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Accession to U.N. Convention on the Law of the Sea Would Expose the U.S. to Baseless Climate Change Lawsuits

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Abstract

Among the many reasons why the U.S. should not accede to the U.N. Convention on the Law of the Sea (UNCLOS) is the reality that it would expose the United States to international environmental lawsuits that would harm its environmental, economic, and military interests. Having failed to impose their agenda on the U.S., climate change alarmists and other environmental activists are preparing the legal ground and claimants to sue the U.S. if it joins UNCLOS. Even the threat of such suits or failed suits will affect the U.S. by imposing unnecessary legal and political costs. The best option for the U.S. is simply not to open the door to such frivolous lawsuits.

This paper, in its entirety, can be found at **http://report.heritage.org/bg2660**

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With the support and encouragement of environmental activists and legal academics, some nations are actively exploring the possible use of international litigation to impose their favored environmental standards on large emitters of greenhouse gases, particularly the United States.

Major international conferences held in recent years in Denmark, Mexico, and most recently Durban, South Africa, have failed to produce a legally binding climate change convention. The continued failure of efforts to regulate greenhouse gases (GHG) through comprehensive treaty commitments has led some proponents of the theory of anthropogenic climate change to seek alternate avenues of enforcement. As one international law professor put it in 2007, "In light of this regulatory failure, victims of climate change have started to think of ways to bring the worst emitters of greenhouse gases to justice."[1]

Currently, there is no forum in which to initiate a viable international climate change lawsuit against the United States. The U.S. withdrew from the compulsory jurisdiction of the International Court of Justice (ICJ) in 1985 and is not as yet a party

Talking Points

- U.S. accession to the United Nations Convention on the Law of the Sea (UNCLOS) would harm U.S. national interests. Joining the convention would needlessly expose the United States to baseless environmental lawsuits, including suits based on alleged U.S. contributions to global climate change.
- Certain UNCLOS states parties, with the support and encouragement of environmental activists and international legal academics, are actively exploring the potential of using international litigation against the United States to advance their climate change agenda.
- An adverse judgment in a climate change lawsuit initiated under UNCLOS would be final, not subject to appeal, and enforceable in the United States. Such a judgment would impose massive regulatory burdens on U.S. companies, which would pass the costs on to American consumers.
- Such a judgment would accomplish through international litigation what climate change alarmists have failed to achieve through treaty negotiations or in the U.S. Congress.

to the United Nations Convention on the Law of the Sea (UNCLOS).[2]

However, if the United States accedes to UNCLOS, thereby reversing a 30-year policy of remaining outside of the convention, the U.S. would be exposed to climate change lawsuits and other environmental actions brought against it by other members of the convention. The economic and political ramifications of such lawsuits would be dire.

This paper demonstrates that accession to UNCLOS would unnecessarily expose the United States to baseless and opportunistic international lawsuits, including suits based on the theory of anthropogenic climate change.

- Part I describes UNCLOS's compulsory dispute resolution mechanisms, the finality and enforceability of judgments rendered by UNCLOS tribunals, and the impact of adverse judgments against the United States in other international lawsuits, including U.S. experiences in the International Court of Justice.

- Part II outlines the legal basis for an international climate change lawsuit against the United States: the "no-harm rule" pronounced in the *Trail Smelter* case and U.S. commitments under the United Nations Framework Convention on Climate Change.

- Part III identifies the potential claimants that are poised to bring an UNCLOS climate change lawsuit against the United States (the most likely target of such a suit) and the support that such claimants would receive from international legal and environmental activists.

- Part IV concludes that the United States should not accede to the convention because of the potential climate change regime that an UNCLOS tribunal could impose on the U.S. and describes the economic and political costs of an adverse judgment.

To date, no study has comprehensively addressed the potential legal, economic, and political consequences that an adverse judgment from an UNCLOS tribunal would have for the United States. The U.S. government should assess the litigation risks that would come with membership in the convention.

The Obama Administration should conduct an interagency review of the convention's compulsory dispute resolution mechanisms to determine both the extent to which acceding to UNCLOS would expose the United States to baseless lawsuits and the potential economic and political costs that could result from accession. Relevant Senate and House committees should hold oversight hearings on potential lawsuits and how an adverse judgment would affect U.S. environmental, economic, and military interests.

1. Timo Koivurova, "International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects," *Journal of Environmental Law and Litigation*, Vol. 22, No. 2 (Fall 2007), p. 269, at *http://www.law.uoregon.edu/org/jell/docs/222/OEL202.pdf* (February 9, 2012).

2. 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* (February 9, 2012).

Part I
Resolution of Maritime Disputes

At the outset, it should be noted that the United States need not accede to UNCLOS in order to resolve its maritime disputes with other nations. The U.N. Charter directs the United States and all other nations to attempt to settle their disputes, maritime or otherwise, through peaceful measures. Specifically, the charter states that nations "shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."[3] Chapter VI of the charter directs states to "seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."[4]

The United States has resolved contentious maritime disputes with other nations regularly and peacefully without being a member of UNCLOS both before the adoption of the convention in 1982 and afterward. For example:

- In May 1972, the United States and the Soviet Union signed an agreement designed to prevent incidents between the two superpowers on the high seas through strict observation of the International Regulations for Preventing Collisions at Sea.[5]
- In February 1988, two U.S. warships were "bumped" by Soviet warships in the Black Sea while the U.S. was challenging the excessive Soviet claim regarding its territorial sea. The next year, the two nations signed the Uniform Interpretation of Rules of International Law Governing Innocent Passage, a joint statement that acknowledged U.S. passage rights through Soviet waters.[6]
- In June 2000, the United States and Mexico adopted a treaty delimiting the boundary of their respective continental shelves beyond the 200-nautical-mile line.[7]

The United States and other nations are free to resolve their maritime disputes in a number of ways outside of UNCLOS, including bilateral negotiations, fact-finding and conciliation commissions, and proceedings at the Permanent Court of Arbitration, to name a few.[8] The United States may also submit a dispute by special agreement to the International Court of Justice, as it did in 1981 to resolve a dispute with Canada over maritime boundaries in the Gulf of Maine.[9]

THE UNITED STATES AND OTHER NATIONS ARE FREE TO RESOLVE THEIR MARITIME DISPUTES IN A NUMBER OF WAYS OUTSIDE OF UNCLOS.

Bilateral negotiations, special agreements, arbitration, and conciliation commissions have in common the fact that they are *voluntary* means of resolving maritime disputes. The United States may choose to engage in such voluntary proceedings depending on whether the predicted outcome would advance its national interests. However, if the U.S. accedes to UNCLOS, it will be compelled to submit itself to legally binding dispute resolution whenever another member state brings a lawsuit against it.

Compulsory Dispute Resolution Under UNCLOS

Part XV of UNCLOS addresses the settlement of maritime disputes between parties to the convention. Part XV contemplates that UNCLOS states parties, in accordance with the U.N. Charter, will attempt to resolve maritime disputes peacefully

3. Charter of the United Nations, October 24, 1945, Art. 2(3), at *http://www.un.org/en/documents/charter/index.shtml* (February 9, 2012).
4. Charter of the United Nations, Art. 33(1).
5. Agreement Between the United States and the Union of Soviet Socialist Republics on the Prevention of Incidents on and over the High Seas, May 25, 1972, at *http://avalon.law.yale.edu/20th_century/sov008.asp* (February 9, 2012).
6. Lieutenant Commander John W. Rolph, "Freedom of Navigation and the Black Sea Bumping Incident: How 'Innocent' Must Innocent Passage Be?" *Military Law Review*, Vol. 135 (Winter 1992) , pp. 137–165, at *http://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/276475~1.pdf* (February 9, 2012).
7. Treaty on the Delimitation of the Continental Shelf in the Western Gulf of Mexico Beyond 200 Nautical Miles, with Annexes, June 9, 2000.
8. R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed. (Manchester, U.K.: Manchester University Press, 1999), pp. 449–453.
9. *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, International Court of Justice, October 12, 1984, at *http://www.icj-cij.org/docket/index.php?sum=346&code=cigm&p1=3&p2=3&case=67&k=6f&p3=5* (February 10, 2012).

without resort to the convention's compulsory procedures.[10] When a dispute arises between two UNCLOS members, they are obligated to "proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means."[11] States parties may also resort to a nonbinding "conciliation procedure" under Annex V of the convention.[12]

If a maritime dispute cannot be settled in a voluntary manner, an UNCLOS state party may compel another state party to defend itself in one of four forums: the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice, an arbitral tribunal organized under Annex VII, or a "special" arbitral tribunal organized under Annex VIII.[13]

International Tribunal for the Law of the Sea. ITLOS was established by Annex VI of UNCLOS and is located in Hamburg, Germany. To date, UNCLOS states parties have initiated 19 cases in ITLOS, 12 of which involved demands for the release of vessels allegedly detained improperly.[14]

ITLOS is composed of 21 recognized experts in the law of the sea elected by UNCLOS states parties. The 21 members must collectively represent the "principal legal systems of the world," and their nationalities must reflect an "equitable geographical distribution" with "no fewer than three members from each geographical group as established by the General Assembly of the United Nations." The members of the tribunal serve nine-year terms and may be reelected. Members select a president of the tribunal from among themselves. ITLOS's jurisdiction is general, encompassing "all disputes … submitted to it in accordance" with the convention.[15]

Within ITLOS, a special tribunal, the Seabed Disputes Chamber (SDC), was established to resolve disputes about activities on the seabed floor beyond the limits of national jurisdiction, known as "the Area."[16] The SDC is composed of 11 members chosen from among the 21 members of ITLOS. The chamber has jurisdiction over disputes between states parties concerning the Area, between the International Seabed Authority and deep seabed mining contractors, and between states parties and the authority for alleged violations of the deep seabed provisions of the convention and for other matters. For these categories of disputes, states parties, contractors, and the International Seabed Authority must submit to SDC jurisdiction, not to the jurisdiction of ITLOS, the ICJ, or an arbitral tribunal.[17] With the notable exception of a 2011 advisory opinion on the responsibilities of member states in the Area, the chamber has not yet adjudicated any matter.[18]

Both ITLOS and the SDC have the authority to grant preliminary relief (known as "provisional measures") to a state party to "preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment." In the event that a claimant has brought a lawsuit in an Annex VII or VIII arbitral tribunal and the panel of arbitrators has not yet been assembled, the claimant may seek provisional measures at ITLOS or, in a case concerning the Area, at the SDC. ITLOS and the SDC may order provisional measures if there is a prima facie case that the arbitral tribunal, once assembled, would have jurisdiction and that "the urgency of the situation so requires." Parties to the dispute "shall comply promptly with any provisional measures" granted by ITLOS or the SDC. Once an arbitral tribunal is assembled, it may modify, revoke, or affirm any provisional

10. United Nations Convention on the Law of the Sea (UNCLOS), December 10, 1982, Arts. 279–280, at *http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm* (February 9, 2012). Article 264 appears to restrict the settlement of disputes relating to marine scientific research to the compulsory procedures of Part XV, Section 2, although the practical effect of requiring states to resolve such disputes only by compulsory procedures is unclear. Churchill and Lowe, *The Law of the Sea*, p. 454.
11. UNCLOS, Art. 283(1).
12. *Ibid.*, Art. 284 and Annex V.
13. *Ibid.*, Art. 286.
14. International Tribunal for the Law of the Sea, "List of Cases," at *http://www.itlos.org/index.php?id=35* (February 9, 2012).
15. UNCLOS, Annex VI, Arts. 2–5, 12, and 21.
16. *Ibid.*, Arts. 1(1) and 187.
17. Churchill and Lowe, *The Law of the Sea*, pp. 458–459. "The Seabed Disputes Chamber shall have jurisdiction under this Part and the Annexes relating thereto." UNCLOS, Art. 187.
18. *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion*, Seabed Disputes Chamber, Case No. 17, February 1, 2011, at *http://www.itlos.org/index.php?id=109&L=0* (February 9, 2012).

measures granted by ITLOS or the SDC.[19]

International Court of Justice. The ICJ was established in June 1945 and is located in The Hague, Netherlands.[20] The ICJ is a court of general jurisdiction and operates independently from the UNCLOS tribunals. Parties to the convention may nevertheless opt to submit maritime disputes to the ICJ.

The United States accepted ICJ jurisdiction at the time of its establishment and for 40 years could be brought before the court by any other nation that also accepted the court's compulsory jurisdiction. In 1985, however, the U.S. announced that it was withdrawing from the ICJ's compulsory jurisdiction after an adverse judgment in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, a lawsuit concerning U.S. support for the Contras.

Annex VII Arbitral Tribunal. The Annex VII tribunal is an arbitral panel of general jurisdiction and is considered the "default means of dispute resolution" if a state party has not declared a preference upon signing or ratifying UNCLOS. These tribunals have been used on a handful of occasions to litigate matters under the auspices of the Permanent Court of Arbitration in The Hague, including cases concerning the delimitation of maritime boundaries and the *MOX Plant* case, an environmental degradation lawsuit.[21]

Annex VII tribunals are composed of five members selected by the two states parties to the dispute. Each party may appoint one of its nationals as a member, and the remaining three members are chosen by agreement between the parties. If the two parties are unable to agree on any of the three members, they are appointed by the ITLOS president.[22]

Annex VIII Special Arbitral Tribunal. States parties may submit cases on four specific subjects—fisheries, protection and preservation of the marine environment, marine scientific research, and navigation—to arbitration by an Annex VIII tribunal.[23] Annex VIII arbitral panels have five members. Each party to the dispute appoints two members, one of which may be a national of the state party. The fifth member is appointed by agreement of the parties and serves as president of the tribunal. If the parties are unable to agree, the U.N. Secretary-General appoints the president.[24]

Enforceability in the U.S.

Acceding to UNCLOS would expose the U.S. to lawsuits on virtually any maritime activity, such as alleged pollution of the marine environment from a land-based source or even through the atmosphere. Regardless of the case's merits, the U.S. would be forced to defend itself against every such lawsuit at great expense to U.S. taxpayers. Any judgment rendered by an UNCLOS tribunal would be final, could not be appealed, and would be enforceable in U.S. territory.

ANY JUDGMENT RENDERED BY AN UNCLOS TRIBUNAL WOULD BE FINAL, COULD NOT BE APPEALED, AND WOULD BE ENFORCEABLE IN U.S. TERRITORY.

Unlike a resolution passed by the U.N. General Assembly or a recommendation made by a human rights treaty committee, judgments issued by UNCLOS dispute resolution tribunals are legally enforceable upon members of the convention. Article 296 of the convention, titled "Finality and binding force of decisions," states, "Any decision rendered by a court or tribunal having

19. UNCLOS, Art. 290, and Annex VI, Art. 25.
20. International Court of Justice, website, at *http://www.icj-cij.org/homepage/index.php* (February 9, 2012).
21. Permanent Court of Arbitration, "*Ad Hoc* Arbitration Under Annex VII of the United Nations Convention on the Law of the Sea," at *http://www.pca-cpa.org/showpage.asp?pag_id=1288* (February 9, 2012).
22. UNCLOS, Annex VII, Art. 3(a)–(e). States parties are urged but not required to select tribunal members from a list of maritime experts. UNCLOS members may nominate up to four experts to the list. Any appointments made by the ITLOS president must be made from the list of experts, which is maintained by the U.N. Secretary-General. For the list, see the notifications made under UNCLOS in United Nations, "Treaty Collection," Web site, at *http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en* (February 9, 2012).
23. The United States has agreed to submit itself to dispute resolution under Annex VIII of UNCLOS for disputes arising under the U.N. Fish Stocks Agreement, a 1995 convention relating to the conservation of straddling and highly migratory fish stocks.
24. UNCLOS, Annex VIII, Art. 1, 3(a)–(e). Similar to Annex VII tribunals, states parties are urged but not required to select arbitrators from lists of experts in the specific subject matter areas under the purview of Annex VIII tribunals. Any appointment made by the U.N. Secretary-General shall be from the relevant expert list. The lists of experts for use by parties to Annex VIII arbitration proceedings are maintained by four international organizations relevant to the subject matter areas. See U.N. Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, "Settlement of Disputes Mechanism: List of Experts for the Purposes of Article 2 of Annex VIII (Special Arbitration) to the Convention," updated October 12, 2011, at *http://www.un.org/Depts/los/settlement_of_disputes/experts_special_arb.htm* (February 9, 2012).

jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute."[25]

Judgments made by UNCLOS tribunals are enforceable in the same manner that a judgment from a U.S. domestic court would be. For example, Article 39 of Annex VI states that "The decisions of the [Seabed Disputes] Chamber shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought."[26] In other words, if the United States accedes to the convention, the U.S. government will be required to enforce and comply with SDC judgments in the same manner as it would enforce and comply with a judgment of the U.S. Supreme Court. The U.S. court system will serve not as an avenue for appeal from UNCLOS tribunals, but rather as an enforcement mechanism for their judgments.

The domestic enforceability of UNCLOS tribunal judgments was confirmed by U.S. Supreme Court Justice John Paul Stevens in *Medellin v. Texas*, a landmark case in 2008.[27] In *Medellin*, Justice Stevens, writing in a concurring opinion, cited Article 39 of Annex VI for the proposition that UNCLOS members—presumably including the United States if it accedes to the convention—are obligated to comply with the judgments of the convention's tribunals.

The *Medellin* case concerned whether the ICJ's judgment in 2003 against the United States in the *Case Concerning Avena and Other Mexican Nationals* (the *Avena* case) is domestically enforceable. Justice Stevens concluded that the relevant treaties in the *Avena* case—the U.N. Charter and the Vienna Convention on Consular Relations (VCCR)—did not require the Supreme Court to enforce the ICJ's ruling. Justice Stevens contrasted the permissive language of the U.N. Charter and the VCCR with the explicit language of UNCLOS and concluded that the convention would indeed oblige the Supreme Court to enforce the judgments of UNCLOS tribunals within the United States.[28]

The fact that the judgments of UNCLOS tribunals are legally binding, not subject to appeal, and domestically enforceable is particularly troubling because the United States has suffered adverse judgments in high-profile international lawsuits in the past.

Judgments Against the U.S. in International Courts

As mentioned, the United States initially accepted compulsory ICJ jurisdiction when the court was established shortly after World War II. For almost 40 years, the U.S. could be sued at the court by any other nation that accepted ICJ jurisdiction.[29]

However, the U.S. relationship with the ICJ changed on April 9, 1984, when the government of Nicaragua initiated the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (the *Paramilitary Activities* case) against the United States, alleging that the U.S. had illegally intervened in Nicaragua's internal affairs and used military force against it in violation of international law.[30] Three days before Nicaragua initiated its lawsuit, U.S. Secretary of State George Shultz delivered a letter to the U.N. Secretary-General withdrawing U.S. consent to jurisdiction under the ICJ Statute for disputes arising between

25. UNCLOS, Annex VI, Art. 33; Annex VII, Art. 11; and Annex VIII, Art. 4. Annex VI provides no procedure to appeal the judgments of ITLOS or the SDC.
26. UNCLOS, Annex VI, Art. 39. The domestic enforceability of the decisions of UNCLOS tribunals regarding deep seabed exploration is reiterated in Article 21 of Annex III: "Any final decision rendered by a court or tribunal having jurisdiction under this Convention relating to the rights and obligations of the Authority and of the contractor shall be enforceable in the territory of each State Party."
27. *Medellin v. Texas*, 552 U.S. 491 (2008).
28. In essence, Justice Stevens held that the dispute resolution mechanisms of UNCLOS are self-executing and that additional congressional action, such as implementing legislation, would not be necessary to enforce a judgment rendered by an UNCLOS tribunal. However, the Senate Committee on Foreign Relations included a declaration in its 2004 draft Resolution of Advice and Consent to Ratification stating that SDC judgments shall be enforceable "only in accordance with procedures established by implementing legislation and that such decisions shall be subject to such legal and factual review as is constitutionally required and without precedential effect in any court of the United States."
29. "The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes." Statute of the International Court of Justice, Art. 36, at *http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0* (February 9, 2012).
30. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America): Application Instituting Proceedings*, International Court of Justice, April 9, 1984, at *http://www.icj-cij.org/docket/files/70/9615.pdf* (February 9, 2012).

the U.S. and any Central American nation.[31]

Since its jurisdiction was in question, the ICJ held hearings in October 1984 to determine whether it would hear the case. The United States contended that the ICJ did not have jurisdiction over the lawsuit due to, *inter alia*, the U.S. withdrawal from the court's jurisdiction as per Secretary Shultz's letter.[32] The ICJ rejected the arguments made by the United States and in November 1984 ruled that it had jurisdiction to proceed to the merits phase of the case.[33] The court later noted that, pursuant to the ICJ Statute, any dispute regarding the scope of the court's jurisdiction is determined by the court itself: "Under Article 36, paragraph 6, of its Statute, the Court has jurisdiction to determine any dispute as to its own jurisdiction, and its judgment on that matter, as on the merits, is final and binding on the parties."[34]

In response to the ICJ's ruling on jurisdiction, Secretary Shultz notified the court that the U.S. was withdrawing from the proceedings in the *Paramilitary Activities* case and that thereafter the U.S. would no longer accept the ICJ's compulsory jurisdiction in any lawsuit initiated under the ICJ Statute.[35] Nevertheless, the ICJ proceeded with the case and in June 1986 issued a lengthy judgment against the United States, demanding that the U.S. cease all activities complained of by Nicaragua and pay reparations to the Sandinista government for intervening in its internal affairs.[36]

The U.S. withdrawal from the ICJ's compulsory jurisdiction under the ICJ Statute remains effective to the present day.[37]

Although the United States withdrew from the ICJ's compulsory jurisdiction in response to the *Paramilitary Activities* case, the court retained jurisdiction over the U.S. in lawsuits arising under the Vienna Convention on Consular Relations, which the U.S. ratified in 1969, because the U.S. had also ratified the VCCR's Optional Protocol Concerning the Compulsory Settlement of Disputes, thereby consenting to compulsory ICJ jurisdiction on disputes arising from the interpretation or application of the VCCR.[38]

In January 2003, the government of Mexico initiated a lawsuit against the United States at the ICJ pursuant to the VCCR's Optional Protocol: the *Case Concerning Avena and Other Mexican Nationals*. Mexico alleged that, in violation of the VCCR, Carlos Avena and 53 other Mexican nationals sitting on death row in the United States had been improperly denied access to the Mexican consulate when they were arrested.[39] The Mexican government demanded that the United States vacate the convictions and sentences of the 54 death row inmates and exclude any of their confessions from any subsequent legal proceedings because the Mexican nationals were not informed of their right to consular access.

The ICJ accepted jurisdiction, and the United States, because of its membership in the VCCR's Optional Protocol, was compelled to defend itself against Mexico's allegations. In March 2004, the ICJ ruled that the

31. George P. Shultz, letter to the U.N. Secretary-General, April 6, 1984. Secretary Shultz's letter withdrew U.S. consent to jurisdiction for a period of two years.
32. Thomas J. Pax, "Nicaragua v. United States in the International Court of Justice: Compulsory Jurisdiction or Just Compulsion?" *Boston College International and Comparative Law Review*, Vol. 8, No. 2 (1985).
33. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America): Jurisdiction and Admissibility*, International Court of Justice, November 26, 1984, at *http://www.icj-cij.org/docket/files/70/6485.pdf* (February 9, 2012).
34. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America): Merits, Judgment*, International Court of Justice, June 27, 1986, para. 27, at *http://www.icj-cij.org/docket/files/70/6503.pdf* (February 9, 2012).
35. George P. Shultz, letter to the U.N. Secretary-General, October 7, 1985, at *http://findarticles.com/p/articles/mi_m1079/is_v86/ai_4076208/* (February 9, 2012), and W. Michael Reisman, "Has the International Court Exceeded Its Jurisdiction?" *American Journal of International Law*, Vol. 80 (1986), p. 128.
36. *Military and Paramilitary Activities: Merits*, International Court of Justice, para. 292.
37. Sean D. Murphy, "The United States and the International Court of Justice: Coping with Antinomies," George Washington University Law School *Legal Studies Research Paper* No. 291, February 8, 2007, pp. 23–24, at *http://www.law.georgetown.edu/internationalhrcolloquium/documents/PICTProjectICJPaper.pdf* (February 9, 2012).
38. Vienna Convention on Consular Relations, April 24, 1963, at *http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf* (February 9, 2012), and Optional Protocol Concerning the Compulsory Settlement of Disputes, April 24, 1963, Art. 1, at *http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963_disputes.pdf* (February 9, 2012).
39. *Avena and Other Mexican Nationals (Mexico v. United States of America): Application Instituting Proceedings*, International Court of Justice, January 9, 2003, at *http://www.icj-cij.org/docket/files/128/1913.pdf* (February 9, 2012).

United States had violated the VCCR by failing to inform the Mexican nationals of their right to consular access at the time of their arrests and ordered the U.S. to review and reconsider their convictions and sentences.[40]

A year later, in response to the ICJ's judgment in *Avena*, U.S. Secretary of State Condoleezza Rice delivered a letter to U.N. Secretary-General Kofi Annan withdrawing the United States from the Optional Protocol to the Vienna Convention and thereby from the ICJ's compulsory jurisdiction on any future lawsuits initiated under the VCCR.[41]

By consenting to the compulsory jurisdiction of the ICJ, the United States had exposed itself to legally and politically embarrassing judgments on matters of national interest. In the *Paramilitary Activities* case, the ICJ disregarded a clear and unequivocal withdrawal from its jurisdiction and then passed judgment on the U.S. use of military force in support of the Contras against Nicaragua's Sandinista government. In the *Avena* case, the ICJ intervened in a highly controversial social issue—the death penalty—and again passed judgment on the United States.

If the United States accepts the compulsory jurisdiction of UNCLOS tribunals, it should expect to defend itself against similar lawsuits initiated by opportunistic foreign governments and suffer adverse judgments along the lines of the *Paramilitary Activities* and *Avena* cases.

40. *Avena and Other Mexican Nationals (Mexico v. United States of America): Judgment*, International Court of Justice, March 31, 2004, at *http://www.icj-cij.org/docket/files/128/8188.pdf* (February 9, 2012).

41. Condoleezza Rice, letter to the U.N. Secretary-General, March 7, 2005.

Part II
Exposure to Environmental Lawsuits Under UNCLOS

When U.S. Secretary of State Warren Christopher submitted UNCLOS to President Bill Clinton for transmittal to the Senate in 1994, he characterized it as "the strongest comprehensive environmental treaty now in existence or likely to emerge for quite some time." Christopher further declared that the convention "creates a positive and unprecedented regime for marine environmental protection that will compel parties to come together to address issues of common and pressing concern."[42] Indeed, UNCLOS is widely considered to be a cornerstone of modern international environmental law.[43]

UNCLOS's provisions for protecting the marine environment are stunning in their breadth and depth. Its definition of "pollution of the marine environment" appears to ban any activity that could have even a minimal environmental impact on the world's oceans:

> "[P]ollution of the marine environment" means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.[44]

UNCLOS dedicates an entire section, Part XII, to "Protection and Preservation of the Marine Environment." Under Part XII, members of the convention must "adopt laws and regulations" to prevent pollution of the marine environment from land-based sources (e.g., rivers, estuaries, and pipelines); activities on the seabed subject to their jurisdiction (e.g., the continental shelf); and activities in the deep seabed and even from pollution emanating through the atmosphere.[45]

In a provision titled "Responsibility and liability," UNCLOS makes clear that states parties will be held legally responsible for any breach of their environmental obligations: "States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. *They shall be liable in accordance with international law.*"[46]

U.S. accession to the convention would provide an opportunity and legal forum for other UNCLOS members to initiate lawsuits against the U.S. challenging the adequacy of its efforts to protect the marine environment. Although current U.S. law may satisfy many of the general environmental obligations set forth in Part XII,[47] the U.S. might nevertheless be forced to defend itself in a costly and politically embarrassing lawsuit challenging the sufficiency and enforcement of U.S. domestic environmental laws and regulations.

The *MOX Plant* Case

In October 2001, the Republic of Ireland initiated one such lawsuit, the *MOX Plant* case, at the Permanent Court of Arbitration against the United Kingdom pursuant to Annex VII of UNCLOS. Ireland alleged that the U.K. violated its legal obligations under the convention by commissioning a mixed oxide (MOX) fuel plant at a nuclear reprocessing site in Cumbria, England, located 114 miles from the coast of Ireland across the Irish Sea. Ireland had also initiated another lawsuit against the U.K. in June 2001 under the Convention for the Protection of the Marine

42. *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, 103rd Cong., 2nd Sess., October 7, 1994, pp. vi–vii.

43. Patricia W. Birnie and Alan E. Boyle, *International Law & the Environment*, 2nd ed. (New York: Oxford University Press Inc., 2002).

44. UNCLOS, Art. 1(4).

45. *Ibid.*, Arts. 207, 208, 209, and 212.

46. *Ibid.*, Art. 235(1) (emphasis added).

47. For example, see the National Environmental Policy Act (NEPA); Clean Air Act; Federal Water Pollution Control Act (Clean Water Act); Toxic Substances Control Act (TSCA); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); Ocean Dumping Ban Act; Deepwater Port Act; Rivers and Harbors Act; Coastal Zone Management Act; Outer Continental Shelf Lands Act (OCSLA); Fishery Conservation and Management Act (Magnuson–Stevens Act); Resource Conservation and Recovery Act (RCRA); Marine Mammal Protection Act (MMPA); Endangered Species Act; and National Marine Sanctuaries Act.

Environment of the North-East Atlantic (OSPAR Convention).[48]

In its UNCLOS lawsuit, Ireland claimed that the U.K. had violated Articles 123 and 197 of the convention by failing to "provide Ireland with adequate information of the environmental consequences arising from the MOX project" and by failing to "carry out a proper assessment of the likely impact of the MOX development upon the marine environment of the Irish Sea."[49] Ireland also accused the U.K. of violating at least nine other UNCLOS articles, including provisions prohibiting pollution from land-based sources, by failing to take a "precautionary approach" to protecting the marine environment.

Ireland initiated its lawsuit despite the fact that permission to build the MOX plant had been granted by the relevant U.K. authorities and the European Commission after environmental impact assessments and cost-benefit analyses had been conducted and approved at both the domestic and international levels.[50]

In November 2001, in conjunction with initiating Annex VII arbitration, Ireland requested injunctive relief ("provisional measures") from the International Tribunal for the Law of the Sea. Ireland requested that ITLOS order the U.K., *inter alia*, to "immediately suspend the authorisation of the MOX plant" and "take such other measures as are necessary to prevent with immediate effect the operation of the MOX plant."[51]

At hearings on Ireland's request for provisional measures, the United Kingdom contended that ITLOS lacked jurisdiction to hear the case because an OSPAR tribunal was already litigating the matter and because the case should have been initiated in the European Court of Justice (ECJ) pursuant to the Treaty Establishing the European Community.[52] ITLOS overruled the U.K.'s jurisdictional objections and ordered that the Annex VII tribunal had jurisdiction over the lawsuit because the dispute "concerns the interpretation or application" of UNCLOS. Similar to the ICJ's ruling in the *Paramilitary Activities* case, ITLOS judged that the Annex VII tribunal had jurisdiction over the lawsuit, and its judgment was final and not subject to appeal.

ITLOS also ordered provisional measures that required Ireland and the U.K. to cooperate with one another, exchange information about the environmental consequences of commissioning the MOX plant, monitor risks for the Irish Sea caused by the plant's operations, and devise appropriate measures to prevent pollution caused by the plant. In light of assurances from the U.K. that there would be no marine transports of radioactive materials to or from the MOX plant until the summer of 2002, ITLOS did not order that operations at the plant be suspended.[53]

Ireland thereafter pursued its case through the Annex VII arbitration proceeding, and hearings were held over two weeks in June 2003 at the Permanent Court of Arbitration.[54] However, the arbitral tribunal never ruled on the merits of the case, and the proceedings were

48. Daniel Bodansky, "The OSPAR Arbitration of the MOX Plant Dispute," University of Georgia *Research Paper Series* No. 08-002, January 2008, and Permanent Court of Arbitration, "Ireland v. United Kingdom ('OSPAR' Arbitration)," website, July 2, 2003, at *http://www.pca-cpa.org/showpage.asp?pag_id=1158* (February 9, 2012).

49. *MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea (Ireland v. United Kingdom): Memorial of Ireland*, International Tribunal for the Law of the Sea, July 26, 2002, Vol. I, pp. 3–4, at *http://www.pca-cpa.org/upload/files/Ireland%20Memorial%20Part%20I.pdf* (February 9, 2012).

50. Bodansky, "The OSPAR Arbitration of the MOX Plant Dispute," pp. 4–7.

51. *MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea (Ireland v. United Kingdom): Request for Provisional Measures and Statement of the Case of Ireland*, International Tribunal for the Law of the Sea, November 9, 2001, p. 67, at *http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/request_ireland_e.pdf* (February 9, 2012).

52. *MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea (Ireland v. United Kingdom): Written Response of the United Kingdom*, International Tribunal for the Law of the Sea, November 15, 2001, at *http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/response_uk_e.pdf* (February 9, 2012), and UNCLOS, Art. 282.

53. *MOX Plant Case (Ireland v. United Kingdom): Order*, International Tribunal for the Law of the Sea, December 3, 2001, at *http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/Order.03.12.01.E.pdf* (February 10, 2012).

54. Permanent Court of Arbitration, "Ireland v. United Kingdom ('OSPAR' Arbitration)."

suspended because the European Commission, apparently agreeing with the U.K.'s jurisdictional objections, initiated a lawsuit against Ireland in the ECJ claiming that Ireland should have brought its suit in the ECJ and not in an UNCLOS tribunal.[55]

In June 2008, at the request of Ireland, the Annex VII tribunal terminated the proceedings in the *MOX Plant* case. To date, no tribunal has passed judgment on whether the operations of the MOX plant actually caused any harm to Ireland or the Irish Sea or violated the U.K.'s obligations under UNCLOS.[56]

In sum, despite rigorous environmental vetting of the MOX plant by U.K. officials and the approval of the European Commission, Ireland prosecuted a highly costly but ultimately unsuccessful lawsuit against the U.K. in an Annex VII tribunal and sought provisional measures at ITLOS, but the case was ultimately dismissed due to a jurisdictional squabble between Ireland and the European Commission.

By joining UNCLOS, the United States would open itself up to baseless and costly lawsuits like the *MOX Plant* case. Like the U.K., the United States would be responsible for fulfilling its international obligations to protect and preserve the marine environment in proximity to other UNCLOS members, such as the Bahamas, Cuba, and Russia. For example, the United States could be exposed to environmental lawsuits for allegedly polluting the Gulf of Mexico, the Straits of Florida, or the Bering Sea. As illustrated by the *MOX Plant* case, even a body of water more than 100 miles wide could not prevent the U.K. from being sued by Ireland for alleged environmental degradation.

DESPITE RIGOROUS ENVIRONMENTAL VETTING OF THE MOX PLANT BY U.K. OFFICIALS AND THE APPROVAL OF THE EUROPEAN COMMISSION, IRELAND PROSECUTED A HIGHLY COSTLY BUT ULTIMATELY UNSUCCESSFUL LAWSUIT AGAINST THE U.K. IN AN ANNEX VII TRIBUNAL.

U.S. accession to the convention would also give rise to a greater threat—a lawsuit brought against the U.S. for contributing to global climate change.

The Legal Basis for a Climate Change Lawsuit

A widely accepted principle of international law known as the "no-harm rule" obligates a nation to use its territory in such a manner that injury is not caused to persons or property located in another nation. In the context of environmental protection, the principle prohibits a nation from allowing pollution to escape its territory and damage another nation's air, land, water, ecosystem, or living resources or the health of its inhabitants.[57] Ironically, the no-harm rule, which would constitute the legal basis of a climate change claim against the United States, has its origins in the landmark *Trail Smelter* dispute between the United States and Canada in 1941.

***Trail Smelter* and the No-Harm Rule.** The *Trail Smelter* case involved damages to land and livestock located in the State of Washington, allegedly caused by sulfur dioxide fumes discharged from a lead smelter operated by the Consolidated Mining and Smelting Company, located across the international border in Trail, British Columbia.[58] Since no treaty existed to address or resolve the dispute, Canada and the United

55. *European Commission v. Ireland*, Case C-459/03, European Court of Justice, May 30, 2006, and Nikolaos Lavranos, "The Epilogue in the MOX Plant Dispute: An End Without Findings," *European Energy and Environmental Law Review*, Vol. 18, No. 3 (June 2009), p. 180, at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1429909* (February 10, 2012).

56. In August 2011, the U.K. Nuclear Decommissioning Authority announced the imminent closure of the MOX fuel plant in the wake of Japan's earthquake and its impact on the Fukushima nuclear plant. The Japanese nuclear industry and the Fukushima reactor in particular were the primary consumers of the reprocessed fuel produced at the MOX plant. Fiona Harvey, "Sellafield Mox Nuclear Fuel Plant to Close," *The Guardian*, August 3, 2011, at *http://www.guardian.co.uk/environment/2011/aug/03/sellafield-mox-plant-close* (February 10, 2012), and Rowena Mason, "Failing Sellafield Fuel Plant Shuts After Losing Japan Orders," *The Telegraph*, August 4, 2011, at *http://www.telegraph.co.uk/finance/newsbysector/energy/8680072/Failing-Sellafield-fuel-plant-shuts-after-losing-Japan-orders.html* (February 10, 2012).

57. American Law Institute, *Restatement of the Law, Third, of the Foreign Relations Law of the United States*, Vol. 2 (St. Paul, Minn.: American Law Institute Publishers, 1987), pp. 99–100. The "no-harm rule" is related to the common law maxim of nuisance, *sic utere tuo ut alienum non laedas* ("So use your own as not to injure another's property").

58. *Trail Smelter Case (U.S. v. Canada)*, April 16, 1938, and March 11, 1941, in United Nations, *Reports of International Arbitral Awards*, Vol. III (2006), pp. 1905–1982, at *http://untreaty.un.org/cod/riaa/cases/vol_III/1905-1982.pdf* (February 10, 2012).

States adopted a special bilateral convention in 1935 that established an arbitral tribunal for the specific purpose of determining whether Canada was liable for the damage caused by the pollution and, if so, the legal relief to which the United States was entitled.[59]

In 1938, after lengthy proceedings, the arbitral tribunal issued a preliminary judgment ordering the smelter to operate at a reduced level so that elaborate measurements of emissions, air flow, and weather could be made before a final disposition of the case. The tribunal appointed two scientists as technical consultants to conduct experiments and make meteorological observations during the crop-growing seasons of 1938–1940.

The technical consultants reported regularly to the tribunal and "were empowered to require regular reports from the Trail Smelter as to the methods of operation of its plant and the latter was to conduct its smelting operations in conformity with the directions of the Technical Consultants and of the Tribunal."[60] The consultants conducted extensive scientific experiments for three years. In 1941, based on these experiments, the tribunal imposed a strict, comprehensive "regime" on the smelter's future operations, including restrictions on the "hourly permissible emission of sulphur dioxide."[61]

The tribunal ruled that Canada was "responsible in international law for the conduct of the Trail Smelter" and that it had a duty to conform the conduct of the smelter with Canada's obligations under the law. In reaching that decision, the tribunal pronounced its legal rationale:

> Under the principles of international law ... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[62]

That principle—the no-harm rule—is the legacy of the *Trail Smelter* case.

From *Trail Smelter* to UNCLOS. The no-harm rule is now widely accepted as the foundation of the international law prohibiting transboundary air pollution.[63] The 1965 *Restatement of the Law, Second, of the Foreign Relations Law of the United States* cited *Trail Smelter* for the principle "that a state may be held responsible under international law for damage which it causes in the territory of another state." By the time that the current *Restatement* was published in 1987, the no-harm rule was defined in explicitly environmental terms:

> A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control...are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.[64]

The current *Restatement* adopts other aspects of the *Trail Smelter* judgment, including potential remedies for transboundary pollution such as the reduction or termination of activities "threatening or causing the violation" and the payment of reparations.[65]

The no-harm rule has been "internationalized" in various international declarations.[66] For example, it was adopted at the United Nations' first major environmental conference, the U.N. Conference on the Human Environment (Stockholm Conference) in June 1972. At the conclusion of the conference, the assembled nations, including the United States, adopted a Declaration of Principles (the Stockholm

59. Convention Between the United States of America and the Dominion of Canada, Signed at Ottawa, April 15, 1935.

60. *Trail Smelter Case*, pp. 1965–1967, and Alfred P. Rubin, "Pollution by Analogy: The Trail Smelter Arbitration," *Oregon Law Review*, Vol. 50, No. 3 (Spring 1971), p. 262.

61. *Trail Smelter Case*, pp. 1974–1978.

62. *Ibid.*, p. 1965.

63. For example, see Rubin, "Pollution by Analogy," p. 272.

64. *Restatement of the Law, Third*, § 601(1)(b).

65. *Ibid.*, § 602(1).

66. Durwood Zaelke and James Cameron, "Global Warming and Climate Change—An Overview of the International Legal Process," *American University International Law Review*, Vol. 5, No. 2 (1990), pp. 263–265, at *http://digitalcommons.wcl.american.edu/auilr/vol5/iss2/4/* (February 10, 2012).

Declaration) that explicitly recognized the "right to a healthy environment." Principle 21 of that declaration affirms the no-harm rule:

> States have, in accordance with the Charter of the United Nations and the principles of international law ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[67]

The language of Principle 21 was subsequently echoed in resolutions adopted by the U.N. General Assembly in the 1970s, including the 1974 Charter of Economic Rights and Duties of States.[68]

By the time that UNCLOS was adopted in 1982, the no-harm rule was a widely recognized principle in the international environmental lexicon and was considered to reflect customary international law, which is binding on all nations.[69] The no-harm rule articulated in the *Trail Smelter* case, the *Restatement*, the Stockholm Declaration, and various other international pronouncements is restated in Article 194 of UNCLOS:

> States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.[70]

Accession to UNCLOS would obligate the United States to affirm and adopt the no-harm rule, specifically within the context of the marine environment. Accession to the convention also would commit the U.S. to "take all measures ... necessary to prevent, reduce and control" the "release of toxic, harmful or noxious substances ... from or through the atmosphere."[71]

Regrettably, the no-harm rule's internationalization has transformed it over time from a sensible principle to regulate conduct between two neighboring countries into a seemingly unconstrained doctrine to impute global liability for alleged acts of atmospheric pollution. Contemporary legal academics take a breathtakingly expansive view of the rule: "While *Trail Smelter* focused on pollution of U.S. territory directly traceable to a Canadian smelter, the no-harm rule now extends to relations between all States, however distant and has also extended its scope from territories of States to common spaces and the environment as a whole."[72] The no-harm rule is cited in legal and environmental journals as a basis for establishing state responsibility for climate change damages.[73]

Acceding to UNCLOS would commit the U.S. to controlling its pollutants, including alleged "harmful substances" such as carbon emissions and other GHG, in such a way that they do not spread beyond U.S. territory and negatively impact the marine environment. The U.S. would also be obligated to adopt laws and regulations to prevent the pollution of the marine environment from the atmosphere and could be liable under international law for failing to enact legislation necessary to prevent

67. Declaration of the United Nations Conference on the Human Environment, June 16, 1972, at *http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503&l=en* (February 10, 2012).

68. U.N. General Assembly, "International Responsibility of States in Regard to the Environment," December 15, 1972, at *http://www.unhcr.org/refworld/docid/3b00effa71.html* (February 10, 2012), and "Charter of Economic Rights and Duties of States," Resolution 3281 (XXIX), Art. 30, December 12, 1974, at *http://www.un-documents.net/a29r3281.htm* (February 10, 2012).

69. For example, see Roda Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (Leiden, Netherlands: Martinus Nijhoff Publishers, 2005), pp. 145–149, and Rio Declaration on Environment and Development, Principle 2, June 1992, at *http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163* (February 10, 2012). "The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." *Legality of the Threat or Use of Nuclear Weapons: Advisory Opinion*, International Court of Justice, para. 29, July 8, 1996, at *http://www.icj-cij.org/docket/files/95/7495.pdf* (February 10, 2012).

70. UNCLOS, Art. 194(2).

71. *Ibid.*, Art. 194(1) and (3)(a).

72. Verheyen, *Climate Change Damage and International Law*, p. 149.

73. Christina Voigt, "State Responsibility for Climate Change Damages," *Nordic Journal of International Law*, Vol. 77, Nos. 1–2 (2008), pp. 1–22, at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1145199* (February 10, 2012); Zaelke and Cameron, "Global Warming and Climate Change," pp. 263–265; and Christophe Schwarte and Ruth Byrne, "International Climate Change Litigation and the Negotiation Process," Foundation for International Environmental Law and Development, October 2010, pp. 6–7, at *http://www.field.org.uk/files/FIELD_cclit_long_Oct.pdf* (February 10, 2012).

atmospheric pollution. Such domestic laws and regulations "shall" take into account "internationally agreed rules, standards and recommended practices and procedures."[74]

THE NO-HARM RULE'S INTERNATIONALIZATION HAS TRANSFORMED IT OVER TIME FROM A SENSIBLE PRINCIPLE TO REGULATE CONDUCT BETWEEN TWO NEIGHBORING COUNTRIES INTO A SEEMINGLY UNCONSTRAINED DOCTRINE TO IMPUTE GLOBAL LIABILITY FOR ALLEGED ACTS OF ATMOSPHERIC POLLUTION.

UNCLOS contemplates a central role for "competent international organizations" and "diplomatic conferences" in establishing "global and regional rules, standards and recommended practices and procedures" to prevent atmospheric pollution.[75] As to which diplomatic conferences and global standards may be relevant to establishing U.S. obligations under the convention, the 1992 U.N. Conference on Environment and Development ("Earth Summit") and the U.N. Framework Convention on Climate Change (UNFCCC) are instructive.

U.S. Commitments Under UNFCCC. The United States signed the U.N. Framework Convention on Climate Change in June 1992 at the U.N. Conference on Environment and Development. The U.S. ratified the convention in October 1992 and is therefore bound by international law to adhere to its terms.[76]

With 195 states parties, the UNFCCC has been universally adopted and therefore is widely considered to reflect internationally agreed rules and standards. One such rule—the no-harm rule—features prominently in the text of the UNFCCC: "States have, in accordance with the Charter of the United Nations and the principles of international law ... the responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[77]

By ratifying the UNFCCC, the United States committed to achieving the convention's central objective: "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." Although the UNFCCC does not include binding emissions targets like those included in the Kyoto Protocol, U.S. ratification commits it to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs."[78] Potential climate change claimants will undoubtedly cite these commitments as part of its legal basis for a lawsuit against the United States.[79]

In sum, the *Trail Smelter* case's internationalized no-harm rule, combined with UNCLOS's numerous other environmental provisions and U.S. commitments under the UNFCCC, establishes a plausible legal basis to sue the United States in an UNCLOS tribunal for allegedly contributing to global climate change due to its transboundary atmospheric pollution. In the words of one Canadian law professor, "the provisions of UNCLOS, particularly Part XII, are sufficiently broad to allow for a state to claim that a failure by another state to mitigate climate change violates its obligations to preserve and protect the marine environment."[80]

74. UNCLOS, Art. 212(1), and *Restatement of the Law, Third,* § 601, cmt. d.
75. UNCLOS, Art. 212(3).
76. United Nations Framework Convention on Climate Change (UNFCCC), Art. 14, May 9, 1992, at *http://unfccc.int/key_documents/the_convention/items/2853.php* (February 10, 2012). Unlike UNCLOS, the UNFCCC does not require its members to submit to compulsory dispute resolution. Parties to the UNFCCC may submit a declaration accepting the jurisdiction of the ICJ or an arbitral tribunal, but to date only the Netherlands and the Solomon Islands have done so.
77. UNFCCC, preamble. A general rule of treaty interpretation is that treaties shall be interpreted in accordance with their context, which shall comprise, *inter alia*, the preamble. Vienna Convention on the Law of Treaties, May 22, 1969, Article 31(2). The no-harm rule was also adopted at the Earth Summit as Principle 2 of the Rio Declaration on Environment and Development.
78. UNFCCC, Art. 2, 4(2)(a).
79. Michael G. Faure and Andre Nollkaemper, "International Liability as an Instrument to Prevent and Compensate for Climate Change," *Stanford Journal of International Law*, Vol. 26A (2007), pp. 142–143, at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1086281##* (February 10, 2012).
80. Meinhard Doelle, "Climate Change and the Use of the Dispute Settlement Regime of the Law of the Sea Convention," *Ocean Development & International Law*, Vol. 37, Nos. 3–4 (2005), p. 324.

Part III
Tuvalu, Bangladesh, et al. v. United States

The possibility that a small island state, or another injured party, would bring a liability claim against states responsible for climate change no longer is a topic for fiction or a theoretical prospect. There is a rise in plans for litigation worldwide for consequences of global warming.

—International law professors Michael Faure and Andre Nollkaemper[81]

Numerous nations qualify as potential claimants in a lawsuit against the United States in an UNCLOS tribunal, including virtually every developing nation in the world that claims to have experienced a negative impact from climate change. The highly controversial and error-prone U.N. Intergovernmental Panel on Climate Change[82] has identified multiple negative impacts related to the world's oceans that are attributable to climate change, including sea-level rise, reduction in sea-ice cover, elevated sea surface temperatures, increased storm floods, coastal erosion, seawater intrusions into fresh surface and groundwater, and adverse impacts on marine fish and aquaculture.[83]

Some climate scientists claim that these changes in the oceans are caused by GHG emissions and are responsible for damaging the environments of coastal and small island states around the world.

- Rising ocean temperatures will negatively affect coral reefs in the Pacific and Indian Oceans as well as the Caribbean Sea, leading to the loss of 50 percent of the subsistence and artisanal fisheries due to coral bleaching.
- Rising sea levels will destroy vast areas of mangrove trees on the world's tropical coastlines and wipe out critical beach habitats, such as those of sea turtles, due to storm surges and coastal erosion.
- Increases in ocean acidification due to increased carbon dioxide emissions will damage coral reefs in the Red Sea, the west central Pacific, and the Caribbean.[84]

Because these alleged climate change phenomena are global in effect, so is the potential pool of litigants in an UNCLOS lawsuit.

Perhaps the first treatise that identified potential climate change claimants and outlined the contours of an international climate change lawsuit was written in 1990 by law professors Durwood Zaelke and James Cameron.[85] Zaelke and Cameron projected that the nations most likely to bring a climate change lawsuit were low-lying islands negatively affected by the sea-level rise allegedly caused by global warming, such as Kiribati, Maldives, the Marshall Islands, and Tuvalu.

According to Zaelke and Cameron, a rise in sea level would seriously damage these island nations, causing the inundation of wetlands and lowlands, erosion of shorelines, increased coastal flooding, salinization of aquifers, and increased height and frequency of waves. The rise in sea level "combined with the increased intensity and frequency of storms, could cause the loss of lives, property, livelihood, and, in some cases, the entire territory of a state, creating stateless environmental refugees."[86]

IN 2002, THE PRIME MINISTER OF TUVALU STATED HIS INTENTION TO INITIATE A CLIMATE CHANGE LAWSUIT AGAINST THE UNITED STATES BECAUSE OF ITS FAILURE TO ADOPT THE KYOTO PROTOCOL.

More than a decade after their treatise was published, one of Zaelke

81. Faure and Nollkaemper, "International Liability as an Instrument," pp. 124–125.
82. Eli Kintisch, "IPCC/Climategate Criticism Roundup," *Science*, February 15, 2010, at *http://news.sciencemag.org/scienceinsider/2010/02/an-overview-of-ipccclimategate-criticism.html* (February 13, 2012); Quirin Schiermeier, "IPCC Flooded by Criticism," *Nature*, February 2, 2010, at *http://www.nature.com/news/2010/100202/full/463596a.html* (February 13, 2012); and Minority Staff of the Committee on Environment and Public Works, U.S. Senate, *"Consensus" Exposed: The CRU Controversy*, February 2010, at *http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=7db3fbd8-f1b4-4fdf-bd15-12b7df1a0b63* (February 13, 2012).
83. Doelle, "Climate Change and the Use of the Dispute Settlement Regime," p. 320.
84. William C. G. Burns, "Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention," *International Journal of Sustainable Development Law & Policy*, Vol. 2, No. 1 (2006), pp. 39–44, at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=930438* (February 13, 2012).
85. Zaelke and Cameron, "Global Warming and Climate Change."
86. *Ibid.*, pp. 252–262.

and Cameron's hypothetical claimants threatened to sue the United States for its alleged contribution to global climate change. Specifically, in 2002, the prime minister of Tuvalu, a Pacific island nation consisting of a chain of nine coral atolls, stated his intention to initiate a climate change lawsuit against the United States because of its failure to adopt the Kyoto Protocol. That year, at the World Summit for Sustainable Development held in Johannesburg, Tuvalu's government lobbied other small island nations to join them in such a suit at the International Court of Justice.[87]

Tuvalu and three other small Pacific island nations (Fiji, Kiribati, and Nauru) have contemplated such a lawsuit, as evidenced by their declarations upon signing the UNFCCC in 1992. Specifically, each of these nations submitted a declaration that preserved its right to seek legal redress for damages allegedly suffered as a result of climate change. For example, Fiji's UNFCCC declaration reads:

> The Government of Fiji declares its understanding that signature of the Convention shall, in no way, constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change, and that no provisions in the Convention can be interpreted as derogating from the principles of general international law.[88]

In other words, these four nations took specific measures to ensure that signing the UNFCCC did not constitute a waiver of their rights to hold other nations responsible for damages allegedly caused by climate change.

Of course, Fiji, Kiribati, Nauru, and Tuvalu are not the only small island nations that qualify as potential climate change litigants. Many other small island states may also experience sea-level rise and other adverse impacts from climate change, as well as ocean acidification allegedly caused by an increase in carbon dioxide emissions. The Alliance of Small Island States, an intergovernmental body established in 1990 to address global warming and negotiate within the U.N. system, has 37 members, 36 of which are UNCLOS states parties.[89]

While small island states are among the most likely climate change claimants, there is no shortage of other nations that could bring a lawsuit against the United States if it accedes to UNCLOS. Low-lying coastal states would suffer from rising sea levels in the same manner as small island states. A rise in sea level of only one meter would allegedly destroy a large portion of Bangladesh, while a two-meter rise would flood Lagos, the capital of Nigeria, as well as 20 percent of the populated area of Egypt.[90] Such low-lying nations may also experience "extreme weather events" induced by climate change such as tropical cyclones of increased frequency and intensity.[91] Even some European nations will allegedly suffer from sea level rise, salt water infusions, and coastal erosion due to climate change.[92]

Potential climate change litigants are not limited to states that would suffer damages from a rise in sea levels. Landlocked nations in the Himalayan mountains may have a claim for climate change damages. For example, climate change is allegedly responsible for causing glaciers to retreat, adversely affecting nations such as Nepal, which is "highly dependent on the water from mountain runoff and on the electricity generated by these waters."[93]

87. Reuters, "Tiny Tuvalu Sues United States over Rising Sea Level," Tuvalu Online, August 29, 2002, at *http://www.tuvaluislands.com/news/archived/2002/2002-08-29.htm* (February 13, 2012), and Kalinga Seneviratne, "Tiny Tuvalu Steps Up Threat to Sue Australia, U.S.," Inter Press Service, September 5, 2002, at *http://www.commondreams.org/headlines02/0905-02.htm* (February 13, 2012).

88. UNFCCC, "Declarations," at *http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXVII~7&chapter=27&Temp=mtdsg3&lang=en#EndDec* (February 13, 2012). Papua New Guinea has also submitted a declaration similar to those made by Fiji, Kiribati, Nauru, and Tuvalu.

89. Alliance of Small Island States, website, at *http://www.sidsnet.org/aosis/members.html* (February 13, 2012). The 36 AOSIS members that are also UNCLOS states parties are Antigua and Barbuda, Bahamas, Barbados, Belize, Cape Verde, Comoros, Cuba, Dominica, Dominican Republic, Fiji, Federated States of Micronesia, Grenada, Guinea–Bissau, Guyana, Haiti, Jamaica, Kiribati, Maldives, Marshall Islands, Mauritius, Nauru, Palau, Papua New Guinea, Samoa, Singapore, Seychelles, São Tomé and Príncipe, Solomon Islands, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Tonga, Trinidad and Tobago, Tuvalu, and Vanuatu.

90. Zaelke and Cameron, "Global Warming and Climate Change," p. 259. Bangladesh, Nigeria, and Egypt are UNCLOS states parties.

91. Verheyen, *Climate Change Damage and International Law*, p. 280.

92. European Commission, "Sea-Level Rise," at *http://ec.europa.eu/clima/sites/change/how_will_we_be_affected/sea_level_rise_en.htm* (February 13, 2012).

93. Verheyen, *Climate Change Damage and International Law*, pp. 280–281. Nepal is an UNCLOS state party.

From coral atolls in the Pacific Ocean to low-lying coastal states to landlocked Himalayan nations, as long as a country is an UNCLOS state party and can demonstrate that it has suffered adverse effects from climate change, it qualifies as a potential litigant in the convention's compulsory dispute resolution tribunals. Scores of such nations are positioned to initiate climate change lawsuits against the United States if it accedes to the convention.

The "Most Logical Target"

There is consensus within the international environmental and legal community that the United States is the best target for an international climate change lawsuit.[94] One law professor has characterized the United States as a likely target because it is a developed nation with high per capita and total GHG emissions, adding that the "higher the overall historic and present contribution to global emissions by the defending party, arguably the better the chance of a successful outcome."[95]

Over the past decade, since Tuvalu's 2002 threat to sue the United States, the drumbeat to sue the U.S. has increased steadily, and UNCLOS tribunals have featured prominently among the potential forums for such a case.

- In 2003, the Washington, D.C.-based Environmental Law Institute published "The Legal Option: Suing the United States in International Forums for Global Warming Emissions" by law professor Andrew L. Strauss. According to Strauss, the U.S. rejection of the Kyoto Protocol "makes the United States the most logical first country target of a global warming lawsuit in an international forum." The article proposed various forums for initiating a lawsuit against the United States, including UNCLOS's compulsory dispute resolution mechanisms, but Strauss lamented, "As the United States has not adhered to the Convention, however, a suit could not be brought directly against it under the Convention."[96]

- In her 2005 book *Climate Change Damage and International Law*, law professor Roda Verheyen posed a comprehensive hypothetical case that could be brought against the United States for its alleged responsibility in melting glaciers and causing glacial outburst floods in the Himalayas. The claim would include compensation for flood damages as well as additional funds to monitor glacial lakes and prevent future floods. Verheyen based liability for such damages on the U.S.'s alleged violation of its commitments under the UNFCCC and failure to ratify the Kyoto Protocol.[97]

- In December 2005, the Inuit Circumpolar Council, an international nongovernmental organization representing Inuit peoples in Alaska, Canada, Greenland, and Russia, filed a petition against the United States at the Inter-American Commission on Human Rights (IACHR), a human rights body operating within the Organization of American States. The petition requested that the IACHR direct the United States to adopt mandatory measures to limit its emissions and to provide assistance to help the Inuit adapt to the impacts of climate change.[98]

- In 2006, the *International Journal of Sustainable Development Law & Policy* published "Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention,"

94. Accession to UNCLOS may also expose U.S. persons and businesses to climate change and other environmental lawsuits in U.S. courts. Pursuant to Article 235(2), states parties to the convention "shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction." See also *Restatement of the Law, Third*, § 602(2). The viability and potential consequences of such domestic lawsuits are outside the scope of this paper.

95. Doelle, "Climate Change and the Use of the Dispute Settlement Regime," p. 332. Doelle also identified Canada and Australia as potential defendants in a climate change lawsuit.

96. Andrew L. Strauss, "The Legal Option: Suing the United States in International Forums for Global Warming Emissions," *Environmental Law Reporter*, Vol. 33, No. 3 (2003), pp. 10185–10188, at *http://www.climatelaw.org/articles/strauss_elr_article.pdf* (February 13, 2012).

97. Verheyen, *Climate Change Damage and International Law*, pp. 279–308.

98. Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, December 7, 2005, at *http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf* (February 13, 2012), and Koivurova, "International Legal Avenues to Address the Plight of Victims of Climate Change," pp. 285–286. The IACHR dismissed the Inuits' petition in November 2006 because the petition failed to allege facts that would constitute a violation of human rights under the American Declaration of the Rights and Duties of Man.

in which law professor William C. G. Burns cited UNCLOS's marine pollution provisions as a basis for a cause of action for rising sea levels and changes in ocean acidity. Burns named the United States as "the most logical State to bring an action against given its status as the leading producer of anthropogenic greenhouse gas emissions, as well as its failure to ratify Kyoto," but noted that the U.S. "is not currently a Party to the Convention."[99]

- In a September 2011 speech to the U.N. General Assembly, Johnson Toribiong, president of the small Pacific island nation of Palau, called upon the General Assembly to seek an advisory opinion from the International Court of Justice "on the responsibilities of States under international law to ensure that activities carried out under their jurisdiction or control that emit greenhouse gases do not damage other States." President Toribiong cited Article 194 of UNCLOS (the no-harm rule) in support of his statement.[100]

In sum, the United States is undoubtedly at the top of the list of potential defendants against climate change suits brought by environmental lawyers and academics, native peoples such as the Inuit, and UNCLOS states parties such as Tuvalu. Moreover, UNCLOS's compulsory dispute resolution tribunals are regularly cited as viable international forums for bringing an international climate change action against the United States.[101]

Thus far, the United States has denied potential climate change claimants their day in international court by withdrawing from compulsory ICJ jurisdiction and by refusing to accede to UNCLOS. Clearly, accession to the convention would open the door to these litigants as well as to their advocates in the international academic, environmental, and nongovernmental organization communities.

THUS FAR, THE UNITED STATES HAS DENIED POTENTIAL CLIMATE CHANGE CLAIMANTS THEIR DAY IN INTERNATIONAL COURT BY WITHDRAWING FROM COMPULSORY ICJ JURISDICTION AND BY REFUSING TO ACCEDE TO UNCLOS.

Environmental NGO Enablers

Some environmental activist groups have already demonstrated a propensity for supporting, participating in, and in some cases actually filing climate change lawsuits against U.S. targets, as well as taking other legal actions relating to the marine environment in U.S. courts[102] and international forums.

- In 2002, Greenpeace, Friends of the Earth, and the city of Boulder, Colorado, filed a climate change lawsuit against the Export–Import Bank of the United States and the Overseas Private Investment Corporation, alleging that they improperly financed fossil fuel projects in foreign nations without assessing whether the projects contributed to global warming or harmed the U.S. environment in violation of the National Environmental Policy Act.[103]

- In 2004, environmental activists including the Natural Resources Defense Council, Greenpeace, and the Pew Environment Group formed the Deep Sea Conservation Coalition, which urges UNCLOS member states to "initiat[e] legal action through the International Tribunal for the Law of the Sea (ITLOS) against States that continue to allow deep-sea [bottom] fishing on the high seas in contravention of the provisions of [U.N. General Assembly] resolutions."[104]

99. Burns, "Potential Causes of Action for Climate Change Damages in International Fora," p. 44. See also William C. G. Burns and Hari M. Osofsky, eds., *Adjudicating Climate Change: State, National and International Approaches* (New York: Cambridge University Press, 2009).
100. Johnson Toribiong, statement to the U.N. General Assembly, 66th Regular Sess., September 22, 2011.
101. Doelle, "Climate Change and the Use of the Dispute Settlement Regime," pp. 327–331; Schwarte and Byrne, "International Climate Change Litigation and the Negotiation Process," pp. 19–20; and Jennifer Kilinski, "International Climate Change Liability: A Myth or a Reality?" *Journal of Transnational Law & Policy*, Vol. 18, No. 2 (Spring 2009), pp. 396–398.
102. Several major climate change lawsuits have been filed in U.S. courts during the past decade, including *Massachusetts, et al. v. U.S. Environmental Protection Agency* (D.C. Cir.); *Connecticut, et al. v. American Electric Power Company, Inc., et al.* (S.D. N.Y.); *Comer, et al. v. Nationwide Mutual Insurance Co., et al.* (S.D. Mass); and *Native Village of Kivalina v. ExxonMobil Corporation, et al.* (N.D. Cal.).
103. *Friends of the Earth, Inc., et al. v. Spinelli, et al.* (N.D. Cal.).
104. Deep Sea Conservation Coalition, "Call to Action," at *http://www.savethehighseas.org/calltoaction/* (February 13, 2012).

- In 2005, when the Inuit Circumpolar Council drafted its climate change petition accusing the United States of human rights violations, the council "received a great deal of assistance from environmental non-governmental organizations such as the Center for International Environmental Law and Earthjustice." The council also received assistance from academic specialists in "the field of indigenous peoples' human rights."[105]

- In 2010, Greenpeace International and the World Wide Fund for Nature intervened in ITLOS proceedings in connection with an advisory opinion concerning the responsibilities of UNCLOS states parties with respect to their activities in the deep seabed.[106]

- In 2011, Greenpeace and the te Whanau-a-Apanui tribe petitioned the government of New Zealand to revoke an oil exploration permit that had been awarded to Petrobras, a major Brazilian oil company. The petition claimed that New Zealand had failed to properly consider the environmental impact of the permit, in violation of customary international law and UNCLOS.[107]

Not surprisingly, major U.S. and international environmental activist groups and nongovernmental organizations strongly support U.S. accession to UNCLOS. Supporters of U.S. accession include the Defenders of Wildlife, the Environmental Defense Fund, Greenpeace, the International Union for Conservation of Nature, the Natural Resources Defense Council, the Nature Conservancy, the Ocean Conservancy, Oceana, and the World Wildlife Fund.[108]

These activists, bolstered by international environmental lawyers and academics, will undoubtedly support any climate change lawsuit brought against the United States by an UNCLOS state party. Such support could come in a number of forms, including fundraising, legal research, political advocacy and pressure within the U.S. and at international conferences, public relations campaign activities, letter-writing efforts, and online petitions.

Three Unpredictable "Swing" Votes

If the U.S. accedes to UNCLOS and a climate change lawsuit is brought against it, the case will most likely be litigated by an Annex VII arbitral tribunal.[109] It is also likely that a climate change claimant will seek "provisional measures" injunctive relief at ITLOS while the arbitral tribunal is being assembled.

Litigating a politically explosive climate change lawsuit in an Annex VII tribunal would create great uncertainty for the United States because of the manner in which the five-member tribunal is assembled. Under Annex VII, the U.S. and the opposing party would each select one of their nationals as the first two members of the tribunal, possibly from a list of maritime experts maintained by the U.N. Secretary-General. Thereafter, the two parties would jointly select the remaining three members, again possibly from the same list of experts. However, if the two parties were unable to agree on these three "swing vote" members, their selection would fall to the president of the International Tribunal for the Law of the Sea, who would select the three members from the list of experts at his complete discretion.[110]

Therein lies the great uncertainty and risk of litigating in an UNCLOS arbitral tribunal. Due to the

105. Koivurova, "International Legal Avenues to Address the Plight of Victims of Climate Change," pp. 286–287.

106. Jon M. Van Dyke, Duncan E. J. Currie, and Daniel Simons, "Memorial Filed on Behalf of Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature," August 13, 2010, at *http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/Statement_Greenpeace_WWF.pdf* (February 13, 2012).

107. Press release, "Greenpeace and te Whānau-ā-Apanui Unite to Legally Challenge Deep Sea Oil Permits," Greenpeace New Zealand, September 19, 2011, at *http://www.greenpeace.org/new-zealand/en/press/Greenpeace-and-te-Whnau—Apanui-unite-to-legally-challenge-deep-sea-oil-permits/* (February 13, 2012).

108. U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, "Supporters," at *http://www.state.gov/e/oes/lawofthesea/statements/index.htm* (February 13, 2012), and Greenpeace USA, "Stand Up for Ocean Wildlife," at *https://secure3.convio.net/gpeace/site/Advocacy?cmd=display&page=UserAction&id=661* (February 13, 2012).

109. Article 287 of UNCLOS permits member states to declare which tribunals they will submit to for dispute resolution. The Senate Committee on Foreign Relations included a declaration in its 2004 draft Resolution of Advice and Consent to Ratification that selected Annex VII tribunals for all general disputes and Annex VIII tribunals for disputes involving four categories of cases, including cases involving the protection and preservation of the marine environment. However, a climate change case would likely "default" to an Annex VII tribunal because the likely claimants have not submitted declarations under Article 287. UNCLOS, Art. 287(5).

110. UNCLOS, Annex VII, Arts. 2–3. UNCLOS states parties may nominate up to four experts to the list of potential tribunal members.

potential legal, economic, and political consequences of a climate change lawsuit, there is a strong likelihood that the United States and a climate change claimant would not agree on the three "swing" members of an Annex VII tribunal. The U.S. would then be at the mercy of the ITLOS president, who would select those three members from a list of international experts who likely sympathize legally, ideologically, and politically with the aggrieved climate change claimant.

The current list of Annex VII arbitrators is populated with foreign nationals from countries that do not necessarily have the best interests of the United States at heart. For example, the current list includes the nationals of UNFCCC "non-Annex I" nations and other developing countries (Argentina, Brazil, Chile, Costa Rica, Indonesia, Mexico, Mongolia, Sri Lanka, and Trinidad and Tobago) that are likely to be sympathetic to the perceived plight of small island states and other developing countries. European Union countries with nationals on the current Annex VII arbitrator list (Austria, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Italy, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Sweden, and the United Kingdom) are uniformly proponents of the theory of anthropogenic climate change. Still other countries represented on the list (Russia and Sudan) are nations that the U.S. would not consider reliable allies.[111]

In sum, by acceding to UNCLOS the United States would unnecessarily expose itself to baseless environmental lawsuits, including a claim that its GHG emissions have caused harm to other nations. Because of its membership in the convention, the U.S. could be compelled to appear before a tribunal to defend itself in any such lawsuit. International courts and tribunals, including those created by UNCLOS, have not hesitated to assert jurisdiction and pass judgment in controversial social, political, and environmental lawsuits. The judgment of an UNCLOS tribunal in a climate change lawsuit would be final, unappealable, and enforceable in the United States.

111. UNCLOS, "Notifications Made Under Article 2 of Annexes V and VII (List of Conciliators and Arbitrators)," at *http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en* (February 13, 2012); UNFCCC, Annex I; and Group of 77, "The Member States of the Group of 77," at *http://www.g77.org/doc/members.html* (February 13, 2012).

Part IV
The U.S. Should Avoid Unnecessary Legal and Political Exposure

If the United States acceded to UNCLOS and was sued for climate change damages, it would certainly defend itself vigorously. However, a review of the proceedings and judgments in the *Paramilitary Activities*, *Avena*, and *MOX Plant* cases shows that having strong jurisdictional and legal defenses does not necessarily carry the day. The United States ignores the lessons learned from those international lawsuits at its peril.

A Climate Change Regime for the U.S.

Unlike the U.S. legal system, which prohibits lawsuits that raise nonjusticiable political questions, international tribunals have not hesitated to accept jurisdiction in such cases and have issued judgments that have adversely affected U.S. national interests.

The ICJ's judgments in the *Paramilitary Activities* case, in which it condemned U.S. use of force in Nicaragua and ordered the payment of reparations, and the *Avena* case, in which it questioned the use of the death penalty in Texas and ordered additional legal reviews, prove that international courts will not hesitate to interfere in contentious social, military, and political matters. In the *MOX Plant* case, UNCLOS tribunals asserted jurisdiction over a major environmental dispute between Ireland and the United Kingdom.

Perhaps the greatest danger that the U.S. would face if it acceded to UNCLOS is a judgment that falls along the same lines as that imposed in the *Trail Smelter* case. That case involved a single smelting operation in Canada, yet the arbitral tribunal ordered intrusive studies and comprehensive, costly remedies.

PERHAPS THE GREATEST DANGER THAT THE U.S. WOULD FACE IF IT ACCEDED TO UNCLOS IS A JUDGMENT THAT FALLS ALONG THE SAME LINES AS THAT IMPOSED IN THE *TRAIL SMELTER* CASE.

The *Trail Smelter* tribunal ordered a complex, multiyear study of the fumes from the Canadian smelter. Scientists were hired to serve as technical consultants and to conduct wide-ranging experiments, as described in the tribunal's judgment:

> Through the authority vested in it by the Tribunal, this technical staff was enabled to study the influence of meteorological conditions on dispersion of the sulphurous gases emitted from the stacks of the smelter. This involved the establishment, operation, and maintenance of standard and newly designed meteorological instruments and of sulphur-dioxide recorders at carefully chosen localities in the United States and the Dominion of Canada, and the design and construction of portable instruments of various types for the observation of conditions at numerous surface locations in the Columbia River Valley and in the atmosphere over the valley. Observations on height, velocity, temperature, sulphur dioxide content, and other characteristics of the gas-carrying air currents, were made with the aid of captive balloons, pilot balloons and airplane flights.[112]

The results of these experiments, which were conducted over three years, were transmitted to the tribunal in a 374-page report, accompanied by "numerous scientific charts, graphs, and photographs."[113] Based on that report, the tribunal ordered that the smelter operation "shall be regulated" through a comprehensive "regime" to monitor and restrict its operations. The tribunal ordered the smelter to install meteorological instruments to measure and record wind direction and velocity on an hourly basis and a special "bridled cup turbulence indicator" to measure wind turbulence. The tribunal further ordered that atmospheric temperature and barometric pressure must also be measured and that sulfur dioxide concentrations be measured on a daily basis and reported to the U.S. and Canada on a monthly basis.[114]

Most apropos to a potential legal remedy for climate change damages, the *Trail Smelter* tribunal set maximum levels of "hourly permissible emission" of sulphur dioxide fumes from the smelter. One such

112. *Trail Smelter Case*, p. 1967.

113. *Ibid.*

114. *Ibid.*, pp. 1974–1975.

restriction required the smelter to shut down or reduce its emissions during the growing season if the sulphur dioxide recorder located at Columbia Gardens (halfway between the smelter and the international boundary line) indicated the presence of 0.3 parts per million or more of sulphur dioxide emissions over two consecutive 20-minute periods.[115] The tribunal's regime included similarly detailed regulations for the nongrowing season:

> If the Columbia Gardens recorder indicates 0.5 part per million or more of sulphur dioxide for three consecutive twenty minute periods during the non-growing season and the wind direction is not favorable, emission shall be reduced by four tons of sulphur per hour or shut down completely when the turbulence is bad, until the recorder shows 0.2 part per million or less of sulphur dioxide for three consecutive twenty minute periods.[116]

As a consequence of the tribunal's comprehensive regulations, the smelter operation ultimately spent nearly $20 million (approximately $310 million in today's dollars) to reengineer the smelter to recover the pollutants and turn them into a marketable byproduct.[117]

If the United States received an adverse judgment in an UNCLOS climate change lawsuit, the tribunal could order remedies similar to those imposed by the *Trail Smelter* tribunal—a regime of regulations, compliance measures, and even reparations. In anthropogenic climate change parlance, such a regime would be akin to mitigation measures (i.e., actions to reduce the level of U.S. GHG emissions).

A comprehensive GHG mitigation regime imposed on the U.S. would seriously affect the American economy because carbon emissions and other GHG are produced throughout the United States by several significant sectors of the economy, including the electricity generation, transportation, industrial, residential, and commercial sectors. Like the "cap-and-trade" regulations that have been debated in Congress, the imposition of international *Trail Smelter*–style regulations on every U.S. power plant, refinery, automobile, chemical plant, and landfill would harm the U.S. economy.[118]

The U.S. government has already completed much of the groundwork for formulating a potential mitigation regime that could be imposed by an UNCLOS tribunal. The Environmental Protection Agency (EPA) has helpfully compiled an inventory of all U.S. GHG emissions from 1990 to 2009, which would assist an UNCLOS tribunal in developing a mitigation plan for the United States.[119] Starting in 2010, approximately 13,000 U.S. facilities accounting for 85 percent of U.S. GHG emissions will be required to track their own emissions and report them to the EPA under the Greenhouse Gas Reporting Program.[120] If an UNCLOS tribunal needed examples of GHG regulations for inspiration, it could refer to such publications as the EPA's 673-page proposed rule for regulating GHG emissions from medium- and heavy-duty vehicles.[121] Such industry data, government reports, and programs would also be considered admissions of liability by the United States and would likely feature prominently in any international climate change lawsuit.

As in the *Trail Smelter* case, an UNCLOS tribunal could field a team of technical experts to report regularly on U.S. compliance with the tribunal's judgment, providing daily

115. *Ibid.*, pp. 1975–1976.

116. *Ibid.*, p. 1976.

117. Keith A. Murray, "The Trail Smelter Case: International Air Pollution in the Columbia Valley," *BC Studies*, No. 15 (Autumn 1972), p. 84; Rubin, "Pollution by Analogy," p. 272; and DollarTimes, "Inflation Calculator," at *http://www.dollartimes.com/calculators/inflation.htm* (February 13, 2012).

118. David W. Kreutzer, Karen A. Campbell, William W. Beach, Ben Lieberman, and Nicolas D. Loris, "What Boxer–Kerry Will Cost the Economy," Heritage Foundation *Backgrounder* No. 2365, January 26, 2010, at *http://www.heritage.org/research/reports/2010/01/what-boxer-kerry-will-cost-the-economy*.

119. U.S. Environmental Protection Agency, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2009*, April 2011, pp. ES-1–ES-19, at *http://www.epa.gov/climatechange/emissions/downloads11/US-GHG-Inventory-2011-Complete_Report.pdf* (February 13, 2012).

120. U.S. Environmental Protection Agency, "Mandatory Reporting of Greenhouse Gases (40 CFR part 98)," June 2011, at *http://www.epa.gov/climatechange/emissions/downloads09/FactSheet.pdf* (February 13, 2012); OMB Watch, "Companies Required to Report Greenhouse Gas Pollution," September 29, 2009, at *http://www.ombwatch.org/node/10431* (February 13, 2012); and Robin Bravender, "EPA Air Chief Says Carbon Registry Could Spur Emissions Cuts," *The New York Times*, October 13, 2009, at *http://www.nytimes.com/gwire/2009/10/13/13greenwire-epa-air-chief-says-carbon-registry-could-spur-26767.html* (February 13, 2012).

121. U.S. Environmental Protection Agency and National Highway Traffic Safety Administration, *Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium and Heavy-Duty Engines and Vehicles*, October 25, 2010, at *http://www.epa.gov/otaq/climate/regulations/hd-preamble-regs.pdf* (February 13, 2012).

or monthly reports tallying GHG emissions, mitigation efforts, temperature monitoring, and so forth. Intrusive site inspections by international climate change scientists might also be judged appropriate to monitor compliance with the tribunal's orders. Such reports and inspections would amount to a "measurement, reporting and verification" system that a comprehensive climate change convention has thus far failed to adopt.

In addition to mitigation and compliance measures, the United States could be ordered to pay monetary reparations, long recognized under international law, to the aggrieved climate change claimant.[122] Small island states such as Tuvalu and Palau consider climate change an existential threat and believe that they will eventually be submerged beneath rising sea levels.[123] Other low-lying nations such as Bangladesh expect to endure massive displacements of their coastal populations due to coastline erosion.

Assigning dollar amounts to such catastrophic events is necessarily difficult, but the costs would undoubtedly be significant. In 2008, for example, an Inupiat village of 400 people in Alaska initiated a climate change lawsuit against major oil companies and electric utilities, alleging that their contribution to climate change had caused coastal erosion, endangering the village's existence. The village demanded that the defendants pay $400 million ($1 million per villager) to relocate their village 12 miles inland.[124]

Such reparations awards would accomplish under the patina of international law a transfer of wealth from the global North to the global South, a goal that has long been central to the demands of the developing world at international climate change negotiations.[125]

Political Exposure and International Pressure

A claimant in a climate change lawsuit against the United States would face several legal and evidentiary challenges in proving its case in an UNCLOS tribunal, including jurisdictional hurdles, causation issues, and the question of equitable apportionment of damages.[126] Nevertheless, regardless of whether the U.S. might ultimately prevail in such a case, acceding to the convention is fraught with political danger.

Advocates of international climate change lawsuits see them as an acceptable way to achieve their environmental ends, including U.S. capitulation to a comprehensive climate change treaty:

> Litigation or the threat thereof would emphasise the urgency of the need to agree [to] binding commitments on climate change and would put additional pressure on the negotiations process. Negotiators may feel more of a responsibility vis-à-vis the international community and have an additional lever in relation to their national governments. A high-profile court case would also engage a variety of actors in the debate and provide new momentum to find consensual solutions inside and outside the UNFCCC talks … . *Inter-State climate change litigation may help to create the political pressure and third-party guidance required to re-invigorate the international negotiations, within or outside the UNFCCC.*[127]

One law professor believes that "litigation will very likely play a role" in determining who will bear the costs of climate change and singles out the United States for special treatment, stating that "litigation efforts need to be primarily focused on the United States as the major

122. *Restatement of the Law, Third,* § 602(1); *Factory at Chorzów (Germany v. Poland)*, Permanent Court of International Justice, September 13, 1928; and Faure and Nollkaemper, "International Liability as an Instrument," pp. 173–175.

123. Rebecca Elizabeth Jacobs, "Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice," *Pacific Rim Law & Policy Journal*, Vol. 14, No. 1 (2005), pp. 103–128.

124. Felicity Barringer, "Flooded Village Files Suit, Citing Corporate Link to Climate Change," *The New York Times*, February 27, 2008, at *http://www.nytimes.com/2008/02/27/us/27alaska.html* (February 13, 2012).

125. Court-ordered wealth transfers would be consistent with other provisions of UNCLOS, such as the redistribution of oil and gas royalties and other proceeds from exploitation of the extended continental shelf and the deep seabed. See UNCLOS, Art. 82 and Part XI.

126. See Shi-Ling Hsu, "A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit," *University of Colorado Law Review*, Vol. 79, No. 3 (Spring 2008), pp. 125–130, at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014870* (February 16, 2012); Voigt, "State Responsibility for Climate Change Damages," pp. 20–21; Burns, "Potential Causes of Action for Climate Change Damages in International Fora," pp. 44–50; and Schwarte and Byrne, "International Climate Change Litigation and the Negotiation Process," pp. 10–17.

127. Schwarte and Byrne, "International Climate Change Litigation and the Negotiation Process," pp. 21–23 (emphasis added).

hindrance to beginning the remedial process" (i.e., by failing to ratify the Kyoto Protocol).[128] Other proponents of the theory of anthropogenic climate change understand that there are precedents for using international courts to achieve purposes other than legal redress. For instance, the World Trade Organization "has similarly been strategically employed by governments to influence negotiations and clarify State obligations."[129]

INDEED, "THE MOST IMPORTANT ROLE OF INTERNATIONAL CLIMATE CHANGE LITIGATION" MAY BE TO INFLUENCE TREATY NEGOTIATIONS.

Another law professor maintains that the mere act of "preparing, announcing, filing, advocating and forcing a response" to a climate change lawsuit would significantly affect ongoing treaty negotiations; build awareness of climate change; develop climate science, law, and policy; strengthen international institutions; support the democratization of global environmental governance; promote the progressive development of international law; and bolster "transnational climate advocacy networks."[130] Indeed, "the most important role of international climate change litigation" may be to influence treaty negotiations:

> [T]he threat of such litigation may have an important effect on the negotiations concerning further reductions of GHG emissions. Thus, exploring the possibilities of such international climate change litigation can be seen as a useful device for furthering the international process and negotiations aiming at the reduction of GHG emissions.[131]

Therefore, those who want the recalcitrant United States brought to heel would win a significant political and diplomatic victory for their cause merely if an UNCLOS tribunal asserted jurisdiction over a climate change lawsuit. Like the International Court of Justice, the tribunals established under UNCLOS have complete discretion over whether they have jurisdiction on a particular case: "In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal."[132] As was seen in both the *Paramilitary Activities* and *MOX Plant* cases, international courts have asserted and maintained jurisdiction in cases where a party rightly and correctly opposes jurisdiction and even in cases where a nation abandons the proceedings altogether.

Moreover, if the United States fails to adhere to an adverse judgment on climate change issued by an UNCLOS tribunal, it risks political backlash both domestically and within the international community. This was starkly illustrated in both the *Paramilitary Activities* and *Avena* cases.

In the *Paramilitary Activities* case, the ICJ issued an adverse judgment against the United States despite the U.S.'s withdrawal from that court's jurisdiction. When the United States continued to insist that the ICJ lacked jurisdiction over the matter, Nicaragua elevated its case to the U.N. Security Council. Specifically, in July and October of 1986, Nicaragua petitioned the Security Council to enforce the ICJ's judgment in *Paramilitary Activities*.[133] In both instances, the council voted overwhelmingly (11 to 1) to demand that the United States fully comply with the ICJ's judgment.[134] On both occasions, the United States was forced to cast a politically embarrassing veto

128. Strauss, "The Legal Option," p. 10191.

129. Schwarte and Byrne, "International Climate Change Litigation and the Negotiation Process," p. 2, citing Tim Josling, Longyue Zhao, Jeronimo Carcelen, and Kaush Arha, "Implications of WTO Litigation for the WTO Agricultural Negotiations," International Food and Agricultural Trade Policy Council *Issue Brief*, March 2006, at *http://www.agritrade.org/Publications/WTO%20litigation.pdf* (February 13, 2012).

130. David Hunter, "The Implications of Climate Change Litigation for International Environmental Law-Making," American University, Washington College of Law *Research Paper* No. 2008-14, July 15, 2007, at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1005345* (February 13, 2012).

131. Faure and Nollkaemper, "International Liability as an Instrument," p. 179.

132. UNCLOS, Art. 288(4).

133. Pursuant to Article 94 of the U.N. Charter, a nation "may have recourse to the Security Council" if another nation "fails to perform the obligations incumbent upon it under a judgment rendered by the [International Court of Justice]."

134. The vote on both resolutions was 11 in favor (Australia, Bulgaria, China, Congo, Denmark, Ghana, Madagascar, Trinidad and Tobago, the U.S.S.R., the United Arab Emirates, and Venezuela); one against (the United States); and three abstentions (France, Thailand, and the United Kingdom).

to prevent the council from adopting the resolutions.

The United States also suffered negative political exposure from its refusal to comply with the ICJ's judgment in the *Avena* case. One of the 54 Mexican death-row inmates in the *Avena* case was Jose Ernesto Medellin, a man who had been convicted and sentenced to death in Texas for the brutal gang rape and murder of two Houston teenagers. After the ICJ's ruling in *Avena*, Medellin filed a petition for habeas corpus in U.S. court, asserting that Texas was obligated to enforce the ICJ's judgment and reconsider his conviction and death sentence. The *Medellin* case was ultimately heard by the U.S. Supreme Court, which in March 2008 held that the ICJ's judgment in *Avena* was not enforceable in the United States.[135]

The Supreme Court's ruling in the *Medellin* case led to diplomatic protests by Mexico and demonstrations in Mexico City, both at the time of the court's decision and on the day of Medellin's execution. The government of Mexico accused the United States of violating international law by refusing to enforce the ICJ's judgment.[136]

In addition, in the 112th Congress, Senator Patrick Leahy (D–VT), chairman of the Committee on the Judiciary, introduced the Consular Notification Compliance Act of 2011. If enacted, the legislation would grant U.S. federal courts jurisdiction to review the cases of Mexican nationals convicted and sentenced to death who claim that their rights under the Vienna Convention on Consular Relations were violated.[137] Senator Leahy's bill is strongly supported by Amnesty International, Human Rights First, Human Rights Watch, and the American Civil Liberties Union.[138]

Finally, unlike the situation in the *Paramilitary Activities* and *Avena* cases, it would not be politically feasible for the United States to withdraw from UNCLOS in the wake of an adverse climate change judgment. The U.S. could not limit its withdrawal to UNCLOS's compulsory dispute resolution provisions, but instead would be required to withdraw from the entire convention, exposing it to criticism for rejecting the convention's environmental protection rules, deep seabed regulations, and navigational provisions.

Don't Open the Door

U.S. national interests would be harmed rather than advanced by accession to UNCLOS. In addition to needlessly exposing itself to baseless environmental lawsuits, the United States would be required to transfer billions of dollars in oil and gas royalties generated on its continental shelf to the International Seabed Authority for redistribution to the developing world.[139] However, the loss of those royalties pales in comparison to the potential costs of a climate change judgment by an UNCLOS tribunal against the United States.

Some UNCLOS states parties, particularly small island nations that view climate change as an existential threat, are poised to sue major greenhouse gas emitters, particularly the United States, in international court. A climate change lawsuit would be encouraged, promoted, and funded by willing international academics, nongovernmental organizations, and climate activists such as Greenpeace and the Natural Resources Defense Council.

In the past, international courts have not hesitated to pronounce adverse judgments against the United States that have negatively affected its national interests, including judgments on critical matters such as the use of military force, as in the *Paramilitary Activities* case, and on controversial legal and social issues such as the death penalty, as in the *Avena* case. UNCLOS tribunals have already indicated that they will

135. *Medellin v. Texas*, 552 U.S. 491 (2008).

136. Reuters, "Mexico Protests U.S. Ruling on Death Row Case," March 31, 2008, at *http://www.reuters.com/article/2008/04/01/us-mexico-usa-execution-idUSN3131381820080401* (February 13, 2012); Reed Johnson, "Texas Executes Mexican Killer Amid International Protests," *Los Angeles Times*, August 6, 2008, at *http://www.latimes.com/news/nationworld/world/la-fg-execute6-2008aug06,0,2738895.story* (February 13, 2012); and CNN, "Mexican Government Protests Texas Execution," August 6, 2008, at *http://articles.cnn.com/2008-08-06/justice/mexican.executed_1_nationals-on-death-row-execution-date-ruling* (February 13, 2012).

137. Consular Notification Compliance Act of 2011, S. 1194, 112th Cong., 1st Sess., June 14, 2011.

138. American Civil Liberties Union *et al.*, letter to Senator Patrick Leahy and Senator Charles Grassley, July 27, 2011, at *http://www.aclu.org/files/assets/civil_human_rights_congress_letter_7-27-11_for_groups.pdf* (February 13, 2012).

139. Steven Groves, "U.N. Convention on the Law of the Sea Erodes U.S. Sovereignty over U.S. Extended Continental Shelf," Heritage Foundation *Backgrounder* No. 2561, June 7, 2011, at *http://www.heritage.org/research/reports/2011/06/un-convention-on-the-law-of-the-sea-erodes-us-sovereignty-over-us-extended-continental-shelf*.

engage in hotly contested international environmental disputes, as demonstrated by the *MOX Plant* case.

An adverse judgment against the United States in a climate change lawsuit would be domestically enforceable and would undoubtedly harm the U.S. economy. The regime formulated by the arbitral tribunal in the *Trail Smelter* case, if extrapolated to its logical extent and applied to U.S. industries that produce greenhouse gases, would impose massive regulatory burdens on U.S. companies, and the costs would be passed on to American consumers. Such a judgment would accomplish through international litigation what climate change alarmists could not achieve through treaty negotiations or in the U.S. Congress.

No comprehensive study of the potential legal, economic, political, and military consequences of adverse judgments from UNCLOS tribunals has been conducted. The U.S. government should assess the litigation risks that would come with UNCLOS membership. To that end:

- The Obama Administration should conduct an interagency review of UNCLOS's compulsory dispute resolution mechanisms to determine the extent to which the United States would be exposed to baseless environmental and other lawsuits and the potential economic, political, and military costs to the U.S. that could result from such suits.

- Relevant Senate and House committees should hold oversight hearings on potential lawsuits that may be brought in an UNCLOS tribunal that could result in adverse judgments that harm U.S. environmental, economic, and military interests.

The proponents of anthropogenic climate change—including small island states, low-lying coastal nations, environmental activists, and international legal academics—already possess the means and motive to initiate a climate change lawsuit against the United States but currently lack the opportunity to do so. Accession to UNCLOS would open that door.

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