THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA,  
THE UNITED STATES,  
AND INTERNATIONAL RELATIONS

NEAL COATES

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Progress in relations among nation-states can be understood as a movement from force to diplomacy to law. Attempts to avoid bloodshed have led mankind to support norms including compliance and institutions that promote stability and order. In the last 50 years, the United States of America has been instrumental in spreading the commitment to the rule of law. This has manifested itself in many ways including through the Nuremberg and Tokyo trials, the United Nations Charter, and the war crimes tribunals for Yugoslavia and Rwanda. The United States has also helped to establish international institutions—the World Bank, the International Monetary Fund, the World Trade Organization—to regulate trade and stabilize finance. In fact, the United States has entered into more treaties than any other nation-state.\(^1\)

Involvement by the world’s most powerful country in the effort to create international organizations and norms, however, has not always been consistent. The dedication of the United States to international law even appears to some observers to now be seriously in question. The present Administration refuses to join the International Criminal Court, pulled out of efforts to agree on a verification protocol for the Biological Weapons Convention, rejected the Kyoto Protocol, and withdrew from the Antiballistic Missile Treaty. Why not follow the multilateral approach? These decisions have prompted wide-spread criticism from many countries and the United Nations, worried that the United States is moving toward isolationism.

Why does the United States often oppose major international agreements, even when those agreements appear to be in its self-interest? This question can be examined
by looking at United States policy toward a significant treaty, the United Nations Convention on the Law of the Sea ("UNCLOS"). In 1982, representatives of 155 nation-states completed a comprehensive this set of rules for the world’s oceans. The meetings which generated UNCLOS have the distinction of being the longest United Nations conference, taking nine years to finalize, and the United States was deeply involved in crafting the agreement generated from the meetings, which 119 states signed.\(^2\)

UNCLOS is perhaps the most important treaty negotiated within the United Nations and the third most crucial multilateral agreement ever concluded after the 1945 United Nations Charter and the 1969 Vienna Convention on the Law of Treaties. This reputation is due to the vast geographic area involved—more than 70 percent of the earth’s surface—and because of the agreement’s comprehensive nature. The Convention is the most complex in the history of international relations, establishes a framework for further protections to later be established, and has become the primary authority for oceans law. As of March 2005, 148 states are party to UNCLOS, including Canada, China, and the Russian Federation, and it is one of the most widely adhered treaties.\(^3\)

President Ronald Reagan’s refusal in 1982 to sign one of the most important agreements ever negotiated raised fundamental questions regarding the viability of the Convention and the leadership of America in the promotion of international law. This paper explores why the executive branch during the two presidencies of the early 1990s moved toward joining UNCLOS and explains why the United States has yet to ratify the treaty. In the process, this study provides insight into why the United States sometimes refuses to enter multilateral treaties but still shapes international law.

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Past and current United States policy regarding the Convention cannot be explained by traditional systemic explanations alone or by other theories. Standard international relations theories can miss causal variables at the other levels-of-analysis, as well as the way in which the variables interact. For example, the underpinning of realism that international agreements are adopted by countries to ensure their survival or to maintain or increase their share of power does not explain the United States position on UNCLOS. Likewise, liberalism’s position is that anarchy can be overcome through institutions facilitating cooperation and that treaties encourage states to cooperate on economic, security, and environmental issues cannot account for the possibility that the 1994 decision to accede to UNCLOS may have been due to a change in political party controlling the executive branch or was influence by the president’s ideology.

In a similar vein, many scholars attribute adoption of major conventions such as UNCLOS to globalization or interdependence. Greater economic ties, rapid travel, and mass communications are shaping relations so that states no longer consider themselves in competition but desire cooperation through agreements or organizations protecting areas of “common heritage” such as Antarctica, the Moon, and Space. Thus, all countries should understand their interests are compatible and enhanced if they bind themselves through UNCLOS to uphold the environmental integrity of the sea and share its economic resources. But the United States has never joined the Convention. Last, international law is advocated as an explanatory factor for behavior because of the effect of communicating norms that reflect states’ interests. The influence of widespread international treaty law (as demonstrated by the vast majority of countries which have joined UNCLOS) also does not explain United States policy.
This paper relies on an inductive case study of the three levels-of-analysis—systemic, domestic, and individual—to examine causality. The systemic-level claims that countries react to situations in the same way as other states and considers the number of major actors and relative strengths, the rules and norms governing relations, and assumes that certain states are hegemons. The domestic level-of-analysis focuses on the influences operating inside states and examines how different attributes lead countries to act at variance from each other, considering such factors as political and economic systems, the bureaucracy, parties, and culture. Last, the individual-level examines leaders’ and their subordinates’ backgrounds, experiences, styles, and beliefs.

This study posits that domestic-level variables had greater weight on the final determination of Part XI policy for Presidents Bush and Clinton. Since Rosenau (1967), it has been noted that domestic-level factors can explain change—states’ reactions to the international system are processed through some type of mediation such as institutions or the bureaucracy. This paper examines evidence from many sources including primary documents from the Bush and Clinton presidencies, Congressional testimony, and interviews with negotiating team members, the bureaucracy, and interest groups. Because UNCLOS policy for the United States was determined largely by domestic factors, there are several implications regarding the creation of international law.

History of the Law of the Sea Convention

The freedom of the oceans was widely acknowledged as a principle of international law throughout the nineteenth and twentieth centuries. After the Second World War, the maritime powers of the United States and the Soviet Union worked to enforce the customary rules of the sea to ensure their own interests. An example of this
was the 1945 Truman Proclamation, declaring United States sovereignty over much of its continental shelf. Other countries, many of them among the more than 90 states winning independence in the next two decades, rapidly asserted the same and other privileges. Disputes arose as technologies became available to exploit oil in the continental shelf and harvest huge amounts of fish anywhere, and it became unclear if the territorial sea was limited to the traditional distance of three nautical miles or extended beyond 12 miles. For example, in 1952 Chile, Ecuador, and Peru claimed territorial seas of 200 miles. Developed countries including the United States protested these declarations because of their enormous geographic nature and the effect on navigation and commerce.  

The first conference hosted by the United Nations on these questions, UNCLOS I, was held in 1958. Four treaties resulted: The Convention on the Territorial Sea and the Contiguous Zone; the Convention on the High Seas; the Convention on the Continental Shelf; and the Convention on Fishing and Conservation of the Living Resources of the High Seas. Disputes remained, though, such as the width of the territorial sea and fishery limits. UNCLOS II, held in 1960, did not resolve these. The failure of the international community to reach consensus resulted in calls for a revised oceans regime.

An additional justification for an updated oceans convention grew out of a 1967 speech to the United Nations General Assembly by Ambassador Arvid Pardo of Malta. He claimed that the resources of the oceans, including deep seabed polymetallic nodules, were the “common heritage of mankind.” This statement was made in the context of the growing North-South confrontation, encapsulated in the early 1970s by the “New International Economic Order” (“NIEO”). Developing states, known as the Group of 77 (“G-77”), argued that the international system failed to address global economic needs
and demanded that capitalism be replaced by a planned and world economy.¹²

UNCLOS III began seven years later in Caracas, and a new treaty was completed in 1982, largely superseding the earlier oceans conventions. It sets the territorial sea at 12 miles; establishes navigation regimes of innocent passage, transit passage in straits, and archipelagic sea lane passage; establishes a 200-mile exclusive economic zone (“EEZ”); provides for a wider continental shelf; addresses vessel and land-based pollution; obligates states to conserve living resources; and requires states to settle their oceans disputes by peaceful means. The Convention also establishes a deep seabed mining regime. The International Seabed Authority (“ISA”), as specified in Part XI and related Annexes and Resolution II of the treaty, governs the taking of minerals from areas beyond the limits of national jurisdiction, i.e., further than 200 miles from the coast.¹³

The ISA, located in Kingston, has three main bodies: Assembly, Council, and Secretariat. State members have one vote in the Assembly to establish general policies, elect the Council and Secretary General, and approve an annual budget. The Council has 36 members and oversees the Authority’s policies, implements regulations, and controls activities in the “Area,” the ocean floor beyond state jurisdiction. The Enterprise, ISA’s operating arm, mines, processes, transports, and markets recovered seabed minerals. An entity applying to mine under Part XI was required to submit applications for two viable sites—the Enterprise would select which it would use for itself. There was also an application fee of U.S. $250,000 and an annual fixed fee of U.S. $1 million. During the first ten years of production, a five percent royalty applied; thereafter it was 12 percent.¹⁴

The Reagan Administration, which took office in 1981, objected to the draft Convention because of its Part XI. The President believed the ISA would block United
States access to strategic minerals and share mining profits with liberation movements. Objections were also made regarding the large fees, that the Enterprise could chose which mine site it wanted, and that the technology transfer requirement would result in proprietary information being made available to competitors. Last, the Administration feared that industrial countries, because they were not guaranteed seats on some of the ISA’s constituent bodies but would bear most of the budgetary cost of the ISA, would be unfairly dominated by the G-77. In essence, Reagan’s objection was ideological, and he believed Part XI was socialistic. Regardless, the Administration’s proposals to revise the treaty were rejected and UNCLOS opened for signature December 10, 1982.15

President George H. W. Bush also refused to join UNCLOS but was criticized by many foreign governments due to the treaty’s importance for the world community and for individual states. In 1990, the United Nations Secretary General announced the reopening of a discussion on UNCLOS focused solely on Part XI. The reason for this action by Javier de Cuellar was that the United States had not signed or ratified the treaty, and without its financial and political support UNCLOS would fail. Several industrialized countries had followed the lead of the United States and had also organized a reciprocal states regime. Although Administration representatives participated in the United Nations-sponsored consultations, President Bush never acceded to UNCLOS.16

In 1993 after the Clinton Administration began, the United States joined negotiations to revise the seabed regime. Fifteen meetings were held, including those conducted during the previous government, at the United Nations to amend Part XI. In July 1994, the Administration announced it would accede to the Convention and the Agreement Relating to the Implementation of Part XI (“Agreement”). The Agreement
was signed by the United States and 71 other countries, and on October 7, 1994 President Clinton transmitted UNCLOS and the Agreement to the Senate where it was referred to the Foreign Relations Committee.17

From November 16, 1994 until July 28, 1996 when the Agreement entered into force, the Clinton Administration provisionally applied UNCLOS. The United States was a member of the ISA Assembly and was elected to the Council, the Finance Committee, and the Legal and Technical Commission. Provisional membership in ISA ended on November 16, 1998 because the Senate had not given advice and consent to accede to UNCLOS or to ratify the Agreement. The United States has to this day refused to formally join the Convention. This was the case even after UNCLOS opponent Jesse Helms (R-NC) was replaced as Chairman of the Foreign Relations Committee by Joseph Biden (D-DE), who was followed by Richard Lugar (R-IN) in 2001. The treaty did not receive a hearing for nine years, until October 2003. Finally, on February 25, 2004 the Committee voted out the treaty to the Senate floor, where it awaits an uncertain fate.18

**Bush Policy Decision**

Why did the Bush Administration decline to accede to UNCLOS? First, based on his beliefs and past experiences, President Bush was in favor of many provisions in UNCLOS but not Part XI. As an oilman drilling in the deep oceans, he understood the freedom to search for valuable commodities with limited regulation. While United Nations Ambassador, he observed how voting blocks could be used against his country and in favor of centralized, planned economies, but he also learned to better appreciate cooperation with other nation-states. As Director of the CIA, he wanted to ensure that the United States could collect intelligence on the Soviet Union and other countries
through the use of the oceans for espionage. These events shaped his reaction to the possibility of discussing changes to Part XI.\textsuperscript{19}

Bush was well-informed about the history of the seabed regime but paid minimal attention to the United Nations-sponsored consultations while in office. In the end, Bush was neither in favor nor opposed to UNCLOS. The President simply did not have time to deal with it—there were too many other pressing issues, and until the opportunity for negotiation clearly arose, he could not devote attention to the Part XI debate. During Bush’s presidency, an unusual series of international events were changing the world. He dealt in 1989 with Tiananmen Square, the fall of the Berlin Wall, and the operation in Panama to capture Manuel Noriega. At the same time, the Cold War was ending and the superpowers had begun more dialogue and even cooperated on a few issues such as the 1991 war against Iraq. Bush regularly declared a “new world order” had begun and that a collective security framework could oppose offensive force. With Gorbachev, Bush also signed START I in 1991 and opened the Madrid peace conference; but by the end of the year, the Soviet premier resigned and the Soviet Union had dissolved. These events demanded the President’s attention.\textsuperscript{20}

The management style and ideology of President George Bush also influenced the decision to stay out of active Part XI talks. Consistency with Reagan’s policies reminded American voters of Bush’s tie to the former Administration. Bush, though, wanted to conduct relations with other countries in a more moderate manner. His Administration was less dogmatic than the prior government and was more open to discussion of the Convention. Talks at the United Nations regarding possible revision of Part XI were, at
least, an opportunity for limited international cooperation. The Secretary of State and National Security Adviser authorized United States officials to join consultations.

James Baker and Brent Scowcroft were hesitant to negotiate on the treaty, however, until they perceived willingness on the part of the G-77 to make meaningful concessions. Ideology was not the driving factor in the Administration. Instead, the policy test was pragmatism and prudence—it was good policy if it worked—and on the whole they believed the Part XI mining regime would not work and would be politically damaging to the President. A moderate appointee, United Nations Ambassador Thomas Pickering, and his assistant, Wesley Scholz, then used diplomacy and circumstances in 1990 and 1991 to convince developing countries that the time was right to meet face-to-face and identify the problems inherent in Part XI. This was in line with instructions to determine if the treaty could be moved toward market principles. But when Secretary Baker claimed that the Ambassador had exceeded his instructions, he was reassigned from New York City and the Administration refused to join Part XI negotiations.21

In addition, at the State Department there were internal disputes regarding what policy was appropriate. This argument pitted the Economics and Business Bureau versus the Oceans and International Environmental and Scientific Affairs Bureau versus the International Organizations Bureau and their respective assistant secretaries, Eugene McAllister, Curtis Bohlen, and John Bolton. Because the lower-level officials were unable to agree, the first option that fit the circumstances was to maintain the status quo. These differences were never resolved during the Bush Administration.22

The availability of strategic minerals from sources other than the deep seabed and the ending of the Cold War were also reasons why President Bush did not put much of a
priority on changing Part XI during his four years in the Oval Office. The nodules
possessing cobalt and copper simply were not needed—other locations to mine had been
identified, in the EEZ and on land. A steep decline in metals prices also meant that the
valuable minerals would be available for many years and that seabed mining would not
be an active industry in the near future.

Interest groups (in addition to the mining companies) attempted to shape policy,
but only one seemed to have an impact. The Center for Oceans Law and Policy, based at
the University of Virginia, had some success in effecting change—it was closer in
ideology to Bush and his appointees, and COLP’s annual meetings with diplomats and
United Nations personnel in attendance provided a forum for the seeds of Part XI reform
to grow. The Council on Ocean Law, an environmental interest group, made multiple
attempts to influence the government, but for the most part was ineffective.

Of import to the question of why Bush did not negotiate or accede to UNCLOS
was the position of the United States Senate. Its opposition to the treaty and ability to
block ratification had been recognized for years, and the Administration had no desire to
antagonize the legislative branch by proposing an international agreement that did not
address the Senate’s objections. Reservations to the Convention were prohibited by the
text of UNCLOS, so if a ratification vote was to ever be successful the President would
have to mollify the Senate’s concerns about Part XI. The few but vocal seabed industry
leaders still had enough clout with legislators to ensure opposition to Part XI stayed alive.
The Administration recognized that the Senate was prepared to reject the treaty, so
seabed mining did not receive much attention from the executive branch.
George Bush’s pragmatism, organization, and the personnel he selected, combined with the changing international political and economic situation, created an opportunity to begin the process of amending Part XI. Any further step would be up to his successor. 1992 was a presidential election year, making it an unlikely time for the President to take up a somewhat controversial treaty. Because there was no serious domestic constituency for seabed mining, in either the public or the Congress, advocating changes to Part XI would not win votes. The internal government disagreement and the looming election resulted in the Administration making no policy change for UNCLOS.

**Clinton Policy Decision**

How was the UNCLOS decision made by the next Administration? Bill Clinton was never uninterested in foreign policy during his first term in office. His attention was instead intermittent because the United States was not as immediately threatened as during the Cold War, and he had committed to focus on the economy. The President allowed his appointees to handle many of the facets of international relations, and he became involved only to address difficult disputes in remote parts of the world. Secretary Christopher and Ambassador Albright were already in favor of UNCLOS before taking office. The treaty, in addition, represented an opportunity for international cooperation. Authorization for personnel to move from consultations to negotiations at the United Nations was the result of the Secretary of State spurring the bureaucracy and the Interagency Working Group on a quick review of UNCLOS policy. It was also the result of a United Nations Ambassador searching for an early foreign policy initiative.23

Within three months of Clinton’s taking office, United States bureaucrats were authorized to discuss revised terms for Part XI. In the late spring of 1993, the State
Department’s lead negotiator, Wesley Scholz, prepared a document with later input of Satya Nandan of Fiji, the most influential G-77 leader, but bypassed the United Nations Secretariat, Belgium (representing the European Community), France, Japan, and Russia in text preparation. It was distributed and quickly became known as the “Boat Paper” because of a drawing on the first page of a ship mining nodules.\(^{24}\)

Most countries were unaware at this point who had penned the negotiating text or that the United States had gained a large advantage in the negotiations. Time was running out—55 of the necessary 60 countries had ratified UNCLOS, and the Boat Paper was the only substantive draft to review. The outline written by the United States ultimately grew into the 1994 Agreement which revised the Part XI seabed regime and opened the door for universal participation in UNCLOS.\(^{25}\)

Bureaucratic politics played a major role in the decision to accede to the Convention. It was not inevitable that the United States would join the treaty—an acceptably revised document was crucial if the country would one day be part of UNCLOS. A dispute between Wesley Scholz and Tucker Scully and their respective Assistant Secretaries was the result of advocating policy that reflected their bureaucracy’s provincial interests. The Economics Bureau was committed to revising Part XI so that it would be based on market principles. OES sought input from groups such as the Council on Ocean Law and was influenced by Senate Foreign Relations Chairman Claiborne Pell and his staff. If Scully of the OES had led the Task Force, it is likely the ISA and the Enterprise would have retained more powers than they did in the 1994 Agreement.

The Council on Ocean Law appeared successful in influencing the American government to modify the UNCLOS seabed mining regime. Its lobbying paid off in
information exchange with the bureaucracy and an unusual agreement in October 1993 in which joint coordination with the State Department regarding the promotion of the Boat Paper was promised. COL was persistent in publishing monthly newsletters and using its Panel on the Law of Ocean Uses for journal articles.

The United States also acceded to UNCLOS to ensure naval and maritime mobility. The changing global security situation in the 1990s influenced the United States position, especially the increased role that the oceans played in connecting the nation and its economic and security interests. The termination of the Cold War had already decreased the need for seabed strategic minerals and access to overseas bases. Having the navigation and overflight rights set forth in UNCLOS would be the best way to ensure the United States could project power. Relying on customary international law for such rights was inadequate because there were too many variations in how the rules were interpreted. The political and military dangers of the Freedom of Navigation Program were growing despite efforts to discourage claims that violated the Convention. By the early 1990s, reduced forces were straining effective FON assertions—the Navy was substantially downsizing from a 600-ship navy to 367 by 1996. Were the Convention strengthened by United States formal support, disputes with coastal states would decrease and fewer FON operations would be needed.

An additional reason to join UNCLOS was because the Convention was to enter into force November 16, 1994, a year after its sixtieth ratification. This deadline transformed UNCLOS to a reality that had to be addressed. The treaty provided for an implementation phase followed by the creation of a framework for all future negotiations in ocean issues, including the International Maritime Organization, and the United States
intended on being from this or the Tribunal for the Law of the Sea. Only countries party to the Convention could cast votes for the Tribunal’s 21 judges. Similarly, the Administration opted to join UNCLOS was because of its protection and preservation of the marine environment, and it was believed the Convention would facilitate the goals of the 1992 United Nations Conference on Environment and Development.  

Finally, the United States wanted to retain leadership in developing world order and the rule of law. As the major global power, it was positioned to maintain a visible role in crafting documents affecting it and most other countries. During UNCLOS III, the United States had heavily influenced the creation of a widely accepted set of oceans rules. During the Part XI revision, the Administration was the main author of what ultimately was the revised seabed regime. To ensure this role in law making, protect its interests, and contribute to the effort to bring conformity to international relations, the executive branch in 1994 believed that the United States must become join UNCLOS.  

There were other domestic influences that were contributing factors to move to join UNCLOS. First, the 1994 Agreement was facilitated by the changing market conditions for the seabed mining industry. In the early 1980s, many had predicted a major boom in the mining of cobalt, manganese, nickel, copper, and other nodules. Later experience revealed that the predictions were early by decades. This was due to a price collapse for these minerals as well as the discovery of substitute products, the location of additional land-based sources, and the realization that some nodules were available within EEZs.

In short, the changes to Part XI were believed by the Clinton Administration to address the objections of the United States. The Agreement ensured that countries with
major economic interests at stake have influence regarding seabed mining decisions, scaled back the Enterprise and linked its activation to the development of concrete interest in seabed mining, and replaced the centralized economic planning approach with market-oriented principles. Specifically, the 1994 Agreement:

- Increased the influence of the United States and other industrialized countries to a level commensurate with their interests by: 1) guaranteeing America a seat in the Council; 2) allowing the United States and two other industrialized nations acting in concert to block decisions in the Council; 3) requiring that the Assembly cannot act independent of Council recommendations; and 4) establishing a Finance Committee controlled by the five largest contributors to the organization’s budget which makes decisions by consensus on all budgetary and financial matters.

- Grandfathered seabed mine site claims by three United States-led consortia on terms no “less favorable than” the best granted to Chinese, French, Indian, Japanese, or Russian claimants already registered.

- Eliminated production limits from the seabed to protect land-based mining and set restrictions on subsidization of seabed mining based on GATT.

- Revised the Enterprise by: 1) requiring a future decision by the Executive Council to make it operational; 2) subjecting it to the same requirements as other commercial enterprises; 3) eliminating the requirement that parties fund its mining activities; 4) removing provisions requiring the transfer of seabed mining technology to the Enterprise; and 5) providing that it operate through joint ventures with other commercial enterprises.

- Eliminated large annual fees miners must pay prior to commercial production.

- Provided that the United States can block funding for liberation movements because distribution of revenues can only take place on the basis of a consensus decision in the Council.

- Eliminated the Review Conference.

Current Status of UNCLOS in the Senate

In February 2004, the Senate Foreign Relations Committee unanimously recommended that the Senate give its advice and consent to accession to UNCLOS. The
Committee adopted a resolution that included two declarations which would be included in the accession document. First, as allowed by the Convention, the United States would choose a special tribunal in treaty disputes relating to fisheries, marine environment, scientific research, navigation, pollution from vessels, and dumping. Second, the United States declaration would also recite its understanding that, under Article 298, it has the exclusive right to determine whether its oceans activities are “military activities” and that such determinations are not subject to review.\textsuperscript{30}

Since the February 25, 2004 Committee approval, numerous statements of support and opposition for the Convention and Agreement have been made. The Administration has responded to opponents, notably through testimony at the March 23, 2004 Senate Environment and Public Works Committee by John Turner, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, and at the April 8, 2004 Armed Services Committee by State Department Legal Adviser William Taft, IV. Critics had claimed that because UNCLOS does not explicitly guarantee a right to interdict or board a ship when WMD evidence exists that the United States would be prevented from counterterrorist efforts such as the Proliferation Security Initiative (“PSI”). They also said UNCLOS Articles 19 and 20 effectively prohibit collecting intelligence in and submerged transit of territorial waters.

Turner and Taft explained that joining UNCLOS enhances national security interests, especially with regard to terrorism, and that the treaty will not affect PSI efforts. UNCLOS allows numerous legal actions against vessels and aircraft suspected of WMD proliferation: Port and coastal state control in internal waters and national air space; coastal state jurisdiction in the territorial sea and contiguous zone; flag state jurisdiction
over vessels on the high seas; and universal jurisdiction over stateless vessels. In 2004, the United States concluded PSI boarding agreements with both Liberia and Panama, two of the largest ship registry nations. Further, nothing in UNCLOS impairs the inherent right of individual or collective self-defense. With regard to the second criticism, UNCLOS does not prohibit intelligence activities or submerged transit in territorial seas. A ship or submarine does not enjoy the right of innocent passage if it collects information prejudicial to the coastal state, but such activities are not prohibited by the Convention.31

Final approval of UNCLOS by the United States has one last hurdle. Although the Committee voted out the Convention to the full Senate, Majority Leader Bill Frist did not schedule the treaty for floor consideration and vote during the remainder of the 108th Congress. Because the treaty was not considered during 2004, it was returned to the Foreign Relations Committee. It will have to be voted out of Committee during 2005 before the Senate Majority Leader decides, with whatever pressure comes from Foreign Relations Committee Chairman Lugar and Secretary of State Rice, to schedule the treaty for a vote. The Committee is expected to vote again in March or April.32

Complicating matters was that hearings were also held by the Environment and Public Works Committee on March 23, the Armed Services Committee on April 8, the Select Committee on Intelligence on June 8, and the House International Relations Committee on May 12. Why were there additional hearings in 2004 in committees that had no direct jurisdiction over UNCLOS, and after it had been passed out of Foreign Relations? Some believed it was because Leader Frist’s rise to power had slowed. 2004 was a difficult year, and Democrats (holding 48 of the Senate’s 100 seats) were blamed for threatening filibusters on issues ranging from judicial nominations to the energy bill,
and Republicans did not appear to have the 60 votes needed to end debate. But that did not fully explain how a GOP majority in the Senate along with a Republican-controlled House and White House suffered defeat on same-sex marriage and failed to pass an energy bill and welfare reauthorization.

Majority Leader Frist has limited legislative experience and has never steeped himself in the Senate’s rules and traditions. As a surgeon, his subordinates had to follow instructions quickly. In the Senate, Frist tends to shift to a different bill when he hits roadblocks rather than grind through negotiations and concessions. Senator John McCain (R-AZ) implied Frist is too reluctant to allow votes, “Someday we’ve got to learn that you’ve got to allow votes on things.” The Majority Leader, however, is hampered by a divided and “dysfunctional” GOP caucus that will not allow him to compromise and pass bills, claims Senator Richard Durbin (D-IL). Some interest groups say Frist is too eager to satisfy right-wing Republicans, such as when UNCLOS finally seemed possible for ratification in the spring of 2004. Despite the Foreign Relations’ unanimous vote, the Majority Leader prevented the treaty from reaching a Senate vote after conservatives—especially Phyllis Schlafly—attacked it and the White House softened its support.33

Despite this, when one party controls Congress and the White House, it should be able to enact the majority of its agenda through force or patience. The entire Administration supports the Convention—President Bush, Vice President Chaney, the Navy and the rest of the Pentagon. At Secretary of State Rice’s confirmation hearing in January, the following comments in support of the treaty were made by the Chairman of the Foreign Relations Committee and the nominee:
LUGAR: I particularly appreciate your response on the Law of the Sea Convention. You urged the committee to favorably report it out and said that you will work with the Senate leadership to bring the convention and implementing agreement to the floor vote in the 109th Congress. And you also said the following: Joining the convention will advance the interests of the United States military. The United States, as the country with the largest coastline and the largest exclusive economic zone, will gain economic and resource benefits from the convention. The convention will not inhibit the United States nor its partners from successfully pursuing the Proliferation Security Initiative. And the United Nations has no decision-making role under the convention in regulating uses of the oceans by any state party to the convention. That’s clearing up an issue sometimes raised by opponents of the convention. Finally, you said, the convention does not provide for or authorize taxation of individuals or corporations. I cannot think of a stronger administration statement in support of the Law of the Sea Convention. Should I assume that the president would like to see this convention passed as soon as possible?

RICE: Would certainly like to see it pass as soon as possible. And, Senator, I think you know the history of this better than I, as well as senators like Senator Warner and others who worked very hard to make sure that some of the early concerns about the convention were addressed and that the convention as it now stands serves our national security interests, serves our economic interests. And we very much want to see it go into force. 

These statements should embolden Bill Frist. He is now in his second term as Senate Majority Leader after Republicans gained four seats in November’s election. He postured in February that he has 51 votes to change Senate rules and make it easier for Republicans to overcome Democratic filibusters. Since this claim, the Senate has passed the most sweeping tort reform bill in a decade. In the 109th Congress, it may be easier for Republicans to achieve their legislative agenda, and at the top are judicial nominations, Social Security reform, and an immigration bill. UNCLOS is a priority item for Lugar and the Committee, and the treaty will be voted on again by the Committee during March or April, but will it be a priority for the Majority Leader?

Committee staff and observers contend that if the treaty is given an opportunity for a vote
in the Senate, it will receive much more than the 67 votes required for approval.\textsuperscript{36} If a vote on the Convention does not occur in 2005, though, it may never.

Who are the groups still opposing UNCLOS, and why? They include the Cato Institute (Doug Bandow), Eagle Forum (Phyllis Schlafly), Free Congress Foundation (Paul Weyrich), Freedom Alliance (Thomas Kilgannon), American Conservative Union (David Keene), and the Center for Security Policy (Frank Gaffney), representing a vocal and very conservative portion of the American public.\textsuperscript{37} Senator Lugar and other senators in favor of UNCLOS declare that these organizations and their leaders are misguided and uninformed about the contents of the treaty and also what the United States can do to protect itself under international law regardless of how these opponents read the treaty. These conservative commentators do not appear to realize that the Convention was altered to reflect the domestic interests and concerns of the United States and do not seem to grasp that Part XI has been modified so the seabed regime will operate on market principles.

These persons and their organizations oppose virtually all multilateral agreements, especially those negotiated under the auspices of the United Nations or which unfortunately simply have the term “United Nations” in their title. These groups point to corruption in the Oil for Food Program as evidence of their concerns. Beyond that, and of more import, they want to protect the United States and its ideology and freedom, and not to lose sovereignty. Schlafly writes:

Global treaties and conferences are a direct threat to every American citizen. They are an assault on our right to raise and educate our children as we see fit. They are an attack on our energy consumption, our private property, and our national treasures. They are an attack on our pocketbooks because, if the UN ever gets taxing power, there is no limit to
how much power and money it can grab. They are an attack on our standard of living because their goal is to steal American wealth and transfer it to the rest of the world. … The Senate should reject all UN treaties out of hand. Every single one would reduce our rights, freedom and sovereignty. That goes for treaties on the child, women, an international court, the sea, trade, biodiversity, global warming, and heritage sites.\textsuperscript{38}

**United States Refusal to Join Certain Multilateral Agreements**

Why does the United States sometimes oppose international agreements?

“Exceptionalism” is often offered—the American ideology, laid out in the founding documents, of being separate and different. This is related to the historical caution to avoid entangling foreign alliances, mentioned in George Washington’s Farewell Address. Treaties can also restrain the autonomy of any country. International agreements and their enforcement mechanisms can even be viewed as unconstitutional and politically dangerous—legitimate laws and judicial systems are only held accountable by state-based democratic constitutions and legislatures. Institutions such as the International Criminal Court and the UNCLOS Tribunal for the Law of the Sea have judges chosen by “political horse-trading,” so decisions could be unfair if not biased.\textsuperscript{39}

These attitudes have long been prevalent in the United States, and the George W. Bush Administration’s decision to reject the Kyoto Protocol on climate change and its decision not to submit the ICC treaty to the Senate for ratification were recent examples. It was the same for UNCLOS and the 1994 Agreement. The executive branch took full part in the negotiations and the drafting, and even submitted the treaty to the Senate, but the United States ultimately decided the Convention did not fulfill its national objectives.

There are other reasons why the United States has never joined UNCLOS. The discipline of International Relations recognizes that powerful states are instrumental in
the creation of norms and law. With regard to stability and order, emerging law depends on such countries to advocate and develop it. It should also be expected that a strong country might refuse to join a treaty that does not fully support its interests. Observers should not be surprised the United States is trying to shape and control international law because that is what all great powers have done. Wohlfarth and Brooks argue that the United States’ military and economic dominance is no longer even debatable—in 2003, the country spent more in its defense budget than the next 15 largest militaries combined; its economy is twice as large as Japan’s. This has led many other countries to depend increasingly on American power for security and prosperity. As a result, the United States must remain free to use its power or the world could succumb to lawlessness. Another way to consider this is that the United States may chose not to join a treaty if other countries are bound to act as the United States wants them to act.

The desire of the United States to use its power to maintain its position can be seen in the views of Pat Buchanan, three-time candidate for President, who editorialized in 1994 against giving away American sovereignty by joining the “LOST” treaty.

Should Morocco fall to hostile rebels, and should they declare the Strait of Gibraltar closed to U.S. warships, is the admiral of the 6th Fleet supposed to take his grievance to the United Nations? Once we Americans relied on ourselves to defend our vital interests. “Don’t tread on me!” is the authentic voice of American sovereignty, not “Injure us, and we’ll sue you in the World Court.” …

About the left, it must be said they know where they are taking us. In 1992 Strobe Talbott, Mr. Clinton’s Oxford roommate, now No. 2 at State, wrote: “Within the next hundred years nationhood as we know it will be obsolete; all states will recognize a single global authority. A phrase briefly fashionable in the mid-20th century—‘citizen of the world’—will have assumed real meaning.”
Some will argue that to maintain its status as the world’s hegemon, the United States must be sensitive to achieving its goals through cooperation. This was advocated by Secretary General Boutros-Ghali at the Inaugural Session of the ISA Assembly:

The Convention on the Law of the Sea must also be seen, and appreciated, in a wider context. For the first time in fifty years, there is now a genuine opportunity for international cooperation to make respect for the principles of international law a meaningful reality. The broader human struggle to ensure that relations between nations, and relations within nations are governed by the rule of law, continues.

The Law of the Sea is an important international symbol of this ongoing endeavour. It is a repudiation of the pursuit of progress through a competition for spoils. It is a rejection of the notion economic might can transcend fundamental national rights. It is a strong disavowal of the tactics of gun-boat development.

By ratifying the Law of the Sea, the international community affirms that rules will regulate the conduct of nations. It proclaims that equity is a right of the small as well as the powerful. It ensures that agreed principles will provide the framework for future development of our planet.43

UNCLOS is symbolic for cooperation and a new substance for international law. If such agreements are not widely binding, it could remain a “might makes right” world.

Two further rationales exist regarding the United States inaction regarding certain international pacts. First, the United States gives great respect and seriousness to treaties. In other words, the government steadfastly believes that international law is binding and effects sovereignty, so it will not even join a bilateral or multilateral agreement unless that treaty has been drafted to suit national interests. Despite the many advantages to the United States in joining the Convention, the reluctance of the Senate to offer its advice and consent to ratification may be because it is not convinced that the treaty was amended satisfactorily by the Clinton Administration.
In conclusion, it seems certain that the United Nations Convention on the Law of the Sea would not have been amended without efforts by the Bush and Clinton Administrations in the early 1990s. Without those changes, UNCLOS would most likely now be irrelevant because of the lack of industrialized countries membership. Those states would have joined the United States in an alternative mining regime, and most countries would today be claiming custom as a legal justification for their actions involving the sea. The world would not be as safe or cooperative. Although it is not known if the deep seabed will ever be mined successfully, American influence in the process of rule creation was important regarding whether the country would join UNCLOS and what form of international oceans law would exist. Other countries have since agreed to join a revised UNCLOS, and today await the hegemon’s decision to bind itself to the Convention. Perhaps the Senate will vote on the treaty during 2005. Regardless, the domestic-level self-interests of a powerful state, the United States of America, had a causal effect at the systemic-level and influenced the making of international law.
Notes


9 This principle was based on the writings of Hugo Grotius in Mare Liberum (Free Sea)(1609). Spain and Portugal, in the 1494 Treaty of Tordesillas, made the largest territorial claims to the oceans in the history of mankind. Spain took exclusive rights over the western Atlantic, the Pacific, and the Gulf of Mexico. Portugal claimed sovereignty in the Atlantic south of Morocco and in the Indian Ocean. Among Grotius’ arguments was that the claims to title over the oceans were founded upon mere discovery and were void absent subsequent possession. Robert Wilder, “The Three-Mile Territorial Sea: Its Origins and Implications for Contemporary Offshore Federalism,” Virginia Journal of International Law 32, no. 3 (1992): 681-746, 692-95.


Brown, 10.

Brown, 153-56.


Coates, 150-55.


22 Wesley Scholz, Interview, Washington, D.C., 10 July 2001; Charney, 379.

23 Klein, 68-9; Jewett and Turetzky, 638-39; Scholz, interview. Elliot Richardson, a moderate Republican, believed that the change of party and control of the executive branch may have been the key to acceding to UNCLOS. Elliot Richardson, “Changing Circumstances Bring New Opportunities for Agreement on the Law of the Sea Convention,” in Center for Oceans Law and Policy, Seventeenth Annual Seminar: Issues in Amending Part XI of the LOS Convention, eds. Myron Nordquist and John Norton Moore (New York: Oceana Publications, 1993), 5-11, 11.


29 Galdorisi and Vienna, 85-6.


37 Perhaps the best collection of links to articles opposing UNCLOS can be found at www.centerforsecuritypolicy.org/index.jsp?topic=lost&section=featured. Interestingly, staff at Eagle Forum told the author on August 10, 2004 that Phyllis Schlafly does not rely on in-house personnel for her articles about UNCLOS.


40 Henkin, How Nations Behave, 33-4; Louis Henkin, International Law: Politics and Values (Boston: Martinus Nijhoff Publishers, 1995), 40-1; Mearsheimer writes that, “the most powerful states in the system create and shape [international] institutions so that [the states] can maintain their share of world power, or even increase it.” In this sense, international organizations do not promote cooperation—cooperation takes place because the world is competitive. John Mearsheimer, “The False Promise of International Institutions,” International Security 19, no. 3 (1995): 5-49, 7, 12-14.
