

International Law of the Sea

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I. United Nations Convention on the Law of the Sea

A. THE UNITED STATES AND UNCLOS

After a flurry of activity in 2007, election year politics largely subsumed efforts to achieve U.S. accession to the United Nations Convention on the Law of the Sea (UNCLOS) in 2008.¹ The Senate Foreign Relations Committee had approved the treaty in October 2007 by a seventeen to four vote and had referred it to the full Senate for its advice and consent to ratification.² But despite continuing widespread and bipartisan support for the treaty, including the support of the Bush Administration, the treaty was never brought to a vote before the full Senate.³ In November 2008, John B. Bellinger, Legal Advisor to the U.S. Department of State, described the scenario in the following terms:

Opponents were ultimately successful in keeping it from reaching the Senate floor by making it clear that a debate on U.S. accession would trigger every possible procedural maneuver and thereby take up maximum floor time. The Senate Majority Leader decided not to send the treaty forward under these circumstances, and the treaty has languished on the Senate calendar for the last year.⁴

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1. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm [hereinafter UNCLOS].

2. Jim Abrams, *Senate Panel Backs Sea Treaty*, LIBERTY MATTERS, Oct. 31, 2007, http://www.libertymatters.org/newsservice/2007/faxback/3180_Lost2.htm (UNCLOS was backed by all eleven Democrats and by six Republicans, but was opposed by Senators Jim DeMint (R-S.C.), Norm Coleman (R-Minn.), Johnny Isakson (R-Ga.), and David Vitter (R-La.)).

3. On the widespread support for UNCLOS during 2007, see Michael A. Becker, *International Legal Developments in Review, 2007 – Public International Law: International Law of the Sea*, 42 INT'L LAW. 797, 797-99 (2008) [hereinafter Becker]. Supporters continued to urge ratification in 2008. See, e.g., Letter from R. Bruce Josten & Gen. Jim Jones, U.S.M.C. (Ret.) to Sen. Harry Reid and Sen. Mitch McConnell (May 22, 2008), <http://www.virginia.edu/colp/pdf/Reid-McConnell%20letter08.pdf> (expressing the strong support of the U.S. Chamber of Commerce for U.S. ratification of UNCLOS).

4. John B. Bellinger III, Legal Advisor, U.S. Dep't of State, Remarks at the Law of the Sea Institute, Berkeley, Cal., (Nov. 3, 2008) available at <http://ilreports.blogspot.com/2008/11/bellinger-united-states-and-law-of-sea.html> [hereinafter Bellinger Remarks].

As a result, treaty supporters at year's end focused on the extent to which the 2008 elections had improved the prospect of UNCLOS ratification in 2009. President Barack Obama expressed strong support for the treaty during the campaign:

The oceans are a global resource and a global responsibility for which the U.S. can and should take a more active role. I will work actively to ensure that the U.S. ratifies the Law of the Sea Convention—an agreement supported by more than 150 countries that will protect our economic and security interests while providing an important international collaboration to protect the oceans and its resources.⁵

In addition, Vice President Joe Biden, who was Chair of the Senate Foreign Relations Committee during the 2007 hearings, has long supported U.S. accession.⁶ By contrast, Senator John McCain, the Republican nominee for president in 2008, backed away from UNCLOS during the campaign, even though he had previously been a supporter.⁷ McCain's decision to "reconsider" his commitment to the treaty was at odds with the position of his running-mate, Governor Sarah Palin of Alaska.⁸ Two former Republican administrators of the Environmental Protection Agency cited this "reconsideration" as a factor in their decision to support Obama over McCain in the election.⁹

Democratic gains in the U.S. Senate have increased the number of potential "yes" votes in favor of ratification. The election of Senators Kay Hagan (D-N.C.), Jeff Merkley (D-Ore.), and Mark Udall (D-Col.) replaced three potential "no" votes with three likely "yes" votes. At the time of writing, it was unclear whether Senator Norm Coleman (R-Minn.) would lose to challenger Al Franken. Coleman opposed the treaty in 2007. The positions of at least two other newly elected senators—Mike Johanns (R-Neb.) and Jim Risch (R-Id.)—are unknown. Johanns replaced Chuck Hagel, a vocal supporter of the treaty; Risch replaced Larry Craig, a likely opponent.

Taken together, the election of President Obama and the democratic gains in the Senate created favorable conditions for U.S. accession to UNCLOS, particularly given the widespread interest in securing U.S. rights to exploit previously inaccessible hydrocarbon resources beneath the Arctic seabed. Nonetheless, as UNCLOS supporters know well, a determined minority has thwarted ratification for many years by advancing arguments and

5. See ScienceDebate2008.com, Barack Obama's Answers To The Top 14 Science Questions Facing America, <http://www.sciencedebate2008.com/www/index.php?id=42> (responding to a questionnaire submitted to both presidential candidates by a consortium that included the American Association for the Advancement of Science and the National Academy of Sciences).

6. Press Release, Joseph R. Biden's Opening Statement at SFRC Hearing (Oct. 31, 2007), available at <http://www.oceanlaw.org/downloads/references/senate/Biden-31Oct07.pdf>.

7. *McCain Caters to GOP Voters*, WASH. TIMES, Oct. 31, 2007, available at <http://www.washingtontimes.com/news/2007/oct/31/mccain-caters-32to-gop-voters/>.

8. Letter from Gov. Sarah Palin to Sen. Ted Stevens and Sen. Lisa Murkowski (Sept. 13, 2007), available at http://www.globalsolutions.org/files/general/Palin_LOS_Letter.pdf (emphasizing Alaska's interest in the adjudication of "claims to submerged lands in the Arctic" and dismissing concerns over sovereignty).

9. William D. Ruckelhaus & Russell E. Train, *Lifelong Republicans Make the Switch*, TAMPA TRIB., Nov. 1, 2008, available at <http://www2.tbo.com/content/2008/nov/01/co-lifelong-republicans-make-the-switch/> (Commentators have speculated that with the election behind him, McCain may revert to his previous position); See also Hugo Miller, *Arctic-Seabed Oil Claims by U.S. May Quicken Under New Senate*, BLOOMBERG.COM, Nov. 20, 2008, available at <http://www.bloomberg.com/apps/news?pid=20601109&sid=axGnGj6oDSqY&refer=home>.

assertions that can be fairly described as “inaccurate, outdated, or incomplete.”¹⁰ Given the many challenges facing the new administration, UNCLOS ratification is by no means a certainty in 2009, despite the military, commercial, and environmental interests that ratification would advance.

B. RATIFICATION OF UNCLOS AND RELATED AGREEMENTS BY OTHER STATES

The number of other states parties to UNCLOS continues to grow. On July 9, 2008, the Democratic Republic of Congo acceded to the treaty, and Liberia, which operates one of the world’s largest shipping registries, followed on September 25, 2008.¹¹ Those two countries, as well as Cape Verde and Guyana, also ratified the Agreement Relating to the Implementation of Part XI of the Convention, which deals with exploitation and management of the deep seabed.¹² In addition, Republic of Korea, Palau, Oman, Hungary, and Slovakia ratified the Agreement for the Implementation of the Provisions of the Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, which now counts 72 states parties.¹³

C. COMMISSION ON LIMITS OF THE CONTINENTAL SHELF

Article 76 of UNCLOS defines the continental shelf and sets forth procedures for the determination of its outer limit where the shelf extends more than 200 nautical miles from the coastal state.¹⁴ Claims to the continental shelf are administered by the Commission on Limits of the Continental Shelf, a body established pursuant to UNCLOS. A state must submit its application—including sophisticated scientific data to support the claim—within ten years of the entry into force of UNCLOS for that state.¹⁵

In 2008, the Commission continued to review pending applications and received new submissions from Barbados, the United Kingdom, Indonesia, and Japan.¹⁶ For several states, May 2009 marks the end of the ten year submission deadline. This is expected to generate a significant increase in submissions to the Commission, which reportedly “has pressed in vain for more funding to review so much new data.”¹⁷ Several countries took

10. Bellinger Remarks, *supra* note 4.

11. For a complete list of states parties to UNCLOS, see http://www.un.org/Depts/los/convention_agreements/convention_agreements.htm. Land-locked Switzerland also took steps to ratify the treaty in 2008, but, as of the time of writing, had not completed the ratification process. See Julia Slater, *Switzerland Takes On The Sea*, SWISSINFO, May 19, 2008, available at http://www.swissinfo.ch/eng/front/Switzerland_takes_on_the_sea.html?siteSect=105&sid=9106668&rss=true&ty=st.

12. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, 1836 U.N.T.S. 41, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

13. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks, Aug. 4, 1995, 2167 U.N.T.S. 88, available at http://www.un.org/Depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm.

14. UNCLOS, *supra* note 1, art. 76.

15. Robert Lee Hotz, *Board of Scientists Is Swamped By Claims For Rich Sea Floors*, THE WALL STREET J., Feb. 22, 2008, available at <http://online.wsj.com/article/SB120363436202384279.html?mod=rss>.

16. See Commission on the Limits of the Continental Shelf, http://www.un.org/Depts/los/clcs_new/clcs_home.htm (last visited Mar. 21, 2009).

17. Hotz, *supra* note 15.

the position that a “pragmatic approach” is required to balance the Commission’s increasing workload with the fact that some states may be unable to comply with the ten year deadline due to a lack of scientific and technical resources.¹⁸

II. Developments in the Arctic

In 2008, international attention remained focused on the continental shelf claims of the Arctic states because of the considerable oil, gas, and mineral reserves believed to exist beneath Arctic waters. Furthermore, the continued retreat of the polar ice cap opened the Northern Sea Route (along Russia’s northern shore) and substantial sections of the Northwest Passage (in North America) to shipping traffic during part of the year.

These developments—and the perceived rapid pace of climate change in the region—generated cries of alarm in 2008, including warnings of a “coming anarchy” in which Arctic states could be expected to “unilaterally grab” as much territory as possible and calls for a new international treaty to manage the region.¹⁹ Other reports fretted that a resurgent Russia was already exploiting the region’s strategic vacuum to intimidate its neighbors.²⁰

Meanwhile, governments with a direct stake in the Arctic spent much of 2008 emphasizing just the opposite. In May, representatives from Canada, Denmark, Norway, the Russian Federation, and the United States met in Ilulissat, Greenland to discuss challenges posed to the Arctic by climate change. In a concluding statement, the participants emphasized that UNCLOS provides the framework for dealing with the issues facing the Arctic—from protection of the marine environment to freedom of navigation—and that “[w]e therefore see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean.”²¹ The Ilulissat Declaration stressed the importance of cooperation in (1) the protection and preservation of the region’s marine environment; (2) the improvement of search and rescue capabilities as ship traffic increases in the region; and (3) the collection of scientific data.²²

Legal Advisor Bellingier of the State Department echoed these themes a month later in the *New York Times*:

We should all cool down. While there may be a need to expand cooperation in some areas, like search and rescue, there is already an extensive legal framework governing the region. The five countries bordering the Arctic Ocean—the United States, Ca-

18. UNCLOS Meeting of States Parties, Eighteenth Meeting, New York, U.S., June 13-20, 2008, U.N. Doc. SPLOS/184 (July 21, 2008), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N08/432/05/PDF/N0843205.pdf?OpenElement>.

19. See, e.g., Scott G. Borgerson, *Arctic Meltdown: The Economic and Security Implications of Global Warming*, FOREIGN AFFAIRS, Mar.-Apr. 2008, available at <http://fullaccess.foreignaffairs.org/20080301faessay87206/scott-g-borgerson/arctic-melt-down.html>.

20. See *The High North—The Arctic Contest Heats Up: What is Russia Up To In The Seas Above Europe?*, THE ECONOMIST Oct. 9, 2008, available at http://www.economist.com/world/europe/displayStory.cfm?source=hp_textfeature&story_id=12381767.

21. Arctic Ocean Conference, Ilulissat, Greenland, May 27-29, 2008, *The Ilulissat Declaration* (May 28, 2008), available at <http://arctic-council.org/filearchive/Ilulissat-declaration.pdf>. [hereinafter *Ilulissat Declaration*] See also Bellingier Remarks, *supra* note 4 (summarizing the areas in which the participants agreed “there may be room for improvement”).

22. *Ilulissat Declaration*, *supra* note 21.

nada, Denmark, Norway, and Russia—have made clear their commitment to observe these international legal rules. In fact, top officials from these nations met last month in Greenland to acknowledge their role in protecting the Arctic Ocean and to put to rest the notion that there is a Wild West-type rush to claim and plunder its natural resources.²³

In subsequent remarks, Bellinger further noted that in addition to UNCLOS, non-binding rules such as the International Maritime Organization's 2002 guidelines for ships operating in ice-covered waters (the so-called Polar Code) and the Arctic Council's Guidelines on offshore oil and gas activities supplement that framework.²⁴

Russia, too, appeared willing to dampen the media frenzy over competing Arctic claims in 2008. Just one year after an elaborate stunt that involved planting a Russian flag on the seabed at the North Pole,²⁵ in October the Russian Foreign Ministry emphasized that discussion of "a possible military conflict for Arctic resources is baseless;" that the region's problems would be "solved on the basis of international law;" and that it was preparing an application to extend the borders of its continental shelf in a manner fully consistent with UNCLOS Article 76.²⁶ The United States acknowledged as much.²⁷

The European Union offered a less consistent message. In October 2008, the European Parliament expressed concern over potential "security threats for the EU" resulting from "the ongoing race for natural resources in the Arctic," and suggested a need for "international negotiations designed to lead to the adoption of an international treaty for the protection of the Arctic, having as its inspiration the Antarctic Treaty."²⁸ The resolution clearly tacked away from the UNCLOS-centered approach promoted by the United States and others, and critics have pointed out that "[t]he situations in the Arctic and the Antarctic are hardly analogous."²⁹ But in November 2008, the European Commission issued its own report on the Arctic and emphasized the development of "a cooperative Arctic governance system" based on UNCLOS, while also calling for permanent observer status for the European Union in the Arctic Council, the intergovernmental body of Arctic states focused on scientific and environmental issues.³⁰

In 2008, Canada continued to press its case for a special regime to cover the Northwest Passage, the series of straits and channels connecting the Atlantic and the Pacific Oceans

23. John B. Bellinger, *Treaty on Ice*, N.Y. TIMES, June 23, 2008, available at <http://www.nytimes.com/2008/06/23/opinion/23bellinger.html> [hereinafter Bellinger]. Bellinger further emphasized that the United States "should take full advantage of the existing rules" by signing up to UNCLOS. *Id.*

24. See Bellinger Remarks, *supra* note 4.

25. C.J. Chivers, *Russians Plant Flag on the Arctic Seabed*, N.Y. TIMES, Aug. 3, 2007, available at <http://www.nytimes.com/2007/08/03/world/europe/03arctic.html>.

26. *Moscow Asks to Stop Arctic War Intimidations*, INTERFAX, Oct. 22, 2008, available at <http://www.istockanalyst.com/article/view/StockNews/articleid/2730476>.

27. Daily Briefing, U.S. Dep't of State, Office of the Spokesperson, Russian Claims to Arctic Territory (Taken Question) (Sept. 18, 2008), available at <http://2001-2009.state.gov/r/pa/prs/ps/2008/sep/109928.htm>.

28. Resolution of 9 October 2008 on Arctic Governance, EUR. PARL. DOC. P6_TA (2008) 0474, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0474+0+DOC+XML+V0//EN>.

29. Bellinger, *supra* note 23 (nothing that among other factors, the Arctic is an ocean surrounded by continents, while the Antarctic is a continent surrounded by oceans).

30. Communication from the Commission to the European Parliament and the Council, The European Union and the Arctic Region, Nov. 4, 2008, EUR. PARL. DOC. (COM 2008) 763 (2008), available at <http://www.europa-kommissionen.dk/upload/application/8a4b7e1e/uuu.pdf>.

through Arctic waters that are surrounded by Canadian lands. Canada views those waterways as historic internal waters. The United States and the European Union, however, treat the passage as an international strait subject to the right of transit passage. Canadian Prime Minister Stephen Harper announced in 2007 that Canada would construct two new military facilities within “contested ARCTIC waters” to bolster its sovereignty claims.³¹ Harper continued to develop the theme in 2008. First, Harper announced that all ships transiting Canada’s Arctic waters would be required to register with NORDREG, Canada’s Arctic marine traffic system.³² According to Harper, Canada’s Coast Guard would intercept and detain vessels that fail to comply with the reporting requirements.³³ Harper also announced that Canada would amend the Arctic Waters Pollution Prevention Act of 1970 to prohibit the deposit of waste from land or ship sources in Arctic waters within 200 nautical miles of the Canadian shoreline—a doubling in size of the regulatory zone over which Canada intends to exert jurisdiction.³⁴

III. Maritime Security

A. PIRACY

Piracy off the coast of Somalia reached unprecedented levels in 2008 as pirates captured larger ships and more valuable cargoes than ever before. As of late November 2008, approximately 100 acts of piracy had been reported in and around the Gulf of Aden—the busy shipping lane that connects the Red Sea and the Indian Ocean.³⁵ Pirates successfully captured vessels in approximately forty of those attacks.³⁶ The ransoms reportedly paid for the release of hijacked vessels, including their crews and cargoes, was projected to reach fifty million dollars by year’s end.³⁷ Reports characterized the emergence of a piracy-based economy in Somalia as “an extension of the corrupt, violent free-for-all that has raged on land for [seventeen] years since the central government imploded in 1991.”³⁸

Despite international efforts to coordinate a multilateral response, Somali pirates appeared emboldened by a string of high-profile attacks, many of which took place several hundred miles from the coast. In April, pirates seized a French yacht, *Le Ponant*, with a crew of thirty people. France dispatched Djibouti-based commandos to the scene, and a two million dollar ransom was ultimately paid to secure the yacht’s freedom.³⁹ Then in September, Somali pirates captured the *M/V Faina*, a Ukrainian vessel carrying thirty mil-

31. See Becker, *supra* note 3, at 802-03.

32. *Canada Requires Ship Registration in Arctic*, MSNBC.COM, Aug. 27, 2008, available at <http://www.msnbc.msn.com/id/26429116/> [hereinafter *Ship Registration*].

33. *Id.* This potentially would violate the right of transit passage through international straits guaranteed by UNCLOS. But states bordering on international straits are allowed to prescribe traffic separation schemes where necessary to promote the safe passage of ships; other measures to promote safe navigation may also be lawful. See UNCLOS, *supra* note 1, arts. 38, 41-42.

34. *Ship Registration*, *supra* note 32.

35. Thom Shanker, *U.S. Urges Merchant Ships to Try Steps to Foil Pirates*, N.Y. TIMES, Nov. 20, 2008.

36. *Id.*

37. Jeffrey Gettleman, *Somalia’s Pirates Flourish in a Lawless Nation*, N.Y. TIMES, Oct. 31, 2008.

38. *Id.* Some have partially attributed the rise of Somalia’s lucrative piracy racket to the destruction of the Somali fishing industry by illegal fishing practices perpetrated by foreign fleets. See *The Indian Ocean: The Most Dangerous Seas in the World*, THE ECONOMIST, July 17, 2008 [hereinafter *The Indian Ocean*].

39. *The Indian Ocean*, *supra* note 38.

lion dollars of military equipment—T-72 tanks—to Kenya.⁴⁰ And in November, in perhaps the most brazen act of piracy seen to date, pirates seized a Saudi-owned supertanker, the *Sirius Star*, 500 miles southeast of Mombasa, Kenya on its voyage from the Persian Gulf to the United States with a \$100 million cargo of oil.⁴¹ Just two weeks later, Somali pirates engaged in another high-profile attack, hijacking a chemical tanker despite the presence of private security contractors on board.⁴² The *M/V Faina* and the *Sirius Star*—among several other vessels—remained anchored off the Somali coast in early December 2008, ransoms not yet paid. As a result of the attacks, shipping companies began rerouting their ships to avoid the Suez Canal route, instead taking the longer and more costly journey around the southern tip of Africa.⁴³

Responding to the escalating crisis, the U.N. Security Council adopted three resolutions under Chapter VII of the U.N. Charter. Building on measures previously taken in 2007 concerning the use of convoys to protect ships delivering humanitarian supplies to Somalia, in June 2008 the Security Council authorized states cooperating with Somalia's transitional government to "[e]nter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea."⁴⁴ Resolution 1816 gave states the right to use "all necessary means" consistent with international law to repress the unlawful conduct, but also required advance notice of such activity to the Security Council.⁴⁵ In practical terms, the resolution made it lawful for foreign navies to chase pirates into Somali waters and, if necessary, to use force against them. Amid a worsening situation, the Security Council dropped the notice requirement when it issued Resolution 1838 in October 2008. In more urgent terms, the Security Council called upon interested states "to take part actively in the fight against piracy on the high seas off the coast of Somalia, in particular by deploying naval vessels and military aircraft" to the region.⁴⁶

In connection with those two resolutions, Canada, Denmark, France, Germany, India,⁴⁷ Russia, Spain, Turkey, the United Kingdom, and the United States all dispatched warships to the region during 2008.⁴⁸ In addition, the North Atlantic Treaty Organization deployed ships to the region in October 2008 to conduct anti-piracy operations.⁴⁹ By year's end, the NATO contingent was scheduled to be replaced by a European Union

40. Jeffrey Gettleman, *Somalia Pirates Capture Tanks and Global Notice*, N.Y. TIMES, Sept. 27, 2008.

41. *Somali Pirates Grab Saudi Oil Tanker*, N.Y. TIMES, Nov. 17, 2008; *See also Ship Owners Call for UN-Led Force*, BBC NEWS, Nov. 24, 2008.

42. Nicholas Kulish, *Legal Hurdles in West Slow Pursuit of Pirates*, N.Y. TIMES, Nov. 29, 2008.

43. Abdi Sheikh, *Major Shippers Skirt Gulf of Aden to Avoid Pirates*, REUTERS, Nov. 20, 2008.

44. S.C. Res. 1816, ¶ 7, U.N. Doc. S/RES/1816 (June 2, 2008). Articles 100-107 of UNCLOS already provide the legal authority to seize pirate ships on the high seas. UNCLOS, *supra* note 1, arts. 100-107.

45. S.C. Res. 1816, *supra* note 44, ¶ 7.

46. S.C. Res. 1838, ¶¶ 2-3, U.N. Doc. S/RES/1838 (Oct. 7, 2008).

47. In November, India reported that one of its warships had sunk a suspected pirate "mother ship"—a ship used by pirates as a base of operations—in the Gulf of Aden. *India 'to Step Up Piracy Battle'*, BBC NEWS, Nov. 21, 2008. Subsequent reports indicated that the sunken vessel—a Thai tuna trawler—had only itself been hijacked by pirates earlier that same day and that its crew was being held hostage when the Indian navy sunk the vessel. *India Navy Defends Piracy Sinking*, BBC NEWS, Nov. 26, 2008.

48. Paul Reynolds, *Rules Frustrate Anti-Piracy Efforts*, BBC NEWS, Dec. 19, 2008.

49. Press Release, NATO, Standing NATO Maritime Group Transits Suez Canal En-Route to Anti-Piracy Duties (Oct. 15, 2008); Press Release, NATO, NATO Task Group of Operation Allied Provider Has Escort Duties (Oct. 27, 2008).

fleet.⁵⁰ Finally, in December 2008, the Security Council adopted Resolution 1846, which lauded those states that had already sent forces to the region and further authorized states and regional organizations to seize and dispose of “boats, vessels, arms and other related equipment” used in the commission of piracy and armed robbery off the coast of Somalia.⁵¹ Importantly, Resolution 1846 also authorized seizures where there is “reasonable ground for suspecting such use.”⁵²

The crisis has raised important legal questions. First, the proper procedures for investigating and prosecuting acts of maritime piracy remain unclear to some actors, even though UNCLOS provides that:

[t]he courts of the State which [carries] out the seizure [of a ship engaged in piracy] may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.⁵³

Nonetheless, the Secretary-General of the International Maritime Organization (IMO) appealed to the U.N. Secretary General in November 2008, urging the Security Council to establish “an effective legal jurisdiction” for bringing alleged offenders to justice.⁵⁴ The Security Council responded quickly. Resolution 1846 calls upon all states to cooperate in efforts to facilitate the investigation and prosecution of persons responsible for acts of piracy.⁵⁵ The Security Council also urged parties to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (the SUA Convention) to fully implement their obligations under that treaty, which provides for parties “to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of” acts of piracy or armed attacks at sea.⁵⁶

Second, how to deal with “suspected” pirates, as opposed to actors apprehended in the course of an actual act of piracy, remains a point of uncertainty.⁵⁷ In this respect, the IMO specifically asked the Security Council to provide “clear rules of engagement” for the anti-piracy forces operating in the region.⁵⁸ The problem was partially addressed by Resolution 1846, which, as noted above, authorized states to suppress piracy on the basis

50. Richard Norton-Taylor, *British Warship to Lead EU Armada Into Gulf of Aden*, THE GUARDIAN, Nov. 20, 2008; see also Kulish, *supra* note 42 (reporting that “Operation Atalanta” will consist of six frigates, three to five airplanes, and some 1,200 people from as many as a dozen E.U. member states).

51. S.C. Res. 1846, ¶¶ 6, 9, U.N. Doc. S/RES/1846 (Dec. 2, 2008).

52. *Id.* ¶ 9.

53. UNCLOS, *supra* note 1, art. 105.

54. Press Release, International Maritime Organization, IMO Chief Makes Direct Appeal to Security Council for Somalia Piracy Action (Nov. 21, 2008); see also James Kraska & Brian Wilson, *Piracy, Policy, and Law*, U.S. NAVAL INST. PROCEEDINGS MAG. (Dec. 2008) (noting the uncertainty surrounding the appropriate means by which to pursue prosecutions).

55. S.C. Res. 1846, *supra* note 51, ¶ 14.

56. *Id.* ¶ 15.

57. For example, a Danish warship reportedly captured ten men suspected of being pirates in the Gulf of Aden in September 2008, but the men were subsequently released after the Danes concluded that they lacked jurisdiction to prosecute. Gettleman, *Somalia's Pirates Flourish* *supra* note 37. And despite the adoption of Resolution 1846 in December, Danish authorities declined to arrest a group of suspected pirates that were rescued from a disabled speedboat, despite the presence of suspicious weapons on board. Alan Cowell, *Danish Navy Rescues Suspected Pirates*, N.Y. TIMES, Dec. 6, 2008.

58. Sheikh, *supra* note 43.

of reasonable suspicion.⁵⁹ In the United States, a working group composed of representatives from the Departments of Defense, Justice, and Homeland Security remained actively engaged with this issue.⁶⁰

While the situation off Somalia remained troubling, there was better news elsewhere. Across the continent, the twenty member states of the Maritime Organization of West and Central Africa (MOWCA) adopted a Memorandum of Understanding in July 2008 to establish a coast guard network for the sub-region, with coordinating centers in Accra, Ghana and Luanda, Angola.⁶¹ The agreement provides for coastal surveillance and authorizes the “right of hot pursuit” to combat unlawful activity, including piracy.⁶² The initiative is aimed at that region’s own piracy problem, largely focused off Nigerian shores.

In addition, the Malaysia-based International Maritime Bureau reported in November that maritime attacks in Asia decreased by eleven percent during the first nine months of 2008.⁶³ This continues the even greater decrease seen in 2007. Indeed, while forty-seven attacks were reported in the Gulf of Aden during the first quarter of 2008, only two attacks were reported in the Straits of Malacca—until recently, the world’s piracy epicenter.⁶⁴ The coordinated naval patrols by Indonesia, Malaysia, and Singapore were given credit for the decrease. The Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia, signed in 2004, provides for such patrols.⁶⁵

B. PROLIFERATION SECURITY INITIATIVE

The year 2008 marked the fifth anniversary of the Proliferation Security Initiative (PSI), the informal multinational network established by the Bush Administration in May 2003 to identify and disrupt the proliferation of weapons of mass destruction (WMD), their delivery systems, and related materials.⁶⁶ Participating states agree to a set of “Interdiction Principles” and to the timely and accurate exchange of information concerning suspected proliferation activity.⁶⁷ As of October 2008, ninety-one states had endorsed those principles. Most of them met in May 2008 to reaffirm the network’s goals.⁶⁸

On the operational side, in 2008, the United States participated in a PSI training exercise hosted by New Zealand; ran its own exercise near the Panama Canal; and signed a shipboarding agreement with the Bahamas. Earlier in the year, a 2007 shipboarding agreement with Mongolia entered into force.⁶⁹ Furthermore, in September 2008, the U.S. Senate gave its advice and consent to ratification of the 2005 SUA Protocol, an im-

59. See S.C. Res. 1846, *supra* note 51, ¶ 9.

60. Kraska & Wilson, *supra* note 54. These efforts build on the comprehensive anti-piracy measures that the Bush administration adopted in 2007 as part of the National Strategy for Maritime Security.

61. Press Release, International Maritime Organization, West and Central African States to Co-Operate in Sub-Regional Coastguard Network (Aug. 12, 2008).

62. *Id.*

63. Mark McDonald, *Maritime Hijackings are Decreasing in Asia*, N.Y. TIMES, Nov. 19, 2008.

64. *Id.*

65. Kraska & Wilson, *supra* note 54.

66. Media Note, Office of the Spokesman, U.S. Department of State, Washington Declaration for PSI 5th Anniversary Senior-Level Meeting (May 28, 2008).

67. *Id.*

68. *Id.* A list of participants as of October 10, 2008 is available at <http://www.state.gov/t/isn/c19310.htm>.

69. U.S. Gov’t Accountability Office, Report to Congressional Committees, Nonproliferation: U.S. Agencies Have Taken Some Steps, But More Effort Is Needed To Strengthen and Expand the Proliferation Secur-

portant amendment to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.⁷⁰ The Protocol criminalizes WMD proliferation and provides independent legal authority to board ships suspected of proliferation activity. At the time of writing, Congress had not yet passed the necessary implementing legislation.

In November 2008, then President-Elect Obama indicated that as part of his administration's efforts to combat terrorism, he would seek to "institutionalize" the PSI.⁷¹ It remains to be seen what this entails, but PSI proponents have routinely cited the network's informal, non-institutional nature as an important part of its success.⁷² Nonetheless, efforts to bring greater accountability to PSI methods and results—while respecting the sensitive nature of PSI operations—may be the first step towards securing greater cooperation from states that have not yet committed to the PSI principles. These include China, India, and Indonesia.

In November 2008, a report from the Government Accountability Office (the "GAO Report") assessed the status of U.S. involvement with the PSI.⁷³ The GAO Report recommended that U.S. law enforcement agencies establish "clear policies, procedures, and indicators to support PSI activities" and that the Departments of State and Defense undertake greater efforts to coordinate with the full range of PSI participating states, and not only "the nineteen other leading PSI countries that attend multilateral meetings."⁷⁴ The GAO Report noted critically that the Bush Administration had failed to comply with binding and non-binding provisions of the Implementing Recommendations of the 9/11 Commission Act of 2007,⁷⁵ which, among other things, required the President to issue a directive to U.S. agencies to establish clear PSI policies and procedures, structures, funding, and performance indicators.⁷⁶ The GAO Report further noted that the Departments of State and Defense had thus far failed to develop "a written strategy to resolve interdiction issues," including how to handle the disposal of seized cargo and how to prosecute individuals apprehended in the course of PSI interdictions.⁷⁷

IV. Whaling

In January 2008, the long-simmering dispute between Australia and Japan over whaling practices in the Southern Ocean resurfaced. The controversy could increase international scrutiny of both Japan's controversial whaling practices and Australia's claim to sovereignty over a large section of Antarctica and its coastal waters.⁷⁸

ity Initiative, 22-24, GAO 09-43 (Nov. 2008), available at <http://www.gao.gov/new.items/d0943.pdf> [hereinafter GAO Report].

70. *Id.* at 24.

71. The Office of the President-Elect, Agenda: Homeland Security, http://change.gov/agenda/homeland_security_agenda (last visited Nov. 30, 2008).

72. See, e.g., Emma Belcher, *Throwing Out the Bathwater, but Keeping the Baby*, HUFFINGTON POST, Nov. 20, 2008.

73. GAO Report, *supra* note 69, at 1.

74. *Id.*

75. Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266, § 1821.

76. GAO Report, *supra* note 69, at 1-2, 8-9.

77. *Id.* at 6.

78. Only France, New Zealand, Norway, and the United Kingdom recognize Australia's claim. See *Whaling: Saly Shepherd*, THE ECONOMIST, Jan. 24, 2008.

Commercial whaling has been banned since 1986, but hunting whales for the purpose of conducting scientific research is still permitted, with restrictions.⁷⁹ Operating under that exception, Japanese whaling vessels have continued to hunt whales, including in the Southern Ocean.⁸⁰ In 1999, Australia declared a whale sanctuary throughout its Exclusive Economic Zone (EEZ), the maritime zone that extends 200 nautical miles from shore. Because Australia also claims an EEZ off the coast of its disputed Antarctic territory, Australia asserts that the whale sanctuary also applies in those waters.⁸¹

The conflict came to a head in January 2008, when an Australian environmental organization obtained an injunction in Australian federal court against a Japanese whaling company operating in the Southern Ocean.⁸² The court determined that the Japanese company had breached Australian environmental law by killing whales in the purported whale sanctuary. The Japanese company reportedly refused to accept service of the order or to acknowledge Australia's right to regulate its conduct.⁸³

Meanwhile, also in January 2008, activist groups Greenpeace and the Sea Shepherd Conservation Society attempted to disrupt Japanese whaling operations in the region. In one headline-grabbing maneuver, two Sea Shepherd protestors managed to board a Japanese vessel at sea in an act of protest; they were subsequently detained on board for a number of days.⁸⁴ Continued hunting by Japanese whaling vessels in waters over which Australia claims jurisdiction could eventually form the basis for a claim by Australia before the International Court of Justice (ICJ) or the International Tribunal for the Law of the Sea (ITLOS), but it remains to be seen whether Australia is willing to defend its Antarctic claims in an international forum.

V. Dispute Resolution

A. INTERNATIONAL COURT OF JUSTICE

In January 2008, Peru instituted proceedings against Chile before the ICJ.⁸⁵ Peru seeks the delimitation of its maritime boundary with Chile in the Pacific Ocean and validation of its claimed EEZ.⁸⁶ Chile has historically treated those waters as the high seas.⁸⁷ The case was in its early stages at year's end.

79. International Convention for the Regulation of Whaling art. VIII, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72.

80. See *Whaling: Salty Shepherd*, *supra* note 78.

81. *Id.*; see also Rosslyn Beeby, *Whalers Refuse To Accept Injunction*, *CANBERRA TIMES*, Jan. 24, 2008.

82. Beeby, *supra* note 81.

83. *Id.*

84. *Whaling: Salty Shepherd*, *supra* note 78. The International Whaling Commission condemned Sea Shepherd's tactics, urging the organization "to refrain from dangerous actions that jeopardise safety at sea." Press Release, International Whaling Commission, Statement on Safety At Sea made at the International Whaling Commission's Intersessional Meeting (Apr. 23, 2008).

85. Press Release, Int'l Court of Justice, Peru Institutes Proceedings Against Chile With Regard to a Dispute Concerning Maritime Delimitation Between the Two States (Jan. 16, 2008).

86. *Id.*

87. *Id.*

In September 2008, public hearings in the case concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine) concluded and the ICJ began its deliberation.⁸⁸ Romania initiated the proceedings in 2004, seeking the establishment of a single maritime boundary between the two states in the Black Sea, thereby delimiting the continental shelf and the exclusive economic zones appertaining to them.⁸⁹ The parties dispute the appropriate starting point for the maritime boundary and the methodology to be used in drawing that boundary.

B. U.S. FEDERAL COURTS

1. *Winter v. Natural Resources Defense Council*

In November 2008, the U.S. Supreme Court decided *Winter v. Natural Resources Defense Council*.⁹⁰ By a six to three margin, the Court invalidated court-imposed restrictions that had prohibited the U.S. Navy from conducting training exercises that use powerful sonar frequencies off the coast of southern California. Conservationists had argued that the use of “mid-frequency active sonar” by the Navy causes severe injury or disruption to whales and other marine mammals. A preliminary injunction by the federal district court—which the U.S. Court of Appeals for the Ninth Circuit upheld—had required the Navy to mitigate the potential harm before training exercises could resume.⁹¹ But the Supreme Court held that “plaintiffs’ ecological, scientific, and recreational interests in marine mammals” were “plainly outweighed by the Navy’s need to conduct realistic training exercises to ensure that it is able to neutralize the threat posed by enemy submarines,” particularly given (1) “the threat posed by enemy submarines and the need for extensive sonar training to counter the threat” and (2) the speculative nature of the possible injury to plaintiffs—“harm to an unknown number of marine mammals that [plaintiffs] study and observe.”⁹² The Court did acknowledge that “[m]ilitary interests do not always trump other considerations,” and the decision did not vacate other, undisputed portions of the lower court’s order, including the requirement that the Navy implement a twelve-mile coastal buffer and avoid certain areas with particularly high concentrations of marine mammals.⁹³

2. *United States v. Kun Yun Jho*

In June 2008, the U.S. Court of Appeals for the Fifth Circuit overturned the dismissal of criminal charges brought pursuant to the Act to Prevent Pollution from Ships (APPS), 33 U.S.C. § 1901, *et seq.*⁹⁴ The court in *United States v. Kun Yun Jho* rejected defendants’ arguments that international law prohibited the government from prosecuting the princi-

88. Press Release, Int’l Court of Justice, Maritime Delimitation in the Black Sea (Romania v. Ukraine): Conclusion of the Public Hearings (Sept. 19, 2008).

89. *Id.*

90. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008).

91. *Id.* at 367.

92. *Id.* at 378.

93. *Id.*

94. *United States v. Kun Yun Jho*, 534 F.3d 398 (5th Cir. 2008). The APPS implements the obligations of the United States under the 1973 International Convention for the Prevention of Pollution from Ship and the related Protocol of 1978—collectively known as MARPOL. In October 2008, the United States ratified Annex VI to MARPOL, which regulates the discharge of atmospheric pollutants from ships. News Release,

pal offense charged in the indictments—the knowing failure to maintain the oil record book aboard the *MT PACIFIC RUBY*, a ship owned by co-defendant Overseas Shipbuilding Group, Inc. and flying the flag of the Marshall Islands.⁹⁵

The case arose out of a U.S. Coast Guard inspection of the ship during a U.S. port stop. The Coast Guard discovered evidence that corroborated a tipster's allegations of unlawful discharges and tampering with the ship's equipment. The government subsequently charged the ship's owner and its chief engineer with violations of the APPS.⁹⁶ But a federal district court dismissed those charges after construing the alleged criminal conduct to have occurred "outside U.S. waters," and therefore beyond the scope of the APPS.⁹⁷ The district court further concluded that the prosecution violated the APPS provision requiring that its enforcement not conflict with international law.

The Fifth Circuit reversed that decision. First, the court explained that knowingly failing to *maintain* an accurate oil record book is a continuing offense that does not start and finish when inaccurate information is first recorded:

Accurate oil record books are necessary to carry out the goals of MARPOL and the APPS. If the record books did not have to be "maintained" while in the ports or navigable waters of the United States, then a foreign-flagged vessel could avoid application of the record book requirements simply by falsifying all of its record book information just before entry into a port or navigable waters. If the oil record book requirements could be avoided in this manner, the Coast Guard's ability to conduct investigations against foreign-flagged vessels would be severely hindered, and the regulation would allow polluters (and likely future polluters) to avoid detection. We refuse to conclude that by imposing limitations on the APPS's application to foreign-flagged vessels Congress intended so obviously to frustrate the government's ability to enforce MARPOL's requirements.⁹⁸

Second, the Fifth Circuit carefully explained that neither "the law of the flag doctrine" nor UNCLOS provided any obstacle to U.S. enforcement of the APPS. The district court had construed "the flag doctrine" to grant exclusive jurisdiction over the ship to its state of registry, thereby precluding U.S. jurisdiction. But the Fifth Circuit rejected that reading and reaffirmed the long established principle that "jurisdiction may be exercised concurrently by the flag state and a territorial state," including the port state.⁹⁹ The Fifth Circuit also examined Articles 216 and 230 of UNCLOS, which concern the prevention, reduction, and control of pollution of the marine environment. On the basis of those provisions, the lower court concluded that enforcing the APPS against the defendants would

International Maritime Organization, USA Ratifies International Rules on Air Pollution From Ships (Oct. 9, 2008).

95. "An oil record book includes, among other things, a log of the ship's discharge and disposal of oil and certain oil-water mixtures." *Kun Yun Jho*, 534 F.3d at 400. See also *Blank Rome LLP, U.S. Court Strikes Down MARPOL and UNCLOS Defenses in OSG Prosecution* (July 2008), <http://www.blankrome.com/index.cfm?contentID=37&itemID=1608>.

96. *Kun Yun Jho*, 534 F.3d at 400-01.

97. The APPS record book requirements only apply to foreign-flagged ships while in the navigable waters of the United States, or while at a port or terminal under jurisdiction of the United States. 33 U.S.C. § 1902(a) (2008).

98. *Kun Yun Jho*, 534 F.3d at 402.

99. *Id.* at 403.

violate international law.¹⁰⁰ Rejecting that argument, the Fifth Circuit concluded that the complete marine pollution prevention scheme of UNCLOS—which allocates various levels of enforcement authority to port states, coastal states, and flag states—“actually broadens the traditional authority given to a port state” to enforce marine pollution laws.¹⁰¹ The court determined that nothing in the UNCLOS provisions cited by the lower court, nor anywhere else in UNCLOS:

limits the power of a state to prosecute violations of its criminal laws that occur after a ship has voluntarily entered its port. Instead, UNCLOS broadens the traditional authority of a port state to allow a port state to pursue violations of marine pollution law that occur outside of its ports, and in some circumstances, outside of its coastal zones.¹⁰²

Accordingly, the Fifth Circuit confirmed the authority of the U.S. government “to prosecute MARPOL/APPS violations, at least in relation to falsified oil record books, no matter where the actual alleged pollution incident and false oil record book entry occurred.”¹⁰³ The decision is a strong statement of the complementary relationship between national and international authorities directed at preventing pollution of the marine environment. Furthermore, given the relatively few federal cases that address specific UNCLOS provisions, the decision is notable for its careful and thoughtful analysis of the treaty.

100. The court was careful to note that because the United States is not a party to UNCLOS, the treaty is relevant to the APPS “only to the extent that UNCLOS reflects customary international law.” *Kun Yun Jho*, 534 F.3d at 406. Because the court found no conflict between UNCLOS and the APPS in any event, it was not required to decide which UNCLOS provisions had attained that status.

101. *Id.*

102. *Id.* at 409.

103. *Blank Rome LLP, supra* note 95.