

STATEMENT OF
REAR ADMIRAL WILLIAM L. SCHACHTE, U.S. NAVY (Retired)
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Statement of

Rear Admiral William L. Schachte, Jr., JAGC, USN (Retired)

Mr. Chairman and Members of the Committee, it is an honor for me to be here today with you, and to present this testimony in support of U.S. accession to the 1982 Law of the Sea Convention. Before I begin my testimony, however, I would like to take a minute, Mr. Chairman, to recall your extensive public service to this nation and your significant contributions to efforts to help ensure that U.S. military forces can operate freely on the world's oceans. In addition to your insightful leadership as chairman of this committee, your active-duty naval service and your appointments as Under Secretary and later Secretary of the Navy give you an invaluable perspective to assess the importance of the LOS Convention to our maritime and national security interests. I especially recall and commend your work as the chief negotiator and U.S. signatory of the Incidents at Sea Executive Agreement, between our nation and the former Soviet Union. As I am sure everyone here knows, INCSEA remains in effect today, and has even been used by other nations, including the United Kingdom, Germany, Canada and France, as their model for similar agreements regarding the operation of military ships and aircraft at sea around the world.

Mr. Chairman, I have worked extensively with the LOS Convention throughout most of my military career as a Navy JAG, serving as a member of the U.S. delegation to the negotiations during President Reagan's administration and as the Defense Department Representative for Ocean Policy Affairs during the late 1980s and early 1990s. I also testified as a private citizen before the Senate Foreign Relations Committee last October. That testimony is a matter of public record, so I won't repeat myself here, Mr. Chairman. What I would like to do today is concentrate my remarks primarily on the national security benefits of the Convention by responding to some of the misleading and inaccurate statements being made by some of the opponents to the Convention. Of course, I am also prepared to address other issues of concern that any of the Members of this Committee may have regarding the national security benefits of the Convention.

It is very important to carefully and comprehensively study the LOS Convention together with President Reagan's 1983 Ocean Policy Statement and the 1994 Agreement whose provisions prevail on Seabed Mining. I would submit that the specific reasons put forth by those opposing the Convention have been corrected by the 1994 Agreement. For example, it is totally inaccurate to state that the Convention subjects U.S. military or economic activities to the control of a UN bureaucracy. That is not true with respect to either military or economic or any

other activities. Under the Convention all activities at sea, with the exception of deep seabed mining, are controlled by either the flag state (or sponsoring nation) or the coastal nation. The most important living and nonliving resources, including oil and gas, are under exclusive coastal nation control. The Seabed Authority's role is very carefully circumscribed and limited to coordinating the exploration and exploitation of nonliving mineral resources of the seabed that are not under exclusive coastal nation control. More importantly, by becoming a party, the United States will acquire a seat on the governing council in perpetuity. This seat gives us the power to veto important substantive decisions of the Council such as those concerning revenue sharing from deep seabed mining and decisions on amendments to the deep seabed mining regime. Additionally, by becoming a party, the United States will acquire a seat on the Finance Committee. Our seat on the Finance Committee gives the United States a veto over all decisions of the Council and the Assembly having financial or budgetary implications.

To quote from President Reagan's Deputy Secretary of State, Mr. John Whitehead, from his op/ed piece in the Washington Times of July 28, 1994: "One cannot dispute the reminiscence that 'some of us in the Reagan administration thought we had slain it for good.' But that was personal, not administration policy. The fact is that the Reagan White House and State Department never questioned

the need for international law to codify a 12-mile limit to coastal sovereignty, naval rights of passage, prohibitions on maritime pollution and protections of fisheries. All of these advance interests important to Americans."

"The administration objected, very specifically and strenuously, to the section of the treaty establishing an international seabed mining authority that would have subjected American mining companies to onerous controls dictated by a Third World majority. It singled out these provisions as 'not acceptable,' but insisted that if they were satisfactorily revised, 'The Administration will support ratification.'"

Mr. Whitehead concluded: "Immediately after the U.N. General Assembly promulgates the new agreement this week, all the major industrialized countries will sign the convention. It is vital for America's interests that we be among them. We have no need to fear prudent use and protection of the world's oceans and seas under rule of law."

National Security Benefits of the Convention.

Mr. Chairman, without question, accession to the LOS Convention will enhance U.S. national security and economic interests. Military planners have long sought international respect for the freedoms of navigation and over-flight that are set forth in the LOS Convention. The Convention guarantees our ships the right of innocent passage through foreign territorial seas.

It guarantees our warships, military aircraft and submarines the right of transit passage through straits used for international navigation, such as Gibraltar, Bab el Mandeb, Hormuz and Malacca. This right of transit passage is critical to maintain the mobility and flexibility of our armed forces. With the extension of the territorial sea from 3 to 12 nautical miles, more than 100 international straits, which previously had high seas corridors, became overlapped by territorial seas. The LOS Convention guarantees our armed forces a non-suspendable right of transit passage in, over and under these straits in the “normal mode” of operation. That means that our submarines can transit submerged, military aircraft can overfly in combat formation with normal equipment operation, and warships can transit in a manner necessary for their security, including launching and recovering aircraft, formation steaming and other force protection measures.

The same guaranteed, non-suspendable rights apply to warships, military aircraft and submarines transiting through archipelagoes, such as Indonesia and the Philippines. The LOS Convention recognizes the right of some island nations to claim archipelagic status if they meet the requirements of the Convention. But it also guarantees our armed forces the right of archipelagic sea lanes passage in the “normal mode” through all routes normally used for international navigation and overflight, regardless of whether sea lanes have been designated by the archipelagic nation.

The Convention guarantees our right to exercise high seas freedoms of navigation and overflight and all other internationally lawful uses of the seas related to those freedoms within the exclusive economic zones (EEZ) of other nations. This includes the right to engage in military activities, such as:

- launching and recovery of aircraft, water-borne craft and other military devices;
- operating military devices;
- intelligence collection;
- surveillance and reconnaissance activities;
- military exercises and operations;
- conducting hydrographic surveys; and

- conducting military surveys (military marine data collection).

By codifying these important navigational rights and freedoms, the Convention provides international recognition of essential maritime mobility rights used by our forces on a daily basis around the globe. It establishes a legal framework for the behavior of its 145 parties and provides the legal predicate that enables our armed forces to respond to crises expeditiously and at minimal diplomatic and political costs. Today, more than ever, it is essential that key sea and air lanes remain open as an international legal right, and not be contingent upon approval by nations along the route. Anything that might inhibit these inherent freedoms is something we must avoid. The stable legal regime for the world's oceans codified in the LOS Convention will guarantee the legal basis for the global mobility needed by our armed forces. And I might add that the navigational provisions of the Convention must continue to be exercised by our operational forces, particularly in the maritime environment of the global commons, an environment that has traditionally been one of claim and counterclaim.

I'm not here to discuss the economic benefits of the Convention, but I would like to mention that the U.S. EEZ is by far the largest and richest of any in the

world. We have some of the richest and most abundant fisheries in the world – all of which are under our exclusive control. Moreover, the pot of gold in the seabed is the oil and gas, and that was also placed under coastal nation control. With all due respect, the focus on deep seabed mining concerns an activity that has no market and is economically not feasible at this time because many of the same minerals are found on land or within the EEZ. In short, our national security and economic interests will be advanced if we join the Convention.

Inaccuracies About the Convention.

If I may, Mr. Chairman, I will now briefly address four areas where inaccurate statements have been made regarding the Convention: (1) the impact of U.S. accession to ongoing intelligence gathering activities, including submerged transits by submarines; (2) the impact of U.S. accession to ongoing maritime interception operations (MIO) and the Proliferation Security Initiative (PSI); (3) reliance on customary international law to exercise our navigational freedoms; and (4) the impact of mandatory dispute resolution on U.S. sovereignty, in particular, U.S. military activities at sea.

Impact on Intelligence Gathering.

Nothing in the Convention will affect the way we currently conduct surveillance and intelligence activities at sea. Opponents to the Convention argue that the Convention's provisions on innocent passage – Articles 19 and 20 – will prohibit or otherwise adversely affect U.S. intelligence activities in foreign territorial seas at a time when such activity is vital to our national security. I can say without hesitation that nothing could be further from the truth.

While it is true that Article 19 provides that intelligence collection within the territorial sea is inconsistent with the innocent passage regime and that Article 20 provides that submarines must navigate on the surface when engaged in innocent passage, it's a far stretch to thus conclude that the Convention prohibits intelligence collection and requires submarines to navigate on the surface when transiting the territorial sea. Nothing in Article 19 prohibits a U.S. vessel from engaging in intelligence activities in a foreign territorial sea. If a vessel does engage in such activities, it simply cannot claim that it is engaged in innocent passage. The same rule has applied for the past seven decades. Similarly, Article 20 does not prohibit submerged transits through the territorial sea, *per se*. Article 20 merely repeats the rule from the 1958 Convention on the Territorial Sea, a convention to which the United States is a party. The rule concerning submerged

transits from the 1958 Convention has been the consistent position of nations, including the United States, for more than 70 years and it has never been interpreted as prohibiting or otherwise restricting intelligence collection activities or submerged transits in the territorial sea. In short, if or when the need arises to collect intelligence in a foreign territorial sea, nothing in the LOS Convention will prohibit that activity.

Impact on MIO/PSI.

As a former naval officer, Mr. Chairman, you know that the U.S. Navy has been conducting Maritime Interception Operations (MIO) or MIO-type operations since we first declared our independence. These operations have been conducted using a variety of legal bases, including: flag State or master's consent, bilateral boarding agreements, conditions of port entry, customs enforcement in waters contiguous to the territorial sea, universal jurisdiction over stateless vessels and vessels engaged in piracy and slave trade, belligerent right of visit and search under the law of armed conflict, and the inherent right of self-defense, most recently reflected in Article 51 of the U.N. Charter. Any of these bases can be used individually or in combination to interdict suspect vessels on the high seas as we continue to fight the Global War on Terrorism. Some of these bases are

codified in the LOS Convention. Others, like the right of self-defense and belligerent rights, exist outside and are unaffected by the Convention. The Convention's preamble is quite clear in this regard – that is, “matters not regulated by the Convention continue to be governed by the rules and principles of general international law.” Thus, matters such as self-defense and belligerent rights are unaffected by the Convention. In short, nothing in the LOS Convention hampers, impedes, trumps, or otherwise interferes with anything we have done in the past, present or future regarding MIO. Where the provisions of the Convention like Articles 92 and 110 apply, we will use them to our advantage. In situations where other aspects of international law apply, such as our right of self-defense, the Convention simply is not controlling. To illustrate, since President Reagan's 1983 direction that the United States would conform to the non-seabed mining provisions of the Convention, the United States has relied on its inherent right of self-defense to conduct MIO on the high seas on two occasions. On 16 August 1990, the United States, joined by Australia and the UK, announced that, in the exercise of the inherent right of individual and collective self-defense and at the request of Kuwait, it was commencing a MIO to enforce U.N. Security Council Resolution (UNSCR) 661, which imposed an embargo on goods entering Iraq and Kuwait. Nine days later, on 25 August, the Security Council adopted UNSCR 665, which endorsed the Arabian Gulf MIO. The right of self-defense has also been

used as one of the legal justifications for the current MIO in support of Operation Enduring Freedom and Operation Iraqi Freedom. I would note parenthetically that self-defense was also one of the legal bases used to justify the interdiction of offensive weapons and associated materials to Cuba during the 1962 Cuban Missile Crisis.

Mr. Chairman, if I can now briefly address the Proliferation Security Initiative (PSI). As you all know, the PSI is a relatively new concept, which was announced by President Bush on 31 May 2003 in Krakow, Poland. I'm certain that members of the Administration can better address the intricacies of the PSI than I can, since I have not been directly involved in its development. But, as I understand it, this initiative was developed in conjunction with 10 other countries – Australia, Japan, France, Germany, Italy, The Netherlands, Poland, Portugal, Spain and the UK. Since then, 3 more countries – Canada, Norway and Singapore – have been added to the partnership. All of these countries are parties to the LOS Convention.

PSI is a global initiative designed to create a more robust approach to preventing weapons of mass destruction (WMD), their delivery systems and related materials flowing to and from States and non-state actors of proliferation

concern. In furtherance of this initiative, the PSI partners agreed to a Statement of Interdiction Principles (SOP) in September 2003. Some of the opponents to the Convention have argued that becoming a party to the Convention will hinder our ability to effectively interdict WMD at sea. This argument, however, fails to recognize that one of the basic tenets of the SOP is that PSI activities will be undertaken consistent with national legal authorities and relevant international law and frameworks, including the navigation-related provisions of the LOS Convention. The LOS Convention absolutely does not provide any role for the UN relating to PSI activities, much less a role in deciding when and where ships at sea may be boarded. There already exists a large body of authority under international law for PSI interdictions at sea, including:

- Enforcement actions by coastal nations in their internal waters, territorial sea and national airspace, consistent with LOS Convention Articles 2 and 21. Coastal nation sovereignty extends beyond its land territory and internal waters to the adjacent territorial sea and the air space over the territorial sea. Within the territorial sea, coastal nations may adopt laws and regulations to prevent the infringement of its customs, fiscal, immigration or sanitary laws. The coastal nation may also exercise the control necessary within its 24 nautical mile contiguous zone to prevent infringement of these laws and regulations.

- Enforcement actions by a flag State over vessels flying its flag, consistent with LOS Convention Articles 92 and 110. As a general rule, the flag State has exclusive jurisdiction over vessels flying its flag on the high seas, but there are exceptions.
- Boarding of foreign flag vessels on the high seas based on the consent of the flag State or the master, consistent with LOS Convention Article 92. Although the flag State has exclusive jurisdiction over its vessels on the high seas, the jurisdiction can be waived by the flag State or by the ship's master, the flag State's representative on the vessel.
- Boarding of a foreign flag vessel pursuant to a bilateral or multilateral boarding agreement with the flag State, as evidenced by the recently concluded U.S.-Liberia PSI Boarding Agreement (11 February 2004). This agreement is modeled after the counter-narcotics cooperation agreements we currently have with 24 nations.
- Enforcement actions against stateless vessels and vessels that have been assimilated to a ship without nationality, consistent with LOS Convention Articles 92 and 110. As you know, Mr. Chairman, all nations have jurisdiction over stateless vessels, as well as vessels engaged in piracy and slave trade.

Last, but not least Mr. Chairman, as in the case of MIOs, PSI interdictions can also be justified as a self-defense measure. Clearly, international law, including the LOS Convention, would not prohibit the United States or any other nation from boarding a vessel carrying a WMD that posed an imminent threat to our national security just because we didn't have flag State or master consent. If one thing is clear in international law, a nation is authorized to use armed force in self-defense to protect its national interests against an imminent threat of attack.

Reliance on Customary International Law.

Mr. Chairman, some have argued that joining the Convention is not necessary because the navigational rights and freedoms codified in the Convention already exist as customary international law and are therefore binding on all nations. I believe that premise is flawed for a number of reasons.

While it is true that many of the Convention's provisions are reflective of customary international law, others, such as the rights of transit passage and archipelagic sea lanes passage that I previously discussed, are creations of the Convention. Additionally, if you examine the evolution of customary international law in the 20th Century, you'll find that it evolved the erosion, not the preservation,

of navigational rights and freedoms. In the mid 1950's- it was concluded by the major maritime powers that the best way to stop that erosion was through the adoption of a universally recognized treaty that established limits on coastal nation jurisdiction and preserved traditional navigational rights and freedoms.

I think it is also important to note, Mr. Chairman, that not everyone agreed with our “customary international law” interpretation announced by President Reagan in his 1983 Ocean Policy Statement. However, our ability to influence the development of customary law changed dramatically in 1994 when the Convention entered into force. As a non-Party, we no longer had a voice at the table when important decisions were being made on how to interpret and apply the provisions of the Convention. As a result, over the past 10 years, we have witnessed a resurgence of creeping jurisdiction around the world. Coastal States are increasingly exerting greater control over waters off their coasts and a growing number of States have started to challenge US military activities at sea, particularly in their 200 nautical mile (nm) EEZ.

For example, as I testified before the Senate Foreign Relations Committee, Malaysia has closed the strategic Strait of Malacca, an international strait, to ships carrying nuclear cargo. Chile and Argentina have similarly ordered ships carrying

nuclear cargo to stay clear of their EEZs. These actions are inconsistent with the Convention and customary law, but will other nations attempt to follow suit and establish a new customary norm that prohibits the transport of nuclear cargo? Will attempts be made to expand such a norm to include nuclear-powered ships?

China, India, North Korea, Iran, Pakistan, Brazil, Malaysia and others, have directly challenged US military operations in their EEZ as being inconsistent with the Law of the Sea Convention and customary international law. Again, the actions by those countries are inconsistent with the Convention and customary law, but will other nations follow suit and attempt to establish a new customary norm that prohibits military activities in the EEZ without coastal State consent?

If we are going to successfully curtail this disturbing trend of creeping jurisdiction, we must reassert our leadership role in the development of maritime law and join the Convention now. The urgency of this issue is highlighted by the fact that under its terms, the Convention can be amended after this November. As a party, the US could prevent any attempt to erode our crucial and hard won navigational freedoms that are codified in the Convention.

I also believe, Mr. Chairman, that it is short-sighted to argue that, if the customary law system somehow breaks down, the United States, as the world's pre-eminent naval power, wouldn't have any trouble enforcing it. Clearly, our Navy could engage in such an effort. However, enforcing our navigational rights against every coastal nation in the event the Convention and customary law systems collapse would be very costly, both politically and economically. Moreover, it would divert our forces from their primary missions, including the long-term global war on terrorism. Excessive coastal nation claims are the primary threat to our navigational freedoms. Those claims can spread like a contagious virus, as they did in the 20th Century. The added legal security we get from a binding treaty permits us to use our military forces and diminishing resources more efficiently and effectively by concentrating on their primary missions.

Loss of U.S. Sovereignty?

Concerns have been raised that it is not in the best interests of the United States to have its maritime activities subject to the control of an international tribunal, like the International Tribunal for the Law of the Sea or the International Court of Justice (ICJ). That concern is clearly misplaced. While the Convention does establish a Tribunal, parties are free to choose other methods of dispute

resolution. The United States has already indicated that if it becomes a party it will elect two forms of arbitration rather than the Tribunal or the ICJ.

More importantly, this concern fails to recognize that no country would subordinate its national security activities to an international tribunal. This is a point that everyone understood during the negotiations of the Convention, and that is why Article 286 of the Convention makes clear that the application of the compulsory dispute resolution procedures of section 2 of Part XV are subject to the provisions of section 3 of Part XV, which includes a provision that allows for military exemptions, which would encompass military activities conducted pursuant to PSI.

Some may try to argue that Article 288 allows a court or tribunal to make the final determination as to whether or not it has jurisdiction over a matter where there is a dispute between the parties as to the court's jurisdiction. They argue that Article 288 could be read to authorize a court or tribunal to make a threshold jurisdictional determination of whether an activity is a military activity or not and, therefore, subject to the jurisdiction of the court or tribunal. However, Article 288 is also found in section 2 of Part XV and therefore does not apply to disputes involving what the U.S. Government has declared to be a military activity under

section 3 of Part XV. I submit this interpretation is supported by the negotiating history of the Convention, which reflects that certain disputes, including military activities, are considered to be so sensitive that they are best resolved diplomatically, rather than judicially. This interpretation is also supported by a plain reading of the Convention.

It is very important, as recommended by the Senate Foreign Relations Committee's report, that while depositing an instrument of accession, the United States should reemphasize this point by making a declaration or an understanding that clearly states that military activities are exempt from the compulsory dispute resolution provisions of the Convention and that the decision regarding whether an activity is military in nature is not subject to review by any court or tribunal.

One final point on dispute settlement, Mr. Chairman. The Convention itself tends to take disputes out of a bilateral context, with both parties directing their attention to the Convention and not necessarily at each other. As you will recall, that's how we resolved the 1988 Black Sea Bumping incident with the former Soviet Union, which resulted in the 1989 Joint Statement by the U.S.S.R. and the United States concerning a Uniform Interpretation of the Rules of Innocent Passage. The Convention's provisions on innocent passage provided the legal

basis for the uniform interpretation. We also successfully utilized the Convention in resolving many other difficult issues, such as the Northwest Passage dispute with Canada.

Rush Job?

Finally, Mr. Chairman, although I didn't mention this issue at the beginning of my statement, I'd like to respond to the allegation that the ratification process with regard to the LOS Convention is moving too fast.

Few treaties in U.S. history have undergone the level of scrutiny that the LOS Convention has undergone. Every aspect of the Convention was painstakingly reviewed and analyzed during its 9-year negotiation. Since 1982, it has been exhaustively considered, analyzed and interpreted by every relevant agency in the U.S. government. As you know, the Reagan administration gave it a long, careful review and decided not to sign it solely because of the flaws in Part XI concerning deep seabed mining. The Convention was again closely scrutinized from 1990 to 1994 as Part XI was being renegotiated to fix the problems identified by the Reagan Administration. I would note, in this regard, that the efforts to renegotiate Part XI commenced under the first Bush Administration. After the Part

XI Agreement was successfully negotiated in 1994 to fix the problems identified by President Reagan, the Convention was again reviewed and analyzed when the Clinton Administration sent the Convention and the Part XI Implementing Agreement to the Senate for advice and consent. The Convention was again extensively reviewed and analyzed in 2001 after 9/11, and again this year. Initial hearings on the Convention were held by the Senate Foreign Relations Committee in 1994 and again in 2003, as well as these hearings and the hearings before the Committee on Environment and Public Works. Finally, Mr. Chairman, the Convention has been the topic of debate and discussion at countless academic conferences hosted by numerous prestigious institutions, including but not limited to: Georgetown University, University of Virginia, Duke University, Center for Ocean Law and Policy, Law of the Sea Institute, and National Academy of Sciences. In short, Mr. Chairman, to conclude this has been a “rush job” would insufficiently credit all of those thoughtful reviews.

Mr. Chairman, there is now almost universal adherence to the LOS Convention, with 145 parties, including all of our major allies and important non-aligned nations. The Convention establishes a stable and predictable legal framework for uses of the oceans that will benefit our armed forces. As a matter of substance, all of his successors have agreed with President Reagan that the

Convention sets forth the appropriate balance between the rights of coastal nations and the rights of maritime nations. The United States is both and will benefit two-fold by becoming a party. The Convention is good for America – good for our economy, good for our well-being and, most importantly, good for our national security. It is time that we reassert our position as the pre-eminent maritime nation of the world and take our rightful place as a party to the Convention.

That concludes my testimony, Mr. Chairman. It has been an honor for me to be with you here today. Thank you.