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Report to the House of Delegates UN Convention on the Law of the Sea

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American Bar Association Section of International Law and Practice Standing Committee on World Order Under Law

Report to the House of Delegates UN Convention on the Law of the Sea*

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association recommends that a special high-level working group within the United States government be established by the President, in consultation with Congress, to determine: (a) what changes and clarifications would make Part XI of the 1982 United Nations Convention on the Law of the Sea acceptable to the United States; (b) what steps should be taken to make these changes and clarifications acceptable to other nations; and (c) by what procedures these changes and clarifications can best be introduced into or attached to the Convention.

REPORT

The United States did not sign the 1982 Convention on the Law of the Sea because of disagreement with the contents of Part XI relating to deep seabed mining. This resolution is designed to promote the United States' becoming a party to the Convention by bringing about changes in Part XI which would make the Convention acceptable to the United States.

Adoption of a codified rule of law for the oceans is of paramount importance to the United States and the world. The 1982 United Nations Convention on the Law of the Sea, the product of long and intensive negotiations, can provide a stable framework for the interaction of nations on a wide range of oceans issues. The Convention defines rights and duties with respect to navigation, overflight, marine scientific research, management of fisheries and other marine resources, maritime jurisdiction and boundaries, the marine environment, and other lawful uses of the oceans. A comprehensive treaty governing these issues is of particular importance to nations such as the United States whose public and private

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interests benefit from a stable legal framework within which to carry out their activities. In addition, the 1982 Convention satisfies important United States interests by establishing wide limits to the continental shelf regime and establishing the regime of the 200-mile exclusive economic zone.

When the Convention was finalized in 1982, 159 nations—though not the United States—signed it. The Convention has not yet entered into force. It has to date received 40 of the 60 ratifications necessary for its entry into force.

The U.S. decision not to sign the 1982 United Nations Convention on the Law of the Sea stemmed from its opposition to certain aspects of the deep seabed mining regime set out in Part XI of the Convention. The U.S. Executive branch and the Congress, however, had supported the Convention negotiating process through four Democratic and Republican presidential administrations. Even when it refused to sign the Convention, the United States Executive branch indicated its support for all but Part XI of the 1982 Convention, arguing that the non-seabed mining provisions of the Convention represent customary international law.

The United Nations Convention on the Law of the Sea contains institutional features that can help to promote obedience to norms found in the Convention and to stabilize the law of the sea. The Convention includes provisions for compulsory third party adjudication of many potential issues. The United States could elect to have a tribunal review and pronounce on the legality under the Convention of another nation's actions. The mere presence of a comprehensive dispute settlement system will help to deter unreasonable unilateral interpretations or violations of Convention norms. These dispute settlement mechanisms will not be operative if the Convention does not enter into force, and the mechanisms are unlikely to be available to the United States if it is not a party to the Convention.

The United States has supported the non-seabed mining portions of the Convention by its words and its actions. The President invoked the Law of the Sea Convention in 1983 in proclaiming a United States exclusive economic zone extending 200 nautical miles from the United States coastline. The oceans area encompassed by that zone exceeded 2,000,000 square miles. The President also invoked the Convention in 1988 when he extended U.S. territorial waters from 3 to 12 miles, adding 195,500 square miles to the U.S. territorial sea, and he recognized the exercise of navigational rights in the territorial sea "in accordance with international law, as reflected in the applicable provisions of the 1982 Convention on the Law of the Sea." A U.S. representative stated before the United Nations in November 1988 that "[t]he United States, as we have stated in the past, views the United Nations Convention on the Law of the Sea as a major accomplishment in the development of international law relating to the oceans."

Without the Law of the Sea Convention in place as treaty law, however, a significant risk exists that nations will not follow its provisions. U.S. assertions of support for Convention provisions coupled with unilateral U.S. actions cannot

eliminate this risk. The great concern is that, unless the Convention enters into force and achieves widespread acceptance, the world will find itself back in the unstable pre-Convention situation where unilateral state assertions of extensive national jurisdiction were rampant.

The American Bar Association has long been sensitive to the difficulties contained in the Convention's deep seabed mining regime. It summarized the U.S. difficulties with certain technical and institutional provisions of the seabed mining regime of Part XI in a 1983 resolution. Among them were:

- Provisions that would actually deter future development of deep seabed minerals resources when such development should serve the interests of all countries;
- A decision-making process that would not give the United States or others a role that fairly reflects and protects their interest;
- Provisions that would allow amendments to enter into force for the United States without its approval;
- Stipulations relating to mandatory transfer of private technology and the possibility of national liberation movements sharing in benefits; and
- The absence of assured access and security of tenure for future qualified deep seabed miners to promote the development of these resources. (American Bar Association Section of International Law and Practice Report to the House of Delegates, August 1983, p. 5.)

Some of the technical and institutional provisions of Part XI, in short, have been perceived as an obstacle to the U.S. acceptance of the Convention, although the United States government has never disputed the overall value of an international agreement that retains the basic features of the legal regime of Part XI. Section 3 of the 1980 Deep Seabed Hard Mineral Resources Act, for example, states that the United States "does not . . . assert sovereignty or sovereign or exclusive rights of jurisdiction over, or the ownership of, any areas or resources in the deep seabed." Section 3 goes on to urge the Secretary of State to negotiate a comprehensive Law of the Sea Treaty to "provide[] assured and nondiscriminatory access to the hard mineral resources of the deep seabed for all nations" and to "give[] legal definition to the principle that the resources of the deep seabed are the common heritage of mankind." Certainly, an international regime for the deep seabed can provide stable rules to govern future mining operations and can create a deterrent to unilateral coastal state expansion into the international commons.

It should be possible to reach an agreement on Part XI that will allow the United States to accept, and by its acceptance to strengthen, the 1982 United Nations Convention on the Law of the Sea. Deep seabed mining issues seem less pressing today than they did in 1983, because of the realization that it will be decades before deep seabed mining operations become commercially feasible and because of the discovery of relatively more attractive, rich mineral deposits within the U.S. exclusive economic zone in the Pacific. A realistic view of the

current prospects for deep seabed mining and of the importance to the world community of the 1982 United Nations Convention on the Law of the Seabed should allow countries to agree that Part XI should not present an obstacle to widespread international support for the Convention. There are indications that other countries, including those from the Third World, are increasingly willing to consider changes that would accommodate U.S. objections to Part XI.

It is crucial, however, to make sure that discussions regarding Part XI not result in changes to other parts of the Convention. Reconsideration of other parts of the Convention would risk unravelling important and delicate provisions. It would also require a major negotiation process potentially of the magnitude and scope of the Third United Nations Conference on the Law of the Sea. Such an exercise is likely to be unacceptable to all nations, especially the United States. It would be better to consider an approach like the conclusion of a protocol modifying the effects of Part XI alone.

Because the United Nations Convention on the Law of the Sea is so important to United States interests, this Resolution urges the establishment of a special U.S. working group composed of high-level representatives of all interests involved. This working group will determine what changes and clarifications affecting Part XI of the Convention are now needed, and how best to implement them.

In a real sense this is a golden moment in history for the United States to lead the way in achieving what had been for many years felt to be unachievable. While recognizing the potential need for changes and clarifications affecting Part XI in order to make the Convention acceptable to the United States and other countries, the sponsors of this Resolution, in pursuance of Goal VIII and the establishment of a rule of law in relations among nations, strongly recommend that the United States become a party to the 1982 United Nations Convention on the Law of the Sea.

Respectfully submitted,
 James R. Silkenat, Chair,
 Section of International Law and Practice
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 Standing Committee on World
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February, 1990