

# THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

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## HEARING BEFORE THE COMMITTEE ON INTERNATIONAL RELATIONS HOUSE OF REPRESENTATIVES ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

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# THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

WEDNESDAY, MAY 12, 2004

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON INTERNATIONAL RELATIONS,  
*Washington, DC.*

The Committee met, pursuant to call, at 10:38 a.m. in Room 2172, Rayburn House Office Building, Hon. Henry J. Hyde presiding.

Chairman HYDE. The Committee will come to order. Brigadier J.D. Hittle, of the U.S. Marine Corps, delivered a speech in Philadelphia on October 28th, 1961, in which he said that the pathway of man's journey through the ages is littered with the wreckage of nations, which in their hour of glory forgot their dependence on the sea.

Clearly, the United States is in no danger of forgetting our dependence on the sea. To the contrary, for years the United States has made great diplomatic investments in the law of the sea, in general, and in the Law of the Sea Convention, in particular.

Recently, the Senate Committee on Foreign Relations held hearings and unanimously reported favorably the United Nations Convention on the Law of the Sea and the 1994 Agreement Relating to the Implementation of Part XI on the U.N. Convention on the Law of the Sea. Subsequently, the Senate Armed Services and the Environment and Public Works Committees held hearings on the subject, and at all three hearings, Administration officials, including leaders from the uniformed services, testified in support of accession to the Convention and ratification of the agreement.

The Law of the Sea Convention established a sweeping legal regime that, in the words of one author, governs activities on, over, and under the world's oceans. As the greatest maritime nation in the world, the significance of such a treaty to our national interests, whether military, diplomatic, or economic, can't be overstated.

These issues demand our serious attention, and today we will hear testimony from proponents and opponents of the treaty. National security interests are central to the proponents' arguments in favor of accession.

Proponents of the treaty have testified that since September 11th our mobility requirements as a naval power have never been greater. They argue that it is in our national interests to accede to the Convention because it supports vital transit rights necessary for our strategic mobility.

These rights are essential for projecting military power, or ensuring freedom of navigation for commercial interests. The Convention

codifies these essentials. Proponents also argue that the United States can better protect its national interests from within the Convention's institutions than from without.

As a party to the Convention, the United States could nominate members for the International Tribunal for Law of the Sea as advocates for legal interpretations favorable to the United States' interests.

I anticipate Administration witnesses will testify on these key national security issues, among others. Today's witness from the commercial sector will undoubtedly testify to the economic interests that will be advanced through accession. She will champion the opportunity to challenge claims of excessive sovereignty within the Law of the Sea Tribunal.

Today, we will also hear from opponents of the treaty, and they have raised a number of fundamental questions as to the wisdom of accession. Among these is whether accession is necessary. If the Convention codifies existing customary international law with regard to navigational rights, the argument runs that the United States benefits from it, whether the U.S. is a party to the treaty or not.

Opponents have also questioned whether the 1994 agreement fixes the deep seabed mining provisions that led President Reagan to oppose Part XI of the Convention in the first instance. The agreement, for example, leaves in place an international bureaucracy that includes an International Seabed Authority to administer mineral resources in the seabed located in areas beyond national jurisdiction. It also provides for administrative fees for deep seabed mining operations and establishment of an economic assistance fund for those developing countries that incur economic losses to their land-based mining operations caused by seabed mining.

Opponents have also expressed both practical and sovereignty concerns over the Convention's mandatory dispute resolution provisions. We look forward to hearing our two panels of distinguished witnesses discuss these and other issues.

And I would ask them if any implementing legislation would be necessary should the United States accede to the treaty. With the help of our witnesses, my hope is that we Members of the Committee will become better informed today on the complex Law of the Sea Treaty, and its impact on the economic, diplomatic, and national security interests of the United States.

I now turn to my friend and colleague, Tom Lantos, the Ranking Democratic Member, for his opening remarks.

[The prepared statement of Chairman Hyde follows:]

PREPARED STATEMENT OF THE HONORABLE HENRY J. HYDE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS, AND CHAIRMAN, COMMITTEE ON INTERNATIONAL RELATIONS

*The pathway of man's journey through the ages is littered with the wreckage of nations, which, in their hour of glory, forgot their dependence on the sea.*

BGen J.D. Hittle, USMC speech in Philadelphia, 28 Oct 61

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The Law of the Sea Convention established a sweeping legal regime that, in the words of one author, governs activities on, over, and under the world's oceans. As the greatest maritime nation in the world, the significance of such a treaty to our national interests, whether military, diplomatic, or economic, can not be overstated. These issues demand our serious attention.

Today we will hear testimony from both proponents and opponents of the treaty.

National security interests are central to the proponents' arguments in favor of accession. Proponents of the treaty have testified that since September 11 our mobility requirements as a naval power have never been greater. They argue that it is in our national interests to accede to the Convention because it supports vital transit rights necessary for our strategic mobility. These rights are essential for projecting military power or ensuring freedom of navigation for commercial interests. The convention codifies these essentials.

Proponents also argue that the United States can better protect its national interests from within the Convention's institutions than without. As a party to the Convention, the United States could nominate members for the International Tribunal for the Law of the Sea as advocates for legal interpretations favorable to U.S. interests.

I anticipate that Administration witnesses will testify on these key national security issues, among others.

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I look forward to hearing our two panels of distinguished witnesses discuss these and other issues. I would ask them if any implementing legislation would be necessary should the United States accede to the treaty. With the help of our witnesses, my hope is that Members of the Committee will become better informed today on the complex Law of the Sea Treaty and its impact on the economic, diplomatic, and national security interests of the United States.

I now turn to my friend and colleague, Tom Lantos, the Ranking Democratic Member, for his opening remarks.

Mr. LANTOS. Thank you very much, Mr. Chairman, for holding this important hearing on the Convention on the Law of the Sea, and its impact on America's national interests. This is yet another milestone along your statesmanlike leadership of this Committee.

Mr. Chairman, the global war on terrorism will be a generations-long struggle to dismantle the global terrorist network, and as we have discovered, there is no silver bullet. We must use every diplomatic, economic, and military tool at our disposal in concert with our allies to prevail over the cowardly terrorists who wish to destroy us.

Mr. Chairman, the Law of the Sea Treaty is precisely such a tool. This important treaty will increase the strategic mobility of our military, and it will ensure that the United States and its allies can respond quickly in times of crisis.

By guaranteeing the rights of our naval and air forces to transit through the seas of other countries and key straits, the treaty makes a critical contribution to U.S. security. It is therefore no surprise, Mr. Chairman, that a broad bipartisan consensus exists for immediate ratification of the Law of the Sea. Both President Bush and Senator Kerry strongly support ratification, along with the Chairman of the Joint Chief of Staffs, and the Chief of Naval Operations.

I am therefore perplexed as to why the Senate Republican leadership has yet to schedule a vote on a treaty directly related to our national security. I can only come to the conclusion, Mr. Chairman, that some in the Senate who fundamentally distrust multilateralism in all its manifestations, and who have fought against almost every international treaty, simply cannot bear the fact that their own Administration, together with our Nation's most senior military officials, believe that the Law of the Sea advances America's national security interests.

I would urge all Members of the other body to listen to the words of General Richard Myers, the Chairman of the Joint Chiefs of Staff, who wrote that this treaty remains, and I quote: "A top national priority," and: "It supports efforts on the war on terrorism by providing much-needed stability and operational maneuver space, codifying essential navigational and over-flight freedoms."

Mr. Chairman, our men and women in uniform, who are on the front lines on the war on terrorism, deserve farsighted legislators who can put aside past prejudices to do what is essential on the war on terrorism.

Representing San Francisco and the peninsula south of San Francisco, areas on the West Coast for which this treaty is particularly significant, I want to emphasize the critically important environmental effects of the Law of the Sea Treaty. In short, this treaty represents a landmark development in our efforts to end marine pollution and conserve the fragile ecosystems in our seas. Recently, the President's National Commission on the Oceans issued its preliminary report.

The conclusions are startling. Simply put, our oceans are dying. Unless we take steps immediately, whole species may vanish and fishing industries in the United States and around the world are going to face collapse at terrible human costs.

The Law of the Sea Treaty establishes basic obligations for all nations to protect and to preserve the marine environment, and to conserve marine species. The treaty requires enforcement of international rules designed to limit pollution from ships and seabed development, and it mandates coastal countries to conserve the living resources up to 200 miles offshore, to ensure that they are not endangered by over-exploitation.

And as we will hear in this hearing, U.S. economic interests are protected by this treaty. But these sound national security, economic, and environmental benefits apparently do not convince the sharpest opponents of Senate ratification of this treaty.



They suggest that the treaty will restrict our intelligence gathering and block the Administration's proliferation security initiative. They argue that the treaty remains unchanged from 1982, when President Reagan refused to let the United States become a party to it.

These charges, Mr. Chairman, are utter nonsense. In 1983, President Reagan issued a proclamation providing that the United States would accept and act in accordance with all provisions of the Convention, except for those relating to deep seabed mining. As a result, the United States has been fully implementing every one of the provisions of the Law of the Sea Treaty that the critics are now condemning without any loss to our national security interests.

Indeed, under a previous treaty from the 1950s, we are under these very same legal obligations today. The provisions on deep seabed mining, the only provisions that President Reagan objected to, were comprehensively revised to remove all of our objections in 1994.

If the Senate gives its advice and consent to the treaty, the United States will have achieved, at the table, future changes to its provisions, and we will obtain a veto on critical matters that come before the governing council established by the Convention.

Mr. Chairman, the Law of the Sea Treaty fundamentally promotes America's national security interests, as well as the global environment, and it accomplishes these important tasks without infringing on our sovereignty, or costing the taxpayers billions of dollars.

By ratifying the treaty the United States will obtain a key role in its implementation, and other countries will be required to respect and ultimately to protect key U.S. national security, economic and environmental interests.

U.S. ratification will undoubtedly further expand the number of countries who will join the treaty, thereby increasing its value to our Nation. Mr. Chairman, later today you and Senators Lugar and Biden, and I, will be visiting with the President, and it is my hope that we will have an opportunity to discuss with him the importance of his weighing in with the Senate Republican leadership on behalf of this treaty. Thank you, Mr. Chairman.

Chairman HYDE. Thank you, Mr. Lantos. Without objection, the prepared statements of our colleagues, Senator Lugar, and Admiral Schachte, will be inserted at this point in the record.

[The statements of Senator Lugar and Admiral Schachte follow:]

PREPARED STATEMENT OF THE HONORABLE RICHARD G. LUGAR, A U.S. SENATOR  
FROM THE STATE OF INDIANA, AND CHAIRMAN, COMMITTEE ON FOREIGN RELATIONS,  
U.S. SENATE

Senator Richard G. Lugar  
Address at the Brookings Institution  
“The Law of the Sea Convention: The Case for Senate Action”  
May 4, 2004

It is a pleasure to return to the Brookings Institution today to open this Conference on the Law of the Sea. As Chairman and as a member of the Senate Foreign Relations Committee, I have followed developments related to the Law of the Sea for more than two decades. On February 25 of this year, almost ten years after the Convention was submitted to the Senate for advice and consent, the Foreign Relations Committee unanimously approved the resolution of ratification to the Convention, thereby placing it on the Senate Calendar.

The Law of the Sea Convention establishes a comprehensive set of rules governing the uses of the world’s oceans, including the airspace above and the seabed and subsoil below. It carefully balances the interests of states in controlling activities off their own coasts and the interests of all states in protecting the freedom to use the oceans without undue interference. Among the central issues addressed by the Convention are navigation and overflight of the oceans, exploitation and conservation of ocean resources, protection of the marine environment, and marine scientific research.

Admiral James Watkins, former Chief of Naval Operations and the Chairman of the U.S. Commission on Ocean Policy, has called the convention “the foundation of public order of the oceans.” As the world’s preeminent maritime power, the largest importer and exporter, the leader in the war on terrorism, and the owner of the largest Exclusive Economic Zone off our shores, the United States has more to gain than any other country from the establishment of order and predictability with respect to the oceans.

Senate passage of the Law of the Sea Convention should be straightforward. The Bush Administration has asked for ratification. In fact, the Law of the Sea was one of only five treaties that the Bush Administration placed in its “urgent” category on their most recent list of

Treaty priorities submitted to the Foreign Relations Committee. Representatives from the Department of State, the Office of the Secretary of Defense, the U.S. Navy, the U.S. Coast Guard, and the Commerce Department have testified in support of the Convention at various Congressional hearings. Representatives from six Bush Administration Cabinet departments participated in the interagency group that helped write the resolution of advice and consent accompanying the treaty. And the U.S. Commission on Ocean Policy, appointed by President Bush, strongly endorsed U.S. accession to the Law of the Sea.

In the private sector, every major ocean industry, including shipping, fishing, oil and natural gas, drilling contractors, ship builders, and telecommunications companies that use underwater cables, support U.S. accession to the Law of the Sea and are lobbying in favor of it. The National Foreign Trade Council, representing hundreds of exporting companies, also supports ratification. Moreover, this is an issue on which industry and environmentalists agree. A long list of environmental and ocean groups have endorsed the treaty because it would protect and preserve the marine environment and establish a framework for further international action to combat pollution.

#### History of the Convention

The Law of the Sea Convention did not always enjoy such strong support. When it was first concluded in 1982, the Convention contained a seabed mining provision that clearly was not in the interest of the United States. President Reagan's decision not to sign the treaty was the right decision at that time. He stated that "while most provisions of the draft convention are acceptable and consistent with U.S. interests, some major elements of the deep seabed mining regime are not acceptable." President Reagan's statement specified his particular objections to the deep seabed mining regime, which included lack of adequate U.S. representation in decision-making about deep seabed mining, requirements for industrialized states to transfer technology related to deep seabed mining, rules providing for artificial limits on production of deep seabed minerals, and rules providing for burdensome regulations and financial costs on private companies seeking to conduct deep seabed mining. Along with many industrialized nations, the United States insisted on a re-negotiation of this provision.

In a 1983 proclamation of United States ocean policy, President Reagan stated that, while the United States would not become party to the Convention, the United States accepted and would act in accordance with the provisions of the Convention except for those relating to deep seabed mining. Presidents Bush, Clinton, and Bush continued this policy.

In 1990, President George H.W. Bush initiated further negotiations to resolve U.S. objections to the deep seabed mining regime. These talks culminated in a 1994 agreement that comprehensively revised the regime and resolved each of the problems President Reagan identified in 1982.

In response to the current Bush Administration's request for Senate approval of the Law of the Sea, the Senate Foreign Relations Committee took up the Convention under my chairmanship in October 2003. The Committee held two extensive public hearings on the Convention at which Administration and private witnesses testified. Between October and February, the SFRC held four briefings on Law of the Sea for Committee staff and the staff of all Committee members. Two of these briefings were headlined by an Administration interagency team. In February 2004, the Committee met to vote on the Law of the Sea. The resolution of ratification, which had been drafted with the Administration's full participation, was approved 19-0.

During the four months between the first hearing on Law of the Sea and the Committee vote to report out the Convention, the Committee received just one inquiry voicing opposition to the measure, and that was from an individual representing himself. Staff offered to receive written testimony from this individual, but none was sent.

#### The Current Debate

Despite this seeming unanimity of informed opinion, Senate consideration of the treaty has been held up for more than two months by vague and unfounded concerns about the Convention's effects. These concerns have been expressed primarily by those who oppose virtually any multi-lateral agreement. Many of the arguments they have made are patently untrue. Others are obsolete in that they attack the Convention as it

existed in 1982 -- as if the re-negotiation of the Convention had never occurred.

For example, critics have contended that the Law of the Sea will give the United Nations control over oceans when the Convention provides no decision-making role for the U.N. They have said that the Convention contains production limits on seabed minerals, and mandatory technology transfers, both of which were eliminated in the 1994 renegotiation of the treaty. They have suggested that U.S. intelligence gathering will be hindered even though the Bush Administration and the U.S. military (which conducts all the intelligence operations in question) say that the Convention will have no effect on intelligence activities. They assert that the President's Proliferation Security Initiative (PSI) which aims to impede shipments of weapons of mass destruction and related materials, will be hindered by the Convention, even though the Chairman of the Joint Chiefs of Staff and the Chief of Naval Operations say unequivocally that U.S. ratification of Law of the Sea would help the PSI.

In fact, most of the articles and statements opposing the Convention have avoided mentioning the military's longstanding and vocal support for Law of the Sea. This is because to oppose the Convention on national security grounds requires one to say that the Chairman of the Joint Chiefs and the Chief of Naval Operations, the Office of the Secretary of Defense, and, indeed, the President of the United States are wrong about the security benefits of the Treaty.

General Richard Myers, Chairman of the Joint Chiefs of Staff has written: "The Convention remains a top national security priority.... It supports efforts in the War on Terrorism by providing much-needed stability and operational maneuver space, codifying essential navigational and overflight freedoms."

Admiral Vern Clark, the Chief of Naval Operations, has stated that "the Convention supports U.S. efforts in the war on terrorism...while leaving unaffected intelligence collection activities. Future threats will likely emerge in places and ways that are not yet known. For these and other as yet unknown operational challenges, we must be able to take maximum advantage of the established navigational rights codified in the Law of the Sea Convention to get us to the fight rapidly." Admiral Clark also delivered impassioned testimony before the Senate Armed Services

Committee underscoring that U.S. accession to the Law of the Sea would reduce the need for dangerous operations in which the Navy threatens the use of force as a means of asserting navigational freedoms.

Opponents are similarly reluctant to mention the unanimous support of affected U.S. industries. To oppose the treaty on economic grounds requires opponents to say that the oil, natural gas, shipping, fishing, boat manufacturing, exporting, and telecommunications industries do not understand their own bottom lines. It requires opponents to say that this diverse set of industries is spending money and time lobbying on behalf of an outcome that will be disadvantageous to their own interests.

The vast majority of conservative Republicans would support, in prospect, a generic measure that expands the ability of American oil and natural gas companies to drill for resources in new areas, solidifies the Navy's rights to traverse the oceans, enshrines U.S. economic sovereignty over our Exclusive Economic Zone extending 200 miles off our shore, helps our ocean industries create jobs, and reduces the prospects that Russia will be successful in claiming excessive portions of the Arctic. All of these conservative-backed outcomes would result from U.S. ratification of the Law of the Sea Convention. Yet the treaty is being blocked because of ephemeral conservative concerns that boil down to a discomfort with multi-lateralism.

#### Putting Multi-lateralism into Perspective

Multi-lateral solutions do not always work. Some multi-lateral agreements that have been brought before the Congress during the last decade were poorly conceived or impossible to verify. But our negotiators won in talks on Law of the Sea. We are hurting no one but ourselves by failing to exploit this hard-earned diplomatic victory.

With respect to the Law of the Sea, the discomfort with multi-lateralism also fails to recognize the obvious: there is no unilateral option with regard to ocean policy. The high seas are not governed by the national sovereignty of the United States or any other country. If we are to establish order, predictability, and responsibility over the oceans – an outcome that is very much in the interest of the United States – we have to engage with other countries.

International cooperation also is required if our companies are to have a chance to safely exploit the resources of the seabed beyond our 200 mile Exclusive Economic Zone. Without the ability to secure property rights to mining sites, companies will be unlikely to invest the substantial capital necessary to conduct such mining. They would not want to risk having their claims disputed or having competitors free ride off their exploration investments. Given that no nation has sovereignty beyond its national jurisdiction, the only way to establish property rights in the open ocean is through an international regime. This is one of the reasons why companies with an interest in deep seabed mining have supported the treaty. Failing to ratify simply shuts our companies out of this process.

Contrary to some characterizations, the International Seabed Authority is not a highly politicized bureaucracy, nor would it be disposed to act against U.S. interests. If the United States joined the Convention, it would be able to veto the ISA's adoption of any rules or regulations relating to the deep seabed mining regime.

#### Consequences of Not Joining the Convention

The debate on the Convention would be just an interesting political science case study if it were not for the fact that there are serious consequences to not ratifying it. The Convention comes open for amendment for the first time in November of this year. If the United States is not party to the Convention at that time, we will not have a seat at the table to protect against proposed amendments that would roll back Convention rights we fought hard to achieve.

Some nations may press for restrictions on the movement of naval or commercial vessels near their coastline. Others may pursue the right to exclude nuclear-powered vessels from their territorial waters. (Under the Convention, a ship's propulsion system cannot be used as an argument to restrict its movements.) As a party, we will be in a very strong position to prevent harmful amendments.

In addition, the Convention's Commission on the Limits of the Continental Shelf will soon begin making decisions on claims to continental shelf areas that could impact the United States' own claims to the area and

resources of our broad continental margin. Russia is already making excessive claims in the Arctic. Unless we are party to the Convention, we will not be able to protect our national interest in these discussions.

Opponents seem to think that if the U.S. declines to ratify the Law of the Sea, it will evaporate into the ocean mists. They seem to think that multi-lateral responsibilities in this case can be avoided if we stay out of the Convention. Unlike some treaties, such as the Kyoto Agreement and the Comprehensive Test Ban Treaty, where U.S. non-participation renders the treaty irrelevant or inoperable, the Law of the Sea will continue to form the basis of maritime law *regardless of whether the U.S. is a party*. International decisions related to national claims on continental shelves beyond 200 miles from our shore, resource exploitation in the open ocean, navigation rights, and other matters will be made in the context of the treaty whether we join or not.

Consequently, the United States cannot insulate itself from the Convention merely by declining to ratify. There are 145 parties to the Convention, including every major industrialized country. The Convention is the accepted standard in international maritime law. Americans who use the ocean and interact with other nations on the ocean, including the Navy, shipping interests, and fisherman, have told me that they already have to contend with provisions of the Law of the Sea on a daily basis. They want the United States to participate in the structures of Law of the Sea to defend their interests and to make sure that other nations respect our rights and claims.

We also should remember that the United States already has been abiding by the Law of the Sea Convention since President Reagan's 1983 Statement of Oceans Policy. In addition, the United States is a party to the 1958 Convention on the Territorial Sea and Contiguous Zone, a predecessor to the Law of the Sea Convention. Many of the provisions of the 1958 Convention are less advantageous to the United States than comparable provisions in the Law of the Sea Convention.

Given that the United States has been abiding by all but one provision of the Treaty for the last 21 years and that we are already a party to a less advantageous international agreement on ocean law, dire predictions about the hazards to our sovereignty of joining the Law of the Sea Convention ring particularly hollow.



### Conclusion

The fact that these concerns have been allowed to sideline the treaty for ten years is a bad sign for U.S. foreign policy in an age of terrorism. If we cannot get beyond political paralysis in a case where the coalition of American supporters is so comprehensive, there is little reason to think that any multi-lateral solution to any international problem is likely to be accepted within the U.S. policy-making structure.

Eventually, however, I believe that the United States *will* become a party to the Convention because events will transpire that will brightly illuminate the costs of not ratifying it. At some point, a foreign nation will seek rule changes to the treaty that restrict passage by U.S. Navy vessels. At some point, our oil and mining industries will want to prospect beyond the 200-mile Exclusive Economic Zone. They won't do that without the international legal certainty provided by the Law of the Sea that their claims and investments will be respected by other nations. At some point, Russia or some other country will succeed in having excessive ocean claims recognized because we are not there to stop them.

My message today is that it is irresponsible for us to wait to ratify the Law of the Sea until we feel the negative consequences of our absence from the Convention. The Senate should ratify the Law of the Sea Convention now in the interest of U.S. national security, the U.S. economy, and the American people.

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PREPARED STATEMENT OF REAR ADMIRAL WILLIAM L. SCHACHTE, U.S. NAVY,  
RETIRED

Mr. Chairman and members of the Committee, it is an honor for me to discuss the Law of the Sea (LOS) Convention and the need for the United States, as the Convention's primary author and proponent, to take a leadership position in joining 145 other parties in a stable legal framework for the oceans.

The Convention and the fundamental changes from the 1994 Agreement constitute a huge success for the U.S. Today's military operations—from Operation Enduring Freedom to Operation Iraqi Freedom to the Global War on Terrorism—place a premium on the Navy's strategic mobility and operational maneuverability. The Convention enhances access and transit rights for our ships, aircraft, and submarines, and reinforces the nation's ability to conduct these operations. The critics of the Convention fail to understand, or even acknowledge, that since President Reagan's 1983 ocean policy statement, we have conducted and continue to conduct all of our operations in accordance with the LOS Convention. From the navigation standpoint we got everything we needed. We will never get as favorable of an international agreement on navigational rights again. We cannot avoid a multilateral approach when it comes to determining rules for the high seas where no one nation has sole jurisdiction. The issue is not whether the LOS Convention provisions are adequate, but whether we can keep them in place in the face of increasing coastal state pressure. The best of all options would be to freeze them in their current form. We cannot continue to rely on customary international law for our navigation rights and freedoms indefinitely. In November, the Convention will be open to amendment and possible change. The United States should accede to the Convention immediately as a means to assure access to the oceans and take a leading role in the future developments in the law to ensure they continue to further our national security interests.

The United States' interests as a global maritime nation was a prime impetus for the negotiations of the Convention from 1973 to 1982, as well as later to obtain changes to the deep seabed mining provisions to which President Reagan correctly objected. President Reagan did not reject the Convention in its entirety as has been misstated by the naysayers. In fact his Oceans Policy Statement of 1983 required that the U.S. operate consistent with the Convention's provisions except for deep seabed mining. Experienced, career Naval officers were integral members of the U.S. delegations during the negotiations, which were hugely successful in securing and protecting all navigational rights necessary for our Navy. Then, due to the hard work of successive administrations, the U.S. was also able to obtain necessary changes to the deep seabed mining provisions to address all of the concerns raised by President Reagan.

Let me put this in proper perspective to better understand what is really at stake by quoting 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 are among them. We have no need to fear prudent use and protection of the world's oceans and seas under rule of law."

We continue to hear that the Part XI seabed mining provisions were not fixed because the 1994 Agreement is not an amendment to the LOS Convention. But, just read the text of the 1994 Agreement. It says, and I quote, "The provisions of this Agreement and Part XI shall be interpreted and applied together as a single instrument. In the event of any inconsistency between this Agreement and Part XI, the provisions of this Agreement shall prevail." It is clear that the fundamental fixes made by the 1994 Agreement absolutely prevail. A specific issue in this area that continues to be wrongly stated is that the U.S. will be subject to mandatory requirements for transfer of technology. In regard to the LOS Convention's technology

transfer provisions found in Annex III, article 5, the 1994 Convention provides, and again, I quote, “The provisions of Annex III, article 5, of the Convention shall not apply.” Even such plain language is not good enough for some critics, who even though they begrudgingly acknowledge what the words say, have in the next breath complained that you cannot believe the words. I cannot conceive any treaty that could satisfy such criticism.

Despite its benefits, the Convention continues to be criticized because of the erroneous belief that the Convention will adversely affect U.S. sovereignty, inhibit our military operations including submarine and intelligence gathering activities, and hamper the President’s Proliferation Security Initiative. These criticisms could not be further from the truth. Although the Convention recognizes the right of innocent passage and what activities constitute innocent passage in the territorial sea, the Convention imposes no obligation on parties to refrain from activities, such as intelligence gathering, that do not qualify for the right of innocent passage. Thus, Article 20 of the Convention merely states what a submarine must do to qualify for innocent passage in the territorial sea. This article merely repeats the rule concerning submerged transits from the 1958 Convention on the Territorial Sea, a convention to which the U.S. is a party. This rule 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 for purposes other than innocent passage. In short, if or when the need arises to collect intelligence in a foreign territorial sea, it will be business as usual for the Navy and nothing in the LOS Convention will prohibit that activity.

In fact, from a navigational rights standpoint, the LOS Convention is more helpful than the 1958 Conventions to which the United States is currently a party. Submarines gain the right of submerged passage through international straits overlapped by territorial seas. More than 135 straits are affected, including strategically critical straits like Gibraltar, Hormuz and Malacca. 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. The same guaranteed, non-suspendable rights apply to warships, military aircraft and submarines transiting through archipelagoes, such as Indonesia and the Philippines. 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. 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 overflight that are set forth in the LOS Convention.

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.

The U.S. has conducted maritime intercept operations (MIO) and MIO-type operations since we first declared our independence and the LOS Convention will not have any adverse impact to continuing those activities. The U.S. has conducted these operations under a variety of legal bases that are consistent with customary international law and our treaty obligations as a party to the 1958 Geneva Conventions. The provisions of the 1958 Geneva Conventions are mirrored in the LOS Convention.

The LOS Convention also will not prohibit or impede the President's Proliferation Security Initiative (PSI). The Statement of Interdiction Principles for PSI explicitly states that interdiction activities under PSI will be taken "consistent with national legal authorities and relevant international law and frameworks." This includes the LOS Convention. Further, all of the U.S. partners to PSI are parties to the LOS Convention. The bottom line is that the Convention provides a solid legal basis for taking enforcement action against vessels and aircraft suspected of engaging in proliferation of WMD, including: exclusive port and coastal state jurisdiction in internal waters, territorial seas and national airspace; coastal state jurisdiction in the 24 nm contiguous zone; flag state jurisdiction over its vessels on the high seas; and universal jurisdiction over stateless vessels. Ultimately, the U.S. always has the right to exercise self-defense, unaffected by the LOS 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 under the UN Charter and belligerent rights under the law of armed conflict are unaffected by the Convention.

Despite claims of critics, the Treaty does not give the United Nations authority to levy taxes. The LOS Convention does not authorize taxation of individuals or corporations. There are revenue provisions for deep seabed mining operations and for oil and gas activities on the continental shelf beyond 200 miles. Under the terms of the LOS Convention none of the revenues go to the United Nations or are subject to its control. Another shibboleth being spread about the LOS Convention is that it will subject our military activities to some sort of world court to settle disputes. Again, this is absolutely wrong and misleading. With respect to the dispute settlement provisions of the LOS Convention, the Convention does establish the International Tribunal for the Law of the Sea (ITLOS). However, the Convention also permits parties to choose other methods of dispute settlement. The U.S. has indicated it will elect two forms of arbitration rather than the Tribunal. Further, the Convention permits parties to exclude from dispute settlement certain types of actions such as military activities. Thus, the U.S. declaration opting out of dispute settlement for military activities is consistent with the Convention and disputes concerning military activities would not be subject to dispute settlement under the Convention. What constitutes a U.S. military activity is a matter solely for the U.S. to determine. Some have also accused ITLOS of over-reaching, citing the UK-Ireland MOX case as an example. The fact is that the UK did not avail itself of available opportunities to avoid jurisdiction of ITLOS and that the ITLOS provisional measure only directed that the two countries consult with each other.

The LOS Convention protects our sovereignty by recognizing our 12 nautical mile (nm) territorial sea and a 200 nm exclusive economic zone. The Convention provides for widely accepted navigational and overflight freedoms that allow our Armed Forces to get to the fight rapidly and with maximum maneuverability. The Convention also provides for warship sovereign immunity. Although the LOS Convention was drafted over twenty years ago, it supports U.S. efforts in the war on terrorism. The Department of Defense, Joint Chiefs of Staff, and the Navy have consistently supported the navigation provisions of the Convention. The combined weight of the knowledge and experience of the Chiefs of Naval Operations (CNOs) consistently supporting the navigation provisions of the LOS Convention ought not be dismissed derisively as some so-called defense experts have done. Those esteemed naval officers have been on the front lines and understand how vital are the navigational provisions of the Convention now and in the future. Following the fixes in 1994 for the Reagan Administration objections to the deep seabed mining provisions, there has been no good reason to not move forward on U.S. accession. In fact, in 1998 all living CNOs endorsed the LOS Convention and urged Senate leadership to take positive action on U.S. accession. Future threats are likely to emerge in places and in ways that are not known. In order to be prepared to handle these challenges, the U.S. must be able to take maximum advantage of the navigational freedoms that the Convention codifies in order to get the armed forces to the fight rapidly. As the current Chief of Naval Operations has said, when sailors are sent out on dangerous missions around the world, they want assurance that not only are they supported

by military force, but that they have the full backing of the law. We owe that to them.

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. 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.

It is also important to note 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 and Armed Services Committees, 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?

It is extremely shortsighted 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 too 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.

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.

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. Additionally, there have been hearings this year before the Senate Committee on Environment and Public Works and Committee on Armed Services. Finally, the Convention has been the topic of debate and discussion at countless academic conferences hosted by numerous prestigious institutions such as Brookings as well as: Georgetown University, University of Virginia, Duke University, Center for Ocean Law and Policy, Law of the Sea Institute, and National Academy of Sciences.

Just as important as those examples of extensive scrutiny, the Convention is put to the test numerous times each day around the world by the U.S. Navy. I ask you to give more credence to our men and women who go in harm's way on Navy vessels far from home than to the theories of so-called defense experts. Every time a U.S. submarine makes a submerged transit of the Strait of Gibraltar and every time a U.S. aircraft carrier transits the Strait of Hormuz with its planes and helicopters flying, the Convention is used and validated.

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.

Chairman HYDE. And if there are any further opening statements, they will also be without objection inserted in the record.

Mr. LANTOS. Mr. Chairman.

Chairman HYDE. Yes, sir.

Mr. LANTOS. May I ask that an ad from today's *Roll Call*, entitled, "The Law of the Sea," in support of ratification, be included in the record?

Chairman HYDE. Without objection, so ordered.

Mr. LANTOS. Thank you, Mr. Chairman.

[The information referred to follows:]

# The Law of the Sea

Dear Majority Leader Frist:

On behalf of millions of Americans, we urge you to bring the Foreign Relations Committee's unanimous resolution of ratification for the UN Convention on the Law of the Sea to the floor of the U.S. Senate for a vote. Ratification of this treaty is good for our national security, good for our business, and good for our environment.

It is not often that an issue, particularly a treaty, enjoys such a broad range of support from such a wide range of individuals and organizations. We represent U.S. business, environmental organizations, citizens' groups and military interests. The diversity of support for the UN Convention on the Law of the Sea is a testament to the need for U.S. ratification of this treaty. The Bush Administration supports Senate ratification of this treaty.

This treaty has been before the Senate for 10 years. It will be open for amendment starting in November. There is every reason to act quickly. Please let the Senate vote on UN Convention on the Law of the Sea so that the U.S. can be fully engaged in all upcoming negotiations.

Signed,

**Daniel Magraw**  
President  
Center for International Environmental Law

**Joe Cox**  
President/CEO  
Chamber of Shipping of America

**Harry C. Bloney, III**  
President  
Coalition for American Leadership Abroad

**Fred Krupp**  
President  
Environmental Defense

**Joe Volk**  
Executive Secretary  
Friends Committee on National Legislation

**Patricia Fortan**  
Executive Vice President  
The Humane Society of the United States

**Philip Clapp**  
President  
National Environmental Trust

**John Connelly**  
President  
National Fisheries Institute

**Monika W. Fomaine, Esq.**  
Vice President, Government Relations  
National Marine Manufacturers Association

**Karen Wayland**  
Legislative Director  
Naval Resources Defense Council

**Roger T. Rute**  
President  
The Ocean Conservancy

**Andrew F. Sharpless**  
Chief Executive Officer  
Oceana

**James L. Henry**  
President  
Transportation Institute

**William H. Luers**  
President  
United Nations Association of the USA

\* Partial list of signatories. Treaty supporters represent diverse concerns and perspectives. Signatories do not necessarily indicate support for the views represented in all of the attached quotes.

**"I appear before you today with the full support of President Bush, Vice President Cheney, Secretary of State Powell ... joining this treaty is in the best interests of the United States.."**

John Turner, Assistant Secretary of State for Ocean Affairs, comments before Senate Committee on Environment and Public Works, March 23, 2004.

**"The Convention is important to our efforts to develop domestic offshore oil and natural gas resources ... The U.S. petroleum industry is concerned that failure by the United States to become a party to the Convention could adversely affect U.S. companies' operations offshore other countries"**

Paul L. Kelly, testimony to Senate Foreign Relations Committee, representing The American Petroleum Institute, The International Association of Drilling Contractors, and The National Ocean Industries Association, October 21, 2003.



Citizens for  
Global Solutions

www.globalsolutions.org

PAID FOR BY CITIZENS FOR GLOBAL SOLUTIONS

Chairman HYDE. We open our testimony today with two witnesses from the Administration. It gives me great pleasure to welcome William H. Taft IV, who has served as Legal Adviser to the Secretary of State since April 2001. He is the principal advisor on all documents of international legal matters to the Department of State, the Foreign Service, and diplomatic and consular posts abroad, as well as the principal advisor on legal matters relating to the conduct of foreign relations to other agencies, and through the Secretary of State, to the President and National Security Council.

In the remarkable legal career prior to joining the State Department, Mr. Taft has been a litigation partner in Fried Frank's Washington, DC office, concentrating on government contracts and counseling on international trade. And spanning the years from 1981 to 1989, he served as U.S. Permanent Representative to NATO, as Deputy Secretary of Defense, as Acting Secretary of Defense, and as General Counsel for the Department of Defense.

Mr. Taft entered private law practice in 1977 after serving in various positions at the Federal Trade Commission and other Federal Government agencies. He received his JD from Harvard, and his BA from Yale. We are truly pleased to have you appearing before us today, Mr. Taft. We look forward to hearing your statement.

As our second witness, we welcome the Vice Chief of Naval Operations, Admiral Michael Mullen. A 1968 graduate of the United States Naval Academy, Admiral Mullen has wide-ranging experience as a commander in both the Atlantic and Pacific fleets, and as a flag officer, he has held many shore assignments, including the U.S. Naval Academy, the Surface Warfare Officer School Command, the Bureau of Naval Personnel, and at the Pentagon on the staffs of the Secretary of Defense and Chief of Naval Operations.

Prior to his current assignment, he served as Deputy Chief of Naval Operations for Resources, Requirements, and Assessments. A graduate of the Naval Post-Graduate School, with a Master of Science degree in Operations Research, Admiral Mullen also attended the Harvard Business School's Advanced Management Program.

He assumed his current duty as Vice Chief of Naval Operations in August 2003. We welcome you today, Admiral Mullen, and certainly look forward to hearing your statement. We will ask you to begin, Mr. Taft, with a summary of your statement. Your written statement, as well as that of all of our witnesses, will be made a part of the record. Mr. Taft.

Mr. TAFT. Thank you, Mr. Chairman. Until today, my life has not included the privilege of appearing before this Committee, and so I am delighted to add that.

Chairman HYDE. We are sort of rounding out your resume.

Mr. TAFT. Thank you.

Mr. LANTOS. We all reach a highlight at a certain point in our life.

**STATEMENT OF THE HONORABLE WILLIAM H. TAFT IV, LEGAL ADVISER, U.S. DEPARTMENT OF STATE**

Mr. TAFT. Thank you, Mr. Chairman. The Administration strongly supports the Convention, and I have testified in favor of it before two Senate Committees. Today, I want to focus on the benefits of U.S. accession and respond to various arguments being made against accession.

As the world's preeminent maritime power, the United States has had a longstanding and consistent interest in achieving international agreement on rules that protect freedom of navigation. It has been the common objective of every successive U.S. Administration for the last 30 years to nail down our navigational and other ocean rights through a widely accepted and comprehensive



Law of the Sea Treaty. The Convention before you does that, and is strongly in our national interests.

Turning specifically to the Convention's navigational benefits, joining the Convention will advance the interests of the United States. It preserves and elaborates the rights of our military to use the world's oceans to meet national security requirements; for example, by stabilizing the territorial sea at 12 nautical miles, by enshrining the right of innocent passage in the territorial sea and the right of transit passage through straits; and by reaffirming the freedom of navigation and overflight in the exclusive economic zone, and the high seas beyond, including the laying and maintenance of submarine cables and pipelines.

U.S. Armed Forces rely on these rights daily and their protection is of paramount importance for our security. This can be done by becoming a party to the Convention. As the country with the longest coastline and the largest exclusive economic zone, the United States will gain economic and resource benefits from the Convention.

It accords the coastal State sovereign rights over living marine resources, including fisheries, out to 200 miles, and it accords that same State sovereign rights over non-living resources, including oil and gas, found in the seabed and subsoil of the continental shelf, and it does so in a manner that improves on the 1958 treaty. It also establishes a legal framework for the protection and preservation of the marine environment from pollution from vessels, from activities in the seabed, from ocean dumping and other sources.

Concerning mineral resources beyond national jurisdiction, that is, those that are not subject to the sovereignty of the United States or any other country, the 1994 agreement meets our goals regarding access by U.S. industry, free market principles, and decision-making.

Now, let me turn to dispute settlement, Mr. Chairman. As sought by the United States, the Convention establishes a dispute settlement system to promote compliance with its provisions and the peaceful settlement of disputes. These procedures are flexible, providing options both as to the forum for resolving disputes, and as to the subject matter. Parties are expressly permitted to exclude matters of vital national concern from dispute settlement, including disputes concerning military activities, and we will do that.

Disputes concerning military activities, including intelligence activities, will not be subject to dispute settlement under the Convention as a matter of law, or U.S. policy.

Regarding disputes that are subject to resolution by arbitration under the Convention, it is very much in our national interests that this is provided for. Some disputes simply can't be resolved by negotiation, but they do need to be settled. I would like to address some of the criticisms of the Convention that have been made, and I would say that they leave me puzzled, particularly those relating to national security.

I have been familiar with the Convention for more than 20 years, including during my tenure as General Counsel of DoD in 1982, when we rejected Part XI of the treaty, but accepted the rest, and later for 5 years, as Deputy Secretary of Defense. In all that time I have never heard a Chief of Naval Operations (CNO) or a Chair-

man of the Joint Chiefs suggest that the United States would be better off from a national security point of view as a non-party to the Convention.

The criticisms of the Convention fall into roughly five sorts. One criticism is based on a misreading of the Convention. For example, the assertion that the International Seabed Authority has jurisdiction over the oceans generally is manifestly incorrect. The Authority deals only with the sea floor beyond national jurisdiction, and there only with mineral activities.

The second criticism would have been correct in 1982, but ignores the fundamental overhaul effectuated by the 1994 agreement. For example, the assertion that joining the Convention would result in mandatory technology transfer.

A third criticism creates the impression that joining the Convention would be a radical departure from the status quo. It isn't. We have been operating consistent with the Convention for many years. Another kind of criticism seems to be based on mischaracterizations of our situations as a non-party, suggesting that we would be able to enjoy the benefits that we have today, even if we stay as a non-party.

The alternative to the Convention is not that we can engage in deep seabed mining without going through the Convention's institutions. We need them in order to go ahead with that.

The alternative is not full exploitation of the outer reaches of our continental shelf without fees. Rather, the inability to get legal certainty in this area will stymie those activities. The U.S. oil and gas industry participated in negotiating the relevant provisions and has testified in support of the Convention.

And the fifth criticism concerns multilateral institutions. Here, however, the commission created by the Convention to recommend outer limits of the continental shelf beyond 200 miles is a necessary institution for us to get legal certainty in oil and gas exploitation off-shore.

Let me try and conclude, Mr. Chairman, simply by saying that it is strongly in our interests to join the Convention because of national security, economic, environmental, and foreign policy benefits.

Among other things, U.S. adherence would promote the stability of the legal regime of the oceans, which is vital to our U.S. global mobility and national security; and we recommend and have recommended to the Senate that it give its advice and consent to accession to the treaty on the basis of the resolution of advice and consent which was supported unanimously by the Senate Foreign Relations Committee this year.

Thank you, Mr. Chairman, and thank you for including my prepared written statement, which I have tried to summarize here for the record.

Chairman HYDE. Thank you, Mr. Taft. Admiral Mullen.  
[The prepared statement of Mr. Taft follows:]

PREPARED STATEMENT OF THE HONORABLE WILLIAM H. TAFT IV, LEGAL ADVISER,  
U.S. DEPARTMENT OF STATE

ACCESSION TO THE 1982 LAW OF THE SEA CONVENTION AND RATIFICATION OF THE 1994  
AGREEMENT AMENDING PART XI OF THE LAW OF THE SEA CONVENTION

[SENATE TREATY DOCUMENT 103-39; SENATE EXECUTIVE REPORT 108-10]

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify on the 1982 United Nations Convention on the Law of the Sea ("the Convention"), which, with the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 ("the 1994 Agreement"), was reported favorably by the Senate Foreign Relations Committee on March 11, 2004. The Administration strongly supports the Convention. I have testified in support of it before the Senate Foreign Relations Committee on October 21, 2003, as well as before the Senate Armed Services Committee on April 8, 2004. This testimony will focus on the benefits of U.S. accession to the Convention and respond to various arguments being made against accession.

BACKGROUND:

The achievement of a widely accepted and comprehensive law of the sea convention—to which the United States can become a party—has been a consistent objective of successive U.S. administrations for the last thirty years. The United States is already a party to a series of conventions from 1958 regarding various aspects of the law of the sea. While a step forward at the time as a partial codification of the law of the sea, those conventions left some unfinished business; for example, they did not set forth the outer limit of the territorial sea, an issue of critical importance to U.S. freedom of navigation. The United States played a prominent role in the negotiating session that culminated in the 1982 Convention, which sets forth a comprehensive framework governing uses of the oceans that is strongly in the U.S. interest.

When the text of the Convention was concluded in 1982, the United States recognized that its provisions supported U.S. interests, except for Part XI on deep seabed mining. In 1983, President Reagan announced in his Ocean Policy Statement that the United States accepted, and would act in accordance with, the Convention's balance of interests relating to traditional uses of the oceans. He instructed the Government to abide by, or, as the case may be, enjoy the rights accorded by, the provisions of the Convention other than those in Part XI.

Part XI has now been fixed, in a legally binding manner, to address the concerns raised by President Reagan and successive Administrations. We also worked closely with the Senate to ensure that the proposed Resolution of Advice and Consent satisfies the concerns and issues identified by the Administration, including those relating to U.S. military interests. We have urged the Senate to give its advice and consent to this Convention, to allow us to take full advantage of the many benefits it offers.

NAVIGATIONAL ASPECTS:

Joining the Convention will advance the interests of the U.S. military. As the world's leading maritime power, the United States benefits more than any other nation from the navigational provisions of the Convention. Those provisions, which establish international consensus on the extent of jurisdiction that States may exercise off their coasts, preserve and elaborate the rights of the U.S. military to use the world's oceans to meet national security requirements. They achieve this, among other things, by stabilizing the outer limit of the territorial sea at 12 nautical miles; by setting forth the navigation regime of innocent passage for all ships in the territorial sea; by protecting the right of passage for all ships and aircraft through, under, and over straits used for international navigation, as well as archipelagoes; by reaffirming the traditional freedoms of navigation and overflight in the exclusive economic zone and the high seas beyond; and by providing for the laying and maintenance of submarine cables and pipelines. U.S. Armed Forces rely on these navigation and overflight rights daily, and their protection is of paramount importance to U.S. national security.

ECONOMIC/RESOURCE ASPECTS:

The United States, as the country with the longest coastline and the largest exclusive economic zone, will gain economic and resource benefits from the Convention:

- It accords the coastal State sovereign rights over living marine resources, including fisheries, in its exclusive economic zone, i.e., out to 200 nautical miles from shore.
- The Convention also accords the coastal State sovereign rights over non-living resources, including oil and gas, found in the seabed and subsoil of its continental shelf. The Convention improves on the 1958 Continental Shelf Convention, to which the United States is a party, in several ways: by replacing the “exploitability” standard with an automatic continental shelf out to 200 nautical miles, regardless of geology; by allowing for extension of the shelf beyond 200 miles if it meets certain geological criteria; and by establishing an institution that can promote the legal certainty sought by U.S. companies concerning the outer limits of the continental shelf.

The Convention also establishes a legal framework for the protection and preservation of the marine environment from a variety of sources, including pollution from vessels, seabed activities, and ocean dumping. The provisions effectively balance the interests of States in protecting the environment and natural resources with their interests in freedom of navigation and communication. With the majority of Americans living in coastal areas, and U.S. coastal areas and EEZ generating vital economic activities, the United States has a strong interest in these aspects of the Convention.

Concerning mineral resources beyond national jurisdiction, i.e., not subject to the sovereignty of the United States or any other country, the 1994 Agreement meets our goal of guaranteed access by U.S. industry on the basis of reasonable terms and conditions. The Agreement restructures the deep seabed mining regime along free-market principles. It also overhauls the decision-making procedures to accord decisive influence to the United States and others with major economic interests at stake. The United States is guaranteed a seat on the critical decision-making body, and no substantive obligation can be imposed on the United States, and no amendment can be adopted, without its consent. Joining the Convention would facilitate deep seabed mining activities of U.S. companies, which require legal certainty to carry out such activities in areas beyond U.S. jurisdiction.

As to actual costs of being a party, our annual contributions to the Convention’s institutions would be about three million dollars, paid to the International Tribunal for the Law of the Sea and the International Seabed Authority from the State Department’s Contributions to International Organizations. These costs are not included in the Administration’s budget request for FY 2005. If we accede to the Convention, the State Department will assess options for addressing these requirements in FY 2005 or future budgets.

#### DISPUTE SETTLEMENT:

The Convention establishes a dispute settlement system to promote compliance with its provisions and the peaceful settlement of disputes. These procedures are flexible, providing options both as to the appropriate means for resolution of disputes and as to subject matter. In terms of forum, a State is able to choose, by written declaration, one or more means for the settlement of disputes concerning the interpretation or application of the Convention. The Administration is pleased that its recommendation that the United States elect arbitration under Annex VII and special arbitration under Annex VIII is included in the proposed Resolution of Advice and Consent.

In terms of subject matter, the system provides Parties with means of excluding matters of vital national concern from the dispute settlement mechanisms. Specifically, the Convention permits a State, through a declaration, to opt out of dispute settlement procedures with respect to one or more enumerated categories of disputes, including disputes concerning military activities and certain law enforcement activities. The Administration is similarly pleased that the proposed Resolution of Advice and Consent follows its recommendation that the United States elect to exclude all optional categories of disputes from dispute settlement mechanisms.

A concern raised by Administration witnesses last fall regarding resolution of disputes concerning military activities has been satisfactorily addressed by the proposed Resolution. As I testified before the Foreign Relations Committee, the ability of a Party to exclude disputes concerning military activities from dispute settlement has long been of importance to the United States. The U.S. negotiators of the Convention sought and achieved language that creates a very broad exception, successfully defeating attempts by certain other countries to narrow its scope. The United States has consistently viewed this exception as a key element of the dispute settlement package, which carefully balances comprehensiveness with protection of vital national interests.

This Administration reviewed whether the U.S. declaration on dispute settlement should in some way particularly highlight the military activities exception, given both its importance and the possibility, however remote, that another State Party might seek dispute settlement concerning a U.S. military activity, notwithstanding our declaration invoking the exception. As a result, the Administration recommended, and the proposed Resolution includes, a statement that our consent to accession to the Convention is conditioned on the understanding that each State Party has the exclusive right to determine whether its activities are or were "military activities" and that such determinations are not subject to review. Disputes concerning military activities, including intelligence activities, would not be subject to dispute settlement under the Convention as a matter of law and U.S. policy.

#### INTELLIGENCE ACTIVITIES:

The question has been raised whether the Convention (in particular articles 19 and 20) prohibits intelligence activities or submerged transit in the territorial sea of other States. It does not. The Convention's provisions on innocent passage are very similar to article 14 in the 1958 Convention on the Territorial Sea and the Contiguous Zone, to which the United States is a party. (The 1982 Convention is in fact more favorable than the 1958 Convention both because the list of non-innocent activities is exhaustive and because it generally uses objective, rather than subjective, criteria in the listing of activities.) A ship does not, of course, enjoy the right of innocent passage if, in the case of a submarine, it navigates submerged or if, in the case of any ship, it engages in an act in the territorial sea aimed at collecting information to the prejudice of the defense or security of the coastal State, but such activities are not prohibited by the Convention. In this respect, the Convention makes no change in the situation that has existed for many years and under which we operate today.

#### PROLIFERATION SECURITY INITIATIVE:

I would also like to address the relationship between the Convention and the President's Proliferation Security Initiative, an activity involving the United States and more than sixty other countries. The Convention will not affect our policies and practices in carrying out maritime-related PSI activities to interdict vessels suspected of engaging in the proliferation of weapons of mass destruction, their means of delivery and related materials. The PSI requires participating countries to act consistent with national legal authorities and "relevant international law and frameworks," which includes the law reflected in the 1982 Law of the Sea Convention. The Convention's navigation provisions derive from the 1958 law of the sea conventions, to which the United States is a party, and also reflect customary international law accepted by the United States. As such, the Convention will not affect applicable maritime law or policy regarding interdiction of weapons of mass destruction, their means of delivery and related materials. Like the 1958 conventions, the Convention recognizes numerous legal bases for taking enforcement action against vessels and aircraft suspected of engaging in proliferation of weapons of mass destruction, for example, exclusive port and coastal State jurisdiction in internal waters and national airspace; coastal State jurisdiction in the territorial sea and contiguous zone; exclusive flag State jurisdiction over vessels on the high seas (which the flag State may, either by general agreement in advance or approval in response to a specific request, waive in favor of other States); and universal jurisdiction over stateless vessels. Further, nothing in the Convention impairs the inherent right of individual or collective self-defense (a point which is reaffirmed in the proposed Resolution of Advice and Consent).

#### REASONS TO JOIN:

As a non-Party to the Convention, the United States has actively sought to achieve global acceptance of, and adherence to, the Convention's provisions, particularly in relation to freedom of navigation. As noted, President Reagan's 1983 Oceans Policy Statement directed the United States to abide by, and enjoy the rights accorded by, the non-deep seabed provisions of the Convention. Abroad, the United States has worked both diplomatically and operationally to promote the provisions of the Convention as reflective of customary international law.

While we have been able to gain certain benefits of the Convention from this approach, formal U.S. adherence to the Convention would have further national security advantages:

- The United States would be in a stronger position invoking a treaty's provisions to which it is party, for instance in a bilateral disagreement where the other country does not understand or accept them.
- While we have been able to rely on diplomatic and operational challenges to excessive maritime claims, it is desirable to establish additional methods of resolving conflict.
- The Convention is being implemented in various forums, both those established by the Convention and certain others (such as the International Maritime Organization or IMO). While the Convention's institutions were not particularly active during the past decade since the Convention entered into force, they are now entering a more active phase and are elaborating and interpreting various provisions. The United States would be in a stronger position to defend its national security and other interests in these forums if it were a party to the Convention.
- Becoming a party to the Convention would permit the United States to nominate members for both the Law of the Sea Tribunal and the Continental Shelf Commission. Having U.S. members on those bodies would help ensure that the Convention is being interpreted and applied in a manner consistent with U.S. national security interests.
- Becoming a party to the Convention would strengthen our ability to deflect potential proposals that would be inconsistent with U.S. national security interests, including those affecting freedom of navigation.

Beyond those affirmative reasons for joining the Convention, there are downside risks of not acceding to the Convention. U.S. mobility and access have been preserved and enjoyed over the past twenty years largely due to the Convention's stable, widely accepted legal framework. It would be risky to assume that it is possible to preserve indefinitely the stable situation that the United States currently enjoys. Customary international law may be changed by the practice of States over time and therefore does not offer the future stability that comes with being a party to the Convention.

RESPONSES TO ARGUMENTS AGAINST U.S. ACCESSION:

I would now like to respond to arguments that are being made against U.S. accession to the Convention. I will address them in turn:

*President Reagan thought the treaty was irremediably defective.*

- President Reagan expressed concerns only about Part XI's deep seabed mining regime.
- In fact, he believed that Part XI could be fixed and specifically identified the elements in need of revision.
- The regime has been fixed in a legally binding manner that addresses each of the U.S. objections to the earlier regime.
- The rest of the treaty was considered so favorable to U.S. interests that, in his 1983 Ocean Policy Statement, President Reagan ordered the Government to abide by and exercise the rights accorded by the non-deep seabed provisions of the Convention.

*U.S. adherence to the Convention is not necessary because navigational freedoms are not threatened (and the only guarantee of free passage on the seas is the power of the U.S. Navy).*

- It is not true that our navigational freedoms are not threatened. There are more than one hundred illegal, excessive claims affecting vital navigational and overflight rights and freedoms.
- The United States has utilized diplomatic and operational challenges to resist the excessive maritime claims of other countries that interfere with U.S. navigational rights under customary international law as reflected in the Convention. But these operations entail a certain amount of risk—e.g., the Black Sea bumping incident with the former Soviet Union in 1988.
- Being a party to the Convention would significantly enhance our efforts to roll back these claims by, among other things, putting the United States in a far stronger position to assert our rights and affording us additional methods of resolving conflict.

*The Convention was drafted before—and without regard to—the war on terror and what the United States must do to wage it successfully.*

- It is true that the Convention was drafted before the war on terror. However, the Convention enhances, rather than undermines, our ability to successfully wage the war on terror.
- Maximum maritime naval and air mobility that is assured by the Convention is essential for our military forces to operate effectively. The Convention provides the necessary stability and framework for our forces, weapons, and materiel to get to the fight without hindrance—and ensures that our forces will not be hindered in the future.
- Thus, the Convention supports our war on terrorism by providing important stability for navigational freedoms and overflight. It preserves the right of the U.S. military to use the world's oceans to meet national security requirements. It is essential that key sea and air lanes remain open as an international legal right and not be contingent upon approval from nations along the routes. A stable legal regime for the world's oceans will support global mobility for our Armed Forces.

*Obligatory technology transfers will equip actual or potential adversaries with sensitive and militarily useful equipment and know-how (such as anti-submarine warfare technology).*

- No technology transfers are required by the Convention. Mandatory technology transfers were eliminated by Section 5 of the Annex to the Agreement amending Part XI of the Convention.
- Article 302 of the Convention explicitly provides that nothing in the Convention requires a party to disclose information the disclosure of which is contrary to the essential interests of its security.

*As a nonparty, the U.S. is allowed to search any ship that enters our EEZ to determine whether it could harm the United States or pollute the marine environment. Under the Convention, the U.S. Coast Guard or others would not be able to search any ship until the United Nations is notified and approves the right to search the ship.*

- Under the Convention, the UN has no role in deciding when and where a foreign ship may be boarded.
- Under applicable treaty law—the 1958 conventions on the law of the sea—as well as customary international law, no nation has the right to arbitrarily search any ship that enters its EEZ to determine whether it could harm that national or pollute its marine environment. Nor would we want countries to have such a blanket “right,” because it would fundamentally undermine the freedom of navigation that benefits the United States more than any other nation.
- Thus, the description of both the status quo and the Convention's provisions is incorrect. The Convention makes no change in our existing ability or authority to search ships entering our EEZ with regard to security or protection of the environment.

*Other Parties will reject the U.S. “military activities” declaration as a reservation.*

- The U.S. declaration is consistent with the Convention and is not a reservation.

*The 1994 Agreement doesn't even pretend to amend the Convention; it merely establishes controlling interpretive provisions.*

- The Convention could only have been formally “amended” if it had already entered into force. We negotiated the 1994 Agreement as a separate agreement in order to ensure that the Convention did not enter into force with Part XI in its flawed state. The 1994 Agreement made explicit, legally binding changes to the Convention and has the same legal effect as if it were an amendment to the Convention itself.
- It would not have been in our interest to wait until the Convention entered into force before fixing Part XI concerns, as it would have been more cumbersome to get the changes that we sought.

*The problems identified by President Reagan in 1983 were not remedied by the 1994 Agreement relating to deep seabed mining.*

- Each objection has been addressed.
- Among other things, the 1994 Agreement:
  - provides for access by U.S. industry to deep seabed minerals on the basis of non-discriminatory and reasonable terms and conditions;

- overhauls the decision-making rules to accord the United States critical influence, including veto power over the most important future decisions that would affect U.S. interests and, in other cases, requires supermajorities that will enable us to protect our interests by putting together small blocking minorities;
- restructures the regime to comport with free-market principles, including the elimination of the earlier mandatory technology transfer provisions and all production controls.

*The Convention gives the UN its first opportunity to levy taxes.*

- The Convention does not provide for or authorize taxation of individuals or corporations. It does include revenue sharing provisions for oil/gas activities on the continental shelf beyond 200 miles and administrative fees for deep seabed mining operations. The amounts involved are modest in relation to the total economic benefits, and none of the revenues would go to the United Nations or be subject to its control. (U.S. companies applying for deep seabed mining licenses would pay the application fee directly to the Seabed Authority; no implementing legislation would be necessary.) U.S. consent would be required for any expenditure of such revenues. With respect to deep seabed mining, because the United States is a non-party, U.S. companies currently lack the practical ability to engage in such mining under U.S. authority. Becoming a Party will give our firms such ability and will open up new revenue opportunities for them when deep seabed mining becomes economically viable. The alternative is no deep seabed mining for U.S. firms, except through other nations under the Convention. These minimal costs are worth it.

*The Convention mandates another tribunal to adjudicate disputes.*

- The Convention established the International Tribunal for the Law of the Sea. However, Parties are free to choose other methods of dispute settlement. The United States would choose two forms of arbitration rather than the Tribunal.
- The United States would be subject to the Sea-bed Disputes Chamber, should deep seabed mining ever take place under the regime established by the Convention. The proposed Resolution of Advice and Consent makes clear that the Seabed Disputes Chamber's decisions "shall be enforceable in the territory of the United States only in accordance with procedures established by implementing legislation and that such procedures shall be subject to such legal and factual review as is constitutionally required and without precedential effect in any court of the United States." The Chamber's authority extends only to disputes involving the mining of minerals from the deep seabed; no other activities, including operations on the surface of the oceans, are subject to it.

*U.S. adherence will entail history's biggest voluntary transfer of wealth and surrender of sovereignty.*

- Under the Convention as amended by the 1994 Agreement, there is no transfer of wealth and no surrender of sovereignty.
- In fact, the Convention supports the sovereignty and sovereign rights of the United States over extensive maritime territory and natural resources off its coast, including a broad continental shelf that in many areas extends well beyond the 200-nautical mile limit, and would give us additional capacity to defend those claims against others.
- The mandatory technology transfer provisions of the original Convention, an element of the Convention that the United States objected to, were eliminated in the 1994 Agreement.

*The International Seabed Authority has the power to regulate seven-tenths of the earth's surface, impose international taxes, etc.*

- The Convention addresses seven-tenths of the earth's surface. However, the International Seabed Authority (ISA) does not.
- The authority of the ISA is limited to administering mining of minerals in areas of the deep seabed beyond national jurisdiction, generally more than 200 miles from the shore of any country. At present, and in the foreseeable future, such deep seabed mining is economically unfeasible. The ISA has no other role and has no general regulatory authority over the uses of the oceans, including freedom of navigation and overflight.
- The ISA has no authority or ability to levy taxes.



*The United States might end up without a vote in the ISA.*

- The Council is the main decision-making body of the ISA. The United States would have a permanent seat on the Council, by virtue of its being the State with the largest economy in terms of gross domestic product on the date of entry into force of the Convention, November 16, 1994. (1994 Agreement, Annex Section 3.15(a)) This would give us a uniquely influential role on the Council, the body that matters most.

*The PRC asserts that the Convention entitles it to exclusive economic control of the waters within a 200 nautical-mile radius of its artificial islands—including waters transited by the vast majority of Japanese and American oil tankers en route to and from the Persian Gulf.*

- We are not aware of any claims by China to a 200-mile economic zone around its artificial islands.
- Any claim that artificial islands generate a territorial sea or EEZ has no basis in the Convention.
- The Convention specifically provides that artificial islands do not have the status of islands and have no territorial sea or EEZ of their own. Sovereignty over certain Spratly Islands (which do legitimately generate a territorial sea and EEZ) is disputed among Brunei, China, Malaysia, the Philippines, and Vietnam. China has consistently maintained that it respects the high seas freedoms of navigation through the waters of the South China Sea.

CONCLUSION:

Mr. Chairman, it is in the U.S. interest to join the Convention because of the national security, economic, environmental, and foreign policy benefits to the United States. Among other things, U.S. adherence would promote the stability of the legal regime of the oceans, which is vital to U.S. global mobility and national security. The Administration recommends that the Senate give its advice and consent to accession to the Convention and ratification of the Agreement, on the basis of the proposed Resolution of Advice and Consent. Thank you.

**STATEMENT OF ADMIRAL MICHAEL G. MULLEN, VICE CHIEF OF NAVAL OPERATIONS, U.S. DEPARTMENT OF THE NAVY**

Admiral MULLEN. Good morning, Mr. Chairman, and other Members of the Committee. Thank you for the opportunity to testify today on the Law of the Sea Convention. I am here today as this is an important matter for all military departments.

Mr. Chairman, your Navy's and your military's ability to operate freely across the vast domain of the world's oceans, in peacetime and in war, makes possible the projection of American influence and power, and do that without a permission slip.

The ability of the U.S. military forces to operate freely on, over, and above the vast military maneuver space of the oceans is critical to our national security interests, the military in general, and the Navy in particular.

Today, I want to reemphasize to you that I, as well as the Chief of Naval Operations, the Chairman of the Joint Chiefs of Staff, the combatant commanders, and the military departments all support accession to the Law of the Sea Convention by the United States. This is a considerable body of war-fighting experience and knowledge.

The military basis for support of the Law of the Sea Convention is broad because it codifies fundamental benefits important to our operating forces as they train and as they fight. It codifies essential navigational freedoms through key international straits and archipelagos in the exclusive economic zone and on the high seas. It supports the operational maneuver space for combat and other operations of our warships and aircraft.

It enhances our own maritime interests in our territorial sea, contiguous zone, and exclusive economic zone, and so that our people know when they are operating in defense of this nation far from our shores as we are today, they have the backing and the authority of widely recognized and accepted law to look to, rather than depending only on the threat of the use of force.

You see, this is for me not just an operational issue, but it is also a people issue. As Navy leaders, we are entrusted to lead America's sons and daughters who are serving our country at the tip of the spear 24 hours a day, 7 days a week, 365 days a year.

And they are willingly conducting our Nation's business, sometimes in harm's way. For the many years that we have remained outside the Convention, we have asked our young men and women to conduct freedom of navigation and other operations, sometimes at great risk, to challenge the excessive maritime claims of other States to prevent those claims from becoming customary international law.

We don't need to do that. The CNO and I are looking for every possible guarantee to ensure our sailors' safety, and to keep them from needlessly going into harm's way. That is why we need to join the Law of the Sea Convention.

Finally, accession to the Law of the Sea Convention is consistent with our indispensable leadership role in maritime matters in the future. Admiral Clark has testified in both open and closed sessions for Congress about this issue. These provisions and others are important, and it is preferable for the United States to be a party to the Convention that codifies the freedom of navigation and overflight needed to support U.S. military operations.

Likewise, it is beneficial to have a seat at the table to shape future developments of the Law of the Sea Convention, which is open for amendment, as I understand it, this November.

Becoming a party, on the other hand, gives us an important seat at the table to ensure the Law of the Sea continues to protect our people and maritime interests, both economic and military, prevent excessive claims that attempt to restrict access, preserve the critical navigation freedoms and freedom of the seas essential to our national security.

It is beneficial for the United States to be in a position of leadership on these issues, continuing to work to preserve the key navigation provisions in the Convention, and shape its future.

In closing, let me just add that the Navy has been reviewing the Law of the Sea Convention for 25 years. Indeed, we currently operate—willingly because it is in our national security interests—within the provisions of the Law of the Sea Convention in every area related to navigation.

We would not recommend an international commitment that would require us to get a permission slip from anyone to conduct our operations, or restrict our intelligence activities.

Simply, the Convention does not require a permission slip or prohibit these activities. We would continue operating our military forces as we do today. Mr. Chairman, and Members of the Committee, thank you for your time today on this important issue, and I look forward to your questions.

[The prepared statement of Admiral Mullen follows:]

PREPARED STATEMENT OF ADMIRAL MICHAEL G. MULLEN, VICE CHIEF OF NAVAL OPERATIONS, U.S. DEPARTMENT OF THE NAVY

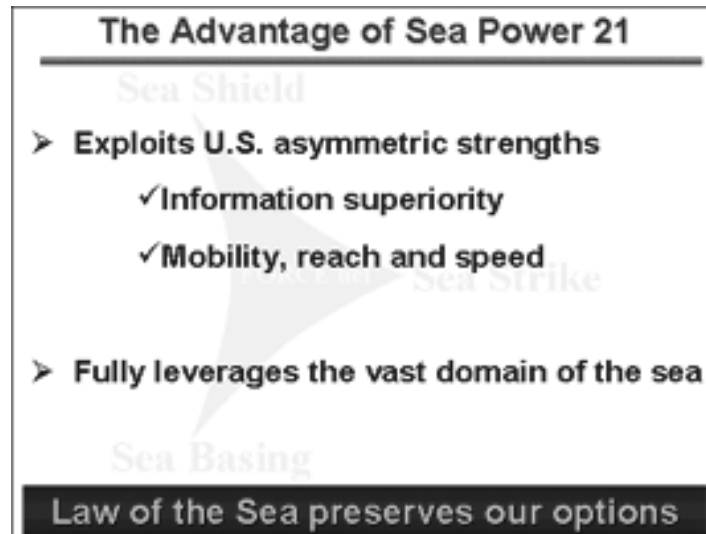
Chairman Hyde, Representative Lantos, Members of the Committee on International Relations, good morning. Thank you for the opportunity to testify today in support of the Law of the Sea Convention. I am Admiral Mike Mullen, U.S. Navy, the Vice Chief of Naval Operations for the Department of the Navy.

Although I am presently the Vice Chief of Naval Operations, I previously commanded the Navy's Second Fleet and NATO's Striking Force Atlantic, was privileged to command the George Washington Carrier Battle Group, and was commanding officer on and served aboard a number of cruisers, destroyers and other ships in our Fleet. The Administration, including the Military Departments, the Joints Chiefs of Staff, and the Combatant Commanders, all strongly support U.S. accession to the Convention. The Department of Defense, Joint Chiefs of Staff, and the Navy have consistently supported the navigation provisions of the Convention over the years. Following the 1994 deep seabed mining fixes, all former living Chiefs of Naval Operations endorsed the Convention in a 1998 letter urging Senate leadership to take positive action on U.S. accession.

General Richard Myers, Chairman of the Joint Chiefs of Staff, recently stated, "The Convention remains a top national security priority . . . It supports efforts in the War on Terrorism by providing much-needed stability and operational maneuver space, codifying essential navigational and overflight freedoms." Admiral Vern Clark, the Chief of Naval Operations, has testified that the Convention supports U.S. efforts in the War on Terrorism and will not negatively affect or impair our ability to collect intelligence, interdict suspect vessels, or in other ways prosecute the war. I, too, believe that to be true.

The collective knowledge and experience of our nation's military leaders supporting U.S. accession to the Convention is a considered body of warfighting experience and knowledge.

Entry into force for the United States will enhance the worldwide mobility our forces require and our traditional leadership role in maritime matters, as well as better position us to initiate and influence future developments in the Law of the Sea.



As the Chief of Naval Operations has testified on numerous occasions, your Navy is built to take persistent, credible combat power to the far corners of the earth, extending the influence of the United States of America as may be necessary, anywhere and at any time we choose to do so. It is our ability to operate freely across the vast expanse of the world's oceans that makes this combat power possible and makes it a force in peace and war.

In my view, the Law of the Sea Convention supports our ability to operate in this manner under the authority of widely recognized and accepted law. For that reason,

I, and the Chairman of the Joint Chiefs of Staff and the Chief of Naval Operations, strongly support the Law of the Sea Convention.

#### I: PROJECTING DECISIVE JOINT POWER ACROSS THE GLOBE

Today's military operations—from Operation Enduring Freedom to Operation Iraqi Freedom to the Global War on Terrorism—place a premium on our strategic mobility and operational maneuver. U.S. Forces are forward deployed worldwide to deter threats to our national security and can surge to respond rapidly to protect U.S. interests, either as part of a coalition or, if necessary, acting independently.

In addition to Operations Enduring Freedom and Iraqi Freedom, our ships and aircraft have been and are deployed overseas to interdict terrorists across the globe. They have also been deployed to the Pacific and Indian Oceans to ensure security in vital sea lines of communication in Southeast Asia, and are conducting operations in the waters off Central and South America to interdict the flow of illicit drug traffic from that region.

We are also laying the groundwork for further implementation of the President's Proliferation Security Initiative (PSI). The Chairman of the Joint Chiefs of Staff, the Chief of Naval Operations, and I are convinced that our work with our international partners in PSI is critical in helping to disrupt the flow of weapons of mass destruction, their delivery systems, and related materials throughout the world.

Some critics have argued that U.S. accession to the Convention will somehow prohibit or impede the PSI. It will not. It should be noted that the international partners assembled as part of the PSI are all parties to the Law of the Sea Convention and, to my knowledge, have not expressed concerns that the Convention and the PSI are incompatible. Furthermore, the Statement of Interdiction Principles for the PSI published by the White House explicitly states that interdiction activities will be taken "consistent with international law and frameworks." This includes relevant provisions of the Law of the Sea Convention as reflected in customary international law.

As we look to the future, Sea Power 21 will provide sea basing from which to project joint forces and joint firepower. It will provide joint logistics and project defensive power in an environment where access to land bases is increasingly denied by foreign governments or put increasingly at risk by asymmetric threats. These capabilities are important to us because they will result in a leaner footprint for joint forces ashore and will minimize the vulnerabilities tied to foreign bases and access rights. The Convention will help preserve our ability to provide these capabilities wherever and whenever needed well into the future.

#### II: PRESERVING OUR FREEDOMS

The basic tenets of the Law of the Sea Convention are clear. It codifies the right to transit through essential international straits and archipelagic waters. It reaffirms the sovereign immunity of our warships and other public vessels. It provides a framework to counter excessive claims of states that seek illegally to expand their maritime jurisdiction and restrict the movement of vessels of other States in international and other waters. And it preserves our right to conduct military activities and operations in exclusive economic zones without the need for permission or prior notice.



Most importantly, the entry into force of the Law of the Sea Convention for the United States will support both the worldwide mobility of our forces and our traditional leadership role in maritime matters. The customary international law we've relied upon for our navigation freedoms is under challenge, and in some respects so is the Law of the Sea Convention itself. Our participation in the Convention will better position us to initiate and influence future developments in the Law of the Sea.

I know there are some who have expressed concern about whether the Law of the Sea Convention prohibits our naval operations, including the boarding and search of ships and our maritime intelligence activities. It does not. The Convention's rules in this regard do not change the rules the Navy has operated under for over 40 years under the predecessor 1958 treaties to which the United States is a party, governing the territorial sea and high seas. We would not, for example, need permission from the United Nations to board and search ships. There simply is no such requirement anywhere in the Convention. Likewise, the Convention does not prohibit our intelligence collection activities.

Last year, before the Senate Foreign Relations Committee, Administration officials expressed a concern about whether the Convention's dispute resolution process could possibly affect U.S. military activities. A review was conducted within the Executive Branch on whether a Law of the Sea tribunal could question whether U.S. activities are indeed "military" for purposes of the Convention's military activities exception clause. Based on the Administration's internal review, it is clear that whether an activity is "military" is for each State party to determine for itself. The declaration contained in the current Resolution of Ratification, stating the U.S. understanding that each Party has the exclusive right to determine which of its activities are "military activities" and that such determinations are not subject to review, has appropriately addressed this issue.

Mr. Chairman, since 1983, the Navy has conducted its activities in accordance with President Reagan's Oceans Policy statement to operate consistent with the Convention's provisions on navigational freedoms. If the U.S. becomes a party to the Law of the Sea Convention, we would continue to operate as we have since 1983, and would gain support for our leadership role in Law of the Sea matters. I am convinced that joining the Law of the Sea Convention will have no adverse effect on our operations or intelligence activities, but rather, will support and enhance ongoing U.S. military operations, including the continued prosecution of the Global War on Terrorism.

### III: CONCLUSION

Future threats will likely emerge in places and in ways that are not yet fully clear. For these and other undefined future operational challenges, we must be able

to take maximum advantage of the established and widely accepted navigational rights the Law of the Sea Convention codifies to get us to the fight rapidly.

Strategic mobility is more important than ever. The oceans are fundamental to that maneuverability; as the CNO and I have both previously testified in our support of the Convention, joining the Convention supports the freedom to get to the fight, twenty-four hours a day and seven days a week, without a permission slip.

The Convention provides a stable and predictable legal regime within which to conduct our operations today, and realize our vision for the future. It will allow us to take a leading role in future developments in the law to ensure they are compatible with our vision.

Again, I wish to thank the Committee for offering me the opportunity to appear before you here today. I support the Law of the Sea Convention. I am happy to answer any questions that you may have.

Chairman HYDE. Thank you, Admiral. As you know, we invite questions from Members in the order in which they arrive for the hearing. So if it appears that we jump around, that is the rules, or that is the rule. So, first, Mr. Blumenauer.

Mr. BLUMENAUER. Thank you. Thank you, Mr. Chairman. I appreciate the opportunity for this hearing, and hearing from our witnesses. I appreciated, Admiral, in particular your focus on the impact on the people under your command, particularly when we have this cloud that I think affects us all: Questions about what is going on in Iraq right now, questions about the transparency of our activities, chains of command, whether or not we are adhering to international conventions dealing with prisoners.

I wonder if you could elaborate for a moment on what impact the approval of this Convention would have on the men and women who are currently operating under difficult situations at sea.

Admiral MULLEN. In my statement, I spoke to the compliance that we have exhibited since the 1983 time frame, and part of that deals with something that, when we go to sea, we call freedom of navigation.

We have operated in areas of the world, in the Mediterranean, for example, off the coast of Libya, for many years, and where there were claims which were excessive from an international standpoint.

I have personally done this also in the economic zone off of North Korea, and in those situations, because there is no codified set of rules, if you will, to which those that sign up to this treaty would conform, we are in a position to ask our sailors—and what we try to do in those circumstances in what we call freedom of navigation operations—is assert what we understand to be the well-understood international law at the time, customary law.

And in doing that, we have on more than one occasion put our ships, and the sailors, the men and women who man them, in a more dangerous position because of where that maneuver space is, well outside our country's territorial seas, and well inside the exclusive economic zone, for instance, of a country that might claim a wider area, for whatever reason.

We have routinely asserted that over the years to make sure that the Law of the Sea Convention and that which is understood internationally around the world, that freedom of navigation, and freedom of the seas, the rights of passage, those things are in fact asserted.

There would not be a guarantee that, if this passed, that that same country wouldn't act belligerently, but it clearly brings in my

view a body of significant beliefs, and certainly the international views and the pressures associated with that, to hopefully put them in a position where they would be a little more reticent in terms of what they might do.

Mr. BLUMENAUER. Thank you. Mr. Chairman, I just would like to put on the record, and I will submit a formal opening statement at your invitation, but there are two points I guess I would just put in closing here. I think this would be an important action by this Congress at this time when we are committed to international cooperation.

I think it would have salutary effects that go far beyond what we are talking about in terms of the Law of the Sea. Second, we have actually a greater threat to the future of humankind than this struggle against terrorism that we are involved with now, and that is what we can do to the environment.

Global climate change, warming, pollution, the two national reports—one private, and one federal—that have been released about the health of the oceans, that paint a picture of putting at risk this center of the food chain and protection of the environment.

And so this would also I think be a powerful signal and a mechanism for us to be able to work cooperatively to protect the environmental health of the oceans, and just as importantly, for our international security.

Chairman HYDE. The gentleman's time has expired. I thank the gentleman for his sound thinking. Mr. Tancredo of Colorado.

Mr. TANCREDO. Thank you, Mr. Chairman, but I believe my colleague preceded me here.

Mr. PAUL. That is okay.

Mr. TANCREDO. I believe that my colleague, Mr. Paul, preceded me here.

Chairman HYDE. You can't believe it is your turn?

Mr. TANCREDO. Right, it is amazing.

Chairman HYDE. Are you willing to yield your turn?

Mr. TANCREDO. I am willing to yield to Mr. Paul if he requires it or requests it.

Mr. PAUL. I am patient.

Mr. TANCREDO. Thank you, Mr. Chairman.

Chairman HYDE. All right. Mr. Paul has adopted a new mantle of patience.

Mr. TANCREDO. Well, thank you, Mr. Chairman. There are a couple of questions that come to mind as a result of your testimony, and especially that of Admiral Mullen. My questions are with respect specifically to the fact that we are operating apparently, the Navy is apparently operating under the provisions of the treaty, because, as you say, it is in our interest to do so.

You are operating in a way that would fulfill the requirements of this treaty. I understand that you are saying that this is acceptable to the Navy.

But there are, of course, a lot of other provisions of this treaty that don't deal specifically with military issues, but that are disconcerting to several of us. I am just wondering why I should feel better about the treaty when you say that you are doing it and it doesn't matter?

I mean, there are other things that I don't like, and if you can continue to do it, and if the military, if the Navy says that the provisions don't stop them from doing what they need to do, and in fact you even can make use of them, that is fine. Go ahead. Why do we need a treaty beyond that. You just continue doing what you are doing.

Admiral MULLEN. As this treaty has evolved over the years, in terms of the debate and discussion, I have been focusing on it, or have focused on it certainly very much this last year. I spend a lot of my time, as I think we all are doing, worrying about the future, and how you predict that, project it. The thing that this treaty brings me from the military standpoint, and from the Navy standpoint in particular, is the ability to better leverage the maneuver space in the oceans that are out there.

And that mobility I believe also is going to—if you accept that it will allow me to do that—it is my belief and the belief of many, many senior military officers, that acceding to this will give me that leverage. And that mobility, and that maneuver space is more important than it has ever been and will continue to be, particularly as we struggle with rights in certain parts of the world to create a footprint.

To make sure that we have the access that we need under accepted law, and the codification of that obviously, it also would allow us—again from the military standpoint—to take a considerable leadership role. This is the seat at the table discussion, which gets back to really two principal pieces for me.

One is my ability to do this from a war fighting standpoint, and the current regime which routinely puts my people in a position that doesn't—if they do not have to be there, from the standpoint of exerting, asserting the freedoms that are currently there. There are those that argue that you can do this from outside. Really, it is the opinion of a considerable number of senior military officers, that it is better to do that from inside.

In looking at the future, and this goes to the comment that was made earlier in testimony, this is a generational war. This is a long war. We are uncertain as to obviously when it is going to end, this global war on terrorism. We believe this treaty will better support our ability to fight that war because of the ability to maneuver in that operational space than we are able to do now. And I don't reject that there is clearly—you know, we have conformed to it—there is an operational aspect which we conform to right now.

Mr. TANCREDO. Well, Mr. Taft, why should I feel any better about this, I suppose, considering the fact that we will still be subject to this compulsory dispute resolution process, which we have learned by now seldom results in anything that accrues to our benefit in this country, just because of the nature of the world that we live in and the resentment that many people have for the United States and what we represent.

I certainly do not feel comfortable at all putting this country into that kind of a situation, compulsory dispute resolutions, giving a certain degree of our sovereignty over to another entity.

Mr. TAFT. Well, Congressman, I would just say that I think we need to focus on exactly what the subjects would be that would be affected by this compulsory dispute mechanism. First of all, we are



excluding from the dispute mechanism any military activities, and matters that affect our vital interests as we are permitted to do under the Convention.

And that is in the resolution of advice and consent proposed by the Senate Foreign Relations Committee—the things that are left that are subject to dispute resolution. I think it is important to wonder what would happen in the absence of a dispute resolution mechanism.

These concern things such as a claim where we have perhaps a pipeline or a cable that is interfered with by another State or we have a ship which is perhaps taken into a port and arrested improperly, and we want compensation for that.

We have a number of areas where it will be very much to our advantage if we are unable to negotiate with the other State a resolution, that we are able to get a settlement of those through these processes.

There really isn't anything that is subject to the dispute resolution that affects our vital national interests. Most of these things will be economic, seeking compensation for damages that the other States have done, and that has been the record of the very small number of cases that have been brought by the existing parties to the treaty under the dispute resolution thing.

There was one, or the most prominent case, was a case where the State of Guinea arrested a ship belonging to St. Vincent and the Grenadines, or registered there, and it was improper that they did that. They were unable to resolve it amongst themselves, although they tried, I guess, but not hard enough. They went to dispute resolution, compensation was paid, and the ship had already previously been ordered released, and that was right, too. This is a good thing to have available where your ability to negotiate a solution fails.

Chairman HYDE. The gentleman's time has expired. Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman. I have one question about the treaty itself. Recently, Admiral and Mr. Taft, there was a report put out by the Oceans Commission, and I don't know if either one of you are necessarily familiar with all of its recommendations.

Would there at some point in time be a divergence, or is there any impact whatsoever, or what would be the context of those recommendations in terms of the Convention? Is there a certain synergy if those recommendations were adopted in toto, or is there a potential conflict? That is the only question I have. Thank you. If you could answer.

Mr. TAFT. I guess I would only say that I am not familiar with all of the details of that report. It is quite an extensive report, but I do know that one of the recommendations in the report was that we should accede to the Law of the Sea Treaty.

So in that sense at least the people who are writing it thought that it was consistent, and indeed that their recommendations, other recommendations, would be benefited by joining.

Admiral MULLEN. And, John, I have not gone through the report in detail either, but to specifically answer your question, I see it as a convergent path, as opposed to a divergent path, for the same reasons that Mr. Taft talked about.

Chairman HYDE. The gentleman from Texas, Mr. Paul.

Mr. PAUL. Thank you, Mr. Chairman. My first question is for Mr. Taft. Is it not true that a treaty is the supreme law of the land; that if we pass a treaty, it becomes the supreme law of the land?

Mr. TAFT. That is what the Constitution says, Congressman, yes, sir.

Mr. PAUL. Do you believe there are any limitations on what can be done with a treaty? Anything that happens in a treaty, does it become the supreme law of the land, or is it unlimited?

Mr. TAFT. No, there are treaties, or there are limitations on the kinds of treaties that the country can enter into. They must be—

Mr. PAUL. No, I am saying what if we get into them, what happens? Are there any limits to what we can do? What I am referring to is can a treaty amend the Constitution?

Mr. TAFT. No, sir.

Mr. PAUL. It could not. But in many ways I think this is what we do too often, and this is what we are attempting to do now, because we give up our sovereignty. You know, we have done it numerous times already.

We have a WTO that dictates trade policy, and tax policies. We have the IMF that dictates monetary policy to us, and here we have a Law of the Sea Treaty that will be dictating policies to us, and actually introduces the notion of a tax.

So I see this as a contradiction, and something that is out in limbo. We have been too careless about it over the last several decades by passing these treaties that literally change our Constitution. And it seems like we should not enter into any treaty that could possibly undermine our constitutional rights.

Mr. TAFT. Well, Congressman, I would agree with you that we should not enter into any such treaty. This treaty does not have that effect. We have looked very carefully at that in crafting the resolution with the Senate Foreign Relations Committee, and we have included in there a number of provisions which address precisely that concern, sir.

Mr. PAUL. Okay. I think I want to go on, because I think it is something that we should continue to think about, because we have a disagreement there. I disagree with the process also because of the nature of our wanting to resolve differences by always expanding the size and role of government.

A hundred years ago or so, we introduced the automobile to this country, and we didn't have a law of highway treaties among the 50 States so cars can drive in and out of different States. What we had were agreements between all the States, and a license works in every State. That principle recognized the notion of State sovereign rights in working out treaties and agreements among the States, so-called treaties.

And we more or less have been doing this with the seas as well, and all of a sudden we are claiming that it does not work anymore. We have to have a treaty, which to me is a great threat. It is a threat to our liberties and our Constitution.

Yet, we have a pretty good history. I would suggest that you—and especially the Navy—are about 180 years too late, because this was a question that came up in our early history.

Jefferson worried about the Barbary Pirates, and Madison worried about the British. And it seems to me like we have had pretty much freedom of the seas ever since. But you claim now that we need our navy to go in certain tight areas and not be kept from going where we want to go.

I see that as a two-edged sword. One is that there is a narrow sea lane, and the two countries that are involved have agreements, and they let commercial ships go in and out and have agreements with all the people in the world, and most of the time trade is going.

And all of a sudden there is a treaty, and we, now being the most powerful nation in the world, we have the clout, that we can say that no matter what you say about armed vessels going in and out of here, we, because we belong to the treaty, we will go in.

I think you are stirring up a hornet's nest. You are saying we will do it because we are the biggest and the toughest. The other question is, and this is a prospective question, what happens when we are not king of the hill?

What happens if our empire dies. What happens if the Chinese come in and under the Law of the Sea Treaty want to put their navy in the Gulf of Mexico, and the Chesapeake Bay? They could argue this.

No, it is not going to happen now, but what are you setting up for the next generation? Those are the things that I am concerned about, and I would like to have our Admiral address that.

Admiral MULLEN. Yes, sir. You said this is a two-edged sword. The other side is that in my view the Law of the Sea Treaty gives us the opportunity and codifies the ability to do that in these in particular critical international States—I am sorry, international straits.

And that the longstanding ability to do that with respect to—and as I talked earlier, about our future, we really think is critical operationally. It puts us in a position inside the treaty, a position of leadership to better guarantee that than we have right now, should someone else choose to oppose that view in a certain strait in that part of the world.

I have spent most of my life at sea, and most of my life around the world, and from the international connection standpoint and from the operations of navies worldwide, these critical nodes, and the understandings of what we need to operate in, around, and through them, I think are better served with the provisions of this treaty than not being there.

Chairman HYDE. The gentleman's time has expired. The gentleman from Indiana, Mr. Pence.

Mr. PENCE. Thank you, Chairman, and thank you for holding this hearing on an issue of enormous national significance. I appreciate the esteemed witnesses that are here.

By way of full disclosure, although I lack probably the caffeinated intensity of the preceding speaker, I am not a fan of multi-national solutions as a rule, and so my concern about this issue has to do largely with the way this Law of the Sea Treaty either does or does not infringe on the ability of the United States of America to prosecute our national security in the seven seas.

And so I am tempted to use a little bit of my time to ask Mr. Taft about the resolution of the deep seabed mining regime, which was the reason why President Reagan refused to sign this two decades ago. My understanding is that has been resolved very much as the United States had hoped, and so I want to focus on national security, if I may, with the Admiral. We have even in our folder, and we will hear later from someone that I greatly respect, the President for the Center for Security Policy, who says that this treaty is not in our national security interests.

And, Admiral, I find that as kind of an interesting assertion, because according to my research, and correct me if I am wrong, the Chairman of the Joint Chiefs of Staff, the Chief of Naval Operations, the Office of the Secretary of Defense, and of course our Commander-in-Chief, believe that this treaty would benefit our ability to pursue our national security on the open seas.

And I wonder if you might speak to the assertion, however briefly, that this does not in fact erode, but in fact may enhance our ability to pursue our national interests in the world on the ocean. Admiral.

Admiral MULLEN. One of the issues that gets discussed around law of the sea is the sovereignty issue. It is my view that in fact—and I have sailed on many ships—that this improves and sustains the sovereign rights that we have when we take literally American territory on ships around the world.

And that is a conclusion that I come to very easily with respect to this treaty. I am not concerned about that piece of it at all. I talked about the future and the ability to support what we see as an expanding and a difficult challenge with respect to the prosecuting of global war.

In some ways, it boils down to codification, and whether we think that is helpful or not. In my experience, dealing in areas around the world, having rules to which we can cite doesn't mean that everybody is going to comply with them.

But having that is very impactful, as opposed to not having it. In our discussions, or in our involvement in various places around the world, going into an area where we know it is contested, in my view it is much different than going into an area that is not or that we know is not contested.

Mr. PENCE. Admiral, if I may, is it your assertion, as my colleague, Senator Lugar has made as Chairman of the Foreign Relations Committee, that this actually may result in American naval personnel being safer—

Admiral MULLEN. Yes.

Mr. PENCE [continuing]. Operating where we now have to use the threat of force to ensure access to certain disputed areas? The Law of the Sea Treaty would clarify within a 200-mile limit where we can operate?

Admiral MULLEN. Yes, sir, it truly is, and in the discussion earlier, I talked in terms of freedom of navigation, and where it is contested, we do go in with the threat of force, and we are certainly ready for that.

Mr. PENCE. Let me ask one other question if I may, Admiral, and Mr. Taft can speak to this as well as the legal expert here. Is it accurate to say that this, the Law of the Sea Treaty, does not in

any way affect intelligence collection by the United States of America? And is it your position that military activities and disputes are excluded from the conflict resolution forums created by this treaty? Either witness.

Mr. TAFT. Congressman, the answer is yes to both of your questions. Intelligence activities have been conducted for the last 20 years, consistent with the provisions of the treaty, and are unaffected. If we become a party, they would just go in the way that they have been carried out.

And as to military activities being subject to dispute resolution, in the resolution of advice and consent that the Senate Committee has put forward, we have taken the option, which is available in the treaty, to exclude those activities from the dispute resolution mechanism, and more than that, we have assured that it will be we who identify those military activities, and when we do that, they are out.

Chairman HYDE. The gentleman's time has expired.

Mr. PENCE. Thank you, Chairman.

Chairman HYDE. The gentleman from American Samoa, Mr. Faleomavaega.

Mr. FALEOMAVAEGA. Mr. Chairman, thank you. I offer my apologies. I had to take in another hearing this morning and so I was unable to be here on time for this hearing. But I do want to thank you, Mr. Chairman, for calling this hearing, and especially for having such a distinguished panel to offer their testimony about this important issue concerning the Law of the Sea Convention Treaty.

I have been tracking this issue for so long, Mr. Chairman, that I think it was about 100 years ago that we began playing with this thing. In fact, my understanding is that we drafted most of the provisions of this proposed treaty that has been approved by several other nations, except for ourselves.

And so I am happy to hear that the Administration does support the proposed treaty, which I think is a very, very dynamic part of the equation. And because I am from the Pacific, Mr. Chairman, I guess it is a natural thing to take a very strong interest in this issue.

When we talk about seabed minerals, like manganese nodules, and lending security to some of these raw metals, I think in the years to come this is going to be a very sensitive issue, not only to our security, but for our economic interests.

I would like to ask Secretary Taft, basically in terms of the overall position of the Administration, are there any other areas in the proposed treaty where you feel that there are some concerns in the Administration?

My understanding is that you do support—the Administration does support—the proposed treaty, but I am just curious if there are any areas in the treaty where you feel maybe we need to beef it up a little bit, or however else we may want to take a position?

Mr. TAFT. Congressman, I think our assessment is that we did very well in the negotiation leading up to the treaty as it was drafted in 1982. Our military, economic interests, and our interests in preserving the environment, were very effectively addressed there.

The only reservation that we had, and it was a substantial one, that prevented us from becoming a party at that time had to do with the seabed mining provision, Part XI. Now that that has been fixed—and Congressman Pence, I think, is correct in his statement that it has been fixed—we do not have any reservations about the treaty's provisions.

Mr. FALEOMAVAEGA. I want to hope that some day maybe the distinguished Chairman and I will visit one of these islands called the Cook Islands. A recent survey was conducted by one of the Norwegian companies, in terms of the potential seabed minerals, manganese nodules, that are contained in this little island nation, which has probably only 20,000 people, but covers 3 million square miles of ocean.

According to the best estimates, the contents of these manganese nodules in this little island country is well over \$200 billion worth, and that is the very, very least estimate in terms of the value of these manganese nodules that are in the Pacific Ocean.

And that is just one little island nation, Mr. Chairman. Hopefully it is not just a tremendous value economically, but as it was mentioned earlier by Mr. Pence, and others may have already asked the question, Mr. Taft, and Admiral Mullen, there are security interests. Are we absolutely assured that we are not going to have any problems with our national security, whether it be under the ocean, on the ocean, or in the air, if the provisions of this treaty are to be implemented?

Mr. TAFT. I will defer to the Admiral on that.

Admiral MULLEN. Absolute certainty about the future is certainly difficult to guarantee, but from my point of view, and my boss' point of view, and that of other military leaders, we are very comfortable with the provisions. We think they will enhance our national security, and not detract from it. From the Navy's point of view, we think they are critical to our ability to maneuver and operate in the future.

Mr. FALEOMAVAEGA. I recall, Mr. Chairman, when the little island nation of Carboast had a special fishing treaty with the then Soviet Union, and so the Soviet Union sent this ship that sat right on the borderline of Carboast, but this fishing vessel never went fishing. It just stood there watching the missiles that we were firing from Vandenberg toward the Bikini atoll.

You know, that was the kind of security issues that we were looking for as far as the Pacific Ocean is concerned, and I am sure that the Admiral is very familiar with the issues that we faced there. What is the time line of the Administration's—

Chairman HYDE. The gentleman's time has expired. I would like to state that we expect six votes to be bunched together when they reach the votes, and so I would like to finish with this panel and really hear the testimony from the next panel before we disperse.

So I will thank this panel for your instructive, illuminating statements, and answers to the questions. We are most appreciative, and we will now invite the second panel to the table.

Mr. TAFT. Thank you, Mr. Chairman.

Admiral MULLEN. Thank you, Mr. Chairman.

Chairman HYDE. Thank you, Mr. Taft, and thank you, Admiral Mullen. Our second panel is led by Frank Gaffney, Junior, Founder

and President of the Center for Security Policy, a not-for-profit, non-partisan education corporation, established in 1998.

Under Mr. Gaffney's leadership the center has been nationally and internationally recognized as a resource for timely, informed, and penetrating analysis of foreign and defense policy matters.

Mr. Gaffney contributes actively to these debates as a columnist for *The Washington Post*, *The Jewish World Review*, and other publications. Mr. Gaffney has served as Assistant Secretary of Defense for International Security Policy under President Reagan, among other appointments, and has been a staff member of the Senate Armed Services Committee.

He holds degrees from Johns Hopkins University's School of Advanced International Studies, and Georgetown University's School of Foreign Service.

Our next panelist is Baker Spring, an F.M. Kirby Research Fellow in National Security Policy at the Heritage Foundation, where he examines the threat of ballistic missiles from third-world countries, arms control, and U.S. national security issues.

Mr. Spring is a student of the treaty-making process and is focused on the Senate's role in advising and consenting to the ratification of treaties. Mr. Spring has previously served as a defense and foreign policy expert for two U.S. Senators, and holds degrees from Washington and Lee University, and Georgetown University.

We will next hear from Dr. Peter M. Leitner, a widely published author, who is President of the Higgins Counterterrorism Research Center, and is President of the Washington Center for Peace and Justice, a non-profit organization representing victims of child abduction by foreign spouses.

Dr. Leitner is also a professor at George Mason University, and an adjunct faculty member with the graduate schools of George Mason, the University of Northern Virginia, Mount Vernon College, and Southeastern University. He is co-editor-in-chief of the *Journal of Power and Ethics*, and is the author of two books on strategic technology and the law of the sea, as well as numerous journal articles.

Dr. Leitner has appeared several times before Congress, and has been featured on radio and television programs, such as *60 Minutes*.

Kathy Metcalf is the Director of Maritime Affairs for the Chamber of Shipping of America, a maritime trade association representing a significant number of U.S. based companies that own, operate, or charter ocean-going tankers, container ships, and other merchant vessels engaged in domestic and international trade.

Ms. Metcalf represents maritime interests before Congress, Federal and State agencies, and in international forums. She came to her present position with experience in various positions in the energy industry, including aboard large ocean-going vessels, and has covered marine safety and environment issues, corporate, regulatory, and compliance and State government affairs. She is a graduate of the U.S. Merchant Marine Academy, and holds a JD from the Delaware School of Law.

Our second panel will conclude with testimony from John Norton Moore, a Professor of Law at the University of Virginia Law School, and Director of their Center for National Security Law, and the

Center for Oceans and Law Policy. Viewed by many as the founder of the field of national security law, Professor Moore has chaired the American Bar Associations's Standing Committee on Law and National Security for four terms.

He is a member of the Council on Foreign Relations, the American Law Institute, and many other professional and honorary organizations. Professor Moore has served under a total of seven Presidential appointments, including as the Senate-confirmed Chairman of the Board of Directors of the United States Institute of Peace.

He has served as the Counselor on International Law to the Department of State, and as Ambassador and Deputy Special Representative of the President to the Law of the Sea Conference. He also has been a member of the Director of Central Intelligence's Historical Review Board.

We welcome each of you to today, and ask that you summarize your statements if you can in about 5 minutes. Your written statements will be a part of the record, and we will begin with you, Mr. Gaffney.

**STATEMENT OF FRANK J. GAFFNEY, JR., PRESIDENT, THE  
CENTER FOR SECURITY POLICY**

Mr. GAFFNEY. Thank you, Mr. Chairman. I will try to be as brief as I can given the complexities of this treaty. First of all, I appreciate very much your leadership in taking up this matter, even though some would have said that it is all the Senate's business. You will almost certainly be responsible for implementing legislation, including I suspect some that will deal with matters that have to originate in the House in light of some of the revenue-generating aspects of this treaty.

I hope other Committees of this body will take note of your leadership and follow it, and if I may, Mr. Chairman, we have an open letter that several organizations have joined me in sending to Senate Majority Leader Bill Frist, asking that he assure that there is time for your deliberations and other Committees here, as well as in the Senate.

And if I may make that a part of the record at this point, I would be very grateful. There may also be a few other signatories that come in shortly, which I would like to be able to add as well if I may.

Chairman HYDE. Without objection, so ordered.

Mr. GAFFNEY. Thank you, sir.

[The information referred to appears in the Appendix.]

Mr. GAFFNEY. I have to issue a disclaimer at the beginning, unlike some of the panel members here, and elsewhere in this town. I do not consider myself an expert on this treaty.

I have spent the better part of 28 years trying to evaluate the national security implications of various treaties, and have on the basis of that background concluded that this one is not as it has been described to you, which is to say that I think not entirely consistent with our national security interests, and the commonweal of the Nation more generally.



It is not to say that there aren't specific parts of this treaty that are unobjectionable, or even desirable, from the standpoint of certain interests, special or governmental.

I believe, however, from a net assessment point of view, the treaty is defective and not in the interests of the United States. If I leave you with only one point, Mr. Chairman, it would be this.

It seems generally agreed, at least implicitly, by even the proponents of this treaty that the part of the treaty that President Reagan most expressly objected to, Part XI, which created a new supranational governmental entity, called the International Seabed Authority, was defective.

In fact, you get that because everybody points quite happily to the 1994 agreement, which supposedly fixed that part of the treaty. I believe close inspection will raise questions in your mind, as they have in mine, as to whether the 1994 agreement does fix anything.

Not least because though there is frequently reference made to the fact that it amended the objectionable parts of the original treaty, that can't be done under the terms of this treaty until November of this year.

The reason that I emphasize this is that, even if it were the case that somehow an agreement that doesn't amend the treaty, and that hasn't been ratified by almost 20 percent of the signatories of the treaty, were actually effective in fixing that particular part of the treaty, you would still have two things at work here that I suggest are going to cause us grave problems down the road—two things that contributed to the creation of Part XI in the first place, and that will haunt us hereafter.

One is the ill-concealed hostility of a majority of the participating nations to American economic and military power, and the determination of that majority to use treaties like the Law of the Sea Treaty in a sort of lilliputian effort to confine or constrain this country's power in both economic and military senses. This agenda was reflected in what was called, at the time this treaty was created, the "New International Economic Order." It sought to redistribute wealth from developed countries, like ours, to undeveloped ones.

The second problem is the one-country-one-vote mechanism, which largely operates in this treaty. In some places, there are consensus arrangements. In some places, people will tell you that constitutes a veto.

But in some places we are not even guaranteed a seat. We are talking about a seat at the table, for example, on the international tribunal. But the problem is there is almost certainly going to be more of this kind of animus, more of this kind of eroding of the United States' position taking place if we become a party.

And the treaty, even if it is, as it has been described to you, as pretty good, will become less and less good over time. It is one of the reasons why I think you are hearing this sense of urgency.

As the treaty is supposedly going to be open for amendment, it may get uglier from the U.S. point of view. If so, it will be because of these two phenomena that caused President Reagan to be right in rejecting this treaty early on.

Another point which I hope you will take away is this treaty has problems not only in its own right, but as a precedent for how others would like to see us deal with other international "commons."

I happen to be particularly concerned about the notion that we need a similar kind of regime to govern space. I think it entirely likely that people will turn around once we are a party to this treaty and say, well, now we want to do that for outer space, governing the access and use thereof.

Mr. Chairman, in my prepared remarks, I talk about the veto. I think that is something that also warrants some close attention.

Let me just close by saying on the question that I think Mr. Pence mentioned, my concern, my differing view from these respected military leaders as to why this treaty is not in our national security interests, is that if you simply look at a number of the provisions of this treaty, for example—and I go through them in my testimony—article 88, article 301, article 19, article 20, article 110, article 144, all have language that is not consistent with how we do business as the leading naval power in the world.

Now, some will tell you, as they have told me, never mind. We simply won't pay attention to those provisions; or never mind, we have already agreed to those sorts of provisions elsewhere.

The thing that is different this time around, Mr. Chairman, and why the precedents are so important, there will be a court, an international tribunal, that will be able perhaps to issue rulings, and certainly to issue advisory opinions, and maybe over time to have them enforced.

That is a very different deal, and I think we ought to be very chary of getting into these kinds of arrangements when we think it will apply. And on that point—very quickly, a last point, sir. I appreciate your indulgence, because this is directly relevant to an area that I know of that is of great interest to you.

The increasing encroachment of so-called customary international law, of precisely the kind that this international tribunal will be spawning, is manifesting itself as Judge Robert Bork, among others, have pointed out in our own jurisprudence.

And Mr. Paul talked about amending our Constitution. I don't know if that is overstating it, but we are certainly seeing people say on the basis of advisory opinions, and not even by courts, but by international commissions, that now we have to do thus and such in our own domestic legal proceedings.

In short, this treaty I believe is not in our interests. We will continue, as we saw when it was negotiated, to be outvoted, to be outmaneuvered, to be disserved by those dynamics that I mentioned a moment ago—the hostility on the one hand and the one-country-one-vote principle, which will apply all too often. Thank you for your attention to this, sir, and I hope that you will join us in opposing this treaty's ratification.

Chairman HYDE. Thank you, Mr. Gaffney. Your time has expired. Mr. Spring.

[The prepared statement of Mr. Gaffney follows:]

PREPARED STATEMENT OF FRANK J. GAFFNEY, JR., PRESIDENT, THE CENTER FOR  
SECURITY POLICY

'THE LAW OF THE SEA TREATY: TRIUMPH OF THE LILLIPUTIANS'

Mr. Chairman, Members of the Committee: Let me say at the outset how much I appreciate the interest you are taking in the Law of the Sea Treaty (LOST). It would have been easy enough for this Committee to have declined to do so on the grounds that the House of Representatives is not, under the Constitution, directly involved in the treaty-ratification process. Yet, you clearly will have responsibilities for producing implementing legislation—some of which, involving granting for the first time an international agency the right to raise revenues, may even have to *originate* in the House.

Therefore, Mr. Chairman, to paraphrase Senator Vandenberg, it is absolutely imperative that you and your colleagues be involved in the take-off of this dubious venture—not simply what is likely to be its subsequent crash landing. I very much hope that other House committees—including Intelligence, Armed Services, Finance, Government Relations, Commerce and Energy—will follow your lead before the resolution of ratification is scheduled for action in the Senate.

Let me begin with a disclaimer. I do not consider, nor want to represent, myself an expert in the Law of the Sea Treaty. I have, however, spent a considerable part of the last twenty-eight years examining the national security implications of various international agreements. And, despite representations to the contrary by other witnesses today, *I have concluded that LOST will have a number of adverse implications for U.S. security interests and the national commonweal more generally.*

This is not to deny that some parts of the Treaty are unobjectionable and possibly even desirable for certain American special and government interests. That can be true and still have a net assessment come out negative from the standpoint of the country as a whole. I will confine these brief remarks to the reasons why I believe such a net assessment to apply and why the United States should *not* become a party to the Law of the Sea Treaty.

ERODING U.S. SOVEREIGNTY

I am struck by the fact that proponents of the Law of the Sea Treaty agree, at least implicitly, that President Ronald Reagan was right to refuse to sign this accord over his objections to Part XI—the section that established a supranational agency charged with regulating seven-tenths of the world's surface. This agency, known as the International Seabed Authority (ISA), has the exclusive right to regulate what is done, by whom, when and under what circumstances on and beneath the sea-floor in international waters. As with all such organizations, it is staffed by unelected and unaccountable international bureaucrats.

The proponents would have you believe that the problems associated with Part XI have been fixed to the United States' satisfaction through an accord negotiated by the Clinton Administration in 1994. This is surely untrue. After all, serious questions exist about the extent to which the so-called "Agreement" actually *changes* the underlying Treaty. For example, it has not amended LOST since—by the Treaty's own terms—it *cannot be amended until November of this year*. What is more, nearly 20% of LOST's States Parties have not ratified the 1994 document.

Even in the absence of such uncertainties, the larger point is that the original Part XI did not just happen. It was the product of extended negotiations and determined haggling, not least that precipitated by President Reagan's efforts to fix this and other unacceptable aspects of the Law of the Sea Treaty.

What the International Relations Committee, and the Congress more generally, needs to appreciate is that *Part XI turned out to be so defective thanks to two things that applied when the Treaty was being negotiated—and that, in important respects, still apply today*: 1) The ill-concealed hostility of an overwhelming majority of the participating nations to American economic and military power and its determination to use agreements like LOST as part of a Lilliputian-like strategy to constrain our sovereignty and strength and redistribute the industrial world's wealth—and ours—to undeveloped states. And, 2) the one-country-one-vote decision-making mechanism by which that strategy was repeatedly translated into arrangements that will diminish our sovereignty and complicate our ability to act in our self-interest on, in and even above the world's oceans.

It is against this backdrop that the powers vested in the International Seabed Authority (ISA) must be considered. *For the first time in history, we are being asked to submit to a supranational agency that has all the trappings of a world government—an executive, a legislative assembly, a court, the ability to raise revenues and, in due course, perhaps the means to enforce its decisions.*

Worse yet, should the United States become a State Party to LOST, *the ISA will become a model for arrangements to govern other so-called "commons," notably, outer space and perhaps Antarctica.* The implications for U.S. security and commercial interests of a world government entity dictating to us our use of and access to space could make the concerns raised by the ISA pale by comparison. Yet, there has been scarcely any discussion of the precedential implications of the Law of the Sea Treaty.

Mr. Chairman, to all those who blithely say we need not worry about the Law of the Sea Treaty—and the institutions and regime it spawns—becoming even less friendly to us in the future, I would simply say: The folks who brought us the defective Part XI will dominate the LOST-mandated proceedings and decision-making mechanisms. To those who say we will be able to prevent bad things from happening if only we are “at the table,” I would point out that things as bad as Part XI happened when we were fully engaged in the negotiations. To those who contend we will be able to exercise a veto, I would say that our practice in other international forums is rarely to do so, even where we clearly have the right. And in some LOST-spawned organizations that will certainly *not* be the case—notably, in the Treaty’s International Tribunal, on which the United States may not even *be represented*, let alone able to block problematic decisions.

#### THE U.S. AS GULLIVER

From a national security perspective, I am particularly concerned that the International Tribunal will be in a position to issue rulings, provide advisory opinions and perhaps enforce a series of obligations that are simply incompatible with our Nation and Navy’s traditional practice of Freedom of the Seas. These include:

- Article 88: This provision declares that the high seas are “reserved” for peaceful purposes.
- Article 301: This provision obliges States Parties to refrain from “the threat or use of force against the territorial integrity or political independence of any state.”
- Article 19: This provision is intended to proscribe the use of territorial waters to collect intelligence and conduct other operations (for example, the “launching, landing or taking on board of any military device”).
- Article 20: This provision dictates that submarines are “required to navigate on the surface and show their flag” in territorial waters.
- Article 110: This provision lists the circumstances under which ships can be intercepted and boarded on the high seas. Suspicion of involvement in terrorism and the shipment of weapons of mass destruction—the focuses of President Bush’s new Proliferation Security Initiative—are not among them.
- Article 144: This provision obligates States Parties to “cooperate in promoting the transfer of technology and scientific knowledge” without regard to the fact that at least some could be highly militarily relevant and used against us for submarine and/or anti-submarine purposes.

Proponents claim that this obligation has been rendered harmless by the 1994 Agreement. Yet, that accord’s Section 5 still says that “As a general rule, States Parties shall promote international technical and scientific cooperation” by, among other things, “developing training, technical assistance and scientific cooperation programs in marine science and technology.” What is more, this Section introduces these responsibilities by declaring them to be “*in addition to the provisions of Article 144*” (emphasis added).

Mr. Chairman, in my professional judgment, *these provisions are simply not compatible with U.S. national security interests or practices.* Some LOST proponents have said that we have already agreed to these or similar commitments elsewhere. Whether that is literally true or not, it would be inadvisable for us to be signing up to them in this context.

#### THE RULE OF WHOSE LAW?

For one thing, the United States generally does not long engage in activities that are prohibited by its treaty obligations. Lawyers in various government agencies, including the U.S. Navy, can be expected to argue against our doing so in cases like the foregoing.

For another, even if our own legal system interposes no objections to, for example, impermissible intelligence collection in or submerged transit of territorial waters, it is a safe bet that the Law of the Sea Treaty’s International Tribunal will be asked to rule against such practices or, at the very least, to issue advisory opinions against

them. *This will, in due course, translate into additional pressure and perhaps domestic court rulings and injunctions that will constrain, and possibly preclude, activities in which we simply must engage—especially in the midst of the present War on Terror.*

Let me underscore that last point, Mr. Chairman, since I am sure you are as seized as anyone with the ominous implications of a phenomenon to which Judge Robert Bork, among others, has recently called attention: the growing practice of U.S. courts and jurists to inject under the rubric of “customary international law” the decisions of international judges and even non-judicial multilateral bodies (such as UN commissions) into domestic legal proceedings. LOST and its tribunal could advance this trend, corroding one of our Republic’s most fundamental principles—namely, that American laws duly fashioned by Congress and signed by the President form the ambit within which U.S. jurisprudence predictably operates.

#### AN INVITATION TO WORLD-CLASS GRAFT?

Finally, let me note the commendable work being performed by this Committee to examine evidence of systemic corruption and malfeasance on the part of senior UN personnel—and, in the case of the Secretary General, one of his relatives—in connection with the notorious Iraq Oil-for-Food program.

At the very least, I would respectfully submit that—even if there were no other grounds for rejecting ratification of the Law of the Sea Treaty—that step would be ill-advised so long as there is reason to believe that its international bureaucracy will not similarly abuse the authority to make decisions about, and generate revenues from, what could be billions of dollars worth of ocean-related commerce. *Knowing what we do at the moment about the Oil-for-Food Program, it would be irresponsible to extend to the ISA what could amount—literally—to a license to steal on an unprecedented scale.*

#### THE BOTTOM LINE

In short, Mr. Chairman, *the people, institutional arrangements and practices that brought us the defective Part XI will dictate how that section and the International Seabed Authority it mandates, the 1994 Agreement and other problematic parts of the Law of the Sea Treaty actually operate.* Were the United States to become a party to the LOST, we can be assured that we will routinely be outvoted, outmaneuvered and disserved by an agreement that was defective when President Reagan refused to sign it and that can only get worse, given the dynamic that first gave rise to this Lilliputian initiative for advancing the long-discredited “New International Economic Order” and that is, if anything, even more virulently anti-American today than it was in 1982.

#### **STATEMENT OF BAKER SPRING, F.M. KIRBY RESEARCH FELLOW IN NATIONAL SECURITY POLICY, THE HERITAGE FOUNDATION**

Mr. SPRING. Thank you very much, Mr. Chairman. It is an honor for me to testify before this distinguished Committee, and I will summarize my remarks as much as I possibly can.

I see four major problems with the Convention. The overarching one is the matter of state sovereignty. The Convention establishes open-ended procedures for administering its myriad provisions that could lead to negative outcomes for the U.S. that are all but impossible to predict by simply reading its text.

It cedes power to international authorities that are unaccountable, and whose behavior individual states cannot predict. If the U.S. becomes a participant in this treaty following a move by the Senate to approve ratification, it may well regret it in the years ahead.

Prior to any vote by the Senate to consent to the ratification of the Convention, I believe that all interested people should fully understand the dangers that are posed by the relinquishment of State sovereignty.

Interestingly, proponents of the Convention acknowledge the far reaching political and legal ramifications of U.S. adherence to the treaty. The University of Virginia School of Law Professor John Norton Moore, who is testifying here today, testified before the Senate Foreign Relations Committee on October 14th, 2003, that he sees it as: "One of the most important law-defining international conventions of the 20th century."

This is quite an assertion. While drafting language promoting the rule of law in international relations, in reality it represents the establishment of the rule of law over sovereign States more than establishing a rule of law made by them.

The second issue concerns the Convention's bias in favor of redistributing global economic resources. The Convention was drafted at a time when the failed policies of state control over-resources, to meet demand for retribution of those resources, were in vogue.

Specifically, article 140 of the treaty states that all activities outside the jurisdictional waters of individual states be carried out for the benefit of mankind, while taking into particular consideration the interests and needs of developing states. It is unclear why the U.S. should accept a treaty that is so explicitly biased against its interests when it comes to access to resources.

Third, the Convention contains an ill-advised revenue-sharing provision that is applied to income derived from oil and gas production, among other things, outside the EEZ. The U.S. will be forced to pay a contribution to the International Seabed Authority created by the treaty based on a percentage of the production.

By any reasonable definition, this provision would allow a U.N.-affiliated international authority to impose a tax directly on the U.S. for economic activity.

Finally, the Convention poses a significant risk to national security. Deputy Assistant Secretary for Defense for Negotiations Policy, Mark T. Esper, who testified in favor of the Convention, told the Senate Foreign Relations Committee on October 21, 2003 that the mandatory dispute resolution mechanism could be used by states unsympathetic to the United States to interrupt its military operations, even though such operations are supposed to be exempt from the mechanism.

This is because it is unclear by the terms of the treaty what activities will be defined as military. While the Administration believes that it will be up to each state party to determine for itself what activities are military, it is uncertain enough about the issue that it is recommending that the U.S. submit a declaration reserving its right to determine which activities in fact are military.

Unfortunately, it is not at all certain that a declaration will suffice to protect U.S. vital national security interests. Other states may choose to accept or ignore the declaration.

In this context a future Administration may accept jurisdiction of a tribunal, and be surprised if precedent-setting decisions go against U.S. interests. While in the future the Navy may recommend that the U.S. reject a claim of jurisdiction for a tribunal, civilian authorities, both inside and outside the Department of Defense, may overrule the Navy.

So those are the four concerns that I have, and when you wrap them all together in the broader language of the treaty, which is

primarily driven by procedure and process over substance, the outcomes in my judgment will be utterly unpredictable, uncontrollable.

Obviously, we find this lack of predictability in any authority that is established by procedures. We don't know, for example, what would happen even with an august piece of political documentation, like the U.S. Constitution, and what the Supreme Court, for example, may do under any particular circumstances, and whether it may exceed its authority. Similarly, Congress may exceed its authority, vis a vis the limitations that are imposed on government, for example, by the Bill of Rights. When you have these open-ended procedures, I think that the lack of predictability is a fatal flaw in this treaty. Thank you, Mr. Chairman.

Chairman HYDE. Thank you, Mr. Spring. Dr. Leitner.

[The prepared statement of Mr. Spring follows:]

PREPARED STATEMENT OF BAKER SPRING, F.M. KIRBY RESEARCH FELLOW IN  
NATIONAL SECURITY POLICY, THE HERITAGE FOUNDATION

*Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed are their own, and do not reflect an institutional position for The Heritage Foundation or its board of trustees.*

Mr. Chairman, those who founded our nation recognized the power to make treaties is an extremely important power. In their wisdom, they sought to ensure that treaties would serve the national interest by dividing that power between the executive branch and the Senate. Article II, Section 2, of the Constitution states that the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties." Further, Article II establishes a two-thirds voting requirement for the approval of treaties by the Senate. Clearly, they intended to place the burden on the proponents of a treaty to demonstrate its value to the United States. The far-reaching provisions of the treaty that is the subject of this hearing amply demonstrate why the nation's founders divided the treaty-making power. There are compelling reasons why the Senate should take the time and care necessary to review this treaty and understand all its implications. While the House of Representatives does not have a role in the advice and consent process, its members can and should contribute to the debate over whether the United States should ratify a treaty such as this one.

In March 23rd testimony before the Senate Environment and Public Works Committee, Assistant Secretary of State for Oceans, International Environment, and Scientific Affairs John F. Turner confirmed that the administration supports Senate approval for the ratification of the 1982 United Nations Convention on the Law of the Sea (hereinafter referred to as the Convention). The Administration's position is puzzling to me because the United States had considered and rejected the Convention during the Reagan Administration. I do not see a compelling reason to revisit the issue today.

While proponents of the Convention argue that the Clinton Administration resolved the problems with the treaty that led to its rejection in the 1980s, through renegotiation in 1994, the fact remains that it represents a potential turning point for the U.S. in the history of international relations. The Convention presents the U.S. with a stark choice. On the one hand, the U.S. may enter into this treaty and proceed on a path that cedes U.S. sovereignty to executive and quasi-judicial international authority with compulsory powers or reject the treaty and stick to the tried and true international system where relations are established between and among sovereign states.

While the Convention contains a wide variety of questionable provisions, its real danger stems from the fact that the treaty represents more than the sum of its questionable provisions. It establishes open-ended procedures for administering these provisions that could lead to negative outcomes for the U.S. that are all but impossible to predict by simply reading its text. If the U.S. becomes a participant in this treaty, following a move by the Senate to approve ratification, it may regret it in the years ahead.

*Myriad Problems.* The Convention has a variety of problems. This is not surprising given that the treaty takes up more than 150 pages. What is surprising is that even the proponents of the treaty both inside the Administration and outside it have publicly acknowledged a number of the dangers associated with several spe-

cific provisions. Prior to any decision to ratify the Convention, the public should fully understand the dangers posed by these provisions. The review process, however, should not stop there. Interested citizens need to take the additional step of understanding each of these provisions in the context of the open-ended and in some instances compulsory dispute settlement and other procedures found in the Convention, over which the U.S. will only have limited control and that could produce adverse outcomes that are all but impossible to predict. The following represents four general shortcomings of the Convention:

*Problem #1: Loss of Sovereignty.* Traditionally, treaties, with only narrow exceptions, have been defined as formal agreements between and among sovereign states that help define their relations to each other as sovereign states. They are inherently political agreements. The option to change such relations and the concomitant power to discontinue adhering to the terms of a treaty is solely the prerogative of the sovereign.

First and foremost, the Convention represents a departure from that tradition. It establishes institutions with executive and judicial powers that in some instances are compulsory. For example, Section 4 of the Treaty establishes the International Sea-Bed Authority. The authority basically is given the power to administer to the "area" under the jurisdiction of the treaty, which includes all the world's oceans and seabed outside national jurisdiction. This is a granting of executive powers to the authority that supersedes the sovereign power of the participating states. Of even greater concern, Part XV of the Convention establishes dispute settlement procedures that are quasi-judicial and mandatory. Once drawn into this dispute settlement process, it will be very difficult for the U.S. extricate itself from it.

Proponents of the Convention acknowledge the far-reaching political and legal ramifications of U.S. adherence to the treaty. University of Virginia School of Law Professor John Norton Moore, a supporter of the Convention who is also testifying today, stated that he sees it as a means for fostering the rule of law in international affairs. In fact, he has stated that adherence to the Convention is "one of the most important law-defining international conventions of the Twentieth Century."

This is quite an assertion. In fact, it is the most troubling aspect of the Convention because the conduct of international relations for centuries has been a more a political than a legal process. Unacknowledged in the language about fostering the rule of law in international relations is the reality that in this particular case it entails subordinating the powers of the participating states to the dictates of an international authority. When it comes to the essential powers for the conduct of international relations, the use of force, and the exercise of diplomacy, they are not readily divisible but they are readily transferable. The Convention is a vehicle for transferring these essential powers from the participating states to the international authority established by the treaty itself. It represents the establishment of the rule of law over sovereign states more than it is establishing a rule of law made by them.

Former Secretary of State George Shultz provides a succinct rejoinder to those who envision the rise of the "rule of law" in international relations in the way it is devised in this Convention. Speaking at the Library of Congress on February 11, 2004, Secretary Shultz stated:

First and foremost, we must shore up the state system. The world has worked for three centuries with the sovereign state as the basic operating entity, presumably accountable to its citizens and responsible for their well-being. In this system, states also interact with each other to accomplish ends that transcend their borders. They create international organizations to serve their ends, not govern them.

*Problem #2: Unnecessary limitations on the exploitation of resources.* The Convention was drafted at time when the failed policies of state control over resources to meet demands for the redistribution of those resources were in vogue. Specifically, Article 140 of the Convention states that all activities outside the jurisdictional waters of individual states "be carried out for the benefit of mankind" while "taking into particular consideration the interests and needs of developing States." These international waters and the accompanying seabed are defined as those outside the 200-nautical-mile exclusive economic zone (EEZ) the treaty leaves within the jurisdictional control of participating states.

It is unclear why the U.S. should accept a treaty that is so explicitly biased against its interests when it comes to the access to resources. This is particularly so when this bias reflects a policy preference for the redistribution of resources that the world abandoned over a decade ago. The world economy is now organized around the requirements of the market. As elsewhere, the application of market principles regarding the exploitation of sea-based resources will ensure the effective



and efficient use of those resources. U.S. adherence to the Convention, therefore, would represent a step backward.

*Problem #3: A step in the direction of international taxing authority.* The Convention contains an ill-advised revenue-sharing provision that is applied to income derived from oil and gas production outside the EEZ. The general bias in the Convention, as I indicated earlier, is in favor of the redistribution of seabed resources. This bias is codified in the area of oil and gas revenues. The U.S. will be forced to pay a contribution to the International Sea-Bed Authority created by the treaty based on a percentage of its production in the applicable area beyond the 200-mile limit.

While he asserted the argument against this revenue-sharing provision was unconvincing, State Department Legal Advisor William H. Taft IV acknowledged it was an argument that could be made in the course of October 21, 2003 testimony before the Senate Foreign Relations Committee. Mr. Taft understates the problem. By any reasonable definition, this provision would for the first time allow a U.N.-affiliated international authority to impose a tax directly on the U.S. for economic activity. At least, I am unaware of any precedent for this kind of international taxing authority. Shoring up the state system, as recommended by former Secretary of State Shultz, means that international institutions should be funded by the voluntary contributions of their member states. The extent to which these international institutions are allowed access to independent streams of revenue is the extent to which they will seek to obtain governing authority at the expense of the state system. While the revenue-sharing provision related to oil and gas production in the Convention is a relatively modest step in this direction, it is still a step in the wrong direction.

*Problem #4: Unnecessary Risks to National Security.* Proponents of the Convention argue that it promotes U.S. security by codifying a variety of rights to navigate the world's oceans that are valued by the Navy. While the Navy, quite appropriately, seeks the codification of these rights, it should be pointed out that a significant portion of these rights are already established by a series of four 1958 "Geneva Conventions on the Law of the Sea" and customary international practice.

On the other hand, the risks to national security posed by the Convention are often understated. For example, Deputy Assistant Secretary of Defense for Negotiations Policy Mark T. Esper, who testified in favor of the Convention, told the Senate Foreign Relations Committee in an October 21, 2003, hearing that the mandatory dispute resolution mechanism could be used by states unsympathetic to the U.S. to curtail its military operations even though such operations are supposed to be exempt from the mechanism. This is because it is unclear by the terms of the treaty what activities will be defined as military. While the Bush Administration believes that it will be up to each State Party to determine for itself what activities are military, it is uncertain enough about the issue that it is recommending the U.S. submit a *declaration* reserving its right to determine which activities are military. Unfortunately, it is not at all certain that a declaration will suffice to protect vital U.S. national security interests. Other states may choose to accept or ignore the declaration, or a future administration may accept the jurisdiction of a tribunal and be surprised if precedent-setting decisions go against U.S. interests. While in the future the Navy may recommend that the U.S. reject a claim of jurisdiction for a tribunal, civilian authorities both inside and outside the Department of Defense may overrule the Navy. Amending the text of the treaty may be the only certain way to protect U.S. interests against overreaching by other states regarding the mandatory dispute resolution mechanism. This is my view, in part, because I am not aware of a precedent for such a mandatory dispute settlement mechanism that could extend to such sensitive areas.

*Members of the House of Representatives have a role in the debate over the Convention.* The four general shortcomings with the Convention that I have described are derived from a longer list of specific shortcomings in a variety of the specific provisions it contains. While the House of Representatives will not consider the matter of granting consent to ratification, House members should participate in the general debate over the Convention. I believe that House members should take the opportunities that are presented to them to communicate with their Senate colleagues both formally and informally on this matter. Generally, they should point out to the Senate that there is no pressing need for rushing to judgment on ratification. The Convention is a long and complex agreement and an informed judgment on granting consent to ratification will necessarily involve a broad debate in the Senate.

*Conclusion.* The United Nations Convention on the Law of the Sea is a modest step toward the creation of an international sovereign authority unchecked by the governed. Nevertheless, it is a significant one. Given that modern states, including the one envisioned for a united Europe, are the product of a combination of just such steps, it is one the United States should not be taking. Further, the treaty con-

tains a number of specific provisions in such areas as regulation, energy, the environment, national security, and constitutional law that are deeply troubling.

National leaders in Europe seem to aspire to relegating their nations to the status of provinces inside a supranational European authority. In this context, it is not surprising that some outside the United States see this move in the direction of broader authority for international entities, which Secretary Shultz has warned against, as desirable.

As for America's leaders, they should firmly reject such aspirations for their nation now. Insofar as the United Nations Convention on the Law of the Sea seeks to move the United States in this direction and serves as an indicator of steps yet to come, it poses a danger to the vision America's fathers had for the nation they founded in 1776.

Mr. Chairman, I again thank you for the opportunity to testify. I would be happy to answer any questions the Committee may have regarding the Convention.

**STATEMENT OF PETER M. LEITNER, PH.D., AUTHOR, "REFORMING THE LAW OF THE SEA TREATY: OPPORTUNITIES MISSED, PRECEDENTS SET, AND U.S. SOVEREIGNTY THREATENED"**

Mr. LEITNER. Mr. Chairman, and Members of the Committee, I really appreciate the opportunity to be before you today in what I see as the democratic process actually working now, unlike what happened initially in the Senate regarding this treaty.

First, I would like to issue a brief caveat just to my appearance. I also am an employee of the Department of Defense, speaking here as a private citizen, and I am not representing the Department of Defense, or the U.S. Government, in my capacity. So the remarks that I have are my own.

I have a much longer statement, which is submitted for the record, and I will just summarize here. I would also say that I hope that we have the opportunity to address some of the statements that were made by the prior panel, particularly statements regarding the freedom of navigation programs, and other issues of national security concern, which I think were either a distortion or a misunderstanding of what the treaty does, in terms of facilitating or alleviating our responsibilities in the freedom of navigation assertions.

To begin with, the American people have little to gain and much to lose by acquiescing and supporting the creation of a new super government, the International Seabed Authority, which is embodied in this treaty.

It is composed of a legislative, an executive, a judiciary, a secretariat, and several powerful sub-commissions. The existence of such a new force, dominated by nations hostile to American interests, is a fact that we must consciously reckon with and not capitulate in.

The benefits of the United States participating in the treaty cannot be denied. They include guidelines on the management of fisheries, the environment, some dispute settlement issues, and marginal improvements in freedom of navigation and overflight.

While such issues seem impressive on the surface, their resolution and achievement was not a herculean effort, nor were they critical to the economic health or physical security of the United States. They fall into the category of nice-to-have issues, which are outbalanced by the national security and other economic implications of this treaty.

The real issues presented by accession to the Law of the Sea Treaty, unfortunately, I think, have been still little discussed since 1982, and are being side-stepped today in an effort to sell the 1994 agreement as a panacea that purportedly fixes what was wrong with the treaty.

And unfortunately this panacea is in reality a smoke screen. Treaty supporters within the U.S., which now include a number of former treaty opponents, appear to have resigned themselves to this as the best deal what we are likely to achieve philosophically after the Clinton Administration's failure to press hard for real change during the 1993-1994 renegotiations, so-called renegotiations.

To cite the Administration, that prior Administration's weak negotiating skill, or its failures to argue on behalf of basic U.S. national security interests in an international forum, makes a poor rationale for ratification of a treaty.

And I think with several people that is where we are today. I want to add a little remark about the openness of the debate, and the fact that we still have not heard from—and hopefully we will in the future, but I am prepared to represent their view today—the nascent U.S. ocean mining community, the actual people who invested hundreds of millions of dollars into developing a type of technology that will allow manganese nodules to be dredged up from the water, 12,000 or 18,000 feet deep in the middle of the central Pacific Ocean.

In 1994 when this agreement, which purportedly changes the Part XI of the treaty, the ocean mining provisions, when it was coming out, the ocean mining at the time was flat out against this amendment, saying that it was inadequate, that it did not purport to change the disincentives to investment, and create an investment climate necessary for ocean mining to take place.

At that time one particular company, the Lockheed Corporation, was one of the leaders in ocean mining technology and the development. They had a facility in Sunnyvale, California, that was the technological leader in the world in developing ocean mining technology and the processes to extract the minerals. At an interagency meeting in 1994, people within the Department of Defense, and the interagency process, were very concerned that Lockheed was making a lot of very public noise about its rejection of its 1994 renegotiation, saying that it does not cure the problems in the treaty and would not allow an ocean mining industry to be born.

At that time a naval officer stood up and said, don't worry, I will take care of Lockheed. Lockheed at that time, if we recall, was in the middle of a very delicate merger with Martin Marietta, and what later became the Lockheed-Martin Corporation. And there was an awful lot of vulnerability there for a government objection to the merger, and basically resulted in them keeping their mouths quiet.

[The prepared statement of Mr. Leitner follows:]

PREPARED STATEMENT OF PETER M. LEITNER, PH.D., AUTHOR, "REFORMING THE LAW OF THE SEA TREATY: OPPORTUNITIES MISSED, PRECEDENTS SET, AND U.S. SOVEREIGNTY THREATENED"

Mr. Chairman, members of the Committee, I would like to thank you for providing me the opportunity to testify before you today concerning the dangerous mo-

mentum to ratify the United Nations Convention on the Law of the Sea. This seriously flawed document was rightly rejected by President Reagan as it embodies a wide range of precedents, obligations, and restrictions that are deleterious to American national and economic security interests. Indeed, the Treaty and its many precedent setting provisions is a direct assault on the sovereignty of the United States and the supremacy of the Nation State as the primary actor in world affairs.

I am appearing before you today as a private citizen and author. Although I am a Senior Strategic Trade Advisor in the Office of the Secretary of Defense my views and statements are my own and do not represent the views of the Department or the U.S. government. I have also submitted to the Committee additional supplementary material regarding this complex and wide-ranging Treaty having been assured that it will be published as part of the record of this hearing.

Before I begin I would like to explain my bona fides. I became involved in Law of the Sea issues first as a student in 1973 and I have pursued the topic ever since. My first master's thesis was entitled: *The Future of the Nation State* (1975) an analysis of threats to sovereignty posed by the direction the Treaty was beginning to take as well as the rise of multinational corporations. The second thesis was entitled: *The Impact of Manganese Nodule Exploitation Upon Less Developed Mineral Exporting Nations*. This economic & engineering analysis was well received as a scene-setter for the struggles that were to come. The third thesis was a quantitative analysis entitled: *Determinants of National Claims to Territorial Seas*. This collection of analytical approaches to the Law of the Sea Treaty and its impacts landed me a job with the U.S. General Accounting Office where I was hired to be their expert on the treaty.

In 1976 GAO was requested by several Committee Chairmen to independently report on the status of negotiations as they were deeply distrustful of the official delegation reports authored by the State Department. As a result, I attended many of the negotiating sessions in New York and Geneva as an observer attached to the US delegation. I joined the U.S. delegation in 1977 and reported regularly to Congress on the state of negotiations through 1982. I was present in New York when the Reagan Administration's good faith attempt to make the Treaty acceptable was roundly rejected by a coalition of Developing and Communist nations.

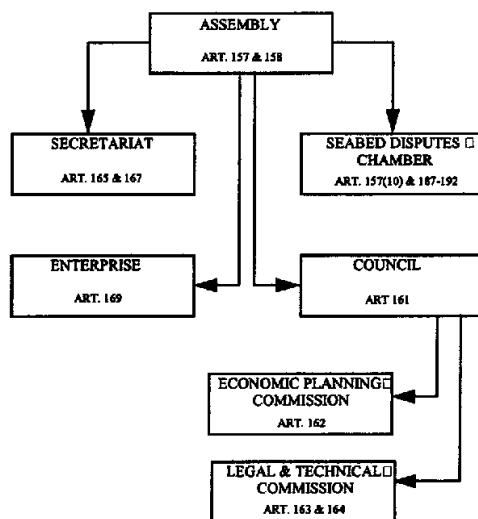
Since that time I have closely tracked the accession process and the development of the International Seabed Authority. Having long since left the General Accounting Office and transferred to the Department of Defense I became deeply involved in the Export Licensing process. In this capacity I was assigned a case whereby the People's Republic of China was using their status as a so-called "pioneer investor" in ocean mining to justify the acquisition of strategic/export-controlled technology under the guise of prospecting for manganese nodules in the mid-Pacific. Unfortunately, the level of technology they were attempting to acquire greatly exceeded the level of capability that either the United States or our industrialized allied used in undertaking such work. The quality of the side-scanning sonar, deep-ocean bathymetric equipment, cameras, lights, remotely operated vehicles, and associated submersible technology provided them the capability to locate, reach, and destroy, or salvage early-warning and intelligence sensors vital to our national security. Additionally, such technology also imparted an offensive capability to our chief potential military adversary by enabling them to map any portion of the ocean or continental shelves to determine submarine routing schemes or underwater bastions where missile-launching or intelligence gathering submarines may operate undetected just off the U.S. coast.

The ultimate nightmare would be a close-in submarine launched cruise missile attack upon the continental U.S. to which we are completely vulnerable and defenseless. I fought a long and lonely battle to prevent the Chinese from acquiring this technology but the zealous advocates of the treaty in several government agencies saw to it that the technology was provided to the PRC so as not to undermine the "spirit of the treaty." This experience prompted me to write the book: *Reforming the Law of the Sea Treaty: Opportunities Missed, Precedents Set, and U.S. Sovereignty Threatened*. This volume is an analysis of the Treaty, the placebo 1994 Agreement, and the military, political and technological implications arising from them. I followed this publication with an article in *World Affairs* entitled: "A Bad Treaty Returns: The Case Against the Law of the Sea Treaty."

The American people have little to gain and much to lose by acquiescing in and supporting the creation of a new supergovernment—The International Seabed Authority (ISA)—empowered to control access to the resources on and below the seabed, previously freely available to us under customary international law. American foreign policy suffered a self-inflicted wound by taking the initiative, in 1970, by proposing the creation of this seagoing government that is now composed of a legislature, an executive, a judiciary, a secretariat, and several powerful commissions.

The existence of such a new force, dominated by nations hostile to American interests is a fact that we must consciously reckon with not capitulate in.

The International Seabed Authority



The benefits to the United States of UNCLOS participation cannot be denied. They include guidelines on the management of fisheries, the environment, dispute settlement, and marginal improvements in freedom of navigation and overflight. While such issues seem impressive on the surface, their resolution was not a Herculean achievement nor are they critical to the economic health or physical security of the United States. Treaty supporters have trumpeted these successes as justification for U.S. accession to UNCLOS, while they have ignored or downplayed serious precedential and strategic issues, engaging in what theologians call *adiaphora*—or dwelling on things that are unimportant. A good rhetorician will attempt to sidetrack a discussion away from substantive issues if they do not support his argument and onto *adiaphorous* issues. The “real” issues presented by accession to UNCLOS have been little discussed since 1982, and they are being sidestepped today in an effort to “sell” the 1994 Agreement as a panacea that purportedly “fixes” what was wrong with the treaty. Unfortunately, this panacea is in reality a smokescreen.

Treaty supporters within the United States now include a number of former treaty opponents who appear to have resigned themselves to a “this is the best deal we are likely to achieve” philosophy after the Clinton administration’s failure to press hard for real change during the 1993–1994 “renegotiations”. To cite that administration’s weak negotiating skill or its failures to argue on behalf of basic U.S. national security interests in international fora makes a poor rationale for ratification of a treaty.

ONE-SIDED HEARINGS

The one-sided hearings in the Senate Foreign Relations Committee earlier this year are the continuation of the undemocratic lengths Treaty supporters are willing to go, in order to secure ratification of this treaty. A similar anti-democratic tactic was employed in 1994 when Congress was about to review the infamous 1994 Agreement. At that time significant political pressure was applied to the Lockheed Corporation to force it to silence its opposition to the treaty and the 1994 Agreement. Lockheed, at that time, was one of the pre-eminent world leaders in the design and development of ocean mining technology and systems. As the story goes, at a 1994 interagency meeting where irritation was expressed over vocal treaty opponents, a naval officer volunteered to “take care” of Lockheed. At that time Lockheed was at a very delicate stage of its controversial merger with Martin-Marietta and extremely sensitive to external factors that could raise government objections to the merger. Reportedly, Lockheed personnel summoned by senior management

were ordered to cease public criticism of the treaty. Congressional review could uncover the truth behind this scandal and expose the parties involved.

Supporters of the Treaty choose their witnesses well. Interestingly, the most vigorous supports of the Treaty are largely a constellation of narrow single interest groups who are willing to overlook Treaty shortcomings so long as their pet rock is included. Last week, in a debate sponsored by the Brookings Institution, we heard a representative of the petroleum industry, in part, explain their support for ratification of LOST. Simply stated it boiled down to this:

*Under existing US law companies operating on the Outer Continental Shelf (OCS) pay approximately 16% in taxes to the USG while the tax rate for onshore production is 12 %. Under LOST, as currently written, a 7% tax will be assessed on production originating on the OCS beyond 200 nm from the coast. The oil industry sees this fact as one of the most compelling reasons for them to support ratification. What they failed to point out was that this "royalty" or tax assessed by the ISA will not fall directly upon them but instead the US taxpayer is presented with the bill. Given the multinational character of many oil companies and the fact that the Treaty doesn't recognize coastal state sovereignty beyond 200 NM it is questionable whether the US will have a legal basis to tax entities operating in these areas and recoup monies paid to the ISA as a result of their activities. In addition, given the capability to engage in "slant" and "horizontal" drilling it is conceivable that resources within 200 nm of the US coast can be illegally tapped from operations conducted in areas under ISA jurisdiction.*

The failure to adequately vet opposing points of view by credible witnesses still belies Senate claims to having held "comprehensive" hearings. Key companies with a direct stake in acquiring access to the hard minerals of the seabed were not heard from. These representatives of the US mining industry had profound concerns over the inadequate 1994 Agreement as it was nearing completion.

#### WHERE DOES THE US OCEAN MINING INDUSTRY STAND ON LOST?

The concerns that Lockheed was prevented from expressing were, at least in part, covered by this overwhelmingly negative assessment of the Treaty put forth by the US ocean miners themselves after reviewing the final draft of the 1994 Agreement. On March 15, 1994, they stated:

"The "Agreement" text does nothing to change industry's assessment that the trend in the negotiations will fail to produce a regime that can attract private investment in ocean mining.

From an investor's standpoint, the "Draft Agreement on Matters Relating to Implementation of United Nations convention on the Law of the Sea's" proposed "fixes" to the problems of the convention are far too limited in scope. While the fixes attack a number of important problems, they leave the fundamental ideology, shape and policies of Part XI intact. The convention, even if the provisions of the "Draft Agreement" were controlling, would:

*fail to provide assured access to qualified applicants because of ambiguities;  
create a privileged class of investor for pioneers and discourage new entrants;*

*impose up-front training obligations on United States licensees;*

*create the risk that unreasonable fees may be imposed on private investors;  
establish the International Seabed Authority, a novel, untested international organization possessing very broad discretionary powers. The Seabed Authority will be the first international organization with control and regulatory powers over a resource and with taxing powers over private persons. It will be partially controlled by countries whose interest is to make seabed mining impossible;*

*establish an unnecessarily large and unwieldy bureaucracy, which is not subject to checks and balances;*

*rely on decision making mechanisms that will promote gridlock;*

*fail to provide investors with judicial and administrative due process;*

*maintain the ideologically bankrupt concepts and policies of the so-called New International Economic Order;*

*encourage discrimination in favor of developing countries, which presumably includes joint ventures among and with developing countries;*

*provide for the creation of an "in-house" competitor, the "Enterprise," which would be the mining company operating arm of the Seabed Authority,*

*impose political and economic burdens on industry to assist in the establishment of competitors through the so-called "banking system" under which a miner must give half of its mine site to the Seabed Authority to be given to the Enterprise and developing countries;*

*provide advantages such as technology transfer to the Enterprise and developing country competitors, which could give them cost advantages over private investors; and*

*commit the United States to participation in the implementation of the convention regime and possibly major changes in the United States seabed mining law and program some years before the United States has decided to ratify or reject the convention.*

Industry further stated: "Because of the overwhelming number of fixes that would be required, the licensees recommended in 1992 that the United States seek complete overhaul of Part XI. This approach was rejected by United States negotiators and by the U.N. process. The result is that the Secretary General's process is hurrying to adopt an approach that is at best ambiguous in form and substance. It is the view of the United States licensees that, if the present course is maintained, there will be no private investment in ocean mining exploration or production under the convention." They further noted: The "Draft Agreement" would resolve many of the "government issues," that is, the issues of concern primarily to governments, relating to control, governance, and precedent. These include financing of the Seabed Authority and decision-making in that organization, and production controls and government assistance, and amendment of the regime, but it leaves untouched the fundamental problem for the prospective investor, that is: the convention seabed mining regime continues to be a system of government ownership and political control over economic activity at a time when the world is turning away from centrally managed economics toward privatization and market oriented policies. Thus, the convention regime remains the victim of "old think," which by its very nature would put privately financed seabed mining at a disadvantage in competition with both its regulator and land based mining.

#### NEGOTIATING FAILURES AND AMBIGUITIES

While UNCLOS has effectively codified many aspects of traditional law and has successfully incorporated several modern issues, such as environment, fisheries, and coastal zone management, these can be regarded as "nice to have" accomplishments but are by no means essential to the political, economic, or military security of the United States. In fact, one of the principal reasons for the establishment of UNCLOS III was to resolve U.S. conflicts with several Latin American states over territorial sea claims in the Pacific Ocean and the repeated seizure of U.S. tuna boats and their crews. After more than ten years of UNCLOS III negotiations, and over twenty years of post-UNCLOS III experience, Nicaragua, Peru, Ecuador, and El Salvador still claim 200-mile territorial seas and refuse to become parties to the Convention.

What the convention actually means is problematic and engulfed in vast uncertainty and intentional ambiguity. Numerous ratifiers have entered reservations and interpretations that either suspend key provisions or impose their own selfish interpretation on the meaning of key concepts. In addition, 28 nations that have ratified the Treaty have not ratified the 1994 Agreement—that is a 20 percent failure rate at the outset. When one combines the reservations, interpretations, and lack of unanimity of the 1994 Agreement, and the impossibility of any effective US control over the behavior of the ISA at best you are left with anarchy. These developments do not serve the national, economic, or political security interests of the American people.

On the other hand, the regulatory, political, technological, economic, and possibly military concessions embedded in the treaty represent a set of potential threats and traps that the United States should not walk blithely into.

#### A SEAT AT THE TABLE

The United States has once again approached a negotiation by "giving or offering a concrete, positive, material advantage in exchange for hypothetical concession of a negative activity; a tangible asset is sacrificed for a promise not to make trouble in the future; something measurable and manifest is traded for the promise of something unmeasurable and unverifiable." (Revel 1983, 249)

This negotiating principle is part of a wider technique: prior concession. It consists of ceding in advance, even before negotiations begin, what should be the subject of the negotiations and which the West should propose at the end of the

talks, not at the start, and then only in exchange for a carefully weighed and at least equivalent counterconcession. (Revel 1983, 249)

As with so many instances of profound diplomatic and intelligence failures, the United States is afflicted by the need for instant gratification, a blinding failure to recognize that many adversaries have a longer-term world view and are willing to accept incremental victories and absorb losses on the way toward their overall objective, a paralyzing State Department mindset that still sees a bad agreement as being preferable to no agreement, and a “through the looking glass” notion that defines leadership within the ISA as the casting of vetoes while trying to constrain anti-American excesses. These are the politics of defeat that will add more problems of survival to the long list being cowardly bequeathed to our next generation.

The current slogan being echoed by Treaty supporters is that “we need to have a seat at the table” to influence developments. Somehow supporters ignore the math of one “seat” among 150 seats, the power of the “one-nation one-vote” principle, and the overwhelmingly anti-American agenda of at least 120 of the 150 “seats”. Having a “seat at the table” of a kangaroo court is not in the US national interest—it will not buy security, it will not buy good government, and it will not dissuade enemies of this nation from using yet another international forum and court system to weaken us further and it will not make the noose any less deadly.

#### CREATING A GLOBAL FRANKENSTEIN

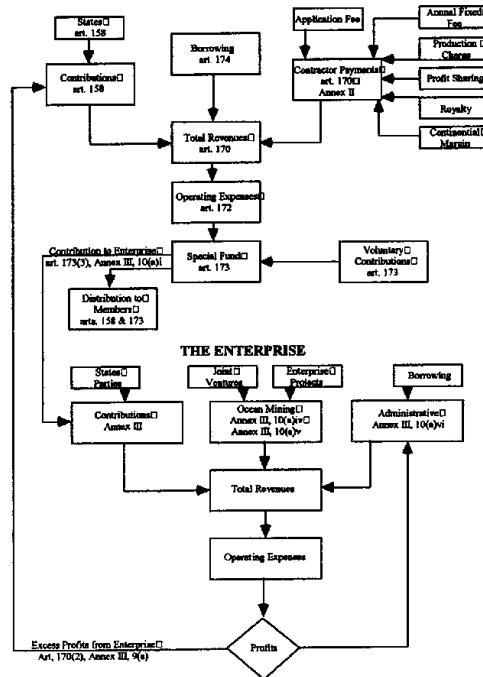
The many precedents embodied in the existence of the International Seabed Authority, the creation of an international bureaucracy with powers to tax, regulate, and enforce its will are perhaps the most dramatic and, in the long term, the most dangerous. The granting of what are essentially sovereign powers is unprecedented and unfortunately fits within a larger pattern of U.N. behavior—that being, to free itself from the political domination of the five permanent members of the Security Council as well as to insulate itself from the uncertainties and political limitations accompanying the traditional state-sponsored financing of U.N. operations.

You may recall that during the 1990’s, Secretary-General Boutros-Boutros Ghali proposed to establish a “world tax” on airline tickets and currency exchanges as an independent means of financing the U.N. “Faced with \$2.3 billion in arrears from member nations that failed to pay their assessments—including \$1.2 billion owed by the United States—U.N. officials and others have long sought an independent means to raise money for the organization’s annual budget of roughly \$3 billion.” (Barber 1996) Disclosure of this plan provoked an immediate negative response in the U.S. Senate when then-majority leader Bob Dole stated “the United Nations continues its out-of-control pursuit of power” and along with colleagues called for an immediate investigation. (Barber 1996)

Unfortunately, the Law of the Sea Treaty goes far beyond the Ghali plan and may indeed be viewed as a harbinger of future U.N. efforts to spin-off or reformulate its activities in such a way as to insulate itself from, and possibly become ascendant to, the sovereign character of nation-states. In fact, the unprecedented opportunities for the ISA to raise capital directly are depicted below:



## Capital Flow of Authority/Enterprise



## TECHNOLOGY AT RISK

Although the 1994 treaty modifications have toned down some of the most direct mandatory technology transfer requirements, the treaty still places at risk some very sensitive, and militarily useful, technology which may readily be misused by the Navy's of ocean mining states. The military application of these technologies would provide new anti-submarine warfare (ASW) capabilities, strategic deep-sea salvage abilities, and deep-water bastions for launching sub-surface ballistic missiles (SSBM's).

Three classes of technology would be placed at risk by U.S. accession to UNCLOS: 1) deep-water bathymetric and high-resolution mapping systems including advanced deep ocean visual surveillance systems; 2) sophisticated vessel station-keeping and navigation systems critical to ASW and strategic salvage operations; and 3) state-of-the-art robotics and remotely operated vehicle technology. Much of the data associated with these technologies is classified for national security reasons and is also at risk.

With or without the mandatory technology transfer provisions contained in the UNCLOS U.S. participation would provide a "legal" conduit and cover to justify the acquisition of state-of-the-art deep ocean devices and technology which have profound national security implications. Ocean mining activities by the Enterprise or third world nations, such as China or India, can provide plausible justification for successfully purchasing technologies which, in the absence of ocean mining, would likely be denied on national security grounds.

In 1995, for instance, the PRC—a nation self-sufficient in the domestic production of the principal metals derived from manganese nodules—sought and obtained sophisticated micro-bathymetry equipment from the United States, along with 6,000 meter capable video and side-scan sonar systems. This equipment may easily be misapplied by the PRC to help advance its meager ASW capability (see capability Charts 8.2 and 8.3) in support of its attempts to develop a "Blue Water" navy. This equipment can also be used to help the PRC locate undersea bastions, even within the U.S. EEZ, for their missile launching submarines.

The justification used by the PRC is its pioneer investor status awarded by the UNCLOS PrepCom in 1993. Ostensibly the equipment will be used for manganese nodule exploration within the Clarion/Clipperton fracture zone. Unfortunately, such surveys should only take for several months at sea to accomplish. In part this is due to the rapid wide-swath capability of the system they purchased and to their choice of minesite locations on, or adjacent to, heavily prospected and claimed nodule fields.

How will the PRC choose to utilize this equipment over the 95 percent of its productive life when it is not involved in nodule exploration? ASW and military submarine mapping are overwhelmingly the most likely applications. An additional factor to consider is the U.S. government's policy of imposing security classifications on many types of microbathymetry data while indiscriminately selling the equipment which is used to generate such data.

#### LOST MILITARY POWER

In a well-timed contribution to the debate on UNCLOS the Center for Naval Analysis (CNA) published a strong analysis on the potential for the International Seabed Authority to take on a blue water police/enforcement role in support of treaty provisions. CNA demonstrated that there is ample precedent and existing regulatory flexibility whereby, if States parties cooperate, the ISA may develop a military arm which may not only radically extend the functions and purposes envisioned for it by the U.S. and its industrialized allies but may one day directly threaten U.S. high seas and economic zone interests as well.

The development of international maritime law, especially the Third U.N. convention of the Law of the Sea (UNCLOS III), has established a legal environment in which the U.N. could take on a variety of new low-intensity policing functions in support of international agreements. This is especially important in areas of international straits because attempts to police straits could lead to disputes, perhaps even conflicts. For many nations, this mission area could involve coast guards as well as civilian maritime agencies. (Sands)<sup>1</sup>

Given the ambiguity embedded in the charter, rules, regulations, and scope of the ISA as well as the highly uncertain ability of the U.S. or its allies to significantly influence events within the new organization the potential of the ISA becoming a runaway train cannot be dismissed. Some of the most likely areas where the ISA may attempt to apply naval power, according to CNA, are summarized below:

1. *Enforcement of fisheries regulation, EEZ arrangements and archipelagic waters.* Under UNCLOS, coastal nations have sovereign rights within 200-n.m. exclusive economic zones (EEZs). In many cases, the added responsibilities of protecting the EEZs may be beyond the capabilities of smaller navies, thus increasing the possibility of disputes. When disputes arise and when adjudication fails, or disputes involving the use or threat of force erupt, naval forces could be called on to establish U.N. maritime peacekeeping operations or to carry out Security Council-mandated Chapter VII enforcement measures.
2. *Measures to protect the marine environment.* Many of the obligations undertaken under UNCLOS concern the protection of the marine environment.<sup>2</sup> There is a growing understanding that military as well as commercial activities can produce adverse consequences for the maritime environment. Given the dearth of technical and financial resources military environmental issues may be ripe for international cooperation. (Miller 1993) The current laissez-faire approach to enforcement may not work, and naval forces may be asked to do more, including enforcement through the threat of the use of force.<sup>3</sup> Be-

<sup>1</sup> For example, the U.S. Coast Guard (USCG) enforces U.S. federal law on the high seas, interdicts smugglers moving drugs and illegal migrants, and enforces fisheries regulations and U.S. Law and protects U.S. interests in the exclusive economic zone claimed by the U.S. Further, the USCG has cutters involved in detection, monitoring interdiction and operational support of third-country drug operations, and conducts joint counter narcotics training and patrols with several countries. The USCG has agreements with Japan and Hong Kong and experience in sea lines of communication (SLOC) through cooperation with the U.S. Navy.

<sup>2</sup> For example, the Convention addresses the dangers of pollution from vessels exercising the right of freedom of navigation, and strengthens the powers of littoral states against polluters.

<sup>3</sup> Sir Brian Urquhart, former Under Secretary-General for Special Political Affairs (the U.N. peacekeeping post), has written that the U.N. needs "a system like this: A convention exists on tankers not being allowed to clean their tanks at sea. So tank cleaning should be monitored, and once you've caught a tanker doing it at sea, and issued a couple of warnings, somebody goes out and drops a very small bomb down a funnel: 'That's it, boys, you've had two warnings

sides enforcement, there may be roles for naval forces in surveillance and in establishing better communication for these purposes between authorities ashore and merchant vessels. Naval forces could also be called on by the United Nations to enforce the Antarctic Treaty provisions, should more be violated.<sup>4</sup>

3. *Protect Sea and Air Traffic.* With the reemergence of piracy in littoral waters, terrorism on the high seas, and the draw-down of national naval forces, multinational naval presence and crisis response for the protection of economic resources and trade may become more important. This is true especially in the world's main navigational straits and passages, which are also its major trade routes. The sovereign immunity of warships is already questioned in some quarters. Moreover, the potential for interfering with customary international law by unilateral threats to close straits is always there. At times, multinational cooperation in this traditional naval mission area may include surveillance, mine sweeping, and convoy and escort operations, even in areas of armed conflict. It may also include greater use of maritime interception operations and the establishing of maritime exclusion zones, or blockades.
4. *Convoy and escort of selected traffic on the high seas.* As a result of increased sensitivity following revelations in Iraq, for example, the United Nations could become involved in protecting the transport of fissile material on the high seas now that Japan is shipping weapons-grade plutonium from Europe to Japan for use in its breeder reactor program. Although the Japanese Maritime Safety Agency is now operating a new escort ship designed specifically for fissile material escort, some have argued that this step alone may be insufficient for adequate protection. Several states have expressed concern about the safety of this shipment as it is transported through the Straits of Malacca, and others have told Japan that shipments will be barred from passing through their territorial waters. (Sands)<sup>5</sup>
5. *ISA protection of offshore assets,* primarily petroleum production platforms and deep-water off-shore port facilities such as pipeheads and ocean mining claims and operations.

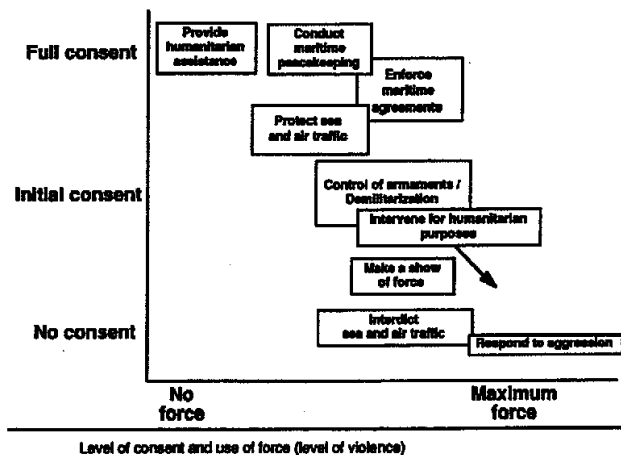
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to stop it. The third time down you go.' The moment that one tanker, after three warnings, goes to the bottom, I don't think there will be any more tanks cleaned at sea."

<sup>4</sup>The Antarctic Treaty internationalized and demilitarized the Antarctic continent and provided for its cooperative exploration and future use. Several countries have claimed sovereignty over areas of Antarctica, claims the United States and the former Soviet Union did not recognize. Rivalry backed by the threat or use of military force for control of exploitable economic resources is still only a theoretical possibility, and one that still looms small given past scientific cooperation and the continent's isolation. Resource exploitation could in the near term raise environmental protection concerns, about which naval forces operating under a U.N. aegis could be called on to respond because of the Antarctic Treaty and the continent's location and isolation. For a text of the Antarctic Treaty, see United States (1982).

<sup>5</sup>With the approval of the U.S. regarding the security plan (U.S. approval is required for fuel and byproducts of U.S. origin, and U.S. warships, planes, and military intelligence satellites monitored the voyage), the first of 45 shipments over the next seven yrs left France in November 1992. The ship carrying the plutonium casks, *Aka-suki Maru*, was escorted by the Japanese Maritime Safety Agency's new 6,500-ton escort ship, *Slukish-ma* Singapore, Malaysia, and Indonesia have expressed concerns about an unspecified "mishap" involving the shipments, arguing that the fissile material should not be transported through busy waterways or near densely populated areas. To date, Argentina, Brazil, Chile, Hong Kong, Indonesia, Malaysia, the Philippines, Singapore, South Africa, Uruguay, and, in a way that has caught the attention of the Japanese media, the Republic of Nauru has told Japan to keep the shipments out of its territorial waters. The United States has ruled out its passage through the Panama Canal. Others, such as the members of the South Pacific Forum, have urged that the shipments be stopped. See also (Reid; Associated Press; Sanger; Waxman; and Offley).

### UN NAVAL MISSIONS AND SUPPORTING TASKS



#### REALITY CHECK URGENTLY NEEDED

Treaty supporters keep attempting to throw up a smokescreen of empty arguments intended to mislead congress. I would go so far as to call these arguments fraudulent assertions as they are made by people who know full well that they are diversionary tactics that sound good in a hearing but do not stand up to probing or scrutiny.

The International Seabed Authority and the Law of the Sea Treaty represent the surrender, with little or no compensation, of a variety of tangible U.S. security and sovereignty equities over a geographic area encompassing 70 percent of the Earth's surface. Treaty supporters are attempting to bind this nation to a treaty and a bureaucratic organization whose basic operating principles are inimical to U.S. interests and whose political orientation views the United States as an objective to be undermined, constrained, and eventually destroyed.

Finally, I urge all Members of Congress and Committee Chairmen to exercise their inherent oversight rights and responsibilities and fully vet this Treaty for its manifold impacts upon the United States. The Treaty contains taxation, legal, borrowing, natural resource, military, and intelligence issues that need to be explored in depth by the Finance, Judiciary, Interior, Armed Services, and Intelligence Committees. In addition, I would further recommend a mandatory review by Homeland Security and law enforcement interests.

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Barber, Ben. "Dole Bill Threatens Funding for U.N." *Washington Times* (January 18, 1996), 1.

Chairman HYDE. Doctor, I am going to have to interrupt you. We have—the best estimate is—six votes, but it could be four. I think the best thing to do is to recess for an hour. It will give you an opportunity to walk around the deck, and get some lunch, and then come back.

We want to finish this and we surely want to hear the testimony from all of you. So, at 1 o'clock, let us be back. Thank you.

[Whereupon, at 12:08 p.m., the Committee recessed, to reconvene at 1:20 p.m., the same day.]

Mr. HOUGHTON [presiding]. The Committee will come to order. Thank you very much for being patient with us. We have had a few little things like votes, and so now we are back in session, and I thank you very much for your patience. Ms. Metcalf, we would now like to hear your testimony.

**STATEMENT OF KATHY J. METCALF, DIRECTOR, MARITIME  
AFFAIRS, CHAMBER OF SHIPPING OF AMERICA**

Ms. METCALF. Thank you, Mr. Chairman. Today I have the privilege of appearing before this Committee, but I wanted to make one preliminary comment, and that is today I sit before you to talk about the "what is" and not the "what ifs."

The Chamber of Shipping of America is very pleased to testify before your Committee concerning and supporting ratification of the U.N. Convention on the Law of the Sea (UNCLOS). We realize that you and your colleagues in the Senate have already heard testimony in support of ratification, and we are pleased to add our support to that list.

We represent 22 American entities which own and operate ocean-going vessels, vessels which carry both U.S. and foreign flags and trade in both the domestic and international trades.

Mr. Chairman, today we consider the Law of the Sea, which has been referred to as the fundamental framework governing obligations and the rights of states; flag states, coastal states, and port states. We have also heard the Convention referred to as the most comprehensive constitution for the oceans. Viewing the Convention in conjunction with the many other maritime conventions shows the detailed interest our country and the world has in maritime trade.

From our inception in 1914, we have been involved in the development of every maritime treaty produced to date and, we are proud to say, at the pleasure of the State Department, we serve also on the U.S. delegation to the International Maritime Organization (IMO) as an industry advisor. And this organization, sir, these conventions, both this one and specific ones from IMO, address safety of life at sea, and freedom of navigation, and environmental concerns.

And most of these were undertaken at the urging, and with the leadership, of the United States, because UNCLOS provides the very framework for the protection of the marine environment under these treaties.

Again, we have recently provided testimony to your colleagues in the Senate, not only of this Convention, but also annex VI of the Convention to Prevent Pollution from Ships, which covers the issues of air pollution.

Also applied under the broad umbrella of UNCLOS, this provides a method and a critical international baseline from which technical issues such as this can be regulated. Mr. Chairman, this Convention and those of IMO involve vital U.S. interests.

The world looks to our leadership in these matters, and we must respond, and respond vigorously and positively to that expectation. You have heard a number of reasons why the U.S. benefits from the ratification of the Convention on the Law of the Sea, including freedom of navigation. Quite incidentally, the legal basis of the sov-

ereignty, this freedom of navigation issue, arose from the legal basis of sovereignty, which was being applied in a very questionable, to put it kindly, method by certain countries.

In recent months, we in the maritime industry have witnessed other nations taking actions to forcibly remove commercial ships compliant with all regulations from their exclusive economic zones.

Mr. Chairman, we don't carry armament like the grey hulls do, and that is a very disquieting aspect to be standing as I have on the bridge of a ship, and to see a military vessel approach you when you are compliant with all regulations, and engaged in what is known in areas of freedom of navigation, the right of innocent passage.

Another example, sir, is the Prestige, which was forced to go out, further out to sea, in extremely dangerous conditions. And in that case, our organization wrote to Secretary Powell expressing our grave concern in this incident, which as most of us are aware, resulted in horrible environmental impacts.

The U.S., sir, cannot afford to be shut out of this accepted and appropriate process for the litigation of claims of this nature. Mr. Chairman, these are not theoretical concepts or law school questions. They are not what if's. They are what is.

We must rely on our Nation to call these actions to account, and be in a position to be the effective force for adherence to treaty obligations by all. It is also interesting to note that this is quite a measure of *deja vu*, as similar actions led to the initiative that resulted in the Law of the Sea Convention to begin with.

We also have to be vigilant concerning recent actions purported by their adherents to be in concert with the Convention. One example, sir, of this is that nations are beginning to feel comfortable in stretching the interpretations of the customary law of the sea into unrecognizable forms.

It is time the U.S. decides that such antics are unacceptable, and ratify the Convention on the Law of the Sea so that our Nation can play a leadership role in preventing further encroachments. Thank you, Mr. Chairman.

Mr. HOUGHTON [presiding]. Thank you very much, Ms. Metcalf. Mr. Moore.

[The prepared statement of Ms. Metcalf follows:]

PREPARED STATEMENT OF KATHY J. METCALF, DIRECTOR, MARITIME AFFAIRS,  
CHAMBER OF SHIPPING OF AMERICA

Thank you, Mr. Chairman and members of the committee. The Chamber of Shipping of America is very pleased to testify before your committee today concerning U.S. ratification of the UN Convention on the Law of the Sea (UNCLOS). We realize that you have heard testimony in support of ratification and are very pleased to add the Chamber of Shipping of America (CSA) to that list of supporters.

The Chamber of Shipping of America represents 22 American entities which own and operate ocean-going vessels. Our members operate both US and foreign-flag ships in the domestic and international trades. While we have undergone a number of name changes over the years, CSA proudly traces its founding to 1914 when the British Government invited a small group of countries to develop the first international treaty regarding safety at sea. The American ship owners were involved in that first maritime treaty and we continue our involvement to this day serving on the US delegation to the International Maritime Organization. That first maritime treaty was prompted by a legendary incident—the sinking of the steamship “TITANIC”. While that treaty failed due to World War I, it plotted the course of future maritime treaties. Today, the safety, security and protection of the environment are all subjects of maritime treaties. World War I blocked the first try at a

safety treaty although it led directly to development of treaties covering maritime labor conditions which were and are still to this day developed at the International Labor Organization (ILO). The ILO exists today under the UN umbrella although it was founded in 1919 as part of the League of Nations, the brain-child of our President Woodrow Wilson.

Mr. Chairman, today we consider the Law of the Sea Treaty. It has been referred to as the fundamental framework governing obligations and rights of states—flag states, coastal states and port states. Viewing it in conjunction with the many other maritime conventions shows the detailed interest the world has in the maritime industry. An important aspect of that interest is that shown by the United States. From 1914 through today, we do not know of any maritime treaties developed in any fora that did not have the active involvement of the United States. Indeed, many of the conventions, particularly those addressing safety of life at sea, freedom of navigation and environmental concerns, were undertaken at the urging of and subsequent leadership by the United States. Because UNCLOS provides the framework for the protection of the marine environment, among a number of other important protections, we have recently provided testimony to your colleagues in the Senate supporting ratification not only of this convention, but also of Annex VI of the Convention to Prevent Pollution from Ships, an International Maritime Organization convention, which covers the issue of air pollution from ships. As with UNCLOS, the US led the effort on the development of Annex VI and while we all recognize, and by all, I mean the private sector and government, that it can be further improved, it, as applied under the broad reaching provisions of UNCLOS, provides a critical international baseline from which this issue can be addressed through enforceable emissions requirements from large vessels worldwide. And I would stress the fact suggested above that Annex VI is not perfect. It can and will be strengthened over time through the amendment process. However, as is also the case with UNCLOS, we must not let perfect become the enemy of the good. Ratification of both of these conventions is critical to establishing a global framework and process through which the United States can exercise its progressive leadership for the overall good of the marine environment, freedom of navigation and protection of vital and irreplaceable marine resources.

UNCLOS, Annex VI of the pollution treaty and the newly adopted amendments to the safety of life at sea treaty (SOLAS) dealing with maritime security involve vital US interests. The world looks to our leadership in these matters. We must respond, and respond vigorously and positively, to that expectation. The credibility of the United States in all international fora where these agreements are made depends on it.

There are reasons why the US benefits from ratification of the UN Convention on the Law of the Sea. It provides the framework for the essential concepts of freedom of navigation. The origination of the process leading to the treaty was occasioned by states exercising sovereignty in waters where the legal basis of that sovereignty was questionable to put it kindly. In recent months, we in the maritime industry have witnessed other nations taking actions to forcibly remove commercial ships compliant with all regulations, from their exclusive economic zones. It was also reliably reported that the vessel "PRESTIGE", listing and in imminent danger, was forced to go further out to sea in extremely dangerous conditions. We considered this very important and wrote to Secretary of State Colin Powell expressing our grave concern. Nations can claim to interpret the law of the sea. Those claims, unless challenged, stand to the detriment of freedom of navigation principles and the marine environment. The Law of the Sea Tribunal, as established under UNCLOS, is the appropriate place to adjudicate these claims. The US can not afford to be shut out of this accepted and appropriate process for the litigation of claims of this nature. Such would be the case should we fail to ratify the convention.

Protection of the crew is also a vital component of the treaty. The Master of the "PRESTIGE", after taking heroic steps to save his ship, was imprisoned by coastal state authorities when the all-too-predictable pollution occurred when the vessel broke up after being forced out to sea by the coastal state in heavy weather and sea conditions. After months of captivity, he was freed on bail that the press reported at over three million dollars; once again, an action which we believe conflicts with provisions of this treaty.

Mr. Chairman and members of the committee, these are not theoretical concepts or law school questions. These are topical circumstances involving developed nations. We must rely on our nation to call these actions to account. The US should place itself in a position to be the effective force for adherence to treaty obligations by all. The only way we can do that is by ratifying this convention. It is certainly unfortunate that nations have taken dramatic steps to control ships off their coasts.

It is also a measure of “*déjà vu*” as similar actions led to the initiative that resulted in the Law of the Sea Convention to begin with!

We also have to be vigilant concerning recent actions which are purported by their adherents to be in concert with the law of the sea. As an example, under the framework of UNCLOS and other maritime conventions, the International Maritime Organization developed the concept of “particularly sensitive sea areas” or PSSAs. There are areas which a state can declare as eligible for special protection subject to approval by the IMO Member States. At the July 2003 meeting of the Marine Environment Protection Committee, it was determined that the entire sea area off Western Europe from the upper reaches of the English Channel to the Straits of Gibraltar qualified for designation as a PSSA in principle, leaving the discussion as to appropriate protective measures for upcoming meetings of the Committee. We will be involved in these deliberations and believe that any measure is inappropriate as we believe the important role of PSSAs in the protection of the marine environment has been intentionally diluted by the proposing nations in order that a few nations may impose unacceptable restrictions on the well established freedom of navigation. It is clear that nations are beginning to feel comfort in stretching the interpretations of the law of the sea into unrecognizable forms. It is time the US decides that such antics are unacceptable and ratify the UN Convention on the Law of the Sea so that our nation can play a leadership role in preventing further encroachments.

Mr. Chairman, we appreciate the opportunity to testify and would be pleased to respond to the questions of you and your colleagues.

**STATEMENT OF JOHN NORTON MOORE, WALTER L. BROWN  
PROFESSOR OF LAW, AND DIRECTOR, CENTER FOR OCEANS  
LAW AND POLICY, UNIVERSITY OF VIRGINIA SCHOOL OF  
LAW**

Mr. MOORE. Mr. Chairman, and Members of the Committee, it is a special pleasure to testify on behalf of submission of the Law of the Sea Treaty to the Senate by the Bush Administration.

In my judgment it is a compelling national interest of the United States to adhere promptly to this Convention. This is indeed, Mr. Chairman, one of those extraordinarily rare settings in which there are no serious interests of the United States on the other side.

There is emphatically no United States interest that is going to be better off if we do not adhere to this treaty, and there are many that will be better off if we do adhere.

Now, I think rather than going through my written testimony, it might be useful if I simply responded briefly to some of the arguments that I have heard, and since there won't be fully enough time to do that, I stand ready to respond to any questions on any of the elements that I have heard in opposition.

Let me just indicate, Mr. Chairman, that I am very sorry to say that the kinds of arguments that I am hearing against this Convention; I have never in my professional life heard a series of arguments so exaggerated, so mistaken, on an issue of public importance such as this.

Let us just look at a few of these arguments one at a time and some of the myths that one keeps hearing. And let me suggest to you that these are not simply myths, but they are 180 degrees wrong.

The first is the notion of sovereignty, that somehow we would give up sovereignty by adhering to this treaty. There is not an ounce of United States sovereignty lost by this treaty.

But to the contrary, this treaty is going to protect an extension of United States sovereignty over resources in an area that is equivalent to the entire continental land mass of the United States



of America. This treaty belongs in the honor roll of actions assisting the sovereignty of the United States of America.

The second myth is a set of arguments about national security: That somehow the Chairman of the Joint Chiefs and every single one of the combatant commanders that have addressed it, and every single one of the Chiefs of Naval Operation in over 30 years that have addressed it have somehow gotten it wrong, and those who admit they are not experts on the Law of the Sea have gotten it right.

Let me suggest to you that these national security arguments are absolutely wrong. They are wrong on each of the issues they raise, but most importantly they are wrong on the overall national security interests of the United States.

We won big in the negotiations leading to the 1982 treaty. We don't want to lose those treaty wins. Let me just give you one example—the argument they throw up with respect to article 20 on submerged transient.

They don't tell you that that article is already binding on the United States under the 1958 LOS Convention. We have been able in this new 1982 treaty to get a complete, very important new exception for straits that was critical to our interests which has no such restriction on submerged transient. But if we don't adhere to the treaty, we don't have that provision.

Third, if we were to go to the question of whether Part XI is not binding, as is being asserted; that is complete nonsense, Mr. Chairman. It is not just wrong. It is nonsense.

Article 2 could not be clearer. It says in the event of an inconsistency between this agreement and Part XI, the provisions of this agreement shall prevail. In addition to that, the Authority has operated for its first decade based on the new agreement.

The Authority has a chambered voting system in the council that is only permitted under the new agreement. It has a finance agreement only permitted under the new agreement. It has all of the contracts drawn up only under the procedures of the new agreement, and the parties have overwhelmingly endorsed it.

And not only that, if for some reason out of all of that we were really wrong, this of course would be a reason the United States could quickly withdraw from the treaty under article 317, because that would be a fundamental move back.

But there is not the slightest chance of that happening, Mr. Chairman. Then there is a set of arguments with respect to one-country-one-vote, and the treaty is a triumph for the new international economic order.

Again, this argument is 180 degrees wrong. This treaty is about as clear a repudiation of the new international economic order as we have ever seen in negotiation, and I would be happy to go through all the details of what was done in the renegotiation in 1994 to show that. One-nation-one-vote, absurd. This is a setting in which we not only got chambered voting, we get a system in which the United States of America has the only permanent seat on the council and is guaranteed a veto over all rules and regulations, over any effort to amend the treaty and over all disposition of financial activities. And in the Finance Committee the U.S. has a veto over all financial elements. Let me just conclude, Mr. Chair-

man, by answering the very excellent question that a number of Members of this Committee have asked, and that is, why is it necessary, what are the costs really for us if we don't adhere to this treaty?

And the answer is really very stark and very clear, Mr. Chairman. Reasons supporting the treaty are, first, the security interests of the United States, particularly on the war on terrorism, will be harmed if we do not adhere. We will, and make no mistake, we will be putting United States service personnel more in harm's way. And as my colleague has just testified, we will be putting United States mariners more in harm's way.

Further, the United States will be killing the deep seabed mining industry of the United States permanently. There will be no mining under the United States flag for deep seabed minerals that were indicated to be very important here. Oil and gas development will not take place beyond the 200 miles for years and years if we don't go forward with this. There will have to be a definite legal regime to resolve those issues. We will be basically saying that we are not going to be interested in trying to move forward with oil and gas domestically.

We will have a risk of amendments being adopted to a treaty in which we won the issues. For example, under article 317 right now, by not being a party, we could have others agree to amendments that we would have no ability to stop; and otherwise by being a party to this treaty, we would have the veto ability. In addition, we have no voice right now in the continental shelf commission in considering an extraordinarily broad arctic claim of Russia with respect to the United States of America.

And, Mr. Chairman, if I had more time, I would I would go on and on, but the point is this is a slam dunk. This is not close like many other issues. This doesn't have tradeoffs like most legislation. Adherence to this treaty is a slam dunk in the interests of the United States of America.

[The prepared statement of Mr. Moore follows:]

PREPARED STATEMENT AND ADDENDUM OF JOHN NORTON MOORE, WALTER L. BROWN  
PROFESSOR OF LAW, AND DIRECTOR, CENTER FOR OCEANS LAW AND POLICY, UNI-  
VERSITY OF VIRGINIA SCHOOL OF LAW

CHAIRMAN HENRY J. HYDE, RANKING MINORITY MEMBER TOM LANTOS  
AND HONORABLE MEMBERS OF THE INTERNATIONAL RELATIONS COM-  
MITTEE—

United States accession to the 1982 Law of the Sea Convention is a compelling national interest of the United States. Ratification of the Convention will secure United States sovereign rights in the oceans, enhance United States national security, restore United States oceans leadership, protect United States oceans industry, serve our environmental interests, and enhance United States foreign policy. For these reasons the Convention is broadly supported<sup>1</sup> by the United States Navy (one of the strongest supporters over the years), the Navy League,<sup>2</sup> the National Ocean

<sup>1</sup>A good compendium of current support can be found at <http://lugar.senate.gov/sfrc/colleague.html>.

The letters from every living former Legal Advisor to the U.S. Department of State, the Navy League and the Chief of Naval Operations should be particularly noted in support of the Convention.

<sup>2</sup>On April 29, 2004, the National President of the Navy League urged the Senate to act favorably on the Law of the Sea Convention. The Navy League represents nearly 70,000 members dedicated to supporting the men and women of the Navy, Marine Corps, Coast Guard and U.S. flagged Merchant Marine.

Industries Association,<sup>3</sup> the United States Outer Continental Shelf Policy Committee,<sup>4</sup> the American Petroleum Institute,<sup>5</sup> the Chamber of Shipping of America,<sup>6</sup> The Center for Seafarers' Rights,<sup>7</sup> the Chemical Manufacturers Association,<sup>8</sup> the congressionally established National Commission on Ocean Policy and a broad coalition of environmental groups.<sup>9</sup> This testimony will briefly explore reasons for United States adherence to the Convention. First, however, it will discuss the criteria for appraising United States adherence to an international agreement and will then set out a brief overview of the Nation's oceans interests and history of the Convention.

#### I. APPRAISING INTERNATIONAL AGREEMENTS

Clearly, a position that the United States should be unable to enter into international agreements is unacceptable. Such a position would deprive the United States of a fundamental sovereign right. Indeed, it would treat the United States like a child unable to enter into contracts. Nor would such a position be consistent

<sup>3</sup>On June 6, 2001, the National Ocean Industries Association submitted a resolution to the Chairman of the Senate Foreign Relations Committee declaring: "The National Ocean Industries Association (NOIA) is writing to urge your prompt consideration of the Convention on the Law of the Sea. . . . The NOIA membership includes companies engaged in all aspects of the Outer Continental Shelf oil and natural gas exploration and production industry. This membership believes it is imperative for the Senate to act on the treaty if the U.S. is to maintain its leadership role in shaping and directing international maritime policy."

<sup>4</sup>On May 24, 2001, the Outer Continental Shelf (OCS) Policy Committee adopted the following recommendation: "[T]he OCS Policy Committee recommends that the Administration communicate its support for ratification of UNCLOS to the United States Senate. . . ."

<sup>5</sup>See the statement of Ms. Genevieve Laffly Murphy on behalf of the American Petroleum Institute at the recent oceans forum of the Center for Oceans Law and Policy, October 1, 2003. Ms. Murphy stressed the energy security interest of the American petroleum industry both in access to the continental shelf beyond 200 miles and in protection of navigational freedom. See *also* the letter from the president of the American Petroleum Institute to the Chairman of the Senate Committee on Foreign Relations of October 1, 1996, which states: "The American Petroleum Institute wishes to express its support for favorable action by the Senate on the United Nations Convention on the Law of the Sea (UNCLOS). API favors ratification of the revised treaty because it promotes unimpeded maritime rights of passage; provides a predictable framework for minerals developed; and sets forth criteria and procedures for determining the outer limit of the continental shelf. The latter will be accomplished by the soon-to-be established Commission on the Limits of the Continental Shelf."

<sup>6</sup>In a letter to the Chairman of the Senate Foreign Relations Committee of May 26, 1998, the president of the Chamber of Shipping of America writes: "[t]he Chamber of Shipping represents 14 U.S. based companies which own, operate or charter oceangoing tankers, container ships, and other merchant vessels engaged in both the domestic and international trades. The Chamber also represents other entities which maintain a commercial interest in the operation of such oceangoing vessels. Over the past quarter century, the Chamber has supported the strong leadership role of the United States in the finalization of the UN Convention on the Law of the Sea (UNCLOS) into its final form, including revision of the deep seabed mining provision. We believe the United States took such a strong role due to its recognition that UNCLOS is of critical importance to national and economic security, regarding both our military and commercial fleets. . . . Mr. Chairman, we appreciate your consideration of these issues and strongly urge you to place the ratification of UNCLOS on the agenda of your Committee. The United States was a key player in its development and today, is one of the few industrialized countries who have not yet ratified this very important Convention. The time is now for the United States to retake its position of leadership."

<sup>7</sup>On May 26, 1998, the Director of the Center for Seafarers' Rights wrote the following in a letter addressed to the Chairman of the Senate Foreign Relations Committee: "The 1982 United Nations Convention on the Law of the Sea creates a legal framework that addresses a variety of interests, the most important of which is protecting the safety and well-being of the people who work and travel on the seas. I urge you to support ratification of the 1982 United Nations Convention on the Law of the Sea."

<sup>8</sup>In a July 17, 1998 letter to the Chairman of the Senate Foreign Relations Committee, the President of the Chemical Manufacturers Association wrote the following: "The Law of the Sea Convention promotes the economic security of the United States by assuring maritime rights of passage. More importantly, the Convention establishes a widely-accepted, predictable framework for the protection of commercial interests. The United States must be a full party to the Convention in order to realize the significant benefits of the agreement; and to influence the future implementation of UNCLOS at the international level. On behalf of the U.S. chemical industry, I strongly encourage you to schedule a hearing on UNCLOS, and favorably report the Convention for action by the Senate."

<sup>9</sup>On November 14, 2001, the National Commission on Ocean Policy adopted a resolution B its first on any subject—providing: "The National Commission on Ocean Policy unanimously recommends that the United States of America immediately accede to the United Nations Law of the Sea Convention. Time is of the essence if the United States is to maintain its leadership role in the ocean and coastal activities. Critical national interests are at stake and the United States can only be a full participant in upcoming Convention activities if the country proceeds with accession expeditiously."

with the Constitution of the United States, which clearly envisages that the United States will be able to enter into international agreements. And, of course, such a position would be absurd in relation to the conduct of international relations by this great Nation. For example, the ability of the United States to enter into the NATO Treaty was of enormous importance to this country. Indeed, NATO may well have prevented World War III. Similarly, with respect to the war for the fourth freedom (the war against terror)<sup>10</sup> the United States is a party to many important multilateral anti-terror treaties which delegitimize terrorist activity. In fact, the United States is, as part of the national effort with respect to the Proliferation Security Initiative (PSI), seeking to strengthen one of those, the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (the SUA Convention), to assist our PSI effort. In relation to oceans issues alone, the United States is party to many multilateral agreements concerning such issues as protection of the marine environment, the protection of whales and fish stocks, and the safety of life at sea. I doubt anyone would suggest that United States leadership in negotiating and adhering to these, or many other such agreements, was wrong.

As such, the criteria for appraising United States adherence to an international agreement, whether bilateral or multilateral, must be the national interest of the United States in relation to the specifics of the agreement being considered and the great principles which have empowered this Nation. Moreover, such an appraisal, to be useful, must be informed—it must describe the agreement and its affect on our national interests accurately. And it must include the alternative reality that will govern if we do not adhere.

Similarly, our Nation, as a global leader, must effectively engage in international affairs. Surely this Nation learned at great cost from Pearl Harbor that isolationism is not the answer. Hopefully, no one in a post-9/11 world would seek to turn back to isolationism or seek to deny the United States the fundamental tools for effective international engagement. Such an approach would be folly at any time, but particularly so during the war on terror when coordination with our allies is of special importance.

I am pleased to report to this Committee that the Law of the Sea Convention is strongly in the national interest of the United States. As such, I wholeheartedly support the judgment of President Bush in seeking to move the Convention forward. Indeed, this Convention is compellingly in our national interest and adherence is overdue. Most remarkably, unlike most treaties, there is no trade off for the United States in adhering to this Convention. The Convention powerfully serves our security interests and no United States oceans interest is better served by non-adherence.

Mr. Chairman, I believe there is also a special obligation in speaking to the national interest of the United States to learn the facts and present accurate information. I have been particularly troubled in the recent debate about the Law of the Sea Convention to see wildly erroneous allegations about the Convention, particularly charges that it would be giving away the sovereignty of the United States when the reality, diametrically opposed, is that this Convention solidifies the sovereign rights of the United States over resources in an area approximately the size of the continental United States. I am also troubled by charges that it would undermine the security interests of the United States when the reality, diametrically opposed, as attested by every Chief of Naval Operations, and every Combatant Commander to have considered the issues, is that the Convention strongly supports the security interests of the United States. Another troubling charge is that some unnamed “bureaucracy” is pushing the Convention. Having chaired the National Security Council Interagency Task Force on the Law of the Sea under Presidents Nixon and Ford, I can attest, to the contrary, that the Convention is overwhelmingly in the national security interest of the United States as determined by repeated hard-headed interagency review within the United States Government under multiple Presidents. It is not surprising that past Legal Advisers of the Department of State and past Chiefs of Naval Operations have recently sent letters in support of United States adherence.

## II. BACKGROUND OF THE CONVENTION

As the quote by Thomas Jefferson which began my testimony illustrates, the United States, surrounded by oceans and with the largest range of oceans interests in the world, has a vital national interest in the legal regime of the sea. Today those interests include naval mobility, navigational freedom for commercial shipping, oil and gas from the continental margin, fishing, freedom to lay cables and pipelines,

<sup>10</sup>Roosevelt’s famous “four freedoms” speech lists “freedom from fear” as the fourth freedom.

environmental protection, marine science, mineral resources of the deep seabed, and conflict resolution. Consistent with these broad interests the United States has been resolute in protecting its ocean freedoms. Indeed, the Nation has fought at least two major wars to preserve navigational freedoms; the War of 1812 and World War I. In point II of his famous 14 Points at the end of World War I, Woodrow Wilson said we should secure “[a]bsolute freedom of navigation upon the seas . . . alike in peace and in war.” And the Seventh Point of the Atlantic Charter, accepted by the Allies as their “common principle” for the post World War II world, provided “such a peace should enable all men to traverse the high seas and oceans without hindrance.”

In the aftermath of World War II the United States provided leadership in the First and Second United Nations Conferences to seek to protect and codify our oceans freedoms. The first such conference, held in 1958, resulted in four “Geneva Conventions on the Law of the Sea” which promptly received Senate Advice and Consent. One of these, the Convention on the Continental Shelf, wrote into oceans law the United States innovation from the 1945 Truman Proclamation—that coastal nations should control the oil and gas of their continental margins. During the 1960s a multiplicity of illegal claims threatening United States navigational interests led to a United States initiative to promote agreement within the United Nations on the maximum breadth of the territorial sea and protection of navigational freedom through straits. This, in turn, led some years later, and with a broadening of the agenda, to the convening in 1973 of the Third United Nations Conference on the Law of the Sea. In this regard it should be clearly understood that the United States was a principal initiator of this Conference, and it was by far the preeminent participant in shaping the resulting Convention. Make no mistake; the United States was not participating in this Conference out of some fuzzy feel good notion. Its participation was driven at the highest levels in our Government by an understanding of the critical national interests in protecting freedom of navigation and the rule of law in the world’s oceans. Today we understand even more clearly from “public choice theory,” which won the Nobel Prize in economics, why our choice to mobilize in a multilateral setting all those who benefited from navigational freedom was a sound choice in controlling individual illegal oceans claims.<sup>11</sup> And the result was outstanding in protecting our vital navigational and security interests. Moreover, along the way we solidified for the United States the world’s largest offshore resource area for oil and gas and fishery resources over a huge 200 nautical mile economic zone, and a massive continental shelf going well beyond 200 miles.<sup>12</sup>

Despite an outstanding victory for the United States on our core security and resource interests, a lingering dispute remained with respect to the regime to govern resource development of the deep seabed beyond areas of national jurisdiction. Thus, when the Convention was formally adopted in 1982, this disagreement about Part XI of the Convention prevented United States adherence. Indeed, during the final sessions of the Conference President Reagan put forth a series of conditions for United States adherence, all of which required changes in Part XI. Following adoption of the Convention without meeting these conditions, Secretary Rumsfeld served as an emissary for President Reagan to persuade our allies not to accept the Convention without the Reagan conditions being met. The success of the Rumsfeld mission set the stage some years later for a successful renegotiation of Part XI of the Convention. In 1994, Part XI dealing with the deep seabed regime beyond national jurisdiction was successfully renegotiated, meeting all of the Reagan conditions and then some. Subsequently, on October 7, 1994, President Clinton transmitted the

<sup>11</sup>The reason supporting this is most easily understood as the high cost of organization of those affected by illegal oceans claims; claims which were externalizing costs on the international community. A multilateral strategy of response to such illegal claims, far from being simply a fuzzy effort at cooperation, effectively enabled coordination of nations to promote the common interest against such illegal claims. Counter to the perception of some that a unilateral U.S. response is always the best strategy, a multilateral forum was indeed the most effective forum for controlling such threats to our navigational freedom. Moreover, since a majority of *coastal* nations are completely “zone locked,” that is, they have no access to the oceans without traversing the 200 mile economic zones of one or more neighboring states, a multilateral strategy continues to offer an important forum for rebutting illegal unilateral oceans claims threatening navigational freedom. The fact is, because of this “zone locked” geography, a majority of nations should never favor extending national jurisdiction beyond 200 nautical miles or permit interference with navigational freedom in the 200 nautical mile economic zone.

<sup>12</sup>The Convention powerfully supports United States control of its fisheries resources. Indeed, with respect to fisheries, the United States is already a party to the “Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks,” a treaty that implements certain fisheries provisions of the Law of the Sea Convention. Senator Ted Stevens provided crucial leadership in Senate advice and consent to this implementing Convention.

Convention to the Senate for advice and consent.<sup>13</sup> Since that time no administration, Democratic or Republican, has opposed Senate advice and consent—and United States ratification.

At present the Convention is in force; and with 145 states parties it is one of the most widely adhered conventions in the world. Parties include all permanent members of the Security Council but the United States, and all members of NATO but the United States and Denmark. The Convention unequivocally and overwhelmingly meets United States national interests—indeed, it is in many respects a product of those interests.

If one were to travel back in time and inform the high-level members of the eighteen agency National Security Council Interagency Task Force which formulated United States oceans policy under Presidents Nixon and Ford during the principal formative Convention process—an effort never matched before or since in the care with which it reviewed United States international oceans interests—that the Convention today in force, powerfully meeting all United States oceans interests, would not yet be in force for the United States nine years after being submitted to the Senate, the news would have been received with incredulity. As this suggests, the Congress should understand that United States oceans interests, including our critical security interests, are being injured—and will continue to be injured—until the United States ratifies the Convention. Among other costs of non-adherence we have missed out in the development of rules for the International Law of the Sea Tribunal and the Commission on the Limits of the Continental Shelf, and in ongoing consideration of cases before the Tribunal as well as ongoing consideration of the Russian continental shelf claim now before the Continental Shelf Commission; we have had reduced effect in the ongoing struggle to protect navigational freedom and our security interests against unilateral illegal claims; and we have been unable to participate in the decisions of the meetings of States Parties. These are not just my conclusions. They are the conclusions of every Chief of Naval Operations and every Secretary of State who has considered these issues and of all the law of the sea experts I work with on a continuing basis.

Mr. Chairman, and members of the Committee, it is for the reasons expressed in the last paragraph that I welcome consideration by this Committee of the United States posture with respect to the Law of the Sea Convention. Our Nation is now almost a decade overdue in adhering to this Convention. I believe it would be helpful if this Committee were to recommend to the Senate that it move forward as expeditiously as possible with advice and consent. That is the action from this Committee that would serve the national interest with respect to the Law of the Sea Convention.

### III. REASONS FOR UNITED STATES ADHERENCE TO THE LAW OF THE SEA CONVENTION

Why should the United States adhere to the Law of the Sea Convention? The most important reasons are summarized under the following nine headings:

#### A. *Solidifying and Protecting Sovereign Rights of the United States*

The Law of the Sea Convention provides “sovereign rights” over the natural resources off the coasts of the United States in an “economic zone” of 200 nautical miles and even beyond where our continental margin goes beyond 200 miles. As such, United States adherence to the Convention will solidify and protect an extension of United States sovereign rights over the living and non-living natural resources off our coasts in an area roughly equal to our continental land mass. Indeed, the size of this resource area for the United States under the Convention is greater than that for any other nation in the world. In the history of actions affecting United States sovereign rights, this Convention would be on the honor roll in its dramatic recognition of an expansive area of sovereign rights over resources.

Of further great importance, this Convention protects the sovereign rights of the United States over our military and commercial vessels; rights that are critical to the economic and security interests of our Nation. In the ongoing struggle for oceans law, these are our sovereign rights that are at the greatest risk, and adherence to

<sup>13</sup>For the letter of transmittal to the Senate and official United States Government article-by-article commentary on the Convention, see SEN. TREATY DOC. 103-39, *reprinted* in U.S. Department of State Dispatch Supplement, *Law of the Sea Convention: Letters of Transmittal and Submittal and Commentary* (Feb. 1995, Vol. 6, Supp. No. 1). For the most authoritative article-by-article interpretation of the Convention, see the multi-volume *Commentary on the United Nations Convention on the Law of the Sea 1982*, prepared under the auspices of the Center for Oceans Law and Policy of the University of Virginia School of Law. MYRON H. NORDQUIST (ED.), UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY (1985-2003 Martinus Nijhoff Publishers).

the Convention will unequivocally serve this national interest in protecting navigational freedom. The Convention not only protects navigational freedom through an improved regime of innocent passage in the territorial sea and full freedom of navigation in the new economic zone, but it creates a critical new regime of straits transit passage permitting our submarines to transit straits submerged and our aircraft to enjoy overflight rights over such straits. And it recognizes immunity for our warships and government ships operated for non-commercial purposes.

In contrast, quite to the contrary of arguments advanced against the Convention by some opponents, the Convention does not remove United States sovereignty or sovereign rights over the resources of the deep seabed. Neither the United States nor any other Nation has now, or has ever had, sovereignty over the mineral resources beyond the continental margins. In fact, it has been a consistent position of the United States and other developed nations to oppose any extension of national sovereignty into this area. Indeed, it is precisely because no nation in the world controls the mineral resources of the ocean basins that the Convention has created a narrowly limited international mechanism to permit mining of these resources. For without such a regime, industry simply cannot obtain the legal rights necessary for the over billion dollar cost of a deep seabed mining operation.

#### *B. Protecting the National Security Interests of the United States*

The most important interests for the United States in the LOS negotiations were our national security interests, particularly our protection of navigational freedom on the world's oceans against unilateral coastal state claims. The Law of the Sea Convention powerfully serves these interests. This is reflected in the strong and consistent support for the Convention from the United States Navy. To my knowledge, every Chairman of the Joint Chiefs, every Chief of Naval Operations, and every Combatant Commander of the United States to consider the Convention has urged prompt United States adherence. This is not simply an accident. The National Security Council Interagency Task Force that I chaired during the Nixon and Ford Administrations, which developed what became the principal negotiating instructions for the United States, had vigorous representation from both the Office of the Secretary of Defense (OSD) and the Joint Chiefs of Staff (OJCS) throughout the development of instructions and throughout the negotiations. When I engaged in negotiations as a United States Ambassador and Deputy Special Representative of the President I was accompanied literally around the world by superbly capable representatives of OSD and OJCS. The treatment of national security interests of the United States in this Convention is not some marginal on balance win, it was a decisive victory for the United States, our ocean allies, and, indeed, the community common interest. In this respect, make no mistake, the United States was the single most influential nation in the world in the negotiations leading to this Convention. But we coordinated closely with other principal developed and maritime nations, and the final victory was a victory for all who believe in freedom and the rule of law.

Each and every one of the arguments I have heard advanced on security grounds against this Convention by some of its recent critics is, I believe, in error. I look forward to an opportunity before this Committee to respond to questions about any of these topics. But the greatest error of these critics is that they do not even remotely understand the overall importance of this Convention for our oceans security interests. That is, even if these critics were correct on some of their isolated points, they would still miss the big picture that must provide the overall basis for assessment.

#### *C. Protecting United States Industry*

It is no accident that the representatives of the National Oceans Industries Association, the American Petroleum Institute, the Chamber of Shipping of America, the Chemical Manufacturers Association, and the Congressionally established National Commission on Oceans Policy support United States adherence to this Convention. The Convention provides a strong legal basis for development of ocean resources and it provides strong guarantees of navigational freedom so vital to United States trade around the world. To my knowledge, no United States industry association has opposed moving forward with the Convention.

With respect to our oil and gas and deep seabed mining industries, however, there are especially compelling reasons why the United States needs to promptly adhere to the Convention. Our oil and gas industry is simply unlikely to move forward in development of the continental margin of the United States in areas beyond 200 nautical miles until United States adherence solidifies the legal regime for them in such areas. And our deep seabed mining industry is now moribund, and will remain so, absent United States adherence to the Convention. The United States led the

world toward development of the technology for the recovery of deep seabed minerals. Our industry collectively expended more than \$200 million to identify and obtain international recognition for five prime mine sites. At present three of those sites lie abandoned and the other two are on hold with zero chance of activity absent United States adherence. The Congress should clearly understand that accepting the arguments of the critics and opposing moving forward with the Convention is to permanently put the innovative United States deep seabed mining industry out of business, and to accept a reality that only the firms of other nations will be able to mine the deep seabed.

#### *D. Protecting United States Mariners and Fishermen*

For many years the United States has been concerned about the fate of United States mariners or fishermen arrested and imprisoned in other nations around the world. This is an issue both of human rights in protecting our citizens and an issue of conflict avoidance with other nations. The Law of the Sea Convention takes the lead in this matter in providing that for fishermen “[a]rrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security,” and “[c]oastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.” Similarly, with respect to mariners the Convention restricts certain non-serious violations to “[m]onetary penalties only” and provides in all cases for “the observance of recognized rights of the accused.” These are important provisions in protecting United States citizens. They are provisions that should be of considerable concern to maritime unions and American distant water fishermen.

#### *E. Protecting Environmental Interests*

The Law of the Sea Convention provides strong protection for the marine environment. Indeed, the Rio Conference on the Environment accepted Part XII of the Convention as the core environmental provisions for the world’s oceans. Not surprisingly, American environmental groups overwhelmingly support adherence to the Convention. Indeed, in one case, that of the protection of marine mammals, the Convention embodies the initiative of a United States environmental NGO. Thus, Article 65 of the Convention on the protection of marine mammals was negotiated following important work done by the Connecticut Cetacean Society. United States influence was also felt in requirements concerning monitoring, publication of reports, and assessment of potential effects of activities. The United States was further successful in avoiding any environmental double standard in the world’s oceans.

Remarkably, the important new environmental provisions of the Convention are sufficiently balanced that they enjoy the support of all United States oceans interests. Support for this Convention is that rare public policy issue on which both industry and environmental groups strongly agree.

#### *F. Encouraging Good Organizational Precedents*

One of the original concerns of the United States with respect to Part XI of the Convention prior to its renegotiation was the precedential effect of what was then a very poor international organization for the regulation of seabed mining in areas beyond national jurisdiction. For example, the original organization had three seats that would have been controlled by the former Soviet Union to one that could have been rotated off for the United States. And there was substantial concern that the International Authority was to be controlled by developing countries on a one nation, one vote basis. Following the renegotiation based on the Reagan conditions, however, the Seabed Authority that has emerged sets a strong precedent for international organization in the interest of the United States. Points of particular benefit to the United States in the renegotiated Part XI include:

- The Authority is a small, narrowly mandated specialized agency with regulatory authority only over the mining of deep seabed minerals of the seabed beyond areas of national jurisdiction. It is not in the slightest some new international authority that will control the oceans that would, for example, have jurisdiction over navigation, fishing or military activities;
- As a first level of protection for the United States and other developed nations it is directed that as a general rule, decision making in the Authority should be by consensus. This consensus procedure was pioneered in the LOS negotiations and has been of substantial benefit within international organizations subsequently using it. My understanding is that it is working quite well in the Authority and that in the almost ten years of the work of the Authority, decisions have been on the basis of this consensus procedure;



- The United States is provided a permanent seat on the Council of the Authority. Indeed, the United States is the only nation in the world assured such a permanent seat, as the nation with the “largest economy” on the date of entry into force of the Convention;
- As a member of the Council the United States will have a veto over the adoption of rules and regulations for seabed mining, the distribution of any revenues collected by the Authority, and any amendments concerning the Authority;
- The United States would also have the ability as a member of the Finance Committee, which adopts all rules of substance by “consensus,” to veto financial decisions of the Authority;
- The Council of the Authority is set up on a chambered voting system in which any three developed nations, from among the five principal mineral consumers, will be able to exercise a veto over non-consensus actions of the Authority. Thus, in areas where the United States would not have a consensus veto, as set out above, the United States and any two other developed nations from among the five principal consumers of the minerals in Chamber A of the Authority would be able to block action. The Authority is thus quite the opposite of a “one nation one vote” system dominated by developing countries;
- The Authority is directed to operate on market principles. Thus the renegotiation specifies variously that the Authority will operate on the basis of “commercial terms and conditions,” and “sound commercial principles.” Further, it is specifically prohibited for the Authority to provide preferential access, including through the use of “tariff or non-tariff barriers;”
- The Authority is itself directed to be “cost effective.” Indeed, for ten years the Authority has had only about 37 employees. This is hardly an earth-shaking bureaucracy; and
- Miners will have assured access under a first-come system for mining the deep seabed. Private industry will be able to directly mine the seabed and will have first refusal in any joint venture with the Authority itself.

Why do we need a specialized agency to regulate deep seabed mining in areas beyond national jurisdiction? Quite simply, no nation owns or has sovereign rights over these resources, as they are beyond national jurisdiction. Perhaps if a “fishing approach” would work in mining these minerals, no such Authority would have been necessary. But our industry has emphatically told us that they can not mine under a “fishing approach” in which everyone simply goes out to seize the minerals. To mine the deep seabed requires security of tenure for the billion dollar plus costs of such an operation. And the size of the area of a mine site is approximately that of the State of Rhode Island. As such, an international authority of strictly limited functional regulatory authority is needed to provide security of tenure for mining to take place whenever the price of the minerals justifies it. After more than a quarter of a century of negotiations, the United States was able to obtain such an Authority to enable mining to take place, while simultaneously meeting our requirements for good organizational precedents. To turn the Convention down after this considerable success is not in the interest of our nation or our industry.

#### *G. Restoring United States Oceans Leadership*

Until our prolonged non-adherence to the 1982 Convention, the United States has been the world leader in protecting the common interest in navigational freedom and the rule of the law in the oceans. We have at least temporarily forfeited that leadership by our continued non-adherence. United States ratification of the Convention will restore that leadership. Specifically, ratification will have the following effects, among others:

- *The United States will be able to take its seat on the Council of the International Seabed Authority.* The authority is currently considering a mining code with respect to polymetallic sulfides and cobalt crusts of the deep seabed. Council membership will also give us important veto rights over distribution of any future revenues from deep seabed exploitation to national liberation groups;
- *The United States should, at the next election of judges for the International Tribunal for the Law of the Sea, see the election of a United States national to this important tribunal.* Since this Tribunal frequently considers issues relating to navigational freedom and the character of the 200 mile economic zone, it is a crucial forum for the development of oceans law;

- *The United States should, at the next election of members of the Commission on the Limits of the Continental Shelf, see the election of a United States expert to the Commission.* This Commission is currently considering the Russian claim in the Arctic that is of real importance for the United States (and Alaska) and for appropriate interpretation of the Convention respecting continental margin limits. Over the next few years the Commission will begin to consider many other shelf limit submissions, beginning next with Australian and Brazilian claims. This is also the Commission that ultimately must pass on a United States submission as to the outer limits of our continental shelf beyond 200 nautical miles. The early work of the Commission, as it begins to develop its rules and guidelines, could significantly affect the limits of the United States continental shelf. To not actively participate in the work of this Commission could result in a loss of thousands of square kilometers of resource-rich United States continental shelf;
- *The United States will be able to participate fully in the annual meeting of States Parties* that has become an important forum for ongoing development of oceans law. Of particular concern, United States presence as a mere observer in this forum has in recent years led to efforts by some to roll back critical navigational freedoms hard won in the LOS negotiations where we were a leader in the negotiations and our presence was powerfully felt; and
- *The United States will be far more effective in leading the continuing struggle against illegal oceans claims* through our participation in specialized agencies such as the International Maritime Organization; in bilateral negotiations such as those with the archipelagic states; in acceptance by other states of our protest notes and our ability to coordinate such notes with others; and generally in organizing multilateral opposition to threats to our oceans interests and the rule of law in the oceans.

#### H. Protecting United States Oceans Interests

A further set of important reasons for United States adherence to the Law of the Sea Convention, many of which overlap with earlier points, relate to the particularized protection of United States oceans interests. I have added this crosscut by way of partial demonstration of the remarkable reality with respect to this Convention: that *no* United States oceans interest will be better served by non-adherence. Some of the more important and immediate assists to our oceans interests from United States adherence include:

- *More effectively engaging in the continuing struggle to protect our naval mobility and commercial navigational freedom.* Protecting the ability of the United States Navy to move freely on the world's oceans and the ability of commercial shipping to bring oil and other resources to the United States and for us to participate robustly in international trade overwhelmingly carried in ships is the single most important oceans interest of the United States. This interest, however, is also the single most threatened interest; the continuing threat being the historic pattern of unilateral illegal oceans claims. As of June 22, 2001, there were at least 136 such illegal claims.<sup>14</sup> This struggle has been the key historic struggle for the United States over the last half century and gives every indication of continuing. Adhering to the Convention provides numerous ways for the United States to engage more effectively in protecting these interests. An immediate and important effect is that we are able, on acceding to the Convention, to attach a series of crucial "understandings" under Article 310 of the Convention as to the proper interpretation of the Convention, as have many other nations—too many of which have made erroneous interpretations as yet unrebutted by United States statements.<sup>15</sup> Moreover, as a party we will be far more effective in multiple fora in protecting the many excellent provisions in the Convention supporting navigational freedom. Indeed, much of the struggle in the future to protect our vital oceans interests will be in ensuring adherence to the excellent provisions in the Convention. Having won in the struggle to protect these interests within UNCLOS we now

<sup>14</sup>The best general discussion of these illegal oceans claims and their effect on United States interests is J. ASHLEY ROACH & ROBERT W. SMITH, *EXCESSIVE MARITIME CLAIMS*, 66 U.S. Naval War College International Law Studies (1994), and J. ASHLEY ROACH & ROBERT W. SMITH, *UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS* (2d ed. 1996).

<sup>15</sup>It should be clearly understood that these United States "understandings" under Article 310 are not "reservations" altering the correct legal meaning of the Convention. Such reservations or exceptions are barred by Article 309 of the Convention except as specifically permitted by the Convention, as, for example, in Article 298 of the Convention concerning optional exceptions to the compulsory dispute settlement provisions.

have a substantial advantage in the continuing struggle—we need only insist that others abide by the nearly universally accepted Convention. Obviously, that is an advantage largely thrown away when we ourselves are not a party. And for our commercial shipping we will be able to utilize the important Article 292 to obtain immediate International Tribunal engagement for the release of illegally seized United States vessels and crew. It should be emphasized that the threat from these illegal claims is that of death from a thousand pin pricks rather than any single incident in response to which the United States is likely to be willing to employ the military instrument. Moreover, some of the offenders may even be allies of the United States, our NATO partners, or even over zealous officials in our own country who are unaware of the broader security interests of the Nation;

- *More effective engagement with respect to security incidents and concerns resulting from illegal oceans claims by others.* Examples include the new law of the People's Republic of China (PRC) providing that Chinese civil and military authorities must approve all survey activities within the 200 mile economic zone; the PRC harassment of the Navy's ocean survey ship, the *USNS Bowditch*, by Chinese military patrol aircraft and ships when the *Bowditch* was 60 miles off the coast; the earlier EP-3 surveillance aircraft harassment; Peruvian challenges to U.S. transport aircraft in the exclusive economic zone, including one aircraft shot down and a second incident in which two U.S. C-130s had to alter their flight plan around a claimed 650 mile Peruvian "flight information area"; the North Korean 50-mile "security zone" claim; the Iranian excessive base line claims in the Persian/Arabian Gulf; the Libyan "line of death"; and the Brazilian claim to control warship navigation in the economic zone;
- *More rapid development of the oil and gas resources of the United States continental shelf beyond 200 nautical miles.* The United States oil and gas industry is poised in its technology to begin development of the huge continental shelf of the United States beyond 200 miles (approximately fifteen percent of our total shelf). But uncertainties resulting from U.S. non-adherence to the Convention will delay the substantial investment necessary for development in these areas. Moreover, U.S. non-adherence is causing the United States to lag behind other nations, including Russia, in delimiting our continental shelf. Delimitation of the shelf is an urgent oceans interest of the United States;<sup>16</sup>
- *Reclaiming United States deep seabed mineral sites now virtually abandoned.* United States firms pioneered the technology for deep seabed mining and spent approximately \$200 million in claiming five first-generation sites in the deep seabed for the mining of manganese nodules. These nodules contain attractive quantities of copper, nickel, cobalt and manganese and would be a major source of supply for the United States in these minerals. Paradoxically, "protecting" our deep seabed industry has sometimes been a mantra for non-adherence to the Convention. Yet because of uncertainties resulting from U.S. non-adherence these sites have been virtually abandoned and most of our nascent deep seabed mining industry has disappeared. Moreover, it is clear that without U.S. adherence to the Convention our industry has absolutely no chance of being revived. I believe that as soon as the United States adheres to the Convention, the Secretary of Commerce should set up a working group to assist the industry in reclaiming these sites. This working group might then recommend legislation that would deal with the industry problems in reducing costs associated with reacquiring and holding the five United States sites until deep seabed mining becomes economically feasible;
- *Enhancing access rights for United States marine scientists.* Access for United States marine scientists to engage in fundamental oceanographic research is

<sup>16</sup>For a state-of-the-art assessment of the extent of the United States continental shelf beyond the 200 mile economic zone, see the work of Dr. Larry Mayer, the Director of the Center for Coastal and Ocean Mapping at the University of New Hampshire. As but one example indicating the great importance of performing this delimitation of the shelf well B and the importance of the United States participating in the resulting approval process in the Commission on the Limits of the Continental Shelf B Dr. Mayer's work shows that sophisticated mapping and analysis of the shelf would enable the United States to claim an additional area off New Jersey within the lawful parameters of Article 76 of the Convention of approximately 500 square kilometers just by using a system of connecting seafloor promontories. The work of Dr. Mayer has been funded in part through an innovative forward-looking grant supported by Senator Judd Gregg of New Hampshire. This work, however, is important for the Nation as a whole, and particularly for Alaska, which has by far the largest shelf beyond the 200 mile economic zone.

a continuing struggle. The United States will have a stronger hand in negotiating access rights as a party to the Convention. As one example of a continuing problem, Russia has not honored a single request for United States research access to its exclusive economic zone in the Arctic Ocean from at least 1998, and the numbers of turn-downs for American ocean scientists around the world is substantial. This problem could become even more acute as the United States begins a new initiative to lead the world in an innovative new program of oceans exploration;

- *Facilitating the laying of undersea cables and pipelines.* These cables, carrying phone, fax, and internet communications, must be able to transit through ocean jurisdictions of many nations. The Convention protects this right but non-adherence complicates the task of those laying and protecting cables and pipelines; and
- *It should be emphasized again with respect to this Convention that no U.S. oceans interest is better served by non-adherence than adherence.* This is a highly unusual feature of the 1982 Convention. Most decisions about Convention adherence involve a trade off of some interest or another. I am aware of no such trade off with respect to the 1982 Convention. United States adherence is not just on balance in our interest; it is broadly and unreservedly in our interest.

#### *I. Enhancing United States Foreign Policy*

The United States would also obtain substantial foreign policy benefits from adhering to the 1982 Convention; benefits going quite beyond our oceans interests. These benefits include:

- *Supporting the United States interest in fostering the rule of law in international affairs.* Certainly the promotion of a stable rule of law is an important goal of United States foreign policy. A stable rule of law facilitates commerce and investment, reduces the risk of conflict, and lessens the transaction costs inherent in international life. Adherence to the Law of the Sea Convention, one of the most important law-defining international conventions of the Twentieth Century, would signal a continuing commitment to the rule of law as an important foreign policy goal of the United States;
- *United States allies, almost all of whom are parties to the Convention, would welcome U.S. adherence as a sign of a more effective United States foreign policy.* For some years I have chaired the United Nations Advisory Panel of the Amerasinghe Memorial Fellowship on the Law of the Sea in which the participants on the Committee are Permanent Representatives to the United Nations from many countries. Every year our friends and allies ask when we will ratify the Convention, and they express to me their puzzlement as to why we have not acted sooner. In my work around the world in the oceans area I hear this over and over—our friends and allies with powerful common interests in the oceans are astounded and disheartened by the unilateral disengagement from oceans affairs that our non-adherence represents;
- *Adherence would send a strong signal of renewed United States presence and engagement in the United Nations, multilateral negotiation, and international relations generally.* At present those who would oppose United States foreign policy accuse the United States of “unilateralism” or a self-proclaimed “American exceptionalism.” Adhering to the Law of the Sea Convention will demonstrate that America adheres to those multilateral Conventions that are worthy while opposing others precisely because they do not adequately meet community concerns and our national interest;
- *Efforts to renegotiate other unacceptable treaties would receive a boost when an important argument now used by other nations against such renegotiation with us is removed.* This argument now used against us, for example, in the currently unacceptable International Criminal Court setting, is: “[W]hy renegotiate with the United States when the LOS renegotiation shows the U.S. won’t accept the Convention even if you renegotiate with them and meet all their concerns?” Let me emphasize this point. The United States will be severely damaged in its international engagement if other nations believe that we will not adhere to agreements, whether they are in our interest or not. And this is particularly true after other nations accommodate the United States in all that it asks in a renegotiation and then see United States inaction toward the renegotiated agreement. If we are to maintain our negotiating leverage we must demonstrate that we distinguish between good and bad

international agreements and that we accept the good while rejecting the bad; finally

- *The United States would obtain the benefit of third party dispute settlement in dealing with non-military oceans interests.* The United States was one of the principal proponents in the law of the sea negotiations for compulsory third party dispute settlement for resolution of conflicts other than those involving military activities. We supported such mechanisms both to assist in conflict resolution generally and because we understood that third party dispute resolution was a powerful mechanism to control illegal coastal state claims. Even the Soviet Union, which had traditionally opposed such third party dispute settlement, accepted that in the law of the sea context it was in their interest as a major maritime power to support such third party dispute settlement.<sup>17</sup> International arbitration, which the President has recommended for the United States in this case, is about as American as apple pie. Indeed, George Washington took great pride in the initiative that led to the Jay Treaty and settlement through arbitration of disputes we had with the United Kingdom. This Convention, negotiated by the first Chief Justice of the United States and one of the principal draftsmen of the *Federalist Papers*, may well have avoided a second war with Britain at a time the new Nation could ill afford it. And, following the Civil War, the United States again led the world to arbitration in the Alabama Claims Arbitration that resulted in substantial net payments to the United States. Modern international arbitration owes its existence to these important American initiatives.<sup>18</sup>

#### IV. SOME POINTS OF CONFUSION TO AVOID IN CONSIDERING UNITED STATES ADHERENCE

Unfortunately, some of the criticisms directed against the Law of the Sea Convention fail to understand the full context for consideration of the Convention. A few points are particularly worth noting in this connection. These are:

- *Some critics, while singling out particular articles that concern them in the 1982 Convention, fail to note that the United States is currently bound by the 1958 Geneva Conventions on the Law of the Sea that are considerably less favorable to United States oceans interests than the 1982 Convention, in which the United States was particularly able to offer greater protection to its security, resource, and environmental interests.* Thus, inaction with respect to United States adherence to the 1982 Convention simply leaves these less favorable treaties binding on the United States. Once the United States becomes a party to the 1982 Convention, however, under Article 311 of the Convention the 1982 Convention will take precedence over these less protective 1958 Conventions;
- *Paradoxically, the critics seem not to have noticed that the less protective 1958 Conventions already binding on the United States, unlike the 1982 Convention, contain no denunciation clause.* Unless the United States adheres to the 1982 Convention, which would automatically supercede our obligations under the 1958 Conventions, we would be faced with substantial uncertainty about revision or withdrawal from the 1958 Conventions. Under the 1958 Conventions, a request for revision of the Conventions would simply be referred to the United Nations General Assembly, which would then “decide upon the steps, if any, to be taken in respect of such requests.” And, in the absence of a denunciation clause in the 1958 Conventions, it would be unclear under

<sup>17</sup>The 1994 submission of the LOS Convention to the Senate recommended that the United States accept “special arbitration for all the categories of disputes to which it may be applied and Annex VII arbitration [general arbitration] for disputes not covered by . . . [this],” and that we elect to exclude all three categories of disputes excludable under Article 298.” See U.S. Department of State Dispatch IX (No. 1 Feb. 1995). This recommendation has been accepted by the Senate Foreign Relations Committee.

<sup>18</sup>According to the Department of State, the United States is already a party to more than 85 agreements (most of them multilateral in nature) that provide for the resolution of disputes by the International Court of Justice. More than 200 treaties—including civil air transport agreements and various types of investment treaties—provide for mandatory arbitration at the request of a party. In addition, there are a number of international organizations that include dispute resolution mechanisms, including the U.S.-Iran Claims Tribunal, and the International Civil Aviation Organization. The acceptance of arbitration in the Law of the Sea Convention is hardly a departure for the United States. Moreover, unlike most such dispute settlement provisions, the Law of the Sea Convention specifically permits the United States to not accept submission of disputes concerning military activities. This provision was insisted on by the United States in the negotiations leading to the Convention and was supported by navies all over the world.

international law whether the United States would be able to lawfully withdraw at all from these Conventions. In sharp contrast, not only will adherence to the 1982 Convention automatically supercede outmoded United States obligations under the 1958 Conventions, but the 1982 Convention does contain a denunciation clause. Under Article 317 of the Convention the United States may leave the Convention after one year following a simple denunciation. Thus, if the horrors espoused by the critics were to occur, the United States could simply denounce the Convention and withdraw;

- *Some critics seem also to act as though United States non-adherence would prevent the Convention from coming into effect, that we can engage in further renegotiation, or that we can simply ignore the Convention in our relations with other nations. None of these assumptions is true.* The 1982 Convention is in force for 145 nations and is today the basic legal regime for the world's oceans. For example, whether or not the United States adheres to the Convention, the Seabed Authority will remain in place. The only difference will be that the United States will gratuitously deprive itself of its deep seabed mining industry and our ability to control the rules and regulations, amendments and any distribution of revenues to states parties in the actions of the Authority. And following a major renegotiation at United States insistence before the Convention went into force (a renegotiation that met all United States conditions established by President Reagan for United States acceptance) there is zero possibility of further renegotiation. Any amendments from this point forward can only come from the participation of states parties using normal Convention provisions for amendment. Similarly, whether or not we are a party to the Convention, when the United States seeks to mobilize its allies around an important initiative such as the Proliferation Security Initiative, it will quickly find, as it has, that our allies will insist on compliance with the Convention provisions;
- *Some critics seem to believe that there would be a negative sea change in the ability of the United States to protect its interests were we to adhere to the Convention.* But to the contrary, pursuant to an order by President Reagan, the United States for over two decades has been complying with the provisions of the Convention other than deep seabed mining, which were not yet renegotiated at the time of Reagan's order. And from 1994 to 1998—until our right to participate on the Council of the Authority under provisional application ran out—the United States took its seat on the Council of the Authority and participated in adopting the budget of the Authority and formulating rules and regulations for seabed mining. The horrors summoned up by the critics simply have not occurred;
- *Some critics seem not to understand the critical United States interest in protecting its sovereign rights in freedom of navigation on the world's oceans.* I have been particularly troubled by criticisms that seem to assume that an absence of rules, or oceans anarchy, would somehow be in our interest. But to the contrary, the United States sought, and is protected by, rules that limit the ability of other nations to control our shipping and that provide a balanced rule of law in the oceans. Any other understanding of this nation's oceans interests is completely naive in failing to understand the death by a thousand pin pricks nature of the challenge to our freedoms; and
- *Some critics seem unaware of other articles in the Convention that negate an argument they are making.* Admittedly, the Convention, with 320 articles and numerous annexes, is complex. That, however, is no excuse for failing to accurately understand the Convention as a whole.

#### V. A FEW EXAMPLES OF THESE CONFUSIONS IN CRITICISMS OF THE CONVENTION

Examples of the above, and other confusions in recurrent criticisms of the Convention, include the following:

- Criticisms that the United States will be required to turn over security information without noting Article 302 of the Convention negating any obligation “to supply information the disclosure of which is contrary to the essential interests of its security;”
- Criticisms that under Article 20 of the 1982 Convention submarines are required to navigate on the surface and to show their flag, without noting that this obligation is already binding on the United States under Article 14 of the 1958 Territorial Sea Convention. Nor does this criticism even bother to mention the critical difference between the 1958 and 1982 Conventions, that under the 1982 Convention, this obligation no longer applies in straits used

for international navigation. In such straits there is a right under the 1982 Convention of “transit passage,” permitting transit in the normal mode; which includes submerged transit and overflight.

- Criticisms that the United States should not commit to provisions in the 1982 Convention to the effect that the high seas are “reserved” for peaceful purposes and that parties to the treaty shall refrain from “any threat or use of force against the territorial integrity or political independence of any state,” without noting that these obligations simply parallel the obligation in the United Nations Charter, already binding on the United States and every other nation in the world banning the aggressive use of force. These obligations, as those in the United Nations Charter, do not in any way inhibit either the right of individual or collective defense or otherwise lawful military activities. If these provisions did in any way inhibit such activities in the world’s oceans there would have been no agreement on the Convention. This is abundantly evident in the robust naval activity of nations for which the Convention has been in force;
- Testimony of at least one critic before the Senate Committee on Environment and Public Works setting out a number of articles from the 1982 Convention, without notifying the Committee that those articles were either taken verbatim from the 1958 Conventions currently binding on the United States, or that the version in the 1958 Conventions now binding on us was even more restrictive than the provision cited from the 1982 Convention;
- Arguments concerning the PSI as though that initiative, developed with ten other countries, required breach of the 1982 Convention. To the contrary, the statement of principles agreed upon and released by the PSI parties in September 2003 is fully consistent with the 1982 Convention, and it is highly likely that the United States would not obtain agreement on some other basis. Indeed, this PSI argument of the critics, which is not consistent with the official position of the United States in the PSI initiative, seems also to fail to understand both the great United States interest in protecting freedom of navigation of United States shipping and our traditional rights of individual and collective defense that are an overlay over the 1982 Convention. The Law of the Sea Convention guarantees our vessels will be permitted to get on station, which is essential before any issue even arises about boarding. Moreover, we emphatically do not want a legal regime that would permit any nation to seize United States vessels anywhere in the world’s oceans. The PSI was carefully constructed, using flag state, port state and other jurisdictional provisions of the 1982 Convention and general international law precisely to avoid this problem.<sup>19</sup> The PSI argument is one of the areas, in which critics have complained about articles in the 1982 Convention without noting that they are already binding on the United States, in a more restrictive fashion, in the 1958 Convention. Thus, critics have cited in connection with PSI Article 110 of the 1982 Convention concerning the right of visit, without noting that a more restrictive version of this article is already binding on the United States in Article 22 of the 1958 High Seas Convention. Indeed, the 1982 Convention adds several new bases for boarding, including that a ship is “without nationality.”
- A variety of arguments asserting interference with United States intelligence activities without noting that the United States has been operating under the rules objected to by the critics since Ronald Reagan’s order; that the intelligence community does not share the critics’ concerns; and that the concerns of the critics, if valid at all, may already be engaged with the 1958 Geneva Conventions binding on the United States that would remain in force for the United States were we to fail to adopt the less restrictive 1982 Convention. Having chaired the eighteen Agency National Security Council Interagency process that drafted the United States negotiating instructions for the Convention, I found these recent arguments of the critics so bizarre that I recently checked with the Intelligence Community to see if I had missed some-

<sup>19</sup>The core legal bases for PSI include actions by states within their territory, actions by states within their national airspace, actions by port states in internal waters, actions by coastal states in territorial waters, actions by flag states over their flag vessels, actions based on flag state or master’s consent, actions based on rights concerning stateless vessels, actions based on universal crimes, actions based on rights of individual or collective defense, and actions based on belligerent rights. None of these legal bases require violation of the 1982 Convention or actions inimical to the crucially important United States security interest in the protection of freedom of navigation.

thing. The answer that came back was that they, too, were puzzled by these arguments and that they were not opposing United States adherence to the 1982 Convention;

- The argument that perhaps the renegotiation of Part XI won't be binding after all and that we will be stuck with the old Part XI. This argument, of course, is flatly at odds with Article 2 of the renegotiation agreement which provides "[i]n the event of any inconsistency between this Agreement and Part XI, the provisions of this Agreement shall prevail." It is at odds with the experience of the United States from 1994 through 1998 when we participated in the Authority on a provisional basis. It is at odds with the practice of the International Seabed Authority toward nations which had adhered to the Law of the Sea Convention before the renegotiation in treating them as fully bound by the renegotiation agreement. It is further at odds with the practice of the Authority in establishing a chambered voting system, a Finance Committee, and mining contracts, all of which are based on the renegotiation agreement. And it is at odds with the official *Compendium of Basic Documents: The Law of the Sea* published in 2001 by the Seabed Authority that not only has an extensive section rewriting Part XI to fully take account of the renegotiation, but which begins this section by noting: "[i]n the event of any inconsistency between the Agreement and Part XI, the provisions of the Agreement shall prevail."<sup>20</sup> To my knowledge, not a single nation in the world has advanced this argument asserted by critics. More importantly, on an issue of such importance, the United States would have not only the legal right to leave the Convention, but given our insistence on the renegotiation we would be expected to exercise our denunciation right under Article 317, should a serious effort be made to set aside the renegotiation of Part XI. This argument, then, simply throws up another horrible without noting that the alternative recommended, not moving forward with adherence, will immediately have continuing substantial costs for the United States, which, unlike the imagined horrible, are neither contingent nor imaginary;
- Assertions that the Convention will create authority for an international organization to tax American citizens. The Convention does nothing of the kind. It does provide for payments on "commercial terms" to mine deep seabed minerals that do not belong to the United States. This is similar to payments to Indonesia or Chile for the ability to have access to resources in those countries. We would not remotely regard payments for such access as authority for taxation of American citizens by Indonesia or Chile. Moreover, unlike arrangements for minerals mining access in foreign countries, in the new deep seabed Authority United States firms will have assured access to mine, and the disposition of payments as well as the rules and regulations for such mining will be subject to a United States veto. Moreover, that veto is exercisable with respect to the distribution of revenues from firms of all other nations mining the deep seabed—thus effectively multiplying the ability of the United States to ensure that the distributions to states parties are put to a good use. Similarly, the Convention provides for minimal revenue sharing for oil and gas development in areas beyond the 200 mile economic zone. Such revenues, which would amount to an average of two to five percent over the life of a well, were an enormous bargain for the United States as payment in return for our obtaining sovereign rights over resources in an area of the continental shelf beyond 200 nautical miles that is roughly equivalent to the size of California. That is, we retain ninety-five to ninety-eight percent of the value of the future resources in this area beyond the 200 mile economic zone placed under United States resource jurisdiction by the Convention. Indeed, the revenue sharing system adopted was drafted by a representative of an American oil company on our law of the sea industry advisory group and has been perfectly acceptable to the oil industry. And even beyond the great bargain that was the purchase of Alaska, in this case not a penny is due until seven years after production begins. Moreover, once again, the distribution of any such revenues to states parties, including revenues from this small royalty from all production beyond 200 miles from other nations, would be subject to a United States veto; and
- Allegations that the Convention "is designed to place fishing rights, deep-sea mining, global pollution and more under the control of a new global bureaucracy. . . ." This is so in error as to be humorous if it were not seriously ad-

<sup>20</sup>*International Seabed Authority, The Law of the Sea: Compendium of Basic Documents 191* (2001).



vanced in a respected national newspaper.<sup>21</sup> As has been seen, the new international organization to be set up to provide security of tenure for deep seabed mining in areas beyond national jurisdiction has regulatory authority only over the mining of minerals from the sea floor beyond national jurisdiction. And even then it would be subject to a United States veto with respect to the adoption of rules and regulations for mining, allocation of any revenues from mining, and any amendments relating to such organization. The suggestion that this organization may someday set up its own navy to enforce its will on the world, in the face of a United States veto, is particularly imaginative fantasy.

Mr. Chairman, and members of the Committee, should we not recognize that the advice from those who proffer such arguments is not more reliable than that from the Joint Chiefs of Staff, the Navy, successive Chiefs of Naval Operations, the Combatant Commanders, Presidents of both parties, United States oceans industries, United States environmental groups, a unanimous Senate Foreign Relations Committee, the United States Arctic Commission, and the unanimous opinion of the Congressionally established National Commission on Ocean Policy?

#### CONCLUSION

Adherence to the 1982 Convention on the Law of the Sea is strongly in the national interest of the United States. There are powerful reasons supporting United States adherence to the Convention; reasons rooted in protecting U. S. sovereign rights, protecting U. S. national security interests, protecting U. S. industry, protecting U. S. mariners and fishermen, protecting our environmental interests, encouraging strong precedents for international organization, restoring U.S. oceans leadership, protecting U.S. oceans interests, and enhancing U.S. foreign policy. I would urge this Committee to suggest that the Senate support advice and consent to the 1982 Convention at the earliest possible time.

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<sup>21</sup> See "Bottom-of-the-Sea Treaty," *The Wall Street Journal*, March 29, 2004.

## **Reasons to Support the Law of the Sea Convention**

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- To solidify an extension of United States sovereign rights over the natural resources off our coasts in an area roughly equal to our continental land mass and greater than that of any other nation in the world;
- To ensure that our armed forces have guaranteed rights of navigation and overflight across the world's oceans necessary to their ability to protect U.S. security interests worldwide;
- To avoid having to put American service men and women in harm's way to assert through the use of force navigation rights that can be secured at less risk and less cost through the rule of law;
- To enhance our energy independence and create jobs in the United States through more immediate development of the oil and gas on the United States continental margin beyond 200 nautical miles;
- To avoid losing United States deep seabed mine sites and killing our seabed mining industry with its seabed mining jobs in the United States;
- To give the United States a *veto* over sending revenues from deep seabed mining to the PLO, over rules and regulations for deep seabed mining, and over any LOS Treaty Amendments concerning deep seabed mining;
- To accept a guaranteed permanent seat for the United States on the Governing Council of the Seabed Authority – the only guaranteed permanent seat for any nation and an important precedent for the United States;
- To provide American fishermen and merchant mariners with legal protection against corporal punishment and imprisonment in jails around the world;
- To enable the United States to participate in assessing continental margin claims of other countries that could prejudice U.S. interests, such as Russia's excessive claim in the Arctic Ocean;
- To support stable expectations and the rule of law in the world's oceans;
- To restore United States leadership in the development of oceans law and policy; and
- To recognize that advice from non-Law of the Sea experts on oceans security issues is not more reliable than that from the Joint Chiefs of Staff, the Navy, the Combatant Commanders, Presidents of both parties, all United States oceans industries, a unanimous Senate Foreign Relations Committee, and the unanimous opinion of the Congressionally established National Commission on Ocean Policy.

John Norton Moore  
May 12, 2004

Mr. HOUGHTON. Well, thank you for that ambiguous testimony. I wondered how you really feel about this. Thank you very much. Very clear, and very understandable, and thank you, Ms. Metcalf, Mr. Gaffney, and Mr. Spring, and Dr. Leitner, I am sorry that I didn't get a chance to hear your testimony.

But let us go on with some of the questions. I may have one or two questions, and I know that Mr. Faleomavaega has some. This is, of course, as you know, a hearing. This is not a decision-making process. We want to get all the facts out, and after we get the facts out, we can face the facts.

And I am inclined to agree with you, but I think we have got to walk around this thing a little carefully. I guess the question you always ask is what is the downside, what are the dangers.

I know that you have talked a little bit about them, but maybe you could sum up, any one of you, the thing that not only in your mind, and in your background, but in your gut you feel is really a possible danger here in advocating this Law of the Sea.

Mr. GAFFNEY. Any particular order, Mr. Chairman?

Mr. HOUGHTON. Yes.

Mr. GAFFNEY. Just walk our way down the aisle?

Mr. HOUGHTON. Absolutely.

Mr. GAFFNEY. Well, as has been famously said in the past in other contexts, I guess John Norton Moore's remarks are fighting words. I feel as though on a number of points I have been rather directly challenged, and I would simply say this treaty does change the nature of our relationship to the world's oceans.

It does. It simply does. There will be, if we become a party to it, new mechanisms under which we will be obliged to interact with a host of issues, ranging from undersea exploration, and research, and oil and gas development, and mineral recovery, and fisheries, and so on. These are routinely cited as among the attributes and benefits of this treaty, and as I said in my opening statement, Mr. Chairman, I think from some points of view those could in fact be seen as benefits of the treaty.

I simply think you can't have it both ways and say that does not at some point constitute an infringement upon our current sovereignty. But my larger concern is, I personally think, where you see the United States Government entering into treaty obligations, even if it has said similar things in the past, even if it has made formal commitments as we have seen in the arms control world—and John Norton Moore and I are usually on the same side on those treaties.

Mr. HOUGHTON. We have got to go through a whole list of people.

Mr. GAFFNEY. Where those commitments—this is a narrow point, Mr. Chairman—where those commitments are at odds with our actual practice, you have people say, well, we will simply continue our existing practice not withstanding these new treaty commitments, and not withstanding the fact that we are agreeing to become bound by an international tribunal that will be able to impose, at minimum, advisory opinions, and maybe regulations or rules, over which we will not have a veto. I submit to you, sir, that is an infringement on our sovereignty and can have deleterious impacts on our national security as well.

Mr. HOUGHTON. Thank you, Mr. Gaffney. Mr. Spring.

Mr. SPRING. Mr. Chairman, my primary concern is that the bulk of this treaty is really about process and procedure as much as it is about substance, and that process and procedure are ultimately uncontrollable. The reason that I am so concerned about this treaty, particularly now, is that we had an unambiguous U.S. veto in the United Nations Security Council regarding Iraq. But in order to do what we had to do for the vital interests of the United States, we had to take positive action there.

It was an exercise in frustration. It has its political sources, but it also has its legal sources, and as we go down this path of open-ended international procedures, our ability, our freedom to navigate politically, not physically on the ocean even so much here, but to navigate politically on the shores of an ambiguous international

situation, becomes less and less apparent. And our ability to withdraw from this process without extensive political damage in my judgment is very, very limited. So that in a sense I would say that what we are doing here is buying into a procedure where we really don't know what the outcomes will be, and in the end I think that it will have many regrettable consequences.

Mr. HOUGHTON. Thank you very much. Dr. Leitner.

Mr. LEITNER. Thank you. There is a long list of reasons, and I will go through a few of them as to why this treaty is iatrical to the United States national interests.

One of the issues that was heard earlier by the Admiral was basically an incorrect assertion that the treaty would obviate the need for freedom of navigation assertions. But where we go and make challenges to coastal state claims that we think are excessive, and that are drawn incorrectly, or claims to historic waters, or bays, or other things, the treaty does very little, if anything, in that regard. States are still holding on to their own interpretations of how they are drawing baselines. They are still closing off areas. They are still claiming historic waters where they claimed them prior to the treaty, and they are still holding on to their claims now.

The assertion that this is going to make the guy on the ship any safer by not having to challenge these claims I think is completely false, or a misreading of the treaty.

Issues such as taxation and sovereignty; taxation and sovereignty are inextricably linked in areas of the high seas, beyond national jurisdictions, particularly on the continental shelf, and in the margin area, that will come under the purview of the International Seabed Authority.

The Seabed Authority now has the ability under this treaty to directly tax a sovereign state for production activities, royalties, for the extraction of oil that is done in that area that it allows to happen. It is not the vendor or the contractor who is assessed this tax. It is taxed to the state government. The United States will be assessed the tax, and then the United States will try to figure out how to collect that tax, or have it recouped to the taxpayer, based upon activities operating beyond its national jurisdiction, which would be extremely problematic.

So it will be a tax assessed directly on the state, and that is unprecedented in international activities, and international law.

Mr. HOUGHTON. Is that it, because we have got to move along here.

Mr. LEITNER. I have a couple of rather quick points. One is there is the inherent possibility in the treaty, and this was demonstrated by the Center for Naval Analysis in a report done several years ago, that there is ample place and ambiguity in the treaty that will allow the treaty organization to actually raise a military force, or some sort of an enforcement body, to enforce its edicts and the rulings of its various tribunals and bodies.

That is a possibility. In addition, I think there is a fundamental problem here, and it is almost a fruit-of-the-looking-glass effect, where we have leadership being characterized as the casting of vetoes.

In this new body that has been created, the U.S. role in terms of leadership will be basically trying to throw chairs in the path of an onslaught of countries who do not share U.S. interests on any particular issue. This is not leadership in any sense of the word, and so binding the United States to a treaty where we will have to basically be fighting a rear-guard action on a regular basis, is not necessarily in the United States interests, and finally—

Mr. HOUGHTON. Thank you very much. We really have to move it along here, because there are other people who are going to testify. Can you get to your final point?

Mr. LEITNER. Yes. One final point. There is a real substantial concern about the U.S. ability to wage war on terrorism because of the treaty, in terms of the proliferation of security initiatives of the President. It is an excellent policy, but one which is not allowed under the treaty the way the treaty reads.

There are several very strict forms of authorization for making visits to ships on the high seas beyond national jurisdiction. Counterterrorism, and looking for weapons of mass destruction, and other things that involve ships in transit passage that are exactly the kinds of ships we need to interdict, are not allowed under the treaty. And several states, members of the treaty organization, have come out and stated that the PSI is barred under this treaty.

Mr. HOUGHTON. Okay. Thank you very much. Ms. Metcalf.

Ms. METCALF. Sir, I have nothing to say that would be a negative at ratifying this treaty. I would say, if you will permit me just a couple of seconds, that my father, God rest his soul, once asked me in law school why we needed 10 million laws to enforce 10 basic commandments.

And after I thought, I recalled that no matter what we do, there are rogue nations, and rogue individuals, and rogue is defined as those who either intentionally or through ignorance, violate accepted norms of behavior. And what we find as we codify those norms of behavior, the general public, or the world in this case, becomes better educated, and then the U.S. can lead the world into a more appropriate and more predictable state of world affairs.

The last thing I would say, sir, is that I have much more faith I suppose in the diplomatic capabilities of the United States. I see the veto power in this Convention as a fallback that we could use if our ordinary, and as documented by history, diplomatic skills do not effect our ultimate goals.

Mr. HOUGHTON. Thank you very much. Dr. Moore.

Mr. MOORE. Thank you again, Mr. Chairman. There are quite simply no costs for the United States in adhering to this treaty, and there are substantial costs for the United States in not adhering to this treaty promptly.

And I would suggest to you it is one of the reasons that, what has come out of my good colleagues who are my friends but are unfortunately on the wrong side of this issue, what is coming out of them is a very high-level generalization, by the way, of many issues which have been refuted on many occasions. Let me just give you one of those.

I am hearing once again that somehow the treaty is inconsistent with PSI when the core members of PSI are all members of the

Law of the Sea Treaty. Indeed, we could not engage in something in PSI that was not consistent with the treaty.

They also keep throwing up article 110 in relation to this PSI argument without noting that article 110 is basically nothing more than a broader version of a provision that is binding on us already in article 22 of the high seas convention.

One of the real difficulties and frustrations here, Mr. Chairman, is that the critics seem not to be aware that the United States is bound today by the four 1958 Geneva Conventions that are more restrictive in many ways than the 1982 Convention.

This is why we wanted to get into the renegotiation. It is what we did in the National Security Council task force under Nixon, and Ford, and later under Reagan. It is why our Government for 30 years has supported this. So we are simply hearing a series of individual arguments that I am afraid don't make sense on their merits, and certainly not when we put it together in the overall U.S. national interests.

Mr. HOUGHTON. Well, thank you very much. Now I am going to ask Mr. Faleomavaega.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman. I just wanted to ask Professor Moore if he could clarify a little more what I think Mr. Spring mentioned on the fact that we do have a veto vote on the Security Council of the United Nations. I suppose that kind of extends our sovereignty and the right to unilaterally undo something that may not necessarily be in our national interests. And I wanted to ask Professor Moore if you could clarify again the voting rights of our country within the provisions of the treaty as it is proposed. I just want to make a comparison whether the integrity of our national interests is still preserved in that context.

Mr. MOORE. Congressman, I very much appreciate that question, which I think is very important. If we look at the issues in Law of the Sea for a moment other than deep seabed mining, what we find is that there is no new creation of some kind of governmental structure. There is no kind of creation here of something taking away from coastal nations' or high seas' freedoms. We were trying to do something that basically would promote freedom, and would promote efficient management by states around the world.

It is not any kind of accident, for example, that all the oil and gas of the continental margins is placed under coastal nation jurisdiction. In contrast, there is an international authority only on an extremely narrow area of deep sea minerals.

This, in turn, is nothing more than trying to obtain security of tenure for mineral resources, the kinds exactly you talked about that were so important in areas beyond national jurisdiction, because no one owns those. We don't own them.

And the notion of saying that when we go out there and we have to pay something to get those, we are having a tax, is about like saying that Indonesia is taxing the United States when Exxon has a joint venture to obtain oil from Indonesia. It is just simply silly. It is not true.

Now, when this was initially set up in the 1970s and 1980s, we had a system that was basically under NIEO, one nation, one vote, all of the kinds of things that the critics are telling you.

But the treaty was completely redone. Every single one of the Reagan conditions was met and then some. The United States had enormous influence in negotiations, and we ended up with the following provisions that are extremely helpful precedently in international organizations. In fact, I don't know of another international organization the United States is a member of in which it has provisions that are this good. Let us look at them.

It is the only nation in the world singled out for a permanent seat in the council of the authority that will exercise the basic control.

Under that it has the veto on virtually all of the important issues, and by the way, any of these revenues that they are talking about, not just from the U.S., but anywhere else in the world, the United States has a veto over where they go.

We have the ability to multiply the sovereignty and power of the United States in the use of those funds. In addition to that, we have a veto over any amendment. The notion that somehow you are going to have a blue-helmeted navy spring out of this is absolute fantasy, Mr. Chairman. It would have to be over the veto of the United States of America, and I might add probably three-quarters of the rest of the world. It just is not going to happen. So we have got a very powerful setting, and we have a chambered voting system on everything that we don't immediately have a veto on.

By the way the Authority is also proceeding even under consensus. There has not been a single substantive decision made in this authority in the first 10 years that was not done under the consensus procedure.

And finally, Mr. Chairman, let me just suggest something that the critics never tell you. The United States was a party from 1994 until 1998 under provisional application. We participated in the budget of the organization and drafting of rules and regulations.

This "huge bureaucracy" that the critics tell you about is 37 employees, indeed 37 employees for 10 years; a tiny budget, et cetera. I could go on and on.

Mr. FALCOMA. Mr. Moore, I know that my time is just about to be up. I know as a matter of observation certainly your expertise, and then in fairness also to Mr. Gaffney and Mr. Spring, I have whole loads of questions, but we are pressed for time. Of the issues raised by Mr. Spring and Mr. Leitner, as well as Mr. Gaffney, about sovereignty and national security, my basic observation is the fact that this Administration is about as conservative as we could ever be, which is positive I think.

But given the fact that it does meet with the full approval of the Chairman of the Joint Chiefs of Staff and the Administration, I have to give credence to the fact that the experts and the gentlemen involved in the whole advent of looking at every provision, and every letter, and every phrase of the provisions of the treaty, have ensured that our national interests are being protected.

And with that, Mr. Chairman, I know my time is up. Thank you.

Mr. HOUGHTON. Thanks very much everybody. We certainly appreciate this. The hearing is over.

[Whereupon, at 1:50 p.m., the Committee meeting was adjourned.]





## A P P E N D I X

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### MATERIAL SUBMITTED FOR THE HEARING RECORD

#### PREPARED STATEMENT OF THE HONORABLE ROY BLUNT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI

Mr. Chairman, Let me start by thanking you for holding this very important hearing. The treaty we are here to discuss today holds enormous ramifications for our nation's sovereignty. At stake is everything from access to the deep seabed mineral resources of our coastal regions to our ongoing ability to guarantee the security of our shipping routes.

This treaty was rejected more than 20 years ago by the Reagan administration. Among the reasons cited for rejecting the treaty were an unacceptable decision-making process, stipulations mandating the transfer of private technology, incorporation of economic principles inconsistent with free market philosophy, and no assured access to future deep seabed mineral resources.

The early years of the Clinton administration were spent trying to fix this treaty. In 1994, an "annex" to the treaty was announced. However, I am concerned that many of President Reagan's initial complaints about the treaty have not been fully addressed in the annex. For example:

- Under the revised treaty, "sponsoring states" (those nations where mining companies are based) are still required to facilitate transfers of mining technology to Third World countries;
- The International Seabed Authority, the treaty's primary agency responsible for mining approval, remains a hugely-complicated international bureaucracy in which mining approval would likely be politicized, discriminatory, and expensive;
- The U.S. would still be responsible for around 25% of the Seabed Authority's budget, but have no proportional representation in terms of setting its agenda or impacting its decisions;
- The treaty still attempts explicitly to regulate intelligence and submarine activities in what are defined as "territorial" seas. These are activities vital to U.S. security that we should ensure remain unrestricted at all costs.

Mr. Chairman, both houses of Congress have a responsibility for examining the impacts that this treaty would have on national security and commercial access to our own resources. As with any treaty, certain aspects of U.S. law will likely have to be altered for compliance if this treaty is ratified by the other body. So we should not take our responsibility in the House lightly. If this treaty commits the United States to expend funds and provide personnel for action not approved by Congress, then it is important we are fully aware of what we are getting ourselves into. Forgive me for sounding cynical if I don't take at face value the line in the annex stating that "all organs and subsidiary bodies to be established under the Convention and this Agreement shall be cost-effective." International institutions are rarely, if ever, held to such a standard.

Mr. Chairman, let me thank you again for holding this hearing today. The witnesses we have here represent both proponents and skeptics of the treaty's effects. It is my hope that this hearing will allow House lawmakers to be better-informed about this treaty and whether or not it is in our national interest to be bound by it.

LETTER SUBMITTED FOR THE RECORD BY FRANK J. GAFFNEY, JR., PRESIDENT, THE  
CENTER FOR SECURITY POLICY

May 12, 2004

The Hon. Bill Frist  
Senate Majority Leader  
United States Senate  
Washington, D.C. 20510

Dear Mr. Leader:

As you know, we and the many Americans represented by our organizations have serious concerns about the Law of the Sea Treaty (LOST) to which the Senate is being asked to give its urgent advice and consent. We agree with President Reagan who refused to sign the LOST in 1982, mindful that it was the product of an international Leftist agenda that aimed to redistribute the world's wealth from developed nations, like the United States, to developing ones.

Specifically, Mr. Reagan objected to the Treaty's Part XI, and the supranational agency – the International Seabed Authority (ISA) – it created to regulate activities on and under the seven-tenths of the globe's surface that lies beneath international waters. The then-Soviet Union and so-called non-aligned nations that dominated the LOST negotiations even empowered the ISA to *levy taxes*, a first in the history of multilateral institutions. President Reagan made clear his concerns about both the specific character of this organization and the “undesirable precedents” it would establish for other international institutions.

Today, even the Treaty's supporters profess to recognize the wisdom of Mr. Reagan's objections. They claim, however, that subsequent negotiations, which produced an accord known as “The Agreement” in 1994, “fixed” what was wrong with the original Law of the Sea Treaty. In fact, this is a matter of some dispute – even with regards to Part XI – since the Agreement does not actually amend the LOST and since nearly twenty percent of the States Parties to the Treaty have not ratified the 1994 accord.

What is more, there are other aspects of the Law of the Sea Treaty that have implications for U.S. sovereignty and national security interests that clearly remain uncorrected. A number of these reflect, in much the same way the original Part XI and its supranational ISA did, the agenda of actual or potential adversaries interested in making it more difficult for this country to use the seas to prosper economically and to protect our national interests.

For example, the Treaty compels parties to submit to mandatory dispute resolution, something the Senate has traditionally rejected. Even under the revisions contained in “the Agreement,” the U.S. would be committed to transfer potentially militarily relevant technology to possibly unfriendly hands. And LOST will give legal grounds to those who wish to prevent us performing vital intelligence-collection and covert submarine activities in territorial waters and to prohibit searches of vessels on the high seas like those allowed under President Bush's new Proliferation Security Initiative.

In short, the Law of the Sea Treaty involves matters of sufficient importance to our sovereignty, security and economic interests to oblige the Senate to consider this accord only after it has been subjected to the most careful of reviews by relevant committees on both sides of

Capitol Hill (as the House of Representatives will be involved in implementing legislation and must *originate* revenue measures that would allow the International Seabed Authority to dun American taxpayers). Even then, sufficient time should be permitted for protracted floor debate and consideration of amendments, including perhaps many of the scores of changes President Reagan's administration unsuccessfully sought to make to LOST in the early 1980s.

If, in the remaining few days of the current session, you cannot find the opportunity for such rigorous deliberation, we strongly encourage you formally to defer the Law of the Sea Treaty's consideration.

Sincerely,

Paul Weyrich	Free Congress Foundation
David Keene	American Conservative Union
Phyllis Schlafly	Eagle Forum
Fred Smith	Competitive Enterprise Institute
Frank J. Gaffney, Jr.	Center for Security Policy
Jim Martin	60 Plus Association
C. Preston Noell	Tradition, Family and Property
Ron Pearson	Council for America
Robert B. Carleson	American Civil Rights Union
Jim Boulet	English First
Richard Falkner	Maryland Taxpayers

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LETTERS FROM ADMIRAL JAMES D. WATKINS, U.S. NAVY, RETIRED, CHAIRMAN, U.S. COMMISSION ON OCEAN POLICY

U.S. COMMISSION ON OCEAN POLICY

3320 20TH STREET, NW \* SUITE 200 NORTH \* WASHINGTON, DC 20036  
PHONE: 202-418-3442 \* FAX: 202-418-3475 \* WWW.OCEANCOMMISSION.GOV

May 12, 2004

The Honorable Henry J. Hyde  
Chairman  
Committee on International Relations  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

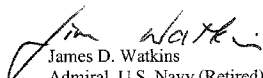
Thank you for the invitation to testify before your Committee on the important subject of United States accession to the United Nations Law of the Sea Convention. Unfortunately, I have a prior commitment that prevents me from accepting this offer.

On October 14, 2003, I appeared before the Senate Committee on Foreign Relations concerning United States accession to the Convention. I have enclosed herewith a copy of my Senate testimony together with associated documents I submitted for the record which I hope will be helpful to your Committee. I am also enclosing testimony presented by my colleague, Commissioner Paul Kelly before the Senate Committee on Environment and Public Works on March 19, 2004. Commissioner Kelly's testimony, while similar in many ways to my own, focuses in greater detail on the benefits of the Convention with respect to offshore energy development.

I share the unanimous and strongly held position of all 16 Presidentially-appointed members of the U.S. Commission on Ocean Policy in favor of United States accession to the United Nations Law of the Sea Convention.

Thank you again for seeking the views of the U.S. Commission on Ocean Policy on this important matter.

Sincerely,

  
James D. Watkins  
Admiral, U.S. Navy (Retired)  
Chairman

Enclosures

COMMISSIONERS

ADM JAMES D. WATKINS, USN (RETI), CHAIRMAN \* ROBERT D. ENGLAND, PH. D. \* TEO A. ELNATH \* JEROME C. BORDONE \* JAMES M. CAMPBELL, PH. D.  
ARTH D'AMATO \* LAWRENCE R. DICKERSON \* ADMIRAL PAUL G. LARSEN, U. S. N. \* MIKE J. HEDGECOCK \* EUG L. KELLY \* CHRISTOPHER L. KATH  
FRANK E. SMELSER-MAGNER, PH. D. \* EDWARD B. RUSSELL \* ANDREW A. ROUSSEFF, PH. D. \* WILLIAM D. BUCKENHUIS \* PAUL A. SANDREA, PH. D.  
\* THOMAS B. RYAN, PH. D., EXECUTIVE DIRECTOR

U.S. COMMISSION ON  
OCEAN POLICY



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Statement by  
Admiral James D. Watkins, USN (Retired)  
Chairman, U.S. Commission on Ocean Policy  
Before the  
Committee on Foreign Relations  
United States Senate  
October 14, 2003

Mr. Chairman:

Thank you for inviting me to testify before your Committee today on the important subject of United States accession to the United Nations Law of the Sea (LOS) Convention.

The U.S. Commission on Ocean Policy has taken a strong interest in the international implications of ocean policy since the inception of our work. Our 16 Commissioners were appointed by the President – 12 from a list of nominees submitted by the leadership of Congress – and represent a broad spectrum of ocean interests. The Oceans Act of 2000 (P.L. 106-256) specifically charged our Commission with developing recommendations on a range of ocean issues, including recommendations for a national ocean policy that "...will preserve the role of the United States as a leader in ocean and coastal activities."

With this charge in mind, the Commission took up the issue of accession to the LOS Convention at an early stage. At its second meeting in November, 2001, the Commissioners heard testimony from Members of Congress, federal agencies, trade associations, conservation organizations, the scientific community and coastal states. We heard compelling testimony from many diverse perspectives – all in support of ratification of the LOS Convention. After reviewing these statements and related information, our Commissioners unanimously passed a resolution in support of United States accession to the LOS Convention. The fact that this resolution was our Commission's first policy pronouncement speaks to the real sense of urgency and importance attached to this issue by my colleagues on the Commission.

The Commission's resolution was forwarded to the President, Members of Congress, the Secretaries of State and Defense, and to other interested parties. I have enclosed a copy of our resolution, and the accompanying transmittal letters, for the record.

COMMISSIONERS

ADM. JAMES D. WATKINS, USN (RET.), CHAIRMAN \* ROBERT D. BALLARD, PH. D. \* TEO A. BEATTIE \* LILLIAN C. BORRONE \* JAMES M. COLEMAN, PH. D.  
ANN D'AMATO \* LAWRENCE R. DICKERSON \* VADM PAUL G. GAFFNEY II, USN \* MARC J. HERSHMAN \* PAUL L. KELLY \* CHRISTOPHER L. KOCH  
FRANK E. MULLER-KARGER, PH. D. \* EDWARD B. RALPHSON \* ANDREW A. ROSENBERG, PH. D. \* WILLIAM D. RUCKELSHAUS \* PAUL A. SANDIFER, PH. D.  
THOMAS R. KITZOS, PH. D., EXECUTIVE DIRECTOR

The responses we received have been very positive. Secretary of State Colin Powell wrote that he "shared our views on the importance of the Convention," and Admiral Vern Clark, Chief of Naval Operations, stated that he "...strongly believe[d] that acceding to this Convention will benefit the United States by advancing our national security interests and ensuring our continued leadership in the development and interpretation of the law of the sea."

Ensuing hearings, and the additional information we have gathered, have served to reinforce our conviction that ratification of the LOS Convention is very much in our national interest. I would like to share with you some of the reasons that our Commissioners have unanimously adopted this view of the Convention.

The LOS Convention was described by those who appeared before the Ocean Commission as the "foundation of public order of the oceans" and as the "overarching framework governing rights and obligations in the oceans." The United States was involved in all aspects of the development of the Convention, including reshaping the seabed mining provisions in the early 1990's. As a consequence, the Convention contains many provisions favorable to U.S. interests.

However, the foundation that the LOS Convention provides is subject to interpretation and will no doubt continue to evolve through time. The United States needs to be an active leader in this process, working to preserve the carefully crafted balance of interests that we were instrumental in developing, and playing a leadership role in the evolution of ocean law and policy. Acceding to the Convention will allow us to fully and effectively fulfill that leadership role, and will enhance United States economic, environmental and security interests.

For example, there are a series of issues currently being considered by parties to the Convention which could have tremendous economic implications for the United States.

Of particular importance is the work of the Convention's Commission on the Limits of the Continental Shelf, which is charged with reviewing claims and making recommendations on the outer limits of the Continental Shelf. This determination will in turn be used to establish the extent of coastal state jurisdiction over Continental Shelf resources. There are several reasons why direct U.S. participation in this process would be beneficial, namely:

- The LOS Convention sets up the ground rules by which coastal nations may assert jurisdiction over exploration and exploitation of natural resources beyond 200 miles to the outer edge of the continental margin. This is particularly important to the United States, which is one of only a few nations in the world with broad continental margins.
- The continental margins beyond the United States' Exclusive Economic Zone (EEZ) are rich not only in oil and natural gas, but also appear to contain large

concentrations of gas hydrates, which may represent an important potential energy source for the future.

- The work of the Continental Shelf Commission in establishing clear jurisdictional limits creates a degree of certainty crucial to capital-intensive deepwater oil and natural gas development projects. Industry representatives stressed to us the importance of this certainty not only for potential investment in energy resource development beyond our own EEZ, but in U.S. industry participation in approved development projects undertaken on other nation's Continental Shelves.

The work of the Continental Shelf Commission is now at a critical stage. All current parties to the LOS Convention must submit their Continental Shelf claims prior to 2009. The Commission's action on these submissions will directly impact U.S. jurisdictional interests, particularly in the Arctic. If we do not become a party to the LOS Convention, we are in danger of having the world leave us behind on issues of Continental Shelf delimitation because we will continue to be ineligible to participate in the selection of members of the Commission or nominate U.S. citizens for election to that body.

Acceding to the LOS Convention will also allow the United States to play an active leadership role in a host of other issues of economic importance. As a party to the Convention, the U.S. can participate fully in International Seabed Authority efforts to develop rules and practices that will govern future commercial activities on the deep seabed. Currently, the U.S. is relegated to observer status.

As a party to the Convention, the United States will also be in a much stronger position to ensure the preservation of the balance between coastal state authority and freedom of navigation. The United States, whose international trade and economic health relies so heavily on maritime commerce, cannot afford to remain on the sidelines while parties to the LOS Convention make decisions that directly impact navigational rights and maritime commerce.

Further, the LOS Convention provides a comprehensive framework for protection of the marine environment. The Convention includes articles mandating global and regional cooperation, technical assistance, monitoring and environmental assessment, and establishing a comprehensive enforcement regime. The Convention specifically addresses pollution from a variety of sources, including land-based pollution, ocean dumping, vessel and atmospheric pollution, and pollution from offshore activities. The principles, rights and obligations outlined in this framework are the foundation on which more specific international environmental agreements are based.

The United States is party to many international agreements – including conventions pertaining to vessel safety, environmental protection and fisheries management – which are based directly on the LOS framework. Those United States representatives who participate in the negotiation of these agreements are among the strongest advocates for accession to the LOS Convention.

For example, the Coast Guard, which has played a lead role in developing international agreements on maritime safety, security and environmental protection at the International Maritime Organization (IMO), and also participates in fisheries negotiations, told our Commission that: “[A] failure to accede to the Convention materially detracts from United States credibility when we seek to advance our various ocean interests based upon Convention principles. Also, as a non-party, we risk losing our ability to influence international oceans policy by leaving important questions of implementation and interpretation to others who may not share our views.” In testimony before our Commission, then-Commandant Admiral James Loy, and more recently the current Commandant, Admiral Thomas Collins, both strongly supported United States accession to the LOS Convention.

From a security perspective, the LOS Convention provides a balance of interests that protect freedom of navigation and overflight in support of United States’ national security objectives. The provisions were carefully crafted during negotiation of the LOS Convention, and reflect the substantial input that the United States had in their development. In particular, the Convention provides core navigational rights through foreign territorial seas, international straits and archipelagic waters, and preserves critical high seas freedoms of navigation and overflight seaward of the territorial sea, including in the EEZ. The navigational freedoms guaranteed by the Convention allow timely movement by sea of U.S. forces throughout the world, and provide recognized navigational routes which can be used to expeditiously transport U.S. military cargo – 95 percent of which moves by ship.

The Convention’s law enforcement provisions establish a regime that has proven to be effective in furthering international efforts to combat the flow of illegal drugs and aliens by vessel – efforts which directly impact our nation’s security. The Convention establishes the rights and obligations of flag states, port states, and coastal states with respect to oversight of vessel activities, and provides an enforcement framework to expeditiously address emerging maritime security threats.

However, there have been several instances of unilateral assertions of jurisdiction which seem to disregard the Convention’s clear meaning and intent relative to freedom of navigation and overflight. The United States has unilaterally challenged some of the more excessive coastal state claims, relying on the navigational freedoms reflected in the Convention. There are also emerging issues that address the balance of interests between navigational freedoms and coastal state authority. The United States has important interests both as a coastal state and as a major maritime power. We will be in a much stronger and more credible position to challenge excessive claims, and to shape the future of issues and outcomes that impact our interests, if we are a party to the Convention.

There are many other examples of benefits that would be derived from U.S. accession to the LOS Convention. For example, the U.S. research fleet frequently suffers costly delays in ship scheduling when other nations fail to respond in a timely manner to our research requests. Currently, we are not in a position to rely on articles in the Convention that address this issue, such as the “Implied Consent” article (Article 252) that allows



research to proceed within 6 months if no reply to the request has been received, and other provisions that outline acceptable reasons for refusal of a research request. Also, as a party to the Convention, the U.S. could participate in the member selection process, including nominating our own representatives, for the International Law of the Sea Tribunal, as well as the Continental Shelf Commission and the various organs of the International Seabed Authority that I have previously mentioned.

U.S. accession to the LOS Convention has received bipartisan support from past and current Administrations. On November 27, 2001, Ambassador Sichan Siv, U.S. Representative on the United Nations Economic and Social Council, in his statement in the General Assembly on Oceans and Law of the Sea, said: "Because the rules of the Convention meet U.S. national security, economic, and environmental interests, I am pleased to inform you that the Administration of President George W. Bush supports accession of the United States to the [LOS] Convention." More recently the G-8 Summit held in June, 2003, produced a G-8 Action Plan for Marine Environment and Tanker Safety which stated: "Specifically, we commit to: [1.1] The ratification or acceding to and implementation of the United Nations Convention on the Law of the Sea, which provides the overall legal framework for oceans."

Mr. Chairman, the input received by the U.S. Commission on Ocean Policy reflects a broad consensus among many diverse groups in favor of ratification of the LOS Convention. Over 140 nations are party to the Convention. As I have described, there are many important decisions being made right now within the framework of the Convention which will impact the future of the public order of the oceans and directly impact U.S. interests. Until we are a party to the Convention, we cannot participate directly in the many bodies established under the Convention that are making decisions critical to our interests.

While we remain outside the Convention, we lack the credibility and position we need to influence the evolution of ocean law and policy. That law and policy is evolving as the provisions of the Convention are interpreted and implemented. It is interesting to note, in this regard, that the Convention will be open for amendment for the first time beginning in 2004. The Ocean Commission was directed by our enabling legislation to make recommendations to preserve the role of the United States as a leader in ocean activities. We cannot be a leader while remaining outside of the process that provides the framework for the future of ocean activities. For this reason, I renew our Commission's unanimous call for United States accession to the United Nations Law of the Sea Convention.

Thank you, Mr. Chairman. I stand ready to answer any questions that the Committee may have.

Attachments to Statement by  
Admiral James D. Watkins, USN (Ret.)  
October 14, 2003

## Commission on Ocean Policy

November 28, 2001

The President  
The White House  
Washington, D.C. 20500

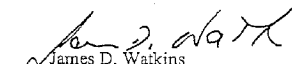
Dear Mr. President:

On behalf of all 16 Members of the Commission on Ocean Policy, I respectfully transmit a copy of the Commission's recently adopted Resolution urging the accession of the United States to the United Nations Law of the Sea Convention. Also enclosed is a copy of a cover letter sent to the Chairman and Ranking Minority Member of the Senate Committee on Foreign Relations providing the background and reasons for the Commission's action.

As the letter makes clear, the Commission heard powerful testimony in support of the Convention from a broad range of witnesses at two days of hearings earlier this month. Additionally, a number of Members have studied various provisions of this complex Convention prior to being appointed to the Commission and have been convinced for some time that there are compelling national security, jurisdictional, environmental, and economic interests reasons for the U.S. to accede to this international agreement. The enclosed letter also makes clear that time is of the essence in such accession because of certain important institutions established by the Convention in which U.S. participation is critically important.

Mr. President, I urge your expeditious, special attention and support for the Convention on the Law of the Sea and I have taken the liberty of providing the Resolution and the letter to the Senate to the Secretaries of Defense and State, with an identical request.

Respectfully,

  
James D. Watkins  
Admiral, U.S. Navy (Retired)  
Chairman

Enclosures

Resolution  
of the  
Commission on Ocean Policy

The National Commission on Ocean Policy unanimously recommends that the United States of America immediately accede to the United Nations Law of the Sea Convention. Time is of the essence if the United States is to maintain its leadership role in ocean and coastal activities. Critical national interests are at stake and the United States can only be a full participant in upcoming Convention activities if the country proceeds with accession expeditiously.

Adopted by Voice Vote  
November 14, 2001  
Washington, D.C.

## Commission on Ocean Policy

November 26, 2001

The Honorable Joseph R. Biden, Jr.  
Chairman  
Committee on Foreign Relations  
United States Senate  
Washington, D.C. 20510-6225

Dear Mr. Chairman:

This is to bring to your attention a policy resolution recently adopted by the Commission on Ocean Policy urging ratification of the United Nations Law of the Sea (LOS) Convention. The Commission is a 16-member congressionally established body that is directed to submit to Congress and the President a report recommending a coordinated and comprehensive national ocean policy to promote a number of noteworthy objectives.

One of those objectives is "the preservation of the role of the United States as a leader in ocean and coastal activities, and, when it is in the national interest, the cooperation by the United States with other nations and international organizations in ocean and coastal activities" (Section 2(8), P.L. 106-256). In this regard, the Commission strongly believes that immediate accession to the LOS Convention is in the national interest of the U.S. and one of the most important steps that we can take to demonstrate such leadership and cooperation.

At the second meeting of the Commission in Washington, D.C. on November 13-14, 2001, the Commissioners heard testimony on a broad range of ocean and coastal issues from Members of Congress, Federal agencies, trade associations, conservation organizations, the scientific community, and coastal states. Some of the most powerful presentations were made in support of ratification of the LOS Convention, particularly from the American Bar Association and the offshore oil and gas industry. The Department of State representative addressed the effects of our current non-party status and the benefits of the Convention to the U.S.

A stable international legal framework for the determination of the rights and responsibilities of nations with respect to adjacent oceans and their resources is a necessary prerequisite for the Commission to be able to assess the place of the U.S. in the community of coastal states. The LOS Convention provides that framework for a whole host of jurisdictional issues including the 12 mile territorial sea, the 200 mile Exclusive Economic Zone, and the continental shelf through its full prolongation including those areas where it extends beyond 200 miles.

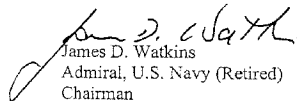
Although there are many more matters addressed by the Convention that are in the economic and environmental interest of the United States, there are some issues of immediate concern that call for the expeditious consideration of the Convention by your Committee. Specifically, the Continental Shelf Commission established by the Convention has the responsibility to review submissions from coastal states that have continental shelves extending beyond 200 miles to establish the outer limits of their shelves. The U.S. has one of the broadest continental margins in the world and our oil and gas industry operates not only on our shelf but on the continental shelves of other nations. Thus, a place on the Commission is critical to the protection of our jurisdictional, resource management, and economic interests. Elections to the 21 member Continental Shelf body are scheduled in April of next year. To be in a position to nominate someone to the Continental Shelf Commission, we must be a party to the Convention by February, 2002. This situation also applies to the primary dispute settlement institution of the Commission, the Law of the Sea Tribunal. Seven of the Tribunal's judges will be elected in April and the U.S. must be a party to the Convention if we want to nominate a candidate.

For these and many other reasons stated by officials from all walks of American life, the Commission on Ocean Policy unanimously passed the enclosed resolution in support of ratification of the Law of the Sea Convention. I would note that the 16 members of the Commission were appointed by the President, 12 from a list of nominees submitted by the leadership of Congress, and represent a broad spectrum of ocean interests.

As the president of the American Bar Association stated in his testimony before the Commission, the LOS Convention is the "foundation of public order for the oceans." The interests of the United States in the world community of coastal states and the work of our Commission in recommending a comprehensive ocean policy is dependent on the stability of that foundation. We urge that, notwithstanding the short legislative calendar that remains this year, the Committee on Foreign Relations consider and report out favorably the Convention on the Law of the Sea prior to adjournment.

A copy of this letter is being forwarded to the President of the United States and the Secretaries of State and Defense, urging their special attention and support.

Sincerely,

  
James D. Watkins  
Admiral, U.S. Navy (Retired)  
Chairman

Enclosure

Cc: The Honorable Thomas Daschle  
The Honorable Trent Lott

## Commission on Ocean Policy

November 26, 2001

The Honorable Jesse Helms  
Ranking Minority Member  
Committee on Foreign Relations  
United States Senate  
Washington, D.C. 20510-6225

Dear Senator Helms:

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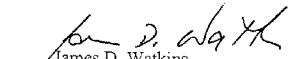
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A copy of this letter is being forwarded to the President of the United States and the Secretaries of State and Defense, urging their special attention and support.

Sincerely,



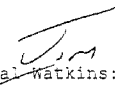
James D. Watkins  
Admiral, U.S. Navy (Retired)  
Chairman

Enclosure

Cc: The Honorable Thomas Daschle  
The Honorable Trent Lott

THE SECRETARY OF STATE  
WASHINGTON

December 12, 2001

  
Dear Admiral Watkins:

Thank you for sending me a copy of the unanimous resolution urging accession of the United States to the United Nations Convention on the Law of the Sea, adopted by the Commission on Ocean Policy at its second meeting November 13-14, 2001.

The Commission's distinguished members were charged with developing a national ocean policy to promote objectives that include preserving the United States' role as a leader in ocean and coastal activities. The resolution conveys a real sense of urgency, both through its words and through its timing, as the Commission's first policy pronouncement.

Deputy Assistant Secretary Mary Beth West testified before your Commission on November 14, explaining the detrimental effects of our non-party status. You may be aware that Ambassador Sichan Siv, two weeks later, announced at the UN General Assembly that the Bush Administration supports U.S. accession to the Convention.

I am aware of the elections scheduled for April 2002 for members of the Commission on the Limits of the Continental Shelf and for judges of the International Tribunal for the Law of the Sea, and the benefits the United States could expect from representation on those bodies. Please be assured that we share your views on the importance of this Convention and are working actively on it.

Admiral James D. Watkins, USN (Retired),  
Chairman, Commission on Ocean Policy,  
1120 20<sup>th</sup> Street NW, Suite 200 North,  
Washington, DC 20036.



- 2 -

I extend best wishes as you undertake leadership of this important Commission, whose report in the spring of 2003 will help to shape national ocean and coastal policy for the 21<sup>st</sup> century.

Sincerely,

A handwritten signature in black ink, appearing to read 'Colin L. Powell', written over a horizontal line.

Colin L. Powell



CHIEF OF NAVAL OPERATIONS

5 Dec 01

Dear Admiral Watkins,

Thank you for your letter of November 29, 2001, advising that the Commission on Ocean Policy unanimously adopted a resolution supporting United States accession to the United Nations Law of the Sea Convention.

Like you, I strongly believe that acceding to this convention will benefit the United States by advancing our national security interests and ensuring our continued leadership in the development and interpretation of the law of the sea.

I appreciate your continued strong support of this convention and the Navy.

Sincerely,

A handwritten signature in black ink, appearing to read "Vern Clark", written over a circular stamp.

VERN CLARK  
Admiral, U.S. Navy

Admiral James D. Watkins, USN(Ret)  
Commission on Ocean Policy  
c/o Ocean.US  
2300 Clarendon Boulevard, Suite 1350  
Arlington, VA 22201-3367

U.S. COMMISSION ON  
OCEAN POLICY

Statement by  
Paul L. Kelly  
Senior Vice President  
Rowan Companies, Inc.  
Member, U.S. Commission on Ocean Policy  
Before the  
Committee on Environment and Public Works  
U.S. Senate  
March 23, 2004

Mr. Chairman:

Thank you for inviting me to testify before your Committee today on the important subject of United States accession to the United Nations Law of the Sea (LOS) Convention. I am here representing the U.S. Commission on Ocean Policy.

The U.S. Commission on Ocean Policy has taken a strong interest in the international implications of ocean policy since the inception of our work. Our 16 Commissioners were appointed by the President – 12 from a list of nominees submitted by the leadership of Congress – and represent a broad spectrum of ocean interests. The Oceans Act of 2000 (P.L. 106-256) specifically charged our Commission with developing recommendations on a range of ocean issues, including recommendations for a national ocean policy that “...will preserve the role of the United States as a leader in ocean and coastal activities.”

With this charge in mind, the Commission took up the issue of accession to the LOS Convention at an early stage. At its second meeting in November, 2001, the Commissioners heard testimony from Members of Congress, federal agencies, trade associations, conservation organizations, the scientific community and coastal states. We heard compelling testimony from many diverse perspectives – all in support of ratification of the LOS Convention. After reviewing these statements and related information, our Commissioners unanimously passed a resolution in support of United States accession to the LOS Convention. The fact that this resolution was our Commission’s first policy pronouncement speaks to the real sense of urgency and importance attached to this issue by my colleagues on the Commission.

The Commission’s resolution was forwarded to the President, Members of Congress, the Secretaries of State and Defense, and to other interested parties. I have attached a copy of our resolution for the record.

The responses we received have been very positive. Secretary of State Colin Powell wrote that he "shared our views on the importance of the Convention," and Admiral Vern Clark, Chief of Naval Operations, stated that he "...strongly believe[d] that acceding to this Convention will benefit the United States by advancing our national security interests and ensuring our continued leadership in the development and interpretation of the law of the sea."

Ensuing hearings, and the additional information we have gathered, have served to reinforce our conviction that ratification of the LOS Convention is very much in our national interest. I would like to share with you some of the reasons that our Commissioners have unanimously adopted this view of the Convention.

- The LOS Convention was described by those who appeared before the Ocean Commission as the "foundation of public order of the oceans" and as the "overarching framework governing rights and obligations in the oceans." The United States was involved in all aspects of the development of the Convention, including reshaping the seabed mining provisions in the early 1990s. As a consequence, the Convention contains many provisions favorable to U.S. interests. The oceans provide vital food and energy supplies, facilitate waterborne commerce, and create valuable recreational opportunities. It is in America's interest to work with the international community to preserve the productivity and health of the oceans and to secure cooperation among nations everywhere in managing marine assets wisely.
- The Convention is subject to interpretation and will no doubt continue to evolve through time. The United States needs to be an active leader in this process, working to preserve the carefully crafted balance of interests that we were instrumental in developing, and playing a leadership role in the evolution of ocean law and policy. Acceding to the Convention will allow us to fully and effectively fulfill that leadership role, and will enhance United States economic, environmental and security interests.

There are a series of issues currently being considered by parties to the Convention which could have tremendous economic implications for the United States. Of particular interest is the work of the Convention's Commission on the Limits of the Continental Shelf, which is charged with reviewing claims and making recommendations on the outer limits of the Continental Shelf. This determination will in turn be used to establish the extent of coastal state jurisdiction over Continental Shelf resources. There are several reasons why direct U.S. participation in this process would be beneficial, namely:

- The LOS Convention sets up the ground rules by which coastal nations may assert jurisdiction over exploration and exploitation of natural resources beyond 200 miles to the outer edge of the continental margin. This is particularly important to the United States, which is one of only a few nations in the world with broad continental margins.
- The continental margins beyond the United States' Exclusive Economic Zone (EEZ) are rich not only in oil and natural gas, but also appear to contain large concentrations of gas hydrates, which may represent an important potential energy source for the future.

The work of the Continental Shelf Commission is now at a critical stage. The Russians have submitted a claim in the Arctic and have received comments on their claim from the Commission. Other States are preparing their submissions, which are due in 2009 or within ten years of a State's becoming a party, whichever is later. Considering the technical work to be done in order to delineate our own shelf, ten years is a short time horizon. The Continental Shelf Commission's action on these submissions will directly impact U.S. jurisdictional interests, particularly in the Arctic. If we do not become a party to the LOS Convention, we are in danger of having the world leave us behind on issues of continental shelf delimitation because we will continue to be ineligible to participate in the selection of members of the Commission or nominate U.S. citizens for election to that body.

We need to conduct extensive multi-beam sonar mapping of the U.S. continental shelf, where substantial resources (including hydrocarbons, minerals and sedentary species) could become available under the LOS Convention provisions concerning extensions of the continental shelf. If the United States accedes to the Convention, it would be able to present evidence to the Continental Shelf Commission on the Limits of the Continental Shelf in support of U.S. jurisdictional claims to its continental shelf. The University of New Hampshire's Center for Coastal and Ocean Mapping/Joint Hydrographic Center, in conjunction with NOAA and USGS, has already identified regions in U.S. waters where the continental shelf is likely to extend beyond 200 nautical miles and is developing strategies for surveying these areas. Bathymetric and seismic data will be required to establish and meet a range of other environmental, geologic, engineering and resource needs.

Acceding to the LOS Convention will also allow the United States to play an active leadership role in a host of other issues of economic importance. As a party to the Convention, the U.S. can participate fully in International Seabed Authority efforts to develop rules and practices that will govern future commercial activities on the deep seabed. Currently, the U.S. is relegated to observer status. In 1994 an agreement was reached addressing U.S. concerns on implementing the deep seabed mining provisions of the Convention, after which the Administration sent the treaty to the Senate for advice and consent. As a party to the Convention, the United States will be in a much stronger position to ensure the preservation of the balance between coastal state authority and freedom of navigation. The United States, whose international trade and economic health relies so heavily on maritime commerce, cannot afford to remain on the sidelines while parties to the LOS Convention make decisions that directly impact navigational rights and maritime commerce.

Further, the LOS Convention provides a comprehensive framework for protection of the marine environment. The Convention includes articles mandating global and regional cooperation, technical assistance, monitoring and environmental assessment, and establishing a comprehensive enforcement regime. The Convention specifically addresses pollution from a variety of sources, including land-based pollution, ocean dumping, vessel and atmospheric pollution, and pollution from offshore activities. The principles, rights and obligations outlined in this framework are the foundation on which more specific international environmental agreements are based.

The United States is party to many international agreements – including conventions pertaining to vessel safety, environmental protection and fisheries management – which are based directly on the LOS framework. Those United States representatives who participate in the negotiation of these agreements, such as the U.S. Coast Guard, are among the strongest advocates for accession to the LOS Convention. In testimony before our Commission, then-Commandant Admiral James Loy, and more recently the current Commandant, Admiral Thomas Collins, both strongly supported United States accession to the LOS Convention.

The Coast Guard, which has played a lead role in developing international agreements on maritime safety, security and environmental protection at the International Maritime Organization (IMO), and also participates in fisheries negotiations, told our Commission that: “[A] failure to accede to the Convention materially detracts from United States credibility when we seek to advance our various ocean interests based upon Convention principles. Also, as a non-party, we risk losing our ability to influence international oceans policy by leaving important questions of implementation and interpretation to others who may not share our views.”

From a security perspective, the LOS Convention provides a balance of interests that protect freedom of navigation and overflight in support of United States’ national security objectives. The provisions were carefully crafted during negotiations of the LOS Convention, and reflect the substantial input that the United States had in their development. In particular, the Convention provides core navigational rights through foreign territorial seas, international straits and archipelagic waters, and preserves critical high seas freedoms of navigation and overflight seaward of the territorial sea, including in the EEZ. The navigational freedoms guaranteed by the Convention allow timely movement by sea of U.S. forces throughout the world, and provide recognized navigational routes which can be used to expeditiously transport U.S. military cargo – 95 percent of which moves by ship.

The Convention’s law enforcement provisions establish a regime that has proven to be effective in furthering international efforts to combat the flow of illegal drugs and aliens by vessel – efforts which directly impact our nation’s security. The Convention establishes the rights and obligations of flag states, port states, and coastal states with respect to oversight of vessel activities, and provides an enforcement framework to expeditiously address emerging maritime security threats.

There are many other examples of benefits that would be derived from U.S. accession to the LOS Convention. For example, the U.S. research fleet frequently suffers costly delays in ship scheduling when other nations fail to respond in a timely manner to our research requests. Currently, we are not in a position to rely on articles in the Convention that address this issue, such as the “Implied Consent” article (Article 252) that allows research to proceed within 6 months if no reply to the request has been received, and other provisions that outline acceptable reasons for refusal of a research request. Also, as a party to the Convention, the U.S. could participate in the member selection process, including nominating our own representatives, for the International Law of the Sea Tribunal, as well as the Continental Shelf Commission and the various organs of the International Seabed Authority.

U.S. accession to the LOS Convention has received bipartisan support from past and current Administrations. On November 27, 2001, Ambassador Sichan Siv, U.S. representative on the United Nations Economic and Social Council, in his statement in the General Assembly on Oceans and Law of the Sea, said: "Because the rules of the Convention meet U.S. national security, economic and environmental interests, I am pleased to inform you that the Administration of President George W. Bush supports accession of the United States to the [LOS] Convention." More recently the G-8 Summit held in June, 2003, produced a G-8 Action Plan for Marine Environment and Tanker Safety which stated: "Specifically, we commit to: [1.1] The ratification or acceding to and implementation of the United Nations Convention on the Law of the Sea, which provides the overall legal framework for oceans."

The input received by the U.S. Commission on Ocean Policy reflects a broad consensus among many diverse groups in favor of ratification of the LOS Convention. 145 nations are now party to the Convention. There are many important decisions being made right now within the framework of the Convention which will impact the future of the public order of the oceans and directly impact U.S. interests. Until we are a party to the Convention, we cannot participate directly in the many bodies established under the Convention that are making decisions critical to our interests.

While we remain outside the Convention, we lack the credibility and position we need to influence the evolution of ocean law and policy. That law and policy is evolving as the provisions of the Convention are interpreted and implemented. It is interesting to note, in this regard, that the Convention will be open for amendment for the first time beginning in 2004. The Ocean Commission was directed by our enabling legislation to make recommendations to preserve the role of the United States as a leader in ocean activities. We cannot be a leader while remaining outside of the process that provides the framework for the future of ocean activities. For this reason, I renew our Commission's unanimous call for United States accession to the United Nations Law of the Sea Convention.

Thank you, Mr. Chairman. I stand ready to answer any questions that the Committee may have.

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD BY PETER M. LEITNER, PH.D.,  
AUTHOR, "REFORMING THE LAW OF THE SEA TREATY: OPPORTUNITIES MISSED,  
PRECEDENTS SET, AND U.S. SOVEREIGNTY THREATENED"

## Law of the Sea Treaty: A Defective Document That Should Not Be Ratified

Dr. Peter M. Leitner

May 12, 2004

1

- LOST was fatally flawed prior to 9-11
  - This document was born of the climate in the 1970's and 1980's
- It was irrelevant and unnecessary prior to 9-11 and is dangerous and obstructive in the Post-9-11 world
- US National Security interests will be severely undermined by the Treaty
  - Undermines the PSI and our ability to manage the maritime threat.
  - Inhibits Interdiction rights of the United States
  - Mandates the transfer of critical "national security" information regarding the submarine characteristics, features and mapping of U.S. off-shore areas. This data can be readily used by foreign military forces or terrorists in mounting attacks upon the CONUS.
- The Treaty does not obviate the need for FON challenges
- The Treaty does not solve those sovereignty or territorial disputes that are likely flashpoints for future wars.
- 31 years after UNCLOS III was convened nations still claim territorial seas of differing breadths

2



- The Treaty does not obviate the need for FON challenges
- The Treaty does not solve those sovereignty or territorial disputes that are likely flashpoints for future wars.
- 31 years after UNCLOS III was convened nations still claim territorial seas of differing breadths
- The power projection ambitions of the PRC are much more evident now than in the 70's and 80's.
- Many key signatories to the Treaty have selectively acceded to the Treaty -- reservations, self-serving definitions, etc.
- The so-called "1994 Agreement" that purports to "Fix" the treaty is a dubious document that has no prior precedent.
- The orig. Treaty is intact, in all respects, but the fiction of the "Agreement" is being used as a "sleight of hand" by the State Department and the UN.
- The Treaty provides "cover" for foreign powers to acquire sophisticated technologies that cannot be otherwise justified.
- Since the Treaty was negotiated the international export control apparatus has been dismantled -- there is no safety net in place.

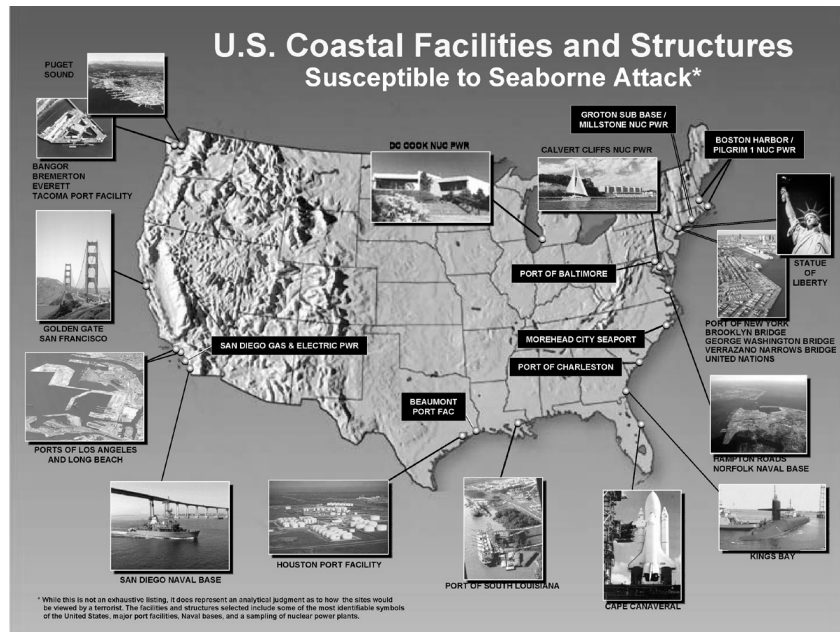
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- Treaty proponents are, in reality, an array of narrow special interest groups.
- The Big-Picture of whether the Treaty is in our essential national interest is not being addressed. Many elements of the Treaty fall in the "nice to have" category but in times of national crisis its provisions will be ignored.
- As the treaty does little toward diffusing serious simmering conflicts it is at best essentially useless from a security standpoint.
- Another "big picture" issue concerns the powers being vested in the ISA and its subordinate organizations. This one-nation/one vote organization does not have the equivalent of a Security Council or "senior body" with a veto power over excesses committed by the lower body.

4

# LOST vs. Homeland Security

5



## LOST Undermines PSI

"Security Plan Against the Proliferation of Weapons of Mass Destruction" (abbreviated as PSI) that was proposed by President Bush when he visited Poland on May 3, 2003.

The objective of the Bush administration in proposing the PSI was to carry out interception of ships suspected of transporting raw materials for the manufacture of weapons of mass destruction to and from so-called "rogue nations" along with countries that share the same viewpoint as the United States.

The PSI is seen as a violation of international law, particularly the 1982 United Nations Convention on the Law of the Sea. The Convention on the Law of the Sea has clearly defined provisions on the right of navigation on the high seas.

7

In cases of boarding and interception, the Convention stresses the need for "reasonable ground," while the preemptive strike strategy currently being pursued by the United States is based on "objective conjecture" and "objective assumption."

Objective assumption can very easily lead to non-objective analysis of intelligence reports, thereby adding to the elements of instability and danger.

Secondly, according to the Convention, warships and government vessels of other States engaged in the transport of weapons on the high seas on the basis of noncommercial service should enjoy complete immunity rights and they may not be boarded or intercepted by other States.

In addition, interception on the high seas also involves a basic issue in international law, that is, for non-signatory states of the treaty on nuclear proliferation, it is not illegal to transport nuclear materials and missiles on ships flying one's own flag nor is it illegal to carry out commercial trading of ammunitions and weapons.

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## **Article 87**

### **Freedom of the high seas**

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:
  - (a) freedom of navigation;
  - (b) freedom of overflight;
  - (c) freedom to lay submarine cables and pipelines, subject to Part VI;
  - (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
  - (e) freedom of fishing, subject to the conditions laid down in section 2;
  - (f) freedom of scientific research, subject to Parts VI and XIII.
2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

9

## **Article 89**

### **Invalidity of claims of sovereignty over the high seas**

No State may validly purport to subject any part of the high seas to its sovereignty.

## **Article 90**

### **Right of navigation**

Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.

10

## **Article 95**

### **Immunity of warships on the high seas**

Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.

## **Article 96**

### **Immunity of ships used only on government non-commercial service**

Ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.

11

## **Article 101**

### **Definition of piracy**

Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
  - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

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## **Article 110**

### **Right of visit**

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
  - (a) the ship is engaged in piracy;
  - (b) the ship is engaged in the slave trade;
  - (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
  - (d) the ship is without nationality; or
  - (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

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## **Article 110**

### **Right of visit (cont.)**

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.
3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.
4. These provisions apply *mutatis mutandis* to military aircraft.
5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.

14

## Freedom of Navigation Program

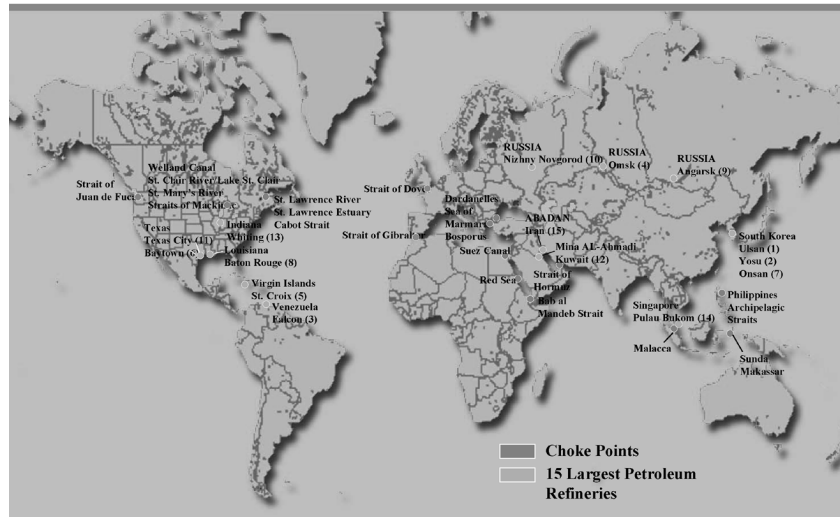
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### Selected Excessive Maritime Claims

<b>Cuba</b>	Require state aircraft to comply with directions from air traffic control within flight information region
<b>Albania</b>	Prior permission for warship to enter the territorial sea
<b>Algeria</b>	Prior permission for warship to enter the territorial sea
<b>Bangladesh</b>	Excessive straight baselines; claimed security zone
<b>Burma</b>	Excessive straight baselines; claimed security zone
<b>Cambodia</b>	Excessive straight baselines; claimed security zone
<b>Croatia</b>	Prior permission for warship to enter the territorial sea
<b>El Salvador</b>	200 nautical miles (nm) territorial sea
<b>Iran</b>	Excessive straight baselines; prior permission for warship to enter the territorial sea
<b>Kenya</b>	Excessive straight baselines; historic bay claim (Ungwana Bay)
<b>Liberia</b>	200 nm territorial sea
<b>Libya</b>	Claims all waters south of 32-30 north latitude Gulf of Sidra closure line as internal waters
<b>Malaysia</b>	Excessive restrictions on military activities in exclusive economic zone
<b>Maldives</b>	Prior permission for warship to enter the territorial sea
<b>Malta</b>	Prior permission for warship to enter the territorial sea
<b>Nicaragua</b>	200 nm territorial sea
<b>Pakistan</b>	Claimed security zone; excessive restrictions on military activities in the exclusive economic zone
<b>Philippines</b>	Excessive straight baselines; claims archipelagic waters as internal waters
<b>PRC</b>	Excessive straight baselines; prior permission for warships, Territorial Claims in S & E. China Seas
<b>Saudi Arabia</b>	Excessive straight baselines; claimed security zone
<b>Seychelles</b>	Prior permission for warship to enter the territorial sea
<b>Sierra Leone</b>	200 nm territorial sea
<b>Somalia</b>	200 nm territorial sea; prior permission for warship to enter the territorial sea
<b>Sudan</b>	Prior permission for warship to enter the territorial sea; claimed security zone
<b>Syria</b>	35 nm territorial sea; prior permission for warship to enter the territorial sea
<b>UAE</b>	Prior permission for warship to enter the territorial sea; claimed security zone
<b>Viet Nam</b>	Excessive straight baselines; claimed security zone; prior permission for warship to enter the territorial sea
<b>Yemen</b>	Prior permission for warship to enter the territorial sea; claimed security zone

16

## World's 15 Largest Petroleum Refineries and Major Maritime Chokepoints





## Disputes in the South & East China Seas

18

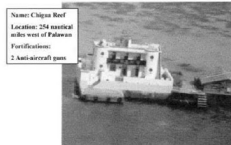
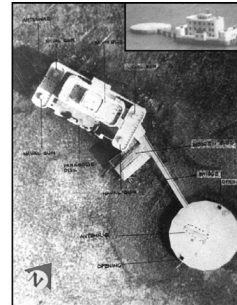
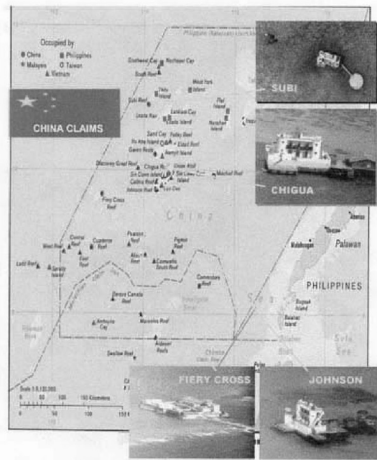
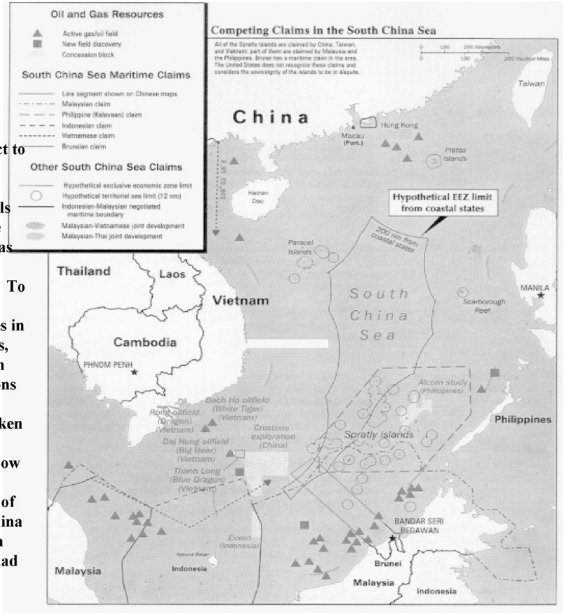
Article 121, states that rocks that cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

The establishment of the EEZ resulted in overlapping claims in semi-enclosed seas such as the South China Sea. The EEZ gives nations around the region the right to establish a settlement on any of the islands within their EEZ. As such, South China Sea claimants have clashed on various occasions as they tried to establish outposts on the islands (mostly military) in conformity with Article 121 of the UNCLOS, in order to strengthen their claims.

19

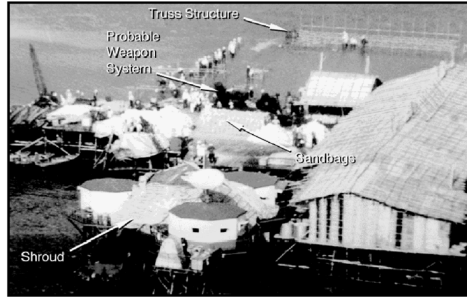
## PRC Territorial Claims

In 1992 the PRC passed a special territorial sea and contiguous zone act to legalize its claims to the Spratlys. Article Two of this legislation specifically identifies both the Paracels and Spratly archipelagos as Chinese territory, and even uses the Spratlys as base-points for drawing baselines delimiting China's territorial waters. To uphold this claim to title, since 1988 China has deployed some 260 marines in garrisons on eight of the Spratly islets, and several helicopter pads have been constructed. The map depicts locations of major Chinese structures in the Spratlys. Most of these reefs were taken from Vietnam after fighting in 1988. Chinese-built concrete "fortresses" now exist on Johnson Reef, Chigua, Subi, and Fiery Cross. Mischief Reef, east of Chigua, was occupied since 1995. China occupies Fiery Cross Reef, Cuarteron Reef, Johnson Reef, Collins Reef, Eldad Reef, Chigua Reef, Subi Reef, and Philippine-claimed Mischief Reef.



## PRC in the Spratlys

## PRC in the Spratlys

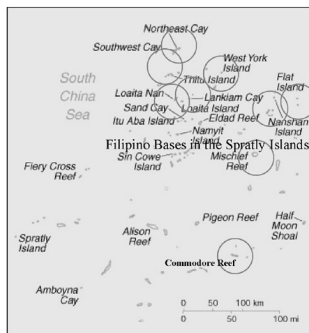


This aerial photo shows new construction activity at a second Chinese occupied area on Mischief Reef. It was also released by the Philippine Department of National Defense on 10 November 1998. In the foreground, the octagonal structures built in early 1995 can be seen with portions of the platform covered by shrouds. In the background, the construction workers can be seen erecting a large, truss structure. On the central platform, personnel can be seen around a large, black object surrounded by sandbags. The object appears to be an anti-aircraft or anti-ship weapon system. However, the type and operational status of the probable weapon system is not evident.

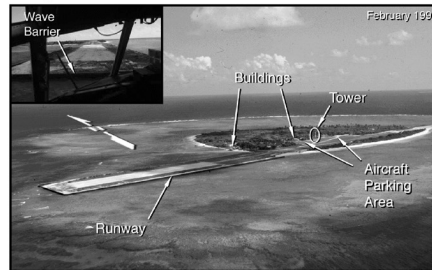
22

## Philippines Claim

595 soldiers garrisoned on at least nine principal islands and assert claims to some 22 other islets, reefs, and shoals; including Mischief Reef that China now occupies, Commodore Reef, Northeast Cay, Pag-asa (Thitu), West York, Lankian Cay, Loaita, Flat, and Nashnan.



Aerial photo of Thitu Island.



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## Malaysian Claim



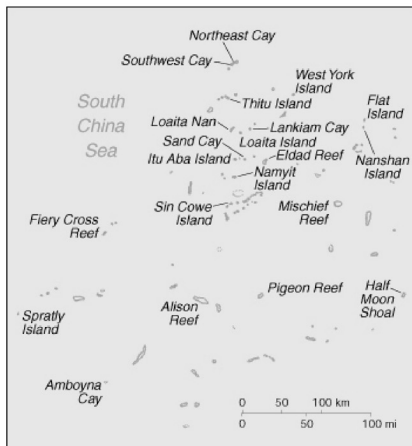
Swallow Reef (Layang Layang)



Malaysia has 70 troops on three atolls and asserts claims to nine other geological formations in the area; including; Swallow Reef (aka Layang Layang), Ardasier Bank (07N38, 113E56), Erica Reef, Mariveles Reef, and Royal Charlotte Bank (06N57, 113E35).

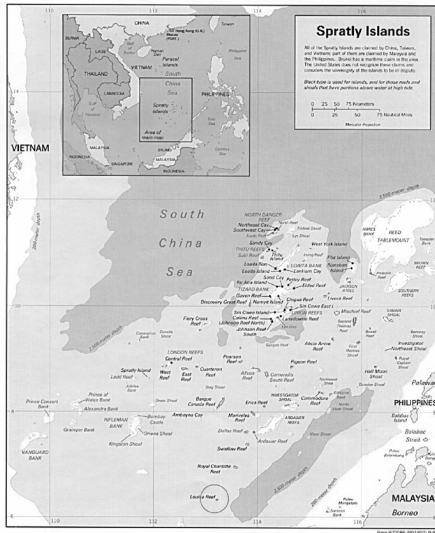
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## Vietnam Claims



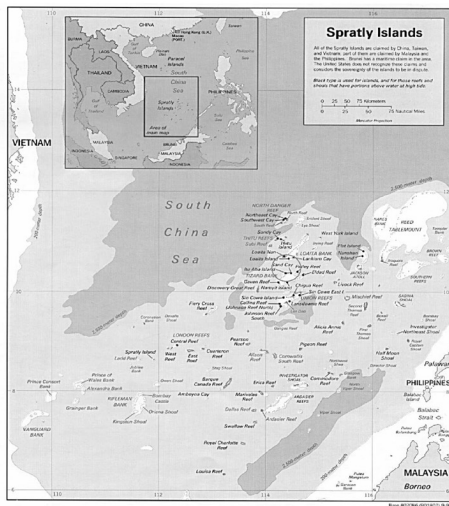
Vietnam claims the entire Spratlys archipelago and has occupied at least 25 islands, reefs, and cays with 600 troops, mainly in the western and central Spratly Islands (Trööøng Sa), including Spratly Island, Ladd Reef, West Reef, Central Reef, East Reef, Amboyna Cay, Pearson Reef, Alison Reef, Cornwallis Reef, Barque Canada Reef, Sand Cay, Collins Reef, Sin Cowe, Great Discovery Reef, Namyit, Petley Reef, and Southwest Cay.

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## Brunei Claims

Brunei occupies one (1) island, Louisa Reef; the southernmost Spratly Island.



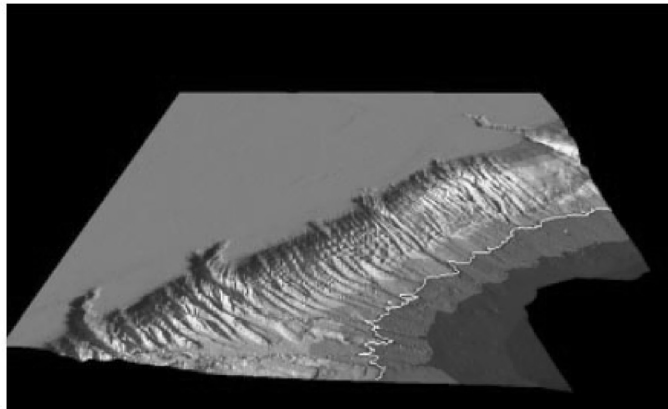
## Taiwan Claims

Taiwan occupies one (1) island, Itu Abo; in the north central part of the Spratly Islands.

## Historic Bays Conflict

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### Present Day Resolution



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