SEAS THE DAY: FINDING THE TREASURES OF RATIFYING THE LAW OF THE SEA CONVENTION

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I. INTRODUCTION

The world community is sailing onward to a prosperous future, leaving the United States in its wake. Our nation is not falling behind because we are being outcompeted. We are falling behind because we chose not to work with the rest of the world. Fifty years ago, in 1973, the world met to establish how all humankind would share the seas.[1] This convention, named the United Nations Convention on the Law of the Sea ("UNCLOS III"), boasted over 300 articles (not including the 10+ annexes which describe extra

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1. JOSH EAGLE & SHI-LING HSU, OCEAN AND COASTAL RESOURCES LAW 10-11 (Wolters Kluwer ed., 3d ed. 2020).

programs and have separate articles within them) and was an incredibly comprehensive agreement to share and preserve the seas and its resources.[2]

After an arduous decade of drafting the convention alongside the rest of the world, the United States elected not to ratify it. Ignoring the time and resources spent on the initial discussion, the United States' failure to ratify only acts to the detriment of its national interests and of the environment. Technological advancements in mining technology will wreak havoc on the marine environment absent a mutually coercive force to keep it in check.[3] This coercive force cannot be mutual without U.S. ratification of UNCLOS III.[4]

U.S. national interests will only be served through ratification. Ratification would protect our interest in freely navigating the high seas without doing it alone or risking the lives of U.S. sailors.[5] Furthermore, without ratification, the U.S. is powerless to prevent the actions of bad actors from outside the convention.[6] The United States is also losing out on a vital opportunity to shape the mining regulations by which the world will be bound by choosing to be silent.[7] Lastly, the Nation will never have the "home court advantage" in any international seabed disputes if we do not ratify UNCLOS III.[8]

The International Seabed Authority ("ISA") is not the monster under the seabed that opponents to ratification fear it to be. It is not an Orwellian superpower ready to destroy American democracy by preventing the destruction of the commons.[9] As a member state, the United States could direct where cost-sharing sharing provision money goes to keep it out of the hands of bad actors.[10] The ISA's authority to set environmental regulations will not be an open door for environmental groups to force the United States to protect its natural resources above all other interests.[11] The ISA will only prevent the destruction of the commons. America would be free to destroy its natural resources as it sees fit, so long as doing so does not interfere with other nations or the international commons.

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2. *See generally,* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS III].
3. *See infra* Section IV(A).
4. *Id.*
5. *See infra* Section IV(B)(i).
6. *See infra* Section IV(B)(ii).
7. *See infra* Section IV(B)(iii).
8. *See infra* Section IV(B)(iv).
9. Donald Rumsfeld, delegate to UNCLOS III during the Reagan administration, referred to the ISA as "Orwellian". *See* The Law of the Sea Convention: Hearing on Treaty Doc. 103-39 Before the S. Comm. on Foreign Rel., 112th Cong. 176 (2012).
10. *Id.*
11. *See infra* Section IV(C)(ii).

The United States must "seas" the chance to ratify UNCLOS III. This Note will begin with the history of sea regulation, starting with the age of exploration and pushing forward to United States regulations that became an international model for sea regulation. After that, this Note will discuss sections of UNCLOS III relevant to jurisdiction over areas of the sea and deep seabed mining. Next, this Note will dive into why the United States must ratify UNCLOS III by analyzing the environmental interests contemplated by the treaty and our national interests. Lastly, this Note will show why UNCLOS III and the ISA are *not* monsters under the seabed and how their existence will protect both the environment and U.S. national interests.

II. HISTORY OF SEA REGULATION

UNCLOS III's creation followed two earlier conventions, UNCLOS I and II.[12] The convention's logic is rooted in much older international custom, though.[13] This section starts by describing what "custom" is in general terms, then it will discuss the two underlying principles that guided international ocean and coastal law for years: *Mare Liberum* and the United States' early marine resource management regulations.

A. Custom

The United States Supreme Court has accepted the importance of customary international law.[14] During the Spanish-American War, the United States captured two Spanish fishing vessels and took them from Cuba to Key West as prizes of war.[15] It was a long-held international custom that fishing vessels could not be taken as prizes of war.[16] The Court held that these vessels were exempt as prizes, by stating:

> Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world.[17]

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12. *See* EAGLE & HSU, *supra* note 1, at 10. UNCLOS I set forth some excellent first steps at regulating the seas, but ultimately did not establish any meaningful limitations, just goals. *Id*. *See* United Nations Convention on the Law of the Sea, Apr. 29, 1958, 1844 U.N.T.S. 146 [hereinafter UNCLOS I]. UNCLOS II's goal was to set a formal length of the territorial sea and fishing catch limitations, but the convention could not do either. *See* EAGLE & HSU, *supra* note 1, at 10.
13. *Id.*
14. *See* The Paquete Habana, 175 U.S. 677 (1900).
15. *Id.* at 678.
16. *Id.* at 698.
17. *Id.* at 711 (internal quotation marks omitted).

Custom—in general—is the result of steady and widespread practice by nations on the international scale.[18] *Mare Liberum* and the United States' early regulations regarding marine resource management are the two sets of custom that UNCLOS III drew on when setting its provisions.

B. Mare Liberum

International ocean and coastal regulation started with Christopher Columbus and the Catholic Church.[19] In the 1400s, Spain and Portugal had a dispute regarding who would control the New World.[20] The nations asked the Pope to decide the issue.[21] Pope Alexander VI split the New World in half between Spain and Portugal, with a commensurate split over control of the seas.[22] Understandably, the other nations clamoring for territory in the New World were unhappy with the church's arbitrary division.

Dutch jurist Hugo Grotius rebelled against the idea that Spain and Portugal should "own" the sea and proposed a new theory—no one nation should have total control.[23] Grotius wrote *Mare Liberum* (translated to "free seas"),[24] a treatise asserting that the seas could not be regulated due to their sheer size.[25] Grotius believed the sea was like the air; therefore, it could not be regulated:

> The Air belongs to this class of citizens for two reasons. First, it is not susceptible of occupation; and second, its common use is destined for all men. For those same reasons the seas are common to all, because it is so limitless that it cannot be the possession of any one and because it is adapted for use by all.[26]

Grotius's view became the custom in international law, with a single exception.[27] Coastal nations would control as far as their

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18. *Customary International Law*, CORNELL LEGAL INFORM. INST. (Dec. 18, 2023), https://www.law.cornell.edu/wex/customary_international_law.
19. EAGLE & HSU, *supra* note 1, at 5.
20. *Id.*
21. *Id.* at 6.
22. *Id.*
23. *Id.*
24. *See* HUGO GROTIUS, THE FREEDOM OF THE SEAS 28 (Ralph Van Deman Magoffin trans., James Brown Scott ed., Oxford University Press 1916) (1608).
25. *Id.* at 38.
26. *Id.*
27. EAGLE & HSU, *supra* note 1, at 6.

cannons could shoot, originally three nautical miles ("NM") and extending to twelve NM once cannon technology advanced.[28]

Grotius's ideas commanded public opinion for hundreds of years, but the world grew, learned, and changed as time passed. His ideas remained important as the world navigated regulations of the seas. Everything changed when the United States started regulating its coastal seas. United States regulations made even bigger waves than Grotius in influencing international custom.

C. Regulations in the United States

History demonstrates that the United States has been a trendsetter in seas regulations since at least the 1940s. Two examples of U.S. leadership in this field are the Truman Proclamation on the Continental Shelf and the United States' fish management legislation.

In the 1940s, President Truman declared the seabed "appurtenant" to the United States (in other words, those areas of the seabed that are a part of the U.S. continental shelf) to be within the United States' jurisdiction.[29] His rationale was that the desire for the subsoil minerals was realizable with the advent of new mining technologies, and so proclaiming the United States' jurisdiction over those minerals was essential to preempting international competition over those minerals.[30] The proclamation was groundbreaking (literally) to international law. Disputes over seabed ownership vanished as the world adopted Truman's view.[31] This view was codified into the Convention on the Continental Shelf, part of UNCLOS I.[32]

The United States charted a new course in ocean regulation through fisheries management as well. In 1976, the United States' Magnuson-Stevens Fishing Conservation and Management Act ("FCMA") declared jurisdiction over fisheries up to 200 NM.[33] The FCMA became the guidepost for the Exclusive Economic Zone ("EEZ") delineated by UNCLOS III, which stated that all nations can manage their fisheries and other living resources up to 200 NM.[34]

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28. *Id.* at 6-7. A nautical mile is 1.15 statutory miles (i.e., the miles on your car) and is different to help make navigation easier by using the latitude and longitude system, a vital system for the navigating mariner.

29. Proclamation No. 2667, 10 Fed. Reg. 12,303 (Sept. 28, 1945).

30. *Id.*

31. EAGLE & HSU, *supra* note 1, at 9.

32. *Id. See* Convention on the Continental Shelf, Apr. 10, 1964, 15 U.S.T. 471, 499 U.N.T.S. 311.

33. EAGLE & HSU, *supra* note 1, at 82.

34. UNCLOS III, *supra* note 2, at art. 57, art. 61.

These examples show the power the United States historically had in pre-UNCLOS III seas regulations. Its desire to utilize the natural resources near its shores, coupled with new technology, drove Grotius's ideas and centuries of customary law to the side. This power did not go away during the drafting of UNCLOS III.

III. UNCLOS III

UNCLOS III was a massive undertaking on the international stage. Over 160 state actors had to describe their desires for seas regulations.[35] The whole convention did not devolve into chaos because of a new voting procedure. Nations could only vote "up" the whole convention or vote "down" the whole convention.[36] This procedural rule was a brilliant play by the convention leadership, as it would prevent holdups in ratification by nations who disliked one small thing in one particular provision.

The United States continued its tradition of being a trendsetter at the convention.[37] The nation had vast interests in the seas.[38] As such, "every provision of UNCLOS III had to have the assent of the United States."[39] The U.S. agreed to them all, except one: the Deep Seabed Mining Provision.[40] This provision established the ISA as the regulatory body for deep seabed mining activities beyond the EEZ, and set forth the new international standards for exploration and exploitation of mineral resources in the deep seabed.[41] This provision would prove to be a massive barrier to U.S. ratification of UNCLOS III.

In lieu of providing an in-depth analysis of every single provision presented during the drafting of UNCLOS III, this Note will only highlight the provisions relevant to my argument for United States ratification: the deep seabed and the jurisdictional bounds. The deep seabed provisions set out how and when nations can mine by establishing an international authority over the deep seabed resources. The jurisdictional bounds formalized the rights and obligations nations owe one another in areas near their shores.

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35. EAGLE & HSU, *supra* note 1, at 10-11.

36. *Id.* at 11. To avoid confusion: A "Convention is both a meeting of countries and the resulting agreement among them." *Id.* at 9.

37. *Id.*; *see supra* Section II(C).

38. These interests included shipping, energy, military, and fishing. *Id.*

39. *Id.*

40. EAGLE & HSU, *supra* note 1, at 11. *See* UNCLOS III, *supra* note 2, at Part XI.

41. *See* UNCLOS III, *supra* note 2, at Part XI.

A. Jurisdictional Bounds

UNCLOS III hit the ground running by doing what UNCLOS II could not: it established the size of the zones surrounding coastal nations: territorial seas, the contiguous zone, and the EEZ.[42] The Territorial Sea goes up to twelve NM, and the Contiguous Zone is the next twelve NM (totaling 24 NM).[43]

The EEZ was new to these accords, so, naturally, it is where the issues started to pop up. An EEZ extends from twelve NM to 200 NM.[44] The EEZ establishes a complex set of rights and obligations for coastal and noncoastal nations.[45] These areas do not overlap; if that were the case, Miami would be in the EEZ of the Bahamas. Instead, the distance beyond the Contiguous Zone of each nation is cut in half and given equally to each nation if the EEZs would overlap due to the proximity of the two nations.[46] In their EEZs, coastal nations have many rights and obligations, including rights to explore, conserve, and manage living and nonliving natural resources.[47] Foreign states retain their rights to navigation, overflight, and lay submarine cables and pipes within another nation's EEZ.[48]

Additionally, within the EEZ, a coastal state may build and regulate artificial islands or other offshore structures, over which it retains jurisdiction.[49] Coastal states can also manage safety zones around the artificial structure to ensure navigational safety.[50] These islands are not *intended* to have territorial seas around them, but some nations are using artificial islands to extend their claims over the sea, such as China in the South China Sea.[51] Actions like this threaten the United States' interests at sea: if these nations continue to claim more area for themselves, there will be fewer areas for the United States to mine.[52]

With an area as large as the sea, it is no wonder jurisdiction over it has become a contested issue. Individual nations' desires to expand their spheres of influence are why the world needs UNCLOS

42. *Id.* at 12-13. This chart shows the various bounds described by UNCLOS III.
43. UNCLOS III, *supra* note 2, at art. 3, 33(2).
44. EAGLE & HSU, *supra* note 1, at 23.
45. *Id.* at 24.
46. *Id.* at 23.
47. UNCLOS III, *supra* note 2, at art. 56(1)(a).
48. *Id.* at art. 58(1).
49. *Id.* at art. 60(1)-(2).
50. *Id.* at art. 60(4).
51. UNCLOS III, supra note 2, at art. 60(8); Adam W. Kohl, China's Artificial Island Building Campaign in the South China Sea: Implications for the Reform of the United Nations Convention on the Law of the Sea, 122 DICK. L. REV. 917, 923 (2018) (discussing island building and the implications for UNCLOS III jurisdictional bounds and the 200 NM EEZ).
52. *See infra* Section IV(B).

III. Its restrictions on what areas nations can claim strike a balance between Grotius's *Mare Liberum* and the regulations needed to preserve the seas for all humankind. Past 200 NM, the seas are as open as possible to prevent exploitation of the commons.[53] What happens when the minerals a nation wants to mine are beyond its EEZ? That's where the deep seabed provisions of UNCLOS III step in to prevent depletion of resources common to all humankind.

B. The Deep Seabed

The deep seabed is the area past the continental shelf.[54] The Deep Seabed Mining Provision, regulating mining in areas beyond the continental shelf, is the provision which led President Ronald Reagan to decline to ratify back in 1982.[55] This section explores what this section of UNCLOS III entails.

Dissenters to ratification cite the cost-sharing requirements of the deep seabed mining provisions as anti-free market and a detriment to U.S. national interests.[56] The convention also establishes the ISA to control mineral resources of the seabed.[57] The ISA is fully autonomous and helps ensure that marine resources and extraction activities are used for the common benefit of humankind.[58] The "Area" they manage is 54% of the entire global sea floor.[59]

The ISA is made of five main organs: The Assembly (which houses the finance committee), The Council, The Secretariat, The Enterprise, and the Legal and Technical Commission.[60] The Council controls the approval of contracts to mine the deep seabed, approves activities within the Area, selects candidates for the secretary general, and assumes additional responsibilities as mining projects commence.[61] The Council selects its thirty-six

53. For a discussion of the concept of "the commons," see Hardin, *infra* note 71.

54. EAGLE & HSU, *supra* note 1, at 27.

55. *See, e.g.*, Ronald Reagan, Statement on United States Ocean Policy (March 10, 1983), https://www.reaganlibrary.gov/archives/speech/statement-united-states-oceans-policy.

56. Alfred P. Rubin, *Monster from the Deep: Return of UNCLOS*, NAT'L INT. (Sept. 1, 1994), https://nationalinterest.org/article/monster-from-the-deep-return-of-unclos-995.

57. *About ISA*, INT'L SEABED AUTH., https://www.isa.org.jm/about-isa/ (last visited March 5, 2023).

58. *Id.*

59. *Id.* The Authority named the seabed under the High Seas "The Area". Creative naming, Authority . . .

60. *Organs of the International Seabed Authority*, INT'L SEABED AUTH., https://www.isa.org.jm/organs/ (last visited May 5, 2023) (describing the various groups that make up the ISA).

61. *Structure and Mandate of the Council*, INT'L SEABED AUTH., https://www.isa.org.jm/structure-and-mandate/ (last visited May 5, 2023) (describing the role the Council plays in deep sea governance).

members in a set of brackets: four from members that consume or import more than two-percent of commodities from the Area, and another four from members who are among those who made the largest investments for activities in the Area.[62] The finance committee sets the ISA budget and manages the cost-sharing distributions.[63] The Assembly is the group that elects members of the Council and sets the budget for the Finance committee to administer.[64] All signatory nations are members of the Assembly.[65]

The cost-sharing provisions establish a baseline for how contributors to mineral exploration and extractions are paid.[66] The goals of this provision are to ensure optimum revenues for the ISA, attract investors, ensure equality, and provide incentives for exploration.[67] The ISA has been working on this equitable sharing plan since 2018 but has not come up with a solid plan, yet.[68] It has been testing three different formulas to determine the most equitable distribution.[69]

No one loves cutting through red tape to do anything, and people enjoy giving away money even less, but the bureaucratic process is necessary to ensure sustainable use of deep seabed mineral resources. This provision cannot be the barrier to ratification any longer; it is time to "seas" the chance to ratify the convention.

IV. "SEAS-ING" THE CHANCE TO RATIFY

The United States should ratify the Law of the Sea Convention for two reasons: the mitigation of environmental impacts from better mining technology and its national interests in navigation and mining. These two principles are discussed in turn; then this Note will show why the ISA will not undermine and control U.S. interests at sea.

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62. *The Council*, INT'L SEABED AUTH., https://www.isa.org.jm/organs/the-council/ (last visited May 5, 2023) (describing the composition of the Council). There are five groups total, each with its own election criteria, but Group A & B are more relevant to this paper.

63. *The Finance Committee*, INT'L SEABED AUTH., https://www.isa.org.jm/organs/the-finance-committee/ (last visited May 5, 2023) (Describing the composition and role of the finance committee).

64. *The Assembly*, INT'L SEABED AUTH., https://www.isa.org.jm/organs/the-assembly/ (last visited May 5, 2023) (describing the composition and role of the Assembly).

65. *Id.*

66. UNCLOS III, *supra* note 2, at Annex III art. 13.

67. *Id.*

68. Int'l Seabed Auth., Policy Brief, *Equitable Sharing of Financial and Other Economic Benefits from Deep-Sea Mining*, at 1 (2022) https://www.isa.org.jm/wp-content/uploads/2023/04/policy_brief_benefit_sharing_01_2022.pdf [hereinafter Policy Brief].

69. *Id.* at 3.

A. Technology & The Commons "Com-Ocean"

The ISA said it best: the Area is "for the benefit of humankind as a whole".[70] The sad truth is that, for some people, the only benefit they care about is how far they can pad their wallets. Without someone to ensure that *all* humankind gets access to deep seabed resources, these people can exploit resources and destroy the environment. This section will explain why the seas and the seabed are a "commons." Next, it will use the FCMA as an example of how proper regulations can guard against the tragedy of the commons in deep seabed resources. Finally, this Section will show why United States ratification is necessary to ensure that mutual coercion stays mutual.

1. Are the Seas a Commons?

The tragedy of the commons is a classic problem in environmental law, formulated by ecologist Garrett Hardin.[71] In short, if too many people plunder a resource owned by a community, it will be depleted because everyone will want the maximum benefit from the commons.[72] The solution, Hardin supposes, is creating a mutually agreed-upon coercion.[73]

The seas are the ultimate example of a commons.[74] World community members want to take all the fish, oil, and minerals that their ships can carry from a pool of resources shared by the entire international community. Left unchecked by a coercive force, the seas will be drained of all these resources and the environment will suffer. UNCLOS III is the mutually agreed upon coercion that Hardin envisioned. The environmental provisions are a restriction on free seas but, absent them, individual nations will continue to rob the seas. The United States must sign on to UNCLOS III to prevent wasteful use of the commons through mutual coercion.

2. Guarding from Technology

Deep sea minerals and fish stocks would both feel the tragedy's effects from different groups clamoring for their resource. These effects would only be exacerbated by technological improvements. Back in the early stages of sea regulation, mining tools consisted of pickaxes, the fastest way you could travel over the water was by sail,

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70. *About ISA*, *supra* note 57.
71. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).
72. *Id.*
73. *Id.* at 1247.
74. *Id.* at 1244.

and the mightiest military weapon was a musket. Since then, there have been some major improvements to technology, like big mining rigs, nuclear-powered vessels, and military drones. At the same time, commercial fishing technology improved, prompting the passage of the FCMA in the United States. The FCMA serves as an example of how an overarching regulatory scheme can protect these resources in the face of technological advancement.

In 1965, Commercial fishermen kept 14,945,800 pounds of snapper from the Gulf of Mexico fishery.[75] That nearly 15-million-pound catch was more than double the catch in 1950.[76] This rise in snapper landings coincides with improvements in fishing technology. Diesel engines, drums in longline fishing, and power blocks started supplementing other fishing tackle in the 1940s and 1950s.[77] Technological advancements made it easier to pull up more fish, making it easier to overfish. Technological advances continued into the 1970s, with the declassification of sonar technology.[78] Sonar makes it easier for fishermen to find schools of fish.[79] Interestingly, the data shows a decrease in gulf snapper landings from 1965-1980 despite the continued technological advancement.[80] The decrease in landings matches an increase in regulation: both successful domestic laws and failed international agreements.[81] These laws protect fish stocks from being depleted by having regional fisheries management councils monitor fish stocks and dictate how many fish in a species fishermen may take out in a given year.[82]

UNCLOS III does not delegate jurisdiction over all fishing upon the high seas. However, it does delegate authority over mining in the Area to the ISA.[83] Years ago, mining the Area was a dream, but now that nations are close to having the power to do it, the Area has become another commons. ISA regulations mirror what the FCMA

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75. *NOAA Gulf Snapper Data*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., https://www.fisheries.noaa.gov/foss/f?p=215:200:11222476092269:Mail:::: (last visited Apr. 28, 2024) (Commercial selected and Recreational unselected; All Years; NMFS Regions, Click "Gulf;" select all species of snapper; Click "Totals by Year/Region;" and Click "Run Report") [hereinafter *NOAA Gulf Snapper Data*].

76. *Id.*

77. *See generally*, *History of Commercial Fishing*, ENCYC. BRITANNICA https://www.britannica.com/technology/commercial-fishing/History-of-commercial-fishing (last visited Apr. 8, 2023).

78. *Sea Floor Mapping*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., https://oceanexplorer.noaa.gov/explorations/lewis_clark01/background/seafloormapping/seafloormapping.html (last visited Apr. 14, 2024).

79. EAGLE & HSU, *supra* note 1, at 76.

80. *NOAA Gulf Snapper Data*, *supra* note 75.

81. *Id.* at 10-11 (UNCLOS I: 1958, UNCLOS II: 1960, UNCLOS III: 1982); *id.* at 82 (FCMA passed in 1976).

82. *See* EAGLE & HSU, *supra* note 1, at 83-84.

83. UNCLOS III, *supra* note 2, at art. 157(1).

did for managing fish stocks in the U.S. Mining technologies will only continue to improve in the foreseeable future, and a comprehensive regulatory scheme will guard against overuse of seabed resources. By signing on to UNCLOS III, the U.S. would show that it is willing to follow the same rules as everyone else when it comes to taking from the commons. Mutual coercion must be mutual, and without the United States, this mutual coercion cannot exist.

3. Mutual Coercion Must be Mutual

UNCLOS III has sweeping environmental provisions. The treaty grants the ISA the power to adopt regulations to preserve the marine environment.[84] These regulations include provisions to control pollution, dredging, drilling, construction, and to protect natural resources.[85] The ISA's authority to control the protection of these resources does not extend to a nation's natural resources, i.e., those in their continental shelves and EEZs.[86]

UNCLOS III does not stand in the way of all U.S. interests at sea. It is just a limited form of Hardin's mutual coercion.[87] Nations are allowed to exploit *their* resources, following their environmental policies; they just cannot destroy the international commons haphazardly for their benefit. This limited intrusion on the United States' ability to destroy the environment is why UNCLOS III is necessary. Without UNCLOS III, nations could compete with one another until they could not compete anymore—as there would be no resources left for which to compete.

What would happen if the United States continued not to ratify UNCLOS III? Hardin's coercion is mutually agreed upon, not unilateral. The United States, as a powerful force in the international community, could ignore the environmental provisions without any fear of significant repercussions in the international courts. Our potential flippancy with these rules may convince other nations that they can also ignore them. The United States should not be the reason this ultimate example of a commons is eradicated.

In sum, technology will continue to advance forever. Absent clear rules for all nations to abide by, the tragedy of the commons will continue to become worse. Mutual coercion needs to be mutual. The United States' continuing failure to ratify UNCLOS III is not mutual coercion. As a result, the regulations of the ISA will fail, and

84. UNCLOS III, *supra* note 2, at art. 145.
85. *Id.*
86. UNCLOS III, *supra* note 2, at art. 193, 56.
87. *See* Hardin, *supra* note 71, at 1247.

the free-for-all race for deep sea resources will begin. There will only be one loser in this race—the environment.

B. "En-Shore-ing" U.S. National Interests

Failure to ratify UNCLOS III has only stood in the way of the United States' national interests for the past four decades. The United States needs to ratify the Convention to represent itself better on the world stage. This section will explore the navigation interests, preventing bad actor interests, representation interests, and international dispute interests impacted by UNCLOS III.

1. Navigation

Freedom of navigation is a custom in international law and is codified by UNCLOS III.[88] United States forces have inserted themselves to preserve the custom through the Freedom of Navigation program.[89] The United States does not have to be a lone soldier in the fight to protect its rights—the U.S. can leverage UNCLOS III to ensure its rights are protected.

The Department of Defense supports UNCLOS III ratification because it protects the United States' navigation rights. The Office of the Judge Advocate for the U.S. Indo-Pacific Command released a memo highlighting the importance of UNCLOS III ratification, stating that "becoming a Party to UNCLOS would help preserve the Department of Defense's ability to move forces on, over, and under the world's oceans, *whenever and wherever needed*."[90]

Ratification would allow the U.S. Navy to turn to a clear expression of our rights instead of an amorphous navigation custom to defend our navigation. Nations of the world must work together to enforce these rights, so when it ratifies UNCLOS III, the United States will not need to unilaterally enforce the treaty anymore.

Because the U.S. has not ratified UNCLOS III, it has implemented The Freedom of Navigation program to assert U.S. navigation rights and discourage other states from operating inconsistently with the navigation provisions of UNCLOS III.[91] The

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88. GROTIUS, *supra* note 24, at 8; UNCLOS III, *supra* note 2, at art. 87(1)(a).

89. *See generally,* Office of the Staff J. Advoc., U.S. Indo-Pacific Command, *The U.S. Position on the U.N. Convention on the Law of the Sea (UNCLOS)*, 97 INT'L L. STUD. 81 (2021) [hereinafter *The U.S. Position on the U.N. Convention on the Law of the Sea*].

90. *See generally id*. at 81-87 (discussing the stance of various government groups on UNCLOS) (emphasis added).

91. Captain George V. Galdorisi, *Treaty at a Crossroads*, U.S. NAVAL INST. (July 2007) https://www.usni.org/magazines/proceedings/2007/july/treaty-crossroads; *see generally U.S. Freedom of Navigation Program*, *supra* note 89 (discussing the specifics of the Freedom of Navigation program).

program enforces what is laid out in the UNCLOS III treaty: ensure the security of the world's oceans and give all nations access to the seas.[92] This expensive program operates through threats of force instead of through a solid body of law that already exists.[93]

Enforcement through force threatens the lives of U.S. sailors. In 2021, the Freedom of Navigation program found that twenty-six nations were acting outside the UNCLOS III program, expanding their jurisdiction illegally over the seas.[94] Some of these nations are friendly with the United States, like Japan, while others are less friendly, like China.[95] The current U.S. approach of enforcement through force risks unnecessary conflict with these nations.

Using force risks the lives of U.S. sailors unnecessarily. Ratifying UNCLOS III gives the United States an extra avenue to exhaust when defending navigational rights: the diplomatic option. Using the diplomatic option will protect U.S. sailors because the nation can resolve conflicts over navigation without deploying the fleet, which may provoke conflict from foreign actors. If the diplomatic option fails, we will still need the fleet, but attempting peaceful negotiations reduces the probability that force will be needed to protect U.S. interests. In addition to protecting sailors' lives, the U.S. can share the burden of protecting navigation rights with the rest of the world by ratifying UNCLOS III.

While not a party to UNCLOS III, the U.S. is still enforcing the rights and restrictions it sets forth. Our government is carrying the burden of enforcing this treaty to protect our customary right to navigate. Ratification will lock in our codified right and make the United States an ocean policy leader once again. As a leader, the United States can reduce the strain on the Freedom of Navigation program by sharing the responsibility of preserving the freedom to navigate with all signatories.

Certainly, pointing to a signature on a document would not be sufficient to protect our rights in a vacuum. However, ratification will send the world a signal that the United States is not going to play around with its rights anymore. When the time comes to enforce the treaty, the U.S. will do so with the backing of codified international law. It is time for the United States to come into the fold and carry the burden with the aid of the international community. Ratification of UNCLOS III is a must to secure U.S. navigational freedom.

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92. *U.S. Freedom of Navigation Program*, *supra* note 89, at 71 (discussing the specifics of the Freedom of Navigation program).

93. Galdorisi, *supra* note 91.

94. *U.S. Freedom of Navigation Program*, *supra* note 89, at 72.

95. *Id.* at 73.

2. Stopping Bad Actors

Chinese interests are currently adversely affecting American interests at sea. China's actions fall into two categories: flagrant violations of the UNCLOS III artificial island provisions and presence on the ISA. U.S. ratification will push back against China's growing sphere of influence and guard U.S. interests. Each of these categories will be tackled in turn throughout this section.

China, an UNCLOS III signatory, has thwarted the Convention for years. At best, China has misinterpreted the EEZ provision on artificial islands for years and, at worst, is willfully ignoring it. China, Taiwan, the Philippines, Vietnam, and Malaysia all have claims to the South China Sea, and many lay overlapping claims to various natural islands.[96] This territory was relatively unimportant to these nations until they found minerals in the deep seabed.[97] Since 1969, all five nations have set up artificial islands to extract these resources.[98] China has gone a step further: they are creating these islands to establish an EEZ over the South China Sea and claiming these artificially created islands gain the same rights as naturally created islands.[99] This jurisdictional extension will cause issues with U.S. Navigation and mining throughout the region.

Chinese actions highlight the importance of the tragedy of the commons in seas regulations. By acting against the mutual coercion set up by UNCLOS III, China causes a drain on the resources in the South China Sea, destroying this commons. Mutual coercion needs to be mutual, so U.S. ratification of UNCLOS III will allow the United States to ensure that China and all bad actor states are mutually coerced by the treaty.

The South China Sea is not the only place China is extending its influence. China is influencing the ISA as well, through its presence in the ISA's various organs. It has been a member of the Council in two types of seats: as a significant contributor to the development of the deep seabed and as a significant consumer/importer.[100] Additionally, China is always a member of the Finance Committee.[101] If the United States continues to give the ISA the cold shoulder, then China will continue to have a powerful voice that can

96. Kohl, *supra* note 51, at 921.
97. *Id.*
98. *Id.*
99. *Id.* at 923.
100. Int'l Seabed Auth., s*upra* note 62 (click "Composition of Council 1996-2026") (showing that China's seats changed in 2005, it was a major investor from 1996-2005, and a major importer from 2005-present).
101. *Members of the Finance Committee*, INT'L SEABED AUTH., https://www.isa.org.jm/wp-content/uploads/2022/07/FinComMembersList_1997-2021.pdf (last visited Apr. 28, 2024) (listing all the members of the ISA Finance Committee).

direct where the cost-sharing provisions will go. China, as a world superpower on the Finance Committee, could define the equitable sharing criteria called for in UNCLOS III.[102] In fact, China has the third-highest share received in the proposed geometric mean formula.[103] If the U.S. ratifies UNCLOS III, it can push back on China's influence on the committees.

As members of the committee, U.S. delegates can direct funds back into its own hands and create incentives to keep this money out of its enemy's hands. Otherwise, under a Chinese-influenced finance committee, it might be equitable to send money to these bad actors that dissenters fear will misappropriate it and work against U.S. interests. China's expanding influence needs to be checked. If the United States ratifies UNCLOS III, it would be able to enter the ISA as a member and weed out the bad actors within it.

3. Representation

The ISA is debating the specifics of deep seabed mining, but only signatories to UNCLOS III can participate in the talks.[104] The United States is losing its voice because it failed to sign on to the convention. The United States has always been a powerful force when dictating the law of the sea. The EEZ came from our Fisheries Management Statute.[105] The Continental Shelf claims came from President Truman.[106] The nation is losing an opportunity to shape the seas. These regulations could be the chance for the United States to shape UNCLOS III to match our policies. If it had a voice in the negotiations, U.S. representatives could throw their weight around like when the nation claimed the continental shelf and the EEZ and like they did during the drafting of UNCLOS III itself; instead, it must sit passively by and let other nations make regulations that benefit them and could harm the U.S.

This lack of representation strikes at the very core of American ideals. In the late 1770s, the nation went to war against the foreign controller who taxed us without representation. Today, the United States is willfully silencing itself and allowing a foreign entity to act without the nation's consent. This silence will only act against U.S. interests. Ratifying UNCLOS III today would be the same as

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102. UNCLOS III, *supra* note 2, at art. 82(4).

103. Policy Brief, *supra* note 68, at 5. China had the second highest distribution in a previous plan, as well. *Id.*

104. Jordan Wolman, *The world is set to debate seabed mining regulations, but the U.S. will be on the outside looking in*, POLITICO (Mar. 22, 2022), https://www.politico.com/news/2022/03/22/seabed-mining-regulations-00019005.

105. *See supra* Section II(C).

106. *Id.*

picking up a musket in 1776: creating an avenue for U.S. voices to be heard.

4. International Disputes

The international community would likely disfavor U.S. attempts to mine in the open seas absent ratification. It will look like the world community is playing by the rules when it comes to mining by jumping through the ISA's hoops to get approval. When the U.S begins to mine, without the ISA's approval process, it will look like it is exploiting a shared resource that all these nations want. When someone acts outside the mutual coercion of the commons, the members who agree to the rules will want to hold them accountable. For example, the United States prosecutes bank robbers and tax evaders every day because they decide not to be bound by this coercion.[107] The world community, in turn, may turn on the U.S. for "robbing the bank."

Suppose the United States were to get into a seabed mining dispute. In that case, it could sue parties of UNCLOS III and the ISA as a state enterprise at the Seabed Dispute Chamber ("Chamber").[108] Parties to the convention *do* get more avenues of recourse against more groups, but putting those aside, the simple ability to sue may not be enough to give the United States equal footing in the Chamber's considerations.[109] The United States, an influential international entity, will be arguing from the outside of UNCLOS III. Despite its strength, it would still be an outsider. The Chamber may be more inclined to rule in favor of an UNCLOS III party rather than a foreign force threatening its authority. Furthermore, when subjected to this tribunal's rules and procedures during suit, the United States will again be bound by UNCLOS III's rules and regulations without having a voice in their implementation.[110]

U.S. interests will only be served by ratifying UNCLOS III. Right now, the nation is playing without a home court advantage in international disputes over its actions at sea. The best way to ensure U.S. interests at sea is to come into the fold and ratify UNCLOS III.

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107. Hardin, *supra* note 71, at 1247. He uses the bank robbing and tax evasion example in his treatise.

108. UNCLOS III, *supra* note 2, at art. 187(c).

109. *Id.* at art. 187.

110. *See supra* Section IV(B)(iii).

C. There Are No Monsters Under the Seabed

Objectors' arguments against ratification center around fears of an overbearing authority forcing compliance upon the United States. The main vessels for these arguments are the cost-sharing and environmental provisions. Detractors fear these provisions will put extra strain on the United States' interests and backdoor environmental regulations. This "boogeyman" argument against UNCLOS III misinterprets the treaty text and ignores the environmental benefits the United States will gain by ratifying.

1. More Money, No Problems

UNCLOS III's cost-sharing provisions do not need to be why the United States fails to ratify the convention. They are one of the first reasons cited when the United States chose not to ratify.[111] The Senate Committee on Foreign Relations held hearings in June 2012 regarding ratification.[112] Donald Rumsfeld, former secretary of Defense and representative of the United States at UNCLOS III during the Reagan administration, spoke at the hearing. He stated the following as reasons not to ratify,

> The treaty creates a United Nations-style body called the 'International Seabed Authority.' 'The Authority,' as U.N. bureaucrats call it in Orwellian shorthand, would be involved in all commercial activity such as mining and oil and gas production in international waters.[113]

Rumsfeld also asserts that royalties of seabed mining flowing through a committee without oversight would be detrimental to U.S. entities because of the lack of control that the United States would have over this cashflow.[114] This is because the ISA could pay the funds collected to cost-sharing programs to nations that work contrary to U.S. national security interests, such as countries that sponsor terrorism.[115]

These concerns ignore the history of the convention and the modern world. The ISA can seem like a monster under the seabed, but this is not the case. When the United States ratifies UNCLOS

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111. *Statement on United States Actions Concerning the Conference on the Law of the Sea* (July 9, 1982), https://www.reaganlibrary.gov/archives/speech/statement-united-states-actions-concerning-conference-law-sea.

112 *See* The Law of the Sea Convention: Hearing on Treaty Doc. 103-39 Before the S. Comm. on Foreign Rel., 112th Cong. 176 (2012).

113. *Id.* (statement of Donald Rumsfeld, Sec'y of Def.).

114. *Id.*

115. *Id.*

III, it will still be a superpower—a superpower who has been an innovator in sea regulations since even before the UNCLOS I treaty.[116] A superpower that led the UNCLOS III convention up until it decided not to ratify the most comprehensive attempt at regulating the seas because of one provision that the then-current administration did not like.

Cashflow uncertainty from the cost-sharing provisions is a significant problem, but that problem is solved by one of the biggest issues the convention solves: the tragedy of the commons. Money reaped from these benefits would be a part of the commons; it is a resource common to all members of UNCLOS III. Controlling this commons, like the rest of the Area, falls to the ISA.[117] If the United States were a party, then it would have a strong voice to say where that money goes.

The idea of bad actors in corrupt regimes abusing the funds is terrifying, but this is not a strictly UNCLOS III issue. The idea of foreign aid misappropriation by corrupt leaders is a problem throughout international relations law.[118] Professor Fernando Tesón argues that if someone objects to intervention on these grounds, then they should either be less of a pessimist or object to all international actions (like aid or war) because someone may act against the will of the country offering aid.[119]

The foreign aid problem should not be the reason the U.S. has no voice in seas regulations. The problem of foreign aid misappropriation is endemic to all international law. Curing the disease requires intervention at its source, not by treating a symptom alone. Great legal thinkers should be working towards fixing the perversion of foreign aid, not standing in the way of a treaty that will preserve a benefit for all humankind.

2. Backdooring Environmental Regulations

Critics also fear that nations will try to control one another's environmental regulations through UNCLOS III. This fear is unfounded. The convention is exactly the mutual coercion that Hardin calls for and furthermore these "control" mechanisms do not force legislation but prevent destruction of the commons.

Keeping one another from destroying the commons is not backdooring environmental policy. The Public Policy Center believes that environmental groups are rejoicing because they can

116. *See supra* Section II(C).

117. *See The Finance Committee*, INT'L SEABED AUTH., s*upra* note 63.

118. Fernando Tesón & Bas van der Vossen, Debating Humanitarian Intervention: Should We Try to Save Strangers? 129-30 (Oxford Univ. Press ed. 2017).

119. *Id.* at 130-31.

now use international laws as a vessel for change.[120] They also say that requiring member states to abide by the convention's terms is backdooring:

> Ireland sought ITLOS's [The International Tribunal for the Law of the Sea] help in forcing the United Kingdom to abandon its planned opening of the Sellafield MOX plant, a nuclear fuel reprocessing plant in northern eastern England, arguing that it would contribute to pollution of the North Sea.[121]

The UNCLOS III provisions are explicit. Nations can do what they want within their borders, but do not let it affect other states:

> States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution *to other States and their environment*, and that pollution arising from incidents or activities under their jurisdiction or control *does not spread beyond the areas where they exercise sovereign rights* in accordance with this Convention.[122]

Dissenters who fear other nations controlling U.S. environmental regulations do not understand the convention. Nations may destroy their land all they want, but UNCLOS III protects the commons for all humankind. Other nations cannot come out from under your bed and force you to protect the environment, just prevent you from destroying the one common to us all.

UNCLOS III will not subject the United States to an oppressive foreign regime trying to take its hard-earned minerals, money, or force it to preserve its environment. As a party to UNCLOS III, the U.S. would be too powerful to oppress. Once a member, the U.S. will be back to trend-setting the law of the sea, like it did with the continental shelf and EEZ.[123] By signing on, the United States would work towards the preservation of the commons—it will not blindly walk into coercion by other states. United States interests need not fear UNCLOS III and the ISA.

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120. *See* David Ridenour, *Ratification of the Law of the Sea Treaty: A Not-So-Innocent Passage*, NAT'L POL'Y ANALYSIS #542 (Aug. 1, 2006) https://nationalcenter.org/ncppr/2006/08/01/ratification-of-the-law-of-the-sea-treaty-a-not-so-innocent-passage-by-david-ridenour/.

121. *Id.*

122. UNCLOS III, *supra* note 2, at art. 194(2) (emphasis added).

123. *See supra* Section II(C).

V. CONCLUSION

The ratification argument comes down to two main points. First, technology exacerbates the tragedy of the commons issue. Preserving the commons requires mutual coercion of all members who can draw from it. This coercion cannot be mutual without the United States. Second, remaining on the sidelines will only continue to hurt the United States. Its "cold shoulder" approach to seas regulations has gone on for too long. Hiding from the alleged "monster under the seabed" cannot be the United States' policy any longer. It is time to "seas" the opportunity to ratify the third United Nations Convention on the Law of the Sea.