

Background

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U.N. Convention on the Law of the Sea Erodes U.S. Sovereignty over U.S. Extended Continental Shelf

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Abstract: *If the U.S. becomes a member of the United Nations Convention on the Law of the Sea, it will be required to transfer a large portion of the royalties generated on the U.S. extended continental shelf to the International Seabed Authority. These royalties could likely total tens or even hundreds of billions of dollars. The Authority may then distribute those funds to developing and landlocked nations, including some that are corrupt, undemocratic, or even state sponsors of terrorism. Instead of diverting U.S. revenues to such dubious purposes, the U.S. government should retain any wealth derived from the U.S. extended continental shelf for the benefit of the American people.*

U.S. law decrees that the mineral resources on and below the surface of the continental shelf are held by the federal government for the benefit of the American people. The U.S. Department of the Treasury and some U.S. states benefit from royalties paid by energy companies for the oil and natural gas that they extract from the continental shelf off the coast of Alaska and in the Gulf of Mexico.

Membership in the United Nations Convention on the Law of the Sea (UNCLOS) would alter U.S. law and current practice for the worse. If the United States joined the convention, it would be required to transfer a portion of the royalty revenue generated on the U.S. extended continental shelf (the shelf beyond 200 nautical miles from shore) to the International Seabed Authority in Kingston, Jamaica. The Authority is empowered to distribute those funds—considered “international royalties”—to developing and land-

Talking Points

- The U.S. currently enjoys full sovereignty over its entire continental shelf. It can claim clear title to all mineral resources (e.g., oil and gas) lying under the shelf and can collect royalty revenue for the exploitation of such resources.
- The resources located on the U.S. extended continental shelf (submerged lands 200 nautical miles or more from shore) may be worth trillions of dollars and would generate substantial royalty revenue.
- If the U.S. joined the U.N. Convention on the Law of the Sea, it would be required to transfer a portion of these royalties to the International Seabed Authority in Kingston, Jamaica.
- The ultimate beneficiaries could easily include corrupt and despotic regimes and state sponsors of terrorism.
- Transferring royalties to an unaccountable international organization is not in the best interests of the United States or the American people, who should remain the sole beneficiary of such royalties.

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locked nations, including some that are corrupt, undemocratic, or even state sponsors of terrorism.

Given the potentially massive mineral wealth on the U.S. extended continental shelf, U.S. accession to UNCLOS would likely have significant financial implications. Congress, particularly the Senate, needs to fully consider the potential wealth transfer that would result from joining UNCLOS. To this end, the U.S. Task Force on the Extended Continental Shelf needs to complete its work so that the Senate and the rest of the U.S. government will have a better estimate of the royalty revenue at stake.

The U.N. Convention on the Law of the Sea

The U.N. Convention on the Law of the Sea was adopted at the Third U.N. Conference on the Law of the Sea on December 10, 1982.¹ UNCLOS is considered by some to be a “constitution for the ocean,” defining the rights and responsibilities of all nations on matters ranging from the breadth of a nation’s territorial waters to the conduct of ships on the high seas.

President Ronald Reagan, whose Administration participated in the final stages of the UNCLOS negotiations, refused to sign the convention and stated several objections to it, most of which dealt with the convention’s provisions on deep seabed mining. In subsequent years, an effort was made to address these objections, which were also raised by other

Article 82 requirements contrast starkly with U.S. law and policy on resources on the U.S. continental shelf and the disposition of royalties.

nations. Negotiations over revisions in the deep seabed mining provisions of UNCLOS concluded in 1994 during the Clinton Administration. This addendum to UNCLOS, which sought to revise the objectionable provisions, was adopted by the U.N. General Assembly on July 28, 1994, and signed by the United States on July 29, 1994.²

President Bill Clinton transmitted UNCLOS and the 1994 agreement to the U.S. Senate for its advice and consent on October 7, 1994.³ Although the Senate Committee on Foreign Relations has conducted several hearings on UNCLOS, the full Senate has not consented to the convention or the 1994 addendum, and the United States remains a non-party to both instruments.

There are several reasons why the United States should be skeptical of acceding to UNCLOS,⁴ but this paper focuses on just one: Article 82 of UNCLOS would require the United States, if it became a member, to transfer a portion of the royalties from exploiting resources on its extended continental shelf to the International Seabed Authority, an international organization established

1. United Nations Convention on the Law of the Sea (UNCLOS), December 10, 1982, at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm (April 29, 2011).
2. 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, at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindxAgree.htm (April 29, 2011). Although the 1994 agreement revised the UNCLOS provisions on the deep seabed, it did not modify the treatment of mineral resources located on the continental shelf within national jurisdiction, which is the focus of this paper.
3. *United Nations Convention on the Law of the Sea, with Annexes, and Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, with Annex*, Treaty Doc. 103–39, 103d Cong., 2d Sess., October 7, 1994, p. iii.
4. For example, see Steven Groves, “Why Reagan Would Still Reject the Law of the Sea Treaty,” Heritage Foundation *WebMemo* No. 1676, October 24, 2007, at <http://www.heritage.org/Research/Reports/2007/10/Why-Reagan-Would-Still-Reject-the-Law-of-the-Sea-Treaty>; Baker Spring, Steven Groves, and Brett D. Schaefer, “The Top Five Reasons Why Conservatives Should Oppose the U.N. Convention on the Law of the Sea,” Heritage Foundation *WebMemo* No. 1638, September 25, 2007, at <http://www.heritage.org/Research/Reports/2007/09/The-Top-Five-Reasons-Why-Conservatives-Should-Oppose-the-UN-Convention-on-the-Law-of-the-Sea>; and Edwin Meese III, Baker Spring, and Brett D. Schaefer, “The United Nations Convention on the Law of the Sea: The Risks Outweigh the Benefits,” Heritage Foundation *WebMemo* No. 1459, May 16, 2007, at <http://www.heritage.org/Research/Reports/2007/05/The-United-Nations-Convention-on-the-Law-of-the-Sea-The-Risks-Outweigh-the-Benefits>.

by UNCLOS and seated in Kingston, Jamaica. In turn, the Authority would distribute the royalty revenue to various developing nations in a manner that might not advance U.S. national interests. These Article 82 requirements contrast starkly with U.S. law and policy on resources on the U.S. continental shelf and the disposition of royalties.

U.S. Law and Policy on the Continental Shelf's Resources

Before the end of World War II, national sovereignty and jurisdiction were understood to end at the outer edge of a nation's territorial sea, generally considered to be three nautical miles (nm) from a nation's shoreline.⁵ However, there was no consensus on the limit of national claims to resources of the sea or seabed beyond a nation's narrow territorial sea.

This situation began to change on September 28, 1945, when President Harry S. Truman issued Proclamation 2667, "Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf." The proclamation states in part:

Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.⁶

The purpose and intent of the Truman Proclamation are clear from the opening paragraph, which references "the long range world-wide need for new sources of petroleum and other minerals" and encourages their discovery and extraction.⁷ Indeed, the accompanying White House press release explains further:

The advance of technology prior to the present war had already made possible the exploitation of a limited amount of minerals from submerged lands within the 3-mile limit. The rapid development of technical knowledge and equipment occasioned by the war now makes possible the determination of the resources of the submerged lands outside of the 3-mile limit. With the need for the discovery of additional resources of petroleum and other minerals, it became advisable for the United States to make possible orderly development of these resources. The proclamation of the President is designed to serve this purpose.⁸

President Truman's proclamation was modified by U.S. law in 1953 in the Outer Continental Shelf Lands Act (OCSLA), which defined the outer continental shelf (OCS) as "all submerged lands lying seaward and outside of the area of lands beneath navigable waters...and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control."⁹ The OCSLA definition places no limit on the seaward extent of the U.S. continental shelf, the end of which is determined only by where the deep seabed begins.

5. Barry E. Carter, Phillip R. Trimble, and Allen S. Weiner, *International Law*, 5th ed. (New York: Aspen Publishers, 2007), pp. 870–871 and 882.
6. Harry S. Truman, "Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf," Presidential Proclamation No. 2667, September 28, 1945, at <http://www.presidency.ucsb.edu/ws/index.php?pid=12332> (April 29, 2011). On the same day, President Truman issued a second proclamation concerning the establishment of conservation zones for the protection of coastal fisheries. Harry S. Truman, "Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas," Presidential Proclamation No. 2668, September 28, 1945, at <http://www.presidency.ucsb.edu/ws/index.php?pid=58816> (April 29, 2011).
7. Truman, "Policy of the United States with Respect to the Natural Resources."
8. While the proclamation itself prescribed no limiting criteria for the breadth of the continental shelf, the press release stated: "Generally, submerged land which is contiguous to the continent and which is covered by no more than 100 fathoms (600 feet) of water is considered as the continental shelf." Press release, The White House, September 28, 1945, at <http://www.presidency.ucsb.edu/ws/index.php?pid=12332> (April 29, 2011).
9. 43 U.S. Code § 1331(a) (emphasis added).

OCSLA declared that it is U.S. policy that “the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition.”¹⁰ The OCSLA further stated that the resources of the continental shelf belong to the American people:

[T]he outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs.¹¹

After Truman’s proclamation, at least 20 nations followed suit by making similar claims regarding their respective continental shelves.¹² This emerging practice, as well as disputes over the breadth of territorial waters and other maritime issues, led the U.N. General Assembly to convene the first U.N. Conference on the Law of the Sea in 1958.¹³ Four separate conventions were adopted at that conference, including the Convention on the Continental Shelf.¹⁴ The United States ratified that convention in 1961, and it remains in effect.¹⁵

The Convention on the Continental Shelf affirmed the principle, set forth by the Truman Proclamation and the OCSLA, regarding a nation’s sovereignty

over its continental shelf: “The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.”¹⁶ The convention defined the continental shelf as “the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres [about 650 feet] or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.”¹⁷

In making his proclamation in 1945, President Truman clearly intended to secure “new sources of petroleum and other minerals” for the United States.

In 1980, Congress adopted, almost verbatim, the convention’s definition of the continental shelf in the Deep Seabed Hard Mineral Resources Act (DSHMRA), which regulates the exploitation of mineral resources such as manganese, nickel, cobalt, and copper on the deep seabed beyond the limit of the U.S. continental shelf.¹⁸

Since these definitions were articulated in 1958 and 1980, advances in deep-sea mining have made it possible to exploit the resources on the continental shelf well beyond the depth of 650

10. 43 U.S. Code § 1332(1).

11. *Ibid.*, § 1332(3) (emphasis added).

12. The notion of the Truman Proclamation that a nation has an exclusive right to its continental shelf was affirmed by the International Court of Justice in 1969. *North Sea Continental Shelf Cases*, 1969 I.C.J. 3 (February 20), pp. 32–23, para. 47. See also Carter *et al.*, *International Law*, p. 885. (“[I]n the North Sea Continental Shelf Cases...the ICJ recognized that certain articles of the Convention [on the Continental Shelf] had become customary international law. This case basically recognized that the coastal state could claim jurisdiction over resources throughout the natural prolongation of the continental landmass.”)

13. U.N. Codification Division, Office of Legal Affairs, “United Nations Conference on the Law of the Sea, 1958,” 2009, at <http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1958/lawofthesea-1958.html> (April 29, 2011).

14. Convention on the Continental Shelf, Geneva, April 29, 1958, at http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_continental_shelf.pdf (April 29, 2011).

15. U.S. Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2010*, p. 401, at <http://www.state.gov/documents/organization/143863.pdf> (April 29, 2011).

16. Convention on the Continental Shelf, Art. 2(1).

17. Convention on the Continental Shelf, Art. 1. Article 1 also contains a secondary definition of the continental shelf as “the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.”

18. Deep Seabed Hard Mineral Resources Act, 30 U.S. Code § 1401 *et seq.*, §§ 1401(b), 1403(2).

feet.¹⁹ The definition of “continental shelf,” derived both from the Convention on the Continental Shelf and from the DSHMRA, therefore essentially encompasses the entire U.S. continental shelf out to the margin where it meets the deep seabed floor.

The Truman Proclamation, the OCSLA, the Convention on the Continental Shelf, and the DSHMRA collectively represent the *status quo* on the definition of the U.S. continental shelf and the disposition of its resources. In making his proclamation in 1945, President Truman clearly intended to secure “new sources of petroleum and other minerals” for the United States. The OCSLA confirmed President Truman’s assertion of U.S. jurisdiction over and control of its continental shelf and mandated that the resources of the continental shelf are “held by the Federal Government for the public.”

Finally, the provisions of the Convention on the Continental Shelf are entirely consistent with U.S. laws that define and delimit the continental shelf, such as the DSHMRA, and the convention places no restrictions on U.S. access to all resources of the shelf or its right to all benefits derived from those resources.

The Continental Shelf and the Exclusive Economic Zone

The 1945 Truman Proclamation claimed the entire U.S. continental shelf in a holistic and indivisible state, with no demarcation line for an “outer” continental shelf. In 1953, the OCSLA clarified the Truman Proclamation’s description by dividing the continental shelf between a narrow portion of the continental shelf abutting the coastline—the “lands

Under UNCLOS, the sovereign rights of a nation to its continental shelf lying beyond the 200 nm EEZ are not absolute.

beneath navigable waters”—and the vast area of the shelf beyond those lands, which was designated the “outer” continental shelf.²⁰

The concept of an undivided continental shelf became complicated in 1982 when the Third U.N. Conference on the Law of the Sea adopted the U.N. Convention on the Law of the Sea. UNCLOS provisions draw a distinction between the submerged lands of the continental shelf that extend from a nation’s shoreline out to 200 nautical miles and any submerged lands beyond 200 nm.²¹ Under UNCLOS, the submerged lands within the 200 nm limit fall within a nation’s exclusive economic zone (EEZ), within which a nation has “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources...of the seabed and its subsoil.”²² However, under UNCLOS, the sovereign rights of a nation to its continental shelf lying beyond the 200 nm EEZ are not absolute.

President Ronald Reagan decided not to become a party to UNCLOS for several reasons, many of which were related to its provisions on deep seabed mining beyond the continental shelf. However, in 1983, he issued Proclamation 5030, which declared the existence of a U.S. EEZ and defined the U.S. zone in a manner consistent with the UNCLOS definition.²³ The proclamation stated that the U.S. EEZ extended

19. For example, Transocean, the world’s largest offshore drilling contractor, has rigs that can operate in waters more than 10,000 feet deep. See Transocean, “Our Rigs: Listing by Water Depth,” at <http://www.deepwater.com/fw/main/List-by-Water-Depth-77.html> (April 29, 2011).

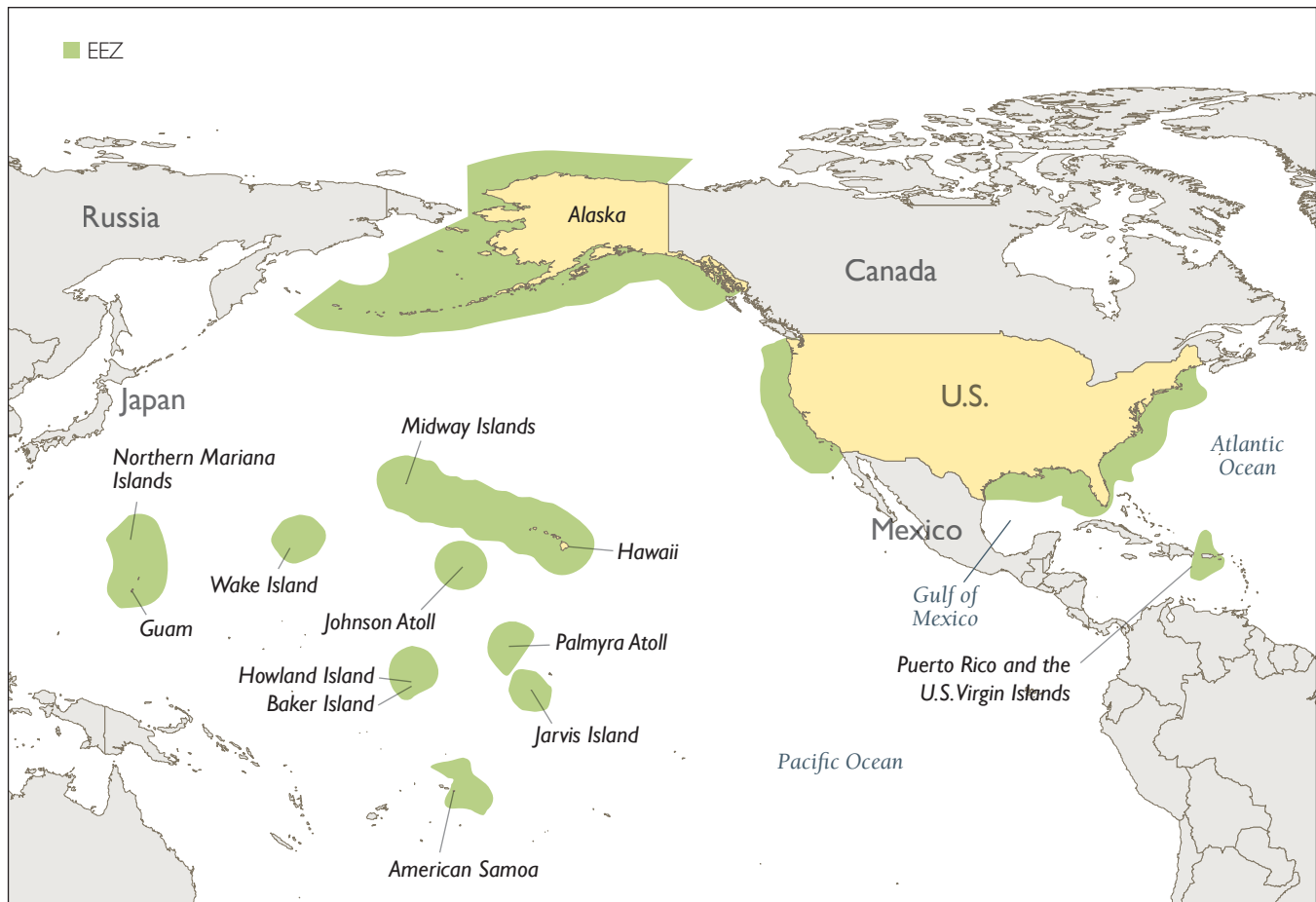
20. 43 U.S. Code § 1331(a). For the definition of “lands beneath navigable waters,” see 43 U.S. Code § 1301(a). The distinction between the “outer continental shelf” and “extended continental shelf” is further complicated by the practice of the U.S. Department of the Interior, which regularly uses the term “outer continental shelf” as shorthand to describe planning areas that it has designated for oil and gas leasing off the continental United States.

21. Article 76 of UNCLOS dictates the manner for measuring the outer limit of the continental shelf beyond 200 nautical miles for UNCLOS members. UNCLOS members are required to submit any claims to continental shelf lands beyond 200 nm to the Commission on the Limits of the Continental Shelf for review and approval. See UNCLOS, Annex II, and Commission on the Limits of the Continental Shelf, at http://www.un.org/Depts/los/clcs_new/clcs_home.htm (April 29, 2011).

22. UNCLOS, Arts. 56–57.

23. Ronald Reagan, “Exclusive Economic Zone of the United States of America,” Proclamation 5030, March 10, 1983, at <http://www.presidency.ucsb.edu/ws/index.php?pid=41037> (April 29, 2011).

U.S. Exclusive Economic Zones (EEZ)



Source: National Oceanic and Atmospheric Administration, Alaska Fisheries Science Center; U.S. Exclusive Economic Zones, at <http://www.afsc.noaa.gov/GeneralInfo/eez.htm> (May 25, 2011).

Map I • B 2561 heritage.org

200 nm from the U.S. coastline and that the United States had sovereignty over the living and nonliving resources of the seabed and subsoil of the continental shelf lying within the EEZ.

While Proclamation 5030 is silent on U.S. sovereignty beyond the EEZ, it does state that the proclamation “does not change existing United States policies concerning the continental shelf.”²⁴ A distinction between the status of submerged lands within and outside the 200 nm line likely seemed unnecessary at the time because the technology to

exploit mineral resources on the continental shelf beyond that line was at best in a nascent stage. However, the technology for deep-sea exploration has continued to advance, and in recent years, the potential to exploit mineral resources beyond the 200 nm EEZ has grown.

Since 2003, in an effort to define the outer limit of the U.S. continental shelf, the United States has collected bathymetric mapping data (to ascertain water depth) on the outer margins of the continental shelf in the Arctic Ocean, the Gulf of Alaska, the

24. *Ibid.*

Gulf of Mexico, the Atlantic Coast, and the Bering Sea and off the Northern Mariana Islands, Kingman Reef, Palmyra Atoll, Guam, Hawaii, and the West Coast. The U.S. Extended Continental Shelf Task Force, an interagency project, is conducting this data collection.²⁵ To differentiate these areas from the “outer” continental shelf, as a term of convenience, the task force designates the continental shelf extending beyond the 200 nm EEZ as the “extended continental shelf” (ECS).

To date, the ECS Task Force has identified six areas that “likely” contain submerged lands that qualify as ECS and nine areas that “possibly” contain such lands. The six likely areas are off the Atlantic Coast, in the Arctic, in the Bering Sea, west of the Marianas Islands, and two small areas in the Gulf of Mexico.²⁶ The nine “possible” ECS areas include the Gulf of Alaska, the western end of the Aleutian Islands, east of the Mariana Islands, Hawaii’s Necker Island, the Johnston Atoll, the Kingman Reef and Palmyra Atoll, and three areas off the West Coast. Over the next several years, the task force will collect additional information, particularly seismic-reflection/refraction data, to identify the outer boundaries of the U.S. ECS more definitively.

As Map 2 indicates, there is a great deal of potential for the existence of U.S. ECS in more than a dozen locations across the globe.

The value of the potential oil and natural gas deposits and other minerals lying beneath the U.S.

ECS is difficult to estimate at present, but it is likely substantial. According to the ECS Task Force, “Given the size of the U.S. continental shelf, the resources we might find there may be worth many billions if not trillions of dollars.”²⁷

Royalties and Revenue

Exploitation of resources from the U.S. ECS is expected to generate royalties in the near future, and the United States will forgo some of those royalties if it joins UNCLOS. The potential financial impact of joining UNCLOS is evident from a brief review of how revenue is generated from activities currently taking place on the U.S. outer continental shelf within the 200 nm line.

A wealth of mineral resources (e.g., oil and natural gas) lies below the surface of the U.S. OCS.²⁸ Alaska’s OCS alone may contain almost 10 billion barrels of oil and 15 trillion cubic feet of natural gas.²⁹ Massive known reserves of oil and natural gas also lie beneath the OCS in the Gulf of Mexico.

The Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE)³⁰ in the U.S. Department of the Interior manages the nation’s oil, natural gas, and other mineral resources on the OCS.³¹ One of BOEMRE’s primary activities is managing sales of offshore oil and gas leases. Through BOEMRE, the United States leases OCS tracts to companies for exploration and exploitation. The companies bid competitively for leases, and the

25. U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Service, “Extended Continental Shelf Project,” Web site, at <http://continentalshelf.gov> (April 29, 2011).
26. The “greatest potential” for an ECS is the area of the Chukchi Borderland of the Arctic Ocean. Larry A. Mayer, A. Armstrong, B. Calder, and J. Gardner, “Sea Floor Mapping in the Arctic: Support for a Potential US Extended Continental Shelf,” *International Hydrographic Review*, May 2010, p. 15, at http://ccom.unh.edu/publications/Mayer_2010_IHR_Sea_Floor_Mapping_In_The_Arctic.pdf (May 13, 2011).
27. U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Service, “About the Extended Continental Shelf Project,” September 22, 2010, at <http://continentalshelf.gov/about.html> (April 29, 2011).
28. “Minerals” include “oil, gas, sulphur, geopressured-geothermal and associated resources, and all other minerals which are authorized by an Act of Congress to be produced from ‘public lands.’” 43 U.S. Code § 1331(q).
29. Northern Economics and University of Alaska Anchorage, Institute of Social and Economic Research, “Potential National-Level Benefits of Alaska OCS Development,” February 2011, at <http://www.northerneconomics.com/pdfs/ShellOCS/National%20Effects%20Report%20FINAL.pdf> (April 29, 2011).
30. The Minerals Management Service (MMS) was renamed the Bureau of Ocean Energy Management, Regulation and Enforcement on June 18, 2010. For purposes of consistency, this paper will refer to it as the BOEMRE regardless of date.
31. U.S. Department of the Interior, Bureau of Ocean Energy Management, Regulation and Enforcement, “Frequently Asked Questions,” at <http://www.boemre.gov/ooc/newweb/frequentlyaskedquestions/frequentlyaskedquestions.htm> (April 29, 2011).

U.S. Extended Continental Shelf (ECS)



Source: U.S., Extended Continental Shelf Project, "Establishing the Full Extent of the Continental Shelf of the United States," at <http://continentalshelf.gov/media/ECSposterDec2010.pdf> (May 26, 2011).

Map 2 • B 2561 heritage.org

winning company is required to make certain payments to the Secretary of the Interior for deposit into the U.S. Treasury.

First, the company that makes the highest bid pays a "bonus bid," an up-front payment to secure the lease. Second, until production begins at the site, the company makes annual "rent" payments of \$5 to \$11 per acre, depending on the water depth at the site. Finally, once production begins, the company pays an annual royalty on the value of production

at the site. The OCSLA sets a minimum annual royalty rate of 12.5 percent, but that rate has increased over the years and often fluctuates between 12.5 percent and 16 percent, depending on the depth of the water at the site of production.

The typical royalty rate on the Alaskan OCS is 12.5 percent.³² However, new leases have a royalty rate of 18.75 percent, which will likely be the rate for future leases.³³ All royalties, rents, and bonus bids generated from lease sales and production on

32. Northern Economics and University of Alaska Anchorage, "Potential National-Level Benefits of Alaska OCS Development," p. 8.

the Alaskan OCS are transferred to the U.S. Treasury general fund.

Bonus bids, rent payments, and royalty payments are distributed differently in the Gulf region. The Gulf of Mexico Energy Security Act of 2006 (GOMESA) governs the distribution of revenue from mineral exploitation in the Gulf of Mexico.³⁴ GOMESA splits the revenue between the U.S. Treasury and certain U.S. states that border the Gulf.³⁵ The U.S. Treasury general fund receives 50 percent of the revenue from Gulf OCS leases, and the remaining 50 percent is divided between the Gulf States (37.5 percent) and the Land and Water Conservation Fund (12.5 percent).³⁶

Exploitation of resources from the U.S. extended continental shelf is expected to generate royalties in the near future, and the United States will forgo some of those royalties if it joins UNCLOS.

Both the Alaskan OCS and Gulf OCS will continue to generate revenue for the United States for many years to come. According to Interior Department estimates, the U.S. OCS contains 8.5 billion barrels of oil and 29.3 trillion cubic feet of natural gas in proved and unproved reserves and another

86 billion barrels of oil and 420 trillion cubic feet of natural gas in as yet undiscovered resources.³⁷

Such vast resources will continue to generate billions of dollars in royalty revenue for the United States. A recent report by the Institute for Social and Economic Research at the University of Alaska evaluated further development of the Alaskan OCS,³⁸ focusing on the Beaufort Sea OCS and the Chukchi Sea OCS, the two OCS areas off the northern shore of Alaska. Assuming a minimum royalty rate of 12.5 percent, mineral exploitation in these two areas would generate almost \$92 billion in royalty revenue over the next 50 years.³⁹

“Sharing” U.S. Royalties

As noted, the Truman Proclamation, the OCSLA, the Convention on the Continental Shelf, and the DSHMRA represent the *status quo* regarding the definition of the U.S. continental shelf and the disposition of its resources. That is to say that the entire continental shelf, from the shoreline to the end of the ECS where the deep seabed begins, is sovereign territory of the United States, subject to its complete jurisdiction and control. U.S. accession to UNCLOS would significantly alter the *status quo*.

If the United States became an UNCLOS member, it would be required to transfer a substantial

33. Marc Humphries, Robert Pirog, and Gene Whitney, “U.S. Offshore Oil and Gas Resources: Prospects and Processes,” Congressional Research Service *Report for Congress*, June 1, 2010, p. 18, at <http://www.cnie.org/NLE/crsreports/10May/R40645.pdf> (May 2, 2011), and 43 U.S. Code § 1337(a).

34. Gulf of Mexico Energy Security Act of 2006, Public Law 109–432.

35. For the purpose of mineral exploration and exploitation, the Gulf of Mexico has been divided into several areas: the 181 Area, 181 South Area, Central Planning Area, Eastern Planning Area, and 2002–2007 planning area. GOMESA defines “Gulf producing state” as the states of Alabama, Louisiana, Mississippi, and Texas. Public Law 109–432, § 102(7).

36. Public Law 109–432, § 105(a). The Land and Water Conservation Fund helps states to develop and purchase federal parks and recreation land. GOMESA further mandates that 20 percent of the royalty revenue appertaining to the Gulf states must be distributed to certain municipalities defined as “coastal political subdivisions” (CPS). Public Law 109–432, §§ 102(10) and 105(b)(3). However, under the current laws, there may be no revenue distributions to CPS from royalties generated on the ECS because CPS, as defined, are necessarily more than 200 nautical miles from the geographic center of any tract that could be leased on the ECS. GOMESA, § 102(10)(B). Finally, some OCS revenue is distributed to the National Historic Preservation Fund, which provides grants for historic sites. U.S. Energy Information Administration, Office of Oil and Gas, “Overview of U.S. Legislation and Regulations Affecting Offshore Gas and Oil Activity,” September 2005, p. 15, at http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2005/offshore/offshore.pdf (May 3, 2011).

37. U.S. Department of the Interior, *Survey of Available Data of OCS Resources and Identification of Data Gaps*, 2009, pp. 5 and II-11, at <http://www.boemre.gov/5-year/PDFs/45-DayReportAvailableDataOnOffshoreResources.pdf> (May 3, 2011).

38. *Ibid.*

39. *Ibid.*, p. 9.

portion of the royalties generated on the U.S. ECS to the International Seabed Authority.⁴⁰ UNCLOS requires member states to “share” a portion of their royalty revenue for all oil, gas, or other mineral resources extracted from the continental shelf beyond 200 nm.⁴¹ This would include, if the U.S. were a member, the extended continental shelf.⁴² Article 82 of UNCLOS states:

The coastal State shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.⁴³

These payments are to be made to the Authority on an annual basis. Like the royalties paid by companies that enter leases under the OCSLA, the amount of the royalty is based on the value of production at the particular site—in most cases, an offshore drilling platform extracting oil or natural gas from the seabed. According to a recent study conducted for the Authority, such payments are considered “international royalties.”⁴⁴

Member states begin to pay these “international royalties” during the sixth year of production at the site, apparently to allow the company a grace period of five years to recoup the costs of exploration. Starting with the sixth year of production, UNCLOS

members must pay 1 percent of the total production at that site to the Authority. Thereafter, the royalty rate increases in increments of 1 percentage point per year until the twelfth year of production, when it reaches 7 percent. The annual royalty rate remains at 7 percent until production ceases at the site.⁴⁵

The entire continental shelf, from the shoreline to the end of the ECS where the deep seabed begins, is sovereign territory of the United States. U.S. accession to UNCLOS would significantly alter the status quo.

If the United States became an UNCLOS member, it would effectively be agreeing to transfer to the International Seabed Authority a considerable portion of the royalties generated on the U.S. ECS that would otherwise be deposited in the U.S. Treasury for the benefit of the American people.⁴⁶ Assuming that the royalty rate on the U.S. ECS is set at 12.5 percent, the U.S. would be required to transfer more than half of its royalty revenue to the Authority beginning in the twelfth year of production until production ends.⁴⁷ Given that ECS resources “may be worth many billions if not trillions of dollars,”⁴⁸ the U.S. would be obligated to pay substantial international royalties to the Authority.

40. UNCLOS, Art. 156.

41. According to a report commissioned by the Authority, it was representatives from the U.S. delegation that, during negotiations regarding UNCLOS, first proposed the revenue-sharing scheme that ultimately became Article 82. International Seabed Authority, *Issues Associated with the Implementation of Article 82, Technical Study No. 4*, 2009, p. 15, at <http://www.isa.org.jm/files/documents/EN/Pubs/Article82.pdf> (May 12, 2011).

42. UNCLOS refers to the area of the continental shelf beyond 200 nm as “the continental shelf beyond 200 nautical miles.” See UNCLOS, Arts. 76 and 82(1). Other sources refer to this area as the “outer continental shelf.” For the sake of simplicity and clarity, this paper refers to the area beyond 200 nm as the “extended continental shelf.”

43. UNCLOS, Art. 82(1).

44. International Seabed Authority, *Issues Associated with the Implementation of Article 82*, p. 25.

45. UNCLOS, Art. 82(2).

46. The Clinton Administration did not oppose the revenue-sharing provision: “On balance, the package contained in the Convention, including revenue sharing at the modest rate set forth in Article 82, clearly serves United States interests.” Treaty Doc. 103–39, p. 58.

47. The United States would not be permitted to enter a reservation regarding Article 82 that would exempt it from complying with the royalty-sharing scheme. Article 309 states, “No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.” Article 82 does not expressly permit a reservation.

48. U.S. Department of Commerce, “About the Extended Continental Shelf Project.”

The United States will likely soon begin to exploit the oil and natural gas resources on its ECS. The BOEMRE has already issued exploration leases for areas located, at least in part, on the U.S. ECS. Indeed, during the bidding process, the BOEMRE has given notice to companies bidding on offshore leases about UNCLOS Article 82. Since at least 2001 and as recently as 2008, BOEMRE has advised companies that the Article 82 royalty payment provisions would apply if the United States joins the convention.⁴⁹

The BOEMRE is not alone in its opinion that activities on the ECS will commence sooner rather than later. The report commissioned by the Authority predicts that, while Article 82 “has been dormant since the adoption of the Convention,” it “will soon awaken,” and royalties from that provision may come due to the Authority as early as 2015.⁵⁰

If the United States accedes to UNCLOS, potentially billions of dollars in royalties would be transferred to the International Seabed Authority. How the Authority would dispense those “internationalized” royalties is less clear.

In sum, under current U.S. law and policy, all royalties and other revenue generated from exploitation of the U.S. ECS and owed to the United States would be deposited in the U.S. Treasury to be dispensed in the best interest of the United States and the American people. However, if the United States accedes to UNCLOS, potentially billions of dollars in royalties would instead be transferred to the Authority pursuant to Article 82. How the Authority would dispense those “internationalized” royalties is less clear.

The Authority’s Distribution of ECS Royalties

UNCLOS authorizes the Authority to distribute royalty funds to despotic regimes, corrupt nations, and even state sponsors of terrorism, arguably without the final consent of the United States or any other country that might pay international royalties pursuant to Article 82.

UNCLOS provisions direct that international royalties generated by resource exploitation of the ECS be distributed to certain recipients to the exclusion of others. The Authority is required to distribute the revenue only to UNCLOS members and to preference developing countries, particularly those that are landlocked or the “least developed,” and to “peoples who have not attained full independence or other self-governing status.”⁵¹

If the United States joined UNCLOS, it would be one of more than 160 nations that are party to the convention and would have limited control over the disposition of Article 82 revenue. All final decisions on the “equitable sharing of...payments and contributions made pursuant to article 82” are made by the Assembly, the “supreme organ” of the Authority. The Assembly consists of all nations that are party to UNCLOS.⁵² The United States would have only one vote in any Assembly decision, whether it dealt with Article 82 revenue or some other matter.⁵³

Some UNCLOS proponents maintain that the United States, if it joined the convention, would have a “veto” over such decisions because the U.S. would hold a permanent seat on the 36-member Council, which is the executive organ of the Authority.⁵⁴ In fact, UNCLOS empowers the Council only to make recommendations to the Assembly on the

49. International Seabed Authority, *Issues Associated with the Implementation of Article 82*, pp. 3–8.

50. *Ibid.*, p. xi.

51. UNCLOS, Arts. 82(4) and 162(2)(o)(i). At the time of the UNCLOS negotiations, the phrase “peoples who have not attained full independence or other self-governing status” was widely understood as a euphemism for the Palestinian Liberation Organization.

52. UNCLOS, Art. 160(1), (2)(f)(i).

53. *Ibid.*, Art. 159(6).

54. *Ibid.*, Art. 162. The United States secured for itself a permanent seat on the Council in the 1994 agreement, which assigns a permanent Council seat to the nation with the largest economy in terms of gross domestic product on the date of entry into force. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, Annex, § 3(15)(a).

disposition of Article 82 revenue, which the Assembly may approve or disapprove.⁵⁵ Any Council recommendation that is disapproved by the Assembly is returned to the Council “for reconsideration in the light of the views expressed by the Assembly.”⁵⁶ Therefore, in function and form, the Assembly makes final determinations regarding the disposition of Article 82 revenue.

UNCLOS does not require that Article 82 revenue be spent in a transparent or accountable manner.

Thus, it is unlikely that the United States would be able to prevent the Authority from distributing Article 82 revenue to Cuba and Sudan, UNCLOS members that the U.S. State Department has designated as state sponsors of terrorism.⁵⁷ It would also be difficult for the United States to block the Authority from sending funds to the undemocratic, despotic, and/or brutal regimes in Belarus, Burma, China, Somalia, and Zimbabwe.⁵⁸ Finally, the United States would have limited ability to stop the transfer of Article 82 revenue to corrupt regimes, especially given that 13 of the 20 most corrupt nations in the world are UNCLOS members.⁵⁹

By virtue of its seat on the Council, the United States might be able to hinder decisions to distribute Article 82 revenue for purposes to which it objects. Whether the United States would be steadfast in its objections to such distributions and whether the

Assembly would make any such distributions without the consent of the Council are open questions.⁶⁰

UNCLOS is silent on how UNCLOS nations that receive Article 82 royalty revenue should spend it. UNCLOS does not require recipient nations to spend the revenue on anything related to the oceans or the maritime environment. Nor does it require them to spend the revenue on humanitarian or development projects, even though most, if not all, of the eligible recipients are supposed to be poor, developing countries. Recipients are apparently free to spend the funds on military expenditures or simply deposit them into the personal bank accounts of national leaders.

Finally, UNCLOS does not require that Article 82 revenue be spent in a transparent or accountable manner. Apparently, the Authority simply hands over substantial amounts of money to the recipient nation to be spent however that nation sees fit, no matter how corrupt or inept that nation’s leadership is.

What the United States Should Do

The U.S. government needs a better understanding of the magnitude of the mineral wealth on and beneath the U.S. extended continental shelf before it begins to contemplate UNCLOS membership. Without a well-informed estimate of the potentially vast resources of the ECS, the U.S. Senate is in no position to make an intelligent decision on UNCLOS accession. To that end:

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55. If the U.S. were an UNCLOS member, it would have a greater ability to affect decisions by the Council regarding Article 82 revenue because such decisions by the Council require consensus. UNCLOS, Arts. 161(8)(d), 162(2)(o)(i).
 56. UNCLOS, Arts. 160(2)(f)(i) and 162(2)(o)(i), and Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, Annex, § 3(4).
 57. U.S. State Department, Office of the Coordinator for Counterterrorism, *Country Reports on Terrorism 2009*, August 5, 2010, chap. 3, at <http://www.state.gov/s/ct/rls/crt/2009/140889.htm> (May 3, 2011). Neither Iran nor Syria, the two other designated state sponsors of terrorism, are parties to UNCLOS.
 58. “Table of Independent Countries,” in Freedom House, *Freedom in the World 2011*, at http://www.freedomhouse.org/images/File/fiw/Tables%2C%20Graphs%2C%20etc%2C%20FIW%202011_Revised%2011_11_11.pdf (May 3, 2011).
 59. Transparency International, “Corruption Perceptions Index 2010 Results,” at http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results (May 3, 2011). Thirteen of the 20 most corrupt nations on the 2010 index are UNCLOS members: Angola, Burma, Chad, Democratic Republic of Congo, Equatorial Guinea, Guinea, Iraq, Kenya, Laos, Papua New Guinea, Russia, Somalia, and Sudan.
 60. While UNCLOS establishes a conciliation process for situations in which the Council is unable to reach a consensus (i.e., Art. 161(8)(e)), no such process is established for situations in which the Council and the Assembly are at an impasse.

- The U.S. Extended Continental Shelf Task Force needs to complete its work. This will require continued support from the Obama Administration and Congress. The task force is a relatively new project and requires much more data to measure and demarcate the full extent of the U.S. ECS properly in locations scattered across the globe. With seabed mining technology continuing to advance, the ECS Task Force should be given the resources necessary to complete its mission.
- Congress should direct the U.S. Geological Survey to estimate the potential mineral wealth associated with the U.S. ECS. The Senate needs to be fully cognizant of the potential wealth of the ECS before making any decision that would transfer a portion of that wealth to the International Seabed Authority for distribution to the “developing world.”
- Once the full extent of the U.S. ECS has been determined, the President should issue a proclamation confirming U.S. jurisdiction over and control of the ECS and all of its resources, similar to the proclamations issued by Presidents Truman and Reagan on the continental shelf and the exclusive economic zone. Congress should amend the Outer Continental Shelf Lands Act to codify the ECS proclamation. While neither step is necessary to establish the U.S.’s rights to its own continental shelf, such a proclamation and legislation would clarify to the international community that the United States is asserting full and complete sovereignty over its ECS regardless of any provision of UNCLOS to the contrary.
- The relevant House and Senate committees should hold oversight hearings on the potential wealth of the U.S. ECS. Under current U.S. law, the resources of the continental shelf are “held by the Federal Government for the public.” Congress should openly debate whether transferring royalties to the International Seabed Authority would be in the best interests of the United States and the American people.

At a minimum, these steps will ensure that Congress, especially the Senate, is fully aware of the financial implications of U.S. membership in UNCLOS before making any decision on accession to the convention.

Caveat Emptor

UNCLOS proponents are prepared to transfer a great deal of wealth—perhaps tens or even hundreds of billions of dollars of royalty revenue over time—to an international organization over which the United States has only limited authority. The ultimate beneficiaries of that wealth could easily include corrupt and despotic regimes and state sponsors of terrorism.

Instead of diverting U.S. revenues to such dubious purposes, the U.S. government should retain any wealth derived from the U.S. extended continental shelf for the benefit of the American people.

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