the U.N. Law of the Sea Convention," address at the Center for Oceans Law and Policy Symposium, "Toward Senate Consideration of the 1982 Law of the Sea Convention," Charlottesville, Va., 29–30 June 1995. Ms. Davidson represented the NOAA General Counsel.

21. James Morell, *The Law of the Sea: A Historical Analysis of the 1982 Treaty and Its Rejection by the United States* (Jefferson, N.C.: McFarland, 1992), p. 10. One of the earliest optimistic appraisals of the commercial potential of deep seabed mining operations was John Mero, *The Natural Resources of the Sea*, 1965. See also John Mero, "A Legal Regime for Deep Sea Mining," *San Diego Law Review*, vol. 7, 1970, p. 499.

22. Marne Dubs, "Minerals in the Deep Sea: Myth and Reality," *The New Order of the Oceans*, ed. Giulio Pontecorvo (New York: Columbia Univ. Press, 1986), pp. 85–121.

23. J.D. Nyhart and M.S. Traintafyllou, *A Pioneer Deep Ocean Mining Venture* (Cambridge, Mass.: MIT Press, 1983), pp. 1–255, passim; and interview with Prof. J. Daniel Nybart, Sloan School of Management, Massachusetts Institute of Technology, 28 October 1994. Professor Nyhart was one of the principal designers of the "MIT Model," completed in 1978 and revised in 1983, at the time the only public model for predicting deep-seabed mining yields and therefore used extensively by both industry and government. Some mining firms had their own models, but these were more limited and in any case proprietary. Professor Nyhart believes that many of the assumptions underlying the original 1978 model were erroneous, leading to exaggerated predictions of yields. See also Kuribayashi and Miles, p. 346; and William Brewer, "Deep Seabed Mining: Can an Acceptable Regime Ever Be Found?" *Ocean Development and International Law*, vol. 11, 1982, p. 42.

24. Churchill and Lowe, p. 155.

25. Ted McDorman, "Will Canada Ratify the Law of the Sea Convention?" *San Diego Law Review*, vol. 5, 1988, p. 540.

26. Jonathan Charney, "Provisional Application of the Agreement Relating to the Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea," unpublished research paper prepared for the Panel on the Law of Ocean Uses, 14 June 1994, pp. 1–12. (The Panel on the Law of Ocean Uses is an independent group of specialists in ocean law and policy, founded in 1983 to monitor developments in the law and practice of nations as they affect the evolution of international ocean law.)

27. Panel on the Law of Ocean Uses, "U.S. Interests in the United Nations Convention on the Law of the Sea," *Ocean Development and International Law*, vol. 21, 1990, p. 373. See also David Larson, "Deep Seabed Mining: A

Definition of the Problem," *Ocean Development and International Law*, vol. 17, 1986, p. 278. The need for much-improved market conditions if deep-seabed mining is to be economically viable was documented in the late 1970s. In congressional testimony in May 1977, Marne Dubs, of Kennecott Corporation and the American Mining Congress, estimated that it would require an investment of more than $2.5 billion between startup and commercial recovery for one site in the Clarion-Clipperton zone, between Hawaii and the U.S. West Coast (Larson, p. 278). Actually, a decade later the market price for most metal had fallen behind the production cost; it cost $3.50 to produce a ton of nickel whose average price was only $2.30 (James Wang, in Larson, p. 182).

28. Stevenson and Oxman, p. 488. Milton Drucker, of the U.S. State Department, makes the additional point that the strategic impact of deep-seabed mining has diminished dramatically due to such alternative sources of strategic materials as manganese and to new technologies that reduce the need for such minerals as cobalt (Kurihayashi and Miles, pp. 352–3).

29. Bernard Oxman, "United States Interests in the Law of the Sea Convention," *American Journal of International Law*, January 1994, p. 173. See, for example, testimony by David Colson and Karen Davidson, and presentations by Wes Scholz, Director of the Office of International Commodities, Bureau of Economic Affairs, Department of State, at the University of Virginia Center for Law and Policy on 23 May 1994 and at the Georgetown University Law Center International Symposium on Implementation of the United Nations Convention on the Law of the Sea on 27 January 1995.

30. See, for example, Doug Bandow, "Beware Part XI of the Sea Treaty," *San Diego Union*, 25 February 1994, p. 18, col. 3; William Safire, "LOST [Law of the Sea Treaty] Is Lost in a Foggy Bottom Fog," *San Diego Union*, 31 March 1994, p. 22, col. 1; and Woody West, "Latest U.N. Maritime Treaty Should Remain Lost at Sea," *Insight*, 30 May 1994, p. 40, col. 1. These three editorials present a one-sided argument against the treaty, referring to it by the pejorative acronym "LOST" though this abbreviation is found nowhere else in the literature.

31. Churchill and Lowe, p. 13.

32. Kuribayashi and Miles, pp. 401–6, especially commentary by Geoffrey Holland, Director General, Physical and Chemical Sciences Directorate, Department of Fisheries and Oceans, Government of Canada.

33. At the beginning of the UNCLOS III process, President Richard Nixon recognized the need for cooperation in attempts to stem marine pollution: "It is not possible for any nation, acting unilaterally, to ensure adequate protection of the marine environment. Unless there are firm minimum international standards, the search for relative economic advantage will preclude effective environmental protection" (Morell, p. 200). See also Clifton Curtis (Oceans and Biodiversity Political Advisor, Greenpeace International), "Environmental Interests," address at the Center for Oceans Law and Policy Symposium, "Toward Senate Consideration of the 1982 Law of the Sea Convention," 29–30 June 1995.

34. William Schachte, Jr. (RAdm., USN), "Special Report: The Value of the 1982 U.N. Convention on the Law of the Sea—Preserving Our Freedoms and Protecting the Environment," Council on Ocean Law, Washington, D.C., August 1991, pp. 4–8, and "National Security Interests in the 1982 U.N. Convention on the Law of the Sea," address at the Council on Ocean Law evening program, the Brookings Institution, Washington, D.C, February 1993, pp. 10–4. See also Churchill and Lowe, chap. 14, for a comprehensive listing of historical attempts to limit marine pollution.

35. John Shkor (RAdm., USCG), testimony, "Current Status of the Convention on the Law of the Sea," 11 August 1994. Admiral Shkor's testimony was quite specific regarding the benefits for the Coast Guard in its environmental-enforcement role: "The Convention is also a far reaching environmental accord addressing vessel source pollution, ocean dumping and land-based sources of marine pollution. As you know, the Coast Guard has recently embarked on a comprehensive, wide-ranging port State control program with the goal of purging our waters of substandard ships. This policy is in fact consistent with and supported by the Convention provisions that provide for port State enforcement competence. The Convention also prescribes a delicate balance between the rights of coastal States to adopt certain measures to protect the marine environment adjacent to their shores and the general right of a flag State to exercise prescriptive and enforcement jurisdiction over their vessels. It addresses State responsibility to curb all sources of marine pollution while requiring that all such regimes be consistent with navigation and other important maritime uses."

36. United Nations, *The Law of the Sea*, pp. 3–10. See also Biliana Cicin-Sain, "Reflections on UNCED: Emphasis on Oceans and Coasts," paper presented at the 29th annual conference of the Law of the Sea Institute, on "Sustainable Development and Preservation of the Oceans," 19–22 June 1995.

37. Elliot Richardson, "Beyond the Law of the Sea: Prospects for a Sustainable Ocean Environment," issued with the Council on Ocean Law, *Oceans Policy News*, January 1993, p. 4. See also Biliana Cicin-Sain and Robert Knecht, "Implications of the Earth Summit for Ocean and Coastal Governance," *Ocean Development and International Law*, vol. 24, 1993, pp. 323–51; Curtis, address; and J. Ashley Roach and R.W. Smith, *Excessive Maritime Claims*, International Law Studies, vol. 66 (Newport, R.I.: Naval War College Press, 1994), p. 263. The introduction to Chapter 17 of UNCED's "Agenda 21" begins, "International law as reflected in the Law of the Sea Convention sets

forth rights and obligations of States and provides the international basis upon which to pursue the protection and sustainable development of the marine and coastal environment and its resources."

38. *Current Status of the Convention on the Law of the Sea*, p. 79; the 1993 DOD Ocean Policy Review Paper is presented therein.

39. Ken Booth, *Law, Force, and Diplomacy at Sea* (London: George Allen and Unwin, 1985), p. 172. See also Galdorisi and Stavridis, pp. 301–15; George Galdorisi, "The United Nations Convention on the Law of the Sea: A National Security Perspective," *American Journal of International Law*, January 1995, p. 209; and Edward A. Smith, Jr. (Capt., USN), "What '. . . From the Sea' Didn't Say," *Naval War College Review*, Winter 1995.

40. Fred Ikle and Albert Wohlstetter, *Discriminate Deterrence: Report of the Commission on Integrated Long Range Strategy* (Washington: GPO, 1988), p. 16.

41. Panel on the Law of Ocean Uses, p. 373.

42. U.S. State Dept., Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas: United States Responses to Excessive Maritime Claims*, State Department Publication 112 (Washington: 1992), p. 2.

43. U.S. Defense Dept., *National Security and the Convention on the Law of the Sea* (Washington: 1994), p. 10. This theme was reinforced at numerous symposia by high-ranking civilian and military DOD officials, who stressed the critical importance of navigation and overflight rights, especially through strategic straits. See, for example, William Center (RAdm., USN, Directorate for Strategic Plans and Polices, Joint Chiefs of Staff), "Military Mobility and the 1982 UN Law of the Sea Convention," address at the Georgetown University Law Center Symposium, "Implementing the United Nations Convention on the Law of the Sea," 27 January 1995; and the Honorable Walter B. Slocombe, Under Secretary of Defense for Policy, "Toward Senate Consideration of the 1982 Law of the Sea Convention," and J. Paul Reason (VAdm., USN, Deputy Chief of Naval Operations for Plans, Policy and Operations), "National Security Interests in the Law of the Sea," addresses to the Center for Oceans Law and Policy Symposium, "Toward Senate Consideration of the 1982 Law of the Sea Convention."

44. See *National Security Strategy of the United States* (Washington: GPO, 1992), pp. 4–6 (updated and expanded in 1994); and *National Military Strategy of the United States* (Washington: 1992), pp. 2–8 (updated and expanded in 1995).

45. John C. Meyer (Cdr., USN), "The Impact of the Exclusive Economic Zone on Naval Operations," *Naval Law Review*, vol. 40, 1992, p. 248.

46. Joseph Morgan, "Constabulary Navies in the Pacific and Indian Oceans," *Ocean Yearbook 11*, ed. Elisabeth Borgese et al. (Chicago: Univ. of Chicago Press, 1994), pp. 368–83.

47. Nien-Tsu Alfred Hu and James K. Oliver, "A Framework for Small Navy Theory: The 1982 U.N. Law of the Sea Convention," *Naval War College Review*, Spring 1988, p. 39.

48. See, for example, Douglas Johnston et al., *NATO Realignment and the Maritime Component* (Washington: Center for Strategic and International Studies Press, 1992), pp. 6–12; William Kaufmann and John Steinbruner, *Decisions for Defense: Prospects for a New Order* (Washington: Brookings Institution Press, 1991), pp. 24–37, 142–4; and Michael O'Hanlon, *The Art of War in the Age of Peace: U.S. Military Posture for the Post–Cold War World* (Westport, Conn.: Greenwood, 1992), pp. 18, 35, and 116. For a countervailing view stressing the need for a more robust naval force structure, see the U.S. Navy's white paper, "*Forward . . . From the Sea*" (Washington: GPO, 1995), pp. 1–12; and J. Paul Reason, address.

49. The FON program was the product of two events related to UNCLOS III: a 1977 National Intelligence Estimate on expanding maritime jurisdiction, concluding that the treaty would not effectively safeguard U.S. navigational freedoms; and the renegotiation of the Informal Composite Negotiating Text (ICNT), which was developed without consulting the developed countries and placed heavier financial and economic burdens on the developed states. See also Roach and Smith, p. 268; and John Rolph, "Freedom of Navigation and the Black Sea Bumping Incident: How 'Innocent' Must Innocent Passage Be?" *Military Law Review*, vol. 137, 1992. When the FON program was created during the final year of the Carter administration, the feeling was that even with a widely ratified Law of the Sea Convention, it still would be necessary to exercise the rights set forth in the Convention in order not to lose them.

50. Council on Ocean Law, *Oceans Policy News*, May 1992, p. 4.

51. *Limits in the Seas*, p. 2. See also John Rolph; Yehuda Blum, "The Gulf of Sidra Incident," *American Journal of International Law*, July 1986; and William Schachte, Jr. (RAdm., USN), "The Black Sea Challenge," U.S. Naval Institute *Proceedings*, June 1990.

52. *Limits in the Seas*; U.S. Defense Dept., Office of the Secretary of Defense for International Security Affairs, *Maritime Claims Reference Manual* (Washington: 12 July 1990, revised 14 June 1994); and Roach and Smith. These are three primary sources regarding claims, by a wide spectrum of nations, that the United States considers unlawful.

53. See William J. Aceves, "Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea," *Naval War College Review*, Spring 1993, pp. 59–79.

54. See, for example, *National Security and the Convention on the Law of the Sea*, p. 20. See also Senator Claiborne Pell, "United Nations Convention on Law of the Sea Will Enhance U.S. National Security," address at the Georgetown University Law Center Symposium, "Implementing the United Nations Convention on the Law of the Sea," 27 January 1995; "U.S. Ships Report Mock Attack," *Los Angeles Times*, 11 August 1979, p. A5; "High Seas Diplomacy Continuing," *Washington Post*, 27 July 1984, p. A1; Dennis Neutze (Cdr., USN), "The Gulf of Sidra Incident: A Legal Perspective," U.S. Naval Institute *Proceedings*, January 1982, pp. 26–31; Robert Stumpf (Lt. Cdr., USN), "Air War with Libya," U.S. Naval Institute *Proceedings*, August 1986, pp. 42–8; and Roger Haerr, "The Gulf of Sidra," *San Diego Law Review*, vol. 24, 1987, p. 751. See also Panel on the Law of Ocean Uses, p. 374; Sam Bateman, "Build a WESTPAC Naval Alliance," U.S. Naval Institute *Proceedings*, January 1993, p. 82; and Roach and Smith, p. 4.

55. Morell, p. 195. Additionally, the Department of the Navy sponsors an annual interagency Freedom of Navigation conference with representatives from the National Security Council, the Department of State, the armed services, the Coast Guard, and others, in attendance.

56. Roach and Smith, p. 266.

57. John McNeill, Senior Deputy General Counsel and Chairman, Department of Defense Task Force on the Law of the Sea Convention, statement before the U.S. Senate Committee on Foreign Relations, 11 August 1994, p. 4 (reprinted as "The Strategic Significance of the Convention on the Law of the Sea," *Naval War College Review*, Winter 1995, pp. 123–9).

58. Schachte, "The Black Sea Challenge," p. 14.

59. Lodel.

60. William Schachte, Jr., (RAdm., USN), "National Security: Customary International Law and the LOS Convention," address at the Georgetown International Law Symposium, "Implementing the United Nations Convention on the Law of the Sea," 27 January 1995.

61. Joshua Goldstein, *Lang Cycles: Prosperity and War in the Modern Age* (New Haven, Conn.: Yale Univ. Press, 1988), p. 268.

62. *Congressional Record*, 103rd Cong., 2d Sess., S14475, testimony of Senator Claiborne Pell, 6 October 1994, p. 2; and interview with Professor Detlev Vaghts, editor, *American Journal of International Law*, 28 October 1994.

63. Morell, p. 206. Morell is particularly pointed regarding the failure of the United States to accede to the Convention, at one point drawing a comparison to the Soviet Union.

Ψ

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