

**ASIL Insight****The United States and the 1982 Law of the Sea Treaty**By **David D. Caron** and **Harry N. Scheiber**

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On May 15, 2007, President George W. Bush “urge[d] the Senate to act favorably on U.S. accession to the United Nations Convention on the Law of the Sea during this session of Congress.”^[1] In doing so, the President identified four benefits to U.S. interests when the U.S. joins the Convention. First, the President noted that the Convention advances the national security interests of the United States, “including the maritime mobility of our armed forces worldwide.” Second, he indicated

that the Convention would “secure U.S. sovereign rights” over extensive marine areas and the valuable natural resources they contain. Third, he stated that accession would “promote U.S. interest in the environmental health of the oceans,” an issue of increasing concern. Finally, President Bush noted that acceding to the Convention would give the United States “a seat at the table when the rights that are vital to our interests are debated and interpreted.” Two senior Senate Republicans – former Foreign Relations Committee Chairman Richard G. Lugar of Indiana and former Appropriations Committee Chairman Ted Stevens of Alaska – immediately endorsed President Bush’s declaration. Senate Foreign Relations Committee Chairman Joseph R. Biden Jr., a Democrat from Delaware, praised President Bush’s “strong statement of support” and said he intended to consider the treaty in his committee “in the coming months.”

The prospect of the U.S. acceding to the 1982 Law of the Sea Convention comes after several decades of consideration. While both political parties and virtually all constituencies have broadly supported the Convention since at least 1994, the Convention did not receive the advice and consent of the Senate in that decade, an unprecedented event in the history of U.S. treaty practice for such a widely supported agreement. This Insight reviews both the history of the treaty in the United States, and considers both why the advice and consent of the Senate has been delayed, as well as the possible costs of that delay.

The 1982 Law of the Sea Convention, U.S. opposition to aspects of the Final Text, and the international accommodation of U.S. concerns in the 1994 Implementing Agreement Modifying Part XI

Following a series of unsuccessful attempts to agree upon an international regime governing the laws of the sea since the 1930s, the U.N. General Assembly in 1970 voted to convene the Third United Nations Law of the Sea Conference (UNCLOS III). The first session of that negotiating effort was held in Caracas in 1974 and the Final Text, the 1982 Law of the Sea Convention, was signed in Jamaica on December 10, 1982.^[2]

The U.S. welcomed this initiative and played a leading role in the negotiations under the administrations of Presidents Nixon, Ford and Carter. Indeed, the influence of the United States’ negotiating team is apparent in many aspects of the 1982 Convention. However, a few aspects of the negotiating text, in particular those relating to the deep seabed, were not acceptable to the then new Reagan Administration. During the final negotiating session, the United States delegation sought substantial revisions of the text, focusing particularly on those relating to the deep seabed. The U.S. was only partially successful in this effort, and ultimately President Reagan declined to sign the Final Text.

In the more than two decades since President Reagan chose not to sign the treaty, significant developments have occurred. First, and most importantly, the portion of the Convention relating to the deep seabed that was objectionable to the U.S. and other states changed dramatically in July of 1994 amidst the political climate following the breakup of the Soviet Union.^[3] As William Taft, then Legal Advisor of the State Department, testified before the Senate Foreign Relations Committee on October 21, 2003: “As a result of the important international political and economic changes of the late 1980s and early 1990s – including the end of the Cold War and growing reliance on free market principles – widespread recognition emerged, not limited to industrialized nations, that the collectivist approach of the seabed mining regime of the Convention required basic change.” He went on to testify that the “changes set forth in the 1994 Agreement overcome each one of the objections of the United States to Part XI of the Convention and meet our goal of guaranteed access by U.S. industry to deep seabed minerals on the basis of reasonable terms and conditions.” Second, the Convention entered into force on November 16, 1994, one year

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after the sixtieth nation consented to be bound by it. Today, the Convention has been subscribed to by 153 states, including virtually all U.S. North Atlantic Treaty Organisation (NATO) and Organisation for Economic Co-operation and Development (OECD) allies, as well as Russia, China and the European Community.

including the ones discussed in this Insight. Educational and news media copying is permitted with due acknowledgement.

There has been broad U.S support for accession since at least 1994, but there has also been effective private ideological opposition

Since at least 1994, a strong base of support for accession to the Law of the Sea Convention in the United States has existed in the federal government, industry and civil society. It is likely that no other treaty has ever been so widely supported and yet failed to be put to a vote in the Senate for such a long duration. The Defense Department, the State Department, the Commerce Department, the U.S. Coast Guard, the oil industry, the shipping industry, and the fishing sector, as well as environmental and conservation non-governmental organizations and religious organizations all support the treaty.^[4] Additionally, both the National Commission on Oceans Policy and the Pew Oceans Commission in their recent reports strongly urged immediate action by the Senate and accession to the Convention.

Further reflecting broad bipartisan support, in a highly unusual statement in the history of U.S. treaty ratification practice, all living former Legal Advisers of the U.S. Department of State issued a joint letter on April 17, 2004 to Senators William H. Frist (then Majority Leader), Richard G. Lugar (then Chairman, Committee on Foreign Relations), and John W. Warner and Carl Levin (respectively, then Chairman and Ranking Member, Committee on Armed Services).^[5] In that letter, the eight former Legal Advisers wrote:

We are unanimous in our view that it is in the best interests of the United States that the Senate, at its earliest opportunity, grant its advice and consent to United States accession to the 1982 United Nations Convention on the Law of the Sea and to United States ratification of the 1994 Implementing Agreement that modifies Part XI of the LOS Convention.

Some three years after receiving this joint letter, President Bush's recent statement is similarly unusual in the history of U.S. treaty ratification. The joint letter of former Legal Advisers and President Bush's recent statement urging timely advice and consent are unusual because treaties with such broad support do not usually languish in the Senate.^[6] It is true that a few treaties, thought important by some, have not received the advice and consent of the Senate over the history of the United States. But in those cases, the treaties in question, for example, the treaty establishing the League of Nations, were hotly debated on the Senate floor.

For both domestic and foreign observers of the United States, the inability of the United States to accede to this Convention, despite the broad, widely-held and bipartisan support, is surprising. The explanation is that a narrow private opposition to the Convention has been effective in blocking accession. Opposition has likely been effective for two reasons.

First, the opposition has focused its narrow, primarily ideological, objections to the Convention so as to take advantage of several procedural customs within the Senate that allow a very few Senators to make more difficult, if not prevent, a vote on the Convention. Previously, in 2004, the Senate Foreign Relations Committee voted the Convention out of Committee unanimously recommending that the Senate give its advice and consent to accession. The placement of the item on the unanimous consent calendar – the most common mechanism for the Senate to vote on a treaty matter – was blocked. The procedural moves involved could be overcome, but the then-Senate Majority Leader Frist, Tennessee Republican declined to do so.

A leading respected opponent to accession was the Reagan administration's Ambassador to the United Nations, the late Jeane Kirkpatrick, who in 2004 remained of the view that the Convention is disadvantageous to American industry and a "bad bargain." On April 8, 2004, she testified before the Senate Armed Services Committee that the protections extended by UNCLOS to freedom of navigation and environmental health of the seas "were especially welcome at a time when a good many countries were arbitrarily extending their territorial claims over straits and vital sea lanes. But the Reagan Administration believed that the cost was too high, especially since most of these benefits had been or could be achieved through bilateral agreements or through existing organizations such as . . . UNEP." Overall, however, the majority of statements made by individuals opposing accession to the Convention involve loss of sovereignty to international government. Following President Bush's May 15, 2007 statement, Senator Lugar stated: "Ideological posturing and flat-out misrepresentations by a handful of amateur admirals have sought to cast a shadow over the treaty by suggesting that we are turning over our sovereignty to the United Nations." Surveys of likely votes by Senators, however, leave little doubt that if it is put to a vote, the Senate will overwhelmingly give its advice and consent to accession.

Second, with the determined opposition of a small group and other matters demanding the Senate's attention, it appears that some members of the Senate believed that it was not particularly urgent for the United States to accede to the Convention. The United States for over twenty years has acted consistently with principles in the Convention. Due to other important business, it has been easy to put consideration of the Convention off to the future. Implicit in President Bush's statement is the belief that it is incorrect and potentially costly to U.S. interest to further delay accession.

The possible risks posed by delay in accession

Senate delay may prove costly since treaties without leadership can decay. Shortly after World War II, a unilateral move by the U.S. in the Truman Proclamations of September 1945, declaring ownership of the continental shelf seabed resources and announcing a policy for extended US jurisdiction of coastal fisheries far out to sea beyond the then dominant three mile limit, diplomatically backfired for the U.S. as the Proclamations resulted in a bevy of national claims by other nations. These nations claimed jurisdiction or even sovereignty over waters as much as 200 miles off their coasts – a development fraught with negative consequences for U.S. naval operations, shipping, and distant water fishery interests. The next three decades of U.S. oceans diplomacy were dedicated to containing this explosion of offshore claims. The solution was formulated with the leadership and consistent support of the U.S. and was formalized in the comprehensive package of new law in the 1982 Law of the Sea Convention. The Convention's central innovation was the creation of a third type of ocean zone from the new 12-mile outer limit of the territorial sea to 200 miles past which the traditional "freedom of the high seas" is retained. That in-between zone of ocean (the Exclusive Economic Zone) mixes coastal ownership and high seas freedoms in a way that allows the U.S. to have sovereign rights in the fish for 200 miles off its coasts but still allows the U.S. Navy to operate up to 12 miles off of other coastlines. The crucial point is that the Exclusive Economic Zone is a complex zone and is, by its nature, unstable, easily tending to gravitate to more and more ownership claims by the nearby coastal state.

The Law of the Sea Convention sets forth the deal, has the institutions to enforce the deal, and may be one of the main things that prevent a collapse of zones from recurring.

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[1] Available at <http://www.whitehouse.gov/news/releases/2007/05/20070515-2.html>.

[2] United Nations Law of the Sea Convention, *signed* 10 December 1982, *entered in force* 1994, available at http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.

[3] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, with annex, *adopted on* July 28, 1994 (Senate Treaty Doc. 103-39), available at http://www.un.org/Depts/los/convention_agreements/convention_overview_part_xi.htm.

[4] See, e.g., Testimony of John Norton Moore before the the Senate Foreign Relations Committee (Oct. 4, 2003) available at <http://www.senate.gov/~foreign/testimony/2003/MooreTestimony031014.pdf>.

[5] Letter of April 17, 2004 from Herbert J. Hansell (*Legal Adviser, 1977–1979*), Edwin D. Williamson (*Legal Adviser, 1990–1993*), Roberts B. Owen (*Legal Adviser, 1979–1981*), Conrad K. Harper (*Legal Adviser, 1993–1996*), Davis R. Robinson (*Legal Adviser, 1981–1985*), David R. Andrews (*Legal Adviser, 1997–2000*), Abraham D. Sofaer (*Legal Adviser, 1985–1990*) and Michael J. Matheson (*Acting Legal Adviser on various occasions*) to Senators William H. Frist, Richard G. Lugar, John W. Warner and Carl Levin, *reprinted at* 98 Am J. Int'l L. 307 (2004).

[6] The White House had attempted earlier in 2007 to urge the Senate to action in a letter dated February 8, 2007 from the National Security Council Advisor, Stephen J. Hadley, to Senator Biden, the Chair of the Senate Foreign Relations Committee where he wrote in part: "Recognizing the historic bipartisan support for the Law of the Sea Convention, I anticipate our shared interest in moving it forward." Despite this letter, it is reported that those favoring accession to the Convention felt the President himself needed to write to the Senate.

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