

## **\*582 LOST OPPORTUNITY: WHY RATIFYING THE LAW OF THE SEA TREATY STILL HAS MERIT**

### **Abstract:**

*The United States remains one of only a handful of nations that have declined to ratify the United Nations Convention on the Law of the Sea (the “UNCLOS”). Although it has been thirty-four years since the UNCLOS was finalized, and twenty-two years since it took effect, the United States’ failure to ratify the UNCLOS remains a significant impediment to international cooperation. If anything, recent advances in maritime technology, indications of accelerating climate change, and signs of increasing geopolitical instability have made the need for U.S. participation in the UNCLOS more urgent. Wishing to maintain the chorus of support behind U.S. ratification despite the years of disappointing political obstructionism, this essay provides a brief overview of the origins and benefits of U.S. participation in the UNCLOS.*

**\*583** The environment is a global issue. Efforts toward preserving the environment and fashioning sustainable societies require global solutions. Unfortunately, the path toward fashioning global policies is complicated by competing perspectives and goals; differing viewpoints exist with respect issues ranging from resource scarcity--as illustrated by the feud between Julian Simon and Paul Ehrlich<sup>1</sup>--to the definition of pollution.<sup>2</sup> These complications underscore the importance of international cooperation and dialogue. The United Nations Convention on the Law of the Sea (“UNCLOS”) provides a useful model for creating meaningful policies to protect the vast and diverse ecosystems of the earth’s oceans.

Although the United States played a crucial role in the formation of UNCLOS, the United States Senate has never ratified it. In 2009, President Barack Obama and members of the Senate conveyed their interest in garnering enough votes to achieve ratification.<sup>3</sup> Again, in 2014, addressing the rise of territorial and maritime disputes **\*584** between China, the Philippines, and Vietnam on claims of ownership to the South China Sea, President Obama called for ratification, noting that “we cannot exempt ourselves from the rules that apply to everyone.”<sup>4</sup> Despite strong bipartisan support and advocacy efforts by both conservationists and the energy sector, the United States still has not ratified UNCLOS. This failure has implications on issues of the environment, the economy, national security, and international territorial and maritime dispute resolution.

### **Part I**

#### **A. UNCLOS in the Senate**

When UNCLOS was finalized in 1982, then-President Ronald Reagan refused to sign it because he “disagreed with the seabed mining provisions calling for shared technology and complex licensing procedures.”<sup>5</sup> He chose instead to implement a unilateral ocean policy that “seemed to ‘pick and choose’ desirable portions of” the Convention.<sup>6</sup> That decision delayed the

Convention's adoption significantly, but by November 16, 1993, UNCLOS had been ratified by sixty countries, taking effect in November 1994.<sup>7</sup> This prompted the United States to press the United Nations to revisit the controversial seabed mining provisions, which were then amended "to satisfy U.S. concerns."<sup>8</sup> It was later signed by President Bill Clinton,<sup>9</sup> but in November 1994, when its provisions came into effect, they did so "without the United States' formal participation"; it was never ratified by the Senate.<sup>10</sup>

Between 1994 and 2007, the UNCLOS languished in the Senate's Foreign Relations Committee. Then, in October 2007, with the strong support of the Bush Administration and a receptive Democratic majority, the Convention was approved by the Committee on a 17-4 majority and "was primed for its first-ever Senate vote."<sup>11</sup> Why were members of Congress suddenly interested? Oil.

### **\*585 B. The Great Arctic Land Grab**

The Arctic represents the "last large piece of non-jurisdictional real estate on the planet."<sup>12</sup> The U.S. Geological Survey estimates that up to twenty-five percent of the world's undiscovered oil and natural gas reserves lie beneath the Arctic Circle's seabed.<sup>13</sup> Ironically, global warming has helped uncover these oil-rich seabeds; as polar ice caps continue to melt, the territory becomes increasingly navigable and drillable.<sup>14</sup> Nation-states are increasingly interested into claiming large swaths of this land as their own.

Perhaps the best-known attempt to lay claim to the Arctic seabed was made in 2007 by the Russian government, which used submarines to plant its national flag on the North Pole's seafloor--2.5 miles below the ice.<sup>15</sup> This largely symbolic act was an attempt to bolster its then-six-year-old claim to Lomonosov Ridge,<sup>16</sup> a claim that was grounded in Part VI of UNCLOS:

The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.<sup>17</sup>

**\*586** More recently, Russia revised its submission seeking to extend its continental shelf<sup>18</sup> in the Arctic,<sup>19</sup> and the Kingdom of Denmark submitted information to support the limits of the territorial sea off of Greenland's northern continental shelf.<sup>20</sup> Russia and Denmark's claims will be decided by the twenty one country Commission on the Limits of the Continental Shelf.<sup>21</sup> The United States, of course, cannot participate as a member on this Commission because of its failure to ratify the Convention.<sup>22</sup> However, if the United States were to become party to the Convention and claim title to its continental shelf, "it would gain Arctic territory roughly the size of Alaska."<sup>23</sup>

In 2009, the United States partnered with Canada to map the arctic seafloor as a means to boost the credibility of future territorial claims.<sup>24</sup> This land is estimated to have at least fifteen billion barrels of untapped oil beneath it.<sup>25</sup> It is not surprising, then, that "[t]he oil lobby has been working furiously to push" the Senate toward ratification.<sup>26</sup>

Notwithstanding this effort and the bipartisan support to pass seventy-eight other treaties at the end of the Bush Presidency in 2008,<sup>27</sup> several Senate conservatives **\*587** were still able to stymie ratification of the United Nations Convention on the Law of the Sea.<sup>28</sup> They did so primarily by claiming that "it would undermine US sovereignty."<sup>29</sup> Quite to the contrary, the UNCLOS expands "national sovereign rights more than any international agreement in history."<sup>30</sup>

### **C. National Sovereignty and National Security**

Opposition to ratifying UNCLOS stems from the isolationist fear that participation in the treaty's adjudicative bodies would compromise American sovereignty.<sup>31</sup> Many critics of the Convention view it as a part of the "conspiracy to create a world government."<sup>32</sup> The main target of concern for these critics is the creation of the International Seabed Authority (ISA). One leading critic, argued in his testimony to the Senate Committee on Environment and Public Works that the ISA represents a "supranational agency to regulate seven-tenths of the world's surface" that will have "exclusive right to regulate what is done, by whom, when and under what circumstances in subsurface international waters and on the sea-floor."<sup>33</sup> But the **\*588** ISA's narrow mandate will strengthen America's sovereignty by providing the property rights necessary to justify the billions

of dollars of investments needed for deep-sea mining.<sup>34</sup> Given the increased interest in deep-sea oil drilling, it is essential that the international community has a means for ensuring environmentally safe extraction methods. At present, the Convention provides the best vehicle for accomplishing that goal. If the United States were to ratify the Convention, it would grant needed legitimacy to these environmental standards.<sup>35</sup>

Critics of ratifying the Convention also point to two chief national security concerns: subjecting United States naval ships to international dispute resolutions, and reduced control of the United States “Territorial Sea.” The Convention, however, will not subject American military activities to a world court.<sup>36</sup> Article 298 of the Convention specifically “permits nations to opt out of the dispute settlement provisions for military activities.”<sup>37</sup> Furthermore, the Convention would not force the United States to adjudicate ocean disputes in an international tribunal.<sup>38</sup> While it creates such a tribunal, it also allows parties “to choose other methods of dispute settlement.”<sup>39</sup>

More importantly, American ships, whether civilian or military, would gain the “freedom of passage to travel through international straits and other bodies of water that were previously off limits.”<sup>40</sup> Currently, the U.S. must seek permission to travel through another country’s territorial sea.<sup>41</sup> Of course, to achieve this expanded navigational freedom, the United States would be required to “allow other nation-states to navigate freely close to U.S. waters,”<sup>42</sup> and many worry that this will expose the United States to additional threats. But nothing in the Convention would alter the U.S. Coast Guard’s or Navy’s ability to interdict foreign vessels suspected of harboring terrorist and other foreign threats.<sup>43</sup>

Moreover, the benefits obtained from greater freedom of navigation will significantly aid American commercial interests and enhance the U.S. Navy’s ability to \*589 respond to emerging issues.<sup>44</sup> Thus, the Senate’s failure to ratify the Convention actually threatens vital U.S. national security and economic interests. It also significantly undermines United Nations Convention on the Law of the Sea’s “goal of global cooperation in marine resource protection.”<sup>45</sup>

#### **D. Marine Biodiversity Protection**

In its preamble, the UNCLOS states that it represents

a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.<sup>46</sup>

Thus, the Convention imposes numerous environmental protection obligations on nation-states to be achieved through both domestic and multilateral arrangements.<sup>47</sup> Nation-states are required “to minimize and control pollution in the oceans, to manage fisheries in order to avoid over-exploitation, and to protect endangered species from extinction.”<sup>48</sup> Unfortunately, the window to effectively address these marine issues is growing smaller.<sup>49</sup>

The United Nations estimates that “over 70% of the world’s fish species are either fully exploited or depleted.”<sup>50</sup> One biodiversity study predicts that currently fished populations will collapse by 2048.<sup>51</sup> This precipitous decline in the world’s fish populations has been caused by rampant overfishing and significant environmental \*590 degradation, including garden-variety pollution and harmful fishing tactics like “bottom trawling.”<sup>52</sup>

In addition to being an essential food source, the ocean’s ecosystems play a critical role in the regulation of the earth’s climate and atmosphere. Nevertheless, the ocean, especially the deep sea, remains largely unexplored as the necessary technology to discover the extent and value of marine biodiversity has only recently emerged.<sup>53</sup> For example, we know very little about “seamounts,” underwater mountains that can “support diverse benthic communities.”<sup>54</sup> It has been “estimated that only 250 out of an estimated 15,000 seamounts have been sampled.”<sup>55</sup> Each of these ecosystems contains significant untapped scientific information.

The bioprospecting industry has already used information gathered from marine organisms to develop “drugs, cosmetics, industrial applications and food products.”<sup>56</sup> The value obtained from marine biotechnology-related products is staggering:

Estimates put worldwide sales of marine biotechnology-related products at US \$100 billion for the year 2000. Profits from a compound derived from a sea sponge to treat herpes were estimated to be worth US \$50 million to US \$100 million annually, and estimates of the value of anti-cancer agents from marine organisms are up to

US\$ 1 billion a year.<sup>57</sup>

It is this vast economic and scientific potential that has led many to believe that “bioprospecting [also] has the potential to act as a sustainable carrot for biodiversity-rich states to conserve marine environments.”<sup>58</sup> David Farrier and Linda Tucker \*591 suggest that Article 249(1) of the United Nations Law of the Sea Convention provides a “solid platform” for developing that incentive.

Article 249 “spells out the conditions with which those conducting marine scientific research in the [Exclusive Economic Zones] or on the continental shelf must comply.”<sup>59</sup> It develops “a multilateral approach” needed to deal with the multitude of economic, environmental, and health problems created by the destruction of the ocean’s vast and fragile ecosystem.<sup>60</sup> This is one of the many reasons why the Convention provides the best forum to tackle these issues.<sup>61</sup>

Jonathan Charney contends that

the Convention probably contains the most comprehensive and progressive international environmental law of any modern international agreement. Not only does the Convention successfully address marine environment issues, it serves as a prototype for environmental agreements in other fields.<sup>62</sup>

This “holistic approach” enables the international community to clamp down on damaging pollution in a coordinated and effective manner, while appeasing national, corporate, and geopolitical interests.<sup>63</sup> Further, Bernard H. Oxman, former Rapporteur for the Panel on the Law of Ocean Uses, contends that there are four broad reasons for widespread ratification:

\*592 1. “Legislators, administrators, and judges are more likely to feel bound to respect treaty obligations,”<sup>64</sup>

2. “Treaty rules are easier to identify and are often more determinate than customary law rules,”<sup>65</sup>

3. “Parties to the Law of the Sea Convention are bound to arbitrate or adjudicate most types of unresolved disputes regarding the interpretation and application of the Convention,”<sup>66</sup> and

4. “Treaty rules are hard to change unilaterally.”<sup>67</sup>

American environmentalists are most enthusiastic about Oxman’s first rationale, because ratification of the treaty would provide a new litigation avenue for pursuing environmental protections.<sup>68</sup>

Given these benefits, supporting ratification would seem obvious, but policymakers have still failed to garner the necessary political capital to accomplish this seemingly obvious decision. What must they do?

## Part II

In December 2009, world leaders met at the 2009 United Nations Climate Change Conference in Copenhagen, Denmark (“Copenhagen Summit”). The Summit produced a non-binding agreement known as the Copenhagen Accord,<sup>69</sup> which was deemed an “abject failure” by many observers.<sup>70</sup> Some critics blamed China and other developing countries for blocking any effective international measures.<sup>71</sup> Others \*593 pointed their fingers at Barack Obama’s “unilateral diplomacy” that was fueled by political realities in the U.S. Senate.<sup>72</sup> Regardless, both theories underscore the tension between domestic and foreign political capital.

In an article published a week before to the Copenhagen Summit, Emma Duncan, Deputy Editor of *The Economist*, aptly assessed the unique political challenges of constructing global solutions to climate change. Duncan stated,

“Climate change is the hardest political problem the world has ever had to deal with. It is a prisoner’s dilemma, a free-rider problem and the tragedy of the commons all rolled into one. At issue is the difficulty of allocating the cost of collective action and trusting other parties to bear their share of the burden. At a city, state and

national level, institutions that can resolve such problems have been built up over the centuries. But climate change has been a worldwide worry for only a couple of decades. Mankind has no framework for it.”<sup>73</sup> While the international framework developed under UNCLOS does not outline the utopic institutions that Duncan pines for, it represents significant opportunities for progress. This is strikingly clear in the context of Arctic affairs.

In an article about the future of Arctic governance, Professor Oran Young posits that the Arctic policy agenda is complicated by the competition of two competing discourses: “the discourse of geopolitics/political realism,” and “the discourse of ecosystem-based management.”<sup>74</sup> The former is a discourse that “assumes that states are the relevant players and that relative power among the key states or coalitions of states is the critical determinant of outcomes.” The latter is a discourse that “starts from the premise that we should think about the Arctic as a complex and dynamic socio-ecological system.”<sup>75</sup> Recognizing that both discourses will “exert influence in the handling of Arctic issues during the near future,” Young pragmatically contends that policy makers would achieve greater success working within the existing legal framework provided by the Convention than by “starting over, \*594 endeavoring to devise a new legal framework for the Arctic Ocean [which] could only create confusion.”<sup>76</sup>

For example, the fact that the Commission on the Limits of the Continental Shelf has already gained legitimacy amongst competing nations demonstrates a willingness to recognize the authority of international law. If the United States were to ratify the Convention, the credibility of that authority would be greatly strengthened, and the United States would have a more legitimate platform on which to assert its rights. Importantly, ratification is politically achievable and desirable.<sup>77</sup>

## Conclusion

The same study that painted marine biodiversity in a dire state also contended that “it is still possible to recover lost biodiversity, at least on local to regional scales,”<sup>78</sup> but urgent action is needed. Ratification of the United Nations Convention on the Law of the Sea offers a unique opportunity to advance conservation efforts and reverse environmental degradation in short order.

## Footnotes

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<sup>1</sup> Ed Regis, *The Doomslayer*, WIRED (Feb. 1997), [http://www.wired.com/wired/archive/5.02/ffsimon\\_pr.html](http://www.wired.com/wired/archive/5.02/ffsimon_pr.html) (describing the dispute over resource scarcity between Ehrlich and Simon).

<sup>2</sup> See e.g., J. Wylie Donald & Craig W. Davis, *Carbon Dioxide: Harmless, Ubiquitous, and Certainly not a “Pollutant” Under a Liability Policy’s Absolute Pollution Exclusion*, 39 SETON HALL L. REV. 107, 120 (2009) (“[E]ven substances that fall literally within the terms of a pollution exclusion’s definition of ‘pollutant’ are not always considered pollutants subject to the exclusion. As will be seen, anthropogenic atmospheric carbon dioxide does not even fall within the literal terms of the definition of ‘pollutant’ and is thus even further removed from the exclusion’s reach.”); NICK LANE, *OXYGEN: THE MOLECULE THAT MADE THE WORLD* (2004) (“In the beginning there was no oxygen. Four Billion years ago, the air probably contained about one part in a million of oxygen. Today, the atmosphere is just less than 21 per cent oxygen, or 208500 part per million. However this change may have come about, it is pollution without parallel in the history of life on earth ... We do not think of it as pollution, because for us, oxygen is necessary and life-giving. For the tiny single-celled organisms that lived on the early Earth, however, oxygen was anything but life giving. It was a poison that could kill, even at trace levels.”).

<sup>3</sup> LAUREN O’NEIL & JOHN A. SULLIVAN, *US Could Take Serious Look at Law of the Sea But Hurdles Remain*, NATURAL

GAS WEEK, Jan. 5, 2009, at 18-19 (“Obama signaled initial support for the convention in a survey sponsored by the National Academy of Sciences during the presidential race. “I will work actively to ensure that the US ratifies the Law of the Sea Convention ... an agreement supported by more than 150 countries that will protect our economic and security interests, he wrote.”).

4 President Barack Obama, Remarks by the President at the United States Military Academy Commencement Ceremony (May 28, 2014) (transcript available at <https://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-united-states-military-academy-commencement-ceremony>).

5 Patricia C. Bauerlein, *The United Nations Convention on the Law of the Sea & U.S. Ocean Environmental Practice: Are We Complying with International Law?*, 17 LOY. L.A. INT’L & COMP. L.J. 899, 903 (1995).

6 *Id.* at 904.

7 Robert N. Huebert, *Canada and the Law of the Sea Convention*, 52 INT’L J. 69 (1996) (“Guyana became the 60th state to deposit its instrument of ratification with the United Nations.”).

8 Jim Abrams, *Senate Panel Approves ‘Law of the Sea’ Treaty*, AP FIN. WIRE, Oct. 31, 2007.

9 *Id.*

10 Bauerlein, *supra* note 5, at 905.

11 Abrams, *supra* note 8.

12 Alex Shoumatoff, *The Arctic Oil Rush*, VANITY FAIR, May 2008, [http://www.vanityfair.com/politics/features/2008/05/arctic\\_oil200805](http://www.vanityfair.com/politics/features/2008/05/arctic_oil200805).

13 Richard A. Lovett, *Arctic Oil Rush Sparks Battles Over Seafloor*, NAT’L GEOGRAPHIC NEWS, Aug. 23, 2007, <http://news.nationalgeographic.com/news/2007/08/070823-arctic-oil.html>.

14 Shoumanoff, *supra* note 12 (noting that our polar ice caps are “shrinking by 28,000 square miles a year.”); *see also* Telis Demos, *The Great Arctic Circle Oil Rush*, FORTUNE, Aug. 8, 2007, [http://money.cnn.com/2007/08/07/news/international/arctic\\_oil.fortune/index.htm](http://money.cnn.com/2007/08/07/news/international/arctic_oil.fortune/index.htm).

15 Richard A. Lovett, *Russia Plants Underwater Flag, Claims Arctic Seafloor*, NAT’L GEOGRAPHIC NEWS, Aug. 3, 2007, <http://news.nationalgeographic.com/news/2007/08/070802-russia-pole.html>.

16 *Id.* (“Since 2001 Russian officials have been arguing that an undersea formation called the Lomonosov Ridge is part of Siberia’s shelf, and that the country is therefore entitled to sole rights to the ridge and the nearby seabed.”).

17 United Nations Convention on the Law of the Sea, Part VI, Art. 76, Dec. 10 1982, 1833 U.N.T.S. 397.

18 *Scramble for the Seabed*, THE ECONOMIST, Dec. 30, 2008, [http://www.economist.com/specialreports/displaystory.cfm?story\\_id=12798472](http://www.economist.com/specialreports/displaystory.cfm?story_id=12798472). (UNCLOS also “allows states to extend their limits beyond 200 miles if they can show that the continental shelf beyond their coastline extends that far. So long as they can

produce the necessary scientific data, and so long as the extra margin is no more than 100 miles from the point at which the sea reaches a depth of 2.5km, they will be granted rights over the natural resources on and under the seabed up to 350 miles from land.”).

<sup>19</sup> PARTIAL REVISED SUBMISSION OF THE RUSSIAN FEDERATION TO THE COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF IN RESPECT OF THE CONTINENTAL SHELF OF THE RUSSIAN FEDERATION IN THE ARCTIC OCEAN (2015), [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/rus01\\_rev15/2015\\_08\\_03\\_Exec\\_Summary\\_English.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/rus01_rev15/2015_08_03_Exec_Summary_English.pdf)

<sup>20</sup> See Council on Foreign Relations, Submission by Denmark to the U.N. Commission on the Limits of the Continental Shelf (CLCS) (Dec. 15, 2014), <http://www.cfr.org/-arctic/submission-denmark-un-commission-limits-continental-shelf-clcs/p35841>.

<sup>21</sup> United Nations, Members of the Commission on the Limits of the Continental Shelf, [http://www.un.org/depts/los/clcs\\_new/commission\\_members.htm#Members](http://www.un.org/depts/los/clcs_new/commission_members.htm#Members) (last visited Apr. 18, 2016).

<sup>22</sup> Shoumatoff, *supra* note 12; see also Nathaniel Gronewold, *Seabed Claims Mount, Swamping U.N. Commission*, N.Y. TIMES (May 14, 2009), <http://www.nytimes.com/gwire/2009/05/14/14greenwireseabedclaims-mount-swamping-un-commission-10572.html>.

<sup>23</sup> Demos, *supra* note 13; see also John B. Bellinger III, *Should the United States Ratify the UN Law of the Sea?*, Council on Foreign Relations (Nov. 11, 2014), <http://www.cfr.org/treaties-and-agreements/should-united-states-ratify-un-law-sea/p31828>.

<sup>24</sup> Dina Fine Maron, *Canada Will Use Robot Subs to Map Arctic Sea Floor, Boost Territorial Claims*, N.Y. TIMES, (Feb. 10, 2010), <http://www.nytimes.com/gwire/2010/02/10/10greenwire-canada-will-use-robot-subs-to-map-arctic-sea-f-45098.html>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> John R. Crook, ed., *Senate Approves Numerous Treaties, Not Including Law of the Sea Convention*, 103 AM. J. INT’L L. 135, 135 (2009) (“In September 2008, the U.S. Senate gave advice and consent to seventy-eight pending treaties, including the 1954 Hague Convention on protection of cultural property in armed conflict; protocols to the Conventional Weapons Convention (CCW) on internal armed conflicts, blinding laser weapons, incendiary weapons, and removing explosive remnants of war; several tax treaties; and numerous extradition and criminal assistance treaties, among them extradition and mutual legal assistance agreements with the European Union and its member countries. The Law of the Sea Convention and the 1996 Protocol to the Convention on Prevention of Marine Pollution by Dumping of Wastes were not among those approved, and remain pending on the Senate’s Executive Calendar. The Senate did not act on several environmental and other treaties for which the administration sought approval.”)

<sup>28</sup> Allison Winter, *Kerry Looks for Window to Ratify Law of the Sea*, ENVIRONMENTAL AND ENERGY DAILY (May 7, 2009), <http://www.eenews.net/stories/77650>

<sup>29</sup> Derek Sands, *In Final Days in Office, Bush Outlines Arctic Policy that Focuses on Drilling*, INSIDE ENERGY WITH FEDERAL LANDS, Jan. 19, 2009 at 18.

<sup>30</sup> John Norton Moore & William L. Schachte Jr., *The Senate Should Give Immediate Advice and Consent to the UN Convention on the Law of the Sea: Why the Critics are Wrong*, 59 J. INT’L AFFAIRS 1, 3 (2005) (“[I]ronically, in their attack on the convention, the critics join extreme internationalists who have been key opponents of the treaty because it focuses on national sovereign rights.”).

31 Jessica Tuchman Mathews, *Op-ed: The Death of Our Treaties*, N.Y. REVIEW OF BOOKS (Mar. 9, 2016) (noting that opposition to ratification “is based more on symbolism, ideology, or mythically exaggerated fears of loss of sovereignty” than on substance).

32 *Id.*; see also John Fonte, *LOST at Sea: The Law of the Sea Treaty Threatens American Sovereignty*, NAT’L REV. ONLINE (Oct. 29, 2007), <http://www.nationalreview.com/article/222662/lost-sea-john-fonte> (arguing that “[a]t the deeper level, the battle over the Law of the Sea Treaty is another round in what promises to be a century-long conflict over the meaning of democratic decision-making between the forces of American self-government and the supporters of ‘global governance,’ the so-called ‘transnational progressives’”).

33 *United Nations Convention on the Law of the Sea: Oversight Hearing Before U.S. Senate Committee on Environment and Public Works*, 109th Cong. (Mar. 24, 2004) (statement of Frank J. Gaffney, Jr.), [http://epw.senate.gov/hearing\\_statements.cfm?id=219549](http://epw.senate.gov/hearing_statements.cfm?id=219549). Mr. Gaffney was recently named a foreign policy adviser to Senator Ted Cruz. See Alan Rappeport, *Ted Cruz Faulted for Advisor with Anti-Islam Views*, N.Y. TIMES (Mar. 17, 2016), <http://www.nytimes.com/politics/firstdraft/2016/03/17/ted-cruz-faulted-for-advisor-with-anti-islam-views>.

34 Moore & Schachte, *supra* note 30, at 9.

35 See generally, Karen Hansen et al., *A Bold New Ocean Agenda: Recommendations for Ocean Governance, Energy Policy, and Health*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10012, 10014-15 (2009).

36 Moore & Schachte, *supra* note 30, at 16.

37 *Id.*

38 *Id.*

39 *Id.*

40 Christopher Shiraldi, *U.S. National Security Implications of the U.N. Convention of the Law of the Sea*, 27 PENN ST. INT’L L. REV. 519, 542 (2008).

41 *Id.*

42 *Id.* at 542.

43 Moore & Schachte, *supra* note 30, at 13.

44 *Id.* at 12-13.

45 Bauerlein, *supra* note 5, at 913.

46 UNITED NATIONAL CONVENTION ON THE LAW OF THE SEA, *Preamble*, [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm).

47 Bauerlein, *supra* note 5, at 900.

- 48 *Id.*
- 49 See ELLIOT A. NORSE, GLOBAL MARINE BIOLOGICAL DIVERSITY: A STRATEGY FOR BUILDING CONSERVATION INTO DECISION MAKING xix (Elliot A. Norse ed., 1993) (“[T]he need for conserving life in the sea and the principles for doing so are far less appreciated than for the land; marine conservation lags terrestrial conservation by roughly two decades.”).
- 50 Nick Nuttall, *Overfishing: A Threat to Marine Biodiversity*, (May 13, 2009), <http://www.un.org/events/tenstories/06/story.asp?storyID=800>; see also E. J. Molenaar, *Unregulated Deep-Sea Fisheries: A Need for a Multi-Level Approach*, 19 INT’L J. MARINE AND COASTAL L. 223 (2004); Daniel Pauly et al., *Towards Sustainability in World Fisheries*, 418 SCI. 689 (2002).
- 51 Boris Worm et al., *Impacts of Biodiversity Loss on Ocean Ecosystem Services*, 314 SCIENCE 787, 790 (2006) (“This trend is of serious concern because it projects the global collapse of all taxa currently fished by the mid-21st century (based on the extrapolation of regression in Fig. 3A to 100% in the year 2048)”).
- 52 Joanna Mossop, *Protecting Marine Biodiversity of the Continental Shelf Beyond 200 Nautical Miles*, 38 OCEAN DEV. & INT’L L. 283, 285 (2007) (defining bottom trawling as a type of fishing where “the trawl net is directed toward the slope of the seamount, with the net following the slope of the seafloor for a period”). “A variety of human activities have the potential to cause harm, in greater or lesser extents, to marine biodiversity on the continental shelf.” *Id.*
- 53 See, e.g., William Broad, *Filmmaker in Submarine Voyages to Bottom of Sea*, N.Y. TIMES (Mar. 25, 2012), <http://www.nytimes.com/2012/03/26/science/james-camerons-submarine-trip-to-challenger-deep.html>.
- 54 MOSSOP, *supra* note 52, at 284 (“[A]lthough the outer areas of the continental shelf are relatively inaccessible compared to the areas closer to shore, increasing information is available about the biodiversity associated with the shelf ... scientific expeditions are uncovering unique creatures with exciting characteristics.”).
- 55 *Id.* at 285.
- 56 *Id.*
- 57 Salvatore Arico & Charlotte Salpin, *Bioprospecting of Genetic Resources in the Deep Seabed: Scientific, Legal and Policy Aspects*, UNITED NATIONS UNIVERSITY-INSTITUTE OF ADVANCE STUDIES, <http://www.ias.unu.edu/binaries2/DeepSeabed.pdf>, at 17 (last updated Mar. 3 2016).
- 58 David Farrier & Linda Tucker, *Access to Marine Bioresources: Hitching the Conservation Cart to the Bioprospecting Horse*, 32 OCEAN DEV. & INT’L L. 213 (2001).
- 59 *Id.* at 229.
- 60 *Id.* (“Fishing is central to the livelihood and food security of 200 million people, especially in the developing world, while one of five people on this planet depends on fish as the primary source of protein.”).
- 61 Moore & Schachte, *supra* note 30, at 7; see also Thilo Bode, *Sea Changes*, OUR PLANET, <http://www.ourplanet.com/imgversn/112/bode.html> (International Executive Director of Greenpeace argues that “[s]olving the environmental problems facing the oceans and ensuring sustainable fisheries is one of the greatest challenges facing humankind in the 21st century. No single nation or region can do this alone: it will require comprehensive international cooperation as required by the United Nations Convention on the Law of the Sea.”).

- 62 Jonathan I. Charney, *The Marine Environment and the 1982 United Nations Convention on the Law of the Sea*, 28 INT'L LAW. 879, 882 (1994).
- 63 *Id.* (“The obligation to protect and preserve the marine environment must be undertaken in a way that does not pose risks to other environments. Thus, states have a duty ‘not to transfer ... damage or hazards from one area to another or transform one type of pollution into another’ ... States are obliged to cooperate regionally and globally, notify other states when they determine that they are in danger of damage from pollution, establish contingency plans against pollution, and undertake scientific research and exchange of information regarding the pollution of the marine environment.”); *see also* Donald K. Anton, *Law of the Sea’s Biodiversity*, 36 COLUM. J. TRANSNAT’L L. 341, 348 (1998) (“Realistically, effective conservation and sustainable use of marine biological diversity in areas solely or partially outside of national jurisdiction will require further ‘cooperation’ of all states.”).
- 64 Bernard H. Oxman, *United States Interests in the Law of the Sea Convention*, 88 AM. J. INT’L L. 167, 172 (1994); *see also* United Nations Convention on the Law of the Sea (Treaty Doc. 103-39): Hearing Before the S. Comm. on Foreign Relations, 108th Cong. 36 (2003) (statement by Bernard H. Oxman).
- 65 *Id.*
- 66 *Id.*
- 67 *Id.*
- 68 *See* Frederic L. Kirgis, *Is Foreign Law International Law*, AM. SOC’Y INT’L L., <http://www.asil.org/insights051031.cfm> (arguing that the United States Supreme Court has opened the door to “the use of *international law* by US courts”); *but see* Darin R. Bartram, *International Litigation Over Global Climate Change: A Skeptic’s View*, 101 AM. SOC’Y INT’L L. PROC. 65 (2007).
- 69 *Copenhagen Deal: Key Points*, BBC NEWS ONLINE (Dec. 13, 2009), <http://news.bbc.co.uk/2/hi/science/nature/8422307.stm>.
- 70 *Copenhagen Deal Reaction in Quotes*, BBC NEWS ONLINE (Dec. 13, 2009), <http://news.bbc.co.uk/2/hi/science/nature/8421910.stm> (quoting Nnimmo Bassey, Chair of Friends of the Earth International).
- 71 Mark Lynas, *How Do I Know China Wrecked the Copenhagen Deal? I Was in the Room*, GUARDIAN WEEKLY, Dec. 21, 2009, <http://www.guardian.co.uk/environment/2009/dec/22/copenhagenclimatechange-mark-lynas>.
- 72 George Monbiot, *If you Want to Know Who’s to Blame for Copenhagen, Look to the US Senate*, GUARDIAN WEEKLY, Dec. 21, 2009, <http://www.guardian.co.uk/commentisfree/2009/dec/21/copenhagen-failure-us-senate-vested-interests>.
- 73 Emma Duncan, *A Special Report on Climate Change and the Carbon Economy: Getting Warmer*, THE ECONOMIST, Dec. 3, 2009, [http://www.economist.com/specialreports/displaystory.cfm?story\\_id=14994872](http://www.economist.com/specialreports/displaystory.cfm?story_id=14994872).
- 74 Oran R. Young, *The Arctic in Play: Governance in a Time of Rapid Change*, 24 INT’L J. MARINE AND COASTAL L. 423, 432 (2009).
- 75 *Id.*
- 76 *Id.* at 435.

<sup>77</sup> Oran Young, *Whither the Arctic? Conflict or Cooperation in the Circumpolar North*, 45 POLAR RECORD 73, 75 (2009).

<sup>78</sup> Worm, *supra* note 51, at 790.