

# Washington Journal of Environmental Law & Policy

---

Volume 5

Issue 1 Arctic Special Edition

---

6-1-2015

## "Lead in the Far North" by Acceding to the Law of the Sea Convention

Craig H. Allen

*University of Washington School of Law*

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wjelp>



Part of the [Law of the Sea Commons](#)

---

### Recommended Citation

Craig H. Allen, "Lead in the Far North" by Acceding to the Law of the Sea Convention, 5 WASH. J. ENVTL. L. & POL'Y 1 (2015).

Available at: <https://digitalcommons.law.uw.edu/wjelp/vol5/iss1/2>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Journal of Environmental Law & Policy by an authorized editor of UW Law Digital Commons. For more information, please contact [cnyberg@uw.edu](mailto:cnyberg@uw.edu).

## "LEAD IN THE FAR NORTH" BY ACCEDING TO THE LAW OF THE SEA CONVENTION

Craig H. Allen<sup>1</sup>

Broad Support for the 1982 U.N. Convention on the Law of the Sea .....	2
Support for Accession to the LOS Convention.....	5
Fate in the U.S. Senate: Close, but Never a Floor Vote.....	7
U.S. National Interests in the Arctic will be Enhanced by Accession .....	10
Test the Convention's Benefits and Drawbacks Against Future Scenarios .....	12
Conclusion .....	13

The theme for the 2015 Arctic Encounter Symposium was "Charting a Path to U.S. Leadership in the Far North." I would like to begin my comments regarding U.S. leadership by reminding the audience that the Arctic is primarily a maritime domain and the fundamental rule set for international relations in the Arctic's maritime domain is the 1982 U.N. Convention on the Law of the Sea (LOS Convention),<sup>2</sup> a convention to which the United States remains the most conspicuous non-party. This, despite the fact that in the 2008 Ilulissat Declaration the United States joined the other states with maritime borders on the Arctic Ocean (Canada, Denmark, Norway, and Russia), in affirming the central importance of the Convention. In rejecting suggestions by some to negotiate an area-specific treaty for the Arctic similar to the treaty regime in place for the Antarctic, the five Arctic coastal states recalled in that 2008 Declaration that:

[A]n extensive international legal framework applies to the Arctic Ocean. . . . Notably, the law of the sea provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf, the protection of the

---

1. Judson Falknor Professor of Law and of Marine and Environmental Affairs and Director, Arctic Law and Policy Institute, University of Washington. This article is based on remarks given to the Arctic Encounter Symposium on Jan. 31, 2015.

2. U.N. Convention on the Law of the Sea [hereinafter "LOS Convention"], Dec. 10, 1982, S. Treaty Doc. 103-39 (1994); 1833 U.N.T.S. 3.

2 WASHINGTON J. OF ENVIRONMENTAL LAW & POLICY [Vol. 5:1

marine environment, including ice-covered areas, freedom of navigation, marine scientific research, and other uses of the sea. We remain committed to this legal framework and to the orderly settlement of any possible overlapping claims.<sup>3</sup>

*Broad Support for the 1982 U.N. Convention on the Law of the Sea*

The 1982 U.N. Convention on the Law of the Sea provides the legal framework for peacetime uses of the oceans. Its development over a period of more than fourteen years is among the most significant feats in the history of international lawmaking. The Convention's 320 articles and nine annexes now govern all aspects of ocean space, including navigation, boundary delimitation, environmental protection, marine scientific research, living and nonliving marine resources, transfer of technology, and peaceful settlement of disputes.

When the Convention was opened for signature in Jamaica in 1982, it was hailed by the conference president as a "constitution for the oceans."<sup>4</sup> It was also viewed by many as the most comprehensive international law project ever completed. The Convention stipulated that it would enter into force one year after sixty states ratified it. Guyana provided the key ratification in 1993, and the Convention entered into force on November 16, 1994.<sup>5</sup> By the end of 2014, 166 states have become a party to the Convention. The United States is not among them.

For the most part, the 1982 LOS Convention takes a "zonal" approach to the oceans, under which a state's rights and responsibilities depend on the location of the vessel or activity. The zones are each measured from the "baseline."<sup>6</sup> All waters landward of the baseline constitute the "internal" waters of the

---

3. Ilulissat Declaration, Arctic Ocean Governance, Ilulissat, Greenland, (May 27–29, 2008), [http://www.oceanlaw.org/downloads/arctic/Ilulissat\\_Declaration.pdf](http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf).

4. Remarks of Tommy T.B. Koh, President of the Third U.N. Conference on the Law of the Sea, *available at* [http://www.un.org/depts/los/convention\\_agreements/texts/koh\\_english.pdf](http://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf).

5. U.S. DIVISION OF OCEAN AFFAIRS AND LAW OF THE SEA, Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as of 3 October 2014, *available at* [http://www.un.org/depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm#TheUnited Nations Convention on the Law of the Sea](http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm#TheUnited Nations Convention on the Law of the Sea).

6. LOS Convention, *supra* note 2, arts. 5, 7.

state.<sup>7</sup> Moving seaward from the baseline, the water column is divided into the territorial sea, the contiguous zone, the exclusive economic zone and the high seas. Moving from the water column to the seabed below, the coastal state's submerged lands extend from the baseline to the outer edge of the territorial sea, followed by the continental shelf and the international seabed (also called "the Area"). In brief summary, for those unfamiliar with the Convention's overall structure, it provides that:

- Coastal states exercise sovereignty over a territorial sea extending up to twelve nautical miles from the state's baseline;
- Vessels (but not aircraft) of all states have a right of "innocent passage" through the territorial sea;
- Ships and aircraft of all states also enjoy a more liberal right of "transit passage" through "straits used for international navigation";
- Coastal states have sovereign rights in a 200-nautical mile exclusive economic zone (EEZ) with respect to natural resources and certain economic activities, and exercise jurisdiction over environmental protection and marine science research in the zone;
- All other states have freedom of navigation and overflight in the EEZ, as well as freedom to lay submarine cables and pipelines;
- Coastal states have sovereign rights over their continental shelf for exploring and exploiting its natural resources; a coastal state's continental shelf extends at least 200 nautical miles from the baseline, and may extend more than that where the physical "continental margin" extends that far;
- States claiming an "extended" continental shelf (ECS) beyond 200 miles submit data substantiating their claims to the Commission on the Limits of the Continental Shelf (CLCS); the CLCS examines the submission and then issues recommendations on whether the claims comply with Article 76; claims that conform to the CLCS recommendations are final and binding;
- Coastal states are required to share with the

---

7. *Id.* art. 8.

4 WASHINGTON J. OF ENVIRONMENTAL LAW & POLICY [Vol. 5:1

international community part of the revenue derived from exploiting resources from their extended continental shelf;

- The International Seabed Authority in Kingston Jamaica controls access to mineral resources in “The Area” (the deep seabed beyond any nation’s continental shelf);
- All states enjoy the traditional freedoms of navigation, overflight, scientific research and fishing on the high seas; they are obliged to cooperate with other states in adopting measures to manage and conserve living resources;
- States are bound to prevent and control marine pollution and are liable for damage caused by any violation of their international obligations to combat such pollution;
- States bordering enclosed or semi-enclosed seas are admonished to cooperate in managing living resources, environmental and scientific research policies and activities;
- All marine scientific research in the EEZ and on the continental shelf is subject to the consent of the coastal state, but in most cases the coastal state is obliged to grant consent to other states when the research is to be conducted for peaceful purposes and fulfills specified criteria (generally equivalent to what is commonly called “pure” research in contrast with “applied” research);
- States-parties are obliged to settle by peaceful means any disputes that arise concerning the interpretation or application of the Convention;
- Disputes between parties can be submitted to the International Tribunal for the Law of the Sea (ITLOS) established by the LOS Convention, the International Court of Justice, or to arbitration. Conciliation is also available and, in certain circumstances, submission is made compulsory. The ITLOS has exclusive jurisdiction over deep seabed mining disputes.

Applying the Convention’s zonal approach to the Arctic Ocean, the majority of the ocean waters fall within one of the five coastal states’ territorial seas or 200-mile exclusive economic zone (EEZ). The Central Arctic Ocean—the high seas

waters beyond any coastal state's EEZ—spans an area of approximately 1.1 million square miles.<sup>8</sup> Of the five states bordering the Arctic Ocean, all but the United States have submitted extended continental shelf claims to the Commission on Limits of the Continental Shelf.<sup>9</sup> Nevertheless, at least part of the seabed beneath the waters of the Central Arctic Ocean will fall within the Area and therefore under the control of the International Seabed Authority.

The U.S. has already taken advantage of the Convention's extended territorial sea and exclusive economic zone provisions. In 1983, President Reagan issued a proclamation establishing a 200-nautical mile wide U.S. exclusive economic zone.<sup>10</sup> Five years later he issued a second proclamation extending the U.S. territorial sea from three miles to twelve miles (but only for international law purposes).<sup>11</sup> Although the United States has conducted extensive surveys that could be used to support an extended continental shelf (ECS) claim in the Arctic,<sup>12</sup> as a non-party it has not submitted an ECS claim to the Commission on the Limits of the Continental Shelf.

#### *Support for Accession to the LOS Convention*

The 1982 LOS Convention sets out a carefully-drafted balance between safety, security and stewardship in the maritime domain. It is not a perfect treaty (is there such a thing?), but on balance, it is a very good treaty for the United States. The audience need not take my word for that. The first recommendation to come out of the bipartisan blue ribbon U.S. Commission on Ocean Policy, chaired by former chief of naval

---

8. Council on Foreign Relations, *The Emerging Arctic*, available at [http://www.cfr.org/polar-regions/emerging-arctic/p32620#/?cid=otr\\_marketing\\_use-arctic\\_Infoguide#!](http://www.cfr.org/polar-regions/emerging-arctic/p32620#/?cid=otr_marketing_use-arctic_Infoguide#!).

9. See U.N. Division of Ocean Affairs and Law of the Sea, Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to art. 76, para. 8, of the United Nations Convention on the Law of the Sea of 10 December 1982, [http://www.un.org/depts/los/clcs\\_new/commission\\_submissions.htm](http://www.un.org/depts/los/clcs_new/commission_submissions.htm).

10. Proclamation 5030, Exclusive Economic Zone of the United States, Mar. 10, 1983, 3 C.F.R. § 22 (1984).

11. Proclamation 5928, Territorial Sea of the United States, Dec. 27, 1988, 3 C.F.R. § 546 (1989).

12. See UNITED STATES NATIONAL OCEAN SERVICE, U.S. EXTENDED CONTINENTAL SHELF PROJECT, available at <http://continentalshelf.gov/>.

operations and secretary of energy James Watkins, was a recommendation that the United States accede to the 1982 Convention.<sup>13</sup> Similarly, former secretary of defense and CIA director Leon Panetta supported accession in his capacity as chairman of the prestigious Pew Ocean Commission.<sup>14</sup> Following a decade-long debate over the Convention's strengths and weaknesses, Canada—our Arctic neighbor and fellow member of NATO and the Arctic Council—ratified the Convention in 2003.<sup>15</sup>

In 1994, President Clinton presented the LOS Convention to the Convention for its advice and consent.<sup>16</sup> In the intervening twenty-one years, each succeeding president has also supported U.S. accession. For example, President Bush's 2009 Arctic Policy presidential directive made clear the position of his administration:

The Senate should act favorably on U.S. accession to the U.N. Convention on the Law of the Sea promptly, to protect and advance U.S. interests, including with respect to the Arctic. Joining 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.<sup>17</sup>

---

13. See U.S. COMMISSION ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY, 444–45 (2004).

14. Testimony of Leon Panetta, Chairman, Pew Oceans Commission, Hearing before the Senate Committee on Environment and Public Works on the United Nations Convention on the Law of the Sea (Mar. 24, 2004), S. Hrg. 108-498 at 11; *available at* <http://www.gpo.gov/fdsys/pkg/CHRG-108shrg94598/html/CHRG-108shrg94598.htm>.

15. U.N. Division of Ocean Affairs and Law of the Sea, Declarations made upon signature, ratification, accession or succession or anytime thereafter, Canada entry, *available at* [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm#Canada](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#Canada).

16. President's Message to Congress Transmitting United Nations Convention on the Law of the Sea, with Annexes, Dec. 10, 1982, S. Treaty Doc. 103-39 (1994). Because the United States did not sign the Convention during the 1982–1984 period during which it was open for signature under Article 305, it may become a party to the Convention only by accession rather than ratification. LOS Convention, *supra* note 2, art. 307. The legal effect is the same.

17. George W. Bush, Arctic Region Policy, Presidential Directive 66/Homeland

Similarly, President Obama emphasized the nexus between international law and national security in his 2013 National Strategy for the Arctic Region, in which he focused on three lines of effort. One of the three lines was to:

Strengthen International Cooperation—Working through bilateral relationships and multilateral bodies, including the Arctic Council, we will pursue arrangements that advance collective interests, promote shared Arctic state prosperity, protect the Arctic environment, and enhance regional security, and we will work toward U.S. accession to the United Nations Convention on the Law of the Sea.<sup>18</sup>

President Obama reiterated his commitment to U.S. accession in the recently-released 2015 National Security Strategy, in which he warned that failure to ratify UNCLOS “undermines our national interest in a rules-based international order.”<sup>19</sup>

While serving as Commandant of the Coast Guard, Admiral Papp—the newly appointed U.S. Special Representative for the Arctic—joined a virtual flotilla of flag and general officers who testified before the Senate Committee on Foreign Relations in favor of accession to the Convention.<sup>20</sup> Admiral Papp led off by emphasizing that the United States is a maritime nation and an Arctic nation. He then went on to state his firm belief that accession to the Convention would help ensure America’s Arctic future.

#### *Fate in the U.S. Senate: Close, but Never a Floor Vote*

Under Article II of the U.S. Constitution, approval by a two-thirds majority of the Senate is required for U.S. accession to the Convention. The decision whether to accede has come

---

Security Presidential Directive 26, Jan. 9, 2009, <http://www.fas.org/irp/offdocs/nspd/nspd-66.htm>.

18. Barack Obama, National Strategy for the Arctic Region, May 10, 2013, at 13, [http://www.whitehouse.gov/sites/default/files/docs/nat\\_arctic\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/docs/nat_arctic_strategy.pdf).

19. Barack Obama, National Security Strategy of the United States, Feb. 2015, at 13, [http://www.whitehouse.gov/sites/default/files/docs/2015\\_national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/docs/2015_national_security_strategy.pdf).

20. Testimony of Admiral Robert Papp, Commandant U.S. Coast Guard, on Accession to the 1982 Law of the Sea Convention, before Senate Committee on Foreign Relations, June 14, 2012, *available at* [http://www.foreign.senate.gov/imo/media/doc/Admiral\\_Robert\\_Papp\\_Testimony.pdf](http://www.foreign.senate.gov/imo/media/doc/Admiral_Robert_Papp_Testimony.pdf). Admiral Papp noted that his six predecessors who served as commandant also supported the Convention.



before the relevant Senate committees on three occasions. On February 25, 2004, the Senate Committee on Foreign Relations unanimously recommended to the full Senate that the United States accede to the Convention.<sup>21</sup> The Committee's recommendation was subject to four "declarations" and twenty-two "understandings." Most of the Committee's recommended declarations and understandings were adopted from the Clinton administration's 1994 letter transmitting the Convention to the Senate for its advice and consent and the attached ninety-seven-page commentary on the Convention's articles prepared by the State Department.<sup>22</sup> The Clinton administration understandings were in turn largely consistent with the position of the U.S. delegation during the UNCLOS III negotiations and with President Reagan's 1983 Ocean Policy Statement; however, they also reflected the changes made by the 1994 Part XI Implementation Agreement.<sup>23</sup> Because the full Senate did not vote on the Committee's 2004 recommendation before the end of the 108th Congress, the matter was returned to the Committee. In 2007 the Committee again held hearings and favorably reported out the Convention,<sup>24</sup> yet the recommendation again failed to reach the full Senate for a vote.

In the spring of 2012 the Senate Committee on Foreign Relations convened a third round of hearings on the Convention.<sup>25</sup> Convention proponents and opponents again exchanged views on the Convention's merits,<sup>26</sup> the relationship

---

21. S. COMM. ON FOREIGN RELATIONS, REPORT ON THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, S. EXEC. REP., 108-10 (2004). The Committee also recommended ratification of the Agreement relating to the Implementation of Part XI.

22. President's Message to Congress Transmitting United Nations Convention on the Law of the Sea, with Annexes, *supra* note 16.

23. *See, e.g.*, Note by the Secretariat, Third United Nations Conference on the Law of the Sea, 243-44, U.N. Doc. A/CONF.62/WS/37 (Dec. 10, 1982).

24. S. COMM. ON FOREIGN RELATIONS, REPORT ON THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, S. EXEC. REP. 110-09 (2007).

25. For a collection of essays on the merits of accession to the convention by military, government, and academic experts, *see* THE LAW OF THE SEA CONVENTION: U.S. ACCESSION AND GLOBALIZATION (Myron H. Nordquist et al. eds., 2012).

26. The author contributed two essays to an online debate hosted by *Opinio Juris* during the 2012 Senate hearings. *See* Craig H. Allen, *The International Law of the Sea: A Treaty for Thee; Customary Law for Me?*, OPINIO JURIS (June 14, 2012), <http://opiniojuris.org/2012/06/14/the-international-law-of-the-sea-a-treaty-for-thee-customary-law-for-me/>; Craig H. Allen, *Will Compulsory Dispute Settlement Sink the LOS Convention in the Senate?*, OPINIO JURIS (June 17, 2012),

between conventional and customary international law, revenue sharing with respect to resources extracted from the extended continental shelf, the role of international organizations, and the merits of a compulsory process for adjusting disputes between and among states.<sup>27</sup> A recurring point of contention concerned the effect of accession to the Convention on U.S. sovereignty (particularly the requirements for compulsory dispute settlement) and security (potential restrictions on "military activities").<sup>28</sup> Despite letters and testimony in support of accession from the Departments of Defense, State, and Homeland Security; the Chairman of the Joint Chiefs of Staff; the Chief of Naval Operations; and the Commandant of the Coast Guard, the 2012 initiative failed to even reach a vote within the Committee before the 112th congressional term expired in January 2013.<sup>29</sup>

During the 113th Congress (spanning the January 2013—January 2015 biennium), the Senate gave its consent to ratification of three important multilateral treaties negotiated to protect the oceans' living marine resources,<sup>30</sup> demonstrating that body's commitment to advancing the rule of law in ocean-space; however, neither the Obama administration nor the Senate took any action to move the stalled LOS Convention. The 2014 elections sent thirteen new senators (twelve Republicans and one Democrat) to Washington in January

---

<http://opiniojuris.org/2012/06/17/will-compulsory-dispute-settlement-sink-the-los-convention-in-the-senate/>.

27. For a chronology of actions taken in the U.S. Senate, see U.S. Library of Congress "Thomas" entries for S. Treaty Doc. No. 103-39, available at <http://thomas.loc.gov/cgi-bin/thomas2>.

28. Some opponents have also argued that the Convention would encroach on domestic management of the nation's fisheries and limit the nation's long-term energy needs.

29. The fate of the Convention in 2012 was essentially sealed when a total of thirty-four senators wrote to the Senate majority leader indicating they would vote against accession, thus rendering a two-thirds majority numerically impossible to achieve. See, e.g., Letter from Senators Rob Portman and Kelly Ayotte to Hon. Harry Reid (July 16, 2012), available at [http://www.portman.senate.gov/public/index.cfm/files/serve?File\\_id=317ccc22-1649-4982-944f-ca1d97e14075](http://www.portman.senate.gov/public/index.cfm/files/serve?File_id=317ccc22-1649-4982-944f-ca1d97e14075).

30. Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, S. Treaty Doc. No. 113-1, Mar. 13, 2014; Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean, S. Treaty Doc. No. 113-2, Mar. 13, 2014; Amendment to the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, S. Treaty Doc. No. 113-3, Mar. 13, 2014.

2015 and gave the Republican Party control of the Senate. Kentucky Senator Mitch McConnell was elected Senate Majority Leader. 2015 will also mark the start of the United States' two-year term as chair of the Arctic Council. Whether the Arctic Council chairmanship will raise the visibility of Law of the Sea issues with the recently "refreshed" membership and leadership remains to be seen.

*U.S. National Interests in the Arctic will be Enhanced by Accession*

The United States' 2009 Arctic Region Policy articulates six national policy goals: (1) meet national security and homeland security needs relevant to the Arctic region; (2) protect the Arctic environment and conserve its biological resources; (3) ensure that natural resource management and economic development in the region are environmentally sustainable; (4) strengthen institutions for cooperation among the eight Arctic nations; (5) involve the Arctic's indigenous communities in decisions that affect them; and (6) enhance scientific monitoring and research into local, regional, and global environmental issues.<sup>31</sup> The policy directive goes on to emphasize that freedom of the seas is a top national priority.<sup>32</sup> Five of the six policy goals—including the "top national priority" of preserving freedom of the seas—will be enhanced by U.S. accession to the Convention. Three of those policy goals merit particular mention here.

First, the policy statement highlights the importance to our national security of navigation rights through international straits in the Northwest Passage over North America and the Northern Sea Route over Russia's northern border.<sup>33</sup> Military and commercial navigation through those straits will become more important—and perhaps more contested—as the Arctic sea ice recedes and thins. Part III of the LOS Convention on straits used for international navigation includes twelve detailed articles that address the status of such straits, the right of transit passage, and the rights, responsibilities, and

---

31. Arctic Region Policy, *supra* note 17, at 2–3.

32. *Id.* at 2.

33. To preserve global mobility of U.S. military and civilian vessels and aircraft throughout the Arctic region the policy statement declares that the United States will "project a sovereign maritime presence" in the Arctic. *Id.* at 3.

jurisdiction of states bordering on those straits. Although a right of transit passage through international states almost certainly ripened into a rule of customary law by the time the LOS Convention entered into force in 1994 (and before Canada became a party to the Convention in 2003), it seems certain that the customary law rule is not nearly as well defined as the articles in Part III of the Convention. Only as a party to the Convention would the United States be in a position to assert the full scope of the navigation rights set out in Part III of the Convention.

The second way in which U.S. national interests in the Arctic region will be enhanced requires no elaboration. The 2009 Arctic Region Policy says it all when it observes that:

Defining with certainty the area of the Arctic seabed and subsoil in which the United States may exercise its sovereign rights over natural resources such as oil, natural gas, methane hydrates, minerals, and living marine species is critical to our national interests in energy security, resource management, and environmental protection. The most effective way to achieve international recognition and legal certainty for our extended continental shelf is through the procedure available to States Parties to the U.N. Convention on the Law of the Sea.<sup>34</sup>

The third way in which the U.S. national Arctic policy goals would be enhanced by accession to the LOS Convention concerns the nation's commitment to enhancing scientific monitoring and research into local, regional, and global environmental issues, and measures that will ensure that natural resource management and economic development in the region are environmentally sustainable. Much of the research to accomplish those goals must necessarily be conducted in waters beyond U.S. jurisdiction. Unfortunately, U.S. oceanographers are presently at a serious disadvantage in gaining access to the offshore waters of other states. As an earlier presidential cabinet report concluded, our status as a non-party to the Convention "often slows or complicates approval for U.S. ships and aircraft access to conduct marine scientific research in foreign waters."<sup>35</sup> One disadvantage of

---

34. Arctic Region Policy, *supra* note 17, at 3-4.

35. Cabinet Report, *Turning to the Sea: America's Ocean Future*, The Law of the Sea Convention, (1999), *available at* <http://www.publicaffairs.noaa.gov/oceanreport/lawofsea.html>.

our non-party status that stands out is that U.S. researchers are unable to take advantage of the more favorable “implied consent” provisions for gaining access to conduct marine scientific research in other states’ exclusive economic zones or on their continental shelves.<sup>36</sup>

*Test the Convention’s Benefits and Drawbacks Against Future Scenarios*

If Senate leaders for the 114th Congress decide to give fresh consideration to the LOS Convention, “future scenarios” could provide a useful analytical tool in assessing the options.<sup>37</sup> Convention advocates and opponents alike might consider drafting a broad set of future scenarios to test the claimed benefits and drawbacks of accession. Each of the scenarios would be evaluated to determine how the outcome would vary, if the United States was or was not a party to the Convention. Possible scenarios could incorporate a future decision by a state bordering a critical international strait to renounce the LOS Convention, as Article 317 permits, and to then deny any right of transit passage through its waters. A variant of the renunciation scenario might posit a major maritime power renouncing the Convention after an unfavorable decision by one of the Convention’s dispute settlement bodies, or further decisions by major states (and permanent members of the Security Council) to boycott proceedings by those bodies.<sup>38</sup> Another scenario might focus on a proposal to amend Parts V and XIII of the Convention to define marine scientific research in a way that includes military surveys and intelligence collection activities.<sup>39</sup> Still another scenario might posit a move by states bordering an enclosed sea to “modify” the effect of the

---

36. LOS Convention, *supra* note 2, art. 252. No credible argument exists that the Convention’s implied consent regime reflects customary law.

37. For guidance on scenario planning and analysis see Paul J.H. Schoemaker, *Scenario Planning: A Tool for Strategic Thinking*, SLOAN MANAGEMENT REVIEW 25–40 (Winter 1995); PETER SCHWARTZ, *THE ART OF THE LONG VIEW* (1991).

38. In 2013 Russia boycotted a prompt release action brought by the Netherlands under Article 292 of the Convention to obtain the release of the Greenpeace vessel *Arctic Sunrise*. Similarly, China has refused to participate in an Annex VIII arbitration action brought by the Philippines.

39. Articles 312–316 of the Convention set out the procedures for amending the Convention. The Convention became subject to amendment in 2004, ten years after it entered into force.

Convention to exclude navigation in the sea by nuclear-powered ships, ships carrying nuclear weapons, or ships transporting nuclear materials.<sup>40</sup> Arctic-specific scenarios might focus on extended continental shelf disputes, access to fisheries resources in the Central Arctic Ocean, and the application of special protective measures for ice-covered waters under Article 234 of the Convention.

### *Conclusion*

Few would argue that the 1982 LOS Convention perfectly serves all of the United States' interests. But are the Convention's flaws 'fatal' deal-breakers that require those acting in the national interest of the United States to reject the treaty? I submit that the answer is no. A treaty brings greater clarity than the rules of customary international law, along with stability and predictability. Clarity, stability, and predictability in the rule set for the oceans—and in particular in the Arctic Ocean and adjacent seas—are plainly in the interest of the United States. The Symposium's keynote speaker, Senator Lisa Murkowski of Alaska, has been a stalwart champion of U.S. accession to the Law of the Sea Convention.<sup>41</sup> Let us hope that she can persuade two-thirds of her Senate colleagues in the 114th Congress—and the new majority leader, who like most of his predecessors is not from a coastal state—that U.S. maritime safety, security, and stewardship interests in the Arctic region all compellingly argue in favor of prompt accession to the 1982 LOS Convention.

---

40. As between parties to the Convention, Article 311(3) would limit the effect of such a "modification" to the parties to that side agreement. Its effect on a non-party to the Convention would be governed by customary law. See LOS Convention, *supra* note 2, art. 311(3). See also Convention on the Law of Treaties, art. 41, May 23, 1969, 1155 U.N.T.S. 336, 8 I.L.M. 679 (1969) (modifications to multilateral treaties).

41. See, e.g., Senator Lisa Murkowski, Opening Statement at S. Hrg. 108-498; Lisa Murkowski, *Go North, America — to the Arctic*, ALASKA DISPATCH NEWS, (June 28, 2013) <http://www.adn.com/article/20130628/go-north-america-arctic>.