The University of the Pacific Law Review

Volume 48 | Issue 2 Article 15

1-1-2017

It's Time to Get Off the Bench: The U.S.Needs to Ratify the Law of the Sea Treaty Before It's Too Late

Randy W. Tong
The University of Pacific, McGeorge School of Law

It's Time to Get Off the Bench: The U.S. Needs to Ratify the Law of the Sea Treaty Before It's Too Late

*Randy W. Tong**

TABLE OF CONTENTS

* J.D. Candidate, University of the Pacific, McGeorge School of Law, to be conferred May 2017; B.S. Clinical Nutrition, University of California, Davis, 2008. I would like to thank Professor Rachael Salcido for her tremendous support and guidance, and my friends and family for their encouragement and understanding. Additionally, I would like to thank my Primary Editor, Nisha De Lany and my Chief Comment Editor, Ryan Matthews, whose invaluable insight and dedication helped craft this Comment into its current form.

> *"By moving off of the sidelines, where we are now, and sitting at the table of nations that have ceded to this treaty, we can defend our interests, we can lead the discussions, and we would be able to influence those treaty bodies that develop and interpret the Law of the Sea."*
>
> *—Former Secretary of Defense Leon Panetta*[1]

I. INTRODUCTION

In early 2018, Nautilus Minerals' Solwara 1 Project (Solwara 1 Project) will become the world's first deep seabed mining operation to successfully extract valuable resources from the seafloor.[2] As of today, no other successful deep seabed mining operation exists.[3] With technologically feasible deep seabed mining operations on the horizon, nations will look to an international legal regime to govern these mining activities.[4] The frontrunner and most internationally recognized candidate to fill that role will likely be the United Nations Convention on the Law of the Sea of 1982 (UNCLOS).[5]

A total of 167 nations have ratified UNCLOS since 1982.[6] A few of the ratifying nations include the United Kingdom of Great Britain, Chile, Germany, Mozambique, Russian Federation, Maldives, and China.[7] A glaring absence among this extensive list is the United States of America who, despite being greatly involved in developing UNCLOS, has for nearly 33 years resisted the ratification of the convention.[8] Notwithstanding bipartisan support and calls for

---

1. PRACHI NAIK, THE LAW OF THE SEA; KEY QUOTATIONS, AMERICAN SECURITY PROJECT (Jun. 27, 2012), *available at* http://www.americansecurityproject.org/the-law-of-the-sea-convention-key-quotations/ (on file with *The University of the Pacific Law Review*).

2. Matthew Keevil, *Nautilus Targets 2018 For Undersea Mining*, THE NORTHERN MINER (Apr. 15, 2015), *available at* http://www.northernminer.com/news/nautilus-targets-2018-undersea-production-at-solwara/1003570693/ (on file with *The University of the Pacific Law Review).*

3. *See* Jort Van Wijk, *Meeting the Challenges of Deep-Sea Mining*, SEATECHNOLOGY MAGAZINE (last visited on Oct. 21, 2015), *available at* http://www.sea-technology.com/features/2012/0312/mining_challenges.php (on file with *The University of the Pacific Law Review*). Many challenges prevent other deep seabed mining operations from being successful. These challenges include fundamental physics of the hyperbaric cutting of rock, physics of vertical two-phase flows containing large solid particles, flow assurance and positioning, and control of the subsea mining tool and vertical transport system.

4. Keevil, *supra* note 2*;* OFFICE OF GENERAL COUNSEL, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, SEABED MANAGEMENT (last visited Oct. 21, 2015), *available at* http://www.gc.noaa.gov/gcil_seabed_management.html (on file with *The University of the Pacific Law Review*).

5. Koji Sekimizu, *Address by Mr. Koji Sekimuzu, Secretary-General of the International Maritime Organization*, INTERNATIONAL MARITIME ORGANIZATION (Mar. 18, 2014), *available at* http://www.imo.org/en/MediaCentre/SecretaryGeneral/SpeechesByTheSecretaryGeneral/Pages/itlos.aspx (*on file with The University of Pacific Law Review*).

6. *Id.*

7. *Id.*

8. Sunil Agarwal, *Prospects of a Paradigm Shift in the American Policy Towards UN Convention on the Law of the Sea: Potential Implications*, NATIONAL MARITIME FOUNDATION 1, 6 (Apr. 15, 2011), *available at* http://ssrn.com/abstract=1866113 (on file with *The University of the Pacific Law Review*) (explaining the involvement of the U.S. in the development of UNCLOS).

ratification by several U.S. presidents, the lack of U.S. Senate approval has proven to be a significant barrier in taking the final step towards ratification.[9]

As more nations join in the ratification of UNCLOS and the realization of deep seabed mining becomes more apparent, the U.S.'s resistance to join the convention will cause it to forgo "an opportunity to extend its sovereign rights over adjoining continental shelf."[10] Furthermore, such continued non-ratification by the U.S. will "simultaneously [abdicate] an opportunity [for the U.S.] to play a significant role in formal deliberations in the UNCLOS institutions."[11] The failure to ratify the convention is largely due to a "handful of ideologues" from the Senate who see UNCLOS as "an assault on U.S. sovereignty" and the misbelief that the original objections by President Reagan in 1982 have yet to be rectified.[12]

The U.S. Senate should immediately ratify UNCLOS to extend and obtain international recognition of U.S. sovereignty to continental shelf resources through deep seabed mining. Ratifying UNCLOS will re-establish itself as a world leader in shaping the rule of law in the oceans.[13] Part II provides a history of UNCLOS, including its origins and subsequent redevelopment in the early 1990's to address concerns regarding deep seabed mining.[14] Part III summarizes the pertinent parts of UNCLOS and deep seabed mining.[15] Part IV examines recent developments in deep seabed mining technology, such as the Solwara 1 Project, and how its realization is significant to the U.S.'s current status as a non-member to UNCLOS.[16] Part V describes the U.S.'s unsuccessful attempt to circumvent UNCLOS and how the international landscape stands today.[17] Part VI discusses the case for the ratification of UNCLOS and why critics' concerns are antiquated and overstated.[18] Part VII calls for the immediate ratification of UNCLOS by the U.S. Senate to strengthen U.S. sovereignty and leadership in the ocean's affairs.[19]

---

9. *Id.* at 8 (providing a basis for why the ratification of UNCLOS fails when it reaches the U.S. Senate).

10. *Id.* at 12 (describing the detriments to the U.S. in its continued absence as a party to UNCLOS).

11. *See id.*

12. Raul Pedrozo, *Arctic Climate Change and U.S. Accession to the United Nations Convention on the Law of the Sea*, 89 INT'L L. STUD. 757, 762–63 (2013) (on file with *The University of the Pacific Law Review*) (explaining who the opponents are of UNCLOS in the U.S. government and why they oppose its ratification).

13. *See generally* Agarwal, *supra* note 8, at 12–14 (providing the benefits that will be realized when the U.S. ratifies UNCLOS); *see also id.* (listing the benefits of U.S. ratification of UNCLOS, such as continental shelf resources and influence in the development of the law of the sea).

14. *Infra* Part II.

15. *Infra* Part III.

16. *Infra* Part IV.

17. *Infra* Part V.

18. *Infra* Part VI.

19. *Infra* Part VII.

II. HISTORY OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA AND THE UNITED STATES

A brief historical overview of the origin and evolution of the convention provides perspective on why UNCLOS is the appropriate legal regime for deep seabed mining. UNCLOS' history also demonstrates why the proposal in this Comment is necessary to advance the interests of the U.S. and to help maintain the U.S.'s perceived role as a world leader in the development of the rule of law in the oceans.[20]

This Part provides a historical overview of UNCLOS' development.[21] Section II.A will discuss the Freedom of the High Seas Doctrine.[22] Section II.B will discuss the origin and development of UNCLOS.[23] Section II.C will briefly go over the U.S. interim regulatory framework known as the Deep Seabed Hard Minerals Resources Act.[24] Section II.D summarizes the U.S. political support in favor of the ratification of UNCLOS.[25]

A. Freedom of the High Seas Doctrine

In 1608, the Freedom of the High Seas Doctrine (High Seas Doctrine) was created in response to the susceptibility by nations to lay claims of territorial ownership and sovereign control on the high seas.[26] The High Seas Doctrine was developed by Hugo Grotius, also known as the "father of international law," in recognition of his prediction that "if States began treating the high seas in the same way as land territory," it may lead to "the risk of a full-blown armed conflict."[27] The High Seas Doctrine set forth the concept that a nation's rights and jurisdiction over the oceans was limited to only a "narrow belt of sea surrounding a nation's coastline."[28]

In accordance with the High Seas Doctrine, the vast remainders of the high seas were "proclaimed to be free to all and belonging to none."[29] The High Seas

20. Pedrozo, *supra* note 12, at 771. The U.S. has historically been known as a world leader in the rule of law in the oceans.

21. *Infra* Part II.A–B.

22. *Infra* Part II.A.

23. *Infra* Part II.B.

24. *Infra* Part II.C.

25. *Infra* Part II.D.

26. *See* James Brosseau, *Frozen in Time: A Fresh Look at the Law of the Sea and Why the United States Continues to Fight Against It*, 42.1 S.U. L. REV. 143, 147 (2014) (on file with *The University of the Pacific Law Review*) (explaining the background behind the Freedom of the High Seas Doctrine).

27. *See id.* (providing the impetus for the creation of the High Seas Doctrine).

28. *See* UNITED NATIONS, THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (A HISTORICAL PERSPECTIVE), ¶ 1 (last visited Oct. 27, 2015), *available at* http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm#HistoricalPerspective (on file with *The University of the Pacific Law Review*) (providing the purpose of the High Seas Doctrine).

29. *Id.*

Doctrine became "one of the first firmly established areas of customary international law" in the world and prospered well into the 20th century.[30] Unfortunately, with the discovery of deep sea resources in the mid-20th century, nations began to lay claims outside the traditional jurisdiction set forth in the High Seas Doctrine.[31] By 1967, the once peaceful waters brought by the High Seas Doctrine became turbulent due to advancements in technology, the realization of deep sea resources, and the "super-power rivalry" among nations.[32]

B. The Birth of the Constitution of the Sea

Global success in the exploitation of deep sea resources led a number of nations to lay claims of ownership over resources on and below the continental shelf within their respective jurisdictions.[33] It was not until the early 20th century that nations realized a legal framework for the sea was desirable when it became technologically and economically feasible to extract resources like oil deposits from beneath the oceans.[34] At the end of World War II, there was an international consensus to avoid future conflicts through the codification of an international legal doctrine regarding the seas.[35]

On November 1, 1967, Arvid Pardo, Malta's Ambassador to the United Nations, called for:

> [A]n effective international regime over the seabed and the ocean floor beyond a clearly defined national jurisdiction. It is the only alternative by which we can hope to avoid the escalating tension that will be inevitable if the present situation is allowed to continue.[36]

In 1973, the Third United Nations Conference on the Law of the Sea was held in New York, sparking initial negotiations towards the creation of the legal regime envisioned by Mr. Pardo.[37] This legal regime was to replace the High Seas Doctrine with a system based on the common heritage of mankind to benefit

30. *See* Brosseau, *supra* note 26, at 147–48 (describing the High Seas Doctrine and its effect for nearly three centuries).

31. *See* UNITED NATIONS, *supra* note 28, at ¶ 1 (describing the decline of the High Seas Doctrine due to claims by seafaring nations for offshore resources).

32. *See id.* at ¶ 16 (listing the reasons why the peace brought by the High Seas Doctrine eroded).

33. Brosseau, *supra* note 26, at 148–49 (explaining the legal environment pre-UNCLOS); UNITED NATIONS, *supra* note 28, at ¶¶ 3–6. Following the U.S. President Harry S. Truman's unilateral claim of its continental shelf; Argentina, Chile, Peru, Ecuador, Egypt, Ethiopia, Saudi Arabia, Libya, Venezuela, Indonesia, the Philippines, and some Eastern European countries followed suit and asserted their sovereign rights over ocean areas off the coast of their borders.

34. *See* Brosseau, *supra* note 26, at 148 (describing the origins of UNCLOS).

35. *See id.* at 150 (describing the origins of UNCLOS).

36. UNITED NATIONS, *supra* note 28, at ¶ 17.

37. *Id.* at ¶¶ 18–19.

the international community.[38] Through the collaboration of over 150 delegations, including the U.S., and nine years of negotiations, a comprehensive legal structure governing ocean use was developed. [39] This legal regime was UNCLOS.[40] During the nine years of negotiations, the U.S. was a "principal broker of consensus on many of the key issues"[41] leading to the ultimate agreement for the 1982 version of UNCLOS.[42]

Despite the U.S.'s substantial influence and involvement in developing UNCLOS,[43] President Ronald Reagan declined to sign the treaty, mostly due to the deep seabed provisions of the treaty.[44] Specifically, Part XI of UNCLOS addressed the ocean's seabed that stretched beyond any nation's jurisdiction.[45] The crux of the U.S.'s apprehension in endorsing the treaty revolved around Part XI's treatment of the seabed beyond any national jurisdiction as the "common heritage of mankind."[46] In doing so, Part XI subjected members of the treaty to "international taxes and technology transfers on seabed mining ventures to support developing and landlocked countries," and "established a new international organization to conduct its own seabed mining," the International Seabed Authority (ISA).[47]

President Reagan's statement on the U.S.'s participation in the Third United Nations Conference on the Law of the Sea listed changes "necessary to correct

---

38. Martin Harry, *The Deep Seabed: The Common Heritage of Mankind or Arena for Unilateral Exploitation?*, 40 NAVAL L. REV. 207, 210 (1992) (on file with *The University of the Pacific Law Review*). Mr. Pardo's call for a change was to replace the Freedom of the Seas doctrine with one based on the "common heritage of mankind" concept.

39. Pedrozo, *supra* note 12, at 759. UNCLOS was negotiated from 1973–1982 by more than 150 delegations to balance the interests of nations to control activities off their coasts and their use of the oceans.

40. *Id.* UNCLOS was negotiated from 1973–1982 by more than 150 delegations to balance the interests of nations to control activities off their coasts and their use of the oceans.

41. *See* John Briscoe & Peter Prows, *The U.N. Convention on the Law of the Sea Turns 27, and American Ratification Is Not in Sight—Still*, BERK. J. INT'L L. (Nov. 5, 2008), *available at* http://bjil.typepad.com/publicist/2009/03/publicist01-briscoe-prows.html (on file with *The University of the Pacific Law Review*) (describing the U.S. as a leader in the development of the Law of the Sea and, thanks to the U.S.'s experience with building the structure of the modern Law of the Sea, it was an influential party involved in the development of UNCLOS).

42. *Id.*

43. David D. Caron & Harry N. Scheiber, *The United States and the 1982 Law of the Sea Treaty*, AM. SOC'Y INT'L L. (Jun. 11, 2007), *available at* http://www.asil.org/insights/volume/11/issue/16/united-states-and-1982-law-sea-treaty (on file with *The University of the Pacific Law Review*). The U.S. administrations of Presidents Nixon, Ford, and Carter all played a leading role in the negotiations of UNCLOS up until 1982.

44. *See* Brosseau, *supra* note 26, at 150 (despite its involvement, the U.S. refused to sign the treaty due to problems with the deep seabed provisions of the treaty).

45. *See* Briscoe & Prows, *supra* note 41 (identifying the concerns the U.S. had with Part XI of UNCLOS in 1982).

46. *See id.* (identifying the concerns the U.S. had with Part XI of UNCLOS in 1982).

47. *See id.*; *see also* INTERNATIONAL SEABED AUTHORITY, ABOUT THE INTERNATIONAL SEABED AUTHORITY (last visited Nov. 3, 2015), *available at* https://www.isa.org.jm/authority (on file with *The University of the Pacific Law Review*) (discussing UNCLOS and that the 1994 Agreement created the ISA as an autonomous international organization to organize and control activities within the seabed, ocean floor, and subsoil beyond the limits of any nation's jurisdiction).

those unacceptable elements" of UNCLOS.[48] In 1994, UNCLOS was renegotiated, and several influential U.S. political figures acknowledged that the renegotiation resolved the "unacceptable elements" noted by Reagan.[49] Despite this, opponents of UNCLOS still believe the 1994 Agreement Relating to the Implementation of Part XI of the Convention (Implementation Agreement) remains flawed.[50] Specifically, opponents are concerned with the following: the lack of any U.S. "veto" power over all ISA decisions, risks to U.S. economic interests; subjecting U.S. companies to an "unaccountable international bureaucracy"; and the possibility that foreign interests would dominate over U.S. interests.[51]

C. Deep Seabed Hard Minerals Resources Act

In 1980, the U.S. established an interim regulatory system for deep seabed hard mineral resource development known as the Deep Seabed Hard Minerals Resource Act (DSHMRA).[52] The purpose of the act was "to be temporary, pending the entry into force of the United States of the [Law of the Sea] Convention including a deep seabed regime."[53] The U.S. Act asserts that:

It is the legal opinion of the United States that exploration for and commercial recovery of hard mineral resources of the deep seabed are *freedoms of the high seas* subject to a duty of reasonable regard to the interests of other

48. President Ronald Reagan's Statement on United States Participation in the Third United Nations Conference on the Law of the Sea, at 1–2 (Jan. 29, 1982), *available at* http://www.jag.navy.mil/organization/documents/Reagan%20statement%20on%20US%20participation%20in%20the%20Third%20United%20Nations%20Conference%20on%20the%20Law%20of%20the%20Sea.pdf (on file with *The University of the Pacific Law Review*) [hereinafter *Reagan's UNCLOS Statement*]. President Reagan criticized UNCLOS and listed necessary changes to the treaty that: 1) will not deter development of any deep seabed mineral resources to meet national and world demand; 2) will assure national access to these resources by current and future qualified entities to enhance U.S. security of supply, to avoid monopolization of the resources by the operating arm of the International Authority, and to promote the economic development of the resources; 3) will provide a decision-making role in the deep seabed regime that fairly reflects and effectively protects the political and economic interests and financial contributions of participating states; 4) will not allow for amendments to come into force without approval of the participating states, including in our case the advice and consent of the Senate; 5) will not set other undesirable precedents for international organizations; and 6) will be likely to receive the advice and consent of the Senate. In this regard, the convention should not contain provisions for the mandatory transfer of private technology and participation by and funding for national liberation movements.

49. *See* Part II.C.; *see id.* at 1–2 (listing the problems with the 1982 treaty that needed to resolved before any ratification by the U.S.); *see also* THE HERITAGE FOUNDATION, U.N. CONVENTION ON THE LAW OF THE SEA: IT'S STILL A BAD IDEA (Jul. 7, 2011), *available at* http://www.heritage.org/research/factsheets/2011/07/un-convention-on-the-law-of-the-sea-its-still-a-bad-idea (on file with *The University of the Pacific Law Review*) [hereinafter BAD IDEA] (providing a summary of reasons why the treaty is still a bad idea despite the 1994 revisions).

50. *See* BAD IDEA, *supra* note 49.

51. *Id.*

52. 30 U.S.C. §§ 1401–73 (1980).

53. Johnathan I. Chamey, *U.S. Provisional Application of the 1994 Deep Seabed Agreement*, 88 AM. J. INTL. L. 705, 710 (1994). DSHMRA was only intended to be a temporary regime.

states in their exercise of those and other freedoms recognized by general principles of international law. [emphasis added][54]

As a result of DSHMRA, the U.S. will continue to follow the High Seas Doctrine[55] with respect to deep seabed mining activities but will continue to lack an international voice on deep seabed mining until Congress ratifies UNCLOS.[56]

D. U.S. Political Support to Ratify UNCLOS

In response to the previous objections of the U.S. and other states over Part XI, UNCLOS was revised in July 1994 by "[doing] away with the technology transfers, sharply limit[ing] the [international organization], and significantly restrict[ing] the original seabed mining taxes."[57] This was done, in large part, to end the impasse initiated by the U.S. and supported by other developed countries that opposed the original deep seabed provisions.[58] President Bill Clinton signed the treaty after the revisions were made to Part XI.[59] However, the U.S. Senate ultimately refused to ratify the treaty.[60]

On November 27, 2001, Ambassador Sichan Siv, the U.S. Representative on the U.N. Economic and Social Council, provided the following statement to the U.N. General Assembly:

> The United States has long accepted the UN Convention on the Law of the Sea as embodying international law concerning traditional uses of the oceans. The United States played an important role in negotiating the Convention, as well as the 1994 Agreement that remedied the flaws in Part XI of the Convention on deep seabed mining. Because the rules of the Convention meet U.S. national security, economic, and environmental interests, I am pleased to inform you that the Administration of President George W. Bush supports accession of the United States to the Convention.[61]

---

54. 30 U.S.C. § 1401(a)(12) (1980) (explaining the stance of the U.S. with regards to the treatment of deep seabed minerals located outside of a nation's jurisdiction).

55. *See infra* Part II.A.

56. 30 U.S.C. § 1401(a)(12) (1980) (explaining the stance of the U.S. with regards to the treatment of deep seabed minerals located outside of a nation's jurisdiction).

57. *See* Briscoe & Prows, *supra* note 41, at 1 (describing the revisions of the 1994 Implementing Agreement to address the objections previously raised by President Reagan).

58. Agarwal, *supra* note 8, at 7.

59. *Id.*

60. *Id.*

61. MARJORIE A. BROWNE, THE LAW OF THE SEA CONVENTION AND U.S. POLICY, CRS BRIEF ISSUE FOR CONGRESS 5 (Jun. 16, 2006), *available at* http://www.fas.org/sgp/crs/row/IB95010.pdf (on file with *The University of the Pacific Law Review*).

On October 21, 2003, William Taft, then Legal Advisor of the U.S. State Department, stated before the Senate Foreign Relations Committee:

> [C]hanges set forth in the 1994 Agreement over[came] each one of the objections of the United States to Part XI of the Convention and [met] our goal of guaranteed access by the U.S. industry to deep seabed minerals and on the basis of *reasonable terms and conditions*. [emphasis added].[62]

In September 2004, the U.S. Commission on Ocean Policy issued 212 recommendations to the President and Congress, classifying U.S. accession to UNCLOS as one of its "13 Critical Actions . . . [to] provide the foundation for a comprehensive national ocean policy."[63]

On May 15, 2007, former President George W. Bush issued a press release indicating his support for the ratification of the treaty because "it will secure U.S. sovereign rights over extensive marine areas, including the valuable natural resources they contain . . . it will give the United States a seat at the table when the rights that are vital to our interests are debated and interpreted."[64] Late in 2007, the Senate Foreign Relations Committee followed President Bush's support for the treaty by voting 17-4 in support of signing UNCLOS.[65]

On May 23, 2012, former Secretary of State Hillary Clinton testified before the Senate Foreign Relations Committee to support the ratification of UNCLOS, stating:

American companies are equipped and ready to engage in deep seabed mining. But the United States can only take advantage of the Convention's provisions that accord security of tenure to mine sites in area beyond national jurisdiction as a part to this treaty.[66]

In June 2012 the Senate Foreign Relations Committee heard witness testimonies from six high-ranking military officials, four Admirals and two Generals, who supported the ratification of UNCLOS.[67] These military officials

---

62. Caron & Scheiber *supra* note 43, at 3.

63. BROWNE, *supra* note 61, at 5.

64. Press Release, President George W. Bush, President's Statement on Advancing U.S. Interests in the World's Oceans (May 2007), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2007/05/20070515-2.html (on file with *The University of the Pacific Law Review*).

65. *See generally* Kevin Drawbaugh, *U.S. Senate Panel Backs Law of the Sea Treaty*, REUTERS (Oct. 31, 2007), *available at* http://www.reuters.com/article/2007/10/31/idUSN31335584 (on file with *The University of the Pacific Law Review*) (reporting on the Senate Foreign Relations Committee's support of UNCLOS).

66. Hillary R. Clinton, Secretary, U.S. Dept. of St., Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part XI of the Law of the Sea Convention before the Senate Foreign Relations Committee 1–2 (May 23, 2012).

67. Press Release, John Kerry, U.S. Senate Committee on Foreign Rel., Statement on "24 Star" Military Witnesses Voice Strong Support for Law of the Sea Treaty (June 14, 2012), *available at* http://www.foreign.senate.gov/press/chair/release/24-star-military-witnesses-voice-strong-support-for-law-of-the-sea-treaty

pointed out major benefits, including: "solid[ifying] our global maritime leadership"; "protecting American prosperity"; and "reinforce[ing] our leadership role in shaping international maritime policy and overseeing peaceful economic activity on and under our world's seas and oceans."[68]

Recently, at the United States' Military Academy, West Point, President Barack Obama remarked upon UNCLOS at the commencement ceremony for the Class of 2014.[69] President Obama urged the U.S. Senate to ratify UNCLOS to maintain a strong American maritime influence, referring to the maritime dispute in the South China Sea as an example. Furthermore, he stated "We can't exempt ourselves from the rules that apply [to] everybody else," acknowledging the odd position the U.S. is placed in when attempting to resolve maritime disputes between members of UNCLOS while the U.S. remains an outsider to the treaty.[70] Despite a number of testimonies and supportive statements by various political and military figures who leverage a substantial amount of influence, the U.S. has yet to ratify the treaty due to staunch conservative republican opposition.[71]

III. CURRENT UNCLOS DEEP SEABED MINING REGIME

Today, most nations are subject to the deep seabed mining regime controlled by Part XI of UNCLOS and the Implementation Agreement.[72] UNCLOS grants the ISA the responsibility to manage and regulate all deep seabed mining operations of its Member States.[73] The ISA's purpose is to develop and implement rules and regulations that would "fill [the] gaps in the framework left

(on file with *The University of the Pacific Law Review*) (issuing a press release summarizing the various points made by six high ranking military officials in support of the ratification of the Law of the Sea Convention).

68. *Id.*

69. Barack Obama, President, United States, U.S. Dept. of St., Keynote Address at the United States Military Academy Commencement (May 28, 2014), *available at* https://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-united-states-military-academy-commencement-ceremony (on file with *The University of the Pacific Law Review*). President Obama noted that in order for American influence to remain strong in maritime matters, that the United States Senate must ratify the Law of the Sea Convention.

70. *Id.*

71. *See generally* Briscoe & Prows, *supra* note 41 (summarizing the U.S.'s absence due to its non-ratification stance towards UNCLOS); Thomas Wright, *Outlaw of the Sea: The Senate Republicans' UNCLOS Blunder*, FOREIGN AFFAIRS (Aug. 7, 2012), *available at* https://www.foreignaffairs.com/articles/oceans/2012-08-07/outlaw-sea (on file with *The University of the Pacific Law Review*). Republican opposition began with the Regan administration and has continued to persevere. A group of 34 Republican senators, led by Senator Jim DeMint, has promised to vote against UNCLOS, which is enough to make it impossible to obtain the required two-thirds majority vote in the Senate to ratify UNCLOS.

72. United Nations Convention on the Law of the Sea, Dec. 10, 1982 [hereinafter UNCLOS] (on file with *The University of the Pacific Law Review*); 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 21, 2010 [hereinafter Implementation Agreement] (on file with *The University of the Pacific Law Review*).

73. UNCLOS, *supra* note 72, Article 157.

by [UNCLOS]."[74] Part XI was never intended to be a comprehensive and complete legal code to guide the ISA in the management and regulation of deep seabed mining.[75] Instead, the deep seabed mining legal regime was meant to evolve and develop over time as the expertise and knowledge of the deep seabed grew.[76]

Most importantly, the extraction of minerals from the seabed is subject to Part XI of UNCLOS and *any* rules and regulations adopted by the ISA.[77] Article 137(2) provides the ISA substantial authority in determining the standards and required practices in all aspects of deep seabed under the ISA's jurisdiction.[78] As of 2015, the ISA issued four regulations with respect to rules, regulations, and procedures regarding prospecting and exploration of marine minerals in the international seabed area.[79] This comprehensive set of rules is collectively known as the "Mining Code."[80] The ISA has yet to issue any regulations on the exploitation of mineral resources in the deep seabed.[81]

As of March 2015, the ISA prepared two consultation documents for its members and stakeholders.[82] These two documents provided a draft framework for the regulation of deep seabed mineral exploitation, as well as a discussion paper on the financial terms of the exploitation contracts.[83]

Throughout 2015, the ISA engaged with the Legal and Technical Commission (LTC)[84] and the Council[85] in developing an action plan and draft

74. James Harrison, *The International Seabed Authority and the Development of the Legal Regime for Deep Seabed Mining*, U. of Edinburgh School of Law Working Paper No. 2010/17 1 (May 17, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1609687 (on file with *The University of the Pacific Law Review*).

75. *Id.*

76. *Id.*

77. UNCLOS, *supra* note 72, art. 133, 134

78. *Id.* at art. 137(2); Harrison, *supra* note 74, at 7-8.

79. THE MINING CODE, THE INTERNATIONAL SEABED AUTHORITY, *available at* https://www.isa.org.jm/mining-code/Regulations (on file with *The University of the Pacific Law Review*).

80. *Id.*

81. ONGOING DEVELOPMENT OF REGULATIONS ON EXPLOITATION OF MINERAL RESOURCES IN THE AREA, THE INTERNATIONAL SEABED AUTHORITY (last visited Dec. 29, 2015), *available at* https://www.isa.org.jm/legal-instruments/ongoing-development-regulations-exploitation-mineral-resources-area [hereinafter ONGOING DEVELOPMENT] (on file with *The University of the Pacific Law Review*).

82. *Id.*

83. *Id.*

84. UNCLOS *supra* note 72, art. 161 and 165. The Legal and Technical Commission is composed of 15 Member States, elected by the Council who are qualified in the areas of the exploration for and exploitation and processing of mineral resources, oceanology, protection of the marine environment, or economic or legal matters relating to ocean mining and related fields of expertise. With their expertise, the LTC will make recommendations to the Council of a variety of matters ranging from preparing assessments of environmental implications of activities in the deep seabed to the formulation and submission of rules and regulations related to activities in the deep seabed.

85. UNCLOS *supra* note 72, art. 161–62. The Council consists of 36 members of the ISA elected by the Assembly to act as the executive organ of the ISA. The Council has the power to establish specific policies to be pursued by the ISA.

framework for the exploitation regulations.[86] Furthermore, the Council called for expanding the participation in the development of these regulations to a broader audience to include other Member States.[87] The Council also directed the LTC to develop exploitation regulations as a priority for 2016.[88]

IV. RECENT DEVELOPMENTS IN DEEP SEABED MINING TECHNOLOGY

Advancements in deep seabed mining technology, primarily driven by Nautilus Minerals Inc., are encouraging the development and international recognition of the ISA's legal framework.[89] As the prominent international actor, Nautilus' involvement with the ISA reinforces the role of the ISA as the international regulatory body ensuring that deep seabed mining activities in international waters are protected and legitimate.[90]

This Part will introduce recent technological developments that are cultivating and fostering the development of the ISA's legal framework.[91] Section IV.A will introduce Nautilus Minerals Inc., a company spearheading recent efforts to make deep seabed mining viable on the commercial market.[92] Section IV.B will delve into the significance and inevitability of deep seabed mining.[93]

A. Nautilus Minerals Inc. and Commercial Mining of the Deep Seabed

Nautilus Minerals Inc. (Nautilus), a well-known member of the international mining community, touted itself as "the first company to commercially explore the seafloor for massive sulfide systems, a potential source of high grade copper, gold, zinc, and silver."[94] Nautilus initially advanced the Solwara 1 Project, a deep seabed mining proposal in July 2008.[95] The project made great strides towards

86. ONGOING DEVELOPMENT, *supra* note 81.

87. *Id.*

88. *Id.*

89. NAUTILUS MINERALS, OVERVIEW, www.nautilusminerals.com/irm/content/overview.aspx?RID=252 (last visited Dec. 28, 2015) (on file with *The University of the Pacific Law Review*); *Large machines for Ocean floor mining will begin field tests in 2016*, NEXTBIGFUTURE (Dec. 24, 2015), www.nextbigfuture.com/2015/12/large-machines-for-ocean-mining-will.html (on file with *The University of the Pacific Law Review*); Luke Burgess, *The Future of Mining is at the Bottom of the Ocean*, ENERGY & CAPITAL (Dec. 28, 2015), www.energyandcapital.com/articles/the-future-of-mining-is-at-the-bottom-of-the-ocean/5262 (on file with *The University of the Pacific Law Review*).

90. *Id.*

91. *Infra* Part IV.

92. *Infra* Part IV.A.

93. *Infra* Part IV.B.

94. *Id.*

95. David Gwyther, *Environmental Impact Statement: Solwara 1 Project* 1 (Sept. 2008), *available at* http://www.nautilusminerals.com/irm/content/pdf/environment-reports/Environmental%20Impact%20Statement%20Executive%20Summary%20(English).pdf (on file with *The University of the Pacific Law Review*).

reaching its goal of commencing seabed mining operations during the first quarter of 2018.[96]

The location of the Solwara 1 Project lies within Papua New Guinea's exclusive economic zone (EEZ)[97] and, therefore, is not subject to UNCLOS or the ISA's jurisdiction.[98] Although UNCLOS and the ISA lack jurisdiction, the success of this project has significant implications for the future of deep seabed mining in the Area.[99] Under UNCLOS, the Area means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.[100] Nautilus has already obtained exploration licenses from the ISA for zones in the Area.[101] In addition, the promising progress made by Nautilus in Papua New Guinea has been a driving force in compelling the ISA to create a legal framework to grant deep seabed mining leases.[102]

B. Significance of the Looming Reality of Deep Seabed Mining

The realization that deep seabed mining technology is becoming less of a pipedream generated considerable worldwide implications for all nations.[103] For the past 50 years, the development of equipment and techniques to explore and exploit natural resources from the deep seabed has been noted as "one of the great challenges to science and technology."[104] Prior to the Solwara 1 Project, the possibility of sustainable mining operations for the commercial recovery of minerals was non-existent.[105] Currently, most technology for the exploration and exploitation of the seabed has been viable only at shallow depths.[106]

---

96. *See generally* Burgess, *supra* note 89 (providing an update on the advances made by the Solwara 1 Project).

97. UNCLOS, *supra* note 72, art. 55–57. The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the rights and jurisdiction of the coastal State. The coastal State has the sovereign rights to explore and exploit this zone for its natural resources. This zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

98. *Id.*; David Shukman, *Deep sea mining licenses issued*, BBC NEWS (Jul. 23, 2014), *available at* http://www.bbc.com/news/science-environment-28442640 (on file with *The University of the Pacific Law Review*); *see also* Gwyther, *supra* note 95, at 1. The seafloor massive sulfide deposits are located approximately 50 km (26.99 nautical miles) north of Rabaul, Papua New Guinea.

99. *Id. see also* UNCLOS, *supra* note 72, art. 1. The "Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.

100. *Id.*

101. Jamie Smyth, *Deep sea mining hopes hit by New Zealand Decision*, FINANCIAL TIMES (Feb. 22, 2015), *available at* http://www.ft.com/intl/cms/s/0/6edaeea8-b894-11e4-a2fb-00144feab7de.html#axzz3vjeUSQht (on file with *The University of the Pacific Law Review*).

102. *Id.*; *supra* Part III.

103. SEABED TECHNOLOGY, INTERNATIONAL SEABED AUTHORITY 1, 1 (last visited Dec. 29, 2015), *available at* http://www.isa.org.jm/files/documents/EN/Brochures/ENG10.pdf (on file with *The University of the Pacific Law Review*).

104. *Id.*

105. *Id.* at 3. Mining operations below ocean depths greater than 200 meters were not feasible.

106. *Id.*

Nautilus, a business incorporated in Canada, which is a Member State of UNCLOS since 2003,[107] is under the purview of the ISA.[108] Pursuant to Article 144 of UNCLOS and Section 5 of the Implementation Agreement, Nautilus is encouraged to share its deep seabed mining technology with developing Member States using "fair and reasonable commercial terms and conditions."[109] As a result, Member States garner a significant technological opportunity over non-Member States, such as the U.S.[110] Although not mandatory, these provisions encourage cooperation between developing and developed Member States.[111]

Originally, the 1982 version of UNCLOS mandated private technology transfers that could potentially be detrimental to a Member State's national security and economic interests.[112] This requirement was effectively removed in the Implementation Agreement in response to President Reagan's criticism of UNCLOS.[113] As a result, Member States need not fear mandatory technology transfers when facing a threat to their national security or economic interests.[114]

Furthermore, the act of obtaining exploration licenses through the ISA further legitimizes and strengthens the legal framework being developed by the ISA for deep seabed mining in the Area.[115] As the poster child for the first commercially viable deep seabed mining operation, Nautilus's move to obtain exploration permits through the ISA, rather than working around the ISA, the confines of UNCLOS, and the Implementation Agreement, reinforces the ISA's legitimacy.[116] In anticipation of the Solwara 1 Project's success in early 2018, Nautilus reported in their August 13, 2015 Investor Update that it began

107. UNITED NATIONS, DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, CHRONOLOGICAL LISTS OF RATIFICATIONS OF, ACCESSIONS AND SUCCESSIONS TO THE CONVENTION AND THE RELATED AGREEMENTS AS AT 02 JANUARY 2015, *available at* http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm (on file with *The University of the Pacific Law Review*); NAUTILUS MINERALS, CORPORATE DIRECTORY, *available at* http://www.nautilusminerals.com/irm/content/corporate-directory.aspx?RID=289 (last visited Oct. 22, 2016) (on file with *The University of the Pacific Law Review*).

108. SPU-EU DEEP SEA MINERALS PROJECT, INFORMATION BROCHURE 15, SECRETARIAT OF THE PACIFIC COMMUNITY & THE INTERNATIONAL SEABED AUTHORITY 7 (Jul. 2013), *available at* http://gsd.spc.int/dsm/images/pdf_files/dsm_brochures/DSM_Brochure15_ISA (on file with *The University of the Pacific Law Review*).

109. UNCLOS, *supra* note 72, art. 144; *see also* Implementation Agreement, *supra* note 72.

110. *Id.*

111. *Id.*

112. Scott G. Borgerson, *The National interest and the Law of the Sea*, Council on Foreign Relations, Council Special Report No. 46, 43–44 (May 2009), *available at* http://www.cfr.org/oceans/national-interest-law-sea/p19156 (on file with *The University of the Pacific Law Review*).

113. *Id.*

114. *Id.*

115. Smyth, *supra* note 101.

116. NAUTILUS MINERALS, *supra* note 89; NEXTBIGFUTURE, *supra* note 89; Burgess, *supra* note 89.

exploration operations in the Solomon Island and the Clarion-Clipperton Zone (CCZ).[117]

Based on the Solwara 1 Project, future deep seabed mining ventures operated by Nautilus and similar entities will likely require a large amount of investment capital.[118] While investors may be protected due to Solwara 1's location within a coastal State's EEZ, potential investors would be deterred absent the protection of the ISA's legal framework provided.[119]

Lockheed Martin, a U.S. based company, has been a large proponent of recognizing the need for the ISA.[120] In June 2012, the chairman of Lockheed Martin sent a letter to the U.S. Senate stating, "[Lockheed Martin] wanted to join the race for undersea riches, but could not assume *investment risks until it was clear that it would have a clear legal title to its findings*."[121] Lockheed Martin stated it is unwilling to do so absent U.S. ratification of UNCLOS.[122]

Lockheed Martin also participated in a 2012 movement known as The American Sovereignty Campaign, which was comprised of members from the government and private sector.[123] The campaign's goal was to send Congress a message: that U.S. accession to UNCLOS would "invite economic opportunity, create U.S. jobs, and protect business and commercial interests at home and abroad."[124] Lockheed Martin is the only U.S. based holder of exploration licenses granted by the ISA.[125] Jennifer Warren, Vice President of Lockheed Martin stated, "business initiatives to exploit deep seabed mineral resources will only be able to secure the necessary financial investments if done pursuant to the existing international framework," referring to the legal structure created by the ISA and UNCLOS.[126]

---

117. Mike Johnston, *Nautilus Minerals Investor Update* 7 (Aug. 13, 2015), *available at* www.nautilusminerals.com/IRM/PDF/1648/ConferenceCallPresentation (on file with *The University of the Pacific Law Review*).

118. Peter Koven, *Nautilus Minerals Inc says it's poised to begin undersea mining following dispute settlement*, FINANCIAL POST (June 25, 2014), *available at* http://business.financialpost.com/news/mining/nautilus-minerals-inc-says-its-poised-to-begin-undersea-mining-following-dispute-settlement (on file with *The University of the Pacific Law Review*); Ngaire McDiarmid, *Seafloor, not the sky, is the limit*, MININGNEWS.NET (Dec. 9, 2015), *available at* http://www.miningnews.net/resource-stocks/company-profiles/seafloor-not-the-sky-is-the-limit/ (on file with *The University of the Pacific Law Review*).

119. Stewart Patrick, *(Almost) Everyone Agrees: The U.S. Should Ratify the Law of the Sea Treaty*, THE ATLANTIC (June 10, 2012), *available at* http://www.theatlantic.com/international/archive/2012/06/-almost-everyone-agrees-the-us-should-ratify-the-law-of-the-sea-treaty/258301/ (on file with *The University of the Pacific Law Review*).

120. *Id.*

121. *Id.*

122. *Id.*

123. Daisy R. Khalifa, *Law of the Sea Goes Public*, SEA POWER, at 16 (June 2012), *available at* http://www.seapower-digital.com/seapower/201206?pg=18#pg18 (on file with *The University of the Pacific Law Review*).

124. *Id.*

125. *Id.* at 18.

126. *Id.*

The accomplishments and vision of the Solwara 1 Project and Nautilus' future intentions to engage in deep seabed mining in the Area have two important implications: 1) Member States of UNCLOS will likely be the ones to benefit first from Nautilus' deep seabed mining technology; and 2) without the backing of the ISA and its legal framework to protect deep seabed mining claims, investors will not risk financially supporting mining ventures that lack an ISA exploration and mineral exploitation license.[127]

V. THE U.S. STANDS ALONE

Legal scholars from the 1980s forewarned that the U.S.'s inability to ratify UNCLOS would be detrimental in the long-term.[128] One of those scholars, Steven J. Molitor, stated, "the [U.S.'s] rejection of the Convention reflects a disappointing unwillingness to accept the contemporary world as one of global interdependence."[129] Molitor went on to state that the U.S. "can no longer attempt to dominate world affairs simply by imposing its views on other countries."[130] Lastly, Molitor warned that the U.S.'s "[failure] to recognize this crucial geopolitical reality" would lead the U.S. "further into some form of international, political, economic, and social isolation with the image of an international outlaw or outcast."[131]

Nearly 30 years later, the U.S. continues to work outside the international framework of UNCLOS and, instead, enacted DSHMRA in 1980 as a temporary framework to govern U.S. access to deep seabed minerals.[132] The U.S. approach relies heavily on a combination of DSHMRA, domestic law, and bilateral agreements with other nations.[133] This approach, as Molitor cautioned in 1987, caused the U.S. to fall into further isolation from the rest of the world, as the number of UNCLOS Member States has grown over the past 33 years.[134]

In the 1980s, the U.S. was a major influence in the evolution of UNCLOS.[135] At that time, the U.S. obtained a temporary multilateral agreement, known as the

---

127. *Supra* Part IV.

128. Steven J. Molitor, *The Provisional Understanding Regarding Deep Seabed Matters: An Ill-Conceived Regime for U.S. Deep Seabed Mining*, 20 CORNELL INT'L L.J. 224, 239 (1987); Elliot L. Richardson, *Interdependence X Political Necessity = The Need for Law*, 75 PROC. AM. SOC'Y INT'L 206, 209 (1981).

129. Molitor, *supra* note 128, at 239. Molitor describes the dangers and consequences of the U.S.'s rejection of UNCLOS in the 1980's.

130. *Id.*

131. *Id.*

132. John Alton Duff, *UNCLOS and the New Deep Seabed Mining Regime: the Risks of Refuting the Treaty*, 19 SUFFOLK TRANSNAT'L L. REV. 1, 8 (1995); *see also* Part II.D.

133. Steven Groves, *The U.S. Can Mine the Deep Seabed Without Joining the U.N. Convention on the Law of the Sea*, THE HERITAGE FOUNDATION (Dec. 4, 2012), *available at* http://www.heritage.org/research/reports/2012/12/the-us-can-mine-the-deep-seabed-without-joining-the-un-convention-on-the-law-of-the-sea (on file with *The University of the Pacific Law Review*).

134. Molitor, *supra* note 128, at 239.

135. Duff, *supra* note 132, at 8.

Provisional Understanding Regarding Deep Seabed Mining (Provisional Understanding), with Belgium, France, the Federal Republic of Germany, Italy, Japan, the Netherlands, and the United Kingdom.[136] The purpose of the Provisional Understanding was to resolve potential deep seabed mining claims in the Area, with primary focus on the CCZ and the northeast Pacific Ocean.[137] The eight developed countries of the Provisional Understanding seemingly "desired an agreement that would minimize bureaucratic interference by Third World countries hoping to share the profits."[138]

In response to the Provisional Understanding, the UNCLOS Preparatory Commission was "deeply concerned that some States have undertaken certain actions which undermine the Convention."[139] The declaration by the Preparatory Commission rejected any regime that was "incompatible with [UNCLOS] and its related resolutions *shall not be recognized*" [emphasis added].[140] In addition, the Preparatory Commission deemed the Provisional Understanding "wholly illegal" and rejected any recognition of it or any claims made by any party to it.[141] It soon became apparent that this approach had significant shortcomings, and by the 1990's every U.N. member but the U.S. ratified UNCLOS.[142]

Today, the number of industrialized and developing nations acceded to UNCLOS has grown to 167.[143] As the U.S. continues its isolationist attitude, its influence as a world leader in shaping the law of the oceans continues to diminish and leaves American companies at a competitive disadvantage compared to those who are members of UNCLOS.[144]

VI. TO ACCEDE OR NOT TO ACCEDE?

Opponents of UNCLOS believe that the U.S. may continue to conduct mining activities in the Area, and that U.S. interests are better served by not acceding to the treaty.[145] Critics also state that Implementation Agreement never really fixed Reagan's list of "unacceptable elements" of UNCLOS.[146]

---

136. *Id.* at 9.

137. *Id.* at 8.

138. Molitor, *supra* note 128, at 226.

139. UNITED NATIONS, DECLARATION ADOPTED BY THE PREPARATORY COMMISSION ON 30 AUGUST 1985 (LOS/PCN/72) 85–86 (Oct. 1985), *available at* http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulE6.pdf (on file with *The University of the Pacific Law Review*).

140. *Id.*

141. *Id.*

142. DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, *supra* note 107.

143. *Id.*

144. Khalifa, *supra* note 123, at 19.

145. *See generally* Groves, *supra* note 133 (discussing the reasons why accession to UNCLOS would be detrimental to U.S. interests and why the U.S. can operate deep seabed mining without being a member to the treaty).

146. *Reagan's UNCLOS Statement*, *supra* note 48 (providing a list of "unacceptable elements" from the treaty that caused Reagan to reject UNCLOS in 1982).

The Heritage Foundation (Heritage), an American conservative think tank, has been a highly influential and stalwart opponent of UNCLOS since the days of the Reagan administration.[147] Heritage significantly influenced the Reagan Administration through its 1981 publication "Mandate for Leadership."[148] Nearly two-thirds of Heritage's 2,000 proposals were implemented or initiated by the end of Reagan's first year in office.[149] Heritage's partnership with Reagan and its influence over his presidency was evidenced by statements made by both sides.[150] At a dinner in December 1989, Reagan stated, "Heritage was a 'vital force' in Washington during his Administration."[151] In a June 2004 article written by Heritage, Heritage reported, "Ronald Reagan was one of the best friends The Heritage Foundation ever had. We will miss him."[152] Addressing the issues and flaws identified by Heritage would be a crucial starting point in swaying opinion towards U.S. accession to UNCLOS.[153]

Heritage argues that the U.S. has much to lose in joining UNCLOS.[154] First, Heritage claims the U.S. would be under the authority of "another unaccountable international bureaucracy" involving nothing but anti-U.S. interests like the proceedings at the U.N. General Assembly.[155] Secondly, Heritage purports that the U.S. would have to transfer a "significant portion of any such royalties to the ISA . . . to the so-called developing world, including corrupt and despotic regimes."[156] Thirdly, Heritage believes U.S. economic interests are at risk.[157] These risks include conflicting economic interests between the U.S. and developing states and deterrence of U.S. companies from engaging in mining activities because of UNCLOS' encouragement of technology transfers.[158] Lastly, that while Implementation Agreement improved many portions of the treaty, it still failed to secure "veto" power for the U.S. over ISA decisions.[159]

Although the concerns raised by Heritage are stated with the best intentions to preserve and protect U.S. interests, these antiquated apprehensions are relics

147. THE HERITAGE FOUNDATION, ABOUT HERITAGE, http://www.heritage.org/about (last visited Jan. 1, 2016) (on file with *The University of the Pacific Law Review*).

148. Andrew Blasko, *Reagan and Heritage: A Unique Partnership*, THE HERITAGE FOUNDATION (June 7, 2004), *available at* http://www.heritage.org/research/commentary/2004/06/reagan-and-heritage-a-unique-partnership (on file with *The University of the Pacific Law Review*). "Mandate for Leadership" was a 1,100-page publication written for President Reagan containing specific policy recommendations ranging from taxes, regulation of trade, to national defense.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. BAD IDEA, supra note 49.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

left over from the Reagan Administration and have an adverse effect on U.S. interests.[160] The following sections, taken together, minimize and dispel the trepidations raised by opponents of UNCLOS.[161] Although the concerns by opponents were well-founded, the growing international recognition and support of the treaty over the past 30 years by both developed and developing nations is a noteworthy indicator of how the Area will be regulated and governed.[162] Opponents must face the reality that domestic political support for UNCLOS existed since the treaty's inception, and only a small minority is holding back the U.S.'s interests.[163]

This Part will discuss three reasons why the U.S. should accede to UNCLOS.[164] Section VI.A provides a discussion on how accession to the treaty will help the U.S. reclaim its former influence as a world leader in ocean law.[165] Section VI.B explains the benefits to U.S. companies of U.S. ratification of UNCLOS.[166] Lastly, Section VI.C discusses the consequences to the U.S. if it continues to remain a non-party to UNCLOS.[167]

A. Reclaiming its Former Influence as a World Leader in Shaping the Laws of the Oceans

Advocates against U.S. accession believe it would disadvantage U.S. interests and place the U.S. under the thumb of the ISA.[168] The assertion that U.S. interests will be lost in the sea of interests of the other 167 Member States is misplaced.[169] U.S. interests have not been represented, in part, due to its 33-year absence.[170] The deep seabed mining framework continued to develop and gain popularity despite the U.S.'s absence.[171] Only by acceding to UNCLOS, will the U.S. regain its proper place as a world leader in shaping the law of the sea while representing its own interests in the proper international arena—before the ISA.[172]

---

160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Infra* Part VI.
165. *Infra* Part VI.A.
166. *Infra* Part VI.B.
167. *Infra* Part VI.C.
168. BAD IDEA, supra note 49.
169. *Id.*
170. *Id.*
171. DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, *supra* note 107.
172. *See generally* Agarwal, *supra* note 8, at 12 (providing the benefits that will be realized when the U.S. ratifies UNCLOS); *see also* Pedrozo, *supra* note 12, at 762–63 (listing out the benefits of a U.S. ratification of UNCLOS, such as continental shelf resources and influence in the development of the law of the sea).

When the treaty was still gaining its sea legs, the U.S.'s influential impact was evident through its ability to band seven industrialized nations[173] into forming the Provisional Understanding, an agreement that operated outside the ISA's purview.[174] After the ISA declared the Provisional Understanding "wholly illegal" under UNCLOS, all seven members of the treaty essentially abandoned the U.S. and ratified the treaty in the 1990's.[175] The realization that the ISA's deep seabed mining was becoming increasingly appealing became a significant factor in the U.S. diminishing influence over matters relating to the law of the sea.[176]

Over the years, the U.S. unsuccessfully challenged other nations' claims outside of their respective EEZs.[177] An ongoing example of this is China's abstruse claims in the South China Sea.[178] The U.S. attempted to admonish China's South China Sea claims by "[insisting] that China must base its [South China Sea] claims solely on the 1982 UNCLOS although the U.S. itself has not ratified it."[179] The U.S.'s stance on the South China Sea debate is fully supported by UNCLOS, although the U.S.'s challenges are empty without its accession.[180] A more recent example involves the U.S.'s claims made in the Arctic.[181]

As of 2015, the U.S. assumed the chairmanship of the Arctic Council through 2017.[182] The challenge the U.S. faces is its inability to evaluate other nations' ECS[183] claims in the Arctic, as well as filing its own ECS claims.[184] Currently, all of the Arctic Council's Member States and its 12 observer States are parties to

---

173. Duff, *supra* note 132, at 9.

174. *Id*. The U.S. was able to obtain agreement with Belgium, France, Germany, Italy, Japan, Netherlands, and United Kingdom to respect each other's deep seabed mining claims in the Area, outside the jurisdiction of UNCLOS and the ISA.

175. *See* Part IV.B.

176. Pedrozo, *supra* note 12, at 774.

177. *Id*. at 771–74. The U.S. has been unable to challenge the Extended Continental Shelf claims of other nations due to its lack of standing with UNCLOS.

178. Mark Valencia, *The South China Sea: What China Could Say*, NAPSNET POLICY FORUM (May 7, 2013), *available at* http://www.nautilus.org/napsnet/napsnet-policy-forum/the-south-china-sea-what-china-could-say/ (on file with *The University of the Pacific Law Review*).

179. *Id.*

180. Stefanos N. Roulakis, *South China Sea Puts Pressure on US to Ratify UNCLOS*, BLANK ROME, LLP (July 18, 2015), *available at* https://www.blankrome.com/index.cfm?contentID=31&itemID=3462 (on file with *The University of the Pacific Law Review*).

181. Fiona Macdonald, SCIENCE ALERT (Aug. 18, 2015), *available at* http://www.sciencealert.com/this-map-shows-all-country-s-claims-on-the-arctic-seafloor (on file with *The University of the Pacific Law Review*). This map shows all the claims on the Arctic seafloor.

182. ARCTIC COUNCIL, ABOUT US, http://www.arctic-council.org/index.php/en/about-us/arctic-council/u-s-chairmanship (last visited Jan. 2, 2016) (on file with *The University of the Pacific Law Review*).

183. Pedrozo, *supra* note 12, at 764; UNCLOS, *supra* note 72, Article 76. "ECS" means Extended Continental Shelf, which is defined under UNCLOS as the seabed and subsoil of the submarine areas that extend beyond 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.

184. Pedrozo, *supra* note 12, at 773.

UNCLOS, except the U.S.[185] Furthermore, it is apparent that activities being discussed within the Arctic Council will be guided by the provisions of UNCLOS.[186]

By ratifying the treaty, the U.S. will not instantaneously regain its former influence, but it will be a huge step in the right direction compared to its static approach for the past three decades.[187] Upon ratification, the U.S. will first regain its seat on the ISA's Council.[188] In addition, the U.S. will gain "important veto rights over distribution of any future revenues from deep seabed exploitation to national liberation groups."[189]

Not only will the U.S. regain a seat on the ISA's Council, but also it will have the ability to participate in the elections of judges for the International Tribunal for the Law of the Sea,[190] members of the Commission on the Limits of the Continental Shelf (CLCS),[191] and other arms of the ISA.[192] This is a critical opportunity for the U.S. to place its own representatives in key areas of the ISA to help restore U.S. presence in vital matters concerning the Area.[193] Furthermore, by reasserting itself as an authoritative component in the ISA, the U.S. will be better able to sway other nations in the issuing of decisions by the ISA.[194] By taking this route versus obtaining a "veto" power over all ISA decisions, the U.S. will be more respected by Member States rather than being seen as a haughty and stubborn Western power as characterized by Molitor.[195]

The fear that U.S. interests will be dominated by the interests of other Member States is overstated by critics of UNCLOS.[196] U.S. accession will be a landmark event in UNCLOS' history and will make waves throughout the international community.[197] The reemergence of the U.S. will make a

185. *Id.*

186. *Id.*

187. *See* Part II.C.

188. John Norton, Statement to the Senate, Committee on Foreign Relations, *United Nations Convention on the Law of the Sea*, Hearing, Mar. 11, 2004 (Serial 108-10), *available at* https://www.gpo.gov/fdsys/pkg/CRPT-108erpt10/html/CRPT-108erpt10.htm (on file with *The University of the Pacific Law Review*).

189. *Id.*

190. *Id.* As a part of the International Tribunal for the Law of the Sea, the U.S. would be able to consider issues relating to navigational freedom and the character of the 200 mile EEZ, which is a crucial forum for the development and evolution of the rule of law in the oceans.

191. *Id.* As a member of the CLCS, the U.S. would be able to assist in the interpretation of UNCLOS with respect to continental margin limits as well as influence the decisions with respect to the U.S.'s claims outside its own EEZ. To lose this opportunity may result in the loss of thousands of square kilometers of resources within the U.S.'s continental shelf.

192. *Id.*

193. *Id.*

194. *Id.*

195. Steven J. Molitor, *supra* note 129, at 239; *see also* BAD IDEA, *supra* note 49.

196. BAD IDEA, *supra* note 49; *see also* Groves, *supra* note 133 (discussing the reasons why accession to UNCLOS would be detrimental to U.S. interests, and why the U.S. can operate deep seabed mining without being a member to the treaty).

197. Khalifa, *supra* note 123, at 17.

considerable impression and will only grow over time.[198] Former U.S. Army General and the 18th Chairman of the Joint Chiefs of Staff, Martin Dempsey, stated the impact best when he said "We have the world's largest and most capable Navy, the world's largest economy and the largest Exclusive Economic Zone. *We will become the leader within the Convention as soon as we enter it*, and that's never been more important" [emphasis added].[199] To properly reassert itself as an influential player, relevant leader, and active participant in the affairs of the oceans, the U.S. must accede to UNCLOS.[200]

B. Propelling U.S. Companies Back into the Game

Contrary to the belief that UNCLOS "discourage[s] U.S. companies from participating in such [mining] activities," there has been a call by U.S. companies and business leaders to ratify the treaty as soon as possible.[201] At the 2012 Forum on the Law of the Sea held in Washington, Jennifer Warren, Vice President of Lockheed Martin, expressed the company's high interest in deep seabed exploration and continued support of UNCLOS.[202] Warren declared, "[r]ecent developments in deep seabed resources have really sharpened our interest in seeing the law of the Sea ratified as soon as possible."[203]

Lockheed Martin currently benefits from UNCLOS and the ISA by acting through its British subsidiary.[204] Despite this workaround, the company's actions are symbolic of how important accession to the treaty is to the economic interests of the U.S.[205] First, Lockheed's workaround shows a lack of confidence in the current deep seabed mining regime provided by DSHMRA and the U.S.'s multilateral and bilateral agreements with a select group of nations.[206] Second, it demonstrates the value U.S. companies place in security and predictability, both of which are provided by the ISA and UNCLOS.[207] Lastly, it validates the significance of deep seabed resources.[208] Warren's statement summarized it best:

> The importance of these resources is well understood internationally. Other countries are moving forward quickly and aggressively to access

198. *Id.*

199. *Id.*

200. *See supra* Part VI.A.

201. *See* generally Khalifa, *supra* note 123, at 18 (describing the American Sovereignty Campaign, which advocates that the ratification of UNCLOS will invite economic opportunity, create U.S. jobs, and protect U.S. business and commercial interests).

202. *Id.*

203. *Id.*

204. Groves, *supra* note 133.

205. *Id.*

206. Duff, *supra* note 132, at 9.

207. Khalifa, *supra* note 123, at 16–19.

208. *Id.* at 18.

> them. As the only U.S.-based claimant, our view is pretty straightforward. Business initiatives to exploit deep seabed mineral resources will only be able to secure the necessary financial investments if done pursuant to the existing international framework.[209]

In addition, John Ryan, Chief Legal Officer of Level 3 Communications,[210] stated, "that any uncertainty inhibits economic growth and investment" when the protection of infrastructure in international waters is not guaranteed.[211] While the rest of the world enjoys the benefits of UNCLOS and the ISA, the U.S. idly stands by, watching other nations like China and Russia claim prime locations for deep seabed mining activities.[212]

Lastly, U.S. companies are not subject to the mandatory technology transfer requirements of Article 5 of Annex III of UNCLOS.[213] As a result of Implementation Agreement, Section 5 of the treaty has been replaced by a set of general principles relating to technology transfers with a developing Member State.[214] Furthermore, the treaty includes language to prevent technology transfers in the event it poses a national security risk to the U.S.[215] Article 302 states: "[N]othing in this Convention shall be deemed to require a State Party, in the fulfillment of its obligations under this Convention, to supply information the disclosure of which is contrary to the essential interests of its security."[216]

Only through the ratification of UNCLOS will the U.S. be able to truly provide American companies with the support and competitive edge that they have been craving for three decades.[217] Without the risk of mandatory technology transfers, U.S. companies have nothing to lose and much to gain from the stability and predictability UNCLOS provides.[218] To avoid losing American jobs to foreign locations like the U.K., the U.S. needs to accede to UNCLOS to help foster a deep seabed mining industry for U.S. companies and create jobs in this potentially lucrative and emerging industry.[219]

---

209. *Id.*

210. *Id.* Level 3 Communications is a U.S.-based company that operates one of the largest Internet Protocol networks in the world, specifically fiber-optic cables spanning the ocean floor.

211. *Id.* at 19.

212. *Id.* at 18–19.

213. BROWNE, *supra* note 61.

214. *Id.*

215. UNCLOS, *supra* note 72, art. 302.

216. *Id.*

217. Khalifa, *supra* note 123, at 16–19.

218. BROWNE, *supra* note 61; *supra* Part VI.B.

219. Groves, *supra* note 133.

C. Standing by Idly will be Detrimental to the U.S.

As time passes by, so too will opportunities for the U.S.[220] The developing deep seabed mining industry is slowly being recognized internationally as a promising source for rare earths and minerals.[221] U.S. companies and their investors will not risk engaging in deep seabed mining operations without the insurance and stability provided by the ISA's developing mining regime.[222] Regardless of the U.S.'s own deep seabed mining regime under DSHMRA, U.S. companies lack the confidence in the U.S.'s current mining regime and instead look to foreign UNCLOS Member States.[223]

Since the mid 1990's, the U.S. experienced a steady decline in its sphere of influence in the arena of ocean law and deep seabed resources.[224] In 1982, the U.S. was one of the most prominent influences and contributors to UNCLOS.[225] The U.S. once wielded enough influence and authority that the drafters of UNCLOS addressed the original misgivings of the Reagan administration through the Implementation Agreement.[226] But when the U.S. chose a different path in 1998, it inadvertently surrendered its influential voice in the rulemaking affairs of the world's oceans.[227]

Without its seats on the various arms of the ISA, any call for change by the U.S. relating to ocean affairs will fall on deaf ears.[228] President Obama pointed out that "[I]t's a lot harder to call on China to resolve its maritime disputes under the Law of the Sea Convention when the United States Senate has refused to ratify it."[229] Regardless of the U.S. Senate's refusal to ratify the treaty, "top decision and policy makers [continue] to operate under the spirit of the law" provided by UNCLOS.[230] The U.S. Senate must realize that despite its continued reservations of UNCLOS, members of political, security, and economic communities in the U.S. recognize the tremendous value in UNCLOS.[231]

---

220. Khalifa, *supra* note 123, at 16–19; *supra* Part III.

221. *Id.* at 18.

222. *Id.*

223. Groves, *supra* note 133.

224. *Supra* Part III.B.

225. Briscoe & Prows, *supra* note 41.

226. UNCLOS, *supra* note 72; *see also* Implementation Agreement, *supra* note 72.

227. BROWNE, *supra* note 61. As of 1998, the U.S. relinquished its seats with the ISA to Italy and has been given the status as an Observer state.

228. *Id.*

229. Jon Breed, *The United States Must Sign and Ratify the U.N. Convention of the Law of the Sea*, AMERICAN SECURITY PROJECT (Jul. 5, 2014), *available at* http://www.americansecurityproject.org/the-united-states-must-sign-and-ratify-the-u-n-convention-of-the-law-of-the-sea/ (on file with *The University of the Pacific Law Review*).

230. *Id.*

231. Khalifa, *supra* note 123, at 16–19; *see also* Part II.D.

Lockheed Martin has already sent American jobs outside the U.S. in order to obtain the benefits from ISA Member States.[232] As 2018 approaches, the eyes of the world will turn its focus on Nautilus' attempt to successfully operate the world's first deep seabed mining operation.[233] The success of the Solwara 1 Project will usher in a new era of opportunity for all, excluding non-ratifying States like the U.S.[234] The probable response by other U.S. companies would be to follow Lockheed Martin's footsteps, triggering the trend of utilizing foreign subsidiaries to operate deep seabed mining businesses, to the detriment of the United States.[235]

VII. CONCLUSION

It is time to take action. The U.S. can no longer afford to idly stand by and watch as the rest of the world takes full advantage of UNCLOS and the stability and predictability afforded by the ISA.[236] While there may be some portions of UNCLOS that may not align with U.S. interests, it is not the time for the U.S. to shy away from the opportunity to take its seat at the ISA and restore its former role as a world leader in the evolution of the legal regime governing deep seabed mining and other ocean affairs.

Various members of U.S. political, security, and economic communities have spoken, and it is time for the U.S. Senate to listen.[237] By ratifying UNCLOS, the U.S. Senate can help secure and preserve U.S. deep seabed mining interests and drive the U.S. in the direction of reestablishing itself as a global leader in the perpetual evolution of the law of the seas.[238]

232. Groves, *supra* note 133.

233. *Id.*

234. *Id.*

235. *Id.*

236. BROWNE, *supra* note 61; *see also* Part VI.B; Khalifa, *supra* note 123, at 16–19.

237. Khalifa, *supra* note 123, at 16–19; *supra* Part II.D.

238. Duff, *supra* note 132, at 50–52; Khalifa, *supra* note 123, at 16–19; *supra* Part II.D.