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Something for Everyone: Why the United States Should Ratify the Law of the Sea Treaty

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SOMETHING FOR EVERYONE: WHY THE UNITED STATES SHOULD RATIFY THE LAW OF THE SEA TREATY

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INTRODUCTION

In April of 2009, newspapers across the nation printed the smiling face of Abduwali Abdukhadir Muse, a Somali teenager that hijacked a U.S. ship, taking its passengers hostage. Headlines proclaimed that Muse was captured, the hostages rescued and that justice would prevail. Federal prosecutors were quick to charge Muse with piracy among other crimes. Shortly thereafter, however, they would need to determine what constitutes piracy—a question that would determine the fate of Muse.

Muse is accused of piracy for taking control of a U.S. cargo ship off of the African coast and holding its captain, Richard Phillips, hostage. He is just one of hundreds of Somali pirates who have made a livelihood out of this criminal pastime. In modern times, the international community has turned a blind eye to piracy given the relatively few incidents that have occurred. However, in light of the rapid growth and emergence of strong-willed Somali pirates, states with interests at sea are reevaluating the safety and security they once took for granted.

The capture of Phillips attracted President Obama's attention, who vowed to "halt the rise of piracy."[1] This was not, however, the first time the new administration has considered U.S. interests on the high seas. President Obama and Senate leaders have looked forward to the long awaited ratification of the United Nations Convention on the Law of the Sea[2] (the "Convention"), which among other benefits also helps address piracy. This treaty, which provides broad ranging regulations, guidance and mechanisms for international cooperation on the open seas has long been a source of contention between conservative Republican lawmakers and most Democrats.[3] Since its signing by President Clinton in 1994 and despite almost unanimous recommendations from the Senate Foreign Relations Committee on two occasions, the Convention has

1. Peter Baker, *Obama Vows to Stop Piracy's Rise Off the Coast of Africa*, N.Y. TIMES, Apr.14, 2009, at A8.

2. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

3. *See* Elana Schor, *Republican Rightwingers Find and Iraq-on-Sea*, GUARDIAN.CO.UK, Oct. 25, 2007, http://www.guardian.co.uk/world/2007/oct/25/usa.antarctica.

failed to make it to the Senate floor for a full vote for ratification.[4] This is in light of a plethora of analysis surrounding the Convention by scholars, journalists, government fellows, politicians and others.

Critics of ratification point to the sovereignty costs of the treaty to the United States and its socialist leanings—echoing the sentiments of President Reagan when the Convention was first introduced in the 1980s in the midst of the Cold War. In the 25 or so years since then, the world has changed dramatically and the reasons that the United States stood steadfast against ratification no longer hold true. Today, the United States should not only ratify the treaty because it stands to benefit, but it must ratify in order to best equip itself for the new challenges it faces.

In Parts Two and Three of this paper, the flawed U.S. approach to treaty ratification is discussed with a focus on the Convention. Part Two focuses on the United States' overstatement of sovereignty costs associated with the Convention. Part Three discusses why the costs of the Convention to the United States are miscalculated.

Part Four addresses three important strategic advantages that the Convention provides the United States. First, the Convention aids the United States in the capture and prosecution of pirates on the seas. Next, it counters the emerging military and economic threat that a powerful new China presents. And finally, by ratifying the treaty, the United States will be able to assert a viable claim over valuable resources that lie beneath the Arctic Seabed.

The final part of this paper discusses treaty ratification from a theoretical perspective. It analyzes three approaches to international agreements—rationalist, constructivist and functionalist—and discusses how the Convention would satisfy proponents of each.

It is in the interests of the United States to bring the Convention to the Senate floor for a vote immediately to protect its interests at sea. In addition to President Obama, Secretary of State Hillary Clinton expressed strong support for the treaty as well as President George W. Bush who also endorsed the Convention before he left office.[5] With approximately 160 state parties to the

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4. *See* Michael A. Becker, *International Law of the Sea*, 42 INT'L LAW. 797-98 (2008). *See generally* John A. Duff, *The United States and the Law of the Sea Convention: Sliding Back from Accession and Ratification*, 11 OCEAN & COASTAL L.J. 1 (2006) (discussing failed ratification efforts of the Convention).

5. Michael A. Becker, *International Law of the Sea*, 43 INT'L LAW. 915 (2009) (quoting President Obama's commitment to ratification of the Law of the Sea Treaty); *Contemporary Practice of the United States Relating to International Law—United States Hosts Antarctic Treaty Parties, Secretary of State Discusses Polar Issues*, 103 AM. J. INT'L. L. 588, 588-89 (2009) (quoting Secretary of State Clinton's commitment to ratification of UNCLOS);

Convention,[6] international cooperation on the seas is greater than ever. It is time for the United States to join the Convention and share in the benefits that it offers.

I. GROSS OVERSTATEMENT OF SOVEREIGNTY COSTS OF THE CONVENTION

This section will describe the United States' approach to international instruments, then define sovereignty and analyze the Convention by focusing on provisions that compromise sovereignty. It will point out the numerous provisions that the United States is already bound to as a party to other treaties with identical or similar provisions. Then it will analyze two provisions that are unique to the Convention with respect to governance on the seas: codification of the "common heritage of mankind" principle and a mandatory dispute resolution mechanism. The section concludes by explaining how the United States may be bound to the "common heritage of mankind" under customary law and why the costs of the Convention's dispute resolution provision are actually relatively minor.

A. The United States' Approach to International Agreements

The United States has resisted becoming party to many important international agreements, even where its staunchest allies are supporters,[7] largely because of the perceived sovereignty costs associated with such agreements.[8] These have included the Con-

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Press Release, Office of the Press Secretary, President's Statement on Advancing U.S. Interests in the World's Oceans (May 15, 2007), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2007/05/20070515-2.html.

6. United Nations, United Nations Convention on the Law of the Sea Status, http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en (last visited Aug. 18, 2010).

7. For example, the U.S. is one of the most vehement opponents of the Rome Statute and the International Criminal Court, whereas, Britain is perhaps its strongest proponent and a major U.S. ally. *See generally* Press Release, Coalition for the International Criminal Court, UK Ratifies ICC Treaty as US Considers Anti-ICC Legislation (Oct. 4, 2001), http://www.iccnow.org/documents/10.04.2001UK%20Ratifies%20RS.pdf (noting the important role the UK is to play in the development and success of the International Criminal Court. Further noting efforts in the United States to pass legislation whose effect would be to punish states that ratify the ICC treaty. Although these efforts did not succeed, this is illustrative of the strong anti-ICC sentiment that is pervasive in U.S. politics); *see also* Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 833-41 (2009) (discussing the United States' disengagement from international treaty law).

8. *See* Michael J. Kelly, *Charting America's Return to Public International Law Under the Obama Administration*, 3 J. NAT'L SECURITY L. & POL'Y 239, 250 (2009) (noting the United States' resistance to the Rome Statute under the Bush Administration was because they viewed it as "a significant threat to U.S. sovereignty"); Amnesty International USA, CEDAW, http://www.amnestyusa.org/violence-against-women/ratify-the-treaty-for-the-

vention on Discrimination Against Women; the Convention on the Rights of the Child; the International Covenant on Economic, Social and Cultural Rights; the Mine Ban Treaty and the Rome Statute.[9] Despite the United States' refusal to become party to many vital international agreements, its role in the international community is undisputed. Since 1776, the United States has been party to countless treaties[10] covering a wide range of topics including agriculture, trade, finance, investment, postal matters, education, and military, in conjunction with almost every nation in the world.[11]

As with many of the instruments discussed above, the United States has refused to ratify the Convention, citing sovereignty costs as its chief complaint.[12] When the Convention was introduced, President Reagan said "no nat[ional] interest of ours could justify handing sovereign control of two-thirds of the earth's surface over to the Third World."[13] Over twenty years later, the same views are echoed by some in the Senate as well as private groups. U.S. Senator James M. Inhofe has denounced the Convention and believes that his colleagues in the Senate need "to understand the real dangers it poses to American sovereignty and security."[14] During his remarks to the Senate, Inhofe claimed that "unless [there is] some great big international body, [the United States] shouldn't have any sovereignty, and that is exactly what [the Con-

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rights-of-women-cedaw/page.do?id=1108216 (last visited Oct 25, 2010) (discussing the myth that "U.S. ratification of [the Convention on the Elimination of All Forms of Discrimination Against Women] would give too much power to the international community" and arguing that the United States' reluctance to sign the treaty is unnecessary as the language of the convention "upholds US sovereignty").

9. Marianna Quenemoen, Global Policy Forum, U.S. Position on International Treaties, (July 2003), http://www.globalpolicy.org/component/content/article/154/26665.html (noting that the United States is among a small minority of states that refuse to become party to several of these treaties. Since July 2003, the United States has become party to some of ten treaties highlighted).

10. *See* U.S. DEP'T OF STATE, TREATIES IN FORCE, A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON NOVEMBER 1, 2007: BILATERAL TREATIES (2007) [hereinafter BILATERAL TREATIES], *available at* http://www.state.gov/documents/organization/83046.pdf; *see also* U.S. DEP'T OF STATE, TREATIES IN FORCE, A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2007: MULTILATERAL TREATIES (2007) [hereinafter MULTILATERAL TREATIES], *available at* http://www.state.gov/documents/organization/89668.pdf.

11. *See* BILATERAL TREATIES, *supra* note 10; MULTILATERAL TREATIES, *supra* note 10.

12. *See* Elizabeth M. Hudzik, Note, *Treaty on Thin Ice: Debunking the Arguments against U.S. Ratification of the U.N. Convention on the Law of the Sea in a Time of Global Climate Crisis*, 9 WASH. U. GLOBAL STUD. L. REV. 353 (2010).

13. William P. Clark & Edwin Meese, *Reagan and the Law of the Sea*, WALL ST. J., Oct. 8, 2007, at A19 (alteration in original).

14. Senator James M. Inhofe, Press Room: Law of the Sea Treaty (Oct. 4, 2007), http://inhofe.senate.gov/public/index.cfm?FuseAction=PressRoom.Speeches&ContentRecord_id=ae6b61e3-802a-23ad-431c-19fcc771af03.

vention] does", referring to the international seabed authority as the "great big international body."[15] In 2007, Frank Gaffney, Jr., President and Chief Executive Officer of the Center for Security Policy presented testimony before the Senate Foreign Relations Committee arguing for rejection of the Convention on sovereignty grounds.[16] Gaffney argued that the Convention threatened sovereignty because it was at odds with U.S. security interests, imposed unprecedented environmental obligations as a result of its empowerment of an "unaccountable, unrepresentative international agency" to oversee it and because of what he referred to as tax collection.[17]

Given the vast number of international agreements to which the United States *is* a party, its aversion to sovereignty costs is not absolute. Critics of the Convention continue to cite the sovereignty costs that led to its rejection in the early 1980s. Today, these same costs are erroneously analyzed for two reasons. First, there is a gross overstatement of the sovereignty costs associated with the Convention. Second, these costs are misinterpreted—critics do not appreciate that the constraints imposed by the Convention ultimately work in favor of the United States.

B. What Are Sovereignty Costs?

States interpret sovereignty differently. In broad terms, sovereignty can be thought of as "the basic international legal status of a [s]tate that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative or judicial jurisdiction of a foreign [s]tate or to foreign law other than public international law."[18] Some link sovereignty to a free market economy[19] while others believe that sovereignty "means that the [s]tate has unlimited power and is subjected to only those rules of international law which it has expressly accepted."[20] Sovereignty costs, thus, are those rules that restrict a state's absolute control over its actions and affairs. States are reluctant to relinquish control where they can help it

15. 153 CONG. REC. S12695, 12712 (daily ed. Oct. 4, 2007) (statement of Sen. Inhofe).

16. *The United Nation's Convention on the Law of the Sea: Hearing on Treaty Doc. 103-39 Before the S. Comm. On Foreign Relations*, 110th Cong. 75 (2007) (statement of Frank Gaffney Jr., President, Center for Security Policy) [hereinafter *UNCLOS Hearing*].

17. *Id.* at 88.

18. James D. Fry, *Sovereign Equality Under the Chemical Weapons Convention: Doughnuts over Holes*, 15 J. CONFLICT & SECURITY L. 45, 48 (2010) (quoting Helmut Steinberger, *Sovereignty*, *in* 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rudolf Bernhardt, ed. 2000) 511.

19. *Id.*

20. Henry Schermers, *Different Aspects of Sovereignty*, *in* STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE 185 (Gerard Kreijen ed., 2002).

because of the potential for negative outcomes and "loss of authority."[21]

C. Sovereignty Costs of the Convention to Which the United States Has Already Agreed

The sovereignty costs associated with the Convention are grossly overstated primarily because many of these costs have already been accepted by the United States. Provisions of the Convention that infringe upon sovereignty include limitations on unilaterally claiming territorial waters, limitations on economically exploitable areas on the seas, limitations on the continental shelf, revenue sharing provisions for exploitation of resources on the high seas, imposition of environmental obligations, and a mandatory dispute resolution mechanism.[22] As will be discussed next, the United States has already agreed to most of these provisions through a variety of previously signed treaties.[23]

Prior to governance on the seas, states could unilaterally claim as much of the open seas as territorial waters (those surrounding their territory) as they chose.[24] In theory, this meant that the United States could claim the entire open sea as its own. Likewise, so could its adversaries, allowing them control of waters that were merely a stone's throw away. The Convention curtailed this practice by declaring a territorial sea limit of twelve nautical miles from coastlines (or other established baselines) which gave coastal states the sovereign right to a limited belt of sea around their state.[25]

The Convention also codified the customary right of "innocent passage," or travel that is "not prejudicial to the peace, good order or security of the coastal State" to ensure that states could continue to travel peacefully through one another's territorial waters.[26]

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21. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, *in* LEGALIZATION AND WORLD POLITICS 37, 53 (Judith L. Goldstein et al. eds., 2001).

22. UNCLOS, *supra* note 2, pts. II, § 2; V; VI; VII, § 2; XII & XV. These provisions impinge upon the sovereignty of parties because they preclude such party from acting independently and instead constrain it by what has been agreed to.

23. MARJORIE ANN BROWNE, CONG. RESEARCH SERV., IB 95010, THE LAW OF THE SEA CONVENTION AND US POLICY (2005).

24. United Nations Division for Ocean Affairs and the Law of the Sea, The United Nations Convention on the Law of the Sea (A Historical Perspective), http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm (last visited Aug. 24, 2010) [hereinafter Historical Perspective] (noting the conflicting and expansive claims to the seas made by states prior to the Convention and using as an example an agreement between Spain and Portugal to split the Atlantic Ocean in half among themselves).

25. UNCLOS, *supra* note 2, pt. II, § 2, art. 3.

26. *Id.* pt. II, § 3, arts. 17, 19.

This is important to states because it provides significant savings in time and transport expense when navigating the seas.[27]

These two provisions impinge upon sovereignty because they preclude a state's absolute right to claim unlimited territorial seas and to create rules to restrict some forms of passage within their territorial seas. The Convention's codification of these principles, however, was not new. The United States was and is still party to the 1964 Convention on the Territorial Sea and Contiguous Zone, which provided limits on how much states may claim as their territorial seas and the right of innocent passage.[28]

Economic jurisdiction under the Convention is established through "exclusive economic zone[s]" which give member states the exclusive right for purposes of exploring, exploiting, conserving and managing the resources of the area that comprises such state's territorial sea, typically 200 miles.[29] This was considered one of the most revolutionary and generous provisions[30] of the Convention because a great deal of valuable resources fall within these expansive zones.[31] However, not only did this provision provide a free license for states to exploit within their exclusive economic zones, but it also imposed duties upon them to ensure conservation and responsible extraction of resources to avoid overexploitation.[32] This imposition of affirmative obligations that a state would not otherwise be required to take on is a sovereignty cost, as is the limitation on where a state is free to exploit. The notion of exclusive economic zones in the Convention parallels a similar one in the 1966 Convention on Fishing and Conservation of the Living Resources of the High Seas which gave state parties the right to fish on the high seas, but also dictated that it was a duty of states to cooperate with one another in efforts to conserve the living resources of the sea.[33] The United States is a party to the Convention on Fishing

27. Historical Perspective, *supra* note 24 ("This means, for example, that a Japanese ship, picking up oil from Gulf States, would not have to make a 3,000-mile detour in order to avoid the territorial sea of Indonesia, provided passage is not detrimental to Indonesia and does not threaten its security or violate its laws.").

28. MULTILATERAL TREATIES, *supra* note 10, at 111-12; United Nations Convention on the Territorial Sea and the Contiguous Zone §§ 2-3, Sept. 10, 1964, 15 U.S.T. 1606, 516 U.N.T.S. 205.

29. UNCLOS, *supra* note 2, pt. V, arts. 56-57.

30. Parker Clote, Comment, *Implications of Global Warming on State Sovereignty and Arctic Resources Under the United Nations Convention on the Law of the Sea: How the Arctic is No Longer* Communis Omnium Naturali Jure, 8 RICH. J. GLOBAL L. & BUS. 195, 205 (2008) (noting the "unprecedented" exclusive economic zone the Treaty offered).

31. Historical Perspective, *supra* note 24 (noting that "87 per cent of all known and estimated hydrocarbon reserves under the sea fall under some national jurisdiction as a result" as well as "almost all known and potential offshore mineral resources" and finally "[t]he most lucrative fishing grounds too are predominantly the coastal waters").

32. UNCLOS, *supra* note 2, pt. V, art. 61-62.

33. United Nations Convention on Fishing and Conservation of the Living Resources

and Conservation of the Living Resources of the High Seas and thus already bound by these rules.[34]

Another important area where the Convention dictates rules is with respect to the continental shelf. The continental shelf is

> the seabed and subsoil of the submarine areas that extend beyond [a coastal state's] 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.[35]

The delineation of the continental shelf was a closely watched and hotly contested issue, due in part to the potential wealth of resources within it. There were tensions between states with wide shelves and those with little or no shelves at all.[36] Since much of the seas that would be free for navigation and exploitation turned on the how the continental shelf was defined, it was in the interests of many states to have their voices heard on this issue.[37]

Ultimately, the Convention settled on an outer limit for the continental shelf of 200 miles,[38] which satisfied many geographically disadvantaged states (those that do have a naturally wide shelf), but also allowed special considerations for states with naturally broad shelves by granting them a potentially deeper shelf of up to 350 miles instead of the standard 200.[39] With the exception of the special considerations, Convention provisions limiting the continental shelf echoed those in the 1964 Convention on the Continental Shelf which set the limit as 200 miles and gave coastal states exclusive rights over its continental shelf.[40] The United

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of the High Seas, art. 1, Apr. 29, 1958, 17 U.S.T. 138, 559 U.N.T.S. 285 [hereinafter Fishing and Conservation Convention]; EUGENE H. BUCK, CONG. RESEARCH SERV., RL 32185, U.N. CONVENTION ON THE LAW OF THE SEA: LIVING RESOURCES PROVISIONS 7 (2009).

34. MULTILATERAL TREATIES, *supra* note 10, at 75.

35. UNCLOS, *supra* note 2, pt. VI, art. 76.

36. Historical Perspective, *supra* note 24.

37. *Id.*

38. UNCLOS, *supra* note 2, pt. VI, art. 76.

39. Historical Perspective, *supra* note 24 (stating that the extension of the continental shelf boundary was dependent on "certain geological criteria" and satisfied several nations with a broader shelf including Argentina, Australia, Canada, India, Madagascar, Mexico, Sri Lanka and France); *see also* Anthony Clark Arend, *Do Legal Rules Matter? International Law and International Politics*, 38 VA. J. INT'L L. 107, 147-53 (1998) (discussing how the Convention changed the identity of geographically disadvantaged states).

40. United Nations Convention on the Continental Shelf, art. 2, Jun. 10, 1964, 15 U.S.T. 471, 499 U.N.T.S. 311.

States is a party to the 1964 Convention on the Continental Shelf and thus bound by these limits.[41] However, if the United States qualifies for the special considerations provided for in the Convention for states with naturally broader shelves, it has the potential to increase its continental shelf.[42]

Another sovereignty-related issue that the Convention addresses is conservation and pollution on the seas, a pressing concern given the widespread exploitation of the sea and its resources.[43] Part XII of the Convention, entitled Protection and Preservation of the Marine Environment, imposes upon states the "obligation to protect and preserve the marine environment."[44] The Convention also includes detailed provisions that explicitly require state parties to take measures to prevent, reduce and control pollution.[45] States are required to cooperate with global and regional efforts in combating pollution by setting standards, rules, and recommended practices, many of these through appropriate international organizations.[46] Furthermore, the Convention requires states to take the affirmative step of implementing systems for monitoring and reporting the risks and effects of pollution to their marine environments.[47]

Conservation and pollution provisions are included in the 1966 Convention on Fishing and Conservation of the Living Resources of the High Seas, to which the United States is also a party.[48] As mentioned previously, this convention permits high seas fishing while also requiring states take steps to conserve the seas' living resources.[49]

The Convention on the Law of the Sea limits the right of states to assert ownership over unlimited territorial seas, defines the area within which state parties are free to exploit resources, and imposes rules for conservation and preservation, among others,

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41. MULTILATERAL TREATIES, *supra* note 10, at 111.

42. United States Department of State, Defining the Limits of the U.S. Continental Shelf, http://www.state.gov/g/oes/continentalshelf/ (last visited Sept. 16, 2010) (noting that the United States is working to secure evidence that would support the requirements for an extended continental shelf under the Convention).

43. Michael Parfit, *Diminishing Returns: Exploiting the Ocean's Bounty*, NAT'L GEOGRAPHIC, Nov. 1995, at 2; ENVTL. PROT. AGENCY, EPA-905-F-97-011, WATER POLLUTION PREVENTION AND CONSERVATION (1997), *available at* http://www.epa.gov/reg5rcra/wptdiv/p2pages/water.pdf.

44. UNCLOS, *supra* note 2, pt. XII, art. 192. The Convention addresses six sources of pollution: "land-based and coastal activities; continental-shelf drilling; potential seabed mining; ocean dumping; vessel-source pollution; and pollution from or through the atmosphere." Historical Perspective, *supra* note 24.

45. UNCLOS, *supra* note 2, pt. XII, art. 194.

46. *Id.* pt. XII, §2.

47. *Id.* pt. XII, §4.

48. MULTILATERAL TREATIES, *supra* note 10, at 75.

49. Fishing and Conservation Convention, *supra* note 33, art. 1.

that limit absolute sovereignty. However, the United States has recognized benefits from ratifying the 1964 and 1966 treaties—which parts of the Convention mirror—and relinquishing sovereignty on a wide range of issues embodied therein.

D. Sovereignty Costs of the Convention Where the United States is Not Already Explicitly Bound

The Convention encompasses additional areas that were not contemplated by the agreements discussed above. These include revenue sharing provisions and binding dispute resolution mechanisms, which are the source of great controversy. While these provisions undoubtedly pose greater sovereignty costs than those discussed earlier, they nevertheless can be easily discounted. The "common heritage of mankind" principle, which the revenue sharing provisions of the Convention codifies, can be deemed customary law that the United States is subject to under principles of international law. Furthermore, the dispute resolution mechanisms that the Convention provides for do not raise the concerns that the United States has with other external adjudication procedures which it strongly opposes.

Given the wide range of definitions that can correspond to notions of sovereignty, it is helpful to examine the sovereignty costs associated with these provisions through the spectrum of "legalization." Hard legalization refers to legally binding treaties where sovereignty costs are highest, whereas soft legalization refers to those instances where states are not bound or are very loosely bound, and thus sovereignty costs are relatively low.[50] Not surprisingly, states are most resistant to hard legalization, which encompasses three dimensions: obligation, precision, and delegation.[51] *Obligation* refers to the rule or commitments (or sets of rules or commitments) that states are bound by.[52] *Precision* refers to the clarity by which rules define the conduct they speak to and *delegation* refers to the authority given to third parties to implement, interpret and apply the rules.[53] Of these, delegation imposes the greatest unexpected sovereignty costs by clearly and explicitly relinquishing decision-making authority to external authorities,

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50. *See* Abbott & Snidal, *supra* note 21, at 53-54.

51. Kenneth W. Abbott et al., *The Concept of Legalization*, *in* LEGALIZATION AND WORLD POLITICS, *supra* note 21 at 17, 17. Because ratification of the Convention would likely be considered hard legalization, sovereignty costs discussed in this section will focus on the dimensions of hard legalization.

52. *Id.* at 17-18 (noting that obligation also refers to rules/commitments that parties other than states are bound by).

53. *Id.* at 17.

which may impact the state.[54]

The subsections that follow will analyze the sovereignty costs of those provisions of the Convention that the United States is not explicitly bound by and classify those according to the dimensions of hard legalization.[55] The next section will point out why these costs are misinterpreted by the United States and are not in fact detrimental to sovereignty, but beneficial.

1. Common Heritage of Mankind

The "common heritage of mankind" principle refers to the idea that there are parts of the world that cannot belong to a single state and should be shared by all of mankind. The Convention declares that the seas fall within this category.[56] The Convention's revenue sharing provisions address exploitation of non-living resources by coastal states in the continental shelf *beyond* their 200-mile territorial zone and try to bring the "common heritage" principle into practice.[57] The exploiting coastal state is required to pay a portion of the production of its resources within this area to the International Seabed Authority to be distributed to the parties to the Convention on the basis of "equitable sharing criteria."[58] This provision can be classified as high on the scale of delegation because it imposes rules upon state parties and seeks to enforce them via an external third party.

Capitalist states like the United States have traditionally disliked this provision because of its "socialist"[59] nature and what some critics call its tax-like effect, which is to say, taxation on what they deem rightful exploitation. In his prepared remarks for the Senate in October of 2007, Senator James M. Inhofe of Oklahoma argued against ratification of the Convention, stating that

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54. Abbott & Snidal, *supra* note 21, at 54.

55. Claire R. Kelly, *Realist Theory and Real Constraints*, 44 VA. J. INT'L L. 545, 552 (2004) (noting that the Convention is a "moderately (to highly) legalized . . . regime." Thus, it could be classified as hard legalization); *see also* Peter B. Rutledge, Medellin, *Delegation and Conflicts (of Law)*, 17 GEO. MASON L. REV. 191 (2009) (discussing delegation debates, noting the role they have had in ratification of the Convention, and arguing that these delegation debates suffer from distortions).

56. UNCLOS, *supra* note 2, pt. XI, § 2, art. 136 ("The [seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction] and its resources are the common heritage of mankind.").

57. *Id.* pt. VI, art. 82.

58. *Id.*

59. Zachary M. Peterson, *Critics Assail Law of the Sea Treaty*, NAVYTIMES, Oct. 4, 2007, http://www.navytimes.com/news/2007/10/navy_lawofthesea_071004w/ ("Critics of the Convention of the Law of the Sea argued at a hearing Thursday that signing the treaty was a 'recipe for disaster,' leading to the creation of 'a socialist entity' to police the world's oceans.").

private mining companies would have to apply to the International Seabed Authority and pay millions of dollars before they can attempt to extract the resources beneath the seabed.[60]

However, the United States is likely already bound by the "common heritage of mankind" doctrine under principles of customary law.[61] Customary law is generally thought of as widespread systematic practice that is backed by *opinio juris*, or the belief that one is acting in accordance with legal obligation.[62] Because these are not objectively measureable qualities, customary law is not always easy to identify. The Convention, including its provisions regarding the "common heritage of mankind" principle, is considered to represent the customary law of the seas, supported in part by its widespread ratification.[63] Under general principles of international law, customary law is binding on all states, including the United States. [64] The United States, thus, is bound by those provisions of the Convention that are deemed customary law, which likely include the "common heritage of mankind" principle.

Additionally, the United States explicitly acknowledges the "common heritage of mankind" principle in its passage of the Deep Seabed Hard Mineral Resources Act.[65] The Deep Seabed Hard Mineral Resources Act notes that deep seabed minerals are the "common heritage of mankind" and establishes a temporary framework for the responsible and respectful mining of the deep

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60. Senator James M. Inhofe, *supra* note 14.

61. *See* Anthony D'Amato, Editorial Comment, *An Alternative to the Law of the Sea Convention*, 77 AM. J. INT'L L. 281, 282-83 (1983) (arguing that the principle of the common heritage of mankind is a "generalizable" norm and represents customary law); *see also* Kenneth Mwenda, *Deep Sea-Bed Mining Under Customary International Law*, 7 MURDOCH U. ELECTRONIC J.L. (2000), http://www.murdoch.edu.au/elaw/issues/v7n2/mwenda72.html; Melissa L. Sturges, *Who Should Hold Property Rights to the Human Genome? An Application of the Common Heritage of Mankind*, 13 AM. U. INT'L L. REV. 219, 247-48 (1997) (noting that the U.N. has applied the common heritage principle to deep seabeds among other things).

62. *See generally* The Paquette Habana, 175 U.S. 677 (1900); North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3; 12 (Feb. 20).

63. Luke T. Lee, *The Law of the Sea Convention and Third States*, 77 AM. J. INT'L L. 541, 556-57 (1983) ("Accordingly, all of the provisions in the High Seas Convention 'must therefore be taken *presumptively* to be declaratory of customary international law.' Indeed, where the expressions 'all States,' 'any States,' etc., are used, the rules concerned may be regarded as expressing customary international law." (citation omitted)); *see also* Sarei v. Rio Tinto, P.L.C., 456 F.3d 1069, 1078 (9th Cir. 2006), *withdrawn*, Sarei v. Rio Tinto, P.L.C., No. 02-56256, 2007 U.S. App. LEXIS 8387 (9th Cir. Apr. 12, 2007) ("[T]he [T]reaty has been ratified by at least 149 nations, which is sufficient for it to codify customary international law."); Mwenda, *supra* note 61.

64. John Tasioulas, *Customary International Law and Global Justice*, *in* THE NATURE OF CUSTOMARY LAW 307, 308 (Amanda Perreau-Saussine & James Bernard Murphy eds., 2007) ("[W]hen [customary law] has come into existence, it is opposable against all states without exception . . . .").

65. 30 U.S.C. §§ 1401-1473 (2006).

seabed taking into account the interests of other nations.[66] That the Deep Seabed Hard Mineral Resources Act was intended as a temporary framework until the Convention could be agreed upon and ratified[67] further supports the United States' willingness to embrace the "common heritage of mankind," and ultimately the Convention which incorporates this principle.

Still others argue that the deep seabed and other areas that the "common heritage" principle applies to are not sovereignty concerns as they never belonged to the United States.[68] Furthermore, because customary international law "by itself is insufficiently clear and reliable and does not secure all the benefits that ratification of the [Convention] would provide," ratification is recommended, as the United States is likely already bound by these.[69]

2. Dispute Resolution Under the Convention

The Convention encourages peaceful dispute resolution, giving disputing parties great discretion in choosing a suitable avenue to resolve their disputes, and in the absence of such, it provides one.[70] Dispute resolution likely falls on the highest end of the delegation dimension of legalization because it has the potential to delegate the most important element of sovereignty—enforcement.[71] Thus, it is not surprising that the United States shies away from it.

Part XV of the Convention allows state parties in a dispute relating to the seas to choose from four options to resolve such disputes—all of which will result in a binding decision. These include arguing the case before the International Tribunal for the Law of the Sea, the International Court of Justice, an international arbitration body or a special arbitral tribunal subject to certain rules.[72] There are, however, exceptions for certain situations that involve national sovereignty where the parties must submit to a concilia-

66. *Id.* § 1401.

67. BROWNE, *supra* note 23.

68. John Norton Moore, *UNCLOS Key to Increasing Navigational Freedom*, 12 TEX. REV. L. & POL. 459, 463 (2008) ("[The international seabed] is not an area that we own. This is not sovereignty. This is not an area that anyone has ever claimed as sovereign under the United States. In addition to that, the Congress of the United States recognized in legislation in 1980 that this area was not sovereign under the United States and that we had no legal rights to that area.").

69. David A. Koplow, *ASAT-isfaction: Customary International Law and the Regulation of Anti-Satellite Weapons*, 30 MICH. J. INT'L L. 1187, 1266 n.255 (2009) (citing comments of John B. Bellinger III, Legal Adviser to the Secretary of State).

70. UNCLOS, *supra* note 2, pt. XV; *see also* Andrew T. Guzman & Jennifer Landsidle, *The Myth of International Delegation*, 96 CAL. L. REV. 1693, 1716-1718 (2008) (discussing the flexibility in the dispute resolution mechanisms in the Convention)..

71. Abbott et al., *supra* note 51.

72. UNCLOS, *supra* note 2, pt. XV, art. 287.

tion commission, in which case the decision of the commission will *not* be binding upon the state parties.[73]

The United States has long resisted international agreements with dispute resolution mechanisms that remove jurisdiction to another country.[74] This resistance stems from claims that international courts (and bodies) are highly politicized and hostile towards the United States.[75] A binding dispute resolution provision encroaches on sovereignty because it takes control away from a state to adjudicate the claim wherever it wants—ideally its own courts where, presumably, it will receive favorable treatment.

Similarly, the United States has vehemently opposed the Rome Statute which establishes the International Criminal Court (ICC) as an independent body with its own legal personality.[76] Parties to the Rome Statute accept jurisdiction of the International Criminal Court over certain crimes committed by their nationals or which take place on their territory.[77] The United States refuses to ratify the Rome Statute and risk "politicized prosecutions of American service members and officials."[78] That U.S. officials, personnel and nationals may be subject to international prosecutions imposes sovereignty costs greater than those the United States is willing to absorb.[79] In 2000, President Clinton authorized signature of the Rome Statute, despite initial opposition, and shortly thereafter President George W. Bush nullified the United States' signature.[80] This is significant because it indicates explicit unwillingness to be-

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73. *Id.* pt. XV, § 3; *see also* MALCOLM NATHAN SHAW, INTERNATIONAL LAW 570 n.383 (5th ed. 2003) (Three situations in which states may opt out of the compulsory settlement procedures include "delimitation and claims to historic waters; disputes concerning military and law enforcement activities, and disputes in respect of which the Security Council is exercising its functions").

74. Nathan Read, Comment, *Claiming the Strait: How U.S. Accession to the United Nations Law of the Sea Convention Will Impact the Dispute Between Canada and the United States Over the Northwest Passage*, 21 TEMP. INT'L & COMP. L.J. 413, 427 (2007) ("The Senate has traditionally been hesitant to accept broad compulsory dispute settlement in treaties, stemming from the desire to control how U.S. interests may be challenged in international forums." (citation omitted)).

75. *UNCLOS Hearing*, *supra* note 16, at 82 ("[Convention] advocates in the Bush Administration are right to be worried about international courts given the track record of such panels (particularly the ICJ) . . . .").

76. Rome Statute of the International Criminal Court art. 12, July 17, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9 (1998).

77. *Id.*

78. Curtis A. Bradley, *U.S. Announces Intent Not to Ratify International Criminal Court Treaty*, ASIL INSIGHTS, May 2002, http://www.asil.org/insights/insigh87.htm.

79. James Paul Benoit, *The Evolution of Universal Jurisdiction over War Crimes*, 53 NAVAL L. REV. 259, 306-10 (2006) (discussing the United States' very strong opposition to the ICC).

80. Remigius Chibueze, *United States Objection to the International Criminal Court: A Paradox of "Operation Enduring Freedom"*, 9 ANN. SURV. INT'L & COMP. L. 19, 21-22 (2003).

come a party to the Convention or further its goals.

Criticism of the Rome Statute stems from concerns that the United States would compromise sovereignty by allowing others to prosecute its citizens without its consent, and potentially denying them basic constitutional rights and other domestic law protections.[81] Proponents of the ICC contend that U.S. arguments against ratification of the Rome Statute fail in the face of facts.[82] These arguments can be extrapolated and applied to the far less controversial dispute resolution provisions of the Convention. Among the most compelling arguments against a cooperative dispute resolution mechanism are assertions that a foreign body would have jurisdiction over U.S. citizens. Under the widely accepted principles of universal jurisdiction and territoriality, the United States already relinquishes a great deal of power over the fate of its citizens on trial.[83] Concerns of bias among the deciding party are also ill-founded. With respect to the International Criminal Court, there are a number of safeguards in place to guard against such fears.[84] The dispute resolution provisions in the Convention do not provide for prosecutions of U.S. citizens, but largely govern disputes over economic matters.[85] While there are costs associated with agreeing to a dispute resolution mechanism that is

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81. Brett D. Schaefer, *Executive Memorandum #708: Overturning Clinton's Midnight Action on the International Criminal Court*, THE HERITAGE FOUND., Jan. 9, 2001 http://www.heritage.org/Research/InternationalOrganizations/EM708.cfm; *see also* Chibueze, *supra* note 80, at 31 (noting that the ICC may exercise jurisdiction "over a citizen of a non-party state if he or she commits a crime in the territory of a state party and the state party elects to surrender the accused to the jurisdiction of the Court rather than trying him or her in its national court.").

82. *See generally* Chibueze, *supra* note 80.

83. *Id.* at 34.

> Similarly, U.S. legislative practice recognizes that the first and best established jurisdictional principle is 'territoriality.' Territoriality is considered the normal, and nationality the exceptional, basis for the exercise of jurisdiction. Also, U.S. legislative practice recognizes that a state may exercise universal jurisdiction to define and punish certain offenses of universal concern which are recognized by the community of nations, such as piracy, the slave trade, attacks on or hijacking of an aircraft, genocide, war crimes . . . .

Id. (citation omitted).

84. *Id.* at 37-45 (noting the safeguards to prevent politically motivated prosecutions include a pre-trial panel, Security Council intervention, principle of complementarity, and a very high threshold for the crimes to meet those triable by the ICC).

85. *The United Nations Convention on the Law of the Sea: Hearing Before the H. Comm. on International Relations*, 108th Cong., 21, 37 (2004) (statement of William H. Taft IV, Legal Adviser, U.S. Department of State) ("Disputes concerning military activities, including intelligence activities, will not be subject to dispute settlement under the Convention as a matter of law, or U.S. policy. . . . Most of [the things subject to the Convention's dispute resolution] will be economic, seeking compensation for damages that the other States have done, and that has been the record of the very small number of cases that have been brought by the existing parties to the treaty under the dispute resolution thing.").

not an American court, those costs are neither new nor absolute.[86] Furthermore, the underlying concern with the ICC, fear of prosecution of servicemen and women,[87] is not relevant in this context. In fact, the U.S. Navy and other military members support ratification of the Convention.[88] Finally, as discussed earlier, the dispute resolution provisions of the Convention contain an explicit carve-out for issues that infringe upon national sovereignty, among others.[89] Under those circumstances, parties to the Convention are not required to utilize any of the mechanisms enumerated, and can instead rely upon a non-binding option, thus softening the delegation aspect associated with dispute resolution.[90]

There is no doubt that external dispute resolution infringes upon U.S. sovereignty and it is therefore not surprising that staunch advocates of sovereignty steadfastly oppose the Convention, in part due to its dispute resolution mechanisms. However, the costs associated with the Convention's dispute resolution provision are similar to those the United States is already subject to under principles of universal jurisdiction and territoriality. Furthermore, the Convention provides the United States with an escape from mandatory dispute resolution. In light of this, arguments against ratification of the Convention based upon sovereignty rooted in the dispute resolution mechanisms are outweighed by the benefits the Convention offers to the United States.[91]

II. U.S. MISINTERPRETATION OF CONVENTION COSTS RELATIVE TO OTHER STATE PARTIES

The costs associated with the Convention to the United States

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86. Fishing and Conservation Convention, *supra* note 33, arts. 9-11 (outlining the dispute resolution provisions to which the United States has already agreed).

87. Arthur W. Rovine, *Memorandum to Congress on the ICC from Current and Past Presidents of the ASIL*, 95 AM. J. INT'L L., 967, 967 (2001).

88. Military endorsements of the Convention include: Admiral Mike Mullen, all members of the Joint Chiefs of Staff, General Michael Myers, Admiral Vern Clark, Admiral Jay Johnson, Admiral Thad Allen, Admiral Thomas Collins and several other members of the Navy and Coast Guard. OceanLaw.org, History of Navy Support for the Law of the Sea Convention (Apr. 21, 2008), http://www.oceanlaw.org/index.php?module=News&func=display&sid=70.

89. Read, *supra* note 74, at 443 ("Ironically, the Convention allows parties to escape its compulsory dispute resolution provisions by permitting 'agreements modifying or suspending the operation of provisions of this Convention.' "); *see also* Montserrat Gorina-Ysern, *World Ocean Public Trust: High Seas Fisheries After Grotius—Towards a New Ocean Ethos?*, 34 GOLDEN GATE U. L. REV. 645, 671 (2004) (noting that "conservation disputes arising from the exercise by coastal States of sovereign rights relating to the living resources of the [exclusive economic zone] are not subject to compulsory settlement of dispute mechanisms under UNCLOS.").

90. Guzman & Landsidle, *supra* note 70, at 1718.

91. *See infra* Parts II, III, IV.

compared with other state parties are significantly less for several reasons. The underlying principle is that the United States benefits when other states are also bound—especially its adversaries. The incremental cost to the United States of complying with the constraints that the Convention imposes is minimal in light of these benefits.

One reason the United States stands to benefit where other states are bound by the Convention is because of its relative stability.[92] By ratifying the Convention, the United States is able to rely on the promises that each of the state parties has implicitly made by becoming party to the Convention. This ensures predictability and cooperation on the seas, an important consideration when confronted with states where power often changes hands and in ways that may be detrimental to U.S. interests.[93]

Further, as discussed in Part Two, the United States already adheres to much of the Convention and thus stands largely to gain from ratification.

A. Convention Ratification is Favorable to the United States During Lags in Power

Regimes are defined as:

> [I]mplicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations. Principles are beliefs of fact, causation, and rectitude. Norms are standards of behavior defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice.[94]

Regime theory holds that regimes or international agreements such as treaties affect the behavior of states through the sense of obligation that they impose.[95] As such, the Convention can be con-

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92. *Top 50: The Most Stable and Prosperous Countries in the World*, TIMES ONLINE, Mar. 25, 2008, http://www.timesonline.co.uk/tol/news/world/article3617160.ece (noting the United States as the 24th most stable nation in the world, closely following Canada).

93. *See generally* Ralph Peters, *Stability, America's Enemy*, PARAMETERS, Winter 2001-2002, at 5 (noting the importance of stability to the United States while arguing that it does not lead to beneficial ends).

94. Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, *in* INTERNATIONAL REGIMES 1, 2 (Stephen D. Krasner ed., 1983).

95. *Id.*

sidered a regime.[96] Because "world politics is characterized by institutional deficiencies that inhibit mutually advantageous coordination,"[97] international regimes, such as the Convention, are essential. They facilitate coordination and improve cooperation by minimizing costs associated with negotiating and promoting efficiency.[98]

International regimes provide predictability and expectations of cooperation from international actors. [99] "Typically, an international regime is established to regularize behavior not only among the members but also between them and outsiders."[100]

State parties to international regimes agree to comply with and internalize the norms that such regime represents. By doing this, states ultimately gain legitimacy—in that they will behave according to agreed upon norms.[101] In fact, "[r]egimes offer one way to account for the persistence of behavior and outcomes even though basic causal factors associated with political power have changed."[102] This period during which distributions in power or other causal variables shift are referred to as lags.[103] In summary, regimes, such as the Convention, allow trust to be placed in norms that prevail over time—even as power, ideals, and priorities change. [104]

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96. Shirley V. Scott, *The LOS Convention as a Constitutional Regime for the Oceans in* STABILITY AND CHANGE IN THE LAW OF THE SEA: THE ROLE OF THE LOS CONVENTION 9 (Alex G. Oude Elferink, ed., 2005); Oran R. Young, *Commentary on Shirley V. Scott "The LOS Convention as a Constitutional Regime for the Oceans", in* STABILITY AND CHANGE IN THE LAW OF THE SEA: THE ROLE OF THE LOS CONVENTION, *supra*, at 39 (supporting that the LOS Convention is a regime and questioning whether or not it is a typical regime).

97. Robert O. Keohane, *The Demand for International Regimes*, 36 INT'L ORG. 325, 335 (1982).

98. *Id.*

99. SUSAN J. BUCK, THE GLOBAL COMMONS 31 (1998) ("[A]lthough cooperation entails costs (especially transaction and monitoring costs), it also reduces economic uncertainty because international regimes provide predictability.").

100. Keohane, *supra* note 97, at 352.

101. Krasner, *supra* note 94, at 18 ("Patterned behavior accompanied by shared expectations is likely to become infused with normative significance: actions based purely on instrumental calculations can come to be regarded as rule-like or principled behavior. They assume legitimacy.").

102. Stephen D. Krasner, *Regimes and the Limits of Realism: Regimes as Autonomous Variables*, 36 INT'L ORG. 497, 500 (1982).

103. Stephen D. Krasner, *Regimes and the Limits of Realism: Regimes as Autonomous Variables, in* INTERNATIONAL REGIMES, *supra* note 94, at 355, 359 ("Lags refer to situations in which the relationship between basic causal variables and regimes becomes attenuated.").

104. William D. Baumgartner, *UNCLOS Needed for America's Security*, 12 TEX. REV. L. & POL. 445, 449 (2008) ("Locking in favorable text in black and white is always preferable to relying upon understandings of customary international law."); John E. Noyes, *The United States, The Law of the Sea Convention, and Freedom of Navigation*, 29 SUFFOLK TRANSNAT'L L. REV. 1, 23 (2005) (noting the Bush Administration's support for "law of the sea rules that help create stable expectations"); John R. Stevenson & Bernard H. Oxman, *The Future of the United Nations Convention on the Law of the Sea*, 88 AM. J. INT'L L. 488, 492 (1994)

Providing a regulation mechanism during lags is important on the seas where the risk of unregulated activity could have serious long-term implications.[105] For example, powerful state parties could engage in exploitation that puts the resources of the sea at risk while profiting handsomely. Similarly, bad actors can engage in non-peaceful navigation threatening security and privacy on the seas. If these activities are grave enough, they may eventually warrant military action by other state parties, threatening the stability of the international community.

For the sake of legitimacy, or at the very least the appearance of legitimacy, parties to the Convention will likely continue to adhere to it through regime changes. Legitimacy is an important source of leverage in international politics.[106] If a state cannot be counted upon to keep its promises, others will be hesitant to engage it. Ratification is viewed advantageously because it indicates commitment, which is vital in an international context due to the lack of enforceability mechanisms.[107] The Convention, with approximately 160 state parties[108] evidences a commitment to laws governing the seas and assures a degree of predictability to safeguard U.S. interests.

Critics of the Convention may point to the sovereignty costs that the United States must absorb to give other state parties these same promises, rendering the U.S. weaker. Although the Convention equally constrains all state parties, the United States, with its wealth, power, and status (albeit declining) is still able to assert a greater degree of control and influence than other state parties.[109] This is important where the United States may seek to

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(discussing why "a widely ratified Convention is a better guarantor of this long-term stability than customary international law"); Candace L. Bates, Comment, *U.S. Ratification of the U.N. Convention on the Law of the Sea: Passive Acceptance Is Not Enough to Protect U.S. Property Interests*, 31 N.C. J. INT'L L. & COM. REG. 745, 788-89 (2006) (noting that the Convention "creates an interdependence of nations with obligations affecting all marine areas and activities," and that its effectiveness depends upon universal acceptance of the Convention).

105. Bernard H. Oxman, Current Development, *United States Interests in the Law of the Sea Convention*, 88 AM. J. INT'L L. 167, 170 (1994).

> Every attempt to use the sea, particularly far from one's shores, poses a potential problem with the claims of a foreign government to restrict or regulate uses of the sea. Every attempt to restrict or regulate uses of the sea, whether close to or far from one's shore, poses a potential problem with the claims of a foreign government to use the sea.

Id.

106. Joseph S. Nye, Jr., *The Decline of America's Soft Power*, FOREIGN AFFAIRS May-June 2004, at 16.

107. Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 592 (2005).

108. United Nations Convention on the Law of the Sea Status, *supra* note 6.

109. *See* NAT'L INTELLIGENCE COUNCIL, OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, NIC 2008-003, GLOBAL TRENDS 2025: A TRANSFORMED WORLD, at vi (2008), *available at*

amend the Convention or otherwise negotiate to meet its needs.

Additionally, ratification of the Convention will soften the United States' image and signal much needed goodwill to the international community.[110] It has been noted that "[a]nti-Americanism has increased in recent years, and the U.S.' soft power—its ability to attract others by the legitimacy of U.S. policies and the values that underlie them—is in decline as a result."[111] Commitment to the Convention, which engages much of the international community, would be emphasized by U.S. ratification.[112] It also allows other states to place their trust in the U.S. and thus its actions on the seas. This is essential for the United States to maintain its legitimacy and ultimate leverage in the international arena.[113]

1. Cost Reduction

The Convention provides a pre-formulated universal mechanism[114] to govern interactions between states on issues related to the seas, resulting in vast cost savings. By creating such a me-

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http://www.dni.gov/nic/PDF_2025/2025_Global_Trends_Final_Report.pdf (noting that the United States will remain the world's single most dominant power, even though its status may decline in the future). *But see* Nye, *supra* note 106 (noting that United States' soft power is in decline.

110. *See* Christopher Shiraldi, Comment, *U.S. National Security Implications of the U.N. Convention on the Law of the Sea*, 27 PENN ST. INT'L L. REV. 519, 544 (arguing that United States ratification of the Convention "will be a positive step in showing the international community that the United States is willing to cooperate and work with others toward a common goal"). *see generally* Susan Sachs, *Poll Finds Hostility Hardening Towards U.S. Policies*, N.Y. TIMES, Mar. 17, 2004 at A3 (reporting attitudes from Britain, France, Germany, Russia, Jordan, Morocco, Pakistan, Turkey and the United States towards U.S. policies and noting overall negative attitude towards U.S. international polices). This is especially important given the United States' history of opening treaties for negotiation, forcing other parties to concede to its demands and then failing to ratify. *See* David J. Scheffer, Speech, *Advancing U.S. Interests with the International Criminal Court*, 36 VAND. J. TRANSNAT'L L. 1567, 1578 (2003).

111. Nye, *supra* note 106, at 16.

112. *See* Raustiala, *supra* note 107.

113. Nye, *supra* note 106, at 17.

> Soft power, therefore, is not just a matter of ephemeral popularity; it is a means of obtaining outcomes the United States wants. When Washington discounts the importance of its attractiveness abroad, it pays a steep price. When the United States becomes so unpopular that being pro-American is a kiss of death in other countries' domestic politics, foreign political leaders are unlikely to make helpful concessions (witness the defiance of Chile, Mexico, and Turkey in March 2003). And when U.S. policies lose their legitimacy in the eyes of others, distrust grows, reducing U.S. leverage in international affairs.

Id.

114. William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 AM. U. J. INT'L L. & POL'Y 227, 244-45 (1997) (noting that institutions reduce costs by providing a framework for negotiations).

chanism (or institution), these costs are reduced in a number of ways:

> First, they reduce the costs associated with the negotiation of agreements. . . . Second, institutions reduce the costs of maintaining agreements once they have been reached by providing an organizational framework, an administrative staff and a forum for meetings. Third, institutions minimize the consequences of incomplete agreements by sketching the broad "rules of the game and then delegat[ing] the authority to apply and adapt these rules to specific cases."[115]

The political scholar Robert Keohane illustrates how interrelated issues focused in a comprehensive and effective mechanism such as the Convention[116] help to reduce transaction costs:

> [I]n dense policy spaces, complex linkages will develop among substantive issues. Reducing industrial tariffs without damaging one's own economy may depend on agricultural tariff reductions from others; obtaining passage through straits for one's own warships may depend on wider decisions taken about territorial waters; the sale of food to one country may be more or less advantageous depending on other food-supply contracts being made at the same time. As linkages such as these develop, the organizational costs involved in reconciling distinct objectives will rise and demands for overall frameworks of rules, norms, principles, and procedures to cover certain clusters of issues—that is, for international regimes—will increase.[117]

The Convention exemplifies the kind of regime that Keohane discusses by incorporating two essential elements: a wide range of interrelated issues[118] and participation by many state parties.[119]

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115. *Id.* (quoting Geoffrey Garrett, *International Cooperation and Institutional Choice: The European Community's Internal Market*, 46 INT'L ORG. 533, 557 (1992) (alteration in original) (citations omitted)).

116. *Id.* at 257 ("By establishing regularized patterns of behavior, treaties promote efficiency.").

117. Robert O. Keohane, *The Demand for International Regimes*, *in* INTERNATIONAL REGIMES, *supra* note 94, at 141, 156.

118. *See* International Foundation for the Law of the Sea, The Constitution, http://www.iflos.org/en/background/the-constitution.aspx (last visited Sept. 19, 2010) ("The

Because the United States engages with virtually all states, it stands to gain a great deal of savings by reaping benefits in the form of transaction and other costs for which the Convention inherently provides.

III. PRESSING STRATEGIC NEEDS THAT SUPPORT RATIFICATION

While the Convention undoubtedly imposes some sovereignty costs on the United States, these costs are incorrectly analyzed by Convention critics. They should be considered in light of the benefits the Convention provides.

Specifically, there are three important areas where the United States would be strengthened by ratification of the Convention. The first is in countering piracy, which has rapidly risen in recent years. The second is containing emerging superpowers, such as China, that pose a threat to the United States.[120] The third involves potential claims the United States has to the valuable resources beneath the Arctic Seabed. This section will explore each in turn.

A. Modern Threat of Piracy

In April 2009, the captured Somali pirate Abduwali Abdukhadir Muse, accused of hijacking the Maersk Alabama off of the coast of Africa, arrived in New York.[121] At the time, the United States declared that Muse would "face justice."[122] As Muse's trial was set to begin, questions surrounding successful prosecution arose. Two potential issues that had to be resolved were which definition of piracy the court could use and whether the United States had ju-

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Convention on the Law of the Sea is still to be seen as the most comprehensive and significant multilateral agreement under the auspices of the United Nations in the history of international law. It replaces the four 1958 Geneva Conventions on law of the sea and regulates almost all fields of international maritime law.").

119. United Nations Convention on the Law of the Sea Status, *supra* note 6.

120. Parag Khanna, *Waving Goodbye to Hegemony*, N.Y. TIMES MAG., Jan. 27, 2008, at 34 (noting a shift in the distribution of the world's power from the United States to the European Union and China, but dismissing Russia and India as frontrunners in the new global power structure); Ian Bremmer, *New Cold War for U.S. with Russia or China Not on Horizon*, REALCLEARPOLITICS, Apr. 3, 2007, http://www.realclearpolitics.com/articles/2007/04/new_cold_war_for_us_with_russi.html ("Even China and Russia, the two prime suspects as potential counterweights to America's global influence, represent fundamentally new sorts of challenges for U.S. policymakers.").

121. Press Release, Dep't of Justice, Somalian Pirate Brought to U.S. to Face Charges for Hijacking the Maersk Alabama and Holding the Ship's Captain Hostage (Apr. 21, 2009) (quoting Acting United States Attorney Lev L. Dassin) *available at* http://newyork.fbi.gov/dojpressrel/pressrel09/nyfo042109.htm.

122. *Id.*

risdiction to try Muse in its domestic courts.[123] Ratification of the Convention would have provided favorable answers to both.[124]

Piracy on the open seas has increased at a rapid pace in recent years. As of May 2009, the number of pirate attacks off of the coast of Somalia exceeded the total number of pirate attacks in all of 2008, and with it the total number of hostages taken increased as well.[125] When the capture of a U.S. ship became front-page news, the United States turned its attention to the issue of piracy.[126]

Muse's trial has drawn attention to U.S. piracy laws, or the lack thereof. In prosecuting Muse or in similar potential prosecutions in the future, the following federal statute underlies the United States' case: "[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life."[127] By allowing piracy to be defined by the "law of nations," prosecutors face a plethora of ambiguity.[128] Defense attorneys for pirates have reason to argue that their clients' actions do not constitute piracy because there is no clear definition of piracy under U.S. law. While the United States has several means to remedy this, ratification of the Convention is a simple, albeit small,[129] step in the right direction. The Convention defines piracy as:

> (a) any illegal acts of violence or detention, or any act

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123. *See* Complaint at 1, United States v. Muse, No. 09-MAG-1012 (S.D.N.Y. Apr. 21, 2009) (noting that Count One of the complaint filed against Muse states that the crime was piracy "as defined by the law of nations" and that the crime was committed "beyond the outer limit of the territorial sea of any country").

124. On May 18, 2010, Muse pled guilty to kidnapping, hostage taking and hijacking. *See Somali Pirate Pleads Guilty in Manhattan Federal Court to Maritime Hijackings, Kidnappings, and Hostage Takings*, PRNEWSWIRE.COM, May 18, 2010, http://www.prnewswire.com/news-releases/somali-pirate-pleads-guilty-in-manhattan-federal-court-to-maritime-hijackings-kidnappings-and-hostage-takings-94204744.html. His case is used here as an illustrative example only.

125. *Pirate Attacks off Somalia Already Surpass 2008 Figures*, INT'L CHAMBER OF COM., May 12, 2009, http://www.icc-ccs.org/index.php?option=com_content&view=article&id=352:pirate-attacks-off-somalia-already-surpass-2008-figures&catid=60:news&Itemid=51 ("In 2008, a total of 815 crew members were taken hostage from vessels hijacked in the Gulf of Aden and off the east coast of Somalia. The total number of hostages taken in these regions during 2009 already stands at 478.").

126. *See generally* Baker, *supra* note 1.

127. 18 U.S.C. § 1651 (2006).

128. *See* United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820) (noting that the law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law.") *Compare* § 1651 (defining piracy abstractly) *with* UNCLOS, *supra* note 2, pt. VII, § 1, art. 101 (providing a broad, specific definition of piracy which encompasses a range of activities).

129. Joseph M. Isanga, *Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes*, 59 AM. U. L. REV. 1267, 1281-94 (2010) (pointing out the shortcomings of the Convention in addressing piracy).

> of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
>
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
>
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).[130]

Under this definition, Muse's actions, if proven, surely would have constituted piracy.[131] Additionally, the "law of nations" or international law, as defined by the Statute of the International Court of Justice, declares treaties and other bilateral agreements between sovereign nations as primary sources of international law.[132] As such, the Convention, with approximately 160 sovereign parties,[133] can be relied upon to provide a definition of piracy.[134] Ratification by the United States would solidify its intention to rely upon the definitions in the Convention and provide a foundation for the prosecution of criminals on the seas that attack U.S. ships.[135]

A second question that Muse's prosecution may have raised is whether the United States has jurisdiction to try him, and other

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130. UNCLOS, *supra* note 2, pt. VII, § 1, art. 101.

131. Press Release, Dep't of Justice, *supra* note 121 (noting that Muse was charged with:

> (1) piracy under the law of nations; (2) conspiracy to seize a ship by force; (3) discharging a firearm, and aiding and abetting the discharge of a firearm, during and in relation to the conspiracy to seize a ship by force; (4) conspiracy to commit hostage taking; and (5) brandishing a firearm, and aiding and abetting the brandishing of a firearm, during and in relation to the conspiracy to commit hostage taking.).

132. Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1031, 33 U.N.T.S. 993.

133. United Nations Convention on the Law of the Sea Status, *supra* note 6.

134. *But see* Rosemary Collins & Daud Hassan, *Applications and Shortcomings of the Law of the Sea in Combating Piracy: A South East Asian Perspective*, 40 J. MAR. L. & COM. 89 (2009) (arguing that the Convention's definition of piracy is narrow and outdated). While the Convention's definition of piracy faces criticism, it is, nevertheless, an improvement from that which the United States currently utilizes.

135. Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 TUL. MAR. L.J. 1, 15 (2008) ("President Bush cited [the Convention] with approval when he defined 'piracy' in a memorandum on 'Maritime Security (Piracy) Policy.' ").

similarly captured pirates, in a domestic court. Universal jurisdiction "provides that national courts can investigate and prosecute a person suspected of committing a crime anywhere in the world regardless of the nationality of the accused or the victim or the absence of any links to the state where the court is located."[136] The basis for universal jurisdiction is the idea that the crimes committed are so grave that they constitute crimes against all of humanity, and thus any state is entitled to prosecute the perpetrators. While the crimes that can be tried by a foreign state on the basis of universal jurisdiction may be controversial, most agree that piracy qualifies.[137] In fact, the Second Circuit likened torturers to pirates in the 1980 case *Filartiga v. Pena-Iralain*, articulating that, like pirates, torturers have committed crimes against all of humanity and thus fall under the purview of all states.[138] Since Muse was tried in the Second Circuit, there was a strong argument that the United States had universal jurisdiction to try him.[139] From the perspective of domestic law, the United States cited 18 U.SC. § 3238 which allows offenses on the high seas to be tried in the district where the accused is first brought.[140] Nevertheless, if Muse had raised a jurisdiction defense, the Convention could have been invoked to overcome it. Article 105 of the Convention gives the state whose ship captures a pirate ship the discretion to choose the penalty that should be imposed.[141] This provision also gives such state the right to seize and arrest the property and persons on board a pirate ship.[142] Article 105, agreed to by approximately 160 state parties,[143] leaves few states that would contest U.S. jurisdiction to prosecute captured pirates.

Not only does the Convention provide a clear definition of piracy and basis for capture and prosecution of pirates, it also imposes an affirmative obligation upon parties to make efforts to curtail

136. Amnesty Int'l, *Universal Jurisdiction: Questions and Answers*, AI Index IOR 53/020/2001, Dec. 2001, *available at* http://www.amnesty.org/en/library/info/IOR53/020/2001/en.

137. *See generally* Joseph Goldstein, *Makin' 'Em Walk the Plank*, A.B.A. J., July 2009, at 16.

138. Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

139. Muse was charged in federal court in the Southern District of New York, where appeals would be heard by the Second Circuit. *See* Patricia Hurtado, *Maersk Pirate Escapes Hanging in New York Prosecution*, BLOOMBERG.COM, Apr. 29, 2009, http://www.bloomberg.com/apps/news?pid=20601070&sid=aukE_muBBgcI; *see also* Eugene Kontorovich & Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy*, 104 AM. J. INT'L L. 436, 437 (2010) (noting that piracy is the original universal jurisdiction crime).

140. Complaint at 1, United States v. Muse, No. 09-MAG-1012 (S.D.N.Y. Apr. 21, 2009).

141. UNCLOS, *supra* note 2, art. 105.

142. *Id.*

143. United Nations Convention on the Law of the Sea Status, *supra* note 6.

piracy.[144] Critics of the Convention argue that it actually impedes the United States' ability to chase and capture pirates because a ship must cease pursuit if the ship it is chasing enters its own or a third state's territorial waters.[145] They assert that this provision provides pirates with a safe haven to retreat to undeterred, and that the Convention prevents non-territorial state ships from pursuing the pirates.[146] This is troubling largely because of the strong presence of Somali pirates.[147] For example, under this provision, Somali pirates can attack ships and if they risk getting captured, rush back into their own state's territorial waters where they would be safe. Somalia, a nation plagued by its own problems of lawlessness and poverty, is in no position to apprehend these criminals.[148]

In such a circumstance, however, the United States can assert that Article 100 of Part VII of the Convention, which imposes upon member parties the duty to cooperate in the repression of piracy, gives it the authority to continue pursuit.[149] Somalia is a party to the Convention and where it cannot assist in apprehending and trying pirates, it must cooperate with others who can. This includes permitting states that are working to repress piracy by pursuing pirates to do so within Somalia's territorial waters.[150] Furthermore, a December 2008 United Nations Security Council resolution called upon states to actively assist in combating piracy off

144. UNCLOS, *supra* note 2, pt. VII, art. 100.

145. *Id.* pt. VII, art. 111; *see also* William F. Jasper, *Somali Pirates: An Excuse to Ratify LOST?*, THE NEW AM., Apr. 9, 2009, http://www.thenewamerican.com/index.php/world-mainmenu-26/africa-mainmenu-27/985.

146. Jasper, *supra* note 145.

147. INT'L CHAMBER OF COM., INTERNATIONAL MARITIME BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS - ANNUAL REPORT 2008, at 5-6 (Jan. 2009) (on file with author) (noting that of the 293 actual and attempted pirate attacks in 2008, 92 of those took place in the Gulf of Aden and were attributed to Somali pirates. By comparison, the region with the next highest incidence of pirate attacks was off of the coast of Nigeria with 40 actual and/or attempted attacks).

148. *See generally* Jeffrey Gettleman, *Somalia's Pirates Flourish in a Lawless Nation*, N.Y. TIMES, Oct. 30, 2008, at A1.

149. *But see* Collins & Hassan, *supra* note 134, at 104 (arguing that the provisions in Article 100 of the Convention are too ambiguous and flexible to impose a meaningful cooperation requirement on all state parties). While Ms. Collins and Mr. Hassan note important practical problems that arise from the language of the Convention, the United States still has a strong argument for remaining in Somali territorial waters based upon the Convention and the Security Council resolution discussed *infra*, note 151.

150. Lawrence Azubuike, *International Law Regime Against Piracy*, 15 ANN. SURV. INT'L & COMP. L. 43, 57 (2009) ("The Security Council Resolutions encourage states to cooperate with the Transitional Federal Government of Somalia (TFG) to repress piracy, and, for that purpose, after notifying the Secretary General of the United Nations, may enter the territorial waters of Somalia to exercise any rights in order to repress piracy.") The author, however, argues that neither this approach nor other measures are sufficient to solve the problem of global piracy and offers suggestions for larger scale, structural responses that address the shortcomings of current approaches, including the Convention. *Id.* at 58-59.

of the coast of Somalia and gives them the authority to "undertake all necessary measures 'appropriate in Somalia' " in furtherance of this end for a period of one year.[151] In April of 2010, the United Nations Security Council adopted a resolution that calls upon states to criminalize piracy under their domestic law and consider prosecution of and imprisonment of apprehended Somali pirates.[152] This resolution also seeks a report from the Secretary General of the United Nations to present options for purposes of "prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia."[153] Given this explicit guidance to counter piracy coupled with the Convention's anti-piracy provisions, criticism that the Convention would preclude apprehending pirates does not hold up.

B. Countering an Emerging and Potentially Dangerous China

China's growing economic influence and covert plans to expand its military power, namely on the seas, threaten the dominant position the United States has secured in the international community. Given the historically unstable relationship between China and the United States, this is particularly alarming from a national security perspective.[154] Ratification of the Convention would allow the United States to mitigate and contain the Chinese threat—at least on the seas—in a systematic manner with the support of the international community.

The tumultuous political history between the United States and China forces both parties to be on the offensive when dealing with one another.[155] Because of the potential dangers, the United

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151. Press Release, Security Council, Security Council Authorizes States to Use Land-Based Operations in Somalia, As Part of Fight Against Piracy Off Coast, U.N. DOC. SC/9541 (Dec. 16, 2008) *available at* http://www.un.org/News/Press/docs/2008/sc9541.doc.htm.

152. S.C. Res. 1918, U.N. Doc. S/RES/1918 (Apr. 17, 2010).

153. *Id.* ¶ 4.

154. John T. Oliver, *National Security and the U.N. Convention on the Law of the Sea: U.S. Coast Guard Perspectives*, 15 ILSA J. INT'L & COMP. L. 573, 578 (2009) ("The U.S. Navy is concerned about apparent government attempts in China and Iran, for example, to assert excessive control over foreign operations within the [exclusive economic zone] as an 'anti-access or sea denial strategy.' "); *see also* James Kraska, *The Law of the Sea Convention: A National Security Success—Global Strategic Mobility Through the Rule of Law*, 39 GEO. WASH. INT'L L. REV. 543, 544-45, 556-60 (2007) (noting China's failure to conform to the Convention and influence the Convention's interpretation, and pointing out various industry experts that are in support of the Convention, including for security concerns).

155. Ying Ma, *China's Stubborn Anti-Democracy*, POL'Y REV, Feb. & Mar. 2007, at 3. Historically the United States has been sympathetic towards Taiwan, a territory of China, with whom China has tenuous relations. In 2001, the U.S. struck a weapons deal with Taiwan, for defensive purposes, to be used against China if the need should arise, allowing Taiwan to maintain some sovereignty against China. This is beneficial to the United States because Taiwanese accession into China would shift the balance of power in the region by

States watches closely over Chinese military growth,[156] including the aggressive expansion of its capabilities on the seas.[157]

Militarily, the Convention provides the United States with a key strategic advantage that its armed services rely upon. That advantage is "the ability to navigate freely on, over, and under the world's oceans."[158] In an urgent situation, the United States would be free to enter the territorial sea of any party to the Convention, including China, without losing momentum by halting to obtain permission, enter into negotiations, or weigh the benefits of violating international law.[159]

This is increasingly important given the recent skirmish between China and the United States on the seas. In March of 2009, U.S. ships were collecting information in what China claimed was an illegal manner in its exclusive economic zone.[160] Chinese and U.S. naval ships had a brief standoff that was peacefully resolved. Because "such incidents can be expected in the future," U.S. ratification of the Convention is essential.[161] If the United States were a party to the Convention, it could argue that it was freely navigating—an activity that *is* permissible in China's exclusive economic zones under the Convention.

Critics of ratification argue that U.S. military flexibility under the Convention is compromised because it will need to bend to the will of Convention guidelines.[162] As discussed above, however, Convention provisions enhance flexibility by allowing access to a

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further strengthening China. Ray Suarez & Huang Suey-Sheng, *NewsHour with Jim Lehrer: Arming Taiwan*, (PBS television broadcast, Apr. 24, 2001) (transcript available at http://www.pbs.org/newshour/bb/asia/jan-june01/taiwan_arms.html) ("Legally the U.S. is committed . . . 'to provide Taiwan with arms of a defensive character.' "(quoting the Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 14 (1979).).

156. Edward Cody, *China Boosts Military Spending*, WASH. POST, Mar. 5, 2007 at A12; *see also* Edmund Klamann, *U.S. Urges Transparency in China Military Strategy*, REUTERS, Mar. 1, 2008, http://www.reuters.com/article/idUSSHA14085920080301.

157. Chris Buckley & Ben Blanchard, *China Shows Off its Expanding, Modernizing Navy*, REUTERS, Apr. 23, 2009, http://www.reuters.com/article/worldNews/idUSTRE53M36R20090423.

158. Letter from Senator Richard G. Lugar, Chairman of the Senate Foreign Relations Comm., to his Senate Colleagues, Mar. 8 2004 (on file with author).

159. Jonathan I. Charney, *Entry Into Force of the 1982 Convention on the Law of the Sea*, 35 VA. J. INT'L L. 381, 385-86 (1995) (discussing the mobility assured to United States armed forces over the seas by the Convention).

160. Mark Thompson, *Behind the Sea Spat Between the U.S. and China*, TIME, Mar.12, 2009, http://www.time.com/time/world/article/0,8599,1884724,00.html.

161. *Id.*

162. David A. Ridenour, *Ratification of the Law of the Sea Treaty: A Not-So-Innocent Passage*, NAT'L POL'Y ANALYSIS, Aug. 2006, http://www.nationalcenter.org/NPA542LawoftheSeaTreaty.html (noting that critics of ratification point to Article 20 of the Convention, which requires "submarines and other underwater vehicles . . . to navigate on the surface and to show their flag" to argue against military flexibility). *See generally* Oliver, *supra* note 154 (discussing benefits and drawbacks of the Treaty from a national security perspective).

vast array of territorial seas.[163] Additionally, the U.S. military enthusiastically supports the Convention, giving it perhaps the strongest endorsement in the interest of national security. [164] Admiral Vern Clark, Chief of Naval Operations, in 2004 stated, "I fully support the Convention because it preserves our navigational freedoms, provides the operational maneuver space for combat and other operations for our warships and aircraft, and enhances our own maritime interests."[165] Furthermore, the Vienna Convention, which governs international treaties, provides that where a state's national security is threatened (or circumstances fundamentally change) it may suspend its obligations under a treaty.[166] In the unlikely event that the Convention inhibits the United States from ensuring national security, the U.S. would be no worse off since it would not be bound by the Convention in those instances.

Finally, the Convention also offers the United States a diplomatic and political solution should a dispute with China arise.[167] Although the United States traditionally resists dispute resolution mechanisms, it would be in its interest to embrace them here. As a non-party to the Convention, a potential dispute between China and the United States could escalate into an explosive situation. By ratifying the Convention, the U.S. will have the support of the international community to exert pressure on China—either for peaceful dispute resolution or to adhere to the provisions of the Convention that it too has ratified.[168]

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163. Oliver, *supra* note 154, at 576-78.

164. *See, e.g.*, GlobalSecurity.org, Advance Questions for Admiral Michael G. Mullen, USN Nominee for the Position of Chief of Naval Operations, http://www.globalsecurity.org/military/library/congress/2005_hr/050419-mullen.pdf (last visited Sept. 22, 2010) ("I support the United States' accession to the [United Nations] Law of the Sea Convention, and I believe that joining the Convention will strengthen our military's ability to conduct operations."); *Arctic Melt Gets U.S. to Move on Sea Treaty*, MSNBC, Oct. 4, 2007, http://www.msnbc.msn.com/id/21131181/ (" 'The United States needs to join the Law of the Sea Convention, and join it now,' Deputy Defense Secretary Gordon England told senators recently. He stressed that it would give legal clarity to U.S. naval operations.").

165. Letter from Admiral Vern Clark, U.S. Navy, to Senator John Warner, Chairman, Senate Armed Servs. Comm. (Apr. 13, 2004), *available at* http://www.oceanlaw.org/downloads/references/military/CNO_Clark_to_Warner_2004.pdf.

166. Vienna Convention on the Law of Treaties arts. 61-66, May 23, 1969, 1155 U.N.T.S. 331.

167. Kraska, *supra* note 154, at 571 (noting that the Convention serves United States interests, including conflict avoidance).

168. *See generally* Sean D. Murphy, *Senate Testimony Regarding U.S. Adherence to Law of the Sea Convention*, 98 AM. J. INT'L L. 173, 175 (2004) (discussing advantages to U.S. ratification of the Convention, which include a stronger U.S. position and the availability of additional methods to resolve disputes).

C. The Race for Arctic Resources

The resource race of the 21st century requires that nations seek resources from every corner of the globe to meet growing demand.[169] The seas—long considered valuable sources of minerals, food, and now, energy—are no exception.[170]

Not surprisingly, nations are racing to stake a claim to these resources.[171] Russia made a bold move in August of 2007 by planting a flag on the Arctic Seacap at the North Pole in an attempt to reinforce claims it has been making since 2001 that it owns the resources on the floor of the Arctic Ocean.[172] The Arctic Seacap is an especially sought after area since it "may hold billions of gallons of oil and natural gas—up to 25 percent of the world's undiscovered reserves"[173] and is rapidly melting, making it navigable for the first time.[174] Russia's actions met immediate resistance from members of the international community, and have sparked debate over the resources the sea holds and who their lawful owner is.[175] In fact, one journalist commented that "[t]he polar dive was part publicity stunt and part symbolic move to enhance [Russia's] disputed claim to nearly half the Arctic seabed."[176]

Although the seas have been declared to be among the "common heritage of mankind,"[177] and thus free for all, a state is en-

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169. *See generally* Andrew Van Wagner, Comment, *It's Getting Hot in Here, So Take Away All the Arctic's Resources: A Look at a Melting Arctic and the Hot Competition for its Resources*, 21 VILL. ENVTL. L.J. 189 (2010).

170. *See generally* Andrew C. Revkin, *Hints of Oil Bonanzas Beneath Arctic Ocean*, N.Y. TIMES, Jun. 1, 2006, at A21.

171. *See generally* Meagan P. Wilder, Comment, *Who Gets the Oil? Arctic Energy Exploration in Uncertain Waters and the Need for Universal Ratification of the United Nations Convention on the Law of the Sea*, 32 HOUS. J. INT'L L. 505 (2010).

172. C.J. Chivers, *Eyeing Future Wealth, Russians Plant the Flag on the Arctic Seabed, Below the Polar Cap*, N.Y. TIMES, Aug. 3, 2007, at A8; *see also* Becker, *supra* note 4, at 801-02 (discussing the "[s]cramble" for underseas resources, specifically in the Arctic).

173. 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.

174. Michael Byers & Suzanne Lalonde, *Who Controls the Northwest Passage*, 42 VAND. J. TRANSNAT'L L. 1133, 1135-1136 (2009) ("The Arctic Climate Impact Assessment reported that the average extent of sea-ice cover in summer had declined by 15%-20% over the previous thirty years . . . . These trends were expected to accelerate such that by the end of the twenty-first century, there might be no sea-ice at all in the summer." (citations omitted)).

175. *Arctic Sovereignty an "Important Issue": Harper*, CTV.CA, Aug. 2, 2007, http://www.ctv.ca/CTVNews/MSNHome/20070802/arctic_claim_070802/ (noting response to Russia's flag drop by Peter MacKay, Canada's foreign minister, "[T]his isn't the 15th century. You can't go around the world and just plant flags and say 'We're claiming this territory' ").

176. William J. Broad, *Russia's Claim Under Polar Ice Irks American*, N.Y. TIMES, Feb. 19, 2008, at A1.

177. *See supra* Part I.D.1.

titled to exploit the resources within its territorial waters for its own benefit.[178] This can be 200 nautical miles from a state's coastlines or it can extend up to 350 miles depending upon other considerations, such as how far a state's continental shelf extends.[179] Parties to the Convention that want to assert a claim to territorial seas greater than 200 miles must submit evidence in support of this to the Commission on the Limits of the Continental Shelf, who then advises the state party.[180] After this, the state party establishes the limits of its continental shelf on the basis of the recommendations it receives from the commission.[181] Disputes over these limits are governed by the Convention or international law and resolved by the dispute resolution mechanisms addressed in Part XV of the Convention.[182]

By planting a flag on the Arctic Seacap, Russia is asserting that this area is within its territorial waters, most likely on the basis of *terra nullius*. Under this principle, any territory that is not occupied by a civilized nation is free to be claimed for ownership by a continuous and peaceful display of authority over that territory.[183]

Other nations, however, may also have a claim to the Arctic Seacap under the Convention, including Canada and Denmark.[184] Under the rules of the Convention, parties interested in unclaimed underwater territory must map their claims and how far their territory reaches and submit it to the Commission on the Limits of the Continental Shelf.[185] Like Russia, since both Canada and Denmark are parties to the Convention,[186] it is not likely that Russia can simply plant a flag and call the Arctic Seacap its own under the principle of *terra nullius*, especially in light of international law moving away from this principle.[187]

Denmark may be in a position to assert a viable claim over the Arctic Seacap if it can find evidence to link an underwater moun-

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178. UNCLOS, *supra* note 2, pt. XI, § 2, art. 136.

179. *Id.* pt. VI, art. 76.

180. *Id.*

181. *Id.*

182. *Id.* pt. VI, art. 83.

183. *See* Island of Palmas (U.S. v Neth.), 2 R. Int'l Arb. Awards 829 (Perm. Ct. Arb. 1928).

184. *See* Doug Struck, *Russia's Deep-Sea Flag-Planting at North Pole Strikes a Chill in Canada*, WASH. POST, Aug. 7, 2007, at A8. *See generally* Rebecca M. Bratspies, *Human Rights and Arctic Resources*, 15 SW. J. INT'L L. 251 (2009) (discussing the claims of other states, including Canada and Denmark, to the Arctic).

185. *See* Bratspies, *supra* note 184, at 266.

186. United Nations Convention on the Law of the Sea Status, *supra* note 6. Canada became party to the Treaty in 2003, Denmark in 2004, and the Russian Federation in 1997. *Id.*

187. *See generally* Bratspies, *supra* note 184.

tain range that extends from its territory to the Arctic Sea.[188] It is currently undertaking an expedition with this end in mind.[189] Canada is also conducting underwater mapping in conjunction with Denmark in an effort to link its own territory to the Arctic Seacap.[190] In the meantime, however, Russia is working to secure evidence, likely to be presented to the Commission on the Limits of the Continental Shelf, to link the North Pole zone to the Siberian platform, which would ultimately result in that area falling within its continental shelf.[191]

The United States has also taken steps to tie its continental shelf to the Arctic Seacap in an effort to claim some of the resources beneath it.[192] The most recent U.S. expedition may have found evidence to extend the continental shelf north of Alaska 100 miles from where it was originally thought to be.[193] This could provide a challenge to Russia, Denmark and even Canada's claims to the territory in the Arctic Seacap.

However, as a non-party to the Convention, the United States has limited recourse for its claim.[194] As a party, the United States may (and likely would) submit evidence of its expansive continental shelf to the Commission on the Limits of the Continental Shelf and conclusively establish the outer limits of its territorial sea in the Arctic.[195] Should another state try to infringe upon these lim-

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188. *United States Explores the Seabed of the Arctic Ocean to Bolster its Claims to the North's Strategic Resources*, CANADIAN AM. STRATEGIC REV., Sept. 2007, http://www.casr.ca/id-arctic-empires-3.htm ("A Danish expedition is seeking evidence that the Lomonosov Ridge, an underwater mountain range, is attached to the Danish territory of Greenland. That data would open the way for a Danish claim that could stretch Greenland's EEZ all the way to the North Pole.").

189. *Id.*

190. Struck, *supra* note 184 ("Russia, the first of the Arctic nations to ratify the treaty, has undertaken extensive mapping using its huge nuclear-powered icebreakers. Norway and Denmark have also conducted undersea mapping. Canada, which ratified the treaty in 2003, is cooperating with Denmark on the ice northeast of Ellesmere Island, setting off explosives to seismically map the ground under the Lincoln Sea region of the Arctic Ocean.").

191. *United States Explores the Seabed*, *supra* note 188.

192. Scott J. Shackelford, *The Tragedy of the Common Heritage of Mankind*, 28 STAN. ENVTL. L.J. 109, 134 (2009).

193. *Continental Slope Off Alaska 100 Nautical Miles Further Off Coast Than Assumed*, SCI. DAILY, Feb. 12, 2008, http://www.sciencedaily.com/releases/2008/02/080211134449.htm.

194. Shackelford, *supra* note 192, at 134 ("American claims on the Arctic are, however, burdened by the fact that the Senate has yet to ratify UNCLOS."); Matin Rajabov, Comment, *Melting Ice and Heated Conflicts: A Multilateral Treaty as a Preferable Settlement for the Arctic Territorial Dispute*, 15 SW. J. INT'L L. 419, 436 (2009):

> Since the United States is not a party to UNCLOS, it cannot initiate a settlement through any of the dispute settlement prescribed by UNCLOS and, accordingly, it does not have a right to intervene as a third party state. Therefore, if the parties use the UNCLOS dispute settlement systems, the United States can easily be outflanked.

195. Bratspies, *supra* note 184.

its, the United States would have evidence supported by international law to protect itself. The states most likely to pose a threat to the United States in the Arctic—Denmark, Canada and Russia—*are* all parties to the Convention and therefore must adhere to the findings of the Commission on the Limits of the Continental Shelf. Absent ratification of the Convention, the United States could have taken Russia's approach. In the unlikely event that *terra nullius* is found to be an acceptable method for claiming territory on the seas, this action, nevertheless, would have been futile since Russia was the first to assert a claim over the Arctic.

Alternatively, the United States always has the option of asserting a claim to the Arctic seabed using brute force, international pressure or a combination of both. These methods—even if effective—will not further U.S. diplomacy abroad and are not likely to be utilized by the Obama administration.

Ratification of the Convention is an urgent matter. Although a state has up to ten years after it has ratified the Convention to map and submit proposed limits of its continental shelf to the Commission on the Limits of the Continental Shelf, by that time it may be too late.[196] Global climate change has caused parts of the Arctic Seacap to begin melting, making it navigable for the first time.[197] While this is promising for underwater mining industries, these environmental effects have attracted a great deal of attention and the international community is cooperating to reverse them.[198] Instead of engaging in fruitless political battles with its strategic adversaries, the United States should move quickly to ratify the Convention and focus its energy on extracting the resources beneath the Arctic as quickly as possible.[199] Ratification

196. Struck, *supra* note 184 ("Global warming has added a sudden urgency to the process by thinning the Arctic ice cap, making drilling and shipping more feasible.").

197. James Graff, *Fight for the Top of the World*, TIME, Sept. 19, 2007, http://www.time.com/time/world/article/0,8599,1663445,00.html:

> This summer, however, saw something new: for the first time in recorded history, the Northwest Passage was ice-free all the way from the Pacific to the Atlantic. The Arctic ice cap's loss through melting this year was 10 times the recent annual average, amounting to an area greater than that of Texas and New Mexico combined. The Arctic has never been immune from politics; during the Cold War, U.S. and Soviet submarines navigated its frigid waters. But now that global warming has rendered the Arctic more accessible than ever—and yet at the same time more fragile—a new frenzy has broken out for control of the trade routes at the top of the world and the riches that nations hope and believe may lie beneath the ice.

198. *Id.*

199. Oliver, *supra* note 154, at 581-82 ("Only by becoming party to UNCLOS and participating in its processes, however, can the United States obtain secure title to these vast resources . . . ."); Wilder, *supra* note 171; see generally Marta Kolcz-Ryan, Comment, *An Arctic Race: How the United States' Failure to Ratify the Law of the Sea Convention Could*

"would allow full implementation of the rights afforded by the convention, [allowing member nations] to protect coastal and ocean resources."[200]

IV. CONVENTION RATIFICATION: THEORETICAL PERSPECTIVE

Finally, examining the Convention from a theoretical perspective also supports ratification. States have several options when faced with the possibility of being bound by international instruments, which include treaties, accords or other agreements.[201] Under the U.S. Constitution, the President has the power to sign or enter into a treaty, but it is not binding upon the United States until it is ratified by the Senate.[202] Although signing does not bind the state to the instrument, it does include an intent to ratify and, at the very least, a willingness *not* to frustrate the purpose of the instrument. [203] Ratification, on the other hand, signals a state's intent to be bound by the instrument, which includes accepting responsibility for consequences upon breach by the ratifying state. [204] The terms signatory and party are used to identify these positions respectively.[205]

Because the implications of international agreements can have widespread effects, a host of considerations from a range of interests are taken into account before a state signs or ratifies. [206] Three approaches that can be used to analyze state decision-making will be discussed with regards to ratification of the Convention: ratio-

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Adversely Affect Its Interests in the Arctic, 35 U. DAYTON L. REV. 149 (2009).

200. *United States Explores the Seabed*, *supra* note 188 (alteration in original).

201. Gable F. Hackman, Comment, *Slipping Through the Cracks: Can We Hold Private Security Contractors Accountable for their Actions Abroad?*, 9 LOY. J. PUB. INT. L. 251, 265-66 (2008).

202. U.S. CONST. art. II, § 2.

203. *See* United Nations Office of Legal Affairs, Treaty Reference Guide, http://untreaty.un.org/ola-internet/Assistance/guide.pdf (last visited Sept, 23, 2010) (noting that where a signature is subject to ratification it does not establish consent to be bound. Further defines a signature as "authentication [that] expresses the willingness of the signatory state to continue the treaty-making process. The signature qualifies the signatory state to proceed to ratification, acceptance or approval. It also creates an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty.").

204. The Vienna Convention on the Law of Treaties is looked to as the ultimate authority that governs treaties. It defines ratification as "the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty." Vienna Convention on the Law of Treaties, *supra* note 166, art. 2, §1(b).

205. *See id.* art. 2, § 1(g).

206. *See* Raustiala, *supra* note 107, at 587 ("International law is a tool that governments employ with care. . . . [Governments] do not accidentally or cavalierly choose between pledges and contracts when negotiating agreements."). Raustiala focuses his discussion on soft law and the inherent legality of it—even though state parties do not necessarily acknowledge it as such. This highlights the importance of legality in international agreements for state parties.

nalism, constructivism and functionalism.

A. Rationalist Advantages of Ratification of the Convention

Rationalists favor ratification of international agreements using an interest-based approach, viewing the relevant actors or states as motivated primarily by material interests.[207] Rationalists "understand contracts as operating by changing incentives or other material features of interactions, such as iteration, reciprocity, information, or the influence of particular interest groups, or through enforcement."[208] The Convention satisfies states that utilize a rationalist approach for two reasons: reciprocity and widespread support of domestic interest groups.

1. Reciprocity

Reciprocity is an ambiguous term with political and academic dimensions.[209] It "can refer either to a policy pursued by a single actor or to a systematic pattern of action."[210] The concept of reciprocity essentially holds that " 'actions . . . are contingent on rewarding reactions from others that cease when these expected reactions are not forthcoming.' "[211] Reciprocity serves an important diplomatic function in the international community by placing trust in the promises that states make. By ratifying the Convention, the United States is guaranteed the protections of the Convention and predictable behavior on the seas by the other states parties—in exchange for its promise to do the same.[212]

Among the provisions of the Convention that provide for reciprocity are those that allow states to freely navigate within territorial seas, equal rights to exploit the resources of the open seas,

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207. Abbott & Snidal, *supra* note 21, at 40; *see also* Noyes, *supra* note 104, at 4 ("[A]ny state will join a treaty if it objectively promotes that state's 'interests.' ").

208. Abbott & Snidal, *supra* note 21, at 40-41.

209. *See* Robert O. Keohane, *Reciprocity in International Relations*, 40 INT'L ORG. 1 (1986).

210. *Id.* at 3.

211. *Id.* at 5-6 (quoting PETER BLAU, EXCHANGE AND POWER IN SOCIAL LIFE 6 (1964)).

212. *See* Marian Nash, *U.S. Practice: Contemporary Practice of the United States Related to International Law*, 88 AM. J. INT'L L. 719, 737 (1994) (noting that the United States is able to assert influence over ocean policy without entering into treaties with other states, but that "costs of this approach, however, would grow over time, and long-term United States interests in stable and predictable rules concerning uses of the oceans would be best served by entry into force of a widely acceptable convention."); *see also* Francesco Parisi & Nita Ghei, *The Role of Reciprocity in International Law*, 36 CORNELL INT'L L.J. 93, 115 (2003) (noting that the U.S. diplomacy has essential elements for reciprocity "role reversibility and repeat interactions. Each state can be on either end of the transaction and undertakes similar transactions repeatedly. Thus, any attempt to cheat today is likely to rebound tomorrow when the State finds itself on the other side of the transaction" (citation omitted)).

and universal standards of environmental protection.[213] For example, the United States does not need to be concerned that its efforts at restoring and maintaining the environment are futile because other states do not have similar rules in place. The Convention imposes standards for environmental protection on all state parties, which is essential because it is a collective effort at protecting the environment that no state alone could achieve.[214]

Since the 18th century, the United States has sought reciprocity with other states and continues to demand it in most commercial treaties today.[215] The Convention is no exception and if ratified, would provide reciprocity to the United States on important issues that relate to the seas.

2. Influential Interest Groups Support Ratification of the Convention

The United States has many domestic interest groups seeking to benefit on the seas. These include military, private industry, government and not-for-profit organizations. Rationalist observers look towards the influence of interest groups when examining international agreements.[216]

Given its two expansive coastlines on the Eastern and Western seaboard coupled with those along the Hawaiian, Micronesian, and Alaskan archipelagos,[217] the United States has ample reason to take a keen interest in maritime policy. With a coastline of 19,924 kilometers, the U.S. ranks eighth globally in coastline length.[218] Some factors that are important in considering whether to adopt a maritime or coastal policy include

> a country's military position and needs, its level of economic development, whether a country has a broad or narrow continental shelf, whether it has a long or short coast or none at all, whether it lies ath-

213. *See supra* Part I.C.

214. Patricia C. Bauerlein, Comment, *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, 923 (1995) ("The United States also must cooperate globally, rather than unilaterally, to achieve and not impede the goal of world environmental protection.").

215. Keohane, *supra* note 209, at 3 (noting that the first United States commercial treaty, signed in 1778 with France, contained reciprocity provisions).

216. *Id.*

217. Ann L. Hollick, *Bureaucrats at Sea* in NEW ERA OF OCEAN POLITICS 1, 1 (1974).

218. Central Intelligence Agency, World Factbook, Field Listing: Coastline, https://www.cia.gov/library/publications/the-world-factbook/fields/2060.html (last visited Sept. 23, 2010).

> wart a significant international strait or has valuable offshore resources (living or nonliving), whether a national or private participant is primarily a producer or importer, a seller or consumer, a user or a supplier of ocean resources and space.[219]

Given the wide range of factors that are at play and the combined size of the coast, the United States is rightfully concerned with the laws of the sea and the varying interests involved.[220]

The debate over whether to ratify has been characterized as one between "interests with varying degrees of political and economic power."[221] Historically, the competing interests have been domestic private industries, such as petroleum, fishing, and hard minerals, government arms, such as the military and defense department, and also scientific communities.[222]

Today, the Convention enjoys widespread support from virtually all groups that have an interest on the seas, including American business groups, various military defense officials and groups, environmental and public interest organizations, high level administration officials, and legal and research bodies, satisfying rationalist observers that the right influences are in favor of the Convention.[223]

B. Constructivist Advantages of Ratification of the Convention

Constructivists, on the other hand, view international agree-

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219. Ann L. Hollick & Robert E. Osgood, *Introduction*, *in* NEW ERA OF OCEAN POLITICS, *supra* note 217, at viii.

220. In fact, President George W. Bush supports ratification of the Treaty. He has said:

> Joining [the Convention] will serve the national security interests of the United States, including the maritime mobility of our armed forces worldwide. It will secure U.S. sovereign rights over extensive marine areas, including the valuable natural resources they contain. Accession will promote U.S. interests in the environmental health of the oceans. And it will give the United States a seat at the table when the rights that are vital to our interests are debated and interpreted.

Press Release, Office of the Press Secretary, *supra* note 5.

221. Hollick, *supra* note 217, at 8.

222. *See generally* Hollick, *supra* note 217.

223. *See* Citizens for Global Solutions, The United States and the Law of the Sea: Time to Join (Oct. 29, 2007), http://www.globalsolutions.org/in_the_beltway/united_states_and_law_sea_time_join (noting support for the Convention from business, military, environmental and public interest, administrative and legal groups); *see also* David R. Andrews et al., *Former Legal Advisers' Letter on Accession to the Law of the Sea Convention*, 98 AM. J. INT'L L. 307 (2004) (an open letter from former legal advisers of the United States Department of State advocating ratification of the Convention); Duff, *supra* note 4, at 33 ("[A] wide range of business, environmental and government figures urged U.S. accession in a letter to Senate majority Leader Bill Frist on August 31, 2005.").

ments as embodying shared norms and understandings[224] and pledges, or "nonlegal agreements"[225] with only "political or moral obligations"[226] as "operating through persuasion, imitation, and internalization to modify inter-subjective understandings of appropriate behavior, interests, and even identities."[227] The Convention has been called "a constitution for the oceans"[228] which expresses universally accepted norms on the seas. As will be discussed below, the Convention satisfies constructivist observers through the United States' power of persuasion and the effect of solidifying norms and reinforcing custom on the seas that U.S. ratification provides.[229]

1. U.S. Power of Persuasion over the Convention

Persuasion is an essential element in negotiating any agreement, including the Convention.[230] For years after it was adopted in 1986, the United States expressed great discontent with the Convention. Several years later, in 1994, the United States was able to persuade the governing body to reopen the Convention for amendments and additional agreements.[231] The United States' ability to have the Convention reopened and revised to meet its needs is demonstrative of the authority that the United States has

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224. Abbott & Snidal, *supra* note 21, at 41.

225. Raustiala, *supra* note 107, at 582.

226. *Id.* at 586.

227. *Id.* at 41; *see also* James Fearon & Alexander Wendt, *Rationalism v. Constructivism: A Skeptical View in* HANDBOOK OF INTERNATIONAL RELATIONS 52, 57-58 (Walter Carlsanes et al. eds., 2002). Professors Fearon and Wendt identify four characteristics of constructivism:

> First, constructivism is centrally concerned with the role of ideas in constructing social life. . . . Second, constructivism is concerned with showing the socially constructed nature of agents or subjects. . . . Third, constructivism is based on a research strategy of methodological holism rather than methodological individualism. . . . Finally, what ties the three foregoing points together is a concern with constitutive as opposed to just causal explanations.

Id.

228. United Nations, Division for Ocean Affairs and the Law of the Sea, Overview—Convention & Related Agreements (July 21, 2010), http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.

229. Kelly, *supra* note 55, at 561 (noting constructivist elements in the Convention).

230. Donald J. Kochan, *The Soft Power and Persuasion of Translations in the War on Terror: Words and Wisdom in the Transformation of Legal Systems*, 110 W. VA. L. REV. 545, 553-59 (2008) (discussing the importance of the soft power of persuasion).

231. Senator Richard G. Lugar, Address at the Brookings Institution: The Law of the Sea Convention: The Case for Senate Action, (May 4, 2004), (transcript available at http://www.brookings.edu/speeches/2004/0504energy_lugar.aspx) ("In 1990, President George H. W. Bush initiated further negotiations to resolve U.S. objections to the deep seabed mining regime. These talks culminated in a 1994 agreement that comprehensively revised the regime and resolved each of the problems President Reagan identified in 1982.").

over negotiations such as these.[232] This authority supports the United States' strong power of persuasion that would meet constructivist ideals.

2. U.S. Ratification Helps Solidify Norms and Reinforces Custom

The Convention also helps further reinforcement of custom on the seas by explicitly codifying generally accepted laws of the sea. The widespread acceptance and adherence to the Convention [233] signals that the laws embodied in it are custom or likely to become customary in the future. Constructivists seek to identify norms inherent in international agreements.[234] Norms are described in terms of behavior.[235] The Convention impacts state behavior, specifically with respect to fishing, mining, navigating and profiting on the seas, thus creating and enforcing norms.[236]

U.S. ratification of the Convention will further it as customary or international law.[237] Although custom is typically considered a source of law, it can also be a consequence of law.[238] Scholars have demonstrated that "the growth of law often stimulates the growth of customary conventions."[239] Since law begets custom, by ratifying the Convention, the United States would play an important role in creating norms because nations imitate the behavior of other nations.[240] Ratification of the Convention will thus satisfy constructivist observers who seek internalization of norms which would be reinforced by the creation and codification of custom.[241]

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232. Shiraldi, *supra* note 110, at 543 (noting that by ratifying, the United States would be able to "ensure input in the decision making process [related to the Convention] and attempt to ensure new policies and laws coincide with U.S. interests").

233. United Nations Convention on the Law of the Sea Status, *supra* note 6.

234. Abbott et al., *supra* note 51, at 41.

235. Ann Florini, *The Evolution of International Norms*, 40 INT'L STUDIES Q. 363, 364 (1996).

236. Kelly, *supra* note 55, at 593 (arguing that the Convention "provides an example of a regime which . . . reveals a normative commitment which has evolved and been codified through state practice").

237. Stevenson & Oxman, *supra* note 104, at 499 (noting that "the law of the sea has been a significant part of the fabric of modern international law," and the widespread impact of a widely ratified Convention.); *see also* Murphy, *supra* note 168, at 175.

238. James Bernard Murphy, *Habit and Convention at the Foundation of Custom*, *in* THE NATURE OF CUSTOMARY LAW, *supra* note 64, at 53, 67.

239. *Id.*

240. Tessa Mendez, Note, *Thin Ice, Shifting Geopolitics: The Legal Implications of Arctic Ice Melt*, 38, DENV. J. INT'L L. & POL'Y 527, 546 (2010) (noting that "[l]egitimacy relies on the internalization of external standards to substantiate the belief by an actor that a rule or institution ought to be obeyed" in connection with the Convention).

241. *See* Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623, 641-42 (1998) (arguing that the Convention "demonstrates that a nation's repeated participation in transnational legal process is internalizing, normative, and constitutive-of-identity"; further noting that "repeated transactions among nations within the law of the

C. Functionalist Advantages of Convention Ratification

Functionalists identify soft law, or non-binding agreements, as advantageous because they offer increased flexibility, are considered preliminary rather than precedential, and because they rarely require additional implementing steps such as ratification or other legislative action.[242] Soft law offers an alternative to the uncertainty that hard law imposes—states can "try out" a law and observe its effects without being subject to its rules.[243] Additionally, soft law facilitates compromise and mutually beneficial cooperation among actors with different interests and values.[244] Although there are a number of advantages associated with pledges, an examination of those benefits reveals that they can either be achieved by ratification or are not applicable to U.S. ratification of the Convention.

Critics of ratification that point to the flexibility that the United States' current status allows should consider that the U.S. has experienced a "trial period" of over fifteen years as "pledgee" to the Convention and over twenty since it was first introduced.[245] This should be ample time to consider the costs and benefits associated with the Convention.

Still others suggest that pledges rather than contracts facilitate compromise and cooperation among state actors with different interests.[246] The Convention provides evidence that this is not uniformly applicable. The Convention currently has approximately 160 state parties whose interests vary dramatically.[247] Although pledges allow states to engage in negotiations and discuss the possibility of ratification, this is merely one step in the process of international diplomacy, and not the end result.

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sea regime generated interpretations of a legal rule that affected future interactions, not just among the parties to the Convention, but also interactions with nonparties, such as the United States" (emphasis omitted)).

242. *See* Raustiala, *supra* note 107, at 591. "When the potential for opportunism is high, uncertainty low, or preferences broadly aligned, contracts are favored. But when uncertainty is high, opportunism low, preferences highly divergent, or speed or confidentiality is of the essence, pledges are favored." *Id.* at 592-93.

243. Abbott & Snidal, *supra* note 21, at 39.

244. *Id.*

245. This trial period has lasted since the time the United States signed the Convention in 1994. *See* Duff, *supra* note 4.

246. Raustiala, *supra* note 107, at 593.

247. State parties to the Convention include states which are very developed as well as highly impoverished; landlocked states and those that are surrounded by water; and democracies, monarchies and communist states. *See* United Nations Convention on the Law of the Sea Status, *supra* note 6 (noting state parties that include Botswana, Czech Republic, Ireland, Monaco and China).

Finally, the time and expense associated with implementing steps such as ratification is minimal for the United States with respect to the Convention, which has already been extensively debated and vetted since the early 1980s.[248] Former President George W. Bush called for ratification of the Convention and now President Barack Obama and Secretary of State Hillary Clinton state that ratification of the Convention is a priority.[249] While not guaranteed, rapid ratification is promising if the Convention makes it to the Senate floor for a full vote. Functionalists, therefore, should be satisfied that the time associated with ratification is negligible since the Convention has already undergone an extensive trial period.

The United States' status as mere signatory to the Convention does not fully avail it of the benefits that it would receive as a party. Although pledges initially appear attractive, the Convention is unique in overcoming the benefits that pledges offer because of its inherent flexibility, the lengthy period the United States has been a signatory, and the lack of domestic difficulty and expense associated with U.S. ratification.

Some scholars assert that a state is neither wholly rationalist nor constructivist but instead that it is "both an interest-based and a normative enterprise."[250] Where this is the case, as discussed, both functionalists and constructivists can be satisfied by the terms of the Convention.

CONCLUSION

Today, the United States is among the last holdouts to the Law of the Sea Convention. While the United Nations contemplates methods for countering Somali piracy, the United States can ensure safety, security, and prosperity on the seas by ratifying the Convention. The flawed U.S. approach towards the Convention has grossly overstated and miscalculated the sovereignty costs associated with it. These costs prove to be minimal and are ultimately outweighed by the benefit to the United States of similarly constraining other state parties.

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248. The Convention was first extensively debated under the Reagan Administration. In the 1990s, the Clinton revived the debate over whether to ratify the Convention, which led to the United States signing the Convention. Most recently, in October 2007, the Convention went to a vote in the Senate Foreign Relations Committee, where it was passed by a 2 to 1 margin. The Convention is now expected to go to a vote in the full Senate. No date has yet been set. *See* Kevin Drawbaugh, *U.S. Senate Panel Backs Law of the Sea Treaty*, REUTERS, Oct. 31, 2007, http://www.reuters.com/article/latestCrisis/idUSN31335584.

249. *See* sources cited *supra* note 5.

250. Abbott & Snidal, *supra* note 21, at 41.

A changing global landscape, where piracy is rampant and China is emerging as a leader, requires the United States to take action to confront these threats. The Convention provides mechanisms to do so, while also providing a legal basis for claims to valuable resources. Finally, the Convention appeases three distinct international observers—rationalists, constructivist, and functionalists—further proving to be a broad ranging, comprehensive instrument that meets the diverse needs of the United States. The Obama administration should act immediately to capitalize on the signal of goodwill and commitment to the international community that ratification would provide.

The Senate composition is currently in favor of ratification by its balance of Democrats to Republicans.[251] "A widely ratified Convention would protect and advance U.S. security, economic, and environmental interests as well as provide a stable legal basis for peaceful dispute resolution."[252]

251. Becker, *supra* note 5 (discussing "Democratic gains in the U.S. Senate" and what this means for the Convention); *see also* The Green Papers, 2009 General Election, http://www.thegreenpapers.com/G09/Senate.phtml (noting the composition of Senate at the time).

252. Oxman, *supra* note 105, at 178.